

**ORDINANCE NO. 233
BEFORE THE MALHEUR COUNTY COURT**

**AN ORDINANCE ADDING TITLE 1 CHAPTER 13 TO THE MALHEUR COUNTY
CODE ESTABLISHING THE BORDER REGION REVIEW BOARD; AND
DECLARING AN EMERGENCY**

This matter came before the Malheur County Court on September 6, 2023 and September 20, 2023 for public hearings. The Court being fully apprised of the testimony, records and files in this matter finds:

WHEREAS, the hearings were properly noticed according to the requirements of ORS Chapters 197; and

WHEREAS, on September 25, 2021, Senate Bill 16 (Chapter 671, 2021 Oregon Laws), which allows counties within the Eastern Oregon Border Economic Development Region to rezone up to 200 acres of land from exclusive farm use to residential uses, became effective and was codified as the Notes Section 1 to 4 of Oregon Revised Statute (ORS) 215.700; and

WHEREAS, on July 1, 2023, Senate Bill 70 amended Senate Bill 16 to amend the definition of high value farmland; and

WHEREAS, decisions under Chapter 671, Oregon Laws 2021, are not land use decisions and therefore do not require a Post Acknowledgment Plan Amendment Notice to the Department of Land, Conservation, and Development; and

WHEREAS, this ordinance is necessary to legislatively implement chapter 671, Oregon Laws 2021 and the amendments;

NOW, THEREFORE, THE MALHEUR COUNTY COURT ORDAINS AS FOLLOWS:

Adoption of Malheur County Code Title 1 Chapter 13

CHAPTER 13

BORDER REGION REVIEW BOARD

SECTION:

- 1-13-1: Creation of Border Region Review Board
- 1-13-2: Purpose
- 1-13-3: Staff and Review Board Duties and Responsibilities
- 1-13-4: Review Board Public Hearing Procedures
- 1-13-5: Border Region Housing (BRH) Zone

1-13-1: Creation of Border Region Review Board: The County Court hereby creates the Border Region Review Board, hereinafter referred to as the “Review Board”, pursuant to Section 3 of the Note following ORS 215.700 as amended. The Note following ORS 215.700 provides limited flexibility to rezone land to allow up to 100 single-family homes on not more than 200 acres of relatively low-quality agricultural land currently zoned for Exclusive Farm Use (EFU) or Exclusive Range Use (ERU) within the Eastern Oregon Border Economic Development Region (Border Region).

1-13-2: Purpose: The Review Board is established to hold fair and impartial public hearings and to render binding opinions related to the implementation of the Note section of ORS 215.700, including approval or denial of rezoning applications and related partitions as set forth in Section 1-13-5 of this chapter. The Review Board may also make determinations of GIS mapping errors identified during its review and decision-making process.

1-13-3: Staff and Review Board Duties and Responsibilities

A. **Planning Director Responsibilities:** The Malheur County Planning Director or designee shall serve as staff to the Review Board and shall assume the following responsibilities:

1. Reviewing rezoning and related partitioning applications for completeness consistent with Border Region Housing (BRH) Zone requirements.
2. Analyzing rezoning and partitioning applications and drafting staff reports to the Review Board recommending approval, approval with conditions, or denial of applications based on the requirements of the BRH Zone.

3. Reviewing and approving land division applications that comply with Title 7 Subdivisions and Land Partitioning, subject to concurrence by the Review Board.
 4. Ensuring that public notices, staff reports, and final decisions are made available to the public pursuant to Section 1-13-4 of this chapter.
 5. Coordinating with affected state agencies and county departments in the review process.
 6. Drafting findings in support of Review Board final opinions subject to approval by the Review Board chair.
 7. Making changes to the official Zoning Map consistent with Review Board opinions.
 8. Coordinating with the County tax assessor to ensure that land divisions approved pursuant to Article Q and Title 7 Subdivisions and Land Partitioning are recognized in tax assessor maps and are no longer eligible to receive farm tax deferral.
 9. Rendering opinions on compliance with county land division standards.
 10. Advising the Review Board regarding claims of error regarding GIS overlay maps where relevant to rezoning criteria and maintaining a record of Review Board opinions regarding such mapping errors.
- B. Review Board Responsibilities: The Review Board shall have sole responsibility for rendering opinions regarding the final approval of rezoning applications from Exclusive Farm Use (EFU) or Exclusive Range Use (ERU) to the Border Region Housing (BRH) Zone pursuant to ORS 215.700 and this chapter. The Review Board's duties include the fair and impartial:
1. Review of rezoning and land division applications and staff reports prior to holding public hearings.
 2. Conduct of public hearings in the manner prescribed in Section 1-13-4 of this chapter.
 3. Rendering of opinions regarding the compliance of rezoning applications with Section 1-13-5 (BRH Zone) based on evidence in the public hearing record.

4. Review of related land divisions to ensure consistency with approved rezoning applications.
5. Establishment of rules of procedure and decorum within the framework established by ORS 215.700 and this chapter.
6. Ensuring that minutes are reviewed and maintained for all Review Board meetings and public hearings.
7. Making determinations of GIS mapping error.

1-13-4: Review Board Public Hearing Procedures: The Review Board is analogous to the Planning Commission in its quasi-judicial review and decision-making role – except that Review Board “opinions” regarding the approval or denial of rezoning and related partitioning applications pursuant to the Note of ORS 215.700 are not “land use decisions” as defined in ORS 197.015(10) and cannot be appealed to the Malheur County Court or to the Land Use Board of Appeals.

A. **Completeness Review:** For a rezoning and land division application to be considered by the Review Board, the Planning Director shall find that the application meets the eligibility requirements set forth in Section 1-13-5 (BRH Zone) and Title 7 Subdivisions and Land Partitions, includes an accurate site plan, and necessary technical materials identified on the BRH Rezoning and Partition application form. The application shall be deemed complete at least 30 days prior to the hearing date.

1. The applicant shall be responsible for preparing a complete rezoning and land division application that provides the Review Board with sufficient information to render an informed opinion regarding approval, approval with conditions, or denial of rezoning and partitioning application.
2. The Planning Director may determine that all required information is not needed in certain circumstances and may assist the applicant in accessing the required information.
3. Upon making such a completeness determination, the Planning Director shall schedule a public hearing before the Review Board and notify the applicant of the scheduled hearing date.

B. **Public Notice:**

1. **Individual Mailed Notice:** The Planning Director or designee shall be responsible for sending public notice of the forthcoming hearing to all property owners within 750 feet of the rezoning or land partition area.

- a. The notice shall state:
 - (1) The location of the property subject to rezoning and land division;
 - (2) The place, time and location of the public hearing;
 - (3) The review criteria applicable to the rezoning and land division decision;
 - (4) When and where the staff report will be available for public review; and
 - (5) That testimony must be directed to applicable review criteria.
 - b. The notice shall be mailed at least twenty (20) days before the scheduled public hearing.
2. Published Notice: In addition to notice by mail, notice of hearing shall be published in a newspaper of general circulation in the County at least twenty (20) days prior to the hearing.
- C. Staff Report: The Planning Director shall prepare a staff report addressing relevant review criteria and development standards, and recommending approval, approval with conditions, or denial of the rezoning and land division application. The staff report shall be available to the applicant, the public and the Review Board at least seven (7) days before the scheduled public hearing.
- D. Standing: Anyone may appear before the Review Board and present testimony.
- E. Record: The Review Board shall maintain a record of its proceedings.
1. An electronic audio or video recording of the hearing shall be made.
 2. All exhibits presented shall be marked to show the identity of the person offering the exhibit.
 3. Exhibits shall be numbered in the order presented.
 4. When exhibits are introduced, the exhibit number or letter shall be read into the record.
- F. Disclosure of Conflicts of Interest or *Ex Parte* Contact.

1. If a Review Board member has a pecuniary interest in the outcome of the Board's opinion, the member shall declare a conflict and shall not participate in the hearing proceeding.
 - a. Prior to or at the commencement of a hearing, any party may challenge the qualification of the hearings body, or a member thereof, for bias, prejudice or personal interest.
 - b. The challenge shall be made on the record and be documented with specific reasons supported by facts.
 - c. Should qualifications be challenged, the hearings body or the member shall disqualify itself, withdraw or make a statement on the record of its capacity to hear the application without bias.
2. Prior to rendering an opinion regarding a rezoning or land division proposal, no Review Board member shall communicate directly or indirectly with any party or their representative in connection with any issue involved in a pending hearing except upon notice and opportunity for all parties to participate. Communication between County staff and the hearings body is not an *ex parte* contact. Should such communication – whether written, electronic or oral - occur, the hearings body member shall:
 - a. Publicly announce for the record the substance of such communication; and
 - b. Announce the parties' right to rebut the substance of the *ex parte* communication during the hearing.

G. Conduct of Public Hearings: A hearing shall be conducted as follows:

1. Explanation Of Purpose: The Review Board Chair (or Vice-Chair as appropriate) shall explain the purpose of the hearing and announce the order of the proceedings, including reasonable time limits on presentations by parties.
2. Statement: A statement by the chair regarding pre-hearing contacts, bias, prejudice or personal interest shall be made.
3. Facts Received Outside Of Hearing: Any facts received, noticed or recognized outside of the hearing shall be stated for the record.
4. Challenges: Challenges to the Review Board's qualifications to hear the matter shall be stated and challenges entertained.
5. Applicable Substantive Criteria: The Review Board shall list applicable substantive criteria, explain that testimony and evidence must be directed toward

those criteria or other provisions in Section 1-13-5 (BRH Zone) or MCC Title 7 Subdivisions and Land Partitions that the person believes to apply to the decision.

H. Order of Presentation:

1. Open the hearing
 2. Staff Report
 3. Applicant's presentation (20 minutes maximum)
 4. Proponent Testimony (5 minutes maximum)
 5. Opponent Testimony (5 minutes maximum)
 6. Applicant's Rebuttal (10 minutes maximum)
 7. Staff Comments
 8. Questions from or to the Chair may be entertained at any time at the Review Board's discretion.
 9. Close the hearing
- I. Record Available: The record shall be available for public review at the hearing.

1-13-5: Border Region Housing (BRH) Zone: The Review Board is authorized to approve rezoning to the Border Region Housing (BRH) zone consistent with this section.

- A. Purpose: The Border Region Housing (BRH) zone implements Section 2 of ORS 215.700, which allows limited rural residential development on relatively poor agricultural land in the Eastern Oregon Border Economic Development Region (Border Region).
- B. Applicability and Review Authority
1. Applicability: The BRH zone may only be applied to qualifying privately-owned land zoned for Exclusive Farm Use (EFU) or Exclusive Range Use (ERU) outside of urban growth boundaries and within the Border Region.
 2. Review Authority. The Review Board appointed by the Malheur County Court shall have the sole authority to review qualifying rezoning applications from an EFU or ERU zone to the BRH zone.

- a. Review Board opinions may only be rendered after the required public hearing and shall be supported by findings demonstrating compliance with the provisions of this Chapter.
 - b. Review Board opinions are not “land use decisions” and cannot be appealed to the Malheur County Court or to the Oregon Land Use Board of Appeals (LUBA).
 - c. Review Board opinions are not subject to the agricultural or urbanization goals and policies of the Malheur County Comprehensive Plan.
3. Review Procedure. Section 1-13-4 of this chapter establishes Review Board decision-making authority and public hearing review procedures.
- C. Permitted Uses. The following uses may be permitted outright in the BRH zone subject to the standards set forth in Subsections D-J below:
1. Single-family residential dwellings.
 2. Farm uses, excluding feed lots.
 3. Structures accessory to primary residential uses.
- D. Application Eligibility Thresholds. The statutory and Review Board eligibility standards set forth in Subsection E and F below should be met before the Planning Director accepts an application for rezoning to the BRH Zone.
- E. Statutory Eligibility Requirements. To be eligible for consideration by the Review Board, an area proposed for rezoning:
1. Shall be privately owned and zoned Exclusive Farm Use (EFU) or Exclusive Range Use (ERU) and located outside an urban growth boundary.
 2. Shall be composed of at least two acres (87,120 square feet) that are not predominantly composed of prime, unique, or Class I-III agricultural soils when either irrigated or not irrigated, as classified by the National Resources Conservation Service (NRCS).
 3. Shall not be classified as high value farmland as described in ORS 195.300(10), excluding lands described in ORS 195.300(10)(c)(B) and (10)(f)(E).
 4. Shall not be within a designated critical groundwater area per ORS 537.730-740 or within an area where groundwater withdrawals are restricted by the Oregon Water Resources Commission.

5. Has not been employed for farm use in the prior three years prior to application submission as demonstrated by aerial photographs, tax records, affidavits from the applicant and abutting property owners, or other substantial evidence.
 6. Does not have an irrigation water right (i.e., the property is not within the place of use for a permit, certificate or decree for the use of water for irrigation issued by the Water Resource Department).
 7. Has not, in the ten years prior to application submission, been assessed for property tax purposes as:
 - a. Open space land under ORS 308A.300 to 308A.330;
 - b. Riparian habitat under ORS 308A.350 to 308A.383;
 - c. Wildlife habitat under ORS 308A.403 to 308A.430; or
 - d. Having a conservation easement under ORS 308A.450 to 308A.465.
 8. Should be within a rural fire protection district established under ORS 478.010 to 478.100 and shall meet all applicable fire prevention code requirements.
 9. Should not be within the 100-year floodplain as defined on Federal Emergency Management Agency maps and referenced in Malheur County Title 5, Chapter 2 – Flood Control.
 10. If approved, would not exceed the 200-acre cumulative maximum based on (a) the date the application was found complete and assuming that other complete applications will be approved by the Review Board; and (b) records maintained by the Planning Department showing the number, date and acreage of rural dwellings approved under this Chapter.
- F. Review Board Application Completeness Review. The Planning Director should not accept an application for rezoning or land division as complete for review purposes unless the application meets all Section 1-13-5-E eligibility requirements, and the following Review Board eligibility requirements are met:
1. If a land division is required, the application must include sufficient information for the Planning Director to determine that Malheur County Title 7 Subdivisions and Land Partitioning substantive standards have been or can be met.
 2. To maximize the number of rural dwellings produced and the number of benefitting property owners, while distributing rural dwellings in different areas of the Border Region:

- a. No single application may result in more than 10 (ten) total homesites on contiguous land covering a maximum of 20 (twenty) acres.
 - b. No single property owner, either directly or indirectly as a member of an investment or development group/partnership, may apply for rezoning that would allow more than 10 (ten) cumulative homesites covering a maximum twenty (20) acres.
 - c. Subsection (2)(a) and (2)(b) requirements may be waived by the Review Board after January 2, 2026, if fewer than 100 rural homesites have been approved pursuant to this chapter.
3. If the applicant claims that all or part of the proposed rezoning area has lower-quality soils than indicated on applicable NRCS maps on file with the Planning Department, the applicant shall provide a soils assessment prepared by a certified soil scientist documenting the agricultural productivity classification of soils found in the proposed rezoning area, pursuant to ORS 215.710(5)(b).

G. Application Forms, Fees, and Map Changes.

1. Application Forms. The County Planning Director shall maintain a form listing all required information necessary for the Review Board to make an informed decision regarding the rezoning, land division and home construction on land subject to the provisions of this Chapter.
2. Fees. The County Court shall establish a fee schedule to cover the costs of staff administration and participation in Review Board activities. The fees can be periodically reviewed and amended by motion and minutes of the County Court and with input from the Review Board. At the time of adopting this chapter the fees are: BRH Zone Research Fee: \$250.00; BRH Zone Application Fee: \$500.00.
3. Claims of Mapping Error. The County Planning Department relies on a series of GIS maps for determining application thresholds and where certain review criteria apply. Because mapping errors occasionally occur, the following process is available to correct them:
 - a. If the applicant or any party to a review proceeding has reason to believe that a map is incorrect with respect to their property, they may provide information to this effect to the Planning Director.
 - b. Based on the recommendation of the Planning Director and supported by substantial evidence, the Review Board may determine that a change to one or more GIS maps is justified.

- c. The Planning Director shall maintain a record of formal map changes approved by the Review Board.

H. Rezoning and Land Division Review Criteria. In addition to meeting the statutory and Review Board threshold and locational standards found in Section 1-13-5-E, the applicant shall be responsible for demonstrating to the satisfaction of the Review Board that the proposed rezoning of land meets all the statutory and county criteria set forth in Subsections 1 and 2, below.

1. Statutory Criteria:

- a. The area proposed for rezoning has not been actively farmed for three years prior to application submission as demonstrated by aerial photographs, tax records, affidavits from the applicant and abutting property owners, or other means acceptable to the Review Board.
- b. The area proposed for rezoning is not viable for reasonably obtaining a profit through farm use. Expert testimony from experienced farmers, the Farm Bureau or the Oregon State University Extension Service may be considered by the Review Board in making its determination.
- c. The property owner has agreed to a condition of rezoning approval to sign and record in the county deed records the following irrevocable deed restriction in the form prescribed by the county acknowledging the protected rights of farm, forest and rangeland practices in the area and prohibiting the owner and the owner's successors in interest from pursuing a cause of action or claim of relief alleging an injury from any farming, forest or rangeland practices if no claim or action is allowed under ORS 30.936 or 30.937 or otherwise protected by law as a farming, forest or rangeland practice.

The property herein described is situated in or near a resource (farm or ranch) zone, where the intent is to encourage agricultural use and minimize conflicts with nonresource uses. Nonresource residents may be subjected to common, customary and accepted farm and ranch practices that are conducted in accordance with Federal and State laws but ordinarily and necessarily produce noise, dust, smoke and other impacts. The grantees, including their heirs, assigns and lessees, by the recording of this statement, and in return for allowing a nonresource dwelling on this property, hereby accept the potential impacts of accepted farm and ranch practices as normal and necessary and part of the risk of establishing a dwelling in this area, and grantee acknowledges the need to avoid activities that conflict with nearby resource uses.

- d. The proposed rezoning, if approved, would not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use.
 - i. To address this criterion, the applicant shall describe the accepted farming practices on abutting agricultural properties and explain why the proposed residential use will not force a significant change in such practices.
 - ii. In addition to the signed non-complaint agreement, the Review Board may consider geographic buffers between proposed dwellings and actively farmed agricultural land, such as intervening rural development, stream corridors, slope differentials, or dedicated roads as evidence towards meeting this this criterion.
 2. County Review Criteria: The Planning Director has certified that the proposed land division, if necessary, complies (or will comply with conditions of approval) with relevant provisions of Title 7 Subdivisions and Land Partitioning of the Malheur County Code.
- I. Development Standards. The following dimensional standards apply to proposed single-family dwellings and accessory structures located within the BRH zone.
1. Dimensional Standards. The following dimensional standards shall apply to single-family residential dwellings in the BRH zone.
 - a. Density. The minimum and maximum density in the BRH zone shall be one unit per two (2) acres.
 - b. On-Site Sanitary Facilities. All septic tanks, drain fields and wells shall be located on the same parcel or lot as the residential dwelling.
 - c. Above Ground Structure Setbacks:
 - i. No building or sight obscuring fence shall be closer than forty (40) feet from a street or road right-of-way line, fifteen (15) feet from any other property line or twenty (20) feet from any major irrigation canal right of way.
 - ii. No sight obscuring fence exceeding three (3) feet in height shall be placed within the forty (40) foot street setback, also within this setback, shrubbery other than trees shall be maintained at heights not exceeding three (3) feet.

EMERGENCY: This ordinance is immediately necessary for the preservation of the public peace, health and safety; an emergency is hereby declared to exist and this ordinance shall take effect immediately upon its passage.

EFFECTIVE DATE: September 20, 2023.

Malheur County Court Judge Dan P. Joyce

Malheur County Commissioner Ron Jacobs

Malheur County Commissioner Jim Mendiola

ATTEST:

Kim Ross, Recording