STAFF MEMORANDUM

TO: Board of County Commissioners ("BOCC")

FROM: Caroline House, Senior Planner

DATE: June 5, 2024

RE: Preparation for an Upcoming BOCC Public Hearing for a Comprehensive Plan Amendment and Zone Change Request (ref. File Nos. 247-22-000573-ZC & 247-22-000574-PA)

On June 10, 2024, staff will be available to provide background information for an upcoming BOCC public hearing scheduled on June 12, 2024, for a Comprehensive Plan Amendment and Zone Change request.

I. PROPOSAL

The Applicant requests approval of a Comprehensive Plan Amendment to change the designation of the subject properties from Agricultural (AG) to Rural Industrial (RI) and a corresponding Zone Change to rezone the subject properties from Exclusive Farm Use (EFU) to Rural Industrial (RI). No exceptions to the Statewide Planning Goals are requested. The subject properties are located at northeast corner of the Deschutes Junction overpass adjacent to Highway 97 (see attached location map).

II. BACKGROUND

The BOCC public hearing scheduled on June 12, 2024, will be the second of two (2) required hearings for this proposal. The first hearing was held on March 21, 2023, before a Deschutes County Hearings Officer and the Hearings Officer found the Applicant demonstrated compliance with all applicable standards *except* the requirements of Statewide Planning Goal 5 related to protected scenic resources. For this reason, the Hearings Officer recommended the BOCC deny the Applicant's request *unless* the Applicant subsequently demonstrates compliance with Statewide Planning Goal 5.

During this same time, the BOCC reviewed a similar Comprehensive Plan Amendment and Zone Change request submitted by LBNW, LLC, where this same issue of compliance with Statewide Planning Goal 5 was before the Board. In that case, the Land Use Board of Appeals ("LUBA")

remanded the previously approved LBNW, LLC Comprehensive Plan Amendment and Zone Change request back to the County for further review to confirm new uses allowed in the RI Zone, that were previously not allowed in the EFU Zone, would not conflict with the designated Highway 97 Goal 5 protected scenic resource. In the summer of 2023, LBNW, LLC initiated a Deschutes County remand application and submitted supporting materials, such as an expanded Economic, Social, Environmental, and Energy ("ESEE") analysis, to demonstrate compliance with Statewide Planning Goal 5. Based on the submitted materials, the BOCC again approved the LBNW, LLC Comprehensive Plan Amendment and Zone Change request. This decision was not appealed and became final in the fall of 2023.

The Applicant waited for the LBNW, LLC remand application to be approved and has since submitted additional materials to demonstrate compliance with Statewide Planning Goal 5. Based on staff's review of the Applicant's most recent submittals, the Applicant has taken a similar approach to LBNW, LLC's remand application to demonstrate compliance with Statewide Planning Goal 5 and the Applicant will be presenting their arguments to the BOCC at the June 12, 2024, public hearing.

Staff notes, during the Hearings Officer's review, Central Oregon LandWatch and 1,000 Friends of Oregon submitted comments in opposition to the Applicant's proposal.

III. TIMELINE

This proposal is not subject to the statutory 150-day review timeline.

IV. BOARD CONSIDERATION

As the subject properties include lands designated for agricultural use, Deschutes County Code 22.28.030(C) requires the applications to be heard *de novo* before the BOCC, regardless of the Hearings Officer's recommendation.

At the hearing, the BOCC will be asked to consider the materials in the record, new materials and arguments presented by the Applicant regarding compliance with Statewide Planning Goal 5, and testimony from other interested parties.

V. RECORD

The record is presented at the following Deschutes County Community Development Department website:

https://www.deschutes.org/cd/page/247-22-000573-zc-247-22-000574-pa-last-ranch-llc-comprehensive-plan-amendment-zone-change

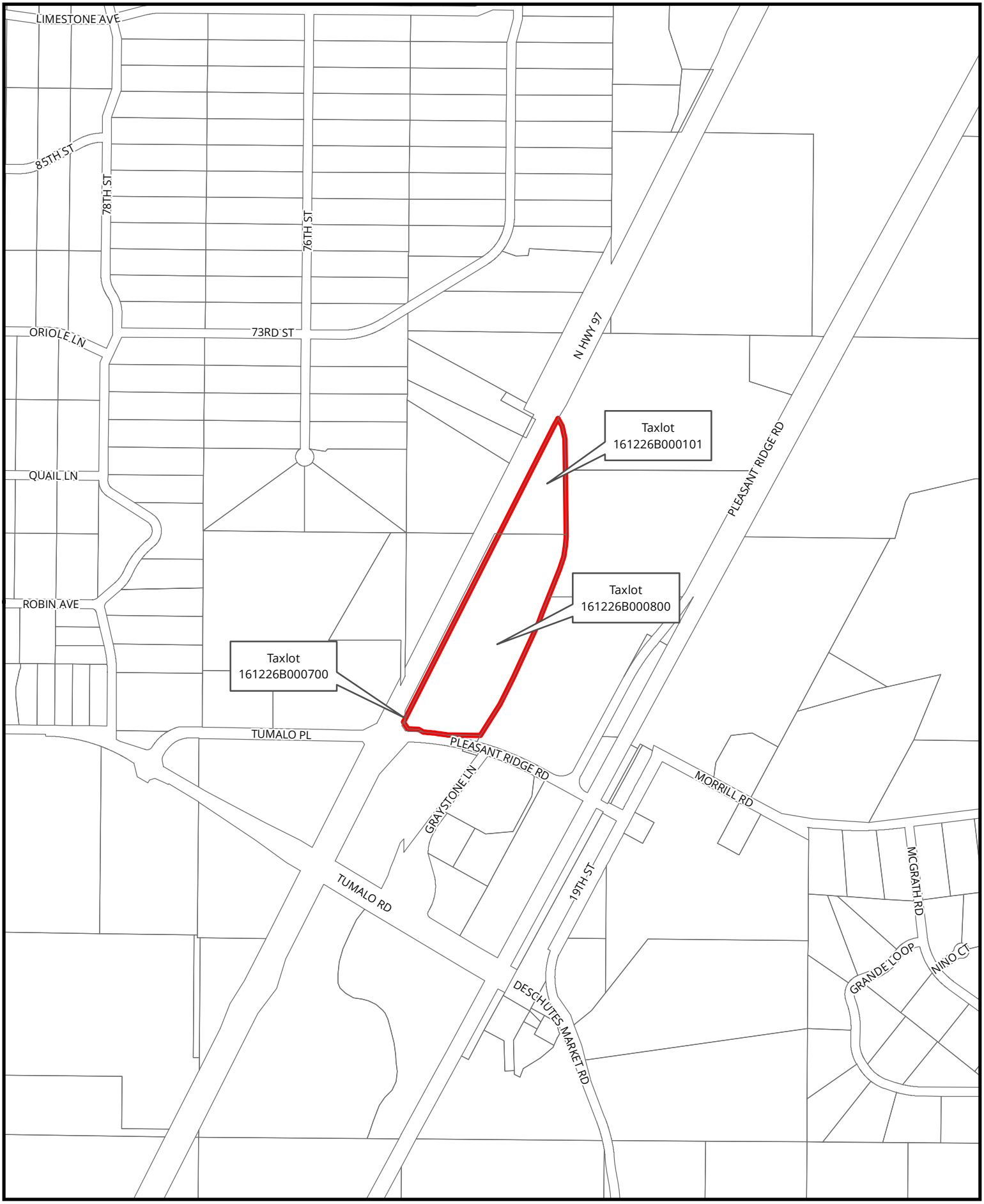
Attachments:

1. Location Map
2. Hearings Officer's Recommendation

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

Location Map

1" = 800'



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

July 14, 2022

Mailing Date:
Tuesday, June 13, 2023

RECOMMENDATION AND FINDINGS OF
THE DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS:	247-22-000573-ZC / 247-22-000574-PA
HEARING DATE:	March 21, 2023, 6:00 p.m.
HEARING LOCATION:	Videoconference and Barnes & Sawyer Rooms Deschutes Services Center 1300 NW Wall Street Bend, OR 97708
APPLICANT/OWNER:	Mark Rubbert; Last Ranch, LLC
SUBJECT PROPERTIES:	Map and Tax Lots: 161226B000101 161226B000700 161226B000800 Situs Addresses: No Situs Address 64994 Deschutes Market Road, Bend, OR 97701 64975 Deschutes Pleasant Road, Bend, OR 97701
REQUEST:	The Applicant requests approval of a Comprehensive Plan Amendment to change the designation of the Subject Properties from Agricultural (AG) to Rural Industrial (RI) and a corresponding Zone Change to rezone the properties from Exclusive Farm Use (EFU-TRB) to Rural Industrial (RI).
HEARINGS OFFICER:	Tommy A. Brooks

SUMMARY OF RECOMMENDATION: The Hearings Officer finds that the record is not sufficient to support the requested Comprehensive Plan Amendment and Zone Change, specifically with respect to the requirements of Statewide Planning Goal 5. The Hearings Officer therefore recommends the Deschutes County Board of Commissioners DENY the Application unless the Applicant demonstrates the requested Comprehensive Plan Amendment and Zone Change are consistent with Statewide Planning Goal 5.

I. APPLICABLE STANDARDS AND CRITERIA

Deschutes County Code (DCC)
Title 18, Deschutes County Zoning Ordinance:
Chapter 18.04, Title, Purpose, and Definitions

Chapter 18.16, Exclusive Farm Use Zones (EFU)
Chapter 18.84, Landscape Management Combining Zone (LM)
Chapter 18.100, Rural Industrial Zone
Chapter 18.136, Amendments
Title 22, Deschutes County Development Procedures Ordinance

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

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

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

II. BACKGROUND AND PROCEDURAL FINDINGS

A. Nature of Proceeding

This matter comes before the Hearings Officer as a request for approval of a Comprehensive Plan Map Amendment ("Plan Amendment") to change the designation of the Subject Properties from Agricultural (AG) to Rural Industrial (RI). The Applicant also requests approval of a corresponding Zoning Map Amendment ("Zone Change") to change the zoning of the Subject Properties from Exclusive Farm Use (EFU-TRB) to Rural Industrial (RI). The basis of the request in the Application is the Applicant's assertion that the Subject Properties do not qualify as "agricultural land" under the applicable provisions of the Oregon Revised Statutes or Oregon Administrative Rules governing agricultural land. Based on that assertion, the Applicants are not seeking an exception to Statewide Planning Goal 3 for the Plan Amendment or Zone Change.

B. Notices, Hearing, Record Materials

The Application was filed on July 13, 2022. Following notice from the Deschutes County Planning Division ("Staff") that the Application was incomplete, the Applicant provided responses to the incomplete letter on November 14, 2022, and confirmed no further information or materials would be provided. Staff therefore deemed the Application to be complete as of that date.

On January 26, 2023, after the Application was deemed complete, Staff mailed a Notice of Public Hearing to all property owners within 750 feet of the Subject Properties ("Hearing Notice"). The Hearing Notice was also published in the Bend Bulletin on Sunday, January 29, 2023. Notice of the Hearing was also submitted to the Department of Land Conservation and Development ("DLCD").

Pursuant to the Hearing Notice, I presided over the Hearing as the Hearings Officer on March 21, 2023, opening the Hearing at 6:00 p.m. The Hearing was held in person and via videoconference, with the Hearings Officer appearing remotely. At the beginning of the Hearing, I provided an overview of the quasi-judicial process and instructed participants to direct comments to the approval criteria and standards, and to raise any issues a participant wanted to preserve for appeal if necessary. I stated I had no *ex parte* contacts to disclose or bias to declare. I invited but received no objections to the County's jurisdiction over the matter or to my participation as the Hearings Officer.

The Hearing concluded at approximately 8:17 p.m. Prior to the conclusion of the Hearing, I announced that the written record would remain open as follows: (1) any participant could submit additional materials until April 4, 2023 ("Open Record Period"); (2) any participant could submit rebuttal materials (evidence or argument) until April 11, 2023 ("Rebuttal Period"); and (3) the Applicant could submit a final legal argument, but no additional evidence, until April 18, 2023. Staff provided further instruction to participants, noting that all post-Hearing submittals needed to be received by the County by 4:00 p.m. on the applicable due date. No participant objected to the post-hearing procedures.

A representative for the Applicant submitted a document on April 18, 2023, the due date for the Applicant's final legal argument. That document responds to some of the arguments previously raised by other participants. However, it also includes statements and attachments that were not previously in the record. Because the Applicant's final legal argument should have included only argument and no new evidence, I have not considered any of the evidentiary materials in that submittal that were not already in the record.[1]

C. Review Period

Because the Application includes a request for the Plan Amendment, the 150-day review period set forth in ORS 215.427(1) is not applicable.[2] The Staff Report also concludes that the 150-day review period is not applicable by virtue of Deschutes County Code ("DCC" or "Code") 22.20.040(D). No participant to the proceeding disputes that conclusion.

/ / /

/ / /

[1] Specifically, this submittal includes: (1) a letter, dated November 29, 2015, relating to County file 247-14-000456; (2) excerpts from a soil study relating to County file PA-11-7; and (3) testimony from the Applicant regarding its attempt to offer the Subject Properties to others for agricultural use.
[2] ORS 215.427(7).

III. SUBSTANTIVE FINDINGS AND CONCLUSIONS

A. Staff Report

On March 7, 2023, Staff issued a report setting forth the applicable criteria and presenting evidence in the record at that time ("Staff Report").[3]

The Staff Report, although it expresses agreement with the Applicant in many places, does not make a final recommendation. Instead, the Staff Report asks the Hearings Officer to determine if the Applicant has met the burden of proof necessary to justify the Plan Amendment and the Zone Change. Other participants objected to the Application, but did so primarily based on legal arguments and through the submittal of additional evidence that supported those legal arguments, rather than dispute the evidence provided by the Applicant and summarized in the Staff Report. As a result, much of the evidence provided by the Applicant and summarized in the Staff Report remains unrefuted.

B. Findings

The legal criteria applicable to the requested Plan Amendment and Zone Change were set forth in the Hearing Notice and also appear in the Staff Report. No participant to this proceeding asserted that those criteria do not apply, or that other criteria are applicable. This Recommendation therefore addresses each of those criteria, as set forth below.

1. Exceptions to Statewide Planning Goals

Pursuant to ORS 197.175(2), if the County amends its Comprehensive Plan ("DCCP" or "Plan"), it must do so in compliance with Statewide Planning Goals (each a "Goal" and, together, the "Goals"). Because the Plan has been acknowledged, the Plan Amendment must adhere to the procedures for a post-acknowledged plan amendment ("PAPA") set forth in state statutes and rules. The fundamental disputes raised in this proceeding relate to whether the Application satisfies the requirement for a PAPA and, more specifically, whether the Applicant is required to take an exception to Goal 3, Goal 5, and Goal 14. The disposition of those issues is relevant to the Applicant's ability to show compliance with the other criteria applicable to the Plan Amendment and Zone Change. These findings will therefore address those issues first.[4]

---

[3] Other than the evidence provided by the Applicant, much of the evidence in the record was submitted after the date of the Staff Report.

[4] COLW, during the Hearing, also stated that the Application requires an exception to Goal 6 and Goal 11. I find that neither of those arguments were presented with enough detail that allows me to address them in this Recommendation. With respect to Goal 6, COLW appears to be arguing that the Applicant cannot satisfy Goal 6 without identifying the specific uses that will be developed on the Subject Properties. However, COLW does not address the Application materials, which describe compliance with Goal 6 through the County's acknowledged regulations in DCC Chapter 18.100. Based on the materials in the record, I find that Goal 6 is satisfied and does not require an exception. With respect to

Goal 3 – Agricultural Lands

Goal 3 and its implementing rules protect agricultural lands for farm use.[5] The Applicant's proposed Plan Amendment and Zone Change is premised on its assertion that the Subject Properties do not qualify as "Agricultural Land" under Goal 3 and its implementing rules and, therefore, do not require protection under Goal 3. Other participants in this proceeding – namely 1000 Friends of Oregon ("1000 Friends") and Central Oregon Land Watch ("COLW") – assert that the Subject Properties do qualify as "Agricultural Land" and, as a result, that the Plan Amendment requires the Applicant to seek an exception to Goal 3.

All participants addressing this issue rely on the language in OAR 660-033-0020(1) that defines "Agricultural Land" as follows:

> *(a) "Agricultural Land" as defined in Goal 3 includes:*
>
> *(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon;*
>
> *(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and*
>
> *(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.*
>
> *(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;*

The NRCS designation for the Subject Properties indicates they are predominantly Class I through Class VI soils. Under OAR 660-033-0020(1)(a)(A), the Subject Properties would therefore qualify as Goal 3 agricultural land. Notwithstanding that designation, the Applicant relies on an Agricultural Soils Capability Assessment (an "Order 1 soil survey") for the Subject Properties. The expert conclusion in the Applicant's Order 1 soil survey is that the Subject Properties consist predominantly of Class VII and

---

Goal 11, COLW provided no additional detail other than the bare statement that an exception is required. Again, COLW does not refute the information in the Application addressing this Goal, and I find that, based on that information, Goal 11 is satisfied and does not require an exception.

[5] *See, e.g.,* OAR 660-033-0010.

Class VIII soils that are unsuitable for farm use and, therefore, do not qualify as agricultural land under Goal 3.

1000 Friends and COLW do not dispute any of the facts or conclusions regarding the soil conditions set forth in the Order 1 soil survey. Rather, they each argue that the NRCS designation is conclusive under the Goal 3 implementing rules as a matter of law. COLW specifically argues the "Hearings Officer cannot rely on information other than the predominant NRCS land capability classification to determine whether the subject property meets LCDC's special definition of 'agricultural land.'"

The legal argument 1000 Friends and COLW present – that only the NRCS designation can be relied on – is contrary to other state statutes and administrative rules addressing this issue. As the Land Use Board of Appeals ("LUBA") recently explained, "ORS 215.211 allows a site-specific analysis of soils where a person believes that such information would, compared to the information provided by the NRCS, assist a county in determining whether land is agricultural land."[6] In that case, which is remarkably similar to the present case, the applicant sought a PAPA to change a property's Plan designation from AG to RI with a corresponding zone change from EFU-TRB to RI. The applicant in that case also relied on a site-specific Order 1 soil survey prepared by a qualified soil scientist. LUBA upheld the County's reliance on that soil survey as part of its determination that the property at issue in that case consisted predominantly of Class VII and Class VIII soils unsuitable for farming.

Based on the language in ORS 215.211 and LUBA's acknowledgment of that statute, I find that the County is not precluded from considering the Order 1 soil survey when applying OAR 660-033-0020(1)(a)(A), as long as doing so is consistent with OAR 660-033-0030(5), which implements ORS 215.211.

I again note that, because the participants raising this issue argued that the Hearings Officer must rely only on the NRCS classification, no participant disputed the information or conclusions in the Order 1 soil survey, nor did they dispute whether the survey complies with OAR 660-033-0030(5). Even so, I find that the record shows the Applicant's Order 1 soil survey does comply with that administrative rule, as explained in the following findings.

OAR 660-033-0030(5)(a) requires that the alternative to the NRCS include more detailed data on soil capability and be "related to the NRCS land capability classification system." Information provided by the Applicant's soil scientist states that the NRCS classification for the Subject Property was completed at a very broad scale and based on high altitude photography, whereas the Order 1 soil survey has more detailed data based on onsite field research. Further, the soil scientist states that the Order 1 soil survey uses the same NRCS classification system, but applies more precise mapping of soil map units with better distribution and quantification of each unit.

OAR 660-033-0030(5)(b) requires the person seeking to use the alternative soil survey to request DLCD "to arrange for an assessment of the capability of the land by a professional soil classifier who is chosen

---

[6] *Central Oregon Land Watch v. Deschutes County*, __ Or LUBA __ (LUBA No. 2023-008, April 24, 2023) ("LUBA No. 2023-008").

by the person, using the process described in OAR 660-033-0045." The Applicant asserts this requirement is met through its coordination with DLCD, and the record includes a letter from DLCD indicating the Order 1 soil survey is consistent with the agency's reporting requirements.

The remaining portions of this rule are procedural in nature and there is no dispute among the participants whether these procedures apply to the Application or whether the Applicant followed those procedures.

Based on the foregoing, and considering the more detailed evidence provided by the Applicant's soil scientist against the NRCS designation of the Subject Properties, I find that that the Subject Properties do not qualify as agricultural land under Goal 3 as defined in OAR 660-033-0020(1)(a)(A). That does not end the inquiry, however, as 1000 Friends and COLW each argue that the Subject Properties qualify as agricultural land under the other sections of OAR 660-033-0020(1)(a).

Turning to OAR 660-033-0020(1)(a)(B), the Subject Properties may qualify for Goal 3 protections if they are "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."

1000 Friends argues that the Subject Properties are currently in farm tax deferral status, have water rights, and contain certain farm structures such as a goat barn and farm implement garage. COLW provides an exhaustive list of various farm commodities that occur throughout the County and, like 1000 Friends, asserts that the Applicant has not demonstrated that the Subject Properties cannot be used for some of those purposes.

The Applicant provides an exhaustive history of the site and its relationship to various farm activities. According to that history, the chain of owners for the Subject Property since 1941 has mostly consisted of retirees who were not engaged in farming. Prior to that time, there were apparently limited farming activities on the site at a time when the Subject Properties were part of larger holdings that also had farm uses. While the Subject Property does have some historical water rights, the Applicant notes that not all of those rights have been developed. Other structures were apparently used for small-scale hobby farming activities rather than for profitable farm uses. More recent uses of the site, however, included use as a roadside attraction called the "Funny Farm" which, according to the Applicant, at one point had a "hot dog eating goat."

Testimony opposing the Application describing how the property could be used, and the Applicant's testimony describing how the property has been used, do not resolve this issue. Instead, OAR 660-033-0020(1)(a)(B) requires an assessment of whether the Subject Properties are "suitable for farm use as defined in ORS 215.203(2)(a)" based on the various factors set forth in this rule. To that end, only the Applicant has fully addressed those factors.

With respect to soil fertility and cattle grazing, the Applicant relies on the Order 1 soil survey to demonstrate that the soils are not fertile and that the property is unsuitable for grazing. The Applicant notes that this also makes it difficult to provide food for other non-grazing animals. With respect to

climatic conditions, the Applicant notes the limited growing season, cold temperatures, and current drought conditions also hamper farm activities. While some water for farm irrigation purposes is available, the Applicant notes that irrigating the soils on the Subject Property is not warranted in light of their low classification. The Applicant also asserts that existing land use patterns in the area are not conducive to agriculture, for example because the Subject Properties are surrounded by non-farm uses and disrupted by the transportation system.

Overall, the Applicant asserts that the technological and energy inputs required to conduct farm uses are too great, which the Applicant believes is a major reason the Subject Properties have not historically been farmed.

ORS 215.203(2)(a) defines "farm use" in part as "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof."

Considering the factors set forth in OAR 660-033-0020(1)(a)(B), I find that it is more likely than not that the Subject Properties are not suitable for farm use as defined in ORS 215.203(2)(a). While it may be possible to conduct some farm activities on the site, that is not the same as employing the land for the primary purpose of obtaining a profit in money from those activities. The low productive soils serve as an initial limit on any profitable farm activities. As the Applicant's soil scientist notes, even irrigating the soils found on site does not improve their quality for farm uses. The Subject Properties are relatively small, irregularly-shaped, and bisected by a rocky outcropping, compounding the difficulties associated with the soil conditions. The portion of the site with the best soils is even smaller and not large enough to support meaningful farming activities. Further, while historical use of the site is not determinative of its current suitability, it is notable that the majority of the farming activities taking place on the site occurred at a time when the Subject Properties were part of a larger tract, or were part of a residential use.

Finally, under OAR 660-033-0020(1)(a)(C), the Subject Properties may still be considered agricultural land if they include land "that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands."

1000 Friends asserts that the presence of a Central Oregon Irrigation District ("COID") canal on the Subject Properties, which is used to convey irrigation water to other farms, demonstrates the Subject Properties qualify as agricultural land under this rule. That argument, however, is difficult to follow because it is based on the assertion that the Applicant "must address the proposed rezone's potential impact on agricultural uses in the surrounding area based on the presence of the COID irrigation canals on and abutting the property." This rule does not appear to impose any sort of "impacts test," and the question is whether the Subject Properties, not a canal on the property owned by a third party, are necessary to permit farm practices on adjacent and nearby lands. In contrast, the Applicant notes that very few farm practices occur on adjacent and nearby lands, even on nearby lands that currently have a farm use designation. The Applicant was unable to identify any land that relies on the Surrounding

Properties for their farm practices. In the absence of any evidence to the contrary, I find that the Applicant has met its burden of addressing that rule provision.

Based on the foregoing, I find that the Applicant has met its burden of demonstrating the Subject Properties do not qualify as agricultural lands under Goal 3 and, as a result, an exception to Goal 3 is not required.

Goal 5 – Natural Resources, Scenic and Historic Areas, and Open Spaces

Goal 5 and its implementing rules protect natural resources, scenic and historic areas, and open spaces. Pursuant to OAR 660-023-0250(3), the County does not have to apply Goal 5 as part of a PAPA "unless the PAPA affects a Goal 5 resource." One scenario in which a PAPA may affect a Goal 5 resource is when the "PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list."[7]

COLW argues that the Plan Amendment and Zone Change is in direct conflict with a Goal 5 resource and, therefore, requires compliance with Goal 5. The Goal 5 resource COLW refers to is the County's designation of a scenic corridor along Highway 97 between Bend and Redmond as a scenic resource.

The County regulates conflicting uses with the Highway 97 scenic resource through the application of the Landscape Management Combining Zone ("LM Zone"), which the County applies to the area that is within one-quarter mile of the highway. The Subject Properties fall within the area subject to that zone.

The Applicant does not fully respond to COLW's Goal 5 argument. Instead, the Applicant asserts that there is no need to apply Goal 5 in light of the County's acknowledged Plan, which contains the LM Zone. According to the Applicant, to the extent there are any conflicts with the scenic resource, those will be resolved at the time when specific development occurs and the County requires site plan approval for any structures within the LM Zone. The Applicant specifically states that "[t]he zone change and plan amendment do not trigger this provision."

The Applicant's argument appears consistent with prior County decisions. However, LUBA No. 2023-008 is again instructive, and it rejects the Applicant's approach to Goal 5. In that case, LUBA explained that its prior decisions require a local jurisdiction "to apply Goal 5 if the PAPA allows a new use that could conflict with Goal 5 resources." LUBA then directly addressed the situation presented in this case and analyzed "whether the new RI zoning allows uses on the subject property that were not allowed under the previous EFU zoning and whether those uses could conflict with protected Goal 5 resources."

LUBA's decision acknowledged that the County previously conducted the appropriate Goal 5 analysis for other RI-zoned properties and applied the LM Zone to protect the Highway 97 scenic resource from conflicting uses on those properties. However, LUBA determined that, in the absence of evidence showing the prior Goal 5 analysis considered impacts from RI-type development on all properties, that analysis did not consider whether RI uses on farm-zoned property affected a Goal 5 resource. Indeed, LUBA concluded

[7] OAR 660-023-0250(3)(b).

that "the county could not have, in its [prior Goal 5 analysis], evaluated whether development of those new uses on the subject property would excessively interfere with the protected scenic resource because those uses were not allowed on the property" at that time. Because the County's decision in that case allowed "new uses that could conflict with inventoried Goal 5 resources," LUBA concluded the County was required to address Goal 5 and, specifically, to comply with OAR 660-023-0250(3).

Based on that LUBA decision, I find that the Applicant's argument that Goal 5 is not applicable is incorrect. The Plan Amendment and Zone Change would allow new uses on the Subject Property that could conflict with a protected Goal 5 resource. It may be possible for the Applicant to show that the County's prior Goal 5 analysis considered such development on the Subject Properties, or, if not, the Applicant may be able to demonstrate that the new uses allowed on the Subject Properties do not significantly affect a Goal 5 resource. However, I find that the current record does not allow me to address either option. I therefore find that I cannot recommend approval of the Application on this basis and the Applicant must address this issue further before the Application is approved.

Goal 14 – Urbanization

Goal 14 and its implementing rules "provide for an orderly and efficient transition from rural to urban land use." *See* OAR 660-015-0000(14).

COLW asserts that the Application violates Goal 14. COLW's specific argument is that the designation of the Subject Properties to the RI zone would constitute urbanization of the Subject Properties. COLW asserts that the County must further analyze the Application and either make a determination that the Plan Amendment "does not offend the goal because it does not in fact convert rural land to urban uses, or it may comply with the goal by obtaining acknowledgment of an urban growth boundary based upon considering [sic] of factors specified in the goal, or it may justify an exception to the goal."

The heart of this issue is whether the RI zone actually authorizes urban uses. COLW argues that this can be determined only by the application of a "*Shaffer* analysis." The *Shaffer* analysis is a reference to *Shaffer v. Jackson County*, 17 Or LUBA 922 (1989), in which LUBA concluded that the determination of whether a use is urban or rural must be made on a case-by-case basis, considering factors discussed in that case (e.g. workforce size, dependency on resources, public facility requirements).

The flaw in COLW's argument is that the County has already determined that all uses in the RI Zone are rural in nature. That decision was upheld on review by LUBA and the Court of Appeals. *See Central Oregon Landwatch v. Deschutes County*, __ Or LUBA __ (LUBA No. 2022-075, Dec. 6, 2002); *aff'd* 324 Or App 655 (2023). In that case, LUBA concluded in part:

> the county correctly determined that the policies and provisions of the DCCP and DCC that apply to the RI zone are independently sufficient to demonstrate that PAPAs that apply the RI plan designation and zone to rural land are consistent with Goal 14 and that uses and development permitted pursuant to those acknowledged provisions constitute rural uses, do not constitute urban uses, and maintain the land as rural land.

LUBA addressed the same issue in LUBA No. 2023-008. In that case, LUBA reiterated its holding and rationale in an earlier case, again concluding "that the county was entitled to rely on its acknowledged RI zone to ensure compliance with Goal 14.

The two prior LUBA cases, one of which has already been affirmed by the Court of Appeals, are clear. The County's RI zone complies with Goal 14. For that reason, I find that the Applicant has demonstrated the Application does not propose urban uses and Goal 14 is satisfied without the need to take an exception to that Goal.

2. Title 18 of the Deschutes County Code, County Zoning

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.

The owner of the Subject Properties has requested a quasi-judicial Plan Amendment and filed an application for that purpose, together with an application for the requested Zone Change. No participant to this proceeding objects to this process. I find it appropriate to review the Application using 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.

According to the Applicant, this Code provision requires a consideration of the public interest based on whether: (1) the Zone Change conforms to the Comprehensive Plan; and (2) the change is consistent with the Comprehensive Plan's introduction statement and goals. No participant to this proceeding disputes that interpretation. I also find that this is the appropriate method for applying this Code provision.

With respect to the first factor, the Applicant asserts the Application conforms to the Comprehensive Plan because it conforms to the procedural components of the Comprehensive Plan, re-designates the Subject Properties to a designation allowed by the Comprehensive Plan, does not result in the loss of resource land, and is compatible with the surrounding land uses and character of the land in the vicinity of the Subject Properties. With the exception of the assertion that no loss of resource land will result – addressed in more detail above relating to Goal 3 – no participant in this proceeding objects to the Applicant's assertions in this regard.

With respect to the second factor, the Applicant notes that introductory statements and goals in the Comprehensive Plan are not approval criteria, and no participant to this proceeding asserts otherwise. Additionally, the Applicant identifies several Comprehensive Plan policies and goals, and then analyzes whether the Application is consistent with those policies and goals. The Applicant specifically points to some of the policies and goals in Chapter 3, Rural Growth Management, of the Comprehensive Plan. The Applicant states that the Application is consistent with those policies and goals, largely based on their reference to "Deschutes Junction", which is the area encompassing the Subject Properties, and the historic non-resource use of that area. While some participants to this proceeding dispute the extent to which the Plan Amendment and Zone Change would "urbanize" the Subject Properties, there does not appear to be any dispute about the historical non-resource use of the Deschutes Junction area or whether the Plan Amendment and Zone Change are consistent with the goals and policies the Applicant identifies.

As explained in more detail in earlier findings, the contested issues in this proceeding address whether the Application satisfies the standards for a Plan Amendment as required by state law (e.g. whether the request requires an exception to Statewide Planning Goals 3, 5, and 14). The arguments raised in support of those contested issues do mention some policies in the County's current Plan. However, those policies are relied on as the basis for arguing that certain exceptions are required to the Goals, and they are not presented in support of any specific argument that the Application violates Plan policies. Even so, for the same reason that the Application is consistent with the Goals (other than Goal 5), I find that the Application conforms to the Plan. Additional findings addressing Plan goals and policies are set forth later in this Recommendation.

However, because the Plan also contains goals and policies implementing Goal 5, which I have concluded has not been satisfied, I cannot conclude that the Zone Change conforms to all Plan policies, particularly those that implement Goal 5, discussed below. I therefore find that this Code provision is not satisfied unless and until the Applicant demonstrates compliance with that Goal.

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

Only the Applicant and Staff offer any evidence or argument with respect to whether the Zone Change is consistent with the purpose and intent of the RI zoning district. Unlike almost every other zoning district, DCC 18.100, which governs uses in the RI zoning district, does not contain a purpose statement. The RI zoning district, appears to implement the Rural Industrial plan designation in the Comprehensive Plan, and Section 3.4 of the Comprehensive Plan provides the following:

> 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.

As the Staff Report notes, the Subject Properties are not within existing Rural Industrial exception areas, but they are located outside unincorporated communities and urban growth boundaries. This Code section is therefore satisfied only if the Application "satisfies the requirements for a Comprehensive Plan designation change set forth by State Statute, Oregon Administrative Rules, the DCCP and the Deschutes County Development Code."

This recommendation determines that the Application satisfies the requirements for a Plan designation change, except as it relates to Goal 5. I therefore find that this Code provision is not satisfied unless and until the Applicant demonstrates compliance with that Goal.

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.

Only the Applicant addresses this Code provision, and the Applicant provided the following as support for why this criterion is met:

- The Applicant has received "will serve" letters from applicable service providers.
- Public facilities and services are available to serve future industrial development.
- On-site wastewater and sewage and disposal systems can be developed to meet specific user needs.
- The proposal satisfies the Transportation Planning Rule.

The Staff Report asks the Hearings Officer to determine the scope of public services and facilities that must be reviewed as part of this Code provision. However, such a determination is likely to change on a case-by-case basis, informed in part by the zoning designation being requested. As it applies to this case, the Applicant has identified fire, police, electric power, domestic water, wastewater, and transportation as being relevant. No participant has disputed the necessity of those services or identified other services that are necessary. Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that this Code provision is satisfied as set forth in the Application.

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

The Applicant states that the Applicant's proposal is consistent with all applicable Plan goals and policies. In support of that statement, the Applicant refers to its discussion of those goals and policies as they relate to DCC 18.136.020(A). The only discussion of those goals and policies by other participants relates to their arguments that certain statewide Goals have not been satisfied. Those arguments are addressed above. Although I conclude the Application is consistent with most Plan goals and policies, for the same reasons I concluded DCC 18.136.020(A) is not satisfied, I conclude that this Code provision is not satisfied; the current record does not demonstrate that impacts on surrounding land uses will be consistent with some of the Plan's goals and policies implementing Goal 5.

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.

Only the Applicant offers any evidence or argument with respect to this Code provision. According to the Applicant, the original zoning of the Subject Properties did not take into account several factors, including the low agricultural capability of the site. Further, conditions have changed over time, especially with respect to the transportation system in the area and the development of other non-resource uses. No other participant addresses this Code provision or otherwise disputes the Applicant's characterization of the change in circumstances.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that this Code provision is satisfied.

3. Deschutes County Comprehensive Plan Goals and Policies

The Applicant and the Staff Report identified several Plan goals and policies that may be relevant to the Application.[8]

Chapter 2, Resource Management

Chapter 2 of the Plan relates to Resource Management. Section 2.2 of that Chapter relates specifically to Agricultural Lands.

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

According to the Applicant, it is pursuing the Plan Amendment and Zone Change because the Subject Properties do not constitute "agricultural lands", and therefore, it is not necessary to preserve or maintain the Subject Properties as such. In support of that conclusion, the Applicant relies primarily on a soils report showing the Subject Properties consist predominantly of Class VII and Class VIII non-agricultural soils. Such soils have severe limitations for agricultural use as well as low soil fertility, shallow and very shallow soils, abundant rock outcrops, low available water capacity, and major management limitations for livestock grazing.

Other comments in the record assert that the Subject Properties qualify as agricultural land because of their NRCS classification, or because they satisfy other definitions of "agricultural land" in OAR 660-030-0020(1). Those arguments are addressed in earlier findings, which conclude the Subject Properties are not agricultural land.

[8] The Applicant and Staff Report note that earlier County decisions have concluded that many Plan goals and policies are directed at the County rather than at an Applicant in a quasi-judicial proceeding. I generally agree with respect to Plan goals, which provide the context for Plan policies. Plan goals are therefore listed in this section to better explain the Plan policies that are being applied and considered. However, some of the findings below do address the goal language specifically. Where the goal language is not discussed, I have deemed that goal to not apply directly to a quasi-judicial application.

With respect to the agricultural industry, the Applicant provides an analysis of surrounding land uses and notes that the surrounding area contains mostly non-agricultural uses. Some opposing comments in the record can be construed as asserting that the conversion of this land to an industrial use has a larger impact on the agricultural industry. However, those comments presume that the Subject Properties are agricultural land. Not only are the Subject Properties not agricultural land, the Applicant has demonstrated that no other farm parcels rely on this parcel.

Based on the foregoing, I find that the Application is consistent with this Plan goal.

> *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.*

The Applicant has not asked to amend the EFU subzone that applies to the Subject Properties. Instead, the Applicant requests a change under Plan Policy 2.2.3 and has provided evidence to support rezoning the Subject Properties to the RI zone.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Plan.

> *Policy 2.2.3 Allow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, for individual EFU parcels as allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan.*

The Applicant requests approval of the Plan Amendment and Zone Change to re-designate the Subject Properties from Agricultural to Rural Industrial and to rezone the Subject Properties from EFU to RI. The Applicant does not seek an exception to Goal 3 for that purpose, but rather seeks to demonstrate that the Subject Properties do not meet the state definition of "Agricultural Land" as defined in Goal 3 and its implementing rules.

The Staff Report notes that the County has previously relied on LUBA's decision in *Wetherell v. Douglas County*, 52 Or LUBA 677 (2006), where LUBA states as follows:

> 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.

The facts presented in the Application are similar to those in the *Wetherall* decision and in other Deschutes County plan amendment and zone change applications. Under this reasoning, the Applicant

has the potential to prove the Subject Properties are not agricultural land, in which case an exception to Goal 3 under state law is not required.

Notwithstanding the foregoing, Policy 2.2.3 is satisfied only if the Plan Amendment is consistent with state law. As discussed in previous findings, I have concluded that the Applicant has not demonstrated compliance with Goal 5, which is a necessary requirement of the Plan Amendment. The Application is therefore not consistent with this portion of the Plan unless and until the Applicant demonstrates compliance with Goal 5.

> *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.*

The Applicant assert this plan policy is not an approval criterion and, instead, provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations and that the Application is consistent with this policy. The Applicant also notes that prior County decisions interpreting this policy have concluded that any failure on the County's part to adopt Plan policies and Code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation does not preclude the County from considering requests for quasi-judicial plan amendments and zone changes.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Plan as described by the Applicant.

> *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.*

This Plan policy requires the County to identify and retain agricultural lands that are accurately designated. The Applicant proposes that the Subject Properties were not accurately designated, as discussed in more detail in the findings above. While some participants have argued that the Subject Properties should retain an agricultural designation, no participant has expressly asserted that the Application is inconsistent with this Plan policy.

Based on the earlier findings that the Subject Properties are not agricultural land, I find that the Application is consistent with Policy 2.2.13.

*** * ***

Section 2.5 of Plan Chapter 2 relates specifically to Water Resource Policies. The Applicant has identified the following goal and policy in that section as relevant to the Application.

> *Goal 6, Coordinate land use and water policies.*
>
> *Policy 2.5.24 Ensure water impacts are reviewed and, if necessary, addressed for significant land uses or developments.*

FINDING: The Applicant asserts that the Applicant is not required to address water impacts associated with development because no specific development application is proposed at this time. Instead, the Applicant will be required to address this criterion during development of the Subject Properties, which would be reviewed under any necessary land use process for the site.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with Policy 2.5.24.

*** * ***

Section 2.7 of Plan Chapter 2 relates specifically to Open Spaces, Scenic Views and Sites and is the County's implementation of Goal 5. Among the specific policies in this Section are:

> *Goal 1, Coordinate with property owners to ensure protection of significant open spaces and scenic view and sites.*
>
> *Policy 2.7.3 Support efforts to identify and protect significant open spaces and visually important areas including those that provide a visual separation between communities such as the open spaces of Bend and Redmond or lands that are visually prominent.*
>
> *Policy 2.7.5 Encourage new development to be sensitive to scenic views and sites.*

The initial Application did not address these policies, but the Applicant did provide supplemental information and argument in response to a comment from Staff.

The Applicant assert that these policies are met because the Subject Properties are not visually prominent and are relatively hidden by and lower than Highway 97 and other transportation facilities. The Applicant notes that a 100-foot setback and 30-foot height limit will ensure that any new structures will be sensitive to the LM zone.

COLW, although it did not address these policies directly, argues that the Plan Amendment is not consistent with Goal 5 because it allows new uses that may conflict with a Goal 5 resource – the scenic corridor along Highway 97. I find that these issues are related and, therefore, consider COLW's argument applicable to these policies.

The Applicant responds to that argument by relying on the County's application of the LM zone as the protection for that resource. The findings above, however, conclude that the current record is not sufficient to demonstrate compliance with Goal 5.

Only the Applicant addresses whether the Application will allow development that is "sensitive to" scenic resources. Based on the Applicant's unrefuted evidence and argument, I find that the Application is consistent with Policy 2.7.5.

However, I do not arrive at the same conclusion for Policy 2.7.3. For the same reasons set forth in the earlier findings relating to Goal 5, I find that the Application is not consistent with policy 2.7.3. The policy

requires the County to support efforts to identify and protect scenic resources. The County has identified the scenic corridor along Highway 97 as a scenic resource. That resource is protected through the County's application of the LM zone. That protection, however, was put into place in the context of the Subject Properties being zoned for farm use rather than industrial uses. The Applicant must demonstrate that the County can continue to protect that inventoried resource with the Plan Amendment. It is not clear from the record if the LM Zone protects the resource with the Plan Amendment.

* * *

Chapter 3 of the Plan relates to Rural Growth. Within that chapter, Section 3.4 relates specifically to Rural Industrial uses. The Applicant and Staff have identified the following language in that section as relevant to the Application.

> *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 language in this portion of the Plan is addressed in findings above relating to DCC Section 18.136.020(B). Those findings are incorporated here by this reference.[9]

* * *

Section 3.4 of Plan Chapter 3 relates to the County's goals for its rural economy.

---

[9] The Staff Report also identifies Policy 3.4.36 as applicable. That policy simply states that properties for which it can be demonstrated Goal 3 does not apply may be considered for the RI designation under the Plan. Because I have concluded that the Subject Properties are not agricultural land and do not qualify for Goal 3 protections, the Application is consistent with that policy and the County can consider applying the RI designation.

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

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

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

...

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

Addressing these policies, the Applicant asserts that the rural industrial designation will maintain a stable and sustainable rural economy that is compatible with a rural lifestyle. In support of that argument, the Applicant notes the potential number of jobs that can occur on the Subject Properties, some of which can be held by rural residents. No participant refutes the Applicant's evidence or argument in this regard.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with these policies.

Lands Designated and Zoned Rural Industrial

...

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

Whether the Plan Amendment and Zone Change would allow urban uses is the same issue raised in COLW's arguments that an exception to Goal 14 is required. Those arguments are addressed in more detail in the findings above relating to Goal 14. Those findings are incorporated here and, based on those findings, I find the Application is consistent with this Plan policy.

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.

The Applicant asserts that there are no forest uses in the surrounding area, and that assertion is unchallenged by any participant.

The Applicant addresses the agricultural component of this Plan policy by asserting that the Plan Amendment and Zone Change do not have an adverse effect on agricultural uses in the surrounding area. The Applicant notes there is one hobby farm nearby, and a nearby parcel with apple trees. The Applicant consulted with the owners of both properties, each of which indicated the Applicant's proposal will not

adversely affect them. The Applicant states it has also done an exhaustive inventory of uses within half mile of the site and found no conflict with any agricultural uses. No participant to this proceeding asserts this policy is not met or otherwise refutes the evidence the Applicant relies on.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this Plan policy.

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

The Applicant asserts that these policies are codified in Chapter 18.100 governing the RI Zone and are implemented through those provisions. The Applicant also notes that the current residential and future industrial uses are already being served by and will be served by a public water system. No participant to this proceeding asserts this policy is not met or otherwise refutes the evidence the Applicant relies on.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with these policies.

* * *

Section 3.5 of Plan Chapter 3 relates to natural hazards. Goal 1 of that section is to "protect people, property, infrastructure, the economy and the environment from natural hazards." Addressing this Plan goal, the Applicant notes that there are no mapped flood or volcano hazards on the Subject Properties and that there is no evidence of increased risk from hazards from wildfire, earthquake, or winter storm risks. No participant to this proceeding asserts this goal is not met or otherwise refutes the evidence or argument the Applicant relies on.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Plan.

* * *

Section 3.7 of Comprehensive Plan Chapter 3 relates specifically to Transportation. The Applicants and Staff have identified the following goal and policy in that section as relevant to the Application.

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.

The Applicant asserts that the Application is consistent with these policies. In support of that assertion, the Applicant relies on a Transportation Impact Analysis ("TIA") prepared by a transportation engineer. The County's Senior Transportation Planner reviewed the TIA, which the Applicant notes constitutes the County's consideration of land use impacts and roadway function, classification, and capacity. No participant to this proceeding asserts these goals and policies are not met or otherwise refutes the evidence or argument the Applicant relies on.[10]

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Plan.

* * *

Section 3.10 of Plan Chapter 3 contains provisions for "Area Specific Policies."

---

[10] The Staff Report notes that the County previously denied an application on the Subject Properties based in part on certain traffic impacts. Staff requests the Hearings Officer address whether that prior decision has any bearing on the present Application. I find that it does not. As noted by the County's Senior Transportation Planner, that decision predates various transportation improvements the County made on Highway 97. The Applicant can rely on the more recent TIA that is based on the transportation system as it currently exists.

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

...

Deschutes Junction

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

The Applicant addresses this Plan policy with a detailed description of the history, previous owners, surrounding uses and the transportation system of the Deschutes Junction area. The Applicant asserts that the Plan Amendment and Zone Change is consistent with how the Deschutes Junction area has developed and the rural character of that particular area. No participant to this proceeding asserts these goals and policies are not met or otherwise refutes the evidence or argument the Applicant relies on.[11]

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Plan.

4. Oregon Administrative Rules

In addition to the administrative rules discussed in the findings above relating to Goal 3, Goal 5, and Goal 14, the Applicant and the Staff Report identify and address several administrative rules as potentially applicable to the Application. No other participant in this proceeding identified other applicable rules.[12]

/ / /

/ / /

/ / /

/ / /

/ / /

[11] The Staff Report also identifies Policies 3.10.6 through 3.10.8 as potentially relevant and asks the Hearings Officer to determine either if the policies apply or if they are satisfied. Policy 3.10.6 and 3.10.7 require the County to review impacts to the transportation system. The County has done that through the review of the Applicant's TIA. Policy 3.10.8 requires the County to review other policies and initiate a Deschutes Junction Master Plan. I find that policy to be directed solely to the County and not applicable to a quasi-judicial land use application.

[12] Some administrative rules the Applicants address, or which appear in the Staff Report, have been omitted from this Recommendation where the rule does not expressly impose an approval criterion.

OAR 660-006-0005

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

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

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

The Applicant asserts that the Subject Properties do not qualify as forest land and, therefore, the administrative rules relating to forest land are not applicable.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this administrative rule.

OAR 660-033-0030

(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).

(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.

This Recommendation finds that the Subject Properties do not qualify as agricultural land as defined by administrative rule, and they are not suitable for farming. Based on the foregoing, I find that the administrative rules do not require the Subject Properties to be inventoried as agricultural land. This conclusion, however, does not alter other findings in this Recommendation relating to the process for

redesignating the Subject Properties and the requirement to demonstrate the Plan Amendment is consistent with Goal 5.

OAR 660-012-0060

(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.

This administrative rule is applicable to the Plan Amendment because it involves an amendment to an acknowledged comprehensive plan. The Applicant asserts that the Plan Amendment will not result in a significant effect to the transportation system. In support of that assertion, the Applicant submitted its TIA (and supplemental information), discussed above. No participant to this proceeding disputed the information in the TIA or otherwise objected to the use of that information. The County Transportation Planner agreed with the TIA's conclusions as supplemented.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application satisfies this administrative rule.

(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.

While the Applicant's TIA concludes that the Plan Amendment and Zone Change would not have a significant effect on the transportation system, that analysis appears to be premised on various recommendations. As stated in the TIA:

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

Although these findings conclude that the record as a whole does not support approval of the Application, the County Board may arrive at a different conclusion. If it does, I recommend the Board incorporate the recommendations from the TIA in any final decision.

Statewide Planning Goals and Guidelines

Division 15 of OAR chapter 660 sets forth the Statewide Planning Goals and Guidelines, with which all comprehensive plan amendments must demonstrate compliance. The Applicant asserts the Application is consistent with all applicable Goals and Guidelines. Except for Goal 3, Goal 5, Goal 6, Goal 11, and Goal 14, which are addressed in more detail in earlier findings, and in the absence of any counter evidence or argument, I adopt the Applicants' position on the remining Goals and find that the Plan Amendment and Zone Change are consistent with the applicable Goals and Guidelines as follows:

Goal 1, Citizen Involvement. Deschutes County will provide notice of the application to the public through mailed notice to affected property owners and by requiring the Applicants to post a "proposed land use action sign" on the Subject Properties. Notice of the Hearings held regarding this application was placed in the Bend Bulletin. A minimum of two public hearings will be held to consider the Application.

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

Goal 4, Forest Lands. Goal 4 is not applicable because the Subject Properties do not include any lands that are zoned for, or that support, forest uses.

Goal 7, Areas Subject to Natural Disasters and Hazards. here are no mapped flood or volcano hazards on the subject property. Wildfire, earthquake, and winter storm risks are identified in the County's DCCP. The subject property is not subject to unusual natural hazards nor is there any evidence in the record that the proposal would exacerbate the risk to people, property, infrastructure, the economy, and/or the environment from these hazards on-site or on surrounding lands.

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

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

Goal 10, Housing. There are already two houses on site, which can be used, adaptively reused or demolished. The proposed plan amendment and zone change will not affect existing or needed housing and Goal 10 is not applicable.

Goal 12, Transportation. This application complies with the Transportation System Planning Rule, OAR 660-012-0060, the rule that implements Goal 12. Compliance with that rule also demonstrates compliance with Goal 12.

Goal 13, Energy Conservation. The Applicant's proposal, in and of itself, will have no effect on energy use or conservation since no specific development has been proposed in conjunction with the subject applications. The record shows that providing additional economic opportunities on the subject property may decrease vehicle trips for persons working in the Deschutes Junction area, therefore conserving energy.

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

/ / /

/ / /

/ / /

/ / /

IV. CONCLUSION

Based on the foregoing findings, I find the Applicant has NOT met the burden of proof with respect to the standards for approving the requested Plan Amendment and Zone Change. I therefore recommend to the County Board of Commissioners that the Application be DENIED unless the Applicant can meet that burden.

Dated this 12th day of June 2023

Tommy A. Brooks
Deschutes County Hearings Officer