DECISION AND RECOMMENDATION
OF THE DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS: 247-21-0000881-PA/882-ZC

OWNER:

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

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

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

APPLICANT:

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

APPLICANT'S ATTORNEY:

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

REQUEST:

The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the property from Agricultural (AG) to Rural Residential Exception Area (RREA). The applicant also requests approval of a corresponding Zone Change to rezone the property from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA-10). The applicant requests approval of the applications without the necessity for a Statewide Planning Goal 3 and/or a Goal 14 Exception, but includes an application for a Goal 14 Exception in the alternative, if determined to be necessary for approval of the requested PAPA and Zone Change

STAFF CONTACT:

Tarik Rawlings, Associate Planner
Phone: 541-317-3148
Email: Tarik.Rawlings@deschutes.org

PUBLIC HEARING DATE: April 26, 2022

RECORD CLOSED: June 14, 2022

HEARINGS BODY: Stephanie Marshall, Deschutes County Hearings Officer

DECISION DATE: July 12, 2022

I. APPLICABLE CRITERIA

Title 18 of the Deschutes County Code, the County Zoning Ordinance:
- Chapter 18.04, Title, Purpose, and Definitions
- Chapter 18.16, Exclusive Farm Use Zones (EFU)
- Chapter 18.80, Airport Safety Combining Zone (AS)
- Chapter 18.100, Rural Industrial Zone (RI)
- Chapter 18.120, Exceptions
- Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance

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

Oregon Administrative Rules (OAR), Chapter 660
- Division 4, Interpretation of Goal 2 Exception Process
- Division 6, Forest Lands
- Division 12, Transportation Planning
- Division 14, Application of the Statewide Planning Goals to Newly Incorporated Cities, Annexation, and Urban Development on Rural Lands
- Division 15, Statewide Planning Goals and Guidelines
- Division 33, Agricultural Land

Oregon Revised Statutes (ORS)
- Chapter 197.732, Goal Exceptions
- Chapter 197.734, Exceptions to Certain Statewide Planning Goal Criteria
- Chapter 215.010, Definitions
- Chapter 215.211, Agricultural Land, Detailed Soils Assessment

II. BASIC FINDINGS

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

> ***B. Permits requiring verification***
>
> ***1. Unless an exception applies pursuant to subsection (B)(2) below, verifying a lot parcel pursuant to subsection (C) shall be required to the issuance of the following permits:***

a. Any land use permit for a unit of land in the Exclusive Farm Use Zones (DCC Chapter 18.16), Forest Use Zone – F1 (DCC Chapter 18.36), or
Forest Use Zone – F2 (DCC Chapter 18.40);

b. Any permit for a lot or parcel that includes wetlands as show on the
Statewide Wetlands Inventory;

c. Any permit for a lot or parcel subject to wildlife habitat special assessment;

d. In all zones, a land use permit relocating property lines that reduces in size a lot or parcel'

e. In all zones, a land use, structural, or non-emergency on-site sewage disposal system permit if the lot or parcel is smaller than the minimum area required in the applicable zone;

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

SITE DESCRIPTION: The subject properties are located approximately 4.8 miles south of the City of Redmond and approximately 4.25 miles north of the City of Bend. The three subject Tax Lots (301, 305, and 500) constitute a total of approximately 19.12 contiguous acres and are located on the west side of Highway 97, immediately adjacent to the highway.

Tax Lot 301 (15.06 acres) is landlocked between Tax Lots 305 (3.00 acres) and 500 (1.06 acres) to the south. Highway 97 corridor, a Central Oregon Irrigation District (COID) canal, and two (2) Exclusive Farm Use (EFU) properties currently receiving farm tax deferral are located to the east. A rural residential subdivision is located to the west.

Tax Lots 305 and 500 are developed with structures associated with a historic "diesel implement and repair shop" use on those properties, which has taken place for the majority of the last 40 years. Tax Lot 301 is developed with a residential manufactured dwelling that is currently unoccupied; this Tax Lot is not currently in use. The properties are relatively level with mild undulating topography and a slight upward slope along the western boundary adjoining the residential subdivision to the west. Vegetation consists of juniper, sage brush, and grasses. The subject properties are not currently receiving farm tax deferral nor are they currently engaged in farm use.

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

Tax Lots 305 and 301 contain 0.20 acres and 2.70 acres of water rights, respectively. The Natural Resources Conservation Service (NRCS) map shown on the County's GIS

mapping program identifies three soil complex units on the property: 31A, Deschutes sandy loam, 0 to 3 percent slopes; 38B, Deskamp-Gosney complex, 0 to 8 percent slopes; and 58C, Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes.

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

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

The Applicant requests approval of the applications without the necessity for a Statewide Planning Goal 3 and/or a Goal 14 Exception, but includes an application for a Goal 14 Exception in the alternative, if determined to be necessary for approval of the requested PAPA.

Submitted with the application are three (3) Order 1 Soil Surveys for each of the three (3) subject properties, titled "Johnson – Order 1 Soil Survey Report" (Tax Lot 301), "LBNW LLC – Order 1 Soil Survey Report" (Tax Lot 305), and "LBNW LLC – Order 1 Soil Survey Report" (Tax Lot 500) (hereafter referred to collectively as the "soil study") prepared by soil scientist Gary Kitzrow, CPSC/CPSS #1741 of Growing Soils Environmental Associates. The Applicant also submitted a traffic analysis prepared by Scott Ferguson of Ferguson & Associate, Inc titled "Site Traffic Report and TPR Assessment for Proposed Zone Change-Deschutes County, OR" hereby referred to as "traffic study." Additionally, the Applicant submitted an application form, a burden of proof statement, and other supplemental materials, all of which are included in the record for the subject applications.

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

The Order 1 soil study was prepared by a certified soils scientist and soil classifier that determined the subject property is predominantly comprised of soils that do not qualify as

Agricultural Land.[1] The purpose of this soil study was to inventory and assess the soils on the subject property and to provide more detailed data on soil classifications and ratings than is contained in the NRCS soils maps. The NRCS soil map units identified on the property are described below.

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

38B, Deskamp-Gosney complex, 0 to 8 percent slopes: This soil is composed of 50 percent Deskamp soil and similar inclusions, 35 percent Gosney soil and similar inclusions, and 15 percent contrasting inclusions. The Deskamp soils are somewhat excessively drained with rapid permeability, and an available water capacity of about 3 inches. The Gosney soils are somewhat excessively drained with rapid permeability, and an available water capacity of about 1 inch. The contrasting inclusions contain Clovkamp soils in swales, soils that are very shallow to bedrock, and are on ridges with occasional rock outcrops. The major use of this soil is for livestock grazing. The Deskamp soils have ratings of 6e when unirrigated, and 3e when irrigated. The Gosney soils have ratings of 7e when unirrigated, and 7e when irrigated. This soil type is not considered high-value soil. Approximately 61.4 percent (Tax Lot 301), 47.7 percent (Tax Lot 305), and 2.8 percent (Tax Lot 500) of the subject properties are made up of this soil type, respectively.

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

The Order 1 soil study includes findings for each of the three tax lots of which the subject property is comprised, set forth below:

- ***Tax Lot 301*****:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney

[1] [1] As defined in OAR 660-033-0020, 660-033-0030.

soil units and less rock. This study area and legal lot of record is comprised of 8.00 acres or 53.1% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

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

- ***Tax Lot 500:*** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. This study area and legal lot of record is comprised of 0.93 Acres or 87.7% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

The Hearings Officer notes that, although the Order 1 soil study refers to "legal lot of record," Lot of Record determination for the subject properties has not been made, nor is such a determination relevant to the subject applications, as discussed above. This Decision and Recommendation shall not constitute verification of or findings on a Lot of Record determination for the subject properties. Further discussion regarding soils is set forth in Section III below.

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

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

East: East of the subject properties are two parcels zoned EFU. Tax Lot 300 (Assessor's Map 16-1223) is a 21.56-acre parcel developed with a single-family manufactured dwelling, an accessory structure, is partially irrigated, and currently receiving farm tax deferral. Tax Lot 306 (Assessor's Map 16-12-23) is a 20.54-acre parcel developed with a

single-family dwelling, an accessory structure previously utilized as a medical hardship dwelling, is partially irrigated, and currently receiving farm tax deferral. Additionally, to the east and southeast, is the Highway 97 transportation corridor.

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

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

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

LAND USE HISTORY:

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

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

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

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

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the transmittal materials for 247-21-000881-PA/882-ZC for three properties totaling approximately 19 acres to change the Comprehensive Plan designation from Agriculture to Rural Industrial and the zoning from Exclusive Farm Use (EFU) to Rural Industrial (RI). The properties lie in the Exclusive Farm Use (EFU), Airport Safety (AS), and Landscape Management (LM) zones at 65301, 65305, and 65315 Hwy 97, aka County Assessor's Map 16-12-23, Tax Lot 305, 16-12-23, Tax Lot 301, and 16-1223, Tax Lot 500, respectively.

The submitted traffic analysis by Ferguson & Associates dated Aug. 11, 2021, is deficient in several areas and does not comply with Deschutes County Code (DCC) 18.116.310 or the Transportation Planning Rule (TPR) and is thus unacceptable. Examples of the traffic analysis' deficiencies include the following major areas. DCC 18116.310(E)(4) requires a 20-year timeframe for analysis; the study has no such analysis. The traffic analysis lack any operational analysis, thus making it impossible to determine the before/after volume-capacity ratio of the access, which means it is impossible to determine if the plan amendment/zone change has any significant effect. Without determining if there is a significant effect or not, the traffic analysis does not comply with the TPR at Oregon Administrative Rule (OAR) 660-00120060. The traffic analysis assumes a right-in, right-out access point; yet there is no physical obstruction (pork chop barrier or raised median) restricting moves to RIRO. The property is slightly closer to Bend than Redmond, yet the trip distribution is almost exclusively skewed toward trips being to/from Redmond. Staff finds that a dubious assumption given Redmond's population of roughly 25,000 vs. Bend's roughly 91,000. Staff disagrees with the baseline trip assumptions under the current zoning. In several recent plan amendment/zone changes involving EFU, the current highest trip generator was a single-family home. The traffic analysis should use one of the specific outright permitted uses found in DCC 18.16.020. The current study significantly understates the p.m. peak hour trips of the EFU zoning. The traffic analysis does not include a reasonable worst case scenario of the outright permitted uses under the Rural Industrial zone. If the Applicant believes the traffic analysis is a reasonable-worst case scenario, then the Applicant needs to provide further justification or rationale. The study simply states "…the assumed uses generated more traffic than the site could handle with existing access configurations, no further examination of potential uses was examined." There is no supporting evidence for this claim; nor is there any explanation why the existing access could not be modified to accommodate more traffic. Finally, the traffic study references a potential mini-storage, but there is not a simultaneous site plan submittal for any specific use.

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

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of $4,757 per p.m. peak hour trip. As the plan amendment/zone change by itself does not

generate any traffic, no SDCs apply at this time. SDCs will be assessed based on development of the property. When development occurs, the SDC is due prior to issuance of certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final.

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

REVISED TRAFFIC STUDY AND RESPONSE FROM SENIOR TRANSPORTATION PLANNER: Upon receipt of the County Senior Transportation Planner's initial comment, above, the Applicant submitted a revised traffic study, dated March 18, 2022, sent to staff via email on April 6, 2022. In response, the following comment was offered by the County's Senior Transportation Planner:

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

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

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

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

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

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

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

SENIOR TRANSPORTATION PLANNER COMMENTS TO APPLICANT'S SECOND RESPONSE: Upon receipt of the County Senior Transportation Planner's second comment, above, the Applicant submitted additional comments, dated April 8, 2022 and sent to staff via email on April 8, 2022. In response, the following comment was offered by the County's Senior Transportation Planner (dated April 11, 2022):

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

- *The Applicant is correct, I mistakenly said the revised TIA uses Warehouse (Land Use 150) and Mini-Warehouse (LU 151), rather than land use actually used, which was Manufacturing (LU 140). I apologize for the error.*
- *The Applicant's TIA uses the wrong version of ITE Trip Generation Manual. The TIA use the 10th Edition (see page 7 of March 18 TIA. Deschutes County Code (DCC) 18.116.310(F)(2) and 18.116.310(G)(2). The 11th Edition is the most recent version of the ITE Trip Generation Manual.*
- *Staff notes that trip caps are notoriously difficult to monitor and enforce. The only regulatory ability the County has is to enforce the type of use allowed on the site and the size of the buildings. The County does not control nor monitor the number of employees used at a business, the number of labor shifts, the*

start/stop times of those shifts, the number of deliveries to a site, etc. Staff would appreciate the Applicant's ideas on how to create a functioning trip cap and what would be the penalty for violation. Staff has used building size as the best proxy for a trip cap, but there may be other measures.

SENIOR TRANSPORTATION PLANNER COMMENTS TO ODOT MAY 23, 2022 SUBMITTAL: On May 24, 2022, Peter Russell emailed Planning staff to respond to ODOT May 23, 2022 submittal and the Applicant's May 24, 2022 agreement to ODOT's proposed language regarding a trip cap:

Tarik,
I have reviewed both the ODOT May 23 submittal regarding the proposed trip cap for 247-21-000881-PA/882-ZC and the applicant's May 24 agreement to the agency's language limiting the trip cap to 32 p.m. peak hour trips and 279 daily trips. I also concur with this limitation. The ODOT language calling for a text amendment is best addressed during the current update of the Deschutes County Transportation System Plan (TSP) as a potential change in policy language. Another option is ODOT can apply to a text amendment to the development code regarding trip caps and land use development.

If you have any questions, please let me know. Thanks.

Central Oregon Irrigation District, Kelley O'Rourke

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

Please be advised that Central Oregon Irrigation District (COID) has reviewed the provided preliminary application for the above referenced project. The Applicant requests approval of a Comprehensive Plan Amendment to change the designation of the property from Agricultural (AG) to Rural Industrial (RI). The Applicant also requests approval of a corresponding Zone Change to rezone the property from Exclusive Farm Use (EFU) to Rural Industrial (RI). The subject properties are located at 65301 N HWY 97, 65315 HWY 97 and 65305 HWY 97 in Bend, Oregon (Map and Tax lots: 1612230000305, 1612230000500, 1612230000301).

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

Water Rights

- *1612230000305: Has 0.20 acres of appurtenant COID irrigation water rights* • *1612230000500: There are no COID water rights*
- *1612230000301: Has 2.70 acres of appurtenant COID irrigation water rights*

- *All water rights must be removed from these properties prior to approval of the zone change. COID requests property owners contact COID to request removal of the water rights.*

Canal and Laterals

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

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

ODOT Region 4, Don Morehouse, Senior Transportation Planner

On April 20, 2022, Don Morehouse emailed Mr. Rawlings regarding the application as follows:

Hi Tarik,

Although we are holding off on the review of the traffic impact study and land use application associated with 21-881-PA/882-ZC because it is incomplete, it does appear that this proposal will constitute a change of use requiring that the applicant submit a new

road approach permit application through our District 10 office. Quinn Shubert is the point of contact:

Quinn Shubert
Permits Specialist
ODOT District 10
63055 North Hwy 97
Bend, OR 97703
C: 541-410-0706

On May 23, 2022, Mr. Morehouse emailed Planning Staff as follows:

Hi Tarik,

I'd like to replace the comment I sent back on April 20, 22 with the following two comments pertaining to this Plan Amendment/Zone Change (21-881-PA/882-ZC) application:

- *The Deschutes County Development Code should be amended to address the concept of a Trip Cap. Ideally, this suggested code provision would require the applicant to submit a Development Code Amendment application with a traffic impact analysis to show whether or not the Transportation Planning Rule is satisfied with the increase of a Trip Cap.*
- *ODOT agrees with a Trip Cap of **32 PM peak hour** trips and **279 daily trips**.*

Please let me know if you have any further questions. Thanks

Proposed Condition of Approval

On May 24, 2022, legal counsel advised County Planning Staff, ODOT and the Senior Transportation Planner of a proposed condition of approval regarding trip caps as follows:

> *Don, Peter and Tarik:*
> *To be consistent with ODOT's comments, we are revising our proposed COA to read as follows:*
> *"The maximum development on the three subject parcels shall be limited to produce no more than 32 trips in the PM peak hour and/or 279 daily trips as determined by the Institute of Engineers Trip Generation Manual, 11th Edition. The County may allow development intensity beyond these maximum number of vehicle trips only if the applicant submits to the County a traffic impact analysis that demonstrates that the proposed intensification of use would be consistent with the Transportation Planning Rule and the Deschutes County Code."*
> *If this works for everyone, we will submit a letter into the record as soon as possible*.

Thereafter, on May 24, 2022, legal counsel requested County Planning Staff to include the entire email chain into the record for the applications, stating:

> *A separate correspondence is likely superfluous as this email chain already includes the proposed condition of approval and written concurrence thereof from*

both ODOT and County staff. If you disagree and prefer a separate correspondence, please let me know. The applicant, of course, still contemplates providing a comprehensive open record submittal by the new May 31, 2022 deadline.

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

PUBLIC COMMENTS: The Planning Division mailed notice of the conditional use application to all property owners within 750 feet of the subject property on October 6, 2021. The Applicant also complied with the posted notice requirements of Section 22.24.030(B) of Title 22. The Applicant submitted a Land Use Action Sign Affidavit indicating the Applicant posted notice of the land use action on October 6, 2021.

Supportive public comments were received from 44 individuals, one of which appears to be associated with the existing business uses on Tax Lots 305 and 500. The names of the supporting commenters are listed below.

Oppositional public comments were received from one neighboring property owner, from Central Oregon LandWatch, and from 1000 Friends of Oregon. The oppositional comments are detailed below. The supportive public comments do not specify approval criteria and are summarized herein as generally supportive of the subject applications for reasons including economic opportunities, improvement of the subject properties since the current owners took over, the character of the Applicant, and the need for industrial uses due to regional growth.

Supporting commenters:

1. Dirk van der Velde
2. Shoshana Buckendorf
3. Micah Frazier
4. Anthony Jimenez
5. Brandon Olson
6. Cody King
7. Craig Shurtleff
8. Donnie Eggers
9. Dee Shields
10. Julie Porfirio
11. Jill Shaffer
12. Nick Alker
13. Nick Greenlee
14. Stephen Wagner
15. Truett Nealy
22. Michael Van Skaik
23. Derek Ridgley
24. Whitney Nordham
25. Sam DeLay
26. Jeremy Stafford
27. Tom Price
28. Ali Luengo
29. Kenna Aubrey
30. Laurie Luoma
31. Sarah Chmiel
32. Jillian Gish
33. Haley Offerman
34. Joshua Wurth
35. Erik Retzman
36. Grace Stafford
43. Joseph Seevers
44. Rebecca Hermeling

16. Bob Trapnell
17. Gerardo Arreola
18. Joseph Seevers
19. Mike Musco
20. Mark Rylant
21. Paula Johnson
37. Marilee Johnson
38. Adam Fuller-Ellifit
39. Theresa Vachon
40. Mike Vachon
41. Marty Petersen
42. Mark Rylant

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

> *"I own the property at address 65468 73rd which backs up to the subject property in this file number. Our property is part of a development called Whispering Pines #4. We have a community well as well as covenants such as no large farm animals (cows and pigs etc). Just like developments in the cities of Bend and Redmond. The only difference is our lots are all about 2.5 acres. All of the properties along 73rd backing up to this subject property are single family houses. The last thing we need in is an industry moving in behind us with large buildings, equipment and possible pollution. In fact the east side of this subject property (the jagged side) is the Central Oregon Irrigation Canal. I'm sure they don't want pollution entering their canal. I therefore strongly object to this proposed zone change. Keep industry in town, not in a pristine residential and agriculture area."*

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

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

Another oppositional comment was received from Kristy Sabo, the Wild Lands and Water Program Manager with Central Oregon LandWatch ("COLW") on October 19, 2021:

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

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

On April 26, 2022, COLW, through Rory Isbell, Staff Attorney and Rural Lands Program Manager, submitted a formal letter in opposition to the applications, primarily alleging that the proposed plan amendment and zone change do not comply with Goals 3 and 14 and alleging that the subject property is rural agricultural land, outside of an urban growth boundary, where new urban industrial uses are prohibited. The letter states, in relevant part:

Goal 3

The subject property is agricultural land as defined by Goal 3, OAR 660-033-0020(1)(a) and DCC 18.040.030 [definitions omitted].

The subject property was correctly designated as agricultural land and is correctly zoned for exclusive farm use (the lack of mistakes in the designation and zoning of agricultural lands in Deschutes County is discussed further below). The subject property is predominantly land capability Class III irrigated and Class IV unirrigated and thus is agricultural land as a matter of law. Statewide Planning Goal 3, OAR 660-015-0000(3); OAR 660-033-0020(1)(a); DCC 18.04.030. The property's 38B and 31A soils are both Class III when irrigated, and because this property is within the boundaries of COID and has water rights, the property is irrigated and contains predominantly NRCS Class III soils.

LandWatch requests the Hearings Officer to take official notice of a true and correct copy of the U.S. Department of Agriculture, NRCS Soil Survey of the Upper Deschutes River Area, Oregon, including parts of Deschutes, Jefferson, and Klamath Counties, 284 pp. The Upper Deschutes River Area, Oregon Soil Survey is attached as Exhibit 1.

LandWatch also requests the Hearings Officer to take official notice of the soils map with legend and the land capability classifications, both irrigated and unirrigated, of the subject property attached as Exhibit 2. These exhibits are true and correct copies of the portions of the official USDA NRCS Upper Deschutes River Area Soil Survey depicting the subject property.[2]

These materials are produced and maintained as public records and are published as official publications of the U.S. Department of Agriculture. They contain information the accuracy of which cannot reasonably be questioned, and so are appropriate subjects for judicial notice. These materials from the U.S. Department of Agriculture, NRCS Upper Deschutes River Area Soil Survey are designed to assist the Hearings Officer in determining the law regarding the definition of agricultural land in DCC 18.04.030, OAR 660-033-0020(1)(a), OAR 660-015- 0000(3), and Statewide Planning Goal 3.

The official NRCS Upper Deschutes River Area Soil Survey relates to the content of law and policy on the definition of "agricultural land" in Oregon and does not concern only the parties in the case at bar. The Hearings Officer is requested to

[2] https://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx. Accessed April 26, 2022.

take official notice of the NRCS Upper Deschutes River Area Soil Survey and the attached excerpts thereof as legislative facts. State v. O'Key, 32l Or. 285, 309 n.35, 899 P.2d 663 (1995) ("When a court, in determining what the law - statutory, decisional, or constitutional - is or should be, takes judicial notice of certain facts, it is taking judicial notice of legislative facts'").
The application's inclusion of additional soils information - an Order 1 soil survey - obtained by a person pursuant to ORS 215.2I1 and OAR 660-033-0030(5), in no way nullifies the official NRCS soil capability classifications for the subject property. The additional soils information "does not otherwise affect the process by which a county determines whether land qualifies as agricultural land." ORS 215.211. The NRCS National Soil Survey Handbook states that ..Order 1 soil surveys and site-specific data collected are supplements to the official soil survey, but they do not replace or change the official soil survey." Exhibit 3.

The applicant's additional soil information could be used to identify "land in other soil classes that is suitable for farm use," OAR 660-033-0020(1)(a)(B), but cannot nullify or otherwise make void the official NRCS soil capability classifications for the subject property which are used to define agricultural land, OAR 660-033-0020(1)(a)(A). The subject property is suitable for a variety of farm uses, including grazing. It is a common practice in Central Oregon to rotate livestock between pastures, and nothing prevents this 19-acre property that has water rights from serving as seasonal rangeland. The Oregon Department of Land Conservation and Development, Oregon Department of Agriculture, and Oregon Department of Fish and Wildlife recently submitted a comment letter on a similar application in Deschutes County where an applicant sought to rezone and redesignate Goal 3- protected agricultural land. The state agencies describe the many ways in which land of NRCS Class VI-VIII soils in Deschutes County can be put to farm use, and how Goal 3's protections of agricultural land are not limited to lands classified by the NRCS as Class I-VI. Exhibit 4.

In any event, the subject property both has been and is currently engaged in farm use, proving its suitability for farm use. The applicant's own aerial photos of the property clearly indicate irrigated crops being grown on tax lots 301 and 305. Application Exhibit 1 at 1-2. These tax lots contain certificated water rights from Central Oregon Irrigation District for agricultural irrigation use. Application Exhibit 4 at I-2. Even though these water rights have been temporarily leased to instream use, they can be returned to agricultural irrigation use on the subject property at any time, further facilitating the agricultural suitability of the subject property.

Even if not currently producing farm crops, the application describes the subject property as "used for farm and other equipment service and storage facilities and related outbuildings." Application at 4. Farm use of land includes the on-site maintenance of equipment and facilities used for other farm activities, ORS 215.203(2), and thus the property is also currently engaged in farm use.

Goal 14

The application proposes allowing urban uses on rural land outside of an urban growth boundary, which violates Goal 14. LUBA has articulated a test, using the

Shaffer factors, to determine whether a specific use is urban or rural. The applicant here has not met its burden to show the application meets the relevant Shaffer factors. Shaffer v. Jackson County,17 Or LUBA 922 (1989); Columbia Riverkeeper v. Columbia County,70 Or LUBA 171 (2014). Instead, the applicant seeks a zone change to Rural lndustrial which would allow a wide variety of industrial uses at any point in the future, but fails to analyze whether those industrial uses would be urban or rural under the Shaffer factors.

The County's RI zone, including its allowed uses, was acknowledged when the comprehensive plan limited the zone to exception areas that were committed to urban uses. Thus the RI Zone and its allowed uses are not per se rural. Without a showing that all of the allowed uses in the County's R[zone are rural using the Shaffer factors, and application fails to comply with Goal 14.

The application also seeks an "irrevocably committed" exception to Goal 14. However, a local government may only adopt an exception to a goal when the land is irrevocably committed to uses not allowed by the applicable goal because those uses are impracticable. OAR 660-004- 0028(1). As described above, the subject properly is agricultural land by definition, and it has been and currently is employed for rural farm uses. Agricultural uses allowed by Goal 3 are not impracticable, and thus the applicant's burden for a goal exception to Goal 14 is not met- OAR 660-004-0028(3)(a). The surrounding area also includes several properties in agricultural use, making the relationship between the property and "exception area" and "adjacent lands" no [sic] irrevocably committed. OAR 660 - 004 -0028(2)(b) -(c).

Relatedly, the subject property is not irrevocably committed to urban uses, making the exceptions process outlined at OAR 660-014-0030 unavailable.

DCC 18.120.010 Nonconforming uses

The DCC, at DCC 18.120.010, states that "[n]o nonconforming use or structure may be resumed after a one-year period of interruption or abandonment unless the resumed use conforms with the provisions of DCC Title 18 in effect at the time of the proposed resumption." This application repeatedly asserts that its nonconforming uses have been operated continuously since the 1970s to justify several of the relevant approval criteria. However, the application includes no evidence of continuous operation without any one-year gaps. LandWatch concurs with the staff report that such evidence is also required to support the application's request for an "irrevocably committed" goal exception, and that a non-conforming use verification is required to establish that the present and historic uses of the property were lawfully established and continued without alteration, abandonment, or interruption.

DCC 18.136.020 Rezoning Standards

This application may seek to serve the landowner's private interest by increasing the development potential of the subject properly. It will not, however, serve the public interest, which would be harmed by the removal of the County's agricultural land base; increased noise, traffic, and pollution in a rural area; and

marked public safety risks imposed by allowing industrial uses and their concomitant traffic and pollution along an open water way and state highway. Such harms to the public interest mean noncompliance with the County's rezoning standards at DCC 18.136.020: [quotation of code omitted]

As for DCC 18.136.020(D), there has been no change in circumstances since the properly was last zoned. The applicant states that the current uses on the property have been in operation for the majority of the past 40 years. Application at 14, 37. The soils and agricultural suitability of the subject property have also not changed since it was planned and zoned for agricultural use by the County. There has further been no mistake in the current EFU zoning of the subject property. The County embarked on legislative efforts in both 2014 and 2019 to establish that errors exist in its EFU zoning designations, but concluded both times that no such errors exist. In 2015, the County consulted with Jon Andersen, who was a Senior Planner, and later became the Community Development Department Director, when the County developed its first comprehensive plan. Mr. Andersen confirmed that none of the County's agricultural land designations were made in error. Exhibit 5 (January 15, 2015 Deschutes County Community Development Department notes from phone conversation with John Andersen). DLCD also commented to the County at the time that it was "unable to determine the nature and scope of the mapping error" of agricultural land designations. Exhibit 6 (January 8, 2015 DLCD letter).

Conclusion

This application requests to convert 19 acres of agricultural land to allow urban, industrial uses, and fails to comply with Goals 3 and 14 as well as provisions of the Deschutes County Code. The property is rural, agricultural land and has not been proven to be irrevocably committed to urban uses. LandWatch respectfully requests this application be denied' We also request the record be left open for 14 days to accommodate additional written comment on this very complex land use application.

1000 Friends of Oregon, through Dan Lawler, Rural Lands Senior Attorney, also submitted public comment in opposition to the applications on April 26, 2022:

Dear Hearings Officer,

Thank you for the opportunity to provide testimony on the comprehensive plan and zoning map amendment application identified as App 247-21-000881-PZ, 882-Z (the "Rezone"). The following testimony is submitted by 1000 Friends of Oregon. 1000 Friends of Oregon is a nonprofit membership organization that works with Oregonians to support livable urban and rural communities, protect family farms, forests and natural areas; and provide transportation and housing choices. We have members in all parts of Oregon, including Deschutes County.

1000 Friends of Oregon requests that the Hearings Officer include this letter in the record for the April 26, 2022 hearing and that the county send any notices related to the Rezone to dan@friends.org and andrew@friends.org. 1000 Friends of Oregon also requests a 14-day open records period following this hearing to

provide the public with more time to review the lengthy application materials and staff report.

1000 Friends recommends that the Hearings Officer deny the Rezone because the application fails to demonstrate compliance with approval criteria for amendments to comprehensive plan and zoning designations. More specifically, the staff report and application do not demonstrate that the subject property is not agricultural land under Goal 3 or that the proposal complies with Goal 14. The following paragraphs provide more detail on 1000 Friends' concerns.

The Subject Property is Agricultural Land Under Goal 3

1000 Friends recommends that the Hearings Officer deny the Rezone because the subject property qualifies as agricultural land under Goal 3 and, thus, an exception to Goal 3 is required to change the property's comprehensive plan and zoning designations. First, the application and staff report fail to adequately consider potential use of the 31A soils on the subject property.

When irrigated, 31A soils are categorized within Class III, which is productive and valuable for farm use. While the applicant claims that irrigation is not available to the subject property, the property is within Central Oregon Irrigation District boundaries and neither the application nor the staff report explain why the property owner can't work with the District to obtain water. Further, while the applicant may plan to continue to lease the property's water rights, neither the application nor the staff report explain why the property owner is unable to use the water rights for agriculture. The application and staff report also fail to explain why the property owner is unable to utilize a water distribution system to irrigate the property using the Pilot Butte Canal. Therefore, the Hearings Officer should deny the Rezone because the application and staff report fail to adequately consider use of irrigated 31A soils and do not demonstrate that the property is not agricultural land.

The application and staff report also fail to adequately consider whether the subject property can be used for grazing. While the applicant argues that the property is not suitable for grazing due to poor soils, both 38B and 58C soils can support viable grazing operations. The applicant's calculations regarding profitability of cattle grazing on the property fail to analyze its potential use with rotational grazing, which is a common practice in Central Oregon. Rotational grazing slows consumption of forage on pastureland by allowing animals to graze on a number of properties throughout the year. If the subject property was used for rotational grazing, rather than as the only location for grazing, it could likely support a greater number of cattle and make a potential grazing operation more profitable. However, the applicant's analysis fails to consider this possibility. Thus, the Hearings Officer should deny the Rezone because the application and staff report fail to demonstrate that the property is unsuitable for grazing and that the land is not protected under Goal 3.

The Application Does Not Satisfy Goal 14

As an initial matter, the Shaffer factors are not appropriate for determining whether the Rezone makes the property urban or rural in the context of Goal 14. As Page 14 of the Staff Report acknowledges, Shaffer v. Jackson County, 16 Or LUBA 871 (1988), involved a map amendment for an asphalt batch plant – a specific use – subject to that application. Because the specific use of the property was known in those proceedings, the county could evaluate the map amendment to determine the number of workers, dependence on site-specific resources, suitability of the use to a rural area, and reliance on public facilities and services. In this case, however, the applicant is not applying for development of a specific use on the property. While the applicant states that it intends to build a mini-storage facility and to continue equipment repairs on-site, nothing requires the applicant to follow through on that plan. Instead, the applicant could use the property for any land uses permitted in the Rural Industrial zone after the property's comprehensive plan and zoning designations change. Thus, 1000 Friends urges the Hearings Officer not to use the Shaffer framework for analysis of Goal 14 because the eventual use of the property is uncertain, making it impossible to determine whether the Shaffer factors are satisfied.

Next, the applicant's argument that the application does not require an exception to Goal 14 is not supported by substantial evidence. The applicant states that the Rezone "should not require a Goal exception because the County's RI zoning complies with Goal 14 by ensuring areas with this zoning remain rural by limiting the uses allowed." Staff Report Page 57. This statement is a mere assertion that lacks evidentiary support. To show with substantial evidence that the Rezone does not facilitate urban use of the property, the applicant and county must evaluate whether the uses permitted outright and conditionally in the Rural Industrial zone are urban or rural in nature. The use-by-use analysis is especially important here because the Rural Industrial zone was adopted when the comprehensive plan limited the zone to exception areas, meaning that the uses in that zone did not have to be rural in nature to be allowed in such areas. However, the subject property is not in an exception area and thus, analysis of the uses in the Rural Industrial zone is necessary to determine whether the Rezone facilitates urban or rural use of the property.

The applicant's alternative argument that the area is irrevocably committed to uses not allowed under the applicable goal is not supported by substantial evidence and does not demonstrate compliance with OAR 660-004-0028(2)(a). As discussed earlier in this letter, the applicant has not demonstrated that the property is not protected agricultural land and thus, the characteristics of the land (suitability for grazing, presence of Class III soils when irrigated, and possibility of irrigation) indicate that the property could be used for agriculture. Further, the applicant fails to explain why the presence of a couple small structures that cover a small percentage of the property make agriculture impossible or impracticable. Nothing prevents the property owner from removing the structures and using the soil underneath to supporting grazing operations. The applicant's statement that the existing improvements on and past use of the property irrevocably commit the property to non-farm use are mere assertions that lack the support of substantial evidence.

In addition, the applicant's description of the characteristics of adjacent lands under OAR 660-004-0028(2)(b) conflicts with staff's findings regarding such lands. On Page 66 of the Staff Report, the applicant states that neither Tax lot 300 or 306 are used for active farming, while staff notes that both of these properties appear to be in farm use and receive farm tax assessments. The applicant cites nothing to support its assertion that farming does not occur on these properties, while the county cites aerial photography and farm tax assessments for its position. Thus, substantial evidence in the record suggests that the characteristics of some adjacent lands are rural and agricultural in nature and that the subject property is not irrevocably committed to non-rural uses. The Hearings Officer should deny the Rezone because the applicant dos not support its findings for OAR 660-004-0028(2)(b) with substantial evidence and, in fact, evidence in the record undermines the applicant's position.

As an additional point, the assertion that the property is irrevocably committed to use as "an equipment service/repair and rental/sales facility" undermines the applicant's argument that uses on the property will be rural after the Rezone. The argument regarding irrevocably committed exceptions relies on the notion that the property has not been and will not be used for rural purposes. Further the commercial nature of service, repair, rental, and sales facilities indicates that the use is more urban than rural. The applicant's arguments on these points conflict and thus, the Hearings Officer should reject the applicant's Goal 14 arguments for lack of substantial evidence.

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

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

III. FINDINGS & CONCLUSIONS

In order to approve the comprehensive plan amendment and zone change request, the proposal must comply with the criteria found in statutes, statewide planning goals and guidelines and their implementing administrative rules, County comprehensive plan, and land use procedures ordinance. Each of these approval criteria is addressed in the findings below.

The Hearings Officer sets forth the following Preliminary Findings and Conclusions on the key issues in these applications below. These Preliminary Findings and Conclusions are incorporated by reference, as if fully set forth therein, in the analysis of individual criteria.

A. PRELIMINARY FINDINGS AND CONCLUSIONS

1. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING USE OF ORDER 1 SOILS SURVEY

In 1979, Deschutes County adopted its first comprehensive plan and zoning ordinance that implemented the Statewide Land Use Planning Goals. The County's comprehensive plan map was developed without the benefit of detailed soils mapping information. The map was prepared and EFU zoning was applied to the subject property prior to the USDA/NRCS's publication of the "Soil Survey of Upper Deschutes River Area, Oregon." That soil survey provides general soils information, but not an assessment of soils on each parcel in the study area.

The NRCS soil survey maps are Order II soil surveys, which extrapolate data from the Upper Deschutes River Survey to determine LCC soil classifications at a landscape level. The Applicant's soil scientist conducted a more detailed Order I survey, which analyzed actual on-the-ground soil compositions on the subject property. The Hearings Officer finds that Order I soils surveys may contradict NRCS soil classifications performed at a higher, landscape level.

The argument advanced by COLW that an Order I survey cannot contradict NRCS soil survey classifications for a particular property has been rejected by the Oregon Legislature in ORS 215.211(1) and DLCD in OAR 660-033-0030. It has also been rejected by Deschutes County Hearings Officers and the Board of County Commissioners.

ORS 215.211(1) and (5) and the implementing regulations in OAR 660-033-0030, specifically and intentionally permit a more detailed soil analysis (an Order I Soil Survey) to be used when determining whether a specific property should qualify as agricultural land. The Applicant opted to provide more detailed Order I Soil Surveys prepared by Kitzrow, who is a Certified Professional Soil Classifier. Exs. 7-9 to Burden of Proof.

In recent years, Deschutes County has recognized the value in rezoning non-productive agricultural lands and has issued decisions approving plan amendments and zone changes where the applicant has demonstrated the property is not agricultural land. Deschutes County has approved the reclassification and rezoning of EFU parcels based on data and conclusions set forth in Order I soils surveys and other evidence that demonstrated a particular property was not "agricultural land," due to the lack of viability of farm use to make a profit in money and considering accepted farming practices for soils other than Class I-VI. *See, e.g., Kelly Porter Burns Landholdings LLC* Decision/File Nos. 247-16-000317-ZC/318-PA; Division of State Lands Decision/File Nos. PA-11-7 and ZC-11-2; *Paget* Decision/File Nos. PA-07-1, ZC-07-1; *The Daniels Group*/File Nos. PA-08-1, ZC-08-1; *Swisher* Decision/File Nos. 247-21-000616-PA/617-ZC. The Board of County Commissioners recently affirmed the Hearings Officer's decision in the *Swisher* files and adopted Ordinance No. 2022-003.

On the DLCD website, it explains:

> *NRCS does not have the ability to map each parcel of land, so it looks at larger areas. This means that the map may miss a pocket of different soils. DLCD has a process landowners can use to challenge NRCS soils information on a specific property. Owners who believe soil on their property has been incorrectly mapped*

may retain a "professional soil classifier … certified and in good standing with the Soil Science Society of America (ORS 215.211) through a process administered by DLCD. This soils professional can conduct an assessment that may result in a change of the allowable uses for a property.

The Hearings Officer agrees with the Applicant's final legal argument, submitted on June 14, 2022, which states, in relevant part at page 2:

> *This statutory and regulatory scheme makes sense, as it would have been impracticable for a county to have conducted an individualized soils analysis on a farm-by-farm basis when it adopted its original zoning ordinances. Precluding the availability of a property owner to achieve a new zoning designation based upon a superior, more detailed and site-specific soils analysis would, to put it mildly, be absurd and cannot be what the legislature intended.*[3]

Kitzrow explained and discussed the original intended uses of both Order I and Order III soil studies in his May 22, 2022 testimony:

> *"Order I Soil Surveys are site-specific and have a high confidence interval and specificity. In other words, while Order III USDA soil surveys (published at 1:24,000) are a foundation for soil series/map unit concepts in the general area under review our current maps for this Order I Soil Survey are inventoried at a scale of 1:831 and 1:738 for this site-specific report In fact, in the original USDA map cited in our original report and henceforth sanctioned by the DLCD, it says right in the notation for the actual enclosed soil map, "Soil Map may not be valid at this scale" which it is not in this particular case. * * * Soil series concepts for the subject area in the USDA report are certainly valid and based upon solid Soil Survey principles, however, the actual soil map units, distribution and quantification of each unit is not always valid at this very detailed site-specific finite land base. This is a major distinct between Order I and Order III Soil Surveys. Order I Soil Surveys are represented by a scale reflective of the very small land base under consideration. Order III Soil Surveys are general in nature since their intended use is for agriculture, ranching and forest management and not for land use decisions and rezoning considerations.* ***Given these facts above, our current Order I Soil Survey is, in fact, a REPLACEMENT and NOT a supplement for the subject properties regarding soil map and Capability Class/Soil Efficacy considerations."***

Exhibit A (emphasis in original).

The Soil Survey of the Deschutes Area, Oregon[4] describes Class VII soils as "not suitable for cultivation and of severely limited use for pasture or as woodland." It describes Class VIII soils as "not suitable for growing vegetation for commercial uses." The Soil Survey of Upper Deschutes River Area, Oregon describes the broad, general level of soil surveying completed by NRCS on page 16, "At the less detailed level, map units are mainly associations and complexes. The average size of the delineations for most management purposes was 160 acres. Most of the land mapped at this level is used as woodland and rangeland. At the more detailed level, map units are mainly consociations and

[3] The stated public purpose of the EFU zone is to preserve "Agricultural Lands" (ORS 215.243) but "Agricultural Lands" are not present on the subject property.

[4] https://www.nrcs.usda.gov/Internet/FSE_MANUSCRIPTS/oregon/OR620/0/or620_text.pdf

complexes…. Most of the land mapped at the more detailed level is used as irrigated and nonirrigated cropland."

As quoted in the Hearings Officer's Decision and Recommendation to the Deschutes County Board of Commissioners in the *Swisher* decision, File Nos. 247-21-000616-PA/617-ZC:

> *The real issue is "map accuracy" which is based upon set standards for maps. National Map Accuracy Standard (NMAS) provides insurance that maps conform to established accuracy specifications, thereby providing consistency and confidence in their use in geospatial applications. An example of such a standard: "maps on publication scales larger than 1:20,000, not more than 10 percent of the points tested shall be in error by more than 1/30 inch, measured on the publication scale; for maps on publication scales of 1:20,000 or smaller, 1/50 inch." The error stated is specific for a percentage of points, and to suggest that accuracy in maps is the unattainable freedom from error as the COL letter does, is not a relevant or a serious argument.*
>
> *When one map shows point data like an Order-1 soil survey the accuracy can be measured, and when another map does not (like the NRCS soil map) there is a shortage of information, so the accuracy of the NRCS map cannot be determined for point data. The accuracy of the NRCS estimate of the percentage of components in the 38B soil complex can be shown to be very inaccurate in this case, and it clearly underestimates the Class 7 and Class 8.*

The Hearings Officer finds that NRCS soil survey maps are not definitive or "binding" with respect to a determination of whether the subject property is, or is not, agricultural land. This is consistent with the ruling of the Land Use Board of Appeals (LUBA) in *Central Oregon Landwatch v. Deschutes County (Aceti), ___ Or LUBA ____ (LUBA NO. 2016-012, August 10, 2016 (Aceti I)*. There, LUBA confirmed that OAR 660-033-0030(5)(a) and (5)(b) allow the County to rely on more detailed data on soil capability than provided by NRCS soil maps to define agricultural land, provided the soils survey has been certified by DLCD, which has occurred here. It found that the County's reliance on the applicant's more-detailed soils analysis prepared by a soil scientist supported a finding that the property was "nonagricultural land" even though the NRCS soil study mapped it as high-value farmland.

The *Aceti* ruling is summarized as follows:

> *LUBA found that it was appropriate for Deschutes County to rely on a site-specific soils survey prepared by soils scientist Roger Borine to find that a majority of the property is comprised of Class VII and VIII soils rather than on information provided by the NRCS Soil Survey. LUBA noted that the NRCS's maps are intended for use at a higher landscape level rather than on a property-by-property basis.*

First, LUBA affirmed the County's determination that the subject property, which had been irrigated and used to grow hay in 1996 and earlier years, was not agricultural land based on the Order 1 soils survey which showed that the poor soils on the property are Class VII and VIII soils when irrigated, as well as when not irrigated.

Second, LUBA determined the applicant had established that the subject property was not

"agricultural lands," as "other than Class I-VI Lands taking into consideration farming practices." LUBA ruled:

> *"It is not an accepted farm practice in Central Oregon to irrigate and cultivate poor quality Class VII and VIII soils – particularly where, as here those soils are adjacent to rural industrial uses, urban density residential neighborhoods that complain about dust and chemicals and to high traffic counts on the surrounding roads and highways. Irrigating rock is not productive."*

The Hearings Officer also rejects the argument that NRCS land classifications based on its soil maps cannot be varied, unless a landowner requests an Order 1 soils study to qualify ***additional*** land as agricultural land. This is directly contrary to LUBA's holding in *Central Oregon Landwatch v. Deschutes County and Aceti*, LUBA No. 2016-012:

> *"The Borine Study is evidence a reasonable person would rely on and the county was entitled to rely on it. As intervenor notes, the NRCS maps are intended for use at a higher landscape level and include the express statement 'Warning: Soil Ratings may not be valid at this scale.' Conversely, the Borine Study extensively studied the site with multiple on-site observations and the study's conclusions are uncontradicted, other than by petitioner's conclusions based on historical farm use of the property. This study supports the county's conclusion that the site is not predominantly Class VI soils."*

ORS 215.211(1) specifically allows for the submittal by a certified soil scientist of an assessment of the capability of the land based on more detailed soils information than that contained in the Web Soil Survey operated by the NRCS to "assist a county to make a better determination of whether land qualifies as agricultural land." The Applicant followed this procedure by selecting a professional soil classifier who is certified by and in good standing with the Soil Science Society of America to prepare the Order 1 soils report. DLCD reviewed the soils report pursuant to ORS 215.211(2) and determined it could be utilized in this land use proceeding. The Hearings Officer finds that the law is settled when it comes to an applicant's ability to rely on an Order I Soil Survey such as the surveys prepared by Kitzrow in this matter.

The Hearings Officer agrees that soils classifications are not the only determining factor with respect to whether a parcel is "agricultural land." The Hearings Officer's findings on all relevant factors to be considered in determining whether the subject property is "agricultural land," are set forth in detail below.

For all the foregoing reasons, the Hearings Officer finds that the County is not bound by the landscape level NRCS Order II study on which classification of soils on the subject property is based. The Hearings Officer finds it is appropriate for the County to consider the Applicant's Order I soils survey, certified for the County's consideration by DLCD.

2. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING WHETHER THE SUBJECT PROPERTY IS "AGRICULTURAL LAND"

For purposes of this Decision and Recommendation, the Hearings Officer considers the definition of "Agricultural Land," in OAR 660-033-020(1)(a), as defined in Goal 3, which includes:

(A) lands classified by the NRCS as predominantly Class 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.

a. OAR 660-033-0020(1)(a)(A) Findings and Conclusions

The first prong defines "agricultural land" to include soils classified predominantly as Class I-VI in Eastern Oregon.[5] The subject property meets this definition, but it is not controlling. As the Hearings Officer found above, the County may rely on the DLCD-certified Order I soil survey submitted by the Applicant. That study shows that the soils on the subject property are not predominantly Class I-VI soils. The Kitzrow Soil Surveys show that Lot 301 is comprised of 53.1% of Class VII and VIII soils, and that both Lot 500 and Lot 305 are comprised of 87.7% of Class VII and VIII soils. The County is entitled under applicable law to rely on the Order I soils survey in these applications in making a determination that the soils on the Subject Property are not predominantly Class I-VI soils. Kitzrow also explained in his Soil Surveys that the addition of irrigation waters will not improve the growing of farm crops on most of the site. No evidence was presented to rebut this evidence.

The Hearings Officer finds that the more detailed, onsite soil study submitted by the Applicant provides property-specific information not available from the NRCS mapping. There is no evidence in the record to rebut the Applicant's soils study. Therefore, the Hearings Officer finds that the subject property does not constitute "agricultural land" under OAR 660-033-0020(1)(a)(A).

b. OAR 660-033-0020(1)(a)(C) Findings and Conclusions

No party has argued that the subject property is necessary to permit farm practices on nearby lands under this subsection, and no evidence has been submitted that any "farm use" on surrounding properties has depended upon use of the subject property to undertake farm practices. There is no showing that the subject property is necessary for farming practices on any surrounding agricultural lands. There is no evidence that the subject property contributes to any such practices, nor that other lands depend on use of the subject property to undertake any farm practices.

The Hearings Officer finds there is no evidence in the record that the subject property is "land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands. Questions concerning the "impact on adjacent or nearby agricultural lands," do not answer the inquiry of whether the subject property is "necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands." OAR 660-033-0020(1)(a)(C).

[5] Eastern Oregon is defined at OAR 660-033-0020(5) to include Deschutes County.

For these reasons, the Hearings Officer finds that the subject property does not constitute "agricultural land" under OAR 660-033-0020(1)(a)(C).

c. OAR 660-033-0020(1)(b) Findings and Conclusions

The Hearings Officer finds there is no evidence in the record that the subject property is adjacent to or intermingled with lands in capability classes I-VI within a farm unit. Therefore, the Hearings Officer finds that the subject property does not constitute "agricultural land" under OAR 660-033-0020(1)(b). Specific findings on each applicable criterion are set forth in Section III(B) of this Decision and Recommendation.

d. OAR 660-033-0020(1)(a)(B) Findings and Conclusions

The Hearings Officer reviews evidence in the record to determine whether the subject property constitutes "agricultural land" under OAR 660-033-0020(1)(a)(B) as "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***." (emphasis added). Competing evidence was presented by the Applicant, COLW and 1000 Friends of Oregon.

This provision acknowledges that, even if a property is comprised of poor soils (aka "Land in other soil classes" that are not classified I-VI in Eastern Oregon), it may nonetheless be "suitable for farm use" under one or more of the seven considerations set forth in OAR 660-033-0020(1)(a)(B). In other words, if any of the seven considerations are such that they ***compensate for the poor soils on a property*** and render such property "***suitable for farm use***," - employment for the primary purpose of obtaining a profit in money - that property is determined to constitute agricultural land.

OAR 660-033-0020(1)(a)(B) begins with the statutory definition of "farm use" in ORS 215.203(2)(a) which informs the determination of whether a property is "suitable for farm use." The Hearings Officer finds that the critical question, in analyzing the seven considerations, is whether any of those considerations essentially improve the conditions on the subject property – poor soils notwithstanding - to a point that it can be employed 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 dairying products or any other agricultural or horticultural use or animal husbandry or any combination thereof." ORS 215.203(2)(a) (emphasis added). Aerial photograph evidence of past irrigation of the subject property is not dispositive without evidence that the property was irrigated and engaged in "farm use," for the primary purpose of obtaining a profit in money." There is no such evidence; rather, the aerial photographs evidence shows site condition

"Farm use" is <u>not</u> whether a person can engage in any type of agricultural or horticultural use or animal husbandry on a particular parcel of property. It is informed by whether such use can be made for the primary purpose of obtaining a profit in money. Therefore, the Hearings Officer rejects the argument that the subject property is "capable of any number of activities included in the definition of farm use," because "farm use" as defined by the Oregon Legislature "***means the current employment of land for the primary purpose***

of obtaining a profit in money." ORS 215.203(2)(a); *see also* Goal 3. This is a critical omission by commentators in opposition to the applications in their submissions. Speculation about whether the property could employ greenhouses, goat grazing, plant nurseries and the like is not enough. There are many properties in Central Oregon that are not engaged in "farm use," but on which agricultural activities take place. However, the idea that a person who owns EFU-zoned property with poor soils is essentially limited to use their property for hobby farm type activities is not supported by the law.

The Hearings Officer finds that the definition of "farm use" in ORS 215.203(2)(a) refers to "***land***," - not "lands," - and does not include any reference to "combination" or requirement to "combine" with other agricultural operations for grazing rotation, or the like. Therefore, if the subject property, in and of itself cannot be engaged in farm use for the primary purpose of obtaining a profit in money, it does not constitute agricultural land. There is no requirement in ORS 215.203(2)(a) or OAR Chapter 660-033 that a certain property must "combine" its operations with other properties in order to be employed for the primary purpose of obtaining a profit in money and thus, engaged in farm use.

What the statutory definition of "farm use" means is that, merely because a parcel of property is zoned EFU and ***some*** type of agricultural activity could take place on it, or whether the property owner could join forces with another agricultural operations, does not mean that a property owner is forced to engage in agricultural activity if the property owner cannot use its own property for farming to obtain a profit in money. This is so, whether the barrier to obtaining a profit in money is due to soil fertility, suitability for grazing, climactic conditions, existing and future irrigation rights, existing land use patterns, technology and energy inputs required and accepted farming practices, any or all of these factors. In short, "farm use" under the statutory definition means more than just having a cow or horses, growing a patch of grapes, or having a passion for rural living. An owner must be able to obtain a profit in money for any use to be considered "farm use."

The Hearings Officer finds that the list of considerations in OAR 660-033-0020(1)(a)(B) in determining whether land in other soil classes are "suitable for farm use," are considered in relation to one another. No one consideration is determinative of whether a property with poor soils is nonetheless "suitable for farm use."

COLW argues that the subject property may be used for some agricultural purpose and lists dozens of potential "agricultural commodities produced in Deschutes County," pursuant to the 2012 USDA Census. Without any information as to whether the agricultural practices on properties in the vicinity of the subject property constitutes "farm use," in that they make a profit in money from such uses, COLW relies on Humfleet's Nubian Dairy Goats and Whistle Stop Farm and Flowers as examples. The Hearings Officer finds that it is not enough to introduce evidence of agricultural use of other properties without evidence of the profitability of such use. Speculation is not evidence, so an inference that uses on other properties "must be profitable" is not enough. Such an inference does not transfer to the subject property, either. Nor does it refute the substantial evidence in the record that establishes it is impractical to engage in allegedly potential agricultural uses of the subject property because one cannot make a profit in money from those uses. Therefore, the record shows the property is not suitable for farm use.

The question is not whether an owner could engage in agricultural uses on a property; it is whether it is impractical to attempt to make a "farm use" of the property, as the term is

defined in state law. The Hearings Officer finds that it is not an applicant's burden to prove that no agricultural use could ever be made of a property. An applicant must prove that the land is not suitable for farm use because one cannot employ the subject property with the primary purpose of making a ***profit*** from any potential "agricultural use" of such property.

Soil Fertility

Unrebutted evidence in the record establishes that the predominant soil type on all three tax lots that comprise the subject property are Capability Class VII and VIII. Kitzrow explained the Soil Surveys in **Exhibit A**, noting that the Class VII and VIII "Order I delineations on Lot 301 will not benefit substantially from the addition of irrigation waters hence the poor Capability Class rating." With regard to Lot 301, Kitzrow stated that the property "does not have any farming opportunities" because "[o]nly two very small areas are 'undisturbed' on this lot dating back to before 1985. * * * The remainder of this property has been highly altered, degraded and permanently debilitated. * * * A preponderance (87.7%) of the 1.06 acs is comprised of Capability Class 7 and 8 soils. Irrigation will not improve the growing of farm crops on most of the site." With regard to Lot 305, Kitzrow concluded that the property "will not produce crops on a large majority of this lot" because of "the proportion and degree of ancient site alteration and degradation dating back to before 1985. * * * A preponderance (87.7%) of the 3.0 acs is comprised of Class 7 and 8 soils. Irrigation will not improve the growing of farm crops."

While COLW argued that soil fertility is not always necessary for commercial agricultural operations because farm equipment could be and/or has been stored on the property, the Hearings Officer finds that the subject property's resource capability is the proper determination. The Applicant is not required to engage in joint management or use with other lands that do constitute productive farm land. Moreover, storage and maintenance of equipment is not, in and of itself, a farm use unless such equipment is for the production of crops or a farm use on the subject property. Therefore, the Hearings Officer rejects the arguments of COLW that certain uses of the subject property could be made that are not dependent on soil type because none of the suggested uses constitute "farm use," without any associated cultivation of crops or livestock.

Suitability for Grazing

The Applicant's burden of proof sets forth the following:

> *The primary agricultural use conducted on properties with poor soils is grazing cattle. Given the high cost of irrigating and maintaining the property as pasture or cropland (high labor costs, labor-intensive, high cost of irrigation equipment and electricity, high cost of fertilizer, etc.), dry land grazing is the accepted farm use of poor soils in Deschutes County.*
>
> *However, the extremely poor soils found on the Subject Property prevent it from providing sufficient feed for livestock for dryland grazing. That, the dry climate, the proximity to Highway 97, and area development prevent grazing from being a viable or potentially profitable use of the Subject Property. The soils are so poor that they would not support the production of crops for a profit.*

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

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

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

30 days x 2#/day/acre = 60.0 lbs. Beef/acre
(1 acre per AUM)

60.0 lbs. Beef/acre x 19.12 acres x $1.20/lb. = $1,382.40 per year gross income

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

While COLW argued that neighboring Humfleet's Nubian Dairy Goats (the "Humfleet Property") is evidence that the Applicant could undertake a similar agricultural use on the subject property, there is no evidence that the Humfleet Property is a for-profit goat farm, or that the primary purpose of the Humfleet Property is "obtaining a profit in money" from such operation, under the "farm use" definition in ORS 215.203(2)(a).

COLW also assumed, without evidence, that the Humfleet Property has "lower quality [soils] compared to the subject properties." This assumption is based only on NRCS soil data and ignores the Order I Soil Surveys of the subject property in the record. There is no Order I soil survey of the Humfleet Property from which to make a valid comparison of the quality of soils.

COLW ignored the location and characteristics of the subject properties in its comparison, as well. Unrebutted evidence in the record shows that Tax Lot 500 is adjacent to Highway 97, which is the busiest stretch of highway in Central Oregon, is covered in gravel and has an old building in the middle of the parcel. There is no evidence that growing crops or raising livestock on this parcel is, or could be, viable – only speculation. Tax Lot 305 is developed with a large building and gravel covers most of the remaining land. Tax Lot 301

is only 400 feet at its widest point, and includes an irrigation ditch and easement, which takes up a substantial portion of the narrow lot.

The current owner of Tax Lot 301, Dwight Johnson, explained that the subject properties do not have comparable attributes to the Humfleet Property, including barns suitable for livestock, a working irrigation system (including an irrigation pond and irrigation hand lines) and mature grass pastures. The Humfleet Property is not compromised by an irrigation district easement that renders a significant portion of the property useless, unlike the subject property, which has an easement that borders its east side. Finally, the Humfleet Property borders BLM land, which is undeveloped and does not present conflicting neighboring uses, unlike the neighboring residential properties to the subject property.

Johnson not only owns Tax Lot 301, but also Bend Soap Company, a successful goat operation in Central Oregon. He submitted a letter to the record (Exhibit QQ) that lists numerous reasons including the poor soils, small parcel sizes, parcel configuration, high costs of fencing and irrigation improvements and proximity to neighboring residential developments as evidence of why the subject property is not suitable for grazing. The letter concludes by stating, "For the reasons provided above, the subject property is not suitable for <u>any agricultural uses</u> and is specifically not suitable for raising goats." Because the subject properties do not have the attributes of the Humfleet Property, he determined that it will be far too expensive to construct similar improvements just to raise a few goats.

The lack of suitability of the subject property for dryland grazing as a viable or profitable use of the subject property is established by substantial evidence in the record. The Hearings Officer finds the Applicant has established that this factor has been established by the Applicant for purposes of determining the subject property is not "agricultural land" under OAR 660-033-020(1)(a)(B).

Climatic Conditions

There is little debate that climatic conditions contribute to the inability to engage in "farm use" for the purpose of making a profit in money. Evidence in the record (Exhibit G, J and K) show that climatic conditions on the subject property are challenging, and are likely to get worse. The climate is extremely arid and receives very little rain or snow throughout the year. The evidence shows that these conditions will continue to worsen as the "22-year megadrought" conditions continue to impact the region. The poor soil conditions on the subject property render the climatic conditions particularly impactful.

Whether or not other properties are engaged in *agricultural use* does not show that climatic conditions do not preclude "*farm use*" on the subject property. This is so, combined with the poor soils on the property and proximity to Highway 97. The relevant issue is whether or not agricultural activities can be engaged in on the subject property for the purpose of making a profit in money, considering climatic conditions. Substantial evidence shows that they cannot.

The Hearings Officer finds the Applicant has established that climatic conditions on the subject property are a factor in determining it is not "agricultural land" under OAR 660-033-020(1)(a)(B).

Existing and Future Availability of Water for Farm Irrigation Purposes

Regarding existing and future availability for water for farm irrigation purposes, commentators do not take into consideration whether any agricultural activities could be utilized for the primary purpose of making a profit in money on the property, such that the suggested agricultural activities constitute "farm use" under the statutory definition. There is no evidence that the subject property could be used for any of the listed activities in ORS 215.203(2)(a) for the primary purpose of obtaining a profit in money, whether or not the property is irrigated.

The Applicant's burden of proof sets forth the following:

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

The Applicant argues that the property's exiting irrigation rights, currently leased back and not in use on the property, should not be considered in evaluating the property's potential for agricultural uses. In its May 31, 2022 open record letter at page 4, the Applicant states:

> *As understood by the Applicant, staff's primary concern regarding Goal 3 stems from irrigation water previously utilized on the Properties. Specifically, the Staff Report clarifies that "Staff recognizes that the property may not be found to be suitable for farm use regardless of the irrigation status, however, staff requests the Hearings Officer make specific findings on question (sic) if the leased water rights are unavailable to the property for the purposes of this analysis." (Page 38). Staff's concerns are understandable in light of a 2014 land use decision issued by the then Board of County Commissioners concerning property owned by NNP IV-NCR, :L:C (File No PA-13-1,. ZC-13-1; "Newland"). The Board in Newland opined that "having irrigation water rights is the most important factor in farm usen throughout the country. Farm use in Central Oregon is primarily dependent upon having water to irrigate land for crops, hay, fields, pasture, and any other water dependent farm use."*
>
> *This case is easily distinguishable from the Newland matter. As clarified by the preceding hearings officer's detailed analysis, the Newland property included soil units which where [sic] Class VII when nonirrigated but Class III when irrigated. Like the Newland property, the Applicant's irrigation water has consistently been leased back for Deschutes River in-stream flows since 2016 as part of COID's Instream Lease Program. See **Exhibit B**. But differing from the Newland property, the irrigation water in this case is irrelevant to the soil classification. **Exhibit A** clarifies that the predominate soil units on all three Properties are Class VII and VII*

"even with supplemental irrigation water" and that "Irrigation does not improve most of each property and therefore the lack of usable land is the governing factor when considering the value and utility of each parcel."

With regard to Lot 301, Kitzrow concluded that the lot's "Class [VII] and [VIII] Order I delineations ***will not*** *benefit substantially from the addition of irrigation waters hence the poor Capability Class rating." With regard to Lot 500, Kitzrow concluded that "Irrigation will not improve the growing farm crops on most of the site." And with regard to Lot 305, Kitzrow concluded that "Irrigation will not improve the growing of farm crops. This site is permanently degraded and will not produce crops on a large majority of this lot of record."*

Regarding the Applicant's irrigation water specifically and Central Oregon's limited water resources generally, the Applicant additionally submits ***Exhibits C*** *to* ***K*** *to the record.*

The irrigation water on the subject property has been leased back each year since 2016 to improve Deschutes River in-stream flows. Exhibit B. This consideration alone is not dispositive and further must be considered in light of unrebutted testimony of Kitzrow that concludes the predominate soil type on the property is Class VII/Class VIII, even with irrigation water, Exhibit A; Exhibits 7-9 to the Burden of Proof. The Hearings Officer finds it is irrelevant whether if the leased water rights are available to the property for the purposes of this analysis. The leased irrigation rights do not compensate for the poor soils in a manner such that the subject property could be engaged in "farm use," for the primary purpose of obtaining a profit in money. The Hearings Officer finds there is no evidence that a reasonable farmer would expect to apply irrigation water to the poor soils on the subject property (considering its size and location, as well) and still obtain a profit in money from agricultural uses on the property, with or without existing irrigation rights.

Without any evidence to the contrary to refute the evidence submitted by the Applicant, the Hearings Officer finds that the Applicant has established that existing and future availability of water for farm irrigation purposes is a factor in determining the subject property is not "agricultural land" under OAR 660-033-020(1)(a)(B).

Existing Land Use Patterns

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

The Hearings Officer disagrees with the Applicant with respect to the last sentence quoted from the burden of proof above. Some nearby properties are engaged in agricultural uses, as evidenced by irrigation rights and farm tax deferral. However, there is no evidence as to whether the agricultural use of such properties constitutes "farm use," for the primary purpose of obtaining a profit in money. The property immediately to the north, while zoned EFU, is vacant, without irrigation rights and is not currently receiving farm tax deferral. To the south of the subject property is a parcel zoned Open Space and Conservation (OS&C), owned and operated by the Oregon Parks & Recreation Department. Only properties to

the east of the subject property that are zoned EFU, are partially irrigated and receiving farm tax deferral, while also having been developed with manufactured homes.

Nonetheless, the Hearings Officer finds that existing land use patterns are a factor in determining the subject property is not "agricultural land" under OAR 660-033-020(1)(a)(B). This is particularly so with the Highway 97 transportation corridor immediately adjacent to the subject property to the east and southeast, and rural residential uses to the west.. The record shows that, as traffic on Highway 97 has increased and a flood of new residents have located to Central Oregon over the past 30-40 years, farm land adjacent to the busy thoroughfare has been impacted by these changes. Drought conditions persist in the region, as well. Surrounding areas have been re-dedicated to rural residential use, as opposed to farming, and large farm tracts over 80 acres in size around the subject property do not exist.

The area is characterized by the heavily trafficked Highway 97 and a mix of rural residential uses, vacant EFU property that lacks irrigation rights, a tract that is not currently in use but is zoned OS&C, and resident-occupied, partially irrigated EFU parcels. There are various non-farm uses in the area, including a number of non-farm dwellings. The Hearings Officer finds that this determination does not ask whether the proposal is "consistent with existing land use pattern," but instead asks whether, considering the existing land use pattern, the property is agricultural land. I find that it does not.

The Hearings Officer finds the Applicant has established that existing land use patterns is a factor in determining the subject property is not "agricultural land" under OAR 660-033-020(1)(a)(B).

Technological and Energy Inputs Required

The Applicant's burden of proof states, "[g]iven the Subject Property has been not been [sic] farmed in recent (or distant) history, and the land has been used for equipment service and repair for at least 4 decades, farming the Subject Property at this time would require immense investment in technological and energy inputs, including irrigation systems, fertilization, and building proper infrastructure." Technological and energy inputs required for agricultural use of the subject property also factor into the fact the property is not suitable for "farm use," because it cannot be so employed for "***primary purpose of obtaining a profit in money***."

Suggested uses by commentators do not address the profitability component of the definition of "farm use," and do not rebut substantial evidence in the record that shows the required investments that preclude the establishment of a legitimate "farm use" on the property.

Exhibit QQ sets forth the difficulty associated with grazing goats on the property – particularly for obtaining a profit in money – and concludes that the same difficulties would frustrate any other farm operation. The record also includes a letter from Paul Schutt, the owner of a 40-acre farm in Tumalo. Exhibit O. His testimony speaks specifically to hemp production and concludes that "even the most experienced farmer would be well advised not to plant hemp for the foreseeable future," because a "glut in the market is causing hemp farmers to suffer huge losses." The Applicant observes that this testimony is notable because hemp was a crop in Central Oregon that, for several years, could justify expending substantial capital on specialized equipment and structures necessary to

establish a legitimate farm use. Other substantial evidence in the record on this consideration is found in Exhibits Q through HH.

The Hearings Officer notes that certain uses, such as storing farm equipment are not, in and of themselves "farm use," as confirmed by LUBA in *Oregon Natural Desert Association v. Harney County*, 42 Or LUBA 149 (2002).

The Hearings Officer finds that agricultural uses of the subject property cannot be undertaken for the primary purpose of obtaining a profit in money due to the costs associated with technological and energy inputs required for any such use. No one presented any evidence to rebut the Applicant's evidence that such costs preclude the owner from making a profit in money from farming the subject property. Therefore, the Hearings Officer finds that the Applicant has established that technological and energy inputs and associated costs thereof is a factor in determining the subject property is not "agricultural land" under OAR 660-033-020(1)(a)(B).

Accepted Farm Practices

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

The definition of "accepted farm practice," like that of "farm use," turns on whether or not it is occurring for the primary purpose of obtaining a profit. The *Wetherell* court relied on the taxation code in ORS 308A.056 to define "accepted farm practice" as "a mode of operation that is common to farms of a similar nature, necessary for the operation of these similar farms to obtain a profit in money and customarily utilized in conjunction with farm use." *Wetherell, supra*, 52 Or LUBA at 681. LUBA determined in the *Aceti I* case that it is not an accepted farming practice in Central Oregon to irrigate and cultivate Class VII and VIII soils.

The Applicant is not required to show that no agricultural use could ever be made on the property; only that no reasonable farmer would attempt to engage in "farm use," which is for the primary purpose of obtaining a profit. The Hearings Officer finds that substantial evidence in the record submitted by the Applicant, and not rebutted, establishes that operations required to turn a profit from agricultural uses on the subject property are unrealistic and not consistent with accepted farm practices. Financial investments that would be required to attempt to operate the subject property in a similar manner to the Humfleet Property or the Whistle Stop Farm & Flowers (see Exs. JJ, KK, LL and MM)[6] are infeasible due to the poor soils and other considerations, including location adjacent to Highway 97, graveled surfaces and other site constraints.

Oregon courts have consistently addressed profitability as an element of the definition of "agricultural land." In *Wetherell v. Douglas County*, 342 Or 666 (2007), the Oregon

[6] The Applicant notes that Whistle Stop Farm & Flowers is engaging in unpermitted commercial activities which, in and of itself, is not an accepted farm practice.

Supreme Court held that profitability is a "profit in money" rather than gross income. In *Wetherell*, the Court invalidated a rule that precluded a local government from analyzing profitability in money as part of this consideration. *Id*. at 683. The Court stated:

> *"We further conclude that the meaning of profitability," as used in OAR 660-033-0030(5), essentially mirrors that of "profit." For the reasons described above, that rule's prohibition of any consideration of "profitability" in agricultural land use determination conflicts with the definition of "farm use" in ORS 215.203(2)(a) and Goal 3, which permit such consideration. OAR 660-033-0030(5) is therefore invalid, because it prohibits consideration of "profitability." The factfinder may consider "profitability" which includes consideration of the monetary benefits or advantages that are or may be associated from the farm use of the property and the costs or expenses associated with those benefits, to the extent such consideration is consistent with the remainder of the definition of "agricultural land" in Goal 3.*
>
> *Finally, the prohibition in OAR 660-033-0030(5) of the consideration of "gross farm income" in determining whether a particular parcel of land is suitable for farm use also is invalid. As discussed above, "profit" is the excess or the net of the returns or receipts over the costs or expenses associated with the activity that produced the returns. To determine whether there is or can be a "profit in money" from the "current employment of [the] land *** by raising, harvesting and selling crops[.]" a factfinder can consider the gross income that is, or could be generated from the land in question, in addition to other considerations that relate to "profit" or are relevant under ORS 215.203(a) and Goal 3.*
>
> *We therefore hold that, because Goal 3 provides that "farm use" is defined by ORS 215.203, which includes a definition of "farm use" as "the current employment of land for the primary purpose of obtaining a profit in money[,]" LCDC may not preclude a local government making a land use decision from considering "profitability" or "gross farm income" in determining whether land is "agricultural land" because it is "suitable for farm use" under Goal 3. Because OAR 660-033-0030(5) precludes such consideration, it is invalid.*

Id. at 681-683.

The Hearings Officer finds that the Applicant has met its burden of showing the subject property cannot be used for agricultural purposes for the primary purpose of obtaining a profit in money and such is not "agricultural land" under all of the considerations of OAR 660-033-020(1)(a)(B)..

The Hearings Officer finds that substantial evidence in the record supports a determination that the subject property is not suited to commercial farming because no reasonable farmer would believe he or she could make a profit in money therefrom, considering all of the factors listed in OAR 660-033-020(1)(a)(B). No one presented any evidence to rebut the Applicant's evidence that "accepted farming practices" would or could change the poor soils on the property to render it suitable for "farm use." There are various barriers to the Applicant, or any other person, that preclude using the subject property to engage in agricultural activities for a profit.

In conclusion, the Hearings Officer finds that substantial evidence in the record supports a determination that each of the listed considerations in OAR 660-033-020(1)(a)(B)

preclude “farm use” on the subject property because no reasonable farmer would expect to make a profit in money by engaging in agricultural activities on the land.

3. HEARINGS OFFICER’S FINDINGS AND CONCLUSIONS REGARDING DCC 18.04.030 DEFINITION OF “AGRICULTURAL LAND”

COLW argues that the definition of “agricultural land,” in DCC 18.04.030 excludes the definition of “farm use” in ORS 215.203(2)(a) and up-ends the Oregon Supreme Court’s decision in *Wetherell* because the County Code definition includes the phrase, “whether for profit, or not.” COLW cites *Brentmar v. Jackson County*, 321 Or 481, 497, 900 P.2d 1030 (1995) for the proposition that, even in EFU zones, Deschutes County can enact “more stringent local criteria” than state statutes.

COLW is wrong. The definition of “***agricultural land***” in DCC 18.04.030 is wholly consistent with ORS 215.203(2)(a) and case law in this state and does not exclude the “profit in money” component which defines “farm use” and guides analysis of whether or not property is in fact “agricultural land”:

> *"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.*

COLW instead relies on the definition of “***agricultural use***,” which is not relevant. Many properties can be engaged in “agricultural use,” even if such properties do not constitute “***agricultural land***.” (hobby farms, for example). Merely because a property can be put to some, more broadly defined “agricultural use,” does not make it “agricultural land,” for the reasons set forth in detail in this Decision and Recommendation.

> *"Agricultural use" means any use of land, whether for profit or not, related to 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 not specifically covered elsewhere in the applicable zone. Agricultural use includes the preparation and storage of the products raised on such land for human and animal use and disposal by marketing or otherwise. Agricultural use also includes the propagation, cultivation, maintenance and harvesting of aquatic species. Agricultural 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.*

The Hearings Officer finds that application of the County Code definition of “agricultural land” does not change the analysis in this Decision and Recommendation.

4. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING RURAL INDUSTRIAL USES AND GOAL 14

The Hearings Officer finds that the arguments of COLW and 1000 Friends concerning Goal 14 are improper attempts to re-litigate a matter that has been before the Deschutes County Hearings Officer, the Board of County Commissioners, LUBA and the Court of Appeals. *Central Oregon LandWatch v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2021-028 ("*Aceti*"), aff'd 315 Or App 673, 501 P3d 1121 (2021). Moreover, COLW and 1000 Friends disagree on whether the factors set forth in *Shaffer v. Jackson County*, 17 Or LUBA 922 (1989) are applicable. *See also Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014). For the reasons set forth in detail below, the Hearings Officer finds that the *Shaffer* factors are not applicable because the eventual use of the subject property is uncertain, making it impossible to determine whether the *Shaffer* factors are satisfied.

As the Hearings Officer finds below, a use-by-use analysis of the uses permitted outright and conditionally in the RI zone to determine whether such uses are urban or rural in nature has been made by the Deschutes County Board of County Commissioners. Those findings are binding on the County in consideration of the subject applications.

a. Analysis of LUBA and Court of Appeals Decisions in Aceti

The recent *Aceti* LUBA opinion states, in relevant part:

> *In 2018, the county amended the DCCP to allow RI designations and zoning of land outside the three existing exception areas. Petitioner appealed those amendments [in Central Oregon LandWatch v. Deschutes County, 79 Or LUBA 253, aff'd 298 Or App 375, 449 P3d 534 (2019)], arguing, among other things, that the county's decision failed to comply with Goal 14 because the amendments would allow urban uses of rural lands. Petitioner further argued that the DCC RI zone regulations – which were not amended concurrently in 2018 with the DCCP amendments – allow urban uses of rural land. We rejected those arguments, concluding that the 2018 DCCP amendments are consistent with Goal 14 because (1) any future application for the RI plan designation would have to demonstrate that it is consistent with Goal 14 and (2)* petitioner's argument that the RI zone regulations allow urban uses was an impermissible, collateral attack on acknowledged land use regulations.

Aceti (slip op at *3) (internal citations omitted). DLCD has acknowledged the County's RI code provisions. LUBA's *Aceti* decision questions whether an analysis of the *Shaffer* factors [*Shaffer v. Jackson County*, 16 Or LUBA 871 (1988)] was necessary because the applicable DCC RI provisions have been repeatedly acknowledged by DLCD as consistent with Goal 14. Among other things, it stated:

> *"* * * the county amended the DCC RI zone regulations in 2002 and DLCD acknowledged those regulations are consistent with Goal 14. In 2002, the RI plan designation was limited to certain geographic areas and specific properties. However, the 2002 Ordinances did not limit uses allowed in the RI zone to preexisting industrial uses. Instead, the 2002 Ordinances provided that the purpose of the RI plan designation 'is to recognize existing industrial uses in rural*

areas of the county and to allow the appropriate development of additional industrial uses that are consistent with the rural character, facilities and services.'

" * * in 2018, the county amended the DCCP to make the RI plan designation available for properties other than those already zoned RI. We have no reason to believe that DLCD's acknowledgment of the 2002 Ordinances as consistent with Goal l4 was premised on the fact that the RI plan designation was at that time limited to specific geographic areas. However, we note that certain factors that indicate the urban nature of a use--such as proximity to a UGB or extension of public facilities--might be different on a new parcel as compared to those properties originally zoned RI prior to the 2018 DCCP amendments.*

** * **

"In adopting the 2018 DCCP amendments, the county took a belt-and-suspenders approach by requiring an applicant for a new RI plan designation to demonstrate compliance with Goal 14, even though the county had already concluded (and DLCD acknowledged) that the RI zone itself complies with Goal l4 by limiting uses to those that are rural in character. In [Central Oregon LandWatch v. Deschutes County, 79 Or LUBA 253, aff'd 298 Or App 375, 449 P3d 534 (2019)], we affirmed that belt-and suspenders approach in response to petitioner's Goal l4 challenge.

"In this case, the county agreed with intervenor that 'the policies of the DCCP, implemented by DCC Chapter 18.100, which is an acknowledged land use regulation, do not allow urban uses on RI designated and zoned land.' Petitioner does not assign error to that finding on appeal. That might have been the end of the Goal 14 inquiry. Nevertheless, perhaps because the county took a belt-and-suspenders approach to support the 2018 DCCP amendments by requiring an applicant to demonstrate compliance with Goal 14, the county further concluded that '[s]pecific findings with 'reasonable clarity' must be made to support a determination that the [DCC] and [DCCP] limit industrial uses to those that are rural in nature.' In what appears to us to be yet another belt-and-suspenders approach, the county applied the Shaffer test to explain why applying RI zoning to the subject property will not result in urban uses.

"Intervenor appears to have accepted and invited that second-step inquiry and neither assigns error to it on appeal nor argues that the county's Shaffer analysis is dicta or unnecessary, alternative findings in light of the county's collateral attack conclusion regarding the acknowledged DCC chapter 18.100. Accordingly, we assume for purposes of this decision, as the county did and the parties do, that the fact that the RI zone regulations have been acknowledged by DLCD to comply with Goal 14 is not independently sufficient to demonstrate the challenged post-acknowledgment plan amendment applying the RI plan designation and zone to the subject property also complies with Goal 14."

(slip op at *12-13). Applicant asserts that the final paragraph above, read in conjunction with the preceding paragraphs, conclusively demonstrates that LUBA's formal *Aceti* holding is constrained to what was likely a superfluous "belt and suspenders" *Shaffer* analysis at issue in those proceedings. On appeal of this LUBA decision to the Oregon Court of Appeals, the Court ruled:

> *"Aceti first argues that LUBA should not have applied the Shaffer test at all because the state agency overseeing land use planning, the Land Conservation and Development Commission, must have already determined that all the uses permitted in the County's RI zones are rural, not urban, when it acknowledged the County Plan. However, that argument was not raised before LUBA, and Aceti does not contend that LUBA committed plain error. Aceti also argues that LUBA misapplied the Shaffer test. However, Aceti has provided no basis under our standard of review that would permit us to displace LUBA's application of its own precedent."*

Central Oregon LandWatch v. Deschutes County, 315 Or App 673, 680, 501 P3d 1121 (2021).

Based on the foregoing analysis and citations, the Applicant argues at page 14 of its June 14, 2022 final argument that LUBA and the Court of Appeals were persuaded by the notion that DLCD's acknowledgement of the County's DCC and DCCP provisions governing the RI zone should have set the Goal 14 issue to rest, but for the *Aceti* applicant undertaking a "belt and suspenders" *Shaffer* analysis.

The Applicant posits that what is dispositive for the subject application are the BOCC's findings regarding the RI zone. The Applicant's primary argument on this issue is that the DCC and DCCP provisions governing the RI zone ensure that no urban uses are allowed on rural lands. Based on that assertion, the subject application specifically does not include the same superfluous "belt and suspenders" *Shaffer* analysis. Therefore, LUBA's formal *Aceti* ruling which is constrained to that "belt and suspenders" analysis is inapplicable to the present application.

b. BOCC's Formal Aceti Findings

The record includes a copy of the Hearings Officer's October 8, 2020 decision in the *Aceti* matter. The BOCC, in turn, adopted that decision as its own, with the Hearings Officer's decision incorporated as the BOCC's findings attached and incorporated into Ordinance No 2021 -002 adopted on January 27, 2021. Pages 48 and 49 of the Hearings Officer's decision includes six findings conclusively demonstrating that the law is settled when it comes to the County's RI zone not allowing urban uses on rural lands.

> *"First, LUBA has rejected the argument that DCC 18.100.010 allows urban uses as constituting an impermissible collateral attack on an acknowledged land use regulation. [Central Oregon LandWatch v. Deschutes County, 79 Or LUBA 253, aff'd.298 Or App 37s,449 P3d 534 (2019)].*
>
> *"Second, DCC Chapter 18.100 implements DCCP Policies 3.4.9 and 3.4.23, which together direct land use regulations for the Rural Commercial and Rural Industrial zones to 'allow uses less intense than those allowed in unincorporated communities as defined by Oregon Administrative Rule 660-022 or its successor,' to 'assure that urban uses are not permitted on rural industrial lands.' The BOCC adopted this finding in support of Ordinance 2018-126, which was appealed and sustained by LUBA and the Court of Appeals.*

"Third, as the BOCC found in adopting Ordinance 2018-126,which was appealed and sustained by LUBA and the Court of Appeals, the application of DCC Title l8 to any development proposed on Rural Commercial or Rural Industrial designated land will ensure that the development approved is consistent with the requirements set forth in DCCP Policies 3.4.12 and 3.4.27 do not adversely affect surrounding area agricultural or forest land, or the development policies limiting building size (DCCP Policies 3.4.14 and 3.4.28), sewers (DCCP Policies 3.4.18 and3.4.3l) and water (DCCP Policies 3.4.19 and 3.4.32) intended to limit the scope and intensity of development on rural land.

"Fourth, DCCP Policy 3.4.28 includes a direction that, for lands designated and zoned RI, new industrial uses shall be limited to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural area, for which there is no floor area per use limitation.

"Fifth, DCCP Policy 3.4.31 includes a direction that, for lands designated and zoned RI, residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.

"Sixth, DCCP Policy 3.4.32 includes a direction that, for lands designated and zoned RI, residential and industrial uses shall be served by on-site wells or public water systems."

The Hearings Officer finds that the above findings are not constrained to the facts and circumstances at issue in the *Aceti* application. These findings apply universally to any application submitted relying on the County's DCC and DCCP RI provisions. LUBA succinctly described the above six findings as follows:

" * * the county determined that even the most intensive industrial use that could be approved on the subject property under the RI regulations and use limitations would not constitute an urban use. The county found that the DCCP RI policies and implementing RI zone regulations in DCC 18.100.010 to 18.100.090 limit the scope and intensity of industrial development in the RI zone so that no urban industrial use can be allowed on the subject property. For example, as explained above, new industrial uses are limited to a maximum floor area of 7,500 square feet within a building and industrial uses must be served by on-site sewage disposal. DCCP Policy 3.4.28; DCCP Policy 3.4.31; DCC 18. 100.040(H)(1); DCC 18. 100.030(K)."*

Aceti (slip op at *11) (internal citations to the record omitted).

The Hearings Officer finds that the law is settled on the question of whether the RI zone permits urban uses on rural lands. It does not. A belt-and-suspenders Shaffer analysis is not required. The Hearings Officer adopts the findings of the BOCC set forth in Ordinance No. 2021-002 (January 27, 2021) by this reference as the Hearings Officer's findings concerning the "urban" or "rural" nature of uses in the RI zone.

As determined in *Aceti*, "*even the most intensive industrial use that could be approved on the property under the RI regulations and use limitations would not constitute an urban use. … [T]he [Deschutes County Comprehensive Plan] RI*

policies and implementing RI zone regulations in DCC 18.100.010 to 18.100.090 limit the scope and intensity of industrial development in the RI one so that no urban industrial use can be allowed on the subject property."

The Hearings Officer finds that the findings in the *Aceti* application, adopted by the BOCC, are binding interpretations of DCC and DCCP provisions governing the County's RI zone. The Hearings Officer declines to revisit these findings here, particularly given the well-established rule that local governments "may err in changing previously adopted interpretations" if doing so is a product of a design to act arbitrarily or inconsistently from case to case." *Foland v. Jackson County*, ___ Or LUBA ___, ____ (LUBA No 201 3-082, Jan 30, 2014) (slip op at *4) (citing *Alexanderson v. Clackamas County*, 126 Or App 549, 552, 869 P2d 873 (1994)).

The Hearings Officer enters the same findings set forth above with respect to this application and finds that the application complies with Goal 14; no Goal 14 exception is required.[7] The County's RI zone does not permit urban uses; this question has been asked and answered.

The Hearings Officer notes that the Applicant included a "Goal 14 exception" application in the alternative if the Board of County Commissioners determines that a Goal 14 exception is required. The Applicant's Goal 14 exception application is addressed in detail in the findings below.

5. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING DCC 22.20.015

COLW argued in its May 31, 2022 open record submittal that the Hearings Officer should determine pursuant to DCC 22.20.015 "if the subject property is in violation of applicable land use regulations" due to "a current farm use or farm equipment maintenance and storage occurring on the subject property." Presumably, COLW is arguing that the County cannot approve the subject applications due to an alleged code violation, per DCC 22.20.015(A). COLW did not provide any additional information or argument as to the relevance of the use of the subject property for such a use, which is allowed outright pursuant to DCC 18.16.020(A).

The Hearings Officer finds that DCC 22.20.015 is irrelevant because no violation has been established under DCC 22.20.015(C), and the record does not support a finding that the subject property is not in compliance with applicable land use regulations and/or conditions of approval of prior land use decisions or building permits.

The Hearings Officer finds that DCC 22.20.015 does not preclude the County's consideration of the applications or its approval thereof.

[7] The Applicant included an alternative request for a Goal 14 exception to address the possibility that the Board of County Commissioners will deviate from the aforementioned proclamation when addressing the ***Aceti*** matter on remand. But until and unless that occurs, the Applicant and the County are entitled to rely on the Board of County Commissioner's precedent.

B. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING APPLICABLE CRITERIA

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.120. Exceptions

Section 18.120.010. Nonconforming Uses.

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

FINDING: In the burden of proof submitted, there are several descriptions of the activities and uses that have taken place on the subject property related to the previously-verified nonconforming uses under files NCU-73-33 and SP-79-21. In the Staff Report, staff questioned whether nonconforming use verification should be made for purposes of the applications. The Applicant, at the hearing, conceded that the nonconforming uses on the subject property were potentially abandoned as a matter of law. The Applicant further agreed that the subject applications are not a replacement for a nonconforming use verification contemplated by DCC 18.120.010(C).

The Hearings Officer finds that, whether or not current uses of the property are lawful non-conforming uses, is not relevant to the determination of compliance with the applicable criteria for the proposal before the County. No applicable DCC provision, statute or rule requires a non-conforming use verification for purposes of review of the subject applications.

The Hearings Officer finds that the Applicant need not prove that the current uses of the property are lawful non-conforming uses to meet its burden of proof.

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 Planning Division's land use application forms for the proposal. The application is 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:

FINDING: The Applicant submits that "the proposed rezone best serves the interest of the community by allowing Applicant to put the Subject Property to its most viable use." The Hearings Officer finds that the four factors listed in DCC 18.136.020 are considered in order to determine whether the public interest is best served by rezoning the property. The Hearings Officer finds that a demonstration of these four factors by the Applicant constitutes proof that the public interest will be best served by rezoning the property.

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

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

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

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

2) *Consistency with the Plan's Introductory Statement and Goals. In previous decisions, the Hearings Officer found the introductory statements and goals are not approval criteria for proposed plan amendments and zone changes[8]. However, the Hearings Officer in the Landholdings decision found that depending on the language, some plan provisions may apply and found the following amended comprehensive plan goals and policies require consideration and that other provisions of the plan do not apply as stated below in the Landholdings decision:*

> *"Comprehensive plan statements, goals and policies typically are not intended to, and do not, constitute mandatory approval criteria for quasi-*

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

judicial/and use permit applications. Save Our Skyline v. City of Bend, 48 Or LUBA 192 (2004). There, LUBA held:

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

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

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

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

In Bothman v. City of Eugene, 51 Or LUBA 426 (2006), LUBA found it appropriate also to review the language of specific plan policies to

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

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

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

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

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

The Hearings Officer relies on the analysis set forth in prior Hearings Officers' decisions. This Decision and Recommendation reviews only the Comprehensive Plan Goals and policies that apply, addressed in detail in the Comprehensive Plan section below.

Based on the Applicant's demonstration of Comprehensive Plan conformance detailed in subsequent findings, the Hearings Officer finds that the zone change conforms to the Plan; and (2) that the change is consistent with the Plan's introduction statement and goals. Rezoning the Subject Property from EFU-TRB to RI will conform with the Comprehensive Plan and is consistent with the plan's introductory statement, as set out below.

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

FINDING: Section 3.4 of the Comprehensive Plan includes the following language for the rural industrial designation:

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

The subject property is not within any existing Rural Industrial exception areas and is located outside unincorporated communities and urban growth boundaries. The County may apply the RI plan designation to any other specific property (outside of an RI exception area, and outside unincorporated communities and urban growth boundaries) that satisfies the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, the Deschutes County Comprehensive Plan ("DCCP") and the Deschutes County Development Code. The Hearings Officer finds that the fact the subject property is outside of an RI exception area does not preclude consideration of the application.

There is no longer a "purpose" statement in DCC Chapter 18.100 regarding the intent of the RI zone.[9] Chapter 18.100 merely sets forth uses permitted outright, conditional uses, use limitations, dimensional standards, off-street parking and loading requirements, site design, "additional requirements" and solar setback requirements and includes a separate section concerning a limited use combining zone, Deschutes Junction. Without a "purpose and intent" statement for the RI zone, the Hearings Officer cannot make findings as to whether the application is consistent with the proposed zone classification's purpose and intent.

As stated in Section 3.4 of the Comprehensive Plan, RI plan designation and zoning brings specific properties into compliance with state rules "by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022." The Hearings Officer finds the applications are consistent with the general statement in the DCCP regarding RI plan

[9] Former DCC 18.100.010 stated that the purpose of the RI zone is "to encourage employment opportunities in rural areas and to promote the appropriate economic development of rural service centers which are rapidly becoming urbanized and soon to be full-service incorporated cities, while protecting the existing rural character of the area as well as preserving or enhancing the air, water and land resources of the area." As amended in 2021, there is no longer a purpose statement in this chapter concerning the RI zone.

designation and zoning, given that the RI zone does not allow urban uses. The Hearings Officer finds that the proposed change in designation and zone classification to RI will ensure that the property remains rural and that the uses allowed are less intensive than those allowed in unincorporated communities.

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: There are no plans to develop the property in its current state. The above criterion asks if the proposed zone change will *presently* serve public health, safety, and welfare. The Applicant provided the following response in the burden of proof statement:

> *Necessary public facilities and services are available to serve the Subject Property. The Subject Property is served by Deschutes County Services, the Deschutes Public Library District, the Central Oregon Irrigation District, and Bend Garbage & Recycling. The Subject Property is already equipped with adequate water and sewage systems, as explained above* [sic], *to support industrial uses.*
>
> *Deschutes Rural Fire Protection District #2 provides fire and ambulance services to the Subject Property, and the Deschutes County Sheriff provides policing services.*
>
> *It is efficient to provide necessary services to the property because the property is already served by these providers and the Subject Property is close to the City limits of both Bend and Redmond. It is also adjacent to a rural residential subdivision. This criterion is met.*

Neighboring properties contain residential and open space & conservation uses, which have water service from a quasi-municipal source or wells, on-site sewage disposal systems, electrical service, telephone services, etc. The Applicant presented evidence that the property itself is already served by public service providers.

In the Staff Report, staff questioned whether the Applicant met its burden of proof on this criterion given potential transportation safety issues concerning a privately constructed/maintained bridge over the canal which serves as access to the majority of the subject property. The Hearings Officer notes that the fire department did not comment on the applications nor otherwise express any concerns regarding adequacy of access to the property for emergency services.

Deschutes County has not requested or required that the bridge be dedicated to public use as a condition of approval of the applications, and the County has generally imposed a moratorium on adding any roads or bridges to the County's transportation system. At the hearing, the Applicant acknowledged that replacement of the existing bridge may be initiated by it directly, or that the County could require such replacement as a condition of approval for the future development of the property and will require further coordination with COID, as noted in COID's comments on these applications.

The Hearings Officer finds that the bridge is not a “public facility” to be evaluated under this criterion. Findings on compliance with TSP requirements are set forth in detail below, incorporated herein by this reference.

Many DCC 18.100.010 uses are outright uses, the future development of which will be subject to review of public services and facilities availability. Prior to development of the properties, the Applicant will be required to comply with the applicable requirements of the Deschutes County Code, including possible land use permitting, building permitting, and sewage disposal permitting processes. Through these development review processes, assurance of adequate public services and facilities will be verified.

The Hearings Officer finds this criterion is met.

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

FINDING: The Applicant’s burden of proof statement addresses potential impacts on surrounding land uses as related to each individual policy and goal item within the County’s Comprehensive Plan, addressed in detail in subsequent findings.

Impacts to surrounding land uses resulting from the requested rezone and re-designation must be determined to be consistent with the specific goals and policies in the DCCP. Specific comprehensive goals and policies pertaining to these surrounding land uses are discussed in the section of this decision addressing the DCCP, in the findings below.

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

Based on the Applicant’s demonstration of Comprehensive Plan conformance set forth in detail in subsequent findings and incorporated herein by this reference, the Hearings Officer finds the application complies with the above criterion.

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

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

Both mistake and change in circumstances are applicable to the Subject Property. As to mistake*, in 1978, the County Board of Commissioners, upon reviewing a*

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

Mistake

For the reasons set forth below, the Hearings Officer finds that a "mistake" was not made. The 1978 File No. Z-78-23 proceeding materials are included in the record and establish that the County made a considered, deliberate decision to rezone only Tax Lot 500 and to deny the application to rezone Tax Lot 301. The then-applicant did not appeal the County Board of Commissioner's decision to deny the application to rezone Tax Lot 301. The Hearings Officer finds that the unchallenged decision cannot now be considered to be the product of "mistake" under Oregon law. The Applicant cannot now collaterally attack this prior decision and claim it to be the product of "mistake."

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

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

The Hearings Officer makes a similar finding with respect to the subject applications. The EFU zoning of the subject properties was not a mistake at the time of its original designation. The properties' EFU designation and zoning were appropriate in light of the soil data available to the County in the late 1970s when the comprehensive plan and map were adopted. For the foregoing reasons, the Hearings Officer finds that "mistake" does not support the Applicant's requested zone change for the subject properties.

Change in Circumstances

In *Aceti* (247-20-000438-PA, 439-ZC), as well as in File Nos. 247-21-00616-PA/617-ZC and *Eden Properties*, File Nos. 247-21-001043-PA/1044-ZC, the Hearings Officer found that new soil data could be considered evidence of a change in circumstances between the time of the original zoning (when the County did not conduct an individualized soils analysis on a farm-by-farm basis), or – as here – the time of the last zoning of the subject property, which was December 7, 1992 when the property was assigned to the EFU-TRB subzone under Ord. 92-065 - and the time when an Order I Soil Survey was conducted by the property owner or applicant to support an application for rezone. The County has an

established practice when it comes to interpreting and applying DCC 18.136.020(D) such that the additional information provided by a site specific Order I Soil Study may constitute a "change in circumstances." The Hearings Officer rejects COLW's argument that Order I Soils Surveys are irrelevant for purposes of this criterion.

While original/most recent EFU zoning of a property may not be a "mistake," given that the County relied on available soils data for such zoning and designation decision-making, new, more in-depth information not available to the County regarding soils is – in and of itself – a change of circumstances pursuant to which the County may consider a requested rezone. What has changed is the information available to the County. The County cannot now ignore the Order I Soil Surveys introduced into the record and supporting testimony which show that the subject property is predominantly characterized by soil capability classes VII and VIII.

In its May 31, 2022 open record submittal, the Applicant stated at pages 2-3:

> *As understood by the Applicant, this issue stems directly from the April 26, 2022 comment letter submitted by Central Oregon LandWatch ("COLW"). There are several "changes in circumstances" that have occurred since the Properties were most recently rezoned on December 7, 1992, that justify the subject application. Those changes range from shifting development patterns in the area to substantial changes in the region's water resources. The most obvious change, however, is that the parties and the County have more accurate soil data at their disposable [sic] because the Applicant commissioned Class I Soil Surveys for the Properties. On that particular issue, it appears that COLW is perhaps trying to re-litigate a settled issue.*
>
> *The County last considered a Class I Soil Survey as a "change in circumstance" in a recent land use proceeding before the same Hearings Officer concerning property owned by Anthony Aceti (File Numbers 247-20-000438-PA / 429-ZC, "Aceti"). That decision succinctly concluded that "new soil data could be considered a change in circumstances," (Pg 22). The Board of County Commissioners, in turn, agreed with that conclusion, and adopted the Aceti Hearings Officer's decision as its own by including said decision as Exhibit F to Ordinance No,. 2021-002. Under the circumstances, it would be inappropriate for the Hearings Officer to now either interpret or apply DCC 18.136.020(D) in a manner inconsistent with Ordinance No. 2021-002.*
>
> *In addition to the Order 1 Soil Surveys already prepared by Gary A. Kitzrow and already included in the record as Exhibits 7, 8 and 9 attached to the Applicant's Burden of Proof, attached hereto is an additional correspondence provided by Kitzrow. See **Exhibit A**. Kitzrow's supplemental testimony includes the following explanation:*
>
> > *"Order I Soil Surveys are site-specific and have a high confidence interval and specificity. In other words, while Order III USDA soil surveys (published at 1:24,000) are a foundation for soil series/map unit concepts in the general area under review our current maps for this Order I Soil Survey are inventoried at a scale of 1:831 and 1:738 for this site-specific report In fact, in the original USDA map cited in our original report and*

> *henceforth sanctioned by the DLCD, it says right in the notation for the actual enclosed soil map, "Soil Map may not be valid at this scale" which it is not in this particular case. * * * Soil series concepts for the subject area in the USDA report are certainly valid and based upon solid Soil Survey principles, however, the actual soil map units, distribution and quantification of each unit is not always valid at this very detailed site-specific finite land base. This is a major distinct between Order I and Order III Soil Surveys. Order I Soil Surveys are represented by a scale reflective of the very small land base under consideration. Order III Soil Surveys are general in nature since their intended use is for agriculture, ranching and forest management and not for land use decisions and rezoning considerations.* ***Given these facts above, our current Order I Soil Survey is, in fact, a REPLACEMENT and NOT a supplement for the subject properties regarding soil map and Capability Class/Soil Efficacy considerations."***
>
> *Id. (emphasis in original).*

As set forth in the Preliminary Findings and Conclusions above, the Hearings Officer does not find it "suspect" that an Order I Soil Survey contradicts NRCS soil classifications performed at a higher, landscape level. Rather, the use of Order I soil surveys to provide more detailed information is specifically contemplated and allowed by ORS 215.211(1) and OAR 660-033-0030. COLW did not introduce any competing evidence of a different Order I soil survey that reached conclusions that diverge from those of the Applicant's soil scientist.

Contrary to COLW's arguments, an applicant does not need to establish that the soils themselves have changed on the subject property. DCC 18.136.020(D) does not require "a change in the physical characteristics since the property was last zoned." The Hearings Officer declines to add new language to the provisions of the Code under the guise of "interpreting" it. Nonetheless, the Hearings Officer finds that the Applicant's certified soil scientist noted significant portions of "disturbed" soils, cut and fill operations, topsoil removal and compaction, which could evidence a change in the physical characteristics of the soils on the property.

The Applicant also addressed the fact that the region has been experiencing a years-long drought, affecting the amount of available water resources. The Applicant noted at the public hearing that it does not make sense to use limited water resources to irrigate poor soils. It has been leasing back irrigation waters associated with the subject property each year since 2016. COLW's evidence acknowledges the region's changing water resources (Exs. E, F, G and I). The record further evidences that continued depletion of regional water resources is not only a "change in circumstances" but is impacting, and will continue to impact public interests (Exs. C through K). The Applicant suggests that "eliminating irrigation inefficiencies," as called for by COLW, should also include allowing property owners to rezone their property if it is shown not to be agricultural land. The Hearings Officer agrees and finds that diminishing water resources in the region independently evidences a "change in circumstances" under this criterion.

Finally, the Applicant's burden of proof statement at page 8 noted several of the reasons a requested rezone of the subject property was denied in 1978 including the County's desire to preserve "openness," and prevent commercialization along Highway 97. The

Applicant discussed the fact, not disputed by any commentator, that the Highway 97 corridor between Bend and Redmond has been significantly developed since 1978, along with a large influx of population to the area since that time.

The Hearings Officer finds that the Order I Soil Survey prepared for the subject property, the current drought in the area and strain on available water resources, and the increasing commercialization along Highway 97 and population influx into the area all evidence a "change in circumstances" since the County's last zoning of the property in 1992. Therefore, this criterion is met.

Deschutes County Comprehensive Plan

Chapter 2, Resource Management

Section 2.2 Agricultural Lands

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

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

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

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

> *"The Hearings Officer found in Aceti 1 this is an aspirational goal and not an approval criterion. LUBA determined that the subject property does not constitute Agricultural Lands under OAR 660033-0020(1); this finding is binding under the law of the case doctrine as discussed above.*
>
> *Substantial evidence in the record supports a finding that the subject property does not constitute agricultural land that must be preserved as set forth in the Applicant's site-specific soil study and as previously found by the Hearings Officer, the BOCC and LUBA. There is no evidence in the record that the proposal will adversely impact surrounding agricultural lands or the agricultural industry, particularly considering the surrounding road network, impacts of nearby heavy traffic and transportation, impacts due to the expansion of US 97 and surrounding commercial and industrial uses already in existence."*

As set forth in the Preliminary Findings and Conclusions, incorporated herein by this reference, the Hearings Officer finds substantial evidence in the record supports a finding that the subject property is not "agricultural land," and is not land that could be used in conjunction with adjacent property for agricultural uses.

There is no evidence that the requested plan amendment and rezone will contribute to loss of agricultural land in the surrounding vicinity. I find that the agricultural industry will not be negatively impacted by re-designation and rezoning of the subject property. Therefore, the Hearings Officer finds the applications are consistent with Section 2.2, Goal 1, "preserve and maintain agricultural lands and the agricultural industry."

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

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

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

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

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

> *In the Landholdings decision (and Powell/Ramsey decision), the Hearings Officer found that this policy is directed at the County rather than an individual Applicant. Applicant is requesting that the subject property be rezoned from EFU-TRB to RI and that the Plan designation be changed from Agriculture to Rural Industrial because the Subject Property is not Agricultural Land subject to Goal 3. The proposed rezone and Plan amendment is allowed by, and in compliance with, State Statute, Oregon Administrative Rules, and the Plan. The requested change is similar to that approved by Deschutes County in the Landholdings case and in PA-11-1/ZC-11-2, which related to land owned by the State of Oregon (DSL). In the DSL decision, Deschutes County determined that State law as interpreted in Wetherell v. Douglas County, 52 Or LUBA 677 (2006), allows this type of amendment. In* Wetherell, *LUBA explained:*
>
> > *As we explained in DLCD v. Klamath County, 16 Or LUBA 817, 820 (1988), there are two ways a county can justify a decision to allow nonresource use of land previously designated and zoned for farm use or forest uses. One is to take an exception to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). The other is to adopt findings which demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. When a county pursues the latter option, it must demonstrate that despite the prior resource plan and zoning designation, neither Goal 3 or Goal 4 applies to the property.*

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

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

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

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

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

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

The facts presented by the Applicant for the subject application are similar to those in the *Wetherell* decision and in the aforementioned Deschutes County plan amendment and zone change applications. For the reasons set forth above in the Preliminary Findings and Conclusions, incorporated herein by this reference, the Hearings Officer finds the subject property is not agricultural land and does not require an exception to Statewide Planning Goal 3 under state law. The applications are consistent with this Policy.

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

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

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

requesting a zone change. Further, the County's interpretation of Policy 2.2.3, discussed above, spells out when and how EFU parcels can be converted to other designations.

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

> *"The Hearings Officer found in Aceti 1 that this policy is directed at the County rather than at an individual Applicant. In said decision, the Hearings Officer cited a previous decision for file nos. PA-14-2 and ZC-14-2 that stated, 'In any event, in my decision in* NNP *(PA-13-1, ZC-13-1) I held any failure on the county's part to adopt comprehensive plan policies and code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation and zoning does not preclude the county from considering quasi-judicial plan amendment and zone change applications to remove EFU zoning.'*
>
> *Hearings Officer Green determined in file nos.* 247-14-000456-ZC, 457-PA *that 'any failure on the county's part to adopt comprehensive plan policies and code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation and zoning does not preclude the county from considering quasi-judicial plan amendment and zone change applications to remove EFU zoning.' Consistent with this ruling, I find that, until such time as the County establishes policy criteria and code on how EFU parcels can be converted to other designations, the current legal framework can be used and must be addressed."*

This plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations. The Hearings Officer finds that, without County-established policy criteria and code provisions that provide guidance on how EFU parcels can be converted to other designations, the current legal framework will be used and addressed. The Hearings Officer adheres to the County's previous determinations in plan amendment and zone change applications and finds the proposal is consistent with this policy.

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

Policy 2.2.13 Identify and retain accurately designated agricultural lands.

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

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

The Hearings Officer finds this plan policy requires the County to identify and retain agricultural lands that are accurately designated. Substantial evidence in the record supports a finding that the subject property is not agricultural land as detailed above in the Preliminary Findings and Conclusions, incorporated herein by this reference. Further

discussion on the soil analysis provided by the Applicant is detailed under the OAR Division 33 criteria below. The Hearings Officer finds the applications are consistent with this policy. The Applicant's compliance with Deschutes County Code provisions applicable to the subject applications is addressed in separate findings herein.

Section 2.5, Water Resources Policies

Goal 6, Coordinate land use and water policies.

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

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

The Hearings Officer found in Aceti 1 that this policy is directed at the County. In said decision, the Hearings Officer cited a previous decision of Hearings Officer Green for file nos. PA-14-2 and ZC14-2 that stated, "Nevertheless, in my decision in NNP I held it is not clear from this plan language what "water impacts" require review -- impacts to water supplies from use or consumption on the subject property, or Impacts to off-site water resources from development on the subject property." The Applicant has not proposed any particular land use or development, and any subsequent applications for development of the subject property would be reviewed under the County's land use regulations that include consideration of a variety of on- and off-site impacts. The Hearings Officer finds it is premature to review "water impacts" because the Applicant has not proposed any particular land use or development. Thus, there are no "significant land uses or developments" that must be reviewed or addressed in this decision. Any subsequent applications for development of the subject property will be reviewed under the County's land use regulations, which include consideration of a variety of on- and off-site impacts. Notwithstanding this statement, the Hearings Officer includes the following findings.

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

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

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

The Applicant is not proposing a specific development at this time. The Applicant will be required to address this criterion during development of the subject property, which will be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat). The Hearings Officer finds this policy does not apply to the subject applications.

Section 2.7, Open Spaces, Scenic Views and Sites

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

FINDING: These policies are fulfilled by the County's Goal 5 program. The County protects scenic views and sites along major rivers and roadways by imposing Landscape Management (LM) Combining Zones to adjacent properties. The subject properties adjoin a property to the south (Tax Lot 700, Assessor's Map 16-1223) which is currently zoned Open Space & Conservation (OS&C) and owned by Oregon Parks & Recreation Department. The subject properties are also located within the Landscape Management (LM) Combining Zone associated with the scenic corridor of Highway 97. The subject properties themselves are zoned EFU and are not included within the OS&C zoning district and the regulations applicable to the LM Combining Zone are applicable only when a specific development proposal is applied for within the Combining Zone.

The Hearings Officer finds that the subject properties do not constitute significant open spaces subject to the Goals and Policies of Deschutes County Comprehensive Plan Chapter 2, Section 2.7 and have not been inventoried in Chapter 5, Section 5.5 of the DCCP as land that is an "area of special concern," nor "land needed and desirable for open space and scenic resources. The Hearings Officer further finds that review of compliance with the LM Combining Zone is not required within the scope of the subject Plan Amendment/Zone Change applications.

For these reasons, the Hearings Officer finds that these provisions of the DCCP are inapplicable to consideration of the proposed zone change and plan amendment.

Chapter 3, Rural Growth

Section 3.4, Rural Economy

Rural Commercial and Rural Industrial

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

or Rural Industrial will be reviewed on a property-specific basis in accordance with state and local regulations.

…

Rural Industrial

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

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

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

Existing Rural Industrial Designated Exception Areas

The Redmond Military site consists of tax lot 1513000000116 and is 35.42 acres, bounded by the Redmond Urban Growth Boundary to the west and agricultural lands (EFU) surrounding the remainder of the property.

The Deschutes Junction site consists of the following tax lots: 161226C000107 (9.05 acres), 16126C000106 (4.33 acres), 161226C000102 (1.41 acres), 161226C000114 (2.50 acres), portions 161226C000300 (12.9 acres). 161226C000301 (8.93 acres), 161226A000203 (1.5 acres) and those portions of 161226C000111 located west of the Burlington Northern-Santa Fe railroad tracks (16.45 acres). Generally, the Deschutes Junction site is bordered on the west by Highway 97, on the east by the Burlington Northern Railroad, on the north by Nichols Market Road (except for a portion of 1612226A000111), and on the south by EFU-zoned property owned by the City of Bend.

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

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

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

Subject Property consistent with the uses allowed (outright or conditionally) in the RI zone. The Application thus complies with this Policy.

The Hearings Officer reviews specific goals and policies in DCCP Section 3.4, Rural Economy, in specific findings below.

Section 3.4, Rural Economy

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

FINDING: The Applicant's burden of proof does not provide a response to the above Goal, however, the Hearings Officer notes that Goals are long-term outcomes the County hopes to achieve by implementing the DCCP, whereas Policies set preferred direction and describe what must be done to achieve stated Goals. The Hearings Officer addresses with specific DCCP policies, consistency with which establishes consistency with this Goal.

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

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

FINDING: The Hearings Officer finds that Policy 3.4.1 in general, and subsection (a) specifically, provides direction to the County, rather than an applicant to "promote rural economic initiatives… that maintain the integrity of the rural character and natural environment" by, among other things, "review[ing] land use regulations to identify legal and appropriate rural economic development opportunities." The Hearings Officer finds this Policy 3.4.1 is not applicable to the Applicant.

Policy 3.4.23 To assure that urban uses are not permitted on rural industrial lands, land use regulations in the Rural Industrial zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 66022 or any successor.

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

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

The Hearings Officer finds this policy is directed at the County with respect to its adoption of land use regulations and uses authorized in the RI zone, and not to an individual applicant. The RI code is acknowledged, valid, and does not permit urban uses, as the Hearings Officer determined in the Preliminary Findings and Conclusions set forth in detail above, incorporated herein by this reference.

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

> *Ordinance 2002-126 adopted what is now DCCP Policy 3.4.23, which applies to lands designated and zoned RI and provides: 'To assure that urban uses are not permitted on rural industrial lands, land use regulations in the [RI] zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successor.' Ordinance 2002127 amended DCC chapter 18.100, the RI zone regulations. On January 23, 2003, DLCD issued Order No. 001456, acknowledging the 2002 Ordinances as consistent with Goal 14.*

Regardless of the inapplicability of this policy to the subject applications, the Hearings Officer notes that the Applicant is requesting a zone change, and has not submitted an application for any particular use at this time. Subsequently, the County will consider application(s) to approve permitted RI uses on the property, which future land use decision(s) must be consistent with RI land use regulations which ensure that any use allowed is less intensive than those allowed for unincorporated communities in OAR 660-22 or any successors.

To the extent this Policy is applicable to the Applicant, the Hearings Officer finds the applications are consistent therewith.

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

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

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

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

The Hearings Officer finds this policy is directed at the County with respect to its adoption of land use regulations for uses allowed in the RI zone. The policy is not applicable to an individual applicant. The Applicant's proposal does not change the land use regulations in the RI Zone. Substantial evidence in the record supports a finding that the zone change and plan amendment will not have an adverse effect on agricultural and forest uses in the surrounding area.

To the extent this policy is applicable to the Applicant, the Hearings Officer finds the applications are consistent therewith.

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

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

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

The Hearings Officer found in *Aceti 1* that this policy applies to quasi-judicial applications and is inapplicable to an applicant for a proposed rezone and plan amendment. This policy is codified in DCC Chapter 18.100 and is implemented through those provisions. The Applicant is not applying for any specific building permit, site plan or conditional use approval at this time, and the proposal does not change the land use regulations in the RI Zone.

This policy is implemented through the County's adoption and enforcement of DCC Chapter 18.100, which will apply at the time the Applicant submits any specific building permit, site plan or conditional use approval application. The proposal does not change the land use regulations in the RI Zone. Therefore, the policy is not applicable to the Applicant's proposal. To the extent this policy is applicable to the Applicant, the Hearings Officer finds the applications are consistent therewith.

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

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

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

The Hearings Officer finds that no specific use is proposed by the Applicant at this time. This policy is codified in DCC Chapter 18.100 and is implemented through those provisions. The Applicant is not applying for any specific building permit, site plan or conditional use approval at this time. At the time a future use is proposed, the County shall, consistent with this policy and DCC Chapter 18.100, ensure that such use is served by DEQ approved onsite sewage disposal systems.

The record shows that a 1982 finalized septic permit (permit no. 247-S5813) exists for Tax Lot 301 and a separate 1982 finalized septic permit (permit no. 247-FS222) exists for Tax Lot 500. Property records show Tax Lot 305 was previously a portion of Tax Lot 301 (based on a Warranty Deed dated August 19, 1981) and served by the same 1982 septic permit under permit no. 247-S5813.

The Hearings Officer finds the subject applications are consistent with this policy, to the extent applicable to the Applicant at this time.

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

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

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

The Hearings Officer finds that no specific use is proposed by the Applicant at this time. This policy is codified in DCC Chapter 18.100 and is implemented through those provisions. The Applicant is not applying for any specific building permit, site plan or conditional use approval at this time. At the time a future use is proposed, the County shall, consistent with this policy and DCC Chapter 18.100, ensure such use is served by on-site well(s) or public water systems.

The record includes a well agreement (Exhibit 5) for the subject property. While it is unclear whether potential future industrial uses of the property may rely on water from the well, future review of any land use and/or building permit will require proof that any proposed use or development will be served by on-site wells or public water systems.

The Hearings Officer finds the subject applications are consistent with this policy, to the extent applicable to the Applicant at this time.

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

FINDING: As set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds that Goal 3 does not apply to the subject property because it is not “agricultural land.” The record shows that Goal 4 does not apply to the subject property, as well. There are no identified forest uses in the vicinity and, juniper, the predominant tree species in the vicinity is not merchantable.

The Hearings Officer finds that the Applicant has demonstrated that Goals 3 and 4 do not apply to the subject property. Therefore, the subject property can be considered for the proposed Rural Industrial designation and Rural Industrial zoning as proposed. Compliance with applicable ORS, OAR, and Comprehensive Plan provisions are addressed herein.

The Hearings Officer finds the applications are consistent with this Policy.

Section 3.5. Natural Hazards

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

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

Section 3.7, Transportation

Appendix C – Transportation System Plan
ARTERIAL AND COLLECTOR ROAD PLAN
…
Goal 4. Establish a transportation system, supportive of a geographically distributed and diversified economic base, while also providing a safe, efficient network for residential mobility and tourism.

Policy 4.1 Deschutes County shall:

a. Consider the road network to be the most important and valuable component of the transportation system; and

b. Consider the preservation and maintenance and repair of the County road network to be vital to the continued and future utility of the County's transportation system.

…

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

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

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

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

The Hearings Officer finds these policies apply to the County, which advise it to consider the roadway function, classification and capacity as criteria for plan amendments and zone changes. These policies also advise the County to consider the existing road network and potential land use impacts when reviewing for compliance with plan amendments and zone changes. The County complies with this direction by determining compliance with the Transportation Planning Rule (TPR), also known as OAR 660-012, as set forth below in subsequent findings.

The Hearings Officer finds the subject applications are consistent with these policies, to the extent applicable to the Applicant.

OREGON ADMINISTRATIVE RULES CHAPTER 660, LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

DIVISION 6, GOAL 4 – FOREST LANDS

OAR 660-006-0005, Definitions

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

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

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

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

The Hearings Officer finds the subject property does not qualify as forest land. These regulations do not apply to the applications.

DIVISION 33 – AGRICULTURAL LAND

OAR 660-033-0010, Purpose

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

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

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

Division 33 includes a definition of “Agricultural Land,” which is repeated in OAR 660-033-0020(1). The Hearings Officer’s Preliminary Findings and Conclusions set forth above, and incorporated herein by this reference, which determine that the subject property does not constitute “agricultural land.”

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[10];

FINDING: The Applicant does not request an exception to Goal 3 on the premise that the subject property is not defined as “Agricultural Land.” In support, the Applicant offered the following response in the burden of proof statement:

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

As set forth in detail in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer 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).

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

FINDING: The Applicant does not request an exception to Goal 3 on the premise that the subject property is not defined as “Agricultural Land.” In support, the Applicant offered the following response, in relevant part, in the burden of proof statement:

[10] 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.*

This part of the definition of "Agricultural Land" requires the County to consider whether the Class 7 and 8 soils found on the subject property are suitable for farm use despite their Class 7 and 8 classification. The Oregon Supreme Court has determined that the term "farm use" as used in this rule and Goal 3 means the current employment of land for the primary purpose of obtaining a profit in money through specific farming-related endeavors. The costs of engaging in farm use are relevant to determining whether farm activities are profitable and this is a factor in determining whether land is agricultural land. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007).

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

The Hearings Officer reviewed each of the seven considerations listed in OAR 660-033-0020(1)(a)(B) in the Preliminary Findings and Conclusions above, incorporated herein by this reference. Not only are there poor soils on the subject property, but none of the considerations in this provision would "improve" the situation such that the property with "land in other soil classes," which do not qualify as agricultural land under OAR 660-033-0020(1)(a)(A) could nonetheless be suitable for "farm use." None of the seven considerations show that the property could be employed for the primary purpose of making a profit in money. The poor soils found on the subject property, combined with these additional considerations, render the property not suitable for farm use that can be expected to be profitable.

The Hearings Officer incorporates herein by this reference the Preliminary Findings and Conclusions above and finds that the subject property does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(B).

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

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

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

The Hearings Officer incorporates herein by this reference the Preliminary Findings and Conclusions above and finds that the subject property does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(C).

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

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

> *The Subject Property is not and has not been a part of a farm unit that includes other lands not currently owned by the Applicant.*
>
> *The farm unit rule is written to preserve large farming operations in a block. It does this by preventing property owners from dividing farmland into smaller properties that, alone, do not meet the definition of "agricultural land." The Subject Property is not formerly part of a larger area of land that is or was used for farming operations and was then divided to isolate poor soils so that land could be removed from EFU zoning.*
>
> *The Subject Property is not in farm use and has not been in farm use of any kind for decades. It contains soils that make the land generally unsuitable for farm use as the term is defined by State law. It is not a part of a farm unit with other land. The Subject Property is predominantly Class 7 and 8 soils and would not be considered a farm unit itself nor part of a larger farm unit based on the poor soils and the fact that none of the adjacent property is farmed.*

The Hearings Officer incorporates by this reference the Preliminary Findings and Conclusions set forth above and finds that the subject property does not constitute "Agricultural Lands," as defined in OAR 660-033-0020(1)(b).

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

FINDING: The subject property is not within an acknowledged urban growth boundary or land within acknowledged exception areas for Goals 3 or 4. The Hearings Officer finds this criterion is inapplicable.

> OAR 660-033-0030, Identifying Agricultural Land
>
> ***(1) All land defined as "agricultural land" in OAR 660-033-0020(1) shall be inventoried as agricultural land.***
>
> ***(2) When a jurisdiction determines the predominant soil capability classification of a lot or parcel it need only look to the land within the lot or parcel being inventoried. However, whether land is "suitable for farm use" requires an inquiry into factors beyond the mere identification of scientific soil classifications. The factors are listed in the definition of agricultural land set forth at OAR 660-033-0020(1)(a)(B). This inquiry requires the consideration of conditions existing outside the lot or parcel being inventoried. Even if a lot or parcel is not predominantly Class I-IV soils or suitable for farm use, Goal 3 nonetheless defines as agricultural "lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands". A determination that a lot or parcel is not agricultural land requires findings supported by substantial evidence that addresses each of the factors set forth in 660-033-0020(1).***

FINDING: The Applicant provided responses to the factors in OAR 660-033-0020(1) above. The soil studies produced by Mr. Kitzrow focused solely on the land within the subject parcels and the Applicant provided responses indicating the subject parcels are not necessary to permit farm practices undertaken on adjacent and nearby lands.

The Applicant established that the subject property is not necessary to permit farm practices undertaken on adjacent and nearby lands. For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference. the Hearings Officer finds the subject property is not "Agricultural Lands," as defined in OAR 660-033-0030(1).

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

FINDING: The Applicant argues that the subject property is not suitable for farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands, regardless of ownership of the subject property and ownership of nearby or adjacent land. For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the subject property is not "Agricultural lands," and thus that no exception to Goal 3 is required.

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

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

> *Attached as* ***Exhibits 7-9*** *are a* [sic] *more detailed Agricultural Soils Capability Assessments conducted by Gary Kitzrow, a professional soil classifier, certified professional soil scientist, and one of only five professionals certified by the state to make such assessment. The soils capability assessment he conducted on the Subject Property is related to the NRCS land capability classification system. It provides and documents more detailed data on soil classification and soil ratings than is contained in the NRCS soil maps and soil survey at the published level of detail. The Order 1 survey performed on the Subject Property included 22 descriptions for the approximately 19-acre site (6 for Tax Lot 305; 12 for Tax Lot*

301; and 4 for Tax Lot 500). The soil samples taken were assessed for structure, consistency, pores, drainage class, root distribution, effective/absolute rooting depths and related morphology testing. Mr. Kitzrow concluded that the Subject Property is made up of predominantly Class 7 and 8 soils that are generally unsuitable for farming.

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

According to the NRCS Web Soil Survey tool, the subject properties contain the following portions of 31A, 38B, and 58C soils:

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

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

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

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

- ***Tax Lot 301*****:** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. This study area and legal lot of record is comprised of 8.00 acres or 53.1% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

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

generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

- ***Tax Lot 500:*** A large (preponderance) of this lot is made up of along infrastructure/Impact Areas along with the shallow, generally unsuited Class 7, Gosney (irrigated and nonirrigated). Conversely, Deschutes soils are somewhat deeper, have defined topsoils and a little less sand than the competing Gosney soil units and less rock. This study area and legal lot of record is comprised of 0.93 Acres or 87.7% of generally unsuited soils Capability Class 7 and 8 by Deschutes County and DLCD definitions.

As set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the submitted soil studies prepared by Mr. Kitzrow of Growing Soils Environmental Associates provide more detailed soils information than contained in the NRCS Web Soil Survey, which provides general soils data for large units of land. The Hearings Officer finds the soil studies provide detailed and accurate information about individual parcels based on numerous soil samples taken from the subject property. The soil study is related to the NRCS Land Capability Classification (LCC) system that classifies soils class I through VIII. An LCC rating is assigned to each soil type based on rules provided by the NRCS.

Correspondence from the Department of Land Conservation and Development (DLCD) confirms that Mr. Kitzrow's prepared soil studies are complete and consistent with the reporting requirements for agricultural soils capability as dictated by DLCD. Mr. Kitzrow's qualifications as a certified Soil Scientist and Soil Classifier are detailed in the submitted application materials. Based on Mr. Kitzrow's qualifications as a certified Soil Scientist and Soil Classifier, and as set forth in detail in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the submitted soil study is definitive and accurate in terms of site-specific soil information for the subject property. These criteria are met.

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

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

FINDING: The Applicant is seeking approval of a non-resource plan designation on the basis that the subject properties are not defined as agricultural land. Therefore, the Hearings Officer finds that this section and OAR 660-033-0045 applies to these applications.

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

FINDING: The Applicant submitted soil studies by Mr. Kitzrow of Growing Soils Environmental Associates dated January 12, 2021. The soils studies were submitted following the ORS 215.211 effective date. The application materials include acknowledgements from Hilary Foote, Farm/Forest Specialist with the DLCD (dated April 16, 2021) that the soil studies are complete and consistent with DLCD's reporting requirements. The Hearings Officer finds this criterion is met based on the submitted soil studies 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 provided DLCD certified soil studies as well as NRCS soil data. The Hearings Officer finds this criterion is met.

DIVISION 12, TRANSPORTATION PLANNING

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

(1) If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would:

(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);

(b) Change standards implementing a functional classification system; or

(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.

(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;

(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the

performance standards identified in the TSP or comprehensive plan; or

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

FINDING: As referenced in the agency comments section in the Basic Findings above, the Senior Transportation Planner for Deschutes County requested revised details in addition to the initial traffic study materials provided. The Applicant submitted an updated report from Ferguson & Associates, Inc. on April 6, 2022, dated March 18, 2022, to address identified concerns and the County's Senior Transportation Planner issued a second comment in response.

The Applicant's burden of proof provided the following statement:

> *The Transportation Planning Rule is applicable because Applicant is requesting a change to an acknowledged comprehensive plan and land use regulation (the zoning map). Attached as **Exhibit 14** is a Site Traffic Report and TPR Assessment prepared by traffic engineer Scott Ferguson, P.E. of Ferguson & Associates. Mr. Ferguson made the following findings with respect to the proposed Plan map amendment and zone change and concluded that a significant impact to the transportation facility would occur:*
>
> - *The only available access to the Subject Property is via Highway 97 through a shared easement driveway. Highway 97 is a four-lane facility in the vicinity of the driveway, with 20-foot shoulders on both sides. Left turns are legally prohibited, as there are two sets of double striped painted lanes marking a striped median. As such, access is limited to right-in, right-out movements from the driveway. There are no proposed changes to access.*
> - *Visibility exiting the site is good and there are no apparent sight-distance issues.*
> - *Rezoning the Subject Property from EFU-TRB to RI would allow outright e.g.:*
>   - *Primary processing, packaging, treatment, bulk storage and distribution of the following products:*
>   - *Agricultural products, including foodstuffs, animal and fish products, and animal feeds,*
>   - *Ornamental horticultural products and nurseries,*
>   - *Softwood and hardwood products excluding pulp and paper manufacturing;* o *Freight Depot, including the loading, unloading, storage and distribution of goods and materials by railcar or truck;*
>   - *Contractor's or building materials business and other construction-related business including plumbing, electrical, roof, siding, etc., provided such use is wholly enclosed within a building or no outside storage is permitted unless enclosed by sight-obscuring fencing;*

- *Wholesale distribution outlet including warehousing, but excluding open outside storage;*
- *Kennel or a veterinary clinic.*

- *The RI zone requires that new industrial uses be limited in size to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural areas, for which there is no floor area per use limitation.*
- *For purposes of the traffic analysis, it was assumed that a large (100,000 square foot) manufacturing building such as a food processing plant or some type of lumber-related manufacturing plant could be built on the Subject Property. Such a distribution center would occupy about 12 percent of available land. In addition, there could be a mix of other uses, not exceeding 7,500 square feet per use, which could include, e.g., a small building supply outlet, a veterinary clinic, a small distribution center, and a plant nursery For purposes of the analysis, one of each of those uses was assumed.*
- *While it may be possible to pack more onto the site, the assumed uses would generate more traffic than the site could handle with existing access configurations.*
- *Net change in trip generation would be an increase of 166 p.m. peak hour trips and 1,299 daily trips.*
- *The addition of several hundred vehicles per hour at the driveway on to Highway 97 would result in performance characteristics that would not meet the goals of the Oregon Highway Plan.*
- *This level of traffic would not be appropriate with the existing limited access and the proposed zone change would significantly impact the transportation if no further action were taken. But there are further actions which can be taken to meet the requirements of the TSP under these conditions.*

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

TABLE 7 – TRIP CAP CALCULATIONS

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

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

Applicant's current plan for the Subject Property, if this Application is approved, is to develop a mini-storage facility on Tax Lot 301. Mr. Ferguson further concluded that "[s]ince mini-storage units are relatively low generators, the trip cap would be met with any reasonably sized mini-storage facility." With the establishment of this proposed trip cap, the proposed Plan map amendment and zone change could meet the requirements of the TPR. Trip generation under this cap would be limited to no more than 32 p.m. peak hour trips and no more than 279 daily trips. Mr. Ferguson concluded that with the planned development of mini-storage units, the level of trip generation would be relatively low and would fall below this threshold[11].

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

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

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

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

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

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

County Senior Transportation Planner, Peter Russell responded to the revised traffic study and expressed additional concerns. The Applicant then responded with additional traffic comments on April 8, 2022, to which the County Senior Transportation Planner responded. The Applicant responded with additional traffic comments on April 13, 2022.

Thereafter, the Applicant worked with the County Senior Transportation Planner, County planning staff and the Oregon Department of Transportation ("ODOT") to develop a "trip cap" condition of approval on which the parties all agreed. The record indicates that both the County and ODOT concur with the proposed condition of approval which states:

The maximum development on the three subject parcels shall be limited to produce no more than 32 trips in the PM peak hour and/or 279 daily trips as determined by the Institute of Engineers Trip Generation Manual, 11th Edition. The County may allow development intensity beyond these maximum number of vehicle trips only if the applicant submits to the County a traffic impact analysis that demonstrates that the proposed intensification of use would be consistent with the Transportation Planning Rule and the Deschutes County Code.

The record also shows that the Applicant discussed with County staff the fact that LUBA has upheld trip caps as an effective tool utilized by other Oregon local governments. The form of the trip cap proposed by the Applicant in the email chain was specifically modeled on a similar trip cap COA utilized by the City of Eugene and upheld by LUBA. *Willamette Oaks v. City of Eugene*, ___ Or LUBA ___ (LUBA NO 2010-062; March 8, 2011) (slip op at *4-5; n.5). Peter Russell responded the same date that the proposed COA "works on my end."

COLW claims that the proposal will "drastically increase transportation trips" and argues that ODOT found a trip cap is not contemplated in the DCC for TPR compliance and that the County found it does not have the ability to monitor and enforce a trip cap. Therefore COLW argues that the application has not satisfied Goal 12 and the TPR The Hearings Officer finds that COLW's argument is based on prior communications from ODOT and the County Senior Transportation Planner and is refuted by the more recent record additions, which include, among other things, an email chain between ODOT, County staff and the Applicant. ODOT did not find that the DCC does not allow a trip cap. Rather, ODOT concurred with the proposed condition of approval stating, "looks good to me." As interpreted by the County's Senior Transportation Planner, Peter Russell, ODOT's

comment regarding the possibility of a DCC text amendment to better address the idea of a trip cap was meant to apply prospectively to future applicants; a retroactive text amendment would violate the "goal post rule" at ORS 215.427(3)(a).

Not only did COLW misread comments provided by ODOT and County staff, it presented no evidence or expert testimony to contradict the evidence included in the record by the Applicant regarding the TPR.

The Hearings Officer finds that the Applicant has studied all facilities identified by the County as potentially impacted by the proposed zone change through the traffic study and revised traffic study, and in its comments from Ferguson & Associates Inc. to the County Senior Transportation Planner. The Hearings Officer finds that the record supports a determination that, ***as conditioned with the proposed condition of approval set forth above***, the proposed zone change, will have no significant adverse effect on the identified function, capacity, and performance standards of the transportation facilities in the impact area, such that it is in compliance with OAR 660-012-0060.

> ***(2) If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below, unless the amendment meets the balancing test in subsection (2)(e) of this section or qualifies for partial mitigation in section (11) of this rule. A local government using subsection (2)(e), section (3), section (10) or section (11) to approve an amendment recognizes that additional motor vehicle traffic congestion may result and that other facility providers would not be expected to provide additional capacity for motor vehicles in response to this congestion.***
>
> ***(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.***
>
> ***(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.***
>
> ***(c) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.***
>
> ***(d) Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures or minor transportation improvements. Local governments shall, as part of the amendment, specify when measures or improvements provided pursuant to this subsection will be provided.***

(e) Providing improvements that would benefit modes other than the significantly affected mode, improvements to facilities other than the significantly affected facility, or improvements at other locations, if:

(A) The provider of the significantly affected facility provides a written statement that the system-wide benefits are sufficient to balance the significant effect, even though the improvements would not result in consistency for all performance standards;

(B) The providers of facilities being improved at other locations provide written statements of approval; and

(C) The local jurisdictions where facilities are being improved provide written statements of approval.

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

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

The Hearings Officer finds that, with imposition of a condition of approval requiring assessment of transportation system development charges (SDCs) and other non-infrastructure mitigations as development occurs on the site on future proposed development, and with imposition of the agreed-upon condition of approval imposing a transportation cap and use limitation on the Subject Property, significant adverse effects on the identified function, capacity and performance standards of the transportation facilities in the impact area of allowed land uses will be mitigated. These criteria are met.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

FINDING: The Applicant's burden of proof addresses each Goal as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

***Goal 14, Urbanization**. This Application involves the potential urbanization of rural land. While the RI zone is an acknowledged rural industrial zoning district that limits the intensity of the uses allowed in the zone, Applicant is requesting a change from EFU to RI on land that is relatively undeveloped. The compliance of the proposed zoning with Goal 14 is acknowledged by the Plan, which recognizes that the "county may apply the Rural Industrial plan designation to specific property within existing Rural Industrial exception areas, or to any other specific property that satisfies the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, this Comprehensive Plan and the Deschutes County Development Code, and that is located outside unincorporated communities and urban growth boundaries. The Rural Industrial plan designation and zoning brings these areas and specific properties into compliance with state rules by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022." Further, LUBA has held that Goal 14, ORS 197.713, ORS 197.714, and OAR 660-0140040(4) do not prohibit or limit rural industrial use of rural land." Central Oregon Landwatch v. Deschutes County, LUBA No. 2021-028, slip op.at p.21 (OR LUBA 2021). Regardless, Applicant has provided analysis for a Goal 14 exception below showing that it meets the requirements for an "irrevocably committed" exception.*

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

The Hearings Officer's findings on each Statewide Planning Goal follow.

Goal 1: Citizen Involvement

To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.

FINDING: The Planning Division provided notice of the proposed plan amendment and zone change to the public through individual mailed notices to nearby property owners, publication of notice in the Bend "Bulletin" newspaper, and posting of the subject property with a notice of proposed land use action sign. A public hearing was held before the Hearings Officer on the proposal on April 26, 2022, and a public hearing on the proposal will be held by the Deschutes County Board of Commissioners, per DCC 22.28.030(C). The Hearings Officer finds the proposal is consistent with Goal 1.

Goal 2: Land Use Planning

To establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.

FINDING: Goals, policies and processes related to plan amendment and zone change applications are included in the County's comprehensive plan and land use regulations in Titles 18 and 22 of the Deschutes County Code and have been applied to the review of these applications. The Hearings Officer finds the proposal is consistent with Goal 2.

Goal 3: Agricultural Lands

To preserve and maintain agricultural lands.

FINDING: For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the subject property does not constitute "agricultural land" under any of the standards for determining "agricultural land" set forth in OAR 660-033-0020(1). The Hearings Officer further finds that substantial evidence supports a finding the proposal will not adversely impact agricultural land. Therefore, I find the Applicant's proposal is consistent with Goal 3; no exception to Goal 3 is required.

Goal 4: Forest Lands

To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.

FINDING: The Hearings Officer finds the subject property does not include any lands that are zoned for, or that support, forest uses. Therefore, the Hearings Officer finds the proposal does not implicate Goal 4. Goal 4 is inapplicable.

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

To protect natural resources and conserve scenic and historic areas and open spaces.

FINDING: The record indicates there are no identified Goal 5 resources on the subject property (cultural, historic, wildlife or plant). There are no scenic or historic areas and no open spaces on the property. There is no wetland, river, stream, creek or pond on the property, and no riparian zone. The subject properties do not constitute significant open spaces subject to the Goals and Policies of Deschutes County Comprehensive Plan Chapter 2, Section 2.7 and have not been inventoried in Chapter 5, Section 5.5 of the DCCP as land that is an "area of special concern," nor "land needed and desirable for open space and scenic resources. The Hearings Officer further finds that review of

compliance with the LM Combining Zone is not required within the scope of the subject Plan Amendment/Zone Change applications.

COLW argues that the County must apply Goal 5 in consideration of the proposed PAPA because it would affect a Goal 5 resource. However, OAR 660-023-0250(3) states that, "[l]ocal governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if":

> *(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;*
>
> *(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or*
>
> *(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.*

The Hearings Officer finds that amending the plan designation and zoning of the subject property from EFU to RI does not allow uses that could be conflicting uses with any "significant Goal 5 resource site." This is so given consideration of OAR 660-023-0040(1)(d), which directs the County to "develop a program to achieve Goal 5." The County has done so by adoption of the LM overlay zone. The proposed plan amendment and zone change does not remove the subject property from the LM overlay zone and thus does not change or diminish the protection afforded to Goal 5 resources on the property, specifically the LM designation of lands within ¼ mile from the centerline of Highway 97.

Therefore, the Hearings Officer finds the proposal is consistent with Goal 5.

> Goal 6: Air, Water and Land Resources Quality
>
> ***To maintain and improve the quality of the air, water and land resources of the state.***

FINDING: The Hearings Officer finds the Applicant's proposal to rezone the property from EFU-TRB to RI, in and of itself, will not impact the quality of the air, water, and land resources of the County. Any future RI Zone development of the property will be subject to local, state, and federal regulations protecting these resources.

COLW observes that the RI zone allows lumber manufacturing, wood processing, all uses that could result in 'waste and process discharges.' It argues that, without specifying which industrial uses may be developed on the property, the county could not find compliance with Goal 6.

The Hearings Officer finds that DCC 18.100.030(J) prohibits the county from approving any use in the RI zone "requiring contaminant discharge permits …prior to review by the applicable state or federal permit-reviewing authority, nor shall such uses be permitted

adjacent to or across a street from a residential use or lot." This provision also generally prohibits the county from approving any use in the RI zone, "which has been declared a nuisance by state statute, County ordinance or a court of competent jurisdiction."

DCC 18.100.030(J) supports a reasonable expectation that uses allowed on the subject property under RI zoning will either comply with state and federal environmental quality standards or be denied county approval. Such a determination does not require a specific development proposal. The Hearings Officer finds that such a determination does not impermissibly defer a finding of Goal 6 compliance.

The Hearings Officer finds the proposal is consistent with Goal 6.

Goal 7: Areas Subject to Natural Hazards

To protect people and property from natural hazards.

FINDING: There are no mapped flood or volcano hazards on the subject property. Additional hazards include wildfire, earthquake, and winter storm risks, which are identified in the County's Comprehensive Plan. The subject property is not subject to unusual natural hazards nor is there any evidence in the record that the proposal would exacerbate the risk to people, property, infrastructure, the economy, and/or the environment from these hazards on-site or on surrounding lands. Therefore, the Hearings Officer finds the proposal does not implicate Goal 7.

Goal 8: Recreational Needs

To satisfy the recreational needs of the citizens of the state and visitors and, here appropriate, to provide for the siting of necessary recreational facilities including destination resorts.

FINDING: The proposed plan amendment and zone change do not affect recreational needs, and no specific development of the property is proposed. Therefore, the Hearings Officer finds the proposal does not implicate Goal 8.

Goal 9: Economic Development

To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens.

FINDING: This goal is to provide adequate opportunities throughout the state for a variety of economic activities. The Subject Property is not designated as Goal 9 economic development land. The Hearings Officer finds the proposed RI zoning will have a more positive economic impact than EFU zoning on land that cannot viably be farmed, given that the currently undeveloped property will be put to a more productive use.
The Hearings Officer finds the proposal is consistent with Goal 9.

Goal 10: Housing

To provide for the housing needs of citizens of the state.

FINDING: The proposed plan amendment and zone change will not affect existing or needed housing. Therefore, the Hearings Officer finds the proposal does not implicate Goal 10.

Goal 11: Public Facilities and Services

To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.

FINDING: This goal requires planning for public services, including public services in rural areas, and generally has been held to prohibit extension of urban services such as sewer and water to rural lands outside urban growth boundaries. The Applicant's proposal will not result in the extension of urban services to rural areas. As discussed in the findings above, public facilities and services necessary for development of the subject property in accordance with the RI Zone are available and will be adequate.

With respect to water, COLW argues that the Applicant has not addressed groundwater supply and water rights for the subject property and alleges that industrial use of the subject property will threaten groundwater supplies in the area. COLW argues that the Application cannot comply with Goals 6 and 11 because there is no water service to the subject property.

The Hearings Officer finds that COLW's argument is based on an unsubstantiated premise that contaminated industrial waste may only be processed in a public wastewater facility. COLW does not cite anything in the record or applicable law that compels a conclusion that potential industrial wastewater discharges may only be treated in a public wastewater facility. Accordingly, the Hearings Officer finds this argument regarding wastewater provides no basis for denial of the applications.

The Hearings Officer finds that substantial evidence in the record the subject property has access to water and that that finding is supported by substantial evidence in the record. The Hearings Officer finds the proposal is consistent with Goal 11.

Goal 12: Transportation

To provide and encourage a safe, convenient and economic transportation system.

FINDING: As discussed in the findings above concerning compliance with the TPR, incorporated by reference herein, the Applicant asserts that this proposal will not significantly affect a transportation facility, as conditioned pursuant to the proposed condition of approval approved by the County Transportation Planner and ODOT. As set forth in the findings above, the proposal complies with the TPR. Accordingly, the Hearings Officer finds the proposal is consistent with Goal 12.

Goal 13: Energy Conservation

To conserve energy.

FINDING: The Applicant's proposed plan amendment and zone change, in and of themselves, will have no effect on energy use or conservation since no specific development has been proposed in conjunction with the subject applications. The Hearings Officer finds that the location of the subject property and rezoning it to RI with proposed use limitations in place may encourage conservation of energy by providing for a conveniently located service (mini-storage) for individuals and businesses located or traveling along Highway 97. The Hearings Officer finds the proposal is consistent with Goal 13.

Goal 14: Urbanization

> ***To provide for orderly and efficient transition from rural to urban use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities.***

FINDING: Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside [UGBs], to ensure efficient use of land, and to provide for livable communities." Goal 14 requires cities and counties to cooperatively establish as part of their comprehensive plan UGBs "to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land." Goal 14 generally prohibits urban uses of rural land.[12]

The Hearings Officer's detailed Preliminary Findings and Conclusions concerning Goal 14 above are incorporated herein by this reference. The Hearings Officer reiterates her findings and conclusions that uses in the RI zone are not "urban uses of rural land," by definition, as restricted by DCC 18.100. Due to the appropriate county rural industrial development standards, (18.100.040. Dimensional Standards) any rural industrial development must meet no more than a 70% lot coverage, a 30-foot maximum height limit, generous setbacks and distances between structures, consist of 7,500 square foot buildings or smaller, and meet the Landscape Management Zone setbacks. All of those regulations will result in appropriate and compatible low density and not an "urban level" density.

No Goal 14 exception is required. The Applicant's alternative Goal 14 Exception request is analyzed in the findings below.

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

Goals 15 through 19

FINDING: The Hearings Officer finds that these goals, which address river, ocean, and estuarine resources, are not applicable because the subject property is not located in or adjacent to any such areas or resources.

The Hearings Officer finds compliance with the applicable Statewide Planning Goals has been effectively demonstrated for all listed Goals.

DIVISION 4, INTERPRETATION OF GOAL 2 EXCEPTION PROCESS

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

> *As explained above, the requested zone change and Plan map amendment from EFU / Agricultural to RI should not require a Goal exception because the County's RI zoning complies with Goal l4 by ensuring areas with this zoning remain rural by limiting the uses allowed. Further, Goal 14, ORS 197.713, ORS 197.714, and OAR 660-014-0040(4) do not prohibit or limit rural industrial use of rural land." Central Oregon Landwatch v. Deschutes County, LUBA No. 2021-028, slip op. at p.21 (OR LUBA 2021). To the extent the County disagrees that a Goal exception is not required, the Subject Property is irrevocably committed to urban uses, and Applicant provides a Goal exception analysis below.*

The Deschutes County Board of County Commissioners entered the following findings associated with File No. 247-16-000593-A, on remand from LUBA of File Nos. 247-14-000456-ZC, 457-PA:

> *Given the above findings that the Applicant did not intend to request and the County Board did not intend to authorize urban uses on the subject property, LUBA's remand warrants that we examine why an exception to Goal 14 was filed in this proceeding at all.*
>
> *It is plainly evident from the evidence in the record and the above findings that staff's request that the Applicant submit an application requesting an exception to Goal 14, the Hearings Officer's consideration and approval of that exception, and the County Board's consideration of the exception application flowed directly from the precedent set by the Hearings Official's decision in ZC-14-2. The County had concluded that the decision was binding precedent and had consistently applied the approach used in that decision to assign R-I zoning to properties in subsequent applications. That decision, as interpreted and applied by the County, concluded that an exception to Goal 14 urbanization was required whenever a property owner sought rural industrial zoning on rural property, and that the Goal 14 exception process was to ensure that the subject site was not developed with "urban" uses. The Hearings Officer's decision in ZC-14-2 was not appealed and, therefore, its reasoning was never reviewed by LUBA.*
>
> *As the excerpts from LUBA's opinion in this matter quoted above make clear, the Hearings Officer's analysis and conclusions in ZC-14-2 regarding the use of the*

Goal 14 exceptions process to limit Rural Industrial uses to those that are not "urban" is both rationally inconsistent and legally incorrect. As LUBA's decision also explains that to get a committed exception to Goal 14, one must demonstrate that it is impossible to locate any rural use on the subject property. It is thus illogical to approve a Goal 14 exception only to then limit it to Rural Industrial uses, which are "rural" by definition and acknowledgment. To do so is also inconsistent with the state's land use legal framework.

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

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

The Hearings Officer finds that, here too, the Applicant is not requesting that urban uses be allowed on the subject property. It does not make sense for the Applicant to request a re-designation and rezone of the property to Rural Industrial and also request a "committed" exception to Goal 14 which requires a showing that it is impossible to locate any rural use on the subject property.

The Applicant's Goal 14 exception request should be denied as inconsistent with underlying applications, unnecessary, and contrary to the state's land use legal framework, as determined by the Deschutes County Board of Commissioner in the decisions quoted above.

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

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

planning goal that cannot comply with the approval standards for that type of use;

FINDING: For the reasons set forth in the Preliminary Findings and Conclusions on Agricultural Land, incorporated herein by this reference, the Hearings Officer finds that an exception to Goal 3 “Agricultural Lands” is not required for the subject applications.

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

FINDING: No public facilities or services are proposed to be extended to support uses outside of urban growth boundaries pursuant to the subject application. The Hearings Officer finds that an exception to Goal 11 “Public Facilities and Services” is not required for the subject applications. As set forth above, the application is consistent with Goal 11.

(d) Goal 14 "Urbanization" as provided for in the applicable paragraph (l)(c)(A), (B), (C) or (D) of this rule:

(A) An exception is not required for the establishment of an urban growth boundary around or including portions of an incorporated city;

(B) When a local government changes an established urban growth boundary applying Goal 14 as it existed prior to the amendments adopted April 28, 2005, it shall follow the procedures and requirements set forth in Goal 2 "Land Use Planning," Part II, Exceptions. An established urban growth boundary is one that has been acknowledged under ORS 197.251, 197.625 or 197.626. Findings and reasons in support of an amendment to an established urban growth boundary shall demonstrate compliance with the seven factors of Goal 14 and demonstrate that the following standards are met:

(i) Reasons justify why the state policy embodied in the applicable goals should not apply (This factor can be satisfied by compliance with the seven factors of Goal 14);

(ii) Areas that do not require a new exception cannot reasonably accommodate the use;

(iii) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and

(iv) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

(C) When a local government changes an established urban growth boundary applying Goal 14 as amended April 28, 2005, a goal exception is not required unless the local government seeks an exception to any of the requirements of Goal 14 or other applicable goals;

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

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

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

> *Applicant provides analysis of a Goal 14 exception to allow urban development on rural lands below. Part D of this Rule (as well as the requirements of OAR 660-014-0030 and – 0040) applies to the County, and not to Applicant.*

The Hearings Officer finds that the Applicant's request in its Goal 14 exception "to allow urban development on rural lands" is inconsistent with its request to re-designate and rezone the property to Rural Industrial. Urban development is not permitted on properties zoned RI. Further analysis is provided in subsequent findings.

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

…

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

FINDING: The Hearings Officer finds that a Goal 12 "Transportation" exception is not required for the subject applications.

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

(1) Purpose. This rule explains the requirements for adoption of plan and zone designations for exceptions. Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements

and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 and 660-014-0030 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule.

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

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

The Hearings Officer finds that OAR 660-004-0018 (Planning and Zoning for Exception Areas) is only applicable if an exception to Goal 14 is required. For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated by this reference, the Hearings Officer finds that a Goal 14 exception is not required.

To prepare a full record with findings and conclusions on all proposal components of the subject applications, the Hearings Officer makes findings on each criterion below.

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

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

(2) For "physically developed" and "irrevocably committed" exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations

shall limit uses, density, and public facilities and services to those that satisfy (a) or (b) or (c) and, if applicable, (d): …

(b) That meet the following requirements:

(A) The rural uses, density, and public facilities and services will maintain the land as "Rural Land" as defined by the goals, and are consistent with all other applicable goal requirements;

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

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

The Hearings Officer finds that this provision has not been considered in its full context. The Applicant has requested an "irrevocably committed" exception to Goal 14. This regulation requires that the zone designation "***shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density and public facilities and services to those that satisfy…"*** **(b)(A), (b)(B), and (b)(C).**

The Applicant did not propose, and staff did not analyze any "single numeric minimum lot size" to limit uses, density and public facilities in the exception area. Without such analysis, the Hearings Officer cannot find that the Applicant has met its burden of proof on the criterion set forth in OAR 660-004-018(2)(b)(A).

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

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

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

As discussed above, the Hearings Officer finds that the Applicant did not propose, and staff did not analyze any "single numeric minimum lot size" to limit uses, density and public facilities in the exception area. Without such analysis, the Hearings Officer cannot find that

the Applicant has met its burden of proof on the criterion set forth in OAR 660-004-018(2)(b)(B).

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

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

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

As discussed above, the Hearings Officer finds that the Applicant did not propose, and staff did not analyze any "single numeric minimum lot size" to limit uses, density and public facilities in the exception area. Without such analysis, the Hearings Officer cannot find that the Applicant has met its burden of proof on the criterion set forth in OAR 660-004-018(2)(b)(C).

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

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

(a) A "committed exception" is an exception taken in accordance with ORS 197.732(2)(b), Goal 2, Part II(b), and with the provisions of this rule, except where other rules apply as described in OAR 660-004-0000(1).

(b) For the purposes of this rule, an "exception area" is that area of land for which a "committed exception" is taken.

(c) An "applicable goal," as used in this rule, is a statewide planning goal or goal requirement that would apply to the exception area if an exception were not taken.

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

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

subdivision to the west, and bordered by Highway 97 on the east. The EFU-zoned lands adjacent to it are in residential use and not in agricultural use. Applicant is entitled to an "irrevocably committed" exception to Goal 14 because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable. Compliance with the requirements for the exception is addressed below.

As set forth above in the Preliminary Findings and Conclusions, the Hearings Officer finds that no Goal 14 exception is required. To prepare a full record with findings and conclusions on all proposal components of the subject applications, the Hearings Officer finds that the proposal would not be entitled to a Goal 14 exception based on "irrevocable commitment," for the reasons discussed in more detail below.

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

(a) The characteristics of the exception area;

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

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

The determination of "irrevocably committed" pursuant to a requested Goal 14 exception is separate and distinct from analysis concerning "agricultural lands" and Goal 3. The Hearings Officer finds that the record shows only one-third of the total acreage of the subject property has been allocated to non-conforming use. Whether or not that non-conforming use has continued in an unaltered, uninterrupted, unabandoned manner is not relevant to the determination of the characteristics of the exception area. The Hearings Officer has previously found in this Decision and Recommendation that a non-conforming use verification is not required.

Despite the more intensive prior uses of the subject property and graveled, disturbed areas on site, the Hearings Officer finds that the record does not support a finding that non-urban uses are *impracticable* on the subject property. For example, the Applicant has indicated that, if the proposed plan amendment and rezone is approved to RI, the Applicant is considering applying for a use conditionally permitted in the zone, a mini-storage facility. *See* DCC 18.100.020(M).

The Hearings Officer finds the Applicant has not met its burden of proof on this criterion.

(b) The characteristics of the adjacent lands;

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

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

As noted above, the determination of "irrevocably committed" pursuant to a requested Goal 14 exception is separate and distinct from analysis concerning "agricultural lands" and Goal 3. The Hearings Officer finds that the record does not support a finding of "irrevocably committed" to urban uses based on the surrounding zoning and use of properties adjacent to the subject property. Adjacent Tax Lots 300 and 306 are in some type of farm use as they have irrigation rights and are receiving farm tax assessment. Aerial photography further supports this determination.

The Hearings Officer finds the Applicant has not met its burden of proof on this criterion.

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

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

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

The Hearings Officer finds that this provision is intended to determine to what extent the relationship between the exception area and the lands adjacent to it renders non-urban uses impracticable. The mere existence of residential uses near a property proposed for an irrevocably committed exception does not demonstrate that such property is necessarily committed to nonresource use. *Prentice v. LCDC*, 71 Or App 394,403-04, 692 P2d 642 (1984).

The Hearings Officer finds that the Applicant has not met its burden of proof on this criterion.

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

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

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

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

> *Applicant is not requesting an exception to Goal 3 because the land is not suitable for agricultural use, as explained above. Applicant requests an exception to Goal 14. The Subject Property is irrevocably committed to non-resource use due to its extensive historic use as a large equipment service / repair and rental / sales facility, which depleted the soils. The soils on the Subject Property are predominantly Class 7 and 8 and as a result cannot reasonably be farmed. The Subject Property's current EFU-TRB zoning allows outright or conditionally a variety of uses. The farm and forest uses allowed in the EFU zone - as well as uses related to farm and forest uses - would be impracticable on the Subject Property due to constraints caused by the historic use of the Subject Property, its proximity to Highway 97, its proximity to a residential subdivision and other residentially-used properties, the landlocked nature of Tax Lot 301, the less than 20-acre size of the Subject Property, the poor quality of the soils, and the difficulty of irrigating. Other resource related uses allowed in the EFU zone such as mining, wetland creation, and wildlife habitat conservation would be impracticable considering the Subject Property's size, location, configuration, and dry rocky soil.*
>
> *While residential uses may not be impossible, the only site that could currently be developed with a residence is landlocked and inaccessible from Highway 97. Tax Lots 305 and 500 are presently developed with facilities historically used for service / repair and rental / sales of large equipment. Developing a dwelling on those lots is impracticable based on the current use of the land. Further, the proximity to Highway 97 creates noise issues that would make dwelling development impracticable. With respect to irrigation-related uses, the Subject Properly, while adjacent to the Pilot Butte Canal, cannot be sufficiently irrigated because (a) the water rights are being leased to the Deschutes River and (b) even if they were not, the Canal is insufficient to irrigate the entire Subject Property. Finally, the utility and similar uses allowed in the EFU zone, such as utility facilities,*

transmission towers, personal use airports, solar power generating facilities, etc.) are impracticable on the Subject Property due to its small size (approx. 19 acres) and the fact that it is already partially developed.

The Hearings Officer finds that the above subsection does not set forth a criterion, but rather explains how to interpret and implement the various requirements set forth in OAR 660-004-0028(6).

> ***For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:***
>
> ***(a) Farm use as defined in ORS 215.203;***
>
> ***(b) Propagation or harvesting of a forest product as specified in OAR 660-0330120; and***
>
> ***(c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a).***

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

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

The Hearings Officer finds this provision is inapplicable.

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

FINDING: The Hearings Officer's findings of fact that address all applicable factors of section (6) of this rule are set forth below.

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

FINDING: The Applicant's proposed exception area consists of three (3) Tax Lots (301, 305, and 500), all of which are the subject of this application. The Hearings Officer's findings of fact regarding the exception area are addressed to all three tax lots collectively.

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

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

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

The Hearings Officer finds that the Applicant has not met its burden of proof for an "irrevocably committed" exception based on existing adjacent uses, as set forth in the findings above.

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

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

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

There are no existing public water and sewer lines on the subject property. The Hearings Officer finds that the Applicant has not met its burden of proof for an "irrevocably committed" exception based on existing public facilities and services (water and sewer lines, etc.).

(c) Parcel size and ownership patterns of the exception area and adjacent lands:

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

...

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

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

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

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

The adjacent property to the south (Map/Tax Lot 1612230000700) is open space and park land owned by the State of Oregon Parks & Recreation Department. Tax Lot 700 is 35.89 acres. It appears to have been created from TL 1612 in or around 196I.

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

The Hearings Officer finds that the Applicant has addressed consideration of parcel size and ownership patterns pursuant to this rule, and analysis of how the existing development pattern came about.

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

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

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

The Hearings Officer finds that the Applicant has established that the Pilot Butte Canal and associated easement make the exception area unsuitable for resource use. There is not a showing that this factor makes resource use of *nearby* lands unsuitable. The Hearings Officer observes that, whether the property is suitable for *resource* use does not constitute a finding that the subject property is not suitable for rural use.

…

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

FINDING: The Applicant does not rely on any parcels created or uses approved pursuant to the applicable goals to justify its request for an irrevocably committed exception.

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

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

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

the Subject Property, is owned by a principal of Applicant. The Subject Property does not stand alone amidst larger farm or forest operations and are not buffered from such operations-there are no such operations in the vicinity of the Subject Property.

The Hearings Officer finds that the three parcels that constitute the subject property total approximately 19 acres in size. The mere fact that smaller parcels exist in the surrounding area and are in separate ownerships does not establish "irrevocable commitment." The parcels are not clustered in a large group or clustered around a road designed to serve those parcels. There are two adjacent, smaller EFU-zoned properties that are receiving tax deferral and appear to be in agricultural use as evidenced by aerial photographs. No finding is made on whether such properties are engaged in "farm use," however, as that is not relevant to this determination. The Hearings Officer finds that the Applicant has not met its burden of proof on this criterion. This criterion is not met.

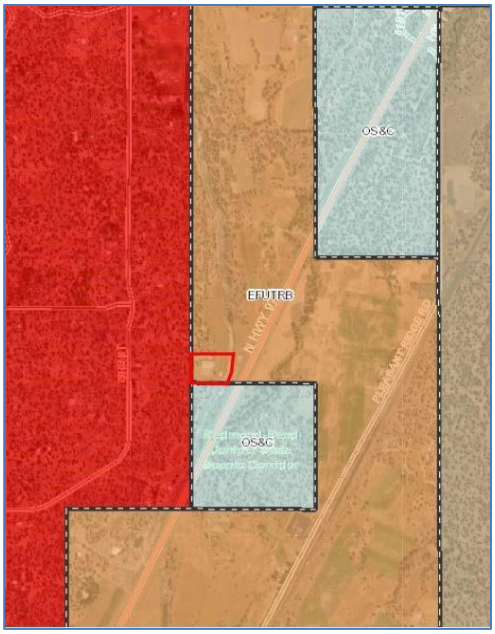
(d) Neighborhood and regional characteristics;

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

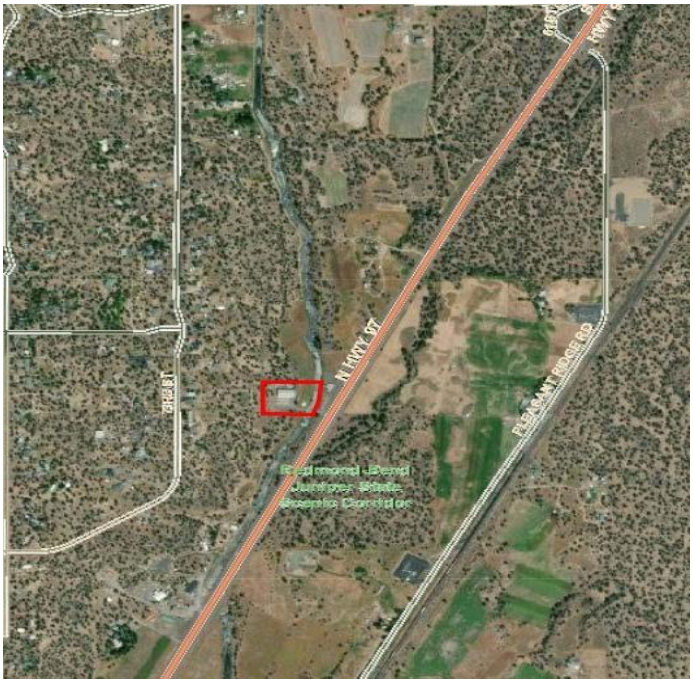
The area, or "neighborhood," in which the Subject Property lies can be characterized generally as developed residential properties. While some are zoned EFU, they are not being used for agricultural purposes. The general area around the Subject Property appears to consist of native vegetation - grasses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

Using an approximately ¼-mile radius around the subject property, the vicinity is comprised of a mix of RR-10, EFU, and OS&C zoning.

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



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



The Hearings Officer finds that the Applicant addressed neighborhood characteristics, but did not address regional characteristics. The Hearings Officer finds the Applicant did not meet its burden of proof on this criterion. This criterion is not met.

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

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

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

The Hearings Officer finds that, while some man-made features separate the exception area from some adjacent resource land, there are other resource lands immediately adjacent to the subject property. Nonetheless, as determined in the findings above, the Hearings Officer finds that both the Pilot Butte Canal and Highway 97 effectively impede practicable resource use (farm use) of all or part of the subject property. Again, the Hearings Officer observes that this finding does not constitute a determination that the subject property is unsuitable for any rural use. This criterion is met.

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

FINDING: OAR 660-004-0025 states:

> ***660-004-0025 Exception Requirements for Land Physically Developed to Other Uses***
>
> ***(1) A local government may adopt an exception to a goal when the land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal. Other rules may also apply, as described in OAR 660004-0000(1).***
>
> ***(2) Whether land has been physically developed with uses not allowed by an applicable goal will depend on the situation at the site of the exception. The exact nature and extent of the areas found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception.***

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

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

The Hearings Officer found above that the Applicant need not obtain a non-conforming use verification to establish "physical development." However, the Hearings Officer finds that the Applicant has not met its burden of proving that the subject property has been physically developed with uses not allowed by Goal 14 to the extent that it is no longer available for uses allowed by Goal 14. These criteria are not met.

(g) Other relevant factors.

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

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

As determined in the findings above, the Hearings Officer finds that both the Pilot Butte Canal and Highway 97 effectively impede practicable resource use of all or part of the subject property. Again, the Hearings Officer observes that this finding does not constitute a determination that the subject property is unsuitable for any rural use. This criterion is met.

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

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

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

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

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

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

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

For the reasons set forth above, the Hearings Officer finds: (1) the subject property is rural land; (2) the Applicant is not required to obtain a Goal 14 exception for purposes of the subject applications; therefore, Goal 2 exceptions standards are not applicable; (3) in the alternative, if the Board of County Commissioners disagrees with the Hearings Officer's findings on (1) and (2) herein, and determines that the Applicant is required to obtain a Goal 14 exception, the record does not support a finding that the subject property is irrevocably committed to urban levels of development.

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

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

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

The Hearings Officer finds that the Applicant has not met its burden of proving that the subject property has been built upon at urban densities and/or is irrevocably committed to urban levels of development. The Applicant has not established "the exact nature and extent of the areas found to be irrevocably committed to urban levels of development" as justification for the exception.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer's findings, the Applicant's alternative request for a Goal 14 exception need not be approved.

(3) A decision that land is committed to urban levels of development shall be based on findings of fact, supported by substantial evidence in the record of the local proceeding, that address the following:

(a) Size and extent of commercial and industrial uses;

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

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

The Hearings Officer found above that the Applicant need not obtain a non-conforming use verification to establish "irrevocable commitment." However, the Applicant's proof on this criterion relies on industrial uses that appear to have been discontinued and, thus, are no longer non-conforming uses. Of the subject property's approximately 19 acres, aerial photography indicates that approximately 4.5 acres have been allocated to industrial use on the property. This constitutes less than 1/3 of the subject property.

The Hearings Officer finds that the Applicant has not met its burden of proving that the size and extent of "commercial or industrial" uses on the subject property demonstrates it is irrevocably committed to urban levels of development.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer's findings, the Applicant's alternative request for a Goal 14 exception need not be approved.

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

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

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

The Hearings Officer finds that the subject property is not developed with residential dwellings and that surrounding residential development is not relevant to the determination under this criterion of "irrevocably committed." Under this consideration, the Applicant has not established that the subject property is irrevocably committed to urban levels of development.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer's findings, the Applicant's alternative request for a Goal 14 exception need not be approved.

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

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

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

Under this consideration, the Applicant has not established that the subject property is irrevocably committed to urban levels of development because there are no urban levels of facilities and services on the property.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer's findings, the Applicant's alternative request for a Goal 14 exception need not be approved.

(d) Parcel sizes and ownership patterns.

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

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

Under this consideration, the Applicant has not established that the subject property is irrevocably committed to urban levels of development due to parcel sizes and ownership patterns of the subject property.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer's findings, the Applicant's alternative request for a Goal 14 exception need not be approved.

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

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

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

For all the reasons set forth in the findings above, the Hearings Officer finds that the Applicant has not established that the subject property is irrevocably committed to urban levels of development.

Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer's findings, the Applicant's alternative request for a Goal 14 exception need not be approved.

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

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

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

Under this consideration, the Applicant has not established that the subject property is irrevocably committed to urban levels of development. Nonetheless, as set forth in the

findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer's findings, the Applicant's alternative request for a Goal 14 exception need not be approved.

OREGON REVISED STATUTES (ORS)

Chapter 197, Comprehensive Land Use Planning

ORS 197.732, Goal Exceptions

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

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

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

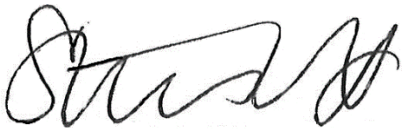
The Hearings Officer finds that the Applicant has not established that the subject property is either physically developed to the point that rural uses are no longer available and/or is irrevocably committed to urban levels of development. Nonetheless, as set forth in the findings above, the Hearings Officer has determined that a Goal 14 exception is not required. If the Board of County Commissioners agrees with the Hearings Officer's findings, the Applicant's alternative request for a Goal 14 exception need not be approved.

IV. CONCLUSION & RECOMMENDATION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds that the Applicant has met the burden of proof necessary to justify changing the Plan Designation of the subject property from Agriculture to Rural Industrial and Zoning of the subject property from Exclusive Farm Use to Rural Industrial through effectively demonstrating compliance with the applicable criteria of DCC Title 18 (the Deschutes County Zoning Ordinance), the Deschutes County Comprehensive Plan, and applicable sections of OAR and ORS. The Hearings Officer finds that no Statewide Planning Goal exceptions are required. The Applicant's alternative request for a Goal 14 Exception is not supported by substantial evidence and should be denied.

The Deschutes County Board of Commissioners is the final local review body for the applications before the County. DCC 18.136.030. The Hearings Officer recommends approval of the requested plan amendment and zone change with the proposed condition of approval set forth herein.

Dated this 12th day of July, 2022.



Stephanie Marshall, Hearings Officer