COMMUNITY DEVELOPMENT

APPEAL APPLICATION

FEE: $5,150

EVERY NOTICE OF APPEAL SHALL INCLUDE:

1. A statement describing the specific reasons for the appeal.
2. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons the Board should review the lower decision.
3. If the Board of County Commissioners is the Hearings Body and *de novo* review is desired, a request for *de novo* review by the Board, stating the reasons the Board should provide the *de novo* review as provided in Section 22.32.027 of Title 22.
4. If color exhibits are submitted, black and white copies with captions or shading delineating the color areas shall also be provided.

It is the responsibility of the appellant to complete a Notice of Appeal as set forth in Chapter 22.32 of the County Code. The Notice of Appeal on the reverse side of this form must include the items listed above. Failure to complete all of the above may render an appeal invalid. Any additional comments should be included on the Notice of Appeal.

Staff cannot advise a potential appellant as to whether the appellant is eligible to file an appeal (DCC Section 22.32.010) or whether an appeal is valid. Appellants should seek their own legal advice concerning those issues.

Appellant's Name (print): Windlinx Ranch Trust Phone: (541) 410-0191

Mailing Address: 59850 Scale House Road City/State/Zip: Bend, OR 97702

Land Use Application Being Appealed: 247-25-000093-A (Remand)

Property Description: Township 18S Range 11E Section 19, 30 & 31 Tax Lot 181100001900

Appellant's Signature: [signature] ATTY

EXCEPT AS PROVIDED IN SECTION 22.32.024, APPELLANT SHALL PROVIDE A COMPLETE TRANSCRIPT OF ANY HEARING APPEALED, FROM RECORDED MAGNETIC TAPES PROVIDED BY THE PLANNING DIVISION UPON REQUEST (THERE IS A $5.00 FEE FOR EACH MAGNETIC TAPE RECORD). APPELLANT SHALL SUBMIT THE TRANSCRIPT TO THE PLANNING DIVISION NO LATER THAN THE CLOSE OF THE DAY FIVE (5) DAYS PRIOR TO THE DATE SET FOR THE *DE NOVO* HEARING OR, FOR ON-THE-RECORD APPEALS, THE DATE SET FOR RECEIPT OF WRITTEN RECORDS.

(over)

NOTICE OF APPEAL

Please see attached Appeal Statement.

(This page may be photocopied if additional space is needed.)

Appeal Statement - 247-25-000093-A (Remand)

Background:

The Board of County Commissioners (the "Board") conclusively declared that the zoning on the subject property is F-2. In an application process that began in 1994 and culminated with a conditional use permit application in 1998 (CU 98-109), ODOT applied for a development permit that included the same property. It represented that the ODOT ROW adjacent to the appellant's property is zoned F-2. Staff and the hearings officer agreed. In its June 1999 decision, the Board determined in a final decision that the dividing line between the RR-10 zoned property on the west of Highway 97 and the F-2 property on the east was the center of the highway right-of-way.

The County Board applied DCC 18.12.040 as written. Unless otherwise specified, zone boundaries are section lines, subdivision lines, lot lines, center lines of street, and railroad rights-of-way. All participants in the 1999 decision accepted that the boundary line between the RR-10 and F-2 zones is the center of the Highway 97 right-of-way.

ODOT filed an application for a declaratory ruling asking the hearings officer to reverse that determination. It requested that the hearings officer find that the dividing line between the zones is the west property line of the appellant's property. Appellant asserted, among other arguments, that ODOT's application was not proper and constituted a collateral attack on the Board's 1999 final decision.

The hearings officer approved ODOT's application. Appellant here appealed that decision to LUBA. LUBA affirmed the hearings officer on all grounds except appellant's collateral attack argument reminding the decision for the hearings officer to address that argument. At the remand hearing appellant requested that the hearings officer reopen the record because after the record in the original proceeding was closed, appellant obtained documents in an open record period that were highly relevant to the collateral attack argument. The hearings officer denied that request and ultimately decided that ODOT's application, even though it requested that he revisit and change the determination made in 1999, was not a collateral attack on that final decision.

Grounds for Appeal:

1. The hearings officer erred in not reopening the record on remand to allow new relevant evidence on the remand issue that should have been but was not placed in the record. To the extent that the hearings officer had discretion on whether or not to reopen the record he abused that discretion.

2. The hearings officer erred in concluding that ODOT's request for a declaratory ruling that the zoning of the subject property was RR-10 and not F-2 as previously determined by the Board was not a collateral attack on the Board's prior 1999 final decision.

3. The hearings officer committed a procedural error in not disclosing facts related to his spouse's work with ODOT and his prior position on a bicycle advocacy group when the application before him was from ODOT and was to facilitate the construction of a facility for bicycling.

Explanation of grounds of appeal:

After the record in the original proceedings was closed, appellant obtained records from ODOT pursuant to a public record request. Included in the documents were memoranda and emails that help demonstrate that ODOT understood and agreed that the Board's prior 1999 decision determining that the zoning of the subject property was F-2 was a final and binding decision and that to avoid it, ODOT had to develop a ruse to collaterally challenge that decision. Appellant submits that the subject records should have been included in the record specifically because early in the application process appellant asserted to the County that ODOT was not allowed to use a declaratory ruling application to challenge the 1999 final decision. The hearings officer should have reopened the record pursuant to appellant's request and allowed the use of that relevant evidence.

The hearings officer's decision that the ODOT application was not a collateral attack on the prior decision misconstrues the law. He focused on the fact that the prior decision was not an approval that was being challenged but rather a denial. That has no relevance. The 1999 decision applied the County code provision on how zoning boundaries must be determined and conclusively established that the zoning on the subject property was F-2. Nothing has changed since that time. The same zoning maps apply, and the relevant code provision has not changed. In fact, one of the pieces of evidence that the hearings officer did not allow into the record on remand was a memo from Senior Transportation Planner Peter Russell that included the same GIS maps that ODOT asserted were more accurate and showed that the zoning was RR-10. Mr. Russell concluded, based on the same GIS maps that ODOT relied upon, reaffirmed that the zoning on the subject property is F-2.

Appellant asserts that the hearings officer should have disclosed his spouse's past and ongoing work with ODOT. As a former ODOT employee and currently the Senior Transportation Advisor to the Governor, the hearings officer's spouse works with ODOT on transportation issues. ODOT is the applicant in this matter. Further, the hearings officer was formerly on the Board of Directors of a bicycle advocacy group. The ODOT application sought a declaratory ruling to facilitate the construction of a bicycle facility. Appellant was not afforded an opportunity to object to the hearings officer's participation because those facts were not disclosed.

Reasons that the Board should accept this appeal:

The compelling reason that the Board should hear this appeal is to set forth the County's position on the integrity of all Board decisions. If applicants are allowed to challenge the Board's decision by seeking declaratory rulings in cases that override the Board's prior final decisions, the Board's status as the County final decision maker is undermined. Any hearings officer can effectively overrule the Board's prior decisions for any reason. That will result in a system where the Board must hear and decide numerous appeals to just uphold the sanctity of its decision-making process and its prior decisions. The County land use decision making process cannot function if hearings officers have the ability to overrule the Board.

This is not a matter that is appropriate to resolve in a LUBA appeal. Neither a hearings officer nor LUBA should be deciding the location of the official zoning boundaries. That is a matter uniquely within the purview of the Board. In addition, LUBA is not the proper body to address the larger policy issue over a hearings officer's authority to undo prior Board decisions on the location of official zoning boundaries.

De Novo Review:

The Board should conduct a de novo review because relevant material was not included in the record as appellant explained above related to its prior request that the hearings officer reopen the record.