



**STAFF REPORT**

**FILE NUMBER:** 247-21-000756-CU

**SUBJECT PROPERTY/  
OWNER:**

Mailing Name: KERR, HODGE & DEBORA NORENE  
Map and Taxlot: 1812310000600  
Account: 271610  
Situs Address: 59770 SCALE HOUSE RD, BEND, OR 97702

**APPLICANT:** Hodge & Debora Kerr

**APPLICANT'S  
ATTORNEY:**

Tia M. Lewis

**REQUEST:**

The applicant is requesting conditional use approval to establish a single-family dwelling in the Forest Use (F2) Zone. The requested Forest Use dwelling type is a "Template Dwelling".

**HEARING DATE:** November 30, 2021

**HEARING START:** 6:00 pm

**STAFF PLANNER:**

Caroline House, Associate Planner  
Phone: 541-388-6667 / Email: [Caroline.House@deschutes.org](mailto:Caroline.House@deschutes.org)

**HEARINGS OFFICER:** Tommy Brooks

**DOCUMENTS:**

Can be viewed and downloaded from:  
[www.buildingpermits.oregon.gov](http://www.buildingpermits.oregon.gov) and <http://dial.deschutes.org>

**I. APPLICABLE CRITERIA**

Deschutes County Code (DCC)

Title 18, Deschutes County Zoning Ordinance

Chapter 18.40. Forest Use Zone (F2)

Chapter 18.113. Destination Resorts Zone (DR)

Title 22, Deschutes County Development Procedures Ordinance

Chapter 22.16, Development Action Procedures

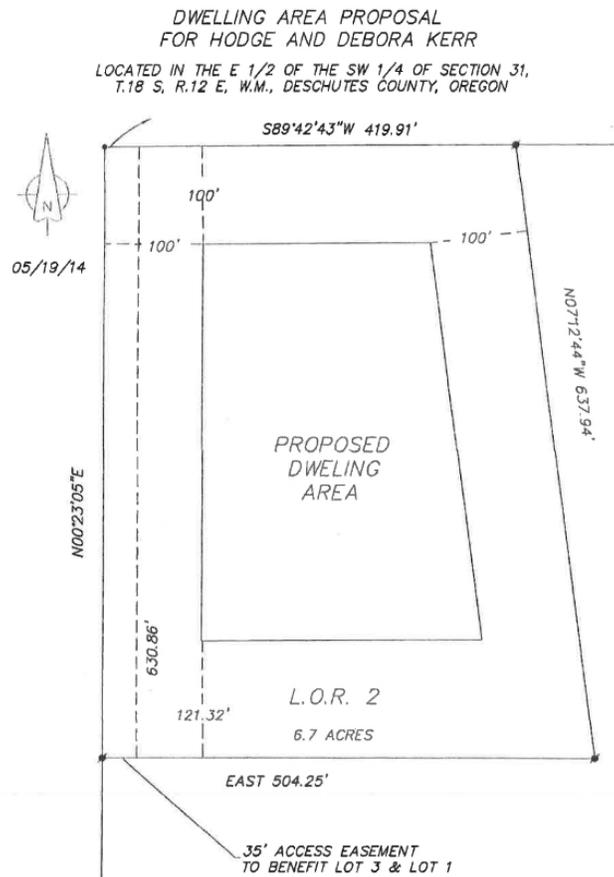
## II. BASIC FINDINGS

**LOT OF RECORD:** The subject property was verified as one (1) legal lot of record under land use file no. LR-13-13 and subsequently reconfigured to its current configuration via a property line adjustment (ref. file no LL-13-40).

**SITE DESCRIPTION:** The subject property is +/- 6.7 acres in size, trapezoidal in shape, and the west property line abuts Scale House Road. The grade is generally level across the property. Vegetation consists of primary of pine trees and native groundcover. Recently, the property owner completed a controlled burn to reduce fuel buildup and improve the health of the land. The property is currently undeveloped.

**PROPOSAL:** The applicant proposes to construct a single-family dwelling on the subject property in the area identified in *Figure 1* below. An onsite septic system and private domestic well will be installed to serve the proposed residential use.

*Figure 1 – Proposed Dwelling Area on Subject Property*



**SURROUNDING LAND USES:** The abutting and nearby properties to the north, northwest, east and south are zoned Forest Use (F2), vary in size from 40 acres to 240 acres, and are held in private ownership. Three (3) of these properties have been developed with a single-family dwelling and related accessory structures. Immediately to the west, there is a 135-acre tract owned by the Oregon High Desert Museum. This tract is zoned Open Space & Conservation (OS&C) and is developed with

several museum buildings, outdoor exhibits, animal enclosures, and related vehicular and pedestrian improvements. Highway 97 abuts the western boundary of this tract and the land on the opposite side of the highway is zoned Rural Residential (RR10) and is comprised of the Deschutes River Woods Subdivision. Further to the north, the area is zoned RR10 with the exception of one (1) parcel that is owned by the Oregon Department of Transportation (ODOT), which is zoned Surface Mining (SM). Beyond the areas described above, the surrounding land to the east, south, and west is federally owned public land that is part of the Deschutes National Forest and Newberry National Volcanic Monument. This large federal tract is zoned Forest Use (F1).

#### **LAND USE HISTORY:**

- *LR-13-13* – Lot of Record Verification
- *LL-13-40* – Property Line Adjustment
- *247-15-000009-CU* – Conditional Use approval to establish a template dwelling on the subject property.
- *247-19-000190-E* – Approval of a 2-year Extension for file no. 247-15-000009-CU. No additional extensions were requested and the approved use was not initiated, which resulted in the conditional use approval expiring.

**PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice on August 19, 2021, to several public agencies and received the following comments

#### Deschutes County Building Division, Randy Scheid

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

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

#### Deschutes County Senior Transportation Planner, Peter Russell

*I have reviewed the transmittal materials for 247-21-000756-CU to establish a template dwelling (single-family home) on a 6.7-acre parcel in the Forest (F-2) zone at 59770 Scale House Rd., aka County Assessor's Map 18-12-31, Tax Lot 600.*

*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. As the proposed land use will not meet the minimum threshold for additional traffic analysis, no further traffic analysis is needed.*

*The property accesses Scale House Road, a private road and functionally classified as a local. As this is a private road, 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 \$4,757 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 \$3,853 (\$4,757 X 0.81). The SDC is due prior to issuance of certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final.*

*THE PROVIDED SDC AMOUNT IS ONLY VALID UNTIL JUNE 30, 2022. 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.*

The following agencies did not respond to the notice: Bend Fire Department, Deschutes County Assessor, Deschutes County Environmental Soils Division, and Watermaster – District 11.

**PUBLIC COMMENTS:** The Planning Division mailed notice of the subject application to all property owners within 750 feet of the subject property on August 19, 2021. The applicant submitted a Land Use Action Sign Affidavit indicating the applicant posted notice of the land use action on August 24, 2021.

The Planning Division received letters from two (2) nearby property owners<sup>1</sup>. Below is a summary of their concerns:

- Objections to whether the applicant has demonstrated there is legal access to the subject property.
- Objections to the applicant's soils analysis and associated template test requirements.
- Objections to the applicant's analysis for the number of parcels that existed on January 1, 1993 and associated template test requirements.
- Objections related to the qualification of the subject property for a dwelling based on the completed 2013 Property Line Adjustment.
- Objections to the depiction of the template used for the applicant's analysis.
- Objections related to whether the subject property has been properly annexed into a Fire Protection District.
- Objections as to whether the applicant complied with the posted notice requirements of DCC 22.24.030.

Staff has incorporated responses and further discussion on these concerns under the corresponding Deschutes County Code sections in this Staff Report.

**NOTICE REQUIREMENTS:** As stated above, notice of application was mailed to neighboring property owners within 750 of the subject property on August 19, 2021 and the applicant submitted a Land Use Action Sign Affidavit indicating the applicant posted notice of the land use action on August 24, 2021. Public comments in the record raise concerns regarding the timing and location of the proposed land use sign. Staff asks the Hearings Officer to determine if there were any procedural

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<sup>1</sup> Reference letters submitted by Fredrick Windlinx and Christopher Koback, as the representative for the Windlinx Ranch Trust, dated August 30, 2021.

errors associated with the posted notice requirements of DCC 22.24.030(B). Notice of the public hearing was mailed to the same parties on November 3, 2021 and a notice of public hearing was published in *The Bulletin* newspaper on November 7, 2021.

**REVIEW PERIOD:** The subject application was submitted on August 10, 2021. An incomplete letter requesting additional information was mailed to the applicant on September 9, 2021. The applicant submitted responses to the incomplete letter on October 21, 2021 and requested that the County deem the application complete based on the submitted materials. Therefore, the 150th day on which the County must take final action on this application is March 20, 2022.

### III. **FINDINGS**

#### **Title 18, Deschutes County Zoning Ordinance**

##### **Chapter 18.40, Forest Use Zone (F2)**

###### Section 18.40.030. Conditional Uses Permitted.

***The following uses and their accessory uses are permitted outright, subject to applicable siting criteria set forth in DCC 18.40 and any other applicable provisions of DCC Title 18:***

...

- X. *Single-family dwellings or manufactured homes as specified in DCC 18.116.070, pursuant to DCC 18.40.050.***

**FINDING:** The applicant requests approval for a single-family dwelling. The applicable criteria under DCC 18.40.050 are addressed below.

###### Section 18.40.040. Limitations on Conditional Uses.

***A use authorized by DCC 18.40.030 must meet the following requirements. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands.***

- A. *The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands;***

**FINDING:** Staff relied upon the following land use decisions to address this criterion:

1. *Hogensen* – Large tract dwelling; Assessor’s map 17-11, tax lot 4301; CU-03-45, A-03-15; appealed to Land Use Board of Appeals (“LUBA”), *Sisters Forest Planning Committee v. Deschutes County*, 49 Or LUBA 78 (2004), aff’d Or App 311 (2005)
2. *Taylor* – Large tract dwelling; Assessor’s map 17-11, tax lot 2722; MP-05-31, CU-05-106, SMA-05-41; LUBA appeal, *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007)

## **Accepted Forest Practices**

In order to determine whether the proposed dwelling will have significant impacts on accepted forest practices, LUBA ruled in *Hogensen* that the Hearings Officer had to determine what the accepted forest practices are. In *Hogensen*, the Hearings Officer identified accepted forest practices in the area as,

*...harvesting of trees, hauling of logs by truck, 'slash' (debris) burning, prescribed burning and aerial chemical spraying.*

In *Taylor*, the Hearings Officer agreed with the applicant's description of accepted forest practices including,

*...selective harvesting of trees, hauling logs by truck, burning of slash/debris, prescribed burning of forested areas, aerial chemical spraying, open space/wildlife habitat management, buffers, and outdoor recreational activities.*

In both *Hogensen* and *Taylor*, LUBA ruled the Hearings Officer adequately described accepted forest practices. Staff adopts these same practices for the purposes of this review.

## **Study Area**

In *Hogensen*, LUBA ruled that although this criterion requires a description of farm and forest practices on "at least agricultural or forest lands adjacent or nearby to the subject property", a specific study area delineation is not required.

The submitted application materials include descriptions of the uses occurring on surrounding and nearby properties, identification of farm and forest lands within a 1-mile radius, and +/- 35-square-acre zoning overview for the surrounding area. Given the large sizes of adjoining and nearby properties, and the likely homogenous management of public lands, staff believes this study area is sufficient to describe both farming and forest practices in the area.

According to the applicant, and confirmed by staff's review of aerial photographs of surrounding lands, there are no farming practices within +/- 2.83 miles of the subject property. For this reason, staff finds the proposed dwelling will not force a significant change in, or significantly increase the cost of, accepted farming practices on agricultural lands.

With respect impacts to nearby and adjacent forestlands, the applicant's incomplete letter response includes the following:

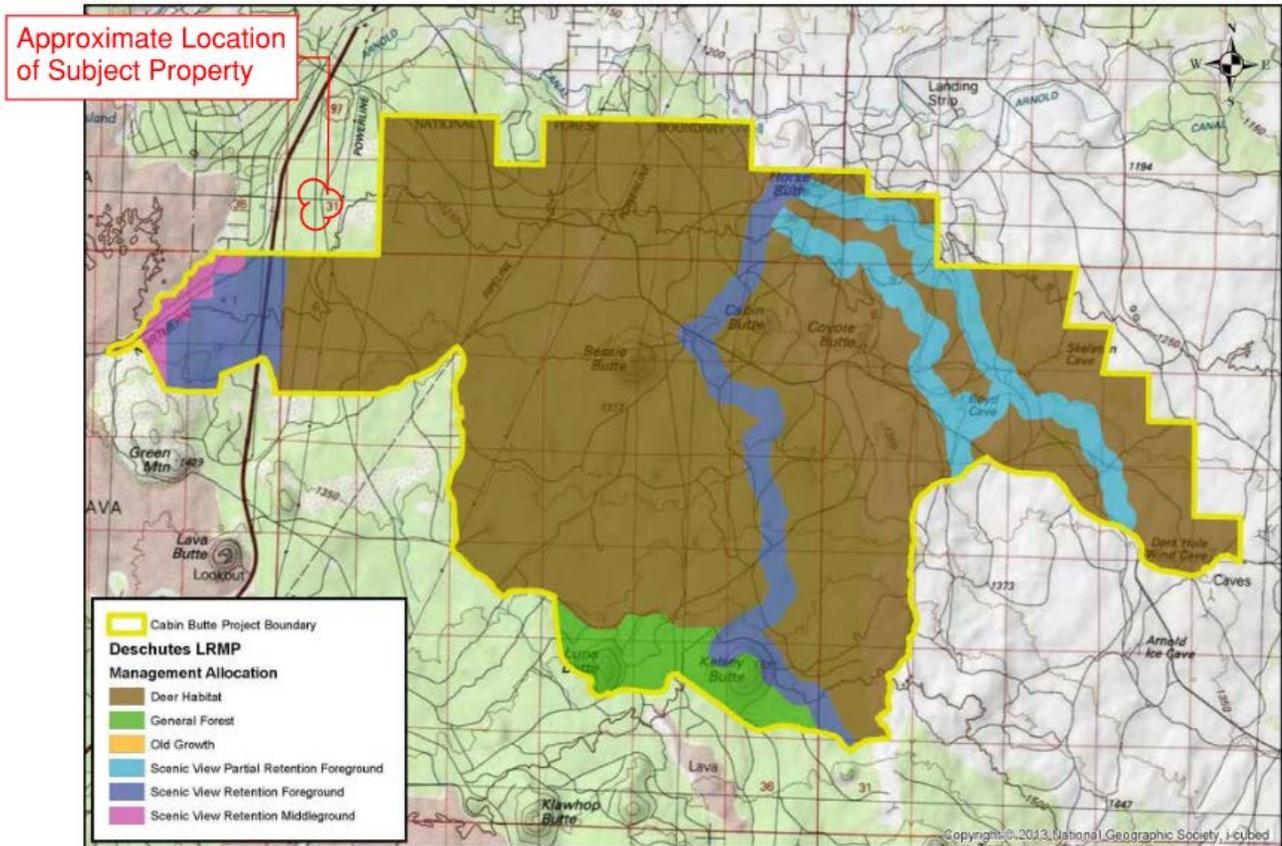
*"We have identified development and forest practices on all forest land within one mile of the subject property as shown on the 1-mile radius Attachment 3 and discussed in a chart on the following page. We have followed this with an explanation of why the template dwelling will not significantly increase the cost of these forest practices in the narrative that follows."*

<i>Property</i>	<i>Forest Practices</i>	<i>Impact?</i>
<i>1812310000300, Windlinx Vacant 40-acre parcel</i>	<i>Harvesting, hauling, prescribed burning, mowing, possible spraying.</i>	<i>No new impacts. Property within approximately 150 feet of residence on Tax Lot 200 and 540 of residence on Tax Lot 100; proposed residence on Kerr property over 500 feet away.</i>
<i>18123 10000200, Windlinx 40-acre parcel with a residence and outbuildings</i>	<i>Harvesting, hauling, prescribed burning, mowing, possible spraying.</i>	<i>No, Tax Lot 200 is developed with a residence.</i>
<i>1812310000100, Windlinx Ranch Trust 240-acre parcel with a residence and outbuilding</i>	<i>Harvesting, hauling, prescribed burning, mowing, possible spraying.</i>	<i>No, Tax Lot 100 is developed with a single-family home due north of the Kerr template dwelling that impacts the same TL 100 forest lands that might be impacted by the Kerr dwelling.</i>
<i>1812000007600, USA</i>	<i>None, see Attachment 6 correspondence with USFS</i>	<i>No new impacts. Several dwellings described herein exist between this property and the proposed Kerr dwelling. - adjoins RR-10 where closest to Kerr property (west side)</i>
<i>1911000000100 (part), USA</i>	<i>None, see Attachment 6 correspondence with USFS</i>	<i>No new impacts. Several dwellings described herein exist between this property and the proposed Kerr dwelling.- most is west of highway 97 and adjoining Newberry National Volcanic Monument</i>
<i>1912000000100, USA</i>	<i>None, see Attachment 6 correspondence with USFS</i>	<i>No new impacts. Several dwellings described herein exist between this property and the proposed Kerr dwelling.</i>

*Attachment 6* referenced in the table above is an emailed response from a representative with the Deschutes National Forest listing the current and upcoming projects occurring on the nearby Deschutes National Forest tract. The list includes one (1) current project for an Oregon State University (OSU) research study and two (2) upcoming projects, the Cabin Butte Vegetation

Management Project and the ODOT Paved Path Project. While both of the upcoming projects are pending approval, staff notes, if approved, the Cabin Butte Vegetation Management Project will be +/-25,780 acres in size (see *Figure 2* below) and includes a mix of thinning (primarily ponderosa pines) and fuels reduction for the purpose of restoring stand structure and composition, resilience through increased tree vigor, and fire hazard reduction<sup>2</sup>.

*Figure 2 – Map of Cabin Butte Project Boundary  
Cabin Butte Planning Area - Deschutes Forest Plan*



Map Source: [https://www.fs.usda.gov/nfs/11558/www/nepa/112442\\_FSPLT3\\_4874435.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/112442_FSPLT3_4874435.pdf)

Staff believes the applicant’s description of forest practices on nearby privately owned land is very similar to those acknowledged in *Hogensen* and *Taylor*. However, it is unclear to staff if the applicant has identified the forest practices likely to occur on the nearby public lands. For this reason, staff asks the Hearings Officer to determine if the applicant has appropriately described all forest practices in the area.

**Significant Change and Significant Increase in Cost**

Assuming the applicant has appropriately identified adjacent and nearby forest practices, the next step is to determine what impacts forest practices could have on the dwelling and whether the presence of the dwelling will result in a significant change in, or significantly increase the cost of,

<sup>2</sup> <https://www.fs.usda.gov/project/?project=56998> and <http://bit.ly/CabinButteStoryMap>

forest practices. Likely impacts from forest practices include noise and dust from harvesting and hauling of logs, smoke from slash and prescribed burning, and chemical drift from spraying.

The applicant argues the proposed dwelling will not result in a significant change in, or significantly increase the cost of, forest practices on adjacent or nearby forestlands for the following reasons:

1. Three (3) nearby F-2 zoned properties already contain dwellings;
2. The proposed home will impose no different or greater impact on logging and forest practices related to management of these properties than created by the existing dwellings;
3. The proposed home will be sited over 100' from the adjoining F-2 zoned properties to allow these properties to be logged without difficulty;
4. The applicant is willing to sign the Farm and Forest Management Easement required under DCC 18.40.040(C).
5. On forest properties located in close proximity to existing development, brush mowing is used in lieu of prescribed burning to control vegetation growing on the forest floor.
6. There is no evidence of forest practices occurring on properties in the area, and the nearby properties are used primarily for rural residential purposes, or what would appear to be open space;

Staff agrees with arguments 1-4 above and believes this criterion will be met with respect to forest practices on nearby privately owned forestlands. However, staff asks the Hearings Officer to determine if this criterion is satisfied as it pertains to the nearby federally managed forestlands.

Regarding forest practices on the subject property, the applicant hired John Jackson, a professional forester with over 28 years of progressive fire management experience with the Oregon Department of Forestry, to analyze the property and determine the best location for the proposed dwelling. John Jackson prepared a Wildfire Mitigation Plan<sup>3</sup> (Plan) outlining his recommendations. Although the Plan doesn't recommend a specific location for the proposed residential use on the property, the Plan emphasizes the importance of vegetation treatment, or forest practices, to enhance overall forest health. As noted below, staff recommends a condition of approval requiring completion of the vegetation treatment recommendations. Given this condition, staff believes the proposed dwelling will not result in a significant change in, or significantly increase the cost of, forest practices on the subject property.

***B. The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel.***

**FINDING:** Staff relied upon the following land use decisions to address this criterion:

1. *York v. Clackamas County*, 79 Or LUBA 278 (2019) – LUBA Headnotes Summary:

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<sup>3</sup> The original Wildfire Mitigation Plan was created in April of 2014, and a recent addendum, dated October 5, 2021, was completed to address the current conditions on the subject property.

“Where a local code provision requires a finding that a proposed use “will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel,” the proper comparison is between the proposed use and the pre-existing use, not between the proposed use and typical uses of the same type.”

2. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007) – LUBA Opinion Pg. 11, Lines 3-8:

“The focus of the “fire hazard” analysis is apparently the increased risk of wildfire *caused* by the dwelling itself and activities associated with it. The focus of the “increased firefighting cost/risk” analysis appears to be different and broader. For example, it appears to encompass the costs or risks associated with protecting the dwelling or its inhabitants from wildfires, whatever their cause.”

The subject property is vacant with no primary use established. As noted above, the record includes a Plan prepared by John Jackson that was updated on October 5, 2021. The updated Plan describes the current conditions on the subject property as:

1. A recently completed cooperative under-burn project with the High Desert Museum has effectively removed all of the brush understory on the parcel. This treatment has effectively reduced a major fire fuels component on the parcel.
2. A secondary effect of this under-burn will result in some limited mortality in some of the smaller Ponderosa pine in the residual stand.
3. The post under-burn pine stand remains partially overstocked to optimize overall forest health. The site pine growing capacity is limited by marginal soil depth/moisture retention capacity.

Given these conditions, staff reviewed the proposed dwelling location, available access, and the Plan to verify whether the applicant’s proposal complies with this criterion.

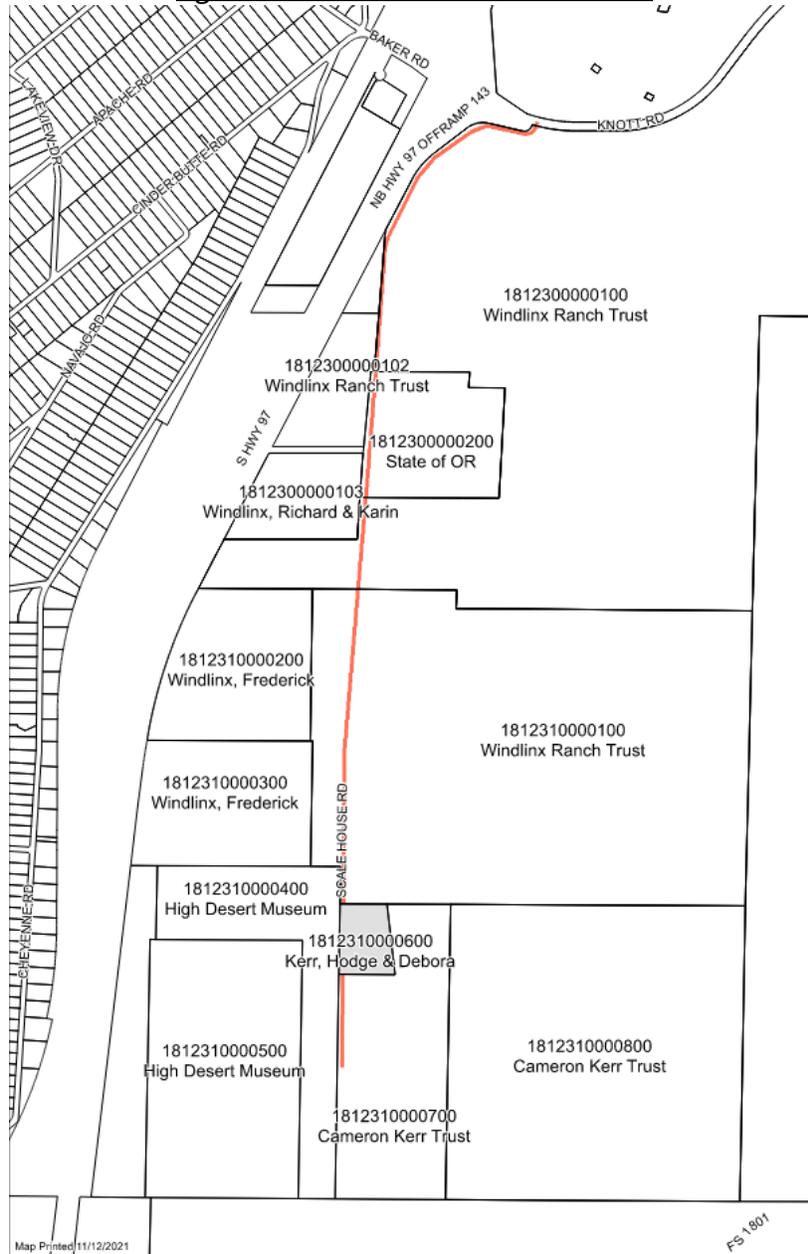
### ***Dwelling Location***

The subject property is +/- 6.7 acres in size. Vegetation consists of pine trees that are evenly distributed across the property. There do not appear to be any major topographical changes or landscape features on the subject property. The applicant has not confirmed the exact location of the proposed dwelling, but instead has requested approval of a building envelope (see *Figure 1* above). The proposed building envelope includes an approximately 2.5-acre area centrally located on the subject property. The proposed building envelope ensures the dwelling is sited at least 100 feet from all property lines. Additionally, the applicant proposes to establish fuel breaks and defensible space around the proposed structure.

**Available Access**

Scale House Road, a paved road<sup>4</sup>, is established along the western boundary of the subject property. The applicant proposes to take access from this road and plans to construct a new looped driveway to the dwelling site. Scale House Road is established across multiple properties owned by the Windlinx Ranch Trust, as well as one parcel owned by the State of Oregon, before connecting to Knott Road, which is a public road maintained by the County (see *Figure 3* below).

*Figure 3 – Scale House Road Location*



Based on the submitted materials, the subject property has legal access via Scale House Road as

<sup>4</sup> Per DCC 18.04.030 "road or street" means a public or private way created to provide ingress or egress to one or more lots, parcels, areas or tracts of land.

road access was granted to the public as part of Partition Plat No. 1990-35 and was also granted as part of a 1994 private easement agreement between the applicant and the Windlinx Ranch Trust (reference the Official Records of Deschutes County instrument number 1994-011023). Whether the applicant has provided sufficient proof of a long-term road access use agreement is discussed later in this staff report under DCC 18.40.050(A)(1)(e).

Separate from the access via Scale House Road, the submitted Plan identifies an old logging railroad grade along the east boundary of the subject property, running north-south, which continues across to the adjoining property to the south. The Plan recommends establishing an alternative access route in this area for both emergency egress from the dwelling and for fire apparatus access with connection to the primary driveway. Specifically, the following alternative access recommendations are included in the Plan:

1. Consider creating a route running east-west just south of the north property boundary. This does not require actually creating a "road", but rather a route that would allow passage of a pick-up sized wildland fire vehicle to enhance initial response access and landowner access in support of forest management activities.
2. Establish and maintain fully functional access/connection between the railroad grade and Scale House Road via the driveway on the adjoining parcel to the south for emergency use.
3. Establish a connection between the loop driveway to the residence and the old railroad grade on the east side of the parcel.
4. Consider an emergency use agreement/gate on the railroad grade made with the landowner to the north. This could be kept locked as needed to restrict inappropriate unauthorized use

The applicant has agreed to improve and maintain this secondary access. However, it's unclear to staff if an additional driveway needs to be established to connect this access route to the proposed dwelling and Scale House Road to provide efficient access for firefighting personnel. Additionally, staff believes this alternative access would likely need to be established on the adjacent property to ensure firefighting personnel can safely use this alternative access. Otherwise, this alternative access route will dead-end at the boundary of the subject property and offer no escape route for occupants of the dwelling or firefighting personnel. Staff asks the Hearings Officer to determine if this alternative access route is required to demonstrate compliance with this criterion and, if yes, what areas need to be improved and maintained.

### ***Wildfire Mitigation Plan***

With respect to reducing wildfire hazard across the property, the applicant submitted a Plan with immediate and ongoing vegetation treatment recommendations. The recommendations are summarized below.

1. Establish defensible space around the proposed dwelling to progressively reduce the flammable vegetation available to carry fire from the surrounding forest fuels to the dwelling.

2. Remove dead and thin overstocked/suppressed trees to improve forest health and reduced fire intensity potential.
3. Reduce the volume of more flammable vegetation for 30 feet along the east side of Scale House Road to reduce spread rates of any road-side related ignitions.
4. Reduce the volume of more flammable vegetation on both east and west sides of the old railroad grade on the east property line to enhance the usability of this road for fire apparatus adding to fire fighter safety and expand its effectiveness as a fire break.
5. Regrowth, which will occur after either an under-burn or brush mowing, should be assessed on a not less than 5-year interval with a 10-year documentation.
6. If regrowth reaches one foot in height in significant patches, retreatment of such areas should occur.
7. Thinning of over-dense stands should be considered to allow the residual stand to become more vigorous, which can help keep any fire ignition on the ground.

Staff recommends conditions of approval requiring the property owner complete the vegetation treatment recommendations and submit an evaluation report prepared by a professional forester at least once every 10 years to the Planning Division. Staff recommends the evaluation must include, at a minimum, a description of the condition of vegetation on the property, condition of previously treated areas (if any), recommended treatment (if any), and a schedule for treatment completion.

Staff asks the Hearings Officer to determine if the applicant has demonstrated the proposed residential use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel.

- C. *Prior to final approval of the uses listed in DCC 18.40.030(H), (O), (S), (V), (X) and (Z), the landowner shall sign and record in the County Clerk's office a written statement recognizing the rights of adjacent and nearby landowners to conduct forest operations consistent with the Forest Practices Act and Rules.***

**FINDING:** The applicant has requested approval for a single-family dwelling under DCC 18.40.030(X). Therefore, the applicant is required to sign and record a Farm and Forest Management Easement agreement. This agreement includes a statement acknowledging the owner of the subject property recognizes the rights of adjacent and nearby landowners to conduct forest operations consistent with the Forest Practices Act and Rules. The applicant has agreed to sign this agreement. Staff recommends a condition of approval to ensure compliance.

Section 18.40.050. Standards for Single Family Dwellings.

**A. *General Provisions.***

1. ***Dwellings listed as a conditional use under DCC 18.40.030(X) shall meet the following standards:***
  - a. ***One of the alternative tests set out in DCC 18.40.050(B) (lot of record dwelling), DCC 18.40.050(C) (large tract dwelling), or DCC 18.40.050(D) (template dwelling);***

**FINDING:** The applicant has requested conditional use approval for a single-family dwelling under the template dwelling standards (DCC 18.40.050(D)). Conformance with the applicable criteria of DCC 18.40.050(D) is addressed is later in this staff report.

- b. *If the lot or parcel is part of a "tract," the remaining undeveloped lots or parcels of the tract shall be consolidated into a single lot or parcel, or the applicant shall sign and record with the County Clerk covenants, conditions and restrictions (on a form substantially similar to that set forth in DCC 18.36.140) prohibiting the siting of a dwelling on the undeveloped portions of the tract. Such covenants, conditions and restrictions are irrevocable, unless a statement of release is signed by the County Planning Director, or his authorized representative.***
- c. *No other dwellings shall be located on the tract.***

**FINDING:** The owner of the subject property does not own any contiguous land. Therefore, the subject property is not part of a tract<sup>5</sup>. These criteria do not apply.

- d. *The applicant shall provide evidence that any domestic water supply is from a source authorized in accordance with the Department of Water Resources Oregon Administrative Rules for the appropriation of ground water (Oregon Administrative Rules 690, Division 10) or surface water (Oregon Administrative Rules 690, Division 20) and not from a Class II stream as defined in the Forest Practices Rule (Oregon Administrative Rules Chapter 629). For purposes of DCC 18.40.050, evidence of a domestic water supply means:***
  - i. *Verification from a water purveyor that the use described in the application will be served by the purveyor under the purveyor's rights to appropriate water; or***
  - ii. *A water use permit issued by the Water Resources Department for the use described in the application; or***
  - iii. *Verification from the Water Resources Department that a water use permit is not required for the use described in the application. If the proposed water supply is from a well and is exempt from permitting requirements under ORS 537.545, the applicant shall submit the well construction report to the County upon completion of the well.***

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<sup>5</sup> "Tract" as used in DCC 18.16, 18.36 and 18.40, means one or more contiguous lots or parcels in the same ownership. A tract shall not be considered to consist of less than the required acreage because it is crossed by a public road or waterway.

**FINDING:** The applicant proposes to drill a private on-site well that is exempt from permitting requirements under ORS 537.545, and agrees to submit the well construction report upon completion of the well. Staff recommends a condition of approval to ensure compliance.

- e. ***If road access to a dwelling is by a road owned and maintained by a private party or by the Oregon Department of Forestry, the U.S. Bureau of Land Management or the U.S. Forest Service, then the applicant shall provide proof of a long term road access use permit or agreement. The road use permit may require the applicant to agree to accept responsibility for road maintenance.***

**FINDING:** The proposed road access to the dwelling is via Scale House Road. The applicant states the subject property has a long term road access agreement to use this road as access was granted to the public as part of Partition Plat No. 1990-35 and was also granted as part of a private easement agreement between the applicant and the Windlinx Ranch Trust (reference the Official Records of Deschutes County instrument number 1994-011023).

To bolster this argument, the applicant submitted a Policy of Title Insurance issued by AmeriTitle ensuring access to the subject property and a 2015 letter, prepared by Attorney Liz Fancher, with the following information:

*“Access is provided by Partition Plat No. 1990-35. The Windlinx plat dedicates an easement for road access across Parcel 3 of Partition Plat No. 1990-35 and across land owned by the Windlinx family to Knott Road. I have highlighted this easement and the language of dedication that appears on the face of the plat which is included as Exhibit A of this letter<sup>1</sup>. The access was created in order to obtain approval of the partition application and is binding on the developers, Don and Shirley Windlinx.*

*Robert and Shirley Windlinx granted an easement for access to property owned by Donald and Cameron Kerr that includes the subject property. The purpose of the easement was to assure the Kerrs of access over an access road being built by the State of Oregon over land owned by Windlinx to provide access to Knott Road for the Kerr and Windlinx properties in lieu of access to Highway 97. The easement is appurtenant to the land shown on Exhibit B of this letter. The subject property is located in the northwest corner and within the boundaries of the land described on the legal description as shown on Exhibit C.*

*The easement provides a legal description of the land benefitted by the easement (Exhibit B of the easement). See, Exhibit D. The land described is found in a specific location on the ground - where it is described in the easement (where shown on Exhibits B and C). The land excluded from the land included on Exhibit B of the easement is also described by reference to specific points on the ground. See, Exhibit D (Parcel 2 of deed from Brooks to State of Oregon). The location of the land served by the easement has not changed and was not change by approval of the lot line adjustment.*

Furthermore, the Windlinx-Kerr access easement does not limit the number of homes or lots that can be served by the access easement. In fact, it contemplates that the Kerr property will be divided and says that new lots will be served by the easement. See, Exhibit E, page 2.”

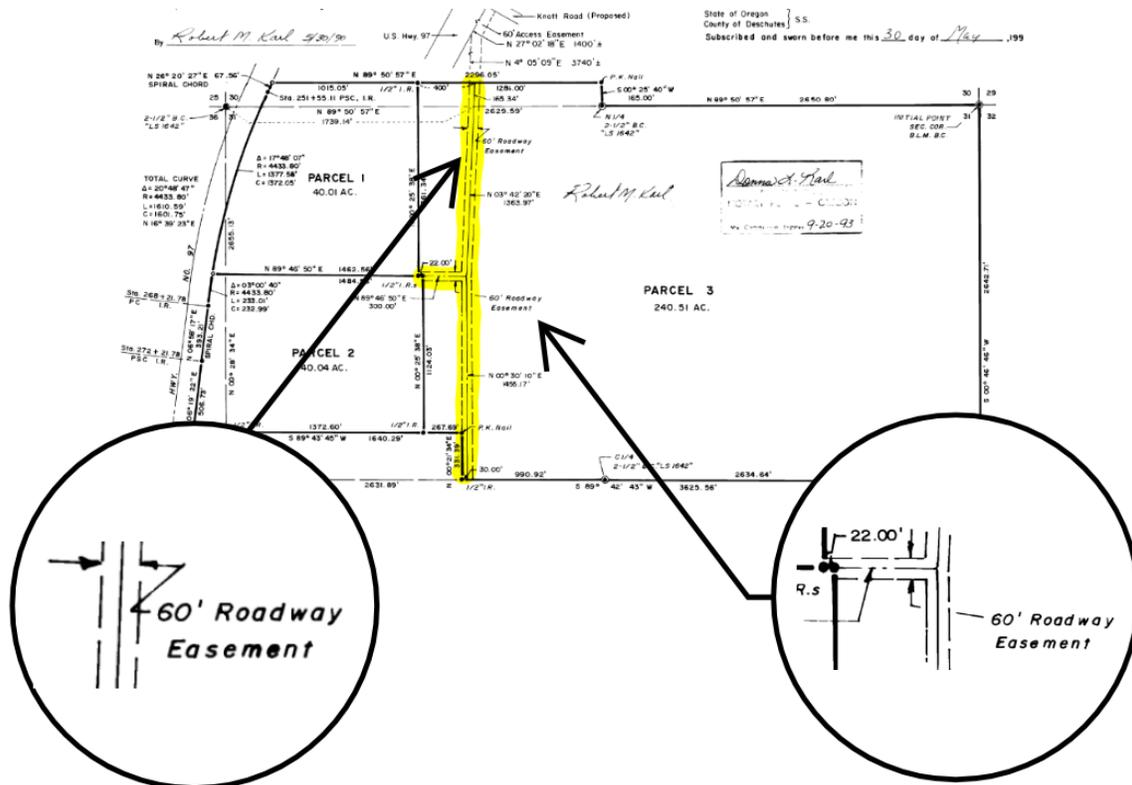
<sup>1</sup> The plat includes land north of Parcel 3 of Partition Plat No. 1990-35 owned by Windlinx that was not partitioned. The road easement on the plat extends across that land to Knott Road.

The Deschutes County Road Department confirmed the portion of Scale House Road lying within the area platted on Partition Plat No. 1990-35 is a public road (see Figure 4 below). However, the Road Department found no records indicating the remaining segments, with the exception of the segment crossing land owned by ODOT, are dedicated to the public.

Figure 4 – Public Road Dedications on Partition Plat No. 1990-35

## OWNER'S AFFIDAVIT AND DEDICATION

Know all men by these presents that we, Robert H. Windlinx and Shirley M. Windlinx, as owners in fee simple of the land shown on this partition plat, have caused said lands to be partitioned into parcels as shown and do hereby dedicate to the public forever, all streets and easements as shown and do hereby submit for approval and record said partition plat.



Separately, the applicant states a 1994 private easement agreement demonstrates the subject property has a long term road access agreement. Staff notes this agreement was established when the subject property was formerly identified by the Assessor’s Office as Tax Lot 99, on Tax Map 18-12 & Index (see Figure 5 below). Since this time, the subject property was adjusted via a property

line adjustment and is now currently identified as Tax Lot 600, on Tax Map 18-12-31 (see Figure 6 below).

Figure 5 – Subject Property on Former Tax Map 18-12

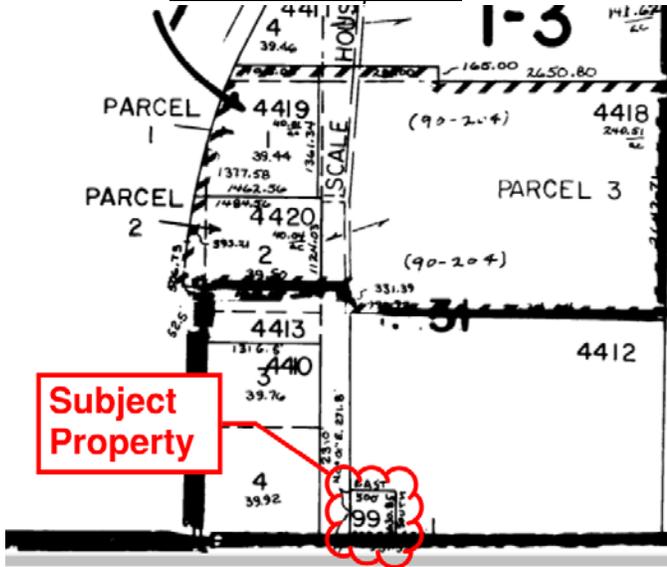
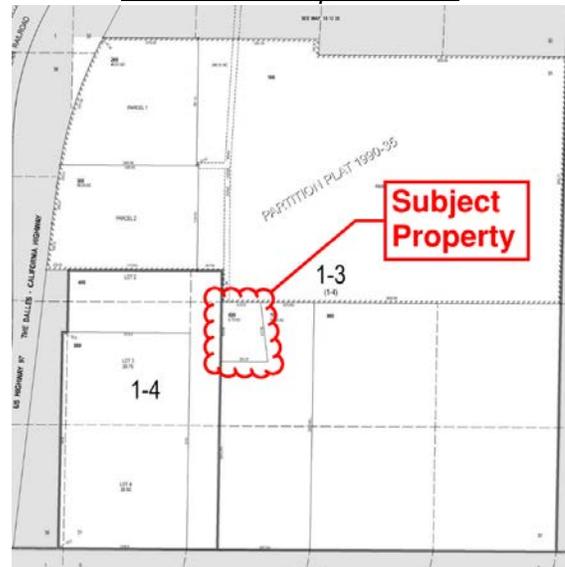


Figure 6 – Subject Property on Current Tax Map 18-12-31



In response to the Notice of Application, two nearby property owners submitted comments stating the subject property does not have legal access. Attorney Christopher Koback, as the representative of The Windlinx Family Trust, on whose property Scale House Road primarily traverses, provided the following remarks to the County on August 30, 2021:

*“The applicants have failed to demonstrate access as required under DCC 18.40.050(A)(1)(e). The applicants rely on an easement recorded in or about March 1994 between Robert and Shirley Windlinx, Grantor, and Donald and Cameron Kerr, Grantee (“Easement Agreement”). We enclosed a copy of the Easement Agreement as Exhibit 1. The easement only benefited the property that, at that time, was within a parcel expressly described as Tax Lot 4412. The Easement Agreement expressly excludes the property within the description of Tax Lot 99. The applicants acquired Tax Lot 99 in 1985. We enclosed a copy of that deed as Exhibit 2. Since the Grantee owned Tax Lot 99 in 1994, it is abundantly clear that the parties never intended the property identified as Tax Lot 99 to benefit from the easement. Moreover, in 2015, the Grantee acknowledged that Tax Lot 99 did not benefit from the easement because they sought an amendment from the Grantor that would have extended the easement over Tax Lot 99. We enclosed a copy of a July 15, 2015 letter with a Proposed Easement Amendment as Exhibit 3.*

*The applicants' attempt to use the line lot adjustment process to circumvent the parties' intent and expand the easement rights is unavailing. The lot line adjustment just relocated Tax Lot 99 north to facilitate using the template test provisions in the DCC to create a new undersized buildable parcel. If Tax Lot 99 remained where it was, it appears the applicants could never have even come close to having the required number of parcels within the template. As we will explain below, the applicants' effort failed because they still do not meet the template test.*

*In any event, relocating Tax Lot 99 does not expand the easement rights created in 1994. While the Windlinx Trust is prepared to seek relief in circuit court, the county cannot take a position that the issue we raise over the easement is a matter exclusively for the court and not relevant to the approvability of the application. On the face of the easement, it is clear; the easement rights extend only to Tax Lot 4412 and not to Tax Lot 99. The application is for approval of a template dwelling on "Tax Lot 99." On the face of the application material, the applicants do not have access rights to the property that is the subject of the application-Tax Lot 99."*

Additionally, Attorney Christopher Koback provided the following remarks in response to the applicant's incomplete letter response on October 22, 2021:

*"We do not agree with or accept Liz's analysis. The Kerrs' creative effort to use the lot line adjustment process to expand easement rights never contemplated by the drafters is not going to work. As you know, in construing an easement the court's role is to discern the nature and scope of the easement's purpose and to give effect to that purpose in a practical manner. Bloomfield v. Weakland, 224 Or App 433, 199 P 3d 318 (2008). The court will first examine the text in context. If the court needs to move past that stage because the easement is ambiguous, it will examine relevant extrinsic evidence. Id. The 1994 easement upon which the Kerrs rely only benefited the property that, at that time, was within a parcel expressly described as Tax Lot 4412. The Easement Agreement expressly excludes the property within the description of Tax Lot 99. The applicants acquired Tax Lot 99 in 1985. We enclosed a copy of that deed as Exhibit 2. Since the Grantee owned Tax Lot 99 in 1994, it is abundantly clear that the parties never intended the property identified as Tax Lot 99 to benefit from the easement. Within the relevant context, a court will find that the original parties never intended the Kerrs to be able to expand the easement to serve two lots, one being expressly excluded from the easement grant, simply by reconfiguring TL 4412.*

*If the court were to find the easement ambiguous, and entertain extrinsic evidence, our client's testimony will be unequivocal; they never intended the easement to benefit two parcels allowing two dwelling to burden their property. Moreover, in 2015, the Grantee acknowledged that Tax Lot 99 did not benefit from the easement because they sought an amendment from the Grantor that would have extended the easement over Tax Lot 99.*

*Our client is committed to upholding the purpose and intent of the 1994 easement even if it must go to the circuit court to do so."*

Staff asks the Hearings Officer to determine if the applicant has provided sufficient proof of a long term road access use permit or agreement.

Lastly, staff notes Scale House Road is not a County maintained road and under this criterion the applicant may be required to agree to accept responsibility for road maintenance. The 1994 private easement agreement states:

10. *The cost of maintenance of the Easement shall be shared by the parties in proportion to the use by each party of the Easement parcel.*

Staff asks the Hearings Officer to determine if the submitted materials demonstrate the necessary maintenance agreement is in place to ensure the road access standards required under DCC 18.40.080 will be met.

2. ***In addition, dwellings listed as a conditional use under DCC 18.40.030(X) shall be subject to the following standards or conditions:***
  - a. ***The conditional use standards set forth in DCC 18.40.040;***
  - b. ***The siting criteria set forth in DCC 18.40.060;***
  - c. ***The fire siting standards set forth in DCC 18.40.070;***
  - d. ***The fire safety design standards for roads set forth in DCC 18.40.080;***
  - e. ***The stocking requirements set forth in DCC 18.40.085, if applicable; and***
  - f. ***Any other provisions made applicable by DCC Title 18 or the comprehensive plan.***

**FINDING:** The criteria under the above-referenced subsections, along with all other applicable provisions of Title 18, are addressed in this staff report. The goals and policies of the Comprehensive Plan are implemented by the specific provisions of Title 18.

3. ***Dwellings in forest zones shall not be subject to conditional use standards.***

**FINDING:** The conditional use standards of DCC 18.128 are not addressed in this staff report.

4. ***Approval of a dwelling in the forest zone under DCC Chapter 18.40 shall include a condition of approval requiring that, prior to the issuance of a building permit, the landowner 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.***

**FINDING:** As noted in previous findings, the applicant has agreed to sign and record the Farm & Forest Easement agreement and relevant conditions of approval have been recommended to ensure compliance.

- D. ***Template Dwelling. For approval under DCC 18.40.050(D), a single family dwelling shall meet the following requirements:***
  1. ***The lot or parcel is predominantly composed of soils that are:***
    - ...
    - b. ***Capable of producing 21 to 50 cubic feet per acre per year of wood fiber if:***

**FINDING:** According to the Natural Resource Conservation Service (NRCS), the subject property is comprised entirely of Mapping Unit 156C soils (Wanoga-Fremkle-Henkle complex). The NRCS rates

both Wanoga and Henkle soils as capable of producing 50 cubic feet per acre per year of wood fiber rating and Fremkle soil has a productivity rating of 47 cubic feet per acre per year of wood fiber.

However, there are several comments in the record objecting to the accuracy of the NRCS soils classification for the soils on the subject property and requests for the applicant to provide an on-site study. To address these concerns, the applicant submitted a Forest Productivity Site Class Assessment report prepared by John Jackson. This report concludes the subject property is *not* capable of producing 50 cubic feet of annual growth per acre per year after analyzing size (6) different sample plots across the subject property. Based on the NRCS data and this site specific analysis, staff believes there is substantial evidence in the record to support the finding that the subject property is composed predominantly of soils capable of producing between 21 to 50 cubic feet per acre per year of wood fiber.

- i. All or part of at least seven other lots or parcels that existed on January 1, 1993, are within a 160 acre square centered on the center of the subject tract; and***

**FINDING:** The applicant submitted a template drawing prepared by John Lucey, a Registered Professional Land Surveyor, showing a “160-acre template” centered on the center of the subject property. Comments in the record question the accuracy of the 160-acre template and state “it appears that the applicants stretched the square to include Randy Windlinx's parcel to capture one lot and one dwelling”. Ultimately, comments in the record state the applicant should be required to provide surveyed measurements to verify the graphic depiction in the application.

Staff asks the Hearings Officer to determine if the applicant’s template drawing can be relied upon for the template test analysis.

After applying the 160-acre template centered on the subject property, the applicant is required to demonstrate *at least* seven (7) lots or parcels that existed on January 1, 1993 are within the 160-acre area. Assuming the applicant’s template has been drawn correctly, the table below describes five (5) of the seven (7) required properties. These five (5) properties were created by an approved partition or verified to be a legal lot of record through a formal Deschutes County Lot of Record Verification review.

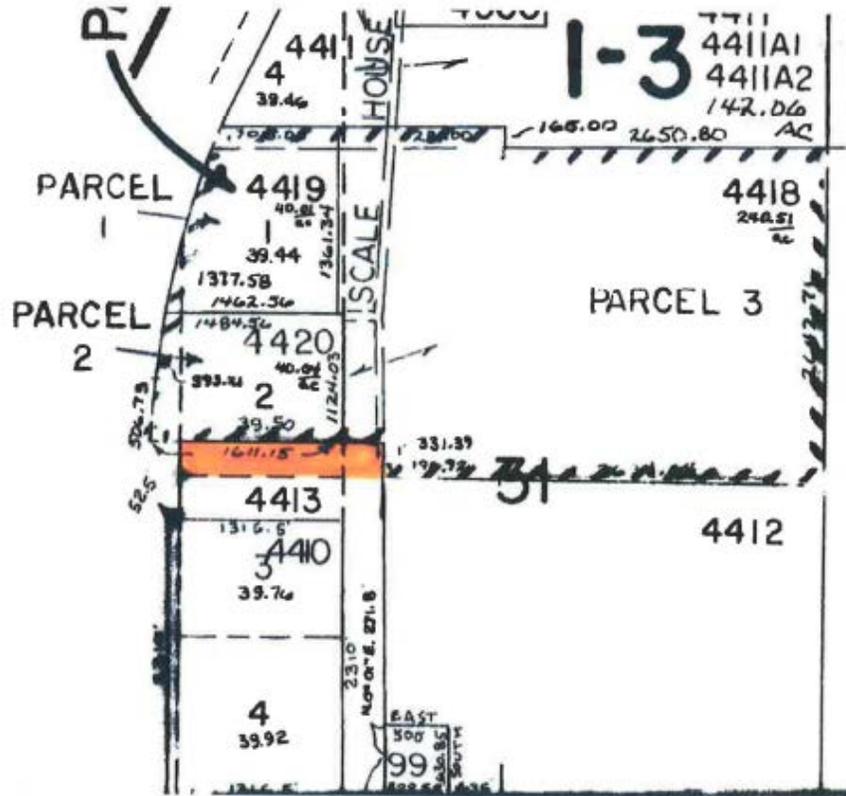
	<b>Tax Map &amp; Lot</b>	<b>Creation Date</b>	<b>DCC Verified Lot of Record</b>
1	18-12-31, TL 800	12/29/1904	Yes – LR-13-13
2	18-12-31, TL 700	5/1/1906	Yes – LR-13-13 / LL-13-40
3	18-12-31, TL 200	7/26/1990	Yes – Parcel 1 of PP1990-35
4	18-12-31, TL 300	7/26/1990	Yes – Parcel 2 of PP1990-35
5	18-12-31, TL 100	7/26/1990	Yes – Parcel 3 of PP1990-35

Additionally, the applicant has provided lot of record analyses to establish up to five (5) additional lots or parcels existed on January 1, 1993 and are located within the 160-acre area. Several comments in the record include objections to the analyses provided by the applicant. Below are the

lot of record findings included in the applicant's submittal dated October 21, 2021 with some of the referenced attachments and exhibits inserted for clarity.

6. *Lot 6 is a legal lot as it is the Remainder Parcel in Section 30. A remainder parcel was created in Section 30 by the approval of the Windlinx partition, MP-90-8. The NW ¼ of Section 31 was created as a 160-acre legal lot of record in 1908 by the grant of a patent by the USA to John L. Kever, Exhibit M of the application. A map depicting the approximate location of the Kever property is Exhibit N of the application. The patent is recorded at 2 Patent 98 of the patent records of the Deschutes County Clerk. Its boundaries were not lawfully altered until 1990 when it was partitioned. In 1990, all parts of the NW 1/4 of Section 31, other than an area about 331 feet wide by 2631 feet long in the approximate location shown on Exhibit O (also shown on Exhibit Has "Remainder Parcel TL 4413") were included in the Exhibit G 1990 partition plat. This left the area depicted on Exhibit O as a lawfully created remainder parcel. Like the Windlinx parcels, this lot of record was created in 1990 and was in existence in 1993.*

Exhibit O - Lot 6



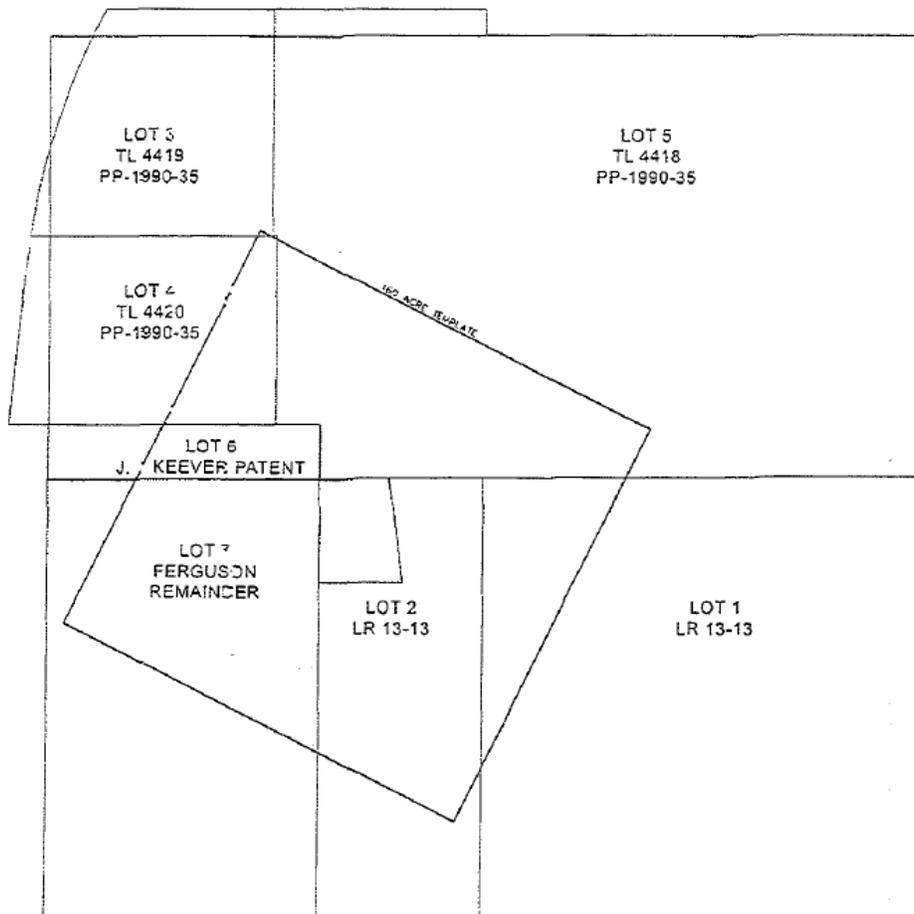
7. *Lot 7 is a legal lot as it is the Remainder of Ferguson Parcel. Lot 7 is a remainder lot that, depending on how the railroad deed is treated, consists of either one lot or three lots. If the railroad deed is treated as an easement as suggested by opponents, Lot 7 is one legal lot within the template.*

*The SW ¼ of Section 31 was created as a legal lot by a patent from the USA to John Ferguson filed on May 7, 1906 in Volume 1, page 421 of the patent records of the Crook County Clerk*

and, later, in Volume 1, page 300 of the patent records of Deschutes County. A copy of Deschutes County's record of this patent is Exhibit P of this application. The location of the Parent Parcel is shown on Exhibit Q.

Land in the east part of the Ferguson parcel has been determined to be a legal lot of record in LR-13-13 (Legal Lots of Record 2 and 3) because these parcels were legally created from the Ferguson parcel. This leaves the remainder of the Ferguson Parcel as a lawfully created remainder parcel in the approximate location shown on Exhibit R. The location of this remainder parcel is also shown on Attachment 10. This remainder parcel constitutes the seventh parcel located within the template.

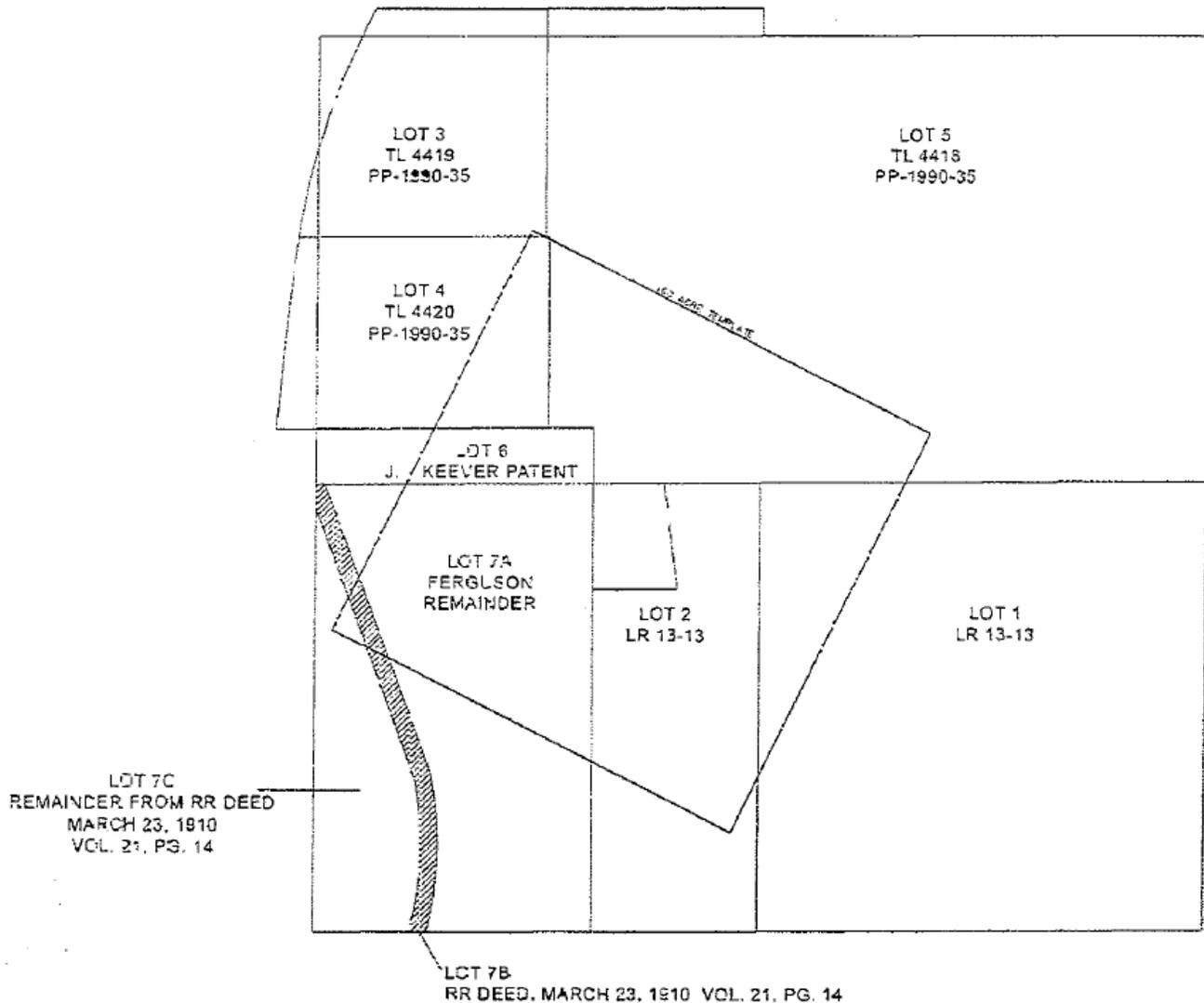
Attachment 10 - Lot 7



Lots 7A, 7B and 7C. Lots Created from Ferguson Parcel by Deed to Railroad. If the railroad deed is treated as a conveyance of fee, Lot 7 is three legal lots of record.

The 160-acre Ferguson parcel remainder parcel was divided into three parts because a 100' strip of land the entire length of the area, the Railroad Parcel, was created as a legal lot in 1910 in the approximate location shown on Exhibits S and H. The location of the three lots is shown on Attachment 11 as Lots 7A, 7B and 7C.

Attachment 11 - Lots 7A, 7B and 7C



*Railroad Parcel (Lot 7B). A parcel of land 100-foot wide running the length of the SW ¼ of Section 31, T18S, R12E was conveyed to the Oregon Trunk Railway in 1910 by John Ferguson and wife. A copy of the deed to the railway is Exhibit T of this application. The approximate location of the railroad parcel is shown on a map prepared by ODOT to accompany the Resolution adopted by the Highway Commission to vacate the original Dalles California Highway, State Primary Highway No. 4- now Scale House Road in Section 30 and 31 of T18S, R12E recorded at Volume 126, page 288 of the deed records of the Deschutes County Clerk. A copy of the Resolution is Exhibit U of this application. The relevant sections of the map that were attachments to the resolution are included as Exhibit V and W of this application. The map exhibits were obtained from the Deschutes County Road Department. Exhibit R shows that the ODOT map depicts the location of the Oregon Trunk Survey as a dashed line with the label "Oregon Trunk Ry. (Survey)." The location of the Oregon Trunk Railway in Section 31 is shown on Exhibit S. The exact location of the railroad parcel is not known but it is clear that the railroad parcel is located within the template. The applicant's*

surveyor reviewed this map and showed the approximate location of the railroad on Exhibit H.

Lot 7A. Lot A is the area east of the Railroad Parcel located within the boundaries of the Exhibit R remainder parcel. This area is a legally created remainder parcel. Deeds conveyed parts of this lot in the 1980s. These deeds were conveyed at a time when partition approval was required to divide land. Since no such approval was obtained, these deeds did not alter the boundaries of Lot A, B or C. *Landwatch Lane County v. Lane County (Kasie), 79 Or LUBA 111 (LUBA No. 2018-077, February 6, 2019)(illegal land divisions do not create new lots and parcels - old, lawfully created parcels are to be used for template test analysis due to ORS 92.017); Landwatch Lane County v. Lane County (Doughty), Or T,UBA (LUBA No. 2019-044, October 15, 2019)(new parcels not created by deed when partition approval required; ORS 92.017 provides original lot lines remain).*

Lot 7C is the area located to the west of the Railroad Parcel, a small portion of which lies within the template.

The properties identified as Lot 6 and Lot 7 by the applicant are currently owned by the Oregon High Desert Museum. These additional lots or parcels have not been formally reviewed by the County to confirm if they comply with the DCC 18.04.030 "Lot of Record" definition. Previous land use approvals for the Oregon High Desert Museum have recognized the property<sup>6</sup> as one (1) legal lot of record.

Staff asks the Hearings Officer to determine if the properties identified as Lot 6 and Lot 7 by the applicant meet the requirements for the template test analysis.

**ii. At least three dwellings existed on January 1, 1993, and continue to exist on the other lots or parcels.**

**FINDING:** Assuming the applicant's 160-acre template has been drawn correctly, the table below describes three (3) dwellings that existed on January 1, 1993 on other lots or parcels within the 160-acre template:

	<b>Tax Map &amp; Lot</b>	<b>Year Built</b>	<b>Structure Currently Assessed as Dwelling?</b>
1	18-12-31, TL 800	1981	Yes
2	18-12-31, TL 200	1992	Yes
3	18-12-31, TL 100	1981	Yes

The Deschutes County Community Development permit records and Deschutes County Assessor records show the three (3) dwellings have existing since at least January 1, 1993 and continue to exist.

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<sup>6</sup> Identified on Deschutes County Tax Assessor's Map 18-12-31, as tax lots 400, 500, and Map 18-11, as tax lot 1900.

**2. Requirements of Applying Template**

**a. Lots or parcels within urban growth boundaries shall not be used to satisfy the template requirements under this subsection.**

**FINDING:** The 160-acre square used for the template dwelling analysis does not include lots or parcels within an urban growth boundary.

**b. Except as provided by subsection (c) of this section, if the tract described in DCC 18.40.050(D) abuts a road that existed on January 1, 1993, the measurement may be made by creating a 160-acre rectangle that is one mile long and 1/4 mile wide centered on the center of the subject tract and that is to the maximum extent possible, aligned with the road.**

**FINDING:** This criterion allows, but does not require, an applicant to apply the template by creating a 160-acre rectangle that is one mile long and 1/4 mile wide centered on the center of the subject tract and that is to the maximum extent possible, aligned with the road. The subject property is 6.7-acres in size and is not part of a tract. The applicant has requested to apply the template as described under DCC 18.40.050(D)(1)(b)(i).

**c. (A) If a tract 60 acres or larger described in DCC 18.40.050(D) abuts a road or perennial stream, the measurement shall be made in accordance with subsection (b) of this section. However, one of the three required dwellings shall be on the same side of the road or stream as the tract, and;**

...

**FINDING:** The subject property is 6.7-acres in size and is not part of a tract. Therefore, this criterion does not apply.

Section 18.40.060. Siting of Dwellings and Structures.

**A. All new dwellings and structures approved pursuant to DCC 18.40.030 or permitted under DCC 18.40.020 shall be sited in accordance with DCC 18.40.060 and DCC 18.40.070.**

**B. These criteria are designed to make such uses compatible with forest operations and agriculture, to minimize wildfire hazards and risks, and to conserve values found on forest lands.**

**FINDING:** The criteria under DCC 18.40.060 and 18.40.070 are addressed later in this staff report.

**C. These criteria shall include the following such that the dwellings and structures shall be sited on the parcel so that they:**

**1. Have the least impact on nearby or adjoining forest or agricultural lands;**

**FINDING:** Staff relied upon the following land use decision to address this criterion:

*Sisters Forest Planning Committee v. Deschutes County*, 49 Or LUBA 78 (2004), – LUBA Headnotes Summary:

“The OAR 660-006-0029(1) requirement to identify a dwelling location that “least impacts” resource operations and “minimizes” wildfire risks and adverse impacts on resource use entails some discussion of alternative locations for the dwelling on the parcel and a demonstration that the preferred location is, on balance, equal or superior to other potential locations on the parcel.”

The proposed development area for the template dwelling is centrally located on the subject property and will be within 400 feet of Scale House Road. There appear to be no nearby farming practices and the closest EFU-zoned property is more than 2.8 miles away. Setbacks from property lines to the proposed development will provide buffering from nearby forest zoned properties. At the time of writing this staff report, no concerns were raised by nearby property owners or public agencies regarding the location of the proposed dwelling. However, the applicant has not provided an analysis of alternative dwelling locations to demonstrate the requested location is equal or superior to other potential locations on the subject property. For this reason, staff asks the Hearings Officer to make specific findings on this issue.

2. ***Ensure that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;***

**FINDING:** The subject property is 6.7-acres in size and is not part of a tract.

3. ***Minimize the amount of forest lands used to site the dwelling and structures, road access and service corridors;***

**FINDING:** The proposed building envelope meets all required F2 setbacks and will be within 400 feet of Scale House Road. There are no existing structures on-site. Staff is uncertain if the proposed building envelope minimizes the amount of forest lands used to site the dwelling and structures, road access, and service corridors as required by this criterion. Staff asks the Hearings Officer to make specific findings on this issue.

4. ***Are consistent with the applicable provisions of DCC 18.40.070, minimizes the risks associated with wildfire.***

**FINDING:** The provisions of DCC 18.40.070 are addressed later in this staff report.

- D. ***Siting criteria satisfying the above may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees.***

**FINDING:** As addressed above, staff evaluated these factors as part of the review of the requested dwelling location.

Section 18.40.070. Fire Siting Standards for Dwellings and Structures.

***The following fire siting standards shall apply to all new dwellings and permanent structures (including permitted uses):***

**A. Access.**

- 1. If a water supply, such as a swimming pool, pond, stream or lake, is available and suitable for fire protection or is required under DCC 18.40.070, then road access to within 15 feet of the water's edge shall be provided for pumping units. The road access shall be constructed and maintained to accommodate the maneuvering of fire fighting equipment during the fire season. Permanent signs shall be posted along the access route to indicate the location of the emergency water source.***

**FINDING:** The subject property has no available water supply such as a swimming pool, pond, stream or lake and, as such, this criterion does not apply to the subject application.

- 2. Road access to the dwelling or structure shall meet the road design standards described in DCC 18.40.080.***

**FINDING:** The road access requirements of DCC 18.40.080 are reviewed for compliance later in this staff report.

**B. Firebreaks. The owners of dwellings and structures shall construct and maintain the following firebreaks on land surrounding the structures that is owned or controlled by the owner:**

- 1. Primary Firebreak. Prior to use, a primary firebreak, not less than 10 feet wide, shall be constructed containing nonflammable materials. This may include lawn, walkways, driveways, gravel borders or other similar materials.***
- 2. Secondary Firebreak. A secondary firebreak of not less than 20 feet shall be constructed outside the primary firebreak. This firebreak need not be bare ground, but can include a lawn, ornamental shrubbery or individual or groups of trees separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed.***
- 3. Fuel Break. A fuel break shall be maintained, extending a minimum of 100 feet in all directions around the secondary firebreak. Individual and groups of trees within the fuel break shall be separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. Small trees and brush growing underneath larger trees shall be removed to prevent spread of fire up into the crowns of the larger trees. All trees shall be pruned to at least eight feet in height. Dead fuels shall be***

***removed. The fuel break shall be completed prior to the beginning of the coming fire season.***

- 4. No portion of a tree or any other vegetation shall extend to within 15 feet of the outlet of a stovepipe or chimney.***

**FINDING:** The applicant agrees to comply with the above-referenced fire and fuel breaks. Staff recommends conditions of approval be added to ensure compliance.

- C. Caretaker residences and private accommodations for fishing shall not be located on hillsides steeper than 30 percent and containing flammable fuels. A single family dwelling shall not be sited on a slope greater than 40 percent.***

**FINDING:** The applicant does not propose a caretaker residence or private accommodations for fishing. Based on the submitted application materials, the proposed building envelope has a slope significantly less than 40 percent.

- D. The applicant for a single family dwelling, caretaker residence or private accommodations for fishing shall obtain an address from the County address coordinator and shall display that number in a location of the property that is clearly visible from the road used as the basis for numbering. The numbers shall not be less than three inches in height, shall be painted in a contrasting or visible color and shall comply with all other applicable standards for signs.***

**FINDING:** The applicant agrees to comply with this criterion. Staff recommends a condition of approval be added to ensure compliance.

***E. Structural Standards.***

- 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.***

**FINDING:** The applicant agrees to comply with the above criteria. Staff recommends conditions of approval be added to ensure compliance.

- F. Fire Protection. Single family dwellings, caretaker residences and private accommodations for fishing shall be located upon a parcel for which fire protection services are available or where alternative protective measures are authorized by DCC 18.40.070(F).***

- 1. For the purposes of DCC 18.40.070 fire protection services are available if the parcel is located within the boundaries of a fire protection district or residential fire protection service is provided by contract, as evidenced by a written, signed contract.***

...

**FINDING:** The subject property is located within the boundaries of the Deschutes County Rural Fire Protection District #2. To demonstrate compliance with this requirement, the applicant submitted the recorded order approving the Kerr Annexation into the Deschutes County Rural Fire Protection District #2 (reference Board Order No. 2015-026 in Deschutes County Commissioners' Journal Book 2015, Page 170). As noted earlier, there is a comment in the record questioning whether the subject property has been annexed.

Section 18.40.080. Fire Safety Design Standards for Roads.

***The following standards apply to all roads and driveways, except for private roads accessing only commercial forest uses, which access uses permitted under DCC 18.40.020 or approved under DCC 18.40.030.***

**FINDING:** Staff notes the applicant agrees with the Plan's recommendation to establish an alternative access on the eastern boundary of the subject property. The "Access and Site Design" section in the original Wildfire Mitigation Plan states:

*"An old logging railroad grade traverses in a north-south direction along the east side of this parcel. This old route continues across the adjoining parcel to the south and should be considered as an alternative access route for both emergency egress from the residence and for fire apparatus access with connection to the primary driveway. This grade is of adequate design to support emergency fire equipment. It should be kept clear of vegetation and blow-down from the adjacent forest stand. Any deterioration of the running surface should be repaired to ensure all weather use."*

Staff asks the Hearings Officer to determine if this alternative access is subject to the standards of this section.

- A. *Roads, bridges and culverts shall be designed and maintained to support a minimum gross vehicle weight (GVW) of 50,000 lbs. If bridges or culverts are involved in the construction of a road or driveway, written verification of compliance with the 50,000 lb. GVW standard shall be provided by a professional engineer registered in Oregon.***

**FINDING:** The applicant agrees to comply with these standards. Staff recommends a condition of approval be added to ensure compliance.

- B. *Access roads shall have an unobstructed horizontal clearance of not less than 20 feet and an unobstructed vertical clearance of not less than 13.5 feet, and provide an all weather surface.***

**FINDING:** The applicant agrees to comply with these standards. Staff recommends a condition of approval be added to ensure compliance.

- C. Turnarounds shall have a minimum of 50 feet of turn radius with an all weather surface and be maintained for turning of fire fighting equipment.**

**FINDING:** The applicant agrees to comply with these standards. Staff recommends a condition of approval be added to ensure compliance.

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

**FINDING:** The applicant agrees to comply with these standards. Staff recommends a condition of approval be added to ensure compliance.

Section 18.40.085. Stocking Requirement.

**All dwellings approved under DCC 18.40 shall be subject to the provisions of DCC 18.40.085.**

**A. Stocking Requirement.**

- 1. Dwellings approved under DCC 18.40 shall include a condition requiring the owner to plant a sufficient number of trees on the tract to demonstrate that the tract is reasonably expected to meet Department of Forestry stocking requirements specified in Department of Forestry administrative rules (Oregon Administrative Rules 629) in force at the time the approval is granted.**

**FINDING:** The applicant agrees to comply with the criteria above. Staff recommends a condition of approval be added to ensure compliance.

- 2. If the lot or parcel is more than 30 acres, the property owner shall submit a stocking survey report to the county assessor and the assessor will verify that the minimum stocking requirements have been met by the time required by Department of Forestry rules.**

**FINDING:** The subject property is 6.7-acres in size. Therefore, the property owner is not required to submit a stocking survey report to the County Assessor for verification of the minimum stocking requirements. This criterion does not apply.

**B. Reporting Requirements.**

- 1. The Planning Director or his designee shall notify the County Assessor of any stocking requirement condition at the time the dwelling is approved.**

**FINDING:** A notice of decision will be sent to the County Assessor. If the subject application is approved, the notice will include all conditions of approval. This criterion will be met.

2. ***The property owner shall submit a stocking survey report to the County Assessor and the Assessor shall verify that the minimum stocking requirements have been met by the time required under Department of Forestry rules. The Assessor shall inform the Department of Forestry in cases where the property owner has not submitted a stocking report or where the survey report indicates that minimum stocking requirements have not been met.***
3. ***Upon notification by the Assessor, the Department of Forestry shall determine whether the tract meets minimum stocking requirements of the Forest Practices Act. That decision shall be solely the decision of the Department of Forestry. If the department determines that the tract does not meet those requirements, the department shall notify the owner and the assessor that the land is not being managed as forest land. The Assessor shall then remove the forest land designation pursuant to ORS 321.359. The tax penalty imposed by the Assessor under DCC 18.40.085 shall be the only sanction for failure to meet stocking requirements.***

**FINDING:** As detailed in the staff findings above, the property owner is not required to submit a stocking survey to the County Assessor. Nevertheless, the property owner is aware of the stocking requirements and related tax assessment penalties described above. These criteria will be met.

Section 18.40.090. Dimensional Standards.

***In an F 2 Zone, the following dimensional standards shall apply:***

- A. ***The minimum lot size is 80 acres; or***
- B. ***Land divisions creating parcels less than 80 acres in size may only be approved for uses listed in DCC 18.40.030(D) through (P), provided that those uses have been approved pursuant to DCC 18.40.040. Such division shall create a parcel that is the minimum size necessary for the use.***

**FINDING:** The proposal does not include a new or altered lot size. These criteria do not apply.

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

**FINDING:** No height information was provided for the proposed dwelling. Staff recommends as a condition of approval, no building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed by DCC 18.120.040.

Section 18.40.100. Yards and Setbacks.

- A. ***The front yard setback shall be 40 feet from a property line fronting on a local street, 60 feet from a property line fronting on a collector and 100 feet from a property line fronting on an arterial.***
- B. ***Each side yard setback shall be a minimum of 25 feet except:***

1. ***All parcels or lots with a side yard adjacent to zoned forest land shall have a minimum side yard of 100 feet; and***
  2. ***Tracts 1-58 located in Haner Park, located in Township 22, Range 09, Section 09BB and Section 04CC, and Tax Lot 2209000000600 shall have a minimum side yard of 25 feet as long as the side yard abuts the Forest Use 2 zone.***
- C. *Rear yards shall be a minimum of 25 feet, except:***
1. ***All parcels or lots with rear yards adjacent to zoned forest land shall have a minimum rear yard of 100 feet; and***
  2. ***Tracts 1-58 located in Haner Park, located in Township 22, Range 09, Section 09BB and Section 04CC, and Tax Lot 2209000000600 shall have a minimum rear yard of 25 feet as long as the rear yard abuts the Forest Use 2 zone.***
- 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 proposed dwelling is subject to the 100-foot side and rear yard setback above. The proposed building envelope complies with the setbacks described in A-D above. Staff recommends 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 18.40.110. Stream Setbacks.

***All sewage disposal installations, such as vault toilets, septic tanks and drainfield systems shall be set back from the ordinary high water mark along all streams and lakes a minimum of 100 feet measured at right angles to the ordinary high water mark. 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:** The property is not adjacent to a stream or lake.

Section 18.40.130. Rimrock Setback.

***Setbacks from rimrock shall be as provided in DCC 18.116.160.***

**FINDING:** There is no rimrock in the project vicinity. This criterion does not apply.

## 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.

## Title 22, Deschutes County Development Procedures Ordinance

### Chapter 22.16, Development Action Procedures

#### Section 22.16.020. Decision.

- D. *A development action decision becomes final when no further appeal under DCC Title 22 is possible.***

**FINDING:** In 2013, the Deschutes County Planning Division approved a property line adjustment that reconfigured the subject property to its current configuration (reference file no. LL-13-40). This Development Action became final on October 15, 2013 after the close of the appeal period under DCC Title 22. Public comments in the record have raised concerns regarding whether this adjustment should have been approved. However, as noted above, the appeal period has ended and the property line adjustment decision is final.

## SYSTEM DEVELOPMENT CHARGE

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$4,757 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 \$3,853 ( $\$4,757 \times 0.81$ ). 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 30TH. DESCHUTES COUNTY'S SDC RATE IS INDEXED AND RESETS EVERY JULY 1ST. WHEN PAYING AN SDC, THE ACTUAL AMOUNT DUE IS DETERMINED BY USING THE CURRENT SDC RATE AT THE DATE THE BUILDING PERMIT IS ISSUED.**

#### **IV. RECOMMENDATION**

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

- Staff asks the Hearings Officer to determine if there were any procedural errors associated with the posted notice requirements of DCC 22.24.030(B).
- Staff asks the Hearings Officer to determine if the applicant has appropriately described all forest practices in the area.
- Staff asks the Hearings Officer to determine if the applicant has demonstrated the proposed residential use will not significantly increase the cost of accepted forest practices on the nearby federally managed forestlands.
- Staff asks the Hearings Officer to determine if an alternative access route is required to ensure the proposed residential use will not significantly increase fire suppression costs or significantly increase risks to fire suppression personnel. If yes, what areas need to be improved and maintained?
- Staff asks the Hearings Officer if the alternative access needs to be improved to the road standards described in DCC 18.40.080 to ensure the proposed residential use will not significantly increase fire suppression costs or significantly increase risks to fire suppression personnel.
- Staff asks the Hearings Officer to determine if the applicant has provided proof of a long term road access use permit.
- Staff asks the Hearings Officer to determine if the submitted materials demonstrate the necessary maintenance agreement is in place to ensure the access standards required under DCC 18.40.080 will be met.
- Staff asks the Hearings Officer to determine if the applicant's 160-acre template drawing can be relied upon for the template test analysis.
- Staff asks the Hearings Officer to determine if the properties identified as Lot 6 and Lot 7 by the applicant meet the requirements for the template test analysis.
- Staff asks the Hearings Officer to determine if the applicant has demonstrated the proposed building envelope for the dwelling will have the least impact on nearby or adjoining forest or agricultural lands.

- Staff asks the Hearings Officer to determine if the applicant has demonstrated the proposed building envelope for the dwelling will minimize the amount of forest lands used to site the dwelling and structures, road access and service corridors.

**V. RECOMMENDED CONDITIONS OF ANY 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.** Other Required Permits. The owner shall obtain any necessary permits from the Deschutes County Building Division and Environmental Soils Division.
- C.** Farm and Forest Management Easement. **Prior to issuance of any building or septic permit for the dwelling,** the land owner shall sign and record in the County Clerk's office a written statement recognizing the rights of adjacent and nearby land owners to conduct forest operations consistent with the Forest Practices Act and Rules.
- D.** Dwelling Design and Introduced Landscaping. The owner shall incorporate the following design standards as described in the Wildfire Mitigation Plans prepared by John Jackson:
1. Structural development on the subject property shall be designed and constructed according to the standards described in Oregon Residential Specialty Building Code R327 and as referenced in John Jackson's attached "Summary of Oregon Residential Specialty Code R327.4-Wildland Hazard Mitigation" and "Wildfire Hazard Mitigation" documents. Adherence to these design standards shall be verified by the written confirmation of a design professional, licensed engineer, or wildfire professional;
  2. Gutter installations shall be limited to entry areas and other passageways that potentially affect foot traffic corridors;
  3. Any landscaping in the form of introduced vegetation shall be selected from the list of fire-resistant plants included in the "Fire-Resistant Plants for Home Landscape" informational guide provided in conjunction with John Jackson's submitted report.
- E.** Initial Vegetation Treatment for Development Area. **Prior to issuance of any building permit for the dwelling,** the owner shall complete the following vegetation treatments as described in the Wildfire Mitigation Plans prepared by John Jackson:
1. Where the treatment and thinning standards exceed those included in DCC 18.40.070(B), the applicant shall establish fuel and fire breaks around any structural development on the subject property in line with the standards outlined in the "Defensible Space" informational guide provided in conjunction with John Jackson's submitted report.
  2. Completion of the above-referenced vegetation treatment shall be confirmed by a letter submitted to the Planning Division from a professional forester or other

wildland fire expert.

- F. Initial Onsite Access Improvements. Prior to issuance of any building permit for the dwelling,** the owner shall complete the following access improvements:
1. Improve the internal access system on the subject property by providing a looped residential driveway design with both ends connecting to Scale House Road.
  2. Establish a 30-foot wide fuel break along the sides of any driveway by:
    - a. Removing all brush within larger tree driplines;
    - b. Trimming all dead branches to a height of at least 8 feet;
    - c. Removing any forest debris accumulations that could contribute to ground fire intensity;
    - d. Removing all small to medium sized juniper within the first 15 feet measured from driveway centerline; and
    - e. Mowing annual grasses within the first 15 feet measured from driveway centerline.
  3. Improve and maintain an alternative access route, with an all-weather surface, along the old logging road on the east boundary of the subject property.
  4. Completion of the above-referenced access improvements shall be confirmed by a letter submitted to the Planning Division from a professional forester or other wildland fire expert.
- G. Ongoing Fuels Management & Vegetation Treatments.** The applicant shall complete the following as described in the Wildfire Mitigation Plans prepared by John Jackson:
1. Within the next 2 years, the small pine thickets and trees with lower branches that have died due to the recent under-burn shall be identified and removed.
  2. Annually clear underneath elevated wood decks, if utilized, of wind-blown flammable debris accumulation, screened, or otherwise enclosed.
  3. Each spring fire-resistant roofing shall be cleared for accumulations of needles and other flammable debris.
  4. Maintain the 30-foot wide fuel break along either side the proposed driveway centerline.
- H. Ongoing Evaluation of Vegetation Treatments. For as long as a dwelling exists on-site,** the owner shall have the subject property evaluated by a professional forester describing the condition of vegetation on the property, condition of previously treated areas (if any), recommended treatment (if any), and a schedule for treatment completion.
1. The above-referenced evaluation shall be completed at a frequency of at least once every five (5) years, commencing from the date this decision becomes final.
  2. At least once every ten (10) years, the owner shall submit an evaluation report prepared by a professional forester.
  3. A copy of each professional forester evaluation shall be submitted to the Planning Division.
- I. Well Report.** The owner shall submit a well construction report to the County upon completion of the proposed well.

- J. Firebreaks. Prior to issuance of any building permit for the dwelling,** the owners of dwelling and structures shall construct and maintain the following firebreaks on land surrounding the structures that is owned or controlled by the owner:
1. Primary Firebreak. A primary firebreak, not less than 10 feet wide, shall be constructed containing nonflammable materials. This may include lawn, walkways, driveways, gravel borders or other similar materials.
  2. Secondary Firebreak. A secondary firebreak of not less than 20 feet shall be constructed outside the primary firebreak. This firebreak need not be bare ground, but can include a lawn, ornamental shrubbery or individual or groups of trees separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed.
  3. Fuel Break. A fuel break shall be maintained, extending a minimum of 100 feet in all directions around the secondary firebreak. Individual and groups of trees within the fuel break shall be separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. Small trees and brush growing underneath larger trees shall be removed to prevent spread of fire up into the crowns of the larger trees. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed. The fuel break shall be completed prior to the beginning of the coming fire season.
  4. Completion of the above-referenced fire and fuel breaks shall be confirmed by a letter submitted to the Planning Division from a professional forester or other wildland fire expert.
- K. Address. Prior to issuance of any building permit for the dwelling,** the owner shall obtain an address from the County address coordinator and shall display that number in a location of the property that is clearly visible from the road used as the basis for numbering. The numbers shall not be less than three inches in height, shall be painted in a contrasting or visible color and shall comply with all other applicable standards for signs.
- L. Structural Standards.** The following standards apply to the proposed dwelling and all other structures on the subject property:
1. All 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. All structures containing a chimney shall have a spark arrester.
- M. Fire Safety Design Standards for Roads. Prior to issuance of any building permit for the dwelling,** the owner shall complete the following standards for all roads and driveways, except for private roads accessing only commercial forest uses:
1. Roads, bridges and culverts shall be designed and maintained to support a minimum gross vehicle weight (GVW) of 50,000 lbs. If bridges or culverts are involved in the construction of a road or driveway, written verification of compliance with the 50,000 lb. GVW standard shall be provided by a Professional Engineer, registered in Oregon.

2. Access roads shall have an unobstructed horizontal clearance of not less than 20 feet and an unobstructed vertical clearance of not less than 13.5 feet, and provide an all weather surface.
3. Turnarounds shall have a minimum of 50 feet of turn radius with an all weather surface and be maintained for turning of fire fighting equipment.
4. Road grades should not exceed eight percent, with a maximum of 12 percent on short pitches. Variations from these standards may be granted by the fire service having responsibility for the area when topographic conditions make these standards impractical and where the local fire protection district states their fire fighting equipment can negotiate the proposed road grade.
5. Completion of the above-referenced road and driveway standards shall be confirmed by submitting a letter submitted to the Planning Division from a professional engineer.

**N.** Stocking Requirement. The owner shall plant a sufficient number of trees on the tract to demonstrate that the tract is reasonably expected to meet Department of Forestry stocking requirements specified in Department of Forestry administrative rules in force at the time the approval is granted.

**O.** Building Height. The proposed dwelling shall not exceed 30 feet in height, except as approved under DCC 18.120.040.

**P.** 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.

#### **DESCHUTES COUNTY PLANNING DIVISION**



Written by: Caroline House, Associate Planner



Reviewed by: Peter Gutowsky, Director

#### Attachments:

1. Proposed Building Envelope
2. Wildfire Mitigation Plan