BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KINE AND KINE PROPERTIES,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

ELKAI WOODS HOMEOWNERS ASSOCIATION,
ELKAI WOODS FRACTIONAL HOMEOWNERS ASSOCIATION
and WIDGI CREEK HOMEOWNERS ASSOCIATION,
Intervenors-Respondents.

LUBA No. 2017-005

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Tia M. Lewis, Bend, filed the petition for review and argued on behalf of petitioner. With her on the brief was Schwabe, Williamson & Wyatt, PC.

No appearance by Deschutes County.

Michael H. McGean, Bend, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was Francis Hansen & Martin LLP.

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

AFFIRMED 06/13/2017

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

Opinion by Bassham.

NATURE OF THE DECISION

In LUBA No. 2017-005, petitioner appeals a county decision denying its application for a replat and related approvals for a 1.59-acre parcel within the Seventh Mountain/Widgi Creek Resort community, in order to create eight new residential lots.[1]

FACTS

The subject property is a 1.59-acre parcel developed with a swimming pool, restrooms, parking area and landscaping, which is located within the Seventh Mountain/Widgi Creek Resort community. Additional background on development, planning and zoning of the Widgi Creek element of the resort community is found in *Kine and Kine Properties v. Deschutes County*, __ Or LUBA __ (LUBA No. 2017-006, June 13, 2017), a companion appeal to the present appeal.

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[1] A companion appeal, LUBA No. 2017-006, concerns petitioner's appeal of a county decision denying its application to subdivide a large remainder parcel, developed as a golf course, within the same Seventh Mountain/Widgi Creek Resort community, in order to create nine new residential lots. Although the two decisions are closely related, and potentially subject to consolidation under OAR 661-010-0055, and the county transmitted a consolidated record for the two appeals, at petitioner's request LUBA did not consolidate the two appeals. Petitioner's second, third and fourth assignments of error in the present appeal incorporate by reference petitioner's arguments under the second, third and fourth assignments of error in LUBA No. 2017-006, which petitioner describes as the master brief in these two related appeals. Accordingly, we set out the full resolution of the overlapping second, third and fourth assignments of error in this appeal only in our opinion in LUBA No. 2017-006, issued this date.

The subject 1.59-acre parcel was created by approval of the Elkai Woods subdivision plat in 1999, and is denoted on the plat as "Common 18." That same year, the county approved a site plan to develop Common 18 with the pool and related facilities, with conditions of approval. In 2001, the county adopted new comprehensive plan and zoning regulations for resort communities, as a result of which the Widgi Creek resort and other resorts in the county were zoned Resort Community (RC). The Elkai Woods portion of the Widgi Creek resort was sub-zoned Widgi Creek—Residential district, which is governed by Deschutes County Code (DCC) 18.110.030.

In 2005, the Widgi Creek developer transferred ownership of common areas and private streets to the homeowner associations. However, Common 18 remained in the developer's possession, and was not transferred to any homeowner's association. In 2009, petitioner acquired Common 18 along with other property within the Widgi Creek resort, and for a couple of years operated the pool pursuant to an agreement with the Widgi Creek homeowners associations. The agreement expired in 2011, and since then the pool has not been in operation.

In November 2014, petitioner applied to the county for a partial replat of the subdivision creating Common 18, in order to remove the "common" notation on the plat and to create eight, zero-lot residential lots, with associated site plan and landscape management review.

In April 2015, the hearings officer denied the application on several grounds, including noncompliance with Deschutes County Comprehensive Plan (DCP) Policy 4.8.2 ("Policy 4.8.2", which in relevant part limits development of areas within the resort that are "[d]esignated open space and common area[.]"[2] Petitioner appealed the hearings officer's decision to the board of county commissioners (commissioners). The commissioners conducted a *de novo* hearing on the appeal. On December 19, 2016, the commissioners issued the county's final decision denying the application based on several grounds, including noncompliance with Policy 4.8.2. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In three sub-assignments of error, petitioner argues that the commissioners misconstrued Policy 4.8.2 in concluding that the Common 18 is a "designated * * * common area."

A. Common Area

Petitioner argued to the commissioners below that Common 18 is not a "common area" as that term is defined in section 5.2 of the DCP, which

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[2] DCP Policy 4.8.2 governs development within the Resort Community zone, and provides:

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

references the definition of "common property" as that term is used in ORS 94.550(7), because it is not owned by a homeowners association or designated in a declaration to be transferred to a homeowners association.[3] The commissioners agreed that Common 18 is not "common property" for purposes of ORS 94.550(7), but concluded DCP section 5.2 does not control the meaning of the phrase "designated open space and common area" as used in Policy 4.8.2, because Policy 4.8.2, adopted in 2001, pre-dated the adoption of the definition in DCP section 5.2.[4] The commissioners concluded that the

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[3] DCP Section 5.2 is the general definitions section, and states:

> "'Common Area' means 'common property' as defined in the Oregon Planned Communities Act at ORS 94.550(7)."

ORS 94.550(7) is part of the definition section for the Oregon Planned Communities Act, at ORS 94.550 to 94.783, and which provides:

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

[4] The commissioners' findings state, in relevant part:

> "The parties have disputed whether the Common 18 parcel is 'designated open space and common area' under Policy 4.8.2.
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> "The applicant argues that the real property where the pool is located has never been owned, held or leased by the homeowners. It was not designated in any plat or declaration for transfer to the association and, in fact, has been specifically exempted out of the declarations for the Elkai Woods subdivision. The HOAs entered

adjective "designated" modifis both "open space" and "common area," and the designation "Common 18" on the Elkai Woods subdivision plat was sufficient to "designate" Common 18 as a "common area" for purposes of Policy 4.8.2.

> agreements with the golf course owner to use the pool facilities, which indicates a lack of ownership by the HOAs. Applicant contends that notwithstanding the parcel's designation as 'Common 18' on the plat for Elkai Woods, it does not meet the definition of 'common property' within the meaning of the Planned Community Act, ORS 94.550, because it is not owned by the HOAs or designated to be transferred to them, and is therefore not 'common area' for Policy 4.8.2. The plat did not designate the property for transfer to the HOAs, as it would have been required to do if there had been such an intent under ORS 92.075 and ORS 92.090. All common areas and streets within Widgi Creek were turned over to the HOAs in 2005. Applicant relies in part on section 5.2 of the Comprehensive Plan, which defines 'common area' to mean 'common property' as that term is defined in the Oregon Planned Communities Act.
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> "However, section 5.2 of the Comprehensive Plan did not exist at the time of the adoption of Policy 4.8.2. Further, it is not clear whether the word 'designated' in Policy 4.8.2. is meant to apply not only to 'open space' but also to 'common area,' that is, whether the policy was intended to apply to those parcels that were 'designated common area' under the Widgi Creek and Elkai Woods plats, as the HOA opponents have argued.
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> "The Board finds that although Common 18 may not strictly be 'common property' under the Planned Community Act's definition, it is still subject to Policy 4.8.2's restrictions on 'designated open space and common area' * * *. The Board finds that the Common 18 Lot was *designated* as common area on the plat, regardless whether it meets the definition of the Planned Community Act." Record 34 (italics in original).

On appeal, petitioner argues that the definition of "common area" at DCP section 5.2, and the cross-referenced definition of "common property" at ORS 94.550(7), are controlling with respect to the meaning of "common area" as used in Policy 4.8.2. However, petitioner does not acknowledge or challenge the commissioners' findings, quoted at n 4, concluding that because DCP section 5.2 was adopted after Policy 4.8.2, it is not controlling as to the meaning of "designated * * * common area" as used in Policy 4.8.2. LUBA must affirm a governing body's interpretation of a comprehensive plan provision, unless the interpretation is inconsistent with the express language of the plan provision, or its purpose or underlying policy, or contrary to a statute, rule or goal that the plan provision implements. ORS 197.829(1).[5] Petitioner

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[5] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

does not argue that Policy 4.8.2 was adopted to implement ORS 94.550(7) or any other statute, rule or goal provision. Petitioner clearly disagrees with the commissioners' conclusion that the definition of "common area" at DCP section 5.2 is not controlling with respect to the phrase "designated * * * common area" as used in Policy 4.8.2, but fails to establish that the commissioners' conclusion is inconsistent with the text and context of Policy 4.8.2, or its purpose or underlying policy.

As intervenors-respondents (intervenors) argue, the phrase "common area" as defined in DCP section 5.2 does not necessarily have the same meaning as the phrase "designated * * * common area" as used in Policy 4.8.2. Policy 4.8.2 was adopted in 2001, as part of a set of plan and zoning amendments specific to resort communities. The DCP section 5.2 definition of "common area" was apparently adopted after 2001. The role and purpose of that definition is not clear, but the cross-reference to ORS 94.550(7) suggests that the definition is intended to further some purpose or element of the Oregon Planned Community Act (ORS 94.550 to 94.783). The Oregon Planned Community Act functions largely to regulate the governance of homeowners associations for planned communities, and has little if anything to do with land use planning or land use regulation within those communities. By contrast, Policy 4.8.2 is specifically intended to regulate the use of open spaces, common areas and golf courses within resort communities. It is likely that when the county commissioners adopted Policy 4.8.2 in 2001, they had a particular

understanding of what the phrase "designated * * * common area" meant as applied to resort communities, but a different understanding of what the term "common area" meant in DCP section 5.2 when they later adopted, by cross-reference, the definition of "common property" as used in the Oregon Planned Community Act. Given the different phrasing and context for Policy 4.8.2, and the different purpose that the phrase "common area" or "common property" serves under the Oregon Planned Community Act, the commissioners' interpretation that DCP section 5.2 does not control the meaning of the phrase "designated * * * common area," as used in Policy 4.8.2, seems a plausible reading of the relevant plan provisions, in context. *See Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) (LUBA must affirm a governing body's interpretation of local land use legislation under the deferential standard of review at ORS 197.829(1) if the interpretation is "plausible"). We cannot say that the commissioners' interpretation of the relevant plan provisions is inconsistent with the express language, purpose or policy underlying them. ORS 197.829(1)(a)-(d). Accordingly, we affirm that interpretation.

B. Open Space

The commissioners also found, in the alternative, that Common 18 constitutes a designated "open space," as well as a designated "common area." Petitioner argues that the commissioners' finding regarding open space on this point is conclusory, and fails to explain why the commissioners believe Common 18, which is developed with a swimming pool, outbuildings and a

parking lot, constitutes designated "open space" within the meaning of Policy 4.8.2. Petitioner argues that Common 18 clearly does not qualify as "open space" as that term is defined at DCC 18.04, the definition section for the county's zoning code, and that the commissioners did not even address the code definition of "open space."[6] Instead, the commissioners reasoned that, because the swimming pool is a recreational amenity, it must be viewed as

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[6] DCC 18.04 defines "open space" for purposes of the zoning code as follows:

> "'Open space' means lands used for agricultural or forest uses and any land area that would, if preserved and continued in its present use:
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> "A. Conserve and enhance natural or scenic resources;
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> "B. Protect air, streams or water supply;
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> "C. Promote conservation of soils, wetlands, beaches or marshes;
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> "D. Conserve landscaped areas such as public or private golf courses, that reduce pollution and enhance the value of adjoining or neighboring property;
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> "E. Enhance the value to the public of adjoining or neighboring parks, forests, wildlife preserves, nature reservations or other open space;
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> "F. Enhance recreation opportunities;
>
> "G. Preserve historic, geological and archeological sites;
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> "H. Promote orderly urban development; and
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> "I. Minimize conflicts between farm and nonfarm uses."

open space.[7] The commissioners also rely on the fact that, during a property tax proceeding, petitioner took the position that Common 18 should be taxed as "open space." Petitioner argues that neither rationale is a sufficient basis to conclude that Common 18 constitutes "open space" for any purpose.

We tend to agree with petitioner that the two rationales cited in the commissioners' findings are insufficient to explain the conclusion that Common 18 is designated "open space" within the meaning of Policy 4.8.2. However, we need not resolve petitioner's challenges to the county's alternative conclusion regarding open space, because we have affirmed the county's primary conclusion that Common 18 is a designated "common area." Even if we sustained this sub-assignment of error, it would not result in reversal or remand. That is because a local government generally requires only one valid basis for denial of an application, and where LUBA has affirmed one basis for denial, any error committed with respect to alternative or independent

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[7] The commissioners' findings state, in relevant part:

> "In the alternative, the Board finds that even if the parcel is not 'common area' under the Policy, the pool amenities on Common 18 are recreational amenities as envisioned by the Widgi Creek Master Plan, that Common 18 is not intended for residential use or development, and that the property is therefore 'designated open space' within the meaning of Policy 4.8.2 * * *. This finding is also consistent with the applicant's admission that the property was designated open space under the Master Plan in the applicant's successful Board of Property Tax Appeals application materials * * *." Record 34-35.

bases for denial would not provide a basis for reversal or remand. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd* 195 Or App 762, 100 P3d 218 (2004). We see no purpose that would be served by resolving challenges to the county's alternative finding that Common 18 qualifies as a designated open space for purposes of Policy 4.8.2.

C. Replat

As noted, the hearings officer denied the application in part because the hearings officer found that the proposed partial replat is not authorized under ORS chapter 92. Petitioner appealed that issue to the county commissioners, who did not reach the issue. On appeal to LUBA, petitioner argues that the commissioners erred in failing to reach and resolve that issue. Petitioner also argues on the merits that the hearings officer erred in concluding that ORS chapter 92 does not authorize the proposed replat.

However, petitioner identifies no authority that obligates the county, when affirming one basis for denial on appeal of an underlying decision that denies an application on multiple grounds, to address all other bases for denial. While it may be prudent and appropriate under those circumstances to address all bases for denial challenged in the local appeal, we are aware of no statute or other authority that requires the county to address all issues raised on local appeal, or to address and resolve all bases for denial, once the county has affirmed at least one basis for denial of the application. Absent citation to such

authority, petitioner had not demonstrated that the county committed any error in failing to address the replat issue.[8]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In addition to concluding that Common 18 is a "designated * * * common area" for purposes of Policy 4.8.2, the commissioners also interpreted Policy 4.8.2 more broadly to implicitly prohibit any further residential development within the Widgi Creek resort, other than two specified areas located elsewhere within the resort.

Under the second assignment of error in this appeal, petitioner challenges those findings, based on identical arguments challenging identical findings in the second assignment of error in the companion appeal, LUBA No. 2017-006. In *Kine and Kine Properties v. Deschutes County*, __ Or LUBA __ (LUBA No. 2017-006, June 13, 2017), issued this date, we affirmed the county's decision in that case, which denies a similar application to create new residential lots within the Widgi Creek resort. Because we affirmed one of the bases for denying that application, and the county needs only one valid basis

[8] By the same token, the hearings officer's conclusion that the proposed replat is not authorized by ORS chapter 92 has no binding or authoritative effect, for purposes of future replat applications.

for denial, we concluded that the second assignment of error in LUBA No. 2017-006 provided no basis for reversal or remand.[9]

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[9] Specifically, we held in LUBA No. 2017-006:

> "We tend to agree with petitioner that the commissioners' interpretation of Policy 4.8.2 to implicitly prohibit all future residential development in Widgi Creek, other than the two areas identified in the findings supporting Ordinance 2001-047/048, is inconsistent with the express language of Policy 4.8.2. As petitioner notes, Policy 4.8.2 is a policy that applies to all resort communities, including Black Butte Ranch. It is not specific to the Widgi Creek resort. While Policy 4.8.2 clearly limits redevelopment of areas developed as a golf course, and residential development of designated open space or common area, there is no language whatsoever in Policy 4.8.2, or in the RC zone provisions at DCC 18.110, that purports to limit future residential development in the Widgi Creek resort to the two areas identified in the findings supporting Ordinance 2001-047/048. It may be that the participants in the 2001 proceedings assumed that, because Widgi Creek was mostly built out, opportunities for new residential development would be limited. But, for whatever reason, the county chose to expressly prohibit residential development only in developed golf course areas and designated open space/common areas, and adopted no plan policies or land use regulations prohibiting residential development in other areas. Indeed, as petitioner notes, the RC zone generally allows residential development in Widgi Creek as an outright permitted use. Interpreting Policy 4.8.2 to implicitly prohibit new residential development in areas other than developed golf courses or designated open space/common area, or to allow residential development only in two areas not mentioned at all in any comprehensive plan policy or land use regulation, would seem to impermissibly insert what has been omitted. ORS 174.010 (in interpreting statutes, the interpreter should not insert what has been omitted, or omit what has been inserted). Any such

In the present case, the second assignment of error is in the identical posture. We have affirmed the county's primary conclusion that the Common 18 site is a "designated * * * common area" within the meaning of Policy 4.8.2, and therefore subject to an express prohibition on development.[10] As noted, the county requires only one valid basis for denial. Accordingly, no purpose would be served by addressing petitioner's challenges to the county's independent conclusion that Policy 4.8.2 embodies an implicit prohibition on all further residential development, other than two specified areas.

We do not reach the second assignment of error.

> interpretation may not survive even the deferential review required under ORS 197.829(1) and *Siporen*, 349 Or 247.
>
> "Nonetheless, we need not and do not reach that issue, because as noted, the county's findings on this point appear to be independent, alternative findings. Because we have affirmed the county's conclusion that the Fairway site was 'developed' as part of the golf course, the express prohibition in Policy 4.8.2 applies, whether or not Policy 4.8.2 can be plausibly interpreted in context to include a broader implicit prohibition on residential development. Even if we sustained the second assignment of error, our resolution of the merits would not result in reversal or remand * * *." *Kine and Kine Properties v. Deschutes County*, __ Or LUBA __ (LUBA No. 2017-006, June 13, 2017) (slip op at 17-19)(footnote omitted).

[10] We note that the express prohibition on development of designated open space and common areas is qualified by the phrase "unless otherwise zoned for development[.]" Policy 4.8.2. The commissioners adopted findings explaining why the subject property is not "otherwise zoned for development," and petitioner does not challenge those findings. Record 60.

THIRD ASSIGNMENT OF ERROR

The 1983 Widgi Creek Master Plan included a condition limiting maximum residential development to 210 residential units. During the proceedings on the present application, petitioner took the position that the 2001 plan and zoning amendments had superseded the 1983 Master Plan. The hearings officer agreed. However, on appeal, the commissioners concluded that the 1983 Master Plan is still effective and the limit of 210 residential units still applied, based in part on DCC 17.16.070, which provides:

> "Once a master plan is approved by the County, the plan shall be binding upon both the County and the developer; provided, however, after five years from the date of approval of the plan, the County may initiate a review of the plan for conformance with applicable County regulations. If necessary, the County may require changes in the plan to bring it into conformance."

The commissioners ultimately concluded that the limit of 210 residential units had been reached, and for that reason the application to create additional residential units was not consistent with the 1983 Master Plan.

The third assignment of error in the companion appeal, LUBA No. 2017-006, challenged the commissioners' identical findings on the continued effectiveness of the 1983 Master Plan. There, we ultimately denied the third assignment of error in LUBA No. 2017-006, on the merits.[11] In the present

[11] The merits were presented in three sub-assignments of error, arguing that (1) the commissioners' findings in reliance on DCC 17.16.070 were inadequate, (2) the commissioners erred in failing to delineate the precise boundaries of the 1983 Master Plan area, and (3) the commissioners'

case, the third assignment of error adopts by incorporation the third assignment of error in LUBA No. 2017-006. For the same reasons, we reject the third assignment of error in the present appeal.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The fourth assignment of error alleges that the commissioners committed procedural error. The alleged error, and the arguments related to it, are identical to those presented in the fourth assignment of error in the companion appeal, LUBA No. 2017-006, which are incorporated by reference as the fourth assignment of error in the present appeal. In our decision in LUBA No. 2017-006 issued this date, we denied the fourth assignment of error. For the same reasons, we reject the fourth assignment in the present appeal.

The fourth assignment of error is denied.

The county's decision is affirmed.

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conclusion that the 1983 Master Plan was still effective as a source of approval standards violated the so-called Goal Post Rule, at ORS 215.427(3)(a). We denied all three sub-assignments of error on the merits.