

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

**FILE NUMBER:** 247-23-000249-MC

**HEARING DATE:** July 12, 2023

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

**APPLICANT/OWNER:** Simmons Brothers, LLC

**SUBJECT PROPERTY:** Map and Tax Lot:  
1413250001200

Situs Addresses:  
4180 NE Oneil Way  
Redmond, OR 97756

**REQUEST:** The Applicant requests a modification of conditions to a previously-approved land use permit (247-21-000593-MP, 594-CU, 595-CU) to change the point of access from NE Coyner Avenue to NE Oneil Way.

**HEARINGS OFFICER:** Tommy A. Brooks

**SUMMARY OF DECISION:** This Decision concludes that the Applicant has not met its burden of demonstrating the requested modification satisfies the applicable criteria and, therefore, DENIES the Application.

**I. STANDARDS AND CRITERIA**

Deschutes County Code (DCC)

Title 17, Subdivisions

Chapter 17.22, Approval of Tentative Plans for Partitions

Chapter 17.36, Design Standards

Chapter 17.48, Design and Construction Specifications

Title 22, Deschutes County Development Procedures Ordinance

Chapter 22.36, Limitations on Approvals

## **II. BACKGROUND AND PROCEDURAL FINDINGS**

### **A. Nature of Proceeding**

This matter comes before the Hearings Officer as a request to modify the conditions of approval of a prior land use action on the Subject Property.

In September 2021, through Casefiles 247-21-000593-MP, 594-CU, and 595-CU (together, the “2021 Minor Partition”), the County approved a Minor Partition to divide the Subject Property into three parcels, together with conditional use permits authorizing the establishment of a nonfarm dwelling on each of two of the new parcels (“New Dwelling Parcels”).

The 2021 Minor Partition contemplates that access from the New Dwelling Parcels will be via NE Coyner Avenue, an undeveloped right-of-way that runs along the south side of the Subject Property. Relatedly, the 2021 Minor Partition includes conditions of approval requiring the applicant to design and construct road improvements on NE Coyner Avenue, and to dedicate additional right-of-way along NE Coyner Avenue, to meet certain road standards.

After the County’s approval of the 2021 Minor Partition, the Applicant sought approval from the Oregon Department of Transportation (“ODOT”) to allow access from the New Dwelling Parcels to NE O’Neil Way/Highway 370 (“O’Neil Way”). ODOT initially approved an approach permit for that purpose on February 23, 2023. ODOT re-issued its approval for the Applicant’s requested access on February 27, 2023. ODOT’s second approval was styled as a “Conditional Approval” and was conditioned on ODOT’s receipt of land use approval from the County.

As described by the Applicant, the purpose of the Application is to modify the approved access for the New Dwelling Parcels (i.e., from NE Coyner Avenue to O’Neil Way), and to remove the conditions of approval in the 2021 Minor Partition relating to the right-of-way dedication and improvements to NE Coyner Avenue, since that right-of-way would no longer be used for access. As set forth in the Applicant’s initial Application materials, the Applicant specifically requests the removal of Condition numbers 8, 9, 12, 15, 16, 17, 18, and 20 from the 2021 Minor Partition.

### **B. Application, Notices, Hearing**

The initial Application was submitted on April 4, 2023. Staff in the County’s Community Development Department (“Staff”) deemed the Application complete on May 4, 2023.

On June 14, 2023, Staff mailed a Notice of Public Hearing (“Hearing Notice”). The Hearing Notice was also published in the Bend Bulletin on June 16, 2023.

Pursuant to the Hearing Notice, I presided over the Hearing as the Hearings Officer on July 12, 2023, opening the Hearing at 6:00 p.m. The Hearing was held in person and via videoconference, with the Hearings Officer appearing 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 if necessary. I stated I had no *ex parte*

contacts to disclose or bias to declare. I invited but received no objections to the County's jurisdiction over the matter or to my participation as the Hearings Officer.

The Hearing concluded at approximately 7:21 p.m. Prior to the conclusion of the Hearing, and at the Applicant's request, I announced that the written record would remain open as follows: (1) any participant could submit additional materials until July 19, 2023 ("Open Record Period"); (2) any participant could submit rebuttal materials (evidence or argument) until July 26, 2023 ("Rebuttal Period"); and (3) the Applicant could submit a final legal argument, but no additional evidence, until August 2, 2023, at which time the record would close. Staff provided further instruction to participants, noting that all post-Hearing submittals needed to be received by the County by 4:00 p.m. on the applicable due date. No participant objected to the post-hearing procedures.

### C. Review Period

Using May 4, 2023, as the date of completeness for the Application, the deadline within which the County must make a final decision under ORS 215.427 – "the 150-day clock" – was initially October 1, 2023. 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 requested and agreed to a 21-day extension of the record. 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 original deadline, the new deadline for the County to make a final decision is October 22, 2023.

## **III. SUBSTANTIVE FINDINGS AND CONCLUSIONS**

The Application requests a Modification of Approval pursuant to DCC 22.36.040. The approval the Applicant seeks to modify is the 2021 Minor Partition. The specific modification the Applicant seeks to make to the 2021 Minor Partition is the portion of that decision establishing the location that the New Dwelling Parcels will use to take access to a public road.

As presented to the Hearings Officer, the requested Modification of Approval would revise the approved site plan by establishing an access point on O'Neil Way. Such an access point already exists for "Parcel 3" and ODOT's conditional approval would allow a new access point to O'Neil Way farther west where it would be accessed by the New Dwelling Parcels. If the location of the road access is approved, the Applicant also requests the removal of the conditions of approval in the 2021 Minor Partition that require additional right-of-way dedication and improvements on NE Coyner Avenue.

### 1. Compliance with DCC 22.36.040

The standards for a Modification of Approval are set forth in DCC 22.36.040:

- A. *An applicant may apply to modify an approval at any time after a period of six months has elapsed from the time a land use action approval has become final.*

The Applicant seeks to modify the 2021 Minor Partition, which the County approved on or about September 21, 2021. The requested modification is therefore more than six months after that decision

became final. No participant in this proceeding has challenged the timing of the Application. Based on the foregoing, I find that this Code provision is satisfied.

*B. Unless otherwise specified in a particular zoning ordinance provision, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties.*

A Modification of Approval requires a showing of a change in circumstances that makes it desirable to make changes to the prior approval. The “change in circumstances” the Applicant describes for purposes of this Code provision is that a new access is now available and conditionally approved by ODOT. The Applicant asserts that it is desirable to change the point of access because the change “only requires access improvements in lieu of NE Coyner right-of-way dedication and road improvements,” and that the “expense to the applicant to take access via NE Coyner is considerably more than to take access from O’Neil Hwy.”

During the Hearing, I raised the question whether the source of the change in circumstances matters for purposes of applying this Code provision. On the one hand, the language of the Code refers only to “a change in circumstances.” On the other hand, not all changes in circumstances can be used for purposes of obtaining a Modification of Approval. For example, if the resulting modification is “filed as a substitute for an appeal”, the modification would not be allowed under the Code. The source of the change in circumstances, therefore, could be relevant in a particular situation to determine the intent and purpose of the modification. In response to my questions, the Applicant submitted to the record several past decisions where the County approved modifications of prior approvals, some of which appear to be based on changes in circumstances created by the applicant in those matters, and some of which appear to be based on changes that were outside of the applicant’s control. It is not clear, however, if those prior decisions addressed the source of the change in circumstances.

Some comments in the record do question whether this Code provision is satisfied, but those comments address whether the proposed modification is a substitute for an appeal of the 2021 Minor Partition. No participant appears to directly challenge the Applicant’s assertion that there has been a change in circumstances, or the Applicant’s assertion that such a change in circumstances makes it desirable to make changes to the original approval. Nor do I read those opposing comments as making an express connection between the Applicant’s role in creating the change in the circumstances and the allegation that the request is being used as a substitute for an appeal. In the absence of a clear interpretation of this Code provision by the County’s Board of Commissioners, and in the absence of a counter argument regarding the change in circumstances the Applicant relies on, I find that, based on this record, the Applicant has established that a change of circumstances since the issuance of the 2021 Minor Partition makes it desirable to make changes to that approval.

The primary comment in the record challenging the Applicant’s ability to satisfy this Code requirement is a memo from the County’s Senior Transportation Planner. That memo asserts that the 2021 Minor Partition is a final, unappealable decision and that the “County cannot now consider an application that

requires a determination that the access and conditions related thereto in the original, unappealed approval should be changed.” That assertion, however, runs counter to the language in DCC 22.36.040, which expressly allows an applicant to seek a change in the conditions of a prior approval, and which allows such a change only if it has been more than six months since the approval became final. If the interpretation the Senior Transportation Planner offers were correct, no modification to a prior approval would ever be allowed and DCC 22.36.040 would serve no purpose.

The question before the Hearings Officer with respect to this Code provision is whether the requested modification is a “substitute” for an appeal. The Applicant makes multiple statements in the record expressing dissatisfaction with the 2021 Minor Partition, particularly with regard to the improvements required on NE Coyner Avenue. For example, the Applicant asserts that its original proposal was for the New Dwelling Parcels to take access via 33<sup>rd</sup> Street, but that the County misunderstood that request and, on its own, required access via NE Coyner Avenue. Even so, dissatisfaction with the outcome of a decision does not mean that any requested modification rises to the level of a substitute for an appeal. As the Applicant notes, the analysis might turn out differently if the Applicant were seeking to re-instate something the County previously denied. For example, if the Applicant had originally proposed access via O’Neil Way, and if the County had rejected that portion of the proposal, it would be more likely viewed as a substitute for an appeal if the Applicant then sought a Modification of Approval allowing the O’Neil Way access anyway. But that is not the case here, as the Applicant never proposed access to O’Neil Way and is proposing that access now only in light of the change in circumstances consisting of ODOT’s conditional approval. Based on these considerations and the evidence in this record, I find that the Applicant is not using the Modification of Approval as a substitute for an appeal by proposing access to O’Neil Way.

The final element of this Code provision is that the Application cannot be a substantially new proposal or one that would have significant additional impacts on surrounding properties. The Applicant addresses this criterion and notes that the fundamental proposal in the 2021 Minor Partition – three new parcels and the ability to build two nonfarm dwellings – remains unchanged and has the same general impacts. No participant in this proceeding asserts that the Application proposes a substantially new proposal or that there is any difference in actual impacts from the proposal. In light of the Applicant’s unchallenged assertions, I find that the proposal in the Application does not result in a substantially new proposal or one that would have significant additional impacts on surrounding properties.

In summary, I find that DCC 22.36.040(B) is satisfied.

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*C. An application to modify an approval shall be directed to one or more discrete aspects of the approval, the modification of which would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties. Any proposed modification, as defined in DCC 22.36.040, shall be reviewed only under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.*

The Applicant seeks to modify only those aspects of the 2021 Minor Partition that relate to the point of access for the Subject Property, including the New Dwelling Parcels. I find that the requested modifications are discrete aspects of that prior approval and, therefore, within the scope of a modification allowed by this Code provision.

The first half of this Code provision repeats some of the same requirements set forth in DCC 22.36.040(B) and requires that the modification not comprise a substantially new proposal or otherwise have significant additional impacts on surrounding properties. Those standards are addressed in the previous findings and are incorporated here. For the same reasons set forth in those findings, I find that this portion of DCC 22.36.040(C) is satisfied.

The second half of this Code provision requires a review of the modification “under the criteria applicable to the particular aspect of the proposal.” Whether the Applicant has met its burden to demonstrate that the requested modification satisfied the applicable criteria is addressed in more detail in the findings below. Those findings conclude that the Applicant has not met its burden.

*D. An application for a modification shall be handled as a land use action.*

The Application is being processed as a land use action, and no participant in this proceeding objects to that approach. Based on the foregoing, I find that this Code provision is satisfied.

## 2. Compliance with Criteria Applicable to the Requested Modification

As noted in the findings above, DCC 22.36.040(C) states in part that a requested modification “shall be reviewed only under the criteria applicable to that particular aspect of the proposal”. The criteria applicable to the original approval are set forth in DCC Title 17. The proposal in the Application must therefore comply with any of those criteria applicable to the modification being proposed.

While the Applicant responds to comments in the Staff Report and argues certain Code provisions identified by Staff do not apply to the requested modification – primarily DCC 17.48.210(B) – I am unable to discern from the Applicant’s initial materials, supplemental materials, or post-hearing materials which criteria from the 2021 Minor Partition are applicable to the modification sought in the present Application. Nor does there appear to be any statement from the Applicant that there are no criteria to apply. In the absence of any evidence or argument from the Applicant regarding which criteria do apply to the requested modification, I am unable to review “the criteria applicable to that particular aspect of the proposal” as required by DCC 22.36.040(C). On that basis, I find that the Applicant has not met its burden of

demonstrating that the Application complies with DCC 22.36.040(C). Additionally, the findings below address criteria that do apply, or that may apply, and which I find are either not addressed by the Application or not satisfied by the proposal.

A review of the 2021 Minor Partition indicates that there may be multiple criteria that apply to the requested modification. DCC 17.22.020(A)(3) appears to be the primary criterion applicable to the modification and requires a partition to be accessed by roads dedicated to the public. There is no affirmative statement in any of the materials in the record regarding that Code provision, but that criterion appears to be met here. It is less clear whether other criteria are applicable and, if so, whether the proposed modification satisfies those criteria.

DCC 17.22.020(A)(2), for example, requires that the proposal in a partition not conflict with existing public access easements within or adjacent to the partition. That criterion was deemed satisfied in the 2021 Minor Partition's findings, but I am unable to determine from the record before me if the change in access to the New Dwelling Parcels would yield the same result, as there is no indication of what, if any, public access easements exist, much less whether the new access point would conflict with those easements.

DCC 17.36.100 relates to frontage roads and imposes certain requirements when a land division abuts an existing arterial. The 2021 Minor Partition found that O'Neil Way is an arterial. That decision also concluded that the improvements required along NE Coyner Avenue were sufficient for purposes of this Code provision and that, as such, no additional improvements on O'Neil Way would be required. The Applicant now proposes to modify the 2021 Minor Partition in a manner that would not require the improvements on NE Coyner Avenue, but the Applicant does not address what effect that change has on the improvements otherwise required by DCC 17.36.100 and if improvements on O'Neil Way are now necessary to meet this Code provision.

DCC 17.48.210 relates to access to the partition. The Staff Report identifies this Code provision as applicable to the requested modification. Specifically, the Staff Report asserts the modification is not allowed under DCC 17.48.210(B), which states that the "creation of access onto arterials and collectors is prohibited unless there is no other possible means of accessing the parcel...". The Applicant disagrees with the Staff Report and presents several arguments that DCC 17.48.210(B) is not applicable.

One argument the Applicant presents in its final submittal is O'Neil Way is not an arterial and, therefore, DCC 17.48.210(B) does not prohibit the new access the Applicant proposes. As just noted, however, the fact that O'Neil Way is an arterial was established in the 2021 Minor Partition. The Applicant has confirmed – for example in its Supplemental Burden of Proof – that it "is not challenging the prior decision was procedurally or substantively incorrect". I therefore find that the status of O'Neil Way as an arterial is a settled matter.

The other argument the Applicant makes is that DCC 17.48.210(B) does not apply to ODOT-controlled rights-of-way and, instead, applies only to limit new access onto arterials and collectors within the County's jurisdiction. This argument is based on the County's conclusion that DCC 17.48.210(A) – which requires a permit from the County for any new access onto a public right-of-way – does not apply to an ODOT right-of-way. According to the Applicant, if subsection (A) of this Code provision does not apply to ODOT roads, then subsection (B) cannot not apply.

No participant in this proceeding has presented any evidence regarding how the County's Board of Commissioners interprets this Code provision. In the absence of such an interpretation, I must address the plain language of the Code. That plain language states simply that the "creation of access onto arterials and collectors is prohibited" absent certain exceptions. The record indicates that both County-controlled and ODOT-controlled roads may be classified as "arterials" under the County's regulations. This portion of the Code, however, does not qualify "arterials" and limit its application only to County-controlled arterials. Rather, it applies to all arterials. Nor does this Code provision contain any language that ties subsection (B) to subsection (A). In other words, the language of subsection (B) stands on its own, and the prohibition on new access onto arterials can apply whether or not a permit is required under subsection (A). Testimony from ODOT during the Hearing stated that ODOT would honor any County regulations that are more restrictive than State regulations, even if ODOT could otherwise issue its own permit. Indeed, this seems to be the purpose of ODOT's conditional approval of the access point, which required the Applicant to obtain land use approval from the County.

The final argument the Applicant makes is that, even if DCC 17.48.210(B) applies in general, the exception in that Code provision applies because "there is no other possible means of accessing the parcel". The Applicant asserts that no other access is possible because the County already rejected access to 33<sup>rd</sup> Street in the 2021 Minor Partition, and that the approved access to NE Coyner Avenue "is prohibitive rendering it not possible". However, the possibility of using NE Coyner Avenue as access was affirmatively established in the 2021 Minor Partition. Again, the Applicant has acknowledged that it is not challenging the substance of the 2021 Minor Partition. To the extent the Applicant is asserting that the 2021 Minor Partition was wrong, or that it otherwise approved an access that is "not possible", that is not an argument the Applicant can raise in this proceeding. To do so would be to attack the substance of the prior decision and convert the requested modification into a substitute for an appeal of that decision.

Based on the foregoing, I find that DCC 17.48.210(B) is applicable, that it prohibits the Applicant from creating an access on O'Neil Way, and that the requested modification is therefore not allowed under the criteria applicable to the proposal.<sup>1</sup>

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<sup>1</sup> The Applicant's materials assert that denial of the Applicant's request would be an unconstitutional taking of the Applicant's private property in the form of an improper exaction. During the Hearing, the Applicant confirmed that its takings argument applied only if the County approved the new access onto O'Neil Way and also required improvements to NE Coyner Avenue even though that road would no longer be how the New Dwelling Parcels accessed a public road. If that were the case, I would tend to agree, and the County would be required to show that the improvements to NE Coyner Avenue were both rationally related to the Applicant's proposal and had a rough proportionality to the impact of the Applicant's proposal. There would seem to be little connection between NE Coyner Avenue improvements and the Subject Property's use of O'Neil Way. But this decision does not result in such an outcome and, because the modification is being denied, the improvements to NE Coyner Avenue required by the 2021 Minor Partition remain applicable. Again, to the extent the Applicant is objecting to the improvements the County required in the 2021 Minor Partition, that is not an issue that can be challenged now in this Modification of Approval proceeding.

Despite the Applicant's clarification during the Hearing, the Applicant's post-Hearing submittals assert that denying the Application based on DCC 17.48.210(B) constitutes a taking *per se*, because the Applicant would be denied use of an access permit approved by ODOT. ODOT's access permit, however, was conditioned on the Applicant obtaining land use approval from the County. The Applicant has not described what vested right or other property interest it has in ODOT's conditional approval that prevents the County from applying its land use regulations or otherwise absolves the Applicant from having to satisfy the criteria in those regulations.



#### **IV. CONCLUSION**

Based on the foregoing findings, I find that the Applicant has not met its burden with respect to the applicable standards for a Modification of Approval. The Application is therefore DENIED.

Dated this 13<sup>th</sup> day of September 2023

A handwritten signature in blue ink, appearing to read 'T. Brooks', is written over a faint rectangular stamp.

Tommy A. Brooks  
Deschutes County Hearings Officer

