



BOARD OF COMMISSIONERS

BOARD OF COUNTY COMMISSIONERS MEETING

1:00 PM, MONDAY, NOVEMBER 14, 2022

Barnes Sawyer Rooms - Deschutes Services Bldg - 1300 NW Wall St - Bend

(541) 388-6570 | www.deschutes.org

AGENDA

MEETING FORMAT: The Oregon legislature passed House Bill (HB) 2560, which requires that public meetings be accessible remotely, effective on January 1, 2022, with the exception of executive sessions. Public bodies must provide the public an opportunity to access and attend public meetings by phone, video, or other virtual means. Additionally, when in-person testimony, either oral or written is allowed at the meeting, then testimony must also be allowed electronically via, phone, video, email, or other electronic/virtual means.

Attendance/Participation options are described above. Members of the public may still view the BOCC meetings/hearings in real time via the Public Meeting Portal at ww.deschutes.org/meetings.

Citizen Input: Citizen Input is invited in order to provide the public with an opportunity to comment on any meeting topic that is not on the current agenda. Citizen Input is provided by submitting an email to: citizeninput@deschutes.org or by leaving a voice message at 541-385-1734. Citizen input received by noon on Tuesday will be included in the Citizen Input meeting record for topics that are not included on the Wednesday agenda.

Zoom Meeting Information: Staff and citizens that are presenting agenda items to the Board for consideration or who are planning to testify in a scheduled public hearing may participate via Zoom meeting. The Zoom meeting id and password will be included in either the public hearing materials or through a meeting invite once your agenda item has been included on the agenda. Upon entering the Zoom meeting, you will automatically be placed on hold and in the waiting room. Once you are ready to present your agenda item, you will be unmuted and placed in the spotlight for your presentation. If you are providing testimony during a hearing, you will be placed in the waiting room until the time of testimony, staff will announce your name and unmute your connection to be invited for testimony. Detailed instructions will be included in the public hearing materials and will be announced at the outset of the public hearing.

For Public Hearings, the link to the Zoom meeting will be posted in the Public Hearing Notice as well as posted on the Deschutes County website at <https://www.deschutes.org/bcc/page/public-hearing-notices>.

CALL TO ORDER

PLEDGE OF ALLEGIANCE

CITIZEN INPUT: Citizen Input may be provided as comment on any topic that is not on the agenda.

***Note:** In addition to the option of providing in-person comments at the meeting, citizen input comments may be emailed to citizeninput@deschutes.org or you may leave a brief voicemail at 541.385.1734. To be timely, citizen input must be received by noon on Tuesday in order to be included in the meeting record.*

CONSENT AGENDA

- [1.](#) Renew Contract for Humane Society Animal Shelter Services
- [2.](#) Consideration of Board Signature of Order No. 2022-064, Appointing Health Services Director's Designees
- [3.](#) Approve Document No. 2022-854, an Intergovernmental Agreement with the Oregon Judicial Department for Parental Custody Mediation Funds
4. Consideration of Board Signature on Letter of Thanks to Bill Anderson for service on the Deschutes County Facility Project Review Committee
5. Consideration of Board Signature on Letter of Thanks to Mark Davis for service on the Spring River Special Road District
6. Approval of the Minutes of November 2, 2022 BOCC Meeting

ACTION ITEMS

- [7.](#) **1:05 PM** Consideration of Board signature of Central Oregon Intergovernmental Council Agreement #2022-782
- [8.](#) **1:25 PM** Consideration of Document No. 2022-793, a Ground Lease with Mountain View Community Development for the Redmond Safe Parking Program
- [9.](#) **1:55 PM** Consideration of American Rescue Plan Act Funding Proposal: Friends of the Children
- [10.](#) **2:05 PM** First reading of Ordinance No. 2022-011, amending the Comprehensive Plan and approving a Zone change for property totaling approximately 19.12 acres along Highway 97
- [11.](#) **2:10 PM** First reading of Ordinance No. 2022-013 amending the Comprehensive Plan and approving a zone change for property totaling approximately 710 acres to the west of Terrebonne and north of Highway 126

- 12. **2:15 PM** Senate Bill (SB) 391 Work Session – Rural Accessory Dwelling Unit (ADU) Legislative Amendments
- 13. **2:45 PM** Preparation for Public Hearing – Psilocybin TPM Amendments
- 14. **3:15 PM** Paid Leave Oregon Implementation

OTHER ITEMS

These can be any items not included on the agenda that the Commissioners wish to discuss as part of the meeting, pursuant to ORS 192.640.

EXECUTIVE SESSION

At any time during the meeting, an executive session could be called to address issues relating to ORS 192.660(2)(e), real property negotiations; ORS 192.660(2)(h), litigation; ORS 192.660(2)(d), labor negotiations; ORS 192.660(2)(b), personnel issues; or other executive session categories.

Executive sessions are closed to the public; however, with few exceptions and under specific guidelines, are open to the media.

- 15. Executive Session under ORS 192.660(2)(d) Labor Negotiations

ADJOURN



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.



BOARD OF COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: Renew Contract for Humane Society Animal Shelter Services

RECOMMENDED MOTION:

Move approval of County Administrator Signature of Document 2022-492, a Contract with the Humane Society of Central Oregon to Provide Animal Shelter Services.

BACKGROUND AND POLICY IMPLICATIONS:

Deschutes County contracts with the Humane Society of Central Oregon to provide animal shelter services for dogs picked up in the unincorporated County outside of Bend, as well as other related services. The County pays a flat monthly fee (\$4,984 per month) in addition to a per day amount for dogs boarded at the Humane Society under a judicial hold.

The proposed contract adjusts for inflation at the beginning of the fiscal year and runs through June 30, 2025.

The estimated cost for this contract per year is \$65,000.

BUDGET IMPACTS:

Costs associated with this contract are included in the FY 22-23 budget.

ATTENDANCE:

Erik Kropp, Deputy County Administrator



For Recording Stamp Only

**DESCHUTES COUNTY SERVICES CONTRACT
CONTRACT NO. 2022 - 492**

This Contract is between DESCHUTES COUNTY, a political subdivision of the State of Oregon, acting by and through the Administrative Services Department (County) and the Humane Society of Central Oregon (Contractor). The parties agree as follows:

Effective Date and Termination Date. The effective date of this Contract shall be November 14, 2022 or the date on which each party has signed this Contract, whichever is later. Unless extended or terminated earlier in accordance with its terms, this Contract shall terminate when County accepts Contractor's completed performance, or on June 30, 2025, whichever date occurs last. Contract termination shall not extinguish or prejudice County's right to enforce this Contract with respect to any default by Contractor that has not been cured.

Statement of Work. Contractor shall perform the work described in Exhibit 1.

Payment for Work. County agrees to pay Contractor in accordance with Exhibit 1.

Contract Documents. This Contract includes Page 1-9 and Exhibits 1, 2, 3, 4, 5 and 6.

CONTRACTOR DATA AND SIGNATURE

Contractor Address:

Federal Tax ID# or Social Security #: _____

Is Contractor a nonresident alien? Yes No

Business Designation (check one): Sole Proprietorship Partnership
 Corporation-for profit Corporation-non-profit Other, describe

A Federal tax ID number or Social Security number is required to be provided by the Contractor and shall be used for the administration of state, federal and local tax laws. Payment information shall be reported to the Internal Revenue Service under the name and Federal tax ID number or, if none, the Social Security number provided above.

I have read this Contract including the attached Exhibits. I understand this Contract and agree to be bound by its terms. NOTE: Contractor shall also sign Exhibits 3 and 4 and, if applicable, Exhibit 6.

Signature Chief Executive Officer

Title

Name (please print) Date

DESCHUTES COUNTY SIGNATURE

Contracts with a maximum consideration of not greater than \$25,000 are not valid and not binding on the County until signed by the appropriate Deschutes County Department Head. Additionally, Contracts with a maximum consideration greater than \$25,000 but less than \$150,000 are not valid and not binding on the County until signed by the County Administrator or the Board of County Commissioners.

Dated this _____ of _____, 20__ Dated this _____ of _____, 20__
DESCHUTES COUNTY DIRECTOR OF _____ COUNTY ADMINISTRATOR

(Insert name)

STANDARD TERMS AND CONDITIONS

1. **Time is of the Essence.** Contractor agrees that time is of the essence in the performance of this Contract.
2. **Compensation.** Payment for all work performed under this Contract shall be made in the amounts and manner set forth in Exhibit 1.
 - a. Payments shall be made to Contractor following County's review and approval of billings and deliverables submitted by Contractor.
 - b. All Contractor billings are subject to the maximum compensation amount of this contract.
 - c. Contractor shall not submit billings for, and County shall not pay, any amount in excess of the maximum compensation amount of this Contract, including any reimbursable expenses, (See Exhibit 5).
 - 1) If the maximum compensation amount is increased by amendment to this Contract, the amendment shall be signed by both parties and fully executed before Contractor performs work subject to the amendment.
 - 2) No payment shall be made for any services performed before the beginning date or after the expiration date of this contract.
 - d. Unless otherwise specifically provided in Exhibit 5, Contractor shall submit monthly invoices for work performed. The invoices shall describe all work performed with particularity and by whom it was performed and shall itemize and explain all expenses for which reimbursement is claimed.
 - e. The invoices also shall include the total amount invoiced to date by Contractor prior to the current invoice.
 - g. Prior to approval or payment of any billing, County may require and Contractor shall provide any information which County deems necessary to verify work has been properly performed in accordance with the Contract.
3. **Delegation, Subcontracts and Assignment.** Contractor shall not delegate or subcontract any of the work required by this Contract or assign or transfer any of its interest in this Contract, without the prior written consent of County.
 - a. Any delegation, subcontract, assignment, or transfer without prior written consent of County shall constitute a material breach of this contract.
 - b. Any such assignment or transfer, if approved, is subject to such conditions and provisions as the County may deem necessary.
 - c. No approval by the County of any assignment or transfer of interest shall be deemed to create any obligation of the County to increase rates of payment or maximum Contract consideration.
 - d. Prior written approval shall not be required for the purchase by the Contractor of articles, supplies and services which are incidental to the provision of services under this Contract that are necessary for the performance of the work.
 - e. Any subcontracts that the County may authorize shall contain all requirements of this contract, and unless otherwise specified by the County the Contractor shall be responsible for the performance of the subcontractor.
4. **No Third Party Beneficiaries.**
 - a. County and Contractor are the only parties to this Contract and are the only parties entitled to enforce its terms.
 - b. Nothing in this Contract gives or provides any benefit or right, whether directly, indirectly, or otherwise, to third persons unless such third persons are individually identified by name in this Contract and expressly described as intended beneficiaries of this Contract.
5. **Successors in Interest.** The provisions of this Contract shall be binding upon and inure to the benefit of the parties and their successors and approved assigns, if any.
6. **Early Termination.** This Contract may be terminated as follows:
 - a. Mutual Consent. County and Contractor, by mutual written agreement, may terminate this Contract at any time.
 - b. Party's Convenience. County or Contractor may terminate this Contract for any reason upon 30 calendar days written notice to the other party.
 - c. For Cause. County may also terminate this Contract effective upon delivery of written notice to the Contractor, or at such later date as may be established by the County, under any of the following conditions:

- 1) If funding from state or other sources is not obtained and continued at levels sufficient to allow for the purchase of the indicated quantity of services as required in this Contract.
 - 2) If state laws, regulations or guidelines are modified, changed or interpreted in such a way that the services are no longer allowable or appropriate for purchase under this Contract or are no longer eligible for the funding proposed for payments authorized by this Contract.
 - 3) In the event sufficient funds shall not be appropriated for the payment of consideration required to be paid under this Contract, and if County has no funds legally available for consideration from other sources.
 - 4) If any license or certificate required by law or regulation to be held by the Contractor to provide the services required by this Contract is for any reason denied, revoked, suspended, not renewed or changed in such a way that the Contractor no longer meets requirements for such license or certificate.
- d. **Contractor Default or Breach.** The County, by written notice to the Contractor, may immediately terminate the whole or any part of this Contract under any of the following conditions:
- 1) If the Contractor fails to provide services called for by this Contract within the time specified or any extension thereof.
 - 2) If the Contractor fails to perform any of the other requirements of this Contract or fails to pursue the work so as to endanger performance of this Contract in accordance with its terms, and after receipt of written notice from the County specifying such failure, the Contractor fails to correct such failure within 10 calendar days or such other period as the County may in writing authorize.
 - 3) Contractor institutes or has instituted against it insolvency, receivership or bankruptcy proceedings, makes an assignment for the benefit of creditors, or ceases doing business on a regular basis.
- e. **County Default or Breach.**
- 1) Contractor may terminate this Contract in the event of a breach of this Contract by the County. Prior to such termination, the Contractor shall give to the County written notice of the breach and intent to terminate.
 - 2) If the County has not entirely cured the breach within 10 calendar days of the date of the notice, then the Contractor may terminate this Contract at any time thereafter by giving written notice of termination.
7. **Payment on Early Termination.** Upon termination pursuant to paragraph 6, payment shall be made as follows:
- a. If terminated under subparagraphs 6 a. through c. of this Contract, the County shall pay Contractor for work performed prior to the termination date if such work was performed in accordance with the Contract. Provided however, County shall not pay Contractor for any obligations or liabilities incurred by Contractor after Contractor receives written notice of termination.
 - b. If this Contract is terminated under subparagraph 6 d. of this Contract, County obligations shall be limited to payment for services provided in accordance with this Contract prior to the date of termination, less any damages suffered by the County.
 - c. If terminated under subparagraph 6 e of this Contract by the Contractor due to a breach by the County, then the County shall pay the Contractor for work performed prior to the termination date if such work was performed in accordance with the Contract. Specifically:
 - 1) with respect to services compensable on an hourly basis and authorized expenses actually incurred, County shall pay the amount due plus any interest within the limits set forth under ORS 293.462, less the amount of any claims County has against Contractor; and
 - 2) with respect to deliverable-based Work, the sum designated for completing the deliverable multiplied by the percentage of Work completed and accepted by County, less previous amounts paid and any claim(s) that County has against Contractor.
 - 3) County's payment to Contractor under this subparagraph 7(c) is subject to the limitations set forth in paragraph 8 of this Contract, below.
8. **Remedies.** In the event of breach of this Contract the parties shall have the following remedies:
- a. Termination under subparagraphs 6 a. through c. of this Contract shall be without prejudice to any obligations or liabilities of either party already reasonably incurred prior to such termination.
 - 1) Contractor may not incur obligations or liabilities after Contractor receives written notice of termination.
 - 2) Additionally, neither party shall be liable for any indirect, incidental, or consequential damages under this Contract or for any damages of any sort arising solely from the termination of this Contract in accordance with its terms.

- b. If terminated under subparagraph 6 d. of this Contract by the County due to a breach by the Contractor, County may pursue any remedies available at law or in equity.
 - 1) Such remedies may include, but are not limited to, termination of this contract, return of all or a portion of this Contract amount, payment of interest earned on this Contract amount, and declaration of ineligibility for the receipt of future contract awards.
 - 2) Additionally, County may complete the work either by itself, by agreement with another Contractor, or by a combination thereof. If the cost of completing the work exceeds the remaining unpaid balance of the total compensation provided under this Contract, then the Contractor shall be liable to the County for the amount of the reasonable excess.
 - c. If amounts previously paid to Contractor exceed the amount due to Contractor under this Contract, Contractor shall repay any excess to County upon demand.
 - d. Neither County nor Contractor shall be held responsible for delay or default caused by fire, civil unrest, labor unrest, riot, acts of God, or war where such cause was beyond reasonable control of County or Contractor, respectively; however, Contractor shall make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under this Contract. For any delay in performance as a result of the events described in this subparagraph, Contractor shall be entitled to additional reasonable time for performance that shall be set forth in an amendment to this Contract.
 - e. The passage of this Contract expiration date shall not extinguish or prejudice the County's or Contractor's right to enforce this Contract with respect to any default or defect in performance that has not been cured.
 - f. County's remedies are cumulative to the extent the remedies are not inconsistent, and County may pursue any remedy or remedies singly, collectively, successively or in any order whatsoever.
- 9. Contractor's Tender upon Termination.** Upon receiving a notice of termination of this Contract, Contractor shall immediately cease all activities under this Contract unless County expressly directs otherwise in such notice of termination.
- a. Upon termination of this Contract, Contractor shall deliver to County all documents, information, works-in-progress and other property that are or would be deliverables had this Contract been completed.
 - b. Upon County's request, Contractor shall surrender to anyone County designates, all documents, research, objects or other tangible things needed to complete the work.
- 10. Work Standard.**
- a. Contractor shall be solely responsible for and shall have control over the means, methods, techniques, sequences and procedures of performing the work, subject to the plans and specifications under this Contract and shall be solely responsible for the errors and omissions of its employees, subcontractors and agents.
 - b. For goods and services to be provided under this contract, Contractor agrees to:
 - 1) perform the work in a good, workmanlike, and timely manner using the schedule, materials, plans and specifications approved by County;
 - 2) comply with all applicable legal requirements;
 - 3) comply with all programs, directives, and instructions of County relating to safety, storage of equipment or materials;
 - 4) take all precautions necessary to protect the safety of all persons at or near County or Contractor's facilities, including employees of Contractor, County and any other contractors or subcontractors and to protect the work and all other property against damage.
- 11. Drugs and Alcohol.** Contractor shall adhere to and enforce a zero tolerance policy for the use of alcohol and the unlawful selling, possession or use of controlled substances while performing work under this Contract.
- 12. Insurance.** Contractor shall provide insurance in accordance with Exhibit 2 attached hereto and incorporated by reference herein.
- 13. Expense Reimbursement.** If the consideration under this Contract provides for the reimbursement of Contractor for expenses, in addition to Exhibit 5, Exhibit 1 shall state that Contractor is or is not entitled to reimbursement for such expenses.
- a. County shall only reimburse Contractor for expenses reasonably and necessarily incurred in the performance of this contract.

- b. Expenses reimbursed shall be at the actual cost incurred; including any taxes paid, and shall not include any mark-up unless the mark-up on expenses is specifically agreed to in this Contract.
- c. The cost of any subcontracted work approved in this Contract shall not be marked up.
- d. Contractor shall not bill County for any time expended to complete the documents necessary for reimbursement of expenses or for payment under this contract.
- e. The limitations applicable to reimbursable expenses are set forth in Exhibit "5", attached hereto and by reference incorporated herein.

14. Criminal Background Investigations. Contractor understands that Contractor and Contractor's employees and agents are subject to periodic criminal background investigations by County and, if such investigations disclose criminal activity not disclosed by Contractor, such non-disclosure shall constitute a material breach of this Contract and County may terminate this Contract effective upon delivery of written notice to the Contractor, or at such later date as may be established by the County.

15. Confidentiality. As applicable, Contractor shall maintain confidentiality of information obtained pursuant to this Contract as follows:

- a. Contractor shall not use, release or disclose any information concerning any employee, client, applicant or person doing business with the County for any purpose not directly connected with the administration of County's or the Contractor's responsibilities under this Contract except upon written consent of the County, and if applicable, the employee, client, applicant or person.
- b. The Contractor shall ensure that its agents, employees, officers and subcontractors with access to County and Contractor records understand and comply with this confidentiality provision.
- c. Contractor shall treat all information as to personal facts and circumstances obtained on Medicaid eligible individuals as privileged communication, shall hold such information confidential, and shall not disclose such information without the written consent of the individual, his or her attorney, the responsible parent of a minor child, or the child's guardian, except as required by other terms of this Contract.
- d. Nothing prohibits the disclosure of information in summaries, statistical information, or other form that does not identify particular individuals.
- e. Contractor shall at all times comply with all of the transaction, security and privacy provisions of the Health Insurance Portability and Accountability Act ("HIPAA") and all other state and federal laws and regulations related to the privacy and/or security of personally identifiable health information.
- f. Contractor shall cooperate with County in the adoption of policies and procedures for maintaining the privacy and security of personally identifiable health records and for conducting transactions pursuant to the requirements of HIPAA and other applicable state and federal laws and regulations..
- g. This Contract may be amended in writing in the future to incorporate additional requirements related to compliance with HIPAA or other applicable state or federal laws and/or regulations..

If Contractor receives or transmits protected health information, Contractor shall enter into a Business Associate Agreement with County, which, if attached hereto, shall become a part of this Contract. To the extent any provision of the Business Associate Agreement is inconsistent with a provision of this paragraph 15, the Business Associate Agreement shall govern.

16. Reports. Contractor shall provide County with periodic reports at the frequency and with the information prescribed by County. Further, at any time, County has the right to demand adequate assurances that the services provided by Contractor shall be in accordance with the Contract. Such assurances provided by Contractor shall be supported by documentation in Contractor's possession from third parties.

17. Access to Records. Contractor shall maintain fiscal records and all other records pertinent to this Contract.

- a. All fiscal records shall be maintained pursuant to generally accepted accounting standards, and other records shall be maintained to the extent necessary to clearly reflect actions taken.
 - 1) All records shall be retained and kept accessible for at least three years following the final payment made under this Contract or all pending matters are closed, whichever is later.
 - 2) If an audit, litigation or other action involving this Contract is started before the end of the three year period, the records shall be retained until all issues arising out of the action are resolved or until the end of the three year period, whichever is later.
- b. County and its authorized representatives shall have the right to directly access all of Contractor's books, documents, papers and records related to this Contract for the purpose of conducting audits and examinations and making copies, excerpts and transcripts.

- 1) These records also include licensed software and any records in electronic form, including but not limited to computer hard drives, tape backups and other such storage devices. County shall reimburse Contractor for Contractor's reasonable cost of preparing copies.
- 2) At Contractor's expense, the County, the Secretary of State's Office of the State of Oregon, the Federal Government, and their duly authorized representatives, shall have license to enter upon Contractor's premises to access and inspect the books, documents, papers, computer software, electronic files and any other records of the Contractor which are directly pertinent to this Contract.
- 3) If Contractor's dwelling is Contractor's place of business, Contractor may, at Contractor's expense, make the above records available at a location acceptable to the County.

18. Ownership of Work. All work of Contractor that results from this Contract (the "Work Product") is the exclusive property of County.

- a. County and Contractor intend that such Work Product be deemed "work made for hire" of which County shall be deemed author.
- b. If, for any reason, the Work Product is not deemed "work made for hire," Contractor hereby irrevocably assigns to County all of its right, title, and interest in and to any and all of the Work Product, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine.
- c. Contractor shall execute such further documents and instruments as County may reasonably request in order to fully vest such rights in County.
- d. Contractor forever waives any and all rights relating to Work Product, including without limitation, any and all rights arising under 17 USC § 106A or any other rights of identification of authorship or rights of approval, restriction or limitation on use or subsequent modifications.
- e. County shall have no rights in any pre-existing work product of Contractor provided to County by Contractor in the performance of this Contract except an irrevocable, non-exclusive, perpetual, royalty-free license to copy, use and re-use any such work product. .
- f. If this Contract is terminated prior to completion, and County is not in default, County, in addition to any other rights provided by this Contract, may require Contractor to transfer and deliver all partially completed work products, reports or documentation that Contractor has specifically developed or specifically acquired for the performance of this Contract.
- g. In the event that Work Product is deemed Contractor's Intellectual Property and not "work made for hire," Contractor hereby grants to County an irrevocable, non-exclusive, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the Contractor Intellectual Property, and to authorize others to do the same on County's behalf.
- h. In the event that Work Product is Third Party Intellectual Property, Contractor shall secure on the County's behalf and in the name of the County, an irrevocable, non-exclusive, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the Third Party Intellectual Property, and to authorize others to do the same on County's behalf.

19. County Code Provisions. Except as otherwise specifically provided, the provisions of Deschutes County Code, Section 2.37.150 are incorporated herein by reference. Such code section may be found at the following URL address: <https://weblink.deschutes.org/public/DocView.aspx?id=78735&searchid=818e81ed-6663-4f5b-9782-9b5523b345fc>. To the extent any provision of DCC 2.37.150 is inconsistent with a provision of this Contract, DCC 2.37.150 shall govern.

20. Partnership. County is not, by virtue of this contract, a partner or joint venturer with Contractor in connection with activities carried out under this contract, and shall have no obligation with respect to Contractor's debts, taxes, or any other liabilities of each and every nature.

21. Indemnity and Hold Harmless.

- a. To the fullest extent authorized by law Contractor shall defend, save, hold harmless and indemnify the County and its current and former officers, departments, employees and agents from and against any and all claims, suits, actions, losses, damages, liabilities costs and expenses of any nature, and by whomever brought, resulting from, arising out of or relating to the activities of Contractor or its current or former officers, employees, contractors, or agents, including without limitation any claim that any work, work product or other tangible or intangible items delivered to County by Contractor may be the subject of protection under any state or federal intellectual property law or doctrine, or that the County's use thereof infringes any patent, copyright, trade secret, trademark, trade dress, mask work utility design or other proprietary right of any third party.

- b. Contractor shall have control of the defense and settlement of any claim that is subject to subparagraph a of this paragraph; however neither Contractor nor any attorney engaged by Contractor shall defend the claim in the name of Deschutes County or any department or agency thereof, nor purport to act as legal representative of the County or any of its departments or agencies without first receiving from the County's Legal Counsel, in a form and manner determined appropriate by the County's Legal Counsel, authority to act as legal counsel for the County, nor shall Contractor settle any claim on behalf of the County without the approval of the County's Legal Counsel.
- c. To the extent permitted by Article XI, Section 10, of the Oregon Constitution and the Oregon Tort Claims Act, ORS 30.260 through 30.300, County shall defend, save, hold harmless and indemnify Contractor and its officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities costs and expenses of any nature resulting from or arising out of, or relating to the activities of County or its officers, employees or agents under this Contract.

22. Waiver.

- a. County's delay in exercising, or failure to exercise, any right, power, or privilege under this Contract shall not operate as a waiver thereof, nor shall any single or partial exercise of any right, power, or privilege under this Contract preclude any other or further exercise thereof or the exercise of any other such right, power, or privilege.
- b. The remedies provided herein are cumulative and not exclusive of any remedies provided by law.

23. Governing Law. This Contract shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law.

- a. Any claim, action, suit or proceeding (collectively, "Claim") between County and Contractor that arises from or relates to this Contract shall be brought and conducted solely and exclusively within the Circuit Court of Deschutes County for the State of Oregon; provided, however, if a Claim shall be brought in federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon.
- b. CONTRACTOR, BY EXECUTION OF THIS CONTRACT, HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS. The parties agree that the UN Convention on International Sales of Goods shall not apply.

24. Severability. If any term or provision of this Contract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if this Contract did not contain the particular term or provision held invalid, unless doing so would materially frustrate the parties' intent in entering into this Contract

25. Counterparts. This Contract may be executed in several counterparts, all of which when taken together shall constitute one agreement binding on all parties, notwithstanding that all parties are not signatories to the same counterpart. Each copy of this Contract so executed shall constitute an original.

26. Notice. Except as otherwise expressly provided in this Contract, any communications between the parties hereto or notices to be given hereunder shall be given in writing, to Contractor or County at the address or number set forth below or to such other addresses or numbers as either party may hereafter indicate in writing. Delivery may be by personal delivery, facsimile, or mailing the same, postage prepaid.

- a. Any communication or notice by personal delivery shall be deemed delivered when actually given to the designated person or representative.
- b. Any communication or notice sent by facsimile shall be deemed delivered when the transmitting machine generates receipt of the transmission. To be effective against County, such facsimile transmission shall be confirmed by telephone notice to the County Administrator.
- c. Any communication or notice mailed shall be deemed delivered five (5) days after mailing. Any notice under this Contract shall be mailed by first class postage or delivered as follows:

To Contractor:

Sabrina Slusser, CEO
The Humane Society of Central Oregon
61170 SE 27th ST
Telephone: (541) 382-3537
Fax No.: (541) 382-2021

To County:

Erik Kropp
Deputy County Administrator
1300 NW Wall Street, Suite 200
Bend, Oregon 97701
Fax No. 541-385-3202

27. Merger Clause. This Contract and the attached exhibits constitute the entire agreement between the parties.

- a. All understandings and agreements between the parties and representations by either party concerning this Contract are contained in this Contract.
- b. No waiver, consent, modification or change in the terms of this Contract shall bind either party unless in writing signed by both parties.
- c. Any written waiver, consent, modification or change shall be effective only in the specific instance and for the specific purpose given.

28. Identity Theft Protection. Contractor and subcontractors shall comply with the Oregon Consumer Identity Theft Protection Act (ORS 646A.600 et seq.).

29. Survival. All rights and obligations shall cease upon termination or expiration of this Contract, except for the rights and obligations set forth in Sections 4, 5, 8, 9, 15, 17, 18, 20-27, 28 and 30.

30. Representations and Warranties.

- a. **Contractor's Representations and Warranties.** Contractor represents and warrants to County that:
 - 1) Contractor has the power and authority to enter into and perform this Contract;
 - 2) This Contract, when executed and delivered, shall be a valid and binding obligation of Contractor enforceable in accordance with its terms;
 - 3) Contractor has the skill and knowledge possessed by well-informed members of its industry, trade or profession and Contractor will apply that skill and knowledge with care and diligence to perform the Work in a professional manner and in accordance with standards prevalent in Contractor's industry, trade or profession in the state of Oregon;
 - 4) Contractor shall, at all times during the term of this Contract, be qualified, professionally competent, and duly licensed to perform the Work;
 - 5) Contractor prepared its proposal related to this Contract, if any, independently from all other proposers, and without collusion, fraud, or other dishonesty; and
 - 6) Contractor's making and performance of this Contract do not and will not violate any provision of any applicable law, rule or regulation or order of any court, regulatory commission, board or other administrative agency.
 - 7) Contractor's making and performance of this Contract do not and will not violate any provision of any other contract, agreement to which Contractor is a party, nor materially impair any legal obligation of Contractor to any person or entity.
- b. **Warranties Cumulative.** The warranties set forth in this paragraph are in addition to, and not in lieu of, any other warranties provided, whether express or implied at law.

31. Amendment.

- a. This Contract may be unilaterally modified by County to accommodate a change in available funds, so long as such modification does not impose an unreasonable hardship upon Contractor or reduce Contractor's compensation for work Contractor actually performs or Contractor's authorized expenses actually incurred. With respect to deliverable-based Work, Contractor's compensation shall not be deemed reduced by a modification of this contract, so long as Contractor is paid the sum designated for performing the Work originally contemplated by this Contract multiplied by the percentage of such originally contemplated Work that Contractor performs under the modified Contract.
- b. With the exception of subparagraph 31(a), above. This Contract (including any exhibits) may only be amended upon written agreement by both parties, and shall not be effective until both parties have executed such written agreement. Any alleged or claimed amendment that is not performed in compliance with this paragraph 31 shall be void and of no effect.

32. Representation and Covenant.

- a. Contractor represents and warrants that Contractor has complied with the tax laws of this state, and where applicable, the laws of Deschutes County, including but not limited to ORS 305.620 and ORS chapters 316, 317 and 318.
- b. Contractor covenants to continue to comply with the tax laws of this state, and where applicable, the laws of Deschutes County, during the term of this contract.

c. Contractor acknowledges that failure by Contractor to comply with the tax laws of this state, and where applicable, the laws of Deschutes County, at any time before Contractor has executed the contract or during the term of the contract is and will be deemed a default for which Deschutes County may terminate the contract and seek damages and/or other relief available under the terms of the contract or under applicable law.

EXHIBIT 1
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-492
STATEMENT OF WORK, COMPENSATION
PAYMENT TERMS and SCHEDULE

1. Contractor shall perform the following work:

a. Definition.

1) "Authorized Representative" means Deschutes County Legal Counsel, Deschutes County Sheriff's Deputy or Animal Control Technician or any other representative of Deschutes County authorized by the Board of County Commissioners or the Board of Supervisors.

2) "Keeper" means the same as that term is defined in Deschutes County Code 6.04.010.

b. General Scope of Services. Unless otherwise provided by law, Contractor shall provide, at its shelter located at 61170 SE 27th Street, Bend, Oregon 97702 ("Shelter"), animal impoundment and maintenance care tasks including, but not limited to, providing shelter, food, health care, adoption, transfer euthanasia and the disposal of the animals impounded by an Authorized Representative or brought to the shelter by members of the public. Additionally, Contractor shall provide education, community service and advertising to support other programs provided under this Contract.

c. Impoundment and Boarding. Contractor shall receive and board animals impounded by an Authorized Representative and stray animals brought to Contractor by members of the public, in an adequate and sanitary environment at the Shelter.

1) Contractor shall impound and board animals according to the following conditions:

a) Impounded animals or stray animals brought to Contractor by an Authorized Representative or the public, with or without identification, shall be held a minimum of five days for dogs, unless sooner claimed by the keeper of such animal and a minimum of three days for cats without identification and a minimum of five days for cats with identification.

b) Animals impounded by judicial or administrative order may be held for an indefinite period of time and shall be released or disposed of only in accordance with the special written instructions from the court or County Legal Counsel. Animals brought to agency on safekeeping hold (defined as cases in which the owner is incarcerated, hospitalized, or deceased and there is no alternative person to care for the animal) will be accompanied by a safekeeping agreement provided by Authorized Representative.

c) Gate Tag.

i. For animals impounded by judicial or administrative order, Contractor shall affix all special written instructions, including the reason for impoundment (e.g., livestock cases), to the gate tag.

ii. In lieu of this required information placed directly on the gate tag, the gate tag may refer to the impound form for details.

d) At the discretion of Contractor, sick or injured animals brought to the shelter by members of the public may be promptly disposed of as provided by law.

i. Such disposal decision shall be the full responsibility of Contractor.

ii. At the request of the County, Contractor shall provide County with a full description of the process to be used and factors to be considered for determining when and how to dispose of a sick or injured animal prior to the termination of the hold period in Paragraph 1.c.1)a) and b).

e) Immediately upon receipt of an impounded animal, Contractor shall assign a Control Number to each animal impounded.

f) Contractor shall maintain a full and complete written record of all animals impounded pursuant to this Contract to be provided to County upon County's request and such record shall include at least the following information:

i. The date of the impoundment.

ii. The source of the impoundment, including the Authorized Representative's name or the name of the public member who brought the animal to the shelter.

iii. The reason for impoundment.

iv. The exact location of where the animal was found by the Authorized Representative or public member.

v. The designated holding period for the animal and any special instructions, including, but not limited to, specific instructions regarding the holding, release or disposal of the animal.

- vi. The name of the judicial official or Authorized Representative who designated the special instructions referred to in Exhibit 1, Paragraph 1.c.1)b).
 - vii. A general description of the animal, including the animal's breed, if known
 - viii. Any inoculation or medical treatment administered or to be administered to the animal at Contractor's Shelter.
 - ix. Whether a keeper was identified who did not claim the animal.
 - x. Whether the dog is licensed, and, if so, the license number.
 - xi. Whether the animal was claimed, adopted, destroyed or otherwise disposed of by Contractor, and the date thereof.
 - xii. Name, address, phone number and any other identifying information, such as driver's license number of any keeper who retrieves an impounded animal.
 - xiii. The name, address and telephone number of the person who released possession of the animal to Contractor.
 - xiv. Control Number given to the impounded animal by Contractor.
 - xv. Any illness or injury.
 - xvi. The number of days the animal was held as of the date of the report.
 - xvii. The results of any behavior assessment.
 - xviii. If the animal is a dog and unlicensed, whether the keeper was cited for failure to license from the gate tag provided by the County representative.
- g) Upon County's request, Contractor shall provide County a copy of a record from the records management system, in addition to any hard copies provided by Contractor, with the information required in Exhibit 1, Paragraph 1.c.1)f) for each impounded animal.
- 2) Prior to release of any impounded dog to the keeper, Contractor shall require the keeper to present photo identification and Contractor shall record any identifying information such as name, address and driver's license number.
 - 3) Prior to release of any impounded dog to the keeper, Contractor shall charge the keeper an impound fee in accordance with the County's fee schedule.
 - 4) Contractor shall make a reasonable effort to notify the keeper of an impounded animal before the animal is removed from impoundment.
 - 5) Contractor shall provide board and care for quarantine animals brought to Contractor by an Authorized Representative.
 - a) "Rabies Quarantine" means the animal will be housed separately for ten consecutive days due to having bitten a person and broken skin.
 - b) Contractor shall follow State guidelines for rabies for quarantined animals brought to Contractor by an Authorized Representative.
 - 6) Contractor shall hold impounded animals in accordance with such other instructions given to Contractor by an Authorized Representative.
 - 7) Contractor shall not refuse to intake, hold or impound any stray or judicial hold animal brought to Contractor's facility by an Authorized Representative [except for Exhibit 1, Paragraph 1.c.1)d)] unless the Authorized Representative agrees or unless the animal has a serious or life threatening injury or illness requiring immediate medical care as determined by the Authorized Representative.
 - 8) For all impounded animals that do not have a serious or life threatening injury or illness requiring immediate medical care, as determined by the Contractor's Veterinarian. Contractor shall be responsible for all medical basic care of those animals.
- d. Cremation of Dead Animals. Contractor shall dispose of dead animals by cremation at Contractor's crematorium or a crematorium with which the Contractor has contracted.
- 1) Subject to the following conditions, Contractor shall have the exclusive right to operate the crematorium at such times and on such terms as Contractor so determines.
 - a) Contractor shall dispose of all dead animals brought to its facility by an Authorized Representative.
 - b) Contractor shall dispose of all stray animals that have been euthanized following expiration of the applicable holding period.
 - c) Contractor shall be responsible for the normal maintenance and repair of the crematorium, including the structure in which the crematorium is located.
 - d) Contractor shall pay all direct and indirect costs of operating the crematorium, including utilities, labor, maintenance and repair.
 - e) Contractor shall be responsible for obtaining and maintaining all local and state permits required in the operation of the crematorium, and shall undertake such other acts as are necessary to

place and maintain the crematorium and its operations in full compliance with the rules and regulations of the Oregon Department of Environmental Quality and other federal, state and local agencies with jurisdiction over the crematorium.

- f) Contractor shall keep complete and accurate records of and make available to County upon County request the following:
 - i. the weight of dead animals per animal that are cremated at County's expense;
 - ii. the total weight of each dead animal cremated at County's expense;
 - iii. the number of dead animals cremated;
 - iv. the operation, maintenance and repair of the crematorium and associated facilities;
 - v. the permitting and compliance with environmental regulations.
- e. Related Responsibilities.
 - 1) Contractor shall make its facility open daily to the public (legal holidays, Sundays and no more than four annual in-service days excepted) at hours to be determined by Contractor, but in no case less than five hours per day to allow impounded animals to be claimed by their keepers. Contractor shall extend the number of impound days, to the extent necessary to offset closed days.
 - 2) Contractor shall provide access to the facility to Authorized Representatives on a 24-hour, seven-day week basis to allow for the lodging of impounded dogs. For cats, Authorized Representative must drop off in the cat impound area.
 - 3) Contractor shall provide all reception and administrative support for transactions involving animals that are brought to Contractor.
 - 4) Contractor property.
 - a) Unless otherwise directed by an Authorized Representative, all animals not returned to their keepers shall become property of Contractor after the expiration of the applicable holding period set forth in this contract.
 - b) After the applicable holding period, Contractor shall have sole authority to make all adoption and disposal decisions
 - 5) Citation.
 - a) Prior to release to the keeper of any impounded dog that has not been licensed by County:
 - i. Contractor shall require the owner or keeper to provide a license for the dog; or
 - ii. Contractor shall require the owner or keeper to present a citation issued by the Sheriff's Office for failure to license the dog under DCC 6.04; or
 - iii. Contractor shall require the keeper to complete the keeper information section of the County three-part, pre-numbered dog license payment voucher form, return the completed form to Contractor and pay the County dog license fee in accordance with the County fee schedule.
 - i) Upon review of the dog license payment voucher form for completeness, Contractor shall then complete the County dog license payment voucher form.
 - ii) Contractor shall not complete the dog license voucher payment form unless the keeper completes all the information in the keeper information section of the form and pays the appropriate dog license fee.
 - iii) Contractor shall issue one of the completed duplicate forms of the dog license payment voucher form to the keeper.
 - iv) Contractor shall remit the dog license fee and original completed dog license payment voucher form in accordance with Exhibit 1, Paragraph 1.e.8).
 - vi) Contractor shall return all copies of any voided or incomplete dog license payment voucher form to County.
 - b) Contractor shall provide notation on gate tag of the requirements in Exhibit 1, Paragraph 1.e.5).
 - 6) For all dog adoptions, upon County request, Contractor shall provide to County a record comprising of at least the following information
 - a) Name of person adopting the dog.
 - b) Address of person adopting the dog.
 - c) Phone number of person adopting the dog.
 - d) Breed, color and gender of dog adopted.
 - e) County dog license number.
 - i. If the dog is under six (6) months, Contractor shall require the keeper to complete the keeper information section of the County three-part, pre-numbered dog license payment voucher form, return the completed form to Contractor and pay the County dog license fee in accordance with the County fee schedule.
 - i) Upon review of dog license payment voucher form for completeness, Contractor shall then complete the County dog license payment voucher form.

- ii) Contractor shall not complete the dog license voucher payment form unless the keeper completes all the information in the keeper information section of the form and pays the appropriate dog license fee.
 - iii) Contractor shall issue one of the completed duplicate forms of the dog license payment voucher form to the keeper.
 - iv) Contractor shall remit the dog license fee and original completed dog license payment voucher form.
 - vi) Contractor shall return all copies of any voided or incomplete dog license payment voucher form to County.
 - ii. If the dog is older than six (6) months, Contractor shall require the new owner to obtain a license prior to removing the dog from the Contractor's premises. If a rabies certificate cannot be obtained, a payment voucher should be issued.
 - f) Copies of all rabies and spay/neuter certificates.
 - g) The spay/neuter status.
 - h) The exact location where the animal was found by the Authorized Representative or public member.
- 7) On the 15th of each month, Contractor shall remit to County all dog license and pet identification tag fees collected by Contractor during the prior month.
 - 8) Contractor shall promptly notify the County Sheriff's Office of reports of animal abuse, neglect or theft.
 - 9) Contractor shall not give legal advice to the public.
 - 10) Contractor shall sell and issue domestic County dog licenses and pet identification tags to the public in accordance with the current County fee schedule.
 - 11) Contractor shall utilize and coordinate with the County's animal license database.
 - 12) County shall provide Contractor computer access via the Internet to the County database for purposes of processing license requests and responses to animal lost and found inquiries
- f. Education Services.
- 1) Contractor may provide or sponsor education programs, community service programs and advertising in all areas of animal care and welfare.
 - 2) Contractor may provide such education programs in accordance with the terms and conditions mutually agreed to by County and Contractor.
 - 3) Such programs may include license, spay/neuter/vaccine programs, educational programs (such as school orientation and awareness programs) and advertising through the local media.
 - 4) At County's request Contractor shall provide to County a periodic report of Contractor's compliance with Exhibit 1, Paragraph 1.f.1) through 4).
 - 5) At least once a calendar year, Contractor shall provide an oral presentation and written report to the Deschutes County Board of County Commissioners a report of all contract activities.
2. **County Services.** County shall provide Contractor, at County's expense, with material and services described as follows:
- a. Special Instructions. County shall promptly (within 24 hours Monday – Friday and within 48 hours Saturday – Sunday) notify Contractor verbally or in writing of any special instructions, new developments or additional information regarding impounded animals that may be necessary in order for Contractor to fulfill its duties pursuant to this Contract.
 - b. County to Supply Known Information. An Authorized Representative of the County shall provide Contractor with all known information required under Exhibit 1, Paragraph 1.c.1)f).
 - c. Vehicle Disinfection. After each use, County shall disinfect all County vehicles used to transport animals to Contractor's shelter.
 - d. County Purchase of Dog Tags.
 - 1) County shall purchase all dog license tags and provide them to Contractor.
 - 2) County shall provide Contractor with pre-numbered, County dog license payment voucher forms.
 - 3) County shall accept the pre-numbered, County dog license payment voucher issued to a keeper in accordance with Exhibit 1, Paragraph 1.e.5)a)iv. and 1.e.7)e)i. and issue a dog license to the keeper upon receipt of the rabies vaccination certification and payment of any additional dog license fee payment required for an unaltered dog if the keeper has an unaltered dog but the dog license payment voucher is for an altered dog.
 - 5) County shall require County's dog license contractors to accept the completed, pre-numbered, County dog license payment voucher issued to a keeper in accordance with Exhibit 1, Paragraph 1.e.5)a)iv. and 1.e.7)e)i. and issue a dog license to the keeper upon receipt of the rabies vaccination

certification and payment of any additional dog license fee payment required for an unaltered dog if the keeper has an unaltered dog but the dog license payment voucher is for an altered dog.

- e. Forms and Software Maintenance. County shall provide Contractor the following:
 - 1) Licensing forms.
 - 2) Reporting forms in electronic format.
 - 3) Ongoing programming maintenance for licensing database.
- f. Renewal Notices. County shall issue all dog license renewal notices.
- g. Payment Schedule. Within twenty-one (21) days of Contractor's submittal of the fees required in Exhibit 1, Paragraph 1.e.8), County shall distribute payment to Contractor pursuant to Exhibit 1, Paragraphs 3.i., j., and l.
- h. If an animal is determined by the Authorized Representative to have a serious or life threatening injury or illness requiring immediate care at the initiation of the impoundment of that animal, the Authorized Representative shall be responsible for obtaining medical care for that animal from a veterinarian until such time as the animal's injuries are no longer life threatening and the animal can safely be transported to Contractor's facility.
- i. Once the animal is in the care of the Emergency Veterinarian Clinic, all fees up to \$500 will be covered by the County and the animal's care will be directed by Shelter management pursuant to Contractor's relationship with the Emergency Veterinary Clinic(s).
- j. To the extent allowed by law, County shall not disclose and shall use for County purposes only any personal information submitted to County by Contractor for any keeper who retrieves an impounded animal, any person who released possession of an animal to Contractor and of any person adopting an animal.

3. Consideration.

a. Boarding Fee.

1) Dogs and Domestic Cats.

- a) Except as provided in Exhibit 1, Paragraph 3.c. and Exhibit 1, Paragraph 3.b., County shall pay Contractor a boarding fee of \$4,984 per month for dogs impounded by a County Authorized Representative or brought to the Shelter by the public and as a boarding fee for cats impounded by a County Authorized Representative. The boarding fee shall pay for a maximum of five days for dogs and cats. The boarding fee of \$4,984 shall be adjusted on July 1, 2023 to reflect an increase equal to the Consumer Price Index (CPI) – All Urban Consumers, All Cities percentage change from January 2022 to January 2023. If the CPI is a negative number, the per month boarding fee will remain the same. Applying this formula, the monthly boarding fee starting on July 1, 2022 shall be \$4,984. Each subsequent July 1 (after July 1, 2022), the monthly boarding fee shall be adjusted to reflect an increase equal to the Consumer Price Index (CPI) – All Urban Consumers, All Cities percentage change from January to January.

b. Domestic Cats Held by Judicial/Administrative Order.

- 1) County shall pay Contractor \$10.00 per day for domestic cats held by judicial or administrative order in excess of five (5) days.
- 2) Cats held by judicial or administrative order means cats required to be impounded by order of the court or held for evidence in a criminal court proceeding.
- 3) Contractor is responsible for billing County for the itemized costs for reasonable veterinarian care and medicines during the period of impoundment.

c. Dogs Held by Judicial/Administrative Order.

- 1) County shall pay Contractor for dogs held by judicial or administrative order as follows:
 - a) \$30.00 per day for days six (6) through the time the hold is released. There shall be a \$10,000 cap per fiscal year that the County will pay Contractor for costs associated with dogs being held by judicial/administrative order.
- 2) Dogs held by judicial order means dogs required to be impounded by order of the court or held for evidence in a violation or criminal court proceeding.
- 3) Dogs held by administrative order means dogs held pending disposition after a hearing before the Deschutes County Board of Supervisors.
- 4) If a judicial or administrative order requires the boarding of a dog for longer than five (5) days, Contractor shall coordinate with the District Attorney's Office for Deschutes County, the Deschutes County Sheriff's Office and the Deschutes County Legal Counsel as to the care and disposition of the impounded dogs during the period of impoundment.

d. Boarding Fees for Dogs Referred by the Crisis Stabilization Center.

- 1) County shall pay contractor \$10.00 per day, for up to five (5) days, for dogs brought from the Crisis Stabilization Center.
- e. Boarding Fees for Other Animals. For any animal other than dogs or domestic cats impounded by a County Authorized Representative, boarding fees shall be as follows.
 - 1) If the fifth day of the five-day impoundment period is a Sunday or legal holiday, the County will pay the boarding fee for each day the animal is held for the Sunday or legal holiday.
 - 2) Small domestic animals, including but not limited to reptiles, birds, ferrets impounded by County Authorized Representative.
 - a) The County shall pay Contractor a boarding fee for small animals of \$5.00 per day per small animal for a maximum of five days pursuant to Exhibit 1, Paragraph 1.c.1)a).
 - b) If a judicial or administrative order requires the boarding of small animals for longer than five (5) days, then the boarding fees shall be paid at a rate of \$5.00 per day per small animal for the duration of the stay.
- f. Retention of Impound and Boarding Fees. Contractor may also retain all impound and boarding fees received from the keepers of impounded animals.
- g. Cremation Fees. Upon receipt of monthly invoices from Contractor, County shall make timely payment to Contractor of \$2.00 per pound for the cremation of the following classes of dead animals.
 - 1) Dead animals brought to Contractor's facility by an Authorized Representative.
 - 2) Stray animals brought to Contractor's facility by an Authorized Representative that have been subsequently euthanized following expiration of the applicable holding period.
- h. Other Cremation Income. Contractor shall be entitled to all other income derived from the operation of the crematorium, located at its Shelter.
- i. Payment of License Fees.
 - 1) County shall pay Contractor \$12 per year for each full-year dog license issued in unincorporated areas of the Bend La Pine School District.
 - 2) For each partial-year dog license, County shall pay Contractor a prorated amount in the same proportion to the license fee as in Paragraph 3.i.1).
- j. Retention of Other Animal Identification Tag Fees.
 - 1) For all other animals other than dogs, County shall pay Contractor all identification tag fees collected in accordance with the County fee schedule from the animal keepers residing in the Bend La-Pine School Districts.
- k. Fees for Education, Spay/Neuter Programs. All monies paid to or retained by Contractor pursuant to Exhibit 1, Paragraphs 3.i. and j. must be applied to expenses for Contractor's responsibilities provided in Exhibit 1, Paragraph 1.f.
- l. Deduction of Cost of Access to County Information. Prior to payment to Contractor pursuant to Exhibit 1, Paragraph 3. County shall deduct any expenses for County providing Contractor access via the Internet to County's animal license and information databases.
- m. Contractor's Failure to Timely Submit Reports and Invoices. If Contractor fails to comply with Exhibit 1, Paragraph 1.e.1) or to timely provide any report requested by County under this contract, County shall deduct a late penalty of \$25 or twenty-five (25%), whichever is greater, from the amount County would have distributed to Contractor for that month. Contractor shall submit an invoice to bill the County each month by the 15th of the following month.
- n. County's Failure to Timely Remit Payments. If County fails to comply with Exhibit 1, Paragraph 2.g., County shall pay Contractor a late penalty of \$25 or twenty-five (25%), whichever is greater.
- o. Contractor shall notify County in writing of the impending expiration of this Contract thirty (30) calendar days prior to the expiration date.
- p. A day is defined as beginning at 12:01 am and ending at 12:00 am.
- q. Contractor shall be entitled to reimbursement for expenses as set forth in Exhibit 5 YES NO
[Check one]

4. The maximum compensation.

- a. There is no total maximum compensation under this contract, including allowable expenses (although there is a maximum charge for judicial holds).
- b. Contractor shall not submit invoices for, and County shall not pay for any amount in excess of the maximum compensation amount set forth above.
 - 1) If this maximum compensation amount is increased by amendment of this contract, the amendment shall be fully effective before contractor performs work subject to the amendment.
 - 2) Contractor shall notify County in writing of the impending expiration of this Contract thirty (30) calendar days prior to the expiration date.

5. Schedule of Performance or Delivery.

- a. County's obligation to pay depends upon Contractor's delivery or performance in accordance with the following schedule:
- b. County will only pay for completed work that conforms to this schedule.

**EXHIBIT 2
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-492
INSURANCE REQUIREMENTS**

Contractor shall at all times maintain in force at Contractor's expense, each insurance noted below. Insurance coverage must apply on a primary or non-contributory basis. All insurance policies, except Professional Liability, shall be written on an occurrence basis and be in effect for the term of this contract. Policies written on a "claims made" basis must be approved and authorized by Deschutes County.

Contractor Name: The Humane Society of Central Oregon

Workers Compensation insurance in compliance with ORS 656.017, requiring Contractor and all subcontractors to provide workers' compensation coverage for all subject workers, or provide certification of exempt status. Worker's Compensation Insurance to cover claims made under Worker's Compensation, disability benefit or any other employee benefit laws, including statutory limits in any state of operation with Coverage B Employer's Liability coverage all at the statutory limits. In the absence of statutory limits the limits of said Employer's Liability coverage shall be not less than \$1,000,000 each accident, disease and each employee. This insurance must be endorsed with a waiver of subrogation endorsement, waiving the insured's right of subrogation against County.

Professional Liability insurance with an occurrence combined single limit of not less than:

Per Occurrence limit	Annual Aggregate limit
<input type="checkbox"/> \$1,000,000	<input type="checkbox"/> \$2,000,000
<input type="checkbox"/> \$2,000,000	<input type="checkbox"/> \$3,000,000
<input type="checkbox"/> \$3,000,000	<input type="checkbox"/> \$5,000,000

Professional Liability insurance covers damages caused by error, omission, or negligent acts related to professional services provided under this Contract. The policy must provide extended reporting period coverage, sometimes referred to as "tail coverage" for claims made within two years after the contract work is completed or the facts underlying County's claim could reasonably have been discovered, whichever is later.

Required by County Not required by County (one box must be checked)

Commercial General Liability insurance with a combined single limit of not less than:

<u>Per Single Claimant and Incident</u>	<u>All Claimants Arising from Single Incident</u>
<input checked="" type="checkbox"/> \$1,000,000	<input checked="" type="checkbox"/> \$2,000,000
<input type="checkbox"/> \$2,000,000	<input type="checkbox"/> \$3,000,000
<input type="checkbox"/> \$3,000,000	<input type="checkbox"/> \$5,000,000

Commercial General Liability insurance includes coverage for personal injury, bodily injury, advertising injury, property damage, premises, operations, products, completed operations and contractual liability. The insurance coverages provided for herein must be endorsed as primary and non-contributory to any insurance or self insurance of County, its officers, employees or agents. Each such policy obtained by Contractor shall provide that the insurer shall defend any suit against the named insured and the additional insureds, their officers, agents, or employees, even if such suit is frivolous or fraudulent. Such insurance shall provide County with the right, but not the obligation, to engage its own attorney for the purpose of defending any legal action against County, its officers, agents, or employees, and that Contractor shall indemnify County for costs and expenses, including reasonable attorneys' fees, incurred or arising out of the defense of such action.

The policy shall be endorsed to name **Deschutes County, its officers, agents, employees and volunteers as an additional insured**. The additional insured endorsement shall not include declarations that reduce any per occurrence or aggregate insurance limit. The Contractor shall provide additional coverage based on any outstanding claim(s) made against policy limits to ensure that minimum insurance limits required by the County are maintained. Construction contracts may include aggregate limits that apply on a "per location" or "per project" basis. The additional insurance protection shall extend equal protection to County as to Contractor or subcontractors and shall not be limited to vicarious liability only or any similar limitation. To the extent any aspect

of this Paragraph shall be deemed unenforceable, then the additional insurance protection to County shall be narrowed to the maximum amount of protection allowed by law.

Required by County Not required by County (One box must be checked)

Automobile Liability insurance with a combined single limit of not less than:

Per Occurrence

- \$500,000
- \$1,000,000
- \$2,000,000

Automobile Liability insurance includes coverage for bodily injury and property damage resulting from operation of a motor vehicle. Commercial Automobile Liability Insurance shall provide coverage for *any* motor vehicle (symbol 1 on some insurance certificates) driven by or on behalf of Contractor during the course of providing services under this contract. Commercial Automobile Liability is required for contractors that own business vehicles registered to the business. Examples include: plumbers, electricians or construction contractors. An Example of an acceptable personal automobile policy is a contractor who is a sole proprietor that does not own vehicles registered to the business.

Required by County Not required by County (one box must be checked)

Additional Requirements. Contractor shall pay all deductibles and self-insured retentions. A cross-liability clause or separation of insured's condition must be included in all commercial general liability policies required by this Contract. Contractor's coverage will be primary in the event of loss.

Certificate of Insurance Required. Contractor shall furnish a current Certificate of Insurance to the County with the signed Contract. Contractor shall notify the County in writing at least 30 days in advance of any cancellation, termination, material change, or reduction of limits of the insurance coverage. The Certificate shall also state the deductible or, if applicable, the self-insured retention level. Contractor shall be responsible for any deductible or self-insured retention. If requested, complete copies of insurance policies shall be provided to the County. Any violation by Contractor of this Certificate of Insurance provision shall, at the election of County, constitute a material breach of the Contract.

Risk Management review

Erin Hopy

Date

10/12/22

EXHIBIT 3
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-492
**CERTIFICATION STATEMENT FOR CORPORATION
OR INDEPENDENT CONTRACTOR**

NOTE: Contractor Shall Complete A or B in addition to C below:

A. CONTRACTOR IS A CORPORATION, LIMITED LIABILITY COMPANY OR A PARTNERSHIP.

I certify under penalty of perjury that Contractor is a [check one]:

Corporation Limited Liability Company Partnership authorized to do business in the State of Oregon.

Signature [Signature] Title CEO Date Oct. 4 2022

B. CONTRACTOR IS A SOLE PROPRIETOR WORKING AS AN INDEPENDENT CONTRACTOR.

Contractor certifies under penalty of perjury that the following statements are true:

1. If Contractor performed labor or services as an independent Contractor last year, Contractor filed federal and state income tax returns last year in the name of the business (or filed a Schedule C in the name of the business as part of a personal income tax return), **and**
2. Contractor represents to the public that the labor or services Contractor provides are provided by an independently established business registered with the State of Oregon, **and**
3. All of the statements checked below are true.

NOTE: Check all that apply. You shall check at least three (3) - to establish that you are an Independent Contractor.

A. The labor or services I perform are primarily carried out at a location that is separate from my residence or primarily carried out in a specific portion of my residence that is set aside as the location of the business.

B. I bear the risk of loss related to the business or provision of services as shown by factors such as: (a) fixed-price agreements; (b) correcting defective work; (c) warranties over the services or (d) indemnification agreements, liability insurance, performance bonds or professional liability insurance.

C. I have made significant investment in the business through means such as: (a) purchasing necessary tools or equipment; (b) paying for the premises or facilities where services are provided; or (c) paying for licenses, certificates or specialized training.

D. I have the authority to hire other persons to provide or to assist in providing the services and if necessary to fire such persons.

E. Each year I perform labor or services for at least two different persons or entities or I routinely engage in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.

Contractor Signature _____ Date _____

C. Representation and Warranties.

Contractor certifies under penalty of perjury that the following statements are true to the best of Contractor's knowledge:

1. Contractor has the power and authority to enter into and perform this contract;
2. This contract, when executed and delivered, shall be a valid and binding obligation of Contractor enforceable in accordance with its terms;
3. The services under this contract shall be performed in a good and workmanlike manner and in accordance with the highest professional standards; and
4. Contractor shall, at all times during the term of this contract, be qualified, professionally competent, and duly licensed to perform the services.
5. To the best of Contractor's knowledge, Contractor is not in violation of any tax laws described in ORS 305.380(4),
6. Contractor understands that Contractor is responsible for any federal or state taxes applicable to any consideration and payments paid to Contractor under this contract; and
7. Contractor has not discriminated against minority, women or small business enterprises in obtaining any required subcontracts.

Contractor Signature

Date

**EXHIBIT 4
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-492
Workers' Compensation Exemption Certificate**

(To be used only when Contractor claims to be exempt from Workers' Compensation coverage requirements)

Contractor is exempt from the requirement to obtain workers' compensation insurance under ORS Chapter 656 for the following reason (check the appropriate box):

SOLE PROPRIETOR

- Contractor is a sole proprietor, and
- Contractor has no employees, and
- Contractor shall not hire employees to perform this contract.

CORPORATION - FOR PROFIT

- Contractor's business is incorporated, and
- All employees of the corporation are officers and directors and have a substantial ownership interest* in the corporation, and
- The officers and directors shall perform all work. Contractor shall not hire other employees to perform this contract.

CORPORATION - NONPROFIT

- Contractor's business is incorporated as a nonprofit corporation, and
- Contractor has no employees; all work is performed by volunteers, and
- Contractor shall not hire employees to perform this contract.

PARTNERSHIP

- Contractor is a partnership, and
- Contractor has no employees, and
- All work shall be performed by the partners; Contractor shall not hire employees to perform this contract, and
- Contractor is not engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement to real property or appurtenances thereto.


LIMITED LIABILITY COMPANY

- Contractor is a limited liability company, and
- Contractor has no employees, and
- All work shall be performed by the members; Contractor shall not hire employees to perform this contract, and
- If Contractor has more than one member, Contractor is not engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement to real property or appurtenances thereto.

*NOTE: Under OAR 436-050-050 a shareholder has a "substantial ownership" interest if the shareholder owns 10% of the corporation or, if less than 10% is owned, the shareholder has ownership that is at least equal to or greater than the average percentage of ownership of all shareholders.

**NOTE: Under certain circumstances partnerships and limited liability companies can claim an exemption even when performing construction work. The requirements for this exemption are complicated. Consult with County Counsel before an exemption request is accepted from a contractor who shall perform construction work.

Sabrina Slusser
Contractor Printed Name
CEO
Contractor Title


Contractor Signature
Oct. 4, 2022
Date

**EXHIBIT 5
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-492____
Expense Reimbursement**

- 1. **Travel and Other Expenses.** (When travel and other expenses are reimbursed.)
 - a. It is the policy of the County that travel expenses shall be allowed only when the travel is essential to the normal discharge of County responsibilities.
 - 1) All travel shall be conducted in the most efficient and cost effective manner resulting in the best value to the County.
 - 2) Travel expenses shall be reimbursed for official County business only.
 - 3) County shall not reimburse Contractor for any item that is not otherwise available for reimbursement to an employee of Deschutes County per Deschutes County Finance Policy F-1, "REIMBURSEMENT FOR MISCELLANEOUS EXPENSES AND EXPENSES INCURRED WHILE TRAVELING ON COUNTY BUSINESS," dated 7/12/2017.
 - 4) County may approve a form other than the County Employee Reimbursement Form for Contractor to submit an itemized description of travel expenses for payment.
 - 5) Personal expenses shall not be authorized at any time.
 - 6) All expenses are included in the total maximum contract amount.
 - b. Travel expenses shall be reimbursed only in accordance with rates approved by the County and only when the reimbursement of expenses is specifically provided for in Exhibit 1, paragraph 3 of this contract.
 - c. The current approved rates for reimbursement of travel expenses are set forth in the above described policy.
 - d. County shall not reimburse for any expenses related to alcohol consumption or entertainment.
 - e. Except where noted, detailed receipts for all expenses shall be provided.
 - f. Charge slips for gross amounts are not acceptable.
 - g. County shall not reimburse Contractor for any item that is not otherwise available for reimbursement to an employee of Deschutes County.

- 2. **Approved reimbursements:**
 - a. Mileage. Contractor shall be entitled to mileage for travel in a private automobile while Contractor is acting within the course and scope of Contractor's duties under this Contract and driving over the most direct and usually traveled route to and from Bend, Oregon.
 - 1) Reimbursement for mileage shall be equal to but not exceed those set by the United States General Services Administration ("GSA") and are subject to change accordingly.
 - 2) To qualify for mileage reimbursement, Contractor shall hold a valid, current driver's license for the class of vehicle to be driven and carry personal automobile liability insurance in amounts not less than those required by this contract.
 - 3) No mileage reimbursement shall be paid for the use of motorcycles or mopeds.
 - b. Meals.
 - 1) Any reimbursement for meals shall be for actual cost of meals incurred by Contractor while acting within the course and scope of Contractor's duties under this contract.
 - 2) For purposes of calculating individual meals where the Contractor is entitled only to a partial day reimbursement, the following maximum allocation of the meal expenses applies:
 - a) Breakfast, \$10;
 - b) Lunch, \$12;
 - c) Dinner, \$22.
 - 3) Except in the event of necessary overnight travel as provided below, partial day meal expenses shall be reimbursed as follows and only while Contractor is acting within the course and scope of Contractor's duties under this contract:
 - a) Breakfast expenses are reimbursable if Contractor is required to travel more than two (2) hours: before the start of Contractor's regular workday (i.e. 8:00 a.m.).
 - b) Lunch expenses are reimbursable only if Contractor is required to travel overnight and begins the journey before 11:00 am or ends the journey after 11:00 a.m.
 - c) Dinner expenses are reimbursable only if Contractor is required to travel more than two (2) hours after Contractor's regular workday (i.e. 5:00 p.m.).

- 4) Breakfast and dinner expenses are reimbursable during Contractor's necessary overnight travel while acting within the course and scope of Contractor's duties under this contract, shall not exceed those set by the GSA, and are subject to change accordingly.
- c. Lodging.
- 1) County shall reimburse Contractor for Contractor's actual cost of lodging necessary to provide service to the County and shall not exceed the maximum lodge rate set by the GSA for Bend, Oregon.
 - 2) Reimbursement rates for lodging are not considered "per diem" and receipts are required for reimbursement.
- d. County shall not reimburse Contractor in excess of the lowest fair for any airline ticket or vehicle rental charges.
3. **Exceptions.** Contractor shall obtain separate written approval of the County Administrator for any exceptions to the expense items listed above prior to incurring any expense for which reimbursement shall be sought.

Exhibit 6
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-492
Compliance with provisions, requirements of funding source and
Federal and State laws, statutes, rules, regulations, executive orders and policies.

Conflicts of Interest

Contractor certifies under penalty of perjury that the following statements are true to the best of Contractor's knowledge:

1. If Contractor is currently performing work for the County, State of Oregon or federal government, Contractor, by signature to this Contract, declares and certifies that Contractor's Work to be performed under this Contract creates no potential or actual conflict of interest as defined by ORS 244 and no rules or regulations of Contractor's employee agency (County State or Federal) would prohibit Contractor's Work under this Contract. Contractor is not an "officer," "employee," or "agent" of the County, as those terms are used in ORS 30.265.

2. No federally appropriated funds have been paid or shall be paid, by or on behalf of Contractor, to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement.
 - a. If any funds other than federally appropriated funds have been paid or shall be paid to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this federal contract, grant, loan, or cooperative agreement, Contractor agrees to complete and submit Standard Form-LLL "Disclosure Form to Report Lobbying," in accordance with its instructions.
 - 1) Standard Form-LLL and instructions are located in 45 CFR Part 93 Appendix B.
 - 2) If instructions require filing the form with the applicable federal entity, Contractor shall then as a material condition of this Contract also file a copy of the Standard Form-LLL with the Department.
 - 3) This filing shall occur at the same time as the filing in accordance with the instructions.
 - b. Contractor understands this certification is a material representation of fact upon which the County and the Department has relied in entering into this Contract. Contractor further understands that submission of this certification is a prerequisite, imposed by 31 USC 1352 for entering into this Contract.
 - c. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.
 - d. Contractor shall include the language of this certification in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.
 - e. Contractor is solely responsible for all liability arising from a failure by Contractor to comply with the terms of this certification.
 - f. Contractor promises to indemnify County for any damages suffered by County as a result of Contractor's failure to comply with the terms of this certification.

3. Contractor understands that, if this Contract involves federally appropriated funds, this certification is a material representation of facts upon which reliance was placed when this Contract was made or entered into, submission of this certification is a prerequisite for make or entering into this Contract imposed by Section 1352, Title 31, U.S. Code and that any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each failure.

Contractor Signature

Date



BOARD OF COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: Consideration of Board Signature of Order No. 2022-064, Appointing Health Services Director’s Designees

RECOMMENDED MOTION:

Move approval of Order No. 2022-064, Appointing Health Services Director’s Designees.

BACKGROUND AND POLICY IMPLICATIONS:

Oregon Revised Statute (ORS) 426.233 (3) provides that the Health Services Director may authorize a qualified individual to perform certain acts, including accepting custody of a person from a peace officer, taking custody of a person, removing a person in custody to an approved hospital or nonhospital facility, transferring a person in custody to another individual authorized under this resolution or a peace officer, transferring a person in custody from a hospital or nonhospital facility to another hospital facility or nonhospital facility, and retaining a person in custody. The Director has confirmed that each of the individuals identified in Sections 2 and 3 of the attached Board Order are qualified mental health professionals as that term is defined under Oregon law and meet applicable standards established by the Oregon Health Authority.

Board Order 2022-047 appointing designees for this purpose was signed September 7, 2022. Since that time, one additional qualified mental health professional who meets the applicable standards has been hired, and one staff has left their designee position. The authorization to provide custody and secure transportation services for allegedly mentally ill persons is being updated to reflect these staff changes through the attached Board Order 2022-064.

BUDGET IMPACTS:

None

ATTENDANCE:

Adam Goggins, Crisis Team Supervisor

REVIEWED

LEGAL COUNSEL

11/14/2022 Item #2.

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Repealing Order No. 2022-047 dated *
September 7, 2022; and Authorizing Designated * ORDER NO. 2022-064
Persons to Provide Custody and Secure *
Transportation Services for Allegedly Mentally Ill *
Persons *

WHEREAS, on September 7, 2022, the Deschutes County Board of Commissioners signed Order No. 2022-047, “An Order Repealing Order No. 2022-039; and Authorizing Designated Persons to Provide Custody and Secure Transportation Services for Allegedly Mentally Ill Persons”; and

WHEREAS ORS 426.070 through 426.395 authorize or require the Community Mental Health Program Director (“Director”) to take certain actions in matters pertaining to the custody, transport and involuntary commitment of mentally ill persons; and

WHEREAS, OAR 309-033-0210 includes, within the definition of the term “community mental health director,” a person who has been authorized by the Director to act in the Director’s capacity for the purpose of this rule; and

WHEREAS, the Director has authorized each of those individuals identified in Section 2, below, to act as the Director’s designee and in the Director’s capacity for purposes of OAR 309-033-0210; and

WHEREAS, ORS 426.233(3) provides that the Director may authorize a qualified individual to perform certain acts listed in ORS 426.233(3) including, without limitation, accepting custody of a person from a peace officer, taking custody of a person, removing a person in custody to an approved hospital or nonhospital facility, transferring a person in custody to another individual authorized under this resolution or a peace officer, transferring a person in custody from a hospital or nonhospital facility to another hospital facility or nonhospital facility, and retaining a person in custody; and

WHEREAS, the Director has recommended to the Deschutes County governing body that each of those individuals identified in Section 3, below, be authorized to perform those acts listed in ORS 426.233(3); and

WHEREAS, the Director has confirmed that each of the individuals identified in Sections 2 and 3 below is a qualified mental health professional as that term is defined under Oregon law and meets applicable standards established by the Oregon Health Authority; now therefore,

Based upon the foregoing recitals and pursuant to ORS 426.233 and OAR 309-033-0210, THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. Order Repealing Order No. 2022-047 dated September 7, 2022: “An Order Repealing Order No. 2022-039; and Authorizing Designated Persons to Provide Custody and Secure Transportation Services for Allegedly Mentally Ill Persons” is hereby repealed;

Section 2. The following persons, all of whom are part of the Deschutes County Health Services Department’s Community Assessment Team/Mobile Crisis Team, and all of whom are Qualified Mental Health Professionals, are hereby recognized as designees of the Director and are authorized to act in the capacity of the Director with regard to any action permitted or required to be performed by the Director under ORS 426.070 through ORS 426.395:

- Holly Harris, M.Ed., LPC, Crisis Services Program Manager
- Zoe Bartlett, MS, LMFT
- Rebecca Battleson, MSW, LCSW
- Amanda Copeland, MSW, CSWA
- Savannah DeLuca, MA, LPCi
- Susan Denight, MSW, CSWA
- Bethany Douglas, MS, LPC
- Susanna M. Gallagher, MSW, CSWA
- Adam Goggins, MA, LPC
- Meredith Haddan, MA, LPCi, CADC-R
- Jill Kaufmann, MS, LMFT
- Stephanie Koutsopoulos, MS, LPC
- Jesse Kratz, MA, LPCi
- Hanako Kubori, MS, LPCi
- Elizabeth Lindt, MS, LPCi
- Taylor McGowan, MSW, CSWA
- Haley Piarulli, MSW, CSWA
- Megan Sergi-Sosa, MSW, LMSW, CADC
- Nicole Von Laven, MA, LPCi
- Megan Weaver, MSW, CSWA
- Hailey Clark, MA, Professional Counselor Associate, NCC
- Briana Schulte, LPC
- Martina Krupinski, M.Ed, LPCi
- Amber Hooper, MA, LMFT
- Ayshea Ali , MSW
- Leah Lewis, MSW, CSWA
- Anna Valencia, M.S., LPC-intern
- Darla Fletcher, LIC, BHS II
- Sophia Buie, MA, LPCa

Section 3. The following persons, all of whom are part of the Deschutes County Health Services Department’s Community Assessment Team/Mobile Crisis Team, and all of whom are Qualified Mental Health Professionals, are hereby authorized to perform any act set forth in ORS 426.233(3):

- Holly Harris, M.Ed., LPC, Crisis Services Program Manager
- Zoe Bartlett, MS, LMFT
- Rebecca Battleson, MSW, LCSW
- Amanda Copeland, MSW, CSWA
- Savannah DeLuca, MA, LPCi
- Susan Denight, MSW, CSWA
- Bethany Douglas, MS, LPC
- Susanna M. Gallagher, MSW, CSWA
- Adam Goggins, MA, LPC
- Meredith Haddan, MA, LPCi, CADC-R

Jill Kaufmann, MS, LMFT
 Stephanie Koutsopoulos, MS, LPC
 Jesse Kratz, MA, LPCi
 Hanako Kubori, MS, LPCi
 Elizabeth Lindt, MS, LPCi
 Taylor McGowan, MSW, CSWA
 Haley Piarulli, MSW, CSWA
 Megan Sergi-Sosa, MSW, LMSW, CADC
 Nicole Von Laven, MA, LPCi
 Megan Weaver, MSW, CSWA
 Hailey Clark, MA, Professional Counselor Associate, NCC
 Briana Schulte, LPC
 Martina Krupinski, M.Ed, LPCi
 Amber Hooper, MA, LMFT
 Ayshea Ali , MSW
 Leah Lewis, MSW, CSWA
 Anna Valencia, M.S., LPC-intern
 Darla Fletcher, LIC, BHS II
 Sophia Buie, MA, LPCa

Section 4. Each individual identified herein in Sections 2 and 3 shall retain the authority granted by this order so long as he or she continuously meets applicable standards established by the Oregon Health Authority and is employed with the County in the Health Services Department except as may otherwise be ordered by the Board of County Commissioners.

Dated this _____ of _____, 20__

BOARD OF COUNTY COMMISSIONERS
 OF DESCHUTES COUNTY, OREGON

 PATTI ADAIR, Chair

 ANTHONY DeBONE, Vice Chair

ATTEST:

 Recording Secretary

 PHIL CHANG, Commissioner



BOARD OF COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: Approve Document No. 2022-854, an Intergovernmental Agreement with the Oregon Judicial Department for Parental Custody Mediation Funds

RECOMMENDED MOTION:

Move to authorize the County Administrator to sign Document No. 2022-854, an intergovernmental agreement with the Oregon Judicial Department for Parental Custody Mediation Funds.

BACKGROUND AND POLICY IMPLICATIONS:

Each biennium, the Oregon Judicial Department (OJD) distributes funds to counties for mediation/conciliation services. These funds come from court filing fees. The Deschutes County Circuit Court (OJD) is responsible for providing Parental Custody Mediation Services to help parents work out cooperative agreements for child custody and parenting time.

Until recently, a Behavioral Health Specialist position in the Health Services Department provided these services on behalf of the Circuit Court. The mediation/conciliation funds for Deschutes County were used to fund this position in the Health Services Department.

The Circuit Court has decided to use a different model to provide Parental Custody Mediation Services. The Court plans to issue an Request for Proposals for individuals and organizations interested in offering court-connected mediation in the community. The responses will be broader than just Parental Custody Mediation Services.

Since the Circuit Court is taking over the responsibility to provide Parental Custody Mediation Services (via a contractor/contractors), it is appropriate to provide the Circuit Court the mediation/consolation funds.

The Intergovernmental Agreement (IGA; County Document No. 2022-854) between Deschutes County and the Oregon Judicial Department on Parental Custody Mediation Funds lays out the terms of the agreement for Deschutes County to transfer

mediation/conciliation funds to OJD to provide Parental Custody Mediation Services.

BUDGET IMPACTS:

If the IGA is approved, staff will return with a budget adjustment.

ATTENDANCE:

Erik Kropp, Deputy County Administrator

Angie Curtis, Trial Court Administrator, Deschutes County Circuit Court



**INTERGOVERNMENTAL AGREEMENT (IGA)
BETWEEN DESCHUTES COUNTY AND
THE OREGON JUDICIAL DEPARTMENT**

PARENTAL CUSTODY MEDIATION FUNDS

**OJD CONTRACT NO. 230034
DESCHUTES COUNTY Document # 2022-854**

This Intergovernmental Agreement (IGA or Agreement) is entered into between Deschutes County (County), a political subdivision of the State of Oregon, and the Oregon Judicial Department (OJD).

RECITALS:

- A.** Each biennium, OJD distributes to County legislatively determined funds for certain county-provided programs, including the County Law Library, County Mediation/Conciliation, and Local Court Security programs.
- B.** The Mediation/Conciliation fund distribution (Mediation/Conciliation Distribution) is based on the 2021 HB 5012, Section 6. For the 2021-23 biennium (July 1, 2021 – June 30, 2023), County received \$442,659 (\$221,329.50 per fiscal year) for the Mediation/Conciliation Distribution. For FY 20-21, County allocated the \$221,329.50 as follows: 37.5% or \$82,999 to Saving Grace and 62.5% or \$138,330.50 was transferred to the Deschutes County Health Services Department to provide Parental Custody Mediation Services on behalf of the Deschutes County Circuit Court (Parental Custody Mediation Service Funds).

IT IS, THEREFORE AGREED:

TERMS OF AGREEMENT

1. Effective Date/Duration.

This agreement will be effective as of signature of both parties to the IGA. This IGA will remain in place until June 30, 2023.

2. Oregon Judicial Department Obligations.

- a. The OJD is responsible for providing Parental Custody Mediation Services, either directly or via a contractor. Through County, OJD had been using the Deschutes County Health Services Department to provide Parental Custody Mediation Services for the Deschutes County Circuit Court. OJD now desires to use a contractor to provide these services. OJD has and continues to maintain the right to determine how Parental Custody Mediation Services are provided.

3. County Obligations.

- a. For FY 22-23, County will allocate a total of \$150,122.50 (\$138,330.50 from the Mediation/Conciliation Distribution and \$11,792.00 from the Law Library Distribution) to OJD for OJD to contract for Parental Custody Mediation Services for the Deschutes County Circuit Court.

4. General Terms.

- a. This Agreement, and each party's rights and responsibilities may not be assigned by either party without the prior written consent of the other party.
- b. This Agreement sets forth the entire agreement of the parties with respect to the subject matter of the Agreement and supersedes any and all prior negotiations, discussions, agreements and understandings of the parties.

- c. The Recitals are incorporated into and made part of this Agreement.
- d. The parties shall attempt to resolve any disputes related to this Agreement by first holding a meeting between the Deschutes Circuit Court Trial Court Administrator and County Administrator within 14 calendar days after one party gives notice to the other party of such dispute. In the event dispute resolution is unsuccessful, this Agreement will be construed, applied and enforced in accordance with the laws of the State of Oregon. Any action or proceedings arising out of this Agreement will be initiated within the circuit court of Marion County for the State of Oregon.
- e. If any provision of this Agreement is held illegal or unenforceable in any respect, the remaining provisions remain in full force and effect to the greatest extent possible.
- f. Either party may end this agreement with written notification to the other party with 90 days' notice.

OJD

By _____
State Court Administrator

Date _____

Deschutes County

By _____
Nick Lelack, County Administrator

Date _____



BOARD OF COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: Consideration of Board signature of Central Oregon Intergovernmental Council Agreement #2022-782

RECOMMENDED MOTION:

Move approval of Board signature of Document No. 2022-782, an agreement with Central Oregon Intergovernmental Council to provide a one-time payment in the sum of \$866,000 for the purpose of HB 4004, Workforce Stability Grant.

BACKGROUND AND POLICY IMPLICATIONS:

The purpose of this agreement is to support efforts to recruit and retain mental health professionals in Deschutes County.

Oregon is experiencing a behavioral health care workforce crisis. Challenges in delivering services in the high-risk COVID environment and the increasing need for behavioral health care have discouraged qualified individuals from seeking employment with providers who serve those who are most vulnerable and impacted by health inequities and injustices. Workforce shortages affect the ability of behavioral health care providers to maintain full staffing capacities, reducing their revenues and their ability to meet payroll obligations.

Oregon State Legislature House Bill 4004 (HB 4004) authorized the Oregon Health Authority (OHA) to distribute grant funds to behavioral health care providers to increase compensation to applicable staff. The goals of this funding are to increase compensation to specified staff, pay hiring and retention bonuses (as applicable), recruit new staff, and/or retain current staff.

OHA awarded Deschutes County Health Services a one-time Workforce Stability Grant in an amount not to exceed \$3,466,092.45, of which 75% is being used for direct compensation to staff in the form of wages, benefits, and bonuses. The remaining 25% of the funds will be used to increase workforce retention or recruitment through non-compensatory means.

The County is proposing a one-time payment to Central Oregon Intergovernmental Council (COIC) in the sum of \$866,500 for workforce recruitment and retention strategies and incentives. COIC will use these funds to support the County's retention and recruitment efforts related to mental health employment opportunities in Deschutes County.

BUDGET IMPACTS:

\$866,500

ATTENDANCE:

Janice Garceau, Health Services Director
Cheryl Smallman, Business Officer

DESCHUTES COUNTY DOCUMENT SUMMARY

(NOTE: This form is required to be submitted with ALL contracts and other agreements, regardless of whether the document is to be on a Board agenda or can be signed by the County Administrator or Department Director. If the document is to be on a Board agenda, the Agenda Request Form is also required. If this form is not included with the document, the document will be returned to the Department. Please submit documents to the Board Secretary for tracking purposes, and not directly to Legal Counsel, the County Administrator or the Commissioners. In addition to submitting this form with your documents, please submit this form electronically to the Board Secretary.)

Please complete all sections **above** the Official Review line.

Date:

Department:

Contractor/Supplier/Consultant Name:

Contractor Contact:

Type of Document: Intergovernmental Agreement

Goods and/or Services: The focus of this agreement is to provide financial assistance to support behavioral and mental health wellness through mental health professionals' recruitment and retention efforts in Deschutes County.

Deschutes County Health Services is providing a one-time payment to Central Oregon Intergovernmental Council (COIC) in the sum of \$866,500 for the purpose of HB 4004, Workforce Stability Grant. The parties desire that this sum of money be utilized for Deschutes County Health Services to withdraw funds to cover the cost of workforce recruitment and retention strategies and incentives.

Background & History: In 1972, COIC was designated a Council of Governments organized under ORS 190. They provide services to the counties of Crook, Deschutes and Jefferson, to the cities of Bend, Culver, La Pine, Madras, Metolius, Prineville, Redmond and Sisters, as well as the Confederated Tribes of Warm Springs. Their offices are located throughout Central Oregon. COIC employs more than one hundred (100) people and services in the following areas: employment and training, alternative high school education, business loans, transportation, and community and economic development.

Deschutes County is in a behavioral health care workforce crisis. Challenges in delivering services in the high-risk COVID environment and the increasing need for behavioral health care have discouraged qualified individuals from seeking employment with providers serving Oregon's community members who are most vulnerable and impacted by health inequities and injustices. Workforce shortages directly impact the ability of behavioral health care providers to maintain full capacity which, in turn, reduces provider revenues and ability to meet payroll obligations.

the Oregon State Legislature House Bill 4004 (HB 4004) authorizes the Oregon Health Authority (OHA) to distribute grant funds to behavioral health care providers to increase compensation to applicable staff. The goals of this funding are to increase compensation to specified staff and pay hiring and retention bonuses (as applicable), recruit new staff or retain current staff. The OHA distributed funds to Deschutes County Health Services with the condition that twenty-five percent (25%) of the funds are used for non-compensatory means to increase workforce retention or recruitment. Pursuant to that condition, County is providing a one-time payment to Central Oregon Intergovernmental Council in the sum of \$866,500 for purposes of the project.

Agreement Starting Date:

Ending Date:

Annual Value or Total Payment:

Insurance Certificate Received (check box)
Insurance Expiration Date:

Check all that apply:

- RFP, Solicitation or Bid Process
- Informal quotes (<\$150K)
- Exempt from RFP, Solicitation or Bid Process (specify – see DCC §2.37)

Funding Source: Workforce Stability Grant

Pass Through Other: _____ Project Code

Included in current budget? Yes No
If **No**, has budget amendment been submitted? Yes No

Is this a Grant Agreement providing revenue to the County? Yes No

Special conditions attached to this grant:


Deadlines for reporting to the grantor:

If a new FTE will be hired with grant funds, confirm that Personnel has been notified that it is a grant-funded position so that this will be noted in the offer letter: Yes No

Contact information for the person responsible for grant compliance: Name:
Phone #:

Departmental Contact and Title:
Phone #:

Director Approval:

Signature: 
Email: janice.garceau@deschutes.org
Title: Director
Company: Deschutes County Health Services

Distribution of Document: Grace Justice Evans, Health Services Department.

Official Review:

County Signature Required (check one): BOCC Department Director (if <\$50K)
 Administrator (if >\$50K but <\$150K; if >\$150K, BOCC Order No. _____)

Legal Review _____ Date _____

Document Number 2022-782

INTERGOVERNMENTAL AGREEMENT

**CENTRAL OREGON INTERGOVERNMENTAL COUNCIL AND DESCHUTES COUNTY PARTICIPATION IN DESCHUTES COUNTY PUBLIC MENTAL HEALTH SERVICES RECRUITMENT AND RETENTION PROGRAM
{DESCHUTES COUNTY DOCUMENT #2022-782**

PARTIES:

Central Oregon Intergovernmental Council
334 NE Hawthorne Ave.
Bend, Oregon, 97701 (“COIC”)

Deschutes County, Oregon
1300 NW Wall St.
Suite 206
Bend, OR 97703 (“County”)

This Intergovernmental Agreement for program management and related funds (this “Agreement”) is dated October 28, 2022, but made effective for all purposes as of the effective date (as defined below), and is entered into between Deschutes County (“County”), a political subdivision of the State of Oregon, and Central Oregon Intergovernmental Council (“COIC”), an intergovernmental entity formed and operated pursuant to ORS 190.003-190.150.

RECITALS:

- A. 2022’s House Bill 4004 resulted in allocated funds to Deschutes County (including \$866,000, the focus of this Agreement), to provide financial assistance to support behavioral and mental health wellness through mental health professionals’ recruitment and retention efforts in Deschutes County.
- B. Deschutes County may add to the program funds transferred to COIC, at its discretion.
- C. COIC will be administering these monies in collaboration with the County, to best deploy the funds.

IT IS, THEREFORE AGREED:

1. Term.

This agreement will be effective as of October 28, 2022. This is known as the Effective Agreement Date. No services shall be performed prior to the Effective Agreement date. This agreement will continue until all monies under the program have been paid out or returned or until otherwise terminated by the County.

2. Statement of work.

This Program is detailed further in Exhibit A, Statement of Work, attached hereto and incorporated herein by reference. The parties shall periodically communicate on administration of the program.

3. Compensation

County shall allow COIC a not-to-exceed 5% of total program funds as payment for administrative fees. The parties shall meet and review actual costs after six months from execution. As more fully described in Sections 4 and 6 below, COIC will provide County with reports specific to administration services and disbursement of funds. COIC will timely prepare any tax information reporting.

4. Reporting and Payment Schedule

COIC will report to County regarding costs of the program including administrative costs and uses of the funds on a quarterly basis.

County shall transfer program funds upon execution of this Agreement, and no later than November 30, 2022.

5. Execution of Work.

COIC shall at all times perform the work diligently, without delay, and punctually fulfill all requirements herein.

This Agreement outlines the entire relationship between COIC and County for purposes stated in statement of work. This Agreement constitutes the entire Agreement between the parties concerning the subject matter hereof, and supersedes any and all prior or contemporaneous agreements or understandings between the parties, if any, whether written or oral, concerning the subject matter of this Agreement which are not fully expressed herein. This Agreement may not be modified or amended except by a writing signed by all parties.

6. Books and Records.

COIC shall keep proper and complete books of record and account and maintain all fiscal records related to this Agreement and the project in accordance with generally accepted accounting principles, generally accepted governmental accounting standards

and state minimum standards for audits of municipal corporations. COIC shall provide a report to the County upon request, outlining financial activities of these funds.

COIC acknowledges and agrees that County and its duly authorized representatives shall have access to the books, documents, papers, and records of COIC which are directly pertinent to this specific Agreement for the purpose of making audit, examination, excerpts, and transcripts for a period of three years after the Agreement expiration date. Copies of applicable records shall be made available upon request. Payment for reasonable costs of copies is reimbursable by County. If for any reason any part of this Agreement is involved in litigation, COIC shall retain all pertinent records for not less than three years after all litigation is resolved or in accordance with applicable ORS County record retention requirements, whichever is longer. Full access will be provided to County and to its duly authorized representatives in preparation for and during litigation.

7. Termination.

This Agreement may be terminated for convenience by either party at any time prior to the expiration date upon 30 day written notice. If one party believes the other party to be in violation of this Agreement, that party shall notify the second party in writing of the circumstances leading to this conclusion. The party alleged to be in violation shall have 15 days to remedy the violation after which, if the violation continues to exist, the agreement will automatically terminate.

8. Litigation.

All claims, counterclaims, disputes and other matters in question between COIC and County arising out of, or relating to, this Agreement or the breach of it will be decided, if the parties mutually agree, by arbitration, mediation, or other alternative dispute resolution mechanism, or, if not so agreed, in a court of competent jurisdiction within the State of Oregon and Deschutes County. In the event of any dispute arising from this Agreement each party shall be required to pay its own separately incurred attorney’s fees, expenses, and court costs, including arbitration, trial, and appeal.

9. Indemnity and Insurance.

9.1 County and/or COIC agrees to indemnify, defend, and hold harmless each other from all claims, lawsuits and actions of whatever nature brought against it which arise from COIC and/or County’s performance or omissions under this Agreement. No party shall be required to defend or indemnify the other for any claim or liability arising out of wrongful, or negligent acts or omissions of its own employees or representatives. Failure to supervise on the part of COIC and/or County shall not constitute a defense to the indemnity obligation imposed by this provision. This provision is subject to the

limitations, if applicable, set forth in Article XI, Section 10 of the Oregon Constitution and in the Oregon Tort Claims Act, ORS 30.260 to 30.300.

9.2 COIC and County will obtain and maintain insurance policies that provide for adequate coverage for all risks normally insured against by a person carrying on a similar business in a similar location, and for any other risks to which either is normally exposed. Minimum coverage limits of \$1,000,000 / \$2,000,000 are required. COIC and County will have workers' compensation insurance in form and amount sufficient to satisfy the requirements of applicable Oregon law. Insurance requirements may be satisfied by existing program of self-insurance.

9.3 County shall indemnify and hold harmless COIC from any claims arising from the County's receipt of source funds resulting from HB 4004 (2022). COIC shall indemnify and hold harmless County from any claims arising from COIC's utilization of source funds from County.

10. Successors & Assigns.

The provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective successors and assigns. After this Agreement is executed, County and/or COIC may enter into any new written sub agreements, upon signature of both parties, for any work scheduled under this Agreement.

11. No Partnership.

COIC will act as an independent contractor for this project. This agreement is not intended to create a partnership, employment status or joint venture.

12. Compliance with Applicable Laws.

12.1 County agrees to comply with all federal, state, and local laws, ordinances, and regulations applicable to this agreement. This agreement shall be governed by and construed in accordance with the laws of the State of Oregon. Both parties hereby consent to the personal jurisdiction of all state courts within Deschutes County, and all federal courts within the State of Oregon.

12.2 COIC shall comply with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules, and regulations.

13. Tax Compliance.

By signature on this agreement, COIC hereby certifies that it is not, to the best of its knowledge, in violation of any Oregon Tax Laws. For the purpose of this certification, "Oregon Tax Laws" are ORS Chapter 118, 119, 314, 316, 317, 318,

320, 321, and 323 and Sections 10 to 20, Chapter 533, Oregon Laws 1981, as amended by Chapter 16, Oregon Laws 1982 (first special session); the Homeowner's and Renters Property Tax Relief Program under ORS 310.630 to 310.690; and any local tax laws administered by the Oregon Owner of Revenue under ORS 305.620.

14. Severability.

The parties agree that if any term or provision of this agreement is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the agreement did not contain the particular term or provision held to be invalid.

15. Force Majeure.

No party shall be held responsible for delay or default caused by fire, riot, public health emergencies and orders of federal, state, county and/or city jurisdictions, acts of God, and war which is beyond such party's reasonable control. Each party shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligation under the agreement.

16. Waiver.

The failure of COIC and/or County to enforce any provision of this agreement shall not constitute a waiver by COIC and/or County of that or any other provision.

17. Ownership.

COIC and County will have full access to, and rights to use, all documents prepared under this agreement.

18. Other Provisions.

COIC and County shall protect and indemnify each other against any payroll taxes or contributions imposed with respect to any employees of COIC and County by any applicable law dealing with pensions, unemployment compensation, accident compensation, health insurance, and related subjects.

19. Signatures

This Agreement may be signed in counterparts. A fax or email transmission of a signature page will be considered an original signature page. At the request of a party, the other party will confirm a fax or email transmitted signature page by delivering an original signature page to the requesting party.

20. Attachments

The following attachments are part of and applicable to this Agreement:

Exhibit A – Statement of Work

THIS AGREEMENT, WHICH INCLUDES ALL ATTACHED EXHIBITS, CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES. THE TERMS OF THIS AGREEMENT SHALL NOT BE WAIVED, ALTERED, MODIFIED, SUPPLEMENTED, OR AMENDED, IN ANY MANNER WHATSOEVER, EXCEPT BY WRITTEN INSTRUMENT. SUCH WAIVER, ALTERATION, MODIFICATION, SUPPLEMENTATION, OR AMENDMENT, IF MADE, SHALL BE EFFECTIVE ONLY IN THE SPECIFIC INSTANCE AND FOR THE SPECIFIC PURPOSE GIVEN, AND SHALL BE VALID AND BINDING ONLY IF IT IS SIGNED BY ALL PARTIES TO THIS AGREEMENT. THERE ARE NO UNDERSTANDINGS, AGREEMENTS, OR REPRESENTATIONS, ORAL OR WRITTEN, REGARDING THIS AGREEMENT EXCEPT AS SPECIFIED OR REFERENCED HEREIN. COIC AND CITY, BY THE SIGNATURE BELOW OF ITS AUTHORIZED REPRESENTATIVE, HEREBY ACKNOWLEDGES THAT IT HAS READ THIS AGREEMENT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

CENTRAL OREGON INTERGOVERNMENTAL COUNCIL

By _____ Date _____
Tammy Baney, Executive Director

DATED this ____ day of _____, 2022

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

PATTI ADAIR, Chair

ANTHONY DEBONE, Vice Chair

ATTEST:

Recording Secretary

PHIL CHANG, Commissioner

EXHIBIT A
STATEMENT OF WORK

Deschutes County will transfer to COIC the remaining funds received by the State Legislature from HB4004 (2022) to support public mental health employee retention and recruitment efforts, estimated at approximately \$866,000. COIC will use these restricted funds in collaboration with Deschutes County staff to support the County's retention and recruitment efforts related to public mental health employment, developing a specific and targeted program to attract and support mental health employment opportunities in Deschutes County.

COIC will report to County on the uses of these funds and remaining available funds on a quarterly basis until all funds are exhausted.



BOARD OF COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: Consideration of Document No. 2022-793, a Ground Lease with Mountain View Community Development for the Redmond Safe Parking Program

RECOMMENDED MOTION:

Move approval of Ground Lease with Mountain View Community Development to utilize County-owned property for the Redmond Safe Parking Program, and move approval authorizing the Property Manager to sign a letter to submit to the City of Redmond to consent the use of the County-owned property for Safe Parking.

BACKGROUND AND POLICY IMPLICATIONS:

Mountain View Community Development (MVCD) is a community-centric nonprofit located in Redmond that specializes in strategic initiatives around houselessness. In collaboration with the City of Redmond, MVCD administrates the Safe Parking program in Redmond that provides opportunities for those individuals and families (collectively, participants) experiencing houselessness to access discreet parking in an authorized location within private property and outside of right-of-way. Program participants are selected through a screening and intake process and sign a comprehensive program agreement upon acceptance. Participants are limited to one vehicle and/or one trailer/recreational vehicle. The program provides portable restrooms and garbage service, as well as case management to work with participants to set goals, which includes transitioning into traditional-permanent housing.

In 1997, Deschutes County acquired two properties by Tax Deed due to nonpayment of property taxes. A 0.55-acre lot known as Map and Tax Lot 151315BA05200 and a 0.52-acre lot know as Map and Tax Lot 151315BA05300. The two properties are located on SE 7th Street and are just north of SE Evergreen Avenue and Hwy 126 in Redmond.

The two County-owned properties are identified as locations to adequately accommodate Safe Parking participants. Though the City of Redmond's municipal code allows up to six

participants at an authorized Safe Parking location, the County-owned properties will be limited to a total of four.

The in-kind lease will include an initial 90-day trial period, and prior to the end of the 90-days, MVCD will report to the County any incidents or challenges with the location. If upon review the Board of Commissioners authorizes continued use of the County-owned property for Safe Parking, MVCD may exercise the option to renew the lease by 1-year terms. Additionally, the lease will include a 90-day termination clause by either party.

Additionally, when MVCD submits the Safe Parking Program Permit to the City of Redmond for review, staff requests your Board to authorize the Deschutes County Property Manager to sign a letter to submit with the application authorizing the use of County-owned property for Safe Parking.

BUDGET IMPACTS:

Mountain View Community Development will maintain the two lots specific to landscape maintenance and Safe Parking program requirements. The in-kind lease has zero budget impacts.

ATTENDANCE:

Kristie Bollinger, Property Manager

Rick Russell, Mountain View Community Development

DESCHUTES COUNTY DOCUMENT SUMMARY

(NOTE: This form is required to be submitted with ALL contracts and other agreements, regardless of whether the document is to be on a Board agenda or can be signed by the County Administrator or Department Director. If the document is to be on a Board agenda, the Agenda Request Form is also required. If this form is not included with the document, the document will be returned to the Department. Please submit documents to the Board Secretary for tracking purposes, and not directly to Legal Counsel, the County Administrator or the Commissioners. In addition to submitting this form with your documents, please submit this form electronically to the Board Secretary.)

Please complete all sections **above** the Official Review line.

Date: November 8, 2022 **Department:** Administration - Property Mangement

Lease With: Mountain View Community Development

Lease Contact: Rick Russell, Executive Director **Contractor Telephone:** 541-325-2582

Type of Document: Ground lease for use of County-owned property for Redmond Safe Parking.

Goods and/or Services: Not applicable

Background & History:

This in-kind lease will include an initial 90-day trial period, and prior to the end of the 90-days, Mountain View Community Development will report to the County any incidents or challenges with the location. If upon review the Board of Commissioners authorizes continued use of the County-owned property for Safe Parking, the lessee will have the option to extend by 1-year terms. The lease also includes a 90-day termination clause by either party.

Agreement Starting Date: Upon Signature
and can be extended.

Ending Date: 90-days initially,

Annual Value or Total Payment: \$00.00

Not Applicable Insurance Certificate Received (check box) Yes No
Insurance Expiration Date: 08/01/2023

Check all that apply: NONE

RFP, Solicitation or Bid Process

Informal quotes (<\$150K)

Exempt from RFP, Solicitation or Bid Process (specify – see DCC §2.37)

Funding Source: (Included in current budget? Yes No

If **No**, has budget amendment been submitted? Yes No

Is this a Grant Agreement providing revenue to the County? Yes No

11/8/2022

Departmental Contact and Title: Kristie Bollinger, Property Manager
Telephone: 541-385-1414

Department Director Approval:  11/8/2022
Signature Date

Distribution of Document: Return by email (scan) copy of executed and CJ recorded document to:
Deborah.Cook@deschutes.org and Kristie.Bollinger@deschutes.org

Official Review:

- County Signature Required (check one):
- BOCC (if \$150,000 or more) – BOARD AGENDA Item
 - County Administrator (if \$25,000 but under \$150,000)
 - Department Director - Health (if under \$50,000)
 - Department Head/Director (if under \$25,000)

Legal Review _____ Date _____

Document Number Document No. 2022-793

GROUND LEASE AGREEMENT

THIS GROUND LEASE AGREEMENT ("Agreement") is made as of the date of the last signature affixed hereto ("Commencement Date") by and between **DESCHUTES COUNTY**, a political subdivision of the State of Oregon ("Lessor"), and **MOUNTAIN VIEW COMMUNITY DEVELOPMENT** an Oregon nonprofit public benefit corporation ("Lessee"). Lessor and Lessee are referred to herein as "Party" or "Parties."

A. RECITALS

1. Lessor owns certain real property located near SE 7th Street and SE Evergreen Avenue, Redmond, known and Map and Tax Lot 151315BA05200 and 151315BA05300 as shown on Exhibit A, attached hereto and incorporated herein by reference. ("Property").
2. Subject to the terms and conditions of this Agreement, the Parties desire to enter into this Agreement to lease the Property containing +/- 0.55-acres (TL 05200) and +/- 0.52-acres (TL 5300) ("Site").
3. Lessor is supportive of Lessee's stated intent to operate Safe Parking at the Site ("Program"). The purpose of the Safe Parking program ("Program") is to offer a partnered emergency response to provide temporary designated parking for up to three hand-selected households per Property that are living in vehicles. The Program provides essential services including but not limited to case management and wraparound services as need, portable toilets, garbage service, and access to showers and laundry. The Program goal is to help participants find permanent or permanent supportive housing within ninety (90) days from the date a participant starts the Program, and as further described in Exhibit B, attached hereto and incorporated herein by reference.

B. WITNESSETH

NOW, THEREFORE, in consideration of the mutual covenants and obligations contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby agree as follows:

1. **TERM.** The term of this Agreement shall be effective December 1, 2022 ("Effective Date"), and shall expire February 28, 2023, unless sooner terminated in accordance with this Agreement, including 1) during the initial ninety (90) day term, either Party may terminate this Agreement for any reason or no reason, with thirty (30) days advance written notice or as agreed upon by the Parties; 2) for subsequent terms, either Party may terminate this Agreement for any reason or no reason, with ninety (90) days advance written notice and as further described in Section B.21.
2. **RENEWAL OPTION.** Except as otherwise provided in this Agreement, if the Lessee is not in default, Lessee has the option to renew this Agreement for one (1) year consecutive terms by giving no less than sixty (60) days written notice to Lessor prior to the Lease Term expiration.

3. RENT. Except as otherwise provided elsewhere in this Agreement, in recognition of the public benefit rendered by Lessee's activities, the monthly lease rate is zero (\$00.00) for the term of this Agreement.
4. POSSESSION. Lessee's right to exclusive possession and obligations under the Agreement shall commence as of the Effective Date of this Agreement, except as otherwise provided herein.
5. CONDITION OF PROPERTY AND SITE. Lessor and Lessor's Agents as defined in Section B.12 have made no warranties or representations regarding the condition of the Property or Site, including, without limitation, the sustainability of the Property or Site for intended uses, except as may be expressly set forth herein. Lessor has no obligation to repair, alter, and/or construct any improvements on the Property. Lessee has inspected and accepts the Site in its "AS IS" condition upon taking possession, except as otherwise expressly set forth herein. Lessor will have no liability to Lessee, and Lessee will have no claim against Lessor, for any damage or injury or loss of use caused by the condition of the Property or Site, except as expressly set forth herein. Lessee is solely responsible for thoroughly inspecting the Site and ensuring that it is in compliance with all Legal Requirements (as referenced below), except as expressly set forth herein.
6. PERMITTED USE. The real property shall be used for the purpose of Safe Parking only, more fully described in Section A.4.
7. RESTRICTIONS ON USE. In terms of use of the Site, Lessee shall:
 - 7.1 Maintain improvements, structures and fences on the Site, if any, to standards of repair, orderliness, neatness, sanitation, and safety reasonably acceptable to Lessor, and shall not store solid waste on the Site.
 - 7.2 Except as undertaken in the ordinary course of conducting its Permitted Use and in compliance with applicable local, state and federal law, refrain from the disposal, spilling or discharging of any oil, gasoline, diesel fuel, chemicals, or other pollutants on the leased Property or Site. In the event of such spills, Lessee shall undertake any and all necessary actions to contain and remove from the Property or Site as provided by law.
 - 7.3 Conform to all applicable Legal Requirements of any public authority affecting the Site and Lessee's specific use of Site, and correct at Lessee's own expense any failure of compliance created by Lessee or by reason of Lessee's specific use of the Site, except as expressly set forth in this Agreement. For purposes of this Agreement, the term "Legal Requirement(s)" means any and all rules, regulations, covenants, conditions, restrictions, easements, declarations, laws, statutes, liens, ordinances, orders, codes, rules, and regulations applicable to the Property and/or Lessee's specific use thereof of the Site, including, without limitation, the Americans with Disabilities Act of 1990, as amended (and the rules and regulations promulgated thereunder), all as now in force and/or which may hereafter be amended, modified, enacted, or promulgated.

7.4 Refrain from any use which would create a nuisance either on the Property or Site or offsite or damage the Property or Site, including but not limited to, creating offensive odors, excessive dust or noise on the Property or Site or maintaining a fire on the Property or Site. Nothing herein shall be construed to prohibit normal activities necessary to utilize the Site for its Permitted Use.

7.5 Refrain from making any unlawful use of said Property or Site or to suffer or permit any waste stored at the Site.

8 LESSEE IS OBLIGATIONS. The following shall be the responsibility of the Lessee at Lessee's sole cost:

8.1 As applicable, arrangement for and delivery to the Site, as necessary, of all water, sanitary sewer, gas, electrical, and other utility services deemed necessary by Lessee.

8.2 As applicable, structural repairs and maintenance of any screening, fences, buildings, water, sanitary sewer, gas and electrical services, and other utility services to the Site.

8.3 All repairs necessitated by the activities or negligence of Lessee, its agents, employees, volunteers or invitees on or in connection with the Property or Site.

8.4 All repairs or alterations required under Lessee's obligation to comply with Legal Requirements and regulations as set forth in "Restrictions on Use" above.

8.5 All landscape maintenance to ensure vegetation remains tidy and viable; as applicable including replacement of any plantings as necessary as well as all irrigation repairs and maintenance to help ensure landscape viability.

8.6 All ad valorem tax and other real property assessments, bonds, levies or the like for the leased Site except as for provided and further described in Section B.9.

8.7 All taxes and assessments upon Lessee's personal property located on the Site as outlined in Section B.9.

8.8 The cost of property and liability insurance as outlined in Section B.17.

8.9 As applicable, all utility charges associated with the operation for the Permitted Use of the Site, including but not limited to electricity, natural gas, water, sanitary sewer, and other such services as necessary.

8.10 All other operational costs or future improvements associated with the Permitted Use of the Site.

9. TAXES AND ASSESSMENTS. After execution of this Agreement, Lessee shall apply within fifteen (15) days for a property tax exemption status based on Lessee's nonprofit

status. If the property tax exemption application is denied and the taxing authority assesses real property tax and assessments for the Property, Site or Site Improvements, Lessee shall pay before delinquency, all assessments and levies against the portion of the Property. Lessee shall pay before delinquent, all personal property taxes on Lessee's fixtures, equipment, inventory and other personal property in or about the portion of the Property subject to taxation.

10. INSPECTION OF PROPERTY. During the term of this Agreement, Lessor shall have the right to inspect the Property and Site in the Lessee's presence with reasonable notice by Lessor.

11. REPAIRS. Lessee accepts the Site in its "AS IS" condition, except as expressly set forth herein. Lessee will at all times keep the Site in good condition consistent with the condition of the Site on the Effective Date and make all repairs during the term of the Agreement necessary to maintain the Site in good condition.

12. INDEMNIFICATION OF LESSOR. Except to the extent caused by the gross negligence or willful misconduct of Lessor, Lessee will indemnify, defend, and hold Lessor and Lessor's current and future elected officials, officers, employees, contractors, agents and volunteers (collectively, "Lessor's Agents") harmless for, from, and against any and all claims, losses, damages, and/or liabilities arising out of or related to, whether directly or indirectly, the following: (a) any negligence or misconduct of Lessee and/or Lessee's members, managers, officers, employees, agents, contractors and volunteers (collectively, "Lessee's Agents") on or at the Property; (b) any condition of the Property (including, without limitation, any improvements constructed thereon) that is caused solely by Lessee and/or Lessee's Agents while the Property are in the possession or under the control of Lessee; and/or (c) Lessee's breach and/or failure to perform any Lessee obligation, covenant, representation, and/or warranty under this Agreement. Lessee's indemnification obligations under this Section B.12 will survive the expiration or termination of this Agreement.

13. PARTIAL TAKING. If a portion of the Property or Site is condemned and Section B.14 TOTAL TAKING does not apply, the Agreement shall continue on the following terms:

13.1 Lessor shall be entitled to all of the proceeds of condemnation and Lessee shall have no claim against Lessor as a result of the condemnation.

13.2 Lessor shall proceed as soon as reasonably possible to make such repairs and alterations to the Property or Site as reasonably practicable to return the Property or Site to its condition existing at the time of the condemnation, but in no event shall Lessor be liable for repairs in excess of condemnation proceeds awarded to and received by Lessor. The Lessor may, but shall not be required to, perform alterations prior to the actual taking after the portion to be taken has been finally determined. Rent shall be abated to the extent the Property or Site is untenable during the period of alteration and repair.

13.3 After the date on which title vests in the condemning authority or an earlier date on which alterations or repairs are commenced by Lessor to restore the balance of the Property or Site in anticipation of taking, the rent, if applicable, shall

be reduced commensurately with the reduction in value of the leased Site as an economic unit on account of the partial taking. If the parties are unable to agree upon the amount of the reduction of rent, the amount shall be determined by arbitration.

13.4 If a portion of the Lessor's Property not included in the leased Site is taken and severance damages are awarded on account of the leased Site, or an award is made for detriment to the leased Site as a result of change of grade of adjacent streets or other activity by a public body not involving a physical taking of any portion of the land, this shall be regarded as a partial condemnation of which subparagraphs (A) and (C) of "Partial Taking" above apply, and the rent, if applicable, shall be reduced to the extent of diminution of value of the Site as though a portion had been physically taken.

14. TOTAL TAKING. If a condemning authority takes all of the Property or Site or a portion sufficient to render the Site reasonably unsuitable for the use which the Lessee was then making of the Site, the Agreement shall terminate as of the date the title vests in the condemning authority. Lessor shall be entitled to all of the proceeds of condemnation and the Lessee shall have no claim against Lessor as a result of the condemnation.

15. SALE IN LIEU OF CONDEMNATION - DEDICATION TO THE PUBLIC. Sale of all or part of the Property to a purchaser with the power of eminent domain in the face of a threat or probability of the exercise of the power shall be treated for the purpose of this Section B.15 as a taking by condemnation. Dedication to the public, sale, or transfer of all or a portion of the Property of Lessor to the State of Oregon, its political subdivisions or United States of America, shall be treated as a Total Taking or Partial Taking, as applicable.

16. LIENS.

16.1 Except with respect to activities for which the Lessor is responsible, the Lessee shall pay as due all claims for work done on and for services rendered or material furnished to the Site and shall keep the Property free from any liens.

16.2 Lessee may withhold payment of any claim in connection with a good faith dispute over the obligation to pay, so long as Lessor's Property interests are not jeopardized. If a lien is filed as a result of nonpayment, Lessee shall, within thirty (30) days after knowledge of the filing, secure the discharge of the lien or deposit with Lessor cash or a sufficient corporate surety bond or other surety satisfactory to Lessor in an amount sufficient to discharge the lien plus any costs, attorney fees and other charges that could accrue as a result of a foreclosure or sale under a lien.

16.3 If Lessee fails to pay any such claims or to discharge any lien, or bond over any such lien, within thirty (30) days after written notice of such lien, Lessee shall remedy any lien. If Lessee fails to remedy any liens, Lessee will be in default and such default may be remedied or exercised in accordance to Section B.19.

17. INSURANCE.

17.1 Lessee shall keep the Site improvements and personal property of the Lessee insured at its own expense against fire and other risks covered by a standard fire insurance policy with an endorsement for extended coverage. The Lessor shall not be responsible for and shall not provide fire or extended coverage on the Site improvements or personal property of the Lessee.

17.2 Liability Insurance: Lessee shall procure and during the term of the Agreement shall continue to carry and maintain commercial general liability insurance including fire legal liability and automobile liability insurance at Lessee’s cost issued by a responsible company with limits of not less than \$1,000,000 for each occurrence and \$2,000,000 in the aggregate for commercial general liability insurance and \$1,000,000 combined single limit for automobile liability insurance. **Hired and non-owned auto insurance (HNOA insurance) will be accepted in lieu of a commercial automobile liability insurance policy.** The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon during the term of this Agreement. Such insurance shall protect Lessee against the claims of Lessor on account of the obligations assumed by Lessee under this Agreement, and shall name, as additional insureds, Lessor and its elected officials, officers, agents, and employees. It is an affirmative obligation on the Lessee to advise the Lessor within ten (10) business days of any substantive change of any insurance policy or endorsement set out herein, and failure to do so may be construed to be a breach of this Agreement. If the insurance is canceled or terminated prior to termination of the Agreement, Lessee shall provide a new policy with the same terms. Lessee agrees to maintain continuous, uninterrupted coverage for the duration of the Agreement.

17.2.1 Certificates evidencing such insurance and bearing endorsements requiring 30 days’ written notice to Landlord prior to any change or cancellation shall be furnished to Lessor prior to Lessee’s occupancy of the Site. Lessee shall maintain, on file with Lessor, a certificate of insurance certifying the coverage required as outlined. The adequacy of the insurance shall be subject to the approval of the Lessor’s Risk Manager or Attorney. Failure to maintain liability insurance required by this paragraph shall be cause for immediate termination of this Agreement by Lessor.

17.3 Workers’ Compensation Insurance: If Lessee is a subject employer under the Oregon Workers’ Compensation law, it shall comply with ORS 656.017, by providing workers’ compensation coverage for all its subject workers for the duration of this Agreement. The employer’s liability limits shall have minimum limits of \$500,000 each accident; \$500,000 for disease, each employee and \$500,000 disease, policy limits.

17.3.1 The policy coverage shall include a waiver of subrogation in Deschutes County’s favor. A certificate of insurance, or copy thereof, shall be attached to this Agreement, if applicable, and shall be incorporated herein and made a term and part of this Agreement. The

adequacy of the insurance shall be subject to the approval of Lessor’s Risk Manager or Attorney.

17.3.2 In the event the Lessee’s workers compensation insurance coverage is due to expire during the term of this Agreement, the Lessee agrees to timely renew its insurance, either as a carrier-insured employer or a self-insured employer, as provided by Chapter 656 of the Oregon Revised Statutes, before its expiration, and the Lessee agrees to provide the Lessor such further certification of workers’ compensation insurance as renewals of said insurance occur.

17.4 Subrogation: Neither party shall be liable to the other (or to the other’s successors or assigns) for any loss or damage caused by fire or any of the risks enumerated in a standard fire insurance policy with an extended coverage endorsement, and in the event of insured loss, neither Party’s insurance company shall have a subrogated claim against the other. This waiver shall be valid only if the insurance policy in question expressly permits waiver of subrogation or if the insurance company agrees in writing that such a waiver will not affect coverage under the policies. Each Party agrees to use best efforts to obtain such an agreement from its insurer, if the policy does not expressly permit a waiver of subrogation.

18. ASSIGNMENT AND SUBLEASE. Lessee will not sell, assign, mortgage, sublet, lien, convey, encumber, and/or otherwise transfer (whether directly, indirectly, voluntarily, involuntarily, or by operation of law) all or any part of Lessee’s interest in this Agreement and/or in the Property or Site (collectively, “Transfer”) without Lessor’s prior written consent. Notwithstanding anything to the contrary set forth in this Agreement, Lessee shall have the right to assign or transfer its interest in this Agreement to any affiliate of Lessee or subsidiary of Lessee’s ultimate parent, without Lessor’s consent but with written notice to Lessor. Upon any approved Transfer, (a) the terms and conditions of this Agreement will in no way be deemed to have been waived or modified, (b) consent will not be deemed consent to any further Transfer, (c) the acceptance of Rent by Lessor from any other person will not be deemed to be a waiver by Lessor of any provision of this Agreement, and (d) no Transfer relating to this Agreement, whether with or without Lessor’s consent, will modify, relieve, or eliminate any liability or obligations Lessee or any guarantor of this Agreement may have under this Agreement. Any Transfer which does not comply with this Agreement will be void and will constitute a breach of this Agreement.

19. DEFAULT. Each of the following will constitute an “Event of Default” and a breach of this Agreement:

19.1 Failure of Lessee to pay taxes or assessments as applicable, utilities or any or other charge. If Lessor is notified of any such amounts related to the Site or Lessee’s operations specific to the Site, said amounts must be paid by Lessee within ten (10) business days after written notice from Lessor.

19.2 Failure of Lessee to perform or comply with any term, condition, and/or covenant or fulfill any obligation of the Agreement (other than the payment of rent or other charge, cost, and/or expense) within thirty (30) days after written notice is received by Lessee from Lessor specifying the nature of the default with

reasonable particularity. If the failure is in such a nature that it cannot be completely remedied within the thirty (30) day period, the failure will not be a default if Lessee begins correction of the failure within the thirty (30) day period and thereafter proceeds with reasonable diligence and in good faith to effect the remedy as soon as practicable, so long as a full cure of said default is made within ninety (90) days of the original written notice.

19.3 Attachment, execution, levy, and/or other seizure by legal process of any right or interest of Lessee under this Agreement if not released within thirty (30) days.

19.4 Lessee becomes insolvent within the meaning of the United States Bankruptcy Code, as amended from time to time; an assignment by Lessee for the benefit of creditors; the filing by Lessee of a voluntary petition in bankruptcy; an adjudication that Lessee is bankrupt or the appointment of a receiver of the properties of Lessee; the filing of any involuntary petition of bankruptcy and failure of Lessee to secure a dismissal of the petition within thirty (30) days after filing; attachment of or the levying of execution on the leasehold interest and failure of Lessee to secure discharge of the attachment or release of the levy of execution within ten (10) days.

20. REMEDIES ON DEFAULT.

20.1 Upon the happening of an Event of Default, the Agreement may be terminated at the option of the Lessor or Lessee by notice in writing to Lessee or Lessor. The notice may be given at any time after any grace period for default given under Section B.19. All of Lessee's rights in relation to the Site and in all improvements on the Site will terminate as of the date of termination and/or expiration. Promptly after such notice, unless agreed upon by the Parties in writing, Lessee will surrender and vacate the Site and all improvements in broom clean and in good condition. Lessor may reenter and take possession of the Property and of all improvements and eject some or all parties in possession except any sub-lessee qualifying under any non-disturbance agreement by Lessor. Lessor and Lessee will have all rights and remedies available to Lessor and Lessee under this Agreement, at law, and in equity. Termination under this Section will not relieve Lessee from the payment of any sum then due to Lessor or from any claim for damages previously accrued or then accruing against Lessee. Termination under this Section will not relieve Lessor from the payment of any sum then due to Lessee or from any claim for damages previously accrued or then accruing against Lessor. If the Site is abandoned by Lessee in connection with a default, termination shall be automatic and without notice.

20.2 In the event Lessor terminates this Lease, the Lessor, or those having the Lessor's estate in the Property, lawfully at its option, may enter into and upon said demised Property and every part thereof, and repossess the same of Lessor's former estate, and expel said Lessee and those claiming by and through or under Lessee, and remove Lessee's effects at Lessee's expense, forcibly if necessary, and store the same, without being deemed guilty of trespass and without prejudice to any remedy which otherwise might be used for arrears of rent or preceding breach of covenant. If Lessor terminates the Agreement, Lessor will be entitled to

recover immediately, without waiting until the due date of any future rent or until the date fixed for expiration of this Agreement, and in addition to any other damages recoverable by Lessor, the reasonable costs of reentry and reletting including, without limitation, the cost of any clean-up, refurbishing, removal of Lessee's property and fixtures, and/or any other expense occasioned by Lessee's failure to quit the Property upon termination and to leave the Property in the required condition, including, without limitation, any remodeling costs, attorney fees, court costs, broker commissions, and advertising costs.

20.3 The foregoing remedies shall be in addition to, and shall not exclude, any other remedy available to Lessor under applicable law.

21. TERMINATION AND SURRENDER.

21.1 Upon expiration, abandonment, termination, revocation or cancellation of this Agreement, the Lessee shall surrender the Site to Lessor in the same condition as the Site was on the date of possession, except, that nothing in this Agreement shall be construed as to relieve Lessee of Lessee's affirmative obligation to surrender said Site in a condition which complies with all Legal Requirements. Upon Lessor's written approval, Lessee may leave Site improvements authorized by any land use permit. Lessee's obligation to observe and perform this covenant shall survive the expiration or the termination of the Agreement.

21.2 Termination on Default. In the event of a default, the Agreement may be terminated at the option of the non-defaulting Party by notice in writing to the other(s). The non-defaulting Party(s) shall be entitled to any remedies available to that Party under applicable law.

21.3 Termination (Convenience) of Agreement. It is the intent of the Parties hereto that the Site shall be used during said term as outlined in Section A. Notwithstanding this intent, Parties have the right to terminate this Agreement at any time upon giving the other Party ninety (90) days written notice and in accordance with Section B.21.

22. PERSONAL PROPERTY.

22.1 All personal property placed upon the leased Property during the term of this Agreement by Lessee shall remain the property of Lessee except as otherwise provided herein.

22.2 Unless agreed upon in writing by the Parties, upon abandonment, expiration, termination, revocation, or cancellation of this Agreement, Lessee shall remove from the Site all site improvements and personal property of Lessee on or prior to the date of such termination. If Lessee fails to remove all or part of such personal property on the expiration or termination of this Agreement then all such personal property shall become the property of Lessor.

23. NOTICES. Any notice by Lessee to Lessor or Lessor to Lessee must be mailed first class by the United States Postal Service (USPS), postage prepaid, addressed to the other at the address given below or at such other address as either may designate by

written notice. Notice shall be deemed effective three (3) calendar days following posting at a USPS location as herein described.

LESSOR:
Deschutes County
Attention: Property Manager
P.O. Box 6005
Bend, Oregon 97708-6005
Physical: 14 NW Kearney
Bend, OR 97703
541-385-1414 Office
541-317-3168 Fax
Kristie.Bollinger@deschutes.org

LESSEE:
Mountain View Community Development
Attn: Safe Parking Director
1475 SW 35th Street
Redmond, Oregon 97756
541-527-0028 Office
Sierra@mvcddredmond.org

- 24. NONWAIVER. Waiver by either party of strict performance of any provision of this Agreement shall not be a waiver of or prejudice the party's right to require strict performance of the same provision in the future or of any other provision.
- 25. PARTNERSHIP. Lessor is not by virtue of this Agreement a partner or joint venture with Lessee in connection with activities carried on under this Agreement, and shall have no obligation with respect to Lessee's debts or any other liabilities of each and every nature.
- 26. LESSEE NOT AN AGENT OF LESSOR. It is agreed by and between the Parties that Lessee is not carrying out a function on behalf of the Lessor, and that Lessor does not have the right of direction or control of Lessee's operation under this Agreement or to exercise any control over the activities of Lessee.
- 27. LAND USE PERMIT. This Agreement does not constitute a land use permit, nor does acceptance of this Agreement by Lessor constitute approval of any legislative or quasi-judicial action required as a condition precedent to use of the land for the intended purpose. Lessee's possession of the Property pursuant to Section B.4 for the use described in Section B.6 of this Agreement and obligations under this Agreement are contingent upon the approval of any necessary land use permits. If Lessee is unable or unwilling to meet conditions of land use permits, Lessee has the right to terminate this Agreement, with thirty (30) days written notice to Lessor.
- 28. LESSOR'S RIGHT TO CURE DEFAULTS. If Lessee fails to perform any obligations under this Agreement, Lessor shall have the option, but not the obligation, to do so after thirty (30) days' written notice to the Lessee. All of Lessor's actual and reasonable expenditures to correct the default shall be reimbursed by Lessee on demand with interest at the rate of nine percent (9%) per annum from the date of expenditure by

Lessor. In the event that Lessee, upon using Lessee's best efforts, is unable to obtain all required land use permits, Lessee may terminate this Agreement upon written notice to Lessor. Lessee shall remain liable to Lessor following termination for all unpaid lease payments, charges and damages due prior to termination and any damages, expenses, costs or losses suffered by Lessor due to Lessee's termination of this Agreement.

29. NON-DISCRIMINATION: No person shall be subject to discrimination in the receipt of any services or benefits made possible by, or resulting from this Agreement on the grounds of sex, race, color, religion, creek, marital status, age, national origin, or disability. Any violation of this provision may be considered a material breach of this Agreement and grounds for termination by Lessor.

30. LITIGATION FEES AND EXPENSES. If any arbitration or litigation is instituted to interpret, enforce, or rescind this Agreement, including, without limitation, any proceeding brought under the United States Bankruptcy Code, the prevailing party on a claim will be entitled to recover with respect to the claim, in addition to any other relief awarded, the prevailing party's reasonable attorney's fees and other fees, costs, and expenses of every kind, including, without limitation, the costs and disbursements specified in ORCP 68 A(2), incurred in connection with the arbitration, the litigation, any appeal or petition for review, the collection of any award, or the enforcement of any order, as determined by the arbitrator or court.

31. TIME IS OF THE ESSENCE. Time is of the essence of each and every provision of this Agreement.

32. SEVERABILITY. The Parties agree that if any term or provision of this Agreement is declared by a court of competent jurisdiction to be void, invalid or unenforceable, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if this Agreement did not contain the particular term or provision held to be void, invalid or unenforceable.

33. AUTHORITY. Lessee covenants that it possesses the legal authority to bind its principals to the terms, provisions and obligations contained within this Agreement. If it is determined that Lessor does not have authority to enter into this Agreement, Lessor may terminate this Agreement by providing written notice to Lessee.

34. MEDIATION and ARBITRATION.

33.1 Mediation. Before any party to this Agreement initiates Arbitration and/or litigation in Circuit Court, the parties must first attempt non-binding mediation. The parties shall split the cost of the mediator. If the parties are unable to agree on selection of the mediator, then the Director at Central Oregon Mediation shall choose. The mediation shall last no more than four (4) hours in duration.

33.2 Disputes for Arbitration. If any dispute arises between the Parties and the dispute cannot be resolved, the Parties shall submit the same to binding arbitration. If the Parties are unable to agree upon an arbitrator, then either party may apply to the presiding judge of Deschutes County to appoint the required arbitrator.

33.3 Procedure for Arbitration. The arbitration shall proceed according to the Oregon statutes governing arbitration, and the award of the arbitrator shall have the effect therein provided. The arbitration shall take place in Deschutes County. Common costs of the arbitration shall be shared equally by the Parties, but each Party shall pay its own attorney fees incurred in connection with the arbitration.

35. ENTIRE AGREEMENT. This Agreement and attached Exhibits, if any, constitute the entire agreement between the Parties concerning the subject matter of the Agreement and supersede any and all prior or contemporaneous negotiations and/or agreements between the Parties, whether written or oral, concerning the subject matter of this Agreement which are not fully expressed herein. This Agreement may not be modified or amended except by a writing signed by all Parties to this Agreement.

36. LESSOR DEFAULT. No act or omission of Lessor will be considered a default under this Agreement until Lessor has received thirty (30) days' prior written notice from Lessee specifying the nature of the default with reasonable particularity. Commencing from Lessor's receipt of such default notice, Lessor will have thirty (30) days to cure or remedy the default before Lessor will be deemed in default of this Agreement; provided, however, that if the default is of such a nature that it cannot be completely remedied or cured within the twenty-day cure period, there will not be a default by Lessor under this Agreement if Lessor begins correction of the default within the thirty-day cure period and thereafter proceeds with reasonable diligence to effect the remedy as soon as practical.

37. INTERPRETATION. All pronouns contained herein and any variations thereof will be deemed to refer to the masculine, feminine, or neutral, singular or plural, as the identity of the parties may require. The singular includes the plural and the plural includes the singular. The word "or" is not exclusive. The words "include," "includes," and "including" are not limiting. The term "person" means any natural person, corporation, limited liability company, partnership, joint venture, firm, association, trust, unincorporated organization, government or governmental agency or political subdivision, or any other entity. The titles, captions, or headings of the sections herein are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement.

38. SEVERABILITY/SURVIVAL. If any of the provisions contained in this Agreement are held illegal, invalid or unenforceable, the enforceability of the remaining provisions shall not be impaired. All provisions concerning the limitation of liability, indemnity and conflicts of interest shall survive the termination or expiration of this Agreement for any cause.

[SIGNATURE PAGES FOLLOW]

SE 7th Street and SE Evergreen Avenue, Redmond



Source: Esri, Maxar, EarthstarGeographics, and the GIS User Community
Deschutes County GIS

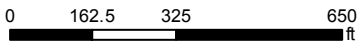


EXHIBIT B

Safe Parking Objectives and
Roles and Responsibilities of
Program Administrator, Host, and Participants

I. Safe Parking Objectives

1. Endeavors to respond to the current reality of Redmond, Oregon regarding homelessness and unauthorized vehicle camping by offering safe, legal, and supportive parking locations.
2. Endeavors to assist individuals and families in their process toward stable housing by meeting the essential need of a safe place to sleep and connecting program participants to MVCD case management services as well as other community resources. MVCD will support additional pathways of care between the hosting group and program participants.
3. Endeavors to provide partnership and relationship-building opportunities between local congregations, businesses, public agencies, private landowners and residents through shared mission and collaboration.
4. Endeavors to decrease the need for Redmond Police to respond to and cite unauthorized vehicle camping.

II. Roles and Responsibilities

1. **FUNDING:** The Parties acknowledge that the Safe Parking program is fiscally supported by public and private funding, which will fluctuate from year-to-year. In the event that funding is not adequate to operate the program, Lessee and Lessor agree to adjust the program as mutually agreed upon including termination of program service as provided by the Lease.
2. **PROGRAM ADMINISTRATOR:** Lessee is the program administrator. The Program Administrator agrees to:
 - a. Set program policies and procedures in compliance with City of Redmond municipal code and Oregon law
 - b. Agrees to be the principal partner and engage in conversation regarding policy and code compliance, and advocating as needed for funding and other support
 - c. Conduct background checks on all employees and volunteers connected with the program
 - d. Program operations and to provide best practices training for those employees and volunteers.
 - e. Limit Safe Parking to 3 operable vehicles per site.
 - f. Train and support Safe Parking staff
 - g. Provide services to program participants from participant entry to exit
 - h. Maintain safety and participant compliance through periodic check-ins from specified camp hosts, as well as through problem solving and intervention conversations with identified participants of concern
 - i. Perform its services with that standard of care, skill and diligence typically provided by a professional in the performance of similar services

- j. At its cost, provide maintenance of sites by providing and a garbage receptacle with regular service and portable toilets with regular service, and mowing grass as needed
 - k. Cover the financial costs associated with garbage receptacles, portable toilets and mowing grass
 - l. Timely and appropriately address complaints concerning Safe Parking or its participants
 - m. Comply with all applicable Federal, State, and Local laws, rules and regulations associated with the Site
3. **HOST:** Lessor is the property owner where a Safe Parking is located. The Host agrees to:
- a. Maintain ownership of the Property
 - b. Provide access to its designated site for all-hours parking
4. **PARTICIPANT:** Participants are those using the Safe Parking program services. By separate agreement between Program Administrator and the Participant, the Participant will agree to:
- a. Complete intake process with Program Administrator to receive a parking space
 - b. Be responsible for their vehicle and personal property
 - c. Adhere to a personalized case management plan to ensure future planning and goals are being met in a timely manner
 - d. Understand that neither the Service Provider nor the Host are responsible for lost or damaged property while the Participant is enrolled in the program
 - e. Sign the Participation Agreement and abide by its expectations
 - f. Vacate the Property upon request of the Program Administrator

COMMERCIAL GENERAL LIABILITY COVERAGE PART DECLARATIONS

POLICY NUMBER: NN1440772

Extension of Declarations is attached.

Effective Date: 08/01/2022 12:01 A.M. Standard Time

LIMITS OF INSURANCE If box is checked, refer to form **S132** Amendment of Limits of Insurance.

General Aggregate Limit (Other Than Products/Completed Operations)	\$	2,000,000	
Products/Completed Operations Aggregate Limit	\$	Excluded	
Personal and Advertising Injury Limit	\$	Excluded	Any One Person Or Organization
Each Occurrence Limit	\$	1,000,000	
Damage To Premises Rented To You Limit	\$	50,000	Any One Premises
Medical Expense Limit	\$	Excluded	Any One Person

RETROACTIVE DATE (CG 00 02 ONLY)

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" which occurs before the Retroactive Date, if any, shown here: (Enter Date or "NONE" if no Retroactive Date applies)

BUSINESS DESCRIPTION AND LOCATION OF PREMISES

BUSINESS DESCRIPTION: community development organization
 LOCATION OF ALL PREMISES YOU OWN, RENT, OR OCCUPY: Location address is same as mailing address.
 1 1475 SW 35th St, Redmond, OR 97756
 2 491 SW Veterans Way, Redmond, OR 97756
 Additional locations (if any) will be shown on form **S170**, Commercial General Liability Coverage Part Declarations Extension.
 LOCATION OF JOB SITE (If Designated Projects are to be Scheduled):

CODE # -	CLASSIFICATION	*	PREMIUM BASIS	RATE		ADVANCE PREMIUM
				Prem/Ops	Prod/Comp Ops	
61225 -	Meeting Space for Board rated as Building or Premises - office-premises primarily occupied by employees of the insured NFP	a	500	63.446	Excluded	32 Excluded
67017 -	Safe Park Program Parking Spots rated as Shelters, Mission, Settlement or Halfway Houses - not church or office buildings	t+	3	65.645	Excluded	197 Excluded
90793 -	First Party Privacy Breach Cov-Med Hazard-Low Exposure	t+	1	Flat		115
67017 -	Safe Park Program Parking Spots rated as Shelters, Mission, Settlement or Halfway Houses - not church or office buildings	t	1	65.645	Excluded	66 Excluded

* **PREMIUM BASIS SYMBOLS** + = Products/Completed Operations are subject to the General Aggregate Limit
 a = Area (per 1,000 sq. ft. of area) o = Total Operating Expenditures (per \$1,000 Total Operating Expenditures) s = Gross Sales (per \$1,000 of Gross Sales)
 c = Total Cost (per \$1,000 of Total Cost) t = See Classification
 m = Admissions (per 1,000 Admissions) p = Payroll (per \$1,000 of Payroll) u = Units (per unit)

PREMIUM FOR THIS COVERAGE PART \$ 1,615 MP

FORMS AND ENDORSEMENTS (other than applicable Forms and Endorsements shown elsewhere in the policy)

Forms and Endorsements applying to this Coverage Part and made part of this policy at time of issue:
Refer to Schedule of Forms and Endorsements

THESE DECLARATIONS ARE PART OF THE POLICY DECLARATIONS CONTAINING THE NAME OF THE INSURED AND THE POLICY PERIOD. Includes copyrighted material of Insurance Services Office, Inc. with its permission.

COMMERCIAL LINES POLICY - COMMON POLICY DECLARATIONS
NAUTILUS INSURANCE COMPANY

Scottsdale, Arizona

Transaction Type: New

Policy No. NN1440772

Renewal of Policy #
Rewrite of Policy #
Cross Ref. Policy #
NIC Quote # 180240001

Inspection Ordered:
[X] Yes [] No

"THIS IS EVIDENCE OF INSURANCE PROCURED AND DEVELOPED UNDER THE OREGON SURPLUS LINE LAWS. IT IS NOT COVERED BY THE PROVISIONS OF ORS 734.510 TO 734.710 RELATING TO THE OREGON INSURANCE GUARANTY ASSOCIATION. IF THE INSURER ISSUING THIS INSURANCE BECOMES INSOLVENT, THE OREGON INSURANCE GUARANTY ASSOCIATION HAS NO OBLIGATION TO PAY CLAIMS UNDER THIS EVIDENCE OF INSURANCE"

Named Insured and Mailing Address

(No., Street, Town or City, County, State, Zip Code)
Mountain View Community Development

1475 SW 35th St

Redmond OR 97756

Agent and Mailing Address

Agency No. 250000

(No., Street, Town or City, County, State, Zip Code)

HULL-BIG SKY UNDERWRITERS
P. O. Box 3567

Missoula MT 59806

Policy

NO FLAT CANCELLATION

Period: From 08/01/2022 to 08/01/2023 at 12:01 A.M. Standard Time at your mailing address shown above.

Business Description: community development organization

Tax State OR

Form of Business: Organization Including Corporation

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE WILL PROVIDE YOU THE INSURANCE STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

Table with 2 columns: Coverage Part and Premium. Rows include Commercial General Liability Coverage Part (\$1,615.00), Taxes, Fees & Surcharges (Total \$446.12), and TOTAL ADVANCE PREMIUM (Total \$2,061.12).

Form(s) and Endorsement(s) made a part of this policy at time of issue:
Refer to Schedule of Forms and Endorsements.

Kathy Colangelo
100159287

[Handwritten Signature]

Countersigned: Missoula, MT
08/17/2022 OIP MJ

By _____
Countersignature or Authorized Representative, whichever is applicable

THESE DECLARATIONS TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE PART DECLARATIONS, COVERAGE PART COVERAGE FORM(S) AND FORMS AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBERED POLICY.

Includes copyrighted material of Insurance Services Office, Inc., with its permission.

**COMMERCIAL GENERAL LIABILITY
CG 00 01 04 13**

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

- (a) The supervision, hiring, employment, training or monitoring of others by that insured; or
- (b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph (1), (2) or (3) above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

- (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
 - (a) Less than 26 feet long; and
 - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

- (5) "Bodily injury" or "property damage" arising out of:
 - (a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged; or
 - (b) The operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;

- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of seven or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does not apply to liability for damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Recording And Distribution Of Material Or Information In Violation Of Law

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III – Limits Of Insurance.

COVERAGE B – PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:
 - (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
 - (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.
- b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods – Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

- (1) Advertising, broadcasting, publishing or telecasting;
- (2) Designing or determining content of web sites for others; or
- (3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a.**, **b.** and **c.** of "personal and advertising injury" under the Definitions section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-related

Any loss, cost or expense arising out of any:

- (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or
- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

COVERAGE C – MEDICAL PAYMENTS

1. Insuring Agreement

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
 - (2) On ways next to premises you own or rent; or
 - (3) Because of your operations;
- provided that:

- (a) The accident takes place in the "coverage territory" and during the policy period;
- (b) The expenses are incurred and reported to us within one year of the date of the accident; and
- (c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid administered at the time of an accident;
- (2) Necessary medical, surgical, X-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers' Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage A.

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

- a. All expenses we incur.
- b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
- c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
- d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
- e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
- f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

- a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";
- d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:

- (1) Agrees in writing to:
 - (a) Cooperate with us in the investigation, settlement or defense of the "suit";
 - (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
 - (c) Notify any other insurer whose coverage is available to the indemnitee; and
 - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
- (2) Provides us with written authorization to:
 - (a) Obtain records and other information related to the "suit"; and
 - (b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I – Coverage A – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

SECTION II – WHO IS AN INSURED

- 1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
 - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
 - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
 - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraph (1)(a) or (b) above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by;

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by;

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage B does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

a. Medical expenses under Coverage C;

b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and

c. Damages under Coverage B.

- 3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".
- 4. Subject to Paragraph **2.** above, the Personal And Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
- 5. Subject to Paragraph **2.** or **3.** above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage **A**; and
 - b. Medical expenses under Coverage **C**
 because of all "bodily injury" and "property damage" arising out of any one "occurrence".
- 6. Subject to Paragraph **5.** above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
- 7. Subject to Paragraph **5.** above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and

- (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.
 You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
- c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

- 1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
 - a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
 - b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.
- 2. "Auto" means:
 - a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
 - b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

- 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
- 4. "Coverage territory" means:
 - a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
 - b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or
 - c. All other parts of the world if the injury or damage arises out of:
 - (1) Goods or products made or sold by you in the territory described in Paragraph a. above;
 - (2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
 - (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication;

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.

- 5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
- 6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document.
- 7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
- 8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
 - a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

- 9. "Insured contract" means:**
- a.** A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
 - b.** A sidetrack agreement;
 - c.** Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 - d.** An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - e.** An elevator maintenance agreement;
 - f.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
- Paragraph **f.** does not include that part of any contract or agreement:
- (1)** That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
 - (2)** That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a)** Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b)** Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
 - (3)** Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in **(2)** above and supervisory, inspection, architectural or engineering activities.
- 10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".**
- 11. "Loading or unloading" means the handling of property:**
- a.** After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
 - b.** While it is in or on an aircraft, watercraft or "auto"; or
 - c.** While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;
- but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".
- 12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:**
- a.** Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
 - b.** Vehicles maintained for use solely on or next to premises you own or rent;
 - c.** Vehicles that travel on crawler treads;
 - d.** Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - (1)** Power cranes, shovels, loaders, diggers or drills; or
 - (2)** Road construction or resurfacing equipment such as graders, scrapers or rollers;
 - e.** Vehicles not described in Paragraph **a., b., c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - (1)** Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - (2)** Cherry pickers and similar devices used to raise or lower workers;
 - f.** Vehicles not described in Paragraph **a., b., c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

- (1) Equipment designed primarily for:
 - (a) Snow removal;
 - (b) Road maintenance, but not construction or resurfacing; or
 - (c) Street cleaning;
- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

- (1) Products that are still in your physical possession; or
- (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy Schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a.** An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b.** Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

- a.** Means:
 - (1)** Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a)** You;
 - (b)** Others trading under your name; or
 - (c)** A person or organization whose business or assets you have acquired; and
 - (2)** Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

- (1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- (2)** The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

- (1)** Work or operations performed by you or on your behalf; and
- (2)** Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
- (2)** The providing of or failure to provide warnings or instructions.



Oregon Workers' Compensation Certificate of Insurance

Certificate holder:

MOUNTAIN VIEW COMMUNITY DEVELOPMENT
1475 SW 35TH ST
REDMOND, OR 97756

The policy of insurance listed below has been issued to the insured named below for the policy period indicated. The insurance afforded by this policy is subject to all the terms, exclusions and conditions of such policy; this policy is subject to change or cancellation at any time.

Insured Mountain View Community Development 1475 SW 35th St Redmond, Or 97756-9805	Producer/contact SAIF Corporation Portland Service Center 503.673.5283 servic@saif.com
Issued 11/04/2022 Policy 100052088 Period 11/04/2022 to 11/01/2023	Limits of liability Bodily Injury by Accident \$500,000 each accident Bodily Injury by Disease \$500,000 each employee Body Injury by Disease \$500,000 policy limit

Description of operations/locations/special items

Important

This certificate is issued as a matter of information only and confers no rights to the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies above. This certificate does not constitute a contract between the issuing insurer, authorized representative or producer and the certificate holder.

Authorized representative

Chip Terhune
President and CEO



BOARD OF COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: Consideration of American Rescue Plan Act Funding Proposal: Friends of the Children

BACKGROUND AND POLICY IMPLICATIONS:

In FY21, Deschutes County was awarded approximately \$38.4 million in American Rescue Plan Act (ARPA) funds. Deschutes County has \$442,217 remaining in unallocated ARPA funds.

During the November 2 meeting, the Board of Commissioners discussed a funding proposal from Friends of the Children for \$100,000 and requested to continue the discussion at a later date. Staff is returning to the November 14 meeting as requested for continued discussion of the funding proposal.

ATTENDANCE:

Dan Emerson, Budget Manager
Laura Skundrick, Management Analyst

FR1ENDS of the CH1LDREN

Central Oregon

August 8, 2023

Dear Deschutes County Administrators and Board of Commissioners:

Friends of the Children Central Oregon respectfully requests \$100,000 in funding from Deschutes County’s American Rescue Plan Act (ARPA) Funds, under the Equity-Focused Services funding area, to support the expansion of our 1:1 mentorship program to La Pine, Oregon. The requested funds would enable our organization to work with La Pine youth facing the greatest obstacles, confronting systematic disparities and promoting healthy environments for these children and their families.

Friends of the Children Central Oregon was founded in 2017, joining the now 25-site national network that impacts generational change by providing youth who are facing the greatest obstacles with long-term relationships with professional mentors – 12+ years, no matter what. Using a rigorous, research-informed child selection process, we intentionally enroll children from low-income households who are facing systemic obstacles and who have experienced multiple Adverse Childhood Experiences (ACEs). Once enrolled between ages 4-6, each child is paired with a professional mentor (“Friend”) who provides an intentional, stable relationship and 1:1 support for 3-4 hours per week – every week, every month, every year, for 12+ years.

The data emerging from the pandemic is clear: more children, especially children of color and those living in poverty, have fallen further behind academically and are experiencing increased behavioral and mental health challenges than prior to 2020. Rural communities, which already faced significant disparities compared to urban settings, experienced additional challenges through virtual learning such as more limited technology access and availability of caregiver support, combined with recent increases in housing expenses and skyrocketing inflation. In response, we have been working with the Bend-La Pine School District and local community leaders to prepare for service expansion to La Pine, where the need for our services is vast and local schools, partners and families have expressed a desire for our services.

The requested grant would enable the launch of this expansion by hiring two full-time professional mentors, called “Friends,”. Each Friend will work closely with 8 youth, who are identified in kindergarten through our highly collaborative selection process. Friends will spend four hours of one-on-one time with each of 16 youth living in La Pine every week, integrating at least 30 minutes of academic support into their ongoing activities with each child. Friends and youth will spend time together in the classroom, at our Ranch, and out in the community. Interactions will be flexible and informal, but never random. Friends join youth in their classrooms, supporting school success and positive peer relationships; in their homes, strengthening family relationships and promoting positive identity development; and in their communities, supporting youth in discovering their talents and passions, or what we call “sparks.”

We believe that any child, in any situation, can succeed, even those facing the most obstacles. Our program creates equity in education through youth empowerment and granting youth agency in their academic experience, both of which lend to improved academic and social-emotional outcomes. We appreciate your time and consideration and look forward to speaking with you in more detail about this initiative. Together, we can make generational change.

Respectfully submitted,



Rachel Cardwell
Executive Director
rcardwell@friendscentraloregon.org



**BOARD OF
COMMISSIONERS**

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: First reading of Ordinance No. 2022-011, amending the Comprehensive Plan and approving a Zone change for property totaling approximately 19.12 acres along Highway 97

RECOMMENDED MOTION:

Move approval of 1st reading of Ordinance 2022-011 to change the Comprehensive Plan Map Designation for certain property From Agriculture to Rural Industrial, and changing the Zone Designation from Exclusive Farm Use to Rural Industrial.

BACKGROUND AND POLICY IMPLICATIONS:

LBNW, LLC has requested a Comprehensive Plan amendment and Zone Change for three tax lots totaling approximately 19.12 acres along Highway 97 (file nos. 247-21-000881-PA, 882-ZC). The requested Comprehensive Plan amendment would re-designate the properties from Agriculture to Rural Industrial. A corresponding Zone Change would rezone the properties from Exclusive Farm Use (EFU) to Rural Industrial (RI). The addresses associated with the subject properties are as follows:

Property 1:
Map and Tax lot: 1312230000305
Account: 164853
Situs Address: 65301 N HWY 97, BEND, OR 97701

Property 2:
Map and Tax lot: 1612230000500
Account: 132821
Situs Address: 65315 HWY 97, BEND, OR 97701

Property 3:
Map and Tax lot: 1612230000301

Account: 132822
Situs Address: 65305 HWY 97, BEND, OR 97701

BUDGET IMPACTS:

None

ATTENDANCE:

Tarik Rawlings, Associate Planner

REVIEWED
LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Code *
Title 23, the Deschutes County Comprehensive Plan, * ORDINANCE NO. 2022-011
to Change the Comprehensive Plan Map Designation *
for Certain Property From Agriculture to Rural *
Industrial, and Amending Deschutes County Code *
Title 18, the Deschutes County Zoning Map, to *
Change the Zone Designation for Certain Property *
From Exclusive Farm Use to Rural Industrial.

WHEREAS, LBNW LLC, applied for changes to both the Deschutes County Comprehensive Plan Map (247-21-000881-PA) and the Deschutes County Zoning Map (247-21-000882-ZC), to change comprehensive plan designation of the subject property from Agricultural (AG) to Rural Industrial (RI) and a corresponding zone change from Exclusive Farm Use (EFU) to Rural Industrial (RI); and

WHEREAS, after notice was given in accordance with applicable law, a public hearing was held on April 26, 2022 before the Deschutes County Hearings Officer and, on July 12, 2022 the Hearings Officer recommended approval of the Comprehensive Plan Map Amendment and Zone Change;

WHEREAS, pursuant to DCC 22.28.030(C), the Board heard *de novo* the application to change comprehensive plan designation of the subject property from Agricultural (AG) to Rural Industrial (RI) and a corresponding zone change from Exclusive Farm Use (EFU) to Rural Industrial (RI); now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. AMENDMENT. DCC Title 23, Deschutes County Comprehensive Plan Map, is amended to change the plan designation for certain property described in Exhibit "A" and depicted on the map set forth as Exhibit "B", with both exhibits attached and incorporated by reference herein, from AG to RI.

Section 2. AMENDMENT. DCC Title 18, Zoning Map, is amended to change the zone designation from EFU to RI for certain property described in Exhibit "A" and depicted on the map set forth as Exhibit "C".

Section 3. AMENDMENT. DCC Section 23.01.010, Introduction, is amended to read as described in Exhibit "D" attached and incorporated by reference herein, with new language underlined.

Section 4. AMENDMENT. Deschutes County Comprehensive Plan Section 5.12, Legislative History, is amended to read as described in Exhibit "E" attached and incorporated by reference herein, with new language underlined.

Section 5. FINDINGS. The Board adopts as its findings in support of this Ordinance the Decision of the Board of County Commissioners as set forth in Exhibit "F" and incorporated by reference herein. The Board also incorporates in its findings in support of this decision, the Decision of the Hearings Officer, attached as Exhibit "G" and incorporated by reference herein.

Section 6. EFFECTIVE DATE. This Ordinance takes effect on the 90th day after the date of adoption.

Dated this _____ of _____, 2022

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

PATTI ADAIR, Chair

ANTHONY DEBONE, Vice Chair

ATTEST:

Recording Secretary

PHIL CHANG, Commissioner

Date of 1st Reading: ____ day of _____, 2022.

Date of 2nd Reading: ____ day of _____, 2022.

Record of Adoption Vote:

Commissioner	Yes	No	Abstained	Excused
Patti Adair	___	___	___	___
Anthony DeBone	___	___	___	___
Phil Chang	___	___	___	___

Effective date: ____ day of _____, 2022.

ATTEST

Recording Secretary



COMMUNITY DEVELOPMENT

MEMORANDUM

TO: Deschutes County Board of Commissioners (Board)

FROM: Tarik Rawlings, Associate Planner
Will Groves, Planning Manager

DATE: November 8, 2022

SUBJECT: Consideration of First Reading of Ordinance 2022-011 – LBNW LLC Plan Amendment and Zone Change

The Board of County Commissioners (Board) will consider a first reading of Ordinance 2022-011 on November 14, 2022 for a Plan Amendment and Zone Change (file nos. 247-21-000881-PA, 882-ZC) on a subject property consisting of three tax lots totaling approximately 19.12 acres.

I. BACKGROUND

The applicant, LBNW LLC, is requesting a Comprehensive Plan Amendment to re-designate the subject properties from Agriculture to Rural Industrial and a corresponding Zone Change to rezone the properties from Exclusive Farm Use (EFU) to Rural Industrial (RI). The applicant's reasoning for the request is that the properties were mistakenly identified as farmland, do not contain high-value soils or other characteristics of high-value farmland, and therefore should be re-designated and rezoned for rural industrial use. The applicant has provided a supplementary soil study that identifies non-high value (Class VII and VIII) soils on a majority of the subject properties. Additionally, the applicant has provided findings within the burden of proof that provide responses to relevant state and local requirements and policies. A public hearing before a Hearings Officer was conducted on April 26, 2022 with the Hearings Officer's recommendation of approval issued on July 12, 2022. The Board held a public hearing on September 7, 2022 and closed the written record period. On September 28, 2022, the Board deliberated to approve the requests, with two of the three Commissioners in favor.

II. NEXT STEPS / SECOND READING

The Board is scheduled to conduct the second reading of Ordinance 2022-011 on November 28, 2022, fourteen (14) days following the first reading.

ATTACHMENTS:

1. Draft Ordinance 2022-011 and Exhibits
Exhibit A: Legal Description

Exhibit B: Plan Amendment Map

Exhibit C: Zone Change Map

Exhibit D: Comprehensive Plan Section 23.01.010, Introduction

Exhibit E: Comprehensive Plan Section 5.12, Legislative History

Exhibit F: Decision of the Board of County Commissioners

Exhibit G: Hearings Officer Recommendation

Exhibit “A” to Ordinance 2022-011

Legal Descriptions of Affected Properties

For Informational Purposes Only: Parcel No. 1612230000305 (commonly known as 65301 N. HWY 97, Bend, OR 97701)

(Legal Description Begins Below)

File No. 414664AM

A parcel of land located in the NW 1/4 SE 1/4 of Section 23, Township 16 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, lying Westerly of the Central Oregon Irrigation’s Pilot Butte Canal, and more particularly described as follows:

Commencing at the North One-Quarter corner of said Section 23; thence South 00°04’40” East, 3,651.07 feet along the North-South centerline of said Section 23 to the true point of beginning; thence South 89°44’29” East 444.09 feet to a point on the centerline of the Pilot Butte Canal (as constructed); thence South 04°43’33” West, 194.02 feet along said canal centerline; thence South 21°51’49” West, 123.14 feet along said canal centerline to a point on the South line of said NW 1/4 SE 1/4; thence North 89°44’29” West, 381.83 feet along said South line to the Southwest corner of said NW 1/4 SE 1/4; thence North 00°04’40” West, 307.93 feet along the West line of said NW 1/4 SE 1/4 to the true point of beginning.

EXCEPTING THEREFROM the right-of-way of the Pilot Butte Canal.

For Informational Purposes Only: Parcel No. 1612230000301 (commonly known as 65305 N. HWY 97, Bend, OR 97701)

(Legal Description Begins Below)

File No. 414726AM

Description of a parcel of land situate in a portion of the Southwest Quarter of the Northeast Quarter (SW 1/4 NE 1/4) and the Northwest Quarter of the Southeast Quarter (NW 1/4 SE 1/4) of Section Twenty-Three (23), Township Sixteen (16) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon, Westerly of Central Oregon Irrigation District's (C.O.I.D.'s) Pilot Butte Canal (P.B.C) and now to be more particularly described as follows:

Commencing at a 3/4" pin at the North 1/4 corner of said Section 23, the initial point; thence South 00°04'40" East along the Westerly line of said NE 1/4, 1,319.37 feet to a 3/4" pipe and the true point of beginning; thence South 89°44'27" East along the Northerly line of said SW 1/4 NE 1/4, 55.72 feet; thence along the centerline of C.O.I.D.'s P.B.C. Canal as constructed as follows: South 11° 11'43" East, 286.69 feet; thence South 12°29'54" East, 422.34 feet; thence South 28°43'42" East, 285.24 feet; thence South 10°16'16" West, 175.47 feet; thence South 03°55'21" East, 458.45 feet; thence South 21°05'56" East, 91.18 feet; thence South 00°46'50" West, 307.68 feet; thence South 18°31'30" East, 204.98 feet, thus ending boundary along said center line; thence South 18°18'10" East, 70.74 feet to a 1/2" pipe on Easterly bank of said canal; thence South 04°43'33" West along said canal bank, 299.37 feet to a 1/2" pipe; thence South 21°51'49" West along said canal bank 123.14 feet to a 1/2" pipe; thence North 89°44'29" West along the Southerly line of said NW 1/4 SE 1/4, 381.83 feet to a 3/4" pipe; thence North 00°04'40" West along the Westerly line of said NW 1/4 SE 1/4, 1,319.27 feet to a 5/8" pin at the center of said section; thence North 00°04'40" West along Westerly line of said SW 1/4 NE 1/4, 1,319.87 feet to the point of beginning.

EXCEPTING THEREFROM that portion thereof conveyed to Robert C. Fair, etal, by Deed recorded June 22, 1981, in Book 343, Page 15, Deschutes County Deed Records, more particularly Described as follows:

A parcel of land located in the NW 1/4 SE 1/4 of Section 23, Township 16 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, lying Westerly of the Central Oregon Irrigation's Pilot Butte Canal, and more particularly described as follows:

Commencing at the North One-Quarter corner of said Section 23; thence South 00°04'40" East, 3,651.07 feet along the North-South centerline of said Section 23 to the true point of beginning; thence South 89°44'29" East 444.09 feet to a point on the centerline of the Pilot Butte Canal (as constructed); thence South 04°43'33" West, 194.02 feet along said canal centerline; thence South 21°51'49" West, 123.14 feet along said canal centerline to a point on the South line of said NW 1/4 SE 1/4; thence North 89°44'29" West, 381.83 feet along said South line to the Southwest corner of said NW 1/4 SE 1/4; thence North 00°04'40" West, 307.93 feet along the West line of said NW 1/4 SE 1/4 to the true point of beginning.

ALSO EXCEPTING THEREFROM the right-of-way of the Pilot Butte Canal.

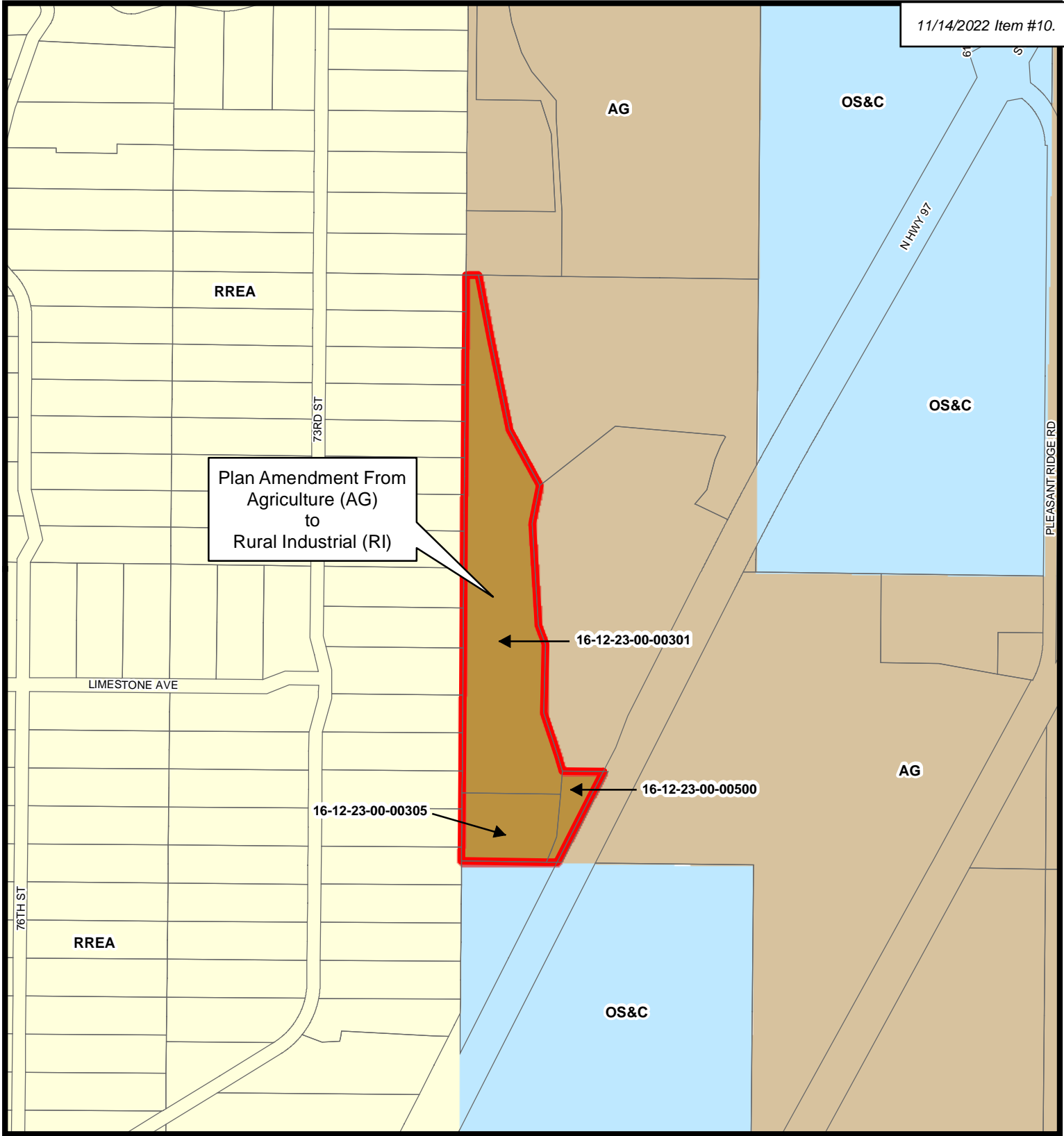
For Informational Purposes Only: Parcel No. 1612230000500 (commonly known as 65315 HWY 97, Bend, OR 97701)

(Legal Description Begins Below)


That portion of the Northwest Quarter of the Southeast Quarter (NW1/4 SE1/4) of Section 23, Township 16 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, described as follows:

Commencing at the Southwest corner of the NW1/4 SE1/4 of said Section; thence East along the South line of the NW1/4 SE1/4 of said section a distance of 381 feet to the East line of the Pilot Butte Canal and the True Point of Beginning; thence continuing along said South line, a distance of 71 feet to the Westerly line of The Dalles-California Highway; thence Northeasterly along the Westerly line of said highway, a distance of 460 feet; thence West and parallel to the South line of the NW1/4 SE1/4 of said section, a distance of 205 feet to the East line of the Pilot Butte Canal; thence Southerly along the East line of said canal to the True Point of Beginning.


EXCEPTING THEREFROM that portion granted to the State of Oregon, by and through its Department of Transportation in stipulated final judgment recorded September 21, 1992 in Book 276, Page 2146, Deschutes County, Oregon



Legend

 Plan Amendment Boundary

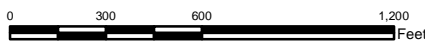
Comprehensive Plan Designation

-  AG - Agriculture
-  OS&C - Open Space & Conservation
-  RREA - Rural Residential Exception Area
-  RI - Rural Industrial

COMPREHENSIVE PLAN MAP

Plan Amendment From Agriculture (AG) to Rural Industrial (RI)

Exhibit "B"
to Ordinance 2022-011



September 14, 2022

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

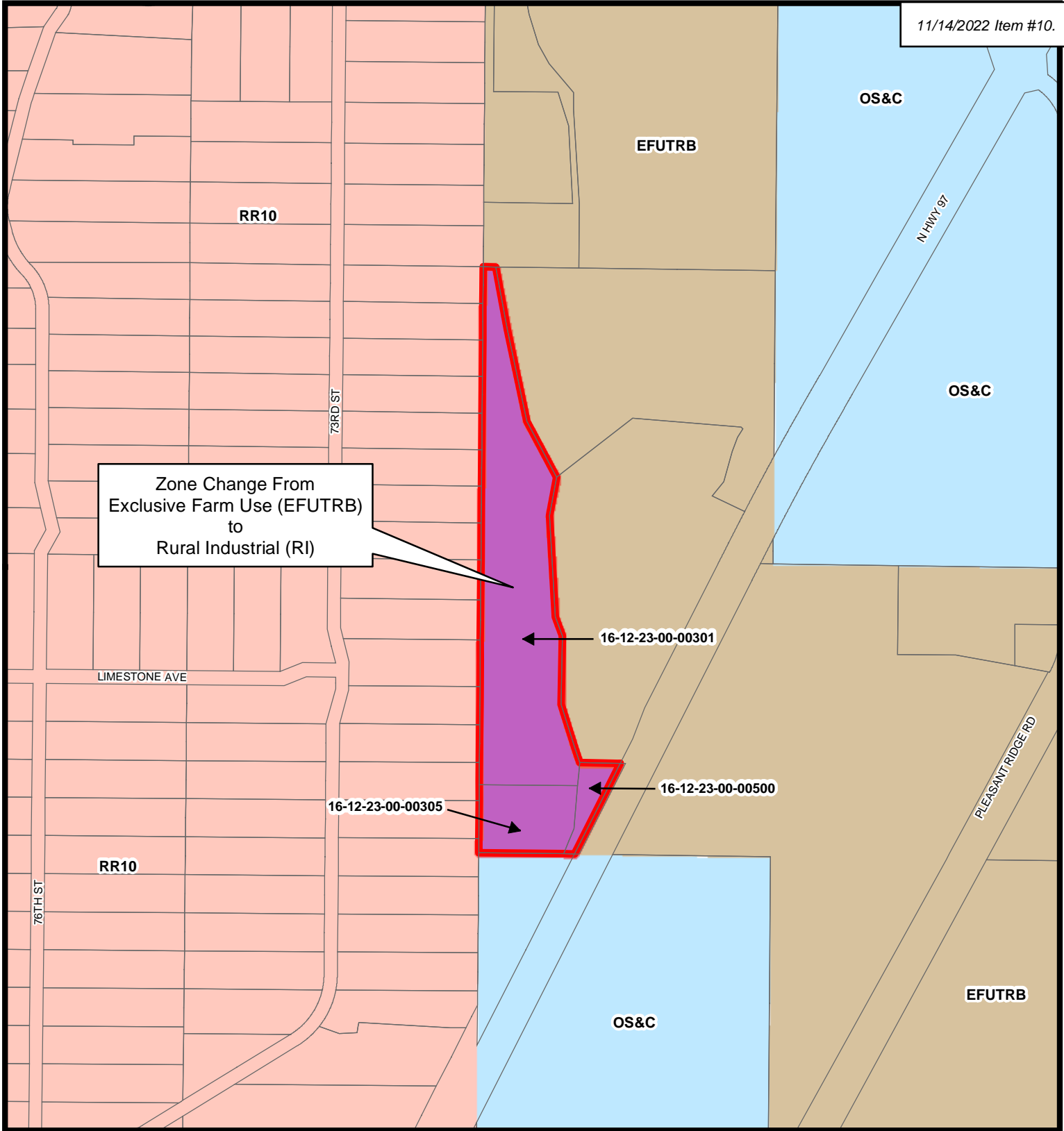
Patti Adair, Chair

Tony DeBone, Vice Chair

Phil Chang, Commissioner

ATTEST: Recording Secretary

Dated this ____ day of ____, 202
Effective Date: ____, 202



Zone Change From
Exclusive Farm Use (EFUTRB)
to
Rural Industrial (RI)

ZONING MAP

Zone Change From Exclusive Farm Use (EFUTRB) to Rural Industrial (RI)

Legend

 Plan Amendment Boundary

Zoning

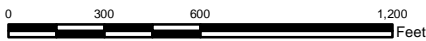
 EFUTRB - Tumalo/Redmond/Bend Subzone

 OS&C - Open Space & Conservation

 RR10 - Rural Residential

 RI - Rural Industrial

Exhibit "C"
to Ordinance 2022-011



September 14, 2022

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Patti Adair, Chair

Tony DeBone, Vice Chair

Phil Chang, Commissioner

ATTEST: Recording Secretary

Dated this ____ day of ____, 202
Effective Date: ____, 202

Chapter 23.01 COMPREHENSIVE PLAN

Chapter 23.01 COMPREHENSIVE PLAN

23.01.010. Introduction.

- A. The Deschutes County Comprehensive Plan, adopted by the Board in Ordinance 2011-003 and found on the Deschutes County Community Development Department website, is incorporated by reference herein.
- B. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2011-027, are incorporated by reference herein.
- C. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-005, are incorporated by reference herein.
- D. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-012, are incorporated by reference herein.
- E. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-016, are incorporated by reference herein.
- F. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-002, are incorporated by reference herein.
- G. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-009, are incorporated by reference herein.
- H. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-012, are incorporated by reference herein.
- I. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-007, are incorporated by reference herein.
- J. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-005, are incorporated by reference herein.
- K. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-006, are incorporated by reference herein.
- L. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-012, are incorporated by reference herein.
- M. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-021, are incorporated by reference herein.
- N. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-027, are incorporated by reference herein.
- O. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-021, are incorporated by reference herein.
- P. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-029, are incorporated by reference herein.
- Q. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-018, are incorporated by reference herein.
- R. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-010, are incorporated by reference herein.
- S. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-001, are incorporated by reference herein.
- T. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-022, are incorporated by reference herein.
- U. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-005, are incorporated by reference herein.

- V. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-027, are incorporated by reference herein.
- W. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-029, are incorporated by reference herein.
- X. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2017-007, are incorporated by reference herein.
- Y. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-002, are incorporated by reference herein.
- Z. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-006, are incorporated by reference herein.
- AA. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-011, are incorporated by reference herein.
- BB. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-005, are incorporated by reference herein.
- CC. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-008, are incorporated by reference herein.
- DD. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-002, are incorporated by reference herein.
- EE. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-001, are incorporated by reference herein.
- FF. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-003, are incorporated by reference herein.
- GG. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-004, are incorporated by reference herein.
- HH. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-011, are incorporated by reference herein.
- II. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-006, are incorporated by reference herein.
- JJ. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-016, are incorporated by reference herein.
- KK. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-019, are incorporated by reference herein.
- LL. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-001, are incorporated by reference herein.
- MM. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-002, are incorporated by reference herein.
- NN. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-003, are incorporated by reference herein.
- OO. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-008, are incorporated by reference herein.
- PP. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-007, are incorporated by reference herein.
- QQ. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-006, are incorporated by reference herein.
- RR. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-009, are incorporated by reference herein.
- SS. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-013, are incorporated by reference herein.

TT. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-02, are incorporated by reference herein.

UU. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2021-005, are incorporated by reference herein.

VV. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2021-008, are incorporated by reference herein.

WW. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-001, are incorporated by reference herein.

XX. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-003, are incorporated by reference herein.

YY. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-006, are incorporated by reference herein.

ZZ. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-0010, are incorporated by reference herein.

[AAA. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-011, are incorporated by reference herein.](#)

[\(Ord. 2022-011 §2, 2022;](#) Ord. 2022-0010 §2, 2022; Ord. 2022-006 §2, 2022; Ord. 2022-003 §2, 2022; Ord. 2022-001 §1, 2022; Ord. 2021-008 §1; Ord. 2021-005 §1, 2021; Ord. 2021-002§3, 2020; Ord. 2020-013§1, 2020; Ord. 2020-009§1, 2020; Ord. 2020-006§1, 2020; Ord. 2020-007§1, 2020; Ord. 2020-008§1, 2020; Ord. 2020-003 §1, 2020; Ord. 2020-002 §1, 2020; Ord. 2020-001 §26, 2020; Ord. 2019-019 §2, 2019; Ord. 2019-016 §3, 2019; Ord. 2019-006 § 1, 2019; Ord. 2019-011 § 1, 2019; Ord. 2019-004 §1, 2019; Ord. 2019-003 §1, 2019; Ord. 2019-001 §1, 2019; Ord. 2019-002 §1, 2019; Ord. 2018-008 §1, 2018; Ord. 2018-005 §2, 2018; Ord. 2018-011 §1, 2018; Ord. 2018-006 §1, 2018; Ord. 2018-002 §1, 2018; Ord. 2017-007 §1, 2017; Ord. 2016-029 §1, 2016; Ord. 2016-027 §1, 2016; Ord. 2016-005 §1, 2016; Ord. 2016-022 §1, 2016; Ord. 2016-001 §1, 2016; Ord. 2015-010 §1, 2015; Ord. 2015-018 § 1, 2015; Ord. 2015-029 § 1, 2015; Ord. 2015-021 § 1, 2015; Ord. 2014-027 § 1, 2014; Ord. 2014-021 §1, 2014; Ord. 2014-12 §1, 2014; Ord. 2014-006 §2, 2014; Ord. 2014-005 §2, 2014; Ord. 2013-012 §2, 2013; Ord. 2013-009 §2, 2013; Ord. 2013-007 §1, 2013; Ord. 2013-002 §1, 2013; Ord. 2013-001 §1, 2013; Ord. 2012-016 §1, 2012; Ord. 2012-013 §1, 2012; Ord. 2012-005 §1, 2012; Ord. 2011-027 §1 through 12, 2011; Ord. 2011-017 repealed; Ord.2011-003 §3, 2011)

Click here to be directed to the Comprehensive Plan (<http://www.deschutes.org/compplan>)

Section 5.12 Legislative History

Background

This section contains the legislative history of this Comprehensive Plan.

Table 5.12.1 Comprehensive Plan Ordinance History

Ordinance	Date Adopted/ Effective	Chapter/Section	Amendment
2011-003	8-10-11/11-9-11	All, except Transportation, Tumalo and Terrebonne Community Plans, Deschutes Junction, Destination Resorts and ordinances adopted in 2011	Comprehensive Plan update
2011-027	10-31-11/11-9-11	2.5, 2.6, 3.4, 3.10, 3.5, 4.6, 5.3, 5.8, 5.11, 23.40A, 23.40B, 23.40.065, 23.01.010	Housekeeping amendments to ensure a smooth transition to the updated Plan
2012-005	8-20-12/11-19-12	23.60, 23.64 (repealed), 3.7 (revised), Appendix C (added)	Updated Transportation System Plan
2012-012	8-20-12/8-20-12	4.1, 4.2	La Pine Urban Growth Boundary
2012-016	12-3-12/3-4-13	3.9	Housekeeping amendments to Destination Resort Chapter
2013-002	1-7-13/1-7-13	4.2	Central Oregon Regional Large-lot Employment Land Need Analysis
2013-009	2-6-13/5-8-13	1.3	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2013-012	5-8-13/8-6-13	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Bend Urban Growth Boundary
2013-007	5-29-13/8-27-13	3.10, 3.11	Newberry Country: A Plan for Southern Deschutes County

2013-016	10-21-13/10-21-13	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Sisters Urban Growth Boundary
2014-005	2-26-14/2-26-14	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Bend Urban Growth Boundary
2014-012	4-2-14/7-1-14	3.10, 3.11	Housekeeping amendments to Title 23.
2014-021	8-27-14/11-25-14	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Sunriver Urban Unincorporated Community Forest to Sunriver Urban Unincorporated Community Utility
2014-021	8-27-14/11-25-14	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Sunriver Urban Unincorporated Community Forest to Sunriver Urban Unincorporated Community Utility
2014-027	12-15-14/3-31-15	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Industrial
2015-021	11-9-15/2-22-16	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Surface Mining.
2015-029	11-23-15/11-30-15	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Tumalo Residential 5-Acre Minimum to Tumalo Industrial
2015-018	12-9-15/3-27-16	23.01.010, 2.2, 4.3	Housekeeping Amendments to Title 23.

2015-010	12-2-15/12-2-15	2.6	Comprehensive Plan Text and Map Amendment recognizing Greater Sage-Grouse Habitat Inventories
2016-001	12-21-15/04-5-16	23.01.010; 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from, Agriculture to Rural Industrial (exception area)
2016-007	2-10-16/5-10-16	23.01.010; 5.10	Comprehensive Plan Amendment to add an exception to Statewide Planning Goal II to allow sewers in unincorporated lands in Southern Deschutes County
2016-005	11-28-16/2-16-17	23.01.010, 2.2, 3.3	Comprehensive Plan Amendment recognizing non-resource lands process allowed under State law to change EFU zoning
2016-022	9-28-16/11-14-16	23.01.010, 1.3, 4.2	Comprehensive plan Amendment, including certain property within City of Bend Urban Growth Boundary
2016-029	12-14-16/12/28/16	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from, Agriculture to Rural Industrial
2017-007	10-30-17/10-30-17	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2018-002	1-3-18/1-25-18	23.01, 2.6	Comprehensive Plan Amendment permitting churches in the Wildlife Area Combining Zone

2018-006	8-22-18/11-20-18	23.01.010, 5.8, 5.9	Housekeeping Amendments correcting tax lot numbers in Non-Significant Mining Mineral and Aggregate Inventory; modifying Goal 5 Inventory of Cultural and Historic Resources
2018-011	9-12-18/12-11-18	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2018-005	9-19-18/10-10-18	23.01.010, 2.5, Tumalo Community Plan, Newberry Country Plan	Comprehensive Plan Map Amendment, removing Flood Plain Comprehensive Plan Designation; Comprehensive Plan Amendment adding Flood Plain Combining Zone purpose statement.
2018-008	9-26-18/10-26-18	23.01.010, 3.4	Comprehensive Plan Amendment allowing for the potential of new properties to be designated as Rural Commercial or Rural Industrial
2019-002	1-2-19/4-2-19	23.01.010, 5.8	Comprehensive Plan Map Amendment changing designation of certain property from Surface Mining to Rural Residential Exception Area; Modifying Goal 5 Mineral and Aggregate Inventory; Modifying Non-Significant Mining Mineral and Aggregate Inventory
2019-001	1-16-19/4-16-19	1.3, 3.3, 4.2, 5.10, 23.01	Comprehensive Plan and Text Amendment to add a new zone to Title 19: Westside Transect Zone.

2019-003	02-12-19/03-12-19	23.01.010, 4.2	Comprehensive Plan Map Amendment changing designation of certain property from Agriculture to Redmond Urban Growth Area for the Large Lot Industrial Program
2019-004	02-12-19/03-12-19	23.01.010, 4.2	Comprehensive Plan Map Amendment changing designation of certain property from Agriculture to Redmond Urban Growth Area for the expansion of the Deschutes County Fairgrounds and relocation of Oregon Military Department National Guard Armory.
2019-011	05-01-19/05-16/19	23.01.010, 4.2	Comprehensive Plan Map Amendment to adjust the Bend Urban Growth Boundary to accommodate the refinement of the Skyline Ranch Road alignment and the refinement of the West Area Master Plan Area I boundary. The ordinance also amends the Comprehensive Plan designation of Urban Area Reserve for those lands leaving the UGB.
2019-006	03-13-19/06-11-19	23.01.010,	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2019-016	11-25-19/02-24-20	23.01.01, 2.5	Comprehensive Plan and Text amendments incorporating language from DLCD's 2014 Model Flood Ordinance and Establishing a purpose statement for the Flood Plain Zone.

2019-019	12-11-19/12-11-19	23.01.01, 2.5	Comprehensive Plan and Text amendments to provide procedures related to the division of certain split zoned properties containing Flood Plain zoning and involving a former or piped irrigation canal.
2020-001	12-11-19/12-11-19	23.01.01, 2.5	Comprehensive Plan and Text amendments to provide procedures related to the division of certain split zoned properties containing Flood Plain zoning and involving a former or piped irrigation canal.
2020-002	2-26-20/5-26-20	23.01.01, 4.2, 5.2	Comprehensive Plan Map Amendment to adjust the Redmond Urban Growth Boundary through an equal exchange of land to/from the Redmond UGB. The exchange property is being offered to better achieve land needs that were detailed in the 2012 SB 1544 by providing more development ready land within the Redmond UGB. The ordinance also amends the Comprehensive Plan designation of Urban Area Reserve for those lands leaving the UGB.
2020-003	02-26-20/05-26-20	23.01.01, 5.10	Comprehensive Plan Amendment with exception to Statewide Planning Goal 11 (Public Facilities and Services) to allow sewer on rural lands to serve the City of Bend Outback Water Facility.

2020-008	06-24-20/09-22-20	23.01.010, Appendix C	Comprehensive Plan Transportation System Plan Amendment to add roundabouts at US 20/Cook-O.B. Riley and US 20/Old Bend-Redmond Hwy intersections; amend Tables 5.3.T1 and 5.3.T2 and amend TSP text.
2020-007	07-29-20/10-27-20	23.01.010, 2.6	Housekeeping Amendments correcting references to two Sage Grouse ordinances.
2020-006	08-12-20/11-10-20	23.01.01, 2.11, 5.9	Comprehensive Plan and Text amendments to update the County's Resource List and Historic Preservation Ordinance to comply with the State Historic Preservation Rule.
2020-009	08-19-20/11-17-20	23.01.010, Appendix C	Comprehensive Plan Transportation System Plan Amendment to add reference to J turns on US 97 raised median between Bend and Redmond; delete language about disconnecting Vandevent Road from US 97.
2020-013	08-26-20/11/24/20	23.01.01, 5.8	Comprehensive Plan Text And Map Designation for Certain Properties from Surface Mine (SM) and Agriculture (AG) To Rural Residential Exception Area (RREA) and Remove Surface Mining Site 461 from the County's Goal 5 Inventory of Significant Mineral and Aggregate Resource Sites.
2021-002	01-27-21/04-27-21	23.01.01	Comprehensive Plan Map Designation for Certain Property from Agriculture (AG) To Rural Industrial (RI)

2021-005	06-16-21/06-16-21	23.01.01, 4.2	Comprehensive Plan Map Amendment Designation for Certain Property from Agriculture (AG) To Redmond Urban Growth Area (RUGA) and text amendment
2021-008	06-30-21/09-28-21	23.01.01	Comprehensive Plan Map Amendment Designation for Certain Property Adding Redmond Urban Growth Area (RUGA) and Fixing Scrivener’s Error in Ord. 2020-022
2022-001	04-13-22/07-12-22	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture (AG) to Rural Residential Exception Area (RREA)
2022-003	04-20-22/07-19-22	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture (AG) to Rural Residential Exception Area (RREA)
2022-006	06-22-22/08-19-22	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Rural Residential Exception Area (RREA) to Bend Urban Growth Area
2022-010	07-27-22/10-25-22	23.01.010	Comprehensive Plan Map Designation for Certain Property from Agriculture (AG) To Rural Industrial (RI)
<u>2022-011</u>	<u>TBD</u>	<u>23.01.010</u>	<u>Comprehensive Plan Map Designation for Certain Property from Agriculture (AG) to Rural Industrial (RI)</u>

Exhibit "F" - Ordinance 2022-011

**BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

FILE NUMBERS: 247-21-0000881-PA/882-ZC

APPLICANT: LBNW LLC
c/o Jake Hermeling
65315 Hwy 97
Bend, OR 97701

OWNERS: Taxlots 1612230000305 ("Taxlot 305") & 1612230000500 ("Taxlot 500")
LBNW LLC
65314 Hwy 97
Bend, OR 97701

Taxlot 1612230000301 ("Taxlot 301")
Dwight E. & Marilee R. Johnson
18550 Walton Road
Bend, OR 97701

APPLICANT'S ATTORNEY: Ken Katzaroff
D. Adam Smith
Schwabe, Williamson & Wyatt, P.C.
360 SW Bond Street, Suite 500
Bend, OR 97702

STAFF PLANNER: Tarik Rawlings, Associate Planner
tarik.rawlings@deschutes.org, 541-317-3148

REQUEST: 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 zoning map amendment to change the zoning of the properties from Exclusive Farm Use - Tumalo/Redmond/Bend subzone (EFU-TRB) to Rural Industrial (RI)

LOCATION: Taxlot 305 (3.00 acres) - 65301 Hwy 97, Bend, OR 97701
Taxlot 301 (15.06 acres) - 65305 Hwy 97, Bend, OR 97701
Taxlot 500 (1.06 acres) - 65315 Hwy 97, Bend, OR 97701

I. FINDINGS OF FACT:

A. Incorporated Findings of Fact: The Findings of Fact from the Hearings Officer’s decision and recommendation dated July 12, 2022 and adopted as Exhibit G of this ordinance (cited herein as “Hearings Officer Decision”), is hereby incorporated as part of this decision, except to the extent said findings are inconsistent with the supplemental findings and conclusions of law herein, and except as modified below. The Board further adopts as its own all Hearings Officer interpretations of the Deschutes County Code (“DCC”) and Deschutes County Comprehensive Plan (“DCCP”), except to the extent said interpretations are inconsistent with the Board’s interpretations set forth herein, and except as modified below. The Board corrects and modifies the Hearings Officer Decision as follows:

1. Amend the enumerated “Request” on page 1 as follows (deletions ~~struck through~~; additions underlined):

“The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the property from Agricultural (AG) to ~~Rural Residential Exception Area (RREA)~~ Rural Industrial Area (RIA). The applicant also requests approval of a corresponding Zone Change to rezone the property from Exclusive Farm Use (EFU) to ~~Multiple Use Agricultural (MUA-10)~~ Rural Industrial (RI). The applicant requests approval of the applications without the necessity for a Statewide Planning Goal 3 and/or a Goal 14 Exception, but includes an application for a Goal 14 Exception in the alternative, if determined to be necessary for approval of the requested PAPA and Zone Change”

B. Procedural History: Deschutes County’s land use Hearings Officer conducted the initial public hearing regarding the LBNW LLC comprehensive plan amendment / zone change application on April 26, 2022. At the conclusion of the hearing, the Hearings Officer closed the hearing for oral testimony but left the written record open until June 7, 2022. On May 19, 2022, the Hearings Officer issued an order extending the written record period until June 14, 2022. On July 12, 2022, the Hearings Officer issued a written decision recommending approval of the applications by the Deschutes County Board of County Commissioners (“County Commissioners” or “Board”).

The Board conducted a *de novo* land use hearing on September 7, 2022, at the conclusion of which the Board closed the hearing for both oral and written testimony. The Board deliberated and a majority of the commissioners voted to approve the applications on September 28, 2022.

C. Deschutes County Land Use Regulations: The DCCP and Title 18 of the DCC were acknowledged by the Land Conservation and Development Commission (“LCDC”) as

being in compliance with every statewide planning goal, including Goal 14. The County amended the DCC and its DCCP in 2002 (Ordinances 2002-126 and 2002-127) in response to LCDC’s Unincorporated Communities Rule. Those 2002 ordinances ensured that areas zoned Rural Industrial (“RI”) and Rural Commercial (“RC”) “remain rural” by “allow[ing] fewer uses and smaller industrial structures * * *.” *Central Oregon LandWatch v. Deschutes County*, 75 Or LUBA 253, 257, *aff’d*, 298 Or App 375, 449 P3d 534 (2019). LCDC acknowledged those 2002 ordinances as compliant with every statewide planning goal, including Goal 14.

In 2018, the County amended the DCCP (Ordinance 2018-008) to allow the RI designation and zoning to be applied to land outside of existing exception areas. On appeal, the Land Use Board of Appeals (“LUBA”) upheld that 2018 ordinance, finding – in part – that the appellant’s argument that the County’s RI zone regulations violated Goal 14 by allowing urban uses on rural lands was an impermissible collateral attack on acknowledged land use regulations. *Id.* at 260-61. LCDC acknowledged that 2018 ordinance as compliant with every statewide planning goal, including Goal 14.

II. ADDITIONAL FINDINGS AND CONCLUSIONS OF LAW:

The Board of County Commissioners approves the requested plan designations and zone change applications and provides the following supplemental findings and conclusions of law, organized in the same manner as the “Board Deliberation Matrix” presented by County staff during the September 28, 2022 deliberations.

A. Goal 14 and the Shaffer Factors; Board Deliberation Matrix Issues 1 and 2.

Opponents Central Oregon LandWatch (“COLW”) and 1000 Friends of Oregon (“1000 Friends”) argued that the subject applications could not be approved without an exception to Goal 14. The Hearings Officer disagreed, concluding that the applications complied with Goal 14 without an exception. The Board agrees with the Hearings Officer, and adopts the Hearings Officer’s findings on this issue as our own. The Board further adopts the following supplemental findings to clarify two persistent issues that arose in these proceedings.

The RI Zone Does Not Allow Urban Uses On Rural Lands

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). 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)]."

"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 and 3.4.31) 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.

The *Shaffer* Factors Are Inapplicable

Second, 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."¹

¹ On the narrow issue of the *Shaffer* factors' applicability, the Hearings Officer generally agreed with 1000 Friends argument. See Hearings Officer Recommendation, pg 39.

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.

B. Goal 5 Compliance; Board Deliberation Matrix Issue 3

COLW initially argued in its May 31, 2022 submittal that the subject application violates Goal 5 because the map amendment / zone change will introduce new "conflicting uses" – i.e. those uses allowed in the RI zone – on properties governed by the County's Landscape Management Combining Zone. The Landscape Management Combining Zone was adopted as part of the County's Goal 5 program to protect scenic resources in Deschutes County.

COLW's May 31 submittal included as an attachment a copy of Ordinance No 92-05 initially codifying the County's Landscape Management Combining Zone as part of DCC Chapter 18.84. COLW renewed its Goal 5 argument in a September 7, 2022 letter provided to this Board (cited herein as "COLW Sep 7 Letter").

Applicant responded to COLW's argument with a record submittal dated June 7, 2022, and in its final legal argument before the Hearings Officer, dated June 14, 2022. Therein, Applicant argued that the uses allowed by the RI zone are not new "conflicting uses" because the County's original "economic, social, environmental, and energy" ("ESEE") analysis adopted as part of Ordinance No 92-05 specifically considered all "Development within the one-quarter mile overlay zone which would excessively interfere with the scenic or natural appearance of the landscape as seen from the road or alteration of the existing landscape by removal of vegetative cover." Stated simply, Applicant argued that uses allowed by the RI zone were not new conflicting uses because they were implicitly already considered by Ordinance No 92-05 as uses that could "excessively interfere with the scenic or natural appearance of the landscape as seen from the road."

The Hearings Officer agreed with Applicant's argument and added findings noting that "the proposed plan amendment and zone change does not remove the subject property from the [Landscape Management Combining Zone] and thus does not change or diminish the protection afforded to Goal 5 resources on the property, specifically the [Landscape Management] designations of lands within ¼ mile from the centerline of Highway 97."² The Landscape Management Combining Zone will still overlay portions of the subject properties despite changes to the applicable base zoning. Accordingly, the RI base zone would not alter the requirement pursuant to DCC 18.84.050(A) that "any new structure or substantial exterior alteration of a structure requiring a building permit or an agricultural structure within [the Landscape Management Combining Zone] shall obtain site plan approval in accordance with DCC 18.84 prior to construction."

The Board agrees with the arguments and analysis set forth by both Applicant and the Hearings Officer, and thereby adopts and incorporates those arguments as our findings.

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C. Transportation Impacts; Board Deliberation Matrix Issue 4.

COLW objects that a "trip cap," first proposed by Applicant and then imposed by the Hearings Officer, will not adequately limit the traffic entering and exiting the subject property. See COLW Sep 7 Letter, pg 10. Citing both Goal 12 (as implemented by OAR 660-012-0060) and DCC 18.136.020(C) (requiring the map amendment / zone change to be in the "public interest"), the main thrust of this traffic argument stems from COLW's assertion

² 247-21-000881-PA, 882-ZC Hearings Officer Recommendation pg. 83

that “[t]he record shows that a ‘trip cap’ will be inadequate to prevent significant effects to an existing transportation facility.” See COLW Sep 7 Letter, pg 10. The Board agrees with COLW that this issue requires an evaluation of the substantial evidence in the record. But the Board disagrees that the record in this case supports COLW’s conclusion.

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 660-012-0060 implementing Goal 12, and/or DCC 18.136.020(C).

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D. Goal 3 Compliance and Order 1 Soil Survey Validity; Board Deliberation Matrix Issue 5.

COLW raised numerous arguments directly or indirectly invoking Goal 3, each of which are addressed below.

Legal Challenge:

COLW’s Goal 3 legal challenge can be easily dismissed. This Board has repeatedly found that an applicant can rely on a site-specific soil survey when applying for a map amendment / zone change. That practice is supported by state statutes (See, e.g. ORS 215.211 (1) and (5)), state rules (See OAR 660-033-0030(5) and 660-033-0045), and case law (See, e.g., *Central Oregon LandWatch v. Deschutes County*, 74 Or LUBA 156 (2016)). COLW’s September 7 letter conceded that the aforementioned *Central Oregon LandWatch v.*

Deschutes County decision stands in direct opposition to its legal position asserted before this Board, arguing that the aforementioned case “was incorrectly decided and should be overturned.” See COLW Sep 7 Letter, pg 3. The County is not in a position to “overturn” LUBA. The Board’s findings and conclusions herein follow applicable law.

Substantial Evidence Challenge:

COLW’s substantial evidence argument with regard to Goal 3 raised in its September 7 letter is an entirely new argument not addressed by the Hearings Officer and thereby requiring more substantive findings from this Board. However, COLW’s new Goal 3 argument is similar to its Goal 12 argument discussed above in that COLW failed to provide any expert testimony to support either argument. Enabling “a county to make a better determination of whether land qualifies as agricultural land,” ORS 215.211(1) specifically allowed evidence to be provided into the record for these proceedings consisting of “more detailed soils information than that contained in the Web Soil Survey operated by the United States Natural Resources Conservation Service.” However, ORS 215.211(1)(a) further provides that such evidence must be prepared by a “professional soil classifier” “certified by and in good standing with the Soil Science Society of America.” See, also OAR 660-033-0045(1) and (2). The record demonstrates that Applicant’s soil expert, Gary A. Kitzrow, possess the qualifications required by ORS 215.211 and OAR 660-033-0045(1) and (2). The record does not include similar evidence demonstrating that COLW’s staff member who provided contrary soil testimony before this Board likewise possesses the requisite qualifications as required by ORS 215.211(1)(a) and OAR 660-033-0045(1) and (2).

As COLW’s staff member was not qualified to provide such testimony, the Board can likely entirely disregard COLW’s September 7 letter attempting to discredit Applicant’s Order 1 Soil Surveys. The Board nevertheless still examined that testimony and finds it unpersuasive. Applicant’s expert’s Order 1 Soil Studies show that 53.1% of the 15.06 acre Taxlot 301, 87.7% of the 3.00 acre Taxlot 305, and 87.7% of the 1.06 acre Taxlot 500 consist of generally unsuitable soils. COLW challenges the methodology utilized to calculate those percentages, arguing that the acreage under a canal crossing two of the three subject properties should be excluded because including the canal acreage “artificially increased the denominator in [the Order 1 Soils studies’] calculation of Class I-VI soils.” See COLW Sep 7 Letter, pg 3. Similarly, COLW further argues that Applicant’s “hired soil scientist also improperly exclude[d] land underneath certain developed portions of the subject property.” *Id.* page 4. Last, COLW argues that the entirety of the acreage under the canal and some of the developed acreage should instead be counted as “agricultural land” because those uses fall within the “farm uses” definition pursuant to ORS 215.203(2)(b)(F).

The Board finds that COLW’s argument is not supported by state rules requiring Applicant’s Order 1 Soil Surveys to analyze the “land,” not the current uses of the subject properties. OAR 660-033-0030(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.")

Stated simply, COLW's argument that the canal and developed acreage should be ignored in its entirety and deducted from the "denominator" violates OAR 660-033-0030(2) because said acreage is clearly still "land within the lot or parcel being inventoried." Similarly, COLW's argument that the canal and developed acreage should be considered "agricultural land" focuses on the current usage of that acreage rather than the "land" itself, again violating OAR 660-033-0030(2). The current usage of the canal and developed acreage are certainly relevant to the broader determination if the subject properties are "suitable for farm use." On that point, 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. Returning to the actual "scientific soil classification," COLW's reliance on those other factors to try and undermine Applicant's Order 1 Soils Surveys is not persuasive to the Board.

As the only party to offer testimony from a qualified expert, the substantial evidence in the record favors the Applicant. But the Board is nevertheless further persuaded by the fact that the Department of Land Conservation and Development ("DLCD") performed a "completeness check" on all three Order 1 Soil Surveys in this case pursuant to OAR 660-033-0045(6)(a). Each Order 1 Soil Survey contains the same DLCD certification confirming that the "soils assessment is complete and consistent with reporting requirements for agricultural soils capability." OAR 660-033-0045(4)(b) further requires "[a] soils assessment that is soundly and scientifically based and that meets reporting requirements as established by [DLCD]." If the Order 1 Soil Surveys in this case were not "soundly and scientifically based" – which is the main thrust of COLW's arguments – the Board trusts that DLCD's certification process would have called that issue to our attention. DLCD did not do so, and it is reasonable to rely upon Applicant's Order 1 Soil Survey and DLCD's acceptance of that survey.

Finally, the Board is persuaded by testimony offered by Kitzrow, Applicant's expert, during the September 7, 2022 public hearing. Responding directly to COLW's September 7 written and oral testimony, Kitzrow explained why the acreage labelled as "impact areas" or "infrastructure" in his Order 1 Surveys were so labelled. Specifically, Kitzrow testified that he classified that acreage as something other than Class I-VI soils because the rehabilitation of those previously developed (or still developed) areas was not practical or economical. For example, the Order 1 Soils Surveys for Taxlot 305 more fully explains that past development of the subject property in essence destroyed the minimal amounts of original, native soil. When it comes to the canal acreage on two of the three subject properties, the development of the canal decades ago impacted any potential Class I-VI soils within that acreage in the same manner. The Board notes that pursuant to the "Agricultural Land" definition in OAR 660-033-0020(1)(a)(A), Kitzrow's charge was specifically

to identify if the properties contained “predominantly Class I-VI soils.” Rather than fixating on the obviously impacted areas, Kitrow’s focus was accordingly on determining the maximum extent of the Class I-VI soils remaining on the properties. That is precisely what Kitrow did as evidenced by that fact that the majority of the 22 test pits spread across the 19.12 total acres were in areas of the properties that Kitrow’s initial assessment suggested the desired soils would be contained. The Board finds Mr. Kitrow is a competent expert and has no reason to doubt the conclusions contained in each of the Order 1 Soils Surveys.

Consistent with those Order 1 Soil Surveys, the Board finds that only 46.9% of Taxlot 301, 18.7% of Taxlot 305, and 12.3% of Taxlot 500 are comprised of Class I-VI soils. The Board further finds that the soil on these three properties are uniquely poor such that even with supplemental irrigation water, the soils on all three properties are predominantly Class VII and VIII.

Miscellaneous Arguments:

In addition to its Goal 3 legal challenge and substantial evidence argument, COLW raised several other arguments, each of which were not persuasive and thereby can be addressed summarily.

The Hearing Officer Decision, (pg 38), set forth detailed findings rejecting COLW’s argument that the County’s definition of “agricultural use” in DCC 18.04.030 is intended to be more stringent than case law and the state’s definition of agricultural land in OAR 660-033-0020(1)(a) because the County’s “agricultural use” definition includes the term “whether for profit or not.” COLW renewed this argument in its September 7 letter. The Board rejects this argument for the same reasons as set forth in the Hearings Officer Decision and notes that DCC 18.04.030 includes a definition of “agricultural land” which is entirely consistent with the state definition of the same term. The Board further notes that the term “agricultural use” is purposely and specifically used throughout the DCC, for example (but not limited to) DCC 18.16.050(G)(1)(a)(4) with regard to buffering non-farm dwellings, DCC 18.32.020 establishing uses permitted outright in the multiple use agricultural zone, and DCC 18.52.110(J)(2) imposing limitations on drilling and blasting for surface mining activity. The Board concurs with the Hearings Officer’s interpretations and findings on this issue, and specifically adopts those interpretations and findings as our own.

COLW also argues that the subject properties are currently in farm use because the canal on two of the three properties is a “water impoundment.” See COLW Sep 7 Letter, pgs 8-9. As previously noted, the Board agrees with and adopts the Hearings Officer’s findings regarding OAR 660-033-0020(1)(a) as the Board’s own findings, except to the extent inconsistency with the findings set forth herein.

Although only indirectly related to Goal 3, the Board notes COLW’s new argument in its September 7 letter regarding DCCP Policy 2.5.24 and water use on the subject properties. The Board agrees with and incorporates the Hearing Officer’s findings on that issue (See

Hearings Officer Decision, pgs 58-59), noting that the proposed map amendment / zone change application does not yet propose a specific development at this time and that this policy will be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat).

Also only indirectly related to Goal 3, the Board notes that COLW renewed in its September 7 letter a persistent argument suggesting that Order 1 Soil Surveys do not constitute a “change in circumstances” as required for a map amendment / zone change application pursuant to DCC 18.136.020(D). The Board again agrees with the Hearings Officer’s findings and interpretation on this issue, which specifically note that the Order 1 Soil Surveys were just one of several enumerated “changes in circumstances.” See Hearings Officer Decisions, pgs 50-54. Accordingly, the Board finds that the availability of more accurate Order 1 Soils Surveys constitutes a “change in circumstances” pursuant to DCC 18.136.020(D).

E. DCC 22.20.015 Code Enforcement and Land Use; Board Deliberation Matrix Issue 6.

Although not raised by COLW’s September 7 letter submitted to this Board, County staff asked during the Board’s September 28, 2022 deliberations that the Board address COLW’s previous argument regarding DCC 22.20.015. The Board affirms that the Hearings Officer’s findings on this issue (See Hearing Officer Decision, pg 43) are consistent with the Board’s past interpretations of DCC 22.20.015.

IV. DECISION:

Based upon the foregoing Findings of Fact and Conclusions of Law, the Board of County Commissioners hereby **APPROVES** Applicant’s applications for a DCCP amendment to re-designate the subject properties from Agriculture (AG) to Rural Industrial Area (RI) and a corresponding zone map amendment to change the zoning of the properties from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial (RI) subject to the following conditions of approval:

1. 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.

Dated this ____ day of ____, 2022

Exhibit "G" to Ord. 2022-011

**DECISION AND RECOMMENDATION
OF THE DESCHUTES COUNTY HEARINGS OFFICER**

FILE NUMBERS: 247-21-0000881-PA/882-ZC

OWNER: Mailing Name: LBNW LLC
Map and Taxlot: 1612230000305
Account: 164853
Situs Address: 65301 N HWY 97, BEND,
OR 97701

Mailing Name: LBNW LLC
Map and Taxlot: 1612230000500
Account: 132821
Situs Address: 65315 HWY 97, BEND, OR 97701

Mailing Name: JOHNSON, DWIGHT E
& MARILEE R
Map and Taxlot: 1612230000301
Account: 132822
Situs Address: 65305 HWY 97, BEND,
OR 97701

APPLICANT: LBNW, LLC
c/o Jake Hermeling
65315 Hwy 97
Bend, OR 97701

**APPLICANT'S
ATTORNEY:** Ken Kataroff
Schwabe, Williamson & Wyatt P.C.
360 SW Bond Street, Suite 500
Bend, OR 97702

REQUEST: The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the property from Agricultural (AG) to Rural Residential Exception Area (RREA). The applicant also requests approval of a corresponding Zone Change to rezone the property from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA-10). The applicant requests approval of the applications without the necessity for a Statewide Planning Goal 3 and/or a Goal 14 Exception, but includes an application for a Goal 14 Exception in the alternative, if determined to be necessary for approval of the requested PAPA and Zone Change

STAFF CONTACT: Tarik Rawlings, Associate Planner
Phone: 541-317-3148
Email: Tarik.Rawlings@deschutes.org

PUBLIC HEARING DATE: April 26, 2022
RECORD CLOSED: June 14, 2022
HEARINGS BODY: Stephanie Marshall, Deschutes County Hearings Officer
DECISION DATE: July 12, 2022

I. APPLICABLE CRITERIA

Title 18 of the Deschutes County Code, the County Zoning Ordinance:

- Chapter 18.04, Title, Purpose, and Definitions
- Chapter 18.16, Exclusive Farm Use Zones (EFU)
- Chapter 18.80, Airport Safety Combining Zone (AS)
- Chapter 18.100, Rural Industrial Zone (RI)
- 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 4, Interpretation of Goal 2 Exception
- Process Division 6, Forest Lands
- Division 12, Transportation Planning
- Division 14, Application of the Statewide Planning Goals to Newly Incorporated Cities, Annexation, and Urban Development on Rural Lands
- Division 15, Statewide Planning Goals and Guidelines
- Division 33, Agricultural Land

Oregon Revised Statutes (ORS)

- Chapter 197.732, Goal Exceptions
- Chapter 197.734, Exceptions to Certain Statewide Planning Goal Criteria
- Chapter 215.010, Definitions
- Chapter 215.211, Agricultural Land, Detailed Soils Assessment

II. BASIC FINDINGS

LOT OF RECORD: Tax Lot 500 is 1.06 acres in size, Tax Lot 305 is 3.00 acres in size, and Tax Lot 301 is 15.06 acres in size. These three lots have not previously been verified as legal lots of record. Per DCC 22.04.040 Verifying Lots of Record, lot of record verification is required for certain permits:

B. *Permits requiring verification*

1. *Unless an exception applies pursuant to subsection (B)(2) below, verifying a lot parcel pursuant to subsection (C) shall be required to the issuance of the following permits:*

- a. **Any land use permit for a unit of land in the Exclusive Farm Use Zones (DCC Chapter 18.16), Forest Use Zone – F1 (DCC Chapter 18.36), or Forest Use Zone – F2 (DCC Chapter 18.40);**
- b. **Any permit for a lot or parcel that includes wetlands as show on the Statewide Wetlands Inventory;**
- c. **Any permit for a lot or parcel subject to wildlife habitat special assessment;**
- d. **In all zones, a land use permit relocating property lines that reduces in size a lot or parcel'**
- e. **In all zones, a land use, structural, or non-emergency on-site sewage disposal system permit if the lot or parcel is smaller than the minimum area required in the applicable zone;**

In the Powell/Ramsey (PA-14-2, ZC-14-2) decision, the Hearings Officer held to a prior Zone Change Decision (Belveron ZC-08-04) that a property’s lot of record status was not required to be verified as part of a plan amendment and zone change application. Rather, the Applicant would be required to receive lot of record verification prior to any development on the subject property. The Hearings Officer adheres to these prior decisions and finds this criterion does not apply.

SITE DESCRIPTION: The subject properties are located approximately 4.8 miles south of the City of Redmond and approximately 4.25 miles north of the City of Bend. The three subject Tax Lots (301, 305, and 500) constitute a total of approximately 19.12 contiguous acres and are located on the west side of Highway 97, immediately adjacent to the highway.

Tax Lot 301 (15.06 acres) is landlocked between Tax Lots 305 (3.00 acres) and 500 (1.06 acres) to the south. Highway 97 corridor, a Central Oregon Irrigation District (COID) canal, and two (2) Exclusive Farm Use (EFU) properties currently receiving farm tax deferral are located to the east. A rural residential subdivision is located to the west.

Tax Lots 305 and 500 are developed with structures associated with a historic “diesel implement and repair shop” use on those properties, which has taken place for the majority of the last 40 years. Tax Lot 301 is developed with a residential manufactured dwelling that is currently unoccupied; this Tax Lot is not currently in use. The properties are relatively level with mild undulating topography and a slight upward slope along the western boundary adjoining the residential subdivision to the west. Vegetation consists of juniper, sage brush, and grasses. The subject properties are not currently receiving farm tax deferral nor are they currently engaged in farm use.

Access to the site is provided from Highway 97, which connects to a private driveway that traverses the COID irrigation canal that runs through the properties.

Tax Lots 305 and 301 contain 0.20 acres and 2.70 acres of water rights, respectively. The Natural Resources Conservation Service (NRCS) map shown on the County’s GIS

mapping program identifies three soil complex units on the property: 31A, Deschutes sandy loam, 0 to 3 percent slopes; 38B, Deskamp-Gosney complex, 0 to 8 percent slopes; and 58C, Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes.

As discussed in detail below in the Soils section, an Agricultural Soils Capability Assessment (Order 1 soil survey) was conducted on each of the three properties and determined that the subject properties do 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 Deschutes County Code (DCC) and DLCD definitions.

PROPOSAL: The Applicant requests approval of a Comprehensive Plan Map Amendment to change the designation of the subject property from Agricultural (AG) designation to a Rural Industrial (RI) designation. The Applicant also requests approval of a corresponding Zoning Map Amendment to change the zoning of the subject property from Exclusive Farm Use (EFU) to Rural Industrial (RI). The Applicant asks that Deschutes County 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 and historical uses utilized on the subject properties may be allowed under the RI Zone. The Applicant's submitted burden of proof states that the Applicant intends to utilize the subject properties to develop a mini-storage facility on Tax Lot 301 (a conditional use within the RI Zone) and maintain the existing equipment repair/storage/rental facilities located on Tax Lots 305 and 500 (an outright use within the RI Zone).

The Applicant requests approval of the applications without the necessity for a Statewide Planning Goal 3 and/or a Goal 14 Exception, but includes an application for a Goal 14 Exception in the alternative, if determined to be necessary for approval of the requested PAPA.

Submitted with the application are three (3) Order 1 Soil Surveys for each of the three (3) subject properties, titled "Johnson – Order 1 Soil Survey Report" (Tax Lot 301), "LBNW LLC – Order 1 Soil Survey Report" (Tax Lot 305), and "LBNW LLC – Order 1 Soil Survey Report" (Tax Lot 500) (hereafter referred to collectively as the "soil study") prepared by soil scientist Gary Kitzrow, CPSC/CPSS #1741 of Growing Soils Environmental Associates. The Applicant also submitted a traffic analysis prepared by Scott Ferguson of Ferguson & Associate, Inc titled "Site Traffic Report and TPR Assessment for Proposed Zone Change-Deschutes County, OR" hereby referred to as "traffic study." Additionally, the Applicant submitted an application form, a burden of proof statement, and other supplemental materials, all of which are included in the record for the subject applications.

SOILS: Tax Lots 305 and 301 contain 0.20 acres and 2.70 acres of water rights, respectively. The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies three soil complex units on the property: 31A, Deschutes sandy loam, 0 to 3 percent slopes; 38B, Deskamp-Gosney complex, 0 to 8 percent slopes; and 58C, Gosney-Rock outcrop/Deskamp complex, 0 to 15 percent slopes.

The Order 1 soil study was prepared by a certified soils scientist and soil classifier that determined the subject property is predominantly comprised of soils that do not qualify as File Nos. 247-21-000881-PA, 882-ZC

Agricultural Land.¹ The purpose of this soil study was to inventory and assess the soils on the subject property and to provide more detailed data on soil classifications and ratings than is contained in the NRCS soils maps. The NRCS soil map units identified on the property are described below.

31A, Deschutes Sandy Loam, 0 to 3 percent slopes: This soil is composed of 85% Deschutes soil and similar inclusions and 15% contrasting inclusions. The Deschutes soil is well drained with a moderately rapid permeability and an available water capacity of about four (4) inches. The major use of this soil is irrigated cropland and livestock grazing. The soil capability rating for the Deschutes sandy loam soil is 6S when not irrigated and 3S when irrigated. This soil is considered a high value soil when irrigated. Approximately 16.5 percent (Tax Lot 301), 22 percent (Tax Lot 305), and 97.2 percent (Tax Lot 500) of the subject properties are composed of 31A soil, respectively.

38B, Deskamp-Gosney complex, 0 to 8 percent slopes: This soil is composed of 50 percent Deskamp soil and similar inclusions, 35 percent Gosney soil and similar inclusions, and 15 percent contrasting inclusions. The Deskamp soils are somewhat excessively drained with rapid permeability, and an available water capacity of about 3 inches. The Gosney soils are somewhat excessively drained with rapid permeability, and an available water capacity of about 1 inch. The contrasting inclusions contain Clovkamp soils in swales, soils that are very shallow to bedrock, and are on ridges with occasional rock outcrops. The major use of this soil is for livestock grazing. The Deskamp soils have ratings of 6e when unirrigated, and 3e when irrigated. The Gosney soils have ratings of 7e when unirrigated, and 7e when irrigated. This soil type is not considered high-value soil. Approximately 61.4 percent (Tax Lot 301), 47.7 percent (Tax Lot 305), and 2.8 percent (Tax Lot 500) of the subject properties are made up of this soil type, respectively.

58C, Gosney-Rock Outcrop-Deskamp complex, 0 to 15 percent slopes: This soil type is comprised of 50 percent Gosney soil and similar inclusions, 25 percent rock outcrop, 20 percent Deskamp soil and similar inclusions, and 5 percent contrasting inclusions. Gosney soils are somewhat excessively drained with rapid permeability. The available water capacity is about 1 inch. Deskamp soils are somewhat excessively drained with rapid permeability. Available water capacity is about 3 inches. The major use for this soil type is livestock grazing. The Gosney soils have ratings of 7e when unirrigated, and 7e when irrigated. The rock outcrop has a rating of 8, with or without irrigation. The Deskamp soils have ratings of 6e when unirrigated, and 4e when irrigated. Approximately 22.1 percent (Tax Lot 301), and 30.3 percent (Tax Lot 305) of two (2) of the subject properties are made up of this soil type.

The Order 1 soil study includes findings for each of the three tax lots of which the subject property is comprised, set forth below:

- **Tax Lot 301:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney

¹ As defined in OAR 660-033-0020, 660-033-0030.

soil units and less rock. This study area and legal lot of record is comprised of 8.00 acres or 53.1% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCDC definitions.

- **Tax Lot 305:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated). These lithic, entic Gosney soil mapping units are shallow, have extremely restrictive rooting capabilities and low water holding capacities. Conversely, Deskamp and Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. Noteworthy is the fact that along the western boundary and southern boundary of this lot are large inclusions of rubble and rock outcrops. This is found regardless of the associated three soils delineated in this analysis. This study area and legal lot of record is comprised of 2.45 acres or 81.7% of the landbase as generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCDC definitions.
- **Tax Lot 500:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. This study area and legal lot of record is comprised of 0.93 Acres or 87.7% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCDC definitions.

The Hearings Officer notes that, although the Order 1 soil study refers to “legal lot of record,” Lot of Record determination for the subject properties has not been made, nor is such a determination relevant to the subject applications, as discussed above. This Decision and Recommendation shall not constitute verification of or findings on a Lot of Record determination for the subject properties. Further discussion regarding soils is set forth in Section III below.

SURROUNDING LAND USES: The subject properties are surrounded by residential subdivisions to the west, open space state park property to the south, the Highway 97 corridor and two (2) EFU-zoned properties currently receiving farm tax deferral and containing irrigation rights to the east, and one EFU-Zoned property not receiving farm tax deferral or containing irrigation rights to the north. The adjacent properties are outlined below in further detail:

North: North of the subject properties is an area of EFU-zoned property. The adjacent property to the north, Tax Lot 202 (Assessor’s Map 16-12-23) is a 5.63-acre vacant EFU-zoned property without irrigation rights, not currently receiving farm tax deferral, and appears to be currently engaged in residential use.

East: East of the subject properties are two parcels zoned EFU. Tax Lot 300 (Assessor’s Map 16-12-23) is a 21.56-acre parcel developed with a single-family manufactured dwelling, an accessory structure, is partially irrigated, and currently receiving farm tax deferral. Tax Lot 306 (Assessor’s Map 16-12-23) is a 20.54-acre parcel developed with a

single-family dwelling, an accessory structure previously utilized as a medical hardship dwelling, is partially irrigated, and currently receiving farm tax deferral. Additionally, to the east and southeast, is the Highway 97 transportation corridor.

West: West of the subject properties are residential subdivisions zoned Rural Residential (RR10). These include the Whispering Pines Estates Fourth Addition subdivision and the First Addition to Whispering Pines Estates subdivision. Rosengarth Estates and Gardenside PUD in the RS Zone. Northwest is a 2.63-acre parcel zoned RR10 located within the Third Addition to Whispering Pines Estates subdivision.

South: South of the subject properties is a 35.89-acre vacant parcel zoned Open Space & Conservation (OS&C), owned and operated by the Oregon Parks & Recreation Department (OPRD). This property is recognized as Tax Lot 700 (Assessor's Map 16-12-23).

Additionally, along the eastern boundary of Tax Lots 301 and 305, and along the western boundary of Tax Lot 500 is an irrigation canal operated by COID.

LAND USE HISTORY:

- **NCU-73-33:** Non-conforming use approval for a "farm equipment business" on Tax Lot 305. In file NUV-91-1 the Hearings Officer provided the following description of this approval:

On February 27, 1973, Terry Mills applied for, and the Deschutes County Planning Commission approved, an application to expand a nonconforming use (File No. NCU-73-33). The application and attached map indicated the proposed expansion was only for property lying west of the Pilot Butte Canal on what is now Tax Lots 305 and 301. However, the Planning Commission approved Mr. Mills' plan to expand his truck and equipment repair and sales business by adding to the existing structure on the east side of the canal (Tax Lot 500) and/or adding a new building west of the canal (Tax Lot 305), constructing a bridge spanning the canal, and keeping uses on the remainder of the parcels limited to "equipment storage and display and agricultural use." The decision allowed Mr. Mills until January 1, 1985, to complete the approved expansion.

- **Z-78-23:** Zone Change approval from A-1 (Exclusive Agricultural) to A-S (Rural Service Center) • **SP-79-21:** Site plan review for a "diesel implement and repair business" on Tax Lot 500.
- **PL-15:** Deschutes County revised Zoning Ordinance changing the zoning of the subject properties to "EFU-20".
- **NUV-96-1:** Nonconforming use verification review for a commercial use in the EFU Zone on Tax Lot 500, 301 and 305, specifically a "truck, machinery and equipment repair, storage and sales business". This request was denied by the Hearings Officer, who concluded:

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on October 6, 2021, to several public agencies and received the following comments:

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the transmittal materials for 247-21-000881-PA/882-ZC for three properties totaling approximately 19 acres to change the Comprehensive Plan designation from Agriculture to Rural Industrial and the zoning from Exclusive Farm Use (EFU) to Rural Industrial (RI). The properties lie in the Exclusive Farm Use (EFU), Airport Safety (AS), and Landscape Management (LM) zones at 65301, 65305, and 65315 Hwy 97, aka County Assessor's Map 16-12-23, Tax Lot 305, 16-12-23, Tax Lot 301, and 16-1223, Tax Lot 500, respectively.

The submitted traffic analysis by Ferguson & Associates dated Aug. 11, 2021, is deficient in several areas and does not comply with Deschutes County Code (DCC) 18.116.310 or the Transportation Planning Rule (TPR) and is thus unacceptable. Examples of the traffic analysis' deficiencies include the following major areas. DCC 18116.310(E)(4) requires a 20-year timeframe for analysis; the study has no such analysis. The traffic analysis lack any operational analysis, thus making it impossible to determine the before/after volume-capacity ratio of the access, which means it is impossible to determine if the plan amendment/zone change has any significant effect. Without determining if there is a significant effect or not, the traffic analysis does not comply with the TPR at Oregon Administrative Rule (OAR) 660-00120060. The traffic analysis assumes a right-in, right-out access point; yet there is no physical obstruction (pork chop barrier or raised median) restricting moves to RIRO. The property is slightly closer to Bend than Redmond, yet the trip distribution is almost exclusively skewed toward trips being to/from Redmond. Staff finds that a dubious assumption given Redmond's population of roughly 25,000 vs. Bend's roughly 91,000. Staff disagrees with the baseline trip assumptions under the current zoning. In several recent plan amendment/zone changes involving EFU, the current highest trip generator was a single-family home. The traffic analysis should use one of the specific outright permitted uses found in DCC 18.16.020. The current study significantly understates the p.m. peak hour trips of the EFU zoning. The traffic analysis does not include a reasonable worst case scenario of the outright permitted uses under the Rural Industrial zone. If the Applicant believes the traffic analysis is a reasonable-worst case scenario, then the Applicant needs to provide further justification or rationale. The study simply states "...the assumed uses generated more traffic than the site could handle with existing access configurations, no further examination of potential uses was examined." There is no supporting evidence for this claim; nor is there any explanation why the existing access could not be modified to accommodate more traffic. Finally, the traffic study references a potential mini-storage, but there is not a simultaneous site plan submittal for any specific use.

The property accesses US 97, a public highway under the jurisdiction of the Oregon Department of Transportation (ODOT). Therefore the access permit requirements of DCC 17.48.210(A) do not apply.

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$4,757 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, 2022. 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 PULLED.

REVISED TRAFFIC STUDY AND RESPONSE FROM SENIOR TRANSPORTATION PLANNER: Upon receipt of the County Senior Transportation Planner's initial comment, above, the Applicant submitted a revised traffic study, dated March 18, 2022, sent to staff via email on April 6, 2022. In response, the following comment was offered by the County's Senior Transportation Planner:

I have reviewed the March 18, 2022, revised traffic study for 247-21-000881-PA/882-ZC for three properties totaling approximately 19 acres to change the Comprehensive Plan designation from Agriculture to Rural Industrial and the zoning from Exclusive Farm Use (EFU) to Rural Industrial (RI). The properties lie in the Exclusive Farm Use (EFU), Airport Safety (AS), and Landscape Management (LM) zones at 65301, 65305, and 65315 Hwy 97, aka County Assessor's Map 16-12-23, Tax Lot 305, 16-12-23, Tax Lot 301, and 16-12-23, Tax Lot 500, respectively. For reasons state below, staff finds the revised traffic study insufficient.

The revised TIA again does not make an apples-to-apples comparison of the potential trip generation from the site based on existing zoning vs. requested zoning. In staff's Oct. 22, 2021, comment staff specifically required traffic analysis that compares reasonable worst-scenario using outright permitted uses in the existing Exclusive Farm Use (EFU) zone to the requested Rural Industrial (RI) use. Those uses are listed under Deschutes County Code (DCC) 18.100.010. Instead, the traffic analysis falters on two points. First, the traffic study uses Warehouse, which is a conditional use in the RI zone at DCC 18.100.020(M). Second, there are several higher traffic generators listed under conditional uses at DCC 18.100.020.

As an aside, on the one hand the Applicant argues this is not productive agricultural land and on the other the traffic engineer argues there are agricultural uses that would generate more trips than a single-family zone. (The County historically uses a single-family as the highest trip generator in EFU). Staff looks to the hearing officer to reconcile this paradox of not being agriculturally viable land, yet potentially producing more trips based on agricultural activities.

Again, the TIA uses Mini-Warehouse as a use for the Rural Industrial (RI) use, yet there is not a simultaneous site plan application for that land use. While the TIA refers to "intention" that is not the same as an actual land use application. The current land use application is only for a plan amendment/zone change. The TIA needs to analyze a reasonable worst-case use based on the current edition of the Institute of Traffic Engineers Trip Generation Handbook, which is the 11th.

As a matter of practice, Deschutes County when reviewing the potential traffic impacts of plan amendment/zone changes, has required Applicants to use a reasonable worst-case scenario of outright permitted uses in the current zone vs. outright permitted uses in the requested zone. If the traffic engineer insists on analyzing counter to accepted County practice, then the traffic analysis should be apples-to-apples and use reasonable worst-case scenario for both the conditional uses of DCC 18.100.020 and DCC 18.100.020. Instead, the revised traffic study uses outright permitted in the base case and a conditional use in the requested zone for an apples-to-oranges comparison. (Staff is opposed to using conditional uses and only presents this argument to demonstrate another area where the revised traffic analysis is deficient).

The traffic study argues transit will decrease the 20-year volumes on US 97, but does not provide any factual evidence, Cascade East Transit (CET) plans for increased service between Bend and Redmond, the number of buses (both capacity and headway, i.e. time between buses) to significantly affect the forecast volumes on US 97. The traffic study also speculates on the effect of rising fuel costs on the 20-year forecast traffic volumes. Equally valid speculation could ruminate on the rising fuel-efficiency of gas-powered vehicles and the State's goal to increase the number of electric vehicles in Oregon as offsetting factors and that future traffic volumes will continue to climb.

The traffic study's views on ODOT methodology for measuring intersection performance is irrelevant. Those are the agency's adopted measures and are cited in DCC 18.116.310(H).

SENIOR TRANSPORTATION PLANNER COMMENTS TO APPLICANT'S SECOND RESPONSE: Upon receipt of the County Senior Transportation Planner's second comment, above, the Applicant submitted additional comments, dated April 8, 2022 and sent to staff via email on April 8, 2022. In response, the following comment was offered by the County's Senior Transportation Planner (dated April 11, 2022):

I have reviewed the Applicant's traffic engineer's April 8, 2022, memo which was written in response to my April 7 assessment of the revised traffic study dated March 18, 2022. Below are my responses.

- The Applicant is correct, I mistakenly said the revised TIA uses Warehouse (Land Use 150) and Mini-Warehouse (LU 151), rather than land use actually used, which was Manufacturing (LU 140). I apologize for the error.*
- The Applicant's TIA uses the wrong version of ITE Trip Generation Manual. The TIA use the 10th Edition (see page 7 of March 18 TIA. Deschutes County Code (DCC) 18.116.310(F)(2) and 18.116.310(G)(2). The 11th Edition is the most recent version of the ITE Trip Generation Manual.*
- Staff notes that trip caps are notoriously difficult to monitor and enforce. The only regulatory ability the County has is to enforce the type of use allowed on the site and the size of the buildings. The County does not control nor monitor the number of employees used at a business, the number of labor shifts, the*

start/stop times of those shifts, the number of deliveries to a site, etc. Staff would appreciate the Applicant's ideas on how to create a functioning trip cap and what would be the penalty for violation. Staff has used building size as the best proxy for a trip cap, but there may be other measures.

SENIOR TRANSPORTATION PLANNER COMMENTS TO ODOT MAY 23, 2022

SUBMITTAL: On May 24, 2022, Peter Russell emailed Planning staff to respond to ODOT May 23, 2022 submittal and the Applicant's May 24, 2022 agreement to ODOT's proposed language regarding a trip cap:

*Tarik,
I have reviewed both the ODOT May 23 submittal regarding the proposed trip cap for 247-21-000881-PA/882-ZC and the applicant's May 24 agreement to the agency's language limiting the trip cap to 32 p.m. peak hour trips and 279 daily trips. I also concur with this limitation. The ODOT language calling for a text amendment is best addressed during the current update of the Deschutes County Transportation System Plan (TSP) as a potential change in policy language. Another option is ODOT can apply to a text amendment to the development code regarding trip caps and land use development.*

If you have any questions, please let me know. Thanks.

Central Oregon Irrigation District, Kelley O'Rourke

Re: 247-21-000881-PA, 882-ZC
1612230000305/65301 N HWY 97, BEND, OR 97701
1612230000500/65315 HWY 97, BEND, OR 97701
1612230000301/ 65305 HWY 97, BEND, OR 97701

Please be advised that Central Oregon Irrigation District (COID) has reviewed the provided preliminary application for the above referenced project. The Applicant requests approval of a Comprehensive Plan Amendment to change the designation of the property from Agricultural (AG) to Rural Industrial (RI). The Applicant also requests approval of a corresponding Zone Change to rezone the property from Exclusive Farm Use (EFU) to Rural Industrial (RI). The subject properties are located at 65301 N HWY 97, 65315 HWY 97 and 65305 HWY 97 in Bend, Oregon (Map and Tax lots: 1612230000305, 1612230000500, 1612230000301).

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

Water Rights

- 1612230000305: *Has 0.20 acres of appurtenant COID irrigation water rights •*
1612230000500: *There are no COID water rights*
- 1612230000301: *Has 2.70 acres of appurtenant COID irrigation water rights*

- *All water rights must be removed from these properties prior to approval of the zone change. COID requests property owners contact COID to request removal of the water rights.*

Canal and Laterals

- *COID's main canal is located within tax lots 1612230000305 and 1612230000301 and has a ROW of 75-feet with a road easement of the west side of 20-feet. The easement appears to extend onto tax lot 1612230000500. COID will need the marginal limit plus 20-feet in areas where the canal and road exceed the easement. Any irrigation conveyance, District or private, which passes through the subject property shall not be encroached upon or crossed without written permission from COID. No structures of any kind, including fence, are permitted within COID property/easement/right of way. Comply with Requirements of COID Developer Handbook including restriction on drilling / blasting and excavation within and adjacent to the existing canal embankment.*
- *COID's POD is located at the southern property line on tax lot 305 for *A-17. There are private delivery ditches that run through each property to access the water rights. *A-18 has a POD at the northern property line of tax lot 301, the easement is 20' each side of center. Please note: a portion of *A-18 is piped. Please contact COID to discuss these facilities.*
- *All crossing shall be in accordance with COID's Development Handbook and must be approved by COID. A crossing license shall be required for the existing bridge. Please provided COID with the existing recorded crossing license for the bridge that spans across the Pilot Butter Canal. If the recorded document does not exist, contact COID for information on the process, timing, fees to obtain a crossing license.*
- *Policies, standards and requirements set forth in the COID Developer Handbook must be complied with.*
- *Please note that COID facilities are located within the vicinity of the subject property; contact COID if any work and/or crossings will be done near the COID facilities.*

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.

ODOT Region 4, Don Morehouse, Senior Transportation Planner

On April 20, 2022, Don Morehouse emailed Mr. Rawlings regarding the application as follows:

Hi Tarik,

Although we are holding off on the review of the traffic impact study and land use application associated with 21-881-PA/882-ZC because it is incomplete, it does appear that this proposal will constitute a change of use requiring that the applicant submit a new

road approach permit application through our District 10 office. Quinn Shubert is the point of contact:

Quinn Shubert
Permits Specialist
ODOT District 10
63055 North Hwy 97
Bend, OR 97703
C: 541-410-0706

On May 23, 2022, Mr. Morehouse emailed Planning Staff as follows:

Hi Tarik,

I'd like to replace the comment I sent back on April 20, 22 with the following two comments pertaining to this Plan Amendment/Zone Change (21-881-PA/882-ZC) application:

- The Deschutes County Development Code should be amended to address the concept of a Trip Cap. Ideally, this suggested code provision would require the applicant to submit a Development Code Amendment application with a traffic impact analysis to show whether or not the Transportation Planning Rule is satisfied with the increase of a Trip Cap.
- ODOT agrees with a Trip Cap of **32 PM peak hour** trips and **279 daily trips**.

Please let me know if you have any further questions. Thanks

Proposed Condition of Approval

On May 24, 2022, legal counsel advised County Planning Staff, ODOT and the Senior Transportation Planner of a proposed condition of approval regarding trip caps as follows:

Don, Peter and Tarik:

To be consistent with ODOT's comments, we are revising our proposed COA to read as follows:

"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."

If this works for everyone, we will submit a letter into the record as soon as possible.

Thereafter, on May 24, 2022, legal counsel requested County Planning Staff to include the entire email chain into the record for the applications, stating:

A separate correspondence is likely superfluous as this email chain already includes the proposed condition of approval and written concurrence thereof from

both ODOT and County staff. If you disagree and prefer a separate correspondence, please let me know. The applicant, of course, still contemplates providing a comprehensive open record submittal by the new May 31, 2022 deadline.

The following agencies did not respond to the notice: Deschutes County Assessor, Bend Fire Department, City of Bend Planning Department, City of Bend Public Works Department, City of Bend Growth Management Department, Redmond Airport, Oregon Department of Aviation, and Deschutes County Road Department.

PUBLIC COMMENTS: The Planning Division mailed notice of the conditional use application to all property owners within 750 feet of the subject property on October 6, 2021. 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 October 6, 2021.

Supportive public comments were received from 44 individuals, one of which appears to be associated with the existing business uses on Tax Lots 305 and 500. The names of the supporting commenters are listed below.

Oppositional public comments were received from one neighboring property owner, from Central Oregon LandWatch, and from 1000 Friends of Oregon. The oppositional comments are detailed below. The supportive public comments do not specify approval criteria and are summarized herein as generally supportive of the subject applications for reasons including economic opportunities, improvement of the subject properties since the current owners took over, the character of the Applicant, and the need for industrial uses due to regional growth.

Supporting commenters:

- | | | |
|------------------------|-----------------------|-----------------------|
| 1. Dirk van der Velde | 22. Michael Van Skaik | 43. Joseph Seevers |
| 2. Shoshana Buckendorf | 23. Derek Ridgley | 44. Rebecca Hermeling |
| 3. Micah Frazier | 24. Whitney Nordham | |
| 4. Anthony Jimenez | 25. Sam DeLay | |
| 5. Brandon Olson | 26. Jeremy Stafford | |
| 6. Cody King | 27. Tom Price | |
| 7. Craig Shurtleff | 28. Ali Luengo | |
| 8. Donnie Eggers | 29. Kenna Aubrey | |
| 9. Dee Shields | 30. Laurie Luoma | |
| 10. Julie Porfirio | 31. Sarah Chmiel | |
| 11. Jill Shaffer | 32. Jillian Gish | |
| 12. Nick Alker | 33. Haley Offerman | |
| 13. Nick Greenlee | 34. Joshua Wurth | |
| 14. Stephen Wagner | 35. Erik Retzman | |
| 15. Truett Nealy | 36. Grace Stafford | |

- 16. Bob Trapnell
- 17. Gerardo Arreola
- 18. Joseph Seevers
- 19. Mike Musco
- 20. Mark Rylant
- 21. Paula Johnson
- 37. Marilee Johnson
- 38. Adam Fuller-Ellifit
- 39. Theresa Vachon
- 40. Mike Vachon
- 41. Marty Petersen
- 42. Mark Rylant

An oppositional comment was received from Jay Musson, a resident and owner of property located at 65468 73rd Street, Bend, OR 97703 on October 9, 2021:

“I own the property at address 65468 73rd which backs up to the subject property in this file number. Our property is part of a development called Whispering Pines #4. We have a community well as well as covenants such as no large farm animals (cows and pigs etc). Just like developments in the cities of Bend and Redmond. The only difference is our lots are all about 2.5 acres. All of the properties along 73rd backing up to this subject property are single family houses. The last thing we need in is an industry moving in behind us with large buildings, equipment and possible pollution. In fact the east side of this subject property (the jagged side) is the Central Oregon Irrigation Canal. I’m sure they don’t want pollution entering their canal. I therefore strongly object to this proposed zone change. Keep industry in town, not in a pristine residential and agriculture area.”

Mr. Musson offered a second public comment on April 15, 2022:

“I own property 65468 73rd ST that backs up to the subject property. I want to announce my opposition to this proposed zone change. This is farm country, not asphalt and tin can storage building country. This kind of development belongs in a city. Also rain runoff from the asphalt into the COCC irrigation canal which borders this property cannot be good. If the owner of this property wants to make money on this piece of property grow some hemp.”

Another oppositional comment was received from Kristy Sabo, the Wild Lands and Water Program Manager with Central Oregon LandWatch (“COLW”) on October 19, 2021:

“I’m writing today to express concern from Central Oregon LandWatch about whether application file nos. 247-21-000881-PA and 247-21-000882-ZC meet the necessary criteria for a zone change and a plan amendment with goal exceptions. These two applications across three tax lots request that land zoned EFU-TRB, exclusive farm use, be rezoned to Rural Industrial. While we are still reviewing the applications and all of the issues, we are initially concerned that the applications include no adequate showing that rezoning and a plan change is appropriate. The proposed use cannot be approved without exceptions to Statewide Planning Goals 3, 11, 12 and 14. Because no exceptions have been justified, the application must be denied. The proposed designation is expressly prohibited by the County’s acknowledged comprehensive plan. We are concerned that the proposal would unnecessarily take agricultural land out of production. The comprehensive plan provides multiple opportunities for the proposed use that do not require rezoning. The proposed use will have a negative impact on surrounding rural land uses.

Please add LandWatch to your list of interested parties and let us know of any decisions or hearings.”

On April 26, 2022, COLW, through Rory Isbell, Staff Attorney and Rural Lands Program Manager, submitted a formal letter in opposition to the applications, primarily alleging that the proposed plan amendment and zone change do not comply with Goals 3 and 14 and alleging that the subject property is rural agricultural land, outside of an urban growth boundary, where new urban industrial uses are prohibited. The letter states, in relevant part:

Goal 3

The subject property is agricultural land as defined by Goal 3, OAR 660-033-0020(1)(a) and DCC 18.040.030 [definitions omitted].

The subject property was correctly designated as agricultural land and is correctly zoned for exclusive farm use (the lack of mistakes in the designation and zoning of agricultural lands in Deschutes County is discussed further below). The subject property is predominantly land capability Class III irrigated and Class IV unirrigated and thus is agricultural land as a matter of law. Statewide Planning Goal 3, OAR 660-015-0000(3); OAR 660-033-0020(1)(a); DCC 18.04.030. The property’s 38B and 31A soils are both Class III when irrigated, and because this property is within the boundaries of COID and has water rights, the property is irrigated and contains predominantly NRCS Class III soils.

LandWatch requests the Hearings Officer to take official notice of a true and correct copy of the U.S. Department of Agriculture, NRCS Soil Survey of the Upper Deschutes River Area, Oregon, including parts of Deschutes, Jefferson, and Klamath Counties, 284 pp. The Upper Deschutes River Area, Oregon Soil Survey is attached as Exhibit 1.

LandWatch also requests the Hearings Officer to take official notice of the soils map with legend and the land capability classifications, both irrigated and unirrigated, of the subject property attached as Exhibit 2. These exhibits are true and correct copies of the portions of the official USDA NRCS Upper Deschutes River Area Soil Survey depicting the subject property.²

These materials are produced and maintained as public records and are published as official publications of the U.S. Department of Agriculture. They contain information the accuracy of which cannot reasonably be questioned, and so are appropriate subjects for judicial notice. These materials from the U.S. Department of Agriculture, NRCS Upper Deschutes River Area Soil Survey are designed to assist the Hearings Officer in determining the law regarding the definition of agricultural land in DCC 18.04.030, OAR 660-033-0020(1)(a), OAR 660-015- 0000(3), and Statewide Planning Goal 3.

The official NRCS Upper Deschutes River Area Soil Survey relates to the content of law and policy on the definition of "agricultural land" in Oregon and does not concern only the parties in the case at bar. The Hearings Officer is requested to

²<https://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx>. Accessed April 26, 2022.

take official notice of the NRCS Upper Deschutes River Area Soil Survey and the attached excerpts thereof as legislative facts. State v. O'Key, 321 Or. 285, 309 n.35, 899 P.2d 663 (1995) ("When a court, in determining what the law - statutory, decisional, or constitutional - is or should be, takes judicial notice of certain facts, it is taking judicial notice of legislative facts").

The application's inclusion of additional soils information - an Order 1 soil survey - obtained by a person pursuant to ORS 215.211 and OAR 660-033-0030(5), in no way nullifies the official NRCS soil capability classifications for the subject property. The additional soils information "does not otherwise affect the process by which a county determines whether land qualifies as agricultural land." ORS 215.211. The NRCS National Soil Survey Handbook states that ..Order 1 soil surveys and site-specific data collected are supplements to the official soil survey, but they do not replace or change the official soil survey." Exhibit 3.

The applicant's additional soil information could be used to identify "land in other soil classes that is suitable for farm use," OAR 660-033-0020(1)(a)(B), but cannot nullify or otherwise make void the official NRCS soil capability classifications for the subject property which are used to define agricultural land, OAR 660-033-0020(1)(a)(A). The subject property is suitable for a variety of farm uses, including grazing. It is a common practice in Central Oregon to rotate livestock between pastures, and nothing prevents this 19-acre property that has water rights from serving as seasonal rangeland. The Oregon Department of Land Conservation and Development, Oregon Department of Agriculture, and Oregon Department of Fish and Wildlife recently submitted a comment letter on a similar application in Deschutes County where an applicant sought to rezone and redesignate Goal 3- protected agricultural land. The state agencies describe the many ways in which land of NRCS Class VI-VIII soils in Deschutes County can be put to farm use, and how Goal 3's protections of agricultural land are not limited to lands classified by the NRCS as Class I-VI. Exhibit 4.

In any event, the subject property both has been and is currently engaged in farm use, proving its suitability for farm use. The applicant's own aerial photos of the property clearly indicate irrigated crops being grown on tax lots 301 and 305. Application Exhibit 1 at 1-2. These tax lots contain certificated water rights from Central Oregon Irrigation District for agricultural irrigation use. Application Exhibit 4 at 1-2. Even though these water rights have been temporarily leased to instream use, they can be returned to agricultural irrigation use on the subject property at any time, further facilitating the agricultural suitability of the subject property.

Even if not currently producing farm crops, the application describes the subject property as "used for farm and other equipment service and storage facilities and related outbuildings." Application at 4. Farm use of land includes the on-site maintenance of equipment and facilities used for other farm activities, ORS 215.203(2), and thus the property is also currently engaged in farm use.

Goal 14

The application proposes allowing urban uses on rural land outside of an urban growth boundary, which violates Goal 14. LUBA has articulated a test, using the

Shaffer factors, to determine whether a specific use is urban or rural. The applicant here has not met its burden to show the application meets the relevant *Shaffer* factors. *Shaffer v. Jackson County*, 17 Or LUBA 922 (1989); *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014). Instead, the applicant seeks a zone change to Rural Industrial which would allow a wide variety of industrial uses at any point in the future, but fails to analyze whether those industrial uses would be urban or rural under the *Shaffer* factors.

The County's RI zone, including its allowed uses, was acknowledged when the comprehensive plan limited the zone to exception areas that were committed to urban uses. Thus the RI Zone and its allowed uses are not per se rural. Without a showing that all of the allowed uses in the County's RI zone are rural using the *Shaffer* factors, and application fails to comply with Goal 14.

The application also seeks an "irrevocably committed" exception to Goal 14. However, a local government may only adopt an exception to a goal when the land is irrevocably committed to uses not allowed by the applicable goal because those uses are impracticable. OAR 660-004-0028(1). As described above, the subject property is agricultural land by definition, and it has been and currently is employed for rural farm uses. Agricultural uses allowed by Goal 3 are not impracticable, and thus the applicant's burden for a goal exception to Goal 14 is not met- OAR 660-004-0028(3)(a). The surrounding area also includes several properties in agricultural use, making the relationship between the property and "exception area" and "adjacent lands" no [sic] irrevocably committed. OAR 660 -004 -0028(2)(b) -(c).

Relatedly, the subject property is not irrevocably committed to urban uses, making the exceptions process outlined at OAR 660-014-0030 unavailable.

DCC 18.120.010 Nonconforming uses

The DCC, at DCC 18.120.010, states that "[n]o nonconforming use or structure may be resumed after a one-year period of interruption or abandonment unless the resumed use conforms with the provisions of DCC Title 18 in effect at the time of the proposed resumption." This application repeatedly asserts that its nonconforming uses have been operated continuously since the 1970s to justify several of the relevant approval criteria. However, the application includes no evidence of continuous operation without any one-year gaps. LandWatch concurs with the staff report that such evidence is also required to support the application's request for an "irrevocably committed" goal exception, and that a non-conforming use verification is required to establish that the present and historic uses of the property were lawfully established and continued without alteration, abandonment, or interruption.

DCC 18.136.020 Rezoning Standards

This application may seek to serve the landowner's private interest by increasing the development potential of the subject property. It will not, however, serve the public interest, which would be harmed by the removal of the County's agricultural land base; increased noise, traffic, and pollution in a rural area; and

marked public safety risks imposed by allowing industrial uses and their concomitant traffic and pollution along an open water way and state highway. Such harms to the public interest mean noncompliance with the County's rezoning standards at DCC 18.136.020: [quotation of code omitted]

As for DCC 18.136.020(D), there has been no change in circumstances since the property was last zoned. The applicant states that the current uses on the property have been in operation for the majority of the past 40 years. Application at 14, 37. The soils and agricultural suitability of the subject property have also not changed since it was planned and zoned for agricultural use by the County. There has further been no mistake in the current EFU zoning of the subject property. The County embarked on legislative efforts in both 2014 and 2019 to establish that errors exist in its EFU zoning designations, but concluded both times that no such errors exist. In 2015, the County consulted with Jon Andersen, who was a Senior Planner, and later became the Community Development Department Director, when the County developed its first comprehensive plan. Mr. Andersen confirmed that none of the County's agricultural land designations were made in error. Exhibit 5 (January 15, 2015 Deschutes County Community Development Department notes from phone conversation with John Andersen). DLCDC also commented to the County at the time that it was "unable to determine the nature and scope of the mapping error" of agricultural land designations. Exhibit 6 (January 8, 2015 DLCDC letter).

Conclusion

This application requests to convert 19 acres of agricultural land to allow urban, industrial uses, and fails to comply with Goals 3 and 14 as well as provisions of the Deschutes County Code. The property is rural, agricultural land and has not been proven to be irrevocably committed to urban uses. LandWatch respectfully requests this application be denied' We also request the record be left open for 14 days to accommodate additional written comment on this very complex land use application.

1000 Friends of Oregon, through Dan Lawler, Rural Lands Senior Attorney, also submitted public comment in opposition to the applications on April 26, 2022:

Dear Hearings Officer,

Thank you for the opportunity to provide testimony on the comprehensive plan and zoning map amendment application identified as App 247-21-000881-PZ, 882-Z (the "Rezone"). The following testimony is submitted by 1000 Friends of Oregon. 1000 Friends of Oregon is a nonprofit membership organization that works with Oregonians to support livable urban and rural communities, protect family farms, forests and natural areas; and provide transportation and housing choices. We have members in all parts of Oregon, including Deschutes County.

1000 Friends of Oregon requests that the Hearings Officer include this letter in the record for the April 26, 2022 hearing and that the county send any notices related to the Rezone to dan@friends.org and andrew@friends.org. 1000 Friends of Oregon also requests a 14-day open records period following this hearing to

provide the public with more time to review the lengthy application materials and staff report.

1000 Friends recommends that the Hearings Officer deny the Rezone because the application fails to demonstrate compliance with approval criteria for amendments to comprehensive plan and zoning designations. More specifically, the staff report and application do not demonstrate that the subject property is not agricultural land under Goal 3 or that the proposal complies with Goal 14. The following paragraphs provide more detail on 1000 Friends' concerns.

The Subject Property is Agricultural Land Under Goal 3

1000 Friends recommends that the Hearings Officer deny the Rezone because the subject property qualifies as agricultural land under Goal 3 and, thus, an exception to Goal 3 is required to change the property's comprehensive plan and zoning designations. First, the application and staff report fail to adequately consider potential use of the 31A soils on the subject property.

When irrigated, 31A soils are categorized within Class III, which is productive and valuable for farm use. While the applicant claims that irrigation is not available to the subject property, the property is within Central Oregon Irrigation District boundaries and neither the application nor the staff report explain why the property owner can't work with the District to obtain water. Further, while the applicant may plan to continue to lease the property's water rights, neither the application nor the staff report explain why the property owner is unable to use the water rights for agriculture. The application and staff report also fail to explain why the property owner is unable to utilize a water distribution system to irrigate the property using the Pilot Butte Canal. Therefore, the Hearings Officer should deny the Rezone because the application and staff report fail to adequately consider use of irrigated 31A soils and do not demonstrate that the property is not agricultural land.

The application and staff report also fail to adequately consider whether the subject property can be used for grazing. While the applicant argues that the property is not suitable for grazing due to poor soils, both 38B and 58C soils can support viable grazing operations. The applicant's calculations regarding profitability of cattle grazing on the property fail to analyze its potential use with rotational grazing, which is a common practice in Central Oregon. Rotational grazing slows consumption of forage on pastureland by allowing animals to graze on a number of properties throughout the year. If the subject property was used for rotational grazing, rather than as the only location for grazing, it could likely support a greater number of cattle and make a potential grazing operation more profitable. However, the applicant's analysis fails to consider this possibility. Thus, the Hearings Officer should deny the Rezone because the application and staff report fail to demonstrate that the property is unsuitable for grazing and that the land is not protected under Goal 3.

The Application Does Not Satisfy Goal 14

As an initial matter, the Shaffer factors are not appropriate for determining whether the Rezone makes the property urban or rural in the context of Goal 14. As Page 14 of the Staff Report acknowledges, Shaffer v. Jackson County, 16 Or LUBA 871 (1988), involved a map amendment for an asphalt batch plant – a specific use – subject to that application. Because the specific use of the property was known in those proceedings, the county could evaluate the map amendment to determine the number of workers, dependence on site-specific resources, suitability of the use to a rural area, and reliance on public facilities and services. In this case, however, the applicant is not applying for development of a specific use on the property. While the applicant states that it intends to build a mini-storage facility and to continue equipment repairs on-site, nothing requires the applicant to follow through on that plan. Instead, the applicant could use the property for any land uses permitted in the Rural Industrial zone after the property’s comprehensive plan and zoning designations change. Thus, 1000 Friends urges the Hearings Officer not to use the Shaffer framework for analysis of Goal 14 because the eventual use of the property is uncertain, making it impossible to determine whether the Shaffer factors are satisfied.

Next, the applicant’s argument that the application does not require an exception to Goal 14 is not supported by substantial evidence. The applicant states that the Rezone “should not require a Goal exception because the County’s RI zoning complies with Goal 14 by ensuring areas with this zoning remain rural by limiting the uses allowed.” Staff Report Page 57. This statement is a mere assertion that lacks evidentiary support. To show with substantial evidence that the Rezone does not facilitate urban use of the property, the applicant and county must evaluate whether the uses permitted outright and conditionally in the Rural Industrial zone are urban or rural in nature. The use-by-use analysis is especially important here because the Rural Industrial zone was adopted when the comprehensive plan limited the zone to exception areas, meaning that the uses in that zone did not have to be rural in nature to be allowed in such areas. However, the subject property is not in an exception area and thus, analysis of the uses in the Rural Industrial zone is necessary to determine whether the Rezone facilitates urban or rural use of the property.

The applicant’s alternative argument that the area is irrevocably committed to uses not allowed under the applicable goal is not supported by substantial evidence and does not demonstrate compliance with OAR 660-004-0028(2)(a). As discussed earlier in this letter, the applicant has not demonstrated that the property is not protected agricultural land and thus, the characteristics of the land (suitability for grazing, presence of Class III soils when irrigated, and possibility of irrigation) indicate that the property could be used for agriculture. Further, the applicant fails to explain why the presence of a couple small structures that cover a small percentage of the property make agriculture impossible or impracticable. Nothing prevents the property owner from removing the structures and using the soil underneath to supporting grazing operations. The applicant’s statement that the existing improvements on and past use of the property irrevocably commit the property to non-farm use are mere assertions that lack the support of substantial evidence.

In addition, the applicant's description of the characteristics of adjacent lands under OAR 660-004-0028(2)(b) conflicts with staff's findings regarding such lands. On Page 66 of the Staff Report, the applicant states that neither Tax lot 300 or 306 are used for active farming, while staff notes that both of these properties appear to be in farm use and receive farm tax assessments. The applicant cites nothing to support its assertion that farming does not occur on these properties, while the county cites aerial photography and farm tax assessments for its position. Thus, substantial evidence in the record suggests that the characteristics of some adjacent lands are rural and agricultural in nature and that the subject property is not irrevocably committed to non-rural uses. The Hearings Officer should deny the Rezone because the applicant does not support its findings for OAR 660-004-0028(2)(b) with substantial evidence and, in fact, evidence in the record undermines the applicant's position.

As an additional point, the assertion that the property is irrevocably committed to use as "an equipment service/repair and rental/sales facility" undermines the applicant's argument that uses on the property will be rural after the Rezone. The argument regarding irrevocably committed exceptions relies on the notion that the property has not been and will not be used for rural purposes. Further the commercial nature of service, repair, rental, and sales facilities indicates that the use is more urban than rural. The applicant's arguments on these points conflict and thus, the Hearings Officer should reject the applicant's Goal 14 arguments for lack of substantial evidence.

NOTICE REQUIREMENT: On April 1, 2022, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the subject property and agencies. A Notice of Public Hearing was published in the Bend Bulletin on Friday, April 1, 2022. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on March 15, 2022.

REVIEW PERIOD: The subject application(s) were submitted on September 30, 2021, and deemed incomplete by the Planning Division on October 28, 2021. Upon the Applicant's confirmation that no further information or materials would be provided in response to the County's incomplete letter, the subject applications were deemed complete on March 7, 2022. According to Deschutes County Code 22.20.040(D), 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

In order to approve the comprehensive plan amendment and zone change request, the proposal must comply with the criteria found in statutes, statewide planning goals and guidelines and their implementing administrative rules, County comprehensive plan, and land use procedures ordinance. Each of these approval criteria is addressed in the findings below.

The Hearings Officer sets forth the following Preliminary Findings and Conclusions on the key issues in these applications below. These Preliminary Findings and Conclusions are incorporated by reference, as if fully set forth therein, in the analysis of individual criteria.

A. PRELIMINARY FINDINGS AND CONCLUSIONS

1. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING USE OF ORDER 1 SOILS SURVEY

In 1979, Deschutes County adopted its first comprehensive plan and zoning ordinance that implemented the Statewide Land Use Planning Goals. The County's comprehensive plan map was developed without the benefit of detailed soils mapping information. The map was prepared and EFU zoning was applied to the subject property prior to the USDA/NRCS's publication of the "Soil Survey of Upper Deschutes River Area, Oregon." That soil survey provides general soils information, but not an assessment of soils on each parcel in the study area.

The NRCS soil survey maps are Order II soil surveys, which extrapolate data from the Upper Deschutes River Survey to determine LCC soil classifications at a landscape level. The Applicant's soil scientist conducted a more detailed Order I survey, which analyzed actual on-the-ground soil compositions on the subject property. The Hearings Officer finds that Order I soils surveys may contradict NRCS soil classifications performed at a higher, landscape level.

The argument advanced by COLW that an Order I survey cannot contradict NRCS soil survey classifications for a particular property has been rejected by the Oregon Legislature in ORS 215.211(1) and DLCD in OAR 660-033-0030. It has also been rejected by Deschutes County Hearings Officers and the Board of County Commissioners.

ORS 215.211(1) and (5) and the implementing regulations in OAR 660-033-0030, specifically and intentionally permit a more detailed soil analysis (an Order I Soil Survey) to be used when determining whether a specific property should qualify as agricultural land. The Applicant opted to provide more detailed Order I Soil Surveys prepared by Kitzrow, who is a Certified Professional Soil Classifier. Exs. 7-9 to Burden of Proof.

In recent years, Deschutes County has recognized the value in rezoning non-productive agricultural lands and has issued decisions approving plan amendments and zone changes where the applicant has demonstrated the property is not agricultural land. Deschutes County has approved the reclassification and rezoning of EFU parcels based on data and conclusions set forth in Order I soils surveys and other evidence that demonstrated a particular property was not "agricultural land," due to the lack of viability of farm use to make a profit in money and considering accepted farming practices for soils other than Class I-VI. *See, e.g., Kelly Porter Burns Landholdings LLC Decision/File Nos. 247-16-000317-ZC/318-PA; Division of State Lands Decision/File Nos. PA-11-7 and ZC-11-2; Paget Decision/File Nos. PA-07-1, ZC-07-1; The Daniels Group/File Nos. PA-08-1, ZC-08-1; Swisher Decision/File Nos. 247-21-000616-PA/617-ZC.* The Board of County Commissioners recently affirmed the Hearings Officer's decision in the *Swisher* files and adopted Ordinance No. 2022-003.

On the DLCD website, it explains:

NRCS does not have the ability to map each parcel of land, so it looks at larger areas. This means that the map may miss a pocket of different soils. DLCD has a process landowners can use to challenge NRCS soils information on a specific property. Owners who believe soil on their property has been incorrectly mapped

may retain a “professional soil classifier ... certified and in good standing with the Soil Science Society of America (ORS 215.211) through a process administered by DLCD. This soils professional can conduct an assessment that may result in a change of the allowable uses for a property.

The Hearings Officer agrees with the Applicant’s final legal argument, submitted on June 14, 2022, which states, in relevant part at page 2:

This statutory and regulatory scheme makes sense, as it would have been impracticable for a county to have conducted an individualized soils analysis on a farm-by-farm basis when it adopted its original zoning ordinances. Precluding the availability of a property owner to achieve a new zoning designation based upon a superior, more detailed and site-specific soils analysis would, to put it mildly, be absurd and cannot be what the legislature intended.³

Kitzrow explained and discussed the original intended uses of both Order I and Order III soil studies in his May 22, 2022 testimony:

*“Order I Soil Surveys are site-specific and have a high confidence interval and specificity. In other words, while Order III USDA soil surveys (published at 1:24,000) are a foundation for soil series/map unit concepts in the general area under review our current maps for this Order I Soil Survey are inventoried at a scale of 1:831 and 1:738 for this site-specific report In fact, in the original USDA map cited in our original report and henceforth sanctioned by the DLCD, it says right in the notation for the actual enclosed soil map, “Soil Map may not be valid at this scale” which it is not in this particular case. * * * Soil series concepts for the subject area in the USDA report are certainly valid and based upon solid Soil Survey principles, however, the actual soil map units, distribution and quantification of each unit is not always valid at this very detailed site-specific finite land base. This is a major distinct between Order I and Order III Soil Surveys. Order I Soil Surveys are represented by a scale reflective of the very small land base under consideration. Order III Soil Surveys are general in nature since their intended use is for agriculture, ranching and forest management and not for land use decisions and rezoning considerations. **Given these facts above, our current Order I Soil Survey is, in fact, a REPLACEMENT and NOT a supplement for the subject properties regarding soil map and Capability Class/Soil Efficacy considerations.”***

Exhibit A (emphasis in original).

The Soil Survey of the Deschutes Area, Oregon⁴ describes Class VII soils as “not suitable for cultivation and of severely limited use for pasture or as woodland.” It describes Class VIII soils as “not suitable for growing vegetation for commercial uses.” The Soil Survey of Upper Deschutes River Area, Oregon describes the broad, general level of soil surveying completed by NRCS on page 16, “At the less detailed level, map units are mainly associations and complexes. The average size of the delineations for most management purposes was 160 acres. Most of the land mapped at this level is used as woodland and rangeland. At the more detailed level, map units are mainly consociations and

³ The stated public purpose of the EFU zone is to preserve “Agricultural Lands” (ORS 215.243) but “Agricultural Lands” are not present on the subject property.

⁴ https://www.nrcs.usda.gov/Internet/FSE_MANUSCRIPTS/oregon/OR620/0/or620_text.pdf

complexes.... Most of the land mapped at the more detailed level is used as irrigated and nonirrigated cropland.”

As quoted in the Hearings Officer’s Decision and Recommendation to the Deschutes County Board of Commissioners in the *Swisher* decision, File Nos. 247-21-000616-PA/617-ZC:

The real issue is “map accuracy” which is based upon set standards for maps. National Map Accuracy Standard (NMAS) provides insurance that maps conform to established accuracy specifications, thereby providing consistency and confidence in their use in geospatial applications. An example of such a standard: “maps on publication scales larger than 1:20,000, not more than 10 percent of the points tested shall be in error by more than 1/30 inch, measured on the publication scale; for maps on publication scales of 1:20,000 or smaller, 1/50 inch.” The error stated is specific for a percentage of points, and to suggest that accuracy in maps is the unattainable freedom from error as the COL letter does, is not a relevant or a serious argument.

When one map shows point data like an Order-1 soil survey the accuracy can be measured, and when another map does not (like the NRCS soil map) there is a shortage of information, so the accuracy of the NRCS map cannot be determined for point data. The accuracy of the NRCS estimate of the percentage of components in the 38B soil complex can be shown to be very inaccurate in this case, and it clearly underestimates the Class 7 and Class 8.

The Hearings Officer finds that NRCS soil survey maps are not definitive or “binding” with respect to a determination of whether the subject property is, or is not, agricultural land. This is consistent with the ruling of the Land Use Board of Appeals (LUBA) in *Central Oregon Landwatch v. Deschutes County (Aceti)*, ___ Or LUBA ___ (LUBA NO. 2016-012, August 10, 2016 (Aceti I)). There, LUBA confirmed that OAR 660-033-0030(5)(a) and (5)(b) allow the County to rely on more detailed data on soil capability than provided by NRCS soil maps to define agricultural land, provided the soils survey has been certified by DLCD, which has occurred here. It found that the County’s reliance on the applicant’s more-detailed soils analysis prepared by a soil scientist supported a finding that the property was “nonagricultural land” even though the NRCS soil study mapped it as high-value farmland.

The *Aceti* ruling is summarized as follows:

LUBA found that it was appropriate for Deschutes County to rely on a site-specific soils survey prepared by soils scientist Roger Borine to find that a majority of the property is comprised of Class VII and VIII soils rather than on information provided by the NRCS Soil Survey. LUBA noted that the NRCS’s maps are intended for use at a higher landscape level rather than on a property-by-property basis.

First, LUBA affirmed the County’s determination that the subject property, which had been irrigated and used to grow hay in 1996 and earlier years, was not agricultural land based on the Order 1 soils survey which showed that the poor soils on the property are Class VII and VIII soils when irrigated, as well as when not irrigated.

Second, LUBA determined the applicant had established that the subject property was not

“agricultural lands,” as “other than Class I-VI Lands taking into consideration farming practices.” LUBA ruled:

“It is not an accepted farm practice in Central Oregon to irrigate and cultivate poor quality Class VII and VIII 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.”

The Hearings Officer also rejects the argument that NRCS land classifications based on its soil maps cannot be varied, unless a landowner requests an Order 1 soils study to qualify **additional** land as agricultural land. This is directly contrary to LUBA’s holding in *Central Oregon Landwatch v. Deschutes County and Aceti*, LUBA No. 2016-012:

“The Borine Study is evidence a reasonable person would rely on and the county was entitled to rely on it. As intervenor notes, the NRCS maps are intended for use at a higher landscape level and include the express statement ‘Warning: Soil Ratings may not be valid at this scale.’ Conversely, the Borine Study extensively studied the site with multiple on-site observations and the study’s conclusions are uncontradicted, other than by petitioner’s conclusions based on historical farm use of the property. This study supports the county’s conclusion that the site is not predominantly Class VI soils.”

ORS 215.211(1) specifically allows for the submittal by a certified soil scientist of an assessment of the capability of the land based on more detailed soils information than that contained in the Web Soil Survey operated by the NRCS to “assist a county to make a better determination of whether land qualifies as agricultural land.” The Applicant followed this procedure by selecting a professional soil classifier who is certified by and in good standing with the Soil Science Society of America to prepare the Order 1 soils report. DLCDC reviewed the soils report pursuant to ORS 215.211(2) and determined it could be utilized in this land use proceeding. The Hearings Officer finds that the law is settled when it comes to an applicant’s ability to rely on an Order I Soil Survey such as the surveys prepared by Kitzrow in this matter.

The Hearings Officer agrees that soils classifications are not the only determining factor with respect to whether a parcel is “agricultural land.” The Hearings Officer’s findings on all relevant factors to be considered in determining whether the subject property is “agricultural land,” are set forth in detail below.

For all the foregoing reasons, the Hearings Officer finds that the County is not bound by the landscape level NRCS Order II study on which classification of soils on the subject property is based. The Hearings Officer finds it is appropriate for the County to consider the Applicant’s Order I soils survey, certified for the County’s consideration by DLCDC.

2. HEARINGS OFFICER’S FINDINGS AND CONCLUSIONS REGARDING WHETHER THE SUBJECT PROPERTY IS “AGRICULTURAL LAND”

For purposes of this Decision and Recommendation, the Hearings Officer considers the definition of “Agricultural Land,” in OAR 660-033-020(1)(a), as defined in Goal 3, which includes:

(A) lands classified by the NRCS as predominantly Class I-VI soils in Eastern Oregon;

(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

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

a. OAR 660-033-0020(1)(a)(A) Findings and Conclusions

The first prong defines “agricultural land” to include soils classified predominantly as Class I-VI in Eastern Oregon.⁵ The subject property meets this definition, but it is not controlling. As the Hearings Officer found above, the County may rely on the DLCD-certified Order I soil survey submitted by the Applicant. That study shows that the soils on the subject property are not predominantly Class I-VI soils. The Kitzrow Soil Surveys show that Lot 301 is comprised of 53.1% of Class VII and VIII soils, and that both Lot 500 and Lot 305 are comprised of 87.7% of Class VII and VIII soils. The County is entitled under applicable law to rely on the Order I soils survey in these applications in making a determination that the soils on the Subject Property are not predominantly Class I-VI soils. Kitzrow also explained in his Soil Surveys that the addition of irrigation waters will not improve the growing of farm crops on most of the site. No evidence was presented to rebut this evidence.

The Hearings Officer finds that the more detailed, onsite soil study submitted by the Applicant provides property-specific information not available from the NRCS mapping. There is no evidence in the record to rebut the Applicant’s soils study. Therefore, the Hearings Officer finds that the subject property does not constitute “agricultural land” under OAR 660-033-0020(1)(a)(A).

b. OAR 660-033-0020(1)(a)(C) Findings and Conclusions

No party has argued that the subject property is necessary to permit farm practices on nearby lands under this subsection, and no evidence has been submitted that any “farm use” on surrounding properties has depended upon use of the subject property to undertake farm practices. There is no showing that the subject property is necessary for farming practices on any surrounding agricultural lands. There is no evidence that the subject property contributes to any such practices, nor that other lands depend on use of the subject property to undertake any farm practices.

The Hearings Officer finds there is no evidence in the record that the subject property is “land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands. Questions concerning the “impact on adjacent or nearby agricultural lands,” do not answer the inquiry of whether the subject property is “necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.” OAR 660-033-0020(1)(a)(C).

⁵ Eastern Oregon is defined at OAR 660-033-0020(5) to include Deschutes County.

For these reasons, the Hearings Officer finds that the subject property does not constitute “agricultural land” under OAR 660-033-0020(1)(a)(C).

c. OAR 660-033-0020(1)(b) Findings and Conclusions

The Hearings Officer finds there is no evidence in the record that the subject property is adjacent to or intermingled with lands in capability classes I-VI within a farm unit. Therefore, the Hearings Officer finds that the subject property does not constitute “agricultural land” under OAR 660-033-0020(1)(b). Specific findings on each applicable criterion are set forth in Section III(B) of this Decision and Recommendation.

d. OAR 660-033-0020(1)(a)(B) Findings and Conclusions

The Hearings Officer reviews evidence in the record to determine whether the subject property constitutes “agricultural land” under OAR 660-033-0020(1)(a)(B) as “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.**” (emphasis added). Competing evidence was presented by the Applicant, COLW and 1000 Friends of Oregon.

This provision acknowledges that, even if a property is comprised of poor soils (aka “Land in other soil classes” that are not classified I-VI in Eastern Oregon), it may nonetheless be “suitable for farm use” under one or more of the seven considerations set forth in OAR 660-033-0020(1)(a)(B). In other words, if any of the seven considerations are such that they **compensate for the poor soils on a property** and render such property “**suitable for farm use,**” - employment for the primary purpose of obtaining a profit in money - that property is determined to constitute agricultural land.

OAR 660-033-0020(1)(a)(B) begins with the statutory definition of “farm use” in ORS 215.203(2)(a) which informs the determination of whether a property is “suitable for farm use.” The Hearings Officer finds that the critical question, in analyzing the seven considerations, is whether any of those considerations essentially improve the conditions on the subject property – poor soils notwithstanding - to a point that it can be employed for the “**primary purpose of obtaining a profit in money** by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairying products or any other agricultural or horticultural use or animal husbandry or any combination thereof.” ORS 215.203(2)(a) (emphasis added). Aerial photograph evidence of past irrigation of the subject property is not dispositive without evidence that the property was irrigated and engaged in “farm use,” for the primary purpose of obtaining a profit in money.” There is no such evidence; rather, the aerial photographs evidence shows site condition

“Farm use” is not whether a person can engage in any type of agricultural or horticultural use or animal husbandry on a particular parcel of property. It is informed by whether such use can be made for the primary purpose of obtaining a profit in money. Therefore, the Hearings Officer rejects the argument that the subject property is “capable of any number of activities included in the definition of farm use,” because “farm use” as defined by the Oregon Legislature “**means the current employment of land for the primary purpose**

of obtaining a profit in money.” ORS 215.203(2)(a); see also Goal 3. This is a critical omission by commentators in opposition to the applications in their submissions. Speculation about whether the property could employ greenhouses, goat grazing, plant nurseries and the like is not enough. There are many properties in Central Oregon that are not engaged in “farm use,” but on which agricultural activities take place. However, the idea that a person who owns EFU-zoned property with poor soils is essentially limited to use their property for hobby farm type activities is not supported by the law.

The Hearings Officer finds that the definition of “farm use” in ORS 215.203(2)(a) refers to “**land**,” - not “lands,” - and does not include any reference to “combination” or requirement to “combine” with other agricultural operations for grazing rotation, or the like. Therefore, if the subject property, in and of itself cannot be engaged in farm use for the primary purpose of obtaining a profit in money, it does not constitute agricultural land. There is no requirement in ORS 215.203(2)(a) or OAR Chapter 660-033 that a certain property must “combine” its operations with other properties in order to be employed for the primary purpose of obtaining a profit in money and thus, engaged in farm use.

What the statutory definition of “farm use” means is that, merely because a parcel of property is zoned EFU and **some** type of agricultural activity could take place on it, or whether the property owner could join forces with another agricultural operations, does not mean that a property owner is forced to engage in agricultural activity if the property owner cannot use its own property for farming to obtain a profit in money. This is so, whether the barrier to obtaining a profit in money is due to soil fertility, suitability for grazing, climactic conditions, existing and future irrigation rights, existing land use patterns, technology and energy inputs required and accepted farming practices, any or all of these factors. In short, “farm use” under the statutory definition means more than just having a cow or horses, growing a patch of grapes, or having a passion for rural living. An owner must be able to obtain a profit in money for any use to be considered “farm use.”

The Hearings Officer finds that the list of considerations in OAR 660-033-0020(1)(a)(B) in determining whether land in other soil classes are “suitable for farm use,” are considered in relation to one another. No one consideration is determinative of whether a property with poor soils is nonetheless “suitable for farm use.”

COLW argues that the subject property may be used for some agricultural purpose and lists dozens of potential “agricultural commodities produced in Deschutes County,” pursuant to the 2012 USDA Census. Without any information as to whether the agricultural practices on properties in the vicinity of the subject property constitutes “farm use,” in that they make a profit in money from such uses, COLW relies on Humfleet’s Nubian Dairy Goats and Whistle Stop Farm and Flowers as examples. The Hearings Officer finds that it is not enough to introduce evidence of agricultural use of other properties without evidence of the profitability of such use. Speculation is not evidence, so an inference that uses on other properties “must be profitable” is not enough. Such an inference does not transfer to the subject property, either. Nor does it refute the substantial evidence in the record that establishes it is impractical to engage in allegedly potential agricultural uses of the subject property because one cannot make a profit in money from those uses. Therefore, the record shows the property is not suitable for farm use.

The question is not whether an owner could engage in agricultural uses on a property; it is whether it is impractical to attempt to make a “farm use” of the property, as the term is

defined in state law. The Hearings Officer finds that it is not an applicant’s burden to prove that no agricultural use could ever be made of a property. An applicant must prove that the land is not suitable for farm use because one cannot employ the subject property with the primary purpose of making a **profit** from any potential “agricultural use” of such property.

Soil Fertility

Unrebutted evidence in the record establishes that the predominant soil type on all three tax lots that comprise the subject property are Capability Class VII and VIII. Kitzrow explained the Soil Surveys in **Exhibit A**, noting that the Class VII and VIII “Order I delineations on Lot 301 will not benefit substantially from the addition of irrigation waters hence the poor Capability Class rating.” With regard to Lot 301, Kitzrow stated that the property “does not have any farming opportunities” because “[o]nly two very small areas are ‘undisturbed’ on this lot dating back to before 1985. * * * The remainder of this property has been highly altered, degraded and permanently debilitated. * * * A preponderance (87.7%) of the 1.06 acs is comprised of Capability Class 7 and 8 soils. Irrigation will not improve the growing of farm crops on most of the site.” With regard to Lot 305, Kitzrow concluded that the property “will not produce crops on a large majority of this lot” because of “the proportion and degree of ancient site alteration and degradation dating back to before 1985. * * * A preponderance (87.7%) of the 3.0 acs is comprised of Class 7 and 8 soils. Irrigation will not improve the growing of farm crops.”

While COLW argued that soil fertility is not always necessary for commercial agricultural operations because farm equipment could be and/or has been stored on the property, the Hearings Officer finds that the subject property’s resource capability is the proper determination. The Applicant is not required to engage in joint management or use with other lands that do constitute productive farm land. Moreover, storage and maintenance of equipment is not, in and of itself, a farm use unless such equipment is for the production of crops or a farm use on the subject property. Therefore, the Hearings Officer rejects the arguments of COLW that certain uses of the subject property could be made that are not dependent on soil type because none of the suggested uses constitute “farm use,” without any associated cultivation of crops or livestock.

Suitability for Grazing

The Applicant’s burden of proof sets forth the following:

The primary agricultural use conducted on properties with poor soils is grazing cattle. Given the high cost of irrigating and maintaining the property as pasture or cropland (high labor costs, labor-intensive, high cost of irrigation equipment and electricity, high cost of fertilizer, etc.), dry land grazing is the accepted farm use of poor soils in Deschutes County.

However, the extremely poor soils found on the Subject Property prevent it from providing sufficient feed for livestock for dryland grazing. That, the dry climate, the proximity to Highway 97, and area development prevent grazing from being a viable or potentially profitable use of the Subject Property. The soils are so poor that they would not support the production of crops for a profit.

When assessing the potential income from dryland grazing, Deschutes County uses a formula and assumptions developed by the OSU Extension Service. This formula is used by the County to decide whether EFU-zoned land is generally unsuitable for farm use.

- *One AUM is the equivalent to the forage required for a 1000 lb. cow and calf to graze for 30 days (900 pounds of forage)*
- *On good quality forage, an animal unit will gain 2 pounds per day*
- *Two animal units will eat as much in one month as one animal unit will eat in two months.*
- *Forage production on dry land is not continuous. Once the forage is eaten, it generally will not grow back until the following spring.*
- *An average market price for beef is \$1.20 per pound.*

Based on these assumptions, the value of beef production on the entire subject property can be calculated using the following formula:

$$\frac{30 \text{ days} \times 2\#/\text{day}/\text{acre}}{(1 \text{ acre per AUM})} = 60.0 \text{ lbs. Beef/acre}$$

$$60.0 \text{ lbs. Beef/acre} \times 19.12 \text{ acres} \times \$1.20/\text{lb.} = \$1,382.40 \text{ per year gross income}$$

Thus, the total gross beef production potential for the Subject Property would be approximately \$1,382.40 annually. This figure represents gross income and does not take into account real property taxes, fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production, which would exceed income. In addition, as the Subject Property abuts a busy state highway, the cost for liability insurance due to the risk of livestock escape and the potential for a vehicle/livestock accident, would likely be expensive

While COLW argued that neighboring Humfleet’s Nubian Dairy Goats (the “Humfleet Property”) is evidence that the Applicant could undertake a similar agricultural use on the subject property, there is no evidence that the Humfleet Property is a for-profit goat farm, or that the primary purpose of the Humfleet Property is “obtaining a profit in money” from such operation, under the “farm use” definition in ORS 215.203(2)(a).

COLW also assumed, without evidence, that the Humfleet Property has “lower quality [soils] compared to the subject properties.” This assumption is based only on NRCS soil data and ignores the Order I Soil Surveys of the subject property in the record. There is no Order I soil survey of the Humfleet Property from which to make a valid comparison of the quality of soils.

COLW ignored the location and characteristics of the subject properties in its comparison, as well. Unrebutted evidence in the record shows that Tax Lot 500 is adjacent to Highway 97, which is the busiest stretch of highway in Central Oregon, is covered in gravel and has an old building in the middle of the parcel. There is no evidence that growing crops or raising livestock on this parcel is, or could be, viable – only speculation. Tax Lot 305 is developed with a large building and gravel covers most of the remaining land. Tax Lot 301

is only 400 feet at its widest point, and includes an irrigation ditch and easement, which takes up a substantial portion of the narrow lot.

The current owner of Tax Lot 301, Dwight Johnson, explained that the subject properties do not have comparable attributes to the Humfleet Property, including barns suitable for livestock, a working irrigation system (including an irrigation pond and irrigation hand lines) and mature grass pastures. The Humfleet Property is not compromised by an irrigation district easement that renders a significant portion of the property useless, unlike the subject property, which has an easement that borders its east side. Finally, the Humfleet Property borders BLM land, which is undeveloped and does not present conflicting neighboring uses, unlike the neighboring residential properties to the subject property.

Johnson not only owns Tax Lot 301, but also Bend Soap Company, a successful goat operation in Central Oregon. He submitted a letter to the record (Exhibit QQ) that lists numerous reasons including the poor soils, small parcel sizes, parcel configuration, high costs of fencing and irrigation improvements and proximity to neighboring residential developments as evidence of why the subject property is not suitable for grazing. The letter concludes by stating, "For the reasons provided above, the subject property is not suitable for any agricultural uses and is specifically not suitable for raising goats." Because the subject properties do not have the attributes of the Humfleet Property, he determined that it will be far too expensive to construct similar improvements just to raise a few goats.

The lack of suitability of the subject property for dryland grazing as a viable or profitable use of the subject property is established by substantial evidence in the record. The Hearings Officer finds the Applicant has established that this factor has been established by the Applicant for purposes of determining the subject property is not "agricultural land" under OAR 660-033-020(1)(a)(B).

Climatic Conditions

There is little debate that climatic conditions contribute to the inability to engage in "farm use" for the purpose of making a profit in money. Evidence in the record (Exhibit G, J and K) show that climatic conditions on the subject property are challenging, and are likely to get worse. The climate is extremely arid and receives very little rain or snow throughout the year. The evidence shows that these conditions will continue to worsen as the "22-year megadrought" conditions continue to impact the region. The poor soil conditions on the subject property render the climatic conditions particularly impactful.

Whether or not other properties are engaged in *agricultural use* does not show that climatic conditions do not preclude "*farm use*" on the subject property. This is so, combined with the poor soils on the property and proximity to Highway 97. The relevant issue is whether or not agricultural activities can be engaged in on the subject property for the purpose of making a profit in money, considering climatic conditions. Substantial evidence shows that they cannot.

The Hearings Officer finds the Applicant has established that climatic conditions on the subject property are a factor in determining it is not "agricultural land" under OAR 660-033-020(1)(a)(B).

Existing and Future Availability of Water for Farm Irrigation Purposes

Regarding existing and future availability for water for farm irrigation purposes, commentators do not take into consideration whether any agricultural activities could be utilized for the primary purpose of making a profit in money on the property, such that the suggested agricultural activities constitute “farm use” under the statutory definition. There is no evidence that the subject property could be used for any of the listed activities in ORS 215.203(2)(a) for the primary purpose of obtaining a profit in money, whether or not the property is irrigated.

The Applicant’s burden of proof sets forth the following:

As explained above, two of the three Tax Lots comprising the Subject Property have existing COID water rights, but they are leased to the Deschutes River and no changes to that are planned for the future. The Pilot Butte Canal running along the eastern portion of two of the Tax Lots comprising the Subject Property is not sufficient to provide irrigation to the Subject Property. A Federal right of way exists on the canal that goes to 50 feet at the toe of the canal. At its widest, the Subject Property is 400 feet wide; even taking the 50 feet from the toe of the canal, at its widest, it is 300 feet. This is insufficient for farming purposes, which is supported by the fact that no historic farming use has been made. Finally, while a water distribution system exists on the Subject Property, it has been effectively extinguished by common ownership of Tax Lots 301 and 305.

The Applicant argues that the property’s exiting irrigation rights, currently leased back and not in use on the property, should not be considered in evaluating the property’s potential for agricultural uses. In its May 31, 2022 open record letter at page 4, the Applicant states:

As understood by the Applicant, staff’s primary concern regarding Goal 3 stems from irrigation water previously utilized on the Properties. Specifically, the Staff Report clarifies that “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 question (sic) if the leased water rights are unavailable to the property for the purposes of this analysis.” (Page 38). Staff’s concerns are understandable in light of a 2014 land use decision issued by the then Board of County Commissioners concerning property owned by NNP IV-NCR, :L:C (File No PA-13-1,. ZC-13-1; “Newland”). The Board in Newland opined that “having irrigation water rights is the most important factor in farm use throughout the country. Farm use in Central Oregon is primarily dependent upon having water to irrigate land for crops, hay, fields, pasture, and any other water dependent farm use.”

*This case is easily distinguishable from the Newland matter. As clarified by the preceding hearings officer’s detailed analysis, the Newland property included soil units which where [sic] Class VII when nonirrigated but Class III when irrigated. Like the Newland property, the Applicant’s irrigation water has consistently been leased back for Deschutes River in-stream flows since 2016 as part of COID’s Instream Lease Program. See **Exhibit B**. But differing from the Newland property, the irrigation water in this case is irrelevant to the soil classification. **Exhibit A** clarifies that the predominate soil units on all three Properties are Class VII and VII*

“even with supplemental irrigation water” and that “Irrigation does not improve most of each property and therefore the lack of usable land is the governing factor when considering the value and utility of each parcel.”

*With regard to Lot 301, Kitzrow concluded that the lot’s “Class [VII] and [VIII] Order I delineations **will not** benefit substantially from the addition of irrigation waters hence the poor Capability Class rating.” With regard to Lot 500, Kitzrow concluded that “Irrigation will not improve the growing farm crops on most of the site.” And with regard to Lot 305, Kitzrow concluded that “Irrigation will not improve the growing of farm crops. This site is permanently degraded and will not produce crops on a large majority of this lot of record.”*

*Regarding the Applicant’s irrigation water specifically and Central Oregon’s limited water resources generally, the Applicant additionally submits **Exhibits C to K** to the record.*

The irrigation water on the subject property has been leased back each year since 2016 to improve Deschutes River in-stream flows. Exhibit B. This consideration alone is not dispositive and further must be considered in light of unrebutted testimony of Kitzrow that concludes the predominate soil type on the property is Class VII/Class VIII, even with irrigation water, Exhibit A; Exhibits 7-9 to the Burden of Proof. The Hearings Officer finds it is irrelevant whether if the leased water rights are available to the property for the purposes of this analysis. The leased irrigation rights do not compensate for the poor soils in a manner such that the subject property could be engaged in “farm use,” for the primary purpose of obtaining a profit in money. The Hearings Officer finds there is no evidence that a reasonable farmer would expect to apply irrigation water to the poor soils on the subject property (considering its size and location, as well) and still obtain a profit in money from agricultural uses on the property, with or without existing irrigation rights.

Without any evidence to the contrary to refute the evidence submitted by the Applicant, the Hearings Officer finds that the Applicant has established that existing and future availability of water for farm irrigation purposes is a factor in determining the subject property is not “agricultural land” under OAR 660-033-020(1)(a)(B).

Existing Land Use Patterns

The Applicant stated in its burden of proof that, “surrounding land use patterns also do not support an agricultural use of the Subject Property. Much of the surrounding lands are zoned residential and consist of a residential subdivision. Other surrounding land is zoned open space / parks, and is not used for agricultural purposes. The land nearby zoned EFU-TRB is not currently used for farming or other agricultural uses.”

The Hearings Officer disagrees with the Applicant with respect to the last sentence quoted from the burden of proof above. Some nearby properties are engaged in agricultural uses, as evidenced by irrigation rights and farm tax deferral. However, there is no evidence as to whether the agricultural use of such properties constitutes “farm use,” for the primary purpose of obtaining a profit in money. The property immediately to the north, while zoned EFU, is vacant, without irrigation rights and is not currently receiving farm tax deferral. To the south of the subject property is a parcel zoned Open Space and Conservation (OS&C), owned and operated by the Oregon Parks & Recreation Department. Only properties to

the east of the subject property that are zoned EFU, are partially irrigated and receiving farm tax deferral, while also having been developed with manufactured homes.

Nonetheless, the Hearings Officer finds that existing land use patterns are a factor in determining the subject property is not “agricultural land” under OAR 660-033-020(1)(a)(B). This is particularly so with the Highway 97 transportation corridor immediately adjacent to the subject property to the east and southeast, and rural residential uses to the west.. The record shows that, as traffic on Highway 97 has increased and a flood of new residents have located to Central Oregon over the past 30-40 years, farm land adjacent to the busy thoroughfare has been impacted by these changes. Drought conditions persist in the region, as well. Surrounding areas have been re-dedicated to rural residential use, as opposed to farming, and large farm tracts over 80 acres in size around the subject property do not exist.

The area is characterized by the heavily trafficked Highway 97 and a mix of rural residential uses, vacant EFU property that lacks irrigation rights, a tract that is not currently in use but is zoned OS&C, and resident-occupied, partially irrigated EFU parcels. There are various non-farm uses in the area, including a number of non-farm dwellings. The Hearings Officer finds that this determination does not ask whether the proposal is “consistent with existing land use pattern,” but instead asks whether, considering the existing land use pattern, the property is agricultural land. I find that it does not.

The Hearings Officer finds the Applicant has established that existing land use patterns is a factor in determining the subject property is not “agricultural land” under OAR 660-033-020(1)(a)(B).

Technological and Energy Inputs Required

The Applicant’s burden of proof states, “[g]iven the Subject Property has been not been [sic] farmed in recent (or distant) history, and the land has been used for equipment service and repair for at least 4 decades, farming the Subject Property at this time would require immense investment in technological and energy inputs, including irrigation systems, fertilization, and building proper infrastructure.” Technological and energy inputs required for agricultural use of the subject property also factor into the fact the property is not suitable for “farm use,” because it cannot be so employed for “**primary purpose of obtaining a profit in money.**”

Suggested uses by commentators do not address the profitability component of the definition of “farm use,” and do not rebut substantial evidence in the record that shows the required investments that preclude the establishment of a legitimate “farm use” on the property.

Exhibit QQ sets forth the difficulty associated with grazing goats on the property – particularly for obtaining a profit in money – and concludes that the same difficulties would frustrate any other farm operation. The record also includes a letter from Paul Schutt, the owner of a 40-acre farm in Tumalo. Exhibit O. His testimony speaks specifically to hemp production and concludes that “even the most experienced farmer would be well advised not to plant hemp for the foreseeable future,” because a “glut in the market is causing hemp farmers to suffer huge losses.” The Applicant observes that this testimony is notable because hemp was a crop in Central Oregon that, for several years, could justify expending substantial capital on specialized equipment and structures necessary to

establish a legitimate farm use. Other substantial evidence in the record on this consideration is found in Exhibits Q through HH.

The Hearings Officer notes that certain uses, such as storing farm equipment are not, in and of themselves “farm use,” as confirmed by LUBA in *Oregon Natural Desert Association v. Harney County*, 42 Or LUBA 149 (2002).

The Hearings Officer finds that agricultural uses of the subject property cannot be undertaken for the primary purpose of obtaining a profit in money due to the costs associated with technological and energy inputs required for any such use. No one presented any evidence to rebut the Applicant’s evidence that such costs preclude the owner from making a profit in money from farming the subject property. Therefore, the Hearings Officer finds that the Applicant has established that technological and energy inputs and associated costs thereof is a factor in determining the subject property is not “agricultural land” under OAR 660-033-020(1)(a)(B).

Accepted Farm Practices

The Applicant’s burden of proof states, in part, “[f]arming lands comprised of soils that are predominately Class 7 and 8 is not an accepted farm practice in Central Oregon. Dryland grazing, the farm use that can be conducted on the poorest soils in the County, typically occurs on Class 6 non-irrigated soils that have a higher soils class if irrigated. The Applicant would have to go above and beyond accepted farming practices to even attempt to farm the property for dryland grazing. Crops are typically grown on soils in soil class 3 and 4 that have irrigation, which this property has neither.”

The definition of “accepted farm practice,” like that of “farm use,” turns on whether or not it is occurring for the primary purpose of obtaining a profit. The *Wetherell* court relied on the taxation code in ORS 308A.056 to define “accepted farm practice” as “a mode of operation that is common to farms of a similar nature, necessary for the operation of these similar farms to obtain a profit in money and customarily utilized in conjunction with farm use.” *Wetherell, supra*, 52 Or LUBA at 681. LUBA determined in the *Aceti I* case that it is not an accepted farming practice in Central Oregon to irrigate and cultivate Class VII and VIII soils.

The Applicant is not required to show that no agricultural use could ever be made on the property; only that no reasonable farmer would attempt to engage in “farm use,” which is for the primary purpose of obtaining a profit. The Hearings Officer finds that substantial evidence in the record submitted by the Applicant, and not rebutted, establishes that operations required to turn a profit from agricultural uses on the subject property are unrealistic and not consistent with accepted farm practices. Financial investments that would be required to attempt to operate the subject property in a similar manner to the Humfleet Property or the Whistle Stop Farm & Flowers (see Exs. JJ, KK, LL and MM)⁶ are infeasible due to the poor soils and other considerations, including location adjacent to Highway 97, graveled surfaces and other site constraints.

Oregon courts have consistently addressed profitability as an element of the definition of “agricultural land.” In *Wetherell v. Douglas County*, 342 Or 666 (2007), the Oregon

⁶ The Applicant notes that Whistle Stop Farm & Flowers is engaging in unpermitted commercial activities which, in and of itself, is not an accepted farm practice.

Supreme Court held that profitability is a “profit in money” rather than gross income. In *Wetherell*, the Court invalidated a rule that precluded a local government from analyzing profitability in money as part of this consideration. *Id.* at 683. The Court stated:

“We further conclude that the meaning of profitability,” as used in OAR 660-033-0030(5), essentially mirrors that of “profit.” For the reasons described above, that rule’s prohibition of any consideration of “profitability” in agricultural land use determination conflicts with the definition of “farm use” in ORS 215.203(2)(a) and Goal 3, which permit such consideration. OAR 660-033-0030(5) is therefore invalid, because it prohibits consideration of “profitability.” The factfinder may consider “profitability” which includes consideration of the monetary benefits or advantages that are or may be associated from the farm use of the property and the costs or expenses associated with those benefits, to the extent such consideration is consistent with the remainder of the definition of “agricultural land” in Goal 3.

*Finally, the prohibition in OAR 660-033-0030(5) of the consideration of “gross farm income” in determining whether a particular parcel of land is suitable for farm use also is invalid. As discussed above, “profit” is the excess or the net of the returns or receipts over the costs or expenses associated with the activity that produced the returns. To determine whether there is or can be a “profit in money” from the “current employment of [the] land *** by raising, harvesting and selling crops[.]” a factfinder can consider the gross income that is, or could be generated from the land in question, in addition to other considerations that relate to “profit” or are relevant under ORS 215.203(a) and Goal 3.*

We therefore hold that, because Goal 3 provides that “farm use” is defined by ORS 215.203, which includes a definition of “farm use” as “the current employment of land for the primary purpose of obtaining a profit in money[.]” LCDC may not preclude a local government making a land use decision from considering “profitability” or “gross farm income” in determining whether land is “agricultural land” because it is “suitable for farm use” under Goal 3. Because OAR 660-033-0030(5) precludes such consideration, it is invalid.

Id. at 681-683.

The Hearings Officer finds that the Applicant has met its burden of showing the subject property cannot be used for agricultural purposes for the primary purpose of obtaining a profit in money and such is not “agricultural land” under all of the considerations of OAR 660-033-020(1)(a)(B)..

The Hearings Officer finds that substantial evidence in the record supports a determination that the subject property is not suited to commercial farming because no reasonable farmer would believe he or she could make a profit in money therefrom, considering all of the factors listed in OAR 660-033-020(1)(a)(B). No one presented any evidence to rebut the Applicant’s evidence that “accepted farming practices” would or could change the poor soils on the property to render it suitable for “farm use.” There are various barriers to the Applicant, or any other person, that preclude using the subject property to engage in agricultural activities for a profit.

In conclusion, the Hearings Officer finds that substantial evidence in the record supports a determination that each of the listed considerations in OAR 660-033-020(1)(a)(B)

preclude “farm use” on the subject property because no reasonable farmer would expect to make a profit in money by engaging in agricultural activities on the land.

3. HEARINGS OFFICER’S FINDINGS AND CONCLUSIONS REGARDING DCC 18.04.030 DEFINITION OF “AGRICULTURAL LAND”

COLW argues that the definition of “agricultural land,” in DCC 18.04.030 excludes the definition of “farm use” in ORS 215.203(2)(a) and up-ends the Oregon Supreme Court’s decision in *Wetherell* because the County Code definition includes the phrase, “whether for profit, or not.” COLW cites *Brentmar v. Jackson County*, 321 Or 481, 497, 900 P.2d 1030 (1995) for the proposition that, even in EFU zones, Deschutes County can enact “more stringent local criteria” than state statutes.

COLW is wrong. The definition of “**agricultural land**” in DCC 18.04.030 is wholly consistent with ORS 215.203(2)(a) and case law in this state and does not exclude the “profit in money” component which defines “farm use” and guides analysis of whether or not property is in fact “agricultural land”:

"Agricultural Land" means lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominately Class I-VI soils, and other lands in different soil classes which are suitable for farm use, taking into consideration soil fertility, suitability for grazing and cropping, 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. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands shall be included as agricultural lands in any event.

COLW instead relies on the definition of “**agricultural use**,” which is not relevant. Many properties can be engaged in “agricultural use,” even if such properties do not constitute “**agricultural land**.” (hobby farms, for example). Merely because a property can be put to some, more broadly defined “agricultural use,” does not make it “agricultural land,” for the reasons set forth in detail in this Decision and Recommendation.

"Agricultural use" means any use of land, whether for profit or not, related to raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof not specifically covered elsewhere in the applicable zone. Agricultural use includes the preparation and storage of the products raised on such land for human and animal use and disposal by marketing or otherwise. Agricultural use also includes the propagation, cultivation, maintenance and harvesting of aquatic species. Agricultural use does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees.

The Hearings Officer finds that application of the County Code definition of “agricultural land” does not change the analysis in this Decision and Recommendation.

4. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING RURAL INDUSTRIAL USES AND GOAL 14

The Hearings Officer finds that the arguments of COLW and 1000 Friends concerning Goal 14 are improper attempts to re-litigate a matter that has been before the Deschutes County Hearings Officer, the Board of County Commissioners, 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)). Moreover, COLW and 1000 Friends disagree on whether the factors set forth in *Shaffer v. Jackson County*, 17 Or LUBA 922 (1989) are applicable. See also *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014). For the reasons set forth in detail below, the Hearings Officer finds that the *Shaffer* factors are not applicable because the eventual use of the subject property is uncertain, making it impossible to determine whether the *Shaffer* factors are satisfied.

As the Hearings Officer finds below, a use-by-use analysis of the uses permitted outright and conditionally in the RI zone to determine whether such uses are urban or rural in nature has been made by the Deschutes County Board of County Commissioners. Those findings are binding on the County in consideration of the subject applications.

a. Analysis of LUBA and Court of Appeals Decisions in Aceti

The recent *Aceti* LUBA opinion states, in relevant part:

In 2018, the county amended the DCCP to allow RI designations and zoning of land outside the three existing exception areas. Petitioner appealed those amendments [in Central Oregon LandWatch v. Deschutes County, 79 Or LUBA 253, aff'd 298 Or App 375, 449 P3d 534 (2019)], arguing, among other things, that the county's decision failed to comply with Goal 14 because the amendments would allow urban uses of rural lands. Petitioner further argued that the DCC RI zone regulations – which were not amended concurrently in 2018 with the DCCP amendments – allow urban uses of rural land. We rejected those arguments, concluding that the 2018 DCCP amendments are consistent with Goal 14 because (1) any future application for the RI plan designation would have to demonstrate that it is consistent with Goal 14 and (2) petitioner's argument that the RI zone regulations allow urban uses was an impermissible, collateral attack on acknowledged land use regulations.

Aceti (slip op at *3) (internal citations omitted). DLCD has acknowledged the County's RI code provisions. LUBA's *Aceti* decision questions whether an analysis of the *Shaffer* factors [*Shaffer v. Jackson County*, 16 Or LUBA 871 (1988)] was necessary because the applicable DCC RI provisions have been repeatedly acknowledged by DLCD as consistent with Goal 14. Among other things, it stated:

*** * * the county amended the DCC RI zone regulations in 2002 and DLCD acknowledged those regulations are consistent with Goal 14. In 2002, the RI plan designation was limited to certain geographic areas and specific properties. However, the 2002 Ordinances did not limit uses allowed in the RI zone to preexisting industrial uses. Instead, the 2002 Ordinances provided that the purpose of the RI plan designation 'is to recognize existing industrial uses in rural*

areas of the county and to allow the appropriate development of additional industrial uses that are consistent with the rural character, facilities and services.'

“* * * in 2018, the county amended the DCCP to make the RI plan designation available for properties other than those already zoned RI. We have no reason to believe that DLCD's acknowledgment of the 2002 Ordinances as consistent with Goal 14 was premised on the fact that the RI plan designation was at that time limited to specific geographic areas. However, we note that certain factors that indicate the urban nature of a use--such as proximity to a UGB or extension of public facilities--might be different on a new parcel as compared to those properties originally zoned RI prior to the 2018 DCCP amendments.

* * *

"In adopting the 2018 DCCP amendments, the county took a belt-and-suspenders approach by requiring an applicant for a new RI plan designation to demonstrate compliance with Goal 14, even though the county had already concluded (and DLCD acknowledged) that the RI zone itself complies with Goal 14 by limiting uses to those that are rural in character. In [Central Oregon LandWatch v. Deschutes County, 79 Or LUBA 253, aff'd 298 Or App 375, 449 P3d 534 (2019)], we affirmed that belt-and suspenders approach in response to petitioner's Goal 14 challenge.

"In this case, the county agreed with intervenor that 'the policies of the DCCP, implemented by DCC Chapter 18.100, which is an acknowledged land use regulation, do not allow urban uses on RI designated and zoned land.' Petitioner does not assign error to that finding on appeal. That might have been the end of the Goal 14 inquiry. Nevertheless, perhaps because the county took a belt-and-suspenders approach to support the 2018 DCCP amendments by requiring an applicant to demonstrate compliance with Goal 14, the county further concluded that '[s]pecific findings with 'reasonable clarity' must be made to support a determination that the [DCC] and [DCCP] limit industrial uses to those that are rural in nature.' In what appears to us to be yet another belt-and-suspenders approach, the county applied the Shaffer test to explain why applying RI zoning to the subject property will not result in urban uses.

"Intervenor appears to have accepted and invited that second-step inquiry and neither assigns error to it on appeal nor argues that the county's Shaffer analysis is dicta or unnecessary, alternative findings in light of the county's collateral attack conclusion regarding the acknowledged DCC chapter 18.100. Accordingly, we assume for purposes of this decision, as the county did and the parties do, that the fact that the RI zone regulations have been acknowledged by DLCD to comply with Goal 14 is not independently sufficient to demonstrate the challenged post-acknowledgment plan amendment applying the RI plan designation and zone to the subject property also complies with Goal 14."

(slip op at *12-13). Applicant asserts that the final paragraph above, read in conjunction with the preceding paragraphs, conclusively demonstrates that LUBA's formal Aceti holding is constrained to what was likely a superfluous "belt and suspenders" Shaffer analysis at issue in those proceedings. On appeal of this LUBA decision to the Oregon Court of Appeals, the Court ruled:

“Aceti first argues that LUBA should not have applied the Shaffer test at all because the state agency overseeing land use planning, the Land Conservation and Development Commission, must have already determined that all the uses permitted in the County's RI zones are rural, not urban, when it acknowledged the County Plan. However, that argument was not raised before LUBA, and Aceti does not contend that LUBA committed plain error. Aceti also argues that LUBA misapplied the Shaffer test. However, Aceti has provided no basis under our standard of review that would permit us to displace LUBA's application of its own precedent.”

Central Oregon LandWatch v. Deschutes County, 315 Or App 673, 680, 501 P3d 1121 (2021).

Based on the foregoing analysis and citations, the Applicant argues at page 14 of its June 14, 2022 final argument that LUBA and the Court of Appeals were persuaded by the notion that DLCD's acknowledgement of the County's DCC and DCCP provisions governing the RI zone should have set the Goal 14 issue to rest, but for the *Aceti* applicant undertaking a “belt and suspenders” *Shaffer* analysis.

The Applicant posits that what is dispositive for the subject application are the BOCC's findings regarding the RI zone. The Applicant's primary argument on this issue is that the DCC and DCCP provisions governing the RI zone ensure that no urban uses are allowed on rural lands. Based on that assertion, the subject application specifically does not include the same superfluous “belt and suspenders” *Shaffer* analysis. Therefore, LUBA's formal *Aceti* ruling which is constrained to that “belt and suspenders” analysis is inapplicable to the present application.

b. BOCC's Formal Aceti Findings

The record includes a copy of the Hearings Officer's October 8, 2020 decision in the *Aceti* matter. The BOCC, in turn, adopted that decision as its own, with the Hearings Officer's decision incorporated as the BOCC's findings attached and incorporated into Ordinance No 2021 -002 adopted on January 27, 2021. Pages 48 and 49 of the Hearings Officer's decision includes six findings conclusively demonstrating that the law is settled when it comes to the County's RI zone not allowing urban uses on rural lands.

“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)].

“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 and 3.4.31) 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."

The Hearings Officer finds that the above findings are not constrained to the facts and circumstances at issue in the *Aceti* application. These findings apply universally to any application submitted relying on the County's DCC and DCCP RI provisions. LUBA succinctly described the above six findings as follows:

" * * the county determined that even the most intensive industrial use that could be approved on the subject property under the RI regulations and use limitations would not constitute an urban use. The county found that the DCCP RI policies and implementing RI zone regulations in DCC 18.100.010 to 18.100.090 limit the scope and intensity of industrial development in the RI zone so that no urban industrial use can be allowed on the subject property. For example, as explained above, new industrial uses are limited to a maximum floor area of 7,500 square feet within a building and industrial uses must be served by on-site sewage disposal. DCCP Policy 3.4.28; DCCP Policy 3.4.31; DCC 18.100.040(H)(1); DCC 18.100.030(K)."*

Aceti (slip op at *11) (internal citations to the record omitted).

The Hearings Officer finds that the law is settled on the question of whether the RI zone permits urban uses on rural lands. It does not. A belt-and-suspenders Shaffer analysis is not required. The Hearings Officer adopts the findings of the BOCC set forth in Ordinance No. 2021-002 (January 27, 2021) by this reference as the Hearings Officer's findings concerning the "urban" or "rural" nature of uses in the RI zone.

As determined in Aceti, "even the most intensive industrial use that could be approved on the property under the RI regulations and use limitations would not constitute an urban use. ... [T]he [Deschutes County Comprehensive Plan] RI

policies and implementing RI zone regulations in DCC 18.100.010 to 18.100.090 limit the scope and intensity of industrial development in the RI one so that no urban industrial use can be allowed on the subject property.”

The Hearings Officer finds that the findings in the *Aceti* application, adopted by the BOCC, are binding interpretations of DCC and DCCP provisions governing the County’s RI zone. The Hearings Officer declines to revisit these findings here, particularly given the well-established rule that local governments "may err in changing previously adopted interpretations" if doing so is a product of a design to act arbitrarily or inconsistently from case to case." *Foland v. Jackson County*, ___ Or LUBA ___, ___ (LUBA No 201 3-082, Jan 30, 2014) (slip op at *4) (citing *Alexanderson v. Clackamas County*, 126 Or App 549, 552, 869 P2d 873 (1994)).

The Hearings Officer enters the same findings set forth above with respect to this application and finds that the application complies with Goal 14; no Goal 14 exception is required.⁷ The County’s RI zone does not permit urban uses; this question has been asked and answered.

The Hearings Officer notes that the Applicant included a “Goal 14 exception” application in the alternative if the Board of County Commissioners determines that a Goal 14 exception is required. The Applicant’s Goal 14 exception application is addressed in detail in the findings below.

5. HEARINGS OFFICER’S FINDINGS AND CONCLUSIONS REGARDING DCC 22.20.015

COLW argued in its May 31, 2022 open record submittal that the Hearings Officer should determine pursuant to DCC 22.20.015 “if the subject property is in violation of applicable land use regulations” due to “a current farm use or farm equipment maintenance and storage occurring on the subject property.” Presumably, COLW is arguing that the County cannot approve the subject applications due to an alleged code violation, per DCC 22.20.015(A). COLW did not provide any additional information or argument as to the relevance of the use of the subject property for such a use, which is allowed outright pursuant to DCC 18.16.020(A).

The Hearings Officer finds that DCC 22.20.015 is irrelevant because no violation has been established under DCC 22.20.015(C), and the record does not support a finding that the subject property is not in compliance with applicable land use regulations and/or conditions of approval of prior land use decisions or building permits.

The Hearings Officer finds that DCC 22.20.015 does not preclude the County’s consideration of the applications or its approval thereof.

⁷ The Applicant included an alternative request for a Goal 14 exception to address the possibility that the Board of County Commissioners will deviate from the aforementioned proclamation when addressing the *Aceti* matter on remand. But until and unless that occurs, the Applicant and the County are entitled to rely on the Board of County Commissioner’s precedent.

B. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING APPLICABLE CRITERIA

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.120. Exceptions

Section 18.120.010. Nonconforming Uses.

Except as otherwise provided in DCC Title 18, the lawful use of a building, structure or land existing on the effective date of DCC Title 18, any amendment thereto or any ordinance codified therein may be continued although such use or structure does not conform with the standards for new development specified in DCC Title 18. A nonconforming use or structure may be altered, restored or replaced subject to DCC 18.120.010. No nonconforming use or structure may be resumed after a one-year period of interruption or abandonment unless the resumed use conforms with the provisions of DCC Title 18 in effect at the time of the proposed resumption.

FINDING: In the burden of proof submitted, there are several descriptions of the activities and uses that have taken place on the subject property related to the previously-verified nonconforming uses under files NCU-73-33 and SP-79-21. In the Staff Report, staff questioned whether nonconforming use verification should be made for purposes of the applications. The Applicant, at the hearing, conceded that the nonconforming uses on the subject property were potentially abandoned as a matter of law. The Applicant further agreed that the subject applications are not a replacement for a nonconforming use verification contemplated by DCC 18.120.010(C).

The Hearings Officer finds that, whether or not current uses of the property are lawful non-conforming uses, is not relevant to the determination of compliance with the applicable criteria for the proposal before the County. No applicable DCC provision, statute or rule requires a non-conforming use verification for purposes of review of the subject applications.

The Hearings Officer finds that the Applicant need not prove that the current uses of the property are lawful non-conforming uses to meet its burden of proof.

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, requested a quasi-judicial plan amendment and filed the applications for a plan amendment and zone change. The

Applicant filed the required Planning Division’s land use application forms for the proposal. The application is 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:

FINDING: The Applicant submits that “the proposed rezone best serves the interest of the community by allowing Applicant to put the Subject Property to its most viable use.” The Hearings Officer finds that the four factors listed in DCC 18.136.020 are considered in order to determine whether the public interest is best served by rezoning the property. The Hearings Officer finds that a demonstration of these four factors by the Applicant constitutes proof that the public interest will be best served by rezoning the property.

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 in its burden of proof statement:

Per prior Hearings Officers decisions for Plan amendments and zone changes on EFU-zoned property, this paragraph establishes two requirements: (1) that the zone change conforms to the Plan and (2) that the change is consistent with the plan’s introduction statement and goals. Rezoning the Subject Property from EFU-TRB to RI will conform with the Comprehensive Plan and is consistent with the plan’s introductory statement, as set out below.

- 1) *Conformance with the Comprehensive Plan.* Applicant is currently requesting a Plan amendment to re-designate the Subject Property from Agriculture to Rural Industrial. The rezone from EFU-TRB to RI will be consistent with the proposed Plan amendment requesting that that the property be designated Rural Industrial.
- 2) *Consistency with the Plan’s Introductory Statement and Goals.* In previous decisions, the Hearings Officer found the introductory statements and goals are not approval criteria for proposed plan amendments and zone changes⁸. However, the Hearings Officer in the Landholdings decision found that depending on the language, some plan provisions may apply and found the following amended comprehensive plan goals and policies require consideration and that other provisions of the plan do not apply as stated below in the Landholdings decision:

"Comprehensive plan statements, goals and policies typically are not intended to, and do not, constitute mandatory approval criteria for quasi-

⁸ Powell/Ramsey (file no. PA-14-2 / ZC-14-2) and Landholdings (file no. 247-16-000317-ZC, 318-PA)
 File Nos. 247-21-000881-PA, 882-ZC
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judicial/and 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 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 decision which must be made to promote the greatest efficiency and equity possible, which [sic] 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 decision 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 (Emphases added.)

The Hearings Officer previously found that the above-underscored language strongly suggests 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 provision.’ (Emphasis added.)*

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."

Hearings Officer Karen Green adhered to these findings in the Powell/Ramsey decision (file nos. PA-14-2/ZC-14-2), and found the above-referenced introductory statements and goals are not approval criteria for the proposed plan amendment and zone change.

This Hearings Officer also adheres to the above findings herein. 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). I find that the following amended comprehensive plan goals and policies require such consideration, and that other provisions of the plan do not apply...."

The Hearings Officer relies on the analysis set forth in prior Hearings Officers' decisions. This Decision and Recommendation reviews only the Comprehensive Plan Goals and policies that apply, addressed in detail in the Comprehensive Plan section below.

Based on the Applicant's demonstration of Comprehensive Plan conformance detailed in subsequent findings, the Hearings Officer finds that the zone change conforms to the Plan; and (2) that the change is consistent with the Plan's introductory statement and goals. Rezoning the Subject Property from EFU-TRB to RI will conform with the Comprehensive Plan and is consistent with the plan's introductory statement, as set out below.

C. 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 Comprehensive Plan 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 any existing Rural Industrial exception areas and is located outside unincorporated communities and urban growth boundaries. 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

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.

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.

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: 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. The Applicant provided the following response in the burden of proof statement:

Necessary public facilities and services are available to serve the Subject Property. The Subject Property is served by Deschutes County Services, the Deschutes Public Library District, the Central Oregon Irrigation District, and Bend Garbage & Recycling. The Subject Property is already equipped with adequate water and sewage systems, as explained above [sic], to support industrial uses.

Deschutes Rural Fire Protection District #2 provides fire and ambulance services to the Subject Property, and the Deschutes County Sheriff provides policing services.

It is efficient to provide necessary services to the property because the property is already served by these providers and the Subject Property is close to the City limits of both Bend and Redmond. It is also adjacent to a rural residential subdivision. This criterion is met.

Neighboring properties contain residential and open space & conservation uses, which have water service from a quasi-municipal source or wells, on-site sewage disposal systems, electrical service, telephone services, etc. The Applicant presented evidence that the property itself is already served by public service providers.

In the Staff Report, staff questioned whether the Applicant met its burden of proof on this criterion given potential transportation safety issues concerning a privately constructed/maintained bridge over the canal which serves as access to the majority of the subject property. The Hearings Officer notes that the fire department did not comment on the applications nor otherwise express any concerns regarding adequacy of access to the property for emergency services.

Deschutes County has not requested or required that the bridge be dedicated to public use as a condition of approval of the applications, and the County has generally imposed a moratorium on adding any roads or bridges to the County’s transportation system. At the hearing, the Applicant acknowledged that replacement of the existing bridge may be initiated by it directly, or that the County could require such replacement as a condition of approval for the future development of the property and will require further coordination with COID, as noted in COID’s comments on these applications.

The Hearings Officer finds that the bridge is not a “public facility” to be evaluated under this criterion. Findings on compliance with TSP requirements are set forth in detail below, incorporated herein by this reference.

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.

The Hearings Officer finds this criterion is met.

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

FINDING: The Applicant’s burden of proof statement addresses potential impacts on surrounding land uses as related to each individual policy and goal item within the County’s Comprehensive Plan, addressed in detail in subsequent findings.

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.

Based on the Applicant’s demonstration of Comprehensive Plan conformance set forth in detail in subsequent findings and incorporated herein by this reference, the Hearings Officer finds the application complies with the above criterion.

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 is proposing to rezone the property from EFU to RI and re-designate the property from Agriculture to Rural Industrial. The Applicant provided the following response in the burden of proof statement:

Both mistake and change in circumstances are applicable to the Subject Property. As to mistake, in 1978, the County Board of Commissioners, upon reviewing a

*request by the then owner of the Subject Property to rezone the Subject Property from A-1 (exclusive agricultural) to C-2, decided to rezone only Tax Lot 500, but changed the zoning to "AS," which "allows just about any kind of commercial" activity. See **Exhibit 11**. That decision mistakenly did not rezone Tax Lot 301, despite the Applicant at the time explaining to the Board of Commissioners that "without this zone change his land is virtually worthless" due to it being landlocked and due to the uses. As to change in circumstances, the Subject Property has been irrevocably committed to non-agricultural uses through decades of using the property for equipment service and rentals/sales. The land, which may have previously been considered suitable for farming, no longer is. Rather it is made up predominantly of Class 7 or 8 soils, which are unsuitable for agricultural use. See **Exhibits 7-9**. For these reasons, this Application meets the requirements of Criterion D.*

Mistake

For the reasons set forth below, the Hearings Officer finds that a "mistake" was not made. The 1978 File No. Z-78-23 proceeding materials are included in the record and establish that the County made a considered, deliberate decision to rezone only Tax Lot 500 and to deny the application to rezone Tax Lot 301. The then-applicant did not appeal the County Board of Commissioner's decision to deny the application to rezone Tax Lot 301. The Hearings Officer finds that the unchallenged decision cannot now be considered to be the product of "mistake" under Oregon law. The Applicant cannot now collaterally attack this prior decision and claim it to be the product of "mistake."

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

As the Hearings Officer found in Aceti 1, I find that the original EFU zoning of the subject property was not a mistake at the time of its original designation. The property's EFU designation and zoning were appropriate in light of the soil data available to the county in the late 1970s when the comprehensive plan and map were adopted.

The Hearings Officer makes a similar finding with respect to the subject applications. The EFU zoning of the subject properties was not a mistake at the time of its original designation. The properties' EFU designation and zoning were appropriate in light of the soil data available to the County in the late 1970s when the comprehensive plan and map were adopted. For the foregoing reasons, the Hearings Officer finds that "mistake" does not support the Applicant's requested zone change for the subject properties.

Change in Circumstances

In *Aceti* (247-20-000438-PA, 439-ZC), as well as in File Nos. 247-21-00616-PA/617-ZC and *Eden Properties*, File Nos. 247-21-001043-PA/1044-ZC, the Hearings Officer found that new soil data could be considered evidence of a change in circumstances between the time of the original zoning (when the County did not conduct an individualized soils analysis on a farm-by-farm basis), or – as here – the time of the last zoning of the subject property, which was December 7, 1992 when the property was assigned to the EFU-TRB subzone under Ord. 92-065 - and the time when an Order I Soil Survey was conducted by the property owner or applicant to support an application for rezone. The County has an File Nos. 247-21-000881-PA, 882-ZC

Hearings Officer Decision and Recommendation

established practice when it comes to interpreting and applying DCC 18.136.020(D) such that the additional information provided by a site specific Order I Soil Study may constitute a “change in circumstances.” The Hearings Officer rejects COLW’s argument that Order I Soils Surveys are irrelevant for purposes of this criterion.

While original/most recent EFU zoning of a property may not be a “mistake,” given that the County relied on available soils data for such zoning and designation decision-making, new, more in-depth information not available to the County regarding soils is – in and of itself – a change of circumstances pursuant to which the County may consider a requested rezone. What has changed is the information available to the County. The County cannot now ignore the Order I Soil Surveys introduced into the record and supporting testimony which show that the subject property is predominantly characterized by soil capability classes VII and VIII.

In its May 31, 2022 open record submittal, the Applicant stated at pages 2-3:

As understood by the Applicant, this issue stems directly from the April 26, 2022 comment letter submitted by Central Oregon LandWatch (“COLW”). There are several “changes in circumstances” that have occurred since the Properties were most recently rezoned on December 7, 1992, that justify the subject application. Those changes range from shifting development patterns in the area to substantial changes in the region’s water resources. The most obvious change, however, is that the parties and the County have more accurate soil data at their disposal [sic] because the Applicant commissioned Class I Soil Surveys for the Properties. On that particular issue, it appears that COLW is perhaps trying to re-litigate a settled issue.

The County last considered a Class I Soil Survey as a “change in circumstance” in a recent land use proceeding before the same Hearings Officer concerning property owned by Anthony Aceti (File Numbers 247-20-000438-PA / 429-ZC, “Aceti”). That decision succinctly concluded that “new soil data could be considered a change in circumstances,” (Pg 22). The Board of County Commissioners, in turn, agreed with that conclusion, and adopted the Aceti Hearings Officer’s decision as its own by including said decision as Exhibit F to Ordinance No. 2021-002. Under the circumstances, it would be inappropriate for the Hearings Officer to now either interpret or apply DCC 18.136.020(D) in a manner inconsistent with Ordinance No. 2021-002.

*In addition to the Order 1 Soil Surveys already prepared by Gary A. Kitzrow and already included in the record as Exhibits 7, 8 and 9 attached to the Applicant’s Burden of Proof, attached hereto is an additional correspondence provided by Kitzrow. See **Exhibit A**. Kitzrow’s supplemental testimony includes the following explanation:*

“Order I Soil Surveys are site-specific and have a high confidence interval and specificity. In other words, while Order III USDA soil surveys (published at 1:24,000) are a foundation for soil series/map unit concepts in the general area under review our current maps for this Order I Soil Survey are inventoried at a scale of 1:831 and 1:738 for this site-specific report In fact, in the original USDA map cited in our original report and

*henceforth sanctioned by the DLCD, it says right in the notation for the actual enclosed soil map, “Soil Map may not be valid at this scale” which it is not in this particular case. * * * Soil series concepts for the subject area in the USDA report are certainly valid and based upon solid Soil Survey principles, however, the actual soil map units, distribution and quantification of each unit is not always valid at this very detailed site-specific finite land base. This is a major distinct between Order I and Order III Soil Surveys. Order I Soil Surveys are represented by a scale reflective of the very small land base under consideration. Order III Soil Surveys are general in nature since their intended use is for agriculture, ranching and forest management and not for land use decisions and rezoning considerations. **Given these facts above, our current Order I Soil Survey is, in fact, a REPLACEMENT and NOT a supplement for the subject properties regarding soil map and Capability Class/Soil Efficacy considerations.”***

Id. (emphasis in original).

As set forth in the Preliminary Findings and Conclusions above, the Hearings Officer does not find it “suspect” that an Order I Soil Survey contradicts NRCS soil classifications performed at a higher, landscape level. Rather, the use of Order I soil surveys to provide more detailed information is specifically contemplated and allowed by ORS 215.211(1) and OAR 660-033-0030. COLW did not introduce any competing evidence of a different Order I soil survey that reached conclusions that diverge from those of the Applicant’s soil scientist.

Contrary to COLW’s arguments, an applicant does not need to establish that the soils themselves have changed on the subject property. DCC 18.136.020(D) does not require “a change in the physical characteristics since the property was last zoned.” The Hearings Officer declines to add new language to the provisions of the Code under the guise of “interpreting” it. Nonetheless, the Hearings Officer finds that the Applicant’s certified soil scientist noted significant portions of “disturbed” soils, cut and fill operations, topsoil removal and compaction, which could evidence a change in the physical characteristics of the soils on the property.

The Applicant also addressed the fact that the region has been experiencing a years-long drought, affecting the amount of available water resources. The Applicant noted at the public hearing that it does not make sense to use limited water resources to irrigate poor soils. It has been leasing back irrigation waters associated with the subject property each year since 2016. COLW’s evidence acknowledges the region’s changing water resources (Exs. E, F, G and I). The record further evidences that continued depletion of regional water resources is not only a “change in circumstances” but is impacting, and will continue to impact public interests (Exs. C through K). The Applicant suggests that “eliminating irrigation inefficiencies,” as called for by COLW, should also include allowing property owners to rezone their property if it is shown not to be agricultural land. The Hearings Officer agrees and finds that diminishing water resources in the region independently evidences a “change in circumstances” under this criterion.

Finally, the Applicant’s burden of proof statement at page 8 noted several of the reasons a requested rezone of the subject property was denied in 1978 including the County’s desire to preserve “openness,” and prevent commercialization along Highway 97. The File Nos. 247-21-000881-PA, 882-ZC
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Applicant discussed the fact, not disputed by any commentator, that the Highway 97 corridor between Bend and Redmond has been significantly developed since 1978, along with a large influx of population to the area since that time.

The Hearings Officer finds that the Order I Soil Survey prepared for the subject property, the current drought in the area and strain on available water resources, and the increasing commercialization along Highway 97 and population influx into the area all evidence a “change in circumstances” since the County’s last zoning of the property in 1992. Therefore, this criterion is met.

Deschutes County Comprehensive Plan

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 in the burden of proof statement:

In the Landholdings decision (and Powell/Ramsey decision) the Hearings Officer found that this goal is an aspirational goal and not an approval criterion. The Subject Property does not constitute agricultural land that must be preserved. The Soil Assessments show that each tax lot comprising the Subject Property is predominantly comprised of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

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

“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 660033-0020(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.”

As set forth in the Preliminary Findings and Conclusions, incorporated herein by this reference, the Hearings Officer finds substantial evidence in the record supports a finding that the subject property is not “agricultural land,” and is not land that could be used in conjunction with adjacent property for agricultural uses.

There is no evidence that the requested plan amendment and rezone will contribute to loss of agricultural land in the surrounding vicinity. I find that the agricultural industry will not be negatively impacted by re-designation and rezoning of the subject property. Therefore, the Hearings Officer finds the applications are consistent with Section 2.2, Goal 1, “preserve and maintain agricultural lands and the agricultural industry.”

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 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. The Hearings Officer finds this policy is not applicable.

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 in the submitted burden of proof statement:

In the Landholdings decision (and Powell/Ramsey decision), the Hearings Officer found that this policy is directed at the County rather than an individual Applicant. Applicant is requesting that the subject property be rezoned from EFU-TRB to RI and that the Plan designation be changed from Agriculture to Rural Industrial because the Subject Property is not Agricultural Land subject to Goal 3. The proposed rezone and Plan amendment is allowed by, and in compliance with, State Statute, Oregon Administrative Rules, and the Plan. The requested change is similar to that approved by Deschutes County in the Landholdings case and in PA-11-1/ZC-11-2, which related to land owned by the State of Oregon (DSL). In the DSL decision, Deschutes County determined that State law as interpreted in Wetherell v. Douglas County, 52 Or LUBA 677 (2006), allows this type of amendment. In Wetherell, LUBA explained:

As we explained in DLCD v. Klamath County, 16 Or LUBA 817, 820 (1988), there are two ways a county can justify a decision to allow nonresource use of land previously designated and zoned for farm use or forest uses. One is to take an exception to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). The other is to adopt findings which demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. When a county pursues the latter option, it must demonstrate that despite the prior resource plan and zoning designation, neither Goal 3 or Goal 4 applies to the property.

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.

The Subject Property is primarily composed of Class 7 and 8 nonagricultural soils, and as such, farm-related endeavors would not be profitable. This Application complies with Policy 2.2.3.

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

"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."

The facts presented by the Applicant for the subject application are similar to those in the *Wetherell* decision and in the aforementioned Deschutes County plan amendment and zone change applications. For the reasons set forth above in the Preliminary Findings and Conclusions, incorporated herein by this reference, the Hearings Officer finds the subject property is not agricultural land and does not require an exception to Statewide Planning Goal 3 under state law. The applications are consistent with this Policy.

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 in the burden of proof statement:

In the Landholdings decision (and Powell/Ramsey decision), the Hearings Officer found this policy is directed at the County rather than at an individual Applicant. Applicant's proposal complies with the DCC and any lack of clarity by the County in regard to the conversion of EFU designations does not prevent Applicant from

requesting a zone change. Further, the County's interpretation of Policy 2.2.3, discussed above, spells out when and how EFU parcels can be converted to other designations.

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

"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."

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.

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

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."

The Hearings Officer finds this plan policy requires the County to identify and retain agricultural lands that are accurately designated. Substantial evidence in the record supports a finding that the subject property is not agricultural land as detailed above in the Preliminary Findings and Conclusions, incorporated herein by this reference. Further

discussion on the soil analysis provided by the Applicant is detailed under the OAR Division 33 criteria below. The Hearings Officer finds the applications are consistent with this policy. The Applicant's compliance with Deschutes County Code provisions applicable to the subject applications is addressed in separate findings herein.

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 (247-20-000438-PA, 439-ZC), the Hearings Officer found:

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 ZC14-2 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 at this time. The Applicant will be required to address this criterion during development of the subject property, which will be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat). The Hearings Officer finds this policy does not apply to the subject applications.

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: 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.

Chapter 3, Rural Growth

Section 3.4, Rural Economy

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 in the burden of proof statement:

This Application proposes a zoning change to RI. The Subject Property is located near, but is not part of, the Deschutes Junction site, and as such rezoning to RI would be consistent with nearby land uses. Applicant’s current plan for the Subject Property, should this Application be approved, is to develop a mini-storage facility, which is an allowed conditional use in the RI zone. See DCC 18.100.020.M. However, those plans are not final. Applicant ultimately wishes to develop the

Subject Property consistent with the uses allowed (outright or conditionally) in the RI zone. The Application thus complies with this Policy.

The Hearings Officer reviews specific goals and policies in DCCP Section 3.4, Rural Economy, in specific findings below.

Section 3.4, Rural Economy

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

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.

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.

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.

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 66022 or any successor.

FINDING: The Applicant provided the following response in the burden of proof statement:

The uses allowed by the RI zone are suitable allowable uses for the Subject Property, and are compatible with the current state of the Subject Property, which, as discussed throughout this Application, is not suitable for farming or agriculture due to its soils and past land uses on the Subject Property. The Application thus complies with this Policy.

The Hearings Officer finds this policy is directed at the County with respect to its adoption of land use regulations and uses authorized in the RI zone, and not to an individual applicant. The RI code is acknowledged, valid, and does not permit urban uses, as the Hearings Officer determined in the Preliminary Findings and Conclusions set forth in detail above, incorporated herein by this reference.

In LUBA 2021-028, a remand of *Aceti* (247-20-000438-PA, 439-ZC), the following findings related to the above Policy were included:

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 2002127 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.

Regardless of the inapplicability of this policy to the subject applications, the Hearings Officer notes that the Applicant is requesting a zone change, and has not submitted an application for any particular use at this time. Subsequently, the County will consider application(s) to approve permitted RI uses on the property, which future land use decision(s) must be consistent with RI land use regulations which ensure that any use allowed is less intensive than those allowed for unincorporated communities in OAR 660-22 or any successors.

To the extent this Policy is applicable to the Applicant, the Hearings Officer finds the applications are consistent therewith.

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 in the burden of proof statement:

If this request for Plan Map amendment and rezone is approved, the land use regulations relating to RI sites ensure that any use allowed by the RI zone will not adversely affect any agricultural uses in the area surrounding the Subject Property. Indeed, none of the immediately adjacent properties are in agricultural use at this time. The Application thus complies with this Policy.

There are no identified forest uses in the vicinity and, juniper, the predominant tree species in the vicinity is not merchantable. Adjacent Tax Lots 300 and 306 appears to be in farm use, based on aerial photography, and are receiving farm tax assessment.

The Hearings Officer finds this policy is directed at the County with respect to its adoption of land use regulations for uses allowed in the RI zone. The policy is not applicable to an individual applicant. 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.

To the extent this policy is applicable to the Applicant, the Hearings Officer finds the applications are consistent therewith.

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.

FINDING: The Applicant provided the following response in the burden of proof statement:

Applicant does not at this time propose any new use or development on the Subject Property, but wishes to develop the Subject Property in the future consistent with the allowable uses in the RI zone. If this Application is approved, approval of any new industrial use can be conditioned to require the size limitations set forth in this Policy.

The Hearings Officer found in *Aceti 1* that this policy applies to quasi-judicial applications and is inapplicable to an applicant for a proposed rezone and plan amendment. This policy is codified in DCC Chapter 18.100 and is 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.

This policy 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.

Policy 3.4.31 Residential and industrial uses shall be served by DEQ approved onsite sewage disposal systems.

FINDING: The Applicant provided the following response in the burden of proof statement:

*The Subject Property is served by an approved on-site sewage disposal system as shown on **Exhibit 12**. The Application thus complies with this Policy.*

The Hearings Officer finds that no specific use is proposed by the Applicant at this time. This policy is codified in DCC Chapter 18.100 and is implemented through those provisions. The Applicant is not applying for any specific building permit, site plan or conditional use approval at this time. At the time a future use is proposed, the County shall, consistent with this policy and DCC Chapter 18.100, ensure that such use is served by DEQ approved onsite sewage disposal systems.

The record shows that a 1982 finalized septic permit (permit no. 247-S5813) exists for Tax Lot 301 and a separate 1982 finalized septic permit (permit no. 247-FS222) exists for Tax Lot 500. Property records show Tax Lot 305 was previously a portion of Tax Lot 301 (based on a Warranty Deed dated August 19, 1981) and served by the same 1982 septic permit under permit no. 247-S5813.

The Hearings Officer finds the subject applications are consistent with this policy, to the extent applicable to the Applicant at this time.

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 in the burden of proof statement:

*The Subject Property is served by an on-site well as shown on **Exhibit 5**. The Application thus complies with this Policy.*

The Hearings Officer finds that no specific use is proposed by the Applicant at this time. This policy is codified in DCC Chapter 18.100 and is implemented through those provisions. The Applicant is not applying for any specific building permit, site plan or conditional use approval at this time. 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.

The Hearings Officer finds the subject applications are consistent with this policy, to the extent applicable to the Applicant at this time.

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: As set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds that Goal 3 does not apply to the subject property because it is not “agricultural land.” The record shows that Goal 4 does not apply to the subject property, as well. There are no identified forest uses in the vicinity and, juniper, the predominant tree species in the vicinity is not merchantable.

The Hearings Officer finds that the Applicant has demonstrated that Goals 3 and 4 do not apply to the subject property. 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 Comprehensive Plan provisions are addressed herein.

The Hearings Officer finds the applications are consistent with this Policy.

Section 3.5. Natural Hazards

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

FINDING: The Hearings Officer finds this Goal 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. The Hearings Officer finds the applications are consistent with this Goal.

Section 3.7, Transportation

**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 in the burden of proof statement:

The Hearings Officer in the Landholdings decision found that Policy 4.4 applies to the County and not to individual Applicants. Policies 4.1 and 4.3 similarly should apply to the County and not to individual Applicants. Regardless, the Subject Property borders Highway 97 on the east and has legal access onto the highway. As explained more fully in the Transportation Planning Rule section below, while the proposed Plan Map amendment and rezone would likely impact transportation facilities, Applicant would agree to a use limitation and traffic cap for the Subject Property.

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.

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 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.

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: The Applicant provided the following response in its burden of proof:

The Subject Property does not constitute agricultural land for the reasons set forth below. Therefore, a Goal 3 exception is not required, nor will the proposed rezone detract from the statutory purpose of preserving and maintaining agricultural lands.

Division 33 includes a definition of "Agricultural Land," which is repeated in OAR 660-033-0020(1). The Hearings Officer's Preliminary Findings and Conclusions set forth above, and incorporated herein by this reference, which determine that the subject property does not constitute "agricultural land."

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 Oregon¹⁰;**

FINDING: The Applicant does not request an exception to Goal 3 on the premise that the subject property is not defined as "Agricultural Land." In support, the Applicant offered the following response in the burden of proof statement:

The Subject Property is not property classified as Agricultural Land and does not merit protection under Goal 3. As shown by the Soils Assessments submitted herewith and described above, the soils on the Subject Property are predominantly unsuitable soils of Class 7 and 8 as defined by Deschutes County and DLCD. See Exhibits 7-9. State Law, ORS 660-033-0030, allows the County to rely on those Soils Assessments for more accurate soils information.

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).

- (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 does not request an exception to Goal 3 on the premise that the subject property is not defined as "Agricultural Land." In support, the Applicant offered the following response, in relevant part, in the burden of proof statement:

¹⁰ 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.

This part of the definition of "Agricultural Land" requires the County to consider whether the Class 7 and 8 soils found on the subject property are suitable for farm use despite their Class 7 and 8 classification. The Oregon Supreme Court has determined that the term "farm use" as used in this rule and Goal 3 means the current employment of land for the primary purpose of obtaining a profit in money through specific farming-related endeavors. The costs of engaging in farm use are relevant to determining whether farm activities are profitable and this is a factor in determining whether land is agricultural land. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007).

The Subject Property has not been in farm use in decades. The land has not been irrigated for years, and the COID water rights are leased back to the Deschutes River.

The Hearings Officer reviewed each of the seven considerations listed in OAR 660-033-0020(1)(a)(B) in the Preliminary Findings and Conclusions above, incorporated herein by this reference. Not only are there poor soils on the subject property, but none of the considerations in this provision would "improve" the situation such that the property with "land in other soil classes," which do not qualify as agricultural land under OAR 660-033-0020(1)(a)(A) could nonetheless be suitable for "farm use." None of the seven considerations show that the property could be employed for the primary purpose of making a profit in money. The poor soils found on the subject property, combined with these additional considerations, render the property not suitable for farm use that can be expected to be profitable.

The Hearings Officer incorporates herein by this reference the Preliminary Findings and Conclusions above and finds that the subject property does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(B).

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

FINDING: The Applicant offered the following response in the burden of proof statement:

A large portion of neighboring lands are residential, and the neighboring lands that are zoned EFU-TRB are not engaged in farm practices that are supported or aided by the Subject Property. Regardless, the Subject Property, given its poor soils and proximity to Highway 97, could not be considered "necessary" to permit farm practices to be undertaken on adjacent or nearby agricultural lands.

The Hearings Officer incorporates herein by this reference the Preliminary Findings and Conclusions above and finds that the subject property does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(C).

(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 in the burden of proof statement:

The Subject Property is not and has not been a part of a farm unit that includes other lands not currently owned by the Applicant.

The farm unit rule is written to preserve large farming operations in a block. It does this by preventing property owners from dividing farmland into smaller properties that, alone, do not meet the definition of "agricultural land." The Subject Property is not formerly part of a larger area of land that is or was used for farming operations and was then divided to isolate poor soils so that land could be removed from EFU zoning.

The Subject Property is not in farm use and has not been in farm use of any kind for decades. It contains soils that make the land generally unsuitable for farm use as the term is defined by State law. It is not a part of a farm unit with other land. The Subject Property is predominantly Class 7 and 8 soils and would not be considered a farm unit itself nor part of a larger farm unit based on the poor soils and the fact that none of the adjacent property is farmed.

The Hearings Officer incorporates by this reference the Preliminary Findings and Conclusions set forth above and finds that the subject property does not constitute "Agricultural Lands," as defined in OAR 660-033-0020(1)(b).

(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. The Hearings Officer finds this criterion is inapplicable.

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: The Applicant provided responses to the factors in OAR 660-033-0020(1) above. The soil studies produced by Mr. Kitzrow focused solely on the land within the subject parcels and the Applicant provided responses indicating the subject parcels are not necessary to permit farm practices undertaken on adjacent and nearby lands.

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, the Hearings Officer finds the subject property is not "Agricultural Lands," as defined in OAR 660-033-0030(1).

(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 argues that the subject property is not suitable for farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands, regardless of ownership of the subject property and ownership of nearby or adjacent land. For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the subject property is not "Agricultural lands," and thus that no exception to Goal 3 is required.

(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 in the burden of proof statement:

*Attached as **Exhibits 7-9** are a [sic] more detailed Agricultural Soils Capability Assessments conducted by Gary Kitzrow, a professional soil classifier, certified professional soil scientist, and one of only five professionals certified by the state to make such assessment. The soils capability assessment he conducted on the Subject Property is related to the NRCS land capability classification system. It provides and documents more detailed data on soil classification and soil ratings than is contained in the NRCS soil maps and soil survey at the published level of detail. The Order 1 survey performed on the Subject Property included 22 descriptions for the approximately 19-acre site (6 for Tax Lot 305; 12 for Tax Lot*

301; and 4 for Tax Lot 500). The soil samples taken were assessed for structure, consistency, pores, drainage class, root distribution, effective/absolute rooting depths and related morphology testing. Mr. Kitzrow concluded that the Subject Property is made up of predominantly Class 7 and 8 soils that are generally unsuitable for farming.

The soil studies prepared by Mr. Kitzrow provide 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 studies provide detailed information about the individual subject properties based on numerous soil samples taken from the subject properties. The soil studies are related to the NRCS Land Capability Classification (LCC) system that classifies soils Class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.

According to the NRCS Web Soil Survey tool, the subject properties contain the following portions of 31A, 38B, and 58C soils:

31A Soils: Approximately 16.5 percent (Tax Lot 301), 22 percent (Tax Lot 305), and 97.2 percent (Tax Lot 500) of the subject properties are composed of 31A soil, respectively.

38B Soils: Approximately 61.4 percent (Tax Lot 301), 47.7 percent (Tax Lot 305), and 2.8 percent (Tax Lot 500) of the subject properties are made up of this soil type, respectively.

58C Soils: Approximately 22.1 percent (Tax Lot 301), and 30.3 percent (Tax Lot 305) of two (2) of the subject properties are made up of this soil type.

The soil studies conducted by Mr. Kitzrow of Growing Soils Environmental Associates find 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 described below (quoted from Exhibits 7-9 of the application materials).

- **Tax Lot 301:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. This study area and legal lot of record is comprised of 8.00 acres or 53.1% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCDC definitions.
- **Tax Lot 305:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated). These lithic, entic Gosney soil mapping units are shallow, have extremely restrictive rooting capabilities and low water holding capacities. Conversely, Deskamp and Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. Noteworthy is the fact that along the western boundary and southern boundary of this lot are large inclusions of rubble and rock outcrops. This is found regardless of the associated three soils delineated in this analysis. This study area and legal lot of record is comprised of 2.45 acres or 81.7% of the landbase as

generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

- **Tax Lot 500:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. This study area and legal lot of record is comprised of 0.93 Acres or 87.7% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

As set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the submitted soil studies prepared by Mr. Kitzrow of Growing Soils Environmental Associates provide more detailed soils information than contained in the NRCS Web Soil Survey, which provides general soils data for large units of land. The Hearings Officer finds the soil studies provide detailed and accurate information about individual parcels based on numerous soil samples taken from the subject property. The soil study is related to the NRCS Land Capability Classification (LCC) system that classifies soils class I through VIII. An LCC rating is assigned to each soil type based on rules provided by the NRCS.

Correspondence from the Department of Land Conservation and Development (DLCD) confirms that Mr. Kitzrow’s prepared soil studies are complete and consistent with the reporting requirements for agricultural soils capability as dictated by DLCD. Mr. Kitzrow’s qualifications as a certified Soil Scientist and Soil Classifier are detailed in the submitted application materials. Based on Mr. Kitzrow’s qualifications as a certified Soil Scientist and Soil Classifier, and as set forth in detail in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the submitted soil study is definitive and accurate in terms of site-specific soil information for the subject property. These criteria are met.

- (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 properties are not defined as agricultural land. Therefore, the Hearings Officer finds that this section and OAR 660-033-0045 applies to these applications.

- (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 soil studies by Mr. Kitzrow of Growing Soils Environmental Associates dated January 12, 2021. The soils studies were submitted following the ORS 215.211 effective date. The application materials include acknowledgements from Hilary Foote, Farm/Forest Specialist with the DLCD (dated April 16, 2021) that the soil studies are complete and consistent with DLCD’s reporting requirements. The Hearings Officer finds this criterion is 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 provided DLCD certified soil studies as well as NRCS soil data. The Hearings Officer finds this criterion is met.

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: As referenced in the agency comments section in the Basic Findings above, the Senior Transportation Planner for Deschutes County requested revised details in addition to the initial traffic study materials provided. The Applicant submitted an updated report from Ferguson & Associates, Inc. on April 6, 2022, dated March 18, 2022, to address identified concerns and the County’s Senior Transportation Planner issued a second comment in response.

The Applicant’s burden of proof provided the following statement:

*The Transportation Planning Rule is applicable because Applicant is requesting a change to an acknowledged comprehensive plan and land use regulation (the zoning map). Attached as **Exhibit 14** is a Site Traffic Report and TPR Assessment prepared by traffic engineer Scott Ferguson, P.E. of Ferguson & Associates. Mr. Ferguson made the following findings with respect to the proposed Plan map amendment and zone change and concluded that a significant impact to the transportation facility would occur:*

- *The only available access to the Subject Property is via Highway 97 through a shared easement driveway. Highway 97 is a four-lane facility in the vicinity of the driveway, with 20-foot shoulders on both sides. Left turns are legally prohibited, as there are two sets of double striped painted lanes marking a striped median. As such, access is limited to right-in, right-out movements from the driveway. There are no proposed changes to access.*
- *Visibility exiting the site is good and there are no apparent sight-distance issues.*
- *Rezoning the Subject Property from EFU-TRB to RI would allow outright e.g.:*
 - *Primary processing, packaging, treatment, bulk storage and distribution of the following products:*
 - *Agricultural products, including foodstuffs, animal and fish products, and animal feeds,*
 - *Ornamental horticultural products and nurseries,*
 - *Softwood and hardwood products excluding pulp and paper manufacturing;* ○ *Freight Depot, including the loading, unloading, storage and distribution of goods and materials by railcar or truck;*
 - *Contractor's or building materials business and other construction-related business including plumbing, electrical, roof, siding, etc., provided such use is wholly enclosed within a building or no outside storage is permitted unless enclosed by sight-obscuring fencing;*

- Wholesale distribution outlet including warehousing, but excluding open outside storage;
- Kennel or a veterinary clinic.
- The RI zone requires that new industrial uses 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.
- For purposes of the traffic analysis, it was assumed that a large (100,000 square foot) manufacturing building such as a food processing plant or some type of lumber-related manufacturing plant could be built on the Subject Property. Such a distribution center would occupy about 12 percent of available land. In addition, there could be a mix of other uses, not exceeding 7,500 square feet per use, which could include, e.g., a small building supply outlet, a veterinary clinic, a small distribution center, and a plant nursery. For purposes of the analysis, one of each of those uses was assumed.
- While it may be possible to pack more onto the site, the assumed uses would generate more traffic than the site could handle with existing access configurations.
- Net change in trip generation would be an increase of 166 p.m. peak hour trips and 1,299 daily trips.
- The addition of several hundred vehicles per hour at the driveway on to Highway 97 would result in performance characteristics that would not meet the goals of the Oregon Highway Plan.
- This level of traffic would not be appropriate with the existing limited access and the proposed zone change would significantly impact the transportation if no further action were taken. But there are further actions which can be taken to meet the requirements of the TSP under these conditions.

Mr. Ferguson proposed, and Applicant will agree to, establishing a trip cap on the three lots comprising the Subject Property to limit the amount of development that would be allowed to reflect the maximum trip generation that would be allowed before a Traffic Impact Analysis would be required under ODOT or County guidelines. Specifically, Mr. Ferguson stated in his Report, based on DCC 18.116.310.C, that "the ODOT guideline for conducting a TIA is 400 daily trips. Since Deschutes County requirements establish a lower (more conservative) threshold, these values were used: less than 20 p.m. peak hour trips (which is more than 19 trips) and more than 200 daily trips. As shown below in Table 7, establishing a trip cap at a threshold where the incremental change would not exceed the Deschutes County threshold." Table 7 is shown below:

TABLE 7 – TRIP CAP CALCULATIONS

Trip Generation Scenarios	TRIP GENERATION	
	PM	DAILY
A Existing EFU Zone	13	79
B Proposed RI Zone	180	1,378
C Net Change in Trip Generation	166	1,299
D ODOT Trigger for TIA	na	400
E Deschutes Count Trigger for TIA	19	200
F Limit on Net Change (Deschutes Criteria governs)	19	200
G Total Trip Generation to Obtain Net Limit (A + F)	32	279

Mr. Ferguson concluded, "Accordingly, if a trip cap were set at 32 p.m. peak hour trips and 279 daily trips, the incremental increase in traffic would be 19 p.m. peak hour trips and 200 daily trips and a Site Traffic Report (STR) would be required by Deschutes County Code as per section 18.110(CX3Xb) for the purposes of evaluating the TPR."

Applicant's current plan for the Subject Property, if this Application is approved, is to develop a mini-storage facility on Tax Lot 301. Mr. Ferguson further concluded that "[s]ince mini-storage units are relatively low generators, the trip cap would be met with any reasonably sized mini-storage facility." With the establishment of this proposed trip cap, the proposed Plan map amendment and zone change could meet the requirements of the TPR. Trip generation under this cap would be limited to no more than 32 p.m. peak hour trips and no more than 279 daily trips. Mr. Ferguson concluded that with the planned development of mini-storage units, the level of trip generation would be relatively low and would fall below this threshold¹¹.

This TPR assessment was prepared for 3 parcels located on Highway 97 between Bend and Redmond, Oregon. These parcels are generally located in Figure 1. Table 1 provides addresses, Tax Lot numbers, and existing building types and sizes.

The proposed change is from EFU (exclusive farm use) to RI (Rural Industrial).

It was found that the proposed zone change would significantly affect the transportation system without a trip cap.

¹¹Further, imposing a trip cap and use limitations is consistent with the purpose of the RI zone and Plan designation. See Plan, 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."); see also id., Policy 3.4.24 - Policy 3.4.36 (placing use limitations on certain parcels given RI zoning to "ensure that the uses in the Rural Industrial Zone on [those tax lots] . . . are limited in nature and scope"); see also DCC 18.100.030 (setting forth use limitations for the RI zone).

The proposed trip cap is 32 new p.m. peak hour trips, above existing trip generation. A trip cap of 32 new p.m. peak hour trips would readily allow for the construction of mini-storage units, which is intended as the next step. That development would need to be addressed in a separate site-application. This is a very reasonable level for a trip cap considering that it was shown herein that a trip cap as high as 123 p.m. peak hour trips might be allowed using the ODOT mobility standards as the measure of impact.

It is trusted that the above updated analysis adequately addresses the Counties comments and otherwise meets the requirements for the proposed zone change including a sufficient assessment of the Transportation Planning Rule (TPR). Please feel free to call at your convenience if you would like to discuss any elements of this letter-report.

County Senior Transportation Planner, Peter Russell responded to the revised traffic study and expressed additional concerns. The Applicant then responded with additional traffic comments on April 8, 2022, to which the County Senior Transportation Planner responded. The Applicant responded with additional traffic comments on April 13, 2022.

Thereafter, the Applicant worked with the County Senior Transportation Planner, County planning staff and the Oregon Department of Transportation (“ODOT”) to develop a “trip cap” condition of approval on which the parties all agreed. The record indicates that both the County and ODOT concur with the proposed condition of approval which states:

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 also shows that the Applicant discussed with County staff the fact that LUBA has upheld trip caps as an effective tool utilized by other Oregon local governments. The form of the trip cap proposed by the Applicant in the email chain was specifically modeled on a similar trip cap COA utilized by the City of Eugene and upheld by LUBA. *Willamette Oaks v. City of Eugene*, ___ Or LUBA ___ (LUBA NO 2010-062; March 8, 2011) (slip op at *4-5; n.5). Peter Russell responded the same date that the proposed COA “works on my end.”

COLW claims that the proposal will “drastically increase transportation trips” and argues that ODOT found a trip cap is not contemplated in the DCC for TPR compliance and that the County found it does not have the ability to monitor and enforce a trip cap. Therefore COLW argues that the application has not satisfied Goal 12 and the TPR. The Hearings Officer finds that COLW’s argument is based on prior communications from ODOT and the County Senior Transportation Planner and is refuted by the more recent record additions, which include, among other things, an email chain between ODOT, County staff and the Applicant. ODOT did not find that the DCC does not allow a trip cap. Rather, ODOT concurred with the proposed condition of approval stating, “looks good to me.” As interpreted by the County’s Senior Transportation Planner, Peter Russell, ODOT’s

comment regarding the possibility of a DCC text amendment to better address the idea of a trip cap was meant to apply prospectively to future applicants; a retroactive text amendment would violate the “goal post rule” at ORS 215.427(3)(a).

Not 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 TPR.

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**, 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.

(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: The Applicant provided the following response in the burden of proof statement:

As discussed above, Mr. Ferguson concluded that the proposed Plan map amendment and zone change could have a significant effect on the transportation facility. As such, Mr. Ferguson proposes, and Applicant would agree to, the imposition of a transportation cap and use limitation on the Subject Property.

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.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

FINDING: The Applicant’s burden of proof addresses each Goal as follows:

Goal 1, Citizen Involvement. *Deschutes County will provide notice of the application to the public through mailed notice to affected property owners and by requiring the Applicant to post a “proposed land use action sign” on the Subject Property. Notice of the public hearings held regarding this application follow the code requirements. A minimum of two public hearings will be held to consider the Application.*

Goal 2, Land Use Planning. *Goals, policies, and processes related to Plan map amendments and zone change applications are included in the Deschutes County Comprehensive Plan and Titles 18 and 23 of the Deschutes County Code. The outcome of the Application will be based on findings of fact and conclusions of law related to the applicable provisions of those laws as required by Goal 2.*

Goal 3, Agricultural Lands. *The Applicant has shown that the subject property is not agricultural land because it is comprised predominantly of Class 7 and 8 soils that are not suitable for farm use. Therefore, the proposal is consistent with Goal 3, and no exception is needed.*

Goal 4, Forest Lands. *This goal is inapplicable because the Subject Property does not contain land zoned forest land, nor does it support forest uses.*

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces. *The majority of the subject property is located in the Landscape Management Combining Zone (LM zone). The LM zone is a Goal 5 resource acknowledged by DLCD that is set out to protect scenic views as seen, in this case, from Highway 97 through a Landscape Management Combining Zone that extends 1/4 mile on either side of the centerline of the designated roadway. The County typically requires LM site plan review when a building permit is required for a new or substantial alteration to an existing structure. The proposal is consistent with Goal 5 because the LM zoning requirements apply when development is proposed; the proposed rezone and Plan amendment is not development and therefore will not impact any Goal 5 resource.*

Goal 6, Air, Water and Land Resources Quality. *The approval of this application will not impact the quality of the air, water, and land resources of the County. Any future development of the Subject Property would be subject to local, state and federal regulations that protect these resources.*

Goal 7, Areas Subject to Natural Disasters and Hazards. *This goal is not applicable because the Subject Property is not located in an area that is recognized by the Plan as a known natural disaster or hazard area.*

Goal 8, Recreational Needs. *This goal is not applicable because there is not development proposed and the property is not planned to meet the recreational needs of Deschutes County.*

Goal 9, Economy of the State. *This goal does not apply to this Application because the Subject Property is not designated as Goal 9 economic development land. In addition, the approval of this Application will not adversely affect economic activities of the state or area. Further, the proposed RI zoning will have more positive impact than EFU zoning on land that cannot viably be farmed.*

Goal 10, Housing. *Applicant's proposed zone change and plan amendment has no impact on housing, as the Subject Property is currently zoned EFU and is not currently in residential use.*

Goal 11, Public Facilities and Services. *The Approval of this application will have no adverse impact on the provision of public facilities and services to the Subject Property. Needed services – including fire, police, water, utilities, schools, and county services – are already available in the area.*

Goal 12, Transportation. *As explained in detail above, the Application complies with the Transportation System Planning Rule, OAR 660-012-0060, the Rule that implements Goal 12. Compliance with that Rule also demonstrates compliance with Goal 12.*

Goal 13, Energy Conservation. *The approval of this Application does not impede energy conservation. The Subject Property is located approximately halfway between the Cities of Bend and Redmond. Allowing the Subject Property to be zoned RI, especially with the proposed use limitations in place, will not negatively impact conservation of energy, and may in fact encourage it because it could provide a conveniently located service (mini-storage) for individuals and businesses located along Highway 97.*

Goal 14, Urbanization. *This Application involves the potential urbanization of rural land. While the RI zone is an acknowledged rural industrial zoning district that limits the intensity of the uses allowed in the zone, Applicant is requesting a change from EFU to RI on land that is relatively undeveloped. The compliance of the proposed zoning with Goal 14 is acknowledged by the Plan, which recognizes that 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." Further, LUBA has held that Goal 14, ORS 197.713, ORS 197.714, and OAR 660-0140040(4) do not prohibit or limit rural industrial use of rural land." Central Oregon Landwatch v. Deschutes County, LUBA No. 2021-028, slip op. at p.21 (OR LUBA 2021). Regardless, Applicant has provided analysis for a Goal 14 exception below showing that it meets the requirements for an "irrevocably committed" exception.*

Goals 15 through 19. *These goals do not apply to land in Central Oregon.*

The Hearings Officer's findings on each Statewide Planning Goal follow.

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.

FINDING: The Planning Division provided notice of the proposed plan amendment and zone change to the public 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 was held before the Hearings Officer on the proposal on April 26, 2022, and a public hearing on the proposal will be held by the Deschutes County Board of Commissioners, per DCC 22.28.030(C). The Hearings Officer finds 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.

FINDING: Goals, policies and processes related to plan amendment and zone change applications are included in the County's comprehensive plan 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 Hearings Officer finds the proposal is consistent with Goal 2.

Goal 3: Agricultural Lands

To preserve and maintain agricultural lands.

FINDING: For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the subject property does not constitute "agricultural land" under any of the standards for determining "agricultural land" set forth in OAR 660-033-0020(1). The Hearings Officer further finds that substantial evidence supports a finding the proposal will not adversely impact agricultural land. Therefore, I find 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.

FINDING: The Hearings Officer finds the subject property does not include any lands that are zoned for, or that support, forest uses. Therefore, the Hearings Officer finds 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.

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. 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.

COLW argues that the County must apply Goal 5 in consideration of the proposed PAPA because it would affect a Goal 5 resource. However, OAR 660-023-0250(3) states that, “[l]ocal governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if”:

- (a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;*
- (b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or*
- (c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.*

The Hearings Officer finds that amending the plan designation and zoning of the subject property from EFU to RI does not allow uses that could be conflicting uses with any “significant Goal 5 resource site.” This is so given consideration of OAR 660-023-0040(1)(d), which directs the County to “develop a program to achieve Goal 5.” The County has done so by adoption of the LM overlay zone. The proposed plan amendment and zone change does not remove the subject property from the LM overlay zone and thus does not change or diminish the protection afforded to Goal 5 resources on the property, specifically the LM designation of lands within ¼ mile from the centerline of Highway 97.

Therefore, the Hearings Officer finds the proposal is consistent with Goal 5.

Goal 6: Air, Water and Land Resources Quality

To maintain and improve the quality of the air, water and land resources of the state.

FINDING: The Hearings Officer finds the Applicant's proposal to rezone the property from EFU-TRB to RI, in and of itself, 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.

COLW observes that the RI zone allows lumber manufacturing, wood processing, all uses that could result in ‘waste and process discharges.’ It argues that, without specifying which industrial uses may be developed on the property, the county could not find compliance with Goal 6.

The Hearings Officer finds that DCC 18.100.030(J) prohibits the county from approving any use in the RI zone “requiring contaminant discharge permits ...prior to review by the applicable state or federal permit-reviewing authority, nor shall such uses be permitted

adjacent to or across a street from a residential use or lot.” This provision also generally prohibits the county from approving any use in the RI zone, “which has been declared a nuisance by state statute, County ordinance or a court of competent jurisdiction.”

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. The Hearings Officer finds that such a determination does not impermissibly defer a finding of Goal 6 compliance.

The Hearings Officer finds the proposal is consistent with Goal 6.

Goal 7: Areas Subject to Natural Hazards

To protect people and property from natural hazards.

FINDING: There are no mapped flood or volcano hazards on the subject property. Additional hazards include wildfire, earthquake, and winter storm risks, which are identified in the County’s Comprehensive Plan. 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 Hearings Officer finds 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.

FINDING: The proposed plan amendment and zone change do not affect recreational needs, and no specific development of the property is proposed. Therefore, the Hearings Officer finds the proposal does not implicate Goal 8.

Goal 9: Economic Development

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

FINDING: This goal is to provide adequate opportunities throughout the state for a variety of economic activities. The Subject Property is not designated as Goal 9 economic development land. The Hearings Officer finds the proposed RI zoning will have a more positive economic impact than EFU zoning on land that cannot viably be farmed, given that the currently undeveloped property will be put to a more productive use. The Hearings Officer finds the proposal is consistent with Goal 9.

Goal 10: Housing

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

FINDING: 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 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.

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 RI Zone are available and will be adequate.

With respect to water, COLW argues that the Applicant has not addressed 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. COLW argues that the Application cannot comply with Goals 6 and 11 because there is no water service to the subject property.

The Hearings Officer finds that COLW's argument is based on an unsubstantiated premise that contaminated industrial waste may only be processed in a public wastewater facility. COLW 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, the Hearings Officer finds this argument regarding wastewater provides no basis for denial of the applications.

The Hearings Officer finds that substantial evidence in the record the subject property has access to water and that that finding is supported by substantial evidence in the record. The Hearings Officer finds the proposal is consistent with Goal 11.

Goal 12: Transportation

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

FINDING: As discussed in the findings above concerning compliance with the TPR, incorporated by reference herein, the Applicant asserts that this proposal will not significantly affect a transportation facility, as conditioned pursuant to the proposed condition of approval approved by the County Transportation Planner and ODOT. As set forth in the findings above, the proposal complies with the TPR. Accordingly, the Hearings Officer finds the proposal is consistent with Goal 12.

Goal 13: Energy Conservation

To conserve energy.

FINDING: The Applicant's proposed plan amendment and zone change, in and of themselves, will have no effect on energy use or conservation since no specific development has been proposed in conjunction with the subject applications. The Hearings Officer finds that the location of the subject property and rezoning it to RI with proposed use limitations in place may encourage conservation of energy by providing for a conveniently located service (mini-storage) for individuals and businesses located or traveling along Highway 97. The Hearings Officer finds 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.

FINDING: 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.¹²

The Hearings Officer’s detailed Preliminary Findings and Conclusions concerning Goal 14 above are incorporated herein by this reference. The Hearings Officer reiterates her findings and conclusions that uses in the RI zone are not “urban uses of rural land,” by definition, as restricted by DCC 18.100. 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.

No Goal 14 exception is required. The Applicant’s alternative Goal 14 Exception request is analyzed in the findings below.

¹² 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.)

Goals 15 through 19

FINDING: The Hearings Officer finds that 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.

The Hearings Officer finds compliance with the applicable Statewide Planning Goals has been effectively demonstrated for all listed Goals.

DIVISION 4, INTERPRETATION OF GOAL 2 EXCEPTION PROCESS

FINDING: The Applicant provided the following response in the burden of proof statement:

As explained above, the requested zone change and Plan map amendment from EFU / Agricultural to RI should not require a Goal exception because the County's RI zoning complies with Goal 14 by ensuring areas with this zoning remain rural by limiting the uses allowed. Further, Goal 14, ORS 197.713, ORS 197.714, and OAR 660-014-0040(4) do not prohibit or limit rural industrial use of rural land." Central Oregon Landwatch v. Deschutes County, LUBA No. 2021-028, slip op. at p.21 (OR LUBA 2021). To the extent the County disagrees that a Goal exception is not required, the Subject Property is irrevocably committed to urban uses, and Applicant provides a Goal exception analysis below.

The Deschutes County Board of County Commissioners entered the following findings associated with File No. 247-16-000593-A, on remand from LUBA of File Nos. 247-14-000456-ZC, 457-PA:

Given the above findings that the Applicant did not intend to request and the County Board did not intend to authorize urban uses on the subject property, LUBA's remand warrants that we examine why an exception to Goal 14 was filed in this proceeding at all.

It is plainly evident from the evidence in the record and the above findings that staff's request that the Applicant submit an application requesting an exception to Goal 14, the Hearings Officer's consideration and approval of that exception, and the County Board's consideration of the exception application flowed directly from the precedent set by the Hearings Official's decision in ZC-14-2. The County had concluded that the decision was binding precedent and had consistently applied the approach used in that decision to assign R-I zoning to properties in subsequent applications. That decision, as interpreted and applied by the County, concluded that an exception to Goal 14 urbanization was required whenever a property owner sought rural industrial zoning on rural property, and that the Goal 14 exception process was to ensure that the subject site was not developed with "urban" uses. The Hearings Officer's decision in ZC-14-2 was not appealed and, therefore, its reasoning was never reviewed by LUBA.

As the excerpts from LUBA's opinion in this matter quoted above make clear, the Hearings Officer's analysis and conclusions in ZC-14-2 regarding the use of the

Goal 14 exceptions process to limit Rural Industrial uses to those that are not “urban” is both rationally inconsistent and legally incorrect. As LUBA’s decision also explains that to get a committed exception to Goal 14, one must demonstrate that it is impossible to locate any rural use on the subject property. It is thus illogical to approve a Goal 14 exception only to then limit it to Rural Industrial uses, which are “rural” by definition and acknowledgment. To do so is also inconsistent with the state’s land use legal framework.

The County Board hereby concludes that the County should no longer follow the precedent set forth in ZC-14-2 that requires approving an exception to Goal 14 before approving the change in plan designation and zoning of a rural property to the Rural Industrial plan designation and R-I zoning if only rural uses are to be permitted on the property. As LUBA explained in its decision, the requirement for an Applicant to apply for an exception to Goal 14 is to be limited to proposals that request urban uses on rural land, or as otherwise required by the DCC, state statute or state land use regulations.

Based upon the above conclusion, because the Applicant did not request urban uses to be allowed on the subject property and because the County Board did not intend to allow urban uses on rural land, the County Board concludes that the Applicant should not have been required to submit an application for an exception to Goal 14 for the purposes set forth by the decision in ZC-14-2 as followed by the Hearings Official in this proceeding.

The Hearings Officer finds that, here too, the Applicant is not requesting that urban uses be allowed on the subject property. It does not make sense for the Applicant to request a re-designation and rezone of the property to Rural Industrial and also request a “committed” exception to Goal 14 which requires a showing that it is impossible to locate any rural use on the subject property.

The Applicant’s Goal 14 exception request should be denied as inconsistent with underlying applications, unnecessary, and contrary to the state’s land use legal framework, as determined by the Deschutes County Board of Commissioner in the decisions quoted above.

OAR 660-004-0010, Application of the Goal 2 Exception Process to Certain Goals

- (1) The exceptions process is not applicable to Statewide Goal 1 “Citizen Involvement” and Goal 2 “land Use Planning.” The exceptions process is generally applicable to all or part of those statewide goals that prescribe or restrict certain uses of resource land, restrict urban uses on rural land, or limit the provision of certain public facilities and services. These statewide goals include but are not limited to: (a) Goal 3 “Agricultural Lands”; however, an exception to Goal 3 “Agricultural Lands” is not required for any of the farm or nonfarm uses allowed in an exclusive farm use (EFU) zone under ORS chapter 215 and OAR chapter 660, division 33, “Agricultural Lands”, except as provided under OAR 660-004-0022 regarding a use authorized by a statewide***

planning goal that cannot comply with the approval standards for that type of use;

FINDING: For the reasons set forth in the Preliminary Findings and Conclusions on Agricultural Land, incorporated herein by this reference, the Hearings Officer finds that an exception to Goal 3 “Agricultural Lands” is not required for the subject applications.

(c) Goal 11 "Public Facilities and Services" as provided in OAR 660-011-0060(9);

FINDING: No public facilities or services are proposed to be extended to support uses outside of urban growth boundaries pursuant to the subject application. The Hearings Officer finds that an exception to Goal 11 “Public Facilities and Services” is not required for the subject applications. As set forth above, the application is consistent with Goal 11.

- (d) Goal 14 "Urbanization" as provided for in the applicable paragraph (I)(c)(A), (B), (C) or (D) of this rule:**
 - (A) An exception is not required for the establishment of an urban growth boundary around or including portions of an incorporated city;**
 - (B) When a local government changes an established urban growth boundary applying Goal 14 as it existed prior to the amendments adopted April 28, 2005, it shall follow the procedures and requirements set forth in Goal 2 "Land Use Planning," Part II, Exceptions. An established urban growth boundary is one that has been acknowledged under ORS 197.251, 197.625 or 197.626. Findings and reasons in support of an amendment to an established urban growth boundary shall demonstrate compliance with the seven factors of Goal 14 and demonstrate that the following standards are met:**
 - (i) Reasons justify why the state policy embodied in the applicable goals should not apply (This factor can be satisfied by compliance with the seven factors of Goal 14);**
 - (ii) Areas that do not require a new exception cannot reasonably accommodate the use;**
 - (iii) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and**

- (iv) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.*
- (C) When a local government changes an established urban growth boundary applying Goal 14 as amended April 28, 2005, a goal exception is not required unless the local government seeks an exception to any of the requirements of Goal 14 or other applicable goals;**

FINDING: The Applicant is not requesting a change to any urban growth boundaries. The Hearings Officer finds that the above criteria (A-C) do not apply to the subject applications.

- (D) For an exception to Goal 14 to allow urban development on rural lands, a local government must follow the applicable requirements of OAR 660-014-0030 or 660-014-0040, in conjunction with applicable requirements of this division;**

FINDING: The Applicant provided the following response in the burden of proof statement:

Applicant provides analysis of a Goal 14 exception to allow urban development on rural lands below. Part D of this Rule (as well as the requirements of OAR 660-014-0030 and – 0040) applies to the County, and not to Applicant.

The Hearings Officer finds that the Applicant’s request in its Goal 14 exception “to allow urban development on rural lands” is inconsistent with its request to re-designate and rezone the property to Rural Industrial. Urban development is not permitted on properties zoned RI. Further analysis is provided in subsequent findings.

- (2) The exceptions process is generally not applicable to those statewide goals that provide general planning guidance or that include their own procedures for resolving conflicts between competing uses. However, exceptions to these goals, although not required, are possible and exceptions taken to these goals will be reviewed when submitted by a local jurisdiction. These statewide goals are:**
 ...
(g) Goal 12 "Transportation" except as provided for by OAR 660-012-0070, "Exceptions for Transportation Improvements on Rural Land";

FINDING: The Hearings Officer finds that a Goal 12 “Transportation” exception is not required for the subject applications.

OAR 660-004-0018, Planning and Zoning for Exception Areas

- (1) Purpose. This rule explains the requirements for adoption of plan and zone designations for exceptions. Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements**

and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 and 660-014-0030 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule.

FINDING: The Applicant provided the following response in the burden of proof statement:

Applicant is proposing a zone change and Plan map amendment for land currently zoned EFUTRB and designated "agricultural." As explained in detail above, the Soils Assessments show that the Subject Property consists of predominantly Class 7 and 8 soils, and as such cannot be considered "agricultural" such that an exception to Goal 3 is required. However, the proposed RI zoning may require a Goal 14 exception. The Subject Property has been in use as a large equipment service and repair / rental and sales facility for the majority of the past 40 years, at least. As such, the Subject Property is irrevocably committed to those uses and an exception is required on that basis to allow Applicant to continue those uses on the Subject Property.

The Hearings Officer finds that OAR 660-004-0018 (Planning and Zoning for Exception Areas) is only applicable if an exception to Goal 14 is required. For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated by this reference, the Hearings Officer finds that a Goal 14 exception is not required.

To prepare a full record with findings and conclusions on all proposal components of the subject applications, the Hearings Officer makes findings on each criterion below.

- (1) A local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable:**
 - (a) A "committed exception" is an exception taken in accordance with ORS 197.732(2)(b), Goal 2, Part II(b), and with the provisions of this rule, except where other rules apply as described in OAR 660-004-0000(1).**
 - (b) For the purposes of this rule, an "exception area" is that area of land for which a "committed exception" is taken.**
 - (c) An "applicable goal," as used in this rule, is a statewide planning goal or goal requirement that would apply to the exception area if an exception were not taken.**

- (2) For "physically developed" and "irrevocably committed" exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations**

shall limit uses, density, and public facilities and services to those that satisfy (a) or (b) or (c) and, if applicable, (d): ...

- (b) That meet the following requirements:**
 - (A) The rural uses, density, and public facilities and services will maintain the land as "Rural Land" as defined by the goals, and are consistent with all other applicable goal requirements;**

FINDING: The Applicant provided the following response in the burden of proof statement:

"Rural Land" is defined by the goals as "[I]and outside urban growth boundaries that is: a) Nonurban agricultural, forest or open space; b) Suitable for sparse settlement, small farms or acreage homesites with minimal public services, and not suitable, necessary or intended for urban use, or c) In an unincorporated community." Applying the RI Plan designation and zoning to the Subject Property will maintain the land as "rural" because rural uses, density, and public facilities allowed by the RI zoning are limited to those that, according to the Plan, "ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities." Applicant addressed consistency with other applicable goal requirements above, and incorporates that discussion here.

The Hearings Officer finds that this provision has not been considered in its full context. The Applicant has requested an “irrevocably committed” exception to Goal 14. This regulation requires that the zone designation “**shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density and public facilities and services to those that satisfy...**” (b)(A), (b)(B), and (b)(C).

The Applicant did not propose, and staff did not analyze any “single numeric minimum lot size” to limit uses, density and public facilities in the exception area. Without such analysis, the Hearings Officer cannot find that the Applicant has met its burden of proof on the criterion set forth in OAR 660-004-018(2)(b)(A).

- (B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and**

FINDING: The Applicant provided the following response in the burden of proof statement:

The rural uses, density, and public facilities allowed by the RI zone will not commit adjacent or nearby resource land to uses not allowed by the applicable goal. The nearby and adjacent resource lands (which are zoned EFU) are either in residential use or used as open space / park land; they are not in any agricultural use. Allowing a Goal 14 exception to rezone the Subject Property from EFU to RI, therefore, will not impact the nearby and adjacent EFU-zoned resource lands to uses not allowed by Goal 3.

As discussed above, the Hearings Officer finds that the Applicant did not propose, and staff did not analyze any “single numeric minimum lot size” to limit uses, density and public facilities in the exception area. Without such analysis, the Hearings Officer cannot find that File Nos. 247-21-000881-PA, 882-ZC
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the Applicant has met its burden of proof on the criterion set forth in OAR 660-004-018(2)(b)(B).

(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses;

FINDING: The Applicant provided the following response in the burden of proof statement:

The rural uses, density, and public facilities and services allowed by the RI zone and Plan designation are compatible with adjacent or nearby resource uses (i.e. residential, open space / parks).

As discussed above, the Hearings Officer finds that the Applicant did not propose, and staff did not analyze any "single numeric minimum lot size" to limit uses, density and public facilities in the exception area. Without such analysis, the Hearings Officer cannot find that the Applicant has met its burden of proof on the criterion set forth in OAR 660-004-018(2)(b)(C).

OAR 660-004-0028, Exception Requirements for Land Irrevocably Committed to Other Uses

- (1) A local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable:**
- (a) A "committed exception" is an exception taken in accordance with ORS 197.732(2)(b), Goal 2, Part II(b), and with the provisions of this rule, except where other rules apply as described in OAR 660-004-0000(1).**
 - (b) For the purposes of this rule, an "exception area" is that area of land for which a "committed exception" is taken.**
 - (c) An "applicable goal," as used in this rule, is a statewide planning goal or goal requirement that would apply to the exception area if an exception were not taken.**

FINDING: The Applicant provided the following response in the burden of proof statement:

ORS 197.732(2)(b) is addressed below. Goal 2, Part II(b) allows an exception to a Goal where "[t]he land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable." The Subject Property, which is the relevant "exception area," is currently zoned EFU-TRB but cannot be used for agricultural purposes, including farming and grazing, because of the poor soil conditions, as discussed above. Further, the Subject Property has been in use as an equipment service / repair and rental/ sales facility for the majority of the past 40 years or more, and has had improvements (buildings, parking areas, etc.) for that long, as well. It is adjacent to a residential large-lot

subdivision to the west, and bordered by Highway 97 on the east. The EFU-zoned lands adjacent to it are in residential use and not in agricultural use. Applicant is entitled to an "irrevocably committed" exception to Goal 14 because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable. Compliance with the requirements for the exception is addressed below.

As set forth above in the Preliminary Findings and Conclusions, the Hearings Officer finds that no Goal 14 exception is required. To prepare a full record with findings and conclusions on all proposal components of the subject applications, the Hearings Officer finds that the proposal would not be entitled to a Goal 14 exception based on "irrevocable commitment," for the reasons discussed in more detail below.

- (2) Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:**
- (a) The characteristics of the exception area;**

FINDING: The Applicant provided the following response in the burden of proof statement:

The "exception area" is the area for which the exception is being requested - i.e., the Subject Property. As discussed above, the Subject Property is composed of mostly Class 7 and 8 soils, which are not suitable for farming or other agricultural use. For most of the past 40 or more years, two of the three tax lots making up the Subject Property have been used for repair, service, and rental / sales of large equipment. This use for such an extended period of time contributed to the degradation of the soils on the Subject Property. The third tax lot, Tax Lot 301, is landlocked and only accessible via a bridge easement from Highway 97 located on Tax Lots 305 and 500. The Subject Property is connected to urban services including fire, police, utilities, schools, library, garbage and recycling, and county services.

The determination of "irrevocably committed" pursuant to a requested Goal 14 exception is separate and distinct from analysis concerning "agricultural lands" and Goal 3. The Hearings Officer finds that the record shows only one-third of the total acreage of the subject property has been allocated to non-conforming use. Whether or not that non-conforming use has continued in an unaltered, uninterrupted, unabandoned manner is not relevant to the determination of the characteristics of the exception area. The Hearings Officer has previously found in this Decision and Recommendation that a non-conforming use verification is not required.

Despite the more intensive prior uses of the subject property and graveled, disturbed areas on site, the Hearings Officer finds that the record does not support a finding that non-urban uses are *impracticable* on the subject property. For example, the Applicant has indicated that, if the proposed plan amendment and rezone is approved to RI, the Applicant is considering applying for a use conditionally permitted in the zone, a mini-storage facility. See DCC 18.100.020(M).

The Hearings Officer finds the Applicant has not met its burden of proof on this criterion.

(b) The characteristics of the adjacent lands;

FINDING: The Applicant provided the following response in the burden of proof statement:

The Subject Property is surrounded by multiple zones and uses. Directly west, and comprising the western boundary of the Subject property, is a large Rural Residential 10 zone ("RR-10"). All neighboring properties to the west are part of the Whispering Pines Estates subdivision and are put to residential uses. The Subject Property shares a southern border with Tax Lot 700, which is owned by the Oregon Parks and Recreation Department land and zoned Open Space and Conservation ("OS&C"). The Subject Property is bordered on the east by Highway 97 and two other parcels, Tax Lots 300 and 306. Tax Lots 300 and 306 are also zoned EFU-TRB, however, neither is actively used for agricultural operations, and both are used for residential purposes. The Subject Property is bordered on the north by Tax Lot 202 which is also zoned EFU-TRB and is not engaged in an agricultural operation, but rather, is used for residential purposes.

As noted above, the determination of “irrevocably committed” pursuant to a requested Goal 14 exception is separate and distinct from analysis concerning “agricultural lands” and Goal 3. The Hearings Officer finds that the record does not support a finding of “irrevocably committed” to urban uses based on the surrounding zoning and use of properties adjacent to the subject property. Adjacent Tax Lots 300 and 306 are in some type of farm use as they have irrigation rights and are receiving farm tax assessment. Aerial photography further supports this determination.

The Hearings Officer finds the Applicant has not met its burden of proof on this criterion.

(c) The relationship between the exception area and the lands adjacent to it; and

FINDING: The Applicant provided the following response in the burden of proof statement:

The Subject Property is adjacent to a residential subdivision consisting of multiple large residential lots, several tax lots zoned EFU used for residential purposes and not currently in agricultural use, Highway 97, and a state park. The Subject Property - which has been used for decades as an equipment repair / service facility - and the properties adjacent to it are compatible with one another and have been for decades. Applicant's proposed zone change and Plan map amendment would not change that relationship because the Subject Property has been used in ways consistent with the allowed uses in the RI zone for decades.

The Hearings Officer finds that this provision is intended to determine to what extent the relationship between the exception area and the lands adjacent to it renders non-urban uses impracticable. The mere existence of residential uses near a property proposed for an irrevocably committed exception does not demonstrate that such property is necessarily committed to nonresource use. *Prentice v. LCDC*, 71 Or App 394,403-04, 692 P2d 642 (1984).

The Hearings Officer finds that the Applicant has not met its burden of proof on this criterion.

(d) The other relevant factors set forth in OAR 660-004-0028(6).

FINDING: The relevant factors of OAR 660-004-0028(6) are discussed in subsequent findings.

(3) Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(2)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule, except where other rules apply as described in OAR 660-004-0000(1). Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad resource protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is "impossible." ...

FINDING: The Applicant provided the following response in the burden of proof statement:

Applicant is not requesting an exception to Goal 3 because the land is not suitable for agricultural use, as explained above. Applicant requests an exception to Goal 14. The Subject Property is irrevocably committed to non-resource use due to its extensive historic use as a large equipment service / repair and rental / sales facility, which depleted the soils. The soils on the Subject Property are predominantly Class 7 and 8 and as a result cannot reasonably be farmed. The Subject Property's current EFU-TRB zoning allows outright or conditionally a variety of uses. The farm and forest uses allowed in the EFU zone - as well as uses related to farm and forest uses - would be impracticable on the Subject Property due to constraints caused by the historic use of the Subject Property, its proximity to Highway 97, its proximity to a residential subdivision and other residentially-used properties, the landlocked nature of Tax Lot 301, the less than 20-acre size of the Subject Property, the poor quality of the soils, and the difficulty of irrigating. Other resource related uses allowed in the EFU zone such as mining, wetland creation, and wildlife habitat conservation would be impracticable considering the Subject Property's size, location, configuration, and dry rocky soil.

While residential uses may not be impossible, the only site that could currently be developed with a residence is landlocked and inaccessible from Highway 97. Tax Lots 305 and 500 are presently developed with facilities historically used for service / repair and rental / sales of large equipment. Developing a dwelling on those lots is impracticable based on the current use of the land. Further, the proximity to Highway 97 creates noise issues that would make dwelling development impracticable. With respect to irrigation-related uses, the Subject Property, while adjacent to the Pilot Butte Canal, cannot be sufficiently irrigated because (a) the water rights are being leased to the Deschutes River and (b) even if they were not, the Canal is insufficient to irrigate the entire Subject Property. Finally, the utility and similar uses allowed in the EFU zone, such as utility facilities,

transmission towers, personal use airports, solar power generating facilities, etc.) are impracticable on the Subject Property due to its small size (approx. 19 acres) and the fact that it is already partially developed.

The Hearings Officer finds that the above subsection does not set forth a criterion, but rather explains how to interpret and implement the various requirements set forth in OAR 660-004-0028(6).

For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:

- (a) Farm use as defined in ORS 215.203;***
- (b) Propagation or harvesting of a forest product as specified in OAR 660-0330120; and***
- (c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a).***

FINDING: The Applicant provided the following response in the burden of proof statement:

Applicant is not requesting an exception to Goal 3 because the land is not suitable for agricultural use, as explained above. Applicant requests an exception to Goal 14.

The Hearings Officer finds this provision is inapplicable.

- (4) A conclusion that an exception area is irrevocably committed shall be supported by findings of fact that address all applicable factors of section (6) of this rule and by a statement of reasons explaining why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area.***

FINDING: The Hearings Officer’s findings of fact that address all applicable factors of section (6) of this rule are set forth below.

- (5) Findings of fact and a statement of reasons that land subject to an exception is irrevocably committed need not be prepared for each individual parcel in the exception area. Lands that are found to be irrevocably committed under this rule may include physically developed lands.***

FINDING: The Applicant’s proposed exception area consists of three (3) Tax Lots (301, 305, and 500), all of which are the subject of this application. The Hearings Officer’s findings of fact regarding the exception area are addressed to all three tax lots collectively.

- (6) Findings of fact for a committed exception shall address the following factors:***
 - (a) Existing adjacent uses;***

FINDING: The Applicant provided the following response in the burden of proof statement:

See above discussion of “characteristics of adjacent lands,” which discusses the existing adjacent uses.

The Hearings Officer finds that the Applicant has not met its burden of proof for an “irrevocably committed” exception based on existing adjacent uses, as set forth in the findings above.

(b) Existing public facilities and services (water and sewer lines, etc.);

FINDING: The Applicant provided the following response in the burden of proof statement:

There are no public water or sewer facilities on the Subject Property; it is served by an on-site, DEQ-approved sewage disposal system and has an on-site well that provides potable water to the Subject Property. Further, Applicant’s proposal to develop the Subject Property with RI zone allowed uses will not require public water or sewer facilities. The Subject Property will continue to be serviced by the Deschutes Rural Fire District #2 and the Deschutes County Sheriff.

There are no existing public water and sewer lines on the subject property. The Hearings Officer finds that the Applicant has not met its burden of proof for an “irrevocably committed” exception based on existing public facilities and services (water and sewer lines, etc.).

(c) Parcel size and ownership patterns of the exception area and adjacent lands:

(A) Consideration of parcel size and ownership patterns under subsection (6)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the goals were made at the time of partitioning or subdivision. Past land divisions made without application of the goals do not in themselves demonstrate irrevocable commitment of the exception area.

...

FINDING: The Applicant provided the following response in the burden of proof statement:

The Subject Property consists of three tax lots that total approximately 19.12 acres; Tax Lot 301 is 15.06 acres, Tax Lot 305 is 3.00 acres, and Tax Lot 500 is 1.06 acres. Tax Lot 301 was formerly part of Tax Lot 300 (discussed below). It was created in 1977 and at that time consisted of 18.06 acres. In 1981, it was divided to create the 3.0 acre Tax Lot 305. Tax Lot 500 was created in 1972 and was originally 7.27 acres. In 1991, 0.21 acres were removed to create Tax Lot 501 (right of way for the highway).

Land use records for the Subject Property do not appear to exist prior to 1978. In April 1978, the owner of the Subject Property - which at that time existed as only Tax Lots 301 and 500 - applied for a rezone from A-1 to C-2 to support the existing tractor sales and service operation. At that time, the Subject Property had been designated by the Deschutes County Comprehensive Plan and the Redmond Comprehensive plan as being for urban development. Exhibit 11 at p. 16. The Subject Property at that time was within the sewer and water service boundaries, and electrical service, telephone service, and other public facilities were being supplied to the area. The County chose to rezone a portion of the Subject Property (Tax Lot 500) to A-S rather than C-2 and to leave Tax Lot 301 zoned A-1.

The adjacent properties to the north and east (Map/Tax Lots 1612230000202, - 300 & -306) are all zoned EFU and are under separate ownership. Tax Lot 202 is 5.63 acres and is owned by Robert E. Fate and Stacey L. Andrews. It appears to have been created by partition plat in or around 2017. Tax Lot 300 is 21.56 acres and is owned by James L. Werth. It was formerly part of TL 1612 (from which Tax Lot 301, part of the Subject Property, was also created). TL 1612 was divided numerous times over the years, culminating in the creation of Tax Lot 300 in around 1988. Tax Lot 306 is owned by William Edward Kirzy and is 20.54 acres. It appears to have been created in 1987 as Minor Land Partition No. MP-87-20.

The adjacent property to the south (Map/Tax Lot 1612230000700) is open space and park land owned by the State of Oregon Parks & Recreation Department. Tax Lot 700 is 35.89 acres. It appears to have been created from TL 1612 in or around 1961.

The adjacent properties to the west consist of lots making up the Whispering Pines subdivision (Map/Tax Lots 161223C000100, 200, 300, 400, 500, 600, 700, &.800 - platted in 1968; Map/Tax Lots 161223B00106 - platted in 1969; Map/Tax Lots 161223B00200, 201, 202, 203, 204, 205, 206, & 207 - platted in 1977). These are all zoned RR-10, are under 3 acres in size, and are under separate ownership. The majority of the soils on these properties are classified as 58C, which is not considered "high-value" farmland and as such would likely not be put to any agricultural use.

The Hearings Officer finds that the Applicant has addressed consideration of parcel size and ownership patterns pursuant to this rule, and analysis of how the existing development pattern came about.

...
Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors makes unsuitable their resource use or the resource use of nearby lands can the parcels be considered to be irrevocably committed.
...

FINDING: The Applicant provided the following response in the burden of proof statement:

The Subject Property is also completely constrained for additional development and use due to the Pilot Butte Canal on the east (and bisecting the property). This canal sits within a federal right of way and, therefore, precludes development or use. Given this fact, and the subdivision to the west, the Subject Property contains severe constraints that preclude operating the property as a single farming operation or for significant agricultural use.

The Hearings Officer finds that the Applicant has established that the Pilot Butte Canal and associated easement make the exception area unsuitable for resource use. There is not a showing that this factor makes resource use of nearby lands unsuitable. The Hearings Officer observes that, whether the property is suitable for resource use does not constitute a finding that the subject property is not suitable for rural use.

...
Resource and nonresource parcels created and uses approved pursuant to the applicable goals shall not be used to justify a committed exception. For example, the presence of several parcels created for nonfarm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for the subject parcels or land adjoining those parcels.

FINDING: The Applicant does not rely on any parcels created or uses approved pursuant to the applicable goals to justify its request for an irrevocably committed exception.

(B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations;

FINDING: The Applicant provided the following response in the burden of proof statement:

The parcel sizes for the Subject Property and the properties adjacent to it range from 1.06 acres to 35.89 acres. The majority of the parcels surrounding the Subject Property are part of the Whispering Pines residential subdivision - they are each under 3 acres. The only contiguous ownerships are Tax Lots 305 and 500, which are owned by Applicant and part of the Subject Property. Tax Lot 301, also part of

the Subject Property, is owned by a principal of Applicant. The Subject Property does not stand alone amidst larger farm or forest operations and are not buffered from such operations-there are no such operations in the vicinity of the Subject Property.

The Hearings Officer finds that the three parcels that constitute the subject property total approximately 19 acres in size. The mere fact that smaller parcels exist in the surrounding area and are in separate ownerships does not establish "irrevocable commitment." The parcels are not clustered in a large group or clustered around a road designed to serve those parcels. There are two adjacent, smaller EFU-zoned properties that are receiving tax deferral and appear to be in agricultural use as evidenced by aerial photographs. No finding is made on whether such properties are engaged in "farm use," however, as that is not relevant to this determination. The Hearings Officer finds that the Applicant has not met its burden of proof on this criterion. This criterion is not met.

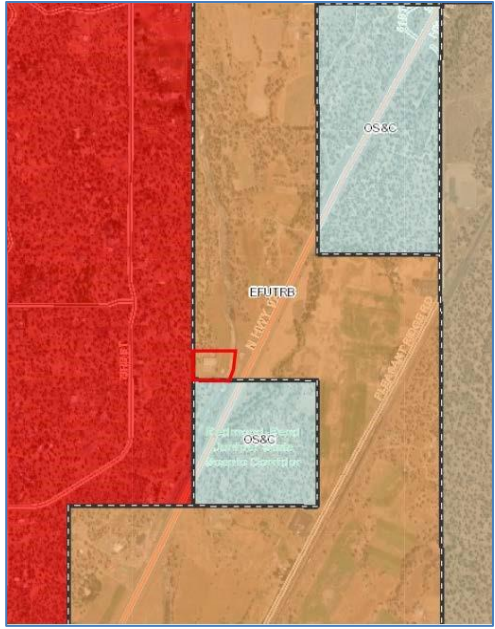
(d) Neighborhood and regional characteristics;

FINDING: The Applicant provided the following response in the burden of proof statement:

The area, or "neighborhood," in which the Subject Property lies can be characterized generally as developed residential properties. While some are zoned EFU, they are not being used for agricultural purposes. The general area around the Subject Property appears to consist of native vegetation - grasses and juniper trees - and is largely infertile soil (58C). Deschutes Junction is nearby and is also zoned RI, and consists of a mixture of commercial and industrial uses, with some hobby farms and rural residences. Approval of the proposed exception would be consistent with the actual character and land use pattern in the neighborhood.

Using an approximately ¼-mile radius around the subject property, the vicinity is comprised of a mix of RR-10, EFU, and OS&C zoning.

Zoning within approximately ¼ mile of the subject property (Tax Lot 305 highlighted for reference)



Aerial Photography (2020) within approximately ¼ mile of the subject property (Tax Lot 305 highlighted for reference)



The Hearings Officer finds that the Applicant addressed neighborhood characteristics, but did not address regional characteristics. The Hearings Officer finds the Applicant did not meet its burden of proof on this criterion. This criterion is not met.

- (e) **Natural or man-made features or other impediments separating the exception area from adjacent resource land. Such features or impediments include but are not limited to roads, watercourses, utility lines, easements, or rights-of-way that effectively impede practicable resource use of all or part of the exception area;**

FINDING: The Applicant provided the following response in the burden of proof statement:

The Subject Property is separated from resource area (zoned EFU) by the Pilot Butte Canal and Highway 97. It is also currently developed with commercial / industrial buildings that have been historically used as equipment service / repair and rental facilities. Tax Lot 301 is landlocked and only accessible via a bridge easement located on or near Tax Lots 500 and 305. These features impede practicable resource use of the exception area.

The Hearings Officer finds that, while some man-made features separate the exception area from some adjacent resource land, there are other resource lands immediately adjacent to the subject property. Nonetheless, as determined in the findings above, the Hearings Officer finds that both the Pilot Butte Canal and Highway 97 effectively impede practicable resource use (farm use) of all or part of the subject property. Again, the Hearings Officer observes that this finding does not constitute a determination that the subject property is unsuitable for any rural use. This criterion is met.

- (f) **Physical development according to OAR 660-004-0025; and**

FINDING: OAR 660-004-0025 states:

660-004-0025 Exception Requirements for Land Physically Developed to Other Uses

- (1) **A local government may adopt an exception to a goal when the land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal. Other rules may also apply, as described in OAR 660004-0000(1).**
- (2) **Whether land has been physically developed with uses not allowed by an applicable goal will depend on the situation at the site of the exception. The exact nature and extent of the areas found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception.**

The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property is developed with a bridge over the Pilot Butte Canal, two commercial buildings and their accessory buildings, and a double-wide mobile home. The two commercial buildings, used for equipment service / repair and rental / sales, total 2,864 square feet combined. The Subject Property has been developed with an approximately 7,500 square foot warehouse since the early 1990s. While this development does not preclude resource uses per se, the historic use of the two commercial buildings and their accessory structures and Applicant's plan to continue that historic use, along with the fact that the only access to the landlocked Tax Lot 301 is via these developed lots, weighs in favor of a determination that the Subject Property is irrevocably committed to urban uses.

The Hearings Officer found above that the Applicant need not obtain a non-conforming use verification to establish "physical development." However, the Hearings Officer finds that the Applicant has not met its burden of proving that the subject property has been physically developed with uses not allowed by Goal 14 to the extent that it is no longer available for uses allowed by Goal 14. These criteria are not met.

(g) Other relevant factors.

FINDING: The Applicant provided the following response in the burden of proof statement:

Highway 97 runs along the east side of the Subject Property. This detracts from the suitability of the Subject Property for resource or other uses permitted in the EFU zone. The Pilot Butte Canal also bisects a portion of the Subject Property or forms a border to similar effect.

As determined in the findings above, the Hearings Officer finds that both the Pilot Butte Canal and Highway 97 effectively impede practicable resource use of all or part of the subject property. Again, the Hearings Officer observes that this finding does not constitute a determination that the subject property is unsuitable for any rural use. This criterion is met.

(7) The evidence submitted to support any committed exception shall, at a minimum, include a current map or aerial photograph that shows the exception area and adjoining lands, and any other means needed to convey information about the factors set forth in this rule. For example, a local government may use tables, charts, summaries, or narratives to supplement the maps or photos. The applicable factors set forth in section (6) of this rule shall be shown on the map or aerial photograph.

FINDING: The Applicant provided a current area map and aerial photograph showing the subject property and adjoining lands, included as **Exhibit 1** of the application materials. This criterion is met.

DIVISION 14, APPLICATION OF THE STATEWIDE PLANNING GOALS TO NEWLY INCORPORATED CITIES, ANNEXATION, AND URBAN DEVELOPMENT ON RURAL LANDS

OAR 660-014-0030, Rural Lands Irrevocably Committed to Urban Levels of Development

- (1) *A conclusion, supported by reasons and facts, that rural land is irrevocably committed to urban levels of development can satisfy the Goal 2 exceptions standard (e.g., that it is not appropriate to apply Goals 14's requirement prohibiting the establishment of urban uses on rural lands). If a conclusion that land is irrevocably committed to urban levels of development is supported, the four factors in Goal 2 and OAR 660-004-0020(2) need not be addressed.***

FINDING: The Applicant provided the following response in the burden of proof statement:

The proposed exception area - the Subject Property - is irrevocably committed to urban levels of development. Specifically, it is irrevocably committed to industrial and quasi-commercial uses at urban levels, as has been shown above. The Subject Property is unsuitable for rural uses including farming because of its size, configuration, poor quality soils, lack of sufficient irrigation, and the highway abutting it. Because the Subject Property has been irrevocably committed, Applicant need not address the four factors in Goal 2 and OAR 660-004- 0020(2).

For the reasons set forth above, the Hearings Officer finds: (1) the subject property is rural land; (2) the Applicant is not required to obtain a Goal 14 exception for purposes of the subject applications; therefore, Goal 2 exceptions standards are not applicable; (3) in the alternative, if the Board of County Commissioners disagrees with the Hearings Officer's findings on (1) and (2) herein, and determines that the Applicant is required to obtain a Goal 14 exception, the record does not support a finding that the subject property is irrevocably committed to urban levels of development.

- (2) *A decision that land has been built upon at urban densities or irrevocably committed to an urban level of development depends on the situation at the specific site. The exact nature and extent of the areas found to be irrevocably committed to urban levels of development shall be clearly set forth in the justification for the exception. The area proposed as land that is built upon at urban densities or irrevocably committed to an urban level of development must be shown on a map or otherwise described and keyed to the appropriate findings of fact.***

FINDING: The Applicant provided the following response in the burden of proof statement:

*The Subject Property is irrevocably committed to an urban level of development as set forth in detail above. Applicant has submitted with this Application maps and aerial photos showing the Subject Property (**Exhibit 1**) and deeds to the Subject Property containing a legal description (**Exhibits 15-17**).*

The Hearings Officer finds that the Applicant has not met its burden of proving that the subject property has been built upon at urban densities and/or is irrevocably committed to urban levels of development. The Applicant has not established “the exact nature and extent of the areas found to be irrevocably committed to urban levels of development” as justification for the exception.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer’s findings, the Applicant’s alternative request for a Goal 14 exception need not be approved.

(3) A decision that land is committed to urban levels of development shall be based on findings of fact, supported by substantial evidence in the record of the local proceeding, that address the following:

(a) Size and extent of commercial and industrial uses;

FINDING: The Applicant provided the following response in the burden of proof statement:

The Subject Property is approximately 19.12 acres in size. It is currently developed with a doublewide mobile home on Tax Lot 301, and facilities used for large equipment service / repair and rentals / sales. The Subject Property has been used for equipment service, etc. for the majority of at least the past 40 years. The land use history also includes documentation that the property has been used, consistently, for industrial uses and not for any farm or agricultural use. This includes heavy equipment rental, repair, and storage, as well as various machine shop use and as a diesel repair shop. The current buildings (decades old), were designed for such uses and maintained in reasonably good working order to continue such use.

The Hearings Officer found above that the Applicant need not obtain a non-conforming use verification to establish “irrevocable commitment.” However, the Applicant’s proof on this criterion relies on industrial uses that appear to have been discontinued and, thus, are no longer non-conforming uses. Of the subject property’s approximately 19 acres, aerial photography indicates that approximately 4.5 acres have been allocated to industrial use on the property. This constitutes less than 1/3 of the subject property.

The Hearings Officer finds that the Applicant has not met its burden of proving that the size and extent of “commercial or industrial” uses on the subject property demonstrates it is irrevocably committed to urban levels of development.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer’s findings, the Applicant’s alternative request for a Goal 14 exception need not be approved.

(b) Location, number and density of residential dwellings;

FINDING: The Applicant provided the following response in the burden of proof statement:

The Subject Property is surrounded by residential dwellings. There are 17 lots to the west of the Subject Property that each contain a residential dwelling, all of which are part of the Whispering Pines subdivision. These properties are less than 3 acres each and the area is zoned RR-10. In addition, Tax Lot 306 contains two residential dwellings, one of which is a manufactured home; and Tax Lot 300 appears to contain at least one residential dwelling.

The Hearings Officer finds that the subject property is not developed with residential dwellings and that surrounding residential development is not relevant to the determination under this criterion of “irrevocably committed.” Under this consideration, the Applicant has not established that the subject property is irrevocably committed to urban levels of development.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer’s findings, the Applicant’s alternative request for a Goal 14 exception need not be approved.

(c) Location of urban levels of facilities and services; including at least public water and sewer facilities; and

FINDING: The Applicant provided the following response in the burden of proof statement:

The Subject Property is not serviced by public water or sewer facilities.

Under this consideration, the Applicant has not established that the subject property is irrevocably committed to urban levels of development because there are no urban levels of facilities and services on the property.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer’s findings, the Applicant’s alternative request for a Goal 14 exception need not be approved.

(d) Parcel sizes and ownership patterns.

FINDING: The Applicant provided the following response in the burden of proof statement:

Parcel sizes and ownership patterns for the Subject Property and those adjacent to it are discussed in detail above. That discussion is incorporated here.

Under this consideration, the Applicant has not established that the subject property is irrevocably committed to urban levels of development due to parcel sizes and ownership patterns of the subject property.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer’s findings, the Applicant’s alternative request for a Goal 14 exception need not be approved.

(4) A conclusion that rural land is irrevocably committed to urban development shall be based on all of the factors listed in section (3) of this rule. The conclusion shall be supported by a statement of reasons explaining why the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than a rural level of development.

FINDING: The Applicant provided the following response in the burden of proof statement:

As discussed in detail above, the Subject Property is irrevocably committed to urban development because (1) it does not constitute agricultural land and is not suitable for farm or forest use; (2) it is a relatively small parcel (19.12 acres); (3) it has been in use as a large equipment service / repair and rental / sales facility for the majority of at least the last 40 years; (4) there are no commercial agricultural activities taking place on the adjacent EFU land - rather, that land is being used largely for residential purposes; and (5) it is adjacent to a busy highway. The public facilities and services - e.g., water and sewer - are not servicing the Subject Property but there is sufficient private infrastructure in place to support the level of urban use that has been taking place on the Subject Property for decades, and that Applicant wishes to have occur on the Subject Property should this Application be approved.

For all the reasons set forth in the findings above, the Hearings Officer finds that the Applicant has not established that the subject property is irrevocably committed to urban levels of development.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer’s findings, the Applicant’s alternative request for a Goal 14 exception need not be approved.

(5) More detailed findings and reasons must be provided to demonstrate that land is committed to urban development than would be required if the land is currently built upon at urban densities.

FINDING: The Applicant provided the following response in the burden of proof statement:

The Application supports the proposed exception and demonstrates that the site is irrevocably committed to urban development.

Under this consideration, the Applicant has not established that the subject property is irrevocably committed to urban levels of development. Nonetheless, as set forth in the

findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer’s findings, the Applicant’s alternative request for a Goal 14 exception need not be approved.

OREGON REVISED STATUTES (ORS)

Chapter 197, Comprehensive Land Use Planning

ORS 197.732, Goal Exceptions

- (2) A local government may adopt an exception to a goal if:**
 - (a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;**
 - (b) The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or (c) The following standards are met:**
 - (A) Reasons justify why the state policy embodied in the applicable goals should not apply;**
 - (B) Areas that do not require a new exception cannot reasonably accommodate the use;**
 - (C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and**
 - (D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.**

FINDING: The Applicant provided the following response in the burden of proof statement:

Applicant has explained in detail above the reasons for which it meets the requirements of ORS 197.732(2)(b), i.e., that the Subject Property is irrevocably committed to urban use. That explanation is incorporated here.

The Hearings Officer finds that the Applicant has not established that the subject property is either physically developed to the point that rural uses are no longer available and/or is irrevocably committed to urban levels of development. Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer’s findings, the Applicant’s alternative request for a Goal 14 exception need not be approved.

IV. CONCLUSION & RECOMMENDATION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds that the Applicant has met the burden of proof necessary to justify changing the Plan Designation of the subject property 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. The Hearings Officer finds that no Statewide Planning Goal exceptions are required. The Applicant’s alternative request for a Goal 14 Exception is not supported by substantial evidence and should be denied.

The Deschutes County Board of Commissioners is the final local review body for the applications before the County. DCC 18.136.030. The Hearings Officer recommends approval of the requested plan amendment and zone change with the proposed condition of approval set forth herein.

Dated this 12th day of July, 2022.



Stephanie Marshall, Hearings Officer



BOARD OF COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: First reading of Ordinance No. 2022-013 amending the Comprehensive Plan and approving a zone change for property totaling approximately 710 acres to the west of Terrebonne and north of Highway 126

RECOMMENDED MOTION:

Move approval of first reading of Ordinance No. 2022-013 to amend the Comprehensive Plan and approve a zone change for property totaling approximately 710 acres to the west of Terrebonne and north of Highway 126.

BACKGROUND AND POLICY IMPLICATIONS:

710 Properties, LLC is requesting a Comprehensive Plan amendment and zone change for property totaling approximately 710 acres to the west of Terrebonne and north of Highway 126, submitted by 710 Properties, LLC (file nos. 247-21-001043-PA, 1044-ZC).

The entirety of the record can be found on the project website at: https://www.deschutes.org/cd/page/247-21-001043-pa-and-247-21-001044-zc-eden-central-properties-comprehensive-plan-amendment

BUDGET IMPACTS:

None

ATTENDANCE:

Haleigh King, Associate Planner



COMMUNITY DEVELOPMENT

MEMORANDUM

TO: Deschutes County Board of Commissioners (Board)

FROM: Haleigh King, Associate Planner

DATE: November 8, 2022

SUBJECT: Consideration of First Reading of Ordinance 2022-013- Eden Properties Plan Amendment and Zone Change

The Board of County Commissioners (Board) will consider a first reading of Ordinance 2022-013 on November 14, 2022 to consider a request for a Plan Amendment and Zone Change (file nos. 247-21-001043-PA, 1044-ZC) for nine tax lots totaling approximately 710 acres to the west of Terrebonne and north of Highway 126.

I. BACKGROUND

The applicant, 710 Properties, LLC/Eden Central Properties, LLC, is requesting a Comprehensive Plan Amendment to re-designate the subject properties from Agriculture to Rural Residential Exception Area and a Zoning Map Amendment to rezone the properties from Exclusive Farm Use (EFU) to Rural Residential - 10 Acre Minimum (RR-10). The applicant argues the properties were mistakenly identified as farmland, do not contain high-value soils or other characteristics of high value farmland, and therefore should be re-designated and rezoned for rural residential use. The applicant provided a supplementary soil study that identifies non-high value (Class VII and VIII) soils on a majority (~71%) of the subject properties. Additionally, the applicant's burden of proof includes findings that demonstrate compliance with state and local requirements and policies.

A public hearing before a Hearings Officer was conducted on April 19, 2022 with the Hearings Officer's recommendation of approval issued on June 2, 2022. The Board held a public hearing on August 17, 2022 and initiated a 21-day open record period, which concluded September 7, 2022 at 4:00pm. On September 28, 2022, the Board deliberated to approve the requests, with two of the three Commissioners in favor.

II. NEXT STEPS / SECOND READING

The Board is scheduled to conduct the second reading of Ordinance 2022-013 on November 28, 2022, fourteen (14) days following the first reading.

ATTACHMENTS:

1. Draft Ordinance 2022-013 and Exhibits

Exhibit A: Legal Descriptions

Exhibit B: Proposed Plan Amendment Map

Exhibit C: Proposed Zone Change Map

Exhibit D: Comprehensive Plan Section 23.01.010, Introduction

Exhibit E: Comprehensive Plan Section 5.12, Legislative History

Exhibit F: Board of County Commissioners Draft Decision

Exhibit G: Hearings Officer Recommendation

REVIEWED _____
LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County *
Code Title 23, the Deschutes County *
Comprehensive Plan, to Change the *
Comprehensive Plan Map Designation for *
Certain Property From Agriculture to Rural *
Residential Exception Area, and Amending *
Deschutes County Code Title 18, the Deschutes *
County Zoning Map, to Change the Zone *
Designation for Certain Property From *
Exclusive Farm Use to Rural Residential.

ORDINANCE NO. 2022-013

WHEREAS, 710 Properties, LLC, applied for changes to both the Deschutes County Comprehensive Plan Map (247-21-001043-PA) and the Deschutes County Zoning Map (247-21-001044-ZC), to change the comprehensive plan designation of the subject property from Agricultural (AG) to Rural Residential Exception Area (RREA), and a corresponding zone change from Exclusive Farm Use (EFU) to Rural Residential (RR10); and

WHEREAS, after notice was given in accordance with applicable law, a public hearing was held on April 19, 2022, before the Deschutes County Hearings Officer and, on June 2, 2022, the Hearings Officer recommended approval of the Comprehensive Plan Map Amendment and Zone Change;

WHEREAS, pursuant to DCC 22.28.030(C), the Board heard *de novo* the applications to change the comprehensive plan designation of the subject property from Agricultural (AG) to Rural Residential Exception Area (RREA) and a corresponding zone change from Exclusive Farm Use (EFU) to Rural Residential (RR10); now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. AMENDMENT. DCC Title 23, Deschutes County Comprehensive Plan Map, is amended to change the plan designation for certain property described in Exhibit "A" and depicted on the map set forth as Exhibit "B" from AG to RREA, with both exhibits attached and incorporated by reference herein.

Section 2. AMENDMENT. DCC Title 18, Zoning Map, is amended to change the zone designation from EFU to RR10 for certain property described in Exhibit "A" and depicted on the map set forth as Exhibit "C", with both exhibits attached and incorporated by reference herein.

Section 3. AMENDMENT. DCC Section 23.01.010, Introduction, is amended to read as described in Exhibit "D" attached and incorporated by reference herein, with new language underlined.

Section 4. AMENDMENT. Deschutes County Comprehensive Plan Section 5.12, Legislative History, is amended to read as described in Exhibit "E" attached and incorporated by reference herein, with new language underlined.

Section 5. FINDINGS. The Board adopts as its findings in support of this Ordinance the Decision of the Board of County Commissioners as set forth in Exhibit "F" and incorporated by reference herein. The Board also incorporates in its findings in support of this decision, the Decision of the Hearings Officer, attached as Exhibit "G" and incorporated by reference herein.

Section 6. EFFECTIVE DATE. This Ordinance takes effect on the 90th day after the date of adoption.

Dated this _____ of _____, 2022

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

PATTI ADAIR, Chair

ANTHONY DEBONE, Vice Chair

ATTEST:

Recording Secretary

PHIL CHANG, Commissioner

Date of 1st Reading: ____ day of _____, 2022.

Date of 2nd Reading: ____ day of _____, 2022.

Record of Adoption Vote:

Commissioner	Yes	No	Abstained	Excused
Patti Adair	—	—	—	—
Anthony DeBone	—	—	—	—
Phil Chang	—	—	—	—

Effective date: ____ day of _____, 2022.

ATTEST

Recording Secretary

Exhibit "A"**Legal Descriptions of Affected Properties****TRACT 1 (Current tax lot 14-12-2100-00700)**

That portion of the NE1/4 of the NE1/4 of Section 21, T14S, R12E, W.M. lying Easterly and Southeasterly of the following described line:

Beginning at the Northeast corner of said Section 21;
thence 10.00 feet west along the North line of said Section 21;
thence South 1000.00 feet along a line parallel to the East line of said Section 21;
thence on a straight line to the Southwest corner of said Section 21.

TRACT 2 (Current tax lot 14-12-2100-00600)

The Northerly 165.00 feet of the NE1/4 of Section 28, T14S, R12E, W.M.;
The S1/2 of the SE1/4 of Section 21, T14S, R12E, W.M.;
The NE1/4 of the SE1/4 of Section 21, T14S, R12E, W.M., and
That portion of the SE1/4 of the NE1/4 of Section 21, T14S, R12E, W.M. Lying Southeasterly of the following described line:

BEGINNING at the Northeast corner of said Section 21;
thence 10.00 feet West along the North line of said Section 21;
thence South 1000.00 feet along a line parallel to the East line of said Section 21;
thence on a straight line to the Southwest corner of said Section 21.

TRACT 3 (Current tax lot 14-12-2100-00500)

That portion of the SW1/4 of the NE1/4 of Section 21, T14S, R12E, W.M. Lying Southeasterly of the following described line:

BEGINNING at the Northeast corner of said Section 21;
thence 10.00 feet West along the North line of said Section 21;
thence South 1000.00 feet along a line parallel to the East line of said Section 21;
thence on a straight line to the Southwest corner of said Section 21.

TRACT 4 (Current tax lot 14-12-2100-00400)

That portion of the NE1/4 of the SW1/4 of Section 21, T14S, R12E, W.M. Lying Southeasterly of the following described line:

BEGINNING at the Northeast corner of said Section 21;
thence 10.00 feet West along the North line of said Section 21;
thence South 1000.00 feet along a line parallel to the East line of said Section 21;
thence on a straight line to the Southwest corner of said Section 21.

TRACT 5 (Current tax lot 14-12-2100-00300)

The Northerly 165.00 feet of the NW1/4 of Section 28, T14S, R12E, W. M., those portions of the NW1/4 of the SE1/4, the SE1/4 of the SW1/4 and the SW1/4 of the SW1/4 of Section 21 T14S, R12E, W.M. Lying Southeasterly of the following described line:

BEGINNING at the Northeast corner of said Section 21;
 thence 10.00 feet West along the North line of said Section 21;
 thence South 1000.00 feet along a line parallel to the East line of said Section 21;
 thence on a straight line to the Southwest corner of said Section 21.

TRACT 6 (Current tax lot 14-12-2800-00100)

The NE1/4 of Section 28, T14S, R12E, W.M.

EXCEPTING the Northerly 165.00 feet THEREOF.

TRACT 7 (Current tax lot 14-12-2800-00200)

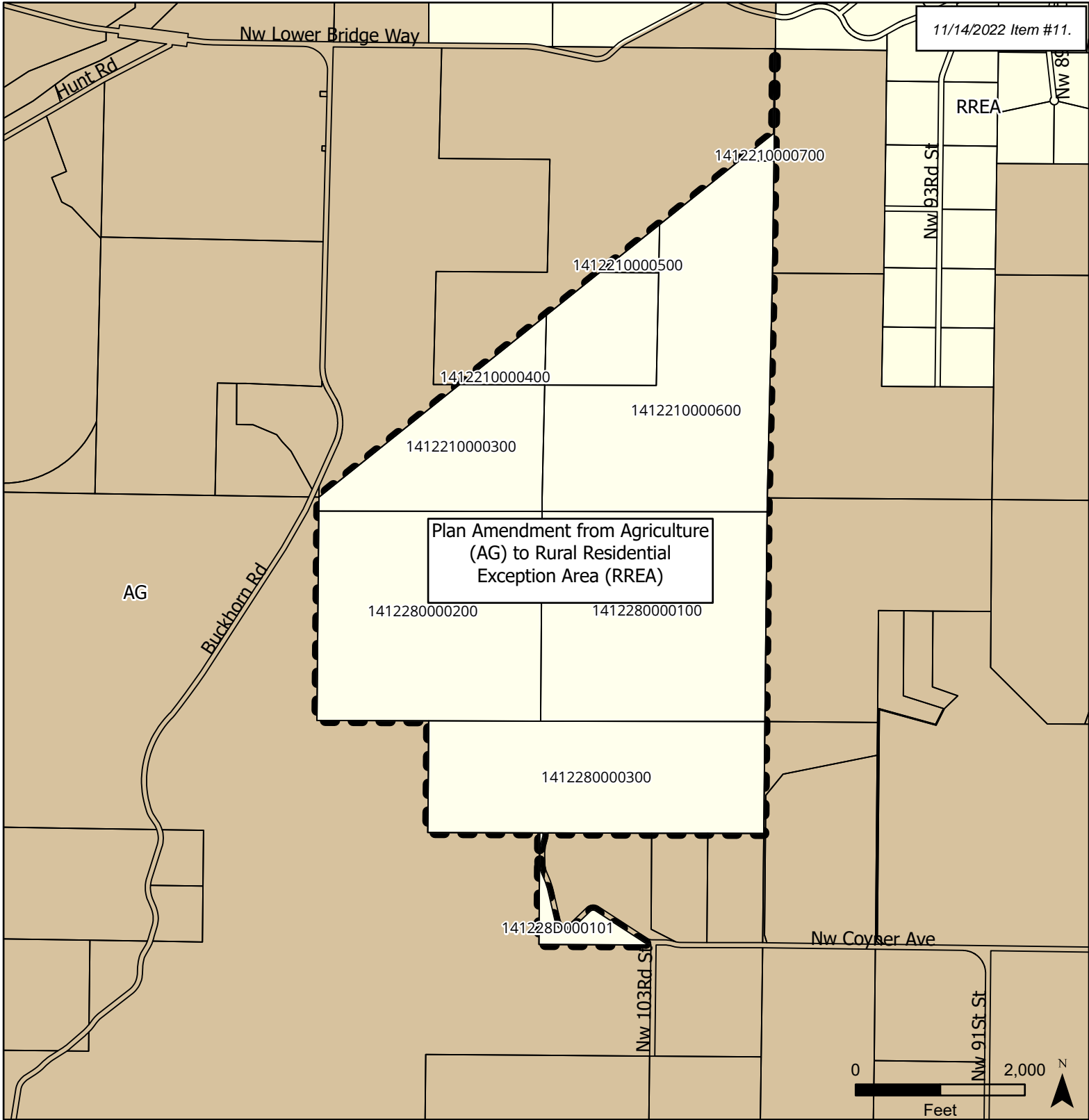
The NW1/4 of Section 28, T14S, R12E, W.M.
 EXCEPTING THEREFROM the Northerly 165.00 feet THEREOF.

TRACT 8 (Current tax lot 14-12-2800-00300)

The NE1/4 of the SW1/4 and the N1/2 of the SE1/4 of Section 28, T14S, R12E, W.M.

TRACT 9 (Current tax lot 14-12-28D0-00101)

PARCEL 2 of Partition Plat No. 2015-15 according to the official Plat THEREOF as recorded in the office of County Clerk for Deschutes County, Oregon.



Plan Amendment from Agriculture (AG) to Rural Residential Exception Area (RREA)

Proposed Comprehensive Plan Map

Applicant: 710 Properties, LLC
Taxlots: 14-12-28-D0-00101
14-12-28-00-00100, 200, 300
14-12-21-00-00300, 400, 500, 600, 700

Exhibit "B"
to Ordinance 2022-013
10/11/2022

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON






Patti Adair, Chair

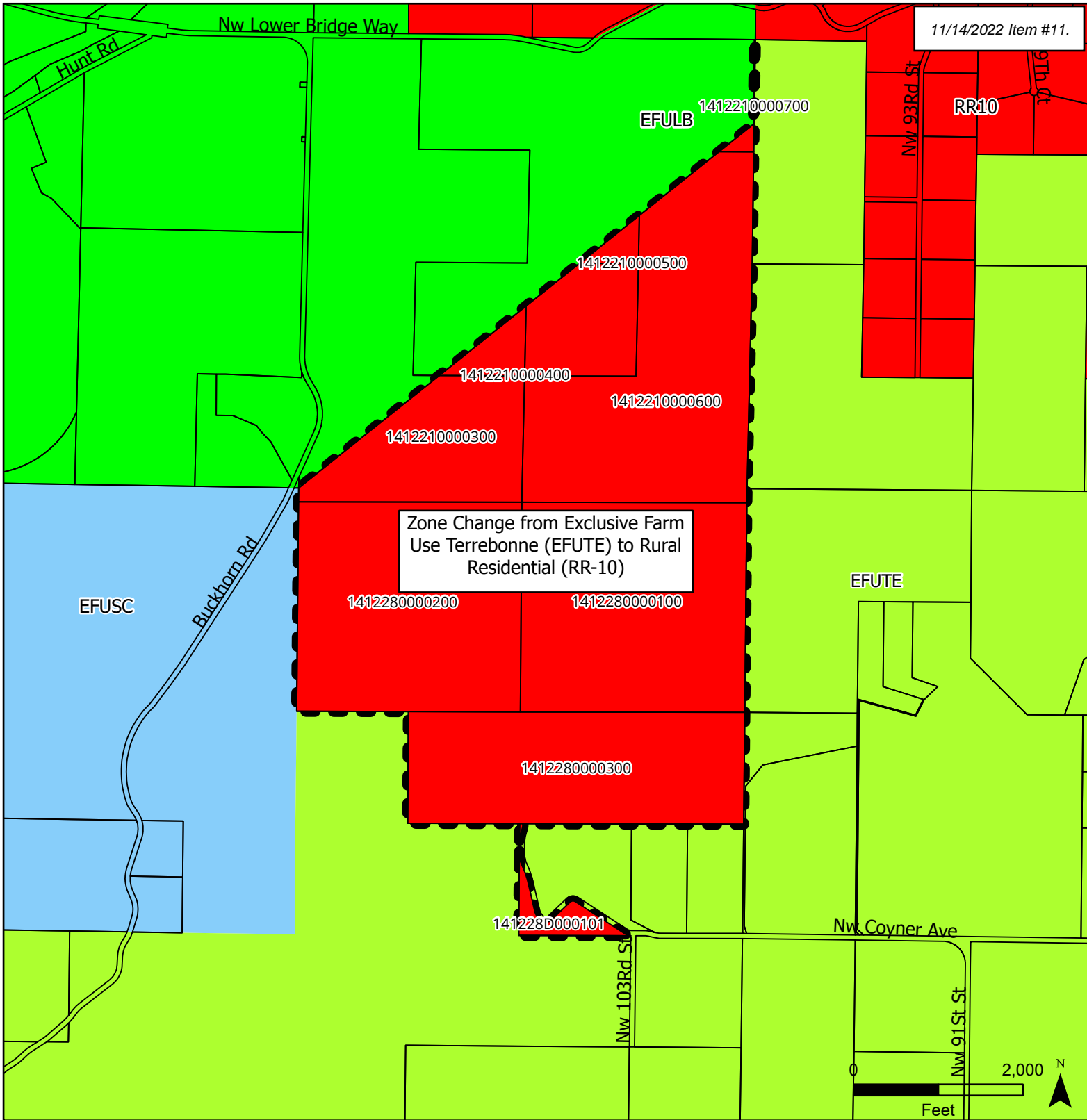
Tony DeBone, Vice Chair

Phil Chang, Commissioner

ATTEST: Recording Secretary

Dated this ____ day of ____, 20____
Effective Date: ____, 20____

-  Proposed Plan Amendment Boundary
-  Comprehensive Plan Designation
-  RREA - Rural Residential Exception Area
-  AG - Agriculture
-  Subject_Property



Proposed Zone Boundary

Zoning

- RR10 - RURAL RESIDENTIAL
- EFUSC - SISTERS/CLOVERDALE SUBZONE
- EFUTE - TERREBONNE SUBZONE
- EFULB - LOWER BRIDGE SUBZONE

GISData.GISADMIN.Street

Proposed Zoning Map

Applicant: 710 Properties, LLC
 Taxlots: 14-12-28-D0-00101
 14-12-28-00-00100, 200, 300
 14-12-21-00-00300, 400, 500, 600, 700

Exhibit "C"
to Ordinance 2022-013
 10/11/2022

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Patti Adair, Chair

Tony DeBone, Vice Chair

Phil Chang, Commissioner

ATTEST: Recording Secretary

Dated this ____ day of ____, 20____
Effective Date: ____, 20____

Exhibit “E” to Ordinance 2022-013

Section 5.12 Legislative History

Background

This section contains the legislative history of this Comprehensive Plan.

Table 5.12.1 Comprehensive Plan Ordinance History

Ordinance	Date Adopted/ Effective	Chapter/Section	Amendment
2011-003	8-10-11/11-9-11	All, except Transportation, Tumalo and Terrebonne Community Plans, Deschutes Junction, Destination Resorts and ordinances adopted in 2011	Comprehensive Plan update
2011-027	10-31-11/11-9-11	2.5, 2.6, 3.4, 3.10, 3.5, 4.6, 5.3, 5.8, 5.11, 23.40A, 23.40B, 23.40.065, 23.01.010	Housekeeping amendments to ensure a smooth transition to the updated Plan
2012-005	8-20-12/11-19-12	23.60, 23.64 (repealed), 3.7 (revised), Appendix C (added)	Updated Transportation System Plan
2012-012	8-20-12/8-20-12	4.1, 4.2	La Pine Urban Growth Boundary
2012-016	12-3-12/3-4-13	3.9	Housekeeping amendments to Destination Resort Chapter
2013-002	1-7-13/1-7-13	4.2	Central Oregon Regional Large-lot Employment Land Need Analysis
2013-009	2-6-13/5-8-13	1.3	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2013-012	5-8-13/8-6-13	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Bend Urban Growth Boundary
2013-007	5-29-13/8-27-13	3.10, 3.11	Newberry Country: A Plan for Southern Deschutes County

2013-016	10-21-13/10-21-13	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Sisters Urban Growth Boundary
2014-005	2-26-14/2-26-14	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Bend Urban Growth Boundary
2014-012	4-2-14/7-1-14	3.10, 3.11	Housekeeping amendments to Title 23.
2014-021	8-27-14/11-25-14	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Sunriver Urban Unincorporated Community Forest to Sunriver Urban Unincorporated Community Utility
2014-021	8-27-14/11-25-14	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Sunriver Urban Unincorporated Community Forest to Sunriver Urban Unincorporated Community Utility
2014-027	12-15-14/3-31-15	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Industrial
2015-021	11-9-15/2-22-16	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Surface Mining.
2015-029	11-23-15/11-30-15	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Tumalo Residential 5-Acre Minimum to Tumalo Industrial
2015-018	12-9-15/3-27-16	23.01.010, 2.2, 4.3	Housekeeping Amendments to Title 23.

Exhibit “E” to Ordinance 2022-013

2015-010	12-2-15/12-2-15	2.6	Comprehensive Plan Text and Map Amendment recognizing Greater Sage-Grouse Habitat Inventories
2016-001	12-21-15/04-5-16	23.01.010; 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from, Agriculture to Rural Industrial (exception area)
2016-007	2-10-16/5-10-16	23.01.010; 5.10	Comprehensive Plan Amendment to add an exception to Statewide Planning Goal II to allow sewers in unincorporated lands in Southern Deschutes County
2016-005	11-28-16/2-16-17	23.01.010, 2.2, 3.3	Comprehensive Plan Amendment recognizing non-resource lands process allowed under State law to change EFU zoning
2016-022	9-28-16/11-14-16	23.01.010, 1.3, 4.2	Comprehensive plan Amendment, including certain property within City of Bend Urban Growth Boundary
2016-029	12-14-16/12/28/16	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from, Agriculture to Rural Industrial
2017-007	10-30-17/10-30-17	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2018-002	1-3-18/1-25-18	23.01, 2.6	Comprehensive Plan Amendment permitting churches in the Wildlife Area Combining Zone

2018-006	8-22-18/11-20-18	23.01.010, 5.8, 5.9	Housekeeping Amendments correcting tax lot numbers in Non-Significant Mining Mineral and Aggregate Inventory; modifying Goal 5 Inventory of Cultural and Historic Resources
2018-011	9-12-18/12-11-18	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2018-005	9-19-18/10-10-18	23.01.010, 2.5, Tumalo Community Plan, Newberry Country Plan	Comprehensive Plan Map Amendment, removing Flood Plain Comprehensive Plan Designation; Comprehensive Plan Amendment adding Flood Plain Combining Zone purpose statement.
2018-008	9-26-18/10-26-18	23.01.010, 3.4	Comprehensive Plan Amendment allowing for the potential of new properties to be designated as Rural Commercial or Rural Industrial
2019-002	1-2-19/4-2-19	23.01.010, 5.8	Comprehensive Plan Map Amendment changing designation of certain property from Surface Mining to Rural Residential Exception Area; Modifying Goal 5 Mineral and Aggregate Inventory; Modifying Non-Significant Mining Mineral and Aggregate Inventory
2019-001	1-16-19/4-16-19	1.3, 3.3, 4.2, 5.10, 23.01	Comprehensive Plan and Text Amendment to add a new zone to Title 19: Westside Transect Zone.

Exhibit “E” to Ordinance 2022-013

2019-003	02-12-19/03-12-19	23.01.010, 4.2	Comprehensive Plan Map Amendment changing designation of certain property from Agriculture to Redmond Urban Growth Area for the Large Lot Industrial Program
2019-004	02-12-19/03-12-19	23.01.010, 4.2	Comprehensive Plan Map Amendment changing designation of certain property from Agriculture to Redmond Urban Growth Area for the expansion of the Deschutes County Fairgrounds and relocation of Oregon Military Department National Guard Armory.
2019-011	05-01-19/05-16/19	23.01.010, 4.2	Comprehensive Plan Map Amendment to adjust the Bend Urban Growth Boundary to accommodate the refinement of the Skyline Ranch Road alignment and the refinement of the West Area Master Plan Area I boundary. The ordinance also amends the Comprehensive Plan designation of Urban Area Reserve for those lands leaving the UGB.
2019-006	03-13-19/06-11-19	23.01.010,	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2019-016	11-25-19/02-24-20	23.01.01, 2.5	Comprehensive Plan and Text amendments incorporating language from DLCD’s 2014 Model Flood Ordinance and Establishing a purpose statement for the Flood Plain Zone.

2019-019	12-11-19/12-11-19	23.01.01, 2.5	Comprehensive Plan and Text amendments to provide procedures related to the division of certain split zoned properties containing Flood Plain zoning and involving a former or piped irrigation canal.
2020-001	12-11-19/12-11-19	23.01.01, 2.5	Comprehensive Plan and Text amendments to provide procedures related to the division of certain split zoned properties containing Flood Plain zoning and involving a former or piped irrigation canal.
2020-002	2-26-20/5-26-20	23.01.01, 4.2, 5.2	Comprehensive Plan Map Amendment to adjust the Redmond Urban Growth Boundary through an equal exchange of land to/from the Redmond UGB. The exchange property is being offered to better achieve land needs that were detailed in the 2012 SB 1544 by providing more development ready land within the Redmond UGB. The ordinance also amends the Comprehensive Plan designation of Urban Area Reserve for those lands leaving the UGB.
2020-003	02-26-20/05-26-20	23.01.01, 5.10	Comprehensive Plan Amendment with exception to Statewide Planning Goal 11 (Public Facilities and Services) to allow sewer on rural lands to serve the City of Bend Outback Water Facility.

Exhibit “E” to Ordinance 2022-013

2020-008	06-24-20/09-22-20	23.01.010, Appendix C	Comprehensive Plan Transportation System Plan Amendment to add roundabouts at US 20/Cook-O.B. Riley and US 20/Old Bend-Redmond Hwy intersections; amend Tables 5.3.T1 and 5.3.T2 and amend TSP text.
2020-007	07-29-20/10-27-20	23.01.010, 2.6	Housekeeping Amendments correcting references to two Sage Grouse ordinances.
2020-006	08-12-20/11-10-20	23.01.01, 2.11, 5.9	Comprehensive Plan and Text amendments to update the County’s Resource List and Historic Preservation Ordinance to comply with the State Historic Preservation Rule.
2020-009	08-19-20/11-17-20	23.01.010, Appendix C	Comprehensive Plan Transportation System Plan Amendment to add reference to J turns on US 97 raised median between Bend and Redmond; delete language about disconnecting Vandevent Road from US 97.
2020-013	08-26-20/11/24/20	23.01.01, 5.8	Comprehensive Plan Text And Map Designation for Certain Properties from Surface Mine (SM) and Agriculture (AG) To Rural Residential Exception Area (RREA) and Remove Surface Mining Site 461 from the County's Goal 5 Inventory of Significant Mineral and Aggregate Resource Sites.
2021-002	01-27-21/04-27-21	23.01.01	Comprehensive Plan Map Designation for Certain Property from Agriculture (AG) To Rural Industrial (RI)

2021-005	06-16-21/06-16-21	23.01.01, 4.2	Comprehensive Plan Map Amendment Designation for Certain Property from Agriculture (AG) To Redmond Urban Growth Area (RUGA) and text amendment
2021-008	06-30-21/09-28-21	23.01.01	Comprehensive Plan Map Amendment Designation for Certain Property Adding Redmond Urban Growth Area (RUGA) and Fixing Scrivener’s Error in Ord. 2020-022
2022-001	04-13-22/07-12-22	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture (AG) to Rural Residential Exception Area (RREA)
2022-003	04-20-22/07-19-22	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture (AG) to Rural Residential Exception Area (RREA)
2022-006	06-22-22/08-19-22	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Rural Residential Exception Area (RREA) to Bend Urban Growth Area
2022-010	07-27-22/10-25-22	23.01.010	Comprehensive Plan Map Designation for Certain Property from Agriculture (AG) To Rural Industrial (RI)
2022-011	TBD	23.01.010	Comprehensive Plan Map Designation for Certain Property from Agriculture (AG) to Rural Industrial (RI)
<u>2022-013</u>	<u>TBD</u>	<u>23.01.010</u>	<u>Comprehensive Plan Map Designation for Certain Property from Agriculture (AG) to Rural Residential Exception Area (RREA)</u>

Exhibit “D” to Ordinance 2022-013**Chapter 23.01 COMPREHENSIVE PLAN**

Chapter 23.01 COMPREHENSIVE PLAN

23.01.010. Introduction.

A. The Deschutes County Comprehensive Plan, adopted by the Board in Ordinance 2011-003 and found on the Deschutes County Community Development Department website, is incorporated by reference herein.

B. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2011-027, are incorporated by reference herein.

C. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-005, are incorporated by reference herein.

D. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-012, are incorporated by reference herein.

E. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-016, are incorporated by reference herein.

F. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-002, are incorporated by reference herein.

G. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-009, are incorporated by reference herein.

H. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-012, are incorporated by reference herein.

I. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-007, are incorporated by reference herein.

J. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-005, are incorporated by reference herein.

K. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-006, are incorporated by reference herein.

L. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-012, are incorporated by reference herein.

M. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-021, are incorporated by reference herein.

N. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-027, are incorporated by reference herein.

O. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-021, are incorporated by reference herein.

P. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-029, are incorporated by reference herein.

Q. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-018, are incorporated by reference herein.

R. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-010, are incorporated by reference herein.

S. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-001, are incorporated by reference herein.

T. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-022, are incorporated by reference herein.

- U. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-005, are incorporated by reference herein.
- V. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-027, are incorporated by reference herein.
- W. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-029, are incorporated by reference herein.
- X. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2017-007, are incorporated by reference herein.
- Y. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-002, are incorporated by reference herein.
- Z. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-006, are incorporated by reference herein.
- AA. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-011, are incorporated by reference herein.
- BB. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-005, are incorporated by reference herein.
- CC. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-008, are incorporated by reference herein.
- DD. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-002, are incorporated by reference herein.
- EE. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-001, are incorporated by reference herein.
- FF. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-003, are incorporated by reference herein.
- GG. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-004, are incorporated by reference herein.
- HH. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-011, are incorporated by reference herein.
- II. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-006, are incorporated by reference herein.
- JJ. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-016, are incorporated by reference herein.
- KK. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-019, are incorporated by reference herein.
- LL. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-001, are incorporated by reference herein.
- MM. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-002, are incorporated by reference herein.
- NN. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-003, are incorporated by reference herein.
- OO. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-008, are incorporated by reference herein.
- PP. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-007, are incorporated by reference herein.
- QQ. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-006, are incorporated by reference herein.
- RR. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-009, are incorporated by reference herein.

- SS. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-013, are incorporated by reference herein.
- TT. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-02, are incorporated by reference herein.
- UU. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2021-005, are incorporated by reference herein.
- VV. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2021-008, are incorporated by reference herein.
- WW. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-001, are incorporated by reference herein.
- XX. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-003, are incorporated by reference herein.
- YY. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-006, are incorporated by reference herein.
- ZZ. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-0010, are incorporated by reference herein.
- AAA. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-011, are incorporated by reference herein.
- BBB. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2022-013, are incorporated by reference herein.

(Ord. 2022-013 §2, 2022; Ord. 2022-011 §2, 2022; Ord. 2022-0010 §2, 2022; Ord. 2022-006 §2, 2022; Ord. 2022-003 §2, 2022; Ord. 2022-001 §1, 2022; Ord. 2021-008 §1; Ord. 2021-005 §1, 2021; Ord. 2021-002§3, 2020; Ord. 2020-013§1, 2020; Ord. 2020-009§1, 2020; Ord. 2020-006§1, 2020; Ord. 2020-007§1, 2020; Ord. 2020-008§1, 2020; Ord. 2020-003 §1, 2020; Ord. 2020-002 §1, 2020; Ord. 2020-001 §26, 2020; Ord. 2019-019 §2, 2019; Ord. 2019-016 §3, 2019; Ord. 2019-006 § 1, 2019; Ord. 2019-011 § 1, 2019; Ord. 2019-004 §1, 2019; Ord. 2019-003 §1, 2019; Ord. 2019-001 §1, 2019; Ord. 2019-002 §1, 2019; Ord. 2018-008 §1, 2018; Ord. 2018-005 §2, 2018; Ord. 2018-011 §1, 2018; Ord. 2018-006 §1, 2018; Ord. 2018-002 §1, 2018; Ord. 2017-007 §1, 2017; Ord. 2016-029 §1, 2016; Ord. 2016-027 §1, 2016; Ord. 2016-005 §1, 2016; Ord. 2016-022 §1, 2016; Ord. 2016-001 §1, 2016; Ord. 2015-010 §1, 2015; Ord. 2015-018 § 1, 2015; Ord. 2015-029 § 1, 2015; Ord. 2015-021 § 1, 2015; Ord. 2014-027 § 1, 2014; Ord. 2014-021 §1, 2014; Ord. 2014-12 §1, 2014; Ord. 2014-006 §2, 2014; Ord. 2014-005 §2, 2014; Ord. 2013-012 §2, 2013; Ord. 2013-009 §2, 2013; Ord. 2013-007 §1, 2013; Ord. 2013-002 §1, 2013; Ord. 2013-001 §1, 2013; Ord. 2012-016 §1, 2012; Ord. 2012-013 §1, 2012; Ord. 2012-005 §1, 2012; Ord. 2011-027 §1 through 12, 2011; Ord. 2011-017 repealed; Ord.2011-003 §3, 2011)

Click here to be directed to the Comprehensive Plan (<http://www.deschutes.org/compplan>)

EXHIBIT F - Ordinance 2022-013

**BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

FILE NUMBERS: 247-21-001043-PA, 247-21-001044-ZC

APPLICANT: 710 Properties, LLC
PO Box 1345
Sisters, OR 97759

OWNER: Eden Central Properties, LLC

ATTORNEY(S) FOR APPLICANT: Liz Fancher
2464 NW Sacagawea Lane
Bend, Oregon 97703

J. Kenneth Katzaroff
Schwabe Williamson & Wyatt
1420 5th Avenue, Suite 3400
Seattle, WA 98101

STAFF PLANNER: Haleigh King, AICP, Associate Planner
Haleigh.King@deschutes.org, 541-383-6710

APPLICATION: Comprehensive Plan Amendment to re-designate the subject property from Agriculture (AG) to Rural Residential Exception Area (RREA) and a corresponding Zone Change to change the zoning from Exclusive Farm Use – Terrebonne (EFU-TE) to Rural Residential (RR10).

SUBJECT PROPERTY: Assessor’s Map 14-12-28, Tax Lots 100, 200, 300
Assessor’s Map 14-12-28D, Tax Lot 101
Assessor’s Map 14-12-21, Tax Lots 300, 400, 500, 600 and 700

I. FINDINGS OF FACT:

A. Hearings Officer’s Decision: The Hearings Officer’s decision dated June 2, 2022, adopted as **Exhibit G** of this ordinance, is hereby incorporated as part of this decision, including any and all interpretations of the County’s code and Comprehensive Plan, and modified as follows:

- 1. Replace the discussion of the tax history of the subject property in Section II. B., page 5 with the following:

“According to the Deschutes County Assessor’s office, no part of the subject property is currently receiving farm tax deferral. Tax Lot 300, Map 14-12-28 erroneously received farm tax deferral but was disqualified in 2014 because the property was not engaged in farm use. The record does not include any evidence the subject property is engaged, or has ever been engaged, in farm use.”

- 2. Add the following sentence to the findings related to Section 3.2, Rural Development on page 54:

“In the event Section 3.2 is determined to establish relevant approval criteria, it has been met. The subject property is comprised of poor soils and it is adjacent to the rural residential zone and rural residential uses on its northern boundary.”

In the event of conflict, the findings in this decision control.

B. Procedural History: The County’s land use hearings officer conducted the initial hearing regarding the 710 Properties, LLC Comprehensive Plan Amendment and Zone Change applications on April 19, 2022, and recommended approval of the applications by the Deschutes County Board of Commissioners (“Board”) in a decision dated June 2, 2022. The Board conducted a de novo land use hearing on August 17, 2022. The Board deliberated and voted to approve the applications on September 28, 2022.

C. Deschutes County Land Use Regulations: The Deschutes County Comprehensive Plan and Title 18 of the Deschutes County Code have been acknowledged by LCDDC as being in compliance with every statewide planning goal, including Goal 14. The County specifically amended its comprehensive plan in 2016 to provide that the Rural Residential Exception Area Plan and its related MUA-10 and RR-10 zones should be applied to non-resource lands. Ordinance 2016-005. This amendment is acknowledged, which means that the RREA plan designation and its related zoning districts, when applied to non-resource lands such as the subject property, do not result in a violation of Goal 14.

II. ADDITIONAL FINDINGS AND CONCLUSIONS OF LAW:

The Board of County Commissioners approves the requested plan designation and zone change applications and provides the following supplemental findings and conclusions of law and the analysis provided by its Decision Matrix:

A. Statewide Goal 3 Definition of Agricultural Land

The following is the definition of Agricultural Land provided by Statewide Goal 3:

“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 of water 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.

Agricultural land does not include land within acknowledged urban growth boundaries or land within acknowledged exceptions to Goals 3 or 4.”

B. Class I-VI Soils identified in Soil Classification System of the US Soil Conservation Service, Decision Matrix page 1

The Board finds, based on the Site-Specific Soils Survey prepared by Soils Classifier Brian Rabe, that 71% of the subject property is comprised of Class VII and VIII soils and that the remaining 29% is comprised of Class VI soils.

OAR 660-033-0030(5)(a) implements Goal 3’s allowance of the use of “more detailed soil data” to define agricultural land. It requires that the soils data provided to the County must be related to the NRCS land capability classification system. This makes it clear that soils information must be reported by soil classification, LCC I through VIII, and that this information may be used in lieu of the NRCS soil surveys. Mr. Rabe classified the soils on the subject property using the NRCS system.

Per OAR 660-033-0030(5)(b), if an applicant concludes that a more detailed soils analysis would assist the county “to make a better determination of whether the land qualifies as agricultural land,” the applicant is required to hire a soils scientist approved by DLDC to conduct agricultural land soil surveys that provide more detailed soils information than contained in the Web Soil Survey of NRCS. Mr. Rabe has been approved by DLCD to conduct such studies and his soils study was reviewed and approved for use by Deschutes County by DLCD. The study, according to OAR 660-033-0030(5)(c)(A), may support “a change to the designation of a lot or parcel planned and zoned for exclusive farm use to a non-resource plan designation and zone on the basis that such land is not agricultural land.” This is

consistent with LUBA's decision in *Central Oregon LandWatch v. Deschutes County*, 74 Or LUBA 156 (2016)(“Aceti”).

C. Suitability for Farm Use as Defined by ORS 215.203(2)(a), Decision Matrix page 2

Definition of Farm Use

The relevant definition of “farm use” is provided by ORS 215.203(2)(a). To constitute “farm use” various agricultural activities must be undertaken for “the primary purpose of obtaining a profit in money.” The evidence in the record establishes that no person would undertake agricultural activities on the subject property for the primary purpose of obtaining a profit in money. The costs of conducting such activities are too high and the income derived therefrom are too low. According to the 2017 US Census of Agriculture, farms in Deschutes County averaged losses of \$12,866 and approximately 84% of farms do not obtain a profit in money. The average cash farm income of Deschutes County farms that lost money in 2017 was only \$21,386. Farms that had net operating income averaged income of only \$31,739. This data suggests that only farms with ideal farm conditions (good soils, irrigation water rights, favorable climate) obtain a profit in money. It supports the collective opinions of experienced ranchers and farmers that the subject property is not suitable for any type of farm use. We agree.

Given the high cost of irrigating and maintaining the subject property as pasture or cropland (high labor costs, labor-intensive, high cost of irrigation equipment and electricity, high cost of fertilizer, etc.), dry land grazing is the only generally accepted farm use of poor soils (predominantly Class VII and VIII) in Deschutes County. However, the collective opinion submitted by several professional ranchers in this case (and discussed below) makes it clear that grazing would not be profitable on the subject property nor would any professional rancher attempt to integrate the subject property with other ranchland holdings or operations.

Income from Livestock Grazing

When assessing the potential income from dry land grazing, Deschutes County uses a formula and assumptions developed by the OSU Extension Service. This formula is used by the County to decide whether EFU-zoned land is generally unsuitable for farm use. While it does not assess income from all types of livestock, it looks at income from a type of livestock operation that typically occurs in Deschutes County on dry land. The formula assumes that one acre will produce 900 pounds of forage per year and support one Animal Unit Month per acre. The Oregon Department of Agriculture (“ODA”), DLCD and ODFW offered their professional opinion in a letter dated April 19, 2022 that the subject property produces enough forage in dry years to allow grazing by one AUM per 10 acres. In wet years, the agencies estimate that the property might be able to support grazing by 1 AUM per 5 acres. This means that the income results of using the OSU formula must be divided by 5 and 10 to obtain the range of potential gross income that might be achieved from grazing.

- One AUM is the equivalent to the forage required for a 1000 lb. cow and calf to graze for 30 days (900 pounds of forage).
- On good quality forage, an animal unit will gain 2 pounds per day.
- Two animal units will eat as much in one month as one animal unit will eat in two months.
- Forage production on dry land is not continuous. Once the forage is consumed, it typically will not grow back until the following spring.
- An average market price for beef is \$1.15 per pound.

Based upon these assumptions, the value of beef production on the entire subject property can be calculated using the following formula:

$$30 \text{ days} \times 2\#/\text{day}/\text{acre} = 60.0 \text{ lbs. Beef}/\text{acre}$$

(1 acre per AUM)

$$60.0 \text{ lbs. Beef}/\text{acre} \times 710 \text{ acres} \times \$1.15/\text{lb.} = \$ 48,990 \text{ per year of gross income}$$

$$\$48,990/10 = \$4,899 \text{ per year of gross income in dry years}$$

$$\$48,990/5 = \$9,798 \text{ per year of gross income in wet years}$$

Thus, using the OSU/County formula based on ODA forage calculations, the total gross beef production potential for the subject property would be approximately \$4,899 to \$9,798 annually.

The State agencies argued that the applicant’s analysis of grazing capacity overlooks the fact that it is an accepted farm practice to graze cattle for five to six months of the year allowing the property owner to double the number of cattle raised by a farm operation. While this is correct, it would not alter the amount of income attributable to grazing on the subject property. The income formula produces the same result whether cattle graze year-round or for a part of the year. Any additional income from a larger herd would be grazing attributable to the other lands where the livestock graze at other times of the year and not be attributable to use of the subject property. Transporting cattle to distant pastures and paying to lease land elsewhere for a larger herd would also impose additional operating costs making it less likely that a livestock grazing operation would generate a profit in money from grazing operations.

Suitability of Property for Dryland Grazing

The record contains a considerable amount of evidence regarding the suitability of the property for dryland grazing. The evidence is generally consistent on two points; the property may be used for grazing livestock but there is inadequate forage on the property to generate net income for a rancher from grazing.

We have considered the vast amount of combined experience of these farmers and ranchers in conducting similar operations and find their testimony more probative and persuasive than that offered by the opposition on the issue of whether the subject property is suitable for farm use as defined by ORS 215.203. Based on evidence and comments submitted into the record from ranchers and farmers, including James M. Stirewalt, Rand Campbell, Matt and Awbrey Cyrus, Russ Mattis, Zach Russell, Craig May, the Board finds the subject property is not suitable for dryland grazing. No reasonable farmer would conduct a cattle or other livestock operation on the subject property intending to make a profit in money from the endeavor.

Other Potential Farm Uses

Arguments were presented that a host of activities, in addition to dryland livestock grazing, that might constitute farm use could occur on the subject property. No claim was made, however, that these activities could be undertaken on the subject property with an intention of making a profit in money use. Instead, the argument was the same argument rejected by the Oregon Supreme Court in *Wetherell v. Douglas County* – that “profit” is “gross income” without the consideration of farm expenses.

All other farm uses that might be conducted on the subject property, other than dryland grazing, would require the property owner to expend extraordinary amounts of money to speculatively attempt to make the subject property suitable for farm use. Furthermore, it is not an accepted farm practice in Deschutes County to irrigate and cultivate Class VII and VIII soils.

The following conditions further support a determination that the property is not suitable for farm use as defined in ORS 215.203:

- Property lacks irrigation water rights and is outside of an irrigation district
- The cost to finance the purchase of groundwater rights and to establish an irrigation system would overwhelm gross farm income
- Property lacks natural source of water for livestock
- Property contains an excessive amount of rocks that would need to be removed to allow the property to be cultivated
- Shallow depth of soil will not hold sufficient water to support the growth of crops
- High plateau location results in exposure to the elements unfavorable for most crops (extreme high temperatures, extreme low temperature, and wind/erosion)
- Low rainfall

First and foremost, irrigation water rights would need to be purchased and would need to be sourced from groundwater. With the cost of purchasing water rights being approximately \$21,000 per acre, the cost of obtaining irrigation water for just 405 acres of the subject property (three 135-acre) pivots would be \$7,800,000.00. The cost of installing agricultural

wells and pumps is approximately \$595,000. This totals approximately \$8,635,000 to establish an irrigation system and supply water for only 405 acres of the 710-acre subject property (three pivots). While these expenditures are capital expenses rather than operating expenses, the cost of debt service is an operating expense that would offset farm income.

In the unlikely event that a farmer could obtain a USDA loan at the favorable rate of interest of 4% per year, the annual cost of funding these improvements on an interest only loan would be approximately \$345,400 per year. Funding from a commercial lender would be even more expensive as interest rates currently range from 5.75 to 8.5 percent. Additionally, the approximate cost of electricity to operate an irrigation system would, based on costs incurred by Dry Creek Ranch, add between \$10,000 and \$12,000 per year to the expense of irrigating the subject property due to the cost of electricity needed to pump groundwater.

The expenses to establish an irrigation system and the shallow, poor quality soils present on the subject property would prevent a reasonable farmer from believing that he or she would ever make a profit in money by conducting irrigation water-dependent farm uses on the subject property. According to the US Census of Agriculture, in 2017, the average Deschutes County farm lost \$12,866 per farm; up from \$11,538 per farm in 2012. A reasonable farmer would also consider the fact that only 22 percent of farm land in the County is cropland and only 27 percent of farm land is irrigated; in other words, only the best soils in the County support irrigated crop production. Only 16 percent of farms in the County in 2017 had net farm income from farm operations. The average income of the successful farms in the County in 2017 was only \$31,739 – not enough to justify the huge expense of bringing water to the subject property or of clearing the land of surface and subsurface rock that would impede tilling – assuming that that is even feasible.

COLW argued that the applicant must show that the subject property is not suitable for any farm use mentioned by a table in the 2012 Census of Agriculture that reports on farm use in Deschutes County. COLW, however, misunderstands the table. It does not represent, as alleged, that all uses listed on the table are occurring in Deschutes County. Instead, it provides income information for groups of uses that are occurring in Deschutes County without disclosing which activities are occurring in our county. COLW mentioned lavender as a potential farm crop, but evidence provided by the applicant shows that lavender farms require irrigation and that the cost paying the interest on the expense of purchasing irrigation water and installing a system would impose interest costs that would be too significant to allow such an operation to be profitable in addition to the other costs of operations – especially considering the track record of other Central Oregon farms. Additionally, lavender farms are typically conducted on much smaller properties with fields less than 5 acres in size. Further, most lavender farms rely upon public visitation. No reasonable lavender grower would attempt to establish a lavender farm on the Property given the poor quality of the soil, lack of water, and other operational constraints – including lack of close proximity to area roadways and population centers.

Additionally, COLW made no substantiated claim that a reasonable farmer would undertake any of the listed uses with the intention of making a profit in money. Instead, COLW argued that gross income from farming the land is synonymous with a profit in money – a claim rejected by the Oregon Supreme Court in *Wetherell v. Deschutes County*. The commenting State agencies and opponents made similar claims arguing that certain farm uses could be established on the subject property without claiming that the uses would be able to be conducted with an intention to make a profit in money¹.

DLCD/ODA/ODFW argued that the subject property “may also be sufficiently capable of supporting *** the boarding and training of horses, raising poultry, honeybees or even ungulate species like elk or raising game birds such as pheasants, chukar or quail.” They did so without suggesting that a farmer might expect to make a profit in money from conducting any of these activities on the subject property. The suitability test, as indicated by DLCD/ODA/ODFW comments, relates to whether the subject property itself can support a farm use. This means that the land must be able to produce crops or forage adequate to feed livestock raised on the property; something that severely limits the size of any operation.

Almost all farm uses require irrigation water and, for those that do, it is simply cost-prohibitive to purchase water rights and install wells, pump and irrigation infrastructure on the subject property. The extensive amount of rock would also make almost any agricultural activity infeasible unless the rocks are removed at a cost that would be too expensive to merit either the initial expenditure (capital cost) or finance costs (operating expense that reduces gross income). The DLCD/ODA/ODFW comments recognize this fact and argue that uses that do not rely on irrigation water might be conducted on the subject property.

The applicant provided extensive evidence that a wide array of farm activities, including those identified by the State agencies, would not be feasible on the subject property and would not be able to be conducted with an intention to make a profit in money. This evidence includes, but is not limited to, unrebutted evidence from Fran Robertson, owner of Robertson Ranch, that she would never consider attempting to establish a horse operation on the subject property due to a lack of irrigation, rocky land, location and numerous juniper trees. Horses eat hay, and, according to opponent Pam Mayo-Phillips “[t]he property is not suitable for hay ground ***.” The State agencies did not contest the fact that the subject property is not suitable for the production of crops, presumably due to the expense and

¹To the extent arguments in the record are read to present a claim that a farmer or rancher would use the subject property for farm activities with an intention of making a profit in money, we find the evidence to the contrary offered by farmers and ranchers who toured the subject property and the overwhelming evidence in the record that supports their opinions more persuasive and find that no reasonable farmer would attempt to farm the subject property with an intention to obtain a profit in money.

difficulty of obtaining irrigation water rights for such a large, infertile property. Without hay and other feed crops, the subject property will not support the farm uses of breeding, boarding or training horses.

The suggestion that elk might be raised on the subject property overlooks the reality that elk ranching requires permits from ODFW. OAR 635-049-0015(1). Additionally, the subject property lacks irrigation which is essential to establish the pastures that should be provided for elk. Elk ranches incur significant expenses to comply with ODFW regulations that make it difficult for them to make a profit in money on any property. This includes disease testing and double fencing with fences at least 8 feet high. OAR 635-049-0245. The costs of installing this fencing would be substantial due to the rocks present on the subject property.

The State agencies' letter of April 19, 2022 states that establishing a confined animal feeding operation (feed lot) would have similar costs wherever located and might be established on the subject property. This is not correct, however, because it would be necessary to remove a substantial quantity of rock from the subject property to make it suitable for this use. It would also be necessary to grade and install a new road (in rock) that will accommodate the trucks used to transport cattle or other livestock to and from the property. Furthermore, the Rabe soils analysis show that the soils on the property are shallow which means that the site is not suitable for a large concentration of animals due to the septic disposal needs of such an operation. Additionally, the number of animals that can be sustained by vegetation produced on the subject property is very low. While hay and feed may be imported to increase production of livestock, that is not a correct measure of whether the land proposed for rezoning can support a particular farm use – the question asked by the definition of Agricultural Land in Goal 3.

As to the other uses mentioned in the State agency letter, Brittany Dye of Brittany's Bees LLC estimated gross income of only \$4,000 per year from the property. Taxes, insurance, transportation, interest on farm loans and labor would make this use one that would not be profitable. The applicant has also provided evidence that shows that conducting a commercial chicken operation is not feasible. The land itself will not produce crops to feed the chickens. The costs of bringing power to the site, obtaining water for the chickens, installing predator control fencing and constructing farm buildings, would make it unreasonable to assume that a farmer would expect to make a profit in money by conducting such an operation on the subject property. Additionally, evidence in the record shows that farm pastures are a key element for a successful chicken (eggs and meat) farm operation such as Great American Egg in Powell Butte, Oregon. Evidence in the record shows that game birds, like poultry, require water and feed not present on the subject property and that these uses are not likely to be profitable.

Redside Restoration, LLC argued that the Class VII soils on the subject property may be used to produce grapes. Its reasoning is that it grows grapes on its property north of the subject property but their property is substantially different than the subject property. The Redside

property has conditions uniquely suited to growing Marquette grape vines that are absent on the subject property. According to the Oregon Wine Press, these conditions are “a south-facing vineyard slope and wind protection” that allow the vines to survive temperatures that drop to the negative teens and twenties in the winter. Additionally, the Redside property is located “within grape seed spitting distance of the Deschutes River” and is fully irrigated. The Redside soils are alluvial because they are next to the river whereas the subject property is a considerable distance from the river. The Redside property is also at a significantly lower elevation than the subject property, which may contribute to the success of operations due to climatic pressures being diminished (warmer, less exposure to the elements). Redside claims its vineyard is growing on land in NRCS map unit 81F. While this is the mapped soil type, soil classifier Brian Rabe, based on a review of the information provided by Redside, offered his expert opinion that the Redside vineyard does not have the characteristics of 81F soil because it has slopes of between 10 and 20 percent rather than the 45 to 80 percent slopes found in areas of 81F soils. Information in the record also establishes that the soils on the subject property are too shallow, with a typical depth of approximately 14 inches, to support a productive and profitable vineyard.

Hemp was mentioned as a potential crop, but former hemp farmer Matt Cyrus is of the opinion that the subject property would not support any working farm use. Mr. Cyrus did not grow hemp in 2021 and 2022 due to poor market conditions. Hemp growers have an oversupply and back inventory of product not yet sold. Mr. Cyrus advised that the subject property is poorly suited for hemp production because it is too rocky and the soils are too shallow for proper tillage and that greenhouse production is not financially feasible. The viability of hemp was also questioned by other commenters including Paul Schutt.

It was also argued that rocks on the subject property might be sold as field stone but this activity is not a farm use or accepted farm practice. Instead, if conducted at a commercial scale it would be surface mining. It was also argued that veterinary clinics are a farm use because they are animal husbandry. The Board disagrees and finds that in the context of the definition of Agricultural Land and farm use, the use described is the day-to-day care, breeding and raising of livestock not a veterinary clinic. This interpretation is consistent with the intention of the EFU zone to preserve land for farm uses that require productive farm land to produce farm products.

In a determination of farm suitability, capital costs may also be considered as a technological and energy input in order to establish the use. The record shows that the cost of establishing an irrigation system (as well as other required capitals costs) on the subject property, would far exceed the sales price that could be obtained if the subject property were improved. Therefore, no reasonable farmer with the intention of making a profit would attempt to establish such a system. This is particularly true given that the record shows at least one example of an existing farm operation that has farm soils and over 500 acres of irrigation water rights, and that that operation has failed to sell for over 18-months at a sales price below the cost of just purchasing the irrigation water appurtenant to that property.

In conclusion, based on a consideration of evidence in the record that might suggest that the subject property might be suitable for “farm use” and the evidence to the contrary, we find the evidence to the contrary more persuasive and find that the subject property is not “other lands which are 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, or accepted farming practices.” Statewide Goal 3.

D. Land Necessary to Permit Farm Practice on Nearby Agricultural Land, Decision Matrix page 3

The State agencies raised the issue of traffic impacts related to the Goal 3 issue of whether land is necessary to permit farm practices to be undertaken on nearby lands. Traffic issues are not, however, a relevant consideration in addressing this issue because Goal 3 asks whether the “land” to be rezoned, the subject property, is needed by area farms to conduct farm practices on their properties. Additionally, the record supports the finding that the small amount of traffic associated with the proposed change will not prevent farm practices associated with area farm uses of growing hay and grazing livestock from occurring in the area.

Arguments were also made that grazing might occur on the subject property and on other area land, but that is not the question posed by Goal 3. The question is whether the subject property is necessary to allow farm practices to occur on other properties, and it is clear that it is not necessary.

E. Traffic Impacts and the TPR, Decision Matrix page 4

The applicant filed expert evidence from transportation system engineer Chris Clemow that demonstrates compliance with the Transportation System Planning Rule, OAR 660-012-0060. The hearings officer and County Transportation Planner both reviewed the analysis and found it demonstrated compliance with the rule and this has not been an issue of dispute. Instead, it has been argued that road conditions are not currently adequate to support the traffic associated with a rural residential subdivision of the property. We find, however, that road condition issues will be addressed during subdivision review because the County’s code allows the County to impose roadway improvement requirements to address identified inadequacies and have considered the availability and efficiency of providing all necessary public services and facilities, including roadways, in approving the 710 applications.² DCC 18.136.020(1).

² See, DCC 17.16.100(B)(adequate facilities), DCC 17.16.115 (Traffic Impact Study), DCC 17.36.040 (Existing Streets), DCC 17.48.160 (Road Development Requirements; Standards).

Additionally, without subdivision review a maximum of only six additional homes in addition may be built on the subject property as a matter of right under the proposed zoning. It is highly likely, however, that the same six additional homes could be approved as nonfarm dwellings on the subject property given the fact that three other nonfarm dwellings have been approved on the property and the fact that 71% of the property is comprised of Class VII and VIII soils.

F. Definition of Forest Lands, Decision Matrix page 5

The State agencies argued that the County must address the definition of forest land. We address that definition below.

(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.***

The subject property is not forested land. It is not suitable for commercial forest uses and none are occurring on adjacent or nearby lands. Western Juniper is not a forest tree species. The Department of Forestry has determined that there is no forestland on the subject property or on adjacent or nearby lands. The Board agrees with the Hearings Officer on this issue.

OAR 660-006-0010(2) states:

(2) Where a plan amendment is proposed:

(a) Lands suitable for commercial forest uses shall be identified using a mapping of average annual wood production capability by cubic foot per acre (cf/ac) as reported by the USDA Natural Resources Conservation Service. ***

The NRCS Soil Survey of the Upper Deschutes River Area includes maps of the subject property and reports the average annual wood production capability (cf/ac) for all forest soils in Table 8 of the survey. Soils not suitable for wood crops are indicated by their omission from the table (zero production). All of the soils identified by the NRCS Soil Survey as being present on the subject property are not suitable for producing wood crops. The same is true for all soils identified as present on the property by soils classifier Brian Rabe. The subject property, therefore, is not land suitable for commercial forest uses.

(c) Counties shall identify forest lands that maintain soil air, water and fish and wildlife resources.

The subject property is not “forest lands.”

G. Goal 14, Urbanization, Goal Exception, Decision Matrix page 6

Opponents argued that the County must approve an exception to Statewide Goal 14, Urbanization, in order to apply the RR-10 zone and RREA plan designation to the subject property. An exception to Goal 14 is, however, only required if the proposed zone and designation allow urban development of the subject property.

Opponents reference the legal case of *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 498-511, 724 P2d 268 (1986) for the proposition that a county may need to approve a goal exception to apply the RREA plan designation and RR-10 zoning districts to the subject property. The *Curry County* case, however, does not support COLW's argument. The Board agrees with the Hearings Officer on this issue.

H. Change in Circumstances or Mistake in Zoning, Decision Matrix page 7

The Board concurs with the Hearings Officer's findings regarding a mistake in zoning and change in circumstances. Additionally, the County adopted comprehensive plan language in 2016 that clearly allows changes of the type proposed by the applicant. In this case, the Board agrees there has been a change in circumstance since the property was originally zoned EFU around 1979 that merits approval of the 710 Properties applications.

I. Impacts on Surrounding Land Use, Decision Matrix page 8

DCC 18.136.020(C)(2) requires a consideration of whether the impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan. All specific goals and policies were identified by the County's hearings officer and were considered by the Board in deciding to approve the zone change and plan amendment applications. Additionally, approval does not violate any specific plan goal or policy. Furthermore, Policy 2.2.3 specifically allows for the proposed changes on EFU land that does not meet Goal 3's definition of Agricultural Land. The Board concurs with the Hearing's Officer findings.

J. Wildlife Impacts, Decision Matrix page 9

The County's Goal 5 program considered and applied mapping to protect all Goal 5 resources in the County. It did not identify any Goal 5 resource on the subject property and did not impose any Goal 5 protections. The Board understands that wildlife agencies are asking the County to apply new Goal 5 protections to a wide swath of lands in the County, including the subject property but the County has not yet conducted an ESEE analysis to determine whether Goal 5 protections should be applied. At this time, however, Goal 5 is not a relevant issue in the review of this application because no Goal 5 resources have been inventoried as

being present on the property. Applying *ad hoc* protections at this time would not be appropriate. *Urquhart v. Lane Council of Governments*, 80 Or App 176, 181-182, 721 P2d 870 (1986); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 350, *rev den* 323 Or 136 (1996). *See also, Central Oregon LandWatch v. Deschutes County*, 301 Or App 701, 457 P3d 369 (2020). Furthermore, approval of the zone change and plan amendment application will not prevent the application of Goal 5 resource protections to the property, if merited, in the future.

K. Fire Hazard, Decision Matrix page 10

The entire County is identified as a Wildfire Hazard Area designation. The plan amendment and zone change does not change this designation.

The subject property, if subdivided, will be required to comply with emergency access requirements or development of the property will be limited by the applicable fire code unless appropriate fire risk and hazard reduction measures are taken by property owners.

The measures identified by the comprehensive plan have been acknowledged as complying with Statewide Goal 7. As approval of the application does not violate the plan, it does not violate Statewide Goal 7.

L. Availability of Water and Water Impacts, Decision Matrix page 11

Evidence in the record is generally consistent regarding the availability of water. Water is available in the regional aquifer and is adequate to serve residents of new homes that might be built on the subject property.³ According to Kyle Gorman of Oregon Water Resources Department, the aquifer has declined by a modest amount of 9 feet over 25 years in the area closest to the subject property. The level of water in the upper levels of the aquifer above the regional aquifer is declining for multiple reasons; none are attributable to the proposed plan amendment and zone change application. The result of groundwater decline is that older wells that are shallow need to be redrilled.

A professional water study conducted by GSI Water Solutions, Inc. found, that the use of exempt wells to meet the water needs of new residents would be unlikely to have a measurable interference on agricultural wells and domestic wells in the area around the subject property. Given this fact, it is not necessary for the subject property to remain undeveloped in order to permit farm practices from being undertaken on adjacent or nearby agricultural lands. Additionally, domestic water use is only a very small percentage of water use occurring in the Deschutes River Basin. The largest use of water is irrigation, particularly irrigation of farm properties. Water use issues, also, will be addressed during subdivision review as required by DCCP Policy 2.5.24.

³ The cost of water for farm use purposes makes that use unrealistic.

Under DCC 18.136.020(C)(1), the water availability issue is limited to a consideration of whether water will be available to the subject property and does not address water availability for other properties. That standard has been met by the applicant.

M. HB 2229 and Related Comprehensive Plan Policies, Decision Matrix page 12

Opponents argued that the County cannot approve the Applicant’s request without first obtaining a “work plan” that has been supported by DLCD. The Board finds the requirements and allowances of HB 2229 (2009) are not applicable to the quasi-judicial process proposed with this application.

The Deschutes County Comprehensive Plan (“**DCCP**”) Policies 2.2.2 and 2.2.3 allow the rezoning of an “individual parcel” of land. In fact, in 2016, the County adopted changes to the DCCP to *specifically authorize* the approval of quasi-judicial plan amendments to nonagricultural land and these plan provisions are acknowledged.

HB 2229 authorizes a County-led “Big Look” of resource lands and has no bearing on a quasi-judicial rezone initiated by an applicant which is permitted Deschutes County’s comprehensive plan. According to former DLCD Director Richard Whitman, the bill authorizes counties to “take a county wide look at all of their farm and forest lands and whether they [are] appropriately zoned or not.”⁴ Nothing in HB 2229 precludes the County from approving property-specific plan amendment and zone change applications for properties incorrectly inventoried as resource lands.

For the above reasons, the Board of County Commissioners approves the requested plan designation and zone change applications.

III. DECISION:

Based upon the foregoing Findings of Fact and Conclusions of Law, the Board of County Commissioners hereby **APPROVES** Applicant’s applications for a DCCP amendment to re-designate the subject properties from Agriculture (AG) to Rural Residential Exception Area (RREA) and a corresponding zone map amendment to change the zoning of the properties from Exclusive Farm Use – Terrebonne (EFU-TE) to Rural Residential (RR10).

Dated this ___ day of _____, 2022

⁴ Exhibit BOCC-24.

**DECISION AND RECOMMENDATION
OF THE DESCHUTES COUNTY HEARINGS OFFICER**

FILE NUMBER: 247-21-001043-PA, 247-21-001044-ZC

HEARING: April 19, 2022, 6:00 p.m.
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

**SUBJECT PROPERTY/
OWNER:**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412280000100
Account: 163920
Situs Address: 10315 NW COYNER AVE, REDMOND, OR
97756

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412280000200
Account: 250543
Situs Address: 10325 NW COYNER AVE, REDMOND, OR
97756

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412280000300
Account: 124845
Situs Address: 10311 NW COYNER AVE, REDMOND, OR
97756

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 141228D000101
Account: 273062
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000300
Account: 276793
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000400
Account: 276794
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000500
Account: 276791
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000600
Account: 124846
Situs Address: 70000 BUCKHORN RD, TERREBONNE, OR
97760

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000700
Account: 276792
Situs Address: **NO SITUS ADDRESS**

APPLICANT: 710 Properties, LLC
PO Box 1345
Sisters, OR 97759

ATTORNEYS FOR APPLICANT: Liz Fancher
2464 NW Sacagawea Lane
Bend, Oregon 97703

J. Kenneth Katzaroff
Schwabe Williamson & Wyatt
1420 5th Avenue, Suite 3400
Seattle, WA 98101

REQUEST: The Applicant requests approval of a Comprehensive Plan Amendment to change the designation of the subject property from Agricultural (AG) to Rural Residential Exception Area (RREA). The Applicant also requests a corresponding Zone Change to rezone the subject property from Exclusive Farm Use – Terrebonne subzone (EFU-TE) to Rural Residential (RR-10).

HEARINGS OFFICER: Stephanie Marshall

STAFF CONTACT: Haleigh King, Associate Planner
Phone: 541-383-6710
Email: Haleigh.King@deschutes.org

RECORD: Record items can be viewed and downloaded from:
<https://www.deschutes.org/cd/page/247-21-001043-pa-and-247->

[21-001044-zc-eden-central-properties-comprehensive-plan-amendment](#)

RECORD CLOSED: May 3, 2022

I. STANDARDS AND APPLICABLE CRITERIA

Title 18 of the Deschutes County Code, the County Zoning Ordinance:
Chapter 18.04, Title, Purpose, and Definitions
Chapter 18.16, Exclusive Farm Use Zones (EFU)
Chapter 18.60, Rural Residential Zone (RR-10)
Chapter 18.113, Destination Resorts Combining Zone (DR)
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 and Guidelines
Division 33, Agricultural Land

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

II. FINDINGS OF FACT

A. LOT OF RECORD: Per DCC 22.04.040 Verifying Lots of Record, lot of record verification is required for certain permits:

B. Permits Requiring Verification.

- 1. Unless an exception applies pursuant to subsection (B)(2) below, verifying a lot or parcel pursuant to subsection (C) shall be required prior to the issuance of the following permits:***
 - a. Any land use permit for a unit of land in the Exclusive Farm Use Zones (DCC Chapter 18.16), Forest Use Zone – F1 (DCC Chapter 18.36), or Forest Use Zone – F2 (DCC Chapter 18.40);***
 - b. Any permit for a lot or parcel that includes wetlands as shown on the Statewide Wetlands Inventory;***
 - c. Any permit for a lot or parcel subject to wildlife habitat special assessment;***

- d. *In all zones, a land use permit relocating property lines that reduces in size a lot or parcel;*
- e. *In all zones, a land use, structural, or non-emergency on-site sewage disposal system permit if the lot or parcel is smaller than the minimum area required in the applicable zone;*

In the *Powell/Ramsey* (PA-14-2, ZC-14-2) decision, the Hearings Officer held to a prior Zone Change 247-21-000400-PA, 401-ZC Decision (*Belveron* ZC-08-04; page 3) that a property’s lot of record status was not required to be verified as part of a plan amendment and zone change application. Rather, the Applicant would be required to receive lot of record verification prior to any development on the subject property. The Hearings Officer adheres to this ruling and finds this criterion does not apply.

B. SITE DESCRIPTION: The subject property encompasses approximately 710.5 acres and includes nine tax lots described below (together hereafter referred to as the “subject property”):

Map and Tax Lot	Situs Address	Area (acres)
1412280000100	10315 NW COYNER AVE, REDMOND, OR 97756	±149.78
1412280000200	10325 NW COYNER AVE, REDMOND, OR 97756	±150.09
1412280000300	10311 NW COYNER AVE, REDMOND, OR 97756	±120.6
141228D000101	NO SITUS ADDRESS	±8.66
1412210000300	NO SITUS ADDRESS	±101.68
1412210000400	NO SITUS ADDRESS	±9.47
1412210000500	NO SITUS ADDRESS	±4.54
1412210000600	70000 BUCKHORN RD, TERREBONNE, OR 97760	±163.87
1412210000700	NO SITUS ADDRESS	±1.79

The subject property is undeveloped except for one tax lot (10325 NW Coyner Avenue), which is developed with a nonfarm dwelling (County Land Use File #CU-05-103). Two other lots of record have valid nonfarm dwelling approvals. Access to the property is provided at the western terminus of NW Coyner Avenue, a County-maintained rural local roadway, and the northern terminus of NW 103rd Street, a County-maintained rural local roadway.

A majority of the property sits on a plateau running from the southwest to the northeast of the subject property boundary. Topography is varied with portions of lava rimrock present along the west and northwest edges with steep to very steep slopes below. Vegetation is typical of the high desert and includes juniper trees, sage brush, rabbit brush, and bunch grasses. The Applicant emphasizes the steep topographical decline on the property, the fact that there is “lava rock all over the property,” and “sparse ground cover and juniper.”

The subject property does not have water rights and is not currently being farmed or irrigated in conjunction with farm use. There is no known history of the property having had irrigation rights. There is no known history of agriculture or farm use, as defined in ORS 215.203 on the subject

property.¹ According to the Deschutes County Assessor's office, only one tax lot within the project area, Assessor's Map 14-12-28, Tax Lot 300, is currently receiving farm tax deferral, but does not appear to be engaged in farm use. The record does not include any evidence the subject property is engaged, or has ever been engaged, in farm use.

The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies six soil complex units on the property: 63C, Holmzie-Searles complex, 106E, Redslide-Lickskillet complex, 101D, Redcliff-Lickskillet-Rock outcrop complex, 106D, Redslide-Lickskillet complex, 71A, Lafollette sandy loam, and 31B, Deschutes sandy loam. Per DCC 18.04, Soil complex 31A and 71A are considered high-value soils when irrigated.

As discussed in detail below in the Soils section, there is no irrigation on the subject property, except for water applied to landscaping associated with the nonfarm dwelling on Tax Lot 301. A soil study conducted on the property determined the subject property contains approximately 71 percent Land Capability Class 7 and 8 nonirrigated soils, including stony shallow soils over bedrock, more characteristic of the Lickskillet series, along with significant rock outcrops. Where surface stoniness was not apparent, the soils were typically moderately deep with sandy loam textures throughout or with some loam textures in the subsurface, more consistent with the Statz series.

C. PROPOSAL: The Applicant requests approval of a Comprehensive Plan Map Amendment to change the designation of the subject property from an Agricultural (AG) designation to a Rural Residential Exception Area (RREA) designation. The Applicant also requests approval of a corresponding Zoning Map Amendment to change the zoning of the subject property from Exclusive Farm Use (EFU) to Rural Residential – 10 Acre Minimum (RR10). The subject property is not within a Wildlife Area (WA) combining zone.

The Applicant requests Deschutes County to change the zoning and the plan designation and does not request a Statewide Planning Goal 3, Agricultural Land" exception because the Applicant submits the subject property does not qualify as "agricultural land" under Oregon Revised Statutes (ORS) or Oregon Administrative Rules (OAR) definitions. The Applicant submitted evidence that 71% of the property is comprised of Class VII and Class VIII soils and that the property could not be employed for "farm use," for the primary purpose of obtaining a profit in money.

The Applicant submitted with the application an Order 1 and 2 Soil Survey of the subject property, titled "Site-Specific Soil Survey of Property Located at or Near 10325 Coyner Avenue, West of Redmond in Deschutes County, Oregon" dated June 22, 2021, and a supplemental addendum titled "Response – Eden Soils Report" dated January 13, 2022 (together hereafter referred to as the "Soil Study") prepared by soil scientist Brian T. Rabe, CPSS, WWSS of Valley Science and Engineering. The Applicant also submitted a traffic impact analysis prepared by Christopher M. Clemow, PE, PTOE titled "710 Properties Plan Amendment and Zone Change – Deschutes County, Oregon" dated November 12, 2021 and revised on January 17, 2022, hereinafter referred to as "Traffic Study." (Applicant's Exhibit S) Additionally, the Applicant submitted an application form, a burden of proof

¹ The Hearings Officer finds that growing a lawn and/or watering a lawn with a domestic exempt well on a portion of the subject property is not "agriculture" and does not constitute "farm use" under the statutory definition in ORS 215.203.

statement,² and other supplemental materials, all of which are included in the record for the subject applications.

D. SOILS: According to Natural Resources Conservation Service (NRCS) maps of the area, the subject property contain six different soil types including 63C, Holmzie-Searles complex, 106E, Redslide-Lickskillet complex, 101D, Redcliff-Lickskillet-Rock outcrop complex, 106D, Redslide-Lickskillet complex, 71A, Lafollette sandy loam, and 31B, Deschutes sandy loam.

The Applicant submitted a soil study report (Applicant's Exhibit F), which was prepared by a certified soils scientist and soil classifier that determined the subject property is comprised of soils that do not qualify as Agricultural Land⁴. The purpose of this soil study was to inventory and assess the soils on the subject property and to provide more detailed data on soil classifications and ratings than is contained in the NRCS soils maps. The NRCS soil map units identified on the properties are described below.

31B, Deschutes Sandy Loam, 0 to 8 percent slopes: This soil map unit predominantly consists of Deschutes soils on lava plains. Deschutes soils are typically moderately deep, well drained, and formed in volcanic ash. This soil map unit is expected to be composed of 85 percent Deschutes soils and similar inclusions, and 15 percent contrasting inclusions. This soil type is considered high-value soil when irrigated. Deschutes Sandy Loam has a rating of 6s when unirrigated. Approximately 0.01 percent of the subject property is made up of this soil type.

63C, Holmzie-Searles complex, 0 to 15 percent slopes: This soil map unit predominantly consists of Holmzie and Searles soils on lava plains and hills. Holmzie soils are typically moderately deep, well drained, and formed in ash over residuum on hills. Searles soils are typically moderately deep, well drained, and formed in ash on lava plains and hills. The primary difference between the Holmzie and Searles soils is depth and texture. This soil map unit represents areas where the soil characteristics vary in a pattern that was not practical to delineate separately at the scale of the published survey. This soil map unit is expected to be composed of 50 percent Holmzie soils and similar inclusions, and 35 percent Searles soils and similar inclusions, and 15 percent contrasting inclusions. This soil type is not considered high-value soil. The Holmzie and Searles soils have a rating of 6e when unirrigated. Approximately 74.4 percent of the subject property is made up of this soil type.

71A, Lafollette sandy loam, 0 to 3 percent slopes: This soil map unit predominantly consists of Lafollette soils on stream terraces. Lafollette soils are typically moderately deep to very gravelly old alluvium, well drained and formed in volcanic ash over old alluvium. This soil map unit is expected to be composed of 85 percent Lafollette soils and similar inclusions, and 15 percent contrasting inclusions. This soil type is considered high-value soil when irrigated. The Lafollette sandy loam soil has a rating of 6s when unirrigated. Approximately 1.6 percent of the subject property is made up of this soil type.

² The Applicant filed a revised burden of proof statement with its final legal argument on May 11, 2022.

³ As defined in OAR 660-033-0020, 660-033-0030.

⁴ As defined in OAR 660-033-0020, 660-033-0030.

101D, Redcliff-Lickskillet-Rock outcrop complex, 15 to 30 percent south slopes: This soil map unit predominantly consists of Redcliff and Lickskillet soils on hills and canyon sides. Redcliff soils are typically moderately deep, well drained, and formed in ash and colluvium. Lickskillet soils are typically shallow, well drained, and formed in colluvium. The primary difference between the Redcliff and Lickskillet soils is depth and coarse fragment content. This soil map unit represents areas where the soil depth varies in a pattern that was not practical to delineate separately at the scale of the published survey. This soil map unit is expected to be composed of 60 percent Redcliff soils and similar inclusions, 20 percent Lickskillet soils and similar inclusions, and 15 percent Rock outcrop, and 5 percent contrasting inclusions. This soil type is not considered high-value soil. The Redcliff soils have rating of 6e when unirrigated. The Lickskillet soils have rating of 7e when unirrigated. The rock outcrop has a rating of 8. Approximately 5 percent of the subject property is made up of this soil type.

106D, Redslide-Lickskillet complex, 15 to 30 percent north slopes: This soil map unit predominantly consists of Redslide and Lickskillet soils on hills and canyon sides. Redslide soils are typically moderately deep, well drained, and formed in ash and colluvium. Lickskillet soils are typically shallow, well drained, and formed in colluvium. The primary difference between the Redslide and Lickskillet soils is depth and coarse fragment content. This soil map unit represents areas where the soil depth varies in a pattern that was not practical to delineate separately at the scale of the published survey. This soil map unit is expected to be composed of 50 percent Redcliff soils and similar inclusions, 35 percent Lickskillet soils and similar inclusions, and 15 percent contrasting inclusions. This soil type is not considered high-value soil. The Redslide soils have rating of 6e when unirrigated. The Lickskillet soils have rating of 7e when unirrigated. Approximately 2.18 percent of the subject property is made up of this soil type.

106E, Redslide-Lickskillet complex, 30 to 50 percent north slopes: This soil map unit is similar to map unit 106D with steeper slopes. Redslide soils have a soil rating of 6e when unirrigated. Lickskillet soils have a rating of 7e when unirrigated. Approximately 16.7 percent of the subject property is made up of this soil type.

E. SURROUNDING LAND USES: The subject property is predominately surrounded by EFU-zoned lands with large-scale farm/agricultural uses apparent near the northwest boundary of the subject property. Per Deschutes County Assessor records, many abutting properties, also zoned EFU, are federally owned and appear to be undeveloped and unirrigated. These surrounding properties contain vegetation typical of the high desert, including juniper and sagebrush, similar to the subject property.

There are existing properties developed with residential uses near the southeastern boundary of the subject property and larger scale farm uses to the east along NW Coyner Avenue. There is property zoned Rural Residential-10 Acre Minimum (RR-10) to the northeast of the subject property containing large-lot rural residential uses within the Lower Bridge Estates Subdivision. All properties on the south side of NW Coyner Avenue have been developed or approved for development with nonfarm dwellings. Two farm and five nonfarm parcels adjoin the north side of this part of NW Coyner Avenue.

The adjacent properties are outlined below in further detail:

North: The northernmost boundary of the subject property abuts land zoned RR-10 and EFU. The property zoned RR-10 is part of the Lower Bridge Estates residential subdivision platted in 1981. Abutting property to the northeast is ± 80 -acre property zoned EFU and appears to be unirrigated and undeveloped. An EFU-zoned property to the south of the NW Lower Bridge Way and NW Teater Avenue intersection contains a non-farm dwelling (Assessor's Map 14-12-00, Tax Lot 1506). Nearby property to the north also includes a former surface mine zoned RR-10 on the north side of NW Lower Bridge Way, west of the Deschutes River. The adjacent property to the north/northwest is a 193.52-acre EFU-zoned property owned by Volwood Farms, LLC. The property contains irrigated pivot fields and appears to be part of a larger ± 368 -acre farm property also owned by Volwood Farms, LLC. According to the Applicant, the primary farm uses include alfalfa, orchard grass and hay.

West: Lands to the immediate west of the subject property are zoned EFU. Property to the west abutting the southern boundary of the project site includes a $\pm 1,588$ -acre parcel (Assessor's Map 14-12-00, Tax Lot 3200) federally owned and managed by the Bureau of Land Management. This property appears to be unirrigated, is undeveloped, and contains vegetation similar to the subject property. Moving north along the subject property's western boundary, there are apparent large-scale farm uses occurring in the EFU Zone, within the Lower Bridge subzone. As discussed above, the Volwood Farms property is located to the west and contains larger-scale farm uses. The Lower Bridge area also includes an alpaca ranch (70397 Buckhorn Road) approximately 1.3 miles to the west. An existing vineyard and winery at 70450 NW Lower Valley Drive is approximately 1.5 miles west of the subject property's western boundary.

East: Tax Lot 700 (Assessors Map 14-12-22B), Tax Lot 500 (Assessor's Map 14-12-22C), and Tax Lot 200 (Assessors Map 14-12-27), totaling 320 acres are federally owned and abut the eastern boundary of the subject property. These lots are vacant and are zoned EFU. Property zoned RR-10 and platted as part of the Lower Bridge Estates is located further east beyond the abutting federal land along NW 93rd Street. One privately-owned tax lot zoned EFU, Tax Lot 301 (Assessor's Map 14-12-27), abuts the eastern boundary of the subject property and is developed with a nonfarm dwelling (247-18-000796-CU). There are some larger scale farm uses occurring further east, on the north side of NW Coyner Avenue at 9805 NW Coyner Avenue (Tax Lot 300, Assessor's Map 14-12-27) and 9293 NW Coyner Avenue (Tax Lot 400, Assessor's Map 14-12-27). These farms adjoin other irrigated and non-irrigated lands on their eastern boundary developed with single-family residences.

South: The land south of the subject property is zoned EFU and includes undeveloped open space federally owned and managed by BLM. There are three nonfarm dwellings and parcels zoned EFU on the north side of NW Coyner Avenue that do not appear to be engaged in farm use, 10305 NW Coyner Avenue, 10255 NW Coyner Avenue, and 10135 NW Coyner Avenue. These nonfarm parcels range in size from 19 to 28 acres. A 37.5-acre parcel at the southeast corner of NW Coyner and NW 103rd Street (10142 NW Coyner Avenue) is developed with a non-farm dwelling (CU-90-97) and appears to have portions of the property in agricultural use.

E. PUBLIC AGENCY COMMENTS: The Planning Division mailed notice of the applications on December 9, 2021, to several public agencies and received the following comments:

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the transmittal materials for 247-21-0001043-PA/1044-ZC to amend the Comprehensive Plan designation of nine abutting properties totaling approximately 710 acres from Agriculture (AG) to Rural Residential Exception Area (RREA) and change the zoning for those same properties from Exclusive Farm Use (EFU) to Rural Residential (RR-10). The properties are located at 10315, 10325, and 10311 NW Coyner Ave., 7000 Buckhorn Rd., and five properties with no assigned address. The NW Coyner properties are County Assessors Map 14-12-28, Tax Lots 100, 200, and 300; the Buckhorn Road property is 14-12-21, Tax Lot 600; and the properties with no assigned addresses are 14-12-28D, Tax Lot 101, 14-12-21, Tax Lot 300, 14-12-21, Tax Lot 400, 14-12-21, Tax Lot 500, and 14-12-21, Tax Lot 700.

The applicant's traffic study dated November 12, 2021, is problematic in two areas. First, staff does not agree with the trip distribution. While Redmond is the logical origin/destination, the applicant's traffic engineer offers no rationale why all trip would only use paved roads. The traffic study simply sends all traffic down the same route to OR 126. Staff finds this a flawed approach for several reasons. Rural residents are accustomed to using unpaved roads to reach their destinations. The traffic study does not offer any time savings of paved vs. unpaved to justify all traffic using the same route to access OR 126. Finally, the access to OR 126 requires a left turn onto the highway to continue to Redmond, a move which can have significant delays [due] to volumes on the highway. Second, the traffic analysis continually states due to the combination of low existing volumes on the affected roadway and the low traffic generation of the proposal, the cited intersections will meet relevant Deschutes County and Oregon Department of Transportation (ODOT) mobility standards. This statement does not indicate if that is for the current year or the planning horizon. While this is likely true, the traffic study provides no actual calculations to prove this statement. Thus the traffic study does not meet the requirements of DCC 18.116.310(G)(10). The lack of supporting calculations also means the traffic study does not comply with the Transportation Planning Rule (TPR) at OAR 660-012-0060(1)(c) to demonstrate the use will have no significant effect. The applicant's traffic engineer may have this information, but I did not see it in the application materials.

The property is proposed to directly access NW Coyner Road, a public road maintained by Deschutes County and functionally classified as a local road. The County [sic] the applicant will need to either provide a copy of a driveway permit approved by Deschutes County prior to development or be required obtain one as a condition of approval prior to development occurring to comply with the access permit requirements of DCC 17.48.210(A).

The County will assess transportation system development charges (SDCs) when development occurs based on the type of proposed use. However, as a plan amendment or a zone change by itself does not generate any traffic, no SDCs are triggered at this time.

In response to Mr. Russell's comment above regarding the traffic impact analysis (TIA) dated November 12, 2021, the Applicant provided an updated traffic study dated January 17, 2022.

In response to the updated traffic study, Mr. Russell provided the following comment, via email dated January 18, 2022:

I received an earlier draft of the revised TIA last week and reviewed it. They wanted my two cents before they submitted. The revised version provided the info I had requested. I've attached my e-mail from last week back to Chris Clemow, the applicant's traffic engineer.

Deschutes County Building Official, Randy Scheid

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.

Department of State Lands, Lynne McAllister

It is unlikely that there are jurisdictional wetlands or waterways on the property based upon a review of wetland maps, the county soil survey and other available information.

A state permit will not be required for the proposed project because, based on the submitted site plan, the project avoids impacts to jurisdictional wetlands, waterways or other waters.

A state permit is required for 50 cubic yards or more of fill removal or other ground alteration in wetlands, below ordinary high water of waterways, within other waters of the state, or below highest measured tide.

There may be some minor headwater stream drainages on the property. Although jurisdictional features are unlikely and minor, the reason a permit will not be required for this project is because it is only an administrative action that does not involve placement of fill material or other physical ground disturbance. Therefore, a land use notice is not necessary.

Department of Land Conservation and Development, Agriculture and Fish and Wildlife, Jon Jinings (Community Services Specialist, DLCD), James W. Johnson (Land Use and Water Planning Coordinator, ODA), Corey Heath (Deschutes Watershed District Manager, ODFW)

The Departments of Land Conservation and Development (DLCD), Agriculture (ODA) and Fish and Wildlife (ODFW) would like to thank Deschutes County for the opportunity to review and comment on the land use proposal referenced above. Please accept this letter as the joint comments of our three Agencies. We understand the applicant is requesting the change the designation of 710 acres from Agriculture to Rural Residential Exception Area and change the zoning of the same property from Exclusive Farm Use Terrebonne Subzone to Rural Residential with a ten-acre minimum parcel size.

Most rural residential areas in Oregon have been designated through what is often referred to as an “exception” or the “exceptions process.” The exceptions process is designed to provide an opportunity to demonstrate that an existing settlement pattern has irrevocably committed an area to something other than commercial agriculture or forestry and, therefore, does not qualify for protection under Statewide Planning Goals 3 (Agricultural Lands) or 4 (Forest Lands). Please see OAR 660-004-0028. The most common type of exception areas are rural residential neighborhoods that include both existing residences, as well as the presence of supportive infrastructure and public services. Lands subject to an acknowledged exception must also show, among other things, that the subsequent zoning designation will not negatively impact nearby farming and forestry activities. Please see OAR 660-004-0018.

The applicant is not pursuing an exception. There is no existing settlement pattern on the subject property. Instead, they are seeking a determination that the property fails to satisfy the definitions of “Agricultural Land” and “Forest Land” found in relevant state law. This approach is often referred to as a “nonresource process” or “nonresource lands determination.”

We have separated our primary comments into three parts. Part 1 includes our responses to applicable Oregon Administrative Rules and Oregon Revised Statutes. Part 2 includes commentary on other issues. These issues may not constitute review criteria in relation to state law although they may have a bearing on whether local county provisions have been satisfied. Either way, we believe they are important and have chosen to include them here. Part 3 includes our recommended outcome.

Please enter these comments into the record for all hearings on the proposal.

Part 1: Oregon Administrative Rules and Oregon Revised Statutes

Definition of Agricultural Land

The applicant is requesting this change on the basis that the property does not qualify as “Agricultural Land” as defined in State law and is therefore not resource land. OAR 660-033-0020 defines Agricultural Land. The specific administrative rule language and our comments are included below:

(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;

State Agency Comments

The applicant has provided a report indicating that the subject property is predominantly comprised of Class VII soils. The State Agencies are not challenging this position. However, please note that “approval” of a soils report by DLCD does not equate to any agreement with the conclusions of the report.

We would also like to emphasize that soil type is only one indicator of whether a property qualifies for protection under Statewide Planning Goal 3. Tracts in Eastern Oregon that are predominantly Class VII soils may be a candidate for reconsideration, but Goal 3 protection may only be removed if they fail to satisfy the other important tests in this definition. Put another way, all tracts planned for Exclusive Farm Use that are determined undeserving of Goal 3 protection must be predominantly comprised of Class VII-VIII soils. However, not all tracts planned for Exclusive Farm Use that are predominantly comprised of Class VII-VIII soils are undeserving of Goal 3 protection.

(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

State Agency Comments

This test requires a detailed analysis of many different factors. Failure to satisfy individual factors does not mean that the subject property fails to qualify as Agricultural Land pursuant to Goal 3 and OAR 660-0330-0020(1).

We have separated the various factors included in this administrative rule provision and included our comments below:

Farm use as defined in ORS 215.203(2)(a)

The definition of “farm use” at ORS 215.203(2)(a) is very broad and includes many different types of pursuits.⁵ Essentially any type of “agricultural or horticultural use or animal husbandry or any combination thereof” is included in this definition. Also included are “stabling and training equines” as well as “...the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission.” Furthermore, “farm use” as defined in this statute includes “the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use”

⁵ (2)(a) As used in this section, “farm use” means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. “Farm use” includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. “Farm use” also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows.

“Farm use” also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. “Farm use” includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection.

“Farm use” does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees or land described in ORS 321.267 (3) or 321.824 (3).

and “the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection.”

A determination that lands deserve protection under Goal 3 need not show that all of the activities described in ORS 215.203(2)(a) are available on a subject tract. A tract that is not suited for one type of farm use may be suited for another type of farm use. For example, a tract that is not suited for cultivated crop production may be well suited for livestock production and other aspects of animal husbandry. In addition to seasonal grazing requirements, commercial livestock operators also need areas for winter activities such as feeding and hay storage, calving or lambing grounds and locations for males (e.g., bulls and rams) that need to be separated from the main herd until breeding season occurs. Such lands may also be sufficiently capable of supporting, among other things, the boarding and training of horses, raising poultry, honeybees or even ungulate species like elk or raising game birds such as pheasants, chuckar, or quail.

Having observed the subject property, we believe that it is capable of any number of activities included in the definition of “farm use” at ORS 215.203(2)(a).

Soil fertility

Soil fertility can be an important factor in commercial agricultural operations. However, the presence of productive soils is not always necessary. Many types of farm uses are not dependent on specific soil types and others tend to benefit from less productive soils. Feedlots, whether commercial or personal, are frequently located on lands with low soil fertility. Having dryland areas to store and maintain equipment when not in use (also a farm use under ORS 215.203(2)(a)) can be very important for farming and ranching operations. Simply stated, having access to areas with low soil fertility can be an advantage for commercial agriculture operations because it allows for necessary activities that could otherwise interfere with the management of areas with more productive soils.

Having observed the subject property, we believe that it has soil fertility sufficient to support any number of activities included in the definition of “farm use” at ORS 215.203(2)(a).

Suitability for grazing

The application presents information regarding the capacity for grazing on the subject tract.

The identified number of Animal Unit Months (AUM) are, more or less, in line with our own assessment and represent average rangeland pastures found in central Oregon. However, we believe the value of this grazing capacity has been understated. Lands such as this have been successfully managed for livestock grazing since cattle and sheep were introduced to the area.

According to the USDA NRCS Rangeland Analysis Platform and the NRCS Heatmap,⁶ the subject property appears to be a perfectly average piece of native rangeland for the area. The NRCS Heatmap provides a spatial map of the biomass production over the entire area and demonstrates the consistency of the land use for the surrounding landscape. If the subject land isn't productive agricultural land, then one would have to believe that no piece of Deschutes County rangeland in the larger area is. Overall, the subject area is in good shape, it has a little bit of annual grass but - sub 10% for shrub and annual grass cover. It looks like over time it averages about a 500lbs/acre in the perennial biomass production, with it having wet year production of 700lbs/acre and drought years and this year with several years of drought, it may get as low as 300lbs/acre. Grazing efficiency is generally around 30% - 100-210 of grass tonnage is what livestock will actually eat. That means that its' AUM/acre ranges from 1 AUM to 10 acres in bad years and 1 to 5 in good years and in most years it's 1 to 6 or 7. This equates to this area being the productive norm for native rangeland in the region.

According to the application, the property is capable of supporting between eight (8) and 15 cow/calf pairs for a year (40-75 sheep or goats). While this may not be technically mistaken, it does not account for customary grazing practices that utilize a five to six month grazing season. In other words, a better metric would be to recognize that the property would be capable of supporting 16-30 cow/calf pairs or an equivalent number of sheep or goats for a typical grazing season, which would be much more worthwhile to a commercial operation, particularly when managed in conjunction with other lands. Another scenario would be to graze a much higher number of livestock for a more limited duration of time. For instance, having a location available between the time cattle are taken off winter pasture and the time they are hauled to summer range can be an important factor in commercial livestock operations.

Ranchers commonly transport livestock significant distances to pasture. Assuming that the property would need to be independently relied on or used by adjacent or nearby operations is not in keeping with the nature of livestock management largely practiced in this region.

Having observed the subject property, we believe that it is sufficiently suitable for grazing.

Climatic Conditions

The subject property is in the rain shadow of the Cascade Mountain Range on the edge of the Oregon High Desert. In other words, the area is dry with cold winters and the potential for frost nearly every month. These climatic conditions are not ideal for commercial agriculture. However, commercial agriculture is active in similar settings in the local area and throughout the mountain and intermountain regions of the United States. For example, the hay and cattle producing regions of Ft. Rock and Christmas Valley share similar precipitation constraints and are located at an elevation of 4,699 and 4,318 feet above sea level, respectively, compared to an elevation of 2,871 at Terrebonne, Oregon. The hay and

⁶ <https://rangelands.app/>
247-21-001043-PA/1044-ZC

cattle producing region of the Big Hole basin near Wisdom, Montana sits at an elevation of over 6,000 feet above sea level.

Having observed the subject property, we believe the relevant climatic conditions are suitable to sustain commercial agriculture.

Existing and future availability of water for irrigation purposes

Irrigation water is critical for irrigated agriculture. However, many types of farm uses are not dependent on irrigation.

Having observed the subject property, we do not believe that water for irrigation purposes is necessary to conduct many of the activities included in the definition of “farm use” at ORS 215.203(2)(a).

Existing land use patterns

The existing land use pattern of the area is unmistakably rural and characterized by farming and ranching activities.

Having observed the subject property, we do not believe that the introduction of rural residential development would be consistent with the existing land use pattern.

Technology and energy inputs required

Every endeavor, agriculture or otherwise, requires technological and energy inputs. As with anything else, high levels of financial investments for agricultural purposes may not make economic sense in every instance. Fortunately, investments in farm use activities may be tailored to fit the circumstances. Lands where installing a series of irrigation pivots would not lead to a suitable return may be well positioned for the development of an indoor riding area. Developing a confined animal feeding operation is likely to incur similar capital costs wherever it is sited.

This proposed application raises several examples of potential costs and asserts that they would have a prohibitive result. We agree that some investments may not be worthwhile on the subject property. However, as previously mentioned, many types of farm uses have similar capital costs wherever they may be established. Furthermore, we believe that many other aspects of technology and energy inputs may be suitably mitigated. For instance, this particular tract is not included in a livestock district, so a livestock operator is not legally required to fence their animals in. Instead, it is incumbent upon other properties to fence them out. If limiting animal movement to the subject property is desired, completing fencing around the perimeter of the tract and cross-fencing the interior for better forage utilization can be accomplished using electric fence, or “hot-wire”, which is much more affordable than traditional fencing products. While the application confirms that power is available to the subject property, a solar electric charger may also be used for powering miles of electric fence. Trucking water to livestock in dryland pastures is not uncommon in this part

of country if a well is not available or convenient and portable panels can be used for working pens rather than having to construct such facilities if they are not present.

We do not believe the cost of labor to be an impediment. Folding the subject property into an existing operation is unlikely to require hiring additional help, neither would managing a grazing operation comprised only of the subject project, unless of course the owner or lease holder is unable to do the work. Costs of additional labor needed to establish other types of stand-alone operations, including but not limited to, boarding, or training horses, raising game birds, or a confined animal feeding operation would be supported by that use.

Having observed the subject property, we do not believe that technological or energy inputs present an overwhelming barrier to conducting farm uses described at ORS 215.203(2)(a).

Accepted farming practices

Commercial farming and ranching operations are often not confined to one particular parcel or tract. Instead, they are regularly comprised of a combination of owned and leased land. These lands may be in close proximity, or they may be dozens (or more) miles apart. The fact that a single property may struggle to be managed profitably by itself does not mean that it does not have important value when managed in conjunction with other lands.

We believe that all the farm uses described above constitute accepted farming practices, many which are currently practiced in the surrounding area.

Having observed the subject property, we believe that it is entirely available for accepted farming practices.

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

State Agency Comments

There is little discussion that we found in the information provided in support of the plan amendment that adequately discusses impacts to area farm operations. The discussion provided by the applicant focuses primarily on an assertion that any subsequent development of the subject property (because of the proposed plan amendment and rezone) would not adversely impact surrounding farming and ranching operations primarily because the property is separated by topography that would provide adequate buffers. This conclusion is not supported by any comprehensive evaluation of the farming and ranching practices that are associated with existing and potential future farm uses in the surrounding area. Without an adequate analysis of the impact on adjacent or nearby agricultural lands, there are many questions that have not been evaluated. For example, what would the cumulative impacts of additional residential water use be to water supply for area irrigated agriculture in the region? Unlike applications for irrigation use,

residential wells are exempt uses and thus there would be no evaluation for injury to other water users in the area. What would be the traffic implications? What would the siting of more dwellings do to the ability to utilize certain agricultural practices? Would the expansion of residential development in the area provide greater opportunities for trespass from adjacent properties onto area farming operations?

(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;

State Agency Comments

It does not appear that the subject property is currently within a farm unit that includes lands in a capability class I-VI. This observation is not meant to dismiss the fact that the property's status in this regard could change in the future.

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

State Agency Comments

We agree that the subject property is not within an acknowledged urban growth boundary or and acknowledged exception area for Goal 3 or 4.

State Agency Agricultural Land Definition Conclusion

Agricultural Land includes all three categories of land described above as part of OAR 660-033-0020(1)(a)(A)-(C). We find that categories (B) and (C) are insufficiently addressed by the burden of proof included with the application. Based on the current application materials, we disagree with findings that asserts the property is not Agricultural Land. We find the subject property is characteristic in soils, terrain, hydrology, and size to many central Oregon properties that have been historically or are currently used for livestock and grazing operations. Utilizing several non-contiguous properties to meet the needs of livestock over the course of a typical year is an accepted farming practice across much of Oregon. To assume that a property of this nature could not be used as standalone or as part of a nearby livestock operation by the current or future landowner or lessee would have significant consequences to existing agriculture operations either by reducing the amount of land available for legitimate agricultural practices or through the introduction of conflicting uses.

We also point to Agricultural Land Policy (ORS 215.243) direction provided to the State from the Legislative Assembly upon passage of Oregon Land Use Bill, Senate Bill 100 and its' companion Senate Bill 101; as important considerations that must be addressed prior to the redesignation or rezoning of any Agriculture Land. ORS 215.243 states:

The Legislative Assembly finds and declares that:

- (1) *Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.*
- (2) *The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.*
- (3) *Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.*
- (4) *Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones. [1973 c.503 §1]*

Finally, we would like to offer a response to this statement included in the application materials:

“Since the property was zoned, it has become evident that farm uses are not viable on the subject property. The economics of farming have worsened over the decades making it difficult for most Deschutes County property owners to make money farming good ground and impossible to earn a profit from attempting to farm Class 7 and 8 farm soils. In 2017, according to Table 4 of the 2017 US Census of Agriculture, Exhibit T, only 16.03% of farm operators achieved a net profit from farming (238 of 1 484 farm operations). In 2012, the percentage was 16.45% (211 of 1283 farm operations). In 2007, according to the 2012 US Census of Agriculture, that figure was 17% (239 of 1405 farm operations). Exhibit U. The vast majority of farms in Deschutes County have soils that are superior to those found on the subject property. As farming on those soils is typically not profitable, it is reasonable to conclude that no reasonable farmer would purchase the subject property for the purpose of attempting to earn a profit in money from agricultural use of the land.”

First, this statement assumes that the subject land would be put into farm use as a single, separate unit. As previously discussed, it is very common for farming and ranching operations to be comprised of multiple, constituent parcels that are operated as a single farm/ranch operation.

Second, the Census of Agriculture numbers provided do not provide the entire context and nature of Deschutes County agriculture. It is important to note that the Census of Agriculture defines a farm as “any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold during the census year.”⁷ Thus, the total number of farms in any given Census statistic can be skewed by a large number of small farms that might better be

⁷ 2017 Census of Agriculture, Oregon State and County Data, Volume 1, Geographic Area Series 37, USDA National Agricultural Statistics Service, page VIII Introduction.
247-21-001043-PA/1044-ZC

characterized as hobby or lifestyle farms. In the case of Deschutes County, the numbers quoted by the applicant may be better considered upon recognizing that of the 1484 farms in the county, 92.7% (1376) are less than 100-acres in size. These same farms constitute only 19.59% (26,367 acres) of the total land area of land in farms. Taken further, 92.1% (1268) of these farms are less than 50-acres in size and comprise but 13.8% (18,531 acres).⁸ The character of Deschutes County “commercial” agriculture is perhaps better considered by looking at the larger footprint of land in farms which is better described as large operations many of which operate using constituent parcels, many times not contiguous to each other.

Definition of Forest Land

The Applicant also asserts that the subject property is not Forest Land. OAR 660-06-0005 defines Forest Lands, it states:

(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.

OAR 660-006-0010(2) states:

(2) Where a plan amendment is proposed:

(a) Lands suitable for commercial forest uses shall be identified using a mapping of average annual wood production capability by cubic foot per acre (cf/ac) as reported by the USDA Natural Resources Conservation Service. Where NRCS data are not available or are shown to be inaccurate, other site productivity data may be used to identify forest land, in the following order of priority:

(A) Oregon Department of Revenue western Oregon site class maps;

(B) USDA Forest Service plant association guides; or

(C) Other information determined by the State Forester to be of comparable quality.

(b) Where data of comparable quality under paragraphs (2)(a)(A) through (C) are not available or are shown to be inaccurate, an alternative method for determining productivity may be used as described in the Oregon Department of Forestry’s Technical Bulletin entitled “Land Use Planning Notes, Number 3 April 1998, Updated for Clarity April 2010.”

⁸ 2017 Census of Agriculture, Oregon State and County Data, Volume 1, Geographic Area Series 37, USDA National Agricultural Statistics Service, Table 8.

(c) Counties shall identify forest lands that maintain soil air, water and fish and wildlife resources.

State Agency Comments

We find the burden of proof does not satisfactorily address OAR 660-06-0005(7)(a) because it does not contain the analysis required by OAR 660-06-0010(2) addressing the wood production capabilities of the property. As a result, it does not verify whether or not it is suitable for commercial forest uses.

Statewide Planning Goal 14 (Urbanization)

Goal 14 does not allow urban uses to be placed on rural lands.

State Agency Comments

The application proposes to include the subject property in an RR-10, Rural Residential Zoning district. It is unclear to us whether such an arrangement is set forth in the County Comprehensive Plan. If so, the issue is settled in this case and our Goal 14 comments would be addressed.

If not, the applicant must demonstrate that the 10-acre minimum parcel size allowed by the RR-10 Zone is compliant with Goal 14. We have regularly expressed concerns that introducing a 10-acre settlement pattern into a rural area that is devoid of development is not consistent with the policies of Goal 14.

Part 2: Other Concerns and Observations

Wildlife Habitat Concerns

It is the policy of the state to protect and enhance Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations (ORS 496.012).

This proposal is within ODFW designated biological mule deer and elk winter range,⁹ which are considered Habitat Category 2 per the ODFW Fish and Wildlife Habitat Mitigation Policy.¹⁰ Habitat Category 2 is essential habitat for a wildlife species, population, or unique assemblage of species and is limited either on a physiographic province or site-specific basis depending on the individual species, population or unique assemblage. Winter habitat includes areas identified and mapped as providing essential and limited function and values (e.g., thermal cover, security from predation and harassment, forage quantity, adequate nutritional quality, escape from disturbance) for deer and elk from December through April. Winter survival and subsequent reproduction of big game is the primary limiting factor influencing species abundance and distribution in Oregon. Winter habitats vary in area, elevation, aspect, precipitation, and vegetation association all

⁹ <https://nrimp.dfw.state.or.us/DataClearinghouse/default.aspx?p=202&XMLname=885.xml>

¹⁰ https://www.dfw.state.or.us/lands/mitigation_policy.asp

influencing the relative quantity and quality of available habitat on both an annual and seasonal basis.

While this property is not currently designated as an acknowledged Goal 5 resource for wildlife habitat in the Deschutes County Comprehensive Plan, it is within the biological big game habitat areas ODFW recommended be included as part of the proposed Goal 5 Wildlife Inventory Update process in 2021.¹¹ ODFW relies on local and state compliance with the land use planning goals to consider natural resources and protect large parcel sizes necessary for habitat connectivity and resource land. The relatively open, undeveloped parcel that is often associated with a resource designated zoning such as Agricultural and EFU, provides valuable habitat for mule deer, elk, and other wildlife species. The open space inherently provided by the land use protections under those designations is not only important in maintaining the farming and ranching practices and rural characteristics of the land, but also preserving the wildlife habitat function and values that the land is providing.

The proposed plan amendment and zone change would allow for the property to be divided into 10 acre lots. Development, including residential development, within big game habitat can result in individual and cumulative impacts. Residential development conflicts with wildlife habitat because it results in the direct loss of habitat at the home site and the fragmentation of the remaining habitat by the structures and associated roads results in increased disturbance and loss of habitat function and values necessary for wildlife, such as fawning or calving areas.

Allowing the change in designation of the subject properties and rezoning to Rural Residential will open the possibility for future parceling and development of the land, resulting in habitat fragmentation, increased disturbance and a loss of important functions and values for wildlife life history needs. If that occurs, ODFW will not respond to any wildlife damage complaints within the development, due to the change in land use.

Water Availability Concerns

The state agencies are concerned with ongoing impacts to surface water and groundwater in the Deschutes basin. We have several primary concerns regarding potential impairment to fish and wildlife habitat from a new water use, the first being potential impact to surface flows necessary for fish and wildlife resources in the Deschutes River system (including a reduction in surface water quantity from groundwater pumping), and the second being the potential for an increase in water temperature as a result of flow reductions or impairment to cold water derived from seeps and springs. Seeps and springs provide unique habitat for a number of plant and animal species, including fish. Seep and spring flows, especially in the summer and fall, are typically cooler than the water flowing in the main stream, providing a natural relative constancy of water temperature. This cooler water provides thermal refuge for salmonids which thrive in cooler water.

We currently do not know if there are existing water rights for the subject property and if so, if they could be utilized for the proposed 10-acre lots intended for residential use. We recognize that

¹¹ <https://www.deschutes.org/cd/page/wildlife-inventory-update>

any new water use, unless exempt, must be appropriately permitted through the Oregon Water Resources Department (OWRD). However, the state relies on both OWRD and Deschutes County processes to ensure that new water use is mitigated in a manner that results in no net loss or net degradation of fish and wildlife habitat quantity and quality and potentially provides a net benefit to the resource. It is becoming increasingly difficult to obtain mitigation to offset impairment to water quality and quantity in the Deschutes basin, when required, due to ongoing declines in groundwater and streamflow in the area. Recent studies by the USGS have reported groundwater levels in the Redmond Area showing a modest and spatially variable decline in recent decades, about 25 ft since 1990, and 15 ft between 2000- 2016. Simulation of pumping 20 cfs from a hypothetical well east-northeast of Sisters and east of the Sisters fault zone shows declines in groundwater discharge not only in the Deschutes River between Lower Bridge and the gage near Culver, but also in the lower Crooked River and Opal Springs.¹²

Therefore, in the face of a changing climate and current and potential human impacts both regionally and in the vicinity of the proposed change in designation, we recommend any required mitigation through OWRD and County processes be carefully analyzed to ensure the intended ecological functions of mitigation are achievable and able to be maintained in perpetuity. We urge the County to consult with ODFW regarding any mitigation proposals and the likelihood of achieving mitigation goals, particularly under the framework of ODFW's Fish and Wildlife Habitat Mitigation Policy and ODFW's Climate and Ocean Change Policy.¹³

Wildfire

The existence of structures, particularly dwellings, can significantly alter fire control strategies and can increase the cost of wildfire protection by 50-95%.¹⁴ More than half of wildfires in the Northwest and more than 80% of wildfires in Northern California are human-caused.¹⁵ Additionally, the cost of the State of Oregon's catastrophic fire insurance policy has dramatically increased in the previous years and future availability is in jeopardy due to the recent escalation in wildfire fighting costs. Additional landscape fragmentation has the potential to exacerbate the costs and risks associated with wildfire.¹⁶

We appreciate Deschutes County's leadership on this issue and your participation in the conversations related to SB 762, the omnibus wildfire bill from the 2021 Legislative Session.

Planning and Zoning

The County Comprehensive Plan calls for the application of a Rural Residential Exception Area plan designation for lands successfully converted from an Agricultural plan designation. This is what the application proposes and we do not object. However, we would like to observe that

¹² Gannett, M.W., Lite, K.E., Jr., Risley, J.C., Pischel, E.M., and La Marche, J.L., 2017, Simulation of groundwater and surface-water flow in the upper Deschutes Basin, Oregon: U.S. Geological Survey Scientific Investigations Report 2017-5097, 68 p., <https://doi.org/10.3133/sir20175097>

¹³ https://www.dfw.state.or.us/climate_ocean_change/docs/plain_english_version.pdf

¹⁴ <http://headwaterseconomics.org/wphw/wp-content/uploads/fire-costs-background-report.pdf>

¹⁵ http://www.fs.fed.us/rm/pubs/rmrs_gtr299.pdf

¹⁶ https://tools.oregonexplorer.info/OE_HTMLViewer/index.html?viewer=wildfireplanning
247-21-001043-PA/1044-ZC

applying this plan designation to lands using the conversion pathway proposed by the application is confusing. Specifically, these lands are not “exception areas” as that term is commonly understood.

The same is true of applying an RR-10, Rural Residential Zoning District. We have already addressed the possibility of Goal 14 implications so we will not repeat them here. Instead, we would like to reiterate that these types of areas are not subject to an acknowledged exception and are viewed differently. For example, should the county choose to offer Accessory Dwelling Units (ADU) in the RR-10 zone pursuant to SB 391, this opportunity may not be extended to lands converted through a nonresource process.

Part 3: State Agency Recommendation

Thank you again for the opportunity to provide comments. We have concerns regarding the conversion of open rural lands to housing development. Much of the nonirrigated rural land in Deschutes County is similar to the subject property. Many of these areas provide essential functions and values to Deschutes County’s citizens which also benefit natural resources, such as open space, recreation, habitat and other environmental services. In addition, these lands are critical buffers to protect working farms and forests from conflicting uses. Many of these same areas are not appropriate for the encouragement of residential development. Remoteness, an absence of basic services and a susceptibility to natural hazards like wildland fire are all reasons why rural areas are not well suited to residential settlement even if they have little value for forestry or agricultural production.

Based on our review of the application materials and for the reasons expressed above, we believe that the subject property qualifies as resource land. It is our recommendation that the subject property retain an Exclusive Farm Use designation and not be converted to allow rural residential development. Please feel free to contact us if you have any questions.

The following agencies did not respond to the notice: Deschutes County Forester, Deschutes County Property Management, Deschutes County Road Department, Redmond City Planning, Redmond Fire and Rescue, Redmond School District 2, Redmond Public Works, Redmond Area Parks and Recreation District, District 11 Watermaster, Bureau of Land Management.

F. PUBLIC COMMENTS: The Planning Division mailed notice of the application to all property owners within 750 feet of the subject property on December 9, 2021. The Hearings Officer finds that the Applicant 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 December 9, 2021. At the public hearing, staff testified that Deschutes County received approximately one hundred (100) public comments on the application. At the public hearing on April 19, 2022, ten (10) members of the public testified in opposition to the applications.

Comments received in support of the applications reference the Applicant’s soil analysis, potential expansion of rural housing inventory, and protection from wildfire through better access and vegetation management as a basis for support. Commentators noted the steep cliffs and distance

from other farms, as well as the lack of irrigation rights and poor soils on the subject property.

Comments received in opposition cite concerns with traffic and emergency access impacts, availability of groundwater, compatibility with and preservation of agricultural land, and impacts to wildlife.

At the conclusion of the public hearing, the Hearings Officer left the record open for two (2) seven-day periods, closing on April 26, 2022 (new evidence) and May 3, 2022 (rebuttal evidence), and permitted the Applicant until May 10, 2022 to submit closing argument. Staff directed that submissions during the open record period be transmitted by 4:00 p.m. on the deadlines. Several submissions, from Nunzie Gould, Andrew Mulkey of 1000 Friends of Oregon and S. Gomes were submitted after the 4:00 p.m. April 26, 2022 deadline and thus were not timely. The Hearings Officer does not consider the untimely evidence and arguments in this Decision and Recommendation.

All public comments timely received are included in the record in their entirety and incorporated herein by reference.

Applicant Responses:

On April 8, 2022, the Applicant provided the following response to public comments received as of that date:

Inaccuracies in Opposition Comments

Ed Stabb, 12/13/2021 Letter

Mr. Stabb claims that his property at 9805 NW Coyner Avenue is contiguous to the subject property. In one part, it is close but not contiguous. The Stabb property is separated from the subject property by the “flagpole” part of a nonfarm parcel and nonfarm dwelling at 9307 NW Coyner Avenue that Mr. Stabb created (Parcel 2 of Partition Plat 2004-85). The “flagpole” part of nonfarm Parcel 2 runs along the west side of the main irrigated farm field on the Stabb property on land formerly irrigated by the property owner (per page 18, Decision MP-04-11/CU-04-42). Furthermore, the Stabb property is surrounded by nonfarm parcels on all sides.

Mr. Stabb’s description of properties in the Odin Valley along the west end of NW Coyner Avenue asserts that area is primarily agricultural. The following facts, however, show that the predominant parcel type along Coyner Avenue west of 91st Street (a length of approximately .75 miles) are not receiving farm tax deferral and are nonfarm parcels or parcels that are developed with nonfarm dwellings. Only two parcels are farm parcels that are farm tax deferred farm properties. In particular beginning at the west end of Coyner Avenue:

10305 NW Coyner Avenue (Witherill), PP 2015-15 nonfarm parcel created; 247-15-000107-CU/-000108-CU nonfarm dwelling (28.6 acres)

10255 NW Coyner Avenue (Bendix), PP 2004-101, nonfarm parcel created; CU-03-55 and CU-03-56 nonfarm dwelling (19.11 acres)
 10142 NW Coyner Avenue (Buchanan), CU-95-11 nonfarm dwelling (37.51 acres)
 10135 NW Coyner Avenue (Hayes), PP 2004-101, nonfarm parcel created; CU-03-55 and CU-03-56 nonfarm dwelling (19.65 acres)
 9307 NW Coyner Avenue (Birklid), PP 2004-85, nonfarm parcel created; 247-18-000796-CU nonfarm dwelling (17.50 acres)
 9600 NW Coyner Avenue (MT Crossing), PP 2006-40 non-irrigated parcel created (80 acres); 247-19-000375-CU nonfarm dwelling (80 acres)
 9805 NW Coyner Avenue (Stabb), PP 2004-85, irrigated parcel created (in addition to nonfarm parcel); receives farm tax deferral (62.58 acres)
 9299 NW Coyner Avenue (Nelson), PP 2005-25 nonfarm parcel created (10.21 acres); nonfarm dwelling approved but not built
 9295 NW Coyner Avenue (Grossman), PP 2005-25 nonfarm parcel created (11.08 acres); nonfarm dwelling approved but not built
 4691 91st Street (intersection Coyner and 91st)(Omlid), PP 2006-40 non-irrigated land division/nonfarm parcel (39.20 acres); 247-17-000220-CU nonfarm dwelling approved
 9293 NW Coyner Avenue (Grossman), irrigated parcel created by PP-2005-25 (irrigated land division created two nonfarm parcels and one farm parcel)(185.06 acres)

Jason and Tammy Birklid, 12/13/2021 Letter

The Birkkids refer to their home as a “family farmhouse.” The dwelling was, however, approved by Deschutes County as a nonfarm dwelling on a non-irrigated parcel of land that was determined by Deschutes County to be unsuited for the production of farm crops and livestock.

The Birkkids and others repeat the same claim as Mr. Stabb (discussed above) re the character of the west end of NW Coyner Avenue. The evidence shows, however, that the primary parcel type and development in this area is a nonfarm dwelling parcel and nonfarm dwellings.

RR-10 Subdivisions

The Johnson properties, TL 200 and 300, Map 14-12-34D (parcels created in 2022 by PP 2022-10 as a farm and a nonfarm parcel) touch, at one point across a road a large area of land zoned RR-10 that includes the Kachina Acres and Odin Crest subdivisions where lots of about 5 acres in size are common. The property owned by opponent Kelsey Pereboom/Colter Bay Investments, LLC adjoins Kachin acres along the entire southern boundary of her property. Opponents Steele and the Elliotts live in the RR-10 zoned Odin Crest subdivision.

Destination Resort Overlay Zoning of Subject Property

Under the current zoning, almost 250 acres of the subject property is zoned as eligible for development with a destination resort. The development of this area of the property as a

resort would have far greater impacts on the surrounding area than would development of the property allowed by the RR-10 zone.¹⁷

On May 3, 2022, the Applicant provided the following rebuttal to evidence and arguments presented during the open record period:

This letter constitutes the Applicant's second post-hearing record submittal (rebuttal period) and provides evidence to respond to evidence and arguments presented during the open record period. Unless otherwise denoted herein, previously defined terms have the same meaning.

I. Subject Property Information

*Ms. Lozito submitted past photographs of the Property that she claims to have paid for (presumably when she previously listed the house for sale). Ms. Lozito claims these photos show the Property can support grass growing. There is no date on these photographs, but they do show patchy areas of grass with significant yellowing, rocks, and patches. Importantly, Ms. Lozito's claim that the land can support this growth is easily disproven. By August of 2020, several months before the Applicant purchased the Property, the grass was gone and the area had reverted back to dusty and non-productive land. **Exhibit 84.**¹⁸*

*Mr. Jim McMullen asserted that the property is not within the Redmond Fire Service boundaries. That is incorrect; the Property is within the Redmond Fire & Rescue District. **Exhibit 98.***

II. Soil Classification and Mapping System; Soil Scientists; and DLCD Administrative Rules on "Agricultural Land":

Ms. Macbeth claims that DLCD's administrative rules prevent landowners from hiring a State-approved soil classifier to conduct a more detailed soils analysis of property mapped by the NRCS and to use the superior property-specific information obtained by such a study instead of information provided by soils mapping conducted at a landscape scale by the NRCS. The Agency Letter does not advance this argument in comments on the Application. In fact, DLCD disagrees with this argument, stating the following on their website:

"NRCS does not have the ability to map each parcel of land, so it looks at larger areas. This means that the map may miss a pocket of different soils. DLCD has a process landowners can use to challenge NRCS soils information on a specific property. Owners who believe soil on their property has been incorrectly mapped may retain a "professional soil classifier...certified by and in good standing with the Soil Science Society of America" (ORS 215.211) through a process

¹⁷ At the public hearing, the Applicant's attorney clarified that, although a portion of the property could be developed as a destination resort because it meets the criteria, the Applicant is not requesting such approval. The Applicant's attorney also noted that a rezone to RR-10 precludes future destination resort development in the future.

¹⁸ Exhibits continue numbering from Applicant's open record submittal.

administered by DLCD. This soils professional can conduct an assessment that may result in a change of the allowable uses for a property.”

*Source: <https://www.oregon.gov/lcd/FF/Pages/Soils-Assessment.aspx> **Exhibit 93**. This process, as DLCD states, requires a site-specific soil assessment by a soil professional accepted by DLCD. *Id.* There are only a handful of these professionals, with Applicant’s expert, Mr. Brian Rabe, being one of them. *Id.**

III. Response to Central Oregon LandWatch and Farm Income Analysis

*Central Oregon LandWatch (“COLW”), through its attorney Ms. Carol MacBeth, advances a number of erroneous arguments. Ms. Macbeth filed information provided by the 2012 US Census of Agriculture. This information is not the most current. The most current information is provided by the County Profile 2017 Census of Agriculture (**Exhibit 91**).*

COLW’s letter includes a list of “agricultural commodities” that it claims, according to the 2012 US Census of Agriculture, are produced in Deschutes County. The 2012 US Census of Agriculture does not support this assertion. First, contrary to COLW’s letter, the 2012 Census shows that tobacco, cotton and cottonseed are not produced in Deschutes County. Second, many of the listed commodities are listed by “commodity groups.” The Census reports income from any one or more of the commodities in the entire group. It does not indicate whether or not each commodity in a group is produced in Deschutes County. So, for instance, “fruits, tree nuts, and berries” are one commodity group. The group is so small, presumably one, that the Census withholds income information to “avoid disclosing data for individual operations.” Whether this lone producer harvests fruits, tree nuts or berries is unknown and it cannot be said which crop is harvested.

*COLW’s claim that “soil capability ** is irrelevant” because some farm uses are “unrelated to soil type” is erroneous because the definition of “Agricultural Land” provided by Goal 3 makes soil fertility and the suitability of the soil for grazing the exact issues that must be considered by the County to determine whether the subject property is “land in other soil classes that is suitable for farm use.” DLCD, ODFW and ODA make the same mistake in ignoring the ability of the land itself, rather than imported feed, to support a farm use. The fact that the suitability test is tied to the specific soil found on a subject Property by the Goal 3 definition makes it clear that the proper inquiry is whether the land itself can support a farm use. Otherwise, any land, no matter how barren, would be classified as farmland – which it is not and should not be. ORS 215.203(2) defines “farm use” and it requires that the land be used for “the primary purpose of obtaining a profit in money[.]”*

COLW claims that the \$48,990 gross income estimate contained in the burden of proof shows that the subject property is suitable for farm use because it would, allegedly, produce three times as much income as grossed by the average farm in Deschutes County in 2012. The \$48,990 figure is, however, overstated. It is based on an OSU formula that assumes that rangeland will support one AUM per acre. The Property will, however, only

*support one AUM per 10 acres in dry years, and one AUM in wet years, a fact established by DLCD, ODFW, and ODA. This means the \$48,990 gross income figure is overstated by **ten times** during the dry years and by **five times** during wet years.*

*When the OSU formula is adjusted to reflect the State's AUM:acres ratios, the range of gross income per year is a mere **\$4,899 to \$9,798** for a 710-acre property. This is lower than the \$16,033 average gross farm income of the average County farm in 2012 – the average farm being a 102-acre farm. If the subject Property were as productive as the average 2012 Deschutes County farm per acre, it would gross \$111,602 not \$4,899 to \$9,798 per year. Expenses that would be incurred to raise a gross income of \$4,899 to \$9,798 per year, based on information obtained from ranchers and extension service publications, include the following:*

- Vaccinations, medicine, veterinary services, monitoring pregnancies, deworming, breeding, calving, soundness exams*
- Branding, castrating bull calves*
- Purchase and care and feeding of a horse to round up cattle and associated shoeing and veterinary expenses; horse tack*
- Water supply for cattle (trucked or well); water troughs*
- Fencing materials, maintenance and repair*
- Freight/trucking of cattle between ranch and auction*
- Ranch vehicles e.g. 5th Wheel 4WD Pickup, 5th Wheel Stock Trailer and ATV and maintenance and operating expenses*
- Portable cattle working facilities (hydraulic or manual squeeze)*
- Labor; hired and farm owner/operator, including taxes, payroll, health care, etc.*
- Livestock insurance*
- Liability insurance*
- Fire insurance*
- Office expense*
- Cost to service farm loans for the purchase of the subject property, farm equipment and improvements*
- Property taxes*

Given the more refined and projected potential income (supported by the Agency Letter), the property taxes alone for the subject Property would exceed the projected, potential income. Even if the Property was able to qualify for farm tax deferred status, other expenses would clearly exceed income. For instance, annual farm loan payments for purchasing the property (excluding loans for farm equipment and improvements) far exceed projected gross income. If a person were able to purchase the Property at a cost of \$2.8 million dollars², a price well below the fair market value set by the Deschutes County Tax Assessor, annual payments for a 15-year loan at a USDA loan rate of just 3.25% would be \$238,808.02 per year for a 15-year fixed loan and \$147,508.81 for a 30-year fixed loan (excluding loan-related costs) from the USDA.³ Interest only on the 15-year fixed rate loan would be \$782,120.35 or an average of \$52,141.36 per year. Interest on a 30-year fixed

rate loan would be \$1,625,264.22 or an average of \$54,175.47 per year. No party has argued that potential farm revenues on the Property could reach anywhere near the levels necessary to service this debt; notwithstanding the fact that other farm infrastructure and startup costs (like the cost of irrigation water) would further add to debt service costs.

If the Property were grazed seasonally (as suggested by the Agency Letter), the operator would incur costs to lease grazing lands elsewhere or to feed cattle hay grown on other properties. These costs would not be deducted from the estimated income for the subject Property because the projected income is based on the productivity of the subject Property to support grazing – not the ability of other lands to support grazing either by lease or by the purchase of forage grown on other lands. Conversely, only one-half of the cattle income derived from an operation that utilizes two properties to raise cattle would be attributable to the subject property if it were able to support grazing six months of the year. The fact that twice as many cattle can be grazed on a property for six months compared to year-round is of no consequence to the property assessment of gross income attributable to the subject Property.

IV. Additional Responses to Specific Parties

This section provides specific responses to various parties' arguments during the open record period.

Redside Restoration and Jordan Ramis

Redside Restoration implies that its small vineyard located close to the Deschutes River in the Deschutes River canyon at an elevation about 400 to 500 feet below the plateau on the subject Property has similar conditions to those found on the subject Property. Presumably, Redside wishes the County to conclude that the Property might be suitable for development as a vineyard. It is not. This is rebutted by:

- E-Mail dated May 2, 2022 from soils scientist Brian Rabe, **Exhibit 107**
- Certificate 66868 Dunn, **Exhibit 87**.
- Certificate 66868 map – Dunn (shows that vineyard area of property is irrigated), **Exhibit 88**.
- OSU impact of smoke on grapes and wine, **Exhibit 97**.

The Property also would not meet most of the site selection and climate concerns related to vineyard selection. **Exhibit 90**.

Equally important, is the fact that the soil depth is simply not enough to establish productive grapes. For example, in Mr. Rabe's comprehensive soil analysis, he made 135 test holes. Of those 135 test holes, only 5 (less than 4%) had soil more than 30 inches in depth. The average (mean) depth was 16.8 inches, the median depth was 16 inches, and the modal depth (most common) was 14 inches. Grapes typically require 2 to 3 feet of soil depth. **Exhibit 106**.

Richard and Lori Johnson

*The Johnsons claim that farms adjacent to the subject property have deepened their wells. As the Johnsons note based on information provided by Central Oregon LandWatch regarding a 2008 USGS study, climate change, groundwater pumping and irrigation canal pumping have been identified as causing declines. The referenced study shows that the primary cause of groundwater decline is climate change. The study attributes a part of the decline to increased groundwater pumping in the region. Maps provided by the USGS report suggests that groundwater use in the Odin Valley area (farm irrigation) and water use by the Eagle Crest (golf course and other irrigation and domestic use) increased significantly between 1997 and 2008. Irrigation water use consumes far more ground water than used for domestic use – a fact that supports the conclusions of the GSI water study that the applicant filed with Deschutes County prior to the land use hearing. This report is re-filed for convenience as **Exhibit 105**. We provide the following supporting documentation:*

- *Understanding Water Rights, Deschutes River Conservancy, **Exhibit 101**.*
- *Analysis of 1997-2008 Groundwater Level Changes in the Upper Deschutes Basin, Central Oregon (relevant part). **Exhibit 104**.*

The Johnsons express a concern that creating 10-acre parcels will result in a loss of open space and wildlife habitat. They claim that using the land for low-density housing will increase the cost of farming for adjacent farms. The Johnsons did not have this concern earlier this year when they divided their farm property to create a 4.049-acre nonfarm parcel right next to their irrigated farm fields. See Partition Plat 2022-10. The location of this new parcel is shown in the aerial photo below (from DIAL): [image omitted]

The following documents are also filed to respond to this argument:

- *Land use application filed by the Johnsons to create a nonfarm parcel and dwelling adjacent to irrigated farm fields (Johnson nonfarm 2021), **Exhibit 94**.*
- *Amended Annual Report for Horse Guard, Inc., a highly successful horse vitamin/mineral supplement product with a primary place of business of 3848 NW 91st Street, Redmond, OR (the Johnson property), **Exhibit 99**.*
- *Tax Assessor's Improvement Report for Johnson property. **Exhibit 83**.*
- *Recent Google Earth Photograph of Johnson house and outbuildings below:*

It appears that the Johnsons keep horses on their property but there is no indication they are engaged in a commercial horse boarding or training operation. The primary farm use of the property is growing alfalfa hay which is stored in the farm building shown on the right in the photo above. [image omitted]

League of Women Voters

The League of Women Voters submitted a comment that the Deschutes River has been designated by DEQ as having impaired water quality. That is true, but only for a portion

of South Deschutes County and not this area. **Exhibit 92**. See also, Testimony of Brian Rabe, **Exhibit 107**.

Pam Mayo Phillips

Ms. Mayo Phillips argues that the subject property is in the heart of farm country and that the Odin Valley consists of parcels that vary in size from 20 to 200 acres in size. While some agricultural uses are occurring in the Odin Falls area, the area contains a mix of farm, nonfarm, and rural residential development as documented by the Johnsons' land division application. Many of the farm properties in the Odin Valley have been divided to create nonfarm parcels that are smaller than the size stated by Ms. Phillips (size listed after current owner) that have received approvals to locate dwellings adjacent to irrigated farm fields: Stabb/Birklid (17.50 acres), Johnson/Nonella (4.05 acres) Grossmann/Nelson (11.08 and 10.21 acres), Stephan/Bessette (4.36 acres), Thoradarson (3.18 acres) and a number of non-irrigated properties have been divided and/or developed with nonfarm dwellings – in particular on the properties closest to the subject property along NW Coyner. Thus far, the farm practices identified by Ms. Mayo Phillips have not been of sufficient significance to merit denial of the many nonfarm dwellings in Odin Valley.

Ms. Mayo Phillips expresses concerns about the condition of area roads. The roads, however, are adequate to handle additional traffic as documented by the applicant's traffic engineer and Deschutes County will address road improvements, provided the pending applications are approved, when a subdivision application is filed with and reviewed by the County.

*Ms. Phillips argues that power is not available to serve the subject Property. This is incorrect. CEC has provided a "will serve" letter and has advised the applicant that it is able to provide power to the property from Buckhorn Road with upgrades that would be paid for by the property owner. **Exhibit 16**.*

*Ms. Phillips expresses concern that the nearest fire station is too far away and that fires are a significant concern. The subject property is located in the Redmond Fire & Rescue service area and the closest fire station in that district is located at 100 NW 71st Street, a short distance north of Highway 126 on the west side of Redmond. Highway 126 provides excellent access to the Odin Valley and the subject property which is approximately six miles away on paved roads (travel time 9 minutes per Google Maps for vehicles traveling at or below the speed limit). Additionally, according to opponent Ted Netter a fire protection association has been formed to provide fire protection to lands that are located outside of fire districts to the west of the subject property which should serve to lessen fire risks in the area. The subject Property is not in the fire association area, contrary to Mr. Netter's assertion, because it is located inside the Redmond Fire district. **Exhibit 95**.*

Nunzie Gould

Ms. Gould's untimely filed post-hearing submittal contains errors of fact. The subject Property is not located in or close to the Three Sisters Irrigation District ("TSID"). The

TSID webpage indicates that the District is currently providing spring irrigation water at 30%. Marc Thalacker, TSID's manager, also had a telephone conversation with one of the principals of the Applicant, Robert Turner. Mr. Thalacker told Mr. Turner that it would not be feasible for TSID to provide water to the Property, nor would it be feasible for other irrigations districts to do so. Mr. Thalacker also indicated that, based upon his conversation with Mr. Turner, placing irrigation water on the Property would be a reckless and poor use of water.

Ms. Gould's claim that agriculture is occurring on the subject property is simply incorrect.

Ms. Gould's claim that 320 acres of BLM land adjoins the east side of the subject Property is correct. This area is not, as Ms. Gould's comments reflect however, engaged in farm use of any kind. It is open space for wildlife use. The Cline Buttes Recreation Area ATV recreational area adjoins the south and southwest sides of the subject property. One of the ATV trails is located in close proximity to the south boundary of the subject property. This large area of public lands, also, is not engaged in farm use.

Andrew Mulkey, 1000 Friends of Oregon

Mr. Mulkey's untimely filed post-hearing submittal claims that the suitability analysis in the applicant's soils report is "simply speculation" because the soils scientist does not purport to have experience farming and ranching in Deschutes County. This is an absurd statement and is contrary to the State's requirements for certified soil scientists (addressed above). The purpose of soils analysis is to determine its suitability to support farm crops, livestock and merchantable tree species. Additionally, the Soil Science Society of America reports that Mr. Rabe has been a member of the American Society of Agronomy for 30 years. The Society describes its membership as follows:

"The American Society of Agronomy is the professional home for scientists dedicated to advancing the discipline of the agronomic sciences. Agronomy is highly integrative and employs the disciplines of soil and plant sciences to crop production, with the wise use of natural resources and conservation practices to produce food, feed, fuel, fiber, and pharmaceutical crops for our world's growing population. A common thread across the programs and services of ASA is the dissemination and transfer of scientific knowledge to advance the profession."
Membership | American Society of Agronomy

- *Soil Science Society of America report re soil scientist and classifier Brian Rabe, **Exhibit 85**.*

Mr. Mulkey provides maps and information about wildlife. None of the maps have been made applicable to the subject Property by land use regulations. The Mule Deer Overlay map also shows that the subject Property is just inside the area proposed by ODFW as an addition to the WA zone and that the number of deer using the area is far lower than areas located closer to the City of Sisters and less populated than areas east of Bend that are not

proposed for inclusion in the WA zone. But again, these maps simply do not apply nor have they been adopted by the County.

DLCD Letter

*DLCD provided additional comment that Goal 4 had not been adequately addressed. Forestry expert John Jackson provides additional response (**Exhibit 89**) to evidence and analysis previous placed in the record by Ms. Fancher.*

V. Additional Evidence for the Record

In further response to COLW’s arguments that certain farm uses my profitably occur on the Property, the Applicant provides the following additional rebuttal evidence.

- *Hemp market information, email from hemp farm owner Paul Schutt, **Exhibit 100.***
- *Impacts of grazing and increased desertification, **Exhibit 82.***
- *Alfalfa production, **Exhibit 96.***

VI. Conclusion

The evidence we provide in this submittal will be used further in final legal argument

G. NOTICE REQUIREMENT: On March 18, 2022, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the subject property, agencies, and parties of record. A Notice of Public Hearing was published in the Bend Bulletin on Sunday, March 20, 2022. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on March 2, 2022.

H. REVIEW PERIOD: The subject applications were submitted on December 2, 2021. The applications were deemed incomplete by the Planning Division on December 30, 2021 and a letter detailing the information necessary was mailed on December 30, 2021. The Applicant provided a response to the incomplete letter and the applications were subsequently deemed complete on January 17, 2022. According to Deschutes County Code 22.20.040(D), review of the proposed quasi-judicial plan amendment and zone change application is not subject to the 150-day review period.

III. FINDINGS & CONCLUSIONS

A. PRELIMINARY FINDINGS AND CONCLUSIONS

1. HEARINGS OFFICER’S FINDINGS AND CONCLUSIONS REGARDING USE OF ORDER 1 SOILS SURVEY

In 1979, Deschutes County adopted its first comprehensive plan and zoning ordinance that implemented the Statewide Land Use Planning Goals. The County’s comprehensive plan map was

developed without the benefit of detailed soils mapping information. The map was prepared and EFU zoning was applied to the subject property prior to the USDA/NRCS's publication of the "Soil Survey of Upper Deschutes River Area, Oregon." That soil survey provides general soils information, but not an assessment of soils on each parcel in the study area.

The NRCS soil survey maps are Order 2 soil surveys, which extrapolate data from the Upper Deschutes River Survey to determine LCC soil classifications at a landscape level. The Applicant's soil scientist, Mr. Rabe, conducted a more detailed Order 1 survey, which analyzed actual on-the-ground soil compositions on the subject property. The Hearings Officer finds that it is not "suspect" that an Order 1 soils survey contradicts NRCS soil classifications performed at a higher, landscape level.

The argument advanced by COLW, 1000 Friends of Oregon and Redside Restoration that an Order 1 survey cannot contradict NRCS soil survey classifications for a particular property has been rejected by the Oregon Legislature in ORS 215.211(1) and DLCD in OAR 660-033-0030. It has also been rejected by Deschutes County Hearings Officers and the Board of County Commissioners.

In recent years, Deschutes County has recognized the value in rezoning non-productive agricultural lands and has issued decisions approving plan amendments and zone changes where the applicant has demonstrated the property is not agricultural land. Deschutes County has approved the reclassification and rezoning of EFU parcels based on data and conclusions set forth in Order 1 soils surveys and other evidence that demonstrated a particular property was not "agricultural land," due to the lack of viability of farm use to make a profit in money and considering accepted farming practices for soils other than Class I-VI. *See, e.g.,* Kelly Porter Burns Landholdings LLC Decision/File Nos. 247-16-000317-ZC/318-PA; Division of State Lands Decision/File Nos. PA-11-7 and ZC-11-2; Paget Decision/File Nos. PA-07-1, ZC-07-1; The Daniels Group/File Nos. PA-08-1, ZC-08-1; Swisher Decision/File Nos. 247-21-000616-PA/617-ZC. The Board of County Commissioners recently affirmed the Hearings Officer's decision in the Swisher files and adopted Ordinance No. 2022-003.

On the DLCD website, it explains:

NRCS does not have the ability to map each parcel of land, so it looks at larger areas. This means that the map may miss a pocket of different soils. DLCD has a process landowners can use to challenge NRCS soils information on a specific property. Owners who believe soil on their property has been incorrectly mapped may retain a "professional soil classifier ... certified and in good standing with the Soil Science Society of America (ORS 215.211) through a process administered by DLCD. This soils professional can conduct an assessment that may result in a change of the allowable uses for a property.

Exhibit 93 (<https://www.oregon.gov/lcd/FF/Pages/Soils-Assessment.aspx>).

The Hearings Officer agrees with the Applicant's final legal argument, submitted on May 11, 2022 which states on page 3, in relevant part:

This statutory and regulatory scheme makes sense, as it would have been impracticable for a county to have conducted an individualized soils analysis on a farm-by-farm basis when it adopted its original zoning ordinances. Precluding the availability of a property owner to achieve a new zoning designation based upon a superior, more detailed and site-specific soils analysis would, to put it mildly, be absurd and cannot be what the legislature intended.¹⁹

The Soil Survey of the Deschutes Area, Oregon²⁰ describes Class VII soils as “not suitable for cultivation and of severely limited use for pasture or as woodland.” It describes Class VIII soils as “not suitable for growing vegetation for commercial uses.” The Soil Survey of Upper Deschutes River Area, Oregon describes the broad, general level of soil surveying completed by NRCS on page 16, “At the less detailed level, map units are mainly associations and complexes. The average size of the delineations for most management purposes was 160 acres. Most of the land mapped at this level is used as woodland and rangeland. At the more detailed level, map units are mainly consociations and complexes.... Most of the land mapped at the more detailed level is used as irrigated and nonirrigated cropland.”

As quoted in the Hearings Officer’s Decision and Recommendation to the Deschutes County Board of Commissioners in the Swisher decision, File Nos. 247-21-000616-PA/617-ZC:

The real issue is “map accuracy” which is based upon set standards for maps. National Map Accuracy Standard (NMAS) provides insurance that maps conform to established accuracy specifications, thereby providing consistency and confidence in their use in geospatial applications. An example of such a standard: “maps on publication scales larger than 1:20,000, not more than 10 percent of the points tested shall be in error by more than 1/30 inch, measured on the publication scale; for maps on publication scales of 1:20,000 or smaller, 1/50 inch.” The error stated is specific for a percentage of points, and to suggest that accuracy in maps is the unattainable freedom from error as the COL letter does, is not a relevant or a serious argument.

When one map shows point data like an Order-1 soil survey the accuracy can be measured, and when another map does not (like the NRCS soil map) there is a shortage of information, so the accuracy of the NRCS map cannot be determined for point data. The accuracy of the NRCS estimate of the percentage of components in the 38B soil complex can be shown to be very inaccurate in this case, and it clearly underestimates the Class 7 and Class 8.

The Hearings Officer finds that NRCS soil survey maps are not definitive or “binding” with respect to a determination of whether the subject property is, or is not, agricultural land. This is consistent with the ruling of the Land Use Board of Appeals (LUBA) in **Central Oregon Landwatch v. Deschutes County (Aceti)**, ___ Or LUBA ___ (LUBA NO. 2016-012, August 10, 2016 (Aceti I)). There, LUBA confirmed that OAR 660-033-0030(5)(a) and (5)(b) allow the County to rely on more detailed data on soil capability than provided by NRCS soil maps to define agricultural land,

¹⁹ The stated public purpose of the EFU zone is to preserve “Agricultural Lands” (ORS 215.243) but “Agricultural Lands” are not present on a subject property.

²⁰ https://www.nrcs.usda.gov/Internet/FSE_MANUSCRIPTS/oregon/OR620/0/or620_text.pdf

provided the soils survey has been certified by DLCD, which has occurred here. The *Aceti* ruling is summarized as follows:

First, LUBA affirmed the County’s determination that the subject property, which had been irrigated and used to grow hay in 1996 and earlier years, was not agricultural land based on the Order 1 soils survey which showed that the poor soils on the property are Class VII and VIII soils when irrigated, as well as when not irrigated.

Second, LUBA determined the applicant had established that the subject property was not “agricultural lands,” as “other than Class I-VI Lands taking into consideration farming practices.” LUBA ruled:

“It is not an accepted farm practice in Central Oregon to irrigate and cultivate poor quality Class VII and VIII 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.”

The Hearings Officer rejects the argument that NRCS land classifications based on its soil maps cannot be varied, unless a landowner requests an Order 1 soils study to qualify **additional** land as agricultural land. This is directly contrary to LUBA’s holding in *Central Oregon Landwatch v. Deschutes County and Aceti*, LUBA No. 2016-012:

“The Borine Study is evidence a reasonable person would rely on and the county was entitled to rely on it. As intervenor notes, the NRCS maps are intended for use at a higher landscape level and include the express statement ‘Warning: Soil Ratings may not be valid at this scale.’ Conversely, the Borine Study extensively studied the site with multiple on-site observations and the study’s conclusions are uncontradicted, other than by petitioner’s conclusions based on historical farm use of the property. This study supports the county’s conclusion that the site is not predominantly Class VI soils.”

ORS 215.211(1) specifically allows for the submittal by a certified soil scientist of an assessment of the capability of the land based on more detailed soils information than that contained in the Web Soil Survey operated by the NRCS to “assist a county to make a better determination of whether land qualifies as agricultural land.” The Applicant followed this procedure by selecting a professional soil classifier who is certified by and in good standing with the Soil Science Society of America to prepare the Order 1 soils report. DLCD reviewed the soils report pursuant to ORS 215.211(2) and determined it could be utilized in this land use proceeding.

The Hearings Officer agrees that soils classifications are not the only determining factor with respect to whether a parcel is “agricultural land.” The Hearings Officer’s findings on all relevant factors to be considered in determining whether the subject property is “agricultural land,” are set forth in detail below.

The Hearings Officer does not accord less weight to the Applicant’s soil scientist because he was “privately commissioned.” Brian T. Rabe, CPSS, WWSS of Valley Science and Engineering is a

listed, accepted soils scientist by DLCD and is certified by and in good standing with the Soil Science Society of America. He has been a certified soils scientist for 30 years.

Public comments submitted by the Jordan Ramis law firm on behalf of Redside Restoration Project One, LLC are correct to the extent that DLCD's certification of an Order 1 soils survey is not a determination of whether a particular property constitutes "agricultural land." The certification constitutes a determination that the soil study is complete and consistent with reporting requirements of OAR 660-033-0045. Pursuant to ORS 215.211, the Applicant's soils survey has been approved for use by Deschutes County by DLCD. If the Applicant's soils survey was deficient in any manner, DLCD would not have allowed the County to rely on the survey in this proceeding. Ultimately, the County – not DLCD - must decide whether the Order 1 soils survey, together with other evidence in the record, supports a determination of whether the subject property is "agricultural land." See ORS 215.211(5).

For all the foregoing reasons, the Hearings Officer finds that the County is not bound by the landscape level NRCS Order 2 study on which classification of soils on the subject property is based. The Hearings Officer finds it is appropriate for the County to consider the Applicant's Order 1 soils survey, certified for the County's consideration by DLCD.

2. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING WHETHER THE SUBJECT PROPERTY IS "AGRICULTURAL LAND"

For purposes of this Decision and Recommendation, the Hearings Officer considers the definition of "Agricultural Land," in OAR 660-033-020(1)(a), as defined in Goal 3, which includes:

- (A) lands classified by the NRCS as predominantly Class I-VI soils in Eastern Oregon;
- (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
- (C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.

a. OAR 660-033-0020(1)(a)(A) Findings and Conclusions

As the Hearings Officer found above, the County may rely on the DLCD-certified Order 1 soil survey submitted by the Applicant. That study shows that the soils on the subject property are not predominantly Class I-VI soils, as they are comprised of 71% Class VII-Class VIII soils. The County is entitled under applicable law to rely on the Order 1 soils survey in these applications in making a determination that the soils on the Subject Property are not predominantly Class I-VI soils. The Hearings Officer finds that the more detailed, onsite soil study submitted by the Applicant provides property-specific information not available from the NRCS mapping.

There is no evidence in the record to rebut the Applicant’s soils study. Therefore, the Hearings Officer finds that the subject property does not constitute “agricultural land” under OAR 660-033-0020(1)(a)(A). Specific findings on each applicable criterion are set forth in Section III(B) of this Decision and Recommendation.

b. OAR 660-033-0020(1)(a)(C) Findings and Conclusions

The Hearings Officer finds there is no evidence in the record that the subject property is “land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands. While DLCD, ODA and ODFW question the “impact on adjacent or nearby agricultural lands,” at page 6 of the agencies’ comment letter, those questions do not answer the inquiry of whether the subject property is “necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.” OAR 660-033-0020(1)(a)(C). Moreover, the reclassification and rezoning of the subject property in and of itself will not change the current use (or lack thereof) of the subject property. Impacts of future development must be reviewed when land use applications are submitted. Simply put, there is no showing that the subject property is necessary for farming practices on any surrounding agricultural lands. There is no evidence that the subject property contributes to any such practices, nor that other lands depend on use of the subject property to undertake any farm practices.

Therefore, the Hearings Officer finds that the subject property does not constitute “agricultural land” under OAR 660-033-0020(1)(a)(C). Specific findings on each applicable criterion are set forth in Section III(B) of this Decision and Recommendation.

c. OAR 660-033-0020(1)(b) Findings and Conclusions

The Hearings Officer finds there is no evidence in the record that the subject property is adjacent to or intermingled with lands in capability classes I-VI within a farm unit. Therefore, the Hearings Officer finds that the subject property does not constitute “agricultural land” under OAR 660-033-0020(1)(b). Specific findings on each applicable criterion are set forth in Section III(B) of this Decision and Recommendation.

d. OAR 660-033-0020(1)(a)(B) Findings and Conclusions

The Hearings Officer reviews evidence in the record to determine whether the subject property constitutes “agricultural land” under OAR 660-033-0020(1)(a)(B) as “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.” Competing evidence was presented by the Applicant, the Department of Land Conservation and Development, Agriculture and Fish and Wildlife, and numerous commentators.

OAR 660-033-0020(1)(a)(B) refers to the statutory definition of “farm use” in ORS 215.203(2)(a) which informs the determination of whether a property is “*suitable* for farm use.” The Hearings Officer finds that the analysis must begin with a determination of whether the subject property can

be employed for the “*primary purpose of obtaining a profit in money* by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairying products or any other agricultural or horticultural use or animal husbandry or any combination thereof.” ORS 215.203(2)(a) (emphasis added).

The state agencies and other commentators left out the highlighted portion of the statutory language. “Farm use” is not whether a person can engage in any type of agricultural or horticultural use or animal husbandry on a particular parcel of property. It is informed by whether such use can be made for the primary purpose of obtaining a profit in money. Therefore, the Hearings Officer rejects the argument that the subject property is “capable of any number of activities included in the definition of farm use,” because “farm use” as defined by the Oregon Legislature “*means the current employment of land for the primary purpose of obtaining a profit in money.*” ORS 215.203(2)(a); *see also* Goal 3. This is a critical omission by the state agencies and other commentators in their submissions.

The state agencies repeatedly assert that the barriers to farming the subject property set forth by the Applicant could be alleviated by combining farm operations with other owned and/or leased land, whether adjacent to the subject property or not. The Hearings Officer finds that the definition of “farm use” in ORS 215.203(2)(a) refers to “*land,*” - not “lands,” - and does not include any reference to “combination” or requirement to “combine” with other agricultural operations. Therefore, if the subject property, in and of itself cannot be engaged in farm use for the primary purpose of obtaining a profit in money, it does not constitute agricultural land. There is no requirement in ORS 215.203(2)(a) or OAR Chapter 660-033 that a certain property must “combine” its operations with other properties in order to be employed for the primary purpose of obtaining a profit in money and thus, engaged in farm use.

What the statutory definition of “farm use” means is that, merely because a parcel of property is zoned EFU and *some* type of agricultural activity could take place on it, or whether the property owner could join forces with another agricultural operations, does not mean that a property owner is forced to engage in agricultural activity if the property owner cannot use its own property for farming to obtain a profit in money. This is so, whether the barrier to obtaining a profit in money is due to soil fertility, suitability for grazing, climactic conditions, existing and future irrigation rights, existing land use patterns, technology and energy inputs required and accepted farming practices, any or all of these factors.

The Applicant correctly cited controlling law on page 5 of its final legal argument:

Oregon courts have consistently addressed profitability as an element of the definition of “agricultural land.” In Wetherell v. Douglas County, 342 Or 666 (2007), the Oregon Supreme Court held that profitability is a “profit in money” rather than gross income. In Wetherell, the Court invalidated a rule that precluded a local government from analyzing profitability in money as part of this consideration. Id. at 683. As may be helpful here, the Court stated:

“We further conclude that the meaning of profitability,” as used in OAR 660-033-0030(5), essentially mirrors that of “profit.” For the reasons described above, that rule’s prohibition of any consideration of “profitability” in agricultural land use determination conflicts with the definition of “farm use” in ORS 215.203(2)(a) and Goal 3, which permit such consideration. OAR 660-033-0030(5) is therefore invalid, because it prohibits consideration of “profitability.” The factfinder may consider “profitability” which includes consideration of the monetary benefits or advantages that are or may be associated from the farm use of the property and the costs or expenses associated with those benefits, to the extent such consideration is consistent with the remainder of the definition of “agricultural land” in Goal 3.

*Finally, the prohibition in OAR 660-033-0030(5) of the consideration of “gross farm income” in determining whether a particular parcel of land is suitable for farm use also is invalid. As discussed above, “profit” is the excess or the net of the returns or receipts over the costs or expenses associated with the activity that produced the returns. To determine whether there is or can be a “profit in money” from the “current employment of [the] land *** by raising, harvesting and selling crops[.]” a factfinder can consider the gross income that is, or could be generated from the land in question, in addition to other considerations that relate to “profit” or are relevant under ORS 215.203(a) and Goal 3.*

We therefore hold that, because Goal 3 provides that “farm use” is defined by ORS 215.203, which includes a definition of “farm use” as “the current employment of land for the primary purpose of obtaining a profit in money[.]” LCDC may not preclude a local government making a land use decision from considering “profitability” or “gross farm income” in determining whether land is “agricultural land” because it is “suitable for farm use” under Goal 3. Because OAR 660-033-0030(5) precludes such consideration, it is invalid. Emphasis added. Id. at 681-683.

Substantial evidence in the record supports a determination that each of the listed factors in OAR 660-033-020(1)(a)(B) preclude “farm use” on the subject property because no reasonable farmer would expect to make a profit in money by engaging in agricultural activities on the land. as detailed in the findings on individual criteria below.

Soil Fertility

The lack of soil fertility is not in debate. The Applicant’s soils study determined that the soils “are predominately shallow with sandy textures (low clay content) and low organic matter content. These conditions result in a low Cation Exchange Capacity (CEC) that limits the ability of these soils to retain nutrients. Fertilizer must be applied to achieve optimum yields. Proper management requires fertilizers be applied in small doses on a frequent basis. The revenue from most locally adapted crops will not cover the costs of inputs and management.” Applicant’s final legal argument, Attachment C, p. 7. Moreover, the evidence shows that the shallow nature of the soils differs from those present at the Redside Restoration property, given that typical wine grapes

require a “minimum of 2 feet to 3 feet of soil depth” to be successful (Exhibit 106). On the subject property, the common depth of soils in the 135 test holes made by Mr. Rabe was merely 14 inches.

While several commentators argued that soil fertility is not always necessary for commercial agricultural operations because farm equipment could be stored on the property, the Hearings Officer agrees with the Applicant that the subject property’s resource capability is the proper determination. The Applicant is not required to engage in joint management or use with other lands that do constitute productive farm land. Moreover, storage and maintenance of equipment is not, in and of itself, a farm use unless such equipment is for the production of crops or a farm use on the subject property. Therefore, the Hearings Officer rejects the arguments of the state agencies and COLW that certain uses of the subject property could be made that are not dependent on soil type because none of the suggested uses constitute “farm use,” without any associated cultivation of crops or livestock. The Applicant has also produced substantial, persuasive evidence that the property cannot be used for a profit in money for a feedlot considering the limited gross farm income from cattle grazing, the lack of irrigation water, limited forage and other factors including the generation of biological waste.

Suitability for Grazing

The lack of suitability for grazing is also established by substantial evidence in the record. Although the state agencies letter agreed with the Applicant’s analysis that a maximum of 15 cow/calf pairs could be supported in a grazing operation, it suggested that an additional up to 15 pairs could be sustained in rotation or if the land was left bare for months at a time. There is no evidence in the record to rebut the Applicant’s conclusion that it could not make a profit in money from grazing operations on the property, such that grazing would not constitute “farm use” under the statutory definition. As shown in Exhibit 107 p. 2, “the gross revenue potential for weight gain associated with the estimated forage available on the 710 acres would range from \$7,209 per year in an unfavorable (dry) year to 414,058 in a favorable (wet) year, or about \$10,000 in an average year. As documented in detail by others, the cost of production and management would exceed the potential revenue.”

Evidence presented by Billy and Elizabeth Buchanan regarding suitability for grazing is distinguishable and therefore not relevant. The Buchanan property is mapped with productive, high-value soils, unlike the Applicant’s property. It also has a groundwater irrigation right and may irrigate up to 14.6 acres of their property. Nonetheless, as the Applicant noted, there is no evidence in the record that the Buchanans make a profit in money by allegedly grazing cattle on their property. In fact, the evidence does not support a finding that the Buchanans’ cattle even graze on dry-land. As shown on their company website, Keystone Cattle claims its cattle are “grass fed & grass finished.”

Climactic Conditions

There is little debate that climactic conditions contribute to the inability to engage in “farm use” for the purpose of making a profit in money. Even the state agencies admit that local climactic conditions “are not ideal for commercial agriculture.” Pointing to other properties to show that climactic conditions should not preclude “farm use,” again does not take into consideration

whether or not agricultural activities can be engaged in for the purpose of making a profit in money. The limited precipitation, the plateau on which the property sits, plus the fact that the property lacks irrigation water rights are all unfavorable to a determination the property could be used for farming to make a profit in money.

Existing and Future Availability of Water for Farm Irrigation Purposes

Regarding existing and future availability for water for farm irrigation purposes, the state agencies merely state that “we do not believe that water for irrigation purposes is necessary to conduct many of the activities included in the definition of ‘farm use.’” Again, this does not take into consideration whether any of such activities could be utilized for the primary purpose of making a profit in money on the property. There is no evidence that the subject property could be used for any of the listed activities in ORS 215.203(2)(a) in a profitable manner, particularly given the lack of irrigation water. The Applicant has presented substantial evidence of the prohibitive costs and other hurdles that preclude bringing irrigation to the subject property (E.g. Exs. 49, 87, 88, 2, 3 and 76). When such costs are factored in, no reasonable farmer would expect to be able to obtain farm irrigation water and still obtain a profit in money from agricultural uses on the property.

Existing Land Use Patterns

The Hearings Officer finds the Applicant has established that existing land use patterns are also a factor in determining the subject property is not “agricultural land” under OAR 660-033-020(1)(a)(B). The area is characterized by rural uses; approval of the requested plan map amendment and rezone will not change the use of the property to urban. There are various non-farm uses in the area, including a number of non-farm dwellings constructed or approved. The surrounding area has substantial areas of land zoned RR-10 and MUA-10. The Hearings Officer finds that this determination does not ask whether the proposal is “consistent with existing land use pattern,” but instead asks whether, considering the existing land use pattern, the property is agricultural land. Given the property’s location on the top of a plateau, any uses in conjunction with surrounding lands are impracticable due to the substantial physical barrier to cross-property use.

Technological and Energy Inputs Required

Technological and energy inputs required for agricultural use of the subject property also factor into the fact the property is not suitable for “farm use,” because it cannot be so employed for “*primary purpose of obtaining a profit in money.*” Suggested uses by the state agencies and other commentators do not address the profitability component of the definition of “farm use,” and do not rebut substantial evidence in the record that shows the subject property cannot be used for agricultural purposes for the primary purpose of obtaining a profit in money. This is due to the costs associated with trucking in water, fencing requirements, livestock transportation, winter hay, fertilizer, attempting to obtain irrigation water rights, labor costs, and energy/power requirements to pump enough groundwater to support agricultural use.

The Hearings Officer also notes that, as discussed above, certain uses, such as storing equipment or an indoor riding arena are not, in and of themselves “farm use,” as confirmed by LUBA in

Oregon Natural Desert Association v. Harney County, 42 Or LUBA 149 (2002). The state agencies and other commentators agree that the cost of technology and energy inputs required for agricultural use on the subject property can be daunting. No one presented any evidence to rebut the Applicant’s evidence that such costs prohibit the ability to make a profit in money from farming the subject property (See, e.g. Exhibits 35 and 91).

Accepted Farm Practices

The Applicant submitted evidence regarding accepted farming practices in Deschutes County, published by the Oregon State University Extension Service (Exhibit 8). The definition of “accepted farm practice,” like that of “farm use,” turns on whether or not it is occurring for the primary purpose of obtaining a profit. The *Wetherell* court relied on ORS 308A.056 to define “accepted farm practice” as “a mode of operation that is common to farms of a similar nature, necessary for the operation of these similar farms to obtain a profit in money and customarily utilized in conjunction with farm use.” *Wetherell, supra*, 52 Or LUBA at 681. Numerous farmers and ranchers, including Rand Campbell, Brian Rabe, James Stirewalt, Russell Mattis, Matt Cyrus, Fran Robertson and Marc Thalacker, testified and presented evidence that the subject property is not suitable for farm use and that operations required to turn a profit are unrealistic. This evidence is based on their own analysis of the subject property and understandings and experience as to what would be required to commence a farm use for profit on the property. Moreover, LUBA determined in the *Aceti I* case that it is not an accepted farming practice in Central Oregon to irrigate and cultivate Class VII and VIII soils.

In summary, the Applicant is not required to show that no agricultural use could ever be made on the property; only that no reasonable farmer would attempt to engage in “farm use,” which is for the primary purpose of obtaining a profit. As set forth in additional detail in the findings on specific criteria below, the Hearings Officer finds that substantial evidence in the record supports a determination that the subject property is not suited to commercial farming because no reasonable farmer would believe he or she could make a profit in money therefrom, considering all of the factors listed in OAR 660-033-020(1)(a)(B).

The Hearings Officer finds that the Applicant has met its burden of showing the subject property cannot be used for agricultural purposes for the primary purpose of obtaining a profit in money and such is not “agricultural land” under OAR 660-033-020(1)(a)(B). There are various barriers to the Applicant, or any other person, that preclude using the subject property to engage in farming activities for a profit. For this reason, and as set forth in more detail below, no exception to Statewide Planning Goal 3 is required.

B. HEARINGS OFFICER’S FINDINGS AND CONCLUSIONS REGARDING APPLICABLE CRITERIA

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 plan amendment and filed the applications for a plan amendment and zone change. The Applicant has filed the required 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. The Hearings Officer finds these criteria are met.

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 in its submitted burden of proof statement²¹:

The Plan’s introductory statement explains that land use must comply with the statewide planning system and sets out the legal framework set by State law. It summarizes the Statewide Planning Goals. It also explains the process the County used to adopt the current comprehensive plan. This application is consistent with this introductory statement because the requested change has been shown to be consistent with State law and County plan provisions and zoning code that implement the Statewide Planning Goals.

The following provisions of Deschutes County’s amended comprehensive plan set out goals or text that may be relevant to the County’s review of this application. Other provisions of the plan do not apply.

The Applicant utilizes this analysis, as well as analyses provided in prior Hearings Officers’ decisions to determine and respond to only the Comprehensive Plan Goals and policies that apply, which are listed in the Comprehensive Plan section of this Decision and Recommendation. The Hearings Officer’s findings addressing compliance with applicable Comprehensive Plan Goals and policies are set forth in the Comprehensive Plan section of this Decision and Recommendation below.

- B. That the change in classification for the subject property is consistent with the***

²¹ As noted above, the Applicant filed a revised burden of proof statement with its final legal argument on May 11, 2022. Both the original and revised burden of proof statements are part of the record.

purpose and intent of the proposed zone classification.

FINDING: The Applicant provided the following response in its burden of proof statement:

The approval of this application is consistent with the purpose of the RR-10 zoning district which stated in DCC 18.60.010 as follows:

“The purposes of the Rural Residential Zone are to provide rural residential living environments; to provide standards for rural land use and development consistent with desired rural character and the capability of the land and natural resources; to manage the extension of public services; to provide for public review of nonresidential uses; and to balance the public's interest in the management of community growth with the protection of individual property rights through review procedures and standards.”

The approval of the application will allow the property to provide rural residential living environments in a rural location that is not suitable for farm use and where impacts of the new use will be minimized by topography and adjoining public lands. The zoning district and subdivision ordinance provide standards that will control land use to be consistent with the desired rural character and capability of the land and natural resources. The zoning district provides for public reviews of nonresidential uses. The approval of this application will allow the property owner to proceed with a low level of development on land that will not support farm use.”

The Hearings Officer finds that the proposed change in classification will allow for potential future development of rural residential living. No application for development is before the County at this time; future application(s) must be consistent with the standards for rural land use and development considering desired rural character, the capability of the land and natural resources and managed extension of public services. Future development will be subject to public review which will require, among other things, a balancing of the public's interest in the management of community growth with the protection of individual property rights.

The Hearings Officer finds the Applicant has demonstrated the proposed change in classification is consistent with the purpose and intent of the RR-10 Zone.

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: There are no plans to develop the properties in their current state; the above criterion asks if the proposed zone change will *presently* serve public health, safety, and welfare. The Applicant provided the following response in the submitted burden of proof statement:

Necessary public facilities and services are available to serve the subject property. A will-serve letter from Central Oregon Electric Cooperative, Exhibit G shows that electric power

is available to serve the property. Well logs, Exhibits H through K, show that wells are a viable source of water for rural residential development.

The existing road network is adequate to serve the use. This has been confirmed by the transportation system impact review conducted by Christopher M. Clemow, PE, PTOE of Clemow Associates LLC, Exhibit S of this application. The property receives police services from the Deschutes County Sheriff. The property is in the Redmond Fire and Rescue rural fire protection district.

The closest neighboring properties which contain residential uses are located on the north side of NW Coyner Avenue, on the south end of the subject property boundary, and nearby RR-10 residential lots along NW 93rd Street. These properties have water service primarily from wells, on-site sewage disposal systems and electrical service, cellular telephone services, etc.

The Applicant provided a will-serve letter from Central Electric Cooperative indicating that it is willing and able to serve the specified project location. The Applicant also included well logs from nearby properties with the application submittal demonstrating water availability in the general area.

Several commentators raised concerns regarding the general availability of groundwater in the area. The Applicant stated that rural residential development would use less water than water required for farming the subject property. There is no evidence that use of groundwater for farm use would be greater than use of groundwater for rural residential development. The Hearings Officer notes that there are no irrigation rights on the subject property, which would be required for most farm operations. The Hearings Officer finds that subjective opinions and anecdotal testimony regarding availability of groundwater for domestic use is not substantial evidence to rebut the Applicant's well log evidence in the record.

Any new water use, unless exempt, must be appropriately permitted through the Oregon Water Resources Department (OWRD). At this time, no development is proposed and no approval for new water use has been requested. The Hearings Officer finds that water availability concerns of the state agencies and other commentators will be reviewed at the time of development applications. Without adequate water availability, future residential development may be limited or denied

The Hearings Officer finds there are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare as the result of reclassifying the zoning of the subject property to RR10. Prior to development of the properties, the Applicant will be required to comply with the applicable requirements of the Deschutes County Code, including land use permitting, building permits, and sewage disposal permit processes, as well as to obtain a permit from the OWRD, if necessary, for a new water use unless exempt. The Hearings Officer finds that, through these development review processes, assurance of adequate public services and facilities will be verified. This criterion is met.

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

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The RR-10 zoning is consistent with the specific goals and policies in the comprehensive plan as shown by the discussion of plan policies above. The existing EFU zoning and comprehensive plan already support development of the subject property with a number of nonfarm dwellings because the property is generally unsuitable for farm or forest uses. The property is comprised of nine lots of record that could qualify for development with up to approximately 24 dwellings including an existing nonfarm dwelling and two approved nonfarm dwellings. The RR-10 zoning will allow more dwellings to be built on the subject property but the impacts imposed will be the same as the minimal impacts imposed by a nonfarm dwelling.

The only adjoining land in farm use is Volwood Farms. It is located to the west of the subject property. Most of this farm property is located far below the subject property. This geographical separation will make it unlikely that the rezone will impose new or different impacts on Volwood Farms than imposed on it by existing farm and nonfarm dwellings. There are other farms in the surrounding area but all, like the Volwood Farms property, are functionally separated from the subject property by the steep hillside and rocky ridges of the subject property. Farm uses in the greater area, also, are occurring on properties that have been developed with residences. These properties are, however, separated from the subject property by a sufficient distance that RR-10 development will not adversely impact area farm uses or lands.

In addition to these comments, the Applicant provided specific findings for each relevant Comprehensive Plan goal and policy, which are addressed below. The Hearings Officer finds the impacts of reclassification of the subject property to RR10 on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan for the reasons set forth in the Comprehensive Plan section of this Decision and Recommendation. This criterion is met.

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 proposes to rezone the properties from EFU to RR-10 and re-designate the properties from Agriculture to Rural Residential Exception Area. The Applicant provided the following response in the submitted burden of proof statement:

There has been a change in circumstances since the subject property was last zoned and a mistake in designating the subject property EFU/Agriculture when soils did not merit a designation and protection as "Agricultural Land." This zone was applied to the property in 1979 and 1980 when Deschutes County adopted zones, a zoning ordinance and comprehensive plan that complied with the Statewide Goals.

In 1979 and 1980, undeveloped rural lands that contained poor soils but undeveloped were zoned EFU without regard to the specific soil characteristics of the property. Land owners were required to apply for a zone change to move their unproductive EFU properties out of the EFU zone. The County's zoning code allowed these owners a one-year window to complete the task. This approach recognized that some rural properties were mistakenly classified EFU because their soils and other conditions did not merit inclusion of the property in the EFU zone.

Some Deschutes County property owners of lands received approval to rezone properties but many eligible parcels were not rezoned during this short window of time. The soils on the subject property are similarly poor and also merit RR-10 Zoning to correct the "broad brush" mapping done in 1979 and 1980. Also, since 1979 and 1980, there is a change of circumstances related to this issue. The County's Comprehensive Plan has been amended to reinstate the right of individual property owners to seek this type of zone change and plan amendment.

Additionally, the population of Deschutes County has, according to the US Census, increased by 336% between 1980 when the County's last zoned this property and 2021 from 62,142 persons to 209,266 persons. The supply of rural residential dwelling lots has been diminishing in the same time period.

*Since the property was zoned, it has become evident that farm uses are not viable on the property or on other area properties. The economics of farming have worsened over the decades making it difficult for most Deschutes County property owners to make money farming good ground and impossible to earn a profit from attempting to farm Class 7 and 8 farm soils. In 2017, according to Table 4 of the 2017 US Census of Agriculture, **Exhibit T**, only 16.03% of farm operators achieved a net profit from farming (238 of 1484 farm operations). In 2012, the percentage was 16.45% (211 of 1283 farm operations). In 2007, according to the 2012 US Census of Agriculture, that figure was 17% (239 of 1405 farm operations). **Exhibit U**. The vast majority of farms in Deschutes County have soils that are superior to those found on the subject property. As farming on those soils is typically not profitable, it is reasonable to conclude that no reasonable farmer would purchase the subject property for the purpose of attempting to earn a profit in money from agricultural use of the land.*

For the reasons set forth above in the Hearings Officer's Preliminary Findings and Conclusions, incorporated herein by this reference, the Hearings Officer finds a mistake was made by Deschutes County in zoning the subject property for Exclusive Farm Use given the predominately poor (Class VII and VIII) soils on the property and the evidence that the property owner cannot engage in "farm use," with the primary purpose of making a profit in money on the subject property. The Hearings Officer further finds that there has been a change in circumstances from the time the property was originally zoned EFU due to a rapid increase in population and a dwindling supply of rural residential lots to accommodate the added residents in the area. The Hearings Officer finds this criterion is met.

Deschutes County Comprehensive Plan

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 in the submitted burden of proof statement:

*The applicant’s soils study, **Exhibit F**, and the findings in this burden of proof demonstrate that the subject property is not agricultural land. This goal, therefore, does not apply. The vast majority of the subject property is comprised of Class 7 and 8 nonagricultural soils and the property has no known history of agricultural use. As noted in the Eastside Bend decision, **Exhibit L**, “these [Class 7 and 8] soils [according to soils scientist and soils classifier Roger Borine] have severe limitations for farm use as well as poor soil fertility, shallow and very shallow soils, surface stoniness, low available water capacity, and limited availability of livestock forage.” According to Agricultural Handbook No. 210 published by the Soil Conservation Service of the USDA, soils in Class 7 “have very severe limitations that make them unsuited to cultivation and that restrict their use largely to grazing, woodland, or wildlife.” Class VIII soils “have limitations that preclude their use for commercial plant production and restrict their use to recreation, wildlife, or water supply or to esthetic purposes.”*

As set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds substantial evidence in the record supports a finding that the subject property is not “agricultural land,” and is not land that could be used in conjunction with adjacent property for agricultural uses. There is no evidence that the requested plan amendment and rezone will contribute to loss of agricultural land in the surrounding vicinity. I find that the agricultural industry will not be negatively impacted by re-designation and rezoning of the subject property. Therefore, the Hearings Officer finds the applications are consistent with Section 2.2, Goal 1, “preserve and maintain agricultural lands and the agricultural industry.”

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 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 RR10. The Hearings Officer finds this policy is inapplicable to the subject applications.

Policy 2.2.3 Allow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, 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 properties from Agricultural to Rural Residential Exception Area. 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 in the submitted burden of proof statement:

*This plan policy has been updated specifically to allow non-resource land plan and zone change map amendments on land zoned EFU. The applicant is seeking a comprehensive plan amendment from Agriculture to RREA and a zone change from EFU-TE to RR-10 for non-resource land. This is essentially the same change approved by Deschutes County in PA-11-1/ZC-11-2 on land owned by the State of Oregon (DSL). In findings attached as **Exhibit N**, Deschutes County determined that State law as interpreted in *Wetherell v. Douglas County*, 52 Or LUBA 677 (2006) allows this type of amendment. LUBA said, in *Wetherell* at pp. 678-679:*

*“As we explained in *DLCD v. Klamath County*, 16 Or LUBA 817, 820 (1988), there are two ways a county can justify a decision to allow nonresource use of land previously designated and zoned for farm use or forest uses. One is to take an exception to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). The other is to adopt findings which demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. When a county pursues the latter option, it must demonstrate that despite the prior resource plan and zoning designation, neither Goal 3 or Goal 4 applies to the property. *Caine v. Tillamook County*, 25 Or LUBA 209, 218 (1993); *DLCD v. Josephine County*, 18 Or LUBA 798, 802 (1990).”*

*LUBA’s decision in *Wetherell* was appealed to the Oregon Court of Appeals and the Oregon Supreme Court but neither court disturbed LUBA’s ruling on this point. In fact, the Oregon Supreme Court used this case as an opportunity to change 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). In that case, the Supreme Court stated that:*

*“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*, 343 Or at 677.*

*The *Wetherell* court 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.” *Wetherell*, 342 Or at 680. In this case, the applicant has shown that the*

subject property is primarily composed of Class VII and VIII nonagricultural soils making farm-related endeavors, including livestock grazing, unprofitable. The property is not currently employed in any type of farm use and exhibits no evidence of such use. It is known that the property has not been employed in farm use for the past 20 years. Accordingly, this application complies with Policy 2.2.3.

The facts presented by the Applicant in the burden of proof for the subject application are similar to those in the *Wetherell* decisions and in the aforementioned Deschutes County plan amendment and zone change applications. For the reasons set forth above in the Preliminary Findings and Conclusions, incorporated herein by this reference, the Hearings Officer finds the subject property is not agricultural land and does not require an exception to Statewide Planning Goal 3 under state law. The applications are consistent with this Policy.

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: 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 adheres to the County’s previous determinations in plan amendment and zone change applications and finds the proposal is consistent with this policy.

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: This plan policy requires the County to identify and retain agricultural lands that are accurately designated. Substantial evidence in the record supports a finding that the subject property was not accurately designated as agricultural land as detailed above in the Preliminary Findings and Conclusions, incorporated herein by this reference. Further discussion on the soil analysis provided by the Applicant is detailed under the OAR Division 33 criteria below. The Hearings Officer finds the applications are consistent with this policy.

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: The Applicant is not proposing a specific development application at this time. Therefore, the Applicant is not required to demonstrate the water impacts associated with future development. Rather, the Applicant will be required to address this criterion during development of the subject property, which would be reviewed under any required land use process for the site (e.g. conditional use permit, tentative plat). The Hearings Officer finds this policy does not apply to the subject applications.

Section 2.7, Open Spaces, Scenic Views and Sites

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

Policy 2.7.3 Support efforts to identify and protect significant open spaces and visually important areas including those that provide a visual separation between communities such as the open spaces of Bend and Redmond or lands that are visually prominent.

Policy 2.7.5 Encourage new development to be sensitive to scenic views and sites.

FINDING: 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 Hearings Officer finds that no LM combining zone applies to the subject property, nor is the subject property identified as a Goal 5 resource. Furthermore, no new development is proposed under the present application.

The state agencies and several commentators suggested that the subject property should be left “as is” because it is allegedly being used by wildlife as a “wildlife sanctuary.” There is no applicable statute or regulation that requires the property to be subject to wildlife protections given that there is no LM combining zone applicable to the subject property and it is not designated as a Goal 5 resource. Nor is there any state law that prohibits redesignation and rezoning of a property in and of itself on this basis. There is nothing in OAR 660-033-0030, “Identifying Agricultural Land,” that makes any reference to wildlife or wildlife use.

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

Chapter 3, Rural Growth

Section 3.2, Rural Development

Growth Potential

As of 2010, the strong population growth of the last decade in Deschutes County was thought to have leveled off due to the economic recession. Besides flatter growth patterns, changes to State regulations opened up additional opportunities for new rural development. The following list identifies general categories for creating new residential lots, all of which are subject to specific State regulations.

- ***2009 legislation permits a new analysis of agricultural designated lands***
- ***Exceptions can be granted from the Statewide Planning Goals***
- ***Some farm lands with poor soils that are adjacent to rural residential uses can be rezoned as rural residential***

FINDING: This section of the Comprehensive Plan does not contain Goals or Policies, but does provide the guidance above. In response to this section, the Applicant provided the following response in the burden of proof:

This part of the comprehensive plan is not a relevant approval criterion for a plan amendment and zone change application. Instead, it is the County's assessment of the amount of population growth might occur on rural residential lands in the future based on its understanding of the types of changes allowed by law. Comprehensive Plan Policy 2.2.3 specifically authorizes rezoning and comprehensive plan map amendments for any property zoned EFU and is the code section that defines the scope of allowed zone changes.

This section makes it clear, however, that EFU-zoned land with poor soils adjacent to rural residential development is expected to be rezoned for rural residential development during the planning period. The subject property has extremely poor soils that do not qualify as agricultural land that must be protected by Goal 3. The subject property also adjoins EFU lands developed with rural residential uses (nonfarm dwellings) – Tax Lots 100, 200, 300, Map 14-12-28D and Tax Lot 301, Map 14-12-27. It is also located in close proximity to a large area of RR-10 land to the north and northeast that includes the large Lower Bridge Estates subdivision.

The RR10 Zone is a rural residential zone and as discussed in the Findings of Fact above, and there are several nearby properties to the north and northeast that are zoned RR10 as well as nearby EFU zoned property developed with residential uses and others that have been approved for development of nonfarm dwellings. This policy references the soil quality, which is discussed above.

The Hearings Officer finds that the County's Comprehensive Plan provisions anticipate the need for additional rural residential lots as the region continues to grow. This includes providing a mechanism to rezone farm lands with poor soils to a rural residential zoning designation. The Hearings Officer notes this policy references the soil quality, which is discussed in detail above. The Hearings Officer finds that, the rezone application does not include the creation of new residential lots. However, read in conjunction with Comprehensive Plan Policy 2.2.3, which specifically authorizes rezoning and comprehensive plan map amendments for any property zoned EFU that is comprised of poor soils and are in the vicinity of other rural residential uses, the Hearings Officer finds that rezoning the subject property to RR-10 is consistent with this policy. The Applicant has demonstrated the Subject Property is comprised of poor soils, cannot be used for "farm use," as defined in ORS 215.203 and that is in the vicinity of other rural residential uses.

Section 3.3, Rural Housing

Rural Residential Exception Areas

In Deschutes County most rural lands are designated for farms, forests or other resources and protected as described in the Resource Management chapter of this Plan. The majority of the land not recognized as resource lands or Unincorporated Community

is designated Rural Residential Exception Area. The County had to follow a process under Statewide Goal 2 to explain why these lands did not warrant farm or forest zoning. The major determinant was that many of these lands were platted for residential use before Statewide Planning was adopted.

In 1979 the County assessed that there were over 17,000 undeveloped Rural Residential Exception Area parcels, enough to meet anticipated demand for new rural housing. As of 2010 any new Rural Residential Exception Areas need to be justified through initiating a nonresource plan amendment and zone change by demonstrating the property does not meet the definition of agricultural or forest land, or taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR.

FINDING: The Applicant provided the following response to this provision in the burden of proof:

The quoted language is a part of the background text of the County's comprehensive plan. It is not a plan policy or directive and it is not an approval standard for this application. It does, however, recognize the fact that a Rural Residential Exception Area designation is an appropriate plan designation to apply to nonresource lands.

As LUBA and the Oregon Supreme Court recognized in the Wetherell decision, there are two ways a county can justify a decision to allow non-resource use of land previously designated and zoned for farm or forest uses. The first is to take an exception to Goal 3 and Goal 4 and the other is to adopt findings that demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. Here, the applicant is pursuing the latter approach. The quoted plan text addressed the former. If the quoted plan text were read to require an exception to Goal 3 or 4 where the underlying property does not qualify as either Goal 3 or Goal 4 resource land, such a reading would be in conflict with the rule set forth in Wetherell and Policy 2.2.3 of the Comprehensive Plan.

The Deschutes County Board of Commissioners has interpreted its RREA plan designation to be the proper "catchall" designation for non-resource land in its approval of the Daniels Group plan amendment and zone change by adopting the following finding by Hearings Officer Ken Helm:

"I find that Deschutes County has interpreted the RREA plan designation as the property "catchall" designation for non-resource land."

As a result, the RREA plan designation is the appropriate plan designation for the subject property.

The Hearings Officer adheres to the past Deschutes County Hearings Officer interpretations and finds that the above language is not a policy and does not require an exception to Statewide

Planning Goal 3. The Hearings Officer finds the proposed RREA plan designation is the appropriate plan designation to apply to the subject property as a “catch-all” rural designation for the subject property, which is not agricultural land.

Section 3.7, Transportation

***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 4.4 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: This policy applies to the County and advises it to consider the roadway function, classification and capacity as criteria for 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.

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 in response to Goal 4:

*The existing site and surrounding areas do not include any lands that are suited for forestry operations. Goal 4 says that forest lands “are those lands acknowledged as forest lands as of the date of adoption of this goal amendment.” The subject property does not include lands acknowledged as forest lands as of the date of adoption of Goal 4. Goal 4 also says that “where**a plan amendment involving forest lands is proposed, forest land shall*

include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources.” This plan amendment does not involved any forest land. The subject property does not contain any merchantable timber and is not located in a forested part of Deschutes County.

The subject property is not zoned for forest lands, nor are any of the properties within a seven-mile radius. The properties do not contain merchantable tree species and there is no evidence in the record that the properties have been employed for forestry uses historically. The NRCS has determined that the soil mapping units on the subject property are not suitable for wood crops and, therefore, has excluded them from Table 8 of the NRCS Soil Survey of the Upper Deschutes River Area. The Hearings Officer finds this satisfies OAR 660-06-0005(7)(a) and OAR 660-06-0010(2). There are no wood production capabilities of the subject property.

For the foregoing reasons, the Hearings Officer finds the subject property does not qualify as forest land.

Division 33 - Agricultural Lands & Statewide Planning Goal 3 - Agricultural Lands;

OAR 660-015-0000(3)

To preserve and maintain agricultural lands.

Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural land use policy expressed in ORS 215.243 and 215.700.

FINDING: Goal 3 includes a definition of “Agricultural Land,” which is repeated in OAR 660-033-0020(1). The Hearings Officer has made Preliminary Findings and Conclusions set forth above, and incorporated herein by this reference, that the subject property does not constitute “agricultural land.”

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 Oregon²²;*

²² 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.

FINDING: The Applicant’s basis for not requesting an exception to Goal 3 is founded on the premise that the subject property does not meet the definitions of “Agricultural Land.” In support, the Applicant offered the following response as included in the burden of proof statement:

*Statewide Goal 3, above, ORS 215.211 and OAR 660-033-0030(5) allow the County to rely on the more detailed and accurate information provided by the **Exhibit F** soil study to determine whether land is agricultural land. ORS 215.211 give a property owner the right to rely on more detailed information than is provided by the NRCS Web Soil Survey of the NRCS to “assist the county to make a better determination of whether land qualifies as agricultural land.” The more detailed soils survey obtained by the applicant shows that approximately 71% of the subject property is composed of Class VII and VIII soils. As a result, it is clear that the tract is not predominantly composed of Class I-VI soils.*

The soil study provided by Mr. Rabe of Valley Science and Engineering (dated June 22, 2021) and the soil report addendum (dated January 13, 2022) support the Applicant’s representation of the data for the subject property. This data was not rebutted by any party.

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).

(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 founded on the proposal that the subject property are not defined as “Agricultural Land.” The Applicant provides the following analysis in the burden of proof.

This part of the definition of “Agricultural Land” requires the County to consider whether the Class VII and VIII soils found on the subject property are suitable for farm use despite their Class VII and VIII classification. The Oregon Supreme Court has determined that the term “farm use” as used in this rule and Goal 3 means the current employment of land for the primary purpose of obtaining a profit in money through specific farming-related endeavors. The costs of engaging in farm use are relevant to determining whether farm activities are profitable and this is a factor in determining whether land is agricultural land. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007).

The primary agricultural use conducted on properties that lack irrigation water rights and have poor soils is grazing cattle. The extremely poor soils found on the property, however, make it a poor candidate for dryland grazing. The dry climate makes it difficult to produce adequate forage on the property to support a viable or potentially profitable grazing

operation or other agricultural use of the property. This issue is addressed in greater detail in the Exhibit F soils study. Photographs of various parts of the subject property provide a visual depiction of the land in question and its characteristics:

[Please see the burden of proof for photos submitted by the applicant]

Given the high cost of irrigating and maintaining the property as pasture or cropland (high labor costs, labor-intensive, high cost of irrigation equipment and electricity, high cost of fertilizer, etc.), dry land grazing is the accepted farm use of poor soils in Deschutes County. This use can be conducted until the native vegetation is removed by grazing (see the discussion of the suitability of the property for grazing, below). The soils study includes an analysis of the level of cattle grazing that would be able to be conducted on the property, without overgrazing it. It finds that the entire 710 acres would support from 8 to 15 cow-calf pairs for a year based on proper management of the land for year-round grazing.

When assessing the potential income from dry land grazing, Deschutes County uses a formula and assumptions developed by the OSU Extension Service. This formula is used by the County to decide whether EFU-zoned land is generally unsuitable for farm use. It assumes that one acre will produce 900 pounds of forage per year.

- One AUM is the equivalent to the forage required for a 1000 lb. cow and calf to graze for 30 days (900 pounds of forage).*
- On good quality forage, an animal unit will gain 2 pounds per day.*
- Two animal units will eat as much in one month as one animal unit will eat in two months.*
- Forage production on dry land is not continuous. Once the forage is consumed, it typically will not grow back until the following spring.*
- An average market price for beef is \$1.15 per pound.*

Based upon these assumptions, the value of beef production on the entire subject property can be calculated using the following formula:

*30 days x 2#/day/acre = 60.0 lbs. Beef/acre
(1 acre per AUM)*

60.0 lbs. Beef/acre x 710 acres x \$1.15/lb. = \$48,990 per year of gross income

Thus, using the OSU/County formula, the total gross beef production potential for the subject property if it was comprised of more productive soils than found on the subject property would be approximately \$48,990 annually. This figure represents gross income and does not take into account real property taxes, fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production which would exceed income. Property taxes, alone, were \$15,706.62 for the eight tax lots that comprise the subject property in 2020. The payment of a modest wage of \$15.00 per hour to the rancher and/or employee for only one FTE would cost the ranch operation \$31,200 in

wages and approximately an additional \$7,800 to \$12,480 (1.25 to 1.4 of salary) for employment taxes paid by the employer and standard employee benefits. An expired internet job listing (at least two years old) for a farmer to farm the Volwood Farms property located to the west of the subject property offered wages of \$15 to \$25 an hour and medical insurance. **Exhibit V.** A wage of \$25 per hour provides an annual salary of \$52,000 and costs the farm approximately \$15,000 to \$20,800 in taxes and benefits.

A review of the seven considerations listed in the administrative rule, below, provided in the soils survey report, Exhibit F, and in the findings provided below explain why the poor-quality soils found on the subject property are not suitable for farm use:

Soil Fertility: Class 7 and 8 soils are not fertile soils. They are not suited for the production of farm crops. This fact has been recognized in numerous County land use cases, including the zone change and plan amendment applications being filed with this land use application. Farm use on these soils is limited to rangeland grazing at a level that does not qualify as “farm use.” No person would expect to make a profit by grazing livestock on the subject property.

Suitability for Grazing: The climate is cold and dry. The growing season is very short. The subject property is located between Redmond and Sisters. According to the OSU Extension Service the growing season for Redmond is only 80 to 90 days long. **Exhibit W.** The growing season for Sisters is shorter. The average annual precipitation for Redmond is only 8.8 inches. This means that the amount of forage available for dry land grazing is low and will be slow to regrow. This also means that a farmer has a short period of amount of time to irrigate pastures, if irrigation water rights can be secured. This makes it difficult for a farmer to raise sufficient income to offset the high costs of establishing, maintaining and operating an irrigation system and groundwater well. That cost also would include the cost of purchasing and retiring water rights from another area farm property to mitigate for the impacts of pumping groundwater – something that is cost-prohibitive for almost any farm operation. This is clearly the case for irrigating non-agricultural Class VII and VIII soils.

Existing and Future Availability of Water for Farm Irrigation Purposes: The subject property is not located in an irrigation district. It is too remote from any irrigation district in terms of distance and elevation (above) to be able to obtain irrigation water from a district for farming as shown by **Exhibit X.** In order to obtain water rights, the applicant would need to acquire a water right from Oregon Water Resources Department (OWRD). If such a right were able to be secured, the property owner would need to purchase and retire water rights from irrigated farm land in Central Oregon that is surely more productive than the subject property (71% Class VII and VIII soils). Such a transaction would run counter to the purpose of Goal 3 to maintain productive Agricultural Land in farm use. The cost of purchasing water rights, obtaining a groundwater permit and establishing an irrigation system are significant and would not be reasonably expected to result in farm income that would offset the cost incurred for the subject property.

Existing Land Use Patterns: *The applicant's analysis of existing land use patterns provided earlier in this burden of proof shows that the subject property is located primarily on a plateau above farm lands. The lands on the plateau are either undeveloped open space owned by the USA or RR-10 zoned subdivision lots developed with single-family homes. The addition of RR-10 zoned lots and homes rather than nonfarm dwellings is consistent with land use of other privately-owned property on the plateau. Below the plateau are public lands and a small number of farms and farm and nonfarm dwellings on or adjacent to existing farm operations. The addition of homes here would not impose significant new impacts on farm operations in the area.*

Technological and Energy Inputs Required: *Given its poor soils, this parcel would require technology and energy inputs over and above accepted farming practices. Excessive fertilization and soil amendments; very frequent irrigation, and marginal climatic conditions would restrict cropping alternatives. Pumping irrigation water requires energy inputs. The application of lime and fertilizer typically requires the use of farm machinery that consumes energy. The irrigation of the property requires the installation and operation of irrigation systems. All of these factors are why Class 7 and 8 soils are not considered suitable for use as cropland.*

Accepted Farming Practices: *As determined by the County in the Aceti case, farming lands comprised of soils that are predominately Class VII and VIII is not an accepted farm practice in Central Oregon. Dryland grazing, the farm use that can be conducted on the poorest soils in the County, typically occur on Class VI non-irrigated soils. Crops are typically grown on soils in soil class III and IV when irrigated that Class VI without irrigation.*

The Hearings Officer incorporates herein by this reference the Preliminary Findings and Conclusions above and finds that the subject property does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(B).

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

FINDING: The Applicant offered the following response in the burden of proof statement:

The subject property is not land necessary to permit farm practices to be undertaken on adjacent or nearby lands. The following facts are shown by the applicant's discussion of surrounding development in Section E of this application, above and by the additional information provided below.

West: *Properties to the west of the subject property are separated from the subject property by topography. The dramatic change in topography makes it infeasible to use the subject property for farm use in conjunction with these properties. Additionally, the subject property is not necessary to permit farm practices to be undertaken on adjacent or nearby lands to the west. Farm practices have been occurring on these properties for decades without any need to use the subject property*

to conduct farm practices on these properties.

EFU Properties to the West (South to North)

Tax Map, Lot and Size	Farm Use	Potential Farm Practices	Need Subject Property?
14-12-00, 300 1588.55 acres	Open space; public land	Dry land grazing	No, property accessible from Buckhorn Road
14-12-21, 200 & 100 372.71 acres Volwood Farms	Irrigated fields currently growing orchard grass, hay and alfalfa	Irrigation Growing/harvesting crops Fertilizing field Baling hay Herbicide use	No, Tax Lot 200 and 100 are below the level of a majority of subject property. They are comprised of good farm soils while the subject property is not. Separation due to elevation has prevented conflicts between existing nonfarm dwelling on subject property and this farming operation.
14-12-20, 200 146.37 acres	Irrigated field suitable for growing orchard grass, hay, and alfalfa	Irrigation Growing/harvesting crops Fertilizing field Baling hay Herbicide use	No, TL 200 is located west of Buckhorn Road and separated from subject property by Volwood Farms property. Property also separated from subject property by topography.

North: All of the land north of the subject property that might rely on the subject property for farm practices, other than the Volwood Farms property inventoried above and an open space tract of land owned by the USA, is zoned RR-10 and is not in farm use. Cattle grazing would be able to occur on the USA property at a very limited scale due to sparse vegetation without need for the subject property to conduct the activity.

East:

EFU Properties to East (North to South)

<i>Tax Map, Lot and Size</i>	<i>Farm Use</i>	<i>Potential Farm Practices</i>	<i>Need Subject Property?</i>
<i>14-12-22B, 700 80 acres</i>	<i>Open space public land</i>	<i>Livestock grazing</i>	<i>No, grazing can occur without reliance on subject property.</i>
<i>14-12-22C, 500 120 acres</i>	<i>Open space public land</i>	<i>Livestock grazing</i>	<i>No, grazing can occur without reliance on subject property.</i>
<i>14-12-27, 200 120 acres</i>	<i>Open space public land</i>	<i>Livestock grazing</i>	<i>No, grazing can occur without reliance on subject property.</i>
<i>14-12-27, 301 17.50 ac</i>	<i>None. Nonfarm parcel and dwelling</i>	<i>None</i>	<i>No, no farm use and property not suitable for farm use.</i>
<i>14-12-00, 300 62.58 acres</i>	<i>Irrigated cropland suitable for growing orchard grass, hay, and alfalfa</i>	<i>Irrigation Growing/harvesting crops Fertilizing field Baling hay Herbicide use</i>	<i>No, separated from subject property by Tax Lot 301 and elevation. Property created by partition that found that nonfarm dwelling would not interfere with farm use on Tax Lot 300 and other area farms.</i>
<i>14-12-14B, 200 80 acres</i>	<i>Approved for nonfarm dwelling</i>	<i>None</i>	<i>No</i>

South: *Most of the land to the south of the subject property is open space land owned by the USA and nonfarm dwelling parcels comprised of land determined by Deschutes County to be generally unsuitable for the production of farm crops, livestock and merchantable tree species.*

EFU Properties to South

Tax Map, Lot and Size	Farm Use	Potential Farm Practices	Need Subject Property?
14-12-280, 100 28.60 acres	None, nonfarm dwelling	None	No
14-12-280, 200 19.11 acres	None, nonfarm dwelling	None	No
14-12-280, 300 19.65 acres	None, nonfarm dwelling	None	No
14-12-20, 3200 1588.55 acres	Open space public land	Livestock grazing	No, grazing can occur without reliance on subject property. Accessible from Buckhorn Road and Coyner Avenue.
14-12-00, 1923 37.51 acres	Nonfarm dwelling. Small irrigated pasture for horses and small pivot suitable for growing hay, grass or alfalfa.	Irrigation Growing/harvesting crops Fertilizing field Baling hay Herbicide use	No, separated from subject property by other nonfarm properties.

The Applicant provided a detailed analysis of land uses and agricultural operations surrounding the subject property. The Hearings Officer finds that barriers for the subject property to engage with in farm use with these properties include: poor quality soils, lack of irrigation, proximity and significant topography changes.

The Hearings Officer incorporates herein by this reference the Preliminary Findings and Conclusions above and finds that the subject property does not constitute “Agricultural Lands” as defined in OAR 660-033-0020(1)(a)(C).

- (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 in the burden of proof statement:

The subject property is not a part of a farm unit. The property is a tract of land that is generally unsuitable for the production of farm crops and livestock and

merchantable trees species that is eligible to be developed with nonfarm dwellings. As a result, this rule does not apply to the County's review of this application.

The apparent purpose of this rule is to prevent the rezoning of portions of a farm property that function together as a farm. That is not the case here. In this case, the property in its entirety is not agricultural land and is not a farm unit because it is not engaged in farm use and has not been engaged in that use for 20 years or more. The applicant is not seeking to remove unproductive lands from an otherwise productive farm property.

Even if the subject property is considered to be a "farm unit" despite the fact it has never been farmed, Goal 3 applies a predominant soil test to determine if a property is "agricultural land." The predominant soils classification of the subject property is Class VII and VII which provides no basis to inventory the property as agricultural land unless the land is shown to be, in fact, productive farmland.

*All parts of the subject property were studied by the applicant's soils analysis, **Exhibit F**. The analysis shows that the predominant soil type found on the property is Class VII and VIII, nonagricultural land. Some Class VI soils are intermingled with the nonagricultural soil not vice versa. As a result, this rule does not require the Class VII and VIII soils to be classified agricultural land.*

The Hearings Officer incorporates by this reference the Preliminary Findings and Conclusions set forth above and finds that the subject property does not constitute “Agricultural Lands,” as defined in OAR 660-033-0020(1)(b).

- (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. The Hearings Officer finds this criterion is inapplicable.

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: The Applicant addressed the factors in OAR 660-033-0020(1) above. For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the subject property is not "Agricultural Lands," as defined in OAR 660-033-0030(1). The subject property is not necessary to permit farm practices undertaken on adjacent and nearby lands.

- (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.*

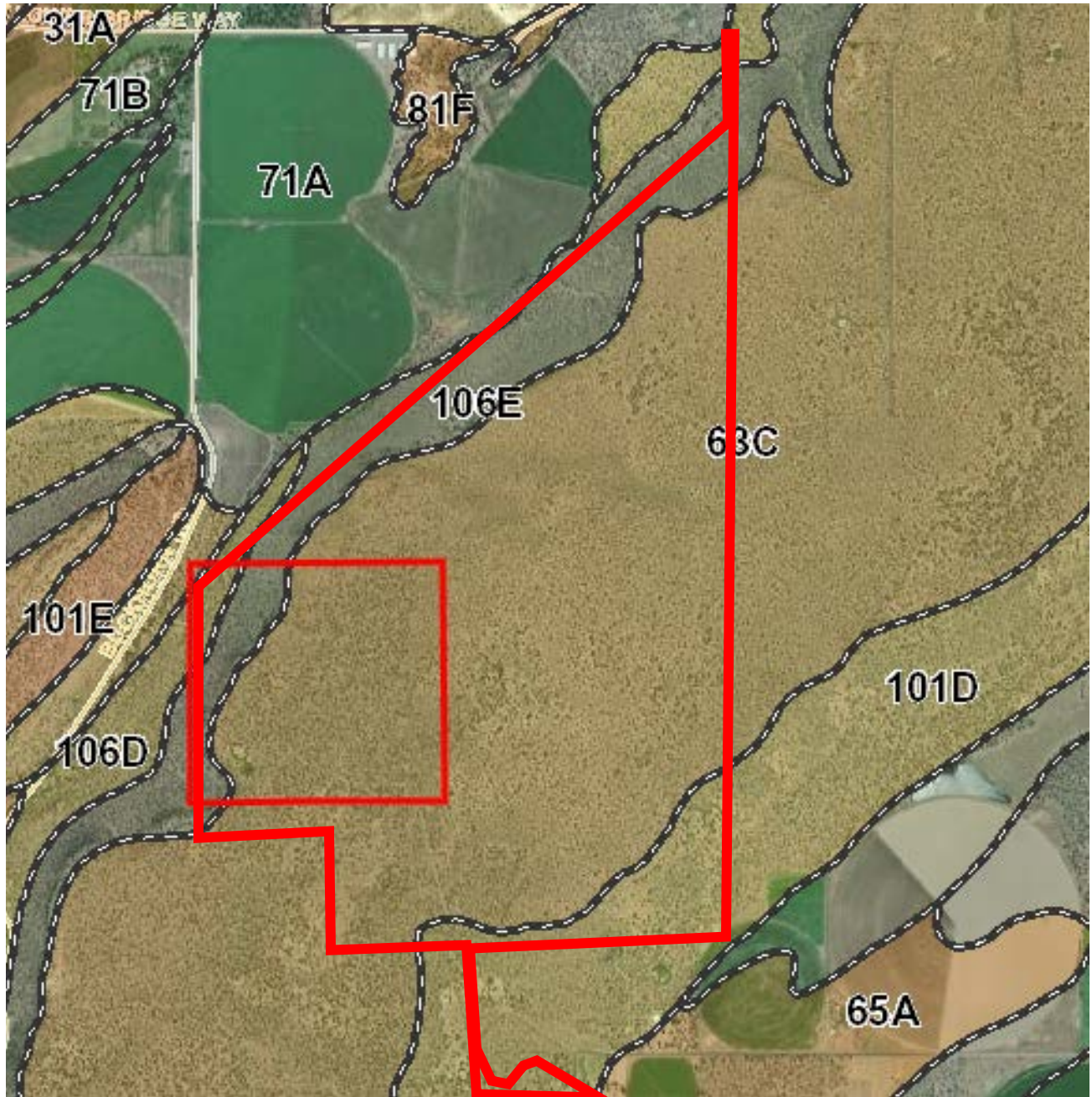
FINDING: As the Hearings Officer found above, the subject property is not suitable for farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands, regardless of ownership of the subject property and ownership of nearby or adjacent land. For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the subject property is not "Agricultural lands," and thus that no exception to Goal 3 is required.

- (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 soil study prepared by Mr. Rabe 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 Hearings Officer finds the soil study provides detailed and accurate information about individual parcels based on numerous soil samples taken from the subject property. The soil study is related to the NRCS Land Capability Classification (LCC) system that classifies soils class I through VIII. 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 1**. According to the NRCS Web Soil Survey tool, the subject property predominantly contains 63C soil (75 percent) and 106E soil (17 percent) with the remaining property containing smaller amounts of 31B, 71A, 101D, and 106D soils.

Figure 1 - NRCS Soil Map (Subject Property, appx.)



The soil study conducted by Mr. Rabe of Valley Science and Engineering finds the soil types on the subject property vary from the NRCS identified soil types. The soil types described in the soil study are described below and the characteristics and LCC rating are shown in **Table 1** below

Table 1 - Summary of Order 1 and 2 Soil Survey (Subject Property)

Site-Specific Symbol	Unit Name	Acreage	%	Land Capability Class ¹	
				non-irrigated	irrigated
36B	Deskamp loamy sand, 0 to 8% slopes	5.05	0.7%	6s	3s
81C	Lickskillet stony sandy loam, 0 to 15% slopes	375.03	52.5%	7e	--
81D	Lickskillet stony sandy loam, 15 to 30% slopes	54.03	7.6%	7e	--
81E	Lickskillet stony sandy loam, 30 to 50% slopes	64.73	9.1%	7e	--
106D(R)	Redslide sandy loam, 15 to 30% slopes	22.88	3.2%	6e	--
127C	Statz sandy loam, 0 to 15% slopes	178.72	25.0%	6s	4s
109	Rock outcrop	14.16	2.0%	8s	--
Total		714.60	100%		
Subtotal Class I - VI		206.65	29%		
Subtotal Class VII - VIII		507.95	71%		

NOTES:

Abbreviations: "--" = no data, e = erosion, NRCS = Natural Resources Conservation Service, s = shallow.

1 Land Capability Class as published in the Soil Survey of Upper Deschutes River Area, Oregon (Soil Survey Staff, Natural Resources Conservation Service, 2002).

Mr. Rabe’s soil study concludes that the subject property contains 71 percent Class VII and VIII soils. The submitted soil study prepared by Mr. Rabe is accompanied in the submitted application materials by correspondence from the Department of Land Conservation and Development (DLCD) (Applicant’s Exhibit F).

The DLCDC correspondence confirms that Mr. Rabe’s prepared soil study is complete and consistent with the reporting requirements for agricultural soils capability as dictated by DLCDC. Based on Mr. Rabe’s qualifications as a certified Soil Scientist and Soil Classifier, and as set forth in detail in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the submitted soil study to be definitive and accurate in terms of site-specific soil information for the subject property.

- (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. Therefore, this section and OAR 660-033-0045 applies to these applications.

- (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 study by Mr. Rabe of Valley Science and Engineering dated June 22, 2021, and an addendum dated January 13, 2022. The soils study was submitted following the ORS 215.211 effective date. The Applicant's Exhibit F includes acknowledgement from Hilary Foote, Farm/Forest Specialist with the DLCD, dated September 13, 2021, that the soil study is complete and consistent with DLCD's reporting requirements. The Hearings Officer finds this criterion is met.

- (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 provided a DLCD certified soil study as well as NRCS soil data. The Hearings Officer finds this criterion is met.

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 Hearings Officer finds this provision is applicable to the proposal because it involves an amendment to an acknowledged comprehensive plan. The proposed plan amendment would change the designation of the subject property from AG to RREA and change the zoning from EFU to RR10. The Applicant is not proposing any land use development of the property at this time.

As referenced in the agency comments section in the Findings of Fact, above, the Senior Transportation Planner for Deschutes County requested additional information to clarify the conclusions provided in the traffic study. The Applicant submitted an updated report from Christopher M. Clemow, PE, PTOE of Clemow Associates, LLC dated January 17, 2022, to address trip distribution, traffic volumes, and Transportation Planning Rule (TPR) criteria. The updates were reviewed by the Senior Transportation Planner who indicated his comments had been addressed and he was satisfied with the amended report. Mr. Clemow included the following conclusions in the traffic impact analysis dated January 17, 2022:

The following conclusions are made based on the materials presented in this analysis:

- 1. The proposed Deschutes County Comprehensive Plan Amendment and Zone Change from Exclusive Farm Use – Terrebonne Subzone (EFUTE) to Rural Residential – 10 Acre Minimum (RR-10) will not significantly affect the transportation system.*
- 2. All roadways along the primary travel route to/from the development are constructed to an adequate County standard, including paved 12-foot travel lanes.*
- 3. All study intersections will operate well with agency mobility standards/targets in the plan year and no intersection mitigation is necessary.*
- 4. The proposed site access is in the same location as the existing access and forms the west intersection leg. There is no horizontal or vertical roadway curvature limiting sight distance, nor is there any obstructing vegetation. As such, there is adequate sight distance at the proposed access location.*
- 5. There are no recorded crashes at any of the study intersections or the roadway segments during the study period. As such, the roadway and intersections are considered relatively safe, and no further evaluation of safety deficiencies is necessary.*

6. *Additional transportation analysis is not necessary to address Deschutes County Code Transportation Planning Rule criteria outlined in Oregon Administrative Rule 660 012-0060.*

Based on the County Senior Transportation Planner's comments and the traffic study from Clemow Associates, LLC, the Hearings Officer finds compliance with the Transportation Planning Rule has been effectively demonstrated. Based on the TIA, the Hearings Officer finds that the proposed plan amendment and zone change will be consistent with the identified function, capacity, and performance standards of the County's transportation facilities in the area.

The Hearings Officer notes that, despite the transportation information provided by the Applicant and via agency comment, public comments received by the County indicate concerns with potential traffic impacts as a result of the proposed plan amendment and zone change. The Hearings Officer finds that no development application is before me at this time. At the time of any land use application(s) for the subject property, analysis and review of transportation and traffic impacts of any proposed development will be required.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

FINDING: The Statewide Planning Goals are addressed as follows in the Applicant's burden of proof:

Goal 1, Citizen Involvement. *Deschutes County will provide notice of the application to the public through mailed notice to affected property owners and by requiring the applicant to post a "proposed land use action sign" on the subject property. Notice of the public hearings held regarding this application will be placed in the Bend Bulletin. A minimum of two public hearings will be held to consider the application.*

Goal 2, Land Use Planning. *Goals, policies and processes related to zone change applications are included in the Deschutes County Comprehensive Plan and Titles 18 and 23 of the Deschutes County Code. The outcome of the application will be based on findings of fact and conclusions of law related to the applicable provisions of those laws as required by Goal 2.*

Goal 3, Agricultural Lands. *The applicant has shown that the subject property is not agricultural land so Goal 3 does not apply.*

Goal 4, Forest Lands. *The existing site and surrounding areas do not include any lands that are suited for forestry operations. Goal 4 says that forest lands "are those lands acknowledged as forest lands as of the date of adoption of this goal amendment." The subject property does not include lands acknowledged as forest lands as of the date of adoption of Goal 4. Goal 4 also says that "[w]here **a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations*

or practices and other forested lands that maintain soil, air, water and fish and wildlife resources.” This plan amendment does not involve any forest land. The subject property does not contain any merchantable timber and is not located in a forested part of Deschutes County.

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces. *The subject property does not contain any inventoried Goal 5 resources.*

Goal 6, Air, Water and Land Resources Quality. *The approval of this application will not cause a measurable impact on Goal 6 resources. Approval will make it more likely that the irrigation and pond water rights associated with the property will ultimately be returned to the Deschutes River or used to irrigate productive farm ground found elsewhere in Deschutes County.*

Goal 7, Areas Subject to Natural Disasters and Hazards. *This goal is not applicable because the subject property is not located in an area that is recognized by the comprehensive plan as a known natural disaster or hazard area.*

Goal 8, Recreational Needs. *This goal is not applicable because the property is not planned to meet the recreational needs of Deschutes County residents and does not directly impact areas that meet Goal 8 needs.*

Goal 9, Economy of the State. *This goal does not apply to this application because the subject property is not designated as Goal 9 economic development land. In addition, the approval of this application will not adversely impact economic activities of the state or local area.*

Goal 10, Housing. *The County’s comprehensive plan Goal 10 analysis anticipates that farm properties with poor soils, like the subject property, will be converted from EFU to MUA-10 or RR-10 zoning and that these lands will help meet the need for rural housing. Approval of this application, therefore, is consistent with Goal 10 as implemented by the acknowledged Deschutes County comprehensive plan.*

Goal 11, Public Facilities and Services. *The approval of this application will have no adverse impact on the provision of public facilities and services to the subject site. Utility service providers have confirmed that they have the capacity to serve the maximum level of residential development allowed by the RR-10 zoning district.*

Goal 12, Transportation. *This application complies with the Transportation System Planning Rule, OAR 660-012-0060, the rule that implements Goal 12. Compliance with that rule also demonstrates compliance with Goal 12.*

Goal 13, Energy Conservation. *The approval of this application does not impede energy conservation. The subject property is located in a part of the community that contains a large amount of rural residential development. Providing homes in this location as*

opposed to more remote rural locations will conserve energy needed for residents to travel to work, shopping and other essential services.

Goal 14, Urbanization. *This goal is not applicable because the applicant's proposal does not involve property within an urban growth boundary and does not involve the urbanization of rural land. The RR-10 zone is an acknowledged rural residential zoning district that limits the intensity and density of developments to rural levels. The compliance of this zone with Goal 14 was recently acknowledged when the County amended its comprehensive plan. The plan recognizes the fact that the MUA-10 and RR zones are the zones that will be applied to lands designated Rural Residential Exception Areas.*

Goals 15, Willamette Greenway. *This goal does not apply because the subject property is not located in the Willamette Greenway.*

Goals 16 through 19. *These goals do not apply to land in Central Oregon.*

The Hearings Officer finds consistency with Goal 1 (Citizen Involvement) has been established with the public notice requirements required by the County for these applications (mailed notice, posted notice and two public hearings). Similarly, the Hearings Officer finds consistency with Goal 2 (Land Use Planning) based on the applications' consistency with goals, policies and processes related to zone change applications as set forth in the Comprehensive Plan and Titles 18 and 23 of the Deschutes County Code.

Based on the findings above, the Hearings Officer finds consistency with Goal 3 (Agricultural Lands) has been demonstrated because the Subject Property is not Agricultural Land. The property is not comprised of Forest Lands. Therefore, Goal 4 is inapplicable.

With respect to Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), the Hearings Officer finds that the Subject Property does not include any inventoried Goal 5 resources. While the Subject Property is currently open and undeveloped, the County Goal 5 inventory does not include the subject property as an "open space" area protected by Goal 5. Members of the public expressed concern regarding potential impact on wildlife. However, the Hearings Officer notes that the property does not include a wildlife overlay (WA) designation and, more importantly, no development is proposed at this time. Rezoning the subject property will not, in and of itself, impact wildlife on the subject property. Protections for wildlife must be sanctioned by the County's Goal 5 ESEEs and WA or similar wildlife overlay zoning. The Hearings Officer finds there are no wildlife protections applicable to these applications.

The Hearings Officer finds consistency with Goal 6 (Air, Water and Land Resources Quality) because there is no measurable impact of approval of the application to rezone the subject property from EFU to RR-10. Future development activities will be subject to local, state and federal regulations that protect these resources.

With respect to Goal 7 (Areas Subject to Natural Disasters and Hazards), the Hearings Officer finds consistency with this Goal based on the fact that rezoning the subject property to RR-10 does not change the Wildfire Hazard Area designation that is applicable to the entirety of Deschutes

County. The subject property is within the Rural Fire Protection District #2. Any application(s) for future development activities will be required to demonstrate compliance with fire protection regulations. The subject property is located in Redmond Fire and Rescue jurisdiction. The Hearings Officer finds that rezoning the properties to RR10 does not change the Wildfire Hazard Area designation. Any future development of the properties will be required to demonstrate compliance with any fire protection regulations and requirements of Deschutes County.

The Hearings Officer finds consistency with Goal 8 (Recreational Needs) given the fact that no development is currently proposed and that rezoning, in and of itself, will not impact recreational needs of Deschutes County.

The Hearings Officer finds Goal 9 (Economy of the State) is inapplicable because the subject property is not designated as Goal 9 economic development land and approval of the application will not adversely impact economic activities of the state or area.

The Hearings Officer finds the applications are consistent with Goal 10 (Housing) because the Comprehensive Plan Goal 10 chapter anticipates that farm properties with poor soils will be converted from EFU to MUA-10 or RR-10 zoning, making such properties available to meet the need for rural housing. Although no development of the subject property is proposed at this time, rezoning it from EFU to RR-10 will enable consideration of the property for potential rural housing development in the future.

The Hearings Officer finds the applications are consistent with Goal 11 (Public Facilities and Services). The record establishes that utility service providers have capacity to serve the subject property if developed at the maximum level of residential development allowed by the RR-10 zoning district. The proposal will not result in the extension of urban services to rural areas.

Based on the findings above regarding the Transportation System Planning Rule, OAR 660-012-0060, the Hearings Officer finds the applications are consistent with Goal 12 (Transportation).

The Hearings Officer finds the applications are consistent with Goal 13 (Energy Conservation) because there is no evidence approval of the applications will impede energy conservation.

The Hearings Officer finds the applications are consistent with Goal 14 (Urbanization). The subject property is not within an urban growth boundary and does not involve urbanization of rural land because the RR-10 zone does not include urban uses as permitted outright or conditionally. The RR-10 zone is an acknowledged rural residential zoning district that limits the intensity and density of developments to rural levels. The state acknowledged compliance of the RR-10 zone with Goal 14 when the County amended its comprehensive plan.

The Hearings Officer finds that Goals 15-19 do not apply to land in Central Oregon.

For all the foregoing reasons, the Hearings Officer finds compliance with the applicable Statewide Planning Goals has been demonstrated.

IV. DECISION & RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds the Applicant has met the burden of proof necessary to justify the request for a Comprehensive Plan Map Amendment to re-designate the subject property from Agriculture to Rural Residential Exception Area and a corresponding request for a Zone Map Amendment (Zone Change) to reassign the zoning of the subject property from Exclusive Farm Use (EFU) to Rural Residential (RR-10).

The Deschutes County Board of Commissioners is the final local review body for the applications before the County. DCC 18.126.030. The Hearings Officer recommends approval of the applications based on this Decision and Recommendation of the Deschutes County Hearings Officer.



Stephanie Marshall, Deschutes County Hearings Officer

Dated this 2nd day of June, 2022

Mailed this 2nd day of June, 2022

owner	agent	inCareOf	address	cityStZip	type	cdd id
J. Kenneth Katzaroff	Schwabe, Williamson & Wyatt		1420 5th Avenue, Suite 3400	Seattle, WA 98101	Hoff Decision	247-21-001043-PA, 1044-ZC
Liz Fancher			2465 NW Sacagawea Lane	Bend, OR 97703	Hoff Decision	247-21-001043-PA, 1044-ZC
710 Properties, LLC			PO Box 1345	Sisters, OR 97750	Hoff Decision	247-21-001043-PA, 1044-ZC
Eden Central Properties, LLC			PO Box 1345	Sisters, OR 97751	Hoff Decision	247-21-001043-PA, 1044-ZC
Chris Clemow			2237 NW Torrey Pines	Bend, OR 97703	Hoff Decision	247-21-001043-PA, 1044-ZC
Brian Rabe			3511 Pacific Blvd SW	Albany, OR 97321	Hoff Decision	247-21-001043-PA, 1044-ZC



COMMUNITY DEVELOPMENT

NOTICE OF HEARINGS OFFICER'S RECOMMENDATION

The Deschutes County Hearings Officer recommends approval of the land use application(s) described below:

FILE NUMBERS: 247-21-001043-PA, 1044-ZC

LOCATION: Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412280000100
Account: 163920
Situs Address: 10315 NW COYNER AVE, REDMOND, OR 97756

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412280000200
Account: 250543
Situs Address: 10325 NW COYNER AVE, REDMOND, OR 97756

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412280000300
Account: 124845
Situs Address: 10311 NW COYNER AVE, REDMOND, OR 97756

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 141228D000101
Account: 273062
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000300
Account: 276793
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000400
Account: 276794

Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000500
Account: 276791
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000600
Account: 124846
Situs Address: 70000 BUCKHORN RD, TERREBONNE, OR 97760

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000700
Account: 276792
Situs Address: **NO SITUS ADDRESS**

APPLICANT: 710 Properties, LLC
PO Box 1345
Sisters, OR 97759

ATTORNEY(S) FOR APPLICANT: Liz Fancher
2464 NW Sacagawea Lane
Bend, Oregon 97703

J. Kenneth Kataroff
Schwabe Williamson & Wyatt
1420 5th Avenue, Suite 3400
Seattle, WA 98101

SUBJECT: The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the subject property from Agricultural (AG) to Rural Residential Exception Area (RREA). The applicant also requests a corresponding Zone Change to rezone the subject property from Exclusive Farm Use - Terrebonne subzone (EFU-TE) to Rural Residential (RR-10).

STAFF CONTACT: Haleigh King, Associate Planner
Phone: 541-383-6710
Email: Haleigh.King@deschutes.org

RECORD: Record items can be viewed and downloaded from:

<https://www.deschutes.org/cd/page/247-21-001043-pa-and-247-21-001044-zc-eden-central-properties-comprehensive-plan-amendment>

APPLICABLE CRITERIA: The Hearings Officer reviewed this application for compliance against criteria contained in Chapters 18.04, 18.16, 18.60, 18.113, and 18.136 in Title 18 of the Deschutes County Code (DCC), the Deschutes County Zoning Ordinance, the procedural requirements of Title 22 of the DCC, Chapters 2, 3 and Appendix C of the Deschutes County Comprehensive Plan, Divisions 6, 12, 15, and 33 of the Oregon Administrative Rules (OAR) Chapter 660, and Chapter 215.211 of the Oregon Revised Statutes.

DECISION: The Hearings Officer finds that the applications meet applicable criteria, and recommends approval of the applications.

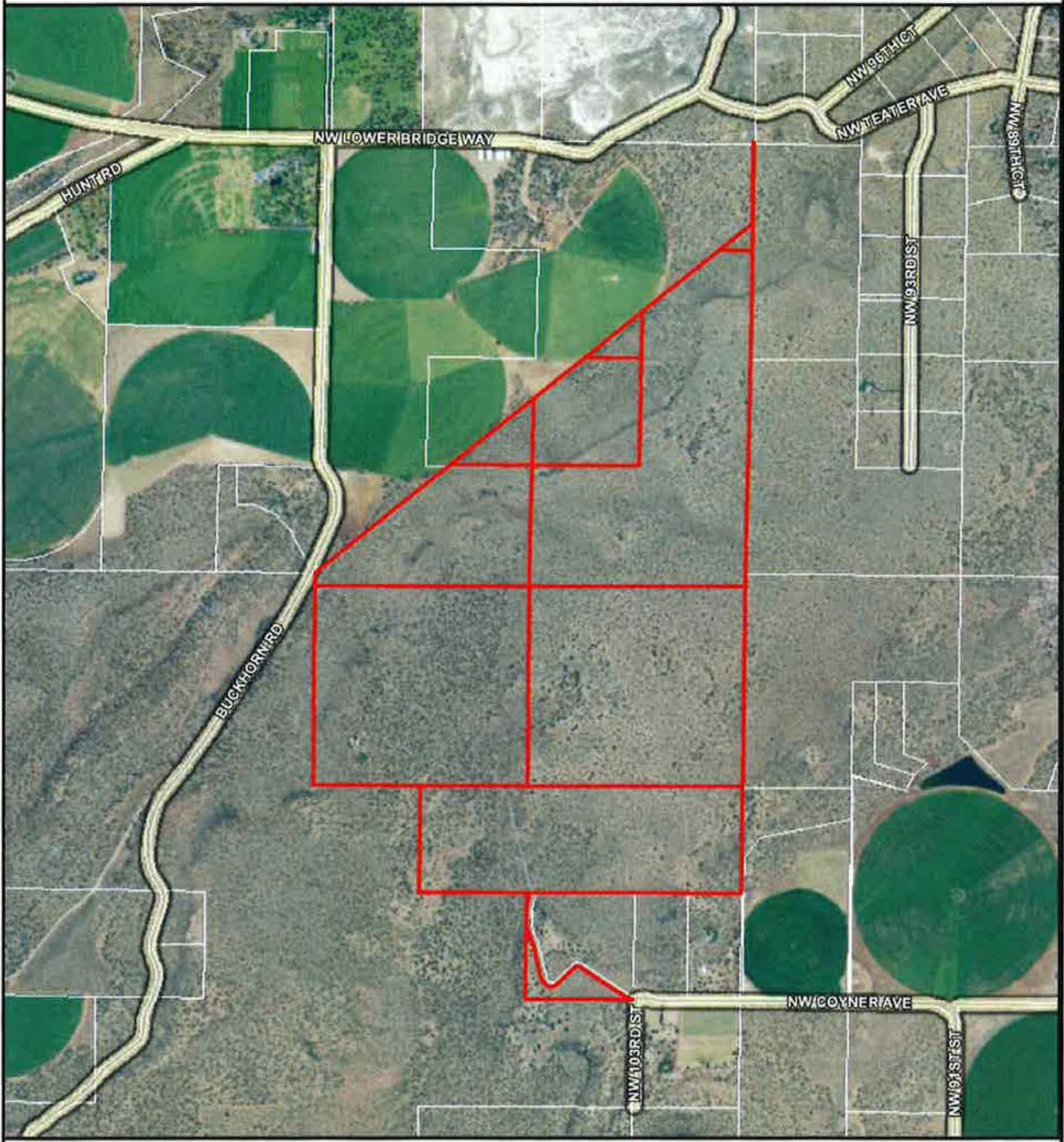
As a procedural note, the hearing on April 19, 2022, was the first of two required de novo hearings per DCC 22.28.030(c). The second de novo hearing will be heard in front of the Board of County Commissioners at a date to be determined.

Copies of the recommendation, application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost. Copies can be purchased for 25 cents per page.

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

Attachment: Location Map

Subject Property
File Nos: 247-21-0001043-PA, 22-1044-ZC



owner	agent	inCareOf	address	cityStZip	type	cdd id
DESCHUTES CO. ASSESSOR			ELECTRONIC		NOD	247-21-001043-PA, 1044-ZC
DESCHUTES CO. SR. TRANS. PLANNER	PETER RUSSELL		ELECTRONIC		NOD	247-21-001043-PA, 1044-ZC
DESCHUTES CO. BUILDING SAFETY			ELECTRONIC		NOD	247-21-001043-PA, 1044-ZC
DESCHUTES CO. ENVIRONMENTAL SOILS DIV.			ELECTRONIC		NOD	247-21-001043-PA, 1044-ZC
DESCHUTES CO. FORESTER	ED KEITH		ELECTRONIC		NOD	247-21-001043-PA, 1044-ZC
DESCHUTES CO. PROPERTY MGMT.	DEBORAH COOK / Deborah.Cook@deschutes.org		ELECTRONIC		NOD	247-21-001043-PA, 1044-ZC
DESCHUTES CO. ROAD DEPT.	CODY SMITH		ELECTRONIC		NOD	247-21-001043-PA, 1044-ZC
REDMOND FIRE & RESCUE	Tom Mooney (Tom.Mooney@redmondfireandrescue.org)	Wade Gibson (Wade.Gibson@redmondfireandrescue.org)	341 NW DOGWOOD AVE	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
OR DEPT. OF AG LAND USE PLANING COORD.	JIM JOHNSON		635 CAPITOL ST NE	SALEM, OR 97301	NOD	247-21-001043-PA, 1044-ZC
OREGON DEPT OF FISH & WILDLIFE	ANDREW WALCH (Andrew.J.Walch@odfw.oregon.gov)	Corey Heath (corey.heath@odfw.oregon.gov)	ELECTRONIC		NOD	247-21-001043-PA, 1044-ZC
OREGON DEPT OF AGRICULTURE	JON HARRANG (jharrang@oda.state.or.us - North DC)	ADAM MILLER (amiller@oda.state.or.us - South DC)	Electronic		NOD	247-21-001043-PA, 1044-ZC
DEPT. OF LAND CONSERV. & DEVEL.			1011 SW EMKAY DR., SUITE 108	Bend, OR 97702	NOD	247-21-001043-PA, 1044-ZC
DEPT. OF LAND CONSERV. & DEVEL.			635 CAPITOL ST. NE, #150	Salem, OR 97301-2540	NOD	247-21-001043-PA, 1044-ZC
WATERMASTER - DISTRICT 11	Sam VanLingham (sam.j.vanlingham@oregon.gov)		ELECTRONIC		NOD	247-21-001043-PA, 1044-ZC
BLM, PRINEVILLE DIST. - DESCHUTES FIELD MGR.	JEFF KITCHENS		3050 N.E. THIRD ST.	Prineville, OR 97754	NOD	247-21-001043-PA, 1044-ZC
Megan Ormid			4691 NW 91st Street	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Marlon Steele			2280 NW 101st	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Del and Lori Johnson			3848 NW 91st Street	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Paul Fisher			4141 NW 91st Street	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
William and Elizabeth Buchanan			10142 NW Coyner Ave	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Tim Phillips			21199 NW Spruce	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Pam Mayo-Phillips			21199 NW Spruce	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Kelsey Nonella			10611 NW Kingwood Drive	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Roger Nonella			10611 NW Kingwood Drive	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Steve Ahlberg			8163 NW Spruce Avenue	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Paige Dufour			8163 NW Spruce Avenue	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Terri Ahlberg			8163 NW Spruce Avenue	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Scott Hayes and Pam Nofziger-Hayes			10135 NW Coyner Ave	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Jason and Tammy Birkild			9307 NW Coyner Ave	Redmond OR 97756	NOD	247-21-001043-PA, 1044-ZC
Kelsey and Matt Pereboom			3475 NW 91st Street	Redmond OR 97756	NOD	247-21-001043-PA, 1044-ZC
Central Oregon Land Watch			2843 NW Lolo Drive, Suite 200	Bend, OR 97703	NOD	247-21-001043-PA, 1044-ZC
Jock and Karen Elliott			2460 NW 101st Street	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Binny Skidgel			4909 NW 83rd Street	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Central Oregon Land Watch			2843 NW Lolo Drive, Suite 200	Bend, OR 97703	NOD	247-21-001043-PA, 1044-ZC
Korren Bower			650 SW Bond Ste 100	Bend, OR 97702	NOD	247-21-001043-PA, 1044-ZC
Michael and Vicki Smith			7350 NW Atkinson Ave	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Marilyn Hofmann-Jones			60102 W Ridgeview Drive	Bend, OR 97702	NOD	247-21-001043-PA, 1044-ZC
Steve Greening			1435 NW Galveston Ave	Bend, OR 97703	NOD	247-21-001043-PA, 1044-ZC
Kim Erdel			60780 Ward Rd	Bend, OR 97702	NOD	247-21-001043-PA, 1044-ZC
Rebecca French			70103 Mustang Drive	Sisters, Or 97759	NOD	247-21-001043-PA, 1044-ZC
Peter Geiser			PO Box 581	Bend, OR 97709	NOD	247-21-001043-PA, 1044-ZC
Byron Buck			19186 Mt Shasta Drive	Bend, OR 97703	NOD	247-21-001043-PA, 1044-ZC
Eric Lea			7117 NW Grubstake Way	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Charles Arnold			66115 White Rock Loop	Bend, OR 97703	NOD	247-21-001043-PA, 1044-ZC
Kristi Newton			10225 NW Oak Lane	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Kent Pressman			20025 Millcrest Place	Bend, Or 97703	NOD	247-21-001043-PA, 1044-ZC
Dick Kellogg			26247 Metolius Meadows Drive	Camp Sherman, OR 97730	NOD	247-21-001043-PA, 1044-ZC
Debbie Salido			170 SE Windance Court	Bend, OR 97702	NOD	247-21-001043-PA, 1044-ZC
Bob Duff			1106 Sw 12th	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Karen Painter			630 NW Rimrock Drive	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Elizabeth Nelson			18160 Cottonwood Road #275	Sunriver, OR 97707	NOD	247-21-001043-PA, 1044-ZC
Rick Felde			16455 Fair Mile Road	Sisters, OR 97759	NOD	247-21-001043-PA, 1044-ZC
Ray Gertler			1012 SW Emkay Drive	Bend, OR 97702	NOD	247-21-001043-PA, 1044-ZC
Cindy Murphy and Mark Piper			1522 NW Kesley Lane	Terrebonne, OR 97760	NOD	247-21-001043-PA, 1044-ZC
Liz Smith			2808 NE Lotno Drive	Bend, OR 97701	NOD	247-21-001043-PA, 1044-ZC
Robin Snyder			7000 SW Umatilla Ave	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Rima Givot			18557 McSwain Drive	Sisters, OR 97759	NOD	247-21-001043-PA, 1044-ZC
Tony Oliver			550 NW 74th Street	Redmond, OR 97756	NOD	247-21-001043-PA, 1044-ZC
Lane Tandy			310 E Apenwood Ave	Sisters, OR 97759	NOD	247-21-001043-PA, 1044-ZC
Daniela Marshall			PO Box 1471	Sisters, OR 97759	NOD	247-21-001043-PA, 1044-ZC
Paul Lipscomb			PO Box 579	Sisters, OR 97759	NOD	247-21-001043-PA, 1044-ZC
Robin Vora			1679 NE Daphne Court	Bend, OR 97701	NOD	247-21-001043-PA, 1044-ZC
Lindsey Overstreet			14977 Cantle	Sisters, OR 97759	NOD	247-21-001043-PA, 1044-ZC
Justine Pillar			8581 Se 57th Ave	Portland, OR 97206	NOD	247-21-001043-PA, 1044-ZC
Charles Humphreys			PO Box 1960	Sisters, OR 97759	NOD	247-21-001043-PA, 1044-ZC
Becky Powell			PO Box 1783	Bend, OR 97709	NOD	247-21-001043-PA, 1044-ZC
Ryder Redfield			8801 NW 93rd Lane	Terrebonne, OR 97760	NOD	247-21-001043-PA, 1044-ZC
Adele Sommer			67134 Gist Road	Bend, OR 97703	NOD	247-21-001043-PA, 1044-ZC
Renee Sweezy			61064 Larkspur Loop	Bend, OR 97702	NOD	247-21-001043-PA, 1044-ZC
Jeff Boyer			21827 Boones Borough Dr	Bend, OR 97701	NOD	247-21-001043-PA, 1044-ZC
Shelli Blais and Kim Campbell			9590 NW Teater Ave, Terrebonne	Terrebonne, OR 97760	NOD	247-21-001043-PA, 1044-ZC
Keenan Ordon-Bakalian			360 SW Bond St, Suite 510	Bend, OR 97702	NOD	247-21-001043-PA, 1044-ZC
Diane Lozito			550 NW Franklin Ave, Suite 108	Bend, OR 97703	NOD	247-21-001043-PA, 1044-ZC

Ted Netter		70535 NW Lower Bridge Way	Terrebonne, OR 97760	NOD 247-21-001043-PA, 1044-ZC
Becky Powell		20607 Coventry Circle	Bend, OR 97702	NOD 247-21-001043-PA, 1044-ZC
Nunzie Gould		19845 J W Brown Rd.	Bend, OR 97703	NOD 247-21-001043-PA, 1044-ZC
Jeff Roberg		8187 NW 93rd	Terrebonne, OR 97760	NOD 247-21-001043-PA, 1044-ZC
Jon Jinings		104 Empire Avenue	Bend, OR 97701	NOD 247-21-001043-PA, 1044-ZC
James M. Stirewalt II		2152 SW Jericho Lane	Culver, OR 97734	NOD 247-21-001043-PA, 1044-ZC
Rand Campbell		20350 Tumalo Road	Bend, OR 97703	NOD 247-21-001043-PA, 1044-ZC
Fran Robertson		20276 Tumalo Road	Bend, OR 97703	NOD 247-21-001043-PA, 1044-ZC
Jim McMullen		9900 NW Teater Avenue	Terrebonne, OR 97760	NOD 247-21-001043-PA, 1044-ZC
1000 Friends of Oregon	Andrew Mulkey	PO Box 40367	Portland, OR 97240	NOD 247-21-001043-PA, 1044-ZC
9805 NW TEATER AVENUE LLC		101 SECOND ST #900	SAN FRANCISCO, CA 94105	NOD 247-21-001043-PA, 1044-ZC
HAYES LIVING TRUST	HAYES, FRANKLIN S TRUSTEE ET AL	10135 NW COYNER AVE	REDMOND, OR 97756	NOD 247-21-001043-PA, 1044-ZC
BENDIX, GARY & LISA		10255 NW COYNER AVE	REDMOND, OR 97756	NOD 247-21-001043-PA, 1044-ZC
CYNTHIA E WITHERILL FAMILY TRUST	WITHERILL, CYNTHIA E TTEE	10305 NW COYNER AVE	REDMOND, OR 97756	NOD 247-21-001043-PA, 1044-ZC
ROLLINS, RANDALL T		17961 S EDGEWOOD	OREGON CITY, OR 97045	NOD 247-21-001043-PA, 1044-ZC
VOLWOOD FARMS LLC		25994 HALL RD	JUNCTION CITY, OR 97448	NOD 247-21-001043-PA, 1044-ZC
STABB, EDWARD D		2940 NW 74TH ST	REDMOND, OR 97756	NOD 247-21-001043-PA, 1044-ZC
BIRKLD, JASON F & TAMMY M		3816 110TH AVE E	EDGEWOOD, WA 98372	NOD 247-21-001043-PA, 1044-ZC
KIM L CAMPBELL REVOCABLE LIVING TRUST	CAMPBELL, KIM L TTEE	9590 NW TEATER ST	TERREBONNE, OR 97760	NOD 247-21-001043-PA, 1044-ZC
HOFELD MCMULLEN TESTAMENTARY TRUST	MCMULLEN, JAMES B TTEE ET AL	9900 NW TEATER AVE	TERREBONNE, OR 97760	NOD 247-21-001043-PA, 1044-ZC
EDEN CENTRAL PROPERTIES LLC		C/O CHARLES F THOMAS III (A)	SISTERS, OR 97759	NOD 247-21-001043-PA, 1044-ZC
BUCHANAN, ELIZABETH ADAIR		PO BOX 1345	REDMOND, OR 97756	NOD 247-21-001043-PA, 1044-ZC
REDSIDE RESTORATION PROJECT ONE LLC		C/O MOSS ADAMS (A)	LOS ANGELES, CA 90024	NOD 247-21-001043-PA, 1044-ZC
DESCHUTES COUNTY		C/O PROPERTY MANAGEMENT	BEND, OR 97708-6005	NOD 247-21-001043-PA, 1044-ZC



BOARD OF
COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: Senate Bill (SB) 391 Work Session – Rural Accessory Dwelling Unit (ADU)
Legislative Amendments

BACKGROUND AND POLICY IMPLICATIONS:

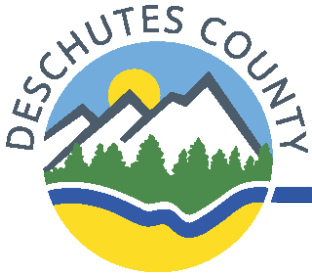
The Board of County Commissioners (Board) will conduct a work session concerning local provisions for rural accessory dwelling units (ADUs) as identified in Senate Bill (SB) 391. The first of two required public hearings on this matter was held with the Deschutes County Planning Commission on September 22, 2022. In anticipation of a future public hearing, staff will provide an overview of the proposed amendments, public comments received on the proposal to date, and recommendations from the Commission.

BUDGET IMPACTS:

None

ATTENDANCE:

Kyle Collins, Associate Planner
Will Groves, Planning Manager



MEMORANDUM

TO: Board of County Commissioners

FROM: Kyle Collins, Associate Planner
Will Groves, Planning Manager

DATE: November 9, 2022

SUBJECT: Senate Bill (SB) 391 Work Session – Rural Accessory Dwelling Unit (ADU) Legislative Amendments

I. OVERVIEW

The Board of County Commissioners (Board) will conduct a work session on November 14, 2022 concerning local provisions for rural ADUs as identified in Senate Bill (SB) 391¹ (file no. 247-22-000671-TA). Staff submitted a 35-day Post-Acknowledgement Plan Amendment (PAPA) notice to the Department of Land Conservation and Development (DLCD) on August 17, 2022. A public hearing was held with the Deschutes County Planning Commission (Commission) on September 22, 2022². The Commission held deliberations on October 27, 2022³ and the recommendations from that meeting are discussed herein.

Attached to this memorandum are the proposed text amendments, a staff report summarizing the changes, and a matrix illustrating the proposed recommendations from the Commission. Within the proposed amendments, added language is shown underlined and deleted shown as ~~strikethrough~~. The proposed amendments currently reflect the recommendations from the Commission.

Board Decision Matrix

A summary review and discussion of the primary issue areas, themes, and decision options is provided in the associated Board Decision Matrix, prepared in conjunction with this work session memorandum. Staff notes that the recommendations from the Commission on primary issue areas are highlighted within this matrix.

¹ <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB0391/A-Engrossed>

² See Deschutes County Planning Commission September 22, 2022 Agenda for more information: <https://www.deschutes.org/bc-pc/page/planning-commission-17>

³ See Deschutes County Planning Commission October 27, 2022 Agenda for more information: <https://www.deschutes.org/bc-pc/page/planning-commission-21>

II. WRITTEN RECORD

The full record is available for inspection at the Planning Division and at the following website: <https://www.deschutes.org/adu>.

III. STATE REGULATIONS

SB 391 contains several provisions related to properties eligible for rural ADUs which cannot be amended by counties. Those criteria and restrictions are highlighted in the table below:

Table 1 - SB 391 – Rural Accessory Dwelling Unit Standards

Eligibility	Restrictions
1. Rural Residential Exception Areas, Minimum Lot Size, and Dwelling Requirements	<ul style="list-style-type: none"> Applies to Rural Residential (RR10), Multiple Use Agricultural (MUA10), Urban Area Reserve (UAR-10), Suburban Residential (SR 2.5), and Westside Transect (WTZ) zones. Lot or parcel must be at least two (2) acres in size. One (1) single-family dwelling must be sited on the lot or parcel.
2. Existing Dwelling Nuisance	<ul style="list-style-type: none"> The existing single-family dwelling is not subject to an order declaring it a nuisance or pending action under ORS 105.550 to 105.600.
3. ADU Sanitation Requirements	<ul style="list-style-type: none"> The ADU must comply with all applicable laws and regulations relating to sanitization and wastewater disposal and treatment.
4. ADU Square Footage Requirements	<ul style="list-style-type: none"> The ADU cannot include more than 900 square feet of useable floor area.
5. ADU Distance Requirements	<ul style="list-style-type: none"> The ADU is required to be located no farther than 100 feet from the existing single-family dwelling.
6. ADU Water Supply Requirements	<ul style="list-style-type: none"> If the ADU is relying on a domestic well, no portion of the lot or parcel can be within new or existing ground water uses restricted by the Water Resource Commission.
7. ADU Water Supply Source Option	<ul style="list-style-type: none"> A county may require that an ADU be served by the same water supply source or water supply system as the existing single-family dwelling, provided such is allowed by an existing water right or a use under ORS 537.545 (exempt uses).⁴
8. ADU / Metolius Area of Critical State Concern / Limitations	<ul style="list-style-type: none"> No portion of a lot or parcel can be within a designated area of critical state concern.
9. ADU Setback Requirements	<ul style="list-style-type: none"> The ADU is required to have adequate setbacks from adjacent lands zoned Exclusive Farm Use (EFU) or Forest Use.
10. ADU / Wildland-Urban Interface Requirements	<ul style="list-style-type: none"> The lot or parcel must comply with the rules of the State Board of Forestry under ORS 477.015 to 477.061.
11. ADU / Outside Wildland-Urban Interface (WUI) Area Requirements	<ul style="list-style-type: none"> If the ADU is not subject to ORS 477.015 to 477.061 (i.e. outside of the newly-defined wildland-urban interface), it must have defensible space and fuel break standards as developed in consultation with local fire protection service providers.

⁴ https://oregon.public.law/statutes/ors_537.545

Eligibility	Restrictions
12. ADU / Statewide Wildfire Map Requirements	<ul style="list-style-type: none"> Applies to properties identified as high or extreme risk and located within a designated WUI on the statewide wildfire risk maps established per SB 762. ADUs are then required to comply with the Oregon residential specialty code relating to wildfire hazard mitigation for the mapped area (R327.4).
13. ADU Adequate Access and Evacuation for Firefighting Requirements	<ul style="list-style-type: none"> Local regulations must ensure the ADU has adequate access for firefighting equipment, safe evacuation and staged evacuation areas
14. ADU Occupancy Requirements	<ul style="list-style-type: none"> ADUs cannot be allowed for vacation occupancy, as defined in ORS 90.100.
15. ADU Land Division Requirements	<ul style="list-style-type: none"> If an eligible property with an ADU is divided, the single family dwelling and ADU cannot be situated on a different lot or parcel.
16. ADU / Additional Units	<ul style="list-style-type: none"> A second ADU is not allowed.

IV. DESCHUTES COUNTY INTERPRETATIONS

Numerous portions of the SB 391 language were not defined during the legislative process and thus were left open to interpretation by local jurisdictions that elect to allow rural ADUs. Specifically, the following items were not explicitly defined:

- “Useable Floor Area” as related to the 900-square-foot size limitation for rural ADUs.
- The specific standards of the 100-foot site distance requirements for rural ADUs.
- Adequate access for firefighting equipment, safe evacuation, and staged evacuation areas.

As summarized in Table 2, staff drafted the proposed amendments to address these areas in the following manner:

Table 2 – Draft Interpretations

Undefined SB 391 Standard	Draft County Interpretation
Useable Floor Area	<ul style="list-style-type: none"> Means the area of the accessory dwelling unit included within the surrounding exterior walls, including garages and other accessory components.
100-Foot Siting Distance	<ul style="list-style-type: none"> A unit must be located no farther than 100 feet from the existing single family dwelling, measured from a wall of the single-family dwelling to the nearest part of the “useable floor area” of the accessory dwelling unit.

Undefined SB 391 Standard	Draft County Interpretation
<p>Adequate Access and Evacuation for Firefighting Requirements</p>	<ul style="list-style-type: none"> • “Safe evacuation plan” means an identifiable route from the rural accessory dwelling unit to the staged evacuation area. • “Staged evacuation area” means a public or private location that occupants of the rural accessory dwelling unit may evacuate to reorganize. • Adequate access for firefighting equipment, safe evacuation and staged evacuation areas are met by providing: <ul style="list-style-type: none"> ○ Written certification from the applicable fire district, on a form prepared by Deschutes County, that access to the property meets minimum fire district requirements to provide emergency services to the property; ○ A safe evacuation plan; and ○ Written authorization from the owner of the staged evacuation area that the occupants of the rural accessory dwelling unit may evacuate to the staged evacuation area.

Groundwater Protection

Due to vulnerable groundwater characteristics in southern Deschutes County, the Onsite Wastewater Division recommends increasing the minimum lot or parcel size for rural ADUs to be at least five (5) acres in size. The draft amendments as presented include this provision. Additionally, in consultation with the Onsite Wastewater Division, staff has explored the possibility of requiring advanced wastewater treatment systems for ADU development in southern Deschutes County. Further details are included as part of the attached recommendation matrix.

V. SB 762 WILDFIRE STANDARDS & TIMING

Certain properties in Deschutes County will be subject to new wildfire mitigation measures as approved under SB 762.⁵ One of the primary pieces of SB 762 is the creation of a comprehensive State Wildfire Risk Map to guide new wildfire regulations for development. The initial risk map was made available on June 30, 2022.⁶ However, based on significant concern from citizens and interest groups through the state, ODF withdrew the initial risk map to provide more time for additional public outreach and refinement of risk classification methodologies. ODF anticipates new risk maps will be finalized by **late fall** or **early winter 2023**.

Due to the current unavailability of fire risk maps, staff cannot provide specific estimates on the number of properties which may be subject to additional wildfire mitigation standards. Additionally, as staff cannot currently determine which properties may be subject to additional standards, no properties in Deschutes County will be eligible for rural ADUs, despite any adoption of County standards which approve said use within the County Comprehensive Plan and zoning ordinances, until such time as a new iteration of a Statewide Map of Wildfire Risk is formally released by ODF.

⁵ SB 762 (2021)

⁶ <https://oregonexplorer.info/tools>

Once these risk maps are finalized, properties included in **both** a designated Wildland Urban Interface (WUI) boundary and classified as either high or extreme risk within the State Wildfire Risk Map will be subject to additional development regulations. Properties meeting both of these standards will be subject to:

- 1) Home hardening building codes as described in section R327 of the 2021 Oregon Residential Specialty Code

The earliest date that the R327 building code standards may become effective is October 1, 2022, and they will become mandatory on April 1, 2023.

- 2) Defensible space standards as determined by the Oregon State Fire Marshal.

At present, the State Fire Marshal has yet to develop final statewide defensible space requirements. SB 762 requires these standards to be developed on or before December 31, 2022.

VI. WRITTEN TESTIMONY AND DISCUSSION

To date, a total of sixteen (16) comments from members of the public have been received by staff concerning the proposed amendments.

Seven (7) of the submitted comments generally expressed support for the proposed ADU amendments, citing the following items:

- Opportunities for a general increase in housing supply, particular given ongoing housing shortages and burdensome rental costs in Central Oregon.
- Increased opportunities for intergenerational living as many aging parents and family members pursue housing with other family members on existing developed properties.
- Increased economic activity from rural ADU development.
- In conjunction with the initially proposed County standards, the existing requirements in SB 391 will serve to limit the effects of increased development in rural areas of the county.

Alternatively, nine (9) of the submitted comments expressed general disapproval of the proposed ADU amendments, citing the following items:

- Negative impacts from increased traffic.
- Additional risk from adding residential development in high wildfire risk areas.
- Impacts to pre-existing water resources from adding additional exempt, private residential wells in the rural county.
- Loss of open space and rural quality of life expected from increased rural density.
- Impacts to wildlife populations and habitat related to increased development density.
- General skepticism around the impact that rural ADUs would have on housing availability and affordability in the region.
- Concerns that certain restrictions, such as the limitation of utilizing rural ADUs for short term vacation rental purposes, can be accurately tracked and enforced by county staff.

Among those comments expressing general disapproval, not all requested a full denial of the proposed amendments. Certain commenters suggested additional actions or details that should accompany any ADU program if ultimately approved by county decision makers:

- Delaying the amendment process until final versions of the State Wildfire Risk Map required by Senate Bill (SB) 762 has been released by the Oregon Department of Forestry.
- Prohibit ADUs in all Goal 5 inventories captured by Deschutes County, including the Wildlife Area Combining Zone, Greater Sage-Grouse Area Combining Zone, and the Flood Plain Zone.
- Prohibit ADUs in the Westside Transect Zone
- Delay the amendment process until the County's proposed Goal 5 inventory update is completed.

VII. PLANNING COMMISSION HEARING TESTIMONY AND DISCUSSION

During the public hearing before the Commission, nine (9) individuals provided testimony. Some testimony expressed dissatisfaction regarding the proposed text amendments in general. These comments focused primarily on the following items:

- Negative impacts to wildlife populations.
- Negative impacts on ground water supplies.
- Potential code compliance issues, specifically related to the required prohibition on vacation rentals.
- Additional wildfire risk from increased development in the rural county.
- A lack of compatibility between the proposed amendments, the statewide land use goals, and the Deschutes County Comprehensive Plan.

Some testimony expressed support for the proposed text amendments in general. These comments focused primarily on the following items:

- Opportunities for a general increase in housing supply, particular given ongoing housing shortages and burdensome rental costs in Central Oregon.
- Increased opportunities for intergenerational living as many aging parents and family members pursue housing with other family members on existing developed properties.
- Increased economic activity from rural ADU development.

VIII. AGENCY COMMENTS AND DISCUSSION

As part of the record, seven (7) comments have been included from several state and local agencies with an interest in the proposed ADU amendments. Staff will attempt to highlight some of those specific comments that are relevant to the deliberation discussion:

Oregon Department of Fish and Wildlife

The Oregon Department of Fish and Wildlife (ODFW) has requested certain mitigation standards for any ADUs that may be developed within the Wildlife Area (WA) Combining Zone. Specifically, ODFW has requested the following:

1. The siting and fencing standards of Deschutes County Code (DCC) 18.88⁷ be maintained for all rural ADU development in the WA Combining Zone.
2. A specific size limitation be instituted for all accessory components (i.e. - garages, storage structures, etc.) of any developed ADU not included in the 900 square-foot “useable floor area” required by SB 391.
3. Access to properties should utilize existing roads and driveways for all rural ADU development.

Staff believes that the siting and fencing standards of DCC 18.88 would apply to all rural ADU development, regardless of specific language included in the proposed text amendments. To maintain clarity, should rural ADUs be allowed within the Wildlife Area Combining Zone, staff will modify the proposed amendment language to explicitly state the referenced standards from DCC 18.88 will apply to any future ADU development.

Options for specific size limitations have been proposed and discussed by the Commission regarding accessory components of an ADU. As discussed below and within the attached recommendation matrix, the Commission recommends limiting the definition of “useable floor area” to encompass both living areas and accessory components of an ADU. As recommended, the total footprint of any proposed ADU, including components such as garages or storage areas, would be limited to 900 square feet.

Finally, staff notes that construction of new roads is typically reviewed through a subdivision or partition process against the standards of DCC Title 17. These proposals are generally distinct from specific physical development on an individual property, such as the construction of an ADU. Additionally, driveway permits are issued and reviewed through the Road Department primarily for compliance with clear sighting and other safety requirements. If driveway access to rural ADUs is required to be consolidated to existing access points, it is unclear how this specific standard would be reviewed or enforced over time.

IX. PLANNING COMMISSION RECOMMENDATIONS

As discussed previously, a public hearing was held with the Commission on September 22, 2022. The Commission held deliberations on October 27, 2022 and made recommendations concerning the proposed amendments as follows:

⁷
https://deschutescounty.municipalcodeonline.com/book?type=ordinances#name=CHAPTER_18.88_WILDLIFE_AREA_COMBINING_ZONE;_WA

- **Recommendation #1** (*approved 4 to 2*): The Commission recommended adoption of the proposed amendments, with substantial changes to the initial proposal as discussed herein.
- **Recommendation #2** (*approved 5 to 1*): “Useable floor area” is undefined within SB 391 and the administering statutes. The Commission recommends “Useable Floor Area” be defined as “the area of the accessory dwelling unit included within the surrounding exterior walls, including garages and other accessory components.” To clarify, the 900 square-foot size limitation for rural ADUs would apply to the entire ADU structure, including garages and accessory components
- **Recommendation #3**: A unit must be located no farther than 100 feet from the existing single family dwelling, measured from a wall of the single-family dwelling to the nearest part of the “useable floor area” of the accessory dwelling unit. This recommendation was unchanged by the Commission from staff’s initial proposal and thus no approval vote was taken.
- **Recommendation #4**: Due to vulnerable groundwater characteristics in southern Deschutes County, the Commission recommends the minimum lot or parcel size for rural ADUs to be at least five (5) acres in size. The boundaries of this recommendation were defined by the upper Deschutes watershed area studied during the La Pine Demonstration Project, US Geological Survey report 2007-5237, USGS Fact Sheet 2007-3103. This recommendation was unchanged by the Commission from staff’s initial proposal and thus no approval vote was taken.
- **Recommendation #5** (*approved 5 to 1*): The Commission recommends prohibiting rural ADU development in designated Goal 5 resource areas (i.e. – Wildlife Area Combining Zone, Greater Sage-Grouse Area Combining Zone, and the Sensitive Bird and Mammal Habitat Combining Zone)
- **Recommendation #6** (*approved 6 to 0*): Pursuant to SB 762, the Commission recommends delaying the adoption of any local rural ADU legislation until such time as the final State Wildfire Risk Map has been released by the Oregon Department of Forestry.
- **Recommendation #7** (*approved 6 to 0*): The Commission recommends prohibiting rural ADU development the Westside Transect Zone (WTZ) Zone.
- **Recommendation #8** (*approved 6 to 0*): The Commission recommends prohibiting both the existing single-family dwelling and the ADU for vacation occupancy use, as defined in DCC 18.116.370(A)(8) and consistent with ORS 90.100.

Outside of the explicit recommendations above, the Commission engaged in numerous discussion points relevant to the proposed amendments. A number of Commissioners expressed concern that the rural ADU amendments were being presented prior to completion of other ongoing long range planning initiatives which may have significant bearing on the proposal. Specifically, some Commissioners highlighted the importance of the ongoing state wildfire mitigation efforts and SB 762, the ongoing Deschutes County Comprehensive Plan update ([Deschutes 2040](#)), and the ongoing Goal 5 habitat inventory update for mule deer ([Wildlife Inventory Update](#)). Of these items, only the

SB 762 mapping and wildfire mitigation efforts received a majority vote recommending delay of the proposed amendments. As discussed above, should the Board elect to follow the Commission's recommendation to delay adoption of local ADU amendments until release of the final Statewide Map of Wildfire Risk by ODF, staff anticipates that these maps will be available by **late fall** or **early winter 2023**.

Staff has edited the proposed amendments, staff report, and ESEE analysis for Goal 5 resources to account for the Commission's recommendations. If the Board desires to change the amendments outside of the initial recommendations, alterations to supporting documents will need to be made prior to adoption of any final implementing ordinance.

X. ANTICIPATED PROPERTY ELIGIBILITY

This proposal amends Deschutes County Code (DCC), Titles 18 and 19 to allow Rural ADUs consistent with SB 391 in the Multiple Use Agricultural (MUA-10), Rural Residential (RR-10), Suburban Low Density Residential (SR 2.5), and Urban Area Reserve (UAR-10) Zones. Eligibility criteria will be incorporated in DCC Chapters 18.116, Supplementary Provisions and 19.92, Interpretations and Exceptions. Based on initial review of the qualifying characteristics, approximately **8,660** tax lots in Deschutes County could potentially qualify for a rural ADU. This includes properties which do not currently have a single-family dwelling onsite, but otherwise meet the qualifying standards. Additionally, this includes parcels which the Commission has recommended be prohibited from rural ADU development. However, staff notes the following limitations and revisions to that initial estimate:

- The estimate is only based on general requirements from SB 391 and does not evaluate properties on an individual level. Specific properties may have unique lot boundaries, geographic features, onsite wastewater limitations, or other characteristics which make the establishment of a rural ADU more challenging or impossible.
- Property owners may encounter additional costs and challenges when constructing a rural ADU above and beyond specific land use standards. It is likely that numerous properties will need to incorporate significant upgrades to onsite wastewater treatment systems prior to establishment of rural ADUs.
- This estimate includes 765 potentially eligible tax lots in the Wildlife Area Combining Zone (includes Deer Migration Corridor, Deer Winter Range, and Significant Elk Habitat). There are no potentially eligible tax lots within the Greater Sage Grouse Area Combining Zone.
 - As noted previously, the Commission recommends that all properties within the Wildlife Area Combining Zone be prohibited from qualifying for an ADU
- This estimate includes 120 potentially eligible parcels in the Westside Transect Zone.
 - As noted previously, the Commission recommends that all properties within the Wildlife Area Combining Zone be prohibited from qualifying for an ADU
- This estimate is based on a 5-acre minimum parcel size in southern Deschutes County. There are approximately 319 potentially eligible tax lots in southern Deschutes County based on a

5-acre minimum parcel size. There are approximately 1,129 potentially eligible tax lots in this area based on a 2-acre minimum parcel size.

- As noted previously, the Commission recommends a 5-acre minimum parcel size in southern Deschutes County for ADU development.

XI. NEXT STEPS

At the conclusion of the meeting, the Board can:

- Set a date for a future public hearing;
- Delay a public hearing of the proposed amendments until additional information is available;

Attachments:

1. Planning Commission Recommendation Matrix
2. Map of Potentially Eligible Properties
3. Staff Report & Proposed Text Amendments

PLANNING COMMISSION RECOMMENDATION MATRIX

SENATE BILL (SB) 391 – RURAL ACCESSORY DWELLING UNIT (ADU) TEXT AMENDMENTS				
Land Use File No. 247-22-000671-TA				
	Issue Area	SB 391 Criterion	Planning Commission Recommendation	Possible Alternatives
1	Should rural ADUs be allowed with additional standards or prohibited?	None	<ul style="list-style-type: none"> Allows an owner of a lot or parcel within an area zoned for rural residential use to construct one accessory dwelling unit on the lot or parcel subject to additional local standards and restrictions. Applies to Rural Residential (RR10), Multiple Use Agricultural (MUA10), Urban Area Reserve (UAR-10), and Suburban Residential (SR 2.5) zones. Recommended by Planning Commission 5 to 1 	<ol style="list-style-type: none"> Prohibit rural ADU development in Deschutes County.
2	How should “Useable Floor Area” be defined?	The ADU cannot include more than 900 square feet of “useable floor area.”	<ul style="list-style-type: none"> “Useable floor area” is undefined within SB 391 and the administering statutes. The 900 square-foot limit to applies to the entire ADU structure, including garages and accessory components Recommended by Planning Commission 5 to 1 	<ol style="list-style-type: none"> Exclude items such as garages and accessory components from the 900 square-foot “useable floor area” definition. Set a maximum size limit to accessory components of ADUs such as garages. Additional requirements for permitting standards on habitable versus non-habitable space (i.e. – Group R-3 building permits for habitable space and Group U permits for non-habitable space).
3	How should the 100-Foot Siting Distance requirement be interpreted?	The accessory dwelling unit will be located no farther than 100 feet from the existing single-family dwelling.	<ul style="list-style-type: none"> A unit must be located no farther than 100 feet from the existing single family dwelling, measured from a wall of the single-family dwelling to the nearest part of the “useable floor area” of the accessory dwelling unit. Unchanged by the Planning Commission from staff’s initial recommendation 	<ol style="list-style-type: none"> Requiring the entire footprint of an ADU to be located within 100 feet of the existing single-family dwelling.

PLANNING COMMISSION RECOMMENDATION MATRIX

SENATE BILL (SB) 391 – RURAL ACCESSORY DWELLING UNIT (ADU) TEXT AMENDMENTS

Land Use File No. 247-22-000671-TA

	Issue Area	SB 391 Criterion	Planning Commission Recommendation	Possible Alternatives
4	Are specific limitations warranted for Southern Deschutes County Groundwater Protection?	None	<ul style="list-style-type: none"> Due to vulnerable groundwater characteristics in southern Deschutes County, the minimum lot or parcel size for rural ADUs to be at least five (5) acres in size. The boundaries of this recommendation were defined by the upper Deschutes watershed area studied during the La Pine Demonstration Project, US Geological Survey report 2007-5237, USGS Fact Sheet 2007-3103. Unchanged by the Planning Commission from staff’s initial recommendation 	<ol style="list-style-type: none"> Prohibit all rural ADU development in the identified southern Deschutes County boundaries. Maintain 5-acre minimum parcel size for rural ADU development and require advanced nitrogen reducing systems for wastewater treatment for both existing single-family dwellings and proposed ADUs. Set a larger minimum parcel size requirement for all southern Deschutes County properties to qualify for rural ADU development. Remove the minimum size requirements for all southern Deschutes County properties to qualify for rural ADU development.
5	Do the current amendments and ESEE analysis adequately address and protect Goal 5 and Natural Resources?	None	<ul style="list-style-type: none"> Prohibit rural ADU development in designated Goal 5 resource areas (i.e. – Wildlife Area Combining Zone, Greater Sage-Grouse Area Combining Zone, and the Sensitive Bird and Mammal Habitat Combining Zone) Recommended by Planning Commission 5 to 1 	<ol style="list-style-type: none"> Allow rural ADU development in designated Goal 5 areas such as the Wildlife Area Combining Zone, subject to existing standards and requirements. Any development within Goal 5 sites such as the Flood Plain Zone or jurisdiction wetlands requires a Conditional Use Permit and review by local, state, and federal agencies to ensure compliance with environmental and natural hazard mitigation regulations. Prohibit rural ADU development in some, but not all, designated Goal 5 resource areas. Develop additional restrictions in coordination with the Oregon Department of Fish and Wildlife (ODFW) for rural ADU development in designated Goal 5 resources areas such as minimum parcel sizes, driveway access consolidation, etc. Delay the adoption of rural ADU legislation until such time as the proposed Deschutes County Goal 5 inventory update is complete.

PLANNING COMMISSION RECOMMENDATION MATRIX

SENATE BILL (SB) 391 – RURAL ACCESSORY DWELLING UNIT (ADU) TEXT AMENDMENTS
 Land Use File No. 247-22-000671-TA

	Issue Area	SB 391 Criterion	Planning Commission Recommendation	Possible Alternatives
6	Do the current amendments adequately address Senate Bill 762 and Wildfire Mitigation?	<ul style="list-style-type: none"> Statewide wildfire risk maps have been approved and the accessory dwelling unit complies with the Oregon residential specialty code relating to wildfire hazard mitigation for the mapped area; The accessory dwelling unit has adequate setbacks from adjacent lands zoned for resource use; The accessory dwelling unit has adequate access for firefighting equipment, safe evacuation and staged evacuation areas; If the accessory dwelling unit is not subject to ORS 477.015 to 477.061, the accessory dwelling unit has defensible space and fuel break standards as developed in consultation with local fire protection service providers. 	<ul style="list-style-type: none"> Delay the adoption of rural ADU legislation until such time as the final State Wildfire Risk Map has been released by the Oregon Department of Forestry Recommended by Planning Commission 6 to 0 	<ol style="list-style-type: none"> Continue the adoption of rural ADU legislation with the SB 391 fire mitigation standards prior to the release of the final State Wildfire Risk Map by the Oregon Department of Forestry. Development on any rural ADU project would be prohibited until a final version of the State Wildfire Risk Map is released, likely in Winter 2023. Require all rural ADUs contain fire sprinklers (per recommendation from Chief Mike Supkis of La Pine Rural Fire Protection District).

PLANNING COMMISSION RECOMMENDATION MATRIX

SENATE BILL (SB) 391 – RURAL ACCESSORY DWELLING UNIT (ADU) TEXT AMENDMENTS

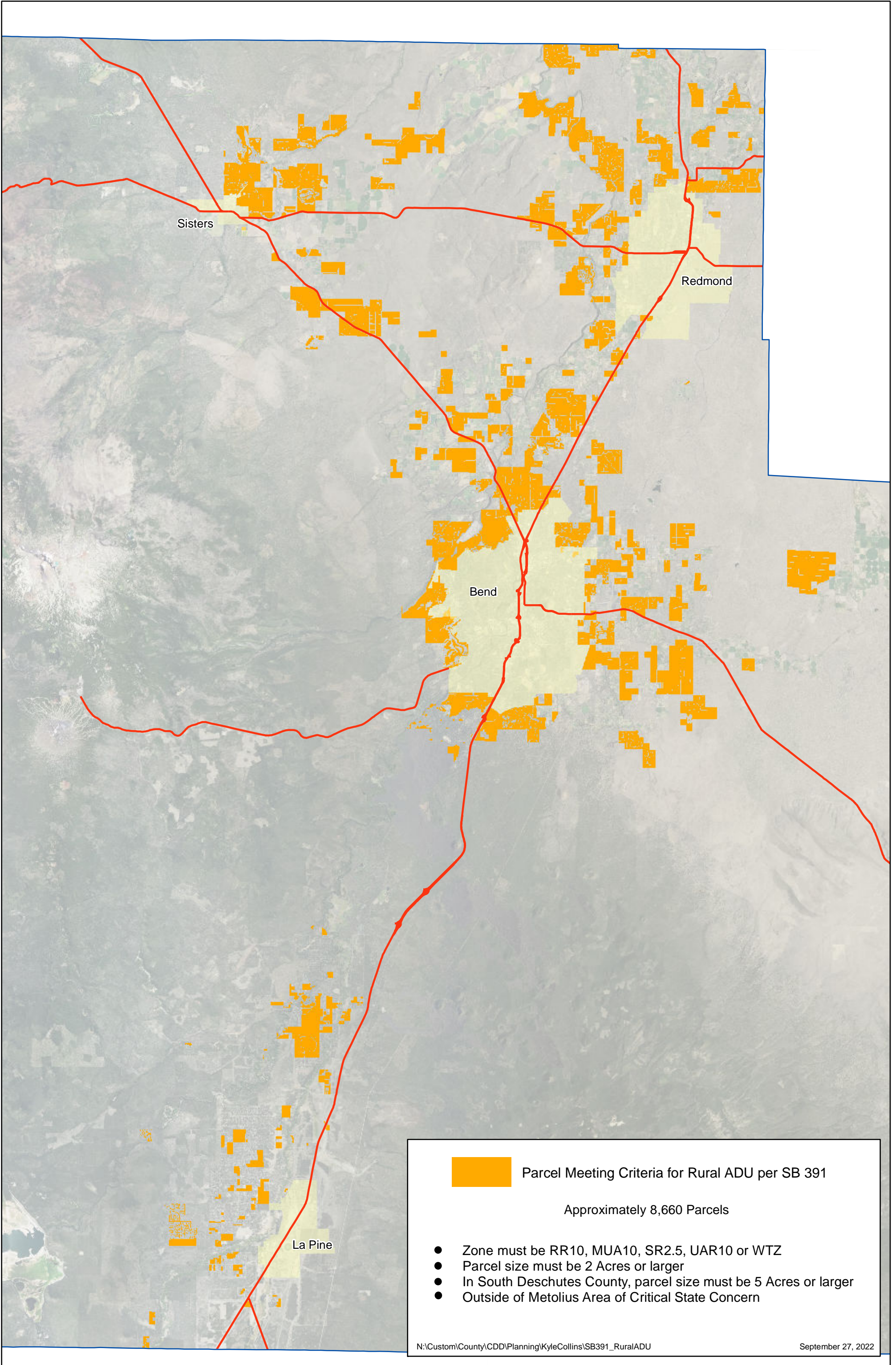
Land Use File No. 247-22-000671-TA

	Issue Area	SB 391 Criterion	Planning Commission Recommendation	Possible Alternatives
7	Should ADUs be allowed in the Westside Transect Zone?	None	<ul style="list-style-type: none"> Prohibit rural ADU development in the WTZ Rural ADUs would be allowed on properties within the Westside Transect Zone (WTZ) Recommended by Planning Commission 5 to 1 	<ol style="list-style-type: none"> Allow rural ADU development in the WTZ. All existing requirements related to development within the WTZ including subdivision and property scale fuel treatments, wildfire mitigation building code standards, and maintenance of designated open space corridors would be unaffected by the proposed amendments. Develop additional restrictions for rural ADU development in the WTZ such as siting standards, etc.
8	Should Vacation Occupancy be prohibited in the existing residence, as well as the ADU?	A county may not allow an accessory dwelling unit allowed under this section to be used for vacation occupancy, as defined in ORS 90.100.	<ul style="list-style-type: none"> Prohibit both the existing single-family dwelling and the ADU for vacation occupancy use, as defined in DCC 18.116.370(A)(8) and consistent with ORS 90.100 Recommended by Planning Commission 6 to 0 	<ol style="list-style-type: none"> Allow the existing single-family dwelling to be utilized for vacation occupancy use. The applicant shall be required to sign and record with the County Clerk, prior to the issuance of a building permit, a restrictive covenant stating an accessory dwelling unit allowed under this section cannot be used for vacation occupancy, as defined in DCC 18.116.370(A)(8) and consistent with ORS 90.100



1" = 3.5 Miles

Parcels Meeting Initial Criteria for Rural ADUs per SB 391



Parcel Meeting Criteria for Rural ADU per SB 391

Approximately 8,660 Parcels

- Zone must be RR10, MUA10, SR2.5, UAR10 or WTZ
- Parcel size must be 2 Acres or larger
- In South Deschutes County, parcel size must be 5 Acres or larger
- Outside of Metolius Area of Critical State Concern



STAFF REPORT

FILE NUMBER: 247-22-000671-TA

APPLICANT: Deschutes County Community Development
117 NW Lafayette Avenue
Bend, Oregon 97703

PROPERTY OWNER: N/A

REQUEST: Pursuant to Senate Bill (SB) 391, Text Amendments to allow an owner of a lot or parcel within a rural residential exception area to construct one accessory dwelling unit (ADU) subject to certain restrictions and limitations.

STAFF CONTACT: Kyle Collins, Associate Planner

I. APPLICABLE CRITERIA:

Deschutes County lacks specific criteria in DCC Titles 18, 19, 22, or 23 for reviewing a legislative text amendment. Nonetheless, since Deschutes County is initiating a legislative text amendment, the County bears the responsibility for justifying that the amendments are consistent with Statewide Planning Goals and its existing Comprehensive Plan

II. BASIC FINDINGS:

A. Senate Bill 391

On June 23, 2021, the Oregon Legislature adopted Senate Bill (SB) 391, which authorizes counties to allow an owner of a lot or parcel within a rural residential exception area to construct one accessory dwelling unit (ADU) subject to certain restrictions and limitations.¹ SB 391 does not obligate a county to allow ADUs, nor does it prohibit a county from imposing any additional restrictions beyond what is mandated in state law.

Rural residential exception areas and their corresponding zones exist throughout Oregon. By definition, rural residential zones exist outside urban growth boundaries (UGBs), but are excluded

¹ <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB391>

from the state’s resource land (farm and forest zone) protections. While the protections afforded to resource lands allow residential uses only in conjunction with a farm or forest use, rural residential zones allow a dwelling as a primary use of the land. Prior to the adoption of SB 391, state law allowed counties to permit an additional dwelling on a property containing a house built prior to 1945.² However, unlike urban zones, rural residential zones did not have other by-right accessory dwelling options, making inter-generational and alternative housing options difficult to achieve.

SB 391 only authorizes ADUs on lands zoned for rural residential use. Areas zoned for rural residential use are defined by ORS 215.501 to mean “land that is not located inside a UGB as defined in ORS 195.060 (Definitions) and that is subject to an acknowledged exception to a statewide land use planning goal relating to farmland or forestland and planned and zoned by the county to allow residential use as a primary use.” The applicable zoning designations in Deschutes County for these lands are Multiple Use Agricultural (MUA-10), Rural Residential (RR-10), Suburban Low Density Residential (SR 2.5), Urban Area Reserve (UAR-10), and Westside Transect Zone (WTZ).

B. Deschutes County Rural ADU Ordinance

In addition to only applying to lands recognized as rural residential exception areas, SB 391 also contains minimum criteria that must be met for a lot or parcel to qualify for an ADU. Many of those criteria are general in nature and therefore require counties to provide their own interpretations or definitions. At the same time, SB 391 contains several provisions related to wildfire hazard mitigation, which relied on and referred to actions at the state level as directed by the passage of SB 762, a comprehensive wildfire hazard mitigation bill.³ While wildfire requirements were being created at the state level, staff worked with the Board of County Commissioners to “translate” the language of SB 391 into the local code presented in these amendments.

III. PROPOSAL:

This is a legislative text amendment to Deschutes County Code (DCC), Title 18, County Zoning, and Title 19, Bend Urban Growth Boundary Zoning Ordinance. The primary purpose of the amendments is to allow rural ADUs per the adoption of SB 391. The proposal creates two new subsections (effectively the same but pertaining to different zones in Titles 18 and 19) that govern the criteria for rural ADUs. Table 1 provides a summary of each provision of the amendments.

Table 1 – SB 391 Requirements

Topic	SB 391 Requirements	Comment
Single Family Dwelling	SB 391 Section 2(2)(c) requires one single-family dwelling to be located on the lot or parcel.	DCC 18.116.370(B)(1) and DCC 19.92.160(B)(1) are consistent with SB 391.

² House Bill 3012 (2017).

³ SB 1533 (2022) corrected broken links in SB 762 related to wildfire mapping.

Topic	SB 391 Requirements	Comment
Urban Reserve Area	SB 391 Section 2(b) requires that the lot or parcel is not located within an area designated as an urban reserve as defined in ORS 195.137. In Deschutes County, the Redmond Urban Reserve Area is the only urban reserve that meets this definition.	DCC 18.116.370(B)(2) is consistent with SB 391. Redmond's Urban Reserve Areas is not near lands zoned in Title 19, therefore it is not cited in DCC 19.92.160.
Nonresource Lands	SB 391 Section 2(1)(b) requires that "Area zoned for rural residential use" has the meaning given that term in ORS 215.501. ORS 215.501(1)(b), "Area zoned for rural residential use" means land that is not located inside an urban growth boundary as defined in ORS 195.060 (Definitions) and that is subject to an acknowledged exception to a statewide land use planning goal relating to farmland or forestland and planned and zoned by the county to allow residential use as a primary use.	Pursuant to DLCD, Acknowledged nonresource plan amendments and zone changes from Exclusive Farm Use (EFU) to RR-10 or MUA-10 are eligible for an ADU.
Areas of Critical State Concern	SB 391 Section 2(2)(i) requires that no portion of the lot or parcel is within a designated area of critical state concern. Areas of critical state concern are generally defined in ORS 197.405 and apply to the Metolius Area of Critical State Concern in ORS 197.416.	DCC 18.116.370(B)(3) is consistent with SB 391. The Metolius Area of Critical State Concern is not near lands zoned in Title 19, therefore it is not cited in DCC 19.92.160.
Minimum Lot Size	SB 391 Section 2(2)(b) requires the subject lot or parcel be at least two acres in size.	DCC 18.116.370(B)(4) and DCC 19.92.160(B)(2) are consistent with SB 391. DCC 18.116.370(B)(4) requires a minimum lot or parcel to be at least 5 acres in size south of Sunriver due to groundwater protection.
Setbacks	SB 391 Section 2(2)(m)(A) requires that the ADU has adequate setbacks from adjacent lands zoned for resource use.	DCC 18.116.370(B)(5) and DCC 19.92.160(B)(3) are consistent with SB 391. Both require a minimum setback of 100 feet between the ADU and adjacent EFU and Forest Use zoned (F-1, F-2) properties.
ADU Size	SB 391 Section 2(2)(f) limits the size of the ADU to 900 square feet of useable floor area.	DCC 18.116.370(B)(6) and DCC 19.92.160(B)(4) are consistent with SB 391. Usable floor area is defined as, "the area of the accessory dwelling unit included within the surrounding exterior walls, including garages and other accessory components."

Topic	SB 391 Requirements	Comment
Distance from Dwelling	SB 391 Section 2(2)(g) requires the ADU to be located no farther than 100 feet from the single family dwelling. ⁴	DCC 18.116.370(B)(7) and DCC 19.92.160(B)(5) are consistent with SB 391. Both require the ADU be located no farther than 100 feet from the existing single family dwelling, measured from a wall of the single-family dwelling to the nearest part of the useable floor area of the ADU.
Sanitation and Wastewater	SB 391 Section 2(2)(e) requires the ADU to comply with applicable sanitation and wastewater regulations.	DCC 18.116.370(B)(9) and DCC 19.92.160(B)(6) are consistent with SB 391.
Fire Protection District Service	SB 391 Section 2(2)(j) requires the lot or parcel be served by a fire protection service provider with professionals who have received training or certification described in ORS 181A.410.	DCC 18.116.370(B)(10) and DCC 19.92.160(B)(7) are consistent with SB 391.
Access and Evacuation	SB 391 Section 2(2)(m)(B) requires that the ADU has adequate access for firefighting equipment and safe evacuation and staged evacuation areas.	DCC 18.116.370(B)(11) and DCC 19.92.160(B)(8) are consistent with SB 391. Both require certification of access by the applicable fire protection district and that there are evacuation plan and authorized staged evacuation areas.
Wildland Urban Interface (WUI) Defensible Space Requirements	SB 1533 Section 5(2)(k) requires that if the lot or parcel is in an area identified on the statewide map of wildfire risk described in ORS 477.490, as within a WUI with a high to extreme risk classification, the lot or parcel must comply with any applicable minimum defensible space requirement for wildfire risk reduction established by the State Fire Marshal under ORS 476.392.	DCC 18.116.370(B)(12) and (13) and DCC 19.92.160(B)(9) and (10) are consistent with SB 391. As required in SB 762, no property can apply for an ADU until release of the final Statewide Map of Wildfire Risk by the Oregon Department of Forestry. The map will be released sometime in winter 2023.
Wildland Urban Interface (WUI) Fire Hardening	SB 762 Section 12 requires that if the lot or parcel is in an area identified on the statewide map of wildfire risk described in ORS 477.490, as within a WUI with a high to extreme risk classification, the ADU must comply with R327 (fire hardening standards) in the Oregon Residential Specialty Code.	DCC 18.116.370(B)(12) and (13) and DCC 19.92.160(B)(9) and (10) are consistent with SB 391. As required in SB 762, no property can apply for an ADU until release of the final Statewide Map of Wildfire Risk by the Oregon Department of Forestry. The map will be released sometime in winter 2023.

⁴ The bill language and legislative history are unclear if the entire ADU must be entirely within 100 feet of the dwelling or just a portion. Local governments are therefore granted deference to interpret this provision.

Topic	SB 391 Requirements	Comment
Nuisance	SB 391 Section 2(2)(d) requires that existing single-family dwelling property on the lot or parcel is not subject to an order declaring it a nuisance or subject to any pending action under ORS 105.550 to 105.600.	DCC 18.116.370(B)(14) and DCC 19.92.160(B)(11) are consistent with SB 391.
Subdivision and Other Accessory Dwelling Unit Limitations	SB 391 Section 2(4)(a) and (b) preclude a subdivision, partition or other division of the lot or parcel so that the existing single-family dwelling is situated on a different lot or parcel than the ADU; and precludes construction of an additional ADU on the same lot or parcel.	DCC 18.116.370(B)(15) and DCC 19.92.160(B)(12) are consistent with SB 391.
Water Supply	SB 391 Section 2(5) allows a county to require that the ADU be served by the same water source or water supply system as the existing single-family dwelling. If the ADU is served by a well, the construction of the ADU shall maintain all setbacks from the well required by the Water Resources Commission or Water Resources Department.	DCC 18.116.370(B)(16) and DCC 19.92.160(B)(13) are consistent with SB 391. While not requiring the same water source, DCC 18.116.370(B)(16) and DCC 19.92.160(B)(15) require setbacks from the well to be maintained from an ADU.
Water Right Exempt Use	SB 391 Section 2(6) recognizes that a single family dwelling and an ADU are considered a single unit and therefore do not require a groundwater permit from the Oregon Water Resources Department. ⁵	DCC 18.116.370(B)(17) and DCC 19.92.160(B)(14) are consistent with SB 391.
Vacation Occupancy	SB 391 Section 2(3) prevents an ADU from being used for vacation occupancy as defined in ORS 90.100.	DCC 18.116.370(B)(18) and DCC 19.92.160(B)(15) are consistent with SB 391. Both require a restrictive covenant be recorded to ensure compliance.

IV. FINDINGS:

CHAPTER 22.12, LEGISLATIVE PROCEDURES

Section 22.12.010.

Hearing Required

FINDING: This criterion will be met because a public hearing was held before the Deschutes County Planning Commission and Board of County Commissioners.

⁵ Deschutes County does not contain any critical groundwater areas as defined by the Water Resources Commission.

Section 22.12.020, Notice**Notice****A. Published Notice**

- 1. Notice of a legislative change shall be published in a newspaper of general circulation in the county at least 10 days prior to each public hearing.**
- 2. The notice shall state the time and place of the hearing and contain a statement describing the general subject matter of the ordinance under consideration.**

FINDING: This criterion will be met as notice was published in the Bend Bulletin newspaper for the Planning Commission public hearing, and the Board of County Commissioners' public hearing.

B. Posted Notice. Notice shall be posted at the discretion of the Planning Director and where necessary to comply with ORS 203.045.

FINDING: Posted notice was determined by the Planning Director not to be necessary.

C. Individual notice. Individual notice to property owners, as defined in DCC 22.08.010(A), shall be provided at the discretion of the Planning Director, except as required by ORS 215.503.

FINDING: Given the proposed legislative amendments do not apply to any specific property, no individual notices were sent.

D. Media notice. Copies of the notice of hearing shall be transmitted to other newspapers published in Deschutes County.

FINDING: Notice was provided to the County public information official for wider media distribution. This criterion is met.

Section 22.12.030 Initiation of Legislative Changes.

A legislative change may be initiated by application of individuals upon payment of required fees as well as by the Board of County Commissioners.

FINDING: The application was initiated by the Deschutes County Planning Division at the direction of the Board of County Commissioners, and has received a fee waiver. This criterion is met.

Section 22.12.040. Hearings Body

- A. The following shall serve as hearings or review body for legislative changes in this order:**
- 1. The Planning Commission.**
 - 2. The Board of County Commissioners.**

B. Any legislative change initiated by the Board of County Commissioners shall be reviewed by the Planning Commission prior to action being taken by the Board of Commissioners.

FINDING: The Deschutes County Planning Commission held the initial public hearing on September 22, 2022. The Board then held a public hearing on [TBD]. These criteria are met.

Section 22.12.050 Final Decision

All legislative changes shall be adopted by ordinance

FINDING: The proposed legislative changes will be implemented by Ordinance No. [number TBD] upon approval and adoption by the Board of County Commissioners. This criterion will be met.

B. Statewide Planning Goals and Guidelines

Goal 1: Citizen Involvement: The amendments do not propose to change the structure of the County's citizen involvement program. Notice of the proposed amendments was provided to the *Bulletin* for the Board public hearing.

Goal 2: Land Use Planning: This goal is met because ORS 197.610 allows local governments to initiate post acknowledgments plan amendments (PAPA). An Oregon Land Conservation and Development Department 35-day notice was initiated on August 17, 2022. The Planning Commission held a public hearing on September 22, 2022 and the Board of County Commissioners will hold a public hearing on [TBD]. The Findings document provides the adequate factual basis for the amendments.

Goal 3: Agricultural Lands: No changes related to agricultural lands are proposed as part of the text amendments. This goal does not apply.

Goal 4: Forest Lands: No changes related to forest lands are proposed as part of the text amendments. This goal does not apply.

Goal 5: Open Spaces, Scenic and Historic Areas, and Natural Resources: By adopting SB 391 in 2021, the Oregon Legislature added a new use, ADU, to rural residential exception areas. Local governments can choose to allow this use by: 1) amending their zoning codes and complying with SB 391's development standards. Goal 5 does not apply.

However, to the extent that it does, local governments apply Goal 5 to a PAPA when the amendment allows a new use and the new use "could be" a conflicting use with a particular Goal 5 resource site on an acknowledged resource list. Certain areas in rural Deschutes County, zoned MUA-10 and RR-10 contain Goal 5 resources because they are overlaid with a Wildlife Area Combining Zone. Two zoning codes are being amended to allow Rural ADUs and are therefore subject to an ESEE Analysis. No other changes to the code warrant specific ESEE Analysis as they are not adding new uses that conflict with Goal 5 resources. The ESEE analysis is included in *Appendix A* which is attached to this document.

Goal 6: Air, Water and Land Resources Quality: The proposed text amendments do not propose changes to the County's Comprehensive Plan policies or implementing regulations for compliance with Goal 6, and therefore are in compliance. However, it is worth noting that the amendments preclude citing an ADU south of Sunriver on lots or parcels that are between 2 and 4.99 acres. The eligible lot or parcel size in this area of the County is 5 acres. In the RR-10 zone south of Sunriver, there are 1,129 tax lots 2 acres or larger and 319 tax lots 5 acres or larger.

Goal 7: Areas Subject to Natural Disasters and Hazards: The proposed text amendments do not propose to changes the County's Comprehensive Plan or implementing regulations regarding natural disasters and hazards; therefore, they are in compliance. Eligible properties subject to SB 762, effective April 1, 2023, will be required to comply with Oregon Residential Specialty Code (R327) to fire harden the ADU and coordinate with the Oregon State Fire Marshal to ensure the property has defensible space.

Goal 8: Recreational Needs: Accessory Dwelling Units are not a recreational use or need. This goal does not apply.

Goal 9: Economic Development: Accessory Dwelling Units are not primarily economic in nature. This goal does not apply.

Goal 10: Housing: This goal is not applicable because unlike municipalities, unincorporated areas are not obligated to fulfill certain housing requirements.

Goal 11: Public Facilities and Services: Accessory Dwelling Units in the rural county typically rely on domestic wells and onsite wastewater treatment systems. A Goal 11 exception would be required for a centralized sewer system and would need to be applied on a property specific, needs related basis. This goal does not apply.

Goal 12: Transportation: By adopting SB 391 in 2021, the Oregon Legislature added a new use, ADU, to rural residential exception areas. Local governments can choose to allow this use by: 1) amending their zoning codes and complying with SB 391's development standards. ADUs will still be subject to Transportation System Development Charges (SDCs) prior to the issuance of a building permit. To the extent that the Transportation Planning Rule at OAR 660-012-0060 does apply, staff notes the following comments from the County's Senior Transportation Planner:

The Transportation Planning Rule (TPR) at OAR 660-012-0060 requires a determination if a new land use regulation will significantly affect a transportation facility. Approximately 9,831 lots could be eligible for a rural accessory dwelling unit (ADU) based on zoning and size of the tax lot with roughly 3,000 tax lots being eligible immediately. The remaining roughly 6,000 tax lots' eligibility will need to be determined based on the wildfire rules and requirements in development based on Senate Bill (SB) 762.

The potential lots for a rural ADU are geographically spread out:

- Bend area: 3,876 lots

- Redmond area: 2,886 lots
- Sisters area: 1,576 lots
- South County: 1,123 lots

The County is currently updating its 2010-2030 Transportation System Plan (TSP) to 2020-2040. The analysis of future traffic volumes only indicated a few intersections that would not meet County performance standards. Both were tied to the Deschutes Junction interchange at US 97/Deschutes Market Road-Tumalo. The TSP has planned improvements to mitigate the deficiencies at those intersections.

The geographic distribution of the lots, the adequate reserve capacity on the County system, the low trip generation of each home, an average of nine daily trips, including one p.m. peak hour trip, and the fact the lots will develop over years and years, means the road system is adequate to handle the traffic volumes generated by rural ADUs.

The rural ADUs do not result in any changes to the County’s functional classifications or access management policies. The County collects transportation system development charges (SDCs) for all new developments, including single-family homes. The SDC rate is indexed to construction costs and resets every July 1. As a rural ADU is essentially a second home on the property, the County would collect SDCs as each rural ADU develops. The current SDC rate for a single-family home is \$4,115. If the SDC rate remained unchanged, which is highly unlikely, the 9,831 lots would generate \$38.6 million dollars in SDCs.

The addition of a second rural ADU on approximately 9,381 lots will not create a significant nor adverse effect to the County transportation system and thus complies with the TPR.

Goal 13: Energy Conservation: Any future site-specific application for an ADU will be required to incorporate energy conservation measures through the Oregon Building Code. This goal does not apply.

Goal 14: Urbanization: The purpose of Goal 14 is to direct urban uses to areas inside UGBs. As the proposed amendments do not seek to allow urban uses on rural land, nor do they seek to expand an existing urban growth boundary, this goal does not apply.

Goals 15 through 19: Deschutes County does not contain any of the relevant land types included in Goals 15-19. Therefore these goals do not apply.

C. Deschutes County Comprehensive Plan

Chapter 3, Rural Growth

Section 3.3, Rural Housing

3.3.5 *Maintain the rural character of the County while ensuring a diversity of housing opportunities, including initiating discussions to amend State Statute and/or Oregon Administrative Rules to permit accessory dwelling units in Exclusive Farm Use, Forest and Rural Residential zones.*

FINDING: Implementing SB 391, which allows ADUs to be sited in rural residential exception areas, is consistent with Policy 3.3.5.

V. CONCLUSION:

Based on the information provided herein, the staff recommends the Board of County Commissioners approve the proposed text amendments that make minor changes necessary to clarify existing standards and procedural requirements, incorporate changes to state and federal law, and to correct errors.

Rural Accessory Dwelling Unit Text Amendment

Appendix A: ESEE Analysis Document to

File No. 247-22-000671-TA

Deschutes County Community Development

November 9, 2022

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- Attachment 1 – Deschutes County Goal 5 Inventory Summary Table
- Attachment 2 – Inventory Site Maps

Chapter 1: Overview of Goal 5 and ESEE Analyses

Introduction

This appendix report was prepared to supplement the findings document associated with File No. 247-22-000671-TA. Deschutes County is amending Deschutes County Code (DCC), Titles 18 and 19 to allow Rural Accessory Dwelling units (ADUs) consistent with Senate Bill (SB) 391 (2021) in Multiple Use Agricultural (MUA-10), Rural Residential (RR-10), Suburban Low Density Residential (SR 2.5), and Urban Area Reserve (UAR-10) Zones. DCC Chapter 18.88 is the Wildlife Area (WA) Combining Zone, which recognizes four Goal 5 inventories: Antelope Range, Deer Migration Corridor, Deer Winter Range, and Significant Elk Habitat. Certain areas in rural Deschutes County, zoned MUA-10 and RR-10, are overlaid with a Deer Migration Corridor, Deer Winter Range, and/or Significant Elk Habitat.

In addition, there are some areas zoned MUA-10 and RR-10 that contain Goal 5 riparian resources and their associated fish, furbearer, waterfowl, and upland game bird habitat. Recognizing that an ADU is a new conflicting use in the WA Combining Zone, Deschutes County is applying Goal 5 in consideration of this Post Acknowledgment Plan Amendment (PAPA). The full findings document provides additional detail and background information regarding the intent of the amendments and compliance with other applicable local and state regulations outside of Statewide Land Use Planning Goal 5 – *Natural Resources, Scenic and Historic Areas, and Open Spaces*.

Deschutes County Goal 5 Program

The purpose of Goal 5 is “to protect natural resources and conserve scenic and historic areas and open spaces.” Local governments, as part of the Comprehensive Planning process, are required to inventory the extent, location, quality, and quantity of significant natural resources within their jurisdictional boundaries. Following this inventory, local governments then conduct an economic, social, environmental, and energy (ESEE) analysis to determine the extent to which land uses should be limited in order to adequately protect significant resources. Following an ESEE analysis, governments then establish a program to protect significant natural resources. Deschutes County established its initial Goal 5 natural resource inventory, ESEE analyses, and protection programs between the years of 1988-1994, as part of periodic review.

In reviewing this document, it is important to acknowledge there are six policies and development standards within the Deschutes County Comprehensive Plan and DCC that were established through ESEEs over time that could still limit the development of ADUs near inventoried Goal 5 resources. Deschutes County finds the proposed amendments do not alter the following existing protections.

1. Setback Protections: 100-foot structural setback from the ordinary high water mark (OHWM) of rivers and streams.
2. Scenic Protections: Development near rivers in the Landscape Management Combining Zone must be reviewed for aesthetic compatibility.

3. Wetland Protections: Prohibition of fill or removal of any material or wetland vegetation, regardless of the amount, within the bed and banks of any stream or river or in any wetland unless approved as a conditional use.
4. Mitigation Protections: Impacts to any wetland or riverbank impacts to be fully mitigated, as evaluated by Oregon Department of Fish and Wildlife (ODFW).
5. Flood Plain Protections: All new construction, expansion or substantial improvement of an existing dwelling, an agricultural related structure, a commercial, industrial or other non-residential structure, or an accessory building in a designated Flood Plain must obtain a conditional use permit.
6. Combining Zone Requirements: Deer Migration Corridor, Deer Winter Range, Elk Habitat, and Sensitive Bird and Mammal Habitat have site specific requirements including development setbacks and/or seasonal construction requirements to prevent impacts to sensitive species and habitat.

Required Steps and Discretionary Review

Local governments are required to comply with Goal 5 when a PAPA allows a new use and the new use “could be” a conflicting use with a particular Goal 5 resource site on an acknowledged resource list.⁶ Deschutes County is amending the MUA-10, RR-10, SR 2.5, and UAR-10 zoning chapters to allow ADUs consistent with SB 391 (2021).

ADUs have the potential to generate a certain level of noise and habitat alteration. As this new use could potentially impact Goal 5 resources, Deschutes County is conducting an ESEE Analysis to identify potential consequences and protections related to the amendments. ADUs will be added as a new permitted use in the MUA-10, RR-10, SR 2.5, and UAR-10 zones. As shown below, only two of those zones, MUA-10 and RR-10 contain Goal 5 resources and are being reviewed as part of this ESEE analysis.

Table 2: Zones Containing Goal 5 Resources

Contain Goal 5 Resources	Do Not Contain Goal 5 Resources
<ul style="list-style-type: none"> • DCC Chapter 18.32, Multiple Use Agricultural Zone • DCC Chapter 18.60, Rural Residential Zone 	<ul style="list-style-type: none"> • DCC Chapter 19.12, Urban Area Reserve Zone • DCC Chapter 19.20, Suburban Low Density Residential Zone

ESEEs are meant to be analytical tools. The content of the ESEE is discretionary and is intended to be conducted by planning staff using existing information. An ESEE is not meant to focus exclusively

⁶ OAR 660-023-0250(3)(b)

on environmental impacts such as an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). Additionally, Goal 5 explains “the ESEE analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected.”⁷ In utilizing this analytical tool, there are a few steps jurisdictions must include and address in accordance with OAR 660-023 – *Procedures and Requirements for Complying with Goal 5*:

1. Identify Conflicting Uses – Does the land use or activity negatively impact natural resources?
2. Determine Impact Area – What is the geographic extent to which land uses or activities adjacent to natural resources could negatively impact those resources?
3. Analyze ESEE Consequences – What are the positive and negative consequences (both for development and natural resources) of a decision to fully protect natural resources, fully allow conflicting uses, or limit conflicting uses?
4. Develop a program – How and to what extent will the natural resources be protected based on the ESEE analysis?

A response to each of these steps is included throughout this report. The relevant page and chapter can be found in the table of contents.

⁷ OAR 660-023-0040(1)

Chapter 2: Deschutes County Goal 5 Inventory and Methodology

660-23-0030 – Inventory Goal 5 Resources

Stemming from periodic review, Deschutes County adopted inventories for a variety of Goal 5 natural resources (Attachment 1). Some of these resources have mapped geographic boundaries such as Deer Winter Range, whereas others are described as being located in general areas – such as furbearer habitat in riparian corridors. The inventories were produced at a countywide scale, with additional detail for the Deschutes River and its tributaries through the Deschutes County/City of Bend River Study. County staff digitized these habitat boundaries into Geographic Information Systems (GIS) shape files in the 2000s for public awareness. The shape files were created from hard copy maps and descriptions found in the ordinances establishing the County’s Goal 5 program, in consultation with the Oregon Department of Fish and Wildlife (ODFW).

Maps provided in this document include inventoried habitat that spatially overlaps with the MUA-10 and RR-10 zones impacted by the proposed text amendments (Attachment 2). The habitat areas include: deer migration corridor, deer winter range, elk habitat, flood plain, and wetlands. Staff utilized the County’s WA Combining Zone layers to determine the general extent of habitat for big game species as the Combining Zone was designed to cover a larger area than the habitat itself (Ordinance 92-046). Inventoried streams and rivers are shown on the map, as well as wetlands and flood plains. Goal 5 Riparian areas (flood plain, wetlands and 100 feet measured from ordinary high water mark) associated with these water bodies is also the habitat area for fish, furbearers, waterfowl, and upland game birds (Ordinance 92-041, 94-007). As the proposed text amendments are legislative and do not impact any specific properties, staff did not review Goal 5 impacts on an individual parcel level basis. Instead staff identified the following potential resource sites in which the allowance of ADUs could potentially intersect with Goal 5 resources:

Riverine Resources: Some properties in the MUA-10 and RR-10 zones are located in relative proximity to the Deschutes River, Little Deschutes River, Paulina Creek, and Whychus Creek and its associated Goal 5 Riparian Area.⁸ Ordinance 92-041 stated the following additional Goal 5 resources depend on riparian corridors for habitat: furbearer, waterfowl, and upland game bird habitat. As the extent of the habitat locations for these species are not detailed in a boundary description or on a map, staff assumes the species habitat is found entirely inside the Riparian Area boundary shown in Attachment 2.

Wildlife Area Combining Zone: The WA Combining Zone was adopted as a protection measure for antelope, deer, and elk in Deschutes County. As an overlay zone, the mapped area conservatively identified typical habitat and migration areas and provided additional development requirements to ensure impacts to wildlife are properly mitigated alongside the underlying base zone regulations. The zone encompasses the previously inventoried area for Antelope Range, Deer Migration

⁸ There are 386 RR-10 tax lots, two acres or greater that abut the Little Deschutes River or Deschutes River and 505 tax lots that are split-zoned RR-10 or MUA-10 with the Flood Plain Zone. The Flood Plain Zone is not recognized as a rural residential exception area. RR-10 and MUA-10 split zoned properties will be required to contain the minimum lot or parcel area to qualify for an ADU.

Corridor, Deer Winter Range, and Significant Elk Habitat. The proposed amendments add a conflicting use, ADUs which affect three habitat ranges in MUA-10 and RR-10: Deer Migration Corridor, Deer Winter Range, and Significant Elk Habitat. These habitat ranges are shown in Attachment 2. The maps include federal land. However, these properties are not subject to Deschutes County land use regulations.

The Deschutes County Goal 5 inventory also includes scenic and open space sites such as Landscape Management Rivers and Streams, State Scenic Waterways and Federal Wild and Scenic Rivers, and Ecologically and Scientifically Significant Natural Areas – Little Deschutes River / Deschutes Confluence (Attachment 1). As these are resources associated with mitigating visual impacts and do not impact development potential, they are not impacted by the proposed amendments and therefore are not reviewed in this document.

Chapter 3: Conflicting Use Analysis

660-023-0040(2): Identify conflicting uses. Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. To identify these uses, local governments shall examine land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area. Local governments are not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site.

Deschutes County is proposing to add ADUs in the MUA-10 and RR-10 zones in the WA Combining Zone. ADUs could be a conflicting use to significant Goal 5 resources as they generate vehicle trips, buildable footprints, and noise. Other uses that are allowed in the two zones are shown below.

Table 3: Allowed Uses

Zoning	Outright Uses	Conditional Uses
MUA-10	Agricultural uses Single family dwelling or manufactured home Harvesting a forest product Class I and II road or street projects subject to land division standards Class III road or street project Noncommercial horse stables Horse events Operation, maintenance and piping of canals Type I Home occupation Historic accessory dwelling units	Public use Semipublic use Dude ranch Kennel and/or veterinary clinic Guest house Manufactured home as a secondary accessory farm dwelling Exploration for minerals Private parks Personal use airstrip Golf course Type 2 or 3 Home occupation Destination resorts Planned developments Cluster developments Landfills Timeshare Hydroelectric facility Storage, crushing and processing of minerals Bed and breakfast inn Excavation, grading and fill Religious institutions Private or public schools Utility facility Cemetery Commercial horse stables Horse events Manufactured home park or RV park Wireless telecommunication facilities Guest lodge Surface mining in conjunction with operation and maintenance of irrigation system

Zoning	Outright Uses	Conditional Uses
RR-10	Single family dwelling or manufactured home Utility facility Community center Agricultural use Class I and II road or street projects subject to land division standards Class III road or street project Noncommercial horse stables Horse events Operation, maintenance and piping of canals Type I Home occupation Historic accessory dwelling units	Public park Dude ranch Personal use airstrip Planned developments Cluster developments Recreation-oriented facility Landfills Cemetery Timeshare Hydroelectric facility Bed and breakfast inn Golf course Excavation, grading and fill Religious institutions Public use Semipublic use Commercial horse stables Private or public schools Manufactured home park or RV park Wireless telecommunication facilities Surface mining in conjunction with operation and maintenance of irrigation system

General Impacts of Conflicting Uses

The proposed amendments would allow ADUs in inventoried Goal 5 resources. As part of the ESEE review “a local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning”.⁹ In reviewing the proposed amendments, Deschutes County finds that the impacts from ADUs in the MUA-10 and RR-10 zones as they relate to Deer Migration Corridor, Deer Winter Range, and Significant Elk Habitat are of such a similar nature that the impacts for these areas may be reviewed together via the general impacts described below.

- *Noise and Light*

ADUs as a secondary dwelling may distress inventoried wildlife, as they seek to avoid noise and light.

- *Habitat Removal*

ADUs would likely require removal of upland vegetation, grading, and soil compaction that could alter drainage and runoff patterns. This could increase peak runoff, cause bank erosion, flooding, or increase the flow of sediment into water bodies. The removal of upland vegetation could also reduce tree canopy and understory vegetation which could be utilized by wildlife, outside of their primary habitat.

⁹ OAR 660-023-0040(4)

- *Introduction of Invasive, Nonnative Plants*

ADUs may contribute to the spread of invasive, nonnative plants which could replace and degrade native vegetation of which many species depend.

- *Habitat Fragmentation*

Additional human development may result in fences, roads, traffic and other barriers to the movement of terrestrial wildlife that is critical to their survival.

Greater detail on these potential conflicts and their consequences are provided below.

Chapter 4: Impact Areas

660-023-0040(3): Determine the impact area. Local governments shall determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site.

This step is discretionary and allows for the local jurisdiction to define which areas are the most vulnerable and/or most likely to be affected by the proposed amendments. The impact area for this ESEE analysis are properties that are within the Deer Migration Corridor, Deer Winter Range, and Significant Elk Habitat in the MUA-10 and RR-10 zones. As this ESEE is not for any specific property, but instead reflects changes to the code generally, there is no individual property specific data.

Properties in this impact area can be found in Attachment 2 – *Impact Area Maps*

Impact Area Methodology

To understand the impact of the proposed amendments, an estimate of the number of parcels is shown in Table 4 below. This estimate excludes unsewered areas smaller than 5 acres between Sunriver and the Klamath County border; defined as those unincorporated portions of Deschutes County contained in Townships 19S, 20S, 21S, and 22S and Ranges 9E, 10E and 11E. As addressed in the proposed amendments, given concerns surrounding groundwater impacts from wastewater disposal systems, unsewered properties between Sunriver and the Klamath County border must be 5 acres or larger to qualify for a rural ADU.

Table 4: Number of Affected Non-Federal Properties in Impact Area ¹⁰

Zone	Deer Migration	Deer Winter	Elk
Multiple Use Agricultural Zone	0	9	0
Rural Residential Zone	314	441	8
Total	314	450	8

¹⁰ See footnote #8.

Chapter 5: ESEE Analysis

660-023-0040(4): Analyze the ESEE consequences. Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation.

Background

Deschutes County is choosing to conduct a single analysis for all resource sites as the impacts from ADUs could have very similar impacts to both riparian areas and fish and wildlife that depend on the riparian for their habitat, and for big game including deer and elk.

As described above, the potential impacts fall into four general areas:

- *Noise and Light*

ADUs as a secondary dwelling may distress inventoried wildlife, as they seek to avoid noise and light.

- *Habitat Removal*

ADUs would likely require removal of upland vegetation, grading, and soil compaction that could alter drainage and runoff patterns. This could increase peak runoff, cause bank erosion, flooding, or increase the flow of sediment into water bodies. The removal of upland vegetation could also reduce tree canopy and understory vegetation which could be utilized by wildlife, outside of their primary habitat.

- *Introduction of Invasive, Nonnative Plants*

ADUs may the spread of invasive, nonnative plants which could replace and degrade native vegetation of which many species depend.

- *Habitat Fragmentation*

Additional human development may result in fences, roads, traffic and other barriers to the movement of terrestrial wildlife that is critical to their survival.

This step is discretionary. The purpose of an ESEE analysis is to provide a qualitative exercise for local governments to weigh the positive and negative consequences of three scenarios in order to determine a preferred outcome. Governments may choose to use quantitative data as necessary, but are not required to gather new information or hire wildlife biologists, economists, sociologists, or energy consultants.

ESEE Scenario Descriptions

Scenario (A) – Allow the Conflicting Use

In this scenario, the local government may decide that a conflicting use should be allowed fully, without any restrictions, no matter the potential impacts on the inventory site(s). In this instance, the Goal 5 rule would require the government to determine the conflicting use is of such importance compared to the site that the use should be allowed without any protections or limitations. In choosing this scenario, the local government could still use other tools to protect the inventories that are currently in place.

Scenario (B) – Prohibit the Conflicting Use

In this scenario, the local government may decide that the inventory site is of such importance or the conflicting use has the potential to be so detrimental to the inventory site(s), that the conflicting use should be entirely prohibited.

Scenario (C) – Limit the Conflicting Use

In this scenario, the local government may decide that the inventory site and the conflicting use are both important when compared to each other, and the use should be allowed with limitations to balance the impacts to the inventory site(s).

Accessory Dwelling Unit ESEE Analysis

Scenario (A) Allow the Conflicting Use

In this scenario, Deschutes County would allow ADUs in MUA-10 and RR-10 zones without any additional requirements to protect the inventoried resources.

Economic Consequences:

Permitting ADUs would have positive consequences by allowing a second dwelling on a property. Deschutes County is experiencing a housing shortage. Allowing ADUs, which are limited to 900 square feet of livable floor area and cannot be used as vacation rentals, could help address work force housing shortages in the region. It could reduce commuting costs for those workers that live in adjoining Crook, Jefferson and Klamath counties, and coupled with other work force housing strategies, attract businesses and employment opportunities in Central Oregon.

Allowing ADUs could also have negative consequences. The development of ADUs in MUA-10 and RR-10 zones could significantly increase land value, which could price out low and middle-income residents from the opportunity to own a home. Previous testimony from ODFW estimates that hunting and wildlife viewing contributed more than \$50 million to the Deschutes County economy annually. Deschutes County is proposing to allow ADUs in some areas that contain riparian areas

and species that rely on the riparian area for habitat including fish, furbearers, upland game birds, and waterfowl. Allowing for ADUs near these areas could reduce income associated with wildlife viewing and hunting of these species.

Based on previous ODFW testimony, mule deer populations have declined in recent years and are currently at about 40% of management objectives for the areas in Central OR managed out of the ODFW Bend office. This reduction represents an approximately 55% population decline since 1998. There are many factors that have contributed to the decline of mule deer populations in Central Oregon, some of which can be directly tied to increased human presence, including habitat alteration, habitat conversion and loss, roadkill, and illegal harvest. Other contributing factors may include increased predation and increased disease amount mule deer populations. By allowing ADUs in Deer Migration Corridor, Deer Winter Range, and Significant Elk Habitat, there is the potential for greater disturbance of deer and elk populations that could reduce hunting and viewing opportunities.

Social Consequences:

Permitting ADUs could have positive consequences by allowing property owners with an existing single family dwelling to build an ADU that accommodates aging parents or family members, farm help for those that are working on MUA-10 zoned agricultural properties or nearby Exclusive Farm Use zoned properties. By providing affordable housing, it could help lift people out of poverty and increase economic mobility. It could bring a positive impact on the surrounding community, encouraging social connections and lowering crime rates.

It could also have negative consequences by allowing ADUs in rural areas with inadequate access to employment, schools, food markets, medical facilities and parks. This could lead to higher automobile-dependence and vehicle emissions caused by more people driving to and from rural areas. Based on previous testimony from ODFW, there could also be negative impacts due to the potential loss of wildlife habitat. Many residents, advocacy organizations, and wildlife agencies continue to express concerns regarding the loss of fish and wildlife habitat due to the region's rapid growth and development. There is a recognition that increases in human activity, especially in rural areas, displace habitat and diminish, incrementally, Deschutes County's rural character and quality of life. The proposed amendments could have negative consequences due to increased human presence and infrastructure near the inventoried Goal 5 resources, which could lead to a reduced level of access and enjoyment for recreationalists.

Environmental Consequences:

In this scenario, ADUs would be permitted outright. As stated previously, ADUs could present negative impacts as they have the potential to increase noise and light near fish and wildlife habitats, and in turn cause distress to inventoried Goal 5 species.

Developing an ADU would likely require removal of upland vegetation, grading, and soil compaction that could alter drainage and runoff patterns. This could increase peak runoff, cause bank erosion, flooding, or increase the flow of sediment into water bodies. The removal of upland vegetation could also reduce tree canopy and understory vegetation which could be utilized by wildlife, outside of their primary habitat. Permitting ADUs could create negative impacts to designated habitat for Deer

Migration Corridor, Deer Winter Range, and Significant Elk Habitat. Based on previous ODFW testimony, mule deer populations have declined in recent years and are currently at about 40% of management objectives for the areas in Central OR managed out of the ODFW Bend office. This reduction represents an approximately 55% population decline since 1998. There are many factors that have contributed to the decline of mule deer populations in Central Oregon, some of which can be directly tied to increased human presence, including habitat alteration, habitat conversion and loss, roadkill, and illegal harvest. Other contributing factors may include increased predation and increased disease amount mule deer populations.

As previously stated, the following Goal 5 protections established during the creation of the initial inventory would remain in place:

1. Setback Protections: 100-foot structural setback from the ordinary high water mark of rivers or streams.
2. Scenic Protections: Development near rivers in the Landscape Management Combining Zone must be reviewed for aesthetic compatibility.
3. Wetland Protections: Prohibition of fill or removal of any material or wetland vegetation, regardless of the amount, within the bed and banks of any stream or river or in any wetland unless approved as a conditional use.
4. Mitigation Protections: Impacts to any wetland or riverbank impacts to be fully mitigated, as evaluated by ODFW.
5. Flood Plain Protections: All new construction, expansion or substantial improvement of an existing dwelling, an agricultural related structure, a commercial, industrial or other non-residential structure, or an accessory building in a designated Flood Plain shall obtain a conditional use permit.
6. Combining Zone Requirements: Deer Migration Corridor, Deer Winter Range, Significant Elk Habitat and Sensitive Bird and Mammal Habitat have site specific requirements including development setbacks and seasonal construction requirements to prevent impact to sensitive species and habitat.

Existing protections would prevent riparian areas from being developed with ADUs established near them. As the existing Goal 5 measures in place today protect riparian areas and the fish and wildlife within that habitat area, the addition of ADUs near these areas will be neutral.

Energy Consequences:

ADUs are unlikely to cause any major energy consequences. Per SB 391, the ADU must be within 100 feet of the existing dwelling. It must utilize the existing onsite system if there is no pre-existing centralized wastewater treatment system. It can also rely on an existing domestic well.

A potential negative consequence of the proposed amendments could be additional development in rural Deschutes County. Depending on the location of the ADU, it could lead to additional Vehicle Miles Traveled and greater congestion on county owned roads for employment, education, and basic services.

Scenario (B) Prohibit the Conflicting Use

In this scenario, Deschutes County would not allow ADUs in the MUA-10 and RR-10 zones associated with the WA Combining Zone and Deer Migration Corridor, Deer Winter Range, and Significant Elk Habitat.

Economic Consequences:

Prohibiting ADUs could have negative economic consequences, as it prevents certain property owners from using their land and building a secondary dwelling unit. This could contribute to work force housing deficiencies in the region and compel residents to commute from adjoining areas in Crook, Jefferson, and Klamath counties.

It could also have neutral consequences based on previous testimony from ODFW. Prohibiting ADUs could contribute to stabilizing mule deer populations, thereby maintaining economic benefits from wildlife viewing or hunting. Wildlife viewing, hunting, and fishing experiences in Deschutes County is a major economic asset to the region. Continuing with the current regulations could minimize further habitat fragmentation and help maintain wildlife viewing, hunting, and fishing revenues in Deschutes County.

Social Consequences:

Prohibiting ADUs could have negative consequences. Many residents and multi-generational families in Deschutes County need affordable housing and are rent-burdened. Limiting the potential supply of ADUs could exacerbate Central Oregon's housing crisis by forcing some residents to pay higher rents, commute longer distances for basic services, or relocate. Those circumstances could lead to further mental and physical stress.

It could also have positive consequences. Many residents express their appreciation for undisturbed landscapes because they contribute to Deschutes County's rural character and quality of life. Prohibiting ADUs, which generate noise and light would continue to limit disturbance to existing fish and wildlife habitats.

Environmental Consequences:

There are 386 RR-10 tax lots, two acres or greater that abut the Little Deschutes River or Deschutes River and 505 tax lots that are split-zoned RR-10 or MUA-10 with Flood Plain. These properties contain a Goal 5 Riparian Area which is also the habitat for Goal 5 inventoried waterfowl, upland game bird, furbearers, and fish. The WA Combining Zone contains Deer Migration Corridor, Deer Winter Range, and Significant Elk Habitat. By prohibiting ADUs and maintaining the status quo, these species will continue to be protected against habitat fragmentation and distress from second dwellings. The environmental consequences are therefore neutral.

Energy Consequences:

Energy consumption would have neutral consequences as this scenario maintains the status quo. Development associated with ADUs may be displaced to other areas of rural Deschutes County, which could still have demands on utilities.

Scenario (C) Limit the Conflicting Use

In this scenario, Deschutes County would allow ADUs in the MUA-10 and RR-10 zones, with additional limitations to protect the inventoried resources, outside of existing protections. The existing limitation would require the entire ADU to be within a 100 feet of the existing dwelling.

Economic Consequences:

Permitting ADUs would have positive consequences by allowing a second dwelling on a property. Deschutes County is experiencing a housing shortage. Allowing ADUs, which are limited to 900 square feet of livable floor area and cannot be used as vacation rentals, could help address work force housing shortages in the region. It could reduce commuting costs for those workers that live in adjoining Crook, Jefferson and Klamath counties and coupled with other work force housing strategies, attract businesses and employment opportunities in Central Oregon.

Compared to scenario (a) in which only a portion of the ADU must be within a 100 feet of the existing dwelling, the addition of limitations could lessen the impact by minimizing the buildable footprint and ultimately, the number of eligible properties, recognizing that some may not have enough area to accommodate an ADU. This could positively impact the hunting and wildlife viewing economy in Central Oregon, valued at \$50 million annually. While such measures could lessen impacts, the overall burden caused by allowing ADUs nevertheless may still overall impact wildlife and thereby impact revenue generated from the recreation economy.

In comparison to scenario (a), which would allow the use outright, Deschutes County finds that this scenario would provide a limitation to reduce the amount of impacts, even if those impacts still exist.

Social Consequences:

The positive social consequences in this scenario are very similar to scenario (a). Permitting ADUs could have positive consequences by allowing property owners with an existing single family dwelling to build an ADU that accommodates aging parents or family members, farm help for those that are working on MUA-10 zoned agricultural properties or nearby Exclusive Farm Use zoned properties. By providing affordable housing, it could help lift people out of poverty and increase economic mobility. It could bring a positive impact on the surrounding community, encouraging social connections and lowering crime rates.

The existing limitation would require the entire ADU to be within a 100 feet of the existing dwelling. Even adding a limitation (or others), there could be a negative consequence of ADUs in rural areas with inadequate access to employment, schools, food markets, medical facilities and parks. This could lead to higher automobile-dependence and vehicle emissions caused by more people driving to and from rural areas. Based on previous testimony from ODFW, there could also be negative

impacts due to the potential loss of wildlife habitat stemming from the possible removal of habitat areas and the establishment of structures and their associated human presence. Many residents, advocacy organizations, and wildlife agencies continue to express concerns regarding the loss of fish and wildlife habitat due to the region's rapid growth and development. There is a recognition that increases in human activity, especially in rural areas, displace habitat and diminish, incrementally, Deschutes County's rural character and quality of life. The proposed amendments could have negative consequences due to increased human presence and infrastructure near or within the inventoried Goal 5 resources, which could lead to a reduced level of access and enjoyment for recreationalists.

Environmental Consequences:

ADUs could present negative consequences as they have the potential to increase activity, noise, and light near fish and wildlife habitats, and in turn cause distress to inventoried Deer Migration Corridor, Deer Winter Range, and Significant Elk Habitat.

Development of an ADU would likely require removal of upland vegetation, grading, and soil compaction that could alter drainage and runoff patterns. This could increase peak runoff, cause bank erosion, flooding, or increase the flow of sediment into water bodies. The removal of upland vegetation could also reduce tree canopy and understory vegetation which could be utilized by fish and wildlife species, outside of their primary habitat. Permitting ADUs could result in further negative impacts to the Deer Migration Corridor, Deer Winter Range, and Significant Elk Habitat. Based on previous ODFW testimony, mule deer populations have declined in recent years and are currently at about 40% of management objectives for the areas in Central OR managed out of the ODFW Bend office. This reduction represents an approximately 55% population decline since 1998. There are many factors that have contributed to the decline of mule deer populations in Central Oregon, some of which can be directly tied to increased human presence, including habitat alteration, habitat conversion and loss, roadkill, and illegal harvest. Other contributing factors may include increased predation and increased disease amount mule deer populations.

Existing protections in place today (discussed above) would prevent Goal 5 riparian areas from being developed when ADUs are nearby. The establishment of ADUs in these areas would likely be neutral.

By limiting the entire ADU within a 100 feet of the existing dwelling, the negative environmental consequences associated with ADU could be mitigated to a certain extent.

Energy Consequences:

The energy consequences in this scenario are the same as in scenario (a). Limiting the entire ADU to within a 100 feet of the existing dwelling could decrease the amount of energy used to operate the ADU.

Chapter 6: ESEE Decision

660-023-0040(5): Develop a program to achieve Goal 5. Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites. This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis. One of the following determinations shall be reached with regard to conflicting uses for a significant resource site:

(c) A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided, as per subsection (b) of this section.

The graphic below is meant to be a simplified representation to balance each of the ESEE factors. As stated in the ESEE analysis, there are a variety of positive, negative, and neutral consequences associated with each scenario. Deschutes County finds that the issue of allowing an ADU in MUA-10 and RR-10 zones would contribute significant environmental impacts that outweigh the other ESEE consequences. The County considered allowing the use with no limitations, but given ongoing population declines in wildlife populations, particularly mule deer populations, this option was considered incompatible with attempts to maintain stable Goal 5 resources over the coming years. Based on testimony from agency partners at ODFW, at least some portion of wildlife population declines can be attributed to increased human population and development pressures in the region. Additionally, the County considered allowing the use with limitations by limiting the entire ADU within a 100 feet of the existing dwelling, but this practice could still produce potential negative impacts on declining wildlife populations. The relatively small number of properties likely to remain eligible with these limitations in place significantly reduced any positive social or economic impacts that may be expected from allowing ADUs, and thus total prohibition was found to be the preferable option. Therefore the County is choosing scenario (b) which will prohibit the use entirely to limit possible impacts on the resource sites.

Table 5: ESEE Factors

ESEE Factors	Support habitat functions (Environmental, economic, social)	Support Affordable Housing (Social, economic)	Support Recreational Economy (Economic, Social)	Preserves Rural Character (Social, economic)	Transportation (Energy)
Prohibit conflict (No code change)	+	-	+	+	0
Allow conflict Allow ADUs with no additional requirements	-	+	-	-	-
Limit conflict Allow ADUs with additional limitation	-	+	-	-	-

Chapter 7: Program to Achieve Goal 5

660-023-0050(1): *For each resource site, local governments shall adopt comprehensive plan provisions and land use regulations to implement the decisions made pursuant to OAR 660-023-0040(5). The plan shall describe the degree of protection intended for each significant resource site. The plan and implementing ordinances shall clearly identify those conflicting uses that are allowed and the specific standards or limitations that apply to the allowed uses. A program to achieve Goal 5 may include zoning measures that partially or fully allow conflicting uses (see OAR 660-023-0040(5)(b) and (c)).*

660-023-0050(2): *When a local government has decided to protect a resource site under OAR 660-023-0040(5)(b), implementing measures applied to conflicting uses on the resource site and within its impact area shall contain clear and objective standards. For purposes of this division, a standard shall be considered clear and objective if it meets any one of the following criteria:*

- (a) It is a fixed numerical standard, such as a height limitation of 35 feet or a setback of 50 feet;*
- (b) It is a nondiscretionary requirement, such as a requirement that grading not occur beneath the dripline of a protected tree; or ...*

Deschutes County has determined that ADUs within the MUA-10 and RR-10 zones and within the Deer Migration Corridor, Deer Winter Range, Significant Elk Habitat, Greater Sage Grouse Area Combining Zone, and Sensitive Bird and Mammal Habitat Combining Zone should be prohibited fully. The implementing measures do not include alternative, discretionary procedures for compliance.

Attachment 1 - Deschutes County Significant Goal 5 Resources

Inventoried Resource	Flood Plain Relationship	Conflicts	Comments	Relevant Ordinances
<p>Fish Habitat (Inventory – Ord. No. 92-041, page 18; creeks, rivers and lakes)</p>	<p>Yes</p>	<p>Major conflicts are removal of riparian vegetation, fill and removal activities within the bed and banks of streams or wetlands, hydroelectric, rural residential development and water regulation</p>	<p>Floodplain zone recognized as program to achieve the goal to conserve fish habitat (Ordinance Nos. 88-030, 88-031, 89-009).</p> <p>Others include: fill and removal permits, wetland removal regulations, hydro prohibitions, rimrock setbacks, 100’ setback from OHW, conservation easements and restrictions on boats and docks.</p>	<p>Ordinance Nos. 86-018, 86-053, 86-054, 86-056, 88-030, 88-031, 89-009, 92-040, 92-041</p>
<p>Deer Winter Range (Inventory – Ord. No. 92-041, page 22; Metolius, Tumalo, North Paulina, and Grizzly ranges identified by ODFW)</p>	<p>Yes</p>	<p>Major conflicts are dwellings, roads, and dogs. Activities which cause deterioration of forage quality and quantity or cover are conflicting uses. Fences which impede safe passage are also a conflicting use.</p>	<p>Floodplain zone recognized as a program to achieve the goal to protect deer winter range (Ordinance Nos. 88-030, 88-031, 89-009).</p> <p>Others include Wildlife Area Combining Zone. Requires 40-acre minimum lot size for all new residential land divisions. Underlying zoning in most of the deer winter range is: EFU, Forest, and Floodplain. These zones provide for large lot sizes and limit uses that are not compatible with farm or forest zones.</p>	<p>Ordinance Nos. 88-030, 88-031, 89-009, 92-040, 92-041, 92-042, 92-046</p>
<p>Deer Migration Corridor (Inventory – Ord. No. 92-041, page 26; Bend-La Pine migration corridor identified by ODFW)</p>	<p>Yes</p>	<p>Major conflicts are dwellings, roads, and dogs. Fences which impede safe passage are also a conflicting use.</p>	<p>Wildlife Area Combining Zone was recognized as the only program to achieve the goal to protect the deer migration corridor. Underlying zoning is RR-10. It was amended to require cluster development for all land divisions in the RR-10 zone in the Bend/La Pine migration corridor (92-042). A 20-acre parcel is the minimum size required for a cluster development. Siting and fencing standards also apply in the deer migration corridor. Migration corridor includes some EFU, Forest, and Floodplain zoned land. These resource zones provide for large lot sizes and limit uses that are not compatible with farm or forest zones.</p>	<p>Ordinance Nos. 92-040, 92-041, 92-042, 92-046</p>

Inventoried Resource	Flood Plain Relationship	Conflicts	Comments	Relevant Ordinances
<p>Elk Habitat (Inventory – Ord. No. 92-041 – page 32; identified by USFS and ODFW)</p>	<p>Yes</p>	<p>Major conflict is the loss of habitat due to increased residential densities in the habitat areas. Increased human disturbance can cause conflict with elk. The use of land which necessitates the removal of large amounts of vegetative cover can also alter the quality of elk habitat.</p>	<p>Wildlife Area Combining Zone was recognized as the only program to achieve the goal to protect the elk habitat.</p> <p>It was amended to require a 160-acre minimum lot size for areas identified as significant elk habitat. Siting standards are required to minimize conflicts of residences with habitat protection.</p> <p>Underlying zoning in the elk habitat areas is either Floodplain, Forest, or Open Space and Conservation. These resource zones restrict high density residential development and prohibit industrial and commercial uses.</p> <p>* Some lands are zoned RR10, including lots that are split zoned with flood plain. They are already parcelized, preventing future land divisions.</p>	<p>Ordinance Nos. 88-030, 88-031, 89-009, 92-040, 92-041, 92-042, 92-046</p>
<p>Antelope Habitat (Inventory – Ord. No. 92-041 – page 38; identified by ODFW)</p>	<p>No</p>	<p>Land use or development activities which would result in the loss of habitat, and animal harassment and disturbance associated with human activity.</p>	<p>To achieve the goal to conserve antelope habitat, uses conflicting with antelope habitat are limited to the Wildlife Area Combining Zone. In antelope range, the minimum lot size is 320 acres. Except for rural service centers, the antelope habitat is zoned EFU or F1.</p>	<p>Ordinance Nos. 92-040, 92-041, 92-042, 92-046</p>
<p>Habitat for Sensitive Birds (Inventory – Ord. No. 92-041 – page 41 and Table 5; identified by ODFW, ODF, OSU, Oregon Natural Heritage Data Bases).</p> <p>The area required for each nest site varies between species.</p>	<p>No</p>	<p>Nest sites are found in Forest, EFU and Open Space and Conservation zones. Uses that could conflict with the habitat site are surface mining, residential use, recreation facilities, roads, logging, and air strips.</p> <p>Any activity which would disturb the nesting birds, including intensive recreational use or removal of trees or</p>	<p>The Sensitive Bird and Mammal Combining Zone achieves the goal to protect sensitive bird sites.</p>	<p>Ordinance Nos. 92-040, 92-041, 92-042, 92-046</p>

Inventoried Resource	Flood Plain Relationship	Conflicts	Comments	Relevant Ordinances
		vegetation could conflict with the habitat site.		
<p>(UPDATE - Inventory – Ord. No. 94-004 –pages 3 to 140 Site specific ESEE analysis and decisions follow each site.</p>	<p>No</p>	<p>See above.</p>	<p>Habitat areas for sensitive birds of the Fish and Wildlife Element, adopted in No. 92-041 is repealed and replaced by inventories in Exhibit 1. Area required around each nest site needed to protect the nest from conflict varies between species. It’s called “sensitive habitat area.”</p> <p>Note: Northern bald eagle, osprey, golden eagle, prairie falcon, and great blue heron rookeries are located on federal land. Classified as “2A” Goal 5 Resources. Great Grey owl site no longer exists. Some bald eagle, golden eagle sites are controlled by the Sensitive Bird and Mammal Combining Zone.</p>	<p>Ordinance Nos. 94-004, 94-005 and 94-021</p>
<p>Waterfowl Habitat (Inventory – Ord. No. 92-041 – page 56; includes all rivers, streams, lakes and perennial wetlands and ponds identified on the 1990 US Fish and Wildlife Wetland Inventory Maps; ODFW provided lists of all bird species; Co/City of Bend River Study provides additional information)</p>	<p>Yes</p>	<p>Future resort and vacation home development, human activity associated with recreation along rivers and lakes, timber-cutting around sensitive habitats, fill and removal of material in wetlands and within the bed and banks of rivers and streams, and removal of riparian vegetation are conflicting uses.</p>	<p>Floodplain zone recognized as program to achieve the goal to conserve waterfowl habitat (Ordinance Nos. 88-030, 88-031, 89-009).</p> <p>Others include: fill and removal permits, wetland removal regulations, rimrock setbacks, 100’ setback from OHW, conservation easements, restrictions on boats and docks, landscape management, state and federal scenic water regulations. In addition, the Forest and EFU zones require large minimum lot size which limits the potential density of development in the areas adjacent to many of the rivers, streams, wetlands, and ponds used for waterfowl habitat.</p>	<p>Ordinance Nos. 86-018, 86-054, 86-056, 88-030, 88-031, 89-009, 92-040, 92-041, 92-042- 92-045, 92-046</p>

Inventoried Resource	Flood Plain Relationship	Conflicts	Comments	Relevant Ordinances
<p>Upland Game Bird Habitat (Inventory – Ord. No. 92-041 – page 60; ODFW did not identify critical habitat for any of the upland game species except for the sage grouse; habitat for upland game birds is dispersed throughout the county in riparian, forest, agricultural, and rangeland areas)</p>	<p>Yes</p>	<p>Pheasant and quail are affected whenever agricultural land is taken out of production through urban sprawl, road construction, industrial development and other land clearing activities.</p> <p>Farming practices on existing agricultural lands also have an impact. Fence row, woodlots, and riparian vegetation are constantly being removed at the expense of upland bird use.</p> <p>Chapter 6 of County/City of Bend River Study identifies conflicting uses with upland bird habitat.</p>	<p>For all of the upland game birds except sage grouse, the habitat is adequately protected by the existing EFU and Forest zoning and the provisions to protect wetlands and riparian areas to achieve the goal of protecting upland game birds.</p> <p>County provisions to protect riparian areas and wetlands protect one of the most significant components of upland game habitat.</p> <p>Note: conflicts with sage grouse are limited by EFU zoning with a 320 acre minimum parcel size. Sensitive Bird and Mammal Combining Zone pertaining to sage grouse and leks have been repealed due to LCDC enacted rules in OAR 660, Division 23.</p>	<p>Ordinance Nos. 86-018, 86-053, 86-054, 86-056, 88-030, 88-031, 89-009, 92-040, 92-041, 92-042, 92-046</p>
<p>UPDATE - Inventory – Ord. No. 94-004 – pages 156-201.</p>	<p>Yes</p>	<p>See above.</p>	<p>Habitat areas for Upland Game Bird Habitat, adopted in No. 92-041 is repealed and replaced and further amended in Exhibit 4 with the ESEE Analysis and inventory for upland game bird habitat.</p> <p>Conflicts with sage grouse are reduced by the limitations on uses in the EFU and Floodplain zone, by the 320 acre minimum lot size and predominance of BLM lands.</p> <p>Note: conflicts with sage grouse are limited by EFU zoning with a 320 acre minimum parcel size. Sensitive Bird and Mammal Combining Zone pertaining to sage grouse and leks have been repealed due to LCDC enacted rules in OAR 660, Division 23.</p>	<p>Ordinance Nos. 94-004 and 94-021</p>

Inventoried Resource	Flood Plain Relationship	Conflicts	Comments	Relevant Ordinances
<p>Furbearer Habitat (Inventory – Ord. No. 92-041 – page 65; ODFW has not identified any specific habitat sites other than riparian and wetland areas that are critical for the listed species.</p>	<p>Yes</p>	<p>The conflicting uses are those activities or development which would degrade or destroy habitat, or disturb the animals causing them to relocate.</p> <p>Conflicts between furbearers and other land uses are minimal in the county.</p>	<p>Furbearer habitat is adequately protected by the existing EFU and Forest zoning and the provisions to protect farm use and forest zoning, and the provisions to protect wetlands and riparian areas to achieve the goal to protect furbearers.</p> <p>The farm and forest zones require large minimum lot sizes and many uses are permitted only as conditional uses. The measures to protect riparian and wetland habitat are detailed in this plan in the Riparian and Wetland Habitat section.</p>	<p>Ordinance Nos. 86-018, 86-053, 86-054, 86-056, 88-030, 88-031, 89-009, 92-040, 92-041</p>
<p>Habitat Areas for Townsend’s Big-Eared Bats (Inventory – Ord. No. 92-041 – page 69; identified by ODFW, ODF, OSU, Oregon Natural Heritage Data Bases)</p>	<p>No</p>	<p>Caves located in EFU zones. Uses permitted in those zones that could conflict with the habitat site are surface mining, recreation facilities including golf courses and destination resorts, roads, logging, and air strips.</p>	<p>Program to achieve the goal is Sensitive Bird and Mammal Combining Zone</p>	<p>Ordinance No. 92-041 and 042</p>
<p>UPDATE - Inventory – Ord. No. 94-004 – pages 140 to 155 Site specific ESEE analysis and decisions follow each site.</p>	<p>No</p>	<p>See above.</p>	<p>Habitat areas for Townsend Bats, adopted in No. 92-041 is repealed and replaced and further amended in Exhibit 2. The ESEE for Townsend’s big-eared bats is amended for additional bat sites in Exhibit 3.</p>	<p>Ordinance Nos. 94-004 and 94-021</p>

Inventoried Resource	Flood Plain Relationship	Conflicts	Comments	Relevant Ordinances
<p>Wetlands and Riparian Areas (Inventory – Ord. No. 92-041 – page 73; identified on USFWS NWI)</p>	<p>Yes</p>	<p>Conflicting uses include fill and removal of material, including vegetation which could cause a reduction in the size or quality or function of a wetland, or cause destruction or degradation of the riparian habitat and vegetation.</p> <p>Structural development in wetlands or riparian areas would reduce the habitat and the use of the structure could cause conflicts such as harassment or disturbance or wildlife dependent on the habitat. Cutting of riparian vegetation can remove important shade for streams, eliminate habitat for various waterfowl, furbearers, and nongame bird species, and can increase the potential for erosion or bank instability in riparian areas.</p>	<p>Floodplain zone recognized as program to achieve the goal to conserve wetland and riparian habitat (Ordinance Nos. 88-030, 88-031, 89-009).</p> <p>Others include: fill and removal permits, wetland removal regulations, hydro prohibitions, 100’ setback from OHW, conservation easements, restrictions on boats and docks, and landscape management.</p>	<p>Ordinance Nos. 86-018, 86-054, 86-056, 88-030, 88-031, 89-009, 92-040, 92-041, 92-045</p>

Inventoried Resource	Flood Plain Relationship	Conflicts	Comments	Relevant Ordinances
<p>UPDATE – Riparian inventory – Ord. No. 94-007; Significant riparian habitat is located in three areas:</p> <p>Area within 100’ of OHW of an inventoried stream or river;</p> <p>Area adjacent to an inventoried river or stream and located within a flood plain mapped by FEMA and zoned Floodplain by the county (Deschutes River, Little Deschutes River, Paulina Creek, Fall River, Indian Ford Creek, Tumalo Creek, Squaw (Whychus) Creek, and Crooked River</p> <p>Area adjacent to a river or stream and inventoried as a wetland on the NWI</p>	<p>Yes</p>	<p>Conflicting uses:</p> <p>Locating septic systems in riparian area could cause pollution of ground and surface water systems. The potential for this conflict depends on the characteristics of the soil.</p> <p>Locating structural development in riparian areas can reduce the habitat and the use of structures could cause conflicts such as harassment or disturbance of wildlife dependent on habitat.</p> <p>Recreational use of the riparian area including boat landing areas, formal and informal trails, and camping areas can alter soil composition and cause destruction of vegetation.</p> <p>Increase in density of residential lots in or adjacent to riparian areas could result in a decrease of habitat effectiveness because of disturbance to wildlife.</p>	<p>Riparian Areas inventory and ESEE analysis adopted by Ordinance No. 92-041 is deleted and replaced by an inventory and ESEE contained in Exhibit A.</p> <p>New parcels meeting the minimum lot size in the resource zones (EFU, Forest, non-exception flood plain) will not cause an increase in residential density that would conflict with riparian habitat values.</p> <p>In RR10, MUA-10, and Floodplain zones found adjacent to inventoried riparian areas, the creation of new 10 acre parcels would not significantly increase the overall density of residential use adjacent to riparian areas because the areas where new parcels could be created, with the exception of Tumalo Creek, are already divided into lots considerably smaller than 10 acres.</p> <p>Program to achieve Goal 5 for Riparian Habitat: fill and removal regulations to protect wetlands, 100’ setback from OHW, Floodplain zone (regulates docks too), Landscape Management zone, Conservation easements, State Scenic Waterway</p>	<p>Ordinance Nos. 94-007</p>

Inventoried Resource	Flood Plain Relationship	Conflicts	Comments	Relevant Ordinances
<p>UPDATE – Wetland Inventory – Ord. No. 94-007, Exhibit B – inventory is NWI (Ord. No. 92-045)</p>	<p>Yes</p>	<p>Conflicting uses include fill and removal of material, including vegetation, which could cause reduction in the size, quality or function of a wetland.</p> <p>Locating structural development in wetlands could reduce the habitat and the use of the structure could cause conflicts such as harassment or disturbance of wildlife dependent on the habitat.</p> <p>Draining wetlands for agriculture or other development purposes destroys the hydrological function of the wetland and alters the habitat qualities that certain wildlife depend on.</p> <p>Cutting wetland vegetation adjacent to streams can remove important shade for streams, eliminate habitat for various waterfowl, furbearers, and nongame bird species, and can also increase the potential for erosion or bank instability in riparian areas.</p>	<p>Wetlands Inventory and ESEE analysis adopted by Ordinance No. 92-041 is deleted and replaced by an inventory and ESEE contained in Exhibit B, Wetlands.</p> <p>Program to achieve Goal 5 for Wetland Habitat:</p> <ul style="list-style-type: none"> • Fill and removal regulations to protect wetlands • 100’ setback from OHW • Flood plain zone (regulates docks too) • DSL Removal / Fill law 	<p>Ordinance Nos. 94-007</p>

Inventoried Resource	Flood Plain Relationship	Conflicts	Comments	Relevant Ordinances
<p>Ecologically and Scientifically Significant Natural Areas * Little Deschutes River / Deschutes River Confluence (Inventory – Ord. No. 92-052, Exhibit B, Page 1; identified by Oregon Natural Heritage Program); Analysis of Pringle Falls and Horse Ridge Research Areas, West Hampton Butte and Davis Lakes excluded b/c they’re on federal land and/or not related to flood plains.</p>	<p>Yes</p>	<p>Resort and vacation home development, recreational uses, livestock grazing, and fill and removal in wetlands are conflicting uses.</p>	<p>Programs for resource protection include the zoning of the property, the provisions of the flood plain, wetlands and the river corridor.</p> <p>The implementing measures which protect and regulate development in the confluence area are: EFU zoning, Floodplain zoning, conservation easements, and fill and removal permits.</p> <p>The confluence area is located in the undeveloped open space area of the Sunriver development (Crosswater). 80% of the property is retained as open space.</p> <p>Today, zoning is Floodplain and Forest Use.</p>	<p>Ordinance Nos. 86-018, 86-054, 86-056, 88-030, 88-031, 89-009, 92-040, 92-041, 92-045</p>
<p>Landscape Management Rivers and Streams (Inventory – Ord. No. 92-052, Exhibit C, Page 3; identified by state and federal wild and scenic corridors; and within 660’ of OHW of portions of Deschutes River, Little Deschutes River, Paulina Creek, Fall River, Spring river, Tumalo Creek, Squaw (Whychus) Creek, and Crooked River not on the state or federal scenic designations)</p>	<p>Yes</p>	<p>Uses conflicting with open space and scenic resources along the designated Landscape Management rivers and streams include land management activities that result in habitat loss or development within river or stream corridors which would excessively interfere with the scenic or natural appearance of the landscape as seen from the river or stream or alteration of existing natural landscape by removal of vegetative cover.</p>	<p>Program for resource protection includes: Floodplain zone and restrictions, fill and removal permits, wetland removal regulations, hydro prohibitions, rimrock setbacks, conservation easements, restrictions on boats and docks, and landscape management.</p>	<p>Ordinance Nos. 86-018, 86-053, 86-054, 86-056, 88-030, 88-031, 89-009, 92-033, 93-034</p>

Inventoried Resource	Flood Plain Relationship	Conflicts	Comments	Relevant Ordinances
<p>Lakes and Reservoirs (Inventory – Ord. No. 92-052, Exhibit C, Page 10; includes Upper Tumalo Reservoir; remaining are on federal land)</p>	<p>No</p>	<p>Conflicting uses with the open space and scenic values of the land adjacent to the inventoried lakes include development which would cause a loss of open space or a decrease in the aesthetic and scenic resources, and land management activities resulting in the removal of natural vegetation which provides wildlife habitat and scenic value.</p>	<p>Conflicting uses around Tumalo Reservoir are specifically limited by Title 18.48, Open Space Conservation Zone and a 100’ setback for any structure from OHW.</p>	<p>Ordinance No. 91-020</p>
<p>State Scenic Waterways and Federal Wild and Scenic Rivers (Inventory – Ord. No. 92-052, Exhibit E, Page 1;</p>	<p>Yes</p>	<p>See County / City of Bend River Study and 1986 River Study Staff Report. Both referenced in Ord. 92-005, Exhibit E.</p>	<p>Program for resource protection includes: Floodplain zone and restrictions, fill and removal permits, wetland removal regulations, hydro prohibitions, rimrock setbacks, conservation easements, restrictions on boats and docks, and landscape management.</p>	<p>Ordinance Nos. 86-018, 86-053, 86-054, 86-056, 88-030, 88-031, 89-009, 92-033, 93-034</p>
<p>Wilderness Areas, Areas of Special Concern, Energy Sources (Ord. No 92-052), and Groundwater Resources (Ord. No. 94-003) not analyzed because they’re on federal land or don’t relate to flood plains.</p>	<p>No</p>	<p>N/A</p>	<p>N/A</p>	<p>N/A</p>

Attachment 2 - Inventory Site Maps







Exception Area Taxlots Meeting ADU Criteria - Deer Migration

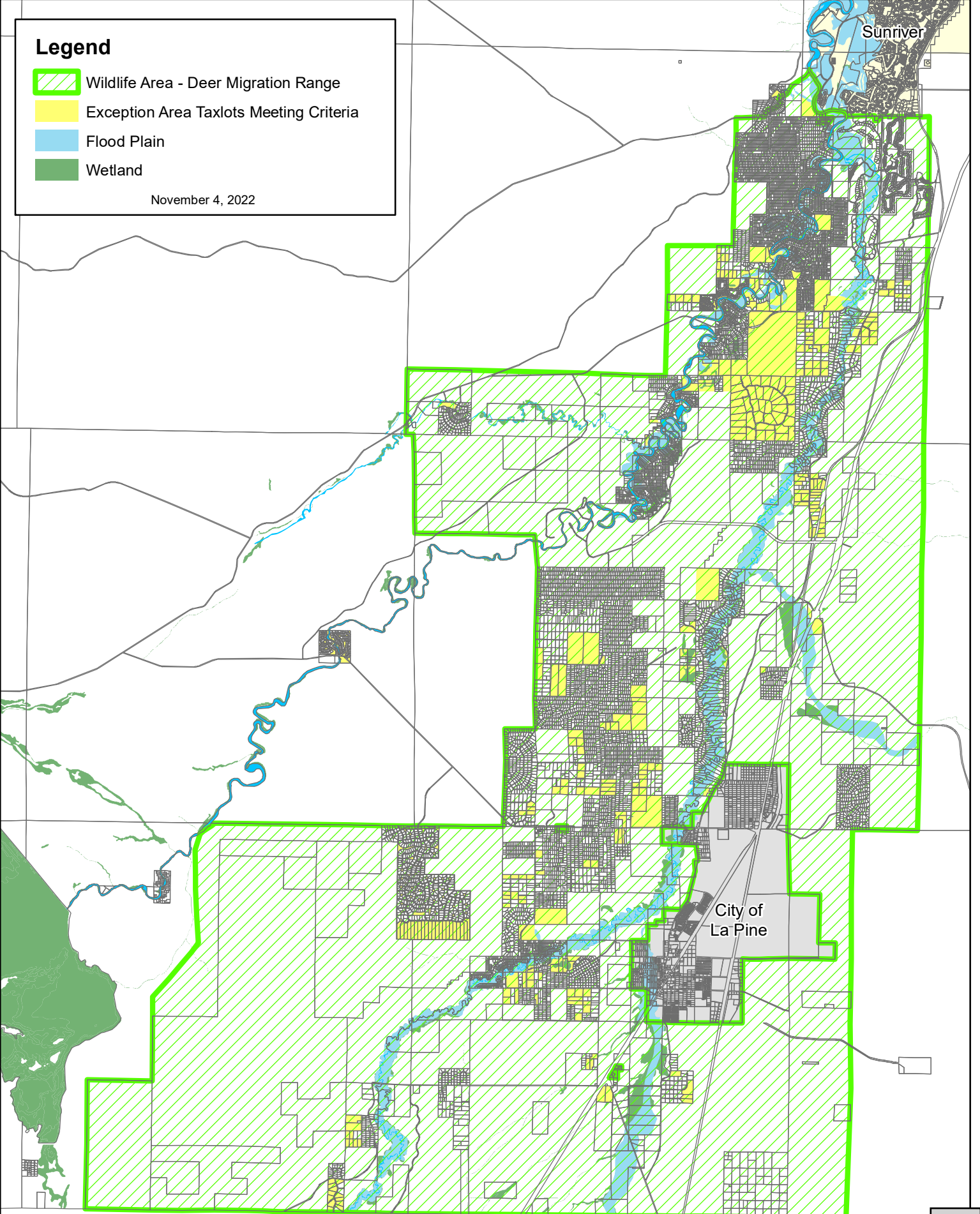
11/14/2022 Item #12.

1" = 10,000'

Legend

-  Wildlife Area - Deer Migration Range
-  Exception Area Taxlots Meeting Criteria
-  Flood Plain
-  Wetland

November 4, 2022









1" = 6 mi.

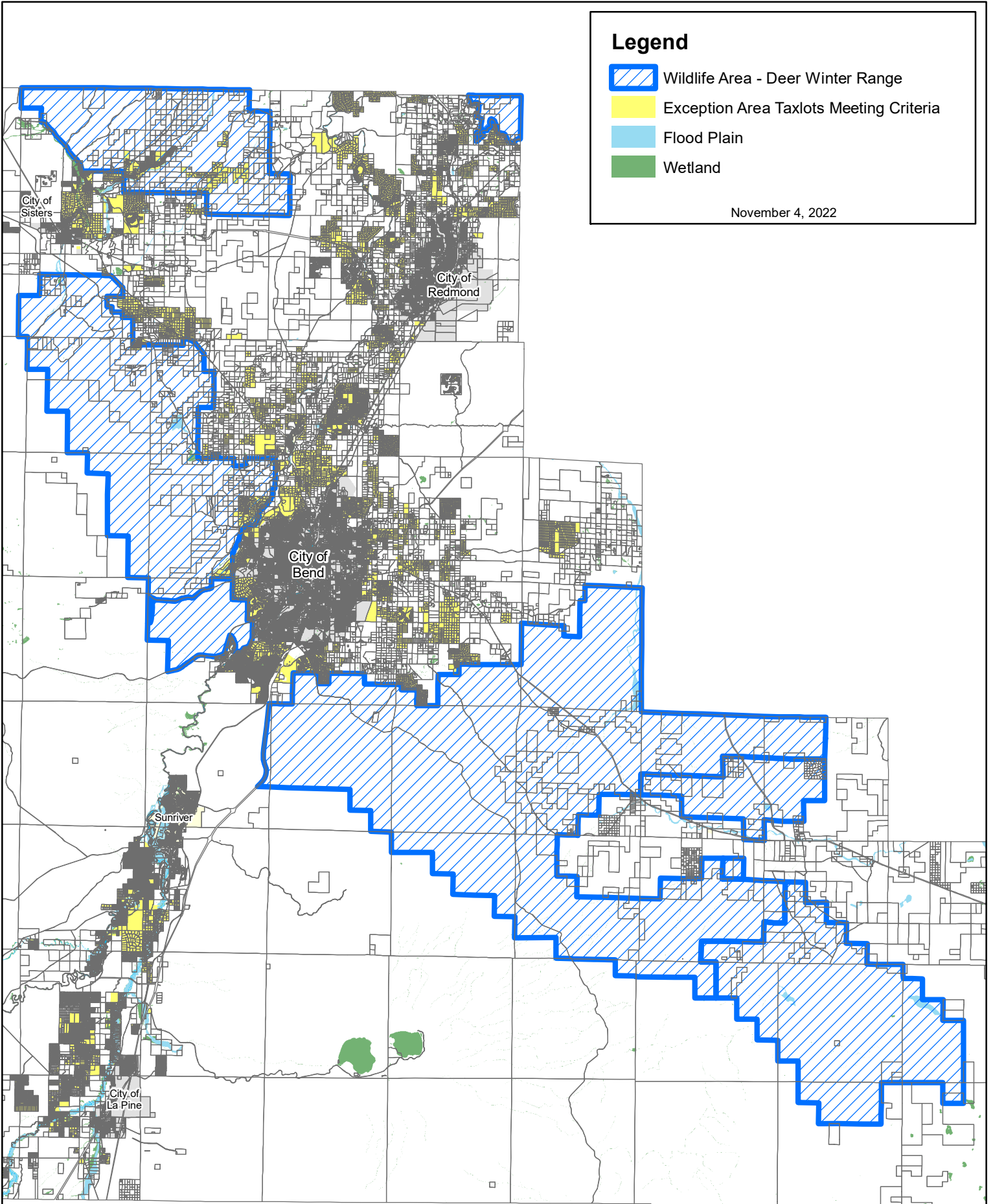
Exception Area Taxlots Meeting ADU Criteria - Deer Winter Range

11/14/2022 Item #12.

Legend

-  Wildlife Area - Deer Winter Range
-  Exception Area Taxlots Meeting Criteria
-  Flood Plain
-  Wetland

November 4, 2022

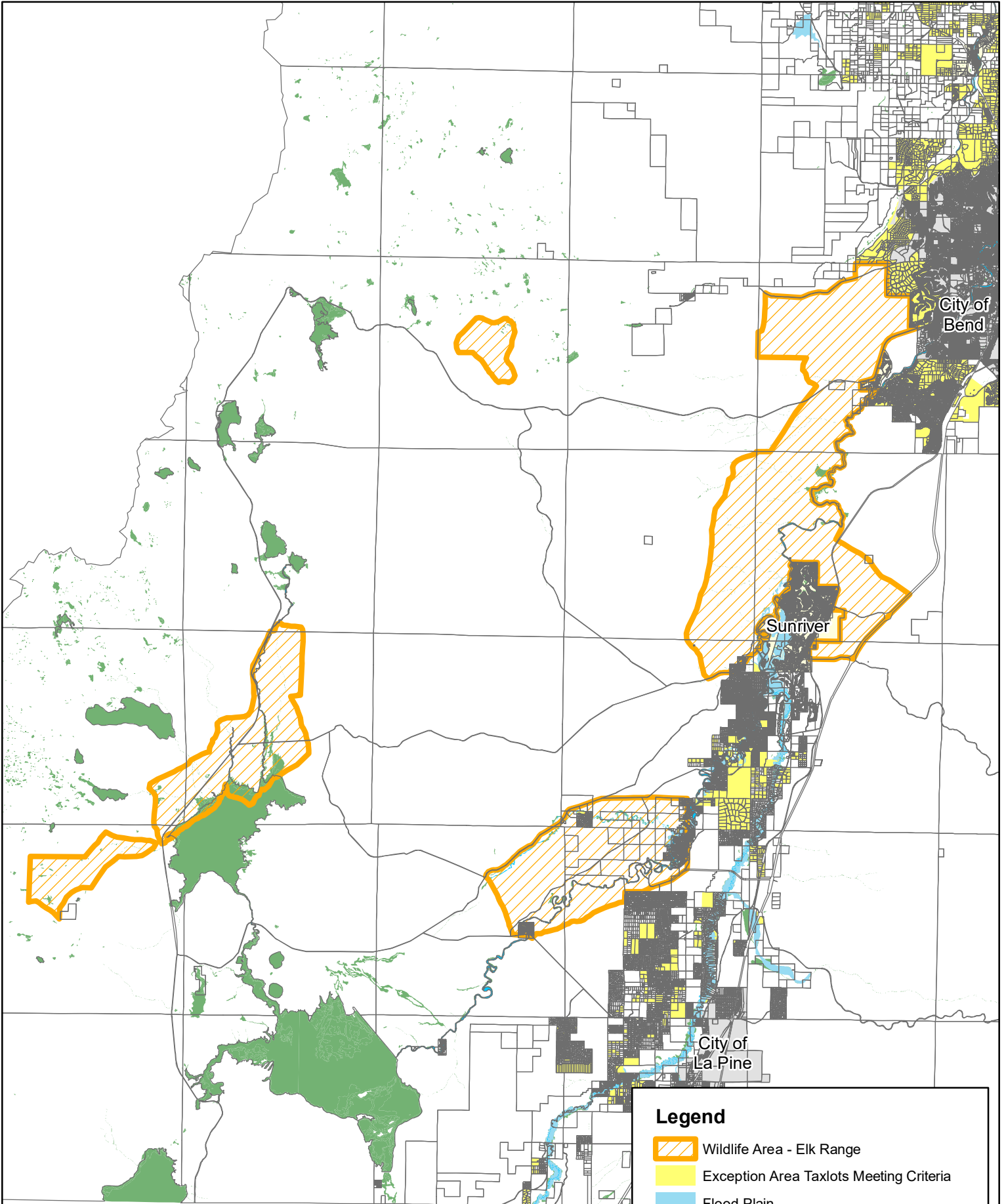








1" = 4 mi.

Exception Area Taxlots Meeting ADU Criteria - Elk Range

11/14/2022 Item #12.



Legend

-  Wildlife Area - Elk Range
-  Exception Area Taxlots Meeting Criteria
-  Flood Plain
-  Wetland

November 4, 2022

Attachment 3 - Proposed Text Amendments

CHAPTER 18.32 MULTIPLE USE AGRICULTURAL ZONE; MUA

18.32.020 Uses Permitted Outright

* * *

18.32.020 Uses Permitted Outright

The following uses and their accessory uses are permitted outright:

- A. Agricultural uses as defined in DCC Title 18.
- B. A single family dwelling, or a manufactured home subject to DCC 18.116.070.
- C. Propagation or harvesting of a forest product.
- D. Class I and II road or street project subject to approval as part of a land partition, subdivision or subject to the standards and criteria established by DCC 18.116.230.
- E. Class III road or street project.
- F. Noncommercial horse stables, excluding horse events.
- G. Horse events, including associated structures, involving:
 - 1. Fewer than 10 riders;
 - 2. Ten to 25 riders, no more than two times per month on nonconsecutive days; or
 - 3. More than 25 riders, no more than two times per year on nonconsecutive days. Incidental musical programs are not included in this definition. Overnight stays by participants, trainers or spectators in RVs on the premises is not an incident of such horse events.
- H. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.
- I. Type 1 Home Occupation, subject to DCC 18.116.280.
- J. **Historic** Accessory Dwelling Units, subject to DCC 18.116.350.
- K. **Residential Accessory Dwelling Units, subject to DCC 18.116.370.**

HISTORY

Adopted by Ord. PL-15 on 11/1/1979
Amended by Ord. 91-002 §6 on 2/6/1991
Amended by Ord. 91-005 §18 on 3/4/1991
Amended by Ord. 91-020 §1 on 5/29/1991
Amended by Ord. 91-038 §1 on 9/30/1991

Amended by Ord. 93-001 §1 on 1/27/1993
Amended by Ord. 93-043 §4 on 8/25/1993
Amended by Ord. 94-008 §10 on 6/8/1994
Amended by Ord. 2001-016 §2 on 3/28/2001
Amended by Ord. 2001-039 §2 on 12/12/2001
Amended by Ord. 2004-002 §3 on 4/28/2004
Amended by Ord. 2019-009 §1 on 9/3/2019
Recorded by Ord. 2019-009 §1 on 9/3/2019
Amended by Ord. 2022-00x §x on [date]

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CHAPTER 18.60 RURAL RESIDENTIAL ZONE; RR-10

18.60.020 Uses Permitted Outright

* * *

18.60.020 Uses Permitted Outright

The following uses and their accessory uses are permitted outright.

- A. A single-family dwelling, or a manufactured home subject to DCC 18.116.070.
- B. Utility facilities necessary to serve the area including energy facilities, water supply and treatment and sewage disposal and treatment.
- C. Community center, if shown and approved on the original plan or plat of the development.
- D. Agricultural use as defined in DCC Title 18.
- E. Class I and II road or street project subject to approval as part of a land partition, subdivision or subject to the standards and criteria established by DCC 18.116.230.
- F. Class III road or street project.
- G. Noncommercial horse stables as defined in DCC Title 18, excluding horse events.
- H. Horse events, including associated structures, involving:
 - 1. Fewer than 10 riders;
 - 2. Ten to 25 riders, no more than two times per month on nonconsecutive days; or
 - 3. More than 25 riders, no more than two times per year on nonconsecutive days. Incidental musical programs are not included in this definition. Overnight stays by participants, trainers or spectators in RVs on the premises is not an incident of such horse events.
- I. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.
- J. Type 1 Home Occupation, subject to DCC 18.116.280.
- K. Historic Accessory Dwelling Units, subject to DCC 18.116.350.
- L. Residential Accessory Dwelling Units, subject to DCC 18.116.370.

HISTORY

Adopted by Ord. PL-15 on 11/1/1979
Amended by Ord. 91-005 §§30 & 31 on 3/4/1991
Amended by Ord. 91-020 §1 on 5/29/1991

Amended by Ord. 93-043 §8 on 8/25/1993
Amended by Ord. 94-008 §12 on 6/8/1994
Amended by Ord. 2001-016 §2 on 3/28/2001
Amended by Ord. 2001-039 §5 on 12/12/2001
Amended by Ord. 2004-002 §7 on 4/28/2004
Amended by Ord. 2019-009 §2 on 9/3/2019
Recorded by Ord. 2019-009 §2 on 9/3/2019
Amended by Ord. 2022-00x §x on [date]

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CHAPTER 18.116 SUPPLEMENTARY PROVISIONS

18.116.350 Historic Accessory Dwelling Units In RR10 And MUA Zones

18.116.370 Residential Accessory Dwelling Units in RR10 and MUA 10 Zones

* * *

18.116.350 Historic Accessory Dwelling Units In RR10 And MUA Zones

A. As used in this section:

- 1. “Historic Accessory dwelling unit” means a residential structure that is used in connection with or that is auxiliary to a single-family dwellinghistoric home. For the purposes of DCC Title 18, the term "auxiliary" shall be synonymous with the terms “incidental and subordinate to.”
- 2. “Area zoned for rural residential use” means land that is not located inside an urban growth boundary as defined in ORS 195.060 and that is subject to an acknowledged exception to a statewide land use planning goal relating to farmland or forestland and planned and zoned by the county to allow residential use as a primary use.
- 3. “Historic home” means a single-family dwelling constructed between 1850 and 1945.
- 4. “New” means that the dwelling being constructed did not previously exist in residential or nonresidential form. “New” does not include the acquisition, alteration, renovation or remodeling of an existing structure.
- 5. “Place a manufactured home” means the placement of a manufactured home that did not previously exist on the subject lot of record; it may include the placement of a manufactured home that was previously used as a dwelling on another lot and moved to the subject lot of record.
- 6. “Single-family dwelling” means a residential structure designed as a residence for one family and sharing no common wall with another residence of any type.

B. An owner of a lot or parcel within an area zoned for rural residential use (RR10 and MUA zones) may construct a new single-family dwelling or place a manufactured home on the lot or parcel, provided:

- 1. The lot or parcel is not located in an area designated as an urban reserve as defined in ORS 195.137;
- 2. The lot or parcel is at least two acres in size;
- 3. A historic home is sited on the lot or parcel;
- 4. The owner converts the historic home to an accessory dwelling unit upon completion of the new single-family dwelling or placement of a manufactured home; and

- 5. The accessory dwelling unit may be required to comply with all applicable laws and regulations relating to sanitation and wastewater disposal and treatment.
- C. The construction of an accessory dwelling under subsection (B) of this section is a land use action subject to DCC 22.20.
- D. An owner that constructs a new single-family dwelling or places a manufactured home under subsection (B) of this section may not:
 - 1. Subdivide, partition or otherwise divide the lot or parcel so that the new single-family dwelling or manufactured home is situated on a different lot or parcel from the accessory dwelling unit.
 - 2. Alter, renovate or remodel the accessory dwelling unit so that the square footage of the accessory dwelling unit is more than 120 percent of the historic home’s square footage at the time construction of the new single-family dwelling commenced.
 - 3. Rebuild the accessory dwelling unit if the structure is deemed a dangerous building due to fire or other natural disaster, pursuant to the Uniform Code for the Abatement of Dangerous Buildings, which defines “dangerous building” as “Whenever any portion thereof has been damaged by fire, earthquake, wind, flood or by any other cause, to such an extent that the structural strength or stability thereof is materially less than it was before such catastrophe and is less than the minimum requirements of the Building Code for new buildings of similar structure, purpose or location.”
 - 4. Construct an additional accessory dwelling unit on the same lot or parcel.
- E. A new single-family dwelling constructed or a manufactured home placed under this section may be required to be served by the same water supply source as the accessory dwelling unit.
- F. Owner occupancy of either the accessory dwelling unit or the new single-family dwelling is not required. However, the new single-family dwelling and the accessory dwelling unit may not be used simultaneously for short-term rentals of thirty (30) consecutive days or less.

HISTORY

Adopted by Ord. [2019-009 §3](#) on 9/3/2019

Recorded by Ord. [2019-009 §3](#) on 9/3/2019

Amended by Ord. 2022-00x §x on [date]

18.116.370 Residential Accessory Dwelling Units in RR10 and MUA Zones

A. As used in this section:

- 1. “Accessory dwelling unit” means a residential structure that is used in connection with or that is auxiliary to an existing single-family dwelling or manufactured home. For the purposes of DCC Title 18, the term “auxiliary” shall be synonymous with the terms “incidental and subordinate to.”

2. “Right-of-way” means either a public road maintained by the county, a private road with a public access easement, a public road maintained by a road district, or an unmaintained road.
 3. “Rural residential use” means a lot or parcel located in the RR-10 or MUA-10 zones, consistent with the definition in ORS 215.501.
 4. “Safe evacuation plan” means an identifiable route on a right(s)-of-ways from the rural accessory dwelling unit to the staged evacuation area.
 5. “Single-family dwelling” or “manufactured home” means a residential structure designed as a residence for one family and sharing no common wall with another residence of any type.
 6. “Staged evacuation area” means a public or private location that occupants of the rural accessory dwelling unit may evacuate to reorganize.
 7. “Useable floor area” means the area of the accessory dwelling unit included within the surrounding exterior walls, including garages and other accessory components.
 8. “Vacation occupancy” means occupancy in a dwelling unit, not including transient occupancy in a hotel or motel, that has all of the following characteristics:
 - a. The occupant rents the unit for vacation purposes only, not as a principal residence;
 - b. The occupant has a principal residence other than at the unit; and
 - c. The period of authorized occupancy does not exceed 45 days.
- B. One accessory dwelling unit is permitted outright on a lot or parcel zoned for RR-10 or MUA-10, provided:
1. One single-family dwelling is sited on the lot or parcel;
 2. The lot or parcel is not located within the Redmond Urban Reserve Area, consistent with ORS 195.137.
 3. No portion of the lot or parcel is within the Metolius Area of Critical State Concern, as defined in ORS 197.416.
 4. The lot area or parcel area is at least two acres in size, with the exception of those unsewered areas between Sunriver and the Klamath County border; defined as those unincorporated portions of Deschutes County contained in Townships 19S, 20S, 21S, and 22S and Ranges 9E, 10E and 11E, the minimum lot or parcel area must be at least five acres in size.
 5. The accessory dwelling unit will have a minimum setback of 100 feet between the accessory dwelling unit and adjacent land zoned F-1, F-2, or EFU and meet the other minimum setback requirements of the underlying zone and combining zones.

6. The accessory dwelling unit will not include more than 900 square feet of useable floor area.
7. The accessory dwelling unit will be located no farther than 100 feet from the existing single-family dwelling, measured from a wall of the single-family dwelling to the nearest part of the useable floor area of the accessory dwelling unit.
8. Accessory dwelling units are prohibited in the Wildlife Area Combining Zone, Sensitive Bird and Mammal Habitat Combining Zone, and the Greater Sage Grouse Area Combining Zone.
9. The accessory dwelling unit receives approval from a sewer authority or Deschutes County Environmental Soils for onsite wastewater disposal and treatment.
10. The lot or parcel is served by a fire protection service provider with professionals who have received training or certification described in ORS 181A.410.
11. Adequate access for firefighting equipment, safe evacuation and staged evacuation areas are met by providing:
 - a. Written certification from a fire protection service provider with professionals who have received training or certification described in ORS 181A.410, on a form prepared by Deschutes County, that access to the property meets minimum fire district requirements to provide emergency services to the property;
 - b. A safe evacuation plan; and
 - c. Written authorization from the owner of the staged evacuation area that the occupants of the rural accessory dwelling unit may evacuate to the staged evacuation area.
12. The lot or parcel and accessory dwelling unit comply with rules of the State Board of Forestry under ORS 477.015, 477.025 and 477.027.
 - a. If the accessory dwelling unit is not subject to ORS 477.015, 477.025 and 477.027, the accessory dwelling unit has defensible space and fuel break standards as developed in consultation with local fire protection service providers.
13. Statewide wildfire risk maps, described in ORS 477.490, have been approved. Pursuant to the Statewide wildfire risk maps, the following requirements shall apply:
 - a. For extreme and high wildfire risk classes in the wildland-urban interface that are identified pursuant to ORS 477.490, the wildfire hazard mitigation building code standards as described in section R327 of the 2021 Oregon Residential Specialty Code;
 - b. For extreme and high wildfire risk classes in the wildland-urban interface that are identified pursuant to ORS 477.490, the minimum defensible space rules established by the State Fire Marshal as described in ORS 476.392.

c. If the accessory dwelling unit is not subject to ORS 477.015, 477.025 and 477.027, the accessory dwelling unit has defensible space and fuel break standards as developed in consultation with local fire protection service providers.

14. The existing single-family dwelling property on the lot or parcel is not subject to an order declaring it a nuisance or subject to any pending action under ORS 105.550 to 105.600.

15. A lot or parcel with an accessory dwelling unit approved under this section is not authorized for:

a. A subdivision, partition, or other division of the lot or parcel so that the existing single-family dwelling is situated on a different lot or parcel than the accessory dwelling unit.

b. Construction of a second accessory dwelling unit or a medical hardship dwelling in conjunction with the existing accessory dwelling unit.

16. If the accessory dwelling unit is served by a well, the construction of the accessory dwelling unit shall maintain all setbacks from the well required by the Water Resources Commission or Water Resources Department.

17. An existing single-family dwelling and an accessory dwelling unit allowed under this section are considered a single unit for the purposes of calculating [ground water right](#) exemptions under ORS 537.545(1).

18. The applicant shall sign and record with the County Clerk, prior to the issuance of a building permit, a restrictive covenant stating an accessory dwelling unit allowed under this section cannot be used for vacation occupancy, as defined in DCC 18.116.370(A)(8) and consistent with ORS 90.100.

HISTORY

Adopted by Ord. 2022-00x §x on [date]

CHAPTER 19.12 URBAN AREA RESERVE ZONE UAR-10

19.12.020 Permitted Uses

* * *

19.12.020 Permitted Uses

The following uses are permitted:

- A. Farm uses as defined in DCC Title 19.
- B. Single-family dwelling.
- C. Home occupation subject to DCC 19.88.140.
- D. Other accessory uses and accessory buildings and structures customarily appurtenant to a permitted use subject to DCC 19.92.020.
- E. Day care center facilities subject to site review, DCC 19.76 and DCC 19.88.160.
- F. Farm stands subject to DCC 19.76 and DCC 19.88.290.
- G. Historic Accessory Dwelling Units, subject to DCC 19.92.150.
- H. Residential Accessory Dwelling Units, subject to DCC 19.92.160

HISTORY

Adopted by Ord. PL-11 on 7/11/1979
Amended by Ord. 88-042 §4 on 12/19/1988
Repealed & Reenacted by Ord. 90-038 §1,2 on 10/3/1990
Amended by Ord. 91-001 §2 on 1/28/1991
Amended by Ord. 2008-014 §3 on 3/31/2008
Repealed & Reenacted by Ord. 2009-002 §1,2 on 2/11/2009
Amended by Ord. 2019-009 §4 on 9/3/2019
Recorded by Ord. 2019-009 §4 on 9/3/2019
Amended by Ord. 2022-00x §x on [date]

CHAPTER 19.20 SUBURBAN LOW DENSITY RESIDENTIAL ZONE; SR 2 1/2

19.20.020 Permitted Uses

* * *

19.20.020 Permitted Uses

The following uses are permitted:

- A. Single-family dwelling.
- B. Agriculture, excluding the keeping of livestock.
- C. Home occupations subject to DCC 19.88.140.
- D. Other accessory uses and accessory buildings and structures customarily appurtenant to a permitted use subject to DCC 19.92.020.
- E. Historic Accessory Dwelling Units, subject to DCC 19.92.150.
- F. Child care facility and/or preschool.
- G. Residential Accessory Dwelling Units, subject to DCC 19.92.160.

HISTORY

Adopted by Ord. PL-11 on 7/11/1979
Amended by Ord. 88-042 §6 on 12/19/1988
Repealed & Reenacted by Ord. 90-038 §1,2 on 10/3/1990
Amended by Ord. 91-001 §4 on 1/28/1991
Amended by Ord. 93-018 §3 on 5/19/1993
Repealed & Reenacted by Ord. 2009-002 §1,2 on 2/11/2009
Amended by Ord. 2019-009 §5 on 9/3/2019
Recorded by Ord. 2019-009 §5 on 9/3/2019
Amended by Ord. 2020-001 §20 on 4/21/2020
Amended by Ord. 2020-010 §9 on 7/3/2020
Amended by Ord. 2022-00x §x on [date]

CHAPTER 19.92 INTERPRETATIONS AND EXCEPTIONS

* * *

19.92.150 Accessory Dwelling Units In UAR-10 And SR-2 1/2 Zones

19.92.160 Residential Accessory Dwelling Units in UAR-10 and SR-2 ½ Zones

19.92.150 Historic Accessory Dwelling Units In UAR-10 And SR-2 1/2 Zones

- A. As used in this section:
1. “Historic Accessory dwelling unit” means a residential structure that is used in connection with or that is auxiliary to a historic home. For the purposes of DCC Title 19, the term “auxiliary” shall be synonymous with the terms “incidental and subordinate to.”
 2. “Area zoned for rural residential use” means land that is not located inside an urban growth boundary as defined in ORS 195.060 and that is subject to an acknowledged exception to a statewide land use planning goal relating to farmland or forestland and planned and zoned by the county to allow residential use as a primary use.
 3. “Historic home” means a single-family dwelling constructed between 1850 and 1945.
 4. “New” means that the dwelling being constructed did not previously exist in residential or nonresidential form. “New” does not include the acquisition, alteration, renovation or remodeling of an existing structure.
 5. “Single-family dwelling” means a residential structure designed as a residence for one family and sharing no common wall with another residence of any type.
- B. An owner of a lot or parcel within an area zoned for rural residential use (UAR-10 and SR-2 1/2 zones) may construct a new single-family dwelling on the lot or parcel, provided:
1. The lot or parcel is not located in an area designated as an urban reserve as defined in ORS 195.137;
 2. The lot or parcel is at least two acres in size;
 3. A historic home is sited on the lot or parcel;
 4. The owner converts the historic home to an accessory dwelling unit upon completion of the new single-family dwelling; and
 5. The accessory dwelling unit may be required to comply with all applicable laws and regulations relating to sanitation and wastewater disposal and treatment.
- C. The construction of an accessory dwelling under subsection (B) of this section is a land use action subject to DCC 22.20.

- D. An owner that constructs a new single-family dwelling under subsection (B) of this section may not:
1. Subdivide, partition or otherwise divide the lot or parcel so that the new single-family dwelling is situated on a different lot or parcel from the accessory dwelling unit.
 2. Alter, renovate or remodel the accessory dwelling unit so that the square footage of the accessory dwelling unit is more than 120 percent of the historic home's square footage at the time construction of the new single-family dwelling commenced.
 3. Rebuild the accessory dwelling unit if the structure is deemed a dangerous building due to fire or other natural disaster, pursuant to the Uniform Code for the Abatement of Dangerous Buildings, which defines "dangerous building" as "Whenever any portion thereof has been damaged by fire, earthquake, wind, flood or by any other cause, to such an extent that the structural strength or stability thereof is materially less than it was before such catastrophe and is less than the minimum requirements of the Building Code for new buildings of similar structure, purpose or location."
 4. Construct an additional accessory dwelling unit on the same lot or parcel.
- E. A new single-family dwelling constructed under this section may be required to be served by the same water supply source as the accessory dwelling unit.
- F. Owner occupancy of either the accessory dwelling unit or the new single-family dwelling is not required. However, the new single-family dwelling and the accessory dwelling unit may not be used simultaneously for short-term rentals of thirty (30) consecutive days or less.

HISTORY

Adopted by Ord. [2019-009 §6](#) on 9/3/2019

Recorded by Ord. [2019-009 §6](#) on 9/3/2019

[Amended by Ord. 2022-00x §x on \[date\]](#)

19.92.160 Residential Accessory Dwelling Units in UAR-10 and SR-2 ½ Zones

A. As used in this section:

1. "Accessory dwelling unit" means a residential structure that is used in connection with or that is auxiliary to an existing single-family dwelling or manufactured home. For the purposes of DCC Title 19, the term "auxiliary" shall be synonymous with the terms "incidental and subordinate to."
2. "Right-of-way" means either a public road maintained by the county, a private road with a public access easement, a public road maintained by a road district, or an unmaintained road.
3. "Rural residential use" means a lot or parcel located in the UAR-10 and SR-2 ½ zones, consistent with the definition in ORS 215.501.
4. "Safe evacuation plan" means an identifiable route on a right(s)-of-way from the rural accessory dwelling unit to the staged evacuation area.

5. “Single-family dwelling” or “manufactured home” means a residential structure designed as a residence for one family and sharing no common wall with another residence of any type.
 6. “Staged evacuation area” means a public or private location that occupants of the rural accessory dwelling unit may evacuate to reorganize.
 7. “Useable floor area” means the area of the accessory dwelling unit included within the surrounding exterior walls, including garages and other accessory components.
 8. “Vacation occupancy” means occupancy in a dwelling unit, not including transient occupancy in a hotel or motel, that has all of the following characteristics:
 - a. The occupant rents the unit for vacation purposes only, not as a principal residence;
 - b. The occupant has a principal residence other than at the unit; and
 - c. The period of authorized occupancy does not exceed 45 days.
- B. One accessory dwelling unit is permitted outright on a lot or parcel zoned for UAR-10 and SR-2 ½, provided:
1. One single-family dwelling is sited on the lot or parcel;
 2. The lot area or parcel area is at least two acres in size.
 3. The accessory dwelling unit will have a minimum setback of 100 feet between the accessory dwelling unit and adjacent land zoned F-1, F-2, or EFU and meet the other minimum setback requirements of the underlying zone and combining zones.
 4. The accessory dwelling unit will not include more than 900 square feet of useable floor area.
 5. The accessory dwelling unit will be located no farther than 100 feet from the existing single family dwelling, measured from a wall of the single-family dwelling to the nearest part of the useable floor area of the accessory dwelling unit.
 6. The accessory dwelling unit receives approval from a sewer authority or Deschutes County Environmental Soils for onsite wastewater disposal and treatment.
 7. The lot or parcel is served by a fire protection service provider with professionals who have received training or certification described in ORS 181A.410.
 8. Adequate access for firefighting equipment, safe evacuation and staged evacuation areas are met by providing:
 - a. Written certification from a fire protection service provider with professionals who have received training or certification described in ORS 181A.410, on a form prepared by Deschutes County, that access to the property meets minimum fire district requirements to provide emergency services to the property;
 - b. A safe evacuation plan; and

- c. Written authorization from the owner of the staged evacuation area that the occupants of the rural accessory dwelling unit may evacuate to the staged evacuation area.
9. The lot or parcel and accessory dwelling unit comply with rules of the State Board of Forestry under ORS 477.015, 477.025 and 477.027.
- a. If the accessory dwelling unit is not subject to ORS 477.015, 477.025 and 477.027, the accessory dwelling unit has defensible space and fuel break standards as developed in consultation with local fire protection service providers.
10. Statewide wildfire risk maps, described in ORS 477.490, have been approved. Pursuant to the Statewide wildfire risk maps, the following requirements shall apply:
- a. For extreme and high wildfire risk classes in the wildland-urban interface that are identified pursuant to ORS 477.490, the wildfire hazard mitigation building code standards as described in section R327 of the 2021 Oregon Residential Specialty Code;
- b. For extreme and high wildfire risk classes in the wildland-urban interface that are identified pursuant to ORS 477.490, the minimum defensible space rules established by the State Fire Marshal as described in ORS 476.392.
- c. If the accessory dwelling unit is not subject to ORS 477.015, 477.025 and 477.027, the accessory dwelling unit has defensible space and fuel break standards as developed in consultation with local fire protection service providers
11. The existing single-family dwelling property on the lot or parcel is not subject to an order declaring it a nuisance or subject to any pending action under ORS 105.550 to 105.600.
12. A lot or parcel with an accessory dwelling unit approved under this section is not authorized for:
- a. A subdivision, partition, or other division of the lot or parcel so that the existing single-family dwelling is situated on a different lot or parcel than the accessory dwelling unit.
- b. Construction of a second accessory dwelling unit or a medical hardship dwelling in conjunction with the existing accessory dwelling unit.
13. If the accessory dwelling unit is served by a well, the construction of the accessory dwelling unit shall maintain all setbacks from the well required by the Water Resources Commission or Water Resources Department.
14. An existing single-family dwelling and an accessory dwelling unit allowed under this section are considered a single unit for the purposes of calculating ground water right exemptions under ORS 537.545(1).

15. The applicant shall sign and record with the County Clerk, prior to the issuance of a building permit, a restrictive covenant stating an accessory dwelling unit allowed under this section cannot be used for vacation occupancy, as defined in DCC 19.92.160(A)(8) and consistent with ORS 90.100.

HISTORY

Adopted by Ord. 2022-00x §x on [date]

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CHAPTER 22.04 INTRODUCTION AND DEFINITIONS

22.04.040 Verifying Lots of Record

* * *

22.04.040 Verifying Lots of Record

- A. Purpose; scope. Concurrent with or prior to the issuance of certain permits, a lot or parcel shall be verified pursuant to this section to reasonably ensure compliance with the zoning and land division laws in effect on the date the lot or parcel was created. Not all permits require verification. If required, verifying that the lot or parcel was lawfully created is a threshold issue that should be addressed before the permit may be issued, but does not supersede or nullify other permit requirements. This section 22.04.040 provides an applicant the option to concurrently verify a lot or parcel as part of applying for a permit that requires verification, or preliminarily apply for a declaratory ruling to thereby determine the scope of available permits.
- B. Permits Requiring Verification.
1. Unless an exception applies pursuant to subsection (B)(2) below, verifying a lot or parcel pursuant to subsection (C) shall be required prior to the issuance of the following permits:
 - a. Any land use permit for a unit of land in the Exclusive Farm Use Zones (DCC Chapter 18.16), Forest Use Zone – F1 (DCC Chapter 18.36), or Forest Use Zone – F2 (DCC Chapter 18.40);
 - b. Any permit for a lot or parcel that includes wetlands as shown on the Statewide Wetlands Inventory;
 - c. Any permit for a lot or parcel subject to wildlife habitat special assessment;
 - d. In all zones, a land use permit relocating property lines that reduces in size a lot or parcel;
 - e. In all zones, a land use, structural, or non-emergency on-site sewage disposal system permit if the lot or parcel is smaller than the minimum area required in the applicable zone;
 - f. In all zones, a permit for a Historic Accessory Dwelling Unit as defined in DCC 18.116.350 or DCC 19.92.150
 - e.g. In all zones, a permit for a Residential Accessory Dwelling Unit as defined in DCC 18.116.370 or DCC 19.92.160.
- C. Verified Lots of Record. Permits that require verification shall only be issued to lots or parcels that meet the “lot of record” definition in 18.04.030.
- D. Findings; Declaratory Ruling. If an applicant is applying for a land use permit listed in subsection (B)(1), the County shall include a finding verifying that the lot or parcel meets the “lot of record” definition in 18.04.030, a finding noting that the lot or parcel does not meet the “lot of record”

definition in 18.04.030, or a finding noting that verification was not required because the lot or parcel qualified for an exception pursuant to subsection (B)(2). If an applicant is applying for a permit listed in subsection (B)(1) that does not require public notice, or prior to applying for any permit, an applicant may request a declaratory ruling pursuant to DCC Chapter 22.40. If the lot or parcel meets the “lot of record” definition in 18.04.030, the County shall issue the declaratory ruling determining that the lot or parcel qualifies for all permits listed in subsection (B)(1). If the lot or parcel does not meet the “lot of record” definition in 18.04.030, the County shall not issue the declaratory ruling and instead shall provide the applicant information on permit options that do not require verification and information on verification exceptions that may apply pursuant to subsections (B)(2).

HISTORY

Adopted by Ord. 2017-015 §3 on 11/1/1979

[Amended by Ord. 2022-00x §x on \[date\]](#)

DRAFT



BOARD OF
COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: Preparation for Public Hearing – Psilocybin TPM Amendments

BACKGROUND AND POLICY IMPLICATIONS:

Staff will present proposed text amendments to the Board in preparation for a public hearing on November 21st regarding time, place, and manner text amendments for rules related to the licensing and use of psilocybin.

BUDGET IMPACTS:

None

ATTENDANCE:

Tanya Saltzman, Senior Planner



MEMORANDUM

TO: Deschutes County Board of Commissioners

FROM: Tanya Saltzman, AICP, Senior Planner

DATE: November 9, 2022

SUBJECT: Preparation for Public Hearing – Psilocybin TPM Amendments

Staff will present proposed text amendments to the Board of County Commissioners (Board) on November 14, 2022, in preparation for a November 21 public hearing concerning time, place, and manner (TPM) text amendments for psilocybin.

Staff submitted a 35-day Post-Acknowledgement Plan Amendment (PAPA) notice to the Department of Land Conservation and Development (DLCD) on August 25, 2022. Staff presented the proposed amendments to the Planning Commission at a work session on September 8, 2022.¹ The initial public hearing was held on September 29, 2022,² at which time the Planning Commission voted to continue the hearing to October 13 in order to receive additional oral and written testimony.³ At the conclusion of the October 13 public hearing continuation, the oral record was closed and the written record was left open until October 14, 2022. The Planning Commission conducted deliberations on October 27, 2022⁴; the recommendations of the Planning Commission are outlined later in this memorandum and reflected in the proposed text amendments.

The draft text amendments as well as draft findings are provided as attachments to this memorandum. The record, which contains all memoranda, notices, and written testimony received, is available at the following website: <https://www.deschutes.org/cd/page/247-22-000676-ta-psilocybin-time-place-and-manner-tpm-text-amendments>.

I. BACKGROUND

On June 1, 2022, staff provided the Board with an overview of Measure 109, which legalized psilocybin in Oregon subject to the criteria noted in the measure and subsequent rulemaking.⁵ The memorandum introduced the origin of the measure, the types of licenses that will be available, the role of the Oregon

¹ <https://www.deschutes.org/bc-pc/page/planning-commission-16>

² <https://www.deschutes.org/bc-pc/page/planning-commission-19>

³ <https://www.deschutes.org/bc-pc/page/planning-commission-20>

⁴ <https://www.deschutes.org/bc-pc/page/planning-commission-21>

⁵ <https://www.deschutes.org/bcc/page/board-commissioners-meeting>

Health Authority (OHA) and its committees, and the rulemaking process. During the discussion, staff noted the compressed timeline: OHA is currently in the process of rulemaking, which may not be complete until December 2022, yet OHA is due to begin accepting applications for licenses on January 2, 2023. As noted, OHA licenses will require a Land Use Compatibility Statement (LUCS) to be issued by the County.

Measure 109 automatically opts cities and counties into the psilocybin program. However, Measure 109 offers the option for cities and counties to opt out of the program via a ballot measure in the next general election—in this case, November 8, 2022. On July 13, 2022, the Board conducted an afternoon and evening hearing to consider Ordinance No. 2022-009, Referring a Measure to the Electors to Prohibit Product Manufacturers and Psilocybin Service Center Operators within Unincorporated Deschutes County.⁶ The Board deliberated on the matter on July 20 and adopted a first reading of Ordinance No. 2022-009. Second reading occurred on August 8. The ordinance was subject to Deschutes County voters for the November 8, 2022 General Election, at which time the electors voted to overturn the opt out.⁷

Measure 109—and the corresponding Oregon Revised Statute 475A.530—allows cities and counties to adopt “reasonable regulations” for time, place, and manner (TPM) concerning psilocybin businesses. During deliberation of Ordinance No. 2022-009 the Board expressed interest in developing TPM amendments in the event voters reject prohibiting psilocybin manufacturing and psilocybin service centers in the unincorporated county. Amendments could be adopted by the end of the calendar year, prior to OHA accepting applications for licensure on January 2, 2023. On July 27, the Board directed staff to begin the TPM process.⁸

Staff continues to monitor the rulemaking process as it continues this winter and has been coordinating with Association of Oregon Counties (AOC) on any pertinent developments to the program. Staff is also coordinating with other counties, including Wasco and Jackson, which are undertaking TPM amendments on a similar schedule, while recognizing that ultimately each county will have its own set of opportunities and constraints.

II. PROPOSAL

This is a legislative text amendment to Deschutes County Code (DCC), Title 18, County Zoning. The primary purpose of the amendments is to create time, place, and manner regulations concerning psilocybin manufacturing, service centers, and testing laboratories. A brief summary of the amendments are as follows, with further description following:

- DCC 18.04.030: Adds new definitions for terms relating to psilocybin.
- DCC 18.65 Rural Service Center, 18.66 Terrebonne Rural Community, 18.67 Tumalo Rural Community, 18.74 Rural Commercial, 18.108 Sunriver Urban Unincorporated Community: Adds psilocybin service centers as a conditional use with site plan review

⁶ <https://www.deschutes.org/bcc/page/board-county-commissioners-meeting-63>

⁷ Unofficial results as of Wednesday, November 9 were 56.31% in favor of overturning the opt out versus 43.69% in favor of opting out.

⁸ <https://www.deschutes.org/bcc/page/board-county-commissioners-meeting-65>

- DCC 18.67 Tumalo Rural Community, 18.100 Rural Industrial: Adds psilocybin testing laboratories as a conditional use with site plan review
- DCC 18.113.030 Destination Resorts: Adds psilocybin service centers to allowable uses in destination resorts
- DCC 18.116.380: Adds a new chapter creating time, place, and manner criteria for psilocybin manufacture as farm use; psilocybin manufacture as a processing use; psilocybin service centers.

III. PLANNING COMMISSION PROCESS

As noted above, the Planning Commission held a public hearing on September 29 and October 13 and deliberated on October 27.

A. Public Testimony

A total of 32 individuals provided written testimony concerning the proposed amendments, spanning the timeframe between initial 35-day DLCD notice on August 25 to the conclusion of the open record period on October 14, 2022. Approximately one dozen individuals testified at the September 29 public hearing, and a dozen more testified on October 13. The majority of in-person testimony focused on similar themes as the written testimony, with the majority supporting psilocybin services and wanting to expand options.

Oral and written testimony topics were generally grouped as follows:

Twenty individuals in written testimony were in favor of psilocybin as a treatment option for conditions such as PTSD (particularly for veterans), trauma and addiction.

- General support of psilocybin as a treatment option.
- Many comments stated the proposed regulations are too restrictive. Specifically:
 - Service centers should be allowed to have overnight/multi-day stays owing to the nature of psilocybin treatment, which ideally involves an initial intake/consultation, a facilitated experience, and then follow-up integration.
 - Service centers should be placed in rural, nature-based settings owing to the sensitivity of clients either from the issues they are seeking to address (i.e. PTSD) and the heightened sensitivity to surroundings/sensations during the treatment itself. The proposed locations of commercial and retail/service zones therefore were not appropriate.
 - Increased access to psilocybin services in general is important, for reasons both financial and societal/cultural (for instance, some veterans prefer maximum privacy)
 - Proposed hours of service centers are too limited and should match OHA guidelines
 - The County should consider allowing service centers in destination resorts
 - The County should consider allowing psilocybin manufacturing in forest zones in addition to Exclusive Farm Use (EFU) zones.

Eight individuals in written testimony were against psilocybin in the rural county:

- Several comments directed the Planning Commission to vote yes to Measure 9-152 (prohibiting psilocybin manufacturing and service centers). It was apparent that many citizens conflated this hearing—which is considering potential zoning if the opt out is overturned—with the opt-out ballot measure in November. During the hearing, staff attempted to clarify this distinction and noted that the voters of the county, not the Planning Commission, will determine if the county opts out of psilocybin altogether.
- Concerns about rural compatibility, orderly growth, safety, and water usage, and a subsequent desire to put psilocybin businesses in cities first.

Additional items from the open record period include:

- Questions and answers regarding the psilocybin program and rulemaking between the Oregon Health Authority (OHA) and the Association of Oregon Counties Planning Directors group (AOCPD).
- Correspondence between Planning Commissioner Altman and Senior Planner Tanya Saltzman concerning more detailed maps of the areas around service center zones as well as discussion regarding options for overnight stays.
- Central Oregon LandWatch (COLW) testified that the proposed amendments should be subject to Goal 5.

In addition to comments from the general public, staff received two written comments from DLCD; both were responses to requests from staff concerning DLCD's interpretation of a component of ORS 475A.570, which addresses psilocybin service centers in relation to farmland.

B. Agency Testimony

DLCD provided written testimony concerning its interpretation along with that of the Department of Justice, of ORS 475A.570(3), which states "(3) The operation of a psilocybin service center may be carried on in conjunction with a psilocybin-producing fungi crop." In addition to the agency's written comments, Hilary Foote, Farm/Forest Specialist from DLCD, provided verbal testimony that further explained the legal mechanisms behind designated uses on EFU land.

Ultimately, DLCD's interpretation of the statute is that psilocybin service centers would not be permitted as a stand-alone use on EFU land. However, it is possible that a service center could be permitted as a part of another use that is allowed in EFU—namely, a home occupation or a commercial activity in conjunction with farm use. These avenues are not without their own criteria and restrictions, and DLCD noted in its follow-up written testimony that Deschutes County's current code is more restrictive than state law concerning commercial activity in conjunction with farm use (DCC 18.16.040(B) requires that the commercial activity be related to an on-property farm use).

C. Planning Commission Deliberations and Recommendations

Based on the testimony received, the Planning Commission deliberated and formulated several recommendations. In general, the Planning Commission supported providing more/broader options for psilocybin businesses where possible, while recognizing that there are regulatory limitations associated with the Oregon land use system and the rulemaking process, which is not yet finalized. To that end, Planning Commission recommendations are as follows, with staff notes where applicable:

- **Allow psilocybin manufacturing as farm use and manufacturing as processing use to occur on Forest zoned properties (F1, F2).**

Some testimony requested that areas permitting psilocybin manufacturing be expanded to forest uses, citing ORS 475A.571(1), which declares psilocybin-producing fungi as a crop for the purposes of “farm” use and “farming practice.” ORS 475A.570(4) states “A county may allow the manufacture of psilocybin products as a farm use on land zoned for farm or forest use in the same manner as the manufacture of psilocybin products is allowed in exclusive farm use zones under this section and ORS 215.213, 215.283 and 475C.053.” The original amendments only allowed manufacturing in EFU zones; the code provided today reflects the Planning Commission’s recommendation.

- **Amend the operating hours relating to psilocybin service centers to align with Oregon Health Authority (OHA) proposed rules, 6:00 a.m. to 11:59 p.m., with allowances beyond this for extenuating circumstances based on the determination of the facilitator.**

The original amendments allowed service center hours as 7:00 a.m. to 7:00 p.m. This was intended to be a placeholder until further information was received via testimony. A significant amount of testimony requested that service center hours match those of Oregon Health Authority’s: 6:00 a.m. to 11:59 p.m., with allowances beyond this for extenuating circumstances based on the determination of the facilitator. This provision currently exists in OHA’s proposed rules; staff will aim to match final OHA language. The code provided today reflects the Planning Commission’s recommendation.

- **Amend Deschutes County’s Destination Resort code to permit psilocybin service centers in destination resorts.**

The original amendments did not allow service centers in destination resorts. However, testimony from representatives from Pronghorn Resort (now called Juniper Preserve) (C. Celko/Emerge Law Group, 2022-10-13 and 2022-9-29 and several individuals providing verbal testimony) recommended that service centers are in fact suitable for destination resorts as promoting wellness opportunities. The testimony noted that siting service centers within destination resorts could potentially be an easier fit with respect to state and local land use law, given its natural setting without potential conflicts. The testimony cited DCC 18.113.010(B), which states the Destination Resort zone “will ensure resort development that complements the natural and cultural attractiveness of the area without significant adverse effect on commercial farming and forestry, environmental and natural features, cultural and historic resources and their settings and other significant resources.” The same testimony also noted the existing overnight accommodations and other ancillary uses in destination resorts.

Testimony against siting service centers in destination resorts (J. Guild, 2022-10-14) cited the requirement in a destination resort of CCRs requiring HOA Board approval. Concerning compatibility, Guild noted that “Pronghorn has a 3 mile Right of Way across Federal land and is surrounded by Bureau of Land Management land where shooting and hunting is allowed.” Other concerns cited included compatibility, liability, and public safety.

The code provided today reflects the Planning Commission’s recommendation to allow service centers in destination resorts. Upon consultation with legal counsel, staff made changes to the language proposed in the testimony to more accurately reflect the approval process with respect to a resort’s master plan. If adopted, it is unclear whether a destination resort could immediately apply for a site plan review. Modifying the conceptual and/or final master plan may be required. This would be a matter of first impression and would be sent directly to a Hearings Officer.

- **Recognize that psilocybin service centers can be allowed as home occupations or commercial activities in conjunction with farm use.**

As noted above, DLCD provided written testimony that psilocybin service centers could not be a stand-alone use in EFU zones but could potentially be allowed on EFU land through two paths: home occupations and commercial activity in conjunction with farm use. Specifically:

- Commercial activities that are in conjunction with farm use are conditional uses subject to DCC 18.16.040, Limitations On Conditional Uses, and 18.128.015; and
- Home Occupations are conditional uses subject to DCC 18.16.0030(M), Limitations On Conditional Uses, and DCC 18.116.280, Home Occupations.

The Planning Commission recommended keeping these options available (as opposed to specifically prohibiting them). No code changes are required to support this interpretation, as the uses (commercial activity in conjunction with farm use and home occupation) already exist in DCC.

- **The proposed amendments are not subject to a Goal 5 analysis.**

Testimony received from Central Oregon LandWatch (R. Isbell, 2022-9-29) suggested that the proposed amendments must demonstrate compliance with Goal 5. Given the proposed uses and their locations, staff currently maintains that the proposed uses for psilocybin will not be subject to Goal 5:

- Psilocybin manufacturing is considered a farm crop/farm/use/farming practice per ORS 475A.570
- The areas in which service centers are currently proposed (retail/commercial zones) are not subject to the current WA combining zone
- Service centers on EFU may be allowed not as new conflicting, stand-alone uses but under existing uses within EFU (home occupations/commercial activity in conjunction with farm use)

This does not require a change to any code language, but staff has updated the findings to reflect the above statements more specifically.

- **Allow overnight accommodations and ancillary uses (meditation, yoga, etc.) as accessory uses to psilocybin service centers.**

A significant amount of testimony—as well as Planning Commissioners’ clarifying questions—focused on the possibility of allowing psilocybin service centers to allow overnight/multi-day stays due to reasons ranging from safety concerns to promoting a better, more complete therapeutic experience. At the conclusion of deliberations, the Planning Commission recommended that overnight accommodations and ancillary uses be permitted, while recognizing that the regulatory path to do so is currently unclear.

Staff has shared the following remarks to psilocybin advocates, Planning Commission, and the Board throughout the TPM process. OHA’s proposed rules and the testimony submitted to date by psilocybin advocates have not defined the operational characteristics of service centers, whether they contain overnight accommodations or not. While we know that OHA’s proposed rules allow up to 25 clients in one group psilocybin session at a service center, staff are unable to develop findings that evaluate the cumulative impacts associated with that number of participants, not to mention “ancillary services” (currently undefined) or overnight accommodations. Legislative amendments to DCC require staff to analyze service centers to demonstrate compliance with the Comprehensive Plan, Statewide Planning Goals, Oregon Administrative Rules (OARs), and Oregon Revised Statutes (ORS). Without more detailed information, staff are unable to evaluate their impacts on farm and forest lands (Goals 3 and 4), wildlife (Goal 5), and county and state transportation facilities (Goal 12).

More specifically, staff are unable to:

- Perform a farm (or forest) impacts test to determine whether service centers disrupt agricultural (or forest) activities.
- Determine if this new conflicting use should be permitted, limited, or prohibited in Deschutes County’s wildlife area, sensitive bird and mammal, and sage grouse combining zones based on an Economic, Social, Environmental, and Energy (ESEE) analysis.
- Analyze whether county or state transportation facilities are affected by service centers as required under the Transportation Planning Rule (TPR).

IV. AMENDMENT SUMMARY

Measure 109 and the subsequent ORS 475A statute provides no direction as to reasonable time, place, and manner restrictions. The measure contains limited basic criteria pertaining to land use. For instance, psilocybin service centers may not be located within 1,000 feet of elementary or secondary schools (500 feet if there is a physical or geographic barrier), and manufacturing facilities may not be located outdoors. Service centers may not be located in single family dwellings.

Table 1 outlines the psilocybin uses in the proposed amendments, including Planning Commission recommendations where applicable, as discussed above.

Table 1 – Summary of Proposed TPM Amendments

Use	Description	Notes
Psilocybin Manufacturing as a Farm Use	Allowed in: <ul style="list-style-type: none"> • EFU zone • F-1 and F-2 zones 	<ul style="list-style-type: none"> • Psilocybin-producing fungi is recognized by Measure 109 as a farm use and is therefore permitted outright in EFU zones. • Psilocybin-producing fungi must be grown indoors.
Psilocybin Manufacturing as a Processing Use	Allowed in: <ul style="list-style-type: none"> • EFU zone.⁹ • F-1 and F-2 zones 	<ul style="list-style-type: none"> • Manufacturing may be carried on in conjunction with a psilocybin producing fungi crop according to Measure 109.
Psilocybin Service Centers	Allowed subject to a conditional use permit and site plan review in: <ul style="list-style-type: none"> • Rural Commercial • Rural Service Centers • Sunriver Commercial District • Sunriver Town Center District • Terrebonne Commercial District • Tumalo Commercial District Allowed as a commercial service in Destination Resort Overlay Zone	<ul style="list-style-type: none"> • Hours of operation will be limited to daily treatments. • No option for larger retreat-style, overnight operations. • Service centers may not be located within 1,000 feet of elementary or secondary schools (500 feet if there is a physical or geographic barrier). • According to DLCD interpretation, service centers could not be a stand-alone use on EFU land but could be allowed on EFU land through two paths: home occupations and commercial activity in conjunction with farm use
Psilocybin Testing Laboratories	Allowed subject to a conditional use permit and site plan review in: <ul style="list-style-type: none"> • Rural Industrial • Tumalo Industrial 	<ul style="list-style-type: none"> • OHA rulemaking concerning testing requirements thus far appear in OAR 333-333-7010 through 333-333-7150

IV. NEXT STEPS

The Board will conduct a public hearing on November 21, 2022, at 3:00 p.m. until 5:00 p.m., reconvening at 6 p.m.

Given the need to adopt regulations by the end of the calendar year so that they will be in place when OHA begins accepting license applications, the adoption timeline is somewhat compressed. Staff recommends the following schedule with respect to keeping the record open. This will allow for one week of an open record period and will allow staff to prepare a package for deliberation. Given that this timeline anticipates the need for first reading to occur during the same session as deliberations, if commissioners would like to pursue any additional issues or amendment directions not already

⁹ DCC 18.16.025 requires the facility uses less than 10,000 square feet for its processing area and complies with all applicable siting standards. Exception: A facility which uses less than 2,500 square feet for its processing area is exempt from any applicable siting standards.

addressed, he or she should notify staff to coordinate one on one meetings; this will allow staff to prepare potential amendment versions that can be considered for first reading.

The timeline for the development and adoption of TPM amendments is as follows:

Table 2 - Psilocybin TPM Schedule

Task	Timeline
1. Board Work Session	November 14
2. Board Hearing	November 21
3. Written Record left open until	November 28
4. Deliberation packet due	November 30
5. Board Deliberation and First Reading	December 7
6. Consideration of Second Reading (if needed)	December 21

Attachments

- 1. Draft Text Amendments
- 2. Draft Findings

CHAPTER 18.04 TITLE, PURPOSE AND DEFINITIONS

18.04.030 Definitions

* * *

"Psilocybin" means psilocybin or psilocin.

"Psilocybin manufacture as a farm use" means the manufacture, planting, cultivation, growing, harvesting, production, preparation, propagation, any packaging or repackaging of psilocybin-producing fungi or labeling or relabeling of its container, provided that the psilocybin manufacturer is licensed by the Oregon Health Authority with a psilocybin manufacturing endorsement for fungi cultivation. It does not include psilocybin manufacture as a processing use.

"Psilocybin manufacture as a processing use" means the compounding, conversion, or processing of a psilocybin product, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, provided that the psilocybin manufacturer is licensed by the Oregon Health Authority with a psilocybin manufacturing endorsement for psilocybin extraction and/or edible psilocybin production.

"Psilocybin premises" includes the following areas of a location licensed under ORS 475A.210 to 475A.722:

- A. All public and private enclosed areas at the location that are used in the business operated at the location, including offices, kitchens, rest rooms and storerooms;
- B. All areas outside a building that the Oregon Health Authority has specifically licensed for the manufacturing of psilocybin products or the operation of a psilocybin service center; and
- C. For a location that the authority has specifically licensed for the operation of a psilocybin service center outside a building, that portion of the location used to operate the psilocybin service center and provide psilocybin services to clients.

"Psilocybin premises" does not include a primary residence.

"Psilocybin-producing fungi" is:

- A. A crop for the purposes of "farm use" as defined in ORS 215.203;
- B. A crop for purposes of a "farm" and "farming practice," both as defined in ORS 30.930;
- C. A product of farm use as described in ORS 308A.062; and
- D. The product of an agricultural activity for purposes of ORS 568.909.

"Psilocybin products" means psilocybin-producing fungi, mycelium and mixtures or substances containing a detectable amount of psilocybin, including whole fungi, homogenized fungi, psilocybin extract and edible psilocybin products. "Psilocybin products" does not include psilocybin services.

"Psilocybin service center" means an establishment licensed by the Oregon Health Authority:

- A. At which administration sessions are held; and
- B. At which other psilocybin services may be provided.

HISTORY

Adopted by Ord. [PL-15](#) on 11/1/1979
 Amended by Ord. [82-013 §1](#) on 5/25/1982
 Amended by Ord. [83-037 §2](#) on 6/1/1983
 Amended by Ord. [83-033 §1](#) on 6/15/1983
 Amended by Ord. [84-023 §1](#) on 8/1/1984
 Amended by Ord. [85-002 §2](#) on 2/13/1985
 Amended by Ord. [86-032 §1](#) on 4/2/1986
 Amended by Ord. [86-018 §1](#) on 6/30/1986
 Amended by Ord. [86-054 §1](#) on 6/30/1986
 Amended by Ord. [86-056 §2](#) on 6/30/1986
 Amended by Ord. [87-015 §1](#) on 6/10/1987
 Amended by Ord. [88-009 §1](#) on 3/30/1988
 Amended by Ord. [88-030 §3](#) on 8/17/1988
 Amended by Ord. [88-030 §4](#) on 8/17/1988
 Amended by Ord. [89-004 §1](#) on 3/24/1989
 Amended by Ord. [89-009 §2](#) on 11/29/1989
 Amended by Ord. [90-014 §2](#) on 7/12/1990
 Amended by Ord. [91-002 §11](#) on 2/6/1991
 Amended by Ord. [91-005 §1](#) on 3/4/1991
 Amended by Ord. [92-025 §1](#) on 4/15/1991
 Amended by Ord. [91-020 §1](#) on 5/29/1991
 Amended by Ord. [91-038 §§3 and 4](#) on 9/30/1991
 Amended by Ord. [92-004 §§1 and 2](#) on 2/7/1992
 Amended by Ord. [92-034 §1](#) on 4/8/1992
 Amended by Ord. [92-065 §§1 and 2](#) on 11/25/1992
 Amended by Ord. [92-066 §1](#) on 11/25/1992
 Amended by Ord. [93-002 §§1, 2 and 3](#) on 2/3/1993
 Amended by Ord. [93-005 §§1 and 2](#) on 4/21/1993
 Amended by Ord. [93-038 §1](#) on 7/28/1993
 Amended by Ord. [93-043 §§1, 1A and 1B](#) on 8/25/1993
 Amended by Ord. [94-001 §§1, 2, and 3](#) on 3/16/1994

Amended by Ord. [94-008 §§1, 2, 3, 4, 5, 6, 7 and 8](#) on 6/8/1994
 Amended by Ord. [94-041 §§2 and 3](#) on 9/14/1994
 Amended by Ord. [94-038 §3](#) on 10/5/1994
 Amended by Ord. [94-053 §1](#) on 12/7/1994
 Amended by Ord. [95-007 §1](#) on 3/1/1995
 Amended by Ord. [95-001 §1](#) on 3/29/1995
 Amended by Ord. [95-075 §1](#) on 11/29/1995
 Amended by Ord. [95-077 §2](#) on 12/20/1995
 Amended by Ord. [96-003 §2](#) on 3/27/1996
 Amended by Ord. [96-082 §1](#) on 11/13/1996
 Amended by Ord. [97-017 §1](#) on 3/12/1997
 Amended by Ord. [97-003 §1](#) on 6/4/1997
 Amended by Ord. [97-078 §5](#) on 12/31/1997
 Amended by Ord. [2001-037 §1](#) on 9/26/2001
 Amended by Ord. [2001-044 §2](#) on 10/10/2001
 Amended by Ord. [2001-033 §2](#) on 10/10/2001
 Amended by Ord. [2001-048 §1](#) on 12/10/2001
 Amended by Ord. [2003-028 §1](#) on 9/24/2003
 Amended by Ord. [2004-001 §1](#) on 7/14/2004
 Amended by Ord. [2004-024 §1](#) on 12/20/2004
 Amended by Ord. [2005-041 §1](#) on 8/24/2005
 Amended by Ord. [2006-008 §1](#) on 8/29/2006
 Amended by Ord. [2007-019 §1](#) on 9/28/2007
 Amended by Ord. [2007-020 §1](#) on 2/6/2008
 Amended by Ord. [2007-005 §1](#) on 2/28/2008
 Amended by Ord. [2008-015 §1](#) on 6/30/2008
 Amended by Ord. [2008-007 §1](#) on 8/18/2008
 Amended by Ord. [2010-018 §3](#) on 6/28/2010
 Amended by Ord. [2010-022 §1](#) on 7/19/2010
 Amended by Ord. [2011-009 §1](#) on 10/17/2011
 Amended by Ord. [2012-004 §1](#) on 4/16/2012
 Amended by Ord. [2012-007 §1](#) on 5/2/2012
 Amended by Ord. [2013-008 §1](#) on 7/5/2013
 Amended by Ord. [2014-009 §1](#) on 8/6/2014
 Amended by Ord. [2015-004 §1](#) on 4/22/2015
 Amended by Ord. [2016-015 §1](#) on 7/1/2016
 Amended by Ord. [2016-026 §1](#) on 11/9/2016
 Amended by Ord. [2016-006 §1](#) on 2/27/2017
 Amended by Ord. [2017-015 §1](#) on 11/1/2017
 Repealed by Ord. [2018-005 §8](#) on 10/10/2018
 Amended by Ord. [2018-006 §4](#) on 11/20/2018
 Amended by Ord. [2019-010 §1](#) on 5/8/2019
 Amended by Ord. [2019-016 §1](#) on 2/24/2020
 Amended by Ord. [2020-001 §1](#) on 4/21/2020

Amended by Ord. [2020-010 §1](#) on 7/3/2020
Amended by Ord. [2020-007 §7](#) on 10/27/2020
Amended by Ord. [2021-013 §3](#) on 4/5/2022
Amended by Ord. 2022-xxx §x on x/x/2022

CHAPTER 18.65 RURAL SERVICE CENTER; UNINCORPORATED COMMUNITY ZONE

18.65.020 RSC; Commercial/Mixed Use District (Brothers, Hampton, Millican, Whistlestop And Wildhunt)
18.65.021 Alfalfa RSC; Commercial/Mixed Use District

18.65.020 RSC; Commercial/Mixed Use District (Brothers, Hampton, Millican, Whistlestop And Wildhunt)

- A. Uses Permitted Outright. The following uses and their accessory uses are permitted outright, subject to applicable provisions of this chapter:
 - 1. Single-family dwelling.
 - 2. Manufactured home, subject to DCC 18.116.070.
 - 3. Type 1 Home Occupation, subject to DCC 18.116.280.
 - 4. Residential home and residential facility.
 - 5. Two-family dwelling or duplex.
 - 6. Agricultural uses, as defined in Title 18, and excluding livestock feed lot or sales yard, and hog or mink farms.
 - 7. Class I and II road or street project subject to approval as part of a land partition, subdivision or subject to the standards and criteria established by DCC 18.116.230.
 - 8. Class III road and street project.
 - 9. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.

- B. Uses Permitted Subject to Site Plan Review. The following uses and their accessory uses are permitted, subject to applicable provisions of this chapter, DCC 18.116, Supplementary Provisions, and DCC 18.124, Site Plan Review, of this title:
 - 1. Retail store, business office and/or commercial establishment in a building or buildings each not exceeding 4,000 square feet of floor space. The aggregate area for any one type of use that takes place in multiple buildings may not exceed 4,000 square feet.
 - 2. Residential use in conjunction with a permitted commercial use.
 - 3. Park or playground.
 - 4. Community building.
 - 5. Public or semipublic building or use.

- 6. Highway maintenance facility.
 - 7. Marijuana wholesaling, office only. There shall be no storage of marijuana items or products at the same location.
 - 8. Religious institutions or assemblies.
- C. Conditional Uses Permitted. The following uses and their accessory uses are permitted subject to applicable provisions of this chapter, DCC 18.116, Supplementary Provisions, DCC 18.124, Site Plan Review, and DCC 18.128, Conditional Use, of this title:
- 1. Multi-family dwelling with three or more units.
 - 2. School.
 - 3. Cemetery.
 - 4. Type 2 or Type 3 Home Occupation, subject to DCC 18.116.280.
 - 5. Medical clinic or veterinary clinic.
 - 6. Community Center.
 - 7. Manufactured home park.
 - 8. Recreational vehicle or trailer park.
 - 9. Wireless telecommunications facilities, except those facilities meeting the requirements of DCC 18.116.250(A).
 - 10. Marijuana retailing, subject to the provisions of DCC 18.116.330.
 - 11. Psilocybin service centers, subject to the provisions of DCC 18.116.380.

HISTORY

Adopted by Ord. [2002-002 §2](#) on 6/5/2002
Amended by Ord. [2002-028 §1](#) on 7/24/2002
Amended by Ord. [2004-002 §11](#) on 4/28/2004
Amended by Ord. [2015-004 §2](#) on 4/22/2015
Amended by Ord. [2016-015 §4](#) on 7/1/2016
Amended by Ord. [2018-006 §8](#) on 11/20/2018
Amended by Ord. [2020-001 §6](#) on 4/21/2020
[Amended by Ord. 2022-xxx §x on x/x/2022](#)

[18.65.021 Alfalfa RSC; Commercial/Mixed Use District](#)

In Alfalfa, the following uses and their accessory uses are permitted:

- A. Uses Permitted Outright.
 - 1. Single-family dwelling.

2. Manufactured home, subject to DCC 18.116.070
 3. Type 1 Home Occupation, subject to DCC 18.116.280.
 4. Residential home and residential facility.
 5. Two-family dwelling or duplex.
 6. Agricultural uses, as defined in Title 18, and excluding livestock feed lot or sales yard, and hog or mink farms.
 7. Class I and II road or street project subject to approval as part of a land partition, subdivision or subject to the standards and criteria established by DCC 18.116.230.
 8. Class III road and street project.
 9. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.
- B. Uses Permitted Subject to Site Plan Review. The following uses and their accessory uses are permitted, subject to applicable provisions of this chapter, DCC 18.116, Supplementary Provisions and DCC 18.124, Site Plan Review, of this title:
1. Retail store, business office and/or commercial establishment in a building or buildings each not exceeding 4,000 square feet of floor space. The aggregate area for any one type of use that takes place in multiple buildings may not exceed 4,000 square feet.
 2. Residential use in conjunction with a permitted commercial use.
 3. Park or playground.
 4. Community building.
 5. Public or semipublic building or use.
 6. Marijuana wholesaling, office only. There shall be no storage of marijuana items or products at the same location.
 7. Religious institutions or assemblies.
- C. Conditional Uses Permitted. The following uses and their accessory uses are permitted subject to applicable provisions of this chapter, DCC 18.116, Supplementary Provisions, DCC 18.124, Site Plan Review, and DCC 18.128, Conditional Use, of this title:
1. School.
 2. Cemetery.
 3. Type 2 or Type 3 Home Occupation, subject to DCC 18.116.280.
 4. Medical clinic or veterinary clinic.
 5. Community Center.

6. Recreational vehicle or trailer park.
7. Wireless telecommunications facilities, except those facilities meeting the requirements of DCC 18.116.250(A).
8. Marijuana retailing, subject to the provisions of DCC 18.116.330.
9. Psilocybin service centers, subject to the provisions of DCC 18.116.380.

HISTORY

Adopted by Ord. [2002-002 §2](#) on 6/5/2002

Amended by Ord. [2018-006 §8](#) on 11/20/2018

Amended by Ord. [2020-001 §6](#) on 4/21/2020

[Amended by Ord. 2022-xxx §x on x/x/2022](#)

CHAPTER 18.66 TERREBONNE RURAL COMMUNITY ZONING DISTRICTS

18.66.040 Commercial (TeC) District

18.66.040 Commercial (TeC) District

The Terrebonne Commercial District is intended to allow a range of commercial and limited industrial uses to serve the community and surrounding rural area.

A. Permitted Uses. The following uses and their accessory uses are permitted outright and do not require site plan review:

1. Single-family dwelling or two-family on a lot or parcel existing on June 4, 1997.
2. Manufactured home on a lot or parcel existing on June 4, 1997, subject to DCC 18.116.070.
3. Type 1 Home Occupation, subject to DCC 18.116.280.
4. Class I and II road or street project subject to approval as part of a land partition, subdivision or subject to the standards of DCC 18.66.070 and 18.116.230.
5. Class III road or street project.
6. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.

B. Uses Permitted Subject to Site Plan Review. The following uses and their accessory uses are permitted subject to the applicable provisions of DCC 18.66, 18.116 and 18.1248:

1. A building or buildings not exceeding 4,000 square feet of floor space to be used by any combination of the following uses:
 - a. Retail or service business.
 - b. Eating or drinking establishment.
 - c. Offices.
 - d. Veterinary clinic and kennel entirely within an enclosed building.
 - e. Residential use in the same building as a use permitted by DCC 18.66.040(B)(1).
 - f. Marijuana wholesaling, office only. There shall be no storage of marijuana items or products at the same location.

2. Any of the uses allowed under DCC 18.66.040 proposing to occupy more than 4,000 square feet of floor area in a building or buildings, subject to provisions of DCC 18.66.040(E).
 3. Child care facility and/or preschool.
- C. Conditional Uses. The following uses and their accessory uses are permitted subject to the applicable provisions of DCC 18.66, 18.116, 18.124 and 18.128:
1. Motel, with a maximum of 35 units, only if served by a community sewer system as defined in OAR 660-22-010(2).
 2. Recreational vehicle park.
 3. Religious institutions or assemblies.
 4. Type 2 or Type 3 Home Occupation, subject to DCC 18.116.280.
 5. Public or private school.
 6. Park.
 7. Public or semi-public building.
 8. Medical center in a building or buildings not exceeding 4,000 square feet of floor space.
 9. Utility facility.
 10. Water supply or treatment facility.
 11. Vehicle and trailer sales, service, repair or rental in a building or buildings not exceeding 4,000 square feet of floor space.
 12. Uses listed below carried on in a building or buildings not exceeding 4,000 square feet of floor space with no exterior displays or storage of industrial equipment, industrial vehicles or industrial products:
 - a. Manufacturing and production.
 - b. Wholesale sales.
 - c. Mini-storage.
 13. Wireless telecommunications facilities, except those facilities meeting the requirements of DCC 18.116.250(A) or (B).
 14. Surface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material.
 15. Marijuana retailing, subject to the provisions of DCC 18.116.330.
 16. Psilocybin service centers, subject to the provisions of DCC 18.116.380.

HISTORY

Adopted by Ord. [97-003 §2](#) on 6/4/1997
Amended by Ord. [97-063 §3](#) on 11/12/1997
Amended by Ord. [2004-002 §15](#) on 4/28/2004
Amended by Ord. [2015-004 §3](#) on 4/22/2015
Amended by Ord. [2016-015 §5](#) on 7/1/2016
Amended by Ord. [2020-001 §7](#) on 4/21/2020
Amended by Ord. [2020-010 §3](#) on 7/3/2020
Amended by Ord. [2021-004 §3](#) on 5/27/2021
[Amended by Ord. 2022-xxx §x on x/x/2022](#)

CHAPTER 18.67 TUMALO RURAL COMMUNITY ZONING DISTRICTS

18.67.040 Commercial (TuC) District
 18.67.060 Industrial (Tul) District

18.67.040 Commercial (TuC) District

The Tumalo Commercial District is intended to allow a range of limited commercial and industrial uses to serve the community and surrounding area.

- A. Permitted Uses. The following uses and their accessory uses are permitted outright and do not require site plan review.
 - 1. Single-family dwelling or duplex.
 - 2. Manufactured home subject to DCC 18.116.070.
 - 3. Type 1 Home Occupation, subject to DCC 18.116.280.
 - 4. Class I and II road or street project subject to approval as part of a land partition, subdivision or subject to the standards of DCC 18.67.060 and 18.116.230.
 - 5. Class III road or street project.
 - 6. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.

- B. Uses Permitted, Subject to Site Plan Review. The following uses and their accessory uses are permitted subject to the applicable provisions of DCC 18.67, 18.116 and 18.124:
 - 1. A building or buildings, none of which exceeds 4,000 square feet of floor space to be used by any combination of the following uses:
 - a. Retail or service business.
 - b. Eating and/or drinking establishment.
 - c. Offices.
 - d. Residential use in the same building as a use permitted in DCC 18.67.040.
 - e. Marijuana wholesaling, office only. There shall be no storage of marijuana items or products at the same location.
 - 2. Any of the uses listed under DCC 18.67.040 proposing to occupy more than 4,000 square feet of floor area in a building subject to the provisions of DCC 18.67.040(E).
 - 3. Child care facility and/or preschool.

- C. Conditional Uses. The following uses and their accessory uses are permitted subject to the applicable provisions of DCC 18.116, 18.124, and 18.128:
1. Religious institutions or assemblies.
 2. Bed and breakfast inn.
 3. Type 2 or Type 3 Home Occupation, subject to DCC 18.116.280.
 4. Park.
 5. Public or semi-public building.
 6. Utility facility.
 7. Water supply or treatment facility.
 8. Manufactured home/RV park on a parcel in use as a manufactured home park or recreational vehicle park prior to the adoption of PL-15 in 1979 and being operated as of June 12, 1996 as a manufactured home park or recreational vehicle park, including any expansion of such uses on the same parcel as configured on June 12, 1996.
 9. The following uses and their accessory uses may be conducted in a building or buildings not to exceed 4,000 square feet of floor space.
 - a. Farm equipment, sales, service or repair.
 - b. Trailer sales, service or repair.
 - c. Vehicle service or repair.
 - d. Veterinary clinic.
 10. The following uses may be conducted in a building or buildings not to exceed 10,000 square feet of floor space:
 - a. Manufacturing or production.
 - b. Wholesale sales.
 - c. Marijuana retailing, subject to the provisions of DCC 18.116.330.
 11. Wireless telecommunications facilities, except those facilities meeting the requirements of DCC 18.116.250(A) or (B).
 12. Surface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material.
 13. Psilocybin service centers, subject to the provisions of DCC 18.116.380.

HISTORY

Adopted by Ord. [97-033 §2](#) on 6/25/1997
 Amended by Ord. [97-063 §3](#) on 11/12/1997
 Amended by Ord. [2000-033 §11](#) on 12/6/2000
 Amended by Ord. [2001-016 §2](#) on 3/28/2001
 Amended by Ord. [2001-039 §8](#) on 12/12/2001
 Amended by Ord. [2004-002 §19](#) on 4/28/2004
 Amended by Ord. [2004-013 §7](#) on 9/21/2004
 Amended by Ord. [2015-004 §5](#) on 4/22/2015
 Amended by Ord. [2016-015 §6](#) on 7/1/2016
 Amended by Ord. [2020-001 §8](#) on 4/21/2020
 Amended by Ord. [2020-010 §4](#) on 7/3/2020
 Amended by Ord. [2021-004 §4](#) on 5/27/2021
 Amended by Ord. [2021-013 §8](#) on 4/5/2022
 Amended by Ord. [2022-xxx §x](#) on x/x/2022

[18.67.060 Industrial \(Tul\) District](#)

The purpose of the Industrial District is to allow a limited range of industrial uses to serve the community and the surrounding area.

- A. Uses permitted outright. The following uses and their accessory uses are permitted outright:
1. Industrial uses in existence on the date of adoption of the Unincorporated Communities rule, OAR 660-022 (October 28, 1994);
 2. Office buildings associated with industrial uses in existence on the date of adoption of the Unincorporated Communities rule, OAR 660-022 (October 28, 1994);
 3. Restaurants and cafeteria facilities associated with industrial uses in existence on the date of adoption of the Unincorporated Communities rule, OAR 660-022 (October 28, 1994);
 4. Residence for caretaker or night watchman on property with industrial uses in existence on the date of adoption of the Unincorporated Communities rule, OAR 660-022 (October 28, 1994);
 5. Equipment storage associated with industrial uses in existence on the date of adoption of the Unincorporated Communities rule, OAR 660-022 (October 28, 1994);
 6. Class I and II road or street project subject to approval as part of a land partition, subdivision or subject to the standards of DCC 18.67.080 and 18.116.230.
 7. Class III road or street project.
 8. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.

- B. Uses Permitted, Subject to Site Plan Review. The following uses and their accessory uses are permitted in a building or buildings not to exceed 40,000 square feet of floor area, subject to the applicable provisions of DCC 18.67, 18.116, and 18.124.
1. Expansion or replacement of uses allowed under DCC 18.67.060(A);
 2. Office buildings associated with industrial uses;
 3. Restaurant and cafeteria facilities associated with industrial uses;
 4. Residence for caretaker or night watchman on property with industrial uses;
 5. Equipment storage associated with industrial uses;
 6. Primary processing, packaging, treatment, bulk storage and distribution of the following products:
 - a. Agricultural products, including foodstuffs, animal and fish products, and animal feeds.
 - b. Ornamental horticultural products and nurseries.
 - c. Softwood and hardwood products excluding pulp and paper manufacturing.
 - d. Sand, gravel, clay and other mineral products.
 7. Freight depot, including the loading, unloading, storage and distribution of goods and materials by railcar or truck;
 8. Contractor's or building materials business and other construction-related business including plumbing, electrical, roof, siding, etc.;
 9. Welding, sheet metal, or machine shop provided such is wholly enclosed within a building or all outside storage is enclosed by site-obscuring fencing.
 10. Mini-storage facility.
 11. Manufacturing, storage, sales, rental, repair and servicing of equipment and materials associated with farm and forest uses, logging, road maintenance, mineral extraction, construction or similar rural activities;
 12. Any industrial use proposing to occupy more than 40,000 square feet of floor area in a building or buildings is subject to the provisions of DCC 18.67.060(C) and (D).
- C. Conditional Uses. The following uses and their accessory uses are permitted subject to the applicable provisions of DCC 18.116, 18.124, and 18.128:
1. Any use permitted by DCC 18.67.060(B) which will exceed 40,000 square feet of floor area;
 2. Concrete or ready mix plant;

3. Stockpiling, storage, crushing and processing of minerals, including the processing of aggregate into asphaltic concrete or Portland Cement Concrete;
4. Buildings, structures, apparatus, equipment and appurtenances necessary for the above uses to be carried on.
5. Marijuana retailing, subject to the provisions of DCC 18.116.330.
6. Psilocybin testing laboratories.

HISTORY

Adopted by Ord. [2005-016 §1](#) on 4/27/2005

Amended by Ord. [2015-004 §6](#) on 4/22/2015

Amended by Ord. [2016-015 §6](#) on 7/1/2016

Amended by Ord. [2021-004 §4](#) on 5/27/2021

[Amended by Ord. 2022-xxx §x on x/x/2022](#)

CHAPTER 18.74 RURAL COMMERCIAL ZONE

[18.74.020 Uses Permitted; Deschutes Junction And Deschutes River Woods Store](#)

[18.74.027 Uses Permitted; Pine Forest And Rosland](#)

18.74.020 Uses Permitted; Deschutes Junction And Deschutes River Woods Store

- A. Uses Permitted Outright. The following uses and their accessory uses are permitted outright and do not require site plan review:
1. Single-family dwelling.
 2. Manufactured home subject to DCC 18. 1 16. 070.
 3. Two-family dwelling.
 4. Type 1 Home Occupation, subject to DCC 18. 1 16. 280.
 5. Agricultural uses.
 6. Class I and II road or street project subject to approval as part of a land partition or subdivision, or subject to the standards and criteria established in DCC 18.116.230.
 7. Class III road or street project.
 8. A lawfully established use existing as of 11/05/02, the date this chapter was adopted, not otherwise permitted by this chapter.
- B. Uses Permitted Subject to Site Plan Review. The following uses and their accessory uses are permitted subject to the applicable provisions of this chapter and DCC 18.116 and 18.124:
1. A building or buildings not exceeding 2,500 square feet of floor space to be used by any combination of the following uses.
 - a. Restaurant, café or delicatessen.
 - b. Grocery store.
 - c. Tavern.
 - d. Retail sporting goods and guide services.
 - e. Barber and beauty shop.
 - f. General store.
 - g. Video store.

- h. Antique, art, craft, novelty and second hand sales if conducted completely within an enclosed building.
- 2. Expansion of a nonconforming use listed under section B(1)(a-h), existing as of 11/05/2002, the date this chapter was adopted, shall be limited to 2,500 square feet or 25 percent of the size of the building as of said date, whichever is greater.
- 3. A building or buildings not exceeding 3,500 square feet of floor space to be used by any combination of the following uses.
 - a. Retail sales of agricultural or farm products.
 - b. Farm machinery sales and repair.
 - c. Kennel.
 - d. Veterinary clinic.
 - e. Automobile service station and repair garage, towing service, fuel storage and sales.
 - f. Public or semi-public use.
 - g. Residential use in the same building as a use permitted by this chapter.
 - h. Park or playground.
- 4. Expansion of a nonconforming use listed under section B(3)(a-h), existing as of 11/05/2002, the date this chapter was adopted, shall be limited to 3,500 square feet or 25 percent of the size of the building as of said date, whichever is greater.
- C. Uses Permitted Subject to Site Plan Review. The following uses and their accessory uses are permitted, subject to the applicable provisions of this chapter, DCC 18.116, Supplementary Provisions, and DCC 18.124, Site Plan Review, of this title:
 - 1. Child care facility and/or preschool.
- D. Conditional Uses. The following uses and their accessory uses are permitted subject to the applicable provisions of this chapter and DCC 18.116, 18.124 and 18.128:
 - 1. A building or buildings not exceeding 3,500 square feet of floor space to be used by any combination of the following uses.
 - a. Type 2 or Type 3 Home Occupation, subject to DCC 18.116.280.
 - b. Utility facility.
 - c. Wireless telecommunications facilities, except those facilities meeting the requirements of DCC 18.116.250(A) or (B).
 - d. Religious institutions or assemblies.
 - e. School.

- 2. Recreational vehicle park
- 3. Mini-storage facilities limited to 35,000 square feet in size.
- 4. Marijuana retailing, subject to the provisions of DCC 18.116.330.
- 5. Psilocybin service centers, subject to the provisions of DCC 18.116.380.

HISTORY

Adopted by Ord. [2002-019 §2](#) on 8/7/2002
Amended by Ord. [2004-002 §20](#) on 4/28/2004
Amended by Ord. [2008-008 §1](#) on 3/18/2008
Amended by Ord. [2015-004 §7](#) on 4/22/2015
Amended by Ord. [2016-015 §7](#) on 7/1/2016
Amended by Ord. [2020-001 §9](#) on 4/21/2020
Amended by Ord. [2020-010 §5](#) on 7/3/2020
Amended by Ord. [2021-013 §9](#) on 4/5/2022
[Amended by Ord. 2022-xxx §x on x/x/2022](#)

18.74.027 Uses Permitted; Pine Forest And Rosland

- A. Uses Permitted Outright. Any use listed as a use permitted outright by DCC 18.74.020(A).
- B. Uses Permitted subject to Site Plan Review. The following uses and their accessory uses are permitted subject to the applicable provisions of this chapter and DCC 18.116 and 18.124:
 - 1. A building or buildings each not exceeding 2,500 square feet of floor space to be used by any combination of the following uses that serve the surrounding rural area or the travel needs of persons passing through the area:
 - a. Eating and drinking establishments.
 - b. Retail store, office and service establishments.
 - c. Marijuana wholesaling, office only. There shall be no storage of marijuana items or products at the same location.
 - 2. Expansion of a nonconforming use existing as of 11/05/2002 shall be limited to 2,500 square feet or 25 percent of the size of the building (or portion of the building) housing the nonconforming use as of said date, whichever is greater.
 - 3. A building or buildings each not exceeding 3,500 square feet of floor space to be used by any combination of the following uses:
 - a. Sales of agricultural or farm products.
 - b. Farm machinery sales and repair.

- c. Kennel or veterinary clinic.
 - d. Automobile service station, repair garage, towing service, fuel storage and fuel sales.
 - e. Public or semi-public use.
 - f. Residential use in the same building as a use permitted in this chapter.
 - g. Park or playground.
4. Expansion of a nonconforming use existing as of 11/05/2002 shall be limited to 3,500 square feet each or 25 percent of the size of the building (or portion of the building) housing the nonconforming use as of said date, whichever is greater.
5. Child care facility and/or preschool.
- C. Conditional Uses. The following uses and their accessory uses are permitted subject to the applicable provisions of this chapter and DCC 18.116, 18.124 and 18.128:
- 1. A building or buildings each not exceeding 3,500 square feet of floor space to be used by any of the following uses:
 - a. Home occupation as defined in DCC 18.04.
 - b. Utility facility.
 - c. Wireless telecommunications facilities, except those facilities meeting the requirements of DCC 18.116.250(A) or (B).
 - d. Religious institutions or assemblies.
 - e. School.
 - f. Marijuana retailing, subject to the provisions of DCC 18.116.330.
 - 2. Recreational vehicle park.
 - 3. Mini-storage facilities limited to 35,000 square feet in size.
 - 4. Psilocybin service centers, subject to the provisions of DCC 18.116.380.

HISTORY

Adopted by Ord. [2003-080 §1](#) on 1/6/2004
 Amended by Ord. [2007-007 §1](#) on 3/5/2007
 Amended by Ord. [2008-008 §1](#) on 3/18/2008
 Amended by Ord. [2015-004 §7](#) on 4/22/2015
 Amended by Ord. [2016-015 §7](#) on 7/1/2016
 Amended by Ord. [2020-001 §9](#) on 4/21/2020
 Amended by Ord. [2020-010 §5](#) on 7/3/2020
 Amended by Ord. [2022-xxx §x on x/x/2022](#)

CHAPTER 18.100 RURAL INDUSTRIAL ZONE; R-I

18.100.020 Conditional Uses

18.100.020 Conditional Uses

The following uses may be allowed subject to DCC 18.128:

- A. Any use permitted by DCC 18.100.010, which is located within 600 feet of a residential dwelling, a lot within a platted subdivision or a residential zone.
- B. Any use permitted by DCC 18.100.010, which involves open storage.
- C. Concrete or ready-mix plant.
- D. Petroleum products storage and distribution.
- E. Storage, crushing and processing of minerals, including the processing of aggregate into asphaltic concrete or Portland Cement Concrete.
- F. Commercial feedlot, stockyard, sales yard, slaughterhouse and rendering plant.
- G. Railroad trackage and related facilities.
- H. Pulp and paper manufacturing.
- I. Any use permitted by DCC 18.100.010, which is expected to exceed the following standards:
 - 1. Lot coverage in excess of 70 percent.
 - 2. Generation of any odor, dust, fumes, glare, flashing lights or noise that is perceptible without instruments 500 feet from the property line of the subject use.
- J. Manufacture, repair or storage of articles manufactured from bone, cellophane, cloth, cork, feathers, felt, fiber, glass, stone, paper, plastic, precious or semiprecious stones or metal, wax, wire, wood, rubber, yarn or similar materials, provided such uses do not create a disturbance because of odor, noise, dust, smoke, gas, traffic or other factors.
- K. Processing, packaging and storage of food and beverages including those requiring distillation and fermentation.
- L. Public Landfill Transfer Station, including recycling and other related activities.
- M. Mini-storage facility.
- N. Automotive wrecking yard totally enclosed by a sight-obscuring fence.
- O. Wireless telecommunications facilities, except those facilities meeting the requirements of DCC 18.116.250(A) or (B).
- P. Utility facility.

- Q. Manufacturing, storage, sales, rental, repair and servicing of equipment and materials associated with farm and forest uses, logging, road maintenance, mineral extraction, construction or similar rural activities.
- R. Electrical substations.
- S. Marijuana retailing, subject to the provisions of DCC 18.116.330.
- T. Psilocybin testing laboratories.

HISTORY

- Adopted by Ord. [PL-15](#) on 11/1/1979*
- Amended by Ord. [86-018](#) §15 on 6/30/1986*
- Amended by Ord. [90-014](#) §38 on 7/12/1990*
- Amended by Ord. [91-020](#) §1 on 5/29/1991*
- Amended by Ord. [91-038](#) §1 on 9/30/1991*
- Amended by Ord. [97-063](#) §3 on 11/12/1997*
- Amended by Ord. [2001-016](#) §2 on 3/28/2001*
- Amended by Ord. [2001-039](#) §12 on 12/12/2001*
- Amended by Ord. [2002-126](#) §1 on 12/11/2002*
- Amended by Ord. [2004-013](#) §10 on 9/21/2004*
- Amended by Ord. [2016-015](#) §8 on 7/1/2016*
- Amended by Ord. [2018-006](#) §12 on 11/20/2018*
- Amended by Ord. [2021-004](#) §5 on 5/27/2021*
- Amended by Ord. [2022-xxx](#) §x on x/x/2022*

CHAPTER 18.108 URBAN UNINCORPORATED COMMUNITY ZONE; SUNRIVER

18.108.050 Commercial; C District

18.108.055 Town Center; TC District

18.108.050 Commercial; C District

- A. Uses Permitted Outright. Any combination of the following uses and their accessory uses are permitted outright in the C district.
1. Recreational path.
 2. Ambulance service.
 3. Library.
 4. Religious institutions or assemblies.
 5. Bus stop.
 6. Community center.
 7. A building or buildings each not exceeding 8,000 square feet of floor space housing any combination of:
 - a. Retail/rental store, office and service establishment.
 - b. Art galleries
 - c. Dry cleaner and/or self-service laundry establishment.
 - d. Radio and television sales and service.
 - e. Radio and television broadcasting studios and facilities, except towers.
 - f. Restaurant, bar and cocktail lounge, including entertainment.
 - g. Automobile service station.
 - h. Technical and business school.
 - i. Catering establishment.
 - j. Crafts in conjunction with retail sales (occurring on premises, such as stained glass/pottery, etc.).
 - k. Medical and dental clinic, office and laboratory.
 - l. Theater not exceeding 4,000 square feet of floor area.

- m. Marijuana wholesaling, office only. There shall be no storage of marijuana items or products at the same location.
 - 8. Multiple-family residential dwelling units, subject to the provisions of DCC 18.108.050(C)(1).
 - 9. Residential dwelling units constructed in the same building as a commercial use, subject to the provisions of DCC 18.108.050(C)(2).
 - 10. Post Office.
 - 11. Administrative and office facility associated with a community association or community use.
 - 12. Police facility.
- B. Conditional Uses Permitted. The following conditional uses may be permitted subject to DCC 18.128 and a conditional use permit.
- 1. Public buildings and public utility buildings and structures.
 - 2. Club, lodge or fraternal organization.
 - 3. Commercial off-street parking lot.
 - 4. Bus passenger station.
 - 5. Interval ownership and/or time-share unit or the creation thereof.
 - 6. Miniature golf.
 - 7. Bed and breakfast inn.
 - 8. Inn.
 - 9. Residential facility.
 - 10. A building or buildings each not exceeding 8,000 square feet of floor space housing any combination of:
 - a. Bowling alley.
 - b. Car wash.
 - c. Dancing or music school, nursery school, kindergarten and day-care facility.
 - d. Theater exceeding 4,000 square feet in floor area.
 - e. Veterinary clinic or kennel operated entirely within an enclosed building.
 - f. Automotive repair and maintenance garage, or tire store, provided the business is wholly conducted within an enclosed building.
 - g. Marijuana retailing, subject to the provisions of DCC 18.116.330.

11. Psilocybin service centers, subject to the provisions of DCC 18.116.380.

HISTORY

Repealed & Reenacted by Ord. [97-078 §2](#) on 12/31/1997

Amended by Ord. [98-016 §1](#) on 3/11/1998

Amended by Ord. [2003-026 §1](#) on 7/9/2003

Amended by Ord. [2015-004 §9](#) on 4/22/2015

Amended by Ord. [2016-015 §9](#) on 7/1/2016

Amended by Ord. [2020-001 §12](#) on 4/21/2020

[Amended by Ord. 2022-xxx §x on x/xx/2022](#)

18.108.055 Town Center; TC District

- A. Uses Permitted Outright. The following uses and their accessory uses are permitted outright in the TC District.
1. Park or plaza.
 2. Library.
 3. Community center.
 4. Visitors center.
 5. A building, or buildings each not exceeding 8,000 square feet of floor space, unless approved as a Large Scale Use pursuant to DCC 18.108.055(C), including any of the following uses:
 - a. Retail/rental store, office, civic and service establishment.
 - b. Grocery store.
 - c. Art gallery.
 - d. Restaurant, bakery, delicatessen, pub, cocktail lounge, including entertainment.
 - e. Health care service including medical and dental clinic, office, pharmacy, and laboratory but excluding nursing homes.
 - f. Health & fitness facility.
 - g. Barber, beauty shop or spa.
 - h. Child care center, preschool and daycare facility.
 - i. Bank.
 - j. Post office.
 - k. Veterinary clinic (without animal boarding facilities).

- l. Crafts in conjunction with retail sales (occurring on premises such as sculpture, stained glass, pottery, etc.).
 - m. Meeting room, convention and banquet facility.
 - n. Property sales, mortgage, management or rental office.
 - o. Movie theater.
6. Multi-family Residential, subject to paragraphs (E)(1) and (2).
7. Developed recreational facilities, outdoors or in a building or buildings each not exceeding 8,000 square feet of floor space, unless approved as a Large Scale Use pursuant to DCC 18.108.055(C), including, but not limited to the following facilities:
 - a. Indoor and outdoor swimming pools.
 - b. Ice skating rink.
 - c. Indoor and outdoor tennis courts.
 - d. Indoor and outdoor basketball court or other ball field.
 - e. Physical fitness facilities.
 - f. Park, playground and picnic and barbeque area.
 - g. Walkways, bike paths, jogging paths.
 - h. Bowling alley.
 - i. Arcade.
8. Hotel with up to 100 hotel units in a single building.
9. Mixed Use Structure, subject to the rules of DCC 18.108.055(E)(3) and a limit of 8,000 square feet of floor space for commercial uses listed in DCC 18.108.055(A)(5) or recreational uses listed in DCC 18.108.055(A)(7), unless said uses are approved as large scale uses pursuant to DCC 18.108.055(C).
10. Residential Facility.
11. Senior housing/assisted living or active adult development, excluding nursing homes.
12. Townhomes, subject to paragraphs (E)(1) and (2).
13. Accessory uses to uses permitted outright, including, but not limited to, parking facilities, private roads, storage facilities, trash receptacles and recycling areas.
14. Similar uses to those allowed outright, provided they are approved by the County in the decision approving the Conceptual Site Plan described in DCC 18.108.055(K).
15. Religious institutions or assemblies.

- B. Conditional Uses Permitted. The following conditional uses may be permitted pursuant to the provisions of DCC 18.128, Conditional Use Permits.
1. Public buildings and public utility buildings and structures.
 2. Bed and breakfast inn.
 3. Ambulance service.
 4. Fire station.
 5. Police station.
 6. Bus passenger station.
 7. Live/work residence.
 8. Stand-alone parking structure.
 9. Accessory uses to the above-listed conditional uses.
 10. Marijuana retailing, subject to the provisions of DCC 18.116.330.
 11. Psilocybin service centers, subject to the provisions of DCC 18.116.380.

HISTORY

Adopted by Ord. [2008-015 §2](#) on 6/30/2008
Amended by Ord. [2015-004 §9](#) on 4/22/2015
Amended by Ord. [2016-015 §9](#) on 7/1/2016
Amended by Ord. [2020-001 §12](#) on 4/21/2020
[Amended by Ord. 2022-xxx §xx on x/xx/2022](#)

CHAPTER 18.113 DESTINATION RESORTS ZONE; DR

18.113.030 Uses In Destination Resorts

18.113.030 Uses In Destination Resorts

The following uses are allowed, provided they are part of, and are intended to serve persons at, the destination resort pursuant to DCC 18.113.030 and are approved in a final master plan:

- A. Visitor-oriented accommodations designed to provide for the needs of visitors to the resort:
 - 1. Overnight lodging, including lodges, hotels, motels, bed and breakfast facilities, time share units and similar transient lodging facilities;
 - 2. Convention and conference facilities and meeting rooms;
 - 3. Retreat centers;
 - 4. Restaurants, lounges and similar eating and drinking establishments; and
 - 5. Other similar visitor-oriented accommodations consistent with the purposes of DCC 18.113 and Goal 8.

- B. Developed recreational facilities designed to provide for the needs of visitors and residents of the resort;
 - 1. Golf courses and clubhouses;
 - 2. Indoor and outdoor swimming pools;
 - 3. Indoor and outdoor tennis courts;
 - 4. Physical fitness facilities;
 - 5. Equestrian facilities;
 - 6. Wildlife observation shelters;
 - 7. Walkways, bike paths, jogging paths, equestrian trails;
 - 8. Other similar recreational facilities consistent with the purposes of DCC 18.113 and Goal 8.

- C. Residential accommodations:
 - 1. Single-family dwellings;
 - 2. Duplexes, triplexes, fourplexes and multi-family dwellings;
 - 3. Condominiums;
 - 4. Townhouses;

5. Living quarters for employees;
 6. Time-share projects.
- D. Commercial services and specialty shops designed to provide for the visitors to the resort:
1. Specialty shops, including but not limited to delis, clothing stores, bookstores, gift shops and specialty food shops;
 2. Barber shops/beauty salons;
 3. Automobile service stations limited to fuel sales, incidental parts sales and minor repairs;
 4. Craft and art studios and galleries;
 5. Real estate offices;
 6. Convenience stores;
 7. Psilocybin service centers licensed by the Oregon Health Authority;
 - 7-8. Other similar commercial services which provide for the needs of resort visitors and are consistent with the purposes of DCC 18.113 and Goal 8.
- E. Uses permitted in open space areas generally include only those uses that, except as specified herein, do not alter the existing or natural landscape of the proposed open space areas. No improvements, development or other alteration of the natural or existing landscape shall be allowed in open space areas, except as necessary for development of golf course fairways and greens, hiking and bike trails, lakes and ponds and primitive picnic facilities including park benches and picnic tables. Where farming activities would be consistent with identified preexisting open space uses, irrigation equipment and associated pumping facilities shall be allowed.
- F. Facilities necessary for public safety and utility service within the destination resort.
- G. Other similar uses permitted in the underlying zone consistent with the purposes of DCC 18.113.030.
- H. Accessory Uses in Destination Resorts:
1. The following accessory uses shall be permitted provided they are ancillary to the destination resort and consistent with the purposes of DCC 18.113 and Goal 8:
 - a. Transportation-related facilities excluding airports;
 - b. Emergency medical facilities;
 - c. Storage structures and areas;
 - d. Kennels as a service for resort visitors only;
 - e. Recycling and garbage collection facilities;

f. A psilocybin product manufacturer licensed by the Oregon Health Authority, so long as the use is in conjunction with a psilocybin service center;

f.g. Other similar accessory uses consistent with the purposes of DCC 18.113 and Goal 8.

HISTORY

Adopted by Ord. [92-004](#) §13 on 2/7/1992

Amended by Ord. 2022-xxx §x on x/x/2022

CHAPTER 18.116 SUPPLEMENTARY PROVISIONS

18.116.380 Psilocybin Manufacturing, Service Centers, and Testing Laboratories

18.116.380 Psilocybin Manufacturing, Service Centers, and Testing Laboratories

A. Applicability. Section 18.116.380 applies to:

- 1. Psilocybin Manufacture as a Farm Use in the EFU, F-1, and F-2 zones.
- 2. Psilocybin Manufacture as a Processing Use in the EFU, F-1, and F-2 zones.
- 3. Psilocybin Service Centers in the EFU, RC, RSC, SUC, SUTC, TeC, and TuC zones.
- 4. Psilocybin Testing Laboratories in the RI and Tul zone.

B. Psilocybin Manufacture as a Farm Use. Psilocybin manufacture as a farm use shall be subject to the following standards:

- 1. Indoor Fungi Cultivation. Psilocybin-producing fungi must be grown indoors. Fungi cultivation is prohibited in any outdoor area.
- 2. Setbacks. Setback requirements shall be applied from the underlying zone.
- 3. Separation distances.

a. Psilocybin manufacture as a farm use shall be located a minimum of 1,000 feet from:

- (1) A public elementary or secondary school for which attendance is compulsory under ORS 339.020; or
- (2) A private or parochial elementary or secondary school, teaching children as described in ORS 339.030 (1)(a); and

b. Notwithstanding DCC 18.116.380(D)(3)(a), psilocybin manufacture as a farm use may be located within 1,000 feet of a school if:

- (1) The psilocybin service center is not located within 500 feet of:
 - i. A public elementary or secondary school for which attendance is compulsory under ORS 339.020; or
 - ii. A private or parochial elementary or secondary school, teaching children as described in ORS 339.030 (1)(a).

- (2) The Oregon Health Authority determines that there is a physical or geographic barrier capable of preventing children from traversing to the premises of the psilocybin manufacture as a farm use.

4. Prohibited Uses.

a. In the EFU zone, the following uses are prohibited:

- (1) A new dwelling used in conjunction with a psilocybin-producing fungi crop;
- (2) A farm stand, as described in DCC 18.16.038(C), used in conjunction with a psilocybin-producing fungi crop.

C. Psilocybin Manufacture as a Processing Use. Psilocybin manufacture as a processing use shall be subject to the standards in DCC 18.16.025(I).

D. Psilocybin service centers. Psilocybin service centers shall be subject to the following standards:

- 1. Co-Location. The operation of a psilocybin service center may be carried on in conjunction with a psilocybin-producing fungi crop in the Exclusive Farm Use zone subject to either DCC 18.16.030(E) or 18.16.030(M).

2. Prohibited Uses.

a. In zones other than Exclusive Farm Use zone, a psilocybin service center as a Home Occupation or Commercial Activity in Conjunction with Farm Use.

3. Separation distances.

a. Psilocybin service centers shall be located a minimum of 1,000 feet from:

- (1) A public elementary or secondary school for which attendance is compulsory under ORS 339.020; or
- (2) A private or parochial elementary or secondary school, teaching children as described in ORS 339.030 (1)(a)

b. Notwithstanding DCC 18.116.380(D)(3)(a), a psilocybin service center may be located within 1,000 feet of a school if:

- (1) The psilocybin service center is not located within 500 feet of:

 - i. A public elementary or secondary school for which attendance is compulsory under ORS 339.020; or
 - ii. A private or parochial elementary or secondary school, teaching children as described in ORS 339.030 (1)(a); and
- (2) The Oregon Health Authority determines that there is a physical or geographic barrier capable of preventing children from traversing to the premises of the psilocybin service center.

- 4. Setbacks. Setback requirements shall be applied from the underlying zone.
- 5. Hours of Operation. Hours of operation shall be no earlier than 6:00 a.m. and no later than 11:59 p.m. on the same day, unless a facilitator determines that it is appropriate to continue an administration session beyond 11:59 PM local time, subject to the requirements in OAR 333-333-5250(3).

HISTORY

Adopted by Ord. 2022-xxx §x on x/x/2022

FINDINGS

I. PROPOSAL

This is a legislative text amendment to Deschutes County Code (DCC), Title 18, County Zoning. The primary purpose of the amendments is to create time, place, and manner regulations concerning psilocybin manufacturing, service centers, and testing laboratories. A brief summary of the amendments are as follows:

- DCC 18.04.030: Adds new definitions for terms relating to psilocybin.
- DCC 18.65 Rural Service Center, 18.66 Terrebonne Rural Community, 18.67 Tumalo Rural Community, 18.74 Rural Commercial, 18.108 Sunriver Urban Unincorporated Community: Adds psilocybin service centers as a conditional use with site plan review
- DCC 18.113.030 Destination Resorts: Adds psilocybin service centers to allowable uses in destination resorts
- DCC 18.67 Tumalo Rural Community, 18.100 Rural Industrial: Adds psilocybin testing laboratories as a conditional use with site plan review
- DCC 18.116.380: Adds a new chapter creating time, place, and manner criteria for psilocybin manufacture as farm use; psilocybin manufacture as a processing use; psilocybin service centers.

II. BACKGROUND

On November 3, 2020, Oregon voters approved Ballot Measure 109, the Psilocybin Program Initiative, which legalized psilocybin in Oregon subject to the criteria noted in the measure and subsequent rulemaking.

Measure 109 automatically opts cities and counties into the psilocybin program, which first underwent a two-year development period, and is slated to begin statewide on January 2, 2023. However, Measure 109 offers the option for cities and counties to opt out via a ballot measure in the next general election—in this case, November 8, 2022.

On June 1, 2022, staff provided the Board of County Commissioners (Board) with an overview of Measure 109.¹ During the discussion, staff noted the compressed timeline: Oregon Health Authority (OHA), which administers the program and the licensing system, was engaged in rulemaking

¹ <https://www.deschutes.org/bcc/page/board-commissioners-meeting>

throughout late 2021 and all of 2022, with completion anticipated by December 2022, yet OHA is due to begin accepting applications for licenses on January 2, 2023. OHA licenses will require a Land Use Compatibility Statement (LUCS) to be issued by the County. This timeline placed the Board—as well as the industry and the public—in a difficult position of not knowing key aspects of the program in advance of the program beginning.

On July 13, 2022, the Board of County Commissioners conducted an afternoon and evening hearing to consider Ordinance No. 2022-009, Referring a Measure to the Electors to Prohibit Product Manufacturers and Psilocybin Service Center Operators within Unincorporated Deschutes County.² The Board deliberated on the matter on July 20 and adopted a first reading of Ordinance No. 2022-009; second reading occurred on August 8. The opt-out measure was subject to Deschutes County voters for the November 8, 2022 General Election, at which time the voters overturned the opt out.

Measure 109—and the corresponding Oregon Revised Statute 475A.530—allows cities and counties to adopt “reasonable regulations” for time, place, and manner (TPM) concerning psilocybin businesses. During deliberation the Board expressed interest in developing TPM amendments in the event voters reject prohibiting psilocybin manufacturing and psilocybin service centers in the unincorporated county. Amendments could be adopted by the end of the calendar year, prior to the Oregon Health Authority (OHA) accepting applications for licensure on January 2, 2023. On July 27, the Board directed staff to begin the TPM process.³

Measure 109 provides no direction as to reasonable time, place, and manner restrictions. It is difficult for staff to estimate impacts from a transportation and land use standpoint without real world examples of psilocybin production, processing, and service centers that the Board can consider. Ultimately, in order for regulations to be “reasonable,” such regulations must be necessary to protect public health, safety and welfare. Erring on the side of more restrictive TPM regulations is defensible because the range and extent of potential impacts of psilocybin production, processing and service centers cannot be defined at this stage.

III. REVIEW CRITERIA

Deschutes County lacks specific criteria in DCC Titles 18, 22, or 23 for reviewing a legislative text amendment. Nonetheless, since Deschutes County is initiating one, the County bears the responsibility for justifying that the amendments are consistent with Statewide Planning Goals and its existing Comprehensive Plan.

IV. FINDINGS

CHAPTER 22.12, LEGISLATIVE PROCEDURES

Section 22.12.010.

² <https://www.deschutes.org/bcc/page/board-county-commissioners-meeting-63>

³ <https://www.deschutes.org/bcc/page/board-county-commissioners-meeting-65>

Hearing Required

FINDING: This criterion will be met because a public hearing was held before the Deschutes County Planning Commission and Board of County Commissioners.

Section 22.12.020, Notice

Notice

A. Published Notice

- 1. Notice of a legislative change shall be published in a newspaper of general circulation in the county at least 10 days prior to each public hearing.**
- 2. The notice shall state the time and place of the hearing and contain a statement describing the general subject matter of the ordinance under consideration.**

FINDING: This criterion will be met as notice was published in the Bend Bulletin newspaper for the Planning Commission public hearing, and the Board of County Commissioners' public hearing.

B. Posted Notice. Notice shall be posted at the discretion of the Planning Director and where necessary to comply with ORS 203.045.

FINDING: Posted notice was determined by the Planning Director not to be necessary.

C. Individual notice. Individual notice to property owners, as defined in DCC 22.08.010(A), shall be provided at the discretion of the Planning Director, except as required by ORS 215.503.

FINDING: Given the proposed legislative amendments do not apply to any specific property, no individual notices were sent.

D. Media notice. Copies of the notice of hearing shall be transmitted to other newspapers published in Deschutes County.

FINDING: Notice was provided to the County public information official for wider media distribution. This criterion is met.

Section 22.12.030 Initiation of Legislative Changes.

A legislative change may be initiated by application of individuals upon payment of required fees as well as by the Board of County Commissioners.

FINDING: The application was initiated by the Deschutes County Planning Division at the direction of the Board of County Commissioners, and has received a fee waiver. This criterion is met.

Section 22.12.040. Hearings Body

- A. *The following shall serve as hearings or review body for legislative changes in this order:***
- 1. *The Planning Commission.***
 - 2. *The Board of County Commissioners.***
- B. *Any legislative change initiated by the Board of County Commissioners shall be reviewed by the Planning Commission prior to action being taken by the Board of Commissioners.***

FINDING: The Deschutes County Planning Commission held the initial public hearing on September 29 and October 13, 2022. The Board then held a public hearing on November 21. These criteria are met.

Section 22.12.050 Final Decision

All legislative changes shall be adopted by ordinance

FINDING: The proposed legislative changes will be implemented by Ordinance No. [number TBD] upon approval and adoption by the Board of County Commissioners. This criterion will be met.

A. Statewide Planning Goals and Guidelines

Goal 1: Citizen Involvement: The amendments do not propose to change the structure of the County's citizen involvement program. Notice of the proposed amendments were provided to the *Bulletin* for each public hearing.

Goal 2: Land Use Planning: This goal is met because ORS 197.610 allows local governments to initiate post acknowledgments plan amendments (PAPA). An Oregon Land Conservation and Development Department 35-day notice was initiated on August 25, 2021. The Planning Commission held a public hearing on September 29, 2022 and the Board of County Commissioners held a public hearing on November 21, 2022. This Findings document provides the adequate factual basis for the amendments.

Goal 3: Agricultural Lands: Measure 109 and the corresponding Oregon Revised Statute 475A.570(2) specify that psilocybin-producing fungi is:

- (a) A crop for the purposes of "farm use" as defined in ORS 215.203;
- (b) A crop for purposes of a "farm" and "farming practice," both as defined in ORS 30.930;
- (c) A product of farm use as described in ORS 308A.062; and
- (d) The product of an agricultural activity for purposes of ORS 568.909.

The statute clearly permits the production of psilocybin-producing fungi in Exclusive Farm Use zones. DCC 18.16.025 allows small-scale processing of farm crops, provided that the facility uses less than 10,000 square feet for its processing area and complies with all applicable siting standards. Processing facilities smaller than 2,500 square feet are exempt from any applicable siting standards.

ORS 475A.570(2) prohibits psilocybin-related farm dwellings and psilocybin-related farm stands. ORS 475A.570(3) states "The operation of a psilocybin service center may be carried on in conjunction with a psilocybin-producing fungi crop." The interpretation of this statute by the Department of Land Conservation and Development (DLCD) is that psilocybin service centers would not be a stand-alone use on EFU but could potentially be permitted either as a commercial activity in conjunction with farm use or as a home occupation. The proposed amendments to the County Code are consistent with these provisions of state law and are therefore consistent with Goal 3.

Goal 4: Forest Lands: ORS 475A.570(4) states "A county may allow the manufacture of psilocybin products as a farm use on land zoned for farm or forest use in the same manner as the manufacture of psilocybin products is allowed in exclusive farm use zones under this section and ORS 215.213, 215.283 and 475C.053." The proposed amendments are consistent with these provisions of state law and are therefore consistent with Goal 4.

Goal 5: Open Spaces, Scenic and Historic Areas, and Natural Resources: Goal 5 is to protect natural resources and conserve scenic and historical areas and open spaces. OAR 660-023-0250(3) states that local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. The proposed text amendments do not create or amend a resource list or any portion of the County's acknowledged Comprehensive Plan or land use regulations adopted to protect a significant Goal 5 resource or to address specific requirements of Goal 5. The proposed text amendments do not allow new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list because the County's LM and WA overlay zones are not changed in these proposed amendments. More specifically, the amendments are not subject to a Goal 5 analysis because:

- Psilocybin manufacturing is considered a farm crop/farm/use/farming practice per ORS 475A.570
- The areas in which service centers are proposed (retail/commercial zones) are not subject to the current WA combining zone
- Service centers on EFU land could be allowed not as new conflicting, stand-alone uses that would require a Goal 5 analysis, but under existing uses within EFU (home occupations/commercial activity in conjunction with farm use)

For these reasons, the proposed text amendments are in compliance with Goal 5.

Goal 6: Air, Water and Land Resources Quality: The proposed text amendments do not propose to change the County's Plan policies or implementing regulations for compliance with Goal 6. The text amendments will not impact the quality of the air, water, and land resources of the County given the fact that psilocybin farm use is required to take place fully indoors, is not odorous and is not a water-intensive use. Psilocybin service centers are proposed to be limited to commercially-zoned

areas and therefore will not impact the quality of land resources. For these reasons, the proposed text amendments are in compliance.

Goal 7: Areas Subject to Natural Disasters and Hazards: The proposed text amendments do not propose to change the County's Plan or implementing regulations regarding natural disasters and hazards; therefore, they are in compliance.

Goal 8: Recreational Needs: The text amendments do not propose to change the County's Plan or implementing regulations regarding recreational needs; therefore, they are in compliance.

Goal 9: Economic Development: Goal 9 and its implementing regulations focus on economic analysis and economic development planning required in urban Comprehensive Plans to ensure there is adequate land available to realize economic growth and development opportunities. The proposed amendments apply to rural lands and do not propose to amend the Comprehensive Plan. The proposed text amendments will encourage economic development in the County as they will provide new business and economic development opportunities. Because these new businesses will be taxed, the public will benefit as well. For these reasons, the proposed text amendments are in compliance with Goal 9.

Goal 10: Housing: This goal is not applicable because, unlike municipalities, unincorporated areas are not obligated to fulfill certain housing requirements.

Goal 11: Public Facilities and Services: Complies because the text amendments do not propose to change the County's Plan or implementing regulations regarding public facilities and services.

Goal 12: Transportation: Goal 12 is to provide and encourage a safe, convenient and economic transportation system. The proposed text amendments will not change the functional classification of any existing or planned transportation facility or standards implementing a functional classification system. The proposed text amendments will not allow any new uses expected to result in transportation system impacts that differ in degree or severity from other allowed or allowable uses in the zones in which psilocybin manufacture and/or psilocybin service centers could be sited.

Goal 13: Energy Conservation: The proposed text amendments do not propose to change the County's Plan or implementing regulations regarding energy conservation. Therefore, compliance with Goal 13 is established.

Goal 14: Urbanization: The proposed text amendments do not propose to change the County's Plan or implementing regulations regarding urbanization. Therefore, compliance with Goal 14 is established.

Goals 15 through 19 are not applicable to the proposed text amendments because the County does not contain these types of lands.

D. Deschutes County Comprehensive Plan

Chapter 1, Comprehensive Planning: This chapter sets the Goals and Policies of how the County will involve the community and conduct land use planning. As described above, the proposed regulations will be discussed at work sessions with the Board of County Commissioners, as well as to the Planning Commission, which is the County's official committee for public involvement. Both will conduct separate public hearings.

These actions also satisfy the Goals and relevant Policies of Section 1.3, Land Use Planning Policies. Goal 1 of this section is to "maintain an open and public land use process in which decisions are based on the objective evaluation of facts." Staff, the Planning Commission, and the Board reviewed the text amendments.

Chapter 2, Resource Management: This chapter sets the Goals and Policies of how the County will protect resource lands, including but not limited to, Agriculture and Forest as well as Water Resources and Environmental Quality.

Section 2.2, Agricultural Lands Policies, states that Goal 1 is to "preserve and maintain agricultural lands and the agricultural industry."

As noted above, Measure 109 and the corresponding Oregon Revised Statute 475A.570(2) specify that psilocybin-producing fungi is:

- (a) A crop for the purposes of "farm use" as defined in ORS 215.203;
- (b) A crop for purposes of a "farm" and "farming practice," both as defined in ORS 30.930;
- (c) A product of farm use as described in ORS 308A.062; and
- (d) The product of an agricultural activity for purposes of ORS 568.909.

The statute clearly permits the production of psilocybin-producing fungi in Exclusive Farm Use zones as well as in other zones that allow farm or forest use (ORS 475A.570(4)). DCC 18.16.025 allows small-scale processing of farm crops, provided that the facility uses less than 10,000 square feet for its processing area and complies with all applicable siting standards. Processing facilities smaller than 2,500 square feet are exempt from any applicable siting standards. The proposed text amendments allow a new state-recognized agricultural use on agricultural lands.

Section 2.2 Goal 2 promotes a diversified, sustainable, revenue-generating agricultural sector. Policy 2.2.10 calls for the promotion of economically viable opportunities and practices while Policy 2.2.11 encourages small farming enterprises including but not limited to, niche markets and organic farming and value-added projects. The proposed text amendments allow a new state-recognized agricultural use on agricultural lands, thereby satisfying this goal.

Section 2.2 Goal 3 specifies the Exclusive Farm Use (EFU) policies, classifications, and codes are consistent with local and emerging agricultural conditions and markets. The proposed amendments

are a direct response to changes in state law, which pursuant to Measure 109, recognize psilocybin-producing fungi as a farm crop. Resource lands devoted to agricultural use in Deschutes County will thereby permit the production of psilocybin-producing fungi, ensuring consistency between local code, emerging markets, and state law.

Section 2.3, Forest Lands Policies, states that Goal 1 is to “preserve and maintain forest lands for multiple uses, including forest products, watershed protection, conservation, recreation and wildlife habitat protection.” Policy 2.3.5 calls for uses allowed in Forest zones to comply with state statute and Oregon Administrative Rule. As noted above, ORS 475A.570(4) states “A county may allow the manufacture of psilocybin products as a farm use on land zoned for farm or forest use in the same manner as the manufacture of psilocybin products is allowed in exclusive farm use zones under this section and ORS 215.213, 215.283 and 475C.053.” The amendments allow psilocybin manufacturing in forest zones pursuant to this law.



BOARD OF COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: November 14, 2022

SUBJECT: Paid Leave Oregon Implementation

RECOMMENDED MOTION:

Move approval of participation in the state plan for Paid Leave Oregon and authorization of County Administrator signature on applicable plan documents.

BACKGROUND AND POLICY IMPLICATIONS:

House Bill 2005 was signed in August 2019, making Oregon the eighth state to establish a paid leave program for employees. Subsequent legislation in 2021 delayed the implementation of Paid Leave Oregon until 2023.

Paid Leave Oregon (PLO) is a required program for employers and employees that allows employees in Oregon to take paid time off for qualified family, medical, and safe leave.

Implementation options for employers include:

- 1) Participate in a State run plan;
- 2) Establish an equivalent plan and contract with a private insurance company; or
- 3) Establish an equivalent plan and self-insure the benefit internally.

Staff is seeking Board direction on how Deschutes County will structure implementation of Paid Leave Oregon benefits. Due to the size of the County, the complexity of the PLO benefit, and the lack of historical claims data, County staff believes self-insuring the PLO is not feasible at this time. Staff is recommending that the County enroll in the State plan as the most affordable option at this time.

Additional details on the PLO program and options for Board consideration follow.

What benefits does Paid Leave Oregon provide?

Employees can take paid leave in increments equal to one workday or one workweek. Employees can take leave all at once (consecutive) or in separate blocks of time (non-consecutive). This program will increase the amount of leave time available to employees in specific circumstances. Employers are required to provide job protection and maintain an employee's health benefits while on leave.

Paid leave time:

- 12 weeks of paid family, medical, or safe leave per benefit year.
 - Additional 2 weeks of paid leave in some pregnancy-related situations.

Benefit amounts are calculated on the employee wages and taking into account the state average weekly wage. Employers can choose to provide additional pay, or allow employees to use their own paid leave to supplement the benefit amount they receive.

When does Paid Leave Oregon start?

- Employee benefits start Sept. 3, 2023
- For the State plan, employee and employer contributions start Jan. 1, 2023
- For equivalent plans and contracting with a private insurance company, contributions would begin in September 2023 for both employee and employer

Financial and/or Resource Considerations

As established in Section 16 of House Bill 2005, the 2023 rate is set at 1% of staff wages (up to \$132,900 annually) split between employers (40%) and employees (60%).

Example, if an employee made \$1,000 in wages on their paycheck, the Paid Leave Oregon contribution would be \$10 for this paycheck; the employee would pay \$6 and the employer would pay \$4.

If the County enrolls in the State plan, employees and the County would begin making contributions to the State program through payroll deductions on January 1, subject to statute and bargaining. For fiscal year 2023 (FY23) the County budgeted for the employer cost of enrolling in the State plan. FY23 employer costs are estimated at approximately \$216,000 due to the half year implementation; annualized employer costs are estimated at \$433,000.

Estimated cost for Paid Leave Oregon State Plan:

- Annual estimate:
 - ~\$649,000 for employee contributions
 - ~\$433,000 for employer contributions

Human Resources staff has reviewed bids for equivalent plan options and the option for the County to participate in an equivalent plan has a rate of 1.42% of wages. Employers may not withhold more than 60% of the total state rate (1%) from employee's gross wages. Given this rule, the County would pay more than 40% of the total cost if we were to select a private plan.

Estimated cost for Paid Leave Oregon Private Equivalent Plan:

- Annual estimate:
 - ~\$649,000 for employee contributions
 - ~\$535,000 for employer contributions

Implementation and Recommendation

The details and major rulemaking by the State for the PLO was finalized very recently, with additional rules and processes still being worked on. If the County enrolls in a private plan, a notification and request for approval would need to be submitted to the State of Oregon by November 30, 2022. A penalty fee would be assessed on required contributions should the State deny a request to enroll in an equivalent plan. While year one costs would be lower if selecting a private plan, staff still recommends enrolling in the State plan as ongoing costs would be lower.

Employers are allowed to move from the state plan to an equivalent plan, and vice versa, annually each fall. Given this flexibility, HR feels the best option is to enroll in the state plan due to its lower cost, to avoid risk of non-compliance, and to provide time for the County to evaluate this new benefit. After one or more years with this benefit, the County will have data on utilization, claims costs, and the impact on staff administration. This useful information will support analysis and decision making in the future. HR will continue to monitor this benefit when it goes into effect.

PLO is available to employees beginning September 3, 2023. Time is needed provide information to employees about this new leave program and set up internal processes to support it.

As staff receives direction from the Board, we will provide notice of our intentions to implement this law and its program requirements to our unions. HR will provide additional updates and supports to departments and employees as new information is available and as we move toward implementation.

Resource: <https://paidleave.oregon.gov/Documents/Paid-Leave-Oregon-Employer-Guidebook-EN-September-2022.pdf>

BUDGET IMPACTS:

FY23 employer costs to enroll in the state plan are estimated at approximately \$216,000, due to the half-year implementation. Annualized employer costs are estimated at \$433,000. The County has budgeted for the employer cost of enrolling in the State plan for FY23.

ATTENDANCE:

Kathleen Hinman, Human Resources Director