



COMMUNITY DEVELOPMENT

HEARINGS OFFICER HEARING - LAND USE

6:00 PM, TUESDAY, SEPTEMBER 21, 2021

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

(541) 388-6575 | www.deschutes.org

AGENDA

MEETING FORMAT

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

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

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

<https://us02web.zoom.us/j/82107828033?pwd=eHROVW53aGRYUFh2b1pMdU4wMnFmZz09>

Passcode: 439097

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

Members of the public can access the meeting via telephone, dial: 1-253-215-8782. When prompted, enter the following Webinar ID: 821-0782-8033 and Passcode: 439097. Written comments can also be provided for the public comment section to Kyle.Collins@deschutes.org by 5 PM on September 20, 2021. They will be entered into the record.

PUBLIC HEARING

1. FILE NUMBERS: 247-21-000616-PA, 617-ZC

OWNER/

APPLICANT: Dave Swisher

PROPOSAL: The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the two subject 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 (EFU) to Multiple Use Agricultural (MUA-10).

STAFF PLANNER: Kyle Collins, Associate Planner
Kyle.Collins@deschutes.org, 541-383-4427



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



NOTICE OF PUBLIC HEARING

MEETING FORMAT

In response to the COVID-19 public health emergency, Oregon Governor Kate Brown issued Executive Order 20-16 (later enacted as part of HB 4212) directing government entities to utilize virtual meetings whenever possible and to take necessary measures to facilitate public participation in these virtual meetings. Since May 4, 2020, Deschutes County public hearings have been conducted primarily in a virtual format. Additionally, on August 13, 2021, the Public Health Division of the Oregon Health Authority adopted into Administrative Rule requirements that all persons 5 years of age or older must wear face coverings and/or masks in indoor spaces (OAR 333-019-1025).

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

PROJECT DESCRIPTION

FILE NUMBERS: 247-21-000616-PA, 617-ZC

**OWNER/
APPLICANT:** Dave Swisher

**ATTORNEY
FOR APPLICANT:** Liz Fancher
2465 NW Sacagawea Lane
Bend, OR 97703

PROPOSAL: The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the two subject 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 (EFU) to Multiple Use Agricultural (MUA-10).

LOCATION: The subject properties are described as follows:

- Property 1:
 - o Assigned address: 63350 Abbey Road, Bend, OR 97701
 - o Assessor Tax Map: 17-13-18C as Tax Lot 100

- Property 2:
 - o Assigned address: No Situs Address
 - o Assessor Tax Map: 17-13-18 as Tax Lot 600

HEARING DATE: Tuesday, September 21, 2021

HEARING START: 6:00 pm

STAFF PLANNER: Kyle Collins, Associate Planner
Kyle.Collins@deschutes.org, 541-383-4427

DOCUMENTS: Can be viewed and downloaded from:
www.buildingpermits.oregon.gov and <http://dial.deschutes.org>

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
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

PUBLIC HEARING PARTICIPATION

- If you wish to provide testimony during the public hearing, please contact the staff planner by 5 pm on September 20, 2021. Testimony can be provided as described below.
- Members of the public may listen, view, and/or participate in this hearing using Zoom. Using Zoom is free of charge. To login to the electronic meeting online using your computer, copy this link:
<https://us02web.zoom.us/j/82107828033?pwd=eHROVW53aGRYUFh2b1pMdU4wMnFmZz09>
 Using this option may require you to download the Zoom app to your device.
- Members of the public can access the meeting via telephone, dial 1-253-215-8782. When prompted, enter the following: Webinar ID: 821-0782-8033 and Password: 439097.
- Written comments can also be submitted to the record. Please see the Document Submission section below for details regarding written submittals.
- If participation during the hearing by video and telephone is not possible, the public can provide testimony in person at 6 pm in the Barnes and Sawyer Rooms of the Deschutes Services Center, 1300 NW Wall Street, Bend. Please be aware County staff will enforce the 6-foot social distancing standard in the hearing room. Additionally, all participants attending in person must wear a face covering at all times.

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

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

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

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

DOCUMENT SUBMISSION

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

In Person

We accept all printed documents.

U.S. Mail

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

Email

Email submittals should be directed to Kyle.Collins@deschutes.org and must comply with the following guidelines:

- Submission is 20 pages or less
- Documents can be printed in black and white only
- Documents can be printed on 8.5" x 11" paper

Any email submittal which exceeds the guidelines provided above must be submitted as a paper copy.

Limitations

- Deschutes County does not take responsibility for retrieving information from a website link or a personal cloud storage service. It is the submitter's responsibility to provide the specific information they wish to enter into the record. We will print the email which includes the link(s), however, we will not retrieve any information on behalf of the submitter.
- Deschutes County makes an effort to scan all submittals as soon as possible. Recognizing staff availability and workload, there is often a delay between the submittal of a document to the record, and when it is scanned and uploaded to Accela Citizen Access (ACA) and Deschutes County Property Information (DIAL). For this reason, the official record is the file that resides in the Community Development office. The electronic record in ACA and DIAL is not a substitute for the official record.
- To ensure your submission is entered into the correct land use record, please specify the land use file number(s).

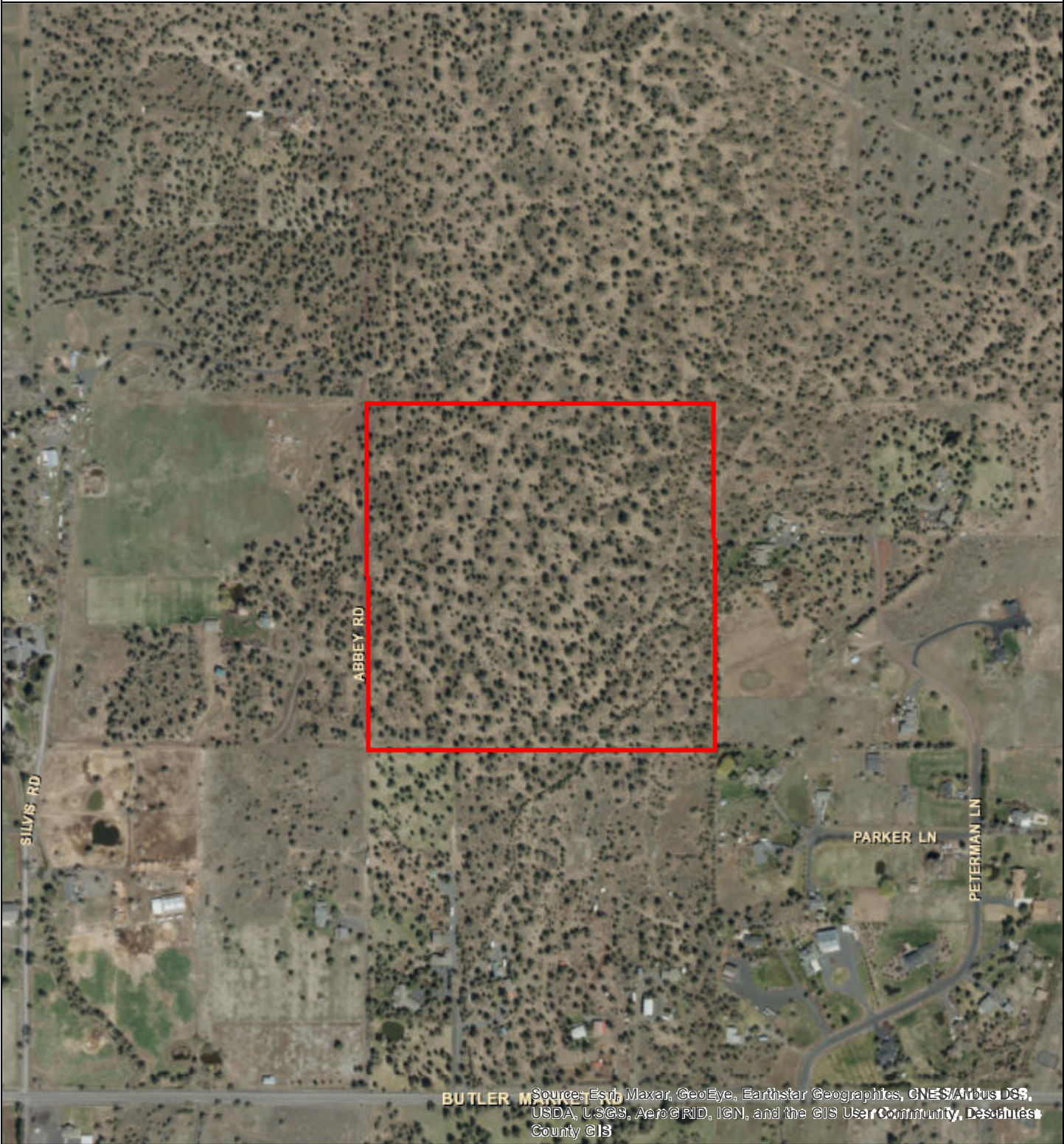
- For the open record period after a public hearing, electronic submittals are valid **if received by the County's server** by the deadline established for the land use action.
- IF YOU WISH TO BE NOTIFIED OF ANY DECISION RELATED TO THIS APPLICATION, YOU MUST PROVIDE A MAILING ADDRESS.

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

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

Property 1: 63350 Abbey Road, Bend, OR 97701

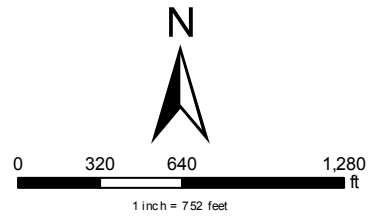
File Nos. 247-21-000616-PA, 21-617-ZC



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

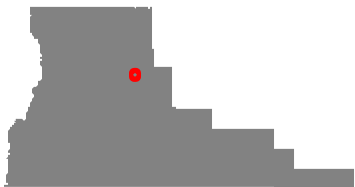
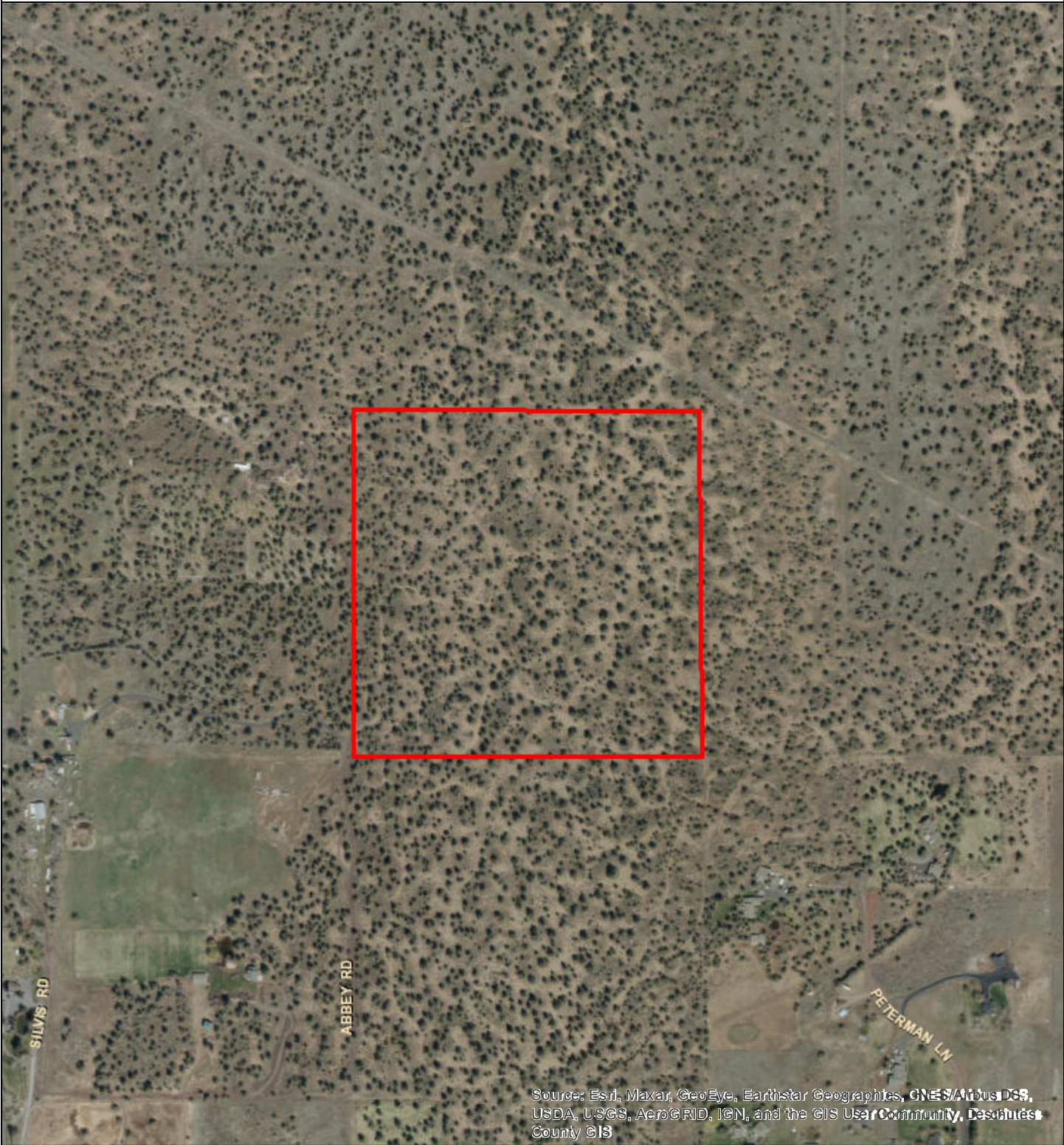


Date: 6/22/2021

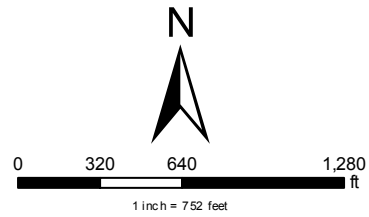


Property 2: No Situs Address (Map and Taxlot: 1713180000600)

File Nos. 247-21-000616-PA, 21-617-ZC



Date: 6/22/2021





FINDINGS AND DECISION

FILE NUMBER: 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

**SUBJECT PROPERTIES/
OWNER:**

Property 1:

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

Property 2:

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

**ATTORNEY
FOR APPLICANT:**

Liz Fancher
2465 NW Sacagawea Lane
Bend, OR 97703

**TRANSPORTATION
ENGINEER:**

Joe Bessman, PE
Transight Consulting, LLC

REQUEST:

The Applicant requests approval of a Comprehensive Plan Amendment to change the designation of the properties from Agricultural (AG) to Rural Residential Exception Area (RREA). The Applicant also requests approval of a corresponding Zone Change to rezone the properties from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA10).

STAFF CONTACT: Kyle Collins, Associate Planner
Phone: 541-383-4427
Email: Kyle.Collins@deschutes.org

DOCUMENTS: Can be viewed and downloaded from:
www.buildingpermits.oregon.gov and <http://dial.deschutes.org>

I. APPLICABLE CRITERIA

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

- Chapter 18.04, Title, Purpose, and Definitions
- Chapter 18.16, Exclusive Farm Use Zones (EFU)
- Chapter 18.32, 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
 - 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. BASIC FINDINGS

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.

SITE DESCRIPTION: The subject properties are each approximately 40 acres in size and adjacent to one another in a north-south orientation. The properties are relatively level with mild undulating topography. Vegetation consists of juniper, sage brush, grasses, and other native vegetation. Both properties are undeveloped. Access to the properties 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 properties do not have water rights, and neither has been farmed or used in conjunction

with any farming operation in the past. The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies two soil complex units on the properties: 38B, Deskamp-Gosney complex and 58C, Gosney-Rock outcrop-Deskamp complex. Neither soil complex 38B, the predominant soil complex on the subject properties, nor soil complex 58C, are defined as high-value soils by DCC 18.04.

Additionally, as discussed in detail below in the Soils section, there is no irrigation on the subject properties 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 these 40 acre parcels are predominantly shallow and ashy-skeletal and rock outcrops Land Capability Class 7 and 8.

PROPOSAL: The Applicant requests approval of a Comprehensive Plan Map Amendment to change the designation of the subject properties 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 properties 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 proposed that no exception to Statewide Planning Goal 3, Agricultural Land is required because the subject properties are not agricultural land.

Submitted with the application is an Order 1 Soil Survey of the subject properties, 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" hereby 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.

SOILS: According to Natural Resources Conservation Service (NRCS) maps of the area, the subject properties contain two different soil types as described below. The subject properties contain 58C – Gosney-Rock Outcrop-Deskamp complex, and 36A – Deskamp loamy sand.

The Applicant submitted a soil study report (Applicant's Exhibit D), which was prepared by a certified soils scientist and soil classifier that determined the subject properties are comprised of soils that do not qualify as Agricultural Land². The purpose of this soil study was to inventory and assess the soils on the subject properties 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.

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

² As defined in OAR 660-033-0020, 660-033-0030

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 properties 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 when unirrigated, and 4e when irrigated. Approximately 3.7 percent of the subject properties is made up of this soil type, all located within the northern parcel.

Further discussion regarding soils is found in Section III below.

SURROUNDING LAND USES: The subject properties are predominately surrounded by EFU-zoned lands 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: Immediately north and northeast of the subject properties is an area of EFU-zoned properties. 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 properties 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.

East: Immediately east of the subject properties are four 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 or agricultural 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.

South: Immediately south of the subject properties are four MUA10-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 MUA10-zoned properties located within the Classic Estates subdivision, all of which are developed with single-family dwellings and a variety of residential accessory structures.

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.

Staff Comment: The comments from COID only reference one property (Map and Tax Lot: 1713180000600). However, staff notes that 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 properties are located within the boundaries of the Central Oregon Irrigation District, but neither parcel contains any listed water rights.

The following agencies did not respond to the notice: Bend Fire Department, City of Bend Planning Department, City of Bend Public Works Department, Oregon Department of Transportation - Region 4, City of Bend Growth Management Department, Bureau of Land Management, Oregon Department of Agriculture, Oregon Department of Land Conservation and Development, Deschutes County Assessor, Deschutes County Environmental Soils Division, Deschutes County Forester, Deschutes County Property Management Division, Deschutes County Road Department, Oregon Department of Fish and Wildlife, District 11 Watermaster, and Bend Municipal Airport.

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.

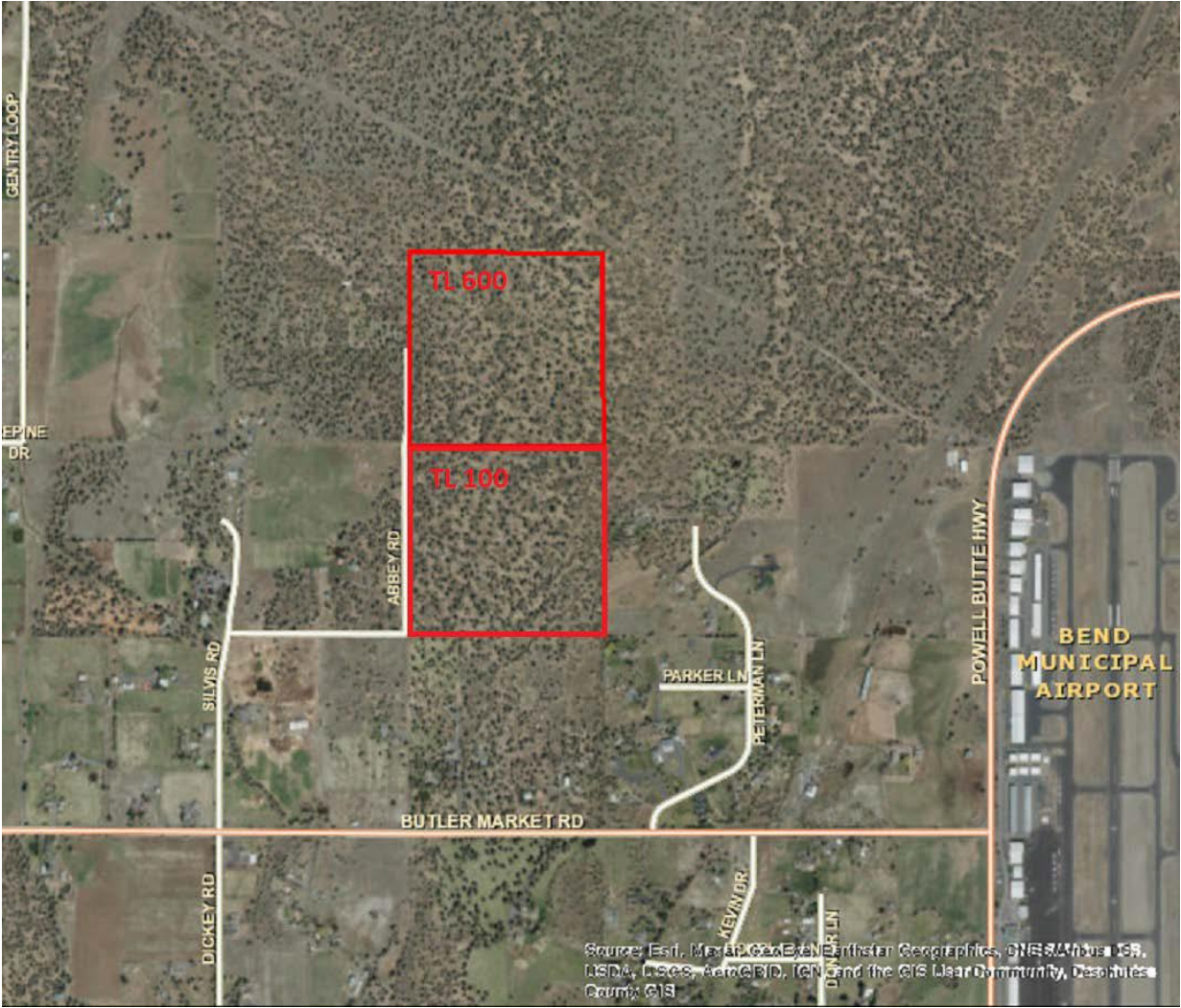
There is abundant wildlife in these two parcels. It is their homes and who knows where they be forced to retreat. We see them regularly.

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.”

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

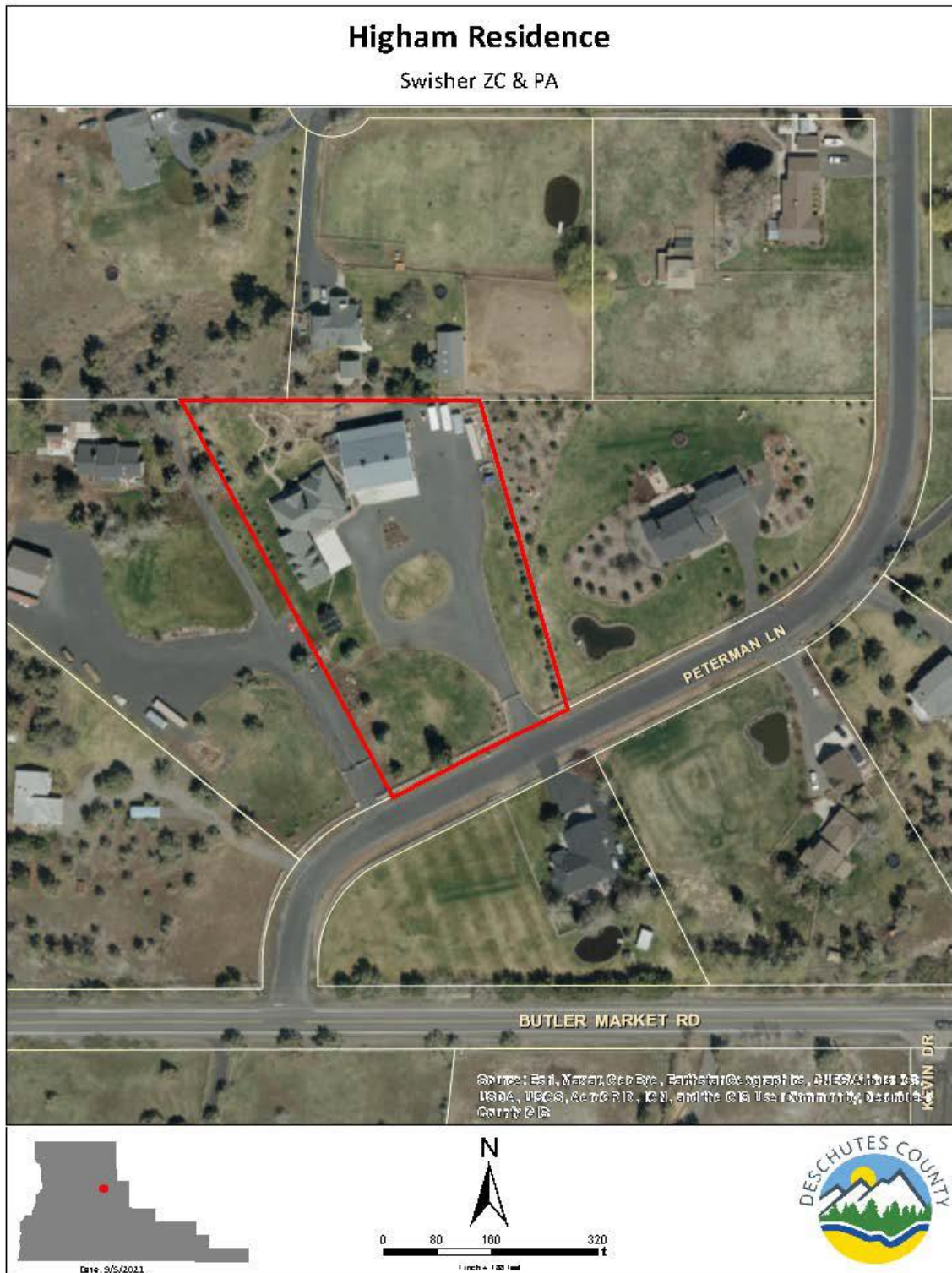
impact analysis filed with the land use applications.

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.

I. Unsuitability for Farm Use: The letter filed by the Conrads states that there is rock at the surface of their property which adjoins the subject property. They express concern that “extreme measures” will be required to build foundations for homes on the subject property. This comment confirms the results of the applicant’s soils study. The study shows that a vast majority of the subject properties are comprised of rock and Class VII soils that do not meet the definition of “Agricultural Land” provided by Statewide Land Use Planning Goal 3.”

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.

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. FINDINGS & CONCLUSIONS

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.136, Amendments

Section 18.136.010, Amendments

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

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

Section 18.136.020, Rezoning Standards

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

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

FINDING: The Applicant provided the following response 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 and respond to only the Comprehensive Plan Goals and policies that apply, which are listed in the Comprehensive Plan section of this staff report in further detail. Staff agrees with the Applicant’s analysis and finds the above provision to be met based on Comprehensive Plan conformance as demonstrated 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.

Staff finds the Applicant has demonstrated the change in classification is consistent with the purpose and intent of the MUA10 Zone, but asks the Hearings Officer to amend or add to these findings as the Hearings Officer sees fit.

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: Although there are no plans to develop the properties in their current state, the above criterion specifically asks if the proposed zone exchange will *presently* serve public health, safety, and welfare. The Applicant provides 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

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. There are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare. Prior to development of the properties, the Applicant would 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. Staff finds this provision 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 provides 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.

In addition to these comments, the Applicant has provided specific findings for each relevant Comprehensive Plan goal and policy, which are addressed below. Staff 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, but asks the Hearings Officer to amend or add to these findings as the Hearings Officer sees fit.

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 properties from EFU to MUA10 and re-designate the properties from Agriculture to Rural Residential Exception Area. The Applicant has 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.

Considering the Applicant's above response, staff requests the Hearings Officer make specific findings on this issue.

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 has provided the following response in the 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."*

Staff is uncertain if this goal is met by the available information in the record and requests the Hearings Officer make specific findings on this topic.

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

FINDING: The Applicant is not asking to amend the subzone that applies to the subject properties; rather, the Applicant is seeking a change under Policy 2.2.3 and has provided evidence to support rezoning the subject properties to MUA10.

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

FINDING: The Applicant is seeking approval of a plan amendment and zone change to re-designate and rezone the properties from Agricultural to Rural Residential Exception Area. The Applicant is not seeking an exception to Goal 3 – Agricultural Lands, but rather seeks to demonstrate that the subject properties do not meet the state definition of “Agricultural Land” as defined in Statewide Planning Goal 3 (OAR 660-033-0020).

The Applicant has 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.

Staff agrees that the facts presented by the Applicant in the burden of proof for the subject application are similar to those in the *Wetherell* decisions and in the aforementioned Deschutes County plan amendment and zone change applications. Therefore, the Applicant has the potential to prove the properties are not agricultural land and do not require an exception to Goal 3 under state law.

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. Staff concurs with the County’s previous determinations in plan amendment and zone change applications and finds the proposal is consistent with this policy.

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

Policy 2.2.13 Identify and retain accurately designated agricultural lands.

FINDING: This plan policy requires the County to identify and retain agricultural lands that are accurately designated. The Applicant proposes that the subject properties were not accurately designated as demonstrated by the soil study, NRCS soil data, and the Applicant’s burden of proof. Further discussion on the soil analysis provided by the Applicant is detailed under the OAR Division 33 criteria below.

Section 2.5, Water Resources Policies

Goal 6, Coordinate land use and water policies.

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

FINDING: The Applicant is not proposing a specific development application at this time. Therefore, the Applicant is not required to demonstrate the water impacts associated with development. Rather, the Applicant will be required to address this criterion during development of the subject properties, which would be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat). This criterion does not apply to the subject application.

Section 2.7, Open Spaces, Scenic Views and Sites

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

Policy 2.7.3 Support efforts to identify and protect significant open spaces and visually important areas including those that provide a visual separation between communities such as the open spaces of Bend and Redmond or lands that are visually prominent.

Policy 2.7.5 Encourage new development to be sensitive to scenic views and sites.

FINDING: These policies are fulfilled by the County’s Goal 5 program. The County protects scenic views and sites along major rivers and roadways by imposing Landscape Management (LM) Combining Zones to adjacent properties. Staff notes that no LM overlay zone applies to either of the subject properties at this time. Furthermore, no new development is proposed under the present application. These provisions of the plan, therefore, are not impacted by 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 provides 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.

Staff notes that the MUA10 Zone is a rural residential zone and as discussed in the Findings of Fact above, there are several adjacent properties to the south and southeast that are zoned MUA10. Staff notes this policy references the soil quality, which staff has discussed above. Staff is uncertain if this policy is met by the available information in the record and requests the Hearings Officer make specific findings on this topic.

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 taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR.

FINDING: The Applicant provided the following response to this provision in the burden of proof:

*The quoted language is a part of the background text of the County's comprehensive plan. It is not a plan policy or directive and it is not an approval standard for this application. 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 use 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 require 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 plan amendment and zone change by adopting the following finding by Hearings Officer Ken Helm:

"I find that Deschutes County has interpreted the RREA plan designation as the property "catchall" designation for non-resource land."

As a result, the RREA plan designation is the appropriate plan designation for the subject property.

Based on the above, staff agrees with the past Deschutes County Hearings Officer interpretations and finds that the above language is not a policy and does not require an exception to the applicable Statewide Planning Goal 3. Staff finds the proposed RREA plan designation is the appropriate plan designation to apply to the subject property, but asks the Hearings Officer to make specific findings related to this language.

Section 3.7, Transportation

**Appendix C – Transportation System Plan
ARTERIAL AND COLLECTOR ROAD PLAN**

...

Goal 4. Establish a transportation system, supportive of a geographically distributed and diversified economic base, while also providing a safe, efficient network for residential mobility and tourism.

...

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

FINDING: This policy applies to the County and advises it to consider the roadway function, classification and capacity as criteria for plan amendments and zone changes. The County will comply with this direction by determining compliance with the Transportation Planning Rule (TPR) also known as 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 properties are not zoned for forest lands, nor are any of the properties within a seven-mile radius. The properties do not contain merchantable tree species and there is no evidence in the record that the properties have been employed for forestry uses historically. None of the soil units comprising the parcel is rated for forest uses according to NRCS data. The properties do not appear to qualify as forest land.

Division 33 - Agricultural Lands & Statewide Planning Goal 3 - Agricultural Lands;

OAR 660-015-0000(3)

To preserve and maintain agricultural lands.

Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural land use policy expressed in ORS 215.243 and 215.700.

FINDING: Goal 3 continues on to define "Agricultural Land," which is repeated in OAR 660-033-0020(1). Staff makes findings on this topic below and incorporates those findings herein by reference.

OAR 660-033-0020, Definitions

For purposes of this division, the definitions in ORS 197.015, the Statewide Planning Goals, and OAR Chapter 660 shall apply. In addition, the following definitions shall apply:

(1)(a) "Agricultural Land" as defined in Goal 3 includes:

- (A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon³;**

FINDING: The Applicant's basis for not requesting an exception to Goal 3 is based on the premise that the subject properties are not defined as "Agricultural Land." In support, the Applicant offers the following response as included 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.*

Staff has reviewed the soil study provided by Mr. Gallagher of Red Hill Soils and agrees with the Applicant's representation of the data for the subject properties. Staff finds, based on the submitted soil study and the above OAR definition, that the subject properties are comprised predominantly of Class 7 and 8 soils and, therefore, do not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A) above.

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

FINDING: The Applicant's basis for not requesting an exception to Goal 3 is based on the proposal that the subject properties are not defined as "Agricultural Land." The Applicant provides 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

³ 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.

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.

Staff agrees with the Applicant that many of the factors surrounding the subject properties – 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 farming on the subject properties. Staff requests the Hearings Officer make specific findings on this issue.

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

FINDING: The Applicant offers the following response as included 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 trees. Dwelling and vacation cabin on property.	Grazing Fertilizing field Herbicide use Irrigation	No, about 1320' west of subject property 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.

Staff agrees with the Applicant's analysis and finds no feasible way that the subject properties are necessary for the purposes of permitting farm practices on any nearby parcels discussed in the Findings of Fact section above, or the larger area more generally. This finding is based in part on poor quality soils and lack of irrigation. If the Hearings Officer disagrees with Staff's assessment, Staff requests the Hearings Officer make specific findings on this issue.

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

FINDING: The Applicant provided the following response 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.*

Considering the Applicant's response, above, Staff requests the Hearings Officer make specific findings on this issue.

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

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

OAR 660-033-0030, Identifying Agricultural Land

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

FINDING: The Applicant addressed the factors in OAR 660-033-0020(1) above. The properties are not "agricultural land," as referenced in OAR 660-033-0030(1) above, and contain barriers for farm use including poor quality soils and lack of irrigation. The soil study produced by Mr. Gallagher focuses solely on the land within the subject parcels and the Applicant has provided responses indicating the subject parcels are not necessary to permit farm practices undertaken on adjacent and nearby lands. Staff requests the Hearings Officer make specific findings on this issue, in part based on the Applicant's responses to OAR 660-033-0020(1), above.

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

FINDING: The Applicant-submitted evidence shows that the subject properties are not suitable for farm use and are not necessary to permit farm practices to be undertaken on adjacent or nearby lands. The ownership of the subject parcels is not used to determine whether the parcel is "agricultural land."

- (5)(a) **More detailed data on soil capability than is contained in the USDA Natural Resources Conservation Service (NRCS) soil maps and soil surveys may be used to**

define agricultural land. However, the more detailed soils data shall be related to the NRCS land capability classification system.

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

FINDING: The soil study prepared by Mr. Gallagher provides more detailed soils information than contained in the NRCS Web Soil Survey. NRCS sources provide general soils data for large units of land. The soil study provides detailed and accurate information about individual parcels based on numerous soil samples taken from the subject properties. The soil study is related to the NRCS Land Capability Classification (LCC) system that classifies soils class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.

The NRCS mapping for the subject properties is shown below in **Figures 1 and 2**. According to the NRCS Web Soil Survey tool, the subject properties contain approximately 96.3% 38B soil and contain 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)

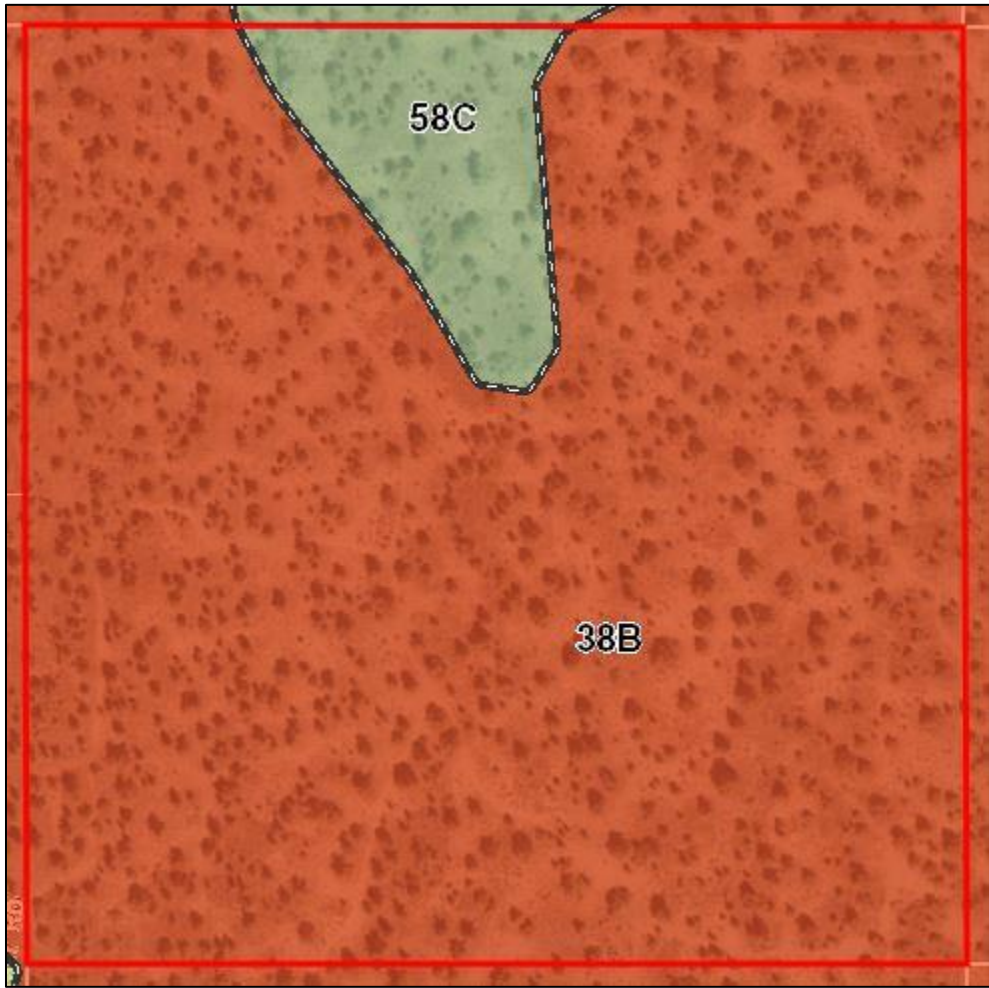
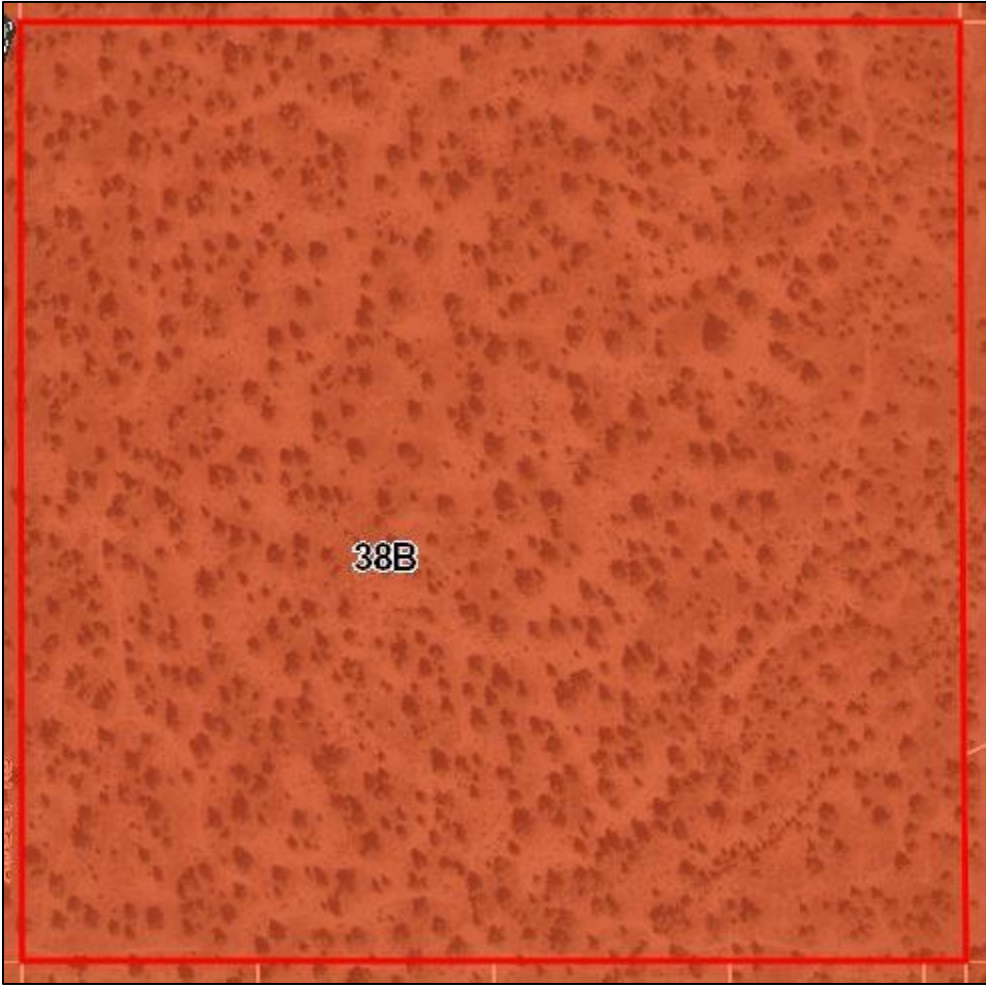


Figure 2 - NRCS Soil Data (Tax Lot 100)



The submitted soil study prepared by Mr. Gallagher of Red Hill Soils is accompanied in the submitted application materials by correspondence from the Department of Land Conservation and Development (DLCD). The DLCD correspondence confirms that Mr. Gallagher's prepared soil study is complete and consistent with the reporting requirements for agricultural soils capability as dictated by DLCD. Based on Mr. Gallagher's qualifications as a certified Soil Scientist and Soil Classifier, staff finds the submitted soil study to be definitive and accurate in terms of site-specific soil information for the subject properties. Staff requests the Hearings Officer make specific findings on this issue.

- (c) This section and OAR 660-033-0045 apply to:**
 - (A) A change to the designation of land planned and zoned for exclusive farm use, forest use or mixed farm-forest use to a non-resource plan designation and zone on the basis that such land is not agricultural land; and**

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

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

FINDING: The Applicant submitted a soil 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 DLCDC that the soil study is complete and consistent with DLCDC's reporting requirements. Staff finds this criterion to be met based on the submitted soil study and confirmation of completeness and consistency from DLCDC.

- (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 DLCDC certified soil study as well as NRCS soil data. Staff finds the Applicant has demonstrated compliance with this provision.

DIVISION 12, TRANSPORTATION PLANNING

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

- (1) ***If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would:***
- (a) ***Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);***
 - (b) ***Change standards implementing a functional classification system; or***
 - (c) ***Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.***

- (A) ***Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;***
- (B) ***Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or***
- (C) ***Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.***

FINDING: This 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. Based on the TIA, staff believes that the proposed plan amendment and zone change will be consistent with the identified function, capacity, and performance standards of the County’s transportation facilities in the area. Staff believes 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 the County’s transportation system plan.

Based on the County Senior Transportation Planner’s comments and the traffic study from Transight Consulting LLC, staff finds compliance with the Transportation Planning Rule has been effectively demonstrated. Staff further notes that, despite the transportation information provided by the Applicant and via agency comment, public comments received by the County indicate concerns with potential traffic impacts as a result of the proposed plan amendment and zone change. Staff asks the Hearings Officer to make specific findings related to these criteria.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

[OAR 660-015, Division 15, Statewide Planning Goals and Guidelines](#)

FINDING: The Statewide Planning Goals are outlined below in the Applicant’s burden of proof:

Goal 1, Citizen Involvement. *Deschutes County will provide notice of the application to the public through mailed notice to affected property owners and by requiring the applicant to post a “proposed land use action sign” on the subject property. Notice of the public hearings held regarding this application will be placed in the Bend Bulletin. A minimum of two public hearings will be held to consider the application.*

Goal 2, Land Use Planning. Goals, policies and processes related to zone change applications are included in the Deschutes County Comprehensive Plan and Titles 18 and 23 of the Deschutes County Code. The outcome of the application will be based on findings of fact and conclusions of law related to the applicable provisions of those laws as required by Goal 2.

Goal 3, Agricultural Lands. The applicant has shown that the subject property is not agricultural land so Goal 3 does not apply.

Goal 4, Forest Lands. The existing site and surrounding areas do not include any lands that are suited for forestry operations. Goal 4 says that forest lands “are those lands acknowledged as forest lands as of the date of adoption of this goal amendment.” The subject property does not include lands acknowledged as forest lands as of the date of adoption of Goal 4. Goal 4 also says that “[w]here ^{**a} plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources.” This plan amendment does not involve any forest land. The subject property does not contain any merchantable timber and is not located in a forested part of Deschutes County.

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces. The subject property does not contain any inventoried Goal 5 resources.

Goal 6, Air, Water and Land Resources Quality. The approval of this application will not cause a measurable impact on Goal 6 resources. Approval will make it more likely that the irrigation and pond water rights associated with the property will ultimately be returned to the Deschutes River or used to irrigate productive farm ground found elsewhere in Deschutes County.

Goal 7, Areas Subject to Natural Disasters and Hazards. This goal is not applicable because the subject property is not located in an area that is recognized by the comprehensive plan as a known natural disaster or hazard area.

Goal 8, Recreational Needs. This goal is not applicable because the property is not planned to meet the recreational needs of Deschutes County residents and does not directly impact areas that meet Goal 8 needs.

Goal 9, Economy of the State. This goal does not apply to this application because the subject property is not designated as Goal 9 economic development land. In addition, the approval of this application will not adversely impact economic activities of the state or 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.*

Staff generally accepts the Applicant's responses and finds compliance with the applicable Statewide Planning Goals has been effectively demonstrated. However, staff would point out one exception to the response provided for Goal 7, Areas Subject to Natural Hazards and Disasters: According to the Deschutes County DIAL property information and Interactive Map the entirety of Deschutes County, including the subject properties, is located in a Wildfire Hazard Area. Additionally, the subject properties are also located in Rural Fire Protection District #2. Staff notes that rezoning the properties to MUA10 does not change the Wildfire Hazard Area designation. Any future development of the properties would need to demonstrate compliance with any fire protection regulations and requirements of Deschutes County.

Staff makes note of public comments concerning potential traffic impacts, impacts to potential open space, and impacts to wildlife habitat highlighted by neighboring property owners and residents. While these comments detail concerns related to specific potential use patterns, staff finds the overall proposal appears to comply with the applicable Statewide Planning Goals for the purposes of this review.

IV. CONCLUSION & RECOMMENDATION

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

DESCHUTES COUNTY PLANNING DIVISION



Written by: Kyle Collins, Associate Planner



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