

**DECISION, FINDINGS AND RECOMMENDATION OF
THE DESCHUTES COUNTY HEARINGS OFFICER**

FILE NUMBERS: 247-23-000470-TA

HEARING DATE: October 2, 2023, 6:00 p.m.

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

APPLICANT: City of Bend

SUBJECT PROPERTIES: The subject properties comprise the Bend Municipal Airport, which includes the following addresses and tax lots:

1. 63155 Gibson Air Rd – 1713200000200
2. 63110 Powell Butte Hwy – 1713200000201
3. 63205 Gibson Air Rd – 171317C000100
4. 63482 Powell Butte Hwy – 1713170000200
5. 22550 Nelson Pl – 1713200000202
6. 63144 Powell Butte Hwy – 1713200000300

REQUEST: Applicant requests text amendments to Deschutes County Code (“DCC” or “Code”) Chapter 18.04, Title Purpose and Definitions; DCC Chapter 18.76, Airport Development Zone; DCC Chapter 18.80, Airport Safety Combining Zone; and DCC Chapter 18.120, Exceptions. The proposed text amendments would modify the Code to add a definition of an air traffic control tower, establish air traffic control towers as a use permitted outright in the Airport Development Zone, and modify the height limit to allow air traffic control towers up to 115 feet in height.

HEARINGS OFFICER: Tommy A. Brooks

SUMMARY OF DECISION: The Hearings Officer finds that the Applicant’s request satisfies all procedural and substantive criteria necessary to approve the Applicant’s request for amendments to the text of the Code as modified during this proceeding. The Hearings Officer recommends the Deschutes County Board of County Commissioners adopt by ordinance the Code language set forth in this Recommendation as Exhibit A.

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I. APPLICABLE STANDARDS AND CRITERIA

Deschutes County Code

Title 18, Deschutes County Zoning Ordinance
Chapter 18.04, Title, Purpose and Definitions
Chapter 18.76, Airport Development Zone
Chapter 18.80, Airport Safety Combining Zone (AS)
Chapter 18.120, Exceptions
Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance

State Statutes

ORS 836.610
ORS 836.616

State Administrative Rules

OAR Chapter 660, Division 013
OAR Chapter 660, Division 015

II. BACKGROUND AND PROCEDURE

A. Background

The Applicant in this proceeding is the City of Bend (“City”). The City owns and operates the Bend Municipal Airport (“Airport”) on the Subject Properties.¹ The Subject Properties are zoned Airport Development (AD) (“AD Zone”) and are the only properties in the County with that zoning designation. The City initially requested various text amendments to Deschutes County Code (“DCC” or “Code”) Chapter 18.04, Title Purpose and Definitions; DCC Chapter 18.76, Airport Development Zone; DCC Chapter 18.80, Airport Safety Combining Zone; and DCC Chapter 18.120, Exceptions. The City included its requested text amendments in the Application. After the Hearing, the City submitted a revised version of the specific text amendments it seeks, which modify only DCC Chapter 18.76, Airport Development Zone, and DCC Chapter 18.80, Airport Safety Combining Zone. This Recommendation will refer to the Applicant’s final version of the text amendments, attached as Exhibit A, as the “Text Amendments.”

¹ The Subject Properties listed above differ slightly from the list of properties included in the Application. Specifically, the Application does not refer to Tax Lot 1719200000300. The Applicant and the Staff Report also refer to a different source for the address of each lot, which makes the addresses appear to be different, although they likely are not. Because the Applicant did not object to the list of properties presented in the Staff Report, and because the Staff Report list of properties appears more inclusive, I have used the list of properties as presented in the Staff Report as the “Subject Properties.”

Staff from the County’s Community Development Department (“Staff”) issued a Staff Report on September 25, 2023, describing the Application and the applicable criteria (“Staff Report”). As described by the City and acknowledged in the Staff Report, the purpose of the Text Amendments is as follows:

The proposed text amendments will support master planning for the Bend Municipal Airport. The proposed amendments are intended to support the construction of an air traffic control tower, which is now an improvement supported by the FAA. The amendments are proposed to ensure the establishment of a tower will support airport operations and, in a manner, consistent with the master planning for the Bend Municipal Airport. The amendments are further limited to the Bend Airport so that another use could not be established through these amendments.

B. Notice and Hearing

On September 7, 2023, the County issued a Notice of Public Hearing (“Hearing Notice”) for this matter. The County mailed the Hearing Notice to all owners of property within 250 feet of the AD Zone and the Airport boundaries. The County also published the Hearing Notice in the Bend Bulletin on September 10, 2023.

Pursuant to the Hearing Notice, I presided over the Hearing as the Hearings Officer on October 2, 2023, at 6:00 p.m. The Hearing took place in a hybrid format, with the Applicant, Staff, and other participants present in the Hearing Room and the Hearings Officer participating remotely.

At the beginning of the Hearing, I noted for the record that this phase of the adoption of the Text Amendments would be quasi-judicial in nature and, therefore, I directed participants to direct comments to the approval criteria and standards, and to raise any issues a participant wanted to preserve for appeal if necessary. At the conclusion of the evidentiary Hearing, and at the request of the Applicant, I announced that the record would remain open for written materials as follows: (1) any participant could submit additional materials until October 9, 2023; (2) any participant could submit rebuttal materials until October 16, 2023 (“Rebuttal Period”); and (3) the Applicant could submit a final legal argument without new evidence until October 23, 2023. Participants were further instructed that all submittals must be received by the County by 4:00 p.m. on the applicable due date.

C. Nature of Decision

The Text Amendments involve changes only to the language of the Code. Due to the unique nature of the AD Zone, the changes, if adopted, impact only one property owner – the City. This matter therefore involves a threshold question of whether the Text Amendments are legislative, or whether they are quasi-judicial in nature. As explained below, this is a unique situation in which the Text Amendments are both. DCC 18.136.010 governs amendments to the Code:

DCC Title 18 may be amended as set forth in DCC 18.136. The procedures for text or legislative map changes shall be as set forth in DCC 22.12. A request by a property owner for a quasi judicial map amendment shall be

accomplished by filing an application on forms provided by the Planning Department and shall be subject to applicable procedures of DCC Title 22.

By its express terms, this provision states that the process for a text amendment is as set forth in DCC 22.12. But DCC 22.12 broadly governs “legislative” procedures. DCC 22.04.020 defines legislative changes as follows:

Legislative changes generally involve broad public policy decisions that apply to other than an individual property owner. These include, without limitation, amendments to the text of the comprehensive plans, zoning ordinances, or the subdivision or partition ordinance and changes in zoning maps not directed at a small number of property owners.

As Staff points out in the Staff Report (attached to this decision as Exhibit B), the Text Amendments do not fit squarely within this definition. Further, the Code does not expressly define “text amendment” in the context of legislative changes or in the context of a quasi-judicial land use application, even though DCC 22.12.030 allows an individual to seek legislative changes through an application process. The Staff Report suggests that the Text Amendments should be processed in the same manner as a quasi-judicial plan amendment, which is governed by DCC 22.28.030.

In support of its conclusion, Staff provides a detailed analysis under *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979) (“*Strawberry Hill 4 Wheelers*”). In that case, the Oregon Supreme Court set out a multi-factor test to determine what process applies to a land use application:

Generally, to characterize a process as adjudication presupposes that the process is bound to result in a decision and that the decision is bound to apply preexisting criteria to concrete facts. The latter test alone [applying preexisting criteria to concrete facts] proves too much; there are many laws that authorize the pursuit of one or more objectives stated in general terms without turning the choice of action into an adjudication. Thus a further consideration has been whether the action, even when the governing criteria leave much room for policy discretion, is directed at a closely circumscribed factual situation or a relatively small number of persons. The coincidence both of this factor and of preexisting criteria of judgment has led the court to conclude that some land use laws and similar laws imply quasijudicial procedures for certain local government decisions. *Strawberry Hill 4 Wheelers* at 602-03.

As Staff correctly notes, the *Strawberry Hill 4 Wheelers* decision sets out three factors which must be considered:

1. Is the inquiry bound to result in a decision?
2. Are there preexisting criteria that are applied to concrete facts?

3. Is the inquiry directed at a closely circumscribed factual situation or a relatively small number of persons?

Although it is a close call, the Hearings Officer agrees with Staff that the three factors listed above, in this case, warrant following a quasi-judicial process for the City's Application, at least initially. First, even if the Text Amendments are legislative changes, the Code provides an opportunity for an individual to make an application to initiate amendments. Whether the County approves or denies that application, a decision will result, so the inquiry is bound to result in a decision. Second, the Code contains preexisting criteria applicable to the City's request. Although those Code provisions are largely procedural, the quasi-judicial process can determine if those requirements are met. Third, as already acknowledged, this matter is directed at a relatively small number of persons because the City is the only property owner within the AD Zone and, therefore, the only property owner directly impacted by the Text Amendments.

At the same time, the Text Amendments carry the qualities of a legislative act. The language in DCC 22.04.020 provides that legislative changes "generally involve broad public policy decisions that apply to other than an individual property owner" (emphasis added), and that definition does not state that decisions applicable to only one individual property owner cannot be legislative. Indeed, that Code provision goes on to list examples of legislative decisions, including amendments to the text of zoning ordinances.

An important component of DCC 22.12 is DCC 22.12.050, addressing final decisions. That Code provision states that "[a]ll legislative changes shall be adopted by ordinance." That language does not distinguish between purely legislative changes and those legislative changes that may be processed using a quasi-judicial process. This makes sense because the DCC is adopted by ordinance, and any changes to the text of the Code would be an amendment to that adopted ordinance. It also makes sense because ORS 215.503(2) requires that "[a]ll legislative acts relating to comprehensive plans, land use planning or zoning adopted by the governing body of a county shall be by ordinance" (emphasis added).

Based on the foregoing, I find that, in this case, the adoption of text amendments proposed by an applicant is a two-step process. In the first step of the process, the Applicant has a right under the Code to submit and to have considered an application to amend the Code's text. This phase of the process is quasi-judicial in nature and it is appropriate to have a hearing and to build a record following the principles of a quasi-judicial process. As part of that process, the Hearings Officer is addressing the application only of the County's existing laws. The second step of the process is for the Deschutes County Board of Commissioners ("County Board") to adopt an ordinance to incorporate any text amendments to the Code. Amendments to the text of a zoning ordinance are a change in the County's law, and only the County Board can make such a change. In other words, the Hearings Officer is without authority to amend the County's Code. The Hearings Officer, however, can make a recommendation to the County Board based on what develops in the quasi-judicial phase of the process. The County Board is free to accept or to reject the Hearings Officer's recommendation.

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III. FINDINGS AND CONCLUSIONS

A. Adoption and Incorporation of Findings in Staff Report

The Staff Report contains a comprehensive discussion and conclusion of the criteria applicable to the Application. The vast majority of the conclusions in the Staff Report are not challenged in this proceeding. I find that the Staff Report correctly lists the applicable criteria, and I hereby adopt the discussion and conclusions in the Staff Report as my findings. The remainder of the findings in this Recommendation are intended to supplement the Staff Report. To the extent any of the findings in this Recommendation conflict with the discussion and conclusions in the Staff Report, the findings set forth in this Recommendation control anything to the contrary in the Staff Report.

B. Issues Raised in Opposition to the Application

Other than the Applicant and Staff, only one individual participated in this proceeding. That individual, Dorinne Tye, resides near the Airport and opposes the Application. The comments and evidence submitted by participant Tye largely address health and safety concerns associated with aviation activities in general. Very few, if any, of those comments identify a Code criterion they are intended to address, and very few of those comments, if any, specifically address air traffic control towers. In the findings below, I attempt to identify and address criteria that may be invoked by participant Tye's testimony, and these findings explain why the issues raised by participant Tye do not undermine the conclusions set forth in the Staff Report.

As an initial matter, there is some uncertainty as to whether participant Tye submitted all post-Hearing materials in a timely manner. As explained at the conclusion of the Hearing, post-hearing submittals were due at 4:00 p.m. on the applicable due date. For electronic submittals, the timing of a submittal is determined based on the date and time the submittal is received by the County's servers. Multiple submittals from participant Tye appear to have time stamps after 4:00 p.m. on the due date. However, those submittals also appear to be re-submittals of items that were sent before the 4:00 p.m. deadline but that may have been initially delivered to the wrong Staff email address. Because the record is unclear whether the County's servers did not receive the submittals by the appropriate deadline, I am allowing them to be included in the record.

The record also contains an email from participant Tye to Staff, dated October 16, 2023, stating a desire to have "a few extra days to reply." It is not clear if that request was intended to be a request to the Hearings Officer to modify the Rebuttal Period. Because this portion of the proceeding is being conducted as a land use action, the hearing procedures are set forth in DCC Chapter 22.24. Within that Code chapter, DCC 22.24.140 sets forth the specific basis for continuances and record extensions. Because participant Tye does not identify a specific basis under the Code for seeking a record extension, the request, to the extent it is one to the Hearings Officer, is subject to the discretion of the Hearings Officer. In light of the fact that participant Tye was able to submit materials during the Rebuttal Period, and in the absence of any particular information explaining what additional information would be provided that is not already in the record, I find that it is not necessary to extend the record period and, therefore, decline that request.

As noted above, the majority of the comments opposing the Application are general in nature and relate to health and safety issues, and those comments do not identify specific Code criteria on which the Application should be analyzed. Indeed, most of the comments fail to recognize that the specific issue before the County is a proposal to amend the text of the Code rather than an approval of a specific development. Those comments also fail to recognize the purpose of the Text Amendments as allowing an air traffic control tower as a permitted use, rather than amendments to Code language that alter whether and how airplanes use the Airport – an activity that already occurs under the current Code.

One specific argument participant Tye makes is that the County should not approve any changes to the Airport without first conducting a “cumulative impacts analysis” that considers factors like noise and air emissions from airplanes. Like other comments, participant Tye does not identify any Code provision that requires a cumulative impacts analysis before the County can adopt text changes to the Code. On that basis alone, I find that this argument should be rejected. In the alternative, to the extent that the cumulative impacts of flight operations should be considered, the record reveals that the purpose of the Text Amendments is to allow the Applicant to better manage existing and planned air operations. Participant Tye does not explain whether or how the Text Amendments themselves will add air operations that are not already planned and, therefore, lead to the additional impacts as asserted. To the contrary, it is the existing impacts from the Airport as it is currently developed that seem to be the center point of participant Tye’s arguments. As presented to the Hearings Officer, there is no basis to review the Airport’s current operations through this proceeding.

Another specific argument participant Tye makes relates to the adequacy of notice related to this proceeding. However, that argument appears to assert that the notice of the Application and the Hearing Notice are “unacceptable” rather than assert that they were not legally sufficient or otherwise did not occur as required by the Code. To the contrary, participant Tye’s comments acknowledge that the Hearing Notice was given to property owners within 250 feet of the Subject Properties and 26 days prior to the Hearing, both of which satisfy the Code’s requirements.

Participant Tye’s comments assert a general conflict of interest by an un-named member of the County Board. The source of that conflict of interest appears to be that the Commissioner also serves on the Redmond Airport Advisory Board, although that assertion, too, is not clear. I find that any arguments relating to conflicts of interest are not well formulated and, therefore, impossible for me to address in these findings. To the extent that a different decision maker has a conflict of interest, that issue can be raised if and when this matter comes before that decision maker.

Participant Tye submitted several comments relating to the behavior of pilots using the Airport. Those comments, however, do not explain what relationship individual pilot behavior has to the Text Amendments. Without such an explanation, I find that this argument is not well formulated and, therefore, impossible for me to address in these findings.

Participant Tye makes several comments, the theme of which is that an air traffic control tower is merely a desire of the Applicant and not actually needed for the Airport. Those comments, however, do not identify a Code provision that requires a text amendment to allow only those uses that are needed, or that prohibits a text amendment to allow a use that is desirable even if it is not needed. Further, whether an air traffic control tower is needed appears to be a question for the Airport operator and the entities that

regulate the Airport's operations. As proposed, the Text Amendments and Code still require the Airport operator to comply with all federal and state laws. Thus, to the extent the need for an air traffic control tower is relevant, that decision would be made in a different venue.

Participant Tye makes several generic assertions that the Text Amendments are not consistent with Statewide Planning Goals ("Goal"). One specific argument participant Tye makes is that the Text Amendments violate Goal 1, the language of which aims to "develop a citizen involvement program that ensures the opportunity for citizens to be involved in all phases of the planning process." Participant Tye appears to take issue with how the Airport's master plans have been developed and, as noted above, the type of notice provided for the Hearing. I agree with the finding in the Staff Report, however, that the process for adopting the Text Amendments complies with Goal 1 "because the County is relying on its citizen involvement program and land use procedures ordinance to conduct public review of these amendments." Further, even if the development of the Airport's master plans was relevant, the Applicant provided evidence of the myriad of ways in which the public is involved in that process.

Participant Tye asserts the Text Amendments do not comply with Goal 3 (and its related statutes), the language of which aims to "preserve and maintain agricultural lands." The specific assertion relating to Goal 3 appears to be that the Applicant has not addressed ORS 215.243.² That statute, however, is a legislative policy statement, which provides guidance on the intent of other language in ORS Chapter 215. ORS 215.243 does not appear to impose any specific requirements with respect to the County's ability to adopt Text Amendments relating to land that is not zoned for farm use, nor does participant Tye attempt to identify any such requirement. Participant Tye does describe potential impacts on farming resulting from airplane operations. As the Staff Report notes, however, there do not appear to be any operating characteristics of an air traffic control tower (the subject of the Text Amendments) that would impact nearby farm properties.

Participant Tye asserts that the Text Amendments do not comply with Goal 5 and Goal 6, but does not explain why. The insinuation in the testimony is that airplane operations potentially impact historic buildings, natural resources such as wildlife, and environmental quality. However, as noted in the Staff Report, Goal 5 is not directly applicable to the Text Amendments because they do not include any changes to the County's Goal 5 inventories. Further, in the absence of any specific assertion that an air traffic control tower itself would impact an inventoried Goal 5 resource, I find that this argument is not well formulated and cannot otherwise be addressed in these findings. For a similar reason, I find that participant Tye's arguments relating to Goal 6 are unavailing, because they do not assert that an air traffic control tower itself will cause any harm to air or water quality.

Participant Tye asserts that the Text Amendments do not comply with Goal 12, which aims to provide and encourage a safe, convenient and economic transportation plan. In support of the Applicant, the Applicant provided a Traffic Impact Analysis ("TIA"). The Applicant also submitted a revised TIA based on initial comments it received from the County's transportation planning staff. The County's Senior Transportation Planner reviewed the TIA as revised and agreed with its assumptions, methodology, and conclusions, which demonstrate compliance with the applicable provisions of Goal 12 as implemented

² Participant Tye cites to ORS 215.241, but that appears to be a typo and the statutory language quoted in the testimony mirrors the language in ORS 215.243.

through state administrative rules. Participant Tye expresses disagreement with the outcome of the TIA, but does not identify any purported errors in the TIA. Participant Tye does question whether the number of employees associated with an air traffic control tower is an accurate assumption in the TIA. However, the record reveals that the number of employees assumed in the TIA – five – is based on a literature review and engineering studies. In the absence of any counter evidence as to the appropriate number of employees that should be used in the TIA, I find that the preponderance of the evidence in this record demonstrates that five employees is an appropriate number to use in the TIA.

Based on the foregoing,³ I find that the adoption of the Text Amendments will be consistent with the Goals.

V. CONCLUSION AND RECOMMENDATION

Based on the Findings above, the Applicant’s proposed amendments to DCC Chapter 18.76 and DCC Chapter 18.80 comply with the County’s provisions for amending the Code. The Hearings Officer therefore recommends that the Deschutes County Board of Commissioners adopts the amendments presented in Exhibit A by ordinance unless the Board of Commissioners determines there is a legislative reason not to adopt the amendments.

Dated this 20th day of November 2023



Tommy A. Brooks
Deschutes County Hearings Officer

Attachment:
Exhibit A – Text Amendments
Exhibit B – Staff Report

³ Participant Tye mentions other Goals, but does so without a well formulated argument for why those Goals are not met. For example, with respect to Goal 10 relating to housing, participant Tye makes statements like “calling our farms ‘suburban’ in documents is damaging to our housing....” Such a statement does not present an argument supporting a conclusion that the Text Amendments violate Goal 10, and I find that it is not possible to further address those statements in these findings.