



January 5, 2016

TO: Deschutes Board of County Commissioners, Planning Director Nick Lelack

RE: File Nos. 247-15-000194-CU/195-TP Lower Bridge

The Oregon Land and Water Alliance (OLAWA) is a Sisters-based group that advocates for protection of land use laws and sustainable water policy. We believe that protecting public health and safety is an integral part of smart development.

We have recently begun to follow the case for a PUD off of Lower Bridge Way. We are very concerned about the known and unknown hazards on the subject property and on the parent parcel. Given the prospect of a modification to the original proposal that nobody else has seen, it is difficult for us or others to craft an appropriate commentary about the proposal at this time.

Given the gravity of the issues and the impending modification, OLAWA requests that if the requested modification is to be permitted after the hearings officer has already ruled and while the case is before the Board on appeal, then the Board should reset the 150 day clock in order to allow sufficient time for consideration of ways to address the toxic waste and dust problems that all agree are at issue with this proposal. This will allow the Board to insure the burden of abatement does not ultimately fall on Deschutes County taxpayers.

Thank you,

Eva Eagle

Deschutes County Board of Commissioners  
1300 NW Wall St # 200  
Bend, Oregon 97701

January 6, 2015

RE: Lower Bridge Road, LLC's Proposed Development on rezoned property.  
January 6, 2016 Public Hearing

File #s: 247-15-000521-A, 247-15-000194-CU, 247-15-000195-TP

Dear Board of Commissioners,

After testimony at the June 23<sup>rd</sup> hearing, Ms. Tia Lewis made several statements regarding testing and cleanup of the proposed planned development site and SM-zoned property. The following are concerns regarding her comments. Ms. Lewis stated that the future responsibility for any testing and cleanup would lie with the HOA of the proposed planned development. She also stated that the monies necessary to do so would be "minimal" and "no big deal" and she repeated those statements several times. Questions and concerns are as follows:

1. If the funding for cleanup is "minimal" then why is it being pushed onto the HOA?
2. If it truly is "no big deal" then why hasn't extensive testing been conducted by the applicant?
3. The burden of proof lies with the applicant of this issue, not the HOA. Why not conduct extensive testing by an independent agent on all lots and adjacent open space to be developed before approval of this application?
4. Mr. Daniels stated at the hearing on May 21<sup>st</sup> that they "wanted to be good neighbors". To sell and run, dumping the responsibility for testing and cleanup onto the new property owners is not responsible, ethical or neighborly. Again, the burden of proof lies with the applicant.
5. The right thing to do is test and clean every lot and adjacent open space before this application is approved. No person wants to live or raise their children on ground that has potential for foreseeable future hazards. The burden of proof lies with the applicant and therefore, so should the liability. The liability should not lie with the new HOA or Deschutes County.

6. A clear line of responsibility should be established before approval of this application, especially when dealing with an LLC that was not formed in Oregon, thereby making it even more difficult to hold the applicant financially responsible.

In the Staff Report, on page 25, staff states that an abundance of caution is vital and that the site is not suitable for residential use where plans for foreseeable future hazards are not in place and that a clear line of responsibility should be established to deal with any future detection of contaminants.

The staff reiterates these concerns and recommendations regarding contamination and financial responsibility from page 22 through page 30 of their report.

I agree with their recommendations and found Ms. Tia Lewis's remarks on June 23<sup>rd</sup> to be, at the least, concerning. No person should ever make light of the possibility that developing land on a potentially toxic site could cause harm to another person. On this issue, I find the attitude of Ms. Lewis and the applicant to be reckless and reprehensible.

I respectfully urge you to deny this application.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Janice Taylor", with a large, stylized initial "J" and "T".

Janice Taylor  
7695 NW 93<sup>rd</sup> Street  
Terrebonne, OR 97760

A handwritten signature in blue ink, appearing to read "James Taylor", with a large, stylized initial "J" and "T".

James Taylor

Deschutes County Board of Commissioners  
1300 NW Wall St # 200  
Bend, Oregon 97701

January 6, 2015

RE: Lower Bridge Road, LLC's Proposed Development on rezoned property.  
January 6, 2016 Public Hearing

File #s: 247-15-000521-A, 247-15-000194-CU, 247-15-000195-TP

Dear Board of Commissioners,

The purpose of this letter is to demonstrate the need for a binding funding source for testing, cleanup, and foreseeable future hazards which may occur as a result of development in accordance with the applicant's proposal. It is also imperative that a clear line of responsibility for funding be established.

Deschutes County Code section 18.128.210(A) states:

***18.128.210(A): Such uses may be authorized as a conditional use only after consideration of the following factors:***

***7. Environmental, social, energy and economic impacts likely as a result of development including impacts on public facilities such as schools, roads, water and sewer systems, fire protection, etc.***

The application, on page 10, does not respond to any environmental impacts likely as a result of the development. They only mention the preservation of existing vegetation and introduction of new vegetation.

The Staff Report, on page 32, states that environmental impacts could occur to residents of the PUD and nearby properties due to potential issues relating to the former mining/industrial use of the subject property and SM zoned lands to the west. Since the applicant does not address this issue, we agree with the staff recommendation and request that Deschutes County require that a funded, binding plan for foreseeable future hazards be in place prior to approval of this application.

As staff states on page 25 of their report that, given the former (uncontrolled and under regulated) mining and industrial use of the site, the staff believes as do we, that an abundance of caution is vital. A finding that the site is suitable for residential use is not supported where plans for foreseeable hazards are not in place.



And we agree with staff finding to ask that this established binding fund, in an amount to be determined by Deschutes County, be used for the following testing prior to approval of the application:

- A. Ground penetrating radar and deep core sample testing on Tax Lots 500, 1501, 1502, 1505, 1600 and 1606.
- B. We request that potential for groundwater contamination be discounted by DEQ and OHA, as well as possibly EPA and DOE since hazardous waste is at issue. Any and all tests recommended by these agencies must be administered prior to approval of this application.
- C. As staff states on page 26 of their report, dust can represent a significant respiratory hazard. The record for 2C-08-1/PA -08-1 establishes that dust from processed diatomaceous earth, which is present on the site, is of particular concern. Therefore, we ask that the funding source and plan include a 24-hour contact to deal with future generation of significant dust generated spontaneously or during construction. We ask that this funding source and plan, with clear lines of responsibility, be in place prior to approval of this application.
- D. We agree with the staff finding on page 27, and request that surface mining on SM zoned portions of lots 1501 and 1502 be permanently prohibited and a binding dust management plan be in place prior to approval of this application.
- E. Due to the complex history of the mine, we ask that independent testing agencies conduct tests on water, soils, etc. as an environmental testing agency employed solely by the applicant may not fully protect the future health of Deschutes County residents.
- F. We request environmental testing of the applicant's Tracts E and F on the west side of Lower Bridge Way because these tracts are bound with the east properties in this application through their inclusion as open space in order to qualify the application for consideration by meeting the 65% open space requirement.

Based on the results of these tests, we ask that the amount of the funding source and specific clear lines of responsibility be determined by Deschutes County prior to consideration of this application.

We ask how the funding source will be affected when Lower Bridge Road Limited Liability Corporation is dissolved due to death of, or departure of, a partner or partners, or bankruptcy? We ask that a clear line of responsibility be established for foreseeable future hazards after dissolution of the LLC; and we ask that this be in place prior to consideration of the application.

Until such time as these conditions and recommendations are met, we ask that you deny this application.

Respectfully Submitted,



Janice Taylor  
7695 NW 93<sup>rd</sup> Street  
Terrebonne, OR 97760

Deschutes County Board of Commissioners  
1300 NW Wall St # 200  
Bend, Oregon 97701

January 6, 2015

RE: Lower Bridge Road, LLC's Proposed Development on rezoned property.  
January 6, 2016 Public Hearing

File #s: 247-15-000521-A, 247-15-000194-CU, 247-15-000195-TP

Dear Board of Commissioners,

As required by the Deschutes County Code, the Conditional Use Permit Application and Tentative Plan referenced above for a planned development within an RR-10 residential zone must meet the following stringent conditions:

**18.128.210(A):** *Such uses may be authorized as a conditional use only after consideration of the following factors:*

**8.** *Effect of the development on the rural character of the area.*

**18.128.210(B):** *The conditional use may be granted upon the following findings:*

**4.** *The proposal is in harmony with the surrounding area or its potential for future use.*

These requirements are not nebulous; they are specific. Currently, when you drive the entire length of Lower Bridge Way between the outskirts of Terrebonne to the outskirts of Sisters, one rural character is presented along the entire journey, particularly in the Lower Bridge area. The applicant does not meet, or even attempt to meet these requirements. In example, **Exhibit B** attached to this letter shows current residences in the Lower Bridge area as yellow dots, and the maximum potential for straightforward ten-acre lots on the applicant's property is shown as red dots. Note: this portion of the applicant's property totals 98.2 acres less approximately 4 acres for roads. Naturally, no one can know precisely where, on ten acre parcels, future residences will be built; but a straightforward RR-10 developmental approach can result in no more than nine residences built east of Lower Bridge Way. **Exhibit B** demonstrates that this approach maintains a density consistent with the existing rural character and would be capable of achieving harmony with the surrounding area. As such, it serves as a baseline for evaluating whether the requirements of the Deschutes County Code have been achieved.

In the starkest of contrasts, **Exhibit A** shows the same existing residences again in yellow, with residences on the lots identified for the applicant's planned development shown in red. As is obvious,

the density of this jumble of residences does not maintain the existing rural character or make any attempt to achieve harmony with the surroundings.

The view of all of 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.

As is evident from Exhibit A, In addition to high visibility from Lower Bridge Way, the incompatibility of residential density resulting from this proposal would also be highly visible from Teater Avenue just to the south, Borden Beck Wildlife Preserve along the Deschutes River, the Wildlife Habitat Conservation & Management Program Area adjacent to wildlife preserve, and the Deschutes River itself which is a State Scenic Waterway and Federal Wild & Scenic River.

The applicant's proposal has already been denied by the Hearings Official through proper channels. One decision of this formal regulatory process was disallowing any land zoned FP to be included in the applicants development. This amounts to 13.84 acres as is delineated in the attached Exhibit C. The applicant now seeks special favor from the Board of Commissioners and Deschutes County to overlook this decision. In return they offer nothing of benefit to Deschutes County. The applicant seeks only their own short term financial gain. The Board of Commissioners has an obligation to protect the rural character of this historic area which is referenced in notes from the diaries of Kit Carson, John Charles Fremont, and Peter Skene Ogden. Preservation of the Lower Bridge area requires that you not be complicit in the avarice emanating from this development scheme. Keep in mind that the applicant is not without development recourse; nothing is stopping them from developing the straightforward 10-acre lots compatible with the property's zoning and in harmony with the rural character.

In addition, the applicant's proposal is incompatible with conditions of their own previous favorable ruling allowing the zone change to RR-10 in the first place. The decision of the Deschutes County Board of Commissioners ZC-08-1, PA-08-1, document no. 2009-168 (page 36, item 4) required the applicant to "not develop any area within a 100-yard radius of the historic Lynch and Roberts Store Advertising sign". And yet, as is shown on the attached Exhibit C, 3.33 acres of their development and much of Lot 1 of their tentative plan occurs within this protected zone. Their proposal must be rejected on these grounds alone because the applicant's performance is contrary to the conditions of the zone change. At a minimum, they must begin the conditional use application process anew, and this time it must conform to all conditions of the zone change just like the application requirements are for everyone else.

The applicant further manipulates the conditions of the original zone change. ZC-08-1, PA-08-1 Document no. 2009-168 (page 36, items 3 and 7) stipulates that a condition of the zone change to RR-10 is the establishment of a conservation easement and open space of approximately 30 acres (29 actual acres) situated west of Lower Bridge Way. Let me reiterate: in order for the applicant to be granted a change of zone to RR-10, they were required to permanently protect these acres from development. This is the base case for the rezoned property. In accordance with the Deschutes County Code, a

conditional use permit must meet the additional standards (including open space) beyond these base case requirements. As demonstrated in Exhibit C, the applicant attempts to advantage their proposal, in an unwarranted fashion, by including this base case responsibility for conservation easement and open space as a part of their planned development open space requirements. This is clearly not allowable. The applicant suggested in their final rebuttal that there was some sort of prior knowledge on the part of the Board of Commissioners of the applicant's intention to eventually present a planned development proposal, and that this constituted some sort of prior approval for including this property in their development as open space. Obviously this could not have been the case because any such approval prior to Conditional Use application is not allowable by any standard. Moreover, this conservation easement acreage west of Lower Bridge Way has never been cleared environmentally. A history of toxic activity on this portion of the mine property eliminates it from any rational inclusion into a planned development. The result of the applicant's effort to include this conservation easement land in their planned development proposal creates a false math which provides for a deceptively high amount of open space which then is used to calculate an artificially high number of allowable planned development lots.

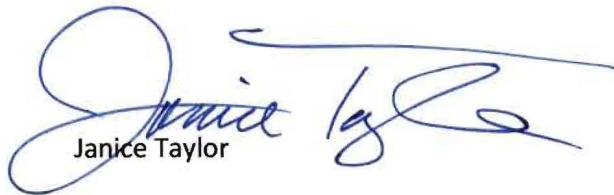
As others will demonstrate, the succession of ownership for the applicant's property has historically received regulatory favor which is not readily available to the average county constituent. Such favor must end now and forever.

The preceding arguments represent best faith efforts to research the applicant's proposal, Deschutes County Code, documents from the Board of Commissioners allowing zone change for the applicant's property to RR-10, and previous testimony. The conclusions expressed herein are the result of those efforts; prime among those conclusions is that the rural character of the historic Lower Bridge area would be impacted negatively, permanently, and in the extreme by this self-serving proposal to radically increase residential density. It must be rejected.

Respectfully Submitted,

A stylized signature in blue ink, consisting of a large 'J' and 'T' intertwined.

James Taylor  
7695 NW 93<sup>rd</sup> Street  
Terrebonne, OR 97760

A stylized signature in blue ink, appearing to read 'Janice Taylor' with a long horizontal flourish extending to the right.

Janice Taylor





## Rural Character / Applicant Proposal

Existing Residences = Yellow / New Residences = Red





## Rural Character / 10 Acre Parcel Comparison

Existing Residences = Yellow / New Residences = Red  
Residences = Red







**IN THE MATTER BEFORE  
THE DESCHUTES COUNTY BOARD OF COMMISSIONERS**

<b>LOWER BRIDGE ROAD, LLC,</b>	)	<b>SUBMITTAL IN OPPOSITION TO</b>
<b>Applicant/Appellant.</b>	)	<b>APPLICANT'S APPEAL</b>
	)	File Numbers 247-15-000194-CU and
	)	247-15-000195-TP -
	)	Decision of Deschutes County
	)	Hearings Officer
	)	

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Kristian Kibak and 8801 NW 93<sup>rd</sup> Lane LLC, an Oregon limited liability, by and through Jordan Ramis, PC, attorney Steven L. Shropshire, appear as interested parties and present the following comments for consideration by the Board of County Commissioners ("BOCC").

**INTRODUCTION**

Mr. Kibak is a member of 8801 NW 93<sup>rd</sup> Lane LLC, which is the owner of Lot 8 in the Eagle Rock Subdivision. An aerial image of Lot 8 and Applicant's property is attached as Exhibit A. Lot 8 is a 25-acre parcel with approximately ½ mile of Deschutes River frontage. It is located due east of Applicant's proposed Planned Unit Development ("PUD") high-density residential subdivision and Applicant's remaining land holdings (the former Diatomite mine and hazardous waste dump). Lot 8 is directly across the Deschutes River from the proposed location of PUD lot nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18. Needless to say, Mr. Kibak has a keen interest in the proposed development and in the preservation of the natural and rural character of the area.

**OPPOSITION SUMMARY**

Mr. Kibak submits this statement in opposition to Applicant's appeal of the Hearings Officer's September 11, 2015 decision (the "HO Decision"). The HO Decision, which involves 101 pages of careful analysis, denied the proposed PUD based on findings that the application fails to comply with all applicable regulations. Applicant's notice of appeal raises 24 different issues for appeal. This Submittal does not seek to address each of those 24 issues in detail; however it touches on the majority of those issues.<sup>1</sup>

The Hearings Officer did her job well. Her thorough evaluation of the facts and law in this matter resulted in a well-reasoned and well-supported decision to deny Applicant's proposed PUD. The Hearings Officer has correctly concluded that Applicant's use of the PUD approach to squeeze as

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<sup>1</sup> Mr. Kibak reserves the right to supplement this Submittal during any continuance or open record period to address arguments and evidence introduced during the BOCC's *de novo* hearing process.

many lots as possible out of its property is fraught with insurmountable challenges. Applicant failed to meet its burden of proof before the Hearings Officer, and it should not fare any better in this *de novo* proceeding before the BOCC. The PUD approach is simply the wrong development model to use on this very challenging property.

The site of this proposed high-density development is uniquely complicated and compromised as a result of mining, dumping and related industrial uses. It is further complicated by the outstanding natural character of the surrounding land and water resources including state scenic waterway and federal wild and scenic river status for the adjacent stretch of the Deschutes River as well as the adjacent Borden Beck Wildlife Preserve. The PUD proposal and the Applicant's effort to push the limits to force as many lots as possible through the approval process will give rise to the proverbial hydra. If the BOCC dispatches the immediate challenge by approving the application, 19 more challenges will rise up as each lot comes before the BOCC for site plan review. Even more challenges will certainly arise as the developer, homebuilders, and residents are forced to contend with impossible lot configurations, legacy contamination issues such as airborne hazardous dust, and water supply challenges.

The Applicant has developed a PUD that exceeds the number of lots allowed in the applicable zone, has willingly configured the lots to make them undevelopable without future special exceptions from set-back requirements, and seeks to defer important environmental investigation and remediation actions until much too late in the land use approval development process.

These problems are based on the following substantive flaws in the application and deficits in the record:

1. Applicant impermissibly seeks to count approximately 30 acres Flood Plain (FP) zoned land toward the PUD land total so that it can meet the 65 percent open space requirement and the one dwelling per 7.5 acre maximum development density ratio.
2. Applicant's proposed lot configuration is not adequate to assure that each proposed dwelling would meet the applicable rimrock, scenic waterway, and yard setbacks. As a result it has not demonstrated that each lot will permit the siting of a dwelling, on-site septic system, and water supply well, with related separation requirements.
3. Applicant has not demonstrated that it can feasibly address all the environmental contamination issues on the PUD site and adjacent property, including toxic dust control. As a result, it has not proven the property is suitable for residential development in light of historical and potentially current environmental contamination.
4. Applicant has not demonstrated that it can feasibly obtain legal authorization to secure a permanent water supply for the development.
5. Applicant has not demonstrated that the development is consistent with the federal Endangered Species Act or with the federal Wild and Scenic Rivers Act.

The record reflects that County planning staff has offered the Applicant a number of alternative residential development pathways that would allow it to obtain approval without the significant complexity that is created by the present PUD application. However, the Applicant has

apparently rejected those options in favor of pressing forward with an untenable PUD application, coupled with a threat of a constitutional takings suit if the application is denied or conditioned. Those claims are without merit and should not be allowed to distract from the substantive issues presented by this application.

We therefore request that the BOCC affirm the HO Decision by entering a decision making specific findings regarding the applicable code sections, their interpretation, and the Applicant's failure to meet its burden of proof with respect to those criteria.

## **DETAILED DISCUSSION**

### **A. Applicant impermissibly seeks to count approximately 30 acres Flood Plain (FP) zoned land toward the PUD land total so that it can meet the 65 percent open space requirement and the one dwelling per 7.5 acre maximum development density ratio.**

The only zone contained in the proposed planned development that authorizes planned developments as a conditional use is the Rural 10 zone (RR – 10 zone). DCC 18.60.030. The other zones, Flood Plain (FP) and Exclusive Farm Use (EFU) do not permit planned developments. The RR – 10 zone requires that lots created through subdivision be no less than 10 acres in size, and establishes a standard density of one unit per 10 acres. 18.60.060(C). Through the planned development conditional use provision, it is possible to reduce this standard density to an equivalent density of one unit per 7.5 acres, and to meet that reduced density with lots that are less than 10 acres in size. 18.60.060(C). Because planned developments constitute an exception to the zone standards, an applicant must make a showing that the application satisfies special criteria associated with planned development review. The review criteria applicable to a planned development are set forth under DCC 18.128.210. The Board is required to consider 14 factors set forth under sub-part (A), and is required to make findings regarding 8 criteria set forth under sub-part (B). Therefore, all applications for planned developments are required to include the materials and information required for approval of a subdivision as specified in DCC Title 17 (Subdivision/Partition Ordinance) and the materials and information required for approval of a conditional use as specified in DCC Title 18.

Review criteria that appear particularly relevant in the context of the present application include DCC 18.128.210 subsections:

- (B)(2) – requires a finding that the proposed development conforms to the Comprehensive Plan;
- (B)(3) – requires a finding that any exceptions from the standards of the underlying district are warranted by the design and amenities incorporated in the development plan and program;
- (B)(4) – requires a finding that the proposal is in harmony with the surrounding area or its potential future use;
- (B)(5) – requires a finding that the system of ownership and the means of developing, preserving and maintaining open space is adequate;
- (B)(6) – requires a finding that sufficient financing exists to assure the proposed development will be substantially completed within four years of approval;

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(B)(7) – requires a finding that sixty-five percent of the land is to be maintained in open space;  
(B)(8) – requires a finding that adequate provision is made for the provision of natural resources such as bodies of water, natural vegetation and special terrain features.

In addition to the burden imposed on the Applicant under DCC 18.128.210, the Applicant in this case bears the burden of demonstrating compliance with requirements imposed by the BOCC in conjunction with a prior 2008 plan amendment/zone change decision. *See*, for example, Hearings Officer 2015 Decision, Page 47.

The PUD application originally incorporated 157 acres, split zoned to include approximately 10 acres Exclusive Farm Use (EFU), acreage along the river zoned Flood Plain (FP), and remainder Rural Residential (RR-10) land. The Hearings Officer explicitly concluded that the EFU and FP lands cannot be included in the PUD proposal, and concluded that the portion of the subject property remaining after the EFU and FP zoned land is subtracted would not be large enough to permit 19 residential lots. *See* Hearings Officer Decision, Page 9, Conclusions of Law. The Applicant submitted a December 31, 2015 Modification Application (“Modification”) proposing to remove 10.4 acres of EFU zoned property located at the southern boundary of the subdivision. The Modification continues to rely on inclusion of FP lands to support the PUD proposal in a manner that conflicts with explicit FP ordinance provisions.

The Modification presents two questions: 1) whether the proposed lot line adjustment included in the Modification effectively and legally removes all EFU lands from the PUD, and 2) whether the Applicant can move forward with a PUD application that relies upon incorporation of FP land as open space. Because the Applicant cannot move forward with a PUD application that incorporates FP land, the Board has a legitimate basis to deny the application as presented.

The Applicant’s Notice of Appeal indicates that the Applicant cannot calculate the exact Flood Plain acreage because “the County’s zone boundaries are based on a map which when applied to the subject property is so grossly inaccurate that it extends under the surface of the river in some areas and up the side of a vertical cliff in others.” *See* Applicant’s 2015 Notice of Appeal, Page 1, footnote 1.

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. *See* January 4, 2016 Planning Staff Memorandum, Item 5. To the extent that the Board determines that the Applicant should be afforded an opportunity to supplement the record on this issue, a continuance will be necessary.

The Applicant acknowledges that subdivisions and open space are both explicitly listed as uses authorized in the Flood Plain zone, but planned unit developments are not. *See* Applicant's December 31, 2015 Correspondence to Deschutes County Legal Counsel, Page 2, B; *see also* DCC 18.96.040. The Applicant suggests that the Board should nevertheless interpret the ordinance as allowing the planned development proposal to include the FP zoned property as open space.

On appeal the Applicant proposes that this Board 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 development nor cluster development 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. Additionally, the Applicant's suggested interpretation is contrary to fundamental principles that guide interpretation of regulatory provisions. Questions regarding statutory interpretation begin with the plain language of the statute and context. *State v. Gaines*, 346 Or. 160, P.3d 1042 (2009), En Banc. ORS 174.010 takes this basic principle one step further by providing that in the construction of a statute, "the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." Where a legislature or administrative agency uses a particular term in one provision, but omits the term from a related provision, the term is considered not to apply to the related provision. *Perlenfein and Perleenfein*, 316 Or. 16, 22, 848 P.2d 604 (1993), En Banc.

Mr Kibak asserts that otherwise undevelopable FP lands should not be leveraged to increase the density of a rural planned development. This is a logical explanation for why the existing Flood Plain ordinance explicitly allows subdivisions and open space in the FP zone, but does not authorize planned development and cluster development. A rural planned development consisting of dense residential lot configurations (5 residential units per 10 acres) positioned on the edge of the canyon to maximize views and value is quite different than standard rural residential subdivision consisting of one residential unit per 10 acres. Contrary to the Applicant's argument, the listing of "open space" as an authorized use within the FP zone for standard subdivisions, but not for planned developments, makes both legal and practical sense. This is because a rural planned development achieves density benefits and development opportunities not afforded to standard rural subdivisions.

The term "open space" is not defined in DCC Title 17 (Subdivisions) general definitions. The term is defined in DCC Title 18 general definitions as:

Lands used for agricultural or forest uses and any land area that would, if preserved and continued in its present use: A) Conserve and enhance natural or scenic resources; B) Protect air, streams or water supply; C) Promote conservation of soils, wetlands, beaches, or marshes; D) Conserve landscaped area such as public or private golf courses, that reduce pollution and enhance the value of adjoining or neighboring property; E) Enhance the value to the public of adjoining or neighboring parks, forest, wildlife preserves, nature reservations or other open space; F) Enhance recreation opportunities; G) Preserve historic, geological and archaeological sites; H) Promote orderly urban development; and I) Minimize conflicts between farm and nonfarm uses.

DCC 18.04.030.

DCC 17.16.100(A) requires that a standard subdivision must provide for the preservation of natural features and resources such as streams, lakes, natural vegetation, special terrain features, and other natural resources. These features would logically be preserved through “open space” designation in a standard subdivision where the standard subdivision’s density is not dependent upon the dedication of “open space” to achieve a density bonus or benefit. The term “open space” is used in standard subdivision code section 17.24.060(Q)(1)(a), which requires a Land Divider’s Declaration to declare that he has completed dedication of any common improvements, such as streets, bike paths, walkways, parks or **open space** in order to meet the land dedication requirement of DCC 17.44.010. The Flood Plain ordinance simply makes it clear that a developer of a standard subdivision could dedicate FP zoned land as open space. DCC 17.36.170 provides that the size, width and orientation of parcels in a standard subdivision “shall be appropriate for the location of the land division and for the type of development and use contemplated, and shall be consistent with the lot or parcel size provisions of DCC Title 18 through 21...” A developer of a standard subdivision not receiving any planned development density or configuration bonus could elect to designate FP zoned land as unimproved “open space” for the common benefit of all owners within the subdivision, and the Flood Plain ordinance explicitly authorizes such designation. By contrast, a rural planned development proposal should not be allowed to include FP lands to achieve a density bonus and configuration benefit beyond the standard zoning density.

If the BOCC adopts Applicant’s argument, it would necessarily follow that FP zoned acreage could be included in all PUD applications to support increased resulting development densities. One ironic result of the interpretation proposed by the Applicant is that FP zoned lands could be grouped within planned development applications to enable applicants to achieve greater density on high scenic value waterfront properties than could otherwise be achieved on property with less aesthetic value to the public.

It follows that the Applicant’s suggestion that the planned development can incorporate land (FP zoned) for which planned development is not a permitted or conditionally permitted use is contrary to ORS 215.416(8)(a). This section provides that approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance ... and which shall relate approval or denial of a permit application to the zoning

Page 6 – SUBMITTAL IN OPPOSITION

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ordinance and comprehensive plan for the area in which the proposed use of land would occur ... ." ORS 215.416(8)(a).

Similarly, the Applicant's attempt to box in the current Board by asserting that the 2008 rezone decision was based on the now proposed planned development is inappropriate. The 2008 rezone decision cannot be stretched to bind the current Board to approve a planned development that fails to comply with plain code provisions that apply to the FP zoning designation, plain code provisions that apply to planned developments, and Comprehensive Plan provisions that apply to the present conditional use application through DCC 18.128.010(A) and DCC 18.128.210(B)(2). The Applicant has repeatedly disregarded Planning Staff recommendations regarding alternative options to avoid the noncompliant inclusion of FP lands in the planned development proposal. Instead the Applicant requests an interpretation by the BOCC that is contrary to the plain language of the Flood Plain ordinance, and that would improperly increase density and the number of small view lots clustered on the most sensitive lands with the greatest resulting aesthetic impact.

**B. Applicant's proposed lot configuration is not adequate to assure that each proposed dwelling would meet the applicable rimrock, scenic waterway, and yard setbacks, and as a result it has not demonstrated that each lot will permit the siting of a dwelling, on-site septic system, and water supply well, with related separation requirements.**

#### **1. Rimrock Setback**

At the time the Hearings Officer considered the application, the Applicant and planning staff actively disagreed as to the existence and location of rimrock within the proposed planned development. *See* Hearings Officer Decision, Page 37. DCC 18.04.030 defines rimrock as:

[a]ny ledge, outcropping or top or overlying stratum of rock which forms a face in excess of 45 degrees, and which creates or is within the canyon of the following rivers and streams: (1) Deschutes River ... For the purpose of DCC Title 18, the edge of the rimrock is the uppermost rock ledge or outcrop of rimrock.

DCC 18.04.030.

The Applicant now appears to agree that rimrock exists in the areas of concern. The Applicant has represented to staff that the location and mapping of "all rimrock on the lots" was completed subsequent to the Hearing Officer's decision now subject to the Applicant's appeal. *See* December 31, 2015 Applicant correspondence to County Legal Counsel, P. 3, section 2.

In theory this recent mapping effort should enable the Applicant to depict the building envelope on each lot, with the required rimrock setbacks and proposed increased setbacks to demonstrate compliance. The concern, however, is whether the short-notice rimrock mapping effort is accurate. An examination of aerial photos of the subject portion of the site reveals a significant difference in the color of the earthen matter in the vicinity of the rimrock. A significant concern

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is that rimrock features may have been buried by past soil relocation activities associated with aggregate mining on the site. Adequate opportunity should be provided to interested parties and the BOCC to ensure that the rimrock mapping recently proposed by the Applicant is accurate in light of the unusual soil characteristics visible through aerial photos.

Rimrock review must occur concurrently with evaluation and decision on the current proposal, and should not be “punted” through conditions to be addressed at some later time. Local governments generally may not fail to adopt findings addressing a relevant approval criterion and then attempt to excuse or cure that failure by imposing a condition of approval that the approval criterion must be satisfied. *Green v. Douglas County* 67 Or LUBA 234 (2013). The *Green* case acknowledges that occasionally objective and easily verifiable subject matter may be addressed through a condition of approval, as contrasted with subjective and more discretionary subject matter that requires explicit concurrent findings. Given the initial dispute between Planning Department staff and the Applicant regarding whether rimrock even existed on site, given the Applicant’s subsequent action to have a rimrock identification report generated within a tight timeframe, and given concerns based on aerial photos indicating that rimrock may have been covered by soil, the rimrock issue should be characterized as subjective and discretionary subject matter warranting an explicit finding based on thorough evaluation by the Board.

## **2. Failure to Demonstrate Feasible Lot Configuration.**

The Hearings Officer found that the conditional use criteria of DCC Section 18.128.015(A)(1) apply to this application and she found the criteria require a finding that Applicant demonstrate the suitability of the subject property for PUD development, considering among other items, the PUD’s lot configuration. HO Decision at pp 41-42. This is a correct interpretation of the code.

Applicant has failed to demonstrate that the PUD configuration as proposed would allow for actual development of individual lots in light of the rimrock, scenic waterway, and yard setbacks. Even if the Applicant introduces evidence of the rimrock locations and the resulting building envelopes, Applicant has not demonstrated that the remaining land will be of a suitable size to permit the siting of a dwelling, on-site septic system, and water supply well, with all related separation requirements. Finally, because Applicant has squeezed the maximum number of lots out of the PUD configuration, it will have very little, if any, leeway to reconfigure the PUD lots in response to any of the setback or spacing issues discussed in the HO Decision.

## **C. Applicant has not demonstrated that it can feasibly address all the environmental contamination issues on the planned development site and adjacent property, including toxic dust control. As a result, it has not proven the property is suitable for residential development in light of historical and potentially current environmental contamination.**

### **1. Dust Control.**

Through the 2008 BOCC plan amendment/zone change decision, the BOCC found that in response to diatomite dust conditions on the property and related notice of violation issued by the

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Department of Environmental Quality (DEQ), the owners of the property obtained a temporary water permit, purchased mitigation credits, installed a pivot and began using an existing well to water a portion of the site to minimize dust. The Board concluded that this, in conjunction with implementation of best management practices to address blowing dust would maintain local air quality. The Applicant has a burden to establish that the measures cited by the Board in 2008 have been adequately implemented and maintained. See Hearings Officer 2015 Decision, Page 44.

This application should not be approved in light of significant and unanswered questions about whether this site is safe for human occupancy, and in light of the fact that basic dust control measures, at issue for more than seven years, have not been successfully completed by the Applicant.

Daniels Group correspondence dated January 15, 2008, addressed to Frank Messina with DEQ, constitutes a response to DEQ's January 4, 2008 Notice of Nuisance Determination regarding nuisance levels of dust from the site. The correspondence states that "[t]he goal of the ownership group for this site is to attempt to mitigate any fugitive dust concerns..." See Daniels Group January 15, 2008 correspondence. The 2008 correspondence cites to the Lower Bridge Road Dust Mitigation Project work plan, and indicates that the work plan "is in its early stages of implementation."

The Applicant's own expert, Maul, Foster and Alongi evaluated the site and issued related findings and conclusions in correspondence dated February 29, 2008. The Applicant's own expert relied heavily on the **presumption** that dust control measures established in the Work Plan would be successfully implemented. The correspondence states that "if the dust control measures outlined in the Work Plan recently approved by the Oregon DEQ are implemented, it is unlikely DE at the site could pose unacceptable health risks." See Maul, Foster and Alongi February 29, 2008 correspondence, emphasis added. This statement from the consultant containing a double negative is a far cry from a definitive finding of no future health risks that a parent would want to hear before moving to this proposed development.

More than seven years have passed since the 2008 correspondence regarding serious, nuisance-level dust conditions on the site. Yet it is clear from the current Hearings Officer findings, issued after the Hearings Officer's recent on-site inspection, that the Applicant has failed to successfully implement dust control measures established in the Work Plan. See Hearings Officer 2015 Order, Page 51. The Hearings Officer personally conducted an on-site inspection of the subject property, and concluded that "[a]lthough the applicant states its dust control measures on SM Site 461 'were successful,' the Hearings Officer's site visit observations indicate the opposite. Hearings Officer 2015 Order, Page 51. "I [Hearings Officer] observed that on much of SM Site 461 the introduced vegetation has not taken hold, and as a result large areas of diatomaceous earth remain exposed...". Hearings Officer 2015 Order, Page 51.

The Applicant's own plan, set forth in the Lower Bridge Road Dust Mitigation Project Document from at least seven years ago, acknowledges that stabilization of the bare areas on the

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site is necessary to “improve the site to make it **more appropriate for residential development**,” and provided that stabilization work “will take place continuously over the next 12 to 18 months.” Lower Bridge Road Dust Mitigation Project Document, Pages 1 and 3. Emphasis added. By Applicant’s own admission, the serious dust conditions on the site render the site inappropriate for residential development. Yet, as of 2016, the Applicant has failed to accomplish this fundamental requirement. This is a trend that has repeated itself since 2008 and before.

The Applicant expresses concern about the resources it has devoted to attempt development on this particular site. *See* Applicant’s Notice of Appeal, Page 5. But a BOCC decision regarding whether this site is safe for human occupancy should not be influenced by such concerns. Applicant’s complaints regarding expenses incurred in this development venture fail to acknowledge past benefits and profits that resulted from historical activities on the site that contributed to its present condition. The Applicant seeks to develop a uniquely complicated and compromised site, and should fully expect that human health and safety will be a fundamental priority in all BOCC decisions. The Applicant should also expect the BOCC to impose significant and long-lasting financial assurance conditions if the development application is approved. To the extent that the Applicant might argue that dust is not controlled but is “clean,” a more thorough evaluation of such representation is warranted in light of the site’s history.

On November 14, 2014, DEQ provided comments to The Daniels Group following review of the Remedial Investigation Work Plan for the East Parcel of the Lower Bridge Site. It is unclear at this point based on the record and seems unlikely that the Applicant has completed associated requirements.

## **2. Hazardous Waste**

Through the 2008 BOCC plan amendment/zone change decision, the BOCC found that hazardous waste violations on the site were addressed only to the level of industrial use standards. The Board conditioned the 2008 approval such that the Applicant now has a burden to establish that the site’s hazardous waste remediation has been completed to residential standards in all portions of property subject to planned development. *See* Hearings Officer 2015 Decision, Page 45.

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.

The Applicant does cite to summary type documentation issued by DEQ regarding hazardous waste clean-up efforts that took place historically. The concern is that the DEQ findings and conclusions were based on standards not applicable in the context of intense residential development. The site was historically contaminated with waste disposed of at the site, including solvent sludge (contaminated with lead and PCBs), cyanides, chromium, caustic sand and radioactive waste. *See* December 30, 1987 Preliminary Assessment, prepared by the Oregon Dpt. of Environmental Remedial Action, and produced to the U.S. EPA Region 10 Superfund Program Management Section. For example, measurements of gamma radiation levels were obtained at up to 20 mR/hr, with repeat readings between .15 to 3 mR/hr, with radioactive materials defined as those with gamma radiation levels greater than .057 mR/hr. *Id.* at Page 4.

On January 18, 1985, DEQ issued a letter summarizing hazardous waste clean-up efforts initiated in 1983. These efforts included removal of at least 691 55-gallon drums of hazardous waste and four dump truck loads of dried sludge and contaminated soil, and removal of 106 55-gallon drums of radioactive waste. The 1987 Preliminary Assessment that followed the 1985 "clean up" summarizes potential health effects resulting from exposure to lead as: weight loss, weakness, anemia, general malaise with gastrointestinal and central nervous system complaints, and brain damage. It summarizes chromium as a potential human carcinogen, as well as an irritant and corrosive that can enter the body by ingestion, inhalation and through dermal contact. It summarizes symptoms of cyanide exposure as weakness, headaches, confusion, and nausea along with reduction in oxygen utilization; and symptoms of PCB exposure as chloracne, edema, jaundice, anorexia, and nausea, as well as liver damage. As with many documents of its kind, the conclusions and summary regarding site condition are vague and leave many questions. The 1987 Preliminary Assessment states that "as a cleanup has occurred at this site, it is very **unlikely** that any of the contaminants are present in **high enough concentrations** to cause the above effects if exposure were to occur." *See* December 30, 1987 Preliminary Assessment, emphasis added.

A significant concern is whether DEQ's 1985 summary and similar summary-type findings and conclusions such as the 1987 Preliminary Assessment are based on appropriate current standards (residential high-density planned development, as opposed to industrial/non-residential standards). At the time of the 1985 cleanup, the likelihood that the remote site would be the subject of a planned development proposal was slim. In fact, the December 30, 1987 Preliminary Assessment concludes that no further action needs to be taken at the site, in part because "[t]he **site is in a sparsely populated area ...**" *See* December 30, 1987 Preliminary Assessment, Page 7, number 5, emphasis added. However, even while recommending that no further action be taken, the Preliminary Assessment questioned why heightened levels of total organic carbon were appearing in the upgradient well, and recommended investigation of other potential sources contributing to that abnormal well reading.

Another concern is whether the prior site evaluation and conclusions are comprehensive and cover all of the land now proposed for planned development. Based on very limited testing of groundwater samples collected from two springs and a well around the disposal site, and limited

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testing of soil from the drum storage area and disposal pond bottom on two days immediately following the removal, DEQ concluded that the cleanup was complete. It did so despite an observation that contaminated sludge remained in the disposal pond containing lead above background levels. *See* January 18, 1985 Memo to File. The December 30, 1987 Preliminary Assessment document states that DEQ's 1985 conclusion regarding clean-up adequacy was based on the fact that radiation "had not migrated from the site," as test results on the site were higher than those performed in the springs below. *See* December 30, 1987 Preliminary Assessment, Page 5.

A related concern is that outdated and incomplete sources and conclusions are cited as authoritative, and that on that basis more current testing builds off the inaccurate premise that the entire site has been restored to a condition suitable for a planned development. *See*, for example, April 21, 2008 Memorandum prepared by Newton Consultants, Inc. for the Applicant. The first page of the memo quotes directly from the 1985 DEQ document that summarily concluded that cleanup of hazardous waste was completed to DEQ's satisfaction.

Newton Consultants' evaluation consisted of analysis of a sample from one well that had recently been installed on the property (sample taken March 5, 2008), and analysis of a sample from a spring on the north side of the property (sample taken March 11, 2008). Based on this limited sampling, Newton Consultants concluded that "there is no reason to believe that individual drinking wells completed into the deep aquifer will not provide adequate domestic water that meets the drinking water standards ..." *See* April 21, 2008 Memorandum prepared by Newton Consultants, Inc., Page 4.

This question regarding nature and extent of testing applies to the [Maul, Foster and Alongi – correspondence dated February 29, 2008 – anything more recent re: hazardous waste:] sampling results submitted by the Applicant.

On November 14, 2014, DEQ provided comments to The Daniels Group following review of the Remedial Investigation Work Plan for the East Parcel of the Lower Bridge Site. It is unclear at this point whether the Applicant has completed the following as specified in the 2014 DEQ comments:

Task 3 – Groundwater Sampling, including samples collected during different seasons to address varying seasonal groundwater flow (to enable a comparison with 2008 Newton Consulting Group groundwater sampling;

Based on current information in the record, the terms of the work plan proposed in late 2014 have not been performed and DEQ has not issued a NFA. Once again it appears that the Applicant is "hopeful" that they can complete the work and is banking on a favorable outcome.

The references above are examples of what appears to be an ongoing pattern of sporadic and limited steps taken by governmental and private entities in an attempt to determine true site conditions. The concern is that this spotty pattern falls far short of a comprehensive evaluation of

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all land subject to the development proposal, with such evaluation based on present day hazardous waste standards applicable to lands slated for residential development.

**D. Applicant has not demonstrated that it can feasibly obtain legal authorization to secure a permanent water supply for the development.**

Through the 2008 BOCC plan amendment/zone change decision, the BOCC found that hazardous waste violations on the site were addressed only to the level of industrial use standards. The Board conditioned the 2008 approval such that the Applicant now has a burden to establish that the site's hazardous waste remediation has been completed to residential standards in all portions of property subject to planned development. *See* Hearings Officer 2015 Decision, Page 45.

In addition, Title 17 of the Deschutes County Code contains required findings for the approval of a tentative plan for a proposed subdivision. Those findings include a requirement that the proposed subdivision will contribute to orderly development in the area. The Hearings Officer (at page 74 of the HO Decision) interpreted this to require a showing that the proposed planned development will have adequate facilities and services, including an adequate water supply.

While the Applicant has provided evidence of physical groundwater availability in the area, it has not met its burden to show that the groundwater would be *legally* available to supply the various needs of the planned development, including possible long-term irrigation use in conjunction with dust control on the former DE mine site (Tax Lots 1501 and 1502). Even if groundwater is physically available at a particular property, it is rarely available for appropriation due to its direct hydraulic connection with the Deschutes River. The Deschutes River is over-appropriated, which means that hydraulically connect groundwater is unavailable for new appropriations without first obtaining a source of mitigation water, which may not be feasible to secure.

Applicant may argue that it is not required to obtain mitigation water because it intends to use small volume domestic wells that are exempt from the requirement to obtain a permit. However, such groundwater use, while exempt from permitting requirements (if usage is below 15,000 gallons per day and used to irrigate no more than ½ acre of lawn and garden), is still subject to regulation and oversight under the prior appropriation doctrine. Moreover any use for dust control or irrigation will require a permanent water right. Given Applicant's close proximity to the Deschutes River in a state scenic waterway section and a federal wild and scenic river segment, it is reasonable to expect the Oregon Water Resources Department will approach water use in this location with a skeptical eye.

Regardless, the Applicant has made no showing that it will be feasible to obtain legal authorization to withdraw water for use in the planned development. This is a potential fatal flaw to the ultimate development of this project, and the BOCC should require Applicant to meet its burden of proof on this issue.

**E. Applicant has not demonstrated that the development is consistent with the federal Endangered Species Act or with the federal Wild and Scenic Rivers Act.**

Pursuant to DCC 18.128.010(A), a conditional use listed in DCC Title 18 shall be permitted, altered or denied in accordance with the standards and procedures of DCC Title 22, the Uniform Development Procedures Ordinance; and the **Comprehensive Plan**. Emphasis added. Planned development is listed as a conditional use for the subject zone under DCC Title 18. DCC 18.60.030(E). Therefore, the proposed planned development project must comply with the Deschutes County Comprehensive Plan. *See also* DCC 18.128.210(B)(2), which requires a finding that any planned development authorized as a conditional use conforms to the Comprehensive Plan.

This means that the planned development cannot be configured in a manner that maximizes density and financial gain by completely disregarding fundamental principles, goals and policies contained in the Comprehensive Plan, including but not limited to sections that pertain to federally designated wild and scenic rivers. Findings on this subject matter are required, as are findings that the proposal is in harmony with the surrounding area.

In addition, a planned development proposed as a conditional use must comply with standards listed under DCC 18.128.210. Therefore, the present planned development application requires consideration of existing natural features, environmental considerations, the effect of the development on the rural character of the area, and the proposed ownership pattern. DCC 18.128.210. 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.

Deschutes County Comprehensive Plan Chapter 2, pertains to scenic and historic areas and open spaces. Section 2.1 of the Deschutes County Comprehensive Plan is just one of many Comprehensive Plan sections that appear to apply to the current proposal. Section 2.1 cites Statewide Goal 6: Air, Water and Land Resources Quality and the requirement for compliance with Federal and State regulations regarding air, water and land quality. This Goal 6 (OAR 660-01500000(6)) provides that all waste and process discharges from future development, when combined with discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. Plans should buffer and separate those land uses which create or lead to conflicting requirements and impacts upon the air, water and land resources.

Comprehensive Plan Section 2.4, Goal 5 Overview, provides that Federal Wild and Scenic Rivers, Oregon Scenic Waterways and natural areas on the Oregon State Register of Natural Heritage Resources list be inventoried at each periodic review. Once inventoried, the Goal requires protection measures. The Goal 5 purpose statement provides that the purpose of identifying Goal 5 related lands is to effectively manage Deschutes County's natural and cultural resources to meet the needs of today while retaining their value for future generations.



The Wild and Scenic designation dictates that a case-by-case site plan review be completed for all designated waterways and lands within 660 feet from either side of designated rivers and streams as measured from the ordinary high water level.

The Applicant must make a showing that the project as proposed is compatible with the goals and policies detailed in the Comprehensive Plan. DCC 18.128.010(A); DCC 18.128.210(B)(2). Comprehensive Plan provisions regarding the federal Wild and Scenic Rivers Act and the federal Endangered Species Act place a burden on the Applicant to make a showing that the project as proposed can feasibly comply with the requirements of both federal Acts, and place a burden on the County to make a finding of compliance with the same.

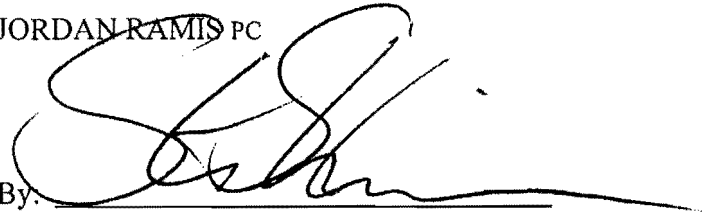
### CONCLUSION

Based on the reasoning set forth above, Mr. Kibak requests that the BOCC either deny the planned development application or continue the hearing for a sufficient time to allow all parties and state and federal agencies sufficient time to respond to Applicant's argument and evidence, and to evaluate the legal significance of Applicant's December 31, 2015 Modification of Application. Such a continuance would also provide the BOCC with an adequate opportunity to conduct on-site evaluations and deliberations. This will ensure that the resulting decision is based on a thorough and well-founded record.

The underlying Hearings Officer's decision was the culmination of significant time and resources invested by Deschutes County Planning staff and the Hearing Officer. The appeal process should be conducted in a manner that ensures that the Board is afforded a similar opportunity to invest the time and resources necessary to reach a sound decision. A reasonable alternative would be denial at this point, based on the simple fact that the Applicant has failed to meet its fundamental burden of proof.

Dated this 6th day of January, 2016.

JORDAN RAMIS PC

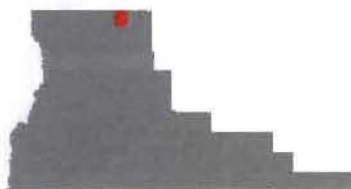


By: \_\_\_\_\_  
Steven L. Shropshire, OSB # 944375  
Attorneys for Kristian Kibak and  
8801 NW 93<sup>rd</sup> Lane LLC

# Lot 8, Eagle Rock Subdivision



Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNR/Airbus DS, USDA, USGS, AeroGRID, IGN, Swayco, and the GIS User Community, Deschutes County GIS



**January 5, 2016**

**Regarding Board of County Commissioners**

**January 6, 2016 Public Hearing**

**File number 247-15-000521-A, 247-15-000194-CU, 247-15-000195-TP**

**FROM: David and Rebecca Boyer, 8619 NW 89<sup>th</sup> Place, Terrebonne, OR 97760**

**Rimrock Locations**

There is significant concern regarding the location of rimrock along the 19 lots proposed by the applicant. Rimrock is defined as any rim or slope along the Deschutes River, which exceeds a slope of 45 degrees. There is disagreement regarding rimrock status along the rim of the project. In the County staff report to the Hearing Officer (for Project File Numbers 247-15-000194-CU/195-TP, Conditional Use Permit and Tentative Plan for a Planned Development), the Oregon Department of Fish and Wildlife commented that all 19 lots include rimrock habitat. County staff noted that some of the proposed lots have no rimrock. The applicant's attorney has also stated during public hearings that some of the proposed lots have no rimrock.

The location of rimrock is critical to determining the minimum setback of any future houses and structures developed as part of the project. Rimrock setback restrictions do not apply when there is no rimrock. The County needs to take special care in adopting river setbacks where slopes do not meet the definition of rimrock. Where rimrock can be located, the County should, at a minimum, require development to comply with the Rimrock Setback requirements of DCC 18.116.160.

Much of the project is located across the river directly opposite of the Borden Beck Wildlife Preserve. The Oregon Department of Fish and Wildlife expressed concerns in the County Staff Report that proposed development actions could result in the loss of habitats used by a variety of native mammals, birds and reptiles. In particular, they noted that rimrock and cliffs provide nesting sites for raptors, especially golden eagles, and roosting sites for bats. In addition, the Redmond Area Park and Recreation District also expressed concerns regarding the preservation of wildlife habitats and decreased user experience of those who use the Borden Beck Wildlife Preserve for recreation because of the impact on the view shed.

The Deschutes River in the area proposed for development is designated by the State as being a Class 3 Wild and Scenic Waterway. In addition, it is classified federally as Wild and Scenic. The development of any houses or structures that would be visible from the river would be incompatible with the State's wild and scenic river goals, and has the potential to cause the State to change the river's existing Class 3 designation to a lower classification. I have not been able yet to determine impacts on the federal Wild and Scenic designation.

I walked along the rim of the project, and took photographs of rimrock angles and slopes. It appears to me that the Oregon Department of Fish and Wildlife is correct in stating that all of the proposed 19 lots have some rimrock in excess of 45 degrees. What follows are photographs documenting rimrock along all 19 lots. Exhibit A on the following page depicts the location of 12 photographs taken along the proposed lots. The photographs follow.

These photographs help show how important is that a study be performed prior to any project approval showing the exact location of all slopes along the rim that are in excess of 45 degrees. For areas where slopes are found to be less than 45 degrees, the County should place specific conditions to restrict the development of structures that would otherwise be seen from the Deschutes River.



# EXHIBIT A

## KEY TO RIMROCK PHOTOGRAPHS

SCALE  
1" = 200'  
(FEET)  
1" = 200'

VICINITY MAP  
SCALE: 1" = 200'

2  
TP1.0

### GENERAL NOTES

1. THESE LOTS ARE PLANNED TO BE DEVELOPED AND ARE NOT TO BE USED FOR ANY OTHER PURPOSE. THE DEVELOPER SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE APPROPRIATE AGENCIES.

LOT	AREA	AREA	AREA
1	2.2 AC.	2	2.0 AC.
3	2.2 AC.	4	2.0 AC.
5	2.1 AC.	6	2.0 AC.
7	2.0 AC.	8	2.0 AC.
9	2.0 AC.	10	2.0 AC.
11	2.0 AC.	12	2.0 AC.
13	2.0 AC.	14	2.0 AC.
15	2.0 AC.	16	2.0 AC.
17	2.0 AC.	18	2.0 AC.
19	2.0 AC.		

**APPLICATION:** LOWER BRIDGE ROAD, LLC  
205 EAST 11TH ST., SUITE 100  
VANCOUVER, WA 98660

**ENGINEERING, SURVEYING AND PLANNING:** D'AGOSTINO PARKER, LLC  
180 SW SHENILAN ROAD, SUITE 101  
BEND, OREGON 97001

**CURRENT ZONING:** RURAL RESIDENTIAL ZONE RR-10  
FLOOD PLAIN ZONE FP  
EXCLUSIVE FARM USE EPU

**TOTAL LOTS:** 19 RESIDENTIAL LOTS  
1 PRIVATE ROAD TRACT  
2 COMMON AREA TRACTS  
3 OPEN SPACE TRACTS

**STREETS:** PRIVATE

**WATER SUPPLY:** EACH RESIDENTIAL LOT IS ANTICIPATED TO HAVE ITS OWN EXISTING PRIVATE WELL

**SEWAGE DISPOSAL:** EACH RESIDENTIAL LOT IS ANTICIPATED TO HAVE ITS OWN ON-SITE DISPOSAL SYSTEM

**POWER:** RACING POWER

**FIRE PROTECTION:** RESIDENTIAL FIRE PROTECTION DISTRICT

### PROJECT AREA SUMMARY

LOTS 1 - 19	44.3 ACRES
COMMON AREA TRACTS 17 AND 18	4.9 ACRES
PRIVATE ROAD RIGHT-OF-WAY	4.4 ACRES
OPEN SPACE EAST OF LOWER BRIDGE ROAD (TRACTS A AND C, PORTION OF TRACT B)	44.3 ACRES
EPU-DEDICATED PORTION OF TRACT B	15.3 ACRES
TOTAL AREA EAST OF LOWER BRIDGE ROAD	113.3 ACRES
OPEN SPACE WEST OF LOWER BRIDGE ROAD (TRACTS E AND F)	20.0 ACRES
LOWER BRIDGE ROAD RIGHT-OF-WAY DEDICATION	4.7 ACRES
TOTAL PROPERTY AREA	137 ACRES
TOTAL PLANNED DEVELOPMENT AREA (44.3 ACRES TRACT B EPU DEDICATED AREA)	44.3 ACRES
OPEN SPACE AREA REQUIRED: (44.3 ACRES)	113.3 ACRES
OPEN SPACE AREA PROVIDED:	95.3 ACRES

### LEGEND

- EXISTING PROPERTY BOUNDARY LINE
- ZONING BOUNDARY
- SPECIAL FLOOD HAZARD AREA ZONE 'X' / COUNTY FLOOD PLAIN ZONE BOUNDARY PER DESCHUTES COUNTY PLANNING DEPARTMENT "SHAPE FILE" FROM PARCEL 300 OF 300, MAP NUMBER 400100000
- EXISTING MENTION (2-8) GROUND CONDITIONS FROM 2011 AERIAL SURVEY
- EXISTING MAJOR (10-12) GROUND CONDITIONS FROM 2011 AERIAL SURVEY
- EXISTING OVERHEAD POWER AND/OR COMMUNICATIONS FACILITIES SEE CIRCULAR PLATE 2
- PROPOSED LOT LINE
- PROPOSED PRIVATE ROAD RIGHT-OF-WAY AREA
- PROPOSED ROAD FROM SURFACE ELEVATION
- TOP-OF-PAVEMENT ELEVATION 10' = HIGH POINT LOCATION 12' = LOW POINT LOCATION
- PROPOSED ROAD GRADE AND DIRECTION OF FLOW
- APPROXIMATE LOCATION OF PROPOSED DRAINAGE WENTON AREAS

TP1.0

DESIGNED BY: CAB	DESIGNED BY: KSD
CHECKED BY: CAB	CHECKED BY: KSD
DATE: 4/7/2015	DATE: 4/7/2015



LOWER BRIDGE ROAD LLC  
TENTATIVE SUBDIVISION PLAN  
A SUBDIVISION OF PARCELS 2 AND 3 OF MINOR PARTITION MP-80-96  
PLANNED DEVELOPMENT

DISCHUTES  
1" = 200'  
DAN001  
LB-TENTATIVE-PLAN.dwg

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Picture 1: Photo taken from Borden Beck Wildlife Preserve showing rim of Lot 1.



Picture 2: Photo taken from Borden Beck Wildlife Preserve showing rims of Lots 1, 2 and 3.



Picture 3: Photo taken from Borden Beck Wildlife Preserve photo showing a close up of rims of Lots 3 and 4.



Picture 4: Photo taken from Borden Beck Wildlife Preserve photo showing an extended view of the rims of Lots 3 and 4.





Picture 5: Photo taken from Borden Beck Wildlife Preserve showing rim of Lot 5.

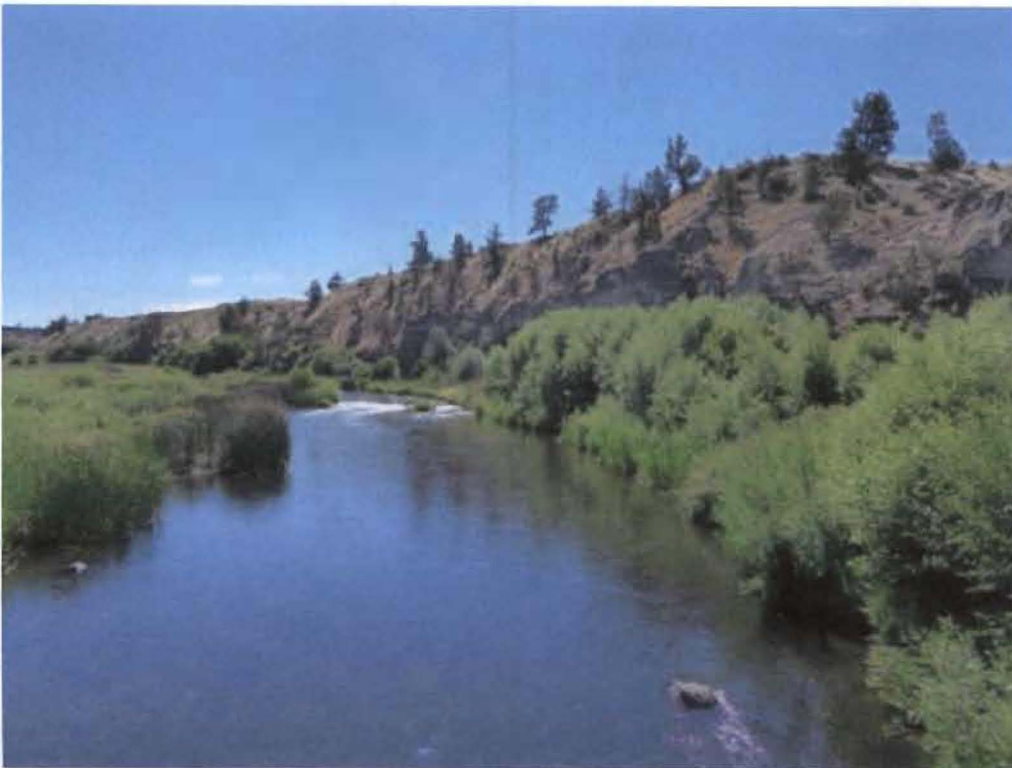


Picture 6: Photo taken from Borden Beck Wildlife Preserve showing rim of Lot 6.





Picture 7: Rims of Lots 7 and 8.



Picture 8: Looking upstream at rims of Lots 8, 9 and 10.



Picture 9: Rims of Lots 9 and 10.



Picture 10: Rims of Lots 11, 12 and 13.



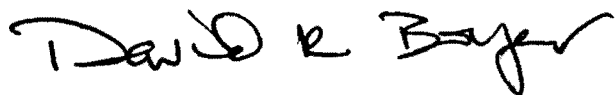


Picture 11: Rims of Lots 14, 15 and 16.



Picture 12. Rims of Lots 16, 17 and 19.

David Boyer

A handwritten signature in black ink that reads "David R. Boyer". The signature is written in a cursive style with a checkmark at the end.

Rebecca Boyer

A handwritten signature in black ink that reads "Rebecca Boyer". The signature is written in a cursive style.

8619 NW 89<sup>th</sup> Place  
Terrebonne, OR 97760

**January 5, 2016**

**Regarding Board of County Commissioners**

**January 6, 2016 Public Hearing**

**File number 247-15-000521-A, 247-15-000194-CU, 247-15-000195-TP**

**FROM: David and Rebecca Boyer, 8619 NW 89<sup>th</sup> Place, Terrebonne, OR 97760**

**RE: Our Opposition to the Proposed Project**

My wife and I live in Lower Bridge Estates, a rural subdivision adjacent to and southeast of the PUD. We have a direct view of the entire project area, and would be subjected to potential health and safety impacts, in addition to considerable dust, noise, light pollution, and increased traffic, if this project is approved.

Attached are our comments regarding the significant impacts of the proposed project. These impacts are discussed in detail, and supply the basis for the project recommendations made at the end of these comments

A comment summary sheet follows, which in turn is followed by more detailed comments on project impacts, which include:

- 1) The proposed residential subdivision has a high potential for serious adverse public health and safety impacts,
- 2) The proposal is incompatible with the surrounding land uses that currently exist,
- 3) The proposed subdivision directly conflicts with federal Wild and Scenic River and State Scenic Waterway designations for this portion of the Deschutes River, and also conflicts with wildlife preservation zones adopted by the County.

We request that you:

1. **Deny the proposed plan, as the property is not suitable for concentrated residential use, or**
2. **If not denied, defer further action to move forward with the project until such time that the applicant can show compliance with all zoning ordinance and development criteria, as well as prove that all significant adverse impacts can and will be fully mitigated.**

## SUMMARY OF COMMENTS AND RECOMENDATIONS

### Summary of comments from David and Rebecca Boyer On Project 247-15-000521-A, 247-15-000194-CU, 247-15-000195-TP

County approval of the PUD would permit development of 19 new homes on 2-acre lots. This would permanently change the rural character of the area, and result in a number of potentially significant adverse impacts, including:

- 1) The proposed residential subdivision has a high potential for serious adverse public health and safety impacts,
- 2) The proposal is incompatible with the surrounding land uses that currently exist,
- 3) The proposed subdivision directly conflicts with scenic river and wildlife preservation zones adopted by both the State and County.

Your County staff report expresses many of these same concerns.

These potentially significant adverse impacts are discussed in detail in the attached comments, and supply the basis for the project recommendations that follow.

## PROJECT RECOMMENDATIONS

The following recommendations apply both to the proposed project site as well as to the former mined areas to the west and north:

1. Deny the proposed plan, as the property is not suitable for concentrated residential use.
2. If not denied, then further action to move forward with the project should be deferred until such time that the applicant can show compliance with all zoning ordinance and development criteria, as well as prove that all significant adverse impacts can and will be fully mitigated.
3. Adopt all conditions of approval and impact mitigation measures recommended by staff in the staff report. The one exception would be the consideration of using Teater Avenue as the project's connection with Lower Bridge Way.  
*To The Hearing officer for Project No: 247-15-000194-CU/195-TP*
4. Require deep core drilling for water and soil samples as part of any required testing.  
All five tax lots comprising the former mine area, not just the project site, need to be tested. The pollution at the mine site has gone on for decades. Toxic chemical may be working their way down the soil substrate, or may have already impacted the deep groundwater aquifer resource that existing and future residents depend on for their drinking water. We need to know.

5. **Require the applicant to replace topsoil and fully revegetate former mined areas.** The mine has and will continue to negatively impact adjacent residents and properties unless major steps are taken to ensure that potentially toxic DE dust storms are eliminated.
6. **Future mining on the mine site to the west should be prohibited.** As the project is directly downwind of the mine (as is much of the existing subdivision areas), future mining activities would likely seriously impact both the proposed project and current and future residents of Lower Bridge Estates and Eagle Rock Estates. The project proponents have used, as a rational for the project, the argument that further mining is not economical. Let's take them up on this.
7. **The applicant needs to recalculate the configuration of the 19 proposed lots, as it appears that land within floodplain areas has been included.** Only developable land should be included in calculating the location and dimensions of the lots.
8. **The applicant should be required to show an apparent need for 19 additional lots in an area that currently has a number of vacant residential lots.** There are currently some 40 large-lot vacant residential parcels located within the adjacent Lower Bridge Estates subdivision. The desire to make profits from land use changes is not a need.
9. **Require the applicant to fund an independent study that examines the impact of the project on the Deschutes River's Federal Wild and Scenic and State Scenic Waterway designations.**
10. **If the proposed project is approved, require full disclosure of the past history and use of formerly mined areas on all five parcels comprising the former mine area** People who would consider building on the proposed lots need to be aware of the past toxic pollution on mine sites. Such disclosure should be prominent on any future real estate documents, and not hidden by fine print or at the end of documents.

12/28/2016

## **DETAILED COMMENTS AND RECOMENDATIONS**

The area surrounding the PUD is rural, mainly comprised of farms and ranches. The only non-agricultural uses are the Lower Bridge Estates, a rural large lot subdivision (currently, there are 27 homes), and the Eagle Rock Estates, with 8 homes. County approval of the PUD would permit development of 19 new homes on 2 acre lots.

This would permanently change the rural character of the area, and result in a number of potentially significant adverse impacts, including:

- 1) The proposed residential subdivision has a high potential for serious adverse public health and safety impacts,**
- 2) The proposed project is incompatible with the surrounding land uses that currently exist, and**
- 3) The proposed subdivision directly conflicts with federal wild and scenic river and State Scenic waterway designations for this portion of the Deschutes River, and also conflicts with and wildlife preservation zones adopted by the County.**

These impacts are discussed in more detail, as follows, and supply the basis for the project recommendations made at the end of this comment submission.

It should be noted that County staff expressed many of these same concerns in the staff report. It is also telling that staff's recommendation is for the Hearings Officer to resolve a number of issues relating to the fact that the applicant has not yet demonstrated compliance with a number of zoning ordinance and important development criteria, or that compliance is currently in dispute.

- 1. Deny the proposed plan, as the property is not suitable for concentrated residential use, or**
- 2. If not denied, we ask that the Board defer further action to move forward with the project until such time that the applicant can show compliance with all zoning ordinance and development criteria, as well as prove that all significant adverse impacts can and will be fully mitigated.**

### **1. The Proposed Subdivision Has Significant Adverse Public Health and Safety Impacts**

a) **Potential contamination of groundwater with toxic substances from the former uncontrolled hazardous waste dump:** Toxic waste was stored on the western portions of the mine property between 1977 and 1983. This waste included PCBs, Volatile Organic Compounds (VOCs), Cyanide, Chromium and radioactive and solvent sludges. Toxics were found in approximately 500 barrels left on the surface. Lagoons were also used to evaporate toxic wastes. It is likely that cleanup operations in 1983 and 1984 failed to remove all toxins on site.



If toxins do remain on site, continued leaching over time could allow toxins to enter and contaminate groundwater. This could impact all existing residences currently relying upon groundwater, as well as allow toxins to enter into the Deschutes River. It is possible that toxins may have already leached into groundwater. If the aquifer were polluted due to the leaching of toxics, wells drilled into it to provide water for the 19 proposed homes would also become contaminated.

There is much information to suggest toxics have migrated down towards the water table. Radioactive and solvent sludges, among other hazardous wastes, were reported dumped at this location from 1975 to 1983. This site was only permitted by the DEQ to receive liquid and solid industrial wastes "Environmentally hazardous" wastes were not permitted. At the time, "environmentally hazardous" was defined as radioactive materials and pesticides. Today the definition of "hazardous waste" is much broader and includes many of the wastes disposed of at this dump.

In addition, it is documented that 5,600 gallons of liquid waste put into one of four lagoons on the mine site to the west in November or December 1975 was apparently gone by January 1976. It likely percolated into the ground, as at that time of the year the evaporation potential would have been low. Only a thin layer of solids is visible in the 1983 photos, suggesting that most of the 5,600 gallons was liquid and it likely went rapidly into the ground. The total quantity of liquid waste disposed of in these lagoons over time is unknown.

The Solid Waste Permit was revoked in 1977 by DEQ because the disposal lagoons were constructed in an area of the property with very permeable and fractured soils. In a February 9, 1976 memo from Fred Lissner of the Oregon Department of Water Resources, it is stated "the slight amount of diatomite remaining will not provide an effective seal or filter to prevent ground water contamination. Liquids placed in the lagoons will readily leak into underlying gravels and eventually migrate either to the regional ground water body, or more likely to a perched ground water body which discharges into Deep Creek and/or the Deschutes River."

During cleanup operations in 1983 and 1984, only one well and two springs were sampled to determine if contaminants had migrated to groundwater. The well was reportedly hydraulically upgradient of the dump. The only constituents that were analyzed for in these water samples were pH, Na, K, IDS, Alk, and TOC. Volatile organic compounds (VOCs), some of the most soluble and toxic contaminants that were dumped in the lagoons, were not even tested for in these water samples. Solvent sludges contain volatile organics. Only one composite soil sample consisting of 12 sub-samples was collected from one of the four lagoons at shallow depths after the cleanup was completed.

With this minimal investigation into the extent of migration of the solvent sludges, DEQ issued a no further action determination for this site in 1986. In an October 27, 1983 memo, EPA commented on DEQ's cleanup plan: "There is no provision for the sampling and monitoring of the groundwater. This should be required if DEQ expects to give a release for the property. I would suggest that the release be conditional so DEQ could come back later if the problem has not been solved."

The limited soil and groundwater sampling conducted in 1984 is insufficient to determine the nature and extent of subsurface contamination, and the associated risk to human health and the environment, from the industrial waste lagoons or spills from the hundreds of corroded drums that were left at this site over the years. Further and rigorous deep testing of soils and groundwater are needed to assess whether groundwater resources have been compromised, posing a hazard to

existing residents as well as future residents of the 19 proposed lots, all of which will be on private drinking water wells.

**b) Potential Exposure of adjacent residents to carcinogens and toxic particulates contained in diatomaceous earth:** The majority of the subject property, and the mine site to the west, is a Diatomaceous Earth (DE) mine that has been used for the quarrying of DE for years. DE contains large quantities of crystalline silica and cristobalite, both carcinogens. Low level long term exposure of inhaled crystalline silica has been documented to cause breathing disorders, silicosis, fibrosis, lung cancer and death. The current mine owners have failed to prevent DE particulate dust from being blown from the mine area onto adjacent properties. Significant dust plumes are blown offsite onto near-by properties, including ours, on windy days. These dust storms adversely impact the health and safety of the surrounding community.

Revegetation is necessary to prevent wind dispersal of DE from the mine property. Soil replacement and continued irrigation is required for revegetation efforts to be successful. While water from a pivot circle irrigated a small portion of the property in the recent past, the vast majority of the mine site to the west is not irrigated. In addition, all of the topsoil in the mine area has been removed, and sold for profit rather than being used to reclaim the mine. This lack of topsoil, along with minimal or no irrigation, virtually ensures the failure of any revegetation effort.

People who build on the 19 proposed lots will be exposed frequently to what could be dangerous levels of DE dust, given that these lots are directly downwind from the mine. In addition, development of the 19 lots may result in grading activities that could release additional large amounts of fine silica dust into the atmosphere. If this were to occur, adjacent residents would be exposed to even higher levels of a dangerous carcinogen than they are currently being exposed to.

**c) Septic systems and water quality:** The subject property is located on diatomaceous earth. This material is mined for its multiple porous uses. The development of 19 septic systems in this extremely porous and fractured material next to the Deschutes River has the potential to result in contaminants finding their way both into the underlying aquifer and into the river, resulting in violations of both County and State water quality regulations.

**d) Increase in traffic along Lower Bridge Road:** Lower Bridge Road is currently a narrow and winding two-lane road that serves as the major route connecting Highway 97 near Terrebonne with Highway 20 near Sisters. The addition of automobile traffic from 19 additional homes could place a significant burden on Lower Bridge Road and increase the potential for accidents. The additional traffic burden could also result in the need for Deschutes County to widen Lower Bridge Way.

Lower Bridge Way is already unsafe in a number of respects, as reflected by a history of serious accidents. Adding traffic from more residences could compound current problems and create an additional burden on the road. The Lower Bridge area is an agricultural hub and agricultural traffic would not mix well with new intensive residential development. Lower Bridge Way is used as a farm-to-market road frequented by large hay trucks and other farm equipment. Wide equipment driving at slow speeds is the norm.

As mentioned in the staff report to the Hearing Officer for Project File Numbers 247-15-000194-CU/195-TP, Conditional Use Permit and Tentative Plan for a Planned Development, Planning and Road Department staff visited the project site and are concerned about the sight visibility from the

proposed access to both the north and south of Lower Bridge Way. There are slight vertical curves and vegetation in both directions and it appears the access may not meet sight distance requirements.

The staff report suggests that the applicant may want to consider whether to replace the proposed direct access to Lower Bridge Way with a direct access onto Teater Avenue at the south edge of the property, thus funneling site traffic to the existing Lower Bridge Way-Teater Avenue intersection. Teater is also the entrance to the Lower Bridge Estates subdivision. While 27 lots in Lower Bridge Estates are currently built on, more than 40 are vacant and could be built on in the future resulting in traffic from nearly 70 lots utilizing Teater.

Teater also has line-of-sight visibility issues, and may not have any benefit over the proposed project's connection with Lower Bridge Way. Adding traffic from 19 additional homes to Teater will only make a bad visibility situation even worse.

In addition, the severe slope on the lower part of Teater levels out just about where the project access would connect to it. During winter months, snow and ice often make this slope extremely hazardous unless County road crews deposit cinders on it. While they are usually on top of this situation, there have been times when they are unable to put cinders on Teater for a day or so following a snowstorm. On one of these occasions, I lost control of my vehicle while traveling down Teater and slide quit a ways down before I ran off the road just about where the project connection would be placed. In such a situation, any vehicles entering Teater from the project would be at extreme risk.

The contribution of project traffic to Lower Bridge Way traffic should be calculated, as traffic at the Lower Bridge Way-Highway 97 and Lower Bridge Way-NW 43<sup>rd</sup> Street (entrance to Crooked River Ranch) has increased dramatically over the last few years. The existing stop signs at these two intersections may be inadequate, resulting in the need to examine whether traffic signals are warranted. If this is the case, the applicant needs to assume their fair share of the costs.

e) **Danger of ground collapse:** Diatomaceous earth can collapse following periods of heavy rainfall. This being the case, I am concerned that if the proposed subdivision were approved, that people and property could be exposed to the potential of ground collapse.

## **2. The Proposed Subdivision is Incompatible With Existing Surrounding Uses**

a) **Concentrated residential development out of character with area.** Much of the land in the vicinity of the subject property is zoned for Exclusive Farm Use (EFU) with 80-acre minimum parcel sizes, and consists of property actively in agricultural use. Two large-lot residential subdivisions exist adjacent to and across the river from the proposed project. These include Lower Bridge Estates, located southeast of the project, and Eagle Rock Estates. Parcel sizes in Lower Bridge Estates average 10 acres, while parcel sizes in Eagle Rock Estates are at least 20 acres.

The concentrated PUD development of 19 residential lots each on 2 acre lots is completely out of character with the surrounding agricultural and rural residential land uses. Houses will be built much close together, and the established character of existing residential development, individual homes on generously sized lots with plenty of open space between them, will be substantially and negatively impacted. This could also negatively impact the property value of existing properties.

The proposed residential density is inconsistent with rural densities, and is closer to that of a suburban development. There is no apparent need for such a development. As previously noted, there are currently some 40 large-lot vacant residential parcels located within the adjacent Lower Bridge Estates subdivision. The applicant has failed to prove the need for an additional 19 lots in this area. The desire to make profits from land use changes is not a need.

**b) Project will expose existing properties to significant new light pollution and glare.** A number of properties, including mine own, overlook the project site. Existing light sources are currently minimal and are diffuse over a wide area. Clustering 19 residences together on 2 acre lots will consolidates new sources of light pollution, creating new sources of light pollution for existing residents. Directing new lighting downward per existing County lighting requirements will not eliminate this impact.

**c) Project is incompatible with the Borden Beck Wildlife Preserve.** The concentrated residential uses are proposed to be located directly across the river from the Borden Beck Wildlife Preserve. Redmond Area Park and Recreation District (RAPRD) owns the Preserve, a 26 acre wildlife preserve off of Lower Bridge Road. The Preserve is sensitive nesting habitat for a variety of bird species, and is also is a migratory path for other animals as well.

In the Staff report, RAPRD had concerns regarding the preservation of wildlife habitats and decreased user experience of those who use the wildlife preserve for recreation because of the impact on the view shed.

Most of the 19 lots include rimrock habitat. Residential development at the edge of rims alters vegetation and disturbs nesting birds. Development of these lots could result in the loss of habitats used by a variety of native mammals, birds and reptiles. Unless the County implements stringent setback standards to protect these sensitive species, many may be adversely impacted.

Some of the proposed lots do not have rimrock, which the County defines as any ledge, outcropping or top or overlying stratum of rock which forms a face in excess of 45 degrees, and which creates or is within the canyon of the Deschutes River. The County's rimrock setbacks would not apply in these cases, resulting in the possibility that structures or residential landscaping could be placed in sensitive habitat areas.

### **3. The Proposed Subdivision is Incompatible with Both State "State Scenic Waterway" and Federal "Wild and Scenic" Designations that Currently Apply to this Stretch of River.**

The Deschutes River in the area proposed for development is designated by the State as a "State Scenic Waterway". Its subclassification is "Scenic River Area", the most restrictive of classifications under the Oregon Scenic Waterways program. A scenic waterway includes the river and its shoreline, and all land banks and tributaries within one quarter mile of the river. The major goal of the program is to protect the natural and scenic diversity of waterways by encouraging new development to blend in with the natural environment.

The primary condition for new structures and developments is that they be completely screened from view from the river. The development of 19 homes adjacent to the river would be incompatible with the State's wild and scenic river goals if structures are not screened from the river view by trees, and has the potential to cause the State to downgrade the river's existing designation

to a lower classification. It is hard to believe that trees can be successfully grown on the bare, soilless DE that currently constitutes the rim over the river along the proposed project.

In addition, this portion of the river is also classified federally as a "Wild and Scenic River". National Wild and Scenic Rivers are federally protected areas designated by Congress or by the Secretary of the Interior under the 1968 Wild and Scenic Rivers Act (Act). The National Park Service (NPS) is responsible for managing rivers throughout the United States. The Act requires the NPS to protect and enhance a designated river's free-flowing condition, water quality, and outstandingly remarkable values.

I did not see any discussion in the staff report regarding the potential impacts of the development on these federal and state river designations. The federal and state agencies responsible for these designations should be notified of the proposed project, and their comments taken into account.

### **County Staff and Existing Residents Living Near the Mine Properties Both Share Significant Concerns**

In the staff report to the Hearing Officer for Project File Numbers 247-15-000194-CU/195-TP, Conditional Use Permit and Tentative Plan for a Planned Development, staff concerns over potential project impacts appear to coincide with those of area residents. I would like to summarize what I think are the most significant issues and concerns raised by the staff report.

The staff report states that residential use of this property would be unsuitable if the site presented significant hazards from the former mining and/or industrial use of the property. Staff believes these hazards could include surface contamination, sub-surface contamination, groundwater contamination, and uncontrolled dust from surfaces with limited vegetation or surfaces disturbed by future actions. Staff believes that the applicant must demonstrate, prior to any approval, that the project site is suitable for residential development. Specific staff concerns relate to:

**Surface Contamination:** Staff is concerned that surface contamination may be detected in the future, and note that surface contamination of the site could include presently exposed contaminated surfaces, and recommends the Hearings Officer request additional information to determine that the site has been adequately investigated for surface contamination. Staff also expressed concern that surface contamination may be detected in the future and believe the site is not suitable unless this risk can be completely discounted, or a plan with clear lines of responsibility and funding source to deal with any future detection of contamination is required.

Staff noted that there needs to be a plan in place prior to project approval which addresses how foreseeable future hazards will be resolved. This being the case, their recommendation is for the Hearings Officer to require that a funded, binding plan for foreseeable future hazards be in place prior to any approval of this application. A finding that the site is suitable for residential use is not supported where plans for foreseeable hazards are not in place. The key elements of that plan should be included as conditions of any approval of this application. The staff report lists the information that should be included in these conditions.

**Subsurface Contamination:** Staff is concerned that sub-surface contamination may be detected in the future, and note that potential hazards could come from exposure to contaminated soils, exposure of solid waste during residential development, or migration of contamination to

groundwater. Staff recommends the Hearings Officer request additional information to determine that the site has been adequately investigated for sub-surface contamination.

Staff believes the site is not suitable unless this risk can be completely discounted, or if a plan with clear lines of responsibility and funding source is required to deal with any future detection of contamination. They recommend that the Hearings Officer require that a funded, binding plan for foreseeable future hazards be required prior to any approval of this application.

**Groundwater Contamination:** Staff is concerned that groundwater contamination may be detected in the future. They note that groundwater contamination of the site could include both presently contaminated groundwater reaching residential wells, or the migration of contaminated soil to groundwater. Contamination sources may be on the subject property, or the larger mine site to the west. New wells can change the flow rate and direction of flow of groundwater.

Staff believes the site is not suitable unless this risk can be completely discounted, or a plan with clear lines of responsibility and funding source is required to deal with any future detection of contamination. They recommend that the Hearings Officer request additional information to determine whether the site has been adequately investigated for groundwater contamination. Staff recommends the Hearings Officer require that a funded, binding plan for foreseeable future hazards be in place prior to any approval of this application.

**Diatomite Dust Dispersal:** Dust, regardless of contamination, can represent a significant respiratory hazard. Staff notes that the subject property and adjacent larger mining site to the west (Tax Lots 1501 and the SM zoned portions of 1502) has and continues to be a significant generator of dust. They also note that the diatomaceous earth prevalent on the subject property and adjacent SM zoned lands to the west has significant potential for the generation of dust, and that dust from processed diatomaceous earth, which may be present on the site, is of particular concern.

The Oregon Department of Human Services, Environmental Health Assessment Program (EHAP) has also found that 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.

The Oregon Department of Environmental Quality (DEQ) stated that the site has currently only been evaluated with respect to environmental safety for its current use as a mine and industrial property. A change from industrial to residential use would require a re-evaluation of the site for residential use. The re-evaluation of the site, applicable exposure routes, and pathways may result in some scenarios requiring deed restrictions, active cleanup and/or monitoring. Following a cleanup of any identified environmental contamination, DEQ could issue a "No Further Action Letter" (NFA) for residential use.

Staff indicated that the site is not suitable for residential development unless the respiratory hazard from dust can be completely discounted, or a plan with clear lines of responsibility and a funding source is required to control any future generation of significant dust. Staff recommends that the Hearings Officer request additional information to determine whether dust can be adequately controlled at the site during construction and after. Staff recommends the Hearings Officer require that a funded, binding plan for this foreseeable future hazard be in place prior to any approval of this application.

Staff is also concerned about dust from future mining use of the adjacent mining site to the west. Dust from this site would be delivered to the proposed PUD by the prevailing winds. This area is still zoned surface mining and staff assumed the site can and will be mined until such use is prohibited on the property. Staff recommends that the Hearings Officer require that a funded, binding plan for this foreseeable future hazard be in place prior to any approval of this application. Staff believes the Hearings Officer would need to be able to answer a number of questions prior to any finding that the new residential use would be suitable. These questions are listed in the staff report.

### **Wildlife Impacts**

The staff report also discusses potentially significant impacts on wildlife.

As noted earlier, the Redmond Area Park and Recreation District (RAPRD) has concerns regarding the preservation of wildlife habitats and decreased user experience of those who use the Borden Beck Wildlife Preserve for recreation because of the impact on the view shed.

In addition, the Oregon Department of Fish and Wildlife (ODFW) is concerned with potential impacts to the rimrock and cliffs adjacent to the Deschutes River. All nineteen lots include rimrock habitat. According to their 2006 Oregon Conservation Strategy, residential development at the edge of rims alters vegetation and disturbs nesting birds.

Also, per ODFW's Fish and Wildlife Habitat Mitigation policy, ODFW is concerned that these development actions could result in the loss of habitats used by a variety of native mammals, birds and reptiles. In particular, rimrock and cliffs provide nesting sites for raptors, especially golden eagles, and roosting sites for bats. ODFW urges the County to implement stringent setback standards to protect these sensitive species.

County planning Staff also notes that changes in the natural grade of land, or the alteration, removal or destruction of natural vegetation in the riparian habitat of the Deschutes River would likely result in erosion and increased sediment delivery to the Deschutes River.

Staff recommends as a condition of any approval that changes in the natural grade of land be prohibited, and that the alteration, removal or destruction of natural vegetation, or placement of new structures below the existing terrace level be prohibited. Staff noted that the "terrace level" varies somewhat across the site. Staff recommends the Hearings Officer request an exhibit identifying the break in topography between the generally level terrace and the steep slope down to the Deschutes River.

Staff also noted that some of the proposed lots have no rimrock: i.e. no rock face in excess of 45 degrees. Rimrock setback restrictions do not apply when there is no rimrock. Staff recommends the Hearings Officer request an exhibit showing all rock faces in excess of 45 degrees on the subject property to understand the distribution of these rock outcroppings.

The properties are within the Landscape Management Combining Zone (LM), but the applicant has not yet applied for LM site plan approval for future dwellings in this application. Staff need to review the project against LM criteria to determine whether it is feasible to obtain LM site plan approval for these future dwellings. Staff recommends that the Hearings Officer require LM site

plan approval for future dwellings or additions to dwellings as a condition of any approval of this application.

Staff also expressed concerns that structures that are exempt from Landscape Management review, such as structures which do not require building permits, may be placed immediately adjacent to rimrock or even projecting partially over rimrock. Staff recommends that the Hearings Officer find that the provisions of the LM apply to those structures that are currently exempt from Landscape Management review, or if this finding is not made, to prohibit such development.

Staff is also concerned that development of some of the proposed lots will only be possible under a rimrock setback exception. Staff believes that the combination of the canyon topography and rimrock setbacks may impose greater setbacks on any residential development and sewage disposal systems, and that new lots should not be created by a subdivision that will require a rimrock exception to develop when alternative layouts of the subdivision are possible.

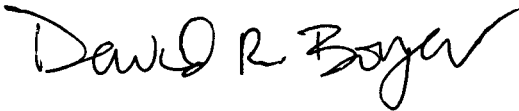
## PROJECT RECOMMENDATIONS

1. **Deny the proposed plan, as the property is not suitable for concentrated residential use.**
2. **If not denied, then further action to move forward with the project should be deferred until such time that the applicant can show compliance with all zoning ordinance and development criteria, as well as prove that all significant adverse impacts can and will be fully mitigated.**
3. **Adopt all conditions of approval and impact mitigation measures recommended by staff in the staff report.** The one exception would be the consideration of using Teater Avenue as the project's connection with Lower Bridge Way, for the reasons previously discussed.  
*To the Hearing Officer for Project 247-15-000194-CU/195-TP*
4. **Require deep core drilling for water and soil samples as part of any required testing.** All five tax lots comprising the former mine area, not just the project site, need to be tested. The pollution at the mine site has gone on for decades. Toxic chemicals may be working their way down the soil substrate, or may have already impacted the deep groundwater aquifer resource that existing and future residents depend on for their drinking water. We need to know.
5. **Require the applicant to replace topsoil and fully revegetate all former mined areas.** The mine has and will continue to negatively impact adjacent residents and properties unless major steps are taken to ensure that potentially toxic DE dust storms are eliminated.
6. **Future mining on the mine site to the west should be prohibited.** As the project is directly downwind of the mine (as is much of the existing subdivision areas), future mining activities would likely seriously impact both the proposed project and current and future residents of Lower Bridge Estates and Eagle Rock Estates. The project proponents have used, as a rationale for the project, the argument that further mining is not economical. Let's take them up on this.

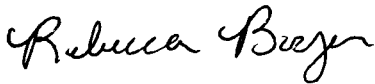


7. **The applicant needs to recalculate the configuration of the 19 proposed lots, as it appears that land within floodplain areas has been included.** Only developable land should be included in calculating the location and dimensions of the lots.
8. **The applicant should be required to show an apparent need for 19 additional lots in an area that currently has a number of vacant residential lots.** As previously noted, there are currently some 40 large-lot vacant residential parcels located within the adjacent Lower Bridge Estates subdivision, so there is no apparent need for the project. The desire to make profits from land use changes is not a need.
9. **Require the applicant to fund an independent study that examines the impact of the project on the Middle Deschutes River's Federal Wild and Scenic and State Scenic Waterway designations.**
10. **If the project is approved, require full disclosure of the past history and use of formerly mined areas on all five parcels comprising the former mine area.** People who would consider building on the proposed lots need to be aware of the past toxic pollution on the mine sites. Such disclosure should be prominent on any future real estate documents.

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