

City Council Issue Summary

Subject: Consider a request to accept review of Hearings Officer's decision on PLCUP20220284 and PLCUP20220285, approval of two Conditional Use Permits for a commercial development on the corner of Brosterhous Road and Murphy Road.

Staff Member, Department: Heidi Kennedy, Senior Planner, Community and Economic Development

Meeting Date: 2/1/2023

Action(s) Required:

- | | | |
|--|---|---|
| <input type="checkbox"/> Consent Agenda | <input type="checkbox"/> Ordinance First Reading | <input type="checkbox"/> Public Hearing |
| <input type="checkbox"/> Information/Direction | <input type="checkbox"/> Ordinance Second Reading | <input type="checkbox"/> Resolution |
| <input checked="" type="checkbox"/> Motion | | |

Recommended Motion:

I move to decline review of the appeals of PLCUP20220284 and PLCUP20220285.

Issue / Council Decision & Discussion Points:

- Staff seeks Council direction on the appeals of the Hearings Officer's decisions to approve two Conditional Use Permits related to a commercial development on the southwest corner of Brosterhous Road and Murphy Road.
- The appellants filed an appeal during the 12-day appeal period after the issuance of the Hearings Officer's decision.
- The Development Code requires the appellant(s) to provide the following information to assist the Council in deciding whether to hear an appeal of a Hearings Officer decision (BDC 4.1.1120.A):
 - a) *How the appeal presents issues that have significant public policy or community-wide implications for the City, as opposed to more limited issues which primarily*



involve the directly affected property or persons involved in the land use decision being appealed.

b) Why it is necessary or desirable for the City Council to review these issues; and why the issues cannot be adequately and fairly reviewed by the Land Use Board of Appeals.

- The appeal as presented does not align with these considerations. This is a site-specific development application that does not have city-wide implications. To the extent there are public policy implications about Conditional Use Permits and what uses are allowed in particular locations or zoning designations, they are not issues that can be resolved through an appeal of this development application, which is governed by the criteria in place at the time of the application. The number of community members registering their support or opposed to a particular development application is not the same as having community-wide implications or public policy issues. There is no apparent necessity for the Council to review these issues or interpret the meaning of a specific provision of the development code. The Hearings Officer Decision can be appealed to and adequately reviewed by the Land Use Board of Appeals (LUBA). LUBA is an impartial decision maker with specialized expertise that can provide all parties a fair, neutral forum with an established, efficient process to adjudicate an appeal.
- The 36-page appeal document contains lengthy and complicated arguments related to the application, essentially restating issues and arguments before the Hearing Officer. It does not, however, identify why Council rather than LUBA should decide those issues. Contrary to the statement in the appeal, in a conditional use appeal Council does not decide “the applicable approval standards for all future conditional use permits”. In a quasi-judicial application, the issues are decided on the record before the decision-maker and the facts of the particular case. The criteria in the Development Code for a conditional use permit are generally applicable to all conditional uses, and are not specific for the particular uses at issue in this application. If Council chose to hear this appeal, Council would be applying the criteria in the Development Code for the proposed uses, but would not necessarily be interpreting the criteria in a way that would guarantee deference at LUBA, when Council’s decision is appealed to LUBA.
- On January 25, 2023 the applicant filed a document responding to the Notice of Appeal they identify as a Motion to Dismiss and Alternative Motion to Strike. Both the 36-page appeal document and the applicant’s January 25 response are highly unusual in this context, where the only decision before Council is whether to hear the appeal. While the documents, taken together, demonstrate the potential complexity of the arguments the parties may make, they do not present any compelling reasons for Council to hear the appeal. The issues raised by the parties are better resolved at LUBA, if any party wishes to pursue an appeal. Both the Notice of Appeal and the applicant’s January 25 response are included for Council’s information.

- If Council accepts review of the appeal, it would be extremely difficult to issue a final local decision prior to the expiration of the 120-day review period without the applicant granting an extension, or without scheduling special hearings, given the minimum notice requirements for an appeal. Since the application was approved, the applicant has indicated that they are not inclined to extend the 120-day review period to allow a local appeal. An appeal under such a compressed timeline may involve considerations of off-cycle special Council meetings, the possibility of a mandamus petition in Deschutes County Circuit Court, or both.

Background:

Colvin Oil applied for approval of a commercial development on the southwest corner of Brosterhous Road and Murphy Road. A Hearings Officer public hearing was held on November 18, 2022. The Hearings Officer made a decision on January 4, 2023, to approve all the applications involved in the proposed commercial development with conditions of approval.

On January 17, 2023, the appellants filed appeals of two Conditional Use Permits related to the project. There was not adequate time for the City Council to decide whether to hear the appeals at their January 18, 2023 Council meeting. If the Council does decide to hear the appeal, per Bend Development Code Section 4.1.1145 Hearings on Appeal, mailed notice shall be sent to the appellant and all other parties to the decision at least 20 days prior to any de novo hearing or deadline for submission of written arguments. In addition, it is likely that any Council decision would be appealed to LUBA, regardless of how the City Council would rule on the appeal. The 120-day review period expires on March 7, 2023. Given this deadline, the timelines for notice, and the potential need to draft additional findings, if Council chooses to hear the appeal it is highly likely that one or even possibly two special Council meetings will be required.

Budget and Financial Impacts:

If the 120-day period is not met, the applicant may file a writ of mandamus to move jurisdiction of this appeal to Circuit Court, which would not only remove the Council's decision-making authority, but would have significant financial implications on the Planning Fund through a high likelihood of liability for the applicant's legal fees.

Community Outreach Process and Potential Impacts:

A neighborhood meeting was held by the applicant prior to submittal of the applications. The Hearings Officer held a public hearing on November 18, 2022, to consider the four applications associated with the commercial development. Mailed notice of the hearing was sent to the Neighborhood Association land use chair and the property owners within 500 feet. Land use action signs for all four applications were posted on the Brosterhous Road and Murphy Road frontages.

Department Director Review: Colin Stephens

Financial Review: Aaron Rivera

Legal Review: Ian Leitheiser

Attachments:

- Appeal Application
- Applicant's Motion to Dismiss and Alternative Motion to Strike
- Hearings Officer Decision