Mailing Date:
Friday, April 11, 2025

COMMUNITY DEVELOPMENT

NOTICE OF HEARINGS OFFICER'S DECISION

The Deschutes County Hearings Officer has approved the land use application described below:

FILE NUMBER: 247-25-000093-A (Remand)

RELATED FILE NUMBERS: 247-23-000302-DR

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 ("Applicant")

REQUEST: The County previously issued a Declaratory Ruling addressing multiple issues presented by the Applicant in County File 247-23-000302-DR, including the zoning designation of Parcel 1, whether a 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. On appeal, the Land Use Board of Appeals ("LUBA") remanded the County's prior decision based on its conclusion that the County's findings were not adequate with respect to an issue raised in the County's initial proceedings. The Applicant requests that the County conduct remand proceedings to adopt new findings on that issue and to address the deficiency in the findings LUBA identified.

HEARINGS OFFICER: Tommy A. Brooks

STAFF CONTACT: Caroline House, Senior Planner
Phone: 541-388-6667
Email: Caroline.House@deschutes.org

RECORD: Record items can be viewed and downloaded from: https://www.deschutes.org/cd/page/247-25-000093-odot-lava-butte-trail-remand

DECISION:

Based on the findings in the Hearings Officer's decision, the Hearings Officer finds the Applicant's request for a Declaratory Ruling that Parcel 1 is zoned RR-10 does not amount to a collateral attack on the Weigh Station Decision and, therefore, that the finding in the Weigh Station Decision that Parcel 1 is zoned F-2 is not binding in this proceeding.

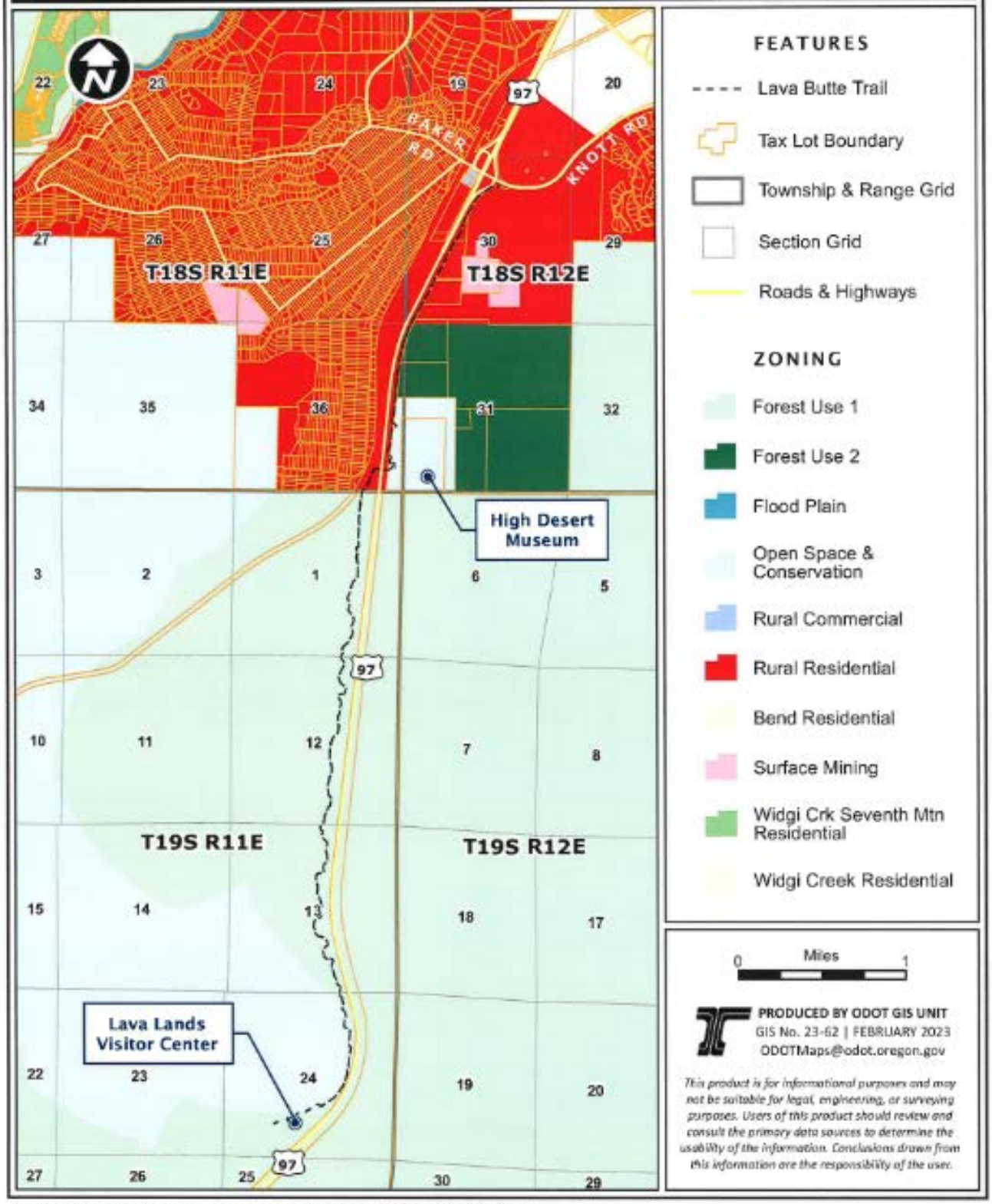
The above findings and conclusion address only the issue on remand as described in LUBA's decision and are not intended to modify the findings relating to any other standard or issue raised or addressed in the Initial Decision.

This decision becomes final twelve (12) days after the date mailed, unless appealed by a party of interest. To appeal, it is necessary to submit a Notice of Appeal, the base appeal deposit plus 20% of the original application fee(s), and a statement raising any issue relied upon for appeal with sufficient specificity to afford the Board of County Commissioners an adequate opportunity to respond to and resolve each issue.

Copies of the decision, application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost. Copies can be purchased for 25 cents per page.

NOTICE TO MORTGAGEE, LIEN HOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST BE PROMPTLY FORWARDED TO THE PURCHASER.

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.

N:\GIS\23_62_Miscellaneous_Small_Maps\Data_requests\Region_4_US97_Lava_Butte_Trail\Final\Lava_Butte_Trail_US97.mxd

owner	agent	inCareof	address	citySt Zip	type	cdd id	email
ODOT Region 4 Planning	David Amiton		63055 N. Highway 97, Bldg M	Bend, OR 97703	NHOD	25-093-A	David.Amiton@odot.oregon.gov
WINDLINX RANCH TRUST	WINDLINX, ROBERT H JR TTEE		59850 SCALE HOUSE RD	BEND, OR 97702	NHOD	25-093-A	
Windlinx Ranch Trust	Randy Windlinx		59895 Scale House Rd	Bend, OR 97702	NHOD	25-093-A	rwindlinx@empnet.com
Christopher P. Koback			937 NW Newport Avenue, Suite 220	Bend, OR 97703	NHOD	25-093-A	chris@hathawaylarson.com
Dana Whitelaw					NHOD	25-093-A	dwhitelaw@highdesertmuseum.org
Stacy C. Posegate	Oregon DOJ Counsel				NHOD	25-093-A	stacy.c.posegate@doj.state.or.us
Ken Shonkwiler			63055 N. Hwy 97, Bldg M	Bend OR 97703	NHOD	25-093-A	Kenneth.d.shonkwiler@odot.oregon.gov
April Cleary					NHOD	25-093-A	acleary@highdesertmuseum.org
David Roth					NHOD	25-093-A	roth7001@gmail.com
Rob Garrott					NHOD	25-093-A	rob@bendingpixels.com
Lisa Kieraldo					NHOD	25-093-A	lisa.m.kieraldo@gmail.com
Brian Harris					NHOD	25-093-A	bharrisks@hotmail.com
Jim Elliott					NHOD	25-093-A	jelliott024@gmail.com
Cassie Doll					NHOD	25-093-A	cassandradoll@gmail.com
Laura Craska Cooper	Brix Law LLP		15 SW Colorado Ave., Suite 3	Bend, OR 97702	NHOD	25-093-A	lcooper@brixlaw.com
Randy Akacich			1670 NW City View Dr	Bend, OR 97703	NHOD	25-093-A	randy.akacich@gmail.com

Mailing Date:
Friday, April 11, 2025

DECISION AND FINDINGS OF THE DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBER:	247-25-000093-A (Remand)
RELATED FILE NUMBERS:	247-23-000302-DR
HEARING DATE:	March 18, 2025
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 ("Applicant")
REQUEST:	The County previously issued a Declaratory Ruling addressing multiple issues presented by the Applicant in County File 247-23-000302-DR, including the zoning designation of Parcel 1, whether a 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. On appeal, the Land Use Board of Appeals ("LUBA") remanded the County's prior decision based on its conclusion that the County's findings were not adequate with respect to an issue raised in the County's initial proceedings. The Applicant requests that the County conduct remand proceedings to adopt new findings on that issue and to address the deficiency in the findings LUBA identified.
HEARINGS OFFICER:	Tommy A. Brooks
STAFF CONTACT:	Caroline House, Senior Planner Caroline.House@deschutes.org / (541) 388-6667

I. BACKGROUND AND PROCEDURAL FINDINGS

A. Applicant's Request; Scope of Remand Proceedings

The Applicant plans to construct a path on the Subject Properties ("Project"). 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. If completed, the path would tie into the existing Sun Lava Trail, which connects to the Sunriver community and to other recreational areas and attractions in the same vicinity.

As proposed, the entirety of the Project runs through multiple zones and into areas in which the County does not regulate land use. Through County File 242-23-000302-DR, the Applicant sought a Declaratory Ruling with respect to the portion of the Project that is within the County's jurisdiction. In a decision dated January 26, 2024 ("Initial Decision"), this Hearings Officer issued a Declaratory Ruling concluding, in part, that Parcel 1 of the Subject Properties is zoned RR-10. The County's Board of Commissioners declined to hear an appeal of that decision, thus making the Initial Decision the final decision of the County.

Windlinx Ranch Trust ("Windlinx") appeared during the County's proceedings leading up to the Initial Decision. As part of its participation, Windlinx and its representatives argued that the portion of the Applicant's request for a Declaratory Ruling relating to the zoning of Parcel 1 was precluded by the Deschutes County Code ("Code" or "DCC") because, according to Windlinx, the Declaratory Ruling was being "used to review and reverse [a] prior County Board decision." The prior decision Windlinx was referring to is the County's 1999 denial of the Applicant's request to site a weigh station in a portion of the right-of-way comprising Parcel 1 (the "Weigh Station Decision").[1] That decision contained findings that Parcel 1 was zoned F-2, and it applied the F-2 zone to that portion of the Subject Properties.

In support of this issue raised during the initial proceedings, Windlinx specifically argued that the finding in the Weigh Station Decision that Parcel 1 is zoned F-2 is binding on the present Application – both because of "issue preclusion" and because of the "collateral attack doctrine." The Initial Decision rejected Windlinx's arguments, concluding that the Weigh Station Decision was not binding on the present Application.

Windlinx appealed the Initial Decision to the Land Use Board of Appeals ("LUBA"). On June 24, 2024, LUBA issued a Final Opinion and Order ("LUBA Decision") resolving the issues raised in that appeal.[2] With one exception, LUBA denied each of the assignments of error raised in that appeal. The one exception was that LUBA sustained a portion of Windlinx's First Assignment of Error. Specifically, LUBA sustained Windlinx's first subassignment of error, which LUBA described as follows:

> The first subassignment of error argues that the hearings officer's findings are inadequate to address petitioner's argument below that the hearings

[1] *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).
[2] *Windlinx Ranch Trust v. Deschutes County*, __ Or LUBA __ (LUBA No. 2024-010, June 24, 2024).

> officer was bound by the board of commissioners' Weigh Station Decision that concluded that the zoning of the Trail Area was F-2, and consequently that determination could not be collaterally attacked in the proceeding on ODOTs application for a declaratory ruling regarding the Trail Area's zoning.[3]

After reviewing the findings in the Initial Decision, LUBA concluded "that the hearings officer's findings addressing petitioner's argument that the doctrine of collateral attack precludes the hearings officer from determining in a declaratory ruling that the zoning of the Trail Area is other than F-2 are inadequate."[4] Although the Initial Decision addressed "issue preclusion" and LUBA denied a subassignment of error challenging that component of the decision, LUBA specifically noted that "[t]he doctrine of issue preclusion is related to, but distinct from, the collateral attack doctrine. We agree with petitioner that remand is required for the hearings officer to adopt adequate findings addressing petitioner's argument that the application is a collateral attack on the final and unappealed Weigh Station Decision."[5]

Based on the foregoing, the scope of this remand is narrow, and the County must adopt new findings that are adequate to address Windlinx's argument that the Application is a collateral attack on the Weigh Station Decision.

B. Notices and Hearing

On February 14, 2025, the County mailed a Notice of Public Hearing ("Hearing Notice"). Pursuant to the Hearing Notice, I presided over the hearing as the Hearings Officer on March 18, 2025, which began at 1:00 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 the scope of the remand hearing, and I instructed participants to direct comments to the approval criteria and standards applicable to the scope of remand, 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 1:47 p.m., at which time I announced that the record was closed.

C. Review Period

The Applicant submitted its request to initiate remand proceedings on February 12, 2025. Pursuant to DCC 22.34.030, the County will make a final decision on the request within 120 days of that date, which is June 12, 2025.

---

[3] LUBA's Decision at p.4, line 16.
[4] LUBA's Decision at p.8, line 9.
[5] LUBA's Decision at p.10, line 11.

D. Record Issues

The Hearing Notice stated that, absent an order from the Hearings Officer reopening the record, no new evidence or testimony could be submitted to the record. Pursuant to DCC 22.34.040, the Hearings Officer has the discretion to reopen the record when appropriate during a remand proceeding. At the beginning of the Hearing, I announced that I was opening the record only to hear testimony or information relating to arguments regarding the issues within the scope of this remand proceeding, but that I would consider a request to open the evidentiary record.

Windlinx submitted a letter addressing the issue on remand, dated March 17, 2025. In that letter, and during the Hearing, Windlinx requested that the evidentiary record be reopened for the purpose of accepting new information Windlinx attached to that letter. The new evidence Windlinx wanted to include in the record is in the form of: (1) an email, dated February 18, 2021, from Peter Russell; (2) a memorandum, dated March 4, 2021, from Peter Russell; and (3) a memorandum, dated August 13, 2021, from David Amiton.

Based on the description provided by Windlinx during the Hearing, these new materials support Windlinx's argument that the Application is a collateral attack on the Weigh Station Decision. The new materials therefore address the same issue Windlinx raised in this proceeding, just in more detail, and given the date of the materials, they existed at the time of the initial Hearing and could have been submitted at that time. Because the scope of this remand as described by LUBA relates solely to the adequacy of findings, and Windlinx had a full and fair opportunity to develop the record in the prior proceedings, I find that it is not necessary or appropriate to reopen the record for these materials to be included. The items listed above are therefore excluded from this record and I am not considering any of the arguments in Windlinx's March 17th letter relating to those materials.

II. SUBSTANTIVE FINDINGS AND CONCLUSIONS

As noted above and in the LUBA Decision, Windlinx asserts that the County's Weigh Station Decision determined that Parcel 1 is zoned F-2, that the Applicant could have, but did not appeal that decision, and that any determination in this proceeding that Parcel 1 is zoned other than F-2 is therefore prohibited by the collateral attack doctrine.

As set forth in the LUBA Decision, quoting from the Court of Appeals:

> "A collateral attack 'is an attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying the decree' or enjoining its execution. *Morrill v. Morrill and Killen*, 20 Or 96, 101, 25 P 362 (1890). Collateral attacks are not permitted because the court or other tribunal having jurisdiction over parties and subject matter 'has a right to decide every question arising in the case, and, however erroneous its decision may be, it is binding on the parties until reversed or annulled.'

> *Id.* at 102, 25 P 362." *Johnson v. Landwatch Lane County*, 327 Or App 485, 490 n 8, 536 P3d 12 (2023).[6]

In describing how the collateral attack doctrine works in the land use context, Windlinx and LUBA both point to *Gansen v. Lane County*, __ Or LUBA __ (LUBA No. 2020-074, Feb. 22, 2021). In that case, an applicant obtained a building permit in 2001, which itself expressly relied on a legal lot verification the applicant obtained through a separate process. Later, in 2020, the applicant again requested a legal lot verification for the same property, but that request was denied. The hearings officer denying that request did so on the basis of their conclusion that the 2001 building permit and lot verification were not final decisions, and their conclusion that the 2001 lot verification was erroneously decided. LUBA rejected both of those conclusions. In doing so, LUBA stated:

> "We have held that, in challenging a development approval that depends upon a prior, unappealed land use decision, LUBA will not review arguments that the prior, unappealed decision was procedurally flawed or substantively incorrect, because such a challenge would constitute an impermissible collateral attack on a decision not before LUBA."

In support of that statement, LUBA cited to other decisions in which it addressed potential collateral attacks on prior land use decisions:

- In *Landwatch Lane County v. Lane County*, 79 Or LUBA 65 (2019), the applicant for a forest template dwelling relied on units of land created by a previously approved land division. The petitioner challenging the forest template dwelling argued that the prior land division was flawed, but LUBA determined that the applicant could rely on that prior decision and that the petitioner was attempting to impermissibly bring a collateral attack on that prior decision.

- In *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006), the applicant had previously received a "preliminary declaration" from the city, the first step in obtaining a tentative subdivision plan approval. The petitioner in that case then challenged the city's approval of the tentative subdivision plan that was based on the preliminary declaration. LUBA rejected the portion of the petitioner's challenge asserting that the preliminary declaration was flawed.

- Although LUBA did not expressly analyze the collateral attack doctrine in *Perry v. Yamhill County*, 26 Or LUBA 73 (1993), in that case it rejected a challenge based on similar facts as the *Lockwood* case. The petitioner there sought to challenge a county's decision that an applicant had complied with conditions of approval by, in part, challenging the underlying decision that imposed those conditions, which LUBA determined was improper.

Other cases rejecting challenges based on the collateral attack doctrine have similar fact patterns. For example, in *Bergmann v. Brookings*, __ Or LUBA __ (LUBA No. 2020-096, Aug. 2, 2021), a petitioner challenged a city's approval of a conditional use permit on a flag lot. The permit, for a residential facility,

---

[6] LUBA Decision at p.5, line 5.

relied on the use of the "flagpole" portion of a lot created as part of a prior land partition for access to a public road. LUBA rejected a challenge to the adequacy of the flagpole area for that use, because its adequacy was established in the prior land partition.

The common theme in each of the cases where LUBA rejected an argument as an improper collateral attack is just as described in the *Gansen* case – LUBA will not review arguments that a prior decision is flawed when it considers a challenge to a new approval that depends on that prior decision. In contrast, new approvals that do not depend on a prior decision are not subject to the collateral attack doctrine. To that end, I find the case *Widgi Creek Homeowners Ass'n v. Deschutes County*, __ Or LUBA __ (LUBA No. 2014-109, June 2, 2015), to be instructive. There, LUBA addressed a challenge to a 2014 site plan approval and a tentative subdivision plan for a 24-lot subdivision. The hearings officer in the local proceeding in that case rejected an argument by the petitioner that the approval of the subdivision was inconsistent with an adopted master plan. The hearings officer rejected the argument as an impermissible collateral attack on prior decisions, noting that the consistency with the master plan was decided in earlier decisions in 2006 and 2009 approving development on the site. LUBA explained how the collateral attack doctrine works, concluding that the hearings officer's reliance on that doctrine was "misplaced":

> "The 2006 decision did two things. First, it granted tentative plan approval (first stage tentative subdivision approval) for 64 lots. Second, it granted approval for a 42-unit condominium project. Later, a final plat was approved and recorded (second stage final subdivision approval). That final plat reflects the 2006 approval of a 42-unit condominium project, but it does not approve the 42-unit condominium project. It was the 2006 site plan decision that granted approval for the 42-unit condominium proposal. If petitioners were challenging the final plat approval for the 64 lots that were granted tentative plan approval or permits necessary to carry out the 42-unit condominium project, it might be accurate to say petitioners are collaterally attacking the 2006 decision. However, the final plat for 64 lots was recorded and is not the subject of this appeal. The 2006 site plan approval for the 42-unit condominium project has expired, and is not the subject of this appeal. The subject of this appeal is the 2014 application for approval of a 24-lot subdivision in place of the 42-unit condominium proposal. While intervenor-respondent characterized that application for tentative plan approval for a 24-unit townhouse subdivision as a second phase of the 2006 proposal, Record 385, it is not. **It is a proposal for a development that is very different from the 42-unit condominium proposal that was approved in 2006. It also is a proposal for a development that is different from the subdivision that was approved in 2009. Petitioners' challenge to the 2014 proposed subdivision proposal is not a collateral attack on the 2006 or 2009 decisions**." (Emphasis added).

I find that the present matter is distinguishable from the cases that apply the collateral attack doctrine to reject challenges to prior land use decisions. The Application here does not depend on the prior Weigh Station Decision. Unlike the facts in *Gansen*, *Landwatch Lane County v. Lane County*, *Lockwood v. City of Salem*, and *Bergmann v. Brookings*, where the challenged decision was essentially a second phase to

the prior decision being "attacked" (i.e. implementing a site plan, relying on tentative or final land division approval, or implementing conditions of approval), the present Application is a stand-alone approval that is not relying on any prior land use decisions, much less the Weigh Station Decision. It is therefore more like the scenario in *Widgi Creek Homeowners Ass'n v. Deschutes County* – "a proposal for a development that is very different from" the prior decision. As explained in the findings in the Initial Decision, "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 there is any prior County decision related to this Application, it was the County's decisions adopting the Zoning Map for the Subject Properties. As determined in the Initial Decision, affirmed by LUBA, that zoning decision resulted in the RR-10 zoning of Parcel 1.

I also note that the collateral attack doctrine appears to protect only those prior land use decisions that resulted in an approval. Windlinx argues that there is nothing different about an approval and a denial, and that a final land use decision is a final land use decision safe from collateral attacks regardless of the outcome. At the same time, Windlinx has not cited to any cases where a prior denial was subject to the collateral attack doctrine and binding on future decisions. This makes sense in light of how LUBA has described the doctrine, because a future land use action is unlikely to "depend on" a prior denial.

III. CONCLUSION

Based on the foregoing, I find that the Applicant's request for a Declaratory Ruling that Parcel 1 is zoned RR-10 does not amount to a collateral attack on the Weigh Station Decision and, therefore, that the finding in the Weigh Station Decision that Parcel 1 is zoned F-2 is not binding in this proceeding.

The above findings and conclusion address only the issue on remand as described in LUBA's decision and are not intended to modify the findings relating to any other standard or issue raised or addressed in the Initial Decision.

Dated this 10th day of April 2025.

Tommy A. Brooks
Deschutes County Hearings Officer

owner	agent	inCareof	address	cityStZip	type	cdd id	email
ODOT Region 4 Planning	David Amiton		63055 N. Highway 97, Bldg M	Bend, OR 97703	HOD	25-093-A	David.Amiton@odot.oregon.gov
Stacy C. Posegate	Oregon DOJ Counsel				HOD	25-093-A	stacy.c.posegate@doj.state.or.us
Ken Shonkwiler			63055 N. Hwy 97, Bldg M	Bend OR 97703	HOD	25-093-A	Kenneth.d.shonkwiler@odot.oregon.gov