



**MEMORANDUM**

**TO:** Deschutes County Planning Commission

**FROM:** Nicole Mardell, Associate Planner

**DATE:** October 3, 2019

**SUBJECT:** Land Division of Split Zoned Flood Plain Property Amendments (247-19-000532-TA) – Deliberations

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The Deschutes County Planning Commission held public hearings on August 8, September 12, and September 26, 2019. At the conclusion of the September 26 hearing, the Planning Commission closed the oral and written records and scheduled deliberations for October 10, 2019.

**I. PROPOSAL**

Deschutes County, through File No. 247-19-000532-TA is amending the Deschutes County Zoning Ordinance to add procedures for divisions involving split zoned Flood Plain properties. Many properties in the County are split zoned, meaning they contain more than one base zone. Base zones control development and land division requirements including: permitted and conditional uses, setbacks, and minimum lots sizes for the creation of new parcels. The current county code is unclear as it pertains to division of Flood Plain, split zoned properties, and staff had to rely on previous staff and Hearings Officers decisions to determine division eligibility.

These amendments are intended to clarify the requirements for land divisions as long as the property contains no more than two base zones and one comprehensive plan designation, and the Flood Plain portion of the property is entirely located on one parcel resulting from the division. The amendments do not alter the mapped Federal Emergency Management Agency (FEMA) Flood Plain zone boundary or the standards applicable to development within the Special Flood Hazard Area, also known as the 100-year Flood Plain. Extensive background is provided in the July 25, 2019 work session packet<sup>1</sup> and on the project website: <https://www.deschutes.org/cd/page/flood-plain-information-and-text-amendments>.

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<sup>1</sup><http://deschutescountyor.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=2126&Inline=True>



## **II. PUBLIC COMMENTS**

Public comments received throughout the hearing process are summarized in the public comment summary provided in Attachment 1. No additional comments were provided for the split zone amendments during the September 26, 2019 continued public hearing.

## **III. LOWER BRIDGE HEARINGS OFFICER DECISION**

A copy of the Lower Bridge Hearings Officer's decision<sup>2</sup> was distributed to Planning Commissioners and submitted to the record during the September 26, 2019 meeting. Staff, at the meeting, noted the decision re-opened the interpretation issue regarding the use of Flood Plain Zoned land as open space in Cluster and Planned Unit Developments<sup>3</sup>.

Upon further review and consultation with legal counsel, staff found the decision also overlaps with the Split Zone amendments, as the decision analyzes the division of a split zoned property that contains Flood Plain zoning. These issues are likely to be interpreted by the Board of County Commissioners and potentially the Land Use Board of Appeals in the current appeal process.

## **IV. RECOMMENDATION**

As the outcome of the Lower Bridge process is likely to impact the content of the proposed Split Zone amendments, staff recommends the Planning Commission postpone deliberations on the item until a decision for the Lower Bridge decision is reached. In the interim, staff can engage stakeholders that submitted comments during the hearing process (i.e. Oregon Department of Fish and Wildlife, Central Oregon LandWatch, Fred and Theresa Netter, Myles Conway, etc.) to address potential concerns.

## **V. NEXT STEPS**

The Planning Commission will begin deliberations on October 10, 2019. At the conclusion of the meeting, the Planning Commission can choose one of the following:

- Postpone deliberations until a decision is reached for the Lower Bridge application;
- Continue deliberations to a scheduled date;
- Conclude deliberations and recommend approval of the amendments as proposed;
- Conclude deliberations and recommend approval of the amendments with additional minor changes; or
- Conclude deliberations and recommend denial of the proposed amendments.

## **ATTACHMENT**

1) Public Comment Summary

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<sup>2</sup> 247-19-000405-CU, 406-TP, 407-SMA

<sup>3</sup> 247-19-000531-TA

## Public Comment Summary – Split Zone Amendments

No.	Topic/Issue	Summary of Public and Agency Comments	Staff Comments
1	Improper Notice Provided to Property Owners	<ul style="list-style-type: none"> <li>• COLW states the notice should have been provided to all property owners containing Flood Plain Zoning</li> </ul>	<ul style="list-style-type: none"> <li>• The proposed amendment is legislative and does not impact any specific property, nor does it rezone or redesignate a property, therefore notice to individual property owners is not required.</li> <li>• Staff provided a courtesy notice to parties with standing from the 2017 Flood Plain Amendment process.</li> </ul>
2	Changes to the Flood Plain Zone Weaken Protections to Wildlife	<ul style="list-style-type: none"> <li>• Species depend on the Flood Plain Zone for protection.</li> <li>• Riparian areas along certain streams are critical habitat for Oregon Spotted Frog, a threatened species.</li> <li>• Changes could result in dense development along sensitive river corridors.</li> <li>• Maintaining wildlife populations is important to quality of life in Deschutes County for residents.</li> </ul>	<ul style="list-style-type: none"> <li>• Staff conducted an ESEE Analysis to identify impacts to Goal 5 inventoried wildlife affected by the amendments. In balancing the consequences, staff finds the social/economic implications to warrant the allowance of the amendments, with additional limitations to protect wildlife.</li> <li>• ESEEs do not require no net loss mitigation measures.</li> </ul>

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3	Need for additional ESEE analysis	<ul style="list-style-type: none"> <li>• Ramis states the ESEE does not analyze impacts to non-land use related items such as presence of dogs or recreation activities, etc. Staff needs to analyze impacts as they directly impact resource.</li> <li>• ODFW also mentioned the need for greater analysis and specificity in the potential consequences section of the ESEE. Including cumulative and indirect impacts associated with development.</li> <li>• COLW stated the need for ESEE consequences to analyze individual impacts at the species level.</li> <li>• COLW and ODFW expressed concerns that the Goal 5 inventory is going to be repealed and replaced with the provided ESEE analysis.</li> </ul>	<ul style="list-style-type: none"> <li>• Staff consulted with DLCD Goal 5 Coordinator, Amanda Punton. Analysis of non-land use related items are not required, as an ESEE differs from traditional environmental review such as an Environmental Impact Assessment or National Environmental Protection Act review. The review only analyzes impacts of land uses.</li> <li>• Staff can add additional detail to the consequences section of the ESEE, utilizing comments provided by ODFW, if supported by the Planning Commission. Oregon Administrative Rule does not require review of indirect or cumulative impacts. Review is limited to already acknowledged significant resources (i.e. the adopted Goal 5 inventory in the Deschutes County Comprehensive Plan.</li> <li>• Staff acknowledges COLWs comments. Species level analysis is not required by statute, but staff can edit the ESEE to provide a table of the Goal 5 “groups” initially established in the County’s Goal 5 inventory to discuss more specific impacts (i.e. analyze impacts to big game versus furbearers).</li> <li>• In the Goal 5 matrix attached to the ESEE, staff outlined the progression of the County’s Goal 5 program, of which certain sections were repealed and replaced as part of periodic review as required by DLCD in the early to mid-1990s.</li> </ul>

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4	Inventory Sites	<ul style="list-style-type: none"> <li>COLW states the inventory provided in the ESEE is flawed as it focused on specific properties rather than the location of the Goal 5 resources.</li> </ul>	<ul style="list-style-type: none"> <li>In consultation with DLCD Goal 5 Coordinator and staff from the City of Portland with ESEE experience, particularly before LUBA, the intent of an ESEE is to determine a geographic “impact area” in which properties eligible for the new conflicting use and Goal 5 resources in the existing Comprehensive Plan inventory intersect. Staff disagrees with COLWs interpretation of this requirement.</li> </ul>
5	Flood Zone as Combining Zone	<ul style="list-style-type: none"> <li>General comments opposing or supporting the re-designation of the Flood Plain Zone from a base zone to a combining zone, and the potential of higher density development.</li> </ul>	<ul style="list-style-type: none"> <li>Staff is not proposing a re-designation as part of the 2019 Flood Plain Amendments.</li> </ul>
6	Split Zone Divisions as a New Use	<ul style="list-style-type: none"> <li>The ESEE analysis states the addition of procedures are a “new use” as they allow for the division of properties that were previously ineligible.</li> </ul>	<ul style="list-style-type: none"> <li>As staff understands the Goal 5 rule, a “new” use is defined as a use that was previously not allowed in the zone. Residential development and land divisions are currently allowed in the zone, therefore staff finds it is not a “new” use but chose to conduct an ESEE analysis to fully vet the impacts of the procedures.</li> </ul>

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7	Goal 10 – Housing Does Not Apply to Counties	<ul style="list-style-type: none"> <li>• COLW notes that Goal 10, which requires governments to supply needed housing, does not apply to counties. Therefore, the County cannot claim a need for rural housing as a primary reason for the proposed amendment.</li> </ul>	<ul style="list-style-type: none"> <li>• Staff acknowledges COLWs comments and agrees that housing cannot be the primary need for the proposed amendments and will alter the ESEE to reflect this comment.</li> </ul>
8	General Edits to ESEE	<ul style="list-style-type: none"> <li>• ODFW has submitted several comments related to verbiage in the ESEE analysis.</li> </ul>	<ul style="list-style-type: none"> <li>• Staff is supportive of amending the ESEE to address these comments and alter verbiage.</li> </ul>
9	Proposal Cannot Alter Goal 5 Program to Protect	<ul style="list-style-type: none"> <li>• COWL stated that the proposed alters the existing Goal 5 Program to protect inventoried fish and wildlife species. This alteration of the Comprehensive Plan is not allowed.</li> </ul>	<ul style="list-style-type: none"> <li>• Staff notes the Comprehensive Plan and Goal 5 allows for changes to the Comprehensive Plan through a Post Acknowledgement Plan Amendment and the ESEE process. The Comprehensive Plan is a living document that can be revised, as noted in the LUBA <i>Aceti</i> decision (LUBA No. 2018-126)</li> </ul>
10	Text Edits to Procedures	<ul style="list-style-type: none"> <li>• Netter/Fancher requested edits to the procedures to aid in clarity for EFU divisions.</li> <li>• Conway requested edits to the procedures to address lot line adjustments involving split zone properties.</li> </ul>	<ul style="list-style-type: none"> <li>• Staff is supportive of the proposed edits (attached).</li> </ul>

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11	Flood Plain Minimum Lot Size	<ul style="list-style-type: none"> <li>• Flood Plain Zone 80-acre minimum is part of program to protect various sensitive fish and wildlife species.</li> <li>• Adding procedures to allow division of split-zoned, Flood Plain property would allow greater density in the non-flood plain zoned area which could impact fish and wildlife.</li> <li>• An exception to Goals 3 and 4 are required for division of Flood Plain Zoned land that also contain resource zoned properties.</li> </ul>	<ul style="list-style-type: none"> <li>• Almost all split zoned, Flood Plain properties do not meet the current 80-acre minimum lot size as the boundary for the Flood Plain zone is based on FEMA maps for flood risk. Many properties instead have a small portion of the property zoned Flood Plain, with the majority in a non-Flood Plain zone such as RR-10 or EFU.</li> <li>• The procedures would require the Flood Plain zoned portion of the property to remain entirely intact following division. Therefore, the existing Flood Plain zoned portion would not be divided or fragmented.</li> <li>• Development adjacent to the Flood Plain zoned area would continue to abide by Goal 5 requirements including rimrock setbacks, setbacks from the ordinary high water mark, etc.</li> <li>• Divisions involving split zone property that contains Flood Plain and EFU or Forest Zoning must continue to meet non-Flood Plain minimum lot size (i.e. 80 acres or that size required by the subzone). Therefore an exception is not required.</li> </ul>

Edited Text – Fancher and Conway Suggestions

Chapter 18.96. FLOOD PLAIN ZONE - FP

- 18.96.010. Purposes.
- 18.96.020. Designated Areas.
- 18.96.030. Uses Permitted Outright.
- 18.96.040. Conditional Uses Permitted.
- 18.96.050. Prohibited Uses.
- 18.96.060. Limitations on Conditional Uses.
- 18.96.070. Application for Conditional Use.
- 18.96.080. Criteria to Evaluate Conditional Uses.
- 18.96.085. Elevation Certification.
- 18.96.090. Yard and Setback Requirements.
- 18.96.100. Stream Setback.
- 18.96.110. Dimensional Standards.
- 18.96.120. Warning and Disclaimer of Liability.
- 18.96.130. Interpretation of FIRM Boundaries
- 18.96.140. Use Variances.

18.96.150. Acreage Calculation for Partition or Subdivision of Certain Properties Containing Flood Plain Zoned Lands

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Partitions or subdivisions of Properties that contain both Flood Plain zoned lands and exactly one other primary zone and which have only one comprehensive plan designation are subject to the following area calculation and configuration standards.

1. The Flood Plain and non-Flood Plain zoned area shall be summed for the purposes of lot area calculation.
2. The minimum lot size for new lots or parcels resulting from such partitions or subdivision shall be determined by the applicable minimum lot and parcel size(s) and land division rules of the non-Flood Plain zone.
3. For partitions and subdivisions, all Flood Plain zoned lands from the parent lot or parcel must be contained within a single subdivision lot or partition parcel.

(Ord 2019-0xx §1, 2019)