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. 2017-006

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

Petitioner appeals a county decision denying its application for a subdivision of a large remainder parcel, developed as a golf course, within the Seventh Mountain/Widgi Creek Resort community, in order to create nine new residential lots.[1]

FACTS

The subject property is a 149.36-acre parcel, which is developed as an 18-hole golf course with clubhouse and other facilities, within the Seventh Mountain/Widgi Creek resort community. The proposed subdivision would

[1] A companion appeal, LUBA No. 2017-005, concerns petitioner's appeal of a county decision denying its application for a replat of a 1.59-acre parcel, developed with a swimming pool, within the same Seventh Mountain/Widgi Creek Resort community, in order to create eight new residential lots. Although the two decisions are closely related, and potentially subject to consolidation under OAR 661-010-0055, the county transmitted a single consolidated record for the two appeals, and the two petitions for review have three overlapping and virtually identical assignments of error, at petitioner's request LUBA did not consolidate the two appeals for purpose of LUBA review of the two decisions. Petitioner states that the petition for review in the present appeal, LUBA No. 2017-006 (the golf course parcel), is intended to be the master brief. The petition for review in LUBA No. 2017-005 (the swimming pool parcel) includes only one non-overlapping assignment of error, incorporating by reference the argument under the second, third and fourth assignments of error in the petition filed in the present appeal, LUBA No. 2017-006. Accordingly, on this date we issue separate opinion and orders in these two unconsolidated appeals, but the three overlapping assignments of error will be addressed in full only in our opinion here, in LUBA No. 2017-006.

create nine new zero-lot-line residential lots on a .9-acre portion of the subject property, located between the fairway of the first hole of the golf course, to the south, and an internal resort road, Seventh Mountain Drive, to the north. The findings refer to this .9-acre area as the "Fairway site." The Fairway site is partially developed with a turn-around and mailboxes, and includes a number of trees and landscaped berms. A paved golf cart path connecting the tee and the green for the first hole of the golf course is located immediately adjacent to the southern boundary of the Fairway site.

Understanding the issues in this appeal requires some historical background. Development in the area began with approval of the Seventh Mountain resort in the 1960s, prior to adoption of the statewide land use program. At some point, the land was planned and zoned for forest use, under Statewide Planning Goal 4 (Forest Lands). In 1983, the Widgi Creek development was approved under a zone change, master plan and conditional use permit approval, as an expansion of the Seventh Mountain resort. Widgi Creek was initially referred to as the "Seventh Mountain Golf Village." We refer to this approval as the 1983 Master Plan. The Widgi Creek development was approved as a destination resort, which at that time was a conditional use in the county's Forest zone.[2] The standards at the time required that 65 percent

[2] The 1983 Master Plan predated the current Statewide Planning Goal 8 (Recreational Needs) destination resort standards and the destination resort statutes at ORS 197.435 *et seq*.

of the project had to be maintained as some form of open space. The 1983 Master Plan approved a maximum density of 210 residential units, divided between single-family dwellings and condominiums. The Widgi Creek development was built in a number of phases over the years, during which a number of modifications to the Master Plan were approved, including substituting townhomes for the originally approved condominiums.

The 149.36-acre parcel that includes the Widgi Creek golf course was created in 1990, as a large remainder parcel created by approval of the Seventh Mountain Golf Village subdivision plat. The golf course was developed soon thereafter. It is privately owned, with no CC&Rs, homeowner assessments, contributions or homeowner membership requirements.

In 1998, in response to adoption of administrative rules governing unincorporated communities, the county began a process of adopting exceptions to Goal 4 and comprehensive plan and zoning amendments for the county's resort communities, including the Seventh Mountain/Widgi Creek development and Black Butte Ranch. The county adopted a "reasons" exception to Goal 4 for Black Butte Ranch, to justify the addition of 82 acres of land to that resort community. For the Seventh Mountain/Widgi Creek development, the county adopted a "physically developed" exception to Goal 4, "in recognition that this resort is for all practical purposes fully developed." Record 512.

In 2001, the county adopted Ordinance 2001-047/048, reflecting the goal exception and comprehensive plan and zoning code text and map amendments. The county applied a new Resort Community (RC) zone to the Black Butte and Seventh Mountain/Widgi Creek communities, codified at Deschutes County Code (DCC) 18.110. The RC zone generally allows residential development as a permitted use. Ordinance 2001-047/048 adopted a staff report, Exhibit H, which recited that the Widgi Creek development was approved in 1983 to consist of a golf course and 210 residential units, and that the development was for "all practical purposes built-out." Record 3001. Exhibit H also noted that homeowner turnout at the hearings for adoption of the RC zone was low, which staff attributed to the perception that the amendments would not cause significant changes, because the Black Butte and Seventh Mountain/Widgi Creek resorts "are substantially built out and have their own internal controls for future development in accordance with approved master plans." Record 518-19.

Ordinance 2001-047/048 also adopted a new Deschutes County Comprehensive Plan (DCP) Policy 4.8.2 ("Policy 4.8.2"), which 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."

In 2004, a county hearings officer approved the Elkai Woods subdivision plat in the southern portion of the Widgi Creek development area, based in part

on findings that the proposed townhome development was consistent with the 1983 Master Plan, including the 210-residential lot limit. In 2006, the county approved the Points West and Mile Post 1 subdivisions, which are located mostly within the Inn of the Seventh Mountain resort area, but which include some lots within what the county understood to be the area subject to the 1983 Master Plan for the Widgi Creek development.[3]

At some point after 2008 petitioner acquired ownership of the golf course parcel at Widgi Creek. In November 2014, petitioner applied to the county for tentative plan approval for a nine-lot zero lot line subdivision of the Fairway site (the .9-acre portion of the golf course parcel) with associated site plan and landscape management reviews. In April 2015, the hearings officer denied the application on several grounds, including that residential development of the Fairway site would (1) violate the 1983 Master Plan's limit on 210 residential units, and (2) violate Policy 4.8.2, because the Fairway site is developed as part of the golf course, and is also designated "open space" within the meaning of Policy 4.8.2.

Petitioner appealed the hearings officer's decision to the county board of commissioners. The board of commissioners conducted a *de novo* hearing on

[3] The 1983 Master Plan decision apparently did not include a master plan map, at least any map labeled as such. As explained below, petitioner takes the position that without a master plan map there is some uncertainty regarding the exact size or boundaries of the area subject to the 1983 Master Plan decision.

the appeal and, on December 19, 2016, issued a decision affirming the hearings officer's decision, and adopting additional findings. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In three sub-assignments of error, petitioner challenges the county's conclusions that the Fairway site is "developed as [a] golf course" or "designated open space" within the meaning of Policy 4.8.2.

A. Developed as a Golf Course

Petitioner argues that the commissioners misconstrued Policy 4.8.2 and adopted inadequate findings not supported by substantial evidence in concluding that the Fairway site is "developed as [a] golf course[][.]"[4]

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[4] The board of commissioners' findings on this point state:

> "The Hearings Officer found that [since the] Comprehensive Plan Policy 4.8.2 was generally intended to preserve the status quo within the Widgi Creek development as it existed in 2001, that the proposed subdivision site was indeed 'developed as [a] golf course[]' at that time, and that it therefore must remain as golf course or be reserved for open space or recreation uses. The Hearings [O]fficer Decision stated: 'I find it is most likely the board [of commissioners] considered the proposed subdivision site to be part of the developed golf course in 2001 considering the site's location and the fact that it looks like all of the other vegetated land within and surrounding the golf course tees, fairways and greens on the aforementioned aerial photos and diagrams of Widgi Creek attached to the goal exception.'
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> "The Hearings Officer also noted that Brad Hudspeth, General Manager of Widgi Creek Golf Course since 2005, admitted in his testimony that prior to 2009 'there were never any out of bounds markers on Hole #1 in the area of the proposed development.'

Petitioner notes that DCC 18.04.030 defines the term "golf course" as "an area of land with highly maintained natural turf laid out for the game of golf with a series of nine or more holes, each including a tee, a fairway, a putting green and often one or more natural or artificial hazards." While the DCC includes no definition of "developed," petitioner argues that the plain dictionary meaning of "developed" denotes some physical change or improvement to land. According to petitioner, the Fairway site does not include any golf-related

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> Therefore, she found that prior to the owner's placement of the out of bounds stakes in 2009, the out of bounds area for the first fairway extended to the southern edge of Seventh Mountain Drive, and therefore the proposed subdivision site was not out of bounds in 2001 when Policy 4.8.2 was adopted. The Hearings Officer concluded that the proposed subdivision site—which includes both mowed and 'rough' or natural areas—was within the 'developed golf course' in 2001 and therefore falls within the restriction of Policy 4.8.2.
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> "The Board agrees with and adopts as its own the findings and conclusions of the Hearings Officer decision on this point. It is clear to the Board that the proposed subdivision site was never intended for residential development under either the Widgi Creek Master Plan or ordinance 2001-047/048. The area is not within either of the areas specifically identified for possible development in the County's goal exception. The Board finds based on all of the evidence in the record that the area was 'area developed as golf courses' in 2001 within the meaning of Policy 4.8.2. The Board finds that even if it was not '[a]rea[] developed as [a] golf course[]' then it was still 'designated open space' under Policy 4.8.2. Either way, the policy applies to prohibit any development for residential use." Record 23.

physical improvements or any identified features of a "golf course" as defined at DCC 18.04.030.

Under ORS 197.829(1), LUBA must affirm the commissioners' interpretation of Policy 4.8.2 unless the interpretation is inconsistent with the express language or purpose of Policy 4.8.2, or the policy underlying that comprehensive plan provision.[5] *See also Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) (LUBA must defer to a governing body's interpretation of local land use legislation under ORS 197.829(1), as long as the interpretation is "plausible"). Petitioner contends that the commissioners' apparent understanding of the phrase "developed as a golf course" to include an area of land that adjoins a golf course fairway, but that itself has no physical

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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."

improvements related to game of golf, is inconsistent with the text and context of Policy 4.8.2.

Petitioner's preferred interpretation of Policy 4.8.2 is that whether land is "developed as a golf course" depends solely on the presence or absence of physical golf course improvements, such as a fairway or water hazard. The commissioners, however, adopted a broader interpretation that also evaluates how the land at issue was actually used and managed for golf in 2001, when the county adopted Policy 4.8.2. The commissioners' findings cite evidence that in 2001 the .9-acre Fairway site was an in-bounds, playable area for Hole No. 1, and that most of the Fairway site was landscaped, maintained and used in the same manner as other in-bounds, playable areas surrounding the fairways, with a mix of mowed and "rough" areas. Petitioner does not dispute that playable "rough" areas bordering a fairway are, or can be, part of the game of golf. It is true that since 2009 out of bound markers were placed that located the Fairway site outside the playable area of Hole #1, but that is immaterial under the commissioners' interpretation, which focuses on how the area was landscaped and used in 2001. We cannot say that the commissioners' broader interpretation of the phrase "developed as a golf course" is implausible or inconsistent with the text or context of Policy 4.8.2.

Petitioner also argues under the second sub-assignment of error that the county's findings are inadequate because they fail to address evidence petitioner submitted to show that the Fairway site is not developed as a golf

course. *See Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992) (adequate findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the conclusion that the approval standards are met). Petitioner argues that the findings fail to address evidence consisting of (1) a small portion of the Fairway site adjoining Seventh Mountain Drive is developed with a turnaround and mailboxes, and (2) golf course maps and irrigation maps from 1990, and (3) current maps showing that development of the Fairway site would be consistent with nearby residential development. However, as intervenors-respondents (intervenors) argue, *Heiller* does not necessarily require the local government to adopt findings addressing evidence that conflicts with the evidence it chooses to rely upon. The findings in fact do discuss the evidence that petitioner submitted. Record 23. The commissioners, however, chose not to rely on that evidence. *Heiler* does not require the decision-maker to adopt findings explaining why it chose not to rely upon evidence that conflicts with the evidence it did choose to rely upon. Petitioner has not demonstrated that the findings are inadequate under *Heiller*.

To the extent petitioner also challenges the evidentiary support for the county's findings, the county is entitled to choose the evidence it relies upon as long as that evidence, considering the evidence in the entire record, is substantial evidence, *i.e.*, evidence a reasonable person would rely upon. *Wetherell v. Douglas County*, 209 Or App. 1, 4, 146 P3d 343 (2006) (citing

Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988)). The county's finding that in 2001 the Fairview site was an in-bounds, playable area is supported by substantial evidence, and under the county's interpretation of Policy 4.8.2, affirmed above, that evidence is a sufficient basis for the county to conclude that the Fairway site was "developed as [a] golf course[]" in 2001.

B. Designated Open Space

Alternatively, the county found that "even if" the Fairway site "was not [an] '[a]rea[] developed as [a] golf course[]' then it was still 'designated open space' under Policy 4.8.2." Record 23; n 4. Petitioner argues that the county misconstrued the "designated open space" language of Policy 4.8.2, and adopted inadequate findings explaining its conclusion that the Fairway site was "designated" as open space for purposes of Policy 4.8.2.

As we understand Policy 4.8.2 and the county's findings, the first and second sentences of Policy 4.8.2 are mutually exclusive. The first sentence concerns designated open space or common areas that are *undeveloped*, except for specified community amenities. ("Designated open space and common area * * * shall remain undeveloped except for community amenities such as bike and pedestrian paths, park and picnic areas"). By contrast, the second sentence expressly concerns "[a]reas *developed* as golf courses * * *." We affirmed, above, the county's interpretation and conclusion that the Fairway site was "developed" as a golf course, under the second sentence of Policy 4.8.2. It would seem to follow that, if the area was "developed" as a golf course under

the second sentence, it cannot also be an "undeveloped" open space area, which is presumably why the county's findings frame the analysis in the alternative. Generally, a local government needs only one valid basis to deny an application, and where LUBA rejects all challenges to one basis for denial, frequently no purpose would be served by addressing challenges to alternative bases for denial. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd* 195 Or App 762, 100 P3d 218 (2004). Those challenges, even if sustained, would not provide a basis for reversal or remand. In the present case, given that we have affirmed the county's primary conclusion under Policy 4.8.2, we see no purpose in addressing petitioner's interpretative and findings challenges to the county's alternative conclusion that the Fairway site is a designated open space area, for purposes of the first sentence of Policy 4.8.2.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The county adopted a set of findings, leading to the conclusion that Policy 4.8.2 was intended to prohibit new residential development within the Widgi Creek development, with the limited exception of two areas described in the findings supporting Ordinance 2001-047/048, *i.e.*, an area of 8-9 buildable acres and another area of 1.2 acres.[6] There is no dispute that the Fairway site is

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

> "The Hearings Officer concluded that [Policy 4.8.2], when read in context with Ordinance 2001-047/048 and its findings, was

not located within either of these two areas. The county also relied on the testimony of the planner who supervised the 2001 goal exception, plan amendment and zone change for Widgi Creek, to support their conclusion that Policy 4.8.2, read in context with the other 2001 amendments, was intended to prohibit residential development within Widgi Creek, except for the two

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> intended to preserve the *status quo* at Widgi Creek as it existed in 2001, the time of the policy's adoption. The only land intended to remain available for residential development as an exception to that property was the '8-9 acre' piece that was referenced in the findings for 2001-047/048 and that has now been developed as Points West and approved for development in the Milepost One application, along with another specifically identified 1.2-acre site. The subject property is not included in these identified areas.
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> "The Board agrees with the Hearings Officer and finds that the Board intended to assure that all Widgi Creek areas that were 'physically developed'—everything except specific identified undeveloped areas—would continue in their then-current uses or would be developed with 'community amenities' or 'open space/recreation uses.' The Board finds that any ambiguity regarding the meaning of Policy 4.8.2 is rendered clear by reading this Policy in the context of the Goal Exception, adopting ordinances, and associated findings. The proposed 'Fairway' site was not within the 8-9 developable acres or other 1.2-acre area identified in the findings for Ordinance 2001-047/048 for future development. As such, the subject area was 'developed as golf courses' or, alternatively, 'designated open space and common area' within the meaning of Comprehensive Plan Policy 4.8.2. The Board believes that this conclusion gives effect to both Comprehensive Plan Policy 4.8.2 and the Resort Community Zone and is most generally consistent with the findings for Ordinance 2001-047-048." Record 22.

identified areas.[7] We understand the commissioners' findings on this point to represent an independent alternative to their conclusion that the Fairway site is developed as a golf course, or designated open space. In other words, even if the Fairway site was not developed as part of the golf course, or designated

[7] The commissioners' findings continue:

> "The Board finds persuasive the comments by Catherine Morrow, who was one of the principal planners for Deschutes County at the time of the adoption of Policy 4.8.2, and was a supervisor on the goal exception, comprehensive plan amendment and rezone process for Widgi Creek. Ms. Morrow stated that the constituents who participated in that process clearly believed that open space and recreational facilities would be retained and not redeveloped for residential use. She also testified that the 'physically developed' exception was taken by the County on the basis that the area was already substantially built out, and that therefore comprehensive plan policy was enacted with the intent that existing golf course areas, open space and recreational facilities would not be subject to future development for residential use such as townhomes.
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> "The Board agrees with Ms. Morrow's comments and rejects the applicant's argument that the adoption of the [RC] Zone showed an intent to allow for limited development, other than the areas specifically referenced in the findings for 2001-047/048 including the 8-9-acre area subsequently developed by Arrowwood Development. The use of the word 'shall' demonstrates that Policy 4.8.2 was more than aspirational and indicates a mandatory policy to be applied. The mere fact that the [RC] Zone was imposed on the entire Widgi community does not show an intent to allow development on property other than the specific areas identified in the findings for ordinance 2001-047/048. The [RC] Zone, Master Plan, and [DCP] policy 4.8.2 were intended to govern development in those areas." Record 22.

open space, residential development on the site is nonetheless prohibited because Policy 4.8.2 implicitly prohibits any future residential development in Widgi Creek, other than in the two areas identified in the findings supporting Ordinance 2001-047/048.

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.[8] 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,

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[8] We repeat the full text of Policy 4.8.2:

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

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 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. Accordingly, we see no point in resolving petitioner's challenges to the findings quoted at ns 6 and 7.

We do not reach the second assignment of error.

THIRD ASSIGNMENT OF ERROR

The hearings officer found that the 1983 Master Plan no longer functioned as a regulatory document, but had been superseded by the 2001 plan and zoning amendments. As a consequence, the hearings officer rejected arguments that the 1983 Master Plan's maximum limit of 210 residential units continues to apply to development within the Widgi Creek resort. On appeal to the board of commissioners, the commissioners reached the opposite conclusion.[9] That conclusion was based in part on DCC 17.16.070, which provides:

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

> "In 2001, the County created the [RC] Zone and [DCP] Policies (including Policy 4.8) under the Unincorporated Communities Planning Rule and took a 'physically developed' goal exception from Goal 4 (Forest Lands). The adopting ordinance, 2001-047/048, did not expressly define what if any role the Widgi Creek Master Plan would serve under the new [RC] zoning.
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> "* * * * *
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> "The applicant contended that the Ordinance 2001-047/048 incorporated the principal elements of the Widgi Creek Master Plan but did not intend to retain it as a regulatory document. The applicant cites a lack of any expression of intent to retain the Master Plan, and also pointed to the Comprehensive Plan policy

"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."

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for Black Butte Ranch (also within the RCZ) that expressly preserved the Black Butte Ranch Master Plan.

"The opponent HOAs argued that ordinance 2001-047/048 did not express an intent to displace or repeal the Master Plan and CUP [conditional use permit]. They pointed to discussions in the findings for the ordinance about community participation in the goal exception process that suggested that the Master Plan would survive and regulate future development within the community. They also referred to past ordinances that expressly repealed master plans, such as in the creation of the Sunriver Urban Unincorporated Community zone, as proof that the County knew how to expressly repeal a Master Plan and chose not to in this instance.

"Opponents also rely upon DCC 17.16.070 and its predecessor, which was cited in the Widgi Creek Master Plan: [citing DCC 17.16.070].

"The Board notes the absence in Ordinance 2001-047/048 of any express language to either preserve or repeal the Widgi Creek Master Plan. However, it is persuaded that even if the prior Board intended to replace the Widgi Creek Master Plan with the [RC] Zone and 2001-047/048, the ordinance did not have that effect, particularly given the express language of DCC 17.16.070 * * *. Therefore, the Widgi Creek Master Plan continues to apply to the subject property and imposes restrictions including open space percentage and overall unit cap requirements that the applicant must demonstrate compliance with." Record 18-19.

The commissioners went on to conclude that residential development within the Widgi Creek Master Plan area had, after approval of the Elkai Woods, Points West and Milepost 1 subdivisions, reached the maximum limit of 210 residential units specified in the 1983 Master Plan. Record 19-20. Accordingly, the county concluded that unless and until the 1983 Master Plan is modified, for example, to exclude the portions of the Points West or Milepost 1 subdivisions within the master plan area, the application for nine additional residential units at the Fairway site is not consistent with the 1983 Master Plan and must be denied for that reason alone. Record 20-21.

On appeal to LUBA, petitioner challenges the county's conclusion that the 1983 Master Plan remains an applicable source of approval criteria for the proposed residential development. In the alternative, petitioner argues that the county's application of the 1983 Master Plan as approval criteria violates the "Goal-Post" rule at ORS 215.427(3).

A. Preservation

Petitioner does not assign error to the commissioners' decision to consider the applicability of the 1983 Master Plan, but does suggest, in a footnote, that because petitioner did not raise any issue regarding the applicability of the 1983 Master Plan in its local appeal to the county commissioners, that issue may not have been properly presented in the local appeal under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). However, because petitioner does not develop that suggestion

further or assign error to the commissioners' consideration of the issue (indeed, in the main body of the brief petitioner urges LUBA to resolve the merits of that issue), we consider the suggestion no further.

Intervenor argues that petitioner failed to preserve an objection to the commissioners' consideration of the applicability of the 1983 Master Plan, but instead appeared to concede below that the issue was properly before the commissioners. Supplemental Record 202 ("[T]he question about whether or not the master plan remains applicable is unanswered, it's before you today * * *."). However, intervenor does not identify what principle of preservation is invoked. We could speculate that intervenor believes that petitioner affirmatively waived any objection to the commissioners' consideration of the issue, or perhaps failed to object to an alleged procedural error. Absent a more developed argument, intervenor has not demonstrated a basis to conclude that the issues raised in the third assignment of error were not preserved.

B. DCC 17.16.070

In *Widgi Creek HOA v. Deschutes County*, 71 Or LUBA 321, *aff'd* 273 Or App 821, 362 P3d 1215 (2015) (*Mile Post 1*), LUBA remanded a hearings officer's decision approving the Mile Post 1 subdivision in part for the hearings officer to reconsider whether the 1983 Master Plan applied to the proposed subdivision. That litigation was subsequently settled, and did not resolve that issue. In the present case, the hearings officer took up the question left unanswered by LUBA's remand, and concluded that the 1983 Master Plan had

been superseded by the 2001 plan and zoning amendments. However, the hearings officer did not address the applicability or effect of DCC 17.16.070. As noted, on appeal the county commissioners addressed the parties' arguments regarding the applicability of the 1983 Master Plan, and ultimately concluded, based on DCC 17.16.070, that it remained applicable.

On appeal, petitioner faults the county for failing to address the hearings officer's reasoning regarding the applicability of the 1983 Master Plan, and for failing to discuss LUBA's *Mile Post 1* decision. Petitioner also quotes the hearings officer's reasoning for concluding that the 1983 Master Plan was superseded by the 2001 amendments, and argues that the hearings officer was correct and the commissioners incorrect.

However, none of these arguments provide a basis for reversal or remand. The county commissioners were not obligated to adopt findings addressing the hearings officer's reasoning, or LUBA's *Mile Post 1* decision, in the course of explaining why the commissioners concluded that the 1983 Master Plan remains in effect. And the question is not whether the hearings officer's reasoning is better than the county commissioners', but whether petitioner identifies any legal error or inadequacy in the commissioners' findings, in particular the commissioners' reliance on DCC 17.16.070, to conclude that the 1983 Master Plan remains a source of applicable regulation for the proposed Fairway subdivision. Under this subassignment of error, petitioner does not advance any challenge to the commissioners' reliance on

DCC 17.16.070 to conclude that the 1983 Master Plan is applicable to the proposed subdivision. The commissioners' findings discuss the arguments for and against the conclusion that the 2001 amendments superseded the 1983 Master Plan, and note the absence of any express language in Ordinance 2001-047/048 to repeal the Widgi Creek Master Plan, similar to the express language the county adopted to repeal the Sunriver master plan. The commissioners ultimately relied on DCC 17.16.070 to resolve the uncertainty. DCC 17.16.070, as noted, provides that "[o]nce a master plan is approved by the County, the plan shall be binding upon both the County and the developer[.]" The commissioners clearly understood that language to require some express action on the county's part to modify or repeal the 1983 Master Plan. Petitioner offers no focused challenge to that understanding of DCC 17.16.070. Absent such a challenge, petitioner has not demonstrated that the commissioners' findings regarding the applicability of the 1983 Master Plan are inadequate or erroneous.

C. Failure to Delineate Bounds of 1983 Master Plan Area

Petitioner also argues under this subassignment of error that the county erred in applying the 1983 Master Plan without delineating the boundaries of the area that the master plan governs. As noted, there is no master plan map, and petitioner argues that the documents that the county found to comprise the 1983 Master Plan include somewhat conflicting descriptions of the area it governs. We understand petitioner to argue that uncertainty on this point may

be critical, because applying the 210-residential-unit limit from the 1983 Master Plan requires the county to know exactly how many units in the approved Points West and Mile Post 1 subdivisions lie within the area governed by the 1983 Master Plan.

The county found that eight lots of the Points West subdivision, and 10 lots in the Mile Post 1 subdivision, lie partially within the 1983 Master Plan area. Record 19-20. Petitioner does not challenge those findings, or the sufficiency of the evidence supporting them. Absent a more developed argument, petitioner has not demonstrated that any uncertainty regarding the precise boundaries of the master plan area affects the question of how many residential units presently exist within the master plan area, or that the county erred in failing to determine the precise boundaries of the master plan area.

D. Fixed Goal-Post Rule

Finally, petitioner argues that the commissioners erred in applying the 1983 Master Plan, because denying the application under the 1983 Master Plan violated ORS 215.427(3)(a), the so-called Goal Post rule.

ORS 215.427(3)(a) provides in relevant part that "approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted." ORS 215.427(3) is intended to assure the parties to a land use proceeding that the regulations that apply to the application remain constant during the proceedings. *Davenport v. City of Tigard*, 121 Or App 135, 854 P2d 483 (1993). One way that a county

can violate ORS 215.427(3) is to approve or deny a permit application based on an approval standard that was deemed not to be applicable on the date the application was first submitted. *See Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998) (a city violates the goal post rule in denying a permit application based on a code standard that the city council, the city attorney and city planning staff had previously deemed to be superseded).

Petitioner argues that, until the present case, the county has not applied the 1983 Master Plan as a source of approval criteria for a subdivision of land since the adoption of the RC zone in 2001. Petitioner argues that, prior to the commissioners' decision in this case, the only other county decision-maker to consider the applicability of the 1983 Master Plan was the hearings officer, who in two decisions (the decision that lead to LUBA's *Mile Post 1* decision, and the underlying decision in the present case) concluded that the 1983 Master Plan had been superseded by the 2001 amendments. According to petitioner, this history indicates that on the date petitioner submitted the present application, the 1983 Master Plan had been deemed not to constitute "standards and criteria that were applicable at the time the application was first submitted."

Intervenor responds, and we agree, that petitioner had not established that the county violated ORS 215.427(3)(a). DCC 17.16.070 was adopted long before the application was filed, and was in effect when the 1983 Master Plan was adopted. Petitioner has not challenged, at least in any way we understand,

the commissioners' conclusion that DCC 17.16.070 operates to provide that the 1983 Master Plan continues as a source of applicable standards, and was not superseded by the 2001 amendments. While the hearings officer concluded that the master plan had been superseded by the 2001 amendments in the decision that led to LUBA's *Mile Post 1* decision, LUBA remanded the hearings officer's decision to reconsider that same conclusion. At the time petitioner submitted the present application, there was no final decision from any county authority that the 1983 Master Plan had been superseded. At best, there was uncertainty on that point. During the present proceedings, the parties recognized that uncertainty, and provided arguments for and against application of the 1983 Master Plan. The hearings officer agreed with petitioner that the 1983 Master Plan had been superseded, but the hearings officer was not the final decision maker in this case. The commissioners ultimately concluded, after additional argument from the parties during a *de novo* review hearing, that the 1983 Master Plan had not been superseded, and by operation of DCC 17.16.070 continues as a source of approval standards for petitioner's application. As discussed above, petitioner has demonstrated no error in that conclusion. Because the applicability of the 1983 Master Plan was, at most, an undecided issue at the time petitioner filed the application, and a live issue throughout the proceedings below, the county commissioners did not "change the goal posts" by deciding that issue in this decision, and concluding that the 1983 Master Plan did apply. Thus, the present

circumstances are distinguishable from those in *Holland*, 154 Or App 450, where prior to the application the city council had previously affirmed in a final decision that the code standard at issue had been repealed, and city staff had, throughout the local proceedings on the application, taken the position that the code standard was not applicable.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the county committed procedural error, when the chair of the board of county commissioners met twice with planning staff to discuss the evidence and issues on appeal. Petitioner speculates that during these private meetings planning staff provided the chair with new evidence not already in the record.

ORS 215.422(4) exempts communications between staff and decision-makers from the scope of *ex parte* contacts that must be disclosed under that statute. Nonetheless, a county can commit procedural error requiring remand if a staff communication to a decision-maker includes new evidence outside the record that is relied upon to approve or deny the application. *Wal-Mart Stores v. City of Oregon City*, 50 Or LUBA 87, 98-99 (2005); *DLCD v. Umatilla County*, 39 Or LUBA 715, 733 (2001); *Wicks v. City of Reedsport*, 29 Or LUBA 8, 17 (1995). In the present case, however, petitioner offers nothing but speculation that staff communications with the chair involved new evidence outside the record. Petitioner cite nothing in the decision or the record, or

anything outside the record, suggesting that staff provided new evidence to the chair, much less that any new evidence provided played some role in the commissioners' decision. Accordingly, petitioner's arguments do not provide a basis for reversal or remand.

The fourth assignment of error is denied.

The county's decision is affirmed.