



## Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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<http://www.deschutes.org/cd>

### STAFF REPORT

**FILE NUMBER:** 247-16-000211-CU

**APPLICANT/OWNER:** Richard and Linda Losch  
P.O. Box 462  
Saint James City, FL 33956

**APPLICANT'S  
LEGAL COUNSEL:** Liz Fancher  
644 NW Broadway Street  
Bend, OR 97703

**PROPOSAL:** A conditional use permit to establish a nonfarm dwelling on a 19.09-acre property in the Exclusive Farm Use Zone.

**HEARING DATE:** September, 7, 2016

**STAFF REVIEWER:** Anthony Raguine, Senior Planner

#### I. APPLICABLE CRITERIA:

Title 18 of the Deschutes County Code, County Zoning  
Chapter 18.16, Exclusive Farm Use (EFU) Zones  
Chapter 18.56, Airport Safety (AS) Combining Zone

Title 22, Deschutes County Development Procedures Ordinance

#### II. BASIC FINDINGS:

- A. LOCATION:** The subject property has an assigned address of 19725 Connarn Road, Bend. It is identified as tax lot 800 on County Assessors Map 16-12-19.
- B. LOT OF RECORD:** The subject property is a legal lot of record pursuant to lot of record determination LR-97-52.
- C. ZONING:** The property is zoned Exclusive Farm Use – Tumalo/Redmond/Bend subzone (EFU-TRB) and is designated Agriculture on the Deschutes County Comprehensive

Plan. The property is also within the Airport Safety Combining Zone (AS) associated with the Redmond Municipal Airport. Surface Mining Site No. 368, located on tax lot 200, 201 and 202 on Assessor Map 16-12-20, has been reclaimed. For this reason, the subject property is not subject to the standards under Chapter 18.56, Surface Mining Impact Area (SMIA) Combining Zone.

- D. **PROPOSAL:** The applicant proposes to establish a nonfarm dwelling on a parcel zoned EFU.
- E. **SITE DESCRIPTION:** The subject property is 19.09 acres in size and rectangular in shape. The property is bordered to the north by Connarn Road. The Columbia Southern Canal traverses the property in a north-south direction through the center of the property. Kentucky Road, a private road, traverses the property in a north-south direction along the eastern edge of the property. A driveway from Connarn Road also traverses the property in the north-south direction, and connects to the adjoining property to the south (65535 Kentucky Road). Vegetation on-site consists of mature juniper trees, sagebrush and bunch grasses. The site is generally flat with exposed rock scattered throughout.
- F. **SURROUNDING LAND USES:** The property is bordered to the northwest, west and south by EFU-zoned lands developed with residential and farm uses. To the northeast and east are lands zoned Multiple Use Agricultural (MUA10) that are also developed with residential and farm uses. Approximately 2,600 feet to the east is Surface Mining Site No. 368. Approximately 6,800 feet to the south is Surface Mining Site No. 488.

The attributes of the adjoining and nearby EFU properties are summarized in the following table.

**Table: Adjacent and Nearby EFU Tax Lots<sup>1</sup>**

Direction	Owner	Tax Lots	Total Acres/Irrigated Acres	Farm Tax Deferral	Dwelling	Soil Mapping Units
Northwest	Sappington	16-12-18, TL 1100	28.89/27.89	Yes	Yes	128C, 152B
South	Blakeslee	16-12-10, TL 801	20.00/0.00	No	Yes	34C, 128C, 152A
West	Greene	16-12-19, TL 900	34.75/28.00	Yes	Yes	152A, 152B

- G. **SOILS:** The subject property contains the soil types identified below.

34C, Deschutes-Stukel, 0 to 15 percent slopes. This soil complex is composed of 50 percent Deschutes soils and similar inclusions, 35 percent Stukel soils and similar inclusions, and 15 percent contrasting inclusions. The Deschutes soils are well drained with a moderately rapid permeability and an available water capacity of about four inches. The Stukel soils are also well drained with a moderately rapid permeability and

<sup>1</sup> The property is bordered to the north and east by lands zoned MUA10.

an available water capacity of about two inches. The contrasting inclusions consist of Redmond soils in swales, soils with loamy sand surfaces, and rock outcrops. The major uses of this soil complex are irrigated cropland and livestock grazing. The NRCS ratings for the Deschutes soils are 6E when unirrigated, and 3E when irrigated. The NRCS ratings for the Deskamp soils are 6E when unirrigated, and 4E when irrigated. This soil complex is not considered high value farmland when irrigated. Approximately 60 percent of the subject property is composed of 34C soil.

128C, Statz-Deschutes complex, 0 to 15 percent slopes. This soil complex is composed of 45 percent Statz soils and similar inclusions, 40 percent Deschutes, and 15 percent contrasting inclusions. The Statz soil is well drained with a moderately slow permeability and an available water capacity of about 2 inches. The Deschutes soil is well drained with a moderately rapid permeability and an available water capacity of about 4 inches. The major use of this soil complex is livestock grazing. The NRCS rates both soils as 6E, with no rating for irrigated soil. This soil complex comprises approximately 45 percent of the subject property and is not designated high value soil. Approximately 35 percent of the subject property is composed of 128C soil.

152B, Tumalo sandy loam, 0 to 3% and 3 to 8% slopes: This soil type is composed of 85 percent Tumalo soils and similar inclusions, and 15 percent contrasting inclusions. The Tumalo soil is well drained with a moderately rapid above the duripan and very rapid below the duripan permeability and an available water capacity of about 4 inches. The major use of this soil type is irrigated cropland and livestock grazing. The NRCS rates the Tumalo soil as 6S/3S. This soil type comprises approximately five percent of the property, and is designated high-value soil when irrigated.

**H. PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice to several public agencies and received the following comments:

County Transportation Planner

I have reviewed the transmittal materials for 247-16-000211-CU to develop a dwelling in the Exclusive Farm Use (EFU) and Airport Safety zones at 19725 Connarn Road, aka 16-12-19, Tax Lot 800

The most recent edition of the Institute of Traffic Engineers (ITE) Trip Generation Handbook indicates a single-family residence (Land Use 210) generates an average of approximately 10 daily weekday trips. Deschutes County Code (DCC) at 18.116.310(C)(3)(a) states no traffic analysis is required for any use that will generate less than 50 new weekday trips. The proposed land use will not meet the minimum threshold for additional traffic analysis.

While the property is at the very edge of the approach zone for the Redmond Airport, aka Roberts Field, the home will not penetrate any imaginary surfaces as the easternmost property line is approximately 9.5 miles southwest of the edge of the closest runway, which is Runway 4.

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$3,852 per p.m. peak hour trip. County staff has determined a local trip rate of 0.81 p.m. peak hour trips per single-family dwelling unit; therefore the applicable SDC is \$3,120 (\$3,852 X 0.81).

## Bend Fire Department

### FIRE APPARATUS ACCESS ROADS

- Approved fire apparatus access roads shall be provided for every facility, building or portion of a building hereafter constructed or moved into or within the jurisdiction. The fire apparatus access road shall comply with the requirements of this section and shall extend to within 150 feet of all portions of the facility and all portions of the exterior walls of the first story of the building as measured by an approved route around the exterior of the building or facility. 2014 OFC 503.1.1
- Fire apparatus roads shall have an unobstructed width of not less than 20 feet, exclusive of shoulders, except for approved security gates in accordance with Section 503.6, and an unobstructed vertical clearance of not less than 13 feet 6 inches. Where a fire hydrant is located on a fire apparatus road, the minimum width shall be 26 feet, exclusive of shoulders. Traffic calming along a fire apparatus road shall be approved by the fire code official. Approved signs or other approved notices or markings that include the words NO PARKING-FIRE LANE shall be provided for fire apparatus roads to prohibit parking on both sides of fire lanes 20 to 26 feet wide and on one side of fire lanes more than 26 feet to 32 feet wide. 2014 OFC 503.2.1, D103.1, 503.4.1, 503.3.
- Fire apparatus access roads shall be designed and maintained to support the imposed loads of fire apparatus (60,000 pounds GVW) and shall be surfaced (asphalt, concrete or other approved driving surface) as to provide all weather driving capabilities. Inside and outside turning radius shall be approved by the fire department. All dead-end turnarounds shall be of an approved design. Bridges and elevated surfaces shall be constructed in accordance with AASHTO HB-17. The maximum grade of fire apparatus access roads shall not exceed 10 percent. Fire apparatus access road gates with electric gate operators shall be listed in accordance with UL325. Gates intended for automatic operation shall be designed, constructed and installed to comply with the requirements of ASTM F 2200. A Knox® Key Switch shall be installed at all electronic gates. 2014 OFC D102.1, 503.2.4.

### FIRE PROTECTION WATER SUPPLIES

- An approved water supply capable of supplying the required fire flow for fire protection shall be provided to premises upon which facilities, buildings or portions of buildings are hereafter constructed or moved into or within the jurisdiction. 2014 OFC 507.1.
- Fire flow requirements for buildings or portions of buildings shall be determined by an approved method. Documentation of the available fire flow shall be provided to the fire code official prior to final approval of the water supply system.
- In areas without water supply systems, the fire code official is authorized to use NFPA 1142 in determining fire flow requirements. 2014 OFC B107.1

## OTHER FIRE SERVICE FEATURES

- New and existing buildings shall have approved address numbers, building numbers or approved building identification placed in a position that is plainly legible and visible from the street or road fronting the property. These numbers shall be Arabic numbers or alphabetical letters. Numbers shall be a minimum 4 inches high with a minimum stroke width of 0.5 inch. Where access is by means of a private road and the building cannot be viewed from the public way, a monument, pole, or other sign or means shall be used to identify the structure. Address numbers shall be visible under low light conditions and evening hours. Provide illumination to address numbers to provide visibility under all conditions. Address signs are available through the Deschutes Rural Fire Protection District #2. An address sign application can be obtained from the City of Bend Fire Department website or by calling 541-388-6309 during normal business hours. 2014 OFC 505.1

## CODES AND REFERENCED STANDARDS

2014 Oregon Fire Code (OFC)  
2012 NFPA 1142

### Tumalo Irrigation District

This property is encumbered with an easement for the Tumalo Irrigation District's north Columbia southern canal. This easement is 50 feet in all directions from the marginal edge of the canal. The open canal is scheduled to be piped under the District's water conservation and system improvement plans, at a future date to be determined.

**The following agencies were provided notice but did not submit comments:** County Assessor, County Building Safety Division, County Environmental Soils Division, and County Road Department.

- I. **PUBLIC COMMENTS:** The Planning Division mailed notice of the conditional use application to all property owners within 750 feet of the subject property. Additionally, a land use sign was posted on the property. In response to the mailed and posted notice, one comment was received.

### Central Oregon LandWatch (COLW)

1. The application is incomplete. Several sections of the application materials are left blank and are not addressed in the applicant's burden of proof. The Deschutes County application contains the information "Incomplete Applications Will Not Be Accepted," yet this application is incomplete and is being processed.

[STAFF COMMENT: Although some sections of the application packet are blank, the information necessary to address all of the required approval criteria can be found in the burden of proof. For this reason, staff deemed the application complete on May 12, 2016.]

2. Approval of the application will violate DCC 18.16.040 and ORS 215.284. Neither the subject property nor any portion thereof is generally unsuitable for the production of farm crops and livestock or merchantable tree species. There is no

evidence that this parcel or any portion thereof is any less suitable than similarly situated parcels in active use for the production of farm crops and livestock or merchantable tree species.

Based on the evidence presented by the applicant about the potential for new dwellings in the surrounding area, approval of this application will materially alter the stability of the land use pattern by setting a precedent for approval of nonfarm dwellings, thereby driving up the price of the land and making it more difficult for farm use to continue due to diminished opportunities to expand, purchase, or lease farmland.

This matter raises several questions of state law as well as county code. We respectfully request that the matter go before a Hearings Officer. Please consider this a formal request to be notified of any future decisions or opportunities to comment in this matter.

[STAFF COMMENT: Both the applicant and staff address COLW's concerns under the appropriate approval criteria below.]

**J. REVIEW PERIOD:** This application was submitted on April 13, 2016. The application was accepted and deemed complete on May 12, 2016. Via electronic mail (email) dated May 11, 2016, and conversations with staff, the applicant requested the conditional use permit application be put on hold from May 12, 2016 to the public hearing date, September 7, 2016<sup>2</sup>. Therefore, the 150-day land use clock begins on September 7, 2016. The 150<sup>th</sup>-day on which the County must take final action on this application is therefore February 3, 2017.

The applicant has also complied with the posted notice requirement of Section 22.23.030(B) of Title 22. The applicant has submitted a Land Use Action Sign Affidavit for the application dated April 27, 2016 indicating the applicant posted notice of the land use action on April 26, 2016.

**K. LAND USE HISTORY:** As noted above, the property was determined to be a legal lot of record pursuant to lot of record determination LR-97-52. The property is subject to any other land use applications.

### **III. CONCLUSIONARY FINDINGS:**

#### **TITLE 18 OF THE DESCHUTES COUNTY CODE, COUNTY ZONING.**

##### **A. CHAPTER 18.16, EXCLUSIVE FARM USE ZONES.**

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

***The following uses may be allowed in the Exclusive Farm Use zones on either high value farmland or nonhigh value farmland subject to applicable***

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<sup>2</sup> Pursuant to DCC 22.22.00(B) and (C), the applicant can extend the 150-day period for a final county land use decision for a specified time not to exceed 215 days.

**provisions of the Comprehensive Plan, DCC 18.16.040 and 18.16.050, and other applicable sections of Title 18.**

**A. Nonfarm dwelling**

**FINDING:** The applicant proposes to establish a non-farm dwelling on the subject property. The proposed dwelling may be allowed as a conditional use if the applicant satisfies the applicable criteria in Title 18 of the County Code. The applicant does not propose to establish a use other than the dwelling under this application.

2. Section 18.16.040, Limitations on Conditional Uses.

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

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

**FINDING:** The County has applied an area of analysis that covers all properties within a one-mile radius of the subject property. This radius has been determined to be sufficient to identify farm or forest uses that might be impacted by a proposed nonfarm dwelling. There are no properties zoned for forest use in the surrounding area. Additionally, the predominant tree species in the surrounding area is juniper, which is not a commercial species. For these reasons, staff finds that the proposed nonfarm dwelling will not force a significant change in, or significantly increase the cost of, accepted forest practices on surrounding lands devoted for forest use.

The record indicates that approximately 50 percent of the study area is comprised of non-EFU lands including MUA10, Rural Residential (RR10) and Surface Mining (SM). The applicant correctly states these lands should be excluded from consideration under this criterion because they are not devoted to farm or forest uses.

The remainder of the study area is comprised of 84<sup>3</sup> privately owned EFU tax lots, including the subject property. Of the 84 total EFU tax lots, 59 of these are receiving farm tax deferral, with 53 of the deferred properties having irrigation. The typical farm practices in the area include pasture and livestock grazing (horses and cattle), and some grass hay and alfalfa.

The subject property is bordered to the northwest, south and west by properties zoned EFU. The property to the northwest across Connarn Road (tax lot 1100, on Assessor map 16-12-18) is irrigated, engaged in farm use, and receiving farm tax deferral. The property to the south (801, 16-12-19) is not irrigated, does not appear to be in farm use, and has been approved for a

<sup>3</sup> The total EFU tax lots within the study area is 86, regardless of lot of record status. The applicant notes that tax lots 2300 and 2400 on Assessor's Map 16-12-19, along with tax lot 1900 on Assessor map 16-12-19C, are a single legal lot of record pursuant to lot of record determination LR-00-1. For this reason, the applicant argues these tax lots should be counted as a single EFU tax lot for the purposes of this review. Staff agrees. The 84 EFU tax lots referenced above take this into consideration.

nonfarm dwelling under county land use file CU-98-124. The property to the west (900, 16-12-19) is irrigated, engaged in farm use, and receiving farm tax deferral.

The record includes information from the Oregon State University Extension Service describing the types of impacts the farming practices in the surrounding area could generate on nearby lands. Maintaining irrigated pasture can generate dust from re-seeding, drifting of herbicides from spraying, vehicle noise from trucks, manure odor from fertilizing, and possible water runoff from irrigation. Grazing livestock can generate dust, manure odor, possible interference with vehicular traffic, and property damage if livestock escape. The owner will be required to sign and record in the County Clerk's office a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.396 or 30.397. The recordation of this document with the County Clerk helps ensure that the proposed nonfarm dwelling will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm use, nor will it significantly increase the cost of accepted farm practices.

The nonfarm dwelling is proposed in the eastern portion of the property separated from the western portion of the property by the irrigation canal. In concert with the required 100-foot setback for nonfarm dwellings adjacent to properties receiving farm tax deferral, the proposed dwelling envelope will be at least 100 feet from the property to the northwest and at least 550 feet from the property to the west. The proposed distances from the dwelling site to farm uses in the area will provide a significant buffer to mitigate farm-related impacts.

Within the study area, 65 of the 84 EFU tax lots are developed with dwellings. Given the establishment of a significant number of residential uses and the continuing farm uses in the study area, staff finds the existing residential uses likely have not had a negative impact on those farm uses.

For the reasons detailed above, staff concludes the proposed nonfarm dwelling will not be subject to adverse impacts from adjacent farm uses, nor will it cause a significant change in or significantly increase the cost of accepted farming practices occurring on nearby lands. No response from adjacent or nearby property owners engaged in farm use was received from the mailed or posted notice, indicating a lack of concern about the impact the proposed dwelling could have on nearby farm uses.

This criterion will be met.

**3. *That the actual site on which the use is to be located is the least suitable for the production of farm crops or livestock.***

**FINDING:** In the Clough decision (file no. 247-15-000035-CU/247-15-000403-A), the Board of County Commissioners determined that when the general unsuitability criterion of 18.16.050(G)(1)(a)(iii) is met, the least suitable criterion of Section 18.16.040(A)(3) above is satisfied as well. The findings under DCC 18.16.050(G)(1)(a)(iii) below are incorporated herein by reference. Staff finds this criterion will be met.

3. Section 18.16.050, Standards for Dwellings in the EFU Zones.

***Dwellings listed in DCC 18.16.025 and 18.16.030 may be allowed under the conditions set forth below for each kind of dwelling, and all dwellings are***



**subject to the landowner for the property upon which the dwelling is placed, signing and recording in the deed records for the County, a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.**

**FINDING:** The applicant/owner will be required to sign and record the above document prior to issuance of the building permit for the dwelling. A condition of approval has been added to ensure compliance.

**G. Nonfarm Dwelling.**

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

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

**i. The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming practices, as defined in ORS 215.203(2)(c), or accepted forest practices on nearby lands devoted to farm or forest use.**

**FINDING:** This approval criterion is nearly identical to the approval criterion under DCC 18.16.040(A)(1) and (2). Those findings are incorporated herein by reference. This criterion will be met.

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

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

**(D) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative**

**impact of possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall:**

- (i) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas. Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area;**
- (ii) Identify within the study area the broad types of farm uses (irrigated or nonirrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, nonfarm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of nonfarm/lot of record dwellings that could be approved under subsections (3)(a) and section 4 of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993, and the parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4). The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible nonfarm dwellings under this subparagraph;**
- (iii) Determine whether approval of the proposed nonfarm/lot of record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area;**

#### **FINDING:**

Cumulative Impacts Analysis Area. The County has applied an area of analysis including all EFU-zoned land located within a one-mile radius of the subject property's boundaries and including approximately 2,000 acres (hereafter called "study area"). Staff finds this study radius is suitable to provide a comprehensive analysis of the character of the area surrounding the subject property because of its size and the number of parcels located within it.

As discussed above, there are 84 EFU-zoned tax lots in the study area, including the subject property. All 84 of these tax lots are in private ownership and range in size from approximately 0.48 to 406.64 acres. Of the 84 privately owned tax lots in the study area, fifty (50) tax lots are 20 acres or smaller. Twenty-six (26) tax lots are between 20+ and 40 acres in size. Six (6) tax

lots are between 40 and 80 acres in size, and two (2) of the parcels larger than 80 acres. The study area where the subject property is located is comprised of parcels of varying size, most of which are 20 acres or less in size.

Types of Farm Uses. The EFU zoned land in the study area involves farming primarily in the form of irrigated pasture/hay production and livestock grazing. As noted above, 59 of the 84 EFU tax lots are receiving farm tax deferral, with 53 of the tax deferred tax lots having irrigation water rights. Approximately 50 percent of the study area is comprised of non-EFU lands and, pursuant to subsection (i), are not included as part of this analysis.

The study area is located within the boundaries of the Tumalo Irrigation District and has 12 soil types. Six (6) of these soils are considered high-value farmland if irrigated. The remaining six (6) are considered nonhigh-value farmland. The only potentially high-value farmland occurs in the northwest corner of the subject property (152B soil). This area represents less than five (5) percent of the property. Additionally, the property contains no irrigation water rights therefore the 152B soils do not meet the definition of high-value farmland per DCC 18.04. Staff notes the study area is predominantly composed of those soils types which could meet the definition of high-value farmland, if they are irrigated. However, the subject property is located within a thin ribbon of soils along the center of the study area which are considered nonhigh-value farmland.

Existing Dwellings. The record indicates that 65 of the 84 tax lots in the study area, or 77 percent, have dwellings. These dwellings were built in the following years: 20 from 1900 through 1978; 11 from 1979 to 1992; and 34 dwellings from 1993 to present.

The dwellings developed prior to 1979 predated the County's EFU zone, and therefore were not subject to EFU zoning requirements. Of the 11 dwellings developed between 1979 and 1992, two appear to be approved as farm dwellings and two were approved as nonfarm dwellings, although the dwellings approved in the 1980's were not necessarily reviewed as farm or nonfarm dwellings.

Dwelling Development Trends Since 1993. Thirty-four (34) dwellings were constructed in 1993 or after and included 15 nonfarm dwellings, 17 replacement dwellings, and two relative farm assistance dwellings. Thus, the trend for the area has been one where the dwellings have been predominantly approved as nonfarm dwellings or replacement dwellings, rather than farm dwellings. Staff finds this trend highlights significant nonfarm residential development on properties with few new apparent farm uses.

Potential Nonfarm Parcels. In the EFU Zone, two types of land divisions are possible, those where the parent parcel is irrigated (DCC 18.16.055(B)) and those where the parent parcel is not irrigated (DCC 18.16.055(C)). Pursuant to section (D) above, the required analysis includes those properties that are "similarly situated." Since this proposal does not involve the creation of a new parcel for a nonfarm dwelling, the subject property does not contain any water right to qualify for an irrigated land division, and the property is not large enough for a non-irrigated land division, staff finds that it is not necessary to determine whether a new parcel will lead to the creation of other nonfarm parcels, to the detriment of agriculture in the area.

As stated above, staff limited its analysis to "similarly situated" properties. However, staff notes the applicant also analyzed the potential nonfarm parcels that could be created via irrigated and non-irrigated land division. Although staff believes this analysis is not necessary, staff includes it here for the Hearings Officer's review.

Based on the applicant’s review of EFU tax lots in the study area with sufficient acreage and water right to qualify for an irrigated land division<sup>4</sup>, the applicant states 12 new nonfarm parcels could be created via irrigated land divisions. The applicant’s review of unirrigated EFU tax lots indicates two parcels in the study area are large enough to be divided and create a total of two new nonfarm parcels via nonirrigated land divisions. Therefore, according to the applicant’s analysis, a total of 14 new nonfarm parcels could be created via irrigated and nonirrigated land divisions.

Potential Nonfarm Dwellings. Pursuant to section (D) above, staff will consider the cumulative impact of nonfarm dwellings on other lots or parcels “similarly situated.” In other words, staff will consider the cumulative impact of new nonfarm dwellings on vacant lots or parcels that are approximately 20 acres in size<sup>5</sup>, have no irrigation water right, and are predominantly composed of nonhigh-value soils.

Per the information in the record and detailed in the table below, staff finds there are two properties which meet the previously stated parameters and could be approved for a nonfarm dwelling.

Assessor’s Map & Tax Lot	Size in Acres	Predominant Soil(s)
16-11-13, 1300	27.25	141C
16-11-24, 102	18.98	34C, 152B

Although the ability for a specific property to be approved for a nonfarm dwelling is a case-by-case analysis, staff assumes for this review that both properties could establish a nonfarm dwelling. Therefore, including the subject property, if all similarly situated properties were approved for a nonfarm dwelling, a total of three new nonfarm dwellings could be established in the study area.

It is not clear whether a nonfarm dwelling can be approved on a vacant parcel, since they are reviewed on a case-by-case basis. The proposals have to be reviewed for their effect on the stability of the land use pattern, whether they are on land generally unsuitable land for the production of crops or livestock, and whether they will cause a significant change in or significantly increase the cost of accepted farming practices on adjacent land. Given the number of existing nonfarm dwellings in the study area and the limited number of potential nonfarm dwellings for similarly situated properties, staff finds the proposed development of a nonfarm dwelling on dry, non-productive land will not cause a change in the land use pattern of the area. Staff notes the three parcels directly south of the subject property include a dwelling which was approved as a nonfarm dwelling (CU-98-122, CU-98-124, CU-99-40).

As discussed previously, staff limited its review to those “similarly situated” properties. The applicant’s burden of proof broadened the review of potential nonfarm dwellings to include all vacant, privately owned, properties in the study area. For this reason, the applicant states there could be a total of 19 new nonfarm dwellings in the study area, including the subject property. Pursuant to the applicant’s methodology, if all of the potential nonfarm parcels (14) were approved for a nonfarm dwelling and all existing vacant parcels (19) in the study area were approved for a nonfarm dwelling, there could be an additional 33 nonfarm dwellings.

<sup>4</sup> See page 10 of the applicant’s Burden of Proof.

<sup>5</sup> For the purposes of this review, staff included those properties 10 to 30 acres in size.

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

The Planning Division has previously determined that lot of record dwellings can be difficult to obtain, given the requirement for ownership prior to 1985 and the land cannot be suitable for farming based on the above factors. Some parcels may qualify for a lot of record dwelling, but without a specific analysis of each and every parcel, this determination cannot be concluded. No lot of record dwellings have been approved in the study area to date.

Stability and Character of the Land Use Pattern of the Area. The land use pattern and character of the study area is a mixture of some farm use, which includes pasture for livestock and some grass hay, as well as rural residential use. The land use pattern appears to be stable, with many of the dwellings in the area constructed since 1993 being nonfarm dwellings. There is dry land in the area and most of the dry parcels are already developed with dwellings. Staff notes that only two "farm" dwellings have been approved in the area since 1995, when the farm dwelling standards included significant changes. The proposed dwelling will be consistent with the land use pattern of the area by allowing a nonfarm dwelling on a dry, unproductive property. As noted above, the three parcels directly south of the subject property all received nonfarm dwelling approval.

Effect on Stability from Proposed Non-irrigated Partition and Nonfarm Dwellings. Approval of the proposed nonfarm dwelling will result in 66 of the 84 EFU tax lots having a dwelling. Of the 66 dwellings, 18 will be nonfarm dwellings. Staff finds the cumulative effect of adding this nonfarm dwelling will not "materially alter the stability of the land use pattern in the area" by making it more difficult for the existing farms to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or by diminishing the number of tracts or acreage in farm use. It is unlikely that adding this home would tip the balance from resource to non-resource use. Additionally, staff finds that the approval of the nonfarm dwelling would not impact the existing farming that occurs in the area.

Given the 17 previous nonfarm dwelling approvals, it does not appear to staff that the approval of the proposed nonfarm dwelling will set a precedent for the wholesale approval of nonfarm dwellings to the detriment of surrounding farming. The parcels currently in farm use will likely remain relatively stable, with little or no expansion of farm use in the area, given the topography, soil types and availability of water rights. The properties capable of being farmed appear to already be farmed. Additionally, no response to the notice of application or land use action sign was received by nearby farmers requesting the subject property be made available for farm use. The approval of the proposed dwelling will not affect the amount of farming or the type of farming. Lastly, conditional use permit review for nonfarm dwellings are reviewed on a case-by-case basis where each proposed nonfarm dwelling would need to demonstrate compliance with all of the applicable criteria for approval. For the foregoing reasons, staff finds that approval of the proposed nonfarm dwelling will not destabilize the mixture of agricultural and residential character of the surrounding area.

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

**FINDING:** There are no known forest uses within the study area. The only trees on-site are juniper trees, which are not commercially viable. For these reasons, staff finds the subject property could not be put to forest use either by itself or in conjunction with another property.

With respect to suitability of the subject property for farm uses, the applicant's May 12, 2016 letter in the record cites a number of cases which provide guidance regarding the suitability analysis.

1. Griffin v. Jackson County, 48 Or LUBA 1 (2004). The question is not whether land is generally unsuitable for all farm use; the question is whether the land is generally unsuitable to produce crops, livestock or merchantable trees.
2. Griffin v. Jackson County, 48 Or LUBA 1 (2004). Land that can be used to stable and train equines but that does not support the growth of crops is not suitable for the production of farm crops or livestock.
3. Williams v. Jackson County, 55 Or LUBA 223 (2007). The fact that land can and has been used for farm buildings, does not make it suitable for the production of farm crops or livestock.
4. Williams v. Jackson County, 55 Or LUBA 223 (2007); Peterson v. Crook County, 52 Or LUBA 160, 172 (2006); King v. Washington County, 42 Or LUBA 400, 406 (2002). A county may create nonfarm dwelling parcels that contain some land that is suitable for farm use.
5. Dorvinen v. Crook County, 33 Or LUBA 711 (1997; discussing legislative history). ORS 215.284(2)(b) allows nonfarm dwellings to be sited on unproductive parts of the productive farm land on lands outside the Willamette Valley.
6. Frazee v. Jackson County, 45 Or LUBA 263 (2003). Where a nonfarm dwelling is proposed to be sited on unproductive parts of the productive farm land on lands outside the Willamette Valley, the county is to focus on the productivity of the part of the property selected for nonfarm development and should not consider the suitability of the rest of the parcel or tract.

2. ***For the purposes of DCC 18.16.050(G) only, "unsuitability" shall be determined with reference to the following:***

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

**FINDING:** The applicant notes that LUBA determined the issue of whether nonfarm parcels can be put to farm use in conjunction with other properties "is triggered under DCC 18.16.050(G)(2)(a) if the parcels are found to be unsuitable solely because of size or location." Central Oregon LandWatch v. Deschutes County, 56; Williams v. Jackson County, 55 Or LUBA 223, 230 (2007). In this case, the applicant argues the property is not suitable due to adverse soil and land conditions, lack of farm use, and the lack of adequate vegetation to demonstrate that the portion of the property proposed for nonfarm development is generally unsuitable for farm use. Because the applicant does not claim unsuitability due to size or location, the applicant argues this criterion does not apply. Staff agrees.

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

**FINDING:** Similar to the discussion above, the applicant does not argue the eastern portion of the property proposed for the nonfarm dwelling is generally unsuitable because it is too small to be farmed profitably by itself. Rather, the applicant argues the poor soils, rocks and lack of vegetation suitable for grazing in this area make the eastern part of the property generally unsuitable for the production of farm crops and livestock. To bolster their argument that the subject property contains poor soils, the applicant submitted *Agricultural Soils Suitability Assessment for Nonfarm Dwelling* (August 22, 2016), prepared by Roger Borine of Sage West, LLC (Report).

The Report indicates 29 sites were excavated and described with respect to soil characteristics, map unit composition and soil boundaries. Further, Order 1 mapping units were designed to separate Land Capability Class (LCC) 7/8 soils from LCC 6 soils. As noted in this rule, and in conjunction with *Griffin v. Jackson County*, 48 Or LUBA 1 (2004), Class I-VI soils are presumed to be suitable to produce crops, livestock or merchantable trees.

The Soils Map (page 5) of the Report illustrates soil mapping units A and B, which are composed of LCC 6 soils. However, the predominant soil mapping unit within the eastern portion of the property is LCC 7, identified as mapping unit C. The Report goes on to state the Natural Resource Conservation Service (NRCS) does not rate this map unit for the production of farm crops or pasture due to very severe hazards and limitations. The Report explains that very shallow and shallow soils, low available water capacity, and limited availability of livestock forage are considerations for determining suitability for farm uses. Additionally, western juniper is not considered a merchantable tree. For these reasons, the Report concludes soil mapping unit C is generally unsuitable for the production of farm crops and livestock, or merchantable tree species.

To further prove the subject property is generally unsuitable for the production of farm crops and livestock, or merchantable tree species, the applicant notes the subject property was once a part of the farm property immediately to the west (tax lot 900). The subject property was sold by a prior owner of tax lot 900 in the 1960's. The applicant states the likely reason for the sale was that the land was not suited for the production of farm crops or livestock.

Included in the record is an excerpt from the 2012 US Census of Agriculture, attached as Exhibit A to the applicant's May 12, 2016 letter. The applicant states only 16.45 percent of farm operators achieved a net profit from farming in Deschutes County in 2012. Additionally, the applicant points to the Oregon Supreme Court determination that the "farm use" protected by EFU zoning regulations is farm use conducted with the primary purpose of making a profit in money. *Wetherell v. Douglas County*, 342 Or 66, 678, 160 P3d 614 (2007). The applicant concludes that no reasonable farmer would expect to make a profit farming the Losch property.

Based on the information and case law cited above, staff agrees with the applicant that the areas of the subject property mapped as soil unit C are not generally suitable for production of farm crops and livestock, or merchantable tree species.

- c. ***If a lot or parcel under forest assessment can be sold, leased, rented or otherwise managed as a part of a forestry operation, it is not "generally unsuitable". If a lot or parcel is under forest assessment, it is presumed suitable if it is composed predominantly of soil capable of producing 20 cubic feet of wood fiber per acre per year. If a lot or parcel is under forest assessment, to be found compatible and not seriously interfere with forest uses on surrounding land it must not force a significant change in forest practices or significantly increase the cost of those practices on the surrounding land.***

**FINDING:** The subject property is not under forest assessment. Therefore, staff finds this rule does not apply.

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

**FINDING:** This criterion is not applicable because the subject property is not within one-quarter mile of a dairy farm, feed lot, or sales yard.



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

**FINDING:**

Electricity. The applicant submitted a letter, attached as Exhibit N to the burden of proof, from Central Electric Cooperative indicating they can serve the subject property.

Road access. The property has existing access from Connarn Road, a county maintained road. Staff notes the Road Department does not require any road improvements as a part of this land use action.

Telephone. No information has been submitted in this regard. Due to the prevalence of existing residential uses and cellular telephone technology, staff finds telephone service is feasible for the subject property.

Domestic water. Domestic water will be provided by a future on-site well. Well log reports attached as Exhibits O-Q to the burden of proof indicate static water levels at 502 to 551 feet. Based on this information, staff finds adequate domestic water supply from an individual well is feasible.

Fire protection. The subject property is located within Bend Rural Fire District #2. Staff finds adequate fire protection will be available.

Police protection. Law enforcement service to the property will be provided by the Deschutes County Sheriff. Staff finds adequate police protection will be available.

Based on this information, staff finds the proposal meets this criterion.

- vi. ***The nonfarm dwelling shall be located on a lot or parcel created prior to January 1, 1993, or was created or is being created as a nonfarm parcel under the land division standards in DCC 18.16.055(B) or (C).***

**FINDING:** Pursuant to lot of record determination LR-97-52, the property was created as a remainder lot in 1972. This criterion is met.

- 3. ***Loss of tax deferral. Except as provided in DCC 18.16.050(1)(2), pursuant to ORS 215.236, a nonfarm dwelling on a lot or parcel in an Exclusive Farm Use zone that is or has been receiving special assessment may be approved only on the condition that before a building permit is issued, the applicant must produce evidence from the County Assessor's Office that the parcel upon which the dwelling is proposed has been disqualified for special assessment at value for farm use under ORS 308.370 or other special assessment under ORS 308.765, 321.352, 321.730 or 321.815, and that any additional tax or penalty imposed by the County Assessor as a result of disqualification has been paid.***

**FINDING:** The subject property is not currently receiving farm tax deferral.

4. Section 18.16.060, Dimensional Standards

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

**FINDING:** The application does not indicate the height of the proposed dwelling. A condition of approval has been added to ensure compliance.

5. Section 18.16.070, Yards

- A. The front yard shall be a minimum of: 40 feet from a property line fronting on a local street, 60 feet from a property line fronting on a collector street, and 100 feet from a property line fronting on an arterial street.**
- B. Each side yard shall be a minimum of 25 feet, except that for a nonfarm dwelling proposed on property with side yards adjacent to property currently employed in farm use, and receiving special assessment for farm use, the side yard shall be a minimum of 100 feet.**
- C. Rear yards shall be a minimum of 25 feet, except that for a nonfarm dwelling proposed on property with a rear yard adjacent to property currently employed in farm use, and receiving special assessment for farm use, the rear yard shall be a minimum of 100 feet.**
- D. In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.**

**FINDING:** A site plan indicating the proposed building site was not provided. The applicant indicates the nonfarm dwelling will be located in the portion of the property east of the irrigation canal and within the soil mapping unit identified as C. The applicant agrees to comply with the required setbacks.

The subject property has frontage on Connarn Road, a designated local road requiring a 40-foot north front yard setback. Adjoining the property to the east and west are properties receiving special assessment for farm use. Therefore, the required east and west side yard setbacks are 100 feet. The adjoining property to the south is not receiving special assessment for farm use. Therefore, the required south rear yard setback is 25 feet.

Given the size of the eastern portion of the property and the size of mapping unit C, staff finds it is feasible for the proposed nonfarm dwelling to meet the required yard setbacks. A condition of approval has been added to ensure compliance.

6. Section 18.16.080, Stream Setbacks

- To permit better light, air, vision, stream pollution control, protection of fish and wildlife areas and preservation of natural scenic amenities and vistas along streams and lakes, the following setbacks shall apply:**

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

**FINDING:** There are no rivers or streams on or near the subject property. These standards do not apply.

7. Section 18.16.090, Rimrock Setback

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

**FINDING:** The subject property has no rimrock on or near it. This standard does not apply.

B. **Chapter 18.80, Airport Safety Combining Zone**

1. Section 18.80.020. Application of Provisions.

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

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

*Public use airports covered by DCC 18.80.020 include Redmond Municipal, Bend Municipal, Sunriver and Sisters Eagle Air. Although it is a public-use airport, due to its size and other factors, the County treats land uses surrounding the Sisters Eagle Air Airport based on the ORS 836.608 requirements for private-use airports. The Oregon Department of Aviation is still studying what land use requirements will ultimately be applied to Sisters. However, contrary to the requirements of ORS 836.608, as will all public-use airports, federal law requires that the FAA Part 77 surfaces must be applied. The private-use airports covered by DCC 18.80.020 include Cline Falls Airpark and Juniper Airpark.*

**FINDING:** The northeastern corner of the subject property lies under the approach surface associated with the Redmond Municipal Airport. The provisions of this apply to only this portion of the property. However, given the location of Kentucky Road, a private road, in the northeastern corner of the property in conjunction with the required yard setbacks, staff finds the proposed nonfarm dwelling will not be located under the above-referenced approach surface. Therefore, staff does not address the provisions of this chapter.

**IV. CONCLUSION:**

Based on the foregoing Basic and Conclusionary Findings, staff finds that the proposed nonfarm dwelling can comply with the applicable standards and criteria of the Deschutes County zoning ordinance if conditions of approval are met.

**V. RECOMMENDATION:**

**APPROVAL.** Should the conditional use permit be approved, staff recommends the following conditions of approval.

**VI. CONDITIONS OF APPROVAL:**

- A. This approval is based upon the application, site plan, specifications, and supporting documentation submitted by the applicant. Any substantial change in this approved use will require review through a new land use application.
- B. Prior to issuance of the building permit for the dwelling, the landowner for the property upon which the dwelling is placed, shall sign and record in the deed records for the County, a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.
- C. The nonfarm dwelling shall be located within eastern portion of the subject property identified as mapping unit C in the soils report.
- D. The nonfarm dwelling shall comply with the 30-foot height limit under DCC 18.16.060(E).
- E. The nonfarm dwelling shall observe the following minimum yard setbacks.
  - 1. Front (north): 40 feet;
  - 2. Side (east and west): 100 feet; and
  - 3. Rear (south): 25 feet.

Dated this 30<sup>th</sup> day of August, 2016

Mailed this 30<sup>th</sup> day of August, 2016