

MEMORANDUM

TO: Board of County Commissioners

FROM: Dan DiMarzo, Assistant Planner

DATE: October 18, 2023

RE: Consideration to Hear – Deschutes County Land Use File Nos. 247-23-000249-MC, 23-704-A: Modification of a previously-approved land use permit to change the point of access.

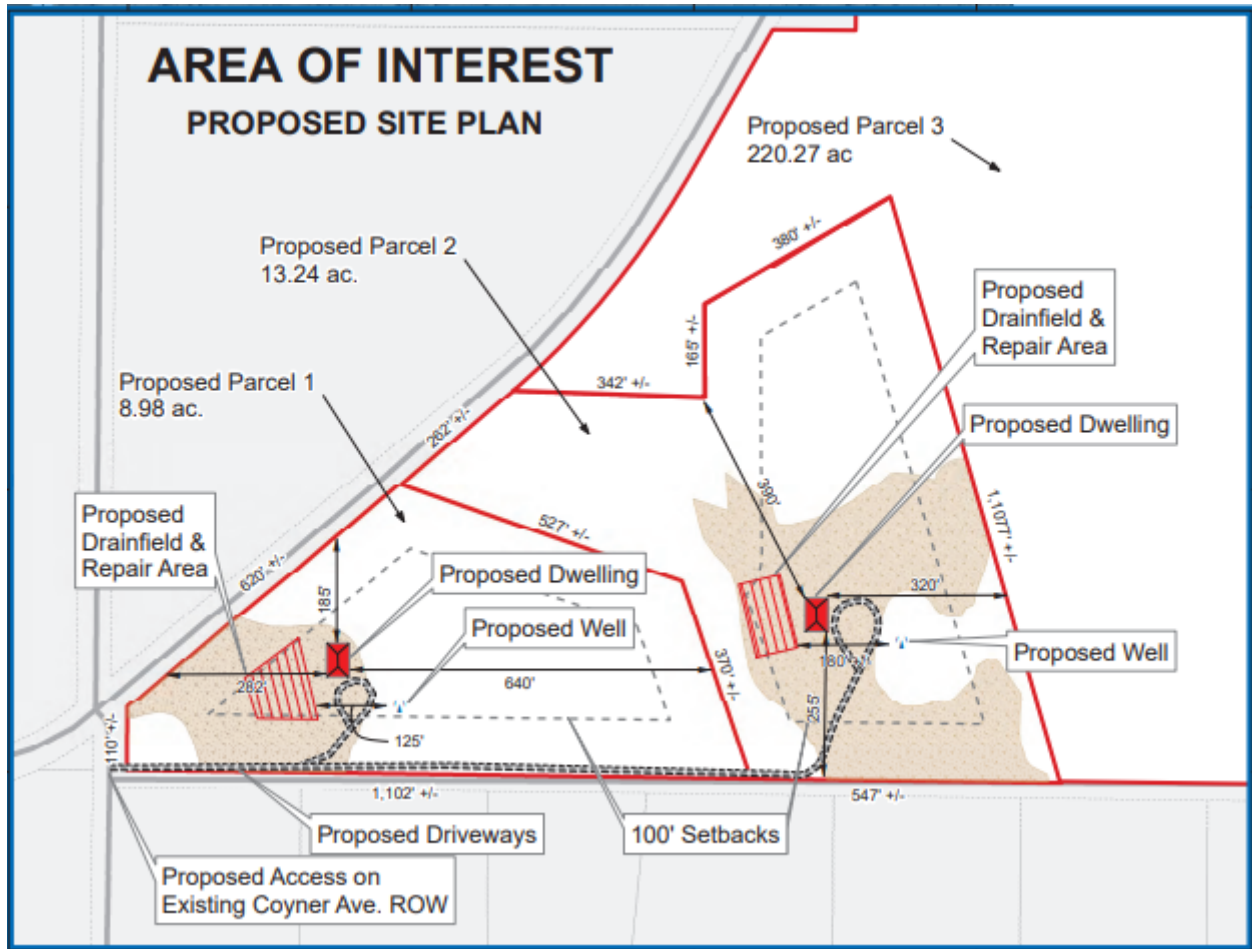
On October 18, 2023, the Board of County Commissioners (Board) will consider whether to hear an appeal of a Hearings Officer's decision (ref. File No. 247-23-000249-MC) denying an application to modify a previously approved land use permit to change the point of access.

I. BACKGROUND AND PROCEDURAL HISTORY

The subject ± 242.49-acre property is not currently in farm use, nor does it possess any irrigation rights. The property is currently developed with one (1) single-family dwelling and several accessory structures, all located within its northern region. The subject property is located ± 2 miles northeast of the City of Redmond, and is adjacent to the Crook County line. The property's mailing address is 4180 NE O'Neil Way, and is further identified on County Assessor's Map 14-13-25 as tax lot 1200. The subject property is zoned Exclusive Farm Use – Terrebonne Subzone.

Through land use permit nos. 247-21-000593-MP, 594-CU, 595-CU, the applicant received approval to divide the ± 242.49-acre parcel into three (3) parcels, and approval to establish nonfarm dwellings on both Parcel #1 and Parcel #2. The existing single-family dwelling is located on proposed Parcel #3. The approved parcel configuration is shown below:

Figure 1 – Approved Parcel/Access Configuration



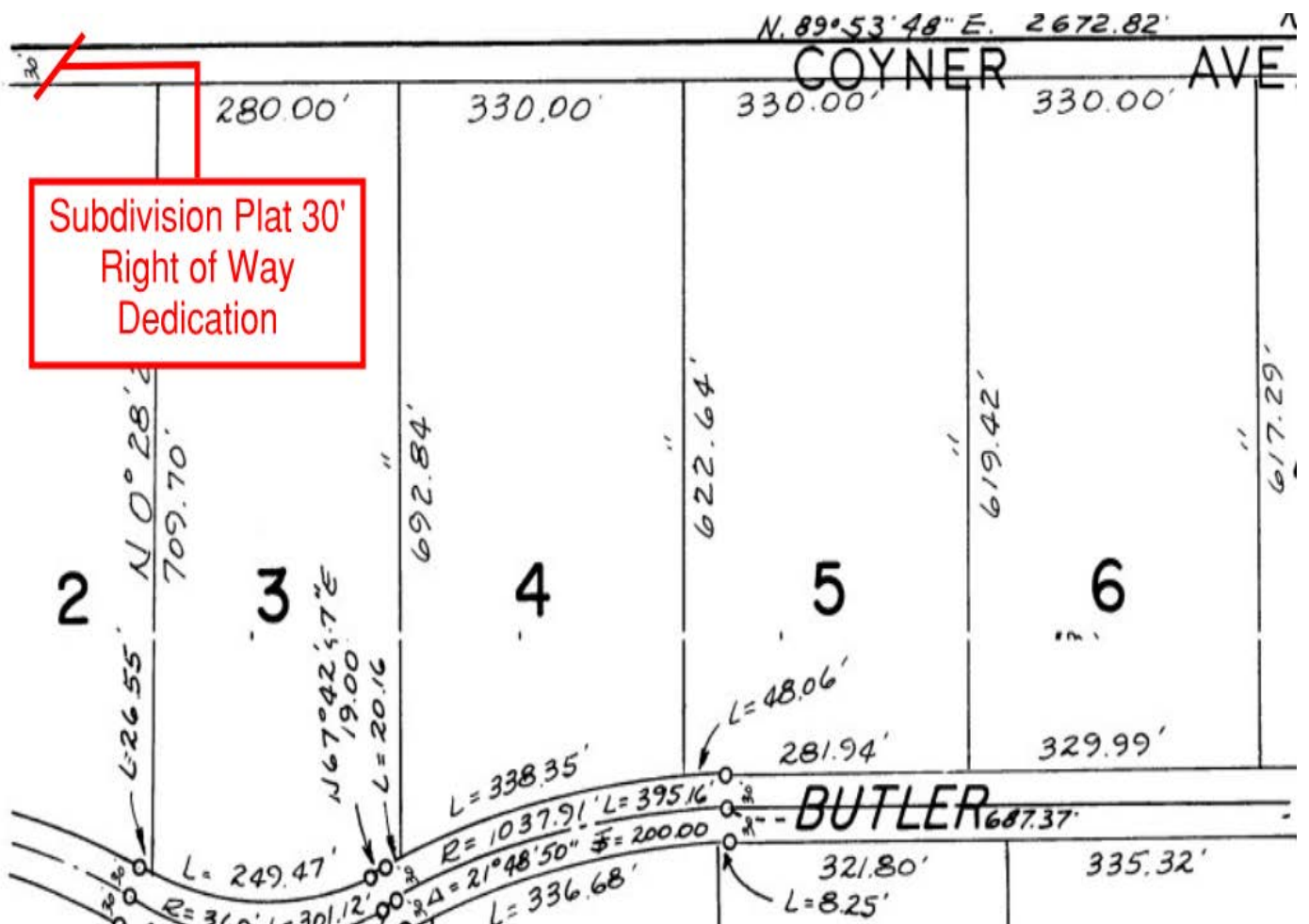
Source: Application materials, 247-21-000593-MP, 594-CU, 595-CU

The Applicant, Simmons Brothers, LLC, has requested a Modification of Conditions to this previously approved land use permit (247-21-000593-MP, 594-CU, 595-CU). The modification seeks to change the point of access to the nonfarm parcels from NE Coyner Avenue to NE O'Neil Way (Highway 370). NE O'Neil Way is a state highway under the jurisdiction of Oregon Department of Transportation (ODOT), functionally classified as Principal Arterial. The partition originally approved under 247-21-000593-MP, 594-CU, 595-CU granted access via NE Coyner Avenue, functionally classified as Rural Local. The modification application also seeks to remove the permit's conditions of approval that require road improvements and right of way dedication to NE Coyner Avenue.

Staff notes where it abuts the subject property, NE Coyner Avenue does not meet the minimum local road standards given in Deschutes County Code (DCC) 17.48 Table A and 17.48.100, which would include a 20 ft.-wide aggregate-surfaced road centered within a 60 ft.-wide public right of way. The existing 30 ft.-wide public right of way exists south of the subject property and was dedicated with the Lake Park Estates subdivision plat (shown below, Figure 2). The Road Department has considered the need to improve NE Coyner

Avenue along the south frontage of the subject property and has determined that approval of the proposed partition should not be subject to road surface improvement requirements along the entire south frontage. Instead, dedication of an additional 30 ft. of public right of way and the minimum standard gravel roads improved only to the point of access for the new parcels should be required to provide the full 60 ft. right of way required under DCC 17.48.100 and 17.48 Table A. In the case of potential approval to use O'Neil Highway as the modified point of access, the Road Department determined that dedications of the additional 30 ft. of public right of way should still be required, but not road improvements, to comply with DCC 17.48.100 and 17.48 Table A to provide for any future installation of utility facilities or road improvements.

Figure 2 – NE Coyner Avenue Dedication (Lake Park Estates)



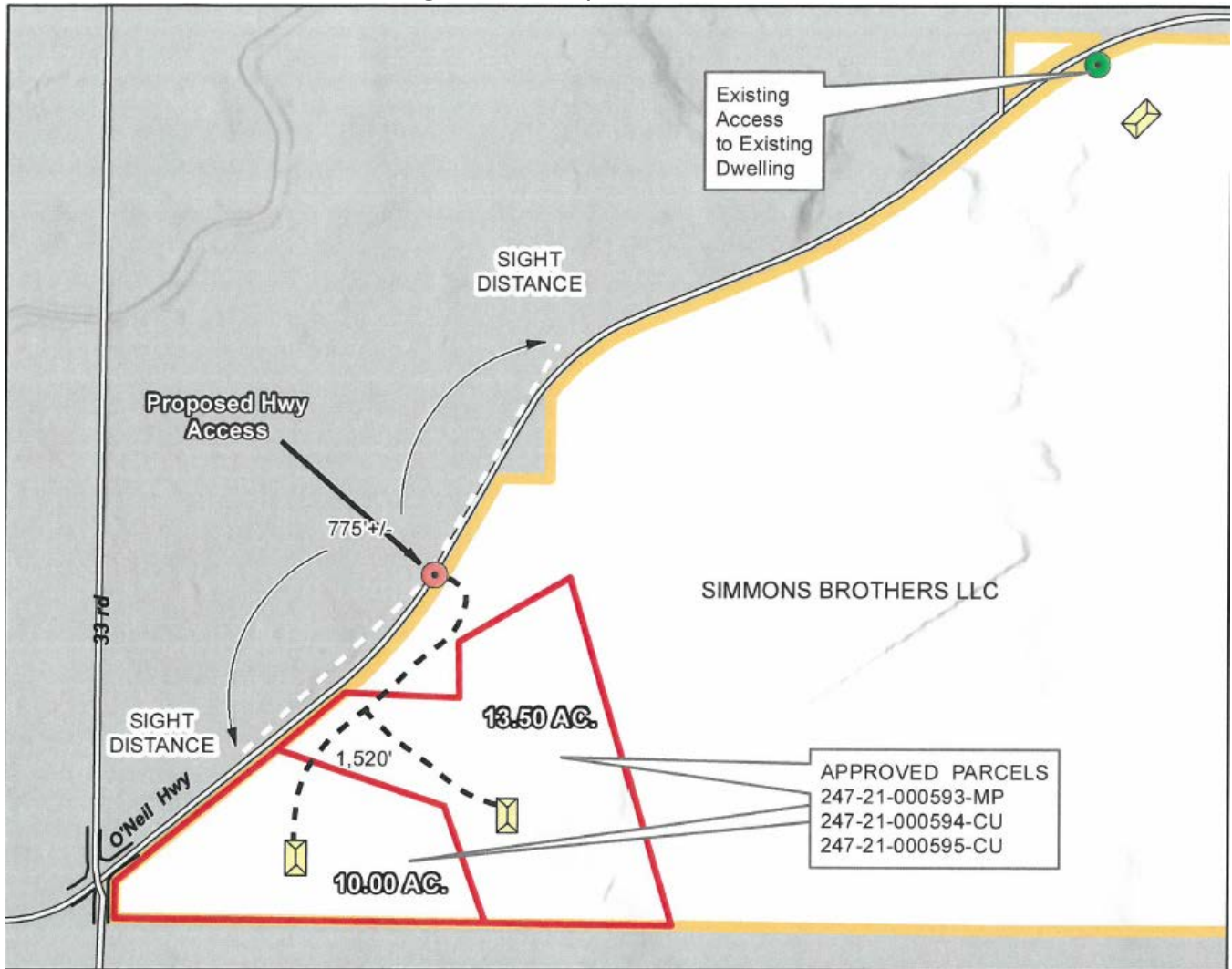
For clarity, the requested modifications are summarized below:

1. Allow new access from NE O'Neil Way that would serve the driveways to the two new nonfarm parcels;

2. Remove any conditions of approval which require dedication of private property to public right of way along NE Coyner Avenue;
3. Remove any conditions of approval which require road improvements to NE Coyner Avenue.

The proposed access requested in the Modification of Conditions application is shown below:

Figure 3 – Proposed New Access



Source: Application materials, 247-23-000249-MC¹

¹ Staff notes the discrepancy between the acreage calculations between Figure 1 & Figure 3. The subject modification application does not propose to re-configure the approved nonfarm parcels. For the purposes of the subject modification application, the configuration of the parcels shall remain the same, as approved through land use file nos. 247-21-000593-MP, 594-CU, 595-CU (Figure 1).

A relevant timeline of events is described below:

October 3, 2021	Land use approval became final (247-21-000593-MP, 594-CU, 595-CU).
December 12, 2022	Application submittal to ODOT for State Highway Approach.
January 30, 2023	ODOT Staff Report; Findings of Fact.
February 23, 2023	ODOT approval letter which approved new access from the property to NE O’Neil Way.
February 27, 2023	Revised ODOT approval letter which conditionally approved new access from the property to NE O’Neil Way; conditional on local land use approval
April 4, 2023	Modification of Conditions application submittal (247-23-000249-MC)
September 13, 2023	Hearings Officer decision (denial)

Staff referred the Modification of Conditions application to a public hearing and recommended denial based on comments from the County Transportation Planner, and the County Road Department. A public hearing before a Hearings Officer was held on July 12, 2023. The Hearings Officer issued a denial on September 13, 2023. The Applicant filed a timely appeal of the Hearings Officer’s denial on September 25, 2023.

II. DECISION

The Deschutes County Hearings Officer rendered a decision to deny the applicant’s request to modify the point of access for the nonfarm parcels and to remove the conditions of approval requiring right-of-way dedication and road improvements to NE Coyner Avenue on the grounds that:

- NE O’Neil Way’s status as an Arterial is a settled matter.
- DCC 17.48.210(B) – copied below – is applicable to the proposal; therefore, access from NE O’Neil Way is prohibited.

Section 17.48.210 Access

...

B. Access Restrictions and Limitations. The creation of access onto arterials and collectors is prohibited unless there is no other possible means of

accessing the parcel. In any event, residential access onto arterials and collectors shall not be permitted within 100 feet of an intersection or the maximum distance obtainable on the parcel, whichever is less.

- The conditions of approval related to NE Coyner Avenue improvements and right of way dedication are both rationally related and have a rough proportionality to the impact of the approved proposal.
- ODOT's conditional approval does not prevent the County from applying its land use regulations.

III. APPEAL

APPLICANT/PROPERTY OWNER

The Applicant (Simmons Brothers, LLC) submitted a timely appeal of the Hearings Officer's Decision on September 25, 2023. The Applicant requests the Board accept review and conduct a hearing to review and make a decision based the following issues:

- The Hearings Officer's interpretation and application of DCC 17.48.210(B)
- ODOT's conditional approval of access to/from NE O'Neil Way
- Whether the right-of-way dedication and road improvement conditions of approval related to NE Coyner Avenue are rationally related, and roughly proportionate, to the impacts of the proposed partition.

The Applicant requests *de novo* review.

IV. BOARD OPTIONS

In determining whether to hear the appeal, the Board may consider only:

1. The record developed before the Hearings Officer;
2. The notice of appeal; and
3. Recommendation of staff²

If the Board decides to hear the appeal, it must direct whether the appeal will be considered *de novo*, or *limited de novo*. The Board also may consider providing time limits for public testimony, if it decides to hear the appeal.

² Deschutes County Code 22.32.035(D)

Staff has attached three alternative versions of Order No. 2023-044 to this memo; one to hear the appeal *de novo*, one to hear the appeal *limited de novo*, and one to decline to hear the appeal.

Reasons to hear

The Board may wish to accept review of the application on appeal so that its Code interpretations may be accorded deference by the Land Use Board of Appeals (LUBA) if the matter is further appealed. Unlike a Hearings Officer decision, a Board decision that is based on interpretation of the County Code is entitled to local deference. Moreover, the Board may want to reinforce or revisit some the Hearings Officer's findings/interpretations in what would then become the final decision of the County.. Further, beyond the subject application, the Board may want to interpret DCC 17.48.210(B), the application of which has County-wide implications. related to the safety of the traveling public. Staff notes that they received no public comments – neither in support nor opposition – during the Hearings Officer review process.

If the Board chooses to hear this matter, the appellant requests the Board conduct a *de novo* hearing. Under Deschutes County Code 22.32.027(B)(2), the Board may grant an appellant's request to hear a matter *de novo* after considering the factors of DCC 22.32.027(B)(2)(a-d). If the Board chooses to hear this matter, Staff includes considerations for the Board below on *limited de novo* vs. *de novo*.

Reasons to hear *de novo*:

- This allows the Board to consider any relevant issue not related to the reason for denial and may allow new evidence and testimony on any applicable criteria as it sees appropriate.
- Any scope of review exercised by the Board (*de novo* or *limited de novo*) will provide an opportunity for the Board to make a final decision on interpretation of local criteria to which LUBA may defer.
- The applicant has requested *de novo* proceedings.

Reasons to hear *limited de novo*:

- The Hearings Officer found that the applicability of DCC 17.48.210(B) prohibited approval for the change of access onto NE O'Neil Way. A *limited de novo* hearing would allow the Board to consider new evidence and testimony that would be focused solely on this decision point.
- *Limited de novo* review may focus the Board's attention on the Code interpretation issue on which it may be accorded deference by LUBA.

Reasons not to hear

- The Board may determine that the Hearings Officer’s Decision is consistent with its interpretation of DCC 17.48.210(B) and is supported, by the record, if the decision is appealed to LUBA. In addition, the Board may take note that the applicant was represented by a land use attorney.

If the Board decides 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 application and associated appeals becomes final upon the mailing of the Board’s decision to decline review.

V. 150-DAY LAND USE CLOCK

The applicant has requested a 150-day extension of the land use clock. The 150th day on which the County must take final action on this application is March 20, 2024.

VI. RECORD

The record for File No. 247-23-000249-MC and the Notice of Appeal for Appeal No. 247-23-000704-A are as presented at the following Deschutes County Community Development Department website:

<https://www.deschutes.org/cd/page/247-23-000249-mc-modification-conditions-247-21-000593-mp-594-cu-595-cu>

Attachments:

1. DRAFT Board Order 2023-044 Accepting Review of the Hearings Officer’s Decision (*de novo*)
2. DRAFT Board Order 2023-044 Accepting Review of the Hearings Officer’s Decision (*limited de novo*)
3. DRAFT Board Order 2023-044 Declining Review of the Hearings Officer’s Decision
4. Notice of Appeal (Appeal No. 247-23-000704-A)
5. Hearing’s Officer Decision (File No. 247-23-000249-MC)
6. Deschutes County Code 17.48.210