



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

AGENDA REQUEST & STAFF REPORT

For Board Business Meeting of 1/27/16

Please see directions for completing this document on the next page.

DATE: January 11, 2016

FROM: Will Groves Community Development Department 388-6518

TITLE OF AGENDA ITEM:

A de novo hearing on Kine & Kine Properties appeal of a Hearings Officer's decision. (File Nos. 247-14-000391-TP, 392-SP, 393-LM, and 207-A) to establish an eight-lot, zero-lot-line subdivision consisting of a partial replat of Elkai Woods Townhomes Phase III, as well as site plan and non-visible Landscape Management (LM) review for dwellings on the proposed subdivision lots.

PUBLIC HEARING ON THIS DATE? Yes

BACKGROUND AND POLICY IMPLICATIONS:

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

The Hearings Officer issued a decision on April 6, 2015 finding that the proposal does not comply with all applicable regulations. On April 17, 2015, Kine & Kine Properties appealed the decision to the BOCC. The BOCC agreed to hear this matter under Order 2015-030.

The applicant has agreed to toll the 150-day deadline within which the County has to issue a decision in this matter until March 1, 2016.

FISCAL IMPLICATIONS:

None

RECOMMENDATION & ACTION REQUESTED:

Staff recommends that the Board open the public hearing and receive testimony.

ATTENDANCE: Will Groves

DISTRIBUTION OF DOCUMENTS:

CDD, Legal



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
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<http://www.co.deschutes.or.us/cdd/>

MEMORANDUM

DATE: January 11, 2016
TO: Board of County Commissioners
FROM: Will Groves, Senior Planner
RE: De novo hearing on the Kine & Kine Properties appeal of a Hearings Officer's decision. File Nos. 247-14-000391-TP, 392-SP, 393-LM, and 207-A.

Before the Board of County Commissioners (BOCC) is an appeal filed by Kine & Kine Properties. The appeal is submitted in response to a Deschutes County Hearings Officer's decision that a proposed subdivision does not comply with all applicable regulations. The BOCC agreed to hear this matter under Order 2015-030. A de novo public hearing is scheduled for January 27, 2016.

BACKGROUND

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

The Hearings Officer issued a decision on April 6, 2015 finding that the proposal does not comply with all applicable regulations. On April 17, 2015, Kine & Kine Properties appealed the decision to the BOCC. The BOCC agreed to hear this matter under Order 2015-030.

The applicant has agreed to toll the 150-day deadline within which the County has to issue a decision in this matter until March 1, 2016

APPEAL

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

- (a)** The Hearings Officer erred when she concluded Comprehensive Plan Policy 4.8.2 applies to the subject property and requires it to remain undeveloped except for community amenities. H.O. Decision, p. 7, 26.1
- (b)** The Hearings Officer erred when she used the "physically developed" exception process as a basis to conclude the BOCC intended to limit future development at Widgi Creek to all but 14 acres. H.O. Decision, p. 12, 25-26.
- (c)** The Hearings Officer erred when she concluded Comprehensive Plan Policy 4.8.2. was intended to maintain the status quo at Widgi Creek as of 2001. H.O. Decision, p. 23.
- (d)** The Hearings Officer erred when she failed to apply the definition of "Common Area" in the County Comprehensive Plan to the subject property. H.O. Decision, p. 25.
- (e)** The Hearings Officer erred when she concluded there was nothing in Ordinance 2001-046 and -048, the RC Zone or the RC plan policies that "otherwise zoned" the subject property for development. H.O. Decision, p. 26.
- (f)** The Hearings Officer erred when she concluded the proposal to create a subdivision of 8 zero lot line lots and remove the common area notation did not constitute a replat and was not authorized under ORS Chapter 92. H.O. Decision, p. 27, 30.
- (g)** The Hearings Officer erred when she concluded the Conditions of Approval Agreement requires the applicant to permanently maintain the community amenities on the subject property, including the pool, community building, parking areas and landscaping. H.O. Decision, p. 28-30.
- (h)** The Hearings Officer erred when she concluded the configuration of the private road and Lots 6, 7 and 8 would not relate harmoniously with the existing development. H.O. Decision, p. 39.
- (i)** The Hearings Officer erred when she concluded the removal of the pool, building, parking area and landscaping on the subject property and the development of dwellings would not be harmonious with the existing development. H.O. Decision, p. 40.
- (j)** The Hearings Officer erred when she concluded the proposed subdivision and residential development do not contribute to the land use patterns of the area. H.O. Decision, p. 50.
- (k)** The Hearings Officer erred when she concluded the orientation of Lots 6, 7 and 8 is not appropriate for the type of development and use contemplated. H.O. Decision, p. 61.
- (l)** The Hearings Officer erred when she applied the double frontage standards to the zero lot line subdivision and when she concluded the double frontage on Lots 1, 2 and 3 was not essential or appropriate. H.O. Decision, p. 62.
- (m)** The Hearings Officer's decision violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment of the U.S. Constitution by interpreting the County Conditions of Approval agreement in a way that results in a taking of private property for public use by requiring the private property owner to dedicate his property to community use and permanently maintain improvements thereon for the benefit of the community.

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

Attachments

1. Hearing Officer's decision
2. Notice of Intent to Appeal

**IN A MATTER BEFORE
THE DESCHUTES COUNTY BOARD OF COMMISSIONERS**

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

1. DCC 22.32.010 Who May Appeal.

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

2. DCC 22.32.015 Filing Appeals.

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

3. DCC 22.32.020 Notice of Appeal.

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

4. Issues on Appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Request for De Novo Review.

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

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

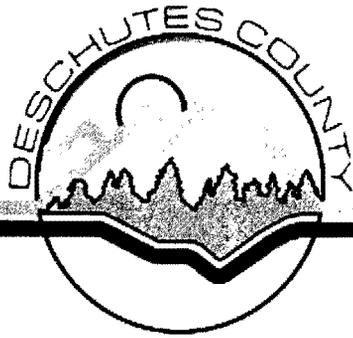
De novo review is required because it is necessary to fully and properly evaluate several significant policy issues relevant to the proposed land use action. Specifically, de novo review is necessary to fully evaluate and correct the Hearings Officer's conclusions regarding the scope, intent and meaning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

DATED this 17th day of April, 2015.

Schwabe, Williamson & Wyatt, P.C.



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



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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NOTICE OF PUBLIC HEARING

The Deschutes County Board of Commissioners will hold a public hearing on January 27, 2016, at 10 AM in the Deschutes County Board of Commissioners Hearing Room at 1300 NW Wall Street, Bend, to take testimony on the following item:

FILE NUMBERS: 247-14-000391-TP, 247-14-000392-SP, 247-14-000393-LM

PROPOSAL: The applicant requests approval of an eight-lot, zero-lot-line subdivision consisting of a partial replat of Elkai Woods Townhomes Phase III, as well as site plan and non-visible LM review for dwellings on the proposed subdivision lots, on property in Widgi Creek zoned RC and LM and located on land developed with a swimming pool, community building, and parking area. (Pool application).

STAFF REVIEWER: Will Groves, Senior Planner

Seven (7) days prior to the public hearing, copies of the proposed documents and attachments will be available for inspection at no cost at the Deschutes County Community Development Department at 117 NW Lafayette Avenue. Copies of the documents and attachments can be purchased at the office for (25) cents a page.

ALL INTERESTED PERSONS MAY APPEAR, BE HEARD, BE REPRESENTED BY COUNSEL, OR SEND WRITTEN SIGNED TESTIMONY. ALL WRITTEN REPLIES MUST BE RECEIVED BY THIS DEPARTMENT PRIOR TO THE HEARING DATE OR SUBMITTED AT THE HEARING. ANY PARTY TO THE APPLICATION IS ENTITLED TO A CONTINUANCE OF THE INITIAL EVIDENTIARY HEARING OR TO HAVE THE RECORD LEFT OPEN IN ACCORDANCE WITH SECTION 22.24.140 OF THE DESCHUTES COUNTY CODE.

Recipients of this notice may request a copy of the Staff Report (25 cents a page). Any person submitting written comment or who presents testimony at the hearing will receive a copy of the decision.

Failure to raise an issue in person at the hearing or in writing precludes appeal by that person to the Land Use Board of Appeals (LUBA). Failure to provide statements of evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to LUBA based on that issue.

Copies of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at the Planning Division at no cost, and can be purchased for 25 cents a page.

STANDARDS AND APPLICABLE CRITERIA:

- A. Title 17 of the Deschutes County Code, the Subdivision/Partition Ordinance**
 - 1. Chapter 17.16, Approval of Subdivision Tentative Plans and Master Development Plans
 - 2. Chapter 17.20, Zero Lot Subdivision
 - 3. Chapter 17.36, Design Standards
 - 4. Chapter 17.44, Park Development
 - 5. Chapter 17.48, Design and Construction Specifications

- B. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance**
 - 1. Chapter 18.04, Title, Purpose and Definitions
 - 2. Chapter 18.08, Basic Provisions
 - 3. Chapter 18.84, Landscape Management Combining Zone
 - 4. Chapter 18.110, Resort Community Zone
 - 5. Chapter 18.116, Supplementary Provisions
 - 6. Chapter 18.124, Site Plan Review.

- C. Title 22 of the Deschutes County Code, the Development Procedures Ordinance**
 - 1. Chapter 22.04, Introduction and Definitions
 - 2. Chapter 22.20, Review of Land Use Action Applications
 - 3. Chapter 22.24, Land Use Action Hearings

- D. Deschutes County Comprehensive Plan**
 - 1. Chapter 4, Urban Growth

- E. Oregon Revised Statutes (OAR) Chapter 92, Subdivisions and Partitions**
 - 1. Replatting
 - * ORS 92.180, Authority to Review Replats
 - * ORS 92.185, Reconfiguration of Lots or Parcels and Public Easements; Vacation; Notice Utility Easements
 - * Section 92.190, Effect of Replat; Operation of Other Statutes; Use of Alternate Procedures

NOTICE TO MORTGAGEE, LIENHOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST PROMPTLY BE FORWARDED TO THE PURCHASER.

Please contact Will Groves at (541) 388-6518 if you have any questions.

Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please call the ADA Coordinator at (541) 617-4747.

Dated this ____ day of _____, 2016 Mailed this ____ day of _____, 2016