



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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MEMORANDUM

DATE: April 15, 2016
TO: Board of County Commissioners
FROM: Will Groves, Senior Planner
RE: Deliberations on two matters:

Kine & Kine Properties appeal of a Hearings Officer's decision. File Nos. 247-14-000395-TP, 247-14000396-SP, and 247-14-000397-LM (247-15-000206-A)

Kine & Kine Properties appeal of a Hearings Officer's decision. File Nos. 247-14-000391-TP, 392-SP, 393-LM, and 207-A.

The Board of County Commissioners (BOCC) has heard appeals filed by Kine & Kine Properties. The appeals were submitted in response to a Deschutes County Hearings Officer's decision that proposed subdivisions do not comply with all applicable regulations. The BOCC agreed to hear these matters under Order 2015-029. De novo public hearings were conducted on January 27 and February 29, 2016. The post-hearing written record periods have ended.

Typically, the Board would proceed to deliberations. In this instance, the Applicant has asked that the Board delay making a decision for 90 days and tolled the decision timeline to provide for this delay. The Applicant is requesting additional opportunity to work with property owners to resolve what issues can be resolved.

Michael McGean, representing several Widgi HOAs, asserts that the Board should proceed towards decisions, as the Applicants' offers to negotiate have not been in good faith, and they have instead used their delays to intimidate and retaliate against the Widgi Creek and Elkai Woods residents who have spoken up against the developments on the first fairway and common lot 18.

Nothing precludes the Board from delaying a decision to accommodate the Applicant's efforts and nothing precludes the Board from proceeding towards a decision in this situation. Timing is wholly at the discretion of the Board.

Staff seeks direction from the Board on whether to schedule deliberations in regular course, or to delay those deliberations in accordance with the Applicant's request. Correspondence from the parties on this issue is attached.

William Groves

From: Lewis, Tia M. <TLewis@SCHWABE.com>
Sent: Monday, March 14, 2016 3:08 PM
To: William Groves
Cc: David Doyle; Michael McGean (michael@francishansen.com)
Subject: Widgi Creek Appeals before the Board

Hi Will:

I have been asked by my clients to request a tolling or a stay of the appeals for a period of 90 days to begin at the close of the post hearing written record next Monday, 3/21/16. The purpose of this request is to allow the applicants an opportunity to work with members of the community towards a negotiated resolution related to the proposed development and future community management and development issues. To be clear, we are not asking that the record remain open or for an extension of the post hearing record set by the Board at its hearing on 2/29/16. We will continue to comply with that post hearing schedule and will submit final argument next Monday with the record closing at that time.

If we are able to successfully resolve some or all of the issues in the appeal during the pendency of the stay, we will ask that the record be reopened and take the appropriate steps to incorporate any resolution into the applications with further opportunity for public comment and participation. If we are unsuccessful, we will ask the Board to proceed with deliberations and decisions on the appeals. Because the 150 day time periods within which the County has to make a decision in the matters were restarted as of the date of the modified applications addressing the design issues, we should not have a timing problem. However, just to be safe, we hereby agree to toll the 150 day time periods within which the County has to issue decisions in these matters for a period of 90 days (3/21/16 + 90 = 6/19/16, which is a Sunday so 6/20/16). Please let me know the County's position on this request as soon as possible. Thanks, Tia.

TIA M. LEWIS | Shareholder
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TIA M. LEWIS

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March 16, 2016

VIA E-MAIL

David Doyle
Deschutes County Legal Counsel
1300 NW Wall Street, Suite 205
Bend, OR 97703

RE: Applications of Kine & Kine Properties
247-14-000391-TP; 247-14-000393-SP; 247-14-000394-LM
247-14-000395-TP; 247-14-000396-SP; 247-14-000397-LM
Our File No.: 126937-194291

Dear Mr. Doyle:

The applicant's requested 90-day continuance of the pending appeals is both authorized and reasonable in the present circumstances. The conduct of land use proceedings is regulated by ORS 197.763, ORS 215.402-.437 and the Deschutes County Procedures Ordinance, Title 22. Under all of those procedural rules, the applicant is allowed to request a continuance, record extension or both consistent with the obligation to provide public input and opportunity to respond to any new evidence and to toll or waive the time period within which the local jurisdiction has to make a decision. ORS 197.763; ORS 215.427; DCC 22.24.140. Likewise, the applicant can modify the application any time prior to the close of the record, which restarts the 150 day time period, and can restart it as many times as there are modifications. DCC 22.20.055 A, B. Except for continuance requests made prior to the date set for the initial hearing (which shall be granted to the applicant), the continuance request is at the discretion of the Hearings Body. DCC 22.24.140. The Board can and should grant the requested continuance because it is authorized by law, will cause no prejudice to opponents' substantive rights and will allow the applicant an opportunity to resolve any issues it can with the community.

Nothing in the state statutory provisions, the County ordinances or elsewhere prohibits the requested continuance. The 150 day deadline cited by opponents in fact allows the applicant to extend it for a specified period of time and only the applicant can seek to extend it. *Leathers Oil Company v. City of Newberg*, 63 Or LUBA 176 (2011) (citing ORS 227.178, which the City equivalent provision of ORS 215.427). In fact, the applicant is free to waive the deadline entirely without divesting the local jurisdiction of decision-making authority over the applications being tolled or waived. *Id.*

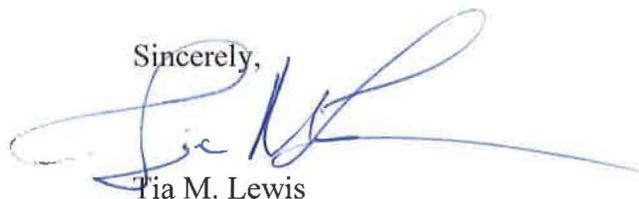
David Doyle
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The County is entirely within its discretion and authority to grant the requested continuance. If the parties can resolve some or all of the issues through additional time for negotiations, the County should allow time for that in the interest of the community and judicial efficiency. The matters are fully briefed, the record will close upon applicant's final argument so the applicant's requested continuance poses no harm to opponent's substantive or procedural rights. If the settlement negotiations are unsuccessful, the County can proceed toward a decision with the record as it exists as of the date of the continuance and tolling of the 150-day deadline. If any resolutions can be reached, the applicant will request the record be reopened in conformance with state and county procedural requirements for evidentiary submissions and public opportunity to respond. DCC 22.24.160; ORS 197.763.

The remaining issues raised in Mr. McGean's letter of March 15, 2016 are outside of the scope of the record in this matter and are improper for consideration by the Board. However for the purpose of legal counsel's knowledge, the lawsuit against the Elkai HOAs is to decide a property ownership question – a matter clearly outside of the County jurisdiction and land use process and squarely within the jurisdiction of the Circuit Court. This lawsuit was necessitated to clear the cloud on title to Common 18, a cloud the HOA opponents have put there by claiming a property interest in a piece of property that their CC&Rs plainly exclude and for which they do not now nor have they ever accepted any financial or ownership responsibility. As for the allegations of bad faith, threats and intimidation, this information has no place in this proceeding and is improperly being used by counsel to influence the Board. Interestingly, the same accusations have been communicated to the applicants by individual homeowners against opponent's counsel and the HOA officers, but the applicants have refrained from submitting it into the land use proceedings.

The Widgi Creek community consists of many individual homeowners, each with their own opinion and interests regarding community development and management. Many of the homeowners, including a few who testified at the hearing, support some development and a negotiated resolution of future development and management issues within the community. The modified applications are a result of community input and design changes made to address homeowner input. The applicant is requesting additional opportunity to work with these property owners to resolve what issues can be resolved. The request creates no prejudice to opponent's rights and conserves County time and resources if some or all issues can be resolved. The applicant has restarted the 150-day clock with the modified applications and agrees to toll it during the pendency of the requested continuance. There is no reason to deny the opportunity to work towards a resolution.

Sincerely,



Tia M. Lewis

TML:ls

cc: Michael McGean (*via e-mail*)





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March 15, 2016



BY HAND DELIVERY

David Doyle
Deschutes County Legal Counsel
1300 NW Wall St., Ste 205
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**Re: Applications of Kine & Kine Properties
247-14-000391-TP; 247-14-000393-SP; 247-14-000394-LM
247-14-000395-TP; 247-14-000396-SP; 247-14-000397-LM**

Dear Mr. Doyle:

On behalf of the three Widgi Creek and Elkai Woods homeowners associations, I am writing to object to the request this week by Ms. Lewis to "toll or stay" her clients' appeal of the hearings officer decision that was just heard by the Board of Commissioners. The applicants' purported reason for the delay is to negotiate. Unfortunately, the applicants' offers to negotiate have not been in good faith, and they have instead used their delays to intimidate and retaliate against the Widgi Creek and Elkai Woods residents who have spoken up against the developments on the first fairway and common lot 18.

The Deschutes County Development Procedures Ordinance does not give the applicant a right to a stay or postponement of the County's decisions. To the contrary, as you know, it gives the County a deadline for the decisions, and limits the total of all extensions to 215 days. DCC 22.20.040. Although the applicant has offered to "toll" even that limit, it would not seem to be in the County's interest to put its own deadline to the test.

The applicants have already delayed their appeal for nearly a full year. They have used that delay to file a lawsuit against the Elkai Woods and Elkai Woods Fractional Homeowners Association in the circuit court. That lawsuit is a thinly-veiled attempt to collaterally attack the County Hearings Officer's decision, and to make the HOAs withdraw their opposition to the land use applications.

During that time, Ms. Lewis' clients have shown no interest in negotiation. It was not until recently that they mentioned anything about wanting to negotiate, and those proposals have been in bad faith. Just before the February 29, 2016 hearing before the Board, Mr. Helm through his golf course manager Brad Hudspeth contacted the HOA board members and other homeowners for an informal meeting to discuss their development proposals. While the homeowners attended in good faith, Mr. Helm and Hudspeth

David Doyle

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unfortunately used the occasion to threaten the homeowners that Kine and Helm's attorneys would be taking depositions of every single Elkai Woods resident, and that hundreds of thousands of dollars would be spent in litigation unless the HOAs agreed to resolve the appeals. It was clear to the HOAs that Mr. Helm and Mr. Hudspeth were using the proposed informal meeting not for good faith negotiation but to intimidate the residents and turn them against each other and their own HOAs.

Since then, Mr. Helm and Mr. Kine have made good on their threats by issuing subpoenas just last week to random Widgi and Elkai residents (including the spouses of board members) for depositions in the Kine/ Helm civil suit against the Elkai HOAs. This gamesmanship and abusive behavior is unfortunately very consistent with the applicants' past tactics. The HOAs expect that Kine and Helm will use their requested delay to further bully the homeowners and try to create more conflict in the Elkai/Widgi communities, or to get some perceived new advantage before the Board.

For these reasons the HOAs have no interest in sitting down with Mr. Kine and Mr. Helm at this point, and strongly object to any further delay. The appeals hearing has already occurred and the parties have all invested their time and resources in that appeal. The HOAs have already submitted their post-hearing rebuttal and argument. It is our view that postponing the appeals now will serve no legitimate purpose. We are therefore hopeful that the Board will deny the requested postponement and proceed with its deliberations and decisions on the appeals to resolve these matters.

Sincerely,



MICHAEL H. McGEAN

cc: Barbara Munster, Widgi Creek HOA
Carl Stromquist, Elkai Woods HOA
Randy Bauman, Elkai Woods Fractional HOA
Tia Lewis