From:	Nicole Mardell
To:	"swisher@bendbroadband.com"; "Maggie Kirby"; "Hugh Palcic"; "jessica kieras"; "Jim Beeger"; "les.hudson@q.com"; "dalecraw@bendnet.com"
Cc:	Peter Gutowsky; Nick Lelack; Adam Smith
Subject:	Additional Information - September 26 PC Meeting
Date:	Tuesday, September 24, 2019 11:26:57 AM
Attachments:	image001.png image002.png image003.png image004.png 247-19-000405-CU 406-TP, 407-SMA_Planned Development Hearings Officer Decision.pdf

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Good morning Planning Commissioners,

I'm reaching out with information related to this Thursday's meeting.

Religious Institution Amendments

- As staff stated in the memo and in correspondence from last week, Asst. Legal Counsel Adam Smith will not be in attendance during this week's meeting. Adam would like to be present during the entirety of deliberations to answer questions and provide staff input.
    - Staff recommends the PC make a motion to reschedule deliberations to October 10, 2019.

Model Flood Amendments (530-TA, 533-PA)

- As staff stated in the memo, and as shown in the public comment summary, there has been a minor amount of public comment specific to the Model Flood amendments received to date.
    - Following additional testimony provided during the continued public hearing, staff recommends the PC close the oral/written records and deliberate on the amendments during the September 26, 2019 meeting.

Split Zone Amendments (531-TA)

- The Split Zone amendments have received various suggestions for edits in the public comments, which are provided in the public comment summary attached to the staff memo.
    - Following additional testimony provided during the continued public hearing, staff recommends the PC close the oral/written records and set a date to deliberate on the amendments for October 10, 2019.

Cluster/PUD Amendments (532-TA)

- This week, a Hearings Officer's decision (attached) was issued for a quasi-judicial application involving a Planned Development for a property containing Flood Plain zoned land. I am providing this decision for you in advance of the meeting so you have time to review, and will place it formally in the record during the meeting on Thursday.
- The application was denied on the basis of two items:
    1. Applicant cannot defer Surface Mining Impact Area review until time of building permit, an application for this type of review needs to be submitted and reviewed as part of the application (pg. 24-25, 33, 150).
    2. Applicant did not provide financing information to assure the proposed development

will be substantially completed within four year of approval. This information needs to be submitted and reviewed as part of the application (pg. 113-114, 151).

- The issue of the use of Flood Plain zoned land as Open Space for Cluster/PUDs was addressed through this decision. The Hearings Officer found Flood Plain zoned land could be used both as open space and in determining the total acreage calculation under today's existing code. This contradicts the 2015 Hearings Officers decision on the matter, but is consistent with nine previous Staff and Hearings Officer's decisions. (pg. 16, 22-24, 39, 150).
- Staff and the Hearings Officer anticipate the decision will be appealed by multiple parties to the Board of County Commissioners and likely on to the Land Use Board of Appeals.
    - As this issue has been reopened for interpretation, the outcome of an appeal could impact the proposed legislative amendments to the Flood Plain zone chapter relating to this item.
    - Staff recommends the PC make a motion to recommend the Cluster/PUD Amendments be tabled by the Board of County Commissioners, until a determinative outcome is made for the quasi-judicial application.

I appreciate your time and efforts in considering these recommendations. Please reach out to me individually with questions.

Best,
Nicole

Nicole Mardell | Associate Planner
DESCHUTES COUNTY COMMUNITY DEVELOPMENT
117 NW Lafayette Avenue | Bend, Oregon 97703
PO Box 6005 | Bend, Oregon 97708
Tel: (541) 317-3157| www.deschutes.org/cd

Disclaimer: Please note that the information in this email is an informal statement made in accordance with DCC 22.20.005 and shall not be deemed to constitute final County action effecting a change in the status of a person's property or conferring any rights, including any reliance rights, on any person.

From:	Nicole Mardell
To:	Tom Anderson
Cc:	William Groves; Peter Gutowsky; Nick Lelack; Adam Smith
Bcc:	Patti Adair; Phil Henderson; Tony DeBone
Subject:	Lower Bridge Decision and 2019 Flood Plain Amendments
Date:	Tuesday, September 24, 2019 12:14:05 PM
Attachments:	image001.png image002.png image003.png image004.png 247-19-000405-CU 406-TP. 407-SMA_Planned Development Hearings Officer Decision.pdf

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Good afternoon Tom (BCC: Board),

This week, a Hearings Officer's decision (attached) was issued for the Lower Bridge Planned Development application. The application was for a 19-lot Planned Development on a property near Terrebonne, and involved land partially zoned Flood Plain.

History

In 2015, a Hearings Officer denied an almost identical proposal on the same property. The denial was based on an interpretation of County Code that the Flood Plain zoned portion of the property could not be used as open space for the Planned Development, and the Flood Plain zoned area could not be used in determining the total acreage of the property and allowable density of lots. The 2015 decision contradicted the County's previous interpretation of the code. In May of 2019, staff initiated a set of text amendments to the Deschutes County Code to correct the interpretation issue within the Flood Plain Zone as it relates to the use of Flood Plain Zoned land for Planned Developments. The amendments are currently being reviewed by the Planning Commission.

Current Hearings Officer Decision

This week, the Hearings Officer denied the Planned Development application on the basis of two items:

1. Applicant cannot defer Surface Mining Impact Area review until time of building permit, an application for this type of review needs to be submitted and reviewed as part of the application (pg. 24-25, 33, 150).
2. Applicant did not provide financing information to assure the proposed development will be substantially completed within four year of approval. This information needs to be submitted and reviewed as part of the application (pg. 113-114, 151).

This 2019 decision further reviewed the interpretation issue relating to Flood Plain zoned land and Clusters/Planned Developments. In this decision, the Hearings Officer found Flood Plain zoned land could be used both as open space and in determining the total acreage calculation and lot density under today's existing code. This goes against the 2015 Hearings Officers decision on the matter, but is consistent with the County's past practice and nine previous Staff and Hearings Officer's decisions. (pg. 16, 22-24, 39, 150).

Code Amendment Impact

Staff and the Hearings Officer anticipate this decision will be appealed by multiple parties to the

Board and likely on to the Land Use Board of Appeals. As this issue has been reopened for interpretation, the outcome of an appeal could impact the proposed legislative amendments to the Flood Plain zone chapter relating to this item, potentially eliminating the need for the changes in the code. With this new information, Staff is recommending the Planning Commission and ultimately the Board consider tabling the Cluster/PUD Code Amendments until a determinative outcome is made for the quasi-judicial Lower Bridge application. The other two amendments to the Flood Plain Zone pertaining to the DLCD Model Flood Ordinance Updates and Division of Flood Plain, Split Zone properties will continue through the legislative process. Staff anticipates the Planning Commission conducting deliberations on those items this Thursday, September 26 and/or on October 10.

Thank you for your time and efforts in considering this matter. If the Board is interested in a further debrief on this matter at a work session, please us know.

Best,
Nicole

Nicole Mardell | Associate Planner
DESCHUTES COUNTY COMMUNITY DEVELOPMENT
117 NW Lafayette Avenue | Bend, Oregon 97703
PO Box 6005 | Bend, Oregon 97708
Tel: (541) 317-3157| www.deschutes.org/cd

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Mailing Date:
Tuesday, September 24, 2019

HEARINGS OFFICER DECISION

FILE NUMBER/S: 247-19-000405-CU, 406-TP. 407-SMA

APPLICANT/ OWNER: Lower Bridge Road, LLC

ATTORNEY: Tia M. Lewis

PROPOSAL: Conditional use and tentative subdivision plan to establish a 19-lot residential planned development on three parcels totaling 144.7 acres, zoned RR-10, FP, LM and SMIA and located between the Deschutes River and Lower Bridge Way west of Terrebonne.

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: 70465 NW 96th Court;
Tax Lot 1502: 70300 NW Lower Bridge Way;
Tax Lot 1505: 10000 NW Lower Bridge Way; and
Tax Lot 1600: 70350 NW Lower Bridge Way

STAFF CONTACT: Will Groves, Senior Planner

I. APPLICABLE CRITERIA

Title 18 of the Deschutes County Code, the County Zoning Ordinance:

- Chapter 18.04, Title, Purpose and Definitions
- Chapter 18.16, Exclusive Farm Use Zones (EFU)
- Chapter 18.52, Surface Mining (SM) Zone
- Chapter 18.56, Surface Mining Impact Area Combining Zone (SMIA)
- Chapter 18.60. Rural Residential Zone (RR-10)
- Chapter 18.84. Landscape Management Combining Zone (LM)
- Chapter 18.96. Flood Plain Zone (FP)
- Chapter 18.116. Supplementary Provisions
- Chapter 18.128, Conditional Uses

Title 17 of the Deschutes County Code:

- Chapter 17.08, Definitions and interpretation of Language
- Chapter 17.12, Administration and Enforcement
- Chapter 17.16, Approval of Subdivision Tentative Plans and Master Development Plans
- Chapter 17.24, Final Plat
- Chapter 17.36, Design Standards

Chapter 17.44, Park Development
Chapter 17.48, Design and Construction Specifications

Title 22, Deschutes County Development Procedures Ordinance

Deschutes County Comprehensive Plan
Chapter 3, Rural Growth Management

Oregon Administrative Rules (OAR)
OAR 660-004 (7)(e), Application of Goal 14 (Urbanization) to Rural Residential Areas

II. BASIC FINDINGS

LOT OF RECORD: The total area of the planned development subdivision request is 144.7 acres (hereinafter the "Subject Property"), which consists partially of two parcels created by a three lot Minor Partition (MP) 80-96 (Applicant's Exhibit 13). The applicant/owner (the "Applicant") proposed to separate the EFU zoned portion of Parcel 2 and the portions of Parcel 3 not shown in the current proposal prior to recording any final plat under this approval. Staff, in the Deschutes County Community Development Staff Report ("Staff Report")(page 2) prepared by Senior Planner William Groves, recommended that the Hearings Officer include a condition of any approval requiring the Applicant to lawfully reconfigure the lots to correspond with the proposed plat boundaries, or otherwise establish the proposed plat boundaries as legal lot(s) prior the recording of any final plat under this approval.

Attorney Elizabeth Dickson ("Dickson"), representing opponents Diane Lozito and the Friends of Lower Bridge, questioned whether or not "the lots [could be] lawfully reconfigured to correspond with the propose plat boundaries" (August 13, 2019 Final Rebuttal)? The Hearings Officer finds that with a condition of approval (See proposed condition E) requiring the EFU parcel be legally separated from the Subject Property (reconfigured) prior to final plat approval the Subject Property will lawfully be a Lot of Record under the Deschutes County Code ("DCC").

SITE DESCRIPTION: The Subject Property is 144.7 acres in size and irregular in shape. The Subject Property has varied topography consisting of a large, relatively level bench/plateau above the Deschutes River, moderate to steep slopes and rocky outcrops leading from the plateau to the river, and areas within and at the bottom of the river canyon. The Subject Property abuts Lower Bridge Way along most of its western border. The Subject 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. Much of the Subject 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 vegetative cover consisting of scattered juniper trees and native shrubs and grasses along the perimeter of the Subject Property and within the upper portions of the river canyon.

The portion of the Subject 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 National Wetlands Inventory ("NWI") "Cline Falls" map. The Subject 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.

REVIEW PERIOD: The subject application(s) were submitted on May 17, 2019 and deemed complete by the Planning Division on June 15, 2018. The Applicant agreed, prior to the issuance of the Staff Report, in writing to a 21-day extension of the 150-day clock. In addition, the Applicant, at the Hearing, requested that the record be kept open for 35 days (14-days for new evidence, 14-days for rebuttal evidence and 7-days for final rebuttal). The 150th day on which the County must take final action on this application is January 7, 2020

PROPOSAL: The Applicant requested conditional use, tentative subdivision plan, and SMIA site plan approval to establish a 19-lot residential planned unit development ("PUD) on the Subject Property. The residential lots would range in size from 2 to 5 acres, would comprise a total of 42.5 acres, and would have access from Lower Bridge Way via private roads. The subdivision would include two common area tracts comprising 0.9 acres, five open space tracts comprising 94.1 acres, 4.4 acres of private road, and 2.8 acres of right-of-way dedication for the abutting segment of Lower Bridge Way. No development is proposed to occur within the Flood Plain Zone of the Deschutes River Canyon area.

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

SURROUNDING LAND USES: Part of the land north of the Subject Property located 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 Surface Mining ("SM") Site 322 which is engaged in farm use consisting of irrigated pasture and hay production. Also located to the north of the Subject Property is land zoned Exclusive Farm Use ("EFU") Lower Bridge ("EFU-LB"). Land to the south and southeast of the Subject Property is zoned EFU-LB and EFU-Terrebonne Subzone ("EFU-TE") and is engaged in irrigated agriculture. Land to the west of the Subject Property is developed with SM Site 461 which is also owned by the Applicant and is pending a rezone from SM to RR-10 subject to compliance with conditions of rezoning the property. Farther west is a mixture of large and small agricultural enterprises. Land to the east and southeast of the Subject Property is land zoned RR-10 and developed with rural residences, some of which are part of the Lower Bridge Estates subdivision consisting of 74 lots that predominantly range in size of 5 to 10-acres, including lots along the Deschutes River. The abutting segment of the Deschutes River is a designated state Scenic Waterway.

LAND USE HISTORY: The Subject Property has been the subject of several previous land use actions/decisions described below.

CU-74-156. This conditional use application contains plan information for a solid and liquid waste disposal site on a larger site containing the Subject Property. According to the staff report associated with the Applicant's prior land use application for a conditional use and subdivision on the property (file numbers 247-15-000194-CU, 247-15-000195-TP), it appears the application was approved because the record indicates solid and liquid waste, including hazardous waste, were 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 associated with the Applicant's prior land use application for a conditional use and subdivision on the property (file numbers 247-15-000194-CU, 247-15-000195-TP) 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 testimony and evidence from the prior application demonstrated 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 Rural Residential Exception Area ("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 Subject Property: the "East Area," the property subject to the proposed PUD, and the "West Area" consisting of SM 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 ZC-08-1/PA-08-1 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. The ZC-08-1/PA-08-1 staff report stated 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. 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 applicant has indicated that completion is of these requirements is nearing.

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

E-14-6, E-15-247, Order No. 2015-027. These decisions granted extensions of the Intent to Rezone decision approved in PA-08-1/ZC-08-01 to Fall of 2019.

247-15-000194-CU, 247-15-000195-TP. In these applications, the Applicant requested conditional use, tentative subdivision plan, and SMIA site plan approval to establish a 19-lot residential planned development on three parcels zoned RR-10, FP, LM, and SMIA, located between the Deschutes River and Lower Bridge Way. The Hearings Officer for the 247-15-000194-CU, 247-15-000195-TP cases issued her decision on September 11, 2015 and denied the application finding that the Applicant's proposal did not satisfy all applicable standards in Title 18 and Title 17. The Hearings Officer included, in her decision, a list of recommended Conditions of Approval should the Board approve the applications on appeal. The Applicant filed an appeal with the Board and a hearing was held. The Applicant later withdrew the application. Since that time, the Applicant indicated that the environmental clean-up process had been completed for the Subject Property (East area) and has received No Further Action ("NFA") letters from both the Department of Environmental Quality ("DEQ") and the Department of Human Services ("DHS") verifying the Subject Property is safe for residential use, including considerations of proximity to the adjacent west side parcel. The Applicant represented that it has also completed enough of the clean-up on the west side parcel to estimate its completion date and receipt of No Further Action letters for that property before the end of 2019. The Applicant filed the present application again to pursue the residential development.

Historical Mining/Environmental Conditions: The 144.7-acre Subject Property (also referred to as the East Area) is adjacent to and a part of a larger property (approximately 556 total acres) which has significant environmental and land use history. The historical environmental documents were submitted by the Applicant in the "Supplemental Binder". The environmental history can be summarized as having a long and inconsistently documented history of diatomite and aggregate mining, most of which occurred prior to any regulatory permitting or reclamation requirements but which left large, exposed areas of diatomite. The Subject Property was also historically used for solid waste disposal and had radioactive and hazardous waste stored on site prior to the early 1980's. There were several clean-up and remediation efforts initiated over the years but without regulatory requirements, a comprehensive reclamation and environmental safety assessment was not completed until recent efforts.

The Applicant represented that it completed the reclamation and environmental clean-up of the East Area through the DEQ Voluntary Clean-Up Program ("VCP") and has received NFA letters from both DEQ and the Oregon Health Authority ("OHA") verifying the site is safe for residential use. The DEQ file, including the Remedial Investigation Report and the Final Clean-Up Report, can be accessed through DEQ's on-line public records portal under file number ECSI #4950.

The Applicant represented that it is continuing the clean-up efforts on the West Area through the DEQ VCP program and expects NFA letters by the end of 2019. The Applicant represented that since 2006 it has spent approximately 11 years and over a million dollars for this voluntary clean-up of the properties with the goal to redevelop the transient surface mining use to residential use.

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice, to several public agencies and received the following comments:

<u>Deschutes County Senior Transportation Planner, Peter Russell</u>

> *[Revised comment, June 27, 2019)] "I have reviewed the transmittal materials for 247-19-000405-CU/406-TP/407-SMA for a 19-lot residential planned unit development (PUD) on three parcels totaling approximately 145 acres in the Rural Residential (RR-10), Flood Plan (FP), and Surface Mine Impact Area (SMIA) Zones at the following addresses and tax lots: 70465 NW 96th Court, aka 14-12-15, Tax Lot 500; 70300 NW Lower Bridge Way, aka 14-12-00, Tax Lot 1502; 10000 NW Lower Bridge Way, aka 14-12-00, Tax Lot 1505; and 70350 NW Lower Bridge Way, aka 14-12-00, Tax Lot 1600.*
>
> *The most recent edition of the Institute of Traffic Engineers (ITE) Trip Generation Handbook, 10th edition, indicates single-family home (Land Use 210), generates 9.44 weekday trips per house and 0.99 p.m. peak hour weekday trips per house. The proposed 19-lot subdivision would generate 179 weekday trips and 19 p.m. peak hour trips. A Site Traffic Report is therefore required under DCC 18.116.310(C)(3)(b). Staff agrees with the submitted traffic analysis and its methodologies, findings, and recommendations. .*
>
> *The applicant in its burden of proof on page 32 indicated the internal roads will be private and thus the applicant does not need to comply with access permit requirements of DCC 17.48.210(A).*

A condition of approval should be added to require an agreement with maintenance responsibilities for the private roads assigned to the abutting land owners or homeowners association to comply with DCC 17.16.105(B) and (C).

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of $4,240 per p.m. peak hour trip. County staff has determined a local trip rate of 0.81 p.m. peak hour trips per single-family dwelling unit; therefore the applicable SDC is $3,434 ($4,240 X 0.81) per home for a total of $65,246 (19 X $3,434). The SDC is due prior to issuance of certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final. If you have any questions, please let me know."

Deschutes County Road Department:

[Revised comment, June 27, 2019)] "I have reviewed the application materials submitted to date for the above-referenced file numbers, proposing a 19-lot planned development of Tax Lot 500 on Assessor's Map 14-12-15 and Tax Lots 1502, 1505, and 1600 on Assessor's Map 14-12. The subject property is bisected by NW Lower Bridge Way and abuts NW Teater Ave along the property's southern boundary. Road Department records indicate that the abutting roads have the following attributes along the frontage of the subject property:

NW Lower Bridge Way

• *Road Status*	*County Road*
• *Surface Type*	*Asphalt Concrete*
• *Surface Width*	*varies 24 ft. to 30 ft.*
• *Functional Classification*	*Rural Collector*
• *Right of Way Width*	*60 ft.*
o *Right of Way Instrument*	*1927 Groszkruger Rd (Lower Bridge) (recorded instrument status unknown); 1909 Lambert Rd (Lower Bridge), Crook County Commissioners Journal Volume 4, page 321*

NW Teater Ave

• *Road Status*	*County Road*
• *Surface Type*	*Asphalt Concrete*
• *Surface Width*	*24 ft.*
• *Functional Classification*	*Rural Local*
• *Right of Way Width*	*60 ft.*
• *Right of Way Instrument*	*Deschutes County Commissioners Journal Volume 50, Page 934*

Along the frontage to the subject property, a portion of NW Lower Bridge Way does not meet the minimum paved width requirement of 28 ft. in DCC 17.48A. Road Department's 5-Year Capital Improvement Plan (CIP) currently shows improvement of NW Lower Bridge Way between 43rd Street and Holmes Road beginning preliminary engineering in County Fiscal Year 2024.

Additionally, portions of the roadway centerline do not appear to coincide with the right of way centerline, and, as noted above, the status of the right of way instrument for a portion of the road along the frontage to the subject property is unknown to Road Department staff. NW Teater Ave does meet the minimum local road improvement requirements in DCC 17.48A.

The applicant has proposed an interior private road system for the proposed subdivision with a private road connection to NW Lower Bridge Way.

In regards to intersection sight distance for the proposed private road connection to NW Lower Bridge Way, the Site Traffic Report submitted as part of the application states that "a posted speed was assumed to be 40 miles per hour on this rural roadway (NW Lower Bridge Way) despite the nearby curve warning signs for 25 mph…" This is an incorrect assumption, as there is no posted speed on NW Lower Bridge Way and the referenced 25 mph curve advisory speed riders, which have recently been replaced with 30 mph riders, are not indicative of an appropriate design speed to be used for determining minimum intersection sight distances. Rather, the statutory designated speed for NW Lower Bridge Way of 55 mph is the appropriate design speed, yielding a minimum design intersection sight distance of 610 ft. for Case B1 and 530 ft. for Case B2 per AASHTO. ***Deschutes County Road Department requests that the Site Traffic Report be revised to reflect the correct design speed and intersection sight distances and to provide appropriate recommendations for providing the required intersection sight distances at the proposed private road connection to Lower Bridge Way.***

Pending the applicant's submittal of an acceptable Site Traffic Report, Deschutes County Road Department requests that approval of the proposed subdivision be subject to the following conditions:

<u>Prior to construction of public and private road improvements:</u>

- *Applicant shall submit road improvement plans for private roads to Road Department for approval prior to commencement of construction pursuant to DCC 17.40.020 and 17.48.060. The roads shall be designed to the minimum standard for a private road pursuant to 17.48.160, 17.48.180, and 17.48A. Road improvement plans shall be prepared in accordance with all applicable sections of DCC 17.48.*
- *Improvement plans shall include provisions for improvements on Lower Bridge Way to provide for the required intersection sight distances according to recommendations given in an acceptable Site Traffic Report.*

<u>Prior to final plat approval by Road Department:</u>

- *Applicant shall complete road improvements according to the approved plans and all applicable sections of DCC 17.48. Improvements shall be constructed under the inspection of a register professional engineer consistent with ORS 92.097 and DCC 17.40.040. Upon completion of road improvements, applicant shall provide letter from the engineer certifying that the improvements were constructed in accordance with the approved plans and all applicable sections of DCC 17.48.*
- *Maintenance of the interior private roads shall be assigned to a home owners association by covenant or plat pursuant to DCC 17.16.040, 17.16.105, 17.48.160(A), and 17.48.180(E).*

If by covenant, applicant shall submit covenant to Road Department or Community Development Department for review and shall record covenant with the County Clerk upon Road Department approval. A copy of the recorded covenant shall be submitted to the Community Development Department prior to final plat approval.

- *All easements of record or existing rights of way shall be noted on the final partition plat pursuant to DCC 17.24.060(E),(F), and (H).*
- *Applicant shall dedicate additional right of way to provide the required right-of-way width of 30 feet from the centerline on each side of the road (60-feet total minimum width) on Lower Bridge Way pursuant to DCC 17.36.020(B), 17.36.080, and 17.48A. Dedication shall be by plat declaration.*
- *The surveyor preparing the plat shall, on behalf of Applicant, submit information showing the location of the existing roads in relationship to the rights of way to Deschutes County Road Department. This information can be submitted on a worksheet and does not necessarily have to be on the final plat. All existing road facilities and new road improvements are to be located within legally established or dedicated rights of way. In no case shall a road improvement be located outside of a dedicated road right of way. If research reveals that inadequate right of way exists or that the existing roadway is outside of the legally established or dedicated right of way, additional right of way will be dedicated as directed by Deschutes County Road Department to meet the applicable requirements of DCC Title 17 or other County road standards. This condition is pursuant to DCC 17.24.060(E),(F), and (G) and 17.24.070(E)(8).*
- *Applicant shall submit as-constructed improvement plans to Road Department pursuant to DCC 17.24.070(E)(1).*
- *Applicant shall submit plat to Road Department for approval pursuant to DCC 17.24.060(R)(2), 100, 110, and 140."*

<u>Oregon Parks and Recreation Department (OPRD):</u>

June 21, 2019

"The property of Lower Bridge Road, LLC, identified as Tax Lot 500 on Deschutes County Assessor's Map 14-12-15, in Terrebonne, sits within a State Scenic Waterway - so the landowner will need to send us a completed Notice of Intent form before any work begins on site. Feel free to pass along the below information to the landowner.

...[web links omitted]

The Notification of Intent form is for the landowner to make written notification to OPRD. Acceptance of this form is dependent upon completion with the required information and attachments including landowner signature, location, activity, map drawing, etc. We ask that all drawings be no larger than 11"x17". Upon acceptance of a complete notification by OPRD, the review process begins. Copies of the notification and all associated materials are provided to affected agencies and interested parties for their review and comment. Upon closure of the comment period, OPRD conducts a site visit to review the proposal. OPRD staff, the property owner or representative, and interested agencies typically attend the site visit. During the site visit, staff will consider whether the proposal meets the scenic waterway requirements, or whether modifications are necessary. After the site visit, OPRD determines whether the project will comply with the scenic waterway regulations. If the proposal is in compliance, OPRD will issue a written

approval for the project. OPRD works to finalize reviews within four to six weeks of accepting a complete notification."

July 16, 2019 supplementary submission (only portion of submission quoted below):

- *The proposed development is incompatible with the existing 'Scenic River Area' category, and as such a 19-lot riverfront housing development might not be granted approval by the Oregon State Parks and Recreation commission. Such development is not in line with the existing agricultural and low-density development, and would require signification [sic] vegetation and rim rock setbacks to ensure that the structures do not obstruct the river's view.*
    - *The proposed subdivision lies within an area categorized as 'Scenic River Area' which is defined in the Middle Deschutes Management Plant [sic] as 'Areas [that] may be accessible by roads, but <u>are largely undeveloped and primitive except for agriculture and grazing</u>. River segments considered 'Scenic' are managed to maintain or enhance their high scenic quality, recreation value, fishery and wildlife habitat. <u>The intent is to preserve their largely undeveloped character while allowing continued agricultural land use</u>.'*
- *Since the lots are designed to maximize the housing density on the upper plateau overlooking the river, from the river's edge it would appear that this section of the river is a high density housing development. . The proposed density and clustering along the river would deplete the river corridor's 'relatively pristine condition', therefore undermining the values of the Scenic Waterway designation was established to protect.*
- *Establishing a requirement that any part of any building constructed must be no closer than 50 feet from the rimrock could be a way to avoid visually impacting the Middle Deschutes Scenic Waterway and would help ensure that the development aligns with the goals of the State Scenic Waterway program.*
- *Although this is not in the purview of the OPRD nor the State Scenic Waterway Program, I think it warrants noting that because the 'Riparian Area Management Plan' (RAMP) was completed during the winter season (December 14, 2018), the natural resource values identified are unlikely to accurately represent the abundance of wildlife and flora present along the riparian area. Because of the riparian was surveyed during dormancy, it is not an adequate baseline to measure the existing condition or set standards to preserve the integrity and biodiversity of the riparian ecosystem at this stretch of the Middle Deschutes Scenic Waterway..."*

<u>Deschutes County Historical Planner:</u>

"The NOPH that you sent me identifies as a proposed 19-lot residential planned development on properties identified as Tax Lot 500 on Assessor's Map 14-12-15, and Tax Lots 1502, 1505, and 1600 on Assessor's Map 14-12 (index). My understanding of your request for comment pertains to Goal 5 historic resources. As presented, the specified subject properties do not contain a Goal 5 historic resource. However, a Goal 5 historic resource is located at 70420 NW Lower Bridge Way (Assessor's Map 14-12-00, Tax Lot 1501): the Lynch and Roberts Store Advertisement. This property appears to be owned by the same entity that has proposed the aforementioned subdivision and

is adjacent to the subject properties. If any development or moving of earthen material occurs on tax lot 1501, the property owners should communicate with County staff to determine if a land use approval is required based on the potential impacts to the identified historic resource. The Lynch and Roberts Store Advertisement is painted on soft volcanic ash and is the only local example remaining of early advertising placed on natural material."

Department of State Lands:

(partial comments from June 4, 2019 email) "Riparian areas above ordinary high water elevation and non-wetland are not within our jurisdiction, however, healthy naturally vegetated riparian areas are important for water quality and habitat, so we sometimes comment from that standpoint.
It is always a good idea to provide a wetland land use notice anytime a proposed project is near a water or wetland for several reasons. 1. – to get this out of the way, it is required. 2. Part of our process is to search our database for related files. This can reveal if the area is a compensatory mitigation area, for example, or other information that is not easily found via other sources. 3. It is an educational opportunity to let the applicant know about regulatory programs that may apply on their property, even if for the particular project it is not applicable. 4. In the WLUN form you can ask specific questions that you may have about the project and we will do our best to respond."

Oregon Department of Fish and Wildlife (July 12, 2019):

"ODFW has the following concerns:

- *The project as proposed will negatively affect mule deer winter range and does not meet mitigation criteria.*
- *The project as proposed with negatively affect habitat in the narrow riparian corridor despite the Riparian Area Management Plan.*
- *The project as proposed will negatively affect potential nesting habitat for Golden Eagles and other sensitive species.*

Justification of Concerns:

The property is located within biological mule deer winter range [foot note omitted]. Under the mitigation policy, it is the policy of ODFW to recommend mitigation for unavoidable impacts to wildlife habitat. The mitigation goal, if impacts are unavoidable, is no net loss of either habitat quantity or quality and to provide a net benefit of habitat quantity or quality through reliable in-kind and in-proximity mitigation. As proposed, this application does not meet these criteria.

The riparian habitat of the Deschutes River in the project area is a 'Strategy Habitat' in the Oregon Conservation Strategy [footnote omitted]. It is also a category 2 habitat, and subject to the same mitigation standards as above. Despite the proposed Riparian Area Management Plan, increased use and trail creation associated with the development will have a negative effect on the habitat values provided by the narrow riparian zone.

Cliffs, rimrock, rock outcrops and talus are category habitats, and identified as 'Specialized and Local Habitats' per Oregon Conservation Strategy 4 [footnote omitted]. These habitats are essential for

raptor nesting (golden eagles in particular) and bat roosting. All 19 lots in the proposed CUP application contain rimrock habitat and ODFW is concerned about the individual and cumulative impacts as a result of development actions disturbing these sensitive habitats. Continued development and disturbance along the Deschutes River canyon rim has a compounding impact on suitable available impact.

According to DCC 18.128.210 A(7), environmental impacts resulting from a Planned Development must be considered. In the applicant's 2019 Burden of Proof, they state that 'environmental impact from the development of the proposed PUD will likely involve the removal of some vegetation for structures and the new road.' The environmental impact of this and other planned developments go far beyond the removal of vegetation. Increased land division, development, and human presence have permanent environmental impacts and cumulatively lead to loss of wildlife habitat, migration corridors, and reduced wildlife populations.

Recommendations:

ODFW recommends that the County ensure there is a sufficient compensatory mitigation plan to address all three of the Category 2 habitats outline above prior to approving the application. ODFW urges the county to implement stringent setback standards for any future development of the property.

If this development is approved, ODFW recommends CC&R's that ban the feeding of wildlife, and require wildlife friendly fencing in accordance with DCC 18.88.070 throughout the development. Due to the change in land use, ODFW will not respond to any wildlife damage complaints within this development."

United States Fish and Wildlife Service:

(Excerpted in relevant part) "I'll let you know if Peter Lickwar from our office has any particular comments about the wells. Although not our wheelhouse or within a federal nexus, the RAMP looks good. I was happy to see ongoing coordination with Oregon Department of Fish and Wildlife, and leash regulations written into the plan."

Redmond area Parks and Recreation District:

(July 15, 2019 email) "Redmond Area Park and Recreation District owns Borden Beck Wildlife Preserve, a 26 acre wildlife preserve on the Lower Bridge Road. Our property is directly across the Deschutes River from the proposed planned development of 19 residential lots. Borden Beck Wildlife Preserve is a sensitive nesting habitat for a variety of bird species. Additionally, the cliffs adjacent to the Deschutes River (on the property that is proposed for development) is a nesting habitat for birds, including golden eagles, and a migratory path for deer.

RAPRD is concerned that this development could negatively impact these wildlife habitats. We request that the County implements the setback requirements that are defined in the County's Comprehensive Plan to minimize the impact to the nearby habitat."

Redmond Fire and Rescue:

"If there are questions regarding Fire Code issues, please contact the Redmond Fire and Rescue Deputy Fire Marshal at 541-504-5016 or email at clara.butler@redmondfireandrescue.org.

Findings: Plans not to scale- unable to provide accurate comments, water and access requirements must be met.

WATER:

- ***Fire Safety during Construction – 2014 OFC 501.4***

o *Approved fire department access roads, required water supply, fire hydrants, and safety precautions shall be installed and serviceable prior to and during the time of construction.*

Area without Fire Hydrants:

- ***NFPA 1142 Requirements***

o *If the structure is being built in an area without a public water supply system, then the water flow requirements will come from NFPA 1142.*

o ***Note****: The following information will need to be provided in order to determine accurate water flow requirements.*

- *Building height, length and width*
- *Use of the building*
- *Type of construction*
- *Whether the structure 100 sq ft or larger and within 50 feet of any other structures*

- ***Structures with Automatic Sprinkler systems – 2012 NFPA 1142 Chapter 7***

o *The authority having jurisdiction shall be permitted to waive the water supply required by this standard when a structure is protected by an automatic sprinkler system that fully meets the requirements of NFPA 13 or NFPA 13D*

ACCESS:

- ***Premises Identification – 2014 OFC 505.1***

o *Approved numbers or addresses shall be placed on all new and existing buildings in such a position as to be plainly visible and legible from the street fronting the property. Said numbers shall contrast with their background and visible at night. Number/letter shall be a minimum of 4" high and a .5 "stroke width.*

o ***Note****: The* ***street names*** *shall follow the City of Redmond or Deschutes County grid names and numbers.*

o ***Note****: Green address signs for addresses in the county are available for $10.00 from Redmond Fire & Rescue. Please call 541-504-5000 to have one ordered and posted.*

- ***Required Access – 2014 OFC 504.1***

- *Exterior doors and openings shall be made readily accessible for emergency access by the fire department. An approved access walkway leading from fire apparatus access roads to exterior openings shall be provided.*

- ***Fire Apparatus Access Roads – 2014 OFC Section 503 & Appendix D***
  - *Fire apparatus access **roads shall extend to within 150 ft of all portions of the building** as measured by an approved route around the exterior of the building.*
  - *Fire apparatus access roads shall have an unobstructed width of **not less than 20 feet** and an unobstructed vertical clearance of not less than 13 feet 6 inches.*
  - *Fire apparatus roads shall be designed and maintained to support the imposed loads of **70,000 lbs** and shall be surfaced so as to provide **all-weather driving** capabilities.*
  - *The required **turning radius** of a fire apparatus access road shall be 30 feet inside and 50 feet outside.*
  - *The **grade** of the fire apparatus access roads shall be within the limits established by the fire code official (10%).*

- ***Fire Lanes – 2014 OFC 503.3 & Appendix D***
  - *Approved signs or other approved notices shall be provided for fire apparatus access roads to identify such roads or prohibit the obstruction thereof. Such signs or notices shall be kept in legible conditions at all times. The stroke shall be 1 inch with letters 6 inches high and read **"No Parking Fire Lane"**. Spacing for signage shall be every 50 feet.*
  - *Recommended to also (in addition to Fire lane signs) paint fire lane curbs in bright red paint with white letters.*
  - ***Appendix D Section 103.6.1 Roads 20-26 Ft. Wide:** Shall have Fire Lane signs posted on both sides of a fire lane.*
  - ***Appendix D Section 103.6.2 Roads more than 26 Ft. Wide:** Roads 26-32 ft wide shall have a Fire Lane signs posted on one side of the road as a fire lane.*

- ***Aerial Access Roads – 2014 OFC Appendix D, Section D105***
  - *Buildings or portions of buildings or facilities exceeding 30 feet in height above the lowest level of fire department vehicle access shall be provided with approved fire apparatus access roads and capable of accommodating fire department aerial apparatus. Overhead utility and power lines shall not be located within the aerial fire apparatus access roadways.*
  - *Access roads shall have a minimum unobstructed width of 26 feet in the immediate vicinity of any building or portion of a building more than 30 feet in height.*
  - *At least one of the required access routes meeting above requirement shall be located within a minimum of 15 feet and a maximum of 30 feet from the building and shall be positioned parallel to one entire side of the building.*

- ***Dead-Ends – 2014 OFC 503.2.5***
  - *Dead-end fire apparatus access roads in excess of 150 feet in length shall be provided with an approved area for turning around fire apparatus. Contact Redmond Fire & Rescue for requirements.*
- *D 103.4 Table: Length of Dead end: greater than 500 ft shall meet the turnaround requirements and the width of the road shall be a minimum of 26 ft clear for fire apparatus.*

See requirements below.

- ***Additional Access – 2014 OFC 503.1.2***

o *The fire code official is authorized to require more than one fire apparatus access road based on the potential for impairment of a single road by vehicle congestion, conditions or terrain, climatic conditions or other factors that could limit access.*

- ***Emergency Access Road Gates – 2014 OFC Appendix D 103.5***

o *Minimum 20 feet wide.*
o *Gates shall be swinging or sliding type.*
o *Shall be able to be manually operated by one person.*
o *Electric gates shall be equipped with a means of opening by emergency personnel & approved by fire official.*
o *Locking devices shall be fire department padlocks purchased from A-1 Lock, Safe Co., Curtis Safe and Lock, on line at www.knoxbox.com, or contact Redmond Fire & Rescue for an order form.*
o *Section 503.3: Install a sign on the gate "Emergency Access"*

- ***Key Boxes – 2014 OFC 506.1***

o *An approved key box shall be installed on all structures equipped with a fire alarm system and /or sprinkler system. Approved key boxes can only be purchased at A-1 Lock Safe Co., Curtis Safe and Lock, on line at www.knoxbox.com, or contact Redmond Fire & Rescue for an order form."*

[Turnaround figure omitted]

The following agencies did not respond to the notice: Bureau of Land Management, Department of Geology and Mineral Industries, Department of Environmental Quality, Deschutes County Assessor, Deschutes County Building Division, Deschutes County Environmental Health, Deschutes county Environmental Soils Division, Deschutes County Property Management, Deschutes County Surveyor, Oregon Health Authority, Redmond School District, Upper Deschutes Watershed Council, and Watermaster.

PUBLIC COMMENTS: The Planning Division mailed notice of the conditional use application to all property owners within 750 feet of the subject property. The Applicant also complied with the posted notice requirements of Section 22.23.030(B) of Title 22. The Applicant submitted a Land Use Action Sign Affidavit indicating the applicant posted notice of the land use. Public comments were received and are included in the record.

Numerous comments were received from the public. The Hearings Officer reviewed the entire public record including Hearing testimony and emails/letters/documents submitted by persons/entities interested in this case. Many of those comments, where relevant to approval criteria, are referenced below.

III. FINDINGS & CONCLUSIONS

Preliminary Finding #1:

Issues: Is Open Space associated with a Planned Development Subdivision (1) Permitted Outright (DCC 18.96.030) and/or (2) as a Conditional Use (DCC 18.96.040)?

These issues were vigorously disputed by the Applicant and those representing opponents of the current application. The dispute appears to this Hearings Officer to have arisen from the September 11, 2015 Hearings Officer decision rendered in case No. 247-15-000194-TP (hereafter referred to as the "2015 Land Use Decision"). The application dealt with in the 2015 Land Use Decision is essentially the same property involved in the current case and the relevant sections of the DCC are also essentially the same. The primary difference between the application involved in the 2015 Land Use Decision and this case is that a parcel of land designated EFU was included in the 2015 case but not included in the current one.

Staff, in the Staff Report for this case, included all of the 2015 Land Use Decision Hearings Officer's findings related to DCC 18.96.030 and DCC 18.96.040. The Hearings Officer in this case believes that the 2015 Land Use Decision material is very important in putting the current Hearings Officer's decision in context. The Hearings Officer has, similar to the Staff Report, included all of the relevant DCC 18.96.030 and DCC 18.96.040 2015 Lane Use findings below (These findings are found on pages 14 through 16 of the 2015 Land Use Decision). The 2015 quoted material begins below and ends on page 19 of this decision.

[*start of material quoted from 2015 Land Use Decision*]

"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

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, 2017. 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-zone 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, treats 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 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-along 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*** and, 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 of 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 are also significant

differences. 'Cluster development' is limited to residential uses, can have no more than 20 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 (footnote 8 omitted from this quote). The Hearings Officer finds the text and context of the provisions of 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 plan 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."

[Hearings Officer Note: *End of 2015 Land Use Decision quoted material*]

Applicant disagreed with the above-quoted sections of the 2015 Land Use Decision. Representative of Applicant's arguments are the following statements (Applicant August 20, 2019 Final Argument, page 3).

"In fact, the <u>only</u> County decision ever interpreting the current Flood Plain code to prohibit the use of Flood Plain zone land for open space associated with a planned or cluster development is the 2015 Hearings Officer decision related to the subject property. And even then, the Hearings Officer expressly acknowledged the interpretation advanced by the Applicant is plausible and could have been the intent of the drafters of the present code. Exhibit 12, pg. 16. That Hearings Officer did not have the benefit of the 9 prior decisions (one of which was her own) allowing Flood Plain zone acreage as open space nor the subsequent Flood Plain amendment process where the Board interpretation and policy decisions were clear. It is undisputed the present Hearings Officer is not bound by the decision of the prior Hearings Officer." [Emphasis in the original]

Opponents offered support of the 2015 Land Use Decision as it related to the above-quoted findings.[1] For example, the following is taken from the Ramis August 13, 2019 Letter:

"In 2015, when faced with this issue directly, the Hearings Officer provided extensive code analysis as to why flood plain zoned lands could not be used as open space within a cluster development or planned unit development and why those areas, even if used as open space, could not be used to

[1] Timothy Ramis July 16, 2019 and August 13, 2019 letters, Central Oregon Landwatch July 16, 2019 letter,

calculate the ultimate density for the development. The 2015 Hearings Officer, in reviewing the prior iteration of the Applicant's proposal, expressly found that 'the approximately 30 acres of FP-zoned land…cannot be included in the density calculation,' because the planned unit development is not a use permitted outright or conditionally in the FP zone [footnote omitted] Not a single one of the other Hearings Officer or staff decisions have any express statements to the contrary, let alone directly related to including flood plain zoned areas within the cluster or planned unit development density calculation. The 2015 Hearings Officer's decision is the prevailing and controlling interpretation on this issue. Reeder v. Clackamas Cnty., 20 Or LUBA 238, 244 (1990) (finding that consistency with prior decisions is not relevant if prior decisions applied incorrect interpretations; Okeson v. Union Cnty., 10 Or LUB 1, 3, 5 (1983) (finding that there is no requirement that local government decisions be consistent with past incorrect decisions). The Hearings Officer in this case should follow this prevailing interpretation.

The Applicant has also submitted additional evidence of the abandoned 2018 legislative effort (which resulted in an amendment to the flood plain regulations permitting use of those lands as open space in cluster and PUDs) and as yet uncompleted 2019 legislative effort to support its position. The 2018 amendment has been withdrawn and is therefore, entirely inapplicable to this case. The very fact that the County is using the legislative process to amend its flood plain regulations is an indicator that a legislative change is required before the County can interpret the flood plain regulations any differently than in 2015."

The Hearings Officer finds that Applicant did provide a number of "prior" County land use decisions in the record in support of its arguments related to the above-quoted sections of the 2015 Land Use Decision (See Applicant Supplement A). The Hearings Officer agrees with the above-quoted Ramis Letter comments that none of the Applicant provided "prior" land use decisions directly addressed the Flood Plain issues facing the Hearings Officer in the 2015 Land Use Decision. The Hearings Officer did not rely upon any legal analysis or interpretation set forth in the earlier land use decisions as precedent for the decision in this case.

The Hearing Officer agrees with the Ramis Letter statement that the Hearings Officer cannot rely upon the County proposed, but withdrawn, legislative modification to the Deschutes County Flood Plain Zone text. The Hearings Officer also agrees with the Ramis Letter statement that the Hearings Officer cannot rely upon a current, but yet to be finalized, legislative modification to the Deschutes County Flood Plain Zone text. The Hearings Officer notes that both Lewis (Applicant representative) and Ramis (on behalf of an opponent) suggested that it may be possible for the Hearings Officer to draw legislative intent inferences for the current code from the now withdrawn and currently proposed legislative modification to the Deschutes County Flood Plain Zone.[2] The Hearings Officer finds that it would be inappropriate for a Hearings Officer to infer legislative intent from either the withdrawn proposed ordinance or the currently in process legislative amendment to the text of the Deschutes County Flood Plain Zone.

[2] Lewis argued that the process of proposing a legislative amendment to the Flood Plain Zone infers the Board's intent to interpret the Flood Plain code as adopted by Applicant and Ramis argued the proposed legislative amendment shows that the Flood Plain ordinance cannot be interpreted as requested by Applicant.

The Hearings Officer appreciates the LUBA cases cited in the Ramis Letter. The Hearings Officer agrees with the Ramis Letter that the 2015 Land Use Decision is the "prevailing interpretation" of the Flood Plain/Open Space issue. The Hearings Officer also agrees with the argument in the Ramis Letter that the Hearings Officer in this case is not bound by prior Deschutes County land use decisions if those decision were based upon "incorrect interpretations." The Hearings Officer finds that a "fresh" review, based upon the relevant law and evidence in the record, is appropriate and necessary to determine if the "prevailing interpretation" is "correct" or "incorrect."

The Hearings Officer finds that relevant sections of the DCC, as referenced in the 2015 Land Use Decision, remain unchanged as of the date of this decision. The Hearings Officer shall conduct a de novo review of the Flood Plain sections of the DCC.

Application of the DCC Flood Plain Zone.

The Hearings Officer finds that DCC 18.96 does apply to the Subject Property. The Hearings Officer finds DCC 18.96 is directed to the portion of the Subject Property designated as Flood Plain.

Section 18.96.030, Uses Permitted Outright.

The Hearings Officer finds that the 2015 Land Use Decision (pages 14-15) determined that DCC 18.96.030 C lists "Open Space" as a use permitted outright in the Flood Plain Zone. The 2015 Land Use Decision then cited the DCC 18.04.030 definition of Open Space. The 2015 Land Use Decision then proceeded to analyze the Applicant's proposed CC&Rs and concluded that Tracts C and E, which includes the Flood Plain designated property, contained provisions to protect and restrict development within those Tracts. The Hearings Officer finds that this portion of the 2015 Land Use Decision analysis is reasonable.

The 2015 Land Use Decision then concludes its analysis of DCC 18.96.030 by stating:

> *"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 application'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."*

The 2015 Land Use Decision fails to provide any legal support or analysis as to how it reached this conclusion. While the Open Space proposed in this application is certainly integral to the PUD proposal the 2015 Land Use Decision does not describe how being "integral" or "dependent" is a legal concept relevant to DCC 18.96.

DCC 18.96.030 lists the uses permitted outright in the Flood Plain zone. One of those uses is "Open Space" (DCC 18.96.030 C.) DCC 18.04.030 defines Open Space. 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 course, 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 Hearings Officer believes that the 2015 Land Use Decision Hearings Officer tacitly acknowledged that Tracts C and E would adequately address the definition of Open Space. Specifically, the Hearings Officer in this case finds that Tracts C and E would meet the definition of Open Space because the Tracts would be "preserved and continued in its [their] present use" and would conserve and enhance natural resources, would protect streams, promote conservation of wetlands and enhance recreation opportunities.

The Hearings Officer finds ORS 174.010, while not a section of the DCC and not a mandatory land use approval criterion in this case, provides a useful perspective when reviewing the 2015 Land Use Decision findings for DCC 18.96.030. ORS 174.010 gives an Oregon statewide perspective on the interpretation of statutes and code sections. ORS 174.010 states:

> *"In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible to be adopted as will give effect to all."*

The Hearings Officer found no reference in DCC 18.96.030 to "stand-alone" uses or to "dependent" uses. The Hearings Officer, based upon the text of the 2015 Land Use Decision findings for DCC 18.96.030, finds no legal analysis, case citations or DCC code references that would require a person reading DCC 18.96.030 to include the concepts of "stand alone" or "dependent" uses when determining if a proposed use is "Open Space."

As a practical matter the Hearings Officer cannot recall a "stand-alone" Open Space use beyond that of an application for a park, trail or nature/wildlife preserve. What is very common, however, are applications for subdivisions, schools, public building and the like which "include" Open Space tracts for the purpose of protecting the Open Space land from development. If the Board intended to require the a "stand alone" or "dependent" analysis as proffered by the 2015 Land Use decision for DCC 18.96.030 then it could have easily included such language. It did not and the Hearings Officer finds it inappropriate to do so.

The Hearings Officer finds the 2015 Land Use Decision conclusion, as set forth in the findings for DCD 18.96.030 is "incorrect." Based upon the cited *Reeder* and *Okeson* LUBA cases the Hearings Officer finds the 2015 Land Use Decision findings for DCC 18.96.030 are not "controlling." The Hearings Officer finds that the plain language of DCC 18.96.030 and DCC 18.04.030 means that the proposed Tracts C and E are Open Space and therefore constitute a use permitted outright in the Flood Plain Zone.

Section 18.96.040, Conditional Uses Permitted.

The 2015 Land Use Decision findings for DCC 18.96.040 made specific reference to DCC 18.96.040 H. which states that:

> *"the following 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."*

The 2015 Land Use Decision followed up the above-quoted material by stating that:

> *"Neither 'cluster development' nor 'planned development" is a use permitted outright or conditionally in the FP Zone. [footnote omitted]*
> ***
> *Title 18 permits three types of land divisions relevant here: (1) subdivision; (2) 'cluster development;' and (3) 'planned development.'"*

The Hearings Officer, in this case, finds that 18.96.040 H does not include the phrase "land divisions." As noted in the findings for DCC 18.96.030 above, the role of a Hearings Officer is not to insert words that are not included in the DCC. The Hearings Officer finds the 2015 Land Decision reference to "land divisions" is irrelevant to the interpretation of DCC 18.96.040.

Relevant to the findings for this approval criterion are the words actually used in DCC 18.96.040: "subdividing or partitioning of land." The following DCC definitions are important for the proper interpretation of DCC 18.96.040:

> "**subdivide** land means to divide land into four or more lots within a calendar year." [DCC 18.04.030]; and
>
> "**subdivision** means either an act of subdividing land or an area or a tract of land subdivided." [DCC 18.04.030]; and
>
> **"lot"** means a unit of land created by a subdivision of land." [DCC 18.04.030]; and
>
> **"land development"** means the subdividing or partitioning of land for any purpose into parcels or the creation of units or parcels..." (partial definition) [DCC 17.08.030].

The Hearings Officer finds that the application in this case is a subdivision because it proposes to divide land into more than four lots (units of land) within a calendar year. The Hearings Officer finds that the proposed subdivision includes land which is located within a flood plain. The Hearings Officer finds that the application in this case is subject to the provisions of DCC Title 18 and DCC Title 17.

The Hearings Officer disagrees with the 2015 Land Use Decision comment that "I find the plain language of the FP Zone does not allow such a development" referring to a "cluster" and/or a "planned" development. The Hearings Officer, in this case, believes the language used in DCC 18.96.040 is clear, plain and unambiguous. The 2015 Land Use Decision findings for DCC 18.96.040 characterizes "cluster developments" and "planned developments "as something separate and distinct from the act of subdividing. This Hearings Officer, in this case, finds that "cluster developments" and "planned developments" are subdivisions that are "subject to the provisions of DCC Title 18 and DCC Title 17." The Hearing Officer finds the application in this case meets the requirements of DCC 18.96.040, Conditional Uses Permitted.

Preliminary Finding #2:

Issue: Did Applicant request SMIA site plan review for the PUD/tentative plan being considered in this case or did Applicant "defer" SMIA Site Plan Review to a later time (building permit applications for each dwelling unit)?

Applicant, on or about May 14, 2019, submitted a *Land Use Application* form (the "Application"). The Application section titled *Type of Application* shows that the Applicant requested approval of a Conditional Use, Subdivision and Other: Subdivision SMIA Review. The Application, in section 1. Request, states "Conditional Use Permit, Tentative Subdivision Plan & SMIA Site Plan for a Planned Development. Applicant, in the Introduction section of its Burden of Proof (page iii), requested approval of a "19-lot subdivision, conditional use approval for a Planned Unit Development "that will cluster the residential lots in the RR-10 zone and approval of a riparian area management plan."

The Notice of Public Hearing (mailing date June 11, 2019) indicated Applicant was requesting approval of a "conditional use, tentative subdivision plan, and SMIA site plan approval…." The Staff Report issued in this case also indicated that Applicant was requesting approval of a "conditional use, tentative subdivision plan, and SMIA site plan approval…."

The Staff Report (page 18), in comments related to approval criterion for DCC 18.56.100, stated that

> *"the applicant submitted a county land use application form and fee for SMIA site plan review. The materials included in the SMIA application…"*

Applicant, in its Burden of Proof (page 26), stated the following with respect to DCC 18.56.080:

> *"the applicant is not proposing any dwellings in conjunction with the PUD. If approved, the applicant agrees to obtain SMIA site plan review for each dwelling in the SMIA zone as applicable, prior to construction to ensure compliance with this combining zone."*

Applicant, in its Burden of Proof (page 26), also stated the following with respect to DCC 18.56.090:

> *"No dwellings are proposed in conjunction with the PUD. The applicant agrees to a condition of approval to obtain SMIA site plan approval for each dwelling prior to construction to ensure compliance with DCC 18.56.100."*

Applicant, in its Final Argument (August 20, 2019 – page 11), stated that

> *"any application for SMIA review for development of noise/dust sensitive uses would be premature at this subdivision stage where no development is proposed."*

The 2015 Land Use Decision Hearings Officer stated (page 26) stated that SMIA review, per DCC 18.56 B, required that site plan review and approval was required to be undertaken as part of the PUD application process.[3]

The Hearings Officer reviewed all Applicant submissions and found no document, or even a section of a document, referencing, "SMIA Site Plan Review" or "DCC 18.56.100 Site Plan Review." Rather, the Hearings Officer notes that Applicant's Hearing testimony, Power Point presentation, Burden of Proof and all open-record submissions all request that the Hearings Officer "defer" SMIA Site Plan review until dwellings are proposed at the Subject Property.

The detailed findings for all relevant sections of DCC 18.56 are based upon the Hearings Officer's conclusion that Applicant did **NOT** clearly and definitively submit and support a request for a SMIA Site Plan review; rather, Applicant requested the Hearings Officer defer SMIA Plan review until the building permit stage.

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.16, Exclusive Farm Use Zones (EFU)

FINDING: As previously discussed, Parcel 2 of MP-80-96 is split zoned RR-10 and EFU. The 10.4-acre area zoned EFU is located between the southern boundary of the proposed development and Teater Avenue. This area is part of Parcel 2 of MP 80-96 and Tax Lot 1505. The Applicant did not propose to divide or develop the EFU zoned property as a part of the present request, and has not included it in the acreage calculations for the subdivision. As recommended by the Hearings Officer in the 2015 Land Use Decision, the Applicant currently proposes to combine the EFU-zoned area with the adjacent West Area parcel or another legal lot of record prior to final plat approval via a lot line adjustment process. In footnotes 5 and 7 of the 2015 Land Use Decision, the Hearings Officer

[3] Please refer to the Hearings Officer findings, in this case, for DCC 18.56 B. In those findings the Hearings Officer in this case agreed with 2015 Land Use Decision Hearings Officer's conclusion that SMIA site plan review is required at the tentative plan/PUD approval stage but disagreed with the 2015 Land Use Decision Hearings Officer's statement that "*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.*"

found that as long as the EFU-zoned portion is not divided, the EFU Zone land division standards in Section 18.16.055 are not applicable. The Hearings Officer, in this case, agrees with the 2015 Land Use Decision findings related to the EFU area. The Hearings Officer finds that with a condition of approval, requiring the lawful segregation/reconfiguration of the EFU zoned area from the Subject Property prior to the final plat, this approval criterion is not relevant.

Chapter 18.52, Surface Mining Zone (SM)

FINDING: No part of the Subject Property that is proposed for the PUD is zoned SM. Therefore, the provisions of this chapter are not applicable. For the portion of Parcel 3 that is zoned SM but located outside of the project area, the 2015 Land Use Decision Hearings Officer suggested treating it similarly to the EFU zoned land located outside of the subdivision area by combining it with the adjacent west parcel via a lot line adjustment prior to final plat approval. The Applicant indicated that it agreed to the imposition of a condition establishing the remainder of Parcel 3 as a legal lot or parcel through a lot line or other land use process prior to final plat approval.

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

> 18.56.020, Location.
> ***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.***

FINDING: The Subject Property is located within one-half mile of the boundaries of Surface Mines ("SM") 461 and SM 322 (See Applicant's Exhibit 17, page 1 of 1). SM 461 is owned by the Applicant, and Applicant represented that it was no longer an active mine and is pending Resolution of Intent to Rezone to RR-10 (Applicant's Exhibit 11). The Applicant represented that all conditions of the Resolution have been met with the exception of receiving the NFA letters from DEQ and OHA for the West Area. Applicant indicated that the clean-up process is nearing completion and the Applicant expects the NFA letters for the West Area to be issued before the end of 2019.

SM 322 is located north of the Subject Property and across the Deschutes River and is an inactive and closed surface mining site that is engaged in agricultural use (irrigated farm use) (See Applicant's Exhibit 18). DOGAMI has closed the mine; however, it's unclear whether the mine has been "reclaimed" in compliance with the County's Surface Mining rules.

The standards set forth in DCC 18.56 apply to the Subject Property and the PUD application that is subject to this decision.

> 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.***

FINDING: The Hearings Officer finds that DCC 17.16.100(D) applies and requires:

> ***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.***

Applicant, in its Burden of Proof (page 25), provided the following comments related to this criterion:

> *"Since no dwellings are proposed with this application, SMIA site plan review for each dwelling is premature. In addition, none of the proposed residential lots will be located within 250 feet of either of the SM site boundaries."*

Staff, in the Staff Report (page 15), concurred with Applicant's statement that per-dwelling SMIA review will be required prior to the issuance of building permits. To that end Staff recommended a condition of approval. However, Hearings Officer also notes that the Staff, in the Staff Report (page 15) stated the following:

> *"in prior subdivisions subject to SMIA review, staff has used this SMIA review at the time of **Tentative Plan review**, to approve dwellings on the lots to be created. Staff requests the Hearings Officer to determine if this is possible under the DCC."* [Emphasis added by Hearings Officer].

The Hearings Officer, in this case, takes notice of the 2015 Land Use Decision findings related to this issue. The Hearings Officer, in the 2015 Land Use Decision (page 26), stated the following:

> *"The applicant does not propose any dwellings in conjunction with the PUD. Nevertheless, staff concluded the provisions of Chapter 18.56 requires 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 <u>through concurrent SMIA site plan</u> 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 of use</u>.'***
>
> *The Hearings officer finds the above-scored language supports staff 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 the SMIA site plan review <u>of the dwellings</u> 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."*

Applicant, in its Final Argument, summarized its position related to whether a SMIA review must occur at the PUD stage or at a later stage (Lewis, August 20, 2019, page 11). Applicant stated, in part, the following:

> *"The present subdivision application is in the middle stage of a multi-stage approval process. The zone change and environmental clean-up come first, the subdivision is second, followed by the applications related to the structural and on-site development...*
> *Lastly, SMIA review (to the extent it remains applicable) is also for development of noise/dust sensitive uses or structures within ½ mile of the boundary of an SM zone. The present subdivision application does not include any development proposals...."*

The Hearings Officer, for the review of this issue, reiterates the legal interpretation concept referenced in the Preliminary Findings: "a decision maker is obligated to take the words used in a law/code section as they are drafted." The court in *PGE v. BOLI*,[4] and later cases addressing "interpretation of law/code issues," directs a decision maker to first review the "text and context" of the code language at issue and if the language is ambiguous the decision maker may consider other legal interpretive arguments.

The Hearings Officer, in this case, agrees with the 2015 Land Use Decision Hearings Officer's statement that the DCC 18.56.100 (B) language "*site plan review and approval...shall be required for all uses in the SMIA Zone prior to commencement of any construction or use*" 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.'"

In the findings below the Hearings Officer will refer to the following DCC definitions:

> "***Use***" *means the purpose for which land or a structure is designed, arranged or intended, or for which it is occupied or maintained. (DCC 18.04.030)*
>
> "***Land Development***" *(partial definition) means the subdividing or portioning of land for any purpose. (DCC 17.08.030)*
>
> "***Planned Development***" *(partial quotation) Such uses may be authorized as a conditional use only after consideration of the following factors..." (DCC 18.128.210 A)*
>
> "***Master Development Plan***" *An overall master development plan shall be submitted for all developments affecting land under the same ownership for which phased development is contemplated. The master plan shall include, but not be limited to, the following elements:*
> *A. Overall development plan, including phase and unit sequence;*
> *C. Schedule of improvement, initiation and completion;*
> *F. Development plans for any common elements or facilities..." (DCC 17.16.050)*

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[4] *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2nd 1143 (1993); See also *Oregon v. Gaines,* 346 Or 160, 206 P3rd 1042 (2009)

The Hearings Officer finds DCC 18.56.020 makes Chapter 18.56 applicable to "all property located within one-half mile of a surface mining zone." The Hearings Officer finds Applicant and Staff agree that the Subject Property is located within ½ mile of a current surface mining zone boundary/property. The Hearings Officer finds that Applicant, Staff and most of those in opposition to the present PUD proposal, agree that DCC.18.56.100 B requires "site plan review and approval "prior to the commencement" of "*some event*." What the Applicant, Staff, 2015 Land Use Decision Hearings Officer and opponents appear to disagree upon is whether the PUD tentative plat proposal is a relevant "*event*." Restated, is approval of an application for a PUD and tentative plat considered "the commencement of any construction ***or use***" under DCC 18.56.100 B? [Emphasis added by the Hearings Officer in this case]

The word "use" is defined in DCC 18.04.030. The words used by the Board, when drafting the definition of "use," are important. The Board defined "Use" to mean the "purpose for which land or a structure is designed, arranged or intended for which it is occupied or maintained." The "purpose" of the PUD application is to subdivide the Subject Property. The "use" definition includes "land or a structure." Clearly, the Subject Property is "land" in the context of the "use" definition. Finally, the planned PUD is a "design" and "arrangement" for the land.

The Hearings Officer finds the language used in DCC 18.56.100 B is clear and not ambiguous. In addition to the clear language of DCC 18.56.100 B there is support for the 2015 Land Use Decision Hearings Officer finding that "the PUD is a 'use" and requires site plan approval "prior to the commencement of the 'use.'" The Hearings Officer searched the DCC, as related to land use planning, and did not find a stand-alone definition of "development." However, there is a DCC definition for "land development." That definition strongly suggests that subdividing land is "land development" and therefore a PUD subdivision is a "development." The application in this case is for a "Tentative Subdivision Plan." DCC 17.16.050 states, in part, that "an overall master development plan shall be submitted for all developments affecting land..." DCC 17.16.050 strongly suggests that the act of creating a PUD is development.

The Hearings Officer takes note that DCC 18.56.100 B also includes the word "shall." DCC 18.08.030 B states that the "word 'shall' is mandatory. The Hearings Officer finds a SMIA Site Plan review must occur during the PUD approval process and cannot be deferred to the building permit for dwellings stage. The Hearings Officer finds that the 2015 Land Use Decision Hearings Officer statement "because no dwellings have been proposed in conjunction with the PUD, I find SMIA site plan review of the dwelling is premature" is incorrect. The Hearings Officer finds SMIA review, in this case, is required to be conducted as part of the PUD subdivision process. The Hearings Officer finds the Applicant deferred the SMIA review until the building permit process for dwellings on each proposed lot. The Hearings Officer finds that Applicant's failure to seek SMIA Site Plan approval at this stage (PUD/tentative plan approval stage) results in this criterion not being met.

Finally, the Hearings Officer takes note that the Application Form submitted by Applicant on May 14, 2019 does indicate that the application included a request for a "SMIA Site Plan for a Planned Development." As noted in the findings for Preliminary Finding #2 the Hearings Officer, in this case, could find no discussion of a SMIA Site Plan review for the PUD development (as opposed to

Applicant's request to conduct SMIA Site Plan reviews for proposed dwellings at the building permit stage) and could not find a Staff analysis of a SMIA Site Plan review in the Staff Report.

The Hearings Officer takes no position on whether a fully documented SMIA Site Plan review, if presented to the Board upon an appeal of this Hearings Officer's decision, would constitute a substantial change in the application.

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.

FINDING: The proposed PUD is a use permitted conditionally in the RR-10 Zone (DCC 18.60.030 E). Therefore, the Hearings Officer finds the PUD is permitted conditionally in the SMIA Zone that overlays the RR-10 Zone.

The Hearings Officer incorporates Preliminary Finding #1 as additional findings for this approval criterion. The Hearings Officer finds that the proposed PUD is a subdivision and therefore allowable as conditional use under DCC 18.96.040.

18.56.060, Dimensional Standards.

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

FINDING: The Applicant, in its Burden of Proof (page 25), responded to this criterion as follows:

"The minimum lot size in the underlying RR-10 Zone is 10 acres and for a PUD is 40 acres. The subject property consists of 144.7 acres in size and therefore, meets the 10 acre minimum lot size in the RR-10 Zone and the 40-acre minimum lot size for a PUD."

The Hearings Officer incorporates Preliminary Finding #1 as additional findings for this approval criterion. The Hearings Officer finds that Applicant's current proposal is for a 144.7-acre PUD. The Hearings Officer finds the Applicant's PUD subdivision proposal meets the minimum lot size requirements for a PUD in the underlying zone (RR-10 Zone).

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; and

FINDING: The Applicant, in its Burden of Proof (page 26), responded to this approval criterion as

follows:

> *"The Applicant is not proposing any dwellings in conjunction with the PUD. If approved, the applicant agrees to obtain SMIA site plan review for each dwelling in the SMIA zone as applicable, prior to construction to ensure compliance with this combining zone. In addition, as shown on the tentative plan, none of the dwellings will be within 250 feet of the boundaries of either surface mines and each dwelling can be sited on lots to be consistent with the applicable SMIA Zone setbacks."*

The Hearings Officer agrees with the Applicant's statement quoted above. The Hearings Officer finds no noise sensitive or dust sensitive use or structure is/are proposed to be located within 250 feet of any surface mining zone.

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.

FINDING: Staff, in the Staff Report (page 17), indicated that

> *"while there are SM zoned lands within one quarter mile of the development, there are no '...existing or proposed surface mining processing or storage site[s]...' within one quarter mile of the Subject Property."*

Staff concluded that "demonstration of consistency with 18.52.090, 18.52.110 and 18.52.140 for the adjacent surface mined zoned lands is not required." The Hearings Officer concurs with Staff's preceding comments.

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

FINDING: The Hearings Officer finds that Applicant has not proposed additional setbacks in the SMIA zone that will be required for future dwellings.

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.

FINDING: The Hearings Officer finds that none of proposed PUD subdivision dwellings will be within

250 feet of the boundaries of a surface mine. However, if it is determined, prior to the County's acceptance of the final plat, that there is/are one or more dwellings located within 250 feet of the boundaries of a surface mine, then the Hearings Officer finds this approval criterion can be met by imposing a condition requiring the affected property(s) to execute a written agreement, prior to County acceptance of the Final Plat, meeting the requirements of DCC 18.56.070 and determining that each dwelling can be sited on the lots to be consistent with the applicable SMIA Zone setbacks.

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.

FINDING: Applicant, in its Burden of Proof (page 26), stated the following in response to this approval criterion:

> *"The applicant is not proposing to erect any dwellings or other noise-or dust-sensitive uses or structures in the SMIA zone in conjunction with the PUD and agrees to a condition of approval to obtain site plan approval prior to construction to ensure compliance with this combining zone."*

The Hearings Officer finds DCC 18.56.080 is directed to "dwellings." The findings for this section of the DCC must be distinguished from the findings for DCC 18.56.030, DCC 18.56.070 and DCC 17.16.100(D) which are not limited by the "dwelling" limitation. The Hearings Officer finds that the Applicant is not proposing to erect any dwellings or other noise- or dust-sensitive uses or structures in the SMIA Zone in conjunction with the PUD.

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.

FINDING: The Hearings Officer incorporates the findings for DCC 18.56.030, DCC 18.56.070, DCC 17.16.100(D) and Preliminary Finding #2 as additional findings for this approval criterion. The Hearings Officer finds the proposed PUD subdivision is a new noise and dust sensitive "use" and must comply with DCC 18.56.100. The Hearings Officer finds that it is necessary to, as part of this PUD subdivision application, consider an application for SMIA Site plan review. Applicant did not submit a SMIA Site Plan review at this time. Applicant elected to defer SMIA Site plan review until the building permit stage for each lot. The Hearings Officer finds this criterion is not met.

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.

FINDING: The Hearings Officer incorporates the findings for DCC 17.16.100(D), DCC 18.56.030, DCC 18.56.090 and Preliminary Finding #2 as additional findings for this approval criterion. The Hearings Officer finds that it is necessary for the Applicant, at the time of consideration of the PUD application, to submit a SMIA Site Plan review for review and approval. The Hearings Officer finds Applicant did not meet the requirements of this approval criterion. Applicant elected to defer the SMIA Site Plan review until the building permit stage for each lot.

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 the commencement of any construction or use.

FINDING: The Hearings Office incorporates the findings for DCC 17.16.100(D), DCC 18.56.030, DCC 18.56.090 and Preliminary Finding #2 as additional findings for this approval criterion. The Hearings Officer finds Applicant did not meet the requirements of this approval criterion.

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.

FINDING: The 2015 Land Use Decision addressed this criterion as follows:

> *"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."*

The Hearings Office incorporates the findings for DCC 17.16.100(D), DCC 18.56.030, DCC 18.56.090 and Preliminary Finding #2 as additional findings for this approval criterion. The Hearings Officer, in this case, disagrees with the 2015 Land Use Decision finding inferring that deferral of SMIA Site Plan review until the building permit stage for each dwelling is incorrect. The Hearings Officer finds Applicant did not meet the requirements of this criterion.

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 the setbacks, standards and conditions set forth in DCC 18.52.090, 18.52.110 and 18.52.140, respectively.

FINDING: The Hearings Office incorporates the findings for DCC 18.56.030, DCC 18.56.090 and Preliminary Finding #2 as additional findings for this approval criterion. . The Hearings Officer finds Applicant did not meet the requirements of this approval criterion.

The Hearings Officer acknowledges that Applicant did submit an ESEE analyses, albeit quite dated/old, for SM 461 and SM 322 (Applicant's Exhibits 19 and 20). Further, the Hearings Officer acknowledges Applicant's representation that SM Site 461, owned by Applicant, is relatively close to receiving final "clean-up" approval from DEQ, is not currently being mined and is close to having the SM zoning designation removed. However, even if the Hearings Officer treated SM Site 461 as not having surface mining (SM) zoning there would still remain SM Site 322 that is zoned by the County for surface mining. The Hearings Officer must consider the facts as of the date of this decision; both SM Site 461 and Site 322 are now zoned for surface mining and together they create the surface mining impact area (See Applicant Exhibit 17) affecting the Subject Property. The Hearings Officer finds that Applicant's inclusion of the ESEE analyses related to SM Sites 461 and 322 (Applicant's Exhibits 19 and 20), together or individually, do not constitute a complete "Site Plan" request as required by DCC 18.56.100.

The Hearings Officer finds that Applicant does not dispute the need to undertake the SMIA Site Plan review process. Rather, the Hearings Officer finds Applicant proposed to defer the SMIA Site Plan review process to a time later than the review being conducted in this case; to the time that individual dwellings submit building permit applications.

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 an SMIA application shall be sent to the mine owners and/or operators whose SM Zoned site triggered the SMIA review.

FINDING: The Hearings Officer incorporates Preliminary Finding #2 as additional findings for this criterion. The Hearings Officer finds Applicant did not submit a SMIA Site Plan review request in this case. The Hearings Officer finds Applicant proposed to defer SMIA Site Plan review until individual dwelling units submit building permit applications. The Hearings Officer finds no notice, pursuant to this approval criterion has been given by Applicant.

<u>Section 18.56.110. Abbreviated SMIA Site Plan Review.</u>

A. A new or enlarged noise or dust sensitive use to which DCC 18.56.110 applies that is at least one quarter mile from an SM Zone and that has at least two dwellings or other noise or dust sensitive uses between it and the SM zone is presumed to meet the approval criteria set forth in DCC 18.56.100(D), and shall be processed under DCC 18.56.110.

B. Abbreviated SMIA site plan review shall require the submission of an application in a form prescribed by the Planning Director or Hearings Body and such documentation as is necessary to demonstrate conformance with DCC 18.56.110(A).

C. Unless the underlying zoning at the SMIA site would require additional review of the proposed use for some other land use permit, abbreviated site plan review shall be

conducted (1) administratively without prior public notice; (2) with public notice of the Findings and Decision mailed consistent with DCC 18.56.100(E), to all persons entitled to receive notice; and (3) with an appeal period and procedures as set forth in DCC Title 22, the Uniform Development Procedures Ordinance. Appellants may submit evidence to overcome the presumption set forth in DCC 18.56.110(A).

FINDING: No new or enlarged noise or dust sensitive use to which DCC 18.56.110 applies are proposed at this time.

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.

FINDING: The Hearings Office incorporates the findings for DCC 18.56.030, DCC 18.56.090, DCC 18.56.100 D and Preliminary Finding #2 as additional findings for this approval criterion. The Hearings Officer finds Applicant did not submit a SMIA Site Plan review for the PUD and conditional use request in this case.

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.

FINDING: The 2015 Land Use Decision included the following comments related to this approval criterion:

"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."

The Applicant did not respond to this specific approval criterion. The Hearings Officer finds no evidence in the record that the Subject Property and the current application are exempt from the provisions of DCC 18.56.

B. Continuation and maintenance of a conforming or nonconforming use established prior to the effective date of Ordinance No. 90 014.

C. The employment of land for farm or forest use.

D. Additions to noise-sensitive or dust-sensitive uses or structures existing on the effective date of Ordinance No. 90 014 or established or constructed in accordance with DCC Chapter 18.56 which are completely screened from the surface mining site by the existing use or structure.

FINDING: The Hearings Officer finds these approval criteria do not apply to this proposal.

Chapter 18.60, Rural Residential Zone (RR-10)

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.

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

Section 18.60.030, Conditional Uses Permitted.

The following uses may be allowed subject to DCC 18.128:

...

E. Planned development.

FINDING: The Applicant proposed a PUD subdivision on the 144.7-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 RR-10-zoned portion of the Subject Property includes approximately 116 acres. Specific conditional use criteria relating to this use are addressed below under DCC 18.128.

Section 18.60.040. Yard and Setback Requirements.

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.

FINDING: No dwellings or structures are proposed by Applicant as part of this PUD subdivision application. The 2015 Land Use Decision included the following comments related to this criterion:

> *"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*."

The Hearings Officer takes note of Applicant's Exhibit 6. Exhibit 6, titled Conceptual Building Envelopes Exhibit, appears to color the projected building envelopes yellow and appears to indicate the front, side and rear setbacks. Exhibit 6 also displays contour lines, the flood plain area and overhead electric transmission lines. Exhibit 6 does not include any references to the location of rimrock on the Subject Property. Applicant Exhibit PH-20 shows "typical lot layout[s]" for lots 4 and 12 of the proposed PUD subdivision. PH-20 does indicate the location of rimrock on lots 4 and 12.

The Hearings Officer, in this case, generally concurs with the above-quoted findings from the 2015 Land Use Decision. However, the Hearings Office, based upon a of lack of information on Exhibit 6 showing the location of rimrock, finds it difficult to definitively state that there is adequate area on *all* of the proposed lots to locate a dwelling and associated water well and subsurface water disposal (i.e. Lots 5, 6, 7, 8, 9 and 18). The Hearings Officer does find adequate, for this review, rimrock information related to lots 4 and 12.

The Hearings Officer finds that Applicant's proposed tentative plan, with the conceptual building envelopes, shows residential lots that appear to be of adequate size and able to meet yard and setback requirements in the RR-10 Zone, including 20-foot rear yard setbacks, 20-foot front yard setback and 10-foot side yard setbacks. The findings for these approval criteria do not restrict the Hearings Officer from making findings for other another approval criterion that determines the proposed lots are not feasible (i.e. adequate size to meet setbacks and other requirements).

<u>Section 18.60.050. Stream Setbacks</u>

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.

FINDING Applicant did not propose any dwellings or structures as part of this PUD subdivision application. The Hearings Officer finds that while the proposed PUD subdivision lots may be large enough to meet these approval criteria the Hearings Officer finds that a condition of approval is necessary to assure, when dwellings and/or structures are proposed, that they meet the technical and objective standards set forth above.

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.

FINDING: Staff, in the Staff Report (page 24), recommended that the Hearings Officer impose conditions of approval requiring all dwellings to satisfy the lot coverage and building height limitations in this section. The Hearings Officer concurs with this Staff recommendation and finds with a condition of approval requiring all dwellings to be constructed at the Applicant's proposed PUD subdivision can meet the lot DCC 18.60.060 dimensional standards.

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.

FINDING: The Subject Property is not within one mile of an acknowledged UGB and no arterial rights-of-way separate any proposed parcels. The Applicant requested approval to develop a PUD subdivision with a density of one unit per 7.5 acres by clustering the 19 lots together and reserving the majority of the subject property as open space. Staff, in the Staff Report (page 24), noted that the 2015 Land Use Decision Hearings Officer (page 24) denied the application in 2015 under this criterion as follows:

"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."

The Hearings Officer, in this case, incorporates the Preliminary Finding #1 as additional findings for this criterion. The Hearings Officer, in Preliminary Finding #1, determined that the area designated Open Space including area with the Flood Plan Zone, should be included in the computation of the PUD acreage. The Hearings Officer finds the Subject Property is 144.7 acres in size and the Applicant proposed 19 lots for an average lot size slightly greater than 7.5 acres. The Hearings Officer finds this criterion will be met.

<u>18.60.070. Limitations on Conditional Uses.</u>

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.

FINDING: In the 2015 Land Use Decision, the Hearings Officer found 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. The 2015 Land Use Decision Hearings Officer (page 25) found 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."

The Applicant, in its Burden of Proof (page 23) made the following comments related to this approval criterion:

"The Redmond Fire and Rescue provided comments in 2015 that included specific fire protection standards for the proposed PUD, which the applicant agrees to incorporate into the design (Exhibit 16)."

Staff, in the Staff Report (page 25) for this case, recommended that the Hearings Officer impose a similar condition of any approval of this application. However, Staff also noted, in the Staff Report, that it believed there was insufficient information in the record to determine if the site layout, as proposed, would comply with fire code obligations. For example, in the June 13, 2019 letter,

Redmond Fire and Rescue ("RFD") (See Public Comments above and page 12 of the Staff Report) stated:

> *"Additional Access – 2014 OFC 503.1.2*
>
> > *The fire code official is authorized to require more than one fire apparatus access road based on the potential for impairment of a single road by vehicle congestion, conditions or terrain, climatic conditions or other factors that could limit access."*

Kieth D'Agostino ("D'Agostino") testified at the Hearing that he met, on behalf of the Applicant, with the RFD regarding this proposal. D'Agostino stated the primary concern of the RFD is water storage capacity at the Subject Property. D'Agostino stated that if additional on-site water storage is requested by RFD there is sufficient area on the Subject Property to construct additional water storage. D'Agostino testified that a second access into the PUD was never requested by RFD. D'Agostino stated that if RFD would ask for a second access that emergency access could be accommodated on the Subject Property.

Staff, in the Staff Report, expressed concern that RFD may require more than one access road, for emergency access purposes, in/out of the PUD. Staff also expressed concern that if a second access road be required by RFD the proposed PUD road layout may be substantially/significantly altered/modified. The Hearings Officer also is concerned about the possibility of RFD requiring a second access roadway in/out of the PUD. The Hearings Officer believes that with a condition requiring approval, by RFD of the road proposed in the PUD (a single access road) the access issue can be resolved. The Hearings Officer finds that if RFD requires a "second road access" in/out of the Subject Property then Staff proposed condition A (Substantial Conformance) would likely not be met. The Hearings Officer finds it necessary modify Staff proposed conditions A and J (See Staff Report page 121 for Staff proposed language) because of the possibility, even if remote, that RFD requires a "second road access." The Hearings Officer finds condition A must indicate that a "second access road" would constitute a substantial change in the proposed PUD subdivision.

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.

FINDING: 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 Deschutes River. The 2015 Land Use Decision stated the following related to this approval criterion:

> *"…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."*

Opponents noted that the mining activity that occurred on the Subject Property has already modified the natural grade. The Hearings Officer finds no legal authority to order the pre-mining natural grade be restored. The Hearings Officer finds that it would be not practicable to restore the original (pre-mining) natural grade of the Subject Property. No interested person, in this case, has offered any objective method of restoring the original natural grade. The Hearings Officer finds that the existing topography of the Subject Property, as of the date of this decision, represents the natural grade.

Staff, in the Staff Report (page 50), recommended a condition related to earthmoving and structures on existing slopes over 10 percent within the canyon. The Hearings Officer finds that to minimize erosion and/or pollution and minimize changes to the natural (existing) topography of the land the Staff recommended condition is necessary but should be modified to restrict the removal or destruction of natural vegetation riverward of proposed or actual structures or on slopes in excess of 10 percent within the canyon unless such activities are part of an ODFW approved habitat enhancement project.

Section 18.60.080. Rimrock Setback.

Setbacks from rimrock shall be as provided in DCC 18.116.160.

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

Chapter 18.84, Landscape Management Combining Zone (LM)

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. The distance specified above shall be measured horizontally from the center line 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 18.84.20 shall not unduly restrict accepted agricultural practices.

FINDING: The Deschutes River is identified on the County Zoning Map as the landscape management feature. The Subject Property falls within one-fourth of a mile from the Deschutes River. Therefore, the Hearings Officer finds that the provisions of DCC 18.84 apply.

The 2015 Land Use Decision (page 32), in part, responded to this approval criterion as follows:

"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."

The Applicant, in its Burden of Proof (page 30) provided the following response to this approval criterion:

"The Design Review Standards and Setback standards of the LM zone will be reviewed at the time of submission of a building permit for each dwelling or structure requiring a building permit within the LM Zone prior to construction to ensure compliance with these standards…in addition to recognizing the requirement to submit for LM review for each individual dwelling prior to the issuance of a building permit, the applicant is agreeable to a condition of approval that it will not seek exceptions to the LM setback standards."

The Applicant, in its Final Argument submission (page 11) stated the following:

"the County LM zone requires LM review and approval for 'any new structure' or 'substantial alteration' to any structure requiring a building permit…The Landscape Management review applications at the County are processed as land use decisions with public notice, opportunity for comment and appeal rights. Because the LM review, including river/rimrock setbacks and height measurements regulate structures, any review at this time with no structures proposed would be premature."

Staff, in the Staff Report (page 27), recommended that the Hearings Officer in this case impose a condition of any approval stating that any new structure or substantial exterior alteration of a structure requiring a building permit or an agricultural structure within an LM Zone shall obtain LM Site Plan review and approval in accordance with DCC 18.84 prior to construction.

The Hearings Officer reviewed DCC 18.84 in a similar fashion to that conducted for DCC 18.56 (Surface Mining Impact Area Combining Zone – SMIA Zone). The Hearings Officer found that SMIA Site Plan review for the PUD subdivision application (the stage of this decision) was expressly required by DCC 18.56.100 B. The Hearings Officer, in the findings for DCC 18.56, rejected Applicant's request to defer SMIA Site Plan review until the building permit stage.

The Hearings Officer, in this case, could not find language in DCC 18.84 requiring the LM Zone Site Plan review be conducted as part of the PUD subdivision application process. The Hearings Officer finds that the Landscape Management Combining Zone -LM Zone is focused upon "new structures or substantial exterior alterations." The Hearings Officer finds LM Zone Site Plan review is not required during the PUD subdivision process. The Hearings Officer finds that Applicant's request to defer the LM Site Plan review until the building permit stage is supported by the DCC 18.84 code language. The Hearings Officer agrees with Applicant and Staff that a condition of approval which includes the prohibition that "Applicant shall seek no exceptions to LM standards" during LM Site plan review, is necessary to assure that this criterion is met.

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.

FINDING: The 2015 Land Use Decision (page 33), in part, responded to this approval criterion as follows:

"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."

The Hearings Officer concurs with the 2015 Land Use Decision statement quoted above.

Section 18.84.050. Use Limitations.

A. Any new structure or substantial exterior 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 exterior alteration consists of an alteration which exceeds 25 percent in the size or 25 percent of the assessed value of the structure.

FINDING: Staff, in the Staff Report (page 27), stated that the Applicant need only demonstrate that it is feasible for proposed future dwellings to comply with applicable standards, with site specific review to be completed prior to issuance of building permits. The Hearings Officer finds that at the time any "new structure" or any proposed "substantial alteration of a structure requiring a building permit" is proposed to be located on the Subject Property an LM Zone Site Plan application must be submitted to the County. Staff, in the Staff Report (page 27), recommended a condition of approval to assure this criterion is met. The Hearings Officer concurs with the Staff's recommendation.

Section 18.84.060, Dimensional Standards.

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

FINDING: The 2015 Land Use Decision (page 33), in part, responded to this approval criterion as follows:

"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."

The Applicant, in its Burden of Proof (page 30) responded to this criterion as follows:

"The minimum lot size in the underlying RR-10 zone is 10 acres and individual residential lots in the PUD must be at least 2 acres in size and for a PUD, the minimum lot size is 40 acres. The subject property consists of 144.7 acres in size and the tentative plat shows the residential lot sizes to be at least 2 acres in size and, therefore, meets the 40-acre minimum lot size for a PUD. The minimum lot size of the FP zone is 10 acres when adjacent to non-resource property and all FP zoned acreage is contained in open space tracts [exceeding] 10 acres in size."

The Hearings Officer incorporates Preliminary Finding #1 as additional findings for this approval criterion.

The Hearings Officer finds that the area within the Flood Plain Zone and Open Space is to be included in the calculations of size when determining whether or not Applicant's proposed lot sizes meet this criterion. The Hearings Officer find Applicant's proposed PUD subdivision proposal meets this criterion.

<u>Section 18.84.080. Design review standards.</u>

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 non-reflective and of a color which blends with the surrounding vegetation and landscape. DCC 18.84.080 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, flag poles or other projections from the roof of the structure. DCC 18.84.080(E) 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. (Formerly section 18.84.080 (C))

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 18.04.280 "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.

FINDING: The 2015 Land Use Decision (page 35) responded to this approval criterion as follows:

> *"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."*

Staff, in the Staff Report (page 30), noted that the present application "is not a 'landscape management site plan' subject to section (J). The Hearings Officer agrees that Applicant did not submit a Landscape Management Plan (per DCC 18.84) application in this case. The Hearings Officer determined, consistent with the 2105 Land Use Decision, that a Landscape Management Plan review is necessary at the building permit stage for new structures and alterations of existing structures.

Staff, in the Staff Report (page 30), noted that DCC 18.116.220, Conservation Easements on Property Adjacent to Rivers and Streams-Prohibition, requires:

> ***A. As a condition of approval of all land use actions involving property adjacent to the Deschutes River, Crooked River, Fall River, Little Deschutes River, Spring River, Paulina Creek, Whychus Creek and Tumalo Creek, the property owner shall convey to the County a conservation easement, as defined in DCC 18.04.030, "Conservation Easement," affecting all property on the subject lot which is within 10 feet of the ordinary high water mark of the river or stream.***

Staff recommended a condition of any approval requiring that the Applicant to convey to the County a conservation easement, as defined in DCC 18.04.030, "Conservation Easement,

> *"affecting all property on the subject lot which is within 10 feet of the ordinary high water mark of the river or stream, prior to final plat approval."*

The Hearings Officer concurs with Staff's recommendation.

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.***

FINDING: Setback standards of the LM Zone will be reviewed at the time of submission of a building permit for each dwelling or structure requiring a building permit within the LM Zone prior to construction to ensure compliance with these standards. The Applicant addressed the 2015 Hearings Officer concerns in this respect by preparing the conceptual building envelopes (see Applicant's Exhibits 6 and PH-20) which demonstrates that the location, size, and configuration of the PUD residential lots will likely accommodate the future siting of dwellings in compliance with the LM Site Plan approval. These building envelopes are conceptual in nature only and were prepared to demonstrate the proposal can meet the LM setbacks without requesting exceptions to those standards. In addition to recognizing the requirement to submit for LM Site Plan review for each individual dwelling prior to the issuance of a building permit, the Applicant also proposed that it will not seek exceptions to the LM setback standards. Staff, in the Staff Report (page 30), recommended a condition of any approval specifying, that notwithstanding DCC 18.84.090(E), structures in the PUD are precluded from receiving exceptions to the rimrock setback standards. The Hearings Officer concurs with this Staff recommendation.

> ***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.

FINDING: 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

FINDING: The Hearings Officer finds that the location, size and configuration of the proposed PUD subdivision 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.

FINDING: The Applicant did not respond individually to each of the above listed criterion. However, Applicant did indicate that a minimum 50-foot setback from any rimrock[5] would be observed. In the 2015 Land Use Decision (page 39) that Hearings Officer made findings under these criteria as follows:

> *"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."*

It is unclear if the Applicant-provided conceptual building envelopes were developed in response to such a "lot-specific" rimrock survey. Staff, in the Staff Report (page 32), suggested that the creation of new lots may require a rimrock setback exception under (E)(1)(d) of these criteria to be residentially developed. Staff, in the Staff Report, indicated that seeking a rimrock setback exception "would not constitute 'orderly development' under 17.16.100(A)." Staff recommended that the Hearings Officer preclude Applicant from seeking rimrock setback exceptions by imposing a condition of approval. Staff recommended a condition prohibiting the approval of any rimrock setback standards exceptions.

Staff, in the Staff Report (page 32), also noted that there has been significant debate before the Board of County Commissioners related to these criteria. Aerial photo evidence suggested that rimrock features may have been buried decades ago (particularly near proposed lots 13, 14, and 19) as part of the mining of the Subject Property and the Board did not resolve the issue of whether long-buried rimrock still required setbacks. Staff included, in the record, 1943, 1951 and 1985 aerial photos showing the areas where overburden was pushed into the canyon. Staff noted that these photos correspond roughly to the pre-mining, diatomaceous earth mining, and gravel mining phases, respectively, of the Subject Property's use.

Applicant, in its Final Argument (page 13), responded to the rimrock issue as follows:

> *"With regard to rimrock and height measurements required under the Land Management Code, those are not applicable approval criteria for the subdivision application and contain their own approval process which provides public notice and opportunities for public hearing. As demonstrated by Exhibit 6 and PH-20 and further discussion below, there is sufficient evidence in the record to demonstrate that compliance with those standards is not precluded as a matter of law and the Applicant has agreed not to seek exceptions to the rimrock setbacks as would otherwise be allowed under DCC 18.94.090E."*

---

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

The Hearings Officer, in this case, finds that the rimrock setback standards are part of the Design review process of DCC 18.84.080 which itself is part of the LM Site Plan review process. The Hearings Officer has previously found that LM Site Plan review is required for new structures and certain alterations to structures. The Hearings Officer found the LM Site Plan review is required at the building permit stage for the new/altered structures and not at the PUD review stage. The Hearings Officer finds the most appropriate time to consider the rimrock setback standards will be upon the LM Site Plan review for new structures/altered structures.

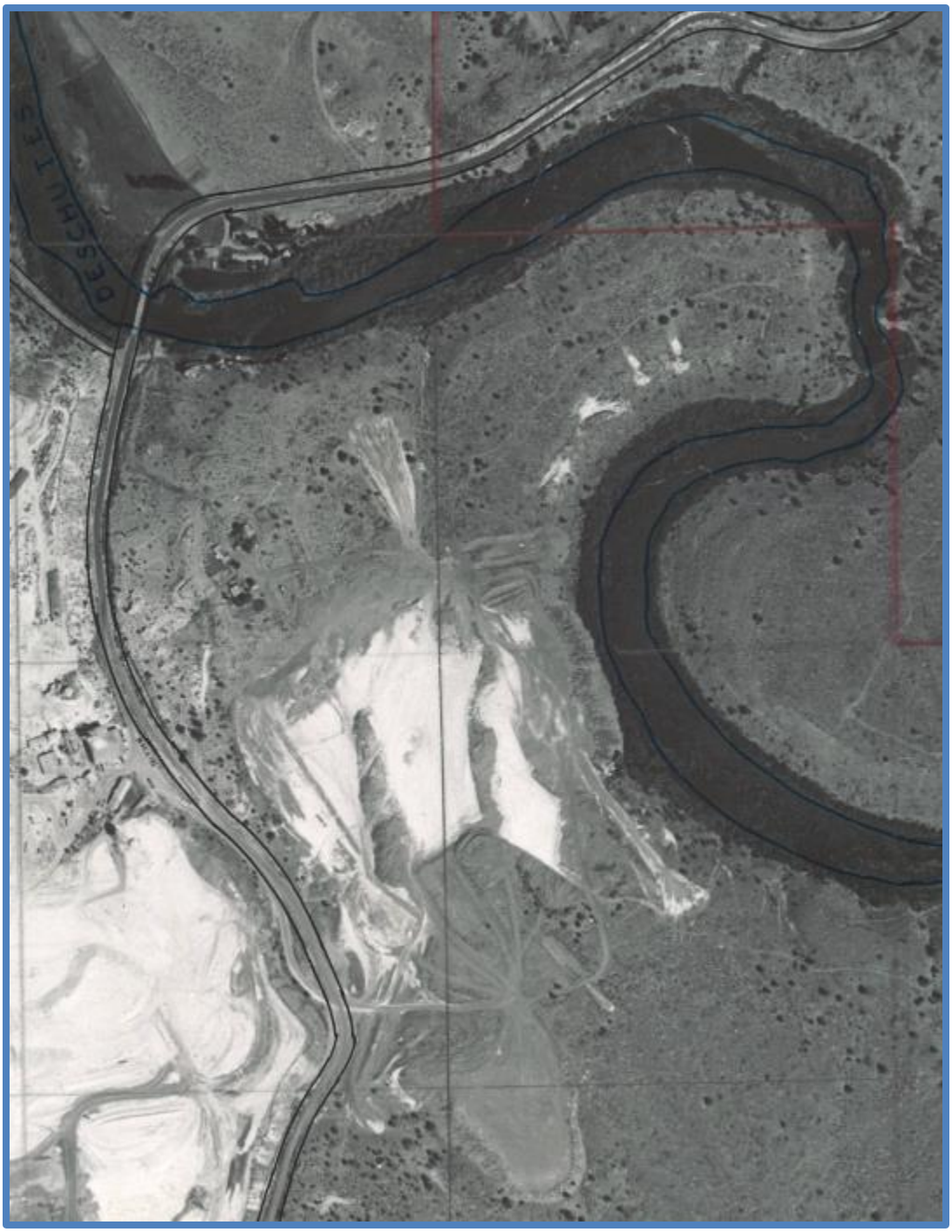
In response to Staff's comment that the Board has struggled in the past with the rimrock setback standards the Hearings Officer in this case offers the following observations. Applicant's proposal is for a new 19-lot PUD subdivision. The application for PUD subdivision approval is not a code enforcement proceeding. The application in this case is not requesting approval for any proposed correction of prior code violations such as the unlawful placement of materials over rimrock. While the Hearings Officer may concur with Staff and many opponents of this proposal that in the past "rimrock may have been buried" the Hearings Officer also believes that Applicant's proposed PUD subdivision application in this case is to be judged on the current condition of the Subject Property and under the current laws/codes. The Hearings Officer does not believe, in this case proceeding, that the Hearings Officer, or even the Board has authority to require previously "buried rimrock" be "unburied"

The alteration of the rimrock area(s) is not unlike the issue of "natural topography" of the Subject Property which was discussed in earlier findings for this case. Everyone associated with this case agrees that mining activities occurred on the Subject Property and that such mining activities altered the original topography of the Subject Property. As stated in earlier findings the Hearings Officer does not have the authority, in this case, to demand Applicant return the topography of the Subject Property to that of pre-mining times.

In conclusion, the Hearings Officer finds that with Staff's recommended condition, which is agreeable to the Applicant, that prohibits Applicant from seeking exceptions to the rimrock standards then this criterion can be met.

1943 Aerial Photo, Courtesy USFS

1951 Aerial Photo



1985 Aerial Photo

Section 18.84.095. Scenic waterway.

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

FINDING: 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. The proposal includes no dwellings in conjunction with the PUD. The Hearings Officer finds that this criterion is directed towards the "approval of structures" and not the approval of PUD's or subdivisions.

The Applicant agreed to a condition of approval requiring that each dwelling on a PUD residential lot will seek and receive OPRD scenic waterway approval prior to construction and that Applicant would not seek "exceptions" to the rimrock setback standards. The Hearings Officer finds that with a condition of approval requiring that Applicant receive OPRD scenic waterway approval, without seeking exceptions to setback standards, prior to the receipt of building permits for all structures in the Scenic Waterway this approval criterion can be met.

Chapter 18.96, Flood Plain (FP) Zone

The Hearings Officer considered the findings set forth in the 2015 Land Use Decision (pages 14 -21) for Chapter 18.96 to be the most contentious issue raised in the current case. As such, the Hearings Officer addressed DCC 18.96 in Preliminary Finding #1 rather than bury the findings in the bowels of a very long decision. The Hearings Officer does not desire to repeat the Preliminary Finding#1 at this location of the decision. Therefore, the Hearings Officer incorporates Preliminary Finding #1 as the findings for relevant sections of DCC 18.96 below.

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.

FINDING: The Hearings Officer finds the purpose statement is not an approval criterion in this case.

Section 18.96.020, Designated Areas.

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.

FINDING: The Hearings Officer finds the Subject Property includes area within the Flood Plain Zone and that Chapter 18.96 applies to this case.

Section 18.96.030, Uses Permitted Outright.

The following uses and their accessory uses are permitted outright
...

C. Open space.

FINDING: 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 areas 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, forests, wildlife preserves, nature reservations or other open space;
F. Enhance recreation opportunities;
G. Preserve historic, geological and archeological sites;
H. Promote orderly urban development; and
I. Minimize conflicts between farm and nonfarm uses.

FINDING: The Hearings Officer incorporates Preliminary Finding #1 as the findings for these criteria.

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.

FINDING: The Hearings Officer incorporates Preliminary Finding #1 as the findings for these criteria.

Section 18.96.060, Limitations on Conditional Uses.

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

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.

FINDING: The Applicant did 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 Hearings Officer finds that 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: Staff, in the Staff Report (page 41), stated that it was unaware of any other federal, state and local government agency permits which are required as part of the PUD review process. However, Staff recommended that this criterion be included as a condition of any approval, as aspects of the RAMP may require permits from other agencies. The Hearings Officer concurs with Staff's recommendation.

Section 18.96.070, Application for Conditional Use.

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

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).

FINDING: In 2015 Land Use Decision (page 18) addressed this criterion as follows:

> *"With respect to the remainder of this paragraph, it appears to require a detailed flood study because the BFE[fn] 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."*

[fn] *BFE is the Base Flood Elevation*.

The Applicant, in its Burden of Proof (page 16) responded to this criterion as follows:

> *"The proposed use in the Flood Plain Zone will be Open space, an outright permitted use in the Flood Plain Zone. The land area zoned FP in the PUD application is included to provide sufficient open space acreage to create 19 residential lots. The FP- zoned portion of the property will not be developed and will be placed entirely within open space tracts.*
>
> *The open space use in the flood plain zone provides more protection for the natural resources than a regular subdivision without clustering (allowed conditionally in the Flood Plain Zone) by containing all Flood Plain Zoned property in an open space tract, prohibiting development within that tract, providing for increased riparian protections and a funding mechanism for management of the resource.*
>
> *Finally, the proposal is consistent with exactly what the Applicant proposed and the Board envisioned when it zoned the property RR-10 in 2008. The Applicant planned a cluster development with all river frontage being protected in open space. The Applicant showed this plan to the Board and the Board approved it, allowing the Applicant to add 30 acres of riverfront property from the west side to the RR-10 zone for the eastside to be preserved as open space and make enough acreage to get a 19 lot planned development. See Staff Report and record for ZC-08-1/PA-08-1."*

Staff, in the Staff Report (page 42), recommended that the 2015 Land Use Hearings Officer's proposed condition be imposed as a condition of any approval of this application. The Hearings Officer concurs with the 2015 Land Use Decision and Staff recommended condition. The Hearings Officer finds that with such a condition this approval criterion can be met.

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.

FINDING: The Hearings Officer finds that Applicant's submitted tentative plan includes all information required by these criteria.

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 base flood elevation for the Subject Property. The Hearings Officer finds that 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 that Applicant's tentative plan and Burden of Proof statements provided all information necessary to evaluate the proposed PUD for compliance with the FP Zone standards.

<u>Section 18.96.080, Criteria to Evaluate Conditional Uses.</u>

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.

FINDINGS: The Hearings Officer incorporates the findings set forth in Preliminary Finding #1 as additional findings for this criterion.

Staff, in the Staff Report (page 43), stated that Staff believed that "DCC 18.96 fully implements all standards established by the Federal Emergency Management Agency." The Hearings Officer concurs with the Staff's quoted comments.

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.

FINDINGS: The Hearings Officer finds that the findings in this decision relate to the Subject Property and proposed development improvements located on the Subject Property. The Hearings Officer finds that the findings in this decision to 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.

FINDING: The Hearings Officer finds that no utilities or structures are proposed in the FP-zoned portion of the PUD, and therefore the criteria in Subparagraphs (1) and (2) of this paragraph are not applicable. In addition, the Applicant represented that it will retain all surface water drainage on-site on the upper bench/plateau of the subject property and outside the FP Zone.

Staff, in the Staff Report (page 44), recommended that the Hearings Officer impose the following conditions of any approval:

- *"Prior to final plat approval, a drainage submittal package that is in conformance with the standards and criteria found within the Central Oregon Stormwater Manual shall be submitted to Deschutes County for review and acceptance. Drainage facilities shall be designed and constructed to receive and/or transport at least a design storm as defined in the current Central Oregon Stormwater Manual and all surface drainage water coming to and/or passing through the development or roadway.*

- *All new surface water drainage shall be retained on-site on the upper bench/plateau of the subject property and outside the FP Zone."*

The Hearings Officer finds that with the Staff recommended conditions, as quoted above, these approval criteria can be met.

<u>Section 18.96.090, Yard and Setback Requirements</u>

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.

FINDING: Because the Applicant does not propose any structures or utilities in the FP-zoned portion of the PUD, the Hearings Officer finds that these criteria are not applicable.

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.

FINDING: No structures or utilities are proposed in the FP-zone. The Hearings Officer finds that these criteria are not applicable. However, as shown on Applicant's Exhibits 6 and PH-20 (conceptual building envelopes) the proposed residential lots are of sufficient size to accommodate the siting of dwellings satisfying these river setback requirements.

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.

FINDING: No structures or development are proposed in the FP-zoned area. The Hearings Officer finds that these criteria are not applicable.

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.

FINDING: The 2015 Land Use Decision (page 21) addressed this criterion as follows:

> "*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.*[fn]
>
> [fn] *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.*
>
> *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.*[fn]
>
> [fn] *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.*

Applicant, in its Burden of Proof (page 20) provided the following response:

> *"The proposal involves no land division in the FP zone. That portion of the FP-zoned property will be open space and labeled as Tracts C and E. Tract C has approximately 20.9 acres zoned FP and Tract E has 19.1 acres zoned FP, both of which exceed the 10 acre minimum in the FP zone*."

Central Oregon Landwatch ("Landwatch"), in a July 16, 2019 evidentiary submission (page 3), provided the following comments regarding this approval criterion:

> *"The minimum lot size in the Flood Plain Zone is either 80 acres or 10 acres, depending on whether or not the area has 'received an exception to the Statewide Planning Goals for resource uses.' DCC 18.96.110(C). The application includes no evidence that the Flood Plain-zoned portion of the subject property has received an exception to the statewide planning goals for resource areas.*
>
> *Indeed, the 2015 Decision found, 2015 Decision at 21, and the current application reiterates, Burden of Proof at 20, that '[the board's 2008 plan amendment and zone change decision did not*

include any FP-zoned land.' Although the EFU-zoned portion of [sic] the property was redesignated to RREA in PA-08-01, the Flood Plain-zoned portion was not. Accordingly, and without any indication that the Flood Plain-zoned portion of the subject property has received a goal exception, the clear language of DCC 18.96.110(C) requires a minimum size of 80 acres.

The subject property apparently includes 40 acres of land in the Flood Plain Zone. Burden of Proof at 20. The application cannot meet the 80-acres minimum lot size of the Flood Plain Zone for areas that have not received and exception to the statewide planning goals.

One of the main reasons the Flood Plain Zone has a minimum lot size is to protect the County's inventoried significant Goal 5 resources of riparian areas, wetland, and fish and wildlife, pursuant to the County's acknowledged program to achieve Goal 5 for these resources. See Deschutes County Ordinance No. 92-041. The County's program to achieve Goal 5 prevents development on parcels smaller than the minimum lot size of the Flood Plain Zone in order to protect its riparian areas, wetlands, and many different species of fish and wildlife. Approval of the application would violate these provisions of the County's acknowledged comprehensive plan."

Applicant, in its Final Argument (page 4), responded to Landwatch's arguments as follows:

"With regard to Goal 5, opponents focus on the Flood Plain zone portions of the property and argue its inclusion within a planned development subdivision as open space is inconsistent with the County's acknowledged Goal 5 Program and therefore requires and ESEE analysis [footnote omitted] and a Goal 5 exception. The opponents' arguments are predicated on the idea that planned and cluster subdivisions are not allowed under the current acknowledged Comprehensive Plan and implementing code provisions. As discussed above and as further supported below, this is incorrect.

The County Flood Plain zone was first adopted in the 1970's based on FEMA and FIRM maps of areas subject to flooding, see Deschutes County Comprehensive Plan (DCCP), Section 2.5, p. 31 and later refined by the Flood Insurance Study for Deschutes County DCC 18.96.020. The Flood Plain zone boundaries were not established by any resource inventory or based on any resource studies or locations. The maps used to establish the Flood Plain zone were based solely on the propensity of lands for flooding.

In 1992 the County first inventoried the Goal 5 resources within its jurisdiction and subsequently adopted two ordinances, 92-041 and 94-007, creating the Goal 5 inventories and Programs to Achieve the Goal. These materials are included in the record as Exhibits 1 and 2 to COLW's July 30 letter. Because the pages of those Exhibits are not number, the Applicant will refer to the Ordinance page numbers to reference specific text [footnote omitted]. The Ordinances are codified at DCCP Chapters 2 and 5 and implemented through Title 18. At the time the Goal 5 program was developed, the Interagency Wildlife Working Group, including Oregon Department of Fish and Wildlife ("ODFW"), the U. S. Forest Service ("USFS"), the U. S. Fish and Wildlife Service ("USFWS") and the Bureau of Land Management ("BLM") participated in the Goal 5 protection program. PH-12, pg. 4, 9; DCCP Section 2.5. Each inventoried Goal 5 resource was separately identified and a program to achieve the goal of protecting that resource was adopted. The ordinances with specific

provisions adopted to protect Goal 5 resources include the Landscape Management Combining Zone, DCC 18.84 (Exhibit PH-13); the Wildlife Area Combining Zone, DCC 18.88 (Exhibit PH-14); the Sensitive Bird and Mammal Habitat Combining Zone, DCC 18.90 (Exhibit PH-15); the Open Space and Conservation Zone, DCC 1848 and later, with participation of ODFW and BLM, the Greater Sage-Grouse Combining Zone, 18.89 (adopted in 2015). Each of these zones is based on the inventory and location of Goal 5 resources and contains implementing measures, consistent with the program to achieve the goal, to protect these resources. The following is a list of just some of the implementing measures in these zones:

- *LM zone 100 foot setback from OHWM of designated rivers and streams; 50 foot setback from rim rock; conservation easement along designated rivers and streams.*
- *WA zone prohibited uses; special dimensional standards (min. lot sizes, density limitations, land division prohibitions); siting and fence standards*
- *SBMH locational standards; special land division rules; site plan requirements*
- *OS & C limited uses allowed, special dimensional standards; 200 foot setbacks from OHM of designated perennial stream or lake*

The Applicant does not dispute that the Goal 5 program refers to measures in the Flood Plain zone which are relied upon in the programs to achieve the goal. However, those measures include development restrictions requiring a conditional use process for land divisions, fill and removal provisions, prohibitions on certain docks, piers and hydro facilities and conservation easement requirements. They specifically do not include any prohibitions on cluster or planned developments in zones adjacent to the Flood Plain or to the use of Flood Plan zone lands for open space associated with other permitted uses.

Each inventoried Goal 5 resource is listed in Ordinance 92-041 and 92-007 (See Exhibits 1 and 2 to COLW July 30 letter) and in DCCP Chapter 5. The program to achieve the goal is described in item #6 following each resource in 92-041 for fish habitat (Ord. 92-041, pg. 16), deer winter range (Ord. 92-040, pg. 24), deer migration (Ord. 92041, pg. 29), elk habitat (Ord. 92-041, pg. 34), antelope habitat (Ord. 92-041, pg. 40), sensitive bird habitat (Ord. 92-041, pg. 43), waterfowl habitat (Ord. 92-041, pg. 57), upland game birds (Ord. 92-041, pg. 62), FUR BEARERES (Ord. 92-041, pg. 68), and riparian and wetland (Ord. 92-041, pg. 75). The inventory lists are found at DCCP Chapter 5 and the implementing measures described in the program to achieve the goal are found in DCCP, Chapter 2 and DCC, Title 18. None of the measures described in any program to achieve the goal are changed by the present application. In fact, the present form of development with the Flood plain acreage contained entirely within open space, the RAMP and the funded management and monitoring, provides more protection for the Goal 5 resources than individual ownership. The restrictions of docks, piers, hydro facilities, fill and removal, as well as the requirement for conservation easements and a conditional use process for all land divisions and any development in the Flood Plain zone remain unchanged. There are simply no measures described in any of the programs to achieve the goal which are changed or otherwise implicated by the present application.

The County Goal 5 process and acknowledged Comprehensive Plan provisions identify measures to achieve the Goal which are implemented through the Flood Plain Zone as setbacks and structural development restrictions, limitations on fill and removal, docks and piers and the like.

There are no identified measures or implementing provisions impacted by the proposal. The acknowledged Goal 5 process identifies the measures to implement wildlife, sensitive bird and scenic view corridor protection in the Wildlife Area Combining Zone (PH-14), the Sensitive Bird and Mammal Habitat Zone (PH-15_, and the Landscape Management Zone (PH-13). See PH-21, pgs. 4-6. The subject property is included within the Landscape Management Zone as a scenic view river corridor and subject to siting provisions associated with that zone (as discussed in more detail below). The subject property is not within the Wildlife Area or the Sensitive Bird and Mammal combining zones as inventoried Goal 5 resources protected by those implementing zones were not identified on the subject property. Furthermore, the Goal 5 inventories have been reviewed and, in 2009, the USFW, ODFW, U. S. Forest Service and BLM collaborated to provide a report on wildlife in Deschutes County for use in revising the County's Goal 5 inventories. PH-12, pg. 9. The report provided new inventories and site specific recommendations for revised prohibitions on uses. Id. Significantly, the report did not recommend changes to the maps or boundaries of the zoning codes protecting those resources. PH-12, pg. 10. In other words, Goal 5 wildlife and bird resources were not inventoried or identified on the subject property for protection under the Goal 5 Programs to Achieve the Goal and their implementing code provisions either when done initially in 1992 or when reviewed in 2009.

The allowance of Flood Plain acreage as open space and the resulting density increase from the cluster form of subdivision does not change or otherwise implicate any of the implementing measures in the program to achieve the goal for any of the inventoried Goal 5 resources. Based on the above discussed evidence in the record and analysis, the Applicant has demonstrated the present proposal is consistent with the acknowledged County Comprehensive Plan provisions, the acknowledged Goal 5 Programs to Achieve the Goal and the implementing zoning code. Provisions. For these reasons, the project is also consistent with Goal 5. OAR 660-023-0250(1)."

The Hearings Officer, in this case, found that resolving the Goal 5 exception issue was challenging. Ultimately the Hearings Officer was persuaded by Applicant's Final Argument that the Applicant was not seeking, in this PUD subdivision proposal, to change any existing section of the DCC or the Comprehensive Plan. The Hearings Officer was persuaded that the Deschutes County Goal 5 acknowledgment process involved identifying resources and creating programs to protect the identified Goal 5 resources. The Hearings Officer found persuasive the Applicant's argument that the County, as part of the Goal 5 process, did not designate the Subject Property with a Wildlife Area Combining Zone or a Sensitive Bird and Mammal Habitat Combining Zone. The Hearings Officer acknowledges that the Subject Property is covered by the Landscape Management Combining Zone and the Staff, the Applicant and the Hearings Officer addressed that section as it is currently drafted.

The Hearings Officer finds that no Goal 5 exception is required in this case and therefore the minimum lot size is ten (10) acres. The Hearings Officer finds concurs with the 2015 Land Use Decision holding that Tracts C and E include at least ten (10) acres of FP-zoned land. The Hearings Officer finds this criterion is met.

Chapter 18.116, Supplementary Provisions

Section 18.116.160, Rimrock Setbacks Outside of LM Combining Zone.

FINDING: The 2015 Land Use Decision (page 40) addressed this criterion as follows:

> *"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."*

The Hearings Officer finds that a condition prohibiting the development of any structure within the LM Zone rimrock setback is appropriate and by prohibiting Applicant from seeking any exception to the rimrock setback standards this criterion can be met.

<u>Section 18.116.310, Traffic Impact Studies.</u>

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

…

I. Mitigation

- ***1. The applicant shall be responsible to mitigate any safety or capacity problems that are caused by their proposed development.***
- ***2. At the County Engineer's discretion, if there are pre-existing safety deficiencies and/or capacity failures at relevant intersections or road frontages within the impact analysis area, then no additional development shall be allowed until a solution that accounts for the proposed project's additional impacts is funded or built.***

FINDING: Applicant submitted a traffic impact study dated May 14, 2019 (Exhibit 7). The traffic study concluded that (See Burden of Proof, page 31):

> *"because of low existing traffic vehicle volumes on Lower Bridge Way, the addition of 190*

additional average daily vehicle trips and 20 weekday p.m. peak trips predicted to be generated by the proposed PUD would 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. [footnote omitted]."

Following receipt of Applicant's traffic study County Senior Transportation Planner Peter Russell requested an updated/revised traffic study related to design speeds and intersection sight distances. (Russell email dated June 27, 2019). Applicant provided an updated/revised traffic study addressing the County's design speed and sight distance concerns (Transight Consulting letter dated July 10, 2019 – Exhibit PH-2).

Staff in the Staff Report (page 47), recommended that the Hearings Officer only find that this criterion will be met only at such time as the Road Department or the County Senior Transportation Planner have confirmed the updated/revised traffic study (Exhibit PH-2) meets all applicable requirements. The Hearings Officer finds by including a condition of approval requiring County confirmation by the updated/revised traffic study (Exhibit PH-2) meets all applicable transportation related requirements is appropriate and necessary.

Chapter 18.128, Conditional Use

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:

18.128.015 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 general conditional use approval criteria apply because the Applicant's proposal is for a PUD subdivision and not for an individual single-family dwelling. Each of the factors in this paragraph is addressed in the findings below.

Description of Site, Design and Operating Characteristics

Site.

Location. The majority of the Subject Property is located in the RR-10 Zone in which residential PUDs are permitted 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.

Size. The proposed PUD includes 144.7 acres. which exceeds the 40-acre minimum lot size for a PUD in the RR-10 Zone.

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 and protected and managed by the RAMP.

Configuration. The proposed PUD includes 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 on the plateau area over 100 feet above the river, and open space Tracts C and E would include the river and the associated flood plain zoned acreage. The PUD residential lots would be at least two acres in size.

Applicant's Exhibit 6 show conceptual building envelopes for all of the proposed residential lots and Exhibit PH-20 shows "typical lot" layouts for Lots 4 and 20. These Exhibits were intended by the Applicant to demonstrate that the proposed residential lots are large enough and have the configurations necessary to permit the future siting of dwellings, on-site septic systems and individual wells and still comply with yard and setback requirements, including the 50-foot LM zone setbacks from top of slope, 20-foot front yard setbacks and 10-foot side yard setbacks consistent with the RR-10 Zone.

Design.

General Description. The proposed PUD subdivision is designed as a cluster development as shown on Applicant's Exhibit 6.

Density. The proposed PUD is 7.5 lots per acre.

Operating Characteristics.

Characteristics of the Uses. The proposed uses in the PUD would include single-family dwellings and residential uses as well as passive use of the Open Space tracts.

Services and Utilities. The Applicant proposed that each dwelling in the proposed PUD would be served by an individual well and on-site septic system. (See Applicant's Exhibit 9 for well logs in the area that demonstrate water is available in the area.)

Specific Findings Related to Size, Design and Operating Characteristics

Location. The Subject Property has access from a designated county collector road. The Hearings Officer finds the location of the Subject Property is suitable for a residential PUD subdivision use.

Size. The Hearings Officer finds that the Subject Property is of sufficient size to accommodate the proposed PUD. The Hearings Officer the Subject Property exceeds the 40-acre minimum lot size for a PUD in the RR-10 Zone.

Topography. Staff, in the Staff Report (page 50), proposed a condition of approval related to earthmoving and structures on existing slopes over 10 percent within the canyon. The Hearings Officer finds the Staff recommended condition is necessary to demonstrate compliance with this section. The Hearings Officer finds, with the Staff recommended condition, that the general topography of the Subject Property is suitable for a residential PUD subdivision use.

Configuration. The 2015 Land Use Decision (page 42) provided the following findings related to this factor:

"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."

Staff noted, in the Staff Report (page 50), that the "Redmond Fire and Rescue comments indicate a second access road is required to comply with the Fire Code." The Hearings Officer reviewed the RFD comments and finds that a "second road" was not "required" but that a "second road" might be necessary. The Hearings Officer incorporates the findings for DCC 18.60.070 as additional findings for this section.

Staff, in the Staff Report (page 50), recommended that any approval should be subject to condition of approval requiring that each residential lot receive an approved septic site evaluation, prior to final plat approval. Staff noted below that, under DCC 17.36.170(A), soil structure analysis for septic feasibility is likely required prior to any approval. As also discussed below, the record indicates all other necessary utility services are available to the Subject Property. The Hearings Officer finds Staff's recommended condition, related to drainage and DCC 17.36.170(A) are necessary. The Hearings Officer finds the proposed configuration, with the recommended conditions, is suitable for the PUD subdivision use.

General Description - Design. The Hearings Officer finds the design of the proposed PUD subdivision is suitable for its intended use.

Density*:* The Applicant excluded EFU-zoned lands from this proposal. The Hearings Officer incorporates Preliminary Finding #1 as an additional finding for this factor. . The Hearings Officer finds the proposed PUD subdivision density is suitable for its intended use.

Characteristics of the Uses. The Hearings Officer finds that the proposed single-family and open space uses of the Subject Property are suitable for the Subject Property.

Services and Utilities. The Hearings Officer finds that individual County approved wells and on-site septic systems for each lot are appropriate and suitable for the Subject Property. The Hearings Officer finds other services, such as law enforcement and fire enforcement, are available and suitable for the proposed PUD subdivision.

2. Adequacy of transportation access to the site;

The Hearings Officer incorporates the findings for DCC 18.116.310 as additional findings for this criterion. The Hearings Officer finds, with a condition of approval set forth in the findings for DCC 18.116.310, that the transportation access of to the proposed PUD subdivision is adequate.

3. The natural and physical features of the site, including but limited to, general topography, natural hazards and natural resources.

This criterion was the subject of vigorous debate during the 2015 Land Use Decision hearing process and continues to be contentious at this time. To that end, this section of findings contains references to the 2008 comprehensive plan/zone change process and extensive quotations from the 2015 PUD Land Use Decision. The Hearings Officer, in this case, believes that giving the reader the benefit of the thoughts of the Board in 2008 and the Hearings Officer's 2015 Land Use Decision is necessary to fully understand the current Hearings Officer's findings. For example, what follows immediately below is a lengthy quoted section from the 2015 Land Use Decision.

The 2015 Land Use Decision (pages 43-54) addressed this criterion as follows:

> *"…, 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.*[fn]

[fn] *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."*

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.

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. [Footnote Omitted]</u>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.[fn] *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.*

[fn] *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 (2103), and cases cited therein.*

In its final argument, the applicant suggests that 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 (page 47 of 2015 Land Use Decision):

> *'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).'

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.[fn]

[fn] *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*

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 that the proposal 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.

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.[fn] Finally, approval of a final subdivision plat is expressly excepted from the definition of 'land use decision' under ORS 197.015(10)(G).

[fn] *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 in as much 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.*

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*

- *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.

***

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.[fn]

[fn] *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. .*

<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.*
>
> *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* [fn] *which conclude that the site is free of residual radioactive contamination from previous site operations.'*

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

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.

<u>Water Quality.</u>

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."*

End of Quotes (pages 43 – 54) of the 2015 Land Use Decision

In response to dust hazards created by the PUD subdivision application and also in response to opponents' concerns about dust hazards, the Applicant submitted into the record as Exhibit PH-2. This document was 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 that the purpose of the study 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."*

Applicant, as part of their application materials, submitted Exhibits 2, 3 and 4. Each of the letters found in Exhibits 2, 3 and 4 were drafted after the 2015 Land Use Decision was issued. Exhibits 2, 3 and 4 all are relevant to the current status of contaminated soil and dust hazards at the Subject Property. The Hearing Officer includes quoted sections below from Exhibits 2, 3 and 4.

Exhibit 2: Determination of No Apparent Health Hazard letter prepared by Julie Early Sifuentes, M.S., Public Hearing Division, Oregon Health Authority, dated June 30, 2017.

"In the 2009 Health Consultation, EFIAP concluded there were physical hazards posed by dilapidated structures and debris piles, and an indeterminate public health hazard from

cristobalite and inhalation of airborne dust from the site. The indeterminate public health hazard determination was the result of a lack of environmental sampling data to adequately evaluate the cristobalite and airborne dust pathway of potential human exposure. At the time, EHAP concluded that all other exposure pathways (soil and groundwater) posed no apparent public health hazard. EHAP recommended removal of physically dangerous structures and debris and additional environmental sampling to provide data enabling EHAP to better evaluate health risks from cristobalite and airborne dust.

…

Since the release of the 2009 Health Consultation, structures and debris piles have been removed and additional environmental sampling data have been collected and analyzed. The 2016 and 2017 remedial investigation and clean-up reports, mentioned above, document that cristobalite concentrations in the soil on all portions of the site are similar to native soils in the area. This indicates that hazards from airborne dust originating from the site are no more dangerous than airborne dust originating from anywhere else in the region.

Measured concentrations of contaminants in soil, groundwater, and air are too low to harm the health of potential future residents living on the site. Therefore, EHAP is revising all conclusions related to the former diatomaceous earth mine located at Lower Bridge Road to no apparent public health hazard for residential use as currently proposed by Mr. Greg Daniels."

Exhibit 3: NFA letter prepared by David Anderson, Department of Environmental Quality (DEQ), dated August 11, 2017.

"DEQ has determined that no further action is required.

…

Based on the available information, environmental conditions are currently protective of public health and the environment. The site requires no additional action under Oregon Administrative Rules (OAR) 340-122-0010 through 340-122-A140 unless new or previously undisclosed information becomes available, or there are changes in site development or land and water uses, or more contamination is discovered. DEQ has updated the Environmental Cleanup Site Information (ECSI) database to reflect this decision."

Exhibit 4: Summary of Remedial Action on Clean-up document prepared by Scott Wallace of the Wallace Group, dated August 23, 2017.

"Airborne dust monitoring was performed on the east parcel during RI field work in August 2016. This work was conducted during periods when prevailing winds were from the north-northwest to assess whether dust originating on the west parcel contained respirable silica dust or asbestos fibers above OSHA Permissible Exposure Limits (PELs). Airborne dust monitoring did not detect respirable silica or asbestos fibers above their respective PEL.

Two groundwater monitoring wells were installed and tested on the east parcel to evaluate an upper, unconfined alluvial aquifer and lower confined/semi-confined alluvial aquifer underlying both the west, and east sides of Lower Bridge Road. The lower aquifer does not appear to be in hydrogeologic-continuity with the Deschutes River and is the target for future residential water

supply wells on the east parcel. The groundwater monitoring work included a comprehensive suite of drinking water parameters, including alpha/beta radiation. The results of this testing indicate that groundwater within the upper and lower aquifers have not been impacted by historical mining activities, or by previous hazardous material storage/disposal operations on the west property."

The Hearings Officer also takes note of Applicant's comments in its Final Argument (page 10) which, in part, stated:

> *"…the DEQ and DHS process are public processes are public processes with notice and participation rights to interested parties. The DHS process is administered in connection with the DEQ programs which are explained at Exhibit PH-6. The VCP is the one the Applicant chose and it involves DEQ monitoring and oversight together with solicitation and incorporation of public comments into the work plan, remedial investigation and clean-up plan selected by DEQ."*

The Hearings Officer notes that a November 16, 2015 letter from the DEQ to the County described the VCP public process and DEQ's response to the public comments (Exhibit 5).

The Hearings Officer agrees with the 2015 Land Use Decision findings for "natural and man-made hazards" to the extent that they were based upon the evidence in the record at that time. The Hearings Officer also agrees with the 2015 Land Use Decision findings that held that the Board's 2008 Zone Change conditions 1 and 2 (quoted above) do not independently establish whether or not an approval criterion in this case is satisfied. The Hearings Officer agrees with opponents that the "Hearings Officer needs to determine if the Subject Property is suitable for the proposed use given the man-made hazards on the Subject Property. However, the Hearings Officer finds that the Board's 2008 Zone Change conditions can be used, in this case, as evidence of the Board's intent related to environmental conditions.

The Hearings Officer takes notice of the Board's 2008 Zone Change finding that stated that

> *"with regard to environmental issues, the Board lacks the expertise to determine if [sic] the subject property is safe for residential use and will look to DEQ and DHS to provide this determination."*

The Hearings Officer finds that opponents provided extensive and detailed information related to the history of mining operations and waste dumping activities at the Subject Property. Opponents also offered, during this case, their opinions of perceived health risks that would be created by developing a former mine and contaminated property.

The Hearings Officer finds that Exhibits 2, 3 and 5 were issued by State of Oregon agencies responsible for the health and safety or Oregon residents. The Hearings Officer finds that Exhibits 2, 3 and 5 provided an overview of the historical mining, waste disposal and reclamation activities that have occurred at the Subject Property. The Hearings Officer finds that the Subject Property was enrolled in a State of Oregon voluntary environmental clean-up program ("VCP") and for the Subject Property successfully navigated the process.

The Hearings Officer finds Exhibit 2, described the health and safety risks posed by the Subject Property, including physical hazard risks from dilapidated structures, debris piles and hazards from "cristobalite and inhalation of airborne dust from the site." The OHA, in Exhibit 2, discussed remediation activities occurring at the Subject Property from 2009 until 2017. Exhibit 2 stated that "hazards from dust originating from the site are no more dangerous than airborne dust originating from anywhere else in the region." Exhibit 2 also indicated that soil, groundwater, and air contaminants are "too low to harm the health of potential future residents living on the site."

Exhibit 3, is a letter titled "No Further Action Determination for Lower Bridge Road – East Parcels, ECSI #4950." Exhibit 3 also included a brief history of mining and land fill (dumping) at the Subject Property. Exhibit 3 described the DEQ's investigation and cleanup activities at the Subject Property (including removal of asbestos containing materials and petroleum contaminated soil on the parcels east of Lower Bridge Road). The DEQ concluded that

> *"environmental conditions are currently protective of public health and the environment. The site requires no additional action under Oregon Administrative Rules (OAR) 340-122-0010 through 340-122-0140..."*

Exhibit 5, authored by David Anderson for the DEQ, in a November 16, 2015 letter (drafted after the issuance of the 2015 Land Use Decision) included the following statement:

> *"Radioactive waste was disposed of at US Ecology's landfill in Hanford in 1984 and those records are available in DEQ's files. As outlined in the 2008 reports additional sampling of soil, dust, groundwater from wells, radioactivity, and surface water from springs have not detected contaminants of concern."*

The Hearings Officer finds the DEQ and OHA are State agencies that possess technical and scientific expertise in matters relating to the environment including, but not limited to ground, water and air pollution/contamination. The Hearings Officer finds Applicant participated in the DEQ's VCP and the OHA review processes.

The Hearings Officer finds the DEQ process is a public process and that opponents of this application had the right to participate. The Hearings Officer that the DEQ and OHA determinations (Exhibits 2 and 3) should be considered "expert" evidence in this case.

The Hearings Officer finds Exhibit 4 was prepared by a professional geologist with expertise in applied earth and environmental science. Exhibit 4 described risks associated with crystalline silica and total oxides in the Subject Property soils. Exhibit 4 also indicated that two groundwater wells were installed and tested on the Subject Property. Exhibit 4 concluded that the groundwater beneath the Subject Property

> *"has not been impacted by historical mining activities, or by previous hazardous material storage/disposal operations on the west property."*

The Hearings Officer takes note of an Osprey Environmental, LLC Memorandum dated February 19, 2016 ("Osprey Memo"). The Osprey Memo was drafted prior to the issuance of Exhibits 2 and 3. The Osprey Memo represented that it reviewed documents related to the environmental conditions at the Subject Property. Based upon its review of "the documents" the Osprey Memo concluded that "it is unknown if significant contamination remains at the site." The Osprey Memo (page 3) stated that

> *"in May, 2008, approximately 45 tons of PCB impacted soil was removed from the 'Old' substation site and disposed of at a permitted solid waste facility."*

The Osprey Memo recommended the following:

> *"to evaluate the current concerns at the site and catalog the historic concerns and locations at the property, an updated Phase I ESA and an ecological risk assessment should be conducted."*

The Hearings Officer finds that the DEQ and OHA letters provide substantial evidence that the Subject Property was a mine and waste disposal site, was engaged in a public environmental clean-up program and has been found to meet Oregon standards for soil, water and air quality. The Hearings Officer finds the Osprey Memo to be less credible than Exhibits 2 and 3 because the Osprey Memo did not consider events related to the Subject Property environmental condition after February 19, 2016.

The Hearings Officer finds, based upon the evidence in the record of this case (which supplements evidence that was in the record of the 2015 Land Use Decision) that the Applicant has demonstrated that the Subject Property is suitable for the proposed residential PUD considering man-made and natural hazards. Specifically, the Hearings Officer finds that Applicant, through Exhibits 2, 3, 4 and 5 have demonstrated that environmental clean-up activities at the Subject Property have been completed and the Subject Property "environmental conditions are currently protective of public health" (quoting from Exhibit 3, page 2). Further, the Hearings Officer finds that "blowing dust" at or from the Subject Property does not present a hazard to human health any greater than dust blowing from other properties in the vicinity of the Subject Property.

Despite the findings of the preceding paragraph the Hearings Officer does recognize the potential of "blowing dust" resulting from excavation, cutting and filling activities associated with the development of the proposed PUD subdivision. The Hearings Officer makes this finding based upon evidence in the record suggesting the topography of the general vicinity of the Subject Property is prone to "blowing dust" if the soil is disturbed. The Hearings Officer finds that it is necessary for the Applicant to have a "dust plan" to address "blowing dust" during construction activities.

The Hearings Officer finds that the record of this case has been supplemented beyond that available for the Hearings Officer's consideration in the 2015 Land Use Decision case. The Hearings Officer finds that with the supplemental information the concerns expressed by the Hearings Officer in the 2015 Land Use Decision have been adequately addressed.

18.128.015 A. 2. Adequacy of transportation access to the site; and

FINDINGS: The Hearings Officer incorporates the findings for DCC 18.116.310, Traffic Impact Studies, as additional findings for this approval criterion. Staff, in the Staff Report (page 65), also recommended that the Hearings Officer impose all of the Road Department's conditions of approval under this criterion. The Hearings Officer concurs with this Staff recommendation and finds this approval criterion will be met with the conditions of approval as recommended by Staff above and the condition set forth in the findings for DCC 18.116.310.

18.128.015 A.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 did 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 proposed to protect the existing Deschutes 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. Future dwellings will also be required, at the building permit stage, to secure County LM Site Plan approval.

Staff, in the Staff Report (page 66), proposed prohibitions on earthmoving and structures on existing slopes over 10 percent within the canyon. Staff, in the Staff Report, noted that this requirement, or some other similar condition of approval as discussed below, is required to demonstrate compliance with this criterion. The Hearings Officer concurs with Staff that a condition prohibiting earthmoving and structures on existing slopes over 10% must be included to meet this criterion

Natural Hazards. Natural hazards include flooding within the flood plain of the Deschutes River, and wildfire risk to residential development within the PUD. Staff indicated, in the Staff Report (page 66), that the proposed residential development 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 Deschutes River canyon.

With respect to wildfire, the Subject Property has no greater risk of wildfire than other land within Deschutes County. Staff, in the Staff Report (page 66), suggested that 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, could create a natural fire break.

Applicant, in its Burden of Proof (page 34), responded to this issue as follows:

> *"The subject property also is located in the Redmond Fire and Rescue District. 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 [required to] 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 combination of the natural fire break on the subject property and the proposed measures to provide an adequate water supply for firefighting, as well as 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"

The 2015 Land Use Decision (pages 56-57) responded to this issue by stating the following:

"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."

Staff, in the Staff Report (page 67), recommended the Hearings Officer impose the previously recommended condition as a condition of any approval of this application. The Hearings Officer concurs with this Staff recommendation. The Hearings Officer incorporates the findings for DCC 18.60.070 as additional findings for this approval criterion. The Hearings Officer finds that with recommended conditions of approval this criterion can be met.

Natural Resource Values. The 2015 Land Use Decision (page 57) Hearings Officer found that 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, 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. The Applicant responded to this criterion and the 2015 Land Use Decision (pages 34-36), in part, as follows:

"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. In addition, the applicant will provide provisions in the CC&Rs that will monitor and enforce the RAMP, which is attached as Exhibit 8. The RAMP was prepared by Dr. Wendy Wente, Wildlife Biologist, and Kristin Currens, Botanist/Professional Wetland scientist, with Mason, Bruce & Girard, Inc. The report provides a Riparian Area Management Plan

(RAMP) for the area of property within the Flood Plain zone as well as for the associated riparian and upland areas covered by the RAMP.

The RAMP scientists visually surveyed approximately 90 percent of the riparian area within the project study area (PSA) on December 14, 2018 and documented aspect, species composition, and noxious weed presence at eight vegetation plots within the PSA to document the variety of conditions observed. Vegetation plots were informal, and encompassed riparian vegetation within the immediate vicinity of the observer. The biologists also recorded GPS locations of the Deschutes River ordinary high water mark (OHWM) and upper extent of the riparian area above the OHWM. Once in the office the biologists utilized the GPS data to derive average OHWM and upper riparian area elevations for four sub-reaches of the river. Riparian vegetation areas were mapped between the average OHWM and upper riparian vegetation elevation for each sub-reach. The Riparian Area that is the subject of this plan includes the riparian vegetation as well as upland vegetation extending 100 feet from the OHWM.

The biologists' results and Riparian Area Management Plan are located in the RAMP report and summarized below:

RESULTS

> *In general, the Riparian Area extended from the Deschutes River OHWM up through the riparian vegetation band and continued up relatively steep slopes along the river where the riparian vegetation transition*[s] *to upland species. Below the OHWM of the Deschutes River we observed large areas of wetland vegetation, but these fell outside of the Riparian Area as defined in the Deschutes County Comprehensive Plan (2011) and they are not further addressed in this RAMP. We observed an existing trailhead at the southwest corner of the Lower Bridge Road Bridge. Adjacent to the bridge was a river access point, and a trail extended along the south side of the river through and beyond the PSA. No other developed trails were observed within the Riparian Area; however, numerous game trails paralleled the river at various elevations. These showed signs of current, and in some cases heavy, use by mule deer (Odocoileus hemionus). We also noted sign of North American beaver (Castor canadensis) harvesting riparian vegetation cuttings within the Riparian Area.*

A full inventory of botanical species observed in the eight vegetation plots is provided in Appendix B of the RAMP report.

RIPARIAN AREA MANAGEMENT PLAN

> *Post-development, the Riparian Area as defined in this report and depicted on Figure 2 will be protected and managed as a sensitive resource by following this RAMP. The Deschutes County Code pertaining to Cluster Developments (18.128.200) and Planned Developments (18.128.210) specifically prohibits the following uses within the Riparian Area that is subject to this RAMP:*

- *Golf courses, tennis courts, swimming pools, marinas, ski runs or other developed recreational uses of similar intensity. Low intensity recreational uses such as bicycle, equestrian and pedestrian trails, and wildlife viewing areas located to minimize impact to the identified riparian resources may be permitted.*
- *Off-road motor vehicle use is prohibited.*

The following sections detail additional specific conservation and avoidance measures targeted at protecting and enhancing the Riparian Area, provide a monitoring approach, and identify contingent mitigation measures that could be implemented should the conservation and avoidance measures fail to perform.

The ***Conservation and Avoidance Measures*** *to protect and preserve the on-site riparian vegetation and the greater Riparian Area include: Noxious Weed Control; Waste Control and Trash Removal; Remove Old Fence; Leash Requirement; Limited Access and Trail Development; Education; and Vegetation Monitoring and Maintenance. (See RAMP report for detailed descriptions of each measure.)*

The RAMP also includes a section on ***Monitoring*** *that identifies: Responsible Parties; Performance Standards; and a Timeline to complete the monitoring fieldwork and report. In addition, another section identifies* ***Contingent Mitigation*** *measures. The applicant agrees to incorporate the RAMP into the CC&Rs for the subdivision, with management, monitoring and enforcement authority resting in the HOA and fully funded by assessments against the individual lots."*

Applicant, on or about July 30, 2019 (after the publication of the Staff Report and Hearing), submitted into the record Exhibit PH-3 (Revised RAMP). The Revised RAMP was represented by Applicant to have incorporated "agency input/recommendations." The Hearings Officer compared the December 21, 2018 Applicant submitted RAMP ("RAMP") to the July 1, 2019 (date on document) RAMP ("Revised RAMP).

The Hearings Officer's review of the RAMP and Revised RAMP indicated that the narrative sections of each document were generally the same. The Hearings Officer did note the following sections of the RAMP had been modified by the Revised RAMP:

- Section 3.1, *Limited Access and Trail Development*; and
- Section 3.1, *Education; and*
- Section 3.2, *Responsible Parties.*

The Hearings Officer finds the Revised RAMP's *Conservation and Avoidance Measures* (Section 3.1) includes a discussion related to the planning/development of an access trail to the river open space and contains slightly more detail than was found in the initially submitted RAMP. The Hearings Officer finds the Revised RAMP's modification to the *Monitoring Approach* (Section 3.2) section was the addition of CC&R language related to the Home Owners Association ("HOA"). In the Revised RAMP the HOA would be responsible for reviewing and approving any improvements proposed within the "Riparian Area" (e.g. river access trail).

Staff, in the Staff Report (page 69), indicated that the RAMP reviewed by Staff would be difficult to

monitor and enforce due to a lack of specificity in most provisions. Staff, in the Staff Report, recommended that the Hearings Officer request the Applicant to convert the RAMP recommendations into clearly worded conditions of approval so that the Hearings Officer could find, by adherence to those conditions, that the Natural Resources of the Deschutes River riparian area would be protected. The Hearings Officer did not make such request to the Applicant at the Hearing. However, the Hearings Officer notes that the Applicant was fully aware of the Staff Report, and Staff's concerns related to the RAMP at the Hearing.

Staff, in the Staff Report (page 69), also recommended that the Hearings Officer (if the application was approved) impose conditions that address:

- *"Why the measure is recommended. State the objective of the measure. (This can be simple introductory phrase: "To reduce water use…", "to protect existing trees…"*
    - *What action or actions must be completed. How will it be implemented.*
    - *Identify the measure.*
    - *Describe the steps necessary to complete the measure.*
    - *Identify measurable performance standards by which the success of the mitigation can be determined. (e.g., replace trees 10:1, maintain and replace until 3:1 survive…) Provide for contingent mitigation if monitoring reveals that success standards are not satisfied.*
- *Who is responsible for implementing the actions required by the measure (e.g., the applicant shall…; the permittee shall…)*
- *Where is the action to take place (e.g., in the creek; on the site…)*
- *When must each action be implemented (e.g., prior to PERMIT APPROVAL or ISSUANCE; during all grading phases…)*
- *Monitoring: Identify who, how and when monitoring will occur. "*

Staff, in the Staff Report (page 69), noted that the County does not have the expertise to monitor biological conditions and suggested that the Hearings Officer require expert third-party monitoring and reporting.

Applicant, in its Final Argument dated August 20, 2019 (page 19) responded to the Staff Report comments quoted above as follows:

> *"Staff recommended implementing conditions of the RAMP to be included as conditions of approval. The Revised RAMP is included in the record as Exhibit PH3. The Applicant is agreeable to making compliance with all provisions of the RAMP a condition of approval and agrees to include it as an Exhibit to the CC&Rs to be recorded in the Official Records as an encumbrance on the subject property."*

The 2015 Land Use Decision (page 57), with respect to this criterion, found the following:

> *"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."

Staff noted, in the Staff Report (page 70), that the 2015 Land Use Decision Hearings Officer's concerns under this criterion were broader than protection of the riparian area. Staff, in the Staff Report, recommended the Hearings Officer impose each of the 2015 Land Use Decision Hearings Officer's concerns as proposed conditions.

The Hearings Officer, in this case, agrees with Staff's above referenced comments. The Hearings Officer agrees that the 2015 Land Use Decision Hearings Officer's concerns were broader than the protection of just the riparian area. This section is directed at the "Deschutes River and Canyon" and not exclusively to the riparian area. The Hearings Officer finds that Applicant is agreeable to conditioning approval upon making the Revised RAMP a condition of approval including the Revised RAMP as an Exhibit to the CC&Rs and recording the CC&Rs (with the Revised RAMP) in County records.

The Hearings Officer finds that with conditions of approval that include the following bullet items this criterion can be met:

- Restriction on changes in the natural grade of land, or the alteration, removal or destruction of natural vegetation riverward of proposed and actual existing strictures or on existing slopes over 10 percent within the canyon unless they are part of an ODFW approved habitat enhancement project ; and

- Prohibition of construction of any structure, whether or not it requires a building permit, closer than 50-feet from any rimrock; and

- Compliance with all provisions of the Revised RAMP; and

- Recording in the Deschutes County public records a copy of the CC&Rs with a copy of the Revised RAMP attached.

Applicant, in its Burden of Proof (page 36) also provided the following response:

> ***"b. Deschutes River Scenic Waterway.***
>
> *"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. In the 2015 decision, the decision includes the following excerpt by ORPD as it relates to the Deschutes River Scenic Waterway and the proposed PUD:*
>
> *'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.'"*

OPRD responded on two occasions to the present application. The first submission/comment, quoted in full under the Basic Findings Section, is incorporated herein by reference. In summary, the first submission/comment by OPRD requested Applicant complete and submit a Notice of Intent form. The second OPRD comment is quoted, in part, in the Basic Findings Section and is incorporated herein by reference. The second OPRD submission/comment contained the statement that:

> *"the proposed development is incompatible with the exiting 'Scenic River Area' category, and as such a 19-lot riverfront housing development might not be granted approval by the Oregon State Parks and Recreation commission. Such development is not in line with the existing agricultural and low-density development, and would require significant [sic] vegetation screening and rim rock setbacks to ensure that the structures do not obstruct the river's view."*

The second OPRD submission/comment referenced the Middle Deschutes Management Plan which, in part, states that the Scenic River Area is defined as:

> *"areas [that] may be accessible by roads, but <u>are largely undeveloped and primitive except for agriculture and grazing</u>. River segments considered 'Scenic' are managed to maintain or enhance their high scenic quality, recreation value, fishery and wildlife habitat. <u>The intent is to preserve their largely undeveloped character while allowing continued agricultural land.'"</u>*

The second OPRD submission/comment indicated that:

> *"establishing a requirement that any part of any building constructed must be no closer than 50 feet from the rimrock could be a way to avoid visually impacting the Middle Deschutes Scenic Waterway and would help ensure that the development aligns with the goals of the State Scenic Waterway program."*

The Hearings Officer reviewed DCC 17 and 18 and found no specific approval criterion requiring, as a prerequisite to approval of a subdivision (including a PUD) or conditional use, approval by OPRD approval related to Scenic Waterways. The Hearings Officer reviewed generally Oregon Administrative Rules ("OAR") Chapter 736. The Hearings Officer reviewed more carefully OAR 736-040-0015, OAR 736-040-0035, OAR 736-040-0040 and OAR 736.040-0072. The Hearings Officer takes notice that when certain activities ("structures, building, or other improvements - see OAR 736-040-0035 (7)) are proposed to occur within Oregon Scenic Waterway "Related Adjacent Land" a notice to OPRD is to be submitted. OAR 736-040-0015 (6) defines "Improvement" to mean

> *"the placing on related adjacent land of any building or structure or modification of existing buildings or structures or the clearing, leveling, filling or excavating of related adjacent land."*

Related Adjacent Land is defined, in OAR 736.-040-0015 (7) as:

> *"all land within one-fourth of a mile (measured horizontally or level, as in usual surveying practice) of the bank on each side of a river within a scenic waterway, except that land, in the Commissions judgment, does not affect the view from the waters within a scenic waterway."*

The Hearings Officer finds that technically no buildings or structures will be constructed if the Applicant's PUD is approved. However, "clearing, leveling, filling or excavating of related adjacent land" will occur prior to Final Plat approval. While there is no specific approval criterion requiring OPRD approval for a PUD application it seems to the Hearings Officer that the existence of the OPRD Scenic Waterway Rules should be part of the "consideration" of factors set forth in DCC 18.128.200 and DCC 18.128.210.

The Hearings Officer finds that Staff's and Applicant's suggested condition of approval must be modified to require OPRD approval for the PUD (prior to Final Plat approval) and for each individual dwelling (prior to a building permit being issued). The Hearings Officer finds that with this modified condition this section the Oregon Scenic Waterway issues are adequately considered and addressed.

Applicant, in its Burden of Proof (page 37) also provided the following response:

> ***"c. Fish and Wildlife.*** *With respect to fish and wildlife and their habitats, the 2015 decision included an excerpt from ODFW District 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>.'
>
> *As shown on the tentative plan and the conceptual Building envelope exhibit, all dwellings within the PUD will meet the County's development setbacks, which include a minimum of 100 feet from the OHWM of the Deschutes River and at least 50 feet from any rimrock as that term is defined in Deschutes County Code. No structures are proposed or will be allowed in the Deschutes River Canyon and the Flood Plain zone area, which will be protected and managed by the RAMP."*

The Hearings Officer believes the ODFW first submission/comment was made without the benefit of the Revised RAMP. ODFW summarized its concerns as follows:

- *"The project as proposed will negatively affect mule deer winter range and does not meet mitigation criteria.*
- *The project as proposed will negatively affect habitat in the narrow riparian corridor despite the Riparian Area Management Plan.*

- *The project as proposed will negatively affect potential nesting habitat for Golden Eagles and other sensitive species."*

ODFW recommended, in its second submission (July 12, 2019), that the County require Applicant to provide a

> *"sufficient compensatory mitigation to address all three of the Category 2 habitats prior to approving the application. ODFW urges the county to implement stringent setback standards for any future development of the property…ODFW recommends CC&R's that ban the feeding of wildlife and require wildlife friendly fencing in accordance with DCC 18.88.070 through the development."*

Deschutes County Planner Peter Gutowsky ("Gutowsky") testified at the Hearing that he was concerned about the July 12, 2019 ODFW letter. Specifically, Gutowsky indicated that the County had problems with the ODFW requested "compensatory mitigation." Gutowsky stated that he did not believe that ODFW request for "compensatory mitigation" was a relevant to any criterion in this case. Gutowsky also did not believe the ODFW "compensatory mitigation" request was consistent with the rules applicable in effect on the date the application in this case was filed.[6] Gutowsky requested the Hearings Officer have the parties to the case "brief" the "goal post" and "taking" issues that could be raised by ODFW's demand for "compensatory mitigation." Gutowsky testified that mule deer, golden eagles, bats were not included in the County's Goal 5 inventory.

The Hearings Officer finds that generally "fish and wildlife" issues are related to various requirements set forth in DCC 18.128.200 and DCC 128.200. DCC 18.128.200 (Cluster Development) requires a decision maker to "consider" environmental and wildlife consequences resulting from a proposed development. DCC 18.128.210 (Planned Development) requires a decision maker to "consider" a number of factors including, but not limited to, existing natural features, environmental impacts, and the "preservation of natural resources." The Hearings Officer finds that the Applicant, Staff, various governmental agencies and opponents have "considered" the protection of fish and wildlife on the Subject Property and in the vicinity of the Subject Property.

The Hearings Officer finds that ODFW provided citations to the Oregon Conservation Strategy and the ODFW Fish and Wildlife Habitat Mitigation Policy. However, ODFW did not provide any evidence in the record, such as a DCC or ORS citation, showing that the Hearings Officer has the legal authority to treat the Oregon Conservation Strategy or the ODFW Fish and Wildlife Habitat Mitigation Policy as relevant approval criteria for this case. The Hearings Officer's review of the Oregon Conservation Strategy and the ODFW Fish and Wildlife Habitat Mitigation Policy suggests that those documents/regulations are generally aspirational. The Hearings Officer finds that both the Oregon Conservation Strategy and the ODFW Fish and Wildlife Habitat Mitigation Policy are relevant "considerations" under DCC 18.128.200 and DCC 18.128.210.

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[6] The Oregon Conservation Strategy referenced in the July 12, 2019 ODFW letter, per website http://www.oregonconservationstrategy.org/overview/, was last updated in 2016. The ODFW Fish and Wildlife Habitat Mitigation Policy referenced in the July 12, 2019 ODFW letter, per website https://www.dfw.state.or.us/OARs/415.pdf was last updated in 2016.

The Hearings Officer finds the ODFW request that the Hearings Officer ensure "compensatory mitigation" is not supported by any relevant approval criteria. The ODFW suggestion that the Applicant's PUD proposal does not meet the "compensatory mitigation" standards is not a valid reason to deny this application. The Hearings Officer finds that the ODFW recommendations to include a "ban on the feeding of wildlife" and require "wildlife friendly fencing" (DCC 18.88.070) are reasonable. The Hearings Officer finds adding such restrictions to the CC&Rs will help to assure that the effect of development of the PUD on wildlife is minimized.

Finally, Applicant suggested that the Deschutes River Canyon in the vicinity of the Subject Property, is not golden eagle habitat. The Hearings Officer finds, based upon the attachment to the Jon Berreen July 25, 2019 letter, that the Lower Bridge Annotated Bird List does include golden eagles.

Applicant, in its Burden of Proof (page 37) also provided the following response related to the Borden Beck Wildlife Preserve:

> ***"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 the 2015 decision, comments from RAPRD 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.*
>
> *<u>RAPRD requests that as this application is being considered, the appropriate setbacks are enforced that will minimize the impact to the nearby wildlife habitat.</u>* (Underscored emphasis added by Applicant)
>
> *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, staff finds 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."*

The Hearings Officer incorporates the findings for DCC 18.128.015 A.3 as additional findings for this approval criterion. The Hearings Officer finds that with conditions requiring setbacks from the

Deschutes River and rimrock, a prohibition upon Applicant seeking exceptions to the County rimrock standards or LM review standards, a prohibition upon Applicant seeking Scenic Waterway exceptions, and modification of the CC&R's to reflect ODFW's request to "ban the feeding of wildlife and require "wildlife friendly fencing" (DCC 18.88.070), the Applicant has adequately addressed this issue.

Applicant, in its Burden of Proof (page 38) also provided the following response:

> ***"e. Scenic Views*.** In the 2015 decision, with respect to scenic views of the river and mountains, the Hearings Officer found:
>
> *'. . . 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.'"*

The Hearings Officer finds that with conditions requiring setbacks from the Deschutes River and rimrock, a prohibition upon Applicant seeking exceptions to the County rimrock standards or LM review standards, and a prohibition upon Applicant seeking Scenic Waterway exceptions this issue has been adequately addressed.

18.128.015 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: *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.

The 2015 Land Use Decision (page 61) included the following statements related to this criterion:

> *"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."*

Applicant, in its Burden of Proof (page 39), responded to this criterion as follows:

> *"With regard to compatibility to the SM sites 461 and 322: SM site 461 is pending an Intent to Rezone and SM 322 has been closed by DOGAMI and is in agricultural use, which as stated above the PUD would be compatible with agricultural uses. The status of the rezone and use of best management practices during construction enhance compatibility with existing and projected uses due to the extensive environmental clean-up that has occurred on the properties and adjacent properties associated with SM site 461."*

Applicant, in its Final Argument (page 18) stated the following:

> *"This criterion requires an analysis of compatibility based on the site, design, operating characteristics, transportation access, and natural features of the site. When the Board re-zoned this property for residential use in 2008, the Board specifically found residential development to be more compatible with the neighboring residential uses than the historic mining activities. Exhibit 11, pg. 12. The Board further found that any impact to open spaces, natural or scenic resources from residential*

development was less than or an improvement to the impacts from mining. Exhibit 11, pg. 16. The site was described as notable for the chalky white appearance of exposed diatomite, not the pristine scenic area described by opponents. The Board specifically referenced the planned or cluster development form of subdivision, with significant open space as the preferred development and the form of development providing the most protection for the natural and scenic resources in the area. Exhibit 11, pg. 10, 16. And the Board specifically envisioned those residential lots clustered along the rim, Exhibit 11, pg. 10, with riparian areas and previously disturbed mining areas protected and commonly managed as open space.

The subject property is in in an area of the County where rural residential development is prevalent. Exhibit PH-5 shows the Plat for Lower Bridge Estates subdivision and homes in the surrounding area, including Lower Bridge Estates and the Eagle Rock subdivision. Significantly, homes in the Lower Bridge Estates subdivision are exempt from the 100' setback from the OHWM and many homes are located in close proximity to and visible from the river. PH-5.

Based on all the evidence in the record, the present proposal is compatible with the existing and surrounding uses in the area considering site, design, operating characteristics, access, topography and natural features. The low density and structure of the development ensures the riparian areas and previously mined areas will be commonly managed and protected under the guidance of experts. The cost to manage the riparian and common areas, maintain the private streets and administer the RAMP and Dust Control Plans will be spread across the 19 lots. The development is an appropriate subsequent use to the mining and provides a workable and responsible plan to reclaim and redevelop a site that had become a problem for the community. The Board saw the opportunity for such redevelopment in 2008 and the present proposal is the next step towards finalizing that plan."

Staff, in the Staff Report (page 74), noted that while SM Site 461 is eligible for rezoning that rezoning has not been completed. Similarly, Staff noted that SM Site 322 continues to be zoned SM. Barring a deed restriction or completed rezoning, Staff advised the Hearings Officer to include findings reflecting the presumption that it is possible that SM Site 461 and SM Site 322 could be put to those uses allowed in the SM Zone. The Hearings Officer takes notice of Applicant's Exhibits 18 (DOGAMI Closure Memorandum for Surface Mining Site #322 dated December 8, 20008), PH-18 (Email correspondence from Ben Mundie at DOGAMI verifying the closure of Site 461 together with a map of the site), and PH-19 (July 2006 Memo from DOGAMI officially closing the file for the Dicalite Pit SM 461; a land owners acceptance and 20011 summary to Scott Moore). The Hearings Officer finds Staff's advised presumption is reasonable and appropriate with respect to SM Sites 461 and 322.

Mining or residential development of SM Site 461 could produce significant dust that would potentially adversely impact the suitability of the Subject Property for residential use. While the Hearings Officer cannot require SM Site 461 to be encumbered with a dust management plan as part of this application, the Hearings Officer can find that the Subject Property is not suitable for residential use without this potential dust impact being addressed. Because the Applicant is the owner of SM Site 461, the Hearings Officer finds that it is feasible for the Applicant to encumber SM Site 461 with a deed restriction (or equally restrictive legal documentation) which shall be recorded in the Deschutes County Records, prior to Final Plat approval, requiring that any future construction,

mining, and earthmoving on the property be subject, at minimum, to a dust management plan as restrictive as that imposed on the Subject Property.
.

The Hearings Officer reviewed the record for the purpose of considering "Dust Control Plans" referenced by the Applicant in the quoted material above. The Hearings Officer acknowledges that the record in this case is, to put it mildly, voluminous. With that in mind the Hearings Officer represents that the only reference to "Dust Control Plan[s]" found was an attachment to the CC&Rs (Attachment D). CC&R's Exhibit 14, Attachment D (the "Dust Control Plan") is blank. Attachment D contains no narrative description of a "Dust Control Plan."

Staff, in the Staff Report (page 74), expressed concern that uncontrolled dust during development of the Subject Property due to construction related ground disturbance could represent a significant adverse impact on surrounding residential and agricultural uses. Staff, in the Staff Report, recommended the Hearings Officer consider the following conditions of approval to mitigate dust from construction related ground disturbance:

> *"The applicant shall mitigate dust from construction related ground disturbance at all times using the following Best management Practices:*
>
> - *Clearing and grubbing shall be held to the minimum necessary for grading and equipment operation.*
> - *Construction shall be sequenced to minimize the exposure time of the cleared surface area.*
> - *Exposed soils shall be quickly stabilized using vegetation, mulching, spray-on adhesives, calcium chloride, sprinkling, and/or stone/gravel layering;*
> - *Key access points shall be identified and stabilized prior to commencement of construction;*
> - *The impact of dust shall be minimized by anticipating the direction of prevailing winds;*
> - *Most construction traffic shall be directed to stabilized roadways within the project site;*
> - *Water shall be applied by means of pressure-type distributors or pipelines equipped with a spray system or hoses and nozzles that will ensure even distribution;*
> - *All distribution equipment shall be equipped with a positive means of shutoff;*
> - *Unless water is applied by means of pipelines, at least one mobile unit shall be available at all times to apply water or dust palliative to the project;*
> - *Pre-construction vegetative ground cover shall not be destroyed, removed, or disturbed more than twenty calendar days prior to land disturbance;*
> - *Temporary soil stabilization with appropriate vegetation shall be applied on areas that will remain unfinished for more than thirty calendar days;*
> - *Permanent soil stabilization with perennial vegetation or pavement shall be applied as soon as practical after final grading; and*
> - *Irrigation and maintenance of the perennial vegetation shall be provided for thirty calendar days or until the vegetation takes root, whichever is longer."*

The Hearings Officer finds that dust control is an important issue when considering compatibility of the proposed PUD with existing and proposed area uses. The Hearings Officer finds that if the Applicant intended that a "Dust Control Plan" be included in the evidentiary record the Applicant failed to direct the Hearings Officer to its location. If the Applicant intended Exhibit 14, Attachment

D, to be the "Dust Control Plan" the Hearings Officer finds that document provided no narrative plan. The Hearings Officer finds Staff's above-quoted suggested conditions are a necessary and appropriate way to assure that "dust control" is adequately addressed.

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 finds that Staff, Applicant and the Hearings Officer have recommended conditions of approval to meet this criterion. The Hearings Officer finds that with conditions of approval this criterion will be met.

Section 18.128.210, Planned Development

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

FINDINGS: In the 2015 Land Use Decision, the Hearings Officer found this criterion required her 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." The Hearings Officer, in this case, concurs with the 2015 Land Use Decision Hearings Officer and finds that the fourteen factors listed under DCC 18.128.210A are to be "considered" but do not individually set approval or denial standards/criteria for this PUD application. The Hearings Officer shall review the DCC 18.128.210A factors below.

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 7.5 acres on 144.7 acres of land.

The 2015 Land Use Decision Hearings Officer considered this factor as follows:

> *"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."*

The Hearings Officer incorporates the Preliminary Finding #1 and the findings for Section 18.84.060 as additional findings for this considered factor. The Hearings Officer finds the proposed land use and density of the PUD meets the requirements of the DCC.

2. Building types and densities.

FINDINGS: The Applicant proposed that the PUD would include 19 new single-family dwellings, each located on a lot at least two acres in size. The tentative plan showing a conceptual building envelope for each lot demonstrating that each residential lot has adequate size and design layout to meet the required setbacks.

The Hearings Officer incorporates the Preliminary Finding #1 and the findings for Section 18.84.060 as additional findings for this factor. The Hearings Officer finds the proposed building types and densities of the proposed PUD meets the requirements of the DCC.

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 three 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. In the 2015 decision, the Hearings Officer (page 62) found that site distance at the intersection of Lower Bridge Way and the main PUD access road would be adequate, and that the addition of traffic from 19 new dwellings would not exceed the capacity of Lower Bridge Way.

The Applicant proposed 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 Applicant also agreed to a condition of approval to stripe a 4-foot-wide shoulder bikeway on both sides of the private roads to accommodate bicycle and pedestrian traffic. The Hearings Officer incorporates the findings for DCC 18.116.310 as additional findings for this consideration factor. The Hearings Officer finds, based upon the evidence in the record, that this factor is adequately considered.

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: In the 2015 Land Use Decision (page 63), the Hearings Officer found 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. The Hearings Officer, in this case agrees with the findings in the 2015 Land Use Decision. The Hearings Officer finds this factor has been adequately addressed.

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-zoned portions of the Subject Property which includes areas within the Deschutes River canyon. According to the proposed PUD CC&Rs (Applicant's Exhibit 14) these Open Space tracts would be available for PUD residents' passive recreational activities such as fishing and hiking. The Hearings Officer finds this factor has been adequately considered.

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 Subject 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 proposed that all riparian areas would be managed and monitored through the RAMP. Staff, in the Staff Report (page 77), reminded this Hearings Officer of its concern about the crafting of conditions of approval regarding the implementation of the RAMP. The Hearings Officer, in the findings for DCC 18.128.015 A.3, included the following related RAMP related conditions:

Prohibition, within the river canyon area, of changes in the natural grade including alterations, removal or destruction of natural vegetation per the findings for DCC 18.96.110 C

"The Hearings Officer finds that with conditions of approval that include:

- *Restriction on changes in the natural grade of land, or the alteration, removal or destruction of natural vegetation riverward of proposed and actual existing strictures or on existing slopes over 10 percent within the canyon unless they are part of an ODFW approved habitat enhancement project ; and*
- *Prohibition of construction of any structure, whether or not it requires a building permit, closer than 50-feet from any rimrock; and*
- *Compliance with all provisions of the Revised RAMP; and*
- *Recording in the Deschutes County public records a copy of the CC&Rs with a copy of the Revised RAMP attached."*

Staff, with respect to this factor, also recommended the imposition of conditions related to dust reduction during the construction period. The Hearings Officer, in earlier findings for this decision, agreed that the following conditions related to controlling dust are required.

"The applicant shall mitigate dust from construction related ground disturbance at all times using the following Best management Practices:

- *Clearing and grubbing shall be held to the minimum necessary for grading and equipment operation.*
- *Construction shall be sequenced to minimize the exposure time of the cleared surface area.*

- *Exposed soils shall be quickly stabilized using vegetation, mulching, spray-on adhesives, calcium chloride, sprinkling, and/or stone/gravel layering;*
- *Key access points shall be identified and stabilized prior to commencement of construction;*
- *The impact of dust shall be minimized by anticipating the direction of prevailing winds;*
- *Most construction traffic shall be directed to stabilized roadways within the project site;*
- *Water shall be applied by means of pressure-type distributors or pipelines equipped with a spray system or hoses and nozzles that will ensure even distribution;*
- *All distribution equipment shall be equipped with a positive means of shutoff;*
- *Unless water is applied by means of pipelines, at least one mobile unit shall be available at all times to apply water or dust palliative to the project;*
- *Pre-construction vegetative ground cover shall not be destroyed, removed, or disturbed more than twenty calendar days prior to land disturbance;*
- *Temporary soil stabilization with appropriate vegetation shall be applied on areas that will remain unfinished for more than thirty calendar days;*
- *Permanent soil stabilization with perennial vegetation or pavement shall be applied as soon as practical after final grading; and*
- *Irrigation and maintenance of the perennial vegetation shall be provided for thirty calendar days or until the vegetation takes root, whichever is longer."*

The Hearings Officer finds that with the imposition of the above-referenced conditions this factor has been adequately considered.

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 Applicant, in its Burden of Proof (page 41) included the following statement related to this consideration factor:

"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 and manage the riparian area through the RAMP. With regard to surface water drainage, the applicant agrees to a condition of approval requiring to retain all surface water drainage on site and out of the river canyon. Completion of the Intent to Rezone along with using best management practices during construction will address impacts, such as blowing dust, related to the environment."

Staff expressed concern, in the Staff Report (page 78), that uncontrolled dust from the Subject Property due to construction related ground disturbance could represent a significant adverse impact on surrounding residential and agricultural uses. Staff, in the Staff Report, recommended the Hearings Officer consider the conditions proposed by Staff related to DCC 18.128.015(B) to mitigate this impact.

The Hearings Officer finds that for the successful consideration of the environmental impact factors the conditions set forth above (DCC.18.128.210 A.6) are necessary. These conditions include the conditions recommended by Staff that are discussed in the findings for DCC 18.128.015 (B).

b. ***Social Impacts.*** Applicant, in its Burden of Proof (page 41) responded to this factor as follows:

"*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 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 of the 2008 decision 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 applicant has acknowledged these conditions of approval to protect this historic sign to the greatest extent practical."

The Hearings Officer finds this factor has been successfully considered.

c. ***Energy Impacts.*** Applicant, in its Burden of Proof (page 42) responded to this factor as follows:

"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. ***"***

The Hearings Officer finds Applicant adequately considered this factor.

d. ***Economic Impacts.*** The 2015 Land Use Decision Hearings (page 64) made the following comments related to this factor:

"*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. In 2015, opponents argued that development of the proposed PUD would devalue their nearby rural residential properties. However, the Hearings Officer found that they did not submit credible evidence to support their arguments."*

The Hearings Officer finds the 2015 Land Use Decision generally reflects Applicant's comments in its Burden of Proof (Page 42). The Hearings Officer finds the 2015 Land Use Decision findings and the Applicant's Burden of Proof reasonably considered this factor.

e. ***Impacts on Public Facilities.*** The 2015 Land Decision findings and Applicant's Burden of Proof (page 42) contain identical findings/statements related to this factor. They both stated the following:

> ***"****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, all affected utilities are available to, and can accommodate, new dwellings within the proposed PUD with imposition of recommended conditions of approval."*

The Hearings Officer incorporates the findings for DCC 18.116.310 and DCC 18.128.015 A.2 as additional findings for this factor. The Hearings Officer finds, with conditions required by the findings for DCC 18.116.310 and DCC 18.128.015 A.2, this factor has been adequately considered.

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

FINDINGS: Applicant's Burden of Proof (page 42) responded to this factor as follows:

> *"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 on land zoned RR-10. The conditional use approval would allow an increase in the density of development on the property from one dwelling per 10 acres to one dwelling per 7.5 acres through clustering of dwellings and preservation of the majority of the property in open space tracts."*
>
> *Dwellings clustered on two-acre lots constitute "rural" development and not "urban" development. In addition, the proposal includes over about 94 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 – that will preserve the rural character of the area.*
>
> *The applicant could develop the property with a standard subdivision with 14 dwellings each on 10-acre lots where each lot would extend to the center of the river, with no clustering and no preserved open space. The proposed PUD would provide over about 94 acres of open space, consisting of the river and its associated flood plain, wetland, riparian areas, and canyon and most of the upper plateau on the subject property which would preserve the rural character of the areas."*

The 2015 Land Use Decision (pages 64-64) included the following findings related to this factor:

"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."

Opposition comments and Hearing testimony was received in the record of this case echoing the 2015 Land Use Decision Hearing's Officer findings above. Concern was expressed, by opponents, that the appearance of the proposed PUD cluster subdivision would not look like other residential development in the area. The Hearings Officer agrees with these opposition comments; a cluster subdivision will not look exactly like a standard subdivision because of the "clustering" of the smaller lots. However, the Hearings Officer agrees with Applicant and the 2015 Land Use Hearings Officer's findings (quoted above) that 2-acre lots will still have a "rural" appearance and feel; just somewhat smaller than most of the residential lots in the vicinity of the Subject Property. The Hearings Officer finds that on a 144+ acre property the difference between the proposed PUD cluster development (19 lots) and standard subdivision development (14 lots) will not significantly degrade the rural character of the area. The Hearings Officer finds this factor has been adequately considered.

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's homeowner's association.

11. Waste disposal facilities.

FINDINGS: Applicant's Burden of Proof (page 42) responded to this factor as follows:

> *"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."*

Staff, in the Staff Report (page 81), recommended that if the Hearings Officer approved the application then the approval should be subject to condition requiring that each residential lot receive an approved septic site evaluation prior to final plat approval. The Hearings Officer reviewed Applicant's Exhibits 10, 22 and PH-1. The Hearings Officer finds, at this stage, it appears that on-site wastewater disposal is feasible. Ultimately the suitability for individual lot septic systems will be determined by Deschutes County. The Hearings Officer finds the Staff recommended condition of approval that each residential lot receive an approved septic site evaluation prior to plat approval will assure this factor has been adequately considered.

12. Water supply system.

FINDINGS: Applicant's Burden of Proof (page 42) responded to this factor as follows:

> *"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."*

The Hearings Officer reviewed Applicant's Exhibit 10 (Water Supply Development Feasibility Report). The Hearings Officer finds that Applicant has conducted a preliminary feasibility analysis related to the provision of water for the proposed PUD (Exhibit 10). The Hearings Officer also takes note that opposition testimony has raised the specter of one or more water problem(s) occurring in the vicinity of the Subject Property if this application is approved. The Hearings Officer finds the Applicant's preliminary feasibility analysis (Exhibit 10) was performed by registered professional engineers (Engineer and Engineering Geologist) with expertise in geology, soils and water availability. The Hearings Officer is persuaded by the professional opinions of the engineers in Exhibit 10. The Hearings Officer finds that this factor has been adequately considered.

13. Lighting.

FINDINGS: Applicant's Burden of Proof (page 42) responded to this factor as follows:

> *"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 applicant has agreed to a condition of approval requiring all exterior lighting to comply with the county's outdoor lighting ordinance in DCC 15.10."*

Staff, in the Staff Report (page 81), noted that although DCC 15.10 is not applicable criteria for this proposal, the imposition of the following condition would significantly mitigate adverse lighting impacts:

> *"All lighting shall be shielded and directed downward in accordance with DCC 15.10, Outdoor Lighting Control."*

The Hearings Officer finds that with Staff's recommended condition this factor has been adequately considered.

14. General timetable of development.

FINDINGS: The Applicant proposed to commence construction of PUD road improvements within two years of tentative plan approval for the PUD. The Applicant proposed to apply for extension(s) in the event additional time is needed to complete all requirements for submission of the final subdivision plat. The Hearings Officer finds this factor has been adequately considered.

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 finds that this approval criterion requires consideration of the Deschutes County Comprehensive Plan. As a general rule the Deschutes County zoning and subdivision chapters have already been deemed to be consistent with the Deschutes County Comprehensive Plan. The 2015 Land Use Decision (page 66) included the following comments related to this criterion:

> *"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."*

In this instance, the language of DCC 18.28.210 B begins with the statement "the conditional use may be granted upon the following findings." Following this statement is the requirement that the "proposed development conforms to the Comprehensive Plan. The Hearings Officer finds relevant sections of the Comprehensive Plan are approval criteria for this case. The Hearings Officer must make findings as to whether the proposed PUD does, or does not, "conform to the Comprehensive Plan."

The Hearings Officer considered the following Chapter/sections of the Comprehensive Plan relevant to the PUD application in this case.

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 does note that Policy 3.3.4 is drafted with aspirational and not mandatory language. The Applicant proposed to increase the density of development to one dwelling per 7.5 acres as permitted in the RR-10 Zone. The Hearings Officer incorporates the findings for DCC 18.128.210 A.8 as additional findings for this Policy. The Hearings Officer finds Policy 3.3.4 is adequately addressed through the findings for DCC 18.128.210 A.8. The Hearings Officer finds the proposed PUD is a cluster development which mitigates community and environmental impacts.

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 that 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, the Applicant's proposal, as conditioned, adequately 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, which is conditionally allowed for a PUD, no exceptions from the standards of the underlying RR-10 zoned district are proposed. The Hearings Officer finds that clustering the dwellings and providing 65% open space that includes approximately 94 acres of the river, associated flood plain and canyon walls and a significant portion of the upper plateau into Open Space tracts warrants an exception to the standard subdivision design. Without the PUD, the Applicant stated that could it could develop the property with a standard subdivision with 14 dwellings each on 10-acre lots where each lot would extend to the center of the river, with no

clustering and no required/mandated preserved open space and no required/mandated riparian area management plan.

Staff, in the Staff Report (page 83), stated that 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, Staff believed that the preservation of these areas through inclusion in open space tracts likely does not provide significant additional protection for them. The Hearings Officer agrees with these Staff comments. The Hearings Officer finds that 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: The topic of "harmony with surrounding area" generated a significant number of comments by opponents of the PUD proposal. The Hearings Officer takes note of the 2015 Land Use Decision (page 67) findings related to this topic:

> *"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."*

Applicant, in its Burden of Proof (page 45) responded to this approval criterion, by stating the following:

> *"In the 2015 decision, the Hearings Officer found the "compatibility" standard is equivalent to the "harmony" standard in this subsection. As discussed in the findings above, the proposed PUD will be compatible with existing and projected uses on surrounding land. With regard to compatibility to the SM sites 461 and 322: SM site 461 is pending an Intent to Rezone and SM 322 has been closed by DOGAMI and is in agricultural use, which as stated above the PUD would be compatible with agricultural uses. The status of the rezone and use of best management practices during construction enhance compatibility with existing and projected uses due to the extensive environmental clean-up that has occurred on the property associated with SM site 461 and when completed will enhance the compatibility and harmony with the surrounding area and future use."*

The Hearings Officer incorporates the findings for DCC 18.128.015 B as additional findings for this criterion. The Hearings Officer finds the word "harmony" is difficult to apply objectively. The Merriam-Webster online dictionary lists the words "balance," "coherence," and "proportion" as synonyms of "harmony." The Hearings Officer finds the dictionary definition of "harmony" and synonyms for the word "harmony" are not particularly useful in arriving at the Board's intended meaning for the word. Without direction from Applicant, Staff or opponents of the PUD proposal the Hearings Officer finds that the word "harmony" is equivalent to the word "compatible" (as that

term is used in DCC 18.128.015 B. The findings for DCC 18.128.015 B are found by the Hearings Officer to be relevant and applicable to this Policy.

The Hearings Officer finds the proposed PUD is "compatible" and therefore in "harmony" with the surrounding area.

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

FINDINGS: The residential lots would be owned by individual owners, and the HOA would own and manage and/or oversee the common areas, open space tracts, RAMP, and private roads. The proposed 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. The Applicant agreed to conditions of approval as recommended in part by the Hearing Officer in 2015 based on the restrictions applicable to cluster developments Applicant has agreed to the inclusion of conditions of approval that facilitate the following concepts:

- *Uses permitted in the open space tracts include the management of natural resources via the RAMP, 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 2015 Land Use Decision (page 68) made the following findings related to this criterion:

> *"..., 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."

Staff, in the Staff Report (page 85), expressed concerns regarding the necessity of imposing a "dust" condition as described by the 2015 Land Use Decision Hearings Officer above. The Hearings Officer finds the 2015 Land Use Hearings Officer's anxiety related to possible dust impacts from possible resumption of mining on SM Site 461 is shared by the Hearings Officer in this case. The Hearings Officer, in this case, is also aware that there is a possibility of future mining on SM Site 322. The Hearings Officer, however, does take notice that there is evidence in the record that SM Site 322 is, per the records of DOGAMI, closed (Applicant's Exhibit 18). The Hearings Officer also takes notice that SM Site 461 is closed (Applicant's Exhibits PH-18 and PH-19). The Hearings Officer finds, based upon the evidence in the record, that the mining permits/files for SM Sites 322 and 461 have been closed. The Hearings Officer appreciates that it may be legally possible to apply for and receive State of Oregon permission to open a new mining operation on either Site SM 322 or SM Site 461.

Applicant, in the Burden of Proof (page 24) stated the following:

"SM 461 is owned by the applicant, is no longer an active mine and is pending Resolution of Intent to Rezone to RR-10 (Exhibit 11). All conditions of the Resolution have been met with the exception of

receiving the NFA letters from DEQ and OHA for the west area. This process is nearing completion and the applicant expects the NFA letters for the west area to be issued before the end of 2019."

The Hearings Officer finds that Staff's recommended conditions related to dust control on the Subject Property, as set forth in the findings for DCC 18.128.015, are necessary. The Hearings Officer finds that the possibility of mining on SM Site 461 creates a remote potential of dust traveling from SM Site 461 to the Subject Property which could negatively impact the proposed PUD's Open Spaces. The Hearings Officer appreciates the legal fragility of imposing a condition upon the Applicant to provide assurances to the County that "dust control" will be performed on SM Site 461 if SM Site 461 is approved by the State/County to conduct mining activities. However, despite these reservations the Hearings Officer finds a condition relating to dust control if mining is allowed on SM Site 461 is necessary to adequately assure the maintenance of Open Space in the proposed PUD.

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

FINDINGS: The Applicant, in its Burden of Proof (page 46) responded to this criterion with the following comments:

"The applicant first began work on the subject property in 2006, with the zone change applications submitted in 2008 and completed in 2011. As previously described, the Board divided the property east and west of Lower Bridge Road, changed zoning on the east area to RR-10 and subjected the west area to the Resolution of Intent to Rezone. Since that time, the applicant has participated in the DEQ Voluntary Clean-Up program for the east area, resulting in the NFA letters verifying the east area is safe for residential use from both DEQ and DHS. The applicant continues to participate in the Voluntary Clean-Up program for the west area, with NFA letters expected before the end of 2019. The applicant has invested over 1 million dollars in land use and environmental applications and clean-up efforts over the past decade and a half. The applicant has the financial resources and demonstrated capacity to complete the development."

The 2015 Land Use Decision (page 69) provided the following findings related to this criterion:

"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."

Staff, in the Staff Report (page 86), indicated that this criterion, at a minimum, required the Applicant to estimate the cost of completing the project and suggest some plausible way of covering those costs. Staff, in the Staff Report (page 86), suggested that as significant as the prior expenditures and ongoing efforts at the Subject Property have been that they do not address the prospective issue by posed in this criterion: Can the Applicant substantially complete the PUD proposal within four years? The Hearings Officer finds this criterion is not satisfied by the simple statement that "the

applicant has the financial resources and demonstrated capacity to complete the development." The Hearings Officer finds Applicant must provide something more that such a conclusionary statement. The Hearings Officer finds this criterion is not met by the evidence in the record.

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

FINDINGS: The Hearings Officer incorporates Preliminary Finding #1 as additional findings for this criterion. Applicants Tentative Plan shows the Subject Property is 144.7 acres in size. 65% of 144.7 acres equals 94.06 acres. The proposed PUD indicates that the five Open Space Tracts are cumulatively 94.1 acres in size. The Hearings Officer finds the proposal, based upon the evidence in the record, meets this criterion.

The Hearings Officer takes note that Staff, in the Staff Report (page 86), expressed concern about the level of detail (number of decimal points – and ability of the Applicant to "round off" numbers to, for example, the nearest tenth or one-hundredth) to be used in calculations related to this approval criterion. Staff recommended that the Hearing Officer impose a "two decimal places" standard. The Hearings Officer notes that no interested person/entity provided any insight (following the publication of the Staff Report) on this matter. The Hearings Officer finds that it is necessary, in the processing of the PUD subdivision plat that all acreages need to be provided with such accuracy so as to allow confirmation by the County that the applicable criteria are met (not an effect of rounding). Therefore, based upon Staff's recommendation the Hearings Officer adopts a "two decimal places" standard for calculations related to this approval criterion.

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's Burden of Proof addresses this criterion as follows:

> *"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 those areas within the RAMP, subject to the provisions of the CC&Rs as managed by the HOA and funded by assessments against the individual lots. These provisions assure 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. Exhibit 6 shows a conceptual building envelope for each residential lot to demonstrate that each residential lot is large enough and has the configuration necessary to permit the future siting of a dwelling, on-site septic system and individual well and still comply with yard and setback requirements. The proposed PUD CC&Rs contain provisions restricting uses in the open space tracts and the areas covered by the RAMP, which the applicant agrees to a condition of approval."*

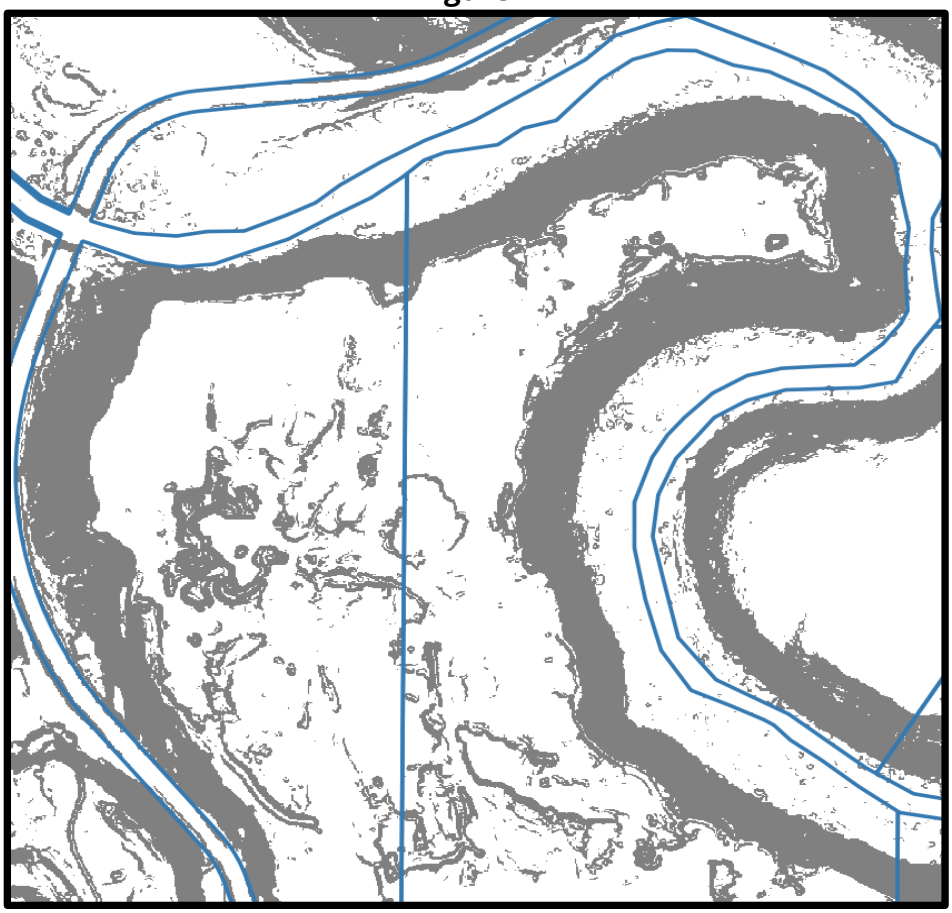
Staff, in the Staff Report (page 87), recommended the Hearings Officer confirm that the conceptual building envelopes are responsive to a rimrock survey. In addition, Staff recommended that the Hearings Officer note any conditions pertaining to the preservation of natural resources such as bodies of water, natural vegetation and special terrain features made elsewhere in any approval as incorporated herein by reference. Staff, in the Staff Report (page 87), also noted that the steep

canyon slopes are a special terrain feature that could be adversely impacted if subject to cut and/or fill or the siting of structures. Specifically, Staff stated that slope stability, erosion, and visual impacts could result from such earthmoving and construction. Nothing in the DCC otherwise prevents construction of roads and structures down the canyon slope. Because the canyon rim is frequently defined by the point at which mining overburden was pushed over the natural rim, it is difficult to define an "edge of canyon" for the purposes of delineating the canyon slope.

To protect the canyon slope as a special terrain feature under this criterion Staff, in the Staff Report (page 87), recommended that the Hearings Officer either request binding per-lot building/earthmoving envelopes from the Applicant, or in the alternative impose a condition precluding structures and/or earthmoving on or below slopes exceeding 10 percent within the canyon. Staff recommended that any such condition include a provision specifying that habitat improvement projects approved or sponsored by ODFW are not subject to this requirement. For reference, staff includes a staff prepared figure (Figure 1 below) based on DOGAMI LiDAR data showing slopes (in grey) at or above 10 percent on the subject property. Since the staff figure is not sufficiently detailed for site-specific development, a topographic survey shall be required prior to construction or earthmoving in the vicinity of the canyon rim, as a condition of approval.

The Hearing Officer incorporates the findings for DCC 18.128.015 A.3 and DCC 18.128.015 B as additional findings for this criterion. The Hearings Officer finds conditions described and required in DCC 18.128.015 A.3 and DCC 18.128.015 B address the issues raised by Staff above. The Hearings Officer finds that with the conditions set forth in the findings for DCC 18.128.015 A.3 and DCC 18.128.015 B this criterion will be met.

Figure 1



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.

FINDING: The Applicant 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. Also, the Hearings Officer incorporates Preliminary Finding #2 as additional findings for this criterion (lack of application for SMIA Site Plan review).

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: Staff, in the Staff Report (page 88), recommended that this approval 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 also the building height limitations

in Title 18. . The Hearings Officer finds, with conditions relating to setbacks and height limitations, this criterion can be met.

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

FINDINGS: Applicant's Burden of Proof (page 47) responded to this approval criterion as follows:

> *"The proposed density is one dwelling per 7.5 acres, which is the maximum allowed density for a PUD."*

The Hearings Officer incorporates Preliminary Finding #1 as additional findings for this criterion. The Hearings Officer finds, based upon Preliminary Finding #1 that the proposed density for the PUD meets the requirements of this criterion.

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 Hearings Officer finds that the 10-acre minimum lot size of the RR-10 Zone does not apply to PUDs that include clustered dwellings and that the Applicant has proposed an overall density factor of one dwelling per 7.5 acres. Staff, in the Staff Report (page 89), noted that the Applicant did not propose alternative width, frontage and yard requirements and that these will default to the standards in the RR-10 Zone. The Hearings Officer finds this criterion is met.

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

FINDINGS: The Subject Property is 144.7 acres in size, which exceeds the 40-acre minimum size for PUDs. The Hearings Officer finds that the Subject Property exceeds 40 acres and complies with this criterion.

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 that these criteria are not applicable because no commercial uses are proposed in the PUD.

Administrative Rules

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

Division 4, Goal 2 Exceptions Process

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) For purposes of this rule, the definitions in ORS 197.015, the Statewide Planning Goals and OAR 660-004-0005 shall apply. In addition, the following definitions shall apply:

(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: The Board, in 2008, 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). In 2015, the Hearings Officer found that 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. The Hearings Officer incorporates the findings for DCC 18.96.110 C as additional findings for these approval criteria as

those findings address Goal 5. For these reasons, the Hearings Officer finds that the proposed PUD is not subject to the Goal exception process.

PA-08-1 AND ZC-08-1 Conditions of Approval

FINDINGS: The Board's 2008 decision (Applicant's Exhibit PH-17) approving a plan amendment and zone change for the Subject Property imposed seven conditions of approval.

The 2015 Land Use Decision (page 73) included the following comments related to the 2008 Board imposed 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."*

Staff, in the Staff Report (page 91), recommended the Hearings Officer impose the previously recommended condition as a condition of any approval of this application. The Hearings Officer agrees with the 2015 Land Use Decision findings quoted above. The Hearings Officer finds it appropriate to include a condition of approval in this case stating that the 2008 conditions of approval remain in full force and effect.

Title 17, The County Subdivision and Partition Ordinance

Chapter 17.12, Administration and Enforcement

Section 17.12.080, Statement of Water Rights.

All applicants for a subdivision or partition shall be informed by the Planning Director or his designee of the requirement to include a statement of water rights on the final plat.

FINDING: Staff included this criterion, in the Staff Report (page 91) to inform the Applicant of the requirement to include a statement of water rights on the final plat.

Section 17.12.100, Sale of Subdivision Lots Prohibited Before Final Approval.

No person shall sell any lot in any subdivision until final approval of the land division has been granted by the County. Final approval occurs when the plat of the subdivision or partition is recorded with the County Clerk. No person shall negotiate to sell any lot in a subdivision until a tentative plan has been approved.

FINDING: This section of the DCC is included for informational purposes only.

Chapter 17.16, Approval of Subdivision Tentative Plans.

Section 17.16.040 Protective Covenants and Homeowner Association Agreements.

Landowner covenants, conditions, and restrictions and homeowner association agreements are not relevant to approval of subdivisions and partitions under DCC Title 17, unless otherwise determined by the County to carry out certain conditions of approval, such as road maintenance or open space preservation. Any provisions in such agreements not in conformance with the provisions of DCC Title 17 or applicable zoning ordinances are void.

FINDING: As discussed below in this decision, an agreement will be required as a condition of approval for road maintenance, open space management, and the RAMP. The Hearings Officer finds the proposed CC&R (Exhibit 14), as submitted by Applicant into the record, are the sole CC&Rs document considered in this case.

Section 17.16.050, Master Development Plan.

An overall master development plan shall be submitted for all developments affecting land under the same ownership for which phased development is contemplated. The master plan shall include, but not be limited to, the following elements:

A. Overall development plan, including phase or unit sequence;

B. Show compliance with the comprehensive plan and implementing land use ordinances and policies;

C. Schedule of improvements, initiation and completion;

D. Overall transportation and traffic pattern plan, including bicycle, pedestrian and public transit transportation facilities and access corridors;

E. Program timetable projection;

F. Development plans for any common elements or facilities;

G. If the proposed subdivision has an unknown impact upon adjacent lands or lands within the general vicinity, the Planning Director or Hearings Body may require a potential development pattern for streets, bikeways and access corridors for adjoining lands to be submitted together with the tentative plan as part of the master development plan for the subject subdivision.

FINDING: The Hearing Officer finds that no phased development is proposed.

Section 17.16.060, Master Development Plan Approval.

The Planning Director or Hearings Body shall review a master development plan at the same time the tentative plan for the first phase is reviewed. The Planning Director or Hearings Body may approve, modify or disapprove the master plan and shall set forth findings for such decision. The Planning Director or Hearings Body may also attach conditions necessary to bring the plan into compliance with all applicable land use ordinances and policies. Any tentative plan submitted for the plan area shall conform to the master plan unless approved otherwise by the County. Master plan approval shall be

granted for a specified time period by the Planning Director or Hearings Body, and shall be included in the conditions of approval.

FINDING: The Hearing Officer finds that no phased development is proposed.

Section 17.16.070, Development Following Approval.

Once a master plan is approved by the County, the plan shall be binding upon both the County and the developer; provided, however, after five years from the date of approval of the plan, the County may initiate a review of the plan for conformance with applicable County regulations. If necessary, the County may require changes in the plan to bring it into conformance.

FINDING: The Hearing Officer finds that no phased development is proposed.

Section 17.16.080, Tentative Plan as a Master Plan.

A. As an alternative to the filing of a master plan for phased development, the applicant may file a tentative plan for the entire development. The plan must comply with the provisions of DCC Title 17 for tentative plans.

B. If the applicant proposed to phase development, he shall provide sufficient information regarding the overall development plan and phasing sequence when submitting the tentative plan.

C. If the tentative plan is approved with phasing, the final plat for each phase shall be filed in accordance with DCC 17.24.020 through 17.24.110.

FINDING: The Hearing Officer finds that no phased development is proposed.

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 would meet the requirements of this title and Titles 18 through 21 of this code and is in compliance with the comprehensive plan. Such findings shall include, but not be limited to, the following:

A. The subdivision contributes to the 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.

FINDING: 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 Sites 461 and 322) 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 proposed 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 2015 Land Use decision issued findings that indicated 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 large as to conflict with surrounding rural residential development land use patterns. The Hearings Officer in this case agrees with the findings set forth in the 2015 Land Use Decision related to land use patterns.

Orderly Development. The 2015 Land Use Decision Hearings Officer determined that this factor is focused on whether the proposed PUD will have adequate facilities and services. The Hearings Officer, in this case, agrees. The Applicant proposed that PUD dwellings will have access from Lower Bridge Way via a private road system.

The Deschutes County Road Department requested that the Site Traffic Report be revised to reflect the correct design speed and intersection sight distances and to provide appropriate recommendations for providing the required intersection sight distances at the proposed private road connection to Lower Bridge Way. The Hearings Officer, related to the Road Department's request, adopts the findings for DCC 18.116.310 as additional findings for this approval criterion.

Each dwelling would be served by a private well and on-site sewage disposal system. The Applicant submitted, as part of Exhibit 9 to its 2015 application, well logs from two nearby properties showing water is available in the area. Applicant also submitted a *Water Supply Development Feasibility Report* (Exhibit 10) relating to water supply at the Subject Property. The record indicates utilities are available in the area to serve PUD dwellings.

The Hearings Officer in 2015 found, based on the statements/conclusions set forth in the *Water Supply Development Feasibility Report* (Applicant Exhibit 10 in this case) that since the Applicant proposed only 19 residential lots in the PUD there would be adequate water available to supply wells for these uses without interfering with other wells in the area. The Hearings Officer, based upon a review of the evidence in the record finds that there is adequate water available to supply wells for the proposed lots/residences.

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 proposed to retain a significant portion of the Subject 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 finds that with imposition of Staff, Applicant and 2015 Land Use Decision recommended conditions discussed in earlier findings the proposed PUD will preserve the Subject Property's natural resources and features.

For the foregoing reasons, the Hearings Officer believes that 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 would not create excessive demand on public facilities, services and utilities required to serve the development.

FINDING: The 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 Applicant's Exhibit 9, 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. Staff, in the Staff Report (page 95), recommended that any approval should be subject to condition of approval requiring that each residential lot receive an approved septic site evaluation prior to final plat approval. The Hearings Officer concurs with this Staff recommendation.

Stormwater Drainage. Attached as Exhibit 21 is a July 7, 2015 memorandum from the Applicant's engineer Keith D'Agostino, 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."

In the 2015 Land Use Decision (page 95) the Hearings Officer found that if the proposed PUD was 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 the lot/site and out of the Deschutes River.

Staff, in the Staff Report, recommended that the Hearings Officer in this case impose the following condition of any approval:

"Prior to final plat approval, a drainage submittal package that is in conformance with the standards and criteria found within the Central Oregon Stormwater Manual shall be submitted to Deschutes County for review and acceptance. Drainage facilities shall be designed and constructed to receive and/or transport at least a design storm as defined in the current Central Oregon Stormwater Manual and all surface drainage water coming to and/or passing through the development or roadway. All new surface water drainage shall be retained on-site on the upper bench/plateau of the subject property and outside the FP Zone."

The Hearings Officer finds that with the Staff recommended condition the proposed PUD will not create excessive demand on public facilities, services and utilities.

Roads. The Deschutes County Road Department requested that the Site Traffic Report be revised to reflect the correct design speed and intersection sight distances and to provide appropriate recommendations for providing the required intersection sight distances at the proposed private road connection to Lower Bridge Way. The Hearings Officer, related to the Road Department's request, adopts the findings for DCC 18.116.310 as additional findings for these approval criteria. The Hearings Officer finds that with the conditions of approval set forth in the findings for DCC 18.116.310, including the imposition of conditions recommended by the Road Department, this service requirement will be met. .

Police. The Subject Property is served by the Deschutes County Sheriff.

Fire. The Subject Property is served by Redmond Fire and Rescue (fire department). The Hearings Officer incorporates fire-related findings, concerns, and proposed conditions from DCC 18.128.015(A)(3) as additional findings for this service.

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.

C. The tentative plan for the proposed subdivision meets the requirements of Oregon Revised Statutes Section 92.090.

FINDING: The relevant provisions of ORS 92.090 and the proposal's compliance with those provisions are addressed in the findings below.

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.***

FINDING: The Applicant agreed to a condition of approval requiring 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.***

FINDING: The record indicates there are no subdivision or partition plats on adjoining property with which the proposed PUD roads must conform. The Hearings Officer finds that 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.***

FINDING: The Applicant proposed private PUD roads and agrees 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.***

FINDING: The proposed PUD's compliance with the applicable zoning regulations is discussed in detail findings throughout this decision. The Hearings Officer incorporates findings related to "applicable zoning ordinances and regulations" as additional findings for this criterion.

(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.

FINDING: The proposed PUD has no public streets. As discussed in the findings below, the Hearings Officer finds that 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.

FINDING: The proposed PUD's compliance with the applicable zoning regulations is discussed in detail findings throughout this decision. The Hearings Officer incorporates findings related to "applicable zoning ordinances and regulations" as additional findings for this criterion.

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

FINDING: The 2015 Land Use Decision (page 98) concluded that this requirement is applicable to final subdivision plats and therefore does not apply to the proposed tentative plan. The Hearings Officer in this case concurs.

(e) The subdivision or partition plat contains a donation to the public of all 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.

FINDING: No sewage disposal and water supply systems are proposed.

(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.

FINDING: The 2015 Land Use Decision (page 98) determined that this requirement is applicable to final subdivision plats and therefore does not apply to the proposed tentative plan. The Hearings Officer in this case concurs.

(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;

(b) A bond, irrevocable letter of credit, contract or other assurance by the subdivider to the city or county that a domestic water supply system will be installed by or on behalf of the subdivider to the lot line of each and every lot depicted in the proposed subdivision plat; and the amount of any such bond, irrevocable letter of credit, contract or other assurance by the subdivider shall be determined by a registered professional engineer, subject to any change in such amount as determined necessary by the city or county; or

(c) In lieu of paragraphs (a) and (b) of this subsection, a statement that no domestic water supply facility will be provided to the purchaser of any lot depicted in the proposed subdivision plat, even though a domestic water supply source may exist. A copy of any such statement, signed by the subdivider and indorsed by the city or county, shall be filed by the subdivider with the Real Estate Commissioner and shall be included by the commissioner in any public report made for the subdivision under ORS 92.385 (Examination). If the making of a public report has been waived or the subdivision is otherwise exempt under the Oregon Subdivision Control Law, the subdivider shall deliver a copy of the statement to each prospective purchaser of a lot in the subdivision at or prior to the signing by the purchaser of the first written agreement for the sale of the lot. The subdivider shall take a signed receipt from the purchaser upon delivery of such a statement, shall immediately send a copy of the receipt to the commissioner and shall keep any such receipt on file in this state, subject to inspection by the commissioner, for a period of three years after the date the receipt is taken.

FINDING: The Applicant proposed private wells for water supply and the proposed lots will not be supplied by a city-owned or privately-owned water system, therefore, subsection (c) applies. Staff, in the Staff Report (page 99), recommended the following condition of approval to ensure compliance with the above criterion.

"Domestic Water Supply Statement: Prior to final plat approval, a statement that no domestic water supply facility will be provided to the purchaser of any lot depicted in the proposed subdivision plat, even if a domestic water supply source may exist. A copy of any such statement, signed by the subdivider and indorsed by the County, shall be filed by the subdivider with the Real Estate Commissioner and shall be included by the commissioner in any public report made for the subdivision under ORS 92.385 (Examination). If the making of a public report has been waived or the

subdivision is otherwise exempt under the Oregon Subdivision Control Law, the subdivider shall comply with the applicable provisions of ORS 92.090(4)(c)."

The Hearings Officer finds with Staff's recommended condition of approval this criterion can be met.

(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;

(b) A bond, irrevocable letter of credit, contract or other assurance by the subdivider to the city or county that a sewage disposal system will be installed by or on behalf of the subdivider to the lot line of each and every lot depicted on the proposed subdivision plat; and the amount of such bond, irrevocable letter of credit, contract or other assurance shall be determined by a registered professional engineer, subject to any change in such amount as the city or county considers necessary; or

(c) In lieu of paragraphs (a) and (b) of this subsection, a statement that no sewage disposal facility will be provided to the purchaser of any lot depicted in the proposed subdivision plat, where the Department of Environmental Quality has approved the proposed method or an alternative method of sewage disposal for the subdivision in its evaluation report described in ORS 454.755 (Fees for certain reports on sewage disposal) (1)(b). A copy of any such statement, signed by the subdivider and indorsed by the city or county shall be filed by the subdivider with the Real Estate Commissioner and shall be included by the commissioner in the public report made for the subdivision under ORS 92.385 (Examination). If the making of a public report has been waived or the subdivision is otherwise exempt under the Oregon Subdivision Control Law, the subdivider shall deliver a copy of the statement to each prospective purchaser of a lot in the subdivision at or prior to the signing by the purchaser of the first written agreement for the sale of the lot. The subdivider shall take a signed receipt from the purchaser upon delivery of such a statement, shall immediately send a copy of the receipt to the commissioner and shall keep any such receipt on file in this state, subject to inspection by the commissioner, for a period of three years after the date the receipt is taken.

FINDING: The Applicant proposed private on-site subsurface sewage disposal systems and the lots would not be supplied by a city-owned or privately-owned sewage disposal system, therefore, subsection (c) applies. Staff, in the Staff Report (page 100), recommended the following condition of approval to ensure compliance with the above criterion.

"Sewage Disposal Statement: Prior to final plat approval, a statement that no sewage disposal facility will be provided to the purchaser of any lot depicted in the proposed subdivision plat, where the Department of Environmental Quality has approved the proposed method or an alternative method of sewage disposal for the subdivision in its evaluation report described in ORS 454.755 (Fees for certain reports on sewage disposal) (1)(b). A copy of any such statement, signed by the subdivider and indorsed by the city or county shall be filed by the subdivider with the Real Estate Commissioner and shall be included by the commissioner in the public report made for the subdivision under ORS 92.385 (Examination). If the making of a public report has been waived or the subdivision is otherwise exempt under the Oregon Subdivision Control Law, the subdivider shall comply with the applicable provisions of ORS 92.090(5)(c)."

The Hearings Officer finds with Staff's recommended condition of approval this criterion can be met.

(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.

FINDING: The 2015 Land Use Decision (page 80) concluded that 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. The Hearings Officer, in this case, concurs with the 2015 Hearings Officer's finding.

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.

FINDING: The Hearings Officer incorporates Preliminary Finding #2 and the findings for DCC 18.56 as additional findings for this criterion. The Hearings Officer finds that Applicant requested SMIA review, which includes a review of noise and dust impacts, to be deferred until the "building permit stage." The Hearings Officer in this case agreed with the 2015 Land Use Decision Hearings Officer conclusion that SMIA site plan review was required during the PUD process. The Hearings Officer found that Applicant did not provide the required SMIA site plan review documents, in this case, to allow the Hearings Officer to determine if this criterion was met. Therefore, the Hearings Officer finds this criterion is not met.

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

FINDING: The Applicant agreed to a condition of approval to obtain the county surveyor's approval of the subdivision name. The Hearings Officer finds that with a condition of approval this criterion can be met.

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 under one of the following conditions:

A. Public roads with maintenance responsibility accepted by a unit of local or state government or assigned to landowners or homeowners association by covenant or agreement; or

B. Private roads, as permitted by DCC Title 18, with maintenance responsibility assigned to landowners or homeowners associations by covenant or agreement pursuant to ORS 105; or

C. 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 that maintenance responsibility for the roads has been assigned as required by this section.

FINDING: Staff, in the Staff Report (page 102), indicated that these criteria have been updated since the 2015 decision. Staff, in the Staff Report, found that this proposal would comply with section (B) with a condition of approval requiring that maintenance responsibility is assigned to landowners or homeowners associations by covenant or agreement pursuant to ORS 105 prior to or concurrently with the recording of the final plat. The Road Department has proposed the following condition to implement this requirement:

Maintenance of the interior private roads shall be assigned to a home owners association by covenant or plat pursuant to DCC 17.16.040, 17.16.105, 17.48.160(A), and 17.48.180(E). If by covenant, applicant shall submit covenant to Road Department or Community Development Department for review and shall record covenant with the County Clerk upon Road Department approval. A copy of the recorded covenant shall be submitted to the Community Development Department prior to final plat approval.

The Hearings Officer finds that with the Road Department's recommended condition of approval this criterion can be met.

Section 17.16.115. Traffic Impact Studies.

A. The traffic studies will comply with DCC 18.116.310.

FINDING: The Hearings Officer incorporates the findings for DCC 18.116.310 as the findings for this approval criterion. The Hearings Officer finds that with the condition required by the findings in DCC 18.116.310 this criterion can be met.

Chapter 17.24, Final Plat.

Section 17.24.030, Submission for Phased Development.

A. If a tentative plan is approved for phased development, the final plat for the first phase shall be filed within two years of the approval date for the tentative plan.

B. The final plats for any subsequent phase shall be filed within three years of the recording date of the final plat for the first phase.

C. The applicant may request an extension for any final plat under DCC 17.24 in the manner provided for in DCC 17.24.020(B).

D. If the applicant fails to file a final plat, the tentative plan for those phases shall become null and void.

FINDING: No phased development is proposed.

Section 17.24.120. Improvement Agreement.

A. The subdivider may, in lieu of completion of the required repairs to existing streets and facilities, and improvements as specified in the tentative plan, request the County to approve an agreement between himself and the County specifying the schedule by which the required improvements and repairs shall be completed; provided, however, any schedule of improvements and repairs agreed to shall not exceed on[e] year from the date the final plat is recorded, except as otherwise allowed by DCC 17.24.120(F) below. The agreement shall also provide the following: …

FINDING: The Applicant is not requesting an Improvement Agreement at this time. Any such request will need to comply with the applicable criteria for improvement agreements.

Chapter 17.36, Design Standards.

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 the 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 requirements for streets set forth in DCC 17.36.

FINDING: The Hearings Officer incorporates the findings for DCC 18.116.310 as the findings for this approval criterion. The Hearings Officer finds that with the condition required by the findings in DCC 18.116.310 and the conditions recommended by the Road Department this criterion can be met.

> ***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.***

FINDING: The proposed PUD streets are allowed to be private under this criterion.

> Section 17.36.030. Division of Land.
>
> ***Any proposal for a condominium conversion which results in a division of real property shall comply with the provisions of DCC Title 17 and ORS 92.***

FINDING: No proposal for a condominium conversion is included in this application.

> 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.***

FINDING: The Road Department proposed the following conditions to ensure compliance with this criterion:

> *"Improvement plans shall include provisions for improvements on Lower Bridge Way to provide for the required intersection sight distances according to recommendations given in an acceptable Site Traffic Report.*
>
> *Applicant shall dedicate additional right of way to provide the required right-of-way width of 30 feet from the centerline on each side of the road (60-feet total minimum width) on Lower Bridge Way pursuant to DCC 17.36.020(B), 17.36.080, and 17.48A. Dedication shall be by plat declaration."*

The Hearings Officer finds that if the conditions recommended by the Road Department are included then this criterion can be met.

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.

FINDING: No continued streets are proposed.

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 refers to street standards found in a zoning ordinance, the standards in the zoning ordinance shall prevail.

FINDING: The street right-of-way and surfacing widths comply with the standards of DCC 18.48, as reviewed below. The Deschutes County Road Department requested several conditions of approval to ensure compliance with this criterion, which have been referenced throughout this decision. Additionally, all road designs will be reviewed and approved by the County Road Department prior to approval of the final plat. The Hearings Officer finds that including the conditions recommended by the Road Department

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 re-subdivision in conformity to the street requirements and other requirements contained in DCC Title 17.

FINDING: The Applicant proposed to create lots that are larger than one acre in size. However, no further subdivision of the Subject Property would be allowed under current zoning regulations.

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.

FINDING: No further subdivision of the adjoining property would be allowed under current zoning regulations.

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.

FINDING: Lower Bridge Way is a designated rural collector. No frontage road is needed to support the proposed subdivision.

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.

FINDING: This criterion is not applicable because the subject property is not adjacent to a railroad, freeway or parkway.

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.

FINDING: The Applicant agreed to a condition of approval to obtain approval of PUD road names from the county's Property Address Coordinator before final plat approval. . The Hearings Officer finds that if Applicant’s agreed upon condition to obtain name approval from the Property Address Coordinator is included then this criterion can be met.

Section 17.36.130. Sidewalks.

A. Within an urban growth boundary, sidewalks shall be installed on both sides of a public road or street and in any special pedestrian way within the subdivision or partition, and along any collectors and arterials improved in accordance with the subdivision or partition.

B. Within an urban area, sidewalks shall be required along frontage roads only on the side of the frontage road abutting the development.

C. Sidewalk requirements for areas outside of urban area are set forth in section 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 Title 18.

FINDING: The Hearings Officer finds that these criteria are not applicable to the proposed development because the Subject Property is located outside of an acknowledged Urban Growth Boundary. Sidewalks are not required for this subdivision pursuant to subsection (C) above.

Section 17.36.140. Bicycle, Pedestrian and Transit Requirements.

Pedestrian and Bicycle Circulation within Subdivision.

A. 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:

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

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

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

FINDING: There are no existing or planned neighborhood activity centers in the vicinity of the Subject Property. The Applicant proposed to accommodate bicycles and pedestrians on the private PUD roads which would have a 28-footwide paved surface. The Applicant also agreed to a condition of approval to stripe a 4-foot- wide shoulder bikeway on each side of the private PUD roads. The Hearings Officer finds that with the Applicant agreed upon conditions this criterion can be met.

B. Subdivision Layout.

1. 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.

FINDING: Most of the Subject Property lies between Lower Bridge Way and the Deschutes River, and there are no abutting subdivisions or nearby neighborhood activity centers to which PUD roads should or can connect. The Applicant proposed three cul-de-sacs off the main PUD access road to serve the proposed residential lots. The 2015 Land Use Decision (page 85) determined that these cul-de-sacs were justified because of the configuration and location of the Subject Property which prevent any additional road connections. The Hearings Officer, in this case, concurs and therefore finds this criterion can be met.

2. ***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.***

FINDING: The 2015 Land Use Decision (page 85) determined that 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 was required. The Hearings Officer, in this case, concurs and therefore finds no additional walking or cycling connections are necessary for approval of Applicant's PUD.

3. ***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.***
4. ***Connections shall not be more than 400 feet long and shall be as straight as possible.***

FINDING: As shown on the proposed tentative plan, there is no street grid system with typical blocks in the area surrounding the Subject Property. Access, off of Lower Bridge Way, has not been established into the Applicant owned property to the west (in this decision, oft referred to as SM site 461 or Tax Lot 1502). At this time the Hearings Officer finds these criteria can be met.

C. ***Facilities and Improvements.***
   1. ***Bikeways may be provided by either a separate paved path or an on-street bike lane, consistent with the requirements of DCC Title 17.***
   2. ***Pedestrian access may be provided by sidewalks or a separate paved path, consistent with the requirements of DCC Title 17.***
   3. ***Connections shall have a 20 foot right of way, with at least a 10 foot usable surface.***

FINDING: The Applicant proposed to accommodate bicycle and pedestrian traffic on the private PUD roads which would have 28 feet of paved surface. In addition, the applicant agrees to stripe 4-foot-wide bikeways on both sides of the PUD roads. The Hearings Officer finds these criteria can be met.

<u>Section 17.36.150. Blocks.</u>

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.***

FINDING: The Hearings Officer finds that 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.

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.

FINDING: Staff, in the Staff Report (page 109), recommended that if the Hearings Officer in this case approved the Application that it should be subject to a condition of approval requiring the Applicant to show and label all utility easements on the final plat. The Hearings Officer concurs with Staff's recommendation. The Hearings Officer finds that with Staff's recommended condition this criterion can be met.

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.

FINDING: The 2015 Land Use Decision (page 87) determined that the Deschutes River qualified as a "watercourse" under this criterion and found the proposed subdivision's private roads generally run parallel to the river. The Applicant proposed to protect the river and its flood plain, wetlands, riparian areas and canyon by including them in Open Space Tracts C and E and managed under the RAMP. The Applicant agreed to a condition of approval requiring a stormwater easement or drainage right-of-way conforming substantially to the course of the river. The Hearings Officer finds that with the condition agreed upon by Applicant this criterion can be met.

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, with the following exceptions:

FINDING: The 2015 Land Use Decision (page 87) made the following findings related to this criterion:

> *"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."*

The Hearings Officer incorporates the findings for DCC 18.96.110 C, DCC 18.128.015 A, DCC 18.128.210 A as additional findings for this criterion. The Hearings Officer finds that with conditions set forth in the findings for DCC 18.96.110 C, DCC 18.128.015 A, DCC 18.128.210 A this approval criterion can be met.

A. In areas not to be served by a public sewer, minimum lot and parcel sizes shall permit compliance with the requirements of the Department of Environmental Quality and the County Sanitarian, and shall be sufficient to permit adequate sewage disposal. Any problems posed by soil structure and water table and related to sewage disposal by septic tank shall be addressed and resolved in the applicant's initial plan.

B. Where property is zoned and planned for business or industrial use, other widths and areas may be permitted by the Hearings Body. Depth and width of properties reserved or laid out for commercial and industrial purposes shall be adequate to provide for the off street service and parking facilities required by the type of use and development contemplated.

FINDING: Staff, in the Staff Report (page 110) stated the following:

> *"The subject property is in an area not served by a public sewer. Staff believes the highly disturbed surface of the former mining site may poise soil structure problems related to sewage disposal by septic tank. Typically, septic feasibility is conditioned to be demonstrated prior to final plat approval, however, this criterion requires that any such issues be resolved in the applicant's initial plan. Staff is uncertain if information confirming that septic service is feasible at each of the proposed lots is in the record and recommends the Hearings Officer confirm that any soil structure problems are addressed prior to approval of this application."*

The Hearings Officer adopts the findings for DCC 18.128.210 A.11 as the findings for this criterion. The Hearings Officer finds that a condition of approval requiring all lots receive septic site evaluation prior to plat approval will assure this criterion is met.

<u>Section 17.36.180. Frontage.</u>

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.

FINDING: As shown on the tentative plat, the proposed lots front on private roads. The side lot lines are generally at right angles to the proposed new streets. All residential lots have at least 50 feet of frontage on a PUD private road or 30 feet of frontage on a cul-de-sac. The Hearings Officer finds these criteria can be met.

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.

FINDING: DCC 17.08.030 defines "through lot" as an "interior lot having a frontage on two streets and/or highways, not including an alley." Proposed Lots 4 and 16 may qualify as "through lots" because they have frontage on both the main PUD access road and a cul-de-sac. The 2015 Land Use Decision (page 88) Hearings Officer stated that:

"..., 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."

The Hearings Officer, in this decision, concurs with the 2015 Land Use Decision section quoted above.

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.

FINDING: The proposed development is not within an urban growth boundary. The Hearings Officer finds that this provision does not apply.

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.

FINDING: The Hearings Officer finds that the proposed lots will be adequate to allow solar access for all dwellings. All structures will be required to comply with the solar requirements of DCC 18.116.180. The Hearings Officer finds these criteria will be met.

Section 17.36.220. Underground Facilities.

Within an urban growth boundary, all permanent utility services ...

FINDING: The proposed subdivision is not within an urban growth boundary. The Hearings Officer finds this criterion does not apply.

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.

FINDING: The Applicant agreed to a condition of approval requiring compliance with these approval criteria during construction activities prior to receipt of final plat approval. The Hearings Officer finds that with the Applicant agreed upon condition these criteria can be met.

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.

FINDING: The proposed development is not within an urban growth boundary. The Hearings Officer finds this criterion does not apply.

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.

FINDING: As shown on the proposed tentative plan, the PUD has a single point of access from a new private road connecting to Lower Bridge Way. The 2015 Land Use Decision (page 90) Hearing Officer found other connections to Lower Bridge Way were not feasible because they either have steep topography adjacent to the road, or they would not provide a meaningful secondary access. The Hearings Officer, in this case, concurs with this statement.

More problematic is the possibility of the requirement, by RFD, of a second fire access road. The Hearings Officer reviewed the letter (see Public Comments section) submitted by RFD and interprets that letter as not "requiring" a second access but rather identifying the "possibility" of a second access at the Subject Property. . The Hearings Officer addressed this issue in the findings for DCC 18.60.07 as follows:

> *"Staff, in the Staff Report, expressed concern that RFD may require more than one access road in/out of the PUD. Staff also expressed concern that if a second access road be required by RFD the proposed PUD road layout may be substantially/significantly altered/modified. The Hearings Officer also is concerned about the possibility of RFD requiring a second access roadway in/out of the PUD. The Hearings Officer believes that with a condition requiring approval, by RFD of the road proposed in the PUD (a single access road) the access issue can be resolved. The Hearings Officer finds that including a modified proposed condition A (Substantial Conformance) and modified condition J (Fire Mitigation Conditions) limiting the number of access points for fire purposes this approval criterion can be met."*

If RFD would require a second fire safety access "road" then the Hearings Officer finds the "second road" would constitute a "substantial difference" from the proposed tentative plan and therefore not meet proposed condition A. It is possible, if RFD required something less that a "road" as a second fire safety access to for the proposed PUD, that a determination would be necessary decide

if such "lesser impact access" would be "substantially different" under proposed condition A. The Hearings Officer finds that with modified conditions A (Substantial Conformance) and J (Fire Mitigation Conditions) this criterion can be met.

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.

FINDING: No street trees have been proposed by the Applicant.

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.

FINDING: No water or sewer lines have been proposed. The subdivision lots will be served by on-site septic systems and individual or shared wells. The Hearings Officer finds this criterion does not apply.

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.

FINDING: The Applicant proposed to serve the PUD residential lots with individual wells. Submitted as part of Applicant's Exhibit 9 are well logs for two wells within one mile of the Subject Property, showing completed well depths of 220 and 390 feet. The Hearings Officer finds this criterion is met.

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 sections 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.

FINDING: No new public water system is proposed. The Hearings Officer finds this criterion is not applicable.

Chapter 17.44, Park Development.

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.

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.

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.

FINDING: The Subject Property is not located in a UGB. The Subject Property is not in an area planned for parks and the Hearings Officer finds that the proposed Open Space tracts are not suitable and adaptable for park purposes. Further, that portion of the property zoned FP, including the Riparian and wetlands area, will be preserved and managed under the RAMP.

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 DCC 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 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.

FINDING: As discussed above, the Subject Property is located outside the boundaries of the Bend Metro Park and Recreation District and the RAPRD. The Applicant agreed to a condition of approval to pay a fee in lieu of dedication of park land in the amount of $350 per dwelling unit, prior to final plat approval. The Hearings Officer finds that with the Applicant agreed upon condition these criteria can be met.

Section 17.44.030. Annexation Agreement.

No partition or subdivision of land lying within the Bend Urban Growth Boundary, including the urban reserve areas, but outside the boundaries of the Bend Metro Park and Recreation District, shall be approved unless the landowner has signed an annexation agreement with the Bend Metro park and Recreation District.

FINDING: The Hearings Officer finds this criterion does not apply.

Chapter 17.48, Design and Construction Specifications.

Section 17.48.100. Minimum Right of Way Width.

The minimum right of way width is 60 feet unless specified otherwise in Table A (or in any right of way specifications set forth for a particular zone in a zoning ordinance). (See Table A set out at the end of DCC Title 17.)

FINDING: The Applicant proposed a 40-foot right of way for the on-site private roads. The Road Department included the following recommended condition of approval to address any deficiencies in the public right-of-way associated with Lower Bridge Way:

"Applicant shall dedicate additional right of way to provide the required right-of-way width of 30 feet from the centerline on each side of the road (60-feet total minimum width) on Lower Bridge Way pursuant to DCC 17.36.020(B), 17.36.080, and 17.48A. Dedication shall be by plat declaration."

The Hearings Officer finds that with the Road Department recommended condition this criterion can be met.

Section 17.48.110. Turn Lanes.

When a turn lane is required, it shall be a minimum of 14 feet in width, except where road specifications in a zoning ordinance provide for travel lanes of lesser width. Additional right of way may be required.

FINDING: The Hearings Officer incorporates the findings for DCC 18.116.310 as the findings for this criterion.

Section 17.48.120, Partial Width Roads.

Partial width roads or half streets shall not be allowed.

FINDING: No partial width road or half streets are proposed.

Section 17.48.130. Road Names.

All roads shall be named in conformance with the provisions of the Deschutes County uniform road naming system set forth in DCC Title 16.

FINDING: Staff, in the Staff Report (page 116), recommended this criterion as a condition of any approval. The Hearings Officer concurs and finds that making this criterion an approval will result in this criterion being met.

Section 17.48.140. Bikeways.

...

D. Shoulder Bikeways.

1. Shoulder bikeways shall be used on new construction of uncurbed arterials and collectors.

2. Shoulder bikeways shall be at least four feet wide. Where the travel lane on an existing arterial or collector is not greater than eleven feet, the bikeway shall be a minimum of four feet wide.

FINDING: No new construction of uncurbed arterials and collectors is proposed.

Section 17.48.150. Structures.

All structures that carry a road or cross over a road shall be designed to have a 50-year life span. All designs must be approved by the Road Department Director and other affected public or private agencies.

FINDING: No structures to carry a road or cross over a road are proposed or required.

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 a homeowners association in a planned unit development.

FINDING: The new private PUD roads will be maintained by the HOA pursuant to the CC&Rs, which the Applicant will record with the Deschutes County Clerk with the final plat. The Hearings Officer finds that including a condition requiring the Applicant to record the CC&R's with the Deschutes County Clerk with the final plat will meet the requirements of this criterion.

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.

C. Primary Access Roads.

1. The primary access road for any new subdivision shall be improved to the applicable standard set forth in Table A.

2. The applicable standard shall be determined with reference to the road's classification under the relevant transportation plan.

3. For the purposes of DCC 17.48.160 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.

FINDING: The Hearings Officer incorporates the findings for DCC 18.116.310 as additional findings for this criterion. In addition, the Hearings Officer incorporates all Road Department recommended conditions of approval as additional findings for this criterion. The Hearings Officer finds that including the condition recommended in the findings for DCC 18.116.310 and the Road Department conditions these criteria can be met.

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.

FINDING: As discussed in the findings above, the Hearings Officer finds that because of the location and configuration of the Subject Property it is not feasible or necessary to provide a secondary road for general access. The Hearings Officer has addressed the possibility of RFD requiring a secondary emergency access road in earlier findings. Therefore, the Hearings Officer finds 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.

FINDING: Proposed roads within the PUD will not terminate at the boundary of the Subject Property.

F. Cul-de-sacs.

1. ***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.***
2. ***The maximum grade on the bulb shall be four percent.***

FINDING: The Applicant, in its Burden of Proof (page 70) responded to these criteria as follows:

> *"The proposal includes three private roads terminating in cul-de-sac bulbs as shown on the tentative plat: Because of topography and geographic location, Roads "C" and "E" exceed 600' in length.*
>
> *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. All three of the applicant's planned cul-de-sacs will have outside diameters of 96 feet. The cul-de-sac design also includes a 40-foot diameter paved circle within a 26-foot- wide paved driving surface. The applicant also plans two "hammerhead" turnarounds along proposed Road "C", the main PUD access road, to aid fire apparatus access.*
>
> *The applicant is agreeable 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."*

Staff, in the Staff Report (page 118), recommended that the Hearings Officer request the Applicant provide confirmation from RFD that the proposed cul-de-sacs design has been reviewed and approved. The Hearings Officer did not make such a request at the Hearing. However, the Hearings Officer takes note that the Applicant had access to the Staff Report prior to the Hearing and, as such, was given an opportunity to respond. Kieth D'Agostino, on behalf of Applicant, testified at the Hearing related to the RFD. D'Agostino did not, testify definitively that the proposed cul-de-sacs had been "approved" by RFD. The Hearings Officer finds that with a condition requiring, prior to final plat approval, Applicant obtain RFD approval of the cul-de-sacs these criteria can be met.

G. Frontage Roads. Right of way widths shall be 40 feet when immediately adjacent to a main highway/arterial; 60 feet when the frontage road is separated from the highway or arterial by private land or as set forth for a particular zone in the zoning ordinance.

FINDING: No frontage roads are proposed as part of the proposed PUD application.

<u>17.48.180, Private Roads.</u>

The following minimum road standards shall apply for private roads:

FINDING: The Applicant proposed private roads within the PUD. The Hearings Officer finds that with conditions of approval contained in the findings for DCC 18.116.310 and those recommended by the Road Department (See Road Department Public Comments contained in this decision) this criterion can be met.

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

FINDING: The Applicant proposed 28-foot-wide paved roads with striped, 4-foot-wide bike lanes.

B. Minimum radius of curvature, 50 feet;
C. Maximum grade, 12 percent;
D. At least one road name sign will be provided at each intersection for each road;

FINDING: The Hearings Officer finds that with conditions of approval contained in the findings for DCC 18.116.310 and those recommended by the Road Department (See Road Department Public Comments contained in this decision) this criterion can be met.

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

FINDING: The Road Department addressed this criterion through the following proposed condition of approval:

> *"Maintenance of the interior private roads shall be assigned to a home owners association by covenant or plat pursuant to DCC 17.16.040, 17.16.105, 17.48.160(A), and 17.48.180(E). If by covenant, applicant shall submit covenant to Road Department or Community Development Department for review and shall record covenant with the County Clerk upon Road Department approval. A copy of the recorded covenant shall be submitted to the Community Development Department prior to final plat approval."*

The Hearings Officer finds if the above-quoted Road Department condition is included this criterion can be met.

F. Private road systems shall include provisions for bicycle and pedestrian traffic.
1. In cluster and planned developments limited to ten dwelling units, the bicycle and pedestrian traffic can be accommodated within the 20-foot wide road.
2. 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.

FINDING: Applicant proposed shoulder bikeways to be four-feet wide, paved and striped. The Hearings Officer finds that with a condition requiring shoulder bikeways to be four-fee wide, paved and striped this criterion can be met.

Section 17.48.190. Drainage.

A. Minimum Requirements.

1. Drainage facilities shall be designed and constructed to receive and/or transport at least a design storm as defined in the current Central Oregon Stormwater Manual created by Central Oregon Intergovernmental Council and all surface drainage water coming to and/or passing through the development or roadway.

2. The system shall be designed for maximum allowable development.

B. Curbed Sections.

...

C. Noncurbed Sections.

1. Road culverts shall be concrete or metal with a minimum design life of 50 years.

2. All cross culverts shall be 18 inches in diameter or larger.

3. Culverts shall be placed in natural drainage areas and shall provide positive drainage.

D. Drainage Swales. The Design Engineer is responsible to design a drainage swale adequate to control a design storm as defined in the Central Oregon Stormwater Manual created by Central Oregon Intergovernmental Council.

E. Drainage Plans. A complete set of drainage plans including hydraulic and hydrologic calculations shall be incorporated in all road improvement plans.

F. Drill Holes. Drill holes are prohibited.

G. Injection wells (drywells) are prohibited in the public right-of-way.

FINDING: The Hearings Officer incorporates the findings for DCC 18.96.080 E and DCC 17.16.100 B as additional findings for these approval criteria. Staff, in the Staff Report (page 120), recommended that the Hearings Officer include these criteria as a condition of any approval. The Hearings Officer finds if the conditions of approval set forth in the findings for DCC 18.96.080 E and DCC 17.16.100 B and Staff's recommended conditions are included in an approval of this application then these criteria can be met.

Section 17.48.210. Access.

A. Permit Required. Access onto public right of way or change in type of access shall require a permit. Permits are applied for at offices of the Community Development Department.

B. Access Restrictions and Limitations. The creation of access onto arterials and collectors is prohibited unless there is no other possible means of accessing the parcel. In any event, residential access onto arterials and collectors shall not be permitted within 100 feet of an intersection or the maximum distance obtainable on the parcel, whichever is less.

FINDING: No access to arterial or collector roads from a proposed subdivision lot is proposed.

IV. CONCLUSION

This decision involves a parcel of land that has been the subject of significant historical controversy. The Subject Property, in the past, has been used for mining and both authorized and unauthorized waste disposal. The Subject Property, in recent years, has participated in a voluntary clean-up program with the State of Oregon. The Subject Property, and a parcel to the west, are both owned by the Applicant in this case.

In 2015 the Applicant proposed a PUD subdivision for the Subject Property. That application was denied by a Hearings Officer (2015 Land Use Decision) on multiple grounds. The current PUD subdivision application is essentially the same as the 2015 application. An important difference between the 2015 application and the current application is that the 2015 application included a 10.4-acre parcel that was, and remains today, zoned EFU; the current application does not include the EFU zoned land.

Both the 2015 application and the current application proposed 19 lots, generally in close proximity to the Deschutes River and included Common Tracts, Open Space Tracts (Tracts C and E are along the Deschutes River), a private road with three cu-de-sacs, private wells and on-site sewage disposal. The PUD subdivision proposal includes the creation of a homeowners' association (HOA) which would be responsible for maintenance and management of all common areas and Open Space Tracts. The PUD subdivision proposal included the creation of a riparian area management plan (RAMP) related to protection of the area along the Deschutes River.

Staff, Applicant and opponents addressed a number of contentious issues related to the current PUD subdivision proposal. One such issue addressed by 2015 Hearings Officer and the Hearings Officer in this decision involved the interpretation of DCC 18.96.030 and DCC 18.96.040. In this decision the Hearings Officer concluded that flood plain zoned land located in the PUD subdivision proposal meet the requirements of DCC 18.96.030 and DCC 18.96.040. The 2015 Land Use Decision Hearings Officer found that *neither* the DCC 18.96.030 *nor* DCC 18.96.040 requirements were met by the PUD subdivision proposal. The Hearings Officer, in this decision, concluded that flood plain/open space areas should be included in density calculations.

A second contentious issue involved the timing of submission of Surface Mining Impact Area Site Plan review(s) (SMIA Site Plan review). . Applicant requested that SMIA Site Plan review could be deferred until the submission of building permit applications for each individual lot (See Preliminary Finding #2). The Hearings Officer in this case concluded that SMIA Site Plan review was required to be conducted at the PUD subdivision stage/level and could not be deferred until the building permit

(for each proposed dwelling) stage. The Hearings Officer found multiple sections of the DCC 18.56 related to SMIA Site Plan review requirements were not met.

A third contentious issue involved opponents' claim that a Goal 5 exception was required for this case. The Hearings Officer found that a Goal 5 exception was not required.

The Hearings Officer also found an additional section of the DCC not met. DCC 18.128.210 B.6 requires Applicant to provide financial information related to its capacity to complete the PUD subdivision project within a stated time period. The Hearings Officer finds this section could have easily been addressed by Applicant in a manner meeting the requirements of DCC 18.128.210 B.6 but, in this case, minimum evidentiary submission was not found in the record. The Hearings Officer found the requirements of DCC 18.128.210 B.6 were not met.

The Hearings Officer acknowledges that the "contentious issues" discussed above do not represent all of the issues raised by Applicant, opponents and Staff. The Hearings Officer addressed, in the detailed findings for this decision, each of the relevant approval criteria.

Because the Hearings Officer found the proposed PUD subdivision application requirements for SMIA Site Plan review and financial information were not met the Hearings Officer's decision is DENIAL.

The Hearings Officer anticipates this decision will be appealed to the Deschutes County Board of Commissioners. The Hearings Officer included "proposed" conditions of approval. In the event the Board, upon appeal, approves the PUD subdivision application the Board may desire to include some or all of the "proposed" conditions.

V. DECISION

Based on the Findings of Facts and Conclusion of Law, the Hearings Officer **DENIES** the Applicant's requested PUD subdivision plan and conditional use permit of a 19-lot planned/cluster development.

In the event this decision is appealed to and approved by the Board of County Commissioners the Hearings Officer for this case **recommends the approval be subject to the following conditions:**

VI. RECOMMENDED CONDITIONS OF ANY APPROVAL

(References to the Applicant refer to the Applicant in this land use application and any successors or assigns.)

A. This approval is based upon the application, site plan, specifications, and supporting documentation submitted by the Applicant. Any substantial change in this approved use will require review through a new land use application. A substantial change to the site plan will result if the Redmond Fire Department requires a "second road" access meeting County "road" standards into the Subject Property.

B. The Applicant shall obtain any necessary permits from the Deschutes County Building Division and Environmental Soils Division.

C. No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed by DCC 18.120.040

D. Structural setbacks from any north lot line shall meet the solar setback requirements in DCC 18.116.180.

E. The Applicant shall lawfully reconfigure the legal lots to correspond with the proposed plat boundaries, or otherwise establish the proposed plat boundaries as legal lot(s) prior the recording of any final plat under this approval.

F. The Applicant not seek, nor be granted, exceptions from setback requirements set forth in DCC 18.60.050, DCC 18.84, DCC 18.56.100 D and the Oregon Scenic Waterway laws.

G. The Applicant shall sign a Waiver of Remonstrance Easement for Surface Mining Site nos. 461 and 322 prepared by the county, record the document in the Deschutes County Book of Records, and submit a copy of the recorded document to the Planning Division prior to final plat approval.

H. 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.

I. Riparian Area Management Plan Implementing Conditions:

1. Prohibit, within the river canyon area (area below the bench/plateau), of changes in the natural grade including no alteration, removal or destruction of natural vegetation excepting when done as part of an ODFW approved habitat enhancement project; and
2. Prohibit construction of any structure, whether or not it requires a building permit, closer than 50-feet from any rimrock; and
3. Compliance with all provisions of the Revised RAMP; and
4. Prohibit the feeding of wildlife; and
5. Recording in the Deschutes County public records a copy of the CC&Rs with a copy of the Revised RAMP attached; and
6. Compliance with DCC 18.96.060.

J. Fire Hazard Mitigation Conditions.

1. Compliance with the Redmond Fire and Rescue water storage requirements; and
2. Confirmation that only one access road is required; and
3. The cul-de-sac designs shall meet the requirements of Redmond Fire and Rescue; and

4. **<u>Additional conditions may be added by the Board based upon on additional information received from Redmond Fire and Rescue.</u>**

K. In order to prevent or minimize erosion and/or pollution, changes in the natural grade of land, or the alteration, removal or destruction of natural vegetation riverward of proposed and actual existing strictures or on existing slopes over 10 percent within the canyon shall be prohibited unless they are part of an ODFW approved habitat enhancement project.

L. Any new structure or substantial exterior 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. No setback exceptions will be granted in LM review for any lot/dwelling.

M. The property owner shall convey to the County a conservation easement, as defined in DCC 18.04.030, "Conservation Easement," affecting all property on the subject lot which is within 10 feet of the ordinary high-water mark of the river or stream, prior to final plat approval.

N. Notwithstanding DCC 18.84.090(E), structures in the PUD are precluded from receiving exceptions to the rimrock setback standards.

O. All necessary federal, state and local government agency permits shall be obtained for work in the Flood Plain Zone.

P. Structures are prohibited in the Flood Plain zoned portions of the property.

Q. Prior to final plat approval, a drainage submittal package that is in conformance with the standards and criteria found within the Central Oregon Stormwater Manual shall be submitted to Deschutes County for review and acceptance. Drainage facilities shall be designed and constructed to receive and/or transport at least a design storm as defined in the current Central Oregon Stormwater Manual and all surface drainage water coming to and/or passing through the development or roadway.

R. All new surface water drainage shall be retained on-site on the upper bench/plateau of the subject property and outside the FP Zone.

S. Drainage facilities compliant with the Central Oregon Stormwater Manual shall be designed for maximum allowable development.

T. Each residential lot receive an approved septic site evaluation, prior to final plat approval.

U. Road and Traffic Mitigation Conditions:

Prior to construction of public and private road improvements:

1. The Applicant shall submit road improvement plans for private roads to Road Department for approval prior to commencement of construction pursuant to DCC 17.40.020 and 17.48.060. The roads shall be designed to the minimum standard for a private road pursuant to 17.48.160, 17.48.180, and 17.48A. Road improvement plans shall be prepared in accordance with all applicable sections of DCC 17.48; and
2. Improvement plans shall include provisions for improvements on Lower Bridge Way to provide for the required intersection sight distances according to recommendations given in an acceptable Site Traffic Report.
3. Review and approval by the Road Department that Applicant Exhibit PH-2 meets all applicable transportation related requirements.

Prior to final plat approval by Road Department:

4. The Applicant shall complete road improvements according to the approved plans and all applicable sections of DCC 17.48. Improvements shall be constructed under the inspection of a register professional engineer consistent with ORS 92.097 and DCC 17.40.040. Upon completion of road improvements, Applicant shall provide letter from the engineer certifying that the improvements were constructed in accordance with the approved plans and all applicable sections of DCC 17.48; and
5. Maintenance of the interior private roads shall be assigned to a home owners association by covenant or plat pursuant to DCC 17.16.040, 17.16.105, 17.48.160(A), and 17.48.180(E). If by covenant, Applicant shall submit covenant to Road Department or Community Development Department for review and shall record covenant with the County Clerk upon Road Department approval. A copy of the recorded covenant shall be submitted to the Community Development Department prior to final plat approval; and
6. All easements of record or existing rights of way shall be noted on the final partition plat pursuant to DCC 17.24.060(E), (F), and (H); and
7. The Applicant shall dedicate additional right of way to provide the required right-of-way width of 30 feet from the centerline on each side of the road (60-feet total minimum width) on Lower Bridge Way pursuant to DCC 17.36.020(B), 17.36.080, and 17.48A. Dedication shall be by plat declaration; and
8. The surveyor preparing the plat shall, on behalf of the Applicant, submit information showing the location of the existing roads in relationship to the rights of way to Deschutes County Road Department. This information can be submitted on a worksheet and does not necessarily have to be on the final plat. All existing road facilities and new road improvements are to be located within legally established or dedicated rights of way. In no case shall a road improvement be located outside of a dedicated road right of way. If research reveals that inadequate right of way exists or that the existing roadway is outside of the legally established or dedicated right of way, additional right of way will be dedicated as directed by Deschutes County Road Department to meet the applicable requirements of DCC Title 17 or other County road standards. This condition is pursuant to DCC 17.24.060(E),(F), and (G) and 17.24.070(E)(8); and

9. The Applicant shall submit as-constructed improvement plans to Road Department pursuant to DCC 17.24.070(E)(1); and
10. The Applicant shall submit plat to Road Department for approval pursuant to DCC 17.24.060(R)(2), 100, 110, and 140.

V. Dust Mitigation Conditions:

The Applicant shall mitigate dust from construction related ground disturbance at all times using the following Best management Practices:

1. Applicant shall include, in its Dust Control Plan (Exhibit 14, Attachment D), all of the following:
   a. Clearing and grubbing shall be held to the minimum necessary for grading and equipment operation; and
   b. Construction shall be sequenced to minimize the exposure time of the cleared surface area; and
   c. Exposed soils shall be quickly stabilized using vegetation, mulching, spray-on adhesives, calcium chloride, sprinkling, and stone/gravel layering; and
   d. Key access points shall be identified and stabilized prior to commencement of construction; and
   e. The impact of dust shall be minimized by anticipating the direction of prevailing winds; and
   f. Most construction traffic shall be directed to stabilized roadways within the project site; and
   g. Water shall be applied by means of pressure-type distributors or pipelines equipped with a spray system or hoses and nozzles that will ensure even distribution; and
   h. All distribution equipment shall be equipped with a positive means of shutoff; and
   i. Unless water is applied by means of pipelines, at least one mobile unit shall be available at all times to apply water or dust palliative to the project; and
   j. Pre-construction vegetative ground cover shall not be destroyed, removed, or disturbed more than twenty calendar days prior to land disturbance; and
   k. Temporary soil stabilization with appropriate vegetation shall be applied on areas that will remain unfinished for more than thirty calendar days; and
   l. Permanent soil stabilization with perennial vegetation or pavement shall be applied as soon as practical after final grading; and
   m. Irrigation and maintenance of the perennial vegetation shall be provided for thirty calendar days or until the vegetation takes root, whichever is longer; and
   n. Prior to any approval of mining use on SM Site 461 Applicant shall provide owners of the Subject Property (including individual lots) assurance of adequate dust control measures on SM Site 461.

W. All lighting shall be shielded and directed downward in accordance with DCC 15.10, Outdoor Lighting Control.

X. Open Space Management Conditions:

1. Uses permitted in the open space tracts include the management of natural resources via the RAMP, creation and maintenance of trail systems, and other outdoor uses that are consistent with the character of the natural landscape; and
2. Off-road motor vehicle use is prohibited in the open space tracts; and
3. 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; and
4. 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.

Y. Structures and/or earthmoving are prohibited on or below slopes exceeding 10 percent within the canyon. Habitat improvement projects approved or sponsored by ODFW and not subject to this requirement.

Z. All conditions of ZC-08-1/PA-08-1 continue to apply to the use and development of the subject property.

AA. The subdivision plat name shall be subject to the approval of the County Surveyor, prior to final plat approval.

AB. Domestic Water Supply Statement: Prior to final plat approval, a statement that no domestic water supply facility will be provided to the purchaser of any lot depicted in the proposed subdivision plat, even if a domestic water supply source may exist. A copy of any such statement, signed by the subdivider and indorsed by the County, shall be filed by the subdivider with the Real Estate Commissioner and shall be included by the commissioner in any public report made for the subdivision under ORS 92.385 (Examination). If the making of a public report has been waived or the subdivision is otherwise exempt under the Oregon Subdivision Control Law, the subdivider shall comply with the applicable provisions of ORS 92.090(4)(c).

AC. Sewage Disposal Statement: Prior to final plat approval, a statement that no sewage disposal facility will be provided to the purchaser of any lot depicted in the proposed subdivision plat, where the Department of Environmental Quality has approved the proposed method or an alternative method of sewage disposal for the subdivision in its evaluation report described in ORS 454.755 (Fees for certain reports on sewage

disposal) (1)(b). A copy of any such statement, signed by the subdivider and indorsed by the city or county shall be filed by the subdivider with the Real Estate Commissioner and shall be included by the commissioner in the public report made for the subdivision under ORS 92.385 (Examination). If the making of a public report has been waived or the subdivision is otherwise exempt under the Oregon Subdivision Control Law, the subdivider shall comply with the applicable provisions of ORS 92.090(5)(c).

AD. 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.

AE. 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.

AF. A stormwater easement or drainage right of way conforming substantially with the lines of the Deschutes river shall be provided, prior to final plat approval.

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

1. Cut slope ratios shall not exceed one foot vertically to one and one half feet horizontally; and
2. Fill slope ratios shall not exceed one foot vertically to two feet horizontally; and
3. The composition of soil for fill and the characteristics of lots and parcels made usable by fill shall be suitable for the purpose intended; and
4. When filling or grading is contemplated by the subdivider, that person/entity 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.

AH. The Applicant shall pay a fee in lieu of dedication of park land in the amount of $350 per dwelling unit, prior to final plat approval.

AI. No on street parking shall be allowed within bike lanes.

AJ. Culverts and Drainage

1. Road culverts shall be concrete or metal with a minimum design life of 50 years.

2. All cross culverts shall be 18 inches in diameter or larger; and
3. Culverts shall be placed in natural drainage areas and shall provide positive drainage; and.
4. Drainage Swales. The Design Engineer is responsible to design a drainage swale adequate to control a design storm as defined in the Central Oregon Stormwater Manual created by Central Oregon Intergovernmental Council; and
5. Drainage Plans. A complete set of drainage plans including hydraulic and hydrologic calculations shall be incorporated in all road improvement plans; and
6. Drill Holes. Drill holes are prohibited; and
7. Injection wells (drywells) are prohibited in the public right-of-way.

AK. All fencing on the Subject Property shall be wildlife friendly and meet the requirements of DCC 18.88.070.

AL. The applicant shall obtain OPRD approval for the PUD (prior to Final Plat approval) and for each individual dwelling (prior to a building permit being issued).

AM. 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.

AN. 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.

AO. All computations related to DCC 18.128.210 B.7 shall carried out to two decimal places.

AP. A topographic survey shall be required prior to construction or earthmoving in the vicinity of the canyon rim

VII. DURATION OF APPROVAL

The applicant shall initiate the use for the proposed development within two (2) years of the date this decision becomes final, or obtain approval of an extension under Title 22 of the County Code, or this approval shall be void.

This decision becomes final twelve (12) days after the date of mailing, unless appealed by a party of interest.

Dated this day of September, 2019

Gregory J Frank

Gregory J Frank, Hearings Officer