BOARD OF COUNTY COMMISSIONERS MEETING

9:00 AM, WEDNESDAY, APRIL 20, 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 www.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. Consideration of Resolution No. 2022-025 to add 1.0 regular FTE Behavioral Health Specialist I
2. Consideration of Board Signature on Letters of Reappointment for Kevin Stock, Dean Richardson, Dan Dougherty and Gary Marshall and Letter of Appointment for Andy Meeuwsen, to the Project Wildfire Steering Committee.
3. Consideration of Board Signature on Letters of Appointment for Christopher Ogden, Luke Dynes, Keith Kessaris and Robin Vora to the Solid Waste Advisory Committee (SWAC).
4. Approval of Minutes of the March 30, 3022 BOCC Meeting
5. Approval of Minutes of the April 4, 2022 BOCC Meeting
6. Approval of Minutes of the April 6, 2022 BOCC Meeting

ACTION ITEMS

7. **9:05 AM** PROCLAMATION: Declaring April 27, 2022 as Oregon State University – Cascades "Dam Proud Day"
8. **9:10 AM** PUBLIC HEARING: Establishing the Deschutes County CPACE Program; adoption of Resolution No. 2022-023 and adoption of Ordinance No. 2022-005 enacting Section 4.35 of the Deschutes County Code
9. **10:00 AM** Consider Authorization of County Administrator's Signature of Document No. 2022-303, Sheriff's Office 2nd Floor Remodel
10. **10:15 AM** 2nd Reading: Ordinance 2022-003 and Ordinance 2022-004 – Dave Swisher Plan Amendment/Zone Change
11. **10:30 AM** Jericho Road Update

12. **11:00 AM** Discussion regarding Wolf Depredation Advisory Committee

13. **11:15 AM** FY 2022 Q4 Discretionary Grant Review

LUNCH RECESS

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.

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.

AGENDA REQUEST & STAFF REPORT

MEETING DATE: 04/20/2022

SUBJECT: Consideration of Resolution No. 2022-025 to add 1.0 regular FTE Behavioral Health Specialist I

RECOMMENDED MOTION:
Move Approval of Resolution No. 2022-025 to add 1.0 regular FTE Behavioral Health Specialist I

BACKGROUND AND POLICY IMPLICATIONS:
On April 13, 2022, Deschutes County Behavioral Health department discussed with the Board the addition of a 1.0 regular FTE Behavioral Health Specialist I, supporting the Mobile Crisis Assessment Team to respond to certain calls, in pairs of two, without law enforcement.

BUDGET IMPACTS:
The Intergovernmental Agreement #173133 with Oregon Health Authority (OHA), amendment #3 provides $363,064 in funding for start-up activities related to Mobile Crisis, including the addition of this requested position. The funding is planned to support this position for at least the current and following fiscal year.

ATTENDANCE:
Dan Emerson, Budget Manager, Finance

REVIEWED

____
LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

A Resolution Increasing *
FTE Within the 2021-22 * RESOLUTION NO. 2022-025
Deschutes County Budget *

WHEREAS, the Deschutes County Behavioral Health department presented to the Board of County Commissioners on 4/13/2022, with regards to the addition of 1.0 regular FTE Behavioral Health Specialist I, in support of the Mobile Crisis Assessment Team, and

WHEREAS, Deschutes County Policy HR-1 requires that the creation of or increase in FTE outside the adopted budget be approved by the Board of County Commissioners; now, therefore,

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, as follows:

Section 1. That the following FTE be added:

Job Class	**Type**	**Duration if Limited Duration**	**FTE**
Behavioral Health Specialist I	Regular		1.0
Total FTE			**1.0**

Section 2. That the Human Resources Director make the appropriate entries in the Deschutes County FTE Authorized Positions Roster to reflect the above FTE changes.

DATED this____________ day of April, 2022.

BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

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PATTI ADAIR, Chair

ATTEST:

____
ANTHONY DEBONE, Vice-Chair

____
Recording Secretary

____
PHIL CHANG, Commissioner

AGENDA REQUEST & STAFF REPORT

MEETING DATE: Wednesday, April 20, 2022

SUBJECT: PROCLAMATION: Declaring April 27, 2022 as Oregon State University – Cascades "Dam Proud Day"

ATTENDANCE:
Christine Coffin, Director of Communications

For Recording Stamp Only

BEFORE THE BOARD OF COMMISSIONERS OF DESCHUTES COUNTY, OREGON

PROCLAMATION

Declaring April 27, 2022 as "Oregon State University – Cascades Dam Proud Day"

Whereas, the Oregon State University – Cascades campus was opened in 2016 following a 30-year, grassroots effort led by Central Oregon community members to bring a university to Central Oregon to serve families, industries and businesses, and the region's economy;

Whereas, community support continues to provide inspiration as OSU-Cascades fulfills its mission to produce skilled graduates who will help create a better, safer, and smarter world as they join the 4,700 alumni who have graduated to date, to apply research excellence to challenges in Central Oregon, and to create a campus for future generations of students;

Whereas, today more than 1,240 students, are pursuing bachelor's and master's degrees and represent communities in Deschutes County including Bend, La Pine, Redmond, Sisters, Sunriver, and Terrebonne;

Whereas, 32% of students at OSU-Cascades are Pell Grant eligible, a strong indicator of financial need, and will benefit academically and personally from the financial support provided through scholarships;

Whereas, 25% of students at OSU-Cascades are the first in their families to attend college, without familiar knowledge of a college environment and its resources, who also benefit academically and personally from scholarship support;

Whereas, OSU-Cascades is committed to the scholarship needs of students in order to help relieve the financial pressures of college so that they may follow in alumni's footsteps, focus on their academic pursuits, and embark on careers that make a difference in society;

Now Therefore Be it Resolved, that Deschutes County Board of Commissioners do hereby proclaim April 27, 2022 as Dam Proud Day, a one-day fund and friend raising event hosted by Oregon State University – Cascades and a special opportunity for Deschutes County community members to show pride in the progress at OSU-Cascades and the impact made possible by scholarships for undergraduate students in need.

Dated this ____ day of _____________ 2022 by the Deschutes County Board of Commissioners.

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Patti Adair, Chair

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Anthony DeBone, Vice Chair

ATTEST:

____
Phil Chang, Commissioner

____
Recording Secretary

AGENDA REQUEST & STAFF REPORT

MEETING DATE: Wednesday April 20, 2022

SUBJECT: PUBLIC HEARING: Establishing the Deschutes County CPACE Program; adoption of Resolution No. 2022-023 and adoption of Ordinance No. 2022-005 enacting Section 4.35 of the Deschutes County Code

ATTENDANCE:
Legal Department and Administration

Deschutes County Board of Commissioners
1300 NW Wall St., Suite 200, Bend, OR 97701-1960
(541) 388-6570 - Fax (541) 385-3202 - www.deschutes.org

AGENDA REQUEST & STAFF REPORT

For Board Business Meeting of April 20, 2022

DATE: March 25, 2022

FROM: Dave Doyle Legal 388-6625

TITLE OF AGENDA ITEM:
Public Hearing: Establishing the Deschutes County CPACE Program; adoption of Resolution No. 2022-023 and adoption of Ordinance No. 2022-005 enacting Section 4.35 of the Deschutes County Code.

PUBLIC HEARING ON THIS DATE? Yes.

BACKGROUND AND POLICY IMPLICATIONS:
County staff was tasking with researching the viability of establishing a Commercial property Assessed Clean Energy (CPACE) program. Following a number of presentations and discussions with the Board of Commissioners, staff was further tasked to generate the necessary enacting documents and schedule a public hearing.

Administration of the CPACE program is assigned to the County Administrator (or outsourced designee).

FISCAL IMPLICATIONS:
Uncertain. However, costs associated with staff time are anticipated to be covered by loan fees.

RECOMMENDATION & ACTION REQUESTED:
Move Board adoption and approval of Resolution No. 2022-023.
Move Board adoption and approval of Ordinance No. 2022-005.

ATTENDANCE: Legal, Admin

DISTRIBUTION OF DOCUMENTS:
Admin

REVIEWED

LEGAL COUNSEL

04/20/2022 Item #8.

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Enacting Section 4.35 of the Deschutes County Code.	* * * *	ORDINANCE NO. 2022-005

WHEREAS, the Deschutes County Code (DCC) contains rules and regulations duly enacted through ordinance by Deschutes County and the Deschutes County Board of Commissioners; and

WHEREAS, from time-to-time the need arises to make amendments, including new enactments to the DCC; and

WHEREAS, County staff has identified ongoing and significant issues concerning financing opportunities for commercial properties within Deschutes County wherein the proposed development seeks to enhance county goals including those associated with increased energy and water conservation and improvement of structures against seismic damage; and

WHEREAS, the Board of County Commissioners of Deschutes County considered this matter at a duly noticed public hearing on April 20, 2022, and concluded that the public will benefit from the proposed enactment of section 4.35 of DCC; now therefore,

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

Section 1. ENACTMENT. The identified new section 4.35 of the DCC, as fully appearing in Exhibit A is enacted as provided in Section 2.

Section 2. EMERGENCY. This Ordinance being necessary for the preservation of the public peace, health and safety, an emergency is declared to exist, and this Ordinance takes effect on ___________, 2022.

Dated this ______ of ___________, 2022

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

____
PATTI ADAIR, Chair

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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				
Phil Chang				
Anthony DeBone				

Effective date: _____ day of ___________, 2022.

REVIEWED

LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Enacting Section 4.35 of the Deschutes County Code. * * * *

ORDINANCE NO. 2022-005

WHEREAS, the Deschutes County Code (DCC) contains rules and regulations duly enacted through ordinance by Deschutes County and the Deschutes County Board of Commissioners; and

WHEREAS, from time-to-time the need arises to make amendments, including new enactments to the DCC; and

WHEREAS, County staff has identified ongoing and significant issues concerning financing opportunities for commercial properties within Deschutes County wherein the proposed development seeks to enhance county goals including those associated with increased energy and water conservation and improvement of structures against seismic damage; and

WHEREAS, the Board of County Commissioners of Deschutes County considered this matter at a duly noticed public hearing on April 20, 2022, and concluded that the public will benefit from the proposed enactment of section 4.35 of DCC; now therefore,

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

Section 1. ENACTMENT. The identified new section 4.35 of the DCC, as fully appearing in Exhibit A is enacted as provided in Section 2.

Section 2. 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

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PATTI ADAIR, Chair

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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				
Phil Chang				
Anthony DeBone				

Effective date: _____ day of ___________, 2022.

EXHIBIT A (to Ordinance 2022-005)

Chapter 4.35 COMMERCIAL PROPERTY ASSESSED CLEAN ENERGY PROGRAM (CPACE)

4.35.010 **Short Title.**

4.35.020 **Purpose and Scope.**

4.35.030 **Definitions.**

4.35.040 **Benefit Assessment Liens.**

4.35.050 **Enforcement of CPACE Benefit Assessment Liens.**

4.35.010 Short Title.

DCC 4.35 shall be known as the Deschutes County CPACE Ordinance and may be so cited and pleaded.
[Ord. 2022-005 § 1, 2022.]

4.35.020 Purpose and Scope.

The purpose and scope of this chapter is to establish lien security and collection procedures for approved CPACE loans.
[Ord. 2022-005 § 1, 2022.]

4.35.030 Definitions.

As used in this section, unless the context requires otherwise, the following terms and their derivations shall be the meanings provided below:

A. "Acts" means ORS 223.680 and ORS 223.685.

B. "Benefit Assessment Lien" means the special assessment lien levied against the Qualifying Real Property securing CPACE financing, pursuant to ORS 223.680(7)(a) and ORS 223.685(6)(a).

C. "Building Resiliency Improvements" means those certain Utility and Seismic Rehabilitation improvements to the Qualifying Real Property that meet the requirements of the Acts and program guide.

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D. Clean Energy: Clean energy is energy that comes from renewable, zero emission sources that do not pollute the atmosphere when used, as well as energy saved by energy efficiency measures.

~~C.~~

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E. "Deschutes County CPACE Program" means the program provided for under the Acts for the financing and construction of Building Resiliency Improvements on Qualifying Real Property.

D.F. Pollutants: Pollutants are any substance that contaminates air, soil, or water and that in sufficient concentrations contributes to undermining public health.

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E.G. "Qualifying Real Property" means the real property that qualifies to receive CPACE financing for Building Resiliency Improvements under the Deschutes County CPACE program.

H. "Recorder" means the Deschutes County Clerk.

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F.I. Renewable Energy: clean energy that comes from natural sources or processes that are constantly replenished.

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G.J. "Seismic Rehabilitation" means improvements to Qualifying Real Property that are (a) intended to reduce or prevent harm to persons and property due to the effects of seismic activity on the Qualifying Real property; and (b) authorized by the County or its designee.

H.K. "Treasurer" means the elected position (typically the appointed Chief Financial Officer for Deschutes County), designated pursuant to ORS 223.505(3) to take all steps necessary to enforce delinquent liens and to maintain records pertaining to collection proceedings thereon.

I.L. "Utilities Improvements" means improvements to Qualifying Real Property for any of the following purposes: (a) energy efficiency; (b) renewable energy; (c) energy storage; (d) smart electric vehicle charging stations; (e) water efficiency.

[Ord. 2022-005 § 1, 2022]

4.35.040 Benefit Assessment Liens.

A. Benefit Assessment Liens shall be entered into the County lien docket.

B. Pursuant to ORS 223.680(7)(a), Benefit Assessment Liens shall have the same priority, as determined under ORS 223.230(3), as a lien for assessments for local improvements arising under ORS 223.393.
[Ord. 2022-005 § 1, 2022.]

4.35.050 Enforcement of CPACE Benefit Assessment Liens.

A. If any installment on any Benefit Assessment Lien bonded is delinquent for a period of one-year from the time it became due and payable, or at any time after 60-days from the time it became due and payable if not bonded, the recorder may thereafter prepare and transmit to the Treasurer a list in tabular form, made up from the lien docket, describing each Benefit Assessment Lien or installment due on any Benefit Assessment Lien that is so delinquent. The list shall also contain the name of the person to whom assessed, a particular description of the property, the amount of the Benefit Assessment Lien or installment due, and any other facts necessary to be given.

B. The Treasurer or its designee may take all steps necessary to enforce delinquent Benefit Assessment Liens and maintain records pertaining to those enforcement proceedings pursuant to the procedure set forth in ORS 223.505 to ORS 223.650, including collecting unpaid Benefit

Assessment Liens or installments by advertising and selling the Qualifying Real Property in the manner provided in ORS 223.505 to ORS 223.650.

C. When an individual/entity purchases real property at a foreclosure sale under ORS 223.505 to ORS 223.590, if, with the written preapproval of the Treasurer or its designee, that purchaser incurs costs for maintaining or improving the property during the period allowed for redemption and if the property is subsequently redeemed, the Treasurer or its designee may return up to all of the penalty paid by the person redeeming the property to the purchaser.

[Ord. 2022-005 § 1, 2022.]

REVIEWED
______________ LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

A Resolution Establishing a Commercial Property Assessed Clean Energy ("CPACE") Program in Deschutes County	* * *	RESOLUTION NO. 2022-023

WHEREAS, ORS 223.680 and ORS 223.685 authorizes the County to establish a program to assist owners of commercial property with securing the financing of cost-effective energy improvements and seismic rehabilitation improvements, respectively; and

WHEREAS, the programs authorized by ORS 223.680 and 223.685 are called Commercial Property Assessed Clean Energy Programs. The CPACE Program supports the financing of energy and water efficiency and renewable energy upgrades and seismic rehabilitation improvements on commercial buildings using a property tax lien; and

WHEREAS, reducing energy and water consumption and improving seismic resiliency through building retrofits will strengthen the County's economic infrastructure by improving property values, building performance, and marketability of the County's commercial real estate. According to the 2011 study by ECONorthwest (attached as Exhibit 1), every $1 million in project spending results in 15 new jobs and $2.5M in economic output; and

WHEREAS, Deschutes County is committed to equitably advancing sustainable economic development and the County will work to ensure communities most in need will benefit from these opportunities; and

WHEREAS, in accordance with best practices nationwide, a CPACE program can be successfully implemented in Deschutes County that minimizes any local administrative burden and cost while ensuring that Deschutes County is protected financially and legally from the authorization of a CPACE program; and

WHEREAS, attached as Exhibit 2 is the Program Guide which along with sample program documents shall be part of the CPACE program in Deschutes County, which may be amended from time to time at the discretion of the County Administrator for Deschutes County; and

WHEREAS, the Program Documents shall allow Property Owners to apply for approval of CPACE benefit assessments on their property to repay financing from third party private capital providers, said benefit assessments to be recorded on title to their property upon approval and closing of financing, with appropriate protections for the County; and

WHEREAS, before establishing a program under this section, Deschutes County has provided notice to utilities that distribute electric energy, natural gas or water within the areas in which the local government will operate the program that a CPACE program will be established in accordance with ORS 223.680(3); and

WHEREAS, Deschutes County held a duly noticed public hearing on April 20, 2022, in order to receive input and comment; now therefore,

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON AS FOLLOWS:

Section 1. The CPACE Program in Deschutes County is hereby established.

Section 2. The County Administrator for Deschutes County shall oversee development of the CPACE program in accordance with ORS 223.680 and 223.685 and the Program Guide, plus sample program documents and a fee schedule necessary to implement the CPACE program. This oversight shall extend to delegated and outsourced services and management.

Section 3. The County Administrator will consult the County Clerk, County Assessor and County Tax Collector as it oversees development and adaptation of the CPACE program.

Section 4. This Resolution shall take effect immediately from and after its adoption.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Dated this ______ of __________, 2022

____
PATTI ADAIR, Chair

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ANTHONY DeBONE, Vice Chair

ATTEST:

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Recording Secretary

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PHIL CHANG, Commissioner

EXHIBIT 1 (to Resolution 2022-023)

Economic Impact Analysis of Property Assessed Clean Energy Programs (PACE)

Research Performed by ECONorthwest for PACENow, April 2011

This report summarizes an analysis by ECONorthwest of the economic impacts of Property Assessed Clean Energy (PACE) programs. The analysis measures the output, employment and tax impacts of purchase activity with the same composition of the project activity of the PACE energy efficiency and renewable energy projects. The analysis is performed using the IMPLAN input-output model system and simulated the implementation of PACE projects in four cities, with computation of both local and national impacts. Significant, positive economic and fiscal impacts are potentially associated with PACE energy efficiency and renewable energy projects.

Economic Impact Analysis of Property Assessed Clean Energy Programs (PACE)

Research Performed by ECONorthwest for PACENow, April 2011

Executive Summary

ECONorthwest was engaged by the PACENow coalition to assist them in describing the economic effects of the Property Assessed Clean Energy (PACE) programs. Specifically, this report presents calculations of the direct, indirect, and induced impacts of purchases associated with hypothetical PACE program implementations on various measures of economic activity, including direct, indirect and induced impacts on output and employment, and the associated impacts on local, state and federal tax revenues.

Findings

The analysis suggests that such programs have the potential of generating significant economic and fiscal impacts. Specifically, $4 million in total PACE project spending, across the four cities included in this analysis ($1 million in spending in each city) will on average generate:

- $10 million in gross economic output;
- $1 million in combined Federal, State and Local tax revenue;
- 60 jobs.

As a result, the PACE program projects have the potential to provide stabilizing economic influences that should redound to the

The Authors

Randall Pozdena, PhD
Senior Economist and
Managing Director

Alec Josephson, MA
Senior Economist and
Director of Economic
Impact Modeling

See Appendix A for more information about the authors.

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benefit of involved communities, the regional and national economies and, thereby, to the value of housing collateral of associated mortgages. The channels by which this occurs are through the largely domestic supply-chain linkages of the purchases associated with the project developments themselves, and the net reduction in housing user costs that flows from implementation of cost-beneficial energy-efficiency improvements. We also offer an opinion regarding the likely effect of the senior property tax lien that is associated with the structure of the PACE program. We conclude that, under most likely conditions, the reduction in the cost and volatility of a building's purchased energy requirements should add strength and resilience to home values in a manner that counterbalances the lenders' concern about the lien impairing their mortgage loan collateral.

Study Approach

The analysis performed by ECONorthwest uses hypothetical purchase activity with the same, approximate composition as PACE projects in terms of the economic sectors involved and does not evaluate particular PACE projects. The impacts of project purchases associated with PACE activity are traced to the linkages between PACE purchases and the chain of vendor relationships. Because PACE projects also have the potential to affect household spending, through reductions in energy costs, the impacts of that effect of the PACE projects were also examined.

The measurement of these relationships is performed within an input-output model framework using IMPLAN model and data. The purchase activity is modeled in four, separate cities with local impacts measured at the county or multi-county level. Impact measures are extended to the nation as a whole, thereby producing local, elsewhere-in-the-US, and total US impact measures for the modeled activities.

The remainder of this report presents the analysis that yielded these findings. First, a brief summary of the PACE program is presented to set the context of the analysis. Then, we report the results of tracing the direct, indirect and induced effects of the spending associated with types of energy-efficiency improvements proposed by the PACE program. We also investigate the economic impacts of any enlargement of household spending potential that arises from the reduced need to purchase energy at market prices. Measurement of the economic implications includes an accounting of the tax-revenue effects of each of the two spending impact channels.

In a final section of the report, the measured economic impacts are discussed in the context of the concerns expressed by bank regulators and secondary mortgage market agencies.

Background: The PACE Program

Since 2008, twenty-four (24) states and the District of Columbia have passed laws enabling local government jurisdictions to establish special assessment districts (also called special improvement districts) that allow residential and commercial property owners to finance renewable energy (RE) and

energy efficiency (EE) improvements on their properties. The National Renewable Energy Laboratory describes the PACE program in this way:

> *The pivotal innovation of PACE is the creation of EE/RE assessments that are tied directly to the house and repaid via the property owner's tax bill. The assessment, which is secured by a senior lien on the property, does not require an up-front payment. The lien provides strong debt collateral in the event the homeowner – or business owner – defaults on the assessment. Because the assessment and lien are tied directly to the property, they can be transferred upon sale.*[1]

By the first half of 2010, PACE programs had been launched in a handful of communities and early results were promising. The program appears to be effective in overcoming traditional barriers to significant investment in energy efficiency and renewable energy and the associated spending have been linked to construction activity in communities with PACE programs. Sonoma County, California, for example, reportedly experienced more than $20 million in program spending activity by April 2010 and had seen its local construction industry employment rate improve dramatically in comparison to neighboring counties.[2]

In early May 2010, Fannie Mae and Freddie Mac issued short letters suggesting that the PACE program violated standard mortgage provisions.[3] In addition, on July 6, 2010 the Federal Housing Finance Agency (FHFA) and the Office of the Comptroller of the Currency (OCC) issued statements concluding that PACE programs "present significant safety and soundness concerns to the housing finance industry."[4]

As reported by the Lawrence Berkeley National Laboratory's Clean Energy Financing Policy Brief in August 2010, that said, "Typically, the tax liens created by assessments are senior to other obligations, like mortgages, and must be paid first in the event of foreclosure. Fannie Mae, Freddie Mac, the FHFA and other financial regulators reasoned that PACE assessments were, in effect, loans not assessments and so violated standard mortgage provisions requiring priority over any other loan."[5]

These and related developments have halted most PACE programs, according to Mr. David Gabrielson, Executive Director of PACENow.

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[1] Property-Assessed Clean Energy Financing of Renewables and Efficiency. NREL/BR-6A2-47097. July 2010.
[2] Written testimony of Sonoma County Auditor-Controller-Treasurer-Tax Collector Rod Dole before the House Ways and Means Committee, April 14, 2010
[3] Lawrence Berkeley National Laboratory, "Clean Energy Financing Policy Brief", August 11, 2010. http://eetd.lbl.gov/ea/emp/ee-pubs.html
[4] http://www.fhfa.gov/webfiles/15884/PACESTMT7610.pdf
[5] Lawrence Berkeley National Laboratory, "Clean Energy Financing Policy Brief", August 11, 2010. http://eetd.lbl.gov/ea/emp/ee-pubs.html

The Role of this Analysis

PACE proponents are assembling information in an effort to respond to these interpretations of mortgage policy. This includes elucidating the economic and tax impacts of PACE projects as well as the projects' effects on household budgets and housing values. To the extent that PACE projects can be demonstrated to have the potential to enhance economic activity and associated tax collections, they have the potential to strengthen local, state and national economic and fiscal conditions. In so doing, PACE projects can improve the weakened housing and construction markets.

An additional issue, although not the direct focus of the quantitative research presented here, relates even more directly to the concerns of regulators and agencies regarding the PACE program and mortgage risk. To the extent the EE and RE projects reduce and/or stabilize households' energy budgets, the programs have the potential to be risk reducing, rather than risk enhancing, for mortgage lenders.

Both of these issues are discussed herein. We turn first to measuring the Program's potential economic impacts. There are two dimensions to this analysis. One is the impact of the spending that occurs as the result of installing energy efficiency and renewable energy measures. The second is the impact on the household of changes in the burden in utility bills and, thus, on the effective cash resources of the household to support other household spending.

Measuring the PACE Program's Project Spending Impacts

PACE program projects generally involve spending on a variety of energy efficiency and renewable energy improvements to existing housing. The decision to employ the PACE program is made by consumers or developer/builders whose motives are reflective of consumer perspectives of the value of the projects. In this respect, PACE project implementations are no different from other home-improvement investment decisions that are made routinely in the economy, either by owner-occupants or property renovators.[6]

The accepted method of measuring the impact of a purchase such as the PACE or traditional home-improvement projects is to trace the impact of the initial ("direct") purchase decision on the activity of vendors of goods and services affected by the purchase. Input-output models are used to trace these

[6] The only significant distinction is that the PACE projects are financed through a though a special finance mechanism. Specifically, through arrangements approved by participating tax authorities, the financing is effected by dedication of a property tax increment to support repatriation of the costs of the PACE improvements. A lien is placed on the property to provide security to the financing entity, and to permit the lien to follow the property when it is sold. Although much is made of this distinctive feature of the program, in fact so-called mechanics' liens are commonly placed against property to ensure that unpaid home-improvement contractors, in the worst case, will have a claim against the value of the property.

impacts. Distinctions are made among *direct, indirect* and *induced* impacts. (See Appendix B for a brief summary of the input-output model tool that was used to develop the economic impact findings.)

Direct impacts

The renovation of buildings involves the purchase of capital equipment and labor to install such things as photovoltaic systems and insulation products. The expenditure of funds on these activities is associated with increased output by the directly involved enterprises. Each enterprise can be seen as a firm who's production function consists of purchases of labor services from its own employees, and purchases of output of other firms that produce the constituent materials that are used in the provision of the energy production and energy efficiency systems installed at the individual sites.

These activities are said to have *direct* impacts in the form of employment of the associated labor, and addition of value to the inputs purchased from other enterprises. The economic *output* of the installation activity and the *jobs* directly associated with that activity are two key measures of the direct impacts. Economists focus on the economic output measure because it is closest to the incremental contribution to total, gross economic output made by the installation activity. Policy makers concerned with job creation often focus more on the labor activity associated with the activity.

Other dimensions of direct impacts include the taxes as a course of providing the installation activity. The tax impacts take the form of local, state and federal tax payments associated with the incomes of those who own or work at the enterprise that performs the project as well as any payroll taxes, property taxes, sales taxes and other payments to taxing entities to which the provider of the PACE improvements is subject. Local governments and agencies are often interested in this dimension of the direct impacts of the installation activity.

Indirect impacts

The direct purchase activity has *indirect* effects on the economy, in addition to the *direct* effects. These occur because the direct purchases result, in turn, in the purchase of goods and services from other businesses, since virtually no firms provide themselves with every needed input. These indirect, ("supply-chain") impacts take the same, general form as the direct impacts. That is, indirect purchases result in impacts on labor services, create value-added, contribute tax payments, etc. in the course of each vendor providing its products and services to the installation sector. The input-output modeling of the various sectors that constitute the economy are used to trace the indirect effects through all of the myriad links in the supply chain. Each vendor to the direct installation activity has vendors, who, in turn, have vendors, etc. The matrix mathematics of input-output models permits aggregating the impacts on what is, in theory, an infinite chain of vendor relationships.

Induced impacts

The third, and final mechanism by which the initial, direct purchase activity has impacts is through the consumption expenditures of those who enjoy incomes from the direct or indirect activities that occur.

That is, some of their income is spent purchasing goods and services that also result in a cascade of supply chain effects. These so-called *induced* impacts together with the indirect and direct impacts are additive and constitute the total impact of the installation activity. The ratio of the total impacts to the direct impacts on each of the dimensions of impact is often reported as the *multiplier* effect of the direct activity. Thus, multipliers can be measured for jobs, value-added, tax receipts, or any other dimension of the accumulated impacts.

The geography of impacts

The impact analysis implicitly has geographic dimensions. That is, the various vendors associated with providing goods and services in response to the direct, indirect, and induced purchases can be located in the immediate locality, other localities and states, or foreign countries. It is possible, with the latest versions of input-output data, to assemble impacts at the various geographies. American policy makers are generally interested in activity that accretes to labor, business and governments within the boundaries of our nation. Purchases that occur in foreign countries are often considered "leakage" of impacts to these locations.

From the broader view of the world economy, even foreign impacts may ultimately stimulate demand for US goods and services through the international exchange of goods and services and international flows of financial capital. Nonetheless, it is not unreasonable for policy makers to be interested primarily in certain, specific geographies when measuring impacts. In the analysis reported herein, the direct purchases of installation services are assumed to be located in one of four, cities, with the impacts appraised at both the local and the national level. This is done because regions host different suppliers of goods and services, and have different labor market and tax systems. Thus, the aggregation of impacts to the national level can vary with the locus of the initial purchase activity.

The Modeling Tool

The modeling of the impacts of purchases made under PACE program is performed using the IMPLAN ("IMpact Analysis for PLANning") model. IMPLAN was originally developed by the Forest Service of the U.S. Department of Agriculture in cooperation with the Federal Emergency Management Agency and the Bureau of Land Management of the U.S. Department of the Interior in 1993, and is currently licensed and distributed by the Minnesota IMPLAN Group, Inc.

The IMPLAN model is an implementation of an input-output model–a way of representing an economy that was developed by Wassily Leontief, for which he received the Nobel Memorial Prize in Economic Sciences. An input-output model uses tabular (matrix) representations of an economy to measure the effect of changes in one industry on others. It can be used to measure the effects of purchases made by US consumers and governments, and foreign entities. Details on the constituent

matrices of input-output model systems and the associated mathematics can be found in many sources.[7].

The IMPLAN model is a highly respected implementation of Leontief's input-output concept, and is generally agreed to be superior to regional impact multiplier systems.[8] IMPLAN is constructed with data assembled for national income accounting purposes, thereby providing a tool that has a robust link to widely accepted data development efforts. In addition, IMPLAN has been subject to detailed scrutiny by experts on regional impact analysis. Most recently, the United States Department of Agriculture (USDA) recognized the IMPLAN modeling framework as "one of the most credible regional impact models used for regional economic impact analysis" and, following a review by experts from seven US agencies, selected IMPLAN as its analysis framework for monitoring job creation associated with the American Recovery and Reinvestment Act (ARRA) of 2009.[9] [10] More information on the features of IMPLAN can be found at Appendix B or www.implan.com.

Application of the IMPLAN model in the case of the PACE program involves the following steps:

1. Development of a representation of PACE projects. This takes the form of a representation of the labor and product purchases that constitute an energy efficiency or renewable energy project.
2. Selection of locales (cities) in which to hypothetically implement the projects. City data is assembled from constituent county data.
3. For each selected city and project, building a model in IMPLAN that emulates the city by linking the constituent counties.
4. Applying the assumed purchase activity to the affected IMPLAN sectors.

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[7] See, for example: Leontief, Wassily W. *Input-Output Economics.* 2nd ed., New York: Oxford University Press, 1986; Miller, Ronald E. and Peter D. Blair. *Input-Output Analysis: Foundations and Extensions,* 2nd edition, Cambridge University Press, 2009: and Ten Raa, Thijs. The Economics of Input-Output Analysis. Cambridge University Press, 2005.
[8] One such system is RIMS III. See, US Department of Commerce, Bureau of Economic Analysis, *Regional multipliers: A user handbook for regional input-output modeling system (RIMS II).* Third edition. Washington, D.C.: U.S. Government Printing Office. 1997.
[9] See excerpts from an April 9, 2009 letter to MIG, Inc., from John Kort, Acting Administrator of the USDA Economic Research Service, on behalf of Secretary Vilsack, at www.implan.com.
[10] In the economics profession, there is a lively debate as to whether job creation measured using input-output tools such as IMPLAN under- or overstates the economic impacts of the spending activities modeled using the IMPLAN system. Pessimists are tempted to assert that if spending occurs on Project A, then one should account for the fact that Project B may not be pursued because of the diversion of funds to Project A. This view of the economy as a zero-sum game is clearly incorrect in the aggregate, because we observe economic growth despite constrained investment budgets. In this analysis we implicitly embrace this more realistic view because the PACE program, though enabled by public policy, is implemented by the private sector which faces incentives to only pursue cost-beneficial programs. This pursuit of economically efficient projects is consistent with the notion that selecting productivity-enhancing (and thus, resource sparing) projects enlarges the potential of an economy, in contrast to the implication of the zero-sum game perspective.

5. Build a model in IMPLAN that links the purchase data and local models, one by one, to the national model. Run the models to compute direct, indirect and induced impacts.

The manner of representing the PACE activities in IMPLAN is discussed further below.

Representing PACE Program Purchases in IMPLAN

In order to implement the IMPLAN model in the study of the PACE program, the purchases typically made with PACE projects must be associated with the sectors that are representable within IMPLAN. Recall that there are two, broad classes of PACE program projects:

1. The *energy efficiency* measures focus on reduction in the use of conventionally sourced energy through the use of higher-efficiency devices and products. Such measures include permanent improvements such as energy efficient HVAC systems; attic and wall insulation; duct and home sealing; cool roof systems; solar water heater systems; tankless water heaters; and evaporative coolers.
2. The *renewable energy* projects involve provision of energy to the household by means that are described as "renewable" because of their reliance on sunlight, wind, ocean waves and other, effectively non-depletable resources. Rooftop photovoltaic projects are expected to be the most common form of project associated with the PACE programs.

As the project descriptions above suggest, a diverse family of products constitute the PACE program, making it hazardous to assume a "typical" project. Installation of, say, a particular type of window product, is also difficult to represent in IMPLAN because IMPLAN is able to represent the production functions of a limited number of industrial products, and there is variation in production techniques ad product features across producers of the same, general class product.

In addition, the costs of energy efficiency measures vary widely due to regional climate and the local costs of labor and materials. Adding efficient central air conditioning to a home with existing forced air heat, for example, costs approximately $3,500-$4,000 and takes about two days.[11] Installing double-paned windows can cost as much as $20,000 in a two-story home.[12] According to GreenHomes America, a leading residential energy services company which operates from coast to coast, an average whole home retrofit project would cost the homeowner approximately $10,000.[13] Average labor costs represent 55% of the total and materials costs represent approximately 45%.[14]

Similarly, the costs of renewable energy projects of a given capacity in kilowatts (kW) is also variable due to variations in the availability of the underlying natural resource (e.g., sunlight in the case of photovoltaic devices), the cost of installation labor, variations in the characteristics of the property, etc.

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[11] http://www.fhfa.gov/webfiles/15884/PACESTMT7610.pdf
[12] Lawrence Berkeley National Laboratory, "Clean Energy Financing Policy Brief", August 11, 2010. http://eetd.lbl.gov/ea/emp/ee-pubs.html
[13] Email correspondence of Mr. Cliff Staten with GreenHomes America Senior VP Michael Rogers, 2/18/11.
[14] *ibid*

According to a December 2010 report by the Lawrence Berkeley National Laboratory, the national average for a 4kW solar photovoltaic system is $30,000.[15] Materials account for 52%, while labor costs associated with marketing, permitting and system installation accounts for approximately 48% of the total.[16]

Because of the variations in the nature of energy efficiency and renewable energy projects, we determined it is not appropriate to characterize a "typical" PACE project. In addition, energy efficiency and renewable energy project activities are not represented at high resolution in the available input-output model data. These models disaggregate the economy into approximately 440 sectors, and it is necessary to represent project spending in terms of these sectors. Therefore, in the analysis that is presented herein, the PACE projects are not specified in detail; rather, we model the impacts in the following fashion:

1. An arbitrary amount of purchases ($1 million in 2011 dollar terms) is used to represent PACE activity in a given locale. Since the inner workings of IMPLAN assume a constant production function (specific to the year the model data represents), taking this approach allows one to scale the impacts to an actual program simply by scaling actual spending to the $1 million placeholder value.
2. It is arbitrarily assumed that 50% of the assumed purchases is associated with photovoltaic (renewable energy) installations, and 50% with energy efficiency projects.
3. Energy efficient project purchases were evenly allocated to the various weatherization and other energy efficiency product sectors represented in IMPLAN. (See Exhibit 1 in Appendix C for the list of IMPLAN and associated North American Industrial Classification System (NAICS) sectoral codes that likely comprise the sectors affected by the energy efficiency and renewable energy project purchases.)
4. No special edits of the IMPLAN model coefficients were made during the modeling. Specifically, the regional purchase coefficients (RPCs) that represent the share of product purchases that are made within the US was left at the average that IMPLAN derives from national income accounting data. For example, solar photovoltaic systems in IMPLAN have an RPC of 75 percent (i.e., less than would be the case with higher US content), because it is not possible to distinguish retail photovoltaic products from other crystalline semiconductor products. This probably yields a somewhat more conservative (low) total domestic impact because an active program like PACE could make special efforts to source products with higher shares of US content.

Geographic Representation in IMPLAN

ECONorthwest and its client agreed that it would be useful to model the consequences of PACE activity in a variety of locales. The selected, four communities are:

1. Columbus, OH (built from Delaware and Franklin Counties)
2. Long Island, NY (built from Nassau and Suffolk Counties)
3. Santa Barbara, CA (represented by Santa Barbara County)
4. San Antonio, TX (represented by Bexar County)

[15] "Tracking the Sun III," December 2010. http://eetd.lel.gov/ea/emp/re-pubs.html
[16] "The Prospect for $1/Watt from Solar" U.S. DOE Workshop Presentation by John Lushetsky, August 10, 2010.

The primary reason for modeling various locales is that vendor relationships vary geographically, with some areas able to source from the immediate locale, while others tending to source from distant US sources, or overseas suppliers. Budgetary considerations limited the number of locales able to be modeled, because representation of each locale requires acquisition of individual databases, in addition to linkages to the national model. However, the four chosen locales are diverse in geography and climate conditions, and are locales of interest to the PACE program.

Findings of the Project Spending Impact Analysis

The findings of the economic impact analysis are presented in detail in Exhibit 2 through Exhibit 10 in the Appendix C. These exhibits report the economic impacts of the hypothetical $1 million in project purchases. In the exhibits, these impacts are reported along the following dimensions:

- **The type of project**. This is defined as a mix of energy efficiency measures or a photovoltaic renewable energy installation;
- **The dimension of the economic impact**. The reported measures are economic output, personal income, jobs and tax revenues;
- **The type of impact**. The direct, indirect, induced and total impacts are reported.
- **The geography of the impact**. Impacts are measured for each of the modeled cities, for the rest-of-the-nation, and the nation as a whole. In the aggregation to the geographic level, a 50% weight is put on energy efficiency and photovoltaic projects, respectively.
- **The type of tax revenue generated**. For compactness, the wide variety of tax types reported by IMPLAN are grouped into four tax base levies–corporate profits and dividends taxes, indirect business taxes, personal taxes, and social insurance levies.
- **The level of government receiving the tax revenues**. These are presented as state and local, and federal subtotals, respectively.

It would be cumbersome to describe here each of the several hundred impact measures provided in the exhibits. Instead, we first report here the range of impacts reported in the summary exhibits, Exhibit 2 and Exhibit 3 in Appendix C. These tables summarize the impacts by the type of project, the type of impact, and the dimension of the economic impact for each of the cities, and for elsewhere-in-the-US and the US as a whole.[17]

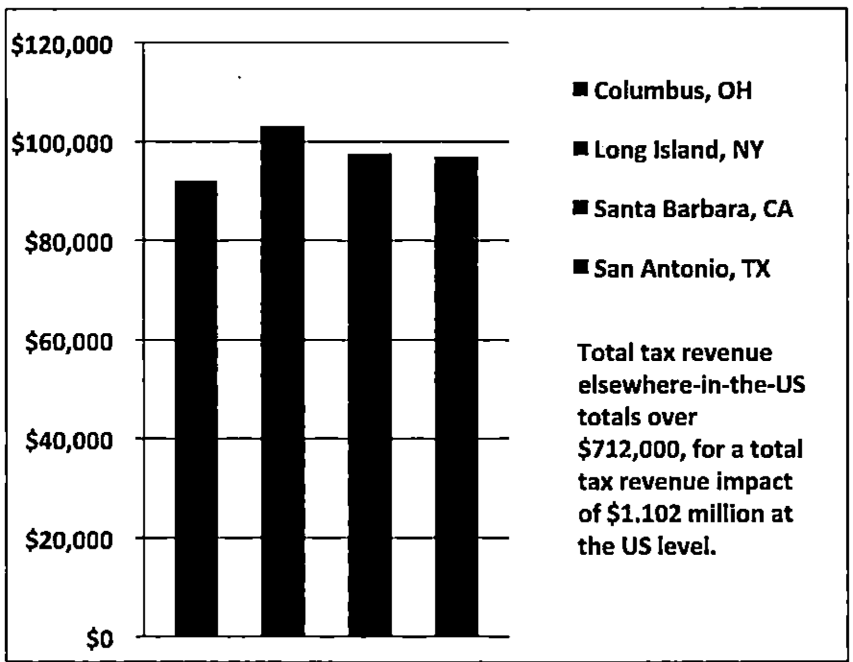
Turning first to solar photovoltaic projects, we find the following impacts for spending $1 million in each of the four cities:

- The impact on total economic output ranges from approximately $718,000 to $872,000 at the individual city level, and is $7.044 million for the rest of the US, and $10.250 million for the US as a whole.
- The impact on personal income ranges from approximately $284,000 to $330,000 at the individual city level, and is $2.066 million for the rest of the US, and $3.325 million for the US as a whole.

[17] Elsewhere-in-the-US and national totals aggregate across the four analyzed cities.

- The impact on jobs ranges from 6 to 8 additional jobs at the individual city level, and is 35 for the rest of the US, and 60 for the US as a whole.
- Tax revenue impacts at the federal level range from $55,000 to $63,000 at the individual city level, and is $426,000 for the rest of the US, and $669,000 for the US as a whole.
- Tax revenue impacts at the state and local level range from $34,000 to $41,000 at the individual city level, and is $287,000 for the rest of the US, and $433,000 for the US as a whole.
- Total tax revenue impact at all levels of government is $1.102 million at the US level.

Figure 1. Total Tax Revenue (Fiscal) Impacts at the City Level, per $1 million in Project Spending per City.



For energy efficiency projects, we find the following impacts for each $1 million in purchases at the city level:

- The impact on total economic output ranges from approximately $717,000 to $939,000 at the individual city level, and is $7.570 million for the rest of the US, and $10.925 million for the US as a whole.
- The impact on personal income ranges from approximately $283,000 to $352,000 at the individual city level, and is $1.943 million for the rest of the US, and $3.232 million for the US as a whole.
- The impact on jobs ranges from 5 to 8 additional jobs at the individual city level, and is 35 for the rest of the US, and 61 for the US as a whole.
- Tax revenue impacts at the federal level range from $60,000 to $66,000 at the individual city level, and is $307,000 for the rest of the US, and $658,000 for the US as a whole.
- Tax revenue impacts at the state and local level range from $35,000 to $41,000 at the individual city level, and is $259,000 for the rest of the US, and $411,000 for the US as a whole.
- Total tax revenue impact at all levels of government is $1.058 million at the US level.

As we have modeled the two project types in IMPLAN, there appears to be a somewhat greater local impact associated with the energy efficiency versus the solar photovoltaic project types. This is consistent with the fact that the specialized products and labor needed to produce photovoltaic products are not likely to be as localized as are the products used in energy efficiency improvements.

When viewed from the jobs impact perspective, the $4 million of PACE-type project spending across the four cities is associated with approximately 60 jobs somewhere in the nation. If one viewed the PACE program as a jobs stimulus program (akin to those pursued at public expense under American Recovery and Reinvestment Act of 2009), the cost per job at $67,000 is quite modest. In fact, of course, in the PACE program the only significant role of government is to authorize a financing mechanism to overcome what some believe to be non-economic impediments to credit access.

If viewed, alternatively, from a fiscal perspective, the $4 million of spending across the four cities ultimately provides over $1 million in tax revenue to local, state or federal taxing entities. If the PACE program is able to identify and stimulate cost-beneficial investments in energy enhancements of housing, government stands to be a major beneficiary of the associated private spending.

Measuring the PACE Program's Household Budget Impacts

In addition to the spending impacts associated with developing PACE-type projects, cost-beneficial PACE projects[18] should also reduce and/or stabilize the cost of energy to the households that occupy the affected housing units. By definition, a cost-beneficial project is one that, over its lifetime, provides the property owner more in the form of avoided energy costs than is spent enhancing the home.[19] Access to alternative energy sources (through so-called renewable energy projects) can also provide, in effect, insurance against the uncertainty about the path of future fossil fuel prices. This insurance effect can be modeled as a financial option that has a positive financial value even if conventional fuel prices are just variable, and do not necessarily trend upward.

Regardless of whether the project persistently lowers the market-energy needs of the household (through energy efficiency projects) or simply provides insurance against uncertainty in market fuel price movements, a cost-beneficial project reduces a household's effective budgetary burden of home

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[18] ECONorthwest was not asked to opine on whether typical PACE projects are, in fact, cost-beneficial. However, since private agents are the ones primarily involved in the decision-making, it is reasonable to anticipate that the projects that are successfully adopted are perceived as cost-beneficial by households or contractors developing the projects for sale to consumer households.

[19] The typical financial calculus involved in this determination involves, therefore, comparing the present value at the time the enhancement spending occurs of the stream of expected energy cost savings enjoyed over the lifetime of the energy enhancements. A discount rate is applied to the stream of energy cost savings in this calculation.

ownership.[20] Thus, to the extent that the project results in additional free cash flow in the household (after paying the tax increment used to pay for the PACE improvements), there can be annual increments of economic impact associated with the likely additional spending that the household will perform.

This impact can also be measured using the IMPLAN modeling system by assuming a hypothetical quantity of additional, non-utility spending by households. As with the PACE program spending impacts, there are direct, indirect, and induced effects of this spending. In this case, however, the amount measured by this method yields only the gross spending effects; the loss of spending to the utility sector will result in a partial offset to these impacts.[21]

Exhibit 11, on page 31, summarizes the city-level and US total impacts, in present value terms, of a household enjoying energy cost savings of $1,000 per year in 2011 dollars for 25 years. As the exhibit reveals, the gross impacts of even a modest annual cost savings can yield large impacts on output, personal income, jobs, and tax revenues over a 25-year period.

Conclusions: The Implications of the Analysis for Issuers of Mortgages on PACE Project Properties

The background of the PACE program reveals that the program is currently not operational because of concerns of bank regulators and secondary mortgage market entities regarding the security of their access to the collateral value of the property in the event of default. The existence of a senior lien (senior to the mortgage) is always of concern to mortgage issuers, especially in non-recourse states (i.e., states in which the lender may not levy claims against assets other than the mortgaged property itself).[22]

Several aspects of the impact analysis presented here bear upon the position taken by those concerned about such risks. First, to the extent that the PACE program operates in the manner assumed in the analysis in this report, use of the program has the potential to have positive economic impacts on the regional (city) economy, as well as the nation as a whole. Cost-beneficial programs that generate such impacts can contribute to the process of recovery for both the economy in general, and the construction services sector in particular.

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[20] Even in the special case where a renewable energy project only provides insurance against future volatility of market fuel prices, the household enjoys budgetary relief. It need not set aside funds against the eventuality of a surprise upward movement in energy costs.
[21] Without knowing the composition of utility and non-utility spending of the affected income groups, the effects of the shift in spending composition can only be estimated in rough terms.
[22] There are 17 such non-recourse states.

Second, to the extent that the projects generate the generous revenues for local, state and federal jurisdictions modeled here, additional stabilization of the general economy can be expected. This is because the difficulties that governments currently have in balancing their budgets is requiring either reductions in public services or increases in taxes, or both. The risk of loss of public services, or reductions in its quality, and the risks of increased taxation on private activity create an environment of uncertainty, in general, and disrupt household location, migration and housing tenure decisions. On some margin, these conditions weaken the strength of the housing market, aggravating lender collateral problems. Cost-beneficial private sector activity that has the effect of enhancing the value of housing services should not be discouraged by lenders, even from the perspective of their own self-interest.

Third, in an environment of uncertain and costly supply of conventional fuels, properties that are distinguished by having energy-sparing or inflation-defensive features will enjoy priority in desirability, and hence, enjoy superior pricing in the marketplace. In a manner similar to the relative price movements of gasoline-consumptive SUVs versus more fuel-efficient vehicles, properties with good energy efficiency characteristics will rise in price in an uncertain commodity price environment.

Finally, although the existence of a lien in a superior position to a mortgage is legitimately worrisome to lenders, the increment in value of the home that is represented by the energy technologies financed by the lien may well move counter-cyclically to other factors affecting home prices and collateral value. If this is the case, then the putative adverse presence of the lien may well be counterbalanced by the superior net resilience of PACE-improved home values. This seems true whether the economy fails to come gracefully out of the recession because of central bank difficulties managing the balance between inflation and real interest rates, or because of rising and/or uncertain energy costs:

- If the monetary expansion results in higher, general inflation levels in the future, households for whom the absolute energy cost of their budgets is below average will be less subject to inflation effects on energy cost components of their budgets than households with larger absolute energy budgets. Moreover, to the extent that the energy features of the home provide a hedge against some portion of general inflation, the value of the home will rise by an amount reflective of the value of that hedge.
- If real interest rates rise instead, those homes with fixed lien payments associated with the PACE program (and, ideally, a fixed-rate mortgage as well) enjoy, in effect, a reduction in the present value of the lien payment obligations. Although higher mortgage rates will not be favorable to home sales or home building, creditors with fixed-rate obligations enjoy an implicit capital gain (much as the holders of low rate mortgages will suffer a capital loss). Abandoning a home with a fixed lien in a rising real interest rate market makes no more sense than abandoning a low-rate mortgage in that environment.
- If energy prices rise independently of other prices (commodity price inflation), the value of the energy-sparing improvements will rise, even if and as the higher energy prices impair economic recovery, incomes and housing demand. By recognizing the value of the energy-sparing features of the home and accommodating borrowers who must take on property tax liens to enjoy these

> features, the lenders are, in effect, putting themselves in a better position than if they had lent the same principal amount to a homeowner who had not acquired protection against energy price movements.

In summary, it is hard to construct a scenario in which the presence of a lien that is associated with value-enhancing and stabilizing housing services adds to the riskiness of a mortgage vs. a loan on a home without the lien and energy features, everything else being equal.

These arguments would be less persuasive, of course, if one did not believe that (a) the housing market recognizes the value of energy-sparing features of homes or that (b) the programs of PACENow and like initiatives will deliver improvements that cost-effectively provide the homeowner with lower energy cost burdens and/or a hedge against rising or uncertain energy prices. ECONorthwest cannot opine on the logic of (b), but has experience in evaluating the relationship between the market prices of homes and their energy features. In 1993, ECONorthwest published a study of an energy-efficient mortgage program that was performed for the Oregon Department of Energy. Using a unique database that contained information on various home insulation and heat source features of homes that sold in Oregon, ECONorthwest established both that the market does recognize the present value of energy cost savings in higher home prices and that the changes in Oregon's building code in 1992 (to reduce energy use by housing) were cost-beneficial.[23]

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[23] See, *Implementing Oregon's Energy Efficient Mortgage Program: Final Report*, ECONorthwest, June 1993. In Part 3 of that report ("Market Response to Energy Saving Features") an econometric analysis was performed using a special database provided by the Appraisers' Comp Service (ACS). At the time, the ACS maintained a database of real estate sales in major markets so that appraisers may obtain comparable sales information for use in appraisals. Uniquely, the database contained information on certain energy-related features of the homes sold including ceiling insulation value, floor insulation value, wall insulation value, type of heating and whether the home had been built to the 1992 code (in addition to many other features of the homes). The sales prices covered a narrow period of September 4, 1992 to June 15, 1993, and comprised approximately 2,780 total observations in two metropolitan areas of Oregon. The econometric analysis revealed that buyers assigned high values to energy-sparing features. The value of those features was such that ECONorthwest concluded on page 48 that "...the 1992 code enhancements are associated with significant enhancements in home value. All of the estimates are far in excess of the estimated costs of the 1992 code described by builders in Part One of this report."

Appendix A: About the Authors

Randall Pozdena, PhD, Senior Economist and Managing Director

Dr. Pozdena leads ECONorthwest's quantitative analysis practice. He joined ECONorthwest as a managing director and head of its Portland office in 1991. He has extensive experience in macroeconomic modeling and forecasting, project feasibility analysis, banking and securities markets, real-estate economics, and monetary policy. In this capacity, he has developed and applied project evaluation and pricing tools, and state, regional and sectoral macroeconomic forecasting and economic impact models. Prior to joining ECONorthwest, Pozdena was research Vice President of the Federal Reserve Bank of San Francisco. He directed the Banking and Regional Studies section, which advised on matters relating to financial-market developments, mortgage and housing markets, banking operations and regulation, and the regional economies of the eight western United States. The latter duties involved developing and operating models of states and metropolitan-area economies and analysis of credit flows in the economy. Before his work at the Federal Reserve Bank, Pozdena was a senior economist at SRI International, where he provided consulting on economics, finance, and transportation economics. In addition, he has taught economics and finance at the Graduate School of Business, University of California, Berkeley and at the Graduate School of Administration, University of California, Irvine. He was also associated with the Institute of Transportation Studies at Irvine. Pozdena has been a member of the CFA Institute for over 15 years and a member, and former board member, of the Portland Society of Financial Analysts. He has written over 50 published books and papers, has 21 listings in the Journal of Economic Literature, and over 5,000 search cross-references in Google Research.

Alec Josephson, MA, Senior Economist and Director of Economic Impact Analysis

Josephson has been with ECONorthwest since 1992 and has participated in well over 300 economic impact studies using the IMPLAN modeling systems. Josephson's experience spans a wide range of industries, sectors, and programs, including major transportation improvement projects; heavy and light manufacturing activities; renewable energy projects and technologies; agriculture, forestry, mining, and commodities; and economic development projects. Josephson recently completed a comprehensive economic analysis of the impacts from proposed changes to Seattle area transportation resulting from restructuring of the Alaska Way Viaduct, including analysis of tolling and other congestion models, impacts of freight traffic, analysis of the short-term construction impacts and the long-term accessibility and business development impacts. In addition to his work with ECONorthwest, Mr. Josephson is an adjunct professor of economics at Pacific University, where he teaches courses in energy and environmental economics, microeconomics, and macroeconomics. Mr. Josephson and his staff conducted the modeling presented in this report.

Appendix B: The IMPLAN Modeling System[24]

Social Accounting

IMPLAN's Social Accounting Matrices (SAMs) capture the actual dollar amounts of all business transactions taking place in a regional economy as reported each year by businesses and governmental agencies. SAM accounts are a better measure of economic flow than traditional input-output accounts because they include "non-market" transactions. Examples of these transactions would be taxes and unemployment benefits.

Multipliers

Social Accounting Matrices can be constructed to show the effects of a given change on the economy of interest. These are called Multiplier Models. Multiplier Models study the impacts of a user-specified change in the chosen economy for 440 different industries. Because the Multiplier Models are built directly from the region specific Social Accounting Matrices, they will reflect the region's unique structure and trade situation.

Multiplier Models are the framework for building impact analysis questions. Derived mathematically, these models estimate the magnitude and distribution of economic impacts, and measure three types of effects that are displayed in the final report. These are the direct, indirect, and induced changes within the economy. Direct effects are determined by the Event as defined by the user (i.e. a $10 million dollar order is a $10 million dollar direct effect). The indirect effects are determined by the amount of the direct effect spent within the study region on supplies, services, labor and taxes. Finally the induced effect measures the money that is re-spent in the study area as a result of spending from the indirect effect. Each of these steps recognizes an important leakage from the economic study region spent on purchases outside of the defined area. Eventually these leakages will stop the cycle.

Trade Flows Method

Unique to IMPLAN data, 2008 and forward, is a method of tracking regional purchases by estimating trade flows. An updated and improved method for calculating and tracking the movement of commodities between industries within a region, this method tracks over 500 commodities in each study area, and allows more accurate capturing of indirect and induced effects. This new method of capturing regional purchase coefficients also makes it possible for our Version 3 software to perform Multiregional Analysis, so users can see how a change in their local region causes additional affects surrounding areas.

Cost-Effective Modeling

Tremendous amounts of data are required in order to run Social Accounting Matrices and Multiplier Models that will accurately estimate the effects of a given event on an economy. There are numerous

[24] Abstracted from descriptive materials offered by IMPLAN at www.implan.com.

factors that need to be taken into account to fully visualize direct, indirect and induced effects of an event. The expense and labor of developing this data independently are prohibitive. By offering the data in many discreet forms, IMPLAN also allows studies to be localized effectively and only data of interest to be purchased.

Appendix C: Exhibits[25]

[25] The data in all exhibits is from ECONorthwest using IMPLAN modeling and emulation of PACE project purchases as described in the text of the report.

Exhibit 1: IMPLAN and NAICS Sectors Associated with PACE Project Activity

IMPLAN Sector	IMPLAN Description	2007 NAICS Codes
40	Maintenance and repair construction of residential structures	23*
99	Wood windows and doors and millwork manufacturing	32191
128	Synthetic rubber manufacturing	325212
137	Adhesive manufacturing	32552
146	Polystyrene foam product manufacturing	32614
149	Other plastics product manufacturing	32619
168	Mineral wool manufacturing	327993
216	Air conditioning- refrigeration- and warm air heat	333415
243	Semiconductor and related device manufacturing	334413

Exhibit 2: Summary of Economic Impacts of Photovoltaic Projects, per $1 million in Project Purchases

Economic Impacts - Solar Photovoltaics

Impact Area / Type of Impact	Direct	Indirect	Induced	Total
Santa Barbara, CA				
Output	$490,221	$116,918	$173,047	$780,185
Personal Income	$214,608	$45,318	$59,668	$319,593
Jobs	3	1	1	6
San Antonio, TX				
Output	$507,649	$145,867	$218,552	$872,068
Personal Income	$198,656	$57,671	$73,611	$329,937
Jobs	5	1	2	8
Columbus, OH				
Output	$501,674	$132,488	$201,844	$836,006
Personal Income	$202,121	$55,477	$68,120	$325,718
Jobs	4	1	2	7
Long Island, NY				
Output	$438,330	$121,541	$157,729	$717,599
Personal Income	$177,780	$49,051	$57,453	$284,284
Jobs	3	1	1	5
Elsewhere in the United States				
Output	$1,587,757	$2,597,183	$2,859,334	$7,044,273
Personal Income	$409,984	$778,674	$877,716	$2,066,374
Jobs	4	12	18	35
United States Total				
Output	$3,525,630	$3,113,996	$3,610,504	$10,250,130
Personal Income	$1,203,148	$986,190	$1,136,566	$3,325,904
Jobs	20	16	24	60

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Exhibit 3: Summary of Fiscal Impacts for Solar Photovoltaics, per $1 million in Project Purchases

Fiscal Impacts - Solar Photovoltaics

Impact Area / Type of Impact		Direct	Indirect	Induced	Total
Santa Barbara, CA					
Federal		$33,390	$17,238	$12,393	$63,021
State and Local		$12,188	$8,920	$13,578	$34,685
	Total All	$45,578	$26,158	$25,971	$97,706
San Antonio, TX					
Federal		$33,990	$13,135	$16,104	$63,228
State and Local		$6,964	$12,005	$14,725	$33,693
	Total All	$40,953	$25,139	$30,829	$96,921
Columbus, OH					
Federal		$29,878	$10,819	$14,317	$55,013
State and Local		$10,491	$11,259	$15,467	$37,217
	Total All	$40,369	$22,078	$29,784	$92,230
Long Island, NY					
Federal		$36,904	$11,239	$13,725	$61,867
State and Local		$15,494	$11,213	$14,451	$41,157
	Total All	$52,398	$22,451	$28,176	$103,024
Elsewhere in the United States					
Federal		$88,116	$149,923	$187,622	$425,660
State and Local		$37,306	$100,785	$148,646	$286,737
	Total All	$125,422	$250,707	$336,268	$712,396
United States Total					
Federal		$222,276	$202,352	$244,160	$668,788
State and Local		$82,442	$144,180	$206,866	$433,488
	Total All	$304,718	$346,532	$451,026	$1,102,276

Exhibit 4: Summary of Economic Impacts of Energy Efficiency Programs, per $1 million in Project Purchases

Economic Impacts - EE Measures

Impact Area / Type of Impact	Direct	Indirect	Induced	Total
Santa Barbara, CA				
Output	$513,252	$123,023	$174,721	$810,996
Personal Income	$215,490	$46,942	$60,245	$322,677
Jobs	3	1	1	6
San Antonio, TX				
Output	$513,521	$145,532	$219,473	$878,525
Personal Income	$199,952	$57,372	$73,921	$331,244
Jobs	5	1	2	8
Columbus, OH				
Output	$565,830	$155,640	$217,883	$939,353
Personal Income	$215,850	$62,958	$73,534	$352,342
Jobs	4	1	2	8
Long Island, NY				
Output	$442,063	$113,635	$161,223	$716,921
Personal Income	$180,828	$44,978	$57,298	$283,104
Jobs	3	1	1	5
Elsewhere in the United States				
Output	$1,772,714	$3,070,827	$2,735,981	$7,579,521
Personal Income	$367,042	$736,774	$839,779	$1,943,594
Jobs	6	11	17	35
United States Total				
Output	$3,807,378	$3,608,656	$3,509,280	$10,925,314
Personal Income	$1,179,160	$949,024	$1,104,776	$3,232,960
Jobs	21	16	24	61

Exhibit 5: Summary of Fiscal Impacts of Energy Efficiency Measures, per $1 million in Project Purchases

Fiscal Impacts - EE Measures

Impact Area / Type of Impact		Direct	Indirect	Induced	Total
Santa Barbara, CA					
Federal		$33,515	$17,551	$12,513	$63,578
State and Local		$12,119	$9,146	$13,709	$34,973
	Total All	$45,633	$26,697	$26,222	$98,551
San Antonio, TX					
Federal		$36,421	$12,584	$16,715	$65,720
State and Local		$8,334	$11,458	$15,287	$35,079
	Total All	$44,755	$24,042	$32,002	$100,798
Columbus, OH					
Federal		$32,427	$12,301	$15,454	$60,181
State and Local		$11,852	$12,613	$16,695	$41,159
	Total All	$44,279	$24,913	$32,149	$101,340
Long Island, NY					
Federal		$37,245	$10,333	$13,688	$61,265
State and Local		$15,578	$10,439	$14,413	$40,429
	Total All	$52,823	$20,771	$28,101	$101,694
Elsewhere in the United States					
Federal		$72,768	$145,060	$178,967	$396,795
State and Local		$17,150	$101,554	$140,997	$259,701
	Total All	$89,918	$246,614	$319,964	$656,495
United States Total					
Federal		$212,374	$197,828	$237,336	$647,538
State and Local		$65,032	$145,208	$201,100	$411,340
	Total All	$277,406	$343,036	$438,436	$1,058,878

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Exhibit 6: Summary of Impacts, Columbus Ohio, per $1 million in Project Purchases

Solar Photovoltaics

Type of Impact	Direct	Indirect	Induced	Total
Output	$501,674	$132,488	$201,844	$836,006
Personal Income	$202,121	$55,477	$68,120	$325,718
Jobs	4.3	1.2	1.7	7.2

Type of Tax	Direct	Indirect	Induced	Total
Federal				
Corporate Profits	$1,831	$829	$1,818	$4,478
Indirect Business	$534	$1,804	$2,378	$4,715
Personal	$9,924	$2,589	$3,164	$15,676
Social Insurance	$17,590	$5,597	$6,958	$30,144
Total Federal	$29,878	$10,819	$14,317	$55,013
State and Local				
Corporate Profits and Dividends	$1,949	$883	$1,935	$4,766
Indirect Business	$2,589	$8,752	$11,539	$22,880
Personal	$5,391	$1,406	$1,719	$8,515
Social Insurance	$564	$219	$275	$1,057
Total State and Local	$10,491	$11,259	$15,467	$37,217
Total All	$40,369	$22,078	$29,784	$92,230

Energy Efficiency

Type of Impact	Direct	Indirect	Induced	Total
Output	$565,830	$155,640	$217,883	$939,353
Personal Income	$215,850	$62,958	$73,534	$352,342
Jobs	4.5	1.3	1.8	7.6

Type of Tax	Direct	Indirect	Induced	Total
Federal				
Corporate Profits	$2,225	$1,004	$1,963	$5,192
Indirect Business	$645	$1,999	$2,566	$5,210
Personal	$10,560	$2,937	$3,415	$16,912
Social Insurance	$18,997	$6,361	$7,511	$32,868
Total Federal	$32,427	$12,301	$15,454	$60,181
State and Local				
Corporate Profits and Dividends	$2,368	$1,069	$2,089	$5,525
Indirect Business	$3,129	$9,701	$12,455	$25,284
Personal	$5,736	$1,595	$1,855	$9,186
Social Insurance	$620	$249	$297	$1,165
Total State and Local	$11,852	$12,613	$16,695	$41,159
Total All	$44,279	$24,913	$32,149	$101,340

Exhibit 7: Summary of Impacts, Long Island, NY, per $1 million in Project Purchases

Solar Photovoltaics

Type of Impact	Direct	Indirect	Induced	Total
Output	$438,330	$121,541	$157,729	$717,599
Personal Income	$177,780	$49,051	$57,453	$284,284
Jobs	3.0	0.8	1.1	5.0

Type of Tax	Direct	Indirect	Induced	Total
Federal				
Corporate Profits	$1,279	$556	$1,002	$2,836
Indirect Business	$360	$856	$1,086	$2,301
Personal	$16,486	$4,537	$5,298	$26,320
Social Insurance	$18,780	$5,291	$6,340	$30,411
Total Federal	$36,904	$11,239	$13,725	$61,867
State and Local				
Corporate Profits and Dividends	$2,174	$945	$1,705	$4,823
Indirect Business	$3,135	$7,458	$9,455	$20,048
Personal	$9,489	$2,611	$3,050	$15,150
Social Insurance	$697	$199	$241	$1,137
Total State and Local	$15,494	$11,213	$14,451	$41,157
Total All	$52,398	$22,451	$28,176	$103,024

Energy Efficiency

Type of Impact	Direct	Indirect	Induced	Total
Output	$442,063	$113,635	$161,223	$716,921
Personal Income	$180,828	$44,978	$57,298	$283,104
Jobs	3.1	0.8	1.1	4.9

Type of Tax	Direct	Indirect	Induced	Total
Federal				
Corporate Profits	$1,324	$530	$1,000	$2,854
Indirect Business	$341	$799	$1,083	$2,222
Personal	$16,805	$4,161	$5,283	$26,248
Social Insurance	$18,776	$4,844	$6,323	$29,942
Total Federal	$37,245	$10,333	$13,688	$61,265
State and Local				
Corporate Profits and Dividends	$2,252	$902	$1,701	$4,854
Indirect Business	$2,965	$6,961	$9,430	$19,355
Personal	$9,672	$2,395	$3,042	$15,109
Social Insurance	$690	$182	$241	$1,112
Total State and Local	$15,578	$10,439	$14,413	$40,429
Total All	$52,823	$20,771	$28,101	$101,694

Exhibit 8: Summary of Impacts, San Antonio, Texas, per $1 million in Project Purchases

Solar Photovoltaics

Type of Impact	Direct	Indirect	Induced	Total
Output	$507,649	$145,867	$218,552	$872,068
Personal Income	$198,656	$57,671	$73,611	$329,937
Jobs	4.5	1.3	1.8	7.7

Type of Tax	Direct	Indirect	Induced	Total
Federal				
Corporate Profits	$2,388	$1,075	$2,043	$5,506
Indirect Business	$610	$1,566	$1,891	$4,067
Personal	$11,903	$3,747	$4,305	$19,955
Social Insurance	$19,089	$6,747	$7,865	$33,701
Total Federal	$33,990	$13,135	$16,104	$63,228
State and Local				
Corporate Profits and Dividends	$818	$368	$700	$1,886
Indirect Business	$4,300	$11,030	$13,323	$28,652
Personal	$1,564	$492	$566	$2,621
Social Insurance	$283	$115	$137	$534
Total State and Local	$6,964	$12,005	$14,725	$33,693
Total All	$40,953	$25,139	$30,829	$96,921

Energy Efficiency

Type of Impact	Direct	Indirect	Induced	Total
Output	$513,521	$145,532	$219,473	$878,525
Personal Income	$199,952	$57,372	$73,921	$331,244
Jobs	4.5	1.3	1.8	7.7

Type of Tax	Direct	Indirect	Induced	Total
Federal				
Corporate Profits	$2,845	$1,058	$2,121	$6,023
Indirect Business	$767	$1,493	$1,963	$4,222
Personal	$12,659	$3,600	$4,469	$20,727
Social Insurance	$20,151	$6,434	$8,163	$34,748
Total Federal	$36,421	$12,584	$16,715	$65,720
State and Local				
Corporate Profits and Dividends	$974	$362	$727	$2,063
Indirect Business	$5,403	$10,514	$13,832	$29,748
Personal	$1,663	$473	$587	$2,723
Social Insurance	$295	$109	$142	$546
Total State and Local	$8,334	$11,458	$15,287	$35,079
Total All	$44,755	$24,042	$32,002	$100,798

Exhibit 9: Summary of Impacts, Santa Barbara, California, per $1 million in Project Purchases

Solar Photovoltaics

Type of Impact	Direct	Indirect	Induced	Total
Output	$490,221	$116,918	$173,047	$780,185
Personal Income	$214,608	$45,318	$59,668	$319,593
Jobs	3.4	0.9	1.4	5.6

Type of Tax	Direct	Indirect	Induced	Total
Federal				
Corporate Profits	$1,094	$150	$892	$2,135
Indirect Business	$412	$3,574	$1,431	$5,416
Personal	$13,958	$2,572	$3,779	$20,308
Social Insurance	$17,927	$10,944	$6,292	$35,162
Total Federal	$33,390	$17,238	$12,393	$63,021
State and Local				
Corporate Profits and Dividends	$1,352	$507	$1,102	$2,961
Indirect Business	$2,945	$6,710	$10,233	$19,887
Personal	$7,218	$1,486	$1,955	$10,658
Social Insurance	$673	$218	$289	$1,180
Total State and Local	$12,188	$8,920	$13,578	$34,685
Total All	$45,578	$26,158	$25,971	$97,706

Energy Efficiency

Type of Impact	Direct	Indirect	Induced	Total
Output	$513,252	$123,023	$174,721	$810,996
Personal Income	$215,490	$46,942	$60,245	$322,677
Jobs	3.4	0.9	1.4	5.7

Type of Tax	Direct	Indirect	Induced	Total
Federal				
Corporate Profits	$1,083	$177	$900	$2,160
Indirect Business	$400	$3,592	$1,445	$5,436
Personal	$14,014	$2,675	$3,816	$20,504
Social Insurance	$18,019	$11,107	$6,353	$35,479
Total Federal	$33,515	$17,551	$12,513	$63,578
State and Local				
Corporate Profits and Dividends	$1,338	$541	$1,113	$2,991
Indirect Business	$2,858	$6,841	$10,332	$20,030
Personal	$7,246	$1,539	$1,973	$10,758
Social Insurance	$678	$225	$292	$1,195
Total State and Local	$12,119	$9,146	$13,709	$34,973
Total All	$45,633	$26,697	$26,222	$98,551

Exhibit 10: Summary of Impacts, United States (aggregate), per $1 million in Project Purchases per City

Solar Photovoltaics

Type of Impact	Direct	Indirect	Induced	Total
Output	$3,525,630	$3,113,996	$3,610,504	$10,250,130
Personal Income	$1,203,148	$986,190	$1,136,566	$3,325,904
Jobs	19.6	16.0	24.4	60.0

Type of Tax	Direct	Indirect	Induced	Total
Federal				
Corporate Profits	$20,048	$19,414	$27,984	$67,446
Indirect Business	$7,214	$17,650	$26,040	$50,904
Personal	$73,692	$59,976	$69,150	$202,818
Social Insurance	$121,322	$105,312	$120,986	$347,620
Total Federal	$222,276	$202,352	$244,160	$668,788
State and Local				
Corporate Profits and Dividends	$17,330	$16,778	$24,188	$58,296
Indirect Business	$45,408	$111,096	$163,900	$320,404
Personal	$17,102	$13,922	$16,048	$47,072
Social Insurance	$2,602	$2,384	$2,730	$7,716
Total State and Local	$82,442	$144,180	$206,866	$433,488
Total All	$304,718	$346,532	$451,026	$1,102,276

Energy Efficiency

Type of Impact	Direct	Indirect	Induced	Total
Output	$3,807,378	$3,608,656	$3,509,280	$10,925,314
Personal Income	$1,179,160	$949,024	$1,104,776	$3,232,960
Jobs	21.4	15.8	23.6	60.8

Type of Tax	Direct	Indirect	Induced	Total
Federal				
Corporate Profits	$17,460	$22,090	$27,204	$66,754
Indirect Business	$4,870	$17,546	$25,312	$47,728
Personal	$72,308	$57,784	$67,216	$197,308
Social Insurance	$117,736	$100,408	$117,604	$335,748
Total Federal	$212,374	$197,828	$237,336	$647,538
State and Local				
Corporate Profits and Dividends	$15,094	$19,092	$23,514	$57,700
Indirect Business	$30,656	$110,454	$159,330	$300,440
Personal	$16,780	$13,410	$15,602	$45,792
Social Insurance	$2,502	$2,252	$2,654	$7,408
Total State and Local	$65,032	$145,208	$201,100	$411,340
Total All	$277,406	$343,036	$438,436	$1,058,878

Exhibit 11: Economic Impacts of $1,000 in Annual Household Energy Costs for 25 Years (in Present Value)

Impact Area	Output	Personal Income	Jobs (Full- and Part-time)	Federal Taxes	State and Local Taxes
Santa Barbara, CA	$19,484	$6,648	0.15	$1,383	$1,515
San Antonio, TX	$21,730	$7,197	0.18	$1,441	$1,358
Columbus, OH	$19,979	$6,578	0.17	$1,548	$1,404
Long Island, NY	$21,007	$7,400	0.15	$1,769	$1,879
United States (est.)	$306,914	$98,453	1.97	$19,119	$12,722

The impacts are the present value effects of $1,000 in energy cost savings per year for 25 years. To reduce this stream of savings to a single number for comparability with project purchase impacts, the so-called *present value* of the savings is calculated. For the present value calculation, it is assumed that the appropriate real (inflation adjusted) discount rate is 3 percent, and that energy costs rise at a rate that is one percentage point higher than other prices. The US totals are estimated outside of IMPLAN using total US spending relative to the city totals observed in the program purchase modeling. These impacts should be considered gross impacts, since the potentially offsetting impacts of reduced utility activity are not captured in these measures.

EXHIBIT 2 (to Resolution 2022-023)

PROGRAM GUIDEBOOK:
C-PACE PROGRAM

Deschutes County, OREGON

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I. Introduction

ABOUT C-PACE

Deschutes County (the "County") administers a Commercial Property Assessed Clean Energy ("C-PACE") financing program (the "C-PACE Program" or the "Program"). The C-PACE Program allows owners of eligible commercial property to obtain long-term financing from private capital providers for certain qualified improvements. While the financing is repaid to the Capital Provider, the C-PACE Act directs the County to impose a voluntary benefit assessment and record a lien (the "C-PACE Lien") on the property. This approach to financing has been used by programs like C-PACE on thousands of properties in more than 24 states and the District of Columbia.

The Oregon Statutes (ORS 223.680 and ORS 223.685) authorize local governments to establish property assessed financing programs that help property owners finance energy, water, renewable, and seismic Improvements to qualifying real property. The financing is secured with a lien on the benefitted property (Benefit Assessment Lien) with the same priority as a lien for the assessment for local improvements. The local improvement lien is an established mechanism used by municipalities for decades to finance projects that provide a public benefit such as street improvements, water, sewer and street lighting.

Individual cities and counties may now take action to create their own C-PACE programs and help buildings become more efficient and resilient. Creating a county C-PACE program is simple: first, a city/county adopts a resolution and guidelines that govern how its C-PACE program works. Second, since the repayment of the C-PACE financing is between a private lender and a property owner, when the lender's lien against the property is filed, a county only has to review the lien application for compliance with the C-PACE state law, and then record a unique agreement that includes the acknowledgment of a special property "benefit assessment" by the city/county.

In Oregon, C-PACE financing is available in four categories: energy efficiency, renewable energy, water conservation, and seismic rehabilitation improvements. Improvements that reduce greenhouse gas emissions would qualify, provided that the improvements also conserve energy or result in renewable energy improvements. A voluntary C-PACE loan is secured by a senior lien on the property and paid back over time; tax liens and other government assessments remain superior to the C-PACE lien. Like other assessments, C-PACE financing is non-accelerating, which means only current or past due payments can be collected, while future payments are the responsibility of whomever owns the property at the time. The C-PACE repayment obligation transfers automatically to the next owner if the property is sold. In the event of default, only the payments in arrears are due. This arrangement spreads the cost of qualifying improvements – such as energy-efficient HVAC equipment, upgraded insulation, new windows, solar installations, or seismic upgrades – over the useful life of the measures.

The Program exists as a function of Oregon's C-PACE legislation and the rules established by the County. No change in the Program or in Oregon's C-PACE legislation will affect a property owner's obligations to pay C-PACE assessments incurred under the Program prior to such changes.

OR-PACE Program Guidebook

This Guidebook was developed to help counties launch C-PACE programs. The Guidebook and related model materials are available at no cost to counties to use and adopt. A major benefit to using a ready-made and legally reviewed program is that it allows counties, property owners, contractors, and capital providers to follow a standard set of rules. This is critical in attracting the broadest capital investment to C-PACE projects.

In this document you can find information about:

- Statutory and programmatic eligibility requirements for C-PACE properties and projects in Oregon and Deschutes County
- Process for applying for C-PACE project approval

II. Benefits of C-PACE

C-PACE offers benefits to building owners, developers, municipalities, mortgage holders, and building professionals.

For Building Owners and Developers: One of the biggest barriers to converting potential projects to completed projects for efficiency and seismic upgrades are the up-front cost of the types of measures identified in the statute as qualifying improvements. C-PACE financing typically requires little up-front investment, and qualifying improvements improve property value. Energy efficiency measures, in particular, also lower operating costs. In addition, C-PACE financing has the following benefits:

- **Up to 100%, long-term financing**. Many owners lack the capital to complete efficiency and seismic improvements. All direct and indirect costs incidental to the qualified improvements can be wrapped into C-PACE financing.

- **Transferrable upon sale**. Some owners may want to sell the building before the financing is repaid. The C-PACE lien and assessment are attached to the property and transfers to the new owner.

- **Cash flow benefits**. C-PACE financing may be repaid over the useful life of the improvements, which because of the long-term financing options can have positive effects on cash flow.

- **Triple-net and Full-net leases may allow pass-through of assessment installments to tenants**. Under triple/full net leases, C-PACE payments can be passed along to tenants, who also typically derive benefit from any energy savings through reduced operating costs.

For Energy Auditors, Architects, Building Engineers, and Contractors: By allowing a property owner to access 100% up-front financing for longer terms than are typically available for conventional financing, more substantial efficiency and seismic improvements are now more affordable with C-PACE. Energy auditors, architects, engineers, and contractors can suggest C-PACE financing as a way for their clients to implement needed energy or seismic upgrades that might otherwise be unaffordable. Since the demand for building efficiency and seismic improvements will grow in a C-PACE-enabled jurisdiction, C-PACE is a powerful business growth catalyst for building professionals like energy auditors and contractors.

For Cities/Counties: C-PACE is an economic development tool. By making it more affordable for building owners to make major improvements to their buildings, local building stock value is enhanced, and more jobs are created. Energy, water, and seismic upgrades create a more competitive environment for retaining and attracting new businesses by lowering energy costs and improving the structural soundness of buildings. Upgraded buildings can generate higher property tax payments for the city/county. Energy upgrades also typically reduce greenhouse gases and other pollutants, which facilitates adherence to city/county or state climate action plans or goals.

For Existing Lien Holders: C-PACE improvements can enhance property value and typically improve a building's longevity, thereby reducing the risk of property value decline over time. In addition, C-PACE financing is non-accelerating, meaning only current or past due annual payments can be collected each year while future payments stay with the property. As such, existing mortgage holders see their collateral improved without substantial increase in credit risk and with only a modest impact on lien priority. C-PACE financing is not permitted without the consent of all existing lien holders and, under certain circumstances, the holders of certain other obligations encumbering commercial residential property.

III. C-PACE Financing Program Rules

The purpose of this Program Guidebook is to provide standard guidelines for counties to use in establishing efficient and effective C-PACE programs that are consistent from across Oregon State.

This Program Guidebook (the "Guidebook") is prepared as required by the C-PACE Act, at the direction of the City/county, and is approved in connection with, and as an attachment to, the enabling resolution/ordinance for this program (the "C-PACE Resolution/Ordinance") dated April 20, 2022. Capitalized terms used herein, but not defined herein, have the meaning given to such terms in the C-PACE Resolution/Ordinance.

The Guidebook establishes guidelines, eligibility, approval criteria, and an application form for the administration of the C-PACE Program for the City/county. The C-PACE Program enables financing for commercial property owners ("Property Owners") to make certain energy efficiency, renewable energy, water conservation, and seismic rehabilitation improvements (each, a "Qualified Improvement") as described in the C-PACE Act and further clarified in this Guidebook.

Qualified Improvements, including all eligible costs that are to be financed as described in a project application (the "Project Application") approved by the Program, constitute a "Qualified Project." Property Owners may receive funding for their Qualified Improvements only from qualified private investors ("Capital Providers") pursuant to a separate Financing Agreement negotiated between the Property Owner and Capital Provider (a "Financing Agreement").

In the following numbered subsections, a reader can find information about:

- Statutory and programmatic eligibility requirements for C-PACE project financing in Oregon State, and
- The appropriate steps and forms needed for a City/county to receive and process a C-PACE project lien application.

1. Establishment of C-PACE Program Boundaries

Deschutes County adopted Resolution No. 2022-023 and Ordinance No. 2022-005 on April 20, 2022, establishing the C-PACE Program for all eligible commercial properties within the boundaries of Deschutes County, including both incorporated and unincorporated territory (the "Region").

2. Administration of Program; Authorized Officials

The County Administrator's Office is designated and authorized to oversee development of the C-PACE program in accordance with ORS, this Program Guide, sample program documents and a fee schedule. This oversight shall extend to delegated and outsourced services and management and will include review of each Project Application to confirm that it is complete and contains no errors on its face. The County

Administrator's Office (or outsourced designee) will then execute the Benefit Assessment Agreement and C-PACE Lien documents on behalf of the City/county and record them with the real property records.

As part of Program operation, the County Administrator's Office (or outsourced designee) will:

- Accept Project Applications from Property Owners and Capital Providers for prospective C-PACE projects.
- Review the Project Application to determine conformance with the Application Checklist.
- Approve/conditionally approve/disapprove the Project Application and communicate to applicant.
- Execute the Benefit Assessment Agreement, Notice of Assessment Interest and C-PACE Lien ("Notice of Assessment Interest") and Assignment of Notice of Assessment Interest and Benefit Assessment Agreement ("Assignment").
- Record the Notice of Assessment Interest and Assignment.

3. Eligibility Requirements

Eligible Property means any privately-owned commercial, industrial, or multi-family real property of five (5) or more dwelling units located within the boundaries of the Region (including properties owned by a not-for-profit organization).

Ground leases on Eligible Property are permitted, so long as all requirements of the C-PACE Ordinance are met, including requiring the Property Owner to enter into a Benefit Assessment Agreement. On ground-leased property, therefore, the assessment and C-PACE Lien encumber the fee interest in the property, not the ground leasehold.

Property Owner means an owner of qualifying eligible property, which is the record owner of title to the Eligible Property. The Property Owner may be any type of business, corporation, individual, or non-profit organization.

Qualified Improvements means a permanent improvement affixed to the real property that must meet at least one of these criteria:

- Decrease energy consumption or demand through the use of efficiency technologies, products, or activities that reduce or support the reduction of energy consumption or allow for the reduction in demand or reduce greenhouse gas emissions ("Energy Efficiency Improvement");

- Support the production of clean, renewable energy, including but not limited to a product, device, or interacting group of products or devices on the customer's side of the meter that generates electricity, provides thermal energy, or regulates temperature ("Renewable Energy Improvement");

  - Guidance for Approval of Projects by County and their designees

  ▪ Whereas through Administrative Order No. DEQ-27-2021 and other statewide rules, Oregon has set goals for greenhouse gas emission reductions. The County and its designees should consider prior to approval of any project:
  - Does the project increase emissions or discharge of pollutants? Pollutants are any substance that contaminates air, soil, or water and that in sufficient concentrations contributes to undermining public health.
  - Is the project clean energy? Clean energy is energy that comes from renewable, zero emission sources that do not pollute the atmosphere when used, as well as energy saved by energy efficiency measures.

- Does the project reduce greenhouse gas emissions? The County and its designees may rely upon experts and/or available guidance. This includes, but is not limited to the Oregon DEQ Chart on Carbon Intensity.

- Decrease water consumption or demand and address safe drinking water through the use of efficiency technologies, products, or activities that reduce or support the reduction of water consumption, allow for the reduction in demand, or reduce or eliminate lead from water which may be used for drinking or cooking ("Water Conservation Improvement"); or

- Increase seismic safety through rehabilitation improvements ("Seismic Improvement").

Qualified Projects include the following:

- The acquisition, construction (including new construction), lease, installation, or modification of a Qualified Improvement permanently affixed to an Eligible Property.

- For Renewable Energy Improvements, "permanently affixed" includes Qualified Projects that are subject to a power purchase agreement or lease between the Property Owner/applicant and the owner of the subject renewable energy system, if the power purchase agreement or lease contains all of the following provisions:

  a) The Renewable Energy Improvement relates to a Renewable Resource, which includes: (a) low impact hydropower projects~~water~~; (b) wind; (c) solar energy; (d) geothermal energy; (e) bioenergy from biomass (like manure or wood products) or biogas (like methane); (f) renewable hydrogen; (g) wave, ocean, or tidal power; ~~(h) Alternative fuels such as ethanol, biodiesel, renewable diesel.~~
  b) The term of the power purchase agreement or lease is at least as long as the term of the related Benefit Assessment Agreement.
  c) The owner of the Renewable Energy Improvement agrees to install, maintain, and monitor the system for the entire term of the Benefit Assessment Agreement.
  d) Neither the owner of the Renewable Energy Improvement, nor the Property Owner, nor any successors in interest are permitted to remove the system prior to completion of the full repayment of the C-PACE Lien.
  e) After installation, the power purchase agreement or lease is paid, either partially or in full, using the funds from the C-PACE financing.
  f) The power purchase agreement or lease specifies the holder of the C-PACE Lien is a third-party beneficiary of the power purchase agreement or lease until the C-PACE Lien has been fully repaid.

- Qualified Projects include the refinancing of existing properties that have had Qualified Improvements installed and completed for no more than three (3) years prior to the date of Project Application.

Qualifying Capital Provider may be any of the following:

- a corporation, partnership, or other legal entity that provides proof that it is currently registered as a C-PACE Capital Provider in two different states with C-PACE programs;
- a federal or state-chartered bank or credit union; or
- a private entity, whose principal place of business is located in Oregon state, provided it is licensed or permitted to do business within the state and can produce its most recent audited financial statement or regulatory business filing.

Qualifying costs that can be C-PACE financed include:

- Materials and labor necessary for installation or modification of a Qualified Improvement;
- Permit fees;
- Inspection fees;
- Financing or origination fees;
- Program application and administrative fees;
- Project development, architectural and engineering fees;
- Third-party review fees, including verification review fees;
- Capitalized interest;
- Interest reserves;
- Escrow for prepaid property taxes and insurance;
- Any other fees or costs that may be incurred by the Property Owner incident to the installation, modification, or improvement on a specific or pro rata basis.
- See also the definition of Total Eligible Construction Costs in Section 5(4)(B).

4. Application Process

The Program Guide reduces the administrative burden on participating cities and counties as much as possible. Thus, the County Administrator's Office (or outsourced designee) will review the Project Application Checklist for proof of compliance with the requirements of the statute that are necessary for the City/county to approve the application and execute the applicable documents for the proposed C-PACE transaction. All applicants are encouraged to review the Project Application Checklist accompanying the Application to ensure that the types of information that the City/county will rely upon to verify compliance with the statute are present in the completed Application.

The process of obtaining financing under the Program starts when a Property Owner approaches a Capital Provider. The Capital Provider will work with the Property Owner to collect a number of diligence items. Once all the items have been received, reviewed, and approved by the Capital Provider, the parties should settle on the loan terms.

The general flow of the C-PACE application process will be as follows:

(1) The Property Owner and the Capital Provider prepare the Project Application, consisting of the Project Application Checklist and all supporting documents (described below). Applicants are encouraged to review the Project Application Checklist accompanying the Project Application to ensure that the types of information that the City/county will rely upon to verify compliance with the C-PACE Act and C-PACE Resolution/Ordinance are present in the completed Project Application.

(2) The County Administrator's Office (or outsourced designee) will have 10 business days to review and approve the Project Application. If the office has received an unusually high number of applications, or if review is delayed because of some force majeure event, the office may notify the applicant that the application review and approval will be delayed by no more than 10 additional business days.

(3) The City/county application review process is confined to confirming that the Project Application is complete and all attachments conform to these guidelines. ***City/county approval does not constitute endorsement of any representations that may be made with regard to the operation and any savings associated with the Qualified Improvements. All risk and liability is borne by***

the property owner and capital provider. The County Administrator's Office (or outsourced designee) will review the Project Application for proof of compliance with the requirements of the C-PACE Act and C-PACE Resolution/Ordinance that are necessary for the City/county to approve the Project Application and execute the applicable documents for the proposed C-PACE transaction. Incomplete Project Applications will be returned to the applicant, and the County Administrator's Office (or outsourced designee) will notify the applicant about which items from the Project Application Checklist were not provided or are insufficient or inaccurate on their face. If the Project Application and supporting documents comply with the Project Application Checklist, the Project Application will be approved, and the approval communicated in writing to the applicant.

(4) The Project Application may be conditionally approved if the application is complete but the attachment regarding lender consent is not yet available. Conditional approval will be treated the same as an approval, with exceptions noted below.

(5) Upon receipt of approval, the Capital Provider will draft the following "Closing Documents": The Benefit Assessment Agreement, the Notice of Benefit Assessmentand C-PACE Lien, and the Assignment of the Notice of Assessment and Benefit Assessment Agreement. At or before closing, at the request of the applicant, the designated and authorized official will execute Closing Documents.

(6) If the Project Application received conditional approval, the Closing Documents executed by the City/county may not be released from escrow unless and until all contingencies (including lender consents) have been received and executed in accordance with the Program Guide.

(7) At closing, the City/county will record the Benefit Assessment Agreement, the Notice of Assessment Interest and C-PACE Lien, and the Assignment of the Notice of Assessment Interest and C-PACE Lien in the Office of the Clerk for Deschutes County. At the election of the applicant, the City/county may delegate the recording of the Closing Documents to the applicant or their designee(s).

(8) Upon confirmation of recordation, the Capital Provider will disburse funds in accordance with the Financing Agreement.

(9) The Property Owner begins making assessment payments per the Benefit Assessment Agreement and in accordance with the Financing Agreement

5. Application Documents

The Project Application must be submitted with the following documents appended:

- Project Application Checklist
- Lienholder(s) Consent
- Certificate of Qualified Improvements:

(1) <u>For Renewable Energy Improvements or Energy Efficiency Improvements on an existing building</u>: A certification stating that (a) the proposed Qualified Improvements will either result in more efficient use or conservation of energy or water, the reduction of greenhouse gas emissions, or the addition of renewable sources of energy or water; or (b) the subject property as a whole prior to the installation of the Qualified Improvements does not conform to the meeting

the current building energy or water code for the City/county, but will do so after the Qualified Improvements are installed.

The certification must be performed by a licensed professional engineer or accredited individual or firm from the following list:

- American Society of Heating, Refrigeration, and Air-Conditioning Engineers (ASHRAE)
  - Building Energy Assessment Professional (BEAP)
  - Building Energy Modeling Professional (BEMP)
  - Operations & Performance Management Professional Certification (OPMP)
  - High-Performance Building Design Professional Certification (HBDP)
- Association of Energy Engineers (AEE)
  - Certified Energy Manager (CEM)
  - Certified Measurement and Verification Professional (CMVP)
  - Certified Energy Auditor (CEA)
- Building Performance Institute
  - Energy Auditor
- Investor Confidence Project
  - ICP Quality Assurance Assessor

Other professional entities may be accepted by the County at its discretion.

(2) For Renewable Energy Improvements that are solar photovoltaics, a North American Board of Certified Energy Practitioners (NABCEP) PV design specialist certification is acceptable, or a licensed Electrical Engineer, Building Energy Assessment Professional (BEAP), Building Energy Modeling Professional (BEMP), Certified Energy Manager (CEM), Certified Measurement and Verification Professional (CMVP), or Certified Energy Auditor (CEA). Other professional entities may be accepted by the County at its discretion.

(3) For Seismic Improvements on an existing building: A Tier 1 and Tier 2 building performance report that conforms to American Society of Civil Engineers and the Structural Engineering Institute 41 - Basic Performance Objectives for Existing Buildings (unless a Tier 3 evaluation is required by ASCE 41) is required on all Seismic Rehabilitation Improvement projects. All ASCE 41 evaluation must be performed by a State licensed structural engineer. The evaluation must justify the cost measures included in the Application as cost-effective.

(4) For New Construction:

(A) Relating to energy or water efficiency, certification by a licensed professional engineer stating that each proposed Qualified Improvement will enable the subject property to exceed the applicable energy efficiency, water efficiency, or renewable energy code requirements. If the building as a whole performs above code, all energy and water-related improvements are eligible for financing; or, alternatively, 30% of the Total Eligible Construction Costs qualify for C-PACE financing.

(B) "Total Eligible Construction Costs" or "TECC"_means all direct and indirect costs of materials, labor, and soft costs related to the design, installation, and construction of the new structure. Soft costs may include, for example, architecture and engineering fees, energy modeling costs, surveys, and development fees and financing costs. Costs that are excluded from TECC

include the costs of land acquisition, off-site improvements, site permitting, environmental testing and remediation, and equipment not permanently installed on the property.

(5) Term of Benefit Assessment:
For all Qualified Improvements, the licensed engineer, individual or firm providing the certification of eligibility of the Qualified Improvements must attest that the proposed term of the financing does not exceed the weighted average effective useful life of the proposed Qualified Improvements and that the Qualified Improvements are permanently affixed, as described in this Guidebook.

6. Closing Documents

The following documents require the signature of the City/county and shall be part of the closing of any C-PACE transaction. Each document must be substantially similar in substance to the forms provided, although it is expected that Property Owners and Capital Providers will negotiate variations tailored to their specific projects:

- Benefit Assessment Agreement
- Notice of Benefit Assessment and C-PACE Lien
- Assignment of Notice of Benefit Assessment and C-PACE Lien and Benefit Assessment Agreement

7. Interest Rates

Interest rates are negotiated in a Financing Agreement between the Property Owner and the Capital Provider. A City/county has no role in reviewing, setting, or opining on such interest rates or other aspects of the Financing Agreement. Market forces – such as competition, the intended use of the property, potential risk –will affect the terms negotiated by the Property Owners and Capital Providers.

8. Billing and Collection of Assessments

Billing, collection and enforcement of delinquent C-PACE Liens or C-PACE financing installment payments, including foreclosure, remain the responsibility of the Capital Provider, and the terms are negotiated within the Financing Agreement.

9. Enforcement of C-PACE Lien

At the Capital Provider's discretion, a delinquent account can be referred to the County for enforcement through the Local Improvement District collection process outlined in ORS 223.505 to 223.650. The County is entitled to recover its costs during the enforcement proceeding. Further details are in the Capital Provider agreement in the Program Documents.

10. Program Fee

The County, as compensation for time and costs incurred in the establishment of the C-PACE Program, including the C-PACE Resolution/Ordinance, this Guidebook, the draft documents, as well as for reviewing a Project Application for completeness and executing the Benefit Assessment Agreement, C-PACE Lien,

and Assignment, is entitled to a fee equal to 1% of the amount financed by the Property Owner, or a minimum of $2,500 and capped at a total of no more than $15,000. The Property Owner must pay this fee to the County at the closing of the transaction between the Property Owner and the Capital Provider, and such payment is a condition precedent to recording.

11. Term of a Benefit Assessment; Calculation of Useful Life of Qualified Improvements

The maximum term of a Benefit Assessment may not exceed the useful life of the Qualified Improvement, or weighted average life if more than one Qualified Improvement is included in the Qualified Project.

12. Form of Closing Documents

The Program has adopted form Closing Documents: The Benefit Assessment Agreements, Notice of Benefit Assessment and C-PACE Lien, and Assignment of Notice of Benefit Assessment and Benefit Assessment Agreement. A Property Owner and Capital Provider may adapt the forms to the needs of their particular transaction but must not modify or omit any material substantive terms contained in the forms.

13. Written Consent from Lienholder(s) Required

Before entering into a Benefit Assessment Agreement with the County, and pursuant to Oregon Statutes 223.680(6)(a) and (b) and 223.685(5)(a) and (b), the Capital Provider must obtain, and the Project Applications must show proof of notice and written consent for the placement of the assessment and C-PACE Lien from any holder of a lien, mortgage, or security interest in the real property.

If the consents are executed at closing, the signatures of the County to the Closing Documents will be held in escrow and will not be released until the consents are obtained. After closing, at the election of the County Administrator's Office (or outsourced designee), an amended Project Application with the consents attached must be sent to the County. Capital Providers are responsible for providing their own form of consent that conforms to the C-PACE Resolution/Ordinance and C-PACE Act.

14. Provisions for Marketing and Participant Education

This Guidebook will be made available to the public on the County website. ~~It is determined that there is no need for marketing and participant education at this time.~~ It is presumed that Property Owners and Capital Providers understand the principles and processes associated with C-PACE financing and will look to the Guidebook for understanding and clarification of the County Program.

15. County Has No Liability or Financial Responsibility

As detailed in the Benefit Assessment and Assignment Agreements, neither the County, its governing body, executives, or employees are personally liable as a result of exercising any rights or responsibilities granted under this Program. The County shall not pledge, offer, or encumber its full faith and credit for any lien amount under the C-PACE program. No public funds may be used to repay any C-PACE financing obligation.

AGENDA REQUEST & STAFF REPORT

MEETING DATE: April 20, 2022

SUBJECT: Pence Contractors: Sheriff's Office 2nd Floor Remodel

RECOMMENDED MOTION:
Move approval of County Administrator signature of services contract in the amount of $171,500 with Pence Contractors, LLC for a remodel on the 2nd floor of the Sheriff's Office Administration Building.

BACKGROUND AND POLICY IMPLICATIONS:

Pence Contractors to provide all materials and labor to remodel offices and conference room on second floor in existing Sheriff's Office administration building (Station 10) located at 63333 West Highway 20 in Bend, Oregon. This project enables more efficient use of existing lobby, reception and conference room space by converting existing conference room and reception area into three private offices, and open lobby space into new conference room.

Scope of work is based on drawings and specifications prepared by Pinnacle Architecture, Inc. and its sub-consultants titled "Permit Set" and dated January 12, 2022. The Facilities Department conducted an informal solicitation process with three firms responding. Pence Contractors provided the lowest responsive proposal. This project is budgeted in Sheriff's Office Fund 2550150 430312 for FY 22.

BUDGET IMPACTS:
If approved, the County will enter services contract with Pence Contractors, LLC for $170,500.

ATTENDANCE:
Lee Randall, Facilities Director
Captain Paul Garrison, DCSO

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: April 20, 2022 **Department:** Facilities

Contractor/Supplier/Consultant Name: Pence Contractors LLC

Contractor Contact: John Williamson **Contractor Phone #:** 541-323-3393

Type of Document: Services Agreement

Goods and/or Services: Construction Services

Background & History:
Pence Contractors to provide all materials and labor to remodel offices and conference room on second floor in existing Sheriff's Office building (Station 10) located at 63333 West Highway 20 in Bend, Oregon. This project enables more efficient use of existing lobby, reception and conference room space by converting existing conference room and reception area into three private offices, and open lobby space into new conference room.

Scope of work is based on drawings and specifications prepared by Pinnacle Architecture, Inc. and its sub-consultants titled "Permit Set" and dated January 12, 2022.

This Project is budgeted in Sheriff's Office Fund 2550150 430312 for FY 22.

Agreement Starting Date: April 20, 2022 **Ending Date:** September 30, 2022

Annual Value or Total Payment: $171,500

☒ Insurance Certificate Received (check box)
Insurance Expiration Date: May 01, 2022

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: (Included in current budget? ☒ Yes ☐ No

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

4/13/2022

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: Lee Randall **Phone #:** 541-617-4711

Department Director Approval: ______________________ ________________
Signature Date

Distribution of Document: Documents to be returned to Facilities Department.

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 **2022-303**

For Recording Stamp Only

DESCHUTES COUNTY SERVICES CONTRACT
CONTRACT NO. 2022-303

This Contract is between DESCHUTES COUNTY, a political subdivision of the State of Oregon, acting by and through the Facilities Department (County) and **PENCE CONTRACTORS LLC**, (Contractor). The parties agree as follows:

Effective Date and Termination Date. The effective date of this Contract shall be **April 18, 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 **September 30, 2022**, 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 1-8 and Exhibits 1-7.

CONTRACTOR DATA AND SIGNATURE

Contractor Address: 1051 NW Bond Street, Suite 310, Bend, OR 97701

Federal Tax ID# 22-3878410

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 6 and, if applicable, Exhibit 4.

Signature ______________________ Title ______________________

Printed Name ______________________ 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__

DESCHUTES COUNTY ADMINISTRATOR

____
Nick Lelack

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.
   f. 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. Contractor shall name ***Deschutes County, its officers, agents, employees, volunteers and Otak, Inc. dba Otak CPM as additional insureds under their Commercial General Liability and Automobile Liability policies.***

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.
    h. 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. To the extent any provision of DCC 2.37.150 is inconsistent with a provision of this Contract, DCC 2.37.150 shall govern. Such code section may be found at the following URL address: https://deschutescounty.municipalcodeonline.com/book?type=ordinances#name=2.37.150_Standard_Contract_Provisions.

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, the Contractor shall indemnify and hold harmless the Owner, and its agents and employees of any of them from and against third party claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such third party claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable.
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 on 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:
Pence Contractors LLC
John Williamson, Project Executive
1051 NW Bond Road, Suite 300
Bend, OR 97701
(541) 323-3393 / John.Williamson@Pence.net

To County:
Deschutes County Facilities
Lee Randall, Director
PO Box 6005
Bend, OR 97708
(541) 617-4711 / Lee.Randall@Deschutes.org

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.

EXHIBIT 1
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-303
STATEMENT OF WORK, COMPENSATION, PAYMENT TERMS and SCHEDULE

1. **Contractor shall perform the following work:** Remodel existing Sheriff's office building located at 63333 West Highway 20 in Bend, Oregon. Scope of work is based on drawings and specifications prepared by Pinnacle Architecture, Inc. its subconsultants dated January 12, 2022, titled "Permit Set."

   The County and Contractor agree to the following scope reductions from original bid amount:
   1) Delete ADA Allowance and associated mark-ups.
   2) Soffit to remain in existing Conference 235.
   3) Ceiling grid and ACT to remain in existing Waiting 209.
   4) Delete transom at new door frames F2 and FG; delete 3'-5" sidelight at new door frame FG.
   5) Floor box to remain in existing Conference 235.
   6) Re-use existing light fixtures in Admin 210.

2. **County Services.** County shall provide the contractor, at County's expense, with material and services described as follows:
   a. Structural (building) permit by County. All other permits by Contractor.
   b. Survey and testing of hazardous materials complete February 2022.

3. **Consideration.**
   a. County shall pay Contractor on a fee-for-service basis at the rate based on progress against the approved Schedule of Values of the Project.

   b. Contractor shall be entitled to reimbursement for expenses as set forth in Exhibit 5
   ☐ **YES** ☒ **NO** [Check one]

4. **The maximum compensation.**
   a. The maximum compensation under this contract, including allowable expenses, is **$171,500.00**
   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: **Within fourteen (14) days after issuance of Notice to Proceed, Contractor shall submit a Project Schedule and Schedule of Values prior to commencement of Work.**
   b. County will only pay for completed work that conforms to this schedule.
   c. Contractor to provide weekly updates so Owner can coordinate access to site.

6. **Oregon Bureau of Labor & Industries required provisions.**
   a. Workers will not be paid less than the applicable prevailing wage rates in accordance with ORS 279C.838 and 279C.840.
   b. When projects are subject to both State Prevailing Wage law and Federal Davis Bacon law, workers must be paid not less than the higher of the applicable State or Federal rate.
   c. If the Contractor fails to pay for labor or services, Deschutes County may be required to withhold payment to Contractor and pay for labor or services directly.
   d. Daily, weekly, weekend and holiday overtime will be paid as required in ORS 279C.540.
   e. Contractor/employer must give a written schedule to all employees showing the number of hours per day and days per week that is required to work.
   f. Contractor/employer must promptly pay for any medical services they have agreed to pay.
   g. Contractor must file a Public Works Bond with CCB prior to starting work on this project, unless exempt. Every subcontractor shall file a Public Works Bond with CCB prior to starting work on this project, unless exempt.

EXHIBIT 2
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-303
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: **Pence Contractors LLC**

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
☐ $1,000,000	☐ $2,000,000
☐ $2,000,000	☐ $3,000,000
☐ $3,000,000	☐ $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 [check one]

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

Per Single Claimant and Incident	All Claimants Arising from Single Incident
☒ $1,000,000	☒ $2,000,000
☐ $2,000,000	☐ $3,000,000
☐ $3,000,000	☐ $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 and Otak, Inc. dba Otak CPM, 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 and Otak CPM 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 and Otak CPM shall be narrowed to the maximum amount of protection allowed by law.

☒ Required by County ☐ Not required by County [check one]

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 [check one]

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

___________________________________ ___________________
Signature Date

____
Printed Name

EXHIBIT 3
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-303
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	Printed Name	Title	Date

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	Printed Name	Title	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	Printed Name	Title	Date

EXHIBIT 4
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-303
WORKERS' COMPENSATION EXEMPTION CERTIFICATE

NOTE: 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.

Contractor Signature	Printed Name	Title	Date

EXHIBIT 5
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-303
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 11/8/06.
      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. <u>Mileage</u>. 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. <u>Meals</u>.
      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:
         (1) Breakfast, $14;
         (2) Lunch, $16;
         (3) Dinner, $29.
      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:
         (1) Breakfast expenses are reimbursable if Contractor is required to travel more than two (2) hours: <u>before</u> the start of Contractor's regular workday (i.e., 8:00 a.m.).
         (2) 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.
         (3) 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 fare 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. 2022-303
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	Printed Name	Title	Date

REVIEWED

LEGAL COUNSEL

EXHIBIT 7
DESCHUTES COUNTY SERVICES CONTRACT
Contract No. 2022-303
GENERAL CONDITIONS OF THE CONTRACT

For Recording Stamp Only

GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION
Contract No. 2022-303

For the following Project:
Sheriff's Office Second Floor Remodel
63333 West Highway 20
Bend, OR 97703

CONTRACTOR:
Pence Contractors LLC
1051 NW Bond Street, Suite 310
Bend, OR 97701

OWNER:
Deschutes County
% Facilities Department
P.O. Box 6005
Bend, Oregon 97708-6005
Telephone Number: (541) 383-6713
Fax Number: (541) 317-3168

ARCHITECT:
Pinnacle Architecture, Inc.
960 SW Disc Drive, Suite 101
Bend, OR 97702

TABLE OF ARTICLES

1 GENERAL PROVISIONS
2 OWNER
3 CONTRACTOR
4 ADMINISTRATION OF THE CONTRACT
5 SUBCONTRACTORS
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7 CHANGES IN THE WORK
8 TIME

9 PAYMENTS AND COMPLETION
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14 TERMINATION OR SUSPENSION OF THE CONTRACT

ARTICLE 1. GENERAL PROVISIONS

§1.1 Basic Definitions

§1.1.1 The Contract Documents: The Contract Documents consist of those documents listed in the Agreement between Owner and Contractor (hereinafter the "Agreement"), including Modifications issued after execution of the contract. A Modification is: (1) a Contract Amendment, (2) a Change Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the Work issued by Architect/Engineer or Owner. A Contract Amendment is a document signed by Owner and Contractor pursuant to Paragraph 7.1.4.

§1.1.2 The Contract: The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind between (1) Architect/Engineer and Contractor, (2) Owner and any subcontractor or sub-subcontractor, (3) Owner and Architect/Engineer, or (4) any persons or entities other than Owner and Contractor.

§1.1.3 The Work: The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by Contractor to fulfill Contractor's obligations. The Work may constitute the whole or a part of the Project.

§1.1.4 The Project: The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by Owner or by separate contractors.

§1.1.5 The Drawings: The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules, and diagrams.

§1.1.6 The Specifications: The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

§1.1.7 The Project Manual: The Project Manual is a volume assembled for the Work which may include Addenda, prevailing wage requirements, program requirements, and Specifications. **See attachments listed in Instructions to Bidders.**

§1.2 Correlation and Intent of the Contract Documents

§1.2.1 The general intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results. All Contract Documents are intended to be consistent. However, anything provided in one document but not provided in another shall be of like effect as if shown or mentioned in both. This does not constitute a conflict, discrepancy, or error between the two. In the event of directly conflicting provisions, precedence shall be given as follows: (1) Modifications of the Agreement, with those of later date having precedence over those of earlier date; (2) the Agreement; (3) Addenda to the Bid Documents; (4) the General Conditions of the Contract for Construction; (5) the Specifications, with precedence given to Division 1 over Divisions 2-16 and

equal precedence given to Divisions 2-16; (6) the Drawings, with precedence given to figures in the event of any conflict between figures and scaled measurements, and precedence given to large scale drawings in the event of any conflict between large scale drawings and small scale drawings.
§1.2.1.1 Inconsistencies within any one Contract Document, or inconsistencies not otherwise resolved by the above prioritization, shall be resolved in favor of Owner receiving (a) the greater quality or greater quantity of goods, services or performance, or (b) the greater obligation to Owner in the terms and conditions. Both (a) and (b) shall be resolved in Owner's sole discretion.

§1.2.1.2 Except as may be otherwise specifically stated in the Contract Documents, the provisions of the Contract Documents shall take precedence in resolving any conflict, error, ambiguity, or discrepancy between the provisions of the Contract Documents and (1) the provisions of any standard, specification, manual, code, or instruction (collectively, "standards"), whether or not specifically incorporated by reference in the Contract Documents, unless the standards provide the better quality or greater quantity of Work to Owner, in which case the standards shall take precedence; or (2) the provisions of any Laws or Regulations applicable to the performance of the Work (unless such an interpretation of the provisions of the Contract Documents would result in violation of such Law or Regulation).

§1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control Contractor in dividing the Work among subcontractors or in establishing the extent of the Work to be performed by any trade.

§1.2.3 Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

§1.2.4 All Work shall be the best of the respective kinds specified or indicated. Should workmanship or materials be required which are not directly or indirectly called for in the Specifications or shown on the Drawings, but are consistent with the Contract Documents and reasonably inferable by them or standard industry practice, said workmanship or materials shall be the same as similar parts that are detailed, indicated or specified, or shall match or exceed the quality of existing improvements, and Contractor shall understand the same to be implied and provide for the same as fully as if it were particularly described or delineated.

§1.2.5 Contractor has included within the Contract Sum all labor, materials, equipment, and services that are likely to be required for the Project in accordance with the requirements of state laws, local building codes, local building officials, manufacturer's recommendations, building standards, and trade practices. To the extent, if at all, that the Contract Documents contain ambiguities, discrepancies, errors, or omissions, and to the extent, if at all, that there are discrepancies between the Contract Documents and the Project site and surveys (collectively referred to hereafter in this Section as "errors and omissions"), Contractor hereby waives any claims for additional compensation or damages or additional time resulting from any such errors and omissions to the extent Contractor has actually observed, or with the exercise of reasonable care should have observed, those errors and omissions and failed to report them to Owner and Architect/Engineer prior to executing the Agreement.

§1.2.6 All of the Work shall conform strictly to the Contract Documents. No change therefrom shall be made without Contract Modification. Where detailed information is lacking, or should discrepancies appear among the Contract Documents, Contractor shall, in writing, request interpretation or information from Architect/Engineer before proceeding with the Work.

§1.2.7 Reference in the Specifications to an article, device, or piece of equipment in the singular number shall apply to as many such articles as are shown on Drawings or required to complete the

installation. Mention in the Specifications or indication of the Drawings of articles, products, materials, operations or methods requires Contractor to provide and install such items.

§1.3 Capitalization

§1.3.1 Terms capitalized in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles, or (3) the titles of other documents published by the AIA.

§1.4 Interpretation

§1.4.1 In the interest of brevity, the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

§1.4.2 The misplacement, addition or omission of any letter, word, or punctuation mark shall in no way affect the true spirit, intent, or meaning of the Contract Documents.

§1.4.3 The words "shown," "indicated," "noted," "scheduled," or words of like effect, shall be understood to mean that reference is made to the Drawings accompanying the Project Manual.

§1.4.4 Where reference herein is made to products or materials "as approved" or "as selected," selection or approval shall be by Architect/Engineer and Owner.

§1.5 Execution of Contract Documents

§1.5.1 The Contract Documents shall be signed by Owner and Contractor. If either Owner or Contractor or both do not sign all the Contract Documents.

§1.5.2 Execution of the Contract by Contractor is a representation by Contractor that the Contract Documents are full and complete, are sufficient to have enabled Contractor to determine the Cost of the Work and Contract Sum, and to enable Contractor to construct the Work described therein, and otherwise to fulfill all its obligations hereunder, including, but not limited to, Contractor's obligation to construct the Work for an amount not in excess of the Contract Sum on or before the Contract time established in the Agreement. Contractor further acknowledges and declares that it and its subcontractors have visited and examined the site, examined all physical, legal and other conditions affecting the Work, and is fully familiar with all of the conditions thereon and thereunder affecting the same. In connection therewith, Contractor specifically represents and warrants to Owner that it has, by careful examination, satisfied itself as to (1) the nature, location, and character of the Project and the site, including, without limitation, the ground conditions and all structures and obstructions thereon and thereunder, both natural and man-made, and the surrounding area; (2) the nature, location and character of the general area in which the Project is located, including, without limitation, its climactic conditions, available labor supply and labor costs, and available equipment supply and equipment costs; and (3) the available quality and quantity of all materials, supplies, tools, equipment, labor and professional services necessary to complete the Work.

§1.5.3 Contractor recognizes the degree of care required for the specific site construction circumstances with respect to safety, protection of pedestrians, cleanliness of the site, health and other laws, and protection of existing utilities, adjacent streets, and property. In arriving at the contract Sum and the Contract Time, contractor has, as an experienced and prudent contractor, exercised its best judgment and expertise to include the impact of such circumstances upon the Contract Sum and the Contract time.

§1.6 Ownership and Use of Drawings, Specifications and Other Instruments of Service

§1.6.1 The Drawings, Specifications and other documents, including those in electronic form, prepared by Architect/Engineer and Architect/Engineer's consultants are Instruments of Service owned by Owner through which the Work to be executed by Contractor is described. Contractor may retain one record set. Neither Contractor nor any subcontractor, sub-subcontractor, or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications, and other documents prepared by Architect/Engineer or Architect/Engineer's consultants and owned by Owner, and unless otherwise indicated, Owner shall retain all common law, statutory and other reserved rights in addition to the copyrights. All copies of Instruments of Service shall be returned or suitably accounted for to the Owner, on request, upon completion of the Work. The Drawings, Specifications, and other documents prepared by Architect/Engineer and Architect/Engineer's consultants, and copies thereof furnished to Contractor, are for use solely with respect to this Project. They are not to be used by Contractor or any subcontractor on other projects or for additions to this Project outside the scope of the work without the specific written consent of Owner. Contractor and subcontractors are authorized to use and reproduce applicable portions of the Drawings, Specifications, and other documents prepared by Architect/Engineer and Architect/Engineer's consultants appropriate to and for use in the execution of the Work under the Contract Documents. All copies made under this authorization shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications, and other documents prepared by Architect/Engineer and Architect/Engineer's consultants. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of Owner's copyrights or other reserved rights.

§1.6.2 The Contract Documents furnished to Contractor or any subcontractor are owned by Owner and contain proprietary and confidential information for use solely with respect to this Project. During the course of the Work and after its completion, Architect/Engineer, Contractor, subcontractors, and all other persons utilizing the Contract Documents shall keep the Contract Documents (and all information received concerning the Work, the Project, and the affairs of Owner) confidential and not divulge any such information to any other person except as is necessary in conjunction with the performance of the Work or as necessary in any litigation or similar dispute resolution process. Neither the Contract Documents nor the other property and confidential information described herein are to be used by such persons outside the scope of this Project without the prior written consent of Owner. Upon request by Owner, all copies of the Contract Documents shall be returned to Owner upon completion of the Work or upon termination of this Agreement for any reason.

ARTICLE 2. OWNER

§2.1 General

§2.1.1 Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. Owner shall designate in writing a representative who shall have express authority to bind Owner with respect to all matters requiring Owner's approval or authorization. Except as otherwise provided in Paragraph 4.2.1, Architect/Engineer does not have such authority. The term "Owner" means Owner or Owner's authorized representative.

§2.1.2 Owner shall furnish to Contractor, within a reasonable time after receipt of a written request, information which is reasonably necessary and relevant for Contractor to evaluate, give notice of, or enforce claims.

§2.2 Information and Services Required by Owner

§2.2.1 Except for permits and fees, including those required under Paragraph 3.7.1, which are the responsibility of Contractor under the Contract Documents, Owner shall secure and pay for necessary

approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures, or for permanent changes in existing facilities, unless noted otherwise under Paragraph 3.7.1 or within the Contract Documents

§2.2.2 Owner shall furnish surveys describing physical characteristics, legal limitations, and utility locations for the site of the Project and a legal description of the site. Contractor shall be entitled to rely on the accuracy of information furnished by Owner, but shall exercise proper precautions relating to the safe performance of the Work. Any such information, including subsurface characteristics or conditions, that is included in the Contract Documents is specifically incorporated into this Agreement. The furnishing of these surveys and the legal description of the site shall not relieve Contractor of any of its duties under the Contract Documents.

§2.2.3 Information or services required by Owner by the Contract Documents shall be furnished by Owner with reasonable promptness. Any other information or services relevant to Contractor's performance of the Work under Owner's control shall be furnished by Owner after receipt from Contractor of a written request for such information or services.

§2.2.4 The Contract Documents will be furnished to Contractor for use during construction as follows:

.1 Owner will provide electronic copies of all Contract Documents to Contractor.

§2.3 Owner's Right to Stop the Work

§2.3.1 If Contractor fails to correct the Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or fails to carry out the Work in accordance with the Contract documents, Owner may issue a written order to Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of Owner to stop the Work shall not give rise to a duty on the party of Owner to exercise its right for the benefit of Contractor or any other person or entity, including, but not limited to, the surety.
§2.3.1.1 Owner's exercise of its right to stop the Work pursuant to Paragraph 2.3.1 shall not relieve Contractor from any of its responsibilities and obligations under the Contract Documents.

§2.4 Owner's Right to Carry Out the Work

§2.4.1 If Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven (7) day period after receipt of written notice from Owner to commence and continue correction of such default or neglect with diligence and promptness, Owner may, without prejudice to other remedies Owner may have, correct such deficiencies. In such case, an appropriate Change Order shall be issued deducting from payments then or thereafter due Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses (including, but not limited to, construction costs, Owner managerial and administrative time and costs, and delay damages), and compensation for Architect/Engineer's or any other consultant's or contractor's additional services made necessary by such default, neglect or failure. If payments then or thereafter due Contractor are not sufficient to cover such amounts, Contractor shall pay the difference to Owner.

§2.5 Extent of Owner's Rights

§2.5.1 The rights stated in this Article 2 and elsewhere in the Contract Documents are cumulative and not in limitation of any rights of Owner granted in the Contract Documents, at law or in equity.

§2.5.2 In no event shall Owner have control over, charge of, or any responsibility for the construction means, methods, techniques, sequences, or procedures or for the safety precautions and programs in

connection with the Work, notwithstanding however any of the rights and authority granted to Owner in the Contract Documents.

ARTICLE 3. CONTRACTOR

§3.1 General

§3.1.1 Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means Contractor or Contractor's authorized representative.

§3.1.2 Contractor shall perform the Work in accordance with the Contract Documents.

§3.1.3 Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of Architect/Engineer in Architect/Engineer's administration of the Contract, or by tests, inspections, or approvals required or performed by persons other than Contractor.

§3.2 Review of Contract Documents and Field Conditions by Contractor

§3.2.1 Since the Contract Documents are complementary, before starting each portion of the Work, Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by Owner pursuant to Paragraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. Contractor shall notify Architect/Engineer and Owner in writing of any errors, inconsistencies, omissions or ambiguities in the Contract Documents discovered by Contractor. Contractor shall be responsible for any additional costs to Owner resulting from Contractor's failure to verify existing conditions related to any portion of the Work or to report to Architect/Engineer and Owner any errors, inconsistencies, omissions, or ambiguities in the Contract Documents discovered by, or which should have been discovered by, Contractor.
§3.2.1.1 Contractor shall notify Architect/Engineer and Owner in writing of materials, systems, procedures, or methods of construction, either shown on the Drawings or specified in the Specifications, which Contractor discovers are incorrect or inappropriate for the purpose intended, or for which Contractor objects to furnishing the warranties required by the Contract Documents. Architect/Engineer and Owner will make a determination of such matters in writing. Contractor shall be responsible for any additional costs to Owner resulting from Contractor's failure to notify Architect/Engineer and Owner of incorrect or inappropriate materials, systems, procedures, and methods that Contractor knows or should know are incorrect or inappropriate.

§3.2.2 Any design errors or omissions noted by Contractor during this review shall be reported promptly to Architect/Engineer, but it is recognized that Contractor's review is made in Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to Contractor shall be reported promptly to Architect/Engineer.

§3.2.3 If Contractor believes that additional cost or time is involved because of clarifications or instructions issued by Architect/Engineer in response to Contractor's notices or requests for information pursuant to Paragraphs 3.2.1 through 3.2.2, Contractor shall make claims as provided in Paragraphs 4.3.5 through 4.3.7. If Contractor fails to perform the obligations of Paragraphs 3.2.1 and 3.2.2, Contractor shall pay such costs and damages to Owner as would have been avoided if Contractor had performed such obligations. Contractor shall not be liable to Owner or Architect/Engineer for damages

resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents unless Contractor recognized or should have recognized such error, inconsistency, omission or difference and failed to report it to Architect/Engineer or Owner.

§3.2.4 Neither Owner nor Architect/Engineer assume responsibility for any understanding or representation made by their agents or representatives prior to the execution of the Agreement unless such understanding or representation is expressly stated in the Contract Documents.

§3.2.5 Should the Specifications and Drawings fail to particularly describe the material or kind of goods to be used in any place, then it shall be the duty of Contractor to request interpretation or information from Architect/Engineer as to what is best suited. The material that would normally be used in its place to produce first quality finished Work shall be considered a part of the Contract.

§3.3 Supervision and Construction Procedures

§3.3.1 Contractor shall supervise, inspect, and direct the Work using Contractor's best skill and attention. Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under the Contract. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If Contractor knows or should know that such means, methods, techniques, sequences, or procedures may not be safe, Contractor shall give timely written notice to Owner and Architect/Engineer and shall not proceed with that portion of the Work without further written instructions from Architect/Engineer.

§3.3.2 Contractor shall be responsible to Owner for acts and omissions of Contractor's employees, subcontractors, materials suppliers and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of Contractor or any of its subcontractors. It is understood and agreed that the relationship of Contractor to Owner shall be that of an independent contractor. Nothing contained herein or inferable herefrom shall be deemed or construed to (1) make Contractor or any subcontractor the agent, servant or employee of Owner, or (2) create any partnership, joint venture, or other association between Owner and Contractor or any subcontractor.

§3.3.3 Contractor shall be responsible for inspection of portions of the Work already performed to determine that such portions are in proper condition to receive subsequent Work.

§3.4 Labor and Materials

§3.4.1 Unless otherwise provided in the Contract Documents, Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, insurance and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.
§3.4.1.1 Contractor's obligations under Paragraph 3.4.1 shall include, without limitation, the obligation to pay all subcontractors and any other person or entity having bond rights regarding the Project due to their performance of Contractor's obligations under the Contract. Contractor agrees to keep the Project and the Project site free and clear of any and all subcontractor claims (bond claims or otherwise) filed or served by any person or entity at any tier performing the Work or Contractor's obligations under the Contract.

§3.4.1.2 To the fullest extent authorized by law Contractor agrees to indemnify, defend, reimburse and hold harmless (with counsel approved by Owner) Owner and Architect/Engineer from, for, and against any and all claims referenced in Paragraph 3.4.1.1, and actions, suits, or proceedings relating to such claims and any and all related costs and expenses incurred by Owner, including, without limitation, attorneys' fees and expert/consultant fees.

§3.4.1.3 Nothing in Paragraph 3.4.1 shall limit Owner's rights under Paragraph 9.10.

§3.4.2 Contractor may make substitutions only with the written consent of Owner, after evaluation by Architect/Engineer and in accordance with a Modification.

§3.4.3 Contractor shall enforce strict discipline and good order among Contractor's employees and other persons carrying out the Contract. Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them. Contractor shall only employ labor on the Project or in connection with the Work capable of working harmoniously with all trades, crafts, and any other individuals associated with the Project. Contractor shall be responsible for labor peace on the Project and shall at all times make its best efforts and judgment as an experienced contractor to adopt and implement policies and practices designed to avoid work stoppages, slowdowns, disputes, or strikes where reasonably possible and practical under the circumstance and shall at all times maintain Project-wide labor harmony. Except as specifically provided in Paragraph 8.3.1, Contractor shall be liable to Owner for all damages suffered by Owner occurring as a result of work stoppages, slowdowns, disputes, or strikes.

§3.4.4 Subcontractors whose Work is unsatisfactory to Owner or Architect/Engineer, or is considered by Owner or Architect/Engineer to be careless, incompetent, unskilled or otherwise objectionable, shall be dismissed from Work under the Contract upon written notice from Owner or Architect/Engineer. No additional compensation shall be provided to Contractor due to the proper dismissal of a subcontractor by Owner or Architect/Engineer.

§3.4.5 Contractor shall coordinate all Work of like material in order to produce harmony of matching finishes, textures, colors, etc., throughout the various components of the Project.

§3.5 <u>Warranty</u>

§3.5.1 Contractor warrants to Owner and Architect/Engineer that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects, and that the Work will conform to the standards and requirements of the Contract Documents and generally recognized standards of the construction industry, whichever provides the higher standard. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. Except as provided in Paragraph 9.8.4, when a longer warranty time is specifically called for in the Specifications, or is otherwise provided by law, warranty shall be for a period of one year commencing on the date of Substantial Completion, shall be in form and content otherwise satisfactory to Owner. Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by Architect/Engineer, Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§3.5.2 All warranties shall include labor and materials and shall be signed by the manufacturer or subcontractor, as the case may be, and countersigned by Contractor. All warranties shall be addressed to Owner and delivered to Architect/Engineer upon completion of the Work and before or with the Final Payment Application.

§3.5.3 Contractor hereby assigns to Owner effective automatically upon Final Completion of the Work, any and all subcontractors' warranties relating to materials and labor used in the Work, and further agrees to perform the Work in such a manner so as to preserve any and all such warranties.

§3.5.4 Contractor shall collect, assemble in a binder, and provide to Owner written warranties and related documents provided by subcontractors. All such written shall extend to Owner.

§3.6 Taxes

§3.6.1 Contractor shall pay sales, consumer, use, and similar taxes for the Work provided by Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

§3.7 Permits, Fees and Notices

§3.7.1 Unless otherwise provided in the Contract Documents, Owner shall secure and pay for the structural (building) permit and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract, and which are legally required when bids are received or negotiations concluded.

§3.7.2 Contractor shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities applicable to performance of the Work.

§3.7.3 If Contractor knows or should know that portions of the Contract Documents are at variance with applicable laws, statutes, ordinances, building codes, and rules and regulations, Contractor shall promptly notify Architect/Engineer and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

§3.7.4 If Contractor performs Work knowing it to be contrary to laws, statutes, ordinances building codes, and rules and regulations without such notice to Architect/Engineer and Owner, Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

§3.8 Allowances – Not Applicable to this Contract

§3.8.1 Contractor shall include in the Contract Sum all Allowances stated in the Contract Documents. Items covered by Allowances shall be supplied for such amounts and by such persons or entities as Owner may direct, but Contractor shall not be required to employ persons or entities to whom Contractor has reasonable objection.

§3.8.2 Unless otherwise provided in the Contract Documents:

.1 Allowances shall cover the cost to Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts.

.2 Contractor's and subcontractors' costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated Allowance amounts shall be included in the Contract Sum but not in the Allowances; and

.3 Whenever costs are more than or less than Allowances, the Contract Sum shall be adjusted accordingly by Change Order executed by both parties in advance of the excess costs being incurred. The amount of the Change Order shall reflect (a) the difference between actual costs and the Allowances under Paragraph 3.8.2.1, and (b) changes in Contractor's costs under Paragraph 3.8.2.2.

§3.9 Superintendent

§3.9.1 Contractor shall employ a competent superintendent approved by Owner and Architect/Engineer and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent Contractor, and communications given to the superintendent shall be as binding as if given to Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case. The superintendent shall not be replaced without the consent of Owner. Owner shall have the right, which shall be exercised in a reasonable fashion, to require replacement of the superintendent.

§3.10 Contractor's Construction Schedules

§3.10.1 Promptly after being awarded the Contract, Contractor shall prepare and submit for Owner's and Architect/Engineer's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and the Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work. Any float time in the schedule shall belong to the Contractor and may be used by the Contractor to optimize the construction process, manage the success of the project, finish the project early. For any loss of time due to project delays not caused by the Contractor, the schedule shall be extended and the cost for the delay will be compensable.

§3.10.2 Contractor shall prepare and keep current, for Architect/Engineer's approval, a schedule of submittals which is coordinated with Contractor's construction schedule and allows Architect/Engineer reasonable time to review submittals.

§3.10.3 Contractor shall perform the Work in general accordance with the most recent schedules approved by Owner and Architect/Engineer.

§3.10.4 In the event Owner determines that the performance of the Work has not progressed or reached the level of completion required by the Contract Documents, Owner shall have the right to order Contractor to take corrective measures necessary to expedite the progress of construction, including, without limitation (1) working additional shifts or overtime, (2) supplying additional manpower, equipment and facilities, and (3) other similar measures (hereinafter referred to collectively as "Acceleration"), which shall continue until the progress of the Work complies with the stage of completion required by the Contract Documents. The Owner's right to require Acceleration is solely for the purpose of ensuring Contractor's compliance with the construction schedule. Any failure of Owner or Architect/Engineer to require Acceleration shall not relieve Contractor of meeting the schedule, the Contract Time, or any other obligation under the Contract Documents.

§3.10.5 Contractor shall not be entitled to an adjustment in the Contract Sum in connection with Acceleration except to the extent Acceleration was made necessary by reason of Owner's or Architect/Engineer's wrongful acts or omissions.

§3.11 Documents and Samples at the Site

§3.11.1 Contractor shall maintain at the site for Owner one record copy of the Drawings, Specifications, Addenda, Change Orders, Construction Change Directives, and other Modifications, in good order and marked currently to record field changes and selections made during construction, and one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to Owner and Architect/Engineer and shall be delivered to Architect/Engineer

for submittal to Owner upon completion of the Work. Failure to deliver them shall result in Owner withholding Contractor's retainage until they are delivered.

§3.12 Shop Drawings, Product Data and Samples

§3.12.1 Shop Drawings are drawings, diagrams, schedules, and other data specifically prepared for the Work by Contractor or a subcontractor to illustrate some portion of the Work.

§3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by Contractor to illustrate materials or equipment for some portion of the Work.

§3.12.3 Samples are physical examples which illustrate materials, equipment, or workmanship and establish standards by which the Work will be judged.

§3.12.4 Shop Drawings, Product Data, Samples, and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate, for those portions of the Work for which submittals are required by the Contract Documents, the way by which Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by Architect/Engineer is subject to the limitations of Paragraph 4.2.7. Informational submittals upon which Architect/Engineer is not expected to take responsive action may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned by Architect/Engineer without action.

§3.12.5 Contractor shall review for compliance with the Contract Documents, approve and submit to Architect/Engineer Shop Drawings, Product Data, Samples, and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by Contractor may be returned by Architect/Engineer without action.

§3.12.6 By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, Contractor represents that Contractor has determined and verified materials, field measurements, and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

§3.12.7 Contractor shall perform no portion of the Work for which the Contract Documents required submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by Architect/Engineer.

§3.12.8 The Work shall be in accordance with approved submittals except that Contractor shall not be relieved of responsibility for deviation from requirements of the Contract Documents by Architect/Engineer's approval of Shop Drawings, Product Data, Samples, or similar submittals unless (1) Contractor has specifically informed the Architect/Engineer in writing of such deviation at the time of submittal and the Architect/Engineer has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. Contractor shall not be relieved of responsibility for errors or omissions in shop Drawings, Product Data, Samples, or similar submittals by Architect/Engineer's approval thereof.

§3.12.9 Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples, or similar submittals, to revisions other than those requested by Architect/Engineer on previous submittals. In the absence of such written notice, Architect/Engineer's approval of a resubmission shall not apply to such revisions.

§3.12.10 Contractor shall not be required to provide professional services which constitute the practice of Architect/Engineer unless such services are specifically required by the Contract Documents for a portion of the Work or unless Contractor needs to provide such services in order to carry out Contractor's responsibilities for construction means, methods, techniques, sequences, and procedures. Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of Contractor by the Contract Documents, Owner and Architect/Engineer will specify all performance and design criteria that such services must satisfy. Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, and certifications. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to Architect/Engineer. Owner and Architect/Engineer shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications, or approvals performed by such design professionals, provided Owner and Architect/Engineer have specified to Contractor applicable performance and design criteria that such services must satisfy. Pursuant to this Paragraph 3.12.10, Architect/Engineer will review, approve, or take other appropriate action on submittals only for the limited purpose (unless Owner requests otherwise) of checking for conformance with information given and the design concept expressed in the Contract Documents. Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents; however, Contractor shall notify Architect/Engineer if additional performance or design criteria are required in accordance with Paragraph 3.2.

§3.12.11 Owner shall be entitled to deduct from the Contract Sum amounts paid to Architect/Engineer for evaluation of any additional resubmittals by Contractor to the extent such resubmittals by Contractor are not the fault of Owner or Architect/Engineer.

§3.13 <u>Use of Site</u>

§3.13.1 Contractor shall confine operations at the site to areas and times permitted by law, ordinances, permits, and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

§3.14 <u>Cutting and Patching</u>

§3.14.1 Contractor shall be responsible for cutting, fitting, or patching required to complete the Work or to make its parts fit together properly.

§3.14.2 Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. Contractor shall not cut or otherwise alter such construction by Owner or a separate contractor except with written consent of Owner and of such separate contractor; such consent shall not be unreasonably withheld. Contractor shall not unreasonably withhold from Owner or a separate contractor Contractor's consent to cutting or otherwise altering the Work.

§3.15 <u>Cleaning Up</u>

§3.15.1 Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, Contractor shall remove from and about the Project waste materials, rubbish, Contractor's tools, construction equipment, machinery, and surplus materials.

§3.15.1.1 Unless otherwise specified in the Contract Documents, Contractor shall not be required to clean up debris or rubbish resulting from operations of Owner or Owner's separate contractors.

§3.15.2 If Contractor fails to clean up as provided in the Contract documents, Owner may do so and the cost thereof shall be charged to Contractor.

§3.16 **Access to Work**

§3.16.1 Contractor shall provide Owner and Architect/Engineer safe access to the Work in preparation and progress wherever located.

§3.17 **Royalties, Patents and Copyrights**

§3.17.1 Contractor shall pay all royalties and license fees. Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall indemnify, reimburse and hold Owner and Architect/Engineer harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process, or product of a particular manufacturer or manufacturers is required by the Contract Documents or where the copyright violations are contained in Drawings, Specifications, or other documents prepared by Owner or Architect/Engineer. However, if Contractor has reason to believe that the required design process or product is an infringement of a copyright or a patent, Contractor shall be responsible for such loss unless such information is promptly furnished to Architect/Engineer.

§3.18 **Indemnification**

§3.18.1 To the fullest extent permitted by law, Contractor shall indemnify, defend, reimburse, protect and hold harmless Owner and its commissioners, executives, managers, directors, officers, agents, attorneys, employees and designees (individually and collectively the "Indemnified Parties") from all claims under the workers' compensation acts and other employee benefit acts with respect to Contractor's employees or its subcontractors' employees. The obligation under this Paragraph shall not be limited in any way by any limitation on amount or type of damages, compensation or benefits payable by or for Contractor or any subcontractor under workers' or workmen's compensation acts, including that of the State of Oregon, United States Longshoremen's and Harbor Workers' Act, Jones Act, or any workers' compensation disability or other employee benefit-state or federal.

§3.18.2 To the fullest extent permitted by law, Contractor shall also indemnify, defend, reimburse, protect, and hold harmless the Owner/Indemnified Parties from all other claims and damages including, but not limited to, economic damages and damages to personal or real property, including the Project itself, and all costs, expenses, losses, injuries, personal or otherwise, including, but not limited to, sickness, disease, and death, and all claims, suits, actions, judgments, orders, awards and liabilities (collectively, "Damages") resulting from or arising out of the Work or the Project to the extent the Damages directly or indirectly arise out of or result from breach of contract, negligence, intentional acts, errors or omissions or other improper conduct of Contractor or its subcontractors, employees, or agents in connection with their obligations stated in this Agreement. The coverage of the obligations contained in this Paragraph shall include, without limitation, attorneys' fees, expert consultant fees, and court/arbitration costs incurred by Owner in connection with any of the foregoing. Payment to third party by an Owner/Indemnified Party shall not be a condition precedent to enforcing such party's right sunder this Paragraph. The obligations set forth in this Paragraph shall apply during the term of this Agreement (or Contractor's performance thereof), and shall survive the expiration or termination of this Agreement until such time as action against the Indemnified Parties on account of any matter covered by this Paragraph is barred by the applicable statute of limitations, Contractor shall insure specifically the obligations contained in this Paragraph and shall include the Owner/Indemnified Parties as named additional insureds by causing amendatory riders or endorsements to be attached to the insurance

policies as described in Article 11 herein. The insurance coverage afforded under these policies shall be primary to any insurance carried independently by the Owner/Indemnified Parties. Said amendatory riders or endorsements shall indicate that, with respect to the Owner/Indemnified Parties, there shall be severability of interests under said insurance policies for all coverage provided under said insurance policies.

§3.19 Maintenance and Inspection of Contractor's Books and Records

§3.19.1 Contractor shall maintain all fiscal records in accordance with generally accepted accounting principles. In addition, Contractor shall maintain all other records necessary to clearly document Contractor's performance and any claims arising from or relating to Contractor's performance. Contractor shall permit Owner to audit and otherwise have prompt access at all times to all of Contractor's records, correspondence, account books, bills, invoices, cancelled checks, payrolls, labor records, daily logs, and other records relating to the Contract, to the Work, and to Contractor's costs. For these purposes, Contractor shall preserve at its expense all such records for the longer of (1) six years after the Final payment hereunder, (2) if any part of the Contract is involved in litigation, until the litigation is resolved, or (3) such longer period as provided by law.

§3.20 Statement of Compliance with Contract Documents

§3.20.1 Within seven (7) days of Owner's request, Contractor shall execute and deliver to Owner a certificate addressed to Owner concerning the compliance of the Work with the Contract Documents and applicable laws and regulations, the status of completion of the Work, and the status of payments and defaults.

§3.21 Nondiscrimination

§3.21.1 Contractor shall not discriminate based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, gender identity, source of income, veteran status or political affiliation in programs, activities, services, benefits or employment. Contractor shall not discriminate against minority-owned, women-owned, or emerging small businesses. Contractor shall include a provision in each subcontract requiring subcontractors to comply with the requirements of this Paragraph.

ARTICLE 4. ADMINISTRATION OF THE CONTRACT

§4.1 Architect/Engineer

§4.1.1 Architect/Engineer is the person lawfully licensed to practice Architect/Engineering or an entity lawfully practicing Architect/Engineering identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Architect/Engineer" means Architect/Engineer or Architect/Engineer's authorized representative. If the design professional retained by Owner for the Work to be done under this Agreement is an Engineer, the term "Architect/Engineer" as used in this Agreement shall refer to the Engineer.

§4.1.2 Duties, responsibilities and limitations of authority of Architect/Engineer as set forth in the Contract Documents shall not be restricted, modified, or extended without written consent of Owner and Architect/Engineer.

§4.1.3 In the event of a termination of Architect/Engineer or a restriction of the duties, responsibilities or authority of Architect/Engineer as described in the contract Documents, Owner itself or through another licensed Architect/Engineer shall carry out those duties, responsibilities, and authority of Architect/Engineer.

§4.1.4 Owner and Contractor acknowledge and agree that nothing in Architect/Engineer's engagement implies any undertaking by Architect/Engineer for the benefit of, or which may be enforced by, Contractor, its subcontractors, or the surety of any of them, it being understood and agreed that Architect/Engineer's obligations are to Owner.

§4.2 Architect/Engineer's Administration of the Contract

§4.2.1 Architect/Engineer will provide administration of the Contract as described in the Contract Documents and for the duration provided in the agreement between Architect/Engineer and Owner. Architect/Engineer will have authority to act on behalf of Owner only to the extent provided in the Contract Documents, unless otherwise modified in writing in accordance with other provisions of the Contract.

§4.2.2 Architect/Engineer, as a representative of Owner, will visit the site as provided in the agreement between Architect/Engineer and Owner. However, Architect/Engineer will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. Architect/Engineer shall report to Owner any deviations from the Contract Documents that Architect/Engineer is aware of or reasonably should be aware of, and Architect/Engineer is responsible to Owner for any failures in this regard. However, other than its reporting requirements to Owner, Architect/Engineer will neither have control over or charge of, nor be directly responsible for the construction means, methods, techniques, sequences, or procedures (unless Architect/Engineer has specified such means, methods, techniques, sequences, or procedures in the Contract Documents) nor for the safety precautions and programs in connection with the Work, since these are Contractor's rights and responsibilities under the Contract documents, except as provided in Paragraph 3.3.1. Architect/Engineer shall promptly submit to Owner a written report subsequent to each on-site visit.

§4.2.3 Architect/Engineer shall report to Owner known deviations or those deviations that should be known from the most recent construction schedule submitted by Contractor. However, other than this reporting requirement to Owner, Architect/Engineer will not be directly responsible for Contractor's failure to perform the Work in accordance with the construction schedule. Architect/Engineer will be responsible for its negligent acts or omissions, but shall not have control over or charge of and will not be directly responsible for acts or omissions of Contractor, subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work unless such acts are performed consistent with the direction of Architect/Engineer.

§4.2.4 Based on Architect/Engineer's evaluations of Contractor's Applications for Payment, Architect/Engineer will review and certify the amounts due Contractor and will issue Certificates for Payment in such amounts.

§4.2.5 Architect/Engineer will have authority to reject Work that does not conform to the Contract Documents. Whenever Architect/Engineer considers it necessary or advisable, Architect/Engineer will have authority to require inspection or testing of the Work in accordance with Paragraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed, or completed. However, neither this authority of Architect/Engineer nor a decision made in good faith either to exercise or not to exercise such authority, shall give rise to a duty or responsibility of Architect/Engineer to Contractor, subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§4.2.6 Architect/Engineer will review in reasonable detail and approve or take other appropriate action upon Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose (unless Owner requests otherwise) of checking for conformance with information given and the design concept expressed in the Contract Documents. Architect/Engineer's action will be taken

with such reasonable promptness as to cause no delay in the Work or in the activities of Owner, Contractor or separate contractors, while allowing sufficient time in Architect/Engineer's professional judgment to permit adequate review. Unless Owner requests otherwise, review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details, such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of Contractor as required by the Contract Documents. Architect/Engineer's review of Contractor's submittals shall not relieve Contractor of the obligations under Paragraph 3.3, 3.5 and 3.12. Architect/Engineer's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by Architect/Engineer, of any construction means, methods, techniques, sequences, or procedures. Architect/Engineer's approval of a specific item shall not indicate approval of an assembly of which the item is a component. Architect/Engineer, however, shall report to Owner any concerns regarding accuracy, completeness, safety, and conformity with the Contract Documents that Architect/Engineer is aware of or reasonably should be aware of as a result of Architect/Engineer's reasonably detailed review of Contractor's submittals.

§4.2.7 Architect/Engineer shall prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Paragraph 7.4.

§4.2.8 Architect/Engineer will conduct inspections to determine the date or dates of Substantial Completion and will receive from Contractor and forward to Owner for Owner's review and records, written warranties and related documents required by the Contract Documents and assembled by Contractor.

§4.2.9 If Owner and Architect/Engineer agree, Architect/Engineer will provide one or more project representatives to assist in carrying out Architect/Engineer's responsibilities at the site. The duties, responsibilities, and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

§4.2.10 Architect/Engineer will interpret and make recommendations concerning performance of Contractor on written request of Owner. Architect/Engineer's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§4.2.11 Interpretations and recommendations of Architect/Engineer will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings.

§4.2.12 Architect/Engineer shall advise, counsel, and guide Owner with respect to initial decisions on claims, disputes, or other matters in question between Owner and Contractor.

§4.3 Claims and Disputes

§4.3.1 Definition: A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

§4.3.2 Time Limits on Claims: Claims by Contractor must be made as soon as possible, but in any event no later than thirty (30) days after occurrence of the event giving rise to such Claim or within thirty (30) days after Contractor first recognizes, or reasonably should have recognized, the condition giving rise to the Claim, whichever is later; provided, however, Contractor shall cooperate with Architect/Engineer and Owner in an effort to mitigate the alleged or potential damages, delay, or other adverse consequences arising out of the condition which is the cause of such a Claim. Failure to make

a Claim within the thirty (30) day timeframe will result in Contractor's waiver of the Claim and all related damage. Claims must be made by written notice. Claims must contain reasonably detailed information (including all supporting documents) sufficient to allow meaningful review by Owner and Architect/Engineer. Contractor must provide all impacts to the Contract Time and Contract Sum at the time the Claim is submitted. Failure to do so will result in Contractor's waiver of the Claim and all related damage.

§4.3.3 Continuing Contract Performance: Pending final resolution of a Claim, except as otherwise directed by Owner in writing or provided in Paragraph 9.7.1 and Article 14, Contractor shall proceed diligently with performance of the Contract, and Owner shall continue to make approved payments in accordance with the Contract Documents.

§4.3.4 Claims for Concealed or Unknown Conditions: If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or otherwise known to (or should have been known to) Contractor, or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, and should not have been known to Contractor, then written notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than fourteen (14) days after first observance of the conditions. Owner will promptly investigate such conditions and, if they differ materially from what Contractor knew or should have known and cause an increase or decrease in Contractor's cost of or time required for performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If Owner determines that the conditions at the site are not materially different from those indicated in the Contract Documents or that otherwise should have been known to Contractor, and that no change in the terms of the Contract is justified, Owner shall so notify Contractor in writing, stating the reasons. Claims by Contractor in opposition to such determination must be made within thirty (30) days after Owner has given notice of the decision. If Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment determination shall be referred to arbitration as provided herein. It is expressly agreed that no adjustment in the Contract Time or Contract Sum shall be permitted in connection with a concealed or unknown condition which does not differ materially from those conditions disclosed or which reasonably should have been disclosed by Contractor's (1) prior inspections, tests, reviews and preconstruction services for the Project, or (2) inspections, tests, reviews and preconstruction services which Contractor had the opportunity to or should have performed in connection with the Project.

§4.3.5 Claims for Additional Cost: If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.6. Any change in the Contract Sum resulting from such Claim shall be authorized by written Modification.

§4.3.6 If Contractor believes additional cost is involved for reasons including, but not limited to (1) a written interpretation from Architect/Engineer, (2) an order by Owner to stop the Work where Contractor was not at fault, (3) a written order for a minor change in the Work issued by Architect/Engineer, (4) failure of payment by Owner, (5) termination of the Contract by Owner, (6) Owner's suspension, or (7) other reasonable grounds, Claim shall be filed in accordance with this Section 4.3.

§4.3.7 Claims for Additional Time:
§4.3.7.1 If Contractor wishes to make Claim for an extension in the Contract Time, written notice as provided herein shall be given to Owner. Such notice shall include detailed documentation of the cause or event resulting in the need for the extension of time and a critical path schedule analysis based upon the approved Contractor's construction schedule showing the impact of the cause or event on the

critical path of the approved Contractor's schedule. Failure to do so will result in Contractor's waiver of the Claim and all related damages. In the case of a continuing delay, only one Claim is necessary.

§4.3.7.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be valid only to the extent documented by data substantiating that weather conditions were (1) abnormal for the period of time, (2) could not have been reasonably anticipated, and (3) had an adverse effect on the scheduled construction. A notice of Claim for additional time due to adverse weather conditions shall include the monthly issue of *Local Climatological Data – Bend, Oregon* for the months involved, plus the "Normals, Means and Extremes" table from the latest *Annual Summary of Local Climatological Data – Bend, Oregon*, both of which are published by the US Department of Commerce, National Oceanic and Atmospheric Administration, national Climatic Data Center located in Asheville, NC 28801. Failure to do so will result in Contractor's waiver of the Claim and all related damages. Unless otherwise agreed by Owner and Contractor, the "Normals, Means and Extremes" table shall be the basis for determining the number of adverse weather days and the effect on the Work resulting therefrom which Contractor should have expected to encounter.

§4.3.8 Injury or Damage to Person or Property: If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding thirty (30) days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

§4.3.9 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§4.3.10 Claims for Consequential Damages: The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

1. Damages incurred by the Owner for rental expenses, for loss of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. Damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for the losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from the Work.

§4.4 Resolution of claims and Disputes

§4.4.1 Owner will review Claims and within thirty (30) days of the receipt of the claim take one or more of the following actions: (1) request additional supporting data from the claimant, (2) reject the Claim in whole or in part, (3) approve the Claim, or (4) suggest a compromise.

§4.4.2 In evaluating Claims, Owner may, but shall not be obligated to, consult with or seek information from either Contractor, Architect/Engineer, or from persons with special knowledge or expertise who may assist Owner in rendering a decision.

§4.4.3 If Owner requests Contractor to furnish additional supporting data, Contractor shall respond, within seven (7) days after receipt of such request, and shall either provide a response on the requested supporting data, advise Owner when the response or supporting data will be furnished, or advise Owner that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, Owner will either reject or approve the Claim in whole or in part.

§4.4.4 Owner will approve or reject Claims by written decision which shall state the reasons therefore and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by Owner shall be subject to mediation and arbitration as provided herein.

§4.4.5 When a written decision of Owner states that (1) the decision is final but subject to mediation and arbitration, and (2) a demand for arbitration of a Claim covered by such decision must be made within thirty (30) days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said thirty (30) days shall result in Owner's decision becoming final and binding upon Contractor.

§4.4.6 Upon receipt of a Claim against Contractor or at any time thereafter, Architect/Engineer or Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the claim. If the Claim relates to a possibility of Contractor's default, Architect/Engineer or Owner may, but is not obligated to, notify the surety or request the surety's assistance in resolving the controversy.

§4.5 Mediation

§4.5.1 Any claim, dispute, or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

§4.5.2 Owner and Contractor shall endeavor to resolve claims, disputes, and other matters in question between them by mediation. Request for mediation shall be filed in writing with the other party to this Agreement. The request may be made concurrently with the filing of a demand for arbitration, but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of sixty (60) days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

§4.5.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Written and executed agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§4.6 Arbitration

§4.6.1 Any claim, dispute or matter in question arising out of or related to this Agreement shall be decided by arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Section 4.5.

§4.6.2 The demand for arbitration shall be filed in writing with the other party to this Agreement. The parties shall mutually select a single arbitrator for cases with less than One Million Dollars ($1,000,000.00) in dispute, and a panel of three arbitrators for cases involving One Million Dollars ($1,000,000.00) or more in dispute. Each party shall be entitled to reasonable discovery in the arbitration. The parties agree to exchange all expert reports prepared for purposes of giving testimony in the arbitration, whether or not such reports will be introduced in the arbitration, thirty (30) days prior to the arbitration.

§4.6.3 A demand for arbitration shall be made within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on said Claim would be barred by the applicable period of limitations. For all claims by Owner against Contractor, the applicable period of limitations shall not commence to run, and any alleged cause of action shall not be deemed to have accrued (whether such action involves negligence, strict liability,

indemnity, intentional tort or other tort, breach of contract, breach of implied or express warrant, or any other legal or equitable theory), unless and until Owner is fully aware of all three of the following: (1) the identity of the part(ies) responsible, (2) the magnitude of the damage or injury, and (3) the cause(s) of the damage or injury. Claims for indemnity shall not begin to run until Owner has actually paid out or otherwise actually incurred the injury or damage. The discovery rule provided herein applies in lieu of any otherwise applicable statute or related case law.

§4.6.4 Consolidation or Joinder. Any arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner, any additional persons or entities if (1) such persons or entities are materially involved in a common issue of law or fact in dispute, and (2) such persons or entities are either contractually bound to arbitrate or otherwise consent to arbitration. If for any reason a party whose presence is required for complete relief to be accorded in the arbitration cannot be joined in the arbitration, Owner may elect to forego arbitration and litigate the dispute. In such event, the parties agree to exchange expert reports in the litigation as provided in Paragraph 4.6.2. The foregoing agreement to arbitrate shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

§4.6.5 Judgment on Final Award. The award rendered by the arbitrator or arbitrators (unless unlawful) shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 5. SUBCONTRACTORS

§5.1 Definitions

§5.1.1 A Subcontractor is a person or entity who has a direct contract with Contractor to perform a portion of the Work at the site. The term “subcontractor” is referred to throughout the Contract Documents as if singular in number and means a subcontractor or an authorized representative of the subcontractor. The term “subcontractor” does not include a separate contractor or subcontractors of a separate contractor. The term includes all subcontractors, suppliers, manufacturers, materialmen, and vendors at any tier unless otherwise qualified as “first tier” only.

§5.1.2 A sub-subcontractor is a person or entity who has a direct or indirect contract with a subcontractor to perform a portion of the Work at the site. The term “sub-subcontractor” is referred to throughout the Contract Documents as if singular in number and means a sub-subcontractor or an authorized representative of the sub-subcontractor.

§5.2 Award of Subcontracts or Other Contracts for Portions of the Work

§5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, Contractor, as soon as practicable after award of the Contract, shall furnish in writing to Owner through Architect/Engineer the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. Architect/Engineer will promptly reply to Contractor in writing stating whether or not Owner or Architect/Engineer, after due investigation, has reasonable objection to any such proposed person or entity.

§5.2.2 Contractor shall not contract with a proposed person or entity to whom Owner or Architect/Engineer has made reasonable and timely objection. Contractor shall not be required to contract with anyone to whom Contractor has made reasonable objection.

§5.2.3 If Owner or Architect/Engineer has reasonable objection to a person or entity proposed by Contractor, Contractor shall propose another to whom Owner or Architect/Engineer has no reasonable

objection. If the proposed but rejected subcontractor was reasonably capable of performing the Work and if its bid was reasonable, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless Contractor has acted promptly and responsively in submitting names as required.

§5.2.4 Contractor shall not change a subcontractor, person, or entity previously selected without the prior written consent of Owner. If such consent is given and the subcontractor to be replaced is a minority, woman, or emerging small business registered with the State of Oregon, Contractor shall make good faith efforts to contract with an M/W/ESB for the work to be performed by that subcontractor. Documentation of these efforts is required and must be submitted to Owner upon request.

§5.3 Subcontractual Relations

§5.3.1 By appropriate agreement, written where legally required for validity, Contractor shall require each subcontractor, to the extent of the Work to be performed by the subcontractor, to be bound to Contractor by the terms of the Contract Documents, and to assume toward Contractor all obligations and responsibilities, including the responsibility for safety of the subcontractor's Work, which Contractor, by these Documents, assumes toward Owner and Architect/Engineer. Each subcontract agreement shall preserve and protect the rights of Owner and Architect/Engineer under the Contract Documents with respect to the Work to be performed by the subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against Contractor that Contractor, by the Contract Documents, has against Owner. Where appropriate, Contractor shall require each subcontractor to enter into similar agreements with sub-subcontractors. Contractor shall make available to each proposed subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the subcontractor will be bound, and, upon written request of the subcontractor, identify to the subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed sub-subcontractors.

§5.3.2 Contractor shall include in all subcontracts with subcontractors a right for Contractor to assign subcontracts to Owner in the event of termination of the Contract with Owner.

§5.4 Contingent Assignment of Subcontracts

§5.4.1 Each subcontract agreement for a portion of the Work is assigned by Contractor to Owner, provided that:

.1 assignment is effective only after termination of Contract by Owner for cause pursuant to Section 14.2 and only for those subcontract agreements which Owner accepts by notifying the subcontractor and Contractor in writing; and

.2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

ARTICLE 6. CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

§6.1 Owner's Right to Perform Construction and to Award Separate Contracts

§6.1.1 Owner reserves the right to perform construction or operations related to the Project with Owner's own forces and to award separate contracts in connection with other portions of the Project or other construction or operations on the site. If Contractor claims that delay or additional cost is involved because of such action by Owner, Contractor shall make such Claim as provided in Section 4.3.

§6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the contractor who executes each separate Owner-Contractor Agreement.

§6.1.3 Contractor shall provide for coordination of the activities of Owner's own forces and of each separate contactor with the Work of Contractor. Owner shall require its own forces and separate contractors to cooperate with Contractor with respect to such coordination. Contractor shall participate with other separate contractors and Owner in reviewing their construction schedules when directed to do so. Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by Contractor, separate contractors, and Owner until subsequently revised.

§6.2 <u>Mutual Responsibility</u>

§6.2.1 Contractor shall afford Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate Contractor's construction and operations with theirs as required by the Contract Documents.

§6.2.2 If part of Contractor's Work depends, for proper execution or results, upon construction or operations by Owner or a separate contractor, Contractor shall, prior to proceeding with that portion of the Work, promptly report to Architect/Engineer and Owner apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of Contractor to so report shall constitute an acknowledgment that Owner's or separate contractors completed or partially completed construction is fit and proper to receive Contractor's Work, except as to defects not then reasonably discoverable.
§6.2.2.1 If part of Contractor's Work requires that any work being performed by Owner or any of its contractors be performed before Contractor can proceed, Contractor shall give Owner and Architect/Engineer adequate prior written notice of when such work must be done. In the absence of such notice, Contractor shall not be entitled to any additional costs or time arising out of delay caused by Owner or its contractors in completing such Work.

§6.2.3 Owner shall be reimbursed by Contractor for costs incurred by Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of Contractor. Owner shall be responsible to Contractor for costs incurred by Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

§6.2.4 Contractor shall promptly remedy damage wrongfully caused by Contractor to completed or partially completed construction or to property of Owner or separate contactors as provided in Paragraph 10.2.5.

§6.2.5 Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for Contractor in Section 3.14.

§6.3 <u>Owner's Right to Clean Up</u>

§6.3.1 If a dispute arises among Contractor, separate contractors, and Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste

materials and rubbish, Owner may clean up and Architect/Engineer will allocate the cost among those responsible.

ARTICLE 7. CHANGES IN THE WORK

§7.1 General

§7.1.1 Changes in the Work may be accomplished AFTER EXECUTION OF THE Contract, and without invalidating the Contract, by prior written Change Order, Construction Change Direction or order for a minor change in the work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§7.1.2 Owner will not be responsible for additional costs, fees, or time associated with any altered or additional Work unless a Modification is properly and timely prepared and executed as required in the Contact Documents. Contractor hereby waives any argument that Owner's conduct (including, but not limited to, orally approving changes) amounts to a waiver of the prior, written change requirements of the Contract Documents.

§7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and Contractor shall proceed promptly, unless otherwise provided in a Change Order, Construction Change Directive, or order for a minor change in the Work.

§7.1.4 Owner shall periodically combine several Change Orders into a Contract Amendment which shall be signed by Owner and Contractor. After a Contract Amendment is signed by Owner and Contractor, Contractor may include in the Contractor's Application for Payment the amounts set forth in the Change Orders included in the Contract Amendment as the Work is completed.

§7.2 Change Orders

§7.2.1 A Change Order is a written instrument prepared by Architect/Engineer and signed by Owner, Contractor and Architect/Engineer, stating their agreement upon all of the following:

.1 change in the Work;

.2 the amount of the adjustment, if any, in the Contract Sum, including all direct and indirect costs, all delay costs, impact costs, ripple effect costs, and all profit and overhead on these costs associated with the change; and

.3 the extent of the adjustment, if any, in the Contract Time, including any delays, schedule impacts, and ripple effects on the Contract Time.

§7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Paragraph 7.3.3.

§7.3 Construction Change Directives

§7.3.1 A Construction Change Directive is a written order signed by Owner and Architect/Engineer directing a change in the Work and stating a proposed basis for adjustment, if any, in the Contact Sum or Contract Time or both. Owner may, by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Times being adjusted accordingly.

§7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

.1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;

.2 unit prices stated in the Contract Documents or subsequently agreed upon;

.3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or

.4 if Owner and Contractor cannot agree on the amount under methods .1, .2 or .3, above, then the adjustment shall be made as provided in Paragraph 7.3.6.

§7.3.4 Upon receipt of a Construction Change Directive, Contractor shall promptly proceed with the change in the Work involved and advise Architect/Engineer of Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

§7.3.5 A Construction Change Directive signed by Contractor indicates the agreement of Contractor therewith, including adjustment in Contract Sum and Contract Time, or both, or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§7.3.6 If Owner and Contractor cannot agree on the amount of a Change Order under the methods provided in Paragraphs 7.3.3 (.1, .2 or .3), then the adjustment shall be determined as provided in Paragraph 7.3.6.1 and Paragraph 7.3.6.2, below.
§7.3.6.1 **Costs**. Costs for the purposes of this Paragraph 7.3.6 shall mean actual charges or expenses, verified by receipt or invoice, if available, or Contractor's certification and shall be limited to the following:

.1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and worker's compensation insurance;

.2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;

.3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from Contractor or others;

.4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and

.5 additional costs of supervision and field office personnel directly attributable to the change.

§7.3.6.2 **Overhead and Profit**. The combined overhead and profit included in the total cost to Owner of a change in the Work shall be based on the following schedule. Costs to which overhead and profit are to be applied shall be determined in accordance with Paragraph 7.3.6.1.

.1 for Contractor, for Work performed by Contractor's own forces, ten percent (10%) of the cost;

.2 for Contractor, for Work performed by Contractor's subcontractors, five percent (5%) of the amount due the subcontractors, provided that with respect to subcontractors affiliated with or substantially owned by Contractor or Contractor's principal officers, no such adjustment under this subparagraph .2 will be allowed; and

.3 for each subcontractor involved, for Work performed by that subcontractor's own forces, five percent (5%) of the cost, provided that with respect to subcontractors affiliated with or substantially owned by Contractor or Contractor's principal officers, no such adjustment under this subparagraph .3 will be allowed .

§7.3.7 The amount of credit to be allowed by Contractor to Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by Architect/Engineer, plus a corresponding decrease in overhead and profit. When both additions and credits covering related Work or substitutions are involved in a change, the Allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§7.3.8 Pending final determination of the total cost of a Construction Change Directive to Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, Owner and Architect/Engineer will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

§7.3.9 When Owner and Contractor agree with the determination made by Architect/Engineer concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

§7.3.10 In order to facilitate checking of quotations for extras or credits, all proposals, except those so minor that their propriety can be seen by inspection, shall be accompanied by a complete itemization of costs, including labor, materials, and subcontracts. Labor and materials shall be itemized in the manner prescribed above. Where major cost items are subcontracts, they shall be itemized also. In no case will a change involving over One Thousand Dollars ($1,000.00) be approved without such itemization.

§7.4 Minor Changes in the Work

§7.4.1 Owner and Architect/Engineer will each have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be affected by written order and shall be binding on Owner and Contractor. Contractor shall carry out such written orders promptly.

ARTICLE 8. TIME

§8.1 Definitions

§8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

§8.1.2 The date of commencement of the Work is the date established in the Agreement.

§8.1.3 The date of Substantial Completion is the date certified by Architect/Engineer in accordance with Section 9.8.

§8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

§8.2 Progress and Completion

§8.2.1 Time limits stated in the Contractor's schedule for substantial completion are of the essence of the contract. By executing the Agreement, Contractor confirms that the Contract Time is a reasonable period for performing and completing the Work.

§8.2.2 Contractor shall not, except by agreement or instruction of Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11, to be furnished by Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given by Owner, Contractor shall notify Owner in writing not less than seven (7) days or other agreed period before commencing the Work.

§8.2.3 Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

§8.3 Delays and Extensions of Time

§8.3.1 If Contractor is delayed at any time in the commencement or progress of the work by an act or neglect of Owner or Architect/Engineer, or of an employee of either, or of a separate contractor employed by Owner, or by changes ordered in the Work, or by industry-wide labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond Contractor's control, or by delay authorized by Owner pending mediation and arbitration, then the following shall apply:

.1 except as set out in Item .4, below, Contractor shall, if Owner so directs in writing, accelerate the performance of the Work, with additional labor, services, materials, equipment, facilities, subcontractors, supervision and otherwise as necessary, so as to overcome the delay and achieve completion of the Work by the Contract Time, and the Contract Sum shall be increased by prior written Change Order to compensate Contractor for its costs incurred in accelerating the Work in an amount determined in accordance with Article 7 of these General Conditions.

.2 Contractor shall give prior written notice to Owner and Owner's Representative of Contractor's intent to commence Acceleration of the performance of the Work pursuant to Item .1, above. Owner shall not be obligated to increase the Contract Sum as a result of any Acceleration of the Work commenced in advance of Owner's receipt of written notice of Contractor's intent to commence such Acceleration.

.3 In the event of Acceleration, except as set out in Item .4, below, the Contract Time shall not be extended due to the delays set out in Paragraph 8.3.1. Contractor's sole remedy in the event of those delays is an increase in the Contract Sum pursuant to Item .1, above, unless otherwise agreed to by Owner.

.4 Contractor shall not be obligated to overcome the delay and achieve completion of the Work by the Contract Time set out in the Agreement, nor shall Contractor be denied an extension

of the Contract Time, in the event the nature of the cause of the delay under Paragraph 8.3.1 is such that no amount of Acceleration of the Work pursuant to Item .1 above reasonably could enable Contractor to overcome the delay and achieve completion of the Work by the Contract Time set out in the Agreement. In the circumstances set out in this Item .4, Contractor shall accelerate the Work to the extent it reasonably is able pursuant to Item .1 above, the unavoidable delay shall be excused, and the Contract Time shall be extended by Change Order in the amount of the unavoidable delay.

§8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Section 4.3.

§8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

ARTICLE 9. PAYMENTS AND COMPLETION

§9.1 Contract Sum

§9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by Owner to Contractor for performance of the Work under the Contract Documents.

§9.2 Schedule of Values

§9.2.1 Before the first Application for Payment, Contractor shall submit to Owner and Architect/Engineer a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as Architect/Engineer may require. This schedule, unless objected to by Owner or Architect/Engineer, shall be used as a basis for reviewing Contractor's Applications for Payment.

§9.3 Applications for Payment

§9.3.1 Contractor shall submit to Owner an itemized application for Payment for Work completed, based on the current, approved schedule of values, in accordance with the Contract Documents. Such Application shall be notarized and supported by such data substantiating Contractor's right to payment as Owner may require, including, but not limited to, copies of invoices and requisitions from subcontractors, waivers and releases by Contractor and subcontractors (see Attachment 1), certified payrolls, all invoices for equipment, proof of payment for prior period invoices, and retainage as provided for in the Agreement. The form of Application for Payment shall be a notarized AIA Document G702, Application and Certification for Payment, supported by AIA Document G703, Continuation Sheet. Applications for Payment may include requests for payment on account of Change Orders that have been included in a Contract Amendment.
§9.3.1.1 Such applications may not include requests for payment for portions of the Work for which Contractor does not intend to pay to a subcontractor, unless such Work has been performed by others whom Contractor intends to pay. Contractor shall include a written notice, on Contractor's letterhead, stating the name of and amount owed to such subcontractor that has requested payment which has not been included on the Application for Payment.

§9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance and in writing by Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by Contractor with procedures satisfactory to Owner to establish Owner's title to such materials and equipment or

otherwise protect Owner's interest, and shall include the costs of applicable insurance, storage, and transportation to the site for such materials and equipment stored off the site.

§9.3.3 Contractor warrants that title to all Work covered by an Application for Payment will pass to Owner no later than the time of payment. Contractor further warrants that, upon submittal of an Application for Payment, all work for which Certificates for Payment have been previously issued and payments received from Owner shall, to the best of Contractor's knowledge, information, and belief, be free and clear of liens, claims, security interests or encumbrances in favor of Contractor, subcontractors, or other persons or entities making a claim by reason of having provided labor, materials, and equipment relating to the Work.

§9.4 Certificates for Payment

§9.4.1 Architect/Engineer will, within seven (7) days after receipt of Contractor's Application for Payment, either issue to Owner a Certificate for Payment, with a copy to Contractor, for such amount as Architect/Engineer determines is properly due, or notify Contractor and Owner in writing of Architect/Engineer's reasons for withholding certification in whole or in part as provided in Paragraph 9.5.1.

§9.4.2 The issuance of a Certificate for Payment will constitute a representation by Architect/Engineer to Owner, based on Architect/Engineer's reasonably detailed review of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of Architect/Engineer's knowledge, information, and belief, the qualify of the Work is in accordance with the Contract Documents, and that all conditions to payment have been satisfied. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests, inspections and observations, to correction of minor deviations from the Contract Documents prior to completion, and to specific qualifications expressed by Architect/Engineer. The issuance of a Certificate for Payment will further constitute a representation that Contractor is entitled to payment in the amount certified.

§9.5 Decisions to Withhold Certification

§9.5.1 Architect/Engineer may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect Owner, if in Architect/Engineer's opinion the representations to Owner required by Paragraph 9.4.2 cannot be made. If Architect/Engineer is unable to certify payment in the amount of the Application, Architect/Engineer will notify Contractor and owner as provided in Paragraph 9.4.1. If Contractor and Architect/Engineer cannot agree on a revised amount, Architect/Engineer will promptly issue a Certificate for Payment for the amount for which Architect/Engineer is able to make such representations to Owner. Architect/Engineer may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in Architect/Engineer's opinion to protect Owner from loss for which Contractor is responsible, including loss resulting from acts and omissions described in Paragraph 3.3.2, because of:

.1 defective Work not remedied;

.2 third-party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to Owner is provided by Contractor;

.3 failure of Contractor to make payments properly to subcontractors or for labor, materials, or equipment;

.4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;

.5 damage to Owner or another contractor;

.6 reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages and actual delay damages for the anticipated delay;

.7 failure to carry out the Work in accordance with the Contract Documents; or

.8 failure to abide by all terms and conditions of the Contract Documents.

§9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

§9.5.3 Notwithstanding the issuance of a Certificate for Payment, Owner may withhold payment for the reasons set forth in Paragraph 9.5.1. If Owner withholds payment, in whole or in part, Owner shall notify Contractor and Architect/Engineer in writing of Owner's reasons for withholding payment.

§9.6 Progress Payments

§9.6.1 After Architect/Engineer has issued a Certificate for Payment, Owner shall make payment in the manner and within the time provided in the Contract Documents. Owner may refuse to make payment on any Certificate of Payment for any breach of the Contract, including, but not limited to, those defaults set forth in Paragraphs 9.5.1.1 through 9.5.1.8. Owner shall not be deemed in breach by reason of withholding payment while any such Contractor breaches remain uncured. If Owner refuses to make payment because Contractor is in breach of the Contract, Owner shall notify Contractor and Architect/Engineer in writing of Owner's reasons for refusing to make payment.

§9.6.2 Contractor shall promptly pay each subcontractor, upon receipt of payment from Owner, out of the amount paid to Contractor on account of such subcontractor's portion of the Work, the amount to which said subcontractor is entitled, reflecting percentages actually retained from payments to Contractor on account of such subcontractor's portion of the Work. Contractor shall, by appropriate agreement with each subcontractor, require each subcontractor to make payments to sub-subcontractors in a similar manner. Notwithstanding anything in this Section 9.6 to the contrary, Owner may elect, in Owner's sole discretion, to make any payment jointly payable to Contractor and any subcontractor. Contractor and such subcontractor shall be responsible for the allocation and disbursement of funds included as part of any such joint payment. In no event shall any joint payment be construed to create (1) any contract between Owner and subcontractors or (2) rights in any subcontractor against Owner. In addition, should Contractor neglect or refuse to pay promptly any bill or charge legitimately incurred by it, Owner shall have the right, but not the obligation, to pay the bill directly, and Contractor shall immediately reimburse Owner for same, provided Owner notifies Contractor of its intent to pay such bill directly and Contractor fails to provide Owner, within seven (7) days following Owner's written notice, of an acceptable explanation in writing regarding Contractor's failure to promptly pay the bill or charge legitimately incurred by Contractor. If Contractor does not reimburse Owner prior to the next payment by Owner to Contractor, Owner may offset the amount of the bill against amounts owed by Owner to Contractor hereunder.

§9.6.3 Architect/Engineer will, on request, furnish to a subcontractor, if practicable, information regarding percentages of completion or amounts applied for by Contractor and action taken thereon by Architect/Engineer and owner on account of portions of the Work done by such subcontractor.

§9.6.4 Neither Owner nor Architect/Engineer shall have an express or implied obligation (1) to pay or to see to the payment of money to a subcontractor or (2) track, monitor or investigate Contractor's disbursement of Project funds for the benefit of any subcontractor, surety, creditor, or any other person or entity.

§9.6.5 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by Owner shall not constitute acceptance of the Work not in accordance with the Contract Documents.

§9.6.6 Unless Contractor provides Owner with a payment bond in the full penal sum of the Contract Sum, payments received by Contractor for the Work properly performed by subcontractors shall be held by Contractor for those subcontractors who performed the Work or furnished materials, or both, under contract with Contractor for which payment was made by Owner.

§9.6.7 With each Application for Payment, Contractor shall furnish a conditional waiver (see Attachment 1) and release of claims for itself and each first-tier subcontractor who furnished labor, equipment, materials or services to the Project during the period covered by the Application for Payment. Upon each payment by Owner, Contractor shall execute and cause first-tier subcontractors to execute an unconditional waiver and release of claim acknowledging receipt of all payments due through the period covered by the previous Application for Payment (see Attachment 2). The conditional and unconditional claim releases shall be on forms attached to the Agreement, and Contractor shall deliver the executed releases to Owner with its next succeeding Application for Payment, including the Final Application for Payment.

§9.6.8 In addition to the retainage specified in the Agreement, Owner may withhold progress payments or final payment or any portion thereof on account of (1) defective or nonconforming Work not remedied, (2) claims filed or a reasonable basis to believe that such claims will be filed, (3) failure of Contractor to make payments properly for labor, materials, equipment, or subcontracts, (4) failure of Contractor to submit to Owner claim waivers and releases (see Attachment 1), or (5) significant failure to carry out the Work in strict accordance with this Agreement. Owner may withhold from a progress payment or final payment up to one hundred fifty percent (150%) of the estimated or actual costs associated with the above items.

§9.7 <u>Failure of Payment</u>

§9.7.1 If Owner fails to make payment to Contractor with respect to any amounts which are not in dispute between Owner and Contractor within the time periods for payment as set forth in the Contract Documents, Contractor may, upon fourteen (14) days' prior written notice to Owner, stop the Work and thereby suspend or terminate the Contract, unless within such fourteen (14) days payment is made to Contractor of all undisputed amounts and Owner's good faith basis for contesting any disputed amounts is delivered to Contractor. If Contractor so terminates the Contract, Contractor's exclusive remedies will b governed by Article 14, below.

§9.8 <u>Substantial Completion</u>

§9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that Owner can occupy or utilize the Work for its intended use without any meaningful interference or disruption.
§9.8.1.1 For Substantial Completion to be achieved, Owner must have received a temporary or final certificate of occupancy and all other governmental approvals as necessary and required for Owner to occupy or utilize the Work or designated portion thereof for its intended purpose. The requirement set out in this Section shall be deemed satisfied if all construction, submittals, and other performance by Contractor required for issuance of the temporary or permanent certificate of occupancy has been

completed but the certificate has not been issued solely because of factors beyond the reasonable control of Contractor. A delay in the applicable governmental agency's issuance of a Certificate of Occupancy, following Contractor's completion of construction, submittals, and other performance that is of normal duration for that agency shall not constitute a factor "beyond the reasonable control of Contractor," as that phrase is used in the prior sentence.

§9.8.2 When Contractor considers that the Work, or a portion thereof which Owner agrees to accept separately, is substantially complete, Contractor shall prepare and submit to Architect/Engineer a comprehensive list of items to be completed or corrected prior to Final Payment ("Punch List"). Failure to include an item on such list does not alter the responsibility of Contractor to complete all the Work in accordance with the Contract Documents.

§9.8.3 Upon receipt of Contractor's list, Architect/Engineer will make an inspection, accompanied by Owner, to determine whether the Work or designated portion thereof is substantially complete. If Architect/Engineer's inspection discloses any item, whether or not included on the Punch List, which is not sufficiently complete in accordance with the Contract Documents, so that Owner can occupy or utilize the Work or designated portion thereof for its intended use, Contractor shall, before issuance of the certificate of Substantial Completion, complete or correct such item upon notification by Architect/Engineer. In such case, Contractor shall then submit a request for another inspection by Architect/Engineer to determine Substantial Completion.

§9.8.4 When the Work or designated portion thereof is substantially complete, Architect/Engineer will prepare a Certificate of Substantial Completion which shall be within the Contract Time unless extended pursuant to Section 8.3, shall establish the date of Substantial Completion, shall establish responsibilities of Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless the warranty relates to Work that is incomplete or requires correction (in which case, such warranty shall commence upon completion or correction of the Work) and unless otherwise provided in the Certificate of Substantial Completion.

§9.8.5 The Certificate of Substantial Completion shall be submitted to Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete and not in accordance with the requirements of the Contract Documents.

§9.9 Partial Occupancy or Use

§9.9.1 Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with Contractor, provided such occupancy or use is consented to by the insurer as required under Paragraph 11.4.1.5, below, and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work, and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When Contractor considers a portion substantially complete, Contractor shall prepare and submit a list to Architect/Engineer as provided in Paragraph 9.8.2. Consent of Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between Owner and Contractor.

§9.9.2 Immediately prior to such partial occupancy or use, Owner, Contractor, and Architect/Engineer shall jointly inspect the area to be occupied or portion of the work to be used in order to determine and record the condition of the Work.

§9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

§9.10 Final Completion and Final Payment

§9.10.1 Contractor shall, within seven (7) days after completion and correction of the items on the Punch List, notify Architect/Engineer and Owner in writing, requesting that a final inspection be made by Owner and Architect/Engineer. Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, Owner and Architect/Engineer will notify Contractor of the date and time of the final inspection. When Owner and Architect/Engineer find the Work acceptable under the contract Documents and the Contract fully performed, Architect/Engineer will promptly issue a final Certificate of Payment stating that, to the best of Architect/Engineer's knowledge, information, and belief, and on the basis of Architect/Engineer's on-site visits and inspections, the Work has been completed in strict accordance with terms and conditions of the Contract Documents and that the entire balance found to be due Contractor and noted in the final Certificate is due and payable. Architect/Engineer's final Certificate for Payment will constitute a further representation that conditions listed in Paragraph 9.10.2 below as precedent to Contractor's being entitled to Final Payment have been fulfilled.
§9.10.1.1 The term "Final Completion" as used in the Contract Documents shall mean that (1) Substantial Completion of the Work or designated portion thereof has been achieved, and (2) Owner has received a final Certificate of Occupancy; (3) Owner has received all other governmental approvals as necessary and required for Owner to occupy or utilize the Work or designated portion thereof for its intended purpose; and (4) Architect/Engineer has issued Architect/Engineer's final Certificate for Payment. Notwithstanding the foregoing, Final Completion shall be deemed achieved if all construction, submittals, and other performance by Contractor required for issuance of the permanent Certificate of Occupancy has been completed, but the certificate has not been issued solely because of factors beyond the reasonable control of Contractor. A delay in the applicable governmental agency's issuance of a Certificate of Occupancy, following Contractor's completion of construction, submittals, and other performance that is of normal duration for that agency shall not constitute a factor "beyond the reasonable control of Contractor," as that phrase is used in the prior sentence.

§9.10.2 Neither Final Payment nor any remaining retained percentage shall become due until Contractor submits to Architect/Engineer (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which Owner or Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied; (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after Final Payment is currently in effect and will not be canceled or allowed to expire until at least thirty (30) days' prior written notice has been given to Owner; (3) a written statement that Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents; (4) consent of surety to Final Payment; (5) if required by Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by Owner; (6) the grounds for withholding certification of payment as set forth in Paragraph 9.5.1 have been removed or no longer exist; (7) completion of the Work in compliance with the Contract Document; and (8) evidence of compliance with all other requirements of the Contract Documents. If a subcontractor refuses to furnish a release or waiver required by Owner, Contractor may furnish a bond satisfactory to Owner to indemnify Owner against such claim. If such claim remains unsatisfied after

payments are made, Contractor shall refund to Owner all money that Owner may be compelled to pay in discharging such claim, including all costs and reasonable attorneys' fees.

§9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of Contractor or by issuance of Change Orders affecting final completion, and Owner and Architect/Engineer so confirm, Owner shall, upon application by Contractor and certification by Architect/Engineer, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. In such event, Owner shall be entitled to retain an amount equal to one hundred fifty percent (150%) of the estimated costs of finally completing or repairing the Work as determined by Owner. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by Contractor to Owner and Architect/Engineer prior to certification of such payment. Such payment shall be made under terms and conditions governing Final payment, except that it shall not constitute a waiver of claims.

§9.10.4 The making of Final Payment shall constitute a waiver of Claims by Owner except those arising from:

- **.1** claims, security interests or encumbrances arising out of the Contract and unsettled;
- **.2** failure of the Work to comply with the requirements of the Contract Documents or industry standards, or failure of Contractor to comply with all terms and conditions of the contract Documents;
- **.3** terms of special warranties required by the Contract Documents; or
- **.4** faulty or defective Work appearing either before or after Final Payment.

§9.10.5 Acceptance of Final Payment by Contractor, a subcontractor, or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 10. PROTECTION OF PERSONS AND PROPERTY

§10.1 Safety Precautions and Programs

§10.1.1 Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract and the entirety of the Work.
§10.1.1.1 Contractor's safety obligations under this Section shall apply, without limitation, to the areas of Owner's property where the Work is performed, or which are used for any purpose in connection with the performance of the Work by Contractor or subcontractors.

§10.1.1.2 Contractor shall coordinate its safety program with the safety programs of Owner's separate contractors and of any other contractors working at the site.

§10.2 Safety of Persons and Property

§10.2.1 Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby, including, but not limited to, licensees, trespassers, and persons on adjacent or adjoining properties;
.2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody, or control of Contractor or Contractor's subcontractors or sub-subcontractors; and
.3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of construction. Contractor at all times shall protect adjoining private or public property from damage arising from Contractor's operations. The Drawings show the approximate location of existing utilities on the Project site. Owner believes the utilities exist as represented in the Drawings, but cannot guarantee this fact. Contractor will take all reasonable precautions to protect and accommodate both the utilities identified in the Drawings and those which may otherwise exist.

§10.2.2 Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities, governmental authorities, and all other persons or entities having jurisdiction bearing on safety of persons or property or their protection from damage, injury, or loss.

§10.2.3 Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety, codes, rules, and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations, and notifying owners and users of adjacent sites and utilities.

§10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

§10.2.5 Contractor shall promptly remedy damage and loss to property, including, but not limited to, the Work itself, caused in whole or in party by Contractor, any subcontractor or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which Contractor is responsible, except damage or loss attributable to acts or omissions of Owner or Architect/Engineer or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, not attributable to the fault or negligence of Contractor. The foregoing obligations of Contractor are in addition to Contractor's obligations under Section 3.18.

§10.2.6 Contractor shall designate a responsible member of Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be Contractor's superintendent unless otherwise designated by Contractor in writing to Owner and Architect/Engineer.

§10.2.7 Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger the safety of persons or property.

§10.2.8 When all or any portion of the Work is suspended for any reason, Contractor shall securely fasten down all coverings and protect the Work, as necessary, from injury by any cause.

§10.2.9 Contractor shall promptly report, in writing, to Owner and Architect/Engineer and to any government or other authority as required by law or regulation, all accidents arising out of or in connection with the Work which cause death, personal injury, or property damage, giving full details and statements of any witnesses. In addition, if death, serious personal injuries, or serious property damages are caused, the accident shall be reported immediately by telephone or messenger to Owner and Architect/Engineer.

§10.3 <u>Hazardous Materials</u>

§10.3.1 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including, but not limited to, toxic substances or other hazardous materials as defined in Paragraph 10.5.1, below, encountered on the site by Contactor, Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to Owner and Architect/Engineer in writing.

§10.3.2 Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by Contractor and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Contract Documents, Owner shall furnish in writing to Contractor and Architect/Engineer the names and qualifications of persons or entities who are to perform tests, verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. Contractor and Architect/Engineer will promptly reply to Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by Owner. If either Contractor or Architect/Engineer has an objection to a person or entity proposed by Owner, Owner shall propose another to whom Contractor and Architect/Engineer have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of Owner and Contractor. The Contract Time shall be extended appropriately, and the Contract Sum shall be increased in the amount of Contractor's reasonable additional costs of shut-down, delay, and start-up, which adjustments shall be accomplished as provided in Article 7, above.

§10.3.3 To the fullest extent permitted by the law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance, presently known and identified, presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss, or expense is due to the fault of negligence of the party seeking indemnity.

§10.4 Owner shall not be responsible under Paragraph 10.3 for materials and substances brought to the site by Contractor.

§10.5 Contractor shall not cause or permit any "Hazardous Materials" (as defined herein) to be brought upon, kept, or used in or about the job site except to the extent such Hazardous Materials are necessary for the prosecution of the Work or are required pursuant to the Contract Documents. Removal of such hazardous Materials shall be undertaken within twenty-four (24) hours following Owner's demand for such removal. Such removal shall be undertaken by Contractor at its sole cost and expense, and shall be performed in accordance with all applicable laws. Any damage to the Work, the job site, or any adjacent property resulting from the improper use, or any discharge or release of Hazardous Materials, shall be remedied by Contractor at its sole cost and expense, and in compliance with all applicable laws. Contractor shall immediately notify Owner of any release or discharge of any Hazardous Materials on the job site. Contractor shall be responsible for making any and all disclosures required under applicable "Community Right-to-Know" laws. Contractor shall not clean or service any tools, equipment, vehicles, materials, or other items in such a manner as to cause a violation of any laws or regulations relating to Hazardous Materials. All residue and waste materials resulting from any such cleaning or servicing shall be collected and moved from the job site in accordance with all applicable laws and regulations. Contractor shall immediately notify Owner of any citations, orders, or warnings issued to or received by Contractor, or of which Contractor otherwise becomes aware, which relate to any Hazardous Materials on the job site, without limiting any other indemnification provisions pursuant to law or specified in this Agreement. Contractor shall indemnify, defend (at Contractor's sole

cost, with legal counsel approved by Owner) reimburse, and hold Owner harmless as provided in Paragraph 3.18 from and against any and all such claims, demands, losses, damages, disbursements, liabilities, obligations, fines, penalties, costs, and expenses in removing or remediating the effect of any Hazardous materials on, under, from, or about the job site, arising out of or relating to, directly or indirectly, Contractor's failure to comply with any of the requirements of this Paragraph 10.5.1. As used in Paragraph 10.3, the term "Hazardous Materials" means any hazardous or toxic substances, materials, and wastes listed in the United States Department of Transportation Hazardous Materials Table (49 CFR 172.101) or listed by the Environmental Protection Agency as hazardous substances (40 CFR Part 302) and any amendments thereto, and any substances, materials, or wastes that are or become regulated under federal, state, or local law. Hazardous Materials (or substances) shall also include, but not be limited to: regulated substances, petroleum products, pollutants, mold and fungi, and any and all other environmental contamination as defined by and in any and all federal, state, and local laws, rules, regulations, ordinances, or statutes now existing or hereinafter enacted relating to air, soil, water, environmental, or health and safety conditions.

§10.6 Emergencies

§10.6.1 In an emergency affecting safety of persons or property, Contractor shall act, at Contractor's discretion, to prevent threatened damage, injury, or loss. Additional compensation or extension of time claimed by Contractor on account of an emergency shall be determined as provided in Paragraph 4.3 and Article 7, above.

§10.6.2 If Contractor does, or omits to do, anything where safety may be endangered or where damage or injury may result to person or property (including the Work itself), Owner may, in its sole discretion, after one-day written notice to Contractor, or in case of imminent danger, immediately after delivery of written notice to Contactor, make good all Work, material, omissions or deficiencies to remove the dangerous condition(s) and prevent damage or injury. Owner may deduct Owner's costs incurred under this Section from the amount included in the Contract Sum due or which may thereafter become due to Contractor. No action taken by Owner under this Section shall affect any of the other rights or remedies of Owner granted by this Agreement or by law, or relieve Contractor from any consequences or liabilities arising from such acts or omissions. Contractor shall not be responsible for costs of emergency work, unless the emergency was due to the negligence or willful misconduct of Contractor or any subcontractors, or anyone for whose acts any of them may be liable.

ARTICLE 11. INSURANCE AND BONDS

§11.1 Contractor's Liability Insurance
§11.1.1 Contractor shall, at all times provide and maintain and require all subcontractors to provide and maintain the following types of insurance written on an occurrence basis protecting the interests of Owner (or any successor in interest to Owner), and naming Owner and its commissioners, executives, managers, directors, officers, agents, attorneys, employees, and designees as additional insureds, with limits and durations not less than those as set forth below; provided, however, Owner may, in its sole discretion, accept lesser insurance for subcontractors if done so in writing in advance of the Work.

.1 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 Employers Liability coverage all at the statutory limits. In the absence of statutory limits the limits of said Employers 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 Owner and Architect/Engineer.

.2 Commercial General Liability Insurance, including insurance on an "occurrence basis," with combined bodily injury and property damage in the following amounts: $1,000,000 each occurrence, $1,000,000 personal and advertising injury, $2,000,000 general aggregate, $2,000,000 products/completed operations aggregate, $100,000 fire damage legal liability, $5,000 medical expenses per person. Such insurance shall include the following coverages: (1) Premises-Operations, (2) without exclusion for subsidence, Explosion, Collapse or Underground Property Damages, (3) without exclusion for water intrusion or water damage, (4) Elevators and Escalators, (5) Independent Contractors, (6) Products and Completed operations shall be carried for the duration applicable for the statute of repose in Oregon and (7) contractual including contract obligations specified in the indemnification paragraphs of the owner-contractor agreement. If the Commercial General Liability Form is used, the General Aggregate limit shall apply to this Project only. Policy limits shall not be eroded or wasted by defense costs. There shall be no endorsement requiring specific contract language be in place with any other entity in order for the policy to be effective.

.3 Automobile Liability Insurance covering all owned, non-owned and hired automobiles used in connection with the Work with minimum combined single limits as provided in the Agreement for Bodily Injury and Property Damage Liability Each Person/Each Occurrence of not less than $1,000,000 each accident.

.4 Umbrella (Excess) Liability Insurance, including coverage for both bodily injury and property damage, with a minimum limit as provided in the Agreement, covering the following:

a. Bodily injury, including damages for care and loss of services, because of bodily injury, including death, at any time resulting therefrom sustained by any person or persons, and including, but not limited to, damages related to and arising out of Hazardous Materials as defined in Article 10, above.

b. Property Damage for losses due to injury to or destruction of tangible personal or real property, including, but not limited to, the Work itself, including, but not limited to, consequential damages and loss of use resulting therefrom.

c. $5,000,000 each occurrence, $5,000,000 aggregate, coverage to be at least as broad as all liability policies described above and shall be carried for the duration of the applicable statute of repose in Oregon.

d. coverage hereunder shall be triggered upon exhaustion, which may include reasonable compromise for amounts less than limits, of the underlying primary and additional insurance applicable to the loss.

.5 The insurance coverages provided for herein must be endorsed as primary and non-contributory to any insurance of Owner, its officers, employees or agents.

§11.1.2 Certificates of insurance from Contractor and all subcontractors and all required endorsements (including, but not limited to, additional insured endorsements) acceptable to Owner evidencing compliance with this Section 11.1 shall be filed at Contractor's cost with Owner prior to commencement of the Work. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least thirty (30) days' prior written notice has been given to Owner. If any of the foregoing insurance coverages are required to remain in force after Final Payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for Payment and upon each renewal for the duration of coverage required. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by Contractor with reasonable promptness in accordance with Contractor's information and belief. All endorsements, including notice of cancellation and additional insured endorsements, shall be physically attached to the certificate of insurance.

§11.1.3 In the event Contractor or any of its subcontractors has or obtains insurance coverage in amounts in excess of those listed above, such additional limits shall inure to the benefit of Owner.

§11.1.4 Contractor agrees to notify Owner by certified mail thirty (30) days prior to cancellation, non-renewal, or material change in any insurance required hereunder. Any provision which provides that the insurer "will endeavor" to provide notice or that the insurer shall not be liable for failure to provide timely notice shall have "endeavor" and the limitation on liability marked out and signed by any authorized agent of the insurer.

§11.1.5 Failure on the part of Contractor to procure and maintain the required insurance and provide proof thereof to Owner shall constitute a material breach of this Agreement, upon which Owner may immediately terminate this Agreement or, upon seven (7) days notice to Contractor, procure such insurance and deduct all costs of procurement from any sum due Contractor, or to withhold any payment due to Contractor under this Agreement until the required proof of insurance coverage is provided to Owner.

§11.1.6 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 Owner with the right, but not the obligation, to engage its own attorney for the purpose of defending any legal action against Owner, its officers, agents, or employees, and that Contractor shall indemnify Owner for costs and expenses, including reasonable attorneys' fees, incurred or arising out of the defense of such action.

§11.1.7 The issuance or maintaining of insurance of any type by Contractor will not be deemed or construed to release, limit, waive, or discharge Contractor from any and all of the obligations and risks imposed by this Agreement upon Contractor. Neither shall any forbearance or omission by Owner to require proof of insurance from Contractor before permitting Contractor to proceed or continue with the Work be deemed a waiver of Owner's rights or Contractor's obligations regarding the provision of insurance under this Agreement.

§11.1.8 Any coverage for adequacy of Contractor's performance shall be maintained after Final Completion of the Work for the full one-year correction of Work period and any longer specific periods set forth in the Contract Documents. If the insurance is cancelled before the end of any such period, and Contractor fails to immediately procure replacement insurance as specified, Owner reserves the right to procure such insurance and to either charge the cost thereof to Contractor or deduct the cost from any sum due Contractor.

§11.1.9 Nothing contained in these insurance requirements shall be construed as limiting the extent of Contractor's responsibility for payment or damages resulting from the operations under this Agreement, including Contractor's obligation to pay both liquidated damages and actual delay damages.

§11.1.10 In no instance will Owner's exercise of its option to occupy and use completed portions of the Work relieve Contractor of its obligation to maintain insurance required herein until the date of Final Completion.

§11.1.11 All insurance to be carried by Contractor shall state, by endorsement, that Contractor's insurance is primary and that any liability insurance maintained by Owner or any other additional insured is excess and noncontributory. Contractor shall not commence Work under this Agreement until proof of all required insurance has been submitted to and approved by Owner. Contractor shall not allow any subcontractor to commence Work until such subcontractor has obtained and submitted proof of insurance as required pursuant to the Contract Documents, including endorsements for notice of cancellation and additional insured provisions.

§11.1.12 The commercial general liability policies maintained by Contractor and subcontractors pursuant to the Contract Documents shall name, by endorsement, Owner and its commissioners, executives, managers, directors, officers, agents, attorneys, employees, and designees as additional named insureds for both ongoing and completed operations. The additional insurance protection shall extend equal protection to Owner 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 Owner shall be narrowed to the maximum amount of protection allowed by law. Additional insured provisions shall include provision for completed operations and shall be primary and noncontributory in the event of a loss.

§ 11.1.13 Upon Owner's request, Contractor will immediately provide an actual copy of its insurance policies and those of its subcontractors and suppliers. The insurance shall be provided by an insurance company or companies acceptable to Owner.

§ 11.1.14 All subcontractors' and suppliers' insurance shall meet all insurance requirements provided in this section 11.1, including but not limited to the types of insurance (except Excess/Umbrella Liability coverage is not required), the extent and duration of coverages, and notice requirements, except that the limits of insurance for subcontractors shall be no less than the following: Workers Comp and Employers Liability, same, Commercial General Liability (occurrence form), combined bodily injury and property damage, $1,000,000 each occurrence, $1,000,000 personal and advertising injury, $1,000,000 general aggregate, $1,000,000 products and completed operations, $50,000 fire damage, $5,000 medical expenses per person. With the exception of worker's compensation, all liability insurance policies shall contain a waiver of subrogation against Owner.

§11.2 Owner's Liability Insurance

§11.2.1 Owner shall be responsible for purchasing and maintaining Owner's usual liability insurance and may self-insure.

§11.3 Project Management Protective Liability Insurance

§11.3.1 Optionally, Owner may require Contractor to purchase and maintain Project Management Protective Liability insurance from Contractor's usual sources as primary coverage for Owner's, Contractor's, and Architect/Engineer's vicarious liability for construction operations under the Contract. Unless otherwise required by the Contract Documents, Owner shall reimburse Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage, and Contractor shall not be responsible for purchasing any other liability insurance on behalf of Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate of the limits required for Contractor's Liability Insurance under Paragraphs 11.1.1.2 through 11.1.1.5.

§11.3.2 To the extent damages are covered by Project management Protective liability insurance, Owner, Contractor, and Architect/Engineer waive all rights against each other for damages, except such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.

§11.4 Property Insurance

§11.4.1 Unless otherwise provided, Owner, at Owner's option, may purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk, "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement

cost basis with deductibles satisfactory to Owner, for which Contractor will be held responsible. Such property insurance shall be maintained, if acquired by Owner, until Final Payment has been made as provided in Section 9.10 or until no person or entity other than Owner has an insurable interest in the property to be covered, whichever is later.
§11.4.1.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage, including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings, and debris removal, including demolition occasioned by enforcement of any applicable legal requirements.

§11.4.1.2 This property insurance shall cover portions of the Work stored off the site and also portions of the Work in transit.

§11.4.1.3 Partial occupancy or use of the premises/building will occur during construction. Owner and Contractor shall take reasonable steps to obtain consent of the insurance company or companies, if any, and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse, or reduction of insurance.

§11.4.2 Boiler and Machinery Insurance. Owner shall, at its option, purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until Final Acceptance by Owner.

§11.4.3 Loss of use Insurance. Owner, at Owner's option, may purchase and maintain such insurance as will insure Owner against loss of use of Owner's property due to fire or other hazards, however caused.

§11.4.4 If Contractor requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, Owner may, if possible, at its option, include such insurance, and the cost thereof shall be charged to Contractor by appropriate Change Order.

§11.4.5 Upon Contractor's written request, Owner shall provide Contractor a copy of each policy that includes insurance coverages described by this Section 11.4. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least thirty (30) days' prior written notice has been given to Contractor.

§11.5 Performance Bond Payment Bond, and BOLI Bond

§11.5.1 Contractor shall obtain a Performance Bond and Payment Bond each in the amount of One Hundred Percent (100%) of the applicable Contract Sum. Contractor shall deliver its required bonds not later than the date of execution of the Agreement and deliver the required subcontractor bonds to Owner not later than the date of execution of the subcontract with any such subcontractor, or if the Work is commenced prior thereto in response to a Notice to Proceed, Contractor shall, prior to commencement of the Work, submit evidence satisfactory to Owner that such bonds will be issued. The bonds shall be in form approved by Owner.

§11.5.2 Contractor and subcontractors performing work that exceeds $100,000 in contract price shall file with the Construction Contractors Board a public works bond with a corporate surety authorized to do business in this state in the amount of $30,000 and must be in compliance with all requirements of ORS 279C.836, "Public works bonds; rules." The purpose of this bond is to ensure payment of claims ordered by the Bureau of Labor and Industries. Exemptions to this bonding requirement are contained in ORS 279C.836.

§11.5.3 Upon request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

§11.5.4 The bonds shall in all respects conform to the requirements of the laws of Oregon in the county in which the Project is located and shall (1) name Owner as oblige, (2) be in a form and be issued by a licensed surety satisfactory to Owner, and (3) be automatically increased in the amount of any additive Change Orders and Construction Change Directives signed by Owner.

§11.5.5 Owner may, in Owner's sole discretion, inform the surety of the progress of the Work and obtain consents as necessary to protect Owner's rights, interests, privileges and benefits under and pursuant to any bond issued in connection with the Work. Owner does not, however, owe any duty to surety, and Owner hereby expressly disclaims any duty or obligation to advise, notify or consult with surety on any matters relating to Contractor or the Project, including, but not limited to, Contractor's payments to subcontractors or Contractor's use of Project funds.

ARTICLE 12. UNCOVERING AND CORRECTION OF WORK

§12.1 Uncovering of Work

§12.1.1 If a portion of the Work is covered contrary to Owner's or Architect/Engineer's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by Owner or Architect/Engineer, be uncovered by Owner's or Architect/Engineer's examination and be replaced at Contractor's expense without change in the Contract Time or Contract Sum.

§12.1.2 If a portion of the Work has been covered which Owner or Architect/Engineer has not specifically requested to examine, and the work is typically not Work to be examined, prior to its being covered, Owner or Architect/Engineer may request to see such Work and it shall be uncovered by Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at Owner's or Architect/Engineer's expense. If such Work is not in accordance with the Contract Documents, correction shall be at Contractor's expense unless the condition was caused by Owner or a separate contractor, in which event Owner or separate contractor shall be responsible for payment of such costs.

§12.2 Correction of Work

§12.2.1 Before or After Substantial Completion
§12.2.1.1 Contractor shall promptly correct Work rejected by Owner or Architect/Engineer or failing to conform to the requirements of the contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed, or completed. Costs of correcting such rejected Work, including additional testing and inspections and compensation for Architect/Engineer's services and expenses made necessary thereby, shall be at Contractor's expense.

§12.2.2 After Final Completion
§12.2.2.1 In addition to Contractor's obligations under Section 3.5, if, within one year after the date of Final Completion of the Work or designated portion thereof, or after the date for commencement of warranties established herein, or by terms of an applicable special warranty required by the Contract Documents, or within such longer period of time as may be prescribed by law or in equity, any of the Work is found to be defective or otherwise not in accordance with the requirements of the Contract Documents, either Owner may correct the Work and charge the costs back to Contractor, or Contractor shall correct it promptly at Contractor's expense after receipt of written notice from Owner to do so unless Owner, with knowledge of the defective or non-conforming condition, has previously given

Contractor a written acceptance of such condition. Owner shall give such notice promptly after discovery of the condition.

§12.2.2.2 Corrective work shall be warranted to be free from defects for the longer of (1) a period of twelve (12) months after the completion of the corrective work, (2) any period specified in the original warranty on such work, (3) any period specified by manufacturer's warranty, or (4) any period that may be prescribed by law or equity. Any defect in such corrective work shall be corrected again by Contractor promptly upon notice of the defect from Owner. The obligation under this Paragraph 12.2.2.3 shall survive acceptance of the Work and termination of the Contract.

§12.2.3 Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by Contractor nor accepted by Owner.

§12.2.4 Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of Owner or separate contractors caused by Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

§12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations which Contractor might have under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of Contractor to correct the Work, and has no relationship to the time limit (if any such limit exists) within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish Contractor's liability with respect to Contractor's obligations other than specifically to correct the Work.

§12.3 Acceptance of Nonconforming Work

§12.3.1 If Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, Owner may do so in writing instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be affected whether or not Final Payment has been made. Contractor may not rely on any non-written statements that purport to accept nonconforming Work.

ARTICLE 13. MISCELLANEOUS PROVISIONS

§13.1 Governing Law

§13.1.1 The Contract shall be governed by the laws of Oregon, with venue in the Circuit Court for Deschutes County, and/or the Federal District Court for Oregon.

§13.2 Successors and Assigns

§13.2.1 Owner and Contractor respectively bind themselves, their partners, successors, assigns, and legal representatives to the other party to this Agreement and to the partners, successors, assigns, and legal representatives of such other party with respect to all covenants of this Agreement. Contractor shall not assign any portion of the Contract Documents or any monies due or to become due to it without the advance written consent of Owner.

§13.4 Rights and Remedies

§13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies

otherwise imposed or available by law or in equity or by any other agreement, and any such rights or remedies shall survive the acceptance of the Work and termination of the Contract.

§13.4.2 No action or failure to act by Owner, Architect/Engineer, or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

§13.4.3 Notwithstanding any other provisions to the contrary contained in the Contract Documents, provided that Owner continues to make payments of approved amounts not in dispute in accordance with the provisions of the Contract Documents during all disputes, actions, claims and other matters in question arising out of or relating to the Contract Documents or the breach thereof, Contractor will continue the Work and maintain the schedule, unless otherwise agreed between Contractor and Owner in writing.

§13.5 Tests and Inspections

§13.5.1 Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections, and approvals. Contractor shall give Architect/Engineer timely notice of when and where tests and inspections are to be made so that Architect/Engineer may be present for such procedures.
§13.5.1.1 Representatives of the testing agency shall have access to the Work at all times. Contractor shall provide facilities for such access in order that the agency may properly perform its functions.

§13.5.1.2 Inspection or testing performed exclusively for Contractor's convenience shall be the sole responsibility the Contractor.

§13.5.2 If Architect/Engineer, Owner, or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection, or approval not included under Paragraph 13.5.1, Architect/Engineer will, upon written authorization from Owner, instruct Contractor to make arrangements for such additional testing, inspection, or approval by an entity acceptable to Owner, and Contractor shall give timely notice to Architect/Engineer and Owner of when and where tests and inspections are to be made so that Architect/Engineer and Owner may be present for such procedures. Such costs, except as provided in Paragraph 13.5.3, shall be at Owner's expense.

§13.5.3 If such procedures for testing, inspection, or approval under Paragraphs 13.5.1 and 13.5.2 reveal faulty or otherwise defective Work or the failure of the portions of the Work to comply with requirements established by the Contract Documents, or if the necessity of any such testing, inspections, and approval procedures arises out of the fault, neglect, or omission of Contractor, all costs made necessary by such failures including, but not limited to, those of repeated procedures and compensation for Architect/Engineer's services and expenses, shall be at Contractor's expense.

§13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by Contractor and promptly delivered to Architect/Engineer.

§13.5.5 If Architect/Engineer or Owner is to observe tests, inspections, or approvals required by the Contract Documents, Architect/Engineer and Owner will do so promptly and, where practicable, at the normal place of testing.

§13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid delay in the Work.

§13.5.7 The conducting of any inspections or tests and the receipt of any approval shall not operate to relieve Contractor from its obligations under the Contract Documents unless specifically so stated by Owner, in writing. Owner's and Architect/Engineer's observations, reviews, or approvals of tests and inspections shall not relieve Contractor from its responsibility for construction means, methods, and techniques, nor shall it relieve Contractor of its responsibility to strictly adhere to the Contract Documents.

§13.6 Interest

§13.6.1 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at the rate provided by law.

§13.7 Forum

§13.7.1 Any mediation, arbitration proceeding, or court suit or action arising out of or related to the Contract or the Work shall be conducted in Bend, Oregon.

§13.8 Severability

§13.8.1 Should any provision of the Contract, at any time, be in conflict with any law, rule, regulation or order, or be unenforceable or inoperative for any reason, then such provision shall continue in effect only to the extent that it remains valid. In the event any provision of the Contract becomes less than fully enforceable and operative, the remaining provisions of the Contract nevertheless shall remain in full force and effect and the arbitrator(s) or court shall give the offending provision the fullest meaning and effect permitted by law.

§13.9 Additional Provisions

§13.9.1 All personal pronouns used in this Agreement, whether used in the masculine, feminine, or neutral gender, shall include all other genders, and the singular shall include the plural, and vice versa. Titles of Articles and sections are for convenience only, and neither limit nor amplify the provisions of this Agreement in itself. The use herein of the word "including," when following any general statement, term or matter, shall not be construed to limit such statement, term, or matter to the specific items or matters set forth immediately following such word or to similar items or matters, whether or not non-limiting language (such words as "without limitation," or "but not limited to," or words of similar import) is used with reference thereto, but rather shall be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of such general statement, term, or matter.

§13.9.2 Any specific requirement in this Agreement that the responsibilities or obligations of Contractor also apply to a subcontractor is added for emphasis and is also hereby deemed to include a subcontractor. The omission of a reference to a subcontractor in connection with any of Contractor's responsibilities or obligations shall not be construed to diminish, abrogate, or limit any responsibilities or obligations of a subcontractor under the Contract Documents.

§13.9.3 This Agreement shall not be interpreted as creating any third party or class of persons not parties hereto or expressly designated herein, any right or benefits of any kind or nature whatsoever.

§13.9.4 The Agreement and Contract Documents, to the extent they were prepared by counsel for the parties hereto, shall not be construed against any party as a consequence of its role, or the role of its

counsel, in the preparation of the Agreement, the General Conditions, or any of the other Contract Documents.

§13.10 Other Provisions

§13.10.1 ORS Chapter 279, more specifically 279a, 279b and 279c, and the most current version of the Attorney General's Model Rules for Public Contracting ("Model Rules") at OAR 137-046, 137-047, 137-048, 187-049 and the provisions of the Deschutes County Contracting Code (DCC 2.37) contain provisions more specifically, ORS 279C.505, 279C.515, 279C.520, 279C.525, 279C.530 and 279C.540. The required contract provisions are incorporated herein by this reference. Furthermore, Contractor and Owner agree to comply with all requirements of ORS Chapter 279, the model Rules and other Oregon laws whether or not any such provisions are excised.

§13.10.2 All notices given under the Contract Documents shall be in writing and shall be deemed properly given when delivered in person or by facsimile transmission to the individual to whom it is addressed or four (4) days after it is sent postage prepaid by certified mail return receipt requested to the addresses set forth above.

§13.10.3 Contractor shall comply fully with the provisions of ORS 279C.800 through 279C.870. Workers shall be paid not less than the specified minimum hourly rate of wage as provided in the Oregon Bureau of Labor and Industries (BOLI) publication (which publication is available at web address http://www.boli.state.or.us/BOLI/WHD/PWR/pwr_book.shtml) titled "Prevailing Wage Rates for Public Works Contracts in Oregon" (subject only to state law) in effect on the date bids are opened.

ARTICLE 14. TERMINATION OR SUSPENSION OF THE CONTRACT

§14.1 Termination by Contractor

§14.1.1 Contractor may terminate the Contract if, after written notice by Contractor and fourteen (14) days' opportunity to cure, Owner fails to make payments to Contractor as set forth in the Contract Documents, subject to all rights and remedies of Owner.

§14.1.2 If the Work is stopped for a period of sixty (60) consecutive days through no act or fault of Contractor or a subcontractor or their agents or employees or any other persons performing portions of the Work under the contract with Contractor because Owner has persistently failed to fulfill Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, Contractor may, upon fourteen (14) days' written notice and opportunity to cure, terminate the Contract and recover from Owner for all Work performed up to the date of termination, plus all reasonable and unavoidable expenses directly attributable to termination for which Contractor is not otherwise compensated. Contractor shall in no case be entitled to compensation of any kind, including, but not limited to, profit and overhead, on any unperformed Work.

§14.2 Termination by Owner for Cause

§14.2.1 Owner may terminate the Contract if Contractor:

.1 refuses or fails to supply enough properly skilled workers or proper materials or equipment;

.2 fails to make payment to subcontractors for materials or equipment or labor in accordance with the respective agreements between Contractor and the subcontractors;

.3 disregards laws, ordinances, or rules, regulations, or orders of a public authority having jurisdiction;

.4 disregards the instructions of Architect/Engineer or Owner (when such instructions are based on the requirements of the Contract Documents);

.5 breaches any warranty made by Contractor under or pursuant to the Contract Documents;

.6 fails to furnish Owner with assurances satisfactory to Owner evidencing Contractor's ability to complete the Work in compliance with all the requirements of the Contract Documents;

.7 fails to proceed diligently and continuously with the construction and completion of the Work in accordance with the Contract Time or the approved schedule;

.8 is adjudged bankrupt or insolvent, or makes a general assignment for the benefit of Contractor's creditors, or a trustee or receiver is appointed for Contractor or for any of its property, or files a petition to take advantage of any debtor's act, or to reorganize under bankruptcy or similar laws, or fails or is unable to provide Owner timely and adequate assurance of future performance of the Work in accordance with the terms and conditions of the Contract Documents; or

.9 otherwise does not fully comply with the Contract Documents.

§14.2.2 When any of the above reasons exist, Owner may, without prejudice to any other rights or remedies of Owner and after giving Contractor and Contractor's surety, if any, fourteen (14) day's written notice, terminate employment of Contractor, and may:

.1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by Contractor;

.2 accept assignment of subcontracts pursuant to Section 5.4; and

.3 finish the Work by whatever reasonable method Owner may deem expedient. Upon request of Contractor, Owner shall furnish to Contractor a detailed accounting of the costs incurred by Owner in finishing the Work.

§14.2.3 When Owner terminates the Contract for one of the reasons stated in Paragraph 14.2.1, above, Contractor shall not be entitled to receive further payment until the Work is finished.

§14.2.4 In the event of termination of the Contract for cause under Paragraph 14.2.1, the compensation of the parties shall be determined as follows:

.1 For lump sum projects using the A101 Agreement, determine the value of the work performed as of the time of termination by reviewing the percentage of completion for each item and the approved schedule of values, provided that this amount shall not exceed the Contract Sum, and add in Contractor's percentage markup on that value for overhead and profit as used by Contractor in preparing its bid. For purposes of this Section 14.2.4, the term "earned Contract Sum" shall mean the sum determined under this Item .1, or .2, below.

.2 For cost-plus projects using the A111 Agreement, add the amount of the Cost of the Work for the Work performed as of the time of the termination to the amount of Contractor's Fee computed upon that Cost of the Work, provided that this sum shall not exceed the Guaranteed Maximum Price as of the time of the termination. For purposes of this Section 14.2.4, the term "Earned Contract Sum" shall mean the sum determined under this Item .2, or .1, above.

.3 Determine the amount of all costs incurred by Owner in completion of the Work. For purposes of this Section 14.2.4, the term "Owner's Costs" shall mean the sum determined under this Item .3. Owner's Costs shall include, but not be limited to, the cost of any additional design, construction management, and Project administrative costs required to facilitate completion with another contractor, any costs incurred in retaining another contractor or other subcontractors, any additional interest or other fees paid by Owner, any attorneys' fees and other legal expenses related to the termination of Contractor and transactions to arrange for the completion of the Project with another contractor, and any and all other costs, expenses, and damages incurred by Owner by reason of the termination of Contractor, the completion of the Work and of the Project, and delay in the completion of the Project.

.4 For cost-plus projects using the A111 Agreement, determine the amount of Owner's share of the savings that Owner would have received under Paragraph 5.2.2.1 of the Agreement, but for the Contractor's failure to perform or the other occurrence(s) that resulted in the termination under Section 14.2.1. For the purposes of this Section 14.2.4, the term "Owner's Lost Savings" shall mean the sum determined under this Item .4.

.5 Subtract the Earned Contract Sum from the Guaranteed Maximum Price (when using A111) or Contract Sum (when using A101). This item shall be called "Unearned Contract Sum."

.6 If Owner's Costs exceed the Unearned Contract Sum, then Contractor shall pay Owner the amount of the excess, plus Owner's Lost Savings (when using A111 only), less the amount of the Earned Contract Sum not yet paid, if any. If this sum is a negative number, then Owner shall pay Contractor any unpaid portion of the Earned Contract Sum up to the amount of the negative number arrived at in this Item In no event will Contractor be entitled to compensation of any kind, including, but not limited to, profit or overhead, on any unperformed Work.

.7 If the Unearned Contract Sum exceeds Owner's Costs, then Owner shall pay Contractor the amount of difference minus Owner's Lost Savings, if any; provided, however, that if this sum is a negative number, the Contractor shall pay Owner that sum.

§14.2.5 **<u>Conversion of Owner's Termination for Cause</u>**

§14.2.5.1 In the event Owner terminates the Contract for cause under Section 14.2 and such termination subsequently is determined in a final arbitrated award or a final judgment to have been wrongful, the termination shall automatically be converted to a termination for Owner's convenience pursuant to Section 14.4, below, and damages will be limited to those described in Paragraph 14.4.3.

§14.3 **<u>Suspension by Owner for Convenience</u>**

§14.3.1 Owner may, without cause or prior notice and at any time, order Contractor in writing to suspend, delay, or interrupt the Work in whole or in part for such period of time as Owner may determine.

§14.3.2 The contract Sum and Contract Time shall be adjusted for increases, if any, if the cost and time caused by suspension, delay, or interruption as described in Paragraph 14.3.1, above. No adjustment shall be made to the extent:

.1 that performance is, was, or would have been so suspended, delayed, or interrupted by another cause for which Contractor is responsible;

.2 that an equitable adjustment is made or denied under another provision of the Contract; or

.3 the suspension, delay, or interruption was made necessary by Contractor or anyone for whose acts Contractor was responsible.

§14.4 Termination by Owner for Convenience

§14.4.1 Owner may, without prior notice and at any time, terminate the Contract for Owner's convenience and without cause.

§14.4.2 Upon receipt of written notice from Owner of such termination for Owner's convenience, Contractor shall:

.1 cease operations as directed by Owner in the notice;

.2 take actions necessary, or that Owner may direct, for the protection and preservation of the Work; and

.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts or purchase orders.

§14.4.3 In case of termination for Owner's convenience, Contractor shall be entitled to receive compensation for Work performed prior to termination, together with reasonable and unavoidable expenses directly attributable to termination for which Contractor was not otherwise compensated. In no event shall Contractor be entitled to recover compensation, including, but not limited to, profit and overhead, on Work not performed, for alleged damage to reputation, for interference with contractual relations, or for consequential damages or losses on other projects.

§14.5 Actions Upon Termination

§14.5.1 Upon termination of the Contract for either cause or convenience, Contractor shall:

.1 forthwith withdraw its employees, workmen, machinery, and equipment from the Project in an orderly manner, as directed by Owner;

.2 within thirty (30) days after such termination, furnish Owner with a complete accounting of the costs incurred to the date of termination, together with a final status report updating the progress of the Work up to the date of termination;

.3 within thirty (30) days after said termination, deliver to Owner all those items enumerated in Paragraph 9.10.2, above, to the extent that said items are available, and all Shop Drawings, Project Data and Samples available, and all other of Contractor's engineering, procurement, accounting and construction documents and record relating to the work performed under the Contract; and

.4 within fourteen (14) days after said termination, assign to Owner all Contractor's interest in any subcontracts and purchase orders that Owner so designates in writing.

Application No: ______________

Date: _______________________

SUBCONTRACTOR PROGRESS PAYMENT WAIVER AND RELEASE OF LIENS AND CLAIMS

Project Name: ______________________________ Subcontractor: ________________________

Project Location: ___________________________ Payment Amount: _____________________

Owner: ___________________________________ Payment Period:_______________________

Contractor: ________________________________ Prior Application No.: __________________

For the purpose of inducing payment by the Contractor identified above ("Contractor") to Subcontractor, and in consideration thereof, and with the recognition that this instrument (this "Waiver") is to be delivered to and will be relied upon by Contractor and Owner, together with their respective directors, officers, managers, members, employees, subcontractors, vendors, attorneys, sureties, lenders, title companies, representatives, successors and assigns, subsidiaries, parents, and affiliates, (the "Released Parties"), Subcontractor hereby agrees and acknowledges as follows:

1. Subcontractor hereby represents and warrants to and for the benefit of the Released Parties that: (a) the work, or labor or services performed or material or equipment (including rented materials and equipment) furnished by Subcontractor ("Work") for which payment is being requested is Work actually supplied to, performed on, or used in connection with the Project; (b) all federal, state and local taxes and contributions required to be withheld from employees of Subcontractor in connection with the Work have been withheld in the manner provided by law; (c) Subcontractor has been paid in full for all Work previously furnished for the Project or for the benefit of Contractor or Owner through the last date of the Payment Period identified above except for the Payment Amount and any retainage allowed under the Contract; (d) all Work covered by the Application has been incorporated into the Project and title thereto has been passed to the Owner, or, in the case of materials or equipment stored at the site or some other location previously agreed to by Contractor, title will pass to the Owner upon receipt of the Payment Amount, in each case free and clear of any lien, claim, security interest or other encumbrance; and (e) all Work furnished on behalf of Subcontractor to the Project for which Subcontractor has previously received payment has been fully paid for by Subcontractor and there are no amounts unpaid in favor of any employee, subcontractor, materialman, supplier, vendor or any other person or entity furnishing or supplying such Work to said Project or to Subcontractor for utilization in the Project or in the performance of the obligations of Subcontractor with respect to the Project.

2. Subcontractor hereby represents and agrees that the entire amount owed to it as consideration for entering into this Waiver is the Payment Amount identified above. Upon receipt by Subcontractor of (i) one or more checks payable to Subcontractor in the aggregate amount of the Payment Amount, when the check(s) has been paid by the bank upon which it is drawn, or (ii) a wire transfer for said Payment Amount, and in consideration therefor, this instrument shall become effective to unconditionally release and waive all liens, claims, or causes of action against the Released Parties, or against bonds or related to the failure to require bonds, now existing or that may hereafter arise, related in any way to the Project, or Work furnished, supplied or performed by Subcontractor in connection with the Project through the last date of the Payment Period identified above.

3. This Waiver shall not operate as an acceptance by any of the Released Parties of any incomplete Work or Work not in conformance with the contract documents, nor shall it relieve Subcontractor of its continuing obligations under such contract documents, including, but not limited to any guarantees, warranties, achievement of final completion of the Work pursuant to such contract documents, all of which are hereby agreed to be for the benefit of and enforceable by any of the Released Parties. It is specifically

understood that this instrument shall not operate to waive, discharge, alter or affect in any way any obligation pursuant to any payment or performance bonds provided for the Project or any guaranty in favor of a Released Party.

4. At the request of Contractor, Subcontractor further agrees to promptly furnish a good and sufficient waiver of liens and claims in the form hereof from every person or entity furnishing or performing any portion of the Work by, through or under Subcontractor.

5. Subcontractor shall indemnify, defend and hold harmless the Released Parties from and against any and all claims, demands, costs and expenses (including attorneys' fees) against any of the Released Parties or their property, arising out of or related in any way to the breach of any representation, warranty or covenant set forth herein or the failure of the Subcontractor to pay any sums owed for Work furnished or performed by, through or under Subcontractor through the date hereof.

Subcontractor: ______________________________

Signed: ______________________________

Name (printed): ______________________________

Title: ______________________________

Application No: ______________

Date: ____________________

SUBCONTRACTOR FINAL PAYMENT WAIVER AND RELEASE OF LIENS AND CLAIMS

Project Name: ____________________________ Contractor: ___________________________

Project Location: __________________________ Subcontractor: _________________________

Owner: ________________________________ Final Payment Amount: __________________

For the purpose of inducing payment by the Contractor identified above ("Contractor") to Subcontractor, and in consideration thereof, and with the recognition that this instrument (this "Waiver") is to be delivered to and will be relied upon by Contractor and Owner, together with their respective directors, officers, managers, members, employees, subcontractors, vendors, attorneys, sureties, lenders, title companies, representatives, successors and assigns, subsidiaries, parents, and affiliates, (the "Released Parties"), Subcontractor hereby agrees and acknowledges as follows:

1. Subcontractor hereby represents and warrants to and for the benefit of the Released Parties that: (a) the work, or labor or services performed or material or equipment (including rented materials and equipment) furnished by Subcontractor ("Work") for which payment is being requested is Work actually supplied to, performed on, or used in connection with the Project; (b) all federal, state and local taxes and contributions required to be withheld from employees of Subcontractor in connection with the Work have been withheld in the manner provided by law; (c) Subcontractor has been paid in full for all Work for the Project or for the benefit of Contractor or Owner except for the Final Payment Amount identified above; (d) all Work covered by the Application has been incorporated into the Project and title thereto has been passed to the Owner, or, in the case of materials or equipment stored at the site or some other location previously agreed to by Contractor, title will pass to the Owner upon receipt of the Final Payment Amount, in each case free and clear of any lien, claim, security interest or other encumbrance; and (e) all Work furnished on behalf of Subcontractor to the Project for which Subcontractor has previously received payment has been fully paid for by Subcontractor and there are no amounts unpaid in favor of any employee, subcontractor, materialman, supplier, vendor or any other person or entity furnishing or supplying such Work to said Project or to Subcontractor for utilization in the Project or in the performance of the obligations of Subcontractor with respect to the Project.

2. Subcontractor hereby represents and agrees that the entire amount owed to it as consideration for entering into this Waiver is the Final Payment Amount identified above. Upon receipt by Subcontractor of (i) one or more checks payable to Subcontractor in the aggregate amount of the Final Payment Amount, when the check(s) has been paid by the bank upon which it is drawn, or (ii) a wire transfer for said Final Payment Amount, and in consideration therefor, this instrument shall become effective to unconditionally release and waive all liens, claims, or causes of action against the Released Parties, or against bonds or related to the failure to require bonds, now existing or that may hereafter arise, related in any way to the Project, or Work furnished, supplied or performed by Subcontractor in connection with the Project.

3. This Waiver shall not operate as an acceptance by any of the Released Parties of any incomplete Work or Work not in conformance with the contract documents, nor shall it relieve Subcontractor of its continuing obligations under such contract documents, including, but not limited to any guarantees, warranties, achievement of final completion of the Work pursuant to such contract documents, all of which are hereby agreed to be for the benefit of and enforceable by any of the Released Parties. The Subcontractor further agrees that if it hereafter performs any labor or furnishes any materials, tools, equipment, supplies or services pursuant to such guaranty or warranty, it will fully pay for the same, will pay any and all taxes and charges in connection therewith and will release, discharge, defend and hold

harmless the Released Parties and their real and personal property, from any and all claims, demands and liens arising in connection therewith, all in a like manner and to the same extent as is herein provided with respect to the Work. It is specifically understood that this instrument shall not operate to waive, discharge, alter or affect in any way any obligation pursuant to any payment or performance bonds provided for the Project or any guaranty in favor of a Released Party.

4. At the request of Contractor, Subcontractor further agrees to promptly furnish a good and sufficient waiver of liens and claims in the form hereof from every person or entity furnishing or performing any portion of the Work by, through or under Subcontractor.

5. Subcontractor shall indemnify, defend and hold harmless the Released Parties from and against any and all claims, demands, costs and expenses (including attorneys' fees) against any of the Released Parties or their property, arising out of or related in any way to the breach of any representation, warranty or covenant set forth herein or the failure of the Subcontractor to pay any sums owed for Work furnished or performed by, through or under Subcontractor.

Subcontractor: ______________________________

Signed: ______________________________

Name (printed): ______________________________

Title: ______________________________

AGENDA REQUEST & STAFF REPORT

MEETING DATE: Wednesday, April 20, 2022

SUBJECT: 2nd Reading: Ordinance 2022-003 and Ordinance 2022-004 – Dave Swisher Plan Amendment/Zone Change

RECOMMENDED MOTION:
Move to approve 2nd reading of Ordinance 2022-003 and Ordinance 2022-004

BACKGROUND AND POLICY IMPLICATIONS:
The Board of County Commissioners (Board) will consider a second reading of Ordinance 2022-003 and Ordinance 2022-004 on April 20, 2022 for a request for a Plan Amendment and Zone Change (file nos. 247-21-000616-PA, 617-ZC) for two (2) 40-acre properties located on Abbey Road, approximately 1.3 miles east of the City of Bend, submitted by Dave Swisher. The addresses associated with the subject properties are as follows:

Property 1:

Map and Taxlot: 171318C000100
Account: 109158
Situs Address: 63350 ABBEY RD, BEND, OR 97701

Property 2:

Map and Taxlot: 1713180000600
Account: 106933
Situs Address: NO SITUS ADDRESS

BUDGET IMPACTS:
None

ATTENDANCE:
Kyle Collins, Associate Planner

COMMUNITY DEVELOPMENT

MEMORANDUM

TO: Deschutes County Board of Commissioners (Board)

FROM: Kyle Collins, Associate Planner
Will Groves, Planning Manager

DATE: April 11, 2022

SUBJECT: Consideration of Second Reading of Ordinance 2022-003 and Ordinance 2022-004 – Dave Swisher Plan Amendment and Zone Change

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The Board of County Commissioners (Board) will consider a second reading of Ordinance 2022-003 and Ordinance 2022-004 on April 20, 2022 to consider a request for a Plan Amendment and Zone Change (file nos. 247-21-000616-PA, 617-ZC) for two (2) 40-acre properties located on Abbey Road, approximately 1.3 miles east of the City of Bend.

I. BACKGROUND

The Applicant, Dave Swisher, is requesting a Comprehensive Plan Amendment to redesignate 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 Multiple Use Agricultural (MUA-10). 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 redesignated and rezoned for residential use. The Applicant has provided a supplementary soil study that identifies non-high value soils on a majority (~96%) of the subject properties. Additionally, the Applicant has provided findings within the burden of proof that demonstrate compliance with state and local requirements and policies.

A public hearing before a Hearings Officer was conducted on September 21, 2021, with the Hearings Officer's recommendation of approval issued on November 24, 2021. The Board held a public hearing on February 2, 2022 and initiated a 21-day open record period, which concluded February 23, 2022 at 4:00pm. On March 16, 2022, the Board deliberated to approve the requests. The Board conducted first reading of Ordinance 2022-003 and Ordinance 2022-004 on April 6, 2022

II. SECOND READING

The Board is scheduled to conduct the second reading of Ordinance 2022-003 and Ordinance 2022-004 on April 20, 2022, fourteen (14) days following the first reading.

ATTACHMENTS:

1. Area Map
2. Draft Ordinance 2022-003 and Exhibits
   - Exhibit A: Legal Description
   - Exhibit B: Proposed Plan Amendment Map
   - Exhibit C: Comprehensive Plan Section 23.01.010, Introduction
   - Exhibit D: Comprehensive Plan Section 5.12, Legislative History
   - Exhibit E: Hearings Officer Recommendation/Decision
3. Draft Ordinance 2022-004 and Exhibits
   - Exhibit A: Legal Description
   - Exhibit B: Proposed Zone Change Map
   - Exhibit C: Hearings Officer Recommendation/Decision

Proposed Comprehensive Plan Amendment / Zone Change

63350 Abbey Rd, Bend

04/20/2022 Item #10.

1" = 500'

Subject Property
17-13-18-00-00600
17-13-18-C0-00100
ABBEY RD
City of Bend
Bend Airport

Legend

Proposed Plan Amendment / Zone Change
Bend Urban Growth Boundary

N:\Custom\County\CDD\Planning\KyleCollins\EX_A_Ord_2022-003\ProjectFiles\Public_Hearing_Map.mxd
Imagery Date: 4/19/2019

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 Prescribing an Effective Date on the 90th Day After the Date of Adoption.	* * *	ORDINANCE NO. 2022-003

WHEREAS, Dave Swisher applied for a Comprehensive Plan Amendment (247-21-000616-PA) to Deschutes County Code ("DCC") Title 23, to change the Comprehensive Plan Map Designation for the subject property from an Agricultural (AG) designation to a Rural Residential Exception Area (RREA) designation; and

WHEREAS, after notice was given in accordance with applicable law, a public hearing was held on September 21, 2021 before the Deschutes County Hearings Officer and, on November 24, 2021 the Hearings Officer recommended approval of the Comprehensive Plan Map change;

WHEREAS, pursuant to DCC 22.28.030(C), the Board of County Commissioners ("Board") heard the application for a comprehensive plan designation change from Agriculture (AG) to Rural Residential Exception Area (RREA) through a *de novo* public hearing held on February 2, 2022 after notice was given in accordance with applicable law; and

WHEREAS, Deschutes County Ordinance 2000-017 ordained the Plan Map to be a component of Title 23 and, therefore, any amendment to the Plan Map is an amendment to Title 23; 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 Agriculture (AG) to Rural Residential Exception Area (RREA).

Section 2. AMENDMENT. DCC Section 23.01.010, Introduction, is amended to read as described in Exhibit "C" attached and incorporated by reference herein, with new language underlined.

Section 3. AMENDMENT. Deschutes County Comprehensive Plan Section 5.12, Legislative History, is amended to read as described in Exhibit "D" attached and incorporated by reference herein, with new language underlined.

Section 4. FINDINGS. The Board adopts as its findings in support of this decision, the Decision of the Hearings Officer, attached as Exhibit "E" and incorporated by reference herein.
/ / /

Section 5. EFFECTIVE DATE. This Ordinance takes effect on the 90th day after the date of adoption.

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

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 Description

A parcel of land situated in the Northeast Quarter of the Southwest Quarter (NE¼ SW¼) and the Southeast Quarter of the Northwest Quarter (SE¼ NW¼), Section Eighteen (18), Township Seventeen (17) South, Range Thirteen (13) East of the Willamette Meridian, Deschutes County, Oregon.

AG

AG

Plan Amendment from
Agriculture (AG)
to
Rural Residential
Exception Area (RREA)

Taxlot 17-13-18-00-00600

Taxlot 17-13-18-00-00100

ABBEY RD

AG

RREA

SILVIS RD

RREA

PARKER LN

PETERMAN LN

BUTLER MARKET RD

RREA

DICKEY RD

AG

KEVIN DR

PROPOSED COMPREHENSIVE PLAN MAP

Exhibit "B"
to Ordinance 2022-003

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

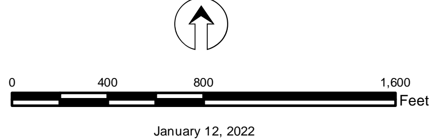
Legend

Proposed Plan Amendment Boundary

Comprehensive Plan Designation

AG - Agriculture

RREA - Rural Residential Exception Area



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.

(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 11 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 1 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 Vandevert 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	TBD/TBD	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture (AG) to Rural Residential Exception Area (RREA)
2022-003	TBD/TBD	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture (AG) to Rural Residential Exception Area (RREA)

DECISION OF THE DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS: 247-21-0000616-PA, 617-ZC

HEARING: September 21, 2021, 6:00 p.m.
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

APPLICANT/ OWNER: Dave Swisher
250 NW Franklin Avenue, Suite 401
Bend, OR 97703

Property 1:
Don Swisher Trust, Dave Swisher, Successor Trustee
Carolyn J. Swisher Trust, Dave Swisher Successor Trustee

Mailing Name: DON SWISHER TRUST ET AL
Map and Taxlot: 171318C000100
Account: 109158
Situs Address: 63350 ABBEY RD, BEND, OR 97701

Property 2:
Don Swisher Trust, Dave Swisher, Successor Trustee
Carolyn J. Swisher Trust, Dave Swisher Successor Trustee
MacCloskey Revocable Trust, Craig and Jane I. MacCloskey, Trustees

Mailing Name: DON SWISHER TRUST ET AL
Map and Taxlot: 1713180000600
Account: 106933
Situs Address: NO SITUS ADDRESS

SUBJECT PROPERTY: Tax Lot 100, Assessor's Map 17-13-18C ("Tax Lot 100")
Tax Lot 600, Assessor's Map 17-13-18 (Tax Lot 600")

ATTORNEY FOR APPLICANT: Liz Fancher
2465 NW Sacagawea Lane
Bend, OR 97703

TRANSPORTATION ENGINEER: Joe Bessman
Transight Consulting, LLC

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 – Tumalo/Redmond/Bend subzone (EFU-TRB) to Multiple Use Agricultural (MUA-10) as the subject property does not qualify as "Agricultural Land" pursuant to State Law and administrative rules

HEARINGS OFFICER: Stephanie Marshall

STAFF CONTACT: Kyle Collins, Associate Planner
Phone: 541-383-4427
Email: Kyle.Collins@deschutes.org

RECORD CLOSED: October 15, 2021[1]

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 18.32, Multiple Use Agricultural Zone (MUA10)
- Chapter 18.80, Airport Safety Combining Zone (AS)
- Chapter 18.113, Destination Resorts Zone (DR)
- Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance

Deschutes County Comprehensive Plan

[1] At the conclusion of the public hearing, the Hearings Officer made an oral ruling, granting a request to leave the record open through October 5, 2021. Thereafter, on October 5, 2021, staff contacted the Hearings Officer, informing her of the fact that Central Oregon LandWatch submitted a letter and exhibits at the conclusion of the first open record period on September 28, 2021. The submission was misidentified with the wrong file number and thus was not initially included in the file for the referenced applications. The Hearings Officer issued an Order Extending Open Record Period dated October 5, 2021, extending the open record period through October 15, 2021. The Order is included in the record.

Chapter 2, Resource Management
Chapter 3, Rural Growth Management
Appendix C, Transportation System Plan

Oregon Administrative Rules (OAR), Chapter 660
Division 6, Forest Lands
Division 12, Transportation Planning
Division 15, Statewide Planning Goals and Guidelines
Division 33, Agricultural Land

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

II. FINDINGS OF FACT

A. LOCATION: Property 1 described above has a situs address of 63350 Abbey Road, Bend, OR 97701. Property 2 described above does not have a situs address. Property 2 is directly adjacent to the north of Property 1. The subject property is generally east of the City of Bend, north of Butler Market Road and west/northwest of Powell Butte Highway and the Bend Airport. Property 1 and Property 2 are referred to collectively herein as the "Subject Property."

B. LOT OF RECORD: Property 1 described above was found to be a legal lot of record pursuant to local land use decision 247-20-000396-LR. Property 2 described above was found to be a legal lot of record pursuant to local land use decision 247-20-000395-LR.

C. ZONING AND PLAN DESIGNATION: The Subject Property is zoned EFU-TRB and is designated Agricultural (AG) in the Deschutes County Comprehensive Plan. The Airport Safety Overlay Zone (AS) and the Destination Resort Overlay Zone (DR) also apply to the Subject Property. The Subject Property does not have any Goal 5 resource designations.

D. 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 Multiple Use Agricultural (MUA10). The Applicant asks that Deschutes County change the zoning and the plan designation because the subject property does not qualify as "agricultural land" under Oregon Revised Statutes (ORS) or Oregon Administrative Rules (OAR) definitions. The Applicant submits that no exception to Statewide Planning Goal 3, Agricultural Land is required because the Subject Property is not agricultural land.

Submitted with the application is an Order 1 Soil Survey of the Subject Property, titled “Soil Assessment for Two 40-acre Parcels, Bend Oregon” (hereafter referred to as the “soil study”) prepared by soil scientist Andy Gallagher, CPSSc/SC 03114 of Red Hill Soils. The Applicant has also submitted a traffic analysis prepared by Transight Consulting, LLC titled “Swisher Rezone” hereafter referred to as “traffic study.” Additionally, the Applicant has 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.

E. SITE DESCRIPTION: Property 1 and Property 2 each are approximately 40 acres in size and adjacent to one another in a north-south orientation. The Subject Property is relatively level with mild undulating topography. Vegetation consists of juniper trees, sage brush, bunch grasses, and other native vegetation. Property 1 and Property 2 are both undeveloped and not irrigated. Access to the Subject Property is provided by Abbey Road, a designated local access road which extends from Butler Market Road to the southwest. The nearest portion of the City of Bend’s Urban Growth Boundary (UGB) is located approximately 1.3 miles to the southwest, and the Bend Municipal Airport is located approximately 0.5 miles to the east. The Subject Property is 0.25 miles south of Butler Market Road and adjoins Abbey Road.

Neither Property 1 nor Property 2 have water rights, and neither has been farmed or used in conjunction with any farming operation in the past. The Applicant’s Burden of Proof statement at page 3 states, “According to COID, the seller of this property entered into a contract with the predecessor of the district to purchase 25 acres of water for each of the two tax lots. See, **Exhibit C**. The contract was, however, never fulfilled and no water rights were adjudicated to these properties.” An old COID ditch crosses Property 1. There are no COID facilities on Property 2.

The Natural Resources Conservation Service (NRCS) map shown on the County’s GIS mapping program identifies two soil complex units on the Subject Property: 38B, Deskamp-Gosney complex and 58C, Gosney-Rock outcrop-Deskamp complex. Neither soil complex 38B, the predominant soil complex on the Subject Property, nor soil complex 58C, are defined as high-value soils by DCC 18.04. The Applicant’s Burden of Proof statement states on pages 3-4:

> *The applicant obtained a professional soils assessment for the two properties. The assessment was made by Andy Gallagher, CPSSc/SC 03114. Mr. Gallagher determined that 88% of Tax Lot 100 is comprised of LCC 7 and 8 soils and 82% of Tax Lot 600 is comprised of LCC 7 and 8 soils. The remainder of each property is comprised of soils that are rated LCC 6 when not irrigated. A copy of Mr. Gallagher’s soils assessment is included as part of* ***Exhibit D*** *to this burden of proof. Mr. Gallagher also provided a professional estimate of the amount of dryland forage each tax lot might produce. He found that Tax Lot 100 would produce approximately 494 pounds per acre per year and that Tax Lot 600 would produce approximately 440 pounds per acre per year.*

As discussed in detail below in the Soils section, there is no irrigation on the Subject Property and an Agricultural Soils Capability Assessment (Order 1 soil survey) conducted on the properties determined Class 3 irrigated and 6 nonirrigated are mapped as a consociation and the Gosney, rock outcrop and very shallow soils mapped as a complex in which all three components are either Capability Class 7 or 8. The soils in both of the 40 acre parcels are predominantly shallow and ashy-skeletal and rock outcrops Land Capability Class 7 and 8.

F. SOILS: According to Natural Resources Conservation Service (NRCS) maps of the area, the Subject Property contains two different soil types as described below: 58C – Gosney-Rock Outcrop-Deskamp complex, and 36A – Deskamp loamy sand.

The Applicant submitted a soil study report (Applicant's), which was prepared by a certified soil scientist and soil classifier that determined the Subject Property is comprised of soils that do not qualify as Agricultural Land[3]. 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. The Applicant's soils study has been verified by DLCD.

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 96.3 percent of the Subject Property is made up of this soil type.

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

[3] As defined in OAR 660-033-0020, 660-033-0030

when unirrigated, and 4e when irrigated. Approximately 3.7 percent of the Subject Property is made up of this soil type, all located within the northern parcel.

G. SURROUNDING LAND USES: The Subject Property is located in Northeast Bend near the Bend Airport. Its south boundary adjoins a large tract of land zoned MUA-10 that is developed with rural residences. EFU-TRB and MUA-10 zones are intermixed in the greater area around the subject property. EFU-zoned lands in the vicinity are developed with small scale agricultural operations and single-family dwellings. The remaining parcels consist of County exception lands zoned MUA10, which are predominately developed with single-family dwellings and host small-acreage irrigation for pasture and hobby farm uses. There are also significant EFU-zoned parcels which contain no irrigation or substantial agricultural operations. The nearest portion of the City of Bend's UGB is located approximately 1.3 miles to the southwest, and the Bend Municipal Airport is located approximately 0.5 miles to the east.

The adjacent properties are outlined below in further detail:

North: The City of Bend's sewage treatment plant tract is north of the Subject Property. The developed part of the City's treatment plant is at least 0.6 miles north, the land between the plant and the Subject Property is vacant, dry, open land. The predominant soil mapping units on these properties are 58C and 59C soils that are primarily comprised of Class 7 and 8 soils. The adjacent property to the north, Tax Lot 104 (Assessor's Map 17-13-00) is a 1,213.82 acre EFU-zoned property owned by the City of Bend that is unirrigated and predominately undeveloped, with the major exception of the city's wastewater treatment facility. Northeast is Tax Lot 105 (Assessor's Map 17-13-00), an 80 acre EFU-zoned property also owned by the City of Bend that is unirrigated and undeveloped.

West: Immediately west of the Subject Property are four EFU-zoned parcels. Tax Lots 700 and 701 (Assessor's Map 17-13-18) are 19.6 acres and 19.2 acres in size respectively. Tax Lots 200 and 300 (Assessor's Map 17-13-18C) are 17.9 acres and 16.3 acres in size respectively. All four parcels are developed with single-family dwellings (land use file nos. CU-89-133 for Tax Lot 300. The dwellings on Tax Lots 201 and 700 predate modern land use standards and requirements. It is unclear what land use decision formally approved the dwelling on Tax Lot 700, which was constructed in 1986 pursuant to building permit no. 247-B13811), accessory structures, and three of the properties (Tax Lots 700, 200, and 300) are partially irrigated. Tax Lot 701 lacks irrigation water rights. None of these properties appear to be engaged in commercial farm use.

East: The Bend Airport is one half mile east of the Subject Property. It is developed with commercial and industrial uses related to aviation and as an airport. Tax Lot 100 is separated from the airport by Powell Butte Highway and small parcels zoned EFU-TRB. Immediately east of the Subject Property is a 40-acre square that has been divided into four small EFU-zoned parcels. Tax Lots 100, 200, 300, and 400 (Assessor's Map 17-13-18DB) are 8.5 acres,

12.2 acres, 8.0 acres, and 10.0 acres in size respectively. All four parcels are developed with single-family dwellings (land use file nos. CU-02-18 for Tax Lot 100, CU-03-8 for Tax Lot 200, CU-90-35 for Tax Lot 300, and CU-88-146 for Tax Lot 400). It does not appear that any of these parcels contain irrigation rights, but several of the properties do appear to contain very minor hobby farming operations. Continuing east are two additional EFU-zoned parcels. Tax Lots 100 and 200 (Assessor's Map 17-13-18D) are both 19.5 acres in size respectively. Tax Lot 100 contains several agricultural buildings and Tax Lot 200 is undeveloped. Farther east is an assemblage of properties associated with the Bend Municipal Airport. The block of nonfarm properties to the east of the Subject Property (which are not receiving farm tax deferral) precludes it from being farmed with small farm parcels further to the east.

South: Immediately south of the Subject Property are four MUA-10-zoned properties all located within the Butler subdivision. All the parcels are approximately 9.85 acres in size, and all are developed with single-family dwellings and assorted residential accessory structures. Southwest of the subject properties is an EFU-zoned parcel (Tax Lot 500, Assessor's Map 17-13-18C) that is approximately 19.3 acres in size and is developed with a single-family dwelling (land use file no. CU-99-46). Tax Lot 500 does not appear to contain any irrigation water rights, but does appear to have some minor agricultural operations onsite. Continuing southeast are numerous MUA-10-zoned properties located within the Classic Estates subdivision – 16 lots - all of which are developed with single-family dwellings and a variety of residential accessory structures. These lot sizes range from 2.12 to 2.59 acres. A large amount of land south of Classic Estates and south of Butler Market Road is also zoned MUA-10.

H. PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on June 23, 2021, to several public agencies and received the following comments:

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the transmittal materials for 247-21-000616-PA/617-ZC to amend the Comprehensive Plan designation Zone of the subject properties from Agriculture and Exclusive Farm Use (EFU) to Rural Residential Exception Area (RREA) and Multiple Use Agriculture (MUA-10). The two 40-acre properties are at 63350 Abbey Road, aka County Assessor's Map 17-13-18C, Tax Lot 100 and a property with no situs address but described as 17-13-18, Tax Lot 600.

The applicant's traffic study dated Feb. 22, 2021, uses marijuana production as one of the outright permitted uses in the EFU zone when comparing and contrasting a reasonable worst case scenario of traffic generation from EFU vs. MUA-10. The County has banned marijuana production so this appears to staff to be an inappropriate choice. Nevertheless, in looking at the other outright permitted uses in EFU vs. MUA-10, staff agrees the plan amendment/zone change will not result in any significant adverse effect and thus the complies with the Transportation Planning Rule.

The property accesses Abbey Road, a public road not maintained by Deschutes County and otherwise known as a Local Access Road (LAR) and functionally classified as a local road. The County remains the road authority. 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.

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

Oregon Department of Aviation, Seth Thompson

Thank you for providing the opportunity for the Oregon Department of Aviation (ODA) to comment on File Number: 247-21-000616-PA, 617-ZC.

The ODA has no comment on the subject proposal. However, future development on the subject parcels will be subject to the following requirements by the ODA and FAA:

1) Prior to issuance of any subsequent building permits on these parcels, the applicant must file and receive aeronautical determinations from the ODA and FAA as required by OAR 738-070-0060 on FAA Form 7460-1 Notice of Proposed Construction or Alteration to determine if any new structures will pose an obstruction to aviation safety at the Bend Municipal Airport.

2) The height of any new structures shall not penetrate FAA Part 77 Imaginary Surfaces, as determined by the ODA and FAA.

Central Oregon Irrigation District, Kelley O'Rourke

Please be advised that Central Oregon Irrigation District (COID) has reviewed the provided application dated June 22, 2021 of the above referenced project. COID has no facilities or water rights on the subject property (1713180000600).

Please note that COID facilities are located within the vicinity of the project; contact COID if any work and/or crossings will be done near the COID facilities and not shown on the provided plans.

The comments from COID only referenced one property (Map and Tax Lot: 1713180000600), Property 2 described above. However, the subject application references two parcels (secondary property: Map and Tax Lot 171318C000100). Based on internal County records and comments within the submitted application materials, both Property 1 and Property 2 are located within the boundaries of the Central Oregon Irrigation District, but neither parcel contains any listed water rights.

I. PUBLIC COMMENTS: The Planning Division mailed notice of the application to all property owners within 750 feet of the subject property on June 23, 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 June 23, 2021. Two public comments were received from neighboring property owners.

The first comment was received from Michael and Donna Grace Higham, residents and owners of property located at 63225 Peterman Lane, Bend, OR 97701 on June 26, 2021:

> *"We OPPOSE this change of rezoning of this land.*
>
> *We are extremely surprised that proposed development of 40 acres is being looked at. We have so much traffic from the airport and Prineville. WE ARE SHORT OF COI WATER. The amount of people and activities will increase by 200%. Having development should be closer to Bend City.*
>
> *Then the next development will be Don Swishers other 40 acres next to this property.*
>
> *This is NOT an orderly development from Bend City to urban growth boundaries. Bend was developing from the city out."*

The second comment was received from Kurt and Sue Conrad, a residents and owners of property located at 22220 Parker Lane, Bend, OR 97701 on July 1, 2021:

> *"We are <u>opposed</u> to the above-referenced land use application. Listed below are our reasons broken down into collective and personal:*
>
> ***Collective: Zoning change request***
>
> *When Don and Carolyn Swisher purchased this land, they did so with the knowledge it could not be developed for residential use. The LCDC laws had been in place for 15 years at that time.*

This attempt to develop the properties has been requested only after the passing of Mr. and Mrs. Swisher. And coincidentally, (?) when there is little to no available land to develop in the appropriate zoning. The current applicant is a well-established local developer.

The land use laws that were in place at the time were designed by a group of citizens and elected officials who genuinely love Oregon for the greater good of all citizens. To quote Tom McCall in 1973, it was to prevent the "unfettered despoiling of the land, ***sagebrush subdivisions,*** *coastal condomania, and the ravenous rampage of suburbia in the Willamette Valley all threaten to mock Oregon's status as the environmental model for the nation."*

This proposal would be breaking the protective laws in place for the singular purpose of personal gain.

Changing from EFU to RREA/MUA10 will set a precedent that will be the ruin of our lovely area, County and State. Just like Covenants, Codes and Restrictions in a neighborhood, once they are broken and not rectified they are no longer enforceable. Others in the State will use this as a reason they, too, will be able to develop subdivisions wherever they please.

End Game of Part One – arbitrary development and subdivision

We who live here purchased this property in good faith that multi-home developments would not be allowable in the remaining vacant lands. We are a reasonable distance from the UGB/reserve to believe we were protected from subdivisions – even ten-acre lot ones.

How will the lack of irrigation rights be handled? Are xeriscaped properties required, or will homeowners be using potable water for their lawns? Or, will water be sucked directly from the aquifer for landscaping aesthetic purposes when natural supplies are dwindling? What about the additional fire risk 8 or more properties will bring? Will fire hydrants be a requirement now that excessive heat and red flag warnings are a concern?

Ten acres per home may sound large, but 8 homes clustered together is significant change for the worse. We moved out to the country for the quiet enjoyment of our homes and yards. We all have numerous pets and animals used to the peaceful country sounds who be affected by the constant noise.

Since there is rock at the surface of our 2-1/2 acres in many places, this will most likely involve extreme measures for the foundation. All this chaos will go on for years.

There is abundant wildlife in these two parcels. It is their homes and who knows where they be forced to retreat. We see them regularly.

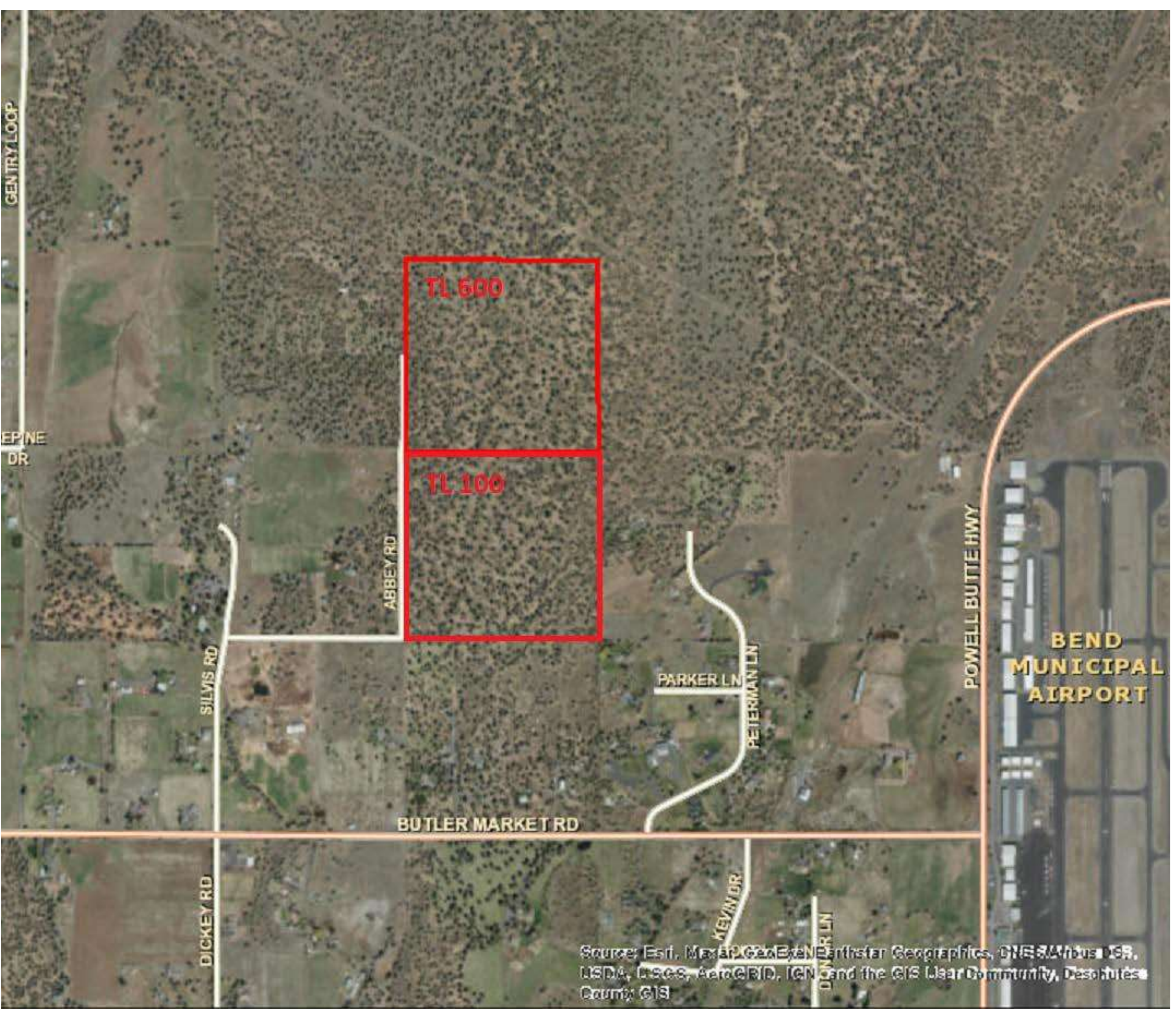
In finishing, I circle back to the "why" of this zoning change. The general public will not reap the greater good, just a developer and 8 additional high-end homebuyers in Central Oregon.

LCD's far-ranging planning prohibited endless building during the frenzy of the early 2000s. They also enabled us to come back stronger. We must stay the course. This is not the time to be changing our structured laws in places. It is time for honoring what we have here in extraordinary Oregon."

(emphasis in original).

Applicant Response: After submission of the public comments above, the Applicant provided the following response on September 13, 2021:

"***A. Location:*** *The location of the subject properties is marked as TL 100 and TL 600 on the following aerial photograph. The owners of two small properties (about 2.5 acres each), Conrad and Higham, filed comments opposing approval of the requested zone change and plan amendment. Their properties are located southeast of the subject property on Peterman Lane and Parker Lane in the Classic Estates subdivision. These roads are shown on the aerial photograph, below.*



B. Zoning: *The zoning of the Classic Estates lots is MUA-10, the same zoning proposed by the applicant for TL 100 and 600. Deschutes County has not applied a WA overlay zone to this property to protect wildlife. Protections for wildlife must be sanctioned by the County's Goal 5 ESEEs and WA or similar wildlife overlay zoning to be relevant to review of this application.*

C. Road Impacts: *Access to Classic Estates lots is provided by Peterman Lane and Parker Lane. Traffic associated with new development of the subject property will not rely on either road for access. Impacts to the greater area arterial street network will be negligible as shown by the traffic impact analysis filed with the land use applications.*

D. Classic Estate Subdivision: *A copy of the Classic Estates subdivision plat is included to illustrate the lot pattern and roads established by it.*

E. Properties Owned by Opponents: *The following photographs are aerial photographs that show the setting of the properties owned by opponents Conrad and Higham. The*

northwest corner of the Conrad property touches the southeast corner of TL 100.

The Higham property does not adjoin the subject properties. Its northwest corner is approximately 700 feet from the southeast corner of TL 100. There are two developed single-family home lots between it and TL 100.

F. Development Under EFU-TRB Zoning: *Tax Lots 100 and 600 are legal lots of record. Each, based on its poor soil conditions, should qualify to be divided into two nonfarm parcels with a nonfarm dwelling on each of the tax lots. Such divisions would allow a total of four nonfarm dwellings on the subject property. The subject property will not remain vacant land even if this application is denied.*

F. Water for Homes and Irrigation: *The applicant has shown that the subject property can obtain water service from Avion Water System as shown by **Exhibit F** and **G** of the application materials we filed with Deschutes County Planning.*

G. Purpose of EFU Zoning/Land Use Planning: *The purpose of EFU zoning, as stated by Statewide Goal 3, is "to preserve and maintain agricultural lands." The term "Agricultural Land" is defined by Goal 3. The subject properties do not meet the definition of "Agricultural Land." As a result, they may be zoned MUA-10, a zoning district that allows low-density* ***rural*** *residential development. The MUA-10 zone has been acknowledged by the Land Conservation and Development Commission as being compliant with the Statewide Goals that protect the community from urbanization of rural lands that formerly occurred in "sagebrush subdivisions."*

H. Location of City of Bend UGB and Airport: *The density of development allowed by the proposed plan amendment and zone change is not urban development. Instead, the MUA-10 zone has been determined, through the land use planning process, to be a zoning district that is both an appropriate zone for nonagricultural land and one that does not allow urban development. Nonetheless, the subject property is only approximately 1.25 miles east of the City of Bend's UGB and approximately one-half mile from the Bend Airport. The relatively large lot sizes required by the MUA-10 zone will preserve this land for future urban development. If the City makes the logical decision to expand its boundaries toward the Bend Airport, a location that is an employment area of the community, the subject properties will likely remain suitable for redevelopment given their size.*

Central Oregon LandWatch (COLW), through its attorney Carol Macbeth, participated in the public hearing and submitted materials into the record during the open record period objecting to the applications.

The Applicant submitted Post-Hearing Evidence on September 28, 2021 as follows:

•"Rural Resource Lands Research Report" dated May 16, 2019 prepared by DLCD Public Research Lands Fellow Stephanie Campbell (part)

•"Agricultural Soils Assessment" webpages published by and obtained from DLCD website on 9/28/2021

•*Central Oregon LandWatch v. Deschutes County*, LUBA No. 2016-12 (relevant part)

•"Conservation Neighbor: Andy Gallagher" article by Teresa Matteson dated December 29, 2020 published on Benton County Soil and Water Conservation District's website

•"Soil Survey Deschutes Area Oregon" published by USDA Soil Conservation Service

•December 1958 (obtained from Web Soil Survey of the NRCS) (part)

•Resume for Andy Gallagher

•"Soil Survey of the Upper Deschutes River Area" published by the USDA and NRCS (part)

•WebSoil Survey "Custom Soil Resource Report" for the subject property (location approximate) obtained from NRCS

•ORS 215.211, Agricultural land

•OAR 660-033-0030, Identifying Agricultural Land

•OAR 660-033-0045, Soils Assessments by Professional Soils Classifiers

The Applicant also submitted Rebuttal and Final Argument on October 15, 2021 which included, among other attachments, a letter from soils scientist Andy Gallagher dated October 14, 2021.

The Hearings Officer addresses the submitted public comments and testimony in the Conclusions of Law below.

J. LAND USE HISTORY: As noted above, Property 1 and Property 2 both have been determined to be legal lots of record. There is no other land use history for Property 1 or Property 2. In its burden of proof, the Applicant included the following:

> *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, however, developed without the benefit of reliable, detailed soils mapping information. The map was prepared prior to the USDA/NRCS's publication of the "Soil Survey of Upper Deschutes River Area, Oregon." This soil survey is more comprehensive than prior soils mapping efforts but continues to provide general soils information – not an assessment of soils on each parcel in the study area. This land application use application includes a more detailed and accurate Order 1 soils survey that is a part of* ***Exhibit D****. It provides Deschutes County with the information required to find that the subject property does not qualify as "agricultural land" as defined by Statewide Goal 3, Agricultural Land. Consistent with the requirements of ORS 215.211, this survey has been approved for use by Deschutes County by the Department of Land Conservation and Development ("DLCD") as shown by* ***Exhibit D****. This approval was sent directly to Deschutes County Planning by DLCD on June 17, 2021.*
>
> *When the County first implemented Statewide Goals, it applied resource zoning using a broad brush. All rural lands were assumed to be resource land. Then-existing development lands not suited for resource use were granted exceptions to the Goals that protect*

resource lands. The County allowed landowners a brief period of time after adoption of PL-15 (1979) to petition the County to remove nonresource properties from resource zone protections but made no effort to determine whether lands might be nonresource lands that do not merit the imposition of stringent land use regulations that protect rural resources – typical farm and forest resources.

Beginning around 2007, Deschutes County has rezoned properties from EFU to MUA-10 zoning and has applied a Rural Residential Exceptions Plan designation to lands found to be nonresource land. The County's comprehensive plan was also amended to authorize this type of change. This type of an amendment has been approved when soils are shown to be "nonagricultural" soils and not otherwise suited for farm use. Some of the ordinances and decisions that have approved this type of zone change and plan amendment include:

> ***Ordinance No. 2013-009*** *for File PA-11, ZC-11-2, State of Oregon DSL,* ***Exhibit H****. The Board's findings in this decision conclude that the current comprehensive plan allows the county to approve applications to change the plan designation of nonagricultural land from Agricultural to RREA. The Board's findings also conclude that a goal exception is not required to allow the county to approve an RREA plan designation for nonagricultural land because Goal 3 does not require protection of nonagricultural land and that an RREA designation is appropriate for nonagricultural land.*
>
> ***Ordinance No. 2007-025****, PA-07-1/ZC-07-1, Pagel,* ***Exhibit J****.*
>
> ***Ordinance No. 2011-014****, PA-08-1/ZC-08-1, The Daniels Group,* ***Exhibit K****.*
>
> ***Ordinance No. 2019-006****, 247-18-000485-PA/247-18-000486-ZC, Eastside Bend, LLC,* ***Exhibit L****.*
>
> ***Central Oregon Landwatch v. Deschutes County (Aceti****), LUBA NO. 2016-012, August 10, 2016,* ***Exhibit M****. LUBA's decision is relevant to this application for the following reasons:*
>
> 1. *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.*
>
> 2. *LUBA affirmed the County's determination that property that had been irrigated and used to grow hay in 1996 and earlier years was not agricultural land based on the Borine Order 1 soils survey that showed that*

the poor soils on the property are Class VII and VIII soils when irrigated, as well as when not irrigated. The Swisher property has no history of irrigation, a fact confirmed by Central Oregon Irrigation District, Exhibit C.

3. *LUBA accepted the following evidence provided by the applicant, to establish that the Aceti property is not "other than Class I-VI Lands taking into consideration farming practices.*

"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."

In Aceti, the County also found that commercial agricultural uses in the vicinity were limited.

The Swisher property, like the Aceti property, is located in close proximity to dense residential development, the Bend Airport and two major arterial roads (Butler Market Road and Powell Butte Highway). Adjoining EFU-zoned lands are vacant or engaged in hobby farming only. Farming in the area is not "commercial" agriculture. As with the Aceti property "irrigating rocks [on the Swisher property] is not productive."

K. PUBLIC SERVICES: The Subject Property receives police services from the Deschutes County Sheriff and is within the Deschutes County Rural Fire Protection District (DCRPFD) No. 2. DCRPFD No. 2 provides fire protection and ambulance services to the property through a contract with the City of Bend Fire Department. Fire Station 304 is located about three miles from the Subject Property at 2500 NE Neff Road, Bend. The Subject Property is easily accessed from this location via the arterial roadways of Hamby Road and Butler Market Road. Access to the Subject Property by fire trucks is provided by arterial streets with the exception of a small stretch of Abbey Road that will be required to be improved as a condition of a future land division of the subject property. The Subject Property is included in the Bend-LaPine School District. The Pine Nursery and Big Sky Park will serve the park needs of future new residents of the Subject Property.

L. UTILITY SERVICES: The Subject Property is in the service area for Central Electric Cooperative, Inc (CEC). CEC is willing to serve the Subject Property with electricity. Avion Water is willing to serve the Subject Property with public water services.

M. NOTICE REQUIREMENT: On August 20, 2021, 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 Sunday, August 24, 2021.

Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on August 12, 2021.

The Applicant complied with the posted notice requirements of DCC 22.24.030(B). The applicant submitted a Land Use Action Sign Affidavit, dated June 23, 2021, indicating the Applicant posted notice of the land use action on June 23, 2021.

Deschutes County sent notice of the proposed change to its comprehensive plan and land use regulation to the Oregon Department of Land Conservation and Development, received by DLCD on August 12, 2021.

N. REVIEW PERIOD: The subject application(s) were submitted on June 18, 2021, and deemed complete by the Planning Division on July 18, 2021. 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. CONCLUSIONS OF LAW

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.136, Amendments

Section 18.136.010, Amendments

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

FINDING: The Applicant, also the property owner, 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. 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 statement:

> *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 consistency with and respond to the Comprehensive Plan Goals and policies that apply, which are listed in the Comprehensive Plan section of this Decision in further detail.

Kurt and Sue Conrad submitted public comments in opposition to the applications, stating that the public interest will not be served by rezoning the property and that the only beneficiaries will be the Applicant and future buyers of new residences constructed on the Subject Property. Mr. and Mrs. Conrad assert that the proposal would be "breaking the protective laws in place for the singular purpose of personal gain." They further argue that a change from EFU to RREA/MUA10 will set a precedent that will adversely affect the surrounding area, the County and the State as a whole. Mr. and Mrs. Conrad argue, "Just like Covenants, Codes and Restrictions in a neighborhood, once they are broken and not rectified they are no longer enforceable." The Conrads' residence is situated on property zoned MUA-10, the same zoning classification to which the Applicant requests changing the Subject Property.

The Applicant submitted rebuttal to these arguments stating that, because the Subject Property is not agricultural land that is protected by Oregon land use laws, "they will not be unwound by approval of this application." The Applicant filed an additional ten (10) photographs that show the condition of the land, stating, "[t]hese confirm our position and the results of the soil study that show that this property is not suitable for agricultural use and is not 'agricultural land.'" The Applicant further argued, "The system designed to protect resource lands will in no way be harmed by allowing nonresource land to be developed with somewhat more housing than the four homes that should be able to be approved on this property given its current EFU zoning."

The Applicant noted that the Conrads' testimony and submissions state that "there is not a lot of potential for farming that 80 acres [the Subject Property]." The Conrads also expressed

concern that because there is rock at the surface of their property, development of homes on the Subject Property "will most likely involve extreme measures for the foundation."

The Applicant detailed a list of potential uses of the Subject Property under current EFU zoning and noted that the uses permitted outright in the MUA-10 zone are much more limited than the uses allowed outright in the EFU zone. *Compare* DCC 18.32.020 *with* DCC 18.16.020 and DCC 18.16.025.

The Hearings Officer finds that the question of whether the public interest is best served in approving the applications requires analysis of each of the factors set forth in DCC 18.136.020(A) through (D). The Applicant is correct in its argument that Oregon's protection of resource lands will not be "unwound" or otherwise undermined by approval of the applications if the Subject Property is determined not to be agricultural land.

The Hearings Officer further finds that approval of the applications will not set a negative precedent nor result in a "free for all" rush to rezone and develop EFU lands because each rezone application is decided on its own merits and must be supported by substantial evidence in the record for a requested rezone to be approved. The Deschutes County zoning regulations in Title 18 of the Deschutes County Code do not constitute "covenants, conditions and restrictions" that become unenforceable when a rezone of a particular property is approved. Zoning regulations are not set in stone, as evidenced by the fact that the Deschutes County Code includes a process and standards for rezoning properties where applicable standards are met and consistency with the Comprehensive Plan and Statewide Planning Goals is established.

The Hearings Officer finds the above provision is met, based on Comprehensive Plan conformance as set forth in subsequent findings.

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

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

> *The approval of this application is consistent with the purpose of the MUA-10 zoning district which stated in DCC 18.32.010 as follows:*
>
>> *"The purposes of the Multiple Use Agricultural Zone are to preserve the rural character of various areas of the County while permitting development consistent with that character and with the capacity of the natural resources of the area; to preserve and maintain agricultural lands not suited to full-time commercial farming for diversified or part-time agricultural uses; to conserve forest lands for forest uses; to conserve open spaces and protect natural and scenic resources; to*

> *maintain and improve the quality of the air, water and land resources of the County; to establish standards and procedures for the use of those lands designated unsuitable for intense development by the Comprehensive Plan, and to provide for an orderly and efficient transition from rural to urban land use."*

The subject property is not suited to full-time commercial farming and has no history of farm use.

The MUA-10 zone will preserve nonagricultural soils for future part-time or diversified agricultural use. The low-density of development allowed by the MUA-10 zone will conserve open spaces and protect natural and scenic resources. This low level of development will also help maintain and improve the quality of the air, water and land resources of the county by encouraging the future owners of the property to return irrigation water to area waterways or to more productive farm ground elsewhere in the county rather than to waste it on unproductive lands.

The subject property adjoins lands zoned MUA-10. They and the subject property provide a proper transition zone from EFU rural zoning to urban land uses in the City of Bend UGB.

The Hearings Officer finds that the purpose of the MUA-10 zoning classification is to allow low-density rural residential development. The MUA-10 zone has been acknowledged by LCDC as being compliant with the Statewide Goals that protect the community from urbanization of rural lands that formerly occurred on "sagebrush subdivisions." This zoning district is both an appropriate zone for nonagricultural land and one that does not allow urban development. For these reasons, the Hearings Officer finds that the density of development allowed by the proposed plan amendment and zone change is not, and will not lead to, urban development. Therefore, the Hearings Officer finds that the proposed rezone of the Subject Property is consistent with the purpose of the MUA-10 zoning classification.

The Hearings Officer notes that, in recent years, Deschutes County has recognized the value in rezoning non-productive agricultural lands and has issued decisions in support of plan amendments and zone changes where the applicant demonstrates the property is not agricultural land and, therefore, Statewide Goal 3, Agricultural Lands, does not apply. This is further supported by the plain language in Policy 2.2.3 of the Deschutes County Comprehensive Plan ("Allow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, for individual EFU parcels…") and Section 3.3 of the Comprehensive Plan ("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…").

Cases pertinent to the proposed request include:

Kelly Porter Burns Landholdings LLC ("Landholdings")/File nos. 247-16-000317-ZC/318-PA

On November 1, 2017, the Board of County Commissioners approved Kelly Porter Burns Landholdings LLC's request to change the plan designation on certain property from Agricultural to Rural Residential Exception Area and to change the zone designation from EFU-TRB to MUA-10 zone. The property consists of about 35 acres.

Based on the Order 1 soil survey for the property and the submitted evidence, the Hearings Officer found that the Landholdings property does not constitute agricultural land and does not merit protection under Goal 3, and therefore, approved the change in Plan designation and Zoning of the property from Agriculture/EFU-TRB to RREA/MUA-10.[4]

Division of State Lands Decision/File Nos. PA-11-7 and ZC-11-2

The *Division of State Lands* decision was a 2013 approval by the Board for a plan amendment from Agriculture to Rural Residential Exception Area and a zone change from EFU-TRB to Multiple Use Agricultural (MUA-10). Based on the Order 1 soil survey for the property and the submitted evidence, the Board found that the property was not agricultural land and therefore, Goal 3 did not apply.

Paget Decision/File Nos. PA-07-1, ZC-07-1

The *Paget* decision was a 2007 approval of a plan amendment from Agriculture to Rural Residential Exception Area and a zone change from EFU to MUA-10. The Board adopted the Hearings Officer's decision, which found that the property did not constitute "agricultural land" and therefore, the plan amendment and zone change to MUA-10 was consistent with Goal 3.

The Daniels Group/File Nos. PA-08-1, ZC-08-1

The Daniels Group decision was a 2011 Board decision approving a change to the Comprehensive Plan map from Surface Mine and Agriculture to Rural Residential Exception Area and a zone change from EFU-LB and Surface Mining to Rural Residential (RR-10). The Board found that the property did not constitute "agricultural land" as defined in Goal 3, was

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[4] The Board adopted as its findings the Hearings Officer's decision with one exception: that if the property is divided, it must be developed as a cluster development and the two irrigation ponds must be included in the common area. In addition, the Board required the applicant to sign a Conditions of Approval agreement to "*assure that future residential development of the property will be harmonious with existing development in the area and so that a part of the property may be developed at urban densities if and when the property is annexed to the City of Bend*."

not subject to protection under Goal 3, and therefore, the plan amendment and zone change did not require an exception to Goal 3. (Exhibit 4).

The Hearings Officer finds the Applicant has demonstrated that the requested change in classification is consistent with the purpose and intent of the MUA-10 Zone. A change in classification will preserve the rural character of the Subject Property, due to the low density of development allowed in the MUA-10 zone, while permitting development consistent with that character. As set forth in the findings below, the Subject Property is not suited to full-time commercial farming but could be used for hobby farming. Low density development will also conserve open spaces and protect natural and scenic resources. The Hearings Officer finds that approval of the proposed rezone to MUA-10 would permit applications for low-density development. The Hearings Officer's findings regarding agricultural land, consistency with the Comprehensive Plan and Goal 3 are set forth in the findings below.

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 is no proposal to develop the property at this time. 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. Will-serve letters from Central Oregon Electric Cooperative and Avion Water Company, Inc., ***Exhibits E, F*** *and* ***G*** *of this application show that electric power and water services are available to serve the property.*

The subject property is located a short distance to the north of Butler Market Road, an arterial street. It is also approximately one-half mile west of the Powell Butte Highway. The impact of rezoning the subject property will be extremely minor. With its current zoning, it is theoretically possible to divide each 40-acre parcel into two nonfarm dwelling parcels. This would allow a total of four dwellings to be built on the subject property. If MUA-10 zoning is applied, the approval of a standard subdivision would allow the creation of eight residential lots. If cluster development approval is allowed as a conditional use, the maximum number of houses allowed would be ten (one per 7.5 acres) – an increase of six houses over the number allowed in the EFU zone. An increase of six houses is a de minimus impact. The existing road network is available to serve the use. This has been confirmed by the transportation system impact review conducted by Transight Engineering, ***Exhibit N*** *of this application.*

The property receives police services from the Deschutes County Sheriff. The southern half of the property is in a rural fire protection district and the nearest fire station is about three miles away. The applicant is pursuing annexation of the northern parcel to the rural fire protection district and believes, based on conversations with District representative, that inclusion in the district will be obtained. Access to the subject property by fire trucks is provided by arterial streets with the exception of a small stretch of Abbey Road that will be required to be improved as a condition of a future land division of the subject property. It is efficient to provide necessary services to the property because the property is already served by these service providers and adjacent to and large tracts of land zoned MUA-10 that have been extensively developed with rural residences on small lots and parcels.

The record shows that neighboring properties contain residential and small scale agricultural uses, which have water service primarily from wells, on-site sewage disposal systems, electrical service, telephone services, etc. The record does not contain any evidence of known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare.

Mr. and Mrs. Conrad expressed concern about the lack of irrigation rights and queried whether homeowners would be using potable water for their lawns. They also asked whether fire hydrants will be required, alleging additional fire risk associated with new development.

The Hearings Officer finds that the Applicant has demonstrated public water is available to the Subject Property through submittal of a will-serve letter from Avion Water Company, Inc. Irrigation water is not required for approval of the requested rezone. Although no development is proposed at this time, prior to development, the Applicant will be required to comply with the applicable requirements of the Deschutes County Code, including possible land use permit, building permit, and sewage disposal permit processes. Through these development review processes, assurance of adequate public services and facilities will be verified.

For the foregoing reasons, 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 provided the following response in the submitted burden of proof statement:

The MUA-10 zoning is consistent with the specific goals and policies in the comprehensive plan discussed above. The MUA-10 zoning is the same as the zoning of many other properties in the area of the subject property and is consistent with that zoning.

The only adjoining lands in farm use – and marginally, noncommercial farm use at that – are those west of the subject property. The proposed zone change and plan amendment will impose new impacts on this EFU-zoned farm land because these lands are separated from the subject property by Abbey Road, each parcel is under twenty acres in size and is developed with a single-family residence. Furthermore, these farm parcels are close proximity to the J-Bar-J therapeutic boarding school. The Academy at Sisters. Farm uses in the greater area, also, are occurring on properties that have been developed with residences and/or are in close proximity to lands zoned MUA-10 that are developed with residences.

In addition to this statement, the Applicant provided specific findings for each relevant Comprehensive Plan goal and policy, which are addressed below. The Applicant's Rebuttal and Final Argument details the uses permitted outright in the EFU zone, compared to those allowed outright in the MUA-10 zone, which are more limited. *Compare* DCC 18.32.020 *with* DCC 18.16.020 and 18.16.025. The Hearings Officer finds that a change in zoning of the Subject Property will not materially alter the impacts on neighbors and the environment that may occur as a result of development of the property.

Mr. and Mrs. Conrad object to the applications in part because they believed their property would be protected from subdivisions, given the distance from the UGB/reserve. They further stated concern regarding pets and animals "used to the peaceful country sounds who will be affected by the constant noise." The Hearings Officer notes that a belief that surrounding properties would not ever be rezoned is not evidence of "impact on surrounding land use," or inconsistency with specific goals and policies within the Comprehensive Plan. Moreover, there is no evidence in the record to support a finding that rezoning the Subject Property to MUA-10 would result in "constant noise." Any future development and use of the Subject Property will be required to be consistent with the County Noise Control Ordinance, DCC Chapter 8.08, which sets forth regulations to protect the public peace, health, safety and general welfare from unreasonably loud or raucous noise.

The Hearings Officer finds the Applicant has demonstrated the impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan. Specifically, the Hearings Officer finds that the MUA-10 zoning is the same zoning of many other properties in the areas west, northwest, east and south of the Subject Property. There is no evidence that the requested zone change will impose new impacts on EFU-zoned land in the vicinity of the Subject Property.

For the foregoing reasons, the Hearings Officer finds 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 is proposing to rezone the Subject Property from EFU to MUA10 and re-designate the Subject Property 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 of the other property owners of lands east of Bend received approval to rezone their properties from EFU to MUA-10 because their properties contained poor soils and were improperly included in the EFU zone. The soils on the subject property are similarly poor and also merit MUA-10 zoning to correct the "broad brush" mapping done in 1979 and 1980. Since 1979/1980, there is a change of circumstances related to this issue. The County's comprehensive plan has been amended to specifically allow individual property owners to have improperly classified land reclassified.*
>
> *Additionally, circumstances have changed since the property was zoned EFU. The City of Bend has been developed to the east toward the subject property. The Bend Airport has grown significantly in this time period and now provides many aviation-related jobs. The property is located within easy commuting distance to Saint Charles Medical. It has grown significantly and its need for workers has increased. The area now includes The Academy at Sisters, a 20 student and 20 employee therapeutic boarding school for girls.*
>
> *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 O****, 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 P****. 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.

The Hearings Officer makes the following findings. First, whether or not owners of other properties may, or may not, request a change of comprehensive plan designation and zoning in the future is not relevant to the Hearings Officer's consideration of the current applications. Each application must be considered on its own merits.

Second, concerns regarding development encroachment support a finding of change of circumstances. As set forth in more detail in the findings below, the Subject Property is not comprised of agricultural soils, and is not land that could be used for agricultural uses in conjunction with adjacent property.

Third, the Hearings Officer does not have authority to deny the requested applications on the basis of concerns about growth. While understandable, the applications may be granted where, as here, all applicable criteria are met.

Finally, concerning wildlife concerns, the Hearings Officer finds the Subject Property is not within a Wildlife Area combining zone and is not subject to wildlife protections sanctioned by the County's Goal 5 ESEEs. Moreover, there is no evidence that the requested rezone, in and of itself, will impact wildlife.

For all the foregoing reasons, and based on evidence in the record that shows declining farm operations and limited numbers of financially successful farm operations, the Hearings Officer finds that a change of circumstances since the time the Subject Property was last zoned exists. Based on the soils report and the detailed findings below, the Hearings Officer finds that a mistake was made in designating the Subject Property EFU/Agriculture because the soils on the property did not merit a designation and protection as "Agricultural Land." Classification and zoning of the Subject Property as EFU/Agricultural was a mistake due to the poor soils on the Subject Property which must be revised to correct the "broad brush" mapping done in 1979 and 1980. 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 and Central Oregon LandWatch (COLW) disagree on whether the NRCS soil mapping units are the most detailed soils information for determining land capability class. The Applicant and COLW both submitted extensive argument concerning

classification of the Subject Property as agricultural land. Statewide Land Use Planning Goal 3 states:

> *"**Agricultural Land** ... in eastern Oregon is land predominantly Class I, II, II, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service ... "*

<u>APPLICANT'S EVIDENCE AND ARGUMENTS</u>

Summarized briefly, the Applicant submits that Goal 3 does not say that "agricultural land" is land mapped by NRCS soil studies as Class I, II, III, IV, V and VI. The Applicant argues that DLCD rules supplement the goal; they say that NRCS mapped soils in Class I-VI are agricultural land, but they also provide property owners with the right to challenge NRCS soil study results. This is done by hiring a certified soil scientist to conduct a more detailed soils study and obtaining DLCD approval to use the study in the present application. The Applicant states that a soil classification system and soil study maps are not one and the same thing.

The Applicant notes that the right to challenge NRCS mapping is allowed both by the text of Goal 3 itself and by ORS 215.211. In the event of conflict, ORS 215.211 controls over the conflicting provisions of the Goal 3 rules adopted by LCDC. The law requires soil scientists to study and report on the soils based on the SCS soil classification. OAR 660-033-0030(5)(a). The Applicant submits that it is permissible to use the results of the soils survey to determine whether soils on a particular property are properly classified as being in Class I-VI. It states, "Nothing in the soils study rules suggests that the results of the study are confined to addressing the suitability of Class VII and VIII for farm use."

The Applicant provided the following in its submitted burden of proof statement:

> *The applicant's soils study, **Exhibit D**, 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."*

The Applicant also submitted an Applicant's Response to Staff Report Supplement to Burden

of Proof addressing this Chapter, Section and Goal 1:

> *The evidence clearly shows that the subject property is not agricultural land. The property is not comprised predominantly of Class VI or better soils. So, it does not qualify for protection as agricultural land based on the classification of its soils. Only if the extremely poor Class VII and VIII soils on the subject property are "suitable for farm use" taking into consideration a host of factors. Lands are suitable for "farm us" only if a farmer can expect a profit from growing crops or raising livestock on the property. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007).*
>
> *In Deschutes County it is clear that farming Class VII and VIII soils will not be profitable. Only 16.03% of farmers in Deschutes County made a profit in 2017 according to the 2017 US Census of Agriculture. From my twenty-nine years of experience working in Deschutes County with a focus on rural land use, I can say that the subject property has one of the highest percentages of Class VII and VIII soils of any EFU-zoned property in the County. This makes it evident that it would be unreasonable for a property owner to expect to make a profit by attempting to farm on the subject property.*
>
> *The subject property has never been irrigated and has no known history of farm use. Approximately 85% of the soils on the property are Class VII and VIII nonagricultural soils. This percentage is higher than the percentage of these soils found to warrant rezoning to MUA-10 in the following similar applications for lands on the eastside of Bend. The following are the percentages:*
>
> *Eastside Bend, LLC* — *58% for TL 1600 and 1601*
56% for TL 1400
>
> *Porter Kelly Burns* — *67%*
>
> *DSL* — *51.5%*
>
> *LCC VII and VIII soils are so poor that the NRCS Soil Survey of Upper Deschutes River Area says that the soils "have very severe limitations that make them unsuitable for cultivation." The LCC VII and VIII soils are described by soil scientist Andy Gallagher as predominantly shallow and ashy-skeletal with interspersed rock outcrops. The only possible agricultural use of the property is livestock grazing. The soils report shows that these soils are so poor they produce only approximately one-half the typical amount of forage expected based on the soil classification – far below the level of forage production expected on typical Central Oregon rangeland.*
>
> *Only 15 percent of the soils on the combined properties are rated Class VI and these areas are not suitable for farm use given their limited extent and location. According to the NRCS, Class VI soils also "have severe limitations that make them generally unsuitable for*

cultivation." They are [sic] do not support the growth of cultivated crops.

The Applicant's Rebuttal and Final Argument, submitted on October 15, 2021 states, in relevant part:

The evidence in this matter is clear. The subject property is not suitable for farm use or forest use. As stated by adjoining property owner Sue Conrad "there is not a lot of potential for farming that 80 acres."[5] As Ms. Conrad observed in pre-hearing comments "[s]ince there is rock at the surface of our 2 ½ acres in many places, this [development of homes on the Swisher Trust property] will most likely involve extreme measures for the foundation." Land of this type is not "agricultural land" of the type Statewide Land Use Planning Goal 3 seeks to protect.

Like the Conrad property, there is rock at the surface in many places throughout the subject property. A set of ten photographs have been filed with the County to illustrate the fact that this is the condition of the property. ...

Ms. Conrad argues that EFU zoning and Oregon's statewide land use planning require that this property be remain [sic] undeveloped open space and that the Swishers purchased the property knowing it could not be developed. Her arguments against approval of the zone change and plan amendment assume that retaining EFU zoning will assure that the Swisher/MacCloskey property will remain undeveloped. This is an unwarranted assumption.

EFU zoning does not preclude development of the Swisher/MacCloskey property. The EFU zoning that applies to the property now allows the applicant to see approval of any of the following developments without approval of the requested zone and plan change.[6]...[list omitted]

If the property contained soils that could support farm use, the property might qualify for approval of the following additional uses. ... [list omitted].

Additionally, the uses permitted outright in the MUA-10 zone are much more limited than the uses allowed outright in the EFU zone. Compare, DCC 18.32.020 (single-family dwelling, stables, horse events, Type I home occupation and other uses allowed in EFU zone) with DCC 18.16.020 and 18.16.025 (exploration of minerals, fire service facilities, exploration and production of geothermal resources, outdoor mass gathering, composting, relative

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[5] This comment was offered in Ms. Conrad's testimony at the 9/21/2021 hearing.

[6] Most listed uses require County review either to confirm they meet special provisions to be allowed without conditional use review or to demonstrate they meet conditional use criteria. Mining and processing would occur only if resource is determined to be present on the property. Some uses such as a fire station are allowed subject only to site plan review.

farm assistance dwelling, church and cemeteries, utility facilities including wetland waste treatment systems, winery, farm stands, model aircraft "airport," processing farm crops). Given these facts, it is clear that a change of zoning will not materially alter the impacts on neighbors and the environment that may occur as a result of development of the property.

Additional materials submitted by the Applicant include the "Rural Resource Lands Research Report" dated May 16, 2019 prepared by DLCD Public Research Lands Fellow Stephanie Campbell (part). This Report states on page 6 with respect to the definition of Agricultural lands in OAR 660-033-0020(1):

The agricultural land definition includes land based on soil capability but also requires an in-depth analysis of whether the land is suitable for farm use, which typically requires the use of discretion by local decision makers. ***OAR 660-033-0030 provides additional guidance on identifying agricultural land and provides an option for the use of soil assessments that are more detailed than NRCS mapping****, In addition, there is substantial case law which has served to further refine how suitability for farm use should be addressed.*

(emphasis added). This Report continues on page 7, in relevant part:

Presently, counties may designate rural resource lands through two methods. The first, and to date only process utilized, is by identifying land that does not meet the definition of "Agricultural Land" or "Forest Land" and thus is not subject to Goal 3 or 4 protection*. These lands are typically designated in the county comprehensive plan as "nonresource lands" and may be developed for residential or other uses not allowed in farm and forest zones. …*

Ten Oregon counties have utilized this method to rezone land from EFU and forest. The primary purpose for nonresource designations appears to be the creation of rural residential parcels.[7] *Between 2008 and 2018, DLCD identified 24 zone changes associated with nonresource designations. These zone changes did not require an exception from Statewide Planning Goals 3 or 4.*

(emphasis added). In the "Agricultural Soils Assessment" submitted by the Applicant, published by and obtained from DLCD website, it states, in relevant part:

Oregon has some of the most productive soil in the world,. Soil mapping done by the USDA Natural Resources Conservation Service (NRCS) is the most common tool used for identifying the types of soils in an area. The NRCS provides a rating for each soil type that indicates how suited the soil is for agriculture. Oregon's land use laws help keep the best soils for crop cultivation and agricultural use. Soils that are less productive have more

[7] Clatsop, Crook, Deschutes, Douglas, Jackson, Josephine, Klamath, Linn, Lane, Wasco.

opportunities for development than higher quality soils.

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 administered by DLCD. This soils professional can conduct an assessment that may result in a change of the allowable uses for a property.

Soil capability is a measure the soil's productivity potential for farm crops and forests. The rules for an assessment of a soil's productivity apply to land zoned exclusive farm use or for mixed farm and forest use (OAR 660-033-0045). They also apply to rezoning forestland for non-resource use when the applicant relies on alternate soils information to show that the land should not be agricultural. The rules can apply to other changes as well, including those for comprehensive plan designations, zoning, non-farm land divisions, and certain dwellings.

In the Applicant's Rebuttal submitted October 5, 2021 at page 4, the Applicant states:

The Class 38B soils are a soils complex. This means that a large unit of land is mapped as containing a mix of soils of different types. In this case, the Deskamp soils are Class VI and the Gosney soils are Class VII. Soil classifier Andy Gallagher's soil survey that was approved by DLCD determined that the subject property contains much a [sic] percentage of Gosney and Class VIII rock outcrop soils than Deskamp soils than found in the entire Class 38B soil mapping unit that applies to the subject property.

Ms. Macbeth filed color photographs of other Bend area properties that are mapped 38B by the NRCS soil survey. The pattern of development shown in the aerial photos is a mix of irrigated and non-irrigated land that is not in farm use – presumably a pattern dictated by the location of the suitable Deskamp and unsuitable Gosney soils. Large non-irrigated areas much like the subject property that are not employed in visible farm use are shown in Figure 1.

Photos of farm pastures in areas allegedly mapped as being Class 38B soils by the NRCS soil survey were filed by Ms. Macbeth. The COLW photos prove little or nothing of relevance to the subject property because it is unknown whether any of the photographs depict land mapped Class 38B that is 85% Gosney soil or whether they are similar to the subject property. It is highly unlikely that they do. The subject property contains rock outcrops and surface rock not seen in Ms. Macbeth's photos of farm uses occurring on 38B soil (excluding the aerial photograph).

Ms. Macbeth claims that the applicant could irrigate the subject property by obtaining

rights to irrigate the subject property. The applicant disagrees. The subject property has no legal right to obtain water from Central Oregon Irrigation District. It has no access to irrigation water. The subject property was previously owned by the District and it did not establish irrigation water rights on the property. It is very telling that the district which delivers and holds irrigation water rights chose not to irrigate its own property – most logically due to its nonagricultural soils.

Furthermore, irrigation water must, by law, be put to beneficial use. Irrigating land that is comprised of 85% Class VII and VIII is not a beneficial use of water and one COID would surely not allow. Drilling a well and purchasing water rights to irrigate to irrigate [sic] these nonagricultural soils in a futile attempt to farm them is cost prohibitive and not an accepted farm practice in Central Oregon. Such an approach would require a person farming good farm ground to retire their water right and transfer it to the applicant to irrigate rocks because no new water rights are available in the Deschutes Basin to serve the subject property. See, photographs of the subject property.

The Applicant submitted the following in its Rebuttal and Final Argument:

1. *Goal 3's definition of "agricultural land" does not say that counties must rely on the soils maps and rating provided by NRCS soil surveys. Instead, it says that the determination of whether soil is agricultural land is based on the soil classes (I-VIII) described in the Soil Capability Classification System of the US Soil Conservation Service. COLW's arguments erroneously conflate the two (soil classification system and soils mapping). ...*

2. *OAR 660-033-0020(1)(a)(A), Definitions, broadens the definition of "agricultural land" provided in Goal 3 to include "lands classified by the US Natural Resources Conservation Service (NRCS) as predominantly *** Class I-VI soils in Eastern Oregon." This broadening, however, does not remove the language of Statewide Goal 3 that specifically allows counties to rely on more detailed soils data to determine whether land is or is not "Agricultural Land." ... The purpose of Goal 3 is to preserve agricultural land. It is not intended to preserve land that does not meet the definition of "agricultural land." A more detailed soils study helps Counties properly sort one from the other by making a better determination of whether land qualifies as agricultural land due to soil classification (LCC).*

3. *The Oregon Legislature adopted ORS 215.211(1) to assure property owners the right to provide local governments with more detailed soils information than provided by the NRCS's Web Soil Survey to "assist a county to make a better determination of whether land qualifies as agricultural land." ORS 215.211 sets the conditions for such "more detailed" surveys. It requires that soil scientists who conduct the assessment belong to the narrow pool of persons who are soils classifiers and are certified in good standing with the Soil Science Society of America. It also requires that reports be reviewed by DLCD before use by local governments in deciding whether land qualifies as agricultural land. Mr. Swisher obtained DLCD's permission to rely on the Red Hill Soils/Gallagher soils study to address*

the "agricultural land" issue.

4. *... It is clear that the report is expected by DLCD to be used in this zone change and plan amendment application [under OAR 660-033-0030(5)(c)(A)]. ... The fact that the soils report must report results based on the NRCS soil classification makes it clear that its classification based on the NRCS system may be used in lieu of the more general information on the topic provided by the NRCS soils study to determine whether a property meets the definition of agricultural land. COLW's argument to the contrary, therefore, should be rejected as it renders meaningless the LCC-based survey results that must be provided to the county to decide whether a property is "agricultural land."*

5. *DLCD describes its understanding of the role NRCS soils mapping and the more detailed soils surveys play in "defining agricultural land" on its website....*

6. *COLW's argument that the less-detailed NRCS soil study conducted at a landscape level must control over the more detailed information provided by an Order 1 soils survey for a particular property is illogical. It is an argument rejected by the Oregon Legislature when it adopted ORS 215.211 and by DLCD. ...*

The Applicant submitted a rebuttal letter from Andy Gallagher dated October 14, 2021 to address COLW's "layperson arguments about soils mapping and the suitability of Soil Mapping Unit 38B for agricultural use." Among other things, Mr. Gallagher stated:

1. *It would be a mistake to confuse farms in the photographs filed by COLW with the Swisher property. They have no bearing on the conditions that exist on the Swisher property which are "rough, rocky land, lava blisters and native vegetation, not farmland."*

2. *COLW misstates the information provided by the NRCS soil survey.*

3. *Even if the NRCS soil study data is used and the contrasting inclusions in the 38B soil mapping unit are correctly identified as Bedrock Outcrop, the subject property is predominantly Class VII and higher.*

4. *The Order 1 more detailed soil survey shows that the NRCS soil survey is very inaccurate for the Swisher property*.

The following constitutes an excerpt from Mr. Gallagher's October 14, 2021 letter:

> *In the letter [COLW] erroneously claim the parcel is mapped only as Class III irrigated and Class VI nonirrigated soils,. Why didn't the letter mention the Class VII and Class VIII land that is mapped here? The fact is that the 38B soil map unit is a complex**. Soil complexes are used in soil mapping where two or more dissimilar soils are mapped together where they either follow a regular pattern or are unpredictable in distribution but***

> ***are too complexly associated at the given scale to delineate individually and have a legible map. Typically, in a complex each major component occurs in each delineation, although the proportions may vary appreciably from one delineation to another***. *This last point is key in this case that the proportions may vary appreciably from one delineation to another. Also critical in this case is that if the soils are mapped as a complex and the percentages can vary appreciably from one delineation to the other then the NRCS soil survey does not actually report a hard number for acres of Class 3 and Class 6 soils as the COL letter states and it is open to interpretation or better yet, more intensive soil mapping.*
>
> *... [T]hese percentages in the NRCS soil survey are not hard facts but are ballpark estimates that vary appreciably between delineations. ...*
>
> *Fine detail needed for land use decisions cannot usually be shown at the scale of the NRCS soil survey, nor is this the intent of the soil survey. The minimum size map delineation is very scale-dependent. This is where the Order-1 soil mapping is important and provides a distinct advantage over the NRCS map. The Order-1 soil survey map is a larger scale map and the minimum map delineation can be much smaller than at the Order-2 scale of the Soil Survey. More detail can be determined because there is more intensive sampling, and more detail can be shown because the map scale is larger. ... The intensive sampling of the Order-1 soil survey supplies a much more realistic measure of map composition of a parcel than the NRCS soil survey. In this case, I was able to map the Deskamp soil as a consociation, separately from the Gosney and Bedrock Outcrop, which gets directly at the issue at hand here of calculating acreage of soils that are Class VI and lower and soils that are Class VII and higher.*
>
> *Another strength the Order-1 soil survey has over the NRCS for detailed land use planning decisions is that all field observations are located with GPS and their positions are shown on the map and each profile is logged in the soil profile descriptions section of the report. This is verifiable information that the NRCS soil survey just does not have and cannot provide.*
>
> ***If the NRCS soil survey is to be followed like a hard fact, then all the 38B map delineations would have to have the identical markup of 50% Deskamp, 35% Gosney and 15% contrasting inclusions. This defies all reason and experience. These published percentages are simply an estimate based on limited data and projected over the survey area, and this is often far off from the truth on the ground. It is a mistake to believe that the percentages NRCS publishes are anything but the approximation of a concept***.

(emphasis added).

With respect to arguments regarding “accuracy” of Order 1 soil surveys and, in particular, the

Red Hill Soils/Gallagher study, Mr. Gallagher commented in his October 14, 2021 letter:

> *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.*

Finally, Mr. Gallagher commented on the photographs submitted by COLW that purport to show successful farming operations on properties with the same LCC soils classification as the Subject Property:

> *In her long letter Ms. Macbeth [of COLW] references the soil assessment that I made for the Swishers on eighty acres northeast of Bend and while she does not deny any of the basic findings of my soil assessment report, there are a number of claims in her letter that are not correct.*
>
> *She submits aerial photographs and landscape images that seem to be selected specifically to mislead the decision makers by trying to portray this land as having much more agricultural potential than it has. The photos offered are claimed to be from land mapped as 38B and they may well be, but it is a mistake to confuse the farms in the pictures with this land, because this land is not 38B.*
>
> *I did not map any 38B on the eighty acres, so all the landscape photos are irrelevant. If anything these photos provide further evidence that the NRCS soil map here is unreliable. It raises suspicion that COL did not include photos of the Swisher property in their collection of photos. For if they had included photos of the Swisher's land the photos would have shown rough, rock land, lava blisters and native vegetation, not farmland.*

CENTRAL OREGON LANDWATCH EVIDENCE AND ARGUMENTS

COLW argues that it is impermissible for the County to rely on the Order 1 Red Hill

Soils/Gallagher soils survey because the NRCS conducted a less-detailed soil survey that included the Subject Property. Summarized briefly, COLW asserts that the NRCS soil survey is controlling and cannot be directly or indirectly challenged by a landowner's submission of an Order 1 soil survey conducted on a particular property. COLW argues that the landscape level NRCS soil survey on which classification of "agricultural land" in eastern Oregon was based means that any lands comprised of Class I-VI soils in eastern Oregon are *per se* agricultural and cannot be rezoned or reclassified without a Goal 3 exception.[8] COLW submitted a number of photographs of property alleged to be comprised of 38B soils with the same NRCS classification as the Subject Property. These photographs show green fields and farming operations on these other properties.

COLW argues that it would be disingenuous to "mislead" the Hearings Officer into believing that use of an Order 1 survey replaces or changes the NRSC soil survey. COLW asserts that "accuracy means free from error," and states that the Applicant's Order 1 survey is not free from error.

In a September 21, 2021 email to Staff, COLW submitted:

> *It is not the qualifications of the person hired to prepare a report, but the demonstrably incorrect legal theory the report is being used to support that LandWatch argues against.*
>
> *For the Hearings Officer's information please find attached a copy of Edward Sullivan's (a member of the law faculty at Lewis and Clark Law School) article in the San Joaquin Agricultural Law Review explaining the history of protection of farmland in Oregon, in which Edward Sullivan explains that the NRCS capability classifications, as LandWatch stated this evening, were expressly and deliberately chosen as the basis for the definition of agricultural land protected by Statewide Planning Goal 3.*
>
> *"As adopted in 1975, Goal 3 incorporated the approach first proposed by OSPIRG during the 1973 legislative session to identify and define agricultural lands using the Soil Conservation Service soil capability ratings, rather than merely "prime farmlands," preferring protection of all suitable agricultural lands. It defined "agricultural land" differently for two distinct regions of the state (East and West): those lands predominantly composed of Class I-IV soils in western Oregon and Class I-VI in eastern Oregon, as well as other lands "suitable for farm use" and other lands necessary to permit farm practices" on adjacent or nearby lands. These are the lands required to be inventoried and preserved."*
>
> *The applicant's statements in the hearing to the contrary are incorrect.*

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[8] In response, the Applicant notes that this same argument was presented to and rejected by LUBA in *Central Oregon LandWatch v. Deschutes County (Aceti*), ___ Or LUBA ___ (LUBA No. 2016-012, August 10, 2016)

COLW submitted into the record a copy of the cited Agricultural Law Review article entitled "The Long and Winding Road: Farmland Protection in Oregon 1961-2009."

In its September 25, 2021 submission COLW stated, in relevant part:

> *We respectfully urge the Hearings Officer to deny the application. The fallowed subject property is classified as Class III and Class VI land by the NRCS and so is agricultural land by definition. An exception to Goal 3 is required. Because no exception has been justified, the application must be denied.*
>
> *Applicant's theory of the case is erroneous for three main reasons. First, the Oregon Court of Appeals has already determined that additional detail such as that provided by the applicant's paid report has no effect on whether land determined by the NRCS to be Class I-VI in eastern Oregon is agricultural land. Such data are relevant only to whether land not comprised of the specified classes determined by the NRCS is also agricultural land. Second, the paid report is an "Order 1 survey." Application, 7. Order 1 surveys, by definition, do not affect the NRCS land capability classifications of the official soil survey, which here are Class III and Class VI. Third, the applicant misinterprets the meaning of "accurate" and the relationship between detail and accuracy, and thus confuses the significance of the paid report, an Order 1 survey. Each of these reasons is explained in more detail below.*
>
> *****
>
> *The applicant's land is predominantly 38B according to the official survey of the NRCS. Att. 1. The land is classified by the NRCS as a "farmland of statewide importance." Id. The same 38B land is shown to be in use across Deschutes County for irrigated crop production. Figures 1-12.*
>
> *The Court of Appeals has interpreted Goal 3 to mean land comprised of the specified classes I-VI is per se agricultural land. Any additional information, such as the applicant's paid report, is relevant only to whether land which is not predominantly comprised of such soils is also agricultural land. 1000 Friends of Oregon v. LCDC, 85 Or App 18, 22-23, 735 P.2d 645 (1987). While applicant correctly noted that more detailed information may be used, the purpose of such information is to identify whether more land may qualify as agricultural land in addition to the lands identified as Class I-VI by the NRCS.*
>
> *The Oregon Court of Appeals decision accords with the legislative history of Goal 3. The legislative history leading to the adoption of the NRCS land capability classifications as the applicable legal standard is summarized in Edward Sullivan's law review article on the history of protection of Oregon farmland. … As the article further explains, the underlying assumption of the Oregon program to protect agricultural lands is that long-term resource decisions should not be based on short-term economics or finances. Id. Here, the applicant's lack of interest in farming is irrelevant to Oregon's agricultural land use policy*

to preserve the state's agricultural industrial land base for future generations of farmers.

***

The Court of Appeals decision in 1000 Friends of Oregon v. LCDC, the legislative history of the definition of agricultural land in Oregon, and the plain language of both Goal 3 and OAR 660-033-0020 mean that agricultural land include all lands classified by the NRCS as Class I, II, III, IV, V, and VI in eastern Oregon, and thus include the fallowed subject property. ***Order 1 surveys have no effect on NRCS land capability classifications****.*

(emphasis in original). COLW states on page 4 of its submittal:

The NRCS explains in the attached official published document from the U.S. Department of Agriculture that an Order 1 Survey has no effect on the results of the NRCS survey. Att. 3:

"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."

An Order 1 survey is used to support a determination of whether a manure storage facility, or other highly specialized land use, can be placed on land like the applicant's land that is currently lying fallow. ... The evidence presented by the applicant is supplemental to, but does not change, the official NRCS survey information. Applicant's paid report provides detailed, but irrelevant, data for this inquiry.

***

Goal 3 defines agricultural land as land in classes I-VI in eastern Oregon as determined by the official NRCS soil survey. The applicant's evidence is not directed at this legal standard and has no effect on it. The land is agricultural land by definition, an exception to Goal 3 is required, and the application must be denied. ***Applicant misrepresents the nature of map units and the effect of more detail***

(emphasis in original).

HEARINGS OFFICER'S ANALYSIS AND FINDINGS

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. As LUBA determined in the *Aceti* case, 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. The NRCS provides an Order 2 soil survey, which extrapolates more limited data from the Upper Deschutes River

Survey to determine LCC soil classifications at a landscape level. On the other hand, the Applicant's soil scientist, Mr. Gallagher, conducted a more detailed Order 1 survey.

The Soil Survey of the Deschutes Area, Oregon 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."

With respect to COLW's arguments regarding "accuracy," the Hearings Officer finds that DLCD confirmed in its review of the Applicant's soils report that the Red Hills Soils/Gallagher soils report is more detailed than the NRCS soils survey. The Applicant notes that, "If it were not, DLCD would not have allowed the applicant to rely on the report in this proceeding." The Hearings Officer agrees. The Hearings Officer finds persuasive Mr. Gallagher's October 14, 2021 letter in which he stated, "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 the Subject Property is mapped by the NRCS soil survey as being comprised predominantly of 38B soils, which is a soils complex. The Applicant's Order 1 soils study shows that about 85% of the Subject Property is Class VII and VIII soil. This is explained by the Red Hills Soils/Gallagher report which found that the Subject Property contains a much higher percentage of Gosney and Class VIII rock outcrop soils than Deskamp soils, as compared to those found in the entire Class 38B soil mapping unit that applies to the Subject Property. The findings and conclusions in the Red Hills Soils/Gallagher report are supported by photographs of the Subject Property submitted by the Applicant that show rocky, shallow soils.

COLW's evidence of other properties alleged to be comprised of 38B soils does not change this determination as there is no supporting documentation that includes any Order 1 soil survey of the photographed properties. The Hearings Officer cannot determine, based on evidence in the record, that the photographs of farming operations submitted by COLW are on lands comprised of 85% Class VII and Class VIII soils, such as the Subject Property, and/or on lands that lacked irrigation rights and had to acquire such rights. Thus, the Hearings Officer finds the photographs submitted by COLW are not relevant to the determination of whether the Subject Property is "agricultural land."

The Hearings Officer rejects COLW's implied assertion that the Red Hill Soils/Gallagher soils study is unreliable because it is a "paid report." The Applicant retained a certified soil scientist and DLCD reviewed and approved the Order 1 soils report prepared by the certified soil scientist. There is no persuasive evidence that the Red Hill Soils/Gallagher soils study is erroneous, or should not be given weight by the County in these proceedings. Neither COLW nor any neighbor opposing the applications submitted any competing evidence to challenge the findings of the Red Hills Soils/Gallagher report.

The Hearings Officer also rejects COLW's 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." COLW's assertion is also directly contrary to ORS 215.211 and OAR 660-033-0030(5)(a), (5)(b) and (5)(c)(A).

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 finds 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 and are thus not "agricultural land" and/or otherwise suitable for farm use. 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. The Hearings Officer finds that the Applicant's soil study supports a finding that the Subject Property does not constitute agricultural land and thus is not subject to Section 2.2, Goal 1 of the Comprehensive plan as "agricultural lands" to be preserved and maintained.

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. I find that the requested plan amendment and

rezone will not contribute to loss of agricultural land in the surrounding vicinity. 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 requesting 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 MUA-10. The Hearings Officer finds this Policy is inapplicable.

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 on the basis that the Subject Property qualifies as non-resource land. The Applicant is not seeking an exception to Goal 3 – Agricultural Lands, but rather seeks to demonstrate that the subject properties do 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:

*The applicant is seeking a comprehensive plan amendment from Agriculture to RREA and a zone change from EFU-TRB and UAR-10 to MUA-10 for non-resource land. This is 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 H**, 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 when irrigated and when not irrigated making farm-related endeavors unprofitable. The property is not currently employed in any type of farm use and has no known history of that use. Accordingly, this application complies with Policy 2.2.3.

COLW argued that the County's comprehensive plan requires that "no more housing will be approved [in rural residential areas] without the required exceptions [to Statewide Planning Goals]." The text of the Comprehensive Plan, Section 3.3 Rural Housing, Rural Residential Exception Areas states:

> *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 non-resource 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.*

The Hearings Officer finds that the text above does not require the Applicant to obtain plan amendments for approval of its applications where, as here, the Applicant has demonstrated that its land is not Goal 3 "agricultural land." The Hearings Officer further finds that a goal exception is not required by the Comprehensive Plan.

The Hearings Officer finds that the facts presented by the Applicant in the burden of proof for the subject applications are similar to those in the *Wetherell* decisions and in the aforementioned Deschutes County plan amendment and zone change applications.

Therefore, the Hearings Officer finds the Applicant has met its burden of proving the property is not agricultural land and does not require an exception to Goal 3 under state law. The Hearings Officer finds the applications are consistent with Policy 2.2.3.

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 policy is not directed to an individual applicant, as the Board of Commissioners held in File No. 247-16-000317-ZC/318-PA, *Porter Kelly Burns Landholdings, LLC*.

The Hearings Officer finds that the County's prior land use decisions hold that EFU land may be converted to RREA designation when shown that the land does not meet the definition of "Agricultural Land" provided by Statewide Land Use Planning Goal 3. In the *DSL* findings, Deschutes County found that this policy does not impose a moratorium on requests for applications of the type filed by property owners (**Exhibit H**). The Board of Commissioners also noted that it had approved the conversion of EFU land to an RREA plan designation and MUA-10 zoning in the *Pagel* decision (**Exhibit J**) and that nothing in this plan policy prohibits that action. The Applicant stated that the County's interpretation of Policy 2.2.3 indicates when and how EFU parcels can be converted to other designations.

The Hearings Officer finds that, based on the County's previous determinations in plan amendment and zone change applications, and based on substantial evidence in the record regarding soils on the Subject Property and use of surrounding lands, 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 provides direction to the County to identify and retain agricultural lands that are accurately designated. The policy is not directed to an individual applicant. Nonetheless, the Hearings Officer finds that the Subject Property was not accurately designated as demonstrated by the soil study, NRCS soil data, and use of surrounding lands, as discussed in the findings above. The County is not required to retain the Subject Property as "agricultural lands" because it was not accurately so designated.

The Hearings Officer finds the proposal is 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 at this time. Therefore, the Hearings Officer finds the Applicant is not required to demonstrate water impacts associated with development. Rather, the Applicant will be required to address this criterion during development of the Subject Property, which would be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat). The Applicant included the following in its submitted burden of proof:

Irrigation is essential for commercial farm use in Central Oregon. Irrigating poor farm ground consumes a large amount of the area's precious water resources without the resulting economic benefits of profitable agricultural production. Homes consume less water than would be needed for farm field irrigation on the subject property.

*In its DSL findings, **Exhibit L**, Deschutes County found that impacts of any proposed future development of the DSL property on water resources would be reviewed by Deschutes County in future development applications. That finding was sufficient to demonstrate compliance with this plan policy. Together with the findings above and the later review by Deschutes County, this policy is satisfied.*

*Future development on the subject property will be able to be served by Avion Water System when developed as shown by **Exhibit F** and **G**.*

The Hearings Officer finds that substantial evidence in the record shows the applications are consistent with this policy given the fact that future development applications require review of water resources impacts and the fact that future development of the Subject Property will be served by Avion Water System. Moreover, rezoning and reclassifying the Subject Property will allow for some productive use of the property. Uses permitted in the MUA-10 zone and RREA classification will result in less consumption of water than if Applicant was somehow able to obtain irrigation rights to irrigate the poor soils on the Subject Property for farm uses.

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: The Hearings Officer finds these policies are fulfilled by the County's Goal 5 program. The County protects scenic views and sites along rivers and roadways by imposing Landscape Management Zoning overlay zones, The County has not, however, imposed the LM overlay zone on the Subject Property. Further, no new development is proposed. The Hearings Officer finds these provisions of the plan are not impacted by approval 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's burden of proof provided the following:

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 a sizeable area of property zoned MUA-10 that is bisected by Butler Market Road. This area is developed with single-family homes.

The MUA-10 zone is a rural residential zone. It will provide for an orderly and efficient transition from rural to urban land use as intended by the purpose of the MUA-10 zone. As a result, rezoning the subject property MUA-10 is consistent with Section 3.2.

The Applicant also submitted an Applicant's Response to Staff Report Supplement to Burden of Proof with respect to this Section:

The staff report asks the hearings officer to determine whether the subject property has soils of poor quality. The soils analysis and other information in the record establishes that the soils are poor quality soils that are not "agricultural land."

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 above.

The Hearings Officer finds that, while the rezone application does not include the creation of new residential lots, the Applicant has demonstrated the Subject Property is comprised of poor soils that are in the vicinity of rural residential MUA-10 zone uses to the south, west, northwest and east. Rezoning the subject property to MUA-10 is consistent with this criterion, as it will provide for an orderly and efficient transition from the City of Bend to rural and agricultural lands.

The Hearings Officer finds that rezoning the Subject Property to MUA-10 is consistent with Section 3.2, Chapter 3 of the Deschutes County Comprehensive Plan as it will provide for an orderly and efficient transition from urban to rural and agricultural lands.

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 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 is not an approval standard for this application. This fact was confirmed by former Deschutes County Senior Planner Terri Hansen Payne, AICP during the County's review of the DSL rezoning and plan amendment application. See **Exhibit I**. County zone change and plan amendment decisions adopted by the Board of Commissioners have so found.*

Even if this plan language were found to be relevant to the County's review of this application, it does not bar application of the RREA plan designation to non-resource land. This application does not require that an exception be taken to apply the RREA designation to non-resource land. Instead, as stated by the Board's findings in Exhibit H, the language "appears to be directed at a fundamentally different situation than the one presented in this application." The text is written to require that exceptions be taken for resource lands that required an exception; not to require goal exceptions for non-resource lands that do not require such exceptions. 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 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 finds that prior Hearings Officer's decisions have found that Section 3.3 is not a plan policy or directive[9]. Further, I find that no goal exception to Statewide Planning Goal 3 is required for the rezone application because the subject property does not qualify as farm or forest zoning or agricultural lands under the statewide planning goals, as discussed in more detail in the findings above. The County has interpreted the RREA plan designation as the proper "catchall" designation for non-resource land and therefore, the Rural Residential Exception Area (RREA) plan designation is the appropriate plan designation to apply to the subject property[10].

Based on past Deschutes County Hearings Officer interpretations, the Hearings Officer finds that the above language is not a policy and does not require an exception to the applicable Statewide Planning Goal 3. The Hearings Officer finds the proposed RREA plan designation is the appropriate plan designation to apply to the Subject Property.

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

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[9] See PA-11-17/ZC-11-2, 247-16-000317-ZC, 318-PA, and 247-18-000485-PA, 486-ZC

[10] The Hearings Officer's decision for PA-11-17/ZC-11-2 concerning this language of Section 3.3 states:

To the extent that the quoted language above represents a policy, it appears to be directed at a fundamentally different situation than the one presented in this application. The quoted language addresses conversions of "farm" or "forest" land to rural residential use. In those cases, the language indicates that some type of exception under state statute and DLCD rules will be required in order to support a change in Comprehensive Plan designation. See ORS 197.732 and OAR 660, Division 004. That is not what this application seeks to do. The findings below explain that the applicant has been successful in demonstrating that the subject property is composed predominantly of nonagricultural soil types. Therefore, it is permissible to conclude that the property is not "farmland" as defined under state statute, DLCD rules, and that it is not correctly zoned for exclusive farm use. As such, the application does not seek to convert "agricultural land" to rural residential use. If the land is demonstrated to not be composed of agricultural soils, then there is no "exception" to be taken. There is no reason that the applicant should be made to demonstrate a reasons, developed or committed exception under state law because the subject property is not composed of the type of preferred land which the exceptions process was designed to protect. For all these reasons, the Hearings Officer concludes that the applicant is not required to obtain an exception to Goal 3.

shall assure that proposed land uses do not exceed the planned capacity of the transportation system.

FINDING: The Hearings Officer finds this plan 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 will comply with this direction by determining compliance with the Transportation Planning Rule (TPR) aka OAR 660-012, as described 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 Subject Property is not zoned for forest lands, nor are any of the properties within a seven-mile radius. The Subject Property does not contain merchantable tree species and there is no evidence in the record that the Subject Property has been employed for forestry uses historically. None of the soil units comprising the parcels is rated for forest uses according to NRCS data. The Hearings Officer finds that the Subject Property does not constitute 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 defines "Agricultural Land," which is repeated in OAR 660-033-0020(1). The Hearings Officer's findings above are incorporated herein by reference.

OAR 660-033-0020, Definitions

For purposes of this division, the definitions in ORS 197.015, the Statewide Planning Goals, and OAR Chapter 660 shall apply. In addition, the following definitions shall apply:
(1)(a) "Agricultural Land" as defined in Goal 3 includes:
(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon[11];

FINDING: The Applicant does not request an exception to Goal 3 because the Subject Property does not meet the definition of "Agricultural Land." In support, the Applicant offers the following response in the submitted burden of proof statement:

State law allows the County to rely on the more detailed and accurate information provided by the Exhibit D study, That study shows that approximately 85% of the subject property is comprised of Class VII and VIII (88% of Tax Lot 100 and 82% of Tax Lot 600). As a result, the land is not predominantly comprised of Class I-VI soils.

The subject property is not properly classified as Agricultural Land and does not merit protection under Goal 3. The soils are predominately Class 7 and 8 soils as shown by the more detailed soils report prepared by soils scientist Andy Gallagher, which State law, OAR 660-033-0030, allows the County to rely on for more accurate soils information. Mr. Gallagher found that approximately 64% of the soils on the subject property (about 24 acres) is Land Capability Class 7 and 8 soils that have severe limitations for farm use. He also found the site to have low soil fertility, shallow and very shallow soils, abundant rock outcrops and rock fragments in the surface, lava tubes, and irrigation ditches, low available water capacity, and limiting areas suitable for grazing and restricting livestock accessibility, all of which are considerations for the determination for suitability for farm use. Because the subject property is comprised predominantly of Class 7 and 8 soils, the property does not meet the definition of "Agricultural Lands" under OAR 660-033-0020(1)(a)(A) listed above, that is having predominantly Class I-VI soils.

The Hearings Officer finds that the soil study provided by Mr. Gallagher of Red Hill Soils is an accurate representation of the data for the Subject Property. Therefore, the Hearings Officer finds, based on the submitted soil study and the above OAR definition, that the Subject Property is comprised predominantly of Class 7 and 8 soils and, therefore, does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A) above.

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[11] 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.*

(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 decision not to request an exception to Goal 3 is based on the premise that the Subject Property is not defined as "Agricultural Land." The Applicant provided the following analysis of this determination 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, the proximity to two major roadways (Butler Market Road and the Powell Butte Highway and area development prevent grazing from being a viable or potentially profitable use of the property. The soils, also, are so poor that they would not support the production of crops even if irrigation water rights could be obtained for that purpose. The soils simply do not hold enough water to sustain and support crop growth.*
>
> *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). 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. The subject property will, however, due to its extremely poor soils, only produce at little more than one half that amount of forage in a normal year – 440 pounds per acre for Tax*
> *Lot 600 and 494 pounds per acre for Tax Lot 100.*
>
> - *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 $1.20 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 80 acres x $1.15/lb. = $5,520 per year for good rangeland

Adjust expected income based on forage on subject property:

440 + 494 / 2 = 467 pounds of forage per acre per year
467 pounds/900 pounds of forage per acre per year assumed in OSU formula = 51.89%
*51.89% of $5,520 annual income for good range land = **$2,708.66** annual income for subject*
Property.

Thus, the total gross beef production potential for the subject property would be approximately $2,708.66 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 $4,341.64 for the two tax lots in 2020.

A review of the seven considerations listed in the administrative rule, below, show why the poor soils found on the subject property are not suitable for farm use that can be expected to be profitable:

***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. According to the OSU Extension Service the growing season is only 80 to 90 days long.* ***Exhibit Q****. The average annual precipitation is only 11.36 inches. This means that the amount of forage available for dry land grazing is low. This also means that a farmer has a short period of amount of time to irrigate pastures. This makes it difficult for a farmer to raise sufficient income to offset the high costs of establishing, maintaining and operating an irrigation system.*

Existing and Future Availability of Water for Farm Irrigation Purposes: *No new irrigation water rights are expected to be available to the Central Oregon Irrigation District (COID) in the foreseeable future. In order to obtain water rights, the applicant would need to convince another COID customer to remove water rights from their property and sell them to the applicant and obtain State and COID approval to apply the water rights to the subject property. In such a transaction, water rights would be taken off productive farm ground and applied to the nonagricultural soils found on the subject property. Such a transaction runs counter to the purpose of Goal 3 to maintain productive Agricultural Land in farm use. Most of the soils on the property are Class VII and VIII soils. The subject property does not have irrigation water rights. The property is located within the boundary of the Central Oregon Irrigation District. Given the poor quality of these soils, however, it is highly unlikely that Central Oregon Irrigation District would approve a transfer of water rights to this property. In addition, no person intending to make a profit in farming would go to the expense of purchasing water rights, mapping the water rights and establishing an irrigation system to irrigate the poor soils found on 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 in an area of small lots and marginal farm land that is primarily devoted to residential and hobby farm uses. Areas of MUA-10 zoning are interspersed with EFU-TRB zoning. The subject property adjoins MUA-10 properties on the south and lots developed at a density of one lot per 10 acres on its eastern boundary. The properties to on its west boundary are small parcels less than 20 acres in size. The only large EFU-TRB property adjoining the subject property (north and east of TL 600) is owned by the City of Bend and used as the City's sewage treatment plant. It is not in farm use.*

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 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 that have a higher soils class if irrigated. Crops are typically grown on soils in soil class III and IV.*

The Hearings Officer finds that many of the factors surrounding the Subject Property, such as the current residential and non-agricultural related land uses in the area, soil fertility, and lack of availability of water rights result in an extremely low possibility of successful farming on the Subject Property.

The Hearings Officer finds that soils on the Subject Property can only be made fertile through artificial means, which is cost prohibitive from a profitability standpoint. The Subject Property is not suitable to grazing on a commercial scale given management limitations and expected low production of suitable vegetation. Climactic conditions result in difficulty for production of most crops. Given the fact that no new irrigation water rights are expected to be available to the COID in the foreseeable future and the poor quality of soils on the Subject Property, it is unlikely COID would approve a transfer of water rights to the Subject Property. Moreover, a transfer of water rights to the Subject Property would be contrary to the purpose of Goal 3 to maintain productive agricultural land in farm use. Expenses associated with irrigation of pastures on the poor soils of the Subject Property limit the suitability of grazing animals on the Subject Property and result in required technological and energy inputs over and above accepted farming practices.

The Hearings Officer finds that existing land use patterns consist of a pattern of relatively small lots, primarily devoted to residential and hobby farm uses, interspersing MUA-10 zoned property with EFU-TRB zoning. The only large EFU-TRB property adjoining the subject property is owned by the City of Bend and used as the City's sewage treatment plant.

The Hearings Officer finds that accepted farm practices in Central Oregon do not include farming lands comprised of soils that are predominantly Class 7 and 8. In order to conduct dryland grazing on the subject property, the applicant would have to take measures beyond accepted farming practices, including attempting to obtain a water rights transfer.

For all the foregoing reasons, the Hearings Officer finds that the Subject Property, primarily comprised of Class 7 and 8 soils, is not suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration the soil fertility, suitability for grazing, climactic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy outputs required and accepted farming practices. Substantial evidence in the record supports a determination that the Subject Property cannot be employed for the primary purpose of obtaining a profit in money through farming-related endeavors, considering the costs of engaging in farm use. *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007).

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

FINDING: The Applicant offers the following response in the submitted 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, with one exception, are separated from the subject property by Abbey Road. The road 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 juniper covered subject property to conduct farm practices.*

Tax Map, Lot and Size	***Farm Use***	***Potential Farm Practices***	***Need Subject Property?***
17-13-18C 400 19.32 acres	*Wilderness Horse Adventures (trail riding business not a farm use); dwelling.*	*Grazing Dry lot feeding Fertilizing field Herbicide use Irrigation*	*No, TL 400 about 660' west of subject property. Horses used for trail riding out of area. Adjoins nonfarm dwelling.*
17-13-18C 500 19.32 acres	*Nonfarm dwelling, irrigated pasture for grazing.*	*Grazing Fertilizing field Herbicide use Irrigation*	*No, self-contained hobby farm use.*
17-12-13D 200 & 300, 6.6 acres and 15.01 acres	*Small pasture and horses. A part of property is MUA-10 and developed with a private boarding school.*	*Grazing Fertilizing field Herbicide use Irrigation*	*No, about 1200' away from subject property. Also, the horse use is incidental to boarding school use and is not conducted to earn a profit in money.*
17-12-13D 100 22.64 ac	*Irrigated pasture with interspersed juniper*	*Grazing Fertilizing field*	*No, about 1320' west of subject property*

	trees. Dwelling and vacation cabin on property.	*Herbicide use Irrigation*	*and separated by other farm properties.*
17-12-13A 100 39.26 acres	*Irrigated pasture; patchy growth of grass. Approved for Measure 49 dwelling.*	*Grazing Fertilizing field Herbicide use Irrigation*	*No, too remote (1320') and separated by other farm properties.*
17-12-13A 200	*Nonfarm parcel; Measure 49 dwelling approval.*	*None*	*No.*
17-12-13A 300	*Irrigated pasture; patchy growth of grass. Single-family dwelling and two machine sheds.*	*Grazing Fertilizing field Herbicide use Irrigation*	*No, too remote (about 1500') and separated by other farm properties.*

North: *All of the land north of the subject property is owned by the City of Bend and is operated as a sewer treatment plant. Farm practices are not occurring on this property.*

East: *The City of Bend's sewer treatment plan adjoins the eastern boundary of Tax Lot 600. No farm practices are occurring on this property. Two tax lots adjoin the eastern boundary of Tax Lot 100. One is 8 acres in size. The other is 12.21 acres in size. Both tax lots are developed with residences. Neither receive special assessment for farm use. East of them are two other small parcels that are not in farm deferral. One is 8.48 acres and the other is 10 acres. All four parcel are developed with dwellings. As the properties are not recognized by the Tax Assessor as being in farm use, the activities occurring on the properties are not farm practices. Even if they are viewed as such, the agricultural uses are limited to the irrigation of small areas of land and horse facilities and one of the parcels is not irrigated. The practices associated with these uses are similar to those of pastures and horse operations outlined in the charts above. The agricultural practices related to this "hobby farming" do not require the subject property to remain in its current vacant state to allow them to conduct agricultural practices.*

South: *All of the land south of the subject property is zoned MUA-10 and is not engaged in farm use.*

The Hearings Officer finds the Subject Property is not necessary for the purposes of permitting farm practices on adjacent or nearby land, or the larger surrounding area generally, based on the factors discussed in the previous finding, the current use of adjacent properties, and separation of the Subject Property by Abbey Road from properties to the west.

(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 submitted burden of proof statement:

The subject property is not and has not been a part of a farm unit. It has not been farmed. As a result, this rule does not apply to the County's review of this application.

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 is a property is "agricultural land." The predominant soils classification of the subject property is Class VII and VIII 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 D.*** *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 Applicant also provided a Supplement following the Staff Report which states, in relevant part:

Oregon case law explains the meaning of this rule. It applies to lands to land [sic] that have a recent a recent [sic] history of farm operations. In particular, it applies where land is divided to create a parcel of nonagricultural land from a larger farm property that was formerly operated as a farm across the entire property. Wetherell v. Douglas County, 235 Or App 246, 230 P3d 976, rev den 349 Or 57 (2010). The rule is written to prevent the "piecemeal fragmentation" of large farm properties to carve out areas for rezoning to a nonagricultural zoning designation. This rule does not apply to the subject property because it has never been farmed at all. This rule does not supplant and render meaningless the predominance and suitability test set by Goal 3 to determine whether land is or is not agricultural land by requiring all land on a property to be inventoried as agricultural land if there is any Class VI soil on the property.

The Hearings Officer finds that there are no bases on which to find that the Subject Property must be inventoried as agricultural lands under this criterion. 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. As demonstrated by the historic use patterns and soils report, it does not have poor soils adjacent to or intermingled with good soils within a farm unit. The Subject Property is not in farm use and has not been in farm use of any kind. It has no history of commercial farm use and contains soils that make the property 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 does not relate to land in active farming, and there are no parcels in the area that were once part of the Subject Property.

Goal 3 applies a predominant soil type test to determine if a property is “agricultural land”. If a majority of the soils is Class I-VI in in Central or Eastern Oregon, it must be classified "agricultural land." Case law indicates that the Class I -VI soil test applies to a subject property proposed for a non-agricultural plan designation while the farm unit rule looks out beyond the boundaries of the subject property to consider how the subject property relates to lands in active farming in the area that were once a part of the area proposed for rezoning. The Hearings Officer finds it is not a test that requires that 100% of soils on a subject property be Class I-VI. A majority of the soils on the Subject Property are not Class I-VI. Therefore, under the predominance test, the Subject Property is not agricultural. The farm unit rule does not mandate a different result.

(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 and the Hearings Officer made findings thereon above. The Applicant's burden of proof statement also includes the following:

> *The subject property is, in no way, necessary to permit farm practices to be undertaken on adjacent and nearby lands.*
>
> *Lands to the west are divided from the subject property by the right-of-way for Abbey Road making it infeasible to farm the properties together. The adjoining farm activities are occurring on small properties that are both developed with single-family homes. The future residential development allowed by MUA-10 zoning will not introduce a new use to the area that will impact farm practices. The more distant EFU properties to the west adjoin MUA-10 zoned lands that are fully developed – primarily with residences – and in no way rely on the subject property remaining in EFU zoning in order to conduct farm practices on their properties.*
>
> *Land to the north is owned by the City of Bend and is not in farm use and the applicant's property is not necessary to permit farm practices to be undertaken on this property which would likely be limited to livestock grazing given the soil type and lack of irrigation water rights for this large property. This property also adjoins the east boundary of Tax Lot 600.*
>
> *The properties to the east are zoned EFU but are all divided into very small parcels that average 10 acres gross. They are developed with houses similar to those found in the MUA-10 zoning district and do not receive special assessment for farm use indicating that they are not employed in farm use. The subject property is not needed by these land owners to conduct farm practices on their properties.*
>
> *The property south of the subject property is zoned MUA and is not engaged in farm use. Land on the subject property is not necessary to permit farm practices to be undertaken on these adjacent and nearby lands*.

As the Hearings Officer has found herein, the Subject Property is not "agricultural land," as referenced in OAR 660-033-0030(1), and contains barriers for farm use including poor quality soils and lack of irrigation. The soil study prepared by Mr. Gallagher focuses solely on the land within the Subject Property and the Applicant provided responses supporting a finding that the Subject Property is not necessary to permit farm practices undertaken on adjacent and nearby lands.

The Hearings Officer finds that substantial evidence in the record shows the Subject Property is not "agricultural land" because the property is predominantly Class 7 and 8 soils. The

Subject Property is not necessary to permit farm practices to be undertaken on adjacent or 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: The Applicant set forth the following in the submitted burden of proof statement:

> *The evidence that shows 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 has assigned no significance to the ownership of adjoining properties.*
>
> *The City of Bend property to the north and east of the subject [sic] is very similar to the subject property and its predominant soil types are Class 58C and 59C. Both of these soil types are predominantly Class VII and VIII soils that do not support farm use – agricultural uses intended to secure a profit in money. This property is not necessary for others in the area to undertake farm practices.*
>
> *The EFU subdivision to the east is developed with single-family homes on lots averaging 10 acres in size gross. These parcels are committed to rural residential development*. The land not so committed is too small to be utilized for agricultural uses intended to obtain a profit in money from the use.
>
> *The land to the south is not agricultural and is not in farm use.*
>
> *The land to the west is 80 acres in size and comprised of four twenty-acre parcels, There is an area of 36A soils on the southern two of these parcels that are high-value soils when irrigated. These soils are located almost entirely on one of these parcels at 63400 Silvas Road. It is the only property that is high-value farmland. The 36A soils are an irrigated farm field. The 36A soils do not extend onto the subject property and this parcel is separated from the subject property by Abbey Road which provides a buffer between uses that protects farm uses on this parcel.*
>
> *A small part of mapping unit 16A is found on the property to the south and it is also irrigated but that parcel is not high-value farmland by definition. This field is about 500 feet to the west of the south part of the subject property.*

Hearings Officer finds that substantial evidence in the record, including examination of lands outside the boundaries of the Subject Property, shows the subject property is not "agricultural land." Substantial evidence shows 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.

(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's burden of proof statement sets forth the following:

> *The Red Hills Soils report,* ***Exhibit D****, provides more detailed soils information than contained on the Web Soil Survey, the Internet soil survey of soils data and information produced by the National Cooperative Soil Survey. Those sources provide general soils data for large units of land. The Red Hills Soils report provides detailed and accurate information about a single property based on numerous soil samples taken from the subject property. The depth of these soils was also determined. The soils samples taken from the subject property were tested to determine soil type and water-carrying capacity of the soils. The results of this analysis were used to develop an accurate soils map of the subject property. The soils assessment is related to the NRCS land capability classification system that classified soils Class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.*

The NRCS mapping for the Subject Property is shown below in ***Figures 1*** *and* ***2***. According to the NRCS Web Soil Survey tool, the Subject Property contains approximately 96.3% 38B soil and approximately 3.7% 58C soil. The soil study conducted by Mr. Gallagher of Red Hill Soils finds the soil types on the Subject Property vary from the NRCS identified soil types.

The soil types described in the Red Hill Soils soil study are described below (as quoted from **Exhibit D** of the submitted application materials) and the characteristics and LCC rating are shown in ***Tables 1*** *and* ***2*** below.

> ***GR Gosney-Rock Outcrop Complex***
>
> ***Capability Class 7***
> *These soils are mapped together in a complex because both components are Capability Class 7 or greater, and it was not practical to map them separately. These soils are*

estimated to be about 25 percent Rock Outcrop and 75 percent Gosney. They have lower productivity than NRCS map unit 38B because they do not contain a mappable area of Deskamp soils that were mapped separately. The productivity reported in Table 2 for Gosney-Rock Outcrop are 20 percent less than the 58C map unit to account for more shallow and very shallow soils in the GR map unit in the revised map unit. Based on the observations here the map unit is about 40 percent very shallow soils, 35 percent Gosney soils and 25 percent rock outcrops.

Gosney (0 to 15 percent slopes)
Description*: Gosney series consists of shallow 10 to 20 inches to hard basalt bedrock, somewhat excessively drained soils on lava plains. These soils have rapid permeability. They formed in volcanic ash over hard basalt bedrock. Slopes are 0 to 15 percent. The mean annual precipitation is less than 12 inches, and the mean annual temperature is about 45 degrees F.*
Capability Class: *7*
Soil Variability: *Depth to bedrock is from surface exposures of bedrock to 20 inches depth. There may be small inclusions of soils like Deskamp that are moderately deep (>20 inches). Many of the pedons are sandy skeletal family. This unit includes very shallow soils <10 inches.*

Very shallow phase 0-15 percent slopes
Description: *this component of the complex is less than 10 inches to basalt.*
Capability Class: *7*
Soil Variability: *Depth to bedrock is from 1 to 10 inches. This soil is a very shallow soil that is similar to Gosney but shallower. It has lower available water holding capacity and an estimated 40 percent lower productivity.*

Rock Outcrop (0 to 15 percent slopes)
Description: *This is a large proportion of the map unit and represents areas where bedrock is at the surface often times standing several feet about the general grade, and in places where suspected lava tubes collapsed the rock out crops are rimrock*
Capability Class: *8*
Soil Variability: *In places rocks are an inch or two below the surface but mainly are surface exposed and are detectible in aerial photographs.*

Dk Deskamp
Description: *Moderately Deep somewhat excessively drained soils with rapid permeability on lava plains. They formed in ash and have hard basalt at 20 to 40 inches. Slopes are 1 to 15 percent. The A and AB horizon are loamy sand. The 2B is loamy sand and gravelly loamy sand. The NRCS soil survey mapped Deskamp and Gosney in a complex described as 50% Deskamp and 35% Gosney. In this Dk unit I broke out the Deskamp component of the former complex based on much more detailed soil sampling than the NRCS soil survey.*

***Capability Class**: 3 irrigated and 6 non-irrigated*
***Soil Variability:** There are inclusions of rock outcrop and of deep soils with sandy skeletal family. Any rock outcrop I observed in the field was delineated from the Deskamp unit, but because not all rock outcrops could be resolved at the one boring per acre average soil observation given the brushy conditions.*

Table 1 - Summary of Order I Soil Survey (Tax Lot 600)

Previous Map Symbol	Revised Map Symbol	Soil Series Name	Capability Class (subclass) nonirrigated	Previous Map*		Revised Map	
				Ac	-%-	Ac	-%-
38B	--	Deskamp-Gosney complex, 0 to 8 percent slopes	6 and 7	36.8	92	0	0
58C	--	Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes	6, 7 and 8	3.2	8	0	0
--	Dk	Deskamp	6	0	0	7.2	18
--	GR	Gosney-Rock Outcrop Complex	7 and 8	0	0	32.8	82

*Soils that were previously mapped as components of a complex that are mapped as consociations in revised map.

Table 2 - Summary of Order I Soil Survey (Tax Lot 100)

Previous Map Symbol	Revised Map Symbol	Soil Series Name	Capability Class (subclass) non-irrigated	Previous Map*		Revised Map	
				Ac	-%-	Ac	-%-
38B	--	Deskamp-Gosney complex, 0 to 8 percent slopes	6 to 7	40	100	0	0
--	Dk	Deskamp	6	0	0	4.7	12
--	GR	Gosney-Rock Outcrop Complex	7 and 8	0	0	35.3	88

*Soils that were previously mapped as components of a complex that are mapped as consociations in revised map.

Figure 1 - NRCS Soil Data (Tax Lot 600)

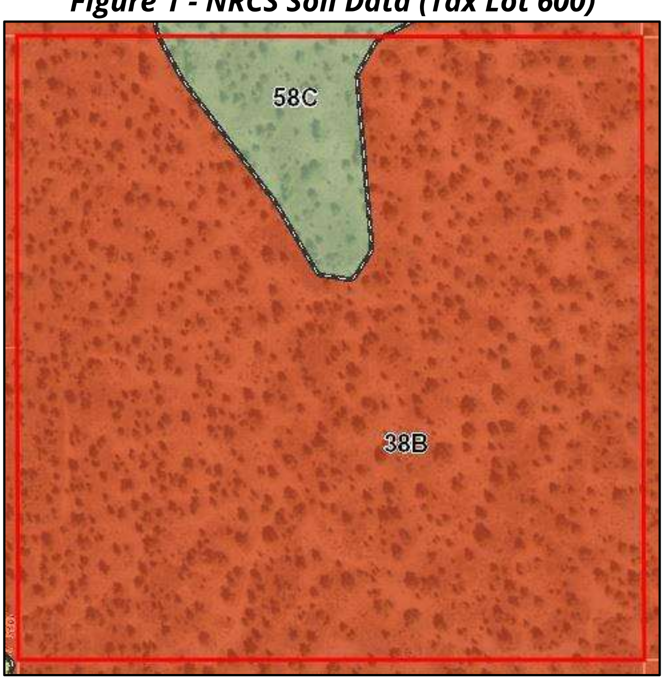
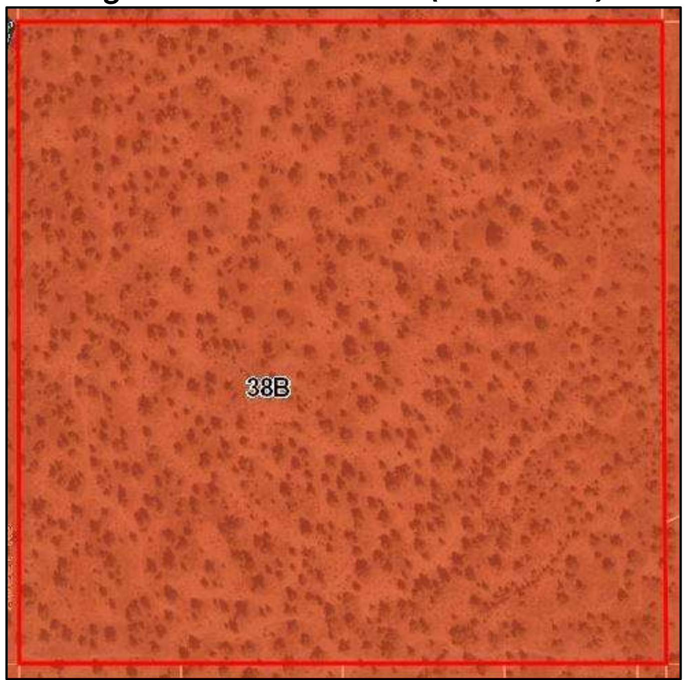


Figure 2 - NRCS Soil Data (Tax Lot 100)



Mr. Gallagher's soils assessment report provides a high intensity Order-1 soil survey and soil assessment – a detailed and accurate soils assessment on the Subject Property based on numerous soil samples – to determine if the subject property is "agricultural land" within the meaning of OAR 660-033-0020. The soils report is related to the NCRS Land Capability Classification (LLC) system that classifies soils class 1 through 8. An LCC rating is assigned to

each soil type based on rules provided by the NRCS. The soils report provides more detailed soils information than contained on the Web Soil Survey operated by the NRCS, which provides general soils data at a scale generally too small for detailed land use planning and decision making.

The state's agricultural land rules, OAR 660-033-0030, allow the County to rely on the high intensity Order-1 soil survey and soil capability analysis prepared by Mr. Gallagher, which is more detailed than the general NRCS soil maps and soil surveys and the Web Soil Survey operated by the NRCS as of January 2, 2012. The Hearings Officer finds that the Order-1 soil survey is related to the NRCS land capability classification system.

The Hearings Officer finds that the more detailed soils information in the report prepared by Mr. Gallagher assists the County to make a better determination of whether the Subject Property qualifies as agricultural land. As set forth above, DLCD completed a Soil Assessment Completeness Review pursuant to OAR 660-033-0045(6)(a), confirming the report prepared by Mr. Gallagher meets the requirements for agricultural soils capability reporting.

Based on Mr. Gallagher's qualifications as a certified Soil Scientist and Soil Classifier, the Hearings Officer finds the submitted soil study to be definitive and accurate in terms of site-specific soil information for the Subject Property. For all the foregoing reasons, the Hearings Officer finds the Subject Property is not "agricultural land."

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

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

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

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

FINDING: The Applicant submitted a soils study by Mr. Gallagher of Red Hill Soils dated November 2, 2020. The soils study was submitted following the ORS 215.211 effective date. Staff received acknowledgement via email on June 16, 2021, from Hilary Foote, Farm/Forest Specialist with the DLCD that the soils study is complete and consistent with DLCD's reporting

requirements. The Hearings Officer finds this criterion to be met based on the submitted soils study and confirmation of completeness and consistency from DLCD.

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

FINDING: The Applicant has provided a DLCD-certified soils study as well as NRCS soils data. The Hearings Officer finds that the Applicant has complied with the soils analysis requirements of OAR 660-033-0045 in order to obtain DLCD certification. DLCD's certification establishes compliance with OAR 660-033-0045.

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 the above language 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 properties from AG to RREA and change the zone from EFU to MUA10. The Applicant is not proposing any land use development of the properties at this time.

The Applicant has submitted a transportation impact analysis (TIA) with the application. The TIA was reviewed by the County Transportation Planner, who agreed with the report's conclusions. No rebuttal evidence was introduced into the record and there was no testimony in opposition to the conclusions in the TIA.

Public comments received by the County indicate concerns with potential traffic impacts as a result of the proposed plan amendment and zone change. These comments are non-specific in nature, do not include any findings contrary to the findings set forth in the Transight Consulting, LLC analyses, and do not include any information that is inconsistent with the Transight Consulting, LLC's reports. Public comments express a generalized concern about traffic impacts associated with additional growth if the subject property is developed. The Hearings Officer notes that additional transportation/traffic review will be required at the time of any future development application(s).

The Applicant further noted that access to Classic Estates lots is provided by Peterman Lane and Parker Lane. Traffic associated with potential future development of the Subject Property will not rely on either road for access. As shown in the TIA, impacts to the greater area arterial street network will be negligible.

The Hearings Officer finds that the proposed rezone will not significantly affect an existing or planned transportation facility for the following reasons: (1) it will not change the functional classification of an existing or planned transportation facility; (2) it will not change standards implementing a functional classification system; and (3) it will not result in any of the following effects – types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility, degradation of the performance of an existing or planned transportation facility such that it would not meet performance standards identified in the TSP or comprehensive plan, or degradation of the

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

Based on the TIA, the Hearings Officer finds 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 proposed changes will not change the functional classification of any existing or planned transportation facility or change the standards implementing a functional classification system. The changes will not allow types or levels of land uses, which would result in levels of travel or access, which are inconsistent with the functional classification of nearby transportation facilities. Furthermore, it will not reduce the performance standards of the facility below the minimum acceptable level in the County's transportation system plan.

The Hearings Officer finds that, based on OAR 660-012-060(1), the County is not required to put in place measures as provided in Section (2) of this rule. Based on the County Senior Transportation Planner's comments and the traffic study from Transight Consulting LLC, the Hearings Officer finds the Applicant has demonstrated compliance with the TPR. These criteria are met.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

FINDING: The Statewide Planning Goals are addressed below, as set forth 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 stat or 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 MUA-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 MUA-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; 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 MUA-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 MUA-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 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. Members of the public commented regarding concerns of loss of the currently vacant property as open space and for recreational uses. The Hearings Officer finds that the Subject Property is not planned to meet the recreational needs of Deschutes County residents and does not directly impact areas that meet Goal 5 needs.

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 the Subject Property from EFU to MUA-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 MUA-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. Rather, if the Subject Property is developed with residential dwellings in the future, energy conservation will be increased – not impeded – as residents will not be required to travel as far to work, shopping and other essential services provided in the City of Bend.

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 MUA-10 zone does not include urban uses as permitted outright or conditionally. The MUA-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 MUA-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 Multiple Use Agricultural (MUA-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 of the Deschutes County Hearings Officer.

____

Stephanie Marshall, Deschutes County Hearings Officer

Dated this 24th day of November, 2021

Mailed this 24th day of November, 2021

Owner	Agent	InCareOf	Address	CityStZip	Type	cdd id
HIGHAM,MICHAEL E & DONNA G			63225 PETERMAN LN	BEND, OR 97701	Hearings Officer Decision	21-616-PA, 21-617-ZC
CONRAD,KURT J & SUSAN L			22220 PARKER LN	BEND, OR 97701	Hearings Officer Decision	21-616-PA, 21-617-ZC
FANCHER, LIZ			2465 SACAGAWEA LN	BEND, OR 97701	Hearings Officer Decision	21-616-PA, 21-617-ZC
Joe Bessman	Transight Consulting		Via Email		Hearings Officer Decision	21-616-PA, 21-617-ZC
SWISHER, DAVE			250 NW FRANKLIN AVE, STE 401	BEND, OR 97703	Hearings Officer Decision	21-616-PA, 21-617-ZC
Central Oregon LandWatch	Carol Macbeth		2843 NW Lolo Drive	Bend, OR 97703	Hearings Officer Decision	21-616-PA, 21-617-ZC
1000 Friends of Oregon	Andrew Mulkey		PO Box 40367	Portland, OR 97240	Hearings Officer Decision	21-616-PA, 21-617-ZC

NOTICE OF HEARINGS OFFICER'S DECISION

The Deschutes County Hearings Officer has approved the land use application(s) described below:

FILE NUMBERS: 247-21-000616-PA, 617-ZC

LOCATION: Property 1:

Map and Taxlot: 171318C000100
Account: 109158
Situs Address: 63350 ABBEY RD, BEND, OR 97701

Property 2:

Map and Taxlot: 1713180000600
Account: 106933
Situs Address: NO SITUS ADDRESS

OWNER/ APPLICANT: Dave Swisher

ATTORNEY FOR APPLICANT: Liz Fancher
2465 NW Sacagawea Lane
Bend, OR 97703

SUBJECT: The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the properties from Agricultural (AG) to Rural Residential Exception Area (RREA). The applicant also requests approval of a corresponding Zone Change to rezone the properties from Exclusive Farm Use – Tumalo/Redmond/Bend subzone (EFU-TRB) to Multiple Use Agricultural (MUA-10) as the subject property does not qualify as "Agricultural Land" pursuant to State Law and administrative rules.

STAFF CONTACT: Kyle Collins, Associate Planner
Phone: 541-383-4427
Email: Kyle.Collins@deschutes.org

RECORD: Record items can be viewed and downloaded from: www.buildingpermits.oregon.gov

APPLICABLE CRITERIA: The Hearings Officer reviewed this application for compliance against criteria contained in Chapters 18.04, 18.16, 18.32, 18.80, 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 application meets applicable criteria, and recommends approval of the applications.

As a procedural note, the hearing on September 21, 2021, 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.

This decision becomes final twelve (12) days after the date mailed, unless appealed by a party of interest. To appeal, it is necessary to submit a Notice of Appeal, the base appeal deposit plus 20% of the original application fee(s), and a statement raising any issue relied upon for appeal with sufficient specificity to afford the Board of County Commissioners an adequate opportunity to respond to and resolve each issue.

Copies of the decision, 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.

Owner	Agent	InCareOf	Address	CityStZip	Type	cdd id
HIGHAM,MICHAEL E & DONNA G			63225 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CONRAD,KURT J & SUSAN L			22220 PARKER LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
FANCHER, LIZ			2465 SACAGAWEA LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
Joe Bessman	Transight Consulting		Via Email		Hearings Officer NOD	21-616-PA, 21-617-ZC
SWISHER, DAVE			250 NW FRANKLIN AVE, STE 401	BEND, OR 97703	Hearings Officer NOD	21-616-PA, 21-617-ZC
Central Oregon Irrigation District			1055 SW Lake Ct	Redmond, OR 97756	Hearings Officer NOD	21-616-PA, 21-617-ZC
Central Oregon LandWatch	Carol Macbeth		2843 NW Lolo Drive	Bend, OR 97703	Hearings Officer NOD	21-616-PA, 21-617-ZC
1000 Friends of Oregon	Andrew Mulkey		PO Box 40367	Portland, OR 97240	Hearings Officer NOD	21-616-PA, 21-617-ZC
WILCOX,COREY D & JANELLE D			63370 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CHONG TRUST	LONG, HAO & CHAO, YU PING ADA TTEES		63358 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
JAMES A WEEKS REVOCABLE TRUST	WEEKS, JAMES A TTEE		63325 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
EMICK,ANTHONY C & BALL,TINA M			63355 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
DON SWISHER TRUST ETAL	SUCCESSOR TRUSTEE	C/O DAVE SWISHER	250 NW FRANKLIN AVE #STE 401	BEND, OR 97703-2814	Hearings Officer NOD	21-616-PA, 21-617-ZC
RICHARD SUTTER LIVING TRUST	SUTTER, RICHARD I TTEE		63488 ABBEY RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
SCHRIER LIVING TRUST ET AL	SCHRIER, MICHAEL L TTEE ET AL		PO BOX 126	HUBBARD, OR 97032	Hearings Officer NOD	21-616-PA, 21-617-ZC
JARVIS,MARK S & CYNTHIA M			63400 SILVIS RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
FREEMAN, MATTHEW B & JAMIE			22050 NE BUTLER MARKET RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
MCOMBER HOLDINGS LLC			PO BOX 1851	BEND, OR 97709	Hearings Officer NOD	21-616-PA, 21-617-ZC
TURLEY, BRANDON L			22110 BUTLER MARKET RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
PALMER,KINGDON P JR & CINDY A			22130 BUTLER MARKET RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
BARTZ, EDWARD G ET AL			22160 BUTLER MKT RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
BROWN, JOHN A ET AL			22190 BUTLER MKT RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
EDWARD & JULIE DENFELD TRUST	DENFELD, EDWARD JAMES TTEE ET AL		63215 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
BLACKMAN, TERESA ANNE & SCOTT			22249 PARKER LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
MCCAUL, KEVIN E & JANETTE M			22229 PARKER LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
SWEEN, TODD A & MELISA V			22240 PARKER LN	BEND, OR 97701-9762	Hearings Officer NOD	21-616-PA, 21-617-ZC
PEVERIERI, LEONARD & ANGELA M			63285 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CITY OF BEND			PO BOX 431	BEND, OR 97709	Hearings Officer NOD	21-616-PA, 21-617-ZC
DINGER, PAUL & LAURA ANN			63311 ABBEY RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CENTRAL OREGON IRRIGATION DIST.			ELECTRONIC		Hearings Officer NOD	21-616-PA, 21-617-ZC
DEPT. OF LAND CONSERV. & DEVEL.			1011 SW EMKAY DR., SUITE 108	Bend, OR 97702	Hearings Officer NOD	21-616-PA, 21-617-ZC
DESCHUTES CO. SR. TRANS. PLANNER			ELECTRONIC		Hearings Officer NOD	21-616-PA, 21-617-ZC
OREGON DEPT. OF AVIATION, PROJ. & PLANNING DIV.			Electronic		Hearings Officer NOD	21-616-PA, 21-617-ZC
WATERMASTER - DISTRICT 11			ELECTRONIC		Hearings Officer NOD	21-616-PA, 21-617-ZC
BEND MUNICIPAL AIRPORT (CITY OF BEND)	AIRPORT MANAGER / ECONOMIC DEVELOPMENT		P.O. BOX 431	Bend, OR 97709	Hearings Officer NOD	21-616-PA, 21-617-ZC

REVIEWED

LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Code Title 18, the Deschutes County Zoning Map, to Change the Zone Designation for Certain Property From Exclusive Farm Use to Multiple Use Agricultural and Prescribing an Effective Date on the 90th Day After the Date of Adoption. * * *

ORDINANCE NO. 2022-004

WHEREAS, Central Oregon Irrigation District (COID) applied for a Deschutes County Comprehensive Plan Map (247-21-000616-PA) and Deschutes County Zoning Map (247-21-000617-ZC) change, to rezone certain property from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA10); and

WHEREAS, after notice was given in accordance with applicable law, a public hearing was held on September 21, 2021 before the Deschutes County Hearings Officer and, on November 24, 2021 the Hearings Officer recommended approval of the comprehensive plan map and zone change; and

WHEREAS, on this same date, the Board of County Commissioners (“Board”) adopted Ordinance 2022-003 amending DCC Title 23, changing the plan designation of the property from Agriculture (AG) to Rural Residential Exception Area (RREA); and

WHEREAS, a change to the Deschutes County Zoning Map is necessary to implement the plan amendment adopted in Ordinance 2022-003; and

WHEREAS, pursuant to DCC 22.28.030(C), the Board heard *de novo* the application for zone change from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA10) to conform to the newly adopted plan amendment; now, therefore,

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

Section 1. AMENDMENT. DCC Title 18, Zoning Map, is amended to change the zone designation from Exclusive Farm Use (EFU) to Rural Residential Exception Area (RREA) 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.

Section 2. FINDINGS. The Board adopts as its findings in support of this decision, the Decision of the Hearings Officer, attached as Exhibit “C”, and incorporated by reference herein.

/ / /

Section 5. EFFECTIVE DATE. This Ordinance takes effect on the 90th day after the date of adoption.

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

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 Description

A parcel of land situated in the Northeast Quarter of the Southwest Quarter (NE¼ SW¼) and the Southeast Quarter of the Northwest Quarter (SE¼ NW¼), Section Eighteen (18), Township Seventeen (17) South, Range Thirteen (13) East of the Willamette Meridian, Deschutes County, Oregon.

04/20/2022 Item #10.

EFUAL

EFUTRB

Zone Change from
EFU Tumalo/Redmond/Bend (EFUTRB)
to
Multiple Use Agricultural (MUA10)

Taxlot 17-13-18-00-00600

Taxlot 17-13-18-00-00100

ABBEY RD

PARKER LN

PETERMAN LN

EFUTRB

MUA10

SILVIS RD

MUA10

BUTLER MARKET RD

DICKEY RD

EFUTRB

KEVIN DR

DOUGLAS LN

DON JR LN

PROPOSED ZONING MAP

Exhibit "B"
to Ordinance 2022-004

Legend

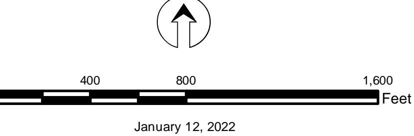
Proposed Zone Change Boundary

Zoning

EFUAL - Alfalfa Subzone

EFUTRB - Tumalo/Redmond/Bend Subzone

MUA10 - Multiple Use Agricultural



January 12, 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

Mailing Date:
Wednesday, November 24, 2021

04/20/2022 Item #10.

DECISION OF THE DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS: 247-21-0000616-PA, 617-ZC

HEARING: September 21, 2021, 6:00 p.m.
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

APPLICANT/ OWNER: Dave Swisher
250 NW Franklin Avenue, Suite 401
Bend, OR 97703

Property 1:
Don Swisher Trust, Dave Swisher, Successor Trustee
Carolyn J. Swisher Trust, Dave Swisher Successor Trustee

Mailing Name: DON SWISHER TRUST ET AL
Map and Taxlot: 171318C000100
Account: 109158
Situs Address: 63350 ABBEY RD, BEND, OR 97701

Property 2:
Don Swisher Trust, Dave Swisher, Successor Trustee
Carolyn J. Swisher Trust, Dave Swisher Successor Trustee
MacCloskey Revocable Trust, Craig and Jane I. MacCloskey, Trustees

Mailing Name: DON SWISHER TRUST ET AL
Map and Taxlot: 1713180000600
Account: 106933
Situs Address: NO SITUS ADDRESS

SUBJECT PROPERTY: Tax Lot 100, Assessor’s Map 17-13-18C (“Tax Lot 100”)
Tax Lot 600, Assessor’s Map 17-13-18 (Tax Lot 600”)

ATTORNEY FOR APPLICANT: Liz Fancher
2465 NW Sacagawea Lane
Bend, OR 97703

TRANSPORTATION ENGINEER: Joe Bessman
Transight Consulting, LLC

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 – Tumalo/Redmond/Bend subzone (EFU-TRB) to Multiple Use Agricultural (MUA-10) as the subject property does not qualify as "Agricultural Land" pursuant to State Law and administrative rules

HEARINGS OFFICER: Stephanie Marshall

STAFF CONTACT: Kyle Collins, Associate Planner
Phone: 541-383-4427
Email: Kyle.Collins@deschutes.org

RECORD CLOSED: October 15, 2021[1]

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 18.32, Multiple Use Agricultural Zone (MUA10)
Chapter 18.80, Airport Safety Combining Zone (AS)
Chapter 18.113, Destination Resorts Zone (DR)
Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance

Deschutes County Comprehensive Plan

[1] At the conclusion of the public hearing, the Hearings Officer made an oral ruling, granting a request to leave the record open through October 5, 2021. Thereafter, on October 5, 2021, staff contacted the Hearings Officer, informing her of the fact that Central Oregon LandWatch submitted a letter and exhibits at the conclusion of the first open record period on September 28, 2021. The submission was misidentified with the wrong file number and thus was not initially included in the file for the referenced applications. The Hearings Officer issued an Order Extending Open Record Period dated October 5, 2021, extending the open record period through October 15, 2021. The Order is included in the record.

Chapter 2, Resource Management
Chapter 3, Rural Growth Management
Appendix C, Transportation System Plan

Oregon Administrative Rules (OAR), Chapter 660
Division 6, Forest Lands
Division 12, Transportation Planning
Division 15, Statewide Planning Goals and Guidelines
Division 33, Agricultural Land

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

II. FINDINGS OF FACT

A. LOCATION: Property 1 described above has a situs address of 63350 Abbey Road, Bend, OR 97701. Property 2 described above does not have a situs address. Property 2 is directly adjacent to the north of Property 1. The subject property is generally east of the City of Bend, north of Butler Market Road and west/northwest of Powell Butte Highway and the Bend Airport. Property 1 and Property 2 are referred to collectively herein as the "Subject Property."

B. LOT OF RECORD: Property 1 described above was found to be a legal lot of record pursuant to local land use decision 247-20-000396-LR. Property 2 described above was found to be a legal lot of record pursuant to local land use decision 247-20-000395-LR.

C. ZONING AND PLAN DESIGNATION: The Subject Property is zoned EFU-TRB and is designated Agricultural (AG) in the Deschutes County Comprehensive Plan. The Airport Safety Overlay Zone (AS) and the Destination Resort Overlay Zone (DR) also apply to the Subject Property. The Subject Property does not have any Goal 5 resource designations.

D. 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 Multiple Use Agricultural (MUA10). The Applicant asks that Deschutes County change the zoning and the plan designation because the subject property does not qualify as "agricultural land" under Oregon Revised Statutes (ORS) or Oregon Administrative Rules (OAR) definitions. The Applicant submits that no exception to Statewide Planning Goal 3, Agricultural Land is required because the Subject Property is not agricultural land.

Submitted with the application is an Order 1 Soil Survey of the Subject Property, titled “Soil Assessment for Two 40-acre Parcels, Bend Oregon” (hereafter referred to as the “soil study”) prepared by soil scientist Andy Gallagher, CPSSc/SC 03114 of Red Hill Soils. The Applicant has also submitted a traffic analysis prepared by Transight Consulting, LLC titled “Swisher Rezone” hereafter referred to as “traffic study.” Additionally, the Applicant has 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.

E. SITE DESCRIPTION: Property 1 and Property 2 each are approximately 40 acres in size and adjacent to one another in a north-south orientation. The Subject Property is relatively level with mild undulating topography. Vegetation consists of juniper trees, sage brush, bunch grasses, and other native vegetation. Property 1 and Property 2 are both undeveloped and not irrigated. Access to the Subject Property is provided by Abbey Road, a designated local access road which extends from Butler Market Road to the southwest. The nearest portion of the City of Bend’s Urban Growth Boundary (UGB) is located approximately 1.3 miles to the southwest, and the Bend Municipal Airport is located approximately 0.5 miles to the east. The Subject Property is 0.25 miles south of Butler Market Road and adjoins Abbey Road.

Neither Property 1 nor Property 2 have water rights, and neither has been farmed or used in conjunction with any farming operation in the past. The Applicant’s Burden of Proof statement at page 3 states, “According to COID, the seller of this property entered into a contract with the predecessor of the district to purchase 25 acres of water for each of the two tax lots. See, **Exhibit C**. The contract was, however, never fulfilled and no water rights were adjudicated to these properties.” An old COID ditch crosses Property 1. There are no COID facilities on Property 2.

The Natural Resources Conservation Service (NRCS) map shown on the County’s GIS mapping program identifies two soil complex units on the Subject Property: 38B, Deskamp-Gosney complex and 58C, Gosney-Rock outcrop-Deskamp complex. Neither soil complex 38B, the predominant soil complex on the Subject Property, nor soil complex 58C, are defined as high-value soils by DCC 18.04. The Applicant’s Burden of Proof statement states on pages 3-4:

> *The applicant obtained a professional soils assessment for the two properties. The assessment was made by Andy Gallagher, CPSSc/SC 03114. Mr. Gallagher determined that 88% of Tax Lot 100 is comprised of LCC 7 and 8 soils and 82% of Tax Lot 600 is comprised of LCC 7 and 8 soils. The remainder of each property is comprised of soils that are rated LCC 6 when not irrigated. A copy of Mr. Gallagher’s soils assessment is included as part of* ***Exhibit D*** *to this burden of proof. Mr. Gallagher also provided a professional estimate of the amount of dryland forage each tax lot might produce. He found that Tax Lot 100 would produce approximately 494 pounds per acre per year and that Tax Lot 600 would produce approximately 440 pounds per acre per year.*

As discussed in detail below in the Soils section, there is no irrigation on the Subject Property and an Agricultural Soils Capability Assessment (Order 1 soil survey) conducted on the properties determined Class 3 irrigated and 6 nonirrigated are mapped as a consociation and the Gosney, rock outcrop and very shallow soils mapped as a complex in which all three components are either Capability Class 7 or 8. The soils in both of the 40 acre parcels are predominantly shallow and ashy-skeletal and rock outcrops Land Capability Class 7 and 8.

F. SOILS: According to Natural Resources Conservation Service (NRCS) maps of the area, the Subject Property contains two different soil types as described below: 58C – Gosney-Rock Outcrop-Deskamp complex, and 36A – Deskamp loamy sand.

The Applicant submitted a soil study report (Applicant's), which was prepared by a certified soil scientist and soil classifier that determined the Subject Property is comprised of soils that do not qualify as Agricultural Land[3]. 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. The Applicant's soils study has been verified by DLCD.

<u>38B, Deskamp-Gosney complex, 0 to 8 percent slopes:</u> 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 96.3 percent of the Subject Property is made up of this soil type.

<u>58C, Gosney-Rock Outcrop-Deskamp complex, 0 to 15 percent slopes:</u> 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

[3] As defined in OAR 660-033-0020, 660-033-0030

when unirrigated, and 4e when irrigated. Approximately 3.7 percent of the Subject Property is made up of this soil type, all located within the northern parcel.

G. SURROUNDING LAND USES: The Subject Property is located in Northeast Bend near the Bend Airport. Its south boundary adjoins a large tract of land zoned MUA-10 that is developed with rural residences. EFU-TRB and MUA-10 zones are intermixed in the greater area around the subject property. EFU-zoned lands in the vicinity are developed with small scale agricultural operations and single-family dwellings. The remaining parcels consist of County exception lands zoned MUA10, which are predominately developed with single-family dwellings and host small-acreage irrigation for pasture and hobby farm uses. There are also significant EFU-zoned parcels which contain no irrigation or substantial agricultural operations. The nearest portion of the City of Bend's UGB is located approximately 1.3 miles to the southwest, and the Bend Municipal Airport is located approximately 0.5 miles to the east.

The adjacent properties are outlined below in further detail:

North: The City of Bend's sewage treatment plant tract is north of the Subject Property. The developed part of the City's treatment plant is at least 0.6 miles north, the land between the plant and the Subject Property is vacant, dry, open land. The predominant soil mapping units on these properties are 58C and 59C soils that are primarily comprised of Class 7 and 8 soils. The adjacent property to the north, Tax Lot 104 (Assessor's Map 17-13-00) is a 1,213.82 acre EFU-zoned property owned by the City of Bend that is unirrigated and predominately undeveloped, with the major exception of the city's wastewater treatment facility. Northeast is Tax Lot 105 (Assessor's Map 17-13-00), an 80 acre EFU-zoned property also owned by the City of Bend that is unirrigated and undeveloped.

West: Immediately west of the Subject Property are four EFU-zoned parcels. Tax Lots 700 and 701 (Assessor's Map 17-13-18) are 19.6 acres and 19.2 acres in size respectively. Tax Lots 200 and 300 (Assessor's Map 17-13-18C) are 17.9 acres and 16.3 acres in size respectively. All four parcels are developed with single-family dwellings (land use file nos. CU-89-133 for Tax Lot 300. The dwellings on Tax Lots 201 and 700 predate modern land use standards and requirements. It is unclear what land use decision formally approved the dwelling on Tax Lot 700, which was constructed in 1986 pursuant to building permit no. 247-B13811), accessory structures, and three of the properties (Tax Lots 700, 200, and 300) are partially irrigated. Tax Lot 701 lacks irrigation water rights. None of these properties appear to be engaged in commercial farm use.

East: The Bend Airport is one half mile east of the Subject Property. It is developed with commercial and industrial uses related to aviation and as an airport. Tax Lot 100 is separated from the airport by Powell Butte Highway and small parcels zoned EFU-TRB. Immediately east of the Subject Property is a 40-acre square that has been divided into four small EFU-zoned parcels. Tax Lots 100, 200, 300, and 400 (Assessor's Map 17-13-18DB) are 8.5 acres,

12.2 acres, 8.0 acres, and 10.0 acres in size respectively. All four parcels are developed with single-family dwellings (land use file nos. CU-02-18 for Tax Lot 100, CU-03-8 for Tax Lot 200, CU-90-35 for Tax Lot 300, and CU-88-146 for Tax Lot 400). It does not appear that any of these parcels contain irrigation rights, but several of the properties do appear to contain very minor hobby farming operations. Continuing east are two additional EFU-zoned parcels. Tax Lots 100 and 200 (Assessor's Map 17-13-18D) are both 19.5 acres in size respectively. Tax Lot 100 contains several agricultural buildings and Tax Lot 200 is undeveloped. Farther east is an assemblage of properties associated with the Bend Municipal Airport. The block of nonfarm properties to the east of the Subject Property (which are not receiving farm tax deferral) precludes it from being farmed with small farm parcels further to the east.

South: Immediately south of the Subject Property are four MUA-10-zoned properties all located within the Butler subdivision. All the parcels are approximately 9.85 acres in size, and all are developed with single-family dwellings and assorted residential accessory structures. Southwest of the subject properties is an EFU-zoned parcel (Tax Lot 500, Assessor's Map 17-13-18C) that is approximately 19.3 acres in size and is developed with a single-family dwelling (land use file no. CU-99-46). Tax Lot 500 does not appear to contain any irrigation water rights, but does appear to have some minor agricultural operations onsite. Continuing southeast are numerous MUA-10-zoned properties located within the Classic Estates subdivision – 16 lots - all of which are developed with single-family dwellings and a variety of residential accessory structures. These lot sizes range from 2.12 to 2.59 acres. A large amount of land south of Classic Estates and south of Butler Market Road is also zoned MUA-10.

H. PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on June 23, 2021, to several public agencies and received the following comments:

<u>Deschutes County Senior Transportation Planner, Peter Russell</u>

I have reviewed the transmittal materials for 247-21-000616-PA/617-ZC to amend the Comprehensive Plan designation Zone of the subject properties from Agriculture and Exclusive Farm Use (EFU) to Rural Residential Exception Area (RREA) and Multiple Use Agriculture (MUA-10). The two 40-acre properties are at 63350 Abbey Road, aka County Assessor's Map 17-13-18C, Tax Lot 100 and a property with no situs address but described as 17-13-18, Tax Lot 600.

The applicant's traffic study dated Feb. 22, 2021, uses marijuana production as one of the outright permitted uses in the EFU zone when comparing and contrasting a reasonable worst case scenario of traffic generation from EFU vs. MUA-10. The County has banned marijuana production so this appears to staff to be an inappropriate choice. Nevertheless, in looking at the other outright permitted uses in EFU vs. MUA-10, staff agrees the plan amendment/zone change will not result in any significant adverse effect and thus the complies with the Transportation Planning Rule.

The property accesses Abbey Road, a public road not maintained by Deschutes County and otherwise known as a Local Access Road (LAR) and functionally classified as a local road. The County remains the road authority. 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.

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

Oregon Department of Aviation, Seth Thompson

Thank you for providing the opportunity for the Oregon Department of Aviation (ODA) to comment on File Number: 247-21-000616-PA, 617-ZC.

The ODA has no comment on the subject proposal. However, future development on the subject parcels will be subject to the following requirements by the ODA and FAA:

1) Prior to issuance of any subsequent building permits on these parcels, the applicant must file and receive aeronautical determinations from the ODA and FAA as required by OAR 738-070-0060 on FAA Form 7460-1 Notice of Proposed Construction or Alteration to determine if any new structures will pose an obstruction to aviation safety at the Bend Municipal Airport.

2) The height of any new structures shall not penetrate FAA Part 77 Imaginary Surfaces, as determined by the ODA and FAA.

Central Oregon Irrigation District, Kelley O'Rourke

Please be advised that Central Oregon Irrigation District (COID) has reviewed the provided application dated June 22, 2021 of the above referenced project. COID has no facilities or water rights on the subject property (1713180000600).

Please note that COID facilities are located within the vicinity of the project; contact COID if any work and/or crossings will be done near the COID facilities and not shown on the provided plans.

The comments from COID only referenced one property (Map and Tax Lot: 1713180000600), Property 2 described above. However, the subject application references two parcels (secondary property: Map and Tax Lot 171318C000100). Based on internal County records and comments within the submitted application materials, both Property 1 and Property 2 are located within the boundaries of the Central Oregon Irrigation District, but neither parcel contains any listed water rights.

I. PUBLIC COMMENTS: The Planning Division mailed notice of the application to all property owners within 750 feet of the subject property on June 23, 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 June 23, 2021. Two public comments were received from neighboring property owners.

The first comment was received from Michael and Donna Grace Higham, residents and owners of property located at 63225 Peterman Lane, Bend, OR 97701 on June 26, 2021:

> *"We OPPOSE this change of rezoning of this land.*
>
> *We are extremely surprised that proposed development of 40 acres is being looked at. We have so much traffic from the airport and Prineville. WE ARE SHORT OF COI WATER. The amount of people and activities will increase by 200%. Having development should be closer to Bend City.*
>
> *Then the next development will be Don Swishers other 40 acres next to this property.*
>
> *This is NOT an orderly development from Bend City to urban growth boundaries. Bend was developing from the city out."*

The second comment was received from Kurt and Sue Conrad, a residents and owners of property located at 22220 Parker Lane, Bend, OR 97701 on July 1, 2021:

> *"We are opposed to the above-referenced land use application. Listed below are our reasons broken down into collective and personal:*
>
> ***Collective: Zoning change request***
>
> *When Don and Carolyn Swisher purchased this land, they did so with the knowledge it could not be developed for residential use. The LCDC laws had been in place for 15 years at that time.*

This attempt to develop the properties has been requested only after the passing of Mr. and Mrs. Swisher. And coincidentally, (?) when there is little to no available land to develop in the appropriate zoning. The current applicant is a well-established local developer.

*The land use laws that were in place at the time were designed by a group of citizens and elected officials who genuinely love Oregon for the greater good of all citizens. To quote Tom McCall in 1973, it was to prevent the "unfettered despoiling of the land, **sagebrush subdivisions,** coastal condomania, and the ravenous rampage of suburbia in the Willamette Valley all threaten to mock Oregon's status as the environmental model for the nation."*

This proposal would be breaking the protective laws in place for the singular purpose of personal gain.

Changing from EFU to RREA/MUA10 will set a precedent that will be the ruin of our lovely area, County and State. Just like Covenants, Codes and Restrictions in a neighborhood, once they are broken and not rectified they are no longer enforceable. Others in the State will use this as a reason they, too, will be able to develop subdivisions wherever they please.

End Game of Part One – arbitrary development and subdivision

We who live here purchased this property in good faith that multi-home developments would not be allowable in the remaining vacant lands. We are a reasonable distance from the UGB/reserve to believe we were protected from subdivisions – even ten-acre lot ones.

How will the lack of irrigation rights be handled? Are xeriscaped properties required, or will homeowners be using potable water for their lawns? Or, will water be sucked directly from the aquifer for landscaping aesthetic purposes when natural supplies are dwindling? What about the additional fire risk 8 or more properties will bring? Will fire hydrants be a requirement now that excessive heat and red flag warnings are a concern?

Ten acres per home may sound large, but 8 homes clustered together is significant change for the worse. We moved out to the country for the quiet enjoyment of our homes and yards. We all have numerous pets and animals used to the peaceful country sounds who be affected by the constant noise.

Since there is rock at the surface of our 2-1/2 acres in many places, this will most likely involve extreme measures for the foundation. All this chaos will go on for years.

There is abundant wildlife in these two parcels. It is their homes and who knows where they be forced to retreat. We see them regularly.

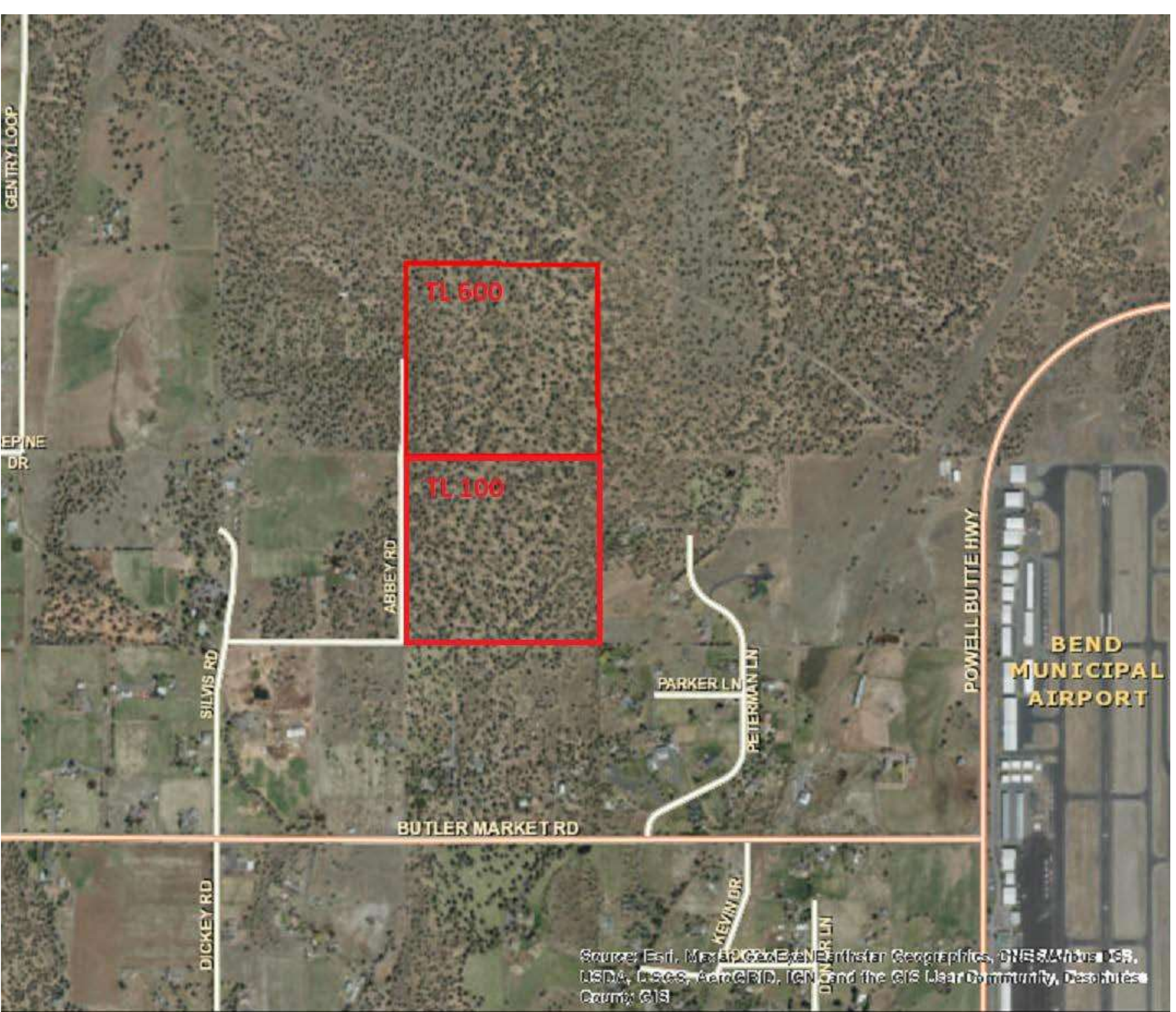
In finishing, I circle back to the "why" of this zoning change. The general public will not reap the greater good, just a developer and 8 additional high-end homebuyers in Central Oregon.

LCD's far-ranging planning prohibited endless building during the frenzy of the early 2000s. They also enabled us to come back stronger. We must stay the course. This is not the time to be changing our structured laws in places. It is time for honoring what we have here in extraordinary Oregon."

(emphasis in original).

Applicant Response: After submission of the public comments above, the Applicant provided the following response on September 13, 2021:

"***A. Location:*** *The location of the subject properties is marked as TL 100 and TL 600 on the following aerial photograph. The owners of two small properties (about 2.5 acres each), Conrad and Higham, filed comments opposing approval of the requested zone change and plan amendment. Their properties are located southeast of the subject property on Peterman Lane and Parker Lane in the Classic Estates subdivision. These roads are shown on the aerial photograph, below.*



B. Zoning: *The zoning of the Classic Estates lots is MUA-10, the same zoning proposed by the applicant for TL 100 and 600. Deschutes County has not applied a WA overlay zone to this property to protect wildlife. Protections for wildlife must be sanctioned by the County's Goal 5 ESEEs and WA or similar wildlife overlay zoning to be relevant to review of this application.*

C. Road Impacts: *Access to Classic Estates lots is provided by Peterman Lane and Parker Lane. Traffic associated with new development of the subject property will not rely on either road for access. Impacts to the greater area arterial street network will be negligible as shown by the traffic impact analysis filed with the land use applications.*

D. Classic Estate Subdivision: *A copy of the Classic Estates subdivision plat is included to illustrate the lot pattern and roads established by it.*

E. Properties Owned by Opponents: *The following photographs are aerial photographs that show the setting of the properties owned by opponents Conrad and Higham. The*

northwest corner of the Conrad property touches the southeast corner of TL 100.

The Higham property does not adjoin the subject properties. Its northwest corner is approximately 700 feet from the southeast corner of TL 100. There are two developed single-family home lots between it and TL 100.

F. Development Under EFU-TRB Zoning: *Tax Lots 100 and 600 are legal lots of record. Each, based on its poor soil conditions, should qualify to be divided into two nonfarm parcels with a nonfarm dwelling on each of the tax lots. Such divisions would allow a total of four nonfarm dwellings on the subject property. The subject property will not remain vacant land even if this application is denied.*

F. Water for Homes and Irrigation: *The applicant has shown that the subject property can obtain water service from Avion Water System as shown by* ***Exhibit F*** *and* ***G*** *of the application materials we filed with Deschutes County Planning.*

G. Purpose of EFU Zoning/Land Use Planning: *The purpose of EFU zoning, as stated by Statewide Goal 3, is "to preserve and maintain agricultural lands." The term "Agricultural Land" is defined by Goal 3. The subject properties do not meet the definition of "Agricultural Land." As a result, they may be zoned MUA-10, a zoning district that allows low-density* ***rural*** *residential development. The MUA-10 zone has been acknowledged by the Land Conservation and Development Commission as being compliant with the Statewide Goals that protect the community from urbanization of rural lands that formerly occurred in "sagebrush subdivisions."*

H. Location of City of Bend UGB and Airport: *The density of development allowed by the proposed plan amendment and zone change is not urban development. Instead, the MUA-10 zone has been determined, through the land use planning process, to be a zoning district that is both an appropriate zone for nonagricultural land and one that does not allow urban development. Nonetheless, the subject property is only approximately 1.25 miles east of the City of Bend's UGB and approximately one-half mile from the Bend Airport. The relatively large lot sizes required by the MUA-10 zone will preserve this land for future urban development. If the City makes the logical decision to expand its boundaries toward the Bend Airport, a location that is an employment area of the community, the subject properties will likely remain suitable for redevelopment given their size.*

Central Oregon LandWatch (COLW), through its attorney Carol Macbeth, participated in the public hearing and submitted materials into the record during the open record period objecting to the applications.

The Applicant submitted Post-Hearing Evidence on September 28, 2021 as follows:

•"Rural Resource Lands Research Report" dated May 16, 2019 prepared by DLCD Public Research Lands Fellow Stephanie Campbell (part)

•"Agricultural Soils Assessment" webpages published by and obtained from DLCD website on 9/28/2021

•*Central Oregon LandWatch v. Deschutes County*, LUBA No. 2016-12 (relevant part)

•"Conservation Neighbor: Andy Gallagher" article by Teresa Matteson dated December 29, 2020 published on Benton County Soil and Water Conservation District's website

•"Soil Survey Deschutes Area Oregon" published by USDA Soil Conservation Service

•December 1958 (obtained from Web Soil Survey of the NRCS) (part)

•Resume for Andy Gallagher

•"Soil Survey of the Upper Deschutes River Area" published by the USDA and NRCS (part)

•WebSoil Survey "Custom Soil Resource Report" for the subject property (location approximate) obtained from NRCS

•ORS 215.211, Agricultural land

•OAR 660-033-0030, Identifying Agricultural Land

•OAR 660-033-0045, Soils Assessments by Professional Soils Classifiers

The Applicant also submitted Rebuttal and Final Argument on October 15, 2021 which included, among other attachments, a letter from soils scientist Andy Gallagher dated October 14, 2021.

The Hearings Officer addresses the submitted public comments and testimony in the Conclusions of Law below.

J. LAND USE HISTORY: As noted above, Property 1 and Property 2 both have been determined to be legal lots of record. There is no other land use history for Property 1 or Property 2. In its burden of proof, the Applicant included the following:

> *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, however, developed without the benefit of reliable, detailed soils mapping information. The map was prepared prior to the USDA/NRCS's publication of the "Soil Survey of Upper Deschutes River Area, Oregon." This soil survey is more comprehensive than prior soils mapping efforts but continues to provide general soils information – not an assessment of soils on each parcel in the study area. This land application use application includes a more detailed and accurate Order 1 soils survey that is a part of* ***Exhibit D****. It provides Deschutes County with the information required to find that the subject property does not qualify as "agricultural land" as defined by Statewide Goal 3, Agricultural Land. Consistent with the requirements of ORS 215.211, this survey has been approved for use by Deschutes County by the Department of Land Conservation and Development ("DLCD") as shown by* ***Exhibit D****. This approval was sent directly to Deschutes County Planning by DLCD on June 17, 2021.*
>
> *When the County first implemented Statewide Goals, it applied resource zoning using a broad brush. All rural lands were assumed to be resource land. Then-existing development lands not suited for resource use were granted exceptions to the Goals that protect*

resource lands. The County allowed landowners a brief period of time after adoption of PL-15 (1979) to petition the County to remove nonresource properties from resource zone protections but made no effort to determine whether lands might be nonresource lands that do not merit the imposition of stringent land use regulations that protect rural resources – typical farm and forest resources.

Beginning around 2007, Deschutes County has rezoned properties from EFU to MUA-10 zoning and has applied a Rural Residential Exceptions Plan designation to lands found to be nonresource land. The County's comprehensive plan was also amended to authorize this type of change. This type of an amendment has been approved when soils are shown to be "nonagricultural" soils and not otherwise suited for farm use. Some of the ordinances and decisions that have approved this type of zone change and plan amendment include:

> ***Ordinance No. 2013-009*** *for File PA-11, ZC-11-2, State of Oregon DSL,* ***Exhibit H****. The Board's findings in this decision conclude that the current comprehensive plan allows the county to approve applications to change the plan designation of nonagricultural land from Agricultural to RREA. The Board's findings also conclude that a goal exception is not required to allow the county to approve an RREA plan designation for nonagricultural land because Goal 3 does not require protection of nonagricultural land and that an RREA designation is appropriate for nonagricultural land.*
>
> ***Ordinance No. 2007-025****, PA-07-1/ZC-07-1, Pagel,* ***Exhibit J****.*
>
> ***Ordinance No. 2011-014****, PA-08-1/ZC-08-1, The Daniels Group,* ***Exhibit K****.*
>
> ***Ordinance No. 2019-006****, 247-18-000485-PA/247-18-000486-ZC, Eastside Bend, LLC,* ***Exhibit L****.*
>
> ***Central Oregon Landwatch v. Deschutes County (Aceti****), LUBA NO. 2016-012, August 10, 2016,* ***Exhibit M****. LUBA's decision is relevant to this application for the following reasons:*
>
> 1. *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.*
>
> 2. *LUBA affirmed the County's determination that property that had been irrigated and used to grow hay in 1996 and earlier years was not agricultural land based on the Borine Order 1 soils survey that showed that*

the poor soils on the property are Class VII and VIII soils when irrigated, as well as when not irrigated. The Swisher property has no history of irrigation, a fact confirmed by Central Oregon Irrigation District, Exhibit C.

3. *LUBA accepted the following evidence provided by the applicant, to establish that the Aceti property is not "other than Class I-VI Lands taking into consideration farming practices.*

"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."

In Aceti, the County also found that commercial agricultural uses in the vicinity were limited.

The Swisher property, like the Aceti property, is located in close proximity to dense residential development, the Bend Airport and two major arterial roads (Butler Market Road and Powell Butte Highway). Adjoining EFU-zoned lands are vacant or engaged in hobby farming only. Farming in the area is not "commercial" agriculture. As with the Aceti property "irrigating rocks [on the Swisher property] is not productive."

K. PUBLIC SERVICES: The Subject Property receives police services from the Deschutes County Sheriff and is within the Deschutes County Rural Fire Protection District (DCRPFD) No. 2. DCRPFD No. 2 provides fire protection and ambulance services to the property through a contract with the City of Bend Fire Department. Fire Station 304 is located about three miles from the Subject Property at 2500 NE Neff Road, Bend. The Subject Property is easily accessed from this location via the arterial roadways of Hamby Road and Butler Market Road. Access to the Subject Property by fire trucks is provided by arterial streets with the exception of a small stretch of Abbey Road that will be required to be improved as a condition of a future land division of the subject property. The Subject Property is included in the Bend-LaPine School District. The Pine Nursery and Big Sky Park will serve the park needs of future new residents of the Subject Property.

L. UTILITY SERVICES: The Subject Property is in the service area for Central Electric Cooperative, Inc (CEC). CEC is willing to serve the Subject Property with electricity. Avion Water is willing to serve the Subject Property with public water services.

M. NOTICE REQUIREMENT: On August 20, 2021, 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 Sunday, August 24, 2021.

Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on August 12, 2021.

The Applicant complied with the posted notice requirements of DCC 22.24.030(B). The applicant submitted a Land Use Action Sign Affidavit, dated June 23, 2021, indicating the Applicant posted notice of the land use action on June 23, 2021.

Deschutes County sent notice of the proposed change to its comprehensive plan and land use regulation to the Oregon Department of Land Conservation and Development, received by DLCD on August 12, 2021.

N. REVIEW PERIOD: The subject application(s) were submitted on June 18, 2021, and deemed complete by the Planning Division on July 18, 2021. 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. CONCLUSIONS OF LAW

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.136, Amendments

Section 18.136.010, Amendments

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

FINDING: The Applicant, also the property owner, 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. 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 statement:

> *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 consistency with and respond to the Comprehensive Plan Goals and policies that apply, which are listed in the Comprehensive Plan section of this Decision in further detail.

Kurt and Sue Conrad submitted public comments in opposition to the applications, stating that the public interest will not be served by rezoning the property and that the only beneficiaries will be the Applicant and future buyers of new residences constructed on the Subject Property. Mr. and Mrs. Conrad assert that the proposal would be "breaking the protective laws in place for the singular purpose of personal gain." They further argue that a change from EFU to RREA/MUA10 will set a precedent that will adversely affect the surrounding area, the County and the State as a whole. Mr. and Mrs. Conrad argue, "Just like Covenants, Codes and Restrictions in a neighborhood, once they are broken and not rectified they are no longer enforceable." The Conrads' residence is situated on property zoned MUA-10, the same zoning classification to which the Applicant requests changing the Subject Property.

The Applicant submitted rebuttal to these arguments stating that, because the Subject Property is not agricultural land that is protected by Oregon land use laws, "they will not be unwound by approval of this application." The Applicant filed an additional ten (10) photographs that show the condition of the land, stating, "[t]hese confirm our position and the results of the soil study that show that this property is not suitable for agricultural use and is not 'agricultural land.'" The Applicant further argued, "The system designed to protect resource lands will in no way be harmed by allowing nonresource land to be developed with somewhat more housing than the four homes that should be able to be approved on this property given its current EFU zoning."

The Applicant noted that the Conrads' testimony and submissions state that "there is not a lot of potential for farming that 80 acres [the Subject Property]." The Conrads also expressed

concern that because there is rock at the surface of their property, development of homes on the Subject Property "will most likely involve extreme measures for the foundation."

The Applicant detailed a list of potential uses of the Subject Property under current EFU zoning and noted that the uses permitted outright in the MUA-10 zone are much more limited than the uses allowed outright in the EFU zone. *Compare* DCC 18.32.020 *with* DCC 18.16.020 and DCC 18.16.025.

The Hearings Officer finds that the question of whether the public interest is best served in approving the applications requires analysis of each of the factors set forth in DCC 18.136.020(A) through (D). The Applicant is correct in its argument that Oregon's protection of resource lands will not be "unwound" or otherwise undermined by approval of the applications if the Subject Property is determined not to be agricultural land.

The Hearings Officer further finds that approval of the applications will not set a negative precedent nor result in a "free for all" rush to rezone and develop EFU lands because each rezone application is decided on its own merits and must be supported by substantial evidence in the record for a requested rezone to be approved. The Deschutes County zoning regulations in Title 18 of the Deschutes County Code do not constitute "covenants, conditions and restrictions" that become unenforceable when a rezone of a particular property is approved. Zoning regulations are not set in stone, as evidenced by the fact that the Deschutes County Code includes a process and standards for rezoning properties where applicable standards are met and consistency with the Comprehensive Plan and Statewide Planning Goals is established.

The Hearings Officer finds the above provision is met, based on Comprehensive Plan conformance as set forth in subsequent findings.

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

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

> *The approval of this application is consistent with the purpose of the MUA-10 zoning district which stated in DCC 18.32.010 as follows:*
>
> > *"The purposes of the Multiple Use Agricultural Zone are to preserve the rural character of various areas of the County while permitting development consistent with that character and with the capacity of the natural resources of the area; to preserve and maintain agricultural lands not suited to full-time commercial farming for diversified or part-time agricultural uses; to conserve forest lands for forest uses; to conserve open spaces and protect natural and scenic resources; to*

> *maintain and improve the quality of the air, water and land resources of the County; to establish standards and procedures for the use of those lands designated unsuitable for intense development by the Comprehensive Plan, and to provide for an orderly and efficient transition from rural to urban land use."*

The subject property is not suited to full-time commercial farming and has no history of farm use.

The MUA-10 zone will preserve nonagricultural soils for future part-time or diversified agricultural use. The low-density of development allowed by the MUA-10 zone will conserve open spaces and protect natural and scenic resources. This low level of development will also help maintain and improve the quality of the air, water and land resources of the county by encouraging the future owners of the property to return irrigation water to area waterways or to more productive farm ground elsewhere in the county rather than to waste it on unproductive lands.

The subject property adjoins lands zoned MUA-10. They and the subject property provide a proper transition zone from EFU rural zoning to urban land uses in the City of Bend UGB.

The Hearings Officer finds that the purpose of the MUA-10 zoning classification is to allow low-density rural residential development. The MUA-10 zone has been acknowledged by LCDC as being compliant with the Statewide Goals that protect the community from urbanization of rural lands that formerly occurred on "sagebrush subdivisions." This zoning district is both an appropriate zone for nonagricultural land and one that does not allow urban development. For these reasons, the Hearings Officer finds that the density of development allowed by the proposed plan amendment and zone change is not, and will not lead to, urban development. Therefore, the Hearings Officer finds that the proposed rezone of the Subject Property is consistent with the purpose of the MUA-10 zoning classification.

The Hearings Officer notes that, in recent years, Deschutes County has recognized the value in rezoning non-productive agricultural lands and has issued decisions in support of plan amendments and zone changes where the applicant demonstrates the property is not agricultural land and, therefore, Statewide Goal 3, Agricultural Lands, does not apply. This is further supported by the plain language in Policy 2.2.3 of the Deschutes County Comprehensive Plan ("Allow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, for individual EFU parcels…") and Section 3.3 of the Comprehensive Plan ("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…").

Cases pertinent to the proposed request include:

Kelly Porter Burns Landholdings LLC ("Landholdings")/File nos. 247-16-000317-ZC/318-PA

On November 1, 2017, the Board of County Commissioners approved Kelly Porter Burns Landholdings LLC's request to change the plan designation on certain property from Agricultural to Rural Residential Exception Area and to change the zone designation from EFU-TRB to MUA-10 zone. The property consists of about 35 acres.

Based on the Order 1 soil survey for the property and the submitted evidence, the Hearings Officer found that the Landholdings property does not constitute agricultural land and does not merit protection under Goal 3, and therefore, approved the change in Plan designation and Zoning of the property from Agriculture/EFU-TRB to RREA/MUA-10.[4]

Division of State Lands Decision/File Nos. PA-11-7 and ZC-11-2

The *Division of State Lands* decision was a 2013 approval by the Board for a plan amendment from Agriculture to Rural Residential Exception Area and a zone change from EFU-TRB to Multiple Use Agricultural (MUA-10). Based on the Order 1 soil survey for the property and the submitted evidence, the Board found that the property was not agricultural land and therefore, Goal 3 did not apply.

Paget Decision/File Nos. PA-07-1, ZC-07-1

The *Paget* decision was a 2007 approval of a plan amendment from Agriculture to Rural Residential Exception Area and a zone change from EFU to MUA-10. The Board adopted the Hearings Officer's decision, which found that the property did not constitute "agricultural land" and therefore, the plan amendment and zone change to MUA-10 was consistent with Goal 3.

The Daniels Group/File Nos. PA-08-1, ZC-08-1

The Daniels Group decision was a 2011 Board decision approving a change to the Comprehensive Plan map from Surface Mine and Agriculture to Rural Residential Exception Area and a zone change from EFU-LB and Surface Mining to Rural Residential (RR-10). The Board found that the property did not constitute "agricultural land" as defined in Goal 3, was

[4] The Board adopted as its findings the Hearings Officer's decision with one exception: that if the property is divided, it must be developed as a cluster development and the two irrigation ponds must be included in the common area. In addition, the Board required the applicant to sign a Conditions of Approval agreement to "*assure that future residential development of the property will be harmonious with existing development in the area and so that a part of the property may be developed at urban densities if and when the property is annexed to the City of Bend*."

not subject to protection under Goal 3, and therefore, the plan amendment and zone change did not require an exception to Goal 3. (Exhibit 4).

The Hearings Officer finds the Applicant has demonstrated that the requested change in classification is consistent with the purpose and intent of the MUA-10 Zone. A change in classification will preserve the rural character of the Subject Property, due to the low density of development allowed in the MUA-10 zone, while permitting development consistent with that character. As set forth in the findings below, the Subject Property is not suited to full-time commercial farming but could be used for hobby farming. Low density development will also conserve open spaces and protect natural and scenic resources. The Hearings Officer finds that approval of the proposed rezone to MUA-10 would permit applications for low-density development. The Hearings Officer's findings regarding agricultural land, consistency with the Comprehensive Plan and Goal 3 are set forth in the findings below.

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 is no proposal to develop the property at this time. 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. Will-serve letters from Central Oregon Electric Cooperative and Avion Water Company, Inc., ***Exhibits E, F*** *and* ***G*** *of this application show that electric power and water services are available to serve the property.*

The subject property is located a short distance to the north of Butler Market Road, an arterial street. It is also approximately one-half mile west of the Powell Butte Highway. The impact of rezoning the subject property will be extremely minor. With its current zoning, it is theoretically possible to divide each 40-acre parcel into two nonfarm dwelling parcels. This would allow a total of four dwellings to be built on the subject property. If MUA-10 zoning is applied, the approval of a standard subdivision would allow the creation of eight residential lots. If cluster development approval is allowed as a conditional use, the maximum number of houses allowed would be ten (one per 7.5 acres) – an increase of six houses over the number allowed in the EFU zone. An increase of six houses is a de minimus impact. The existing road network is available to serve the use. This has been confirmed by the transportation system impact review conducted by Transight Engineering, ***Exhibit N*** *of this application.*

The property receives police services from the Deschutes County Sheriff. The southern half of the property is in a rural fire protection district and the nearest fire station is about three miles away. The applicant is pursuing annexation of the northern parcel to the rural fire protection district and believes, based on conversations with District representative, that inclusion in the district will be obtained. Access to the subject property by fire trucks is provided by arterial streets with the exception of a small stretch of Abbey Road that will be required to be improved as a condition of a future land division of the subject property. It is efficient to provide necessary services to the property because the property is already served by these service providers and adjacent to and large tracts of land zoned MUA-10 that have been extensively developed with rural residences on small lots and parcels.

The record shows that neighboring properties contain residential and small scale agricultural uses, which have water service primarily from wells, on-site sewage disposal systems, electrical service, telephone services, etc. The record does not contain any evidence of known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare.

Mr. and Mrs. Conrad expressed concern about the lack of irrigation rights and queried whether homeowners would be using potable water for their lawns. They also asked whether fire hydrants will be required, alleging additional fire risk associated with new development.

The Hearings Officer finds that the Applicant has demonstrated public water is available to the Subject Property through submittal of a will-serve letter from Avion Water Company, Inc. Irrigation water is not required for approval of the requested rezone. Although no development is proposed at this time, prior to development, the Applicant will be required to comply with the applicable requirements of the Deschutes County Code, including possible land use permit, building permit, and sewage disposal permit processes. Through these development review processes, assurance of adequate public services and facilities will be verified.

For the foregoing reasons, 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 provided the following response in the submitted burden of proof statement:

The MUA-10 zoning is consistent with the specific goals and policies in the comprehensive plan discussed above. The MUA-10 zoning is the same as the zoning of many other properties in the area of the subject property and is consistent with that zoning.

> *The only adjoining lands in farm use – and marginally, noncommercial farm use at that – are those west of the subject property. The proposed zone change and plan amendment will impose new impacts on this EFU-zoned farm land because these lands are separated from the subject property by Abbey Road, each parcel is under twenty acres in size and is developed with a single-family residence. Furthermore, these farm parcels are close proximity to the J-Bar-J therapeutic boarding school. The Academy at Sisters. Farm uses in the greater area, also, are occurring on properties that have been developed with residences and/or are in close proximity to lands zoned MUA-10 that are developed with residences.*

In addition to this statement, the Applicant provided specific findings for each relevant Comprehensive Plan goal and policy, which are addressed below. The Applicant's Rebuttal and Final Argument details the uses permitted outright in the EFU zone, compared to those allowed outright in the MUA-10 zone, which are more limited. *Compare* DCC 18.32.020 *with* DCC 18.16.020 and 18.16.025. The Hearings Officer finds that a change in zoning of the Subject Property will not materially alter the impacts on neighbors and the environment that may occur as a result of development of the property.

Mr. and Mrs. Conrad object to the applications in part because they believed their property would be protected from subdivisions, given the distance from the UGB/reserve. They further stated concern regarding pets and animals "used to the peaceful country sounds who will be affected by the constant noise." The Hearings Officer notes that a belief that surrounding properties would not ever be rezoned is not evidence of "impact on surrounding land use," or inconsistency with specific goals and policies within the Comprehensive Plan. Moreover, there is no evidence in the record to support a finding that rezoning the Subject Property to MUA-10 would result in "constant noise." Any future development and use of the Subject Property will be required to be consistent with the County Noise Control Ordinance, DCC Chapter 8.08, which sets forth regulations to protect the public peace, health, safety and general welfare from unreasonably loud or raucous noise.

The Hearings Officer finds the Applicant has demonstrated the impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan. Specifically, the Hearings Officer finds that the MUA-10 zoning is the same zoning of many other properties in the areas west, northwest, east and south of the Subject Property. There is no evidence that the requested zone change will impose new impacts on EFU-zoned land in the vicinity of the Subject Property.

For the foregoing reasons, the Hearings Officer finds 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 is proposing to rezone the Subject Property from EFU to MUA10 and re-designate the Subject Property 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 of the other property owners of lands east of Bend received approval to rezone their properties from EFU to MUA-10 because their properties contained poor soils and were improperly included in the EFU zone. The soils on the subject property are similarly poor and also merit MUA-10 zoning to correct the "broad brush" mapping done in 1979 and 1980. Since 1979/1980, there is a change of circumstances related to this issue. The County's comprehensive plan has been amended to specifically allow individual property owners to have improperly classified land reclassified.*
>
> *Additionally, circumstances have changed since the property was zoned EFU. The City of Bend has been developed to the east toward the subject property. The Bend Airport has grown significantly in this time period and now provides many aviation-related jobs. The property is located within easy commuting distance to Saint Charles Medical. It has grown significantly and its need for workers has increased. The area now includes The Academy at Sisters, a 20 student and 20 employee therapeutic boarding school for girls.*
>
> *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 O****, 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 P****. 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.

The Hearings Officer makes the following findings. First, whether or not owners of other properties may, or may not, request a change of comprehensive plan designation and zoning in the future is not relevant to the Hearings Officer's consideration of the current applications. Each application must be considered on its own merits.

Second, concerns regarding development encroachment support a finding of change of circumstances. As set forth in more detail in the findings below, the Subject Property is not comprised of agricultural soils, and is not land that could be used for agricultural uses in conjunction with adjacent property.

Third, the Hearings Officer does not have authority to deny the requested applications on the basis of concerns about growth. While understandable, the applications may be granted where, as here, all applicable criteria are met.

Finally, concerning wildlife concerns, the Hearings Officer finds the Subject Property is not within a Wildlife Area combining zone and is not subject to wildlife protections sanctioned by the County's Goal 5 ESEEs. Moreover, there is no evidence that the requested rezone, in and of itself, will impact wildlife.

For all the foregoing reasons, and based on evidence in the record that shows declining farm operations and limited numbers of financially successful farm operations, the Hearings Officer finds that a change of circumstances since the time the Subject Property was last zoned exists. Based on the soils report and the detailed findings below, the Hearings Officer finds that a mistake was made in designating the Subject Property EFU/Agriculture because the soils on the property did not merit a designation and protection as "Agricultural Land." Classification and zoning of the Subject Property as EFU/Agricultural was a mistake due to the poor soils on the Subject Property which must be revised to correct the "broad brush" mapping done in 1979 and 1980. 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 and Central Oregon LandWatch (COLW) disagree on whether the NRCS soil mapping units are the most detailed soils information for determining land capability class. The Applicant and COLW both submitted extensive argument concerning

classification of the Subject Property as agricultural land. Statewide Land Use Planning Goal 3 states:

> *"**Agricultural Land** … in eastern Oregon is land predominantly Class I, II, II, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service … "*

APPLICANT'S EVIDENCE AND ARGUMENTS

Summarized briefly, the Applicant submits that Goal 3 does not say that "agricultural land" is land mapped by NRCS soil studies as Class I, II, III, IV, V and VI. The Applicant argues that DLCD rules supplement the goal; they say that NRCS mapped soils in Class I-VI are agricultural land, but they also provide property owners with the right to challenge NRCS soil study results. This is done by hiring a certified soil scientist to conduct a more detailed soils study and obtaining DLCD approval to use the study in the present application. The Applicant states that a soil classification system and soil study maps are not one and the same thing.

The Applicant notes that the right to challenge NRCS mapping is allowed both by the text of Goal 3 itself and by ORS 215.211. In the event of conflict, ORS 215.211 controls over the conflicting provisions of the Goal 3 rules adopted by LCDC. The law requires soil scientists to study and report on the soils based on the SCS soil classification. OAR 660-033-0030(5)(a). The Applicant submits that it is permissible to use the results of the soils survey to determine whether soils on a particular property are properly classified as being in Class I-VI. It states, "Nothing in the soils study rules suggests that the results of the study are confined to addressing the suitability of Class VII and VIII for farm use."

The Applicant provided the following in its submitted burden of proof statement:

> *The applicant's soils study, **Exhibit D**, 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."*

The Applicant also submitted an Applicant's Response to Staff Report Supplement to Burden

of Proof addressing this Chapter, Section and Goal 1:

> *The evidence clearly shows that the subject property is not agricultural land. The property is not comprised predominantly of Class VI or better soils. So, it does not qualify for protection as agricultural land based on the classification of its soils. Only if the extremely poor Class VII and VIII soils on the subject property are "suitable for farm use" taking into consideration a host of factors. Lands are suitable for "farm us" only if a farmer can expect a profit from growing crops or raising livestock on the property. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007).*
>
> *In Deschutes County it is clear that farming Class VII and VIII soils will not be profitable. Only 16.03% of farmers in Deschutes County made a profit in 2017 according to the 2017 US Census of Agriculture. From my twenty-nine years of experience working in Deschutes County with a focus on rural land use, I can say that the subject property has one of the highest percentages of Class VII and VIII soils of any EFU-zoned property in the County. This makes it evident that it would be unreasonable for a property owner to expect to make a profit by attempting to farm on the subject property.*
>
> *The subject property has never been irrigated and has no known history of farm use. Approximately 85% of the soils on the property are Class VII and VIII nonagricultural soils. This percentage is higher than the percentage of these soils found to warrant rezoning to MUA-10 in the following similar applications for lands on the eastside of Bend. The following are the percentages:*
>
> *Eastside Bend, LLC* — *58% for TL 1600 and 1601*
56% for TL 1400
>
> *Porter Kelly Burns* — *67%*
>
> *DSL* — *51.5%*
>
> *LCC VII and VIII soils are so poor that the NRCS Soil Survey of Upper Deschutes River Area says that the soils "have very severe limitations that make them unsuitable for cultivation." The LCC VII and VIII soils are described by soil scientist Andy Gallagher as predominantly shallow and ashy-skeletal with interspersed rock outcrops. The only possible agricultural use of the property is livestock grazing. The soils report shows that these soils are so poor they produce only approximately one-half the typical amount of forage expected based on the soil classification – far below the level of forage production expected on typical Central Oregon rangeland.*
>
> *Only 15 percent of the soils on the combined properties are rated Class VI and these areas are not suitable for farm use given their limited extent and location. According to the NRCS, Class VI soils also "have severe limitations that make them generally unsuitable for*

cultivation." They are [sic] do not support the growth of cultivated crops.

The Applicant's Rebuttal and Final Argument, submitted on October 15, 2021 states, in relevant part:

The evidence in this matter is clear. The subject property is not suitable for farm use or forest use. As stated by adjoining property owner Sue Conrad "there is not a lot of potential for farming that 80 acres."[5] *As Ms. Conrad observed in pre-hearing comments "[s]ince there is rock at the surface of our 2 ½ acres in many places, this [development of homes on the Swisher Trust property] will most likely involve extreme measures for the foundation." Land of this type is not "agricultural land" of the type Statewide Land Use Planning Goal 3 seeks to protect.*

Like the Conrad property, there is rock at the surface in many places throughout the subject property. A set of ten photographs have been filed with the County to illustrate the fact that this is the condition of the property. …

Ms. Conrad argues that EFU zoning and Oregon's statewide land use planning require that this property be remain [sic] undeveloped open space and that the Swishers purchased the property knowing it could not be developed. Her arguments against approval of the zone change and plan amendment assume that retaining EFU zoning will assure that the Swisher/MacCloskey property will remain undeveloped. This is an unwarranted assumption.

EFU zoning does not preclude development of the Swisher/MacCloskey property. The EFU zoning that applies to the property now allows the applicant to see approval of any of the following developments without approval of the requested zone and plan change.[6] *…[list omitted]*

If the property contained soils that could support farm use, the property might qualify for approval of the following additional uses. … [list omitted].

Additionally, the uses permitted outright in the MUA-10 zone are much more limited than the uses allowed outright in the EFU zone. Compare, DCC 18.32.020 (single-family dwelling, stables, horse events, Type I home occupation and other uses allowed in EFU zone) with DCC 18.16.020 and 18.16.025 (exploration of minerals, fire service facilities, exploration and production of geothermal resources, outdoor mass gathering, composting, relative

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[5] This comment was offered in Ms. Conrad's testimony at the 9/21/2021 hearing.

[6] Most listed uses require County review either to confirm they meet special provisions to be allowed without conditional use review or to demonstrate they meet conditional use criteria. Mining and processing would occur only if resource is determined to be present on the property. Some uses such as a fire station are allowed subject only to site plan review.

farm assistance dwelling, church and cemeteries, utility facilities including wetland waste treatment systems, winery, farm stands, model aircraft "airport," processing farm crops). Given these facts, it is clear that a change of zoning will not materially alter the impacts on neighbors and the environment that may occur as a result of development of the property.

Additional materials submitted by the Applicant include the "Rural Resource Lands Research Report" dated May 16, 2019 prepared by DLCD Public Research Lands Fellow Stephanie Campbell (part). This Report states on page 6 with respect to the definition of Agricultural lands in OAR 660-033-0020(1):

The agricultural land definition includes land based on soil capability but also requires an in-depth analysis of whether the land is suitable for farm use, which typically requires the use of discretion by local decision makers. ***OAR 660-033-0030 provides additional guidance on identifying agricultural land and provides an option for the use of soil assessments that are more detailed than NRCS mapping****, In addition, there is substantial case law which has served to further refine how suitability for farm use should be addressed.*

(emphasis added). This Report continues on page 7, in relevant part:

Presently, counties may designate rural resource lands through two methods. The first, and to date only process utilized, is by identifying land that does not meet the definition of "Agricultural Land" or "Forest Land" and thus is not subject to Goal 3 or 4 protection*. These lands are typically designated in the county comprehensive plan as "nonresource lands" and may be developed for residential or other uses not allowed in farm and forest zones. …*

Ten Oregon counties have utilized this method to rezone land from EFU and forest. The primary purpose for nonresource designations appears to be the creation of rural residential parcels.[7] Between 2008 and 2018, DLCD identified 24 zone changes associated with nonresource designations. These zone changes did not require an exception from Statewide Planning Goals 3 or 4.

(emphasis added). In the "Agricultural Soils Assessment" submitted by the Applicant, published by and obtained from DLCD website, it states, in relevant part:

Oregon has some of the most productive soil in the world,. Soil mapping done by the USDA Natural Resources Conservation Service (NRCS) is the most common tool used for identifying the types of soils in an area. The NRCS provides a rating for each soil type that indicates how suited the soil is for agriculture. Oregon's land use laws help keep the best soils for crop cultivation and agricultural use. Soils that are less productive have more

[7] Clatsop, Crook, Deschutes, Douglas, Jackson, Josephine, Klamath, Linn, Lane, Wasco.

opportunities for development than higher quality soils.

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 administered by DLCD. This soils professional can conduct an assessment that may result in a change of the allowable uses for a property.

Soil capability is a measure the soil's productivity potential for farm crops and forests. The rules for an assessment of a soil's productivity apply to land zoned exclusive farm use or for mixed farm and forest use (OAR 660-033-0045). They also apply to rezoning forestland for non-resource use when the applicant relies on alternate soils information to show that the land should not be agricultural. The rules can apply to other changes as well, including those for comprehensive plan designations, zoning, non-farm land divisions, and certain dwellings.

In the Applicant's Rebuttal submitted October 5, 2021 at page 4, the Applicant states:

The Class 38B soils are a soils complex. This means that a large unit of land is mapped as containing a mix of soils of different types. In this case, the Deskamp soils are Class VI and the Gosney soils are Class VII. Soil classifier Andy Gallagher's soil survey that was approved by DLCD determined that the subject property contains much a [sic] percentage of Gosney and Class VIII rock outcrop soils than Deskamp soils than found in the entire Class 38B soil mapping unit that applies to the subject property.

Ms. Macbeth filed color photographs of other Bend area properties that are mapped 38B by the NRCS soil survey. The pattern of development shown in the aerial photos is a mix of irrigated and non-irrigated land that is not in farm use – presumably a pattern dictated by the location of the suitable Deskamp and unsuitable Gosney soils. Large non-irrigated areas much like the subject property that are not employed in visible farm use are shown in Figure 1.

Photos of farm pastures in areas allegedly mapped as being Class 38B soils by the NRCS soil survey were filed by Ms. Macbeth. The COLW photos prove little or nothing of relevance to the subject property because it is unknown whether any of the photographs depict land mapped Class 38B that is 85% Gosney soil or whether they are similar to the subject property. It is highly unlikely that they do. The subject property contains rock outcrops and surface rock not seen in Ms. Macbeth's photos of farm uses occurring on 38B soil (excluding the aerial photograph).

Ms. Macbeth claims that the applicant could irrigate the subject property by obtaining

rights to irrigate the subject property. The applicant disagrees. The subject property has no legal right to obtain water from Central Oregon Irrigation District. It has no access to irrigation water. The subject property was previously owned by the District and it did not establish irrigation water rights on the property. It is very telling that the district which delivers and holds irrigation water rights chose not to irrigate its own property – most logically due to its nonagricultural soils.

Furthermore, irrigation water must, by law, be put to beneficial use. Irrigating land that is comprised of 85% Class VII and VIII is not a beneficial use of water and one COID would surely not allow. Drilling a well and purchasing water rights to irrigate to irrigate [sic] these nonagricultural soils in a futile attempt to farm them is cost prohibitive and not an accepted farm practice in Central Oregon. Such an approach would require a person farming good farm ground to retire their water right and transfer it to the applicant to irrigate rocks because no new water rights are available in the Deschutes Basin to serve the subject property. See, photographs of the subject property.

The Applicant submitted the following in its Rebuttal and Final Argument:

1. *Goal 3's definition of "agricultural land" does not say that counties must rely on the soils maps and rating provided by NRCS soil surveys. Instead, it says that the determination of whether soil is agricultural land is based on the soil classes (I-VIII) described in the Soil Capability Classification System of the US Soil Conservation Service. COLW's arguments erroneously conflate the two (soil classification system and soils mapping). …*

2. *OAR 660-033-0020(1)(a)(A), Definitions, broadens the definition of "agricultural land" provided in Goal 3 to include "lands classified by the US Natural Resources Conservation Service (NRCS) as predominantly *** Class I-VI soils in Eastern Oregon." This broadening, however, does not remove the language of Statewide Goal 3 that specifically allows counties to rely on more detailed soils data to determine whether land is or is not "Agricultural Land." … The purpose of Goal 3 is to preserve agricultural land. It is not intended to preserve land that does not meet the definition of "agricultural land." A more detailed soils study helps Counties properly sort one from the other by making a better determination of whether land qualifies as agricultural land due to soil classification (LCC).*

3. *The Oregon Legislature adopted ORS 215.211(1) to assure property owners the right to provide local governments with more detailed soils information than provided by the NRCS's Web Soil Survey to "assist a county to make a better determination of whether land qualifies as agricultural land." ORS 215.211 sets the conditions for such "more detailed" surveys. It requires that soil scientists who conduct the assessment belong to the narrow pool of persons who are soils classifiers and are certified in good standing with the Soil Science Society of America. It also requires that reports be reviewed by DLCD before use by local governments in deciding whether land qualifies as agricultural land. Mr. Swisher obtained DLCD's permission to rely on the Red Hill Soils/Gallagher soils study to address*

the "agricultural land" issue.

4. *... It is clear that the report is expected by DLCD to be used in this zone change and plan amendment application [under OAR 660-033-0030(5)(c)(A)]. ... The fact that the soils report must report results based on the NRCS soil classification makes it clear that its classification based on the NRCS system may be used in lieu of the more general information on the topic provided by the NRCS soils study to determine whether a property meets the definition of agricultural land. COLW's argument to the contrary, therefore, should be rejected as it renders meaningless the LCC-based survey results that must be provided to the county to decide whether a property is "agricultural land."*

5. *DLCD describes its understanding of the role NRCS soils mapping and the more detailed soils surveys play in "defining agricultural land" on its website....*

6. *COLW's argument that the less-detailed NRCS soil study conducted at a landscape level must control over the more detailed information provided by an Order 1 soils survey for a particular property is illogical. It is an argument rejected by the Oregon Legislature when it adopted ORS 215.211 and by DLCD. ...*

The Applicant submitted a rebuttal letter from Andy Gallagher dated October 14, 2021 to address COLW's "layperson arguments about soils mapping and the suitability of Soil Mapping Unit 38B for agricultural use." Among other things, Mr. Gallagher stated:

1. *It would be a mistake to confuse farms in the photographs filed by COLW with the Swisher property. They have no bearing on the conditions that exist on the Swisher property which are "rough, rocky land, lava blisters and native vegetation, not farmland."*

2. *COLW misstates the information provided by the NRCS soil survey.*

3. *Even if the NRCS soil study data is used and the contrasting inclusions in the 38B soil mapping unit are correctly identified as Bedrock Outcrop, the subject property is predominantly Class VII and higher.*

4. *The Order 1 more detailed soil survey shows that the NRCS soil survey is very inaccurate for the Swisher property*.

The following constitutes an excerpt from Mr. Gallagher's October 14, 2021 letter:

> *In the letter [COLW] erroneously claim the parcel is mapped only as Class III irrigated and Class VI nonirrigated soils,. Why didn't the letter mention the Class VII and Class VIII land that is mapped here? The fact is that the 38B soil map unit is a complex**. Soil complexes are used in soil mapping where two or more dissimilar soils are mapped together where they either follow a regular pattern or are unpredictable in distribution but***

> ***are too complexly associated at the given scale to delineate individually and have a legible map. Typically, in a complex each major component occurs in each delineation, although the proportions may vary appreciably from one delineation to another***. *This last point is key in this case that the proportions may vary appreciably from one delineation to another. Also critical in this case is that if the soils are mapped as a complex and the percentages can vary appreciably from one delineation to the other then the NRCS soil survey does not actually report a hard number for acres of Class 3 and Class 6 soils as the COL letter states and it is open to interpretation or better yet, more intensive soil mapping.*
>
> *… [T]hese percentages in the NRCS soil survey are not hard facts but are ballpark estimates that vary appreciably between delineations. …*
>
> *Fine detail needed for land use decisions cannot usually be shown at the scale of the NRCS soil survey, nor is this the intent of the soil survey. The minimum size map delineation is very scale-dependent. This is where the Order-1 soil mapping is important and provides a distinct advantage over the NRCS map. The Order-1 soil survey map is a larger scale map and the minimum map delineation can be much smaller than at the Order-2 scale of the Soil Survey. More detail can be determined because there is more intensive sampling, and more detail can be shown because the map scale is larger. … The intensive sampling of the Order-1 soil survey supplies a much more realistic measure of map composition of a parcel than the NRCS soil survey. In this case, I was able to map the Deskamp soil as a consociation, separately from the Gosney and Bedrock Outcrop, which gets directly at the issue at hand here of calculating acreage of soils that are Class VI and lower and soils that are Class VII and higher.*
>
> *Another strength the Order-1 soil survey has over the NRCS for detailed land use planning decisions is that all field observations are located with GPS and their positions are shown on the map and each profile is logged in the soil profile descriptions section of the report. This is verifiable information that the NRCS soil survey just does not have and cannot provide.*
>
> ***If the NRCS soil survey is to be followed like a hard fact, then all the 38B map delineations would have to have the identical markup of 50% Deskamp, 35% Gosney and 15% contrasting inclusions. This defies all reason and experience. These published percentages are simply an estimate based on limited data and projected over the survey area, and this is often far off from the truth on the ground. It is a mistake to believe that the percentages NRCS publishes are anything but the approximation of a concept***.

(emphasis added).

With respect to arguments regarding "accuracy" of Order 1 soil surveys and, in particular, the

Red Hill Soils/Gallagher study, Mr. Gallagher commented in his October 14, 2021 letter:

> *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.*

Finally, Mr. Gallagher commented on the photographs submitted by COLW that purport to show successful farming operations on properties with the same LCC soils classification as the Subject Property:

> *In her long letter Ms. Macbeth [of COLW] references the soil assessment that I made for the Swishers on eighty acres northeast of Bend and while she does not deny any of the basic findings of my soil assessment report, there are a number of claims in her letter that are not correct.*
>
> *She submits aerial photographs and landscape images that seem to be selected specifically to mislead the decision makers by trying to portray this land as having much more agricultural potential than it has. The photos offered are claimed to be from land mapped as 38B and they may well be, but it is a mistake to confuse the farms in the pictures with this land, because this land is not 38B.*
>
> *I did not map any 38B on the eighty acres, so all the landscape photos are irrelevant. If anything these photos provide further evidence that the NRCS soil map here is unreliable. It raises suspicion that COL did not include photos of the Swisher property in their collection of photos. For if they had included photos of the Swisher's land the photos would have shown rough, rock land, lava blisters and native vegetation, not farmland.*

CENTRAL OREGON LANDWATCH EVIDENCE AND ARGUMENTS

COLW argues that it is impermissible for the County to rely on the Order 1 Red Hill

Soils/Gallagher soils survey because the NRCS conducted a less-detailed soil survey that included the Subject Property. Summarized briefly, COLW asserts that the NRCS soil survey is controlling and cannot be directly or indirectly challenged by a landowner's submission of an Order 1 soil survey conducted on a particular property. COLW argues that the landscape level NRCS soil survey on which classification of "agricultural land" in eastern Oregon was based means that any lands comprised of Class I-VI soils in eastern Oregon are *per se* agricultural and cannot be rezoned or reclassified without a Goal 3 exception.[8] COLW submitted a number of photographs of property alleged to be comprised of 38B soils with the same NRCS classification as the Subject Property. These photographs show green fields and farming operations on these other properties.

COLW argues that it would be disingenuous to "mislead" the Hearings Officer into believing that use of an Order 1 survey replaces or changes the NRSC soil survey. COLW asserts that "accuracy means free from error," and states that the Applicant's Order 1 survey is not free from error.

In a September 21, 2021 email to Staff, COLW submitted:

> *It is not the qualifications of the person hired to prepare a report, but the demonstrably incorrect legal theory the report is being used to support that LandWatch argues against.*
>
> *For the Hearings Officer's information please find attached a copy of Edward Sullivan's (a member of the law faculty at Lewis and Clark Law School) article in the San Joaquin Agricultural Law Review explaining the history of protection of farmland in Oregon, in which Edward Sullivan explains that the NRCS capability classifications, as LandWatch stated this evening, were expressly and deliberately chosen as the basis for the definition of agricultural land protected by Statewide Planning Goal 3.*
>
> *"As adopted in 1975, Goal 3 incorporated the approach first proposed by OSPIRG during the 1973 legislative session to identify and define agricultural lands using the Soil Conservation Service soil capability ratings, rather than merely "prime farmlands," preferring protection of all suitable agricultural lands. It defined "agricultural land" differently for two distinct regions of the state (East and West): those lands predominantly composed of Class I-IV soils in western Oregon and Class I-VI in eastern Oregon, as well as other lands "suitable for farm use" and other lands necessary to permit farm practices" on adjacent or nearby lands. These are the lands required to be inventoried and preserved."*
>
> *The applicant's statements in the hearing to the contrary are incorrect.*

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[8] In response, the Applicant notes that this same argument was presented to and rejected by LUBA in *Central Oregon LandWatch v. Deschutes County (Aceti*), ___ Or LUBA ___ (LUBA No. 2016-012, August 10, 2016)

COLW submitted into the record a copy of the cited Agricultural Law Review article entitled "The Long and Winding Road: Farmland Protection in Oregon 1961-2009."

In its September 25, 2021 submission COLW stated, in relevant part:

> *We respectfully urge the Hearings Officer to deny the application. The fallowed subject property is classified as Class III and Class VI land by the NRCS and so is agricultural land by definition. An exception to Goal 3 is required. Because no exception has been justified, the application must be denied.*
>
> *Applicant's theory of the case is erroneous for three main reasons. First, the Oregon Court of Appeals has already determined that additional detail such as that provided by the applicant's paid report has no effect on whether land determined by the NRCS to be Class I-VI in eastern Oregon is agricultural land. Such data are relevant only to whether land not comprised of the specified classes determined by the NRCS is also agricultural land. Second, the paid report is an "Order 1 survey." Application, 7. Order 1 surveys, by definition, do not affect the NRCS land capability classifications of the official soil survey, which here are Class III and Class VI. Third, the applicant misinterprets the meaning of "accurate" and the relationship between detail and accuracy, and thus confuses the significance of the paid report, an Order 1 survey. Each of these reasons is explained in more detail below.*
>
> *****
>
> *The applicant's land is predominantly 38B according to the official survey of the NRCS. Att. 1. The land is classified by the NRCS as a "farmland of statewide importance." Id. The same 38B land is shown to be in use across Deschutes County for irrigated crop production. Figures 1-12.*
>
> *The Court of Appeals has interpreted Goal 3 to mean land comprised of the specified classes I-VI is per se agricultural land. Any additional information, such as the applicant's paid report, is relevant only to whether land which is not predominantly comprised of such soils is also agricultural land. 1000 Friends of Oregon v. LCDC, 85 Or App 18, 22-23, 735 P.2d 645 (1987). While applicant correctly noted that more detailed information may be used, the purpose of such information is to identify whether more land may qualify as agricultural land in addition to the lands identified as Class I-VI by the NRCS.*
>
> *The Oregon Court of Appeals decision accords with the legislative history of Goal 3. The legislative history leading to the adoption of the NRCS land capability classifications as the applicable legal standard is summarized in Edward Sullivan's law review article on the history of protection of Oregon farmland. … As the article further explains, the underlying assumption of the Oregon program to protect agricultural lands is that long-term resource decisions should not be based on short-term economics or finances. Id. Here, the applicant's lack of interest in farming is irrelevant to Oregon's agricultural land use policy*

to preserve the state's agricultural industrial land base for future generations of farmers.

*****

The Court of Appeals decision in 1000 Friends of Oregon v. LCDC, the legislative history of the definition of agricultural land in Oregon, and the plain language of both Goal 3 and OAR 660-033-0020 mean that agricultural land include all lands classified by the NRCS as Class I, II, III, IV, V, and VI in eastern Oregon, and thus include the fallowed subject property. ***Order 1 surveys have no effect on NRCS land capability classifications****.*

(emphasis in original). COLW states on page 4 of its submittal:

The NRCS explains in the attached official published document from the U.S. Department of Agriculture that an Order 1 Survey has no effect on the results of the NRCS survey. Att. 3:

"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."

An Order 1 survey is used to support a determination of whether a manure storage facility, or other highly specialized land use, can be placed on land like the applicant's land that is currently lying fallow. … The evidence presented by the applicant is supplemental to, but does not change, the official NRCS survey information. Applicant's paid report provides detailed, but irrelevant, data for this inquiry.

*****

Goal 3 defines agricultural land as land in classes I-VI in eastern Oregon as determined by the official NRCS soil survey. The applicant's evidence is not directed at this legal standard and has no effect on it. The land is agricultural land by definition, an exception to Goal 3 is required, and the application must be denied. ***Applicant misrepresents the nature of map units and the effect of more detail***

(emphasis in original).

HEARINGS OFFICER'S ANALYSIS AND FINDINGS

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. As LUBA determined in the *Aceti* case, 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. The NRCS provides an Order 2 soil survey, which extrapolates more limited data from the Upper Deschutes River

Survey to determine LCC soil classifications at a landscape level. On the other hand, the Applicant's soil scientist, Mr. Gallagher, conducted a more detailed Order 1 survey.

The Soil Survey of the Deschutes Area, Oregon 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."

With respect to COLW's arguments regarding "accuracy," the Hearings Officer finds that DLCD confirmed in its review of the Applicant's soils report that the Red Hills Soils/Gallagher soils report is more detailed than the NRCS soils survey. The Applicant notes that, "If it were not, DLCD would not have allowed the applicant to rely on the report in this proceeding." The Hearings Officer agrees. The Hearings Officer finds persuasive Mr. Gallagher's October 14, 2021 letter in which he stated, "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 the Subject Property is mapped by the NRCS soil survey as being comprised predominantly of 38B soils, which is a soils complex. The Applicant's Order 1 soils study shows that about 85% of the Subject Property is Class VII and VIII soil. This is explained by the Red Hills Soils/Gallagher report which found that the Subject Property contains a much higher percentage of Gosney and Class VIII rock outcrop soils than Deskamp soils, as compared to those found in the entire Class 38B soil mapping unit that applies to the Subject Property. The findings and conclusions in the Red Hills Soils/Gallagher report are supported by photographs of the Subject Property submitted by the Applicant that show rocky, shallow soils.

COLW's evidence of other properties alleged to be comprised of 38B soils does not change this determination as there is no supporting documentation that includes any Order 1 soil survey of the photographed properties. The Hearings Officer cannot determine, based on evidence in the record, that the photographs of farming operations submitted by COLW are on lands comprised of 85% Class VII and Class VIII soils, such as the Subject Property, and/or on lands that lacked irrigation rights and had to acquire such rights. Thus, the Hearings Officer finds the photographs submitted by COLW are not relevant to the determination of whether the Subject Property is "agricultural land."

The Hearings Officer rejects COLW's implied assertion that the Red Hill Soils/Gallagher soils study is unreliable because it is a "paid report." The Applicant retained a certified soil scientist and DLCD reviewed and approved the Order 1 soils report prepared by the certified soil scientist. There is no persuasive evidence that the Red Hill Soils/Gallagher soils study is erroneous, or should not be given weight by the County in these proceedings. Neither COLW nor any neighbor opposing the applications submitted any competing evidence to challenge the findings of the Red Hills Soils/Gallagher report.

The Hearings Officer also rejects COLW's 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." COLW's assertion is also directly contrary to ORS 215.211 and OAR 660-033-0030(5)(a), (5)(b) and (5)(c)(A).

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 finds 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 and are thus not "agricultural land" and/or otherwise suitable for farm use. 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. The Hearings Officer finds that the Applicant's soil study supports a finding that the Subject Property does not constitute agricultural land and thus is not subject to Section 2.2, Goal 1 of the Comprehensive plan as "agricultural lands" to be preserved and maintained.

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. I find that the requested plan amendment and

rezone will not contribute to loss of agricultural land in the surrounding vicinity. 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 requesting 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 MUA-10. The Hearings Officer finds this Policy is inapplicable.

> ***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 on the basis that the Subject Property qualifies as non-resource land. The Applicant is not seeking an exception to Goal 3 – Agricultural Lands, but rather seeks to demonstrate that the subject properties do 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:

> *The applicant is seeking a comprehensive plan amendment from Agriculture to RREA and a zone change from EFU-TRB and UAR-10 to MUA-10 for non-resource land. This is 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 H****, 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 when irrigated and when not irrigated making farm-related endeavors unprofitable. The property is not currently employed in any type of farm use and has no known history of that use. Accordingly, this application complies with Policy 2.2.3.

COLW argued that the County's comprehensive plan requires that "no more housing will be approved [in rural residential areas] without the required exceptions [to Statewide Planning Goals]." The text of the Comprehensive Plan, Section 3.3 Rural Housing, Rural Residential Exception Areas states:

> *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 non-resource 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.*

The Hearings Officer finds that the text above does not require the Applicant to obtain plan amendments for approval of its applications where, as here, the Applicant has demonstrated that its land is not Goal 3 "agricultural land." The Hearings Officer further finds that a goal exception is not required by the Comprehensive Plan.

The Hearings Officer finds that the facts presented by the Applicant in the burden of proof for the subject applications are similar to those in the *Wetherell* decisions and in the aforementioned Deschutes County plan amendment and zone change applications.

Therefore, the Hearings Officer finds the Applicant has met its burden of proving the property is not agricultural land and does not require an exception to Goal 3 under state law. The Hearings Officer finds the applications are consistent with Policy 2.2.3.

> ***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 policy is not directed to an individual applicant, as the Board of Commissioners held in File No. 247-16-000317-ZC/318-PA, *Porter Kelly Burns Landholdings, LLC*.

The Hearings Officer finds that the County's prior land use decisions hold that EFU land may be converted to RREA designation when shown that the land does not meet the definition of "Agricultural Land" provided by Statewide Land Use Planning Goal 3. In the *DSL* findings, Deschutes County found that this policy does not impose a moratorium on requests for applications of the type filed by property owners (**Exhibit H**). The Board of Commissioners also noted that it had approved the conversion of EFU land to an RREA plan designation and MUA-10 zoning in the *Pagel* decision (**Exhibit J**) and that nothing in this plan policy prohibits that action. The Applicant stated that the County's interpretation of Policy 2.2.3 indicates when and how EFU parcels can be converted to other designations.

The Hearings Officer finds that, based on the County's previous determinations in plan amendment and zone change applications, and based on substantial evidence in the record regarding soils on the Subject Property and use of surrounding lands, 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 provides direction to the County to identify and retain agricultural lands that are accurately designated. The policy is not directed to an individual applicant. Nonetheless, the Hearings Officer finds that the Subject Property was not accurately designated as demonstrated by the soil study, NRCS soil data, and use of surrounding lands, as discussed in the findings above. The County is not required to retain the Subject Property as "agricultural lands" because it was not accurately so designated.

The Hearings Officer finds the proposal is consistent with this Policy.

<u>Section 2.5, Water Resources Policies</u>

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 at this time. Therefore, the Hearings Officer finds the Applicant is not required to demonstrate water impacts associated with development. Rather, the Applicant will be required to address this criterion during development of the Subject Property, which would be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat). The Applicant included the following in its submitted burden of proof:

Irrigation is essential for commercial farm use in Central Oregon. Irrigating poor farm ground consumes a large amount of the area's precious water resources without the resulting economic benefits of profitable agricultural production. Homes consume less water than would be needed for farm field irrigation on the subject property.

*In its DSL findings, **Exhibit L**, Deschutes County found that impacts of any proposed future development of the DSL property on water resources would be reviewed by Deschutes County in future development applications. That finding was sufficient to demonstrate compliance with this plan policy. Together with the findings above and the later review by Deschutes County, this policy is satisfied.*

*Future development on the subject property will be able to be served by Avion Water System when developed as shown by **Exhibit F** and **G**.*

The Hearings Officer finds that substantial evidence in the record shows the applications are consistent with this policy given the fact that future development applications require review of water resources impacts and the fact that future development of the Subject Property will be served by Avion Water System. Moreover, rezoning and reclassifying the Subject Property will allow for some productive use of the property. Uses permitted in the MUA-10 zone and RREA classification will result in less consumption of water than if Applicant was somehow able to obtain irrigation rights to irrigate the poor soils on the Subject Property for farm uses.

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: The Hearings Officer finds these policies are fulfilled by the County's Goal 5 program. The County protects scenic views and sites along rivers and roadways by imposing Landscape Management Zoning overlay zones, The County has not, however, imposed the LM overlay zone on the Subject Property. Further, no new development is proposed. The Hearings Officer finds these provisions of the plan are not impacted by approval 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's burden of proof provided the following:

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 a sizeable area of property zoned MUA-10 that is bisected by Butler Market Road. This area is developed with single-family homes.

The MUA-10 zone is a rural residential zone. It will provide for an orderly and efficient transition from rural to urban land use as intended by the purpose of the MUA-10 zone. As a result, rezoning the subject property MUA-10 is consistent with Section 3.2.

The Applicant also submitted an Applicant's Response to Staff Report Supplement to Burden of Proof with respect to this Section:

The staff report asks the hearings officer to determine whether the subject property has soils of poor quality. The soils analysis and other information in the record establishes that the soils are poor quality soils that are not "agricultural land."

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 above.

The Hearings Officer finds that, while the rezone application does not include the creation of new residential lots, the Applicant has demonstrated the Subject Property is comprised of poor soils that are in the vicinity of rural residential MUA-10 zone uses to the south, west, northwest and east. Rezoning the subject property to MUA-10 is consistent with this criterion, as it will provide for an orderly and efficient transition from the City of Bend to rural and agricultural lands.

The Hearings Officer finds that rezoning the Subject Property to MUA-10 is consistent with Section 3.2, Chapter 3 of the Deschutes County Comprehensive Plan as it will provide for an orderly and efficient transition from urban to rural and agricultural lands.

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 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 is not an approval standard for this application. This fact was confirmed by former Deschutes County Senior Planner Terri Hansen Payne, AICP during the County's review of the DSL rezoning and plan amendment application. See **Exhibit I**. County zone change and plan amendment decisions adopted by the Board of Commissioners have so found.*

Even if this plan language were found to be relevant to the County's review of this application, it does not bar application of the RREA plan designation to non-resource land. This application does not require that an exception be taken to apply the RREA designation to non-resource land. Instead, as stated by the Board's findings in Exhibit H, the language "appears to be directed at a fundamentally different situation than the one presented in this application." The text is written to require that exceptions be taken for resource lands that required an exception; not to require goal exceptions for non-resource lands that do not require such exceptions. 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 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 finds that prior Hearings Officer's decisions have found that Section 3.3 is not a plan policy or directive[9]. Further, I find that no goal exception to Statewide Planning Goal 3 is required for the rezone application because the subject property does not qualify as farm or forest zoning or agricultural lands under the statewide planning goals, as discussed in more detail in the findings above. The County has interpreted the RREA plan designation as the proper "catchall" designation for non-resource land and therefore, the Rural Residential Exception Area (RREA) plan designation is the appropriate plan designation to apply to the subject property[10].

Based on past Deschutes County Hearings Officer interpretations, the Hearings Officer finds that the above language is not a policy and does not require an exception to the applicable Statewide Planning Goal 3. The Hearings Officer finds the proposed RREA plan designation is the appropriate plan designation to apply to the Subject Property.

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

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[9] See PA-11-17/ZC-11-2, 247-16-000317-ZC, 318-PA, and 247-18-000485-PA, 486-ZC

[10] The Hearings Officer's decision for PA-11-17/ZC-11-2 concerning this language of Section 3.3 states:

To the extent that the quoted language above represents a policy, it appears to be directed at a fundamentally different situation than the one presented in this application. The quoted language addresses conversions of "farm" or "forest" land to rural residential use. In those cases, the language indicates that some type of exception under state statute and DLCD rules will be required in order to support a change in Comprehensive Plan designation. See ORS 197.732 and OAR 660, Division 004. That is not what this application seeks to do. The findings below explain that the applicant has been successful in demonstrating that the subject property is composed predominantly of nonagricultural soil types. Therefore, it is permissible to conclude that the property is not "farmland" as defined under state statute, DLCD rules, and that it is not correctly zoned for exclusive farm use. As such, the application does not seek to convert "agricultural land" to rural residential use. If the land is demonstrated to not be composed of agricultural soils, then there is no "exception" to be taken. There is no reason that the applicant should be made to demonstrate a reasons, developed or committed exception under state law because the subject property is not composed of the type of preferred land which the exceptions process was designed to protect. For all these reasons, the Hearings Officer concludes that the applicant is not required to obtain an exception to Goal 3.

shall assure that proposed land uses do not exceed the planned capacity of the transportation system.

FINDING: The Hearings Officer finds this plan 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 will comply with this direction by determining compliance with the Transportation Planning Rule (TPR) aka OAR 660-012, as described 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 Subject Property is not zoned for forest lands, nor are any of the properties within a seven-mile radius. The Subject Property does not contain merchantable tree species and there is no evidence in the record that the Subject Property has been employed for forestry uses historically. None of the soil units comprising the parcels is rated for forest uses according to NRCS data. The Hearings Officer finds that the Subject Property does not constitute 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 defines "Agricultural Land," which is repeated in OAR 660-033-0020(1). The Hearings Officer's findings above are incorporated herein by reference.

OAR 660-033-0020, Definitions

For purposes of this division, the definitions in ORS 197.015, the Statewide Planning Goals, and OAR Chapter 660 shall apply. In addition, the following definitions shall apply:
(1)(a) "Agricultural Land" as defined in Goal 3 includes:
(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon[11];

FINDING: The Applicant does not request an exception to Goal 3 because the Subject Property does not meet the definition of "Agricultural Land." In support, the Applicant offers the following response in the submitted burden of proof statement:

State law allows the County to rely on the more detailed and accurate information provided by the Exhibit D study, That study shows that approximately 85% of the subject property is comprised of Class VII and VIII (88% of Tax Lot 100 and 82% of Tax Lot 600). As a result, the land is not predominantly comprised of Class I-VI soils.

The subject property is not properly classified as Agricultural Land and does not merit protection under Goal 3. The soils are predominately Class 7 and 8 soils as shown by the more detailed soils report prepared by soils scientist Andy Gallagher, which State law, OAR 660-033-0030, allows the County to rely on for more accurate soils information. Mr. Gallagher found that approximately 64% of the soils on the subject property (about 24 acres) is Land Capability Class 7 and 8 soils that have severe limitations for farm use. He also found the site to have low soil fertility, shallow and very shallow soils, abundant rock outcrops and rock fragments in the surface, lava tubes, and irrigation ditches, low available water capacity, and limiting areas suitable for grazing and restricting livestock accessibility, all of which are considerations for the determination for suitability for farm use. Because the subject property is comprised predominantly of Class 7 and 8 soils, the property does not meet the definition of "Agricultural Lands" under OAR 660-033-0020(1)(a)(A) listed above, that is having predominantly Class I-VI soils.

The Hearings Officer finds that the soil study provided by Mr. Gallagher of Red Hill Soils is an accurate representation of the data for the Subject Property. Therefore, the Hearings Officer finds, based on the submitted soil study and the above OAR definition, that the Subject Property is comprised predominantly of Class 7 and 8 soils and, therefore, does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A) above.

[11] 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.*

(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 decision not to request an exception to Goal 3 is based on the premise that the Subject Property is not defined as "Agricultural Land." The Applicant provided the following analysis of this determination 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, the proximity to two major roadways (Butler Market Road and the Powell Butte Highway and area development prevent grazing from being a viable or potentially profitable use of the property. The soils, also, are so poor that they would not support the production of crops even if irrigation water rights could be obtained for that purpose. The soils simply do not hold enough water to sustain and support crop growth.

*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). 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. The subject property will, however, due to its extremely poor soils, only produce at little more than one half that amount of forage in a normal year – 440 pounds per acre for Tax
Lot 600 and 494 pounds per acre for Tax Lot 100.*

- *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 $1.20 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 80 acres x $1.15/lb. = $5,520 per year for good rangeland

Adjust expected income based on forage on subject property:

440 + 494 / 2 = 467 pounds of forage per acre per year
467 pounds/900 pounds of forage per acre per year assumed in OSU formula = 51.89%
51.89% of $5,520 annual income for good range land = ***$2,708.66*** *annual income for subject*
Property.

Thus, the total gross beef production potential for the subject property would be approximately $2,708.66 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 $4,341.64 for the two tax lots in 2020.

A review of the seven considerations listed in the administrative rule, below, show why the poor soils found on the subject property are not suitable for farm use that can be expected to be profitable:

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. According to the OSU Extension Service the growing season is only 80 to 90 days long.* ***Exhibit Q****. The average annual precipitation is only 11.36 inches. This means that the amount of forage available for dry land grazing is low. This also means that a farmer has a short period of amount of time to irrigate pastures. This makes it difficult for a farmer to raise sufficient income to offset the high costs of establishing, maintaining and operating an irrigation system.*

Existing and Future Availability of Water for Farm Irrigation Purposes: *No new irrigation water rights are expected to be available to the Central Oregon Irrigation District (COID) in the foreseeable future. In order to obtain water rights, the applicant would need to convince another COID customer to remove water rights from their property and sell them to the applicant and obtain State and COID approval to apply the water rights to the subject property. In such a transaction, water rights would be taken off productive farm ground and applied to the nonagricultural soils found on the subject property. Such a transaction runs counter to the purpose of Goal 3 to maintain productive Agricultural Land in farm use. Most of the soils on the property are Class VII and VIII soils. The subject property does not have irrigation water rights. The property is located within the boundary of the Central Oregon Irrigation District. Given the poor quality of these soils, however, it is highly unlikely that Central Oregon Irrigation District would approve a transfer of water rights to this property. In addition, no person intending to make a profit in farming would go to the expense of purchasing water rights, mapping the water rights and establishing an irrigation system to irrigate the poor soils found on 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 in an area of small lots and marginal farm land that is primarily devoted to residential and hobby farm uses. Areas of MUA-10 zoning are interspersed with EFU-TRB zoning. The subject property adjoins MUA-10 properties on the south and lots developed at a density of one lot per 10 acres on its eastern boundary. The properties to on its west boundary are small parcels less than 20 acres in size. The only large EFU-TRB property adjoining the subject property (north and east of TL 600) is owned by the City of Bend and used as the City's sewage treatment plant. It is not in farm use.*

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 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 that have a higher soils class if irrigated. Crops are typically grown on soils in soil class III and IV.*

The Hearings Officer finds that many of the factors surrounding the Subject Property, such as the current residential and non-agricultural related land uses in the area, soil fertility, and lack of availability of water rights result in an extremely low possibility of successful farming on the Subject Property.

The Hearings Officer finds that soils on the Subject Property can only be made fertile through artificial means, which is cost prohibitive from a profitability standpoint. The Subject Property is not suitable to grazing on a commercial scale given management limitations and expected low production of suitable vegetation. Climactic conditions result in difficulty for production of most crops. Given the fact that no new irrigation water rights are expected to be available to the COID in the foreseeable future and the poor quality of soils on the Subject Property, it is unlikely COID would approve a transfer of water rights to the Subject Property. Moreover, a transfer of water rights to the Subject Property would be contrary to the purpose of Goal 3 to maintain productive agricultural land in farm use. Expenses associated with irrigation of pastures on the poor soils of the Subject Property limit the suitability of grazing animals on the Subject Property and result in required technological and energy inputs over and above accepted farming practices.

The Hearings Officer finds that existing land use patterns consist of a pattern of relatively small lots, primarily devoted to residential and hobby farm uses, interspersing MUA-10 zoned property with EFU-TRB zoning. The only large EFU-TRB property adjoining the subject property is owned by the City of Bend and used as the City's sewage treatment plant.

The Hearings Officer finds that accepted farm practices in Central Oregon do not include farming lands comprised of soils that are predominantly Class 7 and 8. In order to conduct dryland grazing on the subject property, the applicant would have to take measures beyond accepted farming practices, including attempting to obtain a water rights transfer.

For all the foregoing reasons, the Hearings Officer finds that the Subject Property, primarily comprised of Class 7 and 8 soils, is not suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration the soil fertility, suitability for grazing, climactic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy outputs required and accepted farming practices. Substantial evidence in the record supports a determination that the Subject Property cannot be employed for the primary purpose of obtaining a profit in money through farming-related endeavors, considering the costs of engaging in farm use. *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007).

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

FINDING: The Applicant offers the following response in the submitted 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, with one exception, are separated from the subject property by Abbey Road. The road 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 juniper covered subject property to conduct farm practices.*

Tax Map, Lot and Size	***Farm Use***	***Potential Farm Practices***	***Need Subject Property?***
17-13-18C 400 19.32 acres	*Wilderness Horse Adventures (trail riding business not a farm use); dwelling.*	*Grazing Dry lot feeding Fertilizing field Herbicide use Irrigation*	*No, TL 400 about 660' west of subject property. Horses used for trail riding out of area. Adjoins nonfarm dwelling.*
17-13-18C 500 19.32 acres	*Nonfarm dwelling, irrigated pasture for grazing.*	*Grazing Fertilizing field Herbicide use Irrigation*	*No, self-contained hobby farm use.*
17-12-13D 200 & 300, 6.6 acres and 15.01 acres	*Small pasture and horses. A part of property is MUA-10 and developed with a private boarding school.*	*Grazing Fertilizing field Herbicide use Irrigation*	*No, about 1200' away from subject property. Also, the horse use is incidental to boarding school use and is not conducted to earn a profit in money.*
17-12-13D 100 22.64 ac	*Irrigated pasture with interspersed juniper*	*Grazing Fertilizing field*	*No, about 1320' west of subject property*

	trees. Dwelling and vacation cabin on property.	*Herbicide use Irrigation*	*and separated by other farm properties.*
17-12-13A 100 39.26 acres	*Irrigated pasture; patchy growth of grass. Approved for Measure 49 dwelling.*	*Grazing Fertilizing field Herbicide use Irrigation*	*No, too remote (1320') and separated by other farm properties.*
17-12-13A 200	*Nonfarm parcel; Measure 49 dwelling approval.*	*None*	*No.*
17-12-13A 300	*Irrigated pasture; patchy growth of grass. Single-family dwelling and two machine sheds.*	*Grazing Fertilizing field Herbicide use Irrigation*	*No, too remote (about 1500') and separated by other farm properties.*

North: *All of the land north of the subject property is owned by the City of Bend and is operated as a sewer treatment plant. Farm practices are not occurring on this property.*

East: *The City of Bend's sewer treatment plan adjoins the eastern boundary of Tax Lot 600. No farm practices are occurring on this property. Two tax lots adjoin the eastern boundary of Tax Lot 100. One is 8 acres in size. The other is 12.21 acres in size. Both tax lots are developed with residences. Neither receive special assessment for farm use. East of them are two other small parcels that are not in farm deferral. One is 8.48 acres and the other is 10 acres. All four parcel are developed with dwellings. As the properties are not recognized by the Tax Assessor as being in farm use, the activities occurring on the properties are not farm practices. Even if they are viewed as such, the agricultural uses are limited to the irrigation of small areas of land and horse facilities and one of the parcels is not irrigated. The practices associated with these uses are similar to those of pastures and horse operations outlined in the charts above. The agricultural practices related to this "hobby farming" do not require the subject property to remain in its current vacant state to allow them to conduct agricultural practices.*

South: *All of the land south of the subject property is zoned MUA-10 and is not engaged in farm use.*

The Hearings Officer finds the Subject Property is not necessary for the purposes of permitting farm practices on adjacent or nearby land, or the larger surrounding area generally, based on the factors discussed in the previous finding, the current use of adjacent properties, and separation of the Subject Property by Abbey Road from properties to the west.

(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 submitted burden of proof statement:

> *The subject property is not and has not been a part of a farm unit. It has not been farmed. As a result, this rule does not apply to the County's review of this application.*
>
> *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 is a property is "agricultural land." The predominant soils classification of the subject property is Class VII and VIII 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 D.*** *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 Applicant also provided a Supplement following the Staff Report which states, in relevant part:

> *Oregon case law explains the meaning of this rule. It applies to lands to land [sic] that have a recent a recent [sic] history of farm operations. In particular, it applies where land is divided to create a parcel of nonagricultural land from a larger farm property that was formerly operated as a farm across the entire property. Wetherell v. Douglas County, 235 Or App 246, 230 P3d 976, rev den 349 Or 57 (2010). The rule is written to prevent the "piecemeal fragmentation" of large farm properties to carve out areas for rezoning to a nonagricultural zoning designation. This rule does not apply to the subject property because it has never been farmed at all. This rule does not supplant and render meaningless the predominance and suitability test set by Goal 3 to determine whether land is or is not agricultural land by requiring all land on a property to be inventoried as agricultural land if there is any Class VI soil on the property.*

The Hearings Officer finds that there are no bases on which to find that the Subject Property must be inventoried as agricultural lands under this criterion. 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. As demonstrated by the historic use patterns and soils report, it does not have poor soils adjacent to or intermingled with good soils within a farm unit. The Subject Property is not in farm use and has not been in farm use of any kind. It has no history of commercial farm use and contains soils that make the property 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 does not relate to land in active farming, and there are no parcels in the area that were once part of the Subject Property.

Goal 3 applies a predominant soil type test to determine if a property is “agricultural land”. If a majority of the soils is Class I-VI in in Central or Eastern Oregon, it must be classified "agricultural land." Case law indicates that the Class I -VI soil test applies to a subject property proposed for a non-agricultural plan designation while the farm unit rule looks out beyond the boundaries of the subject property to consider how the subject property relates to lands in active farming in the area that were once a part of the area proposed for rezoning. The Hearings Officer finds it is not a test that requires that 100% of soils on a subject property be Class I-VI. A majority of the soils on the Subject Property are not Class I-VI. Therefore, under the predominance test, the Subject Property is not agricultural. The farm unit rule does not mandate a different result.

(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 and the Hearings Officer made findings thereon above. The Applicant's burden of proof statement also includes the following:

The subject property is, in no way, necessary to permit farm practices to be undertaken on adjacent and nearby lands.

Lands to the west are divided from the subject property by the right-of-way for Abbey Road making it infeasible to farm the properties together. The adjoining farm activities are occurring on small properties that are both developed with single-family homes. The future residential development allowed by MUA-10 zoning will not introduce a new use to the area that will impact farm practices. The more distant EFU properties to the west adjoin MUA-10 zoned lands that are fully developed – primarily with residences – and in no way rely on the subject property remaining in EFU zoning in order to conduct farm practices on their properties.

Land to the north is owned by the City of Bend and is not in farm use and the applicant's property is not necessary to permit farm practices to be undertaken on this property which would likely be limited to livestock grazing given the soil type and lack of irrigation water rights for this large property. This property also adjoins the east boundary of Tax Lot 600.

The properties to the east are zoned EFU but are all divided into very small parcels that average 10 acres gross. They are developed with houses similar to those found in the MUA-10 zoning district and do not receive special assessment for farm use indicating that they are not employed in farm use. The subject property is not needed by these land owners to conduct farm practices on their properties.

The property south of the subject property is zoned MUA and is not engaged in farm use. Land on the subject property is not necessary to permit farm practices to be undertaken on these adjacent and nearby lands.

As the Hearings Officer has found herein, the Subject Property is not "agricultural land," as referenced in OAR 660-033-0030(1), and contains barriers for farm use including poor quality soils and lack of irrigation. The soil study prepared by Mr. Gallagher focuses solely on the land within the Subject Property and the Applicant provided responses supporting a finding that the Subject Property is not necessary to permit farm practices undertaken on adjacent and nearby lands.

The Hearings Officer finds that substantial evidence in the record shows the Subject Property is not "agricultural land" because the property is predominantly Class 7 and 8 soils. The

Subject Property is not necessary to permit farm practices to be undertaken on adjacent or 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: The Applicant set forth the following in the submitted burden of proof statement:

> *The evidence that shows 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 has assigned no significance to the ownership of adjoining properties.*
>
> *The City of Bend property to the north and east of the subject [sic] is very similar to the subject property and its predominant soil types are Class 58C and 59C. Both of these soil types are predominantly Class VII and VIII soils that do not support farm use – agricultural uses intended to secure a profit in money. This property is not necessary for others in the area to undertake farm practices.*
>
> *The EFU subdivision to the east is developed with single-family homes on lots averaging 10 acres in size gross. These parcels are committed to rural residential development*. The land not so committed is too small to be utilized for agricultural uses intended to obtain a profit in money from the use.
>
> *The land to the south is not agricultural and is not in farm use.*
>
> *The land to the west is 80 acres in size and comprised of four twenty-acre parcels, There is an area of 36A soils on the southern two of these parcels that are high-value soils when irrigated. These soils are located almost entirely on one of these parcels at 63400 Silvas Road. It is the only property that is high-value farmland. The 36A soils are an irrigated farm field. The 36A soils do not extend onto the subject property and this parcel is separated from the subject property by Abbey Road which provides a buffer between uses that protects farm uses on this parcel.*
>
> *A small part of mapping unit 16A is found on the property to the south and it is also irrigated but that parcel is not high-value farmland by definition. This field is about 500 feet to the west of the south part of the subject property.*

Hearings Officer finds that substantial evidence in the record, including examination of lands outside the boundaries of the Subject Property, shows the subject property is not "agricultural land." Substantial evidence shows 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.

(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's burden of proof statement sets forth the following:

> *The Red Hills Soils report, **Exhibit D**, provides more detailed soils information than contained on the Web Soil Survey, the Internet soil survey of soils data and information produced by the National Cooperative Soil Survey. Those sources provide general soils data for large units of land. The Red Hills Soils report provides detailed and accurate information about a single property based on numerous soil samples taken from the subject property. The depth of these soils was also determined. The soils samples taken from the subject property were tested to determine soil type and water-carrying capacity of the soils. The results of this analysis were used to develop an accurate soils map of the subject property. The soils assessment is related to the NRCS land capability classification system that classified soils Class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.*

The NRCS mapping for the Subject Property is shown below in ***Figures 1*** *and* ***2***. According to the NRCS Web Soil Survey tool, the Subject Property contains approximately 96.3% 38B soil and approximately 3.7% 58C soil. The soil study conducted by Mr. Gallagher of Red Hill Soils finds the soil types on the Subject Property vary from the NRCS identified soil types.

The soil types described in the Red Hill Soils soil study are described below (as quoted from **Exhibit D** of the submitted application materials) and the characteristics and LCC rating are shown in ***Tables 1*** *and* **2** below.

> ***GR Gosney-Rock Outcrop Complex***
>
> ***Capability Class 7***
> *These soils are mapped together in a complex because both components are Capability Class 7 or greater, and it was not practical to map them separately. These soils are*

estimated to be about 25 percent Rock Outcrop and 75 percent Gosney. They have lower productivity than NRCS map unit 38B because they do not contain a mappable area of Deskamp soils that were mapped separately. The productivity reported in Table 2 for Gosney-Rock Outcrop are 20 percent less than the 58C map unit to account for more shallow and very shallow soils in the GR map unit in the revised map unit. Based on the observations here the map unit is about 40 percent very shallow soils, 35 percent Gosney soils and 25 percent rock outcrops.

Gosney (0 to 15 percent slopes)
***Description**: Gosney series consists of shallow 10 to 20 inches to hard basalt bedrock, somewhat excessively drained soils on lava plains. These soils have rapid permeability. They formed in volcanic ash over hard basalt bedrock. Slopes are 0 to 15 percent. The mean annual precipitation is less than 12 inches, and the mean annual temperature is about 45 degrees F.*
***Capability Class:** 7*
***Soil Variability:** Depth to bedrock is from surface exposures of bedrock to 20 inches depth. There may be small inclusions of soils like Deskamp that are moderately deep (>20 inches). Many of the pedons are sandy skeletal family. This unit includes very shallow soils <10 inches.*

Very shallow phase 0-15 percent slopes
***Description:** this component of the complex is less than 10 inches to basalt.*
***Capability Class:** 7*
***Soil Variability:** Depth to bedrock is from 1 to 10 inches. This soil is a very shallow soil that is similar to Gosney but shallower. It has lower available water holding capacity and an estimated 40 percent lower productivity.*

Rock Outcrop (0 to 15 percent slopes)
***Description:** This is a large proportion of the map unit and represents areas where bedrock is at the surface often times standing several feet about the general grade, and in places where suspected lava tubes collapsed the rock out crops are rimrock*
***Capability Class:** 8*
***Soil Variability:** In places rocks are an inch or two below the surface but mainly are surface exposed and are detectible in aerial photographs.*

Dk Deskamp
***Description:** Moderately Deep somewhat excessively drained soils with rapid permeability on lava plains. They formed in ash and have hard basalt at 20 to 40 inches. Slopes are 1 to 15 percent. The A and AB horizon are loamy sand. The 2B is loamy sand and gravelly loamy sand. The NRCS soil survey mapped Deskamp and Gosney in a complex described as 50% Deskamp and 35% Gosney. In this Dk unit I broke out the Deskamp component of the former complex based on much more detailed soil sampling than the NRCS soil survey.*

***Capability Class**: 3 irrigated and 6 non-irrigated*
***Soil Variability:** There are inclusions of rock outcrop and of deep soils with sandy skeletal family. Any rock outcrop I observed in the field was delineated from the Deskamp unit, but because not all rock outcrops could be resolved at the one boring per acre average soil observation given the brushy conditions.*

Table 1 - Summary of Order I Soil Survey (Tax Lot 600)

Previous Map Symbol	Revised Map Symbol	Soil Series Name	Capability Class (subclass) nonirrigated	Previous Map*		Revised Map	
				Ac	-%-	Ac	-%-
38B	--	Deskamp-Gosney complex, 0 to 8 percent slopes	6 and 7	36.8	92	0	0
58C	--	Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes	6, 7 and 8	3.2	8	0	0
--	Dk	Deskamp	6	0	0	7.2	18
--	GR	Gosney-Rock Outcrop Complex	7 and 8	0	0	32.8	82

*Soils that were previously mapped as components of a complex that are mapped as consociations in revised map.

Table 2 - Summary of Order I Soil Survey (Tax Lot 100)

Previous Map Symbol	Revised Map Symbol	Soil Series Name	Capability Class (subclass) non-irrigated	Previous Map*		Revised Map	
				Ac	-%-	Ac	-%-
38B	--	Deskamp-Gosney complex, 0 to 8 percent slopes	6 to 7	40	100	0	0
--	Dk	Deskamp	6	0	0	4.7	12
--	GR	Gosney-Rock Outcrop Complex	7 and 8	0	0	35.3	88

*Soils that were previously mapped as components of a complex that are mapped as consociations in revised map.

Figure 1 - NRCS Soil Data (Tax Lot 600)

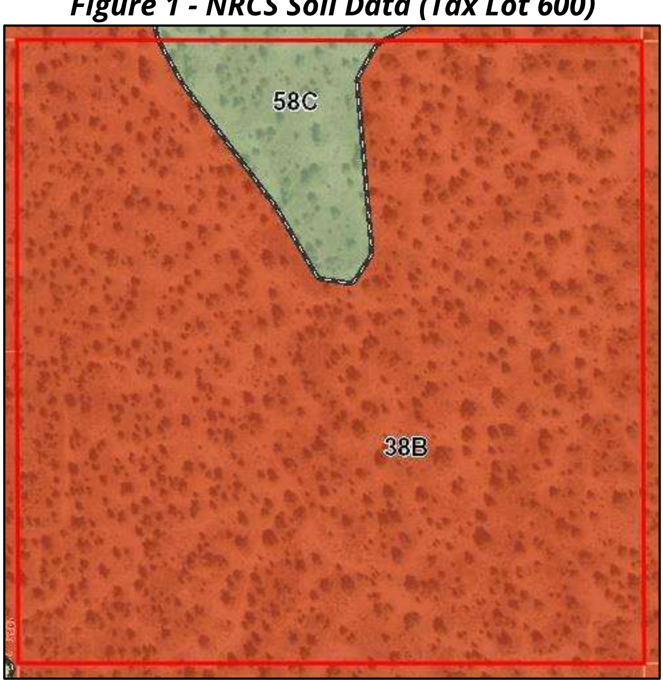
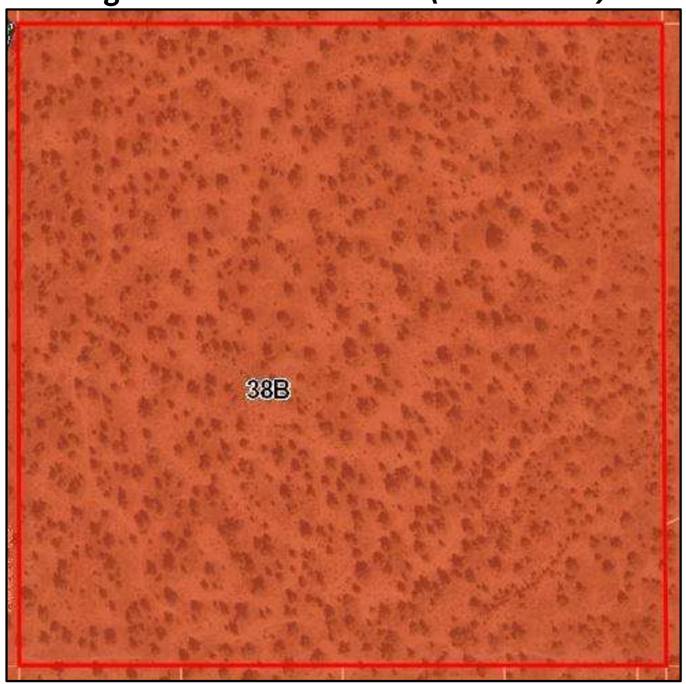


Figure 2 - NRCS Soil Data (Tax Lot 100)



Mr. Gallagher's soils assessment report provides a high intensity Order-1 soil survey and soil assessment – a detailed and accurate soils assessment on the Subject Property based on numerous soil samples – to determine if the subject property is "agricultural land" within the meaning of OAR 660-033-0020. The soils report is related to the NCRS Land Capability Classification (LLC) system that classifies soils class 1 through 8. An LCC rating is assigned to

each soil type based on rules provided by the NRCS. The soils report provides more detailed soils information than contained on the Web Soil Survey operated by the NRCS, which provides general soils data at a scale generally too small for detailed land use planning and decision making.

The state's agricultural land rules, OAR 660-033-0030, allow the County to rely on the high intensity Order-1 soil survey and soil capability analysis prepared by Mr. Gallagher, which is more detailed than the general NRCS soil maps and soil surveys and the Web Soil Survey operated by the NRCS as of January 2, 2012. The Hearings Officer finds that the Order-1 soil survey is related to the NRCS land capability classification system.

The Hearings Officer finds that the more detailed soils information in the report prepared by Mr. Gallagher assists the County to make a better determination of whether the Subject Property qualifies as agricultural land. As set forth above, DLCD completed a Soil Assessment Completeness Review pursuant to OAR 660-033-0045(6)(a), confirming the report prepared by Mr. Gallagher meets the requirements for agricultural soils capability reporting.

Based on Mr. Gallagher's qualifications as a certified Soil Scientist and Soil Classifier, the Hearings Officer finds the submitted soil study to be definitive and accurate in terms of site-specific soil information for the Subject Property. For all the foregoing reasons, the Hearings Officer finds the Subject Property is not "agricultural land."

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

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

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

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

FINDING: The Applicant submitted a soils study by Mr. Gallagher of Red Hill Soils dated November 2, 2020. The soils study was submitted following the ORS 215.211 effective date. Staff received acknowledgement via email on June 16, 2021, from Hilary Foote, Farm/Forest Specialist with the DLCD that the soils study is complete and consistent with DLCD's reporting

requirements. The Hearings Officer finds this criterion to be met based on the submitted soils study and confirmation of completeness and consistency from DLCD.

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

FINDING: The Applicant has provided a DLCD-certified soils study as well as NRCS soils data. The Hearings Officer finds that the Applicant has complied with the soils analysis requirements of OAR 660-033-0045 in order to obtain DLCD certification. DLCD's certification establishes compliance with OAR 660-033-0045.

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 the above language 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 properties from AG to RREA and change the zone from EFU to MUA10. The Applicant is not proposing any land use development of the properties at this time.

The Applicant has submitted a transportation impact analysis (TIA) with the application. The TIA was reviewed by the County Transportation Planner, who agreed with the report's conclusions. No rebuttal evidence was introduced into the record and there was no testimony in opposition to the conclusions in the TIA.

Public comments received by the County indicate concerns with potential traffic impacts as a result of the proposed plan amendment and zone change. These comments are non-specific in nature, do not include any findings contrary to the findings set forth in the Transight Consulting, LLC analyses, and do not include any information that is inconsistent with the Transight Consulting, LLC's reports. Public comments express a generalized concern about traffic impacts associated with additional growth if the subject property is developed. The Hearings Officer notes that additional transportation/traffic review will be required at the time of any future development application(s).

The Applicant further noted that access to Classic Estates lots is provided by Peterman Lane and Parker Lane. Traffic associated with potential future development of the Subject Property will not rely on either road for access. As shown in the TIA, impacts to the greater area arterial street network will be negligible.

The Hearings Officer finds that the proposed rezone will not significantly affect an existing or planned transportation facility for the following reasons: (1) it will not change the functional classification of an existing or planned transportation facility; (2) it will not change standards implementing a functional classification system; and (3) it will not result in any of the following effects – types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility, degradation of the performance of an existing or planned transportation facility such that it would not meet performance standards identified in the TSP or comprehensive plan, or degradation of the

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

Based on the TIA, the Hearings Officer finds 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 proposed changes will not change the functional classification of any existing or planned transportation facility or change the standards implementing a functional classification system. The changes will not allow types or levels of land uses, which would result in levels of travel or access, which are inconsistent with the functional classification of nearby transportation facilities. Furthermore, it will not reduce the performance standards of the facility below the minimum acceptable level in the County's transportation system plan.

The Hearings Officer finds that, based on OAR 660-012-060(1), the County is not required to put in place measures as provided in Section (2) of this rule. Based on the County Senior Transportation Planner's comments and the traffic study from Transight Consulting LLC, the Hearings Officer finds the Applicant has demonstrated compliance with the TPR. These criteria are met.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

FINDING: The Statewide Planning Goals are addressed below, as set forth 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 stat or 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 MUA-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 MUA-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; 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 MUA-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 MUA-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 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. Members of the public commented regarding concerns of loss of the currently vacant property as open space and for recreational uses. The Hearings Officer finds that the Subject Property is not planned to meet the recreational needs of Deschutes County residents and does not directly impact areas that meet Goal 5 needs.

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 the Subject Property from EFU to MUA-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 MUA-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. Rather, if the Subject Property is developed with residential dwellings in the future, energy conservation will be increased – not impeded – as residents will not be required to travel as far to work, shopping and other essential services provided in the City of Bend.

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 MUA-10 zone does not include urban uses as permitted outright or conditionally. The MUA-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 MUA-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 Multiple Use Agricultural (MUA-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 of the Deschutes County Hearings Officer.

____

Stephanie Marshall, Deschutes County Hearings Officer

Dated this 24th day of November, 2021

Mailed this 24th day of November, 2021

Owner	Agent	InCareOf	Address	CityStZip	Type	cdd id
HIGHAM,MICHAEL E & DONNA G			63225 PETERMAN LN	BEND, OR 97701	Hearings Officer Decision	21-616-PA, 21-617-ZC
CONRAD,KURT J & SUSAN L			22220 PARKER LN	BEND, OR 97701	Hearings Officer Decision	21-616-PA, 21-617-ZC
FANCHER, LIZ			2465 SACAGAWEA LN	BEND, OR 97701	Hearings Officer Decision	21-616-PA, 21-617-ZC
Joe Bessman	Transight Consulting		Via Email		Hearings Officer Decision	21-616-PA, 21-617-ZC
SWISHER, DAVE			250 NW FRANKLIN AVE, STE 401	BEND, OR 97703	Hearings Officer Decision	21-616-PA, 21-617-ZC
Central Oregon LandWatch	Carol Macbeth		2843 NW Lolo Drive	Bend, OR 97703	Hearings Officer Decision	21-616-PA, 21-617-ZC
1000 Friends of Oregon	Andrew Mulkey		PO Box 40367	Portland, OR 97240	Hearings Officer Decision	21-616-PA, 21-617-ZC

COMMUNITY DEVELOPMENT

NOTICE OF HEARINGS OFFICER'S DECISION

The Deschutes County Hearings Officer has approved the land use application(s) described below:

FILE NUMBERS: 247-21-000616-PA, 617-ZC

LOCATION: Property 1:

Map and Taxlot: 171318C000100
Account: 109158
Situs Address: 63350 ABBEY RD, BEND, OR 97701

Property 2:

Map and Taxlot: 1713180000600
Account: 106933
Situs Address: NO SITUS ADDRESS

OWNER/ APPLICANT: Dave Swisher

ATTORNEY FOR APPLICANT: Liz Fancher
2465 NW Sacagawea Lane
Bend, OR 97703

SUBJECT: The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the properties from Agricultural (AG) to Rural Residential Exception Area (RREA). The applicant also requests approval of a corresponding Zone Change to rezone the properties from Exclusive Farm Use – Tumalo/Redmond/Bend subzone (EFU-TRB) to Multiple Use Agricultural (MUA-10) as the subject property does not qualify as "Agricultural Land" pursuant to State Law and administrative rules.

STAFF CONTACT: Kyle Collins, Associate Planner
Phone: 541-383-4427
Email: Kyle.Collins@deschutes.org

RECORD: Record items can be viewed and downloaded from: www.buildingpermits.oregon.gov

APPLICABLE CRITERIA: The Hearings Officer reviewed this application for compliance against criteria contained in Chapters 18.04, 18.16, 18.32, 18.80, 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 application meets applicable criteria, and recommends approval of the applications.

As a procedural note, the hearing on September 21, 2021, 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.

This decision becomes final twelve (12) days after the date mailed, unless appealed by a party of interest. To appeal, it is necessary to submit a Notice of Appeal, the base appeal deposit plus 20% of the original application fee(s), and a statement raising any issue relied upon for appeal with sufficient specificity to afford the Board of County Commissioners an adequate opportunity to respond to and resolve each issue.

Copies of the decision, 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.

Owner	Agent	InCareOf	Address	CityStZip	Type	cdd id
HIGHAM,MICHAEL E & DONNA G			63225 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CONRAD,KURT J & SUSAN L			22220 PARKER LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
FANCHER, LIZ			2465 SACAGAWEA LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
Joe Bessman	Transight Consulting		Via Email		Hearings Officer NOD	21-616-PA, 21-617-ZC
SWISHER, DAVE			250 NW FRANKLIN AVE, STE 401	BEND, OR 97703	Hearings Officer NOD	21-616-PA, 21-617-ZC
Central Oregon Irrigation District			1055 SW Lake Ct	Redmond, OR 97756	Hearings Officer NOD	21-616-PA, 21-617-ZC
Central Oregon LandWatch	Carol Macbeth		2843 NW Lolo Drive	Bend, OR 97703	Hearings Officer NOD	21-616-PA, 21-617-ZC
1000 Friends of Oregon	Andrew Mulkey		PO Box 40367	Portland, OR 97240	Hearings Officer NOD	21-616-PA, 21-617-ZC
WILCOX,COREY D & JANELLE D			63370 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CHONG TRUST	LONG, HAO & CHAO, YU PING ADA TTEES		63358 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
JAMES A WEEKS REVOCABLE TRUST	WEEKS, JAMES A TTEE		63325 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
EMICK,ANTHONY C & BALL,TINA M			63355 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
DON SWISHER TRUST ETAL	SUCCESSOR TRUSTEE	C/O DAVE SWISHER	250 NW FRANKLIN AVE #STE 401	BEND, OR 97703-2814	Hearings Officer NOD	21-616-PA, 21-617-ZC
RICHARD SUTTER LIVING TRUST	SUTTER, RICHARD I TTEE		63488 ABBEY RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
SCHRIER LIVING TRUST ET AL	SCHRIER, MICHAEL L TTEE ET AL		PO BOX 126	HUBBARD, OR 97032	Hearings Officer NOD	21-616-PA, 21-617-ZC
JARVIS,MARK S & CYNTHIA M			63400 SILVIS RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
FREEMAN, MATTHEW B & JAMIE			22050 NE BUTLER MARKET RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
MCOMBER HOLDINGS LLC			PO BOX 1851	BEND, OR 97709	Hearings Officer NOD	21-616-PA, 21-617-ZC
TURLEY, BRANDON L			22110 BUTLER MARKET RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
PALMER,KINGDON P JR & CINDY A			22130 BUTLER MARKET RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
BARTZ, EDWARD G ET AL			22160 BUTLER MKT RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
BROWN, JOHN A ET AL			22190 BUTLER MKT RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
EDWARD & JULIE DENFELD TRUST	DENFELD, EDWARD JAMES TTEE ET AL		63215 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
BLACKMAN, TERESA ANNE & SCOTT			22249 PARKER LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
MCCAUL, KEVIN E & JANETTE M			22229 PARKER LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
SWEEN, TODD A & MELISA V			22240 PARKER LN	BEND, OR 97701-9762	Hearings Officer NOD	21-616-PA, 21-617-ZC
PEVERIERI, LEONARD & ANGELA M			63285 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CITY OF BEND			PO BOX 431	BEND, OR 97709	Hearings Officer NOD	21-616-PA, 21-617-ZC
DINGER, PAUL & LAURA ANN			63311 ABBEY RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CENTRAL OREGON IRRIGATION DIST.			ELECTRONIC		Hearings Officer NOD	21-616-PA, 21-617-ZC
DEPT. OF LAND CONSERV. & DEVEL.			1011 SW EMKAY DR., SUITE 108	Bend, OR 97702	Hearings Officer NOD	21-616-PA, 21-617-ZC
DESCHUTES CO. SR. TRANS. PLANNER			ELECTRONIC		Hearings Officer NOD	21-616-PA, 21-617-ZC
OREGON DEPT. OF AVIATION, PROJ. & PLANNING DIV.			Electronic		Hearings Officer NOD	21-616-PA, 21-617-ZC
WATERMASTER - DISTRICT 11			ELECTRONIC		Hearings Officer NOD	21-616-PA, 21-617-ZC
BEND MUNICIPAL AIRPORT (CITY OF BEND)	AIRPORT MANAGER / ECONOMIC DEVELOPMENT		P.O. BOX 431	Bend, OR 97709	Hearings Officer NOD	21-616-PA, 21-617-ZC

AGENDA REQUEST & STAFF REPORT

MEETING DATE: April 20, 2022

SUBJECT: Jericho Road Update

RECOMMENDED MOTION:
None

BACKGROUND AND POLICY IMPLICATIONS:
Don Senecal will attend the April 20, 2022 Board meeting to provide an update on Jericho Road. Jericho Road is a non-profit organization in Redmond that has been serving the community since 2007. The mission of Jericho Road is to provide consistent, nurturing and tangible support people who are homeless and those in need within the Redmond area.

Attached are the following documents: Jericho Road 2021 Annual Report, Jericho Road brochure, and Jericho Road 2022 Charity Golf Tournament brochure.

BUDGET IMPACTS:
N/A

ATTENDANCE:
Don Senecal, Jericho Road

JERICHO ROAD OF REDMOND ANNUAL REPORT FOR 2021

P.O. Box 1623, Redmond, OR. 97756
541-699-2099

JERICHO ROAD ANNUAL REPORT, 2020

OUR MISSION STATEMENT:

"To provide consistent, nurturing and tangible support to the homeless and those in need within the Redmond, Oregon area".

MESSAGE FROM THE CHAIR

Tia Linschied

2021 continued to be a challenging year for everyone, but Jericho Road was unwavering in its desire to help those in need. All involved faced the challenges and sought out solutions to continue to provide the resources that are vital to giving the individuals we serve as healthy and safe a life as possible.

Donors, partners, and volunteers did what they could to help us through extreme heat, cold, fire, and of course COVID. Each one of these offerings of time, resources, and funding helped us to continue our mission to make Redmond a better community for all. Their dedication and strength of character gave us all hope as we continued our work. We look forward to continuing relationships with each one of you as we offer dignity and a better future for the people we love.

Particular challenges we've faced have been the rising cost of supplies and food. Propane, for instance has increased from $1.50 a gallon to $2.30 (65%) and food costs have gone up nearly 20%. The struggle to maintain a level of service while remaining fiscally sound has presented Jericho Road with a new set of challenges. As a result, donations from our friends and neighbors are more important and appreciated than ever before.

Our recent agreement with Oasis Village Project has brought new opportunities for the homeless in the Redmond area. This crucially vital effort to house the houseless has been embraced by the community and will greatly help to reduce the effects of poverty. As their fiscal agent and program partner, we look forward to a strong and growing alliance.

I am immensely proud of Jericho Road and incredibly grateful for all the volunteers and donors who help make our organization's work possible. I know that each member of the Jericho Road Board feels the same. We thank you for all that you do and for your continued support to the unhoused and those limited resources. Without you we could not move forward into 2022 with confidence that our mission to serve through faith and love is as strong as ever.

OUR PROGRAMS

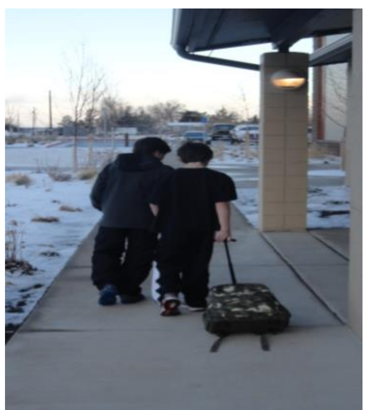
Weekend Food Program

This program provides food packs for hungry students and their families throughout the school year. During the summer months, food is packed and distributed as well. In 2021, 1,422 packs of food were prepared and delivered.

Eleanor Bessonette is the Program Coordinator and, along with her volunteers, has faced challenges brought on by COVID. Obstacles, however, are not in Eleanor's vocabulary! Notes in the past when packs were distributed: "You have no idea what this mans to our family"; "I feel better knowing I can help my family with food"; "Bless you for helping".

Highlights of 2021 – January to March – Our program took place at Redmond High School while schools were not in season. Also, we had to find a new location to store and pack the food.

April to June – In person school resumed but a location for storage and assembly still hadn't been found. Gift cards to pay for food were given to the Leadership Class teachers and the students shopped, packed and delivered food bags to schools.



June to August – Summer Program – Great news came in June. The Redmond Community of Christ Church offered space for food storage and packing! The supply of bags of food continued.

September to December – Weekend Food's happy partnership with Redmond High School Leadership Class student's enabled the continuation of the program through the ups and downs of the COVID pandemic. It continues through a system that is becoming more and more efficient and is teaching caring students the value of volunteerism and the impact it can have on their friends and neighbors throughout the community.

Jericho Table

Jericho Table provides free, hot meals Mondays through Friday's each month to everyone who comes in the door. Volunteers help package and serve the meals which are provided by Tate and Tate caterers. During the pandemic, congregate meals have been put on hiatus, but as soon as possible, we will begin again with our sit downs. We also serve fresh fruits and veggies in cooperation with the Hunger Prevention Coalition. The ability to communicate (just being friendly and talking to our guests) is a critical part of the service we provide. Letting people know we care and want to help. This inter-action creates a level of trust and mutual respect that can result in helping someone into other forms of assistance and eventual reentering the community. Under the steady hands of Tia Linschied and Ken Cardwell, the program coordinators and their crew of volunteers, the Table provides encouragement and nutrition in the best, possible ways!

Jericho Table, at their location at the Church of God Seventh Day's Fellowship Hall, 205 NW 4th Street in Redmond, has also become the gathering place for some additional activities such as: Visits of portable showers. Regular visits by Mosaic Medical Van, Jericho Road's Housing Assistance Team and Thrive Central Oregon were in COVID hiatus.

People come to Jericho Table hungry, cold and alone. They experience friendship, love, food, companionship and hope. We are truly blessed to be able to help those who are in such need. And in helping, we ourselves are lifted spiritually and emotionally.

Housing Assistance

Everyone is aware of the housing situation in the Redmond area. Housing and rental costs have increased to the point that people with even well-paying jobs cannot afford to find or keep a roof over their heads. Although state and federal moratoriums continued throughout 2021, requests for available housing continued to climb even as housing costs increased.

Priscilla Bigler and her team of volunteers interview families and individuals seeking assistance in staying in their homes. Temporary support can last up to three months or longer depending on circumstances. We continue to work closely and collaboratively with St. Vincent De Paul, Family Access Network, NeighborImpact and Thrive to prevent people from becoming homeless due to temporary financial setbacks. Thanks to the generosity of Zion Lutheran Church, the Housing Team can now use the Sunday School building for interviews and counseling of potential participants. It is a friendly and comforting place to meet with those needing help and those willing to give support.

The messages of gratitude and the sharing of successful outcomes are the things that fuel the passions of our volunteers in continuing to keep families and individuals, regardless of age, physical conditions or backgrounds from becoming homeless. In 2021, 242 individuals including 92 children availed themselves of our services. We have included one of those letters here...

"Dear _______,
We are so deeply grateful for your incredible kindness, thoughtful generosity and grace. Your significant contribution to our continued and long term success fills our hearts with joy. We are so over the moon about being here in Central Oregon-the amazing Redmond community. We are so confident that we will be so enriched, and soulfully happy here. Thank you again for your loveliness. We look forward to meeting you sometime in the near future.
All the best. ______"

Emergency Services

The emphasis on immediate needs has taken a higher priority during 2020. Items such as sleeping bags, propane space heaters, propane canisters, tents, tarps, pet food, firewood, bus passes and other items are given those at Jericho Table meals and through the Outreach program.

Jericho's Outreach Program

Jericho Road initiated a new program in 2020 that takes supplies, goodwill and assistance to homeless campers in the Redmond area. Mr. Bob Bohac and his team of volunteers regularly visit these camps bringing supplies and hope to those who simply cannot afford to find permanent shelter or housing.

According to Bob, a significant misconception regarding the homeless is that they simply choose to live as they do. However, Bob and his folks estimate that only 5-10% of all homeless people fall into that category. The rest are victims of circumstances largely beyond their control. The most important of which is the cost of housing. Many of the campers have jobs but are unable to generate sufficient income to afford the costs associated with renting an apartment or house

Each Friday the team of volunteers offers food items, warm breakfast sandwiches, water, sleeping bags, heaters, tents, tarps, propane, pet food, clothing, showers, hygiene items, and more. Masks and sanitizers are also available.

We depend a great deal on our local partners and providers. Their donations and involvement makes a great difference in our success working with our participants.

Reaching out to the people who live in camps is a positive and appreciated action that helps create trust while building hope and a sense of security. Sometimes with a cup of coffee and a hot andwich makes all the difference. In 2021 the Outreach team of 10 volunteers assisted 15 to 35 people each week living "off the grid" in the Redmond area.

SOMETHING NEW FOR 2022!!!!!!!!!!!!!!

Thanks to some extremely generous gifts (anonymous of $100,000), the Dotti and Eli Ashley's trust, Newt and Julie Kerney, The Skinner Family, Margaret McCormick and the Oregon Community Foundation, Jericho Road is proud to announce that we have purchased a new Shower Trailer! The three unit trailer will become a regular visitor to our Jericho Table and Outreach programs as well as other locations throughout the region. Dr. Mark Keener, the program coordinator would like to thank Mosaic Medical and Casey Saclahiro, Deschutes Fair Grounds and maintenance crew, Redmond Proficiency Academy, Les Schwab, Big Country RV, Dana Signs and Senecal Enterprises for their help, advice and support in putting the pieces together. Please stay tuned for upcoming information about locations and schedules on our Web site and Face Book pages!

GIVING THANKS

OUR VOLUNTEERS

JERICHO ROAD VOLUNTEERS ARE FANTASTIC FOLKS WHO GIVE FREELY SO THAT OTHERS MAY HEAL

Although the pandemic would not allow for a gathering to show our gratitude and to honor our volunteers this year, the Jericho Road would like to thank each and every one of these incredible individuals who so graciously and lovingly give of their time and their resources to help those who, like the traveler along the Road to Jericho so many centuries ago, needed help. Those who are served may never know who we are but their lives have been and will continue to be improved because of what we do! In 2021 our volunteers generated $50,000 in in-kind labor!

Jericho Road Board of Directors -2021

Officers: Tia Linschied – Chair, Priscilla Bigler – Vice Chair, David Cook – Secretary, John Seitter – Treasurer.
Board Members:
Shelley Irwin, Ken Cardwell, Eleanor Bessonette, Dr. Mark Keener, Robert Bohac, Rusty Johnson, Margaret King , Steve Thorpe.
Member Emeritus – Irving P. Nygren

Two of our members have recently retired from the Board of Directors; David Cook and member Steve Thorpe. We are grateful for their service and dedication to Jericho Road and for their tireless support.

FUNDERS AND SPONSORS

Jericho Road recognizes the foundations, organizations, businesses and corporations that have given generously to help support our programs:

Bank of America, Bill Healy Foundation, Consumer Cellular, Cow Creek Foundation, COSTCO, Deschutes County Commissioners, First Interstate Bank, Hunger Prevention Coalition of Central Oregon, Les Schwab, Morgan Stanley, Oregon Community Foundation, Morrison Family Fund, PacificCorps, Pacific Source, Reser Foundation, Mid-Oregon Credit Union, Rotary of Greater Bend, St. Charles Foundation, Swigert Foundation, Central Oregon United Way and Windermere Realty, T-Mobile, US Bank, First American Title, Mt. Bachelor Ski Resort, Senecal Enterprises, Keener Dentistry, Catalyst Financial, Hayden Homes, Jay Gronmeyer, OnPoint Credit Union, Sun West, AIC Insurance and Krueger & Lennox, Scott Lucas.

FAITH AND COMMUNITY PARTNERS

Jericho Road is the largest ecumenical social service effort east of the Oregon Cascades. Nineteen local congregations not only provide regular financial support but also many of the volunteer workers who make Jericho Road a success. We could not serve without their support.

These Redmond area congregations support Jericho Road through their prayers, generosity and sense of community:

All Peoples United Church of Christ, Church of God Seventh Day, City Center Church, Redmond Community of Christ, Community Presbyterian Church, Redmond Assembly of God, Highland Baptist Church, Redmond Church of Christ, Redmond 7th Day Adventist, St. Alban's Episcopal, Redmond Community Church, Zion Lutheran Church, The Bridge-Nazarene Church, Nativity Lutheran, Unitarian Universalist Fellowship, Mt. View Fellowship, Ignite Faith.

Jericho Road also acknowledges that, just as we could never exist without our volunteer support and congregational generosity, there are others who have been an integral part of our efforts and have been critical in our success.

Many have already been mentioned, but these additional names deserve the most grateful thanks as well. We urge our friends and neighbors to show their appreciation whenever possible.

The City of Redmond, Redmond School District, Redmond High School's Leadership Class, Family Access Network advocates, NeighborImpact, Alliance Professionals, Central Oregon Council on Aging, Homeless Leadership Coalition, Deschutes Brewery, Earth20, Eagle Crest Resort, Redmond Kiwanis, Central Oregon Old Car Club, Bobbi Haas' Annual Socktober Drive, Central Oregon Retired Educators, Crooked River Ranch Lions, High Desert Museum, Erickson Museum of Flight, Redmond Police Department, Deschutes County Sheriff's Department, MacDonald's, Callan Accounting, Bend Pet Express, Papa Murphy's, Starbucks, Mosaic Medical, Best Care, Pine Mountain Sports, Starbucks of Redmond, Shelley Irwin, Deschutes County Homeless Outreach, Thrive, Myrna and Ryan Anderson Food Delivery, Round Table Pizza, Big Foot Beverages, McDonald's of Redmond, Oregon Food Bank, Order of the Eastern Star Chapter 105, Perception Alpha Omega, Presbytery of the Cascades, Redmond Faith Network, Boneyard Brewery, Redmond Parks and Recreation District, Redmond Library, Redmond Service League, Redmond VFW, St. Vincent De Paul, Sun & Snow Extension Group, Thursday Book Group, Trinity Bike Shop, Vital Provisions, Ten Barrel Brewery, BrightSide Animal Center, Windermere Realty's Clothing Drive, Trader Joe's, Walmart, Ryan's Produce, Jordan's Produce, Franz Bakery, Expion Lithium Batteries, Bi-Mart, Redmond Safeway, Redmond Fred Meyer, Grocery Outlet, Dollar Tree, Hub Motel, Valero Service Station, Eberhard's Dairy, Tate and Tate Caterers and Big 5 Sporting Goods.

EVENTS AND BENEFITS

Jericho Road has traditionally been part of several community events and benefits to share information about our programs and to raise funds to maintain our economic stability. The year 2021 was extremely difficult in that with the closure of facilities and the inability to gather and disseminate information (or even Lemonade!) we were unable to be part of the community we serve.

Empty Bowls, Summer Concerts, Car Shows, Holiday in the Park and other opportunities mostly had to wait for better times. We are eager to be back in the open air and talking with our friends and neighbors!

BENEFIT GOLF TOURNAMENT

The Jericho Road Benefit Golf Tournament is a major event and in 2021 attracted more than 100 golfers and generated nearly $35,000 to help support our programs! We are looking forward to the 2022 tournament that will take place on Saturday, August 13, 2022 at the Eagle Crest Resort. Sponsors, Teams and Volunteers are encouraged to “sign up early”! Please watch our Face Book Page and Website for information.

JERICHO ROAD BY THE NUMBERS, 2021

Annual Budget – 2021 = $210,100 Annual Budget – 2022 = $219,400

• **Jericho Table** - Total number of meals served 2021 = 9,305 to 5,257 adults and 1,079 children.
Volunteers = 1,263. Volunteer hours = 1,446.5
Total program costs = $50,542.29

• **Weekend Food Program** – Volunteers loaded 5,580 lbs of food into 1,422 bags that were delivered to students of the Redmond School District and through summer lunch sacks as well
Volunteers = 55. Volunteer hours = 650
Total Program costs = $14,422.00

• **Housing Assistance** – In 2021, this program funded 78 requests and prevented 99 adults and 92 children as well as 7 senior citizens, 17 disabled individuals, 2 veterans, 7 domestic violence survivors and 15 COVID-related people from becoming homeless.
Volunteers = 5. Volunteer hours = 240.
Total program Costs - $24,849.00

• **Emergency Service** for 2021 this program was able to support the homeless and poor by providing provided: 364 Propane canisters, 384 cleansing towels (in place of showers), 23 heaters, 39 sleeping bags, 47 shower passes, 33 tents, 39 sleeping bags, 47 Bus passes (until cancelled by COVID), 16 stoves, 8 loads of firewood (about 4 cords), 4 flashlights, 2 pair of heavy boots, and a 5 gallon water jug. Volunteers = 5. Volunteer hours = 312.
Total program costs = $8,985.29

• **Homeless Camp Outreach** in 2021 visited camps in the Redmond area each Friday to provide 768 people (men, women and children) with basic necessities: Water, tarps, Tarps, 124 tanks (564 gallons of propane; 416 pounds of pet food.
Volunteers = 12. Volunteer hours = 1,125.
Total program costs = $12,223.17

Total of All Program Costs for 2021 = $132,000.00

• **Children Served – Through all programs 2021: approximately 3,225.**

Number of volunteers 2021: 1,446.
Number of volunteer hours 2021 = 3,917.
Number of volunteer hours times Oregon State Minimum wage ($10.75) = $42,107.00

Never let anyone tell you that volunteering isn't valuable!

Jericho Road's Board of Directors and Volunteers iinvite you to visit our meetings or program locations and witness the effectiveness and humanity of our involvement with the citizens and friends and neighbors that we serve. Your comments and suggestions are also always appreciated as is your support. May the coming year hold promise and blessings…

JERICHO ROAD OF REDMOND, OREGON ADDRESS: POB 1623, REDMOND, OR. 97756
WEBSITE: WWW.JERICHOROADOFREDMOND.ORG. PHONE: 541-548-3367 ALSO ON FACEBOOK

Our Programs

EMERGENCY ASSISTANCE AND HOMELESS CAMP OUTREACH

Everyone needs help from time to time. For those struggling with homelessness, living in cars, tent, old RVs and other equally inadequate places day to day necessities become priority for survival. Water, fuel, sleeping bags, food, clothing and medical access become overwhelming with the added challenges of mental or substance illness. Jericho Road provides those items and more, including heaters, propane, sack lunches or meals, hygiene products and kind words.

Our programs also coordinate with other organizations such as St. Vincent de Paul, Central Oregon Veteran's Outreach, Mosaic Medical, the Shower Truck and others, to gather resources and address as many needs as possible. People living in camps and on the streets are vulnerable, fragile and completely lost in the face of overwhelming challenges they face day to day. Jericho Road promises to be there to help.

YOU CAN BE INVOLVED BY:

Donating directly to Jericho Road (please see our form included here).

Sharing this brochure with your friends and neighbors.

Inviting us to present to your group or organization. Call the number on this brochure for information.

Offering your time as a volunteer with our programs or as a Board Member. Simply contact us by phoning, texting, through our Facebook page or webpage listed here.

Your support is how Jericho Road exists. You make us possible. Thank you!

Donate

You can support Jericho Road, a 501(c)(3) non-profit corporation (EIN 56-2653566), by going to www.jerichoroadofredmond.org and clicking DONATE, or by sending your check to:

Jericho Road, Inc.
P.O. Box 1623
Redmond, OR 97756

My donation of $__________ is enclosed.

Name: ______________________________

Address: ______________________________

City: ______________________________

State: ______________ Zip: ______________

Email: ______________________________

Phone: ______________________________

Food & Shelter

Our Mission

To provide consistent, nurturing and tangible support to the homeless and those in need within the Redmond, Oregon area.

FOR INFORMATION
541- 699-2099

Web:
www.jerichoroadofredmond.org

Email:
info@jerichoroadofredmond.org

PO Box 1623
Redmond, OR 97756

Our Programs

Our Programs

Our Programs

Free Hot Meals

Jericho Table, has been in the service of offering hope, social interaction and free hot meals since 2007 to thousands of hungry men, women and children in our area. Volunteers from local congregations, community organizations & businesses serve meals 25 days each month.

Meals are served at 205 NW 4th St. in Redmond. Doors open at 4:30 p.m. Monday through Thursday each week of the year. Meals are served from 5:00 to 5:45 p.m. We also provide meals the 1st, 3rd and 5th Friday of each month with the Pizza parties happening on the 1st and 4th Saturdays. Additional fresh fruits and vegetables are provided by the Hunger Prevention Coalition of Central Oregon.

We present a friendly, supportive atmosphere where people are invited to enjoy a nutritious meal and enjoy the company of others while being provided additional support through the presence of the Shower Truck, Mosaic Medical Van, Thrive, Jericho Road Housing Assistance and Emergency Service programs.

Rental Assistance

Stable housing is essential for the well being of everyone in our community. Jericho Road's Rental Assistance Program prevents families, seniors, the disabled and veterans from becoming homeless through rental and deposit support. We understand the challenges that result from temporary financial setbacks or circumstances.

Applications and interviews take place by appointment with our trained volunteers. Those wishing to apply can simply call 541-699-2099 to begin the process. All assistance is confidential and other forms of help for our clients can be discussed during the registration process.

Our goal is to help our clients find stability and that our temporary support will make the difference. We know that it can because we have been helping people in these situations for more than a decade and have seen the results.
We like to see our neighbors succeed!

Weekend Food for Students

Jericho Road has established a weekend food program that provides students with packs and bags filled with healthy foods to help them through the weekends during the school year and sack lunches during the summer months.

Students needing assistance are identified by school district staff and Family Access Network. Each week, food goes out to students in Redmond, Terrebonne, Tumalo and Crooked River Ranch. The food Jericho Road provides helps maintain health and strength necessary for good physical and mental development in our youth. Nothing could be more important!

"HOLE -IN-ONE on #3 Wins 2021 Jeep!
Sponsored by Keener Family Dentistry

RIDGE GOLF COURSE
1590 Mountain Quail Dr. | Redmond OR
eagle-crest.com/golf-course/resort-courses

8.13.22
SATURDAY
AUGUST
THIRTEENTH

2022 Charity Golf TOURNAMENT

Join us for prizes, food, raffles and a silent auction at the Jericho Road 2022 Charity Golf Tournament hosted at Eagle Crest Ridge Golf Course. A complimentary continental breakfast and BBQ lunch will be provided. All proceeds go toward the Redmond Community.

TOURNAMENT DETAILS

- 4 Person Team Scramble
- Long Drives, KP's
- Open Division & Women's Division
- Credit cards accepted at event
- No refunds or cancellations
- $100 Per Person Entry Fee
  $400 Per Team
- **August 5th DEADLINE for registration**

TO REGISTER, SPONSOR, OR FOR MORE INFORMATION CONTACT:
Mike Bessonette
2462 Condor Dr. | Redmond OR 97756
541-350-6654
mebessonette@bendbroadband.com

SPONSORSHIPS

$5000 TITLE SPONSOR
Hole Sponsorship
2 Complimentary Teams

$2000 TOURNAMENT SPONSOR
Hole Sponsorship | 6 free players

$1000 PLATINUM
Hole Sponsorship | 4 free players

$750 GOLD
Hole Sponsorship | 3 free players

$500 SILVER
Hole Sponsorship | 2 free players

$250 BRONZE
Hole Sponsorship | 1 free player

$100 HOLE SPONSOR

EVENT SCHEDULE

7:00 am
Registration &
Continental Breakfast

8:30 am
Tournament Shotgun Start

12:30 pm
Awards, Raffle & Silent Auction

Weekend Food Program

Each week of the school year 60 packs of food are distributed to hungry students of the Redmond School District. Our vounteers gather the food, pack, deliver and retrieve the packs. The food goes home to families where there may be younger brothers and sisters, grandparents and extended family. In 2020, 2,374 packs were delivered.

Jericho Table

Jericho Table provides free meals twenty-five nights a month to the hungry. In 2020 we switched to a take-out service for greater safely. We also provide showers, Mosaic Medical van, pizza nights, and fresh vegetables and fruits. People come to Jericho Table hungry, cold and alone. In 2020, 9,305 meals were served.

Housing Assistance

In 2020 Jericho Road successfully prevented 117 adults, including seniors, veterans, folks with disabilites and domestic violence survivors and 116 children from becoming homeless by providing temporary support through the rough times.

Emergency Help & Camp Outreach Programs

Once a week at the meal site and each Friday in the camps, items such as sleeping bags, propane, tents, clothing, pet food, water, masks, hygiene kits, fire wood, and more are distributed to those living on the edge.

For more information, testimonials, photos
and services regarding Redmond Jericho Road
please visit: www.facebook.com/jerichoroadredmond

TO REGISTER, SPONSOR, or for MORE INFORMATION about the
Jericho Road 2022 Charity Golf Tournament

CONTACT: Mike Bessonette
2462 Condor Dr., Redmond OR 97756 | 541-350-6654 | mebessonette@bendbroadband.com

Please make checks payable to Jericho Road.

PLAYERS:

Name: ____
Email: ____

Name: ____
Email: ____

Name: ____
Email: ____

Name: ____
Email: ____

2022 Charity Golf TOURNAMENT

☐ Open Division
☐ All Woman Team Open Division

☐ Single Player ($100)
☐ Full Team ($400) ☐ Multiple Teams ____

☐ Check or Cash
☐ Credit Card

Total: $ ____ . ____

cc#: ____
exp: / cvv: ____
phone: ____

☐ Will Pay at Event

AGENDA REQUEST & STAFF REPORT

MEETING DATE: April 20, 2022

SUBJECT: Wolf Depredation Advisory Committee

BACKGROUND AND POLICY IMPLICATIONS:

In December, the Board had an introductory discussion about the possibility of establishing a Wolf Depredation Advisory Committee.

The State's Wolf Depredation Compensation and Financial Assistance program is administered by the Oregon Department of Agriculture (ODA). It provides pass-through grants to counties to establish and implement county wolf depredation compensation programs.

Currently, 17 counties in Oregon have wolf programs/committees, including Baker, Crook, Curry, Douglas, Grant, Jackson, Jefferson, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco, Wheeler. Historical requests and awards from ODA's grant program are included in the Board's materials. Not all counties with wolf programs / committees submit for compensation each year.

Local Impacts

ODA's Wolf Depredation Compensation and Financial Assistance Grant Program complements and supports Oregon Department of Fish and Wildlife's Wolf Conservation and Management Plan by working to proactively minimize wolf-livestock conflict and assist livestock producers experiencing wolf-related livestock losses.

Oregon Dept. of Fish & Wildlife (ODFW) staff have shared that there are currently no known wolf packs or areas of consistent wolf activity within Deschutes County, but the occurrence of confirmed sightings of transient and dispersing wolves has increased in recent years, as it has throughout most of Eastern Oregon.

Wolf Depredation Compensation and Financial Assistance Program

The State requires that counties establish a wolf depredation compensation committee before a grant application is submitted. County advisory committees must include:

(i) One county commissioner;

(ii) Two members who own or manage livestock; and

(iii) Two members who support wolf conservation or coexistence with wolves.

(iv) Two county business representatives

Participating counties contribute an amount of money equal to 10% of the allowable expenditures necessary to implement the county program during the calendar year.

Once a committee is established, counties must establish rates of compensation. Compensation rates from Wallowa County are included as a sample. Requests can include:

- Compensation for residents who have livestock or working dogs that are killed or injured due to wolf depredation.
- Financial assistance intended to assist residents in implementing livestock management and/or nonlethal wolf deterrent techniques designed to discourage wolf depredation of livestock.
- Compensation for residents who have livestock or working dogs that are missing due to wolf depredation.

Options for Board Consideration

1. Status quo – Do not move forward with establishing a Wolf Depredation Advisory Committee.

2. Direct staff to prepare a resolution for Board consideration and possible adoption that would create a Wolf Depredation Advisory Committee and associated By-Laws.

3. Revisit the discussion at a later date.

Conclusion

Staff seeks Board direction on the potential creation of a Wolf Depredation Advisory Committee.

BUDGET IMPACTS:
Grant funds have not been included in the FY 2023 budget.

ATTENDANCE:
Whitney Hale, Deputy County Administrator

ODA Wolf Depredation Compensation and Financial Assistance
County Block Grant Program History 2012-2021

2012 Grant Requests

County	Death/Injury	Missing	Prevent	Co. Admin.	Total
Wallowa	$13,230	0	$25,000	$500	$38,730
Union	$18,000	$3,000	$9,000	0	$30,000
Baker	0	0	$7,500	0	$7,500
Umatilla	$15,000	$4,500	$10,000	$500	$30,000
Grant	$8,000	$5,000	$6,500	$500	$20,000
Crook	$1,000	$250	$1,000	$270	$2,520
Jefferson	$10,000	$3,500	$5,786	$5,000	$24,286
Malheur	0	0	$3,000	$900	$3,900
Totals	**$65,230**	**$16,250**	**$67,786**	**$7,670**	**$156,936**

2012 Grant Awards

County	Death/Injury	Missing	Prevention	Co. Admin.	Totals
Wallowa	$13,230	$0	$25,000	$495	$38,725
Union	$0	$0	$9,000	$0	$9,000
Baker	$0	$0	$7,500	$495	$7,995
Umatilla	$0	$0	$15,000	$495	$15,495
Grant	$0	$0	$3,000	$495	$3,495
Crook	$0	$0	$1,000	$270	$1,270
Jefferson	$0	$0	$3,000	$495	$3,495
Malheur	$0	$0	$3,000	$495	$3,495
Totals	**$13,230**	**$0**	**$66,500**	**$3,240**	**$82,970**

2013 Grant Requests

County	Death/Inj.	Missing	Preventive	Co. Admin.	Totals
Wallowa	$5,396	$7,056	$6,000	$350	$18,802
Union	0	0	$2,500	0	$2,500
Baker	$1,400	0	0	$500	$1,900
Umatilla	$600	$3,375(75%)	$30,000	$675	$34,650
Crook	0	0	$1,200	0	$1,200
Jefferson	$750	$750	$2,000	0	$3,500
Malheur	0	0	$5,000	$2,250	$7,250
Klamath	$4,000	0	$1,200	0	$5,200
Morrow	$6,000	$2,000	$10,000	$1,000	$19,000
Wheeler	0	0	$500	$770	$1,270
Totals	**$18,146**	**$13,181**	**$58,400**	**$5,545**	**$95,272**

2013 Grant Awards

County	Death/Inj.	Missing	Preventive	Co. Admin.	Totals
Wallowa	$5,396	$5,292(75%)	$18,532	$350	$29,570
Union	0	0	$1,575	0	$1,575
Baker	$1,400	0	0	$495	$1,895
Umatilla	$600	$3,375(75%)	$17,075	$495	$21,545
Crook	0	0	$3,000	0	$3,000
Jefferson	0	0	0	0	$0
Malheur	0	0	$2,990	$495	$3,485
Klamath	0	0	0	0	$0
Morrow	0	0	$760	$495	$1,255
Wheeler	0	0	0	$495	$495
Totals	**$7,396**	**$8,667**	**$43,932**	**$2,825**	**$62,820**

2014 Grant Request

County	Death/Inj	Missing	Prevention	Co. Admin	Totals
Wallowa	$7,482	$13,596	$43,500	$675	$65,253
Umatilla	$1,000	$3,000	$35,000	$675	$39,675
Morrow	$6,000	$1,000	$12,000	$2,500	$21,500
Malheur				$450	$450
Union			$10,000		$10,000
Crook			$3,000		$3,000
Baker		$17,282	$14,000	$495	$31,777
Wheeler			$2,500		$2500
Totals	**$14,482**	**$34,878**	**$120,000**	**$4,795**	**$174,155**

2014 Grant Awards

County	Death/Inj	Missing	Prevention	Co. Admin	Totals
Wallowa	$7,482	$13,596	$43,500	$675	$65,253
Umatilla	$1,000	$3,000	$35,000	$675	$39,675
Morrow			$3,000	$675	$3,675
Malheur				$450	$450
Union			$5,000		$5,000
Crook			$3,000		$3,000
Baker		$17,282	$14,000	$495	$31,777
Wheeler			$2,000		$2,000
Totals	**$8,482**	**$33,878**	**$105,500**	**$2,970**	**$150,830**

2015 Grant Requests

County	Death/Inj.	Missing	Prevent.	Co. Admin	Total
Wallowa	$3,930.00	$33,200.00	$40,000.00	$675.00	$77,805.00
Umatilla	$1,800.00	$975.00	$75,000.	$675.00	$78,450.00
Baker	$1,470.00	$39,801.00	$18,000.00	$495.00	$59,766.00
Union	0	0	$10,000	0	$10,000
Malheur	0	0	0	$450.00	$450.00
Morrow	0	0	$19,000	$2,500.00	$21,500.00
Crook	0	0	$650.00	O	$650.00
Jefferson	0	0	$4,100.00	$685.00	$4,785.00
Wheeler	0	0	$2,500.00	0	$2,500.00

*Klamath	0	0	$6,000.00		$6,000.00
Totals	**$7,200.00**	**$73,976.00**	**$175,250**	**$5,480.00**	**$261,906.00**

*Note: Klamath asked for an emergency prevention grant later in the year due to wolf depredation in the area.

2015 Grant Awards

County	Death/Inj	Missing	Prevent.	Co. Admin	Total
Wallowa	$3,930	$16,600	$36,922	$675	$58,127
Umatilla	$4,731	$975	$50,467	$675	$56,848
Baker	$1,470	$19,900	$5,400	$495	$27,265
Union	0	0	$8,000	0	$8,000
Malheur	0	0	0	$450	$450
Morrow	0	0	$5,700	$675	$6,375
Crook	0	0	$650	0	$650
Jefferson	0	0	$1,230	$675	$1,905
Wheeler	0	0	$750	0	$750
Klamath	0	0	$6,000	0	$6,000
Totals	**$10,131**	**$37,475**	**$115,119**	**$3,645**	**$166,370**

2016 Grant Requests

County	Death/Inj.	Missing	Prevent	Admin	Total
Wallowa	$3,887	$7,000	$30,000	$900	$41,787
Umatilla	$2,931	$33,562.50	$75,000	$675	$112,168.50
Baker	0	$15,724	$15,000	$495	$31,219
Malheur	0	0	0	$495	$495
Morrow	0	0	$19,000	$2,500	$21,500
Crook	0	0	$7,972		$7,972
Wheeler	0	0	$1,000	$500	$1,500
Klamath	$3,796.75	0	$14,203.25	0	$18,000
Wasco	0	0	$2,000	$750	$2,750
Lake	0	0	$16,000	0	$16,000
Sherman	0	0	$1,000	$500	$1,500
Jackson	0	0	0	$495	$495
Union	0	0	$5,000	0	$5000
Totals	**$10,614.75**	**$56,286.50**	**$186,175.25**	**$7,310**	**$260,386.50**

2016 Grant Awards

County	Death/Inj.	Missing (75%)	Prevent	Admin	Total
Wallowa	*$3,887	$5,250.00	$18,340.04	$750	$28,227.04
Umatilla	*$2,931	$25,172.00	$24,000	$675	$52,778
Baker	0	$11,793.00	$11,518	$495	$23,806
Malheur	0	0	0	$495	$495

Morrow	0	0	$3,000	$675	$3,675
Crook	0	0	$2,000		$2,000
Wheeler	0	0	$750	$500	$1,250
Klamath	$3,796	0	$5,000	0	$8,796
Wasco	0	0	$1,000	$750	$1,750
Lake	0	0	$3,000	0	$3,000
Sherman	0	0	$750	$500	$1,250
Jackson	0	0	0	$495	$495
Union	0	0	$5,000	0	$5000
Totals	**$10,614**	**$42,215.00**	**$74,358.04**	**$5,335**	**$132,522.04**

*Note**:** Payments made a few months early in order to use some remaining federal funds before they expired.

2017 Grant Requests

County	Death/Inj	Missing	Prevent.	Co. Admin	Total
Baker	0	*$21,500	$6,598.50	$495	$28,593.50
Jackson	$266.60	0	$4,775	$822	$5,863.60
Klamath	$4,069.95	0	$10,000	0	$14,069.95
Lake	$600	0	$16,000	0	$16,600
Malheur	0	0	0	$450	$450
Morrow	0	O	$19,000	$2,500	$21,500
Umatilla	$900	$14,950	$75,000	$675	$91,525
Union	0	0	$5,000	0	$5,000
Wallowa	$9,390	$10,140	$30,000	$450	$49,980
Wheeler	0	0	$1,000	$500	$1,500
Totals	**$15,226.55**	**$46,590**	**$167,373.50**	**$5,892**	**$235,082.05**

*Note: Baker submitted amended missing claim from $54,787 to $21,500.

2017 Grant Awards

County	Death/Inj	Missing (75%)	Prevent.	Co. Admin	Total
Baker	0	$16,125	$6,599.00	$495	$23,219
Jackson	$267	0	$10,916	$675	$11,858
Klamath	$4,070	0	$10,000	0	$14,070
Lake	$600	0	$ 10,000	0	$10,600
Malheur	0	0	0	$450	$450
Morrow	0	0	$12,000	$675	$12,675
Umatilla	$900	$11,212	$83,771	$675	$96,558
Union	0	0	$5,000	0	$5,000
Wallowa	$9,390	$7605	$59,195	$450	$76,640
Wheeler	0	0	$1,000	$500	$1,500
Totals	**$15,227**	**$34,942**	**$198,481**	**$3,920**	**$252,570**

Note: These totals include a 2017 supplemental prevention grant that was made in October of 2017 as a result of two federal prevention grants that were going to expire during the spring of 2018,

(F16AP00084 - $1,500 and F17AP00114 - $32,764.65) combined with a need of additional prevention funds from 4 counties experiencing an increase in wolf activity and depredation (Jackson, Morrow, Umatilla and Wallowa Counties.)

2018 Grant Requests

County	Death/Inj	Missing	Prevent.	Co. Admin	Total
Baker	0	$1,500	$12,000	$495	$13,995
Jackson	$3,000	0	$52,500	0	$55,500
Klamath	0	0	$5,000	0	$5,000
Lake	0	0	$8,500	0	$8,500
Malheur	0	0	$9,090	$450	$9,540
Morrow	0	0	$22,500	$2,500	$25,000
Umatilla	$4,220.97	$21,132.	$85,000	$675	$111,028.36
Union	$1,000	$3,650,	$25,000	0	$29,650
Wallowa	$5,550	$15,810,	$46,000	$650	$68,010
Wheeler	DNA				0
Wasco	0	0	$6,000	0	$6,000
Totals	**$13,770.97**	**$42,092.39**	**$271,590**	**$4,770**	**$332,223.36**

2018 Wolf Grant Awards

County	Death/Inj	Missing (Reduced 50%)	Prevent Granted	Co. Admin	Total
Baker	0	$750	$12,000	$495	$13,245
Jackson	$3,000	0	$16,000	0	$19,000
Klamath	0	0	$5,000	0	$5,000
Lake	0	0	$4,000	0	$4,000
Malheur	0	0	$3,200	$450	$3,650
Morrow	0	0	$3,200	$450	$3,650
Umatilla	$4,221	$10,566	$27,000	$675	$42,462
Union	$1,000	$1,825	$12,000	0	$14,825
Wallowa	$5,550	$7,905	$37,853	$650	$51,958
Wasco	0	0	$3,100	0	$3,100
Totals	**$13,771**	**$21,046**	**$123,353**	**$2,720**	**$160,890**

Note: Above totals include late federal prevention grant funds paid in 8/7/18. Also amendment #2 to Wallowa for $10,853 for emergency prevention funds.

2019 Grant Requests

County	Direct Comp.	Missing	Prevention	Admin	Totals
Malheur	0	0	$1,050	$450	$1,500
Umatilla	$500	$33,600	$65,000	$675	$99,775
Wheeler	0	0	$8,500	$100	$8,600
Grant	$450	0	$19,008	$500	$19,958
Union	$1,303	0	$40,000	0	$41,303
Klamath	$4,190	0	$7,810	0	$12,000
Jackson	$6,200	0	$31,000	0	$37,200
Morrow	0	0	$5,000	$750	$5,750
Lake	0	0	$2,000	0	$2,000
Wallowa	$5,760	$51,460	$59,994	$650	$117,864
Douglas	0	0	$63,500	$900	$64,400
Baker	$10,634	$48,199	$35,000	$495	$94,328
Totals	**$29,037**	**$133,259**	**$337,862**	**$4,520**	$504,678

2019 Awards

County	Direct Comp.	Missing	Prevention	Admin	Totals
Malheur	0		$500	$400	$900
Umatilla	$500	$4,107	$31,700	$600	$36,907
Wheeler	0		$3,000	$100	$3,100
Grant	$450		$4,000	$400	$4,850
Union	$1,303		$5,000	0	$6,303
Klamath	$4,190		$7,800	0	$11,990
Jackson	$6,200		$26,000	0	$32,200
Morrow	0		$2,000	$400	$2,400
Lake	0		$1,000	0	$1,000
Wallowa	$5,760	$6,889	$30,000	0	$42,649
Douglas	0	0	0	0	0
Baker	$10,634	$5,891	$19,000	$495	$36,020
Totals	$29,037	$16,887	$130,000	$2,395	$178,319

2020 Grant Requests

County	Direct Comp.	Missing	Prevention	Admin	Totals
Malheur	0	0	0	$225	$225
Umatilla	0	$33,600	$50,000	$750	$84,350
Wheeler	0	0	$8,500	$100	$8,600
Grant	0	0	$19,500	$500	$20,000
Union	$1,330	0	$20,000	0	$21,330
Klamath	$876	0	$11,000	0	$11,876
Jackson	$6,000	0	$42,000	0	$48,000

Morrow	0	0	$25,000	$1,000	$26,000
Lake	0	0	$1,000	0	$1,000
Wallowa	0	$45,100	$47,268	$650	$93,018
Douglas	0	0	$63,500	$900	$64,400
Baker	$2,213	0	$45,000	$495	$47,708
Totals	**$10,419**	**$78,700**	**$332,768**	**$4,620**	**$426,507**

2020 Grant Awards

County	Direct Comp.	Missing	Prevention	Admin	Totals
Malheur				$225	$225
Umatilla		$8,620	$50,000	$650	$59,270
Wheeler			$4,000	$100	$4,100
Grant			$10,000	$500	$10,500
Union	$1,330		$16,000		$17,330
Klamath	$876		$11,000		$11,876
Jackson	$6,000		$20,000		$26,000
Morrow			$16,000	$650	$16,650
Lake			$1,000		$1,000
Wallowa		$11,570	$43,000	$650	$55,220
Douglas			$16,000	$650	$16,650
Baker	$2,213		$30,000	$495	$32,708
Totals	**$10,419**	**$20,190**	**$217,000**	**$3,920**	**$251,529**

2021 Grant Requests

County	Direct Comp.	Missing	Prevention	Admin	Totals
Malheur					
Umatilla		$16,218	$70,000	$750	$86,968
Wheeler			$2,350		$2,350
Grant					
Union	$1,413		$20,000		$21,413
Klamath	$16,296		$10,000		$26,296
Jackson	$1,200		$40,521		$41,721
Morrow	$1,260		$45,000		$46,260
Lake			$1,000		$1,000
Wallowa	$3,150	$3,600	$60,000	$700	$67,450
Douglas			$8,000		$8,000
Baker	$1,500		$45,000	$495	$46,995
Totals	$24,819	$19,818	$301,871	$1,945	$348,453

2021 Grant Awards

County	Direct Comp.	Missing	Prevention	Admin	Totals
Malheur					
Umatilla		$4,000	$17,000	$750	$21,750

Wheeler			$1,000		$1,000
Grant					
Union	$1,413		$6,000		$7,413
Klamath	$16,296		$10,000		$26,296
Jackson	$1,200		$12,000		$13,200
Morrow	$1,260		$13,000	$650	$14,260
Lake			$1,000		$1,000
Wallowa	$3,150	$900	$17,000	$700	$21,750
Douglas			$8,000		$8,000
Baker	$1,500		$13,500	$495	$15,495
Totals	$24,819	$4,900	$98,500	$1,945	$130,164

Wallowa County 2021 Compensation Rates

The following are the rates the Compensation Committee set for the 2021 livestock losses from wolves.

Description	Lb/ head	Rate	Cost
Calf – still on the cow, heifer or steer	Will consider it to be a 600 pound steer	Use average August rate for this weight	$1.50/pound
Steer calf weaned	Will consider it to be an 875 pounder.	Use average August rate for this weight	$1.30/pound
Heifer calf weaned	Will consider it to be an 800 pounder.	Use average August rate for this weight	$1.20/pound
Open Replacement weaned heifers	Use the 800 pound rate plus $300/head	Use average August rate for weight	$1200/hd
Bred 2 to 5 year old cow	Use bred heifer rate	Use average rate for September thru December	$1400/hd
Bred 6 to 8 year old cow	Use bred heifer rate minus $150		$1250/hd
Bred 9 year old cow and over	Use bred heifer rate minus $250		$1150/hd
Mule	Used amount owner thought it was worth	Base price off of age and what it is trained for (packing, riding etc.)	
Injured Calf		A set rate	$450/hd
Injured Cow		A set rate	$850/hd
Bull	20% reduction each year 2 year old		
1-3 year old bred Ewe		A set rate	$300/hd
3-5 year old bred Ewe		A set rate	$220/hd
Lamb	Will consider it to a 150 pound lamb	Use average August rate for this weight	$1.50/pound
Injured Lambs		A set rate	$100/hd
Injured Ewe or Ram		Set rate	$200/hd
Llama		Set rate	$100/hd

AGENDA REQUEST & STAFF REPORT

MEETING DATE: April 20, 2022

SUBJECT: FY 2022 Q4 Discretionary Grant Review

RECOMMENDED MOTION:
N/A

BACKGROUND AND POLICY IMPLICATIONS:
Each quarter, the Board of Commissioners reviews applications submitted to the Deschutes County Discretionary Grant Program and makes awards accordingly. On April 20, 2022, the Board will consider requests made for activities to take place beginning or about the fourth quarter of 2021-22.

BUDGET IMPACTS:
Discretionary Grants are made available through the Video Lottery Fund, which is supported by state lottery proceeds. Discretionary Grant funds available during the fourth quarter were budgeted for FY 2021-22.

ATTENDANCE:
Laura Skundrick, Administrative Analyst

DISCRETIONARY GRANT PROGRAM Q4 SUMMARY

Organization	Request	Project
Boys & Girls Club of Bend	$2,500	Security Upgrades for Downtown Location
Building Hope	$2,500	RV Repair and Replacement
City of Sisters	$2,500	Sisters Country Vision: Implementation Support
CLEAR Alliance	$3,000	Counterfeit Pill Education Course
COCC Foundation	$2,500	Preparing Students for Jobs with Electric Vehicles
Destination Rehab	$2,000	Adventure Group Caregivers
Ember's Bunny Rescue	$2,000	2022 RHDV2 Vaccine
The Father's Group	$2,000	Juneteenth Celebration
Furnish Hope	$5,000	Second Towing Vehicle
La Pine Community Kitchen	$5,000	General Operating Costs for Meals Program
The Rawley Project	$2,000	FIXbend 2022
Ronald McDonald House	$2,000	Meals/Pantry Support Initiative
St. Vincent de Paul	$2,500	Outdoor Living Equipment
Q4 Total Requested Amount (Projects)	**$35,500**	

Organization	Request	Fundraiser
Bethlehem Inn (Service Partner)	$2,000	Spotlight on Homelessness Fundraiser
Q4 Total Requested Amount (Fundraisers)	**$2,000**	

DISCRETIONARY GRANT PROGRAM Q4 STATUS

	Commissioner Adair	Commissioner DeBone	Commissioner Chang	Fundraising
2021-2022 Allocation	$20,000	$20,000	$20,000	$15,000
Q1 Contribution	-$6,470	-$4,650	-$5,250	-$4,500
Q2 Contribution	-$4,450	-$5,000	-$4,650	-$4,500
Q3 Contribution	-$4,900	-$5,700	-$4,800	-$6,200
Additional Allocation				+$5,200
Funds Available	**$4,180**	**$4,650**	**$5,300**	**$5,000**