



**MEMORANDUM**

**TO:** Hearings Officer Gregory Frank

**FROM:** Haleigh King, Associate Planner

**DATE:** January 29, 2024

**RE:** Land Use File Nos. 247-23-000293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA;  
Third Supplemental Burden of Proof Statement

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On January 10, 2024, after the staff report was published, the applicant provided a third supplementary burden of proof proposing alternative dwelling envelope locations based on the wildlife siting exception criteria pursuant to DCC 18.88.060(B)(1). The applicant’s narrative asserts that siting the dwellings within 300-feet of the existing road on the west side of the property affords greater or equal protection for habitat values and migration corridors. The existing road along the western boundary of the subject properties did not exist as of August 5, 1992, therefore the applicant responds to the exception criteria in DCC 18.88.060(B)(1). The applicant provided an updated Wildlife Habitat Assessment Report prepared by Mason, Bruce & Girard, Inc, attached as Exhibit 2.

Staff requests the Hearings Officer make specific findings on the alternative building locations as they relates to the exception criteria under DCC 18.88.060(B)(1).

Additionally, the applicant’s supplementary burden of proof provides additional narrative in response to DCC 18.16.050(G) and the “unsuitability” standard for nonfarm dwellings and the stability of the overall land use pattern of the area.

Lastly, the applicant provides updated information regarding the applicant’s request to the Department of State Lands for an onsite determination related to the potential wetland in the northeast corner of Tax Lot 100.

**RECORD**

The record for Files 247-23-000293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA is as presented at the following Deschutes County Community Development Department website: <http://www.deschutes.org/247-23-000293-CU-294-CU-295-CU>

## **ATTACHMENTS**

1. January 10, 2024 – Third Supplemental Burden of Proof Statement – Lisa Andrach

**Third Supplemental Burden of Proof Statement  
With alternative building envelope locations**

**OWNER/APPLICANT:** Roger and Cynthia Grossmann

**APPLICANTS ATTORNEY:** Fitch & Neary, PC  
c/o Lisa Andrach, OSB #040012  
210 SW 5<sup>th</sup> Street, #2  
Redmond, OR 97756

**PURPOSE:** The applicant is requesting Conditional Use Review to establish a nonfarm dwelling on a parcel zoned EFU-SC, WA, SMIA.

**APPLICATION Nos.:** 247-23-000293/ 294/ 295-CU;

**I. APPLICABLE CRITERIA**

The applicant submits a proposed alternative building envelope (**Exhibit 1** hereto) consistent with the exception to the Wildlife Area siting standards criteria of DCC 18.88.060, as follows:

**A. Wildlife Area Siting Standards:**

**Chapter 18.88 Wildlife Area Combining Zone (WA)**

**Section 18.88.060. Siting Standards.**

**B. The footprint, including decks and porches, for new dwellings shall be located entirely within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August , 1992, unless it can be found that:**

**1. Habitat values (i.e., brose, forage, cover, access to water) and migration corridors are afforded equal or greater protection through a different development pattern.**

**C. For purposes of DCC 18.88.060(B):**

**1. A private road, easement for vehicular access or driveway will conclusively be regarded as having existed prior to August 5, 1992 if the applicant submits any of the following:**

**b. An aerial photograph with proof that it was taken prior to August 5, 1992 on which the road, easement or driveway allowing vehicular access is visible;**

**2. An applicant may submit any other evidence thought to establish the existence of a private road, easement for vehicular access or driveway as of August 5, 1992 which evidence need not be regarded as conclusive.**

**RESPONSE:** The applicant has established that the entire parcel is generally unsuitable, and therefore, the building envelope for the nonfarm dwelling could be located in any portion of the property, subject to the setback requirements for the underlying zoning. The applicant has submitted evidence and argument that the original building envelopes submitted are within 300' of a road that ran along the eastern boundary of the property in August 1992. However, ODFW and staff have still questioned whether the existence of the historic road has been established pursuant to the criterion. Therefore, if the hearings officer does not find that that the road has been established as required, the applicant submits an alternative building envelope location relying upon the exception allowed in the criterion of DCC 18.88.060(B)(1), which is supported by the Mason, Bruce & Girard, Inc., Wildlife Habitat Assessment Report attached hereto as **Exhibit 2**. The report addresses three issues that support the exception because locating the dwellings within 300' of the existing road on the west side of the property affords greater protection for habitat values and migration corridors. Specifically, the report provides:

Alternatively siting the building footprints within 300 feet of the western-most road rather than within 300 feet of the pre-1992 eastern-most road would:

- 1) Provide a contiguous corridor that would allow mule deer to move through and utilize the eastern-most portions of the three tax lots by forming a corridor of habitat following the ridgeline and connecting undeveloped public lands to the south to agricultural lands and pockets of juniper woodlands to the north.
- 2) Reduce traffic related disturbance. The route along the eastern road would require traffic to travel approximately 1.25 miles through juniper woodland habitat and adjacent farmland before reaching the turnoff to FHC. The western road reaches the nearest intersection within approximately 0.75 miles. The juniper habitat transected by the eastern road also appears to create a corridor of habitat between agricultural fields, and it is likely used by mule deer as they move about the winter range. Limiting traffic to the western road would, therefore, reduce impacts to overwintering deer.
- 3) Concentrate disturbed areas including the new building footprints and driveways closer to the existing operating farm by keeping the development within 300 feet of the western road.

Due to these factors, the mule deer winter range and other wildlife habitat functions would be better protected by locating the new



dwellings within 300 feet of the western road rather than the eastern road.

Using the alternative location for the dwellings based upon the exception analysis, the applicant has identified the setbacks for the dwellings from Lower Valley Drive which extends along the western side of the property as identified on **Exhibit 1**.

**B. Generally Unsuitable analysis for dwelling locations:**

The applicant and the Staff Report dated 11.27.2023 have addressed the generally unsuitable analysis of the criteria applicable to the 3 subject properties. The analysis addresses the entire parcel, not just the originally proposed building envelopes. Therefore, the proposed alternate locations for the dwellings do not change the analysis concerning the generally unsuitable capability of the property. However, the applicant submits the additional analysis on the issue as set forth below:

**2. For the purposes of this subsection only, unsuitability shall be determined with reference to the following:**

**a. A lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land. If the parcel is under forest assessment, the dwelling shall be situated upon generally unsuitable land for the production of merchantable tree species recognized by the Forest Practices Rules, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the parcel.**

**b. A lot or parcel is not "generally unsuitable" simply because it is too small to be farmed profitably by itself. If a lot or parcel can be sold, leased, rented or otherwise managed as part of a commercial farm or ranch, it is not "generally unsuitable.,. A lot or parcel is presumed to be suitable if it is composed predominantly of Class I-VI soils. Just because a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use. If the parcel is under forest assessment, the area is not "generally unsuitable" simply because it is too small to be managed for forest production profitably by itself.**

**RESPONSE:**

The applicant submits that the proposed dwellings will be situated on an existing lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock as set forth in this criterion. Here, the soil analysis for each parcel found that the soils of the subject properties, either in their fragmented locations, and even taken as a whole, do not

support farm production. So not only are the proposed building envelopes not suitable for farm production, but even the building envelope in conjunction with the entire parcel is not suitable for production because the balance of the parcel is not suitable for production whether with or without the building envelope. The findings of the soil analysis are consistent with the soil classification information set forth on DIAL, which identifies the “Land Classification” for each of the 3 parcels as “D7: Dry Ground – Soil Class 7.” (**Exhibits 3**)

The parcels are dry, and as stated in the Staff Report dated 11.27.2023, (p.34), “[n]onirrigated soils in Deschutes County are agriculturally suitable only as dry range land, and then only on a limited basis.” Here, the parcels cannot support the requisite forage capability as determined by the NRCS Rangeland and Forest Understory Productivity and Plant Composition (September 18, 2015) publication. The study and related forage capability analysis for the subject properties is set forth in the Staff Report 11.27.2023, at Page 34-37. Following the minimum forage production required to support livestock grazing, the subject properties have little forage for livestock and due to the minimal amount of dry land grazing that could be supported, the analysis concludes that the soils on the property are generally unsuitable for the production of livestock. Moreover, it must be noted that the calculation is also based upon a simplified scenario where the property is entirely comprised of NRCS-rated soils which produce forage for livestock, which in this case, the soil study has shown that is not the case for these properties which further limits the forage capability. Therefore, the subject properties are not generally suitable for production of livestock based on the total gross beef production potential of the analysis. The cost to transport any livestock, provide adequate water for the livestock, and to supplement the feed of the livestock exceeds the production value of the livestock, therefore, negating any profit, and as such, the endeavor would not constitute “farm use” within the state definition of farm use as it would not be a farm use that would be for profit.

### **C. Stability of the overall land use pattern in the area:**

The applications are for a single non-farm dwelling, each, on parcels subject to EFU, Wildlife Area Overlay, and Surface Mine Impact overlay zones. The same zoning applies to a majority of the area within the 1-mile study. Due to the substantial limitations of the applicable zoning regulations within the area, there have been only 3 nonfarm dwellings sited within the area since 1993. (Staff Report 11.17.2023, page 22) That is an average of 1 non-farm dwelling every 10 years over the last 30 years (1993 – 2023). Therefore, the land use pattern of the area is arguably stable. Furthermore, the realistic probability of new dwellings in the area is minimal. Most of the one-mile study area to the south is owned by the USA-BLM or Deschutes County and therefore cannot be developed for any dwelling use. The balance of the study area is either already developed or engaged in farm production on high-value soil, and therefore does not qualify for additional development. Approval of one nonfarm dwelling does not cause the approval of another nonfarm dwelling or a farm dwelling. Each dwelling must go through the strict scrutiny review for compliance with the applicable criteria just like the proposed dwelling does. The siting standards of the wildlife area overlay zone which require the location of the dwelling within 300’ of a road that existed in August 1992 is also extremely limiting and restrictive and, as intended, it serves to prohibit new development. Therefore, taken as a whole, the zoning limitations and the on-the-ground soils, water, vegetation, slope, access, and productive use

factors that apply to every proposed dwelling within the study area make it impossible to conclude that the individual proposed nonfarm dwellings will alter the stability of the land use pattern in the area. The language of the analysis is “will,” which is a much more specific, conclusive finding than “may” as used by staff. There is no substantial evidence in the record that the approval of the proposed nonfarm dwelling “will” materially alter the stability of the overall land use pattern in the area.

**D. Wetlands Delineation (TL 100)**

The originally proposed building envelope for Tax Lot 100 was within the vicinity of a possible wetlands area. The applicant submitted a request to the State DSL on November 6, 2023. (**Exhibit 4**) The applicant is still waiting for the results of that onsite determination. However, the proposed alternate dwelling location is outside of the vicinity of the potential wetland, and if approved, would be outside the vicinity of the possible wetland.

**III. CONCLUSION**

Based upon the above analysis, the proposal meets or can meet all of the standards for approval.

**DATED** this 10<sup>th</sup> day of January 2024.

FITCH & NEARY PC

*Lisa Andrach*

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LISA ANDRACH, OSB #040012  
Of Attorneys for Applicant Grossmann  
210 SW 5<sup>th</sup> St, Suite 2  
Redmond, OR 97756  
P: 541.316.1588 F: 541.316.1943  
Email: [lisa@fitchandneary.com](mailto:lisa@fitchandneary.com)

**BUILDING AREAS FOR CONDITIONAL USE PERMITS  
 247-21-000312-CU, 353-CU AND 354-CU  
 LOCATED THE NE 1/4 NW 1/4 OF SECTION 30,  
 T. 14 S., R. 12 E., W.M., DESCHUTES COUNTY, OREGON**

SECTION 19  
 SECTION 30

141200000702  
 GROSSMAN,  
 ROGER & CYNTHIA  
 REVOCABLE LIVING  
 TRUST

N 1/4 CORNER  
 SECTION 30

REGISTERED  
 PROFESSIONAL  
 LAND SURVEYOR



OREGON  
 May 12, 2010  
 DIRK P. DURYEE  
 65694PLS

RENEWS: 12/31/25

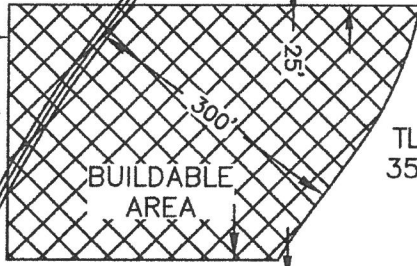
12' WIDE GRAVEL ROAD, LOCATION  
 SURVEYED 01-09-2024

TL 100  
 312-CU



1412000001999  
 TWO CANYONS LLC

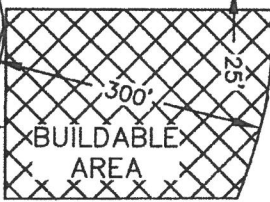
TL 200  
 354-CU



EX. ACCESS  
 EASEMENT AS  
 SHOWN ON  
 PROPERTY LINE  
 ADJUSTMENTS  
 SURVEY CS20439

141200000706  
 DEEP CANYON LLC

TL 300  
 353-CU



CN 1/16TH  
 CORNER

1412000003201  
 DESCHUTES COUNTY



**TYE ENGINEERING, INC.**

725 NW HILL, BEND, OREGON 97703 (541) 389-6959

EXHIBIT

1

DATE: 01-10-2024

SCALE: 1"=200'

DRAWN BY: P.A.T.

2803-Grossman Site Plan.dwg



**To:** FHC Project File for Proposed Development on 14-12-30BA lots 100, 200, and 300  
**From:** Wendy Wente, Ph.D., Senior Ecologist, MB&G, Inc.  
**Date:** July 27, 2023  
**Re:** Professional Opinion regarding the wildlife-related exception to the 300-foot Siting Standard

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## Background

Faith, Hope and Charity Vineyards, LLC, (FHC) proposes to develop three adjacent 5-acre tax lots (14-12-30BA lots 100, 200, and 300) on an area totaling approximately 15 acres located in Deschutes County, Oregon, north of Highway 126. All three tax lots are collectively referred to as the property. The property is located within an area identified by Oregon Department of Fish and Wildlife (ODFW) as biological winter range for mule deer (*Odocoileus hemionus*) (ODFW 2009). Deschutes County subsequently applied a Wildlife Area Combining Zone (WA Zone) for the Metolius Deer Winter Range which overlays the subject property and surrounding areas. Deschutes County Code (DCC) requires development proposals to comply with WA Combining Zone development restrictions.

During the late fall of 2022, FHC contracted with Mason, Bruce & Girard, Inc., (MB&G) to assess the potential wildlife habitat impacts of the proposed development with a goal of minimizing impacts to mule deer winter range and other wildlife habitat, and to provide appropriate conservation measures to maintain the resource. MB&G presented the results of our study in the FHC Property Wildlife Habitat Assessment Report (MB&G 2022).

## 300-foot Siting Standard

There are two gravel roads adjacent to the property, one on the east side of the property and one on the west side, both running approximately north-south in orientation. The road on the east side of the property is older than 1992 while the road on the west is newly constructed. FHC would like to site the houses, one on each tax lot, closest to the western-most road primarily because it is collocated with utilities. FHC subsequently seeks to apply the exception to the siting standard DCC 18.88.060 (2)(1). FHC re-engaged MB&G to provide a professional opinion on the issue. The applicable standard is as follows:

### 18.88.060 Siting Standards

1. *Setbacks shall be those described in the underlying zone with which the WA Zone is combined.*
2. *The footprint, including decks and porches, for new dwellings shall be located entirely within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992 unless it can be found that:*
  1. *Habitat values (i.e., browse, forage, cover, access to water) and migration corridors are afforded equal or greater protection through a different development pattern; or,*
  2. *The siting within 300 feet of such roads or easements for vehicular access would force the dwelling to be located on irrigated land, in which case, the dwelling shall be located to provide the least possible impact on wildlife habitat considering browse, forage, cover,*

*access to water and migration corridors, and minimizing length of new access roads and driveways; or,*

- 3. The dwelling is set back no more than 50 feet from the edge of a driveway that existed as of August 5, 1992.*

## Professional Opinion

During the wildlife habitat assessment completed in 2022, MB&G noted a single habitat type, western juniper woodland, was uniformly distributed throughout the entire property. Topographically, the property lies on a southwest to northeast oriented ridge with parallel rock outcroppings erupting along the main ridge south of the property.

Mule deer likely use the juniper woodlands as cover habitat during winter rather than as a primary food source due to the juniper dominated vegetation community which primarily offers cover rather than forage. The property is also proximal to agricultural fields located immediately to the north-east and north of the property.

Alternatively siting the building footprints within 300 feet of the western-most road rather than within 300 feet of the pre-1992 eastern-most road would:

- 1) Provide a contiguous corridor that would allow mule deer to move through and utilize the eastern-most portions of the three tax lots by forming a corridor of habitat following the ridgeline and connecting undeveloped public lands to the south to agricultural lands and pockets of juniper woodlands to the north.
- 2) Reduce traffic related disturbance. The route along the eastern road would require traffic to travel approximately 1.25 miles through juniper woodland habitat and adjacent farmland before reaching the turnoff to FHC. The western road reaches the nearest intersection within approximately 0.75 miles. The juniper habitat transected by the eastern road also appears to create a corridor of habitat between agricultural fields, and it is likely used by mule deer as they move about the winter range. Limiting traffic to the western road would, therefore, reduce impacts to overwintering deer.
- 3) Concentrate disturbed areas including the new building footprints and driveways closer to the existing operating farm by keeping the development within 300 feet of the western road.

Due to these factors, the mule deer winter range and other wildlife habitat functions would be better protected by locating the new dwellings within 300 feet of the western road rather than the eastern road.

## References

Mason, Bruce & Girard, Inc. 2022. Wildlife Habitat Assessment Report for Faith, Hope and Charity Vineyard, LLC. December 14, 2022, 23 pp.

# Deschutes County Property Information

## Land and Structures for account # 265532

The Deschutes County Assessor's Office is responsible for the appraisal and assessment of all taxable property within the County. Contact this department if you need additional information or if you have questions.

### Account Information

**Mailing Name:** ROGER & CYNTHIA GROSSMANN REV LIV TRUST  
**Map and Taxlot:** 141230BA00300  
**Account:** 265532  
**Situs Address:** 69800 NW LOWER VALLEY DR, TERREBONNE, OR 97760  
**Tax Status:** Assessable

### Warning

This account may have potential additional tax liabilities, taxes due, or other special development conditions.

### Structures Located on this Property

No structures for account.

### Land Characteristics for this Property

Land Description	Acres	Land Classification
Exclusive Farm Use Zoned	5.01	D7: DRY GROUND - SOIL CLASS 7



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# Deschutes County Property Information

## Land and Structures for account # 265533

The Deschutes County Assessor's Office is responsible for the appraisal and assessment of all taxable property within the County. Contact this department if you need additional information or if you have questions.

### Account Information

**Mailing Name:** ROGER & CYNTHIA GROSSMANN REV LIV TRUST  
**Map and Taxlot:** 141230BA00200  
**Account:** 265533  
**Situs Address:** 69850 NW LOWER VALLEY DR, TERREBONNE, OR 97760  
**Tax Status:** Assessable

### Warning

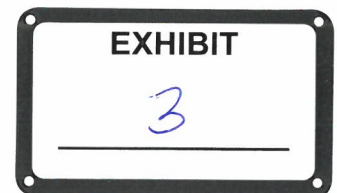
This account may have potential additional tax liabilities, taxes due, or other special development conditions.

### Structures Located on this Property

No structures for account.

### Land Characteristics for this Property

Land Description	Acres	Land Classification
Exclusive Farm Use Zoned	4.98	D7: DRY GROUND - SOIL CLASS 7



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# Deschutes County Property Information

## Land and Structures for account # 265535

The Deschutes County Assessor's Office is responsible for the appraisal and assessment of all taxable property within the County. Contact this department if you need additional information or if you have questions.

### Account Information

**Mailing Name:** ROGER & CYNTHIA GROSSMANN REV LIV TRUST  
**Map and Taxlot:** 141230BA00100  
**Account:** 265535  
**Situs Address:** 69900 NW LOWER VALLEY DR, TERREBONNE, OR 97760  
**Tax Status:** Assessable

### Warning

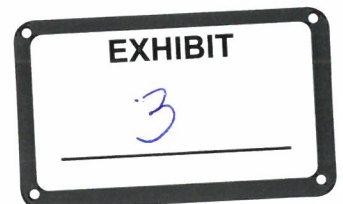
This account may have potential additional tax liabilities, taxes due, or other special development conditions.

### Structures Located on this Property

No structures for account.

### Land Characteristics for this Property

Land Description	Acres	Land Classification
Exclusive Farm Use Zoned	4.98	D7: DRY GROUND - SOIL CLASS 7



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## Lisa Andrach

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**From:** KLEBS Heather \* DSL <Heather.Klebs@dsl.oregon.gov>  
**Sent:** Monday, November 6, 2023 3:41 PM  
**To:** Lisa Andrach  
**Cc:** Cindy Grossman  
**Subject:** 69900 NW Lower Valley Dr Wetland Determination Request received

We received your onsite wetland determination request on 11/06/2023 for the above property. Jessica Salgado (jessica.salgado@dsl.oregon.gov) is the Jurisdiction Coordinator assigned to review and the DSL file number is **WD2023-0508**.

We are experiencing unusually high volume, and response times may be delayed. Our staff will contact you as soon as possible. We appreciate your patience. In the interim, you can access the Department of State Lands: Statewide Wetlands Inventory: Waterways & Wetlands: State of Oregon here <https://www.oregon.gov/dsl/WW/Pages/SWI.aspx>. The SWI is a screening tool to help identify approximate locations of wetlands and waterways.

*Heather Klebs*

(she/her/hers)

Support Services

Oregon Department of State Lands

775 Summer St NE, Ste 100

Salem, OR 97301-1279

971.707.2998 (cell) • 503.378.4844 (fax)

[heather.klebs@dsl.oregon.gov](mailto:heather.klebs@dsl.oregon.gov) • <http://www.oregon.gov/DSL>

*I work a hybrid schedule. I am typically in the office Tuesdays and Wednesdays and remote Mondays, Thursdays, and Fridays.*

**\*\*\*CONFIDENTIALITY NOTICE\*\*\*\*\***

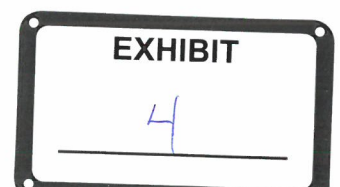
This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system.

**From:** Lisa Andrach <lisa@fitchandneary.com>  
**Sent:** Monday, November 6, 2023 1:08 PM  
**To:** DSL Support Services \* DSL <support.services@dsl.oregon.gov>  
**Cc:** Cindy Grossman <cindy@fhcvineyards.com>  
**Subject:** On-Site wetlands determination request

You don't often get email from [lisa@fitchandneary.com](mailto:lisa@fitchandneary.com). [Learn why this is important](#)

Please see the attached application form for an on-site wetlands determination for a vacant parcel in Deschutes County. I have attached the current DSL land use notification response (WN2023-0364) and the building envelope location.

There are no on-site structures or improvements.



You can access the site any time. The owner is also available to schedule an onsite visit with if you prefer. Cindy Grossman at 541-350-5384.

Thank you.

Lisa Andrach, Attorney



Fitch and Neary, PC  
210 SW 5<sup>th</sup> St, Suite 2  
Redmond, OR 97756  
Ph: 541-316-1588  
Fax: 541-316-1943  
[www.fitchandneary.com](http://www.fitchandneary.com)

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**STAFF REPORT**

**FILE NUMBER(S):** 247-23-000293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA

**OWNER:** GROSSMANN, ROGER W & CYNTHIA M

**SUBJECT PROPERTY:** Property #1: 69900 NW Lower Valley Drive, Terrebonne, OR  
(Map 14-12-30BA, Tax Lot 100)

Property #2: 69850 NW Lower Valley Drive, Terrebonne, OR  
(Map 14-12-30BA, Tax Lot 200)

Property #3: 69800 NW Lower Valley Drive, Terrebonne, OR  
(Map 14-12-30BA, Tax Lot 300)

**APPLICANT:** Lisa Andrach  
Fitch and Neary, PC  
210 SW 5<sup>th</sup> Street, #2  
Redmond, OR 97756

**REQUEST:** Conditional Use Permit and Surface Mine Impact Area Review to establish three (3), non-farm dwellings on three separate legal lots of record ("Subject Property") in the Exclusive Farm Use – Sisters Cloverdale Subzone (EFU-SC), Wildlife Area (WA) Combining Zone and Surface Mining Impact Area Combining Zone (SMIA).

**HEARING DATE:** Tuesday, December 5, 2023

**HEARING START:** 6:00 pm

**STAFF CONTACT:** Haleigh King, Associate Planner  
Phone: 541-383-6710  
Email: [Haleigh.King@deschutes.org](mailto:Haleigh.King@deschutes.org)

**RECORD:** Record items can be viewed and downloaded from:  
[www.deschutes.org/247-23-000293-CU-294-CU-295-CU](http://www.deschutes.org/247-23-000293-CU-294-CU-295-CU)

## **I. APPLICABLE CRITERIA**

Deschutes County Code (DCC)

Title 18, Deschutes County Zoning Ordinance

Chapter 18.16, Exclusive Farm Use Zones (EFU)

Chapter 18.56, Surface Mining Impact Area Combining Zone (SMIA)

Chapter 18.88, Wildlife Area Combining Zone (WA)

Title 22, Deschutes County Development Procedures Ordinance

## **II. BASIC FINDINGS**

**LOT OF RECORD:** Tax Lot 100, 200 and 300 were determined to be individual legal lots of record pursuant to County File No. LR-04-26. The properties were subsequently adjusted via County File Nos. LL-09-117, LL-09-119, and LL-09-128 to their current configuration. The property line adjustment was perfected via the recordation of new property deeds and the property line adjustment survey (CS #20439).

**SITE DESCRIPTION:** Tax Lot 100, Tax Lot 200, and Tax Lot 300 are 4.98 acres, 4.98 acres, and 5.01 acres in size, respectively. Each property contains a cover of juniper trees and other vegetation typical of the high desert. The properties are rectangular in shape and are accessed via a private driveway extending off of NW Lower Valley Drive, a private road. The grade of the property is varied.

**REVIEW PERIOD:** The Conditional Use applications were submitted on April 19, 2023. The applications were deemed incomplete and an incomplete letter was sent to the applicant on May 19, 2023. The applicant provided a response to the incomplete letter and requested the applications be deemed complete on September 15, 2023. The applicant subsequently tolled the land use clock from October 4, 2023 to October 11, 2023 and again from October 31, 2023 to November 14, 2023. The total clock extension time is 21 days. The 150th day on which the County must take final action on these applications is March 4, 2024.

The Surface Mine Impact Area Review applications (File Nos. 247-23-000737-SMA, 738-SMA, 739-SMA) were submitted on October 25, 2023 and deemed complete by the Planning Division on November 24, 2023. The 150<sup>th</sup> day on which the County must take final action on these applications is April 22, 2024.

**PROPOSAL:** The applicant proposes to establish a nonfarm dwelling on each of the subject properties. Sewage disposal will be via an on-site wastewater system and water is anticipated to be provided by an on-site well. Staff notes that while these applications are addressed in one staff report, each Conditional Use Permit and corresponding SMIA Review are distinct and separate land use applications.

**SURROUNDING LAND USES:** Immediately surrounding properties to the north, south, east, and west are EFU-zoned parcels in a variety of sizes and shapes ranging from approximately 5 acres to 165 acres. The majority of surrounding EFU zoned properties contain large scale commercial irrigation pivots and are in active farm use. The subject properties are situated above Deep Canyon, with irrigated farm parcels up and down the canyon to the southwest and northeast. There appears to be some non-irrigated EFU parcels to the southwest that may be in use as dry rangeland. The Faith, Hope & Charity Winery, also owned by the property owner, is located approximately one mile to the northeast. The attributes of the adjoining EFU properties are summarized in the following table.

Owner	Tax Lots	Total Ac./ Irrigated Ac.	Farm Tax	Dwelling Unit	Soil Mapping Units
Deep Canyon LLC <i>West</i>	14-12, Tax Lot 706	20 / 0	Yes	No	101E, 106D, 71A
Grossmann <i>North</i>	14-12, Tax Lot 702	164.99 / 82.75	Yes	Yes <sup>1</sup>	101E, 106D, 71A, 81F, 71B
Two Canyons LLC <i>East</i>	14-12, Tax Lot 1999	160.09 / 72	Yes	Yes <sup>2</sup>	71A, 71B, 106D, 100C, 65A
Deschutes County  <i>South</i>	14-12, Tax Lot 3201	80.75 / 0	No	No	100C, 106D, 65A, 37B

**LAND USE HISTORY:**

- LR-04-26: Legal Lot of Record Verification for the subject property.
- LL-09-117, LL-09-119, LL-09-125, LL-09-126, LL-09-127, LL-09-128, LL-09-120: Series of Property Line Adjustments between seven (7) legal lots of record verified under County File No. LR-04-26. These lot line adjustments resulted in today's configuration of the subject property.

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<sup>1</sup> County Land Use File No. MC-06-03

<sup>2</sup> County Land Use File No. CU-89-117



**SOILS:** According to the Natural Resources Conservation Service (NRCS) maps of the area, there are two soil units mapped on each of the subject properties. See Figures 1 to 3 below:

**Figure 1- Property #1 (Tax Lot 100)**



106D, Redslide-Licksillet complex, 15 to 30 percent north slopes. This soil is rated 6e/7e when nonirrigated and 7e when irrigated. This soil is not considered high-value farmland.

71A, LaFollette sandy loam, 0 to 3 percent slopes. This soil is rated 6s when nonirrigated and 3s when irrigated. This soil is considered high-value farmland.

**Figure 2 - Property #2 (Tax Lot 200)**



106D, Redslide-Licksillet complex, 15 to 30 percent north slopes. This soil is rated 6e/7e when nonirrigated and 7e when irrigated. This soil is not considered high-value farmland.

71A, LaFollette sandy loam, 0 to 3 percent slopes. This soil is rated 6s when nonirrigated and 3s when irrigated. This soil is considered high-value farmland.



**Figure 3 - Property #3 (Tax Lot 300)**



106D, Redslide-Licksillet complex, 15 to 30 percent north slopes. This soil is rated 6e/7e when nonirrigated and 7e when irrigated. This soil is not considered high-value farmland.

100C, Redcliff-Licksillet complex, 0 to 15 percent slopes. This soil is rated 6e/7e when non irrigated. There is no rating for irrigated soils. This soil is not considered high-value farmland.

Soil Study:

The applicant submitted three soil studies prepared by Brian T. Rabe, CPSS, WWS of Valley Science and Engineering. The studies, each dated October 21, 2021, provide a detailed analysis of the soils on each of the subject properties.

The applicant provided the site-specific soil maps in their response to the incomplete letter and supplemental burden of proof on September 14, 2023. Staff has cropped the map images below for clarity.

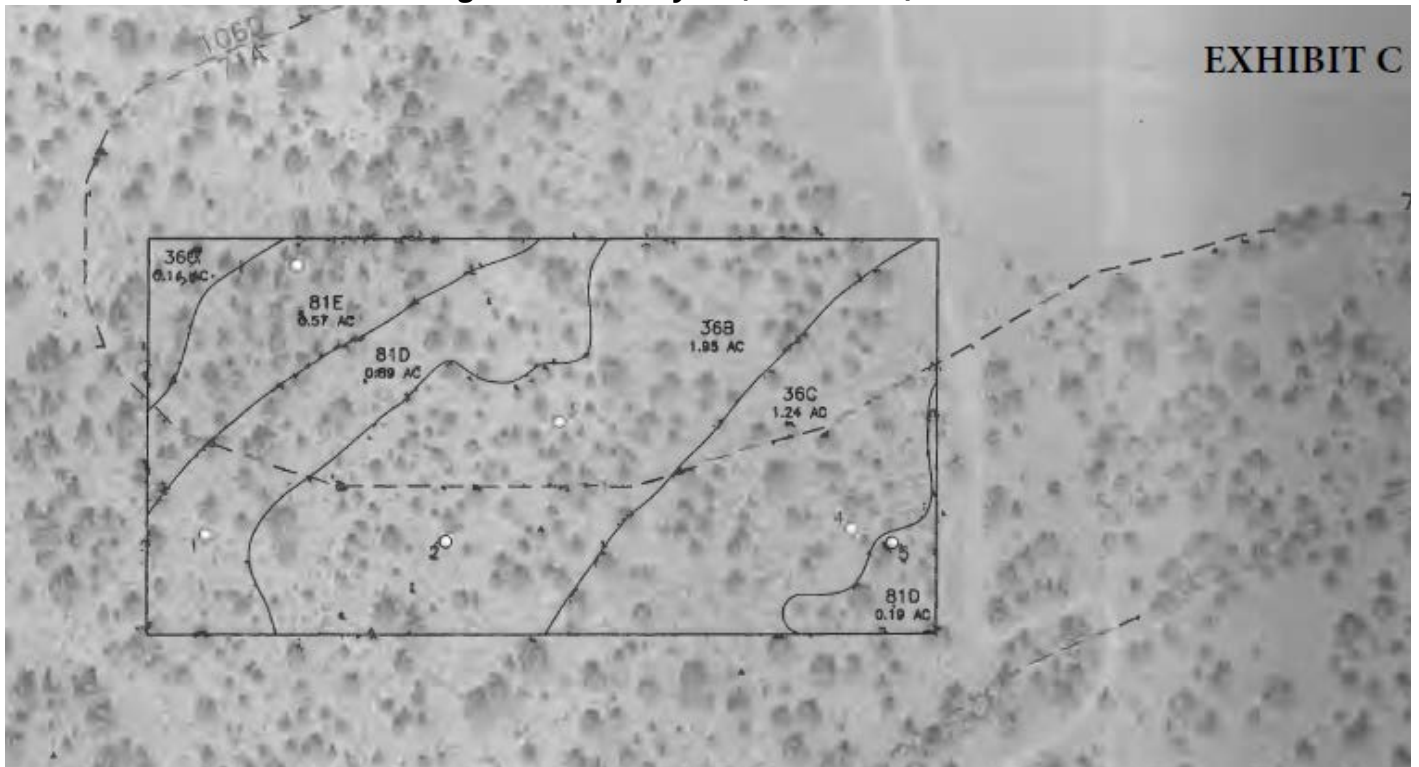
**Figure 4 - Property #1 (Tax Lot 100)**



The soil study states on Page 4:

All 4.98 acres of the Site were evaluated in detail, including 1.88 acres of Licksillet soils. The remaining 3.10 acres consisted of soils more like Deskamp in areas with slightly deeper soils and fewer coarse fragments between delineations of Licksillet soils and the property boundary or right right-of-way. A small delineation of Deskamp (0.79 acres) in the southeaster corner of the parcel is across an access road from an adjacent area that appears to have been disked or mowed but not irrigated in the past. The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties. Therefore, the entire area evaluated is considered “generally unsuitable” for farm use.

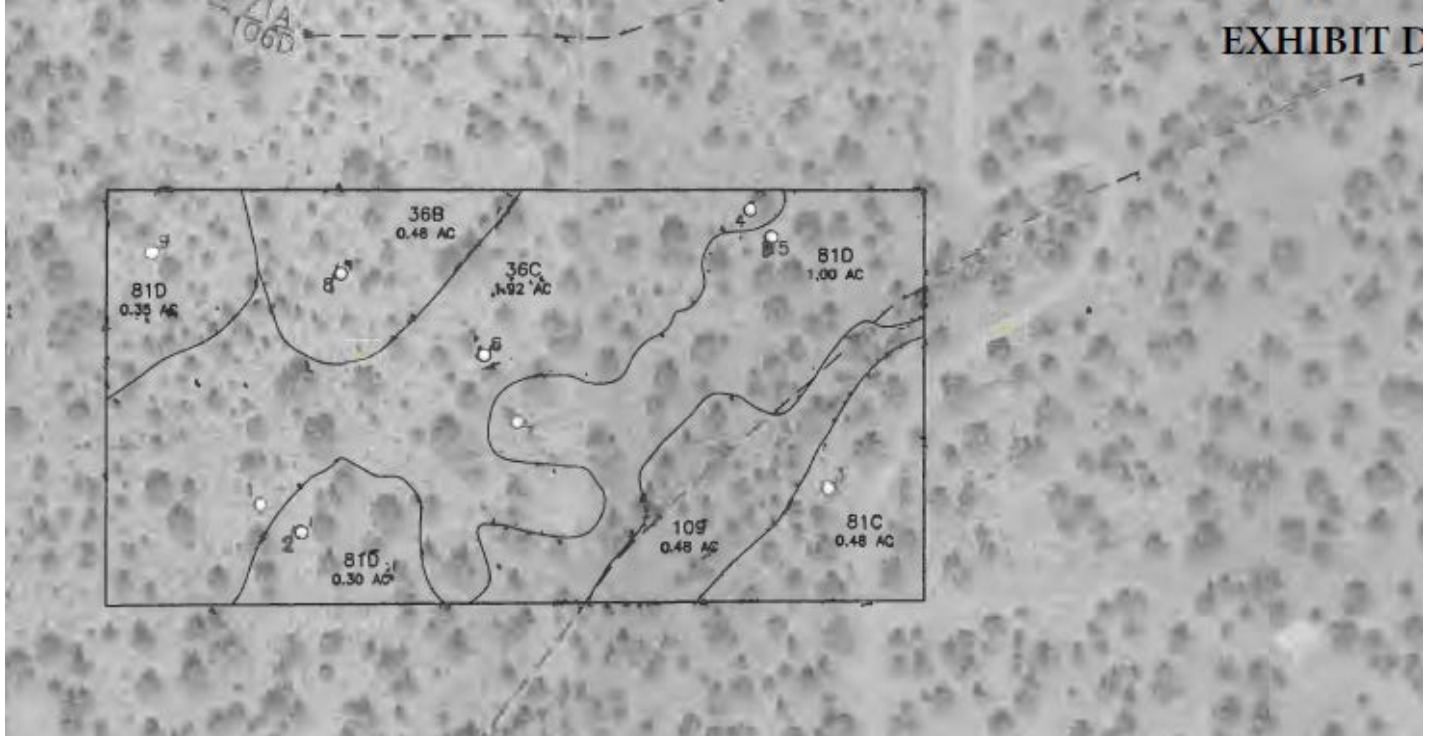
**Figure 5 - Property #2 (Tax Lot 200)**



The soil study states on Page 4:

All 4.98 acres of the Site were evaluated in detail, including 1.65 acres of Licksillet soils. The remaining 3.33 acres consisted of soils more like Deskamp in areas with slightly deeper soils and fewer coarse fragments between delineations of Licksillet soils and the property boundary or right right-of-way. Small delineations of Deskamp (1.24 and 1.95 acres) in the northeast corner of the parcel are across an access road from an adjacent area that appears to have been disked or mowed but not irrigated in the past. The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties. Therefore, the entire area evaluated is considered “generally unsuitable” for farm use.

**Figure 6 - Property #3 (Tax Lot 300)**



The soil study states on Page 4:

All 5.01 acres of the Site were evaluated in detail, including 2.13 acres of Lickskillet soils and 0.48 acres of Rock outcrop. The remaining 2.40 acres, or 47.9%, consisted of soils more like Deskamp in areas with slightly deeper soils and fewer coarse fragments between delineations of Lickskillet soils and the property boundary or right right-of-way. The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties (none of which appear to be or ever have been farmed). Therefore, the entire area evaluated is considered "generally unsuitable" for farm use.

Staff includes additional analysis as it relates to the soil study later in the staff report.

**PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice on April 28, 2023, 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 Onsite Wastewater, Todd Cleveland

The approved development area associated with the dwelling needs to include the existing approved site evaluation area or a new site evaluation will be required. See site evaluation 247-21-000500-EVAL

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the transmittal materials for 247-23-000293-CU to develop a non-farm dwelling on a 4.98-acre parcel in the Exclusive Farm Use (EFU), Surface Mining Impact Area (SMIA), and Wildfire Area (WA) zones at 69900 NW Lower Valley Rd., aka County Assessor's Map 14-12-30BA, Tax Lot 100.

The most recent edition of the Institute of Traffic Engineers (ITE) Trip Generation Handbook indicates a single-family residence (Land Use 210) generates an average of approximately nine daily weekday trips. 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.

The property accesses NW Lower Valley Drive, a private road, functionally classified as a local. The access permit requirements of DCC 17.48.210(A) do not apply. Staff notes, however, that apparently the applicant is proposing access via other roads. As these roads will provide access to more than three tax lots, the road naming requirements of DCC 16.16 are triggered. Staff will defer to the County's Property Address Coordinator for a final determination if the road naming requirement is met.

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$5,080 per p.m. peak hour trip. County staff has determined a local trip rate of 0.81 p.m. peak hour trips per single-family dwelling unit; therefore the applicable SDC is \$4,115 (\$5,080 X 0.81). The SDC is due prior to issuance of certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final.

**THE PROVIDED SDC AMOUNT IS ONLY VALID UNTIL JUNE 30, 2023. DESCHUTES COUNTY'S SDC RATE IS INDEXED AND RESETS EVERY JULY 1. WHEN PAYING AN SDC, THE ACTUAL AMOUNT DUE IS DETERMINED BY USING THE CURRENT SDC RATE AT THE DATE THE BUILDING PERMIT IS PULLED.**



**ON JULY 1, 2023, THE SDC RATE GOES UP TO \$5,603 PER P.M. PEAK HOUR TRIP AND THE SDC FOR A SINGLE-FAMILY HOME WILL BE \$4,538 (\$5,603 X 0.81) AND THAT SDC AMOUNT WILL BE GOOD THROUGH JUNE 30, 2024.**

Deschutes County Property Address Coordinator, Tracy Griffin

It appears from the aerial map in DIAL that the access for these parcels, 14-12-30BA-00100, 00200 and 00300 trigger CDD 16.16.020,

“All unnamed public and private roads and other roadways which provide access to three or more tax lots, or which are more than 1,320 feet in length, shall be assigned a name in accordance with the procedures in DCC 16.16.030”.

Therefore, further discussion with the property owner regarding the actual access to these parcels is necessary and a road naming application is probable.

State Fire Marshal, Clara Butler

Fire has no comments.

Oregon Department of Fish and Wildlife, Jessica Clark, May 3, 2023

Hi Haleigh,

ODFW recently received a Notice of Application for 3 neighboring properties owned by the same landowner under the same applicant. The File No.'s are 247-23-000293-CU and -295-CU (attached). The properties fall within the County's Metolius Deer Winter Range WA Zone and the applications all list Chapter 18.88, WA Zone as applicable criteria.

In the 3 applications, the applicant addresses 18.88.060 Siting Standards by stating that the dwellings will be built within 300' of a historical road (August 5, 1992), and goes on to provide engineering drawings (Exhibit 5 in the Applications) and aerial photos to support this claim.

Could you please provide some clarification on whether the County is accepting the historic roads drawn in Exhibit 5 as proof? From the aerial photographic evidence that they've provided, we have not seen a road that qualifies as historic and we encourage the county to ensure the criteria listed under 18.88 are followed.

For ease of reference, the links to the applications are below:

<https://weblink.deschutes.org/cdd/DocView.aspx?id=1163189&cr=1>

<https://weblink.deschutes.org/cdd/DocView.aspx?id=1163188>

<https://weblink.deschutes.org/cdd/DocView.aspx?id=1163191>

Oregon Department of Fish and Wildlife, Jessica Clark, October 19, 2023

Hi Haleigh!

Cynthia Grossman called Andrew Walch yesterday, requesting to talk about their recent 'evidence' of roads existing prior to 1992 which is included in their Burden of Proof Statement. We called her back today and told her it wasn't up to us to accept the roads condition. Application: 247-23-000293/ 294/ 295-CU If there is a Hearing, could you please keep us in the loop of when it is scheduled?

Oregon Department of Fish and Wildlife, Jessica Clark, November 17, 2023

Hi Haleigh,

ODFW would like to re-iterate the comments made in our previous comment letter dated 5/03/2023. We'd also like to make clear that despite the additional maps and aerial photos provided by the applicant during the fall of 2023, ODFW does not see evidence of a road pre-dating August 5, 1992 in those documents provided in the application materials (link below). In this case, with the materials provided, ODFW does not support an exception to Deschutes County Code (DCC) 18.88.060 Siting Standards, and encourages the county to ensure that Goal 5 mule deer winter range habitat is allowed the protections outlined in DCC.

<https://www.deschutes.org/cd/page/247-23-000293-cu-294-cu-295-cu-conditional-use-permits-three-3-non-farm-dwellings>

Thank you for keeping us in the loop of this application! Please let me know if you want to discuss anything further, and please add this correspondence to the record.

Wetland Land Use Notice Response

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**Response Page**

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**Department of State Lands (DSL) WN#**  
 WN2023-0364

**Responsible Jurisdiction**

<b>Staff Contact</b> Haleigh King	<b>Jurisdiction Type</b> County	<b>Municipality</b> Deschutes
<b>Local case file #</b> 247-23-000293-CU	<b>County</b> Deschutes	

**Activity Location**

<b>Township</b> 14S	<b>Range</b> 12E	<b>Section</b> 30	<b>QQ section</b> BA	<b>Tax Lot(s)</b> 100
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Street Address  
 89900 NW Lower Valley Dr  
 Address Line 2

City Terrebonne	State / Province / Region OR
Postal / Zip Code 97760	Country Deschutes

**Latitude** 44.333528      **Longitude** -121.343128

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**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

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**Your Activity** ^

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

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**Applicable Oregon Removal-Fill Permit Requirement(s)** ^

(continued)



- ☐ 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.

## Closing Information

### Additional Comments

A 154-page document was submitted for the proposed dwelling, but it did not contain a site plan. A previous land use notice (WN2021-0428) documented the same. Therefore, this response cannot be more specific. A wetland/stream is mapped in the northeast portion of this property and can be seen on the State Wetlands Inventory. There are also aerial photo signatures in the southeastern sector that suggest wet ground. These are possibly from irrigation, but a more thorough inspection of current conditions may be needed to determine state jurisdiction. Without a wetland delineation, the proposed project should avoid roughly the eastern half of the property. Other portions of the property appear to be suitable for building. If building is proposed in the eastern portion, a wetland delineation is recommended to minimize impacts to potential jurisdictional waters. You are allowed a total of 50 cubic yards of removal, fill, and movement of material in jurisdictional wetlands and waters before needing a permit.

**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.

### Contact Information

- For information on permitting, use of a state-owned water, wetland determination or delineation report requirements please contact the respective DSL Aquatic Resource, Proprietary or Jurisdiction Coordinator for the site county. The current list is found at: <http://www.oregon.gov/dsl/ww/pages/wwstaff.aspx>
- The current Removal-Fill permit and/or Wetland Delineation report fee schedule is found at: <https://www.oregon.gov/dsl/WW/Documents/Removal-FillFees.pdf>

### Response Date

6/1/2023

### Response by:

Lynne McAllister

### Response Phone:

503-986-5300

Department of State Lands, Lynne McAllister, November 2, 2023

Hi Haleigh,

Thank you for the site plan. The notice was for only tax lot 100, so my response only pertains to the most northern lot in the diagram. The other 2 lots didn't show anything mapped on the SWI, so they wouldn't require a Wetland Land Use Notice.

The building envelope on tax lot 100 is directly on top of the mapped feature of concern, which is a tributary of Deep Canyon. This may only be an ephemeral drainage, but it is not possible for me to determine that from an offsite assessment. I still recommend an on-site check (determination/delineation) by a consultant before ground disturbance occurs. The report should be sent to DSL for review and approval. The feature appears on LiDAR imagery, so there is something present on the ground.

I am copying this message chain to Jessica Salgado, Jurisdiction Coordinator for Deschutes County, who would review a determination/delineation.

**Staff Comment:** As of the writing of this staff report, the applicant has not included a wetland delineation in the record specific to Tax Lot 100, per the DSL recommendation noted above. Based on the proposed building envelope, the proposed project occurs in the eastern half of the subject property. This is the area where DSL identified potential wetlands. Staff includes a recommended condition of approval for the applicant to prepare and submit a wetland delineation to DSL to precisely identify any wetlands on Tax Lot 100. The results of the delineation would determine if additional state or local permitting is required for site development.

The following agencies did not respond to the notice: Central Electric Cooperative, Deschutes County Assessor, Deschutes County Property Management, and Watermaster – District 11.

**PUBLIC COMMENTS:** The Planning Division mailed notice of the conditional use application to all property owners within 750 feet of the subject property on April 28, 2023. The applicant also complied with the posted notice requirements of Section 22.24.030(B) of Title 22. The applicant submitted a Land Use Action Sign Affidavit indicating the applicant posted notice of the land use action on April 28, 2023.

Staff received one public comment from Central Oregon Landwatch on November 8, 2023,

Hi Haleigh,  
LandWatch is concerned the above applications may not meet all applicable criteria for nonfarm dwellings. Please consider us a party to these proceedings.

Our mailing address is:  
2843 NW Lolo Drive  
Bend, Oregon 97703

Can you let me know the status of the 150-day clock on these applications?

Thanks, best regards,  
Carol Macbeth

**STAFF COMMENT:** Staff provided a response to Central Oregon Landwatch to respond to their 150-day clock question. However, the comments provided do not afford enough specificity to be addressed by Staff below in the decision.

**NOTICE REQUIREMENT:** On November 6, 2023, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the subject property, agencies, and parties of record. A Notice of Public Hearing was published in the Bend Bulletin on November 12, 2023. The applicant complied with the posted notice requirements of DCC 22.24.030(B). The applicant

submitted a Land Use Action Sign Affidavit indicating the applicant posted notice of the land use action on April 28, 2023.

### III. FINDINGS & CONCLUSIONS

#### Title 18 of the Deschutes County Code, County Zoning

#### Chapter 18.16, Exclusive Farm Use Zones (EFU)

Section 18.16.030. Conditional uses permitted - High value and non-high value farmland.

***The following uses may be allowed in the Exclusive Farm Use zones on either high value farmland or nonhigh value farmland subject to applicable provisions of the Comprehensive Plan, DCC 18.16.040 and 18.16.050, and other applicable sections of Title 18.***

**A. Nonfarm dwelling**

**FINDING:** The applicant proposes to establish three (3) nonfarm dwellings. The proposed dwellings may be allowed individually as a conditional use if the applicant satisfies the applicable criteria in Title 18 of the County Code. The applicant does not propose to establish a use other than a dwelling under this application.

Section 18.16.040. Limitations on Conditional Uses.

**A. Conditional uses permitted by DCC 18.16.030 may be established subject to ORS 215.296 and applicable provisions in DCC 18.128 and upon a finding by the Planning Director or Hearings Body that the proposed use:**

- 1. Will not force a significant change in accepted farm or forest practices as defined in ORS 215.203(2)(c) on surrounding lands devoted to farm or forest uses; and**
- 2. Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest uses; and**

**FINDING:** The County has applied an area of analysis that covers all properties within a one-mile radius of the subject property. This radius has been determined to be sufficient to identify farm or forest uses that might be impacted by a proposed nonfarm dwelling.

Due to the proximity of each of the subject properties to one another, the results of the study area analysis were substantially the same. Staff addresses each tax lot individually where the results differ.

#### **Forest Practices**

The closest properties zoned for forest use are approximately 5.39 miles to the west. The predominant tree species in the surrounding area is juniper, which is not a commercial species, with scattered pine trees in the area as well. Given the distance to forested lands and the lack of commercially viable tree species in the surrounding area, staff finds that the proposed nonfarm dwellings will not force a significant change in, or significantly increase the cost of, accepted forest practices on surrounding lands devoted to forest use.

**Farm Practices**

The USDA 2017 Census of Agriculture<sup>3</sup> shows agricultural production in Deschutes County roughly split between crop and livestock production in economic value. Predominant crop species include forage-land used for all hay and haylage, wheat for grain; and nursery production. Livestock production is predominated by cattle and calves, equestrian species, dairy and eggs/poultry.

Within the study area for each nonfarm dwelling, Staff includes a chart below which shows the amount of acres receiving farm tax deferral and of those, how many acres are irrigated.

<b>Subject Property (Tax Lot)</b>	<b>Deferred Acres</b>	<b>Irrigated Deferred Acres</b>
Tax Lot 100	2,231.45	1,185.77
Tax Lot 200	2,310.04	1,237.77
Tax Lot 300	2,677.71	1,231.77

Farm practices on the surrounding properties are described in the Surrounding Land Use Section, above.

**Potential Impacts**

Staff finds that the proposed nonfarm dwellings could change accepted farm or forest practices or increase the cost of accepted farm or forest practices on surrounding lands if it caused a reduction in available productive farmland, reduced the availability of irrigation water, or introduced conflicting uses. As described below, the applicant asserts that each subject property is generally unsuitable for farm use in their entirety. There is nothing in the record indicating a farmer has expressed interest in the proposed building envelope for farm use and no water rights would be impacted by this proposal.

Residential uses can conflict with farm uses. The record includes information from the Oregon State University Extension Service describing the types of impacts the farming practices in the surrounding area could generate on nearby lands. Maintaining irrigated pasture can generate dust from re-seeding, drifting of herbicides from spraying, vehicle noise from trucks, manure odor from

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<sup>3</sup>[https://www.nass.usda.gov/Publications/AgCensus/2017/Online\\_Resources/County\\_Profiles/Oregon/cp41017.pdf](https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Oregon/cp41017.pdf)

fertilizing, and possible water runoff from irrigation. Grazing livestock can generate dust, manure odor, possible interference with vehicular traffic, and property damage if livestock escape. However, staff finds that potential conflicts are mitigated, as follows.

Pursuant to DCC 18.16.050, if these applications are approved, each property owner will be required to sign and record in the County Clerk’s office a document binding the landowner, and the landowner’s successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.396 or 30.397. The recordation of this document with the County Clerk helps ensure that the proposed nonfarm dwelling will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm use, nor will it significantly increase the cost of accepted farm practices.

The subject properties are surrounded by farm uses to the north, west, east, and southeast. The closest farm use is on Map 14-12 Tax Lot 1999, to the east, Map 14-12-30A, Tax Lot 100 to the southeast, and Map 14-12 Tax Lot 702 to the north. The property identified as Map 14-12, Tax Lot 701 to the northeast is currently in farm use, as it contains large, irrigated pivot fields. As proposed, the building envelopes will be 100 feet or greater from these farm uses. This distance meets the minimum 100-foot setback required from nonfarm dwellings to adjacent properties currently employed in farm use and receiving farm tax deferral. Staff finds this distance will provide a sufficient buffer to mitigate potential use conflicts. As discussed in further detail below, the location of the building envelope is further influenced by the required siting standards applicable to new dwellings in the WA Zone.

Within the study area, Staff includes data below for each property as it relates to private EFU lots developed with dwellings.

<b>Subject Property (Tax Lot)</b>	<b>Private EFU Dwellings</b>	<b>Private EFU Tax Lots</b>	<b>Percent of Private EFU Tax Lots developed with dwellings</b>
Tax Lot 100	12	29	41
Tax Lot 200	13	30	43
Tax Lot 300	13	29	43

Based on the data above, there appear to be more undeveloped EFU private parcels than those developed with residences. It is not clear if the existing residential uses have had a negative impact on farm uses.

As discussed below, of the properties developed with dwellings, the majority constructed in or after 1993 are nonfarm dwellings (approximately 60 percent). Other dwelling types constructed in or after 1993 including accessory farm dwellings (20 percent) and one dwelling of an unknown type. The most current dwelling development trend in the study area appears to be the establishment of

nonfarm dwellings. Dwellings developed from 1979 through 1992 were primarily established as farm dwellings (approximately 71 to 83 percent).

However, Staff asks the Hearings Officer to make specific findings for this criterion.

**3. That the actual site on which the use is to be located is the least suitable for the production of farm crops or livestock.**

**FINDING:** The Board of County Commissioners determined in the *Clough* decision (File No. 247-15-000035-CU/247-15-000403-A), that when the general unsuitability criterion of 18.16.050 (G)(1)(a)(iii) is met, the least suitable criterion of Section 18.16.040 (A)(3) above is satisfied as well. The findings under DCC 18.16.050(G)(1)(a)(iii) below are incorporated herein by reference.

Section 18.16.050. Standards for Dwellings in the EFU Zones.

***Dwellings listed in DCC 18.16.025 and 18.16.030 may be allowed under the conditions set forth below for each kind of dwelling, and all dwellings are subject to the landowner for the property upon which the dwelling is placed, signing and recording in the deed records for the County, a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.***

**FINDING:** As required under this section, staff includes a condition of approval requiring the property owner to sign and record the above document prior to issuance of a building permit for any nonfarm dwelling

Farm & Forest Management Easement: **Prior to the issuance of any building permit for a nonfarm dwelling**, the property owner shall sign and record in the deed records for the County, a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937. The applicant shall submit a copy of the recorded Farm and Forest Management Easement to the Planning Division.

**G. Nonfarm Dwelling.**

**1. One single-family dwelling, including a manufactured home in accordance with DCC 18.116.070, not provided in conjunction with farm use may be permitted on an existing lot or parcel subject to the following criteria:**

**a. The Planning Director or Hearings Body shall make findings that:**

**i. The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming practices, as defined in ORS 215.203(2)(c),**

***or accepted forest practices on nearby lands devoted to farm or forest use.***

**FINDING:** This approval criterion is nearly identical to the approval criterion under DCC 18.16.040(A)(1) and (2). Those findings are incorporated herein by reference. This criterion will be met.

- ii. The proposed nonfarm dwelling does not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, the county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated, by applying the standards under OAR 660-033-0130(4)(a)(D), and whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area.***

**FINDING:** On June 1, 1998, the Land Conservation and Development Commission adopted amendments to the administrative rules implementing Goal 3, Agricultural Lands (OAR Chapter 660-033) to incorporate case law and to clarify the analysis under the “stability” approval criterion. The rules continue to apply the three-step “stability” analysis first articulated in the Land Use Board of Appeals (LUBA) case Sweeten v. Clackamas County, 17 Or LUBA 1234 (1989). OAR 660-033-0130(4)(a) states:

- (D) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall:***
  - (i) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas. Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area;***

**FINDINGS:** The County has applied an area of analysis including all EFU-zoned land located within a one-mile radius of the subject property’s boundaries and including approximately 2,000 acres (hereafter called “study area”). Staff finds this study radius is suitable to provide a comprehensive

analysis of the character of the area surrounding each subject property because of its significant size and the number of parcels located within it.

Staff has summarized the sizes of private EFU tax lots within the study area for each property below.

Subject Property (Tax Lot)	EFU-zoned Tax Lots	Private EFU Tax Lots	Size range of Private EFU Tax Lots (acres)	Less than or equal to 20 acres	20.01 to 39.99 acres	Greater than or equal to 40 acres
Tax Lot 100	40	29	0.37 acres to 560 acres	13 (45%)	2 (7%)	14 (48%)
Tax Lot 200	41	30	0.37 acres to 560 acres	13 (43%)	2 (7%)	15 (50%)
Tax Lot 300	40	29	0.37 acres to 560 acres	13 (45%)	2 (7%)	14 (48%)

Of the private EFU lots within each study area, a majority are greater than or equal to 40 acres in size.

- (ii) ***Identify within the study area the broad types of farm uses (irrigated or nonirrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, nonfarm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of nonfarm/lot of record dwellings that could be approved under subsections (3)(a) and section 4 of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993, and the parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4). The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible nonfarm dwellings under this subparagraph;***

**FINDINGS:**

**Farm Uses**

The EFU-zoned lands in the study area that are engaged in farm use mainly consist of farming in the form of large-acreage pivot fields including turf production, hay and alfalfa production, vineyards, and keeping horses and/or cattle.

Within the study area for Tax Lot 100, 200 and 300, there are 24, 25, and 24 privately-owned tax lots that are receiving farm tax deferral, respectively. Of these privately-owned tax lots receiving farm tax deferral, 14 to 15 have water rights.



The total amount of water rights on these farm tax-deferred properties ranges from 1,185.77 to 1,237.77 acres. Based on the amount of irrigation and the size of the parcels in the study area, an estimated 1,185.77 to 1,237.77 acres (acreage that is possibly being irrigated) are engaged in irrigated farm use. According to Deschutes County GIS, a portion of the study area is in the Three Sisters Irrigation District.

### Existing Dwellings

The chart below summarizes the types of dwellings constructed within the study area between 1979 and 1993:

Subject Property (Tax Lot)	Private EFU Dwellings	Dwelling built prior to 1979	Dwelling built between 1979 and 1992	Dwelling built from 1993 to present
Tax Lot 100	12	1	6	5
Tax Lot 200	13	1	7	5
Tax Lot 300	13	1	7	5

The one dwelling developed prior to 1979 predated the County's EFU Zone and therefore was not subject to EFU zoning requirements.

Within the study area for all three tax lots, the 6 to 7 dwellings developed from 1979 through 1992 included 5 farm dwellings, 1 accessory farm dwelling, and 1 dwelling of an unknown type. Between this time period, it appears the dominant dwelling type was a farm dwelling.

Staff notes that dwellings constructed up until the late 1980s in this time period were not necessarily reviewed as either farm or nonfarm dwellings.

Of the 5 dwellings constructed in 1993 or after, 3 were nonfarm dwellings, 1 was an accessory farm dwelling and 1 is a dwelling of an unknown type.

### Dwelling Development Trends Since 1993

As discussed above, those 5 dwellings constructed in or after 1993 were a mixture of nonfarm (60 percent), and accessory farm dwellings (20 percent). One dwelling is of an unknown type. For this reason, staff finds the most current dwelling development trend in the study area is the establishment of nonfarm dwellings.

### Potential Nonfarm Dwellings

To address this criterion, staff reviewed the study area to determine how many properties are “similarly situated to the subject property”. Staff finds that privately owned properties in the EFU Zone that are not presently developed with a dwelling are similarly situated, in that they may be eligible for a nonfarm dwelling. Based on staff’s review, 13 to 14 properties, excluding the subject properties, meet these characteristics including one property that has already been approved for nonfarm dwellings but have not been fully constructed yet. Therefore, 12 to 13 possible new nonfarm dwellings could be developed on similarly situated properties.

It is not clear whether a nonfarm dwelling could be approved on these properties since each property would be reviewed on its own merits. Any proposed nonfarm dwellings on the above-referenced properties must be reviewed for their effect on the stability of the land use pattern, whether they are on land generally unsuitable for the production of crops, livestock or merchantable trees, and whether they will cause a significant change in or significantly increase the cost of accepted farming practices on adjacent land. Staff notes many of the vacant, privately-owned EFU lots are owned by Two Canyons LLC or Deep Canyon LLC and contain large pivot fields in active farm use. For the purposes of this review, staff assumes all identified properties could be approved for a nonfarm dwelling.

### **Potential Nonfarm Parcels**

In the EFU Zone, two types of land divisions creating new nonfarm parcels are possible: those where the parent parcel is irrigated (DCC 18.16.055(B)) and those where the parent parcel is not irrigated (DCC 18.16.055(C)). OAR 660-033-130(4)(c)(C) sets the rules for the stability analysis of properties outside of the Willamette Valley:

*The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated by applying the standards set forth in paragraph (4)(a)(D) of this rule. If the application involves the creation of a new parcel for the nonfarm dwelling, a county shall consider whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area by applying the standards set forth in paragraph (4)(a)(D) of this rule; and [...] (emphasis added)*

In the case *Elliott v. Jackson County*, 43 Or LUBA 426 (2003), LUBA found that OAR 660-033-0130(4)(a)(D) requires that the stability analysis for nonfarm dwellings needs to consider the potential for newly created nonfarm parcels. In part, LUBA summarizes that decision as follows:

OAR 660-033-0130(4)(a)(D) requires that the county’s stability analysis consider the potential for new nonfarm parcels in the area, whether or not the applicant proposes a new nonfarm parcel.

OAR 660-033-0130(4)(c)(C) requires compliance with the standards of OAR 660-033-0130(4)(a)(D), and therefore also requires consideration of potential new nonfarm parcels, whether or not a new nonfarm parcel is proposed.

OAR 660-033-0130(4)(a)(D) and (c)(C) require consideration of the cumulative impact of a proposed nonfarm dwelling on lots or parcels that are “similarly situated.” Because OAR 660-033-0130(4)(a)(D)(ii) expressly requires consideration of whether parcels larger than the minimum parcel size may be divided to allow nonfarm dwellings, the scope of “similarly situated” parcels is not limited to substandard parcels or parcels that are the same size as the subject property.

In consideration of the above and of the privately owned properties in the study area, staff finds:

- There are no nonirrigated parcels between 85 and 90 acres in the study area capable of being partitioned under a nonirrigated land division to create a single nonfarm parcel. There are no nonirrigated parcels over 90 acres in the study area capable of being partitioned under a nonirrigated land division to create two nonfarm parcels.
- There are no parcels equal to or greater than 40 acres and less than or equal to 80 acres in the study area that may be capable of being partitioned under a nonirrigated land division to create a single nonfarm parcel.
- There are 2 to 3 parcels that are less than 80 acres in the study area and meet the minimum irrigated acres for the subzone that may be capable of being partitioned under an irrigated land division based on size to create a single nonfarm parcel.
- There are 11 parcels that are equal to or greater than 80 acres in the study area. Approximately 6 of these parcels appear to meet the minimum irrigated acres for the subzone that may be capable of being partitioned under an irrigated land division to each create two nonfarm parcels. It is important to note that many of the EFU parcels within the study area contain two EFU subzones; Lower Bridge and Sisters/Cloverdale. Each of these subzones have differing irrigated acreage requirements; 130 acres and 63 acres, respectively.

The potentially divisible parcels are composed of class 3 to 7 soils that are rated both high-value and non-high value farmland, so it is unknown if they would meet the “generally unsuitable” criteria of 18.16.055(B)(2)(a)(v) and 18.16.050(G)(2)(b). To be eligible for division the parent parcel must have been lawfully created prior to July 1, 2001. In addition, new parcels must meet certain access and frontage requirements. Staff notes that the eligibility of other properties for land use approvals or land divisions cannot be formally determined as part of this process. This assumed eligibility or ineligibility of these properties for land use approvals or land divisions is based on publicly available information and is not binding or final on these other properties.

Therefore, this analysis shows that between 14 to 15 new nonfarm dwelling parcels could potentially be created from land divisions.

### **Potential Lot of Record Dwellings**

Under Section 18.16.050(E) and OAR 660-033-130(3), a lot of record dwelling may be sited on non-high value farmland in the EFU Zone if the parcel was created and acquired by the current owner prior to January 1, 1985, has continuously been owned by the present owner since then, and if the lot or parcel on which the dwelling will be sited was part of a tract on November 4, 1993, no dwelling exists on another lot or parcel that was part of that tract. Under Section 18.16.050(F) and OAR 660-033-130(3)(c), a lot of record dwelling may be sited on high value farmland if it meets the criteria for a lot of record dwelling on non-high value farmland and the Planning Division finds the parcel cannot practically be managed for farm use "due to extraordinary circumstances inherent in the land or its physical setting," such as "very steep slopes, deep ravines or other similar natural or physical barriers."

The Planning Division has previously determined that lot of record dwellings can be difficult to obtain, given the requirement for ownership prior to 1985 and the land cannot be suitable for farming based on the above factors. Some parcels may qualify for a lot of record dwelling, but without a specific analysis of each and every parcel, this determination cannot be concluded. None of the dwellings approved within the Study Area were approved as a lot of record dwelling.

### **Result From Approval of the Possible Nonfarm Dwellings**

The land use pattern and character of the study area is predominately a mixture of large, irrigated pivot fields and crop production.

Including the subject application, approximately 30 to 31 new nonfarm dwellings could be established in the study area on existing and potential future nonfarm parcels. Given the relatively limited number of existing dwellings in the study area and the relatively high number of potential nonfarm dwellings, the proposed nonfarm dwellings may cause a substantial change in the land use pattern of the area. However, staff asks the Hearings Officer to make specific findings on this issue.

There has been 5 dwellings constructed in the study area since 1993, over a 30 year span. It is unclear to staff if the land use pattern is generally stable. The majority of those dwellings were nonfarm dwellings.

For this reason, staff finds the most current dwelling development trends in the study area is the establishment of nonfarm dwellings. Additionally, it does not appear the existing and newly approved dwellings have precluded farm uses in the study area.

There are both irrigated and nonirrigated lands in the area, and most of the nonirrigated parcels are already developed with dwellings. Many of the irrigated parcels are developed with farm dwellings. Staff notes that no farm dwellings have been approved in the area since 1993, and no farm dwellings have been approved since 1995 when the farm dwelling standards included significant changes.

Staff asks the Hearings Officer to make specific findings on whether the proposed dwelling will be consistent with the land use pattern of the area by allowing a nonfarm dwelling on an unproductive portion of the property.

- (iii) Determine whether approval of the proposed nonfarm/lot of record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area;***

**FINDING:** The cumulative effect of existing and potential nonfarm dwellings will increase the number of dwellings in the study area from 12 to 53. Such approvals may “materially alter the stability of the land use pattern in the area” by making it more difficult for the existing farms to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or by diminishing the number of tracts or acreage in farm use. As stated above, it is not clear to staff if such dwellings could be approved as nonfarm dwellings. However, staff notes nonfarm dwelling approvals would be limited to lands generally unsuitable for farm use and, as such, would not reduce available farmland or the number of tracts or acreage in farm use, individually or cumulatively.

Under *Dowrie v. Benton County* (38 Or LUBA 93, 2000), the County must determine whether the proposed nonfarm dwellings will encourage similar uses or divisions on similarly situated parcels in the area:

*Dowrie v. Benton County, 38 Or LUBA 93 (2000)*. A local government cannot reach supportable conclusions as to the stability of the land use pattern required by OAR 660-033-0130(4)(a)(D) unless it adequately defines the study area and determines not only what the land use pattern is, but also whether the proposed use or land division will encourage similar uses or divisions on similarly situated parcels in the area.

It is not clear to staff if the addition of each individual dwelling, for a total of three, would tip the balance from resource to non-resource use. Air photos suggest the farm use in the area has

remained relatively stable for many decades. There have been 3 nonfarm dwellings approved since 2000 within the study area.

Given the 3 nonfarm dwellings approved since 2000, it does not appear to staff that the approval of the proposed nonfarm dwellings will set a precedent for the wholesale approval of nonfarm dwellings to the detriment of surrounding farming. The parcels currently in farm use will likely remain relatively stable, with little or no expansion of farm use in the area, given the topography, soil types, availability of water rights. Parcel sizes vary within the study area with a relatively even mix of large and small parcels. The properties capable of being farmed appear to already be farmed. Additionally, no response to the notice of application or land use action sign was received by nearby farmers requesting the subject property be made available for farm use. The approval of the proposed dwellings will not affect the amount of farming or the type of farming in the study area. Lastly, nonfarm dwellings are reviewed on a case-by-case basis where each proposed nonfarm dwelling would need to demonstrate compliance with all of the applicable criteria for approval. For the foregoing reasons, staff finds that approval of the proposed nonfarm dwellings will not destabilize the mixture of agricultural and residential character of the surrounding area.

However, Staff asks the Hearings Officer to make specific findings on whether the nonfarm dwellings, if approved, would materially alter the stability of the land use pattern in the area.

- iii. The proposed nonfarm dwelling is situated on an existing lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock, or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.***

**FINDING:** Staff notes that the “generally unsuitable” standard is subject to specific criteria discussed in detail under DCC 18.16.050(G)(2) below. Regarding general suitability for the production of farm crops, livestock, and merchantable tree species, staff relies on the following LUBA case law:

Griffin v. Jackson County, 48 Or LUBA 1 (2004). The question is not whether land is generally unsuitable for all farm use; the question is whether the land is generally unsuitable to produce crops, livestock or merchantable trees.

Dorvinen v. Crook County, 33 Or LUBA 711 (1997); (discussing legislative history). ORS 215.284(2)(b) allows nonfarm dwellings to be sited on unproductive parts of the productive farm land on lands outside the Willamette Valley.

Williams v. Jackson County, 55 Or LUBA 223 (2007). A parcel can satisfy the generally unsuitable standard even if portions of the parcel contain areas that, if considered alone, do not satisfy the standard.



Frazer v. Jackson County, 45 Or LUBA 263 (2003). Where a nonfarm dwelling is proposed to be sited on unproductive parts of the productive farm land on lands outside the Willamette Valley, the county is to focus on the productivity of the part of the property selected for nonfarm development and should not consider the suitability of the rest of the parcel or tract.

Based on the above case law, it is optional to focus on the suitability of the *building envelope* or the *entire property* with respect to crops, livestock or merchantable trees only. For this review, the applicant requests staff focuses on the suitability of the entire property for each subject application.

### **Adverse Soil or Land Conditions**

The applicant submitted three soil studies prepared by Brian T. Rabe, CPSS, WWS of Valley Science and Engineering. The studies, each dated October 21, 2021, provide a detailed analysis of the soils on each of the subject properties. The submitted soils report shows that the subject properties contain the following soil types:

**Figure 7 - Property #1 (Tax Lot 100)**



Figure 7 illustrates the location of soil units on the property.

The soil study states on Page 4:

All 4.98 acres of the Site were evaluated in detail, including 1.88 acres of Licksillet soils. The remaining 3.10 acres consisted of soils more like Deskamp in areas with slightly deeper soils

and fewer coarse fragments between delineations of Lickskillet soils and the property boundary or right right-of-way. A small delineation of Deskamp (0.79 acres) in the southeastern corner of the parcel is across an access road from an adjacent area that appears to have been disked or mowed but not irrigated in the past. The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties. Therefore, the entire area evaluated is considered “generally unsuitable” for farm use.

Based on the description above contained in the soil study and corresponding acreages of the soil units provided in the soils map above, staff finds the subject property contains the following acreages:

<b>Soil Type</b>	<b>Classification</b>	<b>Area (acres)</b>
36B	Deskamp Loamy Sand	2.27
36C	Deskamp Loamy Sandy	0.83
81D	Lickskillet-Rock Outcrop Complex	1.18
81E	Lickskillet-Rock Outcrop Complex	0.70

Based on the chart above and the soil map included in the soil study, the subject property contains a total of 3.1 acres of 36B/C (62 percent), and 1.88 acres of 81D/E (38 percent). Therefore, based on these acreages, it appears the subject property is comprised primarily of Deskamp Loamy Sand.

The applicant’s supplemental burden of proof states in part:

As used in the soil report, Table 3 and Figure 4 (Exhibit B (TL 100), C (TL 200), D (TL 300), Brian Rabe has provided the following information:

The data in Table 3 provides the LCC for the soils by name: Deskamp, which is Map Unit 36 – slope phases A, B, or C, all of which are Class 6; Lickskillet, which is Map Unit 81 – slope Phases C, D, E, or F, all of which are Class 7; Rock Outcrop, which is Map Unit 109, which is Class 8.

Based on the acreage amounts summarized above, the subject property contains predominantly Soil Unit 36. According to Mr. Rabe, Soil Unit 36 is Class 6, regardless of slope. DCC 18.16.050(G)(2)(b) above specifies that a parcel is presumed suitable for the production of farm crops and livestock if it is predominately composed of LCC 1-6 soils.

However, staff notes the soil study states in part, “The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties.” However, this statement appears to consider the suitability of the soils in conjunction with adjacent properties whereas the criteria requires an analysis of the suitability of the entire property or a specific building envelope. In this case, the applicant has chosen to focus on the suitability of the entire property.

Staff asks the Hearings Officer to make specific findings on whether the applicant has demonstrated that the proposed nonfarm dwelling is situated on an existing lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock, or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.

**Figure 8 - Property #2 (Tax Lot 200)**

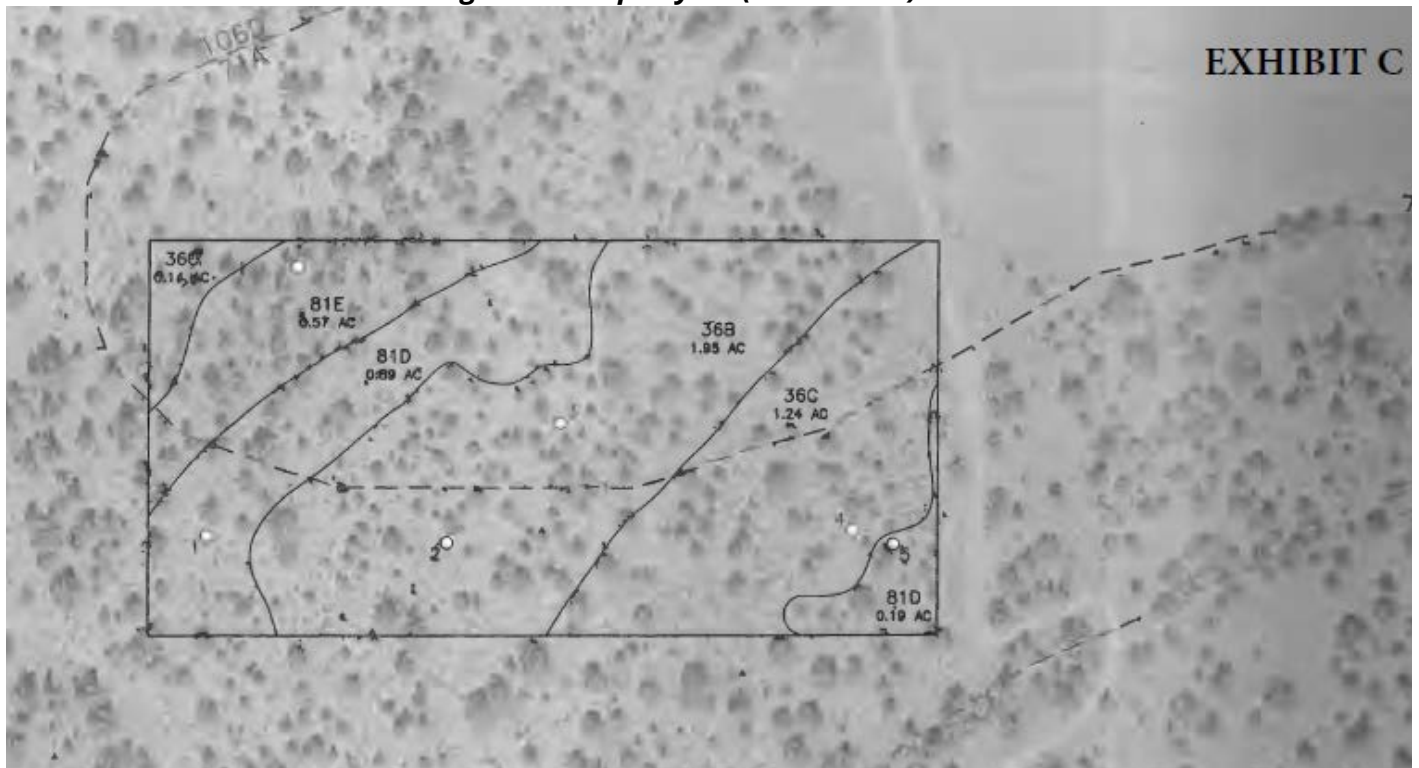


Figure 8 illustrates the location of soil units on the property.

The soil study states on Page 4:

All 4.98 acres of the Site were evaluated in detail, including 1.65 acres of Lickskillet soils. The remaining 3.33 acres consisted of soils more like Deskamp in areas with slightly deeper soils and fewer coarse fragments between delineations of Lickskillet soils and the property boundary or right right-of-way. Small delineations of Deskamp (1.24 and 1.95 acres) in the northeast corner of the parcel are across an access road from an adjacent area that appears to have been disked or mowed but not irrigated in the past. The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties. Therefore, the entire area evaluated is considered "generally unsuitable" for farm use.

Based on the description above contained in the soil study and corresponding acreages of the soil units provided in the soils map above, staff finds the subject property contains the following acreages:

<b>Soil Type</b>	<b>Classification</b>	<b>Area (acres)</b>
36B	Deskamp Loamy Sand	1.95
36C	Deskamp Loamy Sandy	1.38
81D	Lickskillet-Rock Outcrop Complex	1.08
81E	Lickskillet-Rock Outcrop Complex	0.57

Based on the chart above and the soil map included in the soil study, the subject property contains a total of 3.33 acres of 36B/C (67 percent), and 1.65 acres of 81D/E (33 percent). Therefore, based on these acreages, it appears the subject property is comprised primarily of Deskamp Loamy Sand.

The applicant’s supplemental burden of proof states in part:

As used in the soil report, Table 3 and Figure 4 (Exhibit B (TL 100), C (TL 200), D (TL 300), Brian Rabe has provided the following information:

The data in Table 3 provides the LCC for the soils by name: Deskamp, which is Map Unit 36 – slope phases A, B, or C, all of which are Class 6; Lickskillet, which is Map Unit 81 – slope Phases C, D, E, or F, all of which are Class 7; Rock Outcrop, which is Map Unit 109, which is Class 8.

Based on the acreage amounts summarized above, the subject property contains predominantly Soil Unit 36. According to Mr. Rabe, Soil Unit 36 is Class 6, regardless of slope. DCC 18.16.050(G)(2)(b) above specifies that a parcel is presumed suitable for the production of farm crops and livestock if it is predominately composed of LCC 1-6 soils.

However, staff notes the soil study states in part, “The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties.” However, this statement appears to consider the suitability of the soils in conjunction with adjacent properties whereas the criteria requires an analysis of the suitability of the entire property or a specific building envelope. In this case, the applicant has chosen to focus on the suitability of the entire property.

Staff asks the Hearings Officer to make specific findings on whether the applicant has demonstrated that the proposed nonfarm dwelling is situated on an existing lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock, or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.

**Figure 9 - Property #3 (Tax Lot 300)**

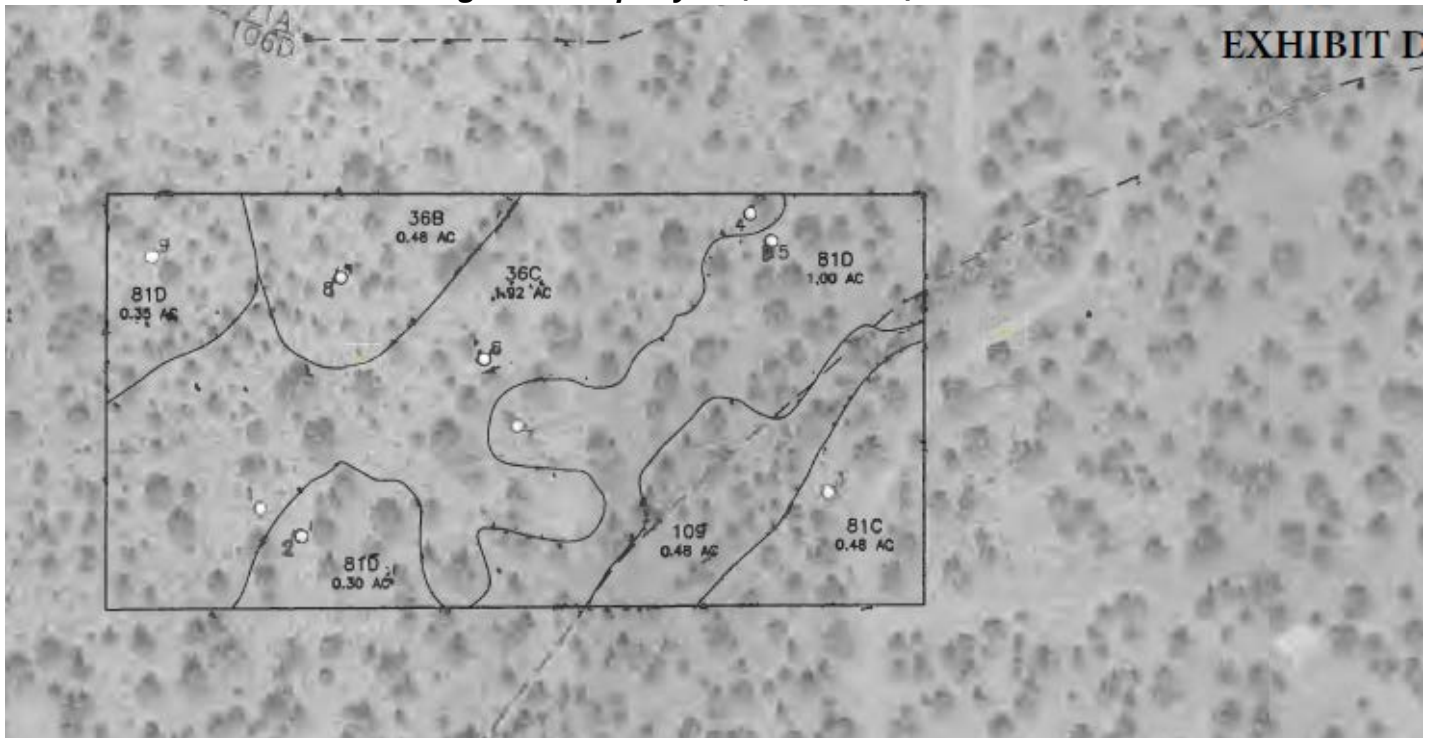


Figure 9 illustrates the location of soil units on the property.

The soil study states on Page 4:

All 5.01 acres of the Site were evaluated in detail, including 2.13 acres of Lickskillet soils and 0.48 acres of Rock outcrop. The remaining 2.40 acres, or 47.9%, consisted of soils more like Deskamp in areas with slightly deeper soils and fewer coarse fragments between delineations of Lickskillet soils and the property boundary or right right-of-way. The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties (none of which appear to be or ever have been farmed). Therefore, the entire area evaluated is considered "generally unsuitable" for farm use.

Based on the description above contained in the soil study and corresponding acreages of the soil units provided in the soils map above, staff finds the subject property contains the following acreages:

Soil Type	Classification	Area (acres)
36B	Deskamp Loamy Sand	0.48
36C	Deskamp Loamy Sandy	1.92
81C	Lickskillet-Rock Outcrop Complex	0.48
81D	Lickskillet-Rock Outcrop Complex	1.65
109	Rock Outcrop	0.48

Based on the chart above and the soil map included in the soil study, the subject property contains a total of 2.4 acres of 36B/C (48 percent), 2.13 acres of 81D/E (43 percent), and 0.48 acres of 109 (10 percent). Lickskillet-Rock outcrop complex is rated Class 7 and 8 when not irrigated. There is no rating for irrigated soil of this type.

The applicant’s supplemental burden of proof states in part:

As used in the soil report, Table 3 and Figure 4 (Exhibit B (TL 100), C (TL 200), D (TL 300), Brian Rabe has provided the following information:

The data in Table 3 provides the LCC for the soils by name: Deskamp, which is Map Unit 36 – slope phases A, B, or C, all of which are Class 6; Lickskillet, which is Map Unit 81 – slope Phases C, D, E, or F, all of which are Class 7; Rock Outcrop, which is Map Unit 109, which is Class 8.

The combination of the Rock Outcrop and Lickskillet soils total 2.61 acres or 52 percent of the subject property. In consideration of the soil study maps and ratings, staff finds the subject property is predominately composed of class 7 and 8 soils and is therefore “generally unsuitable” for the production of farm crops and livestock.

**Farm Crops**

Tax Lot 100

The soil study in the record indicates the soils within the subject property consist of the following two soil units: Deskamp-Loamy Sand and Lickskillet-Rock Outcrop. Based on the chart above and the soil map included in the soil study, the subject property contains a total of 3.1 acres of 36B/C (62 percent), and 1.88 acres of 81D/E (38 percent). Therefore, based on these acreages, it appears the subject property is comprised primarily of Deskamp Loamy Sand. Deskamp Loamy Sand (Soil Unit 36) is rated LCC 6. As noted above, the approval criterion presumes LCC 1 through 6 soils are suitable for farm use.

It is not clear to staff that Tax Lot 100 is not suitable for the production of farm crops. Staff asks the Hearings Officer to make specific findings on whether the applicant has demonstrated that the proposed nonfarm dwelling is situated on an existing lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock, or merchantable tree



species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.

#### Tax Lot 200

The soil study in the record indicates the soils within the subject property consist of the following two soil units: Deskamp-Loamy Sand and Lickskillet-Rock Outcrop. Based on the chart above and the soil map included in the soil study, the subject property contains a total of 3.33 acres of 36B/C (67 percent), and 1.65 acres of 81D/E (33 percent). Therefore, based on these acreages, it appears the subject property is comprised primarily of Deskamp Loamy Sand. Deskamp Loamy Sand (Soil Unit 36) is rated LCC 6. As noted above, the approval criterion presumes LCC 1 through 6 soils are suitable for farm use.

It is not clear to staff that Tax Lot 200 is not suitable for the production of farm crops. Staff asks the Hearings Officer to make specific findings on whether the applicant has demonstrated that the proposed nonfarm dwelling is situated on an existing lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock, or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.

#### Tax Lot 300

The soil study in the record indicates the soils within the subject property consist of the following three soil units: Deskamp-Loamy Sand, Lickskillet-Rock Outcrop, and Rock Outcrop. Based on the chart above and the soil map included in the soil study, the subject property contains a total of 2.4 acres of 36B/C (48 percent), 2.13 acres of 81D/E (43 percent), and 0.48 acres of 109 (10 percent).

The combination of the Rock Outcrop and Lickskillet soils total 2.61 acres or 52 percent of the subject property. Rock Outcrop and Lickskillet are rated LCC 7 and 8. In consideration of the soil study maps and ratings, staff finds the subject property is predominately composed of class 7 and 8 soils and is therefore “generally unsuitable” for the production of farm crops and livestock.

Consequently, staff finds Tax Lot 300 is not suitable for the production of farm crops.

### ***Livestock Production***

Nonirrigated soils in Deschutes County are agriculturally suitable only as dry range land, and then only on a limited basis. Estimates on the value of beef production are based on the following assumptions, which have been derived through consultation with OSU Extension Service:

- One AUM<sup>4</sup> is the equivalent to the forage required for a 1000 lb. Cow and calf to graze for 30 days (900 pounds forage).
- On good quality forage, an animal unit will gain 2 pounds per day.

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<sup>4</sup> Animal Unit Month

- Two animal units will eat as much in one month as one animal unit will eat in two months.
- Forage production on dry land is not continuous: Once the forage is eaten, it generally will not grow back until the following spring.
- An average market price for beef is \$1.15 per pound.

The NRCS Rangeland and Forest Understory Productivity and Plant Composition table (September 18, 2015) provides forage capability for soil types, expressed in annual dry-weight production.

**Tax Lot 100**

The entire property is comprised of two soil types: 36B/C, Deskamp-sandy loam, and 81D/E, Lickskillet-Rock Outcrop. The soil study states that the 36 soil has a forage capability of 900 lbs. per acre for a “normal year” and 81 soil has a forage capability of 700 lbs. per acre for a “normal year.”

It takes about 900 lbs. of forage to sustain a cow and calf for a month (one animal unit month, or AUM). So, the portion of the property comprised of 36 soils would provide the equivalent of 1.0 AUM per acre. The portion of the property classified as 81 soils would provide an equivalent of 0.78 AUM per acre for a “normal year.”

Based on the OSU and NRCS assumptions, the value of beef production on the property, considering the mix of soils, can be calculated using the following formula:

$$(30 \text{ days}) \cdot (2 \text{ lbs./day/acre}) = 60 \text{ lbs. beef/acre}$$

1.0 AUM per acre and 0.78 AUM per acre

The entire property is 4.98 acres in size.

$$(60 \text{ lbs. beef per acre})(4.98 \text{ acres})(1.0 \text{ AUM per acre})(\$1.15 \text{ per lbs.}) = \$344$$

$$(60 \text{ lbs. beef per acre})(4.98 \text{ acres})(0.78 \text{ AUM per acre})(\$1.15 \text{ per lbs.}) = \$268$$

Thus, the total gross beef production potential for the entire property would be between approximately \$268 and \$344 annually. This figure represents gross income and does not take into account any fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production. This calculation is also based on a simplified scenario where the property is entirely comprised of NRCS-rated soils which produce forage for livestock, which as the soil study shows is not necessarily the case. The area has little forage for livestock and may support only minimal dry land grazing. For these reasons, staff finds the soils in this property are generally unsuitable for the production of livestock.

**Tax Lot 200**

The entire property is comprised of two soil types: 36B/C, Deskamp-sandy loam, and 81D/E, Licksillet-Rock Outcrop. The soil study states that the 36 soil has a forage capability of 900 lbs. per acre for a "normal year" and 81 soil has a forage capability of 700 lbs. per acre for a "normal year."

It takes about 900 lbs. of forage to sustain a cow and calf for a month (one animal unit month, or AUM). So, the portion of the property comprised of 36 soils would provide the equivalent of 1.0 AUM per acre. The portion of the property classified as 81 soils would provide an equivalent of 0.78 AUM per acre for a "normal year."

Based on the OSU and NRCS assumptions, the value of beef production on the property, considering the mix of soils, can be calculated using the following formula:

$$(30 \text{ days}) \cdot (2 \text{ lbs./day/acre}) = 60 \text{ lbs. beef/acre}$$

1.0 AUM per acre and 0.78 AUM per acre

The entire property is 4.98 acres in size.

$$(60 \text{ lbs. beef per acre})(4.98 \text{ acres})(1.0 \text{ AUM per acre})(\$1.15 \text{ per lbs.}) = \$344$$

$$(60 \text{ lbs. beef per acre})(4.98 \text{ acres})(0.78 \text{ AUM per acre})(\$1.15 \text{ per lbs.}) = \$268$$

Thus, the total gross beef production potential for the entire property would be between approximately \$268 and \$344 annually. This figure represents gross income and does not take into account any fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production. This calculation is also based on a simplified scenario where the property is entirely comprised of NRCS-rated soils which produce forage for livestock, which as the soil study shows is not necessarily the case. The area has little forage for livestock and may support only minimal dry land grazing. For these reasons, staff finds the soils in this property are generally unsuitable for the production of livestock.

### **Tax Lot 300**

The entire property is comprised of three soil types: 36B/C, Deskamp-sandy loam, 81C/D, Licksillet-Rock Outcrop, and 109, Rock Outcrop. The soil study states that the 36 soil has a forage capability of 900 lbs. per acre for a "normal year" and 81 soil has a forage capability of 700 lbs. per acre for a "normal year." Rock outcrop does not have a forage capability.

It takes about 900 lbs. of forage to sustain a cow and calf for a month (one animal unit month, or AUM). So, the portion of the property comprised of 36 soils would provide the equivalent of 1.0 AUM per acre. The portion of the property classified as 81 soils would provide an equivalent of 0.78 AUM per acre for a "normal year."

Based on the OSU and NRCS assumptions, the value of beef production on the property, considering the mix of soils, can be calculated using the following formula:

$$(30 \text{ days}) \cdot (2 \text{ lbs./day/acre}) = 60 \text{ lbs. beef/acre}$$

1.0 AUM per acre and 0.78 AUM per acre

The entire property is 5.01 acres in size.

$$(60 \text{ lbs. beef per acre})(5.01 \text{ acres})(1.0 \text{ AUM per acre})(\$1.15 \text{ per lbs.}) = \$346$$

$$(60 \text{ lbs. beef per acre})(5.01 \text{ acres})(0.78 \text{ AUM per acre})(\$1.15 \text{ per lbs.}) = \$270$$

Thus, the total gross beef production potential for the entire property would be between approximately \$270 and \$346 annually. This figure represents gross income and does not take into account any fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production. This calculation is also based on a simplified scenario where the property is entirely comprised of NRCS-rated soils which produce forage for livestock, which as the soil study shows is not necessarily the case. The area has little forage for livestock and may support only minimal dry land grazing. For these reasons, staff finds the soils in this property are generally unsuitable for the production of livestock.

Based on the information and case law cited above, staff finds the subject properties are not generally suitable for production of livestock based on the total gross beef production potential noted above.

### ***Merchantable Trees***

The majority of trees on-site are juniper trees. Juniper trees are not a commercially viable tree. None of the soil units present are rated for forest productivity. For this reason, staff finds the subject property is not suitable for the production of merchantable trees.

### ***Building Envelope***

In *Wetherell v. Douglas County*, LUBA found that “the portion of the parcel that is ‘generally unsuitable’ must be large enough to include not only the dwelling, but essential or accessory components of that dwelling.” Staff reads this decision to include the dwelling, detached residential-associated buildings (including garages), well, septic system, drainfield, and the septic reserve area, as essential or accessory components of the dwelling. LUBA however, expressly excluded driveways from “essential or accessory components of the dwelling”. The subject property can reasonably be expected to accommodate these essential and accessory components of a dwelling.

- iv. The proposed nonfarm dwelling is not within one-quarter mile of a dairy farm, feed lot or sales yard, unless adequate provisions are made and approved by the Planning Director or Hearings Body for a buffer between such uses. The establishment of a buffer shall be designed based upon consideration of such factors as prevailing winds, drainage, expansion potential of affected agricultural uses, open space and any other factor that may affect the livability of the nonfarm dwelling or the agriculture of the area.**

**FINDING:** The applicant provides the following response to this criterion:

This criterion is not applicable because the subject property is not within one-quarter mile of a dairy farm, feedlot, or sales yard.

There is nothing in the record indicating a nearby dairy farm, feedlot, or sales yard. For these reasons, staff agrees with the applicant.

- v. Road access, fire and police services and utility systems (i.e. electrical and telephone) are adequate for the use.**

**FINDINGS:**

Electricity. The record includes a letter from Central Electric Cooperative indicating they can serve all three subject properties (Applicant's Exhibit 3).

Road access. The applicant proposes to access the subject property from NW Valley Drive, a private road functionally classified as a local. The County Transportation Planner had indicated that each individual dwelling will not cause this road to exceed its capacity. It appears the subject properties will be accessed via a road along the western side of the properties that eventually connects to NW Lower Valley Drive. The road terminates in the southwest corner of Tax Lot 300.

As quoted in the Agency Comments section above, the Property Address Coordinator provided the following comment:

It appears from the aerial map in DIAL that the access for these parcels, 14-12-30BA-00100, 00200 and 00300 trigger CDD 16.16.020,  
"All unnamed public and private roads and other roadways which provide access to three or more tax lots, or which are more than 1,320 feet in length, shall be assigned a name in accordance with the procedures in DCC 16.16.030".

Therefore, further discussion with the property owner regarding the actual access to these parcels is necessary and a road naming application is probable.

In addition to the road naming process noted above, the property owner will need to provide recorded easements as the road which accesses the subject property crosses nearby parcels, if the subject applications are approved.

Staff adds the following recommended conditions of approval for consideration by the Hearings Officer and to ensure compliance with access requirements:

Road Naming: Prior to the issuance of building permits for any of the non-farm dwellings, the existing unnamed roadway which provides access to the subject property shall be assigned a name in accordance with the procedures in DCC 16.16.030. This requires the submittal and approval of a Road Naming Application.

Easement: Prior to the issuance of building permits, the applicant shall provide a copy of a recorded access easement showing legal access from the subject parcels to NW Lower Valley Drive.

Telephone. The applicant states that they will utilize cellular phone service for any dwelling on the site.

Domestic water. The applicant states that domestic water on the site will be provided by a private well. The applicant has submitted well logs indicating that domestic water to the site can be accommodated with a private well. The chart below lists the submitted well log and corresponding static water level.

Map and Tax Lot	Distance from Subject Property	Static Water Level
14-12-29B, Tax Lot 100	±0.70 miles	234
14-12-29B, Tax Lot 200	±0.60 miles	253
14-12, Tax Lot 702	Adjacent	157

Staff finds there should be adequate water for a domestic well on this property.

Septic. The proposed dwelling will be served by an on-site septic disposal system. Staff recommends the following condition of approval to ensure compliance with this criterion.

Septic: The applicant shall secure any necessary septic permit approval for each nonfarm dwelling.

Fire protection. The subject properties are located outside a fire protection district. Staff sent notice of the application to the Deputy State Fire Marshal and they responded with no comment. However, staff has concerns regarding adequacy of emergency access to the proposed dwelling locations. As

discussed above, the access road to the subject properties is not a County-maintained roadway. As of the writing of this staff report, the roadway crosses multiple privately owned parcels which appear to be under common ownership by the property owner for the subject applications. However, it is not clear how this roadway is maintained and to what standard it was constructed to. For these reasons, staff recommends the following conditions of approval:

Firebreaks and Fuel Break: **Prior to the issuance of any building permit**, the applicant shall construct and maintain the firebreaks detailed below on land surrounding the structure and access road that are owned or controlled by the owner. These required fuel breaks shall be maintained at all times.

1. Primary Firebreak. Prior to use, a primary firebreak, not less than 10 feet wide, shall be constructed containing nonflammable materials. This may include lawn, walkways, driveways, gravel borders or other similar materials.
2. Secondary Firebreak. A secondary firebreak of not less than 20 feet shall be constructed outside the primary firebreak. This firebreak need not be bare ground, but can include a lawn, ornamental shrubbery or individual or groups of trees separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed.
3. Fuel Break. A fuel break shall be maintained, extending a minimum of 100 feet in all directions around the secondary firebreak. Individual and groups of trees within the fuel break shall be separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. Small trees and brush growing underneath larger trees shall be removed to prevent spread of fire up into the crowns of the larger trees. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed. The fuel break shall be completed prior to the beginning of the coming fire season.
4. No portion of a tree or any other vegetation shall extend to within 15 feet of the outlet of a stovepipe or chimney.

Fire Safety Design Standards for Roads: Prior to the issuance of any building permits, the applicant shall provide written verification to the Planning Division from a professional engineer registered in the state of Oregon stating the fire safety design standards for the access road extending from the NW Lower Valley Drive right-of-way to each dwelling site is met as detailed below:

1. Roads, bridges and culverts shall be designed and maintained to support a minimum gross vehicle weight (GVW) of 50,000 lbs. If bridges or culverts are involved in the construction of a road or driveway, written verification of compliance with the 50,000 lb. GVW standard shall be provided by a professional engineer registered in Oregon.
2. Access roads shall have an unobstructed horizontal clearance of not less than 20 feet and an unobstructed vertical clearance of not less than 13.5 feet, and provide an all



- weather surface.
3. Turnarounds shall have a minimum of 50 feet of turn radius with an all weather surface and be maintained for turning of fire fighting equipment.
  4. Road grades should not exceed eight percent, with a maximum of 12 percent on short pitches. Variations from these standards may be granted when topographic conditions make these standards impractical and where the local fire protection district states their fire fighting equipment can negotiate the proposed road grade.

Police protection. The property is served by the Deschutes County Sheriff.

Based on the information and recommended conditions of approval, staff asks the Hearings Officer to make specific findings whether these criteria will be met.

- vi. *The nonfarm dwelling shall be located on a lot or parcel created prior to January 1, 1993, or was created or is being created as a nonfarm parcel under the land division standards in DCC 18.16.055(B) or (C).***

**FINDING:** The applicant provided the following statement in response to this criterion:

The subject property (tax lot 14-12-30BA, 100) is one of nine (9) legal lots of record located within the boundaries of former tax lot 702, Map 14-12. It was created by deed in the Crook County records in 1913- prior to the establishment of Deschutes County. It was adjusted and became what is now tax lot 14-12-30BA, 100 as the result of property line adjustments LL-09-119 and LL-09-128. These adjustments were approved by the County in 2008 and 2009.

The following definitions from Oregon Revised Statutes chapter 92, section 92.010 are applicable here:

- "Lot" means single unit of land created by a subdivision of land.
- "Parcel" means a single unit of land that is created by a partition of land.
- "Partitioning land" means dividing land to create not more than three parcels of land within a calendar year, but does not include:
  - (b) Adjusting a property line as property line adjustment is defined in this section.
- "Property line adjustment" means a relocation or elimination of all of a portion of the common property line between abutting properties that does not create an additional lot or parcel.

Deschutes County contains similar definitions in its acknowledged land use regulations.

Oregon Administrative Rules, under section 660-033-0020(4) has the following language as follows:

"Date of Creation and Existence." When a lot, parcel, or tract is reconfigured pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of the reconfiguration is the date of creation or existence. Reconfigured means any change in the boundary of the lot parcel or tract.

The date of creation and existence definition was adopted by LCDC in the 1990s and it is likely the definition does not apply to the County's review of this application because the County's EFU zoning regulations have been revised and acknowledged by LCDC a number of times since the definition was adopted. Nonetheless, the definition makes it clear that a lot line adjustment does not create a new parcel and does not change the date of creation but for this rule. The 1913 deed created the parcel. This issue has already been judicially resolved by the court of appeals in *COLW v. Deschutes County (Grossmann)*, 320 Or.App. 650 (2022) attached hereto for convenience.

The applicant provided the following responses as it relates to each of the subject properties:

### **Tax Lot 100**

The subject property (14-12-30BA, 100) was not created by a subdivision or partition. No new parcels were created by the County-approved adjustment, and the effect of the property line adjustment did not qualify the subject property for a dwelling. The parent parcel of the subject property is a parcel identified as Lot of Record 2, a 14.90-acre parcel of land with 7 acres of irrigation and 7.90 acres of dry unproductive, unsuitable, Class 7 soils.

After adjustment, LL-09-119 was a 96.61-acre parcel. Adjustment LL-09-128 reduced the size of the dry parcel to 4.98 acres. The parcel as originally configured qualified for a dwelling, and the reduction in size of the subject property did not qualify it for approval of a dwelling.

### **Tax Lot 200**

The subject property (14-12-30BA, 200) was not created by a subdivision or partition. No new parcels were created by the County-approved adjustment, and the effect of the property line adjustment did not qualify the subject property for a dwelling. The parent parcel of the subject property is a parcel identified as Lot of Record 1, a 40.51-acre parcel of land with 40 acres of irrigation and .51 acres of dry unproductive soils, and could have been approved for a dwelling. After adjustment, the property is 4.98 acres. The reduction in size of the subject property did not qualify it for approval of a dwelling.

### **Tax Lot 300**

The subject property (14-12-30BA 300) was not created by a subdivision or partition. No new parcels were created by the County-approved adjustment, and the effect of the property line adjustment did not qualify the subject property for a dwelling. The parent parcel of the subject property is a parcel identified as Lot of Record 4, a 19.89-acre parcel of land with no irrigation and could have been approved for a dwelling.

After adjustment, LL 09-117 the parcel was 5.01 acres. The parcel as originally configured qualified for a dwelling, and the reduction in size of the subject property did not qualify it for approval of a dwelling.

Staff agrees with the applicant's response and finds the subject properties were created prior to January 1, 1993.

2. ***For the purposes of DCC 18.16.050(G) only, "unsuitability" shall be determined with reference to the following:***
  - a. ***A lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land. If the parcel is under forest assessment, the dwelling shall be situated upon generally unsuitable land for the production of merchantable tree species recognized by the Forest Practices Rules, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the parcel.***

**FINDING:** The subject property is not under forest assessment. LUBA determined the issue of whether nonfarm parcels can be put to farm use in conjunction with other properties "is triggered under DCC 18.16.050(G)(2)(a) if the parcels are found to be unsuitable solely because of size or location." *Williams v. Jackson County*, 55 Or LUBA 223, 230 (2007).

The applicant provided the following statement, in part, in their supplemental burden of proof statement, dated September 14, 2023 addressing the standard above:

Here, the applicant is not relying on the lot or parcel "size" or "location" to find the lot is unsuitable. The balance of the code provision makes clear that this criteria can be met when an entire parcel, or a portion of the parcel where the proposed building envelope will be located, is determined to be "unsuitable." While it does not have to be the entire parcel, here, the level one soil analysis done by a professional soil scientist determined that the entire parcel is unsuitable as set forth in the exhibits..."

In this case, and as articulated throughout this staff report and in the applicant's burden of proof, the applicant argues the subject property is not suitable due to adverse soil and land conditions, which could demonstrate that the properties proposed for the nonfarm dwellings are generally

unsuitable for farm use. Because the applicant does not claim unsuitability due to size or location, staff finds this criterion does not apply.

- b. A lot or parcel is not "generally unsuitable" simply because it is too small to be farmed profitably by itself. If a lot or parcel can be sold, leased, rented or otherwise managed as part of a commercial farm or ranch, it is not "generally unsuitable." A lot or parcel is presumed to be suitable if it is composed predominantly of Class I-VI soils. Just because a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use. If the parcel is under forest assessment, the area is not "generally unsuitable" simply because it is too small to be managed for forest production profitably by itself.***

**FINDING:** The applicant’s supplemental burden of proof, dated September 14, 2023 states in part:

Here, the applicant is not relying on the lot or parcel “size” or “location” to find the lot is unsuitable. The balance of the code provision makes clear that this criteria can be met when an entire parcel, or a portion of the parcel where the proposed building envelope will be located, is determined to be “unsuitable.” While it does not have to be the entire parcel, here, the level one soil analysis done by a professional soil scientist determined that the entire parcel is unsuitable as set forth in the exhibits. Specifically, the balance of the code provides:

***iii. The proposed nonfarm dwelling is situated on an existing lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock, or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.***

(underline emphasis added)

Here, the underlined language makes clear that the applicant can demonstrate that all or a portion of a lot or parcel can be determined as unsuitable based upon “adverse soil” conditions in satisfaction of this criterion.

Here, again, the applicant is not relying upon the size or location of the parcel to establish “unsuitability.” In support of this determination, the applicant has submitted a level one, site specific, professionally prepared, soil analysis which determined that based upon professional expertise and training, the soil conditions on the property are generally unsuitable for the production of farm crops and livestock or merchantable tree species due the adverse soil conditions.

Staff agrees with the applicant that they are not asserting the property is too small to be farmed profitably by itself but instead asserting the poor soil quality renders the property generally unsuitable. The applicant's analysis studies each property for general unsuitability for crop and livestock production. While there are large scale commercial farm operations nearby the subject properties, there is no evidence in the record that the subject property can be sold, leased, rented or otherwise managed as part of a commercial farm or ranch. No other generally accepted farm practices are identified in the record.

However, as discussed above, a lot or parcel is presumed to be suitable if it composed predominantly of Class I-VI soils. Tax Lot 100 and 200 appear to be predominantly composed of Class VI soils, based on the information in the soils report. Tax Lot 300 appears to be predominantly composed of Class VII soils, based on the information in the soils report.

Staff asks the Hearings Officer to make specific findings regarding the "unsuitability" of the subject properties based on these qualifications pursuant to DCC 18.16.050(G).

- c. If a lot or parcel under forest assessment can be sold, leased, rented or otherwise managed as a part of a forestry operation, it is not "generally unsuitable". If a lot or parcel is under forest assessment, it is presumed suitable if it is composed predominantly of soil capable of producing 20 cubic feet of wood fiber per acre per year. If a lot or parcel is under forest assessment, to be found compatible and not seriously interfere with forest uses on surrounding land it must not force a significant change in forest practices or significantly increase the cost of those practices on the surrounding land.***

**FINDING:** The subject property is not under forest assessment. Therefore, staff finds this rule does not apply.

- 3. Loss of tax deferral. Pursuant to ORS 215.236, a nonfarm dwelling on a lot or parcel in an Exclusive Farm Use zone that is or has been receiving special assessment may be approved only on the condition that before a building permit is issued the applicant must produce evidence from the County Assessor's office that the parcel upon which the dwelling is proposed has been disqualified under ORS 308A.050 to 308A.128 or other special assessment under ORS 308A.315, 321.257 to 321.390, 321.700 to 321.754 or 321.805 to 321.855 and that any additional tax or penalty imposed by the County Assessor as a result of disqualification has been paid.***

**FINDING:** Staff includes this requirement as a recommended condition of approval.

Farm Tax Deferral Disqualification: **Prior to the issuance of building permits**, the applicant shall produce evidence from the County Assessor's Office that the parcel upon which the dwelling is

proposed has been disqualified for special assessment at value for farm use under ORS 308.370 or other special assessment under ORS 308.765, 321.352, 321.730 or 321.815, and that any additional tax or penalty imposed by the County Assessor as a result of disqualification has been paid.

### **Chapter 18.56, Surface Mining Impact Area Combining Zone (SMIA)**

**FINDING:** The subject property is located within the SMIA Zone in association with mine site 324.

Section 18.56.030, Application of Provisions.

***The standards set forth in DCC 18.56 shall apply in addition to those specified in DCC Title 18 for the underlying zone. If a conflict in regulations or standards occurs, the provisions of DCC 18.56 shall govern.***

**FINDING:** The standards under DCC 18.56 are addressed in the following findings.

Section 18.56.050. Conditional Uses Permitted

***Uses permitted conditionally shall be those identified as conditional uses in the underlying zone(s) with which the SMIA Zone is combined and shall be subject to all conditions of the underlying zone(s) as well as the conditions of the SMIA Zone.***

**FINDING:** As discussed herein, the proposed use is a conditional use in the underlying zone. Therefore, the proposed use is also a conditional use in the SMIA Zone. Applicable standards are addressed below.

Section 18.56.070. Setbacks.

***The setbacks shall be the same as those prescribed in the underlying zone, except as follows:***

- A. No noise sensitive or dust sensitive use or structure established or constructed after the designation of the SMIA Zone shall be located within 250 feet of any surface mining zone, except as provided in DCC 18.56.140; and***
- B. No noise sensitive or dust sensitive use or structure established or constructed after the designation of the SMIA Zone shall be located within one quarter mile of any existing or proposed surface mining processing or storage site, unless the applicant demonstrates that the proposed use will not prevent the adjacent surface mining operation from meeting the setbacks, standards and conditions set forth in DCC 18.52.090, 18.52.110 and 18.52.140, respectively.***
- C. Additional setbacks in the SMIA Zone may be required as part of the site plan review under DCC 18.56.100.***
- D. An exception to the 250 foot setback in DCC 18.56.070(A), shall be allowed pursuant***

***to a written agreement for a lesser setback made between the owner of the noise sensitive or dust sensitive use or structure located within 250 feet of the proposed surface mining activity and the owner or operator of the proposed surface mine. Such agreement shall be notarized and recorded in the Deschutes County Book of Records and shall run with the land. Such agreement shall be submitted and considered at the time of site plan review or site plan modification.***

**FINDING:** No noise sensitive or dust sensitive use or structure is proposed within one quarter mile of any surface mining zone.

Section 18.56.080. Use Limitations.

***No dwellings or additions to dwellings or other noise sensitive or dust sensitive uses or structures shall be erected in any SMIA Zone without first obtaining site plan approval under the standards and criteria set forth in DCC 18.56.090 through 18.56.120.***

**FINDING:** This decision includes SMIA Zone site plan approval under the standards and criteria set forth in DCC 18.56.090 through 18.56.120. Staff finds this approval covers any noise and dust sensitive use anywhere on the property. Barring code changes to DCC 18.56 or changes in the boundaries of mine(s) in the area, no further SMIA review is required for permitted uses on the subject properties.

Section 18.56.090. Specific Use Standards.

***The following standards shall apply in the SMIA Zone:  
New dwellings, new noise sensitive and dust sensitive uses or structures, and additions to dwellings or noise and dust sensitive uses or structures in existence on the effective date of Ordinance No. 90 014 which exceed 10 percent of the size of the existing dwelling or use, shall be subject to the criteria established in DCC 18.56.100.***

**FINDING:** The proposed use is listed in this criterion and is subject to DCC 18.56.100.

Section 18.56.100. Site Plan Review and Approval Criteria.

***A. Elements of Site Plan. A site plan shall be submitted in a form prescribed by the Planning Director or Hearings Body detailing the location of the proposed noise sensitive use, the location of the nearby surface mine zone and operation, if any, and other information necessary to evaluate the approval criteria contained in DCC 18.56.100.***

**FINDING:** The applicant submitted three SMIA applications, File Nos. 247-23-000737-SMA, 738-SMA, 739-SMA associated with Tax Lot 100, 200, and 300, respectively to address Chapter 18.56.



- B. *Site plan review and approval, pursuant to the County Uniform Land Use Action Procedures Ordinance, shall be required for all uses in the SMIA Zone prior to the commencement of any construction or use.***

**FINDING:** The applicant has applied for site plan review for the proposed use, which are being reviewed and processed under Title 22, Deschutes County Development Procedures Ordinance. This criterion will be met.

- C. *The Planning Director or Hearings Body may grant or deny site plan approval and may require such modifications to the site plan as are determined to be necessary to meet the setbacks, standards and conditions described above.***

**FINDING:** This approval does not require modifications to the site plan to meet the DCC 18.56 setbacks, standards and conditions described above.

- D. *The site plan shall be approved if the Planning Director or Hearings Body finds that the site plan is consistent with the site specific ESEE analysis in the surface mining element of the Comprehensive Plan and that the proposed use will not prevent the adjacent surface mining operation from meeting the setbacks, standards and conditions set forth in DCC 18.52.090, 18.52.110 and 18.52.140, respectively.***

**FINDING:** Pursuant to 18.52.160(B), the subject mine is a preexisting mine. Therefore, the standards listed in Chapter 18.52 do not apply. The proposal is consistent with the site specific ESEE analysis.

- E. *Public notice shall be as set forth in DCC Title 22, the Uniform Development Procedures Ordinance, except that in all cases notice of the receipt of an SMIA application shall be sent to the mine owners and/or operators whose SM Zoned site triggered the SMIA review.***

**FINDING:** As set forth in DCC Title 22, notice will be sent to the mine owners and/or operators whose SM Zoned site triggered the SMIA review.

Section 18.56.110. Abbreviated SMIA Site Plan Review.

- A. *A new or enlarged noise or dust sensitive use to which DCC 18.56.110 applies that is at least one quarter mile from an SM Zone and that has at least two dwellings or other noise or dust sensitive uses between it and the SM zone is presumed to meet the approval criteria set forth in DCC 18.56.100(D), and shall be processed under DCC 18.56.110.***

**FINDING:** This criterion is met. Staff finds that any future new or enlarged noise or dust sensitive use on the subject property would likewise meet the applicable criteria of DCC 18.56 and that no further review under DCC 18.56 is required for such uses.

- B. *Abbreviated SMIA site plan review shall require the submission of an application in a form prescribed by the Planning Director or Hearings Body and such documentation as is necessary to demonstrate conformance with DCC 18.56.110(A).***

**FINDING:** The applicant submitted three applications in a form prescribed by the Planning Director or Hearings Body and such documentation as is necessary to demonstrate conformance with DCC 18.56.110(A).

- C. *Unless the underlying zoning at the SMIA site would require additional review of the proposed use for some other land use permit, abbreviated site plan review shall be conducted (1) administratively without prior public notice; (2) with public notice of the Findings and Decision mailed consistent with DCC 18.56.100(E), to all persons entitled to receive notice; and (3) with an appeal period and procedures as set forth in DCC Title 22, the Uniform Development Procedures Ordinance. Appellants may submit evidence to overcome the presumption set forth in DCC 18.56.110(A).***

**FINDING:** This abbreviated site plan review is being conducted in accordance with this criterion.

Section 18.56.120. Waiver of remonstrance.

***The applicant for site plan approval in the SMIA Zone shall sign and record in the Deschutes County Book of Records a statement declaring that the applicant and his successors will not now or in the future complain about the allowed surface mining activities on the adjacent surface mining site.***

**FINDING:** If the Hearings Officer approves the subject applications, a Condition of Approval has been added requiring the applicant to sign and record a Waiver of Remonstrance prior to the issuance of the building permits for the proposed uses.

Section 18.56.140. Exemptions.

***The following shall be exempt from the provisions of DCC 18.56:***

- A. *Uses in the SMIA Zone which are not within one half mile of any identified resource in the SM Zone after all reclamation has occurred.***
- B. *Continuation and maintenance of a conforming or nonconforming use established prior to the effective date of Ordinance No. 90 014.***
- C. *The employment of land for farm or forest use.***
- D. *Additions to noise-sensitive or dust-sensitive uses or structures existing on the effective date of Ordinance No. 90 014 or established or constructed in accordance***

*with DCC Chapter 18.56 which are completely screened from the surface mining site by the existing use or structure.*

**FINDING:** These criteria do not apply to this proposal.

### **Chapter 18.88, Wildlife Area Combining Zone (WA)**

#### Section 18.88.040. Uses Permitted Conditionally.

- A. *Except as provided in DCC 18.88.040(B), in a zone with which the WA Zone is combined, the conditional uses permitted shall be those permitted conditionally by the underlying zone subject to the provisions of the Comprehensive Plan, DCC 18.128 and other applicable sections of this title. To minimize impacts to wildlife habitat, the County may include conditions of approval limiting the duration, frequency, seasonality, and total number of all outdoor assemblies occurring in the WA Zone, whether or not such outdoor assemblies are public or private, secular or religious.***

**FINDING:** The proposed nonfarm dwelling is a conditional use in the EFU Zone and therefore is also a conditional use in the WA Combining Zone.

#### Section 18.88.060. Siting Standards.

- A. *Setbacks shall be those described in the underlying zone with which the WA Zone is combined.***

**FINDING:** Setbacks are those described in the EFU Zone in which the WA Zone is combined.

- B. *The footprint, including decks and porches, for new dwellings shall be located entirely within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992 unless it can be found that:***
- 1. *Habitat values (i.e., browse, forage, cover, access to water) and migration corridors are afforded equal or greater protection through a different development pattern; or,***
  - 2. *The siting within 300 feet of such roads or easements for vehicular access would force the dwelling to be located on irrigated land, in which case, the dwelling shall be located to provide the least possible impact on wildlife habitat considering browse, forage, cover, access to water and migration corridors, and minimizing length of new access roads and driveways; or,***
  - 3. *The dwelling is set back no more than 50 feet from the edge of a driveway that existed as of August 5, 1992.***
- C. *For purposes of DCC 18.88.060(B):***
- 1. *A private road, easement for vehicular access or driveway will conclusively be regarded as having existed prior to August 5, 1992 if the applicant submits***

**any of the following:**

- a. A copy of an easement recorded with the County Clerk prior to August 5, 1992 establishing a right of ingress and egress for vehicular use;**
  - b. An aerial photograph with proof that it was taken prior to August 5, 1992 on which the road, easement or driveway allowing vehicular access is visible;**
  - c. A map published prior to August 5, 1992 or assessor's map from prior to August 5, 1992 showing the road (but not showing a mere trail or footpath).**
- 2. An applicant may submit any other evidence thought to establish the existence of a private road, easement for vehicular access or driveway as of August 5, 1992 which evidence need not be regarded as conclusive.**

**FINDING:** The applicant provided the following statement in response to this criterion:

The applicant agrees to comply with the setbacks of the underlying zone. Applicant also submits herewith a professional survey showing the proposed building envelope and the required setbacks which shows the building envelope is within 300' of private roads in the area, in satisfaction of this criteria. (Exhibit 5) To prepare the survey, the surveyor reviewed historic imagery of the area. In addition, the applicant submits herewith a "FHC Property Wildlife Habitat assessment Report" prepared by Mason, Bruce & Girard (Exhibit 6). In addition to the efforts that the applicant has already undertake to restore and improve the wildlife habitat in the subject area, the Report recommends some additional efforts that the property owner can utilize to further enhance the natural habitat for the existing wildlife. The application has already removed old fencing that posed a hazard and restriction to wildlife use, and does not propose any fencing with this application. The applicant has created water sources for the wildlife use as well, and freely allows the wildlife to forage on the farm crops. The siting standard is not designed to preclude development, but to site the dwelling with as minimal impact on the wildlife use as is feasible, and the applicant agrees to development in a way that minimizes the impact to wildlife habitat.

The applicant provided a supplemental burden of proof and referenced exhibits in their incomplete response dated September 14, 2023:

The applicant has established that the entire parcel is generally unsuitable, and therefore, the building envelope for the nonfarm dwelling could be located in any portion of the property, subject to the setback requirements for the underlying zoning. The exhibit submitted shows the building envelope as it relates to the wildlife area combining zone, which restricts the building envelope to the eastern portion of the parcel within 300 feet of the road that ran along the eastern border in 1992.

The applicant submits evidence demonstrating that a private road existed prior to August 5, 1992 in the attached Exhibits F through L. Tye Engineering, Inc has researched the existence

of the road and has prepared the attached exhibits. The attached exhibits include 3 Exhibit maps from 1982, 1985, and 1990, and a sketch showing the survey points taken in the field with the 1990 aerial behind it. (Exhibits I, J, K, L respectively). Exhibit M shows the USDA receipt and sets forth the image dates for the imagery provided.

The applicant will have copies of the Exhibits available at the hearing because the transmittal, scanning, copying, and processing of the older images as exhibits submitted herewith may cause any clarity of the image to be lost. The applicant also has these images on a USB flash drive that can be provided to the hearings officer for review of the source data.

The 1982 image (Exhibit F) (on the flash drive under USDA folder, as file HAP82-65-203), is a blue and red aerial. On the original aerial, if you look across the top where it says 65-203, and go down the page to almost half way down the sheet you get to the area at issue. The engineers enlarged and cropped this area to put into their Autocad drawing for the exhibit maps. The applicant has circled this area on the attached Exhibit F.

A 1990 image is from the USDA imagery is identified as file 41000-1389\_139 on the flash drive. It's a lighter aerial which showed the road in the northern end around the field which was used for the exhibit map that was submitted with the original land use application for the building envelope and setback locations. On the main large aerial the site area is just SW of a half pivot field a couple inches in from the left and 3-4 inches down from the top. This image was cropped to put into the Autocad drawing for the exhibit map.

The referenced images pre-date August 1992. The applicant submits that based upon the evidence, the existence of the road is established for purposes of DCC 18.88.060(B)(1) and (2) and this criterion is met.

Using the location of the historical road, the applicant has identified the setbacks for the building envelopes.

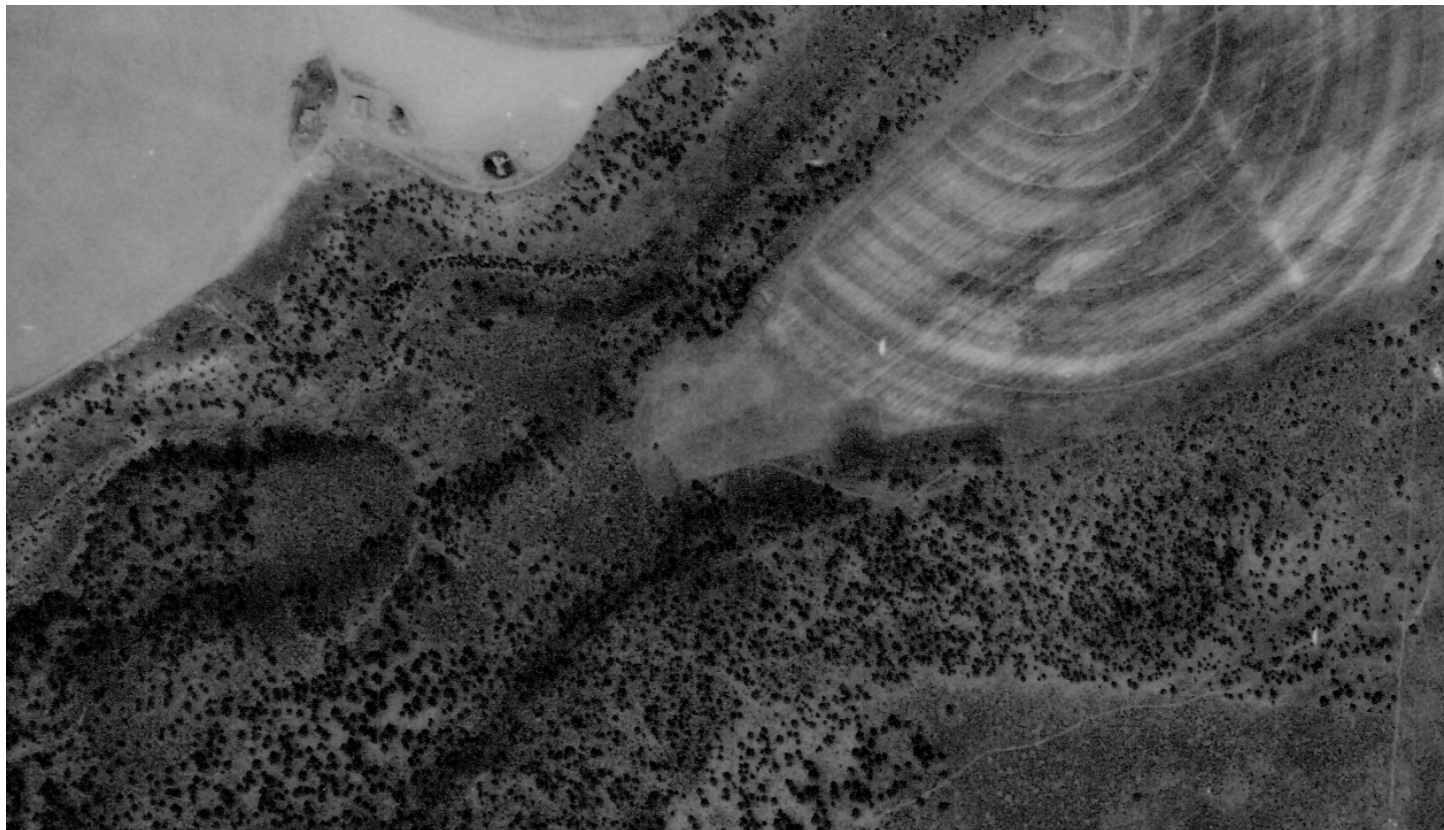
The applicant provided additional aerial imagery in the record via email on October 20, 2023. However, it is not clear to staff what roads these images depict or what year they were captured to demonstrate compliance under 18.88. Furthermore, it appears the outline of the subject property differs between the two images based on the topographic and vegetative features of the property.

Staff notes that the applicant appears to be relying on aerial photographs to prove the existence of a roadway as of August 5, 1992. The applicant also provided a "Wildlife Habitat Assessment Report" dated December 14, 2022 (Applicant's Exhibit 6). Staff addresses each of these below separately.

#### Aerial Photographs

In addition to the aerial photographs provided by the applicant, Staff has found the following aerial images:

*Image 1a - USGS Earth Explorer, 1985*

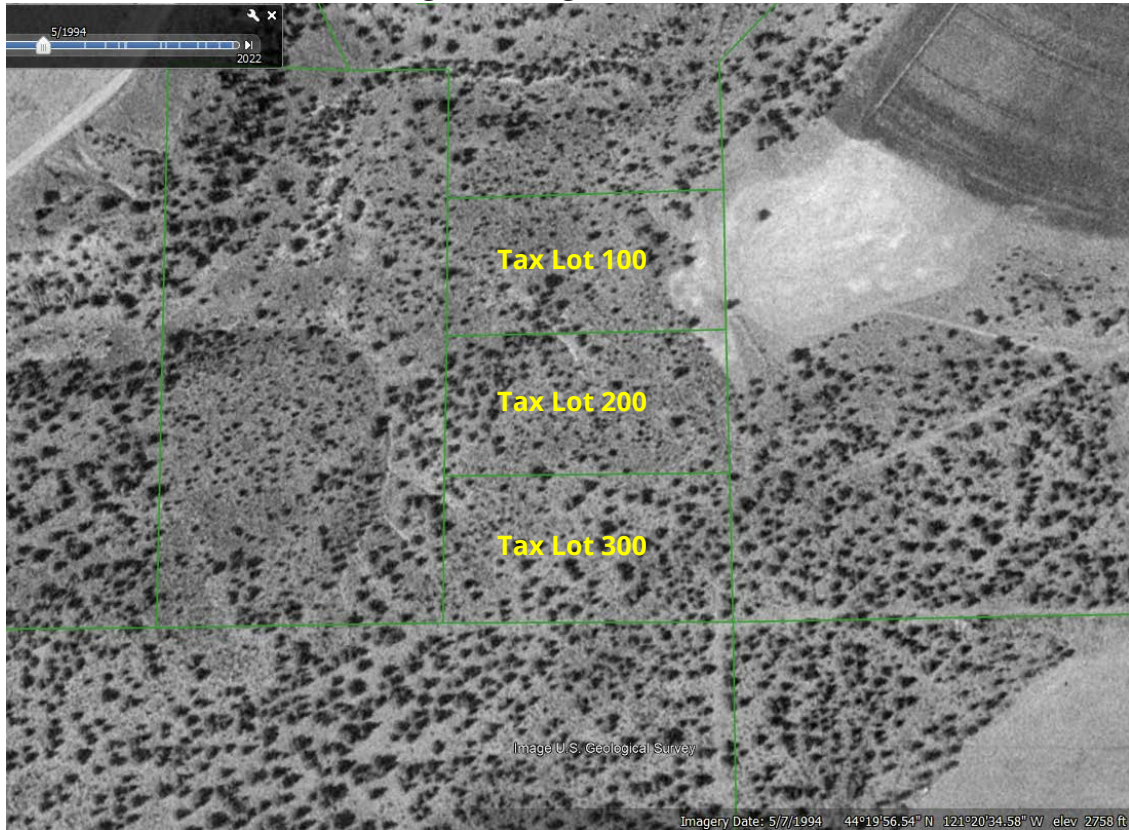


*Image 1b - USGS Earth Explorer, 1985, close-up*

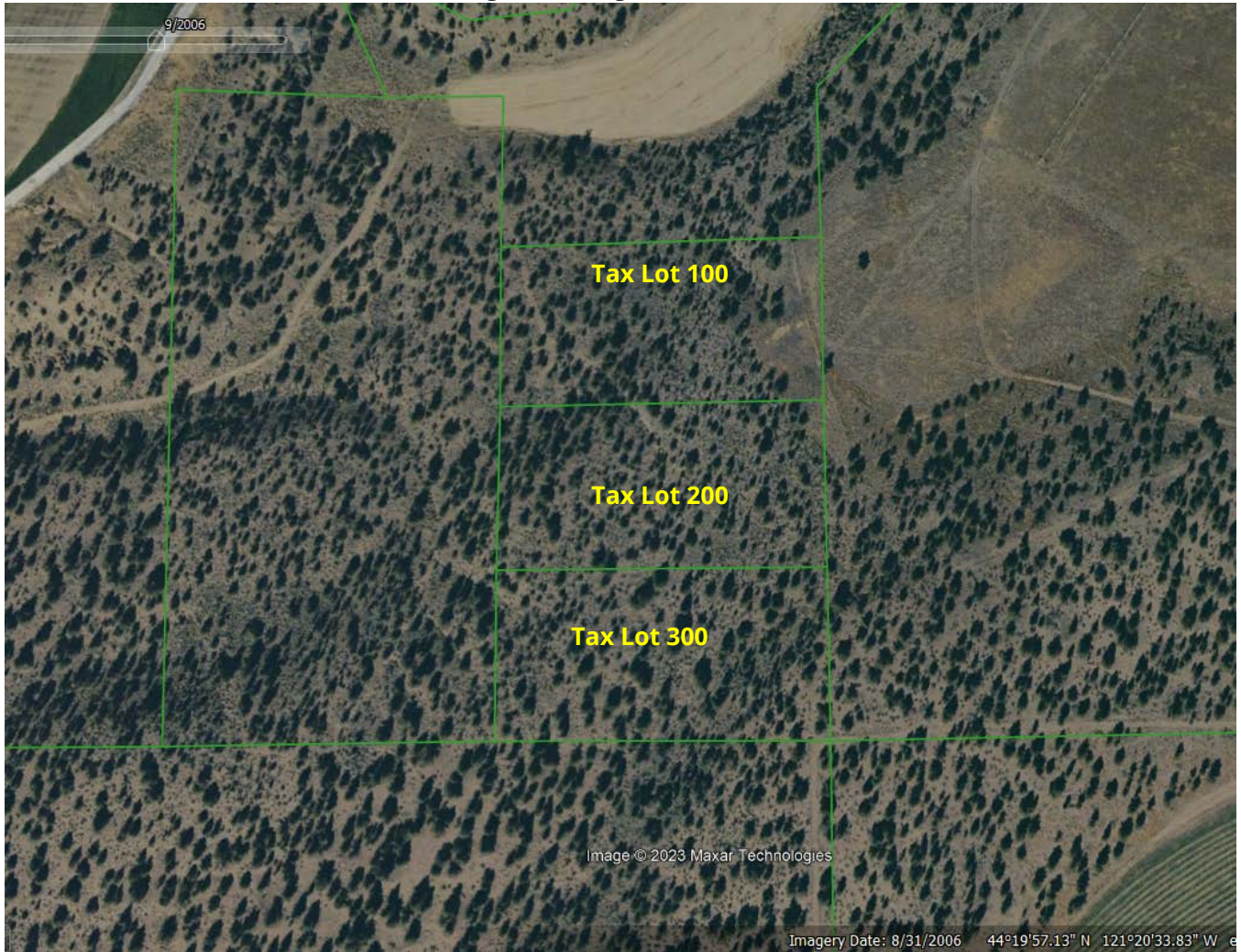




**Image 2 - Google Earth, 1994**

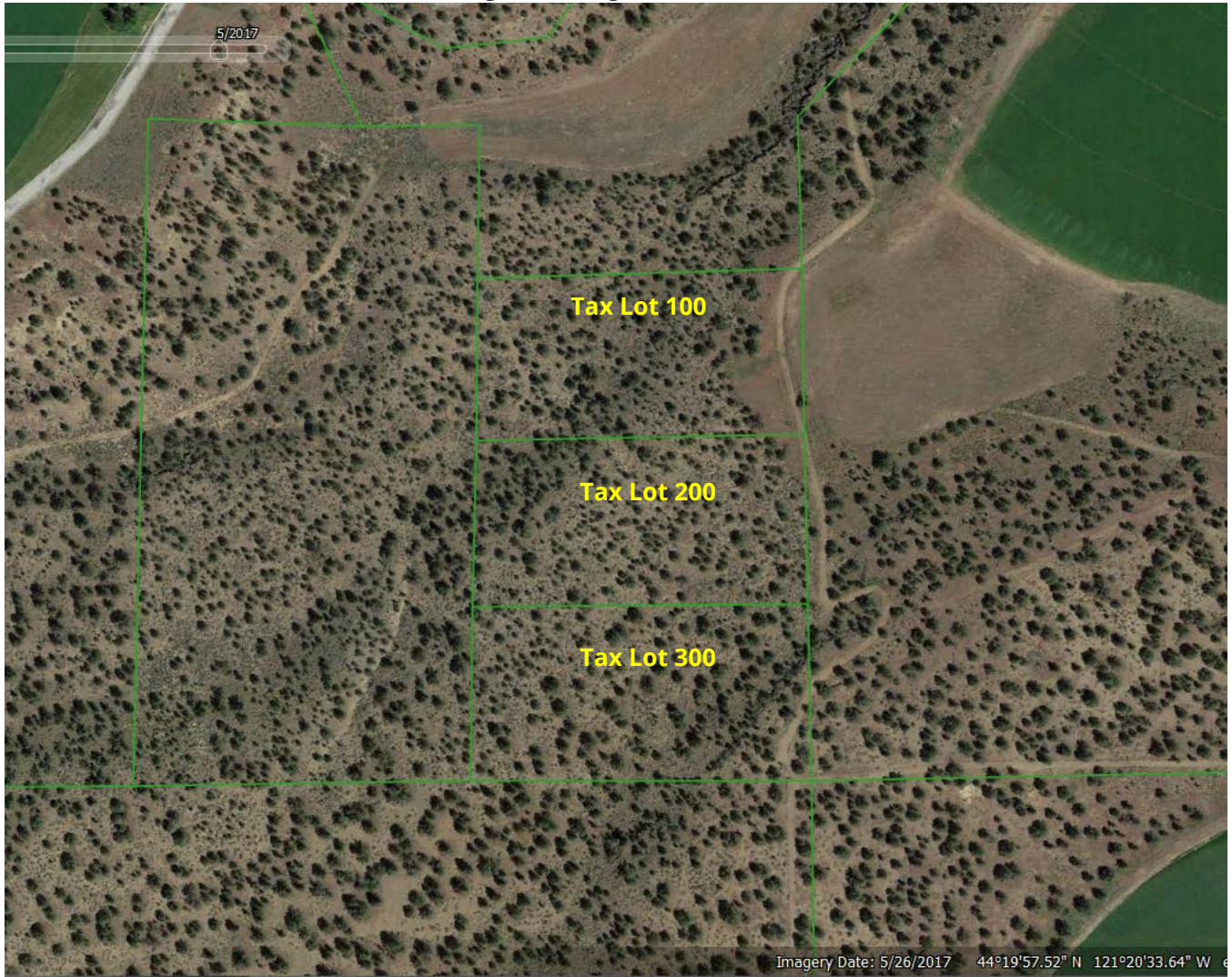


**Image 3 - Google Earth, 2006**



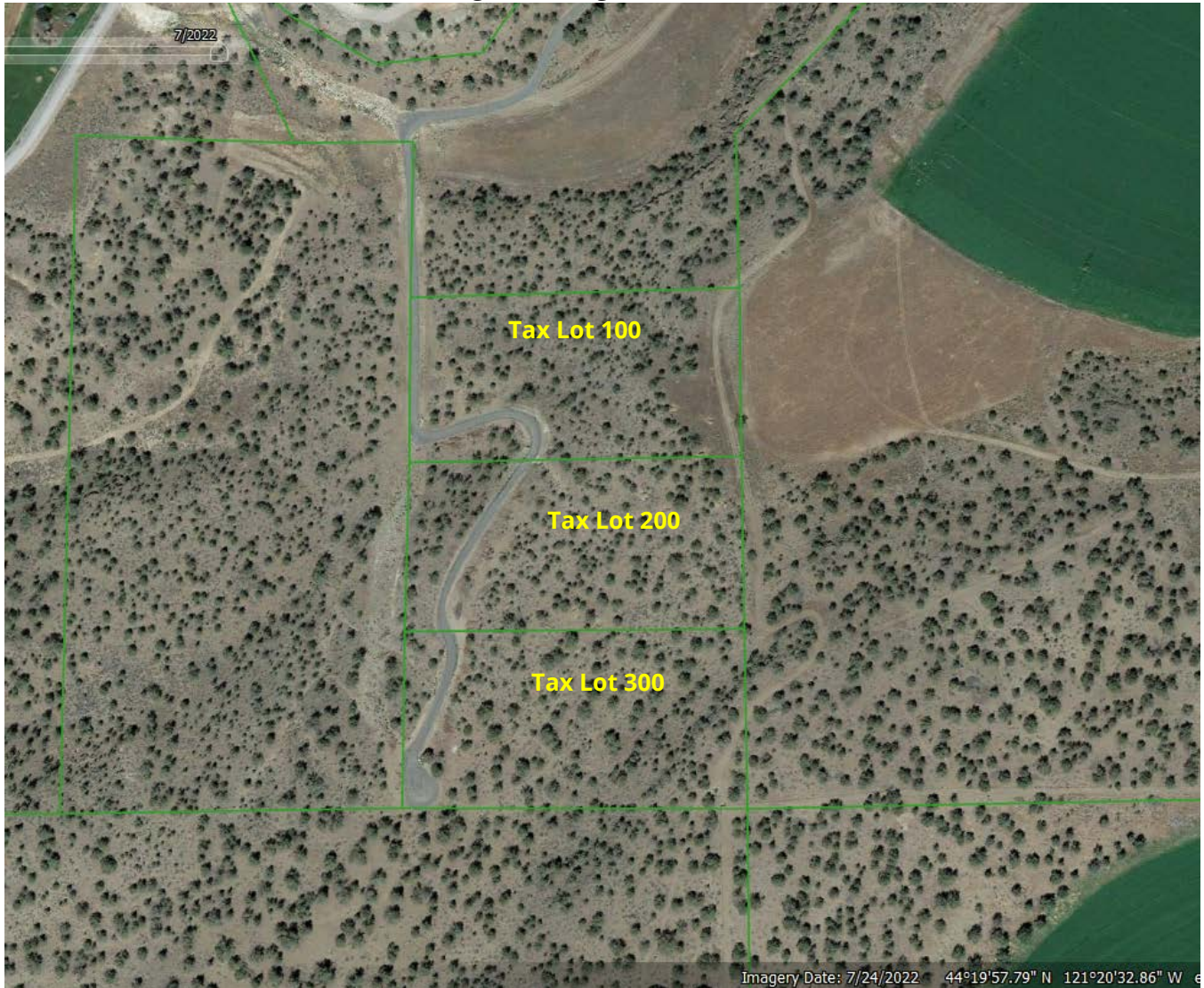


**Image 4 - Google Earth, 2017**





**Image 5 – Google Earth, 2022**



Staff does not dispute that there is an existing road which extends down the western side of the three tax lots before it terminates in the southwest corner of Tax Lot 100. However, based on aerial imagery above, this roadway was constructed sometime between 2017 and 2022 and therefore cannot be considered in the DCC 18.88 findings.

In review of the other aerial imagery provided by the applicant, Exhibits I, J, K include aerial imagery dated 1982, 1985, and 1990. These aerial images include digitized lines over the images, they also include roads labeled “surveyed roads.” It is also not clear from unedited aerial imagery from the same year, 1985 (See Image 1, above) that a road exists where the applicant has included digitized lines. It appears the “Digitized Road from 1990 Aerial” line work as depicted on the 1982, 1985, and 1990 aerials crosses a portion of an agricultural field.

It is not clear to staff that these roads satisfy the requirements of DCC 18.88.060.

Pursuant to DCC Section 18.04.040, the definition for “road or street” is included below which the Hearings Officer may find relevant to these applications:

***“Road or street” means a public or private way created to provide ingress or egress to one or more lots, parcels, areas or tracts of land.***

The aerial imagery provided by the applicant does not provide staff conclusive evidence that a private road existed in the locations they claim prior to August 5, 1992.

Staff asks the Hearings Officer make specific findings on this issue.

#### Wildlife Habitat Assessment Report

Pursuant to (B)(2), the footprint of the dwelling must be located within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992, unless it can be found that habitat values (i.e., browse, forage, cover, access to water) and migration corridors are afforded equal or greater protection through a different development pattern.

It is not clear to staff if the applicant is making an assertion under this criterion and therefore arguing the dwelling location does not have to be sited within 300-feet of a road or easement based on the preservation or enhancement of habitat values. The applicant’s narrative states in part:

In addition, the applicant submits herewith a “FHC Property Wildlife Habitat assessment Report” prepared by Mason, Bruce & Girard (Exhibit 6). In addition to the efforts that the applicant has already undertake to restore and improve the wildlife habitat in the subject area, the Report recommends some additional efforts that the property owner can utilize to further enhance the natural habitat for the existing wildlife.

The Wildlife Habitat Assessment Report provides an assessment of the potential wildlife habitat impacts of the proposed development and provides recommended conservation measures to reduce impacts of the proposed development on wildlife habitat. While staff certainly encourages and supports property owners to incorporate wildlife conservation measures into project design, the Wildlife Habitat Assessment Report does not clearly indicate that habitat values and migration corridors specific to the subject properties are afforded equal or greater protection based on the proposed development pattern and thereby exempt the project from meeting the 300-foot road or easement siting standard.

Staff asks the Hearings Officer make specific findings on this issue.

#### Section 18.88.070. Fencing Standards.

***The following fencing provisions shall apply as a condition of approval for any new fences constructed as a part of development of a property in conjunction with a conditional use***

*permit or site plan review.*

**A. *New fences in the Wildlife Area Combining Zone shall be designed to permit wildlife passage. The following standards and guidelines shall apply unless an alternative fence design which provides equivalent wildlife passage is approved by the County after consultation with the Oregon Department of Fish and Wildlife:***

- 1. *The distance between the ground and the bottom strand or board of the fence shall be at least 15 inches.***
- 2. *The height of the fence shall not exceed 48 inches above ground level.***
- 3. *Smooth wire and wooden fences that allow passage of wildlife are preferred. Woven wire fences are discouraged.***

**B. *Exemptions:***

- 1. *Fences encompassing less than 10,000 square feet which surround or are adjacent to residences or structures are exempt from the above fencing standards.***
- 2. *Corrals used for working livestock.***

**FINDING:** No new fencing is included in this proposal. Staff recommends a condition of approval to ensure compliance.

#### **SYSTEM DEVELOPMENT CHARGE**

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$5,603 per p.m. peak hour trip. County staff has determined a local trip rate of 0.81 p.m. peak hour trips per single-family dwelling unit; therefore the applicable SDC is \$4,538 (\$5,603 X 0.81) per dwelling. The SDC is due prior to issuance of certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final. This SDC amount will be good through June 30, 2024. **DESCHUTES COUNTY'S SDC RATE IS INDEXED AND RESETS EVERY JULY 1. WHEN PAYING AN SDC, THE ACTUAL AMOUNT DUE IS DETERMINED BY USING THE CURRENT SDC RATE AT THE DATE THE BUILDING PERMIT IS PULLED.**

#### **IV. CONCLUSION**

Staff requests the Hearings Officer determine if the Applicant has met the burden of proof necessary to justify approval of a Conditional Use Permit for a nonfarm dwelling on land zoned EFU, WA, and SMIA through effectively demonstrating compliance with the applicable criteria of DCC Title 18 (the Deschutes County Zoning Ordinance) and applicable sections of OAR and ORS.

#### **V. RECOMMENDED CONDITIONS OF APPROVAL**

**A.** This approval is based upon the application, site plan, specifications, and supporting

documentation submitted by the applicant. Any substantial change in this approved use will require review through a new land use application.

- B.** The property owner shall obtain any necessary permits from the Deschutes County Building Division and Onsite Wastewater Division.
- C.** No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed by DCC 18.120.040
- D.** Structural setbacks from any north lot line shall meet the solar setback requirements in DCC 18.116.180.
- E.** In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.
- F.** Farm & Forest Management Easement: **Prior to the issuance of any building permit for a nonfarm dwelling**, the property owner shall sign and record in the deed records for the County, a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937. The applicant shall submit a copy of the recorded Farm and Forest Management Easement to the Planning Division.
- G.** All new fences shall comply with DCC 18.88.070.
- H.** Septic: The applicant shall secure any necessary septic permit approval for each nonfarm dwelling.
- I.** Farm Tax Deferral Disqualification: **Prior to the issuance of building permits**, the applicant shall produce evidence from the County Assessor's Office that the parcel upon which the dwelling is proposed has been disqualified for special assessment at value for farm use under ORS 308.370 or other special assessment under ORS 308.765, 321.352, 321.730 or 321.815, and that any additional tax or penalty imposed by the County Assessor as a result of disqualification has been paid.
- J.** **Prior to issuance of building permits**, applicant shall sign and record in the Deschutes County Book of Records a statement declaring that the applicant and his successors will not now or in the future complain about the allowed surface mining activities on the adjacent surface mining site. A copy of this recording shall be provided to Deschutes County Planning, prior to issuance of building permits.

- K. Road Naming: Prior to the issuance of building permits for any of the non-farm dwellings,** the existing unnamed roadway which provides access to the subject property shall be assigned a name in accordance with the procedures in DCC 16.16.030. This requires the submittal and approval of a Road Naming Application.
- L. Firebreaks and Fuel Break: Prior to the issuance of any building permit,** the applicant shall construct and maintain the firebreaks detailed below on land surrounding the structure and access road that are owned or controlled by the owner. These required fuel breaks shall be maintained at all times.
1. Primary Firebreak. Prior to use, a primary firebreak, not less than 10 feet wide, shall be constructed containing nonflammable materials. This may include lawn, walkways, driveways, gravel borders or other similar materials.
  2. Secondary Firebreak. A secondary firebreak of not less than 20 feet shall be constructed outside the primary firebreak. This firebreak need not be bare ground, but can include a lawn, ornamental shrubbery or individual or groups of trees separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed.
  3. Fuel Break. A fuel break shall be maintained, extending a minimum of 100 feet in all directions around the secondary firebreak. Individual and groups of trees within the fuel break shall be separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. Small trees and brush growing underneath larger trees shall be removed to prevent spread of fire up into the crowns of the larger trees. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed. The fuel break shall be completed prior to the beginning of the coming fire season.
  4. No portion of a tree or any other vegetation shall extend to within 15 feet of the outlet of a stovepipe or chimney.
- M. Fire Safety Design Standards for Roads: Prior to the issuance of any building permits,** the applicant shall provide written verification to the Planning Division from a professional engineer registered in the state of Oregon stating the fire safety design standards for the access road extending from the NW Lower Valley Drive right-of-way to each dwelling site is met as detailed below:
1. Roads, bridges and culverts shall be designed and maintained to support a minimum gross vehicle weight (GVW) of 50,000 lbs. If bridges or culverts are involved in the construction of a road or driveway, written verification of compliance with the 50,000 lb. GVW standard shall be provided by a professional engineer registered in Oregon.
  2. Access roads shall have an unobstructed horizontal clearance of not less than 20 feet and an unobstructed vertical clearance of not less than 13.5 feet, and provide an all weather surface.
  3. Turnarounds shall have a minimum of 50 feet of turn radius with an all weather surface and be maintained for turning of fire fighting equipment.



4. Road grades should not exceed eight percent, with a maximum of 12 percent on short pitches. Variations from these standards may be granted when topographic conditions make these standards impractical and where the local fire protection district states their fire fighting equipment can negotiate the proposed road grade.

**N.** Easement: Prior to the issuance of building permits, the applicant shall provide a copy of a recorded access easement showing legal access from the subject parcels to NW Lower Valley Drive.

**O.** **Prior to the issuance of building permits on Tax Lot 100**, the applicant shall prepare and submit a Wetland Delineation to the Department of State Lands to verify the extent of potential wetlands on the subject property. DSL's review and approval of the delineation would determine if additional state or local permitting is required for site development.

**VI. DURATION OF APPROVAL, NOTICE AND APPEALS**

Staff recommends the Hearings Officer include the following statement as part of any approval:

The applicant shall obtain a building permit for each proposed nonfarm dwelling within four (4) years from the date this decision becomes final, or obtain an extension of time pursuant to Section 22.36.010 of the County Code, or this conditional use permit shall be void.

**This decision becomes final twelve (12) days after the date mailed**, unless appealed by a party of interest. To appeal, it is necessary to submit a Notice of Appeal, the appeal fee, and a statement raising any issue relied upon for appeal with sufficient specificity to afford the Hearings Body an adequate opportunity to respond to and resolve each issue.

Copies of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost. Copies can be purchased for 25 cents per page.

**NOTICE TO MORTGAGEE, LIEN HOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST BE PROMPTLY FORWARDED TO THE PURCHASER.**

**DESCHUTES COUNTY PLANNING DIVISION**



Written by: Haleigh King, Associate Planner

*Jacob Ripper*

Reviewed by: Jacob Ripper, Principal Planner