

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 THE ATHLETIC CLUB OF BEND, INC.,
5 *Petitioner,*
6

7 vs.
8

9 CITY OF BEND,
10 *Respondent,*
11

12 and
13

14 MOUNT BACHELOR CENTER, LLC,
15 and BROOKS RESOURCES CORPORATION,
16 *Intervenors-Respondents.*
17

18 LUBA No. 2011-030
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from City of Bend.
24

25 Aaron J. Noteboom, Eugene, filed the petition for review and argued on behalf of
26 petitioner. With him on the brief was Arnold Gallagher Percell Roberts and Potter, P.C.
27

28 No appearance by City of Bend.
29

30 Sharon R. Smith, Bend, filed the response brief and argued on behalf of intervenors-
31 respondents. With her on the brief was Bryant, Lovlien & Jarvis, PC.
32

33 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,
34 participated in the decision.
35

36 REMANDED

07/05/2011
37

38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner appeals a decision that approves an amendment of the Mount Bachelor Village Planned Unit Development.

MOTION TO INTERVENE

Mount Bachelor Center, LLC and Brooks Resources Corporation (intervenors) separately move to intervene in this appeal. There is no opposition to the motions, and they are allowed.

FACTS

A. County Approval of Mount Bachelor Village in 1976

Mount Bachelor Village Planned Unit Development (Mount Bachelor Village) was approved by Deschutes County in 1976. If we understand the parties correctly, that 1976 county approval included approval of a planned unit development (PUD) Master Plan plat or map, but that PUD Master Plan map has been lost, as has the 1976 county decision that approved Mount Bachelor Village.¹ All that survives from the 1976 county approval is what the parties refer to as the Brown Book. The Brown Book is a 39-page document. Record 968-1012. The Brown Book is most accurately described as a “description” of Mount Bachelor Village and is composed of text and a number of conceptual maps. Some of those maps display all of Mount Bachelor Village and some of those maps display subareas of Mount Bachelor Village. The dispute in this appeal concerns two lots owned by intervenors located in a subarea of Mount Bachelor Village known as the “Village Core,” which the parties and decision sometimes refer to as the “Commercial Core.” As we explain below, with the loss of the Mount Bachelor Village Master Plan, the Brown Book has become the

¹ It is difficult for us to believe that both the PUD master plan map and the county decision that initially approved MBV have both been irretrievably lost. But all parties apparently agree that neither the PUD Master Plan map nor the county decision that approved it can be found, and for purposes of this opinion we assume that such is the case.

1 Mount Bachelor Village Master Plan and that master plan has been amended several times
2 over the years as Mount Bachelor Village developed. Those amendments have introduced
3 what appear to be inconsistencies with the Brown Book without clearly explaining how to
4 resolve those inconsistencies. Development that appears to be inconsistent with the Brown
5 Book has been approved. Given this history, trying to identify the current nature and status
6 of the Mount Bachelor Village Master Plan is a challenge, to put it mildly.

7 **B. The City’s 1981 Decision**

8 In 1981, after Mount Bachelor Village was annexed to the City of Bend, an
9 application to amend the Mount Bachelor Village Master Plan was submitted to the city.
10 That application was approved in part. Record 1050-60. As it bears on this appeal, the 1981
11 decision is important in three ways. First, that 1981 decision treats the Brown Book as the
12 Mount Bachelor Village Master Plan, even though the Brown Book apparently was neither
13 prepared to serve that function nor approved by the county as the Mount Bachelor Village
14 Master Plan. Record 1051. Second, because the city’s land use regulations had no criteria or
15 process for “amending” PUD master plans, the 1981 decision took the position that the 1981
16 decision would constitute the city’s initial approval of the Mount Bachelor Village Master
17 Plan. Third, in nominally “approving” the Mount Bachelor Village Master Plan, rather than
18 “amending” it, the city applied the then existing city land use regulations in approving the
19 Mount Bachelor Village Master Plan. This decision to approve rather than amend the Mount
20 Bachelor Village PUD has a bearing on petitioner’s second assignment of error.²

² It is worth noting that although the 1981 decision appears to have approved a “proposed Mt. Bachelor Village Master Plan,” a copy of that Mount Bachelor Village master plan does not appear to be included in the record of this appeal—at least no party has pointed it out to us, and we have not been able to locate it.

1 **C. The 1982 Application**

2 In the section of the Brown Book devoted to the Village Core area of Mount Bachelor
3 Village, there are two express references to a 200-foot setback from Century Drive where it
4 borders the Village Core:

5 “1) Utilize the advantage of the scale of the area and the 200-foot setback
6 from the highway, to create a setting and a complex totally different in
7 character from the highway commercial areas. The scale of the quarry area
8 which was initially seen as a potential design problem can be made into an
9 asset, a means to set the area apart.” Record 998.

10 “Two intriguing aspects arise out of this phasing concept. First, it produces
11 an image at the very outset in keeping with the sense of quality projected at
12 Black Butte Ranch. It does this with the generosity of open space, of
13 development resting lightly on the land. It makes something of the 200’
14 setback, letting that set the key for the handling of its setting.” Record 1000,
15 1004.

16 In addition, two of the four conceptual maps displaying the Village Core show a 200-foot
17 setback along Century Drive along the Village Core. Record 1002, 1003.

18 In 1982 an application was submitted to reduce the 200-foot setback to 100 feet:

19 “The request is for a conditional use permit to amend the Mt. Bachelor
20 Village Master Plan. The Mt. Bachelor Village Master Plan addresses general
21 opportunities and design objectives, proposed concept and structure of the Mt.
22 Bachelor Village core area. This portion of the master plan specifically makes
23 reference to a 200 foot set-back from Century Drive within the village core
24 area. The applicant is requesting that this set-back be reduced to 100 feet
25 from Century Drive in accordance with a revised plan for the core area * * *.”
26 Record 353.

27 No final action was taken on the 1982 application.

28 **D. The 1999 Amendment**

29 In 1999, an application was submitted to increase residential density in subareas of
30 Mount Bachelor Village outside the Village Core and allow development of Touchmark, a
31 continuing care facility, in those subareas. The proposal was described as follows:

32 “The proposed amendment will increase the number of residential units from
33 500 to 612. This will allow future development of a continuing care
34 community * * * of 307 units in the Upper Terrace and River Terrace areas

1 (also known as River Woods) of the approved 1976 Master Plan.” Record
2 333.

3 The decision approving the 1999 application has a number of exhibits, including Exhibit C.
4 Exhibit C is entitled “Master Plan December 1999.” Record 1044. That master plan
5 displays a narrow (approximately 40-foot wide) band of “Open Space” between Century
6 Drive and the Village Core. The Master Plan December 1999 does not display a 200-foot
7 setback along Century Drive and the Village Core.

8 **E. The 2010 Decision on Appeal**

9 The hearings officer’s decision that is before us in this appeal includes the following
10 description of the proposed amendment of the Mount Bachelor Village PUD:

11 “The Applicant proposes that the MBV PUD/Brown Book be modified as it
12 applies to the subject properties to clarify, as it puts it, that there is no special
13 limitation on the number of stories in the Commercial Core, no square footage
14 limit, nor parking configuration in the Brown Book and that these elements
15 should be controlled by Bend Code and Design review standards; that the
16 setback from Century Drive for lot 3 is 40 feet from the property line tapering
17 to the intersection, as shown on the Applicant’s Exhibit 3; that the subject
18 property can be developed for any uses allowed in the applicable City zoning
19 district, and shall comply with Bend Code with regard to development
20 standards, including: lot coverage, parking, landscape, open space and
21 building size; that the subject property is still subject to architectural review
22 by Mount Bachelor Village Commercial Core Owners Association.” Record
23 30-31 (footnote omitted).

24 Petitioner characterizes the proposal, which was approved by the hearings officer, as a
25 proposal “to effectively ‘opt out’ of the Master Plan * * *.” Petition for Review 9.

26 **THIRD ASSIGNMENT OF ERROR**

27 As previously noted, the 1999 amendment adopted Exhibit C as part of the Mount
28 Bachelor Village Master Plan. Exhibit C displays a narrow (approximately 40-foot wide)
29 ribbon of “Open Space” between Century Drive and the Village Core. The Master Plan
30 December 1999 does not display a 200-foot setback along Century Drive and the Village
31 Core, only the narrow strip of open space along the Village Core.

1 In its third assignment of error, petitioner assigns error to the hearings officer's
2 finding that the 1999 amendment replaced the 200-foot setback along Century Drive at the
3 Village Core with a 40-foot wide strip of open space. The hearings officer's conclusion is
4 set out below:

5 "The Hearings Officer finds that the language of [the 1999 amendment] is
6 clear and controlling and that as it states, Exhibit C, is one of the exhibits that
7 replace sections of the Brown Book. To the extent the Brown Book is
8 contrary to it, Exhibit C controls. It cannot exist as merely supplementary to
9 other sections [of the Brown Book] which pre-existed the decision and which
10 are contrary to it. The Hearings Officer finds that the 1999 amendments, as
11 stated in the decision, required that 'future development within the Mount
12 Bachelor Village Planned Community shall be in conformance with the
13 approved Master Plan for community, including all amendments thereto.' For
14 these reasons and those set forth above in this section addressing the 200-foot
15 setback, the Hearings Officer finds that the 200-foot setback has been
16 removed as a result of [the 1999 amendment] and that it is as reflected in
17 Exhibit C, a setback of 40 feet tapering off near the Mt. Washington/Read
18 Market Roundabout as depicted." Record 37.

19 There are two assumptions in the hearings officer's reasoning that are incorrect.
20 First, the hearings officer assumes Exhibit C "replaces" something in the Brown Book. As
21 explained below, neither the 1999 decision nor Exhibit C itself expressly replaces anything in
22 the Brown Book. Second, the hearings officer assumes Exhibit C is inconsistent with the
23 Brown Book, simply because it does not display a 200-foot setback. As explained below,
24 Exhibit C is not inconsistent with the Brown Book.

25 The 1999 amendment imposed the following condition of approval.

26 "1. The applicant shall develop the affected areas as shown on the
27 amended master plan drawings submitted with this application. This
28 amendment to the master plan will allow the existing 'Brown Book' to
29 remain as the master plan except that the following exhibits *will*
30 *replace sections of the 'Brown Book' as described below:*

31 "◆ Exhibit C – Proposed Mount Bachelor Village Master Plan
32 Map

33 "◆ Exhibit D – Mount Bachelor Village Illustrative Master Plan
34 Map

1 “♦ Exhibit E – Mount Bachelor village Circulation Master Plan
2 Map

3 “♦ Exhibit F – Mount Bachelor Village Master Development Plan
4 Data

5 “* * * * *.” Record 1019-20 (italics and underlining added.)

6 Despite the italicized and underlined text, condition 1 itself never “describes” or identifies
7 any “sections of the ‘Brown Book’” that are replaced by Exhibits C, D, E and F. However,
8 later in the 1999 decision, the city again explains that the Brown Book continues to serve as
9 “the master plan, except that [Exhibits C, D, E, and F] will replace sections of the ‘Brown
10 Book’ as described below.” Record 1032. The county then describes the following sections
11 of the Brown Book that are replaced:

12 “Exhibit D, the illustrative Plan will show the existing and proposed uses and
13 open space and will replace the Site Sectors and Open Space Matrix on page
14 13 and the Illustrative Plan on page 18 of the Brown Book. Exhibit E, the
15 Circulation Plan, will show the streets and pedestrian circulation and parking,
16 and will replace the Circulation plan on page 16 of the Brown Book. These
17 exhibits will be incorporated as an addendum to the Mount Bachelor Village
18 Development Plan (Brown Book) with approval of this application. Staff
19 finds that these exhibits, supplementing the existing Brown Book, will
20 provide the information required for a PUD under this criterion.” Record
21 1032.

22 Nowhere in the 1999 amendment does the city expressly identify any part of the
23 Brown Book to be replaced by Exhibits C or F. It may be that when it adopted the 1999
24 amendment, the county intended that Exhibit C, not Exhibit D, replace the Site Sectors and
25 Open Space Matrix on page 13 of the Brown Book. Exhibit C shows open space in a
26 different configuration from the Site Sectors and Open Space Matrix, and Exhibit D does not
27 show open space at all.³ But whatever the explanation, nothing in the 1999 amendment
28 expressly identifies any part of the Brown Book that is “replaced” by Exhibit C. If the

³ We also suspect the city intended to replace the Development Plan and Basic Data set out at page 39 of the Brown Book with Exhibit F, which shows different data. However, as with Exhibit C, the 1999 decision simply fails to identify any part of the Brown Book that is replaced by Exhibit F.

1 Brown Book included a map entitled “Mount Bachelor Village Master Plan Map” we might
2 assume the city intended to replace that map with Exhibit C. But prior to the 1999
3 amendment, the Brown Book included no map entitled “Mount Bachelor Village Master
4 Plan” or any similar title, at least no party identifies such a map. Despite the confusion that
5 the 1999 decision’s lack of clarity about Exhibit C causes, we will assume that the 1999
6 amendment made Exhibit C part of the Brown Book, and therefore part of the Mount
7 Bachelor Village PUD Master Plan. But the 1999 amendment did so by supplementing the
8 Brown Book with Exhibit C rather than replacing anything in the Brown Book with Exhibit
9 C.

10 Although the hearings officer’s first erroneous assumption is probably not important,
11 his second erroneous assumption is important. The hearings officer’s second erroneous
12 assumption is that Exhibit C is inconsistent with the Brown Book, because it does not show a
13 200-foot setback along Century Drive along the Village Core. If Exhibit C is compared with
14 the maps in the Brown Book there are clearly some differences that likely qualify as
15 inconsistencies. But as we have already explained, the 1999 decision provides no clue how
16 to resolve those inconsistencies. However, the issue that must be decided to resolve the third
17 assignment of error is not whether there are inconsistencies between Exhibit C and parts of
18 the Brown Book. The critical issue is much more limited—whether Exhibit C, a map that
19 displays all of Mount Bachelor Village without showing a 200-foot setback along the Village
20 Core frontage with Century Drive, is for that reason inconsistent with the Brown Book. As
21 noted above, the Brown Book includes two textual references to the 200-foot setback, and
22 two of four Village Core subarea maps depict the setback.

23 Citing *Dahlen v. City of Bend*, 57 Or LUBA 709 (2008), intervenors contend that
24 because Exhibit C “removes” the 200-foot setback, Exhibit C is inconsistent with the Brown
25 Book requirement for a 200-foot setback and Exhibit C therefore controls. There are a
26 number of Brown Book maps that, like Exhibit C, display all of Mount Bachelor Village.

1 Record 977 (“Concept”); 981 (“Site Characteristics”); 986 (“Site Sectors and Open Space
2 Matrix”); 989 (“Circulation”); 991 (“Illustrative Plan”). None of those Brown Book maps
3 show the 200-foot setback. We also cannot assume that the 1976 Mount Bachelor Village
4 Master Plan Map or the 1981 revised master plan map showed the 200-foot setback, at least
5 the record in this appeal provides no reason to assume that they did. For that reason, *Dahlen*
6 *v. City of Bend*, 57 Or LUBA 709 (2008) is inapposite here. In *Dahlen* we concluded that
7 where a prior PUD master plan included references to a required “buffer” but a subsequently
8 adopted PUD master plan included no reference to buffers, the buffer requirement was
9 eliminated. *Dahlen* might have some bearing in this appeal if it were established that prior
10 Mount Bachelor Village Master Plans showed the 200-foot setback. However, neither the
11 city nor intervenors have established that such is the case here.

12 The *only* two maps that show the 200-foot setback are two of the four maps that
13 display the Village Core only. Record 1002 and 1003. As previously noted, there is text in
14 the portion of the Brown Book devoted to the Village Core that discusses the 200-foot
15 setback. As far as we can tell, those maps and that text have been part of the Brown Book
16 from the beginning and are apparently the sole sources of the 200-foot setback. Exhibit C is
17 entirely consistent with all the Brown Book maps that display all of Mount Bachelor Village.
18 There is simply no inconsistency in amending the Brown Book to include Exhibit C (a map
19 of all of Mount Bachelor Village that does not show the 200-foot setback), because all of the
20 maps in the Brown Book that display all of Mount Bachelor Village similarly do not show
21 the 200-foot setback.

22 Our conclusion above is reinforced by the fact that the text of the 1999 amendment
23 never mentions the 200-foot setback and certainly gives no indication that the 200-foot
24 setback is to be eliminated. Exhibit C simply displays the Village Core, as well as all other
25 areas of Mount Bachelor Village. It appears that the drafter of Exhibit C attempted to depict
26 the Village Core as it had actually developed by 1999, rather than as it is depicted

1 conceptually in the Brown Book. It is true that a large portion of one of the areas shown on
2 that map as “Future Commercial” lies within the 200-foot setback and would appear to be
3 rendered developable only for uses that are allowed in the setback. But the text of the 1999
4 decision gives absolutely no indication that the Brown Book is being amended to eliminate
5 the 200-foot setback. Indeed the text of the 1999 decision gives no indication that the
6 portion of the Brown Book addressing the Village Core is being amended in any way,
7 although Exhibit C seems to do so.

8 To summarize our resolution of the third assignment of error, the 1999 amendment
9 expressly identifies no part of the Brown Book that is “replaced” by Exhibit C. Before and
10 after the Brown Book was amended in 1999 to include Exhibit C, the Brown Book imposed a
11 200-foot setback along the Village Core, although none of the maps in the Brown Book that
12 display all of Mount Bachelor Village show the 200-foot setback. That 200-foot setback was
13 established by Brown Book text and two of the maps in the Brown Book that are limited to
14 the Village Core. The hearings officer erred by concluding that Exhibit C of the 1999
15 decision replaced the 200-foot back with a 40-foot setback.

16 The third assignment of error is sustained.

17 **FOURTH ASSIGNMENT OF ERROR**

18 The hearings officer found that the Brown Book does not impose a mandatory
19 requirement that buildings may not exceed two stories, does not impose specific building
20 height or square footage limits and does not impose specific lot coverage, parking,
21 landscaping or open space requirements.

22 “First, the Hearings Officer finds that the Master Plan does not contain a two-
23 story height limitation. As noted by the parties, there is language at page 36
24 of the Brown Book under the heading ‘Special Objectives for the Core Area’
25 which reads: ‘encourage two-story buildings with access at the upper floor.’
26 There is also some additional data referencing ‘two levels’ at page 39.
27 [Athletic Club of Bend] reads these as an absolute requirement that there be
28 only two stories * * *. First, the Hearings Officer does not find a clear,
29 mandatory requirement that limits buildings in the Core to two stories in this
30 language or anywhere in the Brown Book. * * *

1 “The Hearings Officer finds no further statement in the Brown Book
2 specifically stating a requirement that there be a height or square footage
3 limitation within the Commercial Core or elsewhere of a *clear and objective*
4 nature, limiting height to a specific level or square footage of building space
5 to a specific number. The same is true with respect to lot coverage, parking,
6 landscaping and building open space. These read as goals and aspirations, to
7 the extent they are addressed. There are simply no *clear and objective* criteria
8 in these regards. As such, the applicable standards of the Bend Code
9 pertaining to the subject zoning and design review apply as they are the only
10 standards which could.” Record 37-38 (emphases added).

11 We understand the hearings officer to have ultimately concluded that because the Brown
12 Book imposes no clear and objective, mandatory standards concerning lot coverage, parking
13 requirements, building size or height, building square footage and number of stories, those
14 aspects of future development in the Village or Commercial Core are governed (1)
15 exclusively by the Bend Development Code and (2) not at all by the Brown Book.⁴

16 As petitioner correctly argues, the ORS 227.173(1) requirement that permit approval
17 decisions must be governed by “standards and criteria” does not require that all permit
18 approval standards must be “clear and objective.” *Konrady v. City of Eugene*, 59 Or LUBA
19 466, 481-82 (2009). In the land use arena, under state law, “clear and objective” standards
20 are legally required in a relatively small number of specified circumstances.⁵ To the extent
21 the hearings officer found the Brown Book imposes no limits on future permits in the Village
22 Core, unless those limits are expressed as “clear and objective” standards, he erred.

23 Petitioner then contends that the Brown Book need only comply with the ORS
24 227.173(1) requirement for standards and criteria, which allows subjective standards and

⁴ The “Decision” portion of the hearings officer’s decision includes the following:

“1. Lot coverage, parking requirements, building size/height, square footage and the allowed number of stories in the Commercial Core shall be governed by City Code.” Record 45.

⁵ For example, ORS 197.307(6) requires that approval standards applied to needed housing be clear and objective standards. And under OAR 660-023-0050(2), when a local government makes a decision to limit conflicting uses to protect a Goal 5 resource under OAR 660-023-0040(5)(b), the limits imposed on the conflicting use must be clear and objective.

1 criteria. However, the Mount Bachelor Village PUD Master Plan is not subject to the ORS
2 227.173(1) requirement that “discretionary permit” decisions be governed by “standards and
3 criteria” set out in the city’s “development ordinance.”⁶ Presumably permit applications that
4 are subject to a PUD Master Plan must be consistent with the PUD Master Plan, but the PUD
5 Master Plan itself is neither city-adopted “standards and criteria” nor part of the city’s
6 “development ordinance.” It may be that applicants and cities will want to ensure that PUD
7 Master Plans provide a more precise guide for future development than is set forth in the
8 Mount Bachelor Village PUD Master Plan, if for no other reason than to avoid the kind of
9 disputes that are present in this appeal. But ORS 227.173(1) does not mandate that PUD
10 Master Plans include “standards and criteria,” as those words are used in ORS 227.173(1).

11 Whether language in the Brown Book constitutes a mandatory requirement that is
12 applicable in approving specific development will depend on the text and context of the
13 particular language and the nature of the proposal. We have no difficulty agreeing with the
14 hearings officer that the Brown Book does not appear to include any numerical or objective
15 standards regarding lot coverage, parking requirements, building size or height, building
16 square footage or number of stories. Certainly nothing cited by intervenors below or on
17 appeal establishes that such is the case. Record 693-94. The Brown Book merely suggests
18 that the building square footage in the Village Core will be somewhere between 110,000
19 square feet and 220,000 square feet, based on experience with parking requirements. Record
20 1012. While there are several references to two-story buildings, the Brown Book does not
21 come close to imposing a mandatory two-story limit in the Village Core. We agree with the

⁶ ORS 227.173(1) provides:

“Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.”

1 hearings officer that because the Brown Book discussion of expected development in the
2 Village Core is largely suggestive and aspirational, it leaves permit applicants a fair amount
3 of flexibility to design commercial development in the Village Core that does not necessarily
4 closely reflect what is described and displayed in the Brown Book.⁷

5 The difficulty with the hearings officer's decision is that it is one thing to say the
6 Brown Book imposes no mandatory requirement that commercial buildings in the Village
7 Core never exceed two stories, cover only a specified percentage of a lot, provide a specific
8 amount of parking, and meet specific building size, height or square footage requirements,
9 but it is quite another thing to say *any* commercial development that may be approvable
10 under the Bend Development Code BDC is permissible, no matter how profoundly it may
11 differ from what it described and displayed in the Brown Book. The hearings officer's
12 decision can be read to adopt that more extreme position.

13 In 1981, the city determined that the Mount Bachelor Village Master Plan Brown
14 Book constitutes the Mount Bachelor Village Master Plan. That Brown Book has now been
15 amended a number of times, and the 1999 amendment makes it clear that the Brown Book, as
16 it has been amended, remains as the Mount Bachelor Village Master Plan. The Brown Book

⁷ Some language in the Brown Book is worded as a suggestion and is so open ended that it is hard to see how it would preclude any specific proposal. For example, the eighth "Special Objective for the Core Area" is set out below:

"8) Develop concept plans in detail for graphics, lighting, landscaping, and common elements such as boardwalks and amenities. A system of uniform common elements such as boardwalks, boardwalk lighting and directional signals should be complemented by individual variations in storefront lighting, individual tenant graphics and varied treatment of semi-private courtyards." Record 1010.

However, other language in the Brown Book is clearly not a mere suggestion:

"6 Preserve all medium size and larger trees in the core area. At present these may not appear significant, but they are an invaluable resource for their ultimate interspersment between buildings. The need to jog around trees for some buildings will add to the charm." *Id.*

1 admittedly, in large part, paints a highly subjective picture of development in the Village
2 Core, and is filled with far more suggestions than commands.

3 However, the Brown Book is not entirely hortatory. It does impose a 200-foot
4 setback from Century Drive in the Village Core. The Brown Book also seems to envision a
5 grouping of commercial buildings around the inner Village Core that while somewhat
6 conceptual does not appear to be entirely hortatory. Record 1001-03, 1006. The city
7 nevertheless appears to have approved development in the past that hardly seems to be what
8 the Brown Book envisions.⁸ If the city now believes that the Brown Book is either too
9 subjective and aspirational to serve effectively as part of the Mount Bachelor Village PUD
10 Master Plan or that the development the city has permitted in the past deviates to such a
11 degree from the development envisioned by the Brown Book that it is no longer possible to
12 accomplish the development that the Brown Book envisions for the Village Core, the city
13 may be able to amend the Brown Book to correct those deficiencies. Failing that, it may be
14 that the city can replace the Brown Book with a more workable master plan for the Village
15 Core.

16 For present purposes, we agree with petitioners that the hearings officer erred to the
17 extent he ruled that nothing in the Brown Book imposes any kind of mandatory requirement
18 governing development of the Village Core. For the reasons set out in our discussion of the
19 third assignment of error, the Brown Book imposes a 200-foot setback from Century Drive in
20 the Village Core. The Brown Book also seems to call for a grouping of commercial
21 buildings around the inner Village Core. And there may be other requirements in the Brown
22 Book for the Village Core that could amount to mandatory requirements in some

⁸ Ironically, petitioner Athletic Club of Bend's existing building does not appear to be the kind of commercial development envisioned for the Village Core. Neither does that building appear to be located, configured or developed at the scale called for in the Brown Book. Perhaps most ironically, the Athletic Club of Bend appears to encroach into the 200-foot setback. Record 740. It appears that development envisioned by intervenors is almost as at odds with the Brown Book as the Athletic Club of Bend Building. Record 746-47.

1 circumstances. The hearings officer’s decision can be read to find that the Brown Book is
2 irrelevant as a potential source of mandatory approval standards, and to the extent it does so,
3 it is in error. This requires that we sustain petitioner’s fourth assignment of error in part.

4 However, the hearings officer’s conclusion that the Brown Book imposes no specific
5 mandatory requirements regarding lot coverage, parking requirements, building size/height,
6 square footage and the allowed number of stories in the Village Core appears to be accurate;
7 at least petitioner has not established that conclusion to be in error. Therefore, that part of
8 petitioner’s fourth assignment of error is denied.

9 The fourth assignment of error is sustained in part and denied in part.

10 **FIRST ASSIGNMENT OF ERROR**

11 Bend Development Code (BDC) 4.1.1325(B) governs modification of development
12 approvals generally and requires that the modification must not be “one that would have
13 significant additional impacts on surrounding properties.”⁹ In addressing BDC 4.1.1325(B),
14 the hearings officer adopted the following findings:

15 “[A]ny development on the property will require actual development review,
16 the filing of a site plan application and the concomitant notice and procedures
17 attendant to such. It is at that time when the impacts are most properly
18 accessed and mitigation associated with such appropriate. That is not to say
19 that in every instance there is no impact from a proposal to modify a PUD, but
20 that in this instance, I cannot ascertain any impacts. How does one conduct an
21 actual traffic count when the level of traffic is not known, or address safety
22 issues arising from such? Again, I conclude that the proper time to address
23 the impacts under this criterion with respect to this proposal is when the
24 development is actually proposed. The [Athletic Club of Bend] argues that
25 the 200-foot set back is an immediate impact, and the Hearings Officer
26 disagrees, finding that it is not a new proposal, but an amendment to the PUD
27 that occurred in 1999. * * *” Record 35.

⁹ The complete text of BDC 4.1.1325(B) is set out below:

“Unless otherwise specified in this Code, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have *significant additional impacts on surrounding properties.*” (Emphasis added.)

1 The above-quoted findings can be read to embrace two legal theories. We address
2 those theories in turn.

3 **A. The Decision Does not Amend the Mount Bachelor Village Master Plan**

4 The hearings officer’s decision can be read to find that the decision in this appeal
5 does not amend the Mount Bachelor Village Master Plan, because that master plan does not
6 currently impose a 200-foot setback and never has imposed any constraints on lot coverage,
7 parking, building size or height, building square footage or number of stories.¹⁰ Under that
8 theory, assuming the hearings officer’s decision does not modify the Mount Bachelor Village
9 Master Plan, BDC 4.1.1325(B) does not even apply, because BDC 4.1.1325(B) only applies
10 to modifications. In resolving the third assignment of error, we conclude that the Mount
11 Bachelor Village Master Plan does include a 200-foot setback along the Village Center and
12 the hearings officer’s finding to the contrary is erroneous. Similarly, in resolving the fourth
13 assignment of error, while we agree with the hearings officer that the Brown Book does not
14 include any specific, objective standards concerning lot coverage, parking requirements,
15 building size or height, building square footage or number of stories, we reject his finding
16 that the Brown Book imposes no standards at all regarding those considerations. Therefore,
17 to the extent the hearings officer found the proposal complies with BDC 4.1.1325(B) because
18 it results in no change in the Brown Book, the hearings officer erred.

¹⁰ The hearings officer’s determinations regarding whether the Brown Book imposes a 200-foot setback or other mandatory requirements are technically not “amendments” to the Brown Book, but rather interpretative rulings on what the Brown Book already requires or does not require. Those rulings are either right or wrong. Either way, such interpretative rulings are not properly viewed as “amendments.” However, we understand the applicants to have requested actual amendments to the Brown Book, for example to reduce the 200-foot setback to 40 feet, in case the hearings officer determined that the Brown Book imposed a 200-foot setback. Because the hearings officer concluded essentially that the Brown Book imposed no requirements at all, he did not literally approve any amendments to the Brown Book. Nonetheless, the decision can be read to treat the hearings officer’s declarations, for example that the setback imposed by the Brown Book is 40 feet rather than 200 feet, as amendments to the Brown Book, in the event those declarations turn out to be erroneous and are overturned on appeal. We address the arguments under this assignment of error with that understanding.

1 **B. Deferral to Site Plan Review**

2 The hearings officer’s alternative legal theory concerning BDC 4.1.1325(B) appears
3 to be that the amendment of a PUD master plan, in and of itself, will have no impacts on
4 surrounding properties, significant or otherwise. It is instead the additional or new
5 development that may be allowed by the amended PUD master plan that may have
6 significant impacts on surrounding properties, and the hearings officer found that the time to
7 address that possibility is when that future development is reviewed for approval.

8 As petitioner points out, BDC 4.1.1325(B) applies at the time the city approves a
9 modification of a prior development approval; it does not apply at the time of site plan
10 review. As far as we can tell, under site plan review an applicant is not required to
11 demonstrate that the development that is the subject of the site plan review application will
12 not significantly impact surrounding properties. A “modification” in a prior development
13 approval by definition will change that prior development approval. In this case the
14 modification eliminates the 200-foot setback and eliminates any constraints the Brown Book
15 might have on future lot coverage, parking requirements, building size or height, building
16 square footage and number of stories, when approving development within the Village Core.
17 While there may well be practical difficulties in determining now whether those
18 modifications will have significant impacts on surrounding properties, because the precise
19 nature of future development within the Village Core is currently unknown, development
20 approval decisions that govern future permit decisions often must contend with imperfect
21 knowledge of the actual development proposals that will be included in those future permit
22 applications. The hearings officer erred by failing to apply BDC 4.1.1325(B) and determine
23 whether the approved modifications will have significant impacts on surrounding properties.

24 The first assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 BDC 4.5.300(D)(7) governs modification of a master development plan and as
3 relevant provides that the proposed modification is “subject to * * * the applicable criteria
4 used for the initial approval.”¹¹ As noted earlier in this opinion, while the actual initial
5 approval was granted by the county in 1976, the city approved a proposed modification in
6 1981 as though it were the “initial approval,” and all parties agree that the 1981 approval is
7 the “initial approval,” within the meaning of BDC 4.5.300(D)(7). Therefore the proposal in
8 this appeal is subject to “the applicable criteria used for the [city’s 1981] initial approval.” In
9 determining what those applicable criteria are, the hearings officer adopted the following
10 findings:

11 “* * * The Applicant and [the Athletic Club of Bend] are generally in
12 agreement that the applicable criteria used for the initial approval are found in
13 NS 1178 in effect on June 22, 1981.[¹²] The Applicant and [the Athletic Club
14 of Bend] disagree as to what portions of that version of NS 1178 must be
15 addressed and read the criterion differently. The language at issue provides:
16 ‘A modification request shall be subject to ...the applicable criteria used for
17 the initial approval.’ (Emphasis supplied.) [The Athletic Club of Bend]
18 argues that the applicable criteria include all of Sections 10, 29, 30 and 24 as
19 they existed on June 22, 1981. The Applicant argues that only the applicable
20 criteria ‘used for the approval’ apply * * *. A review of the approval in [the
21 1981] Decision demonstrates that the criteria actually used for the approval
22 are limited. In the Decision, the hearings officer stated ‘City Ordinance NS-
23 1178, Section 30 (p. 75) sets forth the requirements for [a] planned unit
24 development approval. In subsection 7 of section 30 standards of approval are
25 set forth.’ * * * The [1981 Decision] * * * also addressed Section 29, of NS
26 1178 and certain LCDC goals. The Hearings Officer finds that by the terms
27 of the [1981 Decision] the Applicant is required to address Section 30,
28 Subsection 7, Section 29 [, and] certain LCDC Goals. * * *” Record 40.

¹¹ The complete text of BDC 4.5.300(D)(7) is set out below:

“Modification of a Master Planned Development. A modification request shall be subject to a Type II application procedure and the applicable criteria used for the initial approval. The Planning Director may decide to refer the request to the Hearings Body for a hearing as a Type III application if the original approval was determined by a Hearings Body.”

¹² NS 1178 is City of Bend Ordinance 1178, the City of Bend’s original zoning ordinance.

1 In its petition for review, petitioner argues “[t]he Hearings Officer ignored other applicable
2 criteria found in NS 1178 and cited by [petitioner] as applicable, including compliance with
3 Section 10 (RS Zone), Section 15 (CL Zone), Section 24 (Off-Street Parking), Section 29
4 (Conditional Use) and Section 30 (Planned Unit Development).” Petition for Review 16.

5 We agree with petitioner that the hearings officer erroneously interpreted BDC
6 4.5.300(D)(7) to require that in approving a modification of the development plan approved
7 by the 1981 Decision the hearings officer need only consider the parts of NS 1178 that are
8 specifically identified in the 1981 decision findings. The hearings officer’s error is in
9 assuming that the parts of NS 1178 that were “applicable” to the 1981 proposal and “used” in
10 granting that approval are limited to the parts of NS 1178 that are specifically identified in
11 the hearings officer’s findings. Just because the hearings officer may not have specifically
12 identified parts of NS 1178 in his findings does not mean those criteria were not used by the
13 county in approving the proposal in 1981.

14 The decision that is before us in this appeal modifies the Mount Bachelor Village
15 Master Plan for the Village Core. As petitioner correctly notes, BDC 4.1.1325(C) provides
16 that “any proposed modification * * * shall be reviewed only under the criteria applicable to
17 that particular aspect of the proposal.”¹³ We agree with petitioner that the proposed
18 modification is subject to the “applicable criteria” that would have applied under NS 1178
19 had the modification been proposed as part of the 1981 application.

¹³ The complete text of BDC 4.1.1325(C) is set out below:

“An application to modify an approval shall be directed to one or more discrete aspects of the approval, the modification of which would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties. Any proposed modification, as defined in this section, shall be reviewed only under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.”

1 While we agree with petitioner that the hearings officer erred in his very narrow
2 interpretation of BDC 4.5.300(D)(7), we do not necessarily agree with petitioner that the
3 parts of NS 1178 that petitioner cites necessarily apply in the way petitioner argues that they
4 apply. The city is only obligated under BDC 4.5.300(D)(7) to apply the criteria in NS 1178
5 that would have applied if the currently proposed modification had been included in the 1981
6 application. We note that it is very clear under the current BDC that one of the reasons for
7 seeking PUD approval is to allow a PUD applicant to deviate from the requirements in the
8 applicable zoning district that would otherwise apply. BDC 4.5.300(B)(2).¹⁴ NS 1178
9 similarly seems to have envisioned that planned unit developments in some cases will not be
10 required to comply with the limitations that would otherwise apply under the underlying
11 zoning. NS 1178, Section 30(7)(c).¹⁵ Thus, while we agree that the hearings officer erred by
12 concluding that the only “applicable” parts of NS 1178 are those that are specifically cited in
13 the hearings officer’s 1981 decision findings, we do not necessarily agree that under BDC
14 4.5.300(D)(7) the proposal must fully comply with all requirements of the underlying zoning
15 district that applied to the Village Core in 1981. The hearing officer was obligated to apply
16 any criteria in NS 1178 that would have applied in 1981 if the modification that is at issue in
17 this appeal had been included in the 1981 application. We express no opinion here on what
18 those criteria might include. That is for the hearings officer to determine in the first instance.

¹⁴ BDC 4.5.300(B)(2) provides:

“A Master Planned Development seeks to change one or more of the development standards contained in this ordinance, the underlying zoning and/or Bend Area General Plan designation. Therefore, a Master Planned Development Concept Plan application shall be reviewed using the Type III procedure in accordance with Chapter 4.1; Land Use Review and Procedures.”

¹⁵ NS 1178, Section 30(7)(c) provides:

“The project will accrue benefits to the City and to the general public in terms of need, convenience, service and appearance sufficient to justify any necessary exceptions to the regulations of the zoning district and Subdivision Ordinance.”

- 1 The second assignment of error is sustained.
- 2 The city's decision is remanded.