



APPEAL APPLICATION – BOARD OF COUNTY COMMISSIONERS

FEE: \$3794

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): Simmons Brothers LLC Phone: (541) 316-1588

Mailing Address: 139 NW Third Street City/State/Zip: Prineville, OR 97754

Email Address: Lisa @FitchandNeary.com

Land Use Application Being Appealed: 247-23-000249-MC

Property Description: Township 14 Range 13 Section 25 Tax Lot 1200

Appellant's Signature: Hank Simmons Date: Sep 22, 2023
Hank Simmons (Sep 22, 2023 14:01 PDT)

By signing this application and paying the appeal deposit, the appellant understands and agrees that Deschutes County is collecting a deposit for hearing services, including "whether to hear" proceedings. The appellant will be responsible for the actual costs of these services. The amount of any refund or additional payment will depend upon the actual costs incurred by the county in reviewing the appeal.

Except as provided in section 22.32.024, appellant shall provide a complete transcript of any hearing appealed, from recordings provided by the Planning Division upon request (there is a \$5.00 fee for each recording copy). Appellant shall submit the transcript to the planning division no later than the close of



Lisa Andrach
lisa@fitchandneary.com

LAND USE AUTHORIZATION FORM

For: Deschutes County Community Development

Re: **Map and Tax Lot: 1413250001200 (Account # 128367)**
Situs Address: 4180 NE O'Neil Way, Redmond, Oregon 97756

Let it be known that the firm of Fitch & Neary PC has been retained to act as my authorized agent to perform all acts for development on my property noted above. These acts include: Pre-application conference, filing applications, and/or other required documents relative to all Permit applications, modifications, appeal, extension.

Property Owner: Simmons Brothers LLC

Hank Simmons **Sep 21, 2023**

Hank Simmons date

Signature: Hank Simmons
Hank Simmons (Sep 21, 2023 10:50 PDT)

Email: simmonsrealty@yahoo.com

NOTICE OF APPEAL
TO DESCHUTES COUNTY BOARD OF COMMISSIONERS

FILE NUMBER: 247-23-000249-MC (Hearings Officer)

APPLICANT/OWNER: Simmons Brothers, LLC
139 NW Third Street
Prineville OR 97754
P: 541-447-5638

APPLICANT'S ATTORNEY: Lisa Andrach
Fitch & Neary, P.C.
210 SW 5th St., Ste. #2
Redmond OR 97756
P: 541-316-1588
Email: lisa@fitchandneary.com

Appeal of hearings officer decision denying modification of conditions to previously approved land use submittal (247-21-000593-MP, 594-CU,595-CU) to modify the point of access to a location approved by ODOT (NE O'Neil Way).

I. APPLICABLE CRITERIA

22.32.010 Who May Appeal

- A. The following may file an appeal:**
1. A party

FINDING: The appellant is the applicant in Deschutes County File No. 247-23-000249-MC that is the subject of this appeal. This criterion is satisfied.

22.32.015 Filing Appeals

1. To file an appeal, an appellant must file a completed notice of appeal on a form prescribed by the Planning Division and an appeal fee.
2. Unless a request for reconsideration has been filed, the notice of appeal and appeal fee must be received at the offices of the Deschutes County Community Development Department no later than 4:00 PM on the twelfth day following mailing of the decision. If a decision has been modified on reconsideration, an appeal must be filed no later than 4:00 PM on the twelfth day following mailing of the decision as modified. Notices of Appeals may not be received by facsimile machine.

3. **If the Board of County Commissioners is the Hearings Body and the Board declines review, a portion of the appeal fee may be refunded. The amount of any refund will depend upon the actual costs incurred by the County in reviewing the appeal. When the Board declines review and the decision is subsequently appealed to LUBA, the appeal fee may be applied toward the cost of preparing a transcript of the lower Hearings Body's decision.**
4. **The appeal fee shall be paid by method that is acceptable to Deschutes County.**

FINDING: The appellant has filed herewith the required notice of appeal on the prescribed form, and the appeal fee, within the 12 days from the date of mailing of the decision. This criterion is met.

22.32.020 Notice Of Appeal

Every notice of appeal shall include:

A. A statement raising any issue relied upon for appeal with sufficient specificity to afford the Hearings Body an adequate opportunity to respond to and resolve each issue in dispute.

FINDING: The appellant appeals the hearings officer's decision denying the modification application pursuant to DCC 22.36.040(C) based upon a finding that the proposed modification does not comply with applicable criteria of Title 17.

The appellant requests review on the following issues:

1. The decision is in error in its application of DCC 17.48.210(B) to deny the application. The hearings officer's interpretation of DCC 17.48 is not binding on the Board of Commissioners, which, as the legislative body of the county, is charged with interpreting the county code. As set forth in the decision, it appears that the interpretation of DCC 17.48.210 is a matter of first impression for the Board. Appellant submits that the decision erred in more than one way in finding that DCC 17.48.210(B) prohibits the use of the state highway access (O'Neil Way). The Board must determine whether DCC 17.48.210, which regulates "Access" for partitions, applies here when:

A. The proposed access is from a state highway within the jurisdiction of ODOT, and the access permit is reviewed, approved, and issued by ODOT;

B. If it does apply, does DCC 17.48.210(B) prohibit the use of a state arterial for access even if ODOT has determined that the access point from the arterial is approved because it passed the state's rigorous safety and operational review criteria and other hurdles to approval; and

C. If DCC 17.48.210(B) does trump any such access simply because NE O'Neil Way is an "arterial" as used in DCC 17.48.210(B), even though approved by ODOT, does the exception in DCC 17.48.210(B) to allow the use of the arterial when there is no other possible means of accessing the parcel apply here.

2. The Hearings Officer's decision overlooked evidence in the record and misinterpreted and misapplied the applicable law and misunderstood the appellant's arguments below as it applied to the balance of Title 17. DCC 22.36.040(C) requires that an application to modify a decision be directed to one or more discrete aspects of the approval. In compliance with this criterion, the applicant addressed the fact that if the O'Neil Way access is approved on modification, the partition would not use NE Coyner Ave for any purpose, and if NE Coyner Ave is not used for any purpose, then the applicable criteria and corresponding conditions of approval in the original decision that required dedication of right of way and development requirements to establish NE Coyner Ave are negated. The modification sought removal of the conditions of approval requiring the dedication of right of way and development of NE Coyner Ave because these conditions of approval would no longer be required to satisfy any applicable criteria – because the criteria to which they relate no longer apply.

In addition, the hearings officer identified a few particular criteria that he thought might be applicable, albeit in dicta, but his comments on those criteria were in error because those criteria were addressed in the initial decision, the substantial evidence in the record, and/or the findings on those criterion in the original decision were not being disturbed by the modification. Specifically:

DCC 17.22.020(A)(3) – The hearings officer questioned whether Ne O'Neil Way is a "road dedicated to the public." However, the record made clear that O'Neil Way (Highway 370) is a state highway, it is owned by the state and governed within the jurisdiction of ODOT, and as set forth in the original decision addressing this criterion, it is a "roadway dedicated to the public." This issue was addressed and satisfied and was not an issue subject to modification.

DCC 17.22.020(A)(2) – The hearings officer wondered if there are public access easements that conflict with the proposal. However, as addressed in the record, there are no public access easements that exist or that are in conflict with the proposed partition and/or new access point. The original decision addressed this criterion and found that there were no public access easements to which the proposed partition would be in conflict and that there were no public access easements within the property. ODOT found that the proposed access did not conflict with any nearby public access intersections or O'Neil Way. There is substantial evidence in the record on this issue and the criterion was satisfied. The applicant did not request a modification to this criterion pertaining to public access easements.

DCC 17.36.100 – The hearings officer wondered whether a frontage road is required. However, here, neither ODOT nor the County Road Department mentioned or required

any frontage road for O'Neil Way with the proposed modified access point on O'Neil Way. Neither authority required a condition of approval to establish a frontage road along O'Neil Way. On modification, the application addressed that the frontage dedication for NE Coyner Ave would no longer be applicable because there was no impact to NE Coyner because there is no use of NE Coyner with the modified access point. There was no requirement for a frontage road triggered by the modification to the access point and this criterion was satisfied.

B. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons why the Board should review the lower Hearings Body's decision.

FINDING: The appeal seeks an interpretation of the Deschutes County Code 17.48.210(B), concerning when it applies, and what does "possible" mean as used in the code. These appear to be issues of first impression for the Board of Commissioners. The applicant's rights are substantially prejudiced by the hearings officer's decision in this matter if the applicant cannot use an ODOT approved access point simply because it is an "arterial" as used in Code. The other issues outlined above were raised by the hearings officer in dicta as possible applicable criteria that needed to be addressed, but the decision was in error in that the issues were either addressed in the record, the prior decision, or were not applicable to the modification.

C. 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 why the Board should provide de novo review as provided in DCC 22.32.030.

FINDING: The applicant requests de novo review of this issue because it appears to be an issue of first impression for the Board of Commissioners, and because the hardship imposed on the applicant if the applicant cannot use the ODOT approved access but must dedicate nearly a mile of right of way (and remove all of his personal property within that 30' area to be dedicated) and improve a road that even ODOT's experienced engineer said is not reasonable to use, when the road is a dead end at the NUID canal and serves no other property or public purpose or benefit. The road would only serve the 2 new non-farm dwellings and nothing more. The result is a huge exaction of real property and financial investment from the applicant when there is another safe, ODOT approved, reasonable and available option. The only improvement to the NE O'Neil Way access is a driveway apron.

The Board of Commissioners, as the legislative body of the county, is the only body that can issue a binding interpretation of the county code. Here it is necessary for de novo review so that the Board has an opportunity to fully and properly evaluate the issues on review which are of first impression. The Board's application and interpretation of DCC 17.48.210(B) is important enough and the stakes are extremely high for the applicant all which further warrant the Board addressing the issues raised *de novo*.

2.32.024 Transcript Requirement

1. Except as otherwise provided in DCC 22.32.024, appellants shall provide a complete transcript of any hearing appealed from, from recorded magnetic tapes provided by the Planning Division.
2. Appellants shall submit to the Planning Division the transcript no later than the close of the day five days prior to the date set for a de novo appeal hearing or, in on-the-record appeals, the date set for receipt of written arguments. Unless excused under DCC 22.32.024, an appellant's failure to provide a transcript shall cause the Board to decline to consider the appellant's appeal further and shall, upon notice mailed to the parties, cause the lower Hearings Body's decision to become final.
3. An appellant shall be excused from providing a complete transcript if appellant was prevented from complying by: (1) the inability of the Planning Division to supply appellant with a magnetic tape or tapes of the prior proceeding; or (2) defects on the magnetic tape or tapes of the prior proceeding that make it not reasonably possible for applicant to supply a transcript. Appellants shall comply to the maximum extent reasonably and practicably possible.
4. Notwithstanding any other provisions in DCC 22.32, the appeal hearings body may, at any time, waive the requirement that the appellant provide a complete transcript for the appeal hearing.

FINDING: The appellant agrees to the transcript requirements imposed by this criterion.

22.32.027 Scope Of Review

1. Before Hearings Officer or Planning Commission. The review on appeal before the Hearings Officer or Planning Commission shall be de novo.
2. Before the Board.
 1. Review before the Board, if accepted, shall be on the record except as otherwise provided for in DCC 22.32.027.
 2. The Board may grant an appellant's request for a de novo review at its discretion after consideration of the following factors:
 1. Whether hearing the application de novo could cause the 150-day time limit to be exceeded; and
 2. If the magnetic tape of the hearing below, or a portion thereof, is unavailable due to a malfunctioning of the recording device during that hearing, whether review on the record would be hampered by the absence of a transcript of all or a portion of the hearing below; or
 3. Whether the substantial rights of the parties would be significantly prejudiced without de novo review and it does not appear that the request is necessitated by failure of the appellant to present evidence that was available at the time of the previous review; or

4. Whether in its sole judgment a de novo hearing is necessary to fully and properly evaluate a significant policy issue relevant to the proposed land use action.

For the purposes of DCC 22.32.027, if an applicant is an appellant, factor DCC 22.32.027(B)(2)(a) shall not weigh against the appellant's request if the applicant has submitted with its notice of appeal written consent on a form approved by the County to restart the 150-day time clock as of the date of the acceptance of applicant's appeal.

FINDING:

1. The applicant is the appellant, and the 150-day clock is near expiration. Therefore, the applicant / appellant hereby agrees to restart the clock to allow time for the appeal as set forth above.

2. The substantial rights of the applicant are prejudiced by the decision on review. Here, the State ODOT has reviewed and approved for use an alternate access for two non-farm dwellings, but the decision on review has rejected the use of that access and requires that the applicant make a substantial dedication of real property to create a new road, and then make a substantial investment financially to improve the new road just to access the same two dwellings. The decision is not based upon any health, life, safety issues – but merely an interpretation of the county code.

3. Notwithstanding DCC 22.32.027(B)(2), the Board may decide on its own to hear a timely filed appeal de novo.
4. The Board may, at its discretion, determine that it will limit the issues on appeal to those listed in an appellant's notice of appeal or to one or more specific issues from among those listed on an applicant's notice of appeal.

FINDING: The appellant requests that the Board limit the issues on appeal to those listed in appellant's notice of appeal.

DATED this 25th day of September 2023.

FITCH & NEARY PC

LISA ANDRACH, OSB #040012
Of Attorneys for Appellant / Applicant below
210 SW 5th St, Suite 2
Redmond, OR 97756
P: 541.316.1588 F: 541.316.1943
Email: lisa@fitchandneary.com

From: [CDD Planning](#)
To: [Tracy Griffin](#)
Subject: FW: Appeal of 247-23-00249-MC App Materials
Date: Monday, September 25, 2023 4:39:15 PM
Attachments: [Appeal filed 9.25.23.pdf](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

Hi Tracy,

App materials for 247-23-000704-A

Thanks,



Ben Wilson | Assistant Planner
Deschutes County Community Development
117 NW Lafayette Ave | Bend, Oregon 97703
Tel: (541) 385-1713 | Mail: PO Box 6005, Bend, OR 97708



Let us know how we're doing: [Customer Feedback Survey](#)

Disclaimer: Please note that the information in this email is an informal statement made in accordance with DCC 22.20.005 and shall not be deemed to constitute final County action effecting a change in the status of a person's property or conferring any rights, including any reliance rights, on any person.

From: Lisa Andrach <lisa@fitchandneary.com>
Sent: Monday, September 25, 2023 2:17 PM
To: CDD Planning <planning@deschutes.org>
Cc: simmonsrealty@yahoo.com; Craig & Cathy Kilpatrick <ckrimrock@yahoo.com>; Linda Nichols <linda@fitchandneary.com>
Subject: Appeal of 247-23-00249-MC

[EXTERNAL EMAIL]

Attached please find the appeal documents for an appeal to the Board of Commissions of the hearings officer decision in 247-23-00249-MC.

When the invoice is ready, please send me the information to pay the filing fee.

Thank you.

Lisa Andrach, Attorney



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Redmond, OR 97756

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