



MEMORANDUM

TO: Board of County Commissioners

FROM: Anthony Raguine, Principal Planner

DATE: April 28, 2025

RE: An appeal of the Hearings Officer's Remand Decision associated with the zoning designation for the ODOT Lava Butte Trail; Remand File No. 247-25-000093-A and Appeal No. 247-25-000264-A

On May 7, 2025, the Board of County Commissioners ("Board") will consider hearing an appeal of the Hearings Officer's remand decision that included additional findings and concluded again a segment of the Oregon Department of Transportation ("ODOT") Lava Butte Trail is zoned Rural Residential ("RR10").

I. DECLARATORY RULING APPLICATION

ODOT ("Applicant") filed a Declaratory Ruling application requesting interpretations on multiple issues in which it asserts there is doubt or dispute over the meaning or application of the County's Comprehensive Plan or Deschutes County Code ("DCC").

The requested interpretations are associated with the zoning requirements for a future ODOT path starting at the Baker-Knott Road/Highway 97 intersection and terminating at the Lava Butte Visitor Center. The proposed path parallels Highway 97 and accesses the High Desert Museum before continuing south onto federal lands (see attached *Location Map*). The proposed path will be designed to serve bicycle and pedestrian users and will be called the Lava Butte Trail.

As part of the original review, the Hearings Officer concluded the following:

1. The subject Highway 97 right-of-way is zoned RR10.
2. The proposal as described by the Applicant is a "road and street project" and, more specifically, a Class III project.
3. As a Class III project, the proposal described by the Applicant is a use permitted outright in the RR10 Zone and OS&C Zone.

II. PROCEDURAL HISTORY

In 2023-2024, the County completed the initial review, and the Windlinx Ranch Trust (“Appellant”) appealed the County’s decision to the Land Use Board of Appeals (“LUBA”) and the Oregon Court of Appeals. Ultimately, the Hearings Officer’s decision was remanded back to the County on one issue – “to adopt adequate findings addressing [Appellant’s] argument that the application is a collateral attack on the final and unappealed Weigh Station Decision”. The referenced Weigh Station Decision was a 1999 Board decision denying a conditional use request for an ODOT weigh station and, as part of this decision, the Board found the same segment of Highway 97 was zoned Forest Use (“F2”).

On February 12, 2025, the Applicant initiated the subject remand application. Since the Hearings Officer was the final decision maker in the previous review, the Hearings Officer was the initial reviewer for this remand application. After reviewing the submitted information, the Hearings Officer issued a decision with additional findings and concluded the Declaratory Ruling decision does not amount to a collateral attack on the Weigh Station Decision.

III. WINDLINX RANCH TRUST APPEAL

The Appellant requests the Board review the Hearings Officer’s decision, as part of a *de novo* review, to address the following key issues related to the template dwelling test requirements:

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.

IV. STAFF RECOMMENDATION

Staff recommends the Board not hear the appeal for the following reasons:

1. The Hearings Officer’s decision is well written and reasoned, and could be supported, as the record exists today on appeal to LUBA.
2. The County’s review of a remand application must be completed within 120 days and the County’s final decision must be made by June 12, 2025. Therefore, it is unlikely there will be

sufficient time for the Board to hear the subject appeal, accommodate an open record period, complete deliberations and finalize a decision within the 120-day deadline.

3. Both parties were well represented.

V. BOARD OPTIONS

First, the Board must decide if it wishes to hear the appeal. In determining whether to hear the appeals, the Board may only consider:

1. The record developed before the Hearings Officer;
2. The Notice of Appeal; and
3. Recommendation of staff¹

Option 1: Hear the Appeal

If the Board decides to hear the appeal, the Board must make a decision on the scope of the review. As noted above, the Appellant has requested a *de novo* review. Per the Deschutes County Code ("DCC"), the Board has two choices for the scope of the review:

1. On the Record. This means parties can only present their arguments and the Board must rely on the record developed before the Hearings Officer. No new evidence can be submitted.
2. De Novo. This means parties can submit new evidence and present their arguments.

Next, the Board may wish, but is not required, to limit the issues it will consider as part of the Board's review.

Lastly, the Board should give staff direction on when to schedule the appeal hearing and the Board may want to establish time limits for testimony at the hearing.

Option 2: Not Hear the Appeal

Should the Board decline to hear the appeal, the Hearings Officer's decision will become the final decision of the County. Upon the mailing of the Board's decision to decline review, the party appealing may continue their appeal as provided under the law.

VI. 120-DAY LAND USE CLOCK

The 120th day on which the County must take final action on this application is June 12, 2025.

¹ Deschutes County Code 22.32.035(D)

VII. RECORD

The record for File no. 247-25-000093-A and the Notice of Appeal are presented at the following Deschutes County Community Development Department website:

<https://www.deschutes.org/cd/page/247-25-000093-odot-lava-butte-trail-remand>

Attachments:

1. Location Map
2. Hearings Officer's Decision – 247-25-000093-A
3. Notice of Appeal – 247-25-000264-A
4. DRAFT Board Order 2025-016 Accepting Review of the Hearings Officer's Decision
5. DRAFT Board Order 2025-016 Declining Review of the Hearings Officer's Decision