

## HEARINGS OFFICER DECISION

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

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

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

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

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

Collectively referred to as the "Subject Property."

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

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

**HEARING TIMES/DATES:** 6:00 pm, Tuesday, December 5, 2023  
6:00 pm, Tuesday, February 6, 2024

**STAFF CONTACT:** Haleigh King, Associate Planner  
Phone: 541-383-6710  
Email: Haleigh.King@deschutes.org

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

### I. APPLICABLE CRITERIA

Deschutes County Code (DCC)  
Title 18, Deschutes County Zoning Ordinance  
Chapter 18.16, Exclusive Farm Use Zones (EFU)  
Chapter 18.56, Surface Mining Impact Area Combining Zone (SMIA)  
Chapter 18.88, Wildlife Area Combining Zone (WA)

**II. BASIC FINDINGS**

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

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

**REVIEW PERIOD:** The Conditional Use applications were submitted on April 19, 2023. The applications were deemed incomplete and an incomplete letter was sent to the Applicant on May 19, 2023. The Applicant provided a response to the incomplete letter and requested the applications be deemed complete on September 15, 2023. The Applicant subsequently tolled the land use clock from October 4, 2023 to October 11, 2023, again from October 31, 2023 to November 14, 2023 and from the December 5, 2023 to February 6, 2024 and finally tolled for the time-period of February 6, 2024 to February 27, 2024; a total of 84 clock days to added from the date of March 4, 2024. The final action date (150<sup>th</sup> day), therefore, is May 27, 2024.

The Surface Mine Impact Area Review applications (File Nos. 247-23-000737-SMA, 738-SMA, 739-SMA) were submitted on October 25, 2023 and deemed complete by the Planning Division on November 24, 2023. The original 150<sup>th</sup> day on which the County must take final action on these applications was April 22, 2024. With the 84 days added from April 22, 2024 the final action date (150<sup>th</sup> day) is July 15, 2024.

**PROPOSAL:** The Applicant proposed to establish a nonfarm dwelling on each of the Subject Properties. Sewage disposal will be via an on-site wastewater system and water is anticipated to be provided by an on-site well. These applications are addressed in one Hearings Officer Decision but it is important to understand that each Conditional Use Permit and corresponding SMIA Review are distinct and separate land use applications.

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

Owner	Tax Lots	Total Ac./ Irrigated Ac.	Farm Tax	Dwelling Unit	Soil Mapping Units
Deep Canyon LLC <i>West</i>	14-12, Tax Lot 706	20 / 0	Yes	No	101E, 106D, 71A
Grossmann <i>North</i>	14-12, Tax Lot 702	164.99 / 82.75	Yes	Yes <sup>1</sup>	101E, 106D, 71A, 81F, 71B

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

Two Canyons LLC <i>East</i>	14-12, Tax Lot 1999	160.09 / 72	Yes	Yes <sup>2</sup>	71A, 71B, 106D, 100C, 65A
Deschutes County <i>South</i>	14-12, Tax Lot 3201	80.75 / 0	No	No	100C, 106D, 65A, 37B

**LAND USE HISTORY:**

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

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

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



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

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

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

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



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

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

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



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

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

Site Specific Soil Study:

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

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



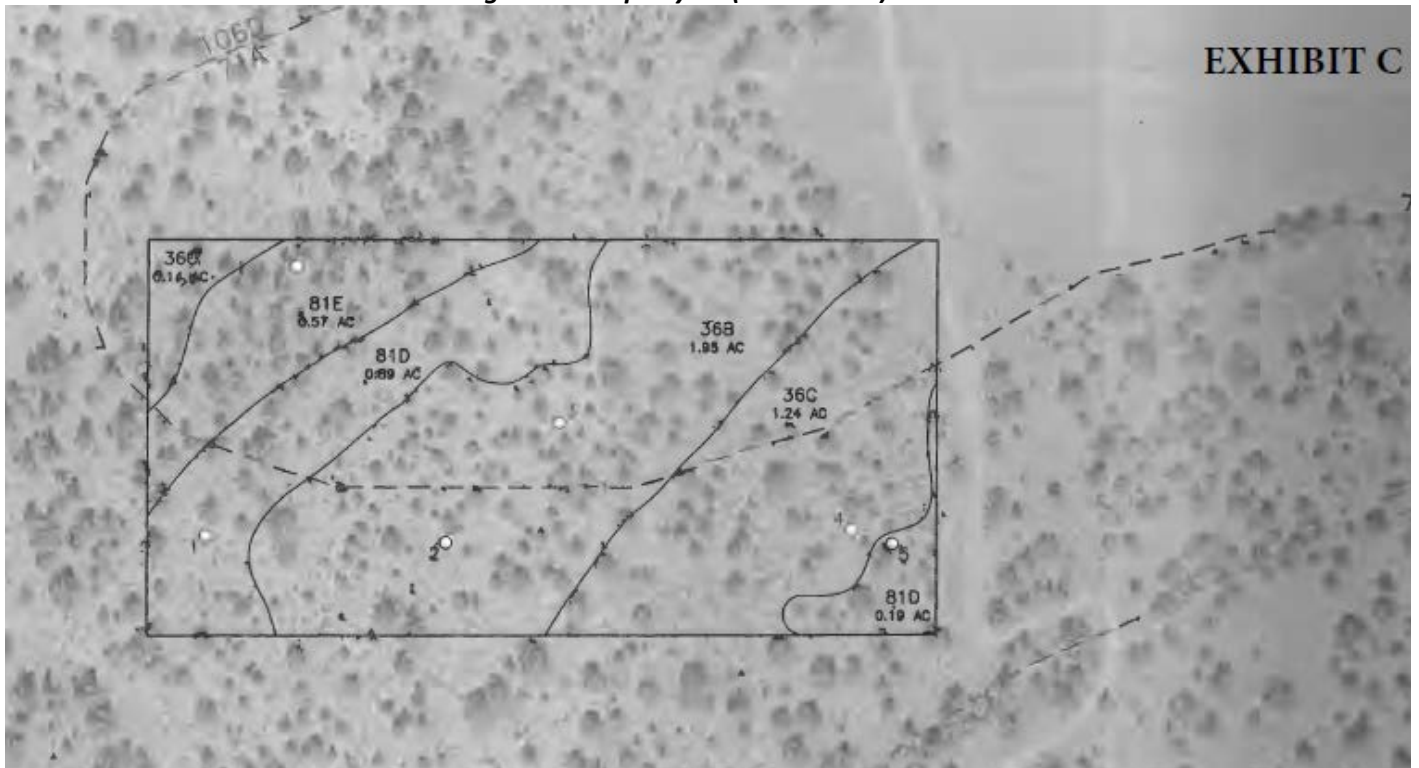
Figure 4 - Property #1 (Tax Lot 100)



The soil study states on Page 4:

All 4.98 acres of Property #1 were evaluated in detail, including 1.88 acres of Licksillet soils. The remaining 3.10 acres consisted of soils more like Deskamp in areas with slightly deeper soils and fewer coarse fragments between delineations of Licksillet soils and the property boundary or right right-of-way. A small delineation of Deskamp (0.79 acres) in the southeastern corner of Property #1 is across an access road from an adjacent area that appears to have been disked or mowed but not irrigated in the past. The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties. Therefore, the entire area evaluated is considered “generally unsuitable” for farm use.

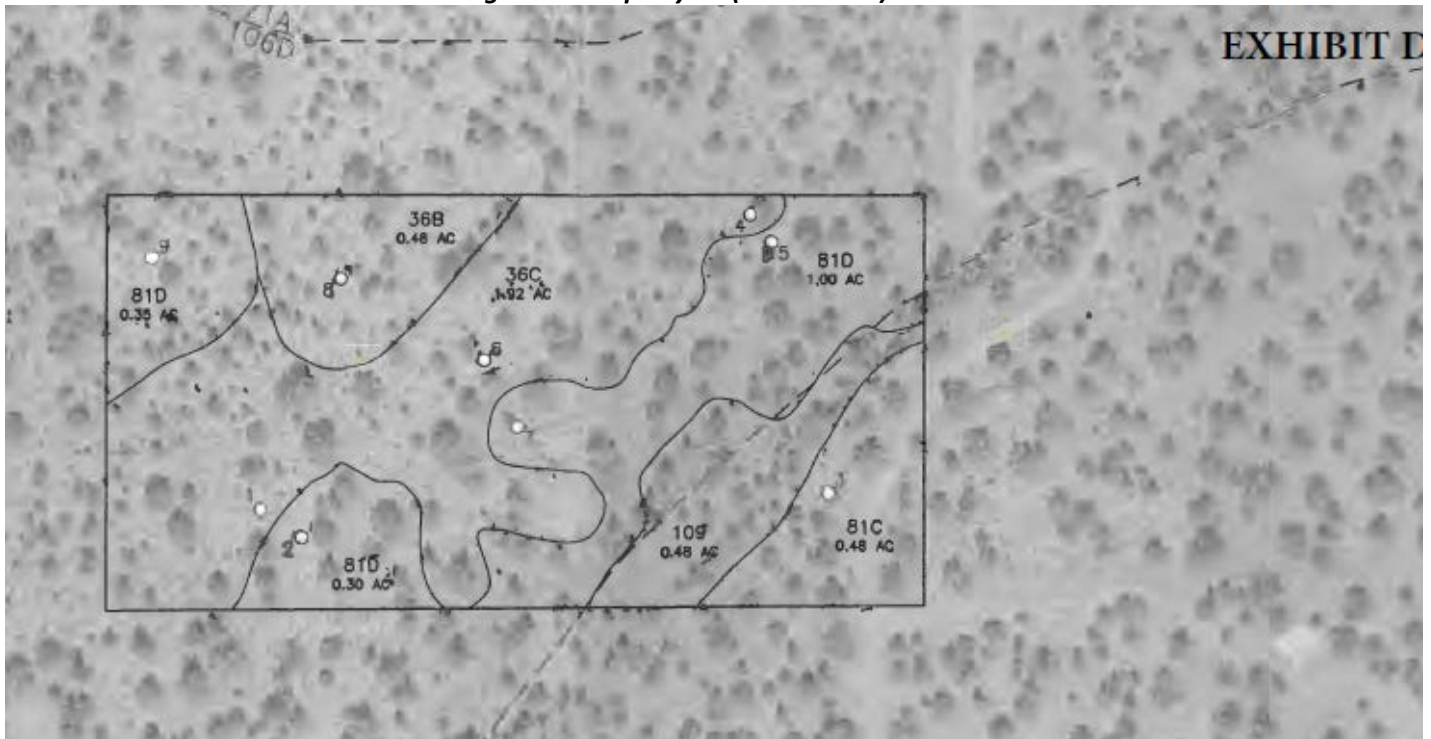
Figure 5 - Property #2 (Tax Lot 200)



The soil study states on Page 4:

All 4.98 acres of Property #2 were evaluated in detail, including 1.65 acres of Licksillet soils. The remaining 3.33 acres consisted of soils more like Deskamp in areas with slightly deeper soils and fewer coarse fragments between delineations of Licksillet soils and the property boundary or right right-of-way. Small delineations of Deskamp (1.24 and 1.95 acres) in the northeast corner of Property #2 are across an access road from an adjacent area that appears to have been disked or mowed but not irrigated in the past. The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties. Therefore, the entire area evaluated is considered "generally unsuitable" for farm use.

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



The soil study states on Page 4:

All 5.01 acres of Property #3 were evaluated in detail, including 2.13 acres of Licksillet soils and 0.48 acres of Rock outcrop. The remaining 2.40 acres, or 47.9%, consisted of soils more like Deskamp in areas with slightly deeper soils and fewer coarse fragments between delineations of Licksillet soils and the property boundary or right right-of-way. The delineations of Deskamp soils are relatively small and irregular in shape and, as such, are generally unsuitable for farm use in conjunction with adjacent properties (none of which appear to be or ever have been farmed). Therefore, the entire area evaluated is considered “generally unsuitable” for farm use.

Additional discussion and analysis, as it relates to Applicant’s site-specific soil study, is included in later Hearings Officer findings.

**PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice on April 28, 2023, to several public agencies and received the following comments:

Deschutes County Building Division, Randy Scheid

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

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

Deschutes County Onsite Wastewater, Todd Cleveland



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

Deschutes County Senior Transportation Planner, Peter Russell

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

The most recent edition of the Institute of Traffic Engineers (ITE) Trip Generation Handbook indicates a single-family residence (Land Use 210) generates an average of approximately nine daily weekday trips. Deschutes County Code (DCC) at 18.116.310(C)(3)(a) states no traffic analysis is required for any use that will generate less than 50 new weekday trips. The proposed land use will not meet the minimum threshold for additional traffic analysis.

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

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$5,080 per p.m. peak hour trip. County staff has determined a local trip rate of 0.81 p.m. peak hour trips per single-family dwelling unit; therefore, the applicable SDC is \$4,115 ( $\$5,080 \times 0.81$ ). 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, 2023. DESCHUTES COUNTY'S SDC RATE IS INDEXED AND RESETS EVERY JULY 1. WHEN PAYING AN SDC, THE ACTUAL AMOUNT DUE IS DETERMINED BY USING THE CURRENT SDC RATE AT THE DATE THE BUILDING PERMIT IS PULLED.**

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

Deschutes County Property Address Coordinator, Tracy Griffin

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

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

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

State Fire Marshal, Clara Butler

Fire has no comments.

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

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

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

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

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

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

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

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

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


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

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

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

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

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



## Wetland Land Use Notice Response

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### Response Page

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

### Responsible Jurisdiction

Staff Contact	Jurisdiction Type	Municipality
Haleigh King	County	Deschutes

Local case file #	County
247-23-000293-CU	Deschutes

### Activity Location

Township	Range	Section	QQ section	Tax Lot(s)
14S	12E	30	BA	100

Street Address  
69900 NW Lower Valley Dr  
Address Line 2

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

Latitude	Longitude
44.333528	-121.343128

### Wetland/Waterway/Other Water Features

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

### Your Activity

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

### Applicable Oregon Removal-Fill Permit Requirement(s)

(continued)

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

## Closing Information

### Additional Comments

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

**This is a preliminary jurisdictional determination and is advisory only.**

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

### Contact Information

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

### Response Date

6/1/2023

### Response by:

Lynne McAllister

### Response Phone:

503-986-5300

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

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

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

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

**Staff Comment (Staff Report, page 15):** Staff, provided the following comment related to the necessity of a wetland delineation.

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

Applicant Wetland Response (Third Supplemental Burden of Proof Statement, page 5):

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

The Hearings Officer notes that the potential wetland on Tax Lot 100 is relevant to a final permitting approval and that a condition of approval is necessary to assure compliance with state and/or local law. The Hearings Officer included a condition of approval requiring Applicant to prepare and submit a wetland delineation to the Department of State Lands to verify the extent of potential wetlands on Tax Lot 100.

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

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

Staff received a comment from Central Oregon LandWatch (“COLW”) on November 8, 2023 indicating that COLW believed that the Applicant, in this case, may have not met all relevant approval criteria and requested a Staff comment related to the “150-day clock.” Carol McBeth, on behalf of COLW, offered oral testimony at the Hearing and submitted open record documents. The findings below address COLW expressed concerns with the applications.

Staff Comment (Staff Report, page 15): Staff included the following response to the COLW “150-day clock” question:

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

See the Hearings Officer Review Period findings above.

**NOTICE REQUIREMENT:** On November 6, 2023, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the Subject Property, agencies, and parties of record. A Notice of Public Hearing was published in the Bend Bulletin on November 12, 2023. The Applicant complied with the posted notice requirements of DCC 22.24.030(B). The Applicant submitted a Land Use Action Sign Affidavit indicating the Applicant posted notice of the land use action on April 28, 2023.



### **III. FINDINGS & CONCLUSIONS**

#### **A. PRELIMINARY FINDINGS:**

##### **1. Purpose of the Preliminary Findings**

The Hearings Officer, in these Preliminary Findings, responds to a number of the issues raised by COLW. These Preliminary Findings are intended to provide an overview of the COLW issues, discussion of the relevant laws/rules related to those issues and the Hearings Officer's legal interpretation of various sections of the DCC and State statutes/regulations relevant to the COLW issues. The Hearings Officer incorporates these Preliminary Findings as additional findings for relevant approval criteria.

##### **2. Road Related Siting Issues (DCC 18.88.060)**

All participants in this case concur that DCC 18.88.060 (Siting Standards) is a relevant approval criterion. Applicant proposed to satisfy the requirements of DCC 18.88.060 by (a) locating proposed building envelopes within 300-feet of an existing road located on the eastern side of the proposed lots (the "300' Option") and/or (b) locating building envelopes in proximity to a road located to the west of each proposed lot (the "Exception Option"). Understanding the specific details of each Applicant proposal is necessary to fully assess whether one or both proposals meet the requirements of DCC 18.88.060.

###### **a. Overview of the "300' Option"**

The Applicant proposed to meet DCC 18.88.060 B requirements by locating building footprints, including decks and porches, for new dwellings within 300 feet of a "private road;" such road existing as of August 5, 1992 (the "300' Option"). Applicant provided written documentation and oral testimony supporting its claim that a "private road" existed, as of August 5, 1992, within the eastern portion or on the eastern side of each of the Subject Property.

The Hearings Officer summarizes COLW's "300' Option" arguments as follows:

- (1) the Applicant's evidentiary proof, in the record, of the existence of a qualifying eastern "road" is inadequate/insufficient; and
- (2) the Applicant's interpretation of "road" is not legally supportable; and,
- (3) the Applicant must provide evidence/proof that that a "road" existed on the specific date of August 5, 1992; and
- (4) the Applicant must demonstrate that the "road" was used "continuously" (had not disappeared).

###### **b. Overview of Western Road (the "Exception Option")**

The Applicant proposed to satisfy the requirements of DCC 18.88.060 B.1 (the "Exception Option") by locating building footprints, including decks and porches, for new dwellings where habitat and migration corridors are afforded equal or greater protection through a different development pattern. COLW argued that the proper interpretation of DCC 18.88.060 B.1 requires that an applicant to first demonstrate that proposed building envelopes exist that meet the 300-foot distance requirement from a August 5, 1992 road. Restated, COLW argued that the 300-foot setback requirement in DCC 18.88.060 B is a prerequisite to a request for a DCC 18.88.060 B.1 exception. COLW (and the Oregon Department of Fish and Wildlife) also argued that factually the Applicant did not satisfy requirements demonstrating the alternative location afforded equal or greater protection by locating the dwellings near the road along the west of the Subject Property.

### c. General Interpretation of DCC 18.88.060

DCC 18.88.060, in part, states:

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

**B. The footprint, including decks and porches, for new dwellings shall be located entirely within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992 unless it can be found that:**

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

COLW's first argument related to DCC 18.88.060 is that Applicant failed to provide adequate factual evidence, in the record, to demonstrate Applicant's proposed location of building footprints met the 300-foot distance requirement from a August 5, 1992 road. The Hearings Officer does not address the COLW evidentiary argument in these Preliminary Findings. The evidentiary issue will be addressed in the general findings for DCC 18.88.060.

The Hearings Officer, in these Preliminary Findings, does address the following COLW's interpretation arguments:

(1) Is DCC 18.88.060 B a prerequisite to consideration of one or more of the exceptions set forth in DCC 18.88.060 B.1, B.2 and B.3 (section d. **Prerequisite Issue**); and

(2) is a "farm road" a DCC 18.88.060 B.1 "private road (section e. **Road Definition Issue**);" and

(3) must an applicant demonstrate, on *the* specific date of August 5, 1992, that a "road" existed or can an applicant provide evidence that a "road" existed "prior to" August 5, 1992 (section f. **Disappearing Road Issue**); and

(4) must a "road" be used "continuously" (section f. **Disappearing Road Issue**)?

#### d. Prerequisite Issue

COLW argued that DCC 18.88.060 B requires, as a prerequisite to an applicant seeking a DCC 18.88.060 B.1, B.2 or B.3 "exception," that there is satisfactory evidence in the record that the proposed footprint(s) is/are located within 300-feet of a road existing on August 5, 1992. Applicant disagrees with this COLW argument asserting that satisfying DCC 18.88.060 B is not a prerequisite to applying for and receiving approval of a DCC 18.88.060 B.1 "exception."

DCC 18.88.060 B contains part of a single sentence with two separate thoughts or parts. These separate thoughts or parts are connected by the word "unless." The first part of DCC 18.88.060 B clearly sets out a requirement that building footprints must be entirely located within 300-feet of a August 5, 1992 roadway (the Hearings Officer will address the interpretation of public roads, private roads or recorded easements in the findings below). The second part of DCC 18.88.060 B contains what the Applicant, Staff and COLW refer to as "exceptions."

The Hearings Officer finds that the word "unless" creates an ambiguity in the interpretation of DCC 18.88.060 B. Consistent with *State v. Gaines*, 206 P.3d 1042 (2009), a decision maker facing a code/statute/regulation that contains an ambiguity must first consider the "text" and "context" of the ambiguous word/phrase.

“Unless” is not defined in the DCC. The Hearings Officer finds that the word “unless,” as used in DCC 18.88.060 B, is a “conjunction.” A “conjunction” is defined as a word “that join together other words or groups of words.” The word “unless” does in fact join two distinct groups of words in DCC 18.88.060 B.<sup>3</sup>

The *Merriam-Webster* Online dictionary defines “unless,” as: “*except if*” and “*except on the condition that.*” The Hearings Officer interprets the word “unless” as allowing an alternative or creating an exception process. Restated, the Hearings Officer finds that a textual review strongly suggests that DCC 18.88.060 B.1, B.2 and B.3 are alternative methods to satisfy the DCC 18.88.060 Siting Standards.

The Hearings Officer also considered the word “unless” within the context DCC 18.88 overall and specifically within 18.88.060. DCC 18.88.010 (Purpose Section) sets forth the overall goal of the Wildlife Area Combining Zone; to conserve important wildlife areas in Deschutes County and to permit development compatible with the protection of wildlife resources. The Hearings Officer finds DCC 18.88.060 B.1 does in fact focus on allowing an exception so long as a proposed exception request does in fact conserve important wildlife resources. Applicant seeks to satisfy the alternative or exception provisions of DCC 18.88.060 B.1. DCC 18.88.060 B.1 states that to approve an alternative or exception an applicant must show that:

“habitat values (i.e., browse, forage, cover, access to water) and migration corridors are afforded equal or greater protection through a different development pattern.”

The Hearings Officer finds the above-quoted language of DCC 18.88.060 B.1 includes the phrase “afforded equal or greater protection...” The alternative location must respond to the DCC 18.88.060 B.1 mandated test: *equal or greater than* “something.” The Hearings Officer finds that the “something” can be reasonably interpreted to refer to footprints which are entirely located within 300-feet of a road that existed as of August 5, 1992; the standard set forth in DCC 18.88.060 B. The Hearings Officer finds that “equal or greater protection” means that the alternative must be “equal or greater” than the wildlife protection afforded by the location of a footprint within 300-feet of a August 5, 1992 road.

The context analysis of the word “unless” suggests that any DCC 18.88.060 B.1 exception must demonstrate that the proposed alternative provides “equal or greater” wildlife protection than a qualifying DCC 18.88.060 B proposal. The Hearings Officer finds the most reasonable and plausible contextual interpretation of DCC 18.88.060 B is that meeting the 300-foot (from a August 5, 1992 road) requirement is a prerequisite to affording an applicant the right to seek a DCC 18.88.060 B.1 alternative or exception.

The Hearings Officer also finds that consideration of ORS 174.010 is appropriate in this interpretative analysis. ORS 174.010 states:

*“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”*

The Hearings Officer finds that interpreting DCC 18.88.060 B as a prerequisite to the application of DCC 18.88.060 B.1 gives effect to all of DCC 18.88.060 B. The Hearings Officer finds that concluding that DCC 18.88.060 B.1 is not a prerequisite to the application of DCC 18.88.060 B.1 would constitute the omission of the 300-foot DCC

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<sup>3</sup> DCC 18.88.060 B. includes a first group of words setting forth the 300-foot from a August 5, 1992 road requirement and a second group of words providing for exceptions described in DCC 18.88.060 B.1, B.2 and B.3.

18.88.060 B requirement and the disregarding (omission) of the DCC 18.88.060 B.1 "equal or greater" protection language.

**e. Road Definition Issue.**

DCC 18.88.060 B. includes references to "public roads," "private roads," and "recorded easements." COLW argued that Applicant's alleged roadway located to the east of the Subject Property (Subject Property refers to all three of the Applicant's proposed non-farm lots) is not a "public road," "private road" or "recorded easement" as required by DCC 18.88.060 B. COLW, in its February 13, 2024 record submission, stated the following:

*"The terms 'public road,' 'private road,' 'farm road,' and 'driveway are undefined in the County code. In plain English a "public road" is a road publicly maintained for use by cars and trucks. A "private road" is a road privately maintained by a group of persons with permission to use it to provide car and truck access to their driveways. A "driveway" is a privately maintained stretch of road connecting a public or private road to a residence. A "farm road" is a privately maintained road used by a farmer to access his fields.*

*There is no evidence of a road existing in 1992. Moreover, even if there were such a road there is no evidence it could be the access road to the nonfarm parcels, which must be located within 300 feet of such a road. DCC 18.88.060(B).*

*East of the subject property there is nothing even now except a farm road. A farm road is not one of the four alternatives in DCC 18.88.060(B).*

*According to the testimony of the applicant's representative, the road to the east, if it is a road, has disappeared at various times in the past. The phrase "as of" indicates the time specified by the acknowledged code as the beginning time for the road's existence, August 5, 1992. By the Protecting Central Oregon's Natural Environment And Working For Sustainable Communities 4 applicant's own admission, the farm road in question is not a road existing as of August 5, 1992, but is only existing as of the last time it disappeared. There is no qualifying road existing as of August 5, 1992 in the vicinity. Therefore, the application must be denied."*

Applicant (February 13, 2024 Applicant Statement, Open Record – Round One) responded with the following comments/arguments:

*"The criterion at issue broadly allows the standard to be met so long as a 'private road, easement for vehicular access or driveway' is established as being in existence on August 5, 1992. In 1995, the County broadened the application of the original standard adopted in 1992, which was originally limited to "roads or easements" to also include 'driveways.' (Exhibit 5 1992 Ordinance 92-042, Page 4) (Exhibit 6 - Ordinance No. 95-001, Exhibit "A" page 2-3) Therefore, the language is intended to be broadly inclusive, but also in 1995 the County clarified that to qualify, 'easements' would have to be for 'vehicle access.' (Exhibit 6) The County did not define or limit the scope of the types of vehicles that are required within the language of the code, leaving it broadly applicable and inclusive of all types of vehicles.*

*Merriam Webster Dictionary defines 'vehicle,' in part, as follows:*

- 1. A means of carrying or transporting something. Planes, trains, and other vehicles such as (a) motor vehicle (b) a piece of mechanized equipment.*

*Based upon the forgoing definition, the farm equipment, as well as trucks, trailers, tractors, and Mr. Howard's crane constitute 'vehicles.'*

*The county adopted a definition of 'Road or Street' and of 'Driveway' in 1995 in conjunction with the amendments to DCC 18.88.060. (Exhibit 6 Ordinance 95-001)*

*"Driveway" was defined as 'A way created to provide vehicular access from a public or private road to a garage or parking area.' (Exhibit 6, Page 1)*

*'Road or Street' was defined as: 'A public or private way created to provide ingress or egress to one or more lots, parcels, areas or tracts of land.' (Exhibit 6, Page 1)*

*Here, the "ways" at issue constitute "roads" as defined by the county. They are private "ways" created to provide ingress and egress to one or more lots, parcels, areas or tracts of land. Again, the definition is very broad in scope and expressly includes the broad application to allow for "ways" that are used to access "areas or tracts of land."*

*Here, the aerial imagery shows that the "ways" at issue herein connect different farm fields, parcels, and different areas or tracts of land, including connectivity to neighboring lots, tracts, or areas including private and County and BLM public lands. The Declaration of Mr. Howard (Exhibit 1) also attests to the use of the roads to access different parts of the farm, the neighboring farm, county ground and BLM grazing allotments. The use was not limited to just the Howards, but as Mr. Howards states, the roads were used by the farmers of the area. (Exhibit 1) Notably, there is no minimum improvement standard for the road, the easement for vehicular access, or driveway.*

*Based upon the totality of the evidence in the record, the applicable criterion of DCC 18.88.060(B) and (C) pertaining to "roads or easements for vehicle access or driveway" has been met."*

DCC 18.88.060 C, in its entirety, states:

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

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

Based upon the Hearings Officer's review of the record the possible "roadway" located to the east of the Subject Property is not a "public road" and was not created by a "recorded easement." It appears to the Hearings Officer that Applicant is seeking to characterize the possible "roadway," located to the east, as a "private road" as that phrase is used in DCC 18.88.060.

COLW stated (COLW quoted material above) that "a farm road is not one of the four alternatives in DCC 18.88.060(B)." The Hearings Officer concurs with COLW that the phrase "farm road" is not a word/phrase included in the explicit language set forth in DCC 18.88.060 B; or, for that matter in DCC 18.88.060 C. The Hearings Officer



finds that the failure of the phrase “farm road” to be specifically included in DCC 18.88.060 is not necessarily determinative in this case.

The Hearings Officer concurs with COLW that the phrase “private road” is undefined in the County Code. The Hearings Officer does, however, take issue with COLW’s assertion that a “private road” is a “road privately maintained by a group of persons with permission to use it to provide car and truck access to their driveways.” The Hearings Officer disagrees with COLW’s limitation of use of a “private road” to “cars” and “trucks.”

The Hearings Officer finds Applicant’s reference to the dictionary definition of “vehicle” is relevant. Applicant’s *Merriam-Webster* quoted definition of “vehicle” is, in part, that a “vehicle” is a “means of carrying or transporting something.” The *Merriam-Webster* Online Dictionary definition of “vehicular” is “relating to, or designed for vehicles and especially motor vehicles.” The Hearings Officer, based on the dictionary definitions of “vehicle” and “vehicular,” finds that farm vehicles such as tractors and trucks and similar motorized transportation devices are included in the DCC 18.88.060 B and C meaning/definition of the phrase “vehicular access.”

As additional support for the “vehicle” and “farm road” findings above, the Hearings Officer takes note of the DCC 18.04.030 definitions of “road or street” and “roadway.” “Road or street” is defined, in part, as “a public or private way created to provide ingress or egress to one or more lots, parcels or tracts of land.” “Roadway” is defined to mean “that portion of a street or road right of way developed for vehicular traffic.” The term “way” is not defined in the DCC. *Merriam-Webster* Online Dictionary defines “way” as “connected with, or constituting an intermediate point on a route.” In the context of the DCC 18.04.030 definition of “road or street” the Hearings Officer finds that term “way” can reasonably be interpreted to mean an “access connection between two points.”

The Hearings Officer finds the DCC 18.88.060 reference to “private roads” is extremely broad in scope and includes private access connections between two places or points. The Hearings Officer finds that the DCC 18.88.060 phrase “private roads” is not limited to a discrete class or type of vehicles, by the level of physical improvement (i.e., dirt or paved surface) or the frequency of use. The Hearings Officer finds that a “farm road” meets the requirements of a DCC 18.88.060 “private road.”

#### **f. Disappearing Road Issue.**

COLW argued (February 13, 2024, pages 3 & 4) that Applicant’s alleged eastern “private road”

*“has disappeared at various times in the past. The phrase ‘as of’ indicated the time specified by the acknowledged code as the beginning time for the road’s existence, August 5, 1992. By the applicant’s own admission, the farm road in question is not a road existing as of August 5, 1992, but is only existing as of the last time it disappeared.”*

The above-quoted COLW statement requires the Hearings Officer to speculate as to the precise legal issue the Hearings Officer is asked to address. COLW may be arguing that an applicant must provide evidence in the record that on a very specific date (August 5, 1992) a “private road” existed. For example, if this characterization of COLW’s argument is correct, then an applicant would be required to include in the record an aerial photograph or map with a August 5, 1992 date stamp. The COLW argument may also be that an applicant must provide proof that a “private road” was used without interruption (i.e., it did not “disappear”). The Hearings Officer finds the above-quoted COLW statement does not provide the Hearings Officer a level of specificity to allow the Hearings Officer to respond in a limited and authoritative way.

In the alternative to the Hearings Officer’s rejection of the COLW “disappearing road issue” on the grounds that COLW’s argument lacked specificity, the Hearings Officer makes the following findings.

DCC 18.88.060 B states, in part, that an applicant must locate building footprints within 300-feet of a “private road ... existing as of August 5, 1992.” DCC 18.88.060 C.1 states that a private road “will conclusively be regarded as having existed prior to August 5, 1992.” DCC 18.88.060 C.1.a, b, and c all use the term “prior.” DCC 18.88.060 C.2 uses the “as of” August 5, 1992 language.

The Hearings Officer finds that the Deschutes County Board of Commissioners (“Board”), in adopting DCC 18.88.060, was likely aware that as time passes an applicant’s proof that a “private road” was in existence on August 5, 1992 would become more challenging. The Hearings Officer finds the use of “prior to” in DCC 18.88.060 C.1, C.1.a, C.1.b and C.1.c reflects the Board’s recognition of challenges facing an applicant attempting to use DCC 18.88.060 B. The Hearings Officer interprets DCC 18.88.060 C.1 as establishing the applicant’s evidentiary obligation to **prove** that a “private road” did exist “as of” August 5, 1992 and that **proof** may be in the form of a recorded easement establishing the right to use a “private road” prior to August 5, 1992, an aerial photograph taken prior to August 5, 1992 or a map published prior to August 5, 1992. The Hearings Officer rejects, if that was actually COLW’s argument, the proposition that an applicant must include in the record an aerial photograph taken or map published or dated precisely on August 5, 1992.

The Hearing Officer, as additional findings for the Disappearing Road Issue finds that COLW provided no citation or reference to relevant code/law/regulation supporting its general argument that a “private road” must be in continuous “use” (if that is what COLW meant by “disappearing”). The Hearings Officer finds that if there is evidence in the record that a “private road” was shown to have existed prior to August 5, 1992 and there is no persuasive evidence in the record that the “right” to “use” that “private road” was terminated then an applicant is not required to provide evidence of continuous “use.”

### **3. Lot Creation Date – DCC 18.16.050 G.1.a.(6)**

COLW argued (February 6, page 5) that DCC 18.16.050 G.1.a.(6) is not satisfied in this case. COLW noted that DCC 18.16.050 G.1.a.(6) requires that to be eligible for a nonfarm dwelling a proposed site must be “located on a lot or parcel created prior to January 1, 1993.” COLW argued that Applicant acknowledged that the three properties subject to this decision were reconfigured in 2009. COLW argued that such reconfiguration changed the “date of creation” to a time after January 1, 1993. COLW relied upon OAR 660-033-0020(4) which states the following:

*“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 reconfiguration is the date of creation or existence. Reconfigured means any change in the boundary of the lot, parcel or tract.”*

The Hearings Officer reviewed the Staff analysis (Staff Report, pages 41 – 43) and Applicant’s open-record submission (Applicant Statement [Open Record – Round One], pages 4 - 5) related to DCC 18.16.050 G.1.a.(6). The Hearings Officer also reviewed the Oregon Court of Appeals decision in *Central Oregon LandWatch v. Deschutes County, Grossman*, 320 Or App 650 (2022). The Hearings Officer finds the Oregon Court of Appeals decision cited above supports Staff’s analysis and Applicant’s evidence and argument contained in the Staff Report and Applicant Open Record submission.

The Hearings Officer finds no evidence in the record supporting COLW’s suggestion that the 2009 lot line adjustment (or reconfiguration as referenced by COLW) was for the purpose of qualifying the adjusted or reconfigured parcels for the siting of a dwelling. The Hearings Officer finds that persuasive evidence is in the record that the three adjusted/reconfigured parcels, in this case, qualified prior to the 2009 lot line adjustment process, for the siting of dwellings.

#### 4. Unsuitability for Farm Use – Use in Conjunction

COLW, through testimony (Carol McBeth) and written submission (i.e., February 6, 2024, pages 5 – 9) asserted that the proposed parcels do not meet the “unsuitability tests” established by certain identified code and statutory provisions. COLW, in the February 6, 2024 record submission, summarized its arguments:

*“2. ORS 215.284 (7)(b); ORS 215.284 (2)(b); A lot or parcel or portion of a lot or parcel may 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;...”*

*...parcels cannot be found unsuitable unless it can be shown that they cannot be used in conjunction with other land for the production of farm crops and livestock. In this case, the standard cannot be met because Deschutes County CU-92-37 explains that the parcels were in farm use in conjunction with the rest of the land in the 300+ acre farm at TL702 as of 1992. Obviously, the same land cannot be used in 1992 to obtain a farm dwelling via CU-92-37 based on its agricultural productivity, and in 2024 to obtain a nonfarm dwelling via CU-92-37 based on its lack of productivity. The land was in agricultural use as part of a large productive far use because it has already been determined to have been in farm use with surrounding lands for the production of farm crops and livestock.”*

ORS 215.284 states, in part, the following:

***(2) In counties not described in subsection (1) of this section, a single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the governing body or its designee, in any area zoned for exclusive farm use upon a finding that:***

***(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;***

***(b) The dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land 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. A lot or parcel or portion of a lot or parcel may 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;***

***(c) The dwelling will be sited on a lot or parcel created before January 1, 1993;***

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***(7) In counties in eastern Oregon, as defined in ORS 321.805 (Definitions for ORS 321.805 to 321.855), a single-family residential dwelling not provided in conjunction with farm use may be established, subject to the approval of the county governing body or its designee, in any area zoned for exclusive farm use upon a finding that:***

***(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;***

***(b) The dwelling will be sited on a lot or parcel created after January 1, 1993, as allowed under ORS 215.263 (Land divisions in exclusive farm use zones) (5);***

DCC 18.16.050 G.2.a states, in part, the following:

**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."**

The Hearings Officer finds, for the purposes of this decision, that the section of ORS 215.284 (quoted above) and the section of DCC 18.16.050 G.2. (quoted above) prohibit a decision maker from concluding that a subject property is unsuitable for farm/forest purposes only in circumstances where an applicant argues the subject property is unsuitable for farm/forest purposes because of size or location. COLW failed to explain why the Hearing Officer should rely upon ORS 215.284 when it appears COLW's argument is actually directed at a relevant County approval criterion set forth in DCC 18.16.050 G.2.a.

The Hearings Officer finds that DCC 18.16.050 G.2 (as well as ORS 215.284 and DCC 18.16.050 G.2), are not general tests of unsuitability to be applied in all cases or all circumstances. Rather, the Hearings Officer finds that DCC 18.16.050 G.2.a is limited to the consideration of unsuitability where an applicant is asserting that a site is unsuitable for farming/timber solely because of the site's size or location. The Hearings Officer, based upon the evidence in the record of this case, finds that Applicant has not furthered the proposition that any property subject to this decision is "unsuitable for farm use" solely because of its size or location.

## **B. GENERAL APPROVAL CRITERIA FINDINGS**

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

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

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

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

#### **A. Nonfarm dwelling**

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

Section 18.16.040. Limitations on Conditional Uses.

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

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

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

Due to the proximity of each of the Subject Properties to one another, the results of the study area analysis were substantially the same. Staff addressed (Staff Report, pages 16-19) each tax lot individually where the results differ. The Hearings Officer finds that the Staff comments, as quoted below, adequately address the issues raised by this approval criterion. The Staff (Staff Report, pages 16 – 19) comments follow:

**“Forest Practices**

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

**Farm Practices**

*The USDA 2017 Census of Agriculture<sup>4</sup> shows agricultural production in Deschutes County roughly split between crop and livestock production in economic value. Predominant crop species include forage-land used for all hay and haylage, wheat for grain; and nursery production. Livestock production is predominated by cattle and calves, equestrian species, dairy and eggs/poultry.*

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

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

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

**Potential Impacts**

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

*Residential uses can conflict with farm uses. The record includes information from the Oregon State University Extension Service describing the types of impacts the farming practices in the surrounding area could generate on nearby lands. Maintaining irrigated pasture can generate dust from re-seeding, drifting of herbicides from spraying, vehicle noise from trucks, manure odor from fertilizing, and possible water runoff from irrigation. Grazing livestock can generate dust, manure odor, possible interference with vehicular traffic, and property damage if livestock escape. However, staff finds that potential conflicts are mitigated, as follows.*

*Pursuant to DCC 18.16.050, if these applications are approved, each property owner will be required to sign and record in the County Clerk’s office a document binding the landowner, and the landowner’s successors in*

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<sup>4</sup>[https://www.nass.usda.gov/Publications/AgCensus/2017/Online\\_Resources/County\\_Profiles/Oregon/cp41017.pdf](https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Oregon/cp41017.pdf)



interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.396 or 30.397. The recordation of this document with the County Clerk helps ensure that the proposed nonfarm dwelling will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm use, nor will it significantly increase the cost of accepted farm practices.

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

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

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

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

As discussed below, of the properties developed with dwellings, the majority constructed in or after 1993 are nonfarm dwellings (approximately 60 percent). Other dwelling types constructed in or after 1993 including accessory farm dwellings (20 percent) and one dwelling of an unknown type. The most current dwelling development trend in the study area appears to be the establishment of nonfarm dwellings. Dwellings developed from 1979 through 1992 were primarily established as farm dwellings (approximately 71 to 83 percent).

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

As noted above, the Hearings Officer finds the Staff evidence and analysis to be adequate to demonstrate this criterion has been 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 BOCC determined in the *Clough* decision (File No. 247-15-000035-CU/247-15-000403-A), that when the general unsuitability criterion of 18.16.050 (G)(1)(a)(iii) is met, the least suitable criterion of Section 18.16.040 (A)(3) above is satisfied as well. The findings under DCC 18.16.050(G)(1)(a)(iii) below are incorporated herein by reference.

Section 18.16.050. Standards for Dwellings in the EFU Zones.

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

**FINDING:** As required under this section, Staff recommended a condition of approval requiring the property owner to sign and record the above document prior to issuance of a building permit for any nonfarm dwelling. The Hearings Officer finds that with Staff's recommended condition, as set forth below, this criterion can be met.

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

**G. Nonfarm Dwelling.**

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

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

**(1) 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. The Hearings Officer finds with the incorporated findings this criterion will be met.

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

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

**(D) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall:**

**(i) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas. Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area;**

The County 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 the "Study Area"). The Hearings Officer finds this study radius is suitable to provide a comprehensive analysis of the character of the area surrounding each Subject Property because of its significant size and the number of parcels located within it.

The following is a summary of the sizes of private EFU tax lots within the Study Area for each individual Subject Property below.

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

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

**OAR 660-033-0130 (4)(a)(D) [continued]**

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

**FINDINGS:** Staff (Staff Report, pages 19 – 26) provided a comprehensive recitation and analysis of factors relating to this approval criterion. The Hearings Officer finds the Staff information and analysis is adequate to justify the Hearings Officer to conclude this criterion is met. The Hearings Officer finds that there is no evidence or argument in the record disputing the Staff information and analysis set forth in full below:

**Farm Uses**

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

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

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

**Existing Dwellings**

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

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

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

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

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

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

**Dwelling Development Trends Since 1993**

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

### **Potential Nonfarm Dwellings**

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

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

### **Potential Nonfarm Parcels**

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

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

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

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

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

*OAR 660-033-0130(4)(a)(D) and (c)(C) require consideration of the cumulative impact of a proposed nonfarm dwelling on lots or parcels that are “similarly situated.” Because OAR 660-033-0130(4)(a)(D)(ii) expressly requires consideration of whether parcels larger than the minimum parcel size may be divided*

*to allow nonfarm dwellings, the scope of “similarly situated” parcels is not limited to substandard parcels or parcels that are the same size as the subject property.*

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

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

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

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

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

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

*The Planning Division has previously determined that lot of record dwellings can be difficult to obtain, given the requirement for ownership prior to 1985 and the land cannot be suitable for farming based on the above*

factors. Some parcels may qualify for a lot of record dwelling, but without a specific analysis of each and every parcel, this determination cannot be concluded. None of the dwellings approved within the Study Area were approved as a lot of record dwelling.

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

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

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

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

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

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

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

As noted above, the Hearings Officer finds that the above-quoted Staff information and analysis is comprehensive and adequately addressed this approval criterion. The Hearings Officer, based upon the above-quoted Staff material, finds OAR 660-033-0130 (4)(a)(D)(ii) is properly addressed and satisfied.

### **OAR 660-033-0130 (4)(a)(D) [continued]**

- (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:** Staff (Staff Report, pages 26 -27) provided a comprehensive recitation and analysis of factors relating to OAR 660-033-0130 (4)(a)(D)(iii). The Hearings Officer finds the Staff information and analysis is adequate to justify the Hearings Officer to conclude OAR 660-033-0130 (4)(a)(D)(iii) is satisfied. The Hearings Officer finds that there is no evidence or argument is in the record disputing the Staff information and analysis set forth in full below:



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

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

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

*It is not clear to staff if the addition of each individual dwelling, for a total of three, would tip the balance from resource to non-resource use. Air photos suggest the farm use in the area has remained relatively stable for many decades. There have been 3 nonfarm dwellings approved since 2000 within the study area.*

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

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

The Hearings concurs with the above-quoted Staff information, analysis and conclusions. The Hearings Officer finds that if the Applicant’s proposal is approved if such approval will not materially alter the stability of the land use pattern in the area.

**DCC 18.16.050 G.1.a. [continued]**

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

**FINDING:** The Hearings Officer incorporates, as additional findings for this section, the Preliminary Findings titled “Unsuitability for Farm Use- Use in Conjunction with Adjacent/Nearby Properties” (Preliminary Findings section A.4).

Staff (Staff Report, pages 27 – 28) referenced Oregon LUBA decisions it believed to be relevant to this criterion. The Hearings Officer sets for Staff’s summary of those cases below:

*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.

Applicant requested Staff and the Hearings Officer to focus on the “entire parcel” for each Subject Property as opposed to considering just the proposed “building envelope.” Staff (Staff Report, page 27) did focus its analysis on the suitability of the entire property for each Subject Property. The Hearings Officer finds Applicant and Staff’s focus on the ‘entire parcel’ for the review of this criterion is appropriate.

Staff (Staff Report, pages 28 – 37) provide a comprehensive review and analysis of each of the relevant DCC 18.16.050 G.1.(3) factors. The Staff review and analysis is quoted, in full, below:

**“Adverse Soil or Land Conditions**

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

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



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

The soil study states on Page 4:

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

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

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

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

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

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

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

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

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

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

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

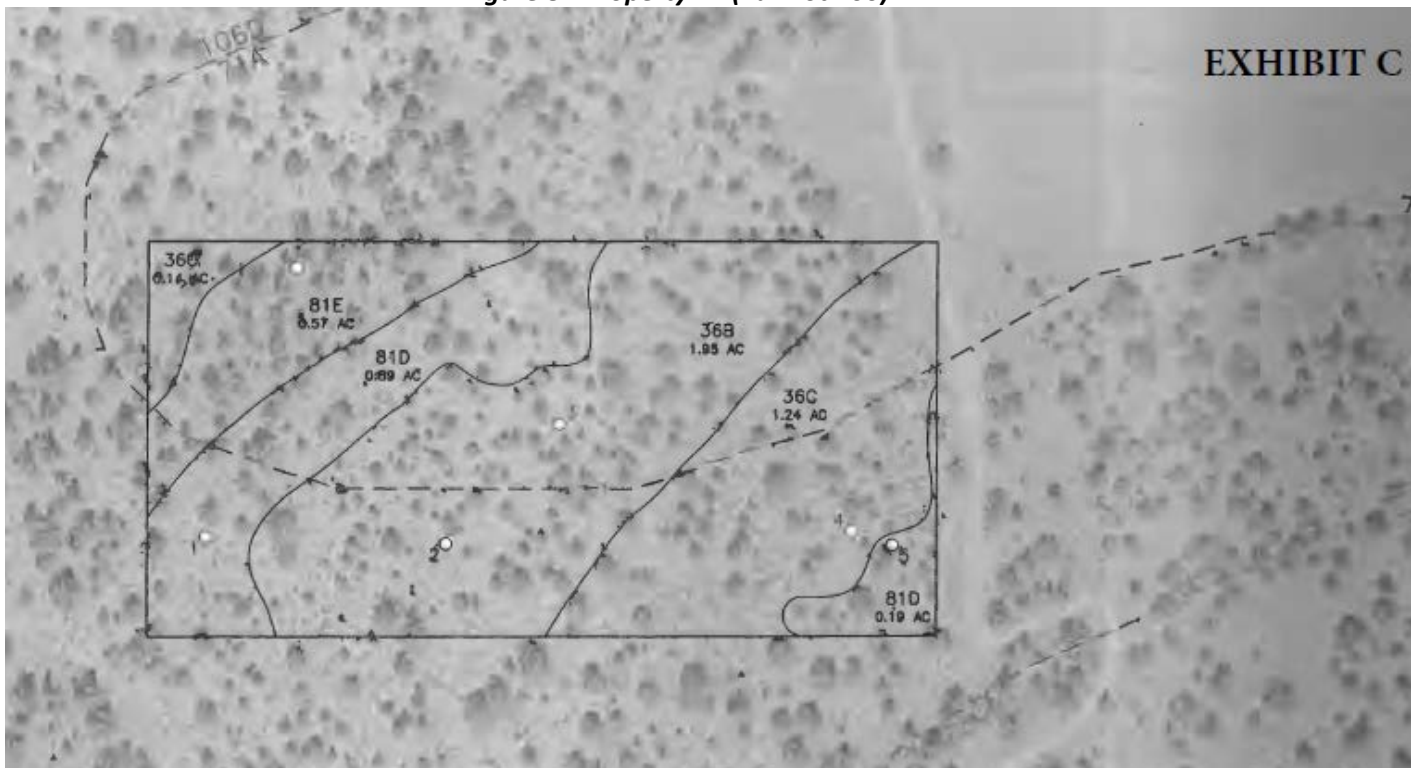


Figure 8 illustrates the location of soil units on the property.

The soil study states on Page 4:

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

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

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

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

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

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

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

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

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

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

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

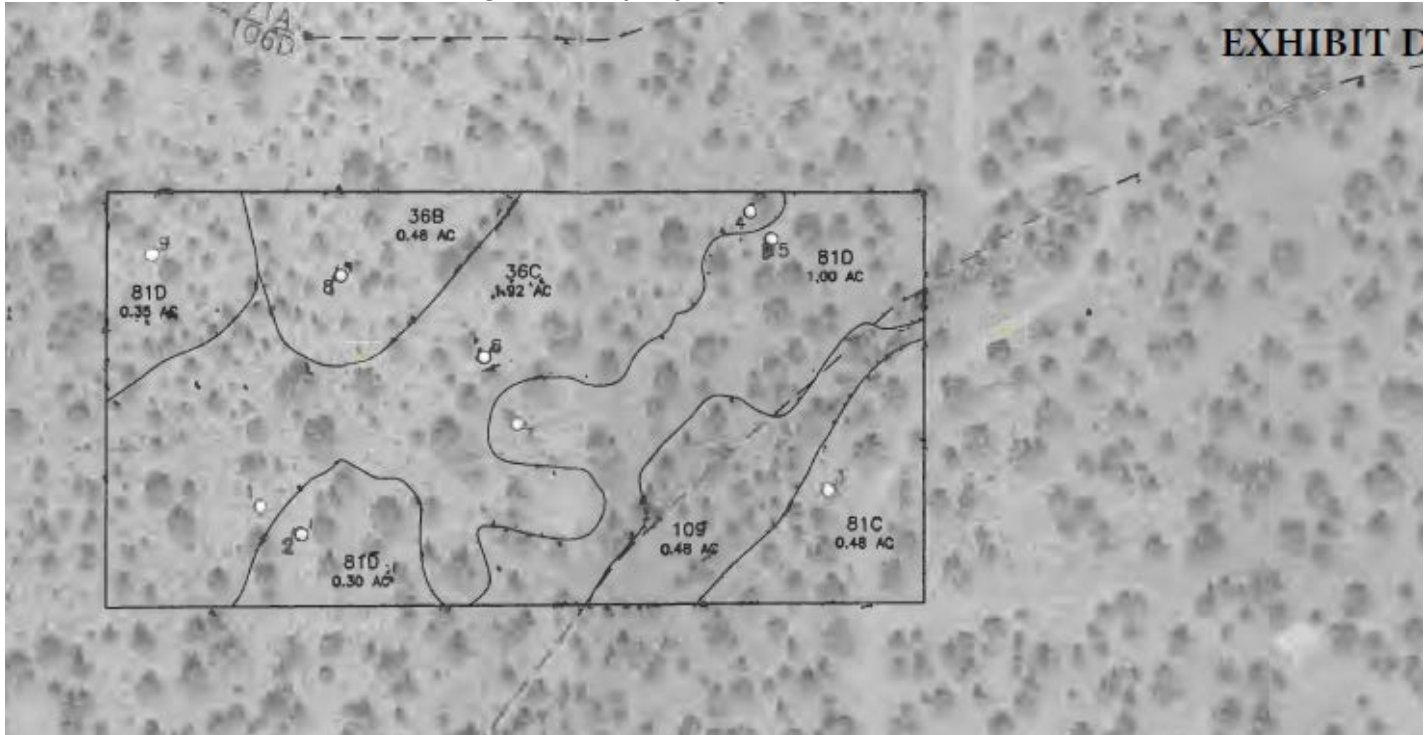


Figure 9 illustrates the location of soil units on the property.

The soil study states on Page 4:

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

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

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

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

*The applicant's supplemental burden of proof states in part:*

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

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

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

### **Farm Crops**

#### Tax Lot 100

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

*It is not clear to staff that Tax Lot 100 is not suitable for the production of farm crops. Staff asks the Hearings Officer to make specific findings on whether the applicant has demonstrated that the proposed nonfarm dwelling is situated on an existing lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock, or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.*

#### Tax Lot 200

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

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

#### Tax Lot 300

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



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

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

### **Livestock Production**

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

- One AUM<sup>5</sup> is the equivalent to the forage required for a 1000 lb. Cow and calf to graze for 30 days (900 pounds forage).
- On good quality forage, an animal unit will gain 2 pounds per day.
- Two animal units will eat as much in one month as one animal unit will eat in two months.
- Forage production on dry land is not continuous: Once the forage is eaten, it generally will not grow back until the following spring.
- An average market price for beef is \$1.15 per pound.

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

### **Tax Lot 100**

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

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

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

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

$$1.0 \text{ AUM per acre and } 0.78 \text{ AUM per acre}$$

The entire property is 4.98 acres in size.

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

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

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<sup>5</sup> Animal Unit Month

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

### **Tax Lot 200**

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

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

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

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

$$1.0 \text{ AUM per acre and } 0.78 \text{ AUM per acre}$$

*The entire property is 4.98 acres in size.*

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

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

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

### **Tax Lot 300**

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

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

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

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

*1.0 AUM per acre and 0.78 AUM per acre*

*The entire property is 5.01 acres in size.*

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

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

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

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

### **Merchantable Trees**

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

### **Building Envelope**

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

Staff, in the above-quoted comments, asked the Hearings Officer to respond to a number of issues. The Hearings Officer will address Staff’s issues in the order raised.

Staff (Staff Report, page 29), with respect to Subject Property #1 (Tax Lot 100) referenced a statement, included in the Applicant’s soil report (See, Applicant submission 2023-04-19 [pages 34 et. seq.]), indicating that the soils found were “generally unsuitable for farm use in conjunction with adjacent properties.” Staff asked the Hearings Officer

*“to make specific findings on whether the applicant has demonstrated that the proposed non farm 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 crops and livestock, or merchantable tree species, considering the terrain, soil or land conditions, drainage and flooding, vegetation, location and size of tract.”*

The Hearings Officer reviewed carefully the Brian T. Rabe soil study (Exhibit 2 to Application Materials, Valley Science and Engineering) and Applicant’s Supplemental Burden of Proof Statement (pages 8 -13). The Hearings Officer finds no evidence in the record, submitted by a person/entity qualified to provide a professional soil classification/analysis or study that disputes or challenges the conclusions set forth in the Rabe soil study or the conclusions drawn from that study by Applicant.

The Hearings Officer, relying upon the Rabe Soil Study, finds that the soil scientist considered the “entire” Subject Property #1 and not any identified or proposed building envelope. The Hearings Officer finds that the use of the phrase “in conjunction” was not used, in the Rabe Soil Study, in a restrictive or limiting sense. The Hearings Officer finds the “in conjunction” language was used in the Rabe Soil Study on in the context of Deskamp soils and not in the context of the overall Subject Property.

The Hearings Officer finds the Rabe Soil Study clearly states that it considered “the entire area evaluated.” The Hearings Officer finds the Rabe Soil Study concluded that the Subject Property predominately consists of soils generally unsuitable for farming and the production of merchantable tree species. The Hearings Officer finds no persuasive evidence in the record to dispute the conclusions expressed by the professional soil scientist in the Rabe Soil Study. Further, the Hearings Officer finds that the Rabe Soil Study investigated and considered, in arriving at its conclusion, the terrain, adverse soil or land conditions, drainage, flooding and vegetation.

The Hearings Officer notes that Staff made the same request to the Hearings Officer, as discussed above, related to Subject Property #2 (Tax Lot 200). The Hearings Officer conducted a review of the Rabe Soil Study and the Applicant’s Supplemental Burden of Proof Statement in the context of Subject Property #2. The Hearings Officer finds, as set forth above, that the soil scientist considered the “entire” Subject Property #2 and concluded that the “entire” property was unsuitable for farming and the production of merchantable tree species. Further, the Hearings Officer finds that the Rabe Soil Study investigated and considered, in arriving at its conclusion for Subject Property #2, the terrain, adverse soil or land conditions, drainage, flooding and vegetation. This Hearings Officer comment also applies to Staff’s request related to Farm Crops (Staff Report, page 33).

In reliance upon the Rabe Soil Study (with attachments) and the Applicant’s Supplemental Burden of Proof Statement, as modified by the Hearings Officer’s responses to Staff issues above, the Hearings Officer finds this criterion is met.

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

**FINDING:** The Applicant provided the following response to this criterion:

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

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

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

**FINDINGS:**

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

Road access. The Hearings Officer incorporates the Preliminary Findings DCC 18.88.060 (section A.2) as additional findings for this criterion.

The Hearings Officer takes note that Applicant, in its initial Burden of Proof, appeared to desire to use a historic roadway located to the east of the Subject Property. Applicant, in its Third Supplemental Burden Of Proof Statement With Alternative Building Envelope Location (pages 2 – 3), proposed to use an access roadway located on the west side of the Subject Property. Based upon the Applicant's comments in its Open-Record – Round Two submission it appears to the Hearings Officer that Applicant desires the Hearings Officer to approve, if possible, the alternative roadway location (to the west of the Subject Properties) even if the Hearings Officer concludes the historic roadway meets the requirements of DCC 18.88.060.B.1.

The Hearings Officer found (Preliminary Findings, Road Related Siting Issues, section A.2 and the findings for DCC 18.88.060 set forth later in this decision) that the historic roadway did meet the requirements of 18.88.060 B which would result in building envelopes/footprints to be located within 300-feet of a "private road" that existed on August 5, 1992. The Hearings Officer also found that Applicant's proposed alternative roadway, located to the west of the Subject Properties, did not meet the requirements of DCC 18.88.060 B.1.

The Applicant's preferred alternative access is via a road along the western side of the Subject Properties; a roadway that connects the Subject Property to NW Lower Valley Drive. NW Lower Valley Drive, a private road, is functionally classified as a local road. The County Transportation Planner indicated that each individual dwelling will not cause NW Lower Valley Drive to exceed its capacity. The private road terminates in the southwest corner of Tax Lot 300.

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

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

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

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

In addition to the road naming process noted above, Staff (Staff Report, page 39) noted that the property owner would need to provide recorded easements as the road which accesses the subject property crosses nearby parcel.

Staff (Staff Report, page 39) recommended the following conditions to ensure compliance with access requirements:

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

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

Telephone. The Applicant proposed to utilize cellular phone service for any dwelling on the Subject Properties.

Domestic water. The Applicant proposed that domestic water on the Subject Properties would be provided by a private well. The Applicant submitted well logs indicating that domestic water to the Subject Properties can be accommodated with a private well. The chart below lists the submitted well log and corresponding static water level.

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

The Hearings Officer finds there should be adequate water for a domestic well on this property.

Septic. Dwellings on each Subject Property are proposed to be served by an on-site septic disposal system. Staff (Staff Report, page 39) recommended the following condition of approval to ensure compliance with this criterion.

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

Fire protection. The Subject Properties are located outside a fire protection district. Staff sent notice of the application to the Deputy State Fire Marshal and they responded with no comment. However, Staff expressed concerns (Staff Report, page 40) regarding adequacy of emergency access to the proposed dwelling locations. As discussed above, the access road to the Subject Properties is not over a County-maintained roadway. The private roadway crosses multiple privately owned parcels which appear to be under common ownership by the property owner for the subject applications. However, it is not clear how this roadway is maintained and to what standard it was constructed to. Therefore, staff recommended (Staff Report, page 40) the following conditions of approval:

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

- 1. **Primary Firebreak.** Prior to use, a primary firebreak, not less than 10 feet wide, shall be constructed containing nonflammable materials. This may include lawn, walkways, driveways, gravel borders or other similar materials.*
- 2. **Secondary Firebreak.** A secondary firebreak of not less than 20 feet shall be constructed outside the primary firebreak. This firebreak need not be bare ground, but can include a lawn, ornamental shrubbery or individual or groups of trees separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. All trees shall be pruned to at least*

- eight feet in height. Dead fuels shall be removed.*
3. *Fuel Break. A fuel break shall be maintained, extending a minimum of 100 feet in all directions around the secondary firebreak. Individual and groups of trees within the fuel break shall be separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. Small trees and brush growing underneath larger trees shall be removed to prevent spread of fire up into the crowns of the larger trees. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed. The fuel break shall be completed prior to the beginning of the coming fire season.*
  4. *No portion of a tree or any other vegetation shall extend to within 15 feet of the outlet of a stovepipe or chimney.*

Fire Safety Design Standards for Roads: Staff (Staff Report, pages 40 – 41) also recommended additional conditions related to fire safety design for the private road. The Staff recommended conditions follow:

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

1. *Roads, bridges and culverts shall be designed and maintained to support a minimum gross vehicle weight (GVW) of 50,000 lbs. If bridges or culverts are involved in the construction of a road or driveway, written verification of compliance with the 50,000 lb. GVW standard shall be provided by a professional engineer registered in Oregon.*
2. *Access roads shall have an unobstructed horizontal clearance of not less than 20 feet and an unobstructed vertical clearance of not less than 13.5 feet, and provide an all weather surface.*
3. *Turnarounds shall have a minimum of 50 feet of turn radius with an all weather surface and be maintained for turning of fire fighting equipment.*
4. *Road grades should not exceed eight percent, with a maximum of 12 percent on short pitches. Variations from these standards may be granted when topographic conditions make these standards impractical and where the local fire protection district states their fire fighting equipment can negotiate the proposed road grade.*

Police protection. The Subject Property (refers collectively to three separate lots) is served by the Deschutes County Sheriff.

The Hearings Officer, based upon the Preliminary Findings, Road Related Siting Issues (section A.2) and the findings set forth above, concludes that if all Staff recommended conditions are included then these criteria will be met.

**(6) *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 Hearings Officer incorporates, as additional findings for this criterion, the Preliminary Findings, **Lot Creation Date - DCC 18.16.050 G.1.a.(6)** (section A.3). The Applicant provided the following statement in response to this criterion:

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



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

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

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

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

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

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

The Applicant also provided the following responses as it relates to each of the Subject Properties:

#### **Tax Lot 100**

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

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

#### **Tax Lot 200**

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

**Tax Lot 300**

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

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

The Hearings Officer, based upon the Preliminary Findings, **Lot Creation Date – DCC 18.16.050 G.1.a.(6)** (section A.3) related the legal interpretation of this approval criterion and the evidence supplied by Applicant, as quoted above, finds the Subject Properties were created prior to January 1, 1993.

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

**FINDING:** The Hearings Officer incorporates the Preliminary Findings, Unsuitability for Farm Use – Use in Conjunction (section A.4) as additional findings for this criterion.

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

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

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

In this case, and as articulated throughout this decision, the Staff Report and in the Applicant's Burdens of Proof, the Subject Property (collectively refers to three lots) is not suitable due to adverse soil and land conditions, which could demonstrate that the properties proposed for the nonfarm dwellings are generally unsuitable for farm use. Because the Applicant does not claim unsuitability due to size or location, the Hearings Officer finds this criterion does not apply.

- b. A lot or parcel is not "generally unsuitable" simply because it is too small to be farmed profitably by itself. If a lot or parcel can be sold, leased, rented or**

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

**FINDING:** The Hearings Officer incorporates the Preliminary Findings, Unsuitability for Farm Use – Use in Conjunction (section A.4) as additional findings for this criterion. The Hearings Officer also incorporates the findings for DCC 18.16.050 G.1.a as additional findings for this criterion.

The Applicant's supplemental Burden of Proof, dated September 14, 2023, states in part:

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

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

The Hearings Officer agrees with the Applicant that it is not asserting any property subject to this decision is too small to be farmed profitably by itself. Rather, the Hearings Officer finds that the Applicant is asserting that the poor soil quality on each Subject Property renders them generally unsuitable for farming/timber production. The Applicant provided an analysis study for each property related to the general unsuitability for crop and livestock production (See findings for DCC 18.16.050 G.1.a (3)). While there are large scale commercial farm operations nearby the Subject Property, there is no evidence in the record that the Subject Property can be sold, leased, rented or otherwise managed as part of a nearby commercial farm or ranch. No other generally accepted farm practices are identified in the record.

Staff (Staff Report, page 45) provided the following comments related to this approval criterion:

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

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

The Hearings Officer finds that the soil conditions existing at the Subject Property was adequately addressed by Applicant (See Applicant Supplemental Burden of Proof Statement pages 8 – 13 and attachments). The Hearings Officer finds, based upon soil conditions, each property subject to this decision, is generally unsuitable for the production of farm crops and livestock. Further, the Hearings Officer finds that Applicant addressed each of the

relevant DCC 18.16.050 G. factors (i.e., terrain, land conditions, drainage, flooding, vegetation and location). The Hearings Officer finds Applicant's submissions related to the DCC 18.16.050 G evaluation factors demonstrates that the Subject Property is not suitable for the production of farm crops and livestock.

- 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 Properties are not under forest assessment. Therefore, the Hearings Officer finds this criterion does not apply.

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

**FINDING:** Staff (Staff Report, pages 45-46) recommended the following condition of approval:

***Farm Tax Deferral Disqualification: Prior to the issuance of building permits, the applicant shall produce evidence from the County Assessor's Office that the parcel upon which the dwelling is proposed has been disqualified for special assessment at value for farm use under ORS 308.370 or other special assessment under ORS 308.765, 321.352, 321.730 or 321.815, and that any additional tax or penalty imposed by the County Assessor as a result of disqualification has been paid.***

The Hearings Officer finds that with Staff's recommended condition of approval this criterion can be met.

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

**FINDING:** The Subject Properties are located within the SMIA Zone in association with mine site 324.

#### Section 18.56.030, Application of Provisions.

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

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

#### Section 18.56.050. Conditional Uses Permitted

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

*as the conditions of the SMIA Zone.*

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

Section 18.56.070. Setbacks.

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

- A. No noise sensitive or dust sensitive use or structure established or constructed after the designation of the SMIA Zone shall be located within 250 feet of any surface mining zone, except as provided in DCC 18.56.140; and*
- B. No noise sensitive or dust sensitive use or structure established or constructed after the designation of the SMIA Zone shall be located within one quarter mile of any existing or proposed surface mining processing or storage site, unless the applicant demonstrates that the proposed use will not prevent the adjacent surface mining operation from meeting the setbacks, standards and conditions set forth in DCC 18.52.090, 18.52.110 and 18.52.140, respectively.*
- C. Additional setbacks in the SMIA Zone may be required as part of the site plan review under DCC 18.56.100.*
- D. An exception to the 250 foot setback in DCC 18.56.070(A), shall be allowed pursuant to a written agreement for a lesser setback made between the owner of the noise sensitive or dust sensitive use or structure located within 250 feet of the proposed surface mining activity and the owner or operator of the proposed surface mine. Such agreement shall be notarized and recorded in the Deschutes County Book of Records and shall run with the land. Such agreement shall be submitted and considered at the time of site plan review or site plan modification.*

**FINDING:** The Hearings Officer finds that no noise sensitive or dust sensitive use or structure is proposed within one quarter mile of any surface mining zone.

Section 18.56.080. Use Limitations.

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

**FINDING:** This decision includes SMIA Zone site plan approval under the standards and criteria set forth in DCC 18.56.090 through 18.56.120. Staff (Staff Report, page 45) found that this approval covers any noise and dust sensitive use anywhere on the property. Barring code changes to DCC 18.56 or changes in the boundaries of mine(s) in the area, no further SMIA review is required for permitted uses on the subject properties.

Section 18.56.090. Specific Use Standards.

*The following standards shall apply in the SMIA Zone:*

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

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

Section 18.56.100. Site Plan Review and Approval Criteria.

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

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

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

**FINDING:** The Applicant applied for site plan review for the proposed use, which are being reviewed and processed under Title 22, Deschutes County Development Procedures Ordinance. The Hearings Officer finds that this criterion will be met.

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

**FINDING:** The Hearings Officer finds that this approval does not require modifications to any site plan to meet the DCC 18.56 setbacks, standards and conditions described above.

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

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

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

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

Section 18.56.110. Abbreviated SMIA Site Plan Review.

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

**FINDING:** Staff provided the following findings (Staff Report, page 49) finds that any future new or enlarged noise or dust sensitive use on the subject property would likewise meet the applicable criteria of DCC 18.56 and that no

further review under DCC 18.56 is required for such uses. The Hearings Officer concurs with Staff's analysis and conclusion. The Hearings Officer finds this criterion is met.

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

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

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

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

Section 18.56.120. Waiver of remonstrance.

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

**FINDING:** Staff (Staff Report, page 47) recommended a condition of approval that requires the Applicant to sign and record a Waiver of Remonstrance prior to the issuance of the building permits for the proposed uses. The Hearings Officer finds that with Staff's recommended condition of approval this requirement can be met.

Section 18.56.140. Exemptions.

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

- A. *Uses in the SMIA Zone which are not within one half mile of any identified resource in the SM Zone after all reclamation has occurred.***
- B. *Continuation and maintenance of a conforming or nonconforming use established prior to the effective date of Ordinance No. 90 014.***
- C. *The employment of land for farm or forest use.***
- D. *Additions to noise-sensitive or dust-sensitive uses or structures existing on the effective date of Ordinance No. 90 014 or established or constructed in accordance with DCC Chapter 18.56 which are completely screened from the surface mining site by the existing use or structure.***

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

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

Section 18.88.040. Uses Permitted Conditionally.

- A. *Except as provided in DCC 18.88.040(B), in a zone with which the WA Zone is combined, the***



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

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

Section 18.88.060. Siting Standards.

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

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

**B. The footprint, including decks and porches, for new dwellings shall be located entirely within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992 unless it can be found that:**

- 1. Habitat values (i.e., browse, forage, cover, access to water) and migration corridors are afforded equal or greater protection through a different development pattern; or,**
- 2. The siting within 300 feet of such roads or easements for vehicular access would force the dwelling to be located on irrigated land, in which case, the dwelling shall be located to provide the least possible impact on wildlife habitat considering browse, forage, cover, access to water and migration corridors, and minimizing length of new access roads and driveways; or,**
- 3. The dwelling is set back no more than 50 feet from the edge of a driveway that existed as of August 5, 1992.**

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

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

**FINDING:** The Hearings Officer incorporates the Preliminary Findings **Road Related Siting Issues** (section A.2) as additional findings for these criteria. Summarized the **Road Related Siting Issues** (section A.2) findings concluded that an applicant must, if seeking a DCC 18.88.060 B.1 exception, first demonstrate that proposed building footprints are within 300-feet of a August 5, 1992 road. The Hearings Officer found, in the Preliminary Findings, that a "private road" includes a "farm road." The Hearings Officer found that a "private road" need not be paved or otherwise improved so long as it serves the purpose of providing vehicular access between two points. The Hearings Officer found that an applicant can provide proof of the existence of a August 5, 1992 private road by submitting into the record aerial photos and maps so long as those photos and maps were taken prior to August 5, 1992 and the roadway is visible. Finally, the Hearings Officer, in the Preliminary Findings, concluded that a DCC

18.88.060 “private road” shall be considered “in use” unless there is evidence in the record that the right to use the roadway was legally terminated or there is substantial evidence in the record that the road use has been permanently discontinued.

The Hearings Officer first addresses the COLW claim that Applicant failed to provide substantial evidence into the record that a “private road,” as set forth in DCC 18.88.060 B, was in existence on August 5, 1992. Applicant submitted comments, in its multiple Burdens of Proof (including its original Burden of Proof and subsequent Supplemental Burdens of Proof), that a “farm road” is located along the eastern side of the Subject Property. Staff also provided comments and evidence (Staff Report, pages 51 – 59) related to the alleged eastern roadway. The Hearings Officer finds COLW provided no evidence in the record disputing the authenticity or accuracy of the Applicant’s or Staff’s proffered record evidence; COLW simply argued that the evidence in the record was not adequate. The Hearings Officer finds all maps and photos submitted by Applicant and Staff to be credible.

The Hearings Officer takes note of the Hearing testimony and record submissions of Dirk Duryee (“Duryee”). Duryee represented, during his Hearing testimony, that he is an Oregon licensed professional engineer. Duryee submitted (Applicant February 12, 2024 record submission plus attachments) comments, maps and aerial photos addressing the alleged eastern roadway. The Hearings Officer finds Duryee’s testimony and record submissions constitute credible and substantial evidence related to the existence of the eastern roadway prior to August 5, 1992.

The Hearings Officer also takes note of an affidavit signed by Keenan Howard (“Howard”) (Applicant February 12, 2024 record submission, attachment). In summary, the Howard affidavit states that he is familiar with the Subject Property and land located east of and adjacent to the Subject Property. Howard stated, in the affidavit, that he used the roadway, located east of the Subject Property, with farm equipment. Howard stated that:

*“There is no question that these were historical roads used by the farmers for decades, extending before 1992.”*

The Hearings Officer sets forth, once again, a portion of DCC 18.88.060:

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

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

\*\*\*

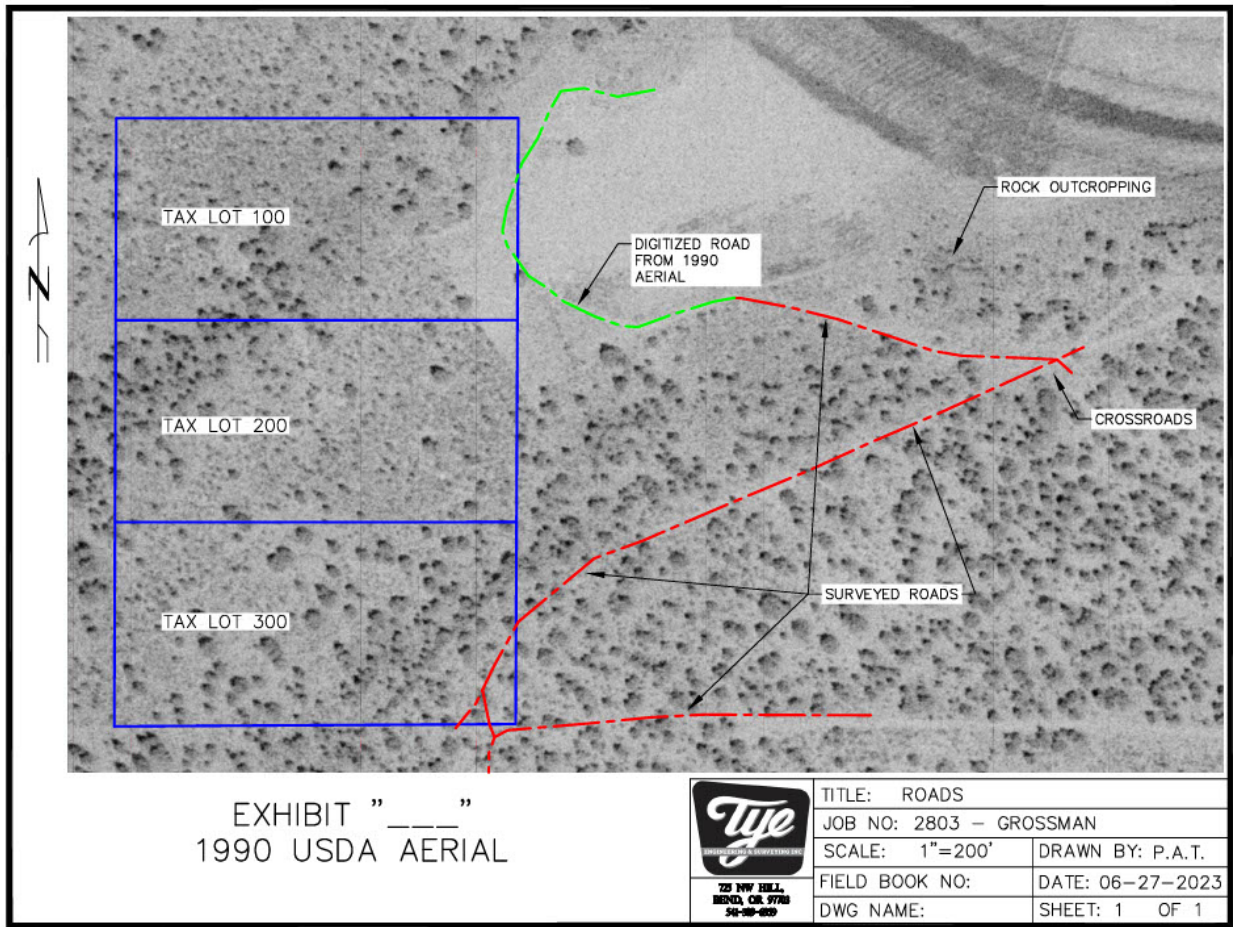
**b. An aerial photograph with proof that it was taken prior to August 5, 1992 on which the road, easement or driveway allowing vehicular access is visible.**

The level of proof required to demonstrate that a “private road” existed on August 5, 1992 (per DCC 18.88.060 B) is set forth above in DCC 18.88.060 C.1. The Hearings Officer finds that there must be in the record (a) one or more aerial photographs with proof that the photographs were taken prior to August 5, 1992 and (b) that the purported “private road” (in this case) is **visible** (*emphasis added*).

The Hearings Officer finds that many of the aerial photographs submitted by Applicant appear to show the alleged eastern “farm road” (Applicant’s Burdens of Proof, Staff Report, and Open-Record Submissions). The Hearings Officer finds many of those photographs are suggestive and perhaps conclusive that the eastern road met the DCC 18.88.060 C.1 proof requirements. The Hearings Officer finds that Duryee submitted Exhibit (1990 USDA Aerial), included below, clearly shows the Subject Property and an eastern roadway prior to August 5, 1992.

The Hearings Officer, based upon the Applicant’s submittals, the Staff Report, Duryee testimony and submitted

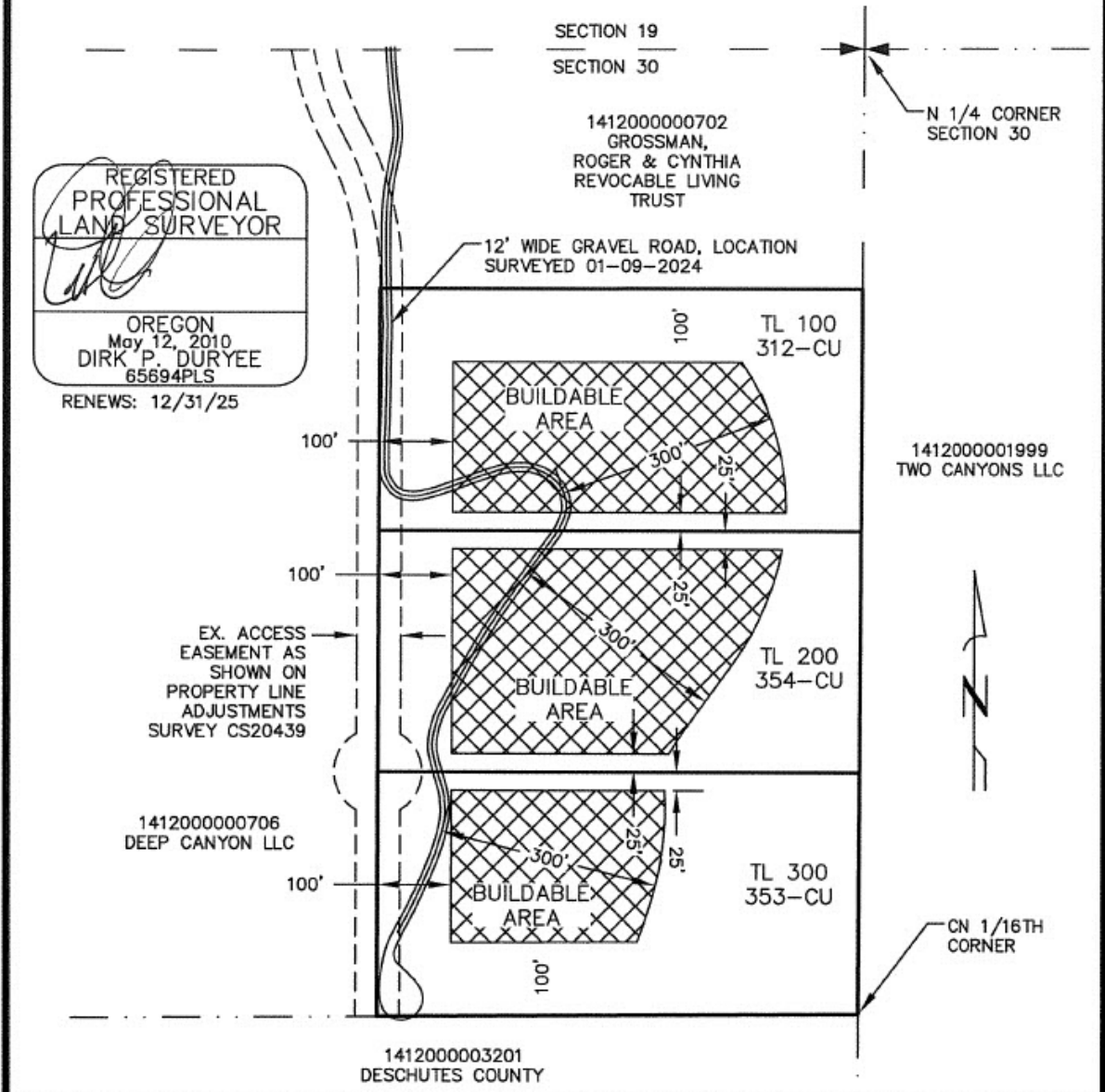
documentation and the Howard affidavit, finds that a “farm road” did exist, on and prior to August 5, 1992, as shown by the aerial photograph below. The Hearings Officer, based upon Duryee testimony and submitted documentation, finds that Applicant’s proposed building footprints as set forth in the initial Burden of Proof, are within 300-feet of a “private road”; thereby, satisfying the DCC 18.88.060 B requirements. The Hearings Officer finds COLW did not dispute or challenge the evidence in the record provided by Applicant that supported its claim that the eastern road met the 300-foot requirement. The only proof of meeting the 300-foot requirement was presented by Applicant. The Hearings Officer finds this evidence/representation by Applicant to be credible.




2803-Grossman Site Plan.dwg

The Hearings Officer next addresses the Applicant’s preferred alternative; locating building footprints accessing a “private road” to the west of the Subject Property. Applicant’s preferred alternative is to utilize the DCC 18.88.060 B.1 “exception” process. Applicant provided the following map/plan showing its preferred access alternative.

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



	<b>TYE ENGINEERING, INC.</b> 725 NW HILL, BEND, OREGON 97703 (541) 389-6959		
	DATE: 01-10-2024	SCALE: 1"=200'	DRAWN BY: P.A.T.

COLW (February 6, 2024 page 5 and February 13, 2024 page 3) and the Oregon Department of Fish and Wildlife ("ODFW" January 30, 2024 email) argued that Applicant did not provide, in the record, substantial evidence that the habitat values and migration corridors are afforded equal or greater protection if Applicant's alternative (west side) roadway is approved. Applicant relied upon the testimony of Wendy Wente ("Wente") and a "wildlife study" submitted into the record (July 27, 2023, Mason, Bruce and Girard, Exhibit 2 to Third Supplemental Burden of Proof Statement – hereafter the "MB&G Study") in support of its request for its preferred alternative DCC 18.88.060 B.1 exception.

DCC 18.88.060 B.1 states:

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

The Hearings Officer finds that DCC 18.88.060 B.1 describes, through a list contained in parenthesis, "habitat values." The Hearings Officer finds the list (in parentheses) following "habitat values" in DCC 18.88.060 B.1 is suggestive and does not ascribe the weight to be given to any item in the list. The Hearings Officer also finds the parenthesis list of "habitat values" is not exclusive; other habitat value factors could be considered. However, no participant in this case suggested that the listed factors should not be considered.

The Hearings Officer finds that the DCC 18.88.060 B.1 language "*afforded equal or greater protection through a different development pattern*" requires the Hearings Officer to compare the proposed alternative to the 300' Option. In this case the Hearings Officer is required to compare the west side road to the historical east side road. The Hearings Officer must determine, based upon the evidence in the record, whether the Applicant's proposed alternative (west side road) provides equal or greater habitat values and migration corridors than the historic eastern road.

The Hearings Officer finds that Applicant relied upon the MB&G Study, the testimony of Wente and a narrative (with accompanying photographs) submitted as part of Applicant Statement (Open Record – Round One) to demonstrate satisfaction of DCC 18.88.060 B.1. The Hearings Officer sets forth below a section of the MB&G Study titled "Professional Opinion:"

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

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

*Alternatively siting the building footprints within 300 feet of the western-most road rather than within 300 feet of the prep1992 eastern-most road would:*

- 1) Provide a contiguous corridor that would allow mule deer to move through and utilize the eastern-most portions of the three tax lots by forming a corridor habitat following the ridgeline and connecting undeveloped public lands to the south to agricultural lands and pockets of juniper woodlands to the north.*
- 2) Reduce traffic related disturbance. The route along the eastern road would require traffic to travel approximately 1.25 miles through juniper woodland habitat and adjacent farmland before reaching the turnoff to FHC. The wester road reaches the nearest intersection within approximately .75 miles.*

*The juniper habitat transected by the eastern road also appears to create a corridor of habitat between agricultural fields, and is likely used by mule deer as they move about the winter range. Limiting traffic to the western road would, therefore, reduce impacts to overwintering deer.*

3) Concentrate disturbed areas including the new building footprints and driveways closer to the existing operating farm by keeping the development within 300 feet of the western road.

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

The MB&G Study, as quoted above, presented a challenge to the Hearings Officer to assess whether the habitat values and mitigation corridors factors were compared and contrasted as required by DCC 18.88.060 B.1. The Hearings Officer finds, in this case, that the habitat value factors of browse, forage and cover must be satisfactorily compared and contrasted by Applicant to meet the requirements of DCC 18.88.060 B.1. The migration corridor factor also is required to be compared and contrasted by Applicant.

The Hearings Officer will address below the required comparison/contrast factors individually.

The first DCC 18.88.060 B.1 habitat value factor is "browse." The Hearings Officer found no reference to "browse" in the MB&G Study. The Hearings Officer reviewed Wente's February 6, 2024 hearing testimony and did not hear any reference to "browse." It is possible that Wente and/or the MB&G Study intended the Hearings Officer to consider the "browse" factor was addressed using some other language or phrasing in testimony and documentation. However, the Hearings Officer will not engage in such speculation. The Hearings Officer finds that Applicant did not address the DCC 18.88.060 B.1 requirement to compare/contrast the "browse" habitat value.

The next habitat value required to be considered is "forage." The Hearings Officer finds that the MB&G Study did reference "food sources" which the Hearings Officer finds may be related to the "forage" habitat value.<sup>6</sup> However, the Hearings Officer finds that neither the Wente testimony nor the MB&G Study clearly compared and contrasted the proposed western road location to the historic eastern road location with respect to the "forage" habitat value factor. The Hearings Officer will not speculate as to the Applicant's intentions related to the habitat factor "forage." The Hearings Officer finds that Applicant did not address the DCC 18.88.060 B.1 "forage" habitat value requirement to compare/contrast the proposed western road development pattern and the historic eastern road.

The next habitat value to be addressed is the DCC 18.88.060 B.1 "cover." The MB&G Study did address the "cover" habitat value factor. However, the MB&G Study does not clearly offer compare/contrast the "cover" habitat value factor (compare the "cover" habitat value for the western road to the historic eastern road). Based upon the evidence in the record the Hearings Officer will not speculate as to whether the proposed western road provides equal or greater "cover" habitat value compared to the historic eastern road.

The Hearings Officer finds the "access to water" habitat value factor is not relevant to this case.

The next DCC 18.88.060 B.1 factor to be compared and contrasted is "migration corridors." The Hearings Officer finds the MB&G Study did directly compare and contrast the proposed western road to the historic eastern road for the "migration corridors." The Hearings Officer finds the MB&G Study comments related to "migration corridors" did adequately compare and contrast the proposed western road to the historic eastern road. The Hearings Officer finds that neither COLW or ODFW offered any evidence to dispute the specific comments contained in the MB&G Study related to "migration corridors."

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<sup>6</sup> The MB&G Study states, in part "mule deer likely use the juniper woodlands as cover habitat during winter rather than as a primary food source due to the juniper dominated vegetation community which primarily offers cover rather than forage."

The Hearings Officer finds that Applicant adequately compared and contrasted the “migration corridors” factor. The Hearings Officer finds Applicant did not provide substantial evidence in the record to support a finding that the “browse,” “forage” or “cover” factors were compared and contrasted sufficiently to allow the Hearings Officer to conclude the location of the dwellings closer to the western road would result in equal or greater protection of habitat values. The Hearings Officer finds Applicant did not carry its burden with respect to DCC 18.88.060 B.1. The Hearings Officer finds, based upon the evidence in the record and available for the Hearings Officer’s consideration, that Applicant’s alternative siting of the dwellings near the western road does not meet the requirements of DCC 18.88.060 B.1 and Applicant’s requested “exception” for an alternative dwelling location must be denied.

Section 18.88.070. Fencing Standards.

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

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

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

***B. Exemptions:***

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

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

**SYSTEM DEVELOPMENT CHARGE**

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

**IV. CONCLUSION**

The Hearings Officer considered the Applicant’s proposal seeking conditional use approval for three non-farm dwellings on three separate lots and SMIA approval for each lot. The Hearings Officer considered Staff reservations related to a number of approval criteria. The Hearings Officer also considered COLW’s arguments that the conditional use applications failed to meet/satisfy a number of approval criteria.

The Hearings Officer, in the Preliminary Findings, addressed many of Staff’s and COLW’s legal interpretation

concerns. The Hearings Officer, in the General Findings for relevant approval criteria, addressed Staff's and COLW's evidentiary concerns in the context of the Hearings Officer's legal interpretation of the criteria.

The Hearings Officer found, with one exception, that the Applicant's proposals met the relevant approval criteria. The Hearings Officer concluded that Applicant failed to carry its evidentiary burden with respect to its request for exceptions to DCC 18.88.060 B.1 (Exception Requests). The Hearings Officer found that Applicant's request to locate the non-farm dwellings on the west side of the lots, as proposed in their Exception Requests was not supported by substantial evidence in the record and therefore had to be denied.

The Hearings Officer concluded that Applicant's proposals for three non-farm dwellings and SMIA review should be approved.

**V. DECISION**

**Approval** of Applicant's requests for conditional use and surface mining impact area review to establish three (3) non-farm dwellings on three separate legal lots of record in the EFU zone.

**Denial** of Applicant's requested DCC 18.88.060 B.1 exception to site the dwelling envelopes within 300-feet of the road located on the west side of the subject property.

**VI. CONDITIONS OF APPROVAL**

- A.** This approval is based upon the application, site plan, specifications, and supporting documentation submitted by the Applicant. Any substantial change in this approved use will require review through a new land use application.
- B.** The property owner shall obtain any necessary permits from the Deschutes County Building Division and Onsite Wastewater Division.
- C.** No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed by DCC 18.120.040
- D.** Structural setbacks from any north lot line shall meet the solar setback requirements in DCC 18.116.180.
- E.** In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.
- F.** Farm & Forest Management Easement: **Prior to the issuance of any building permit for a nonfarm dwelling**, the property owner shall sign and record in the deed records for the County, a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937. The Applicant shall submit a copy of the recorded Farm and Forest Management Easement to the Planning Division.
- G.** All new fences shall comply with DCC 18.88.070.
- H.** Septic: The Applicant shall secure any necessary septic permit approval for each nonfarm dwelling.
- I.** Farm Tax Deferral Disqualification: **Prior to the issuance of building permits**, the Applicant shall produce evidence from the County Assessor's Office that the parcel upon which the dwelling is proposed has been



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

- J. Prior to issuance of building permits,** Applicant shall sign and record in the Deschutes County Book of Records a statement declaring that the Applicant and his successors will not now or in the future complain about the allowed surface mining activities on the adjacent surface mining site. A copy of this recording shall be provided to Deschutes County Planning, prior to issuance of building permits.
- K. Road Naming: Prior to the issuance of building permits for any of the non-farm dwellings,** the existing unnamed roadway which provides access to the subject property shall be assigned a name in accordance with the procedures in DCC 16.16.030. This requires the submittal and approval of a Road Naming Application.
- L. Firebreaks and Fuel Break: Prior to the issuance of any building permit,** the Applicant shall construct and maintain the firebreaks detailed below on land surrounding the structure and access road that are owned or controlled by the owner. These required fuel breaks shall be maintained at all times.
1. Primary Firebreak. Prior to use, a primary firebreak, not less than 10 feet wide, shall be constructed containing nonflammable materials. This may include lawn, walkways, driveways, gravel borders or other similar materials.
  2. Secondary Firebreak. A secondary firebreak of not less than 20 feet shall be constructed outside the primary firebreak. This firebreak need not be bare ground, but can include a lawn, ornamental shrubbery or individual or groups of trees separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed.
  3. Fuel Break. A fuel break shall be maintained, extending a minimum of 100 feet in all directions around the secondary firebreak. Individual and groups of trees within the fuel break shall be separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. Small trees and brush growing underneath larger trees shall be removed to prevent spread of fire up into the crowns of the larger trees. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed. The fuel break shall be completed prior to the beginning of the coming fire season.
  4. No portion of a tree or any other vegetation shall extend to within 15 feet of the outlet of a stovepipe or chimney.
- M. Fire Safety Design Standards for Roads: Prior to the issuance of any building permits,** the Applicant shall provide written verification to the Planning Division from a professional engineer registered in the state of Oregon stating the fire safety design standards for the access road extending from the NW Lower Valley Drive right-of-way to each dwelling site is met as detailed below:
1. Roads, bridges and culverts shall be designed and maintained to support a minimum gross vehicle weight (GVW) of 50,000 lbs. If bridges or culverts are involved in the construction of a road or driveway, written verification of compliance with the 50,000 lb. GVW standard shall be provided by a professional engineer registered in Oregon.
  2. Access roads shall have an unobstructed horizontal clearance of not less than 20 feet and an unobstructed vertical clearance of not less than 13.5 feet, and provide an all weather surface.
  3. Turnarounds shall have a minimum of 50 feet of turn radius with an all weather surface and be maintained for turning of fire fighting equipment.
  4. Road grades should not exceed eight percent, with a maximum of 12 percent on short pitches. Variations from these standards may be granted when topographic conditions make these standards impractical and where the local fire protection district states their fire fighting equipment can negotiate the proposed road grade.

- N. Easement: Prior to the issuance of building permits, the Applicant shall provide a copy of a recorded access easement showing legal access from the subject parcels to NW Lower Valley Drive.
- O. **Prior to the issuance of building permits on Tax Lot 100**, the Applicant shall prepare and submit a Wetland Delineation to the Department of State Lands to verify the extent of potential wetlands on the subject property. DSL's review and approval of the delineation would determine if additional state or local permitting is required for site development.

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

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

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

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

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



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Gregory J. Frank, Hearings Officer

Attachments:

1. Approved Building Envelopes
2. Farm and Forest Management Easement(s)
3. Waiver of Remonstrance(s)



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



SECTION 19  
SECTION 30

141200000702  
GROSSMAN,  
ROGER & CYNTHIA

N 1/4 CORNER  
SECTION 30

BUILDABLE AREAS  
WITHIN 300' OF  
HISTORIC ROADS AND  
BUILDING SETBACKS

REGISTERED  
PROFESSIONAL  
LAND SURVEYOR

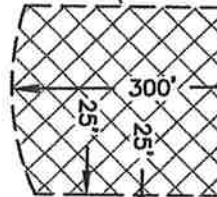


OREGON  
May 12, 2010  
DIRK P. DURYEE  
65694PLS

RENEWS: 12/31/23

NOTE: LOCATION OF  
HISTORIC ROADS BASED ON  
USDA AERIAL DATED  
7-26-90 AND  
1985 WAC-850R TAKEN ON  
MAY 5, 1985 BY WAC AND  
SITE SURVEY ON  
12-07-2022

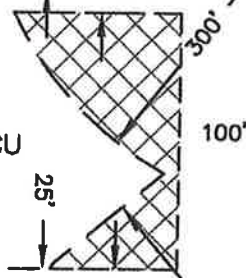
TAX LOT 100  
247-21-000312-CU



1412000001999  
JANET D WHITMORE  
LIVING TRUST

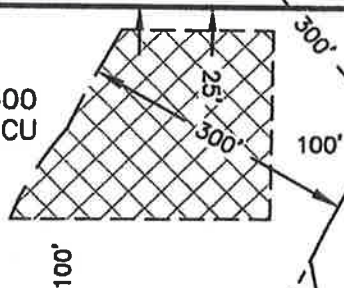
CL HISTORIC  
ROADS

TAX LOT 200  
247-21-000354-CU



141200000706  
BSC LLC

TAX LOT 300  
247-21-000353-CU



CL HISTORIC ROAD

CN 1/16TH  
CORNER

CL HISTORIC ROAD

1412000003201  
DESCHUTES COUNTY



TYE ENGINEERING, INC.

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

DATE: 01-12-2023

SCALE: 1"=200'

DRAWN BY: P.A.T.

2803-Grossman Site Plan.dwg

## **FARM AND FOREST MANAGEMENT EASEMENTS**

As a standard condition of a conditional use permit approval for a nonfarm dwelling in the Exclusive Farm Use Zone, the attached Farm and Forest Management Easement and an Exhibit "A," if needed, must be signed by the property owner and recorded with the Deschutes County Clerk. Exhibit A, if present, is a legal description (a metes and bounds description) that must be recorded in conjunction with the Easement.

You will need to sign the document before a notary public and then take it to the Clerk's office for recording. Please provide the Planning Division with a copy after recording.

To record the document, take the signed and notarized Easement and Exhibit "A" (if included) to the County Clerk's office, 1300 NW Wall Street, Suite 202, Bend, Oregon, 97701, between 8:00 a.m. and 4:00 p.m. There is a recording fee for the first page and a recording fee for each additional page. After this is accomplished, you must furnish copies of the recorded documents to the Planning Division. The Planning Division must have copies of the recorded Easement before the County issues any building permits.

If you have any questions regarding this matter, please feel free to contact the Planning Division at 388-6575.

Return to:  
Haleigh King, Associate Planner  
Community Development Department  
117 NW Lafayette, P.O. Box 6005  
Bend, Oregon 97708-6005

*Space Reserved for Recorder's Use*

## **FARM AND FOREST MANAGEMENT EASEMENT – CONDITIONAL USE**

Roger W Grossmann and Cynthia M Grossmann, Trustees of the Roger & Cynthia Grossmann Revocable Living Trust, herein called the Grantors, are the owners of real property described as set forth in that certain Bargain and Sale Deed dated March 23, 2023, as recorded in the Official Records of Deschutes County as instrument number 2023-06531, and by this reference incorporated herein, and further identified or depicted on Deschutes County Assessor's Map 14-12-30BA, as tax lot 100. In accordance with the conditions set forth in the decision of the Deschutes County Planning Division approving Land Use Permit 247-23-000293-CU, Grantors hereby grant to the owner(s) of all property adjacent to the above described property (Grantees), a perpetual non-exclusive farm and forest practices management easement as follows:

1. The Grantors, their heirs, successors, and assigns, hereby acknowledge by the granting of this easement that the above-described property is situated in a designated farm zone in Deschutes County, Oregon, and may be subjected to conditions resulting from farming or forest practices on adjacent lands. Such operations include management and harvesting of timber, disposal of slash, reforestation, application of chemicals, road construction and maintenance, by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof, and other accepted and customary farm and forest management activities conducted in accordance with federal and state laws. Such farm or forest management activities ordinarily and necessarily produce noise, dust, smoke, and other conditions that may conflict with Grantors' use of Grantors' property for residential purposes. Except as allowed by ORS 30.930 through 30.947, Grantors hereby waive all common law rights to object to normal, non-negligent farm and forest management activities legally conducted on adjacent lands that may conflict with Grantors' use of Grantors' property for residential purposes, and Grantors hereby give an easement to the adjacent property owners for the resultant impact on Grantors' property caused by the farm and forest management activities on adjacent lands.
2. Grantors shall comply with all restrictions and conditions for maintaining residences in farm and forest zones that may be required by State, Federal, and local land use laws and regulations. Grantors shall comply with all fire safety regulations developed by the Oregon Department of Forestry for residential development within a forest zone.

This easement is appurtenant to all property adjacent to the above-described property, and shall bind the heirs, successors, and assigns of Grantors, and shall endure for the benefit of the adjacent landowners, their heirs, successors, and assigns. The adjacent landowners, their heirs, successors, and assigns are hereby expressly granted the right of third-party enforcement of this easement.

***Signature Pages to follow***



Return to:  
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Community Development Department  
117 NW Lafayette, P.O. Box 6005  
Bend, Oregon 97708-6005

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## **FARM AND FOREST MANAGEMENT EASEMENT – CONDITIONAL USE**

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1. The Grantors, their heirs, successors, and assigns, hereby acknowledge by the granting of this easement that the above-described property is situated in a designated farm zone in Deschutes County, Oregon, and may be subjected to conditions resulting from farming or forest practices on adjacent lands. Such operations include management and harvesting of timber, disposal of slash, reforestation, application of chemicals, road construction and maintenance, by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof, and other accepted and customary farm and forest management activities conducted in accordance with federal and state laws. Such farm or forest management activities ordinarily and necessarily produce noise, dust, smoke, and other conditions that may conflict with Grantors' use of Grantors' property for residential purposes. Except as allowed by ORS 30.930 through 30.947, Grantors hereby waive all common law rights to object to normal, non-negligent farm and forest management activities legally conducted on adjacent lands that may conflict with Grantors' use of Grantors' property for residential purposes, and Grantors hereby give an easement to the adjacent property owners for the resultant impact on Grantors' property caused by the farm and forest management activities on adjacent lands.
2. Grantors shall comply with all restrictions and conditions for maintaining residences in farm and forest zones that may be required by State, Federal, and local land use laws and regulations. Grantors shall comply with all fire safety regulations developed by the Oregon Department of Forestry for residential development within a forest zone.

This easement is appurtenant to all property adjacent to the above-described property, and shall bind the heirs, successors, and assigns of Grantors, and shall endure for the benefit of the adjacent landowners, their heirs, successors, and assigns. The adjacent landowners, their heirs, successors, and assigns are hereby expressly granted the right of third-party enforcement of this easement.

***Signature Pages to follow***



Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ GRANTORS

Roger & Cynthia Grossmann Revocable Living Trust

\_\_\_\_\_  
Roger W Grossmann, Trustee

\_\_\_\_\_  
Cynthia M Grossmann, Trustee

STATE OF OREGON            )  
  ) ss.  
COUNTY OF \_\_\_\_\_)

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, a Notary Public in and for said County and State, personally appeared Roger W Grossmann and Cynthia M Grossmann, known to me to be the Trustees of the Roger & Cynthia Grossmann Revocable Living Trust, who acknowledged to me that they executed the same freely and voluntarily on behalf of said Trust.

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_

Return to:  
Haleigh King, Associate Planner  
Community Development Department  
117 NW Lafayette, P.O. Box 6005  
Bend, Oregon 97708-6005

*Space Reserved for Recorder's Use*

## **FARM AND FOREST MANAGEMENT EASEMENT – CONDITIONAL USE**

Roger W Grossmann and Cynthia M Grossmann, Trustees of the Roger & Cynthia Grossmann Revocable Living Trust, herein called the Grantors, are the owners of real property described as set forth in that certain Bargain and Sale Deed dated March 23, 2023, as recorded in the Official Records of Deschutes County as instrument number 2023-06533, and by this reference incorporated herein, and further identified or depicted on Deschutes County Assessor's Map 14-12-30BA, as tax lot 300. In accordance with the conditions set forth in the decision of the Deschutes County Planning Division approving Land Use Permit 247-23-000295-CU, Grantors hereby grant to the owner(s) of all property adjacent to the above described property (Grantees), a perpetual non-exclusive farm and forest practices management easement as follows:

1. The Grantors, their heirs, successors, and assigns, hereby acknowledge by the granting of this easement that the above-described property is situated in a designated farm zone in Deschutes County, Oregon, and may be subjected to conditions resulting from farming or forest practices on adjacent lands. Such operations include management and harvesting of timber, disposal of slash, reforestation, application of chemicals, road construction and maintenance, by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof, and other accepted and customary farm and forest management activities conducted in accordance with federal and state laws. Such farm or forest management activities ordinarily and necessarily produce noise, dust, smoke, and other conditions that may conflict with Grantors' use of Grantors' property for residential purposes. Except as allowed by ORS 30.930 through 30.947, Grantors hereby waive all common law rights to object to normal, non-negligent farm and forest management activities legally conducted on adjacent lands that may conflict with Grantors' use of Grantors' property for residential purposes, and Grantors hereby give an easement to the adjacent property owners for the resultant impact on Grantors' property caused by the farm and forest management activities on adjacent lands.
2. Grantors shall comply with all restrictions and conditions for maintaining residences in farm and forest zones that may be required by State, Federal, and local land use laws and regulations. Grantors shall comply with all fire safety regulations developed by the Oregon Department of Forestry for residential development within a forest zone.

This easement is appurtenant to all property adjacent to the above-described property, and shall bind the heirs, successors, and assigns of Grantors, and shall endure for the benefit of the adjacent landowners, their heirs, successors, and assigns. The adjacent landowners, their heirs, successors, and assigns are hereby expressly granted the right of third-party enforcement of this easement.

***Signature Pages to follow***

Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ GRANTORS

Roger & Cynthia Grossmann Revocable Living Trust

\_\_\_\_\_  
Roger W Grossmann, Trustee

\_\_\_\_\_  
Cynthia M Grossmann, Trustee

STATE OF OREGON            )  
  ) ss.  
COUNTY OF \_\_\_\_\_)

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, a Notary Public in and for said County and State, personally appeared Roger W Grossmann and Cynthia M Grossmann, known to me to be the Trustees of the Roger & Cynthia Grossmann Revocable Living Trust, who acknowledged to me that they executed the same freely and voluntarily on behalf of said Trust.

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_

## **WAIVERS**

As a standard condition of any Site Plan approval in a Surface Mining Impact Area, the attached Waiver of Remonstrance form and an Exhibit "A" must be signed by the property owner and recorded with the Deschutes County Clerk. Exhibit "A" is a legal description (Subdivision, Lot, and Block Numbers, or a metes and bounds description) that must be recorded in conjunction with the Waiver.

To record the document, take the signed and notarized Waiver and attached Exhibit "A" to the County Clerk's office, 1300 NW Wall Street, Suite 202, Bend, Oregon, 97701, between 8:00 a.m. and 4:00 p.m. There is a recording fee for the first page and for each additional page. After this is accomplished, bring copies of the recorded documents to the Planning Division. The Planning Division must have copies of the recorded documents prior to the issuance of any building permits.

If you have any questions regarding this matter, please feel free to contact the Planning Division at 388-6575.



Return to:  
Haleigh King, Associate Planner  
Community Development Department  
117 NW Lafayette, P.O. Box 6005  
Bend, Oregon 97708-6005

*Space Reserved for Recorder's Use*

**EASEMENT  
(WAIVER OF REMONSTRANCE)**

As a condition of the grant of development approval pursuant to Chapter 18.56 of the Deschutes County Code, for property identified on Deschutes County Assessor's Map 14-12-30BA, as tax lot 100, and further described as set forth in that certain Bargain and Sale Deed dated March 23, 2023, as recorded in the Official Records of Deschutes County as instrument number 2023-06531 (hereafter referred to as "burdened property"), Grantors hereby grant and/or relinquish to the owners of record of the property described Surface Mining Site No(s). 324, as described as set forth in that certain Bargain and Sale Deed dated March 23, 2023, as recorded in the Official Records of Deschutes County as instrument number 2023-06531, and further identified on Deschutes County Assessor's Map 14-12, as Tax Lot 702, (hereafter referred to as the "benefited property"), as Grantees, any and all rights of remonstrance or protest that they may have by virtue of ownership of the burdened property or otherwise to the visual, noise, dust, reclamation, traffic and any other similar impacts from the following protected activities:

- (1) Surface mining activities lawfully conducted in connection with a pre-existing mine, as that term is defined in Section 18.52.160(B) of the Deschutes County Code, on the benefited property; or
- (2) Surface mining activities that might be lawfully conducted in the future on the benefited property under County or State permits or exemptions.

Grantors acknowledge that by virtue of such grant they have no remaining rights to complain or protest about the protected activities described above.

This Waiver of Remonstrance Easement runs with the land and is binding upon the heirs, successors and assigns of the undersigned's interest in the burdened property or any persons acquiring through the undersigned an interest in the burdened property.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ GRANTORS

Roger & Cynthia Grossmann Revocable Living Trust

\_\_\_\_\_  
Roger W Grossmann, Trustee

\_\_\_\_\_  
Cynthia M Grossmann, Trustee

STATE OF OREGON            )  
  ) ss.  
COUNTY OF \_\_\_\_\_)

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, a Notary Public in and for said County and State, personally appeared Roger W Grossmann and Cynthia M Grossmann, known to me to be the Trustees of the Roger & Cynthia Grossmann Revocable Living Trust, who acknowledged to me that they executed the same freely and voluntarily on behalf of said Trust.

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_

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Community Development Department  
117 NW Lafayette, P.O. Box 6005  
Bend, Oregon 97708-6005

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**EASEMENT  
(WAIVER OF REMONSTRANCE)**

As a condition of the grant of development approval pursuant to Chapter 18.56 of the Deschutes County Code, for property identified on Deschutes County Assessor's Map 14-12-30BA, as tax lot 200, and further described as set forth in that certain Bargain and Sale Deed dated March 23, 2023, as recorded in the Official Records of Deschutes County as instrument number 2023-06531 (hereafter referred to as "burdened property"), Grantors hereby grant and/or relinquish to the owners of record of the property described Surface Mining Site No(s). 324, as described as set forth in that certain Bargain and Sale Deed dated March 23, 2023, as recorded in the Official Records of Deschutes County as instrument number 2023-06531, and further identified on Deschutes County Assessor's Map 14-12, as Tax Lot 702, (hereafter referred to as the "benefited property"), as Grantees, any and all rights of remonstrance or protest that they may have by virtue of ownership of the burdened property or otherwise to the visual, noise, dust, reclamation, traffic and any other similar impacts from the following protected activities:

- (1) Surface mining activities lawfully conducted in connection with a pre-existing mine, as that term is defined in Section 18.52.160(B) of the Deschutes County Code, on the benefited property; or
- (2) Surface mining activities that might be lawfully conducted in the future on the benefited property under County or State permits or exemptions.

Grantors acknowledge that by virtue of such grant they have no remaining rights to complain or protest about the protected activities described above.

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Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ GRANTORS

Roger & Cynthia Grossmann Revocable Living Trust

\_\_\_\_\_  
Roger W Grossmann, Trustee

\_\_\_\_\_  
Cynthia M Grossmann, Trustee



STATE OF OREGON            )  
  ) ss.  
COUNTY OF \_\_\_\_\_)

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, a Notary Public in and for said County and State, personally appeared Roger W Grossmann and Cynthia M Grossmann, known to me to be the Trustees of the Roger & Cynthia Grossmann Revocable Living Trust, who acknowledged to me that they executed the same freely and voluntarily on behalf of said Trust.

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_

Return to:  
Haleigh King, Associate Planner  
Community Development Department  
117 NW Lafayette, P.O. Box 6005  
Bend, Oregon 97708-6005

*Space Reserved for Recorder's Use*

**EASEMENT  
(WAIVER OF REMONSTRANCE)**

As a condition of the grant of development approval pursuant to Chapter 18.56 of the Deschutes County Code, for property identified on Deschutes County Assessor's Map 14-12-30BA, as tax lot 300, and further described as set forth in that certain Bargain and Sale Deed dated March 23, 2023, as recorded in the Official Records of Deschutes County as instrument number 2023-06533 (hereafter referred to as "burdened property"), Grantors hereby grant and/or relinquish to the owners of record of the property described Surface Mining Site No(s). 324, as described as set forth in that certain Bargain and Sale Deed dated March 23, 2023, as recorded in the Official Records of Deschutes County as instrument number 2023-06531, and further identified on Deschutes County Assessor's Map 14-12, as Tax Lot 702, (hereafter referred to as the "benefited property"), as Grantees, any and all rights of remonstrance or protest that they may have by virtue of ownership of the burdened property or otherwise to the visual, noise, dust, reclamation, traffic and any other similar impacts from the following protected activities:

- (1) Surface mining activities lawfully conducted in connection with a pre-existing mine, as that term is defined in Section 18.52.160(B) of the Deschutes County Code, on the benefited property; or
- (2) Surface mining activities that might be lawfully conducted in the future on the benefited property under County or State permits or exemptions.

Grantors acknowledge that by virtue of such grant they have no remaining rights to complain or protest about the protected activities described above.

This Waiver of Remonstrance Easement runs with the land and is binding upon the heirs, successors and assigns of the undersigned's interest in the burdened property or any persons acquiring through the undersigned an interest in the burdened property.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ GRANTORS

Roger & Cynthia Grossmann Revocable Living Trust

\_\_\_\_\_  
Roger W Grossmann, Trustee

\_\_\_\_\_  
Cynthia M Grossmann, Trustee

STATE OF OREGON            )  
  ) ss.  
COUNTY OF \_\_\_\_\_)

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, a Notary Public in and for said County and State, personally appeared Roger W Grossmann and Cynthia M Grossmann, known to me to be the Trustees of the Roger & Cynthia Grossmann Revocable Living Trust, who acknowledged to me that they executed the same freely and voluntarily on behalf of said Trust.

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_

owner	agent	inCareof	address	cityStZip	type	cdd id	email
Roger W and Cynthia M Grossmann			70450 NW Lower Valley Drive	Terrebonne, OR 97760	HOFF Decision	23-293-CU, 294-CU, 295-CU, et al	cindy@fhcvineyards.com
Fitch and Neary PC		Lisa Andrach	210 SW 5th Street, Suite 2	Redmond, OR 97756	HOFF Decision	23-293-CU, 294-CU, 295-CU, et al	lisa@fitchandneary.com
Dirk Duryee			725 NW Hill Street	Bend, OR 97703	HOFF Decision	23-293-CU, 294-CU, 295-CU, et al	dirk@tyeengineering.com
Wendy Wente			707 SW Washington Street, Suite 1300	Portland, OR 97205	HOFF Decision	23-293-CU, 294-CU, 295-CU, et al	wwente@masonbruce.com
Brian Rabe					HOFF Decision	23-293-CU, 294-CU, 295-CU, et al	elkhornconsultingllc@gmail.com



Mailing Date:  
Friday, March 22, 2024

## COMMUNITY DEVELOPMENT

### NOTICE OF HEARINGS OFFICER'S DECISION

The Deschutes County Hearings Officer has issued a decision on the land use application(s) described below:

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

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

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

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

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

Collectively referred to as the "Subject Property."

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

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

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

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

**APPLICABLE CRITERIA:** Deschutes County Code (DCC)  
Title 18, Deschutes County Zoning Ordinance  
Chapter 18.16, Exclusive Farm Use Zones (EFU)  
Chapter 18.56, Surface Mining Impact Area Combining Zone (SMIA)  
Chapter 18.88, Wildlife Area Combining Zone (WA)  
Title 22, Deschutes County Development Procedures Ordinance

**DECISION:** The Hearings Officer finds the following:

**Approval** of Applicant's requests for conditional use and surface mining impact area review to establish three (3) non-farm dwellings on three separate legal lots of record in the EFU zone.

**Denial** of Applicant's requested DCC 18.88.060 B.1 exception to site the dwelling envelopes within 300-feet of the road located on the west side of the subject property.

**I. CONDITIONS OF APPROVAL:**

- A.** This approval is based upon the application, site plan, specifications, and supporting documentation submitted by the Applicant. Any substantial change in this approved use will require review through a new land use application.
- B.** The property owner shall obtain any necessary permits from the Deschutes County Building Division and Onsite Wastewater Division.
- C.** No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed by DCC 18.120.040
- D.** Structural setbacks from any north lot line shall meet the solar setback requirements in DCC 18.116.180.
- E.** In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.
- F.** Farm & Forest Management Easement: **Prior to the issuance of any building permit for a nonfarm dwelling**, the property owner shall sign and record in the deed records for the County, a document binding the landowner, and the landowner's successors in interest,

prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937. The Applicant shall submit a copy of the recorded Farm and Forest Management Easement to the Planning Division.

- G. All new fences shall comply with DCC 18.88.070.
- H. Septic: The Applicant shall secure any necessary septic permit approval for each nonfarm dwelling.
- I. Farm Tax Deferral Disqualification: **Prior to the issuance of building permits**, the Applicant shall produce evidence from the County Assessor's Office that the parcel upon which the dwelling is proposed has been disqualified for special assessment at value for farm use under ORS 308.370 or other special assessment under ORS 308.765, 321.352, 321.730 or 321.815, and that any additional tax or penalty imposed by the County Assessor as a result of disqualification has been paid.
- J. **Prior to issuance of building permits**, Applicant shall sign and record in the Deschutes County Book of Records a statement declaring that the Applicant and his successors will not now or in the future complain about the allowed surface mining activities on the adjacent surface mining site. A copy of this recording shall be provided to Deschutes County Planning, prior to issuance of building permits.
- K. Road Naming: **Prior to the issuance of building permits for any of the non-farm dwellings**, the existing unnamed roadway which provides access to the subject property shall be assigned a name in accordance with the procedures in DCC 16.16.030. This requires the submittal and approval of a Road Naming Application.
- L. Firebreaks and Fuel Break: **Prior to the issuance of any building permit**, the Applicant shall construct and maintain the firebreaks detailed below on land surrounding the structure and access road that are owned or controlled by the owner. These required fuel breaks shall be maintained at all times.
  - 1. Primary Firebreak. Prior to use, a primary firebreak, not less than 10 feet wide, shall be constructed containing nonflammable materials. This may include lawn, walkways, driveways, gravel borders or other similar materials.
  - 2. Secondary Firebreak. A secondary firebreak of not less than 20 feet shall be constructed outside the primary firebreak. This firebreak need not be bare ground, but can include a lawn, ornamental shrubbery or individual or groups of trees separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed.
  - 3. Fuel Break. A fuel break shall be maintained, extending a minimum of 100 feet in all

directions around the secondary firebreak. Individual and groups of trees within the fuel break shall be separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. Small trees and brush growing underneath larger trees shall be removed to prevent spread of fire up into the crowns of the larger trees. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed. The fuel break shall be completed prior to the beginning of the coming fire season.

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

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

1. Roads, bridges and culverts shall be designed and maintained to support a minimum gross vehicle weight (GVW) of 50,000 lbs. If bridges or culverts are involved in the construction of a road or driveway, written verification of compliance with the 50,000 lb. GVW standard shall be provided by a professional engineer registered in Oregon.
2. Access roads shall have an unobstructed horizontal clearance of not less than 20 feet and an unobstructed vertical clearance of not less than 13.5 feet, and provide an all weather surface.
3. Turnarounds shall have a minimum of 50 feet of turn radius with an all weather surface and be maintained for turning of fire fighting equipment.
4. Road grades should not exceed eight percent, with a maximum of 12 percent on short pitches. Variations from these standards may be granted when topographic conditions make these standards impractical and where the local fire protection district states their fire fighting equipment can negotiate the proposed road grade.

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

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



**This decision becomes final twelve (12) days after the date mailed**, unless appealed by a party of interest. To appeal, it is necessary to submit a Notice of Appeal, the base appeal deposit plus 20% of the original application fee(s), and a statement raising any issue relied upon for appeal with sufficient specificity to afford the Board of County Commissioners an adequate opportunity to respond to and resolve each issue.

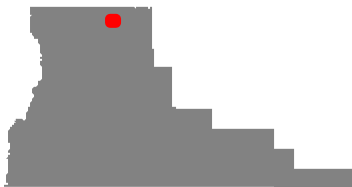
Copies of the decision, application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost. Copies can be purchased for 25 cents per page.

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

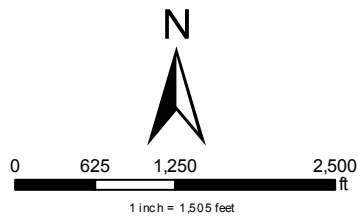
**File Nos. 247-23-000293-CU, 294-CU, 295-CU, 737-SMA,  
738-SMA, 739-SMA**



Source: Esri, Maxar, Earthstar Geographics, and the GIS User Community  
Deschutes County GIS



Date: 10/12/2023



owner	agent	inCareof	address	cityStZip	type	cdd id	email
DEPUTY STATE FIRE MARSHAL	Clara Butler		1345 NW WALL ST., SUITE 202	Bend, OR 97701	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	clara.butler@osp.oregon.gov
DESCHUTES CO. ASSESSOR			ELECTRONIC		NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	
DESCHUTES CO. BUILDING SAFETY	Randy Scheid		ELECTRONIC		NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	Randy.Scheid@deschutes.org
DESCHUTES CO. ONSITE WASTEWATER	Todd Cleveland		ELECTRONIC		NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	Todd.Cleveland@deschutes.org
DESCHUTES CO. SR. TRANS. PLANNER	TARIK RAWLINGS		ELECTRONIC		NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	
OREGON DEPT OF FISH & WILDLIFE	Jessica Clark/ Andrew Walch		ELECTRONIC		NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	Jessica.S.CLARK@odfw.oregon.gov; Andrew.J.Walch@odfw.oregon.gov
Fitch and Neary PC		Lisa Andrach	210 SW 5th Street #2	Redmond, OR 97756	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	lisa@fitchandneary.com
ROGER & CYNTHIA GROSSMANN REV LIV TRUST	GROSSMANN, ROGER W & CYNTHIA M TTEES		70450 NW LOWER VALLEY DR	TERREBONNE, OR 97760	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	
KETTERING, QUAID			70000 NW LOWER VALLEY DR	TERREBONNE, OR 97760	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	
DEEP CANYON LLC			222 N PACIFIC COAST HWY #1400	EL SEGUNDO, CA 90245	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	
DESCHUTES COUNTY		C/O PROPERTY MANAGEMENT	PO BOX 6005	BEND, OR 97708-6005	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	
TWO CANYONS LLC			5580 LA JOLLA BLVD #392	LA JOLLA, CA 92037	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	
DESCHUTES VALLEY FARMS INC					NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	
CENTRAL OREGON LANDWATCH			2843 NORTHWEST LOLO DRIVE, SUITE 200	BEND, OR 97703	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	carol@colw.org
Mark Stockamp					NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	mark.stockamp@710.properties
Steve Sabine			5175 SW Wickiup Avenue	Redmond, OR	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	quilterbychoice@msn.com
Brian Skidgel			4909 NW 83rd Street	Redmond, OR	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	
Ted Netter			70535 NW Lower Bridge Way	TERREBONNE, OR 97760	NOD	23-293-CU, 294-CU, 295-CU, 737-SMA, 738-SMA, 739-SMA	tnetteragr@gmail.com