



MEMORANDUM

TO: Board of County Commissioners

FROM: Cynthia Smidt, Associate Planner

DATE: October 18, 2021

RE: Appeal of Hearings Officer's approval of an application to establish a Nonfarm Dwelling (single-family dwelling) in the Exclusive Farm Use Zone.

On October 25, 2021 the Board of County Commissioners (Board) will consider hearing an appeal of Hearings Officer decision (247-21-000311-CU) approving a proposal for a nonfarm dwelling in the Exclusive Farm Use Zone.

I. BACKGROUND

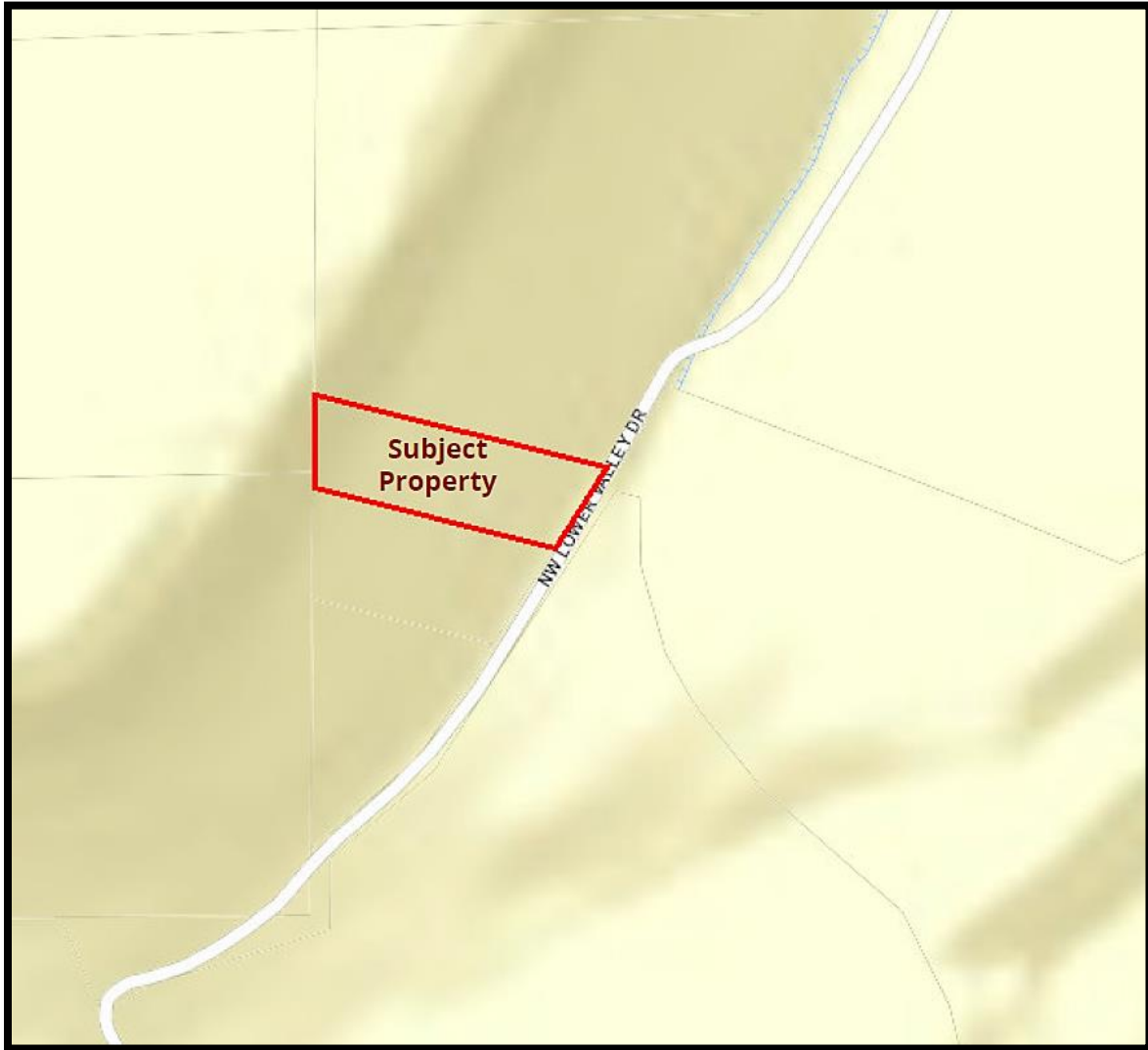
Cynthia Grossmann submitted a request for a conditional use permit for a nonfarm dwelling. The 5.19-acre subject property is located at 70445 Lower Valley Drive, approximately 8 miles west of Terrebonne. The subject property was recognized as a legal Lot of Record pursuant to County file LR-04-24, and subsequently adjusted through files LL-08-49 and LL-08-103. The subject property is shown below in Figure 1.

The application was referred by Deschutes County Planning Division to the Hearings Officer for a decision based primarily on concerns by Central Oregon LandWatch (COLW). The public hearing was set for August 10, 2021¹. Issues before the Hearings Officer are summarized below.

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¹ The Public Hearing agenda included an additional case, files 247-21-000658-A and 247-21-000384-CU. The Hearings Officer accepted nearly identical testimony and documentary evidence related to both cases.

Figure 1 - Vicinity Map



II. HEARINGS OFFICER DECISION

There were several matters before the Hearings Officer brought forward by COLW:

1. Subject Property Not Lawfully Created. COLW argued that the subject property was not a lawfully created unit of land under ORS 215.284(2)(c), ORS 215.263 and DCC 18.16.050 (G)(1)(a)(vi).
2. Applicant's Lot Line Adjustment Approval and Subsequent Recording of Deeds Changed the Subject Property's Date of Creation. COLW argued that applicant's 2009 approved application for a lot line adjustment related to the subject property and the applicant's subsequent recording of one or more deeds reflecting the lot line adjustment constituted a reconfiguration that changed the effective date of creation for the subject property.

3. Suitability for Farm Use. COLW disputes the conclusion by staff and the applicant that the subject property is generally unsuitable for farm uses.
4. Soils. COLW requested the Hearings Officer disregard the applicant's soil scientist report and if considered by the Hearings Officer, COLW disagreed with the methodology and conclusions contained in applicant's soil scientist's report.
5. Code Violations. COLW alleged code violations exist that should preclude approval of applicant's nonfarm conditional use permit.
6. ORS 92.017. COLW argues that staff and the applicant misinterpreted the effect of ORS 92.017 on the ORS 215 definition of "parcel" and County definition of "Lot of Record". This argument is related to arguments 1 and 2, above.
7. DCC 17.04.020 and ORS 92.012. COLW argued that DCC 17.04.020 and ORS 92.012, which state that a property may not be subdivided or partitioned except in conformance with various laws, are relevant because the creation of the property qualifies as a partition. Therefore if applied properly, this would result in the applicant's nonfarm conditional use permit being denied.

On September 23, 2021, the Hearings Officer issued a decision affirming staff's approval of the nonfarm dwelling in the EFU Zone. As previously stated, the Hearings Officer reviewed two matters at the August 20, 2021 hearing where testimony and documentary evidence were virtually identical. The COLW issues and arguments raised in the case of file 247-21-000311-CU were the same as those raised in the other case for files 247-21-000658-A and 247-21-000384-CU. The Hearings Officer's decision in both cases included the following conclusion²:

The Hearings Officer found that the Subject Property was created by deed in conformance with DCC 18.04.030. The Hearings Officer found that Applicant's reconfiguration (Lot Line Adjustment and subsequent recording of deed(s)) was not done for the purpose of qualifying the Subject Property for a nonfarm dwelling. The Hearings Officer found that the Subject Property was qualified for a nonfarm dwelling before the reconfiguration (Lot Line Adjustment and subsequent recording of deeds to meet the requirements of the County approval) and, qualified for a nonfarm dwelling after the reconfiguration the Subject Property. The Hearings Officer found COLW's arguments related to the "generally unsuitable for farm use standard" were not persuasive.

The Hearings Officer rejected COLW's request to ignore Applicant's soil scientist's report. The Hearings Officer also rejected COLW arguments related to "code violation(s)," ORS 92.017 and DCC 17.04.02/ORS 92.012 arguments. In the end the Hearings Officer, based upon the evidence and argument in the record, found COLW's appeal issues were not persuasive. The Hearings Officer, therefore, finds that the Staff Decision as written should be sustained. The

² This conclusion was made by reference to that of files 247-21-000658-A and 247-21-000384-CU.

Hearings Officer attached the Staff Decision is valid and shall be the decision, subject to any appeal, of the County.

III. CENTRAL OREGON LANDWATCH APPEAL

The appellant, Central Oregon LandWatch, appeals the Hearings Officer decision, and indicates various assignments of error in their notice of appeal. The following summarizes their concerns:

- The Hearings Officer's decision fails to distinguish between lots of record and parcels.
- The Hearings Officer's decision misinterprets ORS 92.017, fails to relate that statute to the application, and lacks adequate findings.
- The Hearings Officer's decision lacks adequate findings, misinterprets and misapplies the applicable law, misunderstands appellant's arguments, and lacks substantial evidence in concluding the subject parcel cannot be used in conjunction with the applicant's directly adjacent irrigated farmland. ORS 215.284(2)(b) and DCC 18.16.050(G)(2)(a).

The appellant recommends the Board not hear this matter; passing the review to the Land Use Board of Appeals (LUBA). However, if the Board decides to hear the appeal, the appellant states they would like the hearing to be heard de novo.

IV. BOARD OPTIONS

There are two versions of Order No. 2021-056 attached to this memo, one to hear the appeal and one to decline to hear the appeal. In determining whether to hear an appeal, the Board may consider only:

1. The record developed before the Hearings Officer;
2. The notice of appeal; and
3. Recommendation of staff³

In addition, if the Board decides to hear the appeal, it may consider providing time limits for public testimony.

Reasons not to hear:

- The Hearings Officer's decision is reasoned, well written, and could be supported, as the record exists today on appeal to LUBA.
- The applicant agrees with the Hearings Officer's decision and thus requests that the Board not hear the appeal.

³ Deschutes County Code (DCC) 22.32.035(B) and (D)

- The appellant recommends the Board decline to hear this matter and thus passing the review to LUBA.

Reasons to hear:

- The Board may want to take testimony and make interpretations relating to the Hearings Officer’s decision. The Board may also want to reinforce or refute some or all of the decision findings/interpretations prior to Land Use Board of Appeals (LUBA) review.

If the Board chooses to hear this matter, the appellant requests the hearing be heard de novo. The applicant has not stated whether they would like the hearing before the Board be heard de novo, limited de novo, or on the record. Under DCC 22.32.027(B)(3) the Board may choose to hear a matter de novo at their sole discretion.

If the Board decides that the Hearings Officer’s decision shall be the final decision of the county, then the Board shall not hear the appeal and the party appealing may continue the appeal as provided by law. The decision on the land use applications becomes final upon the mailing of the Board’s decision to decline review.

V. STAFF RECOMMENDATION

Staff recommends the Board not hear this appeal because staff believes that the appellants were able to present all relevant evidence at the hearing before the Hearings Officer. Staff agrees with the Hearings Officer’s analysis and decision. Staff also notes that there is not adequate time in the 150-day land use review clock and the applicant is not willing to extend it for Board review.

VI. 150-DAY LAND USE CLOCK

The 150th day on which the County must take final action on these applications is January 7, 2021.

VII. RECORD

The record for appeal File 247-21-000895-A (247-21-000311-CU) is as presented at the following Deschutes County Community Development Department website:

<https://www.deschutes.org/cd/page/247-21-000311-cu-conditional-use-permit-nonfarm-dwelling-single-family-dwelling-exclusive>

Attachments:

Document	Item No.
2021-10-18 DRAFT Board Order 2021-056 Accept to Hear	1
2021-10-18 DRAFT Board Order 2021-056 Decline to Hear	2

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 File No. 247-21-000311- * ORDER NO. 2021-056
CU.

WHEREAS, on September 23, 2021, the Hearings Officer approved Application No. 247-21-000311-CU; and

WHEREAS, on October 4, 2021, Central Oregon LandWatch, the Appellant, appealed (File No. 247-21-000895-A) the Deschutes County Hearings Officer’s Decision on File No. 247-21-000311-CU; 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 application 247-21-000895-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. 247-21-000311-CU (appeal file no. 247-21-000895-A) as presented at the following website:

<https://www.deschutes.org/cd/page/247-21-000311-cu-conditional-use-permit-nonfarm-dwelling-single-family-dwelling-exclusive>

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 _____, 2021.

BOARD OF COUNTY COMMISSIONERS

ANTHONY DeBONE, Chair

PHIL CHANG, Vice Chair

ATTEST:

Recording Secretary

PATTI ADAIR, Commissioner

DATED this ____ day of _____, 2021.

BOARD OF COUNTY COMMISSIONERS

ANTHONY DeBONE, Chair

ATTEST:

PHIL CHANG, Vice Chair

Recording Secretary

PATTI ADAIR, Commissioner