

Before the Planning Commission

Planning Department File No. 2022-01-014

**CONDITIONAL USE APPLICATION
FOR
ACTION 1-5 AS DESCRIBED BELOW**

Planning Commission Meeting Date: February 24, 2022

1. **APPLICANT:** Jay Beebe
1392 Ridgeview Road
Adrian, OR 97901
2. **PROPOSED ACTION:** Conditional Use approval for one non-farm dwelling and a non-farm partition and the other three actions listed below.
3. **PROPERTY IDENTIFICATION:** Tax Lot 3400, T22S, R46E, Sec.26; Assessors Map 22S46E; Malheur County Reference #10942.
4. **PROPERTY LOCATION AND DIRECTIONS:** West of the intersection of Succor Creek Hwy and Highway 201, in Adrian, OR.
5. **ZONING:** Exclusive Farm Use (C-A1).
6. **PARCEL SIZE:** The parcel is 351.79 acres.
7. **PARCEL USE:** Vacant lot; uneven terrain with slopes and a canal going through the middle of the parcel.
8. **SURROUNDING USE:** All adjoining properties are in Exclusive Farm Use (C-A1).
9. **ACCESS:** US Highway 201.
10. **SANITATION REQUIREMENTS:** A DEQ approved sanitation system would be required.
11. **FIRE PROTECTION:** The parcel is within the Adrian Rural Fire Protection District. (Letter Attached).
12. **NATURAL HAZARDS:** None.
13. **WATER RIGHTS:** No water rights on property.
14. **SOIL TYPE:** There is a small portion, on the west side of the proposed partition, with

soils that are class I and III if irrigated; if non-irrigated - the entire proposed partition is covered with soils in class VI and VII.

- 15. ZONING HISTORY:** In 2010, a property line adjustment was performed, granting 14.61 acres to tax lot 100 (ref#10944) and 5.00 acres to tax lot 400 (ref#10963). Additionally, in 2019 this property was approved for a nonfarm partition and nonfarm dwelling. The approval of this application would void that approval.

I. Action 1: Verification of discrete units of land as described in current deeds pursuant to ORS 92.017

FINDING: Oregon Revised Statute 92.017 states, “A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law.

As documented in the record of title, this property was historically made up of 3 discrete units of land (see Exhibit A): A parcel equaling 160.12 acres, a parcel equally 39.91 acres, and a parcel equaling 140.72 acres. In 1972, prior to planning and zoning requirements, 2.8 acres was partitioned and sold.

Kishpaugh v. Clackamas: the Land Use Board of Appeals found, the text of ORS 92.017, and its legislative history, make it clear that the functions were: (1) to prevent local governments from refusing to recognize lawful divisions of land such that lots and parcels could not be sold to third parties, and (2) to establish that the property lines established by such land divisions remain inviolate, absent the employment of a specific process to eliminate such property lines.

There was not a specific process in place to combine the 3 discrete units of land described in deed. Therefore, the three units of land shall remain discrete parcels.

II. Action II: Consideration of a property line adjustment between the above referenced property and tax lot 3300, Section 26, T.22S, R.46E, W.M.; Malheur County Reference #10943

FINDING: The purpose of this proposal is to change the boundary between the subject properties to align along the existing road known as the old Succor Creek Highway or Cutoff to Succor Creek Road.

Prior to the property line adjustment, Tax Lot 3400 consists of approximately 140.72 acres and Tax Lot 3300 consists of 153.53 acres.

Upon completion of the property line adjustment, Tax lot 3400 will consist of approximately 129.27 acres and Tax Lot 3300 will consist of approximately 164.98 acres.

Both properties are below the minimum parcel size prior to the adjustment, and one is as large or larger than the minimum parcel size after the adjustment, pursuant to ORS 92.192.

III. Action 3: Consideration of a property line adjustment between the above referenced property and tax lot 3500, Section 26, T.22S, R.46E, W.M.; Malheur County Ref #10943.

FINDING: The purpose of this proposal is to change the boundary between the subject properties to align with the occupation line usage as they now exist.

Prior to the property line adjustment, Tax Lot 3400 consists of approximately 129.27 acres and Tax Lot 3500 consists of 2.91 acres.

Upon completion of the property line adjustment, Tax lot 3400 will consist of approximately 123.86 acres and Tax Lot 3500 will consist of approximately 8.32 acres.

Both properties are below the minimum parcel size prior to the adjustment, and both are smaller than the minimum parcel size after the adjustment, pursuant to ORS 92.192.

IV. Action 4: Consideration of a land use determination to verify the creation of two separate parcels when Hwy 20/26 was created on tax lot 3300, Section 26, T.22S, R.46E, W.M.; Malheur County Ref #10970.

FINDING: The purpose of this application is to show that Tax Lot 3300 was split when Hwy 201 was deeded in fee title to the State of Oregon as required in the chain of title.

Lovinger v. Lane County (2006): Affirms that the creation of a road by a mere easement or dedication might not partition a parcel of land, the transfer of fee title in property does; and stipulates that ORS 92.010(9)(d) was not intended to apply retroactively.

In 1947 the transfer of fee title for US Highway 201, created not just two, but three, separate parcels of land (the property to the east of Hwy 201, Hwy 201 itself, and the property to the west of Hwy 201). Therefore, the owners and applicants are entitled to recognize the two distinct parcels on what is now recognized as a single parcel.

V. Action 5: GENERAL CONDITIONAL USE CRITERIA

MCC 6-6-7 - GENERAL CRITERIA TO EVALUATE SUITABILITY: In considering the suitability of proposed conditional uses, the Planning Commission shall base its decision upon the following criteria:

A. Comprehensive Plan goals and policies, as applicable.

B. Specific plan recommendations

Finding: MCC 6-6-8-1 regulates the conditional use process for a non-farm dwelling. MCC 6-6-8-2 regulates the non-resource partition in the exclusive range use zone.

C. Existing development and viewpoints of property owners in the surrounding area.

Finding: Letter notice was sent to adjoining landowners and published in the Argus Observer on February 4, 2022. No comments were received.

D. Availability of services and utilities.

Finding: The parcel is located within Adrian Rural Fire Protection District.

E. The effect of the proposed use on the stability of the community's social and economic characteristics.

Finding: The proposed dwelling will have no effect on the farming/ranching practices that would interfere with the stability of the community's social and economic characteristics, due to the parcel being located on a bare parcel with primarily class 7 soils, unfit for farming.

F. It does not interfere with traditional fish and wildlife use of habitats determined critical or sensitive in the Fish and Wildlife Habitat Protection Plan for Malheur County.

Finding: The proposed dwelling is outside the sage grouse habitat. There are no water sources on the parcel to sustain a fish habitat. Because of those findings, the proposed structure would not interfere with traditional fish and wildlife.

G. General Criteria

1. Increasing setbacks of structures to reduce possibilities of overshadowing adjoining property, noise, odor or night lighting nuisances.

Finding: There will be no increase of activities or operation beyond the minimal use of a family dwelling and parcel. Existing dwellings are not visible from proposed home sites.

2. Landscaping improvements for the visual benefits of the subject site and for

the improved appearance of the neighborhood and County.

Finding: The proposed dwelling would benefit the appearance of the neighborhood and County. There will be typical small residential landscaping not to exceed 0.5 acres surrounding the home.

3. Location and size of driveway access points and right-of-way widening and improvement for present and future traffic circulation and safety.

Finding: As instructed by County Roadmaster, the proposed parcel has adequate visibility from both directions on Succor Creek Cut Off Rd and is deemed as a safe approach. The County will require a culvert to put in the approach and has no other objections to the request.

4. Visual screening of outdoor waste and storage areas.

Finding: The proposed development is for a dwelling. Outdoor waste storage will be minimal.

5. Control and focusing of outdoor lighting to avoid glare being directed beyond property limits.

Finding: Control of outdoor lighting will not be necessary.

6. Special criteria listed below, as applicable:

H. Allowance of Certain Uses: A use allowed under Section 6-3A-3 of this Title shall be approved only where it is found that the use will not:

1. Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
2. Significantly increase cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use. (Ord. 86, 12-7-1993)

Finding: The proposed non-resource dwelling will not force significant change in accepted farm or forest practices on surrounding lands devoted to farm use, nor significantly increase the cost of accepted farm practices. The parcel is surrounded by properties zoned exclusive farm use and BLM land to the south-west. However, not all properties are currently farmed, and will not be impacted by the placement of the dwelling on the proposed parcel. The proposed dwelling will have a private driveway, designated to only access the proposed dwelling, so there will be not impact to the Succor Creek Rd traffic.

SPECIFIC CONDITIONAL USE CRITERIA

MCC 6-6-8-1 - NONRESOURCE DWELLINGS IN EFU, ERU OR EFFU ZONES:

A. Conditions For Allowance: The use:

1. Is compatible with farm uses and is consistent with ORS 215.243; and

Finding: Due to the location of the proposed dwelling site, being surrounded by Succor Creek Rd, Succor Creek Cut Off Rd and US Hwy 201, the single family dwelling is not anticipated to contribute to a traffic increase or cause any neighboring farming practices to be interrupted or restricted. Therefore, the proposed use is compatible with farm use.

2. Does not interfere seriously with accepted farming practices on adjacent lands; and

Finding: The parcel is buffered from area farm land by Succor Creek Rd. Therefore, a single family dwelling will not interfere with adjacent farm practices.

3. Does not materially alter the stability of the overall land use pattern of the area; and

Added by OAR 660-033-130(4)(a)(D) - June 1, 1998: In determining whether a proposed non-farm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of possible new non-farm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall;

- i. Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other adjacent agricultural areas. Findings shall describe the study area, its boundaries and the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or non-resource uses shall not be included in the study area.
- ii. Identify within the study area the broad types of farm uses (irrigated or non-irrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, non-farm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of non-farm / lot-of-record dwellings that could be approved under subsections (3)(a), (3)(d) and section (4) of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993, and the parcels larger than the minimum lot size that may be divided to

create new parcels for non-farm dwellings under ORS 215.263(4). The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible non-farm dwellings under this subparagraph:

- iii. Determine whether approval of the proposed non-farm / lot-of-record dwellings together with existing non-farm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential non-farm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area.

- 4. Is situated on generally unsuitable land for the production of farm crops or livestock considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of tract.

- B. As a condition of approval, the owner is required to allow the following statement to be entered into the chain of title for the non-farm parcel: (the use of a straw-man may be necessary):

“The property herein described is situated in or near a resource (farm or ranch) zone, where the intent is to encourage agricultural use and minimize conflicts with non-resource uses. Non-resource residents may be subjected to common, customary and accepted farm and ranch practices that are conducted in accordance with federal and state laws but ordinarily and necessarily produce noise, dust, smoke and other impacts. The grantees, including their heirs, assigns and lessees, by the recording of this statement, and in return for allowing a non-resource dwelling on this property, hereby accept the potential impacts of accepted farm and ranch practices as normal and necessary and part of the risk of establishing a dwelling in this area, and grantee acknowledges the need to avoid activities that conflict with nearby resource uses.” Evidence shall be provided showing the lot or parcel upon which the dwelling is proposed to be located has been disqualified for valuation at true cash value for farm use under ORS 308.113.

Finding: Due to the adverse conditions of the soil and being hilly with some fairly steep slopes, the subject parcel cannot be reasonably put to farm use in conjunction with other land. The parcel is away from any water delivery system for the farm ground. From these facts, it is concluded that the proposed dwelling is generally unsuitable land for the production of farm crops and livestock.

MCC 6-6-8-2: NONRESOURCE PARTITION IN AN EFU, ERU OR EFFU ZONE:

- A. Nonfarm Use: The creation of all new parcels intended for nonfarm use shall meet the following requirements:

1. Is the proposed use compatible with agriculture uses and is it consistent with ORS 215.243. How? Address each issue;

Finding: This site is hilly and has no water rights. There is a small portion with potential soils in class I and III, if irrigated and class VII otherwise.

2. Is the proposed use located where it may interfere seriously with accepted farming practices on adjacent lands? What conditions exist to avoid this problem?

Finding: There are some irrigated row crops on the neighboring properties, that the dwelling will have no effect on.

3. Will the proposed use materially alter the stability of the overall land use pattern of the area?

Finding: The site is on a hilltop, currently undeveloped.

4. Is the proposed use situated on generally unsuitable land for the production of agricultural crops or livestock considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of tract? If so, the following factors must be met:

- a. If located on range or agricultural lands, are the proposed non-resource parcels only as large as necessary to accommodate the use and provide any buffer area needed to ensure compatibility with adjacent agricultural uses? The intent is that Class I through IV soils be included within nonagricultural parcels only when the limited extent or physical configuration of such soils make it impractical to keep them consolidated in an agricultural parcel.
- b. Are the proposed parcels located on land with predominantly low productivity V through VII soils not suited for agricultural use and are large enough to accommodate the use and provide any buffer area needed to ensure compatibility with adjacent agricultural uses?

Finding: The majority of the proposed parcel is on class VI land, determined as average, un-cleared range, sparse ground cover and poor grazing. It is considered prime farmland if irrigated.

5. A new nonfarm parcel shall not be approved for a use that will have a significant adverse impact on the quality of farm or range land, watersheds, fish and wildlife habitat, soil and slope stability, air and water quality, or outdoor recreation areas. In what ways do the proposed parcels avoid conflict with these items?

Finding: The entire parent parcel is on class VI and VII land, determined as average, un-cleared range, sparse ground cover and poor grazing.

6. Is an existing dwelling used as a residential home for up to six (6) persons who fit within the definition of persons listed in ORS 443.400(5) through (10)?

Finding: The proposed partition is for a single-family residence that fits the criteria listed in ORS 443.400(5) through (10).

7. Is an alternative dwelling used so that a historical dwelling may be preserved without occupation as provided by ORS 215.263(8)(b).

Finding: There are no historical dwellings that are located on the parent parcel.

OTHER FINDINGS OF FACT

Oregon Revised Statute 215.284(2)(c):

“The dwelling will be sited on a lot or parcel created before January 1, 1993”; and

Oregon Administrative Rule 660-033-0020(1)(4):

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

The applicant has submitted additional proposed findings of fact in the conditional use application.

CONDITIONS OF APPROVAL

1. The following statement must be entered into the chain of title for the new non-farm dwelling parcel: (Parent parcel is tax lot #3400, Section 26, T22S, R46E, Assessor’s map 22S46E. Malheur County Reference #10942)

“The property herein described is situated in or near a resource (farm or ranch) zone, where the intent is to encourage agricultural use and minimize conflicts with non-resource uses. Non-resource residents may be subjected to common, customary and accepted farm and ranch practices that are conducted in accordance with federal and state laws but ordinarily and necessarily produce noise, dust, smoke and other impacts. The grantees, including their heirs, assigns and lessees, by the recording of this statement, and in return for allowing a non-resource dwelling on this property, hereby accept the potential impacts of accepted farm and ranch practices as normal and necessary and part of the risk of establishing a dwelling in this area, and grantee acknowledges the need to avoid activities that conflict with nearby resource uses.”

2. Evidence shall be provided showing the parcel upon which the dwelling is proposed to be located has been disqualified for valuation at true cash value for farm use and the back taxes have been paid for the previous ten (10) years.

3. The applicant must comply with the culvert requirements imposed by the Malheur County Road Department.
4. Adequate firebreaks shall be constructed and maintained to minimize danger from potential wildfire.
5. This approval for Action 5 is valid for four years from the date of this order. Substantial action must be taken within this time period or the approval will lapse.
6. Action 1 does not require new deeds as they are already described separately.
7. Action 2 and 3 must meet all requirements of the Planning Director and County Surveyor to finish the property line adjustments.
8. Action 4, the applicant must apply for an administrative segregation from the Malheur County Assessor's Office. A survey is not required, but two new deeds must be filed.
9. Applicant must receive a letter from the Malheur County Road Department and follow any requirements for the additional parcel not included in the previous approval (2019-06-016).
10. This approval voids CUP 2021-06-016.

CONCLUSION

Based upon the foregoing finding of fact, the Malheur County Planning Commission makes the following conclusion and decision:

Substantial evidence exists in the record to support the conclusion that the application meets the general and specific criteria established in the Malheur County Code and Oregon Revised Statutes for the five (5) actions, in an exclusive farm use zone.

ORDER

This application for five (5) actions referenced above is approved.

APPEALS

The appellate body for appeals from the final decision of the Planning Commission is the County Court. To file an appeal an appellant must file a completed notice of appeal on a form prescribed by the Planning Department with a \$200.00 appeal fee with the Planning Department not later than 5:00pm on the tenth day following the mailing of written notice of the decision. Notice of appeals may not be received by fax or email. The notice must include a statement raising any issue relied upon for the appeal with sufficient specificity to afford the County Court an adequate opportunity to respond to and resolve each issue. All appeals from the Planning Commission's final decision shall be based on the record of the hearing made before the Commission.

Therefore, no additional information or testimony not included in the record of the hearing

before the Planning Commission may be brought before the appellate body. The appellant must pay for the transcription of the hearing appealed from and submit the transcript to the Planning Department within ten (10) days after the date of notice of appeal is filed or ten days after the hearing tape is mailed or given to the appellant, whichever is later.



Planning Commission Chair
Kathy Clarich



Date