

**HEARINGS OFFICER**

**DECISIONS**

**PROJECT NUMBERS:** PLSPR20220270 (Phased Site Plan Review)  
PLCUP20220284 (Conditional Use Permit)  
PLCUP20220285 (Conditional Use Permit)  
PLMISC20220729 (Waiver of Public Improvement Standards)

**HEARING DATE:** November 18, 2022 9:30 a.m.

**APPLICANT/ OWNER:** Colvin Oil LLC  
2520 Foothill Boulevard  
Grants Pass, OR 77526

**ARCHITECT:** Kenneth J. Diener  
KJD Architecture pc  
670 SW Tanglewood Cir  
McMinnville, OR 97128

**LOCATION:** 61095 Brosterhous Road, Bend OR 97702; Deschutes County Assessor’s Map 18-12-16B0, Tax Lot 00600.

**REQUESTS:** PLSPR20220270: Phased Site Plan Review application for a mixed use development in the Commercial Convenience (CC) zone.  
PLCUP20220284: Conditional Use Permit for the market/convenience store and fuel station.  
PLCUP20220285: Conditional Use Permit for a drive-through food use.  
PLMISC20220729 Waiver of Public Improvement Standards

**STAFF REVIEWERS:** Heidi Kennedy, AICP, Senior Planner  
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**I. APPLICABLE CRITERIA, STANDARDS, AND PROCEDURES:**

City of Bend Development Code

**Criteria**

Chapter 4.2; MDS Review, Site Plan Review and Design Review  
Chapter 4.4; Conditional Use Permits

## Standards

Chapter 2.2; Commercial Zoning Districts  
Chapter 3.1; Lot, Parcel and Block Design, Access and Circulation  
Chapter 3.2; Landscaping, Street Trees, Fences and Walls  
Chapter 3.3; Vehicle Parking, Loading and Bicycle Parking  
Chapter 3.4; Public Improvement Standards  
Chapter 3.5; Other Design Standards  
Chapter 3.6; Special Standards and Regulations for Certain Uses  
Chapter 4.4; Conditional Use Permits  
Chapter 4.7; Transportation Analysis

## Procedures

Chapter 4.1; Development Review and Procedures

## II. GENERAL FINDINGS OF FACT:

**A. LOCATION:** 61095 Brosterhous Road, Bend OR 97702; Deschutes County Assessor's Map 18-12-16B0, Tax Lot 00600 (the "Subject Property")

**B. ZONING & COMPREHENSIVE PLAN DESIGNATION:** The Subject Property is zoned Commercial Convenience ("CC") and designated CC on the Bend Comprehensive Plan map.

**C. SITE DESCRIPTION & SURROUNDING USES:** The Subject Property is a 2.69 acre, flat and vacant property at the southwest corner of Murphy Road and Brosterhous Road.

The property across Murphy Rd to the north is zoned RS Standard Density Residential and is built out with single-unit homes whose rear or side yards adjoin Murphy Road. The RE Jewell Elementary school is located, according to the Staff Recommendation, over 1100' to the NW, off of the access road Slalom Way, across from the NW corner of the Subject Property. Adjacent to the west side of the Subject Property is property zoned RS. It is owned by the City of Bend and developed as a utility facility site. To the south of the Subject Property is a Trailer Park RV site ("RV Site") which is RS-zoned with Manufactured Home Park Redevelopment Overlay, There is a city-required cross access connection across the Subject Property to allow this southern property to access the Subject Property's Murphy Road access driveway. The driveway apron already constructed was located and built with the traffic circle improvements by the City of Bend for the Subject Property. There is a second cross access designated to connect to the smaller CC zoned parcel to the Subject Property's SE corner. This access will allow the smaller CC neighboring property access to the Brosterhous right-in and right-out driveway that was also located and constructed when the City of Bend developed the Brosterhous traffic circle street frontage improvements. To the East of the Subject Property, across from the Brosterhous Road frontage, are two RS- zoned lots with their side and rear lot lines facing the Brosterhous frontage of the Subject Property.

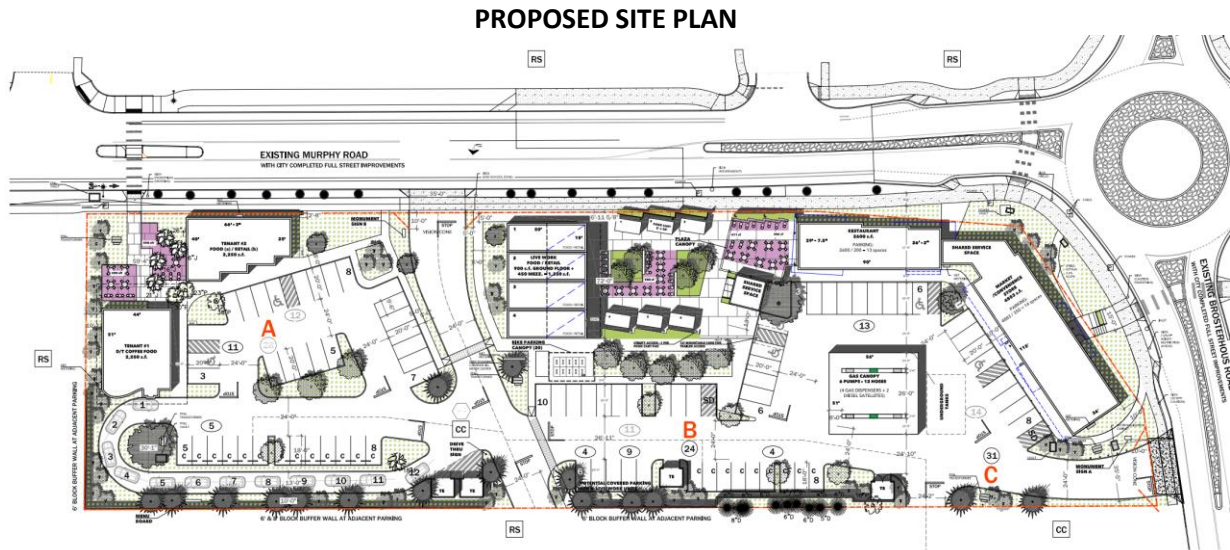
**D. PROPOSALS:**

PLSPR20220270: Phased Site Plan Review application for a mixed-use development in the Commercial Convenience zone.

PLCUP20220284: Conditional Use Permit for the market/convenience store and fuel station.

PLCUP20220285: Conditional Use Permit for a drive-through food use.

PLMISC20220729: Waiver of Public Improvement Standards



**E. PUBLIC NOTICE AND COMMENTS:**

On October 27, 2022, the City of Bend Planning Division sent notices of the requests to the designated representatives of the Old Farm District Neighborhood Association (“OFDNA”) and the Southeast Bend Neighborhood Association (“SEBNA”), and to the surrounding property owners and addresses within 500 feet of the Subject Property as shown on the most recent property tax assessment roll. Notice of the request was also posted on the Subject Property. In response, the City of Bend received two emails and one letter from the SE Bend Neighborhood Association objecting to the proposed applications. Concerns raised include, traffic, noise and light pollution, loss in property values, and concerns with bike and pedestrian safety due to proposed traffic intensive uses. The City of Bend Planning Division also provided notice to various participating agencies, and their comments are contained in the project file and were considered in these decisions.

**F. LOT OF RECORD:** The Subject Property is one legal lot of record identified as Tax Lot 600 on Deschutes County Assessor’s Map 18-12-16B0. In 1965 it was lawful to create parcels by deed. The 1965 deed was recorded with the Deschutes County Clerk and contains a single legal description. The parcel was not created solely by tax lot segregation, section or township line or right-of-way, unrecorded subdivision or foreclosure. As a result, the Hearings Officer finds that the Subject Property is a lot of record.

**G. APPLICATION ACCEPTANCE DATE:** This package of land use applications was submitted to the City of Bend on April 14, 2022. The applications were initially deemed incomplete on May 2, 2022, and then formally accepted as complete on October 21, 2022.

### III. PRELIMINARY ISSUES & FINDINGS

#### A. PRELIMINARY PROCEDURAL ISSUE

##### 1. Request to Reopen Record

Karon Johnson (“K. Johnson”) (Hearings Officer Note: the submission is dated November 7, 2022 but likely submitted December 7, 2022) requested:

*“that you give me a reasonable extension of time to file a response to Applicant’s new exhibits. Monday, December 12 at 5 p.m. would be adequate for me to examine them and write a reply.”*

Daniel Kearns (“Kearns”), attorney for the SE Bend Neighbors for Responsible Development (“SE BNRD”) submitted a written request (December 7, 2022, page 2) stating:

*“the record closes to general comment today (Dec 7). If the applicant submits new substantive evidence by today’s submission deadline, I hereby assert the right to review and rebut that new evidence with further comment, which I first asserted at the November 18<sup>th</sup> hearing.”*

Kearns, at the November 18, 2022 hearing (the “Hearing”), requested that the record remain open for the submission of additional evidence/argument. Applicant’s legal counsel agreed to keeping the record open for the standard “7/7/7” time period. The Hearings Officer, consistent with BDC 4.1.885, kept the record open for new evidentiary submissions for 12 days (until 5:00 p.m. November 30, 2022 – the “Initial Open Record Period”), an additional 7 days for responsive evidentiary submissions (until 5:00 p.m. on December 7, 2022 – the “Responsive Open Record Period”) and an additional 7 days for Applicant’s submission of a final argument (until 5:00 p.m. on December 14, 2022 – the “Final Argument Open Record Period”).

K. Johnson, in her above-referenced objection document (assuming the correct letter date was December 7, 2022), indicated that she submitted her final rebuttal evidence *“this afternoon.”* K. Johnson stated that a few minutes before 5:00 p.m. Applicant submitted additional exhibits as its “final record submittal.” K. Johnson stated that *“some of these [Applicant’s] exhibits contain technical information and are quite extensive.”*

The Hearings Officer takes notice of an Oregon Land Use Board of Appeals (“LUBA”) opinion involving a prior land use decision issued by this Hearings Officer *Gould v. Deschutes County*, LUBA 2021-112 (2022) @ page 27. LUBA, in *Gould*, summarized the law related to reopening the record as follows:

*“Generally, parties in quasi-judicial land use proceedings have a right to present and rebut evidence. Fasano v. Washington Co. Comm., 264 Or 574,588, 507 P2d 23 (1973). However, ‘there is no unlimited right to rebut rebuttal evidence, and Fasano does not require endless opportunities to rebut rebuttal evidence.’ Rice v. City of Monmouth, 53 Or LUBA 55, 60 (2006), affd, 211 Or App 250, 154 P3d 786 (2007).”*

The Hearings Officer takes notice of ORS 197.797(6). ORS 197.797(6) sets out the minimum procedures that a government land use planning body is required to follow when conducting quasi-judicial land use hearings (See, *Emmert v. Clackamas County*, LUBA No. 2011-052). Specifically, ORS 197.797(6)(c) provides that land use hearing participants must be given an opportunity to rebut evidence submitted during a “first” open-record period.

The Hearings Officer finds that all participants in this case were given an opportunity to submit evidence (Initial Open Record Period) and to submit evidence responsive to that entered into the record during the Initial Open Record Period (the Responsive Open Record Period). The Hearings Officer finds that the BDC and 197.767 (6) requirement to allow hearing participants an opportunity to rebut evidence was followed by establishing the Responsive Open Record Period.

The Responsive Open Record Period assured all participants right to submit evidence in response to evidence submitted during the Initial Open Record Period. The Hearings Officer also notes that the only evidence allowed to be submitted during the Responsive Open Record Period is evidence that is responsive to that offered during the Initial Open Record Period.

K. Johnson and the Applicant both exercised their right to submit responsive evidence during the Responsive Open Record Period. Based upon K. Johnson’s letter the Applicant submitted its responsive evidence after she submitted her responsive evidence. Both K. Johnson and the Applicant submitted responsive evidence within the time limit granted by the Hearings Officer.

The Hearings Officer finds that Applicant’s submission of its responsive evidence just prior to the Responsive Open Record Period deadline, and after K. Johnson’s responsive evidence submission, does not substantially prejudice any identified K. Johnson right.

The Hearings Officer finds that Kearns statement that if Applicant submitted “new” evidence (compared to responsive evidence) during the Responsive Open Record Period then the record may be reopened to respond to that “new” evidence is a correct statement of the law. The only evidence allowed to be submitted during the Responsive Open Record Period is evidence that is “responsive” to evidence submitted during the Initial Open Record Period. “New” evidence that is not responsive to evidence submitted in the Initial Open Record Period is not allowed during the Responsive Open Record Period. The Hearings Officer reviewed all Applicant submissions made during the Responsive Open Record Period and found no “new” evidence had been submitted by Applicant. The Hearings Officer found all evidence submitted by Applicant during the Responsive Open Record Period was “responsive” to evidence submitted during the initial open-record period.

The Hearings Officer denies K. Johnson’s request to reopen the evidentiary record. The Hearings Officer finds that it is unnecessary to reopen the record, based upon Kearns’s above quoted comments, because no “new” evidence was submitted by Applicant during the Responsive Open Record Period.

**B. PRELIMINARY SUBSTANTIVE ISSUES**

**1. Project Exempt From Traffic Analysis**

Kearns, attorney for SE BNRD, provided the following argument that the Applicant, in these cases, was “not exempt” from submitting a traffic impact analysis:

*“The applicant asserts that no Traffic Impact Analysis is needed because the project is exempt from this requirement that normally applies pursuant to BDC 4.7.500(B)(1)(c). However, that section only exempts ‘[i]ntersections within the study area that had significant capacity improvements constructed within the five years preceding the application date.’ Thus, the Murphy Road/Brosterhous Road intersection may be exempt, but not the project. The project must still perform and provide a fully compliant TIA.”*

This argument, or a variation of the argument, was made by a number of others in opposition to the Applicant’s proposed projects (i.e., Rick Nys, PE. traffic consultant to SE BNRD, Richard Smith [email – 11/12/22], Kevin Johnson [email dated 11/17/2022] and Dan Crossman [submission dated 11/15/2022]). The Rick Nys (“Nys”) Hearing testimony and record submissions (i.e., November 18, 2022 and December 7, 2022) provided the most comprehensive opposition analysis and discussion of the “Exempt from Traffic Analysis” issue. The Hearings Officer also takes note of Kearns’ argument (December 7, 2021, page 2, Item 4) argument titled “Code definition of Major Intersections and which intersections should be studied.”

Applicant and opponents (i.e., Nys, November 18, 2022, pages 6-7 and December 7, 2022, page 2) argue that BDC 4.7.500 applies to the “Exempt from Traffic Analysis” issue. BDC 4.7.500 B.1.c.i. states:

*“Intersections within the study area that had significant capacity improvements constructed within the five years preceding the application date or are included for construction in the City’s five-year CIP are exempt from analysis in a Traffic Impact Analysis. For the purposes of this section, “significant capacity improvements” means construction of intersection improvements that change the form or add significant capacity to an intersection, including changing the intersection form to a roundabout or adding lane capacity.”*

As noted in the Kearns quoted comments above numerous opponents argue that the “project” is not exempt from traffic analysis. Kearns seemed to acknowledge that certain intersections, those with significant capacity improvements, do not need to be included in Applicant’s traffic analysis. However, Kearns asserted that Applicant did not conduct the necessary analysis on relevant “non-exempt” intersections. The Hearings Officer agrees with Kearns that BDC 4.7.500 B.1.c.i does not “exempt” an applicant from analyzing all intersections, rather it exempts only specifically described intersections.

Applicant and opponents appear to have agreed that the Murphy Road/Brosterhous Road intersection is “exempt.” However, opponents, through traffic engineer Nys, asserted that a number of other intersections are “not exempt” and therefore must be included in Applicant’s traffic analysis.

The Hearings Officer will now address the specific intersections that Nys argued should have been analyzed. Nys (November 18, 2022, page 7), a traffic engineer, stated the following:

*“All of the following intersections are major intersections per the BDC and within one mile of the site and were not included in the TIA. The applicant should be required to illustrate, after reassessing their trip generation and trip distribution, that these intersections are not affected by 50 or more peak hour trips from the development.”*

Nys followed his argument with the following list of major intersections “per the BDC and within one mile of the site” that were not included in the TIA. Nys list includes the following:

- *Murphy Road/Brown Trout Place*
- *Murphy Road/Shalom Way*
- *Murphy Road/Country Club Drive*
- *Murphy Road/Tapadara Street*
- *Murphy Road/Benham Road*
- *Murphy Road/Parr Lane*
- *Murphy Road/Parrell Road*
- *Murphy Road/Broadmoor Way*
- *Murphy Road/Old Murphy Road*
- *Brosterhous Road/Goldenrod Lane*
- *Brosterhous Road/Snapdragon Lane*
- *Brosterhous Road/Basketflower Place*
- *Brosterhous Road/Button Brush Avenue*
- *Brosterhous Road/Songbird Lane*
- *Brosterhous Road/Sun Meadow Way*
- *Brosterhous Road/Jacklight Lane*
- *Brosterhous Road/Foxborough Lane*
- *Brosterhous Road/Conifer Avenue*
- *Brosterhous Road/American Lane*

Joe Bessman (“Bessman”), a traffic engineer employed by Applicant, provided the following statement related to the “Exempt from Traffic Analysis” issue and “major intersections:”

*‘Bend Development Code Chapter 1.2 further defines a Major Intersection as:*

*‘an intersection where at least one intersecting road is classified as a collector or arterial.’*

*The City’s Functional Classification Map identifies expressways, arterials, collectors and local streets. The map in Figure 4 contains an approximate one-mile radius from the site upon the City’s Functional Classification Map. All collector and arterial intersections within this range qualify as Major Intersections for the purposes of this study.*

*As shown in the figure, intersections that are located within this 1-mile radius include the following:*

- *SE 15th Street/SE Ferguson Road*
- *SE 15th Street/Murphy Road*
- *SE 15th Street/Caldera Drive*
- *SE 15th Street/Knott Road*
- *SE Brosterhous Road/SE American Lane*
- *SE Brosterhous Road/SE Murphy Road*
- *SE Brosterhous Road/SE Caldera Drive*
- *SE Brosterhous Road/SE Knott Road*
- *SE American Lane/Chase Road (Future Extension)*
- *SE Murphy Road/SE Parrell Road*
- *SE Murphy Road/SE Country Club Drive*

*These major intersections represent the maximum study area for the proposed development. Those intersections within this one-mile radius impacted by 50 or more weekday p.m. peak hour trips will be included as Study Intersections within the Transportation Impact Analysis that follows.”*

The Hearings Officer finds that Nys provided no comprehensive analysis of the specific intersections listed above and how those specific intersections met the definition of “major intersections.” The Hearings Officer finds Nys statement that the list was “per the BDC” is not supported by substantial evidence.

Bessman (February 28, 2022, page 12) also provided a map (Figure 4. City of Bend Functional Classification Map). The Hearings Officer confirmed that Figure 4 represented the relevant City of Bend Functional Classification Map. Bessman (November 22, 2022, Table 1, page 16) addressed each of the intersections represented by Nys as being major intersections that were not analyzed by Applicant. Finally, Bessman cited (November 22, 2022, page 17) a City Engineering staff comment which stated:

*“I agree. The City confirms the intersections that need to be analyzed during the TFR analysis. If something was missed, it would have been brought up during the TIA analysis and/or made into a mitigation in the TAM.”*

The Hearings Officer, based upon the evidence in the record, finds that Applicant’s traffic consultant (Bessman) statements/analysis/conclusions are credible and constitute substantial evidence that all intersections, particularly major intersections, that were required to be considered and analyzed by BDC 4.7.500 were considered and analyzed. The Hearings Officer finds the opposition traffic consultant’s (Nys) statements/analysis/conclusions are less credible than those offered by Bessman.

The Hearings Officer finds Kearns’, Nys’ and opponent’s “Exempt from Traffic Analysis” argument is not persuasive. The Hearings Officer finds the Applicant did analyze all intersections required by BDC 4.7.500.

## **2. Internal Capture Methodology**

Kearns” (attorney for SE BNRD), provided the following argument that the Applicant failed to properly apply “Internal Capture Methodology.”

*“The original TIA assumed a 18% internal capture rate as a means to reduce the site’s overall trip generation rate. While internal capture of trips is a recognized and legitimate factor when estimating a site’s overall trip generation, the applicant’s assumed 18% reduction is not justified based on national standards. BDC 4.7.400(B)(2)(e) accommodates the notion of internal capture but requires validation of the rate used. Again, the code controls, and the Hearings Officer must require compliance with its requirements.*

*The whole concept of trip generation for the development of this site is important because the site’s overall trip generation dictates the geographic extent to the TIA survey area. See BDC 4.7.500. The opponents’ traffic engineer’s November 18th report explains several ways that the applicant’s transportation engineer reduced the site’s overall trip generation estimate, which resulted in an artificially small geographic range for the TIA’s survey area. BDC 4.7.400(B)(2)(e) still requires some measure of ground-truthing to validate an assumed trip capture rate, and the Hearings Officer is obligated to apply and follow the code.”*



Nys, the SE BNRD traffic consultant, addressed the “Internal Capture Methodology” (November 18, 2022, pages 4 & 5) as follows:

*“NCHRP 8-51 methodology is reported in NCHRP 684[ footnote omitted]. NCHRP 684 makes it clear that the internal capture methodology of NCHRP 684 is not appropriate for all mixed use sites. Step 1 of the methodology is to ‘Determine Whether the Methodology Is Appropriate for Your Application.’*

*NCHRP 684 states that ‘Development Size: The [mixed use development] should have at least 100,000 sq ft of building space within an overall acreage of up to roughly 300 acres.’ The site does not have anywhere close to 100,000 square feet of building space and is well short of 300 acres. Therefore, relying on the methodology of NCHRP 8-51/NCHRP 684 is not appropriate for this location. Table 1 of the TIA inappropriately relies on a significant internal trip reduction of 86 weekday PM peak hour trips compared to the 140 new trips.”*

Nys, in a December 7, 2022 rebuttal submission, stated:

*“The applicant’s traffic engineer has noted that the internal capture methodology of the TIA is acceptable. In their response, the applicant’s traffic engineer did not respond to the NCHRP criteria I previously noted that states “The [mixed use development] should have at least 100,000 sq ft of building space.” I agree that there will be internal capture trips as part of this development. However, I don’t agree the NCHRP methodology would lead an analyst to conclude that the NCHRP methodology is appropriate for this site as the development has far less than 100,000 square feet of building area. Based on that information, I question the validity of the 18% internal capture rate that is based solely on that methodology. I do not question that some internal trips will occur. The BDC offers language to address internal capture trips.”*

Bessman, Applicant’s traffic consultant, offered the following responsive comments related to the opponents’ “Internal Capture Methodology” argument (November 29, 2022, pages 11 & 12):

*“Internal trips refer to trips between adjacent on-site uses that do not affect the public transportation system. As the ITE is based on surveys of isolated suburban sites with low modal splits, this is critical to avoid over-assessing transportation impacts with an additive approach. The internal trip generation methodology employed in the TIA reflects National Cooperative Highway Research Project 08- 51, prepared by the Texas Transportation Institute, which is a methodology that is described within NCHRP Report 684. This methodology updated the original internal trip methodology first identified within the ITE Trip Generation Handbook to include a wider range of land use classifications, as it sought to improve the accuracy of these internal rates for application within mixed-use developments. This methodology also accounts for travel distances, multimodal trips, and vehicle occupancy as additional factors that were not included within the original ITE methodology.*

*Contrary to the assertions from the opposition, the NCHRP Project 08-51 methodology is not limited to sites with 300 or more acres, and the report specifically states that one criterion for selecting sites includes those that are “300 to 500 acres or less,” with the actual data collection efforts that informed this research based on sites ranging between 7 to 300 acres in size.[footnote omitted] The data collection methodology for surveys of additional sites to add to the database specifically states that future sites continue to remain below the 300- to 500-acre size. Accordingly, the opposition*

*argument that because our site is not more than 300 acres these internal rates are not applicable is literally the opposite of what the research states.*

*At this time, this internal trip methodology remains the most appropriate means of identifying internal capture within mixed-use developments and the most accurate. From a practical standpoint it would be inappropriate to assume that every site patron stopping to purchase fuel would make a separate trip to get coffee, and a separate trip to later use the food cart pod or visit the brew pub/restaurant. The application of internal trip rates based on this methodology is documented in the submitted Transportation Impact Analysis and result in an expected internal trip rate of 18%, as correctly applied in the analysis. No changes are provided in response to this comment.*

*These ITE-based trip generation methodologies are limited in how they apply to a commercial site within an entirely residential area. While the traffic study assumes all trips are additive, providing the internal trip exercise in review of the broader market area (that would extend beyond the circle drawn) that is currently devoid of any commercial development would further highlight the value in developing this community commercial node (see Figure 5). Not only will this site reduce vehicular trip lengths, but it increases the possibility of reducing additive trips to the larger street system outside this circle and provides for multimodal trips as it is located along a supportive low-stress walking and cycling route.”*

The Hearings Officer finds that Kearns argument that the Applicant’s traffic studies did not “validate” its conclusions is a problematic argument. The validation argument is problematic because neither Kearns or Nys cite any measurable, objective or otherwise applicable process to measure when evidence in the record “validates” an estimate of an internal capture rate.

The Hearings Officer finds that the concept of “internal capture rate” is relevant in this case. Both Kearns and Nys simply say that using the *NCHRP 8-51/NCHRP 684* methodology is not appropriate. Neither Kearns or Nys point out any particular part or sections of the *NCHRP 8-51/NCHRP 684* are not appropriate methodology(s). Without providing the Hearings Officer with specific/identifiable “problems” with the *NCHRP 8-51/NCHRP 684* methodology the Hearings Officer cannot assess whether the *NCHRP 8-51/NCHRP 684* is, or is not, appropriate.

Kearns “ground-truthing” comment is without explanation or definition. Kearns also argued that the *NCHRP 8-51/NCHRP 684* methodology is not a national standard. That may be true but the Hearings Officer cannot and will not rely upon an attorney’s conclusionary statement such as “it is not a national standard.”

The Hearings Officer finds that Nys statement that the *NCHRP 8-51/NCHRP 684* only applies to projects of at least 100,000 square feet is simply incorrect. Bessman referenced (November 29, 2022, page 12, footnote 1) the *NCHRP 8-51/NCHRP 684* in the context of the applicability of the *NCHRP 8-51/NCHRP 684* to projects of less than 100,000 square feet in size. The Hearings Officer reviewed the “Application in Practice Estimation Methodology and Data-Collection Framework” section of *NCHRP 8-51/NCHRP 684* and confirmed that Bessman’s statement is factual and accurate. The Hearings Officer finds Nys suggestion that the *NCHRP 8-51/NCHRP 684* cannot be applied because of the size of the Applicant’s proposed project is not accurate.

The Hearings Officer acknowledges that traffic engineering professionals may not agree when it comes to when application of the *NCHRP 8-51/NCHRP 684* methodology is appropriate (or the weight it should be given). However, in a land use case the Hearings Officer is given the authority to weigh evidence based upon credibility and other factors. Based upon the Hearings Officer's review of the evidence in the record related to the "internal rate methodology" argument the Hearings Officer finds that the Bessman evidence is more credible and persuasive than that offered by Nys.

The Hearings Officer finds that Bessman's "internal capture rate" estimate is credible and based upon substantial evidence and also upon his professional opinion. The Hearings Officer finds, based upon the evidence in the record of this case, that Applicant's/Bessman's "internal capture rate" for the proposed project is reasonable and appropriate.

### **3. Block length and perimeter standards**

The Applicant requested an exception to BDC 3.1.200 block and perimeter standards primarily because of the existence of the fully developed RV park located immediately south of the Subject Property. Nys, the SE BNRD traffic consultant, provided a good summary of the Applicant's arguments and his professional responses related to the "Block length and perimeter standards" argument. Nys (December 7, 2022, page 3) stated the following:

*The applicant's traffic engineer argues:*

*'The roads on the property to the south are private roads so it is impossible to provide a connecting network of public streets in this location. The access points onto the abutting Minor Arterial streets are set, as are the private connections to the south. The proposed development provides a complete walkway along the east side of the Murphy Road access but matches into the narrow and uncurbed drive aisles with the Crown Villa RV Resort.'*

*The BDC is clear in that in order to meet these standards, a public road is not required to be constructed, but a private street meeting the requirements of a public road may be constructed. It is certainly possible that the RV park to the south could redevelop and/or the private streets reconstructed. Based on the applicant's argument, the city would rarely require to make the standard street connections and meet block and perimeter standards when intersecting with underdeveloped properties that may redevelop in the future. That may be a valid argument, but seems short-sighted in light of the BDC's intent to create a well connected transportation network that serves all modes.*

*The applicant's traffic engineer further states:*

*'The access provides a narrowed pavement width of 24-feet (standard for a two-way access) within a curbed pavement section to help manage speeds (in lieu of a 36-foot wide public commercial street), resulting in narrowed pedestrian crossings, and supporting a low-speed 'parking lot' environment while meeting the area connectivity needs. Bisecting the site with a more formalized commercial street design would create higher-speed conflicts within this retail site that would conflict with connectivity goals.'*

*It should be reiterated that the BDC requires these block and perimeter standards and this is how development is supposed to be constructed in the City of Bend. The purpose is not to create a*

*‘parking lot environment,’ but to create street connections. While the kind of street that the BDC requires may not fit with how the developer envisions their site, the BDC standards exist for a reason and presumably for the public good. I fail to recognize how constructing streets to meet the BDC would conflict with connectivity goals when it is the adopted code.*

Nys also addressed his “block standard” argument in his November 18, 2022 record submission (pages 13-15)

BDC 3.1.200 (D)(2)(d) states:

*“An exception may be granted to the maximum block length and/or block perimeter by the Review Authority if the applicant can demonstrate that the block length and/or block perimeter cannot be satisfied due to topography, natural features, existing development or other barriers, or it is unreasonable to meet such standards based on the existing pattern of development, or other relevant factors. When an exception is granted, the Review Authority may require the land division or site plan to provide blocks divided by one or more access corridors in conformance with the provisions of BDC 3.1.300 Multi-Modal Access and Circulation. Access corridors must be located to minimize out-of-direction travel by pedestrians and bicyclists and must meet all applicable accessibility standards.”*

The Hearings Officer interprets BDC 3.1.200 (D)(2)(d) as allowing (“may be granted”) an exception if an applicant can demonstrate **either** (1) it *cannot* meet the block length and/or block perimeter requirements due to topography, natural features, existing development or other barriers **or** (2) the applicant can demonstrate that it is *unreasonable* to meet the standards based on the existing pattern of development, or other relevant factors.

The record of this case contains a number of maps and simulation diagrams. Applicant’s Site Plan Layout (See, Transight Consulting, February 28, 2022 Figure 2) and Architectural site renderings (Transight Consulting, February 28, 2022, Figure 3) (See also Staff Recommendation, page 3) clearly displays the relationship of the Subject Property and Applicant’s proposed site layout with the development features of properties in the immediate vicinity of the Subject Property. The one access road connecting to Murphy Road, from the subdivision located north of the Subject Property, is named Brown Trout Place. Brown Trout Place enters Murphy Road at a location where there is a center lane divider. Brown Trout Place cannot practicably be extended directly south into the Subject Property because of the intervening barrier. The single proposed access point designated into the Subject Property does not line up with any existing roadway to the north. This access point was designed and approved by the City of Bend as part of the recent Murphy Road improvement project. The Hearings Officer finds Applicant cannot practicably connect access into the Subject Property which will connect to an existing roadway to the north.

The Hearings Officer finds that Nys and Applicant agree that there is development to the south of the Subject Property; the RV Site where a RV park, with private roadways, is located. The Hearings Officer also takes note that the RV Site is zoned RS with a Manufactured Home Park Redevelopment Overlay (See Chapter 2.7, Article VIII, 2.7.910 et seq.). While the Manufactured Home Redevelopment Overlay zone does not guarantee that the existing RV park use is guaranteed to remain on the RV Site the Hearings Officer finds that the aspirational/encouragement language of BDC 2.7 does suggest that a RV/mobile home/manufactured home use may continue for the foreseeable future.

Kearns stated, in his “Block length and perimeter standards” argument, that the existing RV Site should be treated similar to a parcel of undeveloped land. The Hearings Officer disagrees with that statement. The Hearings Officer finds the developed residential community to the north is analogous to the development on the RV Site; both are developed with residential uses. The Hearings Officer does not believe that a suggestion that the developed residential community to the north of the Subject Property should be considered as vacant land for the purposes of transportation planning (i.e., connectivity, block lengths, etc.) would be appropriate in the context of BDC 3.1.200 (D)(2)(d). The simple fact is the RV Site *is* developed and the RV Site development reflects the reality of existing conditions to the south of the Subject Property.

The Hearings Officer finds that BDC 3.1.200 (D)(2)(d) allows a block waiver if “it is **unreasonable** to meet such standards based on the existing pattern of development” (bold emphasis added by the Hearings Officer). The Hearings Officer finds the quoted section does not require a demonstration of “cannot” develop because of existing development but rather requires a showing of a lesser standard. This section allows an exception to the block length and perimeter standards to be approved if existing development makes strict application of block standards *unreasonable*. The Hearings Officer finds the existing RV (mobile home) park, which is located on land with a “Manufactured Home Park Redevelopment Overlay” zone, makes it *unreasonable* to require strict adherence to the block length and perimeter requirements set forth in BDC 3.1.200.

Applicant’s legal counsel (Final Argument, December 14, 2022, page 6) provided additional perspective to the block length argument. Applicant’s counsel stated:

*“It is important to understand what is required by the City block rules, in order to understand why it is impossible for the applicant to create blocks that comply with BDC 3.1.200(D). BDC 3.1.200(D)(1) requires that new development must construct and extend planned streets in their proper projection to create ‘continuous through streets and provide the desirable pattern of orderly developed streets and blocks.’ ‘Block length’ is defined by BDC 1.2, Definitions as ‘the distance along a street between the centerline of two intersecting through streets from lot line to lot line.’*

*The creation of a north-south street stubbed to the adjacent Sun Outdoors recreational vehicle (‘RV’) park (Tax Lot 700) across the subject property will not create continuous through streets for two reasons. First, land north of the subject property is fully developed as a residential subdivision of single-family homes without a street connection to Murphy Road north of the Murphy Road access to the subject property. The intersection of the dividing road and Murphy Road would not create a through street. Second, the creation of a road on the subject property will not create a continuous through street because the land to the south of the subject property is developed as an RV park. RV park roads are private roads not open for use as ‘through streets’. The creation of such a north-south road therefore, would also not achieve compliance with block perimeter rules. Even if Sun Outdoors roads were open to use by the public they would not form a block that would qualify for use in meeting block length standards. This is evident from the map filed with the City by Ms. Johnson in her rebuttal memorandum.*

The Hearings Officer finds the above-quoted Applicant argument to be credible and persuasive. The Hearings Officer finds that Applicant’s request for a block length waiver should be approved because of the existing development constraints described above.

#### **4. Build-out Time (2 years v 5 years)**

This opposition “Build out time” argument is summarized by Kearns (SE BNRD attorney) as follows:

*“In his November 18th memo, Rick Nys explained the disconnect in the applicant’s materials between the 5-year buildout period allowed by the City Code for this commercial development and the 2-year build-out scenario that the applicant’s transportation engineer analyzed. In his rebuttal, the applicant’s transportation engineer acknowledges the fact that the City Code allows build-out of this project over 5 years but offers a 2.5% annual growth in background traffic in the analysis, rather than accounting for actual approved master planned and similar large developments.*

*Nonetheless, BDC 4.7800(B)(5)(a) still requires a traffic impact analysis that takes into account traffic from projects within the study area that have received approvals for development – approved master plans, land divisions, site plans, conditional use permits and similar approvals – plus an annual growth factor of 2.5%. Despite objections from the applicant’s transportation engineer, this level of analysis (approved projects plus 2.5% background growth per year out to 2027) is still required by the Code.”*

The Hearings Officer includes the “Nys” comments referred to above by Kearns as follows:

*“BDC 4.2.800(B) states that ‘2. The proposal shall include a time schedule for developing a site in phases, but in no case shall the total time period for all phases be greater than five years from the date of final approval without reapplying for Site Plan Review.’*

BDC 4.7.500(B)(2) requires of a TIA:

*‘Study Analysis Years. The analysis must be performed for all study roadways and intersections, unless exempted in subsection (B)(1)(c) of this section, for the following years with and without the proposed development: ...*

*b. Year of completion of the final phase (for phased projects, intermediate phases may be required to be analyzed);’*

BDC 4.7.500(B)(5)(a)(ii) requires:

*‘For phased developments, the traffic forecasts for the year of completion of each phase must be calculated to be field counts plus traffic from projects within the study area that have received approvals for development (approved master plans, land divisions, site plans, conditional use permits, and similar approvals), plus an annual growth factor of 2.5 percent which would factor the existing counts up to the analysis year.’*

*The TIA is based on a build-out year of 2024, while the applicant's narrative and staff report make it clear that the applicant is planning for this project to not be built-out until 2027 or possibly later. Quite clearly, the TIA must be updated to analyze a year 2027 or later scenario as well as include traffic growth from 2024 to 2027 or later.*

*Based on this issue alone, the application cannot be approved.”*

The Applicant's traffic consultant (Bessman) provided responses to Nys above-quoted comments in a November 29, 2022 record response. One section of Bessman's response states (November 29, 2022, page 7):

*"The TIA was prepared based on the expected build-out timeline of two years, which is the time period required for most commercial centers to develop. As the submitted narrative and City Code does allow up to five years for project completion, the horizon year was revised through continued application of a 2.5% annual growth rate. The inclusion of build-out of master-planned area projects, compounding levels of high growth rates, and a fully additive assessment of the proposed commercial node continues to show acceptable traffic operations throughout the study area.*

*Similar to the original TIA, it should again be reiterated that this simplified analysis is overly conservative, reflecting a 67% increase in existing vehicular trips along the Murphy Road corridor by 2027 (about 11% growth annually not including traffic from the proposed site) which is an unreasonably high growth rate. Growth in this area will primarily be comprised of trips from the surrounding master-planned developments that build-out over the next 10 to 15 years depending on market conditions; adding a high growth rate with the master planned uses double-counts area growth and provides an unreasonable and unrealistic analysis.*

*ODOT travel demand models provide a more reasonable assessment of longer-term growth that avoids this double-counting of trips and accounts for the interaction that occurs between adjacent and compatible land uses in shortening/reducing travel. Review of ODOT Transportation Planning and Analysis Unit's (TPAU) committed 2040 long-range travel demand modeling prepared for these adjacent master plans shows cumulative traffic volumes on the Murphy Road corridor that are 91% of the 2027 values assessed within this TIA. This modeling accounts for this commercial node and other commercial areas that are planned to help retain trips within the area. Use of this modeling provides a more realistic assessment and is required for use in longer-range analyses, though it requires a more rigorous analysis process."*

Bessman also responded with the following comments (November 29, 2022, page 21):

*"Traffic from approved projects in the area have been fully accounted for within the TIA. The listing of projects is provided within the City's TAM along with staff notes on the specific projects, which allows the opposition to review these files and assess the submitted trip distribution and generation to the level of detail desired. Traffic from these projects is summarized within the TIA and included in all analysis scenarios (see Figure 8).*

*While we have included the full assessment of these sites, several of the area projects (Easton Master Plan, Ward Master Plan, and likely the future middle school will each require separate submittals and approvals before the projects can proceed. The master plans provide an assessment of major infrastructure needs to support full buildout, but separate applications and approvals are required for each subsequent plat. Two scenarios were provided in the TIA: 1) an analysis accounting for the full build-out of these projects, and 2) an analysis of a reasonable development by the site's build-out year. The intent is to provide a realistic and relevant analysis of actual conditions at build-out. Build-out timelines for projects are often subject to market conditions, and as currently evident the stated build-out and unit absorption of these primarily residential projects remains speculative.*

*Further reviews, such as subdivision applications, are required before the traffic from master planned areas will impact area roadways.”*

*And*

*“I have visited the site on numerous occasions and observed the traffic operations and can confirm that the modeling provided in the TIA is reflective of field conditions...”*

The Hearings Officer, following the review of the evidence in the record, concludes that there is no “disconnect in the applicant’s materials between the 5-year build-out period allowed by the City Code for this commercial development and the 2-year build-out scenario that the applicant’s transportation engineer analyzed” (Kearns, December 7, 2022, page 2). The Hearings Officer finds that Applicant’s traffic consultant (Bessman) noted that the project in this case was analyzed for a 2-year buildout as that is the typical developmental time frame for this type of project. The Hearings Officer also finds that Bessman considered the full-length of time that the BDC allows for commercial development approvals (5-years).

The Hearings Officer finds that Bessman, contrary to Kearns’s above-quoted representation, did take “into account traffic from project within the study area that have received approvals for development...” (Bessman, November 29, 2022, page 21) The Hearings Officer, based upon the representation by Bessman, finds that Bessman did conduct field counts (for the expected 2-year build-out) and took into account (2.5% per year compounded rate) growth for the BDC allowed approval period of 5-years.

The Hearings Officer finds that Nys, on behalf of SE BNRD, did not provide any studies or data to definitively challenge the validity of the Bessman “build-out” traffic forecasts. The Hearings Officer finds Nys did not provide traffic estimates for years four and five (the years Kearns/Nys argue were not included by Applicant/Bessman) that would demonstrate Applicant’s/Bessman’s years four and five traffic estimates were misstated/incorrect. The Hearings Officer finds that Applicant’s application and interpretation of BDC 4.7.500 (B) is reasonable and appropriate. The Hearings Officer finds Applicant’s evidence meets the requirements of BDC 4.7.500 (B)(2) and BDC 4.7.500(B)(5)(a)(ii).

## **5. Brosterhous Access**

SE BNRD attorney Kearns, and many opponents, argued that the Applicant’s proposed access onto Brosterhous Road, should not, and legally cannot, be approved. Kearns (December 7, 2022, page 3) stated the following:

*“The site has two accesses, both onto arterials; one is a preexisting right-in/right-out curb cut onto Brosterhous Road. The applicant’s plans reflect the retention and use of this access point, as though it is not subject to the City’s access standards in BDC 3.1.400(F), which provide specific standards for allowing a second access point. The most the applicant says is that it wants and needs the second access, which is preexisting anyway. The applicant’s ad hoc arguments as to why it needs and prefers retention of the Brosterhous access are not sufficient given the Code’s restrictions on multiple site access points and the criteria for approving a second access, especially one within 300 feet of a roundabout.*

*As with the other code-based requirements, this site is limited to a single access point unless the standards in BDC 3.1.400 are met, which they are not. Moreover, use of the Brosterhous access for*



*fire and emergency does not justify its use as access for normal customer and delivery traffic. Again, both the applicant and the Hearings Officer are bound by the mandatory code criteria and this applicant's TIA has not demonstrated compliance with those standards."*

The Hearings Officer sets forth sections of BDC 3.1.400 below:

**3.1.400 (F)(1)** *Lots and parcels in all zones and all uses may have one access point, except as authorized in BDC 3.1.400 (F)(4) When a property has more than one permitted street access, the City Engineer may require existing accesses to be closed and replaced with curbing, sidewalks/pathways, and landscaping, in accordance with the provisions of this code and the City standards and specifications.*

**3.1.400 (F)(4)(c) All Other Uses.** *An additional access point may be allowed when it is demonstrated that the additional access improves on-site circulation, and does not adversely impact the operations of the transportation system. If the second access point is only available to an arterial or collector roadway, the City may require one or more of these conditions of approval:*

- i. Locating the access the maximum distance achievable from an intersection or from the closest driveway(s) on the same side of the street;*
- ii. Right-in/right-out access may be required within 300 feet of a signalized intersection or roundabout. If adequate 95 percent queuing and turn pocket transition lengths are determined not to exceed the proposed point of entry, the City Engineer may grant access exceptions;*
- iii. Establishing a shared access with an adjoining property when possible; and/or*
- iv. Establishing a cross access easement with an adjoining property when possible.*

The Hearings Officer finds that BDC 3.1.400 (F)(1) sets forth the City of Bend's general policy with regards to the number of accesses to a property; one access point. However, BDC 3.1.400 (F)(1) also provides that an additional access point may be authorized if the requirements of BDC 3.1.400 (F)(4) are met. The Hearings Officer summarizes BDC 3.1.400 (F)(4)(c) as permitting an additional access point if it is demonstrated that the additional access **improves on-site circulation**, and **does not adversely impact the operation of the transportation system**.

The Hearings Officer agrees with opponents that simply because there is an existing curb cut on the Subject Property accessing Brosterhous Road does not, as a stand-alone fact, satisfy the requirements of BDC 3.1.400 (F)(4)(c). The Hearings Officer finds there must be substantial evidence in the record to demonstrate that the Brosterhous Road access (1) improves on-site circulation and (2) also does not adversely impact the operation of the transportation system.

Atwell, Land Use Chair of SEBNA, (November 18, 2022, page 3) argued that there was no improved *site access plan* presented for development at the time of the 1998 Subject Property zone change or at the time of the recent Murphy Road/Brosterhous Road improvement project. The Hearings Officer interprets this Atwell argument as suggesting that the Hearings Officer take into account "site plans" submitted (if any) at the time of the 1998 zone change and/or the Murphy/Brosterhous Road improvement projects. The Hearings Officer finds that BDC 3.1.400 (F)(4)(c) is not directed to what was proposed in 1998 or the more current Murphy/Brosterhous Road project. The Hearings Officer finds what is relevant to determining if BDC 3.1.400 (F)(4)(c) is satisfied is the Applicant's proposal in this case.

Nys, on behalf of SE BNRD, appears to the Hearings Officer to suggest that the Applicant does not provide sufficient detail to support Applicant's claim that on-site circulation would be improved. Nys

seems to disagree with Applicant's statement that delivery truck circulation would be improved by approving the Brosterhous Road access. Nys also appears to also makes an argument related to Applicant's shared Brosterhous Road access. The Hearings Officer found that Nys argument (share access) to be poorly developed as noted below.

Bessman, on behalf of Applicant, provided the following reasons why approving the proposed Brosterhous access would improve on-site circulation:

- “• All commercial sites require delivery trucks. Most deliveries (as well as accommodations for food carts) occur with trucks that would be unable to make a U-turn within the site and continue along their route without two points of access. Any RV traffic not continuing through the site would also benefit from this second access point.*
- The sufficiency of the operations analysis (and improvement relative to consolidated access at a single location) demonstrates that the access configuration does not adversely impact the operations of the transportation system. In fact, the second access improves the roundabout by allowing some of the site traffic to avoid it.*
- Contrary to statements by the opposition, the access to Brosterhous Road provides shared access with the neighboring commercial land to the south as suggested within BDC 3.1.400(F)(4)(c)(iii). Routing its commercial traffic through the private streets of the RV park as suggested by the opposition engineer would not be a suitable solution.*
- The access to Brosterhous is limited to right-in, right-out movements only and enforced by the raised median. This complies with BDC 3.1.400(F)(4)(c)(ii) for situations when secondary access is only available to a collector or arterial.”*

The Hearings Officer finds the argument by Kearns and Nys that Applicant failed to demonstrate an actual improvement to on-site circulation as required by the BDC (Nys, December 7, 2022, page 4) lacks specificity. Simply stating that Applicant's evidence is “not enough to meet the BDC” lacks the specificity required to allow the Hearings Officer to make a reasoned and supportable decision. Nys arguments related to commercial vehicles maneuvering (making U-Turns) without more, is not substantial evidence. As a legal matter the Applicant, to satisfy BDC 3.1.400 (F)(4)(c) “improving” requirement, need only demonstrate that the circulation is better with the 2<sup>nd</sup> access point that it would be with only one access point. It is clear to the Hearings Officer, from a review of Applicant's submissions (Burden of Proof, Bessman February 28, 2022, Bessman November 29, 2022 and Bessman December 7, 2022), that providing a second access point along Brosterhous Road for Applicant's commercial development will make it easier for many visitors using autos and trucks to maneuver into, out of and within the proposed project; for some vehicles easier access to a project destination and others easier access to leave the project.

The Hearings Officer finds that the Bessman bullet points listed above, while not as detailed as the Hearings Officer might desire, does describe a professional traffic engineers opinions related to the improvements in internal traffic circulation that would result if the second site access, the Brosterhous Road access, is approved. The Hearings Officer also finds Bessman provided evidence, and the City of Bend Engineering staff concurred, that approval of a shared access limited to right turns in and right turns out onto Brosterhous Road will not adversely impact the operations of the transportation system.

The Hearings Officer finds that BDC 3.1.400 (F)(4)(c) provides that if a second access is allowed onto an arterial (such as Brosterhous) the City of Bend may impose conditions relating to right-in and right-out only limitations (if within 300 feet of a roundabout – BDC 3.1.400(F)(4)(c)(ii)) and shared access (BDC 3.1.400(F)(4)(c)(iii)). The Hearings Officer finds that City of Bend Engineering staff approved the right-in and right-out limitation and the proposed a shared access with the adjacent property (October 10, 2022, Mitigation measures 4 and 5).

Nys (November 18, 2022, page 16) references BDC 3.1.400(G) and stated:

*“There is no evidence that the number of access points has been minimized. Additionally, there is an easement with the property to the south with access provided to Brosterhous Road. At Brosterhous/Marble Mountain Lane, full access would be provided to the site via the RV park. Sharing access between multiple properties is one of the key principles of good access management policies and one that the BDC supports.”*

BDC 3.1.400 (G) states, in part, the following:

*“Shared Access. For traffic safety and access management purposes, the number of driveway and private street intersections with public streets shall be minimized by the use of shared driveways with adjoining lots where feasible. The City may require shared driveways as a condition of development approval in accordance with the following standards:*

*1. Shared Driveways and Frontage Streets. Shared driveways and frontage streets are encouraged, and may be required to consolidate access onto a collector or arterial street. When shared driveways or frontage streets are required, they shall be stubbed to adjacent developable land to indicate future extension. For the purpose of this code, **stub** means that a driveway or street temporarily ends at the property line, and shall be extended in the future as the adjacent property develops, and **developable** means that a property is either vacant or it is likely to redevelop.”*

The Hearings Officer agrees with Nys that BDC 3.1.400 statement that the number of access points shall be minimized. However, Nys statement lacks the full context of BDC 3.1.400 (G). BDC 3.1.400 (G) states that the number of driveway intersections with public streets shall be *“minimized by the use of shared driveways with adjoining lots where feasible.”* Applicant is proposing to minimize the number of driveway intersections with Brosterhous Road by agreeing to a condition of approval requiring shared access with the commercially zone site immediately south of the Subject Property.

The Hearings Officer also takes note that Nys then argued that Applicant’s shared access somehow conflicts with an existing Brosterhous Road access (Marble Mountain Lane). The Marble Mountain Lane connection into Brosterhous Road is an accessway to the RS zoned RV Site and the existing RV/mobile home park. The Hearings Officer finds that Nys does not develop his “conflicts” argument with sufficient specificity (facts and argument) to allow the Hearings Officer to make an informed decision.

The Hearings Officer finds Applicant’s proposed Brosterhous access will be shared by the Subject Property and a CC zoned parcel of land located directly south of the Subject Property. The adjacent CC zoned land which will benefit from the proposed shared access is a parcel that has a right to develop independently from the Subject Property and independently from the RV Site. Technically, under BDC 3.1.400, the adjacent CC zoned parcel would be allowed (by BDC 3.1.400) an access to Brosterhous

Road. By utilizing a shared access both the Subject Property and the separate CC zoned parcel to the south of the Subject Property will use only one access point. Restated the number of access points is minimized; the number of access points are not increased beyond those allowed by right.

The Hearings Officer agrees with Nys that sharing access between multiple properties is good access management. The Hearings Officer finds approving Applicant's proposed Brosterhous Road access, with a condition requiring it to be located such that it will be shared by the adjacent CC zoned property, is consistent with the policy goals of BDC 3.1.400.

**6. Traffic impacts on Jewell Elementary School - BDC 4.7.500 (B)(1)(b) & BDC 3.1.200**

General concerns were raised with respect to risks to the safety of students walking on/across Murphy Road, Brosterhous Road and the roundabout. Kevin Johnson (November 17, 2022 email)(See also Richard A. Smith, November 12, 2022 email) referenced BDC 4.7.500 (B)(1)(b) and BDC 3.1.200 in the context of Jewell Elementary school student safety.

Richard A. Smith stated that *"the existing school zone for Jewel Elementary is not sufficiently far enough east and students regularly cross the road and walk in this area. This complex will put student safety at significantly higher risk for injury related accidents."* The Hearings Officer finds that this comment relates to Richard A. Smith's perception (which may be accurate) that the location of the "existing cross walk" is misplaced. The Hearings Officer finds that even if such perception (improper location of a cross walk) is correct it is not a relevant matter for consideration in this case.

The Hearings Officer was unable to identify a specific student safety issue implicated by BDC 4.7.500 (B)(1)(b) or BDC 3.1.200. BDC 4.7.500 relates to requirements for a transportation impact analysis. The Hearings Officer, in previous findings determined that the Applicant's transportation impact analysis met the requirements of BDC 4.7.500. BDC 3.1.200 relates to lot, parcel and block design. BDC 3.1.200 does not relate to the Subject Property's location in relation to students walking to/from Jewell Elementary School.

The Hearings Officer finds the traffic impacts on Jewell Elementary School in the context of BDC 4.7.500(B)(1)(b) or BDC 3.1.200 arguments were not set forth with sufficient specificity to allow the Hearings Officer to provide a basis to authoritatively make a decision based upon relevant approval criteria. In addition, the Hearings Officer notes that the majority of opponents were against the location of a gas station and convenience store but not opposed to other commercial uses. The Hearings Officer finds that opponents did not provide any credible substantial evidence that the traffic generated by a fuel/gas station and/or convenience store would create more severe safety risks to students walking along and/or crossing Murphy Road and/or Brosterhous Road than other commercial uses that could (by right or by conditional use) be approved on the Subject Property. The Hearings Officer takes note that the SE BNRD traffic consultant did not identify any safety issues specifically related to Jewell Elementary School students.

**7. Right-of-Way Waiver**

As noted in previous findings, and discussed throughout the evidentiary record, Murphy Road and Brosterhous Road (in proximity to the Subject Property) have recently been reconstructed (including a new roundabout). The existing right-of-way is 80-feet. The BDC 3.4 Table B establishes a minimum

right-of-way for minor arterials as 100-feet. Applicant seeks a waiver of the 100-foot right-of-way standard.

A number of opponents requested Applicant's right-of-way waiver be denied. Nys, on behalf of SE BNRD (November 18, 2022, page 8 – 13, see page 13), stated the following:

*"The staff report fails to make specific findings on all of the above [referencing Applicant's TIA, Staff Report and BDC 3.4.150]. However, the city has adopted this 100 foot right-of-way requirement for a reason. Based on my review of the above criteria, none [BDC 3.4.150 B, conditions of approval] appear to apply to this particular property with the possible exception of the trees located on the west end of the property. Whether these trees are "significant" enough to abandon an adopted cross section along this corridor, as the applicant suggests as the appropriate course of action, remains a question. The applicant argues that limitations at other locations, and not necessarily along this property, should drive right-of-way decisions and determine the waiver for this property. To the extent that these offsite limitations have been evaluated by the city as valid reasons is unclear. If right-of-way decisions were made based on minor inconveniences, then transportation projects requiring right-of-way would rarely be constructed.*

*By failing to obtain the required right-of-way along the subject property, the city may be harmed if:*

- Parking is required or desired along these portions of these streets.*
- A five lane section is required or desired along either of these streets.*
- Widening or relocated improvements at the roundabout at Murphy Road/Brosterhous Road is required or needed.*
- Any other reason in which the city may require this right-of-way per their standards."*

Applicant provided multiple responses to the Nys comments above. In particular, the Applicant's legal counsel (Final Argument, December 14, 2022, page 9) argued the following:

*"The primary reason a waiver is warranted is that the City of Bend designed and recently built the adjoining street system and intersections to meet the transportation system needs of motor vehicles, pedestrians and cyclists considering future development for a period of 20 years, including development of the subject property. The Applicant's transportation engineer has confirmed that the system works and can accommodate trips generated by all proposed uses and all master planned and approved development within a 1-mile study area. There is no need for additional improvements.*

*There is also no need for additional right-of-way to allow for the construction of new roadways or intersections and no need generated by approval of the pending land use applications. As explained by Mr. Bessman and confirmed by City Engineering, the Murphy corridor plans show the potential need for an additional southbound right-turn lane on Brosterhous at the roundabout. If needed, this would impact the residential property on the northwest corner only. Additionally, Policy 7-17 of the City's TSP (Chapter 7 of BCP) strongly discourages adding travel lanes to Murphy Road and Brosterhous Road – requiring management of congestion before considering adding travel lanes.*

*Widening Murphy Road or Brosterhous Road on one side only will provide no public benefit because existing development along these roads, including the newly constructed bridge over the railroad tracks east of the subject property are built within an 80'-wide right-of-way (or less). The width of Brosterhous Road is constrained by the railroad overpass located south of the subject property.*

*Widening the corridor is, as a practical and financial matter, foreclosed by the surrounding established development patterns. Adding additional lanes to either is neither desired by the TSP nor likely to occur in the foreseeable future, if ever.*

*The Applicant's request meets the criteria of BDC 3.4.150 as follows:*

- The waiver "will not harm or will be beneficial to the public in general." BDC 3.4.150(B)(a). The needs of the public were fully considered by the City when it designed and built the Murphy Corridor project. Adding right-of-way and widening the adjoining roadways to add a travel lane not authorized by a Policy 7-17 review will come at the expense of pedestrian safety, including the safety of elementary school students, by increasing the distance of street crossings. Widening Murphy Road would create unsafe conditions for motorists and cyclists by allowing two lanes of travel to enter a single-lane roundabout.*
- The waiver is not inconsistent with the general purpose of ensuring adequate public facilities. BDC 3.4.150(B)(b). The existing right-of-way and improvements were designed by the City of Bend to provide adequate public facilities for a period of at least 20 years. The Bessman TIA and memoranda show that the facilities are, in fact, adequate as they currently exist.*
- One or more of the conditions of BDC 3.4.150(B)(c) exist.*
  - o (c)(1) – the waiver reduces impacts to significant trees in the northwest corner of the subject property; allowing them to be retained in a public plaza; and*
  - o (c)(2) – the existing railroad bridge and railroad overcrossing structures make widening Murphy and Brosterhous impractical; and*
  - o (c)(5) – the standards are street and right-of-way standards and existing structures on the same side of adjoining roads (homes and the railroad overcrossing on Brosterhous) make future widening unlikely and additional width is not needed sidewalks or on-street (no parking is or would be allowed along the frontage of the subject property due to its proximity to the roundabout) and wide sidewalks were recently built along the entire frontage of the subject property); and*
  - o (c)(7) – the existing infrastructure does not currently meet the newly imposed arterial street criteria but is functionally equivalent to current standards and there is little likelihood that arterial street standards will be met in the area due to the location of existing development relative to Murphy Road and Brosterhous Road.*

*Furthermore, the City must show both that the proposed land use applications impede the governmental interest served by City right-of-way and improvement standards and that those interest will be served by imposition of the roadway and right-of-way exactions in order to impose them as conditions of approval. Hill v. City of Portland, 293 Or App 283 (2018). There is no demonstrated public need for wider street improvements or additional right-of-way along Murphy or Brosterhous, so there is no lawful basis for imposing these exactions.*

*Approval of a waiver is also appropriate because BDC 3.4.100(D) requires that public improvement exactions be related to and roughly proportional to the impact of development on public facilities and services. Specific findings to that effect must be and have not been provided. The burden of proof is on the City to provide these findings and such a showing; not on the Applicant.*

*The Applicant has shown that the proposed development will not adversely impact the City's transportation system and that it will be required to pay systems development charges to offset its*

*impact on the City street system. The Applicant has shown there is no need for additional right-of-way or travel lanes that can be attributed to its proposed development; making it impossible to find that roadway and right-of-way exactions are roughly proportional to impacts of the applicant's proposal.*

*BDC 3.4.100(D) says that the City may deny an application "if required public improvements are not in place" but this is not correct. As discussed in the Applicant's burden of proof, Koontz v. St. Johns River Water Mgmt. Dist., 570 US 595 (2013) makes it clear that the City may not deny development approval for failing to comply with exactions not roughly proportional to specific development impacts."*

The Hearings Officer sets forth the relevant sections of BDC 3.4.150 below:

***"BDC 3.4.150 A. Authority to Grant Waiver or Modification.*** *Waivers and/or modifications of the standards of this chapter and/or the City of Bend Standards and Specifications may be granted as part of a development approval only if the criteria of subsection (B) of this section are met.*

***BDC 3.4.150 (B) Criteria.*** *The Review Authority, after considering the recommendation of the City Engineer, may waive or modify the standards of this title and the City of Bend Standards and Specifications based on a determination that (a) the waiver or modification will not harm or will be beneficial to the public in general; (b) the waiver and modification are not inconsistent with the general purpose of ensuring adequate public facilities; and (c) one or more of the following conditions are met [not quoted is a listing of 12 conditions].*

The Hearings Officer finds that Applicant's legal counsel (Final Argument, December 14, 2022 – quoted above) addressed Nys concerns related to the possibility of street parking, five lanes, widening/relocating roundabout improvements, and "any other reason the City may require this right-of-way per their standards." The Hearings Officer finds that Applicant's above quoted arguments are based upon substantial evidence in the record and are credible.

The Hearings Officer finds that the requested right-of-way waiver will reduce impacts to significant trees (northwest corner of the Subject Property). The Hearings Officer finds that the any widening of Murphy/Brosterhous is impractical because of the existence of a railroad bridge and overcrossing. The Hearings Officer finds that it is highly unlikely that in the near future the north side of Murphy Road, in the immediate vicinity of the Subject Property, will be required to dedicate additional right-of-way because of the existing residential development (homes, landscaping and fences). The Hearings Officer finds that the Murphy Road, Brosterhous Road and the connecting roundabout were all recently constructed by the City of Bend and had the City of Bend desired additional right-of-way (beyond that dedicated as part of that project) it would have been reasonable to have done that prior to the recently reconstructed public improvements. The Hearings Officer finds that based upon the evidence in the record that the requested right-of-way waiver will not harm the public in general and is not inconsistent with the general purpose of ensuring adequate public facilities.

The Hearings Officer finds that the Applicant's requested right-of-way waiver meets the requirements of BEDC 3.4.150.

## **8. Need**

Many participants in this case commented on whether or not a “gas station” was “needed” at location of the Subject Property. Opponents argued that a “gas station” was not “needed.”

K. Johnson (November 14, 2022 Memo, pages 1 & 2) referenced BDC 2.2.200 and stated that the Applications in this case did not meet the code because:

*“a gas station and drive-through are not needed by the adjacent neighborhoods. If these proposed businesses are not needed by those neighborhoods they cannot be permitted on this site.”*

Further, K. Johnson (November 14, 2022 Memo, pages 1 & 2) stated that:

*“automobile-dependent and automobile-oriented businesses are the only uses which require a conditional use permit for this zone. BDC 2.2.300. Thus, gas stations and drive-throughs are not ipso facto considered to be ‘needed’ at a Convenience Commercial site. If they were, there would be no point to requiring a conditional use permit for such businesses. It follows that an applicant who wants to build such businesses in a Convenience Commercial zone must first demonstrate that they are needed.”*

The Hearings Officer notes that BDC 2.2.200 is titled Zoning District Locations and Characteristics. It identifies the commercial zoning districts in the City of Bend and then describes generally the characteristics of each zone. The Hearings Officer finds BDC 2.2.200 is not a relevant approval criterion for these Applications.

K. Johnson also references BDC 2.2.300 in her above-quoted comments. BDC 2.2.300 is titled Permitted and Conditional Uses for all of the City of Bend zoning districts. K. Johnson is correct that auto-dependent uses are listed as conditional uses in Table 2.2.300.

BDC 1.2 Definitions provides the following definition:

*“Conditional use means a use that requires a Conditional Use Permit. See BDC Chapter 4.4 Conditional Use Permits.”*

BDC 4.4.100 further describes Conditional Uses as follows:

*“There are certain uses, which, due to the nature of their impacts on surrounding land uses and public facilities, require a case-by-case review and analysis. These are identified as “Conditional Uses” in this code. The purpose of this chapter is to provide standards and procedures under which a conditional use may be permitted, enlarged or altered if the site is appropriate and if other appropriate conditions of approval can be met.”*

The Hearings Officer finds that designating a particular use on a site as a conditional use simply means that the City of Bend policy makers considered “auto-dependent uses” to potentially have impacts on surrounding properties that should be looked at on a case-by-case basis. The Hearings Officer finds there is no “need” demonstration required by relevant conditional use approval criteria.

## **9. General Transportation Related Concerns**



A number of opponents (i.e., Richard A Smith, November 14, 2022 email.....) argued approval of Applicant's proposals would create additional transportation related safety risks to pedestrians, bicycles, and motorized vehicles. For example, Richard A Smith stated that the *"private street connection from Murphy Road lacks a sidewalk on the southwest side of Brosterhous (in front of the Crown Villa RV Park) which will create a situation where pedestrians are forced to make an extra street crossing at the roundabout which will no doubt be less safe and contribute to more traffic [ Ref BEC 3.2.200 (D)]."* The Hearings Officer notes that no relevant law or criteria requires the Applicant, in this case, to construct a sidewalk on property not owned/controlled by the Applicant. If and/or when the Crown Villa RV Park does redevelop that developer will be required to address sidewalk issues on its property.

Richard A Smith also stated that *"cars traveling south on Murphy after the bridge currently enter the Brosterhous traffic circle at high-speed posing risk for pedestrians and cyclists' the gas station ingress/egress will increase the chances for accidents."* The Hearings Officer had difficulty understanding this comment. Murphy Road travels east and west and therefore was unsure how car would be "traveling south on Murphy." The Hearings Officer does appreciate that vehicles entering the roundabout may do so at "high speed" and the "high speed" could increase risks to pedestrians, cyclists and vehicles. The Hearings Officer did not find substantial evidence in the record that demonstrated that the proposed right turn in and right turn out onto Brosterhous Road would directly pose additional safety risks for pedestrians, cyclists and vehicles.

The Hearings Officer reiterates earlier comments that the Murphy Road, Brosterhous Road and roundabout improvements, along with the existing curb cut accesses to the Subject Property were designed and constructed by the City of Bend meeting the then existing design standards. The Hearings Officer finds there is no persuasive substantial evidence in the record to support Richard A Smith's argument that the proposed Brosterhous access will significantly increase, in a measurable way, safety risks to pedestrians, cyclists and vehicles.

#### **10. City of Bend Comprehensive Plan, City of Bend Transportation System Plan and Oregon Transportation Planning Rule**

SEBNA (November 17, 2022 email/letter) and M. Dickinson (November 15, 2022 email) made general references to the City of Bend Comprehensive Plan, City of Bend Transportation System Plan and the Oregon Transportation Planning Rule. The Hearings Officer finds that unless these documents are specifically included as relevant approval criteria then the Hearings Officer may not consider them relevant approval criteria. The Hearings Officer addressed the relevant approval criteria in the findings of these Decisions. The Hearings Officer did not apply the City of Bend Comprehensive Plan, City of Bend Transportation System Plan and the Oregon Transportation Planning Rule as independent relevant approval criteria.

#### **11. Gas Station/Convenience Store criminal activity**

Richard A. Smith (November 12, 2022 email) raised the following concerns about crime related safety risks caused/created by gas stations and convenience stores:

- "• Convenience store/gas station complexes such as this located along major arterials can be host to increased criminal activities, alcohol abuse and loitering.*

- o See White, Garland F., and Caitlin V. Muldoon. 2015. "Convenience Stores and Routine Activities in a Summer Tourist Destination." Criminal Justice Studies 28 (3): 280–296.*
- o According to recently released FBI statistics, convenience stores accounted for 3% of all violent crime in the US and gas stations accounted for 2%”*

Richard A. Smith attached a document to his November 12, 2022 submission titled “*Studies, Citations Related to Safety and Environmental Concerns.*” This submission contained a summary statement and a listing of a large number of articles related to convenience stores and criminal activity. The Hearings Officer quotes Richard A Smith’s summary below but notes that the Hearings Officer did not read/review the studies because either Richard A Smith only included a general citation for the article or listed a hyperlink for the article. The Hearings Officer notes that the “hard copy” versions of the articles were not included in the public record and the Hearings Officer is not required to access hyperlinks to articles or otherwise search the internet for articles.

Richard A Smith’s summary comments (November 11, 2022) are as follows:

*“Convenience stores and gas station businesses tend to have cash on hand, offer food and refreshments, including alcohol sales, and are lightly staffed. The combination of easy access, shopping convenience, and high volume of patrons can provide fertile opportunities for potential offenders, potential victims, and weak guardianship to come into contact (White and Muldoon 2015, pp. 280–281). Cashiers working at gas stations and convenience stores face a higher rate of workplace violence than almost any other non-law enforcement profession, according to a 2011 report from the U.S. Department of Justice’s Bureau of Justice Statistics (Harrell 2011). Police departments and others have long characterized convenient stores as “stop and rob” referring to how criminals can supposedly easily and often rob convenience stores.”*

Applicant’s legal counsel (Final Argument, December 14, 2022, page 22) responded to the above criminal activity comments as follows:

*“Several opponents suggest that the proposed development will increase crime in their neighborhoods. Similar to the environmental issues address above, concerns regarding crime can be linked to “safety” considerations, thereby invoking BDC 4.4.400(A) discussed above. However, opponents concerns are not supported by the substantial evidence in the record, consisting primarily of statistics provided by the Applicant detailing the very minimal crimes occurring at gas station facilities owned and operated by the Applicant in Oregon and California in 2020, 2021 and 2022. Those statistics were included as Exhibit #4 to the Applicant’s original burden of proof.”*

The Hearings Officer agrees with Applicant’s above-quoted statement that opposition crime comments are appropriately reviewed and considered under the “safety” category listed in BDC 4.4.400 (A). The Hearings Officer also agrees with Applicant (Final Argument, December 14, 2022, page 22 and Burden of Proof, October 7, 2022, page 89) that BDC 4.4.400 (A) is directed at “site” characteristics in the context of “safety.” The Hearings Officer finds that the “site” characteristics, such as site size, dimensions, topography and access are adequate for the proposed “gas station” and “convenience market.” The Hearings Officer also finds that the size is large enough to locate the gas station and convenience store a reasonable distance from the developed residential area to the north of the Subject Property and the RV Site residential uses to the south of the Subject Property.

The Hearings Officer considers Richard A. Smith's comments to be sincere and based upon his reading of a number of published articles. Exhibit #4 sets forth crime statistics for a gas station/convenience store operator who has 53 operating locations in Oregon and a total of 86 business locations on the US west coast. The Hearings Officer finds that the statistics contained in Exhibit #4 are more relevant to this application than the general articles cited by Richard A. Smith. The Hearings Officer finds that the Exhibit #4 data does not indicate a high or even moderate level of criminal activity at its Oregon gas stations/convenience stores. The Hearings Officer finds that Exhibit #4 is relevant, credible and constitutes substantial evidence in this case. The Hearings Officer finds, based upon Exhibit #4 (and to a lesser extent the statistics provided by the Richard A. Smith November 12, 2022 email quoted above), that the proposed gas station and convenience store cannot be expected to create significant negative crime related impacts on surrounding properties.

## 12. Environmental Dangers – Fuel Station

A number of opponents asserted that the location of a gas station created an environmental safety risks to students/staff at nearby Jewell Elementary School and to personal residences (i.e., K. Johnson, 11/16 submission, Sue Smith 11/30 email, Randal Dickinson 11/28 email, Rich Smith 11/14 email, and Leah Guthridge Caron 11/29 submission). K. Johnson stated that

*“the U.S. Environmental Protection agency recommends screening schools sites for potential health risks if a gas station is to be sited within **10,000 feet of schools**. The concerns include air pollution, soil contamination, ground water contamination, vapor intrusion and heavy vehicular traffic.” [foot note omitted – bold emphasis in the original]*

*The amount of emissions from gas stations is a factor in determining where they should be sited. Recent research shows that these emissions were underestimated, that in fact emissions were 10 times higher than estimates used in setback regulations to determine how close schools, playgrounds and parks should be situated. [footnote omitted]*

*The Oregon Department of Environmental Quality Annual Leak Report, 2021, reported that of the 17,96 regulated underground storage tank facilities, 50 were leaking. Even if the tank itself is working perfectly, USTs can leak from their dispensers, piping, or spills from delivery. [footnote omitted]*

*Jewell Elementary School is 800' from this proposed gas station, which raises the concerns addressed by the USEKPA. Colvin has the burden of proving that it has been screened for all the potential health risks connected with gas stations. Exhibits 6-10 show the layout of the entire area and how close these businesses will be to the school.*

*The best Colvin can do is assure the public there won't be hazardous leaks because the system satisfies State requirements. This is based on an assumption that the equipment always works perfectly and there is never human error.”*

Applicant provided an extensive response to the opposition “environmental safety” argument. The Hearings Officer finds that the “environmental issues” raised by opponents requires a thorough and careful consideration. The Hearings Officer reviewed all documents reproduced and included in the record of these cases related to the “environmental issues.” The Hearings Officer normally would summarize a case participant's evidence and arguments in the findings. However, in this instance the

Hearings Officer found Applicant provided a comprehensive response to the “environmental issues” raised by opponents (Final Argument, December 14, 2022, pages 17 – 21). The Hearings Officer includes the “environmental issues” section of Applicant’s Final argument in its entirety below:

**“a. Air Quality**

*Numerous opponents raised air quality concerns which relate back to BDC 4.4.400(A) regarding specifically ‘exhaust / emissions,’ ‘odor,’ and ‘safety.’ The most developed arguments on this topic were submitted by Mr. Dickinson on November 28, 2022 and Ms. Johnson on December 7, 2022. Accordingly, the Applicant responds specifically to Mr. Dickinson and Ms. Johnson’s arguments as a proxy for all other similar opponent arguments relating to air quality.*

*Ms. Johnson’s November 28 submittal renewed an argument that the proposed gas station should be denied specifically because it is within 800 feet of Jewel Elementary School to the north. To support that argument, opponents’ related testimony included references to two documents: (1) School Siting Guidelines, published by the United States Environmental Protection Agency (the ‘EPA’), and Air Quality and Land Use Handbook: A Community Health Perspective published in April 2005 by the California Air Resource Board (the ‘CARB’). Although opponents frequently provided hyperlinks to the aforementioned documents, no party actually included copies of the aforementioned documents in the record. See Conte v. City of Eugene, \_\_ Or LUBA \_\_, \_\_ (LUBA No 2021-092, January 14, 2022) (slip op at \*6) (including only a hyperlink to a document is not sufficient to include that document in the record). Accordingly, the Applicant provided the aforementioned documents as Exhibits 4 and 5, respectively.*

*An examination of the aforementioned documents reveals that the opponents are misquoting and/or mischaracterizing the guidance provided by the EPA and the CARB when it comes to what are in essence recommended setbacks for gas stations. For example, Ms. Johnson’s November 28 letter states that EPA School Siting Guidelines ‘recommends that gas stations be located no closer than 1,000 feet from schools.’ Ms. Johnson’s assertion is incorrect. The EPA’s School Siting Guidelines instead recommends that schools proposed to be located within 1,000 feet of a ‘large gas station dispense [sic] more than 3.6 million gallons per year’ should be ‘evaluated on a case and site-specific basis \* \* \* for potential variables and mitigation options.’ See Exhibit 4, page 67. However, as discussed below, the proposed gas station is not a ‘large gas station.’*

*Notably, the EPA’s School Siting Guidelines provide no recommendation for smaller gas stations dispensing less than 3.6 million gallons per year, like the one proposed here. Such smaller facilities are instead only addressed by the CARB’s Land Use Handbook. Although similarly defining a ‘large gasoline dispensing facility’ as one ‘with a throughput of 3.6 million gallons per year or greater,’ the CARB’s Land Use Handbook deviates from the EPA’s School Siting Guideline by recommending that siting all ‘sensitive land uses’ within 300 feet of such gas stations be avoided. See Exhibit 5, page 15, 41-43. The CARB further defines ‘sensitive land use’ as ‘new residences, schools, day care centers, playgrounds, and medical facilities.’ See Exhibit 5, page 8. With regard to smaller gas stations, the CARB further deviates from the EPA’s School Siting Guideline by recommending a 50-foot separation between ‘typical gas dispensing facilities’ and ‘new sensitive land uses.’ In this case, a separation that exceeds 50 feet is provided between the proposed fuel island and all sensitive land uses. See Exhibit 9.*

*Exhibit 2 provided by the Applicant demonstrates that the proposed gas station is designed to dispense no more than 200,000 gallon per month or 2.4 million gallons a year, far lower than the 3.6 million gallons relied upon by both the EPA and the CARB to trigger more substantial recommended setbacks to ensure safe air quality in the vicinity of 'large gas stations.' Exhibit 2 further demonstrates that the aforementioned 2.4 million gallon per year figure is not a self-imposed limit to get around opponent's air quality arguments. Instead, Casey Hayes, VP of Retail Operations for the Applicant, testified that the Applicant procured a 'Kalibrate' market study suggesting that a gas station at this location would dispense an estimated 143,000 gallons per month or 1.7 million gallons a year. See Exhibit 2, page 4. Based on that study, the Applicant designed a fuel dispensing system to accommodate the anticipated fuel output. Spec sheets detailing that fuel dispensing system are included as part of Exhibit 2, pages 8-46. In the words of Mr. Hayes, 'the design of the facility specifically will prevent fuel sales significantly beyond approximately 200,000 gallons per month.' See Exhibit 2, page 2. Stated simply, the Applicant would need to re-design and re-build the entirety of the fuel dispensing system before the proposed gas station could ever output 3.6 million gallons of fuel a year, thereby triggering either the 1,000 foot setback recommended by the EPA or the 300 foot setback recommended by the CARB for large gas stations. Because a design change would be necessary, this would likely require either a major modification or a new land use application, both of which would require additional review. However, given that the capacity is already self-limited, opponents' arguments suggesting that the EPA and the CARB require or even recommend setbacks that cannot be met in this case is blatantly incorrect. [footnote omitted]*

*Numerous opponents suggest that the EPA's School Siting Guidelines and the CARB's Land Use Handbook provide substantial evidence for determining safe 'exhaust / emissions' and 'odor under BDC 4.4.400(A). The Applicant agrees. Notably, the EPA's School Siting Guidelines provides no recommended setback distance for a gas station of the size proposed by the Applicant, and the CARB's Land Use Handbook suggests a minimal 50 foot setback from any "sensitive land use." Although it is debatable if the transient nature of RVs parked at the adjacent Sun Outdoors RV park qualify as 'residences' to thereby fall within the CARB's 'sensitive land use' category, Exhibit 9 nevertheless demonstrates that a 50 foot setback from the proposed fuel island is entirely contained on the Applicant's property and thereby poses no safety concern to even the nearest RV pad.*

*Differing from those opponents who relied entirely on the EPA and the CARB's recommendations, both Ms. Johnson and Mr. Dickinson also cited a 2018 study to assert that the EPA and CARB recommendation are perhaps inadequate. Specifically, Ms. Johnson and Mr. Dickinson cited and/or provided hyperlinks to a study purported to have been performed by Columbia University's Mailman School of Public Health. Mr. Dickinson further describes that the 2018 study only 'compar[ed] two gas stations, one on the West side of the USA and one on the East side.' This study of only two gas stations of unknown vintage and size offers little more than anecdotal evidence rather than evidence that can be applied across the board to other gas stations. Several other opponents similarly cited the same 2018 study, online articles reporting on the 2018 study, or other similar studies purported to have been conducted in other countries including Brazil, Canada, China, France, South Korea, and Spain. The Applicant responds in summary fashion to all such arguments by noting initially that hyperlinks to studies of gas station emission around the world are not 'substantial evidence because those studies were not themselves provided into the record.*

*Without the actual studies, it is impossible to determine, for example, if the same emission regulations applicable to U.S. gas stations and automobiles apply in those other counties to ensure an "apples to apples" comparison. Further, the 2018 study which was claimed by opponents to have*

*been conducted in the U.S. considered – by Mr. Dickinson’s own admission – only two gas stations. No further evidence was provided demonstrating that those two gas stations are of a similar size to the Applicant’s proposed gas station or that they are new gas stations built to modern environmental standards. It is clear from both the EPA and CARB recommendations that large gas stations dispensing more than 3.6 million gallons of fuel per year emit greater emissions warranting a larger setback. That 2018 study of only two gas stations clearly has not prompted either the EPA or the CARB to amend their now long standing recommendations, nor has that study prompted new legislation from Federal, State, or local governments actually imposing mandatory setback for small gas stations such as the one proposed by the Applicant.*

*In addition to the recommendations provided by the EPA and the CARB, the Applicant’s proposed gas station will – of course – comply with all applicable Federal, State, and local government setbacks and regulations. But as understood by the Applicant and as demonstrated by Exhibits 6, 7, 8 and 14, there are no such mandatory gas station setbacks currently applicable in the City of Bend on par with what the opponents are uniquely asserting should be required in this case. Numerous other gas stations have been built and are currently being built throughout the City that are within similar distances to ‘sensitive land uses’ such as schools and residences. Accordingly, the issue raised by opponents is whether such non-regulatory suggested setbacks promulgated by the EPA and the CARB are substantial evidence of what should be considered “safe” under BDC 4.4.400(A). For the foregoing reasons, the Hearings Officer should conclude that the EPA and the CARB recommendations that were actually placed in the record represent the substantial evidence in the record demonstrating ‘safe’ siting distances when it comes to gas stations emissions, and opponents’ hyperlinks to studies from around the world where environmental regulations differ do not alter the weighing of that substantial evidence.*

**b. Groundwater.**

*Similar to the air quality issues discussed above, several opponents raised arguments regarding the potential for ground water pollution caused by leaking fuel tanks. Ms. Smith’s November 30, 2022 letter provides the most robust argument on this topic, and the Applicant responds specifically to Ms. Smith’s argument as a proxy for all other similar opponent arguments relating to ground water concerns.*

*Although not citing applicable criteria, Ms. Smith’s November 30 letter links two related arguments to make the general assertion – at least as understood by the Applicant – that the Applicant’s proposed underground fuel storage tanks pose a risk to the groundwater aquifer thereby necessitating the denial of the ‘unsafe’ project pursuant to BDC 4.4.400 (A). First, Ms. Smith argues that the adjacent Sun Outdoors RV park includes a well (currently being utilized for irrigation) that is ‘only about 166 feet away from the perimeter of the lot line shared with the Colvin Oil property’ (emphasis in original). Second, Ms. Smith reproduces portions of an Oregon Department of Environmental Quality (‘DEQ’) report showing that 2.8% of the 1,796 regulated underground storage tanks in Oregon were shown to be have leaks between October 1, 2020 and September 20, 2021.*

*In response, the Applicant included several exhibits in the record to alleviate Ms. Smith’s concerns and to further demonstrate that the underground fuel storage tanks impose no unreasonable safety risk. First, the Applicant notes Exhibits 10 and 11 which provide details on the high-quality fuel distribution system designed by the Applicant. Second, the Applicant notes Exhibit 2 wherein Mr. Hayes specifically discussed the Applicant’s state-of-the-art tank monitor, the Veeder-Root TLS-450.*

*In the unlikely event that a leak occurs, the Applicant will be immediately notified allowing swift reaction and remediation prior to any potential groundwater contamination. Third, the Applicant notes Exhibit 16, a ‘stamped’ letter from Catherine Rhode and Dan Capozoola with Osprey Environmental, LLC documenting that in the unlikely event of a leak, ‘[t]he great thickness of unsaturated, compound hard basalt flows between the ground surface and the groundwater aquifer dramatically reduces the potential for any impact to the aquifer from a release near the ground surface.’ Rather than Ms. Smith’s assertion that shallow bedrock in the area increases the risk of groundwater contamination, expert testimony provided by the Applicant suggests just the opposite – that shallow bedrock will insulate and protect the groundwater aquifer.*

*Finally, the Applicant notes Exhibit 15, a second ‘stamped’ letter from Charles Rowles, P.E. with C.A. Rowles Engineering. Exhibit 15 directly counters Ms. Smith’s suggestion that Sun Outdoors’ well poses a more attenuated safety risk because of its close proximity to the proposed gas station. As described by Mr. Rowles, if Sun Outdoor’s ever was utilized for a ‘public water system,’ DEQ safety regulation OAR 331-061-0050(2)(a)(E) would impose only a 100 foot setback on any new underground fuel storage tank. Further, Mr. Rowles’ letter included two exhibits: (1) the Water Supply Well Report showing that the Sun Outdoors’ well was drilled on Tax lot 18-12-16B-1000, and (2) a map showing that distance between the proposed fuel island and the nearest boundary line for Tax Lot 18-12-16B-1000 is 330 ft. Unless Sun Outdoor’s well was drilled on the property line of Tax Lot 18-12-16B-1000, the actual distance between the well and the proposed fuel island will be more than double the 166 feet estimated by Ms. Smith and more than three-times that 100 foot setback that theoretically could be required by OAR 331-061- 0050(2)(a)(e) if the well is ever connected to a public water system.*

*Based on the foregoing, the Applicant asserts that the substantial evidence in the record demonstrates that the proposed underground storage tanks do not pose an unreasonable risk to groundwater aquifers. Accordingly, the Hearings Officer should find that the ‘[t]he site size, dimensions, locations, topography and access are adequate for the needs of the proposed use considering \* \* \* safety considerations’ which are appropriately addressed by the Applicant’s site plan. BDC 4.4.400(A).”*

The Hearings Officer repeats a finding made earlier in these Decisions which held that consideration of “safety issues” is relevant to BDC 4.4.400 (A)(1). The Hearings Officer finds that opponents “environmental issues” related to the gas station can reasonably be considered “safety issues” under BDC 4.4.400 (A)(1). The Hearings Officer notes that no participant raising “environmental issues” referenced any other relevant approval criteria in her/his “environmental issues” comments.

The Hearings Officer finds that Applicant’s Final Argument, as quoted above, references credible evidence. The Hearings Officer found the submissions by Osprey Environmental, LLC (December 7, 2022) and C.A. Rowles Engineering (December 7, 2022) to be particularly persuasive with respect to the possibility of fuel/gas station impacts on groundwater. The Hearings Officer finds that Applicant’s evidentiary submissions related to the “environmental issues” (see references in Applicant’s Final Argument quoted above) are substantial evidence that the Subject Property (the “site”) is adequate in size, dimensions, location, topography and access to avoid or satisfactorily mitigate any environmental issues created/caused by the location of a gas station. The Hearings Officer finds Applicant adequately addressed potential air and groundwater impacts at the Subject Property if a gas station is approved.

### **13. Light Pollution**

Applicant (Final Argument, December 14, 2022, page 22) provided the following comments related to BDC 4.4.400 (A)(1) and “light pollution.”

*“Several opponents raised concerns regarding light pollution emanating from the proposed gas station and other buildings. As discussed above, BDC 4.4.400(A) includes “glare” as one of the relevant factors. To address opponents’ concerns, the Applicant references information and graphics provided during the November 18, 2022 and included as pages 34-36 of Exhibit 3 demonstrating that the Applicant’s use of recessed fixture virtually eliminates glare by containing light with the design area.”*

The Hearings Officer reviewed the Exhibits referenced in the above-quoted Final Argument comments. The Hearings Officer finds that Applicant did address light and glare issues caused/created by Applicant’s proposed development. Foremost, the Hearings Officer finds that light and glare created by the gas station and convenience market is significantly shielded from adjacent residential uses. The Hearings Officer finds that the site size, dimensions, location and topography of the Subject Property is adequate to allow the Applicant to mitigate any light or glare impacts on adjacent properties.

**14. 21165, 21175 & 21185 Reed Market Road Administrative Decision**

The Hearings Officer briefly reviewed the 21165, 21175 & 21185 Reed Market Road Administrative Decision. The Hearings Officer finds that prior administrative decisions, while oftentimes providing interpretative insight, are not mandatory precedent for later land use decisions. The Hearings Officer did not rely upon the 21165, 21175 & 21185 Reed Market Road Administrative Decision to make any finding in this case.

**IV. APPLICATION OF RELEVANT APPROVAL CRITERIA:**

**CONFORMANCE WITH CITY OF BEND DEVELOPMENT CODE**

**Chapter 4.2, MDS Review, Site Plan Review and Design Review**

**4.2.500 Site Plan Review.**

**D. Site Plan Review Approval Criteria. The City shall approve, approve with conditions, or deny the proposed Site Plan Review application based on the following criteria:**

**Criterion #1: The proposed land use is a permitted or conditional use in the zoning district;**

**Criterion #2: Conditionally permitted uses require approval of a Conditional Use Permit and shall meet the criteria in BDC 4.4.400;**

***Chapter 2.2, Commercial Districts (CC).***

**2.2.300 Permitted and Conditional Uses.**

***The land uses listed in Table 2.2.300 are allowed in the Commercial Districts, subject to the provisions of this code. Uses that are listed in Table 2.2.300 and land uses that are similar are permitted or***



***conditionally allowed. The land uses identified with a "C" in Table 2.2.300 require Conditional Use Permit approval prior to development, in accordance with BDC Chapter 4.4.***

**FINDING:** The proposed uses include a convenience store, fuel/gas station, a food cart plaza, a mixed use commercial/residential building and two retail/food buildings that include a drive through food building. The market/convenience store and fuel station and the drive through food use are auto-dependent uses that require Conditional Use approval in addition to Site Plan Review and Design Review. The proposed mixed use building, food cart plaza and retail building without a drive through component are permitted uses in the CC zone, subject to Site Plan Review and Design Review.

**Criterion #3:           The land use, building/yard setback, lot area, lot dimensions, density, lot coverage, building height, design review standards and other applicable standards of the applicable zoning district(s) are met;**

**2.2.400           *Development Standards.***

Table 2.2.400

Commercial Zoning District Development Standards

| STANDARD  | CB  | CC   | CL   | CG   |
|---|---|--|--|--|
| Minimum Front Yard Setback, see note (1) below                                    | None  | None   | 10 feet  | 10 feet  |
| Maximum Front Yard Setback, see note (1) below and subsection (C) of this section |   |  |  |  |
| – From street with on-street parking  | 10 feet   | 10 feet  | 10 feet  | 10 feet  |
| – From street without on-street parking   | 10 feet   | 80 feet  | 80 feet  | 80 feet  |
| Minimum Rear Yard Setbacks  | None  | None   | None   | None   |
| Minimum Side Yard Setbacks  | None  | None   | None   | None   |
| Maximum Lot Coverage  | None  | None   | None   | None   |
| Maximum Building Height   | 35 to 70 feet<br>Subject to the provisions of <a href="#">BDC 2.2.800</a> | 35 feet, except within 100 feet of the Deschutes River where height may be further limited subject to WOZ Review | 55 feet, except within 100 feet of the Deschutes River where height may be further limited subject to WOZ Review | 55 feet, except within 100 feet of the Deschutes River where height may be further limited subject to WOZ Review |
| Minimum Floor Area Ratio  | Floor Area Ratio of 2:1   | None   | None   | None   |
| Maximum Building Footprint, see note (2) below                                    | None  | 50,000 sq. ft.   | None   | None   |

(1) Subject to the special setback standards of [BDC Chapter 3.4](#) and the site layout and building orientation standards of [BDC 2.2.500](#). (2) See subsection (C) of this section.

**A. Setbacks.** *In some of the Commercial Districts, buildings are placed close to the street to create a vibrant pedestrian environment, to slow traffic, provide a storefront character to the street, support future transit service, and encourage walking. The setback standards are flexible to encourage public spaces between sidewalks and building entrances (e.g., extra-wide sidewalks, plazas, squares, outdoor dining areas, and pocket parks). The standards also encourage the formation of solid blocks of commercial and mixed-use buildings for walkable Commercial Districts.*

1. **Applicability.** *Except as modified by this section and BDC 2.2.500, Site Layout and Building Orientation, the setback standards contained in Table 2.2.400 apply to all new construction and expansion of existing buildings within the Commercial Districts.*
2. **Maximum Setback Calculation.** *Where more than one building is proposed on a site, conformance with the maximum setback standard is achieved when no less than 40 percent of the site's frontage on a public or private street is occupied by one or more buildings that conform with the building setback and orientation standards of this chapter. The maximum setback standard may be increased as necessary when an approved usable public space with pedestrian amenities (e.g., extra-wide sidewalk, plaza, pocket park, outdoor dining area or a public square with seating) is provided between the building and front property line. (See also BDC 2.2.600, Commercial Design Review Standards, and 2.2.700, Pedestrian Amenities, for related building entrance standards.)*
3. **Front Yard Setbacks.**
  - a. **General Standards.** *See Table 2.2.400, Commercial Zoning District Development Standards.*
  - b. **Multiple Frontage and Corner Lots.** *For buildings on sites with more than one street frontage or through lots, the minimum front yard setback standards in Table 2.2.400 shall be applied to all street frontages. However, the maximum setback standard shall be applied to only one of the frontages. Where the abutting streets are of different classifications, the maximum setback standard shall be applied to the higher classification of street.*
  - c. **Exception to Front Yard Setbacks.** *This exception applies to all Commercial Zones except the CB Zone.*
    - i. *In the CL, CC and CG Zones, when the street fronting the development does not allow on-street parking, the maximum front yard setback of 80 feet shall apply.*
    - ii. *Where streets with insufficient right-of-way abut the site, special setbacks may apply in conformance with BDC 3.4.200(J), Special Setbacks.*

**FINDING:** The Subject Property adjoins two minor arterial streets. There is no on-street parking on either frontage. Over 40 percent of the Subject Property's frontage on Brosterhous Road contains buildings that will be built within 80 feet of the Brosterhous Road right-of-way. The frontage is approximately 193' with a building frontage of 126' or a coverage of 65%. Along Murphy Rd. the 586' of frontage has either buildings or pedestrian amenities plazas along 76% of the frontage. Only one building is proposed to be setback off the frontage and that is the Lot A, Phase 3 Tenant #1 D/T food building and that is setback off a plaza from Murphy Road by 59'-4". Per the setbacks identified on Site Plan A1.01, the Hearings Officer finds that all the front yard setbacks will be met.

**4. Rear Yard Setbacks.**

- a. *There is no minimum rear yard setback, except that buildings shall conform to the clear vision standards in BDC 3.1.500.*
- b. *Building transition standards in conformance with this subsection apply when abutting a Residential Zone.*
- c. *The applicable fire and building codes for attached structures, firewalls, and related requirements apply.*

**5. Side Yard Setbacks.**

- a. *There is no minimum side yard setback, except that buildings shall conform to the clear vision standards in BDC 3.1.500.*
- b. *Building transition standards in conformance with this subsection apply when abutting a Residential Zone.*
- c. *The applicable fire and building codes for attached structures, firewalls, and related requirements apply.*

**FINDING:** Per Site plan A1.01 and the Landscape plan drawings, the Hearings Officer finds that all the clear vision triangle standards at all the access driveways will be met. The clear vision triangle at the traffic circle a street-to street angle at 15' is met at the building corner. The Subject Property abuts residential zones, and transition standards are addressed below. Setbacks required by fire and building codes will be addressed during building permit review.

**6. Transition Standards.**

- a. *Nonresidential buildings abutting a Residential Zone shall be set back a minimum of 10 feet from the Residential Zone. The minimum setback distance for any portion of a commercial, mixed-use, or nonresidential building exceeding 25 feet in height shall increase one foot for each additional foot of building height over 25 feet.*

**FINDING:** The drive through building area A Phase #3 Tenant#1 is setback 10' from the West abutting residential property line. The proposed building is 24'-6" max height at its eastern high point. The Hearings Officer finds that all nonresidential buildings meet this setback from the southern property line per the submitted site plan.

- b. *A landscape buffer of no less than five feet is required along the abutting Residential Zone. The landscape buffer, to the extent practical, shall provide both a visual and auditory buffer that includes trees, shrubs and ground cover.*

**FINDING:** Per the submitted narrative, the landscape buffers are all at least 10' along the West and South property lines. A sound wall at 6' and 8' high proposed to provide auditory buffering. A 10' planted buffer is shown adjacent to the NW pedestrian plaza. Existing trees near property boundaries are retained to provide additional buffering. The Hearings Officer finds that this standard will be met.

- c. When uses other than a building (i.e., parking, driveway, storage, loading) are built to the edge of the required minimum setback, buffering in addition to the minimum landscaping (i.e., fencing or wall) may be required as a condition of Site Plan Review approval to mitigate the impacts on the abutting Residential Zone.*

**FINDING:** The landscape buffers as shown on the site plans are all at least 10' along the West and South property lines. A sound wall at 6' and 8' high is proposed to provide sound and visual buffering. The Hearings Officer finds that this standard will be met. As shown on the Landscape Plan, the landscape buffers include a variety of shrubs, trees and groundcover, in compliance with this requirement.

- B. Height. All buildings in the Commercial Districts shall comply with the height standards contained in Table 2.2.400 unless excepted below or in compliance with a variance approval.*

**FINDING:** The height of all the proposed buildings complies with the 35' height limit. The Residential exception is not proposed for the plan submitted.

- C. Convenience Commercial Development Standards. The purpose of this subsection is to provide special development standards for the development of new uses within the CC Zone. The zone is intended to provide locations for a wide range of small and medium sized businesses and services as a convenience to surrounding residents. The CC Zone has the following limitation on uses:*

- 1. Maximum Building Size. The maximum building size is 50,000 square feet per building, unless a larger area is approved through a conditional use permit.*

**FINDING:** The proposal complies with this standard because no individual building is proposed to exceed a total floor area of 10,000 square feet. The largest single building proposed is the convenience store market at 4,270 square feet. The Hearings Officer finds that this standard will be met.

#### **2.2.500 Site Layout and Building Orientation.**

- A. Purpose. These site layout and building orientation standards are intended to promote a walkable, storefront character in certain areas of the City, and to facilitate walking, bicycling, and transit use in the Commercial Districts, by forming short blocks.*
- B. Applicability. This section applies to new land divisions and developments that are subject to site plan review in any of the Commercial Districts, Mixed Employment District and Professional Office District.*
- C. Exterior Site Layout. In addition to meeting the access, circulation and lot design standards of BDC Chapter 3.1, new commercial developments shall comply with the following standards:*
  - 1. Usable pedestrian space shall be provided. Usable pedestrian space means a plaza or extra-wide pathway/sidewalk near one or more building entrances. Each development shall provide street trees or planters, space for outdoor seating, canopies or awnings, and on-street parking (in selected areas) to improve the pedestrian environment along internal streets or drives.*

**FINDING:** There are existing sidewalks and bicycle lanes along both frontages of the Subject Property. The proposal includes pedestrian spaces with planned outdoor seating and walkways near all building entrances and connecting across the Subject Property with designated pedestrian crossing areas. Street trees and landscaping will be provided as shown on the submitted site plan and landscape plan drawings. The Hearings Officer finds that this standard will be met.

**2. Where multiple-building development is contemplated on parcels or lots 10 acres or greater in size ...**

**FINDING:** The Hearings Officer finds that this standard does not apply, as the total development is less than 10 acres.

**D. Building Orientation Standards. Developments within all Commercial Districts shall be oriented to a street where practical. The building orientation standard is met when all of the following standards are met:**

- 1. Buildings shall have an entrance(s) visible or oriented to (facing) a street. Building entrances may include entrances to individual units, lobby entrances, entrances oriented to pedestrian plazas, or breezeway/courtyard entrances (i.e., to a cluster of units or commercial spaces). Alternatively, a building may have an entrance facing a side yard when a convenient and direct pedestrian walkway is provided between the building entrance and the street right-of-way.**

**FINDING:** The proposed buildings have either entries off of pedestrian plazas connected directly to the Brosterhous or Murphy Road frontage via walkways or direct street entrances. The Hearings Officer finds that this standard will be met.

- 2. Exceptions. Developments in conformance with subsection (C)(2) of this section as illustrated in Figure 2.2.500.A, "Shopping Street" layout, do not need to comply with the building orientation standards.**

**FINDING:** The Applicant is not seeking an exception to building orientation standards.

**2.2.600 Commercial Design Review Standards.**

- A. Purpose. The Commercial Design Review standards are intended to provide detailed, human-scale design, while affording flexibility to use a variety of architectural building styles. These design standards are in addition to the standards related to commercial development in BDC Chapter 3.2, Landscaping, Street Trees, Fences and Walls, and BDC Chapter 3.3, Vehicle Parking, Loading and Bicycle Parking.**
- B. Applicability. BDC Chapter 4.2, Minimum Development Standards Review, Site Plan Review and Design Review, contains the procedural requirements that pertain to this section.**
- C. Standards. For developments subject to site plan or design review, the following standards shall be met. A design feature used to comply with one standard may be used to comply with another standard.**

**2. Commercial Design Review. The following standards apply to all commercial and mixed-use buildings:**

- a. Buildings with exterior walls greater than 50 feet in horizontal length shall be constructed using the installation of a combination of architectural features and a variety of building materials. Landscaping should be planted adjacent to the walls. Walls that can be viewed from public streets shall be designed with windows totaling a minimum of 10 percent of the wall area and using architectural features and landscaping abutting the building) for at least 50 percent of the wall length. Other walls shall incorporate architectural features and landscaping for at least 30 percent of the wall length.**

**FINDING:** All of the structures in the proposed plan are over 50' in horizontal length. A combination of architectural features and a variety of building materials are proposed including ecological Epoxy bamboo siding materials, glazed walls and various roof designs. All the buildings comply with the 10% window requirement. Public Street Glazing Percentage: Tenant #1 P#3 ; North Elevation = NA – 100%, Tenant #2 P#3 ; North Elevation = 44.9%, Live/Work P#2b ; North Elevation = 11%, Restaurant P#1 North elevation = 43% and Convenience P#1 East Elevation = 44%. The Hearings Officer finds that this standard will be met.

- b. Architectural features include, but are not limited to, the following: recesses, projections, wall insets, arcades, window display areas, awnings, balconies, window projections, landscape structures or other features that complement the design intent of the structure and are acceptable to the Review Authority.**

**FINDING:** All of the features listed above are used in the structures as proposed for the Brosterhouse Plaza. The Hearings Officer finds that this standard will be met.

- c. In addition, a portion of the on-site landscaping shall be planted adjacent to the walls of a building so that the vegetation combined with the architectural features significantly reduces the visual impact of the building mass as viewed from the street. Additional landscaping requirements are in BDC Chapter 3.2, Landscaping, Street Trees, Fences and Walls.**

**FINDING:** Applicant's submitted site plans and the landscape plans address this criterion. All the structures have native planting landscape and rockscapes or the hardscape equivalents, pedestrian plazas and features adjacent to walls 100% along the frontages. The Hearings Officer finds that this standard will be met.

- d. The predominant building materials should be characteristic of Central Oregon such as brick, wood, native stone and tinted/textured concrete masonry units and/or glass products. Other materials such as smooth-faced concrete block, undecorated tilt-up concrete panels, or prefabricated steel panels should only be used as accents and not dominate the building exterior of the structure. Metal roofs may be allowed if compatible with the overall architectural design of the building.**

**FINDING:** The proposed building materials include vertical and horizontal running patterns using a sustainable rainscreen wood equivalent: by Fortress Building Products called Apex Capped Bamboo – PVC composite Cladding boards, exterior aluminum clad/interior wood windows and steel coated panels

for accents and large trim bands. Metal roofs in dark colors are proposed for the buildings. The Hearings Officer finds that this standard will be met.

- e. Roofs should be designed to reduce the apparent exterior mass of a building, add visual interest and be appropriate to the architectural style of the building. Variations within one architectural style are highly encouraged. Visible rooflines and roofs that project over the exterior wall of a building enough to cast a shadow on the ground are highly encouraged. Architectural methods shall be used to conceal flat rooftops; however, a maximum of 30 percent of the building elevations visible from the adjacent right-of-way may include flat roof components. Overhanging eaves, sloped roofs, parapet walls that have variations vertically and horizontally with decorative features, and multiple roof elements are highly encouraged. Mansard style roofs are discouraged.***

**FINDING:** Per the submitted elevation plans, all the buildings are designed to create a variation of the shed roof and include various roof heights which will help to reduce the apparent mass of the buildings. There are a few flat roof areas that are screened by shed roofs except for a few connector pieces in the composition. Per the elevations drawing sheet A4.02 which identify dimensions, the flat roofs are less than 30% of the building elevations visible from the adjacent right of ways. The Hearings Officer finds that this standard will be met.

- f. Clearly defined, highly visible customer entrances using features such as canopies, porticos, arcades, arches, wing walls, and/or integral planters are required.***

**FINDING:** The two proposed entries for the convenience store are each identified by a pair of Pilaster Columns embedded into the walls. The columns branch into a tree type column that support the entry volume for the market. The Brosterhous entry is further identified by a suspended canopy reaching out to the Brosterhous front property line. The interior West elevation of the market has a suspended canopy along the front perimeter sidewalk. The Growler Pub restaurant has a large glazed featured dining room that acts as the entry from the food plaza through roll away sliding doors protected by the large plaza canopy. The Murphy entry has a canopied entry, connected to the Murphy Road sidewalk by a landscaped defined plaza. This plaza entry is adjacent to the lantern like entry Lobby with a clerestory identifying it to pedestrians and vehicles exiting the circle. The Interior south elevation also has a canopy identify the entry from the parking and refueling area sidewalk. The live work units feature canopied entries over each door and the operable facades are identified in the massing of each unit. The Phase 3 Tenant buildings will have canopied entries over the parking side entries. The Hearings Officer finds that this standard will be met.

- g. Community amenities such as patio/seating areas, water features, art work or sculpture, clock towers, pedestrian plazas with park benches or other features located in areas accessible to the public are encouraged and may be calculated as part of the landscaping requirements of BDC Chapter 3.2.***

**FINDING:** There are two primary pedestrian plazas proposed directly connected to the Murphy Road sidewalk frontage. Additional pedestrian features are associated with these plazas. Both Murphy and Brosterhous Road entries to the Market / Convenience store features smaller entry plazas. The Hearings Officer finds that this standard will be met.



- h. Exterior colors shall be of low reflectance, subtle, neutral or earth tone colors. The use of high intensity colors such as black, neon, metallic or fluorescent for the facade and/or roof of the building is prohibited except as approved for building trim. The City of Bend color guide provides samples of acceptable and unacceptable colors. The use of trademark colors requires City approval.***

**FINDING:** The primary exterior colors are a blend of wood tone siding panels. There are spandrel and trim panels shown as black used as accent and formal panels to separate and highlight the building massing. There are mechanical screening layers of black metal at the flat roof parapets to aid in screening and creates an additional layer for the cornice elements. There is also proposed trademark Pinnacle 365 green and blue trim elements that we will use as edges on the convenience store entry canopies. The Hearings Officer finds that this standard will be met.

- i. Exterior lighting shall comply with the outdoor lighting provisions of BDC 3.5.200. Light poles and/or fixtures and flag poles shall not exceed 25 feet in height.***

**FINDING:** According to the application materials, poles will be set below the 25' foot height limit. The Hearings Officer finds that this standard will be met.

- j. Outdoor and rooftop mechanical equipment as well as trash cans/ dumpsters shall be architecturally screened from view. Heating, ventilation and air conditioning units shall have a noise attenuating barrier to protect adjacent Residential Districts from mechanical noise.***

**FINDING:** The mechanical areas for the convenience store and the restaurant are in screen parapet flat roof areas of the building. All trash enclosures will be concrete block. HVAC equipment will be screened with noise attenuating primary enclosures. The closest residential area to the HVAC areas is over 111' feet to the north across Murphy Road and over 169' to the southwest to the adjacent RS land. The Hearings Officer finds that this standard will be met.

**3. Large-Scale Buildings and Developments. For the purpose of this section, "large-scale buildings and developments" are defined as:**

- a. Individual buildings with more than 20,000 square feet of enclosed ground-floor space. Multi-tenant buildings shall be counted as the sum of all tenant spaces within the same building shell; and***
- b. Multiple-building developments with a combined enclosed ground-floor space more than 40,000 square feet (e.g., shopping centers, public/institutional campuses, and similar developments).***

**FINDING:** The combined floor areas is approximately 17,513 square feet. No individual building is more than 20,000 square feet. Therefore, the Hearings Officer finds that the proposal does not meet the definition of "large scale" for the purposes of this code section.

**2.2.700 Pedestrian Amenities.**

**A. Pedestrian Amenity Standards.**

1. **Commercial developments with one or more buildings totaling more than 10,000 square feet and subject to Commercial Design Review shall provide at least one of the “pedestrian amenities” listed below. Pedestrian amenities may be provided on private property or within a public right-of-way (i.e., on the sidewalk, curb, or street pavement) when approved by the City (for City streets), Deschutes County (for County roads), or the Oregon Department of Transportation (“ODOT”) (for State highways):**
  - a. **A plaza, courtyard, square or extra-wide sidewalk next to the building entrance (minimum width of eight feet); or**
  - b. **Sitting space (i.e., dining area, benches or ledges) between the building entrance and sidewalk, with a minimum of 16 inches in height and 30 inches in width; or**
  - c. **Building canopy, awning, pergola, or similar weather protection (minimum projection of four feet over a sidewalk or other pedestrian space); or**
  - c. **Public art (e.g., fountain, sculpture, etc.).**

**FINDING:** There are two primary plazas in the development. Most of the sidewalks next to buildings are 10’-wide. There are two large entry plazas to the Restaurant Growler Pub from Murphy Road (17’ wide at the sidewalk) and in front of the convenience store from the pedestrian cross walk at Brosterhouse Road at 10’ wide. The NW Plaza at the Phase 3 Tenants 1&2 connect to the Murphy Road sidewalk at 9’ wide and organically expand East West around the existing trees being saved in the location. The Hearings Officer finds that this standard will be met.

**Criterion #4:           The proposal complies with the standards of the zoning district that implements the Bend Comprehensive Plan designation of the subject property;**

**FINDING:** The Hearings Officer finds that the modified plans comply with the standards of the CC zone that implement the Bend Comprehensive Plan designation of the Subject Property.

**Criterion #5.       The applicable standards in BDC Title 3 are met;**

**Chapter 3.1, Lot, Parcel and Block Design, Access and Circulation**

**3.1.200 Lot, Parcel and Block Design.**

**FINDING:** No new lots are proposed, but the Subject Property has an adequate width and depth, and all side lot lines are at approximate right angles to the streets. No new streets are proposed, and the Applicant proposed two points of access to the private streets in the Sun Crown Villa RV Park in order to achieve the purpose of the City of Bend’s street connectivity requirements.

The Hearings Officer incorporates the Findings for **Section III.B.3 (Block Length and Perimeter Standards)** as additional findings for these BDC 3.1.200 findings. The Hearings Officer finds that the lot, parcel and block design standards will be met and the exception request is warranted and should be approved.

**3.1.300 Multi-Modal Access and Circulation.**

- A. Purpose.** *The purpose of this section is to ensure safe, accessible, direct and convenient multi-modal circulation by developing an on-street and off-street system of access corridors and public sidewalks throughout the City.*
- B. On-Site Pedestrian Facilities.** *For all developments except single-unit, duplex dwellings on their own lot or parcel, and shared courts, pedestrian access and connectivity must meet the following standards:*
- 1. Pedestrian ways must:**
    - a. Connect all building entrances within the development to one another.**
    - b. Connect all parking areas, storage areas, recreational facilities, common areas (as applicable), and abutting development to the building's entrances and exits.**
    - c. Extend throughout the development site, and connect to all future phases of development, abutting trails, public parks and open space areas whenever possible as described in subsection (C) of this section, Off-Site Multi-Modal Facilities.**
    - d. Connect or stub to abutting streets and private property, in intervals no greater than the block perimeter standards.**
    - e. Provide pedestrian facilities within developments that are safe, accessible, reasonably direct and convenient connections between primary building entrances and all abutting streets, based on the following:**
      - i. Convenient and Direct.** *A route that does not deviate unnecessarily from a straight line or a route that does not involve a significant amount of out-of-direction travel for users.*
      - ii. Safe.** *Bicycling and pedestrian routes that are free from hazards and safely designed by ensuring no hidden corners, sight-obscuring fences, dense vegetation or other unsafe conditions.*
      - iii. Accessible.** *All pedestrian access routes must comply with all applicable accessibility requirements.*
      - iv. Primary Entrance Connection.** *A pedestrian access route must be constructed to connect the primary entrance of each building to the abutting streets. For commercial, industrial, mixed-use, public, and institutional building entrances, the primary entrance is the main public entrance to the building. In the case where no public entrance exists, connections must be provided to each employee entrance.*

**FINDING:** The submitted plans demonstrate that on-site pedestrian walkways link building entrances and other features, connect to existing sidewalks within the public right-of-way, and are designed to be direct, safe, accessible, and connected. The Hearings Officer finds that this standard will be met.

**2. On-Site Pedestrian Facility Development Standards. On-site pedestrian facilities shall meet the following standards:**

- a. On-site pedestrian walkways shall have a minimum width of five feet.**
- d. Pedestrian walkways shall be lighted in conformance with BDC 3.5.200, Outdoor Lighting Standards.**
- c. Switchback paths shall be required where necessary to meet the City's adopted accessibility requirements and City of Bend Standards and Specifications. Accessible alternate routes such as ramps and/or lifts shall be provided when required.**
- d. The City may require landscaping adjacent to a pedestrian walkway for screening and the privacy of adjoining properties. The specific landscaping requirements shall balance the neighbors' privacy with the public safety need for surveillance of users of the public walkway. Tall, sight-obscuring fences or dense landscaping thick enough to conceal hazards are prohibited.**
- e. Vehicle/Walkway Separation. Where walkways are parallel and abut a driveway or street (public or private), they shall be raised six inches and curbed, or separated from the driveway/street by a five-foot minimum landscaped strip. Special designs may be permitted if this five-foot separation cannot be achieved.**
- f. Housing/Walkway Separation. Pedestrian walkways shall be separated a minimum of five feet from all residential living areas on the ground floor, except at building entrances. Separation is measured from the walkway edge to the closest dwelling unit. The separation area shall be landscaped in conformance with the provisions of BDC Chapter 3.2, Landscaping, Street Trees, Fences and Walls. No walkway/building separation is required for commercial, industrial, public, or institutional uses.**
- g. Walkway Surface. Walkway surfaces shall be concrete and conform to accessibility requirements. Asphalt, brick/masonry pavers, or other durable surface that makes a smooth surface texture, and conforms to accessibility requirements, may be allowed as determined by the City. Multi-use paths and trails (i.e., for bicycles and pedestrians) shall be the same materials. (See also BDC 3.4.200, Transportation Improvement Standards.)**
- h. Additional standards for walkway design can be found in BDC Chapter 3.3, Vehicle Parking, Loading and Bicycle Parking.**

**FINDING:** Based on the submitted plans, the Hearings Officer finds that all on-site pedestrian facilities will meet or exceed the standards listed above. In addition, they will all be required to meet ADA requirements.

**3.1.400 Vehicular Access Management.**

**C. Approval of Access Required. Proposals for new access shall comply with the following procedures:**

- 1. Permission to access City streets shall be subject to review and approval by the City based on the standards contained in this chapter and the provisions of BDC Chapter 3.4, Public Improvement Standards. Access will be evaluated and determined as a component of the development review process.***

**FINDING:** The Hearings Officer incorporates the findings for **Section III.B.3 (Block Length and Perimeter Standards)**, **Section III.B.5 (Brosterhouse Access)** and **Section III.B.9 (General Transportation Related Concerns)** as additional findings for these BDC 3.1.400 C. 1 findings.

The Subject Property benefits from two existing driveways. Both access drives were designed and built by the City of Bend in the recent Murphy/Brosterhouse roundabout improvement project. The drives and appropriate spacing have already been reviewed and approved by the City of Bend. The Hearings Officer finds that this standard will be met.

- D. Traffic Study Requirements. A transportation impact analysis (TIA) may be required under BDC Chapter 4.7, Transportation Analysis, for certain types and intensities of development proposals and to determine access restrictions of driveways onto arterial and collector roadways.***

**FINDING:** The Hearings Officer incorporates the findings for **Section III.B.1 (Project Exempt from Traffic Analysis)**, **Section III.B.2 (Internal Capture Methodology)**, **Section III.B.3 (Block Length and Perimeter Standards)**, **Section III.B.5 (Brosterhouse Access)** and **Section III.B.9 (General Transportation Related Concerns)** as additional findings for these BDC 3.1.400 D findings.

The Hearings Officer finds that a Transportation Impact Analysis was prepared and submitted to the City of Bend. Additional traffic impacts are discussed below.

- E. Conditions of Approval. To ensure the safe and efficient operation of the street and highway system, the City may require the closing, consolidation, or relocation of existing curb cuts or other vehicle access points, recording of reciprocal access easements (i.e., for shared driveways and cross access routes), development of frontage or backage streets, installation of traffic control devices, and/or other mitigation measures that comply with this code, the City's Standards and Specifications, and are approved by the City.***

**FINDING:** The Hearings Officer incorporates the findings for **Section III.B.1 (Project Exempt from Traffic Analysis)**, **Section III.B.2 (Internal Capture Methodology)**, **Section III.B.3 (Block Length and Perimeter Standards)**, **Section III.B.5 (Brosterhouse Access)** and **Section III.B.9 (General Transportation Related Concerns)** as additional findings for BDC 3.1.400 E. The existing access drives to Murphy and Brosterhouse Roads were recently built by the City of Bend. The two cross access locations to the adjacent properties to the South have been designated by the City of Bend and are confirmed by Applicant's proposed site plan.

- F. Access Management Requirements. Access to the street system must meet the following standards:***

- 1. Lots and parcels in all zones and all uses may have one access point, except as authorized in BDC 3.1.400(F)(4). When a property has more than one permitted street access, the City Engineer may require existing accesses to be closed and replaced with curbing, sidewalks/pathways, and landscaping, in accordance with the provisions of this code and the City standards and specifications.***

***2. If a lot or parcel has frontage on two or more streets of different street classifications, the property must access the street with the lowest classification.***

**FINDING:** The Hearings Officer incorporates the findings for **Section III.B.1 (Project Exempt from Traffic Analysis), Section III.B.2 (Internal Capture Methodology), Section III.B.3 (Block Length and Perimeter Standards), Section III.B.5 (Brosterhous Access) and Section III.B.9 (General Transportation Related Concerns)** as additional findings for these BDC 3.1.400 D findings. As noted in the findings for 3.1.400 E. above, the existing access drives to Murphy and Brosterhous Roads were recently built by the city.

***G. Shared Access. For traffic safety and access management purposes, the number of driveway and private street intersections with public streets shall be minimized by the use of shared driveways with adjoining lots where feasible. The City may require shared driveways as a condition of development approval in accordance with the following standards:***

- 1. Shared Driveways and Frontage Streets. Shared driveways and frontage streets are encouraged, and may be required to consolidate access onto a collector or arterial street. When shared driveways or frontage streets are required, they shall be stubbed to adjacent developable land to indicate future extension. For the purpose of this code, stub means that a driveway or street temporarily ends at the property line, and shall be extended in the future as the adjacent property develops, and developable means that a property is either vacant or it is likely to redevelop.***
- 2. Access Easements. Access easements for the benefit of affected properties shall be recorded for all shared driveways, including walkways, at the time of final plat approval or as a condition of development approval.***
- 3. Cross Access. Cross access is encouraged, and may be required between contiguous sites in the Public Facilities, Mixed-Use, Commercial and Industrial Zones and for multi-unit housing developments in the Residential Zones in order to provide for direct circulation between sites and uses for pedestrians, bicyclists and drivers and to enable compliance with the collector and arterial access management requirements of this chapter.***

**FINDING:** The Hearings Officer incorporates the findings for **Section III.B.1 (Project Exempt from Traffic Analysis), Section III.B.2 (Internal Capture Methodology), Section III.B.3 (Block Length and Perimeter Standards), Section III.B.5 (Brosterhous Access) and Section III.B.9 (General Transportation Related Concerns)** as additional findings for these BDC 3.1.400 G findings. The two cross access locations to the adjacent property to the South that connect to the City of Bend built Brosterhous and Murphy Road driveways have been designated by the City of Bend and are proposed with the submitted site plan. The Applicant is proposing to record two stubbed cross access easements to provide access to the two properties that adjoin the southern boundary of the Subject Property.

***I. Fire Access and Parking Area Turn-around. A fire equipment access drive shall be provided for any portion of an exterior wall of the first story of a building that is located more than 150 feet from an existing public street or approved fire equipment access drive as measured around the building. Parking areas shall provide adequate aisles or turn-around areas for service and delivery vehicles so that all vehicles may enter the street in a forward manner (except for single-unit dwellings and alleys that provide adequate backing width).***

**FINDING:** The Fire Department reviewed Applicant’s modified plans and did not indicate any concerns regarding fire access. Additional review of compliance with the applicable Fire Codes will be completed by the Building Safety Division and the Fire Department with review of building permit applications.

**3.1.500 Clear Vision Areas.**

**FINDING:** The Hearings Officer finds, based on the submitted plans, that the proposed development does not encroach into the required clear vision areas. Staff recommended (Staff Report, page 19) the following condition of approval. The Hearings Officer finds that the imposition of the following condition is necessary to assure compliance with BDC 3.1.500.

***Condition of Approval:*** Prior to the issuance of any building permits, clear vision areas shall be shown on the site plan at all street and driveway intersections, on-site and at connections to the public right-of-way. The clear vision areas shall conform to City of Bend Standards and Specifications and Standard Drawing R-2. Prior to occupancy, any sight-obstructing vegetation within the required clear vision areas shall be removed. Any trees with branches in the required clear vision areas shall be limbed in accordance with City of Bend Standard Drawing R-2.

**Chapter 3.2, Landscaping, Street Trees, Fences and Walls**

**3.2.200 Landscape Conservation.**

***Landscape Conservation prevents the indiscriminate removal of significant trees and other vegetation, including vegetation associated with streams, wetlands and other protected natural resource areas. This section cross-references BDC 2.7.600 and 2.7.700, which regulate development of areas of special interest.***

***The purpose of this section is to incorporate significant native vegetation into the landscapes of development. The use of existing mature, native vegetation within developments is a preferred alternative to removal of vegetation and re-planting. Mature landscaping provides summer shade and wind breaks, allows for water conservation due to larger plants having established root systems, and assists with erosion control within disturbed construction sites.***

- A. Applicability. The standards in this section shall apply to all development sites containing significant vegetation, as defined below, except for residential development on Residential District lots that were created through a subdivision or partition plat filed with Deschutes County prior to the effective date of the ordinance codified in this code.***
- B. Significant Vegetation. Significant vegetation means individual trees with a specific trunk diameter as measured four feet above the ground (known as DBH, “diameter at breast height”); shall be inventoried during the site design process and protected during construction unless otherwise approved for removal through the site plan review process. For the purpose of this section, deciduous trees measuring six inches or greater and coniferous trees measuring 10 inches or greater shall be considered significant vegetation.***
- C. Mapping and Protection Required. A Tree Protection Plan shall be prepared and submitted with the development application. Significant vegetation shall be inventoried and mapped as required by BDC Chapter 4.2, Site Plan Review and Design Review, BDC 2.7.600, Waterway Overlay Zone***

***(WOZ), and 2.7.700, Upland Areas of Special Interest Overlay Zone. Trees shall be mapped individually and identified by species and size (DBH). A protection area shall be defined around the edge of all branches (drip-line) of each tree (drip-lines may overlap between trees) or stand of trees. The City also may require an inventory, survey, or assessment prepared by a qualified professional when necessary to determine tree health, vegetation boundaries, building setbacks, and other protection or mitigation requirements.***

**FINDING:** The Applicant showed all significant trees on the landscape plan as “existing” trees. Several of the mature trees will be retained and be incorporated into a plaza area. The Hearings Officer finds that this standard will be met.

### **3.2.300 New Landscaping.**

**C. Landscape Area Standards. A minimum percentage landscape coverage is required. “Coverage” is measured based on the size of plants at maturity or after two years of growth, whichever comes sooner. The minimum required landscaping shall equal 15 percent of the gross lot area for the following uses:**

#### **4. Mixed-use developments.**

**FINDING:** The Subject Property has a gross lot area of 117,383 sq. ft. and requires (15%) 17,618 sq. ft. of landscape coverage. 27,595 sq ft is provided (23.5%). This includes the allowable use of Food Cart Plaza/Hardscape as calculated below. The full build out landscape calculations are shown. Intermediate phases before buildout will be all landscape so intermediate phases will have higher landscaped area calculations. The Hearings Officer finds that this standard will be met.

**D. Landscape Materials. Landscape materials include live trees, shrubs, ground cover plants, non-plant ground covers, and outdoor hardscape features, as described below:**

**1. Plant Selection. Native vegetation shall be preserved or planted where practical. A combination of live deciduous and evergreen trees, shrubs and ground covers shall be used for all planted areas, the selection of which shall be based on local climate, exposure, water availability, and drainage conditions. Fire resistive plants should be planted in forested areas or on slopes where necessary to reduce the risk of fire spreading to structures. As necessary, soils shall be amended to allow for healthy plant growth.**

**FINDING:** The Subject Property has little to no existing native vegetation to be preserved. Several of the existing trees in the northwest corner of the Subject Property will be retained. The submitted landscape plan includes live deciduous and evergreen trees, shrubs, and ground cover. The types of live landscaping were selected by a local landscaper, based on the City of Bend’s list of appropriate trees/shrubs, and local climate, exposure, water availability, and drainage conditions. The Subject Property does not include any forested or sloped areas. The responsibility for maintenance and survival of landscaping has been communicated to Applicant.

**2. Hardscape Features. Ground-level areas for passive use, such as patios, decks, plazas, paved dining areas, etc., may cover up to 15 percent of the required 15 percent landscape area; swimming pools, sports courts and similar active recreation facilities may not be counted toward fulfilling the landscape requirement.**



**FINDING:** A patio area is proposed and this area is included in the landscaping area requirement which will allow 15% of the required 15% of landscaping to be hardscape area, in compliance with this requirement.

- 3. *Non-plant Ground Covers. Bark dust, chips, aggregate or other non-plant ground covers may be used, but must be confined to areas underneath plants and is not considered a substitute for ground cover plants. Measures shall be taken to prevent erosion of non-plant ground covers onto adjacent properties or rights-of-way.***

**FINDING:** Native stones will be used in landscaping areas, but will be secondary to trees, grasses and shrubs, and is not proposed as a substitute for ground cover plants.

- 4. *Tree Size. Required deciduous trees shall have a minimum caliper size of two inches or larger at time of planting, including trees planted adjacent to a public right-of-way.***

**FINDING:** The submitted landscaping plan proposes all trees at a minimum caliper size of two inches, in compliance with this requirement.

- 5. *Shrub Size. Shrubs shall be planted from two-gallon containers or larger.***

**FINDING:** Shrubs (multiple varieties) are proposed in the submitted landscape plan and are shown as 2-gallon containers, in compliance with this requirement.

- 6. *Ground Cover Location and Size. All of the landscaped area that is not planted with trees and shrubs or covered by allowable hardscape features must be planted in ground cover plants, including grasses. Ground cover plants shall be sized and spaced in the following manner: planted at a rate of at least one plant per 18 inches on center, in triangular spacing based on plant habitat (growth rate) with an expected coverage of 80 percent within five years of the time of planting.***

**FINDING:** The landscape plan includes several types of groundcover and sizes and locations have been specified to accomplish 95% cover, with an expected coverage of 80 percent within five years of planting.

- 7. *Significant Vegetation. Significant vegetation preserved in accordance with BDC 3.2.200 may be credited toward meeting the minimum landscape area standards in subsection (C) of this section. Credit shall be granted based on the total square footage of the preserved canopy. The street tree standards of BDC 3.2.400 may be waived when trees preserved within the front yard setbacks provide the same or better shading and visual quality as would otherwise be provided by street trees between the street and sidewalk.***

**FINDING:** Little to no significant vegetation exists on Subject Property. However, Applicant has proposed that several of the existing trees will be retained.

- 8. *Stormwater Facilities. Stormwater facilities (e.g., detention/retention ponds and swales) shall be landscaped. Landscaped bio-swales are encouraged and can be counted in the required amount of landscaped area on the site. Planting of broad leaf canopy trees is encouraged as***

***effective surface water interceptors.***

**FINDING:** Stormwater is proposed to be managed with multiple drywells on site, not any detention/retention ponds. As such, the Hearings Officer finds that the requirement for ponds to be landscaped is not applicable.

***E. Landscape Design Standards. All yards, parking lots and required street tree planter strips shall be landscaped at the time of site development in accordance with the provisions of this chapter. All required landscaping and related improvements shall be completed prior to the issuance of a Certificate of Occupancy. Only during winter months when the ground is frozen shall the required landscape improvements be eligible for financial guarantee prior to occupancy. Landscaping shall provide erosion control, visual interest, buffering, privacy, open space and pathway identification, shading and wind buffering, based on the following standards:***

- 1. Yard Setback Landscaping. Landscaping in yard setbacks shall satisfy the following criteria:***
  - a. Based on the proposed use of the site, provide visual screening and privacy within side and rear yards, while leaving front yards and building entrances mostly visible for security purposes; and observing the clear vision requirements of BDC Chapter 3.1;***
  - b. Use shrubs and trees as windbreaks or solar shading, where needed;***
  - c. Retain natural vegetation, as practicable;***
  - d. Define pedestrian pathways and open space areas with landscape materials;***
  - e. Provide focal points within a development, such as signature trees (i.e., large or unique trees), hedges and flowering plants;***
  - f. Use trees to provide summer shading within common open space areas and parking lots, and within front yards when street trees cannot be provided;***
  - g. Use a combination of plants for year-long foliage, color and interest; and***
  - h. Use landscaping to screen outdoor storage and mechanical equipment areas, and to enhance graded areas such as berms, swales and detention/retention ponds.***

**FINDING:** Landscaping is proposed to be completed at the time of site construction of each phase. The proposed landscaping plan includes landscaping in the front, side and rear setbacks, on all sides of the property. Trees and shrubs are proposed in all setback areas, providing visual screening. Minimal natural vegetation currently exists on the Subject Property. A combination of plant types are proposed, including several varieties of trees, shrubs, grasses and vines, to provide year-round foliage and changing colors/flowering. Trees are proposed in the parking area, to provide both shade and visual focus.

- 2. Parking Areas. A minimum of 10 percent of the total paved area of all parking lot(s), as measured around the perimeter of all parking spaces and maneuvering areas, shall be***

*landscaped. Such landscaping shall consist of an evenly distributed mix of broad-canopied deciduous shade trees with shrubs and/or ground cover plants. Evenly distributed means that the trees and other plants are distributed around the parking lot perimeter and between parking bays to provide a partial canopy. At a minimum, one tree per eight parking spaces total shall be planted to create a partial tree canopy over and around the parking area. All parking areas with more than 50 spaces shall include landscape islands with trees to break up the parking area into rows.*

*All landscaped areas for trees shall have minimum dimensions of four feet by four feet to ensure adequate soil, water, and space for healthy plant growth. Where practical, landscape areas within parking lots shall be designed at a lower grade than the parking surface to allow surface water drainage to collect in the planter areas.*

**FINDING:** Parking area distributed landscaping is 8,757 sf (16.3%) (required min. 10%) given the total parking area around the perimeter is 54,787 square feet. The Hearings Officer finds that this standard will be met.

**3. Landscape Buffering and Screening Required. Landscape buffering and screening are required under the following conditions:**

**a. Parking/Maneuvering Area Adjacent to Streets and Drives. Where a parking or maneuvering area for more than 10 vehicles is adjacent and parallel to a public or private street, a landscape buffer consisting of a variety of trees and/or shrubs shall be provided. The width of the landscape buffer shall be the same width as the front yard setback or a minimum of three feet, whichever is greater. The required screening shall provide breaks, as necessary, to allow for access to the site and sidewalk by pedestrians via pathways.**

*The design of the screening shall also allow for visual surveillance of the site for security. Any areas between the parking and maneuvering area and the street/driveway line shall be landscaped with plants or other ground cover. All walls and hedges shall be maintained in good condition, or otherwise replaced by the owner.*

**FINDING:** No parking areas are adjacent to streets. The Hearings Officer finds that this standard is not applicable to the proposed project.

**b. Parking/Maneuvering Area Adjacent to Building. Where a parking or maneuvering area, or driveway, is adjacent to a building, the area shall be separated from the building by a raised walkway, plaza, or landscaped buffer no less than two feet in width. Raised curbs, bollards, wheel stops, or other design features shall be used to protect buildings from being damaged by vehicles. The use of sidewalks adjacent to a building shall comply with ADA standards.**

*When parking areas are located adjacent to residential ground-floor living space, a landscape buffer with a minimum width of five feet is required.*

**FINDING:** Raised walkways are proposed throughout the property in compliance with this standard. No ground-floor residential space is existing or proposed on the Subject Property.

- c. Screening of Mechanical Equipment, Outdoor Storage, Service and Delivery Areas, and Automobile-Oriented Uses. All mechanical equipment, outdoor storage, manufacturing, and service and delivery areas shall be screened to the greatest extent practical from all public streets, Residential Districts, and housing units on the same site. Screening shall be provided by one or more of the following: decorative wall (i.e., masonry or similar quality material as the building), evergreen hedge, non-see-through fence, or a similar feature that provides a non-see-through barrier. Walls, fences, and hedges shall comply with the vision clearance requirements and provide for pedestrian circulation, in accordance with BDC Chapter 3.1, Lot, Parcel and Block Design, Access and Circulation. (See BDC 3.2.500 for other standards related to fences and walls.)**

**FINDING:** According to the submitted application, block screen walls are shown along the south and west property line. All trash enclosures are block walled enclosures with roofs and gates. The convenience store building has a service door facing the interior parking area. All roof top units are screened. The Hearings Officer finds that this standard will be met.

- F. Maintenance and Irrigation. The use of drought-tolerant plant species is encouraged. Water efficient irrigation shall be provided for new plants. If the plantings fail to survive, the property owner shall immediately replace them with an equivalent specimen (i.e., evergreen shrub replaces evergreen shrub, deciduous tree replaces deciduous tree, etc.). All other landscape features required by this code shall be maintained in good condition, or otherwise replaced by the owner.**

**FINDING:** The proposed plants were selected for longevity. Additional irrigation system lines are proposed for areas with new landscaping, as noted on the landscape plans, in compliance with this requirement. The Applicant is aware of the survival and replanting requirements for the plants and must comply.

- G. Additional Requirements. Additional buffering and screening may be required for specific land uses, as identified within the individual land use districts. In addition, the City may require additional landscaping through the Conditional Use Permit process.**

**FINDING:** The proposed site plan includes significant buffering and screening along its western and southern property lines, through wide landscaped areas and a concrete wall. No additional buffering or screening is anticipated.

### **3.2.400 Street Trees.**

**FINDING:** All street trees and sidewalks for both frontages on Murphy Road and Brosterhous Road were planted by the City of Bend in compliance with code requirements and completed as part of the new round about improvement project.

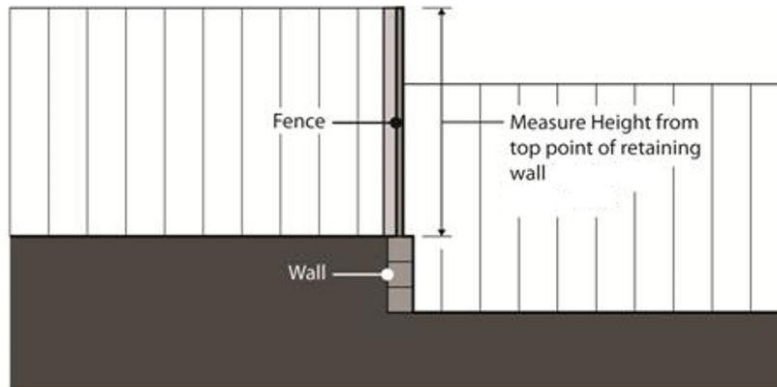
### **3.2.500 Fences and Retaining Walls.**

- B. All fences and retaining walls, regardless of district or location, shall comply with the following requirements:**

- 1. The allowable height must be measured from the lowest grade at the base of the fence or retaining wall unless stated otherwise. Posts, trellises, lattice and any other material placed**

*on top of the fence is considered to be part of the fence when measuring the overall height. As illustrated in Figure 3.2.500.A, when a fence is placed atop a retaining wall, the height of the fence is determined exclusive of the height of the retaining wall such that the top of the retaining wall is considered the finished grade.*

**Figure 3.2.500.A**



2. *Fences to be built as required buffers shall comply with BDC 3.2.300.*
3. *Fences and retaining walls shall comply with the clear vision area standards of BDC 3.1.500.*
4. *Retaining walls may require a building permit and/or approved engineered plans.*
5. *Fences over seven feet in height require a building permit and/or approved engineered plans.*
6. *Fences and retaining walls may be placed on property lines.*

**C. Fences.**

1. *Residential Districts...*
2. *In all other districts, fences shall not exceed eight feet in height.*

**D. Retaining Walls.**

1. *The maximum allowable height of retaining walls is six feet, with the following exceptions:*
  - a. *Retaining walls and terraced walls may exceed six feet when permitted as part of a Site Plan Review or land division approval.*

**FINDING:** No fences are proposed. 6-8' tall block screening walls are shown on the West and South Perimeters between RS zone and the Subject Property. Neither are retaining walls. There are no fences near the two driveways with Clear Vision areas as shown on the site plans.

**Chapter 3.3, Vehicle Parking, Loading and Bicycle Parking**

**3.3.300 Vehicle Parking Standards for On-Site Requirements.**

*The minimum number of required off-street vehicle parking spaces (i.e., parking that is located in parking lots and garages and not in the street right-of-way) is determined based on the standards in this section.*

- A. Off-Street Parking Requirements.** *The number of required off-street vehicle parking spaces is determined in accordance with the following standards. Off-street parking spaces may include spaces in garages, carports, parking lots, and/or driveways if vehicles are not parked in a vehicle travel lane (including emergency or fire access lanes). In applying the exceptions and reductions listed in subsections (B), (C), and (D) of this section, reductions and exceptions may be combined except where otherwise specified. Where a fractional number of spaces results, the required number of spaces is rounded down to the nearest whole number.*

Table 3.3.300

Required Off-Street Vehicle Parking Spaces

| Use   | Minimum Requirement                                      |
|---|--|
| <b>Commercial</b>   |  |
| Restaurants and bars (subject to <a href="#">BDC 3.6.300(J)(10)</a> ) | 1 space per 200 square feet of gross leasable floor area |
| Retail trade and services   |  |
| • General trade   | • 1 space per 350 square feet of gross floor area        |
| • Bulky merchandise (appliance, furniture)                            | • 1 space per 750 square feet of gross floor area        |

**FINDING:** The minimum off-street parking requirement for restaurants and bars is 1 space per 200 square feet of gross leasable floor area, and the minimum off-street parking requirement for general retail trade and services is 1 space per 350 square feet of gross floor area. The live work units parking requirement is 1 space for a quad residential unit plus either the restaurant/office use calculations depending on future tenant proposals. The minimum off-street parking requirements for the proposed development are calculated below.

**SUB LOT AREA "A": PHASE 3**

|   |                     |
|---|---------------------|
| Sub Lot Area                            | 45,253 s.f. 1.03 ac |
| Gross Building Area Shown               | 4,500 s.f.          |
| Tenant #1 - FOOD                        | 2,250 s.f.          |
| Tenant #2 - (a)FOOD (b) Retail          | 2,250 s.f.          |
| FAR- Building Area Ratio/Site Area      | 0.099               |
| <b>Total parking provided</b>           | <b>28 Spaces</b>    |
| Min Parking Required at (a) FOOD/FOOD   | 23 spaces           |
| Max Parking allowed @ 150% of Min       | 35 spaces           |
| PARKING PROVIDED                        | 23 Spaces           |
| Parking Ratio Provided                  | 6 Spaces/K          |
| Min Parking Required at (b) FOOD/RETAIL | 18 spaces           |
| Max Parking allowed @ 150% of Min       | 27 spaces           |
| PARKING PROVIDED                        | 23 spaces           |
| Parking Ratio Provided                  | 6 Spaces/K          |
| PLAZA SEATING                           | 980 s.f             |
| Min Parking Required at FOOD 1/200 s.f  | 4 spaces            |
| Max Parking allowed @ 150% of Min       | 6 spaces            |
| PARKING PROVIDED                        | 5 Spaces            |
| Parking Ratio Provided                  | 5.1 Spaces/K        |
| ADA spaces Required                     | 2 Spaces            |
| ADA spaces Provided                     | 2 Spaces            |
| Bike parking Required                   | 2 Spaces            |
| Bike parking Provided                   | 2 Spaces            |
| Compact parking Provided                | 2 spaces            |

**SUB LOT AREA "B": PHASE 2A**

|   |                  |
|---|------------------|
| <b>Total parking provided</b>             | <b>28 Spaces</b> |
| 12 FOOD CARTS 8' X 20' = 160 s.f          | 1920 s.f         |
| Min Parking Required at (a) FOOD 1.5/cart | 18 Spaces        |
| Max Parking allowed @ 150% of Min         | 27 Spaces        |
| PARKING PROVIDED                          | 18 Spaces        |
| Parking Ratio Provided                    | 9.3 Spaces/K     |
| PLAZA SEATING                             | 1903 s.f         |
| Min Parking Required at FOOD 1/200 s.f    | 9 spaces         |
| Max Parking allowed @150% of Min          | 15 spaces        |
| PARKING PROVIDED                          | 10 Spaces        |
| Parking Ratio Provided                    | 5 Spaces/K       |

**SUB LOT AREA "B": PHASE 2B**

|   |                     |
|---|---------------------|
| Sub Lot Area                                  | 31,475 s.f. 0.72 ac |
| Gross Building Area Shown                     | 5,400 s.f.          |
| 2 Mixed Use Live work                         | 2,700 s.f.          |
| 2 Mixed Use Live work                         | 2,700 s.f.          |
| FAR- Building Area Ratio/Site Area            | 0.17                |
| <b>Total parking provided</b>                 | <b>24 Spaces</b>    |
| <b>OP. 1 PHASE 2B (QUADPLEX)</b>              |                     |
| Min Parking Required at RETAIL (4) 1/350 sf   | 6 spaces            |
| Max Parking allowed @ 150% of Min             | 11 spaces           |
| PARKING PROVIDED                              | 11 Spaces           |
| Parking Ratio Provided                        | 2.0 Spaces/K        |
| <b>OP. 2 BUILT AFTER PHASE 3 (QUADPLEX)</b>   |                     |
| Min Parking Required at (b) FOOD (4) 1/200 sf | 10 spaces           |
| Max Parking allowed @ 150% of Min             | 15 spaces           |
| PARKING PROVIDED                              | 11 Spaces           |
| Parking Ratio Provided                        | 2.0 Spaces/K        |
| 6 FOOD CARTS 8' X 20' = 160 s.f               | 960 s.f             |
| Min Parking Required at (a) FOOD 1.5/cart     | 9 spaces            |
| Max Parking allowed @ 150% of Min             | 13 spaces           |
| PARKING PROVIDED                              | 9 Spaces            |
| Parking Ratio Provided                        | 9.3 Spaces/K        |
| PLAZA SEATING                                 | 980 s.f             |
| Min Parking Required at FOOD 1/200 s.f        | 4 spaces            |
| Max Parking allowed @ 150% of Min             | 6 spaces            |
| PARKING PROVIDED                              | 4 Spaces            |
| Parking Ratio Provided                        | 4 Spaces/K          |
| ADA spaces Required                           | 2 Spaces            |
| ADA spaces Provided                           | 2 Spaces            |
| Bike parking Required                         | 2 Spaces            |
| Bike parking Provided                         | 20 Spaces           |
| Compact parking Provided                      | 15 spaces           |

**SUB LOT AREA "C": PHASE 1**

|   |                     |
|---|---------------------|
| Sub Lot Area                                | 40,723 s.f. 0.93 ac |
| Gross Building Area Shown                   | 7,483 s.f.          |
| (a) 1 GROWLER PUB - FOOD                    | 2,600 s.f.          |
| (b) 1 RETAIL / MARKET                       | 4,883 s.f.          |
| FAR- Building Area Ratio/Site Area          | 0.18                |
| <b>Total parking provided</b>               | <b>31 Spaces</b>    |
| Min Parking Required at (a) FOOD 1/200 sf   | 13 spaces           |
| Max Parking allowed @ 150% of Min           | 19 spaces           |
| PARKING PROVIDED                            | 13 spaces           |
| Parking Ratio Provided                      | 5 Spaces/K          |
| Min Parking Required at (b) RETAIL 1/350 sf | 14 spaces           |
| Max Parking allowed @ 150% of Min           | 21 spaces           |
| PARKING PROVIDED                            | 14 spaces           |
| Parking Ratio Provided                      | 2.8 Spaces/K        |
| PLAZA SEATING                               | 897 s.f             |
| Min Parking Required at FOOD 1/200 s.f      | 4 spaces            |
| Max Parking allowed @ 150% of Min           | 6 spaces            |
| PARKING PROVIDED                            | 4 Spaces            |
| Parking Ratio Provided                      | 4.5 Spaces/K        |
| ADA spaces Required                         | 2 Spaces            |
| ADA spaces Provided                         | 2 Spaces            |
| Bike parking Required                       | 2 Spaces            |
| Bike parking Provided                       | 2 Space             |
| Compact parking Provided                    | 4 Space             |

**SUMMARY:**

|  |     |
|--|-----|
| Total parking provided                           | 83  |
| MAX scenario                                     |     |
| Lot A: FOOD (2)                                  | 43  |
| Lot B: FOOD (4)   FOOD cart (6)   PLAZA          | 34  |
| Lot C: RETAIL   FOOD                             | 46  |
| Potential total parking Maximum Allowed          | 123 |
| MIN scenario                                     |     |
| Lot A: FOOD / RETAIL   PLAZA                     | 22  |
| Lot B: RETAIL (2)   FOOD (2)   FOOD cart   PLAZA | 20  |
| Lot C: RETAIL   FOOD   PLAZA                     | 31  |
| Potential total parking Minimum Required         | 73  |

The full buildout parking scheme has a minimum parking count of 76 with a lessor parking requirement of Retail in Phase 3 and a maximum parking at 125 spaces calculated with full food uses for all possible tenants, a higher parking base count. There are 83 spaces provided. Therefore, the City of Bend's minimum off-street parking requirements will be met.

**C. Parking Location and Shared Parking.**

- 1. Location. Vehicle parking is allowed only on approved streets, within garages, carports and other structures, or on driveways or parking lots that have been developed in conformance with this code. Specific locations for parking are indicated within the individual land use districts for some land uses (e.g., the requirement that parking be located to side or rear of buildings, with access from alleys, for some uses). Required off-street parking shall not be located within the front yard setbacks except for single-unit dwellings, ADUs, duplexes and triplexes.**

**FINDING:** The proposed vehicle parking will be located within parking lots that will be developed in conformance with the Bend Development Code. No required off-street parking will be located within the front yard setbacks.



2. ***Screening. Commercial or industrial off-street parking which adjoins a residentially designated district shall be effectively screened by a fence and landscaping with a minimum width of 10 feet unless otherwise specified in this code.***

**FINDING:** The Commercial parking of this project is located adjacent to residentially zoned land on the West and South of the Project. A 10 buffer and block wall screen are adjacent to the parking areas.

3. ***Off-Site Parking. Except for single-unit dwellings, the vehicle parking spaces required by this chapter may be located on another parcel of land when commercial off-site parking is permitted in the underlying zone, provided the parcel is within 1,000 feet of the use it serves and the amount of off-site parking does not exceed the minimum amount of parking required for the intended use. The distance from the parking area to the use shall be measured from the nearest parking space to a building entrance, following a sidewalk or other pedestrian route. The right to use the off-site parking must be evidenced by a recorded deed, lease, easement, or similar written instrument.***

...

4. ***Shared Parking. Required parking facilities for two or more uses, structures, or parcels of land may be satisfied by the same parking facilities used jointly, to the extent that the owners or operators show that the need for parking facilities does not materially overlap (e.g., uses primarily of a daytime versus nighttime nature, or of a weekday vs. weekend nature); and provided, that the right of joint use is evidenced by a binding agreement that is tied to the land or similar written instrument establishing the joint use. The binding agreement may restrict future changes to use of the property. Shared parking is encouraged.***

**FINDING:** The Hearings Officer finds that these standards are not applicable to this application. All required parking is accommodated on site.

#### ***D. Exceptions and Special Standards for Parking.***

...

2. ***Special Standards for Commercial Customer Parking. The motor vehicle parking areas shall be located and designed to facilitate safe and convenient pedestrian and bicycle movement to and from public sidewalks, streets, or transit stops. Ways to achieve this standard may include, but are not limited to ...***

**FINDING:** This subsection describes several ways to achieve compliance with this standard. The Hearings Officer finds that the submitted site plan demonstrates compliance by:

- Incorporating ADA-compliant raised walkways throughout the parking areas.
- Walkways are protected from parking spots by landscaping buffers and curbs.
- All walkways crossing a drive aisle are identified with white paint.
- On-site paths have multiple connections to existing pedestrian and bicycle facilities.
- Internal drives and sidewalks have been designed to meet City of Bend and ADA standards.

- E. ***Maximum Number of Parking Spaces. The number of parking spaces provided by any particular use in ground surface parking lots must not exceed the required minimum number of spaces provided by this section by more than 50 percent.***

**FINDING:** The full buildout parking scheme has a minimum parking count of 76 with a lesser parking requirement of Retail in Phase 3 and a maximum parking at 125 spaces calculated with full food uses for all possible tenants, a higher parking base count. There are 83 spaces provided which is 9% more than the minimum required and 66% of the maximum allowed. Therefore, the Hearings Officer finds that this standard is met.

**3.3.500 On-Street Parking Design Standards**

**FINDING:** No on-street parking is proposed.

**3.3.600 Bicycle Parking Standards.**

*All uses that are subject to site development review must provide bicycle parking, in conformance with the following standards, which are evaluated during site development review. This section does not apply to single-unit detached, manufactured dwellings, accessory dwelling units, duplexes, triplexes, quadplexes, townhomes and cottage developments, and home businesses. A minimum of one bicycle parking space is required for all other developments with fewer than 10 vehicle parking spaces.*

**A. Number of Bicycle Parking Spaces.** *A minimum of one bicycle parking space per use is required for all uses subject to Site Development Review. Table 3.3.600 lists additional standards that apply to specific types of development:*

**Table 3.3.600**

**Required On-Site Bicycle Parking**

| Use                          | Requirement   |
|------------------------------|---|
| Retail sales and service     | 1 covered space for every 10 employees plus 1 space for every 20 motor vehicle spaces   |
| Multiple uses                | For buildings with multiple uses (such as a commercial or mixed-use center), bicycle parking standards shall be calculated by using the total number of motor vehicle parking spaces required for the entire development. A minimum of one bicycle parking space for every 10 motor vehicle parking spaces is required. |
| Restaurants, cafes, and bars | 1 covered space for every 10 employees plus 1 space for every 20 motor vehicle spaces   |

**C. Location and Design.**

**1. All bike racks shall have the following design features:**

- a. Inverted "U" style racks or similar design as illustrated below.**
- b. Each rack shall provide each bicycle parking space with at least two points of contact for a standard bicycle frame.**
- c. The bike rack shall have rounded surfaces and corners.**
- d. The bike rack shall be coated in a material that will not damage the bicycle's painted surfaces.**

2. *Each required bicycle parking space shall be on asphaltic concrete, portland cement, or similar hard surface material and each space shall be at least two feet wide by six feet long with a minimum vertical clearance of seven feet. An access aisle width of at least five feet wide shall be provided and maintained beside or between each row of bicycle parking.*
  3. *The location of the rack and subsequent parking shall not interfere with pedestrian passage, leaving a clear area of at least 36 inches between bicycles and other existing and potential obstructions. Customer spaces may or may not be sheltered. When provided, sheltered parking (within a building, or under an eave, overhang, or similar structure) shall be provided at a rate of one space per 10 employees, with a minimum of one space per use.*
  4. *Bicycle parking shall be conveniently located to both the street right-of-way and at least one building entrance (e.g., no farther away than the closest parking space). It should be incorporated whenever possible into building design and coordinated with the design of street furniture when it is provided. Street furniture includes benches, street lights, planters and other pedestrian amenities.*
- D. Visibility and Security.** *Bicycle parking shall be visible to cyclists from street sidewalks or building entrances, so that it provides sufficient security from theft and damage, except for bicycles stored per subsection (E) of this section.*
- E. Options for Storage.** *Bicycle parking requirements for long-term and employee parking can be met by providing a bicycle storage room, bicycle lockers, racks, or other secure storage space inside or outside of the building.*
- F. Lighting.** *Bicycle parking should be at least as well-lit as vehicle parking for security.*
- G. Reserved Areas.** *Areas set aside for bicycle parking should be clearly marked and reserved for bicycle parking only.*
- H. Hazards.** *Bicycle parking shall not impede or create a hazard to pedestrians. Parking areas shall be located so as not to conflict with vision clearance standards (BDC Chapter 3.1, Lot, Parcel and Block Design, Access and Circulation).*

**FINDING:** The proposal calls for 24 bike parking spaces. Each of the uses will have no more than 10 employees at a time. One space is required per use. There are 82 motor vehicle spaces proposed. There are 4 individual spaces and a 20-space canopy covered area proposed. There is a bike rack (two spaces) proposed at the Market / Brewpub buildings. There is also a covered bike rack for 20 bicycles proposed adjacent to the Food Plaza. One rack and one space each is proposed for the two tenants in Phase 3 Lot A. The Hearings Officer finds that the minimum bike parking standards will be met.

**Chapter 3.4, Public Improvement Standards**

**3.4.150 Waiver and Modification of Public Improvement Standards.**

**A. Authority to Grant Waiver or Modification.** *Waivers and/or modifications of the standards of this chapter and/or the City of Bend Standards and Specifications may be granted as a part of a development approval only if the criteria of subsection (B) of this section are met. \*\*\*\*\**

**B. Criteria.** *The Review Authority, after considering the recommendation of the City Engineer, may waive or modify the standards of this title and the City of Bend Standards and Specifications based on a determination that (a) the waiver or modification will not harm or will be beneficial to the public in general; (b) the waiver and modification are not inconsistent with the general purpose of ensuring adequate public facilities; and (c) one or more of the following conditions are met:*

- 1. The modification or waiver is necessary to eliminate or reduce impacts on existing drainage patterns or natural features such as riparian areas, significant trees or vegetation, or steep slopes.*
- 2. An existing structure such as a substantial retaining wall makes widening a street or right-of-way or required placement of lines impractical or undesirable.*
- 5. The standard is a street or right-of-way standard and existing structures on the same side of the block make future widening of the remainder of the street or rightof-way unlikely and the additional width on the project site would not be beneficial for sidewalks or parking without the extension for the rest of the block.*
- 7. The existing infrastructure (a) does not meet current standards, (b) is and will remain functionally equivalent to current standards, and (c) there is little likelihood that current standards will be met in the area.*

**FINDING:** The Hearings Officer incorporates the findings for **Section III.B.1 (Project Exempt from Traffic Analysis)**, **Section III.B.2 (Internal Capture Methodology)**, **Section III.B.3 (Block Length and Perimeter Standards)**, **Section III.B.5 (Brosterhous Access)**, **Section III.B.7 (Right-of-Way Waiver)** and **Section III.B.9 (General Transportation Related Concerns)** as additional findings for these BDC 3.1.400 D findings.

The Hearings Officer addressed the waiver criteria of BDC 3.1.150 in the findings set forth in **Section III.B.7**. The Hearings Officer, in the findings for **Section III.B.7**, concluded, based upon the evidence in the record and the arguments presented by Applicant and Staff, that the relevant sections of BDC 3.1.150 are met by this proposal.

Staff noted (Staff Recommendation, page 34) that the relatively recent change in street classification increased the required right-of-way width for both roads to 100' and resulted in the imposition of a special setback of 50' from centerline for both adjoining roadways that applies unless it is found to be exempt from the setback due to the provisions of BDC 3.4.200(J)(2). Staff further noted that the proposed site plan shows all buildings with a minimum of 10 feet from the two front property lines. In this zone, all buildings have a zero front yard setback standard. Staff concluded that the proposed building front yard setbacks meet Section BDC 3.4.200(J)(3). In the event the City of Bend acquires additional right of way and expands the roads, the buildings will comply with all applicable setback standards and will be a minimum of 50 feet from centerline for both adjoining roadways. The Hearings

Officer concurs with the Staff comments contained in the Staff Recommendation (page 34) and referenced above.

**3.4.200 Transportation Improvement Standards.**

- A. Development Requirements. No development shall occur unless the development has frontage or approved access to a public or private street, in conformance with the provisions of BDC Chapter 3.1, Lot, Parcel and Block Design, Access and Circulation...**

**FINDING:** The two frontages and abutting roundabout were constructed/improved in accordance with the TSP as a part of the City of Bend's TSP traffic circle project to the standards set by the City of Bend for that Murphy/Brosterhous project. The City of Bend Engineering Staff recommended the following conditions of approval if the project is approved.

***“Condition of Approval:*** *The access to Brosterhous Road must remain a right in right out turning restricted movement.*

***Condition of Approval:*** *An onsite barrier/buffer must be constructed and maintained along the property boundary where head in parking or drive thru vehicular headlights shine into adjacent residential properties.*

***Condition of Approval:*** *A low clearance sign must be placed on the Brosterhous Road driveway to warn RVs and trucks of the low clearance requirements of the railroad undercrossing on Brosterhous Road.*

***Condition of Approval:*** *Prior to issuance of any permits, the Engineer of Record (EOR) must review the existing curb, sidewalk, and ADA curb ramps (Improvements) along the property frontages and provide the City a letter of compliance or identify where the Improvements are out of compliance. Where the Improvements are out of compliance or damaged, they must be removed and reinstalled to conform to City of Bend Standards and PROWAG guidelines. Water meter boxes and utility pedestals are not permitted within the hardscape. A Right-of-Way permit is required for all work in the right-of-way and the work must be completed by a City approved right-of-way contractor.”*

The Hearings Officer concurs with the above-stated conditions of approval as recommended by City Engineering Staff. The Hearings Officer finds that with the inclusion of the above-stated conditions this criterion can be met.

- F. Minimum Rights-of-Way and Street Sections. Street rights-of-way and improvements shall be the widths defined in Street Improvement Standards Tables A through E except as identified in subsection (F)(3)(b) of this section. Additional right-of-way may be required at intersections to accommodate intersection widening and roundabouts.**

**FINDING:** As previously noted in these Decisions, the two frontages and abutting roundabout were constructed/improved in accordance with the TSP as a part of the City of Bend's TSP traffic circle project to the standards set by the City of Bend for the Murphy/Brosterhous project. The Hearings Officer finds this criterion is satisfied.

- L. Sidewalks, Planter Strips, Bicycle Lanes. Sidewalks, planter strips, and bicycle lanes shall be installed in conformance with the applicable provisions of the Bend Urban Area Transportation System Plan, the General Plan, City of Bend Standards and Specifications...**

**FINDING:** As previously mentioned, the two frontages and abutting roundabout were constructed/improved in accordance with the TSP as a part of the City’s TSP traffic circle project to the standards set by the City of Bend for the Murphy/Brosterhous project.

**3.4.400 Sanitary Sewer and Water Service Improvements.**

**FINDING:** The Subject Property will be served by City of Bend water and sewer. Preliminary water and sewer plans have been submitted. City of Bend Engineering Division Staff recommended the following mitigation measures to be included as conditions of approval if the project is approved.

***“Condition of Approval:*** *A sampling manhole must be installed per City of Bend Standard S-15. If one already exists, then it must be shown on the final plan set. The applicant must also comply with the City’s Industrial Pre-Treatment Program (IPP). The applicant shall coordinate with the IPP Manager for special requirements.*

***Condition of Approval:*** *Only one water and one sewer service per lot is permitted by the City of Bend standards unless otherwise approved by the City Engineer. If the Engineer of Record determines that a larger lateral is needed, the existing lateral must be removed to the main and a new lateral must be extended to the property. A Right-of-Way permit is required for all work in the right-of-way and the work must be completed by a City approved right-of-way contractor.*

***Condition of Approval:*** *The lot has two existing 8-inch sewer mains stubbed to the property. The project shall utilities the 8-inch main, with the City removing the main from its assets and conveying it as a private service to the site. The existing main not used by the site will remain in place to avoid trenching within the new Murphy Road concrete roundabout.*

***Condition of Approval:*** *Backflow / premise isolation will be required on all domestic / fire sprinkler services to the site. All water and fire services must comply with the City of Bend commercial and fire service standards, when applicable.*

***Condition of Approval:*** *Plumbing fixture unit counts will be a required submittal at the time of permitting to verify the meter sizing.”*

The Hearings Officer concurs with the above-stated conditions of approval as recommended by City of Bend Engineering Staff. The Hearings Officer finds that with the inclusion of the above-stated conditions this criterion can be met.

**3.4.500 Storm Drainage Improvements.**

- A. Storm Drainage Improvements Required. Storm drainage facilities shall be depicted on City-approved engineered construction drawings and installed to serve each new development in accordance with applicable City construction specifications as described in the City of Bend Standards and Specifications and BC Title 16, Grading, Excavation, and Stormwater Management.**

...

**E. Easements for Developed Drainage Facilities. Where new drainage facilities are provided that include elements located outside the dedicated public right-of-way, such facilities shall be located within an area provided for in a recorded easement. The easement shall be adequate for conveyance and maintenance as determined by the City Engineer.**

**FINDING:** The Applicant submitted preliminary designs for on-site stormwater facilities. The final stormwater management design and construction plans will be reviewed and approved by the City of Bend Engineer prior to construction. Staff recommended (Staff Recommendation, page 36 & 37) the following mitigation measures as conditions of approval.

***“Condition of Approval:*** Prior to the issuance of any permits, the applicant must submit a Final Drainage Report and Grading/Clearing/Erosion Control Plan for review by the Private Development Engineering Division (PDED) which complies with Bend Code Title 16, Grading, Excavation, and Stormwater Management and the Central Oregon Stormwater Manual (COSM).

***Condition of Approval:*** Prior to final approval by the City, the Engineer of Record must provide written documentation that all storm water management systems have been designed and installed in accordance with the approved plans and/or any applicable Oregon DEQ requirements. The EOR must test the constructed storm water facilities and provide written testing results. DEQ registration is required for private UIC storm facilities, including UIC decommissioning, and/or UIC Rule Authorization, if applicable.

***Condition of Approval:*** All surface water drainage from new impervious surfaces must be captured and contained on-site and must not flow into the right of way or onto neighboring properties. Stormwater retention areas must be at least 10 feet from structure foundations where feasible, but not less than 5 feet, and must not be located within a public utility easement.

***Condition of Approval:*** An emergency access easement through the site must be provided to the Crown Villa RV Park, where gated access currently exists. The City will not require public access, but should consider this to provide access to adjacent patron. Construction of a City of Bend standard fire gate would need to be constructed at the access to the RV Park with only an emergency access easement is recorded and not reciprocal recorded access agreement/easement can be obtained from Crown Villa. The gate is not to block pedestrian traffic between the sites if constructed. The easement must be recorded prior to occupancy of the first building.

***Condition of Approval:*** A shared access easement/agreement must be recorded across the south property line of the site to convey vehicular traffic across the site to properties adjoining for access to the Brosterhous Road and Murphy Road access points/driveways. The easement/agreement must be recorded prior to occupancy of the first building with the City of Bend as a signatory on the document.

***Condition of Approval:*** Prior to occupancy, a Stormwater Maintenance Agreement, per the requirements of Bend Code Title 16, Grading, Excavation and Stormwater Management, must be executed and recorded for the private storm water facilities.”

The Hearings Officer concurs with the above-stated conditions of approval as recommended by City of Bend Engineering Staff. The Hearings Officer finds that with the inclusion of the above-stated conditions this criterion can be met.

**3.4.600 Utilities.**

- A. Underground Utilities.** All utility lines including, but not limited to, those required for electric, communication, lighting and cable television services and related facilities, shall be placed underground, except for surface-mounted transformers, surface-mounted connection boxes and meter cabinets, temporary utility service facilities during construction, and high capacity electric lines operating at 50,000 volts or above, which may be placed above ground.

**3.4.700 Easements.**

- A. Requirement.** Easements for sewer facilities, storm drainage, water facilities, street facilities, electric lines or other public/private utilities shall be dedicated on a final plat, or other instrument approved by the City.
- B. Provision.** The developer or applicant shall make arrangements with the City, the applicable district and each utility franchise for the provision and dedication of utility easements necessary to provide full services to the development.
- C. Standard Width.** The City's standard width for exclusive public main line utility easements shall be 20 feet, unless otherwise specified by the utility company, applicable district, or City Engineer.

**FINDING:** As shown on the submitted plans, the Applicant's proposal in this case extends all new utilities underground. The Applicant will be required to work with all utility providers to ensure easements are provided and recorded if and where needed. Any needed easements shall be recorded prior to occupancy. Staff recommended the following conditions of approval if the project is approved.

**Condition of Approval:** All improvements to be constructed within the right of way or public access easements must be performed under a City approved Right of Way Permit.

**Condition of Approval:** All utility lines must be placed underground prior to surfacing of adjacent streets, except that surface-mounted transformers, connection boxes and meter cabinets, temporary utility service facilities during construction, and high capacity electric lines operating at 50,000 volts or above, may be placed above ground, so long as they are not located within required clear vision areas."

The Hearings Officer concurs with the above-stated conditions of approval as recommended by City Engineering Staff. The Hearings Officer finds that with the inclusion of the above-stated conditions this criterion can be met.

**Chapter 3.5, Other Design Standards**

**3.5.200 Outdoor Lighting Standards.**

- C. Standards for installation and operation of outdoor lighting.** Except as exempt by subsection (D) of this ordinance, new outdoor lighting fixtures installed after February 18, 2004 shall be subject to the standards below. No provision of this ordinance is intended to pre-empt the City of Bend Sign Code or applicable state codes.



- 1. All outdoor lighting fixtures subject to this Ordinance shall be designed as a full cut-off fixture or have a shielding method to direct light emissions down onto the site and not shine direct illumination or glare onto adjacent properties.***

**FINDING:** The Applicant has stated that all proposed outdoor lighting fixtures will meet City of Bend standards. As a condition of approval, all new outdoor lighting fixtures shall be full cut-off fixtures or have a shielding method to direct light emissions down onto the site and not shine direct illumination or glare onto adjacent properties. The Applicant's project narrative also states that fixtures around the fuel/gas station facility to remain on due to safety reasons for 24-hour business operations. However, other areas next door to the fuel/gas station are to be reduced to 50% output during non-operational hours and/or turned off between 12am and 6am depending on further owner feedback. Staff, in the Staff Recommendation (page 38), recommended the following condition if the project is approved.

***"Condition of Approval:*** *All new outdoor lighting fixtures shall be full cut-off fixtures or have a shielding method to direct light emissions down onto the site and not shine direct illumination or glare onto adjacent properties."*

The Hearings Officer concurs with the above-stated condition of approval as recommended by City of Bend Staff. The Hearings Officer finds that with the inclusion of the above-stated conditions this criterion can be met.

### ***Chapter 3.6, Special Standards and Regulations for Certain Uses***

#### ***4.6.200 Residential Uses.***

***1. Residential Uses within Commercial Districts. Residential uses, such as multi-unit dwellings, are encouraged adjacent to employment, shopping and services. All residential developments shall comply with subsections (1)(1) through (5) of this section, which are intended to guide mixed-use development; allow limited residential uses within commercial districts while conserving the community's supply of commercial land for commercial uses; provide for designs which are compatible with a storefront character; avoid or minimize impacts associated with traffic and parking; and ensure proper management and maintenance of common areas. Residential uses that existed prior to the effective date of the ordinance codified in this chapter are considered permitted uses and not a nonconforming use.***

***1. Mixed-Use Development. Residential uses shall be permitted in Commercial Districts only when part of a mixed-use development (residential with commercial or public/institutional use). Both "vertical" mixed-use (housing above the ground floor), and "horizontal" mixed-use (housing on the ground floor) developments are allowed, subject to the following standards in subsections (1)(2) through (5) of this section.***

#### ***2. Limitation on Street-Level Housing.***

***a. Central Business District. Ground-floor residential uses on street frontages are prohibited except ground-floor entrances or breezeways are permitted for housing located above or behind a nonresidential storefront use.***

***b. Other Commercial Districts. On arterial and collector street frontages in other Commercial Zoning Districts, ground-floor residential uses are limited to 25 percent of the street frontage, except ground-floor entrances or breezeways for housing located above or behind a nonresidential use.***

***3. Density. The density standards are intended to ensure efficient use of buildable lands. Residential density standards apply to any portions of the development where ground-floor residential uses are proposed. Area used to calculate residential density includes all area dedicated to parking and landscaping required for the ground-floor residential uses, but does not include land dedicated to right-of-way.***

***a. There is no minimum residential density standard for “vertical” mixed use in a Commercial Zoning District.***

***b. Maximum residential density in a Commercial Zoning District shall be controlled by the applicable lot coverage and building height standards.***

***c. For “horizontal” mixed use in a Commercial Zoning District, where the site is located within 660 feet of a transit route, the minimum residential density standards of the RM Zone shall apply for the portion of the site dedicated to housing on the ground floor.***

***4. Common Areas. All common areas (e.g., walkways, drives, courtyards, private alleys, parking courts, etc., and multi-tenant building exteriors) shall be maintained by a legal entity or legal process. Copies of any applicable covenants, restrictions and conditions shall be recorded and provided to the City prior to building permit approval.***

***5. The commercial or public/institutional uses shall occupy at least the floor area equivalent to the entire ground-floor area of the development. The commercial or public/institutional uses shall be constructed prior to or concurrently with the residential uses.***

**FINDING:** The Applicant’s site plan proposes commercial on the first floor and residential use on the second floor of a four unit, attached building. The front of each unit facing the plaza is designed for commercial use. The City of Bend’s code defines the residential use as a quadplex - "four dwelling units on one lot or parcel. For permitting purposes, units may be attached vertically or horizontally or detached." BDC 1.2.Q. The density proposed does not result in violation of any lot coverage or building height standards. Ground-floor entrances for housing located above or behind a nonresidential use as proposed here are allowed without triggering application of the 25 percent street frontage rule. The Hearings Officer finds Applicant’s residential proposal satisfies these criteria.

### **3.6.300 Nonresidential Uses.**

***This section supplements the standards contained in BDC Title 2 and provides standards for the certain land uses in order to control the scale and compatibility of those uses within the applicable zone.***

***A. Automobile-Oriented and Automobile-Dependent Uses and Facilities. Where permitted, automobile-oriented uses and automobile-dependent facilities shall meet all of the following standards. The standards are intended to provide a vibrant, storefront character, slow traffic, and encourage walking and transit use:***

1. ***Drive-In and Drive-Through Facilities. Drive-in and drive-through facilities, such as teller machines, service windows, drop-boxes and similar features associated with the drive-up and drive-through components of restaurants, banks and similar uses, shall meet all of the following standards:***
  - a. ***The drive-in or drive-through facility receives vehicular access from an alley or approved driveway, and not directly from a street except as authorized through development approval from the City.***
  - b. ***The drive-in or drive-through facilities shall be set back at least 20 feet from street frontages and, for corner lots, are not oriented towards a street corner. For sites with a 10-foot maximum building setback, the maximum setback may be increased to 20 feet.***
  - c. ***Exceptions:***
    - iv. ***Automobile service and gas stations are exempt from the above standards. However, automobile service and gas stations shall comply with the provisions in subsection (A)(2) of this section.***

**FINDING:** The proposed drive-through lane is 13 plus cars long and is entered from a long protected internal driveway. The drive-through lane is not along a street frontage and is over 160' from the Murphy Road right-of-way. The Hearings Officer finds these standards will be met.

2. ***Automobile Service and Gas Stations. The following minimum standards shall apply to automobile service stations and gas stations:***
  - a. ***Minimum Lot Size. The minimum lot size for a service station is 12,000 square feet with a minimum street frontage of 100 feet on both legs of a street corner for corner lots and 120 feet of street frontage on an interior lot.***
  - b. ***Front Yard Setback. A 10-foot landscaped front yard setback is required. Only access driveways constructed in conformance with the standards in this title may be installed in this required setback. Landscaping shall comply with clear vision standards at intersections and driveways.***
  - c. ***Lighting. Lighting fixtures installed within the fueling island canopy shall not extend below the canopy ceiling. The lighting fixtures, illumination intensity and direction shall comply with BDC 3.5.200, Outdoor Lighting Standards.***
  - d. ***Other Requirements.***
    - i. ***No storage of inoperable automobiles or automobile parts is permitted except in enclosed structures or screened parking lots.***
    - ii. ***Landscape planters shall be used when practical as fuel island bollards to protect gas pumps.***

**FINDING:** The site of the proposed gas station is 117,451 square feet in size, with approximately 585 feet along Murphy Road and 180 feet along Brosterhous Road. A 10-foot-wide landscaped front yard is provided between the fueling station and market along Brosterhous Road with the exception of the pedestrian connection to the market's front door and the access driveway on Brosterhous Road. All lighting will comply with BDC 3.5.200.

**Criterion #6: All applicable building and fire code standards are or will be met.**

**FINDING:** The Building Safety Division will review the Applicant's construction plans for compliance with all applicable building code standards. All applicable building and fire code standards will be further addressed with review of building permits.

**Criterion #7. All required public facilities have adequate capacity as determined by the City, to serve the proposed use;**

**FINDING:** The Applicant submitted a Utility Availability Memo confirming adequate water and sewer capacity for the proposed uses. The Applicant also submitted a Traffic Impact Analysis confirming adequate traffic capacity. Therefore, the Hearings Officer finds that this criterion has been satisfied.

**Criterion #8. The proposal complies with BDC Chapter 4.7, Transportation Analysis; and**

**FINDING:** The Hearings Officer incorporates **Section III.B.1 (Project Exempt from Traffic Analysis), Section III.B.2 (Internal Capture Methodology), Section III.B.3 (Block Length and Perimeter Standards), Section III.B.5 (Brosterhous Access), Section III.B.7 (Right-of-Way Waiver) and Section III.B.9 (General Transportation Related Concerns)** as additional findings for these Criterion #7 findings. The Applicant submitted a Traffic Impact Analysis confirming adequate traffic capacity for this mixed use and commercial development. Therefore, the Hearings Officer finds that this criterion has been satisfied.

**Criterion #9. The proposal is in substantial conformance with any applicable approved master plan, master facilities plan, refinement plan, and/or special planned district.**

**FINDING:** There is no applicable master plan, refinement plan, or special planned district. Therefore, this criterion is not applicable.

**Criterion #10. The proposal complies with BC Title 15, Sewer.**

**FINDING:** As previously determined in findings of these Decisions, the proposed uses will comply with BC Title 15, Sewer.

#### **4.2.800 Development in Accordance with Permit Approval.**

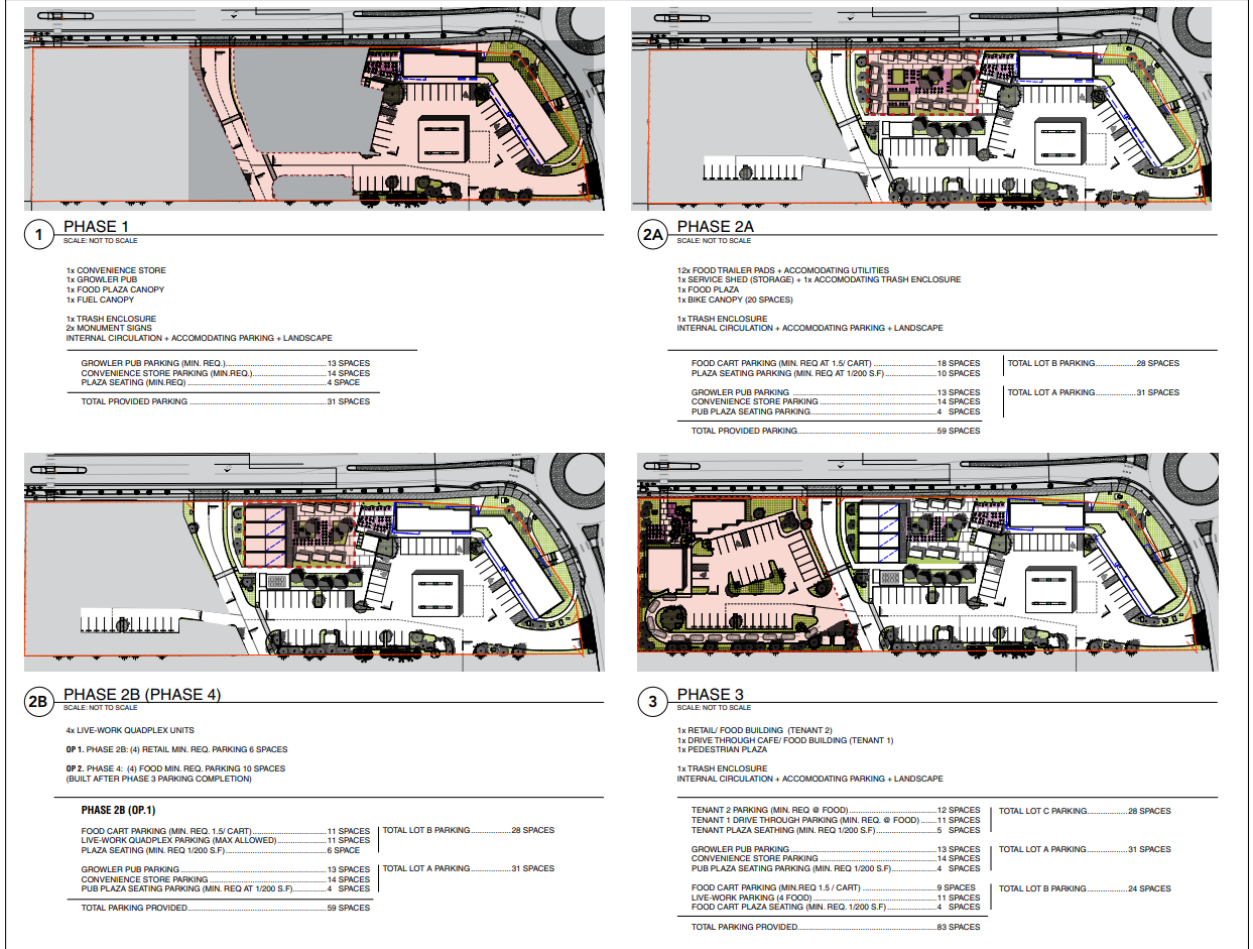
**A. Final Approvals. Development shall not commence until the applicant has received all of the appropriate land use and development approvals including but not limited to: Site Plan Review Approval, Design Review Approval, Minimum Development Standards Review Approval, grading permits and building permits. Construction of public improvements shall not commence until the City has approved all required public improvement plans (e.g., utilities, streets, public land dedication, etc.). The City may require the applicant to enter into an agreement (e.g., for phased developments and developments with required off-site public improvements), and may require**

**bonding or other assurances for improvements, in accordance with BDC 4.2.700, Bonding and Assurances for All Developments.**

**B. Phased Development. Phasing of development may be approved with a Site Plan Review application, subject to the following standards and procedures:**

**1. A proposed phasing plan shall be submitted with the Site Plan Review application.**

**PHASING PLAN**



**2. The proposal shall include a time schedule for developing a site in phases, but in no case shall the total time period for all phases be greater than five years from the date of final approval without reapplying for Site Plan Review.**

**FINDING:** As shown in the submitted Phasing Plan above, the Applicant proposes to complete the proposed development in four phases, in order to manage the site development such that completed buildings may open for business without construction conflicts or delays from other sites. The Applicant requests that the first phase duration of approval be two years, with the total time period for all phases to be five years. The total time period for all phases shall not exceed five years from the date of final approval without reapplying for Site Plan Review.

3. **Approval of a phased site development proposal requires satisfaction of all of the following criteria:**
  - a. **The public facilities required to serve each phase are constructed in conjunction with or prior to each phase;**
  - b. **The phased development shall not result in requiring the City or other property owners to construct public facilities that are required as part of the approved underlying development proposal; and**
  - c. **An application for phasing may be approved after Site Plan Review approval as a modification to the approved plan, in accordance with BDC Chapter 4.1, Development Review and Procedures.**

**FINDING:** The Hearings Officer incorporates **Section III B.1 (Project Exempt From Traffic Analysis)** as additional findings for these criteria. Staff, in the Staff Recommendation (page 44), concluded that all public facilities required to serve each phase will be built in conjunction with or prior to each phase. Staff opined that the proposed phasing plan will not result in requiring the City of Bend or other property owners to build any public facilities that are required as part of the approved underlying development proposal. Based upon the incorporated findings and Staff’s comments the Hearings Officer concludes that these criteria can be met.

#### **Chapter 4.4, Conditional Use Permits**

##### **4.4.400 Criteria, Standards and Conditions of Approval.**

The City shall approve, approve with conditions, or deny an application for a conditional use or to enlarge or alter a conditional use based on findings with respect to each of the following standards and criteria:

#### **A. Use Criteria.**

1. **The site size, dimensions, location, topography and access are adequate for the needs of the proposed use, considering the building mass, parking, traffic, noise, vibration, exhaust/emissions, light, glare, erosion, odor, dust, visibility, safety, and aesthetic considerations;**

#### **FINDING:**

The Hearings Officer incorporates **Section III B.1 (Project Exempt From Traffic Analysis), Section III B.2 (Internal Capture Methodology), Section III B.3 (Block Length and Perimeter Standards), Section III B.4 (Build-Out Time), Section III B.5 (Brosterhous Access), Section III B.6 (Traffic Impacts on Jewell School), Section III B.7 (Right-of-way Waiver), Section III B.9 (General Transportation Concerns), Section III B.11 (Gas Station/Convenience Store Criminal Activity), Section III B.12 (Environmental Risk – Fuel Station) and Section III B.13 (Light Pollution)** as additional findings for these criteria. Staff (Staff Recommendation, pages 44-46) included the following statements/conclusions:

*“1. Building Mass: The proposed Market Convenience Store of 4,270 is a larger convenience store than typically associated with a Fuel Center. The owners see this building as a market providing a*

*larger selection of products than the typical convenience store to serve as a valued drop-in location for the residents in the area and to reduce the trips outside the neighborhood for incidental food selections. The Building Mass as proposed provides for varied ceiling heights and opportunities to bring natural light into the market and pub areas. The multiple roof forms create a unique massing that will screen the Fuel Canopy on the interior of the site from the neighbors to the North & East of the site.*

*2. Parking: The overall master plan orients the onsite parking to the rear of the site creating an active retail food court-oriented street frontage. Parking provided for the market is designed to accommodate the Phase 1 development based on the Bend Development code minimum parking requirements of Table 3.3.300. The parking is located to the interior of the lot and screened from the residential areas. Parking is oriented adjacent to the entries of the Market and Restaurant located to the interior of the site.*

*3. Traffic and Noise: Please see the Traffic Impact Analysis attached which addresses in detail the development's anticipated traffic impacts and demonstrates compliance with City transportation system standards. Traffic will enter and exit the site at access locations already selected for the site by the City of Bend. Traffic and noise from these entries will be minimal and not directly adjacent to residential development. The mechanical roof top areas will be screened from the ground with exterior parapet panels that are design with sound attenuation features. The mechanical units' housings will be shrouded in acoustical backing as well. The Market convenience store units will be located on the flat roof that is interior from the street on the south end of the building additionally separated and screened from the Brosterhous frontage by a shed roof. This end of the market building is adjacent to the CC zoned parcel to the south.*

*4. Vibration: There should be little, or no vibration impacts from the site. With new grading and paving, there should be no level changes that generate truck bounces. All new mechanical units will have sound isolation mounts that will also control vibrations.*

*5. Exhaust and Emissions: There are no direct exhaust and emission impacts from the market convenience store other than the exhaust and emissions of typical heating and cooling units. The fuel equipment will be required to meet or exceed all DEQ and EPA standards with double wall lined tanks, etc. All of which are monitored 24/7 with sensors in the interstitial space.*

*6. Light & Glare: With the new site development the proposed lighting on site has been designed to comply with the Bend dark sky standards. BDC 3.5.200. All lighting has been designed with these standards as a priority. There will be very focused architecturally up lit fixtures illuminating the undersides of the featured entry roof. Please see the narratives on this section. New LED strip lighting will be installed in hidden details in the buildings canopies and fascia's creating screened down lighting. There will be a minimum of light poles all at the Bend maximum height of 25' and all with new well focused and house side shielded LED concealed fixture heads. Please see the Lighting plans and cut sheets for details.*

*7. Erosion: The site is basically a flat site with no flowing active erosion concentration anywhere. The proposed site development will include native planting landscaping designed with Bend Code standard full coverage densities. Parking area planters designed to minimize runoff and site detention areas will be developed per Bend code standards to prevent erosion.*

8. *Odor: As a 2.69-acre retail plaza with major arterial roadways on two sides and adjacent to residential development is well situated for a Commercial node in the SE side. There should not be odor issues associated with the proposed uses. The new convenience store will not have a kitchen function so there will not be on site frying or production cooking.*

9. *Dust: The proposed development from an existing open field to this retail center should reduce the dust generated from the site. There will be no large areas of turf. New landscaping will include native plant ground covers. With automatic irrigation and the dense planting required by code, there should be a reduction in the amount of dust that will be generated from this site.*

10. *Safety: Please see the Traffic Impact Analysis attached for the traffic and Pedestrian safety review. The site's flat topography and straight primary frontages create a very safe pedestrian and bike safety environment. The site, which is the focus of this criterion, does not present any conditions that make it an unsafe location for the uses proposed."*

The Hearings Officer finds the Staff comments to be credible and constitute substantial evidence in the context of this criterion. The Hearings Officer finds, based upon the incorporated findings and Staff comments/conclusions set forth above, that this criterion is met.

**2. Any negative impacts of the proposed use on adjacent properties and on the public can be mitigated through application of other code standards, or other reasonable conditions of approval that include but are not limited to those listed in subsection (C) of this section; and**

**3. All required public facilities have adequate capacity, as determined by the City, to serve the proposed use.**

**FINDINGS:** The Hearings Officer incorporates **Section III B.2 (Internal Capture Methodology), Section III B.3 (Block Length and Perimeter Standards), Section III B.5 (Brosterhous Access), Section III B.6 (Traffic Impacts on Jewell School), Section III B.7 (Right-of-way Waiver), Section III B.9 (General Transportation Concerns), Section III B.11 (Gas Station/Convenience Store Criminal Activity), Section III B.12 (Environmental Risk – Fuel Station) and Section III B.13 (Light Pollution)** as additional findings for these criteria.

The overall project site plan and individual lots have been designed to meet the needs of the proposed uses and mitigate any potential negative impacts. The fuel/gas station will be located as far from residential uses as possible, with existing site access to Murphy Road and Brosterhous Road. Landscaped buffers for visual and noise screening are included throughout the site. Additional screening with a wider than required landscape buffer has been proposed along the west and south side of the Subject Property to further mitigate potential impacts to residential uses. The Hearings Officer finds, based upon the incorporated findings and credible and substantial evidence in the record, that no unacceptable impacts to adjacent properties are anticipated.

**B. Site Design Standards. Where appropriate, the criteria for Site Development Review approval listed in BDC 4.2.500(D), Site Plan Review Approval Criteria, shall be met.**

**FINDING:** As previously set forth in findings for these Decisions, all criteria for Site Plan Review approval are met.



- C. Conditions of Approval. The City may impose conditions that are found necessary to ensure that the use is compatible with other uses in the vicinity, and that any negative impact of the proposed use on the surrounding uses and public facilities is minimized. The City may impose as many of these and other applicable conditions on one conditional use application as it finds necessary. These conditions include, but are not limited to, the following...**

**FINDING:** The Hearings Officer finds that Staff recommended that in order to meet many of the relevant approval criteria that conditions of approval were necessary. The Hearings Officer agreed with all of Staff's recommendations related to conditions of approval. Staff included a listing, at the end of the Staff Recommendation, of its recommended conditions of approval. The Hearings Officer finds that neither Applicant or opponents raised any specific/identified objections to the Staff recommended conditions of approval. The Hearings Officer includes the Staff recommended conditions as part of this approval.

## **V. CONCLUSIONS:**

Applicant requested multiple approvals to allow the development of a community commercial shopping center. Applicant requested approval of a conditional use permit for a market/convenience store and fuel/gas station and a conditional use permit for a drive-through use. In addition, Applicant requested approval of a phased site plan review and a waiver of public improvement standards.

Applicant's proposals generated extensive opposition. Opposition was primarily directed towards Applicant's request for the conditional use permits which would allow for the market/convenience store and the fuel/gas station uses. Opponents focused their comments on the adequacy of the Applicant's transportation impact analysis, traffic impacts created by the market/convenience store and safety and traffic impacts that are anticipated to be created by the location of the fuel/gas station, and whether or not transportation (public improvement) standards had been met.

The Hearings Officer, after consideration and review of all evidence in the record, found that all of Applicant's requests could, with conditions of approval, meet relevant approval criteria.

## **VI. DECISIONS**

The Hearings Officer, based upon a review of the record, **approves** Applicant's Conditional Use Permit for a market/convenience store and fuel/gas station, conditional use permit for a drive-through, phased site plan review and waiver of public improvement standards **with the following conditions of approval.**

### **CONDITIONS OF APPROVAL**

1. Approval is based on the plans and supporting documents uploaded to City View, and the improvements to the Subject Property and public facilities as depicted thereon. Any substantial alterations of the approved plans, other than those that may be required to comply with the conditions of this Site Plan Review & Design Review approval, will require a new application.
2. All new outdoor lighting fixtures shall be full cut-off fixtures or have a shielding method to direct light emissions down onto the Subject Property and not shine direct illumination or glare onto adjacent properties.
3. All required clear vision areas must be shown on the final plan set. All landscaping and site

improvements must comply with the clear vision requirements of BDC 3.1.500 and City of Bend Standards and Specifications and Drawing R-2. There must be no fence, wall, parking, landscaping, structure, or any other obstructions to vision other than a street sign post, pole or tree trunk (clear of branches or foliage) within the clear vision areas on the Subject Property between the height of 2 feet and 8 feet.

4. Prior to the issuance of any permits, the Applicant must submit a Final Drainage Report and Grading/Clearing/Erosion Control Plan for review by the Private Development Engineering Division (PDED) which complies with Bend Code Title 16, Grading, Excavation, and Stormwater Management and the Central Oregon Stormwater Manual (COSM).
5. The access to Brosterhous Road must remain a right in right out turning restricted movement.
6. An onsite barrier/buffer must be constructed and maintained along the Subject Property boundary where head in parking or drive thru vehicular headlights shine into adjacent residential properties.
7. A low clearance sign must be placed on the Brosterhous Road driveway to warn RVs and trucks of the low clearance requirements of the railroad undercrossing on Brosterhous Road.
8. Prior to issuance of any permits, the Engineer of Record (EOR) must review the existing curb, sidewalk, and ADA curb ramps (Improvements) along the property frontages and provide the City a letter of compliance or identify where the Improvements are out of compliance. Where the Improvements are out of compliance or damaged, they must be removed and reinstalled to conform to City of Bend Standards and PROWAG guidelines. Water meter boxes and utility pedestals are not permitted within the hardscape. A Right-of-Way permit is required for all work in the right-of-way and the work must be completed by a City of Bend approved right-of-way contractor.
9. A sampling manhole must be installed per City of Bend Standard S-15. If one already exists, then it must be shown on the final plan set. The Applicant must also comply with the City's Industrial Pre-Treatment Program (IPP). The Applicant shall coordinate with the IPP Manager for special requirements.
10. Only one water and one sewer service per lot is permitted by the City of Bend standards unless otherwise approved by the City Engineer. If the Engineer of Record determines that a larger lateral is needed, the existing lateral must be removed to the main and a new lateral must be extended to the property. A Right-of-Way permit is required for all work in the right-of-way and the work must be completed by a City of Bend approved right-of-way contractor.
11. The lot has two existing 8-inch sewer mains stubbed to the Subject Property. The project shall utilities the 8-inch main, with the City removing the main from its assets and conveying it as a

private service to the Subject Property. The existing main not used by the Subject Property will remain in place to avoid trenching within the new Murphy Road concrete roundabout.

12. Backflow / premise isolation will be required on all domestic / fire sprinkler services to the Subject Property. All water and fire services must comply with the City of Bend commercial and fire service standards, when applicable.
13. Plumbing fixture unit counts will be a required submittal at the time of permitting to verify the meter sizing.
14. All improvements to be constructed within the right of way or public access easements must be performed under a City of Bend approved Right of Way Permit.
15. Prior to final approval by the City of Bend, the Engineer of Record must provide written documentation that all storm water management systems have been designed and installed in accordance with the approved plans and/or any applicable Oregon DEQ requirements. The EOR must test the constructed storm water facilities and provide written testing results. DEQ registration is required for private UIC storm facilities, including UIC decommissioning, and/or UIC Rule Authorization, if applicable.
16. A Stormwater Maintenance Agreement must be executed and recorded in accordance with Bend Code Title 16, Grading, Excavation, and Stormwater Management.
17. Prior to occupancy, the Applicant must provide DEQ documentation for the storm water management plan, UIC decommissioning, and/or UIC Rule Authorization, if applicable.
18. All surface water drainage from new impervious surfaces must be captured and contained on-site and must not flow into the right of way or onto neighboring properties. Stormwater retention areas must be at least 10 feet from structure foundations where feasible, but not less than 5 feet, and must not be located within a public utility easement.
19. All utility lines must be placed underground prior to surfacing of adjacent streets, except that surface-mounted transformers, connection boxes and meter cabinets, temporary utility service facilities during construction, and high capacity electric lines operating at 50,000 volts or above, may be placed above ground, so long as they are not located within required clear vision areas.
20. An emergency access easement through the Subject Property must be provided to the Crown Villa RV Park, where gated access currently exists. The City will not require public access, but should consider this to provide access to adjacent patron. Construction of a City of Bend standard fire gate would need to be constructed at the access to the RV Park with only an emergency access easement is recorded and not reciprocal recorded access agreement/easement can be obtained from Crown Villa. The gate is not to block pedestrian traffic between the sites if constructed. The easement must be recorded prior to occupancy of the first building.
21. A shared access easement/agreement must be recorded across the south property line of the Subject Property to convey vehicular traffic across the Subject Property to properties adjoining for access to the Brosterhous Road and Murphy Road access points/driveways. The

easement/agreement must be recorded prior to occupancy of the first building with the City of Bend as a signatory on the document.

22. Prior to occupancy, all required landscaping and site improvements must be completed.
23. All landscaping, including street trees, must be maintained in good condition. Any plants that fail to survive must be replaced by the property owner.

Dated: January 4, 2023

A handwritten signature in cursive script that reads "Gregory J. Frank".

Gregory J. Frank  
City of Bend Hearings Officer

**DURATION OF APPROVAL:** In accordance with Chapter 4.1, the Hearings Officer's approval shall lapse, and a new application shall be required, if the use approved by this decision is not initiated within two years of the date that this decision becomes final, or if development of the site is in violation of the approved plans or other applicable codes.

**THE HEARINGS OFFICER'S DECISION BECOMES FINAL TWELVE (12) DAYS AFTER THE DATE MAILED, UNLESS APPEALED BY A PARTY OF INTEREST.**