



STAFF REPORT

FILE NUMBER: 247-22-000497-NUV

**SUBJECT PROPERTY/
OWNER:**

Mailing Name: FAGEN, HARRY J & BEVERLY M
Map and Taxlot: 161226B000500
Account: 132963
Situs Address: 21280 TUMALO PL, BEND, OR 97703

APPLICANT: Harry & Beverly Fagen

APPLICANT'S AGENT: Pat Kliewer

REQUEST:

Nonconforming Use Verification to determine whether the following uses were lawfully established in the Multiple Use Agricultural Zone and Rural Commercial Zone:

- Logging and trucking business.
- Welding, fabrication and alteration of trucking, logging, excavation, and drilling equipment.
- Storing, hauling, and selling excavation materials.
- Well drilling business.
- Storage, processing and recycling of masonry and concrete materials.
- Custom logging, peeled logs, sawed logs, logs for log structures, woodchips, firewood, and fence posts production and sales.
- Vehicle sales and sale of vehicle parts.

HEARING DATE: April 12, 2023

HEARING START: 6:00 pm

STAFF PLANNER: Audrey Stuart, Associate Planner
Phone: 541-388-6679 / Email: Audrey.Stuart@deschutes.org

HEARINGS OFFICER: Laura Westmeyer

RECORD: Record items can be viewed and downloaded from:
www.buildingpermits.oregon.gov

I. APPLICABLE CRITERIA

Deschutes County Code (DCC)

Title 18 of the Deschutes County Code, the County Zoning Ordinance:

Chapter 18.32, Multiple Use Agricultural Zone (MUA10)

Chapter 18.74, Rural Commercial Zone (RC)

Chapter 18.80, Airport Safety Combining Zone (AS)

Chapter 18.84, Landscape Management Combining Zone (LM)

Chapter 18.113, Destination Resorts Zone (DR)

Chapter 18.120, Exceptions

Title 22, Deschutes County Development Procedures Ordinance

II. BASIC FINDINGS

LOT OF RECORD: The subject property is a legal lot of record pursuant to previous Deschutes County land use files, including 247-16-000751-CU, 752-SP.

SITE DESCRIPTION: The subject property is approximately 29.04 acres in size and is split-zoned RC and MUA10. The property is irregular in shape, and fronts on Highway 97 to the east and Tumalo Place to the south. Vegetation on the subject property consist of irrigated pasture in the southeast portion of the property, and scattered shrubs and juniper located in the north and west portions of the property. The subject property contains one, two-story building, which is located in the southeast portion of the property. The grade of the property slopes up towards the northwest.

Figure 1: Zoning Designations of Subject Property



REVIEW PERIOD: The subject application(s) were submitted on June 21, 2022. The application was deemed incomplete on July 13, 2022, and a letter detailing the information necessary to complete review was mailed. The application was subsequently deemed complete by the Planning Division on December 18, 2022. The applicant submitted one request to extend the clock for a total of 30 days. The 150th day on which the County must take final action on this application is June 16, 2023.

PROPOSAL: The applicant requests Verification of a Nonconforming Use, consisting of different commercial and industrial uses on the subject property. The submitted application materials include the following description of the uses that the applicant has requested a ruling on:

This application is for the nonconforming uses related to and supporting the following current uses and related activities:

1. Fagen Logging and Fagen Trucking: Contractor trucks and heavy equipment for trucking, logging, and excavation for use by the applicants and for sale. Contractor yard, heavy construction equipment, truck and bus storage sales, new and used. Repair, maintenance, service, storage and sales of farm equipment, vehicles, buses, parts, and trucks, and sales of parts. Although some of it is permitted in the RC zone, it occurs elsewhere on the property.
2. Welding, fabrication and alteration of trucking, logging, excavation, and drilling equipment.

3. Storing, hauling, and selling excavation materials, gravel; rocks, corrugated pipes, dirt and soils, and rock sorting equipment and services. (No mining or soil of rock removal occurs on site.)
 4. Aiken Well Drilling: trucks, pipes, rigs, supplies, and equipment.
 5. Storage, processing and recycling of masonry and concrete materials,
 6. Custom logging, peeled logs, sawed logs, logs for log structures, woodchips, firewood, and fence posts production and sales.
- ...

This application is for the following uses: Contractor trucks and heavy equipment for trucking, logging, excavation, and well drilling; welding, fabrication and alteration of trucking, logging, excavation, and drilling equipment; storing and selling excavation materials, rocks, corrugated pipes, soils, and rock sorting equipment and services; well drilling trucks, pipes, supplies, and equipment; storage, processing and recycling of masonry and concrete materials; contractor yard, heavy construction equipment sales, new and used; repair, maintenance, service, storage and sales of farm equipment, vehicles, buses, parts, and trucks, and sales of parts; custom logging, peeled logs, sawed logs, logs for log structures, woodchips, firewood, and fence posts production and sales.

Staff notes the original application materials also requested verification of the lawful establishment driveway access points onto Tumalo Place. The applicant subsequently modified the request to remove this component of the subject application.

LAND USE HISTORY:

- 247-21-000621-DR: A Nonconforming Use Verification for various commercial and industrial uses on the subject property. This application was withdrawn.
- 247-18-000679-SR: Similar Use Ruling to determine whether mobile storage pods are similar to the “mini-storage facilities” use in the RC Zone. This application was withdrawn.
- 247-16-000751-CU, 752-SP: A Conditional Use Permit and Site Plan Review to establish a marijuana retail store. This application was withdrawn prior to a final Hearings Officer decision.
- DR-10-3: A Declaratory Ruling on whether the existing structure (‘Pink Building’) is a permanent dwelling. The structure was not found to be a permanent dwelling.
- LL-06-121: Property Line Adjustment with Tax Lot 600.
- SP-05-28: Site Plan Review to establish a retail and wholesale landscaping business.
- PA-92-8, ZC-92-3: Comprehensive Plan Amendment to redesignate 4.15 acres of the subject property from Rural Residential to Rural Service Center/Commercial, and change the zoning from Multiple Use Agricultural to Rural Service Center.
- SP-82-22: Site Plan Review for an addition to the existing two-story building, and to allow the establishment of a flea market and the retail sale of collectibles and furniture.
- SP-78-18: Site Plan Review to establish a welding repair shop and retail store.
- Z-77-53: Zone Change for approximately 0.67 acres of the subject property, from Exclusive Agriculture (A-1) to Rural Service Center (A-S).

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on June 28, 2022, to several public agencies and received the following comments:

Central Oregon Irrigation District, Spencer Stauffer

Please be advised that Central Oregon Irrigation District (COID) has reviewed the application received on June 28, 2022 for the above referenced project located 21280 Tumalo PL, Bend, OR 97703/tax lot: 161226B000500. The applicant requests a Nonconforming Use Verification to determine whether the following uses were lawfully established in the Multiple Use Agricultural Zone and Rural Commercial Zone:

- Logging and trucking business.
- Welding, fabrication and alteration of trucking, logging, excavation, and drilling equipment.
- Storing, hauling, and selling excavation materials.
- Well drilling business.
- Storage, processing and recycling of masonry and concrete materials.
- Custom logging, peeled logs, sawed logs, logs for log structures, woodchips, firewood, and fence posts production and sales.
- Driveway access points to Tumalo Place

Tax Map 161226B000500 has 6.66 acres of appurtenant COID irrigation water mapped to a specific place of use. A private irrigation ditch travels through the eastern boundary of the tax lot 161226B000500.

Listed below are COIDs initial comments to the provided land use application. All development affecting irrigation facilities shall be in accordance with COID's Development Handbook and/or as otherwise approved by the District.

- Tax Map 161226B000500 has 6.66 acres of appurtenant COID irrigation water mapped to a specific place of use. A map of the location of the proposed structure was not provided to COID. Construction of a structure, driveway, or other impermeable surface on top of a mapped water right is not allowed. COID requests applicant contact COID to determine if a water transfer will be required.
- Irrigation infrastructure and rights-of-way are required to be identified on all maps and plans
- Any irrigation conveyance, District or private, which passes through the subject property shall not be encroached upon without written permission from this office.
- No structures of any kind, including fence, are permitted within COID property/easement/right of way without written permission from this office.
- Policies, standards and requirements set forth in the COID Developer Handbook must be complied with.

Our comments are based on the information provided, which we understand to be preliminary nature at this time. Our comments are subject to change and additional

requirements may be made as site planning progresses and additional information becomes available. Please provide updated documents to COID for review as they become available.

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the transmittal materials for 247-22-000497-NUV to confirm numerous non-conforming uses, including access to Tumalo Place, on a 29.04-acre parcel in the Multiple Use Agriculture (MUA-10) Rural Commercial (RC), Airport Safety (AS), Landscape Management (LM), and Destination Resort (DR) zones at 21280 Tumalo Pl., aka County Assessor's Map 16-12-26B, Tax Lot 500.

The property abuts Tumalo Place, a public road maintained by Deschutes County and functionally classified as a collector. Tumalo Place serves as a on/off ramp to U.S. 97 for southbound traffic. A search of DIAL does not reveal a driveway permit approved by Deschutes County. As Tumalo Place acts as an on/off ramp, perhaps the Oregon Department of Transportation purchased access control as part of Deschutes Junction interchange project and is the road authority for access. If the County is the permitting authority, the applicant will need to get a driveway permit approved by Deschutes County to meet the access requirements of DCC 17.48.210(A).

The property lies approximately 6.74 miles southwest of the Redmond Airport. The combination of distance from the airfield and the height limits of the zone ensures nothing on site penetrates any imaginary surfaces related to the Redmond Airport.

Board Resolution 2013-020 sets an transportation system development charge (SDC) of \$4,757 per peak hour trip. As the land use application is only to determine the legality of the uses onsite, there is no traffic generation associated with the application. As no roadway capacity is consumed, as that term is commonly understood, SDCs are not triggered.

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.

The following agencies did not respond to the notice: Bend Fire Department, Deschutes County Assessor, Deschutes County Environmental Soils Division, Deschutes County Road Department, Oregon Department of Transportation, and Redmond Airport Manager.

PUBLIC COMMENTS: The Planning Division mailed notice of the subject application to all property owners within 250 feet of the subject property on June 28, 2022. 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 June 30, 2022. No public comments were received.

III. FINDINGS & CONCLUSIONS

Title 22, Deschutes County Development Procedures Ordinance

Chapter 22.40, Declaratory Ruling.

Section 22.40.010, Availability of Declaratory Ruling.

A. *Subject to the other provisions of DCC 22.40.010, there shall be available for the County's comprehensive plans, zoning ordinances, the subdivision and partition ordinance and DCC Title 22 a process for:*

...

- 4. *Determining the validity and scope of a nonconforming use;***
- 5. *Determination of other similar status situations under a comprehensive plan, zoning ordinance or land division ordinance that do not constitute the approval or denial of an application for a permit; and***

FINDING: The applicant is requesting a determination on the validity and scope of a nonconforming use, as described in detail below.

B. *A declaratory ruling shall be available only in instances involving a fact-specific controversy and to resolve and determine the particular rights and obligations of particular parties to the controversy. Declaratory proceedings shall not be used to grant an advisory opinion. Declaratory proceedings shall not be used as a substitute for seeking an amendment of general applicability to a legislative enactment.*

FINDING: The applicant is requesting a determination on the validity and scope of a nonconforming use, as described in detail below. Staff finds this is an instance involving a fact-specific controversy, and will resolve and determine the particular rights and obligations of parties to the controversy. The applicant has not requested an advisory opinion. This proceeding is not being used as a substitute for seeking an amendment of general applicability to a legislative enactment.

C. *Declaratory rulings shall not be used as a substitute for an appeal of a decision in a land use action or for a modification of an approval. In the case of a ruling on a land use action a declaratory ruling shall not be available until six months after a decision in the land use action is final.*

FINDING: The applicant is requesting a determination on the validity and scope of a nonconforming use, as described in detail herein. Staff finds this application is not an appeal of a decision in a land

use action or for a modification of an approval. The proposal does not include a ruling on a land use action under this criterion.

D. *The Planning Director may refuse to accept and the Hearings Officer may deny an application for a declaratory ruling if:*

- 1. *The Planning Director or Hearings Officer determines that the question presented can be decided in conjunction with approving or denying a pending land use application or if in the Planning Director or Hearing Officer's judgment the requested determination should be made as part of a decision on an application for a quasi-judicial plan amendment or zone change or a land use permit not yet filed; or***
- 2. *The Planning Director or Hearings Officer determines that there is an enforcement case pending in district or circuit court in which the same issue necessarily will be decided as to the applicant and the applicant failed to file the request for a declaratory ruling within two weeks after being cited or served with a complaint.***

The Planning Director or Hearings Officer's determination to not accept or deny an application under DCC 22.40.010 shall be the County's final decision.

FINDING: Staff finds the applicant's request for a declaratory ruling is not a question that can be decided in conjunction with some other land use application, plan amendment or zone change. In addition, there is no formal enforcement case pending in district or circuit court on this matter at this time. These criteria do not apply.

Section 22.40.020, Persons Who May Apply.

A. *DCC 22.08.010(B) notwithstanding, the following persons may initiate a declaratory ruling under DCC 22.40:*

- 1. *The owner of a property requesting a declaratory ruling relating to the use of the owner's property.***
- 2. *In cases where the request is to interpret a previously issued quasi-judicial plan amendment, zone change or land use permit, the holder of the permit; or***
- 3. *In all cases arising under DCC 22.40.010, the Planning Director.***

FINDING: The applicant is the property owner. This criterion is met.

B. *A request for a declaratory ruling shall be initiated by filing an application with the planning division and, except for applications initiated by the Planning Director, shall be accompanied by such fees as have been set by the Planning Division. Each application for a declaratory ruling shall include the precise question on which a ruling is sought. The applicant shall set forth whatever facts are relevant and necessary for making the determination and such other information as may be required by the Planning Division.*

FINDING: The applicant is requesting a determination on the validity and scope of a nonconforming use, as described in detail herein. The applicant filed the necessary declaratory ruling application and paid the required fee.

Section 22.40.030, Procedures.

Except as set forth in DCC 22.40 or in applicable provisions of a zoning ordinance, the procedures for making declaratory rulings shall be the same as set forth in DCC Title 22 for land use actions. Where the Planning Division is the applicant, the Planning Division shall bear the same burden that applicants generally bear in pursuing a land use action.

FINDING: The declaratory ruling application is being processed according to Title 22. The decision will be noticed and sent to all required parties. This criterion will be met.

Section 22.40.040, Effect of Declaratory Ruling.

- A. *A declaratory ruling shall be conclusive on the subject of the ruling and bind the parties thereto as to the determination made.***
- B. *DCC 22.28.040 notwithstanding, and except as specifically allowed therein, parties to a declaratory ruling shall not be entitled to reapply for a declaratory ruling on the same question.***
- C. *Except where a declaratory ruling is made by the Board of County Commissioners, the ruling shall not constitute a policy of Deschutes County.***

FINDING: Staff finds these criteria apply to this application and limit reapplication for a declaratory ruling on the same question. This declaratory ruling does not constitute a policy of Deschutes County.

Section 22.40.050, Interpretation.

Interpretations made under DCC 22.40 shall not have the effect of amending the interpreted language. Interpretation shall be made only of language that is ambiguous either on its face or in its application. Any interpretation of a provision of the comprehensive plan or other land use ordinance shall consider applicable provisions of the comprehensive plan and the purpose and intent of the ordinance as applied to the particular section in question.

FINDING: The applicant is requesting a determination on the validity and scope of a nonconforming use, as described in detail herein. No interpretation under this criterion has been requested.

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.32, Multiple Use Agricultural Zone (MUA-10)

Section 18.32.020, Uses Permitted Outright

The following uses and their accessory uses are permitted outright:

A. *Agricultural uses as defined in DCC Title 18.*

FINDING: The application materials indicate approximately six acres of the subject property is in agricultural use and consists of irrigated pasture. Agricultural uses, as defined by DCC 18.04.030, are permitted outright in the MUA10-zoned portion of the subject property and do not require a nonconforming use verification.

Section 18.32.030, Conditional Uses Permitted

The following uses may be allowed subject to DCC 18.128:

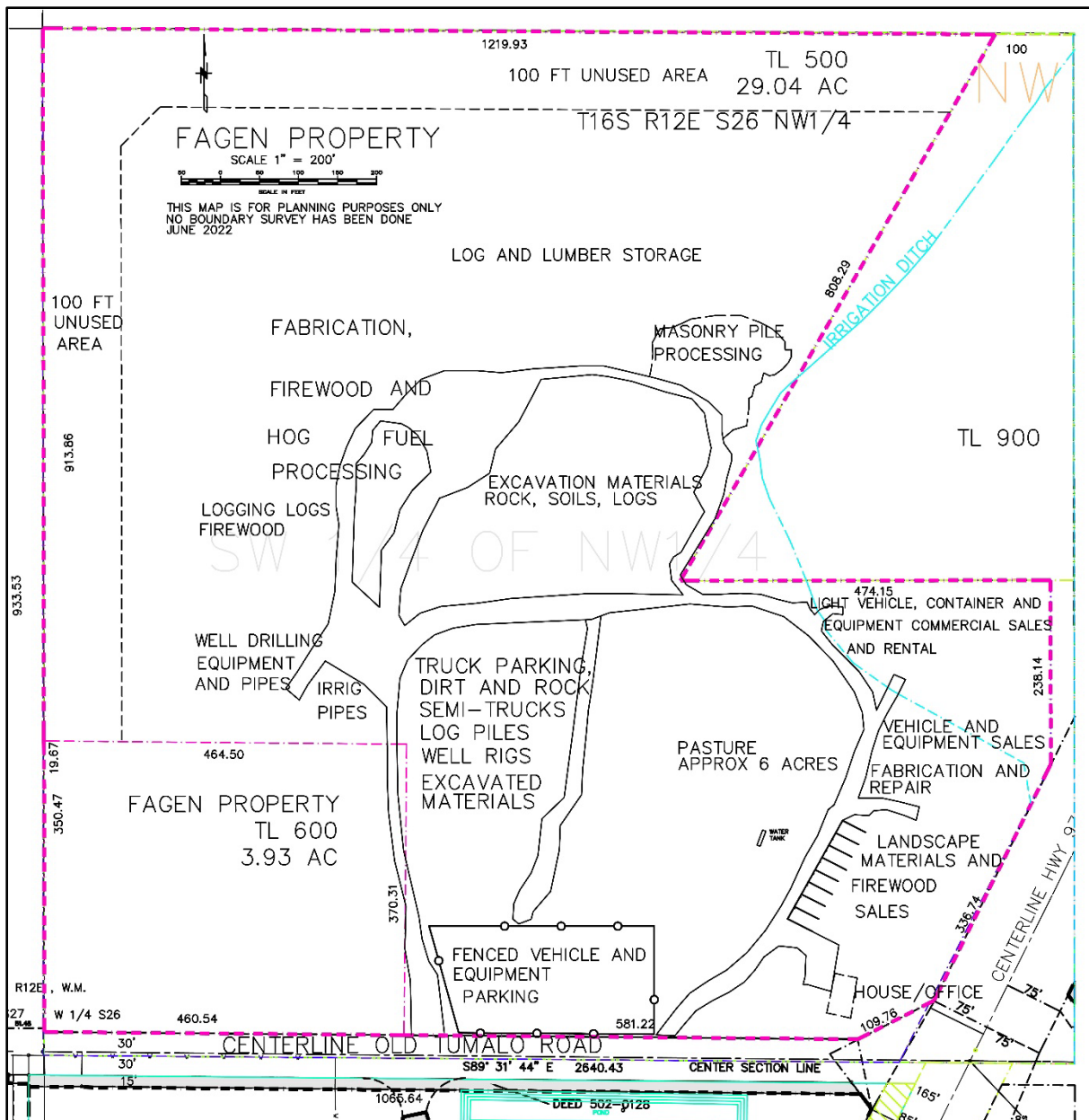
T. *Storage, crushing and processing of minerals, including the processing of aggregate into asphaltic concrete or Portland cement concrete, when such uses are in conjunction with the maintenance or construction of public roads or highways.*

FINDING: One of the uses subject to this review is storing, hauling, and selling excavation materials on the MUA10-zoned portion of the subject property. The subject property has not received a Conditional Use Permit for this use, and the applicant requests a ruling on whether this is a lawfully established, nonconforming use.

The MUA10-zoned portion of the subject property includes other commercial and industrial uses, which the applicant has requested nonconforming use verification for. These other uses within the MUA10 Zone include a well drilling business, commercial trucking, and the rental, sales, and repair of vehicles and equipment. The uses that do not conform to the provisions of DCC 18.32 are discussed in detail under DCC 18.120 below.

In a letter dated December 9, 2022, the applicant provided the following diagram showing the location of various uses on the subject property. Staff includes this for reference to illustrate the uses occurring on the MUA10-zoned portion of the subject property.

Figure 2: Approximate Location of Commercial and Industrial Uses on Subject Property



Section 18.32.040. Dimensional Standards

In an MUA Zone, the following dimensional standards shall apply:

...

- D. *Building height. No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed by DCC 18.120.040.***

FINDING: The MUA-10 zoned portion of the subject property does not contain any structures and the applicant does not propose any new structures. Staff finds this criterion does not apply.

Section 18.32.050. Yards

- A. *The front yard setback from the property line shall be a minimum of 20 feet for***

- property fronting on a local street right of way, 30 feet from a property line fronting on a collector right of way, and 80 feet from an arterial right of way unless other provisions for combining accesses are provided and approved by the County.*
- B.** *Each side yard shall be a minimum of 20 feet. For parcels or lots created before November 1, 1979, which are one-half acre or less in size, the side yard setback may be reduced to a minimum of 10 feet. For parcels or lots adjacent to property receiving special assessment for farm use, the adjacent side yard for a dwelling shall be a minimum of 100 feet.*
 - C.** *Rear yards shall be a minimum of 25 feet. Parcels or lots with rear yards adjacent to property receiving special assessment for farm use, the rear yards for a dwelling shall be a minimum of 100 feet.*
 - D.** *The setback from the 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.*

FINDING: The applicant requests verification that existing uses on the subject property were lawfully established, and no new structures are proposed. As a condition of approval, 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.

Section 18.32.060. Stream Setbacks

To permit better light, air, vision, stream pollution control, fish and wildlife areas and to preserve the natural scenic amenities and vistas along the streams and lakes, the following setbacks shall apply:

- A.** *All sewage disposal installations, such as septic tanks and septic drainfields, shall be set back from the ordinary high water mark along all streams or lakes a minimum of 100 feet, measured at right angles to the ordinary high water mark. In those cases where practical difficulties preclude the location of the facilities at a distance of 100 feet and the County Sanitarian finds that a closer location will not endanger health, the Planning Director or Hearings Body may permit the location of these facilities closer to the stream or lake, but in no case closer than 25 feet.*
- B.** *All structures, buildings or similar permanent fixtures shall be set back from the ordinary high water mark along all streams or lakes a minimum of 100 feet measured at right angles to the ordinary high water mark.*

FINDING: There are no streams or lakes in the project vicinity.

Section 18.32.070. Rimrock Setback

Setbacks from rimrock shall be as provided in DCC 18.116.160.

FINDING: There is no rimrock in the project vicinity.

Chapter 18.74, Rural Commercial Zone

Section 18.74.020, Uses Permitted; Deschutes Junction And Deschutes River Woods Store

- A. Uses Permitted Outright. The following uses and their accessory uses are permitted outright and do not require site plan review:**
- 1. Single-family dwelling.**

FINDING: There is one structure on the RC-zoned portion of the subject property, which is referred to as the 'Pink Building.' A single-family dwelling is permitted outright in the RC Zone, therefore, utilizing this structure as a single-family dwelling is permitted outright. Under land use file no. DR-10-3, staff previously found this structure was not a permanent dwelling. As described under DCC 18.120 below, the use of this structure is not apparent to staff. The application materials refer to this structure as a mixed-use building that contains both a dwelling unit and an office. As described in further detail below, staff requests the Hearings Officer make findings regarding whether there is a lawful, nonconforming use occurring in this structure.

- 8. A lawfully established use existing as of 11/05/02, the date this chapter was adopted, not otherwise permitted by this chapter.**

FINDING: The applicant requests verification that uses on the subject property are lawful nonconforming uses. Staff finds any uses which are found to have existed prior to the adoption of the effective zoning ordinance will meet this criterion.

Chapter 18.80, Airport Safety Combining Zone (AS)

Section 18.80.020. Application of Provisions.

The provisions of DCC 18.80.020 shall only apply to unincorporated areas located under airport imaginary surfaces and zones, including approach surfaces, transitional surfaces, horizontal surfaces, conical surfaces and runway protection zones. While DCC 18.80 identifies dimensions for the entire imaginary surface and zone, parts of the surfaces and/or zones do not apply within the Redmond, Bend or Sisters Urban Growth Boundaries. The Redmond Airport is owned and operated by the City of Redmond, and located wholly within the Redmond City Limits.

Imaginary surface dimensions vary for each airport covered by DCC 18.80.020. Based on the classification of each individual airport, only those portions (of the AS Zone) that overlay existing County zones are relevant.

Public use airports covered by DCC 18.80.020 include Redmond Municipal, Bend Municipal, Sunriver and Sisters Eagle Air. Although it is a public-use airport, due to its size and other factors, the County treats land uses surrounding the Sisters Eagle Air Airport based on the ORS 836.608 requirements for private-use airports. The Oregon Department of Aviation is still studying what land use requirements will ultimately be applied to Sisters. However,

contrary to the requirements of ORS 836.608, as will all public-use airports, federal law requires that the FAA Part 77 surfaces must be applied. The private-use airports covered by DCC 18.80.020 include Cline Falls Airpark and Juniper Airpark.

FINDING: As shown in the figure below, the northwest corner of the subject property is located within the Transitional Surface for the Redmond Municipal Airport.

Figure 3: Extent of the Airport Safety Combining Zone on the Subject Property



No new structures, uses, or other type of development is proposed. The does not propose to alter any nonconforming use. Any future alteration of a verified, nonconforming use will be reviewed against the standards of DCC 18.80. Staff finds the provisions of DCC 18.80 do not apply to the subject application because no new development is proposed.

Chapter 18.84, Landscape Management Combining Zone (LM)

Section 18.84.020. Application of Provisions.

The provisions of DCC 18.84 shall apply to all areas within one-fourth mile of roads identified as landscape management corridors in the Comprehensive Plan and the County Zoning Map. The provisions of DCC 18.84 shall also apply to all areas within the boundaries of a State scenic waterway or Federal wild and scenic river corridor and all areas within 660 feet of rivers and streams otherwise identified as landscape management corridors in

the comprehensive plan and the County Zoning Map. The distance specified above shall be measured horizontally from the center line of designated landscape management roadways or from the nearest ordinary high water mark of a designated landscape management river or stream. The limitations in DCC 18.84.20 shall not unduly restrict accepted agricultural practices.

FINDING: Highway 97 is identified on the County Zoning Map as the landscape management feature(s). The subject property falls within the Landscape Management Combining Zone for this feature(s), therefore, the provisions of this chapter apply.

Section 18.84.050, Use Limitations

- A. *Any new structure or substantial exterior alteration of a structure requiring a building permit or an agricultural structure within an LM Zone shall obtain site plan approval in accordance with DCC 18.84 prior to construction. As used in DCC 18.84 substantial exterior alteration consists of an alteration which exceeds 25 percent in the size or 25 percent of the assessed value of the structure.***

FINDING: No new structures, or alterations of existing structures, are proposed. Staff therefore finds the provisions of DCC 18.84 do not apply to the subject application.

Chapter 18.113, Destination Resorts Zone – DR

Section 18.113.020, Applicability.

- A. *The provision of DCC 18.113 shall apply to proposals for the development of destination resorts, as defined in DCC Title 18, in areas designated DR by the County zoning maps. The provisions of DCC 18.113 shall not apply to any development in an area designated DR other than a destination resort.***

FINDING: The applicant is not proposing to develop a destination resort as defined in DCC Title 18. Therefore, the provisions of DCC Chapter 18.113 do not apply.

Chapter 18.120, Exceptions

Section 18.120.010, Nonconforming Uses.

- C. *Verification of Nonconforming Use.***
- 1. *Subject to the procedures set forth in DCC 18.120.010 and in DCC Title 22 for processing declaratory rulings, the planning division will verify whether or not a use constitutes a valid nonconforming use in accordance with the provisions of DCC 18.120.010 and applicable state law. Verification of the***

existence of a nonconforming use is required prior to or concurrent with any application to alter or restore the use.

FINDING: The requested non-conforming use verification is subject to the procedures set forth in DCC 18.120.010 and in DCC Title 22 for processing declaratory rulings.

- 2. *Subject to DCC 18.120.010(F)(2), the applicant shall demonstrate all of the following:***
 - a. The nonconforming use was lawfully established on or before the effective date of the provisions of the zoning ordinance prohibiting the use or had proceeded so far toward lawful completion as of the date it became nonconforming that a right to complete and maintain the use would be vested;***

FINDING: DCC 18.120.010(F)(2) is discussed in detail below. Under this criterion, a non-conforming use can only exist by predating a new provision of the zoning ordinance prohibiting the use.

Evidence of Lawful Establishment

The applicant has requested a ruling regarding a number of uses on the subject property, and has submitted evidence related to these different uses. For the purpose of this analysis, staff organizes the evidence of lawful establishment by the commercial use that it relates to.

1. Logging and trucking business, including processing logs and wood products.

The applicant submitted a letter dated August 20, 2021, from Sean Mahoney, a resident of Bend since 1956. This letter included the following statement regarding the logging use of the property:

I've personally hauled logs to the subject property. I've seen both wood logs and cull logs there over the years.

A letter dated August 30, 2021, from Tony Aceti, states they bought a neighboring property in 1995. At that time, they hired the owner of the subject property to clear the land for development. Though not explicitly stated, staff interprets this to mean logging or tree removal services were provided. In this same letter, Mr. Aceti asserts there have been logging trucks and equipment, logs, firewood, and lumber visible on the subject property.

The application materials include a letter dated August 28, 2021, from Jack Holt. Mr. Holt is the owner of a nearby property located at 21440 Morrill Road. Mr. Holt's letter includes the following statement:

The Fagans have continued to use this property in a manner consistent with the way it has been operated since I've known of it in the 1950s. Uses include the sale of fire wood, processing logs, maintaining logging equipment, and providing storage for vehicles and equipment.

The application materials include a letter dated May 1, 2018, from Eugene Carsey¹, a former resident and caretaker of the subject property. The application materials indicate Mr. Carsey began residing on the subject property in 1971 and in 1977 he developed 'Buffet Flat,' which included a flea market, retail shops, and small-scale amusement park. In the May 1, 2018 letter, Mr. Carsey describes renting a portion of the subject property to Don Fagen, the brother of the current property owner, Harry Fagen.

We also rented out an area to Don Fagen in 1971 to store and operate his logging business. Truck loads of logs were stored and/or cut up and sold for firewood and fence posts. As a result of that connection Harry Fagen had the opportunity to buy the property in 1990. We relocated our novelty, antique and gift shop directly across Highway 97 and I continue to live and operate the business from there. I am verifying the above operations have occurred on Tax lot 500 since 1971.

2. Welding, fabrication, and alteration of trucking, logging, excavation, and drilling equipment, as well as retail sales of vehicles and equipment.

On page three of the submitted Burden of Proof, the applicant provides the following statement:

...Since the Fagens began using the land in 1968, the east side of the subject site has been used continuously for retail and commercial sales of vehicles, used and new construction equipment, tires, batteries, other vehicle parts and other retail and commercial uses.

The application materials include a letter dated August 28, 2021, from Jack Holt. This letter includes the following statement:

The Fagens have continued to use this property in a manner consistent with the way it has been operated since I've known of it in the 1950s. Uses include the sale of fire wood, processing logs, maintaining logging equipment, and providing storage for vehicles and equipment. (Emphasis added) My first recollections include a café, gas station and mechanical shop... an early version of today's 'quick stop.'

The Fagens are very good neighbors and have not caused any issues or created problems through the operation of their business to my knowledge. They have been a positive addition to the Deschutes Junction. The storage facility has been a real help for small business needing space for storage. The location is ideal and remains affordable, both attributes very hard to find in Deschutes County.

Staff notes the applicant has not requested verification that renting storage space on the subject property is a lawfully established use. The subject property has not received approval for a mini storage facility, and it is not clear if the storage facility described above is associated with one of the commercial and/or industrial uses subject to review.

¹ This letter dated May 1, 2018, is included on page 83 of the Burden of Proof.

The application materials include a letter dated May 1, 2018, from Eugene Carsey, a former resident of the subject property. Mr. Carsey's letter includes the following information on the use of the property:

Today, Tax Lot 500 (the NW corner of Deschutes Junction) is about 1.7 acres of commercial and 28 acres of MUA 10 zoned land. Before the land use laws came into effect in 1973, my partner and I I (*sic*) had controlling interest of this property and did business not only from the commercial portion but also the MUA10 area.

Our primary commercial area was on 3 acres of Rural Service Center at that time. Novelties, antiques and gifts were located in the Pink Building along with 2 other buildings that were razed when highway 97 was widened. Larger items like: autos, trucks, tractors, machinery and logging equipment were stored, sold consigned and repaired in the MUA10. The back access for the novelty and antique store, flea market exist today west of the Pink Building. Additionally, we rented out the MUA10 area immediately west of the buildings for popular weekend flea markets that hosted a large variety of vendors and overnight camping.

3. Well drilling business.

The application materials include a letter dated November 15, 2022, from Beverly Fagen and Neil Miller Fagen, which provides information on the history of ownership of the well drilling business on the subject property. This November 15, 2022, letter states:

The Aiken Well Drilling Inc business owner in 2003 was Jim Thompson. Mr. Thompson leased a portion of the subject Fagen property for the well drilling company and moved the company there in 2005.

Aiken Well Drilling Inc has been on the subject property since 2005 with no breaks in the business on site.

Supplemental application materials submitted on December 9, 2022, include a letter from the property owner's accountant. This letter, dated November 29, 2022, from Todd Gerdes, CPA, states:

Aiken Well Drilling has consistently been doing business at 21280 Tumalo Place Bend OR 97703 since I have been doing their tax returns beginning in 2018.

Staff notes the application materials include a copy of the 2019 business license for Aiken Well Drilling Inc.² This business license lists the business address as 53 NW Tumalo Avenue, which is not the address of the subject property. It is not clear to staff if multiple properties are utilized for Aiken Well Drilling Inc, or if the subject property is used only for storage of vehicles and equipment.

² This 2019 business license is included on Page 8 of supplemental materials dated December 9, 2022.

4. Storage, processing and recycling of masonry and concrete materials; storage, hauling, and selling of excavation materials.

The use listed above is rather broad, and is related to other uses on the subject property which generate masonry, concrete, and excavation materials. Staff notes piles of materials are visible in historical aerial images and photographs of the subject property. The letter dated August 30, 2021, from Tony Aceti describes 'large piles of pumice block and rubble,' on the subject property.

Staff notes the subject property received Site Plan Review for a landscaping business through Deschutes County file SP-05-28. This approved use included outdoor storage and sale of landscaping materials such as compost, bark chips, sand, gravel, and pea gravel. The Hearings Officer findings for file SP-05-28 indicate the two-story building on the property would be utilized as an office for the landscaping business. The submitted burden of proof indicates this landscaping business continues to operate on the subject property. It is not apparent to staff how this approved use relates to outdoor storage and sale of similar items, consisting of masonry, concrete, and excavation materials.

The application materials include a letter dated September 5, 2021, from Tammy Baney. Ms. Baney indicates she is a longtime resident of Central Oregon and has observed the subject property. Staff notes this letter does not reference specific commercial uses, but includes the following statement:

The land in question is an excellent example of activities and uses that have remained throughout the decades, with one common theme; the Fagen's. Through documentation submitted by Pat Kliewer on June 21, 2021, historical records clearly outline the Fagen's continuous use of the stated property.

Effective Date of the Provisions of the Zoning Ordinance

The subject property was originally zoned A-1, Exclusive Agriculture. File Z-77-53 approved a zone change for a 0.67-acre portion of the subject property from A-1 to A-S, Rural Service Center. The provisions of the MUA10 Zone became effective on November 1, 1979, with the adoption of Ordinance No. PL-15.

Files PA-99-2 and TA-99-2 removed the Rural Service Center designation on the subject property and replaced it with Rural Commercial (RC). This was done as part of the County's Periodic Review and was adopted through Ordinance No. 2002-019, with an effective date of November 5, 2002.

Given the zoning information above, staff asks the Hearings Officer to determine whether the nonconforming uses detailed above were lawfully established on or before the effective date of the provisions of the zoning ordinance prohibiting the uses.

- b. The nonconforming use as it existed on the date it became nonconforming, considering the nature and the extent of the actual use of the property, has continued without abandonment or interruption; and***

FINDING: Staff requests the Hearings Officer makes findings regarding the nature and extent of the nonconforming uses that the applicant has requested verification of. Pages 4-5 of the submitted Burden of Proof include the following statement regarding the location of various uses on the subject property.

Identifying the actual locations that individual uses have occurred during the last ten years is usually a simple matter of identifying that a particular use occurs in that building and the other use occurs in this building. However, in this case, there are no buildings or shelters other than the house that is also used as an office on the southeast corner. The uses do not occur in discrete buildings; the uses instead occur in discrete areas on the property. The pasture is 6 acres between the MUA-10 and the RC zoned land and other uses avoid it. Vehicles are often out on jobs, and come and go as they are serviced, used, and parked for short periods. However, the masonry recycling and processing and the logging and firewood uses have been in the same places on the eastern and northern sides. Piles of excavation materials are brought in and taken out on jobs. The other uses are interrelated and move around as space allows. Vehicles are stored in the rectangular fenced area along Tumalo Place. Vehicles and heavy equipment are offered for sale in the RC zoned east side.

Staff notes the application materials also include a diagram of the subject property, which shows the approximate location of various uses. This map of the subject property is identified as **Figure 2** above.

Land Use History

The subject property has previously applied for a number of land use applications. Staff includes relevant descriptions of the uses occurring on the subject property, to provide context for the nature and extent of the various commercial uses. The subject Nonconforming Use Verification does not request any alteration of prior land use approvals. Staff includes the information below for reference to evaluate the uses subject to verification.

Z-77-53: The southeast portion of the subject property was rezoned from A-1, Exclusive Agricultural to A-S, Rural Service Center through Deschutes County file Z-77-53. This application rezoned approximately 0.67 acres of the subject property and approved a convenience store. The staff report for file Z-77-53 includes the following description of the area to be rezoned:

The site is currently developed with two abandoned buildings which are being proposed for a convenience grocery store and some other retail outlet.

SP-82-22: The property owner applied for an addition to an existing building, to be used as a flea market and for the sale of collectibles and furniture. The subject building was located in the portion of the property zoned Rural Service Center. The findings for file SP-82-22 include the following description of the property:

The site currently has two small buildings used for the sale of antiques and collectables. A workshop and house is also located on the property. The applicant proposes to build a 5,040 square foot addition to the existing building located on the northern area of the subject property, which the applicant proposes to utilize for the selling of collectibles and furniture.

SP-05-28: The property owner received approval to operate a landscaping business, which would sell materials such as mulch, compost, pea gravel, and cinder from the subject property, and utilize the 'Pink Building' as an office. The staff report for SP-05-28 described the area subject to review as follows:

The subject property is part of a code enforcement case which deals with the proposed business. The applicant has already set up the site for business, and also apparently a business sign, but no site plan has been approved for its use...

The proposed landscaping business is to be located on the Deschutes Junction site, which has had prior commercial uses in place, including what was referred to as the "Funny Farm," which has moved across the highway. The applicant proposes to use the existing building as the office for the use and the existing gravel area for storage, parking, and access.

DR-10-3: A Declaratory Ruling on whether the existing two-story building on the RC-zoned portion of the subject property is a permanent dwelling.

The vacant pink building has not been the site of a continuously occupied residence. Based on research cited above, apparently the last time the building had a residential component was when Buffet Flat existed; even then, the building's primary use was commercial. Not only has the building been unoccupied since 1997, the site has been the subject of several land use applications for commercial and/or industrial uses. The latter is an equally critical component in the interpretation of "permanent residence." The building has not merely been vacant, the building has been the subject of several land use actions whose intent was to conduct non-residential uses in the building. Indeed, in a letter dated September 9, 2010 from the property owner, the Fagens themselves state "The pink building has been used as both commercial and residential (*sic*) through the years."

Given the history of non-residential uses in the pink building, both historical and intended, as well as well as the time the structure has spent being unoccupied by either residential or non-residential uses, the vacant pink building is not a permanent residential dwelling as the term permanent is defined by dictionaries or understood by the reasonable persons test.

Review of Aerial Images

The submitted application materials include a number of historic photographs and aerial photographs of the subject property, which are part of the public record for this application.

Below, staff includes for reference an aerial image dated May 1994, from Google Earth. This is the earliest aerial image of the subject property available through Google Earth. Staff notes

development is visible in the center and south portion of the subject property, and the configuration of the southeast portion of the subject property appears similar to the current development of the property.

Figure 4: Google Earth Aerial Image Dated May, 1994



However, staff notes one portion of the subject property where it appears development has changed over time. As shown in the figure below, an aerial image dated September 2006 indicates the area in the south portion of the subject property, to the west of the 'Pink Building,' was undeveloped with sparse vegetation.

Figure 5: South Portion of Subject Property, Google Earth Aerial Image dated September 2006



In an image dated July 2022, this area appears to have been fenced in and cleared of vegetation. The applicant's submitted map of uses on the subject property describes this area as 'fenced vehicle and equipment parking.' It is not apparent to staff if this fenced vehicle parking area is associated with a commercial or industrial use on the subject property.

Figure 6: Southern Portion of Subject Property, Google Earth Aerial Image dated July 2022



Staff believes additional information is required to determine the nature and extent of each of the commercial and/or industrial uses on the subject property, and asks the Hearings Officer to make findings for this criterion. Staff notes that the uses on the subject property are interrelated, such as

logging and wood processing, which makes it challenging to interpret the nature and extent of each distinct use.

Finally, it appears a variety of commercial uses have occurred within the existing building ('Pink Building') on the subject property. Staff finds this is related to the extent of any nonconforming uses which the applicant purports is operating in this structure. Page 11 of the submitted burden of proof includes the following statement regarding this building:

A room in the mixed-use house is the office, and it is also a residence. Related landscaping retail items and vehicle parts that cannot be out in the weather are also kept inside.

Page 51 of the same burden of proof goes on to describe the historical use of this building as follows:

The house was built as a residence and has been used as a residence for the business owners and managers. Since Eugene Carsey and Michael Craven lived in it for 15 years, the house has been mixed use. The ground level contained the costume shop, with racks of costumes that were rented out to the public. Recently it was rented out as a home and then was used as the office of a landscaping materials supply business and a bookstore.

Staff asks the Hearings Officer to make specific findings regarding whether any of the uses reviewed through the subject application are verified nonconforming uses occurring within this structure.

- c. Any alteration in the nature and extent of the nonconforming use was done in compliance with applicable zoning ordinance standards governing alterations of non-conforming uses.**

FINDING: The subject application does not include a request to alter a nonconforming use. Staff asks the Hearings Officer to make findings regarding whether any alteration in the nature and extent of the nonconforming uses are documented in the record.

- 3. For purposes of determining whether an abandonment or interruption of use has occurred, the following shall apply:**
 - a. The reference period for determining whether an abandonment or interruption of a nonconforming use or an aspect thereof has occurred shall be one year.**
 - b. An abandonment or interruption in a use or portion thereof may arise from the complete cessation of actual use of a property for a one-year period or may arise from a change in the nature or extent of the use made of the property for a one-year period or more.**

FINDING: Staff asks the Hearings Officer to determine if there has been an abandonment or interruption in any of the nonconforming uses or an aspect thereof.

- c. An interruption or abandonment that constitutes less than full cessation of the use or a portion thereof may, in accordance with DCC**

18.120.010(F)(4), result in a declaration of a continuing use, but of a lesser intensity or scope than what would have been allowable if the nature and extent of the use as of the date it became nonconforming had continued.

FINDING: It is unclear to staff whether there has been a reduction in the intensity or scope of a nonconforming use. However, staff will defer to findings made by the Hearings Officer.

- d. Absent an approved alteration, a change in the nature of the use may result in a determination that the use has been abandoned or has ceased if there are no common elements between the activities of the previous use and the current use.**

FINDING: It is unclear to staff whether there has been a change in the nature of any of the requested nonconforming uses. Staff asks the Hearings Officer to make specific findings for this criterion.

- e. Change of ownership or occupancy shall not constitute an interruption or abandonment, provided that, absent an approved alteration, the continuing use made of the property falls within the allowed scope of use made of the property by previous owners or occupants.**

FINDING: Staff finds change of ownership or occupancy, if any, has not been found to constitute an interruption or abandonment.

- f. Factors to be considered in determining whether there has been a change in the nature and/or extent of a use shall include, but are not limited to, consideration of the type of activities being conducted, the operating characteristics of the activities associated with the use (including off-site impacts of those activities), the frequency of use, the hours of operation, changes in structures associated with the use and changes in the degree to which the activities associated with the use occupy the site.**

FINDING: The applicant asserts there has not been any abandonment or interruption in the nature and extent of the nonconforming use. Staff finds more information is required regarding the type of activities being conducted, the operating characteristics of the activities associated with the use (including off-site impacts of those activities), the frequency of use, the hours of operation, changes in structures associated with the use and changes in the degree to which the activities associated with the use occupy the site. Staff asks the Hearings Officer to determine whether there has been a change in the nature and/or extent of any of the requested nonconforming uses.

- D. Maintenance of a nonconforming use. Normal maintenance of a verified nonconforming use or structure shall be permitted. Maintenance does not include alterations which are subject to DCC 18.120.010(F).**

FINDING: Maintenance of existing structures associated with a nonconforming use in good repair under this criterion and ORS 215.130(5) includes incremental replacement of structural components, at least where the structure as a whole is not substantively replaced and the installed components are similar in function to those replaced. Such incremental replacements are not alterations that require county review and approval under ORS 215.130(9) as implemented by DCC 18.120.010(F). See *Leach v. Lane County*, 45 Or LUBA 580 (2003).

Staff finds normal maintenance of the verified nonconforming use shall be permitted.

- E. Restoration or replacement of a nonconforming use. A verified nonconforming use may be restored or replaced if all of the following criteria are met:**
- 1. Restoration is made necessary by fire, natural disaster or other casualty;**
 - 2. The nonconforming use is restored or replaced on the same location and is the same size or smaller than it was prior to the damage or destruction; and**
 - 3. The restoration or replacement of the nonconforming use is commenced within one year of the damage or destruction.**

FINDING: No restoration or replacement is proposed under the current application.

- F. Alteration of a nonconforming use.**

...

FINDING: The subject application does not include a request to alter a nonconforming use. Staff finds the provisions of DCC 18.120.010(F) do not apply.

- G. Procedure.**
- 1. Any application for verification of a nonconforming use or to expand, alter, restore or replace a nonconforming use shall be processed in conformance with the applicable procedures set forth in DC 18.120.010 and the applicable procedures of DCC Title 22, the Deschutes County Uniform Development Procedures Ordinance.**

FINDING: This application for verification of a nonconforming use is being processed in conformance with the applicable procedures set forth in DC 18.120.010 and the applicable procedures of DCC Title 22, the Deschutes County Uniform Development Procedures Ordinance.

- 2. Notwithstanding DCC 22.20.010, the initial decision on an application for an alteration of a nonconforming use shall be made administratively, without a public hearing. The Planning Director may give prior notice of the pending application pursuant to DCC 22.20.020.**

FINDING: Prior notice of the pending application has been provided pursuant to DCC 22.20.020. Staff notes the subject application is an initial decision on the verification of a nonconforming use, and does not include any alteration of a nonconforming use. Therefore, staff finds the criterion

above does not preclude an initial decision on the subject application from being made by a Hearings Officer at a public hearing.

3. ***Except as allowed by DCC 18.120.010(F)(3)(a), the burden of proof shall be on a verification applicant to prove the existence, continuity, nature and extent of the use.***
 - a. ***Notwithstanding DCC 22.24.050, if an applicant demonstrates by a preponderance of the evidence that the nature and extent of the use sought to be verified is of the same nature and extent as the use of the property for the ten-year period immediately preceding the application, without interruption or abandonment, it shall be presumed that the nonconforming use, as proven, lawfully existed at the time the use became nonconforming and has continued without interruption or abandonment until the date of application.***

FINDING: DCC 22.24.050, Burden of Proof, specifies:

Throughout all local land use proceedings, the burden of proof rests on the applicant.

Staff finds this criterion modifies DCC 22.24.050 as described in this criterion.

Supplemental application materials dated December 9, 2022, include the following statement, as well as other references to uses on the subject property remaining consistent over the previous ten-year period.

The materials in the application, the 12 letters and the 92 photos show that the nature and extent of each of the nonconforming uses listed in the application materials has not changed over the past ten years.

Staff interprets this as a request by the applicant to consider whether there is a preponderance of evidence that the nature and extent of the use sought to be verified is of the same nature and extent as the use of the property for the ten-year period immediately preceding the application. Staff requests the Hearings Officer makes findings regarding whether the presumption allowed under this criterion is granted.

- b. ***The presumption may be rebutted by a preponderance of evidence showing that the use was unlawful prior to the time it became nonconforming, or that the use prior to the ten-year period was of a different nature or different in extent than the use, as proven, or that the use prior to the ten-year period was interrupted or abandoned. If the presumption is so rebutted, the presumption shall disappear and be of no further aid to the applicant.***

FINDING: The submitted application materials indicate the well drilling business was established on the subject property in 2005, in a portion of the subject property zoned MUA10. It is not apparent

to staff that this use was permitted outright or permitted conditionally on the subject property at that time.

4. ***If the proof demonstrates the continued existence of a valid non-conforming use, but of a different nature or extent than that claimed by the applicant, the Hearings Body may declare there to be a valid nonconforming use to the extent proven.***

FINDING: Based on the information above, staff finds the nonconforming uses may be of a different nature or extent than what is currently on the subject property. The Hearings Officer may therefore declare there to be a valid nonconforming use to the extent proven by information in the record.

5. ***An approval of a verification, replacement or restoration of a nonconforming use verification shall not be conditioned; an approval shall be sufficiently detailed to describe the allowed parameters of the verified use. However, an approval of an alteration of a nonconforming use may be conditioned in a manner calculated to ensure mitigation of adverse impacts so that the change has no greater adverse impact to the neighborhood.***

FINDING: As noted above, approval of a verification of a nonconforming use shall not be conditioned. The applicant has not requested an alteration of a verified nonconforming use.

6. ***After a decision has been rendered on an application for a verification of a nonconforming use (including any appeals provided for under DCC Title 22 and under state law), the applicant shall not be entitled to reapply under DCC 22.28.040 for another verification determination involving the same use of the property.***

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

IV. RECOMMENDATION

Based upon the preceding analysis, staff believes additional information is needed to determine the nature and extent of the requested nonconforming uses.

V. RECOMMENDED CONDITIONS OF APPROVAL

If approved, staff recommends the following 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 Environmental Soils Division.
- C. **Prior to alteration of any verified nonconforming use**, the owner shall secure land use approval as required in Title 18.
- D. After a decision has been rendered on an application for a verification of a nonconforming use (including any appeals provided for under DCC Title 22 and under state law), the applicant shall not be entitled to reapply under DCC 22.28.040 for another verification determination involving the same use of the property.

DESCHUTES COUNTY PLANNING DIVISION



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