



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
(541)388-6575 FAX (541)385-1764
<http://www.co.deschutes.or.us/cdd/>

MEMORANDUM

DATE: October 5, 2015
TO: Board of County Commissioners
FROM: Will Groves, Senior Planner
RE: Whether to hear the Lower Bridge Road, LLC appeal of a Hearings Officer's decision. File Nos. 247-15-000194-CU, 247-15-000195-TP (247-15-000521-A)

Before the Board of County Commissioners (BOCC) is an appeal filed by Lower Bridge Road, LLC. The appeal is submitted in response to a Deschutes County Hearings Officer's decision that a proposed Planned Unit Development subdivision does not comply with all applicable regulations. The appellant requests the BOCC formally consider the decision.

BACKGROUND

The applicant, Lower Bridge Road, LLC, requested conditional use, tentative subdivision plan, and SMIA site plan approval to establish a 19-lot residential planned development on three parcels totaling 157 acres, zoned RR-10, EFU, FP, LM, and SMIA, and located between the Deschutes River and Lower Bridge Way west of Terrebonne.

The Hearings Officer issued a decision on September 11, 2015 finding that the proposal does not comply with all applicable regulations. On September 23, 2015 Lower Bridge Road, LLC appealed the decision to the BOCC.

The 150-day period for issuance of a final local decision under ORS 215 expires on November 12, 2015. The applicant has offered to toll the 150-day clock for sufficient time for the Board to hear this matter and issue a decision.

APPEAL

The notice of appeal describes several assignment of error. These are summarized below, with references to those pages within the decision where the Hearings Officer addressed the issue.

1. The Hearings Officer erred when she concluded the provisions of the EFU zone in Chapter 18.16 preclude the proposed subdivision. H.O. Decision, pp. 10-13.
2. The Hearings Officer erred when she concluded the provisions of the FP zone in Chapter 18.96 preclude the proposed subdivision. H.O. Decision, pp.13-21.

3. The Hearings Officer erred when she concluded the FP zoned property could not be included in the overall acreage calculation for the proposed subdivision. H.O. Decision, pp. 13-21.
4. The Hearings Officer erred when she concluded the open space as a part of the proposed subdivision was not allowed in the FP zone. H.O. Decision, pp. 14-16.
5. The Hearings Officer erred in imposing the FP zone boundary on this property because the map the County uses to establish the boundary is grossly inaccurate, was not established by the Flood Insurance Study for Deschutes County, and is in fact, not based on any base flood elevation data or other detailed or scientific method of study.
6. The Hearings Officer erred when she concluded the applicant failed to demonstrate it was feasible to construct a dwelling, septic and well without the need for a rimrock setback exception or that it is feasible to qualify for future rimrock setback exceptions. H.O. Decision, p.39.
7. The Hearings Officer erred in interpreting the Code to require the applicant to demonstrate compliance with LM review criteria at the subdivision stage when no structures are proposed. H.O. Decision, pp.32-39.
8. The Hearings Officer erred in concluding the property should not be eligible for any rimrock setback exceptions in the future. H.O. Decision, p. 40.
9. The Hearings Officer erred in failing to apply the conditional use criteria to the only portion of the development that is conditional, which is not the residential use but instead the difference between 15 homesites and 19 homesites, or essentially 4 additional homesites. H.O. Decision, pp. 41-70.
10. The Hearings Officer erred when she concluded the proposal did not meet the conditional use criteria at 18.128.015 and 18.128.210 and the subdivision criteria at 17.36.170 because the applicant failed to demonstrate the proposed lots are of adequate size and dimensions to accommodate a dwelling, septic and well while complying with all setbacks. H.O. Decision, pp. 43, 62, 87.
11. The Hearings Officer erred in interpreting the suitability criteria for a conditional use and the planned development criteria to apply to residential use, rather than the 4 additional homesites which constitute the conditional part of the use. H.O. Decision, pp.47-70.
12. The Hearings Officer erred when she collaterally attacked the Board's prior decision and found the Board improperly substituted a condition of approval for the necessary findings of compliance in the prior zone change decision. H.O. Decision, p. 47.
13. The Hearings Officer erred when she concluded the revegetating efforts had not been successful in securing the blowing DE dust. H.O. Decision, pp. 52-54.
14. The Hearings Officer erred in concluding the proposal was not compatible with the current and future use of SM Site 461. H.O. Decision, p. 61.
15. The Hearings Officer erred in concluding the proposal was not in harmony with the surrounding area its potential future use based on conflicts between existing and potential conditions and uses on SM Site 461. H.O. Decision, p. 67.
16. The Hearings Officer erred in concluding it is appropriate to require the applicant to post a bond or other form of security to assure the DE dust issues on SM Site 461 and the subject property are fully remediated before any dwellings are constructed H.O. Decision, p. 68.
17. The Hearings Officer erred in concluding there was not sufficient evidence of financing to assure the proposed development will be substantially completed within 4 years of approval. H.O. Decision, p.69.

18. The Hearings Officer erred in concluding the proposal did not comply with DCC 17.16.100(3)(c) because she incorrectly concluded the proposal was not permitted in the EFU and FP zones. H.O. Decision, pp. 78-79.
19. The Hearings Officer erred in concluding the applicant should be required to improve the abutting segment of Lower Bridge Way to County standards. The impacts of the proposal to add traffic associated with 19 residential lots is not roughly proportional to the cost of the required improvement of approximately 3,000 lineal feet of abutting roadway, with possible relocation of power lines. The applicant is dedicating the Lower Bridge right-of-way but any additional improvements are not warranted and in violation of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution.
20. The Hearings Officer erred in interpreting DCC 17.36.270 to require the applicant to submit a street tree plan. H.O. Decision, p. 91.
21. The Hearings Officer erred in her interpretation and application of a flood zone map to the subject property which was clearly and absolutely wrong, was arbitrary and capricious and violated the substantive due process protections of the Fourteenth Amendment to the U.S. Constitution.
22. The Hearings Officer's decision alone or combined with any one or more of the errors alleged above, were in error and so burdened applicant's right to just compensation that the result violates the doctrine of unconstitutional conditions under the Fifth and Fourteenth Amendments to the U.S. Constitution.
23. The Hearings Officer's decision alone or combined with any one or more of the errors alleged above, leaves applicant with no viable economic use of the property and constitutes the taking of it and entitles applicant to just compensation under Article 1, Section 18 of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as the right to attorney's fees under ORS 20.080 and 42 U.S.C. 1983.
24. If the Hearings Officer's decision is the final County decision in this matter, it will cause substantial delay and damages and notice is hereby given the applicant intends to pursue all available legal remedies it has in Court. This would include an inverse condemnation claim for just compensation and attorney's fees and also a money damage claim under 42 U.S.C. 1983 for lost profits caused by delay.

The appellant requests de novo review. In deciding whether to hear an appeal, the BOCC may consider only the notice of appeal, the record of the proceedings below, and any staff recommendations. DCC 22.32.035(D). No additional comments from the parties are allowed.

If the BOCC decides to hear the appeal, the review shall be on the record unless the BOCC decides to hear the appeal de novo. The BOCC may hear this matter de novo if it finds the substantial rights of the parties would be significantly prejudiced without de novo review and it does not appear that the request is necessitated by failure of the appellant to present evidence that was available at the time of the previous review. The BOCC may also choose as de novo review when, in its sole judgment, a de novo hearing is necessary to fully and properly evaluate a significant policy issue relevant to the proposed land use action. DCC 22.32.027(B)(2)(c) and (d).

The BOCC may, at its discretion, determine that it will limit the issues on appeal to those listed in the notice of appeal or to one or more specific issues from among those listed on the notice of appeal. DCC 22.32.027(B)(4).

DECLINING REVIEW

If the BOCC decides that the Hearings Officer's decision shall be the final decision of the county, then the BOCC shall not hear the appeal and the party appealing may continue the appeal as provided by law. The decision on the land use application becomes final upon the mailing of the BOCC's decision to decline review. DCC 22.32.035(B). In determining whether to hear an appeal, the BOCC may consider only:

1. The record developed before the Hearings Officer;
2. The notice of appeal; and
3. Recommendations of Staff. DCC 22.32.035 (D).

STAFF RECOMMENDATION

Reasons to hear:

- 1) There are a number of significant code interpretation issues. LUBA will be obligated to defer to BOCC's interpretations if they are at least plausible. The BOCC may want to reinforce or refute some or all of the Hearing Officer's findings/interpretations prior to LUBA review. However, staff notes that matters of state statute, e.g. EFU zone issues, are not matters to which the Board will be given deference by LUBA.

Reasons not to hear:

- 1) CDD Staff and Legal believes the hearings officer decision is well reasoned and well written and could be supported as-is on appeal.
- 2) The applicant may challenge the denial at LUBA as a remedy to the Hearing Officer's denial.
- 3) The Hearings Officer found that dust suppression efforts had not succeeded on the adjacent former mining site (H.O. Decision, p. 51), making the subject property an unsuitable location for a subdivision and that the record does, "...not support a finding that blowing DE dust does not and will not present a health hazard to future PUD residents -- or that it is feasible to assure no health hazard from blowing DE dust will occur in the future through imposition of conditions of approval." (H.O. Decision, pp. 51-52) Moreover, the hearings Officer found, "...that under Rhyne (Rhyne v. Multnomah County, 23 Or LUBA 442 (1992)), [she does] not have the option of deferring findings of compliance with the "suitability" conditional use approval criterion to final plat approval as suggested by the applicant. That is because final plat approval is not required to, and does not, provide public notice or hearing." (H.O. Decision, p. 49)
- 4) Staff and Legal notified the applicant in a pre-application meeting that this proposal did not appear to comply with Deschutes County Code and might be denied by the Hearings Officer. The applicant was advised that the following preliminary actions would significantly improve the likelihood of approval:

- a. Complete a property line adjustment to match zone boundaries with legal lots. This would remove many or all of the split zoning issues, as well as the EFU issues.
- b. Initiate a text amendment to explicitly allow the use of floodplain zoned lands as open space in a PUD. This would clearly allow the applicant to receive additional homesites in return for preserving flood plain areas as open space.
- c. Complete a study to refine the flood plain boundary in accordance with FEMA standards¹, if the applicant wished to improve the accuracy of the existing map.

The applicant did not take any of these recommended actions prior to submitting its application.

For the above reasons, Staff recommends that BOCC decline to hear the appeal.

Attachments

1. Hearing Officer's decision
2. Notice of Intent to Appeal

¹ <http://www.fema.gov/zone-manual-managing-floodplain-development-approximate-zone-areas>

REVIEWED
LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Denying Review of Hearings Officer’s
Decision in File Nos. 247-15-000194-CU, 247-
15-000195-TP (247-15-000521-A)

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ORDER NO. 2015-051

WHEREAS, Appellant, Lower Bridge Road, LLC, appealed the Hearings Officer’s decision in application number 247-15-000194-CU, 247-15-000195-TP (247-15-000521-A); and

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners (Board) discretion on whether to hear appeals of Hearings Officer’s decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. That the Board will not hear on appeal application 247-15-000194-CU, 247-15-000195-TP (247-15-000521-A).

Section 2. The appellant shall be granted a refund of some of the appeal fees, according to County procedures.

Dated this _____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DEBONE, Chair

ALAN UNGER , Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner