



STAFF REPORT

FILE NUMBER: 247-21-000881-PA, 882-ZC

HEARING: April 26, 2022, 6:00 p.m.
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

**SUBJECT PROPERTY/
OWNER(S):**

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

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

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

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

**ATTORNEY
FOR APPLICANT:**

Ken Katzaroff
Schwabe, Williamson & Wyatt, P.C.
360 SW Bond Street, Suite 500
Bend, OR 97702

**TRANSPORTATION
ENGINEER:**

Scott Ferguson, PE
Ferguson & Associates, Inc.

REQUEST:

The Applicant requests approval of a Comprehensive Plan Amendment to change the designation of the property from Agricultural (AG) to Rural Industrial (RI) and a corresponding Zone Change to rezone the property from Exclusive Farm Use (EFU) to Rural Industrial (RI). The request includes a Goal Exception to Oregon Statewide Planning Goal 14 – Urbanization.

STAFF CONTACT:

Tarik Rawlings, Associate Planner
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Email: Tarik.Rawlings@deschutes.org

DOCUMENTS:

Can be viewed and downloaded from:
<https://www.deschutescounty.gov/cd/page/247-21-000881-pa-and-247-21-000882-zc-Applicant-initiated-plan-amendment-and-zone-change>

I. APPLICABLE CRITERIA

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

- Chapter 18.04, Title, Purpose, and Definitions
- Chapter 18.16, Exclusive Farm Use Zones (EFU)
- Chapter 18.80, Airport Safety Combining Zone (AS)
- Chapter 18.100, Rural Industrial Zone (RI)
- Chapter 18.120, Exceptions
- Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance

Deschutes County Comprehensive Plan

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

Oregon Administrative Rules (OAR), Chapter 660

- Division 4, Interpretation of Goal 2 Exception Process
- Division 6, Forest Lands
- Division 12, Transportation Planning
- Division 14, Application of the Statewide Planning Goals to Newly Incorporated Cities, Annexation, and Urban Development on Rural Lands
- Division 15, Statewide Planning Goals and Guidelines
- Division 33, Agricultural Land

Oregon Revised Statutes (ORS)

- Chapter 197.732, Goal Exceptions
- Chapter 197.734, Exceptions to Certain Statewide Planning Goal Criteria
- Chapter 215.010, Definitions

II. **BASIC FINDINGS**

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

B. Permits requiring verification

- 1. Unless an exception applies pursuant to subsection (B)(2) below, verifying a lot parcel pursuant to subsection (C) shall be required to the issuance of the following permits:***
 - a. Any land use permit for a unit of land in the Exclusive Farm Use Zones (DCC Chapter 18.16), Forest Use Zone – F1 (DCC Chapter 18.36), or Forest Use Zone – F2 (DCC Chapter 18.40);***
 - b. Any permit for a lot or parcel that includes wetlands as show on the Statewide Wetlands Inventory;***
 - c. Any permit for a lot or parcel subject to wildlife habitat special assessment;***
 - d. In all zones, a land use permit relocating property lines that reduces in size a lot or parcel'***
 - e. In all zones, a land use, structural, or non-emergency on-site sewage disposal system permit if the lot or parcel is smaller than the minimum area required in the applicable zone;***

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

SITE DESCRIPTION: The subject properties are located approximately 4.8 miles south of the City of Redmond and approximately 4.25 miles north of the City of Bend. The three subject Tax Lots (301, 305, and 500) constitute a total of approximately 19.12 contiguous acres and are located on the west side of Highway 97. Tax Lot 301 is landlocked between Tax Lots 305 and 500 to the south; Highway 97 corridor, a Central Oregon Irrigation District (COID) canal, and two (2) Exclusive Farm Use (EFU) properties currently receiving farm tax deferral to the east; and a rural residential subdivision to the west.

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

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

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

As discussed in detail below in the Soils section, an Agricultural Soils Capability Assessment (Order 1 soil survey) was conducted on each of the three properties and determined that the subject properties do not constitute agricultural land as defined in Statewide Planning Goal 3 and are generally comprised of unsuited Class 7 and 8 soils as detailed in Deschutes County Code (DCC) and DLCDC definitions.

PROPOSAL: The Applicant requests approval of a Comprehensive Plan Map Amendment to change the designation of the subject property from Agricultural (AG) designation to a Rural Industrial (RI) designation. The Applicant also requests approval of a corresponding Zoning Map Amendment to change the zoning of the subject property from Exclusive Farm Use (EFU) to Rural Industrial (RI). The Applicant asks that Deschutes County change the zoning and the plan designation because the RI zoning district is the more appropriate zone for the subject property as the subject property is not agriculturally viable and is better suited for uses consistent with the RI Zone and historical uses utilized on the subject properties may be allowed under the RI Zone. The Applicant's submitted burden of proof states that the Applicant intends to utilize the subject properties to develop a mini-storage facility on Tax Lot 301 (a conditional use within the RI Zone) and maintain the existing equipment repair/storage/rental facilities located on Tax Lots 305 and 500 (an outright use within the RI Zone).

Submitted with the application are three (3) Order 1 Soil Surveys for each of the three (3) subject properties, titled "Johnson - Order 1 Soil Survey Report" (Tax Lot 301), "LBNW LLC - Order 1 Soil Survey Report" (Tax Lot 305), and "LBNW LLC - Order 1 Soil Survey Report" (Tax Lot 500) (hereafter referred to collectively as the "soil study") prepared by soil scientist Gary Kitzrow, CPSC/CPSS #1741 of Growing Soils Environmental Associates. The Applicant has also submitted a traffic analysis prepared by Scott Ferguson of Ferguson & Associate, Inc titled "Site Traffic Report and TPR Assessment for Proposed Zone Change-Deschutes County, OR" hereby referred to as "traffic study." Additionally, the Applicant 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: Tax Lots 305 and 301 contain 0.20 acres and 2.70 acres of water rights, respectively. The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies three soil complex units on the property: 31A, Deschutes sandy loam, 0 to 3 percent slopes; 38B, Deskamp-Gosney complex, 0 to 8 percent slopes; and 58C, Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes. An Agricultural Soils Capability Assessment (Order 1 soil survey) was conducted on each of the three properties and determined as follows (as quoted from the relevant soil studies included in the submitted application materials as Exhibits 7-9):

- **Tax Lot 301:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and non-irrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. This study area and legal lot of record is comprised of 8.00 acres or 53.1% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.
- **Tax Lot 305:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and non-irrigated). These lithic, entic Gosney soil mapping units are shallow, have extremely restrictive rooting capabilities and low water holding capacities. Conversely, Deskamp and Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. Noteworthy is the fact that along the western boundary and southern boundary of this lot are large inclusions of rubble and rock outcrops. This is found regardless of the associated three soils delineated in this analysis. This study area and legal lot of record is comprised of 2.45 acres or 81.7% of the landbase as generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.
- **Tax Lot 500:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and non-irrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. This study area and legal lot of record is comprised of 0.93 Acres or 87.7% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

STAFF COMMENT: Staff notes that, despite the inclusion of the term “legal lot of record” included above, Lot of Record determination for the subject properties is not relevant to the subject applications nor does the subject staff report constitute any verification of the subject properties as legal lots of record. As expressed previously, the Applicant would be required to receive lot of record verification prior to any development on the subject property.

The Applicant submitted a soil study report (Applicant’s Exhibits 7-9), which was prepared by a certified soils scientist and soil classifier that determined the subject property is predominantly comprised of soils that do not qualify as Agricultural Land². The purpose of this soil study was to inventory and assess the soils on the subject property and to provide more detailed data on soil classifications and ratings than is contained in the NRCS soils maps. The NRCS soil map units identified on the property are described below.

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

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 61.4 percent (Tax Lot 301), 47.7 percent (Tax Lot 305), and 2.8 percent (Tax Lot 500) of the subject properties are made up of this soil type, respectively.

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

Further discussion regarding soils is found in Section III below.

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

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

East: East of the subject properties are two parcels zoned EFU. Tax Lot 300 (Assessor's Map 16-12-23) is a 21.56-acre parcel developed with a single-family manufactured dwelling, an accessory structure, is partially irrigated, and currently receiving farm tax deferral. Tax Lot 306 (Assessor's Map 16-12-23) is a 20.54-acre parcel developed with a single-family dwelling, an accessory structure previously utilized as a medical hardship dwelling, is partially irrigated, and currently receiving farm tax deferral. Additionally, to the east and southeast, is the Highway 97 transportation corridor.

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

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

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

In *Aceti* (247-20-000438-PA), 439-ZC, a 2.5-mile radius was used as the area of analysis for surrounding properties and their uses and developments. Staff asks the Hearings Officer to determine what area radius and level of review detail are required for the subject applications to adequately determine the level of analysis required for surrounding properties and neighborhood/regional analysis.

LAND USE HISTORY:

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

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

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

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

Deschutes County Senior Transportation Planner, Peter Russell

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

The submitted traffic analysis by Ferguson & Associates dated Aug. 11, 2021, is deficient in several areas and does not comply with Deschutes County Code (DCC) 18.116.310 or the Transportation Planning Rule (TPR) and is thus unacceptable. Examples of the traffic analysis' deficiencies include the following major areas. DCC 18116.310(E)(4) requires a 20-year timeframe for analysis; the study has no such analysis. The traffic analysis lack any operational analysis, thus making it impossible to determine the before/after volume-capacity ratio of the access, which means it is impossible to determine if the plan amendment/zone change has any significant effect. Without determining if there is a significant effect or not, the traffic analysis does not comply with the TPR at Oregon Administrative Rule (OAR) 660-0012-0060. The traffic analysis assumes a right-in, right-out access point; yet there is no physical obstruction (pork chop barrier or raised median) restricting moves to RIRO. The property is slightly closer to Bend than Redmond, yet the trip distribution is almost exclusively skewed toward trips being to/from Redmond. Staff finds that a dubious assumption given Redmond's population of roughly 25,000 vs. Bend's roughly 91,000. Staff disagrees with the baseline trip assumptions under the current zoning. In several recent plan amendment/zone changes involving EFU, the current highest trip generator was a single-family home. The traffic analysis should use one of the specific outright permitted uses found in DCC 18.16.020. The current study significantly understates the p.m. peak hour trips of the EFU zoning. The traffic analysis does not include a reasonable worst case scenario of the outright permitted uses under the Rural Industrial zone. If the Applicant believes the traffic analysis is a reasonable-worst case scenario, then the Applicant needs to provide further justification or rationale. The study simply states "...the assumed uses generated more traffic than the site could handle with existing access configurations, no further examination of potential uses was examined." There is no supporting evidence for this claim; nor is there any explanation why the existing access could not be modified to accommodate more traffic. Finally, the traffic study references a potential mini-storage, but there is not a simultaneous site plan submittal for any specific use.

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

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$4,757 per p.m. peak hour trip. As the plan amendment/zone change by itself does not generate any traffic, no SDCs apply at this time. SDCs will be assessed based on development of the property. When development occurs, the SDC is due prior to issuance of certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final.

THE PROVIDED SDC RATE IS ONLY VALID UNTIL JUNE 30, 2022. DESCHUTES COUNTY'S SDC RATE IS INDEXED AND RESETS EVERY JULY 1. WHEN PAYING AN SDC, THE ACTUAL AMOUNT DUE IS DETERMINED BY USING THE CURRENT SDC RATE AT THE DATE THE BUILDING PERMIT IS PULLED.

STAFF COMMENT: Upon receipt of the County Senior Transportation Planner's initial comment, above, the Applicant submitted a revised traffic study, dated March 18, 2022 and sent to staff via email on April 6, 2022. In response, the following comment was offered by the County's Senior Transportation Planner:

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

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

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

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

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

conditional uses and only presents this argument to demonstrate another area where the revised traffic analysis is deficient).

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

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

STAFF COMMENT: Upon receipt of the County Senior Transportation Planner's second comment, above, the Applicant submitted additional comments, dated April 8, 2022 and sent to staff via email on April 8, 2022. In response, the following comment was offered by the County's Senior Transportation Planner (dated April 11, 2022):

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

- *The Applicant is correct, I mistakenly said the revised TIA uses Warehouse (Land Use 150) and Mini-Warehouse (LU 151), rather than land use actually used, which was Manufacturing (LU 140). I apologize for the error.*
- *The Applicant's TIA uses the wrong version of ITE Trip Generation Manual. The TIA use the 10th Edition (see page 7 of March 18 TIA. Deschutes County Code (DCC) 18.116.310(F)(2) and 18.116.310(G)(2). The 11th Edition is the most recent version of the ITE Trip Generation Manual.*
- *Staff notes that trip caps are notoriously difficult to monitor and enforce. The only regulatory ability the County has is to enforce the type of use allowed on the site and the size of the buildings. The County does not control nor monitor the number of employees used at a business, the number of labor shifts, the start/stop times of those shifts, the number of deliveries to a site, etc. Staff would appreciate the Applicant's ideas on how to create a functioning trip cap and what would be the penalty for violation. Staff has used building size as the best proxy for a trip cap, but there may be other measures.*

Central Oregon Irrigation District, Kelley O'Rourke

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

Please be advised that Central Oregon Irrigation District (COID) has reviewed the provided preliminary application for the above referenced project. The Applicant requests approval of a Comprehensive Plan

Amendment to change the designation of the property from Agricultural (AG) to Rural Industrial (RI). The Applicant also requests approval of a corresponding Zone Change to rezone the property from Exclusive Farm Use (EFU) to Rural Industrial (RI). The subject properties are located at 65301 N HWY 97, 65315 HWY 97 and 65305 HWY 97 in Bend, Oregon (Map and Tax lots: 1612230000305, 1612230000500, 1612230000301).

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

Water Rights

- 1612230000305: Has 0.20 acres of appurtenant COID irrigation water rights*
- 1612230000500: There are no COID water rights*
- 1612230000301: Has 2.70 acres of appurtenant COID irrigation water rights*
- All water rights must be removed from these properties prior to approval of the zone change. COID requests property owners contact COID to request removal of the water rights.*

Canal and Laterals

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

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

The following agencies did not respond to the notice: Deschutes County Assessor, Bend Fire Department, City of Bend Planning Department, City of Bend Public Works Department, City of Bend Growth Management Department, ODOT Region 4, Redmond Airport, Oregon Department of Aviation, and Deschutes County Road Department.

PUBLIC COMMENTS: The Planning Division mailed notice of the conditional use application to all property owners within 750 feet of the subject property on October 6, 2021. The Applicant also complied with the posted notice requirements of Section 22.24.030(B) of Title 22. The Applicant submitted a Land Use Action Sign Affidavit indicating the Applicant posted notice of the land use action on October 6, 2021. Supportive public comments were received from 24 individuals between April 12 and April 18 (as of the writing of this staff report), one of which appears to be associated with the existing business uses on Tax Lots 305 and 500. The names of the supporting commenters are listed below. Oppositional public comments were received from one neighboring property owner and from Central Oregon LandWatch. The oppositional comments are detailed below for the purpose of the Hearings Officer's review. The 24 supportive public comments do not specify approval criteria and are summarized herein as generally supportive of the subject applications for reasons including economic opportunities, improvement of the subject properties since the current owners took over, the character of the Applicant, and the need for industrial uses due to regional growth.

Supporting commenters:

- | | |
|------------------------|-----------------------|
| 1. Dirk van der Velde | 13. Nick Greenlee |
| 2. Shoshana Buckendorf | 14. Rebecca Hermeling |
| 3. Micah Frazier | 15. Stephen Wagner |
| 4. Anthony Jimenez | 16. Truett Nealy |
| 5. Brandon Olson | 17. Bob Trapnell |
| 6. Cody King | 18. Gerardo Arreola |
| 7. Craig Shurtleff | 19. Joseph Seevers |
| 8. Donnie Eggers | 20. Mike Musco |
| 9. Dee Shields | 21. Mark Rylant |
| 10. Julie Porfirio | 22. Paula Johnson |
| 11. Jill Shaffer | 23. Michael Van Skaik |
| 12. Nick Alker | 24. Derek Ridgley |

The first oppositional comment was received from Jay Musson, a resident and owner of property located at 65468 73rd Street, Bend, OR 97703 on October 9, 2021:

"I own the property at address 65468 73rd which backs up to the subject property in this file number. Our property is part of a development called Whispering Pines #4. We have a community well as well as covenants such as no large farm animals (cows and pigs etc). Just like developments in the cities of Bend and Redmond. The only difference is our lots are all about 2.5 acres. All of the properties along 73rd backing up to this subject property are single family houses. The last thing we need in is an industry moving in behind us with large buildings, equipment and possible pollution. In fact the east side of this subject property (the jagged side) is the Central Oregon

Irrigation Canal. I'm sure they don't want pollution entering their canal. I therefore strongly object to this proposed zone change. Keep industry in town, not in a pristine residential and agriculture area."

Mr. Musson offered a second public comment on April 15, 2022:

"I own property 65468 73rd ST that backs up to the subject property. I want to announce my opposition to this proposed zone change. This is farm country, not asphalt and tin can storage building country. This kind of development belongs in a city. Also rain runoff from the asphalt into the COCC irrigation canal which borders this property cannot be good. If the owner of this property wants to make money on this piece of property grow some hemp."

The third oppositional comment was received from Kristy Sabo, the Wild Lands and Water Program Manager with Central Oregon LandWatch on October 19, 2021:

"I'm writing today to express concern from Central Oregon LandWatch about whether application file nos. 247-21-000881-PA and 247-21-000882-ZC meet the necessary criteria for a zone change and a plan amendment with goal exceptions. These two applications across three tax lots request that land zoned EFU-TRB, exclusive farm use, be rezoned to Rural Industrial. While we are still reviewing the applications and all of the issues, we are initially concerned that the applications include no adequate showing that rezoning and a plan change is appropriate. The proposed use cannot be approved without exceptions to Statewide Planning Goals 3, 11, 12 and 14. Because no exceptions have been justified, the application must be denied. The proposed designation is expressly prohibited by the County's acknowledged comprehensive plan. We are concerned that the proposal would unnecessarily take agricultural land out of production. The comprehensive plan provides multiple opportunities for the proposed use that do not require rezoning. The proposed use will have a negative impact on surrounding rural land uses.

Please add LandWatch to your list of interested parties and let us know of any decisions or hearings."

NOTICE REQUIREMENT: On April 1, 2022, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the subject property and agencies. A Notice of Public Hearing was published in the Bend Bulletin on Friday, April 1, 2022. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on March 15, 2022.

REVIEW PERIOD: The subject application(s) were submitted on September 30, 2021, and deemed incomplete by the Planning Division on October 28, 2021. Upon the Applicant's confirmation that no further information or materials would be provided in response to the County's incomplete letter, the subject applications were deemed complete on March 7, 2022. According to Deschutes County Code 22.20.040(D), the review of the proposed quasi-judicial plan amendment and zone change application is not subject to the 150-day review period.

III. FINDINGS & CONCLUSIONS

Context for Decision-Making Based on LUBA and Court Rulings

In the Conclusions of Law section of Hearings Officer decision 247-20-000438-PA, 439-ZC (Aceti), the Hearings Officer provides the following analysis related to applicable case law:

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

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

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

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

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

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

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

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

Staff outlines the above-referenced *Shaffer* case law and the applicable review factors captured therein and asks the Hearings Officer to utilize this review framework and review factors for the purposes of reviewing the subject applications.

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.120. Exceptions

Section 18.120.010. Nonconforming Uses.

Except as otherwise provided in DCC Title 18, the lawful use of a building, structure or land existing on the effective date of DCC Title 18, any amendment thereto or any ordinance codified therein may be continued although such use or structure does not conform with the standards for new development specified in DCC Title 18. A nonconforming use or structure may be altered, restored or replaced subject to DCC 18.120.010. No nonconforming use or structure may be resumed after a one-year period of interruption or abandonment unless the resumed use conforms with the provisions of DCC Title 18 in effect at the time of the proposed resumption.

FINDING: The subject properties have received acknowledgment of nonconforming uses practiced on-site, specifically a “diesel implement and repair business” as a “farm equipment business”, originally reviewed under files NCU-73-33 and SP-79-21. Staff notes that, throughout the burden of proof submitted on behalf of the subject properties, there are several descriptions of the activities and uses that take place related to the previously-verified nonconforming uses.

To the extent that analysis in the present application relies on the lawful non-conforming use of the property in a manner that has not been altered, interrupted, or abandoned, staff finds that question is unanswered as of the writing of this staff report and that additional nonconforming use

verification review would be necessary to fully determine the effect of past nonconforming use verifications and the overall allowable uses on the subject properties.

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:

Per prior Hearings Officers decisions for Plan amendments and zone changes on EFU-zoned property, this paragraph establishes two requirements: (1) that the zone change conforms to the Plan and (2) that the change is consistent with the plan's introductory statement and goals. Rezoning the Subject Property from EFU-TRB to RI will conform with the Comprehensive Plan and is consistent with the plan's introductory statement, as set out below.

1) *Conformance with the Comprehensive Plan.* Applicant is currently requesting a Plan amendment to re-designate the Subject Property from Agriculture to Rural Industrial. The rezone from EFU-TRB to RI will be consistent with the proposed Plan amendment requesting that that the property be designated Rural Industrial.

2) *Consistency with the Plan's Introductory Statement and Goals.* In previous decisions, the Hearings Officer found the introductory statements and goals are not approval criteria for proposed plan amendments and zone changes³. However, the Hearings Officer in the

³ Powell/Ramsey (file no. PA-14-2 / ZC-14-2) and Landholdings (file no. 247-16-000317-ZC, 318-PA)

Landholdings decision found that depending on the language, some plan provisions may apply and found the following amended comprehensive plan goals and policies require consideration and that other provisions of the plan do not apply as stated below in the Landholdings decision:

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

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

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

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

The Hearings Officer previously found that the above-underscored language strongly suggests the county's plan statements, goals and policies are not intended to establish approval standards for quasi-judicial land use permit applications.

*In Bothman v. City of Eugene, 51 Or LUBA 426 (2006), LUBA found it appropriate also to review the language of specific plan policies to determine whether and to what extent they may in fact establish decisional standards. The policies at issue in that case included those ranging from aspirational statements to planning directives to the city to policies with language providing 'guidance for decision-making' with respect to specific rezoning proposals. In Bothman LUBA concluded the planning commission erred in not considering in a zone change proceeding a plan policy requiring the city to '[r]ecognize the existing general office and commercial uses located * * * [in the geographic area including the subject property] and discourage future rezonings of these properties.' LUBA held that:*

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

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

Hearings Officer Karen Green adhered to these findings in the Powell/Ramsey decision (file nos. PA-14-2/ZC-14-2), and found the above-referenced introductory statements and goals are not approval criteria for the proposed plan amendment and zone change.

This Hearings Officer also adheres to the above findings herein. Nevertheless, depending upon their language, some plan provisions may require "consideration" even if they are not applicable approval criteria. Save Our Skyline v. City of Bend, 48 Or LUBA 192, 209 (2004). I find that the following amended comprehensive plan goals and policies require such consideration, and that other provisions of the plan do not apply...."

The Applicant utilizes the analysis 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. Based on the Applicant's proposed demonstration of Comprehensive Plan conformance in subsequent findings, Staff asks the Hearings Officer to provide clarification on whether the subject application complies with the above criterion.

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

FINDING: Section 3.4 of the DCCP, includes the following language for the rural industrial designation:

Rural Industrial

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

The subject property is not within existing Rural Industrial exception areas and is located outside unincorporated communities and urban growth boundaries. Therefore, the property must be found to satisfy the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, the DCCP and the Deschutes County Development Code.

As stated in Section 3.4 of the DCCP, quoted above, RI plan designation and zoning brings specific properties, such as the subject property, into compliance with state rules “by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022.”

The Applicant provided the following response in the submitted burden of proof statement:

The Applicant is proposing to change the zone classification from EFU to RI. The Deschutes County Code, Chapter 18.100, Rural Industrial, does not include an “intent” or “purpose” statement. The Plan, however, discusses the RI designation. Approval of the Application is consistent with the purpose and intent of the RI zoning district, as stated in the Plan, Section 3.4, Rural Industrial Uses Section above. For the reasons discussed above [sic] relating to Plan Section 3.4 (including the relevant Goals and Policies), this Application meets the requirements of Criterion B.

Staff notes that an analysis and methodology was applied to findings of compliance with this criterion in *Aceti* (247-20-000438-PA, 439-ZC). Staff requests the Hearings Officer to review the relevance to those findings here and make specific findings regarding compliance with this criterion.

- C. That changing the zoning will presently serve the public health, safety and welfare considering the following factors:**
- 1. The availability and efficiency of providing necessary public services and facilities.**

FINDING: Although there are no plans to develop the property in its current state, the above criterion specifically asks if the proposed zone change 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. The Subject Property is served by Deschutes County Services, the Deschutes Public Library District, the Central Oregon Irrigation District, and Bend Garbage & Recycling. The Subject Property is already equipped with adequate water and sewage systems, as explained above [sic], to support industrial uses.

Deschutes Rural Fire Protection District #2 provides fire and ambulance services to the Subject Property, and the Deschutes County Sheriff provides policing services.

It is efficient to provide necessary services to the property because the property is already served by these providers and the Subject Property is close to the City limits of both Bend and Redmond. It is also adjacent to a rural residential subdivision. This criterion is met.

Neighboring properties contain residential and open space & conservation uses, which have water service from a quasi-municipal source or wells, on-site sewage disposal systems, electrical service, telephone services, etc.

Staff notes that many DCC 18.100.010 uses are outright uses, the development of which would be subject to limited review of public services and facilities availability. Staff asks the Hearings Officer to evaluate what “public services and facilities” review is required at this time to address this policy.

Staff notes that in *Aceti* (247-20-000438-PA / 439-ZC) finding of compliance with this criterion were based on a detailed analysis of public service and facilities, including will-serve letters. TSP compliance was also found to be relevant under this criterion. Staff requests the Hearings Officer review compliance with this criterion in light of findings in *Aceti* (247-20-000438-PA, 439-ZC).

Staff notes that access to the majority of the subject property relies on a privately constructed/maintained bridge. Staff finds that the proposal may not presently serve the public health, safety and welfare where such property relied on bridge access that was not suitable for emergency services response. Staff recommends the Hearings Officer not find that this requirement has been met until the bridge is evaluated by an engineer and the responding fire department confirms that the bridge meets access requirements, including width and weight capacity.

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

FINDING: The Applicant’s submitted burden of proof statement addresses potential impacts on surrounding land uses as related to each individual policy and goal item within the County’s Comprehensive Plan in subsequent findings. In *Aceti* (247-20-000438-PA, 439-ZC), the Hearings Officer found:

Impacts to surrounding land uses resulting from the requested rezone and re-designation must be determined to be consistent with the specific goals and policies in the DCCP. Specific comprehensive goals and policies pertaining to these surrounding land uses are discussed in the section of this decision addressing the DCCP, in the findings below. The Hearings Officer's review includes consideration of the range of uses allowed outright and conditionally in the RI zone which

inform a decision on whether expected or anticipated impacts of such potential uses on surrounding land use will be consistent with the specific goals and policies in the DCCP. Although no specific development is proposed at this time, the Hearings Officer notes that potential impacts to surrounding land use from industrial uses generally include traffic, visual impacts, odor, dust, fumes, glare, flashing lights, noise, and similar disturbances. Again, such impacts are considered in light of existing impacts of development and roads in the surrounding area.

Staff notes the opposition letter in the record for the Hearings Officer's review under this criterion. Further analysis on the specific goals and policies contained within the Comprehensive Plan is detailed below.

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

FINDING: The Applicant is proposing to rezone the property from EFU to RI and re-designate the property from Agriculture to Rural Industrial. The Applicant has provided the following response in the submitted burden of proof statement:

*Both mistake and change in circumstances are applicable to the Subject Property. As to mistake, in 1978, the County Board of Commissioners, upon reviewing a request by the then owner of the Subject Property to rezone the Subject Property from A-1 (exclusive agricultural) to C-2, decided to rezone only Tax Lot 500, but changed the zoning to "AS," which "allows just about any kind of commercial" activity. See **Exhibit 11**. That decision mistakenly did not rezone Tax Lot 301, despite the Applicant at the time explaining to the Board of Commissioners that "without this zone change his land is virtually worthless" due to it being landlocked and due to the uses. As to change in circumstances, the Subject Property has been irrevocably committed to non-agricultural uses through decades of using the property for equipment service and rentals/sales. The land, which may have previously been considered suitable for farming, no longer is. Rather it is made up predominantly of Class 7 or 8 soils, which are unsuitable for agricultural use. See **Exhibits 7-9**. For these reasons, this Application meets the requirements of Criterion D.*

Mistake

Staff asks the Hearings Officer to evaluate if a zoning "mistake" was made, rather than deliberate choice in 1978. Staff has included additional materials from the Z-78-23 proceeding in the record, including the following Board order:

IN THE BOARD OF COUNTY COMMISSIONERS
IN THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

In the Matter)
of File No. Z-78-23)
Zone Change Request by Terry Mills)
from A-1, Exclusive Agriculture)
to C-2, General Commercial)

This matter coming before the Board of County Commissioners on an appeal filed by Vern Robinson on behalf of Terry Mills, which the Planning Commission denied at a public hearing on June 14, 1978,

The following are the reasons for turning this zone change request down from A-1 to C-2 by the Planning Commission:

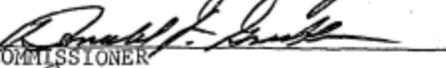
1. Trying to maintain an openness along the highway and not get more commercial along the highway.
2. The reasons for wanting this zone change were not sufficient and did not show the need to have additional commercial property; there were no plans for the remaining property he wanted.

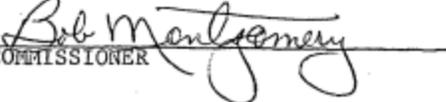
IT IS HEREBY ORDERED that the zoning of this property be changed from A-1 to A-S, to rezone a portion of this property, the Commissioners and Mr. Mills having established the boundaries, and Vern Robinson assured the Commissioners of a recorded easement.

Done by the order of the Board of Commissioners this 4th day of October, 1978, to become effective immediately.

BOARD OF COMMISSIONERS


CHAIRMAN


COMMISSIONER


COMMISSIONER

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

As the Hearings Officer found in Aceti 1, I find that the original EFU zoning of the subject property was not a mistake at the time of its original designation. The property's EFU designation and zoning were appropriate in light of the soil data available to the county in the late 1970s when the comprehensive plan and map were adopted.

Staff asks the hearings officer to determine if a similar soil data analysis applies in this case.

Change in Circumstances

In *Aceti* (247-20-000438-PA, 439-ZC), the Hearings Officer found that new soil data could be considered as a change in circumstances.

Staff notes that the change in circumstance in this criterion appears to be targeted to since the property was last rezoned. Staff finds this last zoning occurred when the property was assigned to the EFU-TRB subzone under Ord. 92-065 on December 7, 1992. Staff is uncertain if any Applicant-identified changes in circumstances prior to this date are relevant under this criterion.

Regarding the Applicant's "irrevocably committed" argument, Staff is uncertain if the development on the property constitutes an unaltered, uninterrupted, unabandoned non-conforming use that can be included in the analysis of the of the irrevocable commitment of the property to non-EFU zone uses. Staff believes a non-conforming use verification would be required to establish that the present and historic uses of the property were lawfully established and continued without alteration, abandonment, or interruption.

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:

In the Landholdings decision (and Powell/Ramsey decision) the Hearings Officer found that this goal is an aspirational goal and not an approval criterion. The Subject Property does not constitute agricultural land that must be preserved. The Soil Assessments show that each tax lot comprising the Subject Property is predominantly comprised of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

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

"The Hearings Officer found in Aceti 1 this is an aspirational goal and not an approval criterion. LUBA determined that the subject property does not constitute Agricultural Lands under OAR 660-033-0020(1); this finding is binding under the law of the case doctrine as discussed above.

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

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

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

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

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

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

The Applicant has provided the following response in the submitted burden of proof statement:

In the Landholdings decision (and Powell/Ramsey decision), the Hearings Officer found that this policy is directed at the County rather than an individual Applicant. Applicant is requesting that the subject property be rezoned from EFU-TRB to RI and that the Plan designation be changed from Agriculture to Rural Industrial because the Subject Property is not Agricultural Land subject to Goal 3. The proposed rezone and Plan amendment is allowed by, and in compliance with, State Statute, Oregon Administrative Rules, and the Plan. The requested change is similar to that approved by Deschutes County in the Landholdings case and in PA-11-1/ZC-11-2, which related to land owned by the State of Oregon (DSL). In the DSL decision, Deschutes County determined that State law as interpreted in Wetherell v. Douglas County, 52 Or LUBA 677 (2006), allows this type of amendment. In Wetherell, LUBA explained:

As we explained in DLCD v. Klamath County, 16 Or LUBA 817, 820 (1988), there are two ways a county can justify a decision to allow nonresource use of land previously designated and zoned for farm use or forest uses. One is to take an exception to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). The other is to adopt findings which demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. When a county pursues the latter option, it must demonstrate that despite the prior resource plan and zoning designation, neither Goal 3 or Goal 4 applies to the property.

Wetherell, 52 OR LUBA at 678-679 (citing Caine v. Tillamook County, 25 Or LUBA 209, 218 (1993); DLCDC v. Josephine County, 18 Or LUBA 798, 802 (1990)). On appeal to both the Oregon Court of Appeals and the Oregon Supreme Court, neither court disturbed LUBA's ruling on this point, and the Oregon Supreme Court even changed the test for determining whether land is agricultural land to make it less stringent. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007). Specifically, the Supreme Court held:

Under Goal 3, land must be preserved as agricultural land if it is suitable for "farm use" as defined in ORS 215.203(2)(a), which means, in part, "the current employment of land for the primary purpose of obtaining a profit in money" through specific farming-related endeavors.

Wetherell, 342 Or at 677. The Wetherell court further held that when deciding whether land is agricultural land "a local government may not be precluded from considering the costs or expenses of engaging in those activities." *Id.* At 680.

The Subject Property is primarily composed of Class 7 and 8 nonagricultural soils, and as such, farm-related endeavors would not be profitable. This Application complies with Policy 2.2.3.

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

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

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. Oppositional public comments submitted to record include a statement from Central Oregon LandWatch explaining, in part, that the subject applications would require a Goal 3 exception. Based on the above information and associated public comments, staff requests the Hearings Officer make specific findings on this issue.

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

FINDING: The Applicant has provided the following response in the submitted burden of proof statement:

In the Landholdings decision (and Powell/Ramsey decision), the Hearings Officer found this policy is directed at the County rather than at an individual Applicant. Applicant's proposal complies with the DCC and any lack of clarity by the County in regard to the conversion of EFU designations does not prevent Applicant from requesting a zone change. Further, the County's interpretation of Policy

2.2.3, discussed above, spells out when and how EFU parcels can be converted to other designations.

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

"The Hearings Officer found in Aceti 1 that this policy is directed at the County rather than at an individual Applicant. In said decision, the Hearings Officer cited a previous decision for file nos. PA-14-2 and ZC-14-2 that stated, 'In any event, in my decision in NNP (PA-13-1, ZC-13-1) I held any failure on the county's part to adopt comprehensive plan policies and code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation and zoning does not preclude the county from considering quasi-judicial plan amendment and zone change applications to remove EFU zoning.'

Hearings Officer Green determined in file nos. 247-14-000456-ZC, 457-PA that 'any failure on the county's part to adopt comprehensive plan policies and code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation and zoning does not preclude the county from considering quasi-judicial plan amendment and zone change applications to remove EFU zoning.' Consistent with this ruling, I find that, until such time as the County establishes policy criteria and code on how EFU parcels can be converted to other designations, the current legal framework can be used and must be addressed."

This plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations. 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.

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

Policy 2.2.13 Identify and retain accurately designated agricultural lands.

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

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

This plan policy requires the County to identify and retain agricultural lands that are accurately designated. The Applicant proposes that the subject property was not accurately designated as demonstrated by the soil study, NRCS soil data, and the Applicant's burden of proof. Further discussion on the soil analysis provided by the analysis 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: In Aceti (247-20-000438-PA, 439-ZC), the Hearings Officer found:

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

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

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

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

The Applicant is not proposing a specific development application at this time. Following the analysis in *Aceti* (247-20-000438-PA, 439-ZC), the Applicant is not required to demonstrate the water impacts associated with development. Rather, the Applicant will be required to address this criterion during development of the subject property, which would be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat). If the Hearings Officer finds a different methodology is needed to determine compliance with the above provision, staff requests the Hearings Officer make such findings.

Section 2.7, Open Spaces, Scenic Views and Sites

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

FINDING: The subject properties adjoin a property to the south (Tax Lot 700, Assessor's Map 16-12-23) which is currently zoned Open Space & Conservation (OS&C) and owned by Oregon Parks & Recreation Department. The subject properties are also located within the Landscape Management (LM) Combining Zone associated with the scenic corridor of Highway 97. Staff notes that the subject properties themselves are zoned EFU and are not included within the OS&C zoning district and that the LM Combining Zone is reviewed for compliance when a specific development proposal is applied for within the Combining Zone. Review of compliance with the LM Combining Zone is not required within the scope of the subject Plan Amendment/Zone Change applications. As a result, staff finds that the subject properties do not constitute significant open spaces subject to the Goals and Policies of Deschutes County Comprehensive Plan Chapter 2, Section 2.7.

Chapter 3, Rural Growth

Section 3.4, Rural Economy

Rural Commercial and Rural Industrial

In Deschutes County some properties are zoned Rural Commercial and Rural Industrial. The initial applications for the zoning designations recognize uses that predated State land use laws. However, it may be in the best interest of the County to provide opportunities for the establishment of new Rural Industrial and Rural Commercial properties when they are appropriate and regulations are met. Requests to re-designate property as Rural Commercial or Rural Industrial will be reviewed on a property-specific basis in accordance with state and local regulations.

...

Rural Industrial

The county may apply the Rural Industrial plan designation to specific property within existing Rural Industrial exception areas, or to any other specific property that satisfies the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, this Comprehensive Plan and the Deschutes County Development Code, and that is located outside unincorporated communities and urban growth boundaries. The Rural Industrial plan designation and zoning brings these areas

and specific properties into compliance with state rules by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022.

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

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

Existing Rural Industrial Designated Exception Areas

The Redmond Military site consists of tax lot 151300000116 and is 35.42 acres, bounded by the Redmond Urban Growth Boundary to the west and agricultural lands (EFU) surrounding the remainder of the property.

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

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

FINDING: The Applicant has provided the following response in the submitted burden of proof statement:

This Application proposes a zoning change to RI. The Subject Property is located near, but is not part of, the Deschutes Junction site, and as such rezoning to RI would be consistent with nearby land uses. Applicant's current plan for the Subject Property, should this Application be approved, is to develop a mini-storage facility, which is an allowed conditional use in the RI zone. See DCC 18.100.020.M. However, those plans are not final. Applicant ultimately wishes to develop the Subject Property consistent with the uses allowed (outright or conditionally) in the RI zone. The Application thus complies with this Policy.

Staff notes this preliminary statement from Chapter 3 of the Deschutes County Comprehensive Plan did not receive responses from the Hearings Officer in Aceti (247-20-000438-PA, 439-ZC). 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 either here or in subsequent findings.

Section 3.4, Rural Economy

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

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

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

The Applicant’s burden of proof does not provide a response to the above Goal and Policy, which staff believes may be germane to the subject applications. Staff requests the Hearings Officer make specific findings under this goal, responsive to the opposition letter included in the record.

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

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

FINDING: The Applicant’s burden of proof does not provide a response to the above Policy, which staff believes may be germane to the subject applications. In *Aceti* (247-20-000438-PA, 439-ZC), the Hearings Officer did not make findings in response to this policy. Staff is uncertain if this goal and policy are met by the available information in the record and requests the Hearings Officer make specific findings on this topic if the policy is determined to apply to the subject applications

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

FINDING: The Applicant’s burden of proof does not provide a response to the above Policy, which staff believes may be germane to the subject applications. In *Aceti* (247-20-000438-PA, 439-ZC), the Hearings Officer did not make findings in response to this policy. Staff is uncertain if this goal and policy are met by the available information in the record and requests the Hearings Officer make specific findings on this topic if the policy is determined to apply to the subject applications.

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

FINDING: The Applicant has provided the following response in the submitted burden of proof statement:

The uses allowed by the RI zone are suitable allowable uses for the Subject Property, and are compatible with the current state of the Subject Property, which, as discussed throughout this Application, is not suitable for farming or agriculture due to its soils and past land uses on the Subject Property. The Application thus complies with this Policy.

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

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

In LUBA 2021-028, a remand of Aceti (247-20-000438-PA, 439-ZC), the following findings related to the above Policy are included:

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

Staff asks the Hearings Officer to determine whether the Applicant’s analysis supports similar findings here.

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

FINDING: The Applicant has provided the following response in the submitted burden of proof statement:

If this request for Plan Map amendment and rezone is approved, the land use regulations relating to RI sites ensure that any use allowed by the RI zone will not adversely affect any agricultural uses in the area surrounding the Subject Property. Indeed, none of the immediately adjacent properties are in agricultural use at this time. The Application thus complies with this Policy.

Staff notes that there are no identified forest uses in the vicinity and, juniper, the predominant tree species in the vicinity is not merchantable. Staff also notes that adjacent Tax Lots 300 and 306 appears to be in farm use, based on aerial photography, and are receiving farm tax assessment.

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

The Hearings Officer finds this policy is directed at the County and not at an individual Applicant. In any case, the Applicant's proposal does not change the land use regulations in the RI Zone. Substantial evidence in the record supports a finding that the zone change and plan amendment will not have an adverse effect on agricultural and forest uses in the surrounding area. The Applicant has completed an exhaustive inventory of uses within half mile of the site and found no conflict with any agricultural or forest use. No evidence to refute the Applicant's study was introduced into the record.

Staff asks the Hearings Officer to confirm if the Applicant's agricultural lands analysis supports a similar finding here.

Policy 3.4.28 New industrial uses shall be limited in size to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural areas, for which there is no floor area per use limitation.

FINDING: The Applicant has provided the following response in the submitted burden of proof statement:

Applicant does not at this time propose any new use or development on the Subject Property, but wishes to develop the Subject Property in the future consistent with the allowable uses in the RI zone. If this Application is approved, approval of any new industrial use can be conditioned to require the size limitations set forth in this Policy.

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

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

Staff notes the application materials do not indicate a floor area associated with any specific development or use proposal. While the application materials outline the Applicant's future intent to develop a mini-storage facility (pending approval of the subject Plan Amendment and Zone Change applications) as the property is currently zoned EFU and does not allow for industrial uses or development. 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.

Policy 3.4.31 Residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.

FINDING: The Applicant has provided the following response in the submitted burden of proof statement:

*The Subject Property is served by an approved on-site sewage disposal system as shown on **Exhibit 12**. The Application thus complies with this Policy.*

Staff confirms that a 1982 finalized septic permit (permit no. 247-S5813) exists for Tax Lot 301 and that a separate 1982 finalized septic permit (permit no. 247-FS222) exists for Tax Lot 500. Property records appear to show Tax Lot 305 as having previously been a portion of Tax Lot 301 (based on a Warranty Deed dated August 19, 1981) and served by the same 1982 septic permit under permit no. 247-S5813. Staff finds this provision is met for the purposes of the subject applications.

Policy 3.4.32 Residential and industrial uses shall be served by on-site wells or public water systems.

FINDING: The Applicant has provided the following response in the submitted burden of proof statement:

*The Subject Property is served by an on-site well as shown on **Exhibit 5**. The Application thus complies with this Policy.*

Staff confirms the well agreement included as Exhibit 5 of the submitted application materials. Staff notes that the well agreement does not appear to indicate whether potential future industrial uses may be supported by the well. 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.

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

FINDING: Staff finds compliance with this policy will depend on the Hearings Officers determination that the proposal has demonstrated that Goals 3 and 4 do not apply. Staff is uncertain what additional analysis, if any, is required to determine that Goal 4 does not apply. Staff notes that there are no identified forest uses in the vicinity and, juniper, the predominant tree species in the vicinity is not merchantable.

Section 3.5. Natural Hazards

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

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

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

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

Section 3.7, Transportation

Appendix C – Transportation System Plan

ARTERIAL AND COLLECTOR ROAD PLAN

...

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

Policy 4.1 Deschutes County shall:

- a. Consider the road network to be the most important and valuable component of the transportation system; and**
- b. Consider the preservation and maintenance and repair of the County road network to be vital to the continued and future utility of the County's transportation system.**

...

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

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

FINDING: The Applicant has provided the following response in the submitted burden of proof statement:

The Hearings Officer in the Landholdings decision found that Policy 4.4 applies to the County and not to individual Applicants. Policies 4.1 and 4.3 similarly should apply to the County and not to individual Applicants. Regardless, the Subject Property borders Highway 97 on the east and has legal access onto the highway. As explained more fully in the Transportation Planning Rule section below, while the proposed Plan Map amendment and rezone would likely impact transportation facilities, Applicant would agree to a use limitation and traffic cap for the Subject Property.

These policies apply to the County and advises it to consider the roadway function, classification and capacity as criteria for plan amendments and zone changes. These policies also advise the County to consider the existing road network and potential land use impacts when reviewing for compliance with plan amendments and zone changes. The County will comply with this direction by determining compliance with the Transportation Planning Rule (TPR) aka OAR 660-012, as described below in subsequent findings.

OREGON ADMINISTRATIVE RULES CHAPTER 660, LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

DIVISION 6, GOAL 4 – FOREST LANDS

OAR 660-006-0005, Definitions

- (7) ***“Forest lands” as defined in Goal 4 are those lands acknowledged as forest lands, or, in the case of a plan amendment, forest lands shall include:***
- (a) ***Lands that are suitable for commercial forest uses, including adjacent or nearby lands which are necessary to permit forest operations or practices; and***
 - (b) ***Other forested lands that maintain soil, air, water and fish and wildlife resources.***

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

DIVISION 33 – AGRICULTURAL LAND

OAR 660-033-0010, Purpose

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

FINDING: Division 33 continues on to define “Agricultural Land,” which is repeated in OAR 660-033-0020(1). The Applicant has provided the following response in the submitted burden of proof statement:

The Subject Property does not constitute agricultural land for the reasons set forth below. Therefore, a Goal 3 exception is not required, nor will the proposed rezone detract from the statutory purpose of preserving and maintaining agricultural lands.

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 Oregon⁴;***

⁴ OAR 660-033-0020(5): “Eastern Oregon” means that portion of the state lying east of a line beginning at the intersection of the northern boundary of the State of Oregon and the western boundary of Wasco County, then south along the western boundaries of the Counties of Wasco, Jefferson, Deschutes and Klamath to the southern boundary of the State of Oregon.

FINDING: The Applicant's basis for not requesting an exception to Goal 3 relies on the premise that the subject property is not defined as "Agricultural Land." In support, the Applicant offers the following response as included in the submitted burden of proof statement:

*The Subject Property is not property classified as Agricultural Land and does not merit protection under Goal 3. As shown by the Soils Assessments submitted herewith and described above, the soils on the Subject Property are predominantly unsuitable soils of Class 7 and 8 as defined by Deschutes County and DLCD. See **Exhibits 7-9**. State Law, ORS 660-033-0030, allows the County to rely on those Soils Assessments for more accurate soils information.*

Staff has reviewed the soil studies provided by Gary Kitzrow of Growing Soils Environmental Associates. No specific findings related to this OAR provision were included in the Hearings Officer's findings for Aceti (247-20-000438-PA, 439-ZC). Depending on the appropriate unit of land related to the subject applications and other relevant considerations from the Hearings Officer, staff asks the Hearings Officer to confirm if what findings are appropriate in this case.

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

FINDING: The Applicant's basis for not requesting an exception to Goal 3 is based on the proposal that the subject property is not defined as "Agricultural Land." The Applicant 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 7 and 8 soils found on the subject property are suitable for farm use despite their Class 7 and 8 classification. The Oregon Supreme Court has determined that the term "farm use" as used in this rule and Goal 3 means the current employment of land for the primary purpose of obtaining a profit in money through specific farming-related endeavors. The costs of engaging in farm use are relevant to determining whether farm activities are profitable and this is a factor in determining whether land is agricultural land. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007).

The Subject Property has not been in farm use in decades. The land has not been irrigated for years, and the COID water rights are leased back to the Deschutes River.

A review of the seven considerations listed in the OAR, below, shows why the poor soils found on the Subject Property are not suitable for farm use that can be expected to be profitable:

Soil Fertility:

Applicant engaged Mr. Gary Kitzrow to perform an Order 1 Soil Survey on the soils found on the Subject Property. Mr. Kitzrow found Tax Lot 305 and 500 to be "severely altered ancient infrastructure...devoid of all vegetation." Tax Lot 305 consists of 81.7% Class 7 and 8 sols. Tax Lot

500 consists of 87.7% Class 7 and 8 soils. Tax Lot 301 consists of 53.1% Class 7 soils. As discussed above, these soils are not suitable for agriculture.

Unsuitability for Grazing:

The primary agricultural use conducted on properties with poor soils is grazing cattle. Given the high cost of irrigating and maintaining the property as pasture or cropland (high labor costs, labor-intensive, high cost of irrigation equipment and electricity, high cost of fertilizer, etc.), dry land grazing is the accepted farm use of poor soils in Deschutes County.

However, the extremely poor soils found on the Subject Property prevent it from providing sufficient feed for livestock for dryland grazing. That, the dry climate, the proximity to Highway 97, and area development prevent grazing from being a viable or potentially profitable use of the Subject Property. The soils are so poor that they would not support the production of crops for a profit.

When assessing the potential income from dryland grazing, Deschutes County uses a formula and assumptions developed by the OSU Extension Service. This formula is used by the County to decide whether EFU-zoned land is generally unsuitable for farm use.

- One AUM is the equivalent to the forage required for a 1000 lb. cow and calf to graze for 30 days (900 pounds of forage)
- On good quality forage, an animal unit will gain 2 pounds per day
- Two animal units will eat as much in one month as one animal unit will eat in two months.
- Forage production on dry land is not continuous. Once the forage is eaten, it generally will not grow back until the following spring.
- An average market price for beef is \$1.20 per pound.

Based on these assumptions, the value of beef production on the entire subject property can be calculated using the following formula:

$$\frac{30 \text{ days} \times 2\#/\text{day}/\text{acre}}{1 \text{ acre per AUM}} = 60.0 \text{ lbs. Beef/acre}$$

$$60.0 \text{ lbs. Beef/acre} \times 19.12 \text{ acres} \times \$1.20/\text{lb.} = \$1,382.40 \text{ per year gross income}$$

Thus, the total gross beef production potential for the Subject Property would be approximately \$1,382.40 annually. This figure represents gross income and does not take into account real property taxes, fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production, which would exceed income. In addition, as the Subject Property abuts a busy state highway, the cost for liability insurance due to the risk of livestock escape and the potential for a vehicle/livestock accident, would likely be expensive.

Climatic Conditions

Deschutes County generally has a dry, hot climate. Irrigation is necessary for agricultural uses, but is not available to the Subject Property as explained herein.

Existing and Future Availability of Water for Farm Irrigation Purposes:

As explained above, two of the three Tax Lots comprising the Subject Property have existing COID water rights, but they are leased to the Deschutes River and no changes to that are planned for the future. The Pilot Butte Canal running along the eastern portion of two of the Tax Lots comprising the Subject Property is not sufficient to provide irrigation to the Subject Property. A Federal right of way exists on the canal that goes to 50 feet at the toe of the canal. At its widest, the Subject Property is 400 feet wide; even taking the 50 feet from the toe of the canal, at its widest, it is 300 feet. This is insufficient for farming purposes, which is supported by the fact that no historic farming use has been made. Finally, while a water distribution system exists on the Subject Property, it has been effectively extinguished by common ownership of Tax Lots 301 and 305.

Existing Land Use Patterns

The surrounding land use patterns also do not support an agricultural use of the Subject Property. Much of the surrounding lands are zoned residential and consist of a residential subdivision. Other surrounding land is zoned open space / parks, and is not used for agricultural purposes. The land nearby zoned EFU-TRB is not currently used for farming or other agricultural uses.

Technological and Energy Inputs Required:

Given the Subject Property has been not been [sic] farmed in recent (or distant) history, and the land has been used for equipment service and repair for at least 4 decades, farming the Subject Property at this time would require immense investment in technological and energy inputs, including irrigation systems, fertilization, and building proper infrastructure.

Accepted Farming Practices:

Farming lands comprised of soils that are predominately Class 7 and 8 is not an accepted farm practice in Central Oregon. Dryland grazing, the farm use that can be conducted on the poorest soils in the County, typically occurs on Class 6 non-irrigated soils that have a higher soils class if irrigated. The Applicant would have to go above and beyond accepted farming practices to even attempt to farm the property for dryland grazing. Crops are typically grown on soils in soil class 3 and 4 that have irrigation, which this property has neither.

The Applicant argues that the property's exiting irrigation rights should not be considered in evaluating the property's potential for agricultural uses. Staff recognizes that the property may not be found to be suitable for farm use regardless of the irrigation status, however, staff request the Hearings Officer make specific findings on question if the leased water rights are unavailable to the property for the purposes of this analysis.

In 247-14-000456-ZC, 457-PA, the Hearings Officer found:

The Applicant's soil study shows the subject property is predominantly Class VII and VIII soils. The Hearings Officer noted in the Powell/Ramsey decision, and I agree with the statement that DLCD's administrative rules define Class VII and VIII soils as having very severe limitations that make them unsuited for cultivation. Thus, the next question under this administrative rule is whether the Class VII and VIII soils on the subject property nevertheless constitute "agricultural land" based on the factors listed in this paragraph. For the following reasons, I find that the answer to the question is "no."

...

Substantial evidence in the record shows that the subject property does not constitute "agricultural land" under the Goal 3 administrative rule factors first because it is comprised of Classes VI and VII soils, and second, based on a consideration each of following factors, addressed by the Borine report: soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices.

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

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

FINDING: The Applicant offers the following response as included in the submitted burden of proof statement:

A large portion of neighboring lands are residential, and the neighboring lands that are zoned EFU-TRB are not engaged in farm practices that are supported or aided by the Subject Property. Regardless, the Subject Property, given its poor soils and proximity to Highway 97, could not be considered "necessary" to permit farm practices to be undertaken on adjacent or nearby agricultural lands.

In 247-14-000456-ZC, 457-PA, the Hearings Officer found:

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

Staff believes that this property is similarly situated to the property in Aceti (247-20-000438-PA, 439-ZC) and requests the Hearings Officer make specific findings on this issue.

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

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property is not and has not been a part of a farm unit that includes other lands not currently owned by the Applicant.

The farm unit rule is written to preserve large farming operations in a block. It does this by preventing property owners from dividing farmland into smaller properties that, alone, do not meet the definition of "agricultural land." The Subject Property is not formerly part of a larger area of land that is or was used for farming operations and was then divided to isolate poor soils so that land could be removed from EFU zoning.

The Subject Property is not in farm use and has not been in farm use of any kind for decades. It contains soils that make the land generally unsuitable for farm use as the term is defined by State law. It is not a part of a farm unit with other land. The Subject Property is predominantly Class 7 and 8 soils and would not be considered a farm unit itself nor part of a larger farm unit based on the poor soils and the fact that none of the adjacent property is farmed.

Staff is uncertain how to identify any potential farm unit. The subject was part of a larger property that also included Tax Lots 300, 302, 303, and 304, which were separated from an approximately 140-acre farm through sales in the 1970's and 1980's. Considering the Applicant's response, above, Staff requests the Hearings Officer make specific findings on this issue.

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

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

OAR 660-033-0030, Identifying Agricultural Land

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

requires findings supported by substantial evidence that addresses each of the factors set forth in 660-033-0020(1).

FINDING: The Applicant provided responses to the factors in OAR 660-033-0020(1) above. The soil studies produced by Mr. Kitzrow 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.

In 247-14-000456-ZC, 457-PA, the Hearings Officer found:

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

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 argues that the subject property is not suitable for farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands.

In 247-14-000456-ZC, 457-PA, the Hearings Officer found:

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

Under the Applicant's burden of proof response and the findings provided in 247-14-000456-ZC, 457-PA, the ownership of the subject parcel is not used to determine whether the parcel is "agricultural land." Staff asks the Hearings Officer to confirm if similar findings are appropriate in this case.

- (5)(a) **More detailed data on soil capability than is contained in the USDA Natural Resources Conservation Service (NRCS) soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the NRCS land capability classification system.**
- (b) **If a person concludes that more detailed soils information than that contained in the Web Soil Survey operated by the NRCS as of January 2, 2012, would assist a county to make a better determination of whether land qualifies as agricultural land, the person must request that the department arrange for an assessment of the capability of the land by a professional soil classifier who is chosen by the person, using the process described in OAR 660-033-0045.**

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

*Attached as **Exhibits 7-9** are a [sic] more detailed Agricultural Soils Capability Assessments conducted by Gary Kitzrow, a professional soil classifier, certified professional soil scientist, and one of only five professionals certified by the state to make such assessment. The soils capability assessment he conducted on the Subject Property is related to the NRCS land capability classification system. It provides and documents more detailed data on soil classification and soil ratings than is contained in the NRCS soil maps and soil survey at the published level of detail. The Order 1 survey performed on the Subject Property included 22 descriptions for the approximately 19-acre site (6 for Tax Lot 305; 12 for Tax Lot 301; and 4 for Tax Lot 500). The soil samples taken were assessed for structure, consistency, pores, drainage class, root distribution, effective/absolute rooting depths and related morphology testing. Mr. Kitzrow concluded that the Subject Property is made up of predominantly Class 7 and 8 soils that are generally unsuitable for farming.*

The soil studies prepared by Mr. Kitzrow 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 studies provide detailed information about the individual subject properties based on numerous soil samples taken from the subject properties. The soil studies are related to the NRCS Land Capability Classification (LCC) system that classifies soils Class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.

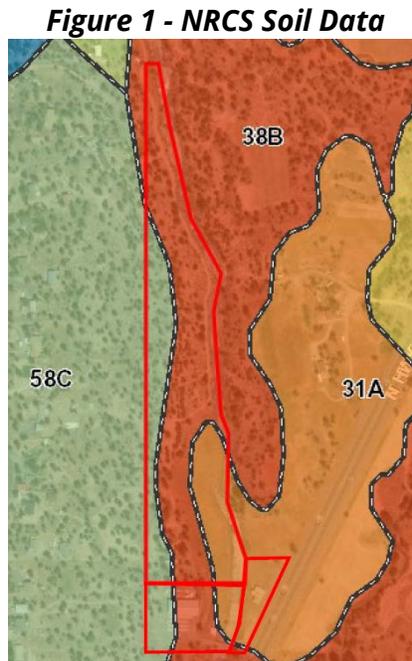
The NRCS mapping for the subject properties is shown below in **Figure 1**. According to the NRCS Web Soil Survey tool, the subject properties contain the following portions of 31A, 38B, and 58C soils:

31A Soils: Approximately 16.5 percent (Tax Lot 301), 22 percent (Tax Lot 305), and 97.2 percent (Tax Lot 500) of the subject properties are composed of 31A soil, respectively.

38B Soils: Approximately 61.4 percent (Tax Lot 301), 47.7 percent (Tax Lot 305), and 2.8 percent (Tax Lot 500) of the subject properties are made up of this soil type, respectively.

58C Soils: Approximately 22.1 percent (Tax Lot 301), and 30.3 percent (Tax Lot 305) of two (2) of the subject properties are made up of this soil type.

The soil studies conducted by Mr. Kitzrow of Growing Soils Environmental Associates finds the soil types on the subject property vary from the NRCS identified soil types. The soil types described in the Growing Soils Environmental Associates soil studies are described below (as quoted from Exhibits 7-9 of the submitted application materials).



- **Tax Lot 301:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and non-irrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. This study area and legal lot of record is comprised of 8.00 acres or 53.1% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.
- **Tax Lot 305:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and non-irrigated). These lithic, entic Gosney soil mapping units are shallow, have extremely restrictive rooting capabilities and low water holding capacities. Conversely, Deskamp and Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. Noteworthy is the fact that along the western boundary and southern boundary of this lot are large inclusions of rubble and rock outcrops. This is found regardless of the associated three soils delineated in this analysis. This study area and legal lot of record is comprised of 2.45 acres or 81.7% of the landbase as generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.
- **Tax Lot 500:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and non-irrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. This study area and legal lot of record is comprised of 0.93 Acres or 87.7% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

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

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

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

FINDING: The Applicant is seeking approval of a non-resource plan designation on the basis that the subject 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 soil studies by Mr. Kitzrow of Growing Soils Environmental Associates dated January 12, 2021. The soils studies were submitted following the ORS 215.211 effective date. The application materials include acknowledgements from Hilary Foote, Farm/Forest Specialist with the DLCDC (dated April 16, 2021) that the soil studies are complete and consistent with DLCDC's reporting requirements. Staff finds this criterion to be met based on the submitted soil studies 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 DLCDC certified soil studies 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: As referenced in the agency comments section in the Findings of Fact above, the Senior Transportation Planner for Deschutes County requested revised details than what the initial traffic study materials provided. The Applicant submitted an updated report from Ferguson & Associates, Inc on April 6, 2022, dated March 18, 2022, to address identified concerns and the County's Senior Transportation Planner issued a second comment in response. In response to these criteria, the Applicant's burden of proof provides the following statement:

*The Transportation Planning Rule is applicable because Applicant is requesting a change to an acknowledged comprehensive plan and land use regulation (the zoning map). Attached as **Exhibit 14** is a Site Traffic Report and TPR Assessment prepared by traffic engineer Scott Ferguson, P.E. of Ferguson & Associates. Mr. Ferguson made the following findings with respect to the proposed Plan map amendment and zone change and concluded that a significant impact to the transportation facility would occur:*

- *The only available access to the Subject Property is via Highway 97 through a shared easement driveway. Highway 97 is a four-lane facility in the vicinity of the driveway, with 20-foot shoulders on both sides. Left turns are legally prohibited, as there are two sets of double-striped painted lanes marking a striped median. As such, access is limited to right-in, right-out movements from the driveway. There are no proposed changes to access.*
- *Visibility exiting the site is good and there are no apparent sight-distance issues.*
- *Rezoning the Subject Property from EFU-TRB to RI would allow outright e.g.:*
 - *Primary processing, packaging, treatment, bulk storage and distribution of the following products:*
 - *Agricultural products, including foodstuffs, animal and fish products, and animal feeds,*
 - *Ornamental horticultural products and nurseries,*
 - *Softwood and hardwood products excluding pulp and paper manufacturing;*
 - *Freight Depot, including the loading, unloading, storage and distribution of goods and materials by railcar or truck;*
 - *Contractor's or building materials business and other construction-related business including plumbing, electrical, roof, siding, etc., provided such use is wholly enclosed within a building or no outside storage is permitted unless enclosed by sight-obscuring fencing;*
 - *Wholesale distribution outlet including warehousing, but excluding open outside storage;*
 - *Kennel or a veterinary clinic.*
- *The RI zone require that new industrial uses be limited in size to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural areas, for which there is no floor area per use limitation.*
- *For purposes of the traffic analysis, it was assumed that a large (100,000 square foot) manufacturing building such as a food processing plant or some type of lumber-related manufacturing plant could be built on the Subject Property. Such a distribution center would occupy about 12 percent of available land. In addition, there could be a mix of other uses, not exceeding 7,500 square feet per use, which could include, e.g., a small building supply outlet, a veterinary clinic, a small distribution center, and a plant nursery For purposes of the analysis, one of each of those uses was assumed.*
- *While it may be possible to pack more onto the site, the assumed uses would generate more traffic than the site could handle with existing access configurations.*
- *Net change in trip generation would be an increase of 166 p.m. peak hour trips and 1,299 daily trips.*
- *The addition of several hundred vehicles per hour at the driveway on to Highway 97 would result in performance characteristics that would not meet the goals of the Oregon Highway Plan.*
- *This level of traffic would not be appropriate with the existing limited access and the proposed zone change would significantly impact the transportation if no further action were taken. But there are further actions which can be taken to meet the requirements of the TSP under these conditions.*

Mr. Ferguson proposed, and Applicant will agree to, establishing a trip cap on the three lots comprising the Subject Property to limit the amount of development that would be allowed to reflect the maximum trip generation that would be allowed before a Traffic Impact Analysis would be required under ODOT or County guidelines. Specifically, Mr. Ferguson stated in his Report, based on DCC 18.116.310.C, that "the ODOT guideline for conducting a TIA is 400 daily trips. Since Deschutes County requirements establish a lower (more conservative) threshold, these values were used: less than 20 p.m. peak hour trips (which is more than 19 trips) and more than 200 daily trips. As shown below in Table 7, establishing a trip cap at a threshold where the incremental change would not exceed the Deschutes County threshold." Table 7 is shown below:

TABLE 7 – TRIP CAP CALCULATIONS

Trip Generation Scenarios	TRIP GENERATION	
	PM	DAILY
A Existing EFU Zone	13	79
B Proposed RI Zone	180	1,378
C Net Change in Trip Generation	166	1,299
D ODOT Trigger for TIA	na	400
E Deschutes Count Trigger for TIA	19	200
F Limit on Net Change (Deschutes Criteria governs)	19	200
G Total Trip Generation to Obtain Net Limit (A + F)	32	279

Mr. Ferguson concluded, "Accordingly, if a trip cap were set at 32 p.m. peak hour trips and 279 daily trips, the incremental increase in traffic would be 19 p.m. peak hour trips and 200 daily trips and a Site Traffic Report (STR) would be required by Deschutes County Code as per section I 8.1 I 6.3 I 0(CX3Xb) for the purposes of evaluating the TPR."

Applicant's current plan for the Subject Property, if this Application is approved, is to develop a mini-storage facility on Tax Lot 301. Mr. Ferguson further concluded that "[s]ince mini-storage units are relatively low generators, the trip cap would be met with any reasonably sized ministorage facility." With the establishment of this proposed trip cap, the proposed Plan map amendment and zone change could meet the requirements of the TPR. Trip generation under this cap would be limited to no more than 32 p.m. peak hour trips and no more than 279 daily trips. Mr. Ferguson concluded that with the planned development of mini-storage units, the level of trip generation would be relatively low and would fall below this threshold⁵.

(Staff has included the updated summary and findings below, submitted by Ferguson & Associates, Inc on April 6, 2022 (dated March 18, 2022), with the revised traffic study.)

⁵ Further, imposing a trip cap and use limitations is consistent with the purpose of the RI zone and Plan designation. See Plan, Policy 3.4.23 ("To assure that urban uses are not permitted on rural industrial lands, land use regulations in the Rural Industrial zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successor."); see also *id.*, Policy 3.4.24 - Policy 3.4.36 (placing use limitations on certain parcels given RI zoning to "ensure that the uses in the Rural Industrial Zone on [those tax lots] . . . are limited in nature and scope"); see also DCC 18.100.030 (setting forth use limitations for the RI zone).

This TPR assessment was prepared for 3 parcels located on Highway 97 between Bend and Redmond, Oregon. These parcels are generally located in Figure 1. Table 1 provides addresses, Tax Lot numbers, and existing building types and sizes.

The proposed change is from EFU (exclusive farm use) to RI (Rural Industrial).

It was found that the proposed zone change would significantly affect the transportation system without a trip cap.

The proposed trip cap is 32 new p.m. peak hour trips, above existing trip generation. A trip cap of 32 new p.m. peak hour trips would readily allow for the construction of mini-storage units, which is intended as the next step. That development would need to be addressed in a separate site-application. This is a very reasonable level for a trip cap considering that it was shown herein that a trip cap as high as 123 p.m. peak hour trips might be allowed using the ODOT mobility standards as the measure of impact.

It is trusted that the above updated analysis adequately addresses the Counties comments and otherwise meets the requirements for the proposed zone change including a sufficient assessment of the Transportation Planning Rule (TPR). Please feel free to call at your convenience if you would like to discuss any elements of this letter-report.

In response to the revised traffic study, the County Senior Transportation Planner, Peter Russell, issued the following comment (also included in Section 2 of this staff report):

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

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

As an aside, on the one hand the Applicant argues this is not productive agricultural land and on the other the traffic engineer argues there are agricultural uses that would generate more trips than a single-family zone. (The County historically uses a single-family as the highest trip

generator in EFU). Staff looks to the hearing officer to reconcile this paradox of not being agriculturally viable land, yet potentially producing more trips based on agricultural activities.

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

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

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

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

The Applicant responded with additional traffic comments on April 8, 2022, (Staff has included the updated summary and findings below, submitted by Ferguson & Associates, Inc on April 8, 2022 (dated March 18, 2022), with the revised traffic study.)

This revised TPR assessment dated March 18, 2022 addressed all of the first round of comments from County staff.

Additional comments from the county regarding the March update, numbered as 1, 3, and 4 above, are not relevant. The study did not assume any conditional uses such as warehousing (mini-storage) in the analysis. The analysis was performed as per staff guidance using only outright permitted uses. This approach is a standard traffic engineering approach as used in the State of Oregon to address the TPR.

Regarding staff comment 2, we disagree with staff on this item. Nevertheless, it does not matter which direction the hearings officer decides on this (1 p.m. peak hour trip assuming a single family home; or, 13 p.m. peak hour trips, assuming other “farm use” operations) since the requested trip cap is only 32 p.m. peak hour trips, while it was demonstrated that up to 123 p.m. peak hour trips could be accommodated on the site and still meet ODOT mobility targets.

Staff comments 5 and 6 are not relevant. They are related to portions of the study which mere [sic] commentary. While this commentary may color ones readings of the findings, no changes to the methodologies or standards were used in the technical portions of the report based on these commentaries. If the two cited paragraphs were removed from the updated traffic report, the findings and analysis would stand as presented.

In response to the additional traffic comments, the County Senior Transportation Planner, Peter Russell, issued the following comment (also included in Section 2 of this staff report):

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

- The Applicant is correct, I mistakenly said the revised TIA uses Warehouse (Land Use 150) and Mini-Warehouse (LU 151), rather than land use actually used, which was Manufacturing (LU 140). I apologize for the error.*
- The Applicant’s TIA uses the wrong version of ITE Trip Generation Manual. The TIA use the 10th Edition (see page 7 of March 18 TIA. Deschutes County Code (DCC) 18.116.310(F)(2) and 18.116.310(G)(2). The 11th Edition is the most recent version of the ITE Trip Generation Manual.*
- Staff notes that trip caps are notoriously difficult to monitor and enforce. The only regulatory ability the County has is to enforce the type of use allowed on the site and the size of the buildings. The County does not control nor monitor the number of employees used at a business, the number of labor shifts, the start/stop times of those shifts, the number of deliveries to a site, etc. Staff would appreciate the Applicant’s ideas on how to create a functioning trip cap and what would be the penalty for violation. Staff has used building size as the best proxy for a trip cap, but there may be other measures.*

Lastly, the Applicant responded with additional traffic comments on April 13, 2022, (Staff has included the updated summary and findings below, submitted by Ferguson & Associates, Inc on April 13, 2022 (dated April 12, 2022), with the revised traffic study.)

All comments from the County email of April 11, 2022 are addressed herein.

The comments related to using “manufacturing” as a land use category for the purposes of a trip generation forecast are not significant. There are a variety of types of “manufacturing” which are outright-permitted uses under the Deschutes County Code, and many which are not. The use of this ITE land use category is reasonable for forecasting trips; and the use of this traffic engineering category for the purpose of forecasting trips does not define what land uses are allowed by the code.

We believe that the use of the 10th Edition of ITE's Trip Generation Manual was reasonable, since the first study was written before the 11th Edition was published. Nevertheless, as shown herein the use of the 11th Edition results in only minor differences in trip generation and it is clear, as shown herein, that the findings of the study are not changed by which edition is used.

Finally, a p.m. peak hour trip cap is a common means of establishing a limit to use of a property and the requested trip cap of 32 p.m. peak hour trips would meet the requirements of the TPR with a significant buffer.

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

The Hearings Officer finds that the Applicant has studied all facilities identified by the County as potentially impacted by the proposed change. The Hearings Officer finds that zone change will have no significant adverse effect on the identified function, capacity, and performance standards of the transportation facilities in the impact area, such that it is in compliance with OAR 660-012-0060. The proposed zone change will have a minimal impact on the area road network. Traffic generated by future development of the subject property with RI-zone uses in the reasonable "worst-case" scenario will not significantly affect a transportation facility (less than 2%) and therefore will comply with the TPR. It will not allow levels of development that will cause existing or planned area transportation facilities to exceed their functional classification.

Based on the County Senior Transportation Planner's comments and the revised traffic study and comments from Ferguson & Associates Inc, staff asks the Hearings Officer to confirm if similar findings are appropriate in this case. Staff finds it is unclear whether compliance with the Transportation Planning Rule has been effectively demonstrated and asks the Hearings Officer to make specific findings related to these criteria, particularly with regard to a trip cap.

- (2) *If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below, unless the amendment meets the balancing test in subsection (2)(e) of this section or qualifies for partial mitigation in section (11) of this rule. A local government using subsection (2)(e), section (3), section (10) or section (11) to approve an amendment recognizes that additional motor vehicle traffic congestion may result and that other facility providers would not be expected to provide additional capacity for motor vehicles in response to this congestion.***
- (a) *Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.***
- (b) *Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall***

- include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.*
- (c) *Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.*
 - (d) *Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures or minor transportation improvements. Local governments shall, as part of the amendment, specify when measures or improvements provided pursuant to this subsection will be provided.*
 - (e) *Providing improvements that would benefit modes other than the significantly affected mode, improvements to facilities other than the significantly affected facility, or improvements at other locations, if:*
 - (A) *The provider of the significantly affected facility provides a written statement that the system-wide benefits are sufficient to balance the significant effect, even though the improvements would not result in consistency for all performance standards;*
 - (B) *The providers of facilities being improved at other locations provide written statements of approval; and*
 - (C) *The local jurisdictions where facilities are being improved provide written statements of approval.*

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

As discussed above, Mr. Ferguson concluded that the proposed Plan map amendment and zone change could have a significant effect on the transportation facility. As such, Mr. Ferguson proposes, and Applicant would agree to, the imposition of a transportation cap and use limitation on the Subject Property.

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

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

Considering the Applicant's response, above, and the initial and revised traffic studies provided by Ferguson & Associates Inc, Staff requests the Hearings Officer make specific findings on this issue.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

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

Goal 1, Citizen Involvement. *Deschutes County will provide notice of the application to the public through mailed notice to affected property owners and by requiring the Applicant to post a "proposed land use action sign" on the Subject Property. Notice of the public hearings held regarding this application follow the code requirements. A minimum of two public hearings will be held to consider the Application.*

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

Goal 3, Agricultural Lands. *The Applicant has shown that the subject property is not agricultural land because it is comprised predominantly of Class 7 and 8 soils that are not suitable for farm use. Therefore, the proposal is consistent with Goal 3, and no exception is needed.*

Goal 4, Forest Lands. *This goal is inapplicable because the Subject Property does not contain land zoned forest land, nor does it support forest uses.*

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces. *The majority of the subject property is located in the Landscape Management Combining Zone (LM zone). The LM zone is a Goal 5 resource acknowledged by DLCD that is set out to protect scenic views as seen, in this case, from Highway 97 through a Landscape Management Combining Zone that extends 1/4 mile on either side of the centerline of the designated roadway. The County typically requires LM site plan review when a building permit is required for a new or substantial alteration to an existing structure. The proposal is consistent with Goal 5 because the LM zoning requirements apply when development is proposed; the proposed rezone and Plan amendment is not development and therefore will not impact any Goal 5 resource.*

Goal 6, Air, Water and Land Resources Quality. *The approval of this application will not impact the quality of the air, water, and land resources of the County. Any future development of the Subject Property would be subject to local, state and federal regulations that protect these resources.*

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

Goal 8, Recreational Needs. *This goal is not applicable because there is not development proposed and the property is not planned to meet the recreational needs of Deschutes County.*

Goal 9, Economy of the State. *This goal does not apply to this Application because the Subject Property is not designated as Goal 9 economic development land. In addition, the approval of this Application will not adversely affect economic activities of the state or area. Further, the proposed RI zoning will have more positive impact than EFU zoning on land that cannot viably be farmed.*

Goal 10, Housing. *Applicant's proposed zone change and plan amendment has no impact on housing, as the Subject Property is currently zoned EFU and is not currently in residential use.*

Goal 11, Public Facilities and Services. *The Approval of this application will have no adverse impact on the provision of public facilities and services to the Subject Property. Needed services – including fire, police, water, utilities, schools, and county services – are already available in the area.*

Goal 12, Transportation. *As explained in detail above, the Application complies with the Transportation System Planning Rule, OAR 660-012-0060, the Rule that implements Goal 12. Compliance with that Rule also demonstrates compliance with Goal 12.*

Goal 13, Energy Conservation. *The approval of this Application does not impede energy conservation. The Subject Property is located approximately halfway between the Cities of Bend and Redmond. Allowing the Subject Property to be zoned RI, especially with the proposed use limitations in place, will not negatively impact conservation of energy, and may in fact encourage it because it could provide a conveniently located service (mini-storage) for individuals and businesses located along Highway 97.*

Goal 14, Urbanization. *This Application involves the potential urbanization of rural land. While the RI zone is an acknowledged rural industrial zoning district that limits the intensity of the uses allowed in the zone, Applicant is requesting a change from EFU to RI on land that is relatively undeveloped. The compliance of the proposed zoning with Goal 14 is acknowledged by the Plan, which recognizes that the "county may apply the Rural Industrial plan designation to specific property within existing Rural Industrial exception areas, or to any other specific property that satisfies the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, this Comprehensive Plan and the Deschutes County Development Code, and that is located outside unincorporated communities and urban growth boundaries. The Rural Industrial plan designation and zoning brings these areas and specific properties into compliance with state rules by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022." Further, LUBA has held that Goal 14, ORS 197.713, ORS 197.714, and OAR 660-014-0040(4) do not prohibit or limit rural industrial use of rural land." Central Oregon Landwatch v. Deschutes County, LUBA No. 2021-028, slip op.at p.21 (OR LUBA 2021). Regardless, Applicant has provided analysis for a Goal 14 exception below showing that it meets the requirements for an "irrevocably committed" exception.*

Goals 15 through 19. These goals do not apply to land in Central Oregon.

In LUBA 2021-028, staff notes the findings related to Goal 6 may be applicable to the subject applications:

"Petitioner argues that, because the challenged decision does not approve any specific industrial use or uses, the county could not determine whether industrial uses allowed on the subject property pursuant to the RI zoning comply with Goal 6. Petitioner observes that the RI zone allows lumber manufacturing, wood processing, all uses that could result in 'waste and process discharges.' Petitioner argues that, without specifying which industrial uses may be developed on the property, the county could not find compliance with Goal 6.

The county found that DCC 18.100.030(j) prohibits the county from approving any use in the RI zone that would 'threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards' because review of the use for compliance with applicable state or federal environmental quality statutes, rules, and standards must precede county approval. We agree with intervenor that DCC 18.100.030(j) supports a reasonable expectation that uses allowed on the subject property under RI zoning will either comply with state and federal environmental quality standards or be denied county approval. Such a determination does not require a specific development proposal. We conclude that the challenged decision does not impermissibly defer a finding of Goal 6 compliance."

Additionally, in LUBA 2021-028, staff notes the findings related to Goal 11 may be applicable to the subject applications:

Goal 11 is "[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." Goal 11 prohibits extension of urban services such as sewer and water to rural lands outside UGBs. Central Oregon Landwatch v. Deschutes County, 74 Or LUBA 455 (2016); Gisler v. Deschutes County, 149 Or App 528,535,945 P2d 1051 (1997). The county found that the change to RI will not result in the extension of urban services to the subject property. Record 105, 83. The findings address sewer/septic, water, fire, police, power, telephone, and transportation facilities and services. Record 83-84. Petitioner takes issue with water and wastewater facilities. With respect to water, petitioner argues that the county erred in not addressing groundwater supply and water rights for the subject property and alleges that industrial use of the subject property will threaten groundwater supplies in the area. Petition for Review 33. Petitioner argues that the challenged decision cannot comply with Goals 6 and 11 because there is no water service to the subject property. Petition for Review 41-43.

Intervenor responds that the county found that the subject property has access to water service and that that finding is supported by substantial evidence in the record. Namely, intervenor explains, a water line currently serves two fire hydrants on the subject property and is connected to an Avion Water Company domestic water pipe at the north property line along the county's right-of-way. Record 84. The county observed that the record includes a will-serve letter from Avion. Record 84, 1041.5 Petitioner does not acknowledge, let alone challenge, those findings.

Accordingly, petitioner's argument regarding water service with respect to Goals 6 and 11 provides no basis for remand. Petitioner argues that any industrial use of the subject property will require public wastewater treatment and that, without such treatment, "waste and process discharges from RI Zone uses on the subject property will be discharged directly into the environment, where such discharges threaten to violate applicable state or federal environmental quality statutes, rules and standards," in violation of Goal 6. Petition for Review 43. Accordingly, petitioner argues that the county erred in finding that "public facilities and services necessary for development of the subject property in accordance with the RI Zone are available and will be adequate." Record 105.

Intervenor responds, and we agree, that petitioner's argument is based on an unsubstantiated premise that contaminated industrial waste may only be processed in a public wastewater facility. Petitioner does not cite anything in the record or applicable law that compels a conclusion that potential industrial wastewater discharges may only be treated in a public wastewater facility. Accordingly, petitioner's argument regarding wastewater provides no basis for reversal or remand.

Additionally, in LUBA 2021-028, staff notes the findings related to Goal 14 may be applicable to the subject applications:

Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside [UGBs], to ensure efficient use of land, and to provide for livable communities." Goal 14 requires cities and counties to cooperatively establish as part of their comprehensive plan UGBs "to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land." Goal 14 generally prohibits urban uses of rural land. Neither Goal 14 nor any other rule or guidance promulgated by LCDC defines "urban use."⁶

The Supreme Court recognized that definitional gap 35 years ago in 1000 Friends of Oregon v. LCDC, 301 Or 447, 724 P2d 268 (1986) (Curry County), in which the court held that urban uses are not permitted outside of UGBs unless an exception to Goal 14 is taken. The court explained that, if a decision affecting rural land outside an UGB is challenged as allowing an urban use in violation of Goal 14, a local government may do one of three things. The local government may (1) establish that the decision does not offend Goal 14 by demonstrating that the proposed use is rural and not urban. Differently, if the local government determines that a proposed use is an urban use, then the local government may either (2) comply with the Goal 14 by including the subject site within

⁶ LCDC has adopted general definitions that apply to the Statewide Planning Goals, including the following: "RURAL LAND. Land outside [UGBs] that is: "(a) Non-urban agricultural, forest or open space, "(b) Suitable for sparse settlement, small farms or acreage homesites with no or minimal public services, and not suitable, necessary or intended for urban use, or "(c) In an unincorporated community. "* * * * *"URBAN LAND. Land inside an urban growth boundary. "URBANIZABLE LAND. Urban land that, due to the present unavailability of urban facilities and services, or for other reasons, either: "(a) Retains the zone designations assigned prior to inclusion in the boundary, or (b) Is subject to interim zone designations intended to maintain the land's potential for planned urban development until appropriate public facilities and services are available or planned." (Boldface omitted.)

an UGB or (3) adopt an exception to Goal 14. Curry County, 301 Or at 477; see also Shaffer v. Jackson County, 16 Or LUBA 871, 872-75 (1988).

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

Staff believes the Applicant's responses are sufficient to find compliance with the applicable Statewide Planning Goals has been effectively demonstrated for all listed Goals except, potentially, Goals 3, 12 and 14. Compliance with Goal 3 and 14 are discussed at length herein. Based on the revised traffic study and the County Senior Transportation Planner's subsequent comment, it is unclear to Staff whether compliance with Goal 12 has been effectively demonstrated by the Applicant. Compliance with Goal 15 is dependent on the Hearings Officer's determination of compliance for the Goal 2 Exception Process (in the subject application, related to Goal 14), as reviewed in subsequent sections. Considering the Applicant's responses, above, and staff's comments regarding compliance, Staff requests the Hearings Officer make specific findings on this issue.

DIVISION 4, INTERPRETATION OF GOAL 2 EXCEPTION PROCESS

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

As explained above, the requested zone change and Plan map amendment from EFU / Agricultural to RI should not require a Goal exception because the County's RI zoning complies with Goal 14 by ensuring areas with this zoning remain rural by limiting the uses allowed. Further, Goal 14, ORS 197.713, ORS 197.714, and OAR 660-014-0040(4) do not prohibit or limit rural industrial use of rural land." Central Oregon Landwatch v. Deschutes County, LUBA No. 2021-028, slip op. at p.21 (OR LUBA 2021). To the extent the County disagrees that a Goal exception is not required, the Subject Property is irrevocably committed to urban uses, and Applicant provides a Goal exception analysis below.

Staff provides, below, the conclusions of law as detailed in the Deschutes County Board of County Commissioners findings associated with file no. 247-16-000593-A, a LUBA remand of file no. 247-14-000456-ZC, 457-PA:

Given the above findings that the Applicant did not intend to request and the County Board did not intend to authorize urban uses on the subject property, LUBA's remand warrants that we examine why an exception to Goal 14 was filed in this proceeding at all.

It is plainly evident from the evidence in the record and the above findings that staff's request that the Applicant submit an application requesting an exception to Goal 14, the Hearings Officer's consideration and approval of that exception, and the County Board's consideration of the exception application flowed directly from the precedent set by the Hearings Official's decision in ZC-14-2. The County had concluded that the decision was binding precedent and had consistently applied the approach used in that decision to assign R-I zoning to properties in subsequent applications. That decision, as interpreted and applied by the County, concluded that an exception to Goal 14 urbanization was required whenever a property owner sought rural industrial zoning on rural property, and that the Goal 14 exception process was to ensure that the subject site was not developed with "urban" uses. The Hearings Officer's decision in ZC-14-2 was not appealed and, therefore, its reasoning was never reviewed by LUBA.

As the excerpts from LUBA's opinion in this matter quoted above make clear, the Hearings Officer's analysis and conclusions in ZC-14-2 regarding the use of the Goal 14 exceptions process to limit Rural Industrial uses to those that are not "urban" is both rationally inconsistent and legally incorrect. As LUBA's decision also explains that to get a committed exception to Goal 14, one must demonstrate that it is impossible to locate any rural use on the subject property. It is thus illogical to approve a Goal 14 exception only to then limit it to Rural Industrial uses, which are "rural" by definition and acknowledgment. To do so is also inconsistent with the state's land use legal framework.

The County Board hereby concludes that the County should no longer follow the precedent set forth in ZC-14-2 that requires approving an exception to Goal 14 before approving the change in plan designation and zoning of a rural property to the Rural Industrial plan designation and R-I zoning if only rural uses are to be permitted on the property. As LUBA explained in its decision, the requirement for an Applicant to apply for an exception to Goal 14 is to be limited to proposals that request urban uses on rural land, or as otherwise required by the DCC, state statute or state land use regulations.

Based upon the above conclusion, because the Applicant did not request urban uses to be allowed on the subject property and because the County Board did not intend to allow urban uses on rural land, the County Board concludes that the Applicant should not have been required to submit an application for an exception to Goal 14 for the purposes set forth by the decision in ZC-14-2 as followed by the Hearings Official in this proceeding.

Additionally, in LUBA 2016-012, staff notes the findings related to the Goal 2 Exception Process may be applicable to the subject applications:

"ORS 197.732(2)(b) provides that a local government may approve an exception to a statewide planning goal if '[t]he land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission [LCDC] rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]' OAR 660-014-0030 is LCDC rule that governs approval of irrevocably committed exceptions to Goal 14 to allow urban uses of rural land. OAR 660-014-0030(3) and (4)

are the most relevant for purposes of the second assignment of error.⁷OAR 660-014-0030(3) sets out four factors that must be considered in granting an irrevocably committed exception to Goal 14. See n 8. OAR 660-014-0030(4) then makes it clear that (1) an irrevocably committed exception to Goal 14 must be based on all the OAR 660-014-0030(3) factors and (2) there must be a statement of reasons explaining why the facts found in addressing the OAR 660-014-0030(3) factors support a conclusion that the land is committed to urban rather than rural development.

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

OAR 660-004-0010, Application of the Goal 2 Exception Process to Certain Goals

- (1) ***The exceptions process is not applicable to Statewide Goal 1 "Citizen Involvement" and Goal 2 "Land Use Planning." The exceptions process is generally applicable to all or part of those statewide goals that prescribe or restrict certain uses of resource land, restrict urban uses on rural land, or limit the provision of certain public facilities and services. These statewide goals include but are not limited to:***
- (a) ***Goal 3 "Agricultural Lands"; however, an exception to Goal 3 "Agricultural Lands" is not required for any of the farm or nonfarm uses allowed in an exclusive farm use (EFU) zone under ORS chapter 215 and OAR chapter 660, division 33, "Agricultural Lands", except as provided under OAR 660-004-0022 regarding a use authorized by a statewide planning goal that cannot comply with the approval standards for that type of use;***

FINDING: Oppositional public comments submitted to record include a statement from Central Oregon LandWatch explaining, in part, that the subject applications would require a Goal 3 exception. Based on the above information and associated public comments, staff requests the Hearings Officer make specific findings on this issue.

- (c) ***Goal 11 "Public Facilities and Services" as provided in OAR 660-011-0060(9);***

FINDING: Oppositional public comments submitted to record include a statement from Central Oregon LandWatch explaining, in part, that the subject applications would require a Goal 11 exception. Based on the above information and associated public comments, staff requests the Hearings Officer make specific findings on this issue.

- (d) ***Goal 14 "Urbanization" as provided for in the applicable paragraph (l)(c)(A),***

⁷ OAR 660-014-0030(3) and (4) provide: "(3) A decision that land is committed to urban levels of development shall be based on findings of fact, supported by substantial evidence in the record of the local proceeding, that address the following: "(a) Size and extent of commercial and industrial uses; "(b) Location, number and density of residential dwellings; "(c) Location of urban levels of facilities and services; including at least public water and sewer facilities; and "(d) Parcel sizes and ownership patterns. "(4) A conclusion that rural land is irrevocably committed to urban development shall be based on all of the factors listed in section (3) of this rule. The conclusion shall be supported by a statement of reasons explaining why the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than a rural level of development." (Emphasis added.)

(B), (C) or (D) of this rule:

- (A) An exception is not required for the establishment of an urban growth boundary around or including portions of an incorporated city;**
- (B) When a local government changes an established urban growth boundary applying Goal 14 as it existed prior to the amendments adopted April 28, 2005, it shall follow the procedures and requirements set forth in Goal 2 "Land Use Planning," Part II, Exceptions. An established urban growth boundary is one that has been acknowledged under ORS 197.251, 197.625 or 197.626. Findings and reasons in support of an amendment to an established urban growth boundary shall demonstrate compliance with the seven factors of Goal 14 and demonstrate that the following standards are met:
 - (i) Reasons justify why the state policy embodied in the applicable goals should not apply (This factor can be satisfied by compliance with the seven factors of Goal 14);**
 - (ii) Areas that do not require a new exception cannot reasonably accommodate the use;**
 - (iii) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and**
 - (iv) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.****
- (C) When a local government changes an established urban growth boundary applying Goal 14 as amended April 28, 2005, a goal exception is not required unless the local government seeks an exception to any of the requirements of Goal 14 or other applicable goals;**

FINDING: The Applicant is not requesting a change to any urban growth boundaries. The above criteria (A-C) do not apply to the subject applications.

- (D) For an exception to Goal 14 to allow urban development on rural lands, a local government must follow the applicable requirements of OAR 660-014-0030 or 660-014-0040, in conjunction with applicable requirements of this division;**

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

Applicant provides analysis of a Goal 14 exception to allow urban development on rural lands

below. Part D of this Rule (as well as the requirements of OAR 660-014-0030 and – 0040) applies to the County, and not to Applicant.

Staff agrees with the above statement and notes that further analysis is provided in subsequent findings.

(2) *The exceptions process is generally not applicable to those statewide goals that provide general planning guidance or that include their own procedures for resolving conflicts between competing uses. However, exceptions to these goals, although not required, are possible and exceptions taken to these goals will be reviewed when submitted by a local jurisdiction. These statewide goals are:*

...

(g) *Goal 12 "Transportation" except as provided for by OAR 660-012-0070, "Exceptions for Transportation Improvements on Rural Land";*

FINDING: Oppositional public comments submitted to record include a statement from Central Oregon LandWatch explaining, in part, that the subject applications would require a Goal 12 exception. Based on the above information and associated public comments, staff requests the Hearings Officer make specific findings on this issue.

OAR 660-004-0018, Planning and Zoning for Exception Areas

(1) *Purpose. This rule explains the requirements for adoption of plan and zone designations for exceptions. Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 and 660-014-0030 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule.*

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

Applicant is proposing a zone change and Plan map amendment for land currently zoned EFU-TRB and designated "agricultural." As explained in detail above, the Soils Assessments show that the Subject Property consists of predominantly Class 7 and 8 soils, and as such cannot be considered "agricultural" such that an exception to Goal 3 is required. However, the proposed RI zoning may require a Goal 14 exception. The Subject Property has been in use as a large equipment service and repair / rental and sales facility for the majority of the past 40 years, at least. As such, the Subject Property is irrevocably committed to those uses and an exception is required on that basis to allow Applicant to continue those uses on the Subject Property.

Regarding the Applicant's "irrevocably committed" argument, Staff is uncertain if the development on the property constitutes an unaltered, uninterrupted, unabandoned non-conforming use that can be included in the analysis of the irrevocable commitment of the property to non-EFU zone uses. Staff believes a non-conforming use verification would be required to establish that the present and historic uses of the property were lawfully established and continued without alteration, abandonment, or interruption.

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

- (1) A local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable:**
 - (a) A "committed exception" is an exception taken in accordance with ORS 197.732(2)(b), Goal 2, Part II(b), and with the provisions of this rule, except where other rules apply as described in OAR 660-004-0000(1).**
 - (b) For the purposes of this rule, an "exception area" is that area of land for which a "committed exception" is taken.**
 - (c) An "applicable goal," as used in this rule, is a statewide planning goal or goal requirement that would apply to the exception area if an exception were not taken.**
- (2) For "physically developed" and "irrevocably committed" exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those that satisfy (a) or (b) or (c) and, if applicable, (d):**
 - ...
 - (b) That meet the following requirements:**
 - (A) The rural uses, density, and public facilities and services will maintain the land as "Rural Land" as defined by the goals, and are consistent with all other applicable goal requirements;**

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

"Rural Land" is defined by the goals as "[l]and outside urban growth boundaries that is: a) Non-urban agricultural, forest or open space; b) Suitable for sparse settlement, small farms or acreage homesites with minimal public services, and not suitable, necessary or intended for urban use, or c) In an unincorporated community." Applying the RI Plan designation and zoning to the Subject Property will maintain the land as "rural" because rural uses, density, and public facilities allowed by the RI zoning are limited to those that, according to the Plan, "ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities." Applicant addressed consistency with other applicable goal requirements above, and incorporates that discussion here.

Staff notes that, to the extent the Applicant is relying on a "physically developed" or "irrevocably committed" goal exception, it is unclear if citing the Plan language is sufficient to ensure compliance with this requirement. It appears to staff that in LUBA No. 2018-126, it was found that a demonstration of compliance is required at the time of PA/ZC.

1 The county adopted findings that the DCCP amendments are consistent
2 with Goal 14:
3 “The proposed amendment is consistent with Goal 14 because not
4 only must any application for Rural Commercial or Rural Industrial
5 plan designation demonstrate it is consistent with Goal 14, but, as
6 DCCP Policy 3.4.9 and 3.4.23 direct, land use regulations for the
7 Rural Commercial and Rural Industrial zones ensure that the uses
8 allowed are less intensive than those allowed for unincorporated
9 communities in OAR 660 Division 22, and are consequently not
10 urban uses.” Record 31.⁶
11 In those findings, the county essentially concluded that because the amendments
12 only amend the DCCP text and do not apply the RI plan designation to any
13 property, the amendments themselves cannot allow urban use of rural land. The
14 findings explain that a future application for the RI plan designation will be
15 required to demonstrate that the proposed use is consistent with all of the
16 statewide planning goals, including Goal 14.

Given the variety of uses in the RI zone, staff is uncertain how to evaluate the individual potential impact of each of those uses or cumulative potential impacts of the establishment of several of these uses on the subject property with regards to ensuring the uses are, “suitable for sparse settlement, small farms or acreage homesites with minimal public services, and not suitable, necessary or intended for urban use”. Staff understands this criterion to also require evaluation of public facilities and services needed to support potential uses. Staff also notes that there are no fixed density standards in the RI zone. Staff requests the Hearings Officer make specific findings on these issues.

(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The rural uses, density, and public facilities allowed by the RI zone will not commit adjacent or nearby resource land to uses not allowed by the applicable goal. The nearby and adjacent resource lands (which are zoned EFU) are either in residential use or used as open space / park land; they are not in any agricultural use. Allowing a Goal 14 exception to rezone the Subject Property from EFU to RI, therefore, will not impact the nearby and adjacent EFU-zoned resource lands to uses not allowed by Goal 3.

Staff notes that adjacent Tax Lots 300 and 306 appear to be in farm use, based on aerial photography, and are receiving farm tax assessment. Given the variety of uses in the RI zone, staff is uncertain how to evaluate the individual potential impact of each of those uses or cumulative potential impacts of the establishment of several of these uses on adjacent and nearby resource land. Staff also notes that there are no fixed density standards in the RI zone. While the canal currently provides some separation between the subject property and the adjacent farm use, it is unclear if that effect will remain when the canal is piped. Staff understands this criterion to also require evaluation of public facilities and services needed to support potential uses.

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

(C) *The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses;*

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The rural uses, density, and public facilities and services allowed by the RI zone and Plan designation are compatible with adjacent or nearby resource uses (i.e. residential, open space / parks).

Staff notes a public oppositional comment from a neighboring property owner to west, indicating concern over the proposal's compatibility with the residential properties to the west. Staff believes this criterion is specific to resource uses. Staff notes that issues raised under (A) and (B), immediately above, likely apply to this criterion as well. Staff requests the Hearings Officer make specific findings on these issues.

OAR 660-004-0028, Exception Requirements for Land Irrevocably Committed to Other Uses

(1) *A local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable:*

- (a) **A "committed exception" is an exception taken in accordance with ORS 197.732(2)(b), Goal 2, Part II(b), and with the provisions of this rule, except where other rules apply as described in OAR 660-004-0000(1).**
- (b) **For the purposes of this rule, an "exception area" is that area of land for which a "committed exception" is taken.**
- (c) **An "applicable goal," as used in this rule, is a statewide planning goal or goal requirement that would apply to the exception area if an exception were not taken.**

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

ORS 197.732(2)(b) is addressed below. Goal 2, Part II(b) allows an exception to a Goal where "[t]he land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable." The Subject Property, which is the relevant "exception area," is currently zoned EFU-TRB but cannot be used for agricultural purposes, including farming and grazing, because of the poor soil conditions, as discussed above. Further, the Subject Property has been in use as an equipment service / repair and rental/ sales facility for the majority of the past 40 years or more, and has had improvements (buildings, parking areas, etc.) for that long, as well. It is adjacent to a residential large-lot subdivision to the west, and bordered by Highway 97 on the east. The EFU-zoned lands adjacent to it are in residential use and not in agricultural use. Applicant is entitled to an "irrevocably committed" exception to Goal 14 because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable. Compliance with the requirements for the exception is addressed below.

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

- (2) **Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:**
 - (a) **The characteristics of the exception area;**

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The "exception area" is the area for which the exception is being requested - i.e., the Subject Property. As discussed above, the Subject Property is composed of mostly Class 7 and 8 soils, which are not suitable for farming or other agricultural use. For most of the past 40 or more years, two of the three tax lots making up the Subject Property have been used for repair, service, and rental / sales of large equipment. This use for such an extended period of time contributed to the degradation of the soils on the Subject Property. The third tax lot, Tax Lot 301, is landlocked and only accessible via a bridge easement from Highway 97 located on Tax Lots 305 and 500. The Subject Property is connected to urban services including fire, police, utilities, schools, library, garbage and recycling, and county services.

Staff notes that of the subject property's approximately 19 acres, aerial photography indicates that approximately 4.5 acres have been allocated to the non-conforming use on the property.

Regarding the Applicant's "irrevocably committed" argument, Staff is uncertain if the development on the property constitutes an unaltered, uninterrupted, unabandoned non-conforming use that can be included in the analysis of the of the irrevocable commitment of the property to non-EFU zone uses. Staff believes a non-conforming use verification would be required to establish that the present and historic uses of the property were lawfully established and continued without alteration, abandonment, or interruption.

Staff is uncertain when determining that non-urban uses are impracticable, if the good soils to which water is not being applied must be considered separately or as part of the cumulative farm potential of the property. Staff is also uncertain if poor soils are sufficient to determine that non-urban uses are impracticable on those portions of the property or if additional findings are required. Staff is also uncertain if other non-urban uses, such as low density residential uses afforded through non-farm dwellings need to be evaluated. Staff requests the Hearings Officer make specific findings on this issue.

(b) The characteristics of the adjacent lands;

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property is surrounded by multiple zones and uses. Directly west, and comprising the western boundary of the Subject property, is a large Rural Residential 10 zone ("RR-10"). All neighboring properties to the west are part of the Whispering Pines Estates subdivision and are put to residential uses. The Subject Property shares a southern border with Tax Lot 700, which is owned by the Oregon Parks and Recreation Department land and zoned Open Space and Conservation ("OS&C"). The Subject Property is bordered on the east by Highway 97 and two other parcels, Tax Lots 300 and 306. Tax Lots 300 and 306 are also zoned EFU-TRB, however, neither is actively used for agricultural operations, and both are used for residential purposes. The Subject Property is bordered on the north by Tax Lot 202 which is also zoned EFU-TRB and is not engaged in an agricultural operation, but rather, is used for residential purposes.

Staff notes that adjacent Tax Lots 300 and 306 appears to be in farm use, based on aerial photography, and are receiving farm tax assessment. Considering the above response and staff's analysis of surrounding properties in Section 2 of this staff report, staff requests the Hearings Officer make specific findings on this issue.

**(c) The relationship between the exception area and the lands adjacent to it;
and**

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property is adjacent to a residential subdivision consisting of multiple large residential lots, several tax lots zoned EFU used for residential purposes and not currently in agricultural use, Highway 97, and a state park. The Subject Property - which has been used for decades as an equipment repair / service facility - and the properties adjacent to it are compatible with one another and have been for decades. Applicant's proposed zone change and Plan map amendment would not change that relationship because the Subject Property has been used in ways consistent with the allowed uses in the RI zone for decades.

Staff is uncertain if this OAR is directed to the current use of the property or potential future uses. If potential future uses are to be evaluated, staff incorporates herein by reference issues raised under OAR 660-004-001(2). Staff notes the following LUBA finding:

...the mere existence of residential uses near a property proposed for an irrevocably committed exception does not demonstrate that such property is necessarily committed to nonresource use. *Prentice v. LCDC*, 71 Or App 394,12 403-04, 692 P2d 642 (1984). (LUBA No. 2019-065)

Staff believes that this OAR is intended to determine to what extent the relationship between the exception area and the lands adjacent to it renders non-urban uses impracticable. The Applicant's response instead focuses on the compatibility of the of the non-conforming use with adjacent uses. Staff requests the Hearings Officer make specific findings on this issue.

(d) The other relevant factors set forth in OAR 660-004-0028(6).

FINDING: The relevant factors of OAR 660-004-0028(6) are discussed in subsequent findings.

(3) Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(2)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule, except where other rules apply as described in OAR 660-004-0000(1). Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad resource protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is "impossible."

...

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

Applicant is not requesting an exception to Goal 3 because the land is not suitable for agricultural use, as explained above. Applicant requests an exception to Goal 14. The Subject Property is irrevocably committed to non-resource use due to its extensive historic use as a large equipment service / repair and rental / sales facility, which depleted the soils. The soils on the Subject Property are predominantly Class 7 and 8 and as a result cannot reasonably be farmed. The Subject

Property's current EFU-TRB zoning allows outright or conditionally a variety of uses. The farm and forest uses allowed in the EFU zone - as well as uses related to farm and forest uses - would be impracticable on the Subject Property due to constraints caused by the historic use of the Subject Property, its proximity to Highway 97, its proximity to a residential subdivision and other residentially-used properties, the landlocked nature of Tax Lot 301, the less than 20-acre size of the Subject Property, the poor quality of the soils, and the difficulty of irrigating. Other resource-related uses allowed in the EFU zone such as mining, wetland creation, and wildlife habitat conservation would be impracticable considering the Subject Property's size, location, configuration, and dry rocky soil.

While residential uses may not be impossible, the only site that could currently be developed with a residence is landlocked and inaccessible from Highway 97. Tax Lots 305 and 500 are presently developed with facilities historically used for service / repair and rental / sales of large equipment. Developing a dwelling on those lots is impracticable based on the current use of the land. Further, the proximity to Highway 97 creates noise issues that would make dwelling development impracticable. With respect to irrigation-related uses, the Subject Property, while adjacent to the Pilot Butte Canal, cannot be sufficiently irrigated because (a) the water rights are being leased to the Deschutes River and (b) even if they were not, the Canal is insufficient to irrigate the entire Subject Property. Finally, the utility and similar uses allowed in the EFU zone, such as utility facilities, transmission towers, personal use airports, solar power generating facilities, etc.) are impracticable on the Subject Property due to its small size (approx. 19 acres) and the fact that it is already partially developed.

Staff is uncertain if this OAR is a criterion in itself or only explains how to interpret and implement other OAR. Staff requests the Hearings Officer make specific findings on this issue.

For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:

- (a) Farm use as defined in ORS 215.203;***
- (b) Propagation or harvesting of a forest product as specified in OAR 660-033-0120; and***
- (c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a).***

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

Applicant is not requesting an exception to Goal 3 because the land is not suitable for agricultural use, as explained above. Applicant requests an exception to Goal 14.

- (4) A conclusion that an exception area is irrevocably committed shall be supported by findings of fact that address all applicable factors of section (6) of this rule and by a statement of reasons explaining why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area.***

FINDING: Compliance with the factors in section (6) is addressed below.

- (5) ***Findings of fact and a statement of reasons that land subject to an exception is irrevocably committed need not be prepared for each individual parcel in the exception area. Lands that are found to be irrevocably committed under this rule may include physically developed lands.***

FINDING: The Applicant's proposed exception area consists of three (3) Tax Lots (301, 305, and 500), all of which are the subject of this application.

- (6) ***Findings of fact for a committed exception shall address the following factors:***
(a) ***Existing adjacent uses;***

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

See above discussion of "characteristics of adjacent lands," which discusses the existing adjacent uses.

Considering the above response and staff's analysis of surrounding properties in Section 2 of this staff report, staff requests the Hearings Officer make specific findings on this issue.

- (b) ***Existing public facilities and services (water and sewer lines, etc.);***

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

There are no public water or sewer facilities on the Subject Property; it is served by an on-site, DEQ-approved sewage disposal system and has an on-site well that provides potable water to the Subject Property. Further, Applicant's proposal to develop the Subject Property with RI zone allowed uses will not require public water or sewer facilities. The Subject Property will continue to be serviced by the Deschutes Rural Fire District #2 and the Deschutes County Sheriff.

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

- (c) ***Parcel size and ownership patterns of the exception area and adjacent lands:***
(A) ***Consideration of parcel size and ownership patterns under subsection (6)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the goals were made at the time of partitioning or subdivision. Past land divisions made without application of the goals do not in themselves demonstrate irrevocable commitment of the exception area.***

...

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property consists of three tax lots that total approximately 19.12 acres; Tax Lot 301 is 15.06 acres, Tax Lot 305 is 3.00 acres, and Tax Lot 500 is 1.06 acres. Tax Lot 301 was formerly part of Tax Lot 300 (discussed below). It was created in 1977 and at that time consisted of 18.06 acres. In 1981, it was divided to create the 3.0 acre Tax Lot 305. Tax Lot 500 was created in 1972 and was originally 7.27 acres. In 1991, 0.21 acres were removed to create Tax Lot 501 (right of way for the highway).

Land use records for the Subject Property do not appear to exist prior to 1978. In April 1978, the owner of the Subject Property - which at that time existed as only Tax Lots 301 and 500 - applied for a rezone from A-1 to C-2 to support the existing tractor sales and service operation. At that time, the Subject Property had been designated by the Deschutes County Comprehensive Plan and the Redmond Comprehensive plan as being for urban development. Exhibit 11 at p. 16. The Subject Property at that time was within the sewer and water service boundaries, and electrical service, telephone service, and other public facilities were being supplied to the area. The County chose to rezone a portion of the Subject Property (Tax Lot 500) to A-S rather than C-2 and to leave Tax Lot 301 zoned A-1.

The adjacent properties to the north and east (Map/Tax Lots 1612230000202, -300 & -306) are all zoned EFU and are under separate ownership. Tax Lot 202 is 5.63 acres and is owned by Robert E. Fate and Stacey L. Andrews. It appears to have been created by partition plat in or around 2017. Tax Lot 300 is 21.56 acres and is owned by James L. Werth. It was formerly part of TL 1612 (from which Tax Lot 301, part of the Subject Property, was also created). TL 1612 was divided numerous times over the years, culminating in the creation of Tax Lot 300 in around 1988. Tax Lot 306 is owned by William Edward Kirzy and is 20.54 acres. It appears to have been created in 1987 as Minor Land Partition No. MP-87-20.

The adjacent property to the south (Map/Tax Lot 1612230000700) is open space and park land owned by the State of Oregon Parks & Recreation Department. Tax Lot 700 is 35.89 acres. It appears to have been created from TL 1612 in or around 1961.

The adjacent properties to the west consist of lots making up the Whispering Pines subdivision (Map/Tax Lots 161223C000100, 200, 300, 400, 500, 600, 700, &.800 - platted in 1968; Map/Tax Lots 161223B00106 - platted in 1969; Map/Tax Lots 161223B00200, 201, 202, 203, 204, 205, 206, & 207 - platted in 1977). These are all zoned RR-10, are under 3 acres in size, and are under separate ownership. The majority of the soils on these properties are classified as 58C, which is not considered "high-value" farmland and as such would likely not be put to any agricultural use.

Staff believes the OAR, in quoted part, has been addressed.

...

Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors makes unsuitable their resource use or the resource use of nearby lands can the parcels be considered to be irrevocably committed.

...

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property is also completely constrained for additional development and use due to the Pilot Butte Canal on the east (and bisecting the property). This canal sits within a federal right of way and, therefore, precludes development or use. Given this fact, and the subdivision to the west, the Subject Property contains severe constraints that preclude operating the property as a single farming operation or for significant agricultural use.

Staff note that Applicant's arguments regarding the existing physical development of the property also likely apply to this portion of the OAR.

...

Resource and nonresource parcels created and uses approved pursuant to the applicable goals shall not be used to justify a committed exception. For example, the presence of several parcels created for nonfarm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for the subject parcels or land adjoining those parcels.

FINDING: No parcels created or uses approved pursuant to the applicable goals are be used to justify a committed exception.

- (B) *Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations;***

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The parcel sizes for the Subject Property and the properties adjacent to it range from 1.06 acres to 35.89 acres. The majority of the parcels surrounding the Subject Property are part of the Whispering Pines residential subdivision - they are each under 3 acres. The only contiguous ownerships are Tax Lots 305 and 500, which are owned by Applicant and part of the Subject Property. Tax Lot 301, also part of the Subject Property, is owned by a principal of Applicant. The

Subject Property does not stand alone amidst larger farm or forest operations and are not buffered from such operations-there are no such operations in the vicinity of the Subject Property.

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

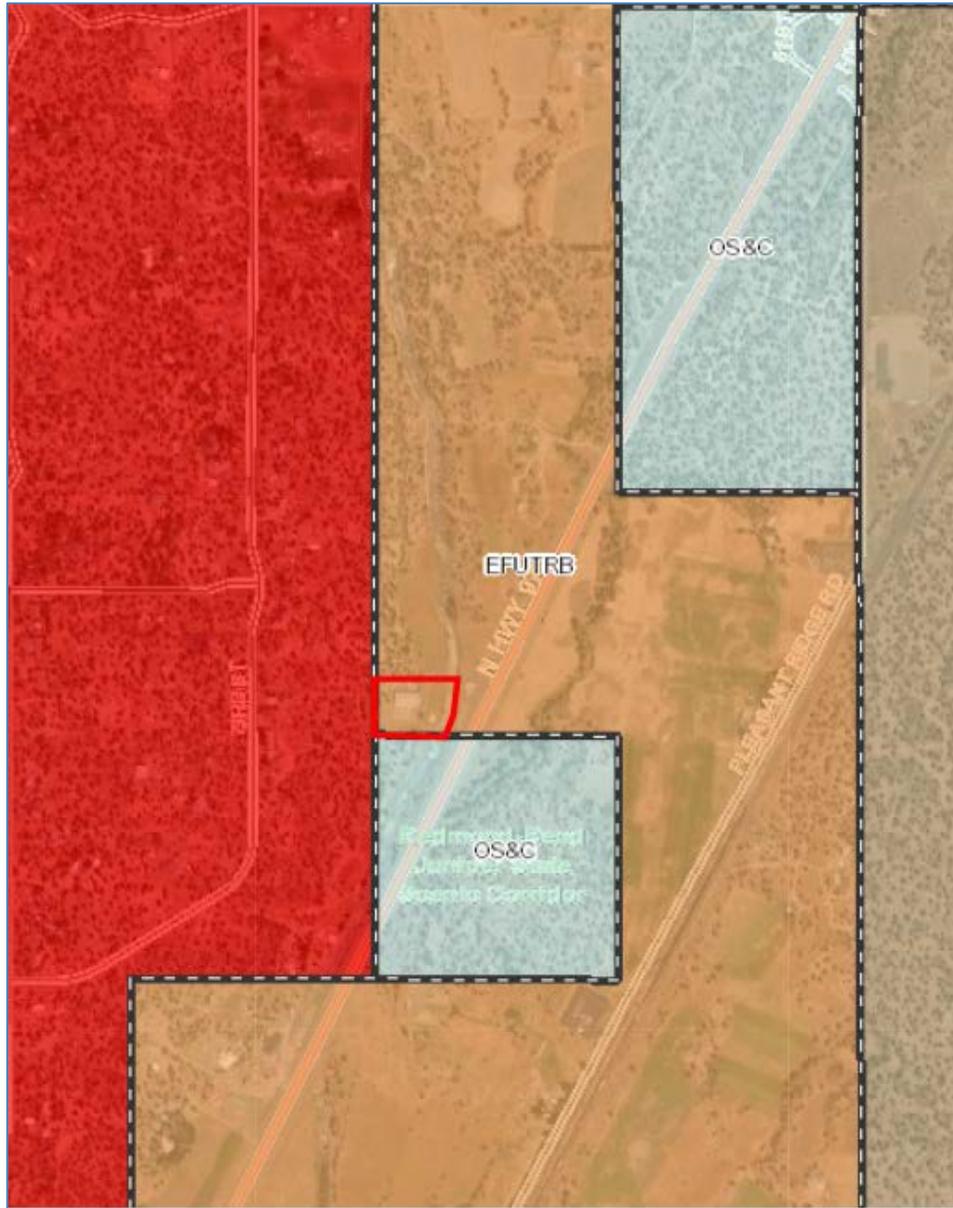
(d) Neighborhood and regional characteristics;

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

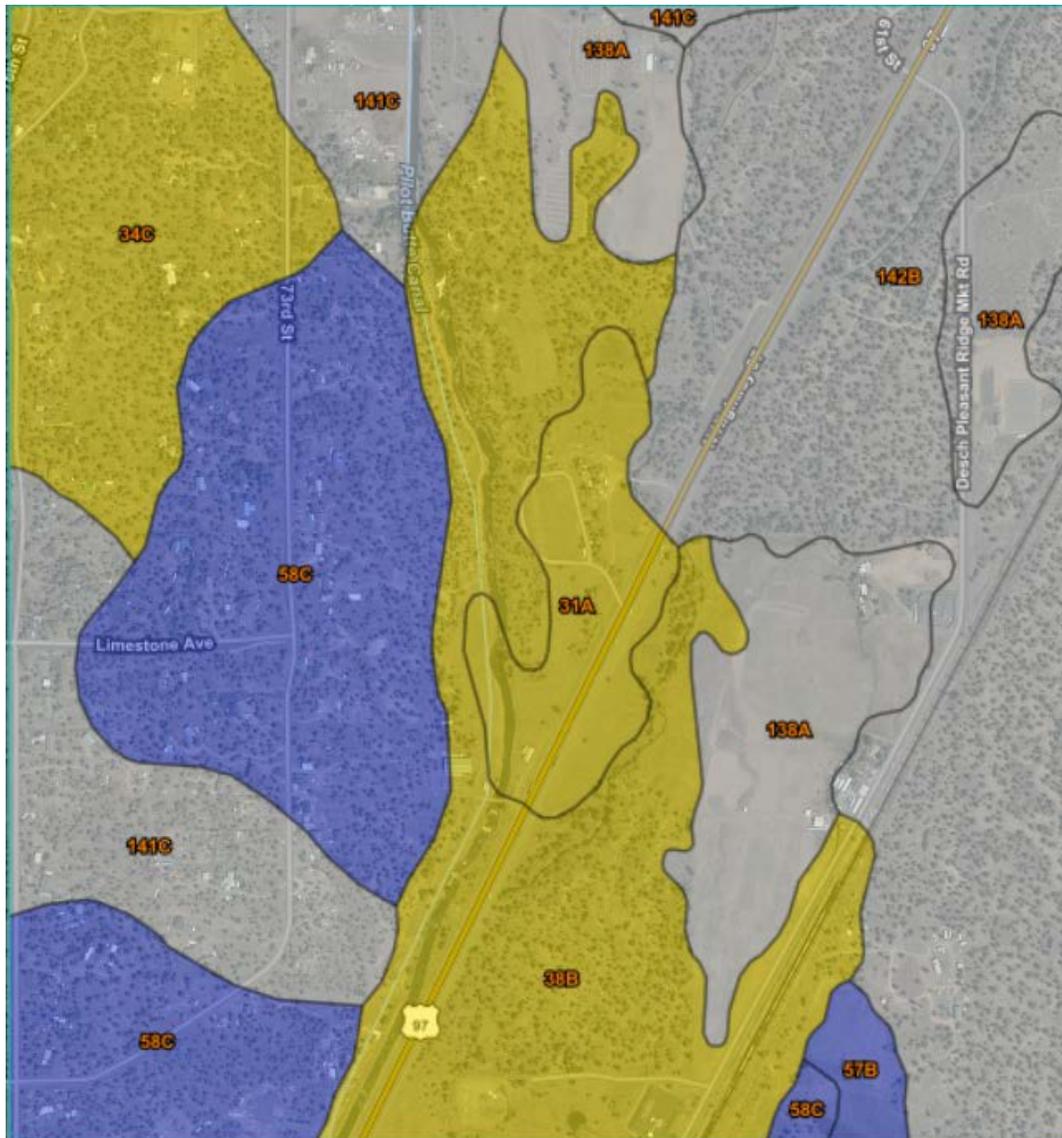
The area, or "neighborhood," in which the Subject Property lies can be characterized generally as developed residential properties. While some are zoned EFU, they are not being used for agricultural purposes. The general area around the Subject Property appears to consist of native vegetation - grasses and juniper trees - and is largely infertile soil (58C). Deschutes Junction is nearby and is also zoned RI, and consists of a mixture of commercial and industrial uses, with some hobby farms and rural residences. Approval of the proposed exception would be consistent with the actual character and land use pattern in the neighborhood.

Staff finds that it is unclear what area of analysis is appropriate for neighborhood and regional characteristics. Using an approximately ¼-mile buffer around the subject property, the vicinity is comprised of a mix of RR-10, EFU, and OS&C zoning. Please see the figures provided on following pages.

Zoning within approximately ¼ mile of the subject property
(Tax Lot 305 highlighted for reference)



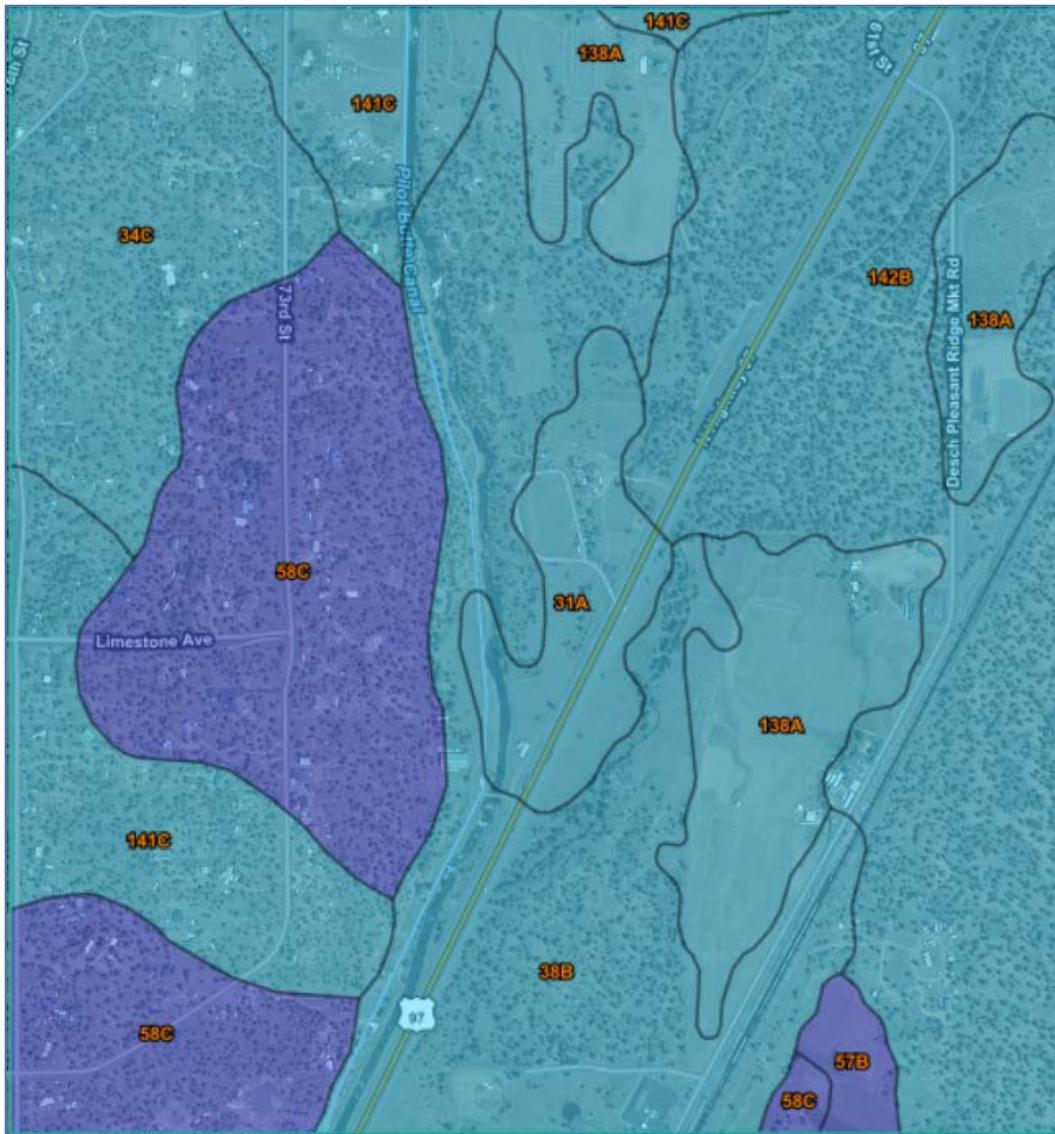
NRCS Irrigated Soil classification within approximately ¼ mile of the subject property



Within the areas shown above, the NRCS soil irrigated classifications are as follows:

Map unit symbol	Map unit name	Rating	Acres in AOI	Percent of AOI
31A	Deschutes sandy loam, 0 to 3 percent slopes	3	30.1	4.6%
34C	Deschutes-Stukel complex, 0 to 15 percent slopes	3	64.9	9.9%
38B	Deskamp-Gosney complex, 0 to 8 percent slopes	3	126.7	19.3%
57B	Gosney stony loamy sand, 3 to 8 percent slopes	7	5.9	0.9%
58C	Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes	7	123.8	18.9%
138A	Stukel sandy loam, 0 to 3 percent slopes		74.8	11.4%
141C	Stukel-Deschutes-Rock outcrop complex, 0 to 15 percent slopes		71.2	10.8%
142B	Stukel-Rock outcrop-Deschutes complex, dry, 0 to 8 percent slopes		158.7	24.2%
Totals for Area of Interest			656.3	100.0%

NRCS Non-irrigated Soil classification within approximately ¼ mile of the subject property

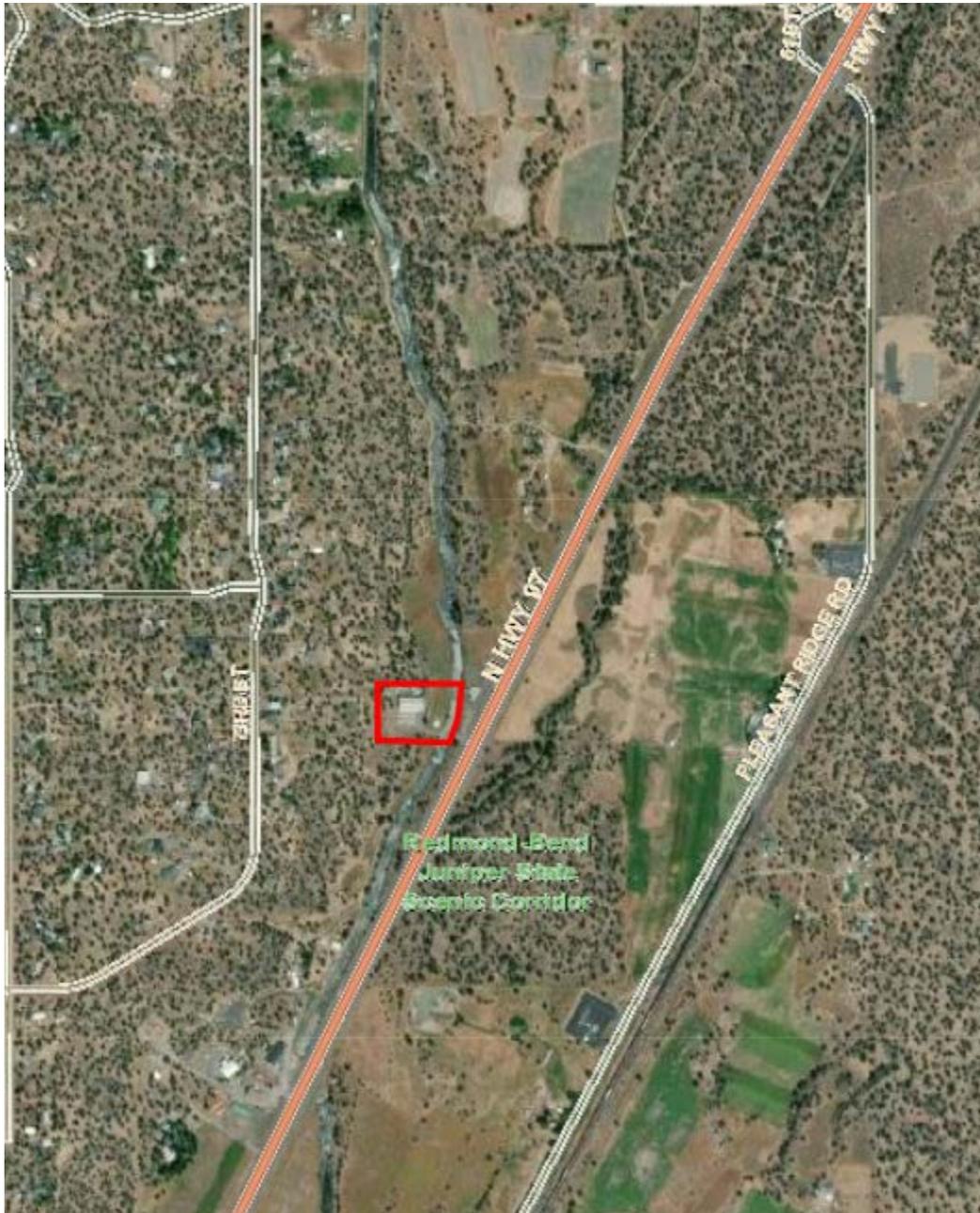


Within the areas shown above, the NRCS soil non-irrigated classifications are as follows:

Map unit symbol	Map unit name	Rating	Acres in AOI	Percent of AOI
31A	Deschutes sandy loam, 0 to 3 percent slopes	6	30.1	4.6%
34C	Deschutes-Stukel complex, 0 to 15 percent slopes	6	64.9	9.9%
38B	Deskamp-Gosney complex, 0 to 8 percent slopes	6	126.7	19.3%
57B	Gosney stony loamy sand, 3 to 8 percent slopes	7	5.9	0.9%
58C	Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes	7	123.8	18.9%
138A	Stukel sandy loam, 0 to 3 percent slopes	6	74.8	11.4%
141C	Stukel-Deschutes-Rock outcrop complex, 0 to 15 percent slopes	6	71.2	10.8%
142B	Stukel-Rock outcrop-Deschutes complex, dry, 0 to 8 percent slopes	6	158.7	24.2%
Totals for Area of Interest			656.3	100.0%

Aerial photography from 2020 shows a mix of residential and agricultural uses in the area.

**Aerial Photography (2020) within approximately ¼ mile of the subject property
(Tax Lot 305 highlighted for reference)**



Staff requests the Hearings Officer make specific findings on what area of analysis is appropriate for neighborhood and regional characteristics and what details are required.

- (e) ***Natural or man-made features or other impediments separating the exception area from adjacent resource land. Such features or impediments include but are not limited to roads, watercourses, utility lines, easements, or rights-of-way that effectively impede practicable resource use of all or***

part of the exception area;

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property is separated from resource area (zoned EFU) by the Pilot Butte Canal and Highway 97. It is also currently developed with commercial / industrial buildings that have been historically used as equipment service / repair and rental facilities. Tax Lot 301 is landlocked and only accessible via a bridge easement located on or near Tax Lots 500 and 305. These features impede practicable resource use of the exception area.

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

(f) Physical development according to OAR 660-004-0025; and

FINDING: OAR 660-004-0025 states:

660-004-0025

Exception Requirements for Land Physically Developed to Other Uses

- (1) *A local government may adopt an exception to a goal when the land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal. Other rules may also apply, as described in OAR 660-004-0000(1).***
- (2) *Whether land has been physically developed with uses not allowed by an applicable goal will depend on the situation at the site of the exception. The exact nature and extent of the areas found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception.***

The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property is developed with a bridge over the Pilot Butte Canal, two commercial buildings and their accessory buildings, and a double-wide mobile home. The two commercial buildings, used for equipment service / repair and rental / sales, total 2,864 square feet combined. The Subject Property has been developed with an approximately 7,500 square foot warehouse since the early 1990s. While this development does not preclude resource uses per se, the historic use of the two commercial buildings and their accessory structures and Applicant's plan to continue that historic use, along with the fact that the only access to the landlocked Tax Lot 301 is

via these developed lots, weighs in favor of a determination that the Subject Property is irrevocably committed to urban uses.

Regarding the Applicant's "irrevocably committed" argument, Staff is uncertain if the development on the property constitutes an unaltered, uninterrupted, unabandoned non-conforming use that can be included in the analysis of the of the irrevocable commitment of the property to non-EFU zone uses. Staff believes a non-conforming use verification would be required to establish that the present and historic uses of the property were lawfully established and continued without alteration, abandonment, or interruption.

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

(g) Other relevant factors.

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

Highway 97 runs along the east side of the Subject Property. This detracts from the suitability of the Subject Property for resource or other uses permitted in the EFU zone. The Pilot Butte Canal also bisects a portion of the Subject Property or forms a border to similar effect.

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

(7) *The evidence submitted to support any committed exception shall, at a minimum, include a current map or aerial photograph that shows the exception area and adjoining lands, and any other means needed to convey information about the factors set forth in this rule. For example, a local government may use tables, charts, summaries, or narratives to supplement the maps or photos. The applicable factors set forth in section (6) of this rule shall be shown on the map or aerial photograph.*

FINDING: The Applicant has provided a current area map and aerial photograph showing the subject property and adjoining lands, included as **Exhibit 1** of the submitted application materials.

DIVISION 14, APPLICATION OF THE STATEWIDE PLANNING GOALS TO NEWLY INCORPORATED CITIES, ANNEXATION, AND URBAN DEVELOPMENT ON RURAL LANDS

OAR 660-014-0030, Rural Lands Irrevocably Committed to Urban Levels of Development

(1) *A conclusion, supported by reasons and facts, that rural land is irrevocably committed to urban levels of development can satisfy the Goal 2 exceptions standard (e.g., that it is not appropriate to apply Goals 14's requirement prohibiting the establishment of urban uses on rural lands). If a conclusion that land is irrevocably committed to urban levels of development is supported, the four factors in Goal 2 and OAR 660-004-0020(2) need not be addressed.*

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The proposed exception area - the Subject Property - is irrevocably committed to urban levels of development. Specifically, it is irrevocably committed to industrial and quasi-commercial uses at urban levels, as has been shown above. The Subject Property is unsuitable for rural uses including farming because of its size, configuration, poor quality soils, lack of sufficient irrigation, and the highway abutting it. Because the Subject Property has been irrevocably committed, Applicant need not address the four factors in Goal 2 and OAR 660-004- 0020(2).

Staff is unclear whether the subject properties have definitely demonstrated that they are irrevocably committed to urban levels of development and requests the Hearings Officer make specific findings on this issue.

- (2) A decision that land has been built upon at urban densities or irrevocably committed to an urban level of development depends on the situation at the specific site. The exact nature and extent of the areas found to be irrevocably committed to urban levels of development shall be clearly set forth in the justification for the exception. The area proposed as land that is built upon at urban densities or irrevocably committed to an urban level of development must be shown on a map or otherwise described and keyed to the appropriate findings of fact.**

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

*The Subject Property is irrevocably committed to an urban level of development as set forth in detail above. Applicant has submitted with this Application maps and aerial photos showing the Subject Property (**Exhibit 1**) and deeds to the Subject Property containing a legal description (**Exhibits 15-17**).*

Staff is unclear whether the subject properties have definitely demonstrated that they are irrevocably committed to urban levels of development and requests the Hearings Officer make specific findings on this issue. To the extent portions of the property have been or irrevocably committed to an urban level of development, staff is uncertain if this irrevocably commits the entire property to this type of use.

- (3) A decision that land is committed to urban levels of development shall be based on findings of fact, supported by substantial evidence in the record of the local proceeding, that address the following:**
- (a) Size and extent of commercial and industrial uses;**

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property is approximately 19.12 acres in size. It is currently developed with a double-wide mobile home on Tax Lot 301, and facilities used for large equipment service / repair and rentals / sales. The Subject Property has been used for equipment service, etc. for the majority of at least the past 40 years. The land use history also includes documentation that the property has been used, consistently, for industrial uses and not for any farm or agricultural use. This includes heavy equipment rental, repair, and storage, as well as various machine shop use and as a diesel repair shop. The current buildings (decades old), were designed for such uses and maintained in reasonably good working order to continue such use.

Staff notes that of the subject property's approximately 19 acres, aerial photography indicates that approximately 4.5 acres have been allocated to the non-conforming use on the property.

Regarding the Applicant's "irrevocably committed" argument, Staff is uncertain if the development on the property constitutes an unaltered, uninterrupted, unabandoned non-conforming use that can be included in the analysis of the of the irrevocable commitment of the property to non-EFU zone uses. Staff believes a non-conforming use verification would be required to establish that the present and historic uses of the property were lawfully established and continued without alteration, abandonment, or interruption.

Staff is unclear whether the subject properties have definitely demonstrated that they are irrevocably committed to urban levels of development and requests the Hearings Officer make specific findings on this issue.

(b) Location, number and density of residential dwellings;

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property is surrounded by residential dwellings. There are 17 lots to the west of the Subject Property that each contain a residential dwelling, all of which are part of the Whispering Pines subdivision. These properties are less than 3 acres each and the area is zoned RR-10. In addition, Tax Lot 306 contains two residential dwellings, one of which is a manufactured home; and Tax Lot 300 appears to contain at least one residential dwelling.

Staff is uncertain if this OAR is directed to on-site residential dwellings or also includes those in the general vicinity. Staff is unclear whether the subject properties have definitely demonstrated that they are irrevocably committed to urban levels of development and requests the Hearings Officer make specific findings on this issue.

(c) Location of urban levels of facilities and services; including at least public water and sewer facilities; and

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The Subject Property is not serviced by public water or sewer facilities.

(d) Parcel sizes and ownership patterns.

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

Parcel sizes and ownership patterns for the Subject Property and those adjacent to it are discussed in detail above. That discussion is incorporated here.

Staff is uncertain if this OAR is directed to on-site parcel sizes or also includes those in the general vicinity. Staff is unclear whether the subject properties have definitely demonstrated that they are irrevocably committed to urban levels of development and requests the Hearings Officer make specific findings on this issue.

(4) A conclusion that rural land is irrevocably committed to urban development shall be based on all of the factors listed in section (3) of this rule. The conclusion shall be supported by a statement of reasons explaining why the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than a rural level of development.

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

As discussed in detail above, the Subject Property is irrevocably committed to urban development because (1) it does not constitute agricultural land and is not suitable for farm or forest use; (2) it is a relatively small parcel (19.12 acres); (3) it has been in use as a large equipment service / repair and rental / sales facility for the majority of at least the last 40 years; (4) there are no commercial agricultural activities taking place on the adjacent EFU land - rather, that land is being used largely for residential purposes; and (5) it is adjacent to a busy highway. The public facilities and services - e.g., water and sewer - are not servicing the Subject Property but there is sufficient private infrastructure in place to support the level of urban use that has been taking place on the Subject Property for decades, and that Applicant wishes to have occur on the Subject Property should this Application be approved.

Staff is unclear whether the subject properties have definitely demonstrated that they are irrevocably committed to urban levels of development and requests the Hearings Officer make specific findings on this issue.

(5) More detailed findings and reasons must be provided to demonstrate that land is committed to urban development than would be required if the land is currently built upon at urban densities.

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

The Application supports the proposed exception and demonstrates that the site is irrevocably committed to urban development.

Staff is uncertain if the Applicant argues that the land is currently built upon at urban densities. If not, staff is uncertain if sufficient “detailed findings and reasons “ have been provided. Staff is unclear whether the subject properties have definitely demonstrated that they are irrevocably committed to urban levels of development and requests the Hearings Officer make specific findings on this issue.

OREGON REVISED STATUTES (ORS)

Chapter 197, Comprehensive Land Use Planning

ORS 197.732, Goal Exceptions

- (2) A local government may adopt an exception to a goal if:**
- (a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;**
 - (b) The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or**
 - (c) The following standards are met:**
 - (A) Reasons justify why the state policy embodied in the applicable goals should not apply;**
 - (B) Areas that do not require a new exception cannot reasonably accommodate the use;**
 - (C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and**
 - (D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.**

FINDING: The Applicant provided the following response in the submitted burden of proof statement:

Applicant has explained in detail above the reasons for which it meets the requirements of ORS 197.732(2)(b), i.e., that the Subject Property is irrevocably committed to urban use. That explanation is incorporated here.

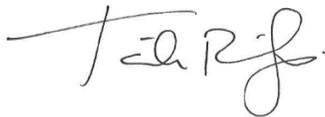
Staff is unclear whether the subject properties have definitely demonstrated that they are

irrevocably committed to urban levels of development and requests the Hearings Officer make specific findings on this issue.

IV. CONCLUSION & RECOMMENDATION

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

DESCHUTES COUNTY PLANNING DIVISION



Written by: Tarik Rawlings, Associate Planner

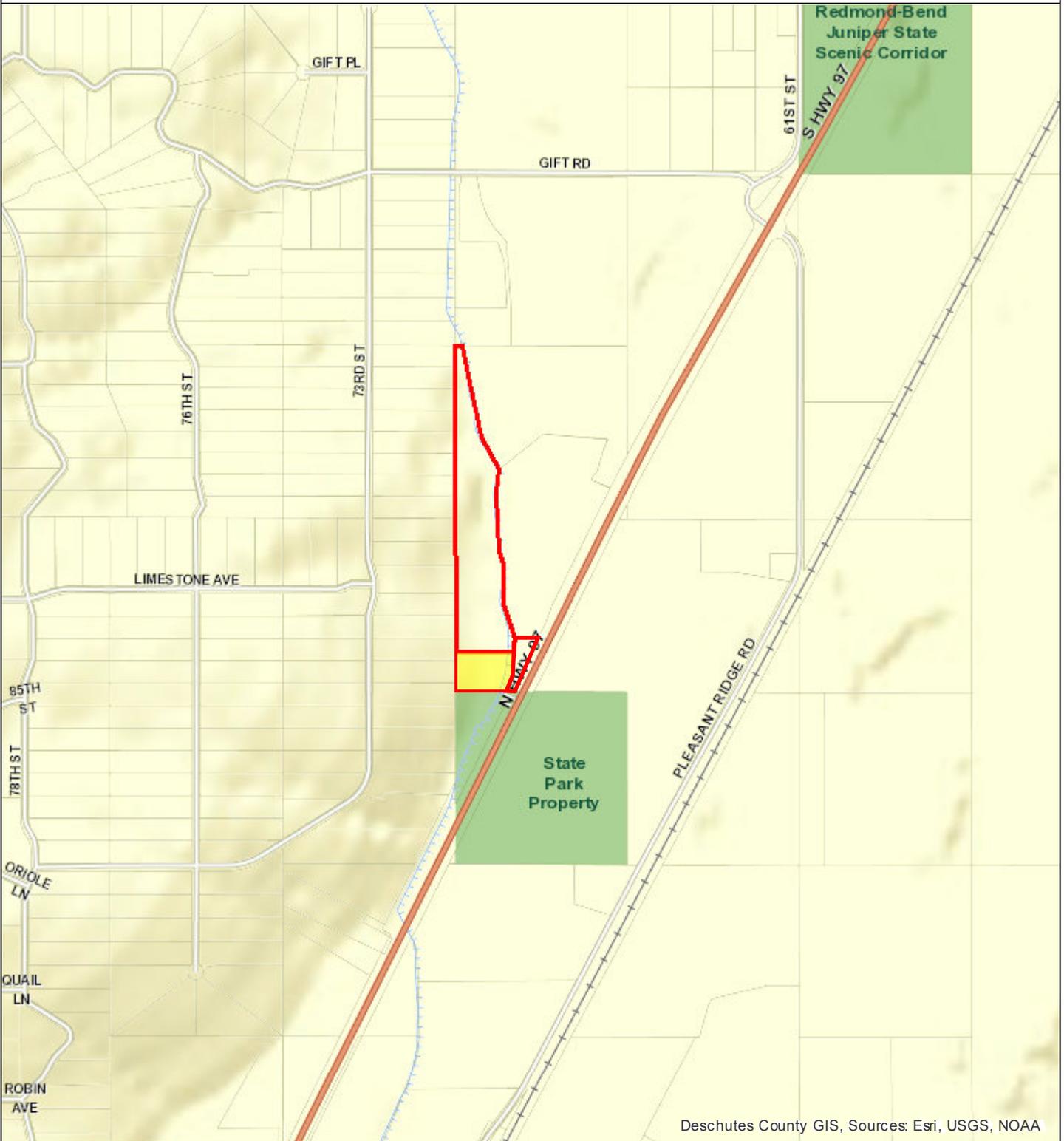


Reviewed by: Will Groves, Planning Manager

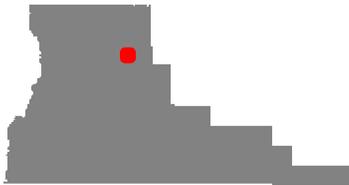
Attachment:

Area Map

247-21-000881-PA, 882-ZC



Deschutes County GIS, Sources: Esri, USGS, NOAA



Date: 10/5/2021

