



Mailing Date:
Wednesday, July 21, 2021

COMMUNITY DEVELOPMENT

STAFF REPORT

FILE NUMBER: 247-21-000311-CU

HEARING DATE: August 10, 2021, 6:00 p.m.

HEARING LOCATION: Barnes and Sawyer Hearing Rooms¹
Deschutes Service Center
1300 NW Wall Street
Bend, OR 97701

SUBJECT PROPERTY/ OWNER: Mailing Name: GROSSMANN, ROGER W & CYNTHIA M
Map and Taxlot: 141219B000100
Account: 265530
Situs Address: 70445 NW LOWER VALLEY DR, TERREBONNE, OR 97760

APPLICANT: Cynthia Grossmann

PROPOSAL: The applicant is requesting a Conditional Use permit to establish a Nonfarm Dwelling (single-family dwelling) on a 5.19-acre parcel in the Exclusive Farm Use Zone.

STAFF CONTACT: Cynthia Smidt, Associate Planner
Phone: (541) 317-3150
Email: Cynthia.Smidt@deschutes.org

DOCUMENTS: Can be viewed and downloaded from <http://dial.deschutes.org> and www.buildingpermits.oregon.gov

¹ The public hearing will also be conducted virtually via Zoom through the following web links and phone numbers: <https://us02web.zoom.us/j/89785428633?pwd=SFNzSWsxNGdRS3JrRUR3MWNLOnJzUT09> or telephone number 1-253-215-8782. For phone participation, when prompted, enter the following Webinar ID: 897 8542 8633 and Passcode: 191612.

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 18.116, Supplementary Provisions

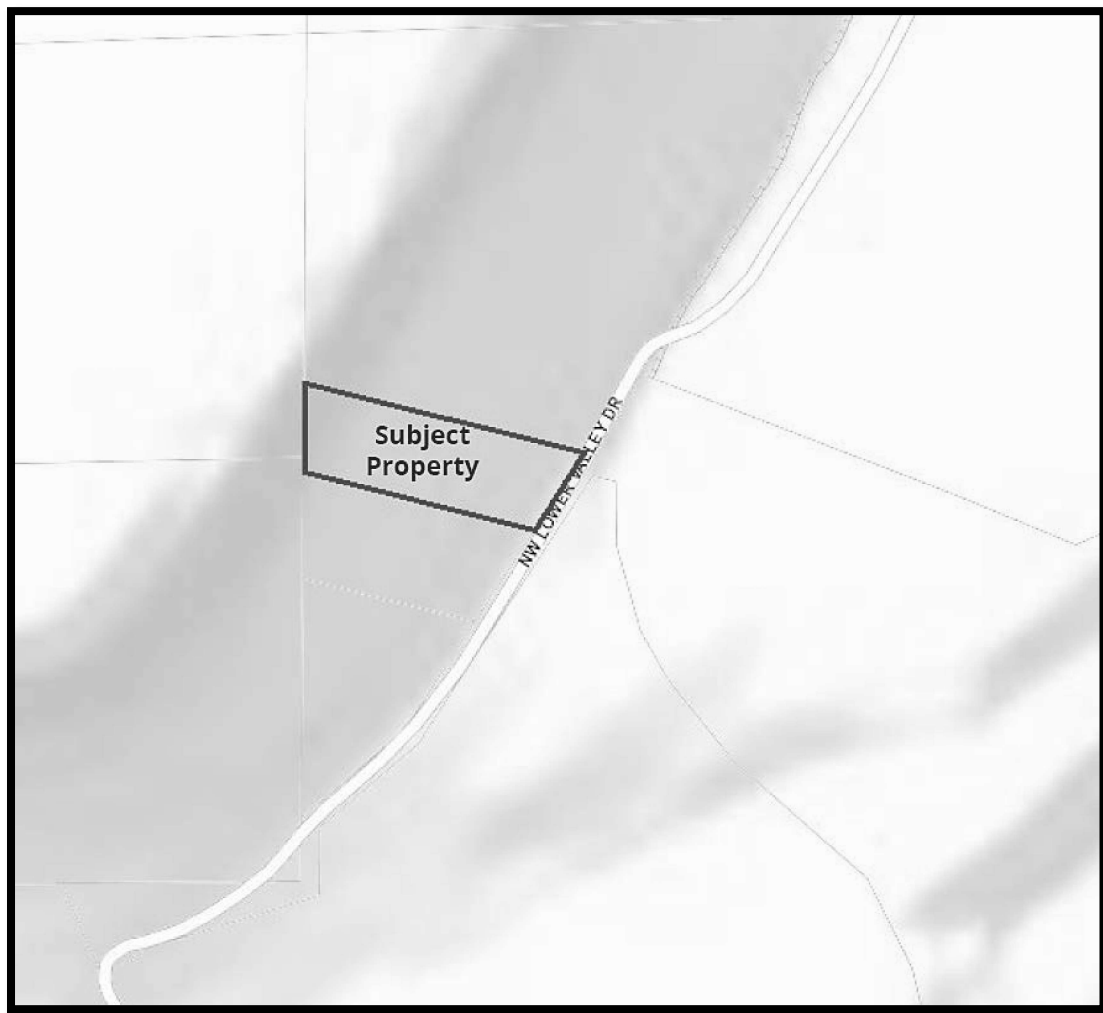
Chapter 18.120, Exceptions

Title 22, Deschutes County Development Procedures Ordinance

II. BASIC FINDINGS

LOT OF RECORD: The subject property is a legal lot of record pursuant to County file LR-04-26, and subsequently adjusted through files LL-08-49 and LL-08-103. Refer to vicinity map below in Figure 1.

Figure 1 - Vicinity Map



SITE DESCRIPTION: The subject property is 5.19 acres in size and irregularly shaped. Lower Valley Drive, a private road not maintained by the County, is adjacent to the eastern property boundary. The site has varying topography with an upward slope from the roadway. The site is vegetated with juniper trees, sagebrush, and native groundcover. The property is currently vacant and does not contain water rights. The property is receiving special assessment for farm use (farm tax deferral) for the dry ground. According to the applicant, the property “has no known history of being used to produce crops or livestock.”

SURROUNDING LAND USES: The surrounding area consists primarily of farm-zoned properties. Farm use in the area is in the form of irrigated pasture with livestock, grass hay, turf (grass), and a vineyard. In addition, there are lands not engaged in farm use, scattered amongst the irrigated lands. The land east of NW Lower Valley Drive is irrigated land engaged in farm use while west of the road, where the subject property is located, is dry land with juniper and native vegetation. Dry farm-zoned lands are directly adjacent to the north, west, and south of the subject property. Parcels range in size from .09 to 387.31 acres. A majority of the farm-zoned properties in the area are developed with single-family dwellings. There is very limited evidence of forestry in the surrounding area. A region of one parcel in the area, tax lot 702 on map 14-12, is zoned Surface Mining (SM) but does not appear to be currently engaged in mining activities

The attributes of the adjoining and nearby farm-zoned properties are summarized in the following table.

Property Owner	Tax Map Tax Lot (“TL”)	TL Acre / Irr. Ac.	Farm Tax	Dwelling Unit / Yr. Built	Soil Units
<i>North and East Big Falls Ranch Co.</i>	14-12-00 TL 1406	225.29 / 133.10	Y	Y	31B, 63C, 71A, 71B, 81F, 101E, 106D
<i>East Lower Bridge Farms LLC</i>	14-12-00 TL 708	116.25 / 116.25	Y	N	71A, 71B, 81F, 101E
<i>South and East Grossmann</i>	14-12-00 TL 702	164.99 / 82.7	Y	Y / 2009	71A, 71B, 81F, 101E, 106D
<i>South BSE LLC</i>	14-12-00 TL 701	103.51 / 86	Y	Y / 1997	37B, 71A, 71B, 101E, 106D
<i>South Grossman</i>	14-12-19B TL 200	5.01 / 0	N	N ²	71A, 101E
<i>South Grossman</i>	14-12-19B TL 300	5.34 / 0	N	N ³	63C, 71A, 101E

² The County approved a nonfarm dwelling on Tax Lot 200 in 2020 through file 247-20-000077-CU.

³ The County is currently reviewing a nonfarm dwelling on Tax lot 300 (file 247-21-000384-CU).

Property Owner	Tax Map Tax Lot ("TL")	TL Acre / Irr. Ac.	Farm Tax	Dwelling Unit / Yr. Built	Soil Units
<i>South and West BSE LLC</i>	14-12-00 TL 700	80 / 50	Y	N	63C, 71A, 71B, 101E
<i>West Deschutes County</i>	14-12-19B TL 400	40.28 / 0	N	N	63C, 106E
<i>West Deschutes County</i>	14-12-19B TL 500	40.46 / 0	N	N	63C, 71B, 101E

PROPOSAL: The applicant proposes to establish a nonfarm dwelling on the subject 5.19-acre parcel. Sewage disposal will be via an on-site septic system and water will be supplied by a private well. Access to the dwelling is proposed from NW Lower Valley Drive. The applicant does not have a specific location on the property for the nonfarm dwelling. However, the submitted application materials illustrate the dwelling will meet all applicable setbacks as noted in this decision. This includes 100 feet from the southeastern property boundary adjacent to the road access easement and 25 feet each from the west and northern boundaries.

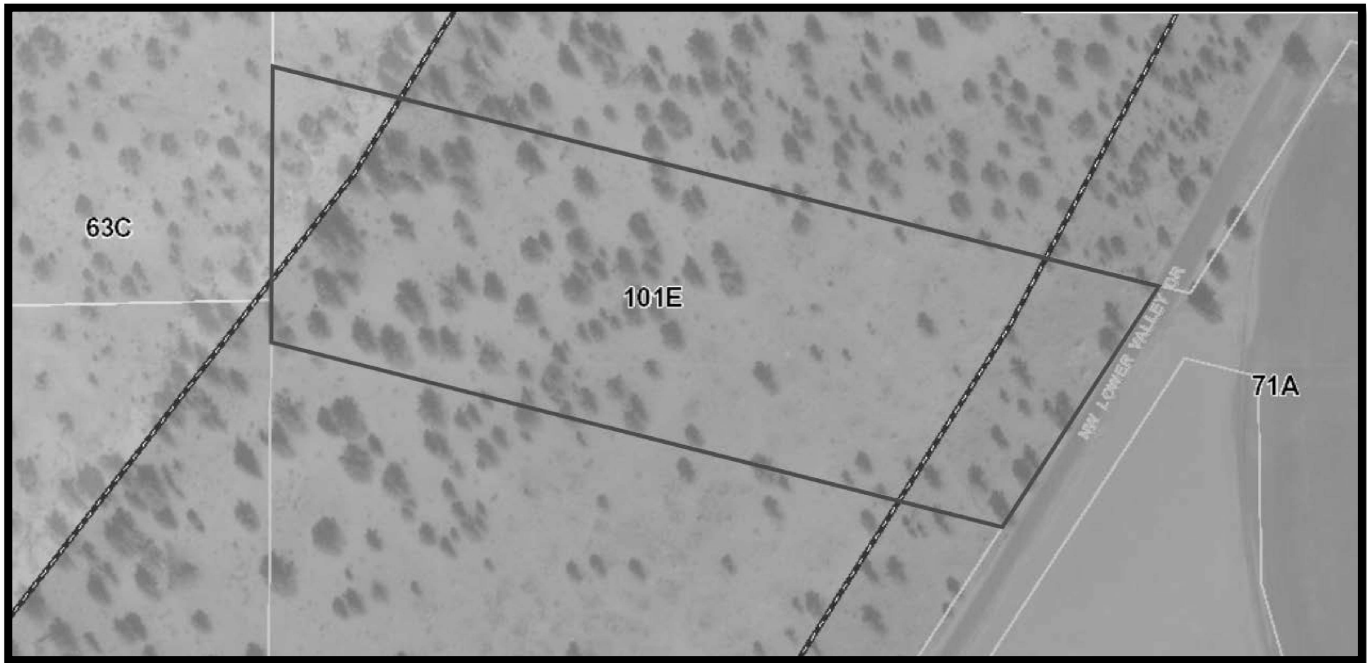
SOILS: According to the Natural Resources Conservation Service (NRCS) maps of the area, there are three soil units mapped on the subject property as described below and shown on Figure 2:

Unit 63C, Holmzie-Searles Complex, 0 to 15 percent slopes: This soil type is comprised of 50 percent Holmzie soil and similar inclusions, 35 percent Searles soils and similar inclusions, and 15 percent contrasting inclusions. The Holmzie soils are well drained with slow permeability and about 5 inches of available water capacity. The Searles complex are well drained soils with moderately slow permeability and available water capacity of about 3 inches. Major uses for this soil type include livestock grazing. The soil capability rating of these soils is 6e nonirrigated. (There is no irrigated soil capability rating for these soil types.) This soil type is not considered a high-value soil when irrigated. This soil type is located on approximately 0.33 acres of the subject property.

Unit 71A, LaFollette sandy loam 0 to 3 percent slopes: This soil type is composed of 85 percent LaFollette soil and similar inclusions, and 15 percent contrasting inclusions. The LaFollette soil is well drained and has a moderately rapid over very rapid permeability, and an available water capacity of about 4 inches. The major use of this soil type is livestock grazing and irrigated cropland. The NRCS rates this complex as Class 6s/3s. This soil complex is considered a high value soil when irrigated. This soil type comprises approximately 0.70 acres of the subject property.

101E, Redcliff-Lickskillet-Rock outcrop complex 30 to 50 percent slopes: This soil type is composed of 60 percent Redcliff soil and similar inclusions, 20 percent Lickskillet soil and similar inclusions, 15 percent Rock outcrop, and 5 percent contrasting inclusions. The Redcliff soil is well drained and has a moderate permeability, and an available water capacity of about 2 inches. The Lickskillet soil is also well drained and a moderate permeability, and has an available water capacity of about 1 inch. The major use of this soil type is livestock grazing. The NRCS rates this complex as 6e/7e/8s. This soil complex is not considered a high value soil when irrigated or when not irrigated. This soil type comprises approximately 4.16 acres of the subject property.

Figure 2 - Soil Map



Soil Study: The applicant submitted a Soil Study dated January 8, 2019 prepared by Brian Rabe, a certified professional soil classifier/soil scientist with Cascade Earth Sciences (CES). The study provides the County with a precise determination of soils unit location and extent within the study area. The Soil Study concludes the entire property consists predominantly of Class 7 and 8 soils, which are not generally suitable for farming.

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on March 31, 2021, to the following public agency and received the following comments:

Deschutes County Building Safety Division: Randy Scheid, Building Safety Director, submitted the following comments on March 31, 2021.

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 Senior Transportation Planner: On April 5, 2021, Peter Russell submitted the following comments.

I have reviewed the transmittal materials for 247-21-000311-CU to develop a non-farm dwelling on a 5.19-acre parcel in the Exclusive Farm Use (EFU) and Surface Mining Impact Area (SMIA) zones at 70445 NW Lower Valley Rd., aka County Assessor's Map 14-12-19B, 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 10 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.

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$4,488 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 \$3,635 ($\$4,488 \times 0.81$). 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, 2021. 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, 2021, THE SDC RATE GOES UP TO \$4,757 PER P.M. PEAK HOUR TRIP AND THE SDC FOR A SINGLE-FAMILY HOME WILL BE \$3,853 ($\$4,757 \times 0.81$) AND THAT SDC AMOUNT WILL BE GOOD THROUGH JUNE 30, 2022.

The following agencies did not respond to the notice: Cascade Natural Gas Company, Central Electric Cooperative, CenturyLink, Deschutes County Assessor, Deschutes County Environmental Soils Division, Deschutes County Road Department, Deschutes County Property Address Coordinator, Oregon Watermaster – District 11, Oregon Deputy State Fire Marshal, and Pacific Power and Light, and Three Sisters Irrigation District.

PUBLIC COMMENTS: The Planning Division mailed notice of the land use permits to all property owners within 750 feet of the subject property on March 31, 2021⁴. The applicant also complied with the posted notice requirements of Section 22.23.030(B) of Title 22. The applicant submitted a Land Use Action Sign Affidavit indicating the applicant posted notice of the land use action on March 30, 2021. Two public comments were received, which are summarized below.

- Central Oregon LandWatch (COLW) – COLW does not believe the subject property and proposal meets the requirements of DCC 18.16.050(G)(1)(a)(vi) regarding creation date.

⁴ The Planning Division mailed notice of the public hearing within 750 feet of the subject property on July 14, 2021. Notice of public hearing was also published on July 18, 2021 in The Bulletin.

- Bill and Susan Scheenstra (Scheenstra/s) – The Scheenstras own and operate a large farm that consists of numerous parcels and several farm dwellings in the area. The private road of NW Lower Valley Drive travels adjacent to and through their land, and thus they are concerned with the validity, usage, and maintenance of this roadway. The Scheenstras present the following information and issues regarding the additional dwellings using this road:
 - Lower Valley Drive is a single land road with only a couple pull-outs, which are rarely used by vehicles
 - Daily, farm vehicles and equipment travel the road including “semis, swathers and tractors pulling various pieces of equipment”
 - Daily issues include vehicles pulling off the road to avoid oncoming traffic, which erodes the asphalt road and gravel shoulder
 - Currently, vehicles pull off the road and onto the edges of the farm fields or into an area with dry grass and weeds, which poses a fire risk
 - Concern over road maintenance, cost for repair and sealing
 - Traffic impacts on neighboring farm dwellings that are adjacent to the road, including, vehicles pulling off onto other properties, safety, and speed control

STAFF COMMENT: Road access to the property is addressed below under DCC 18.16.050(G)(1)(a)(v).

REVIEW PERIOD: The subject application was submitted on March 24, 2021. An incomplete application letter was sent on April 23, 2021. The applicant responded with additional information on various occasions, concluding on June 9, 2021. The Planning Division deemed the application complete and accepted it for review on June 9, 2021. The applicant requested the 150-day review clock be extended starting June 9, 2021. As of the date of the public hearing (August 10, 2021), the clock will have been extended for 62 days. Based on this information, the 150th day on which the County must take final action on this application is January 7, 2022.

III. FINDINGS & CONCLUSIONS

Title 18, Deschutes County Zoning Ordinance

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 a nonfarm dwelling on the subject property. The proposed dwelling may be allowed 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 the proposed nonfarm dwellings.

Forest Practices

The closest properties zoned for forest use are approximately 5.25 miles to the west. The predominant tree species in the surrounding area is juniper, which is not a commercial species. Given the distance to forested lands and the lack of commercially viable tree species in the surrounding area, staff believes that the proposed nonfarm dwelling 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 Agriculture⁵ 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. Nearby farm uses include livestock grazing, irrigated pasture, grass hay, turf (grass), and a vineyard. In the study area, 3,011.49 acres are receiving farm tax deferral and of those, 1,843.46 acres are irrigated.

Potential Impacts

Staff believes that the proposed nonfarm dwelling 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 5.19-acre parcel is generally unsuitable for farm use. In

⁵https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Oregon/cp41017.pdf

addition, staff finds that no 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 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.

Pursuant to DCC 18.16.050 the 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 closest farm uses are on Assessor's maps 14-12, Tax Lots 702 and 708. As proposed, the building envelope will be approximately 100 feet from this farm use, and on the other side of NW Lower Valley Drive. 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, although none is expected.

The study area includes 44 private farm-zoned properties, 19 (43 percent) of which are developed with at least one dwelling⁶. Given the establishment of a significant number of residential uses and the continuing farm uses in parts of the study area, staff believes the existing residential uses likely have not had a negative impact on those farm uses.

For the reasons detailed above, staff concludes the proposed nonfarm dwelling will not be subject to adverse impacts from adjacent farm uses, nor will they cause a significant change in or significantly increase the cost of accepted farming or forest practices occurring on nearby lands.

Staff believes these criteria will be met.

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 Nos. 247-15-000035-CU and 247-15-000403-A), that when the general unsuitability criterion of DCC 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.

⁶ At least one property in the study area (tax map 14-11-13, tax lot 401) has two dwellings.

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: The property owner will be required to sign and record the above document prior to issuance of a building permit for the dwelling. The applicant agrees to comply with this requirement. Staff notes that Bill and Susan Scheenstra, who own and operate a large farm in the area, expressed concern that with the additional residences in the area, complaints may increase regarding normal farming practices and occurrences such as chemical applications, blowing dust, and night time operations. Staff finds that the requirement to sign and record the above noted document will ensure compliance and protect the Scheenstras and other farmers from claims alleging injury from farming practices. Staff recommends the Hearings Officer make the following a condition of any approval.

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. Easement has been prepared for the property owner and is attached to this decision.

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 Oregon Administrative Rules (OAR) 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;***

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 the subject property because of its significant size and the number of parcels located within it.

There are 51 EFU-zoned tax lots in the study area, including the subject property. Forty-four (44) of these tax lots are in private ownership and range in size from approximately 0.09 to 387.31 acres, partially or wholly within the study area. Of the privately owned tax lots in the study area, 16 (36 percent) of the tax lots in the study area are 20 acres or less in size, 8 (18 percent) of the tax lots are more than 20 and less than or equal to 40 acres in size, and 20 (46 percent) of the tax lots are larger than 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;

In addressing (D)(ii) above, the study area provides the following statistical information.

Farm Uses

The EFU-zoned lands in the study area that are engaged in farm use mainly consist of farming in the form of livestock grazing, irrigated pasture, grass hay, turf (grass), and a vineyard. Thirty-seven (37) of the privately-owned tax lots in the study area are receiving farm tax deferral. Of those privately-owned tax lots receiving farm tax deferral, 23 also have water rights. The total amount of water rights on these farm tax-deferred properties appears to be 1,843.46 acres. Based on the amount of irrigation and the size of the parcels in the study area, an estimated 1,843.46 acres (acreage that is possibly being irrigated) are engaged in irrigated farm use. According to Deschutes County GIS, most of the study area is in the Three Sisters Irrigation District, with the exception of the properties in the southern one-third of the study area.

Existing Dwellings

The record indicates that 19 of the 44 private EFU-zoned tax lots in the study area have at least one dwelling⁷. These dwellings were built in the following years: 3 dwellings prior to 1979; 8 dwellings from 1979 through 1992; and 8 dwellings from 1993 to present.

The 3 dwellings developed prior to 1979 predated the County's EFU Zone and therefore were not subject to EFU zoning requirements. The 8 dwellings developed from 1979 through 1992 included 3 farm dwellings, 2 accessory/relative farm help dwellings, 2 replacement dwelling, and 1 dwelling of unknown type. 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 8 dwellings constructed in 1993 or after, 3 were nonfarm dwellings, 4 were replacement dwellings⁸, and 1 was related to a guest ranch and winery.

Dwelling Development Trends Since 1993

⁷ Ibid.

⁸ One dwelling replaced an accessory farm help dwelling.

As discussed above, those 8 dwellings constructed in or after 1993 were a mixture of farm related (12 percent), nonfarm (38 percent), and replacement (50 percent) dwellings. For this reason, staff finds the most current dwelling development trend in the study area is the construction of replacement dwellings and 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 believes that 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, 25 properties meet these characteristics including 4 properties that have already been approved for nonfarm dwellings but have not been fully constructed yet. Staff notes 4 of the 25 properties have active land use applications for nonfarm dwellings. Therefore, 25 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. 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 is one parcel 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 no parcels that are less than 80 acres in the study area and meet the minimum irrigated acres for the subzone⁹ that may be capable of being partitioned under an irrigated land division based on size to create a single nonfarm parcel.
- There are two parcels that are equal to or greater 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 to create two nonfarm parcels.

The potentially divisible parcels are composed of class 3 to 8 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 publically available information and is not binding or final on these other properties.

⁹ The study area includes two subzones – Lower Bridge and Sisters/Cloverdale.

Therefore, this analysis shows that up to 5 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 based on the following: the parcel was created and acquired by the current owner prior to January 1, 1985 and the parcel has continuously been owned by the present owner since January 1, 1985. In addition, if the lot or parcel on which the dwelling will be sited was part of a tract on November 4, 1993, then 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. Moreover, 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 split between irrigated farm lands and unirrigated vacant or developed properties. The land use pattern is mixed with a variety of dwellings which were approved either prior to any land use review requirements for dwellings, or as nonfarm or replacement dwellings. Staff also notes a number of farm operations also include a dwelling on the property.

Including the subject application, a total of 30 new nonfarm dwellings could be established in the study area on existing and potential future nonfarm parcels. Given the large number of existing dwellings in the study area and the relatively limited number of potential nonfarm dwellings, staff believes the proposed development of a nonfarm dwelling on an unproductive portion of the property will not cause a substantial change in the land use pattern of the area.

Although there have been 8 dwellings constructed in the study area since 1993, staff believes that the land use pattern is generally stable. The majority of those dwellings were replacement dwellings and nonfarm dwellings. For this reason, staff believes the most current dwelling development trends in the study area is the construction of replacement dwellings and 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. Of the 21 nonirrigated parcels, 5 are already developed with dwellings and 4 have been approved for dwellings but have not been fully

constructed yet. The remaining 12 nonirrigated parcels include 4 that have active permits for nonfarm dwellings and one approved nonfarm dwelling that has since expired. Staff notes that no farm dwellings have been approved in the area since 1992¹⁰ and only 1 dwelling in conjunction with farm use has been approved since 1995 when the farm dwelling standards included significant changes. The proposed dwelling will be consistent with the land use pattern of the area by allowing a nonfarm dwelling on an unproductive 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 19 to 49. Staff believes such approvals will not “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. This is because any such nonfarm dwelling approval 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. No impact on the ability of farmers to acquire water rights is anticipated. Additionally, staff believes that the approval of the nonfarm dwelling would not impact the existing farm uses that occur in the study area.

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

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 unlikely that adding this dwelling would tip the balance from resource to non-resource use. Given the 6 nonfarm dwellings approved since 2000¹¹, it does not appear to staff that the approval of the proposed nonfarm dwelling will set a precedent for the wholesale approval of nonfarm

¹⁰ Tax lot 501 (map 14-12-20) has a dwelling constructed in 1992 but the approval for the farm dwelling was in 1989 through file CU-89-102. Based on this information, staff does not include this farm dwelling in this calculation of farm dwellings that have been approved since 1992.

¹¹ As noted previously, one approved nonfarm dwelling has since expired.

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, and availability of water rights, within the study area. The properties capable of being farmed appear already to 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 dwelling 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 believes that approval of the proposed nonfarm dwelling will not destabilize the mixture of agricultural and residential character of the surrounding 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.***

Staff notes that the “generally unsuitable” standard is subject to specific criteria discussed in detail under DCC 18.16.050(B)(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.

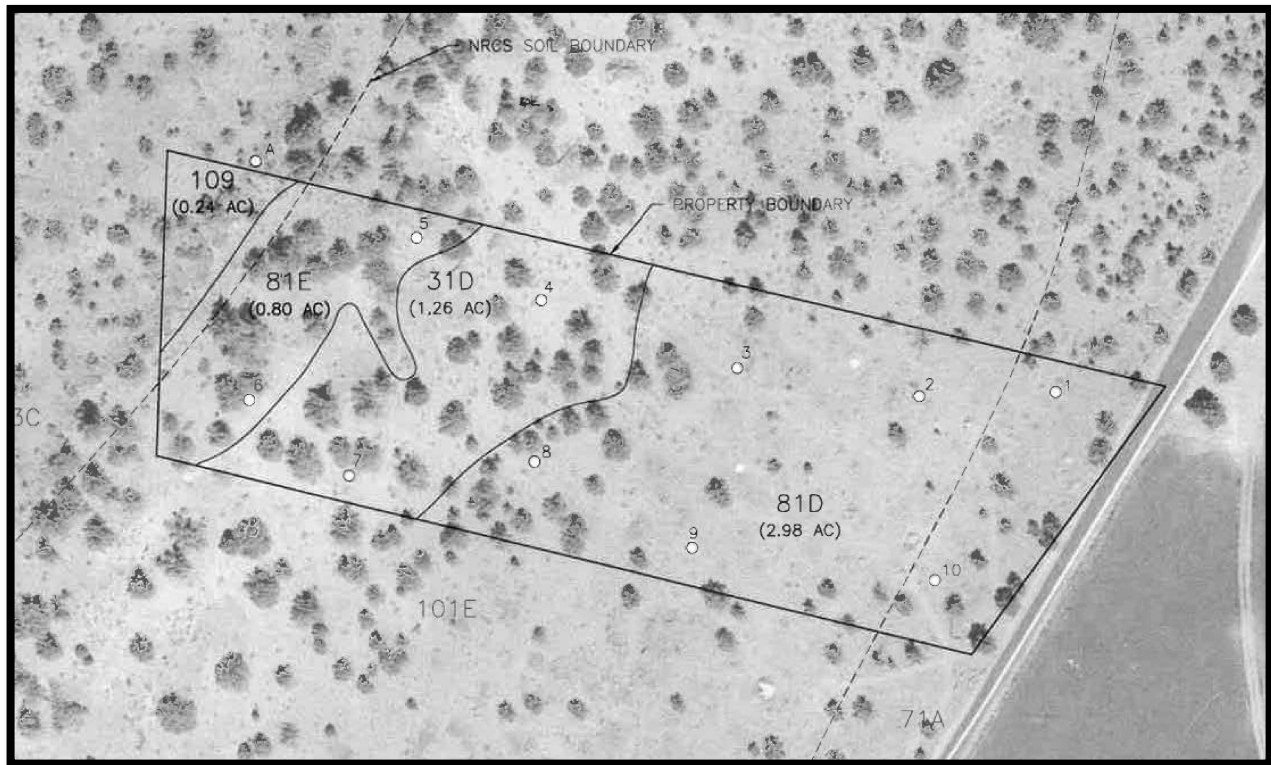
Based on the above case law, it is optional to focus on the suitability of the *building envelope* or the *entire property* with respect to crops, livestock, or merchantable trees only. For this review, staff focuses on the suitability of the entire property.

Adverse Soil or Land Conditions

The applicant submitted a Soil Study dated January 8, 2019, which was prepared by Brian Rabe, a certified professional soil classifier/soil scientist with Cascade Earth Sciences. Although the NRCS maps of the area indicate three soil units – 63C, 71A, and 101E – on the subject property as detailed above in the Basic Findings section, the submitted Soil Study provides the County with a precise determination of the location of the soil units and types of soils found on the subject property.

The submitted soils report shows that the subject property¹² contains a total of 3.78 acres represented by Lickskillet soils (Class VII) in map units 81D and 81E. Approximately 0.24 acres are represented by Rock outcrop (Class VIII) in map unit 109. The remaining acreage is represented by Deschutes soils (Class VI) in map unit 31D. According to Mr. Rabe, the delineations of Deschutes soils is approximately 1.26 acres in size. The results of these measurements are presented in Figure 3, below (the road depicted on the right side of the image is NW Lower Valley Drive). The small size and irregular shape of these areas generally preclude their consideration for any form of commercial farm use. The parcel does not have any water rights assigned to it and non-irrigated native rangeland grazing is the only potential farm use. According to the report, the sustainable forage production potential for this parcel is estimated to range between 0.8 and 1.3 Animal Unit Month (AUM), which is extremely low. Therefore, Mr. Rabe finds that the entire parcel is considered generally unsuitable for farm use and that none of the map units or component soils is defined as having any forest production potential. Staff agrees.

Figure 3 – Soil Study Area



¹² The measurements presented in the soil study total 5.28 acres, which is slightly larger than the 5.19 acres listed on the tax lot map.

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. As stated in the submitted Soil Study and summarized above, the subject property (5.19 acres) is predominately comprised of Class 7-8 soils and does not have suitable soils for farming and production of merchantable tree species due to its shallow rooting depth, low water holding capacity and lack of irrigation.

Farm Crops

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. Given the conclusions of the Soils Study, staff believes the entire property is generally unsuitable for 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 OSU¹³ Extension Service:

- One AUM is the equivalent to the forage required for a 1,000 lb. Cow and calf to graze for 30 days (900 pounds forage).
- On good quality forage, an animal unit will gain two (2) pounds per day.
- 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. The entire property is comprised predominately of three soil types: 81D and 81E, Lickskillett soils and 31D, Deschutes soils, and 109, Rock outcrop. The submitted Soil Study states the following:

A total of 5.28 acres are presented in the figure, which is slightly larger than the 5.19 acres listed on the tax lot map. A total of 3.78 acres are represented by Lickskillet soils (Class VII) in map units 81D and 81E and 0.24 acres are represented by Rock outcrop (Class VIII) in map unit 109. The remaining acreage is represented by Deschutes soils (Class VI) in map unit 31D. The delineation of Deschutes soils is 1.26 acres in size. The relatively small size and irregular shape of this area generally precludes its consideration for any form of commercial farm use. Likewise, this parcel does not have any water rights assigned to it and non-irrigated native rangeland grazing is the only potential farm use. The sustainable forage production potential for this parcel is estimated at between 0.8 and 1.3 animal unit-months (extremely low).

¹³ Oregon State University

Therefore, the entire parcel is considered "generally unsuitable" for farm use. None of the map units or component soils are defined as having any forest production potential.

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

30 days x 2 lbs./day/acre = 60 lbs. beef/acre

1.05 AUM per/acre¹⁴

The entire property is 5.19 acres in size

60 lbs. beef per/acre x 5.19 acres x 1.05 AUM per/acre x \$1.15 per lbs. = \$376.06¹⁵

Thus the total gross beef production potential for the subject property, if it were good rangeland, is approximately \$376.06 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 subject property is entirely comprised of the NRCS-rated soils, which produce the highest level of forage for livestock. The area has little forage for livestock and may support only minimal dry land grazing. For these reasons, staff believes the subject property is generally unsuitable for the production of livestock.

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 is rated for forest productivity. For this reason, staff believes the subject property is not suitable for the production of merchantable trees.

Based on the information and case law cited above, staff believes the entire property is not generally suitable for production of farm crops and livestock, or merchantable tree species.

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.

¹⁴ The under story on the subject property is very sparse and would support only minimal dryland grazing. As a result, the Soil Study projects a range of only 0.8 to 1.3 AUMs for the entire 5.19-acre property. In this calculation, staff uses the mid-point of 1.05 AUM for the entire parcel.

¹⁵ As noted above, the Soil Study projects a range of 0.8 to 1.3 AUMs for the property. For reference, the gross beef production would range from \$286.49 to \$465.54.

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

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

FINDING: Staff makes the following findings to address this criterion.

Electricity

The record includes a letter from Central Electric Cooperative indicating the subject property is within their service area and they are prepared to serve this location.

Road Access

The applicant proposes to take access to the subject property from NW Lower Valley Drive, a private road not maintained by the County. Per Form A of the application, "Traffic Figures for Nonfarm Dwelling" and the Deschutes County Senior Transportation Planner's comments, the proposed nonfarm dwelling would generate an estimated 8 vehicle trips per day and would not exceed the generalized capacity of the road. Staff recommends it be made a condition of any approval that, prior to issuance of a building permit for the proposed dwelling, a driveway access permit shall be obtained in compliance with DCC 17.48.210(A).

As noted above, the Scheenstras, who own and operate a large farm that consists of numerous parcels and several farm dwellings in the area, expressed concern over the increased use of NW Lower Valley Drive. The private road travels adjacent to and through the numerous parcels that the Scheenstras own and farm. The Scheenstras present the following information and issues regarding the additional dwellings using this road:

- Lower Valley Drive is a single land road with only a couple pull-outs, which are rarely used by vehicles
- Daily, farm vehicles and equipment travel the road including "semis, swathers and tractors pulling various pieces of equipment"
- Daily issues include vehicles pulling off the road to avoid oncoming traffic, which erodes the asphalt road and gravel shoulder

- Currently, vehicles pull off the road and onto the edges of the farm fields or into an area with dry grass and weeds, which poses a fire risk
- Concern over road maintenance, cost for repair and sealing
- Traffic impacts on neighboring farm dwellings that are adjacent to the road, including, vehicles pulling off onto other properties, safety, and speed control

The applicant provided the following quoted comments on April 30, 2021 regarding the history of the private road¹⁶, including reference to previous property owners (Van Akin and Nurre).

I would like to reply to the Scheenstra's concerns about the recent CUPs the Grossmann's have in their file at Deschutes County. I have reached out to them personally but they have not been able to find a time to meet at this time so I will address their concerns here. A major concern seems to be the entrance to all of our properties. A little history is that the original easement that has been in place for many years to service the farms in the Lower Valley originates on Lower Bridge Way and continues down to Big Bertha. This allowed access to the well and then the access to the property beyond Big Bertha was through the field ahead. Over the years a friendly neighborly agreement gave the property beyond Big Bertha an easier access to the valley by continuing through the property the Grossmann's now own to get down to their remaining farms rather than through their fields. Nothing was formally recorded. As time progressed The Van Akins and the Nurre's had some concern that their properties did not have legal access.

Since the Grossmanns were doing the Cups in 2009 thee agreed to extend and record the easement through our property so the farms southwest of us had a recorded easement to their properties. At this time the Van Akins allowed us a small easement across their property to access the properties on the other side of the canyon. All easements are 60 foot wide and the blacktop is 12 foot wide plus several pull offs. All of that to explain that the easement through our property was established to give the Scheenstras legal access to their property.

Another legitimate concern is maintenance and repair on the easement. I have addressed that in the covenants that are to be recorded with each title. The maintenance fee will be \$1200 per year on each tax lot that has access to the easement. This will include the 8 tax lots that are presently in Grossmann's ownership, the tax lot owned by Quaid Kettering, the nine tax lots owned by the Scheenstras, the Olmsteads one tax lot and Big Falls one tax lot. This will begin January 1st 2022 and will be recorded on each property. A meeting will be called for all residents presently living on the property when the agreement is completed by attorney Ed Fitch. An account will be established to deposit these funds into each year in January. This account will have a board to make the decisions on maintenance and repair, including snow removal.

Another legitimate concern is the fact that when the large sod trucks or farm equipment meet the traffic on the easement, sometimes the cars or trucks will need to pull off the edge to allow

¹⁶ The applicant clarified with staff that the Oregon Water Resources Department refers to the applicant's irrigation well as "Big Bertha" due to its significant water output. Big Bertha is situated where NW Lower Valley Drive takes a sharp left turn if traveling on the roadway in the southwest direction. In addition, Big Bertha is the junction of the two roadway easements discussed in the application materials.

their trucks to pass. I believe the good neighbor rule needs to apply here but we could put up more signs that say yield to sod trucks. The easement is 60 feet specifically to address this.. The dry ditches should be mowed according to county fire mitigation code.

Regarding the bottle neck in front of Scheenstras ranch hand dwelling. I do agree that the easement in front of their ranch hand home is narrow. The only residents using that now are those living on the Scheenstra properties, Quaid Ketterling and the Olmsteads. It will have three additional single family home sites that will also have access. If the Scheenstras would like to avoid that section by accessing the easement through their property at another location behind their ranch hand dwelling, we would not be opposed. Otherwise I believe another sign saying yield to sod trucks might be a solution.

And finally, I also own two farm parcels on this easement and so does Rex Barber, and I expect no complaints from responsible farming. The right to farm act covers any responsible farming. The people moving onto farm property respect this and actually enjoy it. I am sorry the Scheenstras are opposed to the homesites but all of this was in place well before they purchased their property in July of 2015.

The applicant submitted the following two comments regarding the history and legality of the access easement. Previous property owner in the area, Tom Van Aken, provided the following comments (date approximately 2004¹⁷) regarding the paving and usage of the roadway in approximately 2004 prior to the recordation of the easement.

Sandi and I (Tom Van Aken) own Lower Valley Turf. We are third of five property owners with roadway easement starting at Lower Bridge Way. I paved about 1/3 of it a few years back because I was the main user. Now with a game preserve and a winery on each side of me I will not be the main user. After talking to both parties, they have agreed to help maintain the road.

I have no objections for owners to use their land in ways to help their income on agricultural land, as long it is within the laws and rules set forth by the county and state. Therefore I have no objections for extra use on the roadway as long it is in agreement with all the land owners.

The following letter was provided by the applicant regarding the legality of the easement as it relates to her winery located on a different property. However, staff believes it is relevant to the use of NW Lower Valley Drive. The letter, dated October 19, 2010, is from Ronald Bryant of the former law office of Bryant, Emerson and Fitch, LLP¹⁸.

This letter is in response to your question regarding the road easement to your property and the question of whether or not the road easement can be used by the public to access your property zoned Exclusive Farm Use (EFU) as a result of your operation as a winery on the property.

¹⁷ This letter was undated; however, the applicant indicated it was written about the time their property was undergoing Lot of Record Verification by the County, which was in 2004, and prior to recordation of the roadway easements.

¹⁸ Bryant, Emerson and Fitch, LLP, is currently Bryant Emerson, LLP.

The answer is yes, it is my opinion that the public is entitled to use the road easement to access your property for your winery operation.

The basis for this opinion is that the road easement that was granted for access to your property and other property in the area does not contain any restriction on use.

At the time the easement was granted, all the properties to which the easement provided access were farming properties and provided unrestricted access to those properties by the road easement for the uses on the properties.

The legislature has provided that a winery is an outright permitted use in the Exclusive Farm Use Zone, in which your property is located, and ORS 215.452(2)(b) allows incidental retail sales of wine onsite, including food and beverages.

Because your winery and its operation is allowed in the EFU zone, access under the road easement for the public to come to your property and the winery would be permitted use of the road easement by those members of the public that wish to come to your winery.

Based on the information above including the road easements and road maintenance agreements discussed, staff believes adequate road access is available. However, the Scheenstrass, who own and operate a large farm in the area, are concerned with the validity of the easement and usage and maintenance of the roadway. Staff recommends the Hearings Officer focus his review on this criteria.

If approved, staff recommends the Hearings Officer make the following a condition of approval.

Road Access: Prior to issuance of a building permit for the proposed dwelling, a driveway access permit shall be obtained in compliance with DCC 17.48.210(A).

Telephone

Telephone service appears to be available given the number of dwellings in the area. Furthermore, according to the applicant, cellular phone service is available in the region.

Domestic Water

The applicant states that domestic water for the proposed nonfarm dwelling will be provided by an on-site well. The submitted well log reports from the area indicate the depth of a completed well could range from 113 feet to 210 feet. Staff finds there should be an adequate domestic water supply from an individual well.

Septic

The proposed nonfarm dwelling will be served by an on-site septic disposal system. Staff recommends the Hearings Officer make it a condition of any approval that the applicant secures any necessary septic permit approval for the nonfarm dwelling.

Fire protection

The subject property is not within a fire protection district. To limit fire hazard on the property, staff recommends the imposition of conditions of any approval based on the wildland fire risk assessment and mitigation recommendations dated December 19, 2019 by John Jackson of Singletree Enterprises, LLC Consulting and submitted with the subject request. Staff believes that the initial prescribed vegetation treatments, ongoing vegetation maintenance and structural construction standards, as described in the conditions of approval below, will provide adequate fire protection on this property.

Initial Vegetation Treatment for Development Area: Prior to issuance of any building permit for the dwelling, the applicant shall complete the following vegetation treatments as described in the John Jackson report dated December 19, 2019:

1. Disposal of the residual slash from the recent harvesting of juniper trees;
2. Mowing and additional fuels mitigation on “common ground” areas along the paved portion of Lower Valley Drive;
3. Landscaping design and maintenance consistent with standards adopted from NFPA 1144 shall be required, as detailed:
 - a. Zone 1 – 30 Feet Adjacent to Structures: Use non-flammable landscaping materials within first 5 feet of structures. All vegetation and combustibles are removed from under decks and within 5 feet of the home or auxiliary structures. Outside of 5 feet, low-growing, resin free, fire resistive plants are carefully spaced and maintained, and are kept free of dead material that do not allow flame lengths greater than 3 feet. Areas of lawn must be well irrigated and regularly mowed. Mature trees are pruned to a height of 6 to 10 feet from the ground with no brush inside of the tree dripline. Juvenile trees are not pruned more than 20% of the stem length. Trees may not touch the home. No firewood storage is permitted outside of an enclosed structure. This zone includes/driveway /road surfaces.
 - b. Zone 2 – 30 to 100 Feet from Structures: Plants are low-growing and well irrigated. Tree canopies are spaced at 15-20 feet, or 30 feet between small groups of trees. Zone 2 treatments will extend to the lot boundary (beyond the 100-foot zone) when the lot is adjacent to down-hill slopes greater than 20%. Small individual brush species will be irrigated, maintained free of dead material and outside the dripline of trees.
 - c. Zone 3 – 100 to 200 Feet from Structures: Trees will be thinned and pruned, woody debris removed and brush fields mowed or removed. Density of taller trees will be reduced and maintained so that canopies do not touch. Taller, more mature trees however typically present less of a fire risk as long as brush is not present within the tree drip-line and lower limes are pruned. Overtime, tree canopies will grow together gradually. A long-term strategy is required to address this issue. Provisions should be

made within CC&Rs for removal of some large trees as needed if this standard is to be maintained. Zone 2 and 3 treatment areas will overlap each other between homes sites and extend into open areas. For lots with greater than 20% slopes, Zone 2 treatments will extend beyond the 100 feet to the lot boundary.

4. Completion of the above-referenced vegetation treatment shall be confirmed by a letter submitted to the Planning Division from a professional forester or wildfire expert.

On-Going Vegetation Treatment Evaluation: For as long as a dwelling exists on-site, the applicant shall continue to maintain the vegetation treatment outline in the Initial Vegetation Treatment for Development Area condition noted above.

Structural Standards: At all times, the following standards apply.

1. All dwellings and structures shall use noncombustible or fire resistant roofing materials. This means roofing material identified as Class A, B or C in the Oregon Uniform Building Code. Roof sprinklers are not an acceptable alternative to this standard.
2. If the dwelling or structure has a chimney, it shall have a spark arrester.
3. All ventilation openings shall be screened with metal mesh with not greater than 1/8th inch openings.

Police

The property is served by the Deschutes County Sheriff.

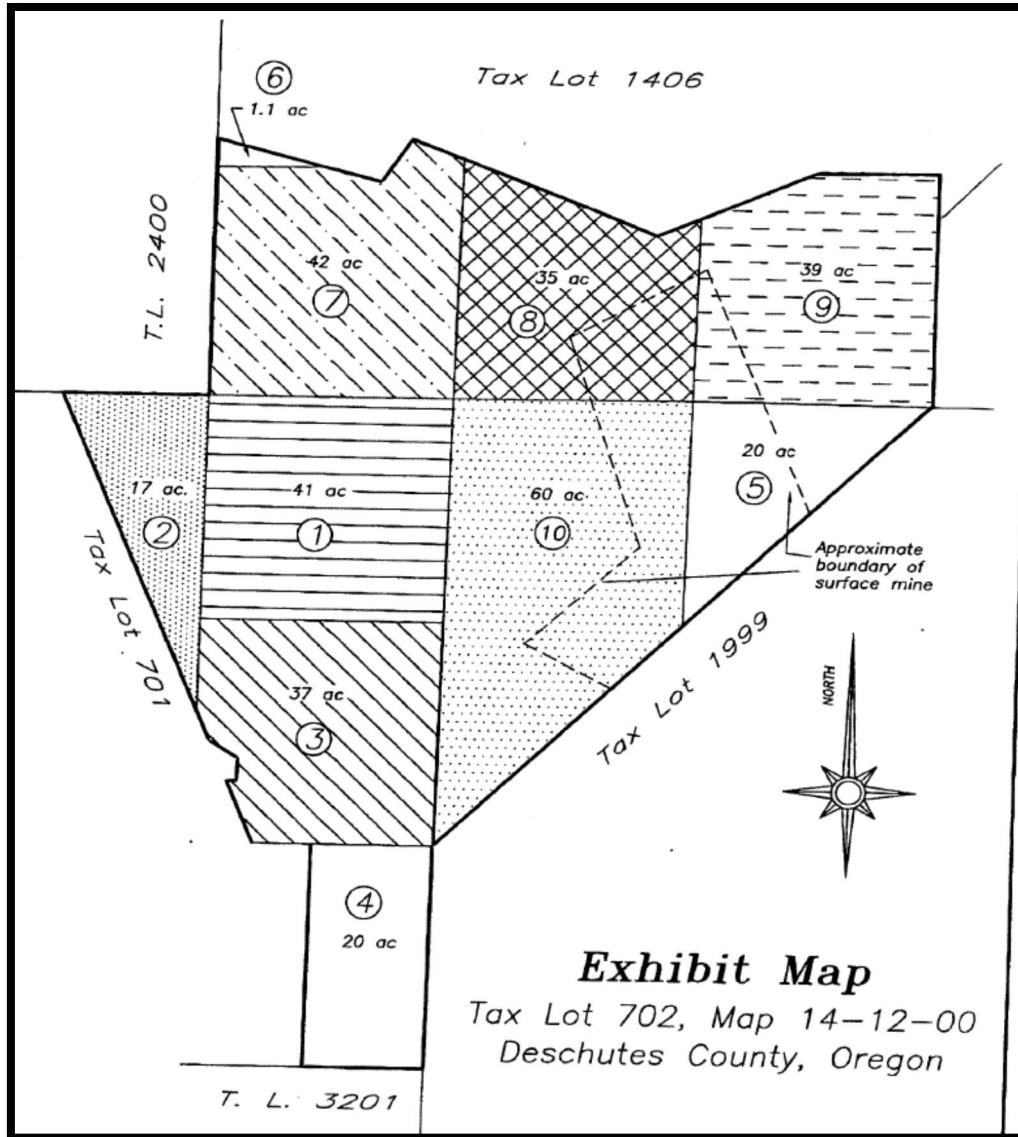
Based on the information above, staff believes adequate utilities and services are or will be available.

- 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 County determined that the subject property is a Lot of Record in County decision in LR-04-26. That decision found the property was created prior to 1993. For reference, County decision of LR-04-26 approved nine separate legal lots of record¹⁹ as illustrated below in Figure 4.

¹⁹ Lots 9 and 10, shown in Figure 4, are together one legal Lot of Record.

Figure 4 - LR-04-26 Lots of Record Map



The subject property originally was all of Lot of Record 6 and the northwestern region of Lot of Record 7. In 2008, via County Decisions LL-08-49 and LL-08-103²⁰, the property was adjusted into its current configuration. No other land use actions have occurred on the property.

These adjustments, however, did not create the parcel. Instead, they reconfigured it. The only exception to this rule is provided by OAR 660-033-0020(4)²¹. It says that if the effect of a lot line

²⁰ The property line adjustment file LL-08-49 adjusted the shared boundary between Lot of Record 7 and Lot of Record 8 (LR-04-26). File no. LL-08-103 adjusted shared boundary between Lot of Record 7 and Lot of Record 6 (LR-04-26).

²¹ "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.

adjustment is to qualify the parcel for the siting of a dwelling, the date of the adjustment becomes the date of creation. Staff believes this is not the case for this property because the parent parcel qualified for approval of a nonfarm dwelling before and after adjustment.

The applicant indicates that the parent parcel would have been potentially eligible for a nonfarm dwelling based on the being dry and unirrigated, and it continues as such after the property line adjustment. County records do not show any previous approvals for a nonfarm dwelling for on the parent parcel. However, this argument is supported by the submitted soils study that was conducted in the same area as that of the parent parcel. Staff concurs with the applicant. Staff believes the parcel, before and after adjustment, was and continues as nonagricultural land rated LCC 7 and 8. No other aspect of that property precluded approval of a dwelling. The lot line adjustments did nothing to make the subject property eligible for approval of a nonfarm dwelling. As a result, the date of creation of the parcel is not changed due to the lot line adjustment approvals under OAR 660-033-0020(4).

Nevertheless, COLW does not believe the subject property and proposal meets the requirements of DCC 18.16.050(G)(1)(a)(vi) regarding creation date. Staff recommends the Hearings Officer focus his review on this criteria.

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). In this case, and as articulated above, staff believes the entire parcel is not suitable due to adverse soil and land conditions, which demonstrates that the parcel is generally unsuitable for farm use. Because staff does not claim unsuitability due to size or location, 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 finding of general unsuitability is not based on the 5.19-acre parcel being too small to be farmed profitably by itself. There is no evidence in the record that the subject parcel can be sold, leased, rented, or otherwise managed as part of a commercial farm or ranch. The parcel is not presumed to be suitable because it is not composed predominantly of Class I-VI soils. The analysis of general unsuitability herein evaluates the entire parcel for crop and livestock production. No other generally accepted farm practices are identified in the record. The subject property is not under forest assessment.

- 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: According to the County Assessor's records, the property is receiving special assessment for farm use. Staff recommends that the following requirement be included as a condition of any 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.

Section 18.16.060. Dimensional Standards.

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

FINDING: No height information was provided for the structure(s). To ensure compliance, staff recommends the following be made a condition of approval.

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.

Section 18.16.070. Yards.

- A. *The front yard shall be a minimum of 40 feet from a property line fronting on a local street, 60 feet from a property line fronting on a collector street, and 100 feet from a property line fronting on an arterial street.***
- B. *Each side yard shall be a minimum of 25 feet, except that for a nonfarm dwelling proposed on property with side yards adjacent to property currently employed in farm use, and receiving special assessment for farm use, the side yard shall be a minimum of 100 feet.***
- C. *Rear yards shall be a minimum of 25 feet, except that for a nonfarm dwelling proposed on property with a rear yard adjacent to property currently employed in farm use, and receiving special assessment for farm use, the rear yard shall be a minimum of 100 feet.***
- D. *The setback from the north lot line shall meet the solar setback requirements in Section 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 proposal is subject to 100-foot nonfarm dwelling setbacks. The 100-foot setback is applicable to the east property boundary only. All other yards shall be a minimum of 25 feet. Staff finds there is sufficient space on the property for the dwelling to comply with required setbacks. To ensure compliance with yards, solar, and additional setbacks staff recommends the following be made a condition of any approval.

Yards: Structural setbacks from all lot lines shall meet the yard requirements in DCC 18.16.070.

Solar Setbacks: Structural setbacks from any north lot line shall meet the solar setback requirements in DCC 18.116.180.

Other Setbacks: 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 18.16.080. Stream Setbacks.

To permit better light, air, vision, stream pollution control, protection of fish and wildlife areas and preservation of natural scenic amenities and vistas along 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 18.16.090. Rimrock Setback.

Notwithstanding the provisions of DCC 18.16.070, setbacks from rimrock shall be as provided in DCC 18.116.160 or 18.84.090, whichever is applicable.

FINDING: There is no rimrock in the project vicinity.

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

FINDING: The subject property is located within the SMIA Zone in association with Mining Site No. 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 applicable to the proposed single-family dwelling. Pursuant to DCC 18.56.030, no dwelling 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 and thus staff recommends the Hearings Officer make it a condition of any approval.

SMIA Zone: Prior to issuance of any building permit for the nonfarm dwelling, the applicant shall first obtain SMIA Zone site plan approval under the standards and criteria set forth in DCC 18.56.090 through 18.56.120.

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 18.116, Supplementary Provisions

Section 18.116.100. Building Projections.

Architectural features such as cornices, eaves, canopies, sunshades, gutters, chimneys and flues shall not project more than three feet into a required yard, provided that the projection is not closer than three feet to a property line.

FINDING: Staff recommends Hearings Officer include this criterion as a condition of any approval.

Building Projections: Architectural features such as cornices, eaves, canopies, sunshades, gutters, chimneys and flues shall not project more than three feet into a required yard, provided that the projection is not closer than three feet to a property line.

Chapter 18.120, Exceptions

Section 18.120.030. Exceptions to Yard Requirements.

The following exceptions to yard requirements are authorized for a lot in any zone:

...

- B. Architectural features such as cornices, eaves, sunshades, gutters, chimneys and flues may project into a required yard in accordance with DCC 18.116.100. Also, steps, terraces, platforms, porches having no roof covering and fences not interfering with the vision clearance requirements may project into a required yard. Signs conforming to the requirements of DCC Title 18 and all other applicable ordinances shall be permitted in required yards.***

FINDING: The exceptions to yard requirements are provided for reference. Staff notes these exceptions are specific to “yards” and do not apply to “setbacks” such as stream or rimrock setbacks.

Section 18.120.040. Building Height Exceptions.

- A. *The following structures or structural parts are not subject to the building height limitations of DCC Title 18:***
- 1. chimneys, not more than three feet six inches above the highest point of the roof, vertical support structures for telephone and power transmission lines in utility easements or public rights-of-way, not requiring a site plan review as defined in DCC 18.124.060, flagpoles not exceeding 40 feet, agricultural structures as defined in DCC 18.04.030 not exceeding 36 feet, and amateur radio facilities as outlined in DCC Title 18.116.290. This exception does not apply to an Airport Development Zone, Airport Safety Combing Zone or Landscape Management Combining Zone.***

FINDING: The exceptions to height requirements are provided for reference. Staff notes these exceptions are not applicable in an Airport Development Zone, Airport Safety Combing Zone, or Landscape Management Combining Zone

IV. CONCLUSION AND RECOMMENDATION:

Based upon the preceding analysis, staff believes that additional information is necessary to determine if the applicant can meet all of the required approval criteria. Staff recommends the Hearings Officer review the issues raised in the Staff Report specifically:

- Whether the applicant has adequately demonstrated that the nonfarm dwelling will be located on a lot or parcel created prior to January 1, 1993, as specified in DCC 18.16.050(G)(1)(a)(vi).
- Whether the applicant has adequately demonstrated road access is adequate for the use, as specified in DCC 18.16.050(G)(1)(a)(v).

owner	agent	inCareOf	address	cityStZip	Type	CDD ID
GROSSMANN, ROGER W & CYNTHIA M			70450 NW LOWER BRIDGE WAY	TERREBONNE, OR 97760	SR	21-311-CU
Central Oregon LandWatch		Carol Macbeth	2843 NW Lolo Dr	Bend, OR 97703	SR	21-311-CU
Bill and Susan Scheenstra			69501 NW Lower Valley Dr.	Terrebonne, OR 97760	SR	21-311-CU
Lisa Andrach		Fitch & Neary PC	210 SW 5th St, #2	Redmond, OR 97756	SR	21-311-CU