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MEMORANDUM

DATE: August 5, 2016

TO: Board of County Commissioners

FROM: Will Groves, Senior Planner

RE: Deliberations on two matters:

Kine & Kine Properties appeal of a Hearings Officer's decision. File Nos. 247-14-000395-TP, 396-SP, 397-LM, and 206-A

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

I. Background

The Board of County Commissioners (Board) has heard appeals filed by Kine & Kine Properties. The appeals were submitted in response to a Deschutes County Hearings Officer's decision that the proposed subdivisions do not comply with all applicable regulations. The BOCC agreed to hear these matters under Order 2015-029. De novo public hearings were conducted on January 27 and February 29, 2016. The post-hearing written record periods have ended The 150th day to reach a final local decision would have been August 23, 2016, as this is when the modification applications became complete. However, the applicant requested a 90 day toll, moving the 150th day to November 21, 2106.

Staff has developed this memorandum and a decision matrix to help the Board engage with the key decision points in this matter.

II. Key Issues

This deliberation summary of party positions is largely composed of direct quotes. Some quotes have been edited for brevity, clarity, or issue focus.

IIA. Issues for both applications

M1 - What is the Widgi Creek Master Plan?

Issue Summary: The Widgi Creek conditional use and master plan (MP-83-1, CU-83-107) was approved in 1983 and was modified at least eight times before the single family lots were platted in 1990. 210 total residential units were approved. The Master Plan required 65% of the resort to be preserved in open space/golf course.

The Widgi Creek conditional use and master plan was approved in 1983 and was modified at least eight times before the single family lots were platted in 1990 (MC-85-13; MC-87-2; MC-8 8-1; MC-88-2; MC-89-22; MC-90-14; MC-90-18; MC-90-21; MC-90-24.) It is unclear if other decisions modified the master plan, the listed decision are those identified in the record.

Applicant: Staff notes that the applicant includes a list of decisions applicable to the resort on Pages 4-9 of the PowerPoint presentation given at the Board hearing. This list includes tentative plans and site plans.

Hearings Officer: Staff believes that the Hearings Officer did not analyze this issue.

Opponents: The Master Plan is MP-83-1 and CU-83-107, as modified by the identified modifications.

Staff Comment: Staff believes it would be helpful for the Board to identify the decisions that constitute the "Master Plan". Staff recommends the Board find that the "Master Plan" is MP-83-1 and CU-83-107, as modified by the decisions cited above, but excluding location specific development reviews such as tentative plans, final plats, site plan reviews, and Landscape Management site plan reviews.

M2 - Does the Widgi Creek Master Plan retain a regulatory role under DCC 18.08.020?

Issue Summary: DCC 18.08.020 sets out one of the general provisions of DCC Title 18, as follows:

> ***DCC Title 18 does not repeal, abrogate or impair any existing easements, covenants, deed restrictions or zoning permits such as preliminary plat and partition approvals, conditional use permits, nonconforming use permits, temporary use permits, special exceptions or building permits.***

The parties have argued whether this provision, by itself or in combination with other provisions, preserves the master plan as a regulatory document.

In the *Mile Post One* matter on this topic, LUBA found,

> We agree with petitioners that the hearings officer seems to have been unduly influenced by the fact that Ordinances 2001-047/048 do not include savings clauses, when DCC 18.08.020 makes it reasonably clear that savings clauses are not necessary to prevent zoning ordinance amendments from impliedly repealing existing conditional use approvals such as the Widgi Creek Master Plan.

Applicant: Staff was unable locate an applicant Briefing specific to this issue.

Hearings Officer: This "savings clause" was included in Title 18 when it was adopted. The Hearings Officer finds this language signifies that any land use approvals and permits in effect on the date Title 18 took effect would continue to be valid. In other words, the effect of the "savings clause" was to apply Title 18 prospectively.

Opponents: Under its inclusive plain language, DCC 18.08.020 is an ordinance of general applicability that would apply to preserve the provisions of CU-83-107 and the Master Plan, with their lot limitations, to the extent that they did not conflict with the Resort Community Zone. Indeed, the Master Plan and CUP should be read in harmony with the Resort Community Zone if at all possible in a manner that gives effect to both. *Tides Assoc. of Unit Owners v. City Council of Seaside*, 92 Or App 446, 450, 759 P2d 292 (1988)("If two laws are totally irreconcilable, the later enactment will prevail; if they can function together, a claim that the earlier is superseded depends on persuasive evidence that the legislature intended the new enactment to prevail.") Nothing in the text of the Resort Community Zone ordinance or the Comprehensive Plan can reasonably be interpreted to show an intent to displace or repeal the Master Plan' and CUP, To the contrary, the Findings in Ord. 2001-047 assigned a specific role for the Master Plan to regulate future development within the community according to those standards. (Ord. 2001-047, Ex. H., p. 28)

Staff Comment: Staff concurs with the Hearings Officer that DCC 18.08.020 is very narrow in scope based on its plain language. Staff believes this provision preserves the described prior approvals and agreements through the 1991 adoption of Title 18 and offers no broad protections to approvals and agreements potentially impacted by other ordinances.

In the current matter the 1983 Widgi Creek Master Plan was potentially impacted by the 2001 adoption of the RC zone. Staff recommends the Board find that DCC 18.08.020 only preserves the described prior approvals and agreements through the 1991 adoption of Title 18 and offers no broad protections to approvals and agreements potentially impacted by later ordinances.

The consequence of this finding is that the impact of other ordinances (in this case the 2001 adoption of the RC zone) on prior approvals and agreements (in this case the master plan) is not predetermined and must be evaluated given the text and context of the adopting ordinances, associated findings, and the non-conforming use provisions of DCC 18.120.

M3 - Did the Goal Exception remove the Master Plan's regulatory role under the Resort Community Zone?

Issue Summary: In 2001, when the County adopted the Resort Community Ordinance as a part of the Unincorporated Communities Planning Rule, it had to take a goal exception from Goal 4 (Forest Lands) for the Inn/Widgi area. Nothing in the adopting ordinances expressly defines the role of the Master Plan under the new RC zoning.

In the *Mile Post One* matter on this topic, LUBA found,

> We do not mean to say that we necessarily agree with petitioners' contention that the Widgi Creek Master Plan survived the 2001 Resort Community Zoning as a regulatory document that must be applied directly as an approval standard for approval of new residential development in the Resort Community Zone in Widgi Creek. It may be as intervenor-respondent argues that the references to the Widgi Creek Master Plan residential development limits were simply intended to

> support the Goal 4 exception that the county had to approve in order to apply the Resort Community Zone, and should not be read as demonstrating an intent that the Widgi Creek Master Plan retained regulatory status under the Resort Community Zone. Intervenor-respondent points out that the Deschutes County Comprehensive Plan includes General Resort Community Policies that apply specifically to the Seventh Mountain/Widgi Creek Resort and Black Butte Ranch. One of those policies expressly provides that residential densities and lot sizes in the Resort Community Zone are to be determined by water and sewer capacity. Policy 4.8.4. But for Black Butte Ranch those same policies make it clear that any future development must be "in accordance with the Master Design for Black Butte Ranch[.]" Policy 4.8.8. There is no corresponding policy that future development in the Resort Community Zone must be in accord with the Widgi Creek Master Plan. Intervenor-respondent argues, and we agree, that the different treatment of Black Butte Ranch and Widgi Creek Resort lends support to its position that following adoption of the Resort ·Community Zone, the Widgi Creek Master Plan no longer applies directly as an approval standard and the Widgi Creek Master Plan limits on future residential development are displaced by the Resort Community Zone standards. Petitioners, on the other hand, cite language in the Exhibit H findings document that explains that "* * *; both resorts are substantially· built out and have their own internal controls for future development in accordance with approved master plans.
>
> Ordinances 2001-047/048 and the supporting findings for those ordinances at Exhibit H are exceedingly unclear about the regulatory status of the Widgi Creek Master Plan, if any, after enactment and application of the Resort Community Zone to the Seventh Mountain/Widgi Creek Resort. There is language that supports both petitioners' position, and the staff's and intervenor-respondent's contrary position. (LUBA Citations and emphasis omitted)

As discussed by LUBA, several findings made under the goal exception suggest the Board intended to “replace” the master plan with the RC zone and accompanying comprehensive plan policies:

- No express language was included to preserve the Widgi Creek Master Plan. However, in the same ordinance the Black Butte Ranch Master Design is expressly preserved through a comprehensive plan policy.

- “The Inn/ Widgi site is already developed to an extent, which, for all practical purposes, limits its use to the type of resort uses that already exist. Resort Community zoning is being adopted concurrent with this exception. The resort community zoning uses permitted in the County zoning ordinance, Title 18 of the County Code, will further limit any future development to resort related uses only.” (Exhibit H, Ord. 2001-047, Page 18)

- The purpose of the Resort Community Zone is to provide standards and review procedures for development in the communities of Black Butte Ranch and The Inn of the Seventh Mountain/Widgi Creek. The provisions of this chapter shall apply to any Resort Community that is planned pursuant to OAR 660 Division 22. (DCC 18.110.010, Purpose)

- A "physically developed" exception was taken for The Inn of the Seventh Mountain/Widgi Creek (the Inn/Widgi) in recognition that this resort is for all practical purposes fully developed. (Goal Exception Statement as adopted)

However, some goal exception findings language suggests the opposite:

- "Attendance by and contact from individual landowners at both resort areas, and by agency staff was generally sparse. This may have been due to a perception that significant changes would not occur at either resort as a result of this project work because both resorts are substantially built out and have their own internal controls for future development in accordance with approved master plans." (Exhibit H, Ord. 2001-047, page 28) (Underscored emphasis added.)

The Master Plan was also approved under a 1981 requirement that is still in the code:

> 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.***

The Board will need to determine if the Widgi Creek Master Plan survived as a regulatory document after the goal exception findings and adopting ordinances.

Applicant: The Resort Community Ordinance regulates the present development. That ordinance and the resulting Comprehensive Plan and zoning provisions incorporated the principal elements of the Widgi Creek master plan. The Resort Community Ordinance did not adopt the master plan or retain it as a regulatory document, but it did incorporate many of the overall development plan provisions that were historically a part of the community like the protections for the golf course, open space and common areas.

References to the Widgi Creek Master Plan residential development limits were simply intended to support the Goal 4 exception that the county had to approve in order to apply the Resort Community Zone, and should not be read as demonstrating an intent that the Widgi Creek Master Plan retained regulatory status under the Resort Community Zone.

Hearings Officer: "…the Hearings Officer finds the above-quoted language in bold type **[Staff note - see H.O. decision, Kine and Kine, *Fairway,* pages 11-12 for findings in bold]** indicates the board understood and intended that there could be future development within Widgi Creek, but that any such development would be governed by the provisions of Title 18. As discussed in detail in the findings below, the board adopted comprehensive plan policies that both contemplate potential redevelopment of developed land within Widgi Creek, and strictly limit that redevelopment in terms of the type and density of uses. However, there is no reference to the Widgi Creek master plan in either the plan policies or the RC Zone.

Opponents: Nothing in the text of the Resort Community Zone ordinance or the Comprehensive Plan can reasonably be interpreted to show an intent to displace or repeal the Master Plan' and CUP, To the contrary, the Findings in Ord. 2001-047 assigned a specific role

for the Master Plan to regulate future development within the community according to those standards.

There is no language whatsoever in Ord. 2001-047 or its findings that shows an intent to repeal the Seventh Mountain Master Plan and subsequent approvals. The County has in fact used specific language before to repeal prior master plans, but chose not to do so in this case. For example, in Ordinance 97-076, the Board of Commissioners amended the Comprehensive Plan to allow for the creation of the Sunriver Urban Unincorporated Community zone, and expressly repealed the Sunriver Master Plan. There is no such express or implied repeal present in Ord. 2001-047/048, although the Commissioners and Staff certainly could have chosen .to do so.

Of particular note, when MP 83-1 was approved, staff specifically referenced the applicability of the following provision to the master plan: "Section 3.040 of Ordinance No. 81-043, the Deschutes County Subdivision Partition Ordinance states: 'DEVELOPMENT FOLLOWING APPROVAL. Once a master plan is approved by the County, the plan shall be binding on both the County and the developer. Provided, however, after five (5) 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." The current code retains the identical provision. See DCC 17.16.070.

Staff Comment: Staff believes that the impact of the RC adopting ordinances on the Widgi Creek Master Plan is not predetermined and must be evaluated given the text and context of the adopting ordinances, associated findings, and the non-conforming use provisions of DCC 18.120. While staff concurs with the Hearings Officer that the preponderance of the evidence suggests the Board intended to “replace” the master plan with the RC zone and accompanying comprehensive plan policies, staff believes the adopted ordinances fail to clearly implement this intention particularly given the express language of DCC 17.16.070. Staff identifies at least three options are available to the Board:

1) Concur with the Hearings Officer and find that the preponderance of the evidence indicates that the Board both intended to and did remove the Widgi Creek Master Plan’s regulatory role and replace it with RC zone and accompanying comprehensive plan policies, or
2) Concur with Staff that the preponderance of the evidence suggests the Board may have intended to “replace” the master plan with the RC zone and accompanying comprehensive plan policies, but that the adopted ordinances fail to implement this intention, particularly given the express language of DCC 17.16.070.
3) Concur with opponents that the preponderance of the evidence indicates that the Board did not intend to remove and did not remove the Widgi Creek Master Plan’s regulatory role and replace it with RC zone and accompanying comprehensive plan policies, particularly given the express language of DCC 17.16.070.

The consequence of Option #1 is that the Master Plan’s regulatory role would be removed and limitations from the Master Plan not expressly carried forward into the zoning code or comprehensive plan policies would be extinguished. This would include removal of the open space percentage and overall unit cap requirements.

The consequences of Options #2 or #3 are that the Master Plan would continue to apply and impose open space percentage and overall unit cap requirements. As described below, Staff believes that the current proposals would exceed the overall unit cap requirements. New

residential development would require some modification of the Master Plan and/or the goal exception as a preliminary step.

M4 - Would additional residential development be allowed at Widgi under the Master Plan?

Issue Summary: To the extent that Master Plan continues to apply, new development would be subject to the overall unit limit and open space requirements. The current count of units within Widgi Creek have been muddied by development that has occurred partially on Inn of the Seventh Mountain land and partially on Widgi Creek land. The Master Plan also included a requirement that 65% percent of the resort area be retained as open space.

Applicant: The Applicant provided a figure showing the Widgi Creek would narrowly exceed 65% open space under the proposed subdivisions, with a reduction from 65.6% to 65.3%. No opposing map or area calculation was provided.

Staff is unable to locate the applicant's briefing on residential unit cap under the Master Plan. However, the applicant testified before the Hearing Officer:

> And then lastly, with regard to the tax lot 1400, the 22 units that are located within the Points West development are served by the Inn at the 7th Mountain water system and by the Inn at the 7th Mountain street system and by easements related to the Inn at the 7th Mountain Resort. Those units in Points West are not served by any facilities at Widgi, they are not served by the Widgi water system, they do not fall under the Widgi permit, which is the origination of the 210 number, and they are not served by any part of the Widgi community. So the idea that they count towards the 210 dwelling units to me doesn't seem to be supported by the record or by any of the origination of where those numbers came from.

Hearings Officer: Did not evaluate this issue in this case. The Hearings Officer found the Master Plan does not apply.

Opponents: The Widgi Creek Master Plan and Conditional Use Permit from 1984 imposed the mandatory condition that a maximum of 210 residential units in designated areas would be allowed. Those units have been built out. The Master Plan required all remaining property outside those designated residential areas to be maintained as open space, including the 18-hole golf course. The conditions of the Master Plan are binding on the developer and the county under Deschutes County Code 17.16.070.

The Hearings Officer Decision provides a very persuasive interpretation of the Comprehensive Plan policy for Widgi Creek and Black Butte Ranch that protected the historical design of the communities by preserving the status quo as of 2001 when the policy was adopted. The HOAs support that finding and believe that it truly reflects the history behind the enactment of that policy. However, the Comprehensive Plan policy is not the only source for that conclusion.

There is no reason that the Master Plan and Comprehensive Plan provisions do not coexist. In fact, the County used the Master Plan as criteria for approval for Elkai Phases V and VI years after the Comprehensive Plan policies were adopted. The Master Plan is compatible with the Hearings Officer's conclusions in this appeal about the Comprehensive Plan policy to limit

development to the "built-out" completion of those developments as of 2001. The Master Plan provisions relevant to these applications would include the requirement that there are to be no more than 210 residential units. Although the developer then adjusted that to 193 in a subsequent approval, the issue is probably moot because of the Points West/Milepost One development on the 8-9 acre piece filling out the rest of the Widgi development. Assuming it applies, the applicant would have the burden to prove that the proposals comply with the Widgi Master Plan as well as with Comprehensive Plan policy 4.8.2, which the applicant simply cannot do.

The Conditional Use Permit (CUP) requires that "65% of the land is to be maintained in open space". The CUP also required that the number of units, types of units and density be revealed in the application. We ask that Applicant determine whether 65% of the land is in open space and will continue to be after all contemplated development is completed.

Between the Points West and Mile Post 1 developments, the entire "8-9 buildable acre" area left within Widgi is now fully used. Further, even if the Comprehensive Plan did not carry forward the reduction of town homes under the Widgi Creek Master Plan from 103 town houses to 86 as discussed in our prior submission, the additional Points West/Mile Post 1 units will now clearly round out and exhaust the 103 town home limit. The 107 single family homes have all been built out through the Widgi Creek development.

Staff Comment: The Applicant-provided figures showing compliance with the 65% open space requirement is not rebutted and Staff believes it to be credible.

Staff understands the parties to agree that 210 residential units have been built or platted within the Widgi Creek Master Plan area. The applicant argues that some of these units are functionally part of the Inn of the Seventh Mountain for water purposes, which was the origin of the 210 unit cap. Staff recommends the Board find that all of the 210 residential units allowed under the Master Plan have been platted and that no further residential development is possible under the Master Plan, to the extent it continues to apply, until it is lawfully modified or formally removed as a regulatory document.

If the Board has found the Master Plan no longer applies, no finding is required under this question.

M5 – Can the Master Plan be amended?

Issue Summary: The applicant has asked the Board to answer this question.

Applicant: If the Master Plan were still in place today, it would be eligible for a modification application to propose the present development applications. The number of units approved/contemplated, proposed clearly changed numerous times over the years. There is no absolute prohibition on future development.

Hearings Officer: The Hearings Officer did not make findings on this issue.

Opponents: The Master Plan could be amended, if consistent with all other applicable provisions.

Staff Comment: To the extent the Master Plan continues to play a regulatory role, it can potentially be "amended" through Modification of Conditions (this option has been used at least 8 times historically). Other approaches such as non-conforming use alteration, a plan amendment to revise the goal exception, and declaratory ruling could also play a role. However, the question "Can the Master Plan be amended?" is not before the Board in the present applications. The Applicant is asking for something like a declaratory ruling (which would require a separate application) and/or legal advice. Staff believes the Board can provide neither in the context of the present applications and should disregard this question.

M6 - Is additional residential development allowed at Widgi under the Rural Community zoning Code?

Issue Summary: Development at the subject properties is allowed pursuant to DCC 18.110.020, Seventh Mountain/Widgi Creek and Black Butte Ranch Resort Districts and DCC 18.110.060, Development Standards. These sections provide allowed uses (including single family residential use), setbacks, and lot size requirements, as well as other requirements.

Applicant: Staff was unable to locate an Applicant briefing specific to this issue. Staff believes this is because the Hearings Officer found that the Applicant met, or could meet with conditions, all applicable criteria.

Hearings Officer: The Hearings Officer finds the applicant's proposal satisfies, or with imposition of the above-described recommended conditions of approval, will satisfy all applicable provisions of the RC Zone.

Opponents: New development is allowed under these sections, provided it is also compliant with the applicable comprehensive plan policies and the Master Plan.

Staff Comment: New residential development may be precluded or constrained by the Master Plan, Goal Exception, or other requirements. However, Staff recommends the Board concur with the Hearings Officer that the proposed subdivisions would comply with the applicable provisions of DCC 18.110.020.

M7 - Does Comprehensive Plan Policy 4.8.2, when read in the context of the Goal Exception and associated findings preclude residential development in Widgi Creek?

Issue Summary: Section 4.8.2 of the comprehensive plan includes specific language that applies to the proposed subdivisions:

> ***Policy 4.8.2*** Designated open space and common area, unless otherwise zoned for development, shall remain undeveloped except for community amenities such as bike and pedestrian paths, park and picnic areas. Areas developed as golf courses shall remain available for that purpose or for open space/recreation uses.

This policy was adopted when Widgi Creek, Inn of the 7th Mountain, and Black Butte Ranch became Resort Communities. There is extensive debate regarding what constitutes "designated open space", "common area", "otherwise zoned for development", and "areas developed as golf courses".

Analysis of the applicability of this provision to the proposed subdivisions will rest first on the text of the policy. A detailed analysis of the text of this policy is provided below, specific to each subdivision. However, where the text is ambiguous, secondary analysis may also rely on the context of the policy, which in this case includes the Goal Exception, adopting ordinances, and associated findings

The parties have argued whether Policy 4.8.2, when read in the context of the Goal Exception, adopting ordinances, and associated findings should be read as an intention of the Board to preserve the 2001 "status quo" at Widgi Creek, except as specifically noted in the Goal Exception, adopting ordinances, and associated findings.

This argument was presented and analyzed in detail by the Hearings Officer on Pages 27 and 28 of *Kine and Kine, Fairway*.

To the extent the Board needs to rely on the context of the Policy 4.8.2, it will need to decide if this context indicates an intention by the Board in 2001 to limit new development at Widgi Creek to a specifically identified 8-9 acres (which has been previously developed and does not include the proposed subdivisions). This context will help inform determination of what constitutes "designated open space", "common area", "otherwise zoned for development", and "areas developed as golf courses" below.

Applicant: The Hearings Officer erred when she concluded Comprehensive Plan Policy 4.8.2. was intended to maintain the status quo at Widgi Creek as of 2001. The Hearings Officer concluded the Resort Community Ordinance and resulting Comprehensive Plan provisions preclude further development at Widgi, except for the identified 8-9 acre vacant area (which is where Points West/Mile Post One subdivisions are located). The Hearings Officer's reliance on these goal exception findings to the exclusion of and without addressing all of the conflicting Comprehensive Plan and zoning ordinance language regarding future development is in error.

Both applications for the fairway and pool involve property located in a completely different zoning district than the 8-9 acre vacant parcel identified in the ordinance as available for future development, and yet the Board devoted time and effort in the RC planning process to drafting and adopting language in these other zoning districts to regulate future development. If the Board intended to preclude all future development except for the 8-9 acre vacant parcel, there would have been no reason to adopt zoning and development standards for the other areas.

The evidence supports the fact that the RC Ordinance and resulting Comprehensive Plan and zoning provisions intended to protect golf course, open space, common areas within the communities, to preserve the integrity of the communities and to allow and regulate limited future residential and resort development consistent with the capacity of the services to accommodate the development.

Hearings Officer: Based on the board's goal exception and RC Zone findings and supporting documents, the Hearings Officer finds that with the exception of the developable 8-9 acres identified in the board's findings, the board concluded the approvals and developed elements of Widgi Creek that existed in 2001 constituted the status quo that Policy 4.8.2 was intended to preserve. And I find the board intended residential development of the 8-9 acres would be governed by the RC Zone and by plan Policy 4.8.4 which states:

> Residential minimum lot sizes and densities shall be determined by the capacity of the water and sewer facilities to accommodate existing and future development and growth.

Based on the foregoing analysis, the Hearings Officer finds that when Policy 4.8.2 was adopted in 2001, the board intended it to assure all Widgi Creek areas that were "physically developed" – everything except the two identified undeveloped areas[1] – would continue in their then-current uses or would be developed with "community amenities" or "open space/recreation uses." I find that because the proposed subdivision site was not identified as within the 8-9 developable acres in Widgi Creek, the site was "developed as golf course," "open space" or "common area" and therefore subject to Policy 4.8.2.

The Board incorporated the aerial photos and diagrams attached as Figures 3, 5, 6 and 7 to Ordinance Nos. 2001-047 and 2001-048 which showed Widgi Creek and Elkai Woods as they existed and/or were approved in 2001. Figure 7 depicts the location and layout of the approved residential lots in Elkai Woods, along with the designated common areas including Common 18 and the "meeting facility and swimming pool" located thereon.

Opponents: The findings to the Comprehensive Plan amendment refer to that 8-9 buildable acre parcel as the remaining "exception area" for Widgi Creek: "However, development in each of these exception areas will be limited by the zoning ordinance restrictions in Chapter 18.110 of the County zoning ordinance." Comprehensive Plan policy 4.8.4 refers to these exception areas when it provides that "residential minimum lot sizes and densities shall be determined by the capacity of water and sewer facilities to accommodate existing and future development." The Resort Community Zone similarly provided development standards for this remaining Points West/Milepost One "exception area." Policy 4.8.4 is not an outright approval of any new development, as applicants argue, because that reading would conflict with the overarching policy 4.8.2 preserving designated open space, common area and golf course area.

Specifying that the 8-9 acre parcel was an "exception area" is further indication that the County intended that everything not currently developed as of 2001 would remain open space or recreation amenities except for that area, as the Hearings Officer concluded.

Catherine Morrow: In 2001 when the subject property was rezoned to Resort Community I was a principal planner for Deschutes County and was supervising the exception, comprehensive plan amendment and rezone in accordance with the state administrative rules for Unincorporated Communities (OAR 660 Division 22).

All of these policies are stated with "shall." At the time I believe that people who participated in the public process clearly thought the intent was that open space and recreational facilities would be retained. Second, a physically developed exception was taken because the area was " ... substantially built out and have their own internal controls for future development in

[1] A small 1.2-acre area formerly used for on-site sewage treatment, located near the boundary with Widgi Creek to the east, might be redeveloped some day for resort uses, but no plans exist as of now for this to occur. This area is surrounded by resort development and could only be redeveloped in the future for resort purposes. A second area on the property, approximately 13 acres in size, of which only about 8-9 acres is usable due to steep slopes down to the Deschutes River, could possibly developed in the future for resort facilities such as a lodge, single family or multi-family dwellings, or conference center. (EXHIBIT "H" to ORDINANCE NO. 2001-047)

accordance with approved master plans." (see page 3 of the staff memorandum dated October 16, 1998). The master plan designates the golf course as open space.

The approved master plan for the Inn of the Seventh Mountain and Widgi Creek, the existing comprehensive plan policy, and the fact that a physically developed exception was taken with the rezoning project indicates that, at the time of the zone change, there was no intent that the existing golf course, designated open space and recreational facilities would be subject to future development such as townhouses that are inconsistent with the master plan and adopted policy.

Staff Comment: Staff identifies at least two conclusions that the Board might reach when reading Policy 4.8.2 in the context of the Goal Exception, adopting ordinances, and associated findings:

- Concur with the Hearings Officer, Catherine Morrow, and Opponents that any ambiguity in the meanings of Policy 4.8.2 is rendered clear by reading this Policy in the context of the Goal Exception, adopting ordinances, and associated findings. The Board intended it to assure all Widgi Creek areas that were "physically developed" – everything except specific identified undeveloped areas – would continue in their then-current uses or would be developed with "community amenities" or "open space/recreation uses." The proposed subdivision sites were not identified as within the 8-9 developable acres in Widgi Creek. As such, the sites were "developed as golf course," "open space" and/or "common area" and therefore subject to Policy 4.8.2.

- Concur with the Applicant that the Board devoted time and effort in the RC planning process to drafting and adopting language in all Widgi zoning districts to regulate future development. If the Board intended to preclude all future development except for the 8-9 acre vacant parcel, there would have been no reason to adopt zoning and development standards for the other areas.

IIB. Issues for the "Pool" subdivision only

M8 – Is the "Pool" subdivision located in a common area or open space?

Issue Summary: The Pool subdivision is proposed on an existing lot which was platted as "Common 18" in the Elkai Woods III subdivision. There is extensive debate in the record if "Common 18" is a "common area" or "open space". The Comprehensive Plan provides as follows:

> Policy 4.8.2. Designated open space and common area unless otherwise zoned for development, shall remain undeveloped except for community amenities such as bike and pedestrian paths, park and picnic areas. Areas developed as golf courses shall remain available for that purpose or for open space/recreation uses.
>
> Section 5.2. "Common Area" means "common property" as defined in the Oregon Planned Communities Act as ORS 94.550(7).

ORS 94.550(7) provides:

> "Common property" means any real property or interest in real property within a planned community which is owned, held or leased by the homeowners association or owned as tenants in common by the lot owners, or designated in the declaration or the plat for transfer to the association.

ORS 94.550(19) provides:

> (a) "Planned community" means any subdivision under ORS 92.010 to 92.192 that results in a pattern of ownership of real property and all the buildings, improvements and rights located on or belonging to the real property, in which the owners collectively are responsible for the maintenance, operation, insurance or other expenses relating to any property within the planned community, including common property, if any, or for the exterior maintenance of any property that is individually owned.
>
> (b) "Planned community" does not mean:
>
> (A) A condominium under ORS chapter 100;
>
> (B) A planned community that is exclusively commercial or industrial; or
>
> (C) A timeshare plan under ORS 94.803 to 94.945.

The Board will need to decide if the plain language of the code is sufficient to determine if "Common 18" is a "common area"/"open space", or if any analysis will also need to look to the context of the adoption of Policy 4.8.2, discussed above.

Applicant: The Elkai Woods development tract platted as Common 18 where the pool and locker rooms are currently located is undisputedly the privately owned property of the Applicant, has never been owned by the community, and has never been dedicated or otherwise designated for transfer to the community.

The evidence in the record shows the real property where the pool is located has never been owned, held or leased by the homeowners. It was not designated in any plat or declaration for transfer to the association and, in fact, has been specifically exempted out of the declarations for the Elkai Woods subdivisions. It was the subject of an agreement between the owner and the HOAs for a few years but has been disclaimed by all HOAs at Widgi.

Any dedication of land to the public or to a public or private entity must be shown on the plat and stated in the declaration. (ORS 92.075, 92.090). There is no dedication, notation or other indicator of intent to dedicate the pool property. In fact, all evidence points directly the other way. All common area and street tracts within the Widgi Creek Community were transferred to the associations by deeds in 2005.

The conduct of the parties is also evidence of intent that the pool was not intended to be common area. The HOAs accepted the deeds to all common areas and street tracts in 2005. They accepted the deed for Common 17 and Tract B to be owned in conjunction with Bhelm, the new owner of the course and pool. They then entered into agreements with the owner for memberships to the pool and ultimately a lease. This is not conduct of parties who believe or intend to hold title to dedicated common property.

The weight of the evidence establishes that Common 18 does not meet the definition of common area and all evidence points towards a conclusion that it was never intended to be

common area. The Hearings Officer fails to address the County definition of common area, the state definition or any of the evidence of the developer and community intent with regard to Common 18. Instead, the Hearings Officer improperly relies on the plat notation of "common" to conclude the area is not eligible for development. In light of the overwhelming evidence of the parties' intent and conduct regarding community ownership and responsibility for this property, this reliance is misplaced. The evidence establishes the property does not meet the definition of common area as that term is defined and used in the Comprehensive Plan and, at a minimum, the County decision must address this evidence.

Hearings Officer: The Hearings Officer understands Ms. Lewis to argue Common 18 is not designated common are for two reasons: (1) it is unique among common areas in Elkai Woods because it was not dedicated to the public or dedicated or conveyed to an HOA on the plat; and (2) the lack of such dedication or conveyance means Common 18 does not fall within the definition of “common area” in the comprehensive plan. With respect to the first argument, I find Common 18 is not unique in not having been dedicated to the public or transferred to an HOA on the subdivision plat. ORS 92.075 requires that any public dedications or restrictions applicable to subdivisions be stated in the declaration by which the subdivision is created – i.e., the first page of the recorded subdivision. I have not found, nor has Ms. Lewis identified, a dedication to the public or transfer to an HOA for any common areas on any of the Elkai Woods Townhomes plat declarations.

The Hearings Officer finds the definition of “common area” in the comprehensive plan also does not support Ms. Lewis’ argument that Common 18 was improperly designated. That definition refers to the “common property” definition in ORS Chapter 94 which governs “planned communities.” Under ORS 94.580, such a community is created through a planned community declaration on or with the subdivision plat that includes a large number of specific components. However, there is nothing in this record that indicates the Elkai Woods Townhomes Subdivisions in general, or Elkai Woods Townhomes Phase III in particular, were developed as planned communities. Ms. Lewis did not identify, nor have I been able to locate, any such planned community declarations on the Elkai Woods Townhomes Subdivision plats.

Opponents: The applicants have previously made admissions that the "Common Lot 18" area is designated open space. Even if what was clearly marked "Common Lot 18" is not considered "designated common area" for policy 4.8.2, the marked common areas within the Widgi/Elkai development were also designated "open space" under the original Widgi Master Plan approval from 1984. The County Hearings Officer in that approval was very clear that everything except for the residential blocks was designated open space to meet the 65% requirement for approval. The applicants have previously admitted that Common Lot 18 is designated open space. Whether it is considered common area or open space, Common Lot 18 cannot be turned into residences under the Comprehensive Plan.

Staff Comment: A strict reading of **“**Common area”, as defined in the Comprehensive Plan and relevant ORS citations above, produces the unlikely conclusion that potentially none of the common/open space tracts in Elkai Woods Townhomes Phase III, including “Common 18” are “common area” because “common area” occurs only in “planned communities” and Elkai Woods Townhomes Phase III does not appear to comply with the plat dedication requirements for “planned communities”, as described by the Hearings Officer. However, it is clear for the documents associated with the plat, including the CC&Rs the subdivision was intended to be a “planned community” under ORS 92.

Staff suspects this confusion is because the codes and definitions may have changed over time. For example, the Deschutes County specification that, “Common Area" means “common property" as defined in the Oregon Planned Communities Act as ORS 94.550(7), did not exist at the time of the adoption of Policy 4.8.2. Also, Staff is uncertain why the Elkai Woods Townhomes Phase III plat fails to have many of the required declarations necessary to qualify as a planned community in which “common property” could exist. Staff believes that there is insufficient information in the record to determine if “Common 18” is a “common area” under Policy 4.8.2 based solely on the text of the text of the Comprehensive Plan and relevant ORS provisions.

Staff believes that, in the face of this ambiguity, the Board could concur with the Hearings Officer that “Common 18” is “common area” or with the Applicant that Common 18” is not “common area”.

Alternatively, the Board could find that there is insufficient information in the record to resolve this issue based on the text of the Comprehensive Plan and relevant ORS alone and look to the context of the adoption of Policy 4.8.2 for guidance. Under M7, above, the Board will have decided if the context of the adoption of Policy 4.8.2 indicates that the pool property was considered “open space” and/or “common area” at the time of the adoption of Policy 4.8.2 in 2001 and therefore subject to Policy 4.8.2. This finding would preclude residential development of the pool property.

M9 – Is the “Pool” subdivision located in an area “otherwise zoned for development”?

Issue Summary: The Comprehensive Plan provides as follows:

> Policy 4.8.2. Designated open space and common area unless otherwise zoned for development, shall remain undeveloped except for community amenities such as bike and pedestrian paths, park and picnic areas. Areas developed as golf courses shall remain available for that purpose or for open space/recreation uses.

To the extent that “Common 18” is “designated open space and common area”, is it also “otherwise zoned for development”? Staff notes that single-family residential use is allowed outright in all Widgi Creek zones. Is the entirety of Widgi Creek “otherwise zoned for development”?

Applicant: The subject property is "otherwise zoned for development" within the meaning of Policy 4.8.2. Common 18 is located within the Elkai area of Widgi Creek, zoned Widgi Creek - Residential. The County zoning map conclusively establishes this fact.

Hearings Officer: The Hearings Officer finds nothing in Ordinance Nos. 2001-047 and 200-048, the RC Zone, or the RC plan policies, that “otherwise zoned” Common 18 for residential development.

Opponents: Staff was unable to locate an Opponent briefing specific to this issue.

Staff Comment: It is unclear how to read Policy 4.8.2. Under the Applicant’s proposed interpretation, the entirety of Widgi Creek is “otherwise zoned for development”, since single-family residential use is allowed outright in all Widgi Creek zones. Under the Hearing Officer’s

interpretation, nothing in the RC Ordinances, the RC Zone, or the RC plan policies identifies Common 18 as "otherwise zoned for development". Staff believes the Board could reasonably reach one of three conclusions, given the available information:

1) All "designated open space and common area" in Widgi Creek is "otherwise zoned for development", since single-family residential use is allowed outright in all Widgi Creek zones.
2) No "designated open space and common area" in Widgi Creek is "otherwise zoned for development", since no area was specifically zoned for development despite being in "open space and common area" use at the time of the goal exception. This would have required language in the zoning code along the lines of, "Despite being in a designated open space or common area, such areas may be residentially developed if…"
3) The Policy 4.8.2 "otherwise zoned for development" language was intended to make clear that only the 8-9 acres identified for development at the time of the goal exception could be developed for uses beyond "community amenities".

Staff notes that the Board's interpretation of this policy would have broad implications for development at Widgi Creek/Inn of the Seventh Mountain as well as Black Butte Ranch. However, any such development would continue to be constrained by any applicable Master Plans.

M10 – Is the Pool a required amenity?

Issue Summary: The pool and pool house were approved under site plan review SP-98-42. As was common for site plan approvals of that era, a conditions of approval agreement was recorded requiring that the conditions of SP-98-42 be adhered to. Condition 13 of SP-98-42 stated:

> *"The applicant shall sign and enter into a Conditions of Approval Agreement with Deschutes County to ensure that all elements of the site plan shall be installed and maintained as approved. This agreement shall be approved and recorded with the Deschutes County Clerk prior to issuance of the building permit for any new structure."* (Emphasis added.)

The Conditions of Approval agreement states in relevant part:

> *"Construction and Permanent Maintenance. If Developer is required under the Permit to construct improvements of any kind or to install landscaping or plantings and Developer elects to proceed with development under the permit, Developer agrees: (1) to undertake the construction and landscaping required under the land use permit, as more specifically set forth in the conditions set out herein and in the land use permit; and (2) in the event that this Agreement and the Permit do not expire as set forth herein, to the permanent maintenance of required landscaping and improvements."*

The parties disagree as to the effect of this agreement, if it can be discharged by the proposed replatting of "Common 18", or if it was discharged by the bankruptcy sale for "Common 18".

The parties also disagree if the pool is a required resort amenity under the Master Plan.

Applicant: It is undisputed there is no statutory or code requirement for amenities, including a pool, at Widgi Creek. It is true a pool was conceptually proposed as a part of the original

development plan in 1983, a plan that changed numerous times over the years. It was ultimately approved and constructed as a part of the third phase of Elkai Woods in 1998 under SP-98-42. As a part of that site plan approval, the owner signed a Conditions of Approval Agreement to ensure the elements of the site plan would be installed and maintained. The Hearings Officer improperly rely on this Conditions of Approval document and the recording of it in the deed records to conclude the present owner is required to maintain a community pool. The Conditions of Approval Agreement is a condition of site plan approval, not a requirement of master plan, subdivision or townhome or even County code approval.

As the testimony and evidence shows, the present owner bought the present property for substantial value out of Bankruptcy free and clean of the obligations of the prior owner. Contrary to the opinion of the opponents' Bankruptcy lawyer, the Conditions of Approval Agreement is not a restrictive covenant. It is a contractual agreement between the County and the owner. It was clearly within the jurisdiction of the Bankruptcy Court. And the expiration language in the agreement itself allows for automatic expiration upon the foreclosure of any prior encumbrance.

The language of the agreement specifically supports this reading of it. First, the COA specifically references the site plan application, not a subdivision, master plan or conditional use permit. The agreement is a condition of that approval, the site plan, not a required element of some larger land use decision. Second, under Scope of Agreement, it specifically states that "Nothing in this Agreement shall require the Developer to construct any improvements under the Permit..." This is clear evidence of the intent that the agreement is intended to regulate the conditions of the approval, to require the developer to comply with the conditions if he undertakes the construction sought by the approval, not to require the developer to undertake the construction and maintain a development in perpetuity. Finally, the expiration language makes it clear the agreement is intended to regulate the development sought in the approval not to dictate what development must be there. The agreement applies so long as the developer/owner seeks to maintain the permit approval for the development, the site plan approval. The present owner no longer seeks to maintain that approval and neither this agreement nor any other County Code provision or land use approval requires that he do so.

Hearings Officer: "The [conditions of approval] agreement does not include an expiration date, nor is there any evidence in the record that the county has released the property owner from the agreement through a change of use approval or in any other manner. Therefore, even assuming the applicant's proposal to remove the "common area" designation from the proposed subdivision site is authorized as a replat under ORS Chapter 92, the Hearings Officer finds such a replat would not vacate the conditions of approval agreement requiring the applicant to permanently maintain the required improvements to the property – i.e., the community amenities including the pool, community building, parking areas and landscaping."

Staff notes that the Bankruptcy Trustee's Deed was not raised as an issue before the Hearings Officer.

Staff notes that the Hearings Officer did not address the question of if the pool is a required amenity under the Master Plan. This is likely because she concluded the Master Plan no longer applies.

Opponents: The pool complex is a required part of the development and cannot be eliminated or re-developed. The Applicant does not appear to dispute that the pool amenities complex was always a required element of the Seventh Mountain Master Plan. That Master Plan was approved under MP 83-1 and CU-83-107 in 1984 (MP 83-1 and CU-83-107) and the

subsequent land use decisions that followed from them are instructive and relevant because they provide restrictions upon the phased development of Widgi/ Elkai that eventually resulted in the creation of the golf course and the platting and creation of Common Lot 18 and construction of the pool amenities complex there.

The Bankruptcy Trustee's Deed did not discharge the Conditions of Approval Agreement. The "free and clear'.' provision only applies to monetary liens and encumbrances, not restrictive covenants and covenants that run with the land like the Conditions of Approval Agreement or neighborhood CC&Rs.

Opponents provided the sworn declaration from Justin L. Leonard, a bankruptcy lawyer whose expertise includes representing bankruptcy trustees in sales such as the Widgi Creek Golf Course sale. Mr. Leonard explains that the bankruptcy court's sale order and the trustee's deed did not extinguish or eliminate the Conditions of Approval Agreement, which therefore remains binding on BHelm LLC with respect to maintenance obligations for the Common Lot 18 features and amenities. · Mr. Leonard's declaration refutes Mr. Hopp's testimony.

The hearings officer stated in the approval to develop Widgi Creek (MP-83-1 and CU-83-107): "The developer will [retain and] be responsible for the maintenance and operation of the lodge, tennis courts, swimming pool and 18 hole golf course."

Staff Comment: Staff concurs with the Hearing Officer that the proposed replatting, by itself, cannot discharge the conditions of approval agreement and recommends that Board adopt the Hearing Officer's findings on this issue.

Staff believes that the bankruptcy impacts, and all other extrinsic matters concerning the parties and the property are independent matters that do not control or impact the decisions of the Board. The Board needs to proceed as if in a vacuum, recognizing that how or if its decisions impact the bankruptcy and other extrinsic matters is outside the scope of their jurisdiction.

Staff believes that the pool is a required amenity under the Master Plan, to the extent it is found to still apply. The Findings in MP-83-1 and CU-83-107 state:

> ***(4) Parks, playgrounds, open spaces:***
> The applicant first intends to develop an 18 hole public golf course with associated ponds as shown on the Master Plan. In addition, there will be a series of bike paths and a proposed horse trail. <u>The lodge area will include four tennis courts and a swimming pool.</u> All other properties not platted as· lots or proposed condominium areas will be maintained as open space and maintained in their natural state.
>
> ***(8) Proposed ownership pattern:***
> The property is currently owned by the US Forest Service. However, the U. S. Forest Service and Moana Corporation have agreed to a land exchange. If the property is developed, the individual recreational homesites will be sold by fee simple interests. The condominiums will be developed in accordance with Oregon Condominium Act, and the underlying title to the property will vest in the condominium association. <u>The golf course, lodge, tennis courts and swimming pool will be retained by the developer as a developer's area in accordance with the covenants, conditions and restrictions of the proposed development.</u>

> ***(9) Operation and maintenance proposal (i.e., howmeowners' association, condominium, etc.):***
> The developer will form a homeowners' association with the responsibility for the maintenance of the interior roads and common areas of the development. The developer will be responsible for the maintenance and operation of the lodge, tennis courts, swimming pool and 18 hole golf course. Each condominium will have a separate condominium association with responsibility for the maintenance of the common areas immediately adjacent to the condominiums as well as for the long term maintenance responsibilities of each condominium unit.
> (Underline added)

Staff recommends that the Board find that, if the Master Plan applies, that an amendment to the Master Plan is required to eliminate the requirement for a pool.

Staff believes that the Conditions of Approval Agreement pertains to the establishment and maintenance of the pool facility established under SP-98-42. As such, the Board could and should release the Conditions of Approval Agreement at such time as the use is lawfully extinguished (amendment to Master Plan) by demolition. Staff notes that a new plat could not be recorded for the subject property prior to demolition of the existing structure, as the existing structure would straddle the new lot lines. Staff recommends that the Board add a condition to any approval so that the applicant shall lawfully demolish the pool and pool house and obtain a release from the Conditions of Approval Agreement prior to the recording of any final plat under this application.

M11 – Have the "Pool" subdivision design issue been resolve by the modification?

Issue Summary: The Hearings Officer found that the proposed development was not harmonious with surrounding development under DCC 18.124.060 due to the proposed double frontage of several lots; the orientation of Lots 6, 7 and 8 in relation to existing development and common area; and the proposed removal of the historic and long-standing use of the "Common 18" community amenities.

The Applicant filed a modification to revise the subdivision layout before the Board to address the raised design issues.

Applicant: The present request is for a modification to relocate the t-court to be adjacent to Elaki Woods drive and add a landscape strip to screen it. All other aspects of the proposal remain the same. The Applicant believes the revised design addresses the Hearing Officer's concerns.

Hearings Officer: (Staff notes that these findings were made prior to the modification of the layout before the Board). The Hearings Officer finds the applicant's proposal includes three lots with double frontage – Lots 1, 2 and 3 which front on both Seventh Mountain Drive and the new private road. I find this double frontage is not essential or appropriate for the reasons set forth in the findings above concerning the configuration of the private road. However, I find that if the applicant's proposal is approved on appeal, such approval need not include a condition of approval requiring a planting screen easement to prevent access across these lots.

Opponents also object to the proposed orientation of Lots 6, 7 and 8 which would have access from the proposed private road that would dead-end at the northern boundary of "Common 21"

in Elkai Woods Townhomes Phase V, and as a result the garages and driveways for those three lots would be located close to the back yards of the existing townhomes in Elkai Woods Townhomes Phase V that back onto "Common 21." Based on the Hearings Officer's site visit observations and my review of the aerial photos and plats of the Widgi Creek development, it appears the proposed configuration of the private road and Lots 6, 7 and 8 is unique in that respect. I find placement of garages and driveways in such close proximity to both Common 21 and the back yards of existing townhomes will not relate harmoniously to this existing development.

"…in response to concerns expressed by the Hearings Officer about the ability of fire trucks and other emergency vehicles to turn around at the end of the proposed private road, the applicant submitted a revised tentative plan drawing showing a "T"-shaped turnaround at the end of the private road." "While this configuration may be acceptable from a firefighting standpoint, the Hearings Officer finds it does not relate harmoniously to existing development by bringing a road, driveways and garages so close to "Common 21" and the back yards of nearby townhomes."

Opponents argue the proposed subdivision would not be harmonious with existing residential development because it would remove the community amenities on "Common 18" that were designed and intended to serve Widgi Creek residents. Opponents submitted extensive evidence describing the history of these amenities and their use by Widgi Creek residents, as well as prior agreements between residents and the property own concerning operation and maintenance of these amenities, and ultimately unsuccessful negotiations to keep the pool facility operational. Opponents argue that for Widgi Creek truly to be considered a "resort community" it must have resort amenities in addition to the golf course. The Hearings Officer agrees with opponents that in light of Widgi Creek residents' historic and long-standing use of the "Common 18" community amenities, their removal and replacement with dwellings would not be harmonious with existing development.

Opponents: The recent design revisions to the plan are minor and do not correct the many problems. Any correction in the revised design is inconsequential to the concerns expressed by the Hearings Officer. The proposed revision to the plan for Common Lot 18 (which the Hearings Officer described as "goofy"), is perhaps even more awkward, with the problematic "T court" turnaround area now being awkwardly located right next to Elkai Woods Drive.

Staff Comment: Staff believes that the reconfiguration of the proposed lots and screening vegetation adequately address many of the Hearings Officer's concerns. Staff recommends that the Board find that the modified subdivision proposal is harmonious with surrounding development with regard to the layout of the proposed subdivision.

The Hearings Officer also found that the proposed removal of "the historic and long-standing use of the Common 18 community amenities" would not be harmonious with the existing development in the area. The Board will need to decide whether to uphold the Hearings Officer's findings or, alternatively, find that additional townhome development is essentially identical to surrounding townhome development and is, thus, harmonious with the existing development.

This decision may be influenced, in part, by the Board's determination regarding the continuing applicability of the Master Plan and if the pool is a required amenity.

IIC. Issues for the "Fairway" application only

M12 – Is the "Fariway" subdivision located in an area developed as golf course or designated as open space?

Issue Summary: The Comprehensive Plan provides as follows:

> Policy 4.8.2. Designated open space and common area unless otherwise zoned for development, shall remain undeveloped except for community amenities such as bike and pedestrian paths, park and picnic areas. Areas developed as golf courses shall remain available for that purpose or for open space/recreation uses.

There is extensive argumentation in the record if the "Fairway" subdivision homesites are located in an area developed as golf course or designated as open space.

Applicant: The historic development maps, golf course master plan, and the irrigation maps combined with the fact that the existing mailboxes and vehicle turnout are located here (at the agreement of the residents) and the testimony of the golf course owner, manager and groundskeeper, is substantial and conclusive evidence that this area is not developed golf course.

The historic development maps are more persuasive than the outdated playing guide book relied upon by the Hearings Officer.

In the Points West subdivision decision from 2006, the Hearings Officer specifically interpreted the above plan policy with regard to an area of land within the tax lot comprising the golf course and adjacent to the 16th fairway, and concluded "the language of the policy, which requires that 'developed golf courses' be retained, implies that underdeveloped portions of golf courses may in some circumstances be developed." In that case, the Hearings Officer found that the area was outside of the out of bounds markers, not developed or maintained as a part of the course and therefore eligible for development as a part of the Points West subdivision.

Hearings Officer: The Hearings Officer has found that because the proposed subdivision site was "developed as golf course" in 2001, it is subject to Comprehensive Plan Policy 4.8.2 which requires that the site remain as golf course or be developed for open space or recreation uses.

The Hearings Officer's analysis is provided on pages 23-28 of the *Kine and Kine* "Fairway" decision. Summarizing the Hearings Officer's findings:

- Based on the foregoing analysis, the Hearings Officer finds that when Policy 4.8.2 was adopted in 2001, the board intended it to assure all Widgi Creek areas that were "physically developed" – everything except two identified undeveloped areas – would continue in their then-current uses or would be developed with "community amenities" or "open space/recreation uses." I find that because the proposed subdivision site was not identified as within the 8-9 developable acres in Widgi Creek, the site was "developed as golf course," "open space" or "common area" and therefore subject to Policy 4.8.2. I find it is most likely the board considered the proposed subdivision site to be part of the developed golf course in 2001 considering the site's location and the fact that it looks like all of the other vegetated land within and surrounding the golf course tees, fairways

and greens on the aforementioned aerial photos and diagrams of Widgi Creek attached to the goal exception.

- In his written testimony, Brad Hudspeth, General Manager of Widgi Creek Golf Course since 2005, stated that prior to 2009 “there were never any out of bounds markers on Hole #1 in the area of the proposed development.” I find from this evidence that prior to the owner’s placement of the out of bounds stakes in 2009, the out of bounds area for the first fairway extended to the southern edge of Seventh Mountain Drive, and therefore the proposed subdivision site was not out of bounds in 2001 when Policy 4.8.2 was adopted.
- Consistent with Hearings Officer Briggs’ analysis, I have found the proposed subdivision site -- which includes both mowed and “rough” or natural areas -- was within the “developed golf course” in 2001 and therefore falls within the restriction of Policy 4.8.2.

Opponents: The area along the first fairway where the developer now wants to build has always been golf course area. The Hearings Officer found that the area was not even out of bounds on the golf course when policy 4.8.2 was established.

The proposed Fairway One area is also "golf course area" under the Comprehensive Plan, as the Hearings Officer found. The applicant's golf course manager unambiguously testified that out of bounds markers were not placed on fairway one until the past several years, when the out of bounds was brought in. Before that, according to the applicant's own golf course rule book, the out of bounds boundary was the internal Seventh Mountain Drive front entrance. Accordingly, the Hearings Officer concluded that the area was part of the golf course area or was open space as of 2001, the effective date of the Comprehensive Plan policy, and could not be redeveloped

Catherine Morrow: In 2001 when the subject property was rezoned to Resort Community I was a principal planner for Deschutes County and was supervising the exception, comprehensive plan amendment and rezone in accordance with the state administrative rules for Unincorporated Communities (OAR 660 Division 22).
…
All of these policies are stated with "shall." At the time I believe that people who participated in the public process clearly thought the intent was that open space and recreational facilities would be retained. Second, a physically developed exception was taken because the area was " ... substantially built out and have their own internal controls for future development in accordance with approved master plans." (see page 3 of the staff memorandum dated October 16, 1998). The master plan designates the golf course as open space.

The approved master plan for the Inn of the Seventh Mountain and Widgi Creek, the existing comprehensive plan policy, and the fact that a physically developed exception was taken with the rezoning project indicates that, at the time of the zone change, there was no intent that the existing golf course, designated open space and recreational facilities would be subject to future development such as townhouses that are inconsistent with the master plan and adopted policy.

Staff Comment: Staff concurs with the Hearings Officer, Catherine Morrow, and opponents that, based on the text of policy 4.8.2 and the context provided by the goal exception and associated findings, the Board in 2001 did not intend to allow residential development on the golf course lots. Staff recommends the Board find that the subject property is not within the 8-9 acres specifically designated for residential development in the goal exception and is, instead, an area developed as golf course as of 2001 or, at minimum, open space adjacent to the

developed golf course that shall remain available for that purpose or for open space/recreation uses under policy 4.8.2.

Alternatively, the Board could find that the subject property is a landscaping area that is not (and never was) "developed as golf course" nor is it "designated open space" or "common area". As such it is eligible for residential development under Policy 4.8.2. Staff notes that this interpretation would set precedent for the residential development of a variety of golf-course-adjacent landscape areas in Widgi Creek and Black Butte Ranch.

M13 – Has the "Fariway" subdivision design issue been resolve by the modification?

Issue Summary: The Hearings Officer found that the layout and design of the proposed subdivision did not comply with all applicable criteria. Specifically, the Hearings Officer found that the layout of lots 8 and 9 would force a dangerous backing motion into a split, one-way couplet section of Seventh Mountain Drive to exit the properties.

Applicant: The applicant submitted a modification to relocate the lots off the one-way portion of Seventh Mountain Drive and create a shared driveway easement for Lots 8 and 9 so vehicles do not back onto the roadway. All other aspects of the proposal remain the same. The Applicant believes that the revised subdivision layout adequately addresses the hearing Officer's concerns.

Hearings Officer: (Staff notes that these findings were made prior to the modification of the layout before the Board). "…the location of these driveways on the one-way segment of Seventh Mountain Drive – which opponents testified has only 10 feet of pavement width – and at or immediately adjacent to the intersection with Golf Village Loop, has the potential to create traffic conflicts at the intersection and to force vehicles to back across the narrow traffic lane and onto the open space area between the two segments of Seventh Mountain Drive. For these reasons, I find the applicant's proposed site plan does not create a safe environment for Lots 8 and 9 and therefore does not satisfy this criterion.

Opponents: The recent design revisions to the plan are minor and do not correct the many problems. The "Fairway 1" revision still places too much traffic congestion right at the entry of 7th Mountain Drive off Century Drive, and is still very near the one-way portion of 7th Mountain Drive. Any correction in the revised design is inconsequential to the concerns expressed by the Hearings Officer.

Staff Comment: Staff has reviewed the modified subdivision layout plan and believes that the changes address the concerns of the Hearings Officer by moving the driveway access for lots 8 and 9 away from the one-way couplet. Staff recommends that Board find that the modified subdivision layout is designed to provide a safe environment and harmonious interior circulation patterns without any need for additional road improvements.

Attachments

1. Decision matrix.

Record

The record materials are available as text-searchable PDF files at:

P:\CDD\Widgi BOCC Hearings\File Record

Please let me know if I can assist with your review of any record materials. The following files will be of particular importance for your review:

2016-03-21 - Kine_Widgi Applicants Final Argument
2016-03-07 - HOA Post Hearing Rebuttal
2016-02-29 - Opponent Attorney Submittal & Exh 1-11
2016-02-29 - Widgi Applicant Presentation
2015-04-06 - HO Decision - Pool 247-14-000391-TP,392-SP,393-LM
2015-04-06 - HO Decision Fairway - 247-14-000395-TP,396-SP,397-LM