



City of Bend

ISSUE SUMMARY

MEETING DATE: February 24, 2016

SUBJECT: Type III Quasi-Judicial General Plan Map Amendment to change the designation of 0.80 acres of property from Public Facilities (PF) to Commercial Limited (CL). City File PZ 15-0876.

STAFF MEMBER: Amy Barry, Senior Planner
DEPARTMENT: CDD

ACTION REQUIRED:

- Motion
- Public Hearing Date:** February 24, 2016
- Ordinance 1st Reading Date:
- Ordinance 2nd Reading Date:
- Resolution (*roll call vote required*)
- Information/Direction
- Consent Agenda A (*adopted by motion*)

ADVISORY BOARD/COMMISSION

RECOMMENDATION:

- Approval
- Denial
- None Forwarded
- Not applicable

Comments: The Hearings Officer held a public hearing on this application and issued a recommendation that the City Council deny the proposed General Plan Map amendment of the subject property from PF to CL.

STAFF RECOMMENDATION: Staff recommends that the City Council hold a public hearing and deliberate on the proposed General Plan Map amendment to change the designation of the subject property from PF to CL.

RECOMMENDED LANGUAGE FOR MOTION TO DENY: I move to direct staff to prepare a Final Order for First Reading on March 2, 2016, to deny the proposed General Plan Map amendment based on City Council findings to be drafted consistent with the direction provided in its deliberations.

RECOMMENDED LANGUAGE FOR MOTION TO APPROVE: I move to direct staff to prepare an Ordinance for First Reading on March 2, 2016, to approve the proposed General Plan Map amendment based on City Council findings to be drafted consistent with the direction provided in its deliberations.

POSSIBLE ALTERNATE MOTION: I move to continue the hearing to accept written responses to new evidence presented at today's hearing to _____, which the applicant may respond to with written argument only by _____, and to continue deliberations to _____, at which time Council will make a decision on the proposed General Plan Map amendment and give direction to staff to prepare findings consistent with its deliberations.

Project/issue relates to:

Council Goals and Priorities

Bend 2030 Vision

Not Applicable

BACKGROUND AND DISCUSSION: On October 2, 2015, Bend-La Pine Schools initiated a Type III Quasi-judicial application to change the General Plan Map designation of the subject property (Troy Field) from PF to CL. On December 16, 2015, the Hearings Officer held a public hearing on the proposed map amendment. Approximately 100 public comments were received and numerous people testified at the hearing. Most comments were in opposition to the proposed amendment, although a few were neutral or in support. Petition signature logs opposing the proposed amendment were also submitted with several hundred signatures, as well as the link to an online

petition in opposition to the proposal. The record was left open for two weeks for additional comments, and an additional week for response to comments. The applicant waived their final argument and the record closed on January 11, 2016.

On January 29, 2016, the Hearings Officer issued a decision with a recommendation to the City Council for denial of the proposed amendment. The Hearings Officer noted that the City Council possesses a great deal of flexibility and deference in the interpretation of its development code and General Plan under ORS 197.829 and *Siporen v. City of Medford*, 349 Or. 247 (2010). Under prior Oregon law, the “public need” requirement was a case law criterion; now it is purely a requirement of local law, so that when a City Council interprets local law, its interpretation is entitled to deference on review. *Neuberger v. City of Portland*, 288 Or. 155, 170 (1979); *Don Gruener v. Klamath County*, 57 Or. LUBA 585 (2008). The Hearings Officer found that it is possible to interpret two of the review criteria in at least two legally defensible ways; each having a good prospect of earning the deference mandated by ORS 197.829. For that reason, the Hearings Officer offered a twofold set of findings for those two standards, one supporting a finding of approval, and an alternative supporting denial.

The Hearings Officer found that the applicant met the burden of proof with respect to all the other applicable criteria. Under the Bend Development Code (BDC), for a site-specific plan amendment that requires and alteration of the Bend Area General Plan by action of the City Council, it is processed through the Type III quasi-judicial proceeding where the initial Hearings Body (the Hearings Officer) makes a recommendation to the City Council for a final decision (BDC Section 4.1.427). Because the proceeding before the City Council will be *de novo*, the City Council will not only have the ability to reject the Hearings Officer’s alternative findings, but also the ability to adopt findings of approval or denial that are different from what the Staff or the Hearings Officer have presented. If the Council rejects the Staff Findings, and wishes to deny the application on other grounds it is not bound to adopt the alternative findings offered by the Hearings Officer, provided its findings are supported by the applicable criteria and supported by the record.

ISSUE / COUNCIL DECISION & DISCUSSION POINTS: The two subjective standards at issue are: 1) BDC 4.6.300.B.2 which implicates the Preface and Purpose statements of the General Plan requiring the applicant to show a public need and benefit for the Plan Amendment, and 2) BDC 4.6.300.B.4 which requires the applicant to provide evidence of a change in the neighborhood or community that justifies the Plan Amendment. The full preface of the General Plan and BDC 4.6.300 are attached as Exhibit D.

Under *Siporen*, *supra*, “when a local government plausibly interprets its own land use regulations by considering and then choosing between or harmonizing conflicting provisions, that interpretation must be affirmed...unless the interpretation is inconsistent with all of the “express language” that is relevant to the interpretation, or inconsistent with the purposes or policies underpinning the regulations....To the extent that the interpretation is directed at a single term or statement, that means determining whether the interpretation plausibly accounts for the text and context of the term or statement. But, to the extent that the interpretation is directed at multiple statements that may be in conflict, the inconsistency determination is a function of two inquiries: (1) whether the interpretation in fact is an interpretation, *i.e.*, a considered determination of what was intended that plausibly harmonizes the conflicting provisions or identifies which ones are to be given full effect; and (2) the extent to which the interpretation comports with the “express language” of the relevant provisions (including, necessarily, those provisions that, according to the interpretation at issue, are to be given full effect). *Id.* At 262.

From the Hearings Officer’s Decision:

Summary of Conclusions of Law (Bottom of page 6-8):

The alternative findings for each of these criteria are discussed more fully in their respective sections in the Hearings Officer decision. For this summary, the Hearings Officer offers reasons why the City Council may wish to depart from the Staff Findings for these two criteria and choose to deny the application.

BDC 4.6.300.B.2

The standard at issue for this criterion comes from language in the General Plan that requires proponents of a Plan Amendment “to demonstrate a public need and benefit for the change.” The standard is two pronged, requiring both a “need” and a “benefit.” This standard is similar to plan amendment criteria in other jurisdictions. However, as the applicant points out in the Third Supplemental Burden of Proof, those other jurisdictions also require the applicant to show that the subject property “best meets” the identified need. That type of nuanced language applicable to the need and benefit analysis is not present in the Bend General Plan. Rules of statutory construction forbid an interpretation that would add the “best meets the need” element into the consideration required by BDC 4.6.300.B.2. ORS 174.010.

What this means is that the General Plan’s “public need and benefit” standard can be interpreted to be a very weak and subjective analysis that becomes nearly meaningless as a standard. If almost any asserted need or benefit will suffice to sustain a finding of approval under this standard, then the standard becomes of little value and the determination will merely blow in the wind subject to other unspoken considerations. More importantly, such an approach virtually forecloses any weighing process that takes account of needs and benefits that may be lost through the map change and focuses only on the potential minor gains of the new map designation. That result would be particularly unfortunate here because the record contains ample evidence, which is essentially uncontested, that Troy Field already provides for multiple highly valued public needs and those benefits are realized over a substantial number of days each year by multiple individuals and groups.

Here, the applicant’s identified needs and benefits can be boiled down as follows: 1) Troy Field is no longer needed for school use, 2) the District has identified it as surplus property, and 3) the District feels that fulfilling its fiduciary duty to the District and thereby the students of the District is a sufficient public benefit. While these are laudable objectives, the Hearings Officer finds they are remote from the goals of the General Plan and are not tied to a land use purpose. The District has changed its priorities for Troy Field and now wishes to liquidate the property. Here, in applying the “public need and benefit” standard, the question that must be asked is whether the same argument would be accepted if the applicant were a publicly traded company to which some broad benefits to shareholders living in Bend might accrue through the same type of map amendment and subsequent sale and profit from the property. Approving the proposed map amendment by interpreting BDC 4.6.300.B.2 to require only a generalized and modest showing of public need and benefit invites future difficulties in fairly applying this standard.

BDC 4.6.300.B.4

The standard for this criteria requires that the applicant show “Evidence of change in the neighborhood or community” or a mistake or inconsistency. The applicant is not arguing that a mistake or inconsistency is the reason for the map amendment. The applicant’s stated reason is that the neighborhood and community have changed because the District’s need for Troy Field has changed – mostly because District students no longer directly use the field for school based recreation or exercise.

The Hearings Officer's concern with regard to the application of this criterion is similar to that expressed above. If the term "change" is interpreted too liberally, it could turn an already subjective standard into a meaningless one. At least one opponent argued that to satisfy the standard any analysis should look at the land itself and the surrounding neighborhood from a land use planning perspective. That argument has some merit. If the term "change" as used in BDC 4.6.300.B.4 is interpreted to allow significant weight to be placed on the "change" in the property owner's desired use of the property, the interpretation risks ignoring the "neighborhood and community" focus of the standard.

The balance of the Hearings Officer decision relies heavily on the findings in the Staff Recommendation to the Hearings Officer. Where the Hearings Officer found additional findings to be necessary, a "Hearings Officer's Finding" was added. If no "Hearings Officer's Finding" section is present, then there was no relevant opposition testimony or evidence present in the record and the Staff Findings are sufficient to support approval.

An abbreviated version of the Hearings Officer's Decision is attached as Exhibit C, to aid the Council's review of the key issues. It is not intended as a substitute for review the Hearings Officer's Recommendation or the Staff Findings and does not change the content. It is intended as a document that organizes the issues together to aid the reader's understanding of the issues.

CURRENT YEAR BUDGET IMPACTS IDENTIFIED BY DEPARTMENT: None.

FINANCIAL PERSPECTIVE:

Reviewed by: Rosemary Schaefer **Date:** February 11, 2016

LEGAL REVIEW:

Reviewed by: Gary Firestone **Date:** February 10, 2016

COMMUNITY INVOLVEMENT PROCESS: The Hearings Officer held a duly-noticed public hearing on December 16, 2015, to consider proposed amendments. A Hearings Officer recommendation to the City Council was issued on January 29, 2016. Notice for the City Council hearing was mailed on February 1, 2016. A revised notice for a change in location and correction to date and time was mailed on February 10, 2016.

PROS & CONS OF APPROVING THE APPLICATION (THE PROS AND CONS ARE SWITCHED IF THE COUNCIL DECIDES TO DENY THE APPLICATION AS RECOMMENDED BY THE HEARINGS OFFICER):

Pros: The proposed amendment will allow a greater variety of potential development options for the site which are otherwise limited under the PF General Plan designation.

Cons: There is substantial public opposition to the proposal. The community values the land as open space for a variety of public events.

ATTACHMENTS:

Exhibit A – General Plan Amendment Map

Exhibit B – Hearings Officer Findings and Recommendation

Exhibit C – Summarization of Hearings Officer Decision from City Attorney

Exhibit D – BDC 4.6.300 and Bend Area General Plan Preface

The application materials as well as all public comments received to date, can be viewed in ePlans from the City of Bend website. To access ePlans, go to the City of Bend website at www.bendoregon.gov. From the **ONLINE SERVICES** menu at the top of the webpage, select **ePlans (Public Viewer)**. Pop-up blockers may cause issues opening eplans so you may

have to disable your pop-up blocker for this site. Then enter the file number **PZ 15-0876** in the e-plans search bar. If a user name and password are prompted, they are as follows:

User name: publicviewer@bendoregon.gov
Password: public

Public comments can be found in the “Public Comments” folder which is under the “Review Process” folder. Materials submitted by the public as exhibits at the Hearings Officer hearing, and staff and applicant responses to public comments during the extended record can be found in the “Hearings Documents” folder.

□ **PZ-15-0876 TYPE III GENERAL PLAN AMENDMENT BEND-LAI**

- └─  [Site Plan Drawings](#) (1 Files - 0 New)
- └─  [Supporting Docs](#) (19 Files - 0 New)
- └─  [Completeness Check](#)
- └─  [Review Process](#)
 - └─  [Initial Agency Comments](#)
 - └─  [Agency Comments](#) (2 Files - 0 New)
 - └─  [Public Comments](#) (101 Files - 1 New)
- └─  [Outgoing Notice Records](#) (13 Files - 1 New)
- └─  [Hearings Documents](#) (24 Files - 0 New)
 - └─  [Council Hearing](#)
 - └─  [Review & Decision](#) (1 Files - 0 New)
 - └─  [Appeals Documents](#)
 - └─  [Final Drawings](#)