



STAFF REPORT

FILE NUMBERS: 247-24-000392-PA, 393-ZC

HEARING: November 14, 2024, 1:00 p.m.
Videoconference and Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

SUBJECT PROPERTY: The proposal includes the seven (7) properties listed below, hereinafter referred to as the Subject Property:

- 64325 OB Riley Rd; Assessor map 17-12-06, tax lot 301;
- 64345 OB Riley Rd; Assessor map 17-12-06, tax lot 300;
- 64375 OB Riley Rd; Assessor map 17-12-06, tax lot 302;
- 64385 OB Riley Rd; Assessor map 17-12-06B, tax lot 100
- No address; Assessor map 16-12-31D, tax lot 4200;
- No address; Assessor map 16-12-31D, tax lot 4300; and
- 64411 OB Riley Rd; Assessor map 16-12-31D, tax lot 4400

APPLICANT/OWNER: Cascades Academy of Central Oregon

ATTORNEY: Tia M. Lewis
Schwabe, Williamson & Wyatt, P.C.
360 SW Bond Street, Suite 500
Bend, OR 97702

PROPOSAL: Plan Amendment (PA) to change the Comprehensive Plan designation of the Subject Property from Surface Mine (SM)¹ and Agriculture (AG)² to Rural Residential Exception Area (RREA). Zone Change (ZC) from Surface Mining (SM) and Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA-10).

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WEBPAGE <https://bit.ly/CascadesAcademy>

¹ Tax lots 4200, 4300, and 4400.

² Tax lots 100, 300, 301, and 302.

I. APPLICABLE STANDARDS AND 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 18.32, Multiple Use Agricultural (MUA-10)
- Chapter 18.52, Surface Mining (SM)
- Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance

Deschutes County Comprehensive Plan

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

Oregon Administrative Rules (OAR), Chapter 660

- Division 12, Transportation Planning
- Division 15, Statewide Planning Goals and Guidelines
- Division 23, Procedures and Requirements for Complying with Goal 5
- Division 33, Agricultural Land

Oregon Revised Statutes (ORS)

- Chapter 215.010, Definitions
- Chapter 215.211, Agricultural Land, Detailed Soils Assessment

II. BASIC FINDINGS:

LOT OF RECORD: 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; page 3) that a property's lot of record status was not required to be verified as part of a plan amendment and zone change application. Rather, the applicant would be required to receive lot of record verification prior to any development on the subject property. Therefore, this criterion does not apply.

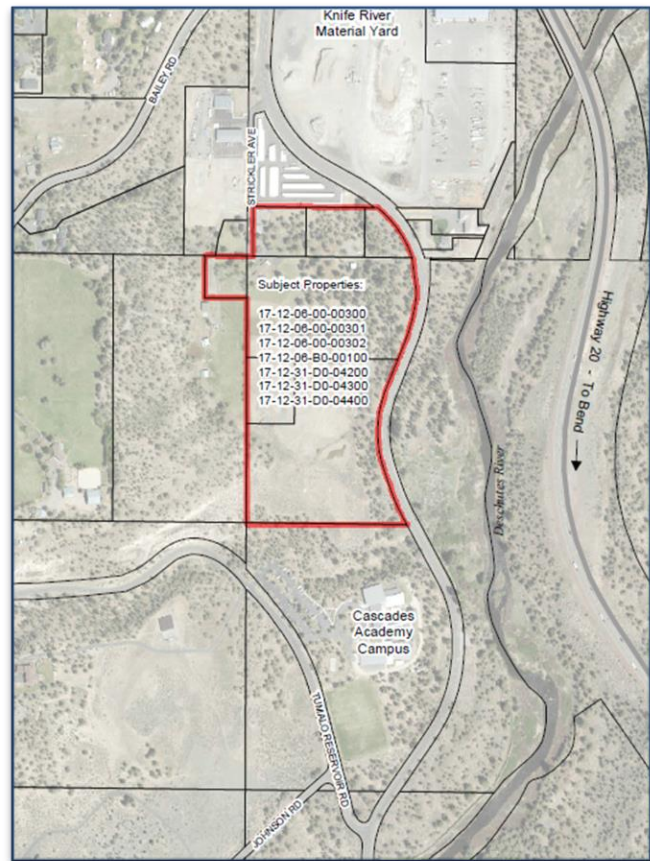
PROPOSAL: The applicant requests approval from the County to change the plan designation of the subject property from Surface Mine and Agriculture to Rural Residential Exception Area and the zoning from SM and EFU-TRB to MUA-10. As noted below, the applicant finds the property is not used or needed as a part of Mining Site 370 for storage and processing and does not contain a significant aggregate resource. Because the subject property does not qualify as "agricultural land" under state law or administrative rule (as established by the Order 1 Soils Report submitted herewith), no exception to Statewide Planning Goal 3, Agricultural Land, is requested or required. No development is proposed with this application; however, the applicant plans to develop the property with additional school facilities as part of a master plan expansion of the school in the future.

SITE DESCRIPTION: The subject properties consist of seven (7) tax lots totaling 22.5 acres in size. 4.03 acres are zoned Surface Mine and 18.47 acres are zoned EFU-Tumalo/Redmond/Bend Subzone. Four (4) taxlots are partially within the Landscape Management Combining Zone

associated with State Highway 20 and also the Deschutes River. The EFU properties are also within the Surface Mining Impact Area Combining Zone associated with Mining Site No. 370. The property shape is irregular as shown in the map below.

The applicant provides the following site description in the burden of proof:

A portion of the property is a part of Surface Mining Site No. 370 which is a storage and processing site (See ESEE for SM 370, Exhibit 5). The portion of the property which is a party of SM Site No. 370 was originally owned by the mining operator but was sold to separate ownership in the '90s and has not been used for mining or storage/processing since that time. Of the remaining 18.47 acres, 17.48 of it was formerly SM Site No. 304, which was mined for aggregate in the '80s and then subsequently removed from the County inventory and rezoned to EFU in 2000 (Exhibit 4). The subject property has 10.7 acres of mapped water rights and 4.2 acres not mapped³, is not currently in farm use and has no history of farm use.



There is no mapped floodplain on the subject properties. A portion of tax lots 4400, 301, and 302 contain a small portion of wetland designation.

SURROUNDING LAND USES: The subject property is bounded to the east by OB Riley Road and to the northwest by Strickler Ave. To the north is SM Site No. 370, which is a storage and processing site operated by Knife River. Further east is Tumalo State Park and the Deschutes River. To the west is a 19-acre parcel with a rural dwelling built in 1960 and several outbuildings. To the south is a 19-acre parcel developed with the existing Cascades Academy of Central Oregon.

SOILS: According to Natural Resources Conservation Service (NRCS) maps of the area, the subject property contains four soil units:

NRCS Soil Map

³ The Applicant indicates the 7.2 acres of mapped water rights for tax lot 302 have been leased in stream for the past several years and currently only 2.5 acres of water is being applied to the property. The property also has .61 acres of water through the Tumalo Town District.

26A, Clinefalls sandy loam, 0 to 3 percent slopes: This soil type is composed of 90 percent Clinefalls soils and similar inclusions, and 10 percent contrasting inclusions. The Clinefalls soil is well drained with a moderately rapid over very rapid permeability and an available water capacity of about 3 inches. The major use of this soil is irrigated cropland and livestock grazing. The NRCS rates the Clinefalls soil as 6S/4S. This soil type comprises approximately 5.1 acres 20.2% of the property. It is designated high value soil when irrigated.

98A, Plainview sandy loam, 0 to 3 percent slopes: This soil type is composed of 85 percent Plainview soil and similar inclusions, and 15 percent contrasting inclusions. This soil is well drained with a moderately-rapid permeability and an available water capacity of about five inches. The major uses of this soil type are irrigated cropland and livestock grazing. The NRCS rates this soil type as 3s when irrigated, and 6s when unirrigated. Approximately 17.6 acres or 69.7 percent of the subject parcel is made up of this soil type. It is designated high value soil when irrigated.

98B, Plainview sandy loam, 3 to 8% slopes. This soil complex is composed of 85% Plainview soil and similar inclusions, and 15% contrasting inclusions. The Plainview soil is well drained and has a moderately rapid permeability, and an available water capacity of about 5 inches. The major use of the soil type is livestock grazing and irrigated cropland, and is rated 3E/6E. This soil complex comprises approximately 1.9 acres or 7.5 percent of the property and is considered high value when irrigated.

101E Redcliff-Lickskillet-Rock outcrop complex, 30 to 50% slopes: This soil complex is composed of 60% Redcliff soils and similar inclusions, 20% Lickskillet soils and similar inclusions, 15% Rock outcrop, and 5% contrasting inclusions. The Redcliff soil is well drained with a moderate permeability and an available water capacity of about 2 inches. The Lickskillet soil is well drained with a moderate permeability and an available water capacity of about 1 inch. The major use of this soil complex is livestock grazing. The NRCS rates the Redcliff soil as 6e nonirrigated and 7e irrigated, the Lickskillet soil as 7e for both nonirrigated and irrigated, and the Rock outcrop as 8 nonirrigated with no rating for irrigated land. This soil complex comprises approximately 0.7 acres or 2.7% of the subject property is not considered a high-value soil.

Site-Specific Soil Survey

A soils assessment conducted by a qualified soils professional approved by the Department of Land Conservation and Development (DLCD) can be used by property owners to determine the extent of agricultural land as defined in Oregon Administrative Rule (OAR) 660-033, Agricultural Land. Submitted as Exhibit 7 is an Order I Soil Survey submitted by Gary A. Kitzrow of Growing Soils Environmental Associates (GSEA).

The applicant noted in their materials that they have submitted the soil survey to the Department of Land Conservation and Development for review, but have not yet received a response. Further discussion on this item is provided below.

Soil Scientist Mr. Kitzrow included the following summary and conclusions within the submitted soil survey report:

The objective of our investigation was to complete a detailed Soil Survey for seven tax lots totaling 22.50 acres...To qualify for a Plan Amendment Zone Change, each lot under review must show a preponderance of Class VII and VIII [soils]. Each of the tax lots which have been researched and mapped for this report shows a preponderance of Class 7 and 8 soils. As a total of the entire 22.5 acres, the site is confirmed to have a preponderance of 68.6%- or 16.59-acres Capability Class 7 and 8 soils. Each tax lot on their own shows a preponderance of Capability Class 7 and 8 soils as well.

We hereby certify all properties independently under consideration are comprised of a preponderance of Capability Class VII and VIII soils. This study area (22.5 acres) is comprised of soils which are generally unsuitable for production of farm crops, livestock and commercial tree species.

AGENCY COMMENTS: The Planning Division mailed notice on July 16, 2024, and September 30, 2024, to several public and private agencies and received the following comments:

Tumalo Town Ditch Improvement Company

Tumalo Town District Improvement Co. aka Tumalo Town Ditch, (not to be confused with Tumalo Irrigation District) just completed a Water Right District 385 Transfer from a property on Cook Avenue in Tumalo to TL 4400 which is one of the Subject Properties listed in the Proposal. The transfer # recorded with OWRD is T-14071. The water right for irrigation/landscaping is for .49 acre-feet of water. The transfer application began prior to Cascades Academy of Central Oregon's purchase of the land by the previous owners Terry and Deborah Fidler.

The Town Ditch point of origin is on the NE side of the Tumalo State Park bridge and is partially open ditch and partially piped as shown on the map included. As it crosses under OB Riley Road, it flows as an open ditch through the Subject Properties, then goes under OB Riley Road again piped all the way into downtown business and residential properties.

There is no objection to the amendment, but as the Tumalo Town Ditch water rights were certified as early as 1905 to serve the original platted Laidlaw township, it is our obligation to inform the parties that Tumalo Town Ditch has a 25' easement from the center line of the ditch on both sides in order to do seasonal cleanup or repair as needed by our volunteers. The water flows from May until October.

Deschutes County Building Safety – Randy Sheid, Building Official:

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

Deschutes County Senior Transportation Planner – Tarik Rawlings:

I have reviewed the application materials submitted on behalf of file no. 247-24-000392-PA, 393-ZC for a Plan Amendment from Agricultural (AG) and Surface Mining (SM) to Rural Residential Exception Area (RREA) and a corresponding Zone Change from Exclusive Farm Use (EFU) and Surface Mining (SM) to Multiple Use Agricultural (MUA-10) for the following properties:

- 64325 OB Riley Rd; Assessor Map 17-12-06, Tax Lot 301
- 64345 OB Riley Rd; Assessor Map 17-12-06, Tax Lot 300
- 64375 OB Riley Rd; Assessor Map 17-12-06, Tax Lot 302
- 64385 OB Riley Rd; Assessor Map 17-12-06B, Tax Lot 100
- No Address; Assessor Map 16-12-31D, Tax Lot 4200
- No Address; Assessor Map 16-12-31D, Tax Lot 4300
- 64411 OB Riley Rd; Assessor Map 16-12-31D, Tax Lot 4400

The tax lots along the northern portion of the subject property are located within the boundaries of a surface mine (Surface Mine No. 370) that has an active permit from Department of Geologic and Mineral Industries (DOGAMI) though the trip generation associated with the surface mine is essentially zero based on the historic lack of activity on these northern properties, which appear to predominantly support residential primary and accessory uses.

I have reviewed Mr. Bessman's June 19, 2024, Traffic Impact Analysis and agree with its assumptions, methodology, and conclusions. Mr. Bessman utilizes a Transportation Research Board report related to Special-Use Truck Traffic trip generation and 2008 trip surveys for existing mine sites in the Central Oregon region to capture the highly variable operations typically associated with surface mining activities, as the ITE manual does not have a clear category for such uses. Staff appreciates the inclusion of these full reports in the submitted application materials. The use of the TRB and Central Oregon survey analysis follows similar methodology for similar past approvals involving Plan Amendment/Zone Change applications on SM-zoned properties. Regarding the overall proposal (including the majority EFU-zoned portions of the subject property), the analysis in Mr. Bessman's report appears to demonstrate that no significant effect, per OAR 660-012-0060 will occur as a result of the proposed Plan Amendment/Zone Change.

As evidenced in the submitted transportation report, the proposal appears to comply with the relevant provisions of the Transportation Planning Rule (TPR).

If the subject application is approved, future land divisions and/or development proposals involving the subject property will require additional transportation analysis per DCC 18.116.310.

Thanks for the opportunity to provide comment and please let me know if you have any questions.

The following agencies either had no comment or did not respond to the notice: Bend Fire, Oregon State Fire Marshall, Oregon Department of Geology and Mineral Industries, Deschutes County Assessor, Deschutes County Environmental Soils, Deschutes County Addressing, and Tumalo Irrigation District.

PUBLIC COMMENTS: On July 16, 2024, the Planning Division mailed a Notice of Application to all property owners within 750 feet of the subject property. Notice of Public Hearing was mailed on September 30, 2024. No comments from the public were received.

NOTICE REQUIREMENT: The applicant complied with the posted notice requirements of Section 22.23.030(B) of Deschutes County Code (DCC) Title 22. The applicant submitted a Land Use Action Sign Affidavit, dated July 22, 2024, indicating the applicant posted notice of the land use action on the property on July 25, 2024. On September 30, 2024, the Planning Division mailed a Notice of Public Hearing to agencies and all property owners within 750 feet of the subject property. A Notice of Public Hearing was published in the Bend Bulletin on Tuesday, October 1, 2024. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on September 27, 2024.

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

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

- 247-22-000359-PS: Permit sign-off for water rights transfer
- 247-V024-PL: Variance for a reduction in lot size
- 247-E0418-PL: Extension for 247-V024-PL
- 247-LL0473-PL: Lot line adjustment
- 247-LR9913-PL: Lot of record verification for tax lot 100
- 247-SP9359-PL: Site Plan review for surface mining
- 247-14-000241-TU: Temporary Use Permit for manufactured home storage
- 247-CU0288-PL: Conditional use permit for nonfarm dwelling
- 247-D0259-PL: Deposit packet for nonfarm dwelling
- 247-LR9915-PL: Lot of record verification for tax lot 301

III. FINDINGS & CONCLUSIONS

Title 18 of the Deschutes County Code

Chapter 18.32, Multiple Use Agricultural Zone

Section 18.32.010, Purpose

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

FINDING: The Applicant proposes to change the zoning designation of the subject property from SM and EFU to MUA-10. The applicant notes in the burden of proof that the property is not suited for full-time commercial farming nor surface mining and that the MUA-10 zone will allow property owners to develop the property as part of a master plan process to expand the existing school site. The low-density development will conserve open spaces and protect natural resources.

As described in additional detail under the findings for DCC 18.136, staff finds the proposed zoning designation is consistent with DCC 18.32.010.

Chapter 18.52, Surface Mining Zone

Section 18.52.200, Termination Of The Surface Mining Zoning And Surrounding Surface Mining Impact Area Combining Zone

- A. *When a surface mining site has been fully or partially mined, and the operator demonstrates that a significant resource no longer exists on the site, and that the site has been reclaimed in accordance with the reclamation plan approved by DOGAMI or the reclamation provisions of DCC 18, the property shall be rezoned to the subsequent use zone identified in the surface mining element of the Comprehensive Plan.***

FINDING: The submitted Burden of Proof includes the following response to this criterion:

This standard requires that Site No. 370 be 1) fully or partially mined, 2) no longer contain a significant resource, and 3) reclaimed in accordance with the reclamation plan approved by DOGAMI. The first two prongs are addressed in the responses to OAR 660-023-0180, which sets out the standards for determining whether an aggregate resource is significant. As discussed more fully herein, Site No. 370 was included on the County's inventory as a storage site, not as an extraction site, and therefore no quantity of material was measured or included in the Comprehensive Plan provisions on the ESEE for Site 370. The Soils Report verifies there is not a significant aggregate resource on site, (Exhibit 7). It does not appear that any minerals were ever extracted from the portion of the properties included in Site No 370 (TL's 4200, 4300 and 4400) and there is no DOGAMI or County reclamation plan for this

property. This criterion therefore is not applicable to the site listed as a storage site only.

According to the deed records, the subject properties that were originally included in Site 370 (TLs 4200, 4300, 4400) have not been owned by the operator or used in conjunction with the storage, and processing operation since 1999 (Exhibit 10). The present operator, Knife River, supports the removal of these properties from Site 370 and the zone change from SM to MUA-10 as they are not a part of, and not needed for, the storage and processing operation (Exhibit 9).

The mining element of the Comprehensive Plan does not identify a subsequent use for Site No. 370 and subsequent uses are not identified in the ESEE analysis for Site No. 370 adopted by the County. The Applicant proposes rezoning the property MUA-10 to allow its use in conjunction with the Cascades Academy school site on the MUA-10 property to the south.

Staff concurs with this analysis. The Department of Geology and Mineral Industries was sent notice of the proposed application and hearing and have not submitted comments to date.

B. Concurrent with such rezoning, any surface mining impact area combining zone which surrounds the rezoned surface mining site shall be removed. Rezoning shall be subject to DCC 18.136 and all other applicable sections of DCC 18, the Comprehensive Plan and DCC Title 22, the Uniform Development Procedures Ordinance.

FINDING: The applicant proposes to retain the SMIA overlay zone associated with the remaining properties within Site No. 370 because that overlay is designed to protect Goal 5 mining resources. This would include applying a SMIA overlay on the subject property.

Chapter 18.136, Amendments

Section 18.136.010, Amendments

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

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

Section 18.136.020, Rezoning Standards

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

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

FINDING: Conformance with relevant sections of the Deschutes County Comprehensive Plan is reviewed below within this Staff Report. The proposed rezoning from EFU and SM to MUA-10 is required to be consistent with the proposed new plan designation. In previous comprehensive plan and zone change recommendations⁴ to the Board of County Commissioners, Hearings Officers have found that the introductory statement of the Comprehensive Plan is aspirational in nature and not necessarily approval criteria.

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

FINDING: In response to subsection (B) of this policy, the applicant's burden of proof provides the following:

The applicant is proposing to change the zone classification from SM and EFU to MUA-10. Approval of the application is consistent with the purpose of the MUA-10 zoning district, which is stated in DCC 18.32.010 as follows:

18.32.010 Purpose

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

The subject property is not suited to full-time commercial farming as discussed in the findings above. The MUA-10 zone will allow property owners to develop the property as part of a master plan process to expand the existing school site to the south. The low-density of development allowed by the MUA-10 zone will conserve open spaces and protect natural and scenic resources. In the Landholdings case, the Hearings Officer found:

I find that the proposed change in zoning classification from EFU is consistent with the purpose and intent of the MUA-10 zone. Specifically, the MUA-10 zone is intended to preserve the rural character of various areas of the County while permitting development consistent with that character and with the capacity of the natural resources of the area.

⁴ Powell/Ramsey decision (PA-14-2, ZC-14-2) and Landholdings Decision (247-16-000317-ZC, 318-PA).

Approval of the proposed rezone to MUA-10 would permit applications for low-density development, which will comprise a transition zone between EFU rural zoning, primarily to the east, and City zoning to the west.

Staff accepts the applicant's statement has demonstrated that the requested change in classification is consistent with the purpose of the proposed zoning.

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

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

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

Necessary public facilities and services are available to serve the subject property, including electrical power from Central Electric Cooperative and water service from on-site wells. Transportation access to the property is available from OB Riley Road. The Transportation Study prepared by Transight Consulting (Exhibit 11) shows that the proposed MUA-10 zoning results in a reduction in potential trips generated from the site. The study includes operational analysis of the abutting OB Riley Road corridor which currently operates at 20% capacity and is projected to operate at 25% by 2040. The study concluded the zone change would have no significant impact on the transportation system.

The property receives police services from the Deschutes County Sheriff. It is in Rural Fire Protection District #2 and receiving assessments from the district. (Exhibits 8 and 10). Neighboring properties contain residential uses, which have water service from wells, on-site sewage disposal systems, electrical service, telephone services, etc. There are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare.

Staff reiterates that prior to development of the properties, the applicant would be required to comply with the applicable requirements of the Deschutes County Code, including possible land use, building, and sewage disposal permits, in addition to approval of the related subdivision. Through these development review processes, assurance of adequate public services and facilities will be verified. Staff agrees with the applicant's response and finds compliance with this criterion has been demonstrated.

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

FINDING: In response to this criterion, the applicant's burden of proof provides the following:

The MUA-10 zoning is consistent with the specific goals and policies in the comprehensive plan discussed above. The MUA-10 zoning allows rural uses consistent with the uses of many other properties in the area of the subject property.

The zone change will not impose new impacts on the EFU-zoned land adjacent to or nearby the subject property because many of those properties are residential properties, hobby farms, already developed with dwellings, not engaged in commercial farm use, are idle, or are otherwise not suited for farm use due to soil conditions, topography, or ability to make a profit farming.

As discussed below, the subject property is not agricultural land, is comprised of predominantly Class 7 and 8 soils, and as described by the soil scientist, Mr. Kitzrow, the nonproductive soils on the subject property make it not suitable for commercial farming or livestock grazing. The subject property is not land that historically has been or could be used in conjunction with the adjacent irrigated property for any viable agricultural use and any future development of the subject property would be subject to building setbacks.

In addition to these comments, the applicant provided specific findings for relevant Comprehensive Plan goals and policies, which are addressed below. Staff finds the applicant demonstrated the impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan but asks the Hearings Officer to amend or add to these findings as the Hearings Officer sees fit.

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

FINDING: In response to this criterion, the applicant's burden of proof provides the following:

1. Mistake: 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 prepared prior to the USDA/NRCS's publication of the "Soil Survey of Upper Deschutes River Area, Oregon." This study replaced a prior study that provided very general information about soils. This Soil Survey of the Upper Deschutes River Area is more comprehensive than the prior soils mapping publication but it continues to provide only general soils information rather than not an assessment of soils on each parcel in the study area.

When the County first implemented the Statewide Goals, it applied resource zoning using a broad brush. All undeveloped rural lands were assumed to be resource land. Then-existing developed rural lands not suited for resource use were granted exceptions to the Goals that protect resource lands. The County allowed landowners a brief period of time after adoption of PL-15 (1979) to petition the County to remove nonresource properties from resource zone protections but made no effort to determine whether lands might be nonresource lands that do not merit the imposition of stringent land use regulations that protect rural resources – typical farm and forest resources.

The EFU zoning designation was likely based on the best soils data that was available to the County at the time it was originally zoned, during the late 1970's, when the comprehensive plan and map were first adopted and when agricultural zoning was applied to land with no history of farming.

2. Change in Circumstances: There has clearly been a change in circumstances since the property was last zoned in the 1970s:

Soils: New soils data provided in Mr. Kitzrow's soils report shows the property does not have agricultural soils.

Non Use for Mining: The deed records show the portion of the property within SM Site No. 370 was originally owned by the operator when the property was zoned SM. However, it was transferred into separate ownership in the '90s and has not been used as a part of the SM operation.

Farming Economics and Viability of Farm Uses: The economics of farming and the viability of commercial farm uses in Deschutes County have significantly changed. Making a profit in farming has become increasingly difficult, particularly on parcels that are relatively small for livestock grazing and that have inadequate soils or irrigation for raising crops such as the subject property. The reality of the difficulties agricultural producers face in Deschutes County is demonstrated below in the stakeholder interview of the Deschutes County Farm Bureau in the County's 2014 Agricultural Lands Program, Community Involvement Results:

Today's economics make it extremely difficult for commercial farmers in Deschutes County to be profitable. Farmers have a difficult time being competitive because other regions (Columbia Basin, Willamette Valley) produce crops at higher yields, have greater access to transportation and consumer markets, and experience more favorable growing climates and soils. Ultimately, the global economy undermines agricultural opportunities in the county because commodities derived from outside the region can be produced at a lower cost. Water limitations also play a role. Junior water right holders are constrained as the summer progresses and they lose their rights to those with higher priority dates.

Decline in Farm Operations: The number of farm operations have steadily declined in Deschutes County between 2012 and 2017, with only a small fraction of farm operators achieving a net profit from farming in 2017. Since the property was zoned, it has become evident that farm uses are not viable on the subject property. The economics of farming have worsened over the decades making it difficult for most Deschutes County property owners to make money farming good ground and impossible to earn a profit from attempting to farm Class 7 and 8 farm soils. In 2017, according to Table 4 of the 2017 US Census of Agriculture, Exhibit 12, only 16.03% of farm operators achieved a net profit from farming (238 of 1484 farm operations). In 2012, the percentage was 16.45% (211 of 1283 farm operations). In 2007, according to the 2012 US Census of Agriculture, that figure was 17% (239 of 1405 farm operations). Exhibit 13. The vast majority of farms in Deschutes County

have soils that are superior to those found on the subject property. As farming on those superior soils is typically not profitable, it is reasonable to conclude that no reasonable farmer would purchase the subject property for the purpose of attempting to earn a profit in money from agricultural use of the land.

Population Changes; Encroaching development: The population of Deschutes County has, according to the US Census, increased by 336% between 1980 when the County's last zoned this property and 2021 from 62,142 persons to 209,266 persons. The supply of rural residential dwelling lots has been diminishing in the same time period. Encroaching development east of Bend's Urban Growth Boundary has brought both traffic and higher density residential uses and congestion to the area, and within a mile of the subject property.

The above analysis regarding farming economics, viability of farm uses, decline in farm operations, and changing population data and encroaching development demonstrates that a change in circumstances has occurred since the property was last zoned. In addition, Mr. Kitzrow's soil assessment confirms that the subject property does not have agricultural soils.

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

The Deschutes County Comprehensive Plan

Chapter 1, Comprehensive Planning

Section 1.3, Land Use Planning

Goal 1, Maintain an open and public land use process in which decisions are based on the objective evaluation of facts.

FINDING: The subject application is being evaluated based on an objective review of compliance with Statewide Planning Goals, Deschutes County Comprehensive Plan policies, and Oregon Administrative Rules. A public hearing will be held before a Hearings Officer on November 14, 2024, and members of the public can attend and testify at that hearing. Pursuant to DCC 22.28.030, the Board of County Commissioners will take final action on the application and may choose to either adopt the Hearings Officer findings or conduct their own hearing. This Comprehensive plan amendment and zone change application will be evaluated through an open process that allows for public input and follows Deschutes County's Procedures Ordinance.

Staff finds that within each of the steps described above, there is an open and public process that

is based on an objective evaluation of facts. This criterion will be met.

Chapter 2, Resource Management

Section 2.2, Agricultural Lands Policies

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

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

The applicant is pursuing a plan amendment and zone change on the basis that the subject property does not constitute "agricultural lands", and therefore, it is not necessary to preserve or maintain the subject lands as such and this goal does not apply. In the Landholdings decision (and the Powell/Ramsey decision) the Hearings Officer found that Goal 1 is an aspirational goal and not an approval criterion.

As demonstrated in this application, the subject property does not constitute "agricultural land" and therefore, is not necessary to preserve and maintain the County's agricultural industry. Mr. Kitzrow's soils assessment demonstrates that the subject property consists predominantly of Class 7 and 8 non-agricultural soils.

According to Mr. Kitzrow, these soils have severe limitations for agricultural use of the subject property due to rocky composition, underlying hard pan and the inability to hold water. . Mr. Kitzrow's study maps each soil unit within all seven lots, assigning soil capability class and percentages to each lot and to the aggregate 22.5 acre property. The Summary Chart for Individual Lot Capability Class is set forth below:

Summary of Individual Lot Capability Class

T17S R 12E Sec. 6 TL# 301; T17S R 12E Sec. 6 TL# 300; T17S R 12E Sec. 6 TL# 302; T17S R 12E Sec. 6B TL# 100; T16S R12E Sec. 31D TL# 4200; T16S R12E Sec. 31D TL# 4300; T16S R12E Sec. 31D TL# 4400

T16S R 12E Sec. 31D TL# 4200	1.46 Acres	Capability Class VII and VIII	0.76 Acs. or 52.1%
T16S R 12E Sec. 31D TL# 4300	1.63 Acres	Capability Class VII and VIII	0.95 Acs. or 58.3%
T16S R 12E Sec. 31D TL# 4400	0.94 Acres	Capability Class VII and VIII	0.74 Acs. or 78.7%
T16S R 12E Sec. 6 TL301	9.95 Acres	Capability Class VII and VIII	7.61 Acs. or 76.5%
T16S R 12E Sec. 6 TL302	6.03 Acres	Capability Class VII and VIII	3.46 Acs. or 57.4%
T16S R 12E Sec. 6 TL300	1.50 Acres	Capability Class VII and VIII	1.50 Acs. or 100%
T17S R 12E Sec. 6B TL100	0.99 Acres	Capability Class VII and VIII	0.51 Acs. or 51.5%

According to Mr. Kitzrow the subject property is not suited for livestock grazing on a commercial scale. The forage potential for all lots under review in this study is quite limited based upon the soil characteristics. The rangeland productivity potential of the soils mapped within this survey area are shown in Table 6 of the USDA Soil Survey Report for the Deschutes County Area. The

productivity ranges from 1100 to 900 to 700 pounds of dry matter per acre per year for map units 26A, 98A. For Soil Map units: Partial Mine Spoil, Tumalo Shallow Variant and Plainview Fragmental Variant mapping units (Class 7 and 8) the estimated pounds of dry matter per acre per year is consistently less than 600. Impact Areas and complete Mine Spoil produce 0 pounds of dry matter. Similarly, the 78C Lickskillet soil map unit produces 800, 600 and 400 pounds of dry matter, none of which meets the minimum of 912.5 pounds of dry matter required to feed a cow/calf pair.

In Table 6 of the USDA published soil survey report for Deschutes County Area, the terms unfavorable, normal and favorable are used to connote production based upon below normal, normal and above normal rainfall and thus moisture available to support the growth of forage plants. According to Technical Note #3 (TN Range No. 3 NRCS, June 2009) it takes 912.5 pounds of dry matter to feed a cow / calf pair for one month defined as an (AUM). Based upon the acreages for each soil present within the study area, the total dry matter production for all five subject properties under review is 8,364 pounds for normal conditions. The accepted standard for sustainable grazing is 25% of dry matter production (with residual grazing products for future crop production and wildlife habitat. Therefore, the sustainable grazing potential for the entire study area (22.50 acres) is 0.80 pair per one month, or well less than one pair per year. The soils present do NOT represent sufficient numbers of AUMs for a commercially viable livestock operation.

As discussed herein, the applicant's soil study, NRCS soil data, and the findings in the submitted burden of proof effectively demonstrate that the subject property is not suitable for designation as Agriculture in the Comprehensive Plan. However, staff directs attention to findings under OAR 660-033-030, Identifying Agricultural Land, below and how a recent Land Use Board of Appeals (LUBA) remand decision approaches factors other than soil data, availability of irrigation, and other common factors.

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 seeking to amend the subzone that applies to the subject property; rather, the applicant is seeking a change under Policy 2.2.3 and has provided evidence to support rezoning the subject property to MUA-10.

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

FINDING: The applicant is seeking approval of a plan amendment and zone change to re-designate and rezone the properties from Surface Mine and Agricultural to Rural Residential Exception Area. 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 Land Use Board of Appeals (LUBA) allowed this approach in *Wetherell v. Douglas County*, 52 Or LUBA 677 (2006), and this approach has been utilized in the previous plan amendment and zone change applications within Deschutes County. The County Hearings Officer also accepted this method in file PA-10-5 (Rose & Associates). In *Wetherell v. Douglas County*, LUBA states at pp. 678-679:

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

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

LUBA's decision in *Wetherell* was appealed to the Oregon Court of Appeals and the Oregon Supreme Court but neither court disturbed LUBA's ruling on this point. In fact, the Oregon Supreme Court 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). In that case, the Supreme Court stated that:

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 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." *Wetherell*, 342 Or at 680. The facts presented in the subject application are sufficiently similar to those in the *Wetherell* decisions and in the above-mentioned Deschutes County plan amendment and zone change applications. The subject property is primarily composed of Class 7 and 8 nonagricultural soils making farm-related endeavors not profitable. This application complies with Policy 2.2.3.

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

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

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

Policy 2.2.13 Identify and retain accurately designated agricultural lands.

FINDING: This plan policy makes it clear that it is County policy to identify and retain agricultural lands that are accurately designated. The applicant proposes that the subject property was not accurately designated as demonstrated by the soil study and the applicant's burden of proof. Further discussion on the soil analysis provided by the applicant is detailed under the OAR Division 33 criteria below.

Section 2.4, Goal 5 Overview

Goal 1, Protect Goal 5 resources.

Policy 2.4.4 Incorporate new information into the Goal 5 inventory as requested by an applicant or as County staff resources allow.

FINDING: The applicant is not proposing to modify or repeal Goal 5 policies, rather the applicant seeks to remove the subject property from the list of significant aggregate and mineral resources in Deschutes County (Comprehensive Plan Table 5.8) based on site-specific conditions. The applicant provides the following findings in their burden of proof:

This application provides new information supporting rezoning and removal of the subject properties from Site No. 370 from the County's Surface Mining Mineral and Aggregate Inventory (Comprehensive Plan Table 5.8.1). The subject properties were included in SM 370 as storage and not based on the material quantity. The subject properties have not been owned by the operator or used as a part of Site 370 for over 20 years. The current operator agrees the properties are not needed for the storage, processing use and supports the removal of these properties from Site No. 370 and the zone change from SM to MUA-10. (Exhibit 9). Furthermore, the Kitzrow Report demonstrates the site does not contain a significant Goal 5 resource based on the quantity, quality, and location of the resource and was never subject to a DOGAMI approved reclamation plan.

Staff finds the applicant has submitted new information for the purpose of amending the Goal 5 mineral aggregate inventory.

Section 2.5, Water Resources Policies

Goal 6, Coordinate land use and water policies.

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

FINDING: The applicant is not proposing specific development at this time, therefore the applicant is not required to demonstrate the water impacts associated with development. This requirement will be reviewed at the time of development through any necessary land use process for the development type (e.g. conditional use, site plan, tentative plat). Therefore, this criterion does not apply to this rezoning application.

Section 2.6, Wildlife

FINDING: There are no Goal 5-listed wildlife species present on the subject property, based on the Goal 5 inventory nor threatened or endangered species. There is no identified wildlife habitat on the subject property.

Section 2.7, Open Spaces, Scenic Views and Sites

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

Policy 2.7.1 Goal 5 open spaces, scenic views and sites inventories, ESEEs and programs are retained and not repealed.

FINDING: The subject proposal will not repeal any open space designations, or impact identified scenic corridors. The subject property is not identified as significant open space and any future development will be subject to setbacks, height limitations, lot coverage standards, and use limitations, which will effectively limit the impact on scenic views.

Policy 2.7.3 Support efforts to identify and protect significant open spaces and visually important areas including those that provide a visual separation between communities such as the open spaces of Bend and Redmond or lands that are visually prominent.

Policy 2.7.5 Encourage new development to be sensitive to scenic view and sites.

FINDING: These policies are fulfilled by the County's Goal 5 program. The County protects scenic views and sites along major rivers and roadways by imposing Landscape Management (LM) Combining Zone to certain adjacent properties. Staff notes that the LM Combining Zone associated with Highway 20 and the Deschutes River apply to portions of the subject property. Any future development within an LM Combining Zone will be evaluated for compliance at that time. The subject property is also not located within the Open Space and Conservation (OS&C) Zone.

Furthermore, no new development is proposed under the present application. These provisions of the plan, therefore, are not impacted by the proposed zone change and plan amendment.

Section 2.10, Surface Mining

Goal 1, Protect and utilize mineral and aggregate resources while minimizing adverse impacts of extraction, processing and transporting the resource.

Policy 2.10.1 Goal 5 mining inventories, ESEEs and programs are retained and not repealed.

Policy 2.10.2 Cooperate and coordinate mining regulations with the Oregon Department of Geology and Mineral Industries.

Policy 2.10.3 Balance protection of mineral and aggregate resources with conflicting resources and uses.

Policy 2.10.5 Review surface mining site inventories as described in Section 2.4, including the associated Economic, Social, Environmental, and Energy (ESEE) analyses.

Policy 2.10.6 Support efforts by private property owners and appropriate regulatory agencies to address reclamation of Goal 5 mine sites approved under 660-016 following mineral extraction.

FINDING: The Applicant provided the following information in the burden of proof:

The present application asks the County to remove property from Site No. 370 and SM zoning because it has no significant aggregate resource and has not been used as a part of the storage and processing site for over 20 years. The Cascades Academy has been operating to the south of Site No. 370 for 11 years, with both operations coexisting compatibly. The subject property should be rezoned for a subsequent use consistent with the surrounding uses as it is underutilized and ready for a subsequent use outside of the SM zone. The applicant proposes the SMIA zone be placed on the subject property to continue the protections for the remaining properties in Site No. 370

FINDINGS: Staff concurs with the applicant; the subject property is not in active use and has not been under the same ownership as the mining entity for Site No. 370 since the early 1990s. The Department of Geology and Mineral Industries was provided notice of the application and did not provide comment. The criterion is met.

Chapter 3, Rural Growth

Section 3.2, Rural Development

Growth Potential

As of 2010, the strong population growth of the last decade in Deschutes County was thought to have leveled off due to the economic recession. Besides flatter growth patterns,

changes to State regulations opened up additional opportunities for new rural development. The following list identifies general categories for creating new residential lots, all of which are subject to specific State regulations.

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

FINDING: This section of the Comprehensive Plan does not contain Goals or Policies, but does provide the guidance above. In response to this section, the applicant's burden of proof provides the following:

As shown above, the County's Comprehensive Plan provisions anticipate the need for additional rural residential lots as the region continues to grow. This includes providing a mechanism to rezone surface mine lands which have been fully mined and reclaimed as well as farm lands with poor soils to a rural residential zoning designation. While this rezone application does not include the creation of new residential lots, the applicant has demonstrated the subject property is comprised of poor soils that are adjacent to rural residential uses.

Rezoning the subject property to MUA-10 to facilitate its redevelopment as part of a master plan process for school expansion is consistent with this criterion, as it will provide for an orderly and efficient transition to rural and agricultural lands. Additionally, it will allow utilization of the non-productive lands of the subject property consistent with existing rural development adjacent to the Tumalo State Park and Deschutes River.

Staff notes that the MUA-10 Zone is a rural residential zone and as discussed in the Basic Findings above, there are many adjacent properties to the south that are zoned MUA-10. The northern boundary abuts the unincorporated community of Tumalo, which includes industrial and residential zoning designations. Staff agrees with the applicant's response and finds the proposal complies with this policy.

Section 3.3, Rural Housing

Rural Residential Exception Areas

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

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

FINDING: The Hearings Officer's decision for file numbers PA-11-17/ZC-11-2 provides the following findings in response to this portion of Section 3.3 of the Comprehensive Plan:

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

There is one additional related matter which warrants discussion in connection with this issue. It appears that part of Staff's hesitation and caution on the issue of whether an exception might be required is rooted in the title of the Comprehensive Plan designation that would ultimately apply to the subject property – which is "Rural Residential Exception Area." There appears to be seven countywide Comprehensive Plan designations as identified in the plan itself. These include "Agriculture, Airport Development, Destination Resort Combining Zone, Forest, Open Space and Conservation, Rural Residential Exception Area, and Surface Mining." Of the seven designations, only Rural Residential Exception Area provides for associated zoning that will allow rural residential development. As demonstrated by reference to the Pagel decision discussed above, there appears to be instances in which rural residential zoning has been applied without the underlying land necessarily being identified as an exception area. This makes the title of the "Rural Residential Exception Area" designation confusing, and in some cases inaccurate, because no exception is associated with the underlying land in question. However, it is understandable that since this designation is the only one that will allow rural residential development, that it has become a catchall designation for land types that are authorized for rural residential zoning. That is the case with the current proposal, and again, for the same reasons set forth in Hearings

Officer Green’s decision in Pagel, I cannot find a reason why the County would be prohibited from this practice.

Based on the above, staff agrees with the past Deschutes County Hearings Officer interpretations and finds that the above language is not a policy and does not require an exception to the applicable Statewide Planning Goal 3. Staff finds the proposed RREA plan designation is the appropriate plan designation to apply to the subject property.

Section 3.7, Transportation

The Transportation System Plan was adopted in Ordinance 2023-017 and is hereby incorporated into this Plan as Appendix C⁵...

Appendix C – Transportation System Plan

Goal 3 Mobility and Connectivity: Promote a multimodal transportation system that moves people and goods between rural communities and Sisters, Redmond, Bend, La Pine, and other key destinations within the County as well as to the adjacent counties, Central Oregon, and the state.

FINDING: This goal applies to the County and advises it to consider the roadway function, classification and capacity as criteria for plan amendments and zone changes. The County will comply with this direction by determining compliance with the Transportation Planning Rule (TPR), also known as OAR 660-012, as described below in subsequent findings.

OREGON ADMINISTRATIVE RULES CHAPTER 660, LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

DIVISION 23, PROCEDURES AND REQUIREMENTS FOR COMPLYING WITH GOAL 5

OAR 660-023-0180 Mineral and Aggregate Resources

FINDING: The applicable provisions identified below and the associated findings are quoted from the applicant’s Burden of Proof. Staff agrees with this analysis but requests the Hearings Officer make specific findings.

- (2) *Local governments are not required to amend acknowledged inventories or plans with regard to mineral and aggregate resources except in response to an application for a post acknowledgement plan amendment (PAPA) or at periodic review as specified in section (9) of this rule. The requirements of this rule modify, supplement, or supersede the requirements of the***

⁵ The 2024 Transportation System Plan became adopted on June 18, 2024. The application was submitted June 24, 2024, therefore the requirements in the 2024 version apply.

standard Goal 5 process in OAR 660-023-0030 through 660-023-0050, as follows:

(b) Local governments shall apply the criteria in section (3) or (4) of this rule, whichever is applicable, rather than OAR 660-023-0030(4), in determining whether an aggregate resource site is significant;

FINDING: The proposed amendment constitutes a PAPA. As outlined in the *Stott* decision discussed below, a determination of significance is required to de-list a Goal 5 aggregate resource. The thresholds for significance are addressed in the responses to OAR 660-023-0180(3) and (4), below.

(3) An aggregate resource site shall be considered significant if adequate information regarding the quantity, quality, and location of the resource demonstrates that the site meets any one of the criteria in subsections (a) through (c) of this section, except as provided in subsection (d) of this section:

(a) A representative set of samples of aggregate material in the deposit on the site meets applicable Oregon Department of Transportation (ODOT) specifications for base rock for air degradation, abrasion, and soundness, and the estimated amount of material is more than 2,000,000 tons in the Willamette Valley, or more than 500,000 tons outside the Willamette Valley;

FINDING: The County’s Goal 5 inventory indicates that Site No. 370 contains the following:

#	Taxlot	Name	Type	Quantity*	Quality	Access/Location
370	161231-D0-00400	Bend Aggregate Plant Site	Storage			

*Quantity in cub yards

The County’s Goal 5 mineral and aggregate inventory lists site 370 as a storage site only. The ESEE indicates there is some amount of unextracted sand and gravel. However, the ESEE acknowledges the amount of resource on site is minimal and would require DOGAMI permitting for its removal. There are no DOGAMI permits for mineral extraction at this site. The ESEE further acknowledges the mining use is transitional and the site could be rezoned for other uses where the mining use is complete. The ESEE does not specify, and in fact is silent as to, a subsequent zoning designation.

(b) The material meets local government standards establishing a lower threshold for significance than subsection (a) of this section; or

FINDING: Subsection (b) is not applicable because Deschutes County has not established lower standards for significance.

(c) The aggregate site was on an inventory of significant aggregate sites in an acknowledged plan on September 1, 1996.

FINDING: Site No. 370 is included in the County's inventory of significant aggregate sites and was acknowledged prior to September 1, 1996. However, it was included as a storage site not as an extraction site. Moreover, subsection (c) is not applicable to this PAPA because the request includes removing the site from the acknowledged inventory.

In PA-98-12/ZC-98-6, the Hearings Officer made the following finding, adopted by the BOCC:

"The subject site is included in the county's inventory of significant mineral and aggregate sites. The Hearings Officer is aware this inventory was acknowledged prior to the effective date of the new Goal 5 administrative rules. Therefore, I find the subject site falls within the 'significant' standard in paragraph (c). Arguable that finding would end the inquiry since under this provision a site is considered 'significant' if it meets any of the three criteria. However, I find such a result would create a 'Catch-22' where, as here, the applicant is seeking to remove a site from the inventory as no longer 'significant.' Consequently, I find the 'significant' standard in paragraph (c) should not be applied to PAPAs requesting removal of a site from an acknowledged inventory..."

The Hearings Officer in *Tumalo Irrigation District* (247-17-000775-ZC/247-17-000776-PA) concurred and concluded that "as in ZC-98-6 and PA-98-12, subsections (b) and (c) are not applicable. Therefore, the aggregate resource is significant only if it meets all the criteria in subsection (a)." The BOCC adopted the Hearings Officer's finding in their ultimate approval of the application.

(d) Notwithstanding subsections (a) and (b) of this section, except for an expansion area of an existing site if the operator of the existing site on March 1, 1996, had an enforceable property interest in the expansion area on that date, an aggregate site is not significant if the criteria in either paragraphs (A) or (B) of this subsection apply:

(A) More than 35 percent of the proposed mining area consists of soil classified as Class I on Natural Resource and Conservation Service (NRCS) maps on June 11, 2004; or

(B) More than 35 percent of the proposed mining area consists of soil classified as Class II, or of a combination of Class II and Class I or Unique soil, on NRCS maps available on June 11, 2004, unless the average thickness of the aggregate layer within the mining area exceeds:

(i) 60 feet in Washington, Multnomah, Marion, Columbia, and Lane counties;

(ii) 25 feet in Polk, Yamhill, and Clackamas counties; or

(iii) 7 feet in Linn and Benton counties.

FINDING: The criterion does not apply. The subject property does not contain any Class I, Class II, or Unique soils as confirmed by the Site-Specific Soil Survey that was conducted by Certified Soil Scientist, Gary Kitzrow and has been submitted to the Department of Land Conservation and Development (DLCD) in accordance with OAR 660-033-0045(6)(a) (Exhibit 7).

- (4) *Notwithstanding section (3) of this rule, a local government may also determine that an aggregate resource site on farmland is significant if subsections (a) and (b) of this section apply or if subsection (c) of this section applies:***

FINDING: The criterion does not apply. The subject property is not identified as agricultural lands on the acknowledged Deschutes County Comprehensive Plan map, and it has not been farmed or used in conjunction with any farming operation. The study conducted by Mr. Kitzrow confirms the site is composed predominantly of Class 7 and 8 soils and therefore does not meet the definition of agricultural land.

Staff finds the applicant has demonstrated compliance with OAR-660-023-0180, above, but requests the Hearings Officer make specific findings on this topic.

DIVISION 6, GOAL 4 – FOREST LANDS

OAR 660-006-0005, Definitions

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

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

DIVISION 33 – AGRICULTURAL LANDS & STATEWIDE PLANNING GOAL 3 – AGRICULTURAL LANDS

OAR 660-015-0000(3)

To preserve and maintain agricultural lands.

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

FINDING: Goal 3 defines "Agricultural Land," which is repeated in OAR 660-033-0020(1). Staff makes findings on this topic below and incorporates those findings herein by reference.

OAR 660-033-0020, Definitions

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

(1)(a) "Agricultural Land" as defined in Goal 3 includes:

(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon⁶;

FINDING: The applicant's basis for not requesting an exception to Goal 3 is based on the premise that the subject property is not defined as "Agricultural Land." In support, the applicant offers the following response to the above definition in addition to subsection (1)(c)⁷ as included in the submitted burden of proof statement:

ORS 215.211 grants a property owner the right to rely on more detailed information that provided by the NRCS Web Soil Survey of the NRCS to "assist the county to make a better determination of whether land qualifies as agricultural land." Statewide Goal 3, discussed above, and OAR 660-033-0030(5) also allow the County to rely on the more detailed and accurate information by a higher order soil survey rather than information provided by the NRCS. The law requires that this survey use the NRCS soil classification system in conducting the survey, making it clear that the point of the survey is to provide better soil classification information than provided by the NRCS for use in making a proper decision whether land is or is not "Agricultural Land." The subject property is not properly classified as Agricultural Land and does not merit protection under Goal 3. The soils are predominately Class 7 and 8, as demonstrated by the site-specific soils assessment conducted by Mr. Kitzrow, a certified soils scientist. State law, OAR 660-033-0030, allows the County to rely on for more accurate soils information, such as Mr. Kitzrow's soil assessment. Mr. Kitzrow found that approximately 68.8 percent of the soils on the subject property are Land Capability Class 7 and 8 soils that have severe limitations for farm use. He also found the site to have low soil fertility, shallow and very shallow soils, abundant rock outcrops, rock fragments on the soil surface, restrictive for livestock accessibility, and low available water holding capacity, all of which are considerations for the determination for suitability for farm use.

⁶ 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.

⁷ "Agricultural Land" does not include land within acknowledged urban growth boundaries or land within acknowledged exception areas for Goal 3 or 4.

Because the subject property is comprised predominantly of Class 7 and 8 soils, the property does not meet the definition of "Agricultural Land" under OAR 660-033-020(1)(a)(A), listed above as having predominantly Class I-VI soils.

Staff has reviewed the soil study provided by Gary Kitzrow, GSEA (dated June 18, 2024), and agrees with the applicant's representation of the data for the subject property. Staff finds, based on the submitted soil study and the above OAR definition, that the subject property is comprised predominantly of Class VII and VIII soils and, therefore, does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A) above, but asks the Hearings Officer to amend or add to these findings as the Hearings Officer sees fit.

(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 provides the following response in the burden of proof:

This part of the definition of "Agricultural Land" requires the County to consider whether the Class 7 and 8 soils found on the subject property are suitable for farm use despite their Class 7 and 8 soil 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 10.7 acres mapped and 4.2 not mapped water rights, has not been farmed, or used in conjunction with any farming operation in the past. The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies four soil complex units on the property: Plainview Sandy Loam 98A and 98B, Clinefalls sandy loam and Redcliff-Lickskillet-Rock outcrop complex.

A more detailed Agricultural Soils Capability Assessment (Order 1 soil survey) conducted on the property by Mr. Kitzrow determined that the property is not agricultural land, the higher capability soils make up only 31.2 percent of the subject property, and the lower capability soils, Capability Class 7 and 8, make up 68.8 percent of the subject property, and that the restrictive soils depth and limited soil fertility create severe limitations for any agricultural use on the property or in conjunction with other neighboring lands.

A review of the considerations listed in the administrative rule, below, shows why the poor soils found on the subject property are not suitable for farm use that can be expected to be profitable:

Soil Fertility:

Mr. Kitzrow made the following findings regarding soil fertility on the subject property:

The soils under consideration for this report are predominately shallow to a restrictive layer (Duripan), Fragmental Substrata, bedrock or have been altered with the irreversible Impacts of mining, homesite/road development, ditch/berm development dating back to before January 1, 1993.

In the natural soils for all map unit delineated for this report, sand dominates ALL soil profiles with no loamy or clayey textures or horizons present. Clay contents are exceedingly low at all locations. Most soils have less than 12% clay (which is exceedingly low even for the Deschutes County Region). The water holding capacities for a majority of soils mapped are less than 2". Two inches of water holding capacity is the threshold for successful farm crop establishment based upon local experience as well as OSU and WSU Extension empirical research. A preponderance of each lot studied for this report does not contribute 2+" of water holding capabilities.

Along with droughty conditions, the high sand contents yield low fertility levels in all soils present. Sand does not hold nutrients therefore cropping is severely limited. The CEC (Cation Exchange Capacity) is very low in these sandy soils. No crops can adequately grow without supplemental fertilizers. The use of fertilization must be frequent and complete given the soils present. The revenue from most locally adapted crops, will not be able to cover the costs of the inputs and management.

The fact that the soils are low fertility unless made fertile through artificial means supports the applicant's position that the Class 7 and 8 soils and the entire property is not suitable for farm use. The costs to purchase and apply fertilizer and soil amendments and the costs to sample and test soils are a part of the reason why it is not profitable to farm the subject property. Additionally, the soils on the property are shallow and very shallow further limiting any potential for commercially farming the property because the shallow soil depth limits the overall volume of soil available for plant roots and limits the size of the overall nutrient pool.

Unsuitability for Grazing:

Mr. Kitzrow also analyzed whether the parcel is suitable for grazing and found:

The forage potential for all lots under review in this study is quite limited based upon the soil characteristics. The rangeland productivity potential of the soils mapped within this survey area are shown in Table 6 of the USDA Soil Survey Report for the Deschutes County Area. The productivity ranges from 1100 to 900 to 700 pounds of dry matter per acre per year for map units 26A, 98A. For Soil Map units: Partial Mine Spoil, Tumalo Shallow Variant and Plainview Fragmental Variant mapping units (Class 7 and 8) the estimated pounds of dry matter per acre per year is consistently less than 600. Impact Areas and complete Mine Spoil produce 0 pounds of dry matter. Similarly, the 78C Lickskillet soil map unit produces

800, 600 and 400 pounds of dry matter, none of which meets the minimum of 912.5 pounds of dry matter required to feed a cow/calf pair.

In Table 6 of the USDA published soil survey report for Deschutes County Area, the terms unfavorable, normal and favorable are used to connote production based upon below normal, normal and above normal rainfall and thus moisture available to support the growth of forage plants. According to Technical Note #3 (TN Range No. 3 NRCS, June 2009) it takes 912.5 pounds of dry matter to feed a cow / calf pair for one month defined as an (AUM). Based upon the acreages for each soil present within the study area, the total dry matter production for all five subject properties under review is 8,364 pounds for normal conditions. The accepted standard for sustainable grazing is 25% of dry matter production (with residual grazing products for future crop production and wildlife habitat. Therefore, the sustainable grazing potential for the entire study area (22.50 acres) is 0.80 pair per one month, or well less than one pair per year. The soils present do NOT represent sufficient numbers of AUMs for a commercially viable livestock operation.

Climatic Features

The climate in Central Oregon is cold and dry, with a very short growing season. According to the OSU Extension Service the growing season for Bend is only 80-90 days long. Exhibit 14. According to Mr. Kitzrow, climatic conditions of this area make is difficult for production of most crops, as stated below:

The Tumalo portion of Deschutes County represents typical weather conditions for the county. A bit of a 'rain shadow' exists due to the proximity of Tumalo to the crest of the Cascades. However, the annual precipitation is approximately 12" or less per year with little to no rainfall occurring during the growing season. Due to the large acreage in this survey area of debilitated and degraded soils, climate restrictions are superceded by soil conditions which are not improvable with irrigation. This survey area will NOT support a commercial livestock operation. The low annual precipitation, high summer temperature and shortened frost-free growing season make this a difficult climate for production of most crops. Irrigation is needed on area farms to meet crop needs given only 8 to 10 inches precipitation that falls mainly between November and June, with long summer drought. The average annual air temperature is 46 degrees F with extreme temperatures ranging from -26 to 104 degrees F.

Existing and Future Availability of Water for Farm Irrigation Purposes

The frost-free period is 50-90 days. The optimum period for plant growth is from late March through June. Freeze-free period (average) 140 days. (NRCS 2020) These harsh climatic conditions coupled with very low soil available water holding capacity limits the potential of irrigated crop production on the studied soils and only those in areas where rocks and rock piles would not impede irrigation infrastructure.

The Study Area contains 15.51 acres of irrigation rights. This includes 14.9 acres with the Tumalo Irrigation District and 0.61 acres with the Tumalo Town District. Due to the inordinate

preponderance of Capability Class 7 and 8 soils on these parcels, irrigation does not improve the growth of crops. The Class 7 and 8 soils are degraded or naturally poor enough irrigation does not change their Capability Class nor utility status. Adding extra water during the growing season does not add enough extra net dry production matter to raise the status from unfavorable to normal. The extra water on these poorer mapping units would not elevate the number of AUMs to make this site a viable Livestock operation. Of the 15.51 available for irrigation on this entire study area, approximately only 2.5 acres are currently being irrigated.

Irrigating the soils found on the subject property as described by Mr. Kitzrow, that have low fertility, low capacity to store nutrients, and very low available water holding capacity translates into low productivity for crops that would amount to no profit for the farm operator and an irresponsible waste of scarce water resources.

Existing Land Use Patterns

Existing land use patterns in the area are primarily non-agricultural related land uses including lands to the north used for processing, storing and concrete production as part of SM Site 370, lands to the west including Tumalo State Park and the Deschutes River, to the south is Cascades Academy and east are lands developed with homes and hobby farm uses on partially irrigated parcels zoned EFU-TRB.

The subject parcels are bordered by O.B. Riley Rd. to the direct east. The subject parcels are zoned EFUTRB to the southern parcels (T17S) and SM for the three Tax Lots 4200, 4300, 4400, in the northern region (T16S). Limits of the Town of Tumalo (unincorporated) are one half mile to the north. The surrounding lands are mostly zoned MUA-10 and TUI or TUR5 further north. FP zoning adjoins the main stem of the Deschutes River and the associated riparian areas. No past or present indications of any farming are noted in these MUA-10 areas with surface mining overlays being noted west of the subject properties. The Deschutes River stem is located from 300' to 475' due east.

Technological and Energy Inputs Required:

According to Mr. Kitzrow:

The amount of disturbance, site degradation and ancient Impact, coupled with the naturally occurring Class 7 and 8 soils, makes this site not viable for technological and energy investments. No contiguous, consistent areas of farmable lands are present within this study area. The area is extremely complex with many small islands (delineations) of contrasting and inhospitable soils due to conditions profiled above as well as in the formal Soil Surveys submitted to the DLCD in conjunction with this supplemental reporting. The large-scale mined areas yielding spoils (TL#s found in Township 17 within the study area) are not economically improvable due to the severity of past soil removal and the current compacted and truncated condition of the land. In the northern, non-mined Lots (4200, 4300 and 4400), the mapping units are far too complex and contrasting to develop a

cohesive and manageable farm plan. The use of further irrigation development is not cost effective for the same reasons. Since only about 2.5 acres or 10% of the entire land base is being irrigated currently, a huge investment would be required to add the necessary infrastructure to utilize the entire 15.51 acres of potential irrigation rights for these parcels. Since a very high percentage of this entire land base is made up of Class 7 and 8 soils, developing irrigation for the remaining potential areas would not be cost effective and not increase farming opportunities.

Due to variable land use patterns in this general area combined with a lack of any current farming practices in the immediate area, re-zoning of these parcels into one common zone and future land use pattern will not lead to an increase in conflict regarding normal farming practices. In perpetuity, this specific area has not been in sustainable farm production therefore adjacent and adjoining lands will not be impacted by a change in zone.

Accepted Farming Practices:

The Deschutes River stem to the east includes both floodways and floodplains. Directly to and contiguous with areas east of the adjoining O.B. Riley Rd. all lands are fallow with no farming whatsoever. Only natural riparian vegetation is present in these areas. Cultivation or pasturing is not confirmed. This area in general is a nonfarm area with urbanization, mining activity and recreation being the dominant activities.

Staff agrees with the findings and conclusions within the submitted soil survey report related to the above factors under subsection (B).

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

FINDING: The applicant provides the following response in the burden of proof:

The subject property is not land necessary to permit farm practices to be undertaken on adjacent or nearby lands. The nearest property to the subject property that is agriculturally zoned and appears to be irrigated and may be engaged in farm use is the Tripolay Farms property located one property over to the east of the property owned by Rita Rice. This property is irrigated and growing pasture grass and/or hay with a horse livestock use. The nonagricultural soils on the subject property are not interspersed with land that is agriculturally productive. There is no history of the subject property being used in conjunction with any adjacent or nearby farming operations. The historical mining of a portion of the subject property under former SM Site 304 and the separation or nonuse of the remaining portion of the property from any adjacent and nearby farming establishes that it is neither useful nor productive to permit farming practices on those lands. Furthermore the school has been operating on the adjacent land to the south since 2013

with no apparent impact to any adjacent or nearby farm practices. The expansion of the school use onto the subject property should also have no impact to adjacent or nearby farm practices. Based on this historical evidence, it does not appear likely that the rezoning of this parcel would detract from any adjacent or nearby agricultural operations.

Only a small percentage of acreage under review has been used for improved farming practices. The remainder of these lots have remained fallow or under former mining operations. Adjoining properties have not been used for farming and are not "Agricultural Lands". The Cascades Academy School was permitted in 2010 and occupied in 2013 and has been operating on the site for the past 11 years without impact to adjacent or nearby lands. None of the current nor past use of neighboring properties impact, nor are impacted by, the status or use of this subject property. The study parcels are not necessary to permit farming practices to occur on adjacent lands.

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 property has no history of farm use and contains soils that make it unsuitable for farm use and therefore, no basis to inventory the subject property as agricultural land.

Goal 3 applies a predominant soil type test to determine if a property is "agricultural land." If a majority of the soils are Class 1-6 in Central or Eastern Oregon, it must be classified "agricultural land." Case law indicates that the Class 1-6 soil test applies to a subject property proposed for a non-agricultural plan designation while the farm unit rule looks out beyond the boundaries of the subject property to consider how the subject property relates to lands in active farming in the area that was once a part of the area proposed for rezoning. It is not a test which requires that 100% of soils on a subject property be Class 1-6.

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 only adjoining EFU land to the east owned by Rita Rice, has been used by her as a residence since 1963. As demonstrated by the historic use patterns and soils reports, the subject property does not have soils which are adjacent to or intermingled with good soils within a farm unit. The subject property is not in farm use and has not only ever been used for hobby farming, with water applied to retain the irrigation rights before in stream leasing was available. It has no history of commercial farm use and contains soils that make the property 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 predominately 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 it has not been used in conjunction with any adjacent farm properties.

As shown by the soils assessment conducted by Mr. Kitzrow, the predominant soil type found on the subject property is Class 7 and 8, nonagricultural land (68.8%). The predominance test says that the subject property is not agricultural soil and the farm unit rule does not require that the Class 7 and 8 soils that comprise the majority of the subject property be classified as agricultural land due to the presence of a small amount of Class 3 irrigated and 6 nonirrigated soils on the subject property that are not employed in farm use and are not part of a farm unit. As a result, this rule does not require the Class 7 and 8 soils on the subject property to be classified agricultural land because a minority of the property contains soils rated Class 3 and 6.

Staff agrees with the findings and conclusions within the submitted soil survey report related to the above factors under subsection (C) and the applicant has demonstrated the property does not fit within the definition of "agricultural land".

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

FINDING: This criterion is addressed above in this Staff Report.

OAR 660-033-030, Identifying Agricultural Land

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

FINDING: The evidence shows that the subject property is not "agricultural land" because the property is predominantly Class 7 and 8 soils. The subject property is not necessary to permit farm practices to be undertaken on adjacent or nearby lands. Therefore, staff considers that the subject property is not identified as agricultural land pursuant to the determination criteria above and finds compliance with this subsection of the rule has been demonstrated.

However, in a recent decision by the Land Use Board of Appeals (LUBA)⁸, LUBA remanded the Deschutes County Board of County Commissioners decision to approve a post-acknowledgement plan amendment and rezone application submitted by 710 Properties, LLC to change the designation and zoning of the subject property from AG/EFU to RREA/RR-10 on 710 acres of property west of Terrebonne and Redmond and north of Highway 126.

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

- LUBA’s discussion at pages 36-37 sustained DLCD’s second assignment of error and portions of Redside’s and Keystone’s assignments of error based on a determination that the County did not consider the ability to use the subject property with a primary purpose of obtaining a profit in money **in conjunction with other property**. LUBA stated that “Relating the profitability of farm related activity solely to the activity on the subject property places undue weight on profitability.” More discussion on this is found on pages 46-49 of the decision.
- “Source of Feed” – this discussion is found at pages 37-42 of the decision. **LUBA’s decision states that the County erred in construing OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a) in concluding that land is suitable for farm uses involving animals only if sufficient feed can be grown on-site.** LUBA stated that these authorities are silent as to the source of the feed that is necessary to sustain animals involved in farm uses. It also noted that, in determining whether land is suitable for dryland grazing, a farmer would have a reasonable expectation of obtaining a profit in money from that activity, based on the factors listed in OAR 660-033-0020(1)(a)(B) (soil fertility, suitability for grazing, climactic conditions, availability of water for irrigation, etc.)
- “On-Site Construction and Maintenance of Equipment and Facilities” – this discussion is found at pages 42-46 of the decision. **LUBA determined that the County erroneously concluded that this use need not be limited to supporting farm activities that occur on the subject property.** In other words, it does not matter where the equipment and facilities are used, whether on or off-site. That said, after a consideration of whether equipment and facilities can be stored onsite for the purpose of making a profit in money also requires a determination of the suitability of the property based on the factors listed in OAR 660-033-0020(1)(a)(B).

⁸ Central Oregon Landwatch, et al. v. Deschutes County and 710 Properties, LLC, et al. (LUBA No. 2023-009)

- **"Nearby and Adjacent Land"** – discussion at pages 46-49 of the decision. LUBA directs the County to make findings and conclusions on the question of whether the subject property is suitable for farm use in conjunction with nearby or adjacent land. It noted that several farms and ranchers testified they would not consider incorporating the subject property into their farm operations, and that ***it "may be that the subject property is not suitable for farm use even in conjunction with nearby or adjacent land. However, the county did not reach that conclusion."***
- **DCC 18.136.020(C)(2) and DCCP Agricultural Lands Goal 1** – see pages 69-74 of the decision. The County's findings that the impacts on surrounding land use from rezoning will be consistent with DCCP Agricultural Lands Goal 1 are inadequate and not supported by substantial evidence. LUBA states that the County only considered impacts on surrounding nonresource lands, and that it was error to consider that the subject property is functionally separated from surrounding agricultural lands due to its location on a plateau. LUBA remands for further consideration of water, wastewater, traffic impacts on surrounding agricultural lands and the agricultural industry.

The applicant noted in the burden of proof that the case is not relevant to this proposal and no additional findings are necessary. The applicant argues that this case is distinguishable from the *Eden* case as the subject property is partially Surface Mine and EFU, of which the EFU portion is sandwiched between an operating surface mine and the Cascades Academy School. Additionally, the planned use currently exists on the adjacent property and the evidence of its impact (or lack thereof) on any nearby agricultural use is known and in the record.

Staff notes that the Board recently issued a decision on the remanded for the *Eden* case which has been uploaded to the record. Staff requests the Hearings Officer determine if the *Eden* case is relevant and provided associated findings.

- (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: Staff considers that the evidence in the record shows that the subject property is not suitable for farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands. In this review staff has not assigned any significance to the ownership of the subject or adjoining properties.

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

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

FINDING: The submitted soil survey report provides more detailed soils information than contained in the NRCS Web Soil Survey. NRCS sources provide general soils data for large units of land. The applicant provides the following information in the burden of proof:

Attached as Exhibit 7 is a more detailed agricultural soil assessment related to the NRCS land capability classification system conducted by Gary Kitzrow, a Certified Professional Soil Scientist authorized by the Department of Land Conservation and Development (DLCD).

The soils assessment prepared by Mr. Kitzrow provides more detailed soils information than contained on the Web Soil Survey operated by the NRCS, which provides general soils data at a scale generally too small for detailed land use planning and decision making. Mr. Kitzrow’s soils assessment report provides a high intensity Order-1 soil survey and soils assessment – a detailed and accurate soils assessment on the subject property based on numerous soil samples – to determine if the subject property is “agricultural land” within the meaning of OAR 660-033-020. Mr. Kitzrow’s Order-1 soil survey is included as evidence in the application to assist the County in making a better determination of whether the subject property qualifies as “agricultural land.”

Table 1 of Mr. Kitzrow’s Report shows the detailed Order 1 Soil Survey results and Capability Class for each soil unit on the property as set forth below:

Table 1 Map Unit Legend with Acreage Summary and Capability Class Summary Cascade Academy

Presumed 22.50 Acre Survey Area

Map Unit	Acreage Percentage	Capability Class	Notes
Tumalo Shallow Variant	1.44	7	<20” to brittle Duripan
Plainview Fragmental Variant	0.75	7	Shallow to fragmental substrata
Clinefalls	1.34	6 (NI) 3 (I)	very deep, very sandy, terraces
Plainview	5.67	6 (NI) 3 (I)	moderately deep, sandy, outwash
Lickskillet	2.02	7	shallow to bedrock, toeslopes
Impact Area	1.88	8	roof, asphalt, concrete, road,
Ditch/Berm	0.49	8	depth 5’ + adjoins berm,
Rubbleland	0.51	8	Consolidated/dense surface rock
Mine Spoil	6.04	8	Complete topsoil/subsoil removal
Partial Mine Spoil	1.78	8	Complete topsoil/subsoil removal

Impoundment	0.58	8	Dug with berm depth 3-5'
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Based on the findings and analysis of the Order-1 soil survey and soil assessment, Mr. Kitzrow made the following summary and conclusions in determining whether the subject property is agricultural land:

By completing a site-specific soil survey for each lot, we were able to determine the acreages of all Capability Class for each soil for every delineation completed, their acreage, and proportion of the entire lot. By mapping the entire lot, we were able to determine the percentages of soils which are members of Capability Class VII and VIII versus soils which are members of Class I-VI. To qualify for a Plan Amendment Zone Change, each lot under review must show a preponderance of Capability Class VII and VIII. Each of the tax lots which have been researched and mapped for this report shows a preponderance of Class 7 and 8 soils. As a total of the entire 22.5 acre, the site is confirmed to have a preponderance of 68.8% or 15.49 acres Class 7 and 8 soils. Each tax lot on their own shows a preponderance of Capability Class 7 and 8 soils as well.

As previously discussed, the State's agricultural land rules, OAR 660-033-0030, allow the county to rely on the more detailed soil capability analysis prepared by Mr. Kitzrow. The applicant has submitted the soils assessment to DLCDC for review of the soils assessment and will submit the certification as a condition of approval. Based on the Order-1 soils report, the subject property is not "agricultural land."

The applicant acknowledges that they submitted the soil study to the Department of Land Conservation and Development (DLCDC) for review but have not yet received correspondence from DLCDC. The applicant confirmed that if correspondence from DLCDC is not received by the date of the hearing, confirming the approval of the soil study, they have agreed to a conditional of approval that it will be submitted prior to the zone change becoming final. Staff requests the hearings officer consider this condition of approval.

(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 property is not defined as agricultural land.

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

FINDING: The applicant submitted a soil survey report to DLCDC for certification. Staff recommends the Hearings officer add a condition of approval that the certification must be received prior to finalization of the proposed zone change.

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

FINDING: The applicant has submitted for DLCDC's certification of its soils analysis and has complied with the soils analysis requirements of OAR 660-033-0045 in order to obtain that certification. DLCDC's certification establishes compliance with OAR 660-033-0045 and will be submitted as a condition of approval.

DIVISION 12, TRANSPORTATION PLANNING

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

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

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

The applicant provided a traffic study by Joe Bessman, Transight Consulting and the following findings in the burden of proof:

- Rezoning of the approximately 22.5-acre properties from *Surface Mining* and *Exclusive Farm Use* to *Multiple Use Agricultural* results in a reduction in the trip generation potential of the property, even with consideration of conditional uses (clustered housing) allowed within the MUA-10 zoning.
- With a reduction in trips the project does not meet Deschutes County, ODOT, or City of Bend study thresholds of significance at any nearby locations to elevate this analysis to a formal Traffic Impact Analysis. With the reduction in potential trips, a comparative analysis would show that all surrounding intersections and corridors will operate better with the rezone.
- Operational analysis shows that the abutting OB Riley Road corridor operates at about 20% of its capacity using the County's established Level of Service "D" threshold today and at about 25% of its capacity by 2040.

As referenced in the agency comments section in the Basic Findings section above, the Senior Transportation Planner for Deschutes County found the analysis provided by the applicable to be sufficient to satisfy the County's requirements and no further materials or analysis are required from the applicant. As such, staff believes that the proposed plan amendment and zone change will be consistent with the identified function, capacity, and performance standards of the County's transportation facilities in the area.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

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

Goal 1, Citizen Involvement. 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 will be placed in the Bend Bulletin. A minimum of two public hearings will be held to consider the application.

Goal 2, Land Use Planning. Goals, policies, and processes related to zone change applications are included in the Deschutes County Comprehensive Plan and Titles 18 and 23 of the Deschutes County Code. The outcome of the application will be based on findings of

fact and conclusions of law related to the applicable provisions of those laws as required by Goal 2.

Goal 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.

Goal 4, Forest Lands. Goal 4 is not applicable because the subject property does not include any lands that are zoned for, or that support, forest uses. Forest land is defined by OAR 660-005-0010 as lands suitable for commercial forest use protection under Goal 4, which are identified using NCRS soil survey maps to determine average annual wood fiber production figures. The NCRS maps for the subject property map it with soil mapping units 98A and B, 26A and 101E. The NCRS Soils Survey for the upper Deschutes River lists all soils mapped by its survey that are suitable for wood crop production in Table 8 (Exhibit 15). None of the soils mapped on the subject property are listed in Table 8 as suitable for wood crop production.

Goal 5, Open Spaces, Scenic and Historic Areas and Natural Resources. The application materials establish the subject property does not have significant aggregate resources and is not utilized or necessary as part of the storage, processing and production uses of adjacent SM Site 370. A portion of the Subject Property is mapped with the Landscape Management Combining Zone associated with Highway 20 and the Deschutes River. The uses in the proposed MUA-10 zone have been acknowledged to be consistent with and applied compatibly with the LM zone provisions, which will remain applicable to the subject property under the proposed zoning classification.

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 property would be subject to local, state, and federal regulations that protect these resources.

Goal 7, Areas Subject to Natural Disasters and Hazards. According to the Deschutes County DIAL property information and Interactive Map the entire Deschutes County, including the subject property, is located in a Wildfire Hazard Area. The subject property is also located in Rural Fire Protection District #2. Rezoning the property to MUA-10 does not change the Wildfire Hazard Area designation. Any future development of the property would need to demonstrate compliance with any fire protection regulations and requirements of Deschutes County.

Goal 8, Recreational Needs. This goal is not applicable because no development is proposed and the property is not planned to meet the recreational needs of Deschutes County. Therefore, the proposed rezone will not impact 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. The proposed zone change will promote economic opportunities by rezoning underutilized property for a subsequent use.

Goal 10, Housing. The County's comprehensive plan Goal 10 analysis anticipates that farm properties with poor soils, like the subject property, will be converted from EFU to MUA-10 or RR-10 zoning and that these lands will help meet the need for rural housing. Cascades Academy supports rural housing by providing school services for the rural properties. Approval of this application, therefore, is consistent with Goal 10 as implemented by the acknowledged Deschutes County comprehensive plan.

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 site. Central Electric Cooperative serves the subject property with power, water and septic are provided on-site and the proposal will not result in the extension of urban services to rural areas.

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

Goal 13, Energy Conservation. The approval of this application does not impede energy conservation. In fact, Planning Guideline 3 of Goal 13 states "land use planning should, to the maximum extent possible, seek to recycle and re-use vacant land..." Cascades Academy provides school services to the rural community in close proximity to residential uses, thereby reducing vehicle miles traveled and conserving energy.

Goal 14, Urbanization. This goal is not applicable because the applicant's proposal does not involve property within an urban growth boundary and does not involve the urbanization of rural land. The MUA-10 zone is an acknowledged rural residential zoning district that limits the intensity and density of developments to rural levels. The compliance of this zone with Goal 14 was recently acknowledged when the County amended its comprehensive plan. The plan recognizes the fact that the MUA-10 and RR zones are the zones that will be applied to lands designated Rural Residential Exception Areas.

The recent Clackamas County case requiring a Goal 14 analysis involved a rezone application for rural residential (exception) lands from a 10-acre minimum to a 2-acre minimum, thereby reducing the minimum lot size and increasing the allowed density for these exception lands. In concluding the zone change process required a Goal 14 analysis, LUBA and the Court of Appeals relied on the Curry County case, *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or. 447, 724 P2d 268 (1986) and the administrative rule, OAR 660-004-0040 adopted by LCDC in response to the Curry County case. 336 Or App at 208-210. This rule is known as the "Rural Residential Rule" and specifically applies to "rural lands in acknowledged exception areas planned for residential uses." OAR 660-004-0040 (1). By its express terms, the rule does not apply to "Nonresource land, as defined in OAR 660-004-0005 (3)." OAR-004-0040 (3)(C)(F).

The present application does not involve rural residential lands and is therefore not subject to the provisions of the rural residential rule and is factually distinguishable from the Clackamas County case and the underlying Curry County case on which it is based. The present application involves SM and EFU land, both of which are resource designations. The present application is to change the designation of these resource lands to nonresource and provides substantial evidence that the subject property is nonresource land, as that term is defined in State law and requests a nonresource plan designation and zone change to a 10-acre minimum. The low density uses allowed in the County's acknowledged MUA-10 zone are consistent with the surrounding rural uses and do not require a Goal 14 analysis or exception as established in the numerous nonresource decisions cited in the original application materials.

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

Staff accepts the applicant's responses and finds compliance with the applicable Statewide Planning Goals has been effectively demonstrated. Staff finds the overall proposal appears to comply with the applicable Statewide Planning Goals for the purposes of this review.

IV. CONCLUSION & RECOMMENDATION:

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

DESCHUTES COUNTY PLANNING DIVISION



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