COMMUNITY DEVELOPMENT

HEARINGS OFFICER HEARING - LAND USE: PA/ZC LAST RANCH, LLC

6:00 PM, TUESDAY, MARCH 21, 2023
Barnes Sawyer Rooms - Deschutes Services Bldg - 1300 NW Wall St – Bend
(541) 388-6575|www.deschutes.org

AGENDA

MEETING FORMAT

This meeting will be conducted electronically, by phone, in person, and using Zoom.

Members of the public may view the meeting in real time via the Public Meeting Portal at www.deschutes.org/meetings.

Members of the public may listen, view, and/or participate in this meeting using Zoom. Using Zoom is free of charge. To login to the electronic meeting online using your computer, copy this link:

https://us02web.zoom.us/j/86861203215

Using this option may require you to download the Zoom app to your device.

Members of the public can access the meeting via telephone, dial: 1-669-444-9171. When prompted, enter the following Webinar ID: 868-6120-3215. Written comments can also be provided for the public comment section to caroline.house@deschutes.org prior to the Hearings Officer closing the record.

PUBLIC HEARING

1. **FILE NUMBERS**: 247-22-000573-ZC / 247-22-000574-PA

   SUBJECT PROPERTIES:

   Map and Taxlot(s): 161226B000101 / 161226B000700 / 161226B000800

   Account(s): 180410 / 132961 / 132960

   Situs Address(es): No Situs Address / 64994 Deschutes Market Road, Bend, OR 97701 / 64975 Deschutes Pleasant Road, Bend, OR 97701

   APPLICANT: Mark Rubbert, Last Ranch, LLC

REQUEST: The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the properties from Agricultural (AG) to Rural Industrial (RI) and a corresponding Zone Change to rezone the properties from Exclusive Farm Use (EFU) to Rural Industrial (RI).

Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please call (541) 617-4747.

NOTICE OF PUBLIC HEARING

HEARING FORMAT

The Deschutes County Hearings Officer will conduct the public hearing described below by video and telephone. If participation by video and telephone is not possible, in-person testimony is available. Options for participating in the public hearing are detailed in the Public Hearing Participation section.

PROJECT DESCRIPTION

FILE NUMBERS: 247-22-000573-ZC / 247-22-000574-PA

SUBJECT PROPERTIES/ OWNER:
Mailing Name: LAST RANCH LLC
Map and Taxlot(s): 161226B000101 / 161226B000700 / 161226B000800
Account(s): 180410 / 132961 / 132960
Situs Address(es): No Situs Address / 64994 Deschutes Market Road, Bend, OR 97701 / 64975 Deschutes Pleasant Road, Bend, OR 97701

APPLICANT: Mark Rubbert, Last Ranch, LLC

REQUEST: The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the properties from Agricultural (AG) to Rural Industrial (RI) and a corresponding Zone Change to rezone the properties from Exclusive Farm Use (EFU) to Rural Industrial (RI).

LOCATION: Deschutes Services Building, Barnes & Sawyer Rooms, 1300 NW Wall Street, Bend, OR 97703 & Zoom

HEARING DATE: Tuesday, March 21, 2023

HEARING START: 6:00 pm

STAFF PLANNER: Caroline House, Senior Planner
Phone: 541-388-6667
Email: Caroline.House@deschutes.org

RECORD: Record items can be viewed and downloaded from: https://www.deschutes.org/cd/page/247-22-000573-zc-247-22-000574-pa-last-ranch-llc-comprehensive-plan-amendment-zone-change

Scan this code using a smartphone camera app and a direct link to the website listed above will load.

STANDARDS AND APPLICABLE CRITERIA

Deschutes County Code (DCC)
- Title 18, Deschutes County Zoning Ordinance:
  - Chapter 18.04, Title, Purpose, and Definitions
  - Chapter 18.16, Exclusive Farm Use Zones (EFU)
  - Chapter 18.84, Landscape Management Combining Zone (LM)
  - Chapter 18.100, Rural Industrial Zone
  - Chapter 18.120, Exceptions
  - Chapter 18.136, Amendments
- Title 22, Deschutes County Development Procedures Ordinance

Deschutes County Comprehensive Plan
- Chapter 2, Resource Management
- Chapter 3, Rural Growth Management
  - Appendix C, Transportation System Plan

Oregon Administrative Rules (OAR) - Chapter 660
- Division 12, Transportation Planning
- Division 15, Statewide Planning Goals
- Division 33, Agricultural Land

Oregon Revised Statutes (ORS)
- Chapter 215.010, Definitions
- Chapter 215.211, Agricultural Land, Detailed Soils Assessment

PUBLIC HEARING PARTICIPATION

- If you wish to provide testimony during the public hearing, please contact the staff planner by 4 pm on Monday, March 20, 2023. Testimony can be provided as described below.

- Members of the public may listen, view, and/or participate in this hearing using Zoom. Using Zoom is free of charge. To login to the electronic meeting online using your computer, copy this link: https://us02web.zoom.us/j/86861203215. Using this option may require you to download the Zoom app to your device.

- Members of the public can access the meeting via telephone, dial 1-669-444-9171. When prompted, enter the following Webinar ID: 868-6120-3215.

- Written comments can also be submitted to the record. Please see the Document Submission section below for details regarding written submittals.

- If participation during the hearing by video and telephone is not possible, the public can provide testimony in person at 6 pm in the Barnes and Sawyer Rooms of the Deschutes Services Center, 1300 NW Wall Street, Bend.

All documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost at the Deschutes County Community Development Department (CDD) at 117 NW Lafayette Avenue. Seven (7) days prior to the public hearing, a copy of the staff report will be available for inspection at no cost at CDD and on the websites listed above. Copies of all documents, evidence and the staff report can be purchased at CDD for (25) cents a page.

ALL INTERESTED PERSONS MAY APPEAR, BE HEARD, BE REPRESENTED BY COUNSEL, OR SEND WRITTEN SIGNED TESTIMONY. ANY PARTY TO THE APPLICATION IS ENTITLED TO A CONTINUANCE OF THE INITIAL EVIDENTIARY HEARING OR TO HAVE THE RECORD LEFT OPEN IN ACCORDANCE WITH SECTION 22.24.140 OF THE DESCHUTES COUNTY CODE.

Failure to raise an issue in person at a hearing or in writing precludes appeal by that person to the Land Use Board of Appeals (LUBA), and that failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to LUBA based on that issue.

Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please contact the staff planner identified above.

DOCUMENT SUBMISSION

Any person may submit written comments on a proposed land use action. Documents may be submitted to our office in person, U.S. mail, or email.

In Person

We accept all printed documents.

U.S. Mail

Deschutes County Community Development
Planning Division, Caroline House
P.O. Box 6005
Bend, OR 97708-6005

Email

Email submittals should be directed to Caroline.House@deschutes.org.

Limitations

- Deschutes County does not take responsibility for retrieving information from a website link or a personal cloud storage service. It is the submitter's responsibility to provide the specific information they wish to enter into the record. We will print the email which includes the link(s), however, we will not retrieve any information on behalf of the submitter.
- Deschutes County makes an effort to scan all submittals as soon as possible. Recognizing staff availability and workload, there is often a delay between the submittal of a document to the record, and when it is scanned and uploaded to Accela Citizen Access (ACA) and Deschutes County Property Information (DIAL).
- To ensure your submission is entered into the correct land use record, please specify the land use file number(s).
- For the open record period after a public hearing, electronic submittals are valid **if received by the County's server** by the deadline established for the land use action.
- IF YOU WISH TO BE NOTIFIED OF ANY DECISION RELATED TO THIS APPLICATION, YOU MUST PROVIDE A MAILING ADDRESS.

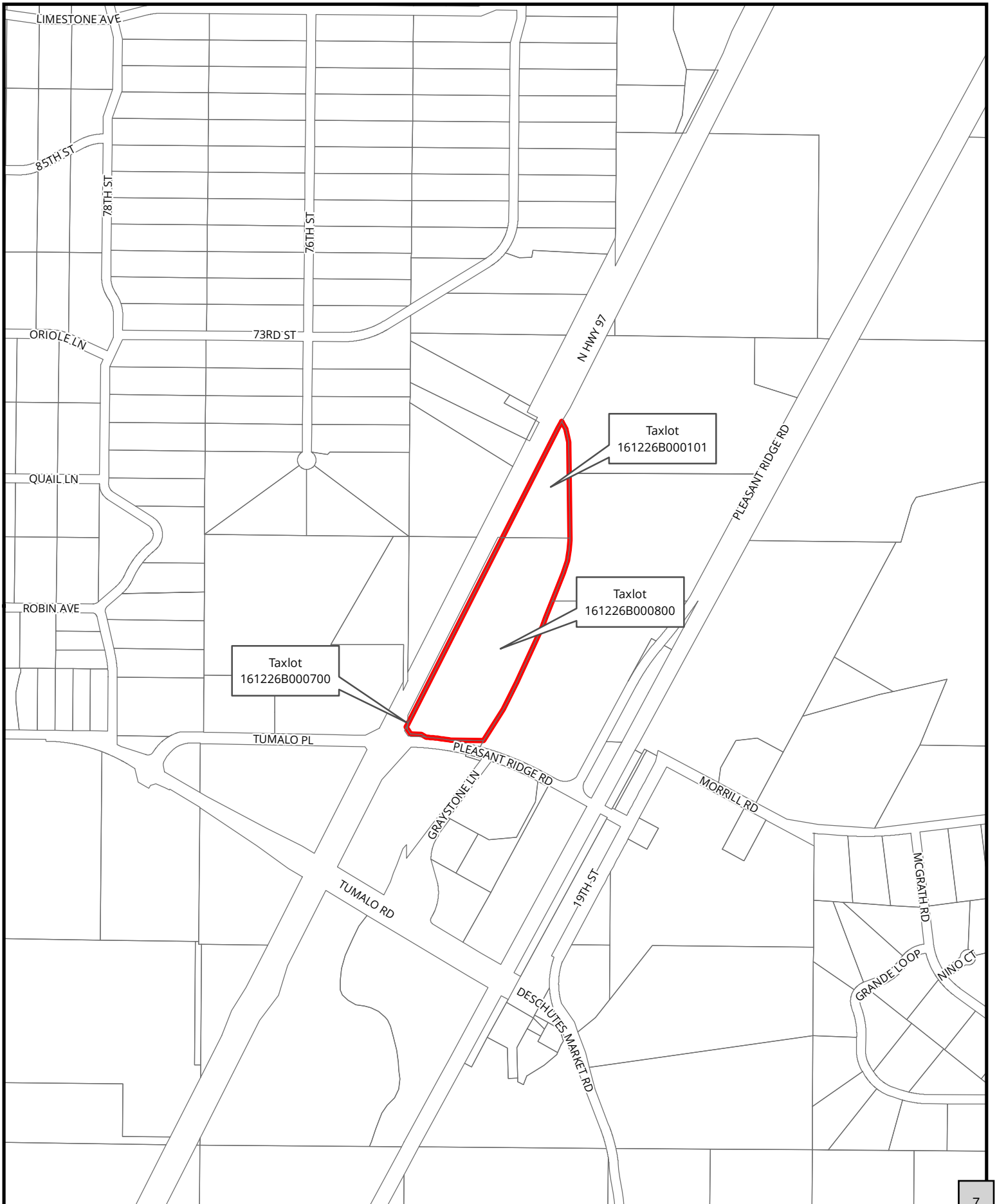
NOTICE TO MORTGAGEE, LIENHOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST PROMPTLY BE FORWARDED TO THE PURCHASER.

This Notice was mailed pursuant to Deschutes County Code Chapters 22.20 and 22.24.

247-22-000573-ZC / 247-22-000574-PA

Location Map

1" = 800'



owner	agent	inCareOf	address	cityStZip	type	cdd id
911			20355 POE SHOLES DR., STE. 300	Bend, OR 97701	NOPH	22-573-ZC / 22-274-PA
BEND FIRE DEPT.	JASON BOLEN		ELECTRONIC	Bend, OR 97702	NOPH	22-573-ZC / 22-274-PA
BEND / LA PINE SCHOOL DIST.			520 NW WALL ST.	Bend, OR 97701	NOPH	22-573-ZC / 22-274-PA
BEND METRO PARKS & REC.	Kelsey Schwartz		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
BNSF RAILWAY - ASSISTANT DIR., PUBLIC PROJECTS			740 CARNEGIE DRIVE	San Bernadino, CA 92408	NOPH	22-573-ZC / 22-274-PA
CASCADE NATURAL GAS CO.			64500 O.B. RILEY RD., SUITE 2	Bend, OR 97703	NOPH	22-573-ZC / 22-274-PA
CENTRAL ELECTRIC CO-OP			P.O. BOX 846	Redmond, OR 97756	NOPH	22-573-ZC / 22-274-PA
CENTURYLINK			135 SE 5TH ST.	Bend, OR 97702	NOPH	22-573-ZC / 22-274-PA
CENTRAL OREGON IRRIGATION DIST.	KELLY O'ROURKE / CRAIG HORRELL		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
DESCHUTES CO. ASSESSOR			ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
DESCHUTES CO. BUILDING SAFETY			ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
DESCHUTES CO. ENVIRONMENTAL SOILS DIV.			ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
DESCHUTES CO. ROAD DEPT.	CODY SMITH		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
DESCHUTES CO. SHERIFF	SHANE NELSON		63333 HWY 20 WEST	Bend, OR 97701	NOPH	22-573-ZC / 22-274-PA
DESCHUTES CO. SR. TRANS. PLANNER	PETER RUSSELL		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
DESCHUTES CO. SURVEYOR	KEVIN SAMUEL / JOHN MC COY		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
DEPT. ENV. QUALITY (DEQ)	LARRY BROWN / Scott Rochette		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
DEPT. OF LAND CONSERV. & DEVEL.			1011 SW EMKAY DR., SUITE 108	Bend, OR 97702	NOPH	22-573-ZC / 22-274-PA
DEPT. OF LAND CONSERV. & DEVEL.			635 CAPITOL ST. NE, #150	Salem, OR 97301-2540	NOPH	22-573-ZC / 22-274-PA
DEPT. OF STATE LANDS (DSL-OWNED PROPERTY)	Shawn Zumwalt		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
DEPUTY STATE FIRE MARSHAL	CALEB BARNES		1345 NW WALL ST., SUITE 202	Bend, OR 97701	NOPH	22-573-ZC / 22-274-PA
MIDSTATE ELECTRIC			P.O. BOX 127	La Pine, OR 97739	NOPH	22-573-ZC / 22-274-PA
OR DEPT. OF AG LAND USE PLANING COORD.	JIM JOHNSON		635 CAPITOL ST NE	SALEM, OR 97301	NOPH	22-573-ZC / 22-274-PA
OREGON DEPT. OF WATER RESOURCES	Kyle Gorman		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
OREGON DEPT OF FISH & WILDLIFE	ANDREW WALCH		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
OREGON PARKS & REC, REG. 4	TINSLEY Bridget		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
PACIFIC POWER & LIGHT			328 N.E. WEBSTER ST.	BEND, OR 97701	NOPH	22-573-ZC / 22-274-PA
PROPERTY ADDRESS COORDINATOR			ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
REDMOND FIRE & RESCUE	Tom Mooney / Wade Gibson		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
WATERMASTER - DISTRICT 11	Sam VanLingham		ELECTRONIC		NOPH	22-573-ZC / 22-274-PA
Mark Rubbert, Last Ranch, LLC			915 SW Rimrock Way #201-166	Redmond, OR 97756	NOPH	22-573-ZC / 22-274-PA
Patricia A. Kliewer, MPA			60465 Sunridge Drive	Bend, OR 97702	NOPH	22-573-ZC / 22-274-PA
Gary Kitzrom	G-Sea Growing Soils Env. Associates		PO Box 225	Winchester, OR 97495	NOPH	22-573-ZC / 22-274-PA
Central Oregon LandWatch	Carol Macbeth		2843 NW Lolo Drive	Bend, OR 97703	NOPH	22-573-ZC / 22-274-PA
Harry & Bev Fagen			53 NW Tumalo Ave	Bend, OR 97703	NOPH	22-573-ZC / 22-274-PA
WILLAMETTE GRAYSTONE INC		ATTN TAX DEPARTMENT	5 CONCOURSE PKY #1900	ATLANTA, GA 30328	NOPH	22-573-ZC / 22-274-PA
ACETI,ANTHONY J			21235 TUMALO PL	BEND, OR 97703	NOPH	22-573-ZC / 22-274-PA
DESCHUTES COUNTY		C/O PROPERTY MANAGEMENT	PO BOX 6005	BEND, OR 97708-6005	NOPH	22-573-ZC / 22-274-PA
MCCAULEY, JOHN M			64970 DESCHUTES PLEASANT RIDGE RD	BEND, OR 97701	NOPH	22-573-ZC / 22-274-PA
LAST RANCH LLC			PO BOX 768	ROUNDUP, MT 59072	NOPH	22-573-ZC / 22-274-PA
IRWIN, R BRADLEY & KATHLEEN K			740 NE 1ST	BEND, OR 97701	NOPH	22-573-ZC / 22-274-PA
RAY,CAMERON			65137 N HWY 97	BEND, OR 97701	NOPH	22-573-ZC / 22-274-PA
LAST RANCH LLC			915 SW RIMROCK WAY #201-166	REDMOND, OR 97756	NOPH	22-573-ZC / 22-274-PA
LAND SUPREMACY LLC		C/O MOLLY R ANDEREGG	65147 N HWY 97	BEND, OR 97701	NOPH	22-573-ZC / 22-274-PA
STATE OF OREGON HWY DIVISION			4040 FAIRVIEW INDUSTRIAL DR SE #MS 2	SALEM, OR 97302-1142	NOPH	22-573-ZC / 22-274-PA
DESCHUTES COUNTY		C/O PROPERTY MANAGEMENT	PO BOX 6005	BEND, OR 97708-6005	NOPH	22-573-ZC / 22-274-PA
JACK ROBINSON & SONS INC			PO BOX 5006	BEND, OR 97708	NOPH	22-573-ZC / 22-274-PA
STATE OF OREGON HWY DIVISION			4040 FAIRVIEW INDUSTRIAL DR SE #MS 2	SALEM, OR 97302-1142	NOPH	22-573-ZC / 22-274-PA
STATE OF OR					NOPH	22-573-ZC / 22-274-PA
DESCHUTES COUNTY		C/O PROPERTY MANAGEMENT	PO BOX 6005	BEND, OR 97708-6005	NOPH	22-573-ZC / 22-274-PA
SCHUEPBACH, SETH R			65140 76TH ST	BEND, OR 97703	NOPH	22-573-ZC / 22-274-PA
BRENDA CHAPIN REVOCABLE TRUST	CHAPIN, BRENDA RAE TRUSTEE		18160 COTTONWOOD RD ##115	BEND, OR 97707-9317	NOPH	22-573-ZC / 22-274-PA

STATE OF OREGON	HIGHWAY DIVISION	417 TRANSPORTATION BLDG	SALEM, OR 97310	NOPH 22-573-ZC / 22-274-PA
CHOATE, TERRY R & JENNIFER LYNN		65130 76TH ST	BEND, OR 97703	NOPH 22-573-ZC / 22-274-PA
LAST RANCH LLC		PO BOX 768	ROUNDUP, MT 59072	NOPH 22-573-ZC / 22-274-PA
LAND SUPREMACY LLC	C/O MOLLY R ANDEREGG	65147 N HWY 97	BEND, OR 97701	NOPH 22-573-ZC / 22-274-PA
LAND SUPREMACY LLC		2660 NE HWY 20 #610-6	BEND, OR 97701	NOPH 22-573-ZC / 22-274-PA
FAGEN, HARRY J & BEVERLY M		53 NW TUMALO AVE	BEND, OR 97703	NOPH 22-573-ZC / 22-274-PA
GOLDEN RULE FARMS INC ET AL		PO BOX 255	CHRISTMAS VALLEY, OR 97641	NOPH 22-573-ZC / 22-274-PA
JCT 97 STORAGE LLC	C/O MANAGER (A)	PO BOX 5006	BEND, OR 97708	NOPH 22-573-ZC / 22-274-PA
GOLDEN RULE FARMS INC ET AL		PO BOX 255	CHRISTMAS VALLEY, OR 97641	NOPH 22-573-ZC / 22-274-PA
OREGON PARKS & RECREATION DEPARTMENT		725 SUMMER ST #SUITE C	SALEM, OR 97301	NOPH 22-573-ZC / 22-274-PA
JACK ROBINSON & SONS INC		PO BOX 5006	BEND, OR 97708	NOPH 22-573-ZC / 22-274-PA
GOLDEN RULE FARMS INC ET AL		PO BOX 255	CHRISTMAS VALLEY, OR 97641	NOPH 22-573-ZC / 22-274-PA

STAFF REPORT

FILE NUMBERS:	247-22-000573-ZC / 247-22-000574-PZ
HEARING:	March 21, 2023, 6:00 p.m. Zoom & Barnes & Sawyer Rooms
SUBJECT PROPERTY/ OWNER:	Mailing Name: LAST RANCH LLC Map and Tax Lots: 161226B000101 / 161226B000700 / 161226B000800 Accounts: 180410 / 132961 / 132960 Situs Addresses: No Situs Address / 64994 Deschutes Market Road, Bend, OR 97701 / 64975 Deschutes Pleasant Road, Bend, OR 97701
APPLICANT:	Mark Rubbert, Last Ranch, LLC 915 SW Rimrock Way #201-166 Redmond, OR 97756
REPRESENTATIVE:	Patricia A. Kliewer, MPA 60465 Sunridge Drive Bend, OR 97702
SOIL SCIENTIST:	Gary Kitzrow, MS, CPSS/SC G-SEA, Growing Soils Environmental Associates PO Box 225, Winchester, OR 97495
TRANSPORTATION ENGINEER:	Joe Bessman, P.E. Transight Consulting, LLC
REQUEST:	The Applicant requests approval of a Comprehensive Plan Amendment to change the designation of the properties from Agricultural (AG) to Rural Industrial (RI) and a corresponding Zone Change to rezone the properties from Exclusive Farm Use (EFU-TRB) to Rural Industrial (RI).
STAFF CONTACT:	Caroline House, Senior Planner Phone: 541-388-6667 Email: Caroline.House@deschutes.org

RECORD: Record items can be viewed and downloaded from: https://www.deschutes.org/cd/page/247-22-000573-zc-247-22-000574-pa-last-ranch-llc-comprehensive-plan-amendment-zone-change

I. APPLICABLE CRITERIA

Deschutes County Code (DCC)
- Title 18, Deschutes County Zoning Ordinance:
  - Chapter 18.04, Title, Purpose, and Definitions
  - Chapter 18.16, Exclusive Farm Use Zones (EFU)
  - Chapter 18.84, Landscape Management Combining Zone (LM)
  - Chapter 18.100, Rural Industrial Zone
  - Chapter 18.136, Amendments
- Title 22, Deschutes County Development Procedures Ordinance

Deschutes County Comprehensive Plan
- Chapter 2, Resource Management
- Chapter 3, Rural Growth Management
  - Appendix C, Transportation System Plan

Oregon Administrative Rules (OAR) - Chapter 660
- Division 12, Transportation Planning
- Division 15, Statewide Planning Goals
- Division 33, Agricultural Land

Oregon Revised Statutes (ORS)
- Chapter 215.010, Definitions
- Chapter 215.211, Agricultural Land, Detailed Soils Assessment

II. BASIC FINDINGS

LOT OF RECORD: A determination on the Lot of Record status for the subject property is not required as part of this review.

SITE DESCRIPTION: The subject property encompasses +/-20.36 acres and includes the three (3) tax lots described in *Table 1* below (together hereafter referred to as the "subject property"):

Table 1 – Subject Property

Map and Tax Lot	Situs Address	Area (Acres)
161226B000101	65110 N HWY 97, BEND, OR 97701	±4.20

161226B000700	64994 DESCHUTES MARKET RD, BEND, OR 97701	±0.01
161226B000800	64975 DESCHUTES PLEASANT RIDGE RD, BEND, OR 97701	±16.15

The subject property is irregularly shaped and located at the northeast corner of the intersection of State Highway 97 and Deschutes Pleasant Ridge Road (see *Figure 1 – Location Map* below). The State Highway 97 northbound on and off ramps are adjacent to the west property line and a highway overpass is approximately a tenth of a mile south. Deschutes Pleasant Ridge Road abuts a portion of the southern property line and the Central Oregon Irrigation District's (COID) main canal, the Pilot Butte Canal, abuts the eastern and northern property lines. A COID sub-lateral irrigation ditch, the PBC-4-1, extends north from Deschutes Pleasant Ridge Road onto the subject property[1] and then enters a pipe, which terminates on tax lot 800. These COID owned facilities have corresponding easements on the subject property.

Figure 1 – Location Map of Subject Property

[1] Reference Applicant's Burden of Proof, Pages 62-63.

The submitted application materials state the southeastern corner of the subject property is developed with the following 12 structures[2]: two (2) single-family dwellings, an outhouse, a garage/store, a shop and storage room, a barn, a farm implement garage, a goat barn, a poultry shed, a small farm products or flowers sales booth, and two enclosed cisterns[3]. The submitted materials indicate these structures and the property are "unused" at this time[4].

According to the submitted materials, the subject property has a 14.6[5] acres deeded water right from Pilot Butte Canal that is delivered by COID under Certificate Number 29052. However, most of the water is not being applied to the subject property. The water right is applied across the subject tax lots as shown in *Table 2* below:

Table 2 – Subject Tax Lots & Appurtenant Water Right Acres

Tax Lot	Total Water Acres	Water Acres in Good Standing	Acres not Beneficially Used for 5 or more years
101	1.8	0	1.8
700	0	0	0
800	12.5[6]	5.23	7.67

Vegetation varies across the subject property. The non-irrigated and undeveloped areas on the south-eastern half of the property can generally be described as typical Central Oregon juniper woodland vegetation. The western portions of tax lot 800 and all of tax lot 101 appear to have been cleared, and vegetation appears to consist of a mixture of both native and invasive grasses and ground cover. The currently irrigated acres on tax lot 800 are cleared and have been planted with grasses. The existing development on the south-eastern half of the property has vegetative cover consisting of introduced landscaping, edible plants, and fruit trees. Staff notes the subject property is in farm tax deferral.

Access to the subject property is via a paved 80-foot driveway extending north, across County owned property, from Deschutes Pleasant Ridge Road. Based on the submitted materials, it is not clear if there is an access easement to cross this County owned property. The driveway provides access to a 112-foot by 53-foot parking lot on the southeast corner of the subject property.

The grade generally slopes gently down from the southeastern corner towards State Highway 97. The Applicant's Burden of Proof states at the southwestern corner, along State Highway 97, the elevation is 3,257 feet and 3,248 feet at the northwest property corner, a drop of nine feet south to north. The land at the parking area in the southeast corner is 3,267 feet and it drops across the property 19 feet to the lowest point.

[2] Reference Applicant's Burden of Proof, Pages 33-45 for more detailed information.
[3] Comments from COID state their District has "no knowledge of two cisterns".
[4] Reference Applicant's Burden of Proof, Page 54.
[5] Staff notes comments from COID indicate the subject property has 14.7 acres of COID water.
[6] Staff notes comments from COID indicate tax lot 800 has 12.9 acres of water.

As discussed in detail below in the Soils section, an Agricultural Soils Capability Assessment (Order 1 soil survey) was conducted for the subject property and determined the subject property does not constitute agricultural land as defined in Statewide Planning Goal 3, and are generally comprised of unsuited Class 7 and 8 soils as detailed in DCC and Department of Land Conservation and Development (DLCD) definitions.

SOILS: As noted above, Tax Lots 101 and 800 contain 1.8 acres and 12.9 acres of water rights, respectively. The Natural Resources Conservation Service (NRCS) map shown on the County's DIAL GIS mapping program identifies two (2) soil complex units on the subject property: 36A, Deskamp loamy sand, 0 to 3 percent slopes (nonirrigated class 6s, irrigated class 3s) and 38B, Deskamp-Gosney complex, 0 to 8 percent slopes (nonirrigated class 6s, irrigated class 3s).

An Agricultural Soils Capability Assessment (Order 1 Soil Survey) was conducted by Gary A. Kitzrow for the subject property and found the following[7]:

> **Executive Summary**
> A detailed soil survey was completed for the 20.36 acre lot of record on July 10, 2020. The study area is transitional in landscape position and exhibits contrasting areas of soil development and landforms. The original government soil maps for this portion of the property show the following mapping units: 36A Deskamp and the 38B Deskamp-Gosney Complex. Of these soils, Gosney is generally unsuited for both farm and forest production. Irrigation is available on several acres of the ownership.
>
> Our field research confirms 13.44 acres (66%) of the property is comprised of generally unsuited soil mapping units showing Capability Class 7 or 8 both irrigated and non-irrigated. This proposed lot is generally unsuited by preponderance.
> ...
> **GROWING SOILS - Order I Soil Survey**
> - We have confirmed and delineated 5 distinct soil mapping units for this area of study. These include the following units: 1). 57B Gosney-Class 7 (irrigated or non-irrigated) is the dominant map unit. 2). The 58C Gosney-Rock Outcrop is intermingled, multitaxa and is inseparable. 3). Rock Outcrop which is Class 8; 4). Infrastructure re including areas of permanent degradation, house*, outbuildings parking/staging areas; 5). 36A Deskamp is Capability Class 3 when irrigated which is present and being utilized on this site within this mapping unit.
>
> ...
> **Summary Statement and Conclusions**
> This 20.36 acre study site is part of the subject property and is composed of a majority or preponderance of unsuited soils including the Gosney (57B), Gosney-RO (58C), Infrastructure, and rock outcrop (109). Over 66% of the subject parcel is made up of Capability Class 7 and 8 soils. Deskamp soils are largely irrigated on this site, have good utility and are suited for farm crops including hay and pasture. The four unsuited mapping units are each generally unsuited for farm crop production including hay and pasture and

[7] Reference Applicant's Burden of Proof, Attachment 2.

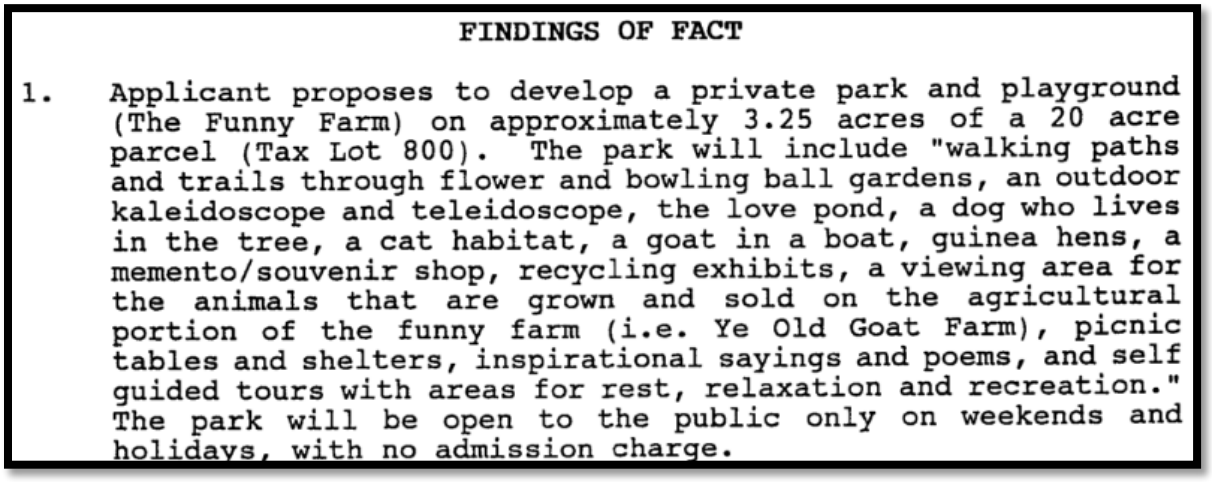
merchantable timber production.

We hereby certify a preponderance of this lot of record is comprised of generally unsuited Capability Class 7 and 8 soils. The percentage of landbase which has been confirmed as generally unsuited (Class 7 and 8) is 66% or 13.44 acres.

Further discussion regarding soils is found in Section III below.

LAND USE HISTORY:

- **LR-90-102:** The County found the tax lot 800 was a legal lot of record together with tax lot 801.
- **PA-90-7/ZC-90-9/CU-90-92:** The County denied a request for Comprehensive Plan Amendment from Agricultural to Rural Service Center/Commercial, and a Zone Change from EFU-20 to RSC for approximately 3.95 acres of tax lot 800. The application included an exception to Statewide Planning Goal 3 (Agricultural Lands) and Goal 14 (Urbanization). The stated purpose of the application was to relocate "Buffet Flat", a commercial amusement business, from tax lot 801 to tax lot 800 and included a conditional use request for this use. As stated above, the County denied this request and the Land Use Board of Appeals (LUBA) and the Oregon Court of Appeals affirmed the County's decision (see *Carsey v. Deschutes County*, 21 Or LUBA 118 (1991)).
- **LL-91-52:** The County approved a Property Line Adjustment, which increased the size of tax lot 800 by reconfiguring the property to include tax lot 101.
- **MP-91-15/V-91-6:** The County approved a two-parcel Partition and a Variance to the minimum lot size requirements. The subject property is generally identified as Parcel 1 of this partition request.
- **LM-91-73/S-91-23:** The County approved a Sign Permit for an agricultural products sales sign and site plan approval for locating the sign in the Landscape Management Combining Zone.
- **CU-91-160:** The County approved a Conditional Use request for a private park and playground on approximately 3.25 acres of the tax lot 800. The approval authorized the following as part of this use:



FINDINGS OF FACT

1. Applicant proposes to develop a private park and playground (The Funny Farm) on approximately 3.25 acres of a 20 acre parcel (Tax Lot 800). The park will include "walking paths and trails through flower and bowling ball gardens, an outdoor kaleidoscope and teleidoscope, the love pond, a dog who lives in the tree, a cat habitat, a goat in a boat, guinea hens, a memento/souvenir shop, recycling exhibits, a viewing area for the animals that are grown and sold on the agricultural portion of the funny farm (i.e. Ye Old Goat Farm), picnic tables and shelters, inspirational sayings and poems, and self guided tours with areas for rest, relaxation and recreation." The park will be open to the public only on weekends and holidays, with no admission charge.

- **SP-92-8:** The County approved a Site Plan request for the private park and playground that was authorized under file no. CU-91-160.

- **E-92-10**: The County approved a 6-month Extension of the approvals authorized under file nos. MP-91-15/V-91-6.
- **E-92-50**: The County approved a second 6-month Extension of the approvals authorized under file nos. MP-91-15/V-91-6.
- **E-93-7**-: The County approved a 6-month Extension of the approval authorized under file no. SP-92-8.
- **S-93-3:** The County approved a Sign Permit for the "Funny Farm" private park and playground.
- **FPA-93-15**: The County approved the Final Plat for Partition approval nos. MP-91-15/V-91-6 (see Partition Plat 1993-32).
- **247-17-000721-TU** – The County approved a Temporary Use Permit for the use of a recreational vehicle as a hardship dwelling. This approval is void as the ongoing conditions of approval have not been met.

SURROUNDING LAND USES: The subject property is surrounded to the north and east by an approximately 64.51-acre EFU-zoned tract; the properties to the south and on the opposite site of Deschutes Pleasant Ridge Road are zoned RI; and the properties to the west and northwest on the opposite side of State Highway 97 are zoned Rural Commercial (RC), Multiple Use Agricultural (MUA10), and EFU. The adjacent and nearby properties are further detailed below:

East and Northeast: The land to the east and northeast of the subject property is +/- 64.51 acres EFU-zoned tract. This tract is identified on Deschutes County Assessor's Map 16-12-26A, as Tax Lots 200, 201 and 202. All three (3) tax lots are currently receiving farm tax deferral, predominately irrigated, and appear to be engaged in farm use. Based on the assessor records, Tax Lot 200 is developed with two (2) dwellings and several farm structures. Staff also notes the COID Pilot Butte Canal straddles the shared boundary between the subject property and this tract.

South: Abutting the south property line of the subject property are two (2) County owned properties zoned EFU and Deschutes Pleasant Ridge Road. The County owned properties are identified on Deschutes County Assessor's Map 16-12-26B, as Tax Lot 701 and 16-12-26C, as a portion of Tax Lot 100, and are +/-0.05 acres and +/-0.09 acres in size, respectively. Staff notes Tax Lot 701 must be used for public road purposes or the County's right, title and interest in the property/right of way will be relinquished (ref. Deed of Relinquishment from the Oregon Department of Transportation (ODOT) to the County, recorded in Volume 2000, Page 13066 of the Deschutes County Book of Records).

The properties to the south on the opposite side of Deschutes Pleasant Ridge Road are primarily zoned RI, vary in size, and have a variety of commercial and industrial uses established. The property to the south, identified on Deschutes County Assessor's Map 16-12-26C, as Tax Lot 107, is zoned RI and EFU, has an approved mini-storage facility use consisting of outdoor recreation vehicle, boat, and similar vehicle storage and a warehouse building[8]. To the southeast is the Willamette Graystone, Inc. property, identified on Deschutes County Assessor's Map 16-12-26C, as Tax Lot 106, which is zoned RI and approved for office, warehouse, and block manufacturing facility uses. Jack

[8] This business is currently operated under the name Deschutes RV Storage.

Robinson & Sons, Inc. owns four (4) tax lots south of the Willamette Graystone property, identified on Deschutes County Assessor's Map 16-12-26C, as Tax Lots 102, 114, 300, and 301. These properties are predominately zoned RI, but portions of Tax Lot 300 and 301 are also zoned EFU. The County has approved an aggregate processing facility, mineral storage, and repair, fueling, and servicing of equipment for road maintenance uses on these properties. Further to the southeast is the JCT 97 Storage, LLC property, identified on Deschutes County Assessor's Map 16-12-26C, as Tax Lot 111, which is zoned is zoned RI and EFU and has an approved mini-storage facility use.

West and Northwest: State Highway 97 abuts the west boundary of the subject property. The properties further to the west on the opposite side of State Highway 97 are zoned EFU, Rural Commercial, MUA10, and Rural Residential (RR10) and include a wide range of uses detailed below.

To the southwest is a +/-21.54-acre EFU-zoned tract owned by Anthony Aceti that is identified on Deschutes County Assessor's Maps 16-12-26C, as Tax Lot 201 and 16-12-27D, as Tax Lot 104. Since 2014, the property owner has been pursuing a Plan Amendment to change the designation of the properties from AG to RI and a corresponding Zone Change to rezone the properties from EFU to RI. The most recent County description for uses occurring on this property explain the property is not engaged in farm use and there is an active code enforcement case in which the County has determined businesses are operating on the property in violation of the current EFU Zone. Further north of the Aceti tract and to the west of the subject property are three (3) properties, identified on Assessor's Map 16-12-26B, as Tax Lots 500, 600, 1200, owned by the Fagen family. These properties are zoned Rural Commercial (RC) and MUA10. Tax lot 600 is developed residentially and tax lot 1200 is undeveloped. Since the 1970s, a variety of uses have been approved on the RC zoned areas of Tax Lot 500. However, it is unclear if these uses remain legal uses[9] and staff notes there is an active code compliance case related to uses on the property.

To the west of the subject property and east of the Fagen properties described above, are two undeveloped properties, identified on Assessor's Map 16-12-26B, as Tax lots 801 and 900, which are zoned EFU and MUA10, respectfully. The First Addition to Whispering Pines Estates, which is zoned MUA10 and RR10, is also west of the subject property. The lots within this subdivision are developed with residential uses.

Northwest of the subject property on the opposite side of State Highway 97 are a variety of uses as well. The property identified on Deschutes County Assessor's Map 16-12-26B, as Tax Lot 300, is developed with a single-family dwelling and related accessory structures. The property identified on Deschutes County Assessor's Map 16-12-26B, as Tax Lot 303, is an agricultural building. Also to the northwest are three (3) EFU-zoned properties owned by Land Supremacy, LCC., identified on Deschutes County Assessor's Map 16-12-26B, as Tax Lots 200, 301, and 302. The County has approved a tractor and equipment sales[10] and service business on Tax Lot 302 and, in 2015, the County approved[11] an office and vehicles/equipment storage use on Tax Lots 200 and 301.

[9] Reference pending nonconforming use verification file no. 247-22-000497-NUV.
[10] Reference file nos. NCU-02-3 / SP-02-56.
[11] Reference file nos. 247-15-000493-NUV / 247-15-000494-SP.

The Applicant's Burden of Proof[12] includes a detailed study of all tax lots within 1,000 feet, in all directions, of the subject property and a summary of surrounding uses on nearby Tax Maps[13]. Additionally, the Applicant's Response to the Incomplete Letter, dated November 10, 2022, details the uses occurring at Deschutes Junction[14]. In *Aceti (*Deschutes County File Nos. 247-20-000438-PA, 439-ZC), a 2.5-mile radius was used as the area of analysis for surrounding properties and their uses and developments. Staff asks the Hearings Officer to determine what area radius and level of review detail are required for the subject applications to adequately determine the level of analysis required for surrounding properties and neighborhood/regional analysis.

PROPOSAL: The Applicant requests approval of a Comprehensive Plan Map Amendment to change the designation of the subject property from Agricultural (AG) to a Rural Industrial (RI). The Applicant also requests approval of a corresponding Zone Change to rezone the property form Exclusive Farm Use (EFU-TRB) to Rural Industrial (RI). The Applicant asks Deschutes County to change the zoning and the plan designation because the RI zoning district is the more appropriate zone for the subject property as the subject property is not agriculturally viable and is better suited for uses consistent with the RI Zone. The Applicant's submitted burden of proof states on pg. 148:

> The Applicant is not at this time requesting approval of any proposed use allowed outright or conditionally in the RI zone. Future development of the property will be subject to the applicable provisions of DCC Chapter 18.100 if the application is approved by the Board of County Commissioners. The Applicant does not need to review specific uses allowed outright or conditionally in the RI zone to determine that DCC 18.100.010 does not allow urban uses. As LUBA ruled in LUBA 2018-126 at page 12, "petitioner's (Clown's) argument that DCC 18.100.010 allows urban uses are an impermissible collateral attack on an acknowledged land use regulation."

Submitted with the application is a USDA equivalent Order I Soil Study for the subject property, titled "Final Order 1 Soil Survey" (hereafter referred to as the "Soil Study"), prepared by soil scientist Gary Kitzrow, M.S., C.P.S.C./C.P.S.S.[15] of Growing Soils Environmental Associates. The Applicant has also submitted a traffic analysis dated May 24, 2022, prepared by Transight Consulting, LLC titled "Funny Farm Rezone TPR Analysis" (hereby referred to as the "Traffic Study") and supplemental memorandum dated November 9, 2022, titled "Last Ranch/Funny Farm Rezone TPR Supplement" (hereafter referred to as the "Traffic Study Memorandum"). Additionally, the Applicant has submitted the required application forms, a burden of proof statement, and other supplemental materials, all of which are included in the record for the subject applications.

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on July 20 2022, to several public agencies and received the following comments:

[12] Reference pages 117-131.
[13] Reference pages 131-136.
[14] Reference pages 15-16.
[15] Certified Professional Soil Classifier / Certified Professional Soil Scientist

Central Oregon Irrigation District, Kelley O'Rourke

Re: 22-573-ZC, 574-PA

Please be advised that Central Oregon Irrigation District (COID) has reviewed the application received on July 20th, 2022 for the above referenced project located 64994 & 64975 Deschutes Market Rd, BEND, OR 97701./tax lot: 161226B000101/161226B000700/161226B000800. The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the properties from Agricultural (AG) to Rural Industrial (RI) and a corresponding Zone Change to rezone the properties from Exclusive Farm Use (EFU) to Rural Industrial (RI).

COID's main canal, Pilot Butte Canal, is located along the eastern property boundary. The Pilot Butte Canal has a 100-foot right of way easement. The easement is 50 feet west of the canal centerline plus an additional 20 feet for an access easement. COID's sub-lateral, PBC-4-1, enters tax lot 161226B000800 on the southern border as an open ditch. The PBC-4-1 travels west along the southern border as an open ditch, then enters pipe. The piped PBC-4- travels west then northwest toward highway 97. The PBC-4-1 dead ends within tax lot 161226B000800. The PBC-4-1 has a 20-foot right of way easement. There are 12.9 acres of COID water rights appurtenant to tax lot 161226B000800. There are 1.8 acres of COID water rights appurtenant to tax lot 161226B000101.

Listed below are COIDs initial comments to the provided pre-application site plan. All development affecting irrigation facilities shall be in accordance with COID's Development Handbook and/or as otherwise approved by the District.

- Tax Map 161226B000800 has 12.9 acres of appurtenant COID irrigation water mapped to a specific place of use. Construction of a structure, driveway, or other impermeable surface on top of a mapped water right is not allowed. COID requests applicant contact COID to determine if a water transfer will be required.
- Tax Map 161226B000101 has 1.8 acres of appurtenant COID irrigation water mapped to a specific place of use. Construction of a structure, driveway, or other impermeable surface on top of a mapped water right is not allowed. COID requests applicant contact COID to determine if a water transfer will be required.
- Any irrigation conveyance, District or private, which passes through the subject property shall not be encroached upon or crossed without written permission from this office. This includes any proposed utilities.
- Irrigation infrastructure and rights-of-way are required to be identified on all maps and plans.
- No structures, fences, or utilities of any kind are permitted within COID property/easement/right of way or canal embankment without written permission from this office.
- Policies, standards and requirements set forth in the COID Developer Handbook must be complied with.

- Comply with Requirements of COID Developer Handbook including restriction on drilling / blasting and excavation within and adjacent to the existing canal embankment. There is no blasting within 100-feet of the marginal limits of the canal.

Our comments are based on the information provided, which we understand to be preliminary nature at this time. Our comments are subject to change and additional requirements may be made as site planning progresses and additional information becomes available. Please provide updated documents to COID for review as they become available.

Deschutes County Building Division, Randy Scheid

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

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

Deschutes County Senior Transportation Planner, Peter Russell

August 5, 2022:

I have reviewed the transmittal materials for 247-22-000573-ZC/574-PA for three properties totaling approximately 20 acres to change the Comprehensive Plan designation from Agriculture (AG) to Rural Industrial (RI) and the zoning from Exclusive Farm Use (EFU) to Rural Industrial (RI). The properties lie in the northeast quadrant of the Deschutes Junction interchange at US 97/Tumalo Road-Deschutes Market Road. One property is unaddressed and the other two properties are at 64994 Deschutes Market Road and 64975 Deschutes Pleasant Ridge Road, aka County Assessor's Maps 16-12-26B, Tax Lots 101; 16-12-26B, Tax Lot 700; and 16-12-26B, Tax Lot 800. For reasons discussed below, staff finds more information is needed to address the Transportation Planning Rule (TPR). The site was previously known as the Funny Farm, a roadside attraction of eclectic offerings.

Deschutes County Code (DCC) 18.116.310(C)(4) requires a 20-year analysis for zone changes. The applicant has submitted a traffic analysis dated May 24, 2022, from Transight, the applicant's traffic engineer. Staff agrees with the assumptions, methodology, and conclusions of the study and using 2040 as the planning horizon to be consistent with the current updating of the County's Transportation System Plan (TSP). Table 7 shows the analyzed intersections meet the County's Level of Service (LOS) Standard of LOS D in 2040 with or without the proposed plan amendment/zone change. Table 8 shows the affected segment of Deschutes Market Road fails the County's LOS D of 9,60 ADT with or without the plan amendment/zone change. The Transportation Planning Rule (TPR) at Oregon Administrative Rule (OAR) 660-012-0060(11) allows local governments to approve plan amendments/zone changes in cases where the affected transportation facility is significantly affected under OAR 660-012-0060(1) by accepting partial mitigations, provided the

application is for an industrial use. More specifically, OAR 660-012-0060(11)(a) notes the plan amendment/zone change involves traded-sector activities and meets the balancing test described in OAR 660-012-0060(11)(b). The applicant needs to provide these findings.

The property abuts Deschutes Pleasant Ridge Road, a public road that functions as on/off ramp to the US 97 interchange and is functionally classified as a collector. The applicant will need to either provide a copy of an access permit approved by Deschutes County or be required to obtain one as a condition of approval to comply with the access permit requirements of DCC 17.48.210(A). If the Oregon Department of Transportation (ODOT) has purchased access control rights, then the applicant should either provide a copy of an approach road permit approved by ODOT or be required as a condition of approval to obtain one from the agency.

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of $5,080 per p.m. peak hour trip. As the plan amendment/zone change by itself does not generate any traffic, no SDCs apply at this time. SDCs will be assessed based on development of the property. When development occurs, the SDC is due prior to issuance of certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final.

THE PROVIDED SDC RATE IS ONLY VALID UNTIL JUNE 30, 2023. DESCHUTES COUNTY'S SDC RATE IS INDEXED AND RESETS EVERY JULY 1. WHEN PAYING AN SDC, THE ACTUAL AMOUNT DUE IS DETERMINED BY USING THE CURRENT SDC RATE AT THE DATE THE BUILDING PERMIT IS SUBMITTED.

AGAIN, THIS IS FOR INFORMATION ONLY AS THE PLAN AMENDMENT/ZONE CHANGE DOES NOT TRIGGER ANY SDCS; THE SDCS ARE ASSESSED WHEN ACTUAL DEVELOPMENT OCCURS.

November 22, 2022:
The Nov. 9, 2022, submittal from Transight addresses my earlier concerns.

The following agencies did not respond to the notice: Bend Fire Department, Bend Metro Parks & Recreation, Century Link, Deschutes County Assessor, Deschutes County Environmental Soils, Deputy State Fire Marshal, Deschutes County Property Address Coordinator, Deschutes County Road Department, Deschutes County Surveyor, Oregon Department of Environmental Quality, Oregon Department of Fish & Wildlife, Oregon Department of Land Conservation and Development, Oregon Parks & Recreation Department, Oregon Department of State Lands (DSL – Owned Property), Oregon Department of Water Resources, Redmond Fire & Rescue, Watermaster – District 11.

PUBLIC COMMENTS: The Planning Division mailed notice of the applications to all property owners within 750 feet of the subject property on July 20, 2022. The Applicant also complied with the posted notice requirements of Section 22.24.030(B) of Title 22. The Applicant submitted a Land Use Action Sign Affidavit indicating the Applicant posted notice of the land use action on July 25, 2022. Two (2)

comments, one (2) in support and one (1) opposed to the Applicant's request, were received in response to the notice of application.

The comments in support were received from Harry and Bev Fagen on August 21, 2022, and state:

> We have owned property that neighbors the "Funny Farm" west of Hwy. 97 for 40 years. In those 40 years, the "Funny Farm" land has NEVER been farmed. The land doesn't seem suitable for farming. RI zoning is best suitable for this land.

The comments in opposition were received from Carol Macbeth, the Staff Attorney with Central Oregon LandWatch on August 7, 2022 and state:

> Central Oregon LandWatch is concerned that the above application does not meet the applicable land use criteria, and recommends denial.
>
> Please consider LandWatch an opposing party in these proceedings and notify LandWatch of any decisions in this matter.

PUBLIC HEARING NOTICE REQUIREMENT: On January 26, 2023, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the subject property, all parties, and applicable agencies. A Notice of Public Hearing was published in the Bend Bulletin on Sunday, January 29, 2023. Notice of the first evidentiary hearing was submitted to the DLCD on January 26, 2023.

REVIEW PERIOD: The subject applications were submitted on July 13, 2022, and deemed incomplete by the Planning Division on August 12, 2022. The applicant provided responses to the incomplete letter and confirmed no further information or materials would be provided in response to the County's incomplete letter on November 14, 2022. Therefore, the subject applications were deemed complete on November 14, 2022. According to Deschutes County Code 22.20.040(D)(1), the review of the proposed quasi-judicial plan amendment and zone change application is not subject to the 150-day review period.

III. FINDINGS & CONCLUSIONS

Context for Decision-Making Based Similar Request and State Court Rulings

For the purposes of this review, staff wants to highlight two (2) nearby Plan Amendment and Zone Change requests, which are listed below. Staff believes the facts of these cases are similar to the subject request and may help the Hearings Officer in their analysis.

1. *Aceti IV (*247-20-000438-PA, 439-ZC) and *Aceti V* (247-22-000287-A)[16]

[16] Staff notes there have been several *Aceti* land use applications that have been appealed to State Courts:

- *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016) (*Aceti I*)

As part of *Aceti IV*, Deschutes County approved a Comprehensive Plan Amendment from AG to RI and a corresponding zoning change from EFU to RI. LUBA remanded this decision back to the County to address findings related to the number of employees resulting from the Plan Amendment and Zone Change and its impact on the determination that the use is rural. As part of *Aceti V*, the County addressed these issues and again approved the Plan Amendment and Zone Change request. On December 1, 2022, LUBA affirmed the County's remand decision. A Petition for Judicial Review has been filed to the Oregon Court of Appeals. This property is located approximately 300 feet to the southwest of the subject property on the opposite side of State Highway 97, and is identified on Deschutes County Assessor's Maps 16-12-26C, as Tax Lot 201 and 16-12-27D, as Tax Lot 104.

2. *LBNW, LCC* (247-21-0000881-PA/882-ZC)
As part of *LBNW, LCC*, Deschutes County approved a Comprehensive Plan Amendment from AG to RI and a corresponding zoning change from EFU to RI in December 2022. At the time of drafting this staff report, it was unknown if a LUBA appeal has been filed. This property is located approximately 2,000 feet to the north of the subject property on the opposite side of State Highway 97 and is identified on Deschutes County Assessor's Map 16-12-23, as Tax Lots 301, 305, and 500.

In the Conclusions of Law section of the Hearings Officer's recommendation in *Aceti IV (*247-20-000438-PA, 439-ZC)*,* the Hearings Officer provided the following analysis related to applicable case law:

In *Shaffer*, LUBA considered an appeal after remand involving a county decision to approve a map amendment requested for a specific use: an asphalt batch plant. LUBA had originally remanded the decision in *Shaffer v. Jackson County*, 16 Or LUBA 871 (871) because the county had not determined whether the proposed asphalt batch plant is an urban or rural use. As stated on page 931-32:

> The additional factor claimed by petitioner to be determinative of urban use status, i.e., not being limited to serving the needs and requirements of the rural area, is derived solely from our opinions concerning the urban/rural nature of commercial uses. This factor might be significant, or even determinative, in deciding whether a commercial use is urban or rural. However, this factor need not have the same relevance with regard to other types of uses. We agree with intervenors that if this factor were determinative for all types of uses, most farm uses would be urban. With regard to industrial uses, we find the fact that the product of an industrial use will be

- *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 441 (*Aceti II*), aff'd, 288 Or App 378, 405 P3d 197 (2017)
- *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (*Aceti III*), aff'd, 298 Or App 375, 449 P3d 534 (2019)
- *Central Oregon Landwatch v. Deschutes County*, ___ Or LUBA _ (LUBA No 2021-028, June 18, 2021) (*Aceti IV*), aff'd, 315 Or App 673, 501 P3d 1121 (2021).
- *Central Oregon Landwatch v. Deschutes County,* (LUBA No 2022-075) (*Aceti V*) – **NOTE:** Pending Judicial Review before the Oregon Court of Appeals

used in urban areas is relevant to a determination of whether that industrial use is urban, but it is not conclusive. (Footnote omitted).

LUBA revisited the issue in *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014). In that case, LUBA reviewed an appeal of a county's approval of an application for comprehensive plan amendment and zone change, submitted for the purpose of allowing an expansion of a rural industrial park to accommodate "future maritime and large lot industrial users that will benefit from the moorage and deep-water access [of Port Woodward], existing services, energy generation facilities and rail/highway/water transportation facilities." The Applicant did not propose any specific industrial uses for approval through the reasons exception process; an exception to Goal 3 was requested. LUBA agreed with the Port that nothing in OAR chapter 660, division 004 or elsewhere requires the county to identify a specific proposed use, or precludes the county from identifying a relatively wide range of industrial uses as the proposed "use" for purposes of applying the reasons exception criteria.

LUBA reiterated its holding in *Shaffer* that industrial uses are not inherently urban in nature. The following factors must be considered in determining whether a proposed rural industrial use is rural or urban, which ask whether the industrial use:

1. Employs a small number of workers;
2. Is significantly dependent on a site-specific resource and there is a practical necessity to site the use near the resource;
3. Is a type of use typically located in rural areas; and
4. Does not require public facilities or services.

None of these factors are conclusive in isolation, but must be considered together. If each of these factors is answered in the affirmative, then it may be concluded, without more, that the proposed industrial use is rural in nature. However, if at least one factor is answered in the negative, then further analysis or steps are necessary. The county then must do one of the following three things:

1. Limit the allowed uses to effectively prevent urban use of rural land;
2. Take an exception to Goal 14; or
3. Adequately explain why the proposed use, notwithstanding the presence of one or more factors pointing toward an urban nature, should be viewed as a rural use.

As LUBA ruled in *Columbia Riverkeeper*, the County must expressly consider the factors listed in *Shaffer* and offer more than a "bare conclusion" that the proposed plan amendment authorizes no urban uses. The Hearings Officer analyzes each of the Shaffer factors in the Ruling on Goal 14 Exception section below.

As part of the Board of County Commissioners (BOCC) remand decision in *Aceti V* (247-22-000287-A), the BOCC adopted the following findings:

> Furthermore, the Board of County Commissioners now expressly finds that the policies and provisions of the DCCP and DCC are independently sufficient to both demonstrate that post-acknowledgment plan amendments that apply the Rural Industrial (RI) plan designation and zoning to rural land are consistent with Goal 14 and that uses and development permitted pursuant to those acknowledged provisions constitute rural uses, do not constitute urban uses, and maintain the land as rural land. Given that finding, any further analysis under *Shaffer* is redundant and precautionary only.

Additionally, the BOCC adopted the following findings as part of their *LBNW, LCC* decision (247-21-0000881-PA/882-ZC) in December 2022:

> The Shaffer Factors Are Inapplicable
>
> ...the Board finds that the "Shaffer factors" are not relevant to these proceedings. See *Shaffer v. Jackson County*, 17 Or LUBA 922 (1989). LUBA explained the "Shaffer factors" as follows: "whether a residential, commercial, industrial or other type of use is 'urban' or 'rural' requires a case by case determination, based on relevant factors identified in various opinions by [[LUBA]] and the courts" *Aceti* (slip op at *14) (quoting Shaffer, 17 Or LUBA at 946). Notably, COLW and 1000 Friends disagreed in these proceedings on the necessity of utilizing the Shaffer factors to determine if Goal 14 was implicated. Specifically, COLW's April 26, 2022 submittal argued that the County was required to use the Shaffer factors to determine that "all of the allowed uses in the County's RI zone are rural." But 1000 Friends' April 26, 2022 submittal argued that the "Shaffer factors are not appropriate * * * because the eventual use of the property is uncertain, making it impossible to determine whether the Shaffer factors are satisfied."[15]
>
> Both COLW and 1000 Friends' arguments in these proceedings neglect LUBA's recent *Aceti* decision. Responding to 1000 Friends' view of the Shaffer factors, LUBA held that "[w]hile it may be more difficult for [the Aceti applicant] to demonstrate that all of the uses that RI zoning authorized on the subject property are not urban uses, petitioner * * * cited no authority that require[d] [the Aceti applicant] to propose specific industrial uses before the county can determine whether the plan designation or zone change would violate Goal 14." Aceti (slip op at *12). Responding to COLW's view of the Shaffer factors, LUBA held that the Aceti applicant did not need to analyze all of the RI uses because "the county determined that even the most intensive industrial use that could be approved on [that] subject property under the RI regulations and use limitation would not constitute an urban use." Id. (slip op at *11).
>
> As understood by this Board, LUBA's two aforementioned holdings suggest that the *Shaffer* factors were not necessarily dispositive in the recent *Aceti* matter. Further bolstering that point of view is LUBA repeatedly describing in the *Aceti* matter that applying the *Shaffer* factors was a "belt-and-suspenders approach in response to petitioner's Goal 14 challenge." Id. (slip op at *13). LUBA remanded the Aceti matter back to the County to allow this Board to further bolster that Shaffer analysis.

Consistent with Board findings in the *Aceti* remand decision (i.e. Ordinance No 2022-010 discussed above), this Board finds that Applicant herein was not required to apply the Shaffer factors in this case or otherwise conduct a Shaffer analysis because the County already conclusively determined in past proceedings that the RI zone does not allow urban uses on rural land. This Board further finds that any argument that suggests that RI zone does allow urban uses on rural lands is inconsistent with Board findings supporting the remanded Ordinance No 2021-002 (original Aceti decision), the recent Ordinance No 2022-010 (remanded *Aceti* decision), and the findings herein, and is also an inappropriate collateral attack on the acknowledged 2002 and 2018 amendments originally implementing the RI zone. Last, this Board finds that the analysis of the Shaffer factors in the *Aceti* remand proceedings, and any findings issued in Ordinance No 2022-010 regarding *Shaffer*, were in direct response to the facts and circumstances at issue in that matter and were thereby not intended to set precedent for future applications of the RI zone.

[15] On the narrow issue of the *Shaffer* factors' applicability, the Hearings Officer generally agreed with 1000 Friends argument. See Hearings Officer Recommendation, pg 39.

As noted above, the Applicant does not propose specific uses on the subject property at this time. Rather the Applicant states the future uses will include the uses permitted outright and conditionally in the RI Zone, subject to the applicable DCC standards and review processes. Based on the BOCC findings cited above, staff believes the *Shaffer* analysis is not required as part of the Applicant's request and staff asks the Hearings Officer to make clear findings on the applicability of this case law.

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.136, Amendments

Section 18.136.010, Amendments

DCC Title 18 may be amended as set forth in DCC 18.136. The procedures for text or legislative map changes shall be as set forth in DCC 22.12. A request by a property owner for a quasi-judicial map amendment shall be accomplished by filing an application on forms provided by the Planning Department and shall be subject to applicable procedures of DCC Title 22.

FINDING: The Applicant, also the property owner, has requested a quasi-judicial map amendment and filed the applications for a Plan Amendment and Zone Change. The Applicant has filed the required Planning Division's land use application forms for the proposal. The application will be reviewed utilizing the applicable procedures contained in Title 22 of the Deschutes County Code.

Section 18.136.020, Rezoning Standards

The Applicant for a quasi-judicial rezoning must establish that the public interest is best served by rezoning the property. Factors to be demonstrated by the Applicant are:

A. That the change conforms with the Comprehensive Plan, and the change is consistent with the plan's introductory statement and goals.

FINDING: The Applicant provided the following response on pgs. 151- 154 of their Burden of Proof:

Depending on their language, some plan provisions may require consideration even if they are not applicable approval criteria, as found in *Save Our Skyline v. City of Bend,* 48 Or LUBA 192, 209 (2004). The public is best served by these applications. This paragraph establishes two requirements: (1) that the zone change conforms to the Plan; and (2) that it is consistent with the Plan's introductory statement and the Plan's goals. Each of these requirements is discussed below.

1. Conformance with Comprehensive Plan. The Applicant requests approval of a Plan Amendment to re-designate the subject property from Agriculture to Rural Industrial. The county's procedures ordinance will be followed to allow public involvement and an impartial review of the application.

No resource lands will be lost. The Soil Scientist, Gary Kitzrow, MS, CPSS/SC, found that the subject parcel is not "Agricultural Land." Farming the portion of this land beside US 97 and Deschutes Pleasant Ridge Road, and near to the other roads such as Tumalo Place and Graystone Lane, does cause a public health and safety danger, from chemicals and thick dust blowing on the roads, highways and surrounding properties. Only about 2.5 acres was irrigated to provide pasture for goats, but that was before 2004. No agriculture has occurred since then. No owner since 1911 has been a farmer. The aerial photos show only 2.5 acres were irrigated occasionally. The email from COID confirms that it has been more than five years since the irrigation water has been used.

The Applicant provided a study of surrounding land and land in the vicinity. The application is compatible with the surrounding land uses and the character of the vicinity. 57 acres of RI zoned land is across Deschutes Pleasant Ridge Road, south of the subject property. The new zoning will match the neighboring parcels on the south. A letter in the record from Timothy Puckett states that the re-zone will not adversely affect his 66 acres next door on the east and north that is zoned EFU-TRB. The following criteria address how the application conforms to the Comprehensive Plan. The proposed rezoning from EFU-TRB to RI will be consistent with its proposed plan designation.

2. Consistency with the Plan's Introductory Statement and Goals. In several previous decisions, the County has made the following findings concerning this requirement:

> "Comprehensive plan statements, goals and policies typically are not intended to, and do not, constitute mandatory approval criteria for quasi-judicial land use permit applications. Save Our Skyline v. City of Bend, 48 Or LUBA 192 (2004). There, LUBA held:

> 'As intervenor correctly points out, local and statutory requirements that land use decisions be consistent with the comprehensive plan do not mean that all parts of the comprehensive plan necessarily are approval standards. [Citations omitted.] Local governments and this Board have frequently considered the text and context of cited parts of the comprehensive plan and concluded that the alleged comprehensive plan standard was not an applicable approval standard. [Citations omitted.] Even if the comprehensive plan includes provisions that can operate as approval standards, those standards are not necessarily relevant to all quasi-judicial land use permit applications. [Citation omitted.] Moreover, even if a plan provision is a relevant standard that must be considered, the plan provision might not constitute a separate mandatory approval criterion, in the sense that it must be separately satisfied, along with any other mandatory approval criteria, before the application can be approved. Instead, that plan provision, even if it constitutes a relevant standard, may represent a required consideration that must be balanced with other relevant considerations. [Citations omitted.]'

LUBA went on to hold in Save Our Skyline that it is appropriate to 'consider first whether the comprehensive plan itself expressly assigns a particular role to some or all of the plan's goals and policies. ' Section 23.08.020 of the county's comprehensive plan provides as follows:

The purpose of the Comprehensive Plan for Deschutes County is not to provide a site-specific identification of the appropriate land uses which may take place on a particular piece of land but rather it is to consider the significant factors which affect or are affected by development in the County and provide a general guide to the various decisions which must be made to promote the greatest efficiency and equity possible, while managing the continuing growth and change of the area. Part of that process is identification of an appropriate land use plan, which is then interpreted to make decisions about specific sites (most often in zoning and subdivision administration) but the plan must also consider the sociological, economic and environmental consequences of various actions and provide guidelines and policies for activities which may have effects beyond physical changes of the land.

The county's plan statements, goals and policies are not intended to establish approval standards for quasi-judicial land use permit applications.

In *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006), LUBA found it appropriate also to review the language of specific plan policies to determine whether and to what extent they may in fact establish decisional standards. The policies at issue in that case included those ranging from aspirational statements to planning directives to the city to policies with language providing 'guidance for decision-making' with respect to specific rezoning proposals. In Bothman LUBA concluded the planning commission erred in not considering in a zone change proceeding a plan policy

requiring the city to '[r]ecognize the existing general office and commercial uses located * * * [in the geographic area including the subject property] and discourage future rezonings of these properties. ' LUBA held that:

> '* * * even where a plan provision might not constitute an independently applicable mandatory approval criterion, it may nonetheless represent a relevant and necessary consideration that must be reviewed and balanced with other relevant considerations, pursuant to ordinance provisions that require * * * consistency with applicable plan provisions.'

In PA-14-2 and ZC-14-2, the Hearings Officer wrote,

> "The county's comprehensive plan includes a large number of goals and policies. The applicant's burden of proof addresses goals for rural development, economy, transportation, public facilities, recreation, energy, natural hazards, destination resorts, open spaces, fish and wildlife, and forest lands. The Hearings Officer finds these goals are aspirational in nature and therefore are not intended to create decision standards for the proposed zone change."

The Hearings Officer further states,

> "...the above-referenced introductory statements and goals are not approval criteria for the proposed plan amendment and zone change. Nevertheless, depending upon their language, some plan provisions may require "consideration" even if they are not applicable approval criteria. Save Our Skyline v. City of Bend, 48 Or LUBA 192, 209(2004). Staff and the Applicant have identified the following plan goals and policies as potentially requiring such consideration. "

In Chapter 3, Rural Growth Management, of the 2011 Plan. Section 3.10 Area Specific Policies, Goals and Policies; Goal 1

> "Create area specific land use policies and/or regulations when requested by a community and only after an extensive public process.
>
> Policy 3.10.1
>
> Maintain a list of communities interested in area specific policies and as resources permit, initiate public processes to address local issues.
>
> Deschutes Junction
>
> Policy 3.10.5
>
> Maximize protection of the rural character of neighborhoods in the Deschutes Junction area while recognizing the intended development of properties designated for commercial, industrial and agricultural uses.
>
> Policy 3.10.6
>
> Review cumulative impacts of future development and future traffic improvements in the Deschutes Junction area in a manner consistent with Deschutes County traffic study requirements at 17.16.115, the Oregon

Highway Plan, access management standards of OAR Chapter 734, Division 51, and OAR Chapter 660, Division 12, the Transportation Planning Rule (TPR).
Policy 3.10.7
Support safe and efficient travel around Deschutes Junction, including a frontage road extending north from Tumalo Road on the west side of Highway 97.
Policy 3.10.8
Review Policies 3.10.11 through 3.10.13 and initiate a Deschutes Junction Master Plan."

The above area specific policy for Deschutes Junction could address many topics, but it primarily addresses the intended development of properties designated for commercial, industrial and agricultural uses. It also focuses on transportation. This policy recognizes the historic urbanization of the area since it was platted as a town in 1911, the commitment to urbanization that preceded the planning program and the fact that 50% of the rural industrial zoning in the county is at Deschutes Junction. (See FIGURE 41, Rural Industrial Zoned Lands in the county, page 124.) (See FIGURE 39, 1972 Metsker's Map, page 112) Also, as County Surveyor Mike Berry states, Deschutes Junction has the only overpass across US 97 between Bend and Redmond and there have been more roads crossing at that location since 1908 than anywhere in the county. (See FIGURE 19 page 55). Hundreds of acres of industrial, retail, residential subdivisions, commercial, hobby farm uses are zoned RI, RC, MUA-10 and RR-10. (See FIGURE 6, Deschutes County Zoning Map, page 22.) Deschutes has 4,000 residents with many living in subdivisions that predate Oregon Land Use Statutes. Rural Industrial uses began at Deschutes Junction in the 1940s. The rezone will allow an economic use of the property and bring some jobs to it and provide more property tax income for the public services and schools. If this criterion is applicable, this application is in conformance with the policies for Deschutes Junction.

Therefore, this policy is met.

The Applicant utilizes the analysis provided in prior LUBA and Hearings Officers' recommendations, which the BOCC adopted as their findings, to determine and respond to only the Comprehensive Plan Goals and policies that apply, which are listed in the Comprehensive Plan section of this staff report in further detail. Based on the Applicant's proposed demonstration of Comprehensive Plan conformance in subsequent findings, staff asks the Hearings Officer to provide clarification on whether the subject application complies with the above criterion.

B. That the change in classification for the subject property is consistent with the purpose and intent of the proposed zone classification.

FINDING: Section 3.4 of the Deschutes County Comprehensive Plan (DCCP), includes the following language for the rural industrial designation:

Rural Industrial

> ***The county may apply the Rural Industrial plan designation to specific property within existing Rural Industrial exception areas, or to any other specific property that satisfies the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, this Comprehensive Plan and the Deschutes County Development Code, and that is located outside unincorporated communities and urban growth boundaries. The Rural Industrial plan designation and zoning brings these areas and specific properties into compliance with state rules by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022.***

The subject property is not within existing Rural Industrial exception areas and is located outside unincorporated communities and urban growth boundaries. Therefore, the property must be found to satisfy the requirements for a Comprehensive Plan designation change set forth by State Statute, Oregon Administrative Rules, the DCCP and the Deschutes County Development Code. As stated in Section 3.4 of the DCCP, quoted above, the RI plan designation and zoning brings specific properties, such as the subject property, into compliance with state rules "by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022."

The BOCC adopted the following Hearings Officer Decision findings as part of their *LBNW, LCC* decision (247-21-0000881-PA/882-ZC):

> …The County may apply the RI plan designation to any other specific property (outside of an RI exception area, and outside unincorporated communities and urban growth boundaries) that satisfies the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, the Deschutes County Comprehensive Plan ("DCCP") and the Deschutes County Development Code. The Hearings Officer finds that the fact the subject property is outside of an RI exception area does not preclude consideration of the application.
>
> There is no longer a "purpose" statement in DCC Chapter 18.100 regarding the intent of the RI zone.[9] Chapter 18.100 merely sets forth uses permitted outright, conditional uses, use limitations, dimensional standards, off-street parking and loading requirements, site design, "additional requirements" and solar setback requirements and includes a separate section concerning a limited use combining zone, Deschutes Junction. Without a "purpose and intent" statement for the RI zone, the Hearings Officer cannot make findings as to whether the application is consistent with the proposed zone classification's purpose and intent.
>
> As stated in Section 3.4 of the Comprehensive Plan, RI plan designation and zoning brings specific properties into compliance with state rules "by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022." The Hearings Officer finds the applications are consistent with the general statement in the DCCP regarding RI plan designation and zoning, given that the RI zone does not allow urban uses. The Hearings

Officer finds that the proposed change in designation and zone classification to RI will ensure that the property remains rural and that the uses allowed are less intensive than those allowed in unincorporated communities.

[9] Former DCC 18.100.010 stated that the purpose of the RI zone is "to encourage employment opportunities in rural areas and to promote the appropriate economic development of rural service centers which are rapidly becoming urbanized and soon to be full-service incorporated cities, while protecting the existing rural character of the area as well as preserving or enhancing the air, water and land resources of the area." As amended in 2021, there is no longer a purpose statement in this chapter concerning the RI zone.

Staff believes the same findings are appropriate for the subject request and asks the Hearings Officer to make specific findings on compliance with this criterion.

C. That changing the zoning will presently serve the public health, safety and welfare considering the following factors:

1. The availability and efficiency of providing necessary public services and facilities.

FINDING: The Applicant provided the following response on pg. 163 of their Burden of Proof:

Section 12 starting on page 48 addresses this criterion, including will-serve letters. The necessary public facilities and services are available to serve future industrial development on the subject property. The property receives fire protection from the Deschutes County Rural Fire District No. 2. In its comments on the applicant's proposal, the fire department stated it can serve the subject site if it is rezoned. The property receives police protection from the Deschutes County Sheriff. Pacific Power provides electrical service and Avion Water Company provides water service to the subject site. Avion's letter of willingness to serve the property is Figure 15, Pacific Power's letter of willingness to serve is Figure 16. Avion water and power are already on site. Bend Fire Department's will-serve letter is in Figure 17. Appropriate on-site wastewater and sewage disposal systems will be engineered, designed and developed when a site plan for a specific user is submitted to the County. The Applicant's Traffic Impact Analysis in Attachment 1 show that the Applicant's proposal satisfies the TPR. Therefore, this criterion is met.

Staff asks the Hearings Officer to evaluate what "public services and facilities" review is required to demonstrate compliance with this criterion. In *Aceti IV* (247-20-000438-PA / 439-ZC), compliance with this criterion was based on a detailed analysis of public service and facilities, including will-serve letters. TSP compliance was also found to be relevant under this criterion. As noted in the applicant's response above, the same information has been submitted as part of the subject request. However, the Hearings Officer evaluated this criterion differently in *LBNW, LCC* (247-21-0000881-PA/882-ZC) and made the following findings, which were adopted as part of the BOCC's decision:

There are no plans to develop the property in its current state. The above criterion asks if the proposed zone change will presently serve public health, safety, and welfare…Many DCC

18.100.010 uses are outright uses, the future development of which will be subject to review of public services and facilities availability. Prior to development of the properties, the Applicant will be required to comply with the applicable requirements of the Deschutes County Code, including possible land use permitting, building permitting, and sewage disposal permitting processes. Through these development review processes, assurance of adequate public services and facilities will be verified.

Staff requests the Hearings Officer review compliance with this criterion in light of findings in *Aceti IV* (247-20-000438-PA, 439-ZC) and *LBNW, LCC* (247-21-0000881-PA/882-ZC).

2. The impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan.

FINDING: The Hearings Officer and BOCC adopted the following findings as part of *Aceti IV* (247-20-000438-PA, 439-ZC):

Impacts to surrounding land uses resulting from the requested rezone and re-designation must be determined to be consistent with the specific goals and policies in the DCCP. Specific comprehensive goals and policies pertaining to these surrounding land uses are discussed in the section of this decision addressing the DCCP, in the findings ·below. The Hearings Officer's review includes consideration of the range of uses allowed outright and conditionally in the RI zone which inform a decision on whether expected or anticipated impacts of such potential uses on surrounding land use will be consistent with the specific goals and policies in the DCCP. Although no specific development is proposed at this time, the Hearings Officer notes that potential impacts to surrounding land use from industrial uses generally include traffic, visual impacts, odor, dust, fumes, glare, flashing lights, noise, and similar disturbances. Again, such impacts are considered in light of existing impacts of development and roads in the surrounding area.

The Applicant's proposed uses are the same as *Aceti IV* (247-20-000438-PA, 439-ZC) as the subject proposal includes all uses permitted outright and conditionally in the RI Zone. Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request. Further analysis on the impacts on surrounding land uses, and analysis of specific goals and policies contained within the DCCP are detailed below.

D. That there has been a change in circumstances since the property was last zoned, or a mistake was made in the zoning of the property in question.

FINDING: The Applicant provided responses to this criterion on pgs. 113-117 and 163-174 of their Burden of Proof to demonstrate there has been a change of circumstances. Staff highlights the following passage from the submitted materials:

Section 19 [of the Burden of Proof] describes the significant and many changes in circumstances including the location of the four-lane US 97 along the entire western property line, the construction of the overpass approach just south of the property and the north

bound on and off ramps to US 97 being in front of the property, the realignment of roads, the increase in traffic around the property, and the new soils study which says the land is not agricultural land. If the property was being zoned today, it would not be zoned EFU.

The zoning of the subject property was not based on a parcel-specific soils analysis or on the agricultural capability of this parcel by itself. We now have data that shows the land is not primarily resource soils. (See Attachment 2, Agricultural Soils Capability Assessment.)

The zoning did not consider the population, parcelization and rapid growth in population in the area. Subdivisions were done in the 1960s and 1970s and already Long Butte and the area south of Tumalo Road and along Deschutes Market Road were subdivided into residential lots. See Figure 39 on page 111. It was not an agricultural area. Circumstances at the time of the first zoning code already pointed to the highly developed nature of the area. See the Section 17 on the history of Deschutes and about previous owners and how they used the property and Section 19 about changes in circumstances. The rock spine on the eastern third of the land were the worst acres of the original homestead and were not even cleared of native vegetation. Parcels to the west were either unproductive, had been broken up as small hobby farms and residential subdivisions or had sharp slopes on the edges of Long Butte. Long Butte was already subdivided into Whispering Pines Estates, as was Starwood and other rural subdivisions nearby, totaling over 1,750 residential lots. Residential development was already significant and the US 97 immediately adjacent to the subject site made farming difficult and hazardous to the highway travelers due to the prevailing winds blowing dust of tilling itself and fragile newly tilled soils across the highway when the original zone was assigned.

The 1972 property ownership map is repeated here and shows the committed subdivisions at the beginning of the Statewide Planning Program and at the time of the original zoning. In the early 1970s few parcels were of adequate size for a productive commercial farm and most of those were either rocky, in public ownership (labeled US) or were already surrounded by urbanization.

[Figure Omitted]

The area in this map is within T16S, R 12 E, WM. The section numbers are marked in bold black. This map is made with the 1972 Metsker's Atlas of Deschutes County. In 2021, there is more parcelization and more subdivisions than there was in 1972.

The above 1972 property ownership map shows the parcels at the time of the original 1979 land use planning effort. The Deschutes Ranch was broken into 13 parcels that were sold by 1995, in addition to the land for road and the canal. The Howard Ranch has been divided into 17 lots, including the subject property. Within seven years of the original zoning, the Three Sisters Adventist Christian School was underway. US 97 was widened to 4 lanes in 1992, taking land from the subject property.

Long Butte was never farmed, as its soil is nearly non-existent, and the steep slope made irrigation infeasible. But it had great views. By 1979 it was a residential subdivision. Whispering Pines, Starwood, El Rancho and Glacier subdivisions are shown on the map. Already by 1972 about 1,550 residential lots were subdivided at Deschutes, adjacent to the subject property. Also, the unique system of important roads going in all directions and the establishment of the post office and Deschutes Railroad Passenger and Freight Station and the town of Deschutes in 1911 gave early indications that the area would be a town.

It can be successfully argued that the original EFU-TRB zone was in error, but, due to all of the changes in circumstances, and in light of the soil data available to the county today, it is not appropriate or prudent to keep the EFU zoning that was applied to the subject property in the 1970's when the comprehensive plan and map were adopted.

2. Change in Circumstances. Section 19, Changes in Circumstances, is the relevant answer to this criterion. It describes some important changes to the subject property and to Deschutes since the original zone and plan designation. Section 19 identifies significant changes in circumstances justifying the proposed plan amendment and zone change from EFU to RI. The changes in circumstances since 1979 are significant and numerous and are described in Section 19:

The new site-specific soils data alone for the subject property is a significant change of circumstances justifying the proposed plan amendment and zone change from EFU to Rl. The soil study, discussed in detail in the findings below (Attachment 2) shows the subject property is comprised predominantly of Class VII and Class VIII - non-agricultural - soils that are unsuitable for farm use.

For the foregoing reasons, the Applicant's proposal satisfies the applicable provisions of the comprehensive plan. The criteria are met.

Staff asks the Hearings Officer to determine if the Applicant has demonstrated there has been a change in circumstances since the property was zoned to warrant rezoning the subject property from EFU to RI.

Deschutes County Comprehensive Plan (DCCP)

Chapter 2, Resource Management

Section 2.2 Agricultural Lands

Goal 1, Preserve and maintain agricultural lands and the agricultural industry.

FINDING: The Applicant provided the following response on pgs. 154-155 of their Burden of Proof:

This is an aspirational goal and not an approval criterion. Nevertheless, as discussed in detail in the findings below, the subject property does NOT constitute agricultural land that must be preserved based on the applicant's site-specific soil study showing the property is composed predominantly of non-agricultural soils. (See ATTACHMENT 2, Agricultural Soils Capability Assessment.)

The purpose of the soils capability assessment was to conduct an inventory and assessment of the soil resource and specifically to determine the extent of agricultural land as defined by Oregon Administrative Rules 660-033, Agricultural Land, for the parcel.

The study found that approximately 66% (13.44 acres) is land Capability Class 7 and 8 soils. 2.46 acres are covered with structures, infrastructure, and the paved parking area and are classified as zone 8. 0.67 acres are rock outcrop and are classified as zone 8. 8.34 acres are classified as 57B Gosney with and without irrigation (Nl/I). 1.97 acres are classified as 58C Gosney- R.O. (Nl/I). Soils generally suited for farm and forest production were found in 6.92 acres as 36A Deskamp (6/NI-3/I). Generally unsuited soils are 13.44 acres.

The parcels, as defined in statute, are not predominately Agricultural Land. Further, with the soil ratings as non-agricultural soils, the determination of suitability for farm use is "generally unsuitable" for the production of farm crops, livestock, or merchantable tree species based upon the low fertility, limited soil depth for cultivation and ability to store and hold water, lack of forage production for livestock grazing, limited length of growing season and high levels of energy input with limited outcome. (Pages 1-3 of the soils report).

Substantial evidence in the record supports a finding that the subject property does not constitute agricultural land that must be preserved as set forth in the Applicant's site-specific soil study and as previously found by the Hearings Officer, the BOCC and LUBA. There is no evidence in the record that the proposal will adversely impact surrounding agricultural lands or the agricultural industry, particularly considering the surrounding road network, impacts of nearby heavy traffic and transportation, impacts due to the expansion of US 97 and surrounding commercial and industrial uses already in existence.

The Kitzrow study concluded the subject property is predominantly non-agricultural soils. The conclusion of the study is as follows:

"This 20.36-acre study site is part of the subject property and is composed of a majority or preponderance of unsuited soils including the Gosney (57B), Gosney-RO (58C), infrastructure, and rock outcrop (109). Over 66% of the subject parcel is made up of Capability Class 7 and 8 soils. Deskamp soils are largely irrigated on this site, have good utility and are suited for farm crops including hay and pasture. The four unsuited mapping units are each generally unsuited for farm crop production including hay and pasture and merchantable timber production."

"We hereby certify a preponderance of this lot of record is comprised of generally unsuited Capability Class 7 and 8 soils. The percentage of land base which has been confirmed as

generally unsuited (Class 7 and 8) is 66% or13.44 acres".

Irrigation

The property has 14.6 acres deeded water right from the Pilot Butte Canal, delivered by Central Oregon Irrigation District (COID) under Certificate Number 29052. 12.9 acres of water are on Tax lot 800 with 5.23 acres being in good standing. 7.67 acres have not been used beneficially for at least the past 20 years or more. 1.8 acres are on Tax lot 101. All 1.8 acres are past 5 years of beneficial use and have not been used for at least 40 years. They have not been used since the property was purchased by the Carseys in 1991. The irrigation water in good standing can be used on the industrial uses landscaping. Therefore, this policy is met.

In *Aceti IV* (247-20-000438-PA, 439-ZC), the Hearings Officer found and the BOCC adopted the following finding:

> The Hearings Officer found in *Aceti 1* this is an aspirational goal and not an approval criterion. LUBA determined that the subject property does not constitute Agricultural Lands under OAR 660-033-0020(1); this finding is binding under the law of the case doctrine as discussed above.
>
> Substantial evidence in the record supports a finding that the subject property does not constitute agricultural land that must be preserved as set forth in the Applicant's site-specific soil study and as previously found by the Hearings Officer, the BOCC and LUBA. There is no evidence in the record that the proposal will adversely impact surrounding agricultural lands or the agricultural industry, particularly considering the surrounding road network, impacts of nearby heavy traffic and transportation, impacts due to the expansion of US 97 and surrounding commercial and industrial uses already in existence.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

> ***Policy 2.2.2 Exclusive Farm Use sub-zones shall remain as described in the 1992 Farm Study and shown in the table below, unless adequate legal findings for amending the sub-zones are adopted or an individual parcel is rezoned as allowed by Policy 2.2.3.***

FINDING: The Applicant is not asking to amend the EFU subzone that applies to the subject property; rather, the Applicant is seeking a change under Policy 2.2.3 and has provided evidence to support rezoning the subject property to RI.

> ***Policy 2.2.3 Allow comprehensive plan and zoning map amendments for individual EFU parcels as allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan.***

FINDING: The Applicant is seeking approval of a Plan Amendment and Zone Change to re-designate and rezone the property from Agricultural to Rural Industrial. The Applicant is not seeking an

exception to Goal 3 – Agricultural Lands, but rather seeks to demonstrate that the subject property does not meet the state definition of "Agricultural Land" as defined in Statewide Planning Goal 3 (OAR 660-033-0020).

The Applicant provided the following response on pg. 155 of their Burden of Proof:

> This policy also is directed at the county rather than an individual applicant. Nevertheless, the applicant has requested a quasi-judicial plan amendment and zone change to remove the EFU designation and zoning from the subject property based on the evidence provided that the land is not agricultural resource land. As discussed in detail in the findings below, the Applicant's proposal is authorized by policies in the comprehensive plan and is permitted under state law. Therefore, this policy is met.

In *Aceti IV* (247-20-000438-PA, 439-ZC), the Hearings Officer found and the BOCC adopted the following finding:

> The Hearings Officer found in *Aceti 1* that this policy is directed at the County rather than an individual Applicant. In any case, the Applicant has requested a quasi-judicial plan amendment and zone change to remove the EFU designation and zoning from the subject property. LUBA has determined that the subject property is not "Agricultural Land" subject to Goal 3. The Hearings Officer finds the Applicant's proposal is authorized by policies in the DCCP and is permitted under state law.

Additionally, the Hearings Officer and BOCC relied upon the following case law as part of the *LBNW, LLC* decision (247-21-000881-PA, 882-ZC)*:*

> *Wetherell*, 52 OR LUBA at 678-679 (citing *Caine v. Tillamook County*, 25 Or LUBA 209, 218 (1993); *DLCD v. Josephine County*, 18 Or LUBA 798, 802 (1990)). On appeal to both the Oregon Court of Appeals and the Oregon Supreme Court, neither court disturbed LUBA's ruling on this point, and the Oregon Supreme Court even changed the test for determining whether land is agricultural land to make it less stringent. *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007). Specifically, the Supreme Court held:
>
> > Under Goal 3, land must be preserved as agricultural land if it is suitable for "farm use" as defined in ORS 215.203(2)(a), which means, in part, "the current employment of land for the primary purpose of obtaining a profit in money" through specific farming-related endeavors.
>
> *Wetherell*, 342 Or at 677. The *Wetherell* court further held that when deciding whether land is agricultural land "a local government may not be precluded from considering the costs or expenses of engaging in those activities." Id. At 680.

Based on the above information and relevant case law, staff requests the Hearings Officer make specific findings on this issue.

Policy 2.2.4 Develop comprehensive policy criteria and code to provide clarity on when and how EFU parcels can be converted to other designations.

FINDING: The Applicant provided the following response on pg. 156 of their Burden of Proof:

> This policy also is directed at the county rather than at an individual application. In any event, in the decision in NNP (PA-13-1, ZC-13-1) the County held any failure on the county's part to adopt comprehensive plan policies and code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation and zoning does not preclude the county from considering quasi-judicial plan amendment and zone change applications to remove EFU zoning. That decision applies to this application. Therefore, this policy is met.

In *Aceti IV* (247-20-000438-PA, 439-ZC), the Hearings Officer found and the BOCC adopted the following finding:

> The Hearings Officer found in Aceti 1 that this policy is directed at the County rather than at an individual Applicant. In said decision, the Hearings Officer cited a previous decision for file nos. PA-14-2 and ZC-14-2 that stated, 'In any event, in my decision in NNP (PA-13-1, ZC-13-1) I held any failure on the county's part to adopt comprehensive plan policies and code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation and zoning does not preclude the county from considering quasi-judicial plan amendment and zone change applications to remove EFU zoning.'
>
> Hearings Officer Green determined in file nos. 247-14-000456-ZC, 457-PA that 'any failure on the county's part to adopt comprehensive plan policies and code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation and zoning does not preclude the county from considering quasi-judicial plan amendment and zone change applications to remove EFU zoning.' Consistent with this ruling, I find that, until such time as the County establishes policy criteria and code on how EFU parcels can be converted to other designations, the current legal framework can be used and must be addressed.

Additionally, the Hearings Officer found and the BOCC adopted the following finding in the *LBNW, LLC* decision (247-21-000881-PA, 882-ZC)*:*

> This plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations. The Hearings Officer finds that, without County-established policy criteria and code provisions that provide guidance on how EFU parcels can be converted to other designations, the current legal framework will be used and addressed. The Hearings Officer adheres to the County's previous determinations in plan amendment and zone change applications and finds the proposal is consistent with this policy.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

Goal 3, Ensure Exclusive Farm Use policies, classifications and codes are consistent with local and emerging agricultural conditions and markets.

Policy 2.2.13 Identify and retain accurately designated agricultural lands.

FINDING: In *Aceti IV* (247-20-000438-PA, 439-ZC), the Hearings Officer found and the BOCC adopted the following finding:

> The Hearings Officer found in Aceti 1 that this policy is directed at the County rather than an individual Applicant. Nonetheless, as determined by LUBA and binding on the parties, I find that the subject property does not constitute "Agricultural Land."

This plan policy requires the County to identify and retain agricultural lands that are accurately designated. The Applicant proposes that the subject property was not accurately designated as demonstrated by the soil study, NRCS soil data, and detailed in the Applicant's Burden of Proof. Further discussion on the soil analysis is detailed under the OAR Division 33 criteria below. Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

Section 2.5, Water Resources Policies

Goal 6, Coordinate land use and water policies.

Policy 2.5.24 Ensure water impacts are reviewed and, if necessary, addressed for significant land uses or developments.

FINDING: In *Aceti IV* (247-20-000438-PA, 439-ZC), the Hearings Officer found and the BOCC adopted the following finding:

> The Hearings Officer found in *Aceti 1* that this policy is directed at the County. In said decision, the Hearings Officer cited a previous decision of Hearings Officer Green for file nos. PA-14-2 and ZC-14-2 that stated, "Nevertheless, in my decision in NNP I held it is not clear from this plan language what ''water impacts" require review -- impacts to water supplies from use or consumption on the subject property, or Impacts to off-site water resources from development on the subject property." The Applicant has not proposed any particular land use or development, and any subsequent applications for development of the subject property would be reviewed under the County's land use regulations that include consideration of a variety of on- and off-site impacts.
>
> The Hearings Officer finds it is premature to review ''water impacts" because the Applicant has not proposed any particular land use or development. Thus, there are no "significant land uses or developments" that must be reviewed or addressed in this decision. Any subsequent applications for development of the subject property will be reviewed under the County's land use regulations, which include consideration of a variety of on- and off-site

impacts. Notwithstanding this statement, the Hearings Officer includes the following findings.

The Applicant's requested zone change to RI would allow a variety of land uses on the subject property. The land east of the subject property (57 acres) is zoned RI and developed with a variety of rural industrial uses. Consequently, it is likely that similar development may occur on the property if it were re-designated and rezoned to RI. In light of existing uses in the surrounding area, and the fact that Avion Water Company provides water service in the Deschutes Junction area, and a 12-inch diameter Avion water line and two fire hydrants are already installed on site, future development of the subject property with uses permitted in the RI Zone will have water service.

The subject property has 16 acres of irrigation water rights and, therefore, the proposed plan amendment and zone change will result in the loss or transfer of water rights unless it is possible to bring some irrigated water to the land for other allowed beneficial uses, such as irrigated landscaping. As stated in the Applicant's Burden of Proof, the 16 acres of irrigation water rights are undeliverable and are not mentioned in the property deed. The Applicant has not grown a crop on the subject property or effectively used his water right since the overpass was constructed in 1998.

The Hearings Officer finds that the proposal will not, in and of itself, result in any adverse water impacts. The proposal does not request approval of any significant land uses or development.

The Applicant is not proposing a specific development application at this time. Following the analysis in *Aceti IV* (247-20-000438-PA, 439-ZC), the Applicant is not required to demonstrate the water impacts associated with development. Rather, the Applicant will be required to address this criterion during development of the subject property, which would be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat). The Hearings Officer made similar findings in *LBNW, LLC* (247-21-000881-PA, 882-ZC). Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

Section 2.7, Open Spaces, Scenic Views and Sites

Goal 1, Coordinate with property owners to ensure protection of significant open spaces and scenic views and sites.

FINDING: The subject property is located within the Landscape Management (LM) Combining Zone[17] associated with the scenic corridor along State Highway 97. The standards associated with the LM Combining Zone are generally reviewed for compliance when a new structure or substantial alternation of an existing structure is proposed. However, it is unclear to staff if the Landscape Management Combining Zone overlay designates the subject property as a "significant" scenic view and how this policy relates to compliance with Statewide Planning Goal 5.

[17] Staff notes the subject property is zoned EFU and is not included within the OS&C Zoning District.

Section 2.7 of the DCCP states:

> Scenic view protection is implemented through the Landscape Management Combining Zone regulations, with the list of landscape management roads and rivers in the Goal 5 resource list in Chapter 5 of this Plan.
> ...
>
> Views from roads and rivers have long been protected by a landscape management overlay zone. There have been questions as to the effectiveness and usefulness of this protection.

DCCP Section 5.5 states:

> This section contains information from the 1979 Deschutes County Comprehensive Plan as revised. It lists the open spaces, scenic views and sites resources in Deschutes County. These inventories have been acknowledged by the Department of Land Conservation and Development as complying with Goal 5. No changes have been proposed for the 2010 Comprehensive Plan update.
>
> To protect scenic views, landscape management areas have been defined and a combining zone created. On lands outside urban growth boundaries and rural service centers along the portions of roadways listed below, landscape management zoning applies and a case-by-case site plan review is required. The area extends ¼ mile on either side from the centerline of the roadways and includes all areas designated as State and Federal Wild, Scenic or recreational waterways and within 660 feet from either side of designated rivers and streams as measured from the ordinary high water level.

The Applicant provided the following response on pg. 21 of the Applicant's Incomplete Letter Response:

> This Criteria is directed at the County. It directs the County to collaborate with the property owners to identify and protect significant open spaces and scenic views and sites. It also encourages, (It does not require) new development to be sensitive to scenic view and sites without defining what this vison means. This is not a code requirement, but rather a goal of the County.
>
> The subject property has not been designated as a significant open space, scenic view or site and the property owner was not approached about the subject.
>
> Nonetheless, if it was a code requirement, the land is not visually prominent. In fact, it is relatively hidden by US 97, the Deschutes Junction Overpass and its approaches, and the sloped north-bound on and off ramps to US 97 and to Deschutes Pleasant Ridge Road. The wide 100-foot LM setback for buildings on site along US 97 will ensure that any new structures will be set far back from US 97 and be sensitive to the LM zone, The 30-foot height limit required by dimensional standard 18.100.040(6) because of the proximity of two houses

on the west of US 97 on L6I226 B lots 300 and 500 will also keep any future buildings on site along US 97 lower than the 5-feet tall that they could be otherwise.

The property is also lower in elevation than US 97 by four feet. The elevation of US 97 is generally 3254 and the adjacent subject property is generally at the 3250 level. The elevation at Deschutes Pleasant Ridge Road adjacent to the driveway into the property is 3269, 15 feet higher than on US 97. Staff will have an opportunity to address this issue, if it is applicable, during future site plan review.

The Hearings Officer found and the BOCC adopted the following findings in the *LBNW, LLC* decision (247-21-000881-PA, 882-ZC):

These policies are fulfilled by the County's Goal 5 program. The County protects scenic views and sites along major rivers and roadways by imposing Landscape Management (LM) Combining Zones to adjacent properties. The subject properties adjoin a property to the south (Tax Lot 700, Assessor's Map 16-1223) which is currently zoned Open Space & Conservation (OS&C) and owned by Oregon Parks & Recreation Department. The subject properties are also located within the Landscape Management (LM) Combining Zone associated with the scenic corridor of Highway 97. The subject properties themselves are zoned EFU and are not included within the OS&C zoning district and the regulations applicable to the LM Combining Zone are applicable only when a specific development proposal is applied for within the Combining Zone.

The Hearings Officer finds that the subject properties do not constitute significant open spaces subject to the Goals and Policies of Deschutes County Comprehensive Plan Chapter 2, Section 2.7 and have not been inventoried in Chapter 5, Section 5.5 of the DCCP as land that is an "area of special concern," nor" land needed and desirable for open space and scenic resources. The Hearings Officer further finds that review of compliance with the LM Combining Zone is not required within the scope of the subject Plan Amendment/Zone Change applications.

For these reasons, the Hearings Officer finds that these provisions of the DCCP are inapplicable to consideration of the proposed zone change and plan amendment.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

Chapter 3, Rural Growth

Section 3.4, Rural Economy Policies

Rural Commercial and Rural Industrial

In Deschutes County some properties are zoned Rural Commercial and Rural Industrial. The initial applications for the zoning designations recognize uses that predated State land use laws. However, it may be in the best interest of the County to provide opportunities for the

establishment of new Rural Industrial and Rural Commercial properties when they are appropriate and regulations are met. Requests to re-designate property as Rural Commercial or Rural Industrial will be reviewed on a property-specific basis in accordance with state and local regulations.

…

Rural Industrial

The county may apply the Rural Industrial plan designation to specific property within existing Rural Industrial exception areas, or to any other specific property that satisfies the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, this Comprehensive Plan and the Deschutes County Development Code, and that is located outside unincorporated communities and urban growth boundaries. The Rural Industrial plan designation and zoning brings these areas and specific properties into compliance with state rules by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022.

The county originally applied the Rural Industrial designation to the following acknowledged exception areas.

- ***Redmond Military***
- ***Deschutes Junction***
- ***Bend Auto Recyclers***

Existing Rural Industrial Designated Exception Areas

The Redmond Military site consists of tax lot 1513000000116 and is 35.42 acres, bounded by the Redmond Urban Growth Boundary to the west and agricultural lands (EFU) surrounding the remainder of the property.

The Deschutes Junction site consists of the following tax lots: 161226C000107 (9.05 acres), 16126C000106 (4.33 acres), 161226C000102 (1.41 acres), 161226C000114 (2.50 acres), portions 161226C000300 (12.9 acres). 161226C000301 (8.93 acres), 161226A000203 (1.5 acres) and those portions of 161226C000111 located west of the Burlington Northern-Santa Fe railroad tracks (16.45 acres). Generally, the Deschutes Junction site is bordered on the west by Highway 97, on the east by the Burlington Northern Railroad, on the north by Nichols Market Road (except for a portion of 1612226A000111), and on the south by EFU-zoned property owned by the City of Bend.

Bend Auto Recyclers consists of tax lot 1712030000111 and is 13.41 acres, bounded by Highway 97 to the west, and Rural Residential (MUA-10) lands to east, north and south.

FINDING: The Applicant provided the following response on pg. 157 of their Burden of Proof:

This policy is directed at the County and not an individual applicant and not at individual applications. As seen in LUBA No. 2016-012, the Deschutes County RI code is acknowledged and valid and includes a list of outright permitted uses that are not urban and are appropriate rural uses. The Applicant is asking for a zone change, not any particular use at this time. Figure 23 on pages 72 and 73 is of actual uses at Deschutes Junction on RI zoned land. The uses that will be approved in the future on this parcel are likely to be similar. Subsequently, the County will approve outright permitted RI uses or conditional uses on the property to ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successors. Therefore, this policy is met.

Staff notes this preliminary statement from Chapter 3 of the DCCP did not receive responses from the Hearings Officer in *Aceti IV* (247-20-000438-PA, 439-ZC) or *LBNW, LLC* (247-21-000881-PA, 882-ZC). Staff asks the Hearings Officer to determine if any findings are necessary for the subject applications.

Section 3.4, Rural Economy

Goal 1, Maintain a stable and sustainable rural economy, compatible with rural lifestyles and a healthy environment.

FINDING: In *Aceti IV* (247-20-000438-PA, 439-ZC), the Hearings Officer found and the BOCC adopted the following finding:

The Hearings Officer incorporates the findings regarding compatibility with "rural character" from DCC 18.136.020(B) herein by reference to address "rural lifestyles". No adverse impacts to the "rural economy" or "healthy environment" have been identified in the record.

In *LBNW, LLC* (247-21-000881-PA, 882-ZC), the Hearings Officer found and the BOCC adopted the following finding:

The Applicant's burden of proof does not provide a response to the above Goal, however, the Hearings Officer notes that Goals are long-term outcomes the County hopes to achieve by implementing the DCCP, whereas Policies set preferred direction and describe what must be done to achieve stated Goals. The Hearings Officer addresses with specific DCCP policies, consistency with which establishes consistency with this Goal.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

Policy 3.4.1 Promote rural economic initiatives, including home-based businesses, that maintain the integrity of the rural character and natural environment.

a. Review land use regulations to identify legal and appropriate rural economic development opportunities.

Policy 3.4.3 Support a regional approach to economic development in concert with Economic Development for Central Oregon or similar organizations.

FINDING: The Applicant's Burden of Proof does not provide responses to the above policies. However, the Applicant provided the following responses to these policies as part of the Applicant's Incomplete Letter Response:

> The TIA pages 8 and 9 as noted above estimate potential employees on site once it is developed with allowed and approved uses in 7,500 square foot buildings. Because there are 4,000 residents in Deschutes and Long Butte, some of those people may work on site. That will reduce miles traveled to and from work for some people who now drive to Bend or Redmond.
>
> > Specialty Trade Contractor, two sites, ITE 180: 370 square feet per employee = 20 x2 = 40 employees.
> >
> > Building Materials and Lumber Store, ITE 812: 1,511 square feet per employee = 5 employees.
> >
> > Animal Hospital/Veterinary Clinic, ITE 640: 590 square feet per employee = 12 employees. (Note that a 7,500 square foot veterinarian building would be enormous!)
> >
> > Warehousing, multiple uses, ITE 150: 2,953 square feet per employee = 3 employees.
> >
> > Manufacturing, multiple uses, ITE 140: 528 square feet per employee =. 14 employees.
> >
> > Total worst case employment estimate: 74 employees.
>
> In the Hearings Officer's Decision on application24T-20-000438-PA/439-ZC, dated 7 October 2020, by Stephanie Marshall, the Hearings Officer found on page 61, regarding Chapter 3.4, Rural Economy, that the policies are directed at the County and not at an individual applicant.
>
> She wrote, "No adverse impacts to the 'rural economy' or 'healthy environment' have been identified in the record." That decision was for the property immediately southwest of the subject property.
>
> In this case for Mark Rubbert, the County can maintain a stable and sustainable rural economy, compatible with rural lifestyles and a healthy environment. No adverse impacts have been identified. The County codes and dimensional standards and the environmental codes addressing any future development will ensure that the area maintains a healthy environment.
>
> Utilities are discussed in Section 12 of the application. Avion Water Company already serves the property and has a "will serve" letter in the application. Any landscaping can be watered with the water delivered by the 1912 water right from Central Oregon Irrigation District, as it has been since it was part of the Roscoe Howard Ranch. Power is already on site and a will-serve letter was provided by Pacific Power. Other will-serve letters show there is no need to

bring in any new utility to serve the new use. Any further sewage disposal systems will be regulated to protect the environment.
On page 62, the Decision on application 247-20-000438-PAI439-ZC, dated 7 October 2020, by Stephanie Marshall, the Hearings Officer states, "The Hearings Officer finds the Applicant has demonstrated that Goals 3 and 4 do not apply to the subject property as affirmed by LUBA No. 2016-012. Therefore, I find the subject property can be considered for the proposed Rural Industrial designation and Rural Industrial zoning as proposed. Compliance with applicable ORS, OAR, and DCCP provisions is addressed in the findings herein."

Stephanie Marshall is referring to the Borine Soils Study and report that demonstrated that the soils do not meet the definition of agricultural land. That is the same situation as in this application. This application includes an Agricultural Soils Capability Assessment by Gary Kitzrow, MS, CPSS/SC that demonstrates that the land is poor and is primarily non-agricultural. The soil survey completed on July 10,2020, by Gary Kitzrow, MS, CPSS/SC, concluded that 13.44 acres (66%) of the property is comprised of generally unsuited mapping units showing Capability Class 7 or 8 both irrigated and non-irrigated. This property is generally unsuited for "Agricultural Land" as defined by Oregon Statutes and Oregon Administrative Rules. The property meets the requirements for a non-resource designation. See Soils Capability Report in Attachment 2.

Deschutes or Deschutes Junction has been unusually well developed or scheduled for development since Centralo was platted and developed in 1911. (See Section on Previous Owners.) The subject property was part of the land purchased for the Town of Deschutes as plated in Centralo in 1911 and approved in Crook County. Since the mid-1940s, industrial uses have occurred there. Cascade Pumice was developed along the railroad tracks, followed by Willamette Graystone and Robinson's 4-R and now all of the RI businesses included in Figure 23 above. The location is central in the County, land is not resource land, and it has adequate transportation facilities. It follows the pattern of low impact RI development that is across US 97 and south of Deschutes Pleasant Ridge Road and has been going on in this location for over 100 years. It is logical and orderly development. The land immediately to the east of the canal is also not farmable. Timothy Puckett, a prominent Oregon farmer, owns it and has not irrigated it or cultivated it for decades. He supports this application.

If these criteria are directed at applicants, these criteria are met.

In *Aceti IV* (247-20-000438-PA, 439-ZC), the Hearings Officer and BOCC did not make findings in response to Policy 3.4.1. However, in *LBNW, LLC* (247-21-000881-PA, 882-ZC), the Hearings Officer found and BOCC adopted the following finding:

The Hearings Officer finds that Policy 3.4.1 in general, and subsection (a) specifically, provides direction to the County, rather than an applicant to “promote rural economic initiatives… that maintain the integrity of the rural character and natural environment” by, among other things, “review[ing] land use regulations to identify legal and appropriate rural economic development opportunities.” The Hearings Officer finds this Policy 3.4.1 is not applicable to the Applicant.

In *Aceti IV* (247-20-000438-PA, 439-ZC) and *LBNW, LLC* (247-21-000881-PA, 882-ZC), the Hearings Officers and BOCC did not make findings in response to Policy 3.4.3.

Staff asks the Hearings Officer to determine if any findings on these Policies are required for the subject request.

> ***Lands Designated and Zoned Rural Industrial***
> ***...***
> ***Policy 3.4.23 To assure that urban uses are not permitted on rural industrial lands, land use regulations in the Rural Industrial zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successor.***

FINDING: The Applicant provided the following response on pg. 157 of their Burden of Proof:

> This policy is directed at the County and not an individual applicant and not at individual applications. As seen in LUBA No. 2016-012, the Deschutes County RI code is acknowledged and valid and includes a list of outright permitted uses that are not urban and are appropriate rural uses. The Applicant is asking for a zone change, not any particular use at this time. Figure 23 on pages 72 and 73 is of actual uses at Deschutes Junction on RI zoned land. The uses that will be approved in the future on this parcel are likely to be similar. Subsequently, the County will approve outright permitted RI uses or conditional uses on the property to ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successors Therefore, this policy is met.

In *Aceti IV* (247-20-000438-PA, 439-ZC), the Hearings Officer found and the BOCC adopted the following finding:

> The Hearings Officer finds this policy is directed at the County and not an individual Applicant. The RI code is acknowledged, valid, and does not permit urban uses, as LUBA determined in LUBA No. 2018-126. The Applicant noted in his September 15, 2020 submittal that the first outright use listed in the RI and in the RC zone is farm use. He submits that this additionally supports a finding that RI and RC zoning is considered compatible in the rural county and is not an urban type or size of use.

Additionally, the BOCC adopted the following finding as part of *Aceti V* (247-22-000287-A):

> Furthermore, the Board of County Commissioners now expressly finds that the policies and provisions of the DCCP and DCC are independently sufficient to both demonstrate that post-acknowledgment plan amendments that apply the Rural Industrial (RI) plan designation and zoning to rural land are consistent with Goal 14 and that uses and development permitted pursuant to those acknowledged provisions constitute rural uses, do not constitute urban uses, and maintain the land as rural land.

LUBA, as part of their review of *Aceti IV* (247-20-000438-PA, 439-ZC), made the following findings related to the above Policy:

> Ordinance 2002-126 adopted what is now DCCP Policy 3.4.23, which applies to lands designated and zoned RI and provides: 'To assure that urban uses are not permitted on rural industrial lands, land use regulations in the [RI] zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successor.' Ordinance 2002-127 amended DCC chapter 18.100, the RI zone regulations. On January 23, 2003, DLCD issued Order No. 001456, acknowledging the 2002 Ordinances as consistent with Goal 14.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

> ***Policy 3.4.27 Land use regulations shall ensure that new uses authorized within the Rural Industrial sites do not adversely affect agricultural and forest uses in the surrounding area.***

FINDING: The Applicant provided the following response on pg. 157 of their Burden of Proof:

> The above language about the regulations indicates these policies are directed at the county and not at individual applications. In any case, the applicant's proposal does not change the land use regulations in the RI Zone. Therefore, this criterion is met. It is important to the Applicant and the County that the zone change and plan amendment do not have an adverse effect on agricultural and forest uses in the surrounding area. There are no forest uses within several miles of the site. There is one hobby farm in the area on the east side of Pleasant Ridge Road and the BNSF Railroad tracks. Baby apple trees were recently planted on the 9.71-acre Irwin's property on the west side of the US 97. Both owners were consulted, and both said the applications for the rezone will not adversely affect them. The Applicant has done an exhaustive inventory of uses within half mile of the site and found no conflict with any agricultural or forest use. A letter of support is in the record from Timothy Puckett, the owner of the unfarmed parcels next door to the north and east that are zoned EFU-TRB. No evidence to refute the Applicant's study was introduced into the record. Therefore, this policy is met.

Staff notes that there are no identified forest uses in the vicinity and, juniper, the predominant tree species in the vicinity, is not merchantable.

In *Aceti IV* (247-20-000438-PA, 439-ZC), the Hearings Officer found:

> The Hearings Officer finds this policy is directed at the County and not at an individual Applicant. In any case, the Applicant's proposal does not change the land use regulations in the RI Zone. Substantial evidence in the record supports a finding that the zone change and plan amendment will not have an adverse effect on agricultural and forest uses in the surrounding area. The Applicant has completed an exhaustive inventory of uses within half

mile of the site and found no conflict with any agricultural or forest use. No evidence to refute the Applicant's study was introduced into the record.

The Hearings Officer made similar findings in *LBNW, LLC* (247-21-000881-PA, 882-ZC). Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

> ***Policy 3.4.28 New industrial uses shall be limited in size to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural areas, for which there is no floor area per use limitation.***
>
> ***Policy 3.4.31 Residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.***
>
> ***Policy 3.4.32 Residential and industrial uses shall be served by on-site wells or public water systems.***

FINDING: The Applicant provided the following response to the requirements of the policies listed above on pg. 157 of their Burden of Proof:

> The language of these policies apply to quasi-judicial applications and are inapplicable to the Applicant for the proposed rezone and plan amendment. They will apply when a site plan application and building permits for a specific use is proposed. These policies are codified in Chapter 18.100 governing the RI Zone and are implemented through those provisions. The Applicant is not applying for any specific building permit or site plan at this time. The Applicant used the 7,500 square feet per use code when computing how many buildings might fit on the developable acres. See Section 16, Developable acres. The current residential and future industrial uses are already being served by and will be served by a public water system, Avion. A will-serve letter is included as Figure 15 on page 49. The applicant's proposal does not change the land use regulations in the RI Zone. Therefore, these criteria are met.

In *Aceti IV* (247-20-000438-PA, 439-ZC), the Hearings Officer found and the BOCC adopted the following finding:

> The Hearings Officer found in the Aceti 1 that these policies apply to quasi-Judicial applications and are inapplicable to the Applicant for the proposed rezone and plan amendment. These policies are codified in DCC Chapter 18.100 and are implemented through those provisions. The Applicant is not applying for any specific building permit, site plan or conditional use approval at this time, and the proposal does not change the land use regulations in the RI Zone.

In *LBNW, LLC* (247-21-000881-PA, 882-ZC) the Hearings Officer made similar findings and added:

> This policy [3.4.28] is implemented through the County's adoption and enforcement of DCC Chapter 18.100, which will apply at the time the Applicant submits any specific building

permit, site plan or conditional use approval application. The proposal does not change the land use regulations in the RI Zone. Therefore, the policy is not applicable to the Applicant's proposal. To the extent this policy is applicable to the Applicant, the Hearings Officer finds the applications are consistent therewith.

… At the time a future use is proposed, the County shall, consistent with this policy [3.4.31] and DCC Chapter 18.100, ensure that such use is served by DEQ approved onsite sewage disposal systems.

… At the time a future use is proposed, the County shall, consistent with this policy and DCC Chapter 18.100, ensure such use is served by on-site well(s) or public water systems.

The record includes a well agreement (Exhibit 5) for the subject property. While it is unclear whether potential future industrial uses of the property may rely on water from the well, future review of any land use and/or building permit will require proof that any proposed use or development will be served by on-site wells or public water systems.

Additionally, the BOCC went on to further clarify in *LBNW, LLC* (247-21-000881-PA, 882-ZC) the following:

First, this Board already conclusively determined in the findings supporting the adoption of Ordinance No 2021-002 that the County's RI zone does not allow urban uses on rural land. That determination was predicated on six findings which were first recommended by the Hearings Officer and then adopted by this Board as part of the aforementioned ordinance. Although remanded to allow the Board to adopt additional findings on a separate (albeit related) matter discussed below, the six aforementioned findings demonstrating that the RI zone does not allow urban uses on rural land were reviewed by both LUBA and the Court of Appeals. *Central Oregon LandWatch v. Deschutes County*, __Or LUBA__ (LUBA No 2021-028) ("*Aceti*"), *aff'd*, 315 Or App 673, 501 P3d 1121 (2021) [18]. For its part, LUBA summarized and described those six findings by noting that "the county determined that even the most intensive industrial use that could be approved on the subject property under the RI regulations and use limitation would not constitute an urban use." *Id.* (slip op at *11). The Hearings Officer in this matter again repeated those six findings, concluding that they were "not constrained to the facts and circumstances at issue in the *Aceti* application" meaning that those "findings apply universally to any application submitted relying on the County's DCC and DCCP RI provisions." *See* Hearing Officer Decision, pg 42. For ease of reference, those six findings are repeated herein:

> *"First, LUBA has rejected the argument that DCC 18.100.010 allows urban uses as constituting an impermissible collateral attack on an acknowledged land use regulation. [Central Oregon LandWatch v. Deschutes County, 79 Or LUBA 253, aff'd, 298 Or App 37s,449 P3d 534 (2019)].*

[18] *Aceti IV*

"Second, DCC Chapter 18.100 implements DCCP Policies 3.4.9 and 3.4.23, which together direct land use regulations for the Rural Commercial and Rural Industrial zones to 'allow uses less intense than those allowed in unincorporated communities as defined by Oregon Administrative Rule 660-022 or its successor,' to 'assure that urban uses are not permitted on rural industrial lands.' The BOCC adopted this finding in support of Ordinance 2018-126, which was appealed and sustained by LUBA and the Court of Appeals.

"Third, as the BOCC found in adopting Ordinance 2018-126, which was appealed and sustained by LUBA and the Court of Appeals, the application of DCC Title 18 to any development proposed on Rural Commercial or Rural Industrial designated land will ensure that the development approved is consistent with the requirements set forth in DCCP Policies 3.4.12 and 3.4.27 do not adversely affect surrounding area agricultural or forest land, or the development policies limiting building size (DCCP Policies 3.4.14 and 3.4.28), sewers (DCCP Policies 3.4.18 and3.4.31) and water (DCCP Policies 3.4.19 and 3.4.32) intended to limit the scope and intensity of development on rural land.

"Fourth, DCCP Policy 3.4.28 includes a direction that, for lands designated and zoned RI, new industrial uses shall be limited to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural area, for which there is no floor area per use limitation.

"Fifth, DCCP Policy 3.4.31 includes a direction that, for lands designated and zoned RI, residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.

"Sixth, DCCP Policy 3.4.32 includes a direction that, for lands designated and zoned RI, residential and industrial uses shall be served by on-site wells or public water systems."

Neither COLW nor 1000 Friends provided argument in these proceedings that directly responded to the six aforementioned findings or otherwise presented any argument that gives this Board pause when it comes to re-adopting those same findings. Accordingly, this Board follows suit with the Hearings Officer and again adopts the six aforementioned findings as our own, conclusively demonstrating that the RI zone does not allow urban uses on rural lands.

In the interest of consistency, we also take note that this Board reached a similar conclusion when considering the aforementioned *Aceti* application on remand. Those findings, adopted as Exhibit F to Ordinance No 2022-010 state the following:

"*** * *** the Board of County Commissioners now expressly finds that the policies and provisions of the DCCP and DCC are independently sufficient to both demonstrate that post-acknowledgment plan amendments that apply the Rural Industrial (RI) plan designation and zoning to rural land are consistent with Goal 14 and that uses and development permitted pursuant to those acknowledged provisions constitute rural

uses, do not constitute urban uses, and maintain the land as rural land. Given that finding, any further analysis under *Shaffer* is redundant and precautionary only."

Pursuant to ORS 40.090(7), the Board takes judicial notice of Ordinance No 2022-010, and incorporates by reference herein the findings adopted as Exhibit F in that matter.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

Policy 3.4.29 A lawfully established use that existed on or before February 2, 2003 not otherwise allowed in a Rural Industrial zone may continue to exist subject to the county's non-conforming use regulations.

Policy 3.4.30 A lawfully established use that existed on or before February 2, 2003 may be expanded to occupy a maximum of 10,000 square feet of floor area or an additional 25 percent of the floor area currently occupied by the existing use, whichever is greater.

FINDING: Staff notes a number of uses have been permitted on the subject property and other uses may have been lawfully established. At this time, it is unclear what uses continue to exist on the subject property and/or whether those uses will be abandoned when the property is further developed in the future. Nevertheless, any potential nonconforming uses are subject to county's nonconforming use regulations contained in DCC 18.120 and the policies described above.

Policy 3.4.36 Properties for which a property owner has demonstrated that Goals 3 and 4 do not apply may be considered for Rural Industrial designation as allowed by State Statute, Oregon Administrative Rules, and this Comprehensive Plan. Rural Industrial zoning shall be applied to a new property that is approved for the Rural Industrial plan designation.

FINDING: The Applicant provided the following response to the requirements of the policy listed above on pg. 158 of their Burden of Proof:

The Applicant has demonstrated that Goals 3 and 4 do not apply to the subject property through the Agricultural Soils Capability Assessment, Appendix 2. The land is not agricultural or forest land. Therefore, the subject property can be considered for the proposed Rural Industrial designation and Rural Industrial zoning as proposed.

Compliance with applicable ORS, OAR, and DCCP provisions is addressed in the findings herein. Therefore, this policy is met.

Staff finds compliance with this policy will depend on the Hearings Officer's determination that the proposal has demonstrated Goals 3 and 4 do not apply. Staff asks the Hearings Officer to make findings on whether the subject applications comply with this policy.

<u>Section 3.5, Natural Hazards</u>

Goal 1. Protect people, property, infrastructure, the economy and the environment from natural hazards.

FINDING: In *Aceti IV* (247-20-000438-PA, 439-ZC) and in *LBNW, LLC* (247-21-000881-PA, 882-ZC), the Hearings Officers found and the BOCC adopted the following finding:

> The Hearings Officer finds this policy is directed at the County rather than at an individual Applicant. Nonetheless, I find there are 'no mapped flood or volcano hazards on the subject property or in the surrounding area. Additional hazards include wildfire, earthquake, and winter storm risks, which are identified in the County's DCCP. There is no evidence the proposal would result in any increased risk to persons, property, infrastructure, the economy and the environment from unusual natural hazards.

Staff asks the Hearings Officer to confirm if similar findings are appropriate in this case.

Section 3.7, Transportation

The Transportation System was adopted in Ordinance 2012-005 and is hereby incorporated into this Plan as Appendix C. The Deschutes County Transportation System Plan Map will be retained in official replica form as an electronic map layer within the County Geographic Information System and is adopted as part of this Comprehensive Plan.

Appendix C – Transportation System Plan
ARTERIAL AND COLLECTOR ROAD PLAN
…
Goal 4. Establish a transportation system, supportive of a geographically distributed and diversified economic base, while also providing a safe, efficient network for residential mobility and tourism.

Policy 4.1 Deschutes County shall:

a. Consider the road network to be the most important and valuable component of the transportation system; and

b. Consider the preservation and maintenance and repair of the County road network to be vital to the continued and future utility of the County's transportation system.

Policy 4.3 Deschutes County shall make transportation decisions with consideration of land use impacts, including but not limited to, adjacent land use patterns, both existing and planned, and their designated uses and densities.

Policy 4.4 Deschutes County shall consider roadway function, classification and capacity as criteria for plan map amendments and zone changes. This shall assure that proposed land uses do not exceed the planned capacity of the transportation system.

FINDING: The Applicant provided the following response to the requirements of these policies on pgs. 171-172 of their Burden of Proof:

> The above plan policies provide direction to the county but do not create approval criteria for a plan amendment and zone change. In any case, the applicant submitted the Transportation Impact Analysis (hereafter "traffic studies"). The traffic study prepared by Joe Bessman, PE, Transight Consulting, LLC, is included in the record as Attachment 1 to the Applicant's burden of proof.
>
> Concerning compliance with the Transportation Planning Rule (TPR), the traffic study concludes that traffic generated by development of the subject property with RI-zone uses in the reasonable "worst-case" scenario will not significantly affect a transportation facility (less than 2%) and therefore will comply with the TPR. Therefore, these criteria are met.
>
> The purpose of the Traffic Study is to document compliance with the Transportation Planning Rule (TPR) if a rezone is approved. Findings concerning the Traffic Study are set forth in detail below under Oregon Administrative Rule (OAR) 660, Division 12. Transportation Planning.
>
> Review of the Traffic Study by the County Transportation Planner and the Deschutes County Road Department constitutes consideration of: (1) land use impacts, including but not limited to, adjacent land use patterns, both existing and planned, and their designated uses and densities; and (2) roadway function, classification and capacity, to ensure that proposed land uses do not exceed the planned capacity of the transportation system.
>
> There are no planned land uses proposed with the subject application. The Traffic Study is based on consideration of a "worst-case" scenario of potential future development of the subject property.
>
> Comments from the County Transportation Planner and the Deschutes County Road Department agree with the Traffic Study's assumptions, methodology and conclusions. The Hearings Officer finds that substantial evidence supports a finding that identified transportation impacts of the proposed re-designation and rezone can be adequately mitigated. The County Transportation Planner suggests that, instead of the Traffic Study's proposed mitigation for the intersections of Tumalo Road/Graystone Lane and Graystone Lane/Pleasant Ridge Road via property donations or acquisitions for future roundabouts, the County will assess transportation system development charges (SDCs) and other non-infrastructure mitigations as development occurs on the site on that development:
>
> > The current SDC rate is $4,488 per peak trip. The County changes its SDC every July 1, per Board Resolution 2013-059. The actual SDC is based on the rate current when building permits are pulled, not the SDC rate when the land use is approved. The SDCs will mitigate the transportation impacts of the subsequent rural industrial development. Additionally, at time of future development, further traffic analysis may be required, depending on whether a future proposed development triggers the

> traffic analysis thresholds of Deschutes County Code (DCC) 18.116.310(C)(3). The County may also consider non-infrastructure mitigations (as an example, for manufacturing uses, start/stop times for workers would occur outside of the 7-9 a.m. and 4-6 p.m. peak hours), which are allowed under the Transportation Planning Rule (TPR) at OAR 660-012-0060(11).

The County Road Department agrees with the comments of the County Transportation Planner.

For the foregoing reasons, the Applicant's proposal is consistent with all applicable DCCP policies.

In *LBNW, LLC* (247-21-000881-PA, 882-ZC), the Hearings Officers found and the BOCC adopted the following finding:

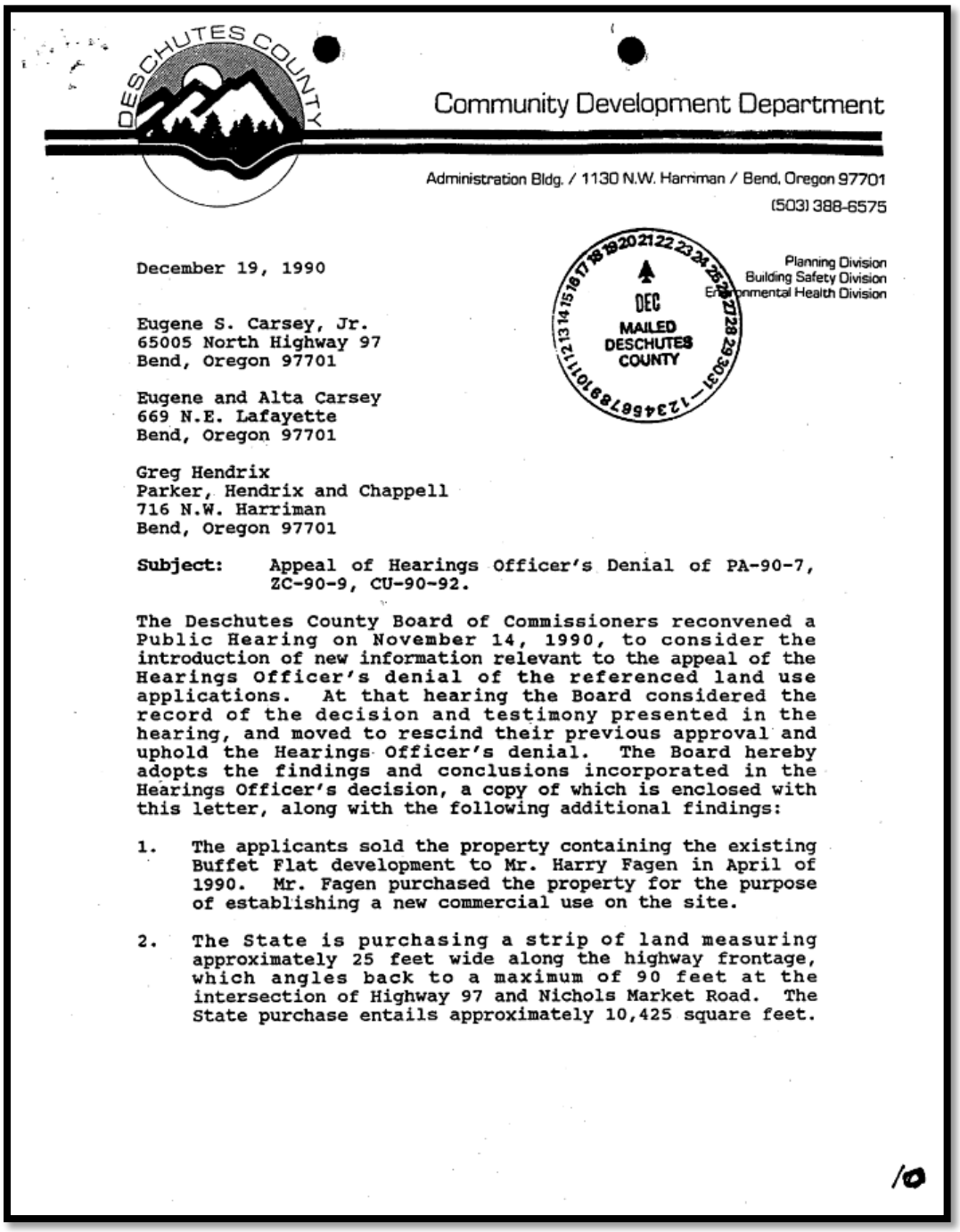
> The Hearings Officer finds these policies apply to the County, which advise it to consider the roadway function, classification and capacity as criteria for plan amendments and zone changes. These policies also advise the County to consider the existing road network and potential land use impacts when reviewing for compliance with plan amendments and zone changes. The County complies with this direction by determining compliance with the Transportation Planning Rule (TPR), also known as OAR 660-012, as set forth below in subsequent findings.
>
> The Hearings Officer finds the subject applications are consistent with these policies, to the extent applicable to the Applicant

As detailed in the Basic Finding section above, a previous owner in 1990 requested a Comprehensive Plan Amendment and Zone Change, which was denied by the BOCC as part of file nos. PA-90-7, ZC-90-9, CU-90-92. The basis of denial included findings that may fall under the requirements of these policies (ref. BOCC findings 4 and 5 below). However, staff asked Deschutes County's Senior Transportation Planner, Peter Russell, to provide comments on the relevancy of this decision and the following response was provided:

> When the Board denied PA-90-7/ZC-90-9/CU-90-92 in 1990, U.S. 97 was a two-lane highway with an at-grade intersection with U.S. 97 as the through move and stop signs on the east-west legs of the intersection. The highway was widened to four lanes in the early 1990s with US 97 remaining the through move and Tumalo Road and Deschutes Market Road still being controlled by stop signs. Due to the crash history in this location, a grade-separated interchange, aka Deschutes Junction, was approved under CU-96-45. The first phase of the grade-separated interchange opened to traffic in November 1998. Phase I included overpasses over U.S. 97 and the Pilot Butte Canal. That improvement corrected the transportation issues cited in the Board's 1990 decision as on/off movements use on/off ramps and the crossing maneuvers use the overpass portion of the interchange. A second phase of the Deschutes Junction interchange was built circa 2009 and had overpasses over the BNSF railroad tracks and the Jack Robinson property and a realignment of Deschutes

Market Road.

In light of the information above, staff asks the Hearings Officer to evaluate if this BOCC decision has any effect on whether the subject request complies with the current policies.



DESCHUTES COUNTY

Community Development Department

Administration Bldg. / 1130 N.W. Harriman / Bend, Oregon 97701
(503) 388-6575

Planning Division
Building Safety Division
Environmental Health Division

DEC
MAILED
DESCHUTES
COUNTY

December 19, 1990

Eugene S. Carsey, Jr.
65005 North Highway 97
Bend, Oregon 97701

Eugene and Alta Carsey
669 N.E. Lafayette
Bend, Oregon 97701

Greg Hendrix
Parker, Hendrix and Chappell
716 N.W. Harriman
Bend, Oregon 97701

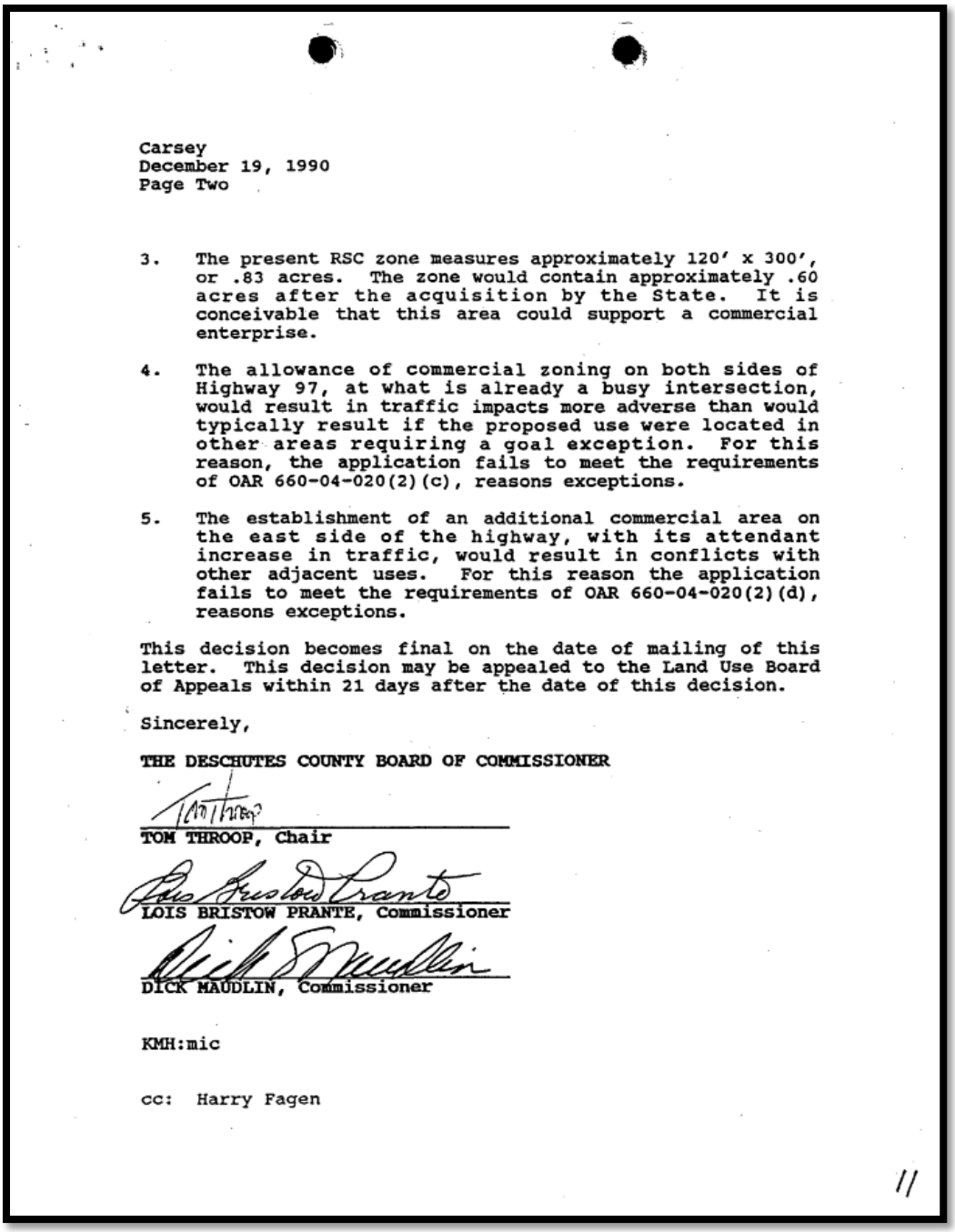
Subject: Appeal of Hearings Officer's Denial of PA-90-7, ZC-90-9, CU-90-92.

The Deschutes County Board of Commissioners reconvened a Public Hearing on November 14, 1990, to consider the introduction of new information relevant to the appeal of the Hearings Officer's denial of the referenced land use applications. At that hearing the Board considered the record of the decision and testimony presented in the hearing, and moved to rescind their previous approval and uphold the Hearings Officer's denial. The Board hereby adopts the findings and conclusions incorporated in the Hearings Officer's decision, a copy of which is enclosed with this letter, along with the following additional findings:

1. The applicants sold the property containing the existing Buffet Flat development to Mr. Harry Fagen in April of 1990. Mr. Fagen purchased the property for the purpose of establishing a new commercial use on the site.

2. The State is purchasing a strip of land measuring approximately 25 feet wide along the highway frontage, which angles back to a maximum of 90 feet at the intersection of Highway 97 and Nichols Market Road. The State purchase entails approximately 10,425 square feet.

/0



Carsey
December 19, 1990
Page Two

3. The present RSC zone measures approximately 120' x 300', or .83 acres. The zone would contain approximately .60 acres after the acquisition by the State. It is conceivable that this area could support a commercial enterprise.

4. The allowance of commercial zoning on both sides of Highway 97, at what is already a busy intersection, would result in traffic impacts more adverse than would typically result if the proposed use were located in other areas requiring a goal exception. For this reason, the application fails to meet the requirements of OAR 660-04-020(2)(c), reasons exceptions.

5. The establishment of an additional commercial area on the east side of the highway, with its attendant increase in traffic, would result in conflicts with other adjacent uses. For this reason the application fails to meet the requirements of OAR 660-04-020(2)(d), reasons exceptions.

This decision becomes final on the date of mailing of this letter. This decision may be appealed to the Land Use Board of Appeals within 21 days after the date of this decision.

Sincerely,

THE DESCHUTES COUNTY BOARD OF COMMISSIONER

TOM THROOP, Chair

LOIS BRISTOW PRANTE, Commissioner

DICK MAUDLIN, Commissioner

KMH:mic

cc: Harry Fagen

//

Section 3.10. Area Specific Policies

Goal 1, Create area specific land use policies and/or regulations when requested by a community and only after an extensive public process.

Policy 3.10.1 Maintain a list of communities interested in area specific policies and as resources permit, initiate public processes to address local issues.

FINDING: The Hearings Officer and BOCC adopted the following findings as part of *Aceti IV* (247-20-000438-PA, 439-ZC):

As the Hearings Officer found in Aceti 1, these policies are directed at the County and not intended to be an approval criterion for plan amendment and zone change applications for land in the Deschutes Junction area.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

Deschutes Junction

Policy 3.10.5 Maximize protection of the rural character of neighborhoods in the Deschutes Junction area while recognizing the intended development of properties designated for commercial, industrial and agricultural uses.

FINDING: The Applicant provided the following response on pgs. 159-161 of their Burden of Proof:

No adverse impacts to "rural character of neighborhoods in the Deschutes Junction area" from the proposal have been identified in the record.

The Applicant's Burden of Proof thoroughly reports the history, previous owners and surrounding uses as well as the transportation system. Section 14 Transportation; Section 17 History of Deschutes Junction and Previous Owners and How They Used the Property; Section 19, Changes in Circumstances; and Section 20, Surrounding Zoning and Land Uses. Deschutes Junction has never been suitable for agriculture and has had an extensive, well-developed transportation system of county and state highways and roads and the railroad double track and spur that resulted in non-agricultural development.

Substantial evidence in the record supports a finding that Deschutes Junction is well developed and is not what is typically envisioned by the term "agricultural area". It includes over 1,756 urban sized lots, has 57.7 acres of land zoned and used for Rural Industrial, and many rural commercial uses that predate Oregon's land use program. Deschutes Junction has mixed residential, commercial, industrial and hobby farm uses.

According to Tim Berg, on March 19, 2004, there were 1,756 tax lots within a 2.5-mile radius around the subject properties.

Urban Density Subdivisions in the immediate area:

1. Starwood, 178 lots and houses,
2. Whispering Pines Estates, 1,095 lots,
3. Rancho El Sereno, 39 lots,
4. Centralo, 9 remaining lots,
5. Glacier View, 13 lots
6. Glacier View 1st Addition, 30 lots,
7. Buena Ventura, 41 lots,
8. Winston Ranch, 15 lots,
9. An unnamed subdivision in the SE ¼ of the SE ¼ of Section 14, 11 lots.

10. A rural subdivision off Morrill Road,
11. Lots off Half Mile Road, 18 lots,
12. Boones Borough Subdivision, 1st Addition, 79 lots
13. Boones Borough Subdivision, 2nd Addition, 108 lots

CONCLUSION: Total Platted lots in Nearby Subdivisions: 1,252
Total Platted Residential Lots in Deschutes Subdivisions: 1,291.
Total Residential Lots in Deschutes: 1,756.
Total Houses Built: 1,324.
84 Houses Built in Two Years Between 2004 and 2006.

Deschutes Junction is well developed and is not what we think of when we envision the term "an agricultural area". It includes over 1,252 urban sized lots, has 57.7 acres of land zoned and used for Rural Industrial, and many commercial uses that predate Oregon's land use program.

See the applicable Figure 14 on page 47, the County's map of 1,756 tax lots in the vicinity Deschutes Junction has mixed residential, commercial, industrial and hobby farm uses. A significant geographic and land use feature of Deschutes Junction is the extensive transportation system there. The road and highway network, the State Highway interchange and the railroad tracks and spurs are the dominant features. The County and ODOT are planning more roads that will significantly affect the immediate area of the subject site. They include providing for better access to the Deschutes Junction Interchange with US Highway 97, a new frontage road on the west side of US Highway 97 from Quarry Avenue (US 97: Redmond Refinement Plan, Quarry Avenue-Deschutes Market Road) or Gift Road to Deschutes Junction Frontage Road, and the necessary new road to the Deschutes County Fairgrounds, usually referred to as the 19th Street Extension Project.

Industrial development on the subject property would not negatively impact the "rural character", which is actually not agricultural but rather consists of low-density residential, commercial and industrial uses and lots of 1/5 acre to 5 acres for the most part.

The 1979 Comprehensive Plan designated the area of the intersection of roads and some industrial and commercial uses, "Deschutes Junction", as a Rural Service Center. (Chapter 23.40.060). That RSC designation did not address the Community of Deschutes. (See Figure 10 on page 27, Conceptual Map of the Community of Deschutes.) The above area specific policy for Deschutes Junction addresses the intended development of properties designated for commercial, industrial, and small agricultural uses. It also focuses on transportation. This policy recognizes the historic urbanization of the area, the commitment to urbanization that preceded the planning program and the fact that 50% of the rural industrial zoning in the county is at Deschutes Junction. (FIGURE 41, Rural Industrial Zoned Lands in the County, page 124; FIGURE 53, 1972 Metsker's Map, page 112). Also, as County Surveyor Mike Berry states, Deschutes Junction has the only overpass across Highway 97 between Bend and Redmond and there are more roads crossing at that location than anywhere in the county. (FIGURE 19, page 55), and more are planned. Many of the hobby farms and commercial uses are zoned the non-resource designations, RC, MUA-10, and RR-10. (See FIGURE 6, Deschutes County

Zoning Map, page 22.) This application is in conformance with the policies for Deschutes Junction. Therefore, this criterion is met.

A significant geographic and land use feature of Deschutes Junction is the extensive transportation system there. The road and highway network that dates back 120 years, the Deschutes Junction overpass, the State Highway interchange and the 1911 railroad tracks and spurs are the dominant features.

The area specific policies for Deschutes Junction primarily address the intended development of properties designated for commercial, industrial and agricultural uses.
This policy recognizes the historic urbanization of the area since it was platted as a town in 1911, the commitment to urbanization that preceded the planning program and the fact that 50% of the rural industrial zoning in the county is at Deschutes Junction. As County Surveyor Mike Berry states, Deschutes Junction has the only overpass across US 97 between Bend and Redmond and there have been more roads crossing at that location since 1908 than anywhere in the county.

Over a thousand acres of industrial, retail, residential subdivisions, commercial, and hobby farm uses at Deschutes are zoned RI, RC, MUA-10 and RR-10.

Potential development of the subject property will not negatively impact any remaining "rural character" of Deschutes Junction because the remaining rural uses are more distant from the impacts of highway, overpass and road system. Arterial and collector roads surrounding the property, including the overpass project, connect rural commercial and industrial existing uses that constitute the "core" of Deschutes Junction with the subject property itself. The subject property is surrounded by the US 97, the north-bound on and off ramps to US 97, and the connecting road to the overpass, Deschutes- Pleasant Ridge Road.

Rural neighborhoods to the east of the railroad tracks are at a distance from the highway/road interchange and are protected from any impact of commercial/industrial development of the property. Approval of the requested applications will protect any remaining rural character of neighborhoods in the Deschutes Junction area, while allowing the development of properties designated for rural commercial, rural industrial and agricultural uses. Therefore, this policy is met.

The Hearings Officer and BOCC adopted the following findings as part of *Aceti IV* (247-20-000438-PA, 439-ZC):

The Applicant's Burden of Proof thoroughly reported on the history, previous owners and surrounding uses as well as the transportation system in Section 17, Transportation; Section 21 History of Deschutes Junction; Section 22, Previous Owners and How They Used the Property; Section 23, Changes in Circumstances; and Section 24, Surrounding Zoning and Land Uses. Deschutes Junction has not been suitable for agriculture and has had an extensive, well-developed transportation system of county and state highways and roads that resulted in non-agricultural development.

Substantial evidence in the record supports a finding that Deschutes Junction is well developed and is not what is typically envisioned by the term "agricultural area". It includes over 1,252 urban sized lots, has 57.7 acres of land zoned and used for Rural Industrial, and many commercial uses that predate Oregon's land use program. Deschutes Junction has mixed residential, commercial, industrial and hobby farm uses. A significant geographic and land use feature of Deschutes Junction is the extensive transportation system there. The road and highway network, the State Highway interchange and the railroad tracks and spurs are the dominant features. The County and ODOT are planning more roads that will significantly affect the subject site and immediate area of the subject site. They include providing for better access (possibly a diamond interchange) to the Deschutes Junction Interchange with US Highway 97, a new frontage road on the west side of US Highway 97 from Quarry Avenue (US 97: Redmond Refinement Plan, Quarry Avenue-Deschutes Market Road) or Gift Road to Deschutes Junction Frontage Road, the new roundabout at Tumalo Road and Tumalo Place, and the necessary new road to the Deschutes County Fairgrounds, usually referred to as the 19th Street Extension Project.

The Applicant submits that the area specific policies for Deschutes Junction primarily address the intended development of properties designated for commercial, industrial and agricultural uses. The Applicant argues that this policy recognizes the historic urbanization of the area since it was platted as a town in 1911, the commitment to urbanization that preceded the planning program and the fact that 50% of the rural industrial zoning in the county is at Deschutes Junction. As County Surveyor Mike Berry states, Deschutes Junction has the only overpass across US 97 between Bend and Redmond and there have been more roads crossing at that location since 1908 than anywhere in the county. Hundreds of acres of industrial, retail, residential subdivisions, commercial, and hobby farm uses are zoned RI, RC, MUA-10 and RR-10.

The record shows that the subject property, in particular, is more impacted by the road/highway development in Deschutes Junction than any other adjacent or adjoining property given its bisection in 1998 for construction of Tumalo Road and the US 97 overpass. Based on this fact, I find that potential industrial development of the subject property will not negatively impact any remaining "rural character" of Deschutes Junction because the remaining rural uses are to the south and northwest of the property and more distant from the impacts of highway, overpass and road system. Arterial roads surrounding the property, including its bisection by the overpass project, connect rural commercial and industrial existing uses that constitute the "core" of Deschutes Junction with the subject property itself. Rural neighborhoods to the northwest of the property are located at enough of a distance from the highway/road interchange to be protected from any impact of commercial/industrial development of the property. I find that approval of the requested applications will protect any remaining rural character of neighborhoods in the Deschutes Junction area, while allowing the development of properties designated for rural commercial, rural industrial and agricultural uses.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

Policy 3.10.6 Review cumulative impacts of future development and future traffic improvements in the Deschutes Junction area in a manner consistent with Deschutes County traffic study requirements at 17.16.115, the Oregon Highway Plan, access management standards of OAR Chapter 734, Division 51, and OAR Chapter 660, Division 12, the Transportation Planning Rule (TPR).

FINDING: The Hearings Officer and BOCC adopted the following findings as part of *Aceti IV* (247-20-000438-PA, 439-ZC):

> The Hearings Officer finds this policy is directed at the County and not individual applicants. Nonetheless, I find that the Applicant's traffic study includes a "review of cumulative impacts" and is consistent with the cited requirements, as detailed in the findings below.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

Policy 3.10.7 Support safe and efficient travel around Deschutes Junction, including a frontage road extending north from Tumalo Road on the west side of Highway 97.

FINDING: The Hearings Officer and BOCC adopted the following findings as part of *Aceti IV* (247-20-000438-PA, 439-ZC):

> As the Hearings Officer found in Aceti 1, this policy is directed at the County and is not intended to be an approval criterion for plan amendment and zone change applications for land in the Deschutes Junction area.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

Policy 3.10.8: Review Policies 3.10.11 through 3.10.13 and initiate a Deschutes Junction Master Plan.

FINDING: The Hearings Officer and BOCC adopted the following findings as part of *Aceti IV* (247-20-000438-PA, 439-ZC):

> These references are scrivener errors and should point to Policies 3.10.5 through 3.10.7. The Hearings Officer finds these policies are directed at the County rather than at an individual applicant.

Staff asks the Hearings Officer to determine if similar findings are warranted for the subject request.

OREGON ADMINISTRATIVE RULES CHAPTER 660, LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

DIVISION 6, GOAL 4 – FOREST LANDS

OAR 660-006-0005, Definitions

(7) "Forest lands" as defined in Goal 4 are those lands acknowledged as forest lands, or, in the case of a plan amendment, forest lands shall include:

(a) Lands that are suitable for commercial forest uses, including adjacent or nearby lands which are necessary to permit forest operations or practices; and

(b) Other forested lands that maintain soil, air, water and fish and wildlife resources.

FINDING: The Applicant provided the following response to the requirements of this criterion on pgs. 24-26 of Applicant's Incomplete Letter Response, dated November 10, 2022:

This criterion does not apply to this property. The property is zoned EFU-TRB. It is not acknowledged as "forest lands". The definition of forest land above says that they are lands acknowledged as forest lands. It then says forest lands are lands that are suitable for commercial forest uses.

The subject property has an average of two Western Juniper trees per acre. For most loggers, juniper trees are weeds. Most people call land with sparse sage brush, bitter brush and juniper trees, scrub land.

The BLM is now cutting hundreds of acres of land in Deschutes County with juniper trees as a way to create fire breaks and reduce water loss. Each Western Juniper tree is thought to use 30-40 gallons of water per day. Even if someone wanted to log the 40 juniper trees for something, there is no market and there are not enough trees on site to make that practical.

The property does not have any wildlife resources, due to its being surrounded by a four lane US 97, the Pilot Butte Canal, the Deschutes Junction overpass and approaches, on and off ramps for US 97, and a busy Deschutes Pleasant Ridge Road.

Tax lot 101 with 4.20 acres has four small juniper trees growing along the Pilot Butte Canal, in the canal easement.

Tax lot 700 with 0.01 acre has no trees.

Tax lot 800 with 16.5 acres has about 40 small juniper trees, all growing along the Pilot Butte Canal and a drainage way.

Some landscaping trees, such as two apple trees and a clump of lilac bushes are around the primary house but are stressed from a lack of water and are dying.

The following July 24,2A22, Google Earth photo shows the locations of trees.

[Photo omitted]

As seen in the above aerial photo taken three months ago, most of the feather shaped property is clear of shrubs or trees.

Oregon State University is addressing the opportunity to use Western juniper that is being cleared.

In a current research project called "Establishing Engineering Design Values for Western Juniper", it is working on this issue.

UPDATE: April 6, 2018 – Mechanical Property Assessment for Establishing Design Values of Western Juniper is now published in the April edition of Wood & Fiber Science.

Western juniper (*Juniperus occidentalis*) acreage in the Great Basin of the western United States has increased dramatically in the past century, In Oregon alone, western juniper woodlands have expanded from approximately 607,000 hectares (1.5 million acres) tn 1930 to about 2.6 million hectares (5.5 million acres) today. As juniper trees dominate a site, erosion increases, stream flows are reduced, forage production declines, and wildlife habitat (e.9., for the sage grouse in particular) is altered. Thinning juniper stands has been shown to help restore rangelands. However such efforts are economically marginal at best in the absence of markets for juniper logs.

Over the past century, numerous small-scale efforts have been undertaken to develop markets for western juniper. Given that juniper is a naturally durable wood species, one market of particular interest has been sign posts and guard rail posts. However, for an agency such as the Oregon Department of Transportation (ODOT) to purchase juniper timbers/posts, the species' engineering values must first be established following standard methods approved by the American Lumber Standards Committee (ALSC). Similarly, architects and engineers often wish to specify juniper beams or columns. However in the absence of published strength values for the species, such markets are closed to juniper. Well that barrier will soon be removed.

USDA Rural Development, ODOT, and Business Oregon have provided funding to test juniper in what is simply being referred to as the 'juniper certification' project. Sustainable Northwest in Portland is managing the project and the testing work is being conducted at OSU's Oregon Wood Innovation Center. The deliverables for the project will be the publication of engineering design values for juniper in key references such as the West Coast Lumber Inspection Bureau's (WCLIB) grade book. Specific properties to be tested are bending, compression parallel and perpendicular to grain, and horizontal shear.

A sampling and testing plan has been developed and submitted for approval by ALSC, The ALSC has reviewed the plan to ensure, for example, adequacy of sample size, sample locations (e.g., juniper material sourced from throughout the species' native range), and specific details on how materials will be prepared and tested. We will be sourcing juniper from throughout the species' native range; 4x4s and 6x6s will be obtained from 3 producers

in Oregon as well as from one location each in northeast California and southwest Idaho. Once we receive this materials we will then cut the test specimens from them (for example 2"x2"x30" bending specimens will be cut from each timber), the material will then be conditioned to the standard moisture content of L2o/o, and then testing will commence. Given the high interest in the project, we have developed this page in an effort to keep interested parties up-to-date on our progress. Below is a bullet list of progress to-date.

Therefore, these criteria are met.

In *LBNW, LLC* (247-21-000881-PA, 882-ZC), the Hearings Officers found and the BOCC adopted the following finding:

The subject property is not zoned for forest lands, nor are any of the properties within a 6.5-mile radius. The property does not contain merchantable tree species and there is no evidence in the record that the property has been employed for forestry uses historically. None of the soil units comprising the parcel are rated for forest uses according to NRCS data.

The Hearings Officer finds the subject property does not qualify as forest land. These regulations do not apply to the applications.

Staff asks the Hearings Officer to confirm if similar findings are appropriate in this case.

DIVISION 33 – AGRICULTURAL LAND

OAR 660-033-0010, Purpose

The purpose of this division is to preserve and maintain agricultural lands as defined by Goal 3 for farm use, and to implement ORS 215.203 through 215.327 and 215.438 through 215.459 and 215.700 through 215.799.

FINDING: OAR 660-033-0020(1) and Goal 3 both define "Agricultural Lands". The Applicant provided the following response to this section on pg. 183 of their Burden of Proof:

At the outset, the Applicant demonstrates that the subject property does not constitute "agricultural land" requiring protection under Goal 3 and therefore no exception to that goal is required. The standards and procedures for identifying and inventorying agricultural land are found in OAR Chapter 660, Division 33, discussed in the findings below.

Goal 3 defines "agricultural land" in relevant part as follows:

Agricultural Land - * * * in eastern Oregon is land of predominantly Class I. II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions,

existing and future availability for farm irrigation purposes, existing land-use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event. More detailed soil data to define agricultural land may be utilized by local governments if such data permits achievement of this goal.

Staff makes findings on this topic below and incorporates those findings herein by reference.

OAR 660-033-0020, Definitions

For purposes of this division, the definitions in ORS 197.015, the Statewide Planning Goals, and OAR Chapter 660 shall apply. In addition, the following definitions shall apply:
(1)(a) "Agricultural Land" as defined in Goal 3 includes:

(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon[19];

FINDING: The Applicant's basis for not requesting an exception to Goal 3 relies on the premise that the subject property does not constitute "Agricultural Land". In support of this position, the Applicant provided the following response on pgs. 183-185 of their Burden of proof:

This rule defines "agricultural land" by essentially the same terminology used in the language of Goal 3, and describes it as consisting of:

- land that is predominantly Class l-VI soils (in Eastern Oregon) without a goal exception;
- land that is predominantly Class VII and VIII soils and that is "suitable for farm use" considering the factors set forth in OAR 660-033-0020(1)(a)(B) of this rule;
- land that is necessary to permit farm practices on adjacent or nearby agricultural lands; and
- Class VII and VIII land that is adjacent to or intermingled with Class l-VI land within a farm unit.

The subject property does not constitute "agricultural land" under any of these categories, each of which is discussed in the findings below.

The Final Order Soil Survey finds that 6.92 acres are agricultural land. See Attachment 2.
Appropriate Unit of Land. The "predominant soils" prong of the agricultural land definition cannot be applied until an appropriate unit of land is selected to determine whether Class I-6 soils are predominant within that unit of land based on the decision of the Land Use Board of Appeals (LUBA) in *Wetherell v. Douglas County*, 50 Or LUBA 71 (2005). The combination of

[19] OAR 660-033-0020(5): *"Eastern Oregon" means that portion of the state lying east of a line beginning at the intersection of the northern boundary of the State of Oregon and the western boundary of Wasco County, then south along the western boundaries of the Counties of Wasco, Jefferson, Deschutes and Klamath to the southern boundary of the State of Oregon.*

tax lots is the appropriate unit of land because they are being used together and will be used together. They are under single ownership. No parcel has a predominance of Agricultural Land.

Predominant Soils. Gary Kitzrow MS, CPSS.SC prepared a site-specific report for the Applicant, Agricultural Soils Capability Assessment T16S, R12E, Section 26B, Tax Lots 101, 800 and 700 to address the agriculture and soils criteria. It is Attachment 2. This study is dated July 17, 2020. On September 8, 2020, Mr. Kitzrow submitted the soil study to DLCD for certification pursuant to OAR 660-033-0030(5).

By an electronic mail message dated November 23, 2020, from Hilary Foote of DLCD to the Deschutes County Planning Manager, DICED certified the study (See the email [Figure 46] below.) The Applicant's Soils Assessment Release Form, the Soils Assessment Submittal Form and the soils report are included as Attachment 2.

[Figure 46 – Omitted]

The Kitzrow study identified different soil units on the subject property than are identified on the NRCS maps. Mr. Kitzrow conducted an on-site investigation to provide a more detailed soil analysis and mapping. Based on the Kitzrow study, the predominance of soils on the subject property, 13.44 acres, do not meet the definition of "agricultural land." However, the administrative rule provides that such soils nevertheless may be considered "agricultural land" under certain circumstances, addressed in the findings below.

In *LBNW, LLC* (247-21-000881-PA, 882-ZC), the Hearings Officers found and the BOCC adopted the following finding:

As set forth in detail in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds, based on the submitted soil study and the above OAR definition, that the subject property is comprised predominantly of Class VII and VIII soils and, therefore, does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A).

No specific findings related to this OAR provision were included in the *Aceti IV* decision. Staff asks the Hearings Officer to confirm if similar findings to the *LBNW, LLC* decision are appropriate in this case.

(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and

FINDING: The Applicant's basis for not requesting an exception to Goal 3 is based on the proposal that the subject property is not defined as "Agricultural Land." The Applicant provided the following response on pgs. 185-186 of their Burden of proof:

> Because the applicant's soil study shows the subject property is predominantly Class 7 and 8 soils, the next question under this administrative rule is whether the Class 7 and 8 soils on the subject property nevertheless constitute "agricultural land" based on the seven factors listed in this paragraph.
>
> **a. Soil Fertility.** The western portion of the property along US 97 are relatively flat to gently sloping east to west. The southern parcel 800 has access to irrigation water in adequate amounts. Irrigation begins in April and ends in October. The southwest corner, 2.5 acres, can grow hay for grazing by livestock, but the acreage is below that which would be needed by hay farming practices or by livestock and will not sustain them.
>
> This parcel requires technology and energy inputs over and above that considered acceptable farming practices in this region. Excessive fertilization and soil amendments; very frequent irrigation applications pumped from a pond with limited availability (there is none); and marginal climatic conditions restrict cropping alternatives .DLCD's administrative rules define Class 7 and 8 soils as having very severe limitations that make them unsuited for cultivation.
>
> **b. Suitability for Grazing and Climatic Conditions.** The study found that the subject property is unsuitable for grazing and climate conditions are too cold in the winter and too dry year around. The LCC rating is "non-agricultural soils". The study determined that the soils are generally unsuitable for the production of farm crops, livestock or merchantable tree species based upon low fertility, limited soil depth for cultivation and ability to store and hold water, lack of forage production for livestock grazing, limited length of frowning season and high levels of energy input with limited outcome.
>
> **c. Existing and Future Availability of Water for Farm Irrigation Purposes.** Section 15, pages 60-66, are relevant here. Please read it. The subject property has some rights to the water conveyed by the Pilot Butte Canal. Even if using irrigation water was feasible, the subject property's soils are too poor to justify irrigating them. 2.46 acres are in the canal itself and its associated berm and are completely unusable for agriculture. The upper triangle on the east side is all rocky with slopes and rock outcroppings. There are highly compacted soils in the southeast corner on 2.5 acres under the twelve buildings, driveway and parking lot. An irrigation pond was dug around 2003 to irrigate the northern portion of the lot that was acquired in 1991. It failed.
>
> **d. Existing Land Use Patterns.** As discussed thoroughly and in detail in the Surrounding Uses Section 20 of this application, the subject property is surrounded on the south and west by non-agricultural uses. Deschutes RV Storage is on the south. On the north and eastern sides are three lots owned by a farmer who found the lots cannot be farmed due to rocks and shallow soils that bend his farming equipment.

e. Technological and Energy Inputs Required. Excessive technological and energy inputs - including heavy use of fertilizer and soil amendments and frequent irrigation - would be required to make the soils on the subject property somewhat productive, given the soil's very poor quality, and they are likely to fail, as efforts to farm it in the past 110 years have failed.

f. Accepted Farming Practices. It is not an accepted farm practice in Central Oregon to irrigate and cultivate poor quality Class 7 and 8 soils - particularly where, as here, those soils are adjacent to rural industrial uses, urban density residential neighborhoods that complain about dust and chemicals and to high traffic counts on the surrounding roads and highways. Irrigating rock is not productive.

For the foregoing reasons, the subject property is not suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices.

The Applicant argues that the property's existing irrigation rights should not be considered in evaluating the property's potential for agricultural uses. Staff recognizes that the property may not be found to be suitable for farm use regardless of the irrigation status, however, staff requests the Hearings Officer make specific findings on this issue.

In *Aceti I* (247-14-000456-ZC, 457-PA), the Hearings Officer found:

> The Applicant's soil study shows the subject property is predominantly Class VII and VIII soils. The Hearings Officer noted in the Powell/Ramsey decision, and I agree with the statement that DLCD's administrative rules define Class VII and VIII soils as having very severe limitations that make them unsuited for cultivation. Thus, the next question under this administrative rule is whether the Class VII and VIII soils on the subject property nevertheless constitute "agricultural land" based on the factors listed in this paragraph. For the following reasons, I find that the answer to the question is "no."
> ...
> Substantial evidence in the record shows that the subject property does not constitute "agricultural land" under the Goal 3 administrative rule factors first because it is comprised of Classes VI and VII soils, and second, based on a consideration each of following factors, addressed by the Borine report: soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices.

Considering the burden of proof statement and analysis methodology from *Aceti I* (247-14-000456-ZC, 457-PA), staff requests the Hearings Officer make specific findings on this issue.

(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.

FINDING: The Applicant provided the following response on pgs. 187 of their Burden of proof:

> Section 20, Surrounding Zoning and Land Uses, is relevant here. Most of the subject property and surrounding lands are engaged in rural industrial, commercial, or non-farm uses. North of Deschutes Pleasant Ridge Road and east of the centerline of the Pilot Butte Canal is land zoned EFU-TRB but is unfarmed due to the poor soil and shallowness of it. To the south of Deschutes Pleasant Ridge Road are 57 acres of land zoned RI and used for Deschutes RV Storage; Jet 97 Storage, a 55,000 square foot mini-storage business; Willamette Greystone that produces and sells masonry products; 4-R Construction and Jack Robinson and Sons Excavation; gpEnergy, and Faulkner Excavation. Farther south is publicly owned and undeveloped land along both sides of US 97. Immediately to the west are a landscaping supply business on land zoned RC, Fagen Trucking, Fagen Logging, Aiken Well Drilling, Rock Supremacy, a mini-storage facility and a forklift and other equipment rental company. The subject property is not land necessary to permit farm practices to be undertaken on those lands because none of those lands have farms.

In *Aceti I* (247-14-000456-ZC, 457-PA), the Hearings Officer found and the BOCC adopted the following finding:

> The Hearings Officer finds that the subject property is not land necessary to permit farm practices to be undertaken on adjacent or nearby lands because none of the identified farm uses on those lands is dependent upon the subject property.

Staff believes that this property is similarly situated to the *Aceti* property and requests the Hearings Officer make specific findings on this issue.

(b) Land in capability classes other than I-IV/I-VI that is adjacent to or intermingled with lands in capability classes I-IV/I-VI within a farm unit, shall be inventoried as agricultural lands even though this land may not be cropped or grazed;

FINDING: The Applicant provided the following response on pgs. 187 of their Burden of proof:

> The soils study found that 66% of the subject property consists of Class 7 and 8 soils and soils on the subject site are not adjacent to or intermingled with higher capability soils. In addition, the subject property is neither a farm unit itself nor part of a larger farm unit.

Staff is uncertain how to identify any potential “farm unit”. As detailed on pg. 73 of the Applicant’s Burden of Proof, the subject was part of the “160-acre rectangular Roscoe Howard Ranch at Deschutes that was founded in 1911”. Considering the Applicant’s response above, staff requests the Hearings Officer make specific findings on this issue.

(c) "Agricultural Land" does not include land within acknowledged urban growth boundaries or land within acknowledged exception areas for Goal 3 or 4.

FINDING: The subject property is not within an acknowledged urban growth boundary or land within acknowledged exception areas for Goals 3 or 4.

OAR 660-033-0030, Identifying Agricultural Land

(1) All land defined as "agricultural land" in OAR 660-033-0020(1) shall be inventoried as agricultural land.

(2) When a jurisdiction determines the predominant soil capability classification of a lot or parcel it need only look to the land within the lot or parcel being inventoried. However, whether land is "suitable for farm use" requires an inquiry into factors beyond the mere identification of scientific soil classifications. The factors are listed in the definition of agricultural land set forth at OAR 660-033-0020(1)(a)(B). This inquiry requires the consideration of conditions existing outside the lot or parcel being inventoried. Even if a lot or parcel is not predominantly Class I-IV soils or suitable for farm use, Goal 3 nonetheless defines as agricultural "lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands". A determination that a lot or parcel is not agricultural land requires findings supported by substantial evidence that addresses each of the factors set forth in 660-033-0020(1).

FINDING: As detailed in the preceding findings, the Applicant provided responses to the factors in OAR 660-033-0020(1). The soil study produced by Mr. Kitzrow focuses solely on the land within the subject property. Additionally, the Applicant provided the following response to demonstrate the subject property is not necessary to permit farm practices undertaken on adjacent and nearby lands on pg. 188 of their Burden of Proof:

> The conditions existing outside the subject property as listed in detail in the surrounding property uses analysis [pg.117-169 of the Burden of Proof], find that the subject property is not needed to permit farm practices to be undertaken on adjacent or nearby lands.

In *Aceti I* (247-14-000456-ZC, 457-PA), the Hearings Officer found:

> The Hearings Officer finds that the Borine study shows the subject property is predominantly non-agricultural land based on the soil's capability classification. The findings above address the additional factors under OAR 660-033-0020(1), none of which support a determination that the subject property is "agricultural land." Further, as set forth in detail above, substantial evidence in the record shows that the conditions existing outside the subject property on surrounding properties support a determination that the subject property is not needed to permit farm practices to be undertaken on adjacent or nearby lands.

In *LBNW, LLC* (247-21-000881-PA, 882-ZC), the Hearings Officers found:

> The Applicant established that the subject property is not necessary to permit farm practices undertaken on adjacent and nearby lands. For the reasons set forth in the Preliminary

Findings and Conclusions above, incorporated herein by this reference [*See* Hearings Officer Decision, pgs. 26-38]. The Hearings Officer finds the subject property is not "Agricultural Lands," as defined in OAR 660-033-0030(1).

Moreover, the BOCC further clarified in *LBNW, LLC* (247-21-000881-PA, 882-ZC):

...the Board specifically agrees with and incorporates by reference the Hearings Officer's analysis of those "factors beyond the mere identification of scientific soil classifications" referenced by OAR 660-033-0030(2). *See* Hearings Officer Decision, pgs. 26-38.

Staff requests the Hearings Officer make specific findings on this issue, in part based on the Applicant's responses to OAR 660-033-0020(1), above.

(3) Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land. Nearby or adjacent land, regardless of ownership, shall be examined to the extent that a lot or parcel is either "suitable for farm use" or "necessary to permit farm practices to be undertaken on adjacent or nearby lands" outside the lot or parcel.

FINDING The Applicant provided the following response on pg. 188 of their Burden of Proof:

The information on parcels in the Section 16 on Developable Land, and in the Surrounding Uses Section (Section 20) lists the current owners as listed on the Deschutes County Assessor's Database, DIAL. This application does not take into account the ownership of surrounding lots or parcels in determining whether the subject site and/or the entire subject property is suitable for farm use or necessary to permit farm practices on adjacent or nearby lands. The subject property is not needed for any farm use to occur on other lands in the area.

In *Aceti I* (247-14-000456-ZC, 457-PA), the Hearings Officer found and the BOCC adopted the following finding:

As stated in foregoing findings, property located at 64835 Hwy 97, tax lot 16-12-27D 1100 is zoned EFU and presently receiving farm deferral. It is proximate to the Applicant's property at the southwest corner. The subject property is not necessary for any farm use to occur on adjacent or nearby lands, including tax lot 1100 above. Additionally, as stated in foregoing findings, the Borine study concluded that the subject property is 80% class VII and VIII soils.

Staff asks the Hearings Officer to confirm if similar findings are appropriate in this case.

(5) (a) More detailed data on soil capability than is contained in the USDA Natural Resources Conservation Service (NRCS) soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the NRCS land capability classification system.

(b) If a person concludes that more detailed soils information than that contained in the Web Soil Survey operated by the NRCS as of January 2, 2012, would assist a county to make a better determination of whether land qualifies as agricultural land, the person must request that the department arrange for an assessment of the capability of the land by a professional soil classifier who is chosen by the person, using the process described in OAR 660-033-0045.

FINDING: The Applicant provided the following response on pg. 188 of their Burden of Proof:

> The Applicant submitted the Kitzrow study discussed in the foregoing findings. The record indicates this study was reviewed and certified by DLCD in accordance with the process in OAR 660-033-0045 and the NRCS land capability classification system. The Kitzrow study is credible, based on Mr. Kitzrow's qualifications and the methodology and detailed analysis in the study.

The soil study prepared by Mr. Kitzrow provides more detailed soils information than contained in the NRCS Web Soil Survey. NRCS sources provide general soils data for large units of land. The soil study provides detailed information exclusively about the subject property based on numerous soil samples taken from the subject property. The Mr. Kitzrow's soil study is related to the NRCS Land Capability Classification (LLC) system that classifies soils as Class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.

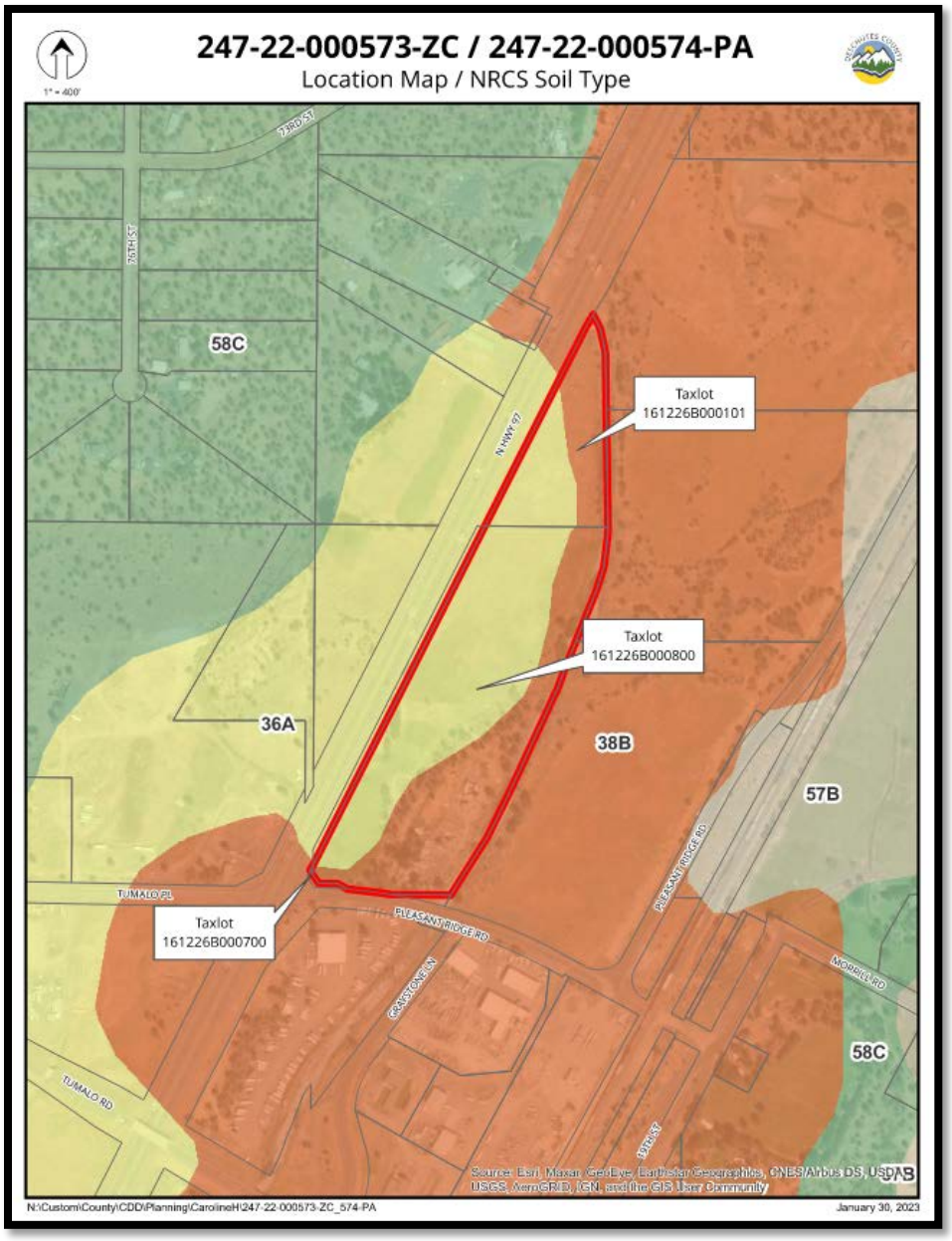
The NRCS mapping for the subject property is shown below in *Figure 2*. According to the NRCS Web Soil Survey tool, the subject property contains 36A and 36B soils as detailed below:

> **36A Soils (Deskamp loamy sand, 0 to 3 percent slopes):** Approximately 62-percent of the subject property is composed of 36A soils.
>
> **38B Soils (Deskamp-Gosney complex, 0 to 8 percent slopes):** Approximately 38-percent of the subject property is composed of 36B soils.

The soil study conducted by Mr. Kitzrow of Growing Soils Environmental Associates finds the soil types on the subject property vary from the NRCS identified soil types. The soil types described in the Growing Soils Environmental Associates soil studies are as quoted below:

> We have confirmed and delineated 5 distinct soil mapping units for this area of study. These include the following units: 1). 57B Gosney-Class 7 (irrigated or non-irrigated) is the dominant map unit. 2). The 58C Gosney-Rock Outcrop is intermingled, multitaxa and is inseparable. 3). Rock Outcrop which is Class 8; 4). Infrastructure re including areas of permanent degradation, house*, outbuildings parking/staging areas; 5). 36A Deskamp is Capability Class 3 when irrigated which is present and being utilized on this site within this mapping unit.

Figure 2 - NRCS Soil Data



The submitted soil study prepared by Mr. Kitzrow of Growing Soils Environmental Associates are accompanied in the submitted application materials by correspondence from the DLCD. The DLCD correspondence confirms that Mr. Kitzrow's prepared soil study is complete and consistent with the reporting requirements for agricultural soils capability as dictated by DLCD. Staff notes Mr. Kitzrow's qualifications as a certified Soil Scientist and Soil Classifier, as detailed in the submitted application materials.

Staff requests the Hearings Officer make specific findings on this issue.

(c) This section and OAR 660-033-0045 apply to:

(A) A change to the designation of land planned and zoned for exclusive farm use, forest use or mixed farm-forest use to a non-resource plan designation and zone on the basis that such land is not agricultural land; and

FINDING: The Applicant is seeking approval of a non-resource plan designation on the basis that the subject property is not defined as agricultural land.

(d) This section and OAR 660-033-0045 implement ORS 215.211, effective on October 1, 2011. After this date, only those soils assessments certified by the department under section (9) of this rule may be considered by local governments in land use proceedings described in subsection (c) of this section. However, a local government may consider soils assessments that have been completed and submitted prior to October 1, 2011.

FINDING: The Applicant submitted a soil assessment prepared by Mr. Kitzrow of Growing Soils Environmental Associates dated July 17, 2020. This soils assessment was completed after the effective date of the ORS 215.211. The application materials include acknowledgements from Hilary Foote, Farm/Forest Specialist with the DLCD (dated November 22, 2020) that the soils assessment is complete and consistent with DLCD's reporting requirements. Staff finds this criterion to be met based on the submitted soil studies and confirmation of completeness and consistency from DLCD.

(e) This section and OAR 660-033-0045 authorize a person to obtain additional information for use in the determination of whether land qualifies as agricultural land, but do not otherwise affect the process by which a county determines whether land qualifies as agricultural land as defined by Goal 3 and OAR 660-033-0020.

FINDING: The Applicant has provided a DLCD certified soil study as well as NRCS soil data. Staff finds the Applicant has demonstrated compliance with this provision.

DIVISION 12, TRANSPORTATION PLANNING

OAR 660-012-0060 Plan and Land use Regulation Amendments

(1) If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would:

(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);

(b) Change standards implementing a functional classification system; or

(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the

planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.

(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;

(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or

(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.

FINDING: The Applicant submitted a Traffic Impact Analysis (TIA), dated May 24, 2022, as part of the Applicant's Burden of Proof (ref. Attachment 1). The TIA was prepared by Transight Consulting, LLC. As referenced in the agency comments section in the Findings of Fact above, Deschutes County's Senior Transportation Planner, Peter Russell, requested additional information to address the OAR above. In response, the Applicant submitted a supplemental memorandum, dated November 9, 2022, addressing the issues identified. On November 11, 2022, Mr. Russell confirmed the supplemental memorandum addressed all of the concerns that had been raised. Staff also notes ODOT had no comments on the subject request.

Additionally, the Applicant provided the following response on pgs. 173-174 of their Burden of Proof:

> On May 24, 2022, Joe Bessman, PE, of Transight Consulting, LLC, completed a Traffic Impact Analysis (TIA) for the Proposed Deschutes Junction Zone Change. (See Attachment 1.) The purpose of the TIA is to document compliance with the Transportation Planning Rule for the zone change of lands near the Deschutes Junction from Exclusive Farm Use-Tumalo Redmond Bend to Rural Industrial, to support desired property use.
>
> Findings in this transportation portion of the criteria are included in the TIA. The study found that the worst-case scenario of the proposed zone change will add only 62 weekday p.m. peak hour trips and have a minimal (less than 2%) impact on the area road network. As the volume of regional traffic increases over time, the predicted percentage of effect from the zone change will go down. The zone change will not allow levels of development that will cause existing or planned area transportation facilities to exceed their functional classification.

> The consultant studied all facilities identified by the County as potentially impacted by the proposed change. All of the existing or planned transportation facilities within the study area will operate better than the TSP's standard of Level of Service "D".
>
> On page 20, the engineer wrote the rezone does not cause any intersections to fail but does create an incremental degradation in the performance of Graystone Lane's connections, while performing within County operation standards. The Deschutes Junction County and State interchange has an increasing role supporting regional travel needs but was built to support lower intensity rural uses. It is supporting a high volume of regional trips between Bend and Redmond.
>
> The TIA concludes that the rezone has the potential to increase the trip generation compared to the existing EFU zoning and the conditional use permit for the Funny Farm. However, a rezone application is not a development application and in itself will not generate any additional impacts on the transportation system. Impacts will only occur with future development that is implemented over time. The scale of impacts demonstrated within this analysis (up to 2%) are unlikely to change the need and timing of improvements to the Deschutes Junction Interchange.
>
> The existing driveway onto Deschutes Pleasant Ridge Road will be used to serve the proposed rural industrial development ODOT and the County are expected to make safety improvements and to add capacity to the system during the next 10 years, regardless of the proposed zone change.

Staff notes the Applicant's "worst-Case scenario" analysis that the TIA relies upon was updated as part of the Applicant's Response to Incomplete Letter, dated November 10, 2022 (see pgs. 6-18).

In *LBNW, LLC* (247-21-000881-PA, 882-ZC), the Hearings Officers found:

> The Hearings Officer finds that the Applicant has studied all facilities identified by the County as potentially impacted by the proposed zone change through the traffic study and revised traffic study, and in its comments from Ferguson & Associates Inc. to the County Senior Transportation Planner. The Hearings Officer finds that the record supports a determination that, as conditioned with the proposed condition of approval set forth above[20], the proposed zone change, will have no significant adverse effect on the identified function, capacity, and performance standards of the transportation facilities in the impact area, such that it is in compliance with OAR 660-012-0060.

Moreover, the BOCC further clarified as part of the *LBNW, LLC decision* (247-21-000881-PA, 882-ZC):

[20] The maximum development on the three subject parcels shall be limited to produce no more than 32 trips in the PM peak hour and/or 279 daily trips as determined by the Institute of Engineers Trip Generation Manual, 11th Edition. The County may allow development intensity beyond these maximum number of vehicle trips only if the applicant submits to the County a traffic impact analysis that demonstrates that the proposed intensification of use would be consistent with the Transportation Planning Rule and the Deschutes County Code.

The record shows that three separate traffic experts were all involved with the formulation of the trip cap and ultimately concurred with its utilization in this case. As noted by the Hearings Officer, those experts included the applicant's own traffic engineer, Ferguson & Associates, the County's own Senior Transportation Planner, and traffic engineers with the Oregon Department of Transportation. See Hearings Officer Decision, pgs 74-77. The Hearings Officer further explained that COLW's argument suggesting that neither County staff nor ODOT supported the trip cap, or that the trip cap will be "unenforceable," were predicated on earlier comments in the record and failed to account for updated comments from the aforementioned experts. Id. at 77. Last, the Hearings Officer summarized COLW's traffic arguments, concluding that "[n]ot only did COLW misread comments provided by ODOT and County staff, it presented no evidence or expert testimony to contradict the evidence included in the record by the Applicant regarding the [Transportation Planning Rule.]" Id. at 78.

Following the Hearings Officer proceedings, COLW renewed its traffic arguments relating to Goal 12 and DCC 18.136.020(C) but failed to provide any evidence or expert testimony to support its assertions, instead relying entirely on statements submitted by its "Staff Attorney and Rural Lands Program Manager." Following suit with the Hearings Officer, the Board accordingly defers to the expert testimony provided by Applicant's engineer, County staff, and ODOT and finds that the substantial evidence in the record clearly supports that imposing a trip cap will address any lingering concerns stemming from Goal 12, OAR 660-012-0060implementing Goal 12, and/or DCC 18.136.020(C).

Staff asks the Hearings Officer to confirm if similar evidence can be relied upon for the subject request and staff requests the Hearings Officer make findings on this issue.

(2) If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below, unless the amendment meets the balancing test in subsection (2)(e) of this section or qualifies for partial mitigation in section (11) of this rule. A local government using subsection (2)(e), section (3), section (10) or section (11) to approve an amendment recognizes that additional motor vehicle traffic congestion may result and that other facility providers would not be expected to provide additional capacity for motor vehicles in response to this congestion.

(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.

(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include

an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.

(c) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.

(d) Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures or minor transportation improvements. Local governments shall, as part of the amendment, specify when measures or improvements provided pursuant to this subsection will be provided.

(e) Providing improvements that would benefit modes other than the significantly affected mode, improvements to facilities other than the significantly affected facility, or improvements at other locations, if:

(A) The provider of the significantly affected facility provides a written statement that the system-wide benefits are sufficient to balance the significant effect, even though the improvements would not result in consistency for all performance standards;

(B) The providers of facilities being improved at other locations provide written statements of approval; and

(C) The local jurisdictions where facilities are being improved provide written statements of approval.

FINDING: As part of the Applicant's proposal, Transight Consulting, LLC included the following remedies on page 7 of the supplemental memorandum dated November 9, 2022:

- It is recommended that ROW dedications along Pleasant Ridge Road be provided to the County standard as part of any future development application. County standards identify a 60-foot standard for Collectors.
- The existing driveway onto Pleasant Ridge Road may require relocation to support realignment of Graystone Lane's connection to Pleasant Ridge Road. The need for access relocation should be addressed as part of any future land use application and coordinated with the County's transportation planning and engineering departments. An approved approach permit is required by the County for property access.
- At the time of future property development transportation system development charges will be applied, based on the specific use, to help fund regional transportation system improvements.

In *Aceti I* (247-14-000456-ZC, 457-PA), the Hearings Officer found and the BOCC adopted the following finding:

> *As set forth in the finding above, the Hearings Officer finds that, with imposition of a condition of approval requiring assessment of transportation system development charges (SDCs) and other noninfrastructure mitigations as development occurs on the site on future proposed development, there will not be a significant adverse effect on the identified function, capacity, and performance standards of the transportation facilities in the impact area.*

In *LBNW, LLC* (247-21-000881-PA, 882-ZC), the Hearings Officers made similar findings as detailed below:

> *The Hearings Officer finds that, with imposition of a condition of approval requiring assessment of transportation system development charges (SDCs) and other non-infrastructure mitigations as development occurs on the site on future proposed development, and with imposition of the agreed-upon condition of approval imposing a transportation cap and use limitation on the Subject Property, significant adverse effects on the identified function, capacity and performance standards of the transportation facilities in the impact area of allowed land uses will be mitigated. These criteria are met.*

Considering the Applicant's response, above, and the initial and revised traffic studies provided by Transight Consulting, LLC, staff requests the Hearings Officer make specific findings on this issue.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

OAR 660-015, Division 15, Statewide Planning Goals and Guidelines

FINDING: The Statewide Planning Goals are outlined below as detailed in the Applicant's burden of proof pgs. 177-181:

> ***Goal 1, Citizen Involvement.***
> ***To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.***
>
> **[APPLICANT] FINDING:** The Planning Division will provide notice to the public of the proposed plan amendment and zone change through individual mailed notices to nearby property owners, publication of notice in the Bend Bulletin newspaper, and posting of the subject property with a notice of proposed land use action sign. A public hearing will be held before the Hearings Officer on the proposal, and a public hearing on the proposal will also be held by the Deschutes County Board of Commissioners, per DCC 22.28.030(C). The proposal is consistent with Goal 1.
>
> ***Goal 2, Land Use Planning.***
> ***To establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.***
>
> **[APPLICANT] FINDNING:** Goals, policies and processes related to plan amendment and zone change applications are in the DCCP and land use regulations in Titles 18 and 22 of the Deschutes County Code and have been applied to the review of these applications. The proposal is consistent with Goal 2.

Goal 3, Agricultural Lands.
To preserve and maintain agricultural lands.

[APPLICANT] FINDING: The Applicant's submitted Agricultural Soils Capability Assessment (Soils Survey Attachment 2) demonstrates the subject property does not constitute "agricultural land" because it is comprised predominantly of Class VII and VIII soils that are not suitable for farm use. The County relied upon the Soil Survey in determining that the prior applications for re-designation and rezoning of the subject property were consistent with Goal 3. No adverse impacts to other agricultural lands resulting from the proposal have been identified. Therefore, the Applicant's proposal is consistent with Goal 3; no exception to Goal 3 is required.

Goal 4, Forest Lands.
To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.

[APPLICANT] FINDING: The subject property does not include any lands that are zoned for, or that support, forest uses. Therefore, the proposal does not implicate Goal 4. Goal 4 is inapplicable.

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces.
To protect natural resources and conserve scenic and historic areas and open spaces.

[APPLICANT] FINDING: The record indicates there are no identified Goal 5 resources on the subject property (cultural, historic, wildlife or plant). There are no scenic or historic areas and no open spaces on the property. There is no wetland, river, stream, creek or pond on the property, and no riparian zone. Therefore, the proposal does not implicate Goal 5. Goal 5 is inapplicable.

Goal 6, Air, Water and Land Resources Quality.
To maintain and improve the quality of the air, water and land resources of the state.

[APPLICANT] FINDING: The Applicant's proposal to rezone the property from EFU-TRB to RI will not impact the quality of the air, water, and land resources of the County. Any future RI Zone development of the property will be subject to local, state, and federal regulations protecting these resources. This fact does not constitute "deferring" or "postponing" a Goal 6 compliance analysis to review of a specific development application.

It is appropriate to consider restrictions and protections in the County's acknowledged RI zone regulations in determining whether the proposed plan amendment and rezone are consistent with the statewide planning goals. In particular, DCC 18.100.030(J) prohibits

approval of any use of property requiring contaminant discharge permits prior to a review of the contaminant discharge permits by state and/or federal agencies.

Thus, any impact to air, water and land resources from a specific proposed use is not allowed under the zoning code, and may not legally be approved by the County, until state and/or federal agencies review the details of any such proposal and issue permits (typically including conditions) restricting and regulating air emissions, discharges to waterways and ground water and other potential environmental impacts of the use.

The regulatory scheme set forth in DCC Chapter 18.100, which is an acknowledged regulation, maintains the quality of air, water and land resources of the state. The proposal to re-designate and rezone the property is consistent with Goal 6.

Goal 7, Areas Subject to Natural Disasters and Hazards.
To protect people and property from natural hazards.

[APPLICANT] FINDING: There are no mapped flood or volcano hazards on the subject property. Wildfire, earthquake, and winter storm risks are identified in the County's DCCP. The subject property is not subject to unusual natural hazards nor is there any evidence in the record that the proposal would exacerbate the risk to people, property, infrastructure, the economy, and/or the environment from these hazards on-site or on surrounding lands. Therefore, the proposal does not implicate Goal 7.

Goal 8, Recreational Needs.
To satisfy the recreational needs of the citizens of the state and visitors and, here appropriate, to provide for the siting of necessary recreational facilities including destination resorts.

[APPLICANT] FINDING: The property is not a recreational site. The proposed plan amendment and zone change do not affect recreational needs, and nonspecific development of the property is proposed. Therefore, the proposal does not implicate Goal 8.

Goal 9, Economy of the State.
To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens.

[APPLICANT] FINDING: This goal is to provide adequate opportunities throughout the state for a variety of economic activities. The Applicant asserts that the proposed plan amendment and zone change are consistent with this goal because it will provide opportunities for economic development in the county in general, and in the Deschutes Junction area in particular, by allowing the property to be put to a more productive use. The proposal is consistent with Goal 9.

Goal 10, Housing.

To provide for the housing needs of citizens of the state.

[APPLICANT] ***FINDING:*** There are already two houses on site, which can be used, adaptively reused or demolished. The proposed plan amendment and zone change will not affect existing or needed housing. Therefore, the Hearings Officer finds the proposal does not implicate Goal
10. Goal 10 is inapplicable.

Goal 11, Public Facilities and Services.
To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.

[APPLICANT] FINDING: This goal requires planning for public services, including public services in rural areas, and generally has been held to prohibit extension of urban services such as sewer and water to rural lands outside urban growth boundaries. The Applicant's proposal will not result in the extension of urban services to rural areas. As discussed in the findings above, public facilities and services necessary for development of the subject property in accordance with the Rl Zone are available and will be adequate. The Avion Water Company, Pacific Power and Light, and the Bend Fire Department each provided Will-Serve Letters and they are already serving the property. See Section 12, Utilities, beginning on page 48.

When the County considers individual applications for specific use(s) in the future, such applications cannot be legally approved without a demonstration by the applicant that public facilities and services are available under DCC 18.100.060, which requires all uses in the rural industrial zone, other than residential, farm or forest, to comply with the requirements of DCC Chapter 18.124, site plan review. Other than those uses permitted outright in the Rl zone, conditional use permit review pursuant to DCC Chapter 18.128 also is required. The proposal is consistent with Goal 11.

Goal 12, Transportation.
To provide and encourage a safe, convenient and economic transportation system.

[APPLICANT] FINDING: For the reasons set forth in the findings above concerning OAR 660-012-0060, the proposal is consistent with Goal 12. As discussed in the detail in the findings concerning compliance with the TPR, incorporated by reference herein, the Applicant's proposal will not significantly affect a transportation facility and therefore it complies with the TPR. Accordingly, it also is consistent with Goal 12.

Goal 13, Energy Conservation.
To conserve energy.

[APPLICANT] FINDING: The Applicant's proposal, in and of itself, will have no effect on energy use or conservation since no specific development has been proposed in conjunction with the subject applications. In any case, the record shows that providing additional

economic opportunities on the subject property may decrease vehicle trips for persons working in the Deschutes Junction area, therefore conserving energy. The proposal is consistent with Goal 13.

Goal 14, Urbanization.
To provide for orderly and efficient transition from rural to urban use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities.

[APPLICANT] FINDING: The proposed plan amendment and zone change would allow for future development of the site with rural uses permitted in RI Zone. LUBA 2016-012 concluded that the uses listed in DCC 18.100.010 are not urban uses. Because there are two residential dwellings within 600 feet of the subject site, the County will implement special provisions of the RI development code when a site plan is submitted. The Applicant notes that the subject property has only 14.25 acres that can be used for development due to easements, required setbacks and the requirement that only 70% of the total 20.36 acres can be used due to the proximity to residences.

For the reasons set forth above in the Ruling on Applicability of Goal 14 Exception, proposal is not likely to result in the "urbanization" of the subject site by allowing potential future development of Rural Industrial zone uses. Due to the appropriate County rural industrial development standards in DCC Chapter 18.100, compliance with these regulations will result in appropriate and compatible low density and not an "urban level" density. An exception to Goal 14 is not required for the proposed plan amendment and zone change. The Applicant is NOT applying for an urban use.

Goal 14 provides for an orderly and efficient transition from rural to urban land use." The proposed plan amendment and zone change is for rural uses that are not likely to result in the "urbanization" of the subject site by allowing development with Rural Industrial Zone uses that are permitted outright. However, due to the appropriate county rural industrial development standards, (18.100.040. Dimensional Standards) any rural industrial development must meet no more than a 70% lot coverage, a 30-foot maximum height limit, generous setbacks and distances between structures, consist of 7,500 square foot buildings or smaller, and meet the Landscape Management Zone setbacks. All of those regulations will result in appropriate and compatible low density and not an "urban level" density. The property will be consistent with surrounding uses after the rezone. An exception to Goal 14 is not required for the proposed plan amendment and zone change.

Goals 15 through 19. These goals, which address river, ocean, and estuarine resources, are not applicable because the subject property is not located in or adjacent to any such areas or resources.

In *Aceti IV*, LUBA made the following findings related to Goal 6 that may be applicable to the subject applications:

> Petitioner argues that, because the challenged decision does not approve any specific industrial use or uses, the county could not determine whether industrial uses allowed on the subject property pursuant to the RI zoning comply with Goal 6. Petitioner observes that the RI zone allows lumber manufacturing, wood processing, all uses that could result in 'waste and process discharges.' Petitioner argues that, without specifying which industrial uses may be developed on the property, the county could not find compliance with Goal 6.
>
> The county found that DCC 18.100.030(J) prohibits the county from approving any use in the RI zone that would 'threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards' because review of the use for compliance with applicable state or federal environmental quality statutes, rules, and standards must precede county approval. We agree with intervenor that DCC 18.100.030(J) supports a reasonable expectation that uses allowed on the subject property under RI zoning will either comply with state and federal environmental quality standards or be denied county approval. Such a determination does not require a specific development proposal. We conclude that the challenged decision does not impermissibly defer a finding of Goal 6 compliance.

Additionally, in *Aceti IV*, LUBA made the following findings related to Goal 11 may be applicable to the subject applications:

> Goal 11 is "[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." Goal 11 prohibits extension of urban services such as sewer and water to rural lands outside UGBs. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 455 (2016); *Gisler v. Deschutes County*, 149 Or App 528,535,945 P2d 1051 (1997). The county found that the change to RI will not result in the extension of urban services to the subject property. Record 105, 83. The findings address sewer/septic, water, fire, police, power, telephone, and transportation facilities and services. Record 83-84. Petitioner takes issue with water and wastewater facilities. With respect to water, petitioner argues that the county erred in not addressing groundwater supply and water rights for the subject property and alleges that industrial use of the subject property will threaten groundwater supplies in the area. Petition for Review 33. Petitioner argues that the challenged decision cannot comply with Goals 6 and 11 because there is no water service to the subject property. Petition for Review 41-43.
>
> Intervenor responds that the county found that the subject property has access to water service and that that finding is supported by substantial evidence in the record. Namely, intervenor explains, a water line currently serves two fire hydrants on the subject property and is connected to an Avion Water Company domestic water pipe at the north property line along the county's right-of-way. Record 84. The county observed that the record includes a will-serve letter from Avion. Record 84, 1041.5 Petitioner does not acknowledge, let alone challenge, those findings. Accordingly, petitioner's argument regarding water service with respect to Goals 6 and 11 provides no basis for remand. Petitioner argues that any industrial use of the subject property will require public wastewater treatment and that, without such

> treatment, "waste and process discharges from RI Zone uses on the subject property will be discharged directly into the environment, where such discharges threaten to violate applicable state or federal environmental quality statutes, rules and standards," in violation of Goal 6. Petition for Review 43. Accordingly, petitioner argues that the county erred in finding that "public facilities and services necessary for development of the subject property in accordance with the RI Zone are available and will be adequate." Record 105.
>
> Intervenor responds, and we agree, that petitioner's argument is based on an unsubstantiated premise that contaminated industrial waste may only be processed in a public wastewater facility. Petitioner does not cite anything in the record or applicable law that compels a conclusion that potential industrial wastewater discharges may only be treated in a public wastewater facility. Accordingly, petitioner's argument regarding wastewater provides no basis for reversal or remand.

Additionally, in *Aceti IV*, LUBA made the following findings related to Goal 14 may be applicable to the subject applications:

> Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside [UGBs], to ensure efficient use of land, and to provide for livable communities." Goal 14 requires cities and counties to cooperatively establish as part of their comprehensive plan UGBs "to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land." Goal 14 generally prohibits urban uses of rural land. Neither Goal 14 nor any other rule or guidance promulgated by LCDC defines "urban use."[21]
>
> The Supreme Court recognized that definitional gap 35 years ago in *1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P2d 268 (1986) (Curry County), in which the court held that urban uses are not permitted outside of UGBs unless an exception to Goal 14 is taken. The court explained that, if a decision affecting rural land outside an UGB is challenged as allowing an urban use in violation of Goal 14, a local government may do one of three things. The local government may (1) establish that the decision does not offend Goal 14 by demonstrating that the proposed use is rural and not urban. Differently, if the local government determines that a proposed use is an urban use, then the local government may either (2) comply with the Goal 14 by including the subject site within an UGB or (3) adopt an exception to Goal 14. Curry County, 301 Or at 477; see also *Shaffer v. Jackson County*, 16 Or LUBA 871, 872-75 (1988).

[21] LCDC has adopted general definitions that apply to the Statewide Planning Goals, including the following: "RURAL LAND. Land outside [UGBs] that is: "(a) Non-urban agricultural, forest or open space, "(b) Suitable for sparse settlement, small farms or acreage homesites with no or minimal public services, and not suitable, necessary or intended for urban use, or "(c) In an unincorporated community. "* * * * * "URBAN LAND. Land inside an urban growth boundary. "URBANIZABLE LAND. Urban land that, due to the present unavailability of urban facilities and services, or for other reasons, either: "(a) Retains the zone designations assigned prior to inclusion in the boundary, or (b) Is subject to interim zone designations intended to maintain the land's potential for planned urban development until appropriate public facilities and services are available or planned." (Boldface omitted.)

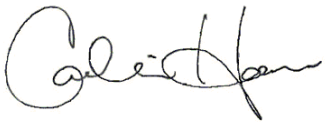
> In 1994, in response to the Curry County decision, LCDC adopted the Unincorporated Communities Rule at OAR chapter 660, division 22, which interprets Goals 11 and 14 concerning urban and rural development outside UGBs. As the court explained in Gisler, Goals 11 and 14 work together "to regulate development as well as services and facilities, to coordinate development levels with service and facility levels[,] and***to channel intensive uses and development to existing urban and urbanizable land first before allowing the conversion of or intense non-resource uses on the rural land that comprises the areas outside UGBs." 149 Or App at 535 (citing Curry County).

Staff believes the Applicant's responses are sufficient to find compliance with the applicable Statewide Planning Goals has been effectively demonstrated for all listed Goals except, potentially, Goals 3, 5, and 12. Compliance with Goal 3 and 12 are discussed at length herein. Considering the Applicant's responses, above, and staff's comments regarding compliance, staff requests the Hearings Officer make specific findings on this issue.

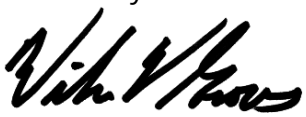
IV. CONCLUSION & RECOMMENDATION

Staff requests the Hearings Officer determine if the Applicant has met the burden of proof necessary to justify changing the Plan Designation from Agriculture to Rural Industrial and Zoning of the subject property from Exclusive Farm Use to Rural Industrial through effectively demonstrating compliance with the applicable criteria of DCC Title 18 (the Deschutes County Zoning Ordinance), the Deschutes County Comprehensive Plan, and applicable sections of OAR and ORS.

DESCHUTES COUNTY PLANNING DIVISION



Written by: Caroline House, Senior Planner



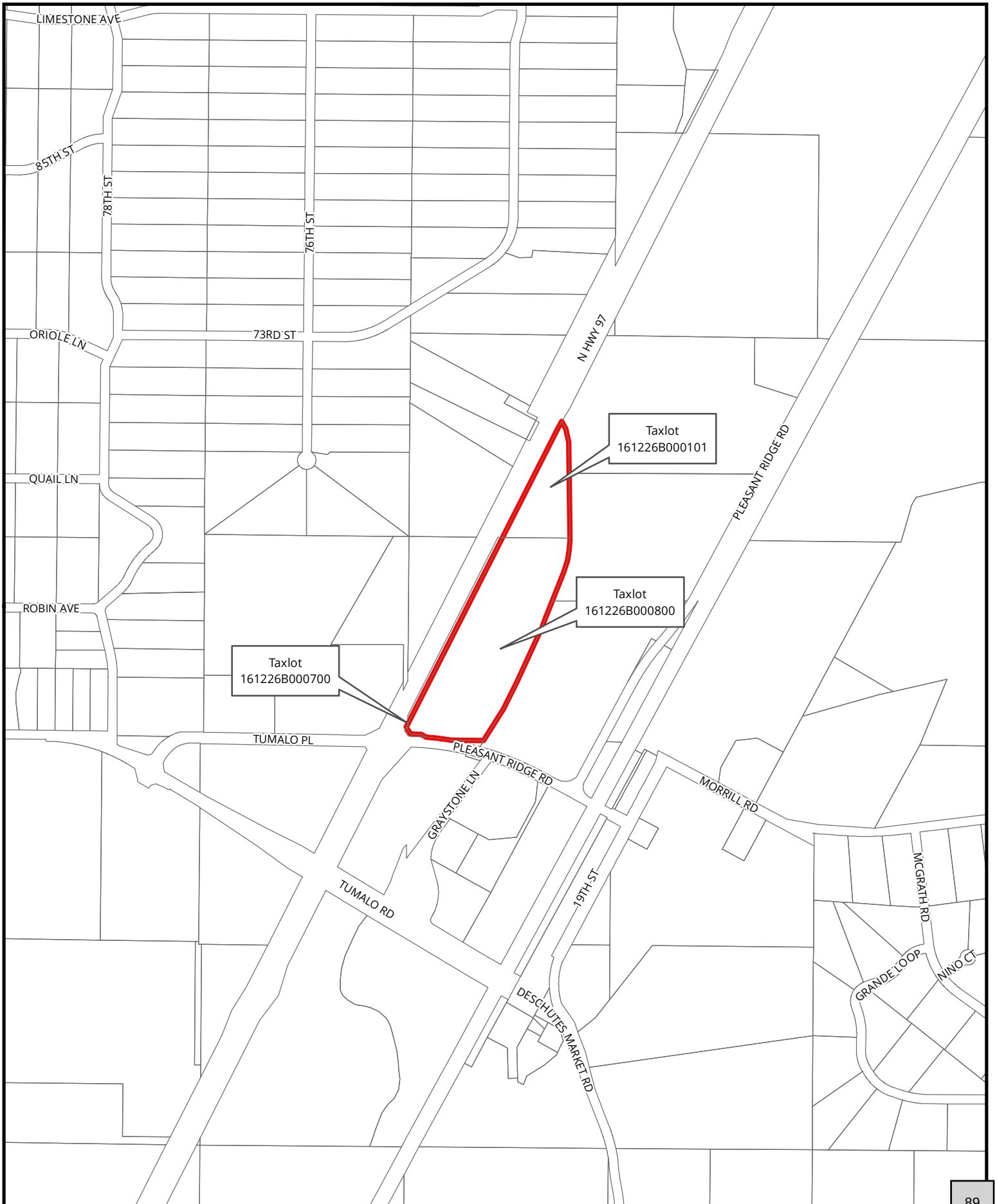
Reviewed by: Will Groves, Planning Manager

Attachment: Area Map

247-22-000573-ZC / 247-22-000574-PA

Location Map

1" = 800'



N:\Custom\County\CDD\Planning\PeterG\SB391_Eligible_Properties

July 14

owner	agent	inCareOf	address	cityStZip	type	cdd id
Mark Rubbert, Last Ranch, LLC			915 SW Rimrock Way #201-166	Redmond, OR 97756	Staff Report	22-573-ZC 22-574-PA
Patricia A. Kliewer, MPA			60465 Sunridge Drive	Bend, OR 97702	Staff Report	22-573-ZC 22-574-PA