IN A MATTER BEFORE
THE DESCHUTES COUNTY BOARD OF COMMISSIONERS

LOWER BRIDGE ROAD, LLC,	)	**NOTICE OF APPEAL -**
	)	File Numbers 247-15-000194-CU and
Applicant/Appellant.	)	247-15-000195-TP –
	)	Decision of Deschutes County
	)	Hearings Officer
	)	

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

Appellant Lower Bridge Road, LLC was the applicant below, a party to the proceedings and is entitled to appeal under DCC 22.32.010(A)(1).

2. **DCC 22.32.015 Filing Appeals**.

Appellant Lower Bridge Road, LLC submits the attached Notice of Appeal form, the appeal fee and the following statement of issues on appeal.

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

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

4. **Subject Property and Procedural History**.

The applicant's property is 157 acres which is split zoned with approximately 10 acres zoned Exclusive Farm Use (EFU), the acreage along the river zoned Flood Plain[1] (FP), and the remainder zoned Rural Residential (RR-10). The applicant proposes to leave all of the EFU and FP zoned acreage as open space, proposes no residential lots within these areas and proposes an HOA to own and manage these areas consistent with resource use in perpetuity. This proposal is consistent with the zone change approval granted by this Board in 2008 and should be reviewed by this Board on appeal.

5. **150 Day Period**.

The 150 day time period within which the County has to issue a decision in this matter expires on November 12, 2015. If the Board agrees to hear the appeal, the applicant will toll the 150 day period for a period of time necessary to allow the Board to conduct a

[1] The exact Flood Plain acreage is unknown because the County's zone boundaries are based on a map which when applied to the subject property is so grossly inaccurate that it extends under the surface of the river in some areas and up the side of a vertical cliff in others.

hearing and issue a decision. The applicant will work with staff and legal counsel to establish the appropriate time period to accommodate the Board's schedule.

6. <u>Issues on Appeal</u>.

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

1. The Hearings Officer erred when she concluded the provisions of the EFU zone in Chapter 18.16 preclude the proposed subdivision. H.O. Decision, pp. 10-13.

2. The Hearings Officer erred when she concluded the provisions of the FP zone in Chapter 18.96 preclude the proposed subdivision. H.O. Decision, pp. 13-21.

3. The Hearings Officer erred when she concluded the FP zoned property could not be included in the overall acreage calculation for the proposed subdivision. H.O. Decision, pp. 13-21.

4. The Hearings Officer erred when she concluded the open space as a part of the proposed subdivision was not allowed in the FP zone. H.O. Decision, pp. 14-16.

5. The Hearings Officer erred in imposing the FP zone boundary on this property because the map the County uses to establish the boundary is grossly inaccurate, was not established by the Flood Insurance Study for Deschutes County, and is in fact, not based on any base flood elevation data or other detailed or scientific method of study.

6. The Hearings Officer erred when she concluded the applicant failed to demonstrate it was feasible to construct a dwelling, septic and well without the need for a rimrock setback exception or that it is feasible to qualify for future rimrock setback exceptions. H.O. Decision, p. 39.

7. The Hearings Officer erred in interpreting the Code to require the applicant to demonstrate compliance with LM review criteria at the subdivision stage when no structures are proposed. H.O. Decision, pp. 32-39.

8. The Hearings Officer erred in concluding the property should not be eligible for any rimrock setback exceptions in the future. H.O. Decision, p. 40.

9. The Hearings Officer erred in failing to apply the conditional use criteria to the only portion of the development that is conditional, which is not the residential use but instead the difference between 15 homesites and 19 homesites, or essentially 4 additional homesites. H.O. Decision, pp. 41-70.

10. The Hearings Officer erred when she concluded the proposal did not meet the conditional use criteria at 18.128.015 and 18.128.210 and the subdivision criteria at 17.36.170 because the applicant failed to demonstrate the proposed lots are of adequate

size and dimensions to accommodate a dwelling, septic and well while complying with all setbacks. H.O. Decision, pp. 43, 62, 87.

11. The Hearings Officer erred in interpreting the suitability criteria for a conditional use and the planned development criteria to apply to residential use, rather than the 4 additional homesites which constitute the conditional part of the use. H.O. Decision, pp. 47-70.

12. The Hearings Officer erred when she collaterally attacked the Board's prior decision and found the Board improperly substituted a condition of approval for the necessary findings of compliance in the prior zone change decision. H.O. Decision, p. 47.

13. The Hearings Officer erred when she concluded the revegetating efforts had not been successful in securing the blowing DE dust. H.O. Decision, pp. 52-54.

14. The Hearings Officer erred in concluding the proposal was not compatible with the current and future use of SM Site 461. H.O. Decision, p. 61.

15. The Hearings Officer erred in concluding the proposal was not in harmony with the surrounding area or its potential future use based on conflicts between existing and potential conditions and uses on SM Site 461. H.O. Decision, p. 67.

16. The Hearings Officer erred in concluding it is appropriate to require the applicant to post a bond or other form of security to assure the DE dust issues on SM Site 461 and the subject property are fully remediated before any dwellings are constructed. H.O. Decision, p. 68.

17. The Hearings Officer erred in concluding there was not sufficient evidence of financing to assure the proposed development will be substantially completed within 4 years of approval. H.O. Decision, p. 69.

18. The Hearings Officer erred in concluding the proposal did not comply with DCC 17.16.100(3)(c) because she incorrectly concluded the proposal was not permitted in the EFU and FP zones. H.O. Decision, pp. 78-79.

19. The Hearings Officer erred in concluding the applicant should be required to improve the abutting segment of Lower Bridge Way to County standards. The impacts of the proposal to add traffic associated with 19 residential lots is not roughly proportional to the cost of the required improvement of approximately 3,000 lineal feet of abutting roadway, with possible relocation of power lines. The applicant is dedicating the Lower Bridge right-of-way but any additional improvements are not warranted and in violation of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution.

20. The Hearings Officer erred in interpreting DCC 17.36.270 to require the applicant to submit a street tree plan. H.O. Decision, p. 91.

21. The Hearings officer erred in her interpretation and application of a flood zone map to the subject property which was clearly and absolutely wrong, was arbitrary and capricious and violated the substantive due process protections of the Fourteenth Amendment to the U.S. Constitution.

22. The Hearings Officer's decision alone or combined with any one or more of the errors alleged above, were in error and so burdened applicant's right to just compensation that the result violates the doctrine of unconstitutional conditions under the Fifth and Fourteenth Amendments to the U.S. Constitution.

23. The Hearings Officer's decision alone or combined with any one or more of the errors alleged above, leaves applicant with no viable economic use of the property and constitutes the taking of it and entitles applicant to just compensation under Article 1, Section 18 of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as the right to attorney's fees under ORS 20.080 and 42 U.S.C. § 1983.

24. If the Hearings Officer's decision is the final County decision in this matter, it will cause substantial delay and damages and notice is hereby given the applicant intends to pursue all available legal remedies it has in Court. This would include an inverse condemnation claim for just compensation and attorney's fees and also a money damage claim under 42 U.S.C. § 1983 for lost profits caused by delay.

7. Request for De Novo Review.

Appellant requests de novo review by the Board because the matter involves significant policy considerations and local code interpretations that need to be made by the Board in the first instance. Specifically, the Hearings Officer incorrectly interpreted the County Flood Plain zone to preclude development which platted all of the Flood Plain zoned property and a buffer of RR-10 zoned property around it in open space use for perpetuity, with private covenants to protect it and homeowner assessments and a management structure to pay for its protection. She incorrectly ruled the development was not allowed in the Flood Plain zone despite the fact that no residential lot was located within the zone and open space is a use allowed outright. The Board needs to interpret its own Code in the first instance on this important policy issue. This is particularly true for the Flood Plain zoned property in this area of the County where there is no base flood elevation data or accurate Flood Plain map. To allow an overly restrictive interpretation and one which actually provides less protection for the Flood Plain is inconsistent with sound County policy, as well as local, state and federal law.

The Hearings Officer also incorrectly applied conditional use criteria to decide whether this property was suitable for residential use, a decision already made by this Board in 2008 and relied upon by this applicant in pursing subdivision approval. A residential subdivision in the present zone is a use allowed outright. The only conditional part of the present proposal is the increase in density from 15 lots allowed outright, to 19 lots allowed conditionally as part of the density increase for a planned development. In interpreting the conditional use criteria and improperly applying to the residential use rather than the 4 additional lots, the Hearings Officer challenges this Board's 2008 decision, improperly collaterally attacks that decision and incorrectly concludes the Board improperly deferred a finding of compliance. This collateral attack and incorrect reading of the Board's 2008 decision should be corrected by this Board.

Finally, the Board should hear this because the applicant expended considerable resources, time and energy to rezone the property in 2008 for residential use subject to certain conditions. The record clearly shows the plan at that time was to create a cluster development with 20 residential lots utilizing the density increase allowed and preserving significant open space, including the resources and land within the river canyon. The applicant has done exactly what it promised in complying with all conditions of the zone change approval and the present subdivision proposal should be decided by this Board in accordance with the zone change plan as developed in 2008.

DATED this 23rd day of September, 2015.

Schwabe, Williamson & Wyatt, P.C.

Tia M. Lewis, OSB #933437
D. Joe Willis, OSB #711884
Of Attorneys for Appellant

DECISION OF DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS: 247-15-000194-CU, 247-15-000195-TP

APPLICANT/ PROPERTY OWNER: Lower Bridge Road, LLC
205 E. 11th Street, Suite 200
Vancouver, Washington 98660

APPLICANT'S ATTORNEY: Tia M. Lewis
Schwabe, Williamson & Wyatt
360 S.W. Bond Street, Suite 500
Bend, Oregon 97702

APPLICANT'S ENGINEER: Keith D'Agostino, P.E.
D'Agostino Parker LLC
185 S.W. Shevlin-Hixon Drive, #101
Bend, Oregon 97702

PROPOSAL: The applicant requests conditional use, tentative subdivision plan, and SMIA site plan approval to establish a 19-lot residential planned development on three parcels totaling 157 acres, zoned RR-10, EFU, FP, LM, and SMIA, and located between the Deschutes River and Lower Bridge Way west of Terrebonne.

STAFF REVIEWER: Will Groves, Senior Planner

HEARING DATES: May 21 and June 23, 2015

RECORD CLOSED: July 28, 2015

I. APPLICABLE STANDARDS AND CRITERIA:

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

1. Chapter 17.08, Definitions and Interpretation of Language

*** Section 17.08.030, Definitions Generally**

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

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

3. Chapter 17.24, Final Plat
*** Section 17.24.105, Final Plat Review**
*** Section 17.24.110, Conditions of Approval**

4. Chapter 17.36, Design Standards

*** Section 17.36.020, Streets**
*** Section 17.36.040, Existing Streets**
*** Section 17.36.050, Continuation of Streets**
*** Section 17.36.060, Minimum Right of Way and Roadway Width**
*** Section 17.36.070, Future Resubdivision**
*** Section 17.36.080, Future Extension of Streets**
*** Section 17.36.100, Frontage Roads**
*** Section 17.36.110, Streets Adjacent to Railroads, Freeways and Parkways**
*** Section 17.36.120, Street Names**
*** Section 17.36.130, Sidewalks**
*** Section 17.36.140, Bicycle, Pedestrian and Transit Requirements**
*** Section 17.36.150, Blocks**
*** Section 17.36.160, Easements**
*** Section 17.36.170, Lots – Size and Shape**
*** Section 17.36.180, Frontage**
*** Section 17.36.190, Through Lots**
*** Section 17.36.200, Corner Lots**
*** Section 17.36.210, Solar Access Performance**
*** Section 17.36.220, Underground Facilities**
*** Section 17.36.230, Grading of Building Sites**
*** Section 17.36.250, Lighting**
*** Section 17.36.260, Fire Hazards**
*** Section 17.36.270, Street Tree Planning**
*** Section 17.36.280, Water and Sewer Lines**
*** Section 17.36.290, Individual Wells**
*** Section 17.36.300, Public Water System**

4. Chapter 17.44, Park Development

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

5. Chapter 17.48, Design and Construction Specifications

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

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

1. Chapter 18.04, Title, Purpose and Definitions

*** Section 18.04.030, Definitions**

2. Chapter 18.16, Exclusive Farm Use (EFU) Zone

*** Section 18.16.020, Uses Permitted Outright**

*** Section 18.16.025, Uses Permitted Subject to the Special Provisions Under DCC Section 18.16.038 or DCC Section 18.16.042 and a Review Under DCC Chapter 18.124 Where Applicable**
*** Section 18.16.030, Conditional Uses Permitted – High Value and Nonhigh Value Farmland**
*** Section 18.16.031, Conditional Uses On Nonhigh Value Farmland Only**

3. Chapter 18.52, Surface Mining (SM) Zone

*** Section 18.52.030, Uses Permitted Outright**
*** Section 18.52.060, Dimensional Standards**

4. Chapter 18.56, Surface Mining Impact Area Combining (SMIA) Zone

*** Section 18.56.010, Purpose**
*** Section 18.56.030, Application of Provisions**
*** Section 18.56.050, Conditional Uses Permitted**
*** Section 18.56.060, Dimensional Standards**
*** Section 18.56.070, Setbacks**
*** Section 18.56.080, Use Limitations**
*** Section 18.56.100, Site Plan Review and Approval Criteria**
*** Section 18.56.120, Waiver of Remonstrance**
*** Section 18.56.140, Exemptions**

5. Chapter 18.60, Rural Residential (RR-10) Zone

*** Section 18.60.030, Conditional Uses Permitted**
*** Section 18.60.040, Yard and Setback Requirements**
*** Section 18.60.050, Stream Setback**
*** Section 18.60.060, Dimensional Standards**
*** Section 18.60.070, Limitations on Conditional Uses**
*** Section 18.60.080, Rimrock Setback**

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

*** Section 18.84.020, Application of Provisions**
*** Section 18.84.030, Uses Permitted Outright**
*** Section 18.84.040, Uses Permitted Conditionally**
*** Section 18.84.050, Use Limitations**
*** Section 18.84.060, Dimensional Standards**
*** Section 18.84.080, Design Review Standards**
*** Section 18.84.090, Setbacks**
*** Section 18.84.095, Scenic Waterways**

7. Chapter 18.96, Flood Plain (FP)

*** Section 18.96.010, Purpose**
*** Section 18.96.020, Designated Areas**
*** Section 18.96.030, Uses Permitted Outright**
*** Section 18.96.040, Conditional Uses Permitted**
*** Section 18.96.060, Limitations on Conditional Uses**

*** Section 18.96.070, Application for Conditional Use**
*** Section 18.96.090, Yard and Setback Requirements**
*** Section 18.96.100, Stream Setback**
*** Section 18.96.110, Dimensional Standards**

8. Chapter 18.116, Supplementary Provisions

*** Section 18.116.160, Rimrock Setbacks Outside of LM Combining Zone**
*** Section 18.116.310, Traffic Impact Studies**

9. Chapter 18.128, Conditional Uses

*** Section 18.128.015, General Standards Governing Conditional Uses**
*** Section 18.128.210, Planned Development**

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

1. Chapter 22.04, Introduction and Definitions

*** Section 22.04.030, Definitions**

2. Chapter 22.16, Development Action Procedures

*** Section 22.16.010, Review of Development Action Applications**

3. Chapter 22.20, Review of Land Use Action Applications

*** Section 22.20.055, Modification of Application**

3. Chapter 22.24, Land Use Action Hearings

*** Section 22.24.030, Notice of Hearing or Administrative Action**
*** Section 22.24.140, Continuances and Record Extensions**

D. Deschutes County Comprehensive Plan

1. Chapter 3, Rural Growth Management

*** Section 3.3, Rural Housing**
*** Section 3.6, Public Facilities and Services Policies**

E. Oregon Administrative Rules (OAR), Chapter 660, Land Conservation and Development Commission

1. Division 4, Goal 2 Exception Process

a. OAR 660-004-0040, Application of Goal 14 to Rural Residential Areas

F. PA-08-1/ZC-08-1 Conditions of Approval

II. FINDINGS OF FACT:

A. Location: The subject property is identified as Tax Lot 500 on Deschutes County Assessor's Map 14-12-15, and Tax Lots 1502, 1505, and 1600 on Assessor's Map 14-12 (index). Each of these tax lots has an assigned address in Terrebonne as follows:

- Tax Lot 500: 704 N.W. 96th Court;
- Tax Lot 1502: 70300 N.W. Lower Bridge Way;
- Tax Lot 1505: 10000 NW Lower Bridge Way; and
- Tax Lot 1606: 70350 N.W. Lower Bridge Way.

B. Zoning and Plan Designation: The majority of the subject property is zoned Rural Residential (RR-10), and Landscape Management (LM) because of its proximity to the Deschutes River. The portion of the property adjacent to the Deschutes River also is zoned Flood Plain (FP). Portions of the property are zoned Surface Mining Impact Area (SMIA) associated with Surface Mining (SM) sites to the west (Site 461) and north (Site 322). The majority of the property is designated Rural Residential Exception Area (RREA) on the Comprehensive Plan map. Approximately ten acres of the subject property, located east of Lower Bridge Way and north of Teater Road, are designated Agriculture and zoned Exclusive Farm Use-Lower Bridge Subzone (EFU-LB).

C. Site Description: The subject property is approximately 157 acres in size and irregular in shape. It has a varied topography consisting of a large, relatively level bench/plateau above the Deschutes River, steep slopes and rocky outcrops leading from the plateau to the river, and areas within and at the bottom of the river canyon. The property abuts Lower Bridge Way along most of its western border. The property is undeveloped except for a small wooden pump house along the south bank of the Deschutes River in the northwest quadrant of the property, the remains of a small former scale house in the west-central portion of the property, several gravel and dirt roads, and a power pole and overhead power line in the north-central portion of the property. The property has been mined for aggregate that overlays diatomaceous earth (diatomite) which has a chalky white appearance. As a result of historic mining, much of the existing ground surface has been disturbed and is comprised of piles and berms of earth, some exposed diatomite, and some vegetative cover consisting of scattered juniper trees and native shrubs and grasses along the perimeter of the property and within the upper portions of the river canyon.

The portion of the property located at the bottom of the river canyon is mapped flood plain according to the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM). This area of the subject property also has intact riparian vegetation and mapped wetlands shown on the Nation Wetlands Inventory (NWI) "Cline Falls" map. The property has existing access from Lower Bridge Way.

Near the northwest corner of the subject property is the historic Lynch and Roberts Store Advertisement sign which is painted on rock adjacent to Lower Bridge Way.

D. Surrounding Zoning and Land Uses: Part of the land north across the Deschutes River consists of the 26-acre Borden Beck Wildlife Preserve. Near the northwest corner of the subject property adjacent to Lower Bridge Way is the historic Lynch and Roberts Store advertisement sign. Farther north is SM Site 322 which is engaged in farm use consisting of irrigated pasture and hay production. Also to the north is land zoned EFU-

LB. Land to the south and southeast is zoned EFU-LB and EFU-Terrebonne Subzone (EFU-TE) and is engaged in irrigated agriculture. Land to the west is SM Site 461. Farther to the west is a mixture of large and small agricultural enterprises. Land to the east and southeast is zoned RR-10 and developed with rural residences. The abutting segment of the Deschutes River is a designated state Scenic Waterway.

E. Land Use History: The property has been the subject of several previous land use actions/decisions described below.

CU-74-156. The staff report states the record for this conditional use application contains plan information for a solid and liquid waste disposal site on the subject property. According to the staff report, it appears this application was approved because the record indicates solid and liquid waste, including hazardous waste, was stored on the portion of the subject property west of Lower Bridge Way.

MP-80-96. This minor partition created three parcels. Parcel 2 comprises modern Tax Lots 500 and 1505 east of Lower Bridge Way, and Parcel 3 comprises modern Tax Lots 1501 and 1502 west of Lower Bridge Way.

ZC-85-3. This decision approved a zone change on Tax Lots 1501, 1502, 1600, and 704 from surface mining reserve (SMR) to SM. Condition of Approval 3 required a mine reclamation plan.

SP-85-23. This site plan approval allowed surface mining, aggregate mining, and rock crushing on Tax Lots 1501, 1502, 1600, and 704. Condition of Approval 1 of this decision required an updated reclamation plan and set forth specifications therefor in Exhibit "C" to the decision. The staff report states materials are missing from the record for this decision, including a map of the area subject to the site plan approval and an updated reclamation plan. However, the record includes testimony and evidence demonstrating the area covered by the updated reclamation plan encompasses an 18-acre area north and west of Lower Bridge Way.

1989 ESEE Analysis for SM Site 461. On October 24, 1989, the Board of County Commissioners (hereafter "board") approved an ordinance rezoning modern Tax Lots 1501, 1502, 1503, and 1507 from SMR to SM. The decision contains findings on the quality and quantity of aggregate resources on the property, placed SM Site 461 on the county's Goal 5 inventory of significant mineral and aggregate resources, and included a site-specific ESEE (economic, social, energy and environmental) analysis for Site 461.

MP-90-74. This minor partition divided Tax Lot 1507 from Tax Lot 1501.

ZC-08-1/PA-08-1. This decision approved a plan amendment to change the comprehensive plan designation of a 566-acre area including SM Site 461 and most of the subject property from Agriculture and Surface Mining to RREA, and an amendment to the zoning map to change the zoning from SM to RR-10. The board's decision, effective September 25, 2011 (Ordinance Nos. 2011-014 and 2011-015), contained separate approvals for portions of the property: the "East Area," the property subject to the proposed planned unit development (PUD),[1] and the "West Area" consisting of SM

[1] Section 18.04.030 defines "planned unit development" and "planned development" as the same type of development. These terms, and PUD, are used interchangeably throughout this decision.

Site 461. The decision stated the board's intent that the rezoned property includes 160 acres in order to accommodate future development of a 20-lot residential cluster/PUD. The staff report states that because there was not enough land east of Lower Bridge Way to create 160 acres of developable property, the board included in the rezoned area approximately 30 acres on the west side of Lower Bridge Way with the understanding that such acreage would be maintained as open space within a future residential PUD. That staff report states that a survey of the rezoned property revealed the acreage was sufficient only for a 19-lot cluster/PUD.

The board's decision also approved for the "West Area" a plan amendment, zone change, and removal of SM Site 461 from the Goal 5 mineral and aggregate inventory on the basis that the mineral and aggregate resource had been fully extracted.[2] However, that approval was made subject to a Resolution of Intent to Rezone requiring the property owner to complete a number of prerequisites addressing environmental assessment and remediation of the mine site. The record indicates that as of the date of this decision, these prerequisites had not yet been completed. Therefore, the re-designation and rezoning of the "West Area" has not taken effect and Site 461 remains zoned SM and included in the county's mineral and aggregate inventory.

MC-09-3/MA-10-5/MA-11-2. In this decision, this Hearings Officer approved modifications to the 1985 site plan approval (SP-85-23) to revise the reclamation requirements for Site 461. The property subject to the PUD application constitutes a small portion of the tract subject to the approved modifications.

E-14-6. This decision granted a one-year extension of the Intent to Rezone decision approved in PA-08-1/ZC-08-01 to April 8, 2015.

E-15-247. This application requests an additional one-year extension, to April 9, 2016, of the Intent to Rezone decision approved in PA/08-1/ZC-08-01. The record indicates that as of the date of this decision this application was pending.[3]

F. Procedural History: The conditional use and tentative subdivision plan applications were submitted on April 10, 2015, and were deemed complete by the Planning Division on May 11, 2015. Therefore, the 150-day period for issuance of a final local land use decision under ORS 215.427 would have expired on October 8, 2015. A public hearing

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[2] The board's decision in ZC-08-1/PA-08-1 described the property subject to the plan amendment and zone change – i.e., the "East Area" and "West Area" -- as follows:

"Tax Lot 1501:	*249.1 acres zoned Surface Mining (SM), including 9.8 acres in Landscape Management Combining Zone (LM)*
Tax Lot 1502:	*188.1 acres zoned SM, including 82.3 acres zoned LM*
Tax Lot 1503:	*64.4 acres zoned SM, including 64.4 acres zoned LM*
Tax Lot 1505:	*Only 42.1 acres of this 72.47 acre tax lot are subject to this application. The most southerly portion of this lot adjacent to Teater Road and zoned EFU is not subject to the proposed zone change.*
Tax Lot 1600:	*10.6 acres total including 9.6 acres of Exclusive Farm Use 1.0 acre zoned Flood Plain, 10.6 acres zoned LM, and 10.6 acres zoned SMIA."*

[3] The Hearings Officer understands the county considers the extension granted by E-14-6 to remain in effect until the county acts on this second extension application.

on the applications was scheduled for May 21, 2015. On April 22, 2015, the Planning Division mailed written notice of the public hearing to the owners of record of all property located within 250 feet of the boundaries of Tax Lots 500 and 1505.

On May 15, 2015, the Planning Division determined that Tax Lots 1502 and 1600 were inadvertently omitted from the notice of hearing, and the owners of record of property located within 250 feet of those tax lots did not receive notice of the hearing. On May 15, 2015, the Planning Division mailed a revised notice of public hearing with a revised description of the subject property including Tax Lots 500, 1502, 1505, and 1600, and 1606. This notice was mailed to the owners of record of all property located within 750 feet of the five listed tax lots. The staff report also was issued on that date. The staff report concluded that an application for SMIA site plan review must be submitted concurrently with the PUD applications.

On May 18, 2015, the Hearings Officer conducted a site visit to the subject property and vicinity accompanied by Senior Planner Will Groves. At the initial public hearing on May 21, 2015, the Hearings Officer disclosed her observations and impressions from the site visit. Several interested parties requested a continuance of the hearing because the revised notice of hearing was mailed less than a week before the public hearing. The Hearings Officer continued the public hearing to June 23, 2015. However, because two members of the public requested the opportunity to testify at the initial public hearing, the Hearings Officer requested and received an abbreviated staff report and an abbreviated presentation by the applicant, and received testimony from two members of the public.

At the continued public hearing on June 23, 2015, the Hearings Officer received testimony and evidence, left the written evidentiary record open through July 7, 2015 for the opening round of evidence and through July 21, 2015 for the rebuttal round of evidence, and allowed the applicant through July 28, 2015 to submit final argument pursuant to ORS 197.763. On July 7, 2015, the applicant submitted an application for SMIA site plan review for the PUD. On July 28, 2015, the applicant submitted final argument and the record closed on that date.

Because the applicant agreed to extend the written record from the continued hearing on June 23, 2015 through the record closure on July 28, 2015, pursuant to Section 22.24.140 of the county's land use procedures ordinance, the 150-day period was tolled for 35 days and now expires on November 12, 2015. As of the date of this decision, there remain 63 days in the extended 150-day period.

G. **Proposal:** The applicant requests conditional use, tentative subdivision plan, and LM and SMIA site plan approval to establish a 19-lot residential PUD on the subject property. The residential lots would range in size from 2 to 4.4 acres,[4] would comprise a total of 41.3 acres, and would have access from Lower Bridge Way via four private roads. The subdivision would include two common area tracts comprising 0.9 acres, five open space tracts comprising 105.7 acres (including 10.4 acres of EFU-zoned land), 4.4 acres of private road, and 4.7 acres of right-of-way dedication for the abutting segment of Lower Bridge Way. No development would occur within the Deschutes River Canyon.

[4] Proposed Lot 19 would be 4.4 acres. As discussed in the findings above, the applicant determined from a survey of the "East Area" rezoned in 2008 that it was not large enough to provide sufficient open space acreage for 20 residential lots. The applicant's burden of proof states the size of Lot 19 was intended to allow it to be further divided if additional open space acreage could be added to the PUD in the future.

Dwellings on the residential lots would be served by individual wells and individual on-site septic systems. No dwellings are proposed concurrent with the PUD application.

H. **Public Notice and Comments:** The Planning Division mailed two individual written notices of the initial public hearing. The first notice, mailed April 22, 2015, was sent to the owners of record of all property located within 250 feet of the Tax Lots 500 and 1505. The second, revised, notice was mailed May 15, 2015, and sent to the owners of record of all property located within 750 feet of Tax Lots 500, 1502, 1505 and 1600. In addition, notice of the initial public hearing was published in the Bend "Bulletin" newspaper, and the subject property was posted with a notice of proposed land use action sign. As of the date the record in this matter closed, the county had received 39 letters in response to these notices. In addition, two members of the public testified at the initial public hearing and eleven members of the public testified at the continued public hearing. Public comments are addressed in the findings below.

I. **Public/Private Agency Comments:** The Planning Division sent written notice of the applicant's proposal to a number of public and private agencies and received responses from: the Deschutes County Senior Transportation Planner, Road Department (road department), and Environmental Soils Division; Redmond Fire and Rescue; Redmond Area Parks and Recreation District (RAPRD); Oregon Department of Fish and Wildlife (ODFW); Oregon Parks and Recreation Department (OPRD); Oregon Department of Environmental Quality (DEQ); and Oregon Health Authority (OHA). These comments are set forth at pages 4-5 of the staff report and/or are included in the record. The following agencies did not respond to the request for comments or submitted a "no comment" response: Deschutes County Assessor, Surveyor, and Property Address Coordinator; Redmond School District; and Oregon Department of Geology and Mineral Industries (DOGAMI).

J. **Lot of Record:** The applicant submitted into the record as Hearing Exhibit 1 the plat for Minor Partition (MP) 80-96, showing the subject property consists of Parcel 2 and most of Parcel 3 of that partition. The applicant's burden of proof states the subject property also includes Parcel 1 of the partition. However, the Hearings Officer finds Parcel 1 is located south of Teater Road which forms the southern boundary of the proposed PUD, and therefore the PUD does not include Parcel 1. The staff report notes that because the proposed PUD would not include all of Parcel 3, it would create a remainder lot or parcel within Parcel 3. The status of that remainder area is discussed in the findings below.

III. CONCLUSIONS OF LAW:

A. SUMMARY:

The Hearings Officer finds the applicant's proposed PUD cannot be approved because: (1) it includes land zoned EFU and FP in which PUDs are not permitted outright or conditionally; (2) it reconfigures and reduces the size of Parcel 3 of MP-80-96 without a partition or lot line adjustment; (3) the portion of the subject property remaining after the EFU- and FP-zoned land is subtracted is not large enough to permit 19 residential lots; and (4) the applicant failed to demonstrate the proposed PUD complies with all applicable conditional use, site plan, and subdivision approval criteria. However, because I anticipate this decision will be appealed to the board, and the board may elect to hear the appeal, I include in this decision recommended findings and conclusions on applicable approval criteria to assist planning staff and the board.

B. PRELIMINARY ISSUES:

1. Adequacy of Notice. Several opponents argue the county's notices to property owners were inadequate. As discussed in the Findings of Fact above, the original notice of public hearing was deficient in failing to list all tax lots included within the subject property and in failing to provide notice to all property owners entitled to notice. The Planning Division issued a revised notice of hearing that listed all affected tax lots and was mailed to all property owners entitled to notice. However, the revised notice was mailed less than a week before the initial public hearing. Opponents requested, and the Hearings Officer granted, a continuance of the initial public hearing because of the notice deficiencies.

Opponents argue the notice was insufficient because it did not include enough potentially affected property owners. The notice area is prescribed in Section 22.24.030 of the county's procedures ordinance. That section provides that individual mailed notice shall be sent to the owners of record of all property located within 250 feet of the subject property where it is outside an urban growth boundary (UGB) and not within a farm or forest zone, and 750 feet of the subject property when it is within a farm or forest zone. The subject property is outside any UGB, and the majority of the subject property is zoned RR-10 and FP, requiring a 250-foot notice area. However, a portion of the subject property is zoned EFU-LB, requiring a 750-foot notice area. The record indicates the revised notice was mailed to the owners of record of all property located within 750 feet of the entire subject property. The Hearings Officer finds the notice area used by the Planning Division was adequate.

The county also published notice of the public hearing in a newspaper of general circulation and the subject property was posted with a notice of proposed land use action sign. Opponents argue the posted notice was not adequate because it was not visible and was not posted for a sufficient period of time prior to the initial public hearing. The Hearings Officer disagrees. Section 22.24.030(B) of the procedures ordinance states posted notice must be in place for at least 10 continuous days prior to any date set for receipt of comments – e.g., the public hearing -- and that it shall "where practical, be visible from any adjacent public way." The record includes a "Land Use Action Sign Affidavit" signed by the applicant's engineer Keith D'Agostino stating the posted notice was placed on May 11, 2015, ten days prior to the initial public hearing. In addition, as the Hearings Officer disclosed at the initial public hearing, during my May 18, 2015 site visit I observed the posted notice, and I found it to be clearly visible and legible from Lower Bridge Way which is a county road. For these reasons, I find the posted notice also was adequate.

2. Property Included in Proposed PUD. The Hearings Officer has found the proposed PUD consists of Parcel 2 and the majority of Parcel 3 of MP-80-96. The staff report questions the status and disposition of the part of Parcel 3 not included in the PUD. This "remainder" area consists of land zoned SM within Site 461 and Tax Lot 1502, and land zoned EFU-LB in Tax Lot 1600, all located west of Lower Bridge Way. As discussed above, the record indicates the portion of Parcel 3 included in the subject property was rezoned to RR-10 in 2008 in order to provide sufficient acreage for the open space required for a 20-lot PUD.

The Hearings Officer finds the board's 2008 rezoning decision did not have the effect of reconfiguring Parcel 3 of MP-80-96. Rather, it merely "split-zoned" Parcel 3 and Tax Lots 1502 and 1600. That is because in 2008 rezoning was not a recognized means of creating a legal lot or parcel. In 2008, as now, Section 18.04.030 defined "lot" and "parcel" as units of land *created by subdividing or partitioning*, respectively – i.e., created as a unit of land within a subdivision or

partition. In addition, that section defined "lot" or "parcel" as a lot of record, defined in DCC 18.04.030 as follows:

> **"Lot of Record" means:**
>
> **A. A lot or parcel at least 5,000 square feet in area and at least 50 feet wide, <u>which conformed to all zoning and subdivision or partition requirements, if any, in effect on the date the lot or parcel was created, and which was created by any of the following means</u>:**
>
> **1. By partitioning land as defined in ORS 92;**
>
> **2. By a subdivision plat, as defined in ORS 92, filed with the Deschutes County Surveyor and recorded with the Deschutes County Clerk;**
>
> **3. By deed or contract, dated and signed by the parties to the transaction, containing a separate legal description of the lot or parcel, and recorded in Deschutes County if recording of the instrument was required on the date of the conveyance. If such instrument contains more than one legal description, only one lot of record shall be recognized unless the legal descriptions describe lots subject to a recorded subdivision or town plat;**
>
> **4. By a town plat filed with the Deschutes County Clerk and recorded in the Deschutes County Record of Plats: or**
>
> **5. <u>By the subdividing or partitioning of adjacent or surrounding land, leaving a remainder lot or parcel.</u>** (Emphasis added.)

Paragraph (5) of this section authorizes the county to recognize as a lot of record a lot or parcel created as a remainder following the subdividing or partitioning of adjacent or surrounding land. However, the Hearings Officer finds this definition does not provide a means for the applicant to establish a *new* parcel through the creation of a "remainder" in Parcel 3 outside the PUD. That is because the text of the "lot of record" definition makes clear it addresses circumstances that created a lot or parcel *in the past*. The operative language of the definition expressly refers to *past* circumstances and events – i.e., a lot or parcel that *conformed* to all zoning and subdivision or partition requirements, if any, "in effect on the date the lot or parcel was created," and which "was created" by any of the listed methods. Moreover, this definition authorizes the after-the-fact recognition of a lot or parcel that was created by a recorded deed although a lot or parcel could not *presently* be created by that method. I find the lot-of-record definition was adopted to provide a means of recognizing as a legal lot certain types of lots and parcels that were lawfully created in the past but do not qualify as lawful parcels under current code provisions.

The staff report suggests the applicant could reconfigure the remainder of Parcel 3 by including it as a lot in the PUD. The Hearings Officer disagrees. As noted in the findings above, the northern portion of the remainder area is zoned EFU-LB, and the rest of the remainder area is still zoned SM because the prerequisites established in the 2008 Intent to Rezone have not been met. Subdivisions and PUDs are not permitted outright or conditionally in either the EFU or SM Zone. Therefore, I find none of the remainder of Parcel 3 can be included as a lot in the

PUD. However, I find the applicant potentially could establish the remainder of Parcel 3 as a legal lot or parcel through a lot line adjustment, a replat of MP 80-96, or a partition of Parcel 3.[5]

Based on the foregoing discussion, the Hearings Officer finds I cannot approve the proposed PUD because it improperly reconfigures Parcel 3 of MP 80-96 by subdividing a part of the parcel without establishing the remainder area as a legal lot or parcel.

3. Modification. The applicant submitted an application for SMIA site plan approval on July 7, 2015 while the written evidentiary record was open. The Hearings Officer finds this application raises the question of whether it is a "modification" of the applicant's proposal, and if so, whether I may consider it.

Section 22.20.055 allows an applicant to modify an application at any time during the approval process up until the close of the record. However, the Hearings Officer cannot consider any evidence submitted by the applicant that would constitute a modification unless the applicant submits a modification application and agrees in writing to toll the 150-day period.[6]

Section 22.04.020 defines "modification" as:

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

The Hearings Officer finds the applicant's SMIA application and burden of proof contain legal argument and information concerning the status of SM Sites 322 and 461 for which the applicable SMIA Zones were established. However, I find this new information does not constitute a modification of the PUD application because it would not change any of the components of the proposed PUD. Rather, the information supports the pending PUD application and was submitted specifically in response to staff's conclusion that a SMIA site plan application is required as part of the PUD application. Therefore, I find I can consider the SMIA application and information therein concurrent with the PUD application.

4. Previous Bankruptcies of Applicant's Principals. Opponent David Jenkins submitted into the record information concerning previous bankruptcies and other civil litigation filed by Greg Daniels, Frank Nolan, and Robert Riemenschneider, who Mr. Jenkins states are owners of SM

[5] The Hearings Officer finds that as long as any lot line adjustment or partition of the remainder of Parcel 3 does not divide the SM- or EFU-zoned land, the prohibition against creating new lots in the SM Zone in Section 18.52.060 and the land division provisions in the EFU Zone in Section 18.16.055 are not applicable.

[6] This section gives exclusive authority to the Hearings Officer to determine whether the applicant has submitted a modification once the hearing has opened.

Site 461. Mr. Jenkins did not identify, nor has the Hearings Officer found, any applicable approval criteria to which this evidence is relevant. Therefore, I will not consider it.

C. TITLE 18 OF THE DESCHUTES COUNTY CODE, THE DESCHUTES COUNTY ZONING ORDINANCE

EFU ZONE STANDARDS

1. Chapter 18.16, Exclusive Farm Use Zones (EFU)

FINDINGS: The proposed PUD includes a 10.4-acre area zoned EFU-LB located at the southern boundary of the subject property. This area is part of Parcel 3 of MP 80-96 and Tax Lot 1505 which is split-zoned between RR-10 and EFU-LB. It was not included in the land rezoned to RR-10 in 2008. The applicant proposes to include the EFU-zoned area as part of PUD open space Tract B.

The Hearings Officer finds subdivisions and PUDs are not uses permitted outright or conditionally in the EFU Zone. The applicant appears to argue that because the EFU-zoned area will be included in an open space tract and may be engaged in agricultural use, it can be included in the PUD. I disagree. While agricultural use is consistent with this area's zoning, including it within a subdivision is not.[7]

Based on the foregoing discussion, the Hearings Officer finds I cannot approve the proposed PUD because it includes EFU-zoned land in which subdivisions and PUDs are not permitted.

FLOOD PLAIN ZONE STANDARDS

2. Chapter 18.96, Flood Plain Zone (FP)

a. Section 18.96.010, Purpose

The purposes of the Flood Plain Zone are: To implement the Comprehensive Plan Flooding Section; to protect the public from hazards associated with flood plains; to conserve important riparian areas along rivers and streams for the maintenance of fish and wildlife resources; and to preserve significant scenic and natural resources while balancing the public interests with those of individual property owners in the designated areas.

FINDINGS: The Hearings Officer finds the FP Zone purpose statement does not establish approval criteria for the applicant's proposed PUD, but can provide context for interpreting ambiguous provisions in Chapter 18.96.

b. Section 18.96.020, Designated Areas

[7] The Hearings Officer finds that as long as the EFU-zoned portion of Parcel 3 is not divided if/when the applicant lawfully reconfigures Parcel 3 of MP-80-96, the EFU Zone land division standards restrictions in Section 18.16.055 are not applicable.

The areas of special flood hazard identified by the Federal Insurance Administration in a scientific and engineering report entitled "Flood Insurance Study for Deschutes County, Oregon and Incorporated Areas" revised September 28, 2007, with accompanying Flood Insurance Rate Maps is hereby adopted by reference and incorporated herein by this reference. The Flood Insurance Study is on file at the Deschutes County Community Development Department.

The Flood Plain Zone shall include all areas designated as "Special Flood Hazard Areas" by the Flood Insurance Study for Deschutes County. When base flood elevation data has not been provided in the Flood Insurance Study, the Planning Director will obtain, review and reasonably utilize any base flood elevation or floodway data available from federal, state or other sources, in determining the location of a flood plain or floodway.

FINDINGS: The FP Zone includes all areas designated as "Special Flood Hazard Areas" on the FIRM. These are lands that would be inundated by a 100-year flood event and that are at or below the base flood elevation (BFE). The FIRM for the section of the Deschutes River adjacent to the subject property is Map No. 41017C0300E, revised September 28, 2007. The FIRM indicates portions of the land below the river canyon rim are designated "Special Flood Hazard Areas." In addition, the staff report notes the riparian habitats along the river contain mapped wetlands on the NWI "Cline Falls" map. The submitted tentative plan shows the areas mapped as Flood Plain and wetlands would be located in PUD open space Tracts C and E. Therefore, the provisions of the FP Zone are applicable to the proposed PUD.

b. Section 18.96.030, Uses Permitted Outright

The following uses and their accessory uses are permitted outright

*** * ***

C. Open space.

FINDINGS: Section 18.04.030 defines "open space" as follows:

"Open space" means lands used for agricultural or forest uses and any land area that would, if preserved and continued in its present use:

A. Conserve and enhance natural or scenic resources;

B. Protect air, streams or water supply;

C. Promote conservation of soils, wetlands, beaches, or marshes;

D. Conserve landscaped area such as public or private golf courses, that reduce pollution and enhance the value of adjoining or neighboring property;

E. Enhance the value to the public of adjoining or neighboring parks, forest, wildlife preserves, nature reservations or other open space;

F. Enhance recreation opportunities;

G. Preserve historic, geological and archaeological sites;

H. Promote orderly urban development; and

I. Minimize conflicts between farm and nonfarm uses.

The tentative plan shows all FP-zoned portions of the proposed PUD would be located within open space Tracts C and E. The proposed residential lots would not include any FP-zoned land.

The applicant's proposed PUD covenants, conditions and restrictions (CC&Rs), included in the record as Exhibit "H" to the applicant's original burden of proof, treat Tracts C and E as "open space" and treat Tract C as "common area" within the PUD. The CC&Rs expressly address the open space and common areas in detail. Exhibit "C" to the CC&Rs lists as "common areas" Tracts A, B, C and D and all private roads. The CC&Rs include provisions protecting and restricting or prohibiting development in riparian areas (described as open space Tracts C and E), common areas, and scenic river areas described as the "area along the Deschutes River."

The Hearings Officer finds that although "open space" is listed as an outright permitted use in the FP Zone, and the proposed CC&Rs provide protection for such areas consistent with the purpose of the FP Zone, the applicant's proposed open space is not a stand-alone use. Rather, it consists of open space lots and uses *within a PUD* which is not a use permitted outright in the FP Zone. In other words, the open space use is dependent upon the rest of the PUD use.

c. Section 18.96.040, Conditional Uses Permitted.

The following uses and their accessory uses may be allowed subject to applicable sections of this title:
*** * ***

H. Subdividing or partitioning of land, any portion of which is located in a flood plain, subject to the provisions of DCC Title 18 and DCC Title 17, the Subdivision/Partition Ordinance.

FINDINGS: Proposed open space Tracts C and E include the FP-zoned portion of the subject property. The staff report states, and the Hearings Officer agrees, the applicant's proposal constitutes "subdividing * * * land, any portion of which is located in a flood plain," because Tracts C and E would be subdivision lots.

Title 18 permits three types of land divisions relevant here: (1) subdivision; (2) "cluster development;" and (3) "planned development." Subdivision is defined in Section 18.04.030 as dividing an area or tract of land into four or more lots within a calendar year, and is subject to all applicable requirements in Title 17 and in the underlying zone(s) in Title 18. "Cluster development" is defined in Section 18.04.030 as:

. . . a development permitting the clustering of single or multi-family residences on part of the property, with individual lots of not less than two acres in size and

not exceeding three acres in size. No commercial or industrial uses not allowed by the applicable zoning ordinance are permitted.

"Planned development" is defined in Section 18.04.030 as:

> **. . . the development of an area of land at least 40 acres in size for a number of dwelling units, commercial or industrial uses, <u>according to a plan which does not necessarily correspond in lot size, bulk or type of dwelling, density, lot coverage, or required open space to the standard regulations otherwise required by DCC Title 18, and usually featuring a clustering of residential units.</u>** (Emphasis added.)

"Cluster development" and "planned development" are subject to distinct special conditional use approval criteria set forth in Sections 18.128.200 and 18.128.210, respectively. These land divisions share some characteristics. Both require a minimum of 65 percent open space, and both contemplate the clustering of dwellings to maximize open space. There also are significant differences. "Cluster development" is limited to residential uses, can have no more than 10 new lots or parcels (which must be contiguous) and no more than 10 clustered dwelling units, and is not subject to a minimum area size for the overall development. In contrast, planned development may include commercial and industrial uses, must be a minimum of 40 acres in size, may have as many dwelling units as are permitted in the applicable zone(s), and may qualify for exceptions to the standards in the applicable zone(s).

Neither "cluster development" nor "planned development" is a use permitted outright or conditionally in the FP Zone.[8] The Hearings Officer finds the text and context of the provisions of Title 18 defining and governing the three types of subdivisions make clear they have different characteristics and are intended to be reviewed and approved under different substantive standards. While it may seem counterintuitive not to permit use of FP-zoned land for open space within a planned development where such use would protect these areas consistent with the purpose of the FP Zone, I find the plain language of the FP Zone does not allow such development.

The drafters of the FP Zone standards may have intended to preclude *clustered* residential development *on FP-zoned land*, but may not have intended to preclude the scenario contemplated by the applicant's proposal in which the clustered residential development would occur on land *in another adjacent zone* and the FP-zoned land would be used for the required open space. If this decision is appealed to the board and the board agrees to hear the appeal, the board will have an opportunity to address this question.

d. Section 18.96.060, Limitations on Conditional Uses

The following limitations shall apply to all uses allowed by DCC 18.96.040:

[8] "Planned development" is a use permitted in three zones: MUA-10 (Section 18.32.030(O)); RR-10 (Section 18.60.030(E)); and Urban Unincorporated Community (UUC) – Sunriver, RM District (Section 18.108.040(4). "Cluster development" is permitted in five zones: MUA-10 (Section 18.32.030(P)); RR-10 (Section 18.60.030(F)); Urban Unincorporated Community (UUC) – La Pine Residential District (Section 18.61.030(2)(j)); UUC – Wickiup Junction (Section 18.61.040(c)(5)); and Terrebonne Rural Community (Section 18.66.020(B)(4).

A. No new construction of a dwelling (including manufactured housing), accessory structure or farm use structure shall be allowed in the floodway of any river or stream except for replacement in conformance with the applicable provisions of DCC 18.96 of a dwelling lawfully in existence as of the effective date of Ordinance 88 030.

B. No new construction of a dwelling (including manufactured housing), accessory structure or farm use structure shall be located in the flood plain unless it can be demonstrated by the applicant that no alternative exists on the subject property which would allow the structure to be placed outside of the flood plain.

FINDINGS: The applicant does not propose any dwellings or other structures in the floodway or flood plain.

C. No subdivision or partition shall be allowed which creates the potential for additional residential dwellings in the flood plain.

FINDINGS: The proposed PUD would not allow dwellings in the flood plain because all FP-zoned land would be in open space Tracts C and E.

D. All necessary federal, state and local government agency permits shall be obtained.

FINDINGS: The applicant does not propose any development in the FP Zone requiring agency permits.

e. Section 18.96.070, Application for Conditional Use

All records of any application for a conditional use permit and all certification of elevations shall be maintained in the records of the Community Development Department for public inspection. An application for a conditional use permit in the Flood Plain Zone shall, at a minimum, contain the following information:

A. A detailed explanation of why it is necessary to conduct the proposed use in the Flood Plain Zone. Where base flood elevation data is not available from the Flood Insurance Study or from another authoritative source, it shall be generated and submitted with the application for subdivision proposals and other proposed developments which contain at least 50 lots or five acres (whichever is less).

FINDINGS: The applicant doesn't address this criterion. As to the first sentence, the applicant does not identify the reason for including the FP-zoned land in the proposed PUD. However, as discussed in the RR-10 Zone findings below, at least 65 percent of the proposed PUD must be open space. The applicant did not include the 10.4-acre EFU-zoned parcel in its open space calculations, leaving 146.6 acres of the subject property for PUD development, of which 65 percent is 95.29 acres. The proposed open space Tracts A, B, C, E and F (without EFU-zoned land but including FP-zoned land) total 95.3 acres. Therefore, the Hearings Officer finds I may

infer from the applicant's materials that the FP-zoned land was included in the PUD in order to provide sufficient open space acreage to gain approval for 19 residential lots.

With respect to the remainder of this paragraph, it appears to require a detailed flood study because the BFE for the subject property is not available from the Flood Insurance Study, and the proposed PUD contains at least five acres. However, the staff report states the county understands that FEMA policy does not require this detailed study where, as here, the FP-zoned portion of the property is located entirely within open space tracts that would not be developable. The staff report recommends, and the Hearings Officer agrees, that if the proposed PUD is approved on appeal, it should be subject to a condition of approval prohibiting the development of any structure in the FP-zoned portion of the subject property.

B. A site plan, drawn to scale and accompanied by drawings, sketches and descriptions which describe and illustrate the proposed use. This site plan shall include, at a minimum, existing and proposed site contours in relation to the base flood elevation, existing and proposed structures, drainage facilities, and an explanation of how erosion will be dealt with during and after construction of the use.

C. The location of the property relative to the channel of the river or stream.

D. The location of existing and proposed diking or abutments, if any.

FINDINGS: The Hearings Officer finds the applicant's submitted tentative plan includes all information required in these paragraphs.

E. The elevation of the lowest habitable floor and of any basement floor for any dwelling unit or structure.

F. The elevation to which the structure is to be floodproofed, if applicable.

G. Elevations on the site plan shall be established by a licensed surveyor or engineer, and shall be in relation to mean sea level.

H. Certification by a registered professional engineer or architect that the floodproofing methods for any structure meet the floodproofing criteria established by the Federal Emergency Management Agency and the applicable standards in DCC 18.96.

FINDINGS: The applicant does not propose any structures in the FP Zone, and did not provide the BFE for the subject property. Therefore, the Hearings Officer finds these criteria are not applicable to the proposed PUD.

I. All other elements or information which will assist in the evaluation of the proposed development and conformance with the applicable criteria.

FINDINGS: The Hearings Officer finds the applicant's tentative plan and burden of proof statements provide all information necessary to evaluate the proposed PUD for compliance with the FP Zone standards.

f. Section 18.96.080, Criteria to Evaluate Conditional Uses

A. A conditional use permit in a Flood Plain Zone shall not be approved unless all standards established by the Federal Emergency Management Agency and DCC Title 18 are addressed and findings are made by the Hearings Body or Planning Director that each of the standards and criteria are satisfied.

C. A conditional use permit shall be based upon findings which relate to the property and existing and proposed structure(s). They shall not pertain to the property owner, inhabitants, economic or financial circumstances.

*** * ***

E. Subdivision and Partition Proposals.

1. All subdivision and partition proposals shall be consistent with the need to minimize flood damage.

2. All subdivision and partition proposals shall have public utilities and facilities such as sewer, gas, electrical and water systems located and constructed to minimize flood damage.

3. All subdivision and partition proposals shall have adequate drainage provided to reduce exposure to flood damage.

FINDINGS: The applicant does not propose any utilities or structures in the FP-zoned portion of the PUD, and therefore the Hearings Officer finds the criteria in Subparagraphs (1) and (2) of this paragraph are not applicable. I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring that all surface water drainage be maintained on-site on the upper bench/plateau of the subject property and outside the FP Zone.

g. Section 18.96.090, Yard and Setback Requirements

In an FP Zone, the following yard and setback requirements shall be maintained:

A. The front setback shall be a minimum of 20 feet from a property line fronting on a local street, 30 feet from a property line fronting on a collector and 50 feet from an arterial.

B. There shall be a minimum side yard of 10 feet for all uses.

C. The minimum rear yard shall be 20 feet.

D. The setback from a north lot line shall meet the solar setback requirements in DCC 18.116.180.

E. The minimum yard setback for a nonfarm use from the property line adjacent to a farm use not owned by the applicant shall be 100 feet.

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

FINDINGS: The Hearings Officer finds that because the applicant does not propose any structures or utilities in the FP-zoned portion of the PUD, these criteria are not applicable. However, as discussed in the findings below concerning the size and configuration of the proposed residential lots, incorporated by reference herein, I find the proposed residential lots are of sufficient size to accommodate the siting of dwellings satisfying these yard and setback requirements.

h. Section 18.96.100. Stream Setback

To permit better light, air, vision, stream and pollution control, to protect fish and wildlife areas and to preserve the natural scenic amenities along streams and lakes, the following setbacks shall apply:

A. All sewage disposal installations such as septic tanks or septic drain fields shall be setback from the ordinary high water mark along all streams or lakes a minimum of 100 feet, measured at right angles to the ordinary high water mark. In those cases where practical difficulties preclude the location of the facilities at a distance of 100 feet, and the County Sanitarian finds that a closer location will not endanger public health or safety, a setback exception may be permitted to locate these facilities closer to the stream or lake, but in no case closer than 25 feet.

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

FINDINGS: The Hearings Officer finds these criteria are not applicable because the applicant does not propose any structures, utilities or septic systems in the FP Zone. However, as discussed in the findings below concerning the size and configuration of the proposed residential

lots, incorporated by reference herein, I find the proposed residential lots are of sufficient size to accommodate the siting of dwellings satisfying these river setback requirements.

i. Section 18.96.110, Dimensional Standards

In an FP Zone, the following dimensional standards shall apply:

A. Lot Coverage. The main building and accessory buildings located on any building site or lot shall not cover in excess of 30 percent of the total lot area.

B. Building Height. No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed under DCC 18.120.040.

FINDINGS: The Hearings Officer finds that because the applicant does not propose any structures or development in the FP-zoned portion of the PUD, these criteria are not applicable. However, as discussed in the findings below concerning the size and configuration of the proposed residential lots, incorporated by reference herein, I find the proposed residential lots are of sufficient size to accommodate the siting of dwellings satisfying the lot coverage requirements in this section.

C. Minimum lot size shall be 10 acres for all areas which have received an exception to the Statewide Planning Goals for resource uses. Areas which have not received an exception to the Statewide Planning Goals shall have a minimum lot size of 80 acres.

FINDINGS: The FP-zoned portion of the subject property is not considered a "resource zone" under the county's comprehensive plan and Title 18. The board's 2008 plan amendment and zone change decision did not include any FP-zoned land. Because the FP Zone was not modified and it is not considered a "resource" zone, the Hearings Officer finds no goal exception was or is required, and therefore the creation of new lots in the FP-zoned portions of property is subject to a 10-acre minimum lot size.[9]

The staff report questions whether in order to comply with the 10-acre minimum lot size in this paragraph, Tracts C and E must each have at least 10 *total* acres or at least 10 *FP-zoned* acres. Neither the tentative plan nor the applicant's burden of proof states how many FP-zoned acres are in each tract. However, based on the Hearings Officer's comparison of the tentative plan and the large-scale aerial photo/zoning map submitted into the record by staff, I find approximately 30 acres of the land in Tracts C and E – i.e., approximately 16 acres in Tract C and approximately 14 acres in Tract E – are zoned FP. Therefore, because Tract C and Tract E each include at least 10 acres of FP-zoned land, I find I need not address staff's question.[10]

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[9] As discussed elsewhere in this decision, the applicant has proposed a PUD with clustered residential lots to increase the overall density to one dwelling per 7.5 acres.

[10] In this Hearings Officer's decision in *Tree Farm 4* (247-14-000248-CU, 247-14-000249-TP), I adhered to my previous holding in *Taylor* (MP-05-31, CU-05-106, SMA-05-41, MA-06-1, MA-0608) that the minimum lot size required for a new lot or parcel in the pertinent zone must be met *entirely within that zone*.

For the foregoing reasons, the Hearings Officer finds I cannot approve the proposed PUD because it is not a use permitted outright or conditionally in the FP Zone.

RURAL RESIDENTIAL ZONE STANDARDS

3. Chapter 18.60, Rural Residential Zone (RR-10)

a. Section 18.60.010, Purposes

The purposes of the Rural Residential Zone are to provide rural residential living environments; to provide standards for rural land use and development consistent with desired rural character and the capability of the land and natural resources; to manage the extension of public services; to provide for public review of nonresidential uses; and to balance the public's interest in the management of community growth with the protection of individual property rights through review procedures and standards.

FINDINGS: The Hearings Officer finds this purpose statement does not establish approval criteria for the RR-10 Zone, but can provide context for interpreting ambiguous provisions in this chapter.

b. Section 18.60.030, Conditional Uses Permitted

The following uses may be allowed subject to DCC 18.128:

*** * ***

E. Planned development.

FINDINGS: The applicant proposes a PUD on the 157-acre subject property including 19 residential lots, two common areas, five open space tracts, a private road system, and dedication of additional right-of-way for the abutting segment of Lower Bridge Way. The proposed residential lots would be clustered along the northern and eastern property boundaries east of Lower Bridge Way and adjacent to the Deschutes River canyon. As discussed above, the Hearings Officer has found I cannot approve the proposed PUD because it includes land zoned EFU and FP in which PUDs are not permitted. However, because I anticipate there will be an appeal of my decision and the board may hear the appeal, I include recommended findings and conclusions on the approval criteria in the RR-10 Zone.

c. Section 18.60.040, Yard and Setback Requirement.

In an RR-10 Zone, the following yard and setbacks shall be maintained.

A. The front setback shall be a minimum of 20 feet from a property line fronting on a local street right of way, 30 feet from a property line fronting on a collector right of way and 50 feet from an arterial right of way.

B. There shall be a minimum side yard of 10 feet for all uses, except on the street side of a corner lot the side yard shall be 20 feet.

C. The minimum rear yard shall be 20 feet.

D. The setback from the north lot line shall meet the solar setback requirements in DCC 18.116.180.

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

FINDINGS: Because the applicant does not propose any dwellings concurrent with the PUD application, the Hearings Officer finds these criteria are not applicable. However, I find that in order to approve the proposed PUD, I must determine whether the size and configuration of the proposed PUD residential lots will allow the future siting of dwellings meeting the setbacks in this section. I find the two-acre size and the configuration and dimensions of the proposed residential lots will accommodate the siting of dwellings complying with the RR-10 Zone setbacks. I also find the record does not indicate any greater setbacks established by building or structural codes.

d. Section 18.60.050, Stream Setback

To permit better light, air, vision, stream or pollution control, protect fish and wildlife areas and to preserve the natural scenic amenities and vistas along streams and lakes, the following setback shall apply:

A. All sewage disposal installations, such as septic tanks or septic drainfields, shall be set back from the ordinary high water mark along all streams or lakes a minimum of 100 feet, measured at right angles to the ordinary high water mark. In those cases where practical difficulties preclude the location of the facilities at a distance of 100 feet and the County Sanitarian finds that a closer location will not endanger health, the Planning Director or Hearings Body may permit the location of these facilities closer to the stream or lake, but in no case closer than 25 feet.

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

FINDINGS: The tentative plan does not show the ordinary high water mark (OHWM) of the abutting stretch of the Deschutes River. However, the Hearings Officer finds the OHWM is located at the bottom of the river canyon well below the upper bench/plateau on which the proposed residential lots would be located. The question presented under this section is whether there is sufficient room on the residential lots to site dwellings and septic systems at least 100 back from the OHWM. The tentative plan shows the riverside boundaries of the

residential lots are located well above the river and part way up the river canyon walls. The tentative plan also shows the distance between those riverside lot lines and the edge of the upper bench/plateau ranges from 50 feet to nearly 200 feet. For these reasons, I find the size and configuration of the proposed residential lots will allow the siting of septic systems and dwellings at least 100 feet from the OHWM of the Deschutes River.

e. Section 18.60.060, Dimensional Standards

In an RR-10 Zone, the following dimensional standards shall apply:

A. Lot Coverage. The main building and accessory buildings located on any building site or lot shall not cover in excess of 30 percent of the total lot area.

B. Building Height. No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed under DCC 18.120.040.

FINDINGS: The applicant does not propose any dwellings concurrent with the PUD and therefore the Hearings Officer finds these criteria do not apply. The question presented under this section is whether size and configuration of the proposed PUD residential lost will allow the future siting of dwellings satisfying the lot coverage limitations in this section. I find that they do. I further find that if the PUD is approved on appeal, it should be subject to a condition of approval requiring all dwellings to satisfy the lot coverage and building height limitations in this section.

C. Minimum lot size shall be 10 acres, except planned and cluster developments shall be allowed an equivalent density of one unit per 7.5 acres. Planned and cluster developments within one mile of an acknowledged urban growth boundary shall be allowed a five-acre minimum lot size or equivalent density. For parcels separated by new arterial rights of way, an exemption shall be granted pursuant to DCC 18.120.020.

FINDINGS: The subject property is not within one mile of an acknowledged UGB, and no arterial rights-of-way separate any proposed parcels. The applicant requests approval to develop a PUD with a density greater than one dwelling per 10 acres by clustering the 19 dwellings adjacent to the river and preserving the majority of the subject property as open space.

The property is approximately 157 acres in size. The applicant's density calculation does not include the 10.4 acres of EFU-zoned land, leaving 146.6 developable acres and resulting in a density of one dwelling per 7.7 acres, less than the maximum density allowed by this paragraph. However, as discussed in the findings above under the FP Zone, the Hearings Officer has found the proposed PUD is not a use permitted outright or conditionally in that zone. Therefore, I find the approximately 30 acres of FP-zoned land included in the subject property cannot be included in the density calculation, leaving approximately 116 acres of developable land for the PUD. At the maximum allowed density of one dwelling per 7.5 acres, there would be sufficient

developable land for only 15 dwellings and the required 65 percent open space. **Therefore, I find I cannot approve the proposed PUD with 19 dwellings.**[11]

f. Section 18.60.070, Dimensional Standards

The following limitations shall apply to uses allowed by DCC 18.60.030:

A. The Planning Director or Hearings Body may require establishment and maintenance of fire breaks, the use of fire resistant materials in construction and landscaping, or may attach other similar conditions or limitations that will serve to reduce fire hazards or prevent the spread of fire to surrounding areas.

FINDINGS: The Hearings Officer finds that because the proposed dwellings would be constructed on the upper bench/plateau of the subject property on which mining previously occurred, and where there remain few trees and little other vegetation, the upper portion of the property effectively creates a natural fire break, and therefore no additional fire break is necessary. I further find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring that all dwellings be constructed of fire resistant materials. Additional fire protection measures are discussed in the subdivision findings below.

B. The Planning Director or Hearings Body may limit changes in the natural grade of land, or the alteration, removal or destruction of natural vegetation in order to prevent or minimize erosion or pollution.

FINDINGS: The staff report states, and the Hearings Officer agrees, that any changes to the natural grade, or the alteration, removal or destruction of natural vegetation in the riparian habitat along the Deschutes River or within NWI mapped wetlands or on the adjacent canyon walls, likely would result in erosion and increased sediment delivery to the river. Based on my site visit observations, I find that alteration of the existing grade and removal of vegetation on the upper plateau at the upper edge of the river canyon – such as removing the existing vegetated berms along the riverside of the proposed PUD residential lots -- could have similar negative impacts on the river and its canyon. Therefore, I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval prohibiting such actions unless they are part of an ODFW approved habitat enhancement project.

g. Section 18.60.080, Rimrock Setback

Setbacks from rimrock shall be as provided in DCC 18.116.160.

FINDINGS: Compliance with the provisions of Section 18.116.160 is addressed in the findings below.

[11] Opponents argue the applicant also cannot include in its density calculations the acreage proposed to be dedicated for Lower Bridge Way. However, opponents have not cited, nor has the Hearings Officer found, any provision in Title 18 prohibiting the inclusion of the dedication in the density calculations.

Based on the foregoing discussion, the Hearings Officer finds I cannot approve the proposed PUD because the 19-lot density exceeds that allowed on the subject property without including the FP-zoned land in which PUDs are not permitted.

SM ZONE STANDARDS

4. Chapter 18.52, Surface Mining Zone (SM)

FINDINGS: No part of the proposed PUD is zoned SM. Therefore, the Hearings Officer finds the provisions of this chapter are not applicable. However, as discussed in the findings above, I have found the applicant's proposal cannot be approved because it separates the SM-zoned portion of Parcel 3 of MP-80-96 from the subject property without making that remainder area a legal lot.[12]

SMIA ZONE STANDARDS

5. Chapter 18.56, Surface Mining Impact Area Combining Zone (SMIA)

FINDINGS: The applicant does not propose any dwellings in conjunction with the PUD. Nevertheless, staff concluded the provisions of Chapter 18.56 require SMIA site plan review concurrent with tentative plan and conditional use permit review for the proposed PUD. At staff's suggestion the applicant submitted an application for SMIA site plan review on July 7, 2015. The Hearings Officer understands staff to argue the applicant must demonstrate *through concurrent SMIA site plan review* that the proposed PUD would allow dwellings to be sited on the PUD residential lots in conformance with all applicable SMIA site plan approval criteria. Staff's position is based on Section 18.56.100)B) which provides:

> **B. Site plan review and approval, pursuant to the County Uniform Land Use Action Procedures Ordinance, <u>shall be required for all uses in the SMIA Zone prior to commencement of any construction or use.</u>** (Emphasis added.)

The Hearings Officer finds the above-underscored language supports staff's interpretation because it applies to "all uses" in the SMIA Zone and requires site plan approval prior to commencement of any such use, and the proposed PUD is a "use." However, because no dwellings have been proposed in conjunction with the PUD, I find SMIA site plan review *of the dwellings* is premature. Therefore, I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring SMIA site plan review for each dwelling prior to construction.

a. Section 18.56.010, Purpose

> **The purpose of the SMIA Zone is to protect the surface mining resources of Deschutes County from new development which conflicts with the removal and processing of a mineral and aggregate resource while allowing owners of property near a surface mine site reasonable use of their property.**

[12] As also discussed above, the Hearings Officer has found that if the applicant does not further divide the SM-zoned portion of Parcel 3, the provisions of Section 18.52.060 prohibiting the creation or reduction in size of SM parcels do not apply.

FINDINGS: The Hearings Officer finds the SMIA Zone purpose statement is not an approval criterion for the applicant's proposal, but can provide context for interpreting ambiguous provisions in this chapter.

b. Section 18.56.020, Location

The SMIA Zone shall apply to all property located within one-half mile of the boundary of a surface mining zone. However, the SMIA Zone shall not apply to any property located within an urban growth boundary, city or other county. The extent and location of the SMIA Zone shall be designated at the time the adjacent surface mining zone is designated.

FINDINGS: The subject property is not located within a UGB. The property abuts SM Site 461 along its western boundary, and is located south across the Deschutes River from SM Site 322. The applicant's SMIA burden of proof indicates, and based on the Hearings Officer' review of the tentative plan I agree, that some or all of the proposed PUD residential lots are within the SMIA Zones for these surface mining sites, and therefore the SMIA Zone is applicable to the proposed PUD.

c. Section 18.56.030, Application of Provisions

The standards set forth in DCC 18.56 shall apply in addition to those specified in DCC Title 18 for the underlying zone. If a conflict in regulations or standards occurs, the provisions of DCC 18.56 shall govern.

d. Section 18.56.050, Conditional Uses Permitted

Uses permitted conditionally shall be those identified as conditional uses in the underlying zone(s) with which the SMIA Zone is combined and shall be subject to all conditions of the underlying zone(s) as well as the conditions of the SMIA Zone.

FINDINGS: The proposed PUD is a use permitted conditionally in the RR-10 Zone. Therefore, the Hearings Officer finds the PUD also is permitted conditionally in the SMIA Zone that overlays the RR-10 Zone. However, as discussed in the findings above, I have found the proposed PUD is not permitted in the FP Zone and therefore it is not permitted in the SMIA Zone that overlays the FP Zone.

e. Section 18.56.060, Dimensional Standards

In the SMIA Zone, the lot size shall be that prescribed in the underlying zone.

FINDINGS: The Hearings Officer assumes the term "lot size" in this section means the minimum lot size prescribed in the underlying zone for the proposed use. As discussed in the conditional use findings below, the minimum lot size for a PUD is 40 acres and therefore 40 acres also is the minimum lot size for a PUD in the SMIA Zone. The subject property is 157 acres in size. As discussed above, I have found the applicant cannot include in the PUD either the 10.4 acres of EFU-zoned land or the approximately 30 acres of FP-zoned land because PUDs are not

allowed in these zones. The remaining approximately 116 acres in the proposed PUD are zoned RR-10, therefore satisfying the 40-acre minimum lot size for a PUD in both the RR-10 Zone and the SMIA Zone overlaying the RR-10 Zone.

f. Section 18.56.070, Setbacks

The setbacks shall be the same as those prescribed in the underlying zone, except as follows:

A. No noise-sensitive or dust-sensitive use or structure established or constructed after the designation of the SMIA Zone shall be located within 250 feet of any surface mining zone, except as provided in DCC 18.56.140.

B. No noise-sensitive or dust-sensitive use or structure established or constructed after the designation of the SMIA Zone shall be located within one-quarter mile of any existing or proposed surface mining processing or storage site, unless the applicant demonstrates that the proposed use will not prevent the adjacent surface mining operation from meeting the setbacks, standards and conditions set forth in DCC 18.52.090, 18.52.110 and 18.52.140, respectively.

C. Additional setbacks in the SMIA Zone may be required as part of the site plan review under DCC 18.56.100.

D. An exception to the 250-foot setback in DCC 18.56.070(A) shall be allowed pursuant to a written agreement for a lesser setback made between the owner of the noise-sensitive or dust-sensitive use or structure located within 250 feet of the proposed surface mining activity and the owner or operator of the proposed surface mine. Such agreement shall be notarized and recorded in the Deschutes County Book of Records and shall run with the land. Such agreement shall be submitted and considered at the time of site plan review or site plan modification.

FINDINGS: Compliance with the setbacks in the FP and SMIA Zones is discussed in the findings above.

Section 18.04.030 defines “noise-sensitive” and “dust-sensitive” uses or structures as real property normally and structures thereon used for sleeping, such as dwellings. The applicant does not propose any dwellings in conjunction with the PUD. Therefore, the Hearings Officer finds the question under this section is whether the size and configuration of the proposed PUD residential lots will permit future siting of dwellings in a manner satisfying the prescribed setbacks.

The applicant’s SMIA burden of proof states both SM Sites 322 and 461 “are inactive, closed mining sites with no existing or proposed mining uses,” and therefore the siting of dwellings on the proposed PUD lots will not prevent any existing or proposed surface mining on these sites from meeting applicable SM Zone standards. In support of this argument, the applicant submitted as Exhibits “A,” “B” and “C” to its SMIA burden of proof copies of correspondence

from DOGAMI stating the agency has closed its file for SM Site 461. However, as discussed in the findings above, the Hearings Officer has found that because the prerequisites for rezoning SM Site 461 under the 2008 Intent to Rezone have not been met, Site 461 is still zoned SM and remains on the county's Goal 5 inventory of significant mineral and aggregate sites. And although the record indicates SM Site 322 is being used for agricultural purposes, it also is zoned SM and remains on the county's Goal 5 inventory of significant mineral and aggregate sites. Therefore, I find both SM Sites 461 and 322 have the potential to be mined in the future. Nevertheless, the record does not indicate whether or where storage or processing uses are permitted on either Site 461 or 322. For this reason, I find the quarter-mile setback from processing and storage areas is not applicable to the proposed PUD. However, the 250-foot setback is applicable.

The tentative plan shows none of the proposed PUD residential lots is located in whole or in part within 250 feet of the boundaries of either SM Site 322 or 461. Therefore, the Hearings Officer finds noise- and dust-sensitive uses – i.e., dwellings – can be sited on all proposed PUD residential lots consistent with the applicable SMIA Zone setbacks.

f. Section 18.56.080, Use Limitations

No dwellings or additions to dwellings or other noise-sensitive or dust-sensitive uses or structures shall be erected in any SMIA Zone without first obtaining site plan approval under the standards and criteria set forth in DCC 18.56.090 through 18.56.120.

FINDINGS: The Hearings Officer has found the location, size and configuration of the proposed PUD residential lots will allow the siting of noise- and dust-sensitive use – i.e., dwellings – at least 250 feet from the boundaries of SM Sites 461 and 322. The siting standards in Sections 18.56.090 through 18.56.120 are discussed in the findings below.

g. Section 18.56.090, Specific Use Standards

The following standards shall apply in the SMIA Zone:

New dwellings, new noise-sensitive and dust-sensitive uses or structures, and additions to dwellings or noise- and dust-sensitive uses or structures in existence on the effective date of Ordinance No. 90-014 which exceed 10 percent of the size of the existing dwelling or use, shall be subject to the criteria established in DCC 18.56.100.

FINDINGS: The record indicates there are no existing dwellings on the subject property that could be expanded. The applicant does not propose any dwellings concurrent with the PUD application. However, the applicant proposes 19 residential lots in the PUD, each of which would be developed with new dwelling. Therefore, the Hearings Officer finds I must determine whether the proposed PUD will permit the future siting of dwellings on the residential lots incompliance with the criteria in Section 18.56.100, discussed in the findings below.

h. Section 18.56.100, Site Plan Review and Approval Criteria

A. Elements of Site Plan. A site plan shall be submitted in a form prescribed by the Planning Director or Hearings Body

detailing the location of the proposed noise-sensitive use, the location of the nearby surface mine zone and operation, if any, and other information necessary to evaluate the approval criteria contained in DCC 18.56.100.

FINDINGS: The applicant submitted a county land use application form and fee for SMIA site plan review. The materials included in the SMIA application, as well as the conditional use and tentative plan applications and burden of proof statements, detail the location of the nearby SM sites as well as the proposed residential lots on which dwellings would be sited in the future, therefore complying with these requirements.

B. Site plan review and approval, pursuant to the County Uniform Land Use Action Procedures Ordinance, shall be required for all uses in the SMIA Zone prior to commencement of any construction or use.

FINDINGS: As discussed above, the Hearings Officer has found the language in this paragraph is sufficiently broad to require SMIA site plan review concurrent with conditional use and tentative plan review for the applicant's proposed residential PUD.

C. The Planning Director or Hearings Body may grant or deny site plan approval and may require such modifications to the site plan as are determined to be necessary to meet the setbacks, standards and conditions described above.

FINDINGS: The Hearings Officer has found that because of the location, size and configuration of the proposed PUD residential lots, dwellings can be sited on those lots in a manner that satisfies the setbacks, standards and conditions in the SMIA Zone. I also have found that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring SMIA site plan review for each PUD dwelling before construction thereof.

D. The site plan shall be approved if the Planning Director or Hearings Body finds that the site plan is consistent with the site-specific ESEE analysis in the surface mining element of the Comprehensive Plan and that the proposed use will not prevent the adjacent surface mining operation from meeting setbacks, standards and conditions set forth in DCC 18.52.090, 18.52.110 and 18.56.140, respectively.

FINDINGS: Included in the record as Exhibits "D" and "E" to the applicant's SMIA site plan burden of proof are copies of the county's ESEE analyses for SM Sites 461 and 322, respectively. The Hearings Officer finds that both ESEE analyses identify land uses potentially conflicting with mining of the sites, including residential uses on surrounding land. However, both ESEE analyses state that although the intensity of such future residential uses could not be predicted, the surrounding low-density – i.e., RR-10 -- zoning would minimize such conflicts.

As discussed above, in 2008 the board approved a zone change for the subject property to RR-10 consistent with the zoning of other nearby rural residential areas. The applicant proposes to develop a PUD at a density of one dwelling per 7.7 acres. The Hearings Officer cannot determine from this record whether the board contemplated this higher density when it adopted the ESEE analyses for SM Sites 461 and 322. Nevertheless, I have found the location, size and

configuration of the proposed PUD residential lots will allow dwellings to be sited on those lots in compliance with the SMIA Zone setbacks adopted to protect surface mining activities. For these reasons, I find the SMIA site plan approval can be granted for the proposed PUD consistent with the ESEE analyses for SM Site 461 and 322.

E. Public notice shall be as set forth in DCC Title 22, the Uniform Development Procedures Ordinance, except that in all cases notice of the receipt of a SMIA application shall be sent to the mine owners and/or operators whose SM-Zoned site triggered the SMIA review.

FINDINGS: The Planning Division mailed individual written notice of the initial public hearing on the applicant's proposal to the owners of record of all property located within 750 feet of the subject property, including the owners of SM Sites 461 and 322, and published notice of the initial public hearing in a newspaper of general circulation. In addition, the applicant posted a notice of proposed land use action sign on the subject property. All of these notices were provided in accordance with Title 22, therefore satisfying the requirements in this paragraph.

i. Section 18.56.120, Waiver of Remonstrance

The applicant for site plan approval in the SMIA Zone shall sign and record in the Deschutes County Book of Records a statement declaring that the applicant and his successors will not now or in the future complain about the allowed surface mining activities on the adjacent surface mining site.

FINDINGS: The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition requiring the applicant to execute and record with the Deschutes County Clerk a waiver of remonstrance as required by this section.

j. Section 18.56.140, Exemptions
The following shall be exempt from the provisions of DCC 18.56:

A. Uses in the SMIA Zone which are not within one-half mile of any identified resource in the SM Zone after all reclamation has occurred.

*** * *.**

FINDINGS: The record indicates the DOGAMI files for SM Sites 461 and 322 have been closed. Nevertheless, both sites remain zoned SM and are included on the county's Goal 5 inventory of significant mineral and aggregate resources. Therefore, both sites have the potential to be mined in the future with all necessary permits from the county and DOGAMI. Moreover, as discussed in the Findings of Fact above, only a portion of Site 461 was subject to a DOGAMI and/or county-approved reclamation plan. Therefore, the Hearings Officer finds it cannot be said of either Site 461 or 322 that "all reclamation has occurred," and consequently I find the applicant's proposed PUD is not exempt from SMIA site plan review under this section.

Based on the foregoing findings, the Hearings Officer finds that if the proposed PUD is approved on appeal, the board should adopt a finding that the PUD satisfies, or with imposition

of the recommended conditions of approval set forth above can satisfy, all applicable provisions of the SMIA Zone.

LANDSCAPE MANAGEMENT ZONE STANDARDS

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

FINDINGS: The applicant did not propose dwellings concurrent with its PUD application, and did not submit an application for LM site plan review. However, staff concluded, and the Hearings Officer agrees, that review of the proposed PUD should include findings as to whether the location, size and configuration of the PUD residential lots will permit the future siting of dwellings in compliance with LM site plan approval criteria. I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring LM site plan review and approval for all future dwellings or additions to dwellings in the PUD prior to construction thereof.

a. Section 18.84.020, Application of Provisions

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

FINDINGS: The tentative plan shows all proposed residential lots are located within the quarter-mile LM corridor for the Deschutes River, and that the abutting stretch of the river is a designated state scenic waterway. Therefore, the Hearings Officer finds the LM Zone applies to the proposed PUD.

b. Section 18.84.030, Uses Permitted Outright

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

FINDINGS: The LM Zone overlays land within the proposed PUD zoned RR-10, EFU, and FP. As discussed above, the Hearings Officer has found the proposed PUD is not a use permitted in the EFU and FP Zones, and therefore I also have found it is not permitted in the LM Zone overlaying those two zones. However, because as discussed in the findings immediately below I have found the PUD is a use permitted conditionally in the RR-10 Zone, I also find it is a use permitted conditionally in the LM Zone overlaying the RR-10 zoned land within the PUD.

b. Section 18.84.040, Uses Permitted Conditionally

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

FINDINGS: As discussed in the findings below, the Hearings Officer has found the proposed PUD is a use permitted conditionally in the RR-10 Zone, and therefore I find it is permitted conditionally in the LM Zone overlaying the RR-10 zoned land in the PUD.

c. Section 18.84.050, Use Limitations

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

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

FINDINGS: There are no existing dwellings or other structures on the subject property. Because the applicant did not propose new dwellings in conjunction with the PUD, the Hearings Officer finds I cannot determine whether such dwellings will be sited so that they are visible from the Deschutes River. However, because of the location, size and configuration of the proposed PUD residential lots, I find it is feasible for dwellings to be sited on those lots so they are not visible from the river. To assure that future dwellings that *are visible from the river* receive LM site plan approval, I find that if the proposed PUD is approved on appeal, it should be subject to conditions of approval requiring the applicant or its successor to demonstrate whether the dwelling would be visible from the river, and if it is visible from the river, to obtain LM site plan approval for such dwelling prior to construction thereof.

d. Section 18.84.060, Dimensional Standards

In an LM Zone, the minimum lot size shall be as established in the underlying zone with which the LM Zone is combined.

FINDINGS: As discussed in the RR-10 Zone findings above, the minimum lot size for a PUD is 40 acres, and individual residential lots in the PUD must be at least 2 acres in size. Therefore, the Hearings Officer finds these minimum lot sizes are applicable to the LM Zone overlaying the RR-10 Zone. The subject property is 157 acres in size. I have found that after subtracting the 10.4 acres of EFU-zoned land and the approximately 30 acres of FP-zoned land, approximately

116 acres of the property are developable as a PUD. The proposed tentative plan shows all proposed PUD residential lots will be at least two acres in size. For these reasons, I find the proposed PUD satisfies the 40-acre minimum PUD size and the two-acre minimum residential lots size.

e. Section 18.84.080, Design Review Standards

The following standards will be used to evaluate the proposed site plan:

A. Except as necessary for construction of access roads, building pads, septic drainfields, public utility easements, parking areas, etc., the existing tree and shrub cover screening the development from the designated road, river, or stream shall be retained. This provision does not prohibit maintenance of existing lawns, removal of dead, diseased or hazardous vegetation; the commercial harvest of forest products in accordance with the Oregon Forest Practices Act, or agricultural use of the land.

B. It is recommended that new structures and additions to existing structures be finished in muted earth tones that blend with and reduce contrast with the surrounding vegetation and landscape of the building site.

C. No large areas, including roofs, shall be finished with white, bright or reflective materials. Roofing, including metal roofing, shall be nonreflective and of a color which blends with the surrounding vegetation and landscape. This subsection shall not apply to attached additions to structures lawfully in existence on April 8, 1992, unless substantial improvement to the roof of the existing structure occurs.

D. Subject to applicable rimrock setback requirements or rimrock setback exception standards in DCC 18.84.090(E), all structures shall be sited to take advantage of existing vegetation, trees and topographic features in order to reduce visual impact as seen from the designated road, river or stream. When more than one nonagricultural structure is to exist and no vegetation, trees or topographic features exist which can reduce visual impact of the subject structure, such structure shall be clustered in a manner which reduces their visual impact as seen from the designated road, river, or stream.

E. Structures shall not exceed 30 feet in height measured from the natural grade on the side(s) facing the road, river or stream. Within the LM Zone along a state scenic waterway or federal wild and scenic river, the height of a structure shall include chimneys, antennas, flagpoles or other projections

from the roof of the structure. DCC 18.84.080 shall not apply to agricultural structures located at least 50 feet from a rimrock.

F. New residential or commercial driveway access to designated landscape management roads shall be consolidated wherever possible.

G. New exterior lighting, including security lighting, shall be sited and shielded so that it is directed downward and is not directly visible from the designated road, river or stream.

H. The Planning Director or Hearings Body may require the establishment of introduced landscape material to screen the development, assure compatibility with existing vegetation, reduce glare, direct automobile and pedestrian circulation or enhance the overall appearance of the development while not interfering with the views of oncoming traffic at access points or views of mountains, forests and other open and scenic areas as seen from the designated landscape management road, river or stream. Use of native species shall be encouraged.

I. No signs or other forms of outdoor advertising that are visible from a designated landscape management river or stream shall be permitted. Property protection signs (No Trespassing, No Hunting, etc.,) are permitted.

J. A conservation easement as defined in DCC 18.04.030 "Conservation Easement" and specified in DCC 18.116.220 shall be required as a condition of approval for all landscape management site plans involving property adjacent to the Deschutes River, Crooked River, Fall River, Little Deschutes River, Spring River, Whychus Creek and Tumalo Creek. Conservation easements required as a condition of landscape management site plans shall not require public access.

FINDINGS: The applicant did not propose dwellings in conjunction with the PUD. Based on the location, size and configuration of the proposed PUD residential lots, the Hearings Officer finds it is feasible to site future dwellings in compliance with these criteria. I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring compliance with the criteria in this section, including the execution and recording of a conservation easement.

g. Section 18.84.090, Setbacks

A. Except as provided in DCC 18.84.090, minimum setbacks shall be those established in the underlying zone with which the LM Zone is combined.

FINDINGS: The applicable setbacks in the FP, SMIA and RR-10 Zones are discussed in the findings above and below. The Hearings Officer has found that with the possible exception of rimrock setbacks, the location, size and configuration of the proposed PUD residential lots will

allow the future siting of dwellings on the PUD residential lots in conformance with the setbacks in those zones. Rimrock setbacks are addressed in the findings below.

B. Road Setbacks. All new structures or additions to existing structures on lots fronting a designated landscape management road shall be set back at least 100 feet from the edge of the designated road right-of-way unless the Planning Director or Hearings Body finds that:

1. A location closer to the designated road would more effectively screen the building from the road; or protect a distant vista; or

2. The depth of the lot makes a 100 foot setback not feasible; or

3. Buildings on both lots abutting the subject lot have front yard setbacks of less than 100 feet and the adjacent buildings are within 100 feet of the lot line of the subject property, and the depth of the front yard is not less than the average depth of the front yards of the abutting lots.

If the above findings are made, the Planning Director or Hearings Body may approve a less restrictive front yard setback which will be appropriate to carry out the purpose of the zone.

FINDINGS: The Hearings Officer finds these criteria are not applicable because the LM Zone on the subject property is associated with the Deschutes River and not with a designated landscape management road.

C. River and Stream Setbacks. All new structures or additions to existing structures shall be set back 100 feet from the ordinary high water mark of designated streams and rivers or obtain a setback exception in accordance with DCC 18.120.030. For the purpose of DCC 18.84.090, decks are considered part of a structure and must conform with the setback requirement.

The placement of on site sewage disposal systems shall be subject to joint review by the Planning Director or Hearings Body and the Deschutes County Environmental Health Division. The placement of such systems shall minimize the impact on the vegetation along the river and shall allow a dwelling to be constructed on the site as far from the stream or lake as possible. Sand filter systems may be required as replacement systems when this will allow a dwelling to be located further from the stream or to meet the 100 foot setback requirement.

FINDINGS: The Hearings Officer has found the location, size and configuration of the proposed PUD residential lots will permit future siting of dwellings and on-site septic systems thereon at least 100 feet from the OHWM of the Deschutes River, and in a manner minimizing impact to vegetation along the river.

D. Rimrock Setback. New structures (including decks or additions to existing structures) shall be set back 50 feet from the rimrock in an LM Zone. An exception to this setback may be granted pursuant to the provisions of DCC 18.84.090(E).

E. Rimrock Setback Exceptions. An exception to the 50 foot rimrock setback may be granted by the Planning Director or Hearings Body, subject to the following standards and criteria:

1. An exception shall be granted when the Planning Director or Hearings Body finds that:

a. A lesser setback will make the structure less visible or completely screened from the river or stream; or

b. The subject lot or parcel was a lot of record prior to the adoption of this ordinance; or

c. Dwellings (including decks) on both lots or parcels abutting the subject lot within 50 feet of the rimrock and the adjacent buildings are within 100 feet of the lot line of the subject property; or

d. Adherence to the 50-foot setback would prevent the structure from being sited on the lot.

*** * *.**

FINDINGS: Staff and the parties disagree as to whether and where there is rimrock in the proposed PUD. Section 18.04.030 includes the following definition:

> **"Rimrock" means any ledge, outcropping or top or overlying stratum of rock, <u>which forms a face in excess of 45 degrees, and which creates or is within the canyon</u> of the following rivers and streams: (1) Deschutes River . . . For the purpose of DCC Title 18, <u>the edge of the rimrock is the uppermost rock ledge or outcrop of rimrock</u>.** (Emphasis added.)

The Hearings Officer finds the above-underscored language signifies a rock outcrop or face in excess of 45 degrees constitutes "rimrock" even if it does not form the highest point on the canyon wall. In other words, rimrock may be located on the canyon wall *below* the top of the canyon. In light of this definition, and based on my site visit observations and the photos of the subject property and the river canyon submitted into the record by opponents, I find there may be rimrock within open space Tracts C and E as well as on some or all of the proposed PUD residential lots.

The staff report questions whether all of the proposed residential lots are configured so that dwellings cannot be sited on them without the need for a rimrock setback exception. Staff suggests that because of the proximity of the proposed PUD residential lots to the Deschutes River -- a designated state scenic waterway -- lots requiring rimrock setback exceptions should not be permitted. Staff also notes it may not be possible for future owners of PUD residential lots to obtain rimrock setback exceptions in light of the strict standards therefor. Accordingly, the staff report recommends the applicant be required to submit into this record a figure showing the location and dimensions of the developable area of each lot in order to demonstrate it is feasible to site a dwelling without a rimrock setback exception.

The applicant did not submit the recommended information concerning rimrock on each lot. Rather, it submitted as Exhibit "PH-14" to its original burden of proof a memorandum dated June 30, 2015 from the applicant's engineer Keith D'Agostino listing proposed setbacks for each residential lot and stating in relevant part:

> *"In accordance with your request, we have compiled the following proposed setbacks for lots/yard setbacks related to lot boundaries that abut the Deschutes River/open space tracts within the planned development. The proposed setbacks are based on the Tentative Subdivision Plan, April 2, 2015, <u>and are generally coincident with the location of the existing top of slope, relative to the particular lot lines.</u>*
>
> *Note for lots 2-18, the subject setback is likely to be clearly recognized as a REAR yard setback. On lots 1 and 19 the subject setback to the "River" may be viewed as a SIDE or REAR yard setback."* (Underscored emphasis added.)

The applicant's July 28, 2015 final argument explains these "special setbacks" in relevant part as follows:

> *". . .* [T]*he Applicant conducted an on-site investigation to create setbacks for each individual lot to demonstrate the proximity of each proposed dwelling to the river and avoid the need for any conditions or exceptions to rimrock setbacks. The memo submitted as* ***Exhibit PH-14*** *contains the proposed minimum rear yard setbacks for each individual lot based on the Applicant's on-site investigation. The proposed setbacks are designed to minimize visibility from the river and meet County and State requirements for preservation of scenic resources. These are minimum rear yard setbacks and, as discussed, each structure will be required to seek approval from State Parks which could result in a greater setback to meet State scene waterway requirements."* (Bold emphasis added.)

The Hearings Officer finds the above-underscored language in Mr. D'Agostino's memorandum is less than clear in describing how the "special setbacks" were determined and where they are located. Reading that language in the context of the applicant's final argument, it could be interpreted to mean the "special setbacks" represent the minimum distance between the existing "top of slope" on each lot and a future dwelling. However, scaling each "special setback" on the tentative plan suggests they instead represent the distance between the riverside lot line of each lot – located on the canyon wall -- and the "top of slope." I find that under either interpretation, the proposed "special setbacks" are not an acceptable means of demonstrating compliance with required rimrock setbacks.

If the “special setbacks” represent the distance between a future house and the “top of slope,” it may not be feasible to develop some lots. For example, the distance from the “top of slope” to the private road on Lots 5 and 6 is less than 200 feet, raising the question of whether the proposed “special setbacks” of 130 and 110 feet, respectively, for these lots could be achieved while still allowing the siting of a dwelling, on-site septic system, and individual well meeting the minimum front-yard setbacks from the road and from each other. Similarly, the long-narrow configuration of Lot 9 likely would preclude any type of development with the proposed 190-foot “special setback” measured back from the “top of slope.”

If, on the other hand, the “special setbacks” represent the distance between the riverside lot line and the “top of slope” on each lot, dwellings could be sited *on the rim* of each lot regardless of where any rimrock is located. The Hearings Officer finds that without the lot-specific rimrock survey recommended by staff, the applicant has not demonstrated that each lot can be developed with a dwelling, on-site septic system and individual well in a manner that assures the dwelling is at least 50 feet from any rimrock, and that all other yard and setback requirements in the LM Zone can be met.

Based on the foregoing discussion, the Hearings Officer finds the applicant has not demonstrated it is feasible to site a dwelling, on-site septic system and individual well on each PUD residential lot without the need for a rimrock setback exception, or that it is feasible for future dwellings to qualify for rimrock setback exceptions.

h. Section 18.84.095, Scenic Waterways

Approval of all structures in a State Scenic Waterway shall be conditional upon receipt of approval of the Oregon Department of Parks and Recreation.

FINDINGS: The section of the Deschutes River adjacent to the subject property is a designated scenic waterway – i.e., the Middle Deschutes Scenic Waterway -- administered by OPRD. By a letter dated February 24, 2015, and signed by Greg Cianella, Scenic Waterway Program Coordinator, OPRD granted approval for the “subdivision framework (road and underground utilities)” for the applicant’s proposed PUD. The letter states the approval does not include any structures within the PUD.

In his July 7, 2015 comments on the applicant’s proposal, Mr. Cianella stated in relevant part:

> *“When current or future property owner(s) propose to construct new structures on their lots created by this decision, they will need to notify OPRD as prescribed by the Scenic Waterways Act, ORS 390.845(3); OAR 736-040-0030, and meet criteria provided in OAR 736-040-0035(&) and OAR 736-040-0072(5)(b). OPRD requests that Deschutes County consider these criteria when evaluating the Lower Bridge Road LLC application so that property owner(s) will have the opportunity to develop their lot(s) in the future in a manner consistent with the Scenic Waterways Act.”*

The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring that each dwelling on a PUD residential lot receives OPRD scenic waterway approval prior to construction thereof.

For the foregoing reasons, the Hearings Officer finds the applicant has not demonstrated its proposed PUD complies with all applicable approval criteria in the LM Zone.

SUPPLEMENTARY PROVISIONS

7. Chapter 18.116, Supplementary Provisions

a. Section 18.116.160, Rimrock Setbacks Outside of LM Combining Zone

FINDINGS: The Hearings Officer finds the criteria in this section are not applicable to the proposed PUD because all residential lots and rimrock, if any, are located within the LM Zone. Nevertheless, the staff report recommends that I find the provisions of this section apply to any structures that are exempt from LM site plan review, such as structures that do not require building permits. Staff argues that if this section does not apply to such structures, a PUD lot owner potentially could place a structure not requiring a building permit – such as an accessory structure less than 200 square feet in size and less than 10 feet in height -- immediately adjacent to or projecting over rimrock.

The Hearings Officer understands staff's concern. However, I find the plain language of this section makes clear it does not apply within the LM Zone. Alternatively, staff recommends, and I agree, that it is appropriate to prohibit the development of *any* structure within the LM Zone rimrock setback as a condition of approval to assure compliance with conditional use approval criteria. As discussed in the conditional use findings below, I have recommended imposition of such a condition of approval to assure the natural resources on the subject property are protected.

b. Section 18.116.310, Traffic Impact Studies

A. For purposes of DCC 18.116.310, the transportation system includes public and private roads, intersections, sidewalks, bike facilities, trails, and transit systems.

B. The applicant shall meet with County staff in a pre-application conference to discuss study requirements, then generate the traffic study and submit it concurrently with the land use application.

C. Guidelines for Traffic Impact Studies

*** * *.**

FINDINGS: The applicant submitted a traffic impact study (hereafter "traffic study") dated November 6, 2014, prepared by Kittelson & Associates, and included in the record as Exhibit "I" to the applicant's original burden of proof. The traffic study concluded that because of low existing traffic volumes on Lower Bridge Way, the addition of the 190 additional average daily vehicle trips (ADTs) and 20 weekday p.m. peak hour trips predicted to be generated by the proposed PUD will not cause Lower Bridge Way to function below acceptable levels of service as defined by the road department. The traffic study also concluded there is adequate sight distance at the intersection of Lower Bridge Way and the proposed PUD access road.

In his April 28, 2015 comments on the applicant's proposal, the county's Senior Transportation Planner Peter Russell stated in relevant part:

> *"Staff agrees with the submitted traffic study's methodology and LOS conclusions. Planning and Road Department staff visited the site and are concerned about the sight visibility from the proposed access to both the north and south of Lower Bridge Way. There are slight vertical curves and vegetation in both directions and it appears the access will not meet sight distance requirements. The applicant might wish to consider whether to replace the direct access to Lower Bridge Way with a direct access onto Teater at the south edge of the property, thus funneling site traffic to the existing Lower Bridge Way/Teater Avenue intersection.*

In their May 11, 2015 comments on the applicant's proposal, George Kolb, County Engineer, and Michael Martin, County Utility Coordinator/Surveyor, stated:

> "*Access onto Lower Bridge Road will have to meet AASHTO* [American Association of State Highway and Transportation Officials] *standards for sight distance. Staff from the Road Department has met with the applicant's engineer and it appears that the necessary sight distance can be met at a location that was agreed upon in the field. Another option would be to move the access from Lower Bridge Way south to NW Teater Avenue which is classified as a rural local road if sight distance requirements can't be met on Lower Bridge Road."*

The record indicates the agreed-upon access location referred to in these comments is the applicant's proposed access road intersection with Lower Bridge Way.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies the requirements for traffic studies in this section.

CONDITIONAL USE APPROVAL CRITERIA

8. Chapter 18.128, Conditional Use

a. Section 18.128.015, General Standards Governing Conditional Uses

Except for those conditional uses permitting individual single family dwellings, conditional uses shall comply with the following standards in addition to the standards of the zone in which the conditional use is located and any other applicable standards of the chapter:

A. The site under consideration shall be determined to be suitable for the proposed use based on the following factors:

1. Site, design and operating characteristics of the use;

FINDINGS: The Hearings Officer finds the general conditional use approval criteria apply because the applicant's proposal is for a PUD and not for an individual single-family dwelling. Each of the factors in this paragraph is addressed in the findings below.

Design and Operating Characteristics. The Hearings Officer finds these two factors require an evaluation of the suitability of the subject property for PUD development considering *the proposed PUD's characteristics*, such as its size, configuration, density, uses, transportation access, and services and utilities.

1. Size. The proposed PUD would include 157 acres, far exceeding the 40-acre minimum lot size for a PUD in the RR-10 Zone.

2. Configuration. The proposed PUD would include 19 residential lots, two common areas, five open space tracts, a private road system including bicycle lanes, and the dedication of right-of-way for the abutting segment of Lower Bridge Way. All residential lots would be clustered adjacent to the Deschutes River, and open space Tracts C and E would include the river and its associated flood plain, wetlands and riparian areas as well as much of the river canyon. Open space Tracts C, E and F would include the EFU-zoned area, and the portions of SM Site 461 zoned RR-10 and located on the west side of Lower Bridge Way. The open space tracts would not be developed. The PUD residential lots would be at least two acres in size.
As discussed in the findings above, the applicant has proposed "special setbacks" for dwellings that the Hearings Officer has found are not adequate to assure each proposed dwelling would meet the 50-foot rimrock setback, or that each residential lot is large enough, or has the configuration necessary, to permit the future siting of a dwelling, on-site septic system and individual well and still comply with all yard and setback requirements. And because the proposed 157-acre PUD has only the minimum required open space acreage, I find it may not be feasible to reconfigure the residential lots and open space tracts to increase the size or dimensions of the residential lots in order to assure dwellings can be sited thereon consistent with all required yards and setbacks.

3. Density. The proposed density is one dwelling per 7.7 acres which is less than the maximum density of one dwelling per 7.5 acres permitted for a planned/cluster development in the RR-10 Zone.

4. Uses. Proposed uses in the PUD would include single-family dwellings and residential uses as well as passive use of the open space tracts by residents and their guests.

5. Transportation Access. The proposed PUD would have access from Lower Bridge Way via a system of private PUD roads including a main access road and three cul-de-sac roads. As discussed above, the Hearings Officer has found traffic generated by the proposed PUD would not exceed the capacity of Lower Bridge Way nor create traffic hazards at the proposed intersection with the PUD access road. The applicant proposes to dedicate additional right-of-way for, and to improve to the county's standards for rural collector roads, the abutting segment of Lower Bridge Way.

6. Services and Utilities. Each dwelling in the proposed PUD would be served by an individual well and on-site septic system. As discussed in the subdivision findings below, the record indicates water is available in the area. In addition, the Hearings Officer has recommended that if the proposed PUD is approved on appeal, such approval should be subject to conditions of approval requiring that each residential lot receive an approved septic site evaluation. As also discussed below, the record indicates all necessary utility services are available to the subject property.

Based on the foregoing findings, the Hearings Officer finds the subject property is not suitable for the proposed PUD considering the development's design and operating characteristics

because the applicant has failed to demonstrate the proposed PUD residential lots are of adequate size and dimensions to accommodate single-family dwellings, on-site septic systems and individual wells while complying with all yard and setback requirements including rimrock setbacks.

Site. The Hearings Officer finds this factor requires evaluation of the suitability of the subject property for PUD development considering *the property's characteristics* such as its location, size, configuration, topography, and natural and man-made hazards.

a. Location. The majority of the subject property is located in the RR-10 Zone in which residential PUDs are permitted conditionally. However, as discussed above, the Hearings Officer has found the proposed PUD cannot include land zoned EFU-LB and FP because these zones do not permit PUDs outright or conditionally. The property is located across the Deschutes River from the Borden Beck Wildlife Preserve and includes within its boundaries the Lynch and Roberts Advertisement sign, a designated historic site. The property has access from a designated county collector road.

b. Size. The Hearings Officer has found the subject property is of sufficient size to accommodate the proposed PUD because it is larger than 40 acres, even after subtracting the EFU- and FP-zoned acreage.

c. Configuration. The subject property is irregular in shape, generally following the course of the Deschutes River on the east and Lower Bridge Way on the west. The shape of the subject property effectively precludes more than a single road access. However, as discussed in the subdivision findings below, the Hearings Officer has found a secondary access is not required.

d. Topography. The subject property's topography varies from the large, generally level upper plateau on which most of the PUD, all of the residential lots, and the private PUD roads would be located. This location would preclude the need for significant grading for dwellings or roads. The Deschutes River and most of its canyon would be included in the PUD's open space tracts which would not be developed with dwellings or other structures or roads.

e. Natural and Man-Made Hazards. As discussed in the Findings of Fact above, the subject property was part of an approximately 557-acre property (hereafter "parent parcel") that was mined for aggregate and diatomite. Because mining on the parent parcel began as early as the 1920's, long before county land use regulations and state mining regulations became effective, most of the parent parcel is exempt from state or county mine reclamation requirements. The record indicates that after 1980, DOGAMI began regulating some mining activity on the parent parcel, and that although multiple mining permits were issued by DOGAMI over the years, various companies were cited for violating environmental laws, mining permits, or operating without permits. The record indicates, and the Hearings Officer's site visit observations confirmed, that due to past mining activity, diatomaceous earth is exposed on much of the parent parcel west of Lower Bridge Way and on the subject property. The record also indicates the parent parcel on the west side of Lower Bridge Way was used for the storage of hazardous/radioactive waste and some of the parent parcel was subject to a DEQ-approved cleanup program. However, there is no evidence in this record that any part of the subject property located west of Lower Bridge Way was utilized for waste storage.

In its 2008 plan amendment/zone change decision, the board made the following relevant findings concerning environmental conditions on the parent parcel:

"The record indicates that the processing of diatomaceous earth can create cristobalite, classified by the International Agency for Research on Cancer as carcinogenic to humans. There is no evidence in the record that the property has been tested or evaluated for potential hazard form this carcinogen. The site has also been used for hazardous and radioactive waste disposal and has been subject to numerous violations of environmental quality regulations.

* * *

As noted above, the majority of the site, primarily west of Lower Bridge Way, has a long history of industrial use, and some of those uses have resulted in significant environmental impacts. Those impacts include dust from diatomite, hazardous and radioactive waste disposal and remediation, and violations of environmental quality regulations. Neighbors expressed concerns regarding the impact of the proposal on water quantity and quality, arguing that the water needed to reclaim the site will adversely affect the area's water supply."

After considering the evidence before it in 2008, the board made the following findings concerning each of the identified adverse environmental impacts:

"Diatomite dust. *. . . The applicant supplied testimony and evidence that shows that fresh-water diatomite contains a smaller percentage of crystalline silica, the type of silica that has been identified as a health hazard if inhaled in quantity. The applicant argues that this type of diatomite poses no more risk than other dust in the area. The applicant also argues that before this site is redeveloped for residential uses, the diatomite will be graded and seeded to prevent dust from blowing from the site to neighboring properties. The neighbors expressed reservations about this assertion, arguing that the cost and feasibility of that type of reclamation is unlikely to be recouped as part of development on this site.*[5]

The evidence shows that blowing dust has been an issue for many years, although recent grading activities exacerbated the situation. The recent activities led the Department of Environmental Quality (DEQ) to issue a notice of violation. In response to the notice, the owners obtained a temporary water permit, purchased mitigation credits, installed a pivot and began using an existing well to water a portion of the site to minimize dust. The applicant is also proposing to implement best management practices to ensure that blowing dust during development is minimized. These measures are adequate to assure that local air quality is maintained.

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[5] *The opponents argue that the diatomite has been converted to crystalline silica during through [sic] an on-site manufacturing process. They cited evidence showing that crystalline silica is hazardous to worker health, and argued that until the diatomite at the site has been removed or covered with top soil, there is no guarantee that existing or future residents' health will not be affected. They further argue that diatomite doesn't grow much, and unless the applicant plans to import a significant amount of top soil, it is unlikely that the reseeding efforts will be successful. While the former evidence tends to support a finding that processing of diatomite at the site needs to be regulated, the evidence of the health effects of freshwater diatomite on neighboring property owners is not sufficient to undermine the applicant's evidence that such effects are limited, and consistent with the effects of blowing dust in general."*

Water quality/quantity. *. . The applicant proposes to develop individual, shared or group wells (serving up to three lots) as part of its residential development. . . Neighbors expressed concerns regarding potential water contamination from past industrial uses, and also argue that the introduction of 17 or more new wells (assuming 72 dwelling units, and at least one well per three dwelling units minus the seven existing wells) could significantly affect their water quality and quantity. . . . Here, the evidence (including evidence from testing of nearby community water wells) shows that existing water quality in the area is adequate, and that past activities on the site have not affected nearby well water quality. With respect to water quality at the site, the Board finds that the question can be better addressed at the time a development proposal is submitted for the site. At this point, the evidence shows that the proposed plan amendment/zone change will not have any effect on water quality.*

Erosion/Fill. *One of the neighbors expressed concerns regarding slope stability at the site, asserting that new grading may undermine the slope along the edges of the river bank. . . The evidence shows that diatomite mining occurred closer to the center of the site, and that the aggregate mining has ceased. There is no evidence that past mining has undermined slope stability along the river edge. . . As a condition of approval, if fill is brought onto the site, the applicant will be required identify the general location of the fill, and if the site is used for development, the applicant shall either certify that the fill is suitable for development, or specifically declaim any knowledge of its suitability. The Board concludes that these measures are adequate to assure that development on the site will not adversely affect air, water or land quality.*

Dumping/Environmental Issues. *A portion of the site west of Lower Bridge Way was an approved waste facility in the mid-1970s, and consequently, sludge, radioactive materials as well as standard solid waste was brought to the site during that time. According to the applicant, the dumping grounds were limited to the central portion of the site, near the former lagoons, and included 55-gallon drums filled primarily with caustic sand. The site was subject to a DEQ-mandated clean up, which was completed by January 1985. The evidence shows that all of the materials located at the site prior to 1985 were removed to approved hazardous waste disposal sites, including Arlington and the Hanford Reservation. According to Maul Foster and Alongi, Inc., the applicant's environmental consultant, the standards used to evaluate the clean-up was based on one of two standards "clean up to the maximum extent practical" or "clean up to background conditions." Maul Foster and Alongi, Inc. representatives testified that these standards are higher than the current risk-based standards, which permit less comprehensive clean up where the site will be used for industrial purposes than is required for sites that will be redeveloped for residential uses. With respect to spills or activities that have occurred since that time, including disposal of mining solvents and industrial burning, the evidence shows that the violations have been addressed by meeting industrial use standards. The Board has included conditions, as discussed more fully herein, to ensure the property is clean enough to meet residential use standards."* (Bold and underscored emphasis added.)

Based on these findings, the board concluded that re-designating the parent parcel to RREA for rural residential development would not "significantly impair air, water and land quality in the area," and therefore would be consistent with the environmental quality goals set forth in Section 23.96.020 of the comprehensive plan.

However, in approving the proposed zone change from EFU and SM to RR-10 for the parent parcel, the board did not find the proposal complied with the zone change approval criterion in Section 19.136.020 requiring that the public interest be served by the rezoning. Instead, the board made the following findings:

> *"The record indicates the subject property was historically used to mine and process diatomaceous earth. The record also indicates that the process of diatomaceous earth can create cristobalite, classified by the International Agency for Research on Cancer as carcinogenic to humans.* ***There is no evidence in the record that the property has been tested for potential hazard from this carcinogen. The site also has been used for hazardous and radioactive waste disposal and has been subject to numerous violations of environmental quality regulations.***
> *The Oregon Department of Human Services, Environmental Health Assessment Program* ***(EHAP) stated that the existing EHAP evaluation of environmental conditions at the site only dealt with the present use of the property.*** *EHAP recommended that the landowner obtain a letter of 'No Apparent Public Health Hazard' from EHAP for the site prior to residential use. This would require additional environmental sampling and cleanup of any identified environmental concerns.* ***EHAP has also found that airborne dust from any source can cause short-term respiratory irritation, but more information is needed to evaluate possible long-term effects at this site. EHAP considers inhalation of airborne dust emanating from this site to be an indeterminate health hazard.***
>
> *The Oregon Department of Environmental Quality* ***(DEQ) stated that the site has currently only been evaluated with respect to environmental safety for its current use as a mine and an industrial property.*** *A rezone of the site from industrial to residential use would require a re-evaluation of the site for residential use.* ***The re-evaluation of the site, applicable exposure routes, and pathways may result in some scenarios requiring deed restrictions, active cleanup and/or monitoring. Following a cleanup of any identified environmental concerns, DEQ could issue a 'No Further Action Letter' (NFA) for residential use.***
>
> ***Given the environmental history of the site, the Board finds that the public interest will not be served by rezoning the property for residential use, <u>prior to establishing that the site is safe for residential use.</u>*** [Footnote omitted.] ***The Board finds, however, that the applicant can meet this criterion through conditions of approval.****"* (Bold and underscored emphasis added.)

In making these findings, the board stated:

"With regard to environmental issues, the Board lacks the expertise to determine of the subject property is safe for residential use and will look to DEQ and DHS to provide this determination."

The board established separate conditions of approval applicable to the subject property and to the rest of the parent parcel. Conditions 1 and 2, applicable to the subject property, provided as follows:

> *"1. Prior to final plat approval for any residential subdivision, the applicant shall obtain from the Department of Environmental Quality (DEQ) a 'No Further Action' (NFA) determination or the equivalent for a residential use designation for the 160 acres.*
>
> *2. Prior to final plat approval for any residential subdivision, the applicant shall obtain from the Department of Human Services (DHS) a determination of 'no apparent public health hazard' for residential use designation for the 160 acres."*

The Hearings Officer finds the board effectively substituted a condition of approval for the necessary findings of compliance with the "public interest" zone change approval criterion. And the board appears to have delegated making the necessary findings to EHAP and DEQ, and to have deferred those findings to an unspecified future date when the 2008 applicant or its successor would submit a final subdivision plat for approval.[13] Nevertheless, nothing in the 2008 decision suggests the board intended that future residential development of the subject property would not to be subject to applicable approval criteria for such development.

In its final argument, the applicant suggests the Hearings Officer also should defer findings on whether the subject property meets the "suitability" conditional use approval criterion for the proposed PUD to final plat approval, based on the following reasoning:

> *"As the Board correctly recognized in 2008, neither the County nor the Hearings Officer have* [sic] *the level of expertise necessary to determine the environmental condition of the site and its safety for residential use. . . DEQ is the appropriate regulatory agency to make that determination and the issuance of a NFA letter from DEQ after a complete and thorough analysis of the site will ensure it meets regulatory residential use standards. . . Conditions of approval which require receipt of a state agency permit or compliance with state agency requirements (and may defer compliance with approval criteria) are permissible and entirely appropriate in a multi-stage approval process (such as plan amendment/zone change and subsequent subdivision and/or development applications); see Butte Conservancy v. City of Gresham, 52 Or LUBA 550 (2006); Rhyne v. Multnomah County, 23 Or LUBA 442 (1992), and are likewise permissible and appropriate where the land use standards expressly require compliance with state agency requirements or that the applicant secure a state agency permit, see, Wetherell v. Douglas County, 44 Or LUBA 745 (2002); Sam Miller v. City of Joseph, 32 Or LUBA 472 (1996)."*

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[13] These actions were at odds with cases holding that local governments cannot fail to adopt, or defer, findings on approval criteria in favor of imposing conditions of approval. *E.g., Green v. Douglas County,* 67 Or LUBA 234 (2013), and cases cited therein.

The Hearings Officer is not persuaded by the applicant's argument. In the first place, the decision-maker is not excused from the requirement to make findings on compliance with approval criteria simply because the facts are complex and technical. Second, I find the applicant's reliance on the *Wetherell* and *Miller* cases is misplaced because there is nothing in the PUD or subdivision approval criteria that requires either DEQ or EHAP approval or the issuance of DEQ or EHAP permits for residential development of the subject property.[14]

Third, the Hearings Officer finds the *Rhyne* and *Butte Conservancy* decisions do not assist the applicant. The circumstances presented here are similar to those in *Rhyne* in which LUBA found the county's decision improperly deferred necessary findings to a stage in the proceedings for which notice and hearing were not required. In that case, the applicant sought approval of a zone change to create a planned development (PUD) overlay on the subject property in order to site a manufactured home development. The PUD approval was a two-stage process in which the second stage – final approval – was purely ministerial. LUBA's decision in *Rhyne* included the following findings concerning when it is appropriate to condition approval on a future demonstration of compliance with applicable standards:

> *"Assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage. * * **
>
> *<u>Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available.</u> First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. <u>Third, * * * instead of finding that the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing.</u> * * *."*

LUBA found the county erred in not adopting findings either than the proposed complied with the approval criteria or that it was feasible to comply with the criteria, and instead improperly deferring discretionary determinations concerning compliance with the criteria to a stage in the proceedings in which notice and hearing were not required or provided – essentially what the board did in its 2008 decision rezoning the parent parcel.

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[14] The only state agency permit required by Title 18 for PUD approval is state scenic waterway approval which, as discussed elsewhere in this decision, OPRD already has issued for the PUD infrastructure.

Finally, the Hearings Officer finds the circumstances in *Butte Conservancy* are distinguishable from those presented here. In that case, the city required the applicant for a residential development to obtain an easement for, and to construct, a secondary access road through adjacent private property that was subject to CC&Rs. The question before the city was whether the CC&Rs permitted an access road in the designated location. The city concluded it was feasible for the applicant to construct such a road either by obtaining an easement across the adjacent property, or through the city's condemnation of the property for the road. In its decision, LUBA held that where the feasibility of satisfying an approval criterion through imposition of a condition of approval turns on a *legal interpretation* – e.g., whether the CC&Rs allowed road construction on the proposed access location – the proper approach is as follows:

> *". . . it is sufficient for the local government in such circumstances to (1) adopt findings that establish that fulfillment of the condition of approval <u>is not precluded as a matter of law</u>, and (2) ensure, in imposing the condition of approval, that the condition will be fulfilled prior to final development approvals or actual development."* (Underscored emphasis added.)

The Hearings Officer finds the approach in *Butte Conservancy* is not applicable where, as in the subject PUD application, the feasibility of demonstrating compliance with the "suitability" conditional use approval criterion does not depend on a legal interpretation.
The record for this PUD application includes conflicting evidence, some of it quite technical, concerning whether the subject property is suitable for residential development considering environmental impacts from previous mining and hazardous materials storage. The Hearings Officer finds that under *Rhyne*, I do not have the option of deferring findings of compliance with the "suitability" conditional use approval criterion to final plat approval as suggested by the applicant. That is because final plat approval is not required to, and does not, provide public notice or hearing. Under Chapter 17.24 of the subdivision ordinance, final plat approval is ministerial. Sections 17.24.105 and 17.24.110 describe final plat approval as determinations of whether the final plat "is substantially the same as it appeared on the approved tentative plan" and "all conditions of approval have been satisfied." Once those determinations are made by the Planning Director, the final plat is signed by the board. Chapter 17.24 contains no provision requiring notice or hearing prior to final plat approval. In addition, under Section 22.04.020 of the land use procedures ordinance, final plat approval is a "development action" – i.e., a determination that involves application of the subdivision ordinance – which under Section 22.16.010 generally is handled administratively without notice and hearing.[15] Finally, approval of a final subdivision plat is expressly excepted from the definition of "land use decision" under ORS 197.015(10)(G).

For the foregoing reasons, the Hearings Officer finds I have two options concerning findings on compliance with the "suitability" conditional use approval criterion:

- I may find the evidence, although conflicting, is sufficient to support a finding that the suitability criterion is satisfied or that it is feasible for the applicant to satisfy it through imposition of conditions of approval; or

[15] Although under Section 22.16.010 the Planning Director may elect to handle a development action with notice and hearing, the Hearings Officer finds there would be no reason for the Planning Director to do so in this case inasmuch as the determination of whether the applicant submitted letter from DEQ and EHAP as required in Conditions 1 and 2 of the board's 2008 decision would be purely ministerial – i.e., the applicant either did or did not submit the letters.

- I may find that the evidence is insufficient to support a finding that the suitability criterion is satisfied or that it is feasible to satisfy it through conditions of approval, and therefore I must deny the application.

The applicant and opponents submitted evidence on four environmental issues potentially affecting the suitability of the subject property for development with a residential PUD – dust, water quality, hazardous materials, and radioactive materials. Each of these issues is discussed in the findings below.

Blowing Dust.

Opponents argue the exposed diatomite remaining on the subject property and on SM Site 461 presents an unacceptable risk to human health. Opponent David Jenkins submitted testimony and evidence that the mining and processing of diatomaceous earth on SM Site 461 produced cristobalite, a known carcinogen, and that this material was disturbed during mining and processing, resulting in it becoming airborne. Opponents note that prevailing winds in Central Oregon are from the west, therefore potentially blowing cristobalite from SM Site 461 onto the subject property. The record indicates Site 461 has been a significant generator of dust for decades.
In response to opponents' concerns about dust hazards, the applicant submitted into the record as Exhibit "PH-2" to its burden of proof a document dated February 29, 2008, prepared by Maul, Foster, Alongi, Inc. (hereafter "MFA"), an environmental and engineering consulting firm, and entitled "Evaluation of Dust Risks at Former Diatomaceous Earth Mine Near Terrebonne, Oregon." This evaluation states its purpose was to "assess if exposure to fugitive dust from the property could pose health hazards." The evaluation concluded in relevant part:

> *"Long-term, chronic exposure to most types of dust can cause adverse health effects.* [Footnote omitted.] *However, as described in greater detail below, it is MFA's opinion that the dust from this particular site is no more hazardous than most types of dust in rural Oregon. If the dust control measures outlined in the work plan recently approved by the Oregon Department of Environmental Quality (DEQ) are implemented, it is unlikely DE* [diatomaceous earth] *at the site could pose unacceptable health risks."*

The record indicates the DEQ-approved control measures consisted of seeding and watering most of SM Site 461 in order to establish vegetative cover to secure the DE and reduce blowing dust.

The applicant also submitted a memorandum dated June 22, 2015, prepared by R. Scott Wallace of the Wallace Group, and entitled "Preliminary Geologic Exploration Proposed Lower Bridge Road Subdivision, 10000 Lower Bridge Road, Terrebonne, Oregon, Project No. 10446 (2)." The memo states its purpose was to describe a "preliminary subsurface exploration" of the subject property conducted on June 9, 2015. The memo states the exploration revealed a layer of diatomite on the subject property ranging from 0.5 to 2 feet in depth. The memo goes on to state in relevant part:

> *"Based on the initial lab data and our experience, the very lightweight nature of diatomite represents and air-borne dust hazard if the material is disturbed (i.e., excavated and processed during site grading). In addition, the diatomite horizon's ability to support roads, infrastructure and residential structures warrants further*

geotechnical investigation and testing. The supplemental geotechnical analysis should also address the infiltration characteristics of the diatomite and feasibility for on-site septic systems."

The memo recommended dust control measures on the subject property including spraying the ground surface with water prior to site grading and road building, and/or covering the diatomite with three to six inches of sand and gravel.

The applicant's final argument states the following with respect to dust hazards and control on SM Site 461 and the subject property:

> *"With regard to the issues associated with the blowing DE, the Applicant worked closely with DEQ in 2008/2009 to develop and implement a dust mitigation plan to control airborne DE and to demonstrate safety for residential use. This dust mitigation plan involved watering and planting/seeding approximately 300 acres of the mined area west of Lower Bridge Road. The owners used a large agricultural pivot irrigation system on the site and spent substantial resources to reduce the airborne DE. These efforts were successful and the complaints of blowing dust have diminished significantly since 2009. The applicant will continue to utilize dust suppression measures approved by DEQ to control dust both during and post construction. Submitted as* ***Exhibits PH-12 and PH-13*** *are memos outlining the construction, erosion and storm water control measures the Applicant will implement to control dust and ensure no runoff leaves the site."* (Bold emphasis in original.)

Although the applicant states its dust control measures on SM Site 461 "were successful," the Hearings Officer's site visit observations indicate the opposite. I observed that on much of SM Site 461 the introduced vegetation has not taken hold, and as a result large areas of diatomaceous earth remain exposed. In addition, as discussed above, I have found that as long as SM Site 461 is zoned SM and included in the county's inventory of significant mineral and aggregate sites, future mining on the site is possible with necessary county and DOGAMI permits, and therefore additional ground disturbance on Site 461 could occur in the future. Moreover, the Wallace Group geotechnical survey shows there is a significant amount of DE on the subject property that can become airborne with the types of disturbances contemplated in development of the proposed PUD – i.e., road building and grading for dwelling construction. And I find nothing in the proposed CC&Rs that addresses dust control on either SM Site 461 or the subject property.

The staff report questions whether there are clear lines of authority and adequate funding to assure future dust control measures will be adequate to address airborne DE dust blowing over the subject property from SM Site 461, and raises the following questions:

> *"1) What earth/vegetation disturbance and mining is allowed on tax lots 1501 and 1502 without any further land use review? What limits, if any exist on potential dust generation? The county does not have a grading ordinance and the site pre-dates DOGAMI requirements. Is there any evidence that massive earthmoving and dust production could not be conducted without recourse on the SM zoned property?*
>
> *2) What new earth/vegetation disturbance and mining could be permitted on tax lots 1501 and 1502 under conditional use and/or site plan review? Would these*

review processes include sufficient safeguards to protect the PUD from dust, noise, and industrial emissions? Staff notes that the protections of the Surface Mining zone tend to be limited to only very close or immediately adjacent residences."

The applicant's only response to these questions is to argue SM Site 461 no longer can be mined because DOGAMI has closed its files for the site, and that the applicant can control DE dust on the subject property through the mitigation measures recommended in the 2015 Wallace Group memo. However, the applicant does not explain precisely how, *and by whom*, dust control measures will be undertaken during either road construction or site preparation for home construction. The applicant also argues I should defer to DEQ and EHAP for the determination of whether blowing DE dust would render the subject property unsuitable for residential development. I have found that option is not available or appropriate in this matter.

Based on the foregoing discussion, the Hearings Officer finds the applicant has not demonstrated the subject property is suitable for the proposed PUD considering blowing DE dust. I find the current state of SM Site 461 with large areas of exposed DE, the location of SM Site 461 west of the subject property, the potential for future mining of SM Site 461, and the presence of a significant amount of DE on the subject property, do not support a finding that blowing DE dust does not and will not present a health hazard to future PUD residents -- or that it is feasible to assure no health hazard from blowing DE dust will occur in the future through imposition of conditions of approval. I find particularly significant the evidence that re-vegetating and site watering efforts on SM Site 461 have not been successful in securing and covering the DE on the site, and that there is a significant amount of DE *on the subject property.* I find this evidence simply does not support imposing a condition of approval requiring further similar mitigation actions to reduce or eliminate blowing DE dust.[16]

<u>Hazardous Materials Cleanup.</u>

Opponents argue hazardous materials likely remain on SM Site 461 and possibly on the portion of the subject property west of Lower Bridge Way. Opponent David Jenkins argues the 1985 DEQ-approved cleanup of SM Site 461 covered only one acre of the site and that contaminated soil was found on Site 461 after the approved cleanup.

In response to opponents' concerns, the applicant submitted into the record as Exhibit "PH-3" to its burden of proof a February 29, 2008 document prepared by MFA entitled "Evaluation of Environmental Cleanup Actions at a Former Waste Management Facility Near Terrebonne, Oregon." This evaluation states SM Site 461 was cleaned up in 1983 and 1984, and that DEQ concluded there were no remaining soil contaminants following cleanup. In addition, the applicant submitted as Exhibit "PH-6" to its burden of proof an MFA document dated May 20, 2008 entitled 'Potential Environmental Hazards at a Former Mine Site Near Terrebonne, Oregon." This document states in relevant part:

"Several comments . . . suggest that additional investigations are necessary to determine if there is environmental contamination that could pose unacceptable risks to future residents. MFA agrees that it is in the best interest of the prospective purchaser and other stakeholders to determine if environmental contamination is present at the site.

[16] The Hearings Officer notes the owners of SM Site 461 have made no commitment to cease mining SM Site 461 or to prevent any purchaser of SM Site 461 from mining the site in the future.

> *MFA recommends that an investigation of potential hazardous substances in environmental media at the property should be performed as part of the Oregon Department of Environmental Quality's (DEQ's) Voluntary Cleanup Program (VCP). In our opinion, the DEQ's VCP is the best available regulatory process to investigate and clean up potential contamination at this site."*

The MFA evaluation recommended further investigation of the site (the parent parcel) for several specific types of hazardous materials.

The applicant's final argument states in relevant part:

> *"To further analyze the site for hazardous material issues and evaluate the previous clean up actions, the applicant hired . . . MFA . . . The evaluation performed by MFA previously submitted into this record confirms the result of the PA* [DEQ's 'preliminary assessment' of the hazards on the site]; *see* ***Exhibits PH-3 and PH-6****). In fact, MFA finds that the clean-up standard that was used for the site was 'to the maximum extent practical or cleanup to background conditions."*

The applicant's final argument states it "is working closely with DEQ to structure a plan involving DEQ oversight which will demonstrate and verify that the site is suitable for residential use."

The Hearings Officer finds the crux of the applicant's argument is that *future* evaluation and cleanup of SM Site 461 is needed to assure the subject property is suitable for the proposed PUD. The question, then, is whether this evidence is sufficient to demonstrate the subject property is suitable for PUD development considering the potential presence of hazardous materials on SM Site 461, or that it is feasible for the site to be made suitable for the PUD through imposition of conditions of approval. I find this is a close question. However, because the record indicates the applicant has entered into a DEQ VCP, the purpose of which is to identify and remediate hazardous conditions on SM Site 461, I find this evidence is sufficient to support a finding that it is feasible to make the subject property suitable for the proposed PUD through imposition of a condition of approval requiring the applicant to complete its DEQ VCP and to obtain an "NFA" letter from the agency. The board's 2008 decision required only that the applicant obtain the "NFA" letter but said nothing about completing the VCP. Therefore, I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval expressly requiring the applicant to complete the VCP prior to submitting the final subdivision plat for approval.

<u>Radioactive Waste.</u> Opponents argue it is likely radioactive waste remains on SM Site 461 and the portion of the subject property west of Lower Bridge Way. Washington State, a representative of the U.S. Department of Energy with access to Hanford records advised him there are no records documenting radioactive waste from the parent parcel was delivered to Hanford.

In response to opponents' concerns, the applicant submitted into the record as Exhibit "PH-1" a document dated April 2008, prepared by Joel Arana of Dade Moeller & Associates, and entitled "Environmental Radiological Survey Report: Property Associated with the Former Deschutes Valley Sanitation (DVS) Waste Disposal Site; 10000 & 70420 NW Lower Bridge Road, Deschutes County, Oregon." The report states in relevant part:

> *"On April 8, 2008, a comprehensive environmental radiological survey of the property associated with the former Deschutes Valley Sanitation (DVS) waste disposal site located in Deschutes County, Oregon, approximately 7 miles west of the city of Terrebonne, Oregon, on NW Lower Bridge Road was performed by a Dade Moeller and Associates staff Health Physicist.*
>
> *All radiation measurements performed at the former waste disposal site were at (or below in some cases) naturally occurring background radiation levels. These findings support, and are in addition to, the findings in References 1 and 2* [[17]] *which conclude that the site is free of residual radioactive contamination from previous site operations."*

While it is troubling that there is no evidence radioactive materials from the parent parcel were disposed of at Hanford, the Hearings Officer finds the evidence submitted by the applicant of no residual radioactive contamination is sufficient evidence from which I can find the subject property is suitable for the proposed PUD considering radioactive contamination.

Water Quality.

Opponents argue that if there remain any hazardous or radioactive materials on the parent parcel, there is a possibility such materials could leach into and contaminate the groundwater from which both their wells and future wells on the subject property would obtain domestic water.

In response to opponents' concerns, the applicant submitted into the record as Exhibit "PH-4" to its burden of proof an April 21, 2008 memorandum from Dick Nichols of Newton Consultants, Inc. addressing water quality sampling results from testing a well drilled on the parent parcel to provide irrigation for the re-vegetation thereof, and from a natural spring located on the north side of the parent parcel. Mr. Nichols' memo states the purpose of the water sampling and testing was to determine if hazardous or radioactive waste on the parent parcel had migrated to groundwater. The memo indicates water was tested for bacteria, several chemicals, and radiation. The memo states the results of the testing showed the levels of contamination and radium were "far below the drinking water standards" and consistent with test results for other wells in the surrounding area. The memo concluded that based on the water sampling and testing, "there is no reason to believe that individual wells completed into the deep aquifer will not provide adequate domestic water that meets" both state and federal drinking water standards.

The Hearings Officer finds the Newton Consultants' memorandum provides sufficient evidence from which I can find the subject property is suitable for the proposed PUD considering water quality.

For the foregoing reasons, the Hearings Officer finds the applicant has not demonstrated the subject property is suitable for the proposed residential PUD considering man-made and natural hazards. Specifically, I have found the applicant has not demonstrated the suitability of the subject property considering blowing DE dust and the potential hazards to human health therefrom, or the feasibility of establishing such suitability through imposition of conditions of approval.

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[17] These references are, respectively, a previous environmental site assessment performed in May 2007 by PBS Engineering and Environmental, and the aforementioned DEQ preliminary assessment.

2. Adequacy of transportation access to the site; and

FINDINGS: The applicant proposes PUD access from Lower Bridge Way via a private access road and three private cul-de-sac roads within the PUD. In his May 11, 2015 comments on the applicant's proposal, County Engineer George Kolb stated in relevant part:

> *"Lower Bridge Road is classified as a rural collector with an ADT of 551 (2011 count). Existing road width is 24 feet. Per DCC 17.36.040, 'Improvements to adjacent streets shall be required where traffic on such streets will be directly affected by the proposed subdivision or partition.' Based on this, Lower Bridge Road will have to be improved to a width of 28 feet along the length of this subdivision.*
>
> - *Access onto Lower Bridge Road will have to meet AASHTO standards for sight distance. Staff from the Road Department has met with the applicants engineer and it appears that the necessary sight distance can be met at a location that was agreed upon in the field. Another option would be to move the access from Lower Bridge Way south to NW Teater Avenue which is classified as a rural local road if sight distance requirements can't be met on Lower Bridge Road.*
>
> - *Roads within the subdivision will be built to the private road standards listed in DCC 17.48.180 F.2., Private Roads, which requires a paved road width of 28 feet.*
> - *The applicant stated in the Burden of Proof that they will dedicate 60 feet of right of way along the subdivision boundary for Lower Bridge Way.*
>
> *The applicant is to meet the following conditions if this land use application is approved:*
>
> 1. *Road design within the subdivision shall be in accordance with DCC #17.48.180, "Private Roads" and Table "A", DCC, private roads. Road will be constructed to a paved width of 28 feet.*
>
> 2. *Lower Bridge Way shall be widened to meet the minimum standards for a collector road along the frontage of the subdivision. That will involve widening the existing 24 foot width out to 28 foot width with 2 foot aggregate shoulders. The widened section shall be constructed with eight (8) inches of aggregate base and three (3) inches of HMAC."*

The Hearings Officer has found the sight distance at the proposed intersection of Lower Bridge Way and the PUD access road will be adequate. The applicant proposes to dedicate sufficient right-of-way for, and to widen and improve to the county's collector road standards, the abutting segment of Lower Bridge Way.

Opponents argue the additional traffic on Lower Bridge Way generated by 19 new dwellings would exceed the road's capacity and impair traffic safety. The Hearings Officer disagrees. Mr. Kolb's comments indicate current traffic volumes on Lower Bridge Way are quite low for a collector road – i.e., 551 ADTs. The applicant's traffic study concludes the addition of 190 ADTs

and 20 p.m. peak hour trips will not cause Lower Bridge Way to operate below the county's standards for rural collector roads.

For the foregoing reasons, the Hearings Officer finds the subject property is suitable for the proposed PUD considering transportation access to the site.

3. The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values.

FINDINGS: Each of the natural features, resources and hazards is discussed in the findings below.

Topography. The subject property has varying topography, ranging from the floor and walls of the Deschutes River canyon to the upper bench/plateau above the river canyon that comprises the majority of the subject property. The applicant does not propose to modify the property's existing topography except to construct the private PUD roads and as necessary to widen and improve the abutting segment of Lower Bridge Way. In addition, the applicant proposes to protect the existing river canyon by including the floor and the lower levels of the canyon walls within open space Tracts C and E. As discussed in the findings above, dwellings on the proposed residential lots will be subject to a minimum 100-foot setback from the OHWM of the river and a minimum 50-foot setback from any rimrock.

Natural Hazards. The Hearings Officer finds natural hazards include flooding within the flood plain of the Deschutes River, and wildfire. I find residential development within the PUD will not be affected by flooding as no structures are proposed or will be permitted in the flood plain, riparian areas, wetlands, or upland areas within the river canyon.

With respect to wildfire, the Hearings Officer finds the subject property has no greater risk of wildfire than other land within Deschutes County. I find the lack of significant vegetation on the bench/plateau that comprises most of the subject property, as well as the largely unvegetated SM Site 461 to the west across Lower Bridge Way, will create a natural fire break.

Redmond Deputy Fire Marshal Clara Butler's submitted comments on the proposed PUD dated April 23, 2015, and discussed in detail in the subdivision findings below. Those comments include identification of provisions of the Oregon Fire Code (OFC) concerning water supply for firefighting. In response to Ms. Butler's comments, the applicant's engineer Keith D'Agostino submitted a memorandum dated June 30, 2015, included in the record as Exhibit "PH-9" to the applicant's original burden of proof, addressing these water supply standards. The memorandum states the applicant proposes to provide firefighting water by installing a 10,000-gallon underground cistern with a dry hydrant near the intersection of PUD Roads C and E. In addition, the applicant proposes that at the time of building permit application for each dwelling, the lot owner/applicant will determine the minimum firefighting water supply for the structure, and if the water supply requirements for a particular structure cannot be met by the common cistern, the lot owner/applicant will be provide alternative or additional measures to assure adequate firefighting water supply, such as an automatic sprinkler system for the structure. The applicant proposes to include provisions addressing these water supply measures in the PUD CC&Rs.

The Hearings Officer finds the combination of the natural fire break on the subject property, the applicant's proposed measures to provide an adequate water supply for firefighting, and the

location of the subject property within the fire department's service area, will allow the subject property to be suitable for the proposed PUD residential uses considering natural hazards. I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to install the proposed water cistern and dry hydrant, and to include in the PUD's CC&Rs provisions addressing potential additional lot-specific firefighting water measures.

Natural Resource Values. The Hearings Officer finds the natural resource values on the subject property include: the abutting stretch of the Deschutes River, a designated state scenic waterway, and its associated wetlands and riparian areas; rock outcrops and native vegetation within the river canyon; fish and wildlife and their habitats; scenic views of the river and the Cascade mountains from the bench/plateau; and the Borden Beck Wildlife Preserve.

a. Deschutes River and Canyon. The applicant proposes to protect the natural resource values associated with the river and the canyon by including all of the land within the FP Zone and the lower levels of the river canyon within open space Tracts C and E. The staff report correctly notes that although the applicant has proposed CC&R provisions that restrict use of the open space tracts, the county does not enforce CC&Rs. For that reason, staff recommends, and the Hearings Officer agrees, that if the proposed PUD is approved on appeal, it should be subject to a condition of approval prohibiting within the PUD's open space tracts: the construction of any structures, whether or not they require a building permit; earthmoving; and the alteration, removal or destruction of natural vegetation outside of any ODFW-approved habitat enhancement projects.

The staff report also notes that changes in the natural grade, or alteration, removal or destruction of natural vegetation, on the slopes of the river canyon could result in erosion and increased sediment delivery to the river. For this reason, staff recommends, and the Hearings Officer agrees, that if the PUD is approved on appeal, it also should be subject to a condition of approval prohibiting the following activities within the river canyon below the upper bench/plateau: changes in the natural grade, and the alteration, removal or destruction of natural vegetation, except as part of an ODFW-approved habitat enhancement project; and the construction of new structures.

Finally, as discussed in the findings above concerning supplementary code provisions, the staff report expressed concern that a residential lot owner potentially could construct a structure not requiring a building permit within the 50-foot rimrock setback established in the LM Zone. The Hearings Officer concurs with staff that allowing such construction would not adequately protect the natural resource values on the subject property. Therefore, I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval prohibiting the construction of *any* structure, whether or not it requires a building permit, closer than 50 feet from any rimrock on each PUD residential lot.

b. Deschutes River Scenic Waterway. The record indicates the section of the Deschutes River adjacent to the subject property is a designated state scenic waterway consisting of the Middle Deschutes Scenic Waterway, administered by OPRD. By a letter dated February 24, 2015, and signed by Greg Cianella, Scenic Waterway Program Coordinator, OPRD granted approval for the "subdivision framework (road and underground utilities)" for the applicant's proposed PUD. The letter states the approval does not include any structures within the PUD.

Opponents argue the proposed PUD is not permitted in the scenic waterway, and/or that if the PUD were approved its presence would result in removal of the scenic waterway designation for

this stretch of the river. Greg Cianella responded to these concerns in a May 21, 2015 electronic mail message to Senior Planner Will Groves which states in relevant part:

> *"Our program has received calls from the public questioning whether a subdivision is allowed within the Scenic River Area (I've attached excerpts from Oregon Administrative Rule (OAR) that the public feels the development would be in direct conflict of* [sic]*).*
>
> *It is unclear whether each individual lot could meet the rules and regulations of the program, given our lack of information regarding structure type, structure location on lot, and landscape plan. We don't have enough information for each of these lots.*
> *Of note, the Middle Deschutes Scenic River Area rules do not have specific language regarding screening requirements, as opposed to other Scenic River Area rivers in the program (example Middle For of the John Day) – attached are both OARs that have different screening requirement languages* [sic].
>
> *Next step for OPRD. I have asked my superiors for guidance on whether 1) a 19 home subdivision is permissible in a 'Scenic River Area' and 2) given the rules and regulations for the Middle Deschutes River & the proposed layout of the subdivision, is it feasible to develop there?"*

On July 7, 2015, Mr. Cianella sent another letter to Mr. Groves concerning the applicant's proposal, stating in relevant part:

> *"Although no development on the lots or the common area tracts is proposed at this time, OPRD writes to note that any future development of land within one-fourth mile of the bank on each side of a river within a scenic waterway would be subject to state scenic waterway regulations. Specifically, portions of the subject property that are within a reach of the Middle Deschutes Scenic Waterway area classified as 'Scenic River Area' and subject to both general and specific regulations. Generally, OPRD will administer scenic river areas 'to maintain or enhance their high scenic quality, recreational value, fish and wildlife habitat, while preserving their largely undeveloped character and allowing continuing agricultural uses.' OAR 735-040-0040(1)(b)(B). Specifically, for the Middle Deschutes Scenic River Area 'all new structures, improvements and development will comply with the Land Management rules as described in OAR 736-040-0040(1)(b)(B)' in addition to complying with applicable Deschutes County land use and development regulations. OAR 736-040-0072(5)(b). The Middle Deschutes Scenic Waterway regulations also provide minimum setbacks for new structures and improvements and other measures to further mitigate visual impact of such structures and improvements as seen from the river. OAR 735-040-0072(5)(b)(A)-(B).*
>
> *OPRD endorses the Deschutes County staff recommendation as described in the May 15, 2015 staff report on Section 18.84.050 – that the Hearings Officer require LM site plan approval for future dwellings or additions to dwellings as a condition of any approval of this application.*
>
> *When current or future property owner(s) propose to construct new structures on their lots created by this decision, they will need to notify OPRD as prescribed by the Scenic Waterways Act, ORS 390.845(3); OAR 736-040-0030, and meet*

criteria provided in OAR 736-040-0035(&) and OAR 736-040-0072(5)(b). OPRD requests that Deschutes County consider these criteria when evaluating the Lower Bridge Road LLC application so that property owner(s) will have the opportunity to develop their lot(s) in the future in a manner consistent with the Scenic Waterways Act."

The Hearings Officer finds there is nothing in Mr. Cianella's correspondence that indicates approval of the proposed PUD would result in a change in the current classification of the stretch of the Deschutes River adjacent to the subject property. Nor do his letters suggest dwellings on individual PUD lots could not receive scenic waterway approval from OPRD. To the contrary, the approval standards for new structures in the Middle Deschutes River Scenic Waterway, set forth in OAR 736-040-0072 attached to Mr. Cianella's May 21, 2015 e-mail message, are similar to those imposed through the county's LM site plan review. They require new structures to be set back 100 feet from the OHWM of the river and at least 20 feet from the edge of any rimrock, require exterior finishes to be of earth-tone colors, and require the maintenance of existing natural vegetative screening between new structures and the river.

The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring that each future dwelling and other structures in the PUD within the Middle Deschutes Scenic Waterway receive scenic waterway approval from OPRD prior to commencement of construction of such dwelling or structure.

c. Fish and Wildlife. With respect to fish and wildlife and their habitats, Nancy Breuner, ODFW District Wildlife Habitat Biologist, stated in her May 6, 2015 comments on the applicant's proposal:

> *"The proposed nineteen-lot residential development is not located in a Wildlife Area Combining Zone. However, ODFW is concerned with potential impacts to the rimrock and cliffs adjacent to the Deschutes River. All nineteen lots include rimrock habitat. According to the 2006 Oregon Conservation Strategy, residential development at the edge of rims alters vegetation and disturbs nesting birds. <u>To protect rimrock habitat, ODFW urges Deschutes County planners to implement the setback standards described in the County's Comprehensive Plan.</u>*
>
> *Also, per the Department's Fish and Wildlife Habitat Mitigation policy (OAR 635-415-0010:0025), ODFW is concerned that these development actions could result in the loss of habitats used by a variety of native mammals, birds and reptiles. In particular, rimrock and cliffs provide nesting sites for raptors, especially golden eagles, and roosting sites for bats.* <u>ODFW again urges the County to implement stringent setback standards, to protect these sensitive species</u>*."* (Emphasis added.)

As discussed in the findings above, the Hearings Officer has found that if the proposed PUD is approved on appeal, it should be subject to conditions of approval requiring that all dwellings within the PUD be set back a minimum of 100 feet from the OHWM of the Deschutes River and at least 50 feet from any rimrock, and that all structures be prohibited within the Deschutes River canyon. The application of rimrock setbacks is discussed in the findings above.

d. Borden Beck Wildlife Preserve. This 26-acre property is owned by the RAPRD and is located north of the subject property across the Deschutes River. In her May 6, 2015 comments on the applicant's proposal, Katie Hammer, RAPRD Executive Director, stated in relevant part:

"Borden Beck Wildlife Preserve is a sensitive nesting habitat for a variety of bird species. Some of the bird species that can be seen at the preserve are Osprey, Canyon Wren, Bank Swallow, American Dipper and Yellow-breasted Chat. It also is our understanding the area is a migratory path for other animals as well.

While RAPRD is supportive of planned growth I wanted to share information about our property and share a concern regarding the preservation of wildlife habitats. I also have a secondary concern regarding the decreased user experience of those who use the wildlife preserve for recreation because of the impact on the view shed.

RAPRD requests that as this application is being considered, the appropriate setbacks are enforced that will minimize the impact to the nearby wildlife habitat." (Underscored emphasis added.)

The applicant proposes to protect all flood plain areas, wetlands, riparian habitat and canyon associated with the Deschutes River by including such areas within open space Tracts C and E, both of which are located across the river from the Borden Beck Wildlife Preserve. In addition, as discussed above, the Hearings Officer has found that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring that all structures be set back at least 100 feet from the OHWM of the Deschutes River and at least 50 feet from any rimrock. And as discussed in the LM Zone findings above, I have found that any structures that would be visible from the river are required to obtain LM site plan review which assures the PUD's visual impacts on the river are minimized. I find the design of the proposed PUD, and implementation of these setbacks and LM review, will minimize impacts on the wildlife habitat

e. Scenic Views. Finally, with respect to scenic views of the river and mountains, the Hearings Officer finds that dwellings in the proposed PUD will not block or interfere with views of the river or the Cascade Mountains from adjacent or nearby properties to the east and north. Opponents who live across the Deschutes River east of the proposed PUD object to having to look at dwellings on the subject property. However, I find that with the 2008 rezoning of the subject property to RR-10, opponents no longer had reasonable expectations that the subject property would remain undeveloped.

For the foregoing reasons, and with imposition of the recommended conditions of approval set forth above, the Hearings Officer finds the subject property is suitable for the proposed PUD considering the natural and physical features of the site.

B. The proposed use shall be compatible with existing and projected uses on surrounding properties based on the factors listed in DCC 18.128.015(A).

FINDINGS: The Hearings Officer finds *existing* uses on surrounding properties are as follows:

West: Tax Lots 1501 and 1502 (SM Site 461), zoned SM and consisting of an inactive surface mine.

South/Southwest: Several tax lots zoned EFU and developed with rural residences and irrigated pasture and hay production.

North: The Deschutes River and associated riparian habitats zoned FP, and SM Site 322 zoned SM and currently engaged in irrigated agriculture.

Northwest: Tax Lot 1400, zoned EFU, presently undeveloped juniper woodland with irrigated pasture and hay production.

East: The Deschutes River and associated riparian habitats zoned FP, and parcels zoned RR-10 and developed with rural residences.

Southeast: Several tax lots zoned RR-10 and developed with rural residences.

With respect to *projected* uses on these properties, the Hearings Officer finds it is likely the lands currently zoned RR-10 will continue to be developed with rural residential uses, and that the EFU-zoned lands will continue to be engaged in irrigated agriculture. I find the proposed PUD will be compatible with both existing and projected agricultural uses on surrounding land because such uses already are in close proximity to rural residential development in the area and both the agricultural and residential uses generally are of low intensity. And in light of existing restrictions on uses within the Deschutes River flood plain and associated riparian areas and wetlands, I find projected uses therein will continue to be limited to wildlife habitat and potential ODFW habitat enhancement projects, I find the proposed PUD will be compatible with both existing and projected river-related uses considering the protection for such areas within the proposed PUD's open space tracts and CC&Rs.
As discussed in the findings above, because both SM Sites 322 and 461 are zoned SM and remain on the county's inventory of significant mineral and aggregate sites, the Hearings Officer finds projected uses on these parcels include potential future surface mining. As discussed above, I have found all dwellings on PUD lots will be more than 250 feet from the SMIA Zones protecting SM Sites 322 and 461, and therefore can comply with the SMIA Zone standards. However, as discussed in detail in the findings above, the Hearings Officer has found the applicant has failed to demonstrate the subject property is suitable for the proposed PUD considering potential human health impacts on PUD residences from exposure to blowing DE dust from SM Site 461 and the portion of the subject property located west of Lower Bridge Way, both in their current condition and with future mining activity. Based on those findings, incorporated by reference herein, I find the proposed PUD will not be compatible with the current and future use of SM Site 461.

For the foregoing reasons, the Hearings Officer finds the applicant failed to demonstrate the proposed PUD will be compatible with existing and projected uses on surrounding land.

C. These standards and any other standards of DCC 18.128 may be met by the imposition of conditions calculated to insure that the standard will be met.

FINDINGS: The Hearings Officer has found that if the proposed PUD is approved on appeal, it should be subject to a number of conditions of approval, discussed throughout this decision, that are calculated to assure compliance with applicable conditional use approval criteria.

b. Section 18.128.210, Planned Development

A. Such uses may be authorized as a conditional use only after consideration of the following factors:

FINDINGS: The Hearings Officer finds this criterion requires me to *consider* the factors discussed in the findings below in determining whether to approve the proposed PUD. In other words, none of the individual factors establishes a PUD approval criterion.

1. Proposed land use and densities.

FINDINGS: The proposed land uses within the PUD include 19 residential lots, two common areas, five open space tracts, three private roads, and dedication of right-of-way for the abutting segment of Lower Bridge Way. The applicant proposes a residential density of one dwelling per 7.7 acres, calculated excluding the 10-4-acre EFU-zoned property within the PUD, leaving 146.6 acres of developable land. However, the Hearings Officer has found the proposed PUD cannot include EFU- or FP-zoned land because PUDs are not permitted in those zones. Subtracting both the 10.4 acres zoned EFU and the approximately 30 acres zoned FP from the PUD, only approximately 116 acres of developable land remain. I have found that at the maximum allowed density of one dwelling per 7.5 acres, the PUD could include no more than 15 dwellings – assuming the required 65 percent open space also could be provided on the remaining developable land. For these reasons, I have found I cannot approve the PUD.

2. Building types and densities.

FINDINGS: The applicant proposes that the PUD would include 19 new single-family dwellings, each located on a lot at least two acres in size. As discussed above, the Hearings Officer has found I cannot approve a 19-lot residential PUD, and that the applicant has failed to demonstrate each proposed residential lot is of sufficient size and proper configuration to allow the siting of a dwelling meeting the rimrock setback and all other yard and setback requirements.

3. Circulation pattern, including bicycle and pedestrian circulation, and a demonstration of how those facilities connect to the County transportation facilities. Private developments with private roads shall provide bicycle and pedestrian facilities.

FINDINGS: The PUD would have four private roads including the main access road that would intersect with Lower Bridge Way, a county rural collector road, and three cul-de-sacs. The PUD also includes right-of-way dedication for and improvement of the abutting segment of Lower Bridge Way. As discussed in the findings above, the Hearings Officer has found there will be adequate site distance at the intersection of Lower Bridge Way and the main PUD access road, and that the addition of traffic from 19 new dwellings will not exceed the capacity of Lower Bridge Way.

The applicant proposes to construct the new PUD private roads (Roads C, D and E) to the applicable private road standards in Table A of Title 17, including a 28-foot wide paved surface with 2-foot gravel shoulders. The Hearings Officer has found that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to stripe a 4-foot-wide shoulder bikeway on both sides of the private roads to accommodate bicycle and pedestrian traffic.

4. Bicycle and pedestrian connections shall be provided at the ends of cul-de-sacs, at mid-block, between subdivision plats, etc., wherever the addition of such a

connection would reduce the walking or cycling distance to a connecting street by 400 feet and by at least 50 percent over other available routes. These connections shall have a 20-foot right of way, with at least a 10-foot wide useable surface, and should not be more than 100 feet long if possible.

FINDINGS: The Hearings Officer finds that in light of the shape and configuration of the subject property, the location of Lower Bridge Way, and the PUD's proposed private road system, no additional bicycle and pedestrian connections are possible or required.

5. Parks, playgrounds, open spaces.

FINDINGS: The record indicates there are no parks or playgrounds in the surrounding area and none is proposed within the PUD. The PUD would have five open space tracts including the FP- and EFU-zoned portions of the subject property as well as areas within the Deschutes River canyon. According to the proposed PUD CC&Rs, these open space tracts would be available for PUD residents' passive recreational activities such as fishing and hiking.

6. Existing natural features.

FINDINGS: The natural features on the subject property include the Deschutes River and its associated flood plain, wetlands and riparian areas and canyon, existing vegetation, and river and Cascade mountain views. As discussed above, the proposed PUD would retain most of the property in its natural condition, including all of the property within the open space tracts that protect the river and most of the river canyon. The applicant has proposed that the open space tracts be enhanced through the introduction of vegetative species to stabilize the soil, decrease dust, and promote wildlife habitat. As discussed in the findings above, the Hearings Officer has found the proposed PUD will be compatible with existing natural features.

7. Environmental, social, energy and economic impacts likely to result from the development, including impacts on public facilities such as schools, roads, water and sewage systems, fire protection, etc.

FINDINGS:

a. Environmental Impacts. The environmental impact from the development of the proposed PUD will likely involve the removal of some vegetation for structures and the new road. The applicant proposes to preserve the existing vegetation within the Deschutes River flood plain, wetlands and riparian areas, as well as on the canyon walls. The staff report states, and the Hearings Officer's site visit observations confirmed, that most existing trees on the subject property are located in the riparian area adjacent to the river and therefore will be retained. As discussed elsewhere in this decision, I have found that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to retain all surface water drainage on site and out of the river canyon.

As discussed in detail in the findings above, the Hearings Officer has found the applicant has failed to demonstrate the subject property is suitable for the proposed PUD considering potential health hazards to PUD residents from blowing DE dust. Based on these findings, incorporated by reference herein, I find this health hazard will be an environmental impact likely to result from

development of the PUD because such development will place people on the subject property and in the path of DE dust blowing from the adjacent SM Site 461 and the portions of the subject property located west of Lower Bridge Way.

b. Social Impacts. The social impacts from development of the proposed PUD will include additional people living in this area and additional traffic on Lower Bridge Way. As discussed elsewhere in this decision, the Hearings Officer has found the addition of traffic generated by 19 new dwellings on the subject property will not exceed the capacity of Lower Bridge Way or cause traffic hazards thereon.

As discussed in the Findings of Fact above, the historic Lynch and Roberts Store Advertisement sign is located near the northwest corner of the subject property. The sign is painted on rocks adjacent to Lower Bridge Way. In its 2008 decision, the board included as Condition of Approval 4 a prohibition against any development within a 100-yard radius of the sign and a requirement that the applicant post markers near the sign to prevent trespass. Condition 4 also required the applicant to include in the CC&Rs provisions obligating PUD lot owners to protect the area within a 100-yard radius of the sign from development and trespass and to maintain the posted markers. The Hearings Officer finds that imposition of this condition of approval will protect this historic sign to the greatest extent practical.

c. Energy Impacts. The energy impacts from development of the proposed PUD will include additional vehicle trips to the property during construction and after development with residences, as well as domestic energy use within the new dwellings.

d. Economic Impacts. The economic impacts from development of the proposed PUD will include additional work being available for the installation of utilities and the construction of dwellings on the new lots. In addition, new dwellings will add to the county's property tax base. Potential negative economic impacts from development of the PUD could include limiting future mining and industrial uses on SM Site 461. Opponents argue development of the proposed PUD will devalue their nearby rural residential properties. However, they did not submit credible evidence to support their arguments.

e. Impacts on Public Facilities. Public facilities affected by development of the proposed PUD would include roads, police and fire protection, and public schools. As discussed in detail in the subdivision findings below, incorporated by reference herein, the Hearings Officer has found all affected utilities are available to, and can accommodate, new dwellings within the proposed PUD with imposition of recommended conditions of approval. I also have found the addition of traffic generated by 19 new dwellings in the PUD will not exceed the capacity of Lower Bridge Way or cause traffic hazards thereon.

8. Effect of the development on the rural character of the area.

FINDINGS: The area surrounding the subject property is characterized by a mixture of agricultural enterprises, surface mines, and rural residences on land zoned RR-10. The proposed PUD would add 19 additional single-family residences to the area. The applicant correctly notes that conditional use approval is not required to site rural residences on the subject property, but rather to increase the density of development on the property from one dwelling per 10 acres to one dwelling per 7.7 acres through clustering of dwellings and preservation of the majority of the property in open space tracts.

Opponents who own property and reside in the Eagle Rock and Lower Bridge Estates subdivisions east and southeast of the subject property across the Deschutes River object to the applicant's PUD primarily because of the proposed density and the clustering of dwellings along the river. As discussed above, the Hearings Officer has found the applicant cannot include EFU- and FP-zoned land within the proposed PUD because PUD is not a use permitted outright or conditionally in those zones. Therefore, I have found the acreage available for PUD development on the subject property would be approximately 116 acres, and at the applicant's proposed density of one dwelling per 7.7 acres, a maximum of 15 dwellings would be permitted within the PUD. However, because *standard* subdivisions are permitted in the FP Zone, the acreage available for subdivision development would be 146.6 acres (157 acres minus 10.4 EFU-zoned acres), and the applicant could develop the subject property with 14 dwellings on standard 10-acre lots with no clustering and no preserved open space.

The Hearings Officer finds the difference in density between a standard subdivision and a PUD on the subject property is minimal, and the applicant's proposed density will not be incompatible with the existing rural development in the area. With respect to the clustering of dwellings along the river, I understand opponents' concerns about the increased visual impact from 19 clustered PUD dwellings compared to fewer dwellings along the river with a standard subdivision. Nevertheless, I find dwellings clustered on two-acre lots still constitute "rural" development and not "urban" development as claimed by opponents. Moreover, I find inclusion of over 100 acres of open space – consisting of the river and its associated flood plain, wetlands, riparian areas, and canyon as well as most of the upper plateau on the subject property – will preserve the rural character of the area.

9. Proposed ownership pattern.

10. Operation and maintenance proposal (i.e. homeowners association, condominium, etc.).

FINDINGS: The proposed PUD residential lots would be owned by individual lot owners. The common areas, open space tracts and private roads would be owned and maintained by the PUD homeowners association (HOA).

11. Waste disposal facilities.

FINDINGS: The proposed PUD residential lots would be served by Individual on-site systems. Solid waste (garbage) will be handled by High Country Disposal, or lot owners/residents may choose to haul their solid waste to the closest landfill or transfer area.

12. Water supply system.

FINDINGS: The proposed PUD residential lots would be served by individual or shared "exempt" private wells. In addition, as discussed above the applicant proposes to install a 10,000-gallon cistern with a dry hydrant for firefighting water, and to assure through the PUD's CC&Rs that if the cistern does not provide sufficient firefighting water for any individual lot/dwelling, an additional or alternative water supply system, such as automatic fire sprinklers, would be implemented.

13. Lighting.

FINDINGS: No street lighting is proposed for the PUD. The PUD's CC&Rs provide that each lot owner may install exterior lights on his/her lot in compliance with the county's outdoor lighting ordinance. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring all exterior lighting to comply with the county's outdoor lighting ordinance in DCC 15.10.

14. General timetable of development.

FINDINGS: The applicant proposes to commence construction of PUD road improvements within two years of tentative plan approval for the PUD. The applicant proposes to apply for extension(s) in the event additional time is needed to complete all requirements for submission of the final subdivision plat.

B. The conditional use may be granted upon the following findings:

1. All subdivision restrictions contained in DCC Title 17, the Subdivision/Partition Ordinance, shall be met.

FINDINGS: Compliance with the provisions of Title 17 is discussed in the findings below.

2. The proposed development conforms to the Comprehensive Plan.

FINDINGS: The Hearings Officer has held in several previous decisions that the comprehensive plan generally does not establish approval criteria for a quasi-judicial land use application, but it may be a source of approval criteria depending on the text and context of the comprehensive plan provision. The staff report identifies the following plan provisions as potentially applicable to the proposed PUD.

Chapter 3, Rural Growth Management

Section 3.3 Rural Housing Policies

Goal 1 Maintain the rural character and safety of housing in unincorporated Deschutes County.

Policy 3.3.1 The minimum parcel size for new rural residential parcels shall be 10 acres.

Policy 3.3.4 Encourage new subdivisions to incorporate alternative development patterns, such as cluster development, that mitigate community and environmental impacts.

The Hearings Officer finds that because Policy 3.3.1 is couched in mandatory terms, it appears intended to apply to quasi-judicial applications for the creation of new rural residential parcels. As discussed above, the applicant has proposed to increase the density of development to one dwelling per 7.7 acres as permitted in the RR-10 Zone. I find Policy 3.3.4 does not constitute an approval criterion because it is directed at the county and written in aspirational terms. However,

I note the applicant's proposal is for an alternate development pattern – a PUD – that would cluster the dwellings on smaller parcels and preserve large tracts of open space to protect the riparian and scenic resources of the area.

Section 3.6 Public Facilities and Services Policies

Goal 1 Support the orderly, efficient and cost-effective siting of rural public facilities and services.

Policy 3.6.8 Coordinate with rural service districts and providers to ensure new development is reviewed with consideration of service districts and providers needs and capabilities.

Policy 3.6.9 New development shall address impacts on existing facilities and plans through the land use entitlement process.
Policy 3.6.14 Guide the location and design of rural development so as to minimize the public costs of facilities and services.

The Hearings Officer finds Policies 3.6.8 and 3.6.14 are directed at the county and therefore do not constitute approval criteria. I find Policy 3.6.9 is written in mandatory terms and therefore appears to apply to the applicant's proposal. As discussed in detail in findings throughout this decision, I have found the applicant's proposal addresses impacts on existing and future public facilities.

3. Any exceptions from the standards of the underlying district are warranted by the design and amenities incorporated in the development plan and program.

FINDINGS: Except for the increased density allowed for a PUD, and a street frontage exception for proposed Lot 7, no exceptions from the standards of the underlying district -- the RR-10 Zone -- are proposed. As discussed above, the proposed PUD would have over 100 acres of open space, including the river and its associated flood plain, wetlands, riparian areas and canyon walls, as well as the majority of the upper plateau on the subject property. Development within the river canyon is severely restricted because of the minimum OHWM and rimrock setbacks, the state scenic waterway designation, and the LM Zone standards. Therefore, the Hearings Officer finds the preservation of these areas through inclusion in open space tracts likely does not provide much if any additional protection for them. Nevertheless, I find preservation of such a large amount of open space justifies the minimal increase in density.

4. The proposal is in harmony with the surrounding area or its potential future use.

FINDINGS: As discussed in the findings above, the Hearings Officer has found the proposed PUD will be compatible with existing and projected uses on surrounding land, with the exception of the adjacent SM Site 461 to the west. I find the "compatibility" standard is equivalent to the "harmony" standard in this subsection. Therefore, based on the findings above, incorporated by reference herein, I find the proposed PUD will be in harmony with the surrounding area and potential future uses, except for conflicts between existing and potential conditions and uses on SM Site 461 to the west due to the potential human health impacts from blowing DE dust.

5. The system of ownership and the means of developing, preserving and maintaining open space is adequate.

FINDINGS: As discussed in the findings above, residential lots would be owned by individual owners, and the HOA would own and manage common areas, open space tracts, and private roads. The proposed PUD's CC&Rs provide the authority and means to impose assessments on homeowners for the cost of maintenance of common areas, open space tracts and private roads. Opponents question whether the HOA would have sufficient funds and authority to undertake remediation on the subject property should such actions become necessary after the applicant has transferred ownership to the HOA. The Hearings Officer shares these concerns, particularly because the board's 2008 decision approving the intent to rezone for SM Site 461 and the plan amendment and zone change for SM the subject property does not condition such approval on a commitment from the applicant to use proceeds from the sale of PUD residential lots on any necessary remediation of those properties.

As discussed in the findings under Section 18.128.015 above, the Hearings Officer is authorized to impose conditions of approval designed to assure compliance with applicable approval criteria. I have not found any provisions in Title 18 expressly authorizing imposition of a bond to assure remediation of DE dust on SM Site 461 and the subject property. However, I find that in the absence of any requirement in the board's 2008 decision that the applicant complete and pay for such remediation, and any commitment on the applicant's part to do so in as part of this application, I find it is appropriate to require the applicant to post a bond or other form of security acceptable to Deschutes County to assure the DE dust issues on SM Site 461 and the subject property are fully remediated before any dwellings are constructed on the subject property.

Unfortunately, there is no evidence in this record as to the potential cost of remediating the DE Dust on these properties. However, as discussed above, the June 22, 2015 Wallace Group geotechnical report discussed in the findings above memo recommended dust control measures including spraying the ground surface with water prior to site grading and road building, and/or covering the diatomite with three to six inches of sand and gravel. The Hearings Officer finds it is feasible to arrive at a reasonable cost estimate for covering exposed DE on SM Site 461, and spraying and covering DE on the subject property. Therefore, I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to provide cash or a performance bond in favor of Deschutes County, and acceptable to Deschutes County Legal Counsel, for the cost of remediating DE dust on SM Site 461 and the subject property, in an amount to be identified by the applicant and approved by the board, prior to any grading or construction on the subject property. The bond shall be redeemable by the county if the applicant fails to complete the DE remediation identified as necessary for SM Site 461 and the subject property by the Wallace Group report.

Finally, with respect to the PUD CC&Rs, they are not enforceable by the county. Therefore, staff questions whether they are sufficient to assure open space tracts are not developed. Staff suggests there could be confusion among residential lot owners regarding what uses are allowed in the open space tracts. To avoid such confusion, staff recommends, and the Hearings Officer agrees, that additional open space protection should be provided through deed restrictions. I find that if the proposed PUD is approved on appeal, it should be subject to the following conditions of approval, based on the restrictions applicable to cluster developments:

- Uses permitted in the open space tracts include the management of natural resources, creation and maintenance of trail systems, and other outdoor uses that are consistent with the character of the natural landscape.

- Off-road motor vehicle use is prohibited in the open space tracts.

- Where the natural landscape on an open space tract has been altered by prior land use such as surface mining, reclamation and enhancement of the open space tract is permitted to create or improve wetlands, create or improve wildlife habitat, restore native vegetation, and provide for agricultural or forestry use after reclamation. All land use approvals required for such projects -- such as work in mapped wetlands, floodplains, and within the bed and bank of the Deschutes River – shall be obtained from Deschutes County.

- At the time the applicant/owner transfers ownership of the open space tracts to the HOA, the applicant/owner shall record with the Deschutes County Clerk deed restrictions on the open space tracts assuring that use of the tracts is limited to the use(s) allowed in the approved PUD, and precluding construction of any residential dwelling on the tracts, for as long as the open space tracts remain outside an urban growth boundary.

The Hearings Officer finds that with imposition of the recommended conditions of approval, the structure and procedures established in the CC&Rs will be adequate for maintenance of the open space tracts.

6. That sufficient financing exists to assure the proposed development will be substantially completed within four years of approval.

FINDINGS: The applicant's burden of proof states "sufficient funding is available to complete the development as proposed within four years of approval." However, the applicant did not submit any evidence supporting this statement. The Hearings Officer finds a simple conclusory statement does not constitute sufficient evidence to demonstrate compliance with this conditional use approval criterion.

7. Sixty-five percent of the land is to be maintained in open space.

FINDINGS: The subject property is 157 acres in size. To calculate the maximum density of PUD development and the 65 percent open space requirement, the applicant subtracted the 10.4-acre EFU-zoned property, leaving 146.6 acres of developable land. Sixty-five percent of that acreage is 95.3 acres, the exact acreage the applicant has proposed for open space tracts. However, as discussed above, the Hearings Officer has found the proposed PUD cannot include the approximately 30 acres of FP-zoned land on the subject property because PUDs are not allowed in the FP Zone. Subtracting these 30 FP-zoned acres leaves a total of approximately 116 acres of developable land, of which 65 percent is 75.4 acres. As also discussed above, the maximum number of dwellings that could be allowed on the 116-acre developable portion of the subject property is 15. I cannot determine from this record whether the applicant would be able to preserve 65 percent open space on the 116 remaining acres (75 acres) and still provide sufficient room for 15 two-acre residential lots, private roads, and dedication of additional right-of-way for the abutting segment of Lower Bridge Way.

8. Adequate provision is made for the preservation of natural resources such as bodies of water, natural vegetation and special terrain features.

FINDINGS: The applicant proposes to protect the Deschutes River, its associated flood plain, wetlands, riparian areas, and canyon, and the natural vegetation and terrain in the river canyon, by including most of those areas within open space Tracts C and E, and by assuring that dwellings sited on the proposed residential lots would be set back at least 100 feet from the OHWM of the river and at varying distances from the riverside lot lines. As discussed above, the Hearings Officer has found the applicant's proposed "special setbacks" are not sufficient to assure each lot may be developed with a dwelling, on-site septic system, and individual well while meeting the minimum 50-foot setback from any rimrock and the other applicable yard and setback requirements.

The proposed PUD CC&Rs contain provisions restricting uses in the open space tracts. The Hearings Officer has found that if the proposed PUD is approved on appeal, such approval should be subject to conditions of approval requiring that the applicant implement these protective measures. I find that with imposition of these recommended conditions of approval, the measures proposed by the applicant will be adequate to preserve natural resources and vegetation and special terrain features.

C. All applications for planned developments shall include the materials and information required for approval of a subdivision as specified in DCC Title 17, the Subdivision/Partition Ordinance and the materials and information required for approval of a conditional use as specified in DCC Title 18.

1. Approval for the conditional use application and the planned development application may be given simultaneously.

FINDINGS: The applicant has submitted concurrent applications for tentative subdivision plan approval and conditional use approval for the proposed PUD. This decision addresses both applications. Compliance with the applicable approval criteria in Titles 17 and 18 is discussed throughout this decision.

D. Dimensional Standards.

1. Setbacks and height limitations shall be as determined by the Planning Director or Hearings Body upon review of the evidence submitted.

FINDINGS: The Hearings Officer has found that if the proposed PUD is approved on appeal, it should be subject to conditions of approval requiring the applicant to assure new dwellings in the PUD are sited consistent with the river and rimrock setback requirements and the building height limitations in Title 18.

2. Densities shall not exceed that established in the underlying zone.

FINDINGS: The applicant's proposed PUD would include the entire 157-acre subject property, but the applicant's proposed density does not include the 10.4-acre EFU-zoned portion of the subject property, and is therefore based on 146.6 developable acres. The applicant proposes 19 residential lots for a density of one dwelling per 7.7 acres, less than the maximum allowed density of one dwelling per 7.5 acres. However, as discussed in the findings above, the Hearings Officer has found the PUD cannot include the approximately 30 acres of FP-zoned land included in the subject property, and therefore I cannot approve the proposed 19-lot PUD.

3. The minimum lot area, width, frontage and yard requirements otherwise applying to individual buildings in the zone in which a planned development is proposed do not apply within a planned development. An equivalent overall density factor may be utilized in lieu of the appropriate minimum lot area.

FINDINGS: The applicant did not address this criterion. As discussed above, the 10-acre minimum lot size of the RR-10 Zone does not apply to PUDs that include clustered dwellings, and the applicant has proposed an overall density factor of one dwelling per 7.7 acres. As discussed in the subdivision findings below, the Hearings Officer has found the proposed residential lots will be of sufficient size to allow the siting of dwellings meeting the minimum required yards and setbacks in the RR-10 Zone, However, I have found the applicant has not demonstrated the proposed residential lots will allow the siting of dwellings, on-site septic systems and individual wells consistent with the 50-foot setback from any rimrock and all other yard and setback requirements.

4. Minimum size for a planned development shall be 40 acres.

FINDINGS: The subject property is 157 acres in size. As discussed above, the Hearings Officer has found that after the EFU- and FP-zoned portions of the subject property are subtracted from that acreage, there remain 116 acres of developable land. Therefore, in either case, the subject property is at least 40 acres in size.

E. Any commercial use permitted outright in an area zoned as an unincorporated community as that term is defined herein will be allowed in a planned development, subject to the following conditions:

1. Each use shall be wholly enclosed in a building.

2. The total area of such uses shall not exceed three percent of the total area of the planned development.

FINDINGS: The Hearings Officer finds these criteria are not applicable because no commercial uses are proposed in the PUD.

For the foregoing reasons, the Hearings Officer finds the proposed PUD does not comply with all applicable conditional use approval criteria.

ADMINISTRATIVE RULES

D. Oregon Administrative Rules, Chapter 660, Land Conservation and Development Commission

1. Division 4, Goal 2 Exceptions Process

a. OAR 660-004-0040, Application of Goal 14 to Rural Residential Areas

(1) The purpose of this rule is to specify how Statewide Planning Goal 14, Urbanization, applies to rural lands in acknowledged exception areas planned for residential uses.

(2) (a) This rule applies to lands that are not within an urban growth boundary, that are planned and zoned primarily for residential uses, and for which an exception to Statewide Planning Goal 3 (Agricultural Lands), Goal 4 (Forest Lands), or both has been taken. Such lands are referred to in this as rural residential areas.

(b) Sections (1) to (8) of this rule do not apply to the creation of a lot or parcel, or to the development or use of one single-family home on such lot or parcel, where the application for partition or subdivision was filed with the local government and deemed to be complete in accordance with ORS 215.427(3) before the effective date of Section (1) to (8) of this rule.

(c) This rule does not apply to types of land listed in (A) through (H) of this subsection:

(A) land inside an acknowledged urban growth boundary;

(B) land inside an acknowledged unincorporated community boundary established pursuant to OAR Chapter 660, Division 022;

(C) land in an acknowledged urban reserve area established pursuant to OAR Chapter 660, Division 021;

(D) land in acknowledged destination resort established pursuant to applicable land use statutes and goals;

(E) resource land, as defined in OAR 660-004-0005(2);

(F) nonresource land, as defined in OAR 660-004-0005(3);

(G) marginal land, as defined in ORS 197.247, 1991 Edition;

(H) land planned and zoned primarily for rural industrial, commercial or public use.

FINDINGS: In 2008 the board re-designated and rezoned the subject property (minus the 10.4-acre EFU-zoned portion and the approximately 30 acres of FP-zoned land) to RREA and RR-10, respectively (PA-08-1/ ZC-08-1). The Hearings Officer finds the RR-10 and FP-zoned portions of the subject property are nonresource land as described in Paragraph (F) above. The board's decision found the subject property no longer had significant mineral and aggregate resources and was not subject to Statewide Planning Goals 3, 4 or 5. For these reasons, I find the proposed PUD is not subject to the Goal 2 exception process.

PA-08-1 AND ZC-08-1 CONDITIONS OF APPROVAL

FINDINGS: The board's 2008 decision approving a plan amendment and zone change for the subject property imposed seven conditions of approval. The staff report recommends the Hearings Officer include each of these conditions of approval in this PUD decision. I find such inclusion is not necessary because the conditions in the 2008 decision remain in effect and are binding on the applicant and its successors whether or not they are restated in this decision. However, I find it appropriate to include a condition of approval stating that the 2008 conditions of approval remain in full force and effect.

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

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

a. Section 17.16.100, Required Findings for Approval

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

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

FINDINGS: Each of the factors listed in this criterion is addressed in the findings below.

Land Use Patterns. The land use pattern in the surrounding area consists of a mixture of uses and densities. The subject property abuts two inactive surface mines (SM Site 322 and 461) on the north and west, lands engaged in irrigated agriculture, and lands zoned RR-10 and developed with rural residences. The subject property also abuts the Deschutes River along most of the property's eastern and northern boundaries. The applicant proposes a 19-lot residential PUD with large open space tracts that would include the river and its associated flood plain, wetlands, riparian areas, and most of its canyon, as well as undeveloped farm-zoned land and small rezoned portions of SM Site 461 on the west side of Lower Bridge Way.

The Hearings Officer has found that although the proposed PUD would allow greater density than that permitted in a standard subdivision, (one dwelling per 7.5 acres rather than one dwelling per 10 acres), the increase in density is not so at odds with surrounding rural residential development as to conflict with existing land use patterns in the area.

Orderly Development. The Hearings Officer finds this factor focuses on whether the proposed PUD will have adequate facilities and services. The applicant proposes that PUD dwellings will have access from Lower Bridge Way via a private road system. As discussed in the findings above, I have found there will be adequate sight distance at the intersection of Lower Bridge Way and the PUD access road, and that the addition of PUD-generated traffic will not cause Lower Bridge Way to function below acceptable performance standards. Each dwelling would be served by a private well and on-site sewage disposal system. The applicant submitted as part of Exhibit "D" to its original burden of proof well logs from two nearby properties showing water is available in the area. The record indicates utilities are available in the area to serve PUD dwellings.

Opponents argue the drilling of additional wells on the subject property will damage the existing aquifer. In response to these concerns, the applicant submitted into the record as Exhibit "PH-5" to the applicant's burden of proof a document prepared by Newton Consultants, Inc., dated April 21, 2008, and entitled "Water Supply Development Feasibility Report, Lower Bridge Development Project, Deschutes County, Oregon." This report states its purpose was to "assess the availability of water" for individual wells for the entire parent parcel with up to 74 two-acre residential lots and dwellings. After an extensive review of the geology and hydrology in the area surrounding the parent parcel, the report reached the following conclusions:

- There are two groundwater zones – upper and lower-- reflected in well log data from area properties;

- Pumping the maximum peak daily water need for 74 residences – 0.35 cubic feet per second (cfs) could reduce Deschutes River flows by 0.35 cfs, but that drawdown is not likely to occur, and in any event it would represent a very small reduction in the estimated minimum 72 cfs in the river at Lower Bridge;

- Wells could be limited to drawing from the lower groundwater zone to protect river flows and such an approach would be reasonable;

- Well yields reported by well drillers and others for wells in the surrounding area indicates yields range from 5 to 1,300 gallons per minute (gpm) which yield rates are "more than adequate for single-family home use;" and

- Well use and performance test results indicate the aquifer system in the area of the subject property "is capable of supplying the total cumulative peak day need of 49 gpm for all site wells combined without interfering with other wells."

The Hearings Officer finds from this evidence that since the applicant has proposed only 19 residential lots in the PUD, there is adequate water available to supply wells for these uses without interfering with other wells in the area.

Preservation of Natural Features and Resources. The natural features and resources on the subject property include the Deschutes River and its associated flood plain, wetlands, riparian

areas and canyon, as well as existing topography and vegetation, and scenic views of the Cascade Mountains. The applicant proposes to retain most of the property in its natural condition, and to include the river and most of its canyon in open space tracts. As discussed in the conditional use findings above, incorporated by reference herein, the Hearings Officer has found that with imposition of recommended conditions of approval, the proposed PUD will preserve the subject property's natural resources and features.

For the foregoing reasons, the Hearings Officer finds the proposed PUD will contribute to the orderly development and land use patterns in the area, and provides for the preservation of natural features and resources.

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

FINDINGS: The Hearings Officer finds public facilities and services affected by the proposed subdivision include water, sewer, stormwater drainage, roads, police and fire protection, and schools. Each of these facilities and services is addressed in the findings below.

Water. Both domestic water and water for firefighting would be provided through individual on-site wells. The applicant submitted two well logs as part of Exhibit "D" to its original burden of proof, demonstrating that water is available in the area. And as discussed in the findings above, the applicant submitted a technical report on the affected groundwater aquifer indicating it is large enough to provide domestic water for up to 74 dwellings on the parent parcel.

Sewer. The proposed lots would be served by individual on-site septic systems. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring that each residential lot receive an approved septic site evaluation prior to final plat approval.

Stormwater Drainage. Because of the proximity of the subject property to the Deschutes River, the staff report recommends the applicant be required as a condition of approval to provide certification by a licensed professional engineer that drainage facilities in and for the PUD have been designed and constructed to maintain all surface water drainage out of the river canyon and on the residential lots, and, in particular, designed in accordance with the current Central Oregon Stormwater Manual ("Manual") to receive and/or transport at least the design storm as defined in the current Manual for all surface drainage water including stormwater coming to and/or passing through the development.

In response to staff's recommendation, the applicant submitted a July 7, 2015 memorandum from the applicant's engineer Keith D'Agostino, included in the record as Exhibit "PH-13" to the applicant's original burden of proof, addressing stormwater runoff. The memorandum states in relevant part:

> *"If the project construction were to create stormwater runoff that left the project site, and impacted the Deschutes River, it would be subject to the Oregon DEQ-NPDES regulatory process, and may require a DEQ 1200-C Construction Stormwater Permit. There is no proposal or intent, nor anything in the Tentative Subdivision application that suggest that construction stormwater may leave the site and impact the River. In fact, the application notes that all stormwater from the proposed development, including stormwater runoff during construction, will*

be retained onsite as required. The location of the planned roads and utility infrastructure depicted on the Tentative Plan demonstrates that on-site retention of development stormwater runoff and construction stormwater is very feasible and can be easily accomplished. The numerous existing applicable County and State standards and regulations related to future home construction, onsite water wells, and on-site sewage disposal systems, on individual lots, provide adequate protection to ensure those activities as well can be completed without adverse stormwater impacts to the River, or any surrounding area.

I met with Krista Ratliff, Natural Resources Specialist Stormwater, Oregon DEQ-Eastern Division Bend Office, on February 13, 2015 to review the Tentative Subdivision Plan and construction stormwater issues relative to the DEQ 1200-C Permit process. Ms. Ratliff concurred that the proposed subdivision could be constructed without any requirement to submit for a 1200-C Permit, fi the applicant prevents stormwater from leaving the site, and that such provision appeared very feasible."

The record does not describe the relationship, if any, between the Manual referred to in the staff report and the DEQ stormwater permit process referred to in Mr. D'Agostino's memorandum. In any case, the Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant and its successors, including individual lot owners, to maintain all surface water drainage on site and out of the Deschutes River. Section 6.1(f) of the proposed CC&Rs states the HOA is responsible for maintaining "stormwater conveyance and detention systems serving the subdivision, except drainage swales and other stormwater management facilities located on the Lots." Section 6.2 of the CC&Rs provides that lot owners are responsible for maintaining drainage swales and stormwater management facilities on their own lots. Section 11.2 addresses protection of the "Scenic River Area" but does not include any provisions addressing the prevention of stormwater runoff into the river. And I have not found any provisions in the proposed CC&Rs requiring that all surface water drainage be maintained on site. Therefore, I find that if the proposed PUD is approved on appeal, it also should be subject to a condition of approval requiring the CC&Rs to include a provision specifying that surface water drainage must be retained on site and out of the Deschutes River and its canyon.

Roads. As discussed in the findings above, incorporated by reference herein, the Hearings Officer has found the addition of PUD-generated traffic will not cause Lower Bridge Way to function below acceptable levels of service, and that there will be adequate sight distance at the intersection of the PUD access road and Lower Bridge Way. I have found that if the proposed PUD is approved on appeal, it should be subject to the conditions of approval recommended by the road department for right-of-way dedication and improvement of the abutting stretch of Lower Bridge Way.

Police. The subject property is served by the Deschutes County Sheriff. The Sheriff did not comment on the applicant's proposal.

Fire. The subject property is served by Redmond Fire and Rescue (fire department). In her April 23, 2015 comments on the applicant's proposal, Clara Butler, Deputy Fire Marshal for the fire department, submitted a summary of the fire code requirements applicable to the proposed PUD, including the minimum flow requirements for water for fire protection, and specifications for fire apparatus access roads and dead-end streets. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring

the applicant to comply with all requirements of the fire department, and to submit to the Planning Division prior to final plat approval written documentation from the fire department that all such requirements have been satisfied.

Schools. The subject property is within the boundaries of the Redmond School District ("school district"). The school district did not submit comments on the applicant's proposal. However, the Hearings Officer is aware that school districts respond in a variety of ways to accommodate additional students who may move into new residential developments within the school districts, and often request that the developer be required to guarantee school bus access onto private development roads. I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to execute and record with the Deschutes County Clerk prior to final plat approval a perpetual easement allowing school district vehicles to travel across the PUD private roads.

For the foregoing reasons, and with imposition of the recommended conditions of approval described above, the Hearings Officer finds the proposed PUD will not create excessive demand on public facilities and services.

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

FINDINGS: The Hearings Officer finds the provisions of ORS 92.090 are implemented through Title 17, and therefore compliance with Title 17 will result in compliance with Chapter 92. Nevertheless, staff and the applicant have addressed compliance with the following provisions in ORS 92.090.

(1) Subdivision plat names shall be subject to the approval of the county surveyor or, in the case where there is no county surveyor, the county assessor. No tentative subdivision plan or subdivision plat of a subdivision shall be approved which bears a name similar to or pronounced the same as the name of any other subdivision in the same county, unless the land platted is contiguous to and platted by the same party that platted the subdivision bearing that name or unless the party files and records the consent of the party that platted the contiguous subdivision bearing that name. All subdivision plats must continue the lot numbers and, if used, the block numbers of the subdivision plat of the same name last filed. On or after January 1, 1992, any subdivision submitted for final approval shall not use block numbers or letters unless such subdivision is a continued phase of a previously recorded subdivision, bearing the same name, that has previously used block numbers or letters.

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

(2) No tentative plan for a proposed subdivision and not tentative plan for a proposed partition shall be approved unless:

(a) The streets and roads are laid out so as to conform to the plats of subdivisions and partitions already approved for adjoining property as to width, general direction and in all other aspects unless the city

or county determines it is in the public interest to modify the street or road pattern.

FINDINGS: The record indicates there are no subdivision or partition plats on adjoining property with which the proposed PUD roads must conform. The proposed PUD access road would intersect Lower Bridge Way at a right angle.

(b) Streets and roads held for private use are clearly indicated on the tentative plan and all reservations or restrictions relating to such private roads and streets are set forth thereon.

FINDINGS: The applicant proposes private PUD roads. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring that all private road information, reservations, and restrictions be shown on the final plat.

(c) The tentative plan complies with the applicable zoning ordinances and regulations and the ordinances and regulations adopted under ORS 92.044 that are then in effect for the city or county within which the land described in the plan is situated.

FINDINGS: The proposed PUD's compliance with the applicant zoning regulations is discussed in detail findings throughout this decision. As discussed in those findings, the Hearings Officer has found the proposed PUD is not permitted in the EFU and FP Zones, does not comply with all applicable provisions of the RR-10 Zone, and does not comply with all applicable conditional use approval criteria. Therefore, I find the proposed subdivision also does not comply with this statutory requirement.

(3) No plat of a proposed subdivision or partition shall be approved unless:

(a) Streets and roads for public use are dedicated without any reservation or restriction other than reversionary rights upon vacation of any such street or road and easements for public or private utilities.

(b) Streets and roads held for private use and indicated on the tentative plan of such subdivision or partition have been approved by the city or county.

FINDINGS: The proposed PUD has no public streets. As discussed in the subdivision findings below, the Hearings Officer has found the proposed private PUD streets satisfy, or with imposition of recommended conditions of approval will satisfy, all county road standards.

(c) The subdivision or partition plat complies with any applicable zoning ordinances and regulations and any ordinance or regulation adopted under ORS 92.044 that are then in effect for the city or county within which the land described in the subdivision or partition plat is situated.

FINDINGS: As discussed in the findings above, the Hearings Officer has found the proposed PUD is not permitted in the EFU and FP Zones, does not comply with all applicable provisions

of the RR-10 Zone, and does not comply with all conditional use approval criteria. Therefore, I find the proposed subdivision also does not comply with this statutory requirement.

(d) The subdivision or partition plat is in substantial conformity with the provisions of the tentative plan for the subdivision or partition, as approved.

FINDINGS: The Hearings Officer finds this requirement is applicable to final subdivision plats and therefore does not apply to the proposed tentative plan.

(e) The subdivision or partition plat contains a donation to the public of all common improvements, including but not limited to streets, roads, parks, sewage disposal and water supply systems, the donation of which was made a condition of the approval of the tentative plan for the subdivision or partition plat.

FINDINGS: The tentative subdivision plat includes a dedication to the public of additional right-of-way for the abutting segment of Lower Bridge Way. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to provide the right-of-way dedication designated on the tentative plan.

(f) Explanations for all common improvements required as conditions of approval of the tentative plan of the subdivision or partition have been recorded and referenced on the subdivision or partition plat.

FINDINGS: The Hearings Officer finds this requirement is applicable to final subdivision plats and therefore does not apply to the proposed tentative plan.

(4) Subject to any standards and procedures adopted pursuant to ORS 92.044, no plat of a subdivision shall be approved by a city or county unless the city or county has received and accepted:

(a) A certification by a city-owned domestic water supply system or by the owner of a privately owned domestic water supply system, subject to regulation by the Public Utility Commission of Oregon, that water will be available to the lot line of each and every lot depicted in the proposed subdivision plat;

FINDINGS: The applicant proposes to provide domestic water to PUD dwellings through private individual on-site wells. The applicant submitted as part of Exhibit “D” to its original burden of proof two well logs demonstrating the depth and availability of water in the area, and as Exhibit “PH-5” a comprehensive analysis of availability of water supply for the proposed PUD. Therefore, the Hearings Officer finds this requirement is not applicable.

(5) Subject to any standards and procedures adopted pursuant to ORS 92.044, no plat of a subdivision shall be approved by a city or county unless the city or county has received and accepted:

(a) A certification by a city-owned sewage disposal system or by the owner of a privately owned sewage disposal system that is subject to regulation by the Public Utility Commission of Oregon that a

sewage disposal system will be available to the lot line of each and every lot depicted in the proposed subdivision plat;

FINDINGS: As discussed above, sewage treatment will be provided by individual on-site septic systems. In his May 15, 2015 comments on the applicant's proposal, Todd Cleveland of the county's Environmental Soils Division stated each PUD lot would require an individual approved site evaluation before final plat approval. The staff report recommends, and the Hearings Officer agrees, that if the proposed PUD is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to obtain an approved septic site evaluation for each residential lot prior to final plat approval.

(6) Subject to any standards and procedures adopted pursuant to ORS 92.044, no plat of subdivision or partition located within the boundaries of an irrigation district, drainage district, water control district, water improvement district or district improvement company shall be approved by a city or county unless the city or county has received and accepted a certification from the district or company that the subdivision or partition is either entirely excluded from the district or company or is included within the district or company for purposes of receiving services and subjecting the subdivision or partition to the fees and other charges of the district or company.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the record indicates the subject property is not located within any irrigation district, drainage district, water control district, water improvement district or district improvement company.

D. For subdivision or portions thereof proposed within a Surface Mining Impact Area (SMIA) zone under DCC Title 18, the subdivision creates lots on which noise or dust sensitive uses can be sited consistent with the requirements of DCC 18.56, as amended, as demonstrated by the site plan and accompanying information required under DCC 17.16.030.

FINDINGS: As discussed in detail in the findings above under the SMIA Zone, incorporated by reference herein, the Hearings Officer has found the size and configuration of the proposed residential PUD lots will allow dwellings to be sited on those lots in accordance with the SMIA site plan requirements.

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

FINDINGS: The Hearings Officer has found that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to obtain the county surveyor's approval of the subdivision name.

b. Section 17.16.105, Access to Subdivisions

No proposed subdivision shall be approved unless it would be accessed by roads constructed to County standards and by roads accepted for maintenance responsibility by a unit of local or state government. This standard is met if the subdivision would have direct access to an improved collector or arterial, or in cases where

the subdivision has no direct access to such a collector or arterial, by demonstrating that the road accessing the subdivision from a collector or arterial meets relevant County standards and has been accepted for maintenance purposes.

FINDINGS: The proposed subdivision would have access from Lower Bridge Way, a designated rural collector road. The applicant proposes, and the Hearings Officer has recommended the applicant be required as a condition of approval, to dedicate additional right-of-way for, and to improve to the county's standards for rural collector roads, the abutting segment of Lower Bridge Way. I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to construct all private PUD roads to the applicable county private road standards. I also recommend the applicant be required as a condition of approval to execute and record with the Deschutes County Clerk an agreement acceptable to the road department and the county's legal counsel for the maintenance of the new private roads.

2. Chapter 17.36, Design Standards

a. Section 17.36.020, Streets

A. The location, width and grade of streets shall be considered in their relation to existing and planned streets, topographical conditions, public convenience and safety, and the proposed use of land to be served by the streets. The street system shall assure an adequate traffic circulation system for all modes of transportation, including pedestrians, bicycles, and automobiles with intersection angles, grades, tangents, and curves appropriate for traffic to be carried, considering the terrain. The subdivision or partition shall provide for the continuation of the principal streets existing in the adjoining subdivision or partition or of their property projection when adjoining property which is not subdivided, and such streets shall be of a width not less than the minimum requirement for streets set forth in this chapter.

FINDINGS: There are no adjoining subdivisions or partitions, and no adjoining property is eligible for further partitioning or subdividing. Therefore, the Hearings Officer finds there are no principal streets on adjoining property that the proposed PUD roads must continue. The submitted tentative plan shows all private PUD roads will be located on the upper plateau of the subject property which is relatively level. These roads consist of a main PUD access road intersecting with Lower Bridge Way and three cul-de-sacs. I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to construct the private PUD roads to the county's private road standards set forth in Table A of Title 17, including a 28-foot-wide paved surface and 2-foot-wide gravel shoulders. The staff report recommends, and I agree, that the applicant also should be required as a condition of approval to stripe a 4-foot-wide shoulder bikeway on each side of the private PUD roads.

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

where necessary to accommodate present and future through traffic.

FINDINGS: The applicant proposes private streets within the PUD. Because of the location of the subject property, which is bounded by the Deschutes River and Lower Bridge Way, the Hearings Officer finds there is no potential for future through traffic, and therefore public roads are not required.

b. Section 17.36.040, Existing Streets

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

FINDINGS: The applicant proposes to dedicate additional right-of-way for the abutting segment of Lower Bridge Way, for a total right-of-way width of 60 feet. The applicant also proposes to improve the adjacent segment of Lower Bridge Way by widening to provide 28 feet of paved surface with 2-foot-wide aggregate shoulders. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to improve the abutting segment of Lower Bridge Way in accordance with county standards for a rural collector road.

c. Section 17.36.050, Continuation of Streets
Subdivision or partition streets which constitute the continuation of streets in contiguous territory shall be aligned so that their centerlines coincide.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the proposed subdivision has no streets that would constitute a continuation of other streets.

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

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

FINDINGS: The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to dedicate right-of-way for and to improve the abutting segment of Lower Bridge Way in accordance with the county's

standards for rural collector roads, and to construct the private PUD roads in accordance with the county's private road standards.

e. Section 17.36.070, Future Resubdivision

Where a tract of land is divided into lots or parcels of an acre or more, the Hearings Body may require an arrangement of lots or parcels and streets such as to permit future resubdivision in conformity to the street requirements contained in this title.

FINDINGS: The applicant proposes to create lots that are larger than one acre in size. However, the Hearings Officer finds no further subdivision of the subject property would be allowed under current zoning regulations.

f. Section 17.36.080, Future Extension of Streets

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

FINDINGS: The Hearings Officer finds that all adjoining land is subdivided or partitioned to minimum lot sizes in the applicable zones and therefore will not be further subdivided. The proposed private PUD roads would connect with Lower Bridge Way. Therefore, I find no street extension to adjoining properties is required.

g. Section 17.36.100, Frontage Roads

If a land division abuts or contains an existing or proposed collector or arterial street, the Planning Director or Hearings Body may require frontage roads, reverse frontage lots or parcels with suitable depth, screen planting contained in a non-access reservation along the rear or side property line, or other treatment necessary for adequate protection of residential properties and to afford separation of through and local traffic. All frontage roads shall comply with the applicable standards of Table A of DCC Title 17, unless specifications included in a particular zone provide other standards applicable to frontage roads.

FINDINGS: Lower Bridge Way is a designated rural collector. The Hearings Officer finds no frontage road is needed to support the proposed subdivision.

h. Section 17.36.110, Streets Adjacent to Railroads, Freeways and Parkways

When the area to be divided adjoins or contains a railroad, freeway or parkway, provision may be required for a street approximately parallel to and on each side of such right of way at a distance suitable for use of the land between the street and railroad, freeway or parkway. In the case of a railroad, there shall be a land strip of not less than 25 feet in width adjacent and along the railroad right of way and residential property. If the intervening property between

such parallel streets and a freeway or a parkway is less than 80 feet in width, such intervening property shall be dedicated to park or thoroughfare use. The intersections of such parallel streets, where they intersect with streets that cross a railroad, shall be determined with due consideration at cross streets of a minimum distance required for approach grades to a future grade separation and right of way widths of the cross street.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is not adjacent to a railroad, freeway or parkway.

i. Section 17.36.120, Street Names

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

FINDINGS: The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to obtain approval of PUD road names from the county's Property Address Coordinator before final plat approval.

j. Section 17.36.130, Sidewalks

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

FINDINGS: The Hearings Officer finds no sidewalks are required for the proposed PUD because the subject property is outside any acknowledged UGB.

k. Section 17.36.140, Bicycle, Pedestrian and Transit Requirements

A. Pedestrian and Bicycle Circulation within Subdivision.

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

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

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

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

FINDINGS: The record indicates there are no existing or planned neighborhood activity centers in the vicinity of the subject property. The applicant proposes to accommodate bicycles and pedestrians on the private PUD roads which would have a 28-footwide paved surface. As discussed above, the Hearings Officer has found that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to stripe a 4-foot-wide shoulder bikeway on each side of the private PUD roads.

2. Subdivision Layout.

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

FINDINGS: Most of the subject property lies between Lower Bridge Way and the Deschutes River, and the record indicates there are no abutting subdivisions or nearby neighborhood activity centers to which PUD roads should or can connect. The applicant proposes three cul-de-sacs off the main PUD access road to serve the proposed residential lots. The Hearings Officer finds these cul-de-sacs are justified because of the configuration and location of the subject property which prevent any additional road connections.

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

FINDINGS: The Hearings Officer finds no additional bicycle or pedestrian connection would reduce the walking or cycling distance to an existing or planned neighborhood activity center by 400 feet and by at least 50 percent over other available routes, and therefore none is required.

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

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

FINDINGS: The record indicates there is no street grid system with typical blocks in the area surrounding the subject property. The proposed new private PUD access road would intersect with Lower Bridge Way, a rural collector. However, alignment of this private road across the collector is not proposed or appropriate as there are no roads on SM Site 461 and Tax Lot 1502 on the west side of Lower Bridge Way with which to align.

3. Facilities and Improvements.

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

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

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

FINDINGS: The applicant proposes to accommodate bicycle and pedestrian traffic on the private PUD roads which would have 28 feet of paved surface. The Hearings Officer has found that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to stripe 4-foot-wide bikeways on both sides of the PUD roads.

I. Section 17.36.150, Blocks

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

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

FINDINGS: The Hearings Officer finds these criteria are not applicable because there is no grid system with typical blocks in the area, the configuration of the subject property does not allow for the creation of a street grid within the proposed PUD, and the subject property is not located within a UGB.

m. Section 17.36.160, Easements

A. Utility Easements. Easements shall be provided along property lines when necessary for the placement of overhead or underground utilities, and to provide the subdivision or partition with electric power, communication facilities, street lighting, sewer lines, water lines, gas lines or drainage. Such easements shall be labeled "Public Utility Easement" on the tentative and final plat; they shall be at least 12 feet in width and centered on lot lines where possible, except utility pole guyline easements along the rear of lots or parcels adjacent to unsubdivided land may be reduced to 10 feet in width.

FINDINGS: The applicant's burden of proof states all utility easements will be shown on the final plat. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to show and label all utility easements on the final plat.

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

FINDINGS: The Hearings Officer finds the Deschutes River qualifies as a "watercourse" under this criterion. The applicant proposes to protect the river and its flood plain, wetlands, riparian areas and canyon by including them in open space Tracts C and E. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring a stormwater easement or drainage right-of-way conforming substantially to the course of the river. I find the proposed subdivision's private roads generally run parallel to the river.

n. Section 17.36.170, Lots - Size and Shape
The size, width and orientation of lots or parcels shall be appropriate for the location of the land division and for the type of development and use contemplated, and shall be consistent with the lot or parcel size provisions of DCC Title 18 through 21.

FINDINGS: The Hearings Officer finds that in general, the size, width and orientation of the proposed lots are appropriate for the proposed PUD, and are consistent with the lot size permitted for PUDs in Title 18. However, as discussed in the LM Zone findings above, I have found the applicant has failed to demonstrate the size and configuration of each proposed PUD lot will allow the siting of dwellings, on-site septic systems and individual wells consistent with the 50-foot setback from any rimrock and all other applicable yard and setback requirements. For this reason, I find the applicant's proposal also does not satisfy this subdivision standard.

o. Section 17.36.180, Frontage

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

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

FINDINGS: The applicant proposes a PUD with lots fronting on private roads. The side lot lines are generally at right angles to the proposed new streets. With the exception of Lot 7, all residential lots have at least 50 feet of frontage on a PUD road or 30 feet of frontage on a cul-de-sac. It appears the applicant proposes to vary this standard for Lot 7 as part of the PUD proposal. The Hearings Officer finds the amenities provided by the proposed PUD – specifically the preservation of most of the subject property and all of the river areas in open space tracts – is sufficient to justify this minor deviation from the road frontage standard.

p. Section 17.36.190, Through Lots

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

FINDINGS: Section 17.08.030 defines “through lot” as an “interior lot having a frontage on two streets and/or highways, not including an alley.” The Hearings Officer finds proposed Lots 3 and 16 would qualify as “through lots” because they have frontage on both the main PUD access road and a cul-de-sac. However, I find no planting screen or easement is necessary to prohibit access across these residential lots in light of their interior location within the PUD and the relatively low predicted volume of vehicular, bicycle and pedestrian traffic within the PUD.

q. Section 17.36.200, Corner Lots

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

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is not located in a UGB.

r. Section 17.36.210, Solar Access Performance

A. As much solar access as feasible shall be provided each lot or parcel in every new subdivision or partition, considering topography, development pattern and existing vegetation. The lot lines of lots or parcels, as far as feasible, shall be oriented to provide solar access at ground level at the southern building line two hours before and after the solar zenith from September 22nd to March 21st. If it is not feasible to provide solar access to the southern building line, then solar access, if feasible, shall be provided at 10 feet above ground level at the southern building line two hours before and after the solar zenith from September 22nd to March 21st, and three hours before and after the solar zenith from March 22nd to September 21st.

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

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

FINDINGS: The Hearings Officer finds that because of the size and configuration of the proposed PUD lots, solar access will be available to all lots.

s. Section 17.36.220, Underground Facilities

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

*** * ***

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is not located in a UGB.

t. Section 17.36.230, Grading of Building Sites

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

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

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

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

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

FINDINGS: The applicant did not propose any dwellings in conjunction with the conditional use permit and tentative subdivision plan applications and therefore no grading or fill for their construction has been proposed. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to comply with all grading and fill requirements in this section.

u. Section 17.36.250, Lighting

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

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is not located in a UGB.

v. Section 17.36.260, Fire Hazards

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

FINDINGS: The applicant has proposed a single point of access to the PUD from a new private road connecting to Lower Bridge Way. The Hearings Officer finds other connections to Lower Bridge Way are not feasible because they either have steep topography adjacent to the road, or they would not provide a meaningful secondary access. For example, the staff report notes, and

I agree, that a second connection to Lower Bridge Way from Teater Avenue would not provide any better emergency access to the subdivision because of its location at the southern boundary of the subject property and well away from all residential lots.

w. Section 17.36.270, Street Tree Planting

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

FINDINGS: The applicant did not address this criterion. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to plant any street trees in accordance with a street tree plan submitted to and approved by the Planning Director before street trees are planted.

x. Section 17.36.280, Water and Sewer Lines

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

FINDINGS: The Hearings Officer finds this criterion is not applicable because the proposed domestic wells and on-site septic systems for each residential lot do not require water and sewer lines or mains, and none are proposed.

y. Section 17.36.290, Individual Wells

In any subdivision or partition where individual wells are proposed, the applicant shall provide documentation of the depth and quantity of potable water available from a minimum of two wells within one mile of the proposed land division. Notwithstanding DCC 17.36.300, individual wells for subdivisions are allowed when parcels are larger than 10 acres.

FINDINGS: The applicant proposes to serve the PUD residential lots with individual wells. The applicant submitted as part of Exhibit "D" to its original burden of proof well logs for two wells within one mile of the subject property, showing completed well depths of 220 and 390 feet, therefore satisfying this criterion.

z. Section 17.36.300, Public Water System

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

each and every lot depicted in the proposed subdivision or partition plat, prior to final approval.

FINDINGS: The Hearings Officer finds this criterion is not applicable because a public water system is neither required nor proposed for the PUD.

3. Chapter 17.44, Park Development

a. Section 17.44.010, Dedication of Land

A. For subdivisions or partitions inside an urban growth boundary, the developer shall set aside and dedicate to the public for park and recreation purposes not less than eight percent of the gross area of such development, if the land is suitable and adaptable for such purposes and is generally located in an area planned for parks.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is not located in a UGB.

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

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

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

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

FINDINGS: The record indicates the subject property is not in an area planned for parks. The applicant's burden of proof does not address whether portions of the proposed open space tracts are suitable and adaptable for park purposes. The Hearings Officer finds that because of the sensitive nature of the river and its canyon, open space Tracts C and E would not be suitable or adaptable for park purposes. With respect to the remaining open space areas, I find adapting them for park purposes would not be consistent with the applicant's intention to preserve the majority of the subject property in its natural state and not to disturb the ground surface more than necessary for road construction. For these reasons, I find the applicant is not required to set aside land within the PUD for park purposes.

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

FINDINGS: The subject property is located outside the boundaries of the Bend Metro Park and Recreation District and the RAPRD, and therefore the provisions of Section 17.44.010 apply to the proposed PUD.

b. Section 17.44.020, Fee in Lieu of Dedication

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

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

FINDINGS: As discussed above, the subject property is located outside the boundaries of the Bend Metro Park and Recreation District and the RAPRD. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant pay a fee in lieu of dedication of park land in the amount of $350 per dwelling unit.

4. Chapter 17.48, Design and Construction Specifications

a. Section 17.48.160, Road Development Requirements - Standards

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

FINDINGS: The applicant proposes that the new private PUD roads will be maintained by the HOA pursuant to the CC&Rs. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to record the CC&Rs with the Deschutes County Clerk with the final plat.

B. Improvements of Public Rights-of-Way.

1. The developer of a subdivision or partition will be required to improve all public ways that are adjacent or within the land development.

2. All improvements within public rights of way shall conform to the improvement standards designated in DCC Title 17 for the applicable road classification, except where a zoning ordinance sets forth different standards for a particular zone.

FINDINGS: The applicant proposes to dedicate right-of-way for, and to improve to the county's standards for rural collector roads, the abutting segment of Lower Bridge Way. The Hearings Officer has found that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to improve Lower Bridge way to the county's standards for rural collector roads in Table A of Title 17.

C. Primary Access Roads. The primary access road for any new subdivision shall be improved to the applicable standard set forth in Table A (or the applicable standard set forth in a zoning ordinance). The applicable standard shall be determined with reference to the road's classification under the relevant transportation plan. For the purposes of this section a primary access road is a road leading to the subdivision from an existing paved county, city or state maintained road that provides the primary access to the subdivision from such a road.

FINDINGS: The applicant proposes that the primary access road for the subdivision will be a private road connecting with Lower Bridge Way and leading to three private cul-de-sacs within the PUD. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to construct all private PUD roads to the applicable county standards for private roads in Table A of Title 17.

D. Secondary Access Roads. When deemed necessary by the County Road Department or Community Development Department, a secondary access road shall be constructed to the subdivision. Construction shall be to the same standard used for roads within the subdivision.

FINDINGS: As discussed in the findings above, the Hearings Officer has found that because of the location and configuration of the subject property, it is not feasible or necessary to provide a secondary access road. Therefore, I find this criterion is not applicable.

E. Stubbed Roads. Any proposed road that terminates at a development boundary shall be constructed with a paved cul-de-sac bulb.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not proposed to terminate any PUD road at the boundary of the subject property.

F. Cul-de-sacs. Cul-de-sacs shall have a length of less than 600 feet, unless a longer length is approved by the applicable fire protection district, and more than 100 feet from the center of the bulb to the intersection with the main road. The maximum grade on the bulb shall be four percent.

FINDINGS: The applicant proposes three private roads terminating in cul-de-sac bulbs. The tentative plat shows Road "C" is over 600 feet in length, and Road "E" also may be longer than 600 feet. In her comments on the applicant's proposal, Deputy Fire Marshal Clara Butler stated Section 503.2.5 of the Oregon Fire Code (OFC) requires that dead-end fire apparatus access roads exceeding 150 feet in length must have an approved turnaround for fire apparatus, and that dead-end roads exceeding 500 feet in length must have one of three alternative turnarounds depicted on a chart attached to Ms. Butler's April 23, 2015 comments, one of which is a 96-foot-diameter cul-de-sac. The submitted tentative plan does not indicate the diameter of the proposed cul-de-sac bulbs. However, Keith D'Agostino's June 30, 2015 memorandum states all three proposed cul-de-sacs will have outside diameters of 96 feet. According to Mr. D'Agostino, the cul-de-sac design also includes a 40-foot diameter paved circle within a 26-foot-wide paved driving surface. The memo does not indicate whether the interior paved circle would have a rolled curb allowing large vehicles to drive over it. Mr. D'Agostino's memo also states the applicant would add two "hammerhead" turnarounds along proposed Road "C", the main PUD access road, to aid fire apparatus access.

The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to construct all three cul-de-sac bulbs to a minimum diameter of 96 feet, and to submit to the Planning Division prior to final plat approval written documentation from the fire department that the cul-de-sacs as designed and constructed satisfy the applicable provisions of the OFC, including minimum diameter, maximum grade, and adequate driving surface.

b. Section 17.48.180, Private Roads

The following minimum road standards shall apply for private roads:

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

B. Minimum radius of curvature, 50 feet;

C. Maximum grade, 12 percent;

FINDINGS: The applicant proposes to construct the private PUD roads to the applicable county standards for private roads set forth in Table A of Title 17. Specifically, the private roads would have a 28-foot-wide paved surface with 2-foot-wide gravel shoulders. And the Hearings Officer has found that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to stripe a 4-foot-wide shoulder bikeway on each side of the PUD roads. I find any PUD approval also should be subject to a condition of approval requiring PUD roads to satisfy the maximum curve radius and grade standards in this section.

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

FINDINGS: The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring at least one road name sign at each road intersection.

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

FINDINGS: The applicant proposes to provide for the continuing maintenance of the private PUD roads by the HOA through recorded CC&Rs for the PUD that include road maintenance provisions. The Hearings Officer finds that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to obtain approval of the road maintenance provisions of the CC&Rs from the county's legal counsel prior to final plat approval.

F. Private road systems shall include provisions for bicycle and pedestrian traffic. In cluster and planned developments limited to ten dwelling units, the bicycle and pedestrian traffic can be accommodated within the 20-foot wide road. In other developments, shoulder bikeways shall be a minimum of four feet wide, paved and striped, with no on-street parking allowed within the bikeway, and when private roads are developed to a width of less than 28 feet, bike paths constructed to County standards shall be required.

FINDINGS: As discussed above, the applicant proposes to construct the private PUD roads with 28 feet of paved surface and a 2-foot-wide gravel shoulder, and the Hearings Officer has recommended any PUD approval be subject to a condition of approval requiring the applicant to construct PUD roads to these standards, and to stripe a 4-foot-wide bicycle path on each side of PUD roads. I find that with imposition of the recommended condition of approval set forth above, the applicant's proposal will satisfy this criterion.

As discussed in the foregoing findings, the Hearings Officer has found the proposed PUD does not satisfy all applicable standards in Title 17. Specifically, I have found the applicant failed to demonstrate the size and configuration of each proposed PUD lot are appropriate for the proposed use because they may not allow the siting of dwellings, on-site septic systems and individual wells consistent with the minimum 50-foot setback from any rimrock and all other applicable yard and setback requirements.

Based on the foregoing discussion, the Hearings Officer finds the applicant's proposal does not satisfy all applicable subdivision standards in Title 17.

IV. DECISION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer **DENIES** the applicant's requested conditional use permit and tentative plan approval for a 19-lot planned development.

If the applicant's proposal is approved by the Board of County Commissioners on appeal, the Hearings Officer hereby **RECOMMENDS THE APPROVAL BE SUBJECT TO THE FOLLOWING CONDITIONS OF APPROVAL:**

1. This approval is based upon the applicant's submitted tentative plan, site plan, burden of proof statements, supplemental materials, and written and oral testimony. Any substantial change to the approved plan will require new land use applications and approvals.

2. The conditions of approval established in the Board of County Commissioner's decision in ZC-08-1/PA-08-1remain in full force and effect.

PRIOR TO SUBMITTING THE FINAL SUBDIVISION PLAT FOR APPROVAL:

3. The applicant/owner shall execute and record with the Deschutes County Clerk a conservation easement as specified in Section 18.04.030 of the Deschutes County Code.

4. The applicant/owner shall execute and record with the Deschutes County Clerk a perpetual easement allowing Redmond School District vehicles to travel across the PUD private roads.

5. The applicant/owner shall execute and record with the Deschutes County Clerk an agreement acceptable to the Deschutes County Road Department and Deschutes County Legal Counsel for the maintenance of the private PUD roads.

6. The applicant/owner shall complete the Department of Environmental Quality Voluntary Cleanup Program for SM Site 461 and the portion of the subject property located west of Lower Bridge Way.

7. The applicant/owner shall provide to the Planning Division certification by a licensed professional engineer that drainage facilities in and for the PUD have been designed and constructed to maintain all surface water drainage out of the river canyon and on the residential lots, and in accordance with the current Central Oregon Stormwater Manual, to receive and/or transport at least the design storm as defined in the current Manual for all surface drainage water including stormwater coming to and/or passing through the PUD.

8. The applicant/owner shall submit to the Planning Division written documentation from Redmond Fire and Rescue that all requirements of the fire department have been satisfied.

9. The applicant/owner shall submit to the Planning Division written documentation from Redmond Fire and Rescue that the private road cul-de-sacs as designed and depicted on the tentative plan satisfy the applicable provisions of the Oregon Fire Code, including minimum diameter, maximum grade, and adequate driving surface.

10. The applicant/owner shall obtain from Deschutes County an approved septic site evaluation for each PUD residential lot.
11. The applicant/owner shall obtain from the Deschutes County Surveyor approval of the subdivision name.

12 The applicant/owner shall obtain from the Deschutes County Property Address Coordinator approval of all PUD road names.

13. The applicant/owner shall install a 10,000-gallon cistern with a dry hydrant for firefighting water in the location identified on the tentative plan.

14. The applicant/owner shall amend the proposed PUD covenants, conditions and restrictions (CC&Rs) to include including the following:

    a. provisions addressing potential additional lot-specific firefighting water measures, including: (i) each lot owner/applicant will determine the minimum firefighting water supply for the structure; and (ii) if the lot owner/applicant determines the water supply requirements for a particular structure cannot be met by the common cistern, the lot owner/applicant will provide alternative or additional measures to assure adequate firefighting water supply, such as an automatic sprinkler system for the structure.

    b. a provision specifying that surface water drainage must be retained on site and out of the Deschutes River and its canyon.

15. The applicant/owner shall pay to Deschutes County a fee in lieu of dedication of park land in the amount of $350 per dwelling unit.

16. The applicant/owner shall dedicate right-of-way for, and improve to Deschutes County's standards for rural collector roads set forth in Table "A" of Title 17, the abutting segment of Lower Bridge Way.

17. The applicant/owner shall construct all private PUD roads to Deschutes County's standards for private local roads set forth in Table "A" of Title 17, including the following:

    a. twenty-eight (28) feet of pavement width;

    b. two (2) foot wide gravel shoulder on each side of the road;

    c. four (4) foot wide striped bicycle lane on each side of the road;

    d. fifty (50) foot minimum radius of curvature;

    e. twelve (12) percent maximum grade; ;

    f. minimum diameter of ninety-six (96) feet for all cul-de-sac roads; and

    g. at least one road name sign at each road intersection.

WITH OR ON THE FINAL SUBDIVISION PLAT:

18. The applicant/owner shall include the following on the final subdivision plat:

    a. right-of-way dedication for the abutting segment of Lower Bridge Way;

b. a stormwater easement or drainage right-of-way conforming substantially to the course of the Deschutes River;

c. all private road information, reservations, and restrictions; and.

d. the location of all utility easements.

19. The applicant/owner shall record the PUD's covenants, conditions and restriction with the Deschutes County Clerk.

PRIOR TO CONSTRUCTION GRADING OR CONSTRUCTION OF IMPROVEMENTS:

20. The applicant/owner shall provide cash or a performance bond in favor of Deschutes County, and acceptable to Deschutes County Legal Counsel, for the cost of remediating DE dust on SM Site 461 and the subject property, in an amount to be identified by the applicant and approved by the board, prior to grading or construction of any improvements on the subject property. The bond shall be redeemable by the county if the applicant fails to complete the DE remediation identified as necessary for SM Site 461 and the subject property by the June 22, 2015 Wallace Group report.

21. Each dwelling shall receive scenic waterway approval from the Oregon Parks and Recreation Department.

22. Each dwelling shall receive LM site plan approval from Deschutes County.

23. Each dwelling shall receive SMIA site plan approval from Deschutes County.

WITH CONSTRUCTION OF DWELLINGS OR OTHER STRUCTURES:

24. All dwellings shall satisfy all applicable lot coverage and building height limitations, including no lot coverage in excess of thirty (30) percent of the total lot area, and no building or structure exceeding 30 feet in height.

25. All dwellings shall be constructed of fire resistant materials.

26. All structures shall be set back at least 100 feet from the OHWM of the Deschutes River and at least 50 feet from any rimrock.

27. All dwellings shall be constructed consistent with all grading and fill requirements in Section 17.36.230 of the Deschutes County Code.

28. All structures shall be finished in muted earth tones that blend with and reduce contrast with the surrounding vegetation and landscape of the building site.

29. Except as necessary for construction of access roads, building pads, septic drainfields, public utility easements, parking areas, etc., all existing tree and shrub cover screening any structure from the Deschutes River shall be retained. This provision does not prohibit maintenance of existing lawns, removal of dead, diseased or hazardous vegetation.

30. Subject to applicable rimrock setback requirements or rimrock setback exception standards in Section 18.84.090(E) of the Deschutes County Code, all structures shall be

sited to take advantage of existing vegetation, trees and topographic features in order to reduce visual impact as seen from the designated road, river or stream.

31. All exterior lighting, including security lighting, shall be sited and shielded so that it is directed downward and is not directly visible from the Deschutes River.

32. The applicant/owner shall plant any street trees in accordance with a street tree plan submitted to and approved by the Deschutes County Planning Director before street trees are planted.

33. No large areas, including roofs, shall be finished with white, bright or reflective materials. Roofing, including metal roofing, shall be nonreflective and of a color which blends with the surrounding vegetation and landscape.

34. No structure shall be constructed within the LM Zone rimrock setback without the granting of a rimrock setback exception.

35. No structure shall be sited in the FP Zone.

36. No signs or other forms of outdoor advertising that are visible from the Deschutes River shall be installed. Property protection signs (No Trespassing, No Hunting, etc.,) are permitted.

37. No alteration of the existing grade or removal of vegetation on the upper plateau at the upper edge of the river canyon is permitted unless such actions are part of an Oregon Department of Fish and Wildlife approved habitat enhancement project.

AT ALL TIMES:

38. The applicant/owner and its successors, including individual lot owners, shall maintain all surface water drainage on site and out of the Deschutes River.

39. The applicant/owner and its successors, including individual lot owners, shall prohibit within the PUD's open space tracts the following activities: construction of any structures, whether or not it requires a building permit; earthmoving; and the alteration, removal or destruction of natural vegetation outside of any Oregon Department of Fish and Wildlife approved habitat enhancement projects.

40. The applicant/owner and its successors, including individual lot owners, shall prohibit the following activities within the river canyon below the upper bench/plateau: changes in the natural grade; construction of structures; and the alteration, removal or destruction of natural vegetation, except as part of an Oregon Department of Fish and Wildlife approved habitat enhancement project.

41. The applicant/owner and its successors, including individual lot owners, shall install and maintain all exterior lighting in compliance with Deschutes County's outdoor lighting ordinance in Chapter 15.10 of the Deschutes County Code.

42. The applicant/owner and its successors, including individual lot owners, shall comply with all requirements of Redmond Fire and Rescue.

DURATION OF APPROVAL:

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

Dated this 11th day of September, 2015 Mailed this 11th day of September, 2015

Karen H. Green, Hearings Officer

THIS DECISION BECOMES FINAL TWELVE DAYS AFTER MAILING UNLESS TIMELY APPROVED BY A PARTY OF INTEREST.