

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

3
4 BROKEN TOP COMMUNITY ASSOCIATION,
5 RICHARD KAUFMAN and SARAH KAUFMAN,
6 *Petitioners,*

7
8 vs.

9
10 DESCHUTES COUNTY,
11 *Respondent,*

12
13 and

14
15 ARROWOOD DEVELOPMENT, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA Nos. 2006-213 and 2006-215

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Deschutes County.

24
25 Edward P. Fitch, Redmond, filed a petition for review and argued on behalf of
26 petitioner Broken Top Community Association. With him on the brief was Bryant, Emerson,
27 & Fitch, LLP.

28
29 William Hugh Sherlock, Eugene, filed a petition for review and argued on behalf of
30 petitioners Richard Kaufman and Sarah Kaufman. With him on the brief was Hutchinson,
31 Cox, Coons, DuPriest, Orr, & Sherlock, PC.

32
33 Laurie E. Craghead, Bend, filed a response brief on behalf of respondent.

34
35 Brian L. Gingerich and Tia M. Lewis, Bend, filed a response brief and argued on
36 behalf of intervenor-respondent. With them on the brief was Schwabe, Williamson & Wyatt,
37 PC.

38
39 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,
40 participated in the decision.

41
42 AFFIRMED

04/18/2007

43
44 You are entitled to judicial review of this Order. Judicial review is governed by the
45 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a hearings officer’s decision approving a tentative subdivision plan for a previously approved destination resort.

MOTION FOR REPLY BRIEF

Broken Top Community Association (BTCA), the petitioner in LUBA No. 2006-213, moves to file a reply brief. Intervenor-respondent Arrowood Development, LLC (Arrowood) objects to the reply brief, arguing that it does not respond to any “new matters” raised in the response brief, within the meaning of OAR 661-010-0039.¹

The proposed reply brief includes seven sub-sections that for the most part reiterate or elaborate on arguments made in the seven assignments of error in BTCA’s petition for review. We agree with Arrowood that such arguments do not respond to “new matters” raised in the response brief. However, several other portions of the reply brief appear to respond to “new matters.” Section B of the reply brief responds to a statement in Arrowood’s response brief questioning BTCA’s standing to pursue an appeal.² The introduction to section C of the reply brief responds to a general argument in Arrowood’s response brief that all issues raised in BTCA’s assignments of error were resolved by prior county decisions or agreements, and that BTCA’s assignments of error are collateral attacks on those decisions or agreements. Sub-section C.2 includes a paragraph that also responds to

¹ OAR 661-010-0039 provides, in relevant part:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief. * * *”

² Arrowood’s response brief states that “[n]o evidence in the record identifies the members of Petitioner BTCA, where they reside, or whether a proper vote was taken to authorize BTCA to pursue an appeal on behalf of its members.” Response Brief 1. Arrowood does not move to dismiss LUBA No. 2006-213, or elaborate on that statement. To the extent that statement is intended to challenge BTCA’s standing to file this appeal, Arrowood does not explain why the absence of the identified information from the record is a basis to dismiss BTCA’s appeal.

1 the collateral attack issue. In our view, a reply brief is warranted to respond to the collateral
2 attack and standing issues raised in the response brief. Accordingly, Section B, the
3 introduction to section C and that portion of sub-section C.2 at page 3, lines 9 through 18, are
4 allowed. The Board will not consider the remainder of the proposed reply brief in resolving
5 petitioners' assignments of error.

6 **FACTS**

7 The subject destination resort, known as Cascade Highlands, is located on a 698-acre
8 tract north of Century Drive, adjacent to the urban growth boundary and city limits of the
9 City of Bend. The property is undeveloped and zoned Urban Area Reserve (UAR10) with a
10 Destination Resort (DR) overlay. A large fire in 1990 burned nearly all vegetation and trees
11 on the property, and the site is currently covered with brush, grass and stands of small
12 ponderosa pine trees scattered across the property. The property is bordered on the east by
13 the Broken Top Planned Unit Development (PUD) within the city of Bend. Other
14 residentially-developed lands lie to the north and south. U.S. Forest Service lands lie to the
15 west.

16 The county's development ordinance sets out a multi-stage process for destination
17 resort approval, under Deschutes County Code (DCC) Title 19. First, the applicant must
18 obtain conceptual master plan (CMP) approval, then final master plan (FMP) approval, and
19 then seek either site plan review or tentative and final subdivision plat approvals for specific
20 phases of the resort. Tentative subdivision plat approval is subject to DCC Title 17.16,
21 which sets out the county's general subdivision standards.

22 On January 5, 2005, the county approved the CMP for the proposed Cascade
23 Highlands destination resort. The CMP was not appealed and became final. The county
24 approved the FMP in September 2005. Petitioners Kaufman appealed the FMP approval
25 decision locally, but that appeal was denied, and no appeal of the FMP decision was filed
26 with LUBA.

1 Both the CMP and FMP decisions relied in part on a development agreement adopted
2 in 2000 between the City of Bend, the county, and a number of property owners in the area,
3 including the predecessor-in-interest to intervenor-respondent Arrowood. The development
4 agreement was designed to address a number of traffic problems on the west side of the city.
5 Pursuant to the agreement, Arrowood's predecessor-in-interest contributed funds and agreed
6 to construct facility improvements as mitigation for off-site traffic impacts within the city
7 arising from development of the subject property as a destination resort at a density specified
8 in the agreement.

9 In May 2006, Arrowood submitted an application for tentative subdivision plan (TP)
10 approval, proposing 379 lots for single-family dwellings, seven multi-family tracts, overnight
11 lodgings, commercial areas, and recreational areas. The proposed density falls within the
12 maximum density specified in the development agreement. Under DCC Title 19, the
13 proposed TP must be consistent with the CMP and FMP approvals, as well as comply with
14 subdivision approval standards in DCC Title 17. Petitioner Broken Top Community
15 Association (BTCA) submitted testimony in opposition regarding several transportation
16 related impacts. Petitioners Richard Kaufman and Sarah Kaufman (the Kaufmans) testified
17 in opposition, raising issues regarding preservation of natural resources on the subject
18 property. The hearings officer approved the TP application. Petitioners appealed the TP
19 approval to the county board of commissioners, which declined to hear the appeal. These
20 appeals followed.

21 **FIRST THROUGH SIXTH ASSIGNMENTS OF ERROR (BTCA)**

22 BTCA's first six assignments of error are focused on Metolius Drive, which is one of
23 the principal means of access to the Cascade Highlands destination resort. Metolius Drive is
24 a city and county designated collector street that currently exists only as a private street and
25 terminates within the Broken Top PUD. A dedication deed signed in 1994 requires that the
26 segment of Metolius Drive within the Broken Top PUD be dedicated to the city when certain

1 conditions are met. The TP application proposes that Metolius Drive will extend into the
2 Cascade Highlands destination resort, and that the segment of Metolius Drive internal to the
3 destination resort be constructed to county standards and dedicated to the county as a public
4 road.

5 Pursuant to the CMP approval and the 2000 development agreement, Arrowood is
6 obligated to construct improvements to the intersection of Metolius Drive and Mt.
7 Washington Drive, within the Broken Top PUD. The hearings officer imposed a condition
8 of approval requiring that the segment of Metolius Drive within the Broken Top PUD be
9 accepted as a public road prior to final subdivision plan approval.

10 **A. First Assignment of Error**

11 BTCA argues that Arrowood’s 2004 traffic study inadequately addressed traffic
12 impacts of the development on the Metolius/Mt. Washington intersection, within the Broken
13 Top PUD, and that the hearings officer failed to address impacts on the Metolius/Mt.
14 Washington intersection in her findings. BTCA also contends that the hearings officer failed
15 to address DCC 17.16.115, which sets out the required contents of a traffic impact analysis.

16 Arrowood responds that BTCA does not identify where in the record any party raised
17 issues regarding the adequacy of the 2004 traffic study or the other issues raised in the first
18 assignment of error, and that such issues are waived.³ ORS 197.763(1).⁴ Arrowood also
19 argues, generally, that the 2000 development agreement and the CMP/FMP approvals

³ The caption to this portion of Arrowood’s response brief refers to the second assignment of error, but it is clear from the text that Arrowood’s waiver argument is directed at the issues raised in the first assignment of error.

⁴ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 conclusively defined Arrowood’s obligations with respect to off-site traffic impacts or
2 improvements, and that the first assignment of error is essentially a collateral attack on the
3 agreement and the CMP/FMP approvals.

4 BTCA does not identify in the petition for review, the reply brief or elsewhere any
5 place in the record where the issues under the first assignment of error were raised below.
6 The closest BTCA comes is to point out, under the second and sixth assignments of error,
7 that the City of Bend submitted a letter stating that a “traffic study and an agreement about
8 timing and cost responsibilities for the jurisdictional transfer of Metolius Drive to the city
9 must be conducted” prior to city acceptance of the dedication. Record 198. That statement
10 does not raise issues regarding the adequacy of the 2004 traffic study with respect to
11 Metolius Drive or compliance with DCC 17.16.115. Accordingly, those issues are waived.⁵
12 ORS 197.763(1). The first assignment of error is denied.

13 **B. Second Assignment of Error**

14 The second assignment of error consists of a brief allegation that the hearings officer
15 erred in failing to address several issues related to the Metolius/Mt. Washington intersection
16 and other intersections that were raised by the City of Bend in a September 11, 2006 letter.
17 The BTCA discusses those issues in detail in the third through sixth assignments of error.
18 For the reasons set out below, we deny the third through sixth assignments of error. Because
19 the second assignment of error is dependent or derivative of the third through sixth, and does
20 not state an independent basis for reversal or remand, the second assignment of error is also
21 denied.

⁵ Although BTCA’s petition for review does not cite it, we note that BTCA’s notice of appeal of the hearings officer’s decision to the county board of commissioners includes a statement that the 2004 traffic study “did not adequately address the impact of the development on Mount Washington Drive.” Record 18. The notice also argues that a post-approval traffic study should be required that includes the information required by DCC 17.16.115. Record 19. However, BTCA does not assert, and it does not appear to be the case, that those arguments were made to the county prior to “the close of the record at or following the final evidentiary hearing on the proposal before the local government.” ORS 197.763(1).

1 **C. Third, Fourth, Fifth and Sixth Assignments of Error**

2 **1. Third Assignment of Error**

3 Under the third assignment of error, BTCA argues that the decision does not address
4 the issue of who bears the financial responsibility for improving the segment of Metolius
5 Drive within the Broken Top PUD to city standards before that segment is dedicated to the
6 city. BTCA argues that the hearings officer should have imposed a condition of approval
7 requiring Arrowood to bear the cost of upgrading that segment of Metolius Drive.

8 Arrowood responds that BTCA identifies no county approval criteria that authorize
9 the county to determine how improvements to streets within the city’s jurisdiction should be
10 financed or constructed. According to Arrowood, the hearings officer imposed a condition of
11 approval requiring that the city accept the private segment of Metolius Drive as a public
12 street prior to final plat approval, but properly did not attempt to dictate to the city the
13 precise steps that must be taken prior to dedication.⁶

14 BTCA does not identify any DCC approval criterion that requires the hearings officer
15 to determine who is financially responsible for improving the private segment of Metolius
16 Drive to city public street standards, prior to city acceptance of that segment as a public
17 street. The September 11, 2006 City of Bend letter also does not cite any DCC criteria to
18 that effect, or even request a condition of approval addressing financial responsibility.

⁶ Arrowood cites to the following finding by the hearings officer:

“[W]hether and how the segment of Metolius Drive within the Broken Top PUD can be used as a public road, despite its private road status, is another question. The applicant agreed to off-site improvements to Metolius Drive in 2000 and again during the CMP and FMP process, presumably because it recognized that development of the project at destination resort densities would result in a significant increase in the use of that road. Therefore, the Hearings Officer agrees with staff and [BTCA] that some assurances need to be given that Metolius Drive is a public road that serves the function provided for in the City and County TSPs. The Hearings Officer understands the applicant’s predicament—it cannot force the City to accept a public street—however, because its application is predicated on the use of Metolius Drive as a public street, adequate access must be assured before the final subdivision plat is approved. Accordingly, a condition of approval is imposed to require that the applicant demonstrate that the segment of Metolius Drive located within the Broken Top PUD is accepted as a public road prior to final subdivision approval.” Record 29-30.

1 Absent some argument that an applicable county approval criterion requires that the hearings
2 officer determine financial responsibility or impose a condition of approval addressing
3 financial responsibility for any improvements necessary to gain the city's acceptance of
4 Metolius Drive as a public city street, BTCA's arguments under this assignment of error do
5 not provide a basis for reversal or remand. The third assignment of error is denied.

6 **2. Fourth Assignment of Error**

7 Under the fourth assignment of error, BTCA argues that the hearings officer should
8 have required that Arrowood finance and construct a new round-about at the Metolius/Mt.
9 Washington intersection, apparently instead of or in addition to the improvements to that
10 intersection specified in the CMP and under the development agreement.

11 As Arrowood points out, the arguments under the fourth assignment of error appear
12 to confuse a roundabout that is planned for the Metolius/Skyline Ranch Road intersection
13 within the Cascade Highlands destination resort, and the Metolius/Mt. Washington
14 intersection, within the Broken Top PUD, for which no roundabout has ever been
15 contemplated. Instead, the 2000 development agreement, the CMP/FMP, and the present TP
16 approval all require Arrowood to construct other specified improvements to the Metolius/Mt.
17 Washington intersection. Arrowood argues that any argument that a roundabout must be
18 constructed at that intersection instead of the agreed upon and previously required
19 improvements is an impermissible collateral attack on the agreement and prior approvals.

20 The city's September 11, 2006 letter did not request that the Metolius/Mt.
21 Washington intersection be improved as a roundabout, and BTCA does not identify where in
22 the record that issue was raised before the hearings officer. In any case, assuming that issue
23 was raised below, we agree with Arrowood that BTCA has not established that the hearings
24 officer erred in failing to adopt findings addressing that contention. As far as we are
25 informed, the development agreement and the CMP/FMP decisions conclusively established
26 the type and extent of improvements that Arrowood is obligated to make to the intersection.

1 BTCA has not explained what authority the hearings officer has in the present decision to
2 require different off-site improvements than those specified in the agreement and the
3 CMP/FMP approvals. The fourth assignment of error is denied.

4 **3. Fifth Assignment of Error**

5 BTCA contends, under the fifth assignment of error, that the hearings officer failed to
6 address an issue the city raised with respect to the Mt. Washington/Simpson intersection
7 within the Broken Top PUD, specifically, that that intersection must be brought up to city
8 standards before the city would accept dedication of Metolius Drive.

9 The city's September 11, 2006 letter states, in relevant part:

10 "The City position regarding Metolius Drive from Mt. Washington to the
11 proposed Cascade Highlands development is that Metolius Drive must be
12 brought up to City road standards, including the Mt. Washington
13 Drive/Metolius and Mt. Washington/Simpson intersections. A traffic study
14 and an agreement about timing and cost responsibilities for the jurisdictional
15 transfer of Metolius Drive to the City must be conducted." Record 198.

16 That passage simply states the city's position with respect to what it will require prior to
17 accepting Metolius Drive as a city public street. The letter does not request that the hearings
18 officer address the question of who is responsible for making any improvements the city may
19 require, as a condition of accepting Metolius Drive as a city street, or that the hearings
20 officer impose any conditions of approval to that effect. As noted above, the letter does not
21 cite any applicable DCC approval standards, and as far as BTCA has established there are no
22 DCC approval standards that would require the county to determine who is financially
23 responsible for any improvements necessary to induce the city to accept the street dedication.
24 It is not clear that the letter raises any cognizable "issue" regarding applicable approval
25 criteria that the hearings officer was required to address. In short, BTCA has not
26 demonstrated that the hearings officer erred in failing to address the question of
27 responsibility for improving the Mt. Washington/Simpson intersection.

1 **4. Sixth Assignment of Error**

2 Finally, under the sixth assignment of error, BTCA argues that the hearings officer
3 failed to impose a condition of tentative subdivision plan approval requiring an additional
4 traffic study of the Metolius Road intersections and other intersections, prior to accepting
5 dedication of that segment of Metolius Road within the Broken Top PUD, as requested by
6 the city and BTCA.

7 As noted, the city’s September 11, 2006 letter took the position that a traffic study
8 and agreement regarding cost and responsibility “must be conducted” before the city would
9 accept Metolius Road as a public city street. Record 198. That letter did not request that the
10 hearings officer impose a condition of approval to that effect, and as explained BTCA has
11 not demonstrated that the city’s letter raises a cognizable issue regarding applicable approval
12 criteria that the hearings officer was required to address.

13 BTCA also cites to a letter it submitted on September 7, 2006, requesting that the
14 hearings officer impose a condition of approval, stating that Metolius Drive “shall not be
15 used for construction traffic or public access to Cascade Highlands until all appropriate
16 traffic impact studies have been completed, and the street has been dedicated to the City of
17 Bend * * *.” Record 230.⁷ Apparently in response, the hearings officer imposed Condition
18 23, which provides in relevant part that:

19 “Construction related traffic shall not be routed through the segment of
20 Metolius Drive through the Broken Top PUD until such time as the road is
21 accepted by the City of Bend as a public road. * * *” Record 56.

⁷ BTCA also cites to Record 259-61, which is a letter from residents of a residential development south of Century Drive, requesting that the 2004 traffic study used for the CMP/FMP approvals be updated with respect to Century Drive, to reflect data during the winter ski season, when Century Drive is heavily used, rather than during the summer season. The letter at Record 259-61 does not mention Metolius Drive, and also does not relate the request to update the 2004 traffic study to any county approval criterion applicable to the tentative plan approval.

1 Again, BTCA does not identify any county code provision that would require Arrowood to
2 submit a traffic study to the city, prior to city acceptance of Metolius Drive as a public city
3 street. The sixth assignment of error is denied.

4 **D. Conclusion**

5 For the foregoing reasons, BTCA’s first through sixth assignments of error are
6 denied.

7 **SEVENTH ASSIGNMENT OF ERROR (BTCA)**

8 Condition 20 requires that “[n]o lots shall take direct access to Skyline Ranch Road
9 or Metolius Drive.” Record 56. BTCA argues that it is unclear whether that condition
10 applies only to the segment of Metolius Drive inside the proposed destination resort, or also
11 to the segment of Metolius Drive within the Broken Top PUD. BTCA requests that the
12 decision be remanded to clarify that issue.

13 Arrowood responds, and we agree, that it is sufficiently clear that Condition 20
14 applies only to roads within the proposed subdivision. The only subdivision lots subject to
15 the decision, and the only segment of Metolius Road within the county’s jurisdiction, is that
16 internal segment of the road. Condition 20 does not restrict lot access onto any segment of
17 Metolius Drive outside the proposed development.

18 The seventh assignment of error (BTCA) is denied.

19 **ASSIGNMENT OF ERROR (KAUFMANS)**

20 The Kaufmans’ appeal is focused on the identification and preservation of natural
21 features on the subject property. The Kaufmans allege two sub-assignments of error, which
22 we address separately below.

23 **A. DCC 17.16.030**

24 DCC 17.16.030(B)(3) requires that the application for tentative subdivision plan
25 approval include information on existing conditions, including the “[l]ocation of existing
26 structures, irrigation canals and ditches, pipelines, waterways, railroads and any natural

1 features, such as rock outcroppings, marshes, *wooded areas* and natural hazards.” (Emphasis
2 added). Similarly, DCC 17.16.030(B)(10) requires that the application include information
3 on “trees, rock outcroppings or other shade producing objects, if the object will cast shade
4 from or onto the subdivision.”

5 The Kaufmans objected to the hearings officer that the applicant failed to provide
6 information on the location of existing trees on the property, specifically with respect to
7 several stands of maturing ponderosa pine located in two “swales” or depressions on the
8 property. To support their arguments, the Kaufmans submitted photographs of trees growing
9 in one of the swales. The hearings officer responded with the following findings:

10 “The applicant’s engineer * * * prepared a TP and a burden of proof (BoP)
11 statement to address these informational requirements. Richard Kaufman
12 testified that the information is inadequate to satisfy DCC 17.16.030(B)(3)
13 * * *. According to Mr. Kaufman, this standard, unlike DCC 19.106.030(8)
14 requires that all natural features, not just important natural features, be
15 depicted on the applicant’s plans and, by implication, must be preserved.
16 Because DCC 17.16.030(B)(3) is more inclusive than DCC 19.106.030(8),
17 Mr. Kaufman argues that findings adopted in the CMP decision that conclude
18 that DCC 19.106.070(E) was satisfied, [are] inadequate to demonstrate that
19 DCC 17.16.030 and 17.16.080 are satisfied as well.

20 “DCC 17.16.030 sets out the standards for a subdivision plan application. If
21 an applicant submits an application that addresses the informational
22 requirements, the decision maker has a basis for evaluating the application
23 against applicable approval standards. Here the applicant submitted a
24 subdivision plan that depicts special topographic features, namely steep slopes
25 and rock outcroppings. The applicant provided an aerial photo overlay of the
26 property to show the location of trees on the property. That information is
27 adequate to show existing conditions on the property as is required by DCC
28 17.16.030. In addition, other evidence, including evidence submitted by Mr.
29 Kaufman during these proceedings, provides enough information to evaluate
30 relevant approval standards.” Record 73-74 (footnote omitted).

31 The Kaufmans challenge the hearings officer’s conclusion that evidence in the record
32 is sufficient to satisfy the informational requirements of DCC 17.16.030(B)(3). According to
33 the Kaufmans, the aerial photograph cited by the hearings officer is almost seven years old
34 and thus does not show the “existing conditions” on the property with respect to the “wooded

1 areas” such as the disputed stands of ponderosa pine, which have presumably grown over the
2 intervening years. The Kaufmans also argue that the aerial photograph was taken from a
3 high altitude and depicts only the larger trees on the property. With respect to the
4 photographs petitioners submitted, the Kaufmans dispute that such photographs of only a
5 small portion of the property can substitute for the detailed inventory of natural vegetation
6 that they argue DCC 17.16.030(B)(3) requires.

7 Arrowood responds that neither DCC 17.16.030(B)(3) nor 17.16.030(B)(10) require
8 that the applicant survey every tree on the property or provide a detailed inventory of trees or
9 natural features. Arrowood notes that DCC 17.16.030(B)(3) requires that the application
10 identify the “location” of “wooded areas” but not individual trees, and that the aerial
11 photograph and other evidence is sufficient to satisfy to identify the few “wooded areas” on
12 the property. DCC 17.16.030(B)(10) requires information with regard to shade-casting
13 objects including “trees” only if “the object will cast shade from or onto the subdivision.”
14 Arrowood argues that there is no issue raised in this appeal regarding shade or approval
15 criteria involving shade-casting objects. In addition to the evidence cited by the hearings
16 officer, Arrowood argues that the wildlife evaluation submitted as part of the CMP and FMP
17 approvals is in the record, and that evaluation includes a thorough description of the existing
18 vegetation on the site.

19 We agree with Arrowood that the county code does not require a survey of individual
20 trees or the kind of detailed information that the Kaufmans argue is necessary. The
21 DCC 17.16.030(B)(3) and DCC 17.16.030(B)(10) informational requirements must be read
22 in context with the approval standards that the information is presumably directed at, in this
23 case DCC 17.16.100(A). As discussed below, DCC 17.16.100(A) does not require
24 preservation of individual trees, and thus the information necessary to show compliance with
25 those standards need not include that level of detail. While DCC 17.16.030(B)(10) requires
26 information on certain objects including as “trees,” if they will cast shade on or from the

1 subdivision, as Arrowood notes, petitioners raise no issues regarding shade and do not even
2 identify any approval criterion governing shade.

3 While the aerial photograph cited by the hearings officer is almost seven years old,
4 the Kaufmans have not established that a reasonable person could not rely on that
5 photograph, along with other evidence, to identify the “wooded areas” as necessary to
6 determine whether the proposed tentative plan complies with applicable approval criteria,
7 specifically DCC 17.16.100(A). The hearings officer’s findings regarding the informational
8 requirements of DCC 17.16.030(B)(3) and DCC 17.16.030(B)(10) are adequate and
9 supported by substantial evidence.⁸

10 **B. DCC 17.16.100**

11 DCC 17.16.100(A) requires findings that “[t]he subdivision contributes to orderly
12 development and land use patterns in the area, and provides for the preservation of natural
13 features and resources such as streams, lakes, natural vegetation, special terrain features,
14 agricultural and forest lands and other natural resources.”

15 The hearings officer rejected the Kaufmans’ argument below that DCC 17.16.100(A)
16 requires a “complete survey of all trees on the property” or the preservation of all natural
17 features on the site.⁹ The hearings officer interpreted DCC 17.16.100(A) to require a

⁸ Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff’d* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker’s conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

⁹ The hearings officer’s findings state, in relevant part:

“The subject property does not have any natural streams or lakes. It includes neither designated agricultural land nor Goal 4 forest lands. Its vegetative cover is similar to other undeveloped properties in the vicinity: clusters of secondary forest growth, manzanita, juniper, sage brush and other native shrubs. It includes steeper areas, primarily the steep slope rising from Century Drive to rock outcroppings located between 60 and 80 feet above

1 “balancing of the development features so that, overall, the proposed subdivision is safe,
2 includes requires development elements, and preserves natural features that characterize the
3 area.” Record 39.

4 The Kaufmans dispute that interpretation, arguing that DCC 17.16.100(A) permits no
5 “balancing” between development and preservation of natural features, but instead it requires
6 orderly development *and* preservation of natural features, including individual trees and the
7 swales they are located in. According to the Kaufmans, the hearings officer’s interpretation
8 allows many of the individual trees to be logged and at least one swale to be leveled to
9 accommodate a right of way approved in the CMP/FMP decisions.

10 Arrowood responds that DCC 17.16.100(A) does not require preservation of every
11 tree or topographic feature, and that the hearings officer did not err in rejecting that view of
12 the code. The hearings officer properly interpreted DCC 17.16.100(A) to require
13 consideration of the competing factors of orderly development and the preservation of
14 natural features and resources, Arrowood contends. It is impossible, Arrowood argues, to
15 comply with DCC 17.16.100(A) without balancing those competing factors.

and 200 to 600 feet from the road. There are no inventoried wildlife corridors or sensitive species located on the subject property.

“During the FMP appeal and during this process, Richard Kaufman and others testified that this standard requires (1) a survey by an independent entity to identify and evaluate all natural features, including a complete survey of all trees on the property; (2) preservation of natural features that exist on the site and, if necessary (3) a redesign of the approved CMP/FMP plans to address wildlife and natural features that were not adequately identified during the initial CMP process. * * *

“* * * DCC 17.16.100(A) requires a balancing of the development features so that, overall, the proposed subdivision is safe, includes required development elements, and preserves natural features that characterize the area. The evidence shows the general location of trees on the property, and also shows that portions of the property will be logged and graded to better accommodate the proposed development. * * * The applicant testified that trees on the property that do not interfere with the proposed development plans will be preserved, and that rock outcroppings will generally not be graded or developed. This evidence is adequate to demonstrate that the subdivision contributes to the orderly development of the area and that natural features on the property will be preserved. This criterion is satisfied.” Record 39 (footnote omitted).

1 In addition, Arrowood notes that the CMP and FMP decisions established the
2 location of roads, rights of way, open spaces, and development locations, and further that the
3 CMP process required an evaluation of natural resources, including natural features and
4 wildlife habitat, and a plan to preserve or mitigate those resources. According to Arrowood,
5 the CMP and FMP decisions established where development would be located and open
6 spaces where any existing trees or natural features would remain. In this context, Arrowood
7 argues, DCC 17.16.100(A) cannot be applied in a manner that overturns those final,
8 conclusive determinations. Thus, Arrowood argues, that a swale may be leveled to
9 accommodate a right of way approved in the CMP/FMP decisions, as the Kaufmans contend,
10 is not a basis to require that the tentative subdivision plan be modified.

11 We agree with Arrowood that DCC 17.16.100(A) does not require preservation of
12 every tree or topographic feature. The list of natural features that must be considered under
13 DCC 17.16.100(A) includes items such as streams, lakes, special terrain features, agricultural
14 and forest lands, etc. In that context, it is reasonably clear that the “natural vegetation” and
15 “other natural resources” that the county must consider under DCC 17.16.100(A) must be
16 relatively significant natural features, not individual trees or minor topographic features.

17 We also agree with Arrowood that the hearings officer did not err in interpreting
18 DCC 17.16.100(A) to require a balancing between development and preservation of natural
19 features. Where approval criteria require consideration of competing goals or factors, it is
20 permissible and even necessary to conduct a weighing or balancing process. *Waker*
21 *Associates, Inc. v. Clackamas County*, 111 Or App 189, 194, 826 P2d 20 (1992). Further, we
22 agree that in conducting that weighing or balancing process under DCC 17.16.100(A), the
23 hearings officer must take into account the fact that prior, final land use decisions may have
24 determined approximately where development will go and hence identified areas where any
25 “natural features” may not be preserved. The hearings officer is not required to consider the

1 preservation of any natural features in areas, such as rights of way, that the CMP or FMP
2 decisions have determined will be developed.

3 It is important to recognize that DCC 17.16.100(A) is part of the county's general
4 subdivision ordinance, and not a part of the Title 19 destination resort standards. In other
5 words, DCC 17.16.100(A) is written to apply to circumstances where, typically, there have
6 been no previous efforts to identify natural resources on the property to be subdivided or
7 determinations of where proposed development will occur. DCC 17.16.100(A) plays a more
8 limited role in the present circumstance, where the tentative plan application has been
9 preceded by two final, binding land use decisions that together go a long way toward striking
10 the balance between development and preservation of natural features that would otherwise
11 be considered under DCC 17.16.100(A). In this context, the hearings officer's ability to
12 strike a different balance by preserving all natural features, as the Kaufmans suggest, is
13 constrained. The Kaufmans have not demonstrated that the hearings officer erred in
14 concluding that the tentative plan application complies with DCC 17.16.100(A).

15 The Kaufmans' assignment of error is denied.

16 The county's decision is affirmed.