MEMORANDUM

TO: Board of County Commissioners

FROM: Caroline House, Senior Planner

DATE: February 7, 2024

RE: An appeal of a Hearings Officer's Declaratory Ruling Decision associated with an Oregon Department of Transportation ("ODOT") Multi-Use Path Project; File No. 247-23-000302-DR and Appeal No. 247-24-000072-A

On February 14, 2024, the Board of County Commissioners ("Board") will consider hearing an appeal of a Hearings Officer's Declaratory Ruling decision.

I. PROPOSAL

ODOT, as the 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 Planning Division's review 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.

The Hearings Officer identified four (4) issues the Applicant is requesting interpretations on:

1. Is the subject Highway 97 right-of-way zoned RR10 or Forest Use (F2)?
2. Is the proposed use a Class III road or street project and permitted outright in the Rural Residential ("RR10") Zone and Open Space and Conservation ("OS&C") Zone?
3. In the alternative, does the F2 Zone allow a bicycle and pedestrian path as a use permitted outright?
4. In the alternative, does the F2 Zone allow a bicycle and pedestrian path as a conditional use without an exception to Statewide Planning Goal 4 (Forest Lands)?

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.

The Hearings Officer did not address whether the proposal is permitted outright or conditionally in the F2 Zone, because he found those interpretation requests were made in the alternative and were not necessary based on the conclusions above.

II. PROCEDURAL HISTORY

The application was received on April 24, 2023, a public hearing before a Hearings Officer was held on December 6, 2023, and the Hearings Officer issued his decision on January 26, 2024. The Windlinx Ranch Trust filed a timely appeal of the Hearings Officer's Decision on February 2, 2024.

III. WINDLINX RANCH TRUST APPEAL

The Windlinx Ranch Trust ("Appellant"), requests the Board review the Hearings Officer's decision on appeal to address at least seven (7) key issues summarized below:

1. The Hearings Officer's decision collaterally attacks and effectively reverses a prior Board decision that the subject Highway 97 right-of-way is zoned F2.
2. The Hearings Officer erred in deciding that the 1999 Board decision on the subject property did not conclusively establish that the zoning is F2.
3. The Hearings Officer erred in not applying the original mylar zoning map, which clearly shows the F2 Zone extends into Highway 97.
4. The Hearings Officer misconstrued DCC 18.12.040 which states unless otherwise specified, zone boundaries are the section lines, centerlines of street or railroad rights-of-way, water courses, ridges or rimrocks or other recognizable or identifiable features.
5. The Hearings Officer erred in declaring the proposed use is a Class III road project that is permitted in the RR10 Zone.
6. The Hearings Officer erred in declaring that a multi-use path can be approved in almost any zone by characterizing it as a Class III road project.
7. The Hearings Officer erred in declaring that the proposed multi-use path is part of a road and street project because it can be viewed as some form of bike-related facility.

The Appellant requests the Board review the appeal *de novo* as they argue there was a procedural error during the Hearings Officer review process. The Notice of Appeal states:

> The Board's review should be de novo because relevant material in the County records related to the application was not included by staff and only came to light through a public records request.

It is unclear what specifically the Appellant is referring to and for this reason staff can neither evaluate nor make a recommendation to the Board with respect to potential procedural issues that have not been identified.

The Appellant's Notice of Appeal is attached.

IV. STAFF RECOMMENDATION

There are several factors staff believes the Board should consider when deciding whether to hear this appeal. Below staff has summarized key issues that staff recommends the Board consider as part of their decision.

Reasons to hear the appeal:

- The appeal issues are primarily associated with local code requirements. For this reason, the Board decision will potentially be given deference on these matters if appealed to the Land Use Board of Appeals ("LUBA").
- The Board may wish to concur, reverse, or modify the Hearing Officer's decision.
- To the extent there was a procedural error, a second hearing review process would remedy the potential error.

Reasons to not hear the appeal:

- The Hearings Officer's decision is well reasoned and written.
- Both parties were well represented by attorneys before the Hearings Officer.
- The County's decision is likely to be appealed to LUBA regardless of who is the final local reviewer (i.e. Hearings Officer vs. Board).

If the Board decides to hear the appeal, staff recommends the Board hear the appeal *de novo*.

V. BOARD OPTIONS

First, the Board must decide if it wishes to hear the appeals. 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 staff[1]

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 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. 150-DAY LAND USE CLOCK

The 150th day on which the County must take final action on this application is April 28, 2024.

VII. RECORD

The record for File Nos. 247-23-000302-DR and the Notice of Appeal are presented at the following Deschutes County Community Development Department website:
https://www.deschutes.org/cd/page/247-23-000302-dr-odot-lava-butte-trail

[1] Deschutes County Code 22.32.035(D)

Attachments:

1. DRAFT Board Order 2024-008 Accepting Review of the Hearings Officer's Decision
2. DRAFT Board Order 2024-008 Declining Review of the Hearings Officer's Decision
3. Location Map
4. Hearings Officer's Decision – 247-23-000302-DR
5. Notice of Appeal - 247-24-000072-A

REVIEWED

_____
LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Accepting Review of Hearings Officer's Decision in in File No. 247-23-000302-DR.	* *	ORDER NO. 2024-008

WHEREAS, on January 26, 2024, the Hearings Officer issued his decision declaring the subject Highway 97 right-of-way is zoned Rural Residential ("RR10"), the multi-use path contemplated by the Oregon Department of Transportation ("ODOT") is a Class III road and street project use, and is a use permitted outright the RR10 Zone and Open Space & Conservation ("OS&C") Zone in File No. 247-23-000302-DR; and

WHEREAS, on February 2, 2024, the Windlinx Ranch Trust appealed (Appeal No. 247-24-000072-A) the Deschutes County Hearings Officer's Decision on File No. 247-23-000302-DR; and

WHEREAS, Sections 22.32.027 and 22.32.035 of the Deschutes County Code ("DCC") allow the Deschutes County 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 it will hear on appeal Appeal No. 247-24-000072-A pursuant to Title 22 of the DCC and other applicable provisions of the County land use ordinances.

Section 2. The appeal shall be heard *de novo*.

Section 3. Staff shall set a hearing date and cause notice to be given to all persons or parties entitled to notice pursuant to DCC 22.24.030 and DCC 22.32.030.

Section 4. Pursuant to Section 22.32.024, the Board waives the requirement that the appellants provide a complete transcript for the appeal hearing.

Section 5. Pursuant to DCC 22.32.035(D), to date the only documents placed before and considered by the Board are the notice of appeal, recommendations of staff, and the record developed before the lower hearings body for File No. 247-23-000302-DR as presented at the following website:

https://www.deschutes.org/cd/page/247-23-000302-dr-odot-lava-butte-trail

Going forward, all documents further placed before, and not rejected by, the Board shall be added to the aforementioned website, and that website shall be the Board's official repository for the record in this matter.

DATED this _____ day of _____, 2024.

BOARD OF COUNTY COMMISSIONERS

_____
PATTI ADAIR, Chair

ATTEST:

_____
ANTHONY DEBONE, Vice Chair

_____
Recording Secretary

_____
PHIL CHANG, Commissioner

REVIEWED

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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 No. 247-23-000302-DR.	* *	ORDER NO. 2024-0008

WHEREAS, on January 26, 2024, the Hearings Officer issued his decision declaring the subject Highway 97 right-of-way is zoned Rural Residential ("RR10"), the multi-use path contemplated by the Oregon Department of Transportation ("ODOT") is a Class III road and street project use, and is a use permitted outright the RR10 Zone and Open Space & Conservation ("OS&C") Zone in File No. 247-23-000302-DRon File No. 247-23-000302-DR; and

WHEREAS, on February 2, 2024, the Windlinx Ranch Trust appealed (Appeal No. 247-24-000072-A) the Deschutes County Hearings Officer's Decision on File No. 247-23-000302-DR; and

WHEREAS, Sections 22.32.027 and 22.32.035 of the Deschutes County Code ("DCC") allow the Deschutes County Board of County Commissioners ("Board") discretion on whether to hear appeals of Hearings Officers' 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 it will not hear on appeal Appeal No. 247-24-000072-A pursuant to Title 22 of the DCC and/or other applicable provisions of the County land use ordinances.

Section 2. Pursuant to DCC 22.32.015, the County shall refund any portion of the appeal fee not yet spent processing the subject application. If the matter is further appealed to the Land Use Board of Appeals and the County is required to prepare a transcript of the hearing before the Hearings Officer, the refund shall be further reduced by an amount equal to the cost incurred by the County to prepare such a transcript.

Section 3. Pursuant to DCC 22.32.035(D), the only documents placed before and considered by the Board are the notice of appeal, recommendations of staff, and the record

developed before the lower hearing body for File No. 247-23-000302-DR as presented at the following website:

https://www.deschutes.org/cd/page/247-23-000302-dr-odot-lava-butte-trail

DATED this _____ day of _____, 2024.

BOARD OF COUNTY COMMISSIONERS

_____
PATTI ADAIR, Chair

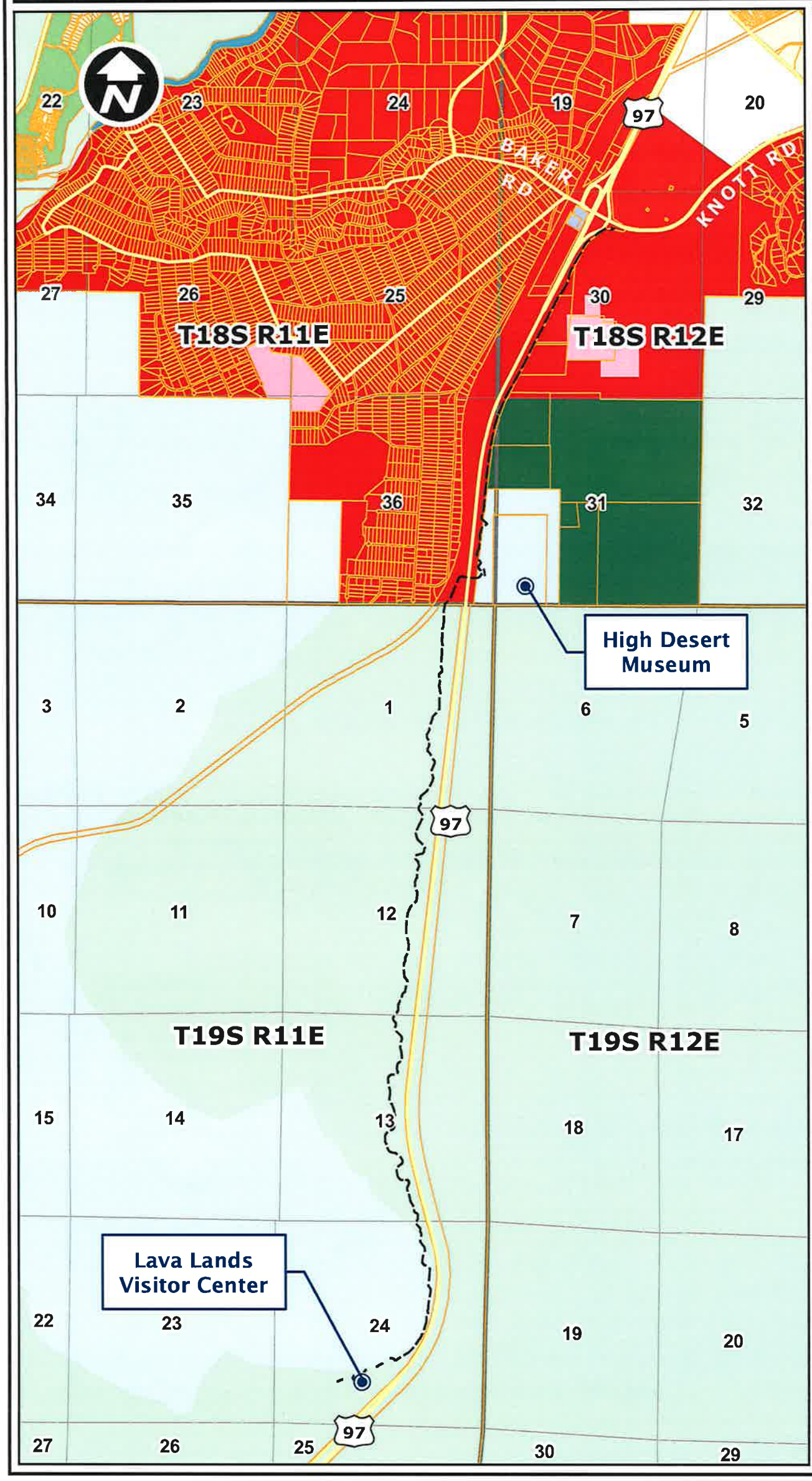
ATTEST:

_____
ANTHONY DEBONE, Vice Chair

_____
Recording Secretary

_____
PHIL CHANG, Commissioner

US-97 LAVA BUTTE TRAIL



FEATURES

- Lava Butte Trail
- Tax Lot Boundary
- Township & Range Grid
- Section Grid
- Roads & Highways

ZONING

- Forest Use 1
- Forest Use 2
- Flood Plain
- Open Space & Conservation
- Rural Commercial
- Rural Residential
- Bend Residential
- Surface Mining
- Widgi Crk Seventh Mtn Residential
- Widgi Creek Residential

0 Miles 1

PRODUCED BY ODOT GIS UNIT
GIS No. 23-62 | FEBRUARY 2023
ODOTMaps@odot.oregon.gov

This product is for informational purposes and may not be suitable for legal, engineering, or surveying purposes. Users of this product should review and consult the primary data sources to determine the usability of the information. Conclusions drawn from this information are the responsibility of the user.

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Mailing Date:
Friday, January 26, 2024

DECISION AND FINDINGS OF THE DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBER: 247-23-000302-DR

HEARING DATE: December 6, 2023

HEARING LOCATION: Videoconference and
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

SUBJECT PROPERTIES: **Parcel 1 -** A portion of Oregon Department of Transportation Right-of-Way for Highway 97 in Township 18S, Range 12E, Sections 19, 30, and 31, and in Township 18S, Range 11E, Section 36

Parcel 2 - 59800 Highway 97, Bend, OR 97702
Map and Taxlot 181100001900

OWNERS: **Parcel 1** - Oregon Department of Transportation
Parcel 2 - Oregon High Desert Museum

APPLICANT: Oregon Department of Transportation

REQUEST: The Applicant requests a Declaratory Ruling to determine multiple issues, including the zoning designation of Parcel 1, whether the proposed path qualifies as a Class III road and street project, and whether such projects are allowed by right in the RR-10 and OS&C zones. The Applicant also makes multiple alternative requests to the foregoing, including whether the proposed path is an outright permitted use in the F-2 zone, or a use permitted conditionally in that zone without the need for an exception to Statewide Planning Goal 4 pursuant to OAR 660-012-0065.

HEARINGS OFFICER: Tommy A. Brooks

STAFF CONTACT: Caroline House, Senior Planner
Caroline.House@deschutes.org / (541) 388-6667

I. APPLICABLE STANDARDS AND CRITERIA

Participants to this proceeding identified the following as potentially applicable to the requested Declaratory Ruling:

Deschutes County Code ("DCC" or "Code") Title 17, Subdivisions
- Chapter 17.04, General Provisions
- Chapter 17.08, Definitions and Interpretations of Language
- Chapter 17.12, Administration and Enforcement
- Chapter 17.40, Improvements
- Chapter 17.48, Design and Construction Specifications
- Chapter 17.56, Variances

DCC Title 18, Deschutes County Zoning Ordinance
- Chapter 18.04, Title, Purpose, and Definitions
- Chapter 18.12, Establishment of Zones
- Chapter 18.40, Forest Use Zone (F2)
- Chapter 18.60, Rural Residential Zone (RR10)

DCC Title 22, Deschutes County Development Procedures Ordinance
- Chapter 22.40, Declaratory Ruling

Oregon Revised Statutes (ORS)
- Chapter 215, County Land Use Planning; Resource Lands

Oregon Administrative Rules (OAR)
- Chapter 660, Land Conservation and Development Department
  - Division 12, Transportation Planning

II. BACKGROUND AND PROCEDURAL FINDINGS

A. Nature of Applicant's Request

The Applicant plans to construct a path on the Subject Properties. The path would parallel Highway 97 and provide bicycle and pedestrian access between the City of Bend and areas south of the city, portions of which are on federally-owned lands. When completed the path will tie into the existing Sun Lava Trail, which connects to the Sunriver community and to other recreational areas and attractions in the same vicinity. This Decision will refer to the proposed path as the "Project."

The entirety of the Project runs through multiple zones and into areas in which the County does not regulate land use. The Applicant seeks a Declaratory Ruling with respect to the portion of the Project that is within the County's jurisdiction. The specific request the Applicant makes are set forth in later findings.

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B. Notices and Hearing

On May 5, 2023, the County mailed a Notice of Application ("Application Notice"), after which the County began receiving comments on the Application. On October 27, 2023, the County issued a Notice of Public Hearing ("Hearing Notice"). Pursuant to the Hearing Notice, I presided over an evidentiary hearing as the Hearings Officer on December 6, 2023, which began at 6:01 p.m. The Hearing was held via videoconference, with Staff from the Deschutes County Planning Division ("Staff"), the Applicant's representatives, and other participants present in the hearing room. The Hearings Officer and other participants participated remotely.

At the beginning of the Hearing, I provided an overview of the quasi-judicial process and instructed participants to direct comments to the approval criteria and standards, and to raise any issues a participant wanted to preserve for appeal. I stated I had no *ex parte* contacts to disclose or bias to declare. I asked for but received no objections to the County's jurisdiction over the matter or to my participation as the Hearings Officer presiding over the Hearing.

The Hearing concluded at 7:29 p.m., before which time I also announced that the written record would remain open as follows: (1) any participant could submit additional materials until December 13, 2023 ("Open Record Period"); (2) any participant could submit materials rebutting information provided during the Open Record Period until December 20, 2023 ("Rebuttal Period"); and (3) the Applicant could submit a final legal argument no later than December 27, 2023. At that time, Staff also provided instructions for how to submit materials within the required timelines.

C. 150-day Clock

The Applicant submitted the Application on April 24, 2023. Staff reviewed the Application and, on May 24, 2023, notified Applicant that the Application was not complete ("Notice of Incomplete Application"). Following an additional submittal from the Applicant, Staff deemed the Application complete on October 19, 2023.

Using October 19, 2023, as the date of completeness, the original deadline for a final County decision under ORS 215.427 – "the 150-day clock" – was March 17, 2024. As of the date of the Hearing, the Applicant requested a 21-day extension of the 150-day clock, which would have extended the deadline for a final County decision until April 7, 2024. As noted above, however, the record was held open for an additional 21 days following the Hearing. The extended record period was agreed to by the Applicant.

Pursuant to DCC 22.24.140(E), a continuance or record extension is subject to the 150-day clock, unless the Applicant requests or otherwise agrees to the extension. Here, the Applicant agreed to the extension. Under the Code, therefore, the additional 21 days the record was left open do not count toward the 150-day clock. Adding that time period to the modified deadline, the new deadline for the County to make a final decision is April 28, 2024.

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III. SUBSTANTIVE FINDINGS AND CONCLUSIONS

A. Declaratory Ruling Standards

The subject Application is presented as a request for a Declaratory Ruling, pursuant to DCC Chapter 22.40. The Applicable provisions of that Code section are set forth below.

Section 22.44.010, Availability of Declaratory Ruling

A. Subject to the other provisions of DCC 22.40.010, there shall be available for the County's comprehensive plans, zoning ordinances, the subdivision and partition ordinance and DCC Title 22 a process for:

1. Interpreting a provision of a comprehensive plan or ordinance (and other documents incorporated by reference) in which there is doubt or a dispute as to its meaning or application;

The Applicant presents multiple issues in which it asserts there is doubt or a dispute over the meaning or application of the County's Comprehensive Plan ("Plan") or Code. Based on my review of the record, the best articulation of those issues and how they relate to the Plan and Code is as follows:

1. Is Parcel 1[1] zoned RR-10 or F-2? The County's Zoning Map, which identifies the zoning for all property in the County, is a component of the Plan and Code. As evidenced by the competing arguments in the record, there is both a doubt and a dispute over the correct zoning of Parcel 1.

2. Is the portion of the project the Applicant seeks to construct a Type III road or street project allowed outright in the RR-10 and OS&C zones? DCC 18.04.030 defines various classes of "road and street projects". As evidenced by the competing arguments in the record, there is a dispute over whether the Applicant's Project is a road or street project under that Code provision at all and, if so, what class of road or street project it is or whether such projects are allowed in the RR-10 and OS&C zones.

3. In the alternative, does the County's F-2 zone allow a bicycle and pedestrian path, like the Project proposed by the Applicant, as a use permitted outright in that zone? While the Applicant asserts that the Project is a use permitted outright in the F-2 zone, opposing testimony asserts the Project is not allowed at all in that zone. A dispute therefore exists over the meaning and application of the F-2 zone provisions.

4. Does the County's F-2 zone allow a bicycle and pedestrian path, like the Project proposed by the Applicant, as a conditional use without the need for an exception to Statewide Planning Goal 4?

[1] As noted on the cover page, the Subject Properties consist of two areas, one of which is within ODOT's right-of-way, and one of which is on private property. Although the participants do not use these designations, for ease of reference this Decision will refer to the ODOT property as "Parcel 1" and to the private property as "Parcel 2".

Similar to the third request, and as an alternative to its other requests, the Applicant asserts that the Project is a use permitted conditionally in the F-2 zone, while opposing testimony asserts the Project is not allowed at all in that zone. The Applicant's alternative requests therefore presents a dispute over the meaning and application of the F-2 zone provisions.

Participants Windlinx Ranch Trust and Randy Windlinx (collectively, "Windlinx") assert that a Declaratory Ruling is not permitted in this matter because the Applicant "is not seeking an interpretation" of the Plan or the Code, and that a Declaratory Ruling "can only be used to interpret ambiguous language." The express language of this Code provision, however, applies where there is "doubt or a dispute over the meaning or application" of the Plan or Code, and it does not require that there be ambiguous language to interpret. The Zoning Map is a good example of a part of the Plan or Code that contains no "language" to interpret, but that nevertheless has meaning and is applied to a factual scenario. Other aspects of the requested Declaratory Ruling are grounded in Code language, such as the meaning of "road and street project", which the parties interpret differently and, therefore, is arguably ambiguous.

Based on the foregoing, I find that the Applicant's request is consistent with DCC 22.44.010(A)(1) and presents the kinds of requests that are contemplated by this Code provision.

> *B. A declaratory ruling shall be available only in instances involving a fact-specific controversy and to resolve and determine the particular rights and obligations of particular parties to the controversy. Declaratory proceedings shall not be used to grant an advisory opinion. Declaratory proceedings shall not be used as a substitute for seeking an amendment of general applicability to a legislative enactment.*

As described above, the Applicant's request for a Declaratory Ruling essentially seeks to determine the land use review requirements, if any, required to construct and maintain the Project on the Subject Properties. As presented to the Hearings Officer, these requests do not seek actual approval of the Project and, instead, seek to establish the Applicant's rights and obligations if it proceeds with the Project. Depending on the outcome of each request, additional review of the Project may be required, and this proceeding only responds to the requests presented in the Application. Each of the requests involves a fact-specific inquiry, based primarily on the location of the Subject Properties and the configuration and purpose of the Project.

No participant has asserted that the Declaratory Ruling would be advisory in nature, but Windlinx does argue that the Applicant's request is precluded by this Code provision because it is "used to review and reverse the prior County Board decision." The prior decision Windlinx refers to is the County's 1999 denial of the Applicant's request to site a weigh station in the same or similar portion of the right-of-way comprising Parcel 1 (the "Weigh Station Decision").[2] That decision applied the F-2 zone to that portion of the Subject Property, which Windlinx asserts is dispositive of the zoning issue. The binding nature of the Weigh Station Decision is addressed in more detail below in findings addressing the zoning of Parcel 1. Regardless of the outcome of that issue, however, I find that Windlinx's argument is not applicable to this specific Code provision, which prevents Declaratory Rulings from serving as "a substitute for seeking

[2] *In re Application of the Oregon Department of Transportation for a Conditional Use Permit and Variance*, County File Nos. CU-98-109 and V-98-15, Findings and Decision (June 28, 1999).

an amendment of general applicability to a legislative enactment." The Weigh Station Decision Windlinx asserts the Applicant is trying to "amend" was not a legislative enactment and, instead, denied the issuance of a conditional use permit. Nor would that decision or any later "amendment" of that decision be of general applicability, as they would apply only to the Applicant.

Based on the foregoing, I find that this Code provision does not limit the Applicant's ability to make the requests presented in the Application for a Declaratory Ruling.

> *C. Declaratory rulings shall not be used as a substitute for an appeal of a decision in a land use action or for a modification of an approval. In the case of a ruling on a land use action a declaratory ruling shall not be available until six months after a decision in the land use action is final.*

Windlinx asserts that this Code provision prohibits the Applicant from requesting a Declaratory Ruling because, according to Windlinx, the request serves as an appeal of the Weigh Station Decision by seeking to overturn that decision. The binding nature of the Weigh Station Decision is addressed in more detail below in findings addressing the zoning of Parcel 1.

The only thing that Applicant's request in this proceeding has in common with the Weigh Station Decision is that they both involve Parcel 1. The two proceedings do not involve the same use (a weigh station for trucks versus a path for bicycles and pedestrians). The two proceedings also do not appear to involve the same properties other than Parcel 1, as Parcel 2 was not part of the proposal in the Weigh Station Decision. To the extent that the two proceedings may invoke a common issue (the zoning of Parcel 1), that issue is relevant only to a portion of the Applicant's request in this proceeding, as the Applicant makes alternative requests, some of which assume Parcel 1 is zoned RR-10, and some of which assume Parcel 1 is zoned F-2.

The argument Windlinx presents relies on a faulty assumption. Windlinx asserts that "[i]f the Hearings Officer declares the subject property RR-10, that decision reverses the 1999 Board decision." (Emphasis added). The Board's prior decision was to deny a conditional use permit. As discussed in more detail below, the Board's denial was not based on the zoning of the property and, instead, was based on the Applicant's failure to satisfy certain approval standards. If this Decision determines Parcel 1 is zoned RR-10, that will have no effect on the County's prior decision. The Applicant would not be able to, for example, argue that it now has a conditional use permit for a weigh station. I find it is more accurate to address Windlinx's argument as one of "issue preclusion". That argument is addressed in more detail below.

Based on the foregoing, I find that this Code provision does not limit the Applicant's ability to requests presented in the Application for a Declaratory Ruling.

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D. The Planning Director may refuse to accept and the Hearings Officer may deny an application for a declaratory ruling if:

1. The Planning Director or Hearings Officer determines that the question presented can be decided in conjunction with approving or denying a pending land use application or if in the Planning Director or Hearing Officer's judgment the requested determination should be made as part of a decision on an application for a quasi-judicial plan amendment or zone change or a land use permit not yet filed;

This Code provision provides the Hearings Officer with some discretion to deny an application for a Declaratory Ruling if, in the Hearings Officer's judgment, the request is better addressed as part of a pending or future land use permit application. As noted above, the requests presented to the Hearings Officer do not seek actual approval of the Project and, instead, seek to establish the Applicant's rights and obligations if it proceeds with the Project. I therefore exercise the discretion provided to me by the Code to consider the Application and not deny it on the basis that some other permitting process is more appropriate.

Section 22.40.020, Persons Who May Apply

A. DCC 22.08.010(B) notwithstanding, the following persons may initiate a declaratory ruling under DCC 22.40:

1. The owner of a property requesting a declaratory ruling relating to the use of the owner's property.
2. In cases where the request is to interpret a previously issued quasi-judicial plan amendment, zone change or land use permit, the holder of the permit; or
3. In all cases arising under DCC 22.40.010, the Planning Director.

As explained in the Staff Report, the record indicates that the Applicant is the owner of Parcel 1, and that the owner of Parcel 2 has consented to the Application. No participant asserts otherwise, and I find that this Code provision is satisfied.

B. A request for a declaratory ruling shall be initiated by filing an application with the planning division and, except for applications initiated by the Planning Director, shall be accompanied by such fees as have been set by the Planning Division. Each application for a declaratory ruling shall include the precise question on which a ruling is sought. The applicant shall set forth whatever facts are relevant and necessary for making the determination and such other information as may be required by the Planning Division.

The only component of this Code section potentially in dispute is the requirement for an applicant to include the precise question on which a ruling is sought. The Staff Report indicates that the Application is sometimes less than clear with respect to the precise question being presented, as do comments provided by Windlinx. Notwithstanding the fact that the Applicant describes its requests in different ways, I find that the Applicant does present precise questions on which a ruling is sought. Those four questions are set forth in the preceding section. The testimony of the Applicant and other participants addresses those

questions, and I do not find any basis to reject or deny the Application based on the level of precision the Applicant used in presenting the questions for which it seeks a ruling.[3]

B. Parcel 1 Zoning Designation

Applicant's first request relates to the zoning designation that applies to Parcel 1, all of which is within the right-of-way of Highway 97. The Applicant specifically requests a ruling that Parcel 1 is designated as part of the RR-10 zone. In support of that request, the Applicant provides evidence of the RR-10 zone as depicted in the County's Zoning Map, as well as the manner in which that zone is depicted in the County's geographic information system ("GIS"), which contains an electronic version of the Zoning Map. Windlinx disputes the Applicant's characterization of the Zoning Map. The participants also disagree whether the County's prior Weigh Station Decision resolves this issue.

1. Zoning Map Designations

The County maintains two types of maps that depict the location of all zones in the County. The first map is an "analog" version of the Zoning Map, prepared on mylar sheets and adopted by County ordinance. As explained in the Staff Report, those mylar sheets include hand-taped lines to identify adopted or amended zoning boundaries, and cartographers originally used varying tape widths that lacked the accuracy of modern GIS software applications. The County also maintains an electronic map layer within its GIS database. Pursuant to DCC 18.12.030, the GIS version of the Zoning Map is the "official replica" of the Zoning Map.

DCC 18.12.040 states that if there is a dispute regarding the zoning classification of a property, "the original ordinance with map exhibit contained in the official county records will control." Thus, because the analog version of the Zoning Map (i.e. the maps prepared on mylar sheets) are exhibits to the County's ordinances adopting the Zoning Map, the analog version of the map will control if there is a difference between that version and the "official replica" of the Zoning Map maintained in an electronic format.

Windlinx relies on that distinction and focuses its arguments on a version of the Zoning Map that includes the mylar sheets, asserting that those maps are different than the electronic version of the map, that they depict Parcel 1 as being in the F-2 zone, and, therefore, are determinative of the F-2 zone applying to all of Parcel 1. Windlinx roots that argument in the County's version of the Zoning Map adopted in 1979.

In 1992, through Ordinance No. 92-060, the County updated the 1979 Zoning Map with the express purpose of making it more accurate. Further, as explained by the technical analysis in the record submitted by Staff, which included information from a County Application Systems Analyst ("Systems Analyst"), the 1992 version of the Zoning Map was itself based on a digitized version of the 1979 Zoning Map. That is, the County hired an outside expert to prepare an electronic version of the Zoning Map, and the County then prepared new mylar sheets based on the electronic version of the map to include with the ordinance

[3] The Code contains other procedural and policy elements relating to a request for a Declaratory Ruling in DCC 22.40.030 through DCC 22.40.050. No participant has raised any issues with respect to those Code provisions. I hereby adopt the findings in the Staff Report relating to those Code provisions as my findings and incorporate them here into this Decision.

for adoption. The 1992 version of the Zoning Map did not change the zoning of Parcel 1. As part of the adopting ordinance, the County's Board of Commissioners ("Board") expressly confirmed that the 1992 Zoning Map, which was based on an electronic version of the original map, would ensure consistency with the original map.

Based on the foregoing, although the analog version of the Zoning Map takes precedence over the County's "digital replica" of the map, in this case there is not a distinction between the two. The electronic version of the Zoning Map was built on the original version of the Zoning Map, which was then updated to reflect the electronic version, and the Board confirmed that the two are the same. This conclusion is further supported by the Systems Analyst, who compared the original mylar-based Zoning Map to the "digital replica", measuring fixed points such as the location of the Highway 97 centerline and the closest section line, to then analyze the location of the zone boundaries. Based on that comparison, the Systems Analyst concluded that the zone boundaries on the original mylar sheets is the same as the boundaries on the digital version of the Zoning Map.

Windlinx does not offer its own technical information to refute the technical analysis provided by the County's Systems Analyst, instead arguing that the information provided by that analyst has "no probative value" because: (1) the analyst is not "qualified for interpreting the official zoning map"; (2) has no authority to make zoning determinations; and (3) does not describe how they were able to scale measurements off the 1979 mylars.[4] Despite Windlinx's criticism, I find that the information provided by the Systems Analyst is relevant to determining the correct zoning. First, the record demonstrates that the Systems Analyst holds a senior-level position with technical expertise relating to the County's electronic data systems, the purpose of which is to provide professional systems analysis to other County departments. Second, the information provided by the Systems Analyst does not require them to have authority to make zoning determinations and, instead, is information on which such a determination can be based by someone with that authority. Third, contrary to Windlinx's statement, the information provided by Staff details the methodology the Systems Analyst used to scale the measurements from the 1979 mylars.

Based on the foregoing, which also demonstrates an intent by the County's Board that the analog and electronic versions of the Zoning Map are to be read as being the same, I find that the preponderance of the evidence indicates Parcel 1 is zoned RR-10 on the Zoning Map. In the alternative, and assuming there is a discrepancy between the two versions of the Zoning Map, I find that the original mylars also depict Parcel 1 as being in the RR-10 zone. The basis for that alternative conclusion is set forth below.

As an initial matter, it should be noted that the record does not reveal a major discrepancy between the two versions of the Zoning Map. The electronic version, the applicable portion of which appears in the Staff Report and other places in the record, depicts the RR-10 zone as encompassing the actual roadway that forms Highway 97, as well as the area to the east of the roadway, which the Applicant asserts, and no participant disputes, is still part of the Highway 97 right-of-way. The adjacent F-2 and Open Space and

[4] Windlinx also asserts the Systems Analyst did not take into account a later decision by the Board that addressed the zoning of Parcel 1. That assertion is addressed in findings below, is a legal argument, and is not relevant to the technical information the Systems Analyst provided. I therefore do not address that argument here.

Conservation ("OS&C") zones on private property to the east appear on the map as being separated from the Highway 97 roadway or centerline, and they coincide with the property lines that separate the Applicant's ownership from those private ownerships. Multiple versions of the original Zoning Map depict a similar configuration. For example, the black and white version of the 1979 Zoning Map included in the Applicant's hearing presentation shows a white strip between the Highway 97 centerline and the adjacent parcels to the east, indicating the presence of the RR-10 zone on the east side of the Highway 97 centerline. The high-resolution version of the mylar maps, provided by Windlinx and the Applicant in post-hearing submittals, shows that same strip.

Although the two versions of the Zoning Map largely depict the same zoning configuration with the RR-10 zone showing on the east side of Highway 97, they do appear to depart in one small area. Specifically, at the north end of the subject area, where the northwest corner of the F-2-zoned Windlinx property intersects with the Highway 97 right-of way, the taped line on the mylar sheets crosses over to the west side of the line depicting the highway centerline, whereas the electronic version of the Zoning Map continues to show the F-2 zone completely to the east of the highway centerline.

The differing positions in this proceeding assert that the Highway 97 right-of-way that comprises Parcel 1 is either fully in the RR-10 zone (the Applicant's position), or fully in the F-2 zone (Windlinx's position). I find that this issue is resolved by looking at the text and context of the Code.

The Applicant and other participants in this proceeding acknowledge that the original Zoning Map lacks precision and that, due to various factors (width of the tape used, scale of the map), the mylars can be difficult to interpret. The Code contemplates this difficulty, however, and provides guidance on how to determine the location of a particular zone. Specifically, DCC 18.12.040 states that "[u]nless otherwise specified, zone boundaries are section lines, subdivision lines, lot lines, center lines of street or railroad rights of way, water courses, ridges or rimrocks, other readily recognizable or identifiable natural features, or the extension of such lines" (emphasis added). No participant has submitted any information to the record describing the zone boundaries using a metes or bounds description, or submitted evidence indicating that the zone boundaries in this area are "otherwise specified" to follow a feature that is not listed in the Code. I further note the presence of other features the Code contemplates as zone boundaries, such as section lines and railroad rights of way, but which the zoning boundary does not appear to follow, and which the participants do not rely on to support their arguments. Thus, the question to resolve is whether the line between the RR-10 zone and the F-2 zone in this area on the Zoning Map is intended to follow lot lines (the Applicant's position) or is intended to follow the center line of Highway 97 (Windlinx's position).

The 1979 Zoning Map depicts the centerline of Highway 97 as a dark, curved line. The tape on the mylar sheets does not appear to have a direct relationship to that line. Instead, except for the northern portion where the tape crosses the right-of-way line, the tape appears to follow property boundaries as described by the participants. In other areas on the exhibits in the record, the tape appears to follow section lines. Understanding that the width and location of the tape is not always consistent, but looking to the entirety of the zoning boundary as it is depicted on this portion of the Zoning Map, I find it more likely than not that the zoning boundary, as indicated by the tape, was intended to follow lot lines rather than the centerline of the highway. If the County intended to follow the centerline of the highway, one might expect to see the tape adhered closer to the black right-of-way line, or even cover that line since it is the centerline

of that street. I also note that no other zone boundary in this area of the Zoning Map appears to key off of the Highway 97 centerline. Of all the features the Code contemplates as a boundary line, the lot lines to the east of the highway right-of-way, rather than the centerline of the highway or any other feature, offer the most likely explanation for the boundary's location.

Windlinx asserts that if the boundary line does not follow the centerline of Highway 97 that the result would be multiple unusable strips of land between Highway 97 and private property to the east of the highway. As the Applicant notes, however, those areas are not unusable if they are zoned RR-10. The evidence in the record indicates that the entire area between the Highway 97 centerline and the private property to the east is part of the Highway 97 right-of-way. As such, that area can be used for right-of-way purposes as long as it is consistent with the applicable provision of the Code. Indeed, the participants appear to agree that there are more uses possible for such areas if they are zoned RR-10 than if they are zoned F-2. It is therefore just as likely that the County intended to have only one zone apply to the Highway 97 right-of-way as it is that it intended to have two different zones, and therefore allow different sets of uses, apply to the same right of way. Regardless of the intent, the bulk of the right-of-way comprising Parcel 1 contains the RR-10 designation, and the line between that zone and the F-2 zone adheres to property boundaries more closely than it does to the Highway 97 centerline.

Based on the foregoing, I find that the Zoning Map, both the analog version and the electronic version, depicts Parcel 1 as being zoned RR-10.

2. Impacts of the Weigh Station Decision

As noted in previous findings, the County's 1999 Weigh Station Decision denied an application for a conditional use permit for a weigh station on a portion of the Highway 97 right-of-way comprising Parcel 1. The Weigh Station Decision expressly concludes that Parcel 1 is zoned F-2. Windlinx argues that the County's prior decision is final and binding on the present Application. The Applicant disagrees and asserts that the Hearings Officer can review the zoning issue without being bound by the language of the Weigh Station Decision.

As presented by the participants, this issue invokes the idea of "issue preclusion." The Land Use Board of Appeals ("LUBA") has consistently described issues preclusion as follows:

> When an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue if five requirements are met: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given.[5]

[5] *See, most recently, Columbia Pacific Building Trades Council v. City of Portland*, -- Or LUBA --

LUBA refers to the foregoing as the "*Nelson* factors." LUBA also distinguishes issue preclusion from the "law of the case", which bars relitigation of the same issue in different phases of a proceeding, for example after remand by LUBA.[6] Although LUBA regularly entertains arguments relating to issue preclusion, it has also held that:

> The nature of successive land use applications and land use decisions is such that it will be a rare circumstance, if ever, that a prior land use proceeding precludes the ability of the applicant to file a new land use application, based on different evidence or a different legal theory, and obtain a new land use decision on the new application.[7]

Applying the *Nelson* factors to this case, I find that the County's prior Weigh Station Decision does not preclude the Applicant from seeking a declaration that Parcel 1 is zoned RR-10.

For related reasons, the issue in the two proceedings is not identical, and the issue over the zoning of Parcel 1 was not actually litigated in the prior decision. Taking a broader view of the two cases, the "issue" in the Weigh Station Decision was whether the Applicant had demonstrated compliance with the County's conditional use criteria, whereas the issue in this proceeding includes a precise question about the applicable zoning and whether Applicant's bicycle and pedestrian path is a "Class III" project permitted outright in either the RR-10 or F-2 zone. Taking a narrower view of the cases, the Board did address the zoning of the Highway 97 right-of-way in the prior decision, but that issue was not actually litigated. Rather, the evidence in this record includes a letter from the Applicant's representative who reviewed the Zoning Map in 1994 and concluded that "this area appears to be zoned F-2." Shortly thereafter, Staff responded that it was Staff's "understanding" that the F-2 zoning was correct, but that response does not indicate if that understanding was based on a zoning analysis or based on the Applicant's representation. Further, it is not clear that the zoning issue was essential to the outcome in the earlier case. Indeed, the Weigh Station Decision also expressly determined that a portion of the subject property in that case (an acceleration lane existing the facility) was zoned RR-10.[8] The essential components of that earlier decision were therefore the criteria the Board addressed that it determined were not met rather than any specific findings about the zoning.

The Board's Weigh Station Decision does describe Highway 97 as dividing "the RR-10 zoning to the west and the F-2 zoning to the east in the vicinity of the proposed weigh station facility." That description also refers to DCC 18.12.040 and its reference to street centerlines. Despite that language, there is no evidence in the Weigh Station Decision that there was a dispute over the zoning of the right-of-way, much less any indication that the Board addressed the portion of DCC 18.12.040 that states a zone boundary can also

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(LUBA No. 2020-009) (Oct. 30, 2020), *quoting Lawrence v. Clackamas County*, 40 Or LUBA 507, 519 (2001) and *citing Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104 (1993)).

[6] *See Widgi Creek Homeowners Association v. Deschutes County*, -- Or LUBA -- (LUBA No. 2014-109) (June 2, 2015).

[7] *See Central Oregon LandWatch v. Deschutes County*, -- Or LUBA -- (LUBA No. 2018-095) (Dec. 14, 2018) (emphasis added).

[8] *See* Weigh Station Decision at p.9.

follow lot lines. Indeed, the decision expressly notes that it was the Applicant that provided the location and map information the Board relied on. Further, that decision followed a decision by a hearings officer and a staff report, neither of which indicates the zoning of the property was an issue in dispute. Windlinx's own characterization of the earlier proceeding undercuts its position, and Windlinx submitted comments in this proceeding that "[t]he County Board's 1998 [sic] decision simply confirmed what ODOT represented."

For a separate and independent reason, I also find that applying issue preclusion in this proceeding would be inconsistent with the fifth *Nelson* factor. In a different case involving the County, LUBA considered a prior decision in which the Board denied a land use application relating to the creation of two reservoirs, but later approved applications allowing the reservoirs.[9] Addressing an argument that issue preclusion prohibited the County from approving the reservoirs, LUBA upheld the County's decision, agreeing in part that applicants are allowed under the Code to re-apply for a use previously denied as a means of encouraging an applicant to address problems identified in the denial decision rather than appealing the decision.

That same logic holds here. If the Applicant would have been authorized to reapply for a conditional use permit for the denied weigh station, it follows that the Applicant should also be authorized to seek approval for a different use. Under Windlinx's argument, in contrast, which asserts the Applicant should have appealed the Weigh Station Decision even though the Applicant accepted the denial, the appeal would have been solely of the Board's finding relating to the zoning, which would not have changed the outcome of that decision.[10] That approach would have also required the Applicant to appeal an issue that was not in dispute in the proceeding. Such an approach is counter to the goal of applying issues preclusion, resulting in additional, more complex proceedings rather than fewer, simpler proceedings.

In this proceeding, the Applicant is making a different request, based on different facts, and different arguments. The Application should therefore be judged on its own merits rather than on a prior decision in which the same issue was not even in dispute. Based on the foregoing, I find that issue preclusion does not bind the outcome of this proceeding.

C. Type III Road and Street Project

For its second request in the Application, the Applicant seeks a determination that its Project is a "road and street project" and, more specifically, a "Class III" road and street project.

1. Road and Street Project

DCC 18.04.030 defines a "road and street project" as "the construction and maintenance of the roadway, bicycle lane, sidewalk or other facility related to a road or street." In the Application, the Applicant states that the "proposed bicycle path is considered a facility related to a road or street", and the Applicant states that the Project is also a "Bicycle Route."

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[9] *Bishop v. Deschutes County*, -- Or LUBA -- (LUBA Nos. 2018-111 and 2018-112) (May 1, 2019).
[10] The Board denied the permit for the weigh station based on multiple substantive approval criteria and not because of the zoning of the property.

The Code language is less than clear with respect to the implication of the Applicant referring to the Project as a Bicycle Route. The Code has two definitions for "Bicycle Route". A stand-alone definition in DCC 18.04.030 defines it as a "a segment of a bikeway[11] system designated with appropriate directional and information markers by the jurisdiction having authority." A separate definition for that same phrase also appears beneath the definition of "road or street" in that same Code section, defining Bicycle Route more broadly as a "right of way for bicycle traffic."

In the absence of an interpretation of this language by the County's Board, I must determine the meaning of this language from the text and context of the Code in which it appears. As it relates to a road or street, the text of the Code states simply that a Bicycle Route is a right-of-way for bicycle traffic. The record clearly indicates that the Project includes a right-of-way (the area along Highway 97 controlled by the Applicant), and that the right-of-way will have a path for bicycles. Looking to the other, stand-alone definition of "Bicycle Route", the Project meets that definition as well, as it is a path that will be a segment of a bikeway, specially designated as open to bicycle traffic. I therefore agree with the Applicant that the Project is appropriately referred to as a "Bicycle Route" as contemplated by the Code.

Turning to the context in which this phrase is used, a Bicycle Route that is a right of way for bicycle traffic is one type of "road or street." This conclusion is based in part on the implication arising from the definition of "Bicycle Route" appearing as a subpart of the definition of "road or street". That is, the Code appears to define certain facilities, including a Bicycle Route, that is an example of a road or street. This conclusion is further evidenced by the other definitions appearing under the definition of "road or street", such as "arterial" and "collector", all of which are examples of streets.

In light of those definitions, there are two bases on which to conclude that the Project is some type of "road and street project" as defined by the Code. First, because a Bicycle Route itself is listed as an example of a "road or street", then the construction of the Bicycle Route is the construction of a "facility related to a road or street." Second, even if the Bicycle Route itself is not a "road or street", the record reveals that the Project relates to Highway 97, which is a street.[12] Specifically, the Applicant intends the Project as a modification and improvement of Highway 97, in part by removing bicycle traffic from the current Highway 97 facility and having bicycle traffic use the new path instead.

Windlinx presents several arguments to support its conclusion that the Project cannot be classified as any type of "road or street project."[13] Windlinx primarily asserts that the Project is a "multi-use path" and that the definition of "road and street project" does not include a reference to multi-use paths. According to

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[11] CDC 18.04.030 defines "bikeway" as a "road, path or way which in some manner is specially designated as being open to bicycle travel, regardless of whether such facility is designated for the exclusive use of bicycles or is shared with other transportation modes.

[12] CDC 18.40.030 defines "street" as "the entire width between the right of way lines of every public way for vehicular and pedestrian traffic" and includes a "highway" or other similar designation, which describes Highway 97.

[13] Windlinx also presents arguments asserting that the Project is not a "Class III" road and street project. Separate findings in a later section of this Decision address those arguments.

Windlinx, the absence of such a reference means the County intended to exclude multi-use paths from that definition.

Windlinx is correct that the Project appears to fall within the definition of a multi-use path. DCC 18.04.030 defines "multi-use path" as "a path physically separated from motor vehicle traffic by an open space or barrier and either within a highway right-of-way or within an independent right-of-way. The multi-use path is used by bicyclists, pedestrians, joggers, skaters and other non-motorized travelers." Using the description of the Project provided by the Applicant, the Project is a multi-use path under this definition: (1) it will be a path; (2) it will be physically separated from motor vehicle traffic; (3) it will be within a highway right-of-way; and (4) it will be used by bicycles and other non-motorized travelers.

Whether or not the Project can be characterized as a multi-use path, however, is not the end of the inquiry. Windlinx's specific argument is that the definition of "road or street project" must be interpreted to exclude multi-use paths from that definition, which logically means that the definition also does not include multi-use paths. Specifically, Windlinx makes the following statements in support of its interpretation:

- "[T]he definition of a road and street project in DCC 18.04.030 includes only a bike lane which is part of the actual road or street"
- "The only bike facility included in the definition [of road or street project] is a bicycle lane."
- "Intuitively, a road or street project can only involve something that is defined as a road or street"
- The definition of road or street "does include a bicycle route and that use is exclusive to bicycle use"

Windlinx's interpretation of the definitions of "road and street project" is narrower than and inconsistent with, the text and context of the Code. First, while the definition of "road and street project" expressly includes a "bike lane", a bike lane is only one type of bike facility, and that is not the only language in this Code provision that can apply to other bike facilities. As noted above, a "road and street project" expressly includes any "other facility related to a road or street." Thus, a bike facility that is not a "bike lane" can still qualify as a "road or street project" as long as it relates to a road or street. For the same reason, Windlinx's statement that a "road or street project" can only involve something that is itself a road or street is inconsistent with the Code language. That is, Windlinx's interpretation would have the effect of removing the phrase "related to" from the definition and replacing it with new language, such that the Code would read, as revised by Windlinx, "…or other facility ~~related to~~ that is a road or street."

Windlinx's characterization of the definition of "road or street" is also counter to the plain text of the Code. Windlinx acknowledges that the definition of "road or street" includes a Bicycle Route as an example, but incorrectly states that a Bicycle Route must be exclusive to bicycle use, which the Project is not. Neither definition of "Bicycle Route" in the Code requires such a facility to be exclusive for bicycles. To the contrary, the stand-alone definition of that phrase describes it as part of a "bikeway" system, and the definition of a "bikeway" expressly states that such a facility does not need to be used exclusively by bicycles.

Finally, the mere absence of "multi-use path" in the definition of "road and street project", in this case, does not serve to exclude multi-use paths from that definition. The Code separately defines many other road or street facilities (e.g., alley, arterial, bicycle route, collector, cul-de-sac, and local street), none of which are expressly included in the definition of "road and street project". Under Windlinx's interpretation, the separate definitions of those facilities, coupled with their absence in the definition of "road and street project", would serve to prevent those facilities from being included in a "road or street project". The only facilities that would qualify as a "road and street project" would be a "roadway", "bicycle lane", or a "sidewalk". In the absence of an interpretation by the County's Board that the Code is intended that way, I find Windlinx's interpretation to be unreasonable. Even if that interpretation is reasonable, a more reasonable interpretation is that the phrase "other facility related to a road or street" includes all facilities related to a road or street whether or not they are defined elsewhere in the Code.
In summary, the Project involves the construction of a facility that is related to a road or street. As such the Project is a "road or street project" under the Code regardless of whether it is characterized as a bicycle route, a bikeway, or a multi-use path.

2. Class III Road and Street Project

The definition of "road and street project" in DCC 18.04.030 states that all road and street projects shall be classified as a "Class I, Class II, or Class III project." The Applicant's request for a Declaratory Ruling seeks to establish only that the Project is a Class III project.[14]

The definition of a Class III project is straightforward. DCC 18.04.030 states that a "'Class III Project' is a modernization, traffic safety improvement, maintenance, repair or preservation of a road or street." According to the Applicant, the Project modernizes and improves the traffic safety on Highway 97. The Applicant specifically asserts that constructing a separated facility for bicycles and pedestrians within the same right-of-way of an existing facility is a "defining element" of modernization. The Applicant also asserts that separating modes of traffic improves safety for all users.

Windlinx counters that the Project is not a Class III project, based primarily on its argument that the Project is not a "road and street project" at all. As explained in more detail above, this Decision rejects that argument and finds that the Project is a "road and street project" as defined in the Code.

With respect to the classification of a "road and street project", Windlinx asserts that the Project "is not a modernization, traffic safety improvement, maintenance, or preservation of a road or street." As Windlinx notes, the Code appears to require that a Class III project that is for modernization or traffic safety be the modernization of an existing road or street, or a traffic safety improvement to an existing road or street. Windlinx asserts the Project fails to meet that definition because "[a] proposed new multi-use path is not a modernization of an existing road or street" and that "[c]onstructing a new facility may provide a safe facility for bikes and other uses, but that does not make that facility part of an existing road." Windlinx also states that "[t]he fact that [Applicant] claims its path provides a safer facility does not make it an

[14] In later submittals, the Applicant presents arguments, in the alternative, that the Project could be considered a Class II project. Because the Application and subsequent materials do not state a clear request for a declaratory ruling on that issue, and because this Decision concludes the Project is a Class III project, this Decision will not address that alternative argument.

improvement to the existing highway," and asserts that the Applicant has not demonstrated there is a bicycle or pedestrian safety issue on Highway 97 that needs to be addressed. At the heart of Windlinx's comments in this regard is a theme that the Project was conceived as a recreational facility, largely separated from Highway 97 where it is not part of the Subject Properties.

I have considered and weighed all of the comments provided by the participants. I find that the Applicant has demonstrated the Project modernizes and improves the safety of Highway 97 even though it may also serve other purposes in areas other than the Subject Properties.

First, I note that one of Windlinx's arguments – that the Project is not part of an existing road – ignores the full language of the Code, which refers to a road or street. As noted above, the Code defines "street" broadly to include "the entire width between the right of way lines of every public way for vehicular and pedestrian traffic." Thus, the entire Highway 97 right-of-way is part of that "street", and any modernization or safety improvements in that area are therefore part of that street.

Second, the Applicant is an expert at developing transportation facilities. Thus, its comment that creating separated paths in the same right-of-way is a defining element of modernization carries more weight than the opposing Windlinx comment that simply disagrees with the Applicant.

Third, the Applicant shows that the County's Transportation System Plan ("TSP") identifies Highway 97 as a bikeway and that the TSP contemplates the use of Highway 97 as a bikeway will be improved over time for bicycle safety." Further all participants appear to agree that new arterials are intended to have such facilities. Thus, the Project is modernizing this portion of Highway 97 by making it more in line with the County's stated future vision and with how new facilities would be designed.

Fourth, the Applicant shows that the money it will use for the Project comes from funds designated for transportation purposes. The Applicant cannot use such funds for recreational facilities. Thus, while the Project may serve recreational purposes, that does not detract from the fact that the Project is a transportation facility.

With respect to safety improvements, Windlinx does not explain why the Applicant must establish that there is a "safety problem". The express language of the Code states that a Class III project is one that makes a traffic safety improvement to an existing road or street. The evidence provided by the Applicant indicates that crash risk factors and crash history indicate that there are safety risks associated with walking and bicycling on Highway 97 and that the Project will reduce those risks. I do not find any credible argument or information in the record that refutes the notion that the Project will reduce these risks and thereby make safety improvements, even if others may subjectively conclude that current conditions are not unsafe.

Based on the foregoing, I find that the Project, as proposed by the Applicant, is a Class III project.

D. Uses Permitted Outright in the RR-10 and OS&C Zones

As part of its second request for a Declaratory Ruling, the Applicant seeks to establish that a Type III road or street project is allowed outright in the RR-10 and OS&C zones.

DCC 18.60.020 provides a list of uses that are permitted outright in the RR-10 Zone. Among those uses, DCC 18.60.020(F) lists "Class III road or street project". Similarly, DCC 18.48.020 provides a list of uses that are permitted outright in the OS&C Zone. Among those uses, DCC 18.48.020(E) lists "Class III road or street project". Based on the earlier findings in this Decision that the Project is a Class III road or street project, the Project is a use permitted outright in the RR-10 and OS&C Zones.

Windlinx argues that the Project is not allowed in either of these zones. Windlinx bases this argument primarily on its assertion that the Project is not a road and street project at all, and that it does not otherwise fit any of other uses permitted outright in these zones. The findings above reject that portion of Windlinx's argument and conclude the Project is a Class III road or street project.[15]

Windlinx makes the additional argument, similar to its arguments addressed above, that the County's definition of "multi-use path", and the absence of that use in DCC 18.60.020 and DCC 18.48.020, means that the County intended that use to be excluded from the list of uses permitted outright. Under Windlinx's argument, the definition of "Class III project" and "multi use path" are mutually exclusive and that the multi-use path is a "distinct and separate" use from all other uses that are Class III projects.

The best evidence Windlinx provides in support of this argument is the manner in which the County uses similar language in the La Pine Neighborhood Planning Area ("La Pine NPA"). Specifically, DCC 18.61.050(D)(1) lists as uses permitted outright both a multi-use path and a Class III road and street project. As Windlinx notes, this separate listing of those uses implies that they are distinct from one another. According to Windlinx, if the County does not treat those as separate uses, the reference to multi-use paths in that Code provision is superfluous (because Class III road project would already include a multi-use path). Further, according to Windlinx, that structure, coupled with the County's choice to omit multi-use paths in other zones, evidences an intent to prohibit the multi-use path in any zone where it is not listed. Put differently, Windlinx suggests that when the County wants to allow multi-use paths in a zone, it knows how to do that.

I agree that the Code language is ambiguous and requires interpretation. The Project falls within the definition of multi-use path and within the definition of Class III project. The ambiguity arises in determining if those definitions are mutually exclusive and, if so, which one controls the present situation. In the absence of an interpretation by the County's Board, I must resolve this ambiguity based on the text and context of the Code.

The fact that the Code defines "multi-use path" is not dispositive, because it carries multiple, contrary implications. As Windlinx notes, the use of "multi-use path" can evidence the County's intent to identify

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[15] I note that the Code contains a minor discrepancy in wording: DCC 18.04.030 provides a definition for "road and street project" and then has a sub-definition for "Class III project", whereas the Code language in the RR-10 and OS&C zone regulations refers to a "Class III road or street project" rather than to either of the defined terms. No participant to this proceeding asserts that the difference in language has any significance, and it is clear from the text and context of the Code language that the phrase "Class III road or street project" in the zoning regulations refers to "Class III project" in the definitions.

that use and to list that use only where that use will be allowed. By implication, the absence of that phrase in other Code language could therefore be meaningful. But as noted in earlier findings, the Code contains other provisions that may apply to a multi-use path even if that phrase is excluded. The best example is the definition of "road and street project", which refers to any facility related to a road or street, which may include a multi-use path. Indeed, because the County has a definition of multi-use path, the County would have been able to exclude that type of facility from road and street project if it intended to. In other words, because multi-use path is defined, the County, if it wanted to exclude that use from "road and street project" could have had that definition read "…other facility, except a multi-use path, related to a road or street."

A more reasonable reading of the Code is that "multi-use path" and "Class III project" have some overlap, with the former being a potential subset of the latter, and that they are not mutually exclusive. First, other Code provisions follow this same structure. For example, the Code contains a definition for "utility facility" and for "land disposal site." Further, a land disposal site is a type of utility facility. Some zone regulations, for example DCC 18.66.020(C), allow a "utility facility" as a conditional use. DCC 18.48.030, in contrast lists as a conditional use in the OS&C zone a "utility facility except land disposal sites."

Second, the Code has other examples of overlapping definitions that create subsets of categories. Under the County's Exclusive Farm Use ("EFU") zone, DCC 18.16.025(F) allows some wineries, provided they meet certain statutory criteria. DCC 18.16.030(E) also allows wineries as a conditional use in the EFU zone under the separately-listed use of "commercial activities that are in conjunction with farm use" even if they do not meet those same statutory criteria.[16] In other words, the Code establishes a broad category for all types of commercial uses, and then establishes regulations for specific uses in that broad category. Moreover, the specific regulations do not appear to impact the broader category. For example, the Multiple Use Agriculture ("MUA") zone allows only commercial activities that are in conjunction with farm use but does not separately list "winery" as the EFU zone does. The absence of "winery" in the MUA regulations does not prohibit approving a winery in that zone. Rather, it simply means that the winery must meet the MUA zone requirements for commercial activities that are in conjunction with farm use.

Third, even Windlinx acknowledges that the Code can use different terms synonymously. In its initial comments, Windlinx identified portions of the Code that it asserts use "bikeway" and "bike lane" synonymously even though those terms are separately defined.

Ultimately, however, it is the definition of these terms and the fact that a 'multi-use path" is not synonymous with "Class III project" that informs how the former term is used. A multi-use path may be a type of road and street project, depending on the specific facts relating to the multi-use path. That is, if the multi-use path is a "facility that relates to a road or street," then it qualifies a "road and street project." If the multi-use path does not relate to a road or street, however, or does not meet the other factors that determine what a "road and street project" is, then it would not qualify as such a facility. Similarly, it is possible that a multi-use path, depending on the facts, does not qualify as a Class III project because it does not involve modernization, traffic safety improvements, maintenance, repair or preservation of an existing road or street.

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[16] LUBA has confirmed that a winery can be permitted under either of these uses. *See, e.g., Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

Those precise definitions in the Code language offer a reasonable explanation for why the County lists both "multi-use path" and "Class III project" in the La Pine NPA. That is, all Class III projects are allowed under that La Pine NPA provision, as are multi-use paths that do not qualify as road and street projects generally or as Class III projects specifically. In the RR-10 and OS&C zones, by contrast, all Class III projects are allowed under those Code provisions, but multi-use paths that do not qualify specifically as a Class III project (or qualify as a Class I or Class II project as part of a partition or subdivision) would not be allowed, because they are not separately listed.

Based on the foregoing, I find that the absence of "multi-use path" in the RR-10 and OS&C provisions does not limit the Project in those zones even though it is a multi-use path, as long as the Project is also a Class III project. The Project is therefore a use permitted outright in those Zones.

E. Uses Permitted Outright or Conditionally in the F-2 Zone

As an alternative to the foregoing requests, the Applicant makes separate requests seeking a Declaratory Ruling that the Project is a use permitted outright or conditionally in the F-2 Zone. Because those requests were made in the alternative, and because this Decision concludes that the Subject Properties are not in the F-2 zone, I find that it is not necessary to address the alternative arguments, and to do so could create more confusion than clarity.

F. Applicability of DCC 17

The record contains multiple references to DCC Title 17, including discussion of whether any provision in DCC Title 17 directly applies to this proceeding. These references and the related discussion were offered by the Applicant, Staff, and Windlinx.

The Applicant asserts that the provisions of DCC Title 17 are not directly applicable, but the Applicant also cites to provisions in DCC Title 17 as context for demonstrating the meaning of certain bicycle-related terms. Windlinx, like the Applicant, argues that DCC Title 17 is not directly applicable, and it asserts that the requests for Declaratory Ruling are answered by the Code language in DCC Title 18 without the need to resort to the language in DCC Title 17.

The Staff Report requests that the Hearings Officer determine if the requirements of DCC Title 17 apply to this proceeding. The Staff Report and the Notice of Incomplete Application specifically refer to DCC 17.04.020, DCC 17.08.030, DCC 17.48.140, and DCC 17.48.490 as potentially applicable.

The Application does not present a specific request for a Declaratory Ruling relating to DCC Title 17. Instead, the Applicant's initial mention of DCC Title 17 appears to be in response to the Notice of Incomplete Application. In that submittal, the Applicant states its belief that DCC Title 17 does not directly apply. The Applicant went on to state "[a[lternatively, and to respond to Staff's notice of incompleteness," its Project complies with DCC Title 17 requirements.

The Oregon Court of Appeals recently opined on the scope of a Declaratory Ruling under the County's Code:

> A declaratory action is not an expansive proceeding that covers any and all issues related to a land use permit. Instead, it is narrowly confined to answering the "precise question" presented by the applicant. DCC 22.40.020(B); *see also* DCC 22.40.010(B) (stating that a declaratory ruling is "available only in instances involving a fact-specific controversy and to resolve and determine the particular rights and obligations of particular parties to the controversy" (emphasis added)). Further limiting the scope of the proceeding are the restrictions on who can seek a declaratory ruling and for what purposes. *See* DCC 22.40.020(A) (limiting the applicants to the owner of property on questions of use of the property, to the holder of a permit on questions of interpretation of a quasi-judicial plan amendment, zoning change or land use permit, or the Planning Director). We also note that under DCC 22.40.040, the effect of a declaratory ruling is conclusive, binds the parties, and prevents the parties from reapplying for a ruling on the same question. The binding and preclusive nature of a declaratory ruling supports our conclusion that the county intended declaratory actions to have a limited scope.[17] (Emphases added).

The precise questions presented in this proceeding are set forth above in earlier findings. Applicant's first question relates to the zoning of Parcel 1, which has no relationship to DCC Title 17. Applicant's second question asks whether the Project is a Class III project, but specifically presents that question in light of the definitions that appear in DCC Title 18. Thus, while DCC Title 17 has nearly identical definitions and may have some bearing on a project that fits those definitions, the issue in this proceeding relates only to DCC Title 18. The Applicant's third and fourth questions relate specifically to uses that are allowed in the F-2 zone, which this Decision does not address, but which also invoke only DCC Title 18 provisions (and state administrative rules) as presented.

To the extent that DCC Title 17 is relevant to this proceeding, it provides some context which may inform the meaning of the Code language in DCC Title 18. While such context may be useful, the findings in this Decision relating to the Applicant's precise questions are based on the text and context of DCC Title 18 and, except where I have described the comments of the participants, I do not find a need to resort to a different title as further context to address the Applicant's requests.

In consideration of the Court's description of the limited scope of this type of proceeding, and in light of the Applicant's requests as presented in the Application, I respectfully decline to extend the scope of this proceeding to address the extent to which DCC Title 17 applies.

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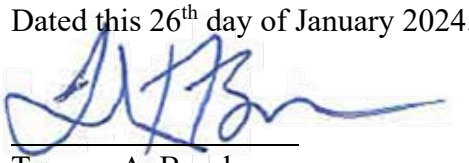
[17] *Central Oregon LandWatch v Deschutes County*, 326 Or App 439, 449-50 (2023).

IV. CONCLUSION

Based on the above findings, this Decision concludes the following:

1 – The Parcel 1 portion of the Subject Properties is zoned RR-10.
2 – The Project 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 Project described by the Applicant is a use permitted outright in the RR-10 zone, and in the OS&C zone.

Dated this 26th day of January 2024.



Tommy A. Brooks
Deschutes County Hearings Officer

Land Use Application

Appeal - BOCC

DESCHUTES COUNTY
117 NW Lafayette Avenue
PO Box 6005
Bend,OR 97703
541-388-6575

247-24-000072-A

www.deschutes.org/cd

cdd@deschutes.org

APPLICATION DESCRIPTION

Type of Application: Appeal - BOCC

Description of Work: Appeal of Hearings Officer Decision for File No. 247-23-000302-DR

LOCATION INFORMATION

Property Address:
59705 Scale House Rd, Bend, OR 97702
59800 Hwy 97, Bend, OR 97702
63055 N Hwy 97, Bend, OR 97703

Parcel:
1812310000400 - Primary
171220A001700
1811000001900
1812310000500

Owner: STATE HIGHWAY COMMISSION

Address:

Owner: OREGON HIGH DESERT MUSEUM

Address: 59800 S HWY 97 BEND OR 97702

Owner: OREGON HIGH DESERT MUSEUM

Address: 59800 S HWY 97 BEND OR 97702

Owner: OREGON HIGH DESERT MUSEUM

Address: 59800 S HWY 97 BEND OR 97702

APPLICANT INFORMATION

Applicant:	Business Name:	Address:	City:	State:	Zip
	Windlinx Ranch Trust	59895 Scale House Road	Bend	OR	97702

APPLICATION FEES

Fee Description	Quantity		Amount
Appeals to Board of County Commissioners Deposit	1.00	Qty	$3,448.00
Appeals to Board of County Commissioners Additional Fee (20% of original fee)	340.20	Amount	$340.20
		Total Fees:	$3,788.20

Deschutes County

Office: Bend
117 NW Lafayette Ave
PO Box 6005
Bend, OR 97708
541-388-6575
cdd@deschutes.org

Transaction Receipt

Record ID: 247-24-000072-A

IVR Number: 247048726789

Receipt Number: 508555

Receipt Date: 2/2/24

www.deschutes.org/cd

Worksite address: 59705 SCALE HOUSE RD, BEND, OR 97702
Parcel: 171220A001700

Fees Paid

Transaction date	Units	Description	Account code	Fee amount	Paid amount
2/2/24	1.00 Qty	Appeals to Board of County Commissioners Deposit	295 230600	$3,448.00	$3,448.00
2/2/24	340.20 Amount	Appeals to Board of County Commissioners Additional Fee (20% of original fee)	295 230600	$340.20	$340.20

Payment Method: Check number: 1487 Payer: Windlinx Ranch Trust Payment Amount: $3,788.20

Cashier: Audrey Stuart **Receipt Total:** **$3,788.20**

RECEIVED
FEB 02 2024
Deschutes County CDD
COMMUNITY DEVELOPMENT

APPEAL APPLICATION

FEE: $3788.20

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: 59895 Scale House Road City/State/Zip: Bend, OR 97702

Land Use Application Being Appealed: 247-23-000302-DR

Property Description: Township 18 Range 12E Section 31 Tax Lot 600

Appellant's Signature: Robert H Windlx

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

See Attached.

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

Appeal of Hearing Officer Decision in 247-23-000302-DR

Background.

The U.S. Forest Service, ODOT and the High Desert Museum are partnering to propose a new recreational multi-use pathway from Sun River to the High Desert Museum and beyond. Only a relatively small segment – about 2 miles of the path – is in ODOT ROW. Most of the continuous path is on Forest Service land beyond any existing ODOT ROW.

A segment of the path is proposed to run in ODOT ROW adjacent to the previously determined to be F-2 as is the property adjacent to the ODOT ROW to the east owned by Windlinx. The issue in this case is what is the zoning of the narrow strip of ROW east of Highway 97 up to the Windlinx property. 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 Windlinx property is zoned F-2. Staff and the hearings officer agreed. In its June, 1999 decision, the Board of County Commissioners 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 Windlinx property. The RR-10 zone is a residential zone and the primary allowed uses are residential. ODOT's request will create a narrow strip of RR-10 property between the highway and the Windlinx F-2 property that has no development potential and serves little purpose.

The hearings officer obliged ODOT, reasoning that the 1999 decision did not "litigate" the zoning and the 1998 ODOT application was decided based on the relevant approval criteria. The hearings officer misunderstands the land use process. A determination on the applicable zoning is an essential finding in any land use application and it was in 1999. The zoning determines the allowed uses and the relevant approval criteria which an applicant must satisfy. The County Board expressly determined, as an essential finding to its decision, that the zoning on the subject property is F-2. The hearings officer effectively overturned the County Board's prior decision on the applicable zoning.

After determining that the 1999 decision did not control and that the ODOT property east of the highway is zoned RR-10, the hearings officer determined that the proposed multi-use path is also a Class III road project (allowed in the RR-10 zone and most zones in the County). Even though multi-use paths are a defined use and listed as an allowed use in one LaPine zone, the hearings

officer concluded that a multi-use path can also be a Class II road project. In the LaPine zone, a multi-use path and a Class II road project are listed as separate distinct uses in the same use section. They cannot be interchangeable terms.

Grounds For Appeal.

Zoning of Subject Property

A. The specific grounds for appeal under this section are:

1. The hearings officer erred in allowing ODOT to use a declaratory ruling provision to collaterally attack and effectively reverse a prior Board decision that the subject property is zoned F-2.

2. The hearings officer erred in deciding that the 1999 Board decision on the subject property did not conclusively establish that the zoning is F-2.

3. The hearings officer erred in not applying the original mylar zoning map which clearly shows that the F-2 zone extends into the highway.

4. The hearings officer misconstrued DCC 18.12.040 which states that unless otherwise specified, zone boundaries are the section lines, centerlines of street or railroad rights-of-way, water courses, ridges or rimrocks or other recognizable or identifiable features. Although the hearings officer found that no participant submitted any evidence that the boundaries were otherwise specified, he refused to apply DCC 18.12.040 as it is written and how the County Board applied it in 1999. The hearings officer incorrectly decided that the digital replica of the official zoning map controls and indicated that the subject property is RR-10.

B. Explanation of appeal grounds for appeal:

As discussed in the background, in its 1999 decision the County Board determined that based on the official zoning maps which are part of the County Ordinance, the zoning on the subject property is F-2. The County Board correctly applied DCC 18.12.040 and its decision is final.

The hearings officer acknowledged that no participant submitted any evidence that the zoning boundaries are "otherwise specified." Despite that, he ignored the text in DCC 18.12.040 and relied on a digital replica of the zoning map to conclude that the County Board's decision was wrong and that the zoning is RR-10. The hearings officer appears to have justified his departure from the County Board's prior decision by noting that after 1979, when the official zoning map was adopted as part of an ordinance, the County digitized its map in 1992. The hearings officer ignored the fact that the County Board had the 1992 digitized maps in 1999 when it determined that the applicable zoning was F-2, and the zoning boundary was the center of Highway 97's right-of-way. The hearings officer provided no support or justification for undermining the County Board's prior decision.

Permitted Use

A. The specific grounds for appeal under this section are:

1. The hearings officer erred in declaring that the proposed use is a Class III road project that is permitted in the RR-10 zone.

2. The hearings officer erred in declaring that a multi-use path can be approved in almost any zone by characterizing it as a Class III road project.

3. The hearings officer erred in declaring that the proposed multi-use path is part of a road and street project because it can be viewed as some form of bike-related facility.

B. Explanation of grounds for appeal:

The hearings officer did not address whether the proposed multi-use path is permitted in the F-2 zone. He limited his decision to declaring that the proposed multi-use path is permitted in the RR-10 zone as a Class III road project. The proposed multi-use path is not permitted in the F-2 zone. Even if the proposed use could be determined to be a Class III road project, such projects are not permitted in the F-2 zone. Because the hearings officer erred in trying to overrule the County Board's 1999 decision that the subject property is zoned F-2, he erred in not declaring that the proposed use is not permitted on the subject property. Even if it is determined that the proposed use is a Class III project, it cannot be constructed on the east, F-2 side of Highway 97; it must be constructed on the west side of Highway 97 where the zoning is RR-10.

The hearings officer also erred in declaring that the proposed use is a road project because it can fit under a definition of a bike facility. A multi-use path is a defined use in Deschutes County.

> "Multi-use path" means a path physically separated from motor vehicle traffic by an open space or barrier and either within a highway right-of-way or within an independent right-of-way. The multi-use path is used by bicyclists, pedestrians, joggers, skaters and other non-motorized travelers.

The County Board decided to list it as a permitted use in one zone–the La Pine Residential Neighborhood zone. DCC 18.61.050 lists the uses permitted in that zone. It lists separately:

- Multi-use paths,
- Class II road projects, and
- Class III road projects.

The hearings officer erred in declaring that the proposed multi-use path is also a Class III road project. If a multi-use path could be a Class III road project, there would be no need to separately list that use. The code would have stated that a Class III road project, including multi-use paths, are permitted.

The hearings officer erred in declaring that the proposed multi-use path is a road or street project. The definition of a road and street project is:

> "Road and street project" means the construction and maintenance of the roadway, bicycle lane, sidewalk or other facility related to a road or street. Road and street projects shall be a Class I, Class II or Class III project.

The hearings officer ignored and never mentioned the undisputed evidence that for most of its length, the proposed path is far removed from any road or street as it meanders through the U.S. Forest. It is the same proposed use, and the evidence clearly shows that it is a recreational path and not part of any road or street project. Further, the proposed use is not a bike lane but a recreational path. Bike lanes are located immediately next to the automobile travel lane and thus can be part of a road project. The proposed multi-use path for most of its length meanders through forest land, unrelated to any road.

Statement on Why the County Board Should Hear this Appeal.

In 1999, in deciding an application on the same property involving the same applicant, the County Board made a final and clear determination that, as depicted on the official County zoning map, the boundary between the RR-10 property to the west and the F-2 property to the east is the centerline of Highway 97. That decision is the proper application of DCC 18.12.040. Notwithstanding his assertion to the contrary, the hearings officer attempted to overrule and reverse that decision. ODOT expressly stated in its material that it was asking the hearings officer to "revisit" the 1999 determination. Effectively, ODOT asked a hearings officer to rezone property from F-2 to RR-10.

The County Board has a compelling reason to interpret and apply its official zoning map. Only the County Board can change the zoning on a property. If the hearings officer's decision is allowed to stand, applicants will use the declaratory ruling provisions in the code to challenge County Board zoning decisions using inferior information – just as the applicant here did. In addition, allowing ODOT to request a determination that the zoning on the subject property is RR-10 after it represented in 1994 and 1998 that the zoning was F-2, undermines the integrity of the County's land use process.

The County Board should also accept this appeal because the hearings officer's decision vastly expands the zoning code in terms of where a multi-use path use path is permitted. Under ODOT's argument and the hearings officer's decision, a multi-use path – even though separately defined – can be placed in any zone where a Class III road project is allowed and with no land use review. By declaring that a multi-use path can also be a Class III road project, there is no effective limit on where that use can be placed. That is inconsistent with the current code that the County Board adopted which permits such paths in a single zone. The hearings officer's decision effectively amends the County Code to allow multi-use paths in almost all zones. Amending the code is an action uniquely left to the County Board.

Standing and Request for De Novo Review

Windlinx appeared in the local proceeding in writing and at the hearing. The Board's review should be de novo because relevant material in the County records related to the application was not included by staff and only came to light through a public records request.