



COMMUNITY DEVELOPMENT

HEARINGS OFFICER HEARING - LAND USE: TUMALO SEWER

6:00 PM, TUESDAY, FEBRUARY 22, 2022

Barnes Sawyer Rooms - Deschutes Services Bldg - 1300 NW Wall St - Bend

(541) 388-6575 | www.deschutes.org

AGENDA

MEETING FORMAT

This meeting will be conducted electronically, by phone, in person, and using Zoom.

Members of the public may view the meeting in real time via the Public Meeting Portal at www.deschutes.org/meetings.

Members of the public may listen, view, and/or participate in this meeting using Zoom. Using Zoom is free of charge. To login to the electronic meeting online using your computer, copy this link:

<https://us02web.zoom.us/j/83555019629>

NOTE: Using this option may require you to download the Zoom app to your device.

Members of the public can access the meeting via telephone, dial: 1-346-248-7799. When prompted, enter the following Webinar ID: 835-5501-9629.

Written comments can also be provided to Caroline.House@deschutes.org by 4pm on February 22, 2022 and they will be entered into the record.

PROJECT DESCRIPTION

FILE NUMBER: 247-21-001067-PS

APPLICANT: Tumalo Property Owners Association - Larry Kine

PROPOSAL: Land Use Compatibility Review for an extension of community sewer services, located in the public road right-of-way, to the entire Unincorporated Community of Tumalo.

PROJECT LOCATION: Public Road Right-of-Way

STAFF PLANNER: Caroline House, Senior Planner Caroline.House@deschutes.org / 541-388-6667

RECORD: Record items can be viewed and downloaded from: www.deschutes.org/tumalosewer

PUBLIC HEARING

1. Land Use Compatibility Review for an extension of community sewer services, located in the public road right-of-way, to the entire Unincorporated Community of Tumalo.



Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please call (541) 617-4747.



COMMUNITY DEVELOPMENT

STAFF REPORT

FILE NUMBER: 247-21-001067-PS

APPLICANT: Tumalo Property Owners Association – Larry Kine

REQUEST: Land Use Compatibility Review for an extension of community sewer services, located in the road right-of-ways, to the entire Unincorporated Community of Tumalo.

STAFF CONTACT: Caroline House, Senior Planner
Phone: 541-388-6667
Email: Caroline.House@deschutes.org

DOCUMENTS: Can be viewed and downloaded from:
<https://www.deschutes.org/tumalosewer>

I. APPLICABLE CRITERIA

Deschutes County Code (DCC)

Title 18, Deschutes County Zoning Ordinance

- Chapter 18.04, Title, Purpose, and Definitions
- Chapter 18.16, Exclusive Farm Use Zone (EFU)
- Chapter 18.32, Multiple Use Agricultural Zone (MUA10)
- Chapter 18.52, Surface Mining Zone (SM)
- Chapter 18.56, Surface Mining Impact Area Combining Zone (SMIA)
- Chapter 18.67, Tumalo Rural Community Zoning Districts
- Chapter 18.80, Airport Safety Combining Zone (AS)
- Chapter 18.84, Landscape Management Combining Zone (LM)
- Chapter 18.96, Flood Plain (FP)
- Chapter 18.120, Exceptions
- Chapter 18.128, Conditional Uses

Title 22, Deschutes County Development Procedures Ordinance

- Chapter 22.04, Introduction and Definitions
- Chapter 22.08, General Provisions
- Chapter 22.24, Land Use Action Hearings
- Chapter 22.36 Limitations of Approvals

II. BASIC FINDINGS

LOT OF RECORD: Verification is not required for the requested Land Use Compatibility Review pursuant to DCC 22.04.040(B).

PROPOSAL: The applicant has submitted a State of Oregon Department of Environmental Quality (DEQ) Land Use Compatibility Statement (LUCS) form to the Deschutes County Planning Division. This LUCS form is used by DEQ to determine whether a DEQ permit or approval will be consistent with local government comprehensive plans and land use regulations.

The submitted LUCS form shows the applicant is requesting a new DEQ permit and a DEQ permit modification for Wastewater/Sewer Construction Plan/Specifications for an “extension of service lines in ROW [right-of-way]”. The applicant submitted a written narrative to provide additional information on the proposal and page 2 of the narrative states:

“The requested LUCS is for the installation of transmission lines located entirely within existing public right of way in the Tumalo unincorporated community. Included with the LUCS is a plan set that depicts the anticipated location of the new transmission lines.”

No changes are proposed to the existing wastewater treatment facilities.

PROPOSAL LOCATION/ZONING: Based on the submitted “Laidlaw Sanitary Sewer Master Plan”, the proposed sewer facilities will be located in the following road right-of-ways.

Road Name	Road Ownership	Base Zone ¹
Hopper Road	Public	TuR5 / MUA10
Putnam Lane	Public	TuR5 / MUA10
Tumalo Road	Public	TuR5/TuR/FP/MUA10
Beaver Lane	Public	TuR5
Cline Falls Road	Public	TuR5/TuR/SM/FP
Cook Avenue	Public	TuR/TuC
Bruce Avenue	Public	TuR/TuC
Wood Avenue	Public	TuR/TuC
Strickler Avenue	Public	TuR/TuC
2 nd Street	Public	TuR
3 rd Street	Public	TuR/TuC
4 th Street	Public	TuR/TuC
5 th Street	Public	TuR/TuC
7 th Street	Public	TuR/TuC
8 th Street	Public	TuC
Wharton Avenue	Public	TuR/TuC

¹ TuR = Residential (TuR) District / TuR5 = Residential-5 Acre Minimum (TuR5) District / TuC = Commercial (TuC) District / TuRE = Research And Development (TuRE) District / TuI = Industrial (TuI) District / MUA10 = Multiple Use Agricultural Zone / FP = Flood Plain Zone / EFU = Exclusive Farm Use Zone / SM = Surface Mining Zone

State Highway 20	Public	TuC
Bailey Road	Public	TuR/TuC/TuI/TuRE/TuR5/EFU
OB Riley Road	Public	TuI/SM
Riverview Avenue	Public	TuR/TuC
Pine Lane	Private	TuR/FP
Fir Lane	Private	TuR/FP
Elm Lane	Private	TuR
Juniper Lane	Private	TuR/FP
Cedar Lane	Private	TuR/FP
Birch Lane	Private	TuR/FP
Alder Lane	Private	TuR/FP
Research Road	Public/Private	TuR5/EFU

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on December 17, 2021, to several public agencies and received the following comments:

Deschutes County Building Division, Randy Scheid

NOTICE: The Deschutes County Building Safety Divisions code mandates that Access, Egress, Setbacks, Fire & Life Safety, Fire Fighting Water Supplies, etc. must be specifically addressed during the appropriate plan review process with regard to any proposed structures and occupancies.

Accordingly, all Building Code required items will be addressed, when a specific structure, occupancy, and type of construction is proposed and submitted for plan review.

Deschutes County Environmental Health Department, Jeff Freund

The only input I have for 247-21-001067-PS is to ensure all setbacks are met for any components of the water system (01096) that may be in the area of expansion and that they should contact me if they increase the number of water service connections

Deschutes County Environmental Soils, Todd Cleveland

My comments below are intended to provide information regarding unknown outcomes of the extension of the trunk line.

The Environmental Soils Division has several questions regarding the expansion feeder lines into the core area of Tumalo from the Tumalo Property Owner Association (TPOA) system. There could be impacts to properties within 300' of a "feeder/trunk" line and on an onsite wastewater treatment system. Current rules require that a septic system permit must be denied if sewer (community system) is legally and physically available to a property (OAR 340-071-0160(4)).

- *Will there be a service district or defined service area for the TPOA system?*
- *How will legal availability be determined?*

- *Must facilities within 300' (physically available) connect to the TPOA system.*
- *Can Environmental Soils Division issue construction-installation permits for properties within 300' of the TPOA trunk lines?*

Deschutes County Road Department, Cody Smith

I have reviewed the application materials for the above referenced file number, proposing extension of community sewer services within public road rights of way in the Tumalo Rural Community. Please note that Deschutes County Road Department is presently advertising a request for proposals for the Tumalo Wastewater Feasibility System Study to explore options for community wastewater collection and treatment and options for governance of a community wastewater system, including formation of a sanitation district; the study will include evaluation of the applicant's current system and proposed expansion to determine if the applicant's system can feasibly provide effective service for the greater unincorporated community of Tumalo. Please also note that matters regarding privately-owned wastewater collection systems within public rights of way under the County's jurisdiction are not explicitly addressed in state statutes or administrative rules, leaving it up to the County to regulate these matters under authority granted by ORS 368.036, ORS 374.305, ORS 374.309, and ORS 374.315; this differs from other utility service providers (power, water, gas, communication) that operate within public rights of way under the County's jurisdiction under the provisions of ORS 757, ORS 758, and other state statutes and administrative rules.

Deschutes County Road Department requests that the proposed land use be subject to the following conditions:

- *The applicant shall enter into a revocable license agreement with Deschutes County prior to any construction or operation of the proposed community sewer services within public road rights of way under Deschutes County jurisdiction.*

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the transmittal materials for 247-21-001067-PS for a land use compatibility statement for an extension of community sewer services, located in the public road right of way, to the entire Unincorporated Community of Tumalo. The sewer would be located in the Exclusive Farm Use (EFU) zone and various Tumalo Rural Community zoning districts.

Deschutes County Code (DCC) at 18.116.310(C)(3)(a) states no traffic analysis is required for any use that will generate less than 50 new weekday trips. The proposed land use will not meet the minimum threshold for additional traffic analysis as other than construction the use will not generate any trips except for the occasional service or repair trip.

As the use will utilize public road right of way, the applicant will need to contact the Deschutes County Road Department regarding permit requirements to work in that public right of way. Similarly, the applicant needs to contact the Oregon Department of Transportation (ODOT) regarding whether permits will be needed regarding US 20.

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$4,757 per peak hour trip. As a sewer and/or sewer expansion does not consume road capacity as that term is commonly used and understood, no SDC applies.

Oregon Department of Environmental Quality (DEQ), Lawrence (Larry) Brown

Comments received on December 27, 2021:

As it relates to the extension of Tumalo Property Owners Association community sewer to the entire Unincorporated Community of Tumalo; the Tumalo Property Owners Association will need to submit detailed plans to DEQ in accordance with OAR Chapter 340, Division 52 and obtain DEQ approval for the sewer extension. Additionally, and dependent upon the number of connections based on flow projections, the Tumalo Property Owners Association's WPCF permit would need to be modified and go through a required public notification process

Comments received on February 2, 2022:

Thank you for the opportunity to comment on Mr. Kine's upcoming public hearing (Feb. 22, 2022, at 6 pm) for the proposed expansion/extension of the Tumalo Property Owners Association sewerage system, with the intent to serve the entire Unincorporated Community of Tumalo. I will be out of town that day and unable to attend due to a funeral.

My email below dated December 14, 2021, regarding community systems and legal availability, should be part of the public hearing record.

Comments from Email dated December 14, 2021:

DEQ is aware that the Tumalo Property Owners Association is proposing an expansion of its community across Hwy 20 and that it proposes to provide sewer services to the new members of its community included within the expansion area. DEQ was requested by the County to provide clarification as it relates to the building sewer extension and if the sewer would be considered legally available where an onsite sewage treatment and disposal system permit would be denied according to Oregon Administrative Rule (OAR), Chapter 340-Division 071; specifically, OAR 340-071-0160 (4).

Assuming the local planning department approves the expansion of the planned community, the community sewerage system owned and managed by homeowner associations or association of unit owners would be considered a community wide sewerage system for the newly designated community and considered legally available per OAR 340-071-0160 (4). This assumes the permit for the community sewerage system is successfully modified to include this expansion along with associated plan reviews.

This may result in an encumbrance on all properties within the planned development and would include the expectation that as systems fail or are needing to be replaced/altered/repared that the properties would connect to the sewerage system.

Laidlaw Water District, Dale Peer

I am the District Manager for Laidlaw Water District, and I want to clarify some of the comments in response to the sewer project in Tumalo (247-21-001067-PS). Laidlaw property is addressed off of Bill

Martin Rd. Because ODOT closed off our access from Hwy 20, and we negotiated an easement with Tumalo Irrigation District. Bill Martin Rd. is a gravel public road. The access from Strickler is not a bootlegged paved road. It is a private driveway with an easement agreement between the property owners and Laidlaw in progress of being developed and recorded. There is no dirt road nor will there be one between the well and reservoirs. The access to the well is at the dead end of Strickler, through a recorded easement from the neighboring property.

I suggested to Larry Kine that it was a good idea to have a public meeting before the Hearing so people could post their comments and concerns informed. The other Business owners that are working on trying to get sewer in the Business District (private sewer) had a meeting in October. Tony DeBone was present at that meeting. The notice for that one was by hand delivered notices. To those in that area. So there is a lot of incorrect information being passed around.

One comment states Laidlaw Water District filed the Application based on Larry Kine's development plans. Laidlaw Water District has NO ASSOCIATION with this project. Another comment stated we asked customers to conserve because we were overdrawing our source, this is not correct we asked for conservation because there were several large leaks in customers service lines so our pump could not keep our reservoirs full. Laidlaw Water has ample water rights and source to supply the district. The wells that are going dry that are referenced are shallow. One comment said Laidlaw Water District decided to call itself The Tumalo Home Owners Association. This is NOT TRUE! There is an association called The Tumalo Property Owners Association. Laidlaw Water has NOTHING TO DO WITH IT!

Oregon Department of State Lands (DSL), Jessica Salgado

Wetland Land Use Response WN2021-1348:

Wetland/Waterway/Other Water Features

√ There are/may be wetlands, waterways or other water features on the property that are subject to the State Removal-Fill Law based upon a review of wetland maps, the county soil survey and other available information.

√ The National Wetlands Inventory shows wetland, waterway or other water features on the property.

√ The property includes or is adjacent to a State Scenic Waterway.

Your Activity

√ It appears that the proposed project is within a designated State Scenic Waterway and may require a State Permit.

√ It appears that the proposed project may impact wetlands and may require a State permit.

√ An onsite inspection by a qualified wetland consultant is recommended prior to site development to determine if the site has wetlands or other waters that may be regulated. The determination or delineation report should be submitted to DSL for review and approval. Approved maps will have a DSL stamp with approval date and expiration date.

Applicable Oregon Removal-Fill Permit Requirement(s)

√ A state permit is required for 50 cubic yards or more of fill removal or other ground alteration in wetlands, below ordinary high water of waterways, within other waters of the state, or below highest measured tide.

√ A state permit is required for any amount of fill or removal activity within State Scenic Waterways

Closing Information - Additional Comments

The majority of likely jurisdictional wetlands and waterways within the study area appear to be located near the Deschutes River and its floodplain.

Based on the submitted site plan, it is unclear whether the proposed "sewer expansion for entire unincorporated community of Tumalo" will involve impacts below the ordinary high water line of the State Scenic Waterway (Deschutes River), or if it will involve greater than 50 cy of ground disturbance within state jurisdictional wetlands and waterways.

If any impacts are proposed within the portion of the Deschutes River that is designated State Scenic, or if 50 cy or greater of impacts are proposed within the river and its adjacent wetlands, a state permit would likely be required for this project. It is then recommended that you have the project areas assessed for jurisdictional wetlands and waterways by a qualified wetland professional prior to earth disturbance activities. A wetland delineation report should be submitted to DSL for review and approval.

The proposed project also appears to fall within the designated buffer for a State Scenic waterway (Deschutes River). Therefore, it is recommended that you contact Oregon Parks and Recreation Department regarding this project.

This is a preliminary jurisdictional determination and is advisory only.

This report is for the State Removal-Fill law only. City or County permits may be required for the proposed activity.

√ A Federal permit may be required by The Army Corps of Engineers: (503)808-4373

Tumalo Town District Improvement Company, Nena Close

Tumalo Town District Improvement Company has no objection to extension of community sewer services, provided said improvements and construction do not alter or interfere with the delivery of irrigation water from our seasonal permitted historic priority water rights which run through the platted townsite of Laidlaw, now known as downtown Tumalo. Our irrigation ditch originates at Tumalo State Park and runs north into the downtown area of Tumalo to service the residences and businesses in the downtown core area where the sewer is planned to be placed.

Our Company was incorporated in 1952 and has priority water rights dating back to 1904. Any projected sewer and construction projects need to consult our firm prior to project completion to avoid conflict with the existing irrigation ditch which is piped in most areas of the downtown core.

The following agencies did not respond to the notice or had no comments: Bend Fire Department, Bend Metro Parks & Recreation District, Cascade Natural Gas, Central Electric Co-op, Century Link, DEQ NW Region, Deputy State Fire Marshall, Deschutes County Assessor, Deschutes County Property Management, Midstate Electric, Oregon Parks & Recreation Department Region 4, Oregon Department of Transportation (ODOT) Region 4 Planning, Oregon Public Utility Commission, Pacific Power & Light, and Swalley Irrigation District. 11.

PUBLIC COMMENTS: The Planning Division mailed notice of the application to all property owners in the Unincorporated Community of Tumalo on December 17, 2021, and all property within 750 feet of the property with the existing treatment facility located at 64730 Bill Martin Road, Bend, OR 97703 (further identified on Assessor’s Map 16-12-31, tax lot 200) on December 20, 2021. A large number of public comments were submitted in response to the notice. Staff has incorporated responses and further discussion on these concerns under the corresponding Deschutes County Code sections in this Staff Report. The submitted comments are included in the record and incorporated herein by reference. Notice of the public hearing was mailed to all parties on January 21, 2022 and a notice of public hearing was published in *The Bulletin* newspaper on January 28, 2022.

REVIEW PERIOD: The subject application was submitted on December 8, 2021. On January 7, 2022, an incomplete letter was mailed requesting additional information needed to complete the review. All of the requested information was received on January 12, 2022. The 150th day on which the County must take final action on this application is June 11, 2022.

III. FINDINGS & CONCLUSIONS

Categorization of the Proposed Use

The applicant submitted a DEQ LUCS to establish sewer transmission pipelines throughout the Tumalo unincorporated community. This LUCS form is used by DEQ to determine whether a DEQ permit or approval will be consistent with local government comprehensive plans and land use regulations. Under Section 2 of the DEQ LUCS form, the Planning Division must determine if the applicant’s DEQ project currently complies with applicable Deschutes County Zoning Ordinances or identify the requirements the applicant must comply with before compatibility can be determined. The applicant describes the proposal as an “extension of service lines in [the] ROW” only.

It is unclear to staff how the proposed use should be categorized. The applicant’s written narrative states the County² suggested the proposed use could fall under the “road and street project” use category. DCC 18.04.030 provides the following definition.

² It appears the applicant is referencing a County letter attached to a reviewed DEQ LUCS form (ref. file no. 247-21-000817-PS).

"Road and street project" means the construction and maintenance of the roadway, bicycle lane, sidewalk or other facility related to a road or street. Road and street projects shall be a Class I, Class II or Class III project.

- A. Class I Project. Land use permit required. "Class I Project" is a major project such as:
 - 1. A new controlled access freeway;
 - 2. A road or street project of four or more lanes on a new location; and
 - 3. A major project involving the acquisition of more than minor amounts of rights of way, substantial changes in access control, a large amount of demolition, displacement of a large number of residences or businesses or substantial changes in local traffic patterns.
- B. Class II Project. Land use permit required. "Class II Project" is a:
 - 1. Modernization where a road or street is widened by more than one lane;
 - 2. Traffic safety or intersection improvement which changes local traffic patterns;
 - 3. System change which has significant land use implications; or
 - 4. The construction of a new County road or street within a dedicated public right-of-way, where none existed before.
- C. Class III Project. No land use permit required. "Class III Project" is a modernization, traffic safety improvement, maintenance, repair or preservation of a road or street.

Staff finds the definition above does not include the installation of utility facilities in a road or street.

Alternatively, staff finds the proposed use could be categorized as a utility facility. DCC 18.04.030 provides the following definition.

"Utility facility" means any major structures, excluding hydroelectric facilities, owned or operated by a public, private or cooperative electric, fuel, communications, sewage or water company for the generation, transmission, distribution or processing of its products or for the disposal of cooling water, waste or by-products, and including power transmission lines, major trunk pipelines, power substations, telecommunications facilities, water towers, sewage lagoons, sanitary landfills and similar facilities, but excluding local sewer, water, gas, telephone and power distribution lines, and similar minor facilities allowed in any zone. This definition shall not include wireless telecommunication facilities where such facilities are listed as a separate use in a zone.

The DCC definition for a utility facility establishes two subcategories of utility facilities – major facilities and minor facilities. This distinction is important as the utility facility definition clearly states minor facilities are allowed in any zone.

Based on the submitted application materials, staff understands the proposed piping will be installed in the road right-of-way and adjacent property owners will have a lateral, or individual service line, connection to the proposed pipeline which will transport the wastewater to the existing treatment facility. Therefore, staff finds the applicant’s proposal is one of the following facilities types described in the utility facility definition above:

1. A major trunk pipeline or a similar facility; or
2. A local sewer distribution line or similar facility

DCC 18.04.030 does not define "major trunk pipeline" or "distribution line". Staff reviewed the Deschutes County "utility facility" definition legislative history and found it was first defined in the historic Bend Urban Growth Boundary Zoning Ordinance (PL-11), which was adopted on July 11, 1979. Later, on November 11, 1979, the same definition was adopted in Deschutes County's first Zoning Ordinance (PL-15). The definition has been modified since this time, but the definition is largely the same (see *Figure 1* and *Figure 2* below).

Figure 1 – PL-11 Utility Facility Definition

(163) Utility Facility. Any major structure owned or operated by a public, private or cooperative electric, fuel, communication, sewage or water company for the generation, transmission, distribution or processing of its products or for the disposal of cooling water, waste or by-products, and including power

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transmission lines, major trunk pipelines, power substations, dams, water towers, sewage lagoons, sanitary landfills and similar facilities, but excluding local sewer, water, gas, telephone and power distribution lines, and similar minor facilities allowed in any zone.

Figure 2 – PL-15 Utility Facility Definition

(134) Utility Facility. Any major structure owned or operated by a public, private or cooperative electric, fuel, communication, sewage or water company for the generation, transmission, distribution or processing of its products or for the disposal of cooling water, waste or byproducts, and including power transmission lines, major trunk pipelines, power substations, dams, water towers, sewage lagoons, landfills and similar facilities, but excluding local sewer, water gas, telephone and power distribution lines, and similar minor facilities allowed in any zone.

Given the definition for "utility facility" was likely developed in 1979 based on DEQ rules/terms in effect at that time, staff contacted DEQ for guidance and was informed there are no current definitions for a "major trunk pipeline" or "distribution line" in relevant DEQ rules. DEQ provided the following definition to offer some clarity:

*Trunk – Trunk sewers are large sewers that are used to convey wastewater from main sewers to treatment or other disposal facilities or to large intercepting sewers.*³

Separately, staff found the following definitions for sewer “trunks” in other jurisdictions:

*"Trunk" means a major sanitary sewer into which more than two laterals or mains discharge and which transports the flow collected from laterals and mains to an interceptor, pumping station or treatment plant.*⁴

*"Sewer trunk" means a sewer pipe eight inches in diameter or larger which receives two or more laterals and serves a large territory.*⁵

*"Trunk line" or "trunk sewer" means a main sewer line to which two or more service laterals are connected and which serves the primary purpose of transporting sewage from service laterals to the treatment plant.*⁶

Based on these definitions, staff finds the applicant’s proposal meets the definition of a major trunk pipeline or a similar major facility under DCC 18.04.030.

The applicant provided the following argument for why their proposal is a use allowed in any zone:

The requested LUCS is for the installation of transmission lines located entirely within existing public right of way in the Tumalo unincorporated community. Included with the LUCS is a plan set that depicts the anticipated location of the new transmission lines. The Association has observed numerous projects throughout the county where utility transmission lines have been installed, repaired, and relocated within a right-of-way. In a public records request, the Association requested all public records that relate to any prior occasion where the county required a party performing such work to undergo any land use review process. The county's response was that it has no such records. The Association interprets that response to mean that the county has never before required land use review for the placement/construction, relocation, or repair of utility transmission lines within an existing right-of-way, regardless of the underlying zone and regardless of whether utilities, as defined in the county Code, are permitted outright in the applicable zone.

In an "explanation" that came with a recent LUCS to extend a transmission line to serve one single-family dwelling located within the Tumalo Feed Company site, the county included a discussion that begins with a statement that DCC 18.67.040(C)(6) classifies a "utility facility" as a conditional use in the Tumalo Commercial Zone. After setting forth the definition of a utility facility in DCC 18.04.030, the county appears to have set forth a new standard not stated in its code. Specifically, the county articulates that if the proposed work is for a facility it considers a minor utility facility, the work is allowed outright in any zone. In articulating that standard, the county acknowledges

³ Metcalf & Eddy, Inc. and George Tchobanoglous. Wastewater Engineering: Collection and Pumping of Wastewater. New York: McGraw-Hill, 1981.
⁴ City of Phoenix, Oregon – Municipal Code 13.12.020. Definitions
⁵ Junction City, Oregon – Municipal Code 13.35.010. Definitions
⁶ Alameda County, California - Municipal Code 13.04.010. Definitions

that its code has no definition of a minor facility and no list of what can, in any given situation, be deemed a minor facility. The county seems to suggest that for minor facilities permitted outright, an applicant may only have to apply for either a Class I, II, or III road project permit.

In an effort to create some meaningful distinction that has support in the code between a utility line that is permitted outright in any zone and one that may require land use review, the county turned to DCC 18.16.020(M) that defines what is a "utility service line" in EFU zones. Such a service line includes a utility line that ends where the service is received by the customer and is located within a public right of way. Since the single service line in the prior LUCS was similar to a utility service a line allowed on EFU land, the county determined that it does not need a land use permit. One problem with the county's explanation in the prior matter is that the county created a standard with no meaningful guidance that can be used to issue purely arbitrary, capricious determinations. The county cautioned that its "interpretation" does not answer any other circumstances where sewer infrastructure is proposed in non-EFU zones that do not meet the definition of a utility facility service line and yet nonetheless still is a similar minor facility not rising to the level of a utility facility as defined in DCC 18.04.030. The explanation expressly states that it does not address any situation when a permit may be required for a utility service line that the county deems to not be a minor utility facility service line.

Thus, the county's stance is that the code, in non-EFU zones, has no definition for a minor utility facility or a utility facility service line. If the county deems a proposed facility to be similar to a utility facility service line as defined in the EFU regulations, it may allow it outright, but may not. There is no clear definition of what is and what is not a minor utility facility or utility facility service line in any zone other than EFU. The county will, on an ad hoc basis, determine with no code-based standards, that determination applicant by applicant.

Against that nebulous standard, the Association is asked to explain why it believes the proposed plan to extend transmission lines does not require land use review. The Association is proposing to install transmission lines entirely within existing right-of-way. The Association proposed lines end where the service to the customer is provided. The Association is not proposing any other facility, equipment, or structure as part of its request. Any tank, pump, or electric facility required to transmit wastewater to the Association's treatment facilities will be on private lots and will be installed/constructed by the customer. As the Association discussed above, the individual property owner's variable speed pumps located entirely on private property create the pressure to transmit wastewater up to the Association's facilities. Thus, what the Association proposes is precisely what the county agrees qualifies as a utility facility service line that in the EFU zone is permitted outright even though utility facilities are not permitted outright. If it is to remain consistent, the county must conclude that the proposed transmission lines are permitted outright in the right-of-way regardless of the underlying zoning.

What the Association is requesting is identical to what Laidlaw Water, Bend Cable, Pacific Power, City of Bend, Avion Water, Central Electric Coop, and other utilities do to provide distribution of the utilities to individual parcels of property within the right of way. Which all of those utilities have never needed to have a land use approval for the service/distribution lines.

Staff asks the Hearings Officer to determine how the applicant’s proposal should be categorized for the purposes of the DEQ LUCS. Should the Hearings Officer find the proposed use is a road or street project, it is unclear to staff if the applicant has authority to submit the LUCS given the ownership of roads either by the County or private entities. Please see the ownership discussion below.

Should the Hearings Officer find the proposed use is a minor facility allowed in any zone, it is unclear to staff at what point sewer pipelines would rise to the level of a major trunk pipeline requiring land use approval; potentially negating the distinction between major and minor facilities.

Should the Hearings Officer find the proposed use is a major utility facility requiring land use approval, staff asks the Hearings Officer to determine which specific land use approvals should be detailed on the LUCS form. Based on the submitted plans, the proposed pipelines would implicate a number of Zoning Districts and Zones. For ease of reference, staff lists the applicable Zoning Districts and Zones in the table below, along with the options for categorization of the proposed use. For each District or Zone, staff identifies the applicable code provisions which would allow a road or street project, and the applicable code provisions which would allow a utility facility, or similar. Staff notes the Surface Mining Zone and the Tumalo Research and Development District do not appear to allow utility facilities, or similar, at all.

District or Zone	Use Category	Permitted Outright	Requires Land Use Approval
Exclusive Farm Use	Road or Street Project	18.16.020(F)	None
	Utility Facility or Similar	18.16.020(M)	18.16.025(E)
Multiple Use Agricultural	Road or Street Project	18.32.020(E)	None
	Utility Facility or Similar	None	18.32.030(Y)
Surface Mining	Road or Street Project	18.52.030(F)	None
	Utility Facility or Similar	None	None
Tumalo Residential	Road or Street Project	18.67.020(A)(6)	None
	Utility Facility or Similar	None	18.67.020(C)(9), (10)
Tumalo Residential 5-Acre Minimum	Road or Street Project	18.67.030(A)(5)	None
	Utility Facility or Similar	None	18.67.030(C)(6), (7)
Tumalo Commercial	Road or Street Project	18.67.040(A)(6)	None
	Utility Facility or Similar	None	18.67.040(C)(6), (7)
Tumalo Research and Development	Road or Street Project	18.67.050(A)(6)	None
	Utility Facility or Similar	None	None
Tumalo Industrial	Road or Street Project	18.67.060(A)(7)	None
	Utility Facility or Similar	None	18.67.060(C)(4)
Flood Plain	Road or Street Project	18.96.030(F)	None
	Utility Facility or Similar	None	18.96.040(A) ⁷ , (F) ⁸

A portion of the proposed pipeline project would be within the Tumalo Flood Plain District subject to DCC 18.67. Pursuant to DCC 18.67.070, all uses in this District are subject to the Flood Plain Zone

⁷ DCC 18.96.040(A) requires a conditional use permit for a roadway, bridge or utility structure.

⁸ DCC 18.96.040(F) requires a conditional use permit for activities affecting a stream, river or wetland.

provisions of DCC 18.96. For this reason, staff includes the Flood Plain Zone in the table above. Pursuant to DCC 18.67.090(C), roadway improvement projects are subject to the standards under Title 17 and Table 18.67-A. Should the Hearings Officer find the proposed use is a roadway project, it is unclear if the pipeline system is a roadway improvement project.

For either a minor or major utility facility, it is unclear if the applicant has the authority to submit the LUCS given the ownership issue.

Title 22, Deschutes County Development Procedures Ordinance

Chapter 22.04. Introduction and Definitions

Section 22.04.020. Definitions.

The following definitions apply to DCC Title 22.

...

"Development action" means the review of any permit, authorization or determination that the Deschutes County Community Development Department is requested to issue, give or make that either:

- A. Involves the application of a County zoning ordinance or the County subdivision and partition ordinance and is not a land use action as defined below; or*
- B. Involves the application of standards other than those referred to in DCC 22.040.030(A), such as the sign ordinance.*

..

"Land use permit" includes any approval of a proposed development of land under the standards in the County zoning ordinances or subdivision or partition ordinances involving the exercise of significant discretion in applying those standards.

By way of illustration, "land use permit" includes review of conditional use permits, landscape management plans, farm or nonfarm dwellings, forest management plans, partition, master plan, river setback exception, riverfront design review, site plan, site plan change of use, modification of approval, solar access, solar shade exception, subdivision, subdivision variance and variance.

FINDING: Staff finds the County’s review of the submitted DEQ LUCS form will require exercising significant discretion to properly categorize the proposed use. For this reason, the subject application is being processed as a land use permit as defined under DCC 22.04.020.

Chapter 22.08. General Provisions

Section 22.08.010. Application Requirements.

- A. Property Owner. For the purposes of DCC 22.08.010, the term "property owner" shall mean the owner of record or the contract purchaser and does not include a person or organization that holds a security interest.**
- B. Applications for development or land use actions shall:**
 - 1. Be submitted by the property owner or a person who has written authorization from the property owner as defined herein to make the application;**

FINDING: Based on the submitted drawings titled "Laidlaw Sanitary Sewer Master Plan", the applicant proposes to place underground piping in public and private road right-of-ways throughout the Unincorporated Community of Tumalo as part of a privately owned community sewer system. All of the public roads, with the exception of Highway 20, are County owned roads. It is unclear if the applicant has obtained the necessary approvals from the Oregon Department of Transportation for the proposed work. The Deschutes County Road Department comments explain the County can regulate privately-owned wastewater collection systems within public rights of way under the County's jurisdiction under authority granted by ORS 368.036, ORS 374.305, ORS 374.309, and ORS 374.315. However, at the time of writing this Staff Report, it does not appear the applicant has obtained the necessary approvals from the County Road Department for work in County owned road right-of-ways. For this reason, it is unclear whether the subject LUCS is properly before the Hearing Officer. Specifically, staff asks the Hearings Officer if the applicant is required to secure County authorization prior to submitting the LUCS.

Staff notes authorization from Deschutes County will be required for all work in County owned rights-of-ways, regardless of whether land use approval is required.

As noted in the Basic Findings section, the applicant's request also includes extensions of sewer services within privately owned road right-of-ways. The Deschutes County Road Department provided the following response to a public inquiry regarding road maintenance responsibilities after the proposed sewer service extensions are completed:

"A utility owner must obtain a permit or license agreement administered by our Department to install an underground utility within the right of way of any public road under Deschutes County jurisdiction. Those permits and license agreements include obligations for road repair. Our Department would notify a utility owner of their obligation to repair a local access road (i.e., the north-south oriented portion of Riverview Avenue) if failure of their underground utility caused damage to the road. If the damage caused to a local access road created a hazard representing imminent danger to the public or prevented the public's right of access, our Department would take more assertive action to ensure that prompt repairs are made. Otherwise, damage caused to local access road improvements or maintenance efforts made by adjacent property owners would be a matter for the adjacent property owners to resolve with the utility owner."

Our Department would have no involvement in the installation of underground utilities on private roads (i.e., Alder Lane, Birch Lane, Cedar Lane, Juniper Lane, Elm Lane, Fir Lane, Pine Lane, Hemlock Lane, and northwest-southeast oriented portion of Riverview Avenue) or the repair or maintenance of private roads. Installation of underground utilities on private roads and repair of private road damage caused by failure of an underground utility would be matters for the private road owner(s) to coordinate or resolve with the utility owner."

Staff asks the Hearings Officer if the applicant must obtain approval from the owners of the privately owned roads prior to submitting the LUCS for review. Further, should the Hearings Officer determine land use approval is required, it is the County's position the applicant must secure authorization from the owners of privately owned roads. Staff asks the Hearings Officer to focus his review on these issues.

3. *Include supporting information required by the zoning ordinance and that information necessary to demonstrate compliance with applicable criteria; and*

FINDING: As noted above, the submitted DEQ LUCS form asks the County to determine if the proposed use is allowed outright, allowed subject to land use approval, or not allowed. With this in mind, it is unclear to staff if the applicant has submitted sufficient information to demonstrate whether land use approval is required. Specifically, based on the submitted plans, it is unclear to staff what Zoning Districts and Zones the proposed sewer facilities will be located and what size piping is being proposed. Staff finds detailed construction drawings, showing the diameter of the proposed piping for example, would help determine if the applicant's proposal is a major trunk pipeline (or similar) or a local sewer distribution line (or similar).

Staff asks the Hearings Officer to focus his review on this issue.

5. *Include an affidavit attesting to the fact that the notice has been posted on the property in accordance with DCC 22.24.030(B).*

FINDING: Compliance with this criterion is discussed later in this Staff Report.

- C. *The following applications are not subject to the ownership requirement set forth in DCC 22.08.010(B)(1):***
 - 1. *Applications submitted by or on behalf of a public entity or public utility having the power of eminent domain with respect to the property subject to the application; or***
 - 2. *Applications for development proposals sited on lands owned by the state or the federal government.***

FINDING: The subject application has not been submitted by or on behalf of a public entity or public utility having the power of eminent domain with respect to the properties subject to this application. Additionally, the project will not be sited on lands owned by the state or the federal government with the exception of the proposed work within the Highway 20 road right-of-way, which is under

the State’s jurisdiction. For this reason, staff finds the ownership requirement set forth in DCC 22.08.010(B)(1) apply with exception of development proposed within the State Highway 20 right-of-way.

Section 22.08.020. Acceptance of Application.

- C. *Acceptance of an application as complete shall not preclude a determination at a later date that additional criteria need to be addressed or a later determination that additional information is needed to adequately address applicable criteria.***

FINDING: The subject application was accepted as complete on January 12, 2022. However, as noted above, acceptance of an application as complete shall not preclude a later determination that additional information is needed to adequately address applicable criteria.

Chapter 22.16, Development Action Procedures

Section 22.16.010. Review of Development Action Applications.

- B. *The Planning Director has the discretion to determine that for the purposes of DCC Title 22 a development action application should be treated as if it were a land use action application.***

FINDING: Pursuant to this section, the Planning Director has chosen to treat the DEQ LUCS as if it were a land use action application and refer the application to a public hearing. The provisions related to land use hearings are addressed below.

Chapter 22.24, Land Use Action Hearings

Section 22.24.030. Notice of Hearing or Administrative Action.

- B. *Posted Notice.***
 - 1. *Notice of a land use action application for which prior notice procedures are chosen shall be posted on the subject property for at least 10 continuous days prior to any date set for receipt of comments. Such notice shall, where practicable, be visible from any adjacent public way.***
 - 2. *Posted notice of an application for a utility facility line approval shall be by posting the proposed route at intervals of not less than one half mile. The notice shall be posted as close as practicable to, and be visible from, any public way in the vicinity of the proposed route.***

FINDING: The Deschutes County Planning Manager required the subject application to be processed according to the prior notice procedures set forth in DCC 22.24. Public comments in the record raise concerns regarding whether the posted notice requirements of DCC 22.24.030(B) have been met.

Under section (2) above, posted notice of an application for a utility facility line approval shall be by posting the proposed route at intervals of not less than one half mile. As detailed earlier in this Staff Report, staff believes the applicant’s request is defined as a “utility facility” under DCC 18.04.030. However, there is no DCC 18.04.030 definition for a “utility facility *line*”. DCC 18.16.020 established standards for a “utility facility *service line*” in the EFU Zone. However, the applicant’s request will be largely be located outside of the EFU Zone. For these reasons, it is unclear to staff if the applicant is required to comply with subsection (2) above. Nevertheless, the applicant submitted a Land Use Action Sign Affidavit stating on January, 8, 2022 signs were placed where they could clearly be seen from the following locations:

- Corner of Cook & 8th Street
- Corner of Cook & 6th Street
- Corner of Cook & Tumalo
- Corner of Tumalo & Laidlaw
- 2nd Street in front of School
- Corner of Bruce & 6th Street
- Corner of Bruce & 7th Street
- Corner of Warton & 5th Street
- Riverview Ave by Juniper

Public comments in the record also raise concerns about the length of time the Land Use Action Signs were posted. Specifically, a comment in the record indicates one of the Land Use Action Signs was posted for less than 24 hours.

Given these public concerns, staff asks the Hearings Officer to determine if the applicant has complied with the posted notice requirements of DCC 22.24.030(B).

Chapter 22.36, Limitations of Approvals

Section 22.36.040. Modification of Approval.

- A. An applicant may apply to modify an approval at any time after a period of six months has elapsed from the time a land use action approval has become final.**
- B. Unless otherwise specified in a particular zoning ordinance provision, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties.**
- C. An application to modify an approval shall be directed to one or more discrete aspects of the approval, the modification of which would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties. Any proposed modification, as defined in DCC 22.36.040, shall be reviewed only under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than**

allowable as a modification shall be treated as an application for a new proposal.

FINDING: The applicant owns and operates a private wastewater treatment facility located at 64730 Bill Martin Road, Bend, OR 97703 and further identified on Assessor’s Map 16-12-31, as tax lot 200. This utility facility was approved under land use file nos. 247-17-000917-SP and 247-17-000918-LM. It is unclear to staff if the proposed sewer extensions require a modification to these approvals under DCC 22.36.040. Additionally, it is unclear if the existing wastewater treatment facility is currently sized to support the uses that will be served by the proposed sewer extensions. The applicant states the existing system was constructed with capacity to serve additional properties. However, the Deschutes County Road Department comments note the County is in the process of commissioning a study to determine if the applicant’s system and proposed expansion can feasibly provide effective service for the greater Unincorporated Community of Tumalo.


Staff asks the Hearings Officer to determine if a modification of approval is required for the proposed extension of sewer services and/or any future expansions of the existing wastewater treatment facility.

IV. OUTSTANDING ISSUES

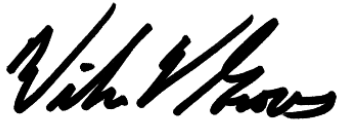
As detailed in this staff report, staff asks the Hearing Officer to focus his review on the following:

- 1. Has the applicant submitted the necessary information to properly categorize the proposed use?
- 2. Is the proposed use allowed outright, allowed subject to land use approval, or not allowed in each of the proposed Zoning Districts and Zones?
- 3. Is the applicant authorized to submit the DEQ LUCS form considering the public and private ownership of the roads where the development is proposed?
- 4. Should the HO determine the use is allowed outright or with land use approval is the applicant required to obtain owner authorization?
- 5. Is a modification of approval required for the proposed extension of sewer services and/or any future expansions of the existing wastewater treatment facility?
- 6. Has the applicant complied with the posted notice requirements of DCC 22.24.030(B)?

DESCHUTES COUNTY PLANNING DIVISION



Written by: Caroline House, Senior Planner



Reviewed by: Will Groves, Planning Manager

Attachment:

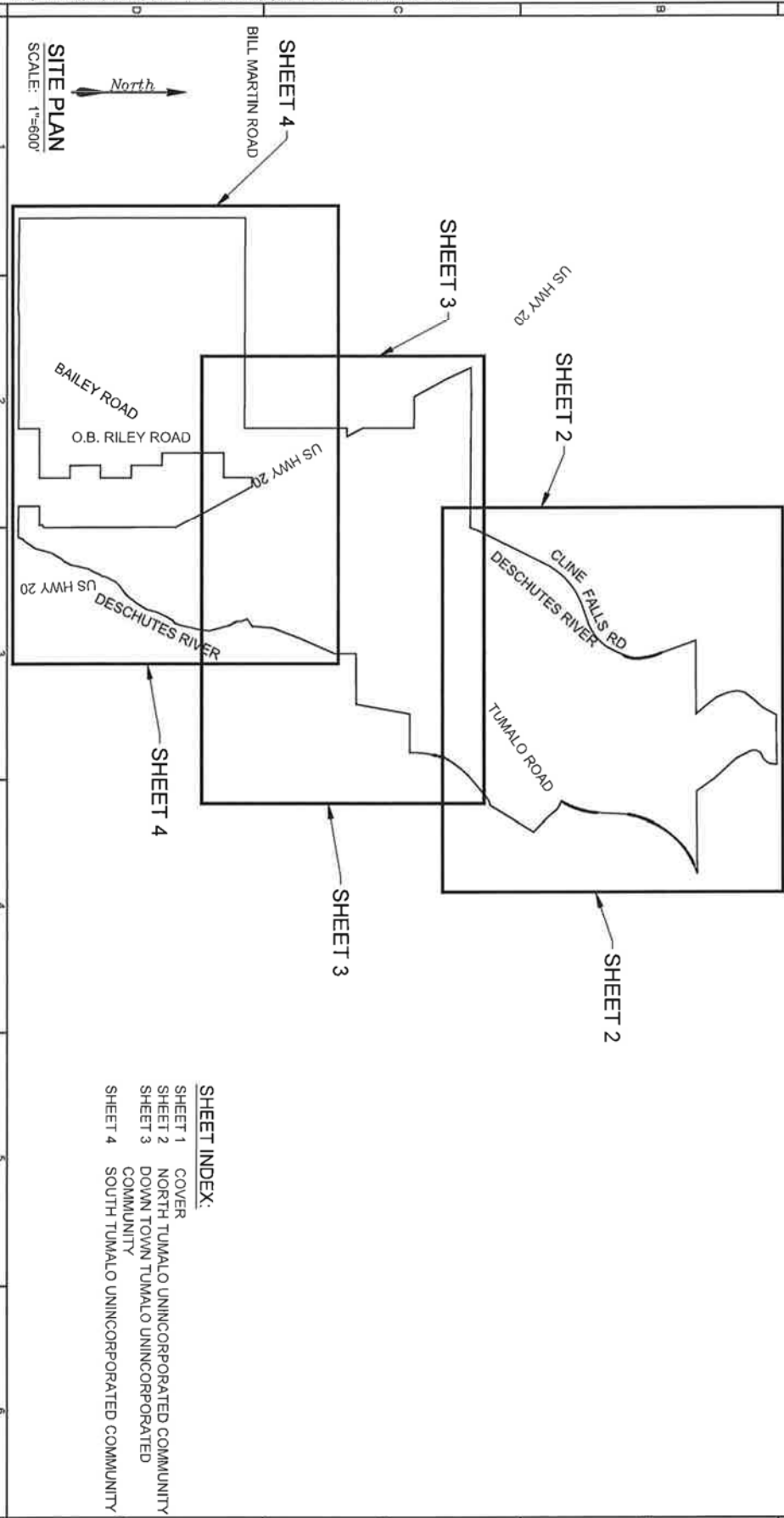
1. Laidlaw Sanitary Sewer Master Plan



LIDLAW SANITARY SEWER MASTER PLAN

NOVEMBER 2021
TUMALO, DESCHUTES COUNTY, OREGON

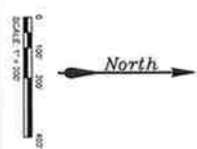
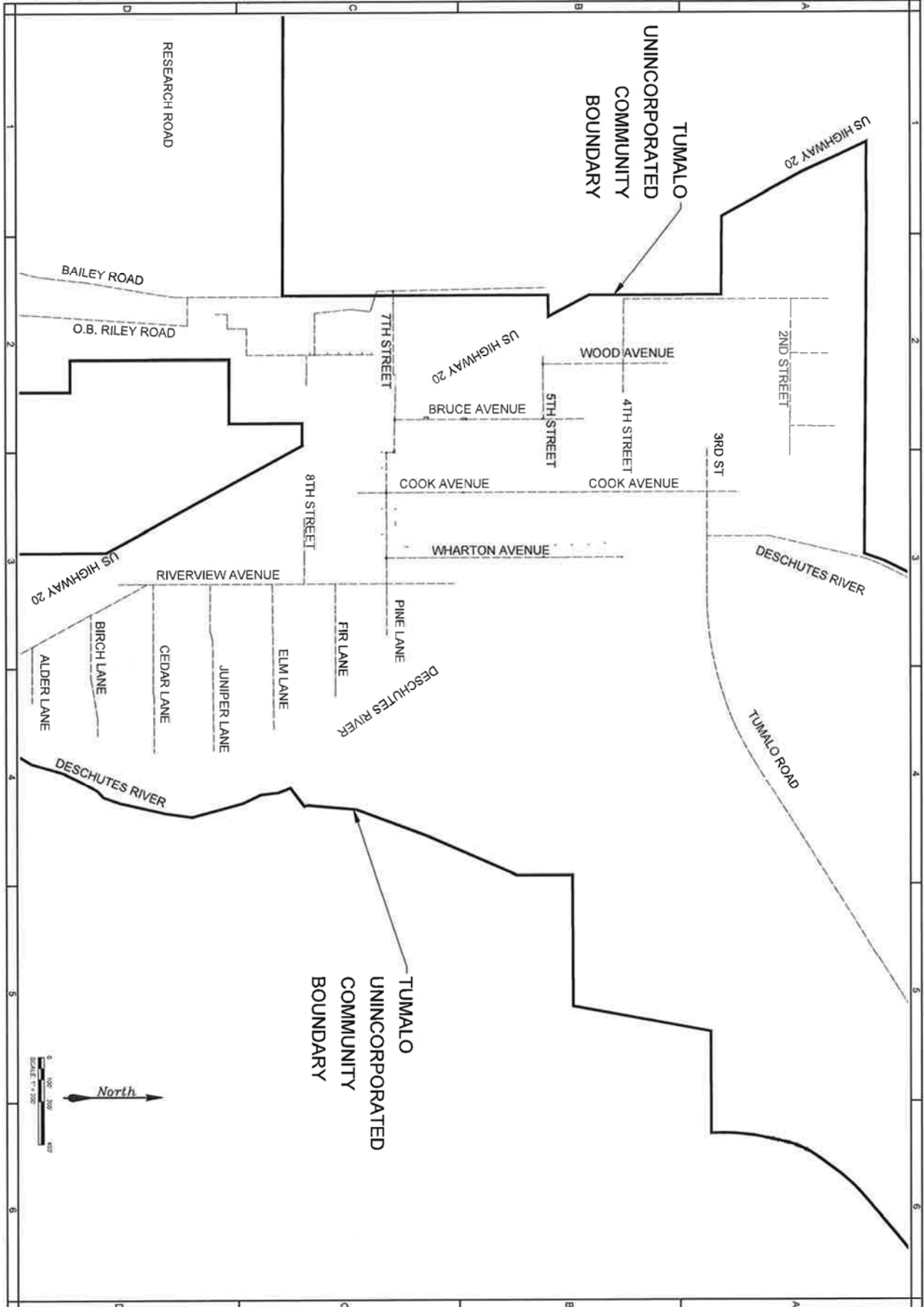
OWNER:
TUMALO HOMEOWNERS ASSOCIATION
250 NW FRANKLIN AVENUE, STE 401
BEND, OR 97703
PHONE # 541 617-1999



SHEET INDEX:

SHEET 1	COVER
SHEET 2	NORTH TUMALO UNINCORPORATED COMMUNITY
SHEET 3	DOWN TOWN TUMALO UNINCORPORATED COMMUNITY
SHEET 4	SOUTH TUMALO UNINCORPORATED COMMUNITY

<p>LIDLAW SANITARY SEWER MASTER PLAN COVER SHEET</p>	<p>DESIGNED BY SCE DRAWN BY SCE SCALE AS SHOWN SHEET 8442-SD-SS</p> <p>DATE NOVEMBER 2021</p>	<p>REVISIONS</p> <table border="1"> <tr><td>1.</td><td></td></tr> <tr><td>2.</td><td></td></tr> <tr><td>3.</td><td></td></tr> </table>	1.		2.		3.		<p>SUN COUNTRY ENGINEERING & SURVEYING, INC. ESTABLISHED 1976 920 SE ARMOUR DRIVE BEND, OR 97702 541-382-8882</p>	
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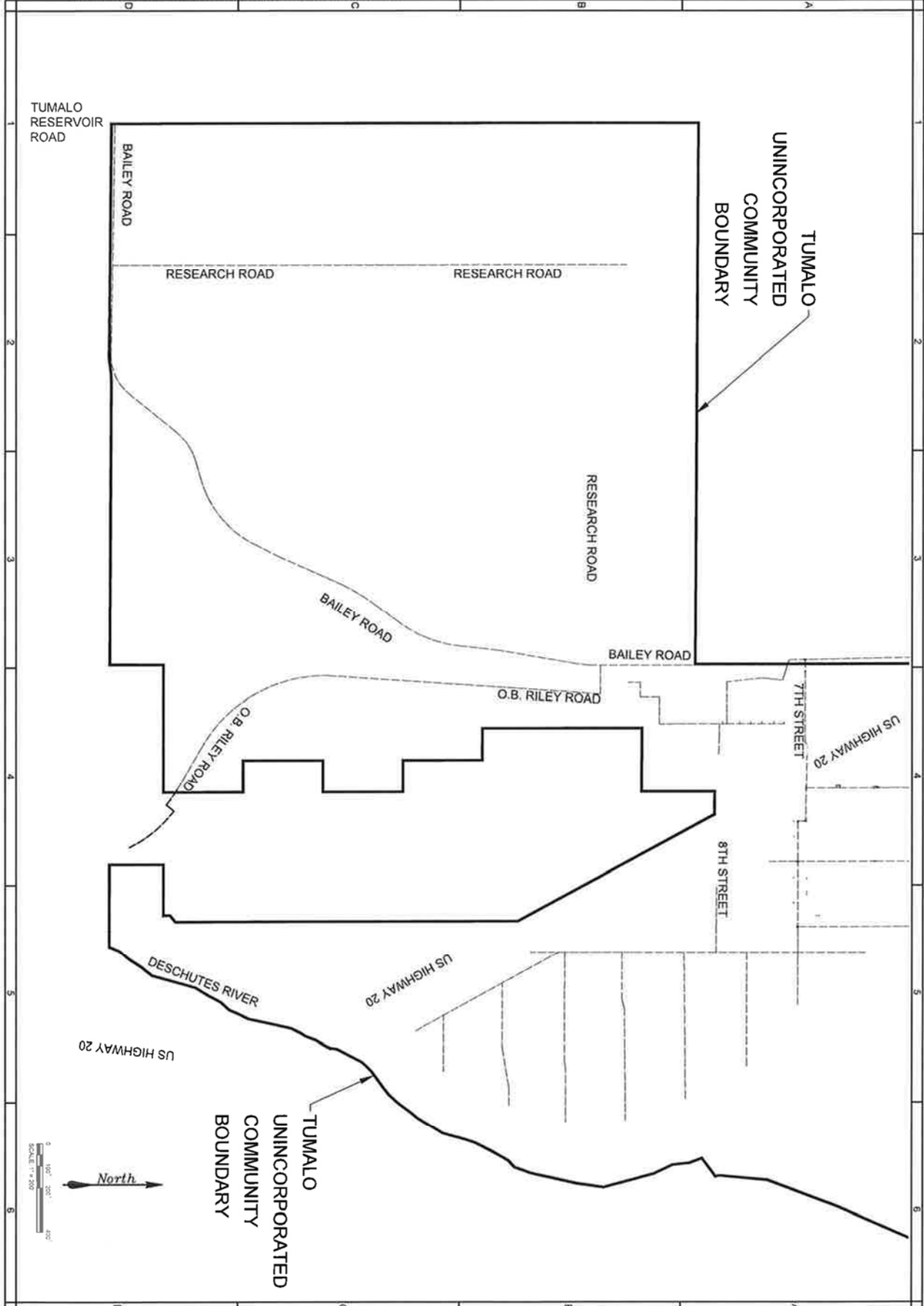
DESIGNED BY SCE
 DRAWN BY SCE
 SCALE AS SHOWN
 FILE 8442-SS-SS
 DATE NOVEMBER 2021

Laidlaw
 SANITARY SEWER
 MASTER PLAN
 7TH ST. BRUCE AVE.
 TO WHARTON AVE.

NO.	REVISIONS
1	
2	
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SUN COUNTRY
 ENGINEERING & SURVEYING, INC.
 ESTABLISHED 1976
 920 SE ARMOUR DRIVE BEND, OR 97702 541-382-8882





SHEET 4 XXX	DESIGNED BY SCE	LIDLAW SANITARY SEWER MASTER PLAN WHARTON AVE. 7TH ST TO 6TH ST	SUBSISTONS 1. 2. 3.	SUN COUNTRY ENGINEERING & SURVEYING, INC. ESTABLISHED 1976 920 SE ARMOUR DRIVE BEND, OR 97702 541-382-8882	
	DRAWN BY SCE				

owner	agent	inCareOf	address	cityStZip	Type	CDD ID
Tumalo Property Owners Association	Larry Kine		250 NW Franklin Ave #401	Bend, OR 97703	Staff Report	21-1067-PS
Chris Koback			1331 NW Lovejoy, Suite 950	Portland, OR 97209	Staff Report	21-1067-PS