



## Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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### MEMORANDUM

**DATE:** April 14, 2015

**TO:** Board of County Commissioners

**FROM:** Will Groves, Senior Planner

**RE:** Deliberation on a conditional use, tentative subdivision plan, and SMIA site plan approval (247-15-000194-CU, 195-TP, 521-A, 689-MA) to establish a 19-lot residential planned development on three parcels totaling 157 acres, zoned RR-10, EFU, FP, LM, and SMIA, and located between the Deschutes River and Lower Bridge Way west of Terrebonne.

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#### I. Background

The Applicant, Lower Bridge Road, LLC, requested conditional use, tentative subdivision plan, and SMIA site plan approval to establish a 19-lot residential planned development on three parcels totaling 157 acres, zoned RR-10, EFU, FP, LM, and SMIA, and located between the Deschutes River and Lower Bridge Way west of Terrebonne.

The Hearings Officer issued a decision on September 11, 2015 finding that the proposal does not comply with all applicable regulations. On September 23, 2015 Lower Bridge Road, LLC appealed the decision to the BOCC.

By Order 2015-467, dated October 19, 2015, the Board initiated review of this application under DCC 22.28.050 through a de novo hearing.

The Board conducted a de novo public hearing on January 6, 2016. The written record closed on March 4, 2016. Staff has developed a decision matrix to help the Board engage with the key decision points in this matter.

#### II. Key Issues

**This deliberation summary of party positions is largely composed of direct quotes. Some quotes have been edited for brevity, clarity, or issue focus.**

#### **M1 - Can a PUD application create open space lots on EFU zoned land?**

**Issue Summary:** The Hearings Officer found that PUD lots cannot be formed out of property that includes EFU Zoned lands. The Applicant modified the application to remove 10.4 acres of EFU-zoned from the application by lot line adjustment. However, this lot line adjustment does not appear to remove the EFU-zoned portion of tax lot 1600, located at the north end of the proposed PUD, from the subject property.

This issue appears not to have been directly briefed by parties. Staff has included arguments by parties directed at the 10.4 acres of EFU-zoned land, as those arguments should address the possibility of using tax lot 1600 EFU zoned land in the PUD.

**Applicant:** The 10.4 acres of EFU zoned property is located at the southern boundary of the subdivision. See attached Tentative Plan map. The Applicant did not count the EFU zoned property in the subdivision either for density or for open space and did not propose to alter or otherwise divide the EFU zoned portion of the property. Under the Applicant's proposal the EFU zoned property boundary does not change and it remains a split zoned property with the adjacent RR-10 subdivision. The Board could choose to agree with the Applicant that the proposal does not result in a subdivision in the EFU zone and is permissible under the code.

In hearings testimony, Applicant has agreed to remove the EFU zoned portion of tax lot 1600 from the PUD prior to final plat approval.

**Hearings Officer:** The Hearings Officer finds subdivisions and PUDs are not uses permitted outright or conditionally in the EFU Zone. The applicant appears to argue that because the EFU-zoned area will be included in an open space tract and may be engaged in agricultural use, it can be included in the PUD. I disagree. While agricultural use is consistent with this area's zoning, including it within a subdivision is not.

**Opponents:** Opponents argued that EFU-zoned land could not be included in the PUD, following the Hearings Officer's findings.

**Staff Comment:** Staff recommends that any approval be conditioned on a finalized lot line adjustment removing the EFU zoned portion of tax lot 1600 prior to final plat approval.

## **M2 - Can a PUD application include FP zoned land?**

**Issue Summary:** This PUD application includes the creation of lots in the Flood Plain (FP) Zone, where "Planned Development" is not one of the allowed uses. The proposed use of FP zoned lands is the creation of lots through subdivision for the preservation of open space. Both subdivision and open space are allowed uses in the zone. However, under the rules of statutory construction the exclusion of "Planned Development" from the Flood Plain Zone is assumed to be meaningful. Staff recommended the Applicant apply for a text amendment to resolve this issue prior to application.

**Applicant:** Subdivisions and open space are both listed uses in the Flood Plain Zone but planned developments (a clustered form of subdivision) are not. The Hearings Officer acknowledged the proposal meets the purpose and intent of the Flood Plain Zone and also recognized that the drafters of that zoning ordinance could have intended to allow a project such as the Applicant's where residential lots were clustered outside of the zone and all Flood Plain Zoned property was contained in an open space tract, but she declined to interpret the ordinance.

Open space is a listed use in the Flood Plain Zone. It is not a listed use in any other zone and the Planning Division does not accept or process applications for open space as a use separate from some development of which it is a component. In fact, open space is not even listed in the Open Space and Conservation Zone.

The present proposal provides more protection for the resource than a subdivision without clustering (allowed conditionally in the Flood Plain Zone) by containing all Flood Plain Zoned property in an open space tract, prohibiting development within that tract, providing for increased riparian protections and a funding mechanism for management of the resource.

Finally, the proposal is consistent with exactly what the Applicant proposed and the Board envisioned when it zoned the property RR-10 in 2008. The Applicant planned a cluster development with all river frontage being protected in open space, the Applicant showed this plan to the Board and the Board approved it, allowing the Applicant to add 30 acres of riverfront property from the westside to the RR-10 zone for the eastside to be preserved as open space and make enough acreage to get a 20 lot planned development.

**Hearings Officer:** Neither “cluster development” nor “planned development” is a use permitted outright or conditionally in the FP Zone. The Hearings Officer finds the text and context of the provisions of Title 18 defining and governing the three types of subdivisions make clear they have different characteristics and are intended to be reviewed and approved under different substantive standards. While it may seem counterintuitive not to permit use of FP-zoned land for open space within a planned development where such use would protect these areas consistent with the purpose of the FP Zone, I find the plain language of the FP Zone does not allow such development.

**Opponents:** The Applicant proposes that the BOCC should reach the unfounded conclusion that the listing of "open space" as an outright permitted use in the FP zone means "open space associated with planned development," despite the fact that neither planned developments nor cluster developments are permitted or conditionally permitted uses in the FP zoning text (in contrast to standard "subdivision or partitioning," which are explicitly included in the FP zoning text). The Applicant's suggested interpretation is contrary to the plain language of the Flood Plain ordinance, and would improperly increase density and the number of small view lots clustered on the most sensitive lands with the greatest resulting aesthetic impact.

**Staff Comment:** The Board is afforded deference on plausible interpretations of local code at LUBA. Staff is uncertain if the applicant's proposed interpretation is plausible, given the rules of statutory construction. Staff believes that a text amendment would be a clearer path to evaluate and formalize (or not, at the Board's discretion) the applicant's proposed interpretation. The Board will need to decide if the applicant's interpretation is plausible at this time.

### **M3 - Can FP zoned land be counted towards PUD housing density and density bonuses?**

**Issue Summary:** This question is only at issue if the Board concludes that a PUD application can create lots in the FP Zone (see summary of M1, above). Planned Unit Developments are afforded a density bonus from one unit per 10 acres to one unit per 7.5 acres, increasing the number of allowed units in the development. This trade-off is given for the preservation of otherwise developable land as restricted open space area. The PUD proposal relies on FP zoned land as part of density calculation to allow for 19 residential lots.

**Applicant:** All acreage included in the project area calculations is available for gross acreage calculations for the PUD. The approximately 30 acre area west of the river was specifically added to the "East Area" zone change to allow its use for open space calculations in a future planned development. The Board specifically understood a planned development would be proposed with lots clustered so that open space could be preserved and site disturbance minimized. See BOCC Decision, pp. 10, 12, 16. Likewise, the gross acreage of the site, including the area to be dedicated for Lower Bridge Way can be included in the overall subdivision acreage for the planned development. See "Lot Area" definition at DCC 17.08. The portion of the property zoned Flood Plain is also available for inclusion in the overall acreage because open space and portions of residential use not containing structures are outright permitted uses in the Flood Plain Zone.

**Opponents:** After deducting undevelopable areas, there are 95.73 acres remaining for development. At 10.3 acres per lot, 9 lots would fit on this site. Applicant's proposal of 19 lots is a 111% increase over the RR-10 standards applicable to this site. Otherwise undevelopable Flood Plain Zoned lands should not be leveraged to increase the density of a rural PUD in an environmentally sensitive area.

**Hearings Officer:** Approximately 30 acres of FP-zoned land included in the subject property cannot be included in the density calculation, leaving approximately 116 acres of developable land for the PUD. At the maximum allowed density of one dwelling per 7.5 acres, there would be sufficient developable land for only 15 dwellings and the required 65 percent open space.

**Staff Comment:** The Board will need to decide whether to interpret the code to allow FP zoned lands to count towards the overall residential density calculation. Staff notes that dwellings are prohibited on FP zoned lands unless no alternative location exists and that these lands are not generally residentially developable.

#### **M4 - Where is the boundary of the FP zone?**

**Issue Summary:** The Applicant correctly notes that the FEMA-provided flood plain maps, adopted as the Flood Plain Zone by the County, contain obvious inaccuracies. The flood plain in the project vicinity is an "unnumbered A zone", meaning that flood areas were designated without detailed flood calculations or detailed local topographic information, due to the low density of development in the area. This issue arises nationwide and FEMA has a technical bulletin directing how to refine the flood plain in this case. The applicant was provided with this information in a pre-application meeting and declined to use any of the FEMA accepted methodologies for refining flood plain boundaries. It is unclear to Staff what the Applicant hopes the Board will do in the face of the flood map inaccuracy.

**Applicant:** Flood Plain Zone in this area is designated Zone A, which is based on FIRM maps with no base flood elevation data. The FIRM map when applied to the significant amount of river frontage on the subject property extends vertically 60' in one area and through the middle of the river channel in another. It clearly does not represent a true flood boundary.

**Hearings Officer:** Did not directly address this issue.

**Opponents:** While the Applicant may have valid concerns about the accuracy of the Flood Plain mapping, the burden is upon the Applicant to present a thorough and complete application as

opposed to raising generalized challenges regarding the accuracy of existing zone designations. These concerns could and should have been addressed prior to submittal of the present application, through affirmative action by the Applicant to complete a flood map amendment or similar process as recommended by County staff during the pre-application meeting.

**Staff Comment:** The Flood Plain Zone boundary was provided by FEMA and adopted by the County. Any alteration of that boundary should be conducted in accordance with FEMA guidance and all applicable regulations.

**M5 - Is the “conditional use” the whole PUD or simply the changes in density and layout afforded in a PUD in excess of a conventional subdivision.**

**Issue Summary:** Planned Unit Development is a conditional use with special standards (See DCC 18.128.210) in the RR-10 Zone. These special standards place additional restrictions over single-family dwellings or conventional subdivisions. The applicant contests that these restrictions should only apply to those lots that are afforded by the PUD over a conventional subdivision. The number of additional lots afforded is a matter of debate and ranges from 4 to 10 lots.

**Applicant:** The Hearings Officer erred in failing to apply the conditional use criteria to the only portion of the development that is conditional, which is not the residential use but instead the difference between 15 homesites and 19 homesites, or essentially 4 additional homesites.

**Hearings Officer:** The general conditional use approval criteria apply to the whole application because the applicant’s proposal is for a PUD and not for an individual single-family dwelling or non-clustered subdivision.

**Opponents:** The Hearings Officer found that the conditional use criteria of DCC Section 18.128.015(A)(l) apply to this application and she found the criteria require a finding that Applicant demonstrate the suitability of the subject property for PUD development.

**Staff Comment:** The Hearings Officer found all aspects of the PUD were part of the conditional use. Because some other similar use (non-clustered subdivision) is allowed without conditional use approval in the zone does not make some portion of the proposed conditional use not conditional. All of the proposed lots are designed and sited in a manner only allowed under the PUD standards.

**M6 – Are required road improvements “roughly proportionate” to traffic impacts?**

**Issue Summary:** County Code requires applicants to improve sub-standard adjacent right-of-way, in this case Lower Bridge Way, to County standards as part of any partition or subdivision approval. Accordingly, the Hearings Officer included a condition of approval requiring that Lower Bridge Way be widened by the applicant from 24 to 28 feet. Under *Nollan* and *Dolan*, required off-site improvements must be related to an impact created by the project, serve a legitimate public interest, and the requirement must be roughly proportional to the impact. The proposed PUD would add 35% to the existing traffic on Lower Bridge Way. The Applicant contends that requiring the Applicant to bear the full burden of this road improvement project is not roughly proportionate to the PUD’s impacts.

**Applicant:** The Hearings Officer erred in concluding the applicant should be required to improve the abutting segment of Lower Bridge Way to County standards. The impacts of the proposal to add traffic associated with 19 residential lots is not roughly proportional to the cost of the required improvement of approximately 3,000 lineal feet of abutting roadway, with possible relocation of power lines. The applicant is dedicating the Lower Bridge right-of-way but any additional improvements are not warranted and in violation of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution.

**Hearings Officer:** Did not directly address issue.

**Opponents:** Staff was unable to locate briefing on this issue.

**Staff Comment:** Staff believes the Applicant's argument is reasonable and that the Hearing Officer's condition should be modified in some way to limit the Applicant's obligation to 35% of the project cost. However, the entire required improvement must be completed prior to final plat approval. Hearings Officer's Condition #16 states:

16. *The applicant/owner shall dedicate right-of-way for, and improve to Deschutes County's standards for rural collector roads set forth in Table "A" of Title 17, the abutting segment of Lower Bridge Way.*

Staff recommends modifying Hearing Officer' Condition #16 as follows:

- 16a. *Prior to final plat approval, the applicant/owner shall dedicate right-of-way for the abutting segment of Lower Bridge Way to Deschutes County's standards for rural collector roads set forth in Table "A" of Title 17.*
- 16b. *Prior to final plat approval, the abutting segment of Lower Bridge Way shall be improved to Deschutes County's standards for rural collector roads set forth in Table "A" of Title 17. The applicant shall be responsible for 35% of the cost of this project. A cost-sharing methodology acceptable to Deschutes County Legal Department and Deschutes County Road Department shall be agreed upon and implemented prior to final plat approval.*

### **M7 – Did the HO collaterally attack the 2008 PA/ZC approval?**

**Issue Summary:** A collateral attack is an attempt to impeach or overturn a judgment rendered in a judicial proceeding, made in a proceeding other than within the original action or an appeal from it. Here, that Applicant argues that the Hearings Officer's findings collaterally attacked the Board's findings in PA-08-1/ZC-80-1, the plan amendment and zone change for the subject property.

It is unclear from the record materials, but staff believes that the applicant argues that the Board has already found that the site is suitable for residential use, provided it receives DEQ/OHA "NFA" letters prior to final plat approval and that issues of environmental safety cannot be revisited.

**Applicant:** The Hearings Officer erred when she collaterally attacked the BOCC's prior decision and found the BOCC improperly substituted a condition of approval for the necessary findings of compliance in the prior zone change decision.

**Hearings Officer:** The Board's approach to deferring findings of environmental safety was likely impermissible under existing case law, but no change to the ZC/PA was imposed. Nothing

precludes the Hearings Officer or Board from imposing additional restrictions, beyond those in the ZC/PA, at this point for the proposed PUD.

**Opponents:** Staff was unable to locate briefing on this issue.

**Staff Comment:** Staff believes the Hearings Officer's decision is not a collateral attack on the zone change/plan amendment (ZC/PA). While the Hearings Officer found that BOCC's approach to deferring findings of environmental safety was likely impermissible under existing case law, no change to the ZC/PA was imposed. Nothing precludes the Hearings Officer or BOCC from imposing additional restrictions beyond those in the ZC/PA contemplated on the proposed PUD. This is, in part, because the PUD is subject to different applicable criteria (DCC 18.128.015, general suitability criteria) than the plan amendment and zone change.

### **M8 – Does the HO denial of the PUD represent a “taking”?**

**Issue Summary:** The "takings" issue is addressed in the Fifth Amendment to the U.S. Constitution, which reads in part, "nor shall private property be taken for public use, without just compensation." The Supreme Court has established clear rules that identify situations that amount to a taking. It has found "takings" where the landowner has been denied "all economically viable use" of the land. The Applicant has argued the failure to approve the PUD, as proposed, would represent such a taking.

**Applicant:** The Hearings Officer's decision alone or combined with any one or more of the errors alleged above, leaves applicant with no viable economic use of the property and constitutes the taking of it and entitles applicant to just compensation under Article 1, Section 18 of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as the right to attorney's fees under ORS 20.080 and 42 U.S.C. 1983.

**Hearings Officer:** Did not directly address issue.

**Opponents:** Staff was unable to locate briefing on this issue.

**Staff Comment:** The applicant has been denied by the Hearings Officer for a PUD. The applicant has not applied for the approximately 15-lot, non-clustered subdivision on the property that is a non-conditional use. The applicant has also not also applied for the single dwelling allowed on the property without conditional use or subdivision approval. Only one use, a PUD, has been presently denied on the property. Staff notes that the Hearings Officer's denial primarily rests on the applicant designing a PUD that exceeds the number of lots in the allowed in the zone, voluntarily configuring those lots as to make them undevelopable without special exceptions, and asking for residential approvals prior to completion of environmental investigations of the property. Nothing in the present denial indicates that a properly designed PUD application could not be approved on the property. As such, the applicant's claims the property has no viable economic as a consequence of the Hearings Officer's denial use are unsubstantiated. Staff believes that were the Board to deny this application, the denial would not constitute a taking.

### **M9 – Does sufficient financing exists to assure the proposed development will be substantially completed within four years of approval.**

**Issue Summary:** DCC 18.128.210(B)(6) requires “That sufficient financing exists to assure the proposed development will be substantially completed within four years of approval.” In prior decisions subject to this criterion, the County found that the relatively small projects could be completed without a specific demonstration of project cost and available financing. The Hearings Officer found that a conclusory statement on this issue without evidentiary support was insufficient.

**Applicant:** The Hearings Officer erred in concluding there was not sufficient evidence of financing to assure the proposed development will be substantially completed within 4 years of approval. Significant expenditures have been made and are planned.

**Hearings Officer:** The applicant’s burden of proof states “sufficient funding is available to complete the development as proposed within four years of approval.” However, the applicant did not submit any evidence supporting this statement. The Hearings Officer finds a simple conclusory statement does not constitute sufficient evidence to demonstrate compliance with this conditional use approval criterion.

**Opponents:** Applicant's counsel, Attorney Lewis, admitted in the January 6, 2016 public hearing that the owners don't have the money to clean up the site. (On a separate level, this is perplexing considering Applicant's open acknowledgement of the money spent on the legal team, the development team, and the engineering team employed in 2008's process and this one.) Applicant has described its cleanup plan consistently for a decade: let them sell lots, and they will use the proceeds from the sales to clean up the site. A decade later, the plan still makes no sense. How can Applicant use money from lot sales to clean up lots, if the lots to be sold to innocent buyers must be cleaned up before they are sold?

The Applicant’s approach of using lot sale proceeds to fund remediation throughout the former industrial site, would be tantamount to asking the BOCC to approve a risky "pay now, clean later" development model. The BOCC should not support a development model where lots are sold off to transfer the burdens and obligations to innocent purchasers, with the developers receiving the financial gain without assurance of performance of future conditions. This is particularly true given the poor track record of performance by the Applicant in terms of remedial efforts undertaken from 2008 to present. This is an unacceptable risk for the County and the future residents of the proposed development.

**Staff Comment:** Staff believes that compliance with this criterion would require that the record contain 1) estimated project costs, 2) documentation that the Applicant has the financial resources to meet these costs, and 3) evidence that the development will be substantially completed within four years of approval. The Applicant did not provide information to determine compliance with this criterion. Staff is uncertain if compliance is even possible at this point, given that project costs cannot be determined until environmental investigations are complete and a scope of work for remediation is established.

### **M10 – Does the Historic Sign render proposed lot 1 undevelopable?**

**Issue Summary:** The historic Lynch and Roberts Store Advertisement sign is located near the northwest corner of the subject property. The sign is painted on rocks adjacent to Lower Bridge Way. In its 2008 decision, the board included as Condition of Approval 4 a prohibition against any development within a 100-yard radius of the sign and a requirement that the applicant post markers near the sign to prevent trespass. Condition 4 also required the applicant to include in



the CC&Rs provisions obligating PUD lot owners to protect the area within a 100-yard radius of the sign from development and trespass and to maintain the posted markers.

It is unclear from the prior condition of approval if precluded “development” includes only structures or includes septic systems, wells, or significant earthmoving projects.

It is also unclear, based on documentation in the record, if Lot 1 is residentially developable, given that approximately 40% of the lot is in the area precluded for development by the sign restriction.

**Applicant:** Did not brief this issue.

**Hearings Officer:** The Hearings Officer did not directly address this issue. The Hearings Officer found that imposition of the conditions of approval will protect this historic sign to the greatest extent practical.

**Opponents:** Expressed concerns regarding the ability to develop Lot 1, given the sign setback. Also expressed concerns about the adequacy of the conditions of approval to protect the sign.

**Staff Comment:** The applicant has an affirmative obligation to demonstrate that the site is suitable for residential development, given known development constraints. The ability to develop proposed Lot 1 will depend on the Board’s interpretation of Condition #4. Does “development” include only structures or also include septic systems, wells, or earthmoving projects. Staff believes it is plausible that Lot 1 could be improved with a residence even if roughly 40% of the lot is rendered unusable by the sign protections. However, the applicant did not provide a figure showing a septic/well/dwelling layout for Lot 1 consistent with Condition #4.

### **M11 – Do the proposed CC&Rs adequately describe the environmental history?**

**Issue Summary:** Condition of Approval (CoA) #5 of the 2008 PA/ZC requires an informational section in the CC&Rs that detail the history of the site, including the remediation efforts taken by the applicant and its predecessors in interest. There is debate in the record if the proposed documentation is adequate.

**Applicant:** Provided draft language to comply with this criterion.

**Hearings Officer:** Did not directly address this issue.

**Opponents:** Provided CC&Rs do not divulge the nature, type and extensiveness of the toxic contamination known and suspected on the site and misrepresents the sites condition to potential buyers.

**Staff Comment:** The supplied draft is a reasonable summary. However, given that testing and clean-up of the site is not complete, it is not possible to provide a full environmental history of the site at this point. Staff recommends the Board direct the applicant to develop a final environmental history for the CC&Rs, following DEQ and OHA final approval of the site for residential use and prior to final plat approval via the following condition of approval:

*To comply with PA-08-1/ZC-08-1 condition of approval (I)(5), the applicant shall include an informational section in its CC&Rs that detail the history of the site, including the remediation*

*efforts taken by the applicant and its predecessors in interest. This informational section shall be updated prior to final plat approval to reflect the results of environmental testing, remediation activities undertaken, issuance of DEQ/OHA "NFA" letters, completion of the DEQ VCP program, as well as any ongoing environmental issues or obligations identified as part the completed VCP program.*

### **M12 – Will the proposed development adversely impact the rural character of the area?**

**Issue Summary:** DCC 18.128.210(A)(8) requires that the effect of the proposed development on the rural character of the area be considered. There is considerable debate in the record if the lots, densely clustered on the canyon rim and highly visible from the surrounding area would adversely impact the rural character of the area.

**Applicant:** Staff was unable to locate briefing on this issue.

**Hearings Officer:** Dwellings clustered on two-acre lots still constitute "rural" development and not "urban" development. Inclusion of over 100 acres of open space will preserve the rural character of the area. Opponents who live across the Deschutes River east of the proposed PUD object to having to look at dwellings on the subject property. However, I find that with the 2008 rezoning of the subject property to RR-10, opponents no longer had reasonable expectations that the subject property would remain undeveloped.

**Opponents:** The view of all the houses on these crowded lots would be unavoidable from Lower Bridge Way as it begins its descent to cross the Deschutes River. The applicant's proposal is neither inconsequential nor benign. It permanently changes the rural character of the area.

It does not appear that the Applicant made any effort to reduce the effect of the development on the area's rural character, to preserve existing natural features or to minimize environmental impacts.

The project site has extreme visibility from Teater Avenue, Lower Bridge Way, and the Wildlife Preserve; and that the 111% density increase that would occur from the applicant's proposal is crowded along the river canyon rim on two acre lots. The rural character of the area would suffer needlessly from the applicant's proposal because they can successfully develop the property without employing a Planned Development approach.

Because the proposal's density exceeds community standards and RR-10 standards by such a great percentage, it's no surprise that the visual depiction of the 19 lots in a tight row overlooking the Deschutes River is not compliant with DCC 18.128.210(A)(8). The rural character of this zone is not followed by this proposal, and no matter what environmental remediation is performed, the application should be denied.

**Staff Comment:** The impact on the rural character of the area is a deeply subjective question. While the close proximity and high visibility of the proposed homesites are uncharacteristic of the area, the proposal includes large areas of land permanently preserved as open space.

### **M13 – Is the site suitable for residential development given prior earthmoving and geotechnical stability?**

**Issue Summary:** Soils disturbed by earthmoving and mining at the site may present difficulties for home construction. Diatomaceous Earth may also be an unsuitable material upon which to construct dwelling foundations.

**Applicant:** The Wallace Group issued a Geotechnical Exploration Report on the subdivision site (see Exhibit PH-14). The geotechnical investigation concluded that the site was suitable for the proposed development from a geotechnical perspective and that slope stability analyses will be performed on a lot by lot basis when construction/development plans are available. Mr. Wallace also notes that development of the site will have strict set-back requirements and that Civil Engineering Grading Plans for the project will incorporate berm removal/grading to mitigate slope instability and erosion risks. This report is a comprehensive on-site geotechnical report by the Wallace Group conducted by geotechnical engineers. It is substantial evidence upon which the Board can and should rely to conclude the site is suitable for the proposed use.

**Hearings Officer:** Did not directly address this issue.

**Opponents:** The record does not contain any substantive geotechnical study verifying that individual building sites within each proposed lot could be safely developed in light of concerns regarding waste rock fill deposits. A full geotechnical analysis in conjunction with the application is required.

**Staff Comment:** This issue was not fully developed before the HO. The Applicant's geotechnical report does not evaluate each proposed lot, but finds that any historic fill or diatomaceous earth can be remedied with "...up to 4 feet of engineered fill or aggregate base course...". Staff recommends that the Board find that the applicant's geotechnical report demonstrates that any stability flaws at the building sites can be remedied with conventional soil engineering solutions.

#### **M14 – Is buried rimrock considered “rimrock”?**

**Issue Summary:** Aerial photos in record indicate that, between 1943 and 1951, overburden was pushed over the west canyon rim between lots 11 and 15. It appears that limited rimrock, near the river level, may have been buried. In the County Code, setbacks from rimrock are required to limit the visual impacts of structures from the river.

**Applicant:** Staff was unable to locate briefing on this issue.

**Hearings Officer:** Did not address this issue.

**Opponents:** A thorough survey of the buried rimrock should be required in order to determine the appropriate rimrock setback requirements on those proposed lots impacted by past dumping.

**Staff Comment:** A finding that buried rimrock is no longer rimrock would set a precedent that would encourage earthmoving in sensitive river canyons to avoid rimrock setbacks. However, the rimrock burial in this case is over 60 years old and that work was not undertaken to circumvent rimrock setback rules. Also, from available aerial photos, it appears that the rimrock, if any, was located near the river and well over 50 feet from any potential dwelling location. Staff recommends the Board find that rimrock buried through artificial means is still subject to rimrock standards. However, the applicant-proposed rear setbacks on lots 11

through 15, ranging from 100 to 170 feet are sufficient to ensure compliant setbacks from the buried rimrock, based on available aerial photography.

### **M15 – Should “rimrock-like” protections be imposed on the non-rocky canyon rim?**

**Issue Summary:** In the County Code, setbacks from rimrock are required to limit the visual impact of structures from the river. The subject property is unusual in that most of the top of canyon rim is not defined by an exposed rock face that would trigger rimrock setbacks. Even if the earthen surface was rocky, it would not meet the rimrock definition as the angle of repose of the soil does not typically exceed 45 degrees. That said, without some sort of top of rim setback, the proposed development would likely have significant visual impacts on the river, even with the required vegetative screening of the Landscape Management Combining Zone. In addition, DCC 18.128.210 requires the preservation of special terrain features.

**Applicant:** The Applicant conducted an on-site investigation to create setbacks for each individual lot to demonstrate the proximity of each proposed dwelling to the river and avoid the need for any conditions or exceptions to rimrock setbacks. The memo submitted as Exhibit PH-14 contains the proposed minimum rear yard setbacks for each individual lot based on the Applicant's on-site investigation. The proposed setbacks are designed to minimize visibility from the river and meet County and State requirements for preservation of scenic resources. These are minimum rear yard setbacks and, as discussed, each structure will be required to seek approval from State Parks that could result in a greater setback to meet State scenic waterway requirements.

**Hearings Officer:** Did not directly address this issue. Included proposed condition of any approval, C, quoted below.

**Opponents:** Staff was unable to locate briefing on this issue.

**Staff Comment:** The Board will need to decide if setbacks specific to this subdivision are needed to address the unusual canyon configuration in the absence of significant rimrock. The Board could either 1) find that rimrock setbacks only apply to exposed rock faces and that no special setbacks from the canyon rim are warranted, or 2) find that development on the canyon rim would result in significant visual impacts to the Deschutes River if structures were not set back from the canyon rim. To mitigate these impacts the Board could include conditions of approval requiring:

- A. *The height of any structure shall not exceed the setback from the edge of the canyon rim.*
- B. *No structure (including decks) shall be located closer than 20 feet from the canyon rim.*

The Board will also need to confirm that the Hearings Officer's proposed condition of approval is sufficient to protect the canyon slope and riparian areas, when combined with other requirements.

- C. *The applicant/owner and its successors, including individual lot owners, shall prohibit the following activities within the river canyon below the upper bench/plateau: changes in the natural grade; construction of structures; and the alteration, removal*

*or destruction of natural vegetation, except as part of an Oregon Department of Fish and Wildlife approved habitat enhancement project.*

**M16 – Are the proposed lots developable, given applicable constraints on the building lots?**

**Issue Summary:** Although the proposed lots are approximately 2 acres in size, significant portions of the proposed lots are undevelopable due to the fact that each lot has significant lot area below the canyon rim. In addition, rimrock setbacks, special canyon rim setbacks (if imposed), and separation requirements between wells and septic systems will significantly constrain development. The Hearings Officer found that it was not possible to determine that the lots were developable, given applicable constraints on the building lots. Since then, the applicant has provided rimrock and rear setback figures showing the buildable area of the proposed lots.

**Applicant:** To address this on appeal, the Applicant has located and mapped all rimrock on the lots, located and mapped the line on each lot for the required rimrock setback and proposed increased setbacks to demonstrate compliance. The Applicant also submitted a typical building footprint and utility facilities to demonstrate all lots can be developed with a dwelling, drainfield and well and fully comply with the rimrock setbacks in the LM zone without the need for any exceptions. This evidence constitutes substantial evidence upon which the Board can rely to conclude the size, shape and configuration of the lots are suitable for the proposed use.

**Hearings Officer:** Applicant has not demonstrated that each lot can be developed with a dwelling, on-site septic system and individual well in a manner that assures the dwelling is at least 50 feet from any rimrock, and that all other yard and setback requirements in the LM Zone can be met.

**Opponents:** Opponents argue that the Board must affirmatively establish that the lots are suitable for residential development given the cumulative effect of applicable criteria.

**Staff Comment:** Staff believes this question is focused on the ability to develop the lot based on physical constraints (well-septic separation, soil stability, topography) as well as regulatory constraints (regular setbacks, rimrock setbacks, site-specific setbacks). The applicant's geotechnical report indicates that any soil deficiencies could be remedied. The applicant's example figures show that it is feasible to develop the lots given physical and regulatory constraints. Lot specific septic evaluations are typically required as a condition of final plat. Staff believes the applicant has demonstrated that it is feasible to site residences on the proposed lots. Conversely, there is no evidence in the record demonstrating clearly that any proposed lot is undevelopable.

**M17, M18, M19 - Is the property a suitable location for residences, given dust concerns?**

**Issue Summary:** The greater mine site, including the east and west areas, has been a very significant generator of fugitive dust. Following large-scale surface disturbance, active and natural revegetation (visible in aerial photos from 2006-2014) has somewhat improved conditions. Dust above natural background levels can exacerbate health problems and the crystalline silica associated with unprocessed diatomaceous earth (DE) and processed DE (Cristobalite, a carcinogen with increased crystalline silica content) is of particular concern.

Surface disturbing activities, including site preparation and surface mining, could cause significant dust problems if not adequately controlled.

**Applicant:** The Applicant worked with DEQ to modify the dust control plan for the east side, to create a dust control plan for the west side, to create provisions in the CC&Rs for dust control compliance, and identify a dust control monitor and contact information in the event of any high wind, or other conditions which could create airborne dust. The community has a proposed on-site 10,000 gallon cistern near the intersection of proposed roads C and E, and as evidenced by the dust control plans, systems in place to ensure airborne dust is controlled and kept to a minimum. In addition to the dust control plans, the Applicant conducted on-site soil testing at locations on both the east and west side Lower Bridge Way to verify the levels of crystalline silica in the soils were not at harmful levels and in fact were no greater than what naturally occurs in the native DE. (See Applicant's 2/19/16 submission)

**Opponents:** The Applicant's dust control plan is not evaluated by state agencies, lacks detail, is not based on verifiable science, and is wholly unreliable. Opponents were also concerned that any water use for dust control or irrigation will require a permanent water right. OHA's David Farrer testified at the January 6, 2016 public hearing as to the known harms of Cristobalite. He admitted to Commissioner Baney upon questioning that if Cristobalite is being inhaled at the site, the health hazard is no longer "indeterminate" as earlier stated. He acknowledged that OHA didn't know about the crystalline material's existence on site at the time, because none was revealed in samples. He concluded there is a lack of information about the site.

The latest analysis from Wallace was submitted as PH-1 through PH-7 in Applicant's Feb. 19, 2016 Post-Hearing Submittal to the Record. That analysis concludes that the six samples taken over 565 acres, though a wholly insufficient ratio of approximately 1 sample for every 94 acres, with only 1 on the east side of the subject property, yields Cristobalite in every single sample. This carcinogen rests on the surface where the samples were taken.

**DEQ/OHA:** Airborne dust from any source can cause short-term respiratory irritation, but more information is needed to evaluate possible long-term effects at this site. EHAP considers inhalation of airborne dust emanating from this site to be an indeterminate health hazard.

- EHAP's early data review indicates there is not enough silica in the airborne dust to cause silicosis or an increased risk for lung cancer, but more data is needed to rule out the possibility.
- EHAP needs more information on particle size and concentration to determine whether nearby residents are at higher risk for other, long-term respiratory problems.
- Continue efforts to control dust, and include dust suppression plans for any future activities.

**Hearings Officer:** Based on the foregoing discussion, the Hearings Officer finds the applicant has not demonstrated the subject property is suitable for the proposed PUD considering blowing DE dust. I find the current state of SM Site 461 with large areas of exposed DE, the location of SM Site 461 west of the subject property, the potential for future mining of SM Site 461, and the presence of a significant amount of DE on the subject property, do not support a finding that blowing DE dust does not and will not present a health hazard to future PUD residents -- or that it is feasible to assure no health hazard from blowing DE dust will occur in the future through imposition of conditions of approval. I find particularly significant the evidence that re-vegetating and site watering efforts on SM Site 461 have not been successful in securing and covering the DE on the site, and that there is a significant amount of DE on the subject property. I find this

evidence simply does not support imposing a condition of approval requiring further similar mitigation actions to reduce or eliminate blowing DE dust.

The Hearings Officer also recommended the following condition of approval: “The applicant/owner shall provide cash or a performance bond in favor of Deschutes County, and acceptable to Deschutes County Legal Counsel, for the cost of remediating DE dust on SM Site 461 and the subject property....”

**Staff Comments – DE Dust Hazard:** The Applicant’s Environmental Consultant concludes that unprocessed DE is unlikely to represent a special hazard above other dust sources. Fugitive dust has not been adequately captured for testing for processed DE content. On 1/26/16, the applicant analyzed 6 samples of DE from the west area, including an undisturbed in-ground sample of DE. Testing concluded each sample had similar silica characteristics and that, confusingly, even the undisturbed in-ground DE sample showed low levels of processed Cristobalite. The study noted that Cristobalite and naturally occurring feldspar would be undistinguishable under the test. Consequently, it is difficult to determine what percentage of the “Cristobalite” detected was actually processed DE. While samples were obtained from likely DE processing locations, the report cautions that higher concentrations could exist on site. From reading DEQ/OHA comments, staff understands that DEQ/OHA are of the opinion that robust dust control could be adequate to mitigate dust health hazards, regardless of processed DE content.

**Staff Comments – West Area Current Dust Hazard (M17):** The dust hazard presented to the proposed subdivision, given the current condition of the west area, is a matter of debate in the record. Following large-scale surface disturbance, active and natural revegetation has somewhat improved conditions. The Hearings Officer found that the current vegetation was inadequate to control existing dust problems. The applicant has noted that air quality complaints to DEQ have ceased, but opponents say this is because they were not getting adequate response to these complaints and gave up.

The Hearings Officer envisioned a binding and bonded plan would be proposed to the Board to stabilize existing conditions across both the east and west areas of the mine. No such plan was brought forward by the applicant. Initial results on the contamination of west-area soils, and likely contamination of dust, indicate low or indeterminate levels of Cristobalite in the samples. Since no site stabilization/reclamation/remediation is proposed at this time, the Board will need to determine if the applicant has demonstrated that subject property is a suitable site for the proposed PUD given existing fugitive dust issues.

**Staff Comments – East Area On-Site Dust Hazard (M18):** The Applicant proposes to control on-site dust by requiring project operators of Construction, Demolition, Excavation, Extraction and Other Earthmoving Activities to submit a Dust Control Plan to the Lower Bridge Road Subdivision Homeowners Association (LBR HOA) if at any time the project involves: Residential development, Subdivision infrastructure construction, and/or Moving, depositing, or relocating of more than 10 cubic yards of bulk native soil or imported fill materials. (See Applicant’s 2/19/16 submission, PH-5)

The applicant proposes that the HOA review and enforce these dust control plans. The template dust control plan was reviewed by DEQ and edited to reflect DEQ comments. Staff is concerned that this approach may be the “plan to make a plan” that LUBA has repeatedly found impermissible as a condition of approval to address present or potential future non-compliance with applicable criteria.

However, this problem can be avoided if a clear condition preventing off-site dust can be included. This has the added benefit of adding a County enforcement nexus, as the HOA may be unable or unwilling to enforce the requirements. As DEQ commented, “Basically it is common sense if visible emissions (fugitive dust) is observed, get water on it.”

Staff recommends this core goal be included in a condition of any approval as follows:

*On-site construction, demolition, excavation, extraction and other earthmoving activities involving residential development, subdivision infrastructure construction, and/or moving, depositing, or relocating of more than 10 cubic yards of bulk native soil or imported fill materials shall comply with the following provisions:*

- a. *The operator of any such project shall adhere to the requirements of the Lower Bridge Road Residential Development Dust Control Plan submitted as PH-5, dated 2/19/16, including any future revisions of this plan reviewed and approved by Oregon Department of Environmental Quality.*
- b. *The property owner shall ensure that one or more water haul trucks with access to an adequate water supply for dust suppression is on site for the duration of any such project.*
- c. *The property owner shall ensure that visible dust emissions from areas disturbed by any such project at no time cross the outer boundary of the subdivision. This provision shall apply only to those projects commenced after January 1, 2016. This provision shall apply to areas disturbed by any such project in perpetuity.*

**Staff Comments – West Area Future Dust Hazard (M19):** Earthmoving activities on the west area of the former mine site could have significant adverse dust impacts to the residents of the proposed subdivision. The applicant has agreed that no mining will take place during pendency of the Resolution of Intent to Re-zone and that any future earthmoving or mining would be required to submit and obtain DEQ/OHA approval of a dust control plan. Again, Staff is concerned that this approach may be the “plan to make a plan” that LUBA has repeatedly has found impermissible as a condition of approval to address present or potential future non-compliance with applicable criteria.

However, this problem can be avoided if a clear condition preventing off-site dust can be included. This has the added benefit of adding a County enforcement nexus, as the HOA may be unable or unwilling to enforce the requirements. As DEQ commented, “Basically it is common sense if visible emissions (fugitive dust) is observed, get water on it.” Staff recommends this core goal be included in a condition of any approval as follows:

*Prior to Final Plat Approval for the Subdivision, the applicant shall cause to be recorded a binding agreement, running with the land, acceptable to the County, and imposing the following requirements on those lands described in County Resolution 2009-035 Exhibit A and as shown in County Resolution 2009-035 Exhibit B:*

*On-site construction, demolition, excavation, extraction and other earthmoving activities involving residential development, subdivision infrastructure construction, and/or moving, depositing, or relocating of more than 10 cubic yards of bulk native soil or imported fill materials shall comply with the following provisions:*

- a. *The operator of any such project shall adhere to the requirements of the Lower Bridge Road Residential Development Dust Control Plan submitted as PH-7,*



dated 2/19/16, including any future revisions reviewed and approved by Oregon Department of Environmental Quality.

- b. The property owner shall ensure that one or more water haul trucks with access to an adequate water supply for dust suppression is on site for the duration of any such project.
- c. The property owner shall ensure that visible dust emissions from areas disturbed by any such project at no time cross the outer boundary of the subdivision. This provision shall apply only to those projects commenced after January 1, 2016. This provision shall apply to areas disturbed by any such project in perpetuity.

## **M20- Can the Board defer or delegate findings that the site is suitable for residential use?**

**Issue Summary:** Based on review of the documents, it is unknown if significant contamination remains at the site. The Hearings Officer, Applicant, and Opponents have cited case law on the legality of deferring or delegating findings of compliance with applicable criteria. Can the Board find that yet-unidentified environmental hazards can be feasibly remediated under a yet-uncreated remediation plan and render the site suitable for residential development? Can the Board find that a requirement for DEQ/OHA “NFA” letters and Applicant completion of the VCP, prior to final plat approval, is sufficient to find that the site will be suitable for residential development at the time of final plat approval?

**Applicant:** A requirement that an applicant obtain a permit or certification from a state agency having jurisdiction to decide the issue (sufficient water supply, for example) is not an improper deferral of compliance with a criterion.

Contrary to the inappropriate discussion by the Hearings Officer, that decision did not improperly defer compliance with an applicable zone change criterion to a later date. In fact, that decision properly found the zone change criteria would be met upon completion of the VCP program through DEQ and equivalent process through DHS and imposed a condition of approval to ensure compliance.

**Hearings Officer:** The *Rhyne* and *Butte Conservancy* decisions do not assist the applicant. The circumstances presented here are similar to those in *Rhyne* in which LUBA found the county’s decision improperly deferred necessary findings to a stage in the proceedings for which notice and hearing were not required.

I find the applicant’s reliance on the *Wetherell* and *Miller* cases is misplaced because there is nothing in the PUD or subdivision approval criteria that requires either DEQ or EHAP approval or the issuance of DEQ or EHAP permits for residential development of the subject property.

The Hearings Officer finds the approach in *Butte Conservancy* is not applicable where, as in the subject PUD application, the feasibility of demonstrating compliance with the “suitability” conditional use approval criterion does not depend on a legal interpretation.

The Hearings Officer finds that under *Rhyne*, I do not have the option of deferring findings of compliance with the “suitability” conditional use approval criterion to final plat approval as suggested by the applicant. That is because final plat approval is not required to, and does not, provide public notice or hearing.

**Opponents:** "When an issue is raised regarding the feasibility of conditions of approval to ensure compliance with approval criteria, the local government cannot simply ignore the issue.

Nor can the local government simply impose the disputed condition as a performance standard and rely on later staff review that does not provide notice and opportunity for hearing to ensure compliance with approval criteria." *Butte Conservancy Order* at page 11, citing *Hodge Oregon Properties, LLC v. Lincoln City*, 194 Or App 50, 55 – 56 (2004)

The *Butte Conservancy. City of Gresham*, 52 Or LUBA 550 (2006) Order cites *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992): "It is well established that a local government may find compliance with applicable criteria by either (1) finding that an applicable approval criterion is satisfied, or (2) finding that it is feasible to satisfy an applicable approval criterion and imposing conditions necessary to ensure that the criterion will be satisfied." *Butte Conservancy Order* at page 10.

Similarly, in *Rhyne v. Multnomah County*, 23 OR LUBA 442 (1992), project opponents raised legitimate issues concerning the potential existence of hazards on the site subject to development review. Much like the present case, project opponents raised concerns regarding the existence of hazardous waste conditions on the property. The evidentiary record failed to contain substantial evidence sufficient to support County action approving the proposal based on conditions, with no provision for future notice and opportunity for hearing, and the County decision was remanded.

Likewise, in *Miller v. City of Joseph*, 31 Or LUBA 472 (1996), LUBA concluded that the city came to conclusions that were not supported by factual findings regarding the feasibility of compliance with applicable conditions and requirements. LUBA concluded that until the city was provided with sufficient detail regarding the proposal, the city could not perform its evaluative function to determine whether it is feasible for the proposed project to operate in compliance with applicable review criteria. *Miller* at page 8. LUBA held that at a minimum, the city must establish that based on the evidentiary facts, compliance with applicable review criteria is feasible.

While a local government is allowed to condition an approval on subsequent requirements to be met in the future, there is a point where the future compliance is too far according to Oregon law. Deschutes County has experienced this "point too far" conclusion in the Thornburgh conditional approval, referenced in case law as *Gould v. Deschutes County*, 216 Or. App. 150 (2007). As that conditional approval bounced back and forth between the County, LUBA, and the higher appellate courts, postponement of some determination by conditional approval was only allowed where it was "feasible" that the developer would comply with wildlife mitigation requirements at a later date.

**Staff Comment:** The Board will need to determine if there is substantial evidence in the record sufficient to support County a finding that the site will be suitable for residential use, based on a condition that the applicant complete the VCP and receive DEQ/OHA "NFA" letters. Can the Board find that it is feasible to remediate the site, when the hazard identification is not complete? Can the board "delegate" this finding to the result of the VCP process? Staff and the Hearings Officer are concerned that this may be legally impermissible.

**M21 - Is the property a suitable location for residences, given hazardous material/radioactive material/ groundwater contamination concerns?**

**Issue Summary:** Based on review of the documents, it is unknown if significant contamination remains at the site. Historic uses of the property have included activities that utilized and/or

disposed of hazardous or potentially hazardous wastes, and petroleum compounds that may have impacted the site. Investigations have not been completed to fully evaluate all areas of potential concern.

A diatomaceous earth mine and processing plant operated at the site between 1911 and 1963. The processing included crushing, drying, calcination, cooling, finish end milling, product collection, packing, and material handling. After diatomaceous earth mining operations ceased the site was used for surface gravel mining and operation of a hot asphalt plant. The site was also permitted as an industrial waste disposal facility in late 1975 to early 1976.

Materials used/ stored/ disposed of at the site included: caustic sand with radioactive material; ink sludge; lead; chromium; oily wastes; petroleum products including gasoline, diesel, waste oil; asbestos containing material; PCBs, batteries; solid waste; and possibly copper wastes.

The property owner has been engaged in redevelopment discussions with DEQ at the site since at least 2008 and an active participant in the DEQ's Voluntary Clean Up program since September 2014. As a part of the program, the owner has worked with DEQ's project manager and the Oregon Health Authority (OHA) to create an approved work plan and has been performing the items identified in the work plan and those specified in the rezone determination from 2011. On 10/9/15 DEQ stated of the investigation work plan, "Based on the plan and the progress thus far, DEQ sees no reason why the owner could not complete the work plan by the end of 2015."

**Applicant:** The 2008 zone change decision conditioned final plat approval upon the submission of a No Further Action letter from DEQ and the equivalent letter from DHS confirming the site had been cleaned up to levels suitable and safe for residential use. That decision was not appealed and is final and binding. Contrary to the inappropriate discussion by the Hearings Officer, that decision did not improperly defer compliance with an applicable zone change criterion to a later date. In fact, that decision properly found the zone change criteria would be met upon completion of the VCP program through DEQ and equivalent process through DHS and imposed a condition of approval to ensure compliance.

The Board further found there was sufficient evidence to show that it was feasible to comply with that condition and that the compliance with the condition involved at least three public processes (VCP program through DEQ, DHS equivalent program, tentative subdivision application with the County). The property owners and the Applicant have conducted water quality and water quantity testing, on-site soil testing, airborne/dust testing, subsurface soil and ground water testing. These tests have all failed to show any harmful or dangerous levels of materials.

Working in coordination with DEQ and OHA the Applicant has identified additional measures, beyond what is required under the VCP, to improve the environmental investigation of the site and has indicated willingness to accept the following condition of approval.

*Prior to final plat approval, the applicant shall provide documentation from DEQ and OHA that the following activities have been completed:*

- *Include comprehensive sampling of surface soil on both the east and west sides of Lower Bridge Road, using incremental sampling methodology. These samples will be analyzed for crystalline silica.*

- *Collect samples from the shallower aquifer during construction of sampling/monitoring wells. While these samples would be from open borings rather than from completed monitoring wells, they would provide information on water quality in the shallower aquifer.*
- *Conduct a scoping level ecological risk assessment for the east side property.*

**Opponents:** The record fails to establish that all land proposed for planned development has been cleaned of hazardous waste to a level safe for human occupancy. The record fails to establish that adequate investigation and cleanup of hazardous waste occurred on the planned development property or the adjacent mine property and fails to establish that present day hazardous waste standards applicable in the context of residential use are satisfied. The application fails to incorporate information regarding the actual hazardous waste conditions on all land subject to this proposal. It is impossible to draw any well-founded conclusion regarding current hazardous waste conditions.

As is the case with this entire application, Applicant seeks to impermissibly defer or avoid altogether the difficult and expensive work necessary to ensure that the site is ready for high-density residential occupancy. The Applicant has not produced evidence to establish that the site is safe for human occupancy. This is a fundamental determination that should be made at the preliminary plat approval stage as opposed to being approved through imposition of conditions.

**Hearings Officer:** “I find this evidence is sufficient to support a finding that it is feasible to make the subject property suitable for the proposed PUD through imposition of a condition of approval requiring the applicant to complete its DEQ VCP and to obtain an “NFA” letter from the agency. The board’s 2008 decision required only that the applicant obtain the “NFA” letter but said nothing about completing the VCP. Therefore, I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval expressly requiring the applicant to complete the VCP prior to submitting the final subdivision plat for approval.”

The Hearings Officer finds the Newton Consultants’ memorandum provides sufficient evidence from which I can find the subject property is suitable for the proposed PUD considering water quality.

**Staff Comments:** It is presently unknown if significant contamination remains at the site, either on the PUD property itself or on the west area, representing a hazard to the PUD. Based on DEQ’s comments, the applicant could have completed (but has chosen not to complete) environmental testing that would have significantly clarified or resolved environmental hazard concerns. This puts the Board in a difficult position of needing to determine if the site can be made suitable for residential development when the extent of the hazard and feasibility of remediation of that hazard have not been documented.

However, the Hearings Officer found there was sufficient evidence to support a finding that it is feasible to make the subject property suitable for the proposed PUD through imposition of a condition of approval requiring the applicant to complete its DEQ VCP and to obtain an “NFA” letter from the agency.

Decision item M20, above, asks if the Board can legally defer or delegate findings that the site is suitable for residential use. One conclusion is that such findings cannot be made now, deferred, or delegated. Alternatively, the Board could conclude that that completion of the VCP will be

sufficient to demonstrate that the site is suitable for residential use and that the record demonstrates that completion of that program appears feasible at this point.

Staff recommends that at minimum the Board, following the Hearings Officer's recommendation, include a condition of any approval requiring:

*Prior to final plat approval, the applicant shall demonstrate that it has completed VCP program to the satisfaction of DEQ and OHA.*

Staff also recommends the Board, with any approval, include the applicant's proposed conditions of approval, listed above.

## **M22 - Is bonding appropriate or required?**

**Issue Summary:** Bonding can be used to ensure that activities required to ensure compliance with applicable criteria are performed, regardless of the applicant's ability or willingness to perform them. Bonding is typically used to ensure performance of required activities after final government approval. For example, final plats may be recorded prior to infrastructure construction using a bond.

The first question here is what, if any, post-final-plat activities are required to ensure compliance with applicable criteria. The Hearings Officer identified that dust control measures on the entire former mine property should be bonded. Staff identified that bonding for remediation of contamination discovered during construction and after final plat approval should be considered. Opponents believe that the BOCC should impose very significant financial assurance requirements in order to ensure that the Applicant or Applicant's successors in interest remain financially responsible for carrying out any required environmental investigation and remediation work.

The second question is the amount of the bonding. In order to use a bond the bond must be in an amount that credibly covers the cost of the required activities. No party has submitted a plan that includes sufficient cost detail to impose a bond against.

**Applicant:** Staff was unable to locate briefing on this issue.

**Hearings Officer:** "I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to provide cash or a performance bond in favor of Deschutes County, and acceptable to Deschutes County Legal Counsel, for the cost of remediating DE dust on SM Site 461 and the subject property, in an amount to be identified by the applicant and approved by the board, prior to any grading or construction on the subject property."

**Opponents:** The remediation performance risks are too great to allow the proposed development to move forward. However, in the event the BOCC overturns the HO Decision it should impose very significant financial assurance requirements in order to ensure that the Applicant or Applicant's successors in interest remain financially responsible for carrying out any required environmental investigation and remediation work.

**Staff:** Since no plan for any activity has been submitted that include cost data, it is not possible to impose bonding requirements at this time. In order to approve this application, the Board will

need to determine that the proposal meets all applicable criteria without the benefit of bonding to ensure performance of post-final plat activities. Staff notes that conditions of approval, without bonding, may be adequate to address post-final plat approval concerns.

### **M23 – Consistency with Oregon State Scenic Waterway Act / Federal Wild and Scenic Rivers Act.**

**Issue Summary:** Development along this segment of the Deschutes River is subject to the Oregon State Scenic Waterway Act / Federal Wild and Scenic Rivers Act. Opponents have argued that compliance with the visual impact provisions of these laws needs to be demonstrated at this point in the application.

**Applicant:** The Applicant has obtained approval for the planned development subdivision from Oregon Parks and Recreation. The approval is for the subdivision infrastructure work necessary to reach final plat approval and not for the residential structures for the individual lots. Both the Applicant and State Parks understand the future structures will need to be permitted through State Parks at the time they are proposed.

**Hearings Officer:** The Hearings Officer found that there is nothing in OPRD's correspondence that indicates approval of the proposed PUD would result in a change in the current classification of the stretch of the Deschutes River adjacent to the subject property. Nor do his letters suggest dwellings on individual PUD lots could not receive scenic waterway approval from OPRD. To the contrary, the approval standards for new structures in the Middle Deschutes River Scenic Waterway, set forth in OAR 736-040-0072 attached to Mr. Cianella's May 21, 2015 e-mail message, are similar to those imposed through the county's LM site plan review.

**Opponents:** The Applicant states that it has obtained "approval" for the planned development subdivision from the Oregon Parks and Recreation Department ("OPRD"), but then clarifies that the "approval" is only for underground utility and infrastructure work, not for residential structures on individual lots. The Applicant acknowledges that future structures will need to be permitted through the state in the future. This will impermissibly piecemeal the development analysis and approval process by OPRD. Applicant has an obligation to obtain a comprehensive analysis from OPRD as to the impacts that the built-out development would have on scenic and natural values. It instead did the bare minimum, which in this instance is legally insufficient.

**Staff Comment:** The Opponents' argument is primarily with OPRD's implementation of the Oregon State Scenic Waterway Act. Staff believes there is no applicable criterion under County Code that requires or allows the Board to second-guess OPRD's administration of this Act. The County implementation of protection of the Deschutes River as a visual corridor is focused on a per-structure analysis under the Landscape Management (LM) Combining Zone provisions. Since these requirements focus on vegetative screening, building height, and building colors, staff believes that it is feasible for the proposed lots to be developed with dwelling that would be evaluated, per-dwelling, for LM compliance prior to issuance of building permits.

### **Attachments**

1. Decision matrix.

LOWER BRIDGE HEARING DECISION MATRIX

	Issue	Information in Record	Staff Comment	Board Options
1.	<p><b>Can a PUD application create open space lots on EFU zoned land?</b></p>	<p><b>HO:</b> Subdivisions and PUDs are not uses permitted outright or conditionally in the EFU Zone.</p> <p><b>Applicant:</b> Proposal does not divide EFU zoned land or propose non-EFU-allowed uses on EFU zoned land. Should be allowed. Alternatively, submitted property line adjustment will remove EFU land from proposal.</p> <p><b>Opponents:</b> Opponents argued that EFU-zoned land could not be included in the PUD, following the Hearings Officer’s findings.</p>	<p><b>Staff Comment:</b> Concurs with HO, but recommend revising decision to reflect proposed lot line adjustment. The Proposed PUD still includes EFU zoned land in Tax Lot 1600. Recommend conditioning any approval to require removal of all EFU zoned lands from the PUD prior to final plat approval.</p> <p>Sample motion for BOCC: <b>“Move that the Board adopt the Hearings Officer’s analysis and update the decision to reflect the Applicant’s modification and lot line adjustment. Require as a condition of any approval that the applicant remove EFU zoned portion of subject property by property line adjustment, prior to final plat approval.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Find that PUD lot creation including EFU zone land is allowed.</p>
2.	<p><b>Can a PUD application include FP zoned land?</b></p>	<p><b>HO:</b> Neither “cluster development” nor “planned development” is a use permitted outright or conditionally in the FP Zone.</p> <p><b>Applicant:</b> Open space and subdivision are allowed in the FP zone. These are the proposed uses of FP zoned lands. The proposal protects FP zoned land.</p> <p><b>Opponents:</b> Concurs with HO. Neither planned developments nor cluster developments are permitted or conditionally permitted uses in the FP zoning text (in contrast to standard "subdivision or partitioning," which are explicitly included in the FP zoning text).</p>	<p><b>Staff Comment:</b> The Board is afforded deference on plausible interpretations of local code at LUBA. Staff is uncertain if the applicant’s proposed interpretation is plausible, given the rules of statutory construction. Staff believes that a text amendment would be a clearer path to evaluate and formalize (or not, at the Board’s discretion) the applicant’s proposed interpretation. The Board will need to decide if the applicant’s interpretation is plausible at this time.</p> <p>Sample motion for BOCC [Denial]: <b>“Move that the Board adopt the Hearings Officer’s findings.”</b></p> <p>Alternate sample motion for BOCC [Approval]: <b>“Move that the Board reverse the Hearings Officer’s findings and, instead, find that open space and subdivision are allowed in the Flood Plain zone. These are the proposed uses of FP zoned lands and lots for these purposes can be created in the FP zone through a PUD application.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Interpret FP Zone code to allow PUD created open space lots.</p>



	Issue	Information in Record	Staff Comment	Board Options
3.	<b>Can FP zoned land be counted towards PUD housing density and density bonuses?</b>	<p><b>HO:</b> Approximately 30 acres of FP-zoned land included in the subject property cannot be included in the density calculation.</p> <p><b>Applicant:</b> All acreage included in the project area calculations is available for gross acreage calculations for the PUD. The approximately 30 acre area west of the river was specifically added to the "East Area" zone change to allow its use for open space calculations in a future planned development.</p> <p><b>Opponents:</b> After deducting undevelopable areas, there are 95.73 acres remaining for development. At 10.3 acres per lot, 9 lots would fit on this site. Applicant's proposal of 19 lots is a 111% increase over the RR-10 standards applicable to this site. Otherwise undevelopable Flood Plain Zoned lands should not be leveraged to increase the density of a rural PUD in an environmentally sensitive area.</p>	<p><b>Staff Comment:</b> <u>This question is only at issue if the Board approves #2, above.</u> Dwellings are prohibited on FP zoned lands unless no alternative location exists and that these lands are not generally residentially developable.</p> <p>Sample motion for BOCC [Denial]: <b>“Move that the Board adopt the Hearings Officer’s findings.”</b></p> <p>Alternate sample motion for BOCC [Approval]: <b>“Move that the Board reverse the Hearings Officer’s findings and, instead, find that Flood Plain zoned open space within the PUD may be counted toward the PUD ‘equivalent density’ calculations.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Interpret FP/PUD code to allow FP zoned land to count in density calculation.</p>
4.	<b>Where is the boundary of the FP zone?</b>	<p><b>HO:</b> HO did not directly address this issue.</p> <p><b>Applicant:</b> Flood Plain Zone in this area is designated Zone A, which is based on FIRM maps with no base flood elevation data. The FIRM map when applied to the significant amount of river frontage on the subject property extends vertically 60' in one area and through the middle of the river channel in another. It clearly does not represent a true flood boundary.</p> <p><b>Opponents:</b> Applicant’s claim that the flood plain mapping is inaccurate should be disregarded due to Applicant’s failure to take appropriate steps to correct the alleged errors.</p>	<p><b>Staff Comment:</b> The Flood Plain Zone boundary was provided by FEMA and adopted by the County. Any alteration of that boundary should be conducted in accordance with FEMA guidance and all applicable regulations. The applicant was provided with this information in a pre-application meeting and declined to use any of the FEMA accepted methodologies for refining flood plain boundaries. It is unclear to Staff what the Applicant hopes the Board will do in the face of the flood map inaccuracy.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that revisions to the boundary of the special flood hazard area must be performed in accordance with applicable FEMA requirements and guidance documents.”</b></p>	<p>Adopt Staff recommendation, with or without modification.</p> <p>Staff is unclear what conclusion the Applicant hopes the Board will reach.</p>
5.	<b>Is the “conditional use” the whole PUD or simply the changes in density and layout afforded in a PUD over a conventional subdivision.</b>	<p><b>HO:</b> The general conditional use approval criteria apply to the whole application because the applicant’s proposal is for a PUD and not for an individual single-family dwelling or non-clustered subdivision.</p> <p><b>Applicant:</b> The Hearings Officer found that the conditional use criteria of DCC Section 18.128.015(A)(I) apply to this application and she found the criteria require a finding that Applicant demonstrate the suitability of the subject property for PUD development.</p> <p><b>Opponents:</b> Concur with HO.</p>	<p><b>Staff Comment:</b> Because some other similar use (non-clustered subdivision) is allowed without conditional use approval in the zone does not make some portion of the proposed conditional use not conditional. All of the proposed lots are designed and sited in a manner only allowed under the PUD standards.</p> <p>Sample motion for BOCC: <b>“Move that the Board adopt the Hearings Officer’s findings.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Confirm the applicant’s interpretation.</p>

	Issue	Information in Record	Staff Comment	Board Options
6.	<b>Are required road improvements “roughly proportionate” to traffic impacts?</b>	<p><b>HO:</b> Did not directly address issue.</p> <p><b>Applicant:</b> Full Lower Bridge Way widening project is not “roughly proportionate” under <i>Nollan/Dolan</i>. Applicant agrees to pay proportionate share.</p> <p><b>Opponents:</b> Did not brief on this issue.</p>	<p><b>Staff Comment:</b> Applicant’s argument is reasonable and that the Hearing Officer’s condition should be modified in some way to limit the Applicant’s obligation to 35% of the project cost. However, the entire required improvement must be completed prior to final plat approval.</p> <p>Sample motion for BOCC: <b>“Move that the Board revise HO condition #16 as recommended by Staff in the deliberation memorandum.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Revise requirement based on new testimony.</p>
7.	<b>Did the HO collaterally attack the 2008 PA/ZC approval?</b>	<p><b>HO:</b> Found that Board’s approach to deferring findings of environmental safety was likely impermissible under existing case law, but no change to the ZC/PA was imposed. Nothing precludes the Hearings Officer or Board from imposing additional restrictions, beyond those in the ZC/PA, at this point on the proposed PUD.</p> <p><b>Applicant:</b> The Hearings Officer erred when she collaterally attacked the BOCC’s prior decision and found the BOCC improperly substituted a condition of approval for the necessary findings of compliance in the prior zone change decision.</p> <p><b>Opponents:</b> Staff was unable to locate briefing on this issue.</p>	<p><b>Staff Comment:</b> No change to the ZC/PA was imposed. Nothing precludes the Hearings Officer or BOCC from imposing additional restrictions beyond those in the ZC/PA contemplated on the proposed PUD. This is, in part, because the PUD is subject to different applicable criteria than the plan amendment and zone change.</p> <p>Sample motion for BOCC: <b>“Move that the Board reject applicant’s argument that the Hearings Officer’s decision is a collateral attack on the 2008 plan amendment/zone change.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Revise the HO’s legal analysis of the 2008 PA/ZC in light of cases cited by HO and opponents.</p>
8.	<b>Does the HO denial of the PUD represent a “taking”?</b>	<p><b>HO:</b> Did not directly address issue.</p> <p><b>Applicant:</b> The Hearings Officer’s decision leaves applicant with no viable economic use of the property and constitutes the taking.</p> <p><b>Opponents:</b> Staff was unable to locate briefing on this issue.</p>	<p><b>Staff Comment:</b> The applicant has not applied for the approximately 15-lot, non-clustered subdivision on the property that is a non-conditional use. The applicant has also not also applied for the single dwelling allowed on the property without conditional use or subdivision approval. Only one use, a PUD, has been presently denied on the property. Nothing in a denial indicates that a properly designed PUD application could not be approved on the property. The applicant’s claims the property has no viable economic as a consequence of the Hearings Officer’s denial use are unsubstantiated. Staff believes that were the Board to deny this application, the denial would not constitute a taking.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that any denial of this application is not a taking of the subject property, as the applicant has not applied for and the County has not denied or pre-judged a variety of residential and economic uses allowed in the zone.”</b></p>	<p>Find that the PUD has been denied for failure to comply with specific criterion and that a variety other development opportunities, including subdivision, exist.</p> <p>Remove the issue by approving the PUD.</p> <p>Find that “no viable economic use of the property” is left. Modify decision to avoid “taking”.</p>

	Issue	Information in Record	Staff Comment	Board Options
9.	<b>Does sufficient financing exist to assure the proposed development will be substantially completed within four years of approval.</b>	<p><b>HO:</b> The HO finds a simple conclusory statement does not constitute sufficient evidence to demonstrate compliance with this conditional use approval criterion.</p> <p><b>Applicant:</b> The HO erred in concluding there was not sufficient evidence of financing to assure the proposed development will be substantially completed within 4 years of approval. Board hearing testimony of demonstrated financial commitment of applicant and investors in place to complete project.</p> <p><b>Opponents:</b> Applicant's counsel admitted in the public hearing that the owners don't have the money to clean up the site. Applicant has described its cleanup plan consistently for a decade: let them sell lots, and they will use the proceeds from the sales to clean up the site. A decade later, the plan still makes no sense.</p>	<p><b>Staff Comment:</b> The Applicant did not provide information to determine compliance with this criterion. Staff is uncertain if compliance is even possible at this point, given that project costs cannot be determined until environmental investigations are complete and a scope of work for remediation is established.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that the Applicant has not demonstrated that sufficient financing exists to assure the proposed development will be substantially completed within four years of approval.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Revise the HO's legal analysis of the 2008 PA/ZC in light of cases cited by HO and opponents.</p>
10.	<b>Does the Historic Sign render proposed lot 1 undevelopable?</b>	<p><b>Applicant:</b> Staff was unable to locate briefing on this issue.</p> <p><b>Hearings Officer:</b> The Hearings Officer did not directly address this issue. The Hearings Officer found that imposition of the conditions of approval will protect this historic sign to the greatest extent practical.</p> <p><b>Opponents:</b> Expressed concerns regarding the ability to develop Lot 1, given the sign setback. Also expressed concerns about the adequacy of the conditions of approval to protect the sign.</p>	<p><b>Staff Comment:</b> Does “development” include only structures or also include septic systems, wells, or earthmoving projects. Staff believes it is plausible that Lot 1 could be improved with a residence even if roughly 40% of the lot is rendered unusable by the sign protections. However, the applicant did not provide a figure showing a septic/well/dwelling layout for Lot 1 consistent with Condition #4.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that Condition of Approval #4 of PA-08-1/ZC-08-1 does not render proposed Lot 1 undevelopable. This finding does not guarantee the developability of Lot 1 or waive other applicable requirements.”</b></p> <p>Alternate sample motion for BOCC: <b>“Move that the Board find that the applicant has not demonstrated that Lot 1 is developable in light of the cumulative effect multiple applicable development constraints. As a condition of approval, Lot one shall be omitted from the final plat.”</b></p>	<p>Find that development is not precluded by CoA #4 on Lot 1.</p> <p>Require that Lot 1 be omitted from any approval.</p>
11.	<b>Do the proposed CC&amp;Rs describe the environmental history?</b>	<p><b>Applicant:</b> Provided draft language to comply with this criterion.</p> <p><b>Hearings Officer:</b> Did not directly address this issue.</p> <p><b>Opponents:</b> Provided CC&amp;Rs do not divulge the nature, type and extensiveness of the toxic contamination known and suspected on the site and misrepresents the sites condition to potential buyers.</p>	<p><b>Staff Comment:</b> The supplied draft is a reasonable summary. Testing and clean-up of the site is not complete, so it is not possible to provide a full environmental history of the site at this point. Direct the applicant to develop a final environmental history for the CC&amp;Rs, following DEQ and OHA final approval of the site.</p> <p>Sample motion for BOCC: <b>“Move that the Board impose a condition of any approval as recommended by Staff in the deliberation memorandum, under section M11.”</b></p>	<p>Find draft CC&amp;Rs, (Exhibit PH-8, Page 6) adequately describe the environmental history of the site.</p> <p>Direct the applicant to develop a final environmental history for the CC&amp;Rs, following DEQ and OHA final approval of the site</p>

	Issue	Information in Record	Staff Comment	Board Options
12.	<b>Will the proposed development adversely impact the rural character of the area?</b>	<p><b>Applicant:</b> Staff was unable to locate briefing on this issue.</p> <p><b>Hearings Officer:</b> Dwellings clustered on two-acre lots still constitute “rural” development and not “urban” development. Inclusion of over 100 acres of open space will preserve the rural character of the area. Opponents who live across the Deschutes River east of the proposed PUD object to having to look at dwellings on the subject property. Opponents no longer had reasonable expectations that the subject property would remain undeveloped.</p> <p><b>Opponents:</b> The project site has extreme visibility from Teater Avenue, Lower Bridge Way, and the Wildlife Preserve; and that the 111% density increase that would occur from the applicant’s proposal is crowded along the river canyon rim on two acre lots. The rural character of the area would suffer needlessly from the applicant’s proposal because they can successfully develop the property without employing a Planned Development approach.</p>	<p><b>Staff Comment:</b> The impact on the rural character of the area is a deeply subjective question. While the close proximity and high visibility of the proposed homesites are uncharacteristic of the area, the proposal includes large areas of land permanently preserved as open space.</p> <p>Sample motion for BOCC: <b>“Move that the Board adopt the Hearings Officer’s findings.”</b></p> <p>Alternate sample motion for BOCC: <b>“Move that the Board find that the proposed PUD layout, clustered on the canyon rim, will result in significant visual impacts to surrounding properties. These impacts are incompatible with the rural character of the area.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Revise the HO’s analysis to reflect neighbor concerns over visual impacts.</p>
13.	<b>Is the site suitable for residential development given prior earthmoving/geotechnical stability?</b>	<p><b>Applicant:</b> The Wallace Group issued a Geotechnical Exploration Report on the subdivision site (see Exhibit PH-14). The geotechnical investigation concluded that the site was suitable for the proposed development from a geotechnical perspective and that slope stability analyses will be performed on a lot by lot basis when construction/development plans are available.</p> <p><b>Hearings Officer:</b> Did not directly address this issue.</p> <p><b>Opponents:</b> The record does not contain any substantive geotechnical study verifying that individual building sites within each proposed lot could be safely developed in light of concerns regarding waste rock fill deposits. A full geotechnical analysis in conjunction with the application is required.</p>	<p><b>Staff Comment:</b> The Applicant’s geotechnical report does not evaluate each proposed lot, but finds that any historic fill or diatomaceous earth can be remedied with “...up to 4 feet of engineered fill or aggregate base course...”.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that, based on the applicant’s geotechnical report, it is feasible to remedy stability flaws at the building sites with conventional soil engineering solutions.”</b></p>	<p>Find that the site is suitable for residential development given prior earthmoving/geotechnical stability.</p> <p>Find that, lacking a per-building-site analysis, a finding of suitability or residential use cannot be made.</p>
14.	<b>Is buried rimrock considered “rimrock”?</b>	<p><b>Applicant:</b> Can be addressed as part of LM review.</p> <p><b>Hearings Officer:</b> Did not address this issue.</p> <p><b>Opponents:</b> A thorough survey of the buried rimrock should be required in order to determine the appropriate rimrock setback requirements on those proposed lots impacted by past dumping.</p>	<p><b>Staff Comment:</b> Rimrock buried through earthmoving is still subject to rimrock standards. Other conclusions would likely encourage earthmoving in river canyons to circumvent rimrock setback rules. Find that the applicant-proposed rear setbacks on lots 11 through 15, ranging from 100 to 170 feet are sufficient to ensure compliant setbacks from the buried rimrock.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that rimrock buried through earthmoving is still subject to rimrock standards. The applicant-proposed rear setbacks on lots 11 through 15, ranging from 100 to 170 feet are sufficient to ensure compliant setbacks from the buried rimrock.”</b></p>	<p>Find that rimrock buried through documented earthmoving is still subject to rimrock standards.</p> <p>Find that buried rimrock no longer meets the 18.04 definition of “rimrock”.</p>

	Issue	Information in Record	Staff Comment	Board Options
15.	Should “rimrock-like” protections be imposed on the non-rocky canyon rim?	<p><b>Applicant:</b> The memo submitted as Exhibit PH-14 contains the proposed minimum rear yard setbacks for each individual lot based on the Applicant's on-site investigation. The proposed setbacks are designed to minimize visibility from the river and meet County and State requirements for preservation of scenic resources. These are minimum rear yard setbacks and, as discussed, each structure will be required to seek approval from State Parks which could result in a greater setback to meet State scenic waterway requirements.</p> <p><b>Hearings Officer:</b> Did not directly address this issue.</p> <p><b>Opponents:</b> Staff was unable to locate briefing on this issue.</p>	<p><b>Staff Comment:</b> Are setbacks specific to this subdivision needed to address potential scenic impacts due to the unusual canyon configuration in the absence of significant rimrock? DCC 18.128.210 requires the preservation of special terrain features.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that rimrock setbacks only apply to exposed rock faces and that no special setbacks from the canyon rim are warranted”</b></p> <p>Alternate sample motion for BOCC: <b>“Move that the Board find that development on the canyon rim would result in significant visual impacts to the Deschutes River if structures were not set back from the canyon rim. To mitigate these impacts the Board includes conditions of approval requiring:</b></p> <p><b>A. The height of any structure shall not exceed the setback from the edge of the canyon rim.</b></p> <p><b>B. No structure (including decks) shall be located closer than 20 feet from the canyon rim.”</b></p> <p><b>C. The applicant/owner and its successors, including individual lot owners, shall prohibit the following activities within the river canyon below the upper bench/plateau: changes in the natural grade; construction of structures; and the alteration, removal or destruction of natural vegetation, except as part of an Oregon Department of Fish and Wildlife approved habitat enhancement project.</b></p>	<p>Find that rimrock standards only apply to exposed or formerly exposed rock faces. No special setback are required.</p> <p>Impose special setbacks and use restrictions on the canyon and canyon rim.</p>
16.	Are the proposed lots developable, given applicable constraints on the building lots?	<p><b>Applicant:</b> the Applicant has located and mapped all rimrock on the lots, located and mapped the line on each lot for the required rimrock setback and proposed increased setbacks to demonstrate compliance. Applicant also submitted a typical building footprint and utility facilities to demonstrate all lots can be developed with a dwelling, drainfield and well and fully comply with the rimrock setbacks in the LM zone without the need for any exceptions.</p> <p><b>Hearings Officer:</b> Applicant has not demonstrated that each lot can be developed with a dwelling, on-site septic system and individual well in a manner that assures the dwelling is at least 50 feet from any rimrock, and that all other yard and setback requirements in the LM Zone can be met.</p> <p><b>Opponents:</b> Opponents argue that the Board must affirmatively establish that the lots are suitable for residential development given the cumulative effect of applicable criteria.</p>	<p><b>Staff Comment:</b> The applicant’s example figures show that it is feasible to develop the lots given physical and regulatory constraints. Lot specific septic evaluations are typically required as a condition of final plat. Staff believes the applicant has demonstrated that it is feasible to site residences on the proposed lots. Conversely, there is no evidence in the record demonstrating clearly that any proposed lot is undevelopable.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that the Applicant has demonstrated that it is feasible to residentially develop the proposed lots in light of applicable setbacks any physical lot constraints.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Find that the applicant has demonstrated that development is feasible.</p>

	Issue	Information in Record	Staff Comment	Board Options
17.	Is the property a suitable location for residences, given dust concerns under current conditions?	<p><b>Applicant:</b> The Applicant worked with DEQ to modify the dust control plan for the east side, to create a dust control plan for the west side. In addition to the dust control plans, the Applicant conducted on-site soil testing at locations on both the east and west side Lower Bridge Way to verify the levels of crystalline silica in the soils were not at harmful levels and in fact were no greater than what naturally occurs in the native DE.</p> <p><b>Opponents:</b> The latest analysis from Wallace was submitted as PH-1 through PH-7 in Applicant's Feb. 19, 2016 Post-Hearing Submittal to the Record. That analysis concludes that the six samples taken over 565 acres, though a wholly insufficient ratio of approximately 1 sample for every 94 acres, with only 1 on the east side of the subject property, yields Cristobalite in every single sample. This carcinogen rests on the surface where the samples were taken.</p>	<p><b>Staff Comment:</b> The site is a source of fugitive dust. It is debated in the record if this dust is of greater intensity or hazard than dust from nearby properties. Following large-scale surface disturbance, active and natural revegetation (visible in aerial photos from 2006-2014) has somewhat improved conditions on the west side of the former mine.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that the Applicant has demonstrated that the dust hazard, under current site conditions, does not render the site unsuitable for residential development.”</b></p> <p>Alternative sample motion for BOCC: <b>“Move that the Board find that the Applicant has not demonstrated that the site is suitable for residential use, given the dust hazard under current site conditions. No plan has been provided to cover or further stabilize exposed DE.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Find that the applicant has demonstrated that development is feasible.</p>
18.	Is the property a suitable location for residences, given dust concerns under east-area development?	<p><b>Hearings Officer:</b> The applicant has not demonstrated the subject property is suitable for the proposed PUD considering blowing DE dust. I find the current state of SM Site 461 with large areas of exposed DE, the location of SM Site 461 west of the subject property, the potential for future mining of SM Site 461, and the presence of a significant amount of DE on the subject property, do not support a finding that blowing DE dust does not and will not present a health hazard to future PUD residents -- or that it is feasible to assure no health hazard from blowing DE dust will occur in the future through imposition of conditions of approval. I find particularly significant the evidence that re-vegetating and site watering efforts on SM Site 461 have not been successful in securing and covering the DE on the site, and that there is a significant amount of DE on the subject property. I find this evidence simply does not support imposing a condition of approval requiring further similar mitigation actions to reduce or eliminate blowing DE dust.</p>	<p><b>Staff Comment:</b> The Applicant proposes to control on-site dust during east area construction by requiring project operators to submit a Dust Control Plan to the HOA. The HOA would review and enforce these dust control plans. The template dust control plan was reviewed by DEQ and edited to reflect DEQ comments. Staff believes that a County enforcement nexus is needed, as the HOA may be unable or unwilling to enforce the requirements. As DEQ commented, “Basically it is common sense if visible emissions (fugitive dust) is observed, get water on it.” Staff recommends requiring the Applicant’s dust control plan as a condition and imposing a condition prohibiting off-site visible dust from earth disturbing activities.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that it is feasible to control fugitive dust during PUD development through imposition of conditions of approval, as listed in the deliberation memorandum under section M18.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Impose conditions to reduce fugitive dust from new soil disturbance.</p>
19.	Is the property a suitable location for residences, given dust concerns under west-area development?	<p><b>DEQ/OHA:</b> From reading DEQ/OHA comments, staff understands that DEQ/OHA are of the opinion that robust dust control could be adequate to mitigate dust health hazards, regardless of processed DE content.</p>	<p><b>Staff Comment:</b> The Applicant proposes to control on-site dust during future west area soil disturbing activities by requiring project operators to develop a Dust Control Plan to be approved by DEQ and OHA. The applicant proposes to self-enforce implementation of this plan. The template dust control plan was reviewed by DEQ and edited to reflect DEQ comments. Staff believes that a County enforcement nexus is needed, as the property owner may be unable or unwilling to enforce the requirements. As DEQ commented, “Basically it is common sense if visible emissions (fugitive dust) is observed, get water on it.” Staff recommends requiring the Applicant’s dust control plan as a condition and imposing a condition prohibiting off-site visible dust from earth disturbing activities.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that it is feasible to control fugitive dust during future west area soil disturbing activities through imposition of conditions of approval, as listed in the deliberation memorandum under section M19.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Impose conditions to reduce fugitive dust from new soil disturbance.</p>

	Issue	Information in Record	Staff Comment	Board Options
20.	<p><b>Can the Board defer or delegate findings that the site is suitable for residential use?</b></p>	<p><b>Applicant:</b> A requirement that an applicant obtain a permit or certification from a state agency having jurisdiction to decide the issue (sufficient water supply, for example) is not an improper deferral of compliance with a criterion.</p> <p>Contrary to the inappropriate discussion by the Hearings Officer, the PA/ZC did not improperly defer compliance with an applicable zone change criterion to a later date. In fact, that decision properly found the zone change criteria would be met upon completion of the VCP program through DEQ and equivalent process through DHS and imposed a condition of approval to ensure compliance.</p> <p><b>Hearings Officer:</b> The Hearings Officer finds that under <i>Rhyne</i>, I do not have the option of deferring findings of compliance with the “suitability” conditional use approval criterion to final plat approval as suggested by the applicant. That is because final plat approval is not required to, and does not, provide public notice or hearing.</p> <p><b>Opponents:</b> Made extensive citations to case law. Argues that, legally, the Board must find that the applicant has demonstrated that it has met all criteria or demonstrated that it is feasible to resolve present non-compliance or uncertainty through conditions of approval. A finding of feasibility of compliance through conditions must be based on present evidence of sufficient detail to determine future conditions can be met.</p> <p>Applicant seeks to impermissibly defer or avoid altogether the difficult and expensive work necessary to ensure that the site is ready for high-density residential occupancy. The Applicant has not produced evidence to establish that the site is safe for human occupancy. This is a fundamental determination that should be made at the preliminary plat approval stage as opposed to being approved through imposition of conditions.</p>	<p><b>Staff Comment:</b> The Board will need to determine if there is substantial evidence in the record sufficient to support County a finding that the site will be suitable for residential use, based on a condition that the applicant complete the VCP and receive DEQ/OHA “NFA” letters. Can the Board find that it is feasible to remediate the site, when the hazard identification is not complete? Can the Board “delegate” this finding to the result of the VCP process? Staff and the Hearings Officer are concerned that this may be legally impermissible.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that, since hazard investigation is incomplete, it is not possible to determine that remediation of an unknown hazard is feasible.”</b></p> <p>Alternative sample motion for BOCC: <b>“Move that the Board find that the Applicant has demonstrated that the site will be suitable for residential use following completion of the VCP and receipt of DEQ/OHA “NFA” letters. This is included as a condition of any approval. The Applicant either will or will not receive “NFA” letters from DEQ and OHA documenting that the site is safe for residential use. No further County discretionary review is required.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Find that residential suitability cannot be determined at this point, deferred, or delegated.</p> <p>Find that it is feasible to demonstrate residential suitability through conditions of approval.</p>

	Issue	Information in Record	Staff Comment	Board Options
21.	<p><b>Is the property a suitable location for residences, given hazardous material/radioactive material/groundwater contamination concerns?</b></p>	<p><b>Applicant:</b> In the 2008 ZC/PA, the Board further found there was sufficient evidence to show that it was feasible to comply with that condition and that the compliance with the condition involved at least three public processes (VCP program through DEQ, DHS equivalent program, tentative subdivision application with the County). The property owners and the Applicant have conducted water quality and water quantity testing, on-site soil testing, airborne/dust testing, subsurface soil and ground water testing. These tests have all failed to show any harmful or dangerous levels of materials.</p> <p>Working in coordination with DEQ and OHA the Applicant has identified additional measures, beyond what is required under the VCP, to improve the environmental investigation of the site.</p> <p><b>HO:</b> The evidence is sufficient to support a finding that it is feasible to make the subject property suitable for the proposed PUD through imposition of a condition of approval requiring the applicant to complete its DEQ VCP and to obtain an “NFA” letter from the agency. The board’s 2008 decision required only that the applicant obtain the “NFA” letter but said nothing about completing the VCP. Therefore, I find that if the proposed PUD is approved on appeal, it should be subject to a condition of approval expressly requiring the applicant to complete the VCP prior to submitting the final subdivision plat for approval.”</p> <p><b>Opponents:</b> The record fails to establish that all land proposed for planned development has been cleaned of hazardous waste to a level safe for human occupancy. The record fails to establish that adequate investigation and cleanup of hazardous waste occurred on the planned development property or the adjacent mine property and fails to establish that present day hazardous waste standards applicable in the context of residential use are satisfied. The application fails to incorporate information regarding the actual hazardous waste conditions on all land subject to this proposal. It is impossible to draw any well-founded conclusion regarding current hazardous waste conditions.</p>	<p><b>Staff Comments:</b> It is presently unknown if significant contamination remains at the site, either on the PUD property itself or on the west area, representing a hazard to the PUD. Based on DEQ’s comments, the applicant could have completed (but has chosen not to complete) environmental testing that would have significantly clarified or resolved environmental hazard concerns. This puts the Board in a difficult position of needing to determine if the site can be made suitable for residential development when the extent of the hazard and feasibility of remediation of that hazard have not been documented.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that, since hazard investigation is incomplete, it is not possible to determine that remediation of an unknown hazard is feasible.”</b></p> <p>Alternative sample motion for BOCC: <b>“Move that the Board find that the Applicant has demonstrated that the site will be suitable for residential use following completion of the VCP and receipt of DEQ/OHA “NFA” letters. The Board imposes the Applicant-proposed and staff-proposed conditions of approval as described in the deliberation memorandum, under section M21.</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Find that residential suitability cannot be determined at this point, deferred, or delegated.</p> <p>Find that it is feasible to demonstrate residential suitability through conditions of approval.</p>



	Issue	Information in Record	Staff Comment	Board Options
22.	Is bonding appropriate or required?	<p><b>Applicant:</b> Staff was unable to locate briefing on this issue.</p> <p><b>Hearings Officer:</b> If the proposed PUD is approved on appeal, it should be subject to a condition of approval requiring the applicant to provide cash or a performance bond in favor of Deschutes County, and acceptable to Deschutes County Legal Counsel, for the cost of remediating DE dust on SM Site 461 and the subject property, in an amount to be identified by the applicant and approved by the board, prior to any grading or construction on the subject property.</p> <p><b>Opponents:</b> The remediation performance risks are too great to allow the proposed development to move forward. However, in the event the BOCC overturns the HO Decision it should impose very significant financial assurance requirements in order to ensure that the Applicant or Applicant's successors in interest remain financially responsible for carrying out any required environmental investigation and remediation work.</p>	<p><b>Staff:</b> Since no plan for any activity has been submitted that include cost data, it is not possible to impose bonding requirements at this time. In order to approve this application, the Board will need to determine that the proposal meets all applicable criteria without the benefit of bonding to ensure performance of post-final plat activities. Staff notes that conditions of approval, without bonding, may be adequate to address post-final plat approval concerns.</p>	<p>No bonding is possible, as no party has submitted a plan that includes sufficient cost detail to impose a bond against.</p>
23.	Consistency with Oregon State Scenic Waterway Act / Federal Wild and Scenic Rivers Act.	<p><b>Applicant:</b> The Applicant has obtained approval for the planned development subdivision from Oregon Parks and Recreation. The approval is for the subdivision infrastructure work necessary to reach final plat approval and not for the residential structures for the individual lots. Both the Applicant and State Parks understand the future structures will need to be permitted through State Parks at the time they are proposed.</p> <p><b>Hearings Officer:</b> The Hearings Officer found that there is nothing in OPRD's correspondence that indicates approval of the proposed PUD would result in a change in the current classification of the stretch of the Deschutes River adjacent to the subject property. Nor do his letters suggest dwellings on individual PUD lots could not receive scenic waterway approval from OPRD.</p> <p><b>Opponents:</b> The Applicant states that it has obtained "approval" for the planned development subdivision from the Oregon Parks and Recreation Department ("OPRD"), but then clarifies that the "approval" is only for underground utility and infrastructure work, not for residential structures on individual lots. The Applicant acknowledges that future structures will need to be permitted through the state in the future. This will impermissibly piecemeal the development analysis and approval process by OPRD. Applicant has an obligation to obtain a comprehensive analysis from OPRD as to the impacts that the built-out development would have on scenic and natural values.</p>	<p><b>Staff Comment:</b> The Opponents' argument is primarily with OPRD's implementation of the Oregon State Scenic Waterway Act. Staff believes there is no applicable criterion under County Code that requires or allows the Board to second-guess OPRD's administration of this Act. The County implementation of protection of the Deschutes River as a visual corridor is focused on a per-structure analysis under the Landscape Management (LM) Combining Zone provisions. Since these requirements focus on vegetative screening, building height, and building colors, staff believes that it is feasible for the proposed lots to be developed with dwelling that would be evaluated, per-dwelling, for LM compliance prior to issuance of building permits.</p> <p>Sample motion for BOCC: <b>"Move that the Board Find that the applicant has complied with applicable requirements at this point and it is feasible for the applicant to comply with per-structure requirements during development."</b></p>	<p>Find that the applicant has complied with applicable requirements at this point and it is feasible for the applicant to comply with per-structure requirements during development.</p> <p>Find that piecemeal analysis of structure impacts fails to capture the cumulative visual impacts of the development</p>



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## **AGENDA REQUEST & STAFF REPORT**

### **For Board Business Meeting of 4/27/15**

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**DATE:** April 12, 2016

**FROM:** Will Groves                      CDD                      (541) 388-6518

**TITLE OF AGENDA ITEM:**

Deliberation on a conditional use, tentative subdivision plan, and SMIA site plan approval (247-15-000194-CU, 195-TP, 521-A, 689-MA) to establish a 19-lot residential planned development on three parcels totaling 157 acres, zoned RR-10, EFU, FP, LM, and SMIA, and located between the Deschutes River and Lower Bridge Way west of Terrebonne.

**PUBLIC HEARING ON THIS DATE?** No.

**BACKGROUND AND POLICY IMPLICATIONS:**

The applicant, Lower Bridge Road, LLC, requested conditional use, tentative subdivision plan, and SMIA site plan approval to establish a 19-lot residential planned development on three parcels totaling 157 acres, zoned RR-10, EFU, FP, LM, and SMIA, and located between the Deschutes River and Lower Bridge Way west of Terrebonne.

The Hearings Officer issued a decision on September 11, 2015 finding that the proposal does not comply with all applicable regulations. On September 23, 2015 Lower Bridge Road, LLC appealed the decision to the BOCC.

By Order 2015-467, dated October 19, 2015, the Board initiated review of this application under DCC 22.28.050 through a de novo hearing.

The Board conducted a de novo public hearing on January 6, 2016. The written record closed on March 4, 2016. Staff has developed a decision matrix to help the Board engage with the key decision points in this matter.

**FISCAL IMPLICATIONS:**

None.

**RECOMMENDATION & ACTION REQUESTED:**

Conduct deliberation and give direction to Staff.

**ATTENDANCE:** Will Groves, Legal

**DISTRIBUTION OF DOCUMENTS:**

Will Groves, Legal

## **INSTRUCTIONS FOR COMPLETING THE AGENDA REQUEST FORM**

Use “tab” to move between fields. You can use as much space as necessary within each field. You may want to save this document to your computer and set it up with your department’s specific information for use the next time. You can remove the editing restrictions by going to review/restrict editing (stop protection), after you have saved it to your computer.

Do not leave any fields incomplete. Don’t forget the “preferred meeting date” section. Incomplete documents will be returned to the Department Director. This could cause your agenda item to miss the deadline for submission.

The Board conducts business meetings on Mondays and Wednesdays beginning at 10 a.m. Please note, if there are not enough agenda items to justify holding two meetings in one week, items may be combined and addressed at either the Monday or Wednesday meeting. There are weeks that the Board does not meet at all; much depends on the Commissioners’ schedules and availability. If your item is time-sensitive or you need to notice a specific date for a hearing or decision, please contact the Board’s Secretary.

The agenda request and backup documents should be submitted to the Board’s secretary no later than Wednesday afternoon prior to the following week’s meetings. It can be submitted as far in advance as you want.

If you are submitting a contract or other document where more than one original is needed (for instance, one original for the County and one for the contractor), please submit the correct number of original documents.

Unless your agenda item is an Order, Ordinance, Resolution or letter, a document summary form is required as well.

Please also e-mail the agenda request form and the document summary form to the Board Secretary so that minor changes can be made if needed.