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

**FILE NUMBERS:** 247-14-000242-CU, 247-14-000243-TP

**APPLICANT:** The Tree Farm LLC  
409 N.W. Franklin Avenue  
Bend, Oregon 97701

**PROPERTY OWNER:** Miller Tree Farm  
110 N.E. Greenwood Avenue  
Bend, Oregon 97701

**APPLICANT'S  
ATTORNEY:** Jeffrey G. Condit - Miller Nash Graham & Dunn LLP  
111 S.W. Fifth Avenue, Suite 3400  
Portland, Oregon 97204

**OPPONENTS'  
ATTORNEYS:** Myles A. Conway - Marten Law  
404 S.W. Columbia Street, Suite 212  
Bend, Oregon 97702  
Attorney for Rio Lobo Investments

Paul Dewey - Central Oregon LandWatch  
50 S.W. Bond Street, Ste. 4  
Bend, Oregon 97702  
Attorney for Central Oregon LandWatch

**REQUEST:** The applicant requests conditional use, tentative plan and site plan approval for a ten-lot cluster/planned unit development ("PUD") on a 105.3-acre parcel in the UAR-10, RR-10 and WA Zones north of Skyliners Road and west of Skyline Ranch Road on the west side of Bend. **This proposal is identified as "Tree Farm 1."** It is

part of a proposed 50-lot cluster/PUD on five contiguous legal lots totaling approximately 533 acres, identified as "The Tree Farm." The applicant submitted four other applications for The Tree Farm (Tree Farms 2 through 5), with the following file numbers:

Tree Farm 2: 247-14-000244-CU, 247-14-000245-TP  
Tree Farm 3: 247-14-000246-CU, 247-14-000247-TP  
Tree Farm 4: 247-14-000248-CU, 247-14-000249-TP  
Tree Farm 5: 247-14-000250-CU, 247-14-000251-TP.

**STAFF REVIEWER:** Anthony Raguine, Senior Planner

**HEARINGS OFFICER:** Karen Green

**HEARING DATES:** November 6 and 20, 2014

**RECORD CLOSED:** January 13, 2015

**DATE OF HEARINGS  
OFFICER DECISION:** March 18, 2015

**DATE OF BOARD OF  
COMMISSIONERS  
HEARING:** July 8, 2015

**RECORD CLOSED:** August 10, 2015

**I. NATURE OF THE PROCEEDINGS AND SUMMARY OF DECISION:**

This matter comes before the Board of Commissioners (the "Board") as the result of an appeal filed by the Applicant pursuant to DCC 22.32.020 of a March 18, 2015, decision of Deschutes County Hearings Officer Karen Green denying the Applicant's request to approve Tree Farm 1 ("Hearings Officer's Decision").

Hearings Officer Green found that the Applicant had demonstrated compliance with the majority of the criteria applicable to the application, but concluded that the Applicant failed to comply with conditional use criteria in DCC 18.128.015 with regard to its Wildfire Protection and Management Plan ("WPMP") and Wildlife Master Plan ("WMP"). DCC 18.128.015(A)(3) requires the applicant to demonstrate that the site is "suitable for the proposed use" based upon a consideration of certain factors relating to the natural and physical features of the sites, including natural hazards and natural resource values. Hearings Officer Green concluded that it was feasible for The Tree Farm to create compliant plans based upon the record, but she concluded

that the Applicant's plans lacked sufficient detail as to how the plans interrelated, and how the plans would be implemented and enforced. As a result of her determination that the plans were inadequate, she found that the Applicant had failed to comply with several other criteria relating to wildlife or fire safety impacts.

Based upon her conclusion that it was feasible for the Applicant to bring its plans into compliance, Hearings Officer Green provided detailed guidance to the Applicant with regard to what the plans should contain in order to remedy the deficiencies and proposed conditions of approval in the event that the Applicant appealed her decision.

The Applicant appealed in order to submit revised plans to address the Hearing Officer's guidance and correct the deficiencies, and to demonstrate compliance with related findings requiring compliant wildfire and wildlife plans. The applicant also requested that the Board correct an ambiguity in the Hearings Officer's Decision regarding the 100-foot setback applicable to the WA Combining Zone. The appeal was heard *de novo* on the issues raised by the Applicant.

In this decision, the Board finds and concludes:

- The Applicant's revised WPMP and WMP address the deficiencies found by the Hearings Officer and now support a finding that the site is suitable for the proposed use within the meaning of DCC 18.128.015(b)(A)(3) with regard to natural hazards and natural resources, and that the WPMP and WMP demonstrate compliance with other criteria that relate to the adequacy of the plans.
- The Board concurs with the Applicant that the Hearings Officer mischaracterized the effect of the 100-foot setback applicable to the WA Combining Zone pursuant to DCC 18.128.200(B)(3)(c) and concludes that the 100-foot setback from open space areas only applies to lots located within the WA Combining Zone.

The Board therefore finds that the Tree Farm 1 satisfies, or will satisfy with conditions of approval, the applicable approval criteria in the relevant administrative rules and the provisions of Titles 17, 18, 19, and 22 of the Deschutes County Code. The Board approves the application.

## **II. APPLICABLE STANDARDS AND CRITERIA:**

The Board adopts and incorporates by reference the description of the applicable standards and criteria set forth in Section I.A. of the Hearings Officer's Decision, with the following additions.

<b>Chapter 22.32</b>	<b>APPEALS</b>
Section 22.32.027	Scope of Review
Section 22.32.030	Hearing on Appeal

### III. BASIC FINDINGS:

The Board adopts and incorporates by reference the code interpretations, findings of fact, and conclusions of law set forth in the Hearings Officer's Decision in Sections II.A (Location), B (Zoning and Plan Designation), C (Site Description), D (Surrounding Zoning and Land Uses), E (Land Use History), F (Procedural History), G (Proposal), H (Public/Private Agency Comments), I (Public Comments), and J (Lot of Record) (pp. 4 to 9) , with the following additions.

- F. Procedural History:** The Board finds that Hearings Officer Green issued her decision on March 18, 2015. On March 30, 2015, the Applicant filed a timely appeal of the decision pursuant to DCC 22.32.020. The Applicant sought review of those portions of the Hearings Officer's Decision finding noncompliance based upon her finding that the WPMP and MWP were inadequate, and sought clarification of the 100-foot setback issue in the WA Combining Zone. Pursuant to DCC 22.32.027(2) and (4), the Applicant requested that the Board hear the appeal *de novo* on the issues raised in the appeal and agreed to restart the 150-day local action requirement under ORS 215.427 as of the date that the Board elected to hear the appeal. The Hearings Officer's Decision was also appealed by Rio Lobo Investments LLC ("Rio Lobo"), a participant in the proceedings before the Hearings Officer, on issues relating to access to its adjacent property through the proposed Tree Farm developments.

On April 8, 2015, the Board met and elected to hear the appeals *de novo* but limited to the issues raised in the appeals.

The Applicant and Rio Lobo reached a settlement of the access issues during the pendency of the appeal to the Board. Rio Lobo withdrew its appeal pursuant to DCC 22.32.080 prior to the hearing before the Board of Commissioners. The hearing was therefore held on the Applicant's appeal alone.

The Board held its duly noticed hearing on July 8, 2015. At the conclusion of the hearing and at the request of the parties, the Board held the record open pursuant to ORS 197.763(6) until July 27, 2015, for additional evidence, arguments or testimony. The Board further held the record open until August 10, 2015, for responses to any additional evidence or argument submitted by July 27. Because these continuances were agreed to by the Applicant, the Board finds that this period of time is exempt from the 150-day local action requirements of ORS 215.427. The Applicant filed the only response during the second continuance, and so Applicant waived its right to final rebuttal under ORS 197.763(6)(e).

The Board conducted deliberations at its regular meeting on September 23, 2015.

### III. FINDINGS:

A. The Board adopts and incorporates by reference the code interpretations, findings of fact, and conclusions of law contained in the Hearings Officer's Decision, Section III.B (Preliminary Issues), pages 9 to 24.

B. The Board adopts and incorporates by reference the code interpretations, findings of fact, and conclusions of law contained in the Hearings Officer's Decision Section III.C (Title 18 of the Deschutes County Code) pages 25 to 63, except for the findings relating to DCC Sections 18.128.015.A.3 (pp 35 to 41), 18.128.015.B (pp. 45 to 48), 18.128.200.A.2 (pp. 49 to 52), 18.128.200.A.4 (pp. 52 to 53), 18.128.200.B.3 and .3.a (pp. 53 and 54), 18.128.200.B.3.c (Page 54-55), and 18.128.200.C.5 (p. 60), which are modified as follows:

**DCC 18.128.015.A.3:** As noted above, this requires the Applicant to demonstrate that the site is "suitable for the proposed use" based upon a consideration of certain factors relating to the natural and physical features of the site, including natural hazards and natural resource values. The Board adopts and agrees with the Hearings Officer's description of the site and the applicable natural hazard on pages 35 to 36 of her decision, and also concurs with and adopts the Hearings Officer's interpretation of the requirements of this criterion for the reasons set forth on pages 36 to 37 of the Hearings Officer's Decision. The Board notes that further support for this interpretation is set forth by the Applicant in its August 10<sup>th</sup>, 2015, submittal by applicant's legal counsel, Jeffrey Condit ("August 10 Letter") on pages 2 to 4.

The Wildfire Protection and Management Plan.

The Hearings Officer determined:

*"For the foregoing reasons, the Hearings Officer finds the applicant's wildfire plan is not sufficient to demonstrate compliance with this conditional use approval criterion because it simply does not include a meaningful action plan or an explanation of how the plan will be implemented. And it addresses The Tree Farm as a whole although the record indicates there is considerable variation in location, topography, and vegetation in The Tree Farm lots. However, because the Firewise and NFPA standards are nationally recognized, comprehensive and detailed, I believe it is feasible for the applicant to create an adequate wildfire plan based on those standards that includes the critical information missing from the submitted plan." (p. 39)*

The Hearings Officer included a set of eight bullet points describing what a compliant plan should contain. The Board concurs with this list. The Applicant's revised WPMP, submitted with their Appeal Narrative, addresses each of these deficiencies as follows.

Hearings Officer Green stated that a revised plan should include:

- *"identification of each residential lot building envelope, the extent and nature of*

*the defensible space around each dwelling, and fire fuel treatments on the building envelope and the rest of the lot;" (p. 39).*

Section IV.H of the revised WPMP describes in detail the "Zone Model," composed of three fire-protection zones that will be required to surround each dwelling in concentric rings:

Zone 1: 30 feet adjacent to home. A well-irrigated area surrounding the home and a fire-free area within 5 feet of the home using nonflammable landscaping.

Zone 2: 30-100 foot zone of low growing, well-irrigated plants and trees thinned to a spacing of 15-20 feet between trunks.

Zone 3: 100-200 feet around homesites in which thinning of vegetation will occur, woody debris and brush will be removed, and tall trees will be thinned so canopies don't touch.

Revised WPMP, Exhibit 6, shows these zones affect each dwelling and lot in the five developments as well as the open space. The lots on steeper slopes (particularly in Tree Farm 5) have the most extensive Zone 2 designated areas.

As depicted in Exhibit 6, the WPMP, Zone 2 and Zone 3 will overlap each other between home sites and extend onto adjoining open space areas. Beyond the 200-foot, Zone 3 boundaries, the open space will continue to be maintained to Zone 3 specifications.

Central Oregon LandWatch ("LandWatch") argued in its July 27, 2015, submittal, that the scale of the exhibit is too small to determine whether the Applicant has complied with these requirements for each lot. The Board disagrees. This information is clearly set forth in the Revised Wildfire Protection and Management Plan ("WPMP") at Exhibit 6. As indicated on the legend on each page of Exhibit 6, the Fire Prevention Zones are shown, and front setbacks of 30 feet, side setbacks of 30 feet, and rear setbacks of 50 feet are shown except where a different setback is specifically noted. Setbacks have thus been established and shown for every single lot. In addition, in its July 27, 2015, Staff Memorandum ("Staff Report") staff recommends a condition of approval that these building envelopes be shown on the final plat. Staff Report, page 2.

The Board finds that the Revised WPMP complies with the Hearings Officer's direction, and finds that the additional condition will ensure that the setbacks are clear for the purposes of notice to properties purchasers and enforcement by the County and the Developer/HOA.

Hearings Officer Green states that the plan should include:

- *"the setback from upper edge of the slope(s) for each building envelope and dwelling" (p. 39).*

The Board finds that revised WPMP, Section IV.A and Exhibit 3 describe/depict the special 30-foot slope setback that will be imposed on combustible construction on lots that adjoin slopes in excess of 20 percent. The wildfire treatment practices, many of which have already been completed, expand into the open space areas.

The Board finds that these special slope setbacks will meet the recommended setbacks prescribed in National Fire Protection Association ("NFPA") 1144, Annex A (Table A.4.1.2 and Fig. A.5.1.3.2), and the Firewise Community Guidelines to provide sufficient fire protection from the potential for wildfire advancing up the adjacent slopes.

LandWatch argues that there is no evidence that a twenty percent slope is the correct measure for determining when greater setbacks should be required. As the August 10 Letter notes, this profile was selected based upon the advice of the Applicant's expert, Gary Marshall, who based it on NFPA literature. Mr. Marshall's extensive credentials and the basis for his conclusion are contained in the record. The Board finds that this evidence and testimony support the Applicant's use of a twenty percent slope as the breakpoint.

As staff noted, the NFPA standard for slope setbacks is 30 feet, but where compliance with that setback is unfeasible, the standards allow the siting of a dwelling closer than 30 feet if a noncombustible barrier (such as a stone retaining wall) is constructed between the structure and the slope. Staff has recommended requiring identification on the final plat of lots that would require a noncombustible wall or barrier. The Board concurs with this condition.

The Board finds that the Revised WPMP, with the imposition of the above-noted condition, complies with the Hearings Officer's direction.

Hearings Officer Green continues:

- *"the fuel treatment, if any, on any slope below each dwelling, and if such fuel treatment will occur on open space, what impact it will have on that open space, on surface water drainage, and on wildlife habitat for lots in the WA Zone;" (p. 40).*

LandWatch argued that the Applicant has not identified fuels treatments or explained impact on open space or surface drainage. The Board disagrees. Additional fire fuels reduction in the way of ladder fuel removal and thinning of the tree canopy will be employed on slopes below homesites as described in Section IV.G of the WPMP and as described and shown in WPMP, Exhibit 6. All open space will be treated to Zone 3 standards, with the exception that pockets of vegetation will be retained pursuant to

the WMP. The area in the vicinity of the residences will be treated to Zone 2 standards.

According to Dr. Wendy Wentz, the applicant's wildlife biologist, fuels treatments on slopes below homesites represents a small proportion of the total acreage of brush. Dr. Wentz noted that fuels reduction will still allow maintenance of pockets of understory habitat for animals to utilize as cover. For these reasons, Dr. Wentz concluded that fuels treatments on slopes are not expected to significantly impact wildlife habitat beyond the management that is already occurring on-site. The Board adopts this assessment.

The WPMP addresses surface water drainage in Section IV.E. The WPMP concludes that proposed fuel treatments will have no impact on drainage because they do not disturb soil or the root systems. LandWatch points to no evidence to the contrary.

LandWatch questioned the science behind the zones. As the Applicant points out in its August 10 Letter, the zone model was utilized by Mr. Marshall based upon research by Jack Cohen, a USFS scientist, and based upon NFPA standards. It is documented and supported in both NFPA 1144 and the Firewise Communities/USA literature. The Board concludes that this is expertise upon which a reasonable person would rely and supports the Applicant's zone approach.

LandWatch also argues that some of the lots are so close to the northern and southeastern boundaries that Zone 3 will be compressed in those areas. The Board notes that evidence in record establishes that the abutting properties are zoned for development and currently being managed to at least a Zone 3 standard.

The Board finds that,

1. The applicant has identified the fuels treatment on each slope;
2. Based on the conclusion provided by Dr. Wentz, the applicant's biologist, the proposed fuels treatment will not have a significant impact on open space or wildlife habitat; and
3. The proposed fuels treatment will have no impact on surface drainage.

Hearings Officer Green continues:

- *"whether and where decks and outbuildings would be permitted on each lot;"* (p. 40).

The Board finds that revised WPMP Section IV.A clarifies that decks and outbuildings (and all combustible construction) are allowed but are subject to the same fire-zone setbacks as the dwelling itself. WPMP, Section IV.A. Nonflammable patios and retaining walls may extend into the fire zones and, in some cases (as noted above) may act as an additional fire barrier for a home adjacent to a slope. The Board finds that



Section IV.H.1, Exhibit 6 of the WPMP depicts "typical" building footprints and outbuildings within the proposed building envelopes and how those buildings could be located within the protective fire zones on each lot.

As further protection, staff recommends a condition of approval requiring that all combustible construction be located within the building envelopes identified in Exhibit 6 of the WPMP. The Board concurs.

The Board finds that the Revised WPMP, with the imposition of the above-noted condition, complies with the Hearings Officer's direction.

Hearings Officer Green:

- *"what specific construction methods and building materials will be required for each dwelling to meet specific, identified NFPA standards;"* (p. 40).

The Board finds that revised WPMP (Appendix 1 to the Applicant's Appeal Narrative) and the proposed Design Guidelines (Appendix 4 to the Applicant's Appeal Narrative), both outline specific construction methods and building materials that will be required within The Tree Farm to comply with NFPA 1144 guidelines. WPMP, Exhibit 2 contains redlined versions of NFPA 1141 and 1144 that identify the segments of these NFPA standards that will be applicable to The Tree Farm (some of the standards apply to multi-family and commercial buildings, building types that will not be located in The Tree Farm and so are not relevant to the development). Exhibit 2 also includes two matrixes listing citations to the applicable NFPA 1141 and 1144 standards, describe which governing documents will incorporate those standards, and which entity will be responsible for compliance. For example, much of Section 1144 (Standard for Reducing Structure Hazards from Wildland Fire) contains standards for structure materials, location, and site landscaping that are incorporated into the Design Guidelines and administered by the Architectural Review Committee of the Homeowners Association or the CCRs administered by the Board of Directors. In contrast, most of Section 1141 standards deal with infrastructure design and review and will be implemented by the Applicant pursuant to engineering and building plans subject to review and approval by Deschutes County. The Board finds that approval of the WPMP will impose these standards as requirements of the affected documents.

Staff recommends certain additional conditions to ensure compatibility with County standards. Where the identified NFPA standards have an equivalent county road standard, staff recommends that the Applicant be required to comply with the more restrictive standard and, prior to construction of any improvements, identify both standards on the engineering plans and document that the more restrictive standard will be met. The Board concurs that this condition will provide additional protection.

The applicant's Design Guidelines include standards for fencing. Staff believes all fencing within the WA Combining Zone should comply with the fencing standards

under Deschutes County Code 18.88.070 and that a condition of any approval be added to ensure compliance as required by the Hearings Officer. The Board concurs with this condition.

The Board finds that the Revised WPMP, with the imposition of the above-noted conditions, complies with the Hearings Officer's direction.

Hearings Officer Green:

- *"a detailed description of how and by whom the wildfire plan will be implemented, monitored, and enforced, with particular attention to the transition between the developer and the HOA;"* (p. 40).

LandWatch argues that the revised WPMP does not identify who is responsible for enforcing the plan or how it will be enforced, and fails to address the transition from the developer to the HOA. The Board disagrees. In addition to the matrixes in Exhibit 2, the Applicant submitted proposed Covenants, Conditions & Restrictions ("CCRs") (Appendix 2) and draft Homeowners Association ("HOA") Bylaws (Appendix 3) with its appeal narrative. The Board finds that these documents establish the requirements for and powers of the HOA and Architectural Review Committee as related to enforcement of the WPMP and WMP.

The Board finds that Wildland Fire Protection is specifically addressed in the following sections of the CCRs:

- Sections 1.27 and 1.28 define the applicable WPMP and WMP as the plans adopted pursuant to this Development Application.
- Sections 4.2.B and .J provide for the payment of costs of compliance with the WPMP and WMP and for obtaining and maintaining Firewise Communities recognition.
- Section 4.4 requires compliance with the WPMP and requires the Association to obtain and maintain Firewise Communities recognition.
- Section 5.5 requires the Association to maintain the Common Areas, including compliance with the WPMP and WMP.
- Section 5.7 requires maintenance of all unimproved Common Areas in compliance with the WPMP and the WMP.
- Section 5.10 requires the designated open space areas to comply with the WPMP and WMP.

- Section 6 establishes the Architectural Review Committee ("ARC") and Sections 6.1.C and 6.2 empower and require the ARC to apply the standards in the Design Guidelines required to comply with the WPMP.
- Section 7.8 empowers the Association or the ARC to enter onto any homesite to correct any violation of the CCRs.
- Sections 10.2, 10.13, and 10.14 require landscaping to be installed, completed, and maintained in compliance with the WPMP.
- Section 10.9 prohibits homeowners from allowing any animal to roam the common area unattended in compliance with the WMP.
- Section 10.10 prohibits wood storage outside of an enclosed fire-resistant structure in compliance with the WPMP.
- Section 10.15 requires compliance with the Wildfire Prevention requirements of the WPMP.
- Section 10.16 requires each homeowner to comply with the WMP.
- Section 10.19 prohibits perimeter fencing, as required by the WPMP and WMP.
- Section 15.6 and 16.2 prohibit the Declarant (the developer) or the HOA from amending the CCRs to lessen their requirements without land use approval from Deschutes County.

The portion of the Design Guidelines attached as Appendix 4 addresses the adoption and application of the NFPA, Firewise, and wildlife requirements to development on individual lots. These guidelines are administered by the ARC under the CCRs.

- Section 5 contains the site guidelines, including setbacks, compliance with NFPA standards, compliance of the driveways with NPFA 1141, fence limitations and requirements, limitations on outdoor barbecues (gas only), wood-burning fireplaces and fire pits (prohibited), and outdoor heaters, firewood storage (prohibited except in enclosed, fire-resistant structures), pet control, and outdoor wildfire protection and wildlife management requirements.
- Section 6 describes the architectural guidelines, including the requirement that new construction comply with the applicable provisions of NFPA 1141 and 1144.
- Section 7 describes the requirements of the landscaping zones, irrigation, and maintenance.

- Sections 8 and 9 contain the construction and ongoing maintenance requirements.
- Appendixes A through N contain the diagrams and applicable criteria, including the applicable provisions of NFPA 1141 and 1144 (Appendix H), and the WPMP (Appendix M) and WMP (Appendix N).

Reviewed as a whole, the Board finds that these standards and criteria create a comprehensive framework for applying, enforcing, and paying for compliance with the WPMP and WMP, as required by Sections VII and VIII of the WPMP and pages 16 and 17 of the WMP.

The Board also finds that the relative roles and responsibilities of and transition between the Declarant (The Tree Farm, LLC) and the HOA are described in detail in Sections 1.6, 1.19, 3.2, and 13 of the HOA Bylaws, and in Sections 1.10, 2.4, and 2.6, and 4.1 of the CCRs. Essentially, the Declarant is responsible for compliance with the CCRs until the HOA homeowners assume control, at which point authority and responsibility transfer to the HOA. The Board finds that the Bylaws and CCRs provide for ongoing oversight and a seamless transition between the developer and the HOA.

LandWatch argues that the County's complaint-based enforcement system is inadequate and the HOA could become dysfunctional and fall apart. As staff pointed out, taking this argument to its logical conclusion, the County shouldn't approve any land use applications because nonenforcement could occur with any approval.

LandWatch argued that the standards being approved are not enforceable because they are easily amended by the HOA. The Board disagrees. Condition of Approval No. 1 requires that any substantial change to the approved development will require new land use applications and approvals. Consistent with this requirement, Article 15.6 of the CCRs prohibits any amendment to the WPMP and WMP that would lessen their requirements without land use approval from Deschutes County. The Board finds that these conditions and provisions will ensure that any amendment to the Plans will require a new land use application and opportunity for citizen comment and appeal.

LandWatch finally argues that this model impermissibly shifts the decision on individual home siting from the Deschutes County Board of Commissioners to the ARC. The Board finds that there is no standard or criterion in the County Code that requires the Board of Commissioners to make individual home siting decisions on a platted lot. The Board finds that designated building envelopes will ensure that all structures are sited within the envelope and the ARC will ensure that structures within the envelope will be built and sited in compliance with fire zone requirements and NFPA siting, design, landscaping, and materials standards as part of the approved WPMP. The Board further finds that if the ARC fails to comply with the approved WPMP, then the County can pursue a code violation. The Board finds that

empowering the ARC to enforce the WPMP does not impermissibly delegate any county land use decision-making authority.

Staff recommends, as a condition of any approval, that proof of Firewise Community recognition and continuing recognition be required to be submitted to the Planning Division annually from the date of first recognition. The Board concurs that this condition will provide addition enforcement of the CCR requirement for Firewise recognition.

The Board finds that the Revised WPMP, with the imposition of the above-noted condition, complies with the Hearings Officer's direction.

Hearings Officer Green concludes her list of required WPMP plan contents with the following two requirements:

- *"a specific, mapped evacuation plan for The Tree Farm and each of the five Tree Farm developments, including directions for operation of the gate on Sage Steppe Drive; and*
- *"a detailed description of when and how residents and guests will be informed of the wildfire plan requirements and the evacuation plan." (p. 40.)*

The Board finds that Section VI of the WPMP contains the specific Evacuation Plan information required by the Hearings Officer, including plans for communicating of the evacuation plan to owners and guests via annual meetings, the project website, and directional signage on site. Exhibit 7 and Exhibit 8 of the WPMP show the designated evacuation routes, and the Emergency Evacuation Information Form and Instructions that will be provided to and required from every homeowner.

LandWatch argued that the evacuation plan shows the evacuation routes for the development as a whole and thus does not show an evacuation plan for "each development" as required by the Hearings Officer. As the plan graphically illustrates, the Board finds that the five tree farm developments are designed to be an integrated community and that the evacuation routes and plans are the same for all five subdivisions. The Board therefore finds that the information contained in the Plan shows evacuation plans routes for all five developments, consistent with the Hearings Officer's direction.

LandWatch also argued that its expert, Addison Johnson, testified that the termination of the secondary emergency access route near a school will compound safety hazards by mixing children with emergency vehicles. The Hearings Officer considered and rejected this same argument below. Hearings Officer's Decision, pp. 33-34. LandWatch did not appeal this decision. As noted above, the Board adopts the Hearings Officer's findings and conclusions on this issue.

Staff recommended an additional condition of approval requiring the Homeowners Association to provide each new owner with written instructions regarding operation of the emergency gate within 30 days of conveyance of a Tree Farm property. The Board concurs with this condition.

The Board finds that the Revised WPMP, with the imposition of the above-noted condition, complies with the Hearings Officer's direction.

#### The Wildlife Management Plan.

Hearings Officer Green found that WMP addressed the significant wildlife issues (pp. 41 to 45), but concluded:

*"[T]he Hearings Officer finds WMP suffers from the same lack of detail and clarity as the applicant's wildfire plan, particular concerning when, how, and by whom these measures will be undertaken, how their success will be measured, and how and by whom they will be enforced. Rather, for the most part the WMP states simply that certain things "will be done" or "will comply." I find that to be effective, and to assure compliance with this conditional use approval criterion, the WMP must include more detail, such as an action plan that identifies specific roles and responsibilities for the developer and HOA, describes how and when the developer will hand off to the HOA, and what specific measures will be undertaken consistent with the wildfire plan to assure more aggressive fuel reduction measures, if required, will not interfere with deer use of the winter range and migration corridors. As with the wildfire plan, I find it is neither feasible nor appropriate for me to craft conditions of approval in an effort to make the applicant's WMP adequate." (p. 45)*

The Applicant submitted a revised WMP containing modifications similar to those in the WPMP to address these deficiencies. The Board finds that implementation, monitoring, and enforcement are addressed on pages 16 to 17 of the revised WMP and implemented by the CCRs in the same manner as the WPMP noted above. In addition, the Board finds that Section 4.5 of the CCRs imposes an ongoing requirement on both the developer and the successor HOA to periodically audit compliance with WMP wildlife habitat conservation measures and adjust management actions accordingly.

The Board finds that transition from the developer to the HOA is described on page 16 of the WMP and is implemented by the same CCRs and Bylaws as described under the response to the similar issue with the WPMP.

The Board finds that the WPMP is specifically subject to the WMP as provided in Section IV.F which incorporates the WMP by reference in the WPMP as Exhibit 5. Pages 10 to 12 of the Action Plan explain how the WPMP fire management requirements will interact with the WMP Wildlife Habitat measures. The Applicant's wildlife biologist, Dr. Wendy Wentz, addressed the Hearings Officer's concern

regarding more aggressive fuels treatment on slopes in the revised WPMP, and concluded that slope treatment would not significantly impact wildlife habitat. (WMP, pp. 10 to 11.) The Board finds the first measure under the Action Plan on page 15 of the WMP provides that if more aggressive fuel reduction treatments are required than currently specified by the WPMP, the impact of these new measures must be assessed by a professional biologist and that modifications to lessen impacts must be considered prior to modification. The periodic audit by a professional biologist as required by CCR 4.5 and the WMP will ensure that these measures remain effective. Based upon these measures, the Board finds that enforcement of the WMP will be ongoing and adaptive and that the plans provide that implementation of more aggressive fuel treatments must be balanced against the wildlife habitat conservation measures required by the WMP.

As noted above and as described in the Applicant's appeal narrative, the Board finds that the roles, responsibilities, and timing of implementation of the wildlife action plan are now set forth in detail in the WMP, the CCRs, and the Bylaws.

LandWatch argues that the WMP contains no action plan or describe responsibilities and timing of implementation, or provide for the enforcement of funding of the Plan. The Board disagrees. The Wildlife Plan contains an action plan that clearly lists the wildlife habitat conservation measures associated with this project (p. 15), identifies responsible parties, and describes how and when these measures will be implemented (p. 16). As noted above, the Board finds that there is a component of adaptive management purposefully built into this Plan that is meant to give it flexibility and longevity. The CCRs include a mandatory provision for regular audits by a biologist to determine compliance by the development with the Wildlife Plan and provide an opportunity for changes to conservation measures if measures are failing or if the current science indicates a more effective action for maintaining or enhancing wildlife habitat. See CCRs Article 4.5. The Board finds that same flexibility is maintained by this Plan's tie to the most current noxious weed control measures (per recommendation of the Board of the Deschutes County Weed Control District) or the requirement to reassess any proposed vegetation treatments that would be more aggressive than those proposed in the Plan. Finally, the Board finds that the CCRs require compliance with WMP (and the WPMP) and provide for funding of maintenance and compliance with the Plans through assessment of the homeowners. CCRs, Articles 1.29, 1.30, 4.2.J, 4.5, 5.5, 10.16.

Staff recommends, as a condition of any approval, that the HOA be required to submit the biological audit report to the Planning Division. Staff recommends a condition that the Applicant's biologist determine the timing of the initial audit report and that, as a part of every audit report thereafter, the biologist should determine the timing of the subsequent audit report. The Board concurs with this recommended condition.

The Board finds that the Applicant's revised WMP, with the imposition of the above-noted condition, complies with the Hearings Officer's requirements for a compliant Wildlife Master Plan.

**Conclusion:** Based on these revised submittals, the Board finds that the revised WPMP and WMP contain the specific details and information deemed necessary for compliance by Hearings Officer Green. As the Staff Report noted, the Hearings Officer required an unprecedented level of detail in both the WPMP and the WMP that is likely to become a model for future projects near forested areas and within WA-Zone lands. Because the Board determines that the Plans now provide the necessary detail and are adequate, the Board finds and concludes that the site is suitable for the proposed use based on natural hazards and natural resource values pursuant to DCC 18.128.015.A.3.

**DCC 18.128.015.A.** On pages 40 to 41 of her decision, the Hearings Officer concludes that the Applicant failed to sufficiently address predictive wildfire behavior because of the lack of specificity in the WPMP as to which NFPA standards are applicable and how they will be enforced. Because the Board finds that the revised WPMP cures these defects, the Board finds that the Applicant has adequately addressed predictive wildfire behavior.

**DCC 18.128.015.B.** On pages 45 to 48 of her decision, the Hearings Officer concludes that due to the lack of adequate wildfire and wildlife plans, The Tree Farm is not compatible with existing and proposed uses on Shevlin Park and nearby forest lands. Because the Board finds that the revised WPMP and WMP cure the defects found by the Hearings Officer, the Board finds that the Applicant has adequately demonstrated that The Tree Farm will be compatible with existing and proposed uses on Shevlin Park and nearby forest lands. The Board further relies on testimony from the Parks and Recreation District submitted at the July 8, 2015, hearing that the management and operation of The Tree Farm will be compatible with Shevlin Park.

**DCC 18.128.200.A.2.** On pages 49 and 50 of her decision, the Hearings Officer concludes that the Applicant had not adequately addressed the environmental, social and economic impacts of the development based upon her findings that the WPMP and WMP were deficient. The Hearings Officer otherwise concluded that the Applicant had adequately addressed this criterion. Because the Board finds that the revised WPMP and WMP cure the deficiencies found by the Hearings Officer, the Board finds that the Applicant has adequately addressed this criterion.

**DCC 18.128.200.A.4.** On pages 52 and 53 of her decision, the Hearings Officer makes a similar finding that the Applicant had not adequately addressed the effect of the development on forestry, wildlife, and natural resources uses based on her prior finding that the WMP was inadequate. Because the Board finds that the revised WMP



cures the deficiencies found by the Hearings Officer, the Board finds that the Applicant has adequately addressed this criterion.

**DCC 18.128.200.B.3 and 3.a.** On pages 53 and 54 of her decision, the Hearings Officer reaches the same conclusion that the Applicant failed to address the potential impacts on habitat from more aggressive fire-fuel reduction measures required to protect ridge-top dwellings from fire based upon her finding that the WMP is inadequate. Because the Board finds that the revised WMP cures this deficiency found by the Hearings Officer, the Board finds that the Applicant has adequately addressed these criteria.

**DCC 18.128.200.B.3.C.** The Hearings Officer addresses this criterion on pages 54 to 55 of her opinion. This criterion establishes a special yard setback in the WA Combining Zone of 100 feet on yards adjacent to required open space area. For the reasons set forth in the Applicant's appeal narrative on pages 15 to 16 and the Staff Report, the Board concurs that the appropriate interpretation of this section is that it only applies to lots within the WA Combining Zone. The Board finds that the Hearings Officer's conclusion that this provision does not apply to Tree Farm 1 is correct, but for the wrong reasons. For the reasons set forth in the Applicant's Appeal Narrative, the Board deletes the last sentence in the Hearings Officer's Finding referencing setbacks from the UAR-10 zoned lots because it is incorrect and unnecessary given that this criterion does not apply to lots outside of the WA Combining Zone.

**DCC 18.128.200.C.5.** On page 60 of her decision, the Hearings Officer concludes that the WMP narrative doesn't adequately address the potential impacts on habitat from more aggressive fire-fuel reduction required to protect ridge-top dwellings. Because the Board finds that the revised WMP cures this deficiency found by the Hearings Officer, the Board finds that the Applicant has adequately addressed these criteria.

C. The Board adopts and incorporates by reference the code interpretations, findings of fact, and conclusions of law contained in the Hearings Officer's Decision, Section III.D (Title 19 of the Deschutes County Code, the Bend Urban Growth Boundary Zoning Ordinance), pages 63 to 83, except for the findings relating to DCC Sections 19.76.070.A, 19.76.070.C, 19.100.030.A, and 19.104.070.E, which are modified as follows:

**DCC 19.76.070.A.** On pages 65 to 66 of her decision, the Hearings Officer found that she cannot conclude that The Tree Farm provides a safe living environment in the absence of an adequate WPMP. Because the Board finds that the revised WPMP cures the defects found by the Hearings Officer, the Board finds that the Applicant has adequately addressed this criterion.

**DCC 19.76.070.C.** On page 66 of her decision, the Hearings Officer concludes that she cannot find that the proposal preserves landscape to the maximum practical degree in the absence of an adequate WPMP or WMP. Because the Board finds that the revised WPMP and WMP cure the defects found by the Hearings Officer, the Board finds that the Applicant has adequately addressed this criterion.

**DCC 19.100.030.A.** On page 74 of her decision, the Hearings Officer concludes she cannot find the site suitable for the proposed use or compatible with Shevlin Park forest lands to the west in the absence of adequate Wildfire and Wildlife plans. Because the Board finds that the revised WPMP and WMP cure the deficiencies found by the Hearings Officer, the Board finds that the Applicant has adequately addressed this criterion. The Board further relies on testimony from the Parks and Recreation District submitted at the July 8, 2015, hearing that the management and operation of The Tree Farm will be compatible with Shevlin Park.

**DCC 19.104.070.E.** On page 79 of her decision, the Hearings Officer repeats her finding that the proposal is not compatible with Shevlin Park and forest lands to the west in the absence of an adequate wildfire plan. Because the Board finds that the revised WPMP cures the deficiencies found by the Hearings Officer, the Board finds that the Applicant has adequately addressed this criterion. The Board further relies on testimony from the Parks and Recreation District submitted at the July 8, 2015, hearing that the management and operation of The Tree Farm will be compatible with Shevlin Park.

**D.** The Board adopts and incorporates by reference the code interpretations, findings of fact, and conclusions of law contained in the Hearings Officer's Decision, Section III.E (Title 17 of the Deschutes County Code, the Subdivision/Partition Ordinance and Comprehensive Plans), pages 83 to 112, except for the findings relating to DCC Section 17.16.100.A, which is modified as follows:

**DCC 17.16.100.A.** On page 84 of her decision, the Hearings Officer concluded that Applicant had not demonstrated The Tree Farm will provide for the preservation of natural features and resources based upon her conclusion that the Applicant's wildfire and wildlife plans were inadequate. Because the Board finds that the revised WPMP and WMP cure the deficiencies found by the Hearings Officer, the Board finds that the Applicant has adequately addressed this criterion.

#### **IV. DECISION:**

Based on the findings of fact and conclusions of law set out above, the Board concludes that the Applicant has demonstrated that all applicable approval criteria have been met or can be with the compliance with conditions of approval. The Board hereby **APPROVES** the Applicant's proposed conditional use, tentative plan, and site plan for a cluster development/PUD on the subject property, to be called Tree Farm 1. The Board adopts and incorporates the Conditions of

Approval in the Hearings Officer's Decision with the following deletions (shown by ~~strikethrough~~) and additions (shown by underline):

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

**PRIOR TO SUBMITTING THE FINAL SUBDIVISION PLAT FOR APPROVAL:**

2. The applicant/owner shall demonstrate to the Planning Division that conditions of approval for The Tree Farm lot line adjustments have been met.
3. The applicant/owner shall submit to the Planning Division an updated title report for Tree Farm 1.
4. The applicant/owner shall obtain an approved septic site evaluation for each residential lot in Tree Farm 1.
5. The applicant/owner shall obtain from the Deschutes County Road Department an access permit for the new road connection to Skyliners Road in Tree Farm 1.
6. The applicant/owner shall obtain from the Deschutes County Road Department a gate permit for the gates on the new secondary emergency access road for The Tree Farm.
7. The applicant/owner shall submit to the Planning Division proof of City of Bend approval to extend domestic water service to Tree Farm 1. If City of Bend water is not available, prior to final plat approval for any Tree Farm development the applicant shall submit to the Planning Division proof that domestic water is available via the alternative means identified by the applicant.
8. If the applicant/owner elects, or is required to, provide water to The Tree Farm through means other than extension of city water service, the applicant/owner shall provide to the Planning Division a water system analysis performed by a registered professional engineer and demonstrating water service from the alternative domestic water source will provide at each residential lot water pressure of at least 40 psi during peak demand periods, 20 psi residual pressure, and 2,000 gpm for fire flow.  
  
The applicant/owner shall provide to the Planning Division a statement from a registered professional engineer indicating whether a runoff storage basin is necessary.
10. The applicant/owner shall submit to the Planning Division written verification from the Bend Fire Department that all standards for subdivision roads, including the secondary emergency access road, have been met.

11. The applicant/owner shall pay all taxes for Tree Farm 1 in accordance with ORS 92.095.

**WITH OR ON, OR AT THE TIME OF RECORDING OF, THE FINAL SUBDIVISION PLAT:**

12. The applicant/owner shall prepare the final plat for Tree Farm 1 in accordance with Title 17 of the Deschutes County Code, including all the necessary information required by Section 17.24.060.

13. The applicant/owner shall show the following on the final plat for Tree Farm 1:

- a. the exact lot size of each residential lot, and of the open space tract which shall be platted as a separate tract;
- b. the building envelope for each lot as shown on Exhibit 6 of the WPMP;
- c. all easements of record and existing rights-of-way;
- d. a statement of water rights as required by ORS 92.120;
- e. all utility easements;
- f. all public access easements;
- g. if a runoff storage basin is necessary, the location of the storage basin; ~~and~~
- h. a notation stating adjustments to the open space and right-of-way calculations may be made if a segment of Skyline Ranch Road is dedicated in Tree Farm 1; and
- i. identification on the final plat of any lots that would require a noncombustible wall or barrier located between a structure and a slope in order to comply with NFPA Standards.

14. The surveyor or registered professional engineer submitting the final plat for Tree Farm 1 shall submit information to the Deschutes County Road Department showing the location of any existing roads in relationship to the road right-of-way. 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 right-of-ways. 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 the Deschutes County Road Department to meet current county standards.

15. The final plat for Tree Farm 1 shall be signed by all persons with an ownership interest in the property, as well as the Deschutes County Assessor and Tax Collector.
16. The applicant/owner shall submit to the Planning Division for review and approval a copy of nonrevocable deed restrictions for the Tree Farm 1 open space tract, stating that no portion of that tract shall be developed with a dwelling or other non-open space use in perpetuity, and that off-road motor vehicle use is prohibited. After county approval, the applicant/owner shall record these nonrevocable deed restrictions and shall provide copies of the recorded deed restrictions to the Planning Division.
17. The applicant/owner shall record with the Deschutes County Clerk the bylaws of the homeowner's association in compliance with the draft bylaws submitted by the Applicant with its Appeal Narrative.
18. The applicant/owner shall record with the Deschutes County Clerk the covenants, conditions and restrictions for Tree Farm 1 in compliance with the draft CCRs submitted by the Applicant with its Appeal Narrative and Conditions 44, 45, and 46.
19. The applicant/owner shall execute and record a Conditions of Approval Agreement for Tree Farm 1.
20. The applicant/owner shall execute and record with the Deschutes County Clerk a development agreement for the private roads in Tree Farm 1 on a form approved by Deschutes County Legal Counsel. The development agreement shall incorporate the drainage plan for Tree Farm 1. The applicant/owner shall provide a copy of the recorded development agreement to the Planning Division.
21. The applicant/owner shall submit to the Deschutes County Road Department for its review and approval a draft Road Maintenance Agreement outlining the maintenance responsibilities for all new roads in Tree Farm 1, and following road department approval the applicant/owner shall record the Road Maintenance Agreement with the Deschutes County Clerk. The applicant/owner shall provide a copy of the recorded maintenance agreement to the Planning Division.
22. The applicant/owner shall record with the Deschutes County Clerk the wildfire plan and WMP for the Tree Farm 1 open space tract. The applicant/owner shall provide copies of these recorded management agreements to the Planning Division.

**PRIOR TO OR WITH CONSTRUCTION:**

23. The applicant/owner shall obtain from the Deschutes County Road Department approval of all construction plans for all required road improvements prior to commencement of any construction.

24. All public road designs shall be in accordance with the standards in Chapter 17.48 and Table "A" of the Deschutes County Code for rural local public roads. Notwithstanding the foregoing, where an applicable and equivalent NFPA standard differs from the County standard, the Applicant is required to comply with the more restrictive standard. Prior to construction of any improvements, the Applicant shall identify both standards on the engineering plans and document that the more restrictive standard will be met.
25. All private road designs shall be in accordance with the standards in Chapter 17.48 and Table "A" of the Deschutes County Code for rural local private roads. Notwithstanding the foregoing, where an applicable and equivalent NFPA standard differs from the County standard, the Applicant is required to comply with the more restrictive standard. Prior to construction of any improvements, the Applicant shall identify both standards on the engineering plans and document that the more restrictive standard will be met.
26. All public and private roads constructed in Tree Farm 1 shall include bicycle and pedestrian paths as proposed on the tentative subdivision plan and burden of proof.
27. The applicant/owner shall construct all road improvements under the inspection and approval of the Deschutes County Road Department. The road department may accept certification of improvements by a registered professional engineer pursuant to ORS 92.097.
28. The applicant/owner shall assure that all road improvements are surveyed and staked in accordance with DCC 17.48.200.
29. The applicant/owner shall construct the Ridgeline Court cul-de-sac bulb so its grade does not exceed 4 (four) percent.
30. The applicant/owner shall place all culverts in natural drainage areas and provide positive drainage.
31. If a runoff storage basin is determined to be necessary, the applicant/owner shall construct such a basin at the lowest point in Tree Farm 1, or in such other location as determined to be appropriate by a registered professional engineer.
32. The applicant/owner shall install all utilities underground.
33. The applicant/owner shall install at least one road name sign at each intersection for each road.
34. If the applicant/owner provides domestic water service to Tree Farm 1 through extension of and connection to the City of Bend water system, the applicant/owner shall construct all required water lines to the city's standards and specifications therefor.

35. The applicant/owner shall install on the residential lot side of the gate at the southern terminus of Sage Steppe Drive at least one means of opening the gate by Tree Farm residents and guests, such as special keys, key codes and/or automatic gates.
36. The applicant/owner shall construct all recreation/mountain bike trails with a two-foot minimum tread width and a six-foot minimum clearing width centered over the trail, and a minimum overhead clearance of seven feet.

**FOLLOWING FINAL PLAT APPROVAL:**

37. The applicant/owner shall begin construction of Tree Farms 1, 2 and 3 within six months of the date this decision becomes final, or such longer period of time as the Planning Director may allow.

**AT ALL TIMES:**

38. The applicant/owner shall satisfy all requirements of the Bend Fire Department for fire protection within Tree Farm 1.
39. The applicant/owner shall limit uses permitted in the Tree Farm 1 open space tract to management of natural resources, trail systems, and low-intensity outdoor recreation uses, and shall prohibit golf courses, tennis courts, swimming pools, marinas, ski runs or other developed recreational uses of similar intensity and off-road vehicle use on the open space tract. The applicant/owner shall enforce these open space restrictions and prohibitions through the Tree Farm 1 covenants, conditions and restrictions.
40. The applicant/owner shall install any fencing in the WA-zoned portion of Tree Farm 1 in accordance with the WA Zone standards therefor.
41. The applicant/owner shall assure the building height and setback standards in the UAR-10, RR-10 and WA-10 Zones are met for dwellings in Tree Farm 1.
42. The applicant/owner shall assure that address numbers are provided for each dwelling in Tree Farm 1 as required by the Oregon Fire Code.

The applicant/owner shall assure that all combustible construction be located within the building envelopes identified in Exhibit 6 of the WPMP.

44. The applicant/owner shall assure that all fencing constructed within the WA Combining Zone comply with the fencing standards under DCC 18.88.070.

45. The Homeowners Association shall submit proof of Firewise Community Recognition to the Planning Division annually from the date of first recognition. This requirement shall

also be added to the CCRs at the appropriate location as part of the HOA's Firewise Community Requirement.

46. The Homeowners Association shall provide each new owner with written instructions regarding operation of the emergency gate within 30 days of conveyance of a property within the PUD. This requirement shall also be added to the CCRs at the appropriate location as part of the HOA's Firewise Community Requirement. This requirement shall also be added to the CCRs at the appropriate location as an HOA requirement.
47. The HOA shall submit the biological audit report required under its CCRs to the Planning Division within 30 days after receipt of the audit by the HOA from its consulting biologist. The applicant's consulting biologist shall determine the timing of the initial audit report and, as a part of every audit report thereafter, shall determine the timing of the subsequent audit report. This requirement shall also be added to the CCRs at the appropriate location as part of the biological audit requirement.

**DURATION OF APPROVAL:**

48. The applicant/owner shall complete all conditions of approval and apply for final plat approval from the Planning Division for Tree Farms 1, 2 and 3 within two (2) years of the date this decision becomes final, or obtain an extension the approval in this decision in accordance with the provisions of Title 22 of the County Code, or the approval shall be void.

Dated this 7 day of October, 2015

BOARD OF COUNTY COMMISSIONERS

  
\_\_\_\_\_  
ANTHONY DeBONE, Chair

  
\_\_\_\_\_  
ALAN UNGER, Vice Chair

ATTEST:

  
\_\_\_\_\_  
Recording Secretary

  
\_\_\_\_\_  
TAMMY BANEY, Commissioner



Mailed this \_\_\_\_\_ day of October, 2015

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