

**HEARINGS OFFICER RECOMMENDATION**

**FILE NUMBERS:** 247-23-000210-PA, 247-23-000211-ZC

**HEARING:** November 14, 2023, 6:00 p.m. (the "Hearing")  
Videoconference and Barnes & Sawyer Rooms  
Deschutes Services Center  
1300 NW Wall Street  
Bend, OR 97708

**SUBJECT PROPERTY/  
OWNER:** Groves Family Revocable Trust  
Map and Taxlot: 1612330000800  
Situs Address: 64430 Hunnell Rd, Bend, OR 97703  
(the "Subject Property")

**APPLICANT/OWNER:** Michael F. Groves and Cathie L. Groves (the "Applicant")  
20075 Cox Lane  
Bend, OR 97703

**ATTORNEY:** Elizabeth A. Dickson  
Dickson Hatfield, LLP  
400 SW Bluff Dr., Ste. 240  
Bend, OR 97702

**PROPOSAL:** The Applicant requested approval of a Comprehensive Plan Map Amendment to change the designation of the Subject Property from Agricultural ("AG") to a Rural Residential Exception Area ("RREA"). The Applicant also requests approval of a corresponding Zoning Map Amendment (Zone Change) to change the zoning of the Subject Property from Exclusive Farm Use ("EFU") to Multiple Use Agricultural ("MUA-10").

**STAFF REVIEWER:** Jacob Ripper, Principal Planner  
Jacob.Ripper@deschutes.org  
541-385-1759

**I. APPLICABLE STANDARDS AND CRITERIA:**

Deschutes County Code, Title 18, County Zoning Ordinance  
Chapter 18.04, Title, Purpose, and Definitions  
Chapter 18.16, Exclusive Farm Use Zones

Chapter 18.32, Multiple Use Agricultural Zone  
Chapter 18.136, Amendments

Deschutes County Code, Title 22, Procedures Ordinance

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

Oregon Administrative Rules (OAR), Chapter 660  
Division 6, Forest Lands  
Division 12, Transportation Planning  
Division 15, Statewide Planning Goals and Guidelines  
Division 33, Agricultural Land

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

## II. **BASIC FINDINGS:**

**LOT OF RECORD:** The Subject Property has been verified as a lawfully created lot of record as it was created by a Land Patent in April of 1922, recorded in Volume 33, Page 67 of the Deschutes County Book of Records. However, per DCC 22.04.040 (Verifying Lots of Record) lot of record verification is only required for certain permits:

### *B. Permits Requiring Verification.*

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

In the *Powell/Ramsey* (PA-14-2, ZC-14-2) decision, a County Hearings Officer held in a prior zone change decision (*Belveron* ZC-08-04; page 3), that a property's lot of record status was not required

to be verified as part of a plan amendment and zone change application. Rather, the Hearings Officer concluded that the Applicant would be required to receive lot of record verification prior to any development on the property. Therefore, the Hearings Officer, in this case, finds that this criterion does not apply.

**PROPOSAL:** The Applicant requested approval of a Comprehensive Plan Map Amendment to change the designation of the Subject Property from AG to RREA. The Applicant also requested approval of a corresponding Zoning Map Amendment (Zone Change) to change the zoning of the subject property from EFU to MUA-10. The Applicant requested that Deschutes County change the zoning and the plan designation because the Subject Property does not qualify as “agricultural land” under Oregon Revised Statutes (“ORS”), Oregon Administrative Rules (“OAR”) or Deschutes County Code definitions. The Applicant proposed that no exception is required to Statewide Planning Goal 3, Agricultural Land, because the Subject Property is not “agricultural land.”

Staff, in the Staff Report (page 3), noted that the original proposal included a Tentative Plan (“TP”) application for a four-lot subdivision. Because that subdivision application would be dependent on the successful outcome of the subject plan amendment and zone change, the TP application has been placed “on hold” and decoupled from the current applications. Several documents and materials submitted by the Applicant include information directed towards the approval of a subdivision but are not applicable to the plan amendment and zone change.

**SITE DESCRIPTION:** The Subject Property is undeveloped and scattered with sagebrush and juniper and is relatively flat. Although the Subject Property is zoned EFU, there is no indication in the record of current or historic farm uses or agricultural uses. The Subject Property is not in farm tax deferral and does not contain any irrigated areas nor does it have irrigation water rights.

**SURROUNDING LAND USES:** Surrounding land uses generally consist of rural residential uses as well as some agricultural or small-scale farm uses. Zoning in the areas to the north, west, and south are smaller 5- to 10-acre lots or parcels in the MUA10 Zone. The property directly to the east of the Subject Property is approximately 80 acres in size, vacant, owned by Deschutes County, and is within the EFU Zone. Properties further to the east are relatively large lots, owned by Deschutes County and the City of Bend, and are predominately in the EFU and Open Space and Conservation (“OS&C”) Zones. Highway 97 runs approximately 0.85 miles to the southeast. The City of Bend’s Urban Growth Boundary and city limits are approximately 1.5 miles directly south. The Subject Property fronts on Hunnell Road to the west, which is designated as a rural collector.

**SOILS:** According to Natural Resources Conservation Service (“NRCS”) maps of the area, the Subject Property contains three soil units:

*NRCS Soil Map*

27A, Clovkamp Loamy Sand: Clovkamp Loamy Sand soils consist of 85 percent Clovkamp soils and similar inclusions and 15 percent contrasting inclusions. The agricultural capability ratings of this

soil are 3s when irrigated and 6s when not irrigated. Section 18.04.030 of the DCC considers this soil type high-value farmland<sup>1</sup> soil when irrigated.

38B, Deskamp-Gosney complex, 0 to 8 percent slopes: This soil is composed of 50 percent Deskamp soil and similar inclusions, 35 percent Gosney soil and similar inclusions, and 15 percent contrasting inclusions. The Deskamp soils have ratings of 6e when unirrigated, and 3e when irrigated. The Gosney soils have ratings of 7e when unirrigated, and 7e when irrigated. This soil type is not considered high-value farmland soil.

58C, Gosney-Rock Outcrop-Deskamp complex, 0 to 15 percent slopes: This soil type is comprised of 50 percent Gosney soil and similar inclusions, 25 percent rock outcrop, 20 percent Deskamp soil and similar inclusions, and 5 percent contrasting inclusions. The Gosney soils have ratings of 7e when unirrigated, and 7e when irrigated. The rock outcrop has a rating of 8, with or without irrigation. The Deskamp soils have ratings of 6e when unirrigated, and 4e when irrigated. This soil type is not considered high-value farmland soil.

### *Site-Specific Soil Survey*

Submitted as Exhibit 4 is a soil assessment titled, Site-Specific Soil Survey of Property Located at 64430 Hunnell Road [...], dated December 11, 2020, with field work completed by Soil Scientist Michael Sowers, CCA-WR, CPSS, and the report prepared by Soil Scientist Brian T. Rabe, CPSS, WWS, of Cascade Earth Sciences (the "Applicant Soil Study").

A letter from the DLCD, dated April 12, 2021, and included with Exhibit 4, stated:

*"In accordance with OAR 660-033-0045(6)(a), the Department of Land Conservation and Development (DLCD) finds that this soils assessment is complete and consistent with reporting requirements. The county may make its own determination as to the accuracy and acceptability of the soils assessment. DLCD has reviewed the soils assessment for completeness only and has not assessed whether the parcel qualifies as agricultural land as defined in OAR 660-033-0020(1) and 660-033-0030."*

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<sup>1</sup> Deschutes County code, 18.04, defines "High Value Farmland" as:

"High-value farmland" means land in a tract composed predominantly of the following soils when they are irrigated: Agency loam (2A and 2B), Agency sandy loam (1A), Agency-Madras complex (3B), Buckbert sandy loam (23A), Clinefalls sandy loam (26A), Clovkamp loamy sand (27A and 28A), Deschutes sandy loam (31A, 31B and 32A), Deschutes-Houstake complex (33B), Deskamp loamy sand (36A and 36B), Deskamp sandy loam (37B), Era sandy loam (44B and 45A), Houstake sandy loam (65A, 66A and 67A), Iris silt loam (68A), Lafollette sandy loam (71A and 1B), Madras loam (87A and 87B), Madras sandy loam (86A and 86B), Plainview sandy loam (98A and 98B), Redmond sandy loam (104A), Tetherow sandy loam (150A and 150B) and Tumalo sandy loam (152A and 152B). In addition to the above described land, high-value farmland includes tracts growing specified perennials as demonstrated by the most recent aerial photography of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture taken prior to November 4, 1993. For purposes of this definition, "specified perennials" means perennials grown for market or research purposes including, but not limited to, nursery stock, berries, fruits, nuts, Christmas trees or vineyards but not including seed crops, hay, pasture or alfalfa.

Soil Scientist Mr. Rabe included the following summary and conclusions within the Applicant Soil Study:

*"The purpose of this report is to present the results of an assessment to verify and, where necessary, refine the soils, map units, and boundaries mapped on the Site and to determine whether the soils on the Site meet the land capability classification criteria for a non-resource zoning designation.*

*The published soil survey information was reviewed and direct observations of soil conditions were made at representative locations across the Site. CES has determined that the information from the published soil survey was generally consistent with observations on the ground with boundary refinements primarily limited to delineating components of the complex mapped by the NRCS and/or commonly occurring inclusions. CES has determined that 26.2 acres, or 65.4%, of the Site consists of Class VII and Class VIII soils. Since the Site is predominantly Class VII and Class VIII soils and does not otherwise meet the criteria for further consideration as agricultural land, the Site meets the soils criteria for consideration of a non-resource zoning designation."*

**AGENCY COMMENTS:** The Planning Division mailed notice on April 14, 2023, to several public and private agencies and received the following comments:

Deschutes County Building Safety – Randy Sheid, Building Official:

*"NOTICE: The Deschutes County Building Safety Divisions code mandates that Access, Egress, Setbacks, Fire & Life Safety, Fire Fighting Water Supplies, etc. must be specifically addressed during the appropriate plan review process with regard to any proposed structures and occupancies. Accordingly, all Building Code required items will be addressed, when a specific structure, occupancy, and type of construction is proposed and submitted for plan review."*

Deschutes County Onsite Wastewater – Todd Cleveland, Manager:

*"A complete approved site evaluation is required for each proposed residential lot prior to final plat approval. Site evaluation applications for new properties need to include details of the proposed lot lines and proposed septic system areas/test pit locations for each parcel."*

Planning Staff Comment (Staff Report, page 5):

*"The original application included a proposal for a four-lot subdivision, which this comment was directed towards. Subsequently, it was determined that the subdivision would be reviewed once the subject Plan Amendment and Zone Change decision becomes final."*

Deschutes County Senior Transportation Planner – Peter Russel:

*"I have reviewed the transmittal materials for 247-23-000210-PA/211-ZC/212-TP to amend the Comprehensive Plan designation of a 40-acre property from Agriculture (AG) to Rural Residential*

*Exception Area (RREA) and change the zoning for that same property from Exclusive Farm Use (EFU) to Multiple Use Agriculture (MUA-10) and a tentative plan to subdivide the property into four, 10-acre lots. The property is located at 64430 Hunnell Rd., aka County Assessors Map 16-12-33 Tax Lots 800. For reasons discussed below, staff finds more information is needed to address the Transportation Planning Rule (TPR) and County code.*

*The applicant's traffic study dated April 17, 2023, is incomplete for two reasons. The TPR at Oregon Administrative Rule (OAR) 660-012-0060 requires the demonstration of whether a plan amendment/zone change will have a significant effect or not. To determine that, the traffic study must include the operational analysis of the affected intersections predevelopment and post-development. The traffic study lacks this information and thus does not comply with the TPR. The TIA does analyze the segment of Hunnell Road itself for throughput, but not the intersection of the future Groves Road/Hunnell Road. Second, Deschutes County Code (DCC) 18.116.310(G)(4) requires zone changes to include a 20-year analysis. DCC 18.116.310(G)(10) requires existing and future years levels of service (LOS), average vehicle delay, and volume/capacity (V/C) ratios both with and without the project. (The V/C ratios are only applicable if ODOT facilities are analyzed.) The TIA lacks this feature and thus does not comply with County code. The TIA does not use the traffic volume standard of 9,600 Average Daily Traffic (ADT), which is set forth in the Transportation System Plan (TSP) at Page 81, Table 2.2T2 (Generalized County Road Segment and LOS). Further, the combination of the TPR and County code helps identify whether the transportation system has adequate capacity to serve the plan amendment/zone change or if the system is already overcapacity regardless of the proposed plan amendment/zone change. By contrast, the applicant has submitted what is in essence a trip generation memo.*

*The property accesses Hunnell Road, a public road maintained by Deschutes County and functionally classified as a collector. The property lacks a driveway permit; the applicant will need to either provide a copy of an access permit approved by Deschutes County or be required to obtain one as a condition of approval to meet the access permit requirements of DCC 17.48.210(A).*

*The County will assess transportation system development charges (SDCs) when development occurs based on the type of proposed use. However, as a plan amendment or a zone change by itself does not generate any traffic and neither does the subdividing of the land, no SDCs are triggered at this time. The SDCs are triggered by actual development."*

Planning Staff Comment (Staff Report, page 6):

*"The applicant submitted additional information to address these comments. Below is the response from the Senior Transportation Planner."*

Deschutes County Senior Transportation Planner – Tarik Rawlings

*"These updated materials and the application materials in record satisfy the County's requirements and no further materials or analysis are required from the applicant."*

The following agencies either had no comment or did not respond to the notice: Arnold Irrigation

District, Avion Water Company, Bend Fire, Bend La Pine School District, Bend Metro Parks and Rec, Bend Planning Dept., Bend Public Works, BLM – Prineville, Department of State Lands, Dept of Land Conservation & Development, Deschutes County Assessor, Deschutes County Property Mgmt., Deschutes County Road Department, OR Dept of Ag Land Use Planning, OR Dept of Agriculture, OR Dept of Agriculture, OR Dept of Fish & Wildlife, OR Parks and Recreation, Swalley Irrigation District, and Watermaster - District 11.

**PUBLIC COMMENTS:** On April 14, 2023, the Planning Division mailed a Notice of Application to all property owners within 750 feet of the Subject Property. No comments from the public were received. Only the Applicant, Applicant’s representative and County Staff appeared at the Hearing. No request was received prior to or at the Hearing to keep the record open to allow the submission of additional evidence/argument. The Hearings Officer closed the record at the conclusion of the Hearing. Following the Hearing a letter was received from Kenneth Kataroff (Schwabe, November 20, 2023). The Hearings Officer finds that the Kataroff letter was submitted after the close of the record and therefore cannot be considered in the making of this recommendation.

**NOTICE REQUIREMENT:** The Applicant complied with the posted notice requirements of Section 22.23.030(B) of Deschutes County Code (DCC) Title 22. The Applicant submitted a Land Use Action Sign Affidavit, dated March 30, 2023, indicating the Applicant posted notice of the land use action on the Subject Property on that same date. On September 25, 2023, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the Subject Property. A Notice of Public Hearing was published in the Bend Bulletin on Sunday, October 1, 2023. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on September 22, 2023.

**REVIEW PERIOD:** According to Deschutes County Code 22.20.040(D), the review of the proposed quasi-judicial Plan Amendment and Zone Change application is not subject to the 150-day review period.

**LAND USE HISTORY:** Previous land use actions associated with the subject property are:

- LR-90-16: Lot of record verification.

### III. **FINDINGS & CONCLUSIONS**

#### **PRELIMINARY FINDINGS**

As noted above no person or entity offered oral testimony or written documentation, in a timely manner, in opposition of the Applicant’s proposal or the Staff Report in this case. As such, the Hearings Officer finds that the Staff Report, as drafted, provides substantial evidence and legal argument to allow the Hearings Officer to adopt the Staff Report as findings for this recommendation.

Staff discussed, in the Staff Report (see pages 12-23), evidence and legal issues related to Applicant's choice to not seek a Goal 3 exception. The Hearings Officer provides the following supplemental findings related to Applicant's decision not to seek a Goal 3 exception.

## **Relevant Law**

The following quoted sections of statutes, regulations and case law represent a general overview of the law related to whether a Goal 3 exception is warranted and/or necessary:

### **OAR 660-033-0020 (1)(a)**

*"Agricultural Land" as defined in Goal 3 includes:*

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

*(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.*

### **OAR 660-033-0030 (5 (b))**

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

### **ORS 215.203 (2)(a)**

*As used in this section, "farm use" means 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. "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm use" also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities*



described in this subsection. "Farm use" does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees or land described in ORS 321.267 (3) or 321.824 (3).

#### **DCC 18.04**

"Agricultural Land" means lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominately Class I-VI soils, and other lands in different soil classes which are suitable for farm use, taking into consideration soil fertility, suitability for grazing and cropping, 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. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands shall be included as agricultural lands in any event.

"Farm use" means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or by 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. "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm Use" also includes the current employment of the land for the primary purpose of obtaining a profit in money by stabling or training equines, including but not limited to, providing riding lessons, training clinics and schooling shows. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described above. "Farm use" does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in ORS 215.203(3). Current employment of the land for farm use also includes those uses listed under ORS 215.203(2)(b).

*Wetherell v. Douglas County*, 342 Or 666 (2007) [hereafter referred to as "Wetherell Decision"]<sup>2</sup>

*Central Oregon LandWatch v. Deschutes County*, LUBA No. 2023-006 (2023) [hereafter referred to as the "LUBA 710 Decision"]

### **Goal 3 Analysis**

The following represents the Hearings Officer's overview findings related to the legal approach to be taken with respect to addressing Applicant's argument that the Subject Property is not "agricultural land" and therefore no Goal 3 exception is required.

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<sup>2</sup> Staff, in the Staff Report (page 13), referenced the LUBA decision (52 Or LUBA 677 (2006)); the LUBA decision was appealed to the Oregon Supreme Court. The legal issue referenced by Staff was not a focus of the *Wetherell* Oregon Supreme Court decision.

LUBA stated, in the *LUBA 710 Decision* (page 11), that “generally counties apply Exclusive Farm Use (EFU) zones to ‘agricultural land’” (citing OAR 660-033-0090(1)). LUBA then proceeded to analyze the laws/regulations/codes referenced above in the context of determining if the property identified in that case was “agricultural land.”

The *LUBA 710 Decision* (pages 13-18) analysis of OAR 660-033-0020(1)(a)(A) addressed the need to meet identified U.S. Natural Resources Conservation Service (“NRCS”) soil classifications. Generally, OAR 660-033-0020(1)(a)(A) identifies soils (Eastern Oregon) classified as I-VI as “agricultural land.” However, LUBA (*LUBA 710 Decision*) held that OAR 660-033-0030(5) permits a county to rely, if certain conditions are met, upon a site-specific soils assessment.

OAR 660-033-0020(1)(a)(B) provides that property can be considered “agricultural land” in “other soil classes” if it 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.”*

The Hearings Officer refers to the OAR 660-033-0020(1)(a)(B) factors (i.e., soil fertility, suitability for grazing, ect.) as the “Suitability Factors.” OAR 660-033-0020(1)(a)(B) refers to ORS 215.203(2)(a) for the definition of “farm use.” ORS 215.203(2)(a), in part, states:

*“farm use” means the current employment of land for the primary purpose of obtaining a profit in money by...”*

The Oregon Supreme Court (*Wetherell Decision*) and LUBA (*LUBA 710 Decision*) addressed the “primary purpose of obtaining a profit” language in ORS 215.203(2)(a). The underlying County interpretation of “primary purpose of obtaining profit” focused on whether or not each of the Suitability Factors, in the context of whether it was reasonably possible (reasonable farmer concept) to obtain a profit, were met on the specific subject property. The *LUBA 710 Decision* refined LUBA’s interpretation of “primary purpose of obtaining profit” to require consideration of property other than (in addition to) just the property subject to the application (i.e., neighboring properties).

OAR 660-033-0020(1)(a)(C) provides that “agricultural land” includes “land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural land.”

DCC 18.04 definitions of “farm use” and “agricultural land” are generally consistent with the OAR 660-033-0020(1)(a) and ORS 215.203 definitions.

The Hearings Office finds the *LUBA 710 Decision* is currently under appeal to the Oregon Court of Appeals. The Hearings Officer considered the *LUBA 710 Decision* as instructional but not a final statement of the law related to the determination of what is “agricultural land” under Oregon and Deschutes County statutes/regulations/code. The Hearings Officer, however, did consider in this

recommendation the Applicant's Hearing testimony and submitted exhibits in the context of the LUBA 710 Decision.

## **Title 18 of the Deschutes County Code**

### **Chapter 18.136, Amendments**

#### Section 18.136.010, Amendments

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

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

#### Section 18.136.020, Rezoning Standards

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

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

**FINDING:** Conformance with relevant sections of the Deschutes County Comprehensive Plan is reviewed below. The proposed rezoning from EFU to MUA-10 is required to be consistent with the proposed new plan designation. In previous comprehensive plan and zone change recommendations<sup>3</sup> to the Board of County Commissioners ("BCC") County hearings officers have found that the introductory statement of the Comprehensive Plan to be aspirational in nature and not necessarily approval criteria. The Hearings Officer, in this case, concurs with the prior BCC and hearings officer findings that this section is aspirational and not an approval criterion.

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

**FINDING:** In response to subsection (B) of this policy, the Applicant's Burden of Proof provides the following:

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<sup>3</sup> Powell/Ramsey decision (PA-14-2, ZC-14-2) and Landholdings Decision (247-16-000317-ZC, 318-PA).

*"The proposed Plan change from Agricultural to Rural Residential Exception Area and Zone change from EFU-TRB to MUA-10 is consistent with the purposes and intents of the MUA zone classification. Per DCC 18.32.010, the stated purposes of the MUA zone are as follows:*

*The purposes of the Multiple Use Agricultural Zone are to preserve the rural character of various areas of the County while permitting development consistent with that character and with the capacity of the natural resources of the area; to preserve and maintain agricultural lands not suited to full time commercial farming for diversified or part time agricultural uses; to conserve forest lands for forest uses; to conserve open spaces and protect natural and scenic resources; to maintain and improve the quality of the air, water and land resources of the County; to establish standards and procedures for the use of those lands designated unsuitable for intense development by the Comprehensive Plan, and to provide for an orderly and efficient transition from rural to urban land use.*

*The County's Transportation System Plan includes planned improvements for the triangle between Highway 20 and Highway 97, as ODOT's management of the highways themselves is focusing on streamlining these through-ways by reducing local points of ingress and egress to the highways. The City of Bend and Deschutes County must develop local transportation networks that do not rely on these highways for local trips. This change includes improvements to Hunnell Road, scheduled for 2023. See Exhibit 7, Hunnell Road Project. City UGB Expansion includes expansion northward as well, presently approximately 7600' south of the subject property. The MUA-10 lands and other exception zone designations in the area are preferred lands for such expansion, as they do not require conversion of resource lands to urban uses, which is disfavored as part of the urban management process.*

*The MUA-10 zone is the optimal county zone designation to transition the Subject Property to a rural residential use. As detailed above and incorporated herein by reference, the Subject Property is not suited for agricultural use, as evidenced by the site-specific study of its soils (Exhibit 4). This property is more appropriately zoned MUA-10, like the surrounding property on 3 sides. The Subject Property is currently zoned Exclusive Farm Use (EFU) likely due to generalized designations in the overall area and/or prior ownership of larger parcels, rather than consideration of the agricultural capability of the land itself. The Property is not documented as ever having been in farm or pasture use, since it is unirrigated. It is not feasible to engage in productive or profitable farming activity without water rights, and the soils classified Classes VII and VIII will not sustain significant usable plant growth without irrigation.*

*This Comprehensive Plan Map and Zoning Map Amendment request will standardize zoning in the area and address the potential conflict and incompatibility between the EFU permitted uses and the adjacent, surrounding lands developed or committed for exception uses. The requested Comprehensive Plan Map and Zoning Map amendments will result in a zoning assignment that is compatible with neighboring properties rather than the current EFU zoning.*

*Rezoning of the Subject Property from EFU to MUA-10 will resolve the latent conflict between EFU permitted uses and the immediately adjacent rural residential uses. Furthermore, the Comprehensive Plan Map and Zone Map change will serve the interests of the northwest Bend*

*residents, surrounding neighborhoods, and existing and future public investments in public facilities and services along Hunnell Road.*

*By allowing for single family dwellings as an outright permitted use (DCC 18.32.020(B), the MUA-10 zone recognizes that rural lands may sometimes be better suited for residential use than agricultural uses. Other non-resource land uses are conditionally permitted; any nonresource land development proposal on the property other than a single family dwelling would not be allowed unless it was found to be consistent with the surrounding properties and the applicable conditional use evaluation standards. Therefore, the proposed change in zoning is consistent with the intent and purpose of the MUA-10 zone, and will be compatible with surrounding properties. The Hunnell Road improvements already planned serve this change well. As a straightened, widened, paved roadway, it is well planned to handle additional trips likely to be coming soon to this growing area."*

The Hearings Officer finds, based upon Applicant's record submissions, that Applicant has demonstrated that the requested change in classification is consistent with the purpose of the proposed zoning.

**C. *That changing the zoning will presently serve the public health, safety and welfare considering the following factors:***

**1. *The availability and efficiency of providing necessary public services and facilities.***

**FINDING:** Although there are no plans to develop the Subject Property in its current state, the above criterion specifically asks if the proposed zone change will *presently* serve public health, safety, and welfare. The Applicant provided the following response in the submitted Burden of Proof statement:

*"The proposed change from EFU to MUA-10 will not require the extension of new public services to the Subject Property. The site is already adjacent to enhanced infrastructure (Hunnell Road, Avion water lines, and electrical power). The site will be served by on-site septic systems. Thus, public facilities are available and can be efficiently provided to the site.*

*Subdividing the property and the Plan Amendment / Zone Change will presently serve public health, safety, and welfare. The 40-acre parcel is not used as farm land at the present time because its soils are not sufficient and it is not irrigated. The proposed land use approvals would allow this land to be used safely and efficiently for uses allowed in the MUA-10 zone, benefiting public health, safety, and welfare by utilizing the facilities already in place to expand housing in the area. The surrounding areas contain numerous properties that are residentially developed and have water service from a quasi-municipal source or wells, on-site sewage disposal systems, electrical service, telephone services, etc. There are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare by allowing a housing supply increase. Development of the property under MUA-10 zoning would need to comply with applicable requirements of the DCC, including land use permits, building permits, and sewage disposal permit processes. Through development review processes, assurance of adequate public services and*

*facilities will be verified and public health, safety, and welfare overall will be improved by the addition of much needed housing in an underutilized area."*

Staff noted (Staff Report, page 10) that prior to development of the Subject Property the Applicant would be required to comply with the applicable requirements of the DCC, including possible land use, building, and sewage disposal permits, in addition to approval of the related subdivision. Through these development review processes, assurance of adequate public services and facilities will be verified. The Hearings Officer agrees with Staff and the Applicant that Applicant's record submissions demonstrate compliance with this criterion.

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

**FINDING:** In response to this criterion the Applicant's Burden of Proof included the following comments:

*"This application asks for approval to change the Comprehensive Plan designation of non-agricultural land to the more accurate Rural Residential Exception Area category, and rezone the Subject Property from EFU-TRB to MUA-10. The MUA-10 zone serves as a transition between EFU lands with productive soils and other rural lands that are "not suited to full time commercial farming" and are more appropriately suited for "diversified or part time agricultural uses." The MUA-10 zone retains consistency with EFU lands by allowing a limited array of rural uses and mandating a 10-acre minimum lot size. There are only a limited number of uses allowed in the MUA-10 zone that are not also allowed in the EFU zone. Further, the majority of the different non-resource land uses in the MUA-10 zone are conditional, thereby ensuring that potential impacts on surrounding land uses are reviewed by the County during each application.*

*In summary, the MUA-10 zone remains a rural zone devoted to a mix of mixed rural and residential uses that acknowledges soil deficiencies precluding profitable farm use. This minimizes potential impacts on surrounding lands. The MUA-10 zoning would emphasize the continued protection of the open space and wildlife values of the property with its 10-acre minimums."*

In addition to these comments, the Applicant provided specific findings for relevant Comprehensive Plan goals and policies, which are addressed below. The Hearings Officer concurs with Staff and Applicant that the Applicant demonstrated, with evidence in the public record, that the impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan.

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

**FINDING:** In response to this criterion, the Applicant's Burden of Proof provides the following:

*"Circumstances have changed since the zoning of the property in November, 1979. Much of unirrigated lands were zoned EFU in large blocks in the interest of efficiency and expediency, even*

*though these parcels were dry and not profitably farmable. This property was zoned without detailed or site specific consideration given to its history, soil, geologic, or topographic characteristics. Now that a certified soils scientist has conducted a detailed Soils Investigation, it is documented that the parcel does not qualify as agricultural farmland and is properly rezoned to a practical designation reflecting the true facts of the parcel. See Exhibit 4.*

*In summary, the County's zoning of agricultural lands has been a process of refinement since the 1970s. The Subject Property appears to have never been suitable for production as profitable agriculture and there is no record of it ever been actively farmed, due to its poor soil and lack of irrigation water. Although it was originally assigned EFU zoning, this property likely should have been originally zoned MUA-10 due to its location, soils, geology, and lack of irrigation water supply. However, in 1979, only tracts with dwellings or divisions below minimum sizes were classified as exception lands, regardless of soils. It is now known that the parcel should be rezoned to MUA-10, consistent with the zoning of adjacent rural-residential uses and its poor soil. The MUA-10 zoning assignment supports logical, compatible, and efficient use of the land in keeping with its highest and best use."*

Staff, in the Staff Report (page 12), stated the following:

*"It is unclear to staff why the subject property was initially zoned EFU. Staff is unaware of any evidence such as soil classification, availability of irrigation, or historic farming, which explains its current zoning. Staff agrees with the applicant's findings that there have been several particularly relevant changes in circumstances that warrant a zone change, especially in consideration of the detailed information provided by the soil study. Staff finds the applicant has demonstrated compliance with this criterion, but asks the Hearings Officer to amend or add to these findings as the Hearings Officer sees fit."*

The Hearings Officer agrees, after reviewing the documents in the record and considering the testimony of County Staff and Applicant's representative at the Hearing, that the underlying rationale and reasoning underlying the original zoning the Subject Property being zoned as EFU is not clear and/or certain. The Hearings Officer finds that whatever the circumstances leading to the decision to assign the Subject Property with the EFU designation there are many relevant factors that are different today. Currently, urban style growth is moving towards the Subject Property and farm uses in the immediate vicinity are rare; if they exist at all. Properties to the north and west of the Subject Property are not in farm use; the property boarding to the north has been developed as the Sun Cloud Estates subdivision and properties to the south and west are divided into residential use parcels. The property boarding the Subject Property to the east is owned by the County and based upon evidence in the record has not been used for farming or agricultural purposes.

The Hearings also finds, based primarily upon the Applicant's site-specific soil study, that the soils on the Subject Property do not support the original EFU zoning designation. The Hearings Officer finds that there has been a change in circumstances since the Subject Property was zoned EFU. The Hearings Officer also finds that the EFU zoning was a mistake. The Hearings Officer finds this criterion is met.

# The Deschutes County Comprehensive Plan

## Chapter 2, Resource Management

### Section 2.2, Agricultural Lands Policies

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

**FINDING:** The Applicant provided the following response in the submitted Burden of Proof statement:

*“As discussed below, the Subject Property is not correctly categorized as agricultural land, because of its inability to retain water and sustain plant growth to a sufficient degree to make it profitable. See the Applicant’s soil study (Exhibit 4) and the responses in the submitted burden of proof, which effectively demonstrate that the Subject Property is not suitable for designation as Agriculture in the Comprehensive Plan. Changing the Subject Property’s Comprehensive Plan designation and zoning is an acknowledgment of site-specific facts, not interpretation.*”

The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer also incorporates the findings for Comprehensive Plan Policy 2.2.3 and OAR 660-006-0005, 660-015-0000(3), 660-033-0020 and 660-033-0030 as additional findings for this criterion.

The Hearings Officer, based upon Applicant’s record submissions and the incorporated findings, concludes that the Subject Property is not “agricultural land” as that phrase is described in relevant laws/rules and relevant land use case law. Therefore, the Hearings Officer finds this policy is not applicable to the Subject Property.

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

**FINDING:** The Applicant is not asking to amend the subzone that applies to the Subject Property; rather, the Applicant is seeking a change under Policy 2.2.3 and has provided evidence to support rezoning the subject property to MUA-10.

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

**FINDING:** The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer also incorporates the findings for Comprehensive Plan Policy 2.2.3



and OAR 660-006-0005, 660-015-0000(3), 660-033-0020 and 660-033-0030 as additional findings for this policy.

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

Staff provided the following comments in the Staff Report (page 13):

*“The Land Use Board of Appeals (LUBA) allowed this approach in Wetherell v. Douglas County, 52 Or LUBA 677 (2006), and this approach has been utilized in the previous Plan Amendment and Zone Change applications within Deschutes County. The County Hearings Officer also accepted this method in file PA-10-5 (Rose & Associates). In Wetherell v. Douglas County, LUBA states at pp. 678-679:*

*‘As we explained in DLCD v. Klamath County, 16 Or LUBA 817, 820 (1988), there are two ways a county can justify a decision to allow nonresource use of land previously designated and zoned for farm use or forest uses. One is to take an exception to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). The other is to adopt findings which demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. When a county pursues the latter option, it must demonstrate that despite the prior resource plan and zoning designation, neither Goal 3 or Goal 4 applies to the property. Caine v. Tillamook County, 25 Or LUBA 209, 218 (1993); DLCD v. Josephine County, 18 Or LUBA 798, 802 (1990).’*

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

The Hearings Officer, based upon the above-quoted Staff comments and the incorporated findings, concurs with Staff’s conclusion that the Applicant may attempt to prove the Subject Property is not “agricultural land” and therefore does not require a Goal 3 exception.

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

**FINDING:** This plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations. In the findings for previous Plan Amendment and Zone Change applications, the County has found that this policy does not impose a moratorium on requests for applications of this type, and that nothing in this plan policy prohibits the conversion of EFU parcels to other designations (see also PA-11-7, 247-16-000318-PA, PA-10-5, PA-07-1 and more). The Hearings Officer concurs with the County’s previous determinations and finds the proposal is consistent with this policy.

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

**Policy 2.2.13 Identify and retain accurately designated agricultural lands.**

**FINDING:** The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer also incorporates the findings for Comprehensive Plan Policy 2.2.3 and OAR 660-006-0005, 660-015-0000(3), 660-033-0020 and 660-033-0030 as additional findings for this policy.

This plan policy makes it clear that it is County policy to identify and retain agricultural lands that are accurately designated. The Applicant proposed that the Subject Property was not accurately designated as demonstrated by the soil study and the applicant's Burden of Proof. The Hearings Officer finds that the EFU designation was not accurately placed on the Subject Property.

Section 2.5, Water Resources Policies

**Goal 6, Coordinate land use and water policies.**

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

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

Section 2.7, Open Spaces, Scenic Views and Sites

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

**FINDING:** These policies are fulfilled by the County's Goal 5 program. The County protects scenic views and sites along major rivers and roadways by imposing Landscape Management ("LM") Combining Zone to certain adjacent properties. Staff noted (Staff Report, page 15) that no LM Combining Zone applies to the subject property at this time. The Subject Property is also not located

within the Open Space and Conservation (“OS&C”) Zone. Furthermore, no new development is proposed under the present application. These provisions of the plan, therefore, are not impacted by the proposed zone change and plan amendment.

## **Chapter 3, Rural Growth**

### Section 3.2, Rural Development

#### ***Growth Potential***

***As of 2010, the strong population growth of the last decade in Deschutes County was thought to have leveled off due to the economic recession. Besides flatter growth patterns, changes to State regulations opened up additional opportunities for new rural development. The following list identifies general categories for creating new residential lots, all of which are subject to specific State regulations.***

- ***2009 legislation permits a new analysis of agricultural designated lands***
- ***Exceptions can be granted from the Statewide Planning Goals***
- ***Some farm lands with poor soils that are adjacent to rural residential uses can be rezoned as rural residential***

**FINDING:** The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer also incorporates the findings for Comprehensive Plan Policy 2.2.3 and OAR 660-006-0005, 660-015-0000(3), 660-033-0020 and 660-033-0030 as additional findings for this policy.

This section of the Comprehensive Plan does not contain Goals or Policies, but does provide the guidance above. In response to this section, the Applicant’s Burden of Proof provides the following:

*“The County Comprehensive Plan above notes that “Some farm lands with poor soils that are adjacent to rural residential uses can be rezoned as rural residential.” The requested Plan amendment is based on the results of the submitted Soils Investigation (Exhibit 4) which has demonstrated that the Subject Property does not constitute “agricultural lands” as defined in the goal, based upon a site-specific soils study conducted by a certified, professional soil scientist (Brian Raby). Therefore, the proposal is consistent with this section of the Comprehensive Plan, given that the Subject Property has been determined to be non-resource land appropriate for rural residential development. Its poor soil and adjacency to rural residential areas on 3 sides and 7600’ from the Bend UGB make it an appropriate candidate for the change contemplated by this section of the Plan.”*

Based upon the incorporated findings and the above-quoted Applicant response the Hearings Officer finds Applicant’s proposal in this case complies with this policy.

### Section 3.3, Rural Housing

#### ***Rural Residential Exception Areas***

***In Deschutes County most rural lands are designated for farms, forests or other resources and protected as described in the Resource Management chapter of this Plan. The majority of the land not recognized as resource lands or Unincorporated Community is designated Rural Residential Exception Area. The County had to follow a process under Statewide Goal 2 to explain why these lands did not warrant farm or forest zoning. The major determinant was that many of these lands were platted for residential use before Statewide Planning was adopted.***

***In 1979 the County assessed that there were over 17,000 undeveloped Rural Residential Exception Area parcels, enough to meet anticipated demand for new rural housing. As of 2010 any new Rural Residential Exception Areas need to be justified through taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR.***

**FINDING:** The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer also incorporates the findings for Comprehensive Plan Policy 2.2.3 and OAR 660-006-0005, 660-015-0000(3), 660-033-0020 and 660-033-0030 as additional findings for this policy.

A County hearings officer's decision for file numbers PA-11-17/ZC-11-2 provides the following findings in response to this portion of Section 3.3 of the Comprehensive Plan:

*"To the extent that the quoted language above represents a policy, it appears to be directed at a fundamentally different situation than the one presented in this application. The quoted language addresses conversions of "farm" or "forest" land to rural residential use. In those cases, the language indicates that some type of exception under state statute and DLCD rules will be required in order to support a change in Comprehensive Plan designation. See ORS 197.732 and OAR 660, Division 004. That is not what this application seeks to do. The findings below explain that the applicant has been successful in demonstrating that the subject property is composed predominantly of nonagricultural soil types. Therefore, it is permissible to conclude that the property is not "farmland" as defined under state statute, DLCD rules, and that it is not correctly zoned for exclusive farm use. As such, the application does not seek to convert "agricultural land" to rural residential use. If the land is demonstrated to not be composed of agricultural soils, then there is no "exception" to be taken. There is no reason that the applicant should be made to demonstrate a reasons, developed or committed exception under state law because the subject property is not composed of the type of preferred land which the exceptions process was designed to protect. For all these reasons, the Hearings Officer concludes that the applicant is not required to obtain an exception to Goal 3.*

*There is one additional related matter which warrants discussion in connection with this issue. It appears that part of Staff's hesitation and caution on the issue of whether an exception might be required is rooted in the title of the Comprehensive Plan designation that would ultimately apply to the subject property – which is "Rural Residential Exception Area." There appears to be seven countywide Comprehensive Plan designations as identified in the plan itself. These include*

*“Agriculture, Airport Development, Destination Resort Combining Zone, Forest, Open Space and Conservation, Rural Residential Exception Area, and Surface Mining.” Of the seven designations, only Rural Residential Exception Area provides for associated zoning that will allow rural residential development. As demonstrated by reference to the Pagel decision discussed above, there appears to be instances in which rural residential zoning has been applied without the underlying land necessarily being identified as an exception area. This makes the title of the “Rural Residential Exception Area” designation confusing, and in some cases inaccurate, because no exception is associated with the underlying land in question. However, it is understandable that since this designation is the only one that will allow rural residential development, that it has become a catchall designation for land types that are authorized for rural residential zoning. That is the case with the current proposal, and again, for the same reasons set forth in Hearings Officer Green’s decision in Pagel, I cannot find a reason why the County would be prohibited from this practice.*

Based on the incorporated findings and the above-quoted comments this Hearings Officer agrees with the past Deschutes County hearings officer interpretations and finds that the above language is not a policy and does not require an exception to the applicable Statewide Planning Goal 3. The Hearings Officer finds that the proposed RREA plan designation is the appropriate plan designation to apply to the Subject Property.

Section 3.7, Transportation

***The Transportation System was adopted in Ordinance 2012-005 and is hereby incorporated into this Plan as Appendix C ...***

**Appendix C – Transportation System Plan**

**ARTERIAL AND COLLECTOR ROAD PLAN**

**Goal 4**

- 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.***

**Policies**

...

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

**FINDING:** This policy applies to the County and advises it to consider the roadway function, classification, and capacity as criteria for plan amendments and zone changes. The County will

comply with this direction by determining compliance with the Transportation Planning Rule ("TPR"), also known as OAR 660-012, as described below in subsequent findings.

**OREGON ADMINISTRATIVE RULES CHAPTER 660, LAND CONSERVATION AND DEVELOPMENT DEPARTMENT**

**Division 6, Goal 4 – Forest Lands**

OAR 660-006-0005, Definitions

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

**FINDING:** The Subject Property is not zoned for forest lands, nor are any of the properties within an approximately 3.6-mile radius. The Subject Property does not contain merchantable tree species and there is no evidence in the record that the Subject Property has been employed for forestry uses historically. None of the soil units comprising the parcel are rated for forest uses according to NRCS data. The Subject Property does not qualify as forest land.

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

OAR 660-015-0000(3)

***To preserve and maintain agricultural lands.***

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

**FINDING:** Goal 3 defines “agricultural land,” which is repeated in OAR 660-033-0020(1). The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer also incorporates the findings for Comprehensive Plan Policy 2.2.3 and OAR 660-033-0020 and 660-033-0030 as additional findings for this policy. The Hearings Officer finds that the Subject Property is not “agricultural land” as defined by relevant Oregon laws/regulations.

OAR 660-033-0020, Definitions

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

(1)(a) ***“Agricultural Land” as defined in Goal 3 includes:***

**(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon<sup>4</sup>;**

**FINDING:** The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion.

The Applicant's basis for not requesting an exception to Goal 3 is that the Subject Property is not "agricultural land." In support, the Applicant offered the following response to the above definition in addition to subsection (1)(c)<sup>5</sup> as included in the submitted Burden of Proof statement:

*"A professionally conducted Soils Investigation has demonstrated that the Subject Property is not composed predominantly of Class I - VI soils (Eastern Oregon administrative standard cited above). To analyze the soils on the site, the Applicant obtained the services of Brian Raby, a Certified Professional Soil Scientist. The complete Soils Investigation report, detailing the procedures and methodology used as well as the complete findings, is attached to this application as Exhibit 4. It is certified by DLCD and that certification is included in the cited exhibit.*

*The purpose of the Soils Investigation for the Property was to determine the existence of agricultural soils on the Subject Property for planning purposes. The soils were found to be predominantly non-agricultural soils according to a certified and well-qualified soils scientist using state sanctioned and approved field investigation methods and techniques. Thus, the Subject Property as defined in OAR 660-033-0020 does not legally qualify as Agricultural land.*

*The Subject Property is characterized as a "lava plain north of Bend" on Page 2 of Exhibit 4. It has no record of ever having been irrigated, used for producing crops or grazing livestock, and is not part of a farm unit and is currently vacant and unused. None of the surrounding properties are used for profitable agriculture including the MUA-10 on three sides and the one EFU-zoned abutting property to the east. They are predominantly developed with rural residences and small hobby farms or are unused. There are no known commercial farm practices being undertaken on adjacent or nearby agricultural lands.*

*The Subject Property is zoned Exclusive Farm Use (EFU), but this designation is not based on the agricultural capability of the land, as the Subject Property has no record of ever having been in farm or pasture use.*

*This is understandable, now that the soil classification of this specific property is known. The soil types are Class VII and VIII and the property has no irrigation water rights. This Comprehensive Plan Map and Zoning Map Amendment request will help to resolve the potential conflict and*

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

<sup>5</sup> "Agricultural Land" does not include land within acknowledged urban growth boundaries or land within acknowledged exception areas for Goal 3 or 4.

*incompatibility between the EFU permitted uses and the adjacent, surrounding lands developed or committed for rural residential uses, and allow the land to be put to its highest and best use, rather than continue to go fallow."*

Staff (Staff Report, pages 19-20) provided the following comments:

*"Staff has reviewed the soil study provided by Brian Rabe of Cascade Earth Sciences (dated December 11, 2020) and agrees with the applicant's representation of the data for the subject property. Staff finds, based on the submitted soil study and the above OAR definition, that the subject property is comprised predominantly of Class VII and VIII soils and, therefore, does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A) above."*

The Hearings Officer finds that the Applicant Soil Study is credible and constitutes substantial evidence. The Hearings Officer finds that the Applicant Soil Study was conducted consistent with DLCDC requirements (Exhibit 4 – Letter from DLCDC). The Applicant Soil Study found that the Subject Property has 26.2 acres (65.4%) of Class VII and Class VIII soils. The Applicant Soil Study concluded that the Subject Property is "predominantly" Class VII and Class VIII soils. The Hearings Officer finds that OAR 660-033-0020 (1)(a)(B) describes "agricultural land," in Eastern Oregon, to include lands that are predominantly Class I – VI. Based upon the Applicant Soil Study that the Subject Property is predominantly Class VII and Class VIII soils. The Hearings Officer finds, per OAR 660-033-0020 (1)(a)(A) that the Subject Property is not "agricultural land."

- (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;**

**FINDING:** The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer finds that the Applicant addressed the OAR 660-033-0020 (1)(a)(B) "Suitability Factors" in the Applicant Soil Study and in Applicant's Hearing testimony and Hearing documentary submissions.

Staff, in the Staff Report (pages 20 – 21) included the following statements from the Applicant Soil Study:



### **Soil Fertility**

These soils are predominantly shallow with sandy textures (low clay content) and low organic matter content. These conditions result in a low Cation Exchange Capacity (CEC) that limits the ability of these soils to retain nutrients. Fertilizer must be applied to achieve optimum yields. Proper management requires that fertilizers be applied in small doses on a frequent basis. The revenue from most locally adapted crops will not cover the costs of inputs and management.

### **Suitability for Grazing**

Without water, dryland grazing is the only potential agricultural use. The rangeland productivity potential of the soils mapped at the Site are shown in Table 6 of the published soil survey<sup>1</sup>. The productivity ranges from 700 to 900 to 1,100 pounds of dry matter per acre per year (unfavorable, normal, and favorable conditions, respectively) for Deskamp soils. The productivity ranges from 500 to 700 to 900 pounds of dry matter per acre per year (unfavorable, normal, and favorable conditions, respectively) for Gosney. It is often recommended that a sustainable level of grazing only removes about 25% of the total production leaving the remainder for maintenance of the stand, wildlife, and detritus for building soil organic matter. According to Ogle & Brazee<sup>3</sup>, it takes an estimated 912.5 pounds of dry matter to feed a cow and calf pair, or equivalent, for one month (animal unit month – AUM). Based on the acreages of each soil, the sustainable dry matter production potential for the Site ranges from 5,000 to 6,725 to 8,450 pounds, or about 5 to 7 to 9 AUM (unfavorable, normal, and favorable conditions, respectively). So the grazing potential is limited to 5 to 9 pair for one month or less than one pair for a year. This does not represent a viable source of grazing.

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<sup>3</sup> Ogle, D., & Brazee, B. (2009). *Technical note: estimating initial stocking rates*, (TN Range No. 3). Boise, ID: U.S. Department of Agriculture - Natural Resources Conservation Service.

(continued)

### **Climatic Conditions**

The general climate conditions at the Site are typical of those in the Bend area with cold winters and warm, dry summers. There is no reason to believe there is anything unique about the climate at this specific location that would, by itself, warrant special attention.

### **Existing and Future Availability of Water for Irrigation**

The Site is within the Swalley Oregon Irrigation District and has no water assigned to it. Most water for irrigation is fully allocated (or over-allocated) throughout the region. In most cases, water for any newly irrigated acreage would have to be removed from acreage elsewhere. This only makes sense if the land that the water is being moved to is better than the land where it is currently being used. There are substantial costs related to acquiring or moving water rights, as well as costs for acquiring or modifying and maintaining irrigation equipment. These costs would not be justified for small or irregular shaped areas.

The Class VII and VIII soils documented on the Site will remain Class VII and VIII regardless of irrigation. Even if water were available, the dispersed nature and irregular shapes of the Class VI (Deskamp) soils make the installation of irrigation equipment impractical for the limited added benefit irrigation would provide. The only potential agricultural use would be for dryland grazing of native grasses (discussed previously). The limited forage potential for the Site does not represent a sufficient number of AUMs for a commercially viable livestock operation.

### **Existing Land Use Patterns**

The Site and parcel to the east are zoned Exclusive Farm Use Tumalo-Redmond-Bend (EFU TRB). The parcel to the east consists of 80 acres, is owned by Deschutes County, and is not managed for agricultural use. The parcels to the north, west, and south are zoned Multiple Use Agricultural 10-acre minimum (MUA10) with no indications of current or recent agricultural activity.

### **Technological and Energy Inputs Required**

There is nothing that has been revealed during the course of this investigation that would suggest there is any technological or energy-related reason to retain the subject property in an agricultural classification. The low fertility, cost of irrigation systems and other infrastructure, as well as the irregular pattern of potentially suitable soils make the use of the Site for commercial agricultural production impractical and unprofitable.

### **Accepted Farming Practices**

Since the Site is surrounded by parcels that are not managed for commercial farm use and there does not appear to be any recent history of farm use, the re-zoning of this parcel is not likely to represent any significant increase in the potential for conflicts with accepted agricultural practices.

Applicant's legal counsel, Liz Dickson ("Dickson"), offered oral testimony and additional documents at the Hearing. Dickson's additional documents were referenced, at the Hearing, as Exhibits 11, 12, 13 and 14. The focus of Dickson's Hearing testimony was upon the *LUBA 710 Decision* and LUBA's analysis of the Suitability Factors. The Hearings Officer finds Dickson's testimony and accompanying documentary submissions to be credible and persuasive.

Dickson, in her Hearing testimony, emphasized that the Subject Property soils are predominantly class VII and VIII. Dickson stated the Applicant attempted to ascertain the level, if any, of historical farming activity in the immediate vicinity of the Subject Property. Dickson indicated, based upon Applicant's research, that the Subject Property has never been used for farm or agricultural

purposes. Dickson noted that the Subject Property has not been cleared and has no water (irrigation rights).

Dickson testified that Applicant considered the Suitability Factors in the context of the *LUBA 710 Decision*. Dickson stated that Applicant considered adjacent / neighboring properties in relation to all relevant Suitability Factors. Dickson stated, based upon Applicant's research, that adjacent/ neighboring properties are not used for commercial farming or "agricultural purposes." Dickson stated that some nearby properties may conduct "hobby farm" activities but those activities were subordinate to the primary residential use and are not conducted for the primary purpose of obtaining a profit.

Dickson opined that the only possible "agricultural use" or farm use that might be considered feasible at the Subject Property is "grazing." Dickson, referencing the Applicant Soil Study, stated that the Subject Property standing alone, could not support commercial grazing. Dickson noted that property adjacent to the north, west and south are developed for residential uses. Dickson stated that combining the Subject Property with any of the adjacent properties would not result in creating a profitable situation for grazing.

Dickson reiterated that the Subject Property does not possess any irrigation rights. Dickson stated that existing land use patterns preclude the likelihood of combining the Subject Property with one or more adjacent property for the purpose of creating a profitable agricultural or farm use. Likewise, Dickson stated that the "accepted farming practices" Suitability Factor was not relevant to the Subject Property as no farming occurs on the Subject Property or any adjacent property.

Dickson, relying upon Exhibits 11, 12, 13 and 14, demonstrated geographical and land use differences between the property subject to the *LUBA 710 Decision* and the Subject Property. Dickson noted that the property subject to the *LUBA 710 Decision* is located in an area where agricultural/farm uses are prevalent. Dickson noted that ranches adjacent to or nearby the property subject to the *LUBA 710 Decision* expressed the desire to combine to facilitate improved agricultural/farm efficiency.

Dickson noted that the *LUBA 710 Decision* is under appeal and it is possible that the Oregon Court of Appeals and/or Oregon Supreme Court could reverse or modify the *LUBA 710 Decision*. However, despite the appellate status of the *LUBA 710 Decision* Dickson opined that there is evidence in the record sufficient to meet the requirements of that decision.

The Hearings Officer finds Applicant addressed, with substantial evidence, the *LUBA 710 Decision* Suitability Factors analysis. The Hearings Officer agrees with Staff and Applicant that there is sufficient evidence in the record to conclude that the Subject Property does not qualify as "agricultural land" as defined in OAR 660-033-0020.

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

**FINDING:** This criterion is addressed above.

OAR 660-033-030, Identifying Agricultural Land

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

**FINDING:** The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer also incorporates as additional findings the findings for OAR 660-033-0020 (1)(a)(A) & (B). The Hearings Officer finds that the Applicant addressed the OAR 660-033-0020 (1)(a)(B) "Suitability Factors" in the Applicant Soil Study and in Applicant's Hearing testimony in documentary submissions.

Staff provided (Staff Report, pages 22-24) additional discussion of the LUBA 710 Decision. "

*"... in a recent decision by the Land Use Board of Appeals (LUBA)<sup>6</sup>, LUBA remanded the Deschutes County Board of County Commissioners decision to approve a post-acknowledgement plan amendment and rezone application submitted by 710 Properties, LLC to change the designation and zoning of the subject property from AG/EFU to RREA/RR-10 on 710 acres of property west of Terrebonne and Redmond and north of Highway 126.*

*LUBA remanded the decision to "consider the ability to use the subject property for farm use in conjunction with other property, including the Keystone property," and directed that the Board "may not limit its review to the profitability of farm use of the subject property as an isolated unit." LUBA further stated that the Board "must consider the ability to import feed for animals and may not limit its consideration to the raising of animals where adequate food may be grown on the subject property." LUBA continued that the Board "must also consider whether the subject property is suitable for farm use as a site for construction and maintenance of farm equipment," and must "consider the evidence and adopt findings addressing the impacts of redesignation of the property related to water, wastewater, and traffic and whether retaining the property's agricultural designation is necessary to permit farm practices on adjacent or nearby lands." Each of the remanded issues is listed separately below.*

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<sup>6</sup> *Central Oregon Landwatch, et al. v. Deschutes County and 710 Properties, LLC, et al.* (LUBA No. 2023-009)

- LUBA's discussion at pages 36-37 sustained DLCD's second assignment of error and portions of Redside's and Keystone's assignments of error based on a determination that the County did not consider the ability to use the subject property with a primary purpose of obtaining a profit in money **in conjunction with other property**. LUBA stated that "Relating the profitability of farm related activity solely to the activity on the subject property places undue weight on profitability." More discussion on this is found on pages 46-49 of the decision.
- "Source of Feed" – this discussion is found at pages 37-42 of the decision. **LUBA's decision states that the County erred in construing OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that land is suitable for farm uses involving animals only if sufficient feed can be grown on-site.** LUBA stated that these authorities are silent as to the source of the feed that is necessary to sustain animals involved in farm uses. It also noted that, in determining whether land is suitable for dryland grazing, a farmer would have a reasonable expectation of obtaining a profit in money from that activity, based on the factors listed in OAR 660-033-0020(1)(a)(B) (soil fertility, suitability for grazing, climactic conditions, availability of water for irrigation, etc.)
- "On-Site Construction and Maintenance of Equipment and Facilities" – this discussion is found at pages 42-46 of the decision. **LUBA determined that the County erroneously concluded that this use need not be limited to supporting farm activities that occur on the subject property.** In other words, it does not matter where the equipment and facilities are used, whether on or off-site. That said, after a consideration of whether equipment and facilities can be stored onsite for the purpose of making a profit in money also requires a determination of the suitability of the property based on the factors listed in OAR 660-033-0020(1)(a)(B).
- "Nearby and Adjacent Land" – discussion at pages 46-49 of the decision. LUBA directs the County to make findings and conclusions on the question of whether the subject property is suitable for farm use in conjunction with nearby or adjacent land. It noted that several farms and ranchers testified they would not consider incorporating the subject property into their farm operations, and that it **"may be that the subject property is not suitable for farm use even in conjunction with nearby or adjacent land. However, the county did not reach that conclusion."**
- DCC 18.136.020(C)(2) and DCCP Agricultural Lands Goal 1 – see pages 69-74 of the decision. The County's findings that the impacts on surrounding land use from rezoning will be consistent with DCCP Agricultural Lands Goal 1 are inadequate and not supported by substantial evidence. LUBA states that the County only considered impacts on surrounding nonresource lands, and that it was error to consider that the subject property is functionally separated from surrounding agricultural lands due to its location on a plateau. LUBA remands for further consideration of water, wastewater, traffic impacts on surrounding agricultural lands and the agricultural industry.

The Hearings Officer appreciates Staff's above-quoted analysis and perspective. The Hearings Officer finds that Applicant, in its Burden of Proof, Applicant Soil Study and Dickson's Hearing testimony and record submissions, provided evidence and argument relating to (1) the ability to use the Subject Property with a primary purpose of obtaining a profit in money in conjunction with other

property, (2) the impacts of providing feed for grazing stock from outside properties, (3) the on-site construction and maintenance of equipment and facilities to serve other properties, and (4) the off-site impacts on resource and nonresource lands.

As summarized in the findings for OAR 660-033-0020 (1)(a)(B) above, the Subject Property has soils that are not considered suitable for "agricultural use" and that the Subject Property is not and has not been used for "agricultural uses." The OAR 660-033-0020 (1)(a)(B) findings indicated that the adjacent or nearby properties are not used for "agricultural uses" or farm uses. The OAR 660-033-0020 (1)(a)(B) findings indicate that combining the Subject Property with any adjacent or nearby property would not improve the chances that the Subject Property, or any nearby or adjacent property, could be operated for the primary purpose of obtaining a profit from agricultural or farm related uses. Impacts on nearby properties is discussed elsewhere in this recommendation. The Hearings Officer approval of Applicant's request would have minimal impacts, if any, on adjacent properties. Rather, the Hearings Officer finds that the proposed change would more consistently reflect the existing land use pattern in the area.

The Hearings Officer agrees with Staff and Applicant that there is sufficient evidence in the record to conclude that the Subject Property does not qualify as "Agricultural Land" as defined in OAR 660-033-0030.

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

**FINDING:** The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer also incorporates as additional findings the findings for OAR 660-033-0020 (1)(a)(A) & (B). The Hearings Officer finds that the Applicant addressed the OAR 660-033-0020 (1)(a)(B) "Suitability Factors" in the Applicant Soil Study and in Applicant's Hearing testimony and Hearing documentary submissions.

The Hearings Officer finds, based upon the evidence and arguments in the record that the Subject Property is not suitable for any identified "agricultural use" or farm use. Further, the Hearings Officer finds that is not necessary to conduct any sort of "agricultural use" or farm use on the Subject Property to facilitate or promote agricultural or farm practices to be undertaken on adjacent or nearby lands. In this review the Hearings Officer has not assigned any significance to the ownership of the Subject Property or adjoining properties.

- (5)(a) More detailed data on soil capability than is contained in the USDA Natural Resources Conservation Service (NRCS) soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the NRCS land capability classification system.**
- (b) If a person concludes that more detailed soils information than that contained in the Web Soil Survey operated by the NRCS as of January 2, 2012, would assist a**

***county to make a better determination of whether land qualifies as agricultural land, the person must request that the department arrange for an assessment of the capability of the land by a professional soil classifier who is chosen by the person, using the process described in OAR 660-033-0045.***

**FINDING:** The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The submitted Applicant Soil Study provided more detailed soils information than contained in the NRCS Web Soil Survey. NRCS sources provide general soils data for large units of land. The Applicant Soil Study provided detailed and accurate information about a single property based on numerous soil samples taken from the Subject Property. The Applicant Soil Study reports data and conclusions consistent with the NCRS Land Capability Classification (LCC) system that classifies soils class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.

The Applicant Soil Study concluded that the Subject Property contains 65.4 percent Class 7 and 8 soils, based on site observations and examination of 111 test holes. The Applicant Soil Study is accompanied in the record by correspondence from the DLCDC. The DLCDC correspondence confirms that the Applicant Soil Study was completed and consistent with the reporting requirements for agricultural soils capability as dictated by DLCDC. Based on qualifications of the professionals conducting the site work and report preparation, the Hearings Officer finds the submitted Applicant Soil Study to be definitive and accurate in terms of site-specific soil information for the Subject Property.

**(c) This section and OAR 660-033-0045 apply to:**

**(A) A change to the designation of land planned and zoned for exclusive farm use, forest use or mixed farm-forest use to a non-resource plan designation and zone on the basis that such land is not agricultural land; and**

**FINDING:** The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer also incorporates as additional findings the findings for OAR 660-033-0020 (1)(a)(A) & (B). The Hearings Officer finds that the Applicant addressed the OAR 660-033-0020 (1)(a)(B) "Suitability Factors" in the Applicant Soil Study and in Applicant's Hearing testimony and Hearing documentary submissions. The Hearings Officer finds the Subject Property is not "agricultural land" as that phrase is defined within relevant Oregon law.

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

**FINDING:** The Applicant submitted the Applicant Soil Study which was prepared by Michael Sowers and Brian Rabe of Cascade Earth Sciences and dated December 11, 2020. The Applicant Soil Study was submitted following the ORS 215.211 effective date. The Applicant submitted to the record an

acknowledgement from Hilary Foote, Farm and Forest Specialist with the DLCD, dated April 12, 2021, that the Applicant Soil Study is complete and consistent with DLCD's reporting requirements. The Hearings Officer finds this criterion to be met based on the submitted Applicant Soil Study and confirmation of completeness and consistency from DLCD.

- (e) This section and OAR 660-033-0045 authorize a person to obtain additional information for use in the determination of whether land qualifies as agricultural land, but do not otherwise affect the process by which a county determines whether land qualifies as agricultural land as defined by Goal 3 and OAR 660-033-0020.**

**FINDING:** The Applicant has obtained additional information regarding soils and how these soils relate to the agricultural designation of the Subject Property. The Applicant has also submitted DLCD's certification of its soils analysis, attached as part of Exhibit 4, and has complied with the soils analysis requirements of OAR 660-033-0045 in order to obtain that certification. DLCD's certification establishes compliance with OAR 660-033-0045.

## **DIVISION 12, TRANSPORTATION PLANNING**

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

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



- (C) **Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.**

**FINDING:** This above language is applicable to the proposal because it involves an amendment to an acknowledged comprehensive plan. The proposed plan amendment would change the designation of the Subject Property from AG to RREA and change the zone from EFU to MUA-10. The Applicant is not proposing any land use development of the properties at this time.

As referenced in the agency comments section in the Basic Findings section above, the Senior Transportation Planner for Deschutes County requested additional information to clarify the conclusions provided in the Transportation Planning Rule (TPR) analysis prepared by Joe Bessman, PE of Transight Consulting, LLC, dated March 17, 2023. The Applicant submitted an updated report and responses to issues raised also from Mr. Bessman, dated June 27, 2023, to address the additional information that was requested.

Staff noted (Staff Report, page 26) that the original application included a subdivision proposal in addition to the comprehensive plan and zone change proposal that is subject to this recommendation. Applicant has decoupled the subdivision proposal from the comprehensive plan amendment and zone change applications. The Hearings Officer notes that traffic impact studies take into account requirements for a subdivision in addition to the plan amendment and zone change.

In response to the revisions noted above, the County Senior Transportation Planner stated, *"These updated materials and the application materials in [the] record satisfy the County's requirements and no further materials or analysis are required from the applicant."* As such, the Hearings Officer finds that the proposed plan amendment and zone change will be consistent with the identified function, capacity, and performance standards of the County's transportation facilities in the area.

## **DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES**

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

**FINDING:** The Statewide Planning Goals are outlined below in the Applicant's Burden of Proof:

***"Goal 1, Citizen Involvement.*** *This proposal satisfies this goal because the Planning Division will provide notice of the proposed plan amendment and zone change to the public through individual notice to affected property owners, posting of the Subject Property with a notice of proposed land use action sign, online notice of the application on the County's website, and publishing notice of the public hearing in the "Bend Bulletin" newspaper. In addition, at least two public hearings will be held on the proposed plan amendment before it can be approved - one before the Hearings Officer and one before the Deschutes County Board of Commissioners.*

***Goal 2, Land Use Planning.*** *This proposal satisfies this goal because the applications were handled pursuant to the procedures applicable to plan amendments and zone changes in the*

County's Comprehensive Plan and Zoning Ordinance. An exception to Goal 3 is not required because site soils have been conclusively determined to be not Agricultural as that term is legally defined.

**Goal 3, Agricultural Lands.** The Applicant is not required to take an exception to Goal 3 for the Subject Property, but rather to provide evidence supporting response that the Subject Property does not constitute "agricultural land" as legally defined in Goal 3 and supporting administrative rules. The application includes a professionally prepared Soils Analysis (**Exhibit 4**) that proves the Subject Property does not constitute "agricultural land" and therefore the proposed plan amendment to Rural Residential Exception Area and zone change to MUA-10 is consistent with Goal 3.

**Goal 4, Forest Lands.** The proposal is consistent with Goal 4 because the Subject Property is not zoned for forest use and the Applicant's soil survey shows the Subject Property does not contain any forest soils or related resources.

**Goal 5, Open Spaces, Scenic and Historic Areas and Natural Resources.** The proposal is consistent with Goal 5 because the site is not identified as containing scenic, historic, or natural resource areas. It is not unique as open space in the area and has not been designated as significant for that purpose. It is reasonable to conclude that the proposed plan amendment and zone change will have no effect on any designated Goal 5 resources.

**Goal 6, Air, Water and Land Resources Quality.** The proposal is consistent with Goal 6 because it will not result in any legally significant detrimental impact on air or water quality and land resources.

**Goal 7, Areas Subject to Natural Disasters and Hazards.** Goal 7 is not applicable to the proposal because the Subject Property is not located in a known natural disaster or hazard area (i.e., flood hazard zone, steep slopes, historic landslide areas or other hazards identified under Goal 7).

**Goal 8, Recreational Needs.** Goal 8 is not applicable to the proposal because the proposal will not affect property zoned for recreation or impact recreational needs.

**Goal 9, Economy of the State.** The proposal is consistent with Goal 9 because it will not adversely impact legally identified economic activities in the state. It may have a minimal impact on the construction industry eventually when the four homesites are developed, but these have not been recognized as significant for purposes of evaluating goal impacts.

**Goal 10, Housing.** Goal 10 is not directly applicable to the proposal because it does not include development of additional housing. The proposal does not remove any land from the county's supply of land for needed housing. The proposal supports a potential, though not certain, eventual transition to development of four homes on the respective parcels. Applicant plans to develop the four created sites for rural residential homes in the future.

**Goal 11, Public Facilities and Services.** *The proposal is consistent with Goal 11 because the proposed plan amendment and zone change will have minimal impact upon the provision of public facilities and services to the Subject Property. Avion Water is already available to the site in Hunnell Road, power is available and sufficient, and Hunnell Road is scheduled for paving, widening, and straightening in 2023 already by the County. These facilities will not be strained by the addition of four lots made possible by the Plan Amendment and Zone Change.*

**Goal 12, Transportation.** *The proposal is consistent with the TPR, and therefore is also consistent with Goal 12 as demonstrated by the attached, professionally prepared Transportation Analysis. See Exhibit 5.*

**Goal 13, Energy Conservation.** *The proposal is consistent with this goal because it will have no legally significant impact on energy use or conservation. Southern exposure and spacing of the four proposed lots will allow solar power development if desired. Rezoning the Subject Property from EFU to MUA-10 will allow future dwellings to be developed on the site, which will be advantageous to the water supply, since the proposed change makes it less likely that the tracts will be irrigated with surface water, where such irrigation would not be productive considering the poor quality of the soils. Current irrigation practices commonly use electricity for pumping of water for distribution. This wasteful use would be made less likely by approval of this proposal.*

**Goal 14, Urbanization.** *The proposal is consistent with Goal 14 for the following reasons:*

- 1. The proposal supports a likely, though not certain, eventual transition from rural to urban land use that responds to identified needed lands as the Bend UGB expands north 7600 feet;*
- 2. The proposal represents an orderly growth pattern that eventually will efficiently utilize public facilities and services, including the 2023 improvements to Hunnell Road;*
- 3. The proposal will ultimately result in the maximum efficiency of land uses on the fringe of the existing urban area;*
- 4. The Subject Property has been found to be not predominantly agricultural land as defined in OAR 660-033-0020; and*
- 5. The proposal will promote compatibility with surrounding rural residential uses and will not adversely impact any nearby commercial agricultural uses because there are none.*

**Goals 15 through 19.** *These goals, which address river, ocean, and estuarine resources, are not applicable to the proposal because the Subject Property is not located in or adjacent to any such areas or resources."*

The Hearings Officer incorporates the Preliminary Findings as additional findings for this criterion. The Hearings Officer also incorporates as additional findings the findings for OAR 660-033-0020 (1)(a)(A) & (B). The Hearings Officer finds that the Applicant addressed the OAR 660-033-0020 (1)(a)(B) "Suitability Factors" in Applicant's Soil Study and in Applicant's Hearing testimony and Hearing documentary submissions.

The Hearings Officer, based upon Applicant's above-quoted responses and the incorporated findings, concludes that Applicant's proposal complies with the applicable Statewide Planning Goals.

The Hearings Officer finds the overall proposal appears to comply with the applicable Statewide Planning Goals for the purposes of this review.

**IV. CONCLUSION & RECOMMENDATION:**

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

**DESCHUTES COUNTY HEARINGS OFFICER**

A handwritten signature in black ink that reads "Gregory J. Frank". The signature is written in a cursive, flowing style.

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Gregory J. Frank, Hearings Officer

owner	agent	inCareOf	address	cityStZip	type	cdd id	email
Michael Groves and Cathie Groves			20075 Cox Lane	Bend, OR 97703	HOD	23-210-PA, 211-ZC	
Elizabeth Dickson	Dickson Hatfield LLP		400 SW Bluff Dr. Ste 240	Bend, OR 97702	HOD	23-210-PA, 211-ZC	



Mailing Date:  
Wednesday, November 22, 2023

COMMUNITY DEVELOPMENT

**NOTICE OF HEARINGS OFFICER'S RECOMMENDATION**

The Deschutes County Hearings Officer has recommended approval of the land use application(s) described below:

**FILE NUMBER:** 247-23-000210-PA, 247-23-000211-ZC

**LOCATION:** Map and Taxlot: 1612330000800  
Situs Address: 64430 Hunnell Rd, Bend, OR 97703

**OWNER:** Groves Family Revocable Trust

**APPLICANT:** Michael F. Groves and Cathie L. Groves

**SUBJECT:** The Applicant requested approval of a Comprehensive Plan Map Amendment to change the designation of the Subject Property from Agricultural ("AG") to a Rural Residential Exception Area ("RREA"). The Applicant also requests approval of a corresponding Zoning Map Amendment (Zone Change) to change the zoning of the Subject Property from Exclusive Farm Use ("EFU") to Multiple Use Agricultural ("MUA-10").

**STAFF CONTACT:** Jacob Ripper, Principal Planner  
Jacob.Ripper@deschutes.org  
541-385-1759

**RECORD:** Record items can be viewed and downloaded from:  
[www.buildingpermits.oregon.gov](http://www.buildingpermits.oregon.gov) and  
<https://www.deschutes.org/cd/page/247-23-000210-pa-247-23-000211-zc-hunnell-road-plan-amendment-and-zone-change>

**APPLICABLE CRITERIA:**

Deschutes County Code, Title 18, County Zoning Ordinance  
Chapter 18.04, Title, Purpose, and Definitions  
Chapter 18.16, Exclusive Farm Use Zones

Chapter 18.32, Multiple Use Agricultural Zone  
Chapter 18.136, Amendments

Deschutes County Code, Title 22, Procedures Ordinance

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

Oregon Administrative Rules (OAR), Chapter 660  
Division 6, Forest Lands  
Division 12, Transportation Planning  
Division 15, Statewide Planning Goals and Guidelines  
Division 33, Agricultural Land

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

**DECISION:** The Hearings Officer finds that the application meets applicable criteria, and recommended approval to the Board of County Commissioners.

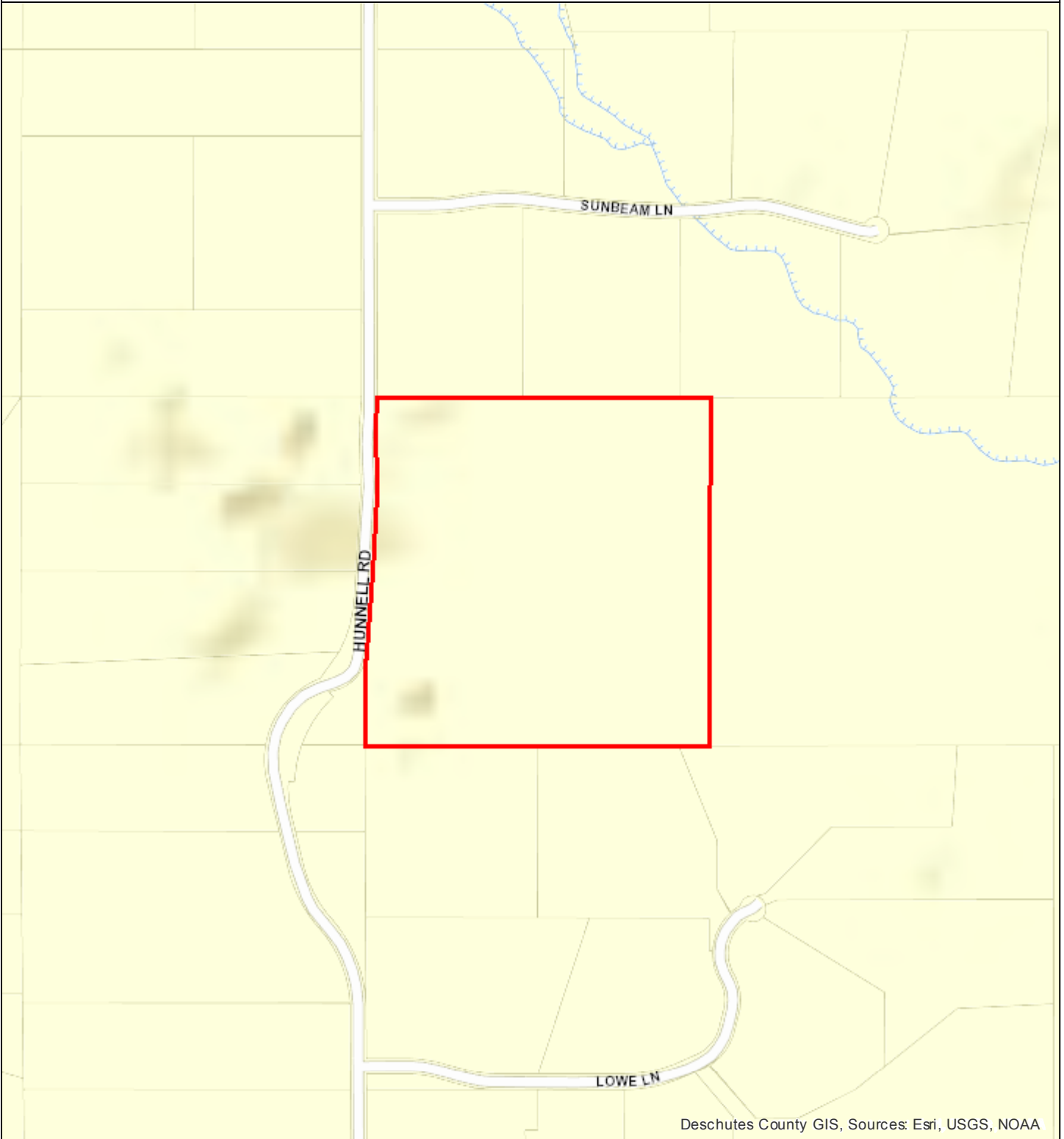
**This decision becomes final twelve (12) days after the date mailed**, unless appealed by a party of interest. To appeal, it is necessary to submit a Notice of Appeal, the base appeal deposit plus 20% of the original application fee(s), and a statement raising any issue relied upon for appeal with sufficient specificity to afford the Board of County Commissioners an adequate opportunity to respond to and resolve each issue.

Copies of the decision, application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost. Copies can be purchased for 25 cents per page.

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

# File Nos 247-23-000210-PA, 211-ZC

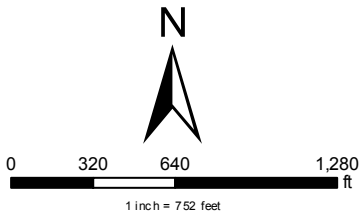
64430 HUNNELL RD, BEND, OR 97703



Deschutes County GIS, Sources: Esri, USGS, NOAA



Date: 9/22/2023





owner	agent	inCareOf	address	cityStZip	type	cdd id	email
Michael Groves and Cathie Groves			20075 Cox Lane	Bend, OR 97703	NOD	23-210-PA, 211-ZC	
Elizabeth Dickson	Dickson Hatfield LLP		400 SW Bluff Dr. Ste 240	Bend, OR 97702	NOD	23-210-PA, 211-ZC	
DESCHUTES CO. SR. TRANS. PLANNER	Tarik Rawlings		ELECTRONIC		NOD	23-210-PA, 211-ZC	Tarik.Rawlings@deschutes.org
Kenneth Katzaroff	Schwabe		1420 5th Ave., Suite 3400	Seattle, WA 98101	NOD	23-210-PA, 211-ZC	
NORBERT & JOAN VOLNY TRUST	VOLNY, JOAN TTEE		64545 HUNNELL RD	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
WILK,DAVID BLAISE & LINDA J			64455 HUNNELL RD	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
CAROLYN CARTER ESKY TRUST	ESKY, CAROLYN C TTEE		20575 SUNBEAM LN	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
MCDONALD, DAVID A & ELIZABETH A			64445 HUNNELL RD	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
THORNEYCROFT, ROY & KAREN E			20605 SUNBEAM LN	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
FARKAS, PETER & KAMILA AGNES			64520 HUNNELL RD	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
TERESA J FREEMAN LIVING TRUST	FREEMAN, TERESA J & PHILLIPPE C TTEES		20610 SUNBEAM LN	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
HALPERIN FAMILY 2019 TRUST	HALPERIN, BRUCE B & CONSTANCE C TTEES		20655 SUNBEAM LN	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
MITCHELL & PETERS REV LIVING TRUST	MITCHELL, HUGH S COTEE ETAL		64435 HUNNELL RD	BEND, OR 97703-8158	NOD	23-210-PA, 211-ZC	
VERN E & CAROLE L HEEREN FAM TRUST	HEEREN, VERN E TTEE ET AL		20560 LOWE LN	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
NEIDORF, DAVID A & LYDERS, PAULINE			64352 HUNNELL RD	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
WILKINSON, JESSICA L			20590 LOWE LN	BEND, OR 97701	NOD	23-210-PA, 211-ZC	
BURGIN, JEFFREY WILLIAM & SUZANNE MARIE			20550 LOWE LN	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
BRUCE W BUNDY TRUST	BUNDY, BRUCE WAYNE TTEE		20595 LOWE LN	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
CHARLES & BARBARA ROBERTS FAM TRUST	ROBERTS, CHARLES A & BARBARA M TTEES		PO BOX 940248	SIMI VALLEY, CA 93094	NOD	23-210-PA, 211-ZC	
MCKEAGE BYPASS TRUST ET AL	MCKEAGE, COLLEEN M TTEE		20585 LOWE LN	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
GROVES FAMILY REVOCABLE TRUST	GROVES, MICHAEL F & CATHIE L TTEES		20075 COX LN	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
DESCHUTES COUNTY		C/O PROPERTY MANAGEMENT	PO BOX 6005	BEND, OR 97708-6005	NOD	23-210-PA, 211-ZC	
OLSON FAMILY TRUST	OLSON, KRISTOPHER W & ELLEN L TTEES		20600 LOWE LN	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
GROSCUP FAMILY TRUST	GROSCUP, ROBERT A & MARLENE A TTEES		2301 WEMBLEY PARK RD	LAKE OSWEGO, OR 97034	NOD	23-210-PA, 211-ZC	
CAMERON, KAREN ANN			64425 HUNNELL RD	BEND, OR 97703	NOD	23-210-PA, 211-ZC	
SULLIVAN, GREGORY P & ALISA D			1857 KINGSTON RD	RICHLAND, WA 99354	NOD	23-210-PA, 211-ZC	
COOPER, RUSSELL L & LORI C			64385 HUNNELL RD	BEND, OR 97703	NOD	23-210-PA, 211-ZC	