BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WIDGI CREEK HOMEOWNERS ASSOCIATION,
ELKAI WOODS HOMEOWNERS ASSOCIATION,
and ELKAI WOODS FRACTIONAL
HOMEOWNERS ASSOCIATION,
Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

ARROWOOD DEVELOPMENT LLC,
Intervenor-Respondent.

LUBA No. 2014-109

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Michael H. McGean, Bend, filed the petition for review and argued on behalf of petitioners. With him on the brief was Francis Hansen & Martin LLP.

No appearance by Deschutes County.

Tia M. Lewis, Bend, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Schwabe Williamson & Wyatt PC.

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

REMANDED 06/02/2015

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a decision approving an application for site plan approval and for tentative subdivision plan approval for a 24-lot subdivision.

MOTION TO INTERVENE

Arrowood Development, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

INTRODUCTION

The history and facts in this matter are complicated. Resort development in the area began in the 1960s with development of the Inn of the Seventh Mountain (now called the Seventh Mountain Resort) on 22.65 acres. The Seventh Mountain Resort was expanded in 1983 with the approval of zone change, master plan and conditional use permit for the Widgi Creek Resort on the adjoining 237 acres. The Widgi Creek Resort includes a golf course and residential development.[1] Record 560-74.

The 2014 tentative subdivision approval decision that is the subject of this appeal would divide 4.4 acres into 24 lots. The 4.4 acres are located almost entirely within the 22.65 acre leasehold where the Seventh Mountain Resort is developed. However a small "sliver" of the 4.4 acre property is located within Widgi Creek's 237 acres near the southwestern part of the golf course.

[1] In 1983 destination resorts were allowed as a conditional use in forest zones. The master plan approval that was granted in 1983 was necessary to allow development of the Widgi Creek Resort to be phased.

Petitioners contend the disputed subdivision is inconsistent with the Widgi Creek Master Plan.[2] The hearings officer that approved the 24-lot subdivision and site plan did not determine whether the 24-lot subdivision is consistent with the Widgi Creek Master Plan. Instead the hearings officer found the proposed 24-lot subdivision did not need to demonstrate that it is consistent with the Widgi Creek Master Plan. The hearings officer found that Deschutes County Code 18.110, the Resort Community Zone, which was applied to the property in 2001, superseded the Widgi Creek Master Plan. The hearings officer found that because the Widgi Creek Master Plan has been superseded, the proposed 24-lot subdivision within the county's Resort Community Zone is only subject to the standards set out in the Resort Community Zone, and is not subject to the superseded Widgi Creek Master Plan. Record 21-22. In their third assignment of error, petitioners challenge that finding.

The hearings officer also found that even if the Widgi Creek Resort Master Plan was not superseded by the Resort Community Zone, any question regarding whether the proposed 24-lot subdivision is inconsistent with the

---

[2] The precise identity and nature of the Widgi Creek Master Plan and conditional use permit is exceedingly unclear. Apparently there is no plan or map called the Widgi Creek Master Plan. For purposes of resolving this appeal it is sufficient that petitioners contend two things: (1) that the Widgi Creek Master Plan prohibits residential development in the area where the proposed subdivision extends into the Widgi Creek Resort, and (2) that the Widgi Creek Master Plan imposes a limit on the number of new single family dwellings and condominiums/townhomes that may be developed on Widgi Creek's 237 acres and that the Widgi Creek Master Plan limit on new townhomes is violated by the 24-lot subdivision approved by the challenged decision, which is to be developed with 24 attached, zero lot line townhome structures.

Widgi Creek Master Plan was resolved by two prior decisions that approved development on the 4.4 acres, one decision in 2006 and one decision in 2009.[3] The hearings officer concluded that petitioners' contentions that the 24-lot subdivision is inconsistent with the Widgi Creek Master Plan raises an issue that was resolved by the 2006 and 2009 decisions and found that petitioners' contentions represented an improper collateral attack on the 2006 and 2009 decisions. Petitioners assign error to the hearings officer's findings regarding the legal effect of the 2006 and 2009 decisions in their first and second assignments of error.

If the hearings officer is correct that the Widgi Creek Master Plan was superseded by the Resort Community Zone when that zoning district was created and applied to the Seventh Mountain Resort and Widgi Creek in 2001, then we would be required to affirm the hearings officer's decision, even if the hearings officer was wrong about the legal effect of the 2006 and 2009 decisions. We therefore first turn to petitioners' third assignment of error.

THIRD ASSIGNMENT OF ERROR

Our standard of review under the third assignment of error is not the highly deferential standard of review required by ORS 197.829(1), *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010), and *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992). Rather our review is governed by ORS 197.835(9)(a)(D), and under that statute we must determine whether the planning commission "[i]mproperly construed the applicable law," "without

[3] We discuss those two decisions in more detail in our discussion of the first and second assignments of error.

according the deference required by *Clark*."[4] *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). The hearing officer that rendered the 2014 decision that is the subject of this appeal quoted extensively from a planning staff report in this matter that concluded the Resort Community Zone replaced and superseded the Widgi Creek Master Plan when that zoning was applied to the Seventh Mountain Resort and Widgi Creek Resort in 2001. The planning staff report notes that when the 2006 and 2009 decisions granted tentative subdivision approvals for property that includes the subject 4.4 acres, the Widgi Creek Master Plan was not applied.[5] The planning staff report then takes the position that the ordinances that adopted the Resort Community Zone for Black Butte Resort and Seventh Mountain/Widgi Creek Resort made no mention of the Widgi Creek Resort Master Plan:

> "Staff reviewed Exhibit 'H' to Ordinances 2001-047/2001-048, which adopted new comprehensive plan designations and also Chapter 18.110, Resort Communities, for both Black Butte Ranch and Inn of the Seventh Mountain/Widgi Creek. **There is no reference in either ordinance to the master plan approval for the lnn/Widgi. Staff has reviewed these ordinances and Exhibit 'H.'** There is a reference on page 29 of Exhibit H which states: 'However, the 82-acre exception area that would be included in the Ranch boundary and an internal piece of land encompassing approximately 8-9 buildable acres at Inn/Widgi both offer significant potential for some additional development.' * * * Staff believes that the 'internal piece of land' referenced in

---

[4] ORS 197.835(9)(a)(D) requires that LUBA "reverse or remand the land use decision" if the "local government" "[i]mproperly construed the applicable law[.]"

[5] We address the 2006 decision (Points West Subdivision) and 2009 decision (Mile Post One Subdivision) in more detail in our discussion of the first and second assignments of error below.

> Exhibit H is referring to the Points West subdivision, as well as the proposed Mile Post One zero lot line subdivision. The final plat for Points West lists the proposed 24-unit property as 'Tract 'A Future Development Site.' This indicates to staff that the County recognized the possibility of development for this site." Record 21-22 (underscored emphasis in planning staff report; bold emphasis added by hearings officer).

The hearings officer then emphasized, as had planning staff, that when the Resort Community Zone was applied there was an express reference that an undeveloped eight to nine acres that includes the subject property would be available for future development. The hearings officer then cited two additional factors that she found significant in concluding that future development with the Seventh Mountain/Widgi Creek Resort would be subject to the Resort Community Zone standards and would not be subject to the Widgi Creek Master Plan. First, the hearings officer cited the lack of a "savings clause" in Ordinance 2001-048, which adopted the Resort Community Zone. By lack of a "savings clause," we understand the hearings officer to mean there was no clause in Ordinance 2001-048 that expressly stated that the previously approved Widgi Creek Master Plan was "saved," in the sense it continues to apply under the Resort Community Zone. Second, the hearings officer cited to the Resort Community Zone purpose statement, which provides in part: "[t]he purpose of the Resort Community Zone is to provide standards and review procedures for development in * * * The Inn of the Seventh Mountain/Widgi Creek." The hearings officer ultimately concluded:

> "* * * In other words, the board [of county commissioners] intended that *future* residential development of any remaining small pockets of *undeveloped* land within those two resorts would be subject to the Resort Community Zone provisions. For these reasons, I find *the applicant's proposal* is not subject to the Widgi Creek master plan." Record 22 (italics in original).

Petitioners first argue that staff and the hearings officer are simply wrong when they say Ordinances 2001-047/048 make no reference to the Widgi Creek Master Plan. Petitioners contend the findings in Exhibit H to the 2001 Ordinances refer to the Widgi Creek and Black Butte Master Plans to explain why homeowner participation in the Resort Community Zone process was so light.[6] Petitioners also argue the Widgi Creek Master Plan limits residential development in Widgi Creek to 210 residential units (107 single family homes and 103 townhouses) and the Exhibit H findings expressly discuss these limits.[7] Finally, petitioners contend the significance the hearings officer

---

[6] Exhibit H to the 2001 Ordinances states:

> "* * *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, page 28; Supplemental Record 59.

[7] We discuss these numerical limits further in our discussion of the first and second assignments of error below. The Exhibit H findings referenced by petitioners are set out below:

> "Widgi Creek was approved in 1983 as a resort including 107 single-family homes, 103 townhouses, a regulation golf course and appurtenant golf facilities, including clubhouse, driving range and maintenance facilities. The physical developments at Widgi Creek encompass 237 acres and are shown on Figures 5 and 6 (an aerial photograph). The layout for the town homes, known as Elkai Woods, is depicted on Figure 6. When Widgi Creek was approved it was zoned F3. In 1992, when the County amended its Forest zone and discontinued the F3 zone to comply with legislative

assigned to the lack of a saving clause in the two 2001 ordinances is misplaced because under DCC 18.08.020 the existence of a savings clause in Ordinances 2001-047/48 was unnecessary to preserve the Widgi Creek Master Plan, which received conditional use approval in 1983. In fact, petitioners contend that under DCC 18.08.020, which the hearings officer cited, the presumption under the Deschutes County Zoning Ordinance is that the Deschutes County Zoning Ordinance does not "repeal, abrogate or impair" existing conditional use permits like the Widgi Creek Master Plan.[8]

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

---

> changes, the resort became zoned F2 and became a nonconforming use.
>
> "As of November 2001, 70 single-family homes have been constructed and all single-family lots have been sold. The majority of town homes have been constructed. The remaining town homes are expected be completed in 2002.
>
> "Similar to the Inn of the Seventh Mountain, Widgi Creek has never been approved as a Goal 8 destination resort, however the development of the site justifies a 'physically developed' exception to Goal 4. As illustrated in the Figures, Widgi Creek is for all practical purposes built-out." Supplemental Record 50.

[8] DCC 18.08.020 sets out one of the general provisions of DCC Title 18, the Deschutes County Zoning Ordinance, and provides 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."

clauses are not necessary to prevent zoning ordinance amendments from impliedly repealing existing conditional use approvals such as the Widgi Creek Master Plan. The hearings officer also seems to have been influenced by staff representation that the Ordinances 2001-047/048 findings include no reference to the Widgi Creek Master Plan, when there are some general references to that master plan and the ones petitioners cite lend at least some support to their position.

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.[9] But for Black Butte Ranch those same policies make it clear that any

[9] Policy 4.8.4 provides:

future development must be "in accordance with the Master Design for Black Butte Ranch[.]" Policy 4.8.8.[10] 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.*")(Emphasis added.)[11] *See* n 6.

Ordinances 2001-047/048 and the supporting findings for those ordinances at Exhibit H are exceedingly unclear about the regulatory status of

---

> "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."

[10] Policy 4.8.8 provides:

> "Residential, resort and utility uses shall continue to be developed in accordance with the Master Design for Black Butte Ranch and the respective Section Declarations."

[11] Intervenor-respondent contends the reference to "internal controls" is a reference to Covenants, Conditions and Restrictions (CC&Rs) and the disputed sliver was released from the applicable CC&Rs by the Elkai Homeowner's Association when the sliver was transferred to intervenor-respondent. Intervenor-respondent's brief 40.

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. We conclude the hearings officer erroneously assigned significance to the lack of any references to the Widgi Creek Master Plan in the ordinances and supporting findings, when there are some references. And the hearings officer erroneously assigned significance to the lack of a savings clause in Ordinances 2001-047/048. But the hearings officer also did not address Deschutes County Comprehensive Plan policies that tie future growth to water and sewer availability and specifically subject future development in Black Butte Resort to the "Master Design for Black Butte Ranch," but fail to do so for Widgi Creek Resort and the Widgi Creek Master Plan.

Given the above identified errors in the hearings officer's analysis, and the hearings officer's failure to consider the County's Comprehensive Plan Resort Community Policies cited by intervenor-respondent, remand is appropriate. Where the county's land use legislation is as deeply ambiguous as it is here, while we are not bound to accord deference to a hearings officer's interpretation of local land use law under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 260-61, 243 P3d 776 (2010), we believe the hearings officer should have another opportunity to expressly address and assign significance to all the relevant conflicting language. *Mental Health Division v. Lake County*, 17 Or LUBA 1165, 1176 (1989).

The third assignment of error is sustained.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioners' first and second assignments of error proceed from an assumption that the Widgi Creek Master Plan has not been superseded by the Resort Community Zone. Those assignments of error raise closely related arguments and the reasoning applied by the hearings officer to reject those arguments is similar. We therefore address those assignments of error together.

A. Prior Decisions

1. Widgi Creek Resort, Widgi Creek Subdivision and Elkai Wood Townhomes

When the 237-acre Widgi Creek Resort was approved in 1983, it was to include a total of 210 residential units, with 95 of those units to be single-family dwellings on individual lots and 120 residential units to be developed as condominiums. All parties appear to agree that at some point the Widgi Creek Resort master plan was modified to authorize 107 single family dwellings on individual lots and 103 "condominium/townhomes." Record 22.

The northern part of the Widgi Creek Resort has been platted into 107 single-family dwelling lots. Supplemental Record 65-66. As far as we can tell, that subdivision is called Widgi Creek, and petitioner Widgi Creek Homeowners' Association is the homeowners association for Widgi Creek subdivision. The middle part of Widgi Creek Resort has also been subdivided and developed with a total of 86 townhomes. Supplemental Record 67. That development is called Elkai Woods, and the other two petitioners are the homeowners associations for Elkai Woods.

With the approval of Widgi Creek subdivision and Elkai Woods, all of the 107 single family dwellings on individual lots and all but 17 of the 103

"condominium townhomes" envisioned by the Widgi Creek Master Plan had been approved.

2. Points West

In 2006, county granted "Tentative Plat approval, site plan approval, and a Landscape Management Review for a 42-unit condominium resort and a 64-lot subdivision." Record 385. The applicant testified that the proposal would be developed in two phases. The first phase was to be the 64-lot subdivision called Points West. The 42-unit condominium project was to be developed as a second phase. Record 385. As noted earlier, most of Points West is located within the 22.65-acre Seventh Mountain Resort property and outside the 237 acres that make up the Widgi Creek Resort. However, a sliver of both the 64-lot subdivision and the 42-unit condominium proposal extended into the Widgi Creek Resort property.[12]

The final subdivision plat for Points West was approved and recorded. Record 454-61. The recorded plat for Points West shows the site for the second phase condominium project as "Tract 'A' Future Development Tract." *Id*. Points West subdivision is either partially or completely developed. The 42-unit condominium project was not developed, and the 2006 approval for the 42-unit condominium development project has expired. Eight of the lots in Points West (lots 1-8) are located partially in the Widgi Creek Resort. If those

[12] Supplemental Record 76 is a zoning map that shows the Seventh Mountain Resort and Widgi Creek Resort. At App C of the intervenor-respondent's brief, intervenor-respondent has added color to that zoning map to show the location of Points West Subdivision and Condominium proposal and the "sliver" intrusion of Points West Subdivision Condominium proposal into Widgi Creek Resort.

lots are counted against the 17 remaining undeveloped lots authorized by the Widgi Creek Master Plan, there are nine remaining lots authorized by Widgi Creek Resort Master Plan.

3. 2009 Decision, Mile Post One Subdivision

In 2009, intervenor sought and was granted approval for a different proposal for the area that was to be developed with 42 condominiums under the 2006 decision. Under that different proposal, Tract A and lots 1 and 2 of Points West Subdivision would be subdivided into 26 lots and developed with attached townhomes on individual lots. This subdivision was to be called Mile Post One, and the rear portion of a number of those lots extended into Widgi Creek Resort. That 2009 approval also expired.

4. 2014 Decision, Mile Post One Subdivision

The challenged decision grants tentative subdivision plan approval for a modified version of 2009 Mile Post One proposal. The 2014 version of Mile Post One is limited to Tract A, and does not include lots 1 and 2 from Points West Subdivision. The 2014 version of Mile Post One proposes a total of 24 lots. It appears to us that portions of eight of the proposed 24 lots are located partially within Widgi Creek Resort (lots 3-10). Record 1045. The remaining 16 lots are located entirely within the Seventh Mountain Resort, and entirely outside the Widgi Creek Resort.

B. Petitioners' Arguments

Petitioners' first two assignments of error concern two arguments that petitioners argue were advanced below and were improperly rejected without consideration on the merits by the hearings officer. First, petitioners argued "that the Widgi Creek Master Plan prohibited any further residential development on property subject to that plan." Petition for Review 5. Second,

petitioners argued "the Widgi Creek Master Plan only allowed a total of 210 residential units, that that allotment was used up in part by Phase I of the 2006 development, and would be exceeded by this application." Petition for Review 10. [13]

C. The Hearings Officer's Decision

Although the hearings officer did not precisely identify her legal theory for doing so, the hearings officer concluded that both of those arguments had been presented and resolved in the 2006 and 2009 decisions and for that reason the arguments did not need to be considered in this proceeding. We set out below the hearings officer's findings regarding both arguments.

1. Widgi Creek Master Plan Forbids Any Residential Development

The hearings officer offered the following explanation for refusing to consider petitioners' argument that the Widgi Creek master plan prohibits any additional development on the 4.4 acres:

> "Some opponents argue the Widgi Creek master plan forbids *any* residential development on the subject property, or at the very

---

[13] For both arguments, rather than cite to the place in the record where the issue was raised, petitioners cite to pages in the record where the hearings officer describes the issue raised by petitioners. We therefore assume the hearings officer accurately describes the issues. This is potentially important, because it appears that Points West Subdivision extended into Widgi Creek Resort in two places. In the north part of the subdivision, we have already noted eight lots partially intrude into the Widgi Creek Resort. In the east part of Points West other lots appear to intrude into Elkai Woods. The hearings officer did not acknowledge those easterly lots, and petitioners have not cited to pages in the record where they raised any issues regarding those easterly lots. We therefore do not consider the easterly Points West Subdivision lots further.

least on that portion of the property included within the Widgi Creek master planned area. The Hearings Officer finds a similar argument was considered and rejected by [a] former Hearings Officer * * * in her 2006 decision approving the applicant's original development plan for the subject property and the adjacent Points West Subdivision (TP-06-968, SP-06-13, LM-06-34). In that decision [the] Hearings Officer * * * noted the subject property -- specifically Tax lot 1400 -- included land within the Widgi Creek resort. Opponents in that case argued that land could not be developed because it was designated common area and/or open space on the Widgi Creek master plan, and therefore must remain undeveloped under a resort community comprehensive plan policy. [The] Hearings Officer * * * disagreed, finding the land at issue was not designated common area or open space. She went on to make the following findings:

> "'The findings adopted by the Board of County Commissioners in support of the amendments regarding the lnn/Widgi Creek resort community [Exhibit 'H' to Ordinance No. 2001-048)] contemplate additional residential development within the area of the subject property, specifically 8-9 acres near the rim rock and the former sewage treatment facilities. Those areas appear to be included within the subject property's boundaries. Therefore, it is not inconceivable that areas the neighbors assumed would remain undeveloped would be built upon at some point. Here, the evidence supports a finding that only those areas that were specifically identified as open space or common area on the Widgi Creek plat are subject to that portion of the policy. The subject property does not include any areas subject to those designations. In addition, the language of the policy, which requires that 'developed golf courses' be retained, implies that undeveloped portions of golf courses may, in some circumstances, be developed.' (Underscoring added by current hearings officer.)

> "In other words, [the] Hearings Officer * * * concluded that in the absence of an open space or common area designation for the portion of the subject property and the Points West Subdivision within the Widgi Creek master planned area, that property was assumed to be -- and was -- available for residential development. The record indicates [the] Hearings Officer[s'] decision was not appealed and therefore controls on the question of whether the portion of the subject property within the Widgi Creek master planned area may be developed with dwellings." Record 20.

2. The Mile Post One Lots Located Partially Within Widgi Creek Resort are Subject to the Widgi Creek Resort Limit on Total Residential Units

The hearings officer offered the following explanation for refusing to consider petitioners' second argument that the Widgi Creek master plan limit on total residential units applies to the northern Points West Subdivision lots and the proposed northerly Mile Post One lots, both sets of which are located partially within Widgi Creek Resort:

> "Even assuming for purposes of argument that the Widgi Creek master plan does apply to the applicant's proposal, the Hearings Officer finds opponents' objections on that basis lack merit. Opponents note the 1983 decision approving the master plan established the following limitations on residential units within what became the Widgi Creek resort: (1) 210 total residential units; (2) 95 single-family residential lots; and (3) 120 condominium units. The record indicates subsequent amendments to the master plan modified the maximum number of single-family dwellings and condominiums/townhomes to 107 and 103, respectively. The record indicates 86 condominium/townhome units have been established in the Elkai Woods development within Widgi Creek. Therefore, opponents assert there remained authorization for only 17 more townhomes within the Widgi Creek master planned area, and because the Points West Subdivision was approved with 8 townhome lots located partially within the Widgi Creek master planned area, the applicant's proposal to develop 10 town homes on the subject property within the Widgi Creek

master planned area exceeds the maximum number of townhomes - regardless of what the Resort Community Zone permits.

"As discussed * * * two previous land use decisions approved residential development by the applicant on the subject property: (1) the 2006 decision by [a] Hearings Officer * * * granting tentative plan and site plan approval for 42 condominiums and a 64-lot zero-lot-line subdivision; and (2) the 2009 administrative decision granting tentative plan and site plan approval for * * * a 26-lot zero-lot-line subdivision. In both cases, according to opponents' calculations the applicant's proposals would have exceeded the townhome limitations in the Widgi Creek master plan. However, it appears from this record that although they could have done so, the Widgi Creek and Elkai Woods homeowners' associations and the neighboring property owners who were parties to those previous proceedings did not raise any objection to the proposed developments on the basis of the townhome limitations in the Widgi Creek master plan. The Hearings Officer finds the homeowners' associations' and other opponents' claims that approval of the Points West Lots 1-8 was subject to the Widgi Creek master plan townhome unit limits, and that under the master plan those lots must be counted against the applicant's proposal, amounts to an improper collateral attack in this proceeding on the 2006 and 2009 decisions." Record 22-23.

D. Discussion

Petitioners assume the hearings officer's legal theory for rejecting its arguments is collateral estoppel, or more accurately "issue preclusion." Issue preclusion bars relitigation of an issue in subsequent proceedings when the issue has been determined by a valid and final determination in a prior proceeding. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993). We set out the five requirements for issue preclusion from *Nelson v. Emerald People's Utility Dist* in our decision in *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519 (2001), *aff'd* 180 Or App 495, 43 P3d 1192 (2002):

> "When an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue if five requirements are met: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Nelson v. Emerald People's Utility Dist.*, 318 Or at 104."

Petitioners argue that at least four of the Nelson requirements are not met here (one, three, four and five). Petitioners are clearly correct about factor four since one of the petitioners was not a party in the 2006 and 2009 proceedings and no one argues that petitioner is in privity with a party to those proceedings. And as recently as our *Lawrence v. Clackamas County* decision we concluded that quasi-judicial land use proceedings are not the kind of proceedings that should be given preclusive effect. 40 Or LUBA at 520.

The county has not appeared in this proceeding and intervenor-respondent does not argue that the hearing officer was relying on issue preclusion to refuse to consider petitioners' arguments. Rather, intervenor argues the hearings officer simply treated petitioners' arguments as an improper collateral attack on the 2006 and 2009 decisions and properly rejected them as such. Since at least one of the *Nelson* factors is clearly missing here, we will assume the hearings officer was not relying on issue preclusion in refusing to consider the two arguments that are the subject of the first two assignments of error.

Intervenor-respondent initially points out that LUBA has long recognized that "law of the case," which the Court of Appeals prefers to call

"waiver," bars relitigation of issues in some circumstances where issue preclusion would not apply.[14] *Mill Creek Glen Protection Ass'n v. Umatilla County*, 88 Or App 522, 526, 746 P2d 728 (1987); *Portland Audubon v. Clackamas County*, 14 Or LUBA 433, *aff'd* 80 Or App 593, 722 P2d 745 (1986). The Oregon Supreme Court has elaborated on the "law of the case" principle in the context of land use appeals, based on the particular statutory backdrop for land use appeals. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). However, as intervenor-respondent recognizes, "law of the case" clearly does not apply in this case. "Law of the case" only applies in land use proceedings following a LUBA remand or in subsequent appeals of a land use decision following LUBA remand. That is not the case here. Moreover, "law of the case" only applies to different phases of the "same case." *Beck*, 313 Or at 151. Here, intervenor is seeking approval for a different development proposal from the ones that were at issue in the 2006 and 2009 decisions, so it is not the same case for that additional reason. *Davenport v. City of Tigard*, 27 Or LUBA 243, 246-47 (1994).

Intervenor-respondent next argues that in a variety of contexts both the Court of Appeals and LUBA have held that decisions rendered in early stages of a multi-stage approval process can be final (appealable) land use decisions. In such cases, issues that could have been raised, but were not raised in early

---

[14] We use the term "law of the case" in this opinion to avoid confusion with a different kind of statutory waiver under ORS 197.763 and 197.835(3), which arises if a party to a quasi-judicial land use proceeding fails to raise an issue before the close of the final evidentiary hearing. No party argues that petitioners failed to raise the issues that are the subject of the first and second assignment of error before the close of the final evidentiary hearing, so there is no question of statutory waiver in this case.

stages, and issues that were raised and resolved adversely to a petitioner in early stage decisions that were not appealed, generally may not be raised by that petitioner in appeals of a later stage decision. *Carlsen v. City of Portland*, 169 Or App 1, 16, 8 P3d 234 (2000); *Piltz v. City of Portland*, 41 Or LUBA 461, 467 (2002); *Bauer v. City of Portland*, 38 Or LUBA 715, 721 (2000); *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145, 148 (1993); *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64, 70-71 (1990); *J.P. Finley & Sons v. Washingon County*, 19 Or LUBA 263, 270 (1990). In rejecting arguments in appeals of subsequent stage land use decisions that in reality are a belated challenge to earlier stage land use decision, we have sometimes referred to those arguments as a "collateral attack" on those earlier stage land use decisions. *Piltz*, 41 Or LUBA at 467; *Bauer*, 38 Or LUBA at 721.

The hearings officer's and intervenor-respondent's attempt to rely on the collateral attack principle articulated in these multi-stage approval cases is misplaced. The 2006 decision did two things. First, it granted tentative plan approval (first stage tentative subdivision approval) for 64 lots. Second, it granted approval for a 42-unit condominium project. Later, a final plat was approved and recorded (second stage final subdivision approval). That final plat reflects the 2006 approval of a 42-unit condominium project, but it does not approve the 42-unit condominium project. It was the 2006 site plan decision that granted approval for the 42-unit condominium proposal. If petitioners were challenging the final plat approval for the 64 lots that were granted tentative plan approval or permits necessary to carry out the 42-unit condominium project, it might be accurate to say petitioners are collaterally attacking the 2006 decision. However, the final plat for 64 lots was recorded

and is not the subject of this appeal. The 2006 site plan approval for the 42-unit condominium project has expired, and is not the subject of this appeal. The subject of this appeal is the 2014 application for approval of a 24-lot subdivision in place of the 42-unit condominium proposal. While intervenor-respondent characterized that application for tentative plan approval for a 24-unit townhouse subdivision as a second phase of the 2006 proposal, Record 385, it is not. It is a proposal for a development that is very different from the 42-unit condominium proposal that was approved in 2006. It also is a proposal for a development that is different from the subdivision that was approved in 2009. Petitioners' challenge to the 2014 proposed subdivision proposal is not a collateral attack on the 2006 or 2009 decisions.

Petitioners' attempt to raise issues that were resolved adversely to two of the three petitioners in this appeal in the 2006 decision is only precluded if this is a proper case for issue preclusion. We have already concluded that it is not. The hearings officer erred in concluding that she need not address those issues in this appeal, and she erred in concluding that petitioners' attempt to raise those issues in this appeal is a collateral attack on the 2006 and 2009 decisions.

The first and second assignments of error are sustained.

CONCLUSION

On remand, the hearings officer will need to determine whether the Widgi Creek Master Plan retains a regulatory role under the Resort Community Zone or DCC 18.08.020. *See* n 8. If it does not, then the hearings officer need not consider petitioners' arguments that the Widgi Creek Master Plan precludes the proposed development and imposes limits on the number of new residential units that would be violated by the approved 24-lot subdivision. However, if the hearings officer concludes that that the Widgi Creek Master Plan has not

been superseded by the Resort Community Zone, the hearings officer will need to consider whether the Widgi Creek Master Plan prohibits additional residential development in the area subject to the Widgi Creek Master Plan and whether the proposal violates the 103-unit limit in the amended Widgi Creek Master Plan on townhome units.[15]

The county's decision is remanded.

[15] As noted earlier, it appears to us that the proposed eight lots that would be located partially within the Widgi Creek Resort, when added to the eight lots in the Points West Subdivision that are located within the Widgi Creek Resort, would total 16 lots, one short of the limit on townhouse units in the Widgi Creek Master Plan.