



## Community Development Department

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### MEMORANDUM

**DATE:** January 4, 2016  
**TO:** Board of County Commissioners  
**FROM:** Will Groves, Senior Planner  
**RE:** Hearing on 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)

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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. By Order 2015-467, dated October 19, 2015, the BOCC initiated review of this application under DCC 22.28.050 through a de novo hearing.

#### 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.

#### 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. Staff has also included selected quotes from the HO decision addressing the error at 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:

"The applicant proposes to include the EFU-zoned area as part of PUD open space Tract B.

The Hearings Officer finds subdivisions and PUDs are not uses permitted outright or conditionally in the EFU Zone. The applicant appears to argue that because the EFU-zoned area will be included in an open space tract and may be engaged in agricultural use, it can be included in the PUD. I disagree. While agricultural use is consistent with this area's zoning, including it within a subdivision is not."

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:

"Neither "cluster development" nor "planned development" is a use permitted outright or conditionally in the FP Zone. The Hearings Officer finds the text and context of the provisions of Title 18 defining and governing the three types of subdivisions make clear they have different characteristics and are intended to be reviewed and approved under different substantive standards. While it may seem counterintuitive not to permit use of FP-zoned land for open space within a planned development where such use would protect these areas consistent with the purpose of the FP Zone, I find the plain language of the FP Zone does not allow such development."

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:

"The property is approximately 157 acres in size. The applicant's density calculation does not include the 10.4 acres of EFU-zoned land, leaving 146.6 developable acres and resulting in a density of one dwelling per 7.7 acres, less than the maximum density allowed by this paragraph. However, as discussed in the findings above under the FP Zone, the Hearings Officer has found the proposed PUD is not a use permitted outright or conditionally in that zone. Therefore, I find the approximately 30 acres of FP-zoned land included in the subject property cannot be included in the density calculation, leaving approximately 116 acres of developable land for the PUD."

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.

"The Hearings Officer finds that although "open space" is listed as an outright permitted use in the FP Zone, and the proposed CC&Rs provide protection for such areas consistent with the purpose of the FP Zone, the applicant's proposed open space is not a stand-alone use. Rather, it consists of open space lots and uses within a PUD which is not a use permitted outright in the FP Zone."

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.

**Staff note:** The Hearings Officer did not specifically address this point. The flood plain in the project vicinity is an “unnumbered A zone”, meaning that flood areas were designated without detailed flood calculations or detailed local topographic information, due to the low density of development in the area. This issue arises nation wide and FEMA has a technical bulletin directing how to refine the flood plain in this case. The applicant was provided with this information in a pre-application meeting and declined to use any of the FEMA accepted methodologies for refining flood plain boundaries.

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.

“The Hearings Officer finds that without the lot-specific rimrock survey recommended by staff, the applicant has not demonstrated that each lot can be developed with a dwelling, on-site septic system and individual well in a manner that assures the dwelling is at least 50 feet from any rimrock, and that all other yard and setback requirements in the LM Zone can be met.”

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.

“The applicant did not propose dwellings concurrent with its PUD application, and did not submit an application for LM site plan review. However, staff concluded, and the Hearings Officer agrees, that review of the proposed PUD should include findings as to whether the location, size and configuration of the PUD residential lots will permit the future siting of dwellings in compliance with LM site plan approval criteria.”

8. The Hearings Officer erred in concluding the properly should not be eligible for any rimrock setback exceptions in the future. H.O. Decision, p. 40.

**Staff note:** Staff believes the applicant misreads the Hearings Officer’s decision on this issue. Staff believes the Hearings Officer did not preclude rimrock exceptions (see proposed condition of approval #34) but, rather, found that creation of new lots that could only be developed under a rimrock setback exception was unsuitable, when alternate subdivisions layouts were feasible. The Hearings Officer only required that the

applicant demonstrate the lots could be developed without a rimrock exception.

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.

“The Hearings Officer finds the general conditional use approval criteria apply because the applicant’s proposal is for a PUD and not for an individual single-family dwelling.”

**Staff note:** The proposed use, PUD, is a conditional use in the zone. Because some other similar use (non-clustered subdivision) is allowed outright in the zone does not make some portion of the proposed conditional use not conditional. All of the proposed lots are designed and sited in a manner only allowed under the PUD standards.

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.

“...the applicant has proposed “special setbacks” for dwellings that the Hearings Officer has found are not adequate to assure each proposed dwelling would meet the 50-foot rimrock setback, or that each residential lot is large enough, or has the configuration necessary, to permit the future siting of a dwelling, on-site septic system and individual well and still comply with all yard and setback requirements.”

**Staff note:** Staff believes a building envelope figure showing the developable area of each lot, considering these factors, may help to demonstrate compliance with the relevant criteria.

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.

**Staff note:** The Hearings Officer found all aspects of the PUD were part of the conditional use. The Applicant erroneously assumes residential use of the property is allowed outright. It is not. The outright use is one single family dwelling. Also, because some other similar use (non-clustered subdivision) is allowed outright in the zone does not make some portion of the proposed conditional use not conditional. All of the proposed lots are designed and sited in a manner only allowed under the PUD standards.

12. The Hearings Officer erred when she collaterally attacked the BOCC's prior decision and found the BOCC improperly substituted a condition of approval for the necessary findings of compliance in the prior zone change decision. H.O. Decision, p. 47.

“The record for this PUD application includes conflicting evidence, some of it quite technical, concerning whether the subject property is suitable for residential development considering environmental impacts from previous mining and hazardous materials storage. The Hearings Officer finds that under Rhyne, I do 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.”

**Staff note:** Staff believes the Hearings Officer’s decision is not a collateral attack<sup>1</sup> on the plan amendment/zone change (ZC/PA). While the Hearings Officer found that BOCC’s approach to deferring findings of environmental safety was likely impermissible under existing case law, no change to the ZC/PA was imposed. Nothing precludes the Hearings Officer or BOCC from imposing additional restrictions, beyond those in the ZC/PA, on the proposed PUD.

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.

“Although the applicant states its dust control measures on SM Site 461 “were successful,” the Hearings Officer’s site visit observations indicate the opposite. I observed that on much of SM Site 461 the introduced vegetation has not taken hold, and as a result large areas of diatomaceous earth remain exposed.”

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 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.

“... because both SM Sites 322 and 461 are zoned SM and remain on the county’s inventory of significant mineral and aggregate sites, the Hearings Officer finds projected uses on these parcels include potential future surface mining.

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<sup>1</sup> Collateral Attack- An attempt to impeach or overturn a judgment rendered in a judicial proceeding, made in a proceeding other than within the original action or an appeal from it. <http://legal-dictionary.thefreedictionary.com/Collateral+Attack>

...the Hearings Officer has found the applicant has failed to demonstrate the subject property is suitable for the proposed PUD considering potential human health impacts on PUD residences from exposure to blowing DE dust from SM Site 461 and the portion of the subject property located west of Lower Bridge Way, both in their current condition and with future mining activity.  
...the proposed PUD will not be compatible with the current and future use of SM Site 461.”

17. 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.

“I find that in the absence of any requirement in the board’s 2008 decision that the applicant complete and pay for such remediation, and any commitment on the applicant’s part to do so in as part of this application, I find it is appropriate to require the applicant to post a bond or other form of security acceptable to Deschutes County to assure the DE dust issues on SM Site 461 and the subject property are fully remediated before any dwellings are constructed on the subject property.”

...Unfortunately, there is no evidence in this record as to the potential cost of remediating the DE Dust on these properties. However, as discussed above, the June 22, 2015 Wallace Group geotechnical report discussed in the findings above memo recommended dust control measures including spraying the ground surface with water prior to site grading and road building, and/or covering the diatomite with three to six inches of sand and gravel. The Hearings Officer finds it is feasible to arrive at a reasonable cost estimate for covering exposed DE on SM Site 461, and spraying and covering DE on the subject property. Therefore, I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to provide cash or a performance bond in favor of Deschutes County, and acceptable to Deschutes County Legal Counsel, for the cost of remediating DE dust on SM Site 461 and the subject property, in an amount to be identified by the applicant and approved by the board, prior to any grading or construction on the subject property. The bond shall be redeemable by the county if the applicant fails to complete the DE remediation identified as necessary for SM Site 461 and the subject property by the Wallace Group report.”

18. 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.

“The applicant’s burden of proof states “sufficient funding is available to complete the development as proposed within four

years of approval.” However, the applicant did not submit any evidence supporting this statement. The Hearings Officer finds a simple conclusory statement does not constitute sufficient evidence to demonstrate compliance with this conditional use approval criterion.”

19. 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.

**Staff Note:** This conclusion is a consequence of findings in the FP and EFU zones, discussed above, and will be sustained, modified, or reversed based on the BOCC’s findings on those issues.

20. 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.

**Staff Note:** Applicant and Staff are working on a partial funding option that plainly complies with Nollan/Dolan.

21. 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.

**Staff note:** Staff concurs with the applicant on this issue. The criterion requires that street planting, if proposed, be approved by the planning director. It does not require street tree planning.

22. 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.

**Staff note:** The Hearings Officer’s decision did not directly address this issue. Staff believes the Hearings Officer’s reliance on zone boundary maps that were adopted in 1988 (and have been in place continually since then) required no interpretation and that this map plainly applied to the subject property. The 1988 adoption of the Flood Plain zoning maps cannot be collaterally attacked under this PUD application.

Staff believes the applicant appears to actually contest the FEMA flood hazard maps that provided the basis for this zone boundary. While the FEMA provided maps are known to have limited accuracy, they are the best available information. FEMA provides guidance on how to refine these maps. The applicant was

informed of the process to refine the existing maps at a pre-application meeting and declined to undertake the required study and mapping project.

If the applicant wants to correct the Flood Plan zone boundary, a study following FEMA methodology followed by a zone change is the proper process.

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.

**Staff note:** The applicant has been denied by the Hearings Officer for a PUD. The applicant has not applied for the approximately 15-lot, non-clustered subdivision on the property that is an outright (non-conditional) use. The applicant has also not also applied for the single dwelling allowed on the property without conditional use or subdivision approval. Only one use, a PUD, has been presently denied on the property. Staff notes that the present denial primarily rests on the applicant designing a PUD that exceeds the number of lots in the allowed in the zone, voluntarily configuring those lots as to make them undevelopable without special exceptions, and asking for residential approvals prior to completion of environmental investigations of the property. Nothing in the present denial indicates that a properly designed PUD application could not be approved on the property. As such, the applicant's claims the property has no viable economic as a consequence of this denial use are unsubstantiated.

#### Attachments

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

LOWER BRIDGE PRE-HEARING DECISION MATRIX

The Appellant's appeal identified several issue areas in the HO Decision. These are summarized in the matrix below.

	Issue	Information in Record	Board Options	Staff Comment
1.	<b>Can a PUD application create open space lots on EFU zoned land?</b>	<p><b>HO:</b> Subdivisions and PUDs are not uses permitted outright or conditionally in the EFU Zone.</p> <p><b>Applicant:</b> Proposal does not divide EFU zoned land or propose non-EFU-allowed uses on EFU zoned land. Should be allowed. Alternatively, submitted property line adjustment will remove EFU land from proposal.</p>	<p>a. Adopt HO decision findings, with or without modification.</p> <p>b. Find that lot creation including EFU zone land is allowed.</p>	<p><b>Staff Comment:</b> Concur with HO, but revise decision to reflect proposed lot line adjustment. <b>Applicant still needs to remove TL 1600.</b> This removes the issue.</p>
2.	<b>Can a PUD application create open space lots on FP zoned land?</b>	<p><b>HO:</b> Neither “cluster development” nor “planned development” is a use permitted outright or conditionally in the FP Zone.</p> <p><b>Applicant:</b> Open space and subdivision are allowed in the FP zone. These are the proposed uses.</p>	<p>a. Adopt HO decision findings, with or without modification.</p> <p>b. Interpret FP Zone code to allow PUD created open space lots.</p>	<p><b>Staff Comment:</b> Receive testimony on this issue. Staff has advocated exploring a text amendment to consider explicitly allowing this use. Alternatively, the applicant could lot line adjust or partition off FP zoned land or apply for a non-clustered/planned subdivision.</p>
3.	<b>Can FP zoned land be counted towards PUD housing density and density bonuses?</b>	<p><b>HO:</b> PUD is not a use permitted outright or conditionally in FP zone. FP-zoned land cannot be included in the density calculation.</p> <p><b>Applicant:</b> Open space in FP zone should count as PUD open space for housing density calculations.</p>	<p>a. Adopt HO decision findings, with or without modification.</p> <p>b. Interpret FP/PUD code to allow FP zoned land to count in density calculation.</p>	<p><b>Staff Comment:</b> Receive testimony on this issue. Staff has advocated exploring a text amendment to consider explicitly allowing this use.</p>
4.	<b>Where is the boundary of the FP zone?</b>	<p><b>Staff:</b> HO did not directly address this issue. FEMA has a technical bulletin directing how to refine the flood hazard boundary. The applicant was provided with this information in a pre-application meeting and declined to use any of the FEMA accepted methodologies for refining flood plain boundaries.</p> <p><b>Applicant:</b> The Flood Hazard Maps are wildly inaccurate.</p>	<p>a. Adopt Staff recommendation, with or without modification.</p> <p>b. Staff is unclear what conclusion the Applicant hopes the Board will reach.</p>	<p><b>Staff Comment:</b> Require that any refinement of the flood hazard boundary be done in accordance with FEMA-approved methodology.</p>

	Issue	Information in Record	Board Options	Staff Comment
5.	<b>Are the proposed lots developable, give rimrock on site?</b>	<p><b>HO:</b> Applicant has not demonstrated that each lot can be developed with a dwelling, on-site septic system and individual well in a manner that assures the dwelling is at least 50 feet from any rimrock, and that all other yard and setback requirements in the LM Zone can be met</p> <p><b>Applicant:</b> Submitted a figure addressing this issue.</p>	<p>a. Adopt HO decision findings, with or without modification.</p> <p>b. Find that the applicant has demonstrated that development is feasible.</p>	<p><b>Staff Comment:</b> Confirm the applicant's figure shows feasible development.</p>
6.	<b>Is the "conditional use" the whole PUD or just the lot pattern? Is residential use allowed outright?</b>	<p><b>HO:</b> The general conditional use approval criteria apply because the applicant's proposal is for a PUD and not for an individual single-family dwelling.</p> <p><b>Applicant:</b> The suitability criteria for a conditional use apply to the 4 additional homesites which constitute the conditional part of the use.</p>	<p>a. Adopt HO decision findings, with or without modification.</p> <p>b. Confirm the applicant's interpretation.</p>	<p><b>Staff Comment:</b> The Hearings Officer found all aspects of the PUD were part of the conditional use. The Applicant erroneously assumes residential use of the property is allowed outright. It is not. The outright use is one single family dwelling. Also, because some other similar use (non-clustered subdivision) is allowed outright in the zone does not make some portion of the proposed conditional use not conditional. All of the proposed lots are designed and sited in a manner only allowed under the PUD standards.</p>
7.	<b>Did the HO collaterally attack the 2008 PA/ZC approval?</b>	<p><b>HO:</b> Found that Board's approach to deferring findings of environmental safety was likely impermissible under existing case law, but no change to the ZC/PA was imposed. Nothing precludes the Hearings Officer or Board from imposing additional restrictions, beyond those in the ZC/PA, on the proposed PUD.</p> <p><b>Applicant:</b> Yes.</p>	<p>a. Adopt HO decision findings, with or without modification.</p> <p>b. Find that, as provided in the PA/ZC, environmental suitability is assured by letters from DEQ/OHA at final plat.</p>	<p><b>Staff Comment:</b> Consider this issue together with the next two questions in light of <i>Rhyme</i>.</p>
8.	<b>What is required at this point to determine the site is suitable, given potential environmental hazards?</b>	<p><b>HO:</b> Under <i>Rhyme</i>, Board does not have the option of deferring findings of compliance with the "suitability" conditional use approval criterion to final plat. There is no evidence of water contamination. DEQ VCP is sufficient for hazardous materials. Not enough evidence on dust.</p> <p><b>Applicant:</b> Environmental review is purview of DEQ/OHA. Letters prior to final plat are sufficient.</p>	<p>a. Adopt HO decision findings, with or without modification.</p> <p>b. Confirm the applicant's interpretation.</p>	<p><b>Staff Comment:</b> Under <i>Rhyme</i>, suitability for PUD use must demonstrate at this step either through a finding 1) the site is suitable now, 2) it is feasible to make the site suitable through a condition of approval (that requires no further County discretion), or deny the application. Dust control would require a multi-property binding/bonded dust management plan.</p>

	Issue	Information in Record	Board Options	Staff Comment
9.	Is this a suitable location for a PUD, given present and potential future use of the “West Area”?	<p><b>HO:</b> Applicant has failed to demonstrate the subject property is suitable for the proposed PUD considering potential human health impacts on PUD residences from exposure to blowing DE dust from SM Site 461 and the portion of the subject property located west of Lower Bridge Way, both in their current condition and with future mining activity. Suggested required bonding and full dust control.</p> <p><b>Applicant:</b> Environmental review is purview of DEQ/OHA. Letters prior to final plat are sufficient.</p>	<p>a. Adopt HO decision findings, with or without modification.</p> <p>b. Revise the findings based on new evidence.</p>	<p><b>Staff Comment:</b> Receive testimony on this issue. Ensure any finding of suitability is based on reasonable future use of “West Area”. Ensure any on/off-site ongoing actions are binding and/or bonded to ensure against change of ownership.</p>
10.	Are required road improvements “roughly proportionate” to traffic impacts?	<p><b>HO:</b> Did not directly address issue.</p> <p><b>Applicant:</b> Full road widening project is not “roughly proportionate” under <i>Nollan/Dolan</i>.</p>	<p>a. Adopt HO decision findings, with or without modification.</p> <p>b. Revise requirement based on new testimony.</p>	<p><b>Staff Comment:</b> Applicant and Staff are working on a partial funding option that plainly complies with <i>Nollan/Dolan</i>. Receive testimony on this issue.</p>
11.	Does the HO denial of the subdivision represent a “taking”?	<p><b>HO:</b> Did not directly address issue.</p> <p><b>Applicant:</b> Yes.</p>	<p>a. Adopt HO decision findings, with or without modification.</p> <p>b. Find that “no viable economic use of the property” is left. Modify decision to avoid “taking”.</p>	<p><b>Staff Comment:</b> The applicant has been denied for a specific PUD layout with insufficient plans for dust control. Other uses remain, including 1) a code-compliant PUD application with dust control, 2) a 15-lot, non-clustered subdivision, 3) a single dwelling allowed on the property without conditional use or subdivision approval, and 4) other outright and conditional uses in the applicable zones. The applicant’s claims the property has no viable economic as a consequence of the HO denial use are unsubstantiated.</p>