



MEMORANDUM

TO: Deschutes County Board of Commissioners (Board)

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

DATE: March 9, 2022

SUBJECT: Deliberations – Dave Swisher Plan Amendment and Zone Change

The Board of County Commissioners (Board) held a public hearing on February 2, 2022 to consider a request for a Plan Amendment and Zone Change (file nos. 247-21-000616-PA, 617-ZC) for two (2) 40-acre properties located on Abbey Road, approximately 1.3 miles east of the City of Bend. The Board is scheduled to deliberate on March 16, 2022 in consideration of the request.

I. BACKGROUND

The Applicant, Dave Swisher, is requesting a Comprehensive Plan Amendment to redesignate the subject properties from Agriculture to Rural Residential Exception Area and a Zoning Map Amendment to rezone the properties from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA-10). The Applicant's reasoning for the request is that the properties were mistakenly identified as farmland, do not contain high-value soils or other characteristics of high value farmland, and therefore should be redesignated and rezoned for residential use. The Applicant has provided a supplementary soil study that identifies non-high value soils on a majority (~96%) of the subject properties. Additionally, the Applicant has provided findings within the burden of proof that demonstrate compliance with state and local requirements and policies. A public hearing before a Hearings Officer was conducted on September 21, 2021 with the Hearings Officer's recommendation of approval issued on November 24, 2021. The Board held a public hearing on February 2, 2022 and initiated a 21-day open record period, which concluded February 23, 2022 at 4:00pm.

II. OPEN RECORD PERIOD

During the initial 7-day segment of the 21-day open record period, staff received two (2) public comments as new evidence and testimony. During the second 7-day segment of the open record period, staff received one (1) rebuttal of the new evidence and testimony that was received. The Applicant's final legal argument was received on February 23, 2022 at the conclusion of the open record period.

The new evidence and testimony received during the open record largely reiterated concerns and arguments that were raised during public testimony of the Board's public hearing on February 2, 2022. These concerns include: growth management, future potential development of the subject property, traffic impacts, and the validity of the Applicant's supplemental soil study in reclassifying the agricultural designations for the subject properties. The rebuttal testimony received during the open record period focused exclusively on the validity of the Applicant's supplemental soil study in reclassifying the agricultural designations for the subject properties.

III. BOARD DELIBERATIONS

On March 16, 2022, the Board will deliberate on the proposed Plan Amendment and Zone Change requests. If the Board finds that additional deliberations are necessary, the Board may schedule a future date for continued deliberations. If the Board finds no additional deliberations are necessary, the Board may then vote on whether to uphold or overturn the Hearings Officer's recommendation of approval.

Per DCC Section 22.20.040(D), the review of the proposed quasi-judicial Plan Amendment and Zone Change is not subject to the 150-day review period typically associated with land use decisions. The full record is available for inspection at the Planning Division and at the following link: <https://www.deschutes.org/cd/page/247-21-000616-pa617-zc-applicant-initiated-plan-amendment-and-zone-change>

Board Decision Matrix

A more thorough review and discussion of the subject proposal's compliance with the applicable approval criteria and issues is provided in the associated Board Decision Matrix, prepared in conjunction with this deliberation memorandum.

IV. NEXT STEPS

If the Board determines that additional deliberations are necessary, staff will work with the Board to schedule a future meeting for continued deliberations. If the Board concludes their deliberations during the March 16, 2022 meeting, the Board may then vote on whether to uphold or overturn the Hearings Officer's recommendation of approval. If the Board renders a vote during the March 16, 2022 meeting, staff will coordinate with the Board to return for a future meeting during which a draft ordinance and relevant exhibits will be presented and a first reading of the ordinance initiated.

V. SUGGESTED MOTION

To the extent the Board decides to uphold the Hearings Officer's decisions, a motion as follows will likely be appropriate:

The Board moves to accept the recommendation of the Hearings Officer for file nos. 247-21-000616-PA and 247-21-000617-ZC in approving the proposed Plan Amendment and Zone Change.

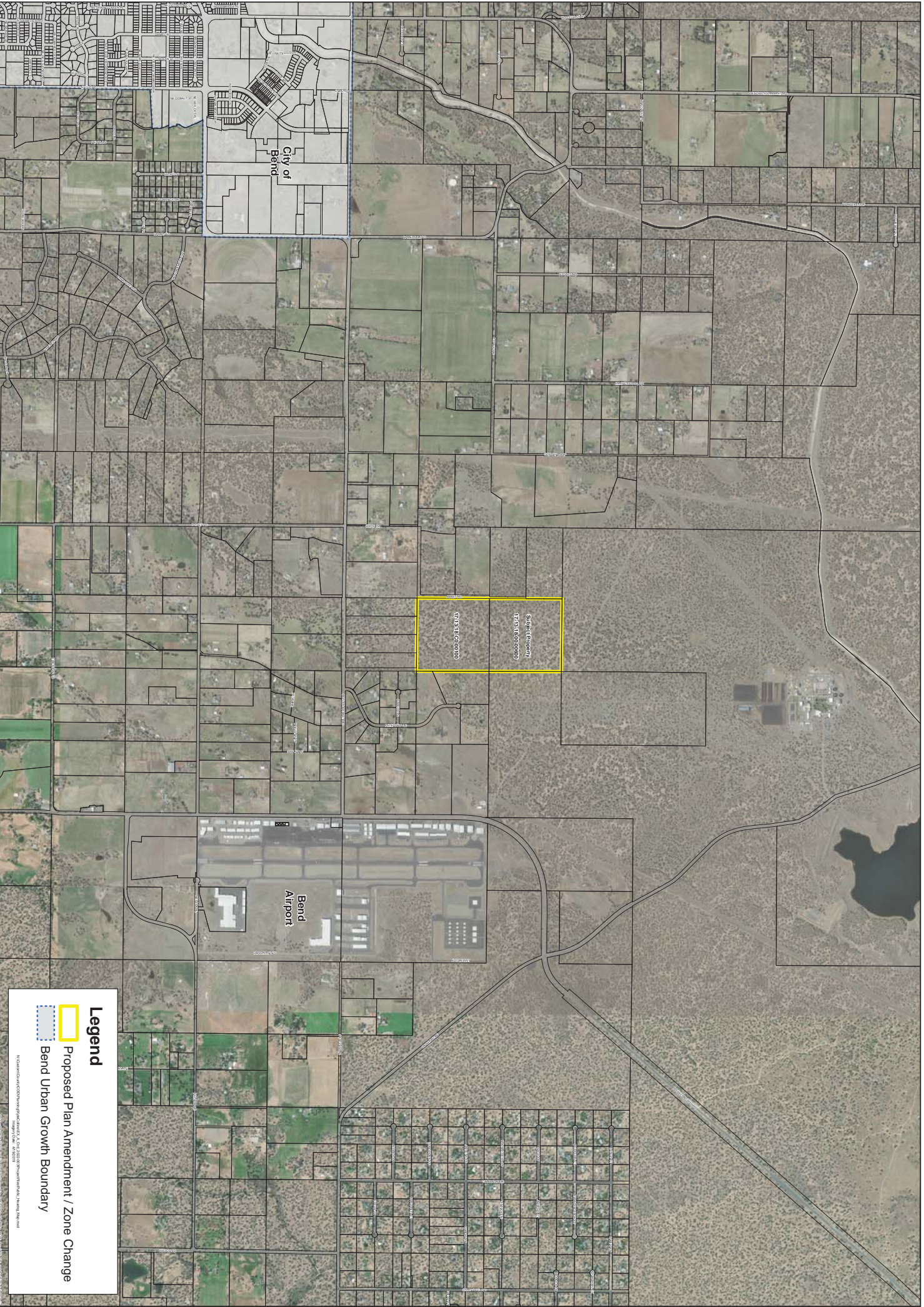
To the extent the Board decides to modify or reverse the Hearings Officer's decision, that motion will need to be crafted to address the Board's specific concerns, as discussed in the deliberations.

ATTACHMENTS:

- 1) Area Map
- 2) Board Decision Matrix

Proposed Comprehensive Plan Amendment / Zone Change

63350 Abbey Rd, Bend



Legend

-  Proposed Plan Amendment / Zone Change
-  Bend Urban Growth Boundary

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BOCC DECISION MATRIX

DAVE SWISHER PLAN AMENDMENT / ZONE CHANGE Land Use File Nos. 247-21-000616-PA, 617-ZC

	Issue Area	Applicable Approval Criterion	Applicant and Oppositional Responses	Hearings Officer	Staff Comment
1	Growth Management: The proposal could bring development that may impact quality of life for neighboring residents	The opposition does not point to specific approval criteria associated with this issue area.	<p>The Applicant asserts the County’s Comprehensive Plan provisions anticipate the need for additional rural residential lots as the region continues to grow. This includes providing a mechanism to rezone farmlands with poor soils to a rural residential zoning designation. While the rezone application does not include the creation of new residential lots, the Applicant has demonstrated the subject properties are comprised of poor soils that are adjacent to existing rural residential MUA-10 zone uses to the south and many surrounding EFU zoned properties are developed with low density residential uses. <u>Oppositional comments</u> focus on whether the subject property is appropriate to serve future residential development and whether there are other non-resource designated areas in the county that are more appropriate to absorb population and housing growth in the county, city, and regional area.</p>	<p>The Hearings Officer found that rezoning the subject properties to MUA-10 is consistent with Section 3.2, Chapter 3 of the Deschutes County Comprehensive Plan as it will provide for an orderly and efficient transition from urban to rural and agricultural lands (HO Decision p. 48). Further, the Hearings Officer states they do not have authority to deny the requested applications on the basis of concerns about growth as the proposal otherwise complies with applicable criteria.</p>	<p>Staff agrees with the Applicant and Hearings Officer on this issue area.</p>
2	Traffic Impacts: The project create traffic issues in the area.	The opposition does not point to specific approval criteria associated with this issue area, although staff notes that OAR 660-012-0060(1)(a-c) are criteria that may relate to this particular issue.	<p>The Applicant’s traffic study indicates the project will not generate traffic that exceeds the capacity of local roads. Additionally, the traffic study noted that access to the MUA-10 zoned Classic Estates lots to the south is provided by Peterman Lane and Parker Lane. Traffic associated with potential future development of the subject properties will not rely on either road for access. Finally, the traffic study notes that impacts to the greater area arterial street network will be negligible. <u>Oppositional comments</u> focus on current traffic trends, general traffic growth concerns, and overall road design in the project area.</p>	<p>The Hearings Officer found the following regarding the proposed project: 1) It will be consistent with the identified function, capacity, and performance standards of the County’s transportation facilities in the area. 2) The proposed changes will not change the functional classification of any existing or planned transportation facility or change the standards implementing a functional classification system. 3) The changes will not allow types or levels of land uses, which would result in levels of travel or access, which are inconsistent with the functional classification of nearby transportation facilities. 4) It will not reduce the performance standards of the facility below the minimum acceptable level in the County’s transportation system plan. (HO Decision p. 70)</p>	<p>Staff agrees with the Applicant, the Applicant's transportation engineer, and Hearings Officer on this issue area.</p>

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3	Farming: The project may prevent or preclude farming activities taking place on the subject property.	The opposition does not point to specific approval criteria associated with this issue area. However, staff notes that OAR 660-033-0020(1)(a)(B) is the criterion under which the applicant's soil study was reviewed.	<u>The Applicant</u> asserts the subject properties are not suited to full-time commercial farming and that the proposed MUA-10 zone will still allow property owners to engage in hobby farming. <u>Oppositional comments</u> focus on a concern that farm potential on the subject and surrounding properties will be impacted, as well as potential water impacts to surrounding properties from residential irrigation uses.	The Hearings Officer found the subject properties, primarily comprised of Class 7 and 8 soils, are not suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration the soil fertility, suitability for grazing, climactic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy outputs required and accepted farming practices. The Hearings Officer pointed to substantial evidence in the record that supports a determination that the subject properties cannot be employed for the primary purpose of obtaining a profit in money through farming-related endeavors, considering the costs of engaging in farm use. (HO Decision p. 56).	Staff agrees with the Applicant and Hearings Officer on this issue area. The Board may uphold the Hearings Officer's decision (including DLCD-approved soil study) or overturn based on a finding that the subject property is suitable for farm use, counter to OAR 660-033-0020(1)(a)(B)
4	Wildlife Impacts: The project may impact wildlife habitat and wildlife populations.	The opposition does not point to specific approval criteria associated with this issue area.	<u>The Applicant</u> asserts that their submitted burden of proof addresses County Comprehensive Plan Goals for rural development, economy, transportation, public facilities, recreation, energy, natural hazards, destination resorts, open spaces, wildlife, and forest lands. <u>Oppositional comments</u> focus on preserving the subject property for perceived wildlife habitat value based on past wildlife sightings from neighboring property owners.	The Hearings Officer found that the property does not include a wildlife overlay (WA) designation and, more importantly, no development is proposed at this time. The Hearings Officer further found rezoning the subject properties will not, in and of itself, impact wildlife and protections for wildlife must be sanctioned by the County's Goal 5 ESEEs and WA or similar wildlife overlay zoning (HO Decision p. 28, 72-73).	Staff agrees with the Applicant and Hearings Officer on this issue area.

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5	Soil Study: The Applicant’s supplemental soil study does not legally alter agricultural designations for the subject properties based on the National Resources Conservation Service (NRCS) soil classification system.	The opposition states the property meets the legal definition of “agricultural land” based on OAR 660-033-0020(1)(a)(A).	<u>The Applicant</u> submits that Goal 3 does not state that “agricultural land” is land mapped by NRCS soil studies as Class I, II, III, IV, V and VI. The Applicant argues that DLCD rules supplement the goal, stating that NRCS mapped soils in Class I-VI are agricultural land, but they also provide property owners with the right to challenge NRCS soil study results by hiring a certified soil scientist to conduct a more detailed soils study and obtaining DLCD approval to use the study in a plan amendment/rezone application. The Applicant states that a soil classification system and soil study maps are not one and the same thing. The Applicant notes that the right to challenge NRCS mapping is allowed both by the text of Goal 3 itself and by ORS 215.211 and in the event of conflict, ORS 215.211 controls over the conflicting provisions of the Goal 3 rules adopted by LCDC. The Applicant notes that OAR 660-033-0030(5)(a) requires soil scientists to study and report on the soils based on the SCS soil classification. <u>Oppositional comments</u> state that lands classified as Class I-VI by the NRCS in Eastern Oregon are agricultural lands <i>per se</i> and cannot be rezoned or reclassified without a Goal 3 exception. The opposition states that OAR 660-033-0030 requires that any land meeting a NRCS Class 1-VI classification “shall be inventoried as agricultural land.”	The Hearings Officer found that NRCS soil survey maps are not definitive or “binding” with respect to a determination of whether the subject properties are, or are not, agricultural land. The Hearings Officer cited LUBA findings in the <i>Aceti</i> case, OAR 660-033-0030(5)(a) and (5)(b) which allow the County to rely on more detailed data on soil capability than provided by NRCS soil maps to define agricultural land, provided the soils survey has been certified by DLCD. (HO Decision p. 40). As such, the Hearings Officer found the Applicant met its burden of proving the property is not agricultural land and does not require an exception to Goal 3 under state law and the applications are consistent with Policy 2.2.3 of the County Comprehensive Plan (HO Decision p. 45).	Staff agrees with the Applicant and Hearings Officer on this issue area. Additionally, staff points to specific findings highlighted by County Legal Counsel from the LUBA <i>Aceti</i> case highlighting the allowance of DLCD certified soil studies when making determinations of properties proper agricultural designation.