



MEMORANDUM

TO: Deschutes County Board of Commissioners (Board)

FROM: Haleigh King, Associate Planner

DATE: July 17, 2024

SUBJECT: Public Hearing: Remand of 710 Properties/Eden Properties Plan Amendment and Zone Change application 247-21-001043-PA, 1044-ZC (247-24-000395-A)

On July 24, 2023, the Board of Commissioners (“Board”) will hold a public hearing held to consider a remanded decision of the Oregon Land Use Board of Appeals (LUBA) regarding a Plan Amendment and Zone Change application proposed by Eden Central Properties (Applicant). The record associated with this remanded review is located on the project webpage¹. This hearing is a continuation of an existing application (247-21-001043-PA/1044-ZC), the full record is located on the project webpage².

I. HEARING PROCEDURE

Deschutes County Code 22.32.040 notes that the scope of the proceeding for an application on remand must be limited to review the issues that LUBA requires to be addressed, although the Board may use its discretion to reopen the record where it seems necessary. The applicant has requested the record to be reopened to address the issues identified by LUBA, in accordance with Deschutes County Code Section 22.34.040. If the Board chooses to reopen the record, the Board must limit it’s review to the remanded issues.

Per DCC 22.34.030(A), only those persons who were parties to the proceedings before the County as part of the File Number(s) listed above are entitled to notice and participation in this remand hearing.

II. BACKGROUND

On December 2, 2021, the applicant, 710 Properties, LLC/Eden Central Properties, LLC, submitted an application for a Plan Amendment and Zone Change for property totaling

¹ <https://www.deschutes.org/cd/page/luba-remand-247-24-000395-247-21-001043-pa-and-247-21-001044-zc-eden-central-properties>

² <https://www.deschutes.org/cd/page/247-21-001043-pa-and-247-21-001044-zc-eden-central-properties-comprehensive-plan-amendment>

approximately 710 acres. The applicant is requesting to redesignate and rezone the subject property from Agriculture to Rural Residential Exception Area and Exclusive Farm Use (EFU) to Rural Residential – 10 Acre Minimum (RR-10).

Staff includes a timeline of the proceedings below:

Action	Date
Hearings Officer Recommendation of Approval to Board of County Commissioners	June 2, 2022
Board of County Commissioners Hearing	August 17, 2022
Board Approval (2-1) of Ordinance No. 2022-013	December 14, 2022
County Decision Appealed to Oregon State Land Use Board of Appeals (LUBA)	January 10, 2023
LUBA issues Final Opinion and Order remanding the decision back to the County	July 28, 2023
Court of Appeals affirms LUBA Remand	January 24, 2024
Applicant initiates remand application with Deschutes County	June 26, 2024
Deadline for final County decision on remand	October 24, 2024

III. LUBA REMAND AND APPLICANT RESPONSE

LUBA, in its Final Opinion and Order, remanded the county decision to address the following issues:

A. Findings related to the ability to use the subject property for farm use in conjunction with other property.

The final opinion and order provides the following guidance:

(pg. 36-37) As we discuss in our resolution of a subsequent assignment of error, the board of commissioners’ decision fails to consider the ability to use the subject property with a primary purpose of obtaining a profit in money in conjunction with other property. ORS 215.203(2)(a) refers to the employment of land for the primary purpose of obtaining a profit by engaging in a farm activity. “Nearby or adjacent land, regardless of ownership, shall be examined to the extent that a lot or parcel is either ‘suitable for farm use’ or ‘necessary to permit farm practices to be undertaken on adjacent or nearby lands’ outside the lot or parcel.” OAR 660-033-0030(3). Relating the profitability of farm related activity solely to the activity on the subject property places undue weight on profitability. The board of commissioners improperly weighed the consideration of profitability of the subject property operating independently.

Staff notes that the applicant, in their initiation of remand materials has not yet provided additional testimony to address the remanded issue area summarized above. Staff anticipates additional information may be submitted prior to or at the public hearing for Board consideration, or potentially during an open record period, should the Board choose to leave the written record open. Any materials received by the applicant ahead of the public hearing will be timely incorporated into the official record.

B. Findings related to the source of feed for farm uses involving animals.

The final opinion and order provides the following guidance:

(pg. 41) ...the board of commissioners' interpretation is not supported by the text of OAR 660-033-0020(1)(a)(B) or ORS 215.203(2)(a), both of which are silent as to the source of the feed that is necessary to sustain animals involved in farm uses.

Whether livestock, poultry, and equines are sustained with forage grown on-site or feed imported from off-site, their feeding, breeding, management, sale, stabling, and training potentially qualify as farm uses. The board of commissioners misconstrued OAR 660-033-0020(1)(a)(B) or ORS 215.203(2)(a) in concluding that land is suitable for farm uses involving animals only if sufficient feed can be grown on-site.

(pg. 42) It may be that, even if feed is imported from off-site, the subject property is not suitable for the feeding, breeding, management, and sale of livestock and poultry or the stabling or training of equines for the primary purpose of obtaining a profit in money, given the factors listed in OAR 660-033-0020(1)(a)(B). However, the board of commissioners did not reach that conclusion. On remand, the county will have an opportunity to evaluate the testimony that 710 properties cites through the proper lens and reach its own conclusion.

Staff notes that the applicant, in their initiation of remand materials has not yet provided additional testimony to address the remanded issue area summarized above. Staff anticipates additional information may be submitted prior to or at the public hearing for Board consideration, or potentially during an open record period, should the Board choose to leave the written record open. Any materials received by the applicant ahead of the public hearing will be timely incorporated into the official record.

C. Findings related to whether the subject property is suitable for farm use as a site for the construction and maintenance of equipment and facilities used for farm activities.

The final opinion and order provides the following guidance:

(pg. 44) Under ORS 215.203(2)(a), “farm use” includes the construction and maintenance of equipment and facilities used for farm activities. Whether those farm activities occur on the subject property or elsewhere, the construction and maintenance of the equipment and facilities used therefore is a farm use. The board of commissioners misconstrued OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that land is suitable for that farm use only if the farm activities occur on the same land.

(pg. 45) ...in determining whether land is suitable for the construction and maintenance of equipment and facilities, the county must consider the factors listed in OAR 660-033-0020(1)(a)(B): soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices. That requirement remains, even though the farm activities for which the equipment and facilities are used occur elsewhere.

Staff notes that the applicant, in their initiation of remand materials has not yet provided additional testimony to address the remanded issue area summarized above. Staff anticipates additional information may be submitted prior to or at the public hearing for Board consideration, or potentially during an open record period, should the Board choose to leave the written record open. Any materials received by the applicant ahead of the public hearing will be timely incorporated into the official record.

D. Findings related to whether retaining the property’s agricultural designation is necessary to permit farm practices on adjacent or nearby lands.

The final opinion and order provides the following guidance:

(pg. 47) ...the county misconstrued OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that it was not required to consider whether the subject property is suitable for farm use in conjunction with nearby or adjacent land. We have previously explained that “[t]he suitability for farm use inquiry must ***consider the potential for use in conjunction with adjacent or nearby land.”

(pg.48)...710 Properties observes that several farmers and ranchers testified that they would not consider incorporating the subject property into their farm operations. It may be that the subject property is not suitable for farm use even in conjunction with nearby or adjacent land. However, the county did not reach that conclusion. On remand, the county will have an opportunity to evaluate the testimony that 710 properties cites through the property lens and reach its own conclusion.

The Court of Appeals opinion included some additional analysis under this remanded issue:

(pg. 14-15) Consequently, we agree with LUBA that consideration of whether land is “agricultural land” under OAR 660-033-0020(1)(a)(C) must include consideration of whether the land’s resource designation and zoning is “necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.”

Having reached that conclusion, we note that we also agree with LUBA that “necessary to permit farm practices on adjacent or nearby agricultural lands” is a “high standard.” ... That is, we do not understand land to be agricultural land under OAR 660-033-0020(1)(a)(C) merely because its designation would merely be “useful” or “desirable” for nearby farm practices. Rather, for land to be agricultural land under OAR 660-033-0020(1)(a)(C), that land, considering its resource designation and zoning, must truly be necessary to adjacent and nearby farm practices.

Staff notes that the applicant, in their initiation of remand materials has not yet provided additional testimony to address the remanded issue area summarized above. Staff anticipates additional information may be submitted prior to or at the public hearing for Board consideration, or potentially during an open record period, should the Board choose to leave the written record open. Any materials received by the applicant ahead of the public hearing will be timely incorporated into the official record.

E. Findings related to impacts on surrounding land use in accordance with comprehensive plan policies and zoning ordinances, specifically, water, wastewater, and traffic impacts on surrounding agricultural lands and the agricultural industry.

The final opinion and order provides the following guidance:

(pg. 73-74)...we agree with Redside that the findings that the increase from 24 to 71 dwellings will have no greater water, wastewater, or traffic impacts on surrounding agricultural lands and the agricultural industry, and the findings relying on the distance between the subject property and surrounding agricultural lands, are inadequate.

While the fact that the subject property is located on a plateau might mitigate some impacts on surrounding agricultural lands and the agricultural industry, it is not clear how that fact will mitigate any water, wastewater, or traffic impacts. The county must consider the evidence of impacts on surrounding agricultural lands vis-à-vis water, wastewater, and traffic.

Staff notes that the applicant, in their initiation of remand materials has not yet provided additional testimony to address the remanded issue area summarized above. Staff anticipates additional information may be submitted prior to or at the public hearing for Board consideration, or potentially during an open record period, should the Board choose

to leave the written record open. Any materials received by the applicant ahead of the public hearing will be timely incorporated into the official record.

IV. RESOLVED ISSUES AND PUBLIC COMMENT

The following are issues that have been resolved by LUBA or were not included in the remand and therefore cannot be considered by the Board in its decision:

- Use of and reliance on site-specific soils assessment
- Adequacy of the Applicant's site-specific soils assessment
- Use of profitability/capital costs in determining "suitable for farm use"
- Application of the Reasonable Farmer test
- That the Board's analysis was not based on, nor required to be based on a "commercial-scale" standard
- That the Board did not give inappropriate weight to "profitability," in analyzing the factors listed in OAR 660-033-0020(1)(a)(B).
- Denying 1000 Friends' argument concerning preservation of agricultural land in large blocks
- That the Board included an appropriate finding concerning traffic impacts that the small amount of traffic associated with the proposed change will not prevent farm practices associated with area farm uses of growing hay and grazing livestock from occurring in the area
- Consistency with ORS 215.788 and DCCP Provisions (sustaining use of quasi-judicial process, instead of requiring legislative process to redesignate and rezone the property)
- Goal 14 issues (orderly and efficient transition from rural to urban land uses)

Staff has received a number of public comments since the Notice of Public Hearing was mailed. All comments received as of the date of this memo are uploaded to the record. To the extent comments are received after the date of this memo, staff will enter into the record in a timely manner.

V. NEXT STEPS AND TIMELINE

Following the hearing the Board may choose to:

- Continue the hearing to a date and time certain;
- Close the oral portion of the hearing and leave the written record open to a date and time certain;
- Close the hearing and commence deliberations; or
- Close the hearing and schedule deliberations for a date and time to be determined.

Staff notes that a final County decision on the remand is required within 120 days of the date the applicant initiates the remand. The applicant initiated the remand on June 26, 2024; therefore, a final County decision is due no later than October 24, 2024.

Attachment(s):

Attachment A: Final Opinion and Order, LUBA No. 2023-006 and 2023-009

Attachment B: Oregon Court of Appeals Opinion