Mailing Date:
Wednesday, January 8, 2025

HEARINGS OFFICER RECOMMENDATION

FILE NUMBERS: 247-24-000404-PA, 247-24-000405-ZC

SUBJECT PROPERTY/ OWNER:
Mailing Name: BEND PARK & RECREATION DISTRICT
Map and Taxlot: 1812230000200
Account: 112113
Situs Address: 60725 ARNOLD MARKET RD, BEND, OR 97701

APPLICANT: Bend Park & Recreation District (BPRD)

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

REQUEST: The Applicant requests approval of a Comprehensive Plan Amendment to change the designation of the subject property (+/- 279 Acres) from Agricultural (AG) and Surface Mining (SM) to Rural Residential Exception Area (RREA). The Applicant also requests a corresponding Zone Change to rezone the subject property from Exclusive Farm Use – Tumalo/ Redmond/ Bend subzone (EFU-TRB) & Surface Mining (SM) to Rural Residential (RR10).

STAFF CONTACT:
Nathaniel Miller, AICP, Associate Planner
Phone: 541-317-3164
Email: Nathaniel.Miller@deschutes.org

RECORD: Record items can be viewed and downloaded from:
www.buildingpermits.oregon.gov

WEBPAGE: https://www.deschutes.org/cd/page/247-24-000404-pa-405-zc-bend-park-and-recreation-district-bprd-comprehensive-plan-amendment

HEARINGS OFFICER: Gregory J Frank

I. APPLICABLE CRITERIA

Title 18 of the Deschutes County Code, the County Zoning Ordinance:
- Chapter 18.04, Title, Purpose, and Definitions
- Chapter 18.16, Exclusive Farm Use Zones (EFU)
- Chapter 18.52, Surface Mining Zone (SM)
- Chapter 18.56, Surface Mining Impact Area Combining Zone (SMIA)
- Chapter 18.60, Rural Residential Zone (RR10)
- 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. FINDINGS AND CONCLUSIONS

A. Preliminary Findings:

1. Purpose of the Preliminary Findings

The Hearings Officer, in these Preliminary Findings, responds to issues raised by Central Oregon LandWatch ("COLW"). These Preliminary Findings are intended to provide an overview of the COLW issues, discussion of relevant laws/rules related to those issues and the Hearings Officer's legal interpretation of various sections of the Deschutes County Code ("DCC") and State statutes/regulations as relevant to the identified COLW issues. The Hearings Officer incorporates these Preliminary Findings as additional findings for relevant approval criteria.

2. Reclamation of SM Zoned Land

COLW stated that the Applicant's proposal in this case must be denied because it failed to meet the following:

> *"the SM zone may only be terminated and rezoned once the mining site has been reclaimed in accordance with the reclamation plan approved by DOGMI or the reclamation provision of DCC 18."* (COLW, 11/12/2024, page 3)

It appears that COLW SM termination argument is twofold: First, COLW argued that the SM zoned property in this case did not meet Oregon Department of Geology and Mineral Industries ("DOGAMI") requirements. Second, COLW argued that the SM zoned property did not meet DCC Title 18 requirements. The Hearings Officer shall address both COLW arguments.

The Hearings Officer takes note of Deschutes County decision 247-23-000709-MC (hereafter the "Modified Reclamation Plan Decision"). The stated purpose of the Modified Reclamation Plan Decision was to

> *document existing site conditions, clarify the obligations in the reclamation plan, to identify the remaining items to be completed and to modify and remaining reclamation requirements through an Amended Reclamation Plan.*

The Modified Reclamation Plan Decision also stated that

> *the applicant's proposed modification plan would replace an outdated, unrealistic reclamation plan under SP-92-98 with a specific plan that complies with current county and DOGAMI standards and that will have minimal impact on surrounding properties.*

The Hearings Officer also takes note of DCC 18.52.200 A. This section of the DCC states:

> *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 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…*

The Hearings Officer finds that DCC 18.52.200 A contains the word "or inserted between the DOGAMI reclamation requirement and the DCC 18 reclamation requirement. The Hearings Officer finds that *if* either the DOGAMI "or" DCC 18 reclamation requirement is met *then* the DCC reclamation requirements of DCC 18.52.200 A are satisfied.

The Hearings Officer first addresses the COLW argument that alleges that the Subject Property has not been reclaimed in accordance with DOGAMI requirements. Initially, the Hearings Officer finds COLW offered no authoritative evidence or legal support that the SM zoned portion of the Subject Property failed to meet DOGAMI reclamation requirements. COLW focused its comments on the bare fact that only partial reclamation had been accomplished not how partial reclamation failed to meet DOGAMI requirements.

The Hearings Officer next takes note of findings included in the Modified Reclamation Plan Decision. The following are specific references to the satisfaction of DOGAMI reclamation requirements found in the Modified Reclamation Plan Decision:

Attached hereto as Exhibit 4 is a Memo dated October 14, 2011 from Robert Huston, Natural Resource Specialist with DOGAMI to the owner of the subject property indicating 'Reclamation has been completed' and "[a]ll obligations to the State of Oregon have been fulfilled, and the file has been closed." [finding for DCC 18.52.080 B., page 11 of 21]

Correspondence from DOGAMI in the record as Exhibit 4 demonstrates DOGAMI is satisfied with the site reclamation and has closed the file. [findings for DCC 18.52.130 A., page 18 of 21]

The Hearings Officer finds, based upon the evidence in the record, that the DOGAMI reclamation requirement in DCC 18.52.200 A has been met. While the Hearings Officer finds that the satisfaction of the DCC 18.52.200 A. DOGAMI requirement is dispositive, the Hearings Officer also addresses the Title 18 requirement.

COLW provided the following comments related to the DCC 18.52.200 Title 18 requirement:

At issue is whether the site reclamation has been completed in accordance with the 2023 Amended Reclamation Plan. The answer is no. The Amended Reclamation Plan approved by the County created a series of reclamation conditions contingent upon future BPRD development plans. Because BPRD has not yet redeveloped the property, these reclamation goals have not been achieved. For example, in reference to revegetation, the Amended Reclamation Plan provides– 'Based upon existing soil conditions some additional re-vegetation is proposed primarily within a 14.5-acre area that was not previously reclaimed in the southernmost portion of the site.' Application Materials, p. 272. This revegetation has not occurred. Another plan condition is similarly incomplete, noting that the '[t]he original DOGAMI reclamation plan (circa 1992) also called for reseeding with Crested Wheat, which may also be incorporated into future BPRD re-vegetation plans. Final reclamation grading work will minimize disturbance in those areas that have been revegetated. Natural re-vegetative processes are expected to continue and will be supplemented with additional re-vegetation work included with future BPRD development plans.' Application Materials, p. 272. The Amended Reclamation Plan also requires grading of the property and the distribution of stockpiled topsoil. Application Materials, p. 271-272. Other plan conditions will be completed in the future, providing simply that reclamation activities are 'To be determined based upon future BPRD development plans.' Application Materials, p. 272-273.

What is more, there appears to be no argument that the reclamation has been completed. In their burden of proof, the applicant admits that 'mining at the site ceased in 2005 and it has remained in a partial state of reclamation since that time.' (emphasis added) Application Materials, p. 25. An admission that reclamation work is incomplete is problematic for the applicant. A property in a state of partial reclamation cannot be considered 'reclaimed' as required under county code to rezone the subject property. DCC18.52.200.

Moreover, the 2023 Amended Reclamation Plan explicitly requires complete reclamation prior to an application for a re-zone. "C. Previous Site Plan Review Conditions" provides that 'unless explicitly modified by this decision, the previous conditions of approval in SP-92-98 shall remain in effect.' Application Materials, p. 85. Condition 11 of SP-92-98 (as modified) provides that the 'Developer shall apply to Deschutes County to rezone the subject property after the site has been reclaimed in

accordance with the amended reclamation plan approved by the County.' Application Materials, p. 73. Condition 11 clearly and explicitly states that the developer shall apply for the rezone after the site has been reclaimed. Here, in the Applicant's own words, the property is in a 'partial state of reclamation'. Application Materials, p. 25. As a result, the property is ineligible for rezoning because it has not been reclaimed in accordance with the Amended Reclamation Plan approved by the County.

The Hearings Officer believes the most important issue raised by COLW in the above-quoted comments is:

Because BPRD has not yet redeveloped the property, these reclamation goals have not been achieved."

Applicant responded to COLW's above-quoted comments (Final Argument, 12/9/2024, page 2) as follows:

The Amended Reclamation Plan was approved by the County via the Modification of Conditions Decision, Exhibit 4 [footnote omitted] The Modification of Conditions Decision specifically recognized the existing site conditions, the incorrect information relied on to create the SP-92-98 conditions, and modified the reclamation requirements to reflect actual site conditions and allow for remaining topsoil to be applied and revegetation contemporaneously/concurrently with park development, as described in the Amended Reclamation Plan.

The Hearings Officer interprets the COLW reclamation plan argument to require all (100%) reclamation duties to be completed prior to the approval of a Comprehensive Plan Amendment and/or zone change for the Subject Property and/or the development of the Subject Property. Applicant argues that reclamation duties may be completed at a later time such as after approval of the application in this case and during Applicant's development process. The Hearings Officer reviewed the Amended Reclamation Plan and the Findings and Decision for case 247-23-000709-MC. The County, in the Findings and Decision for 247-23-000709-MC, added a condition stating that "*Developer shall complete site reclamation in accordance with the 2023 Amended Reclamation Plan approved by the County*." The Hearings Officer finds the Amended Reclamation Plan establishes reclamation obligations related to the Subject Property. The Amended Reclamation Plan includes the following statement:

"Approximately 26,000 yd^3 of silty-sand topsoil from 5 on-site stockpiles will be distributed throughout the site, as needed, to support the -revegetation contemporaneously with future site development." (Section 9, page 4 of 10)

The Hearings Officer finds the Amended Reclamation Plan clearly anticipates reclamation activities to occur during Applicant's development process; a time following approval of the application in this case. The Hearings Officer finds *no* clear language in the Amended Reclamation Plan that would support COLW's argument that all (100%) reclamation activities be completed prior to approval of an application for a Comprehensive Plan and/or zone change approval. The Hearings Officer finds COLW's argument that one or more sections of SP-92-98 remains relevant to this case and provides a basis for denial is not persuasive.

3. Park Use Allowed in EFU Zone

COLW argued that Applicant's current proposal

> *to amend the comprehensive plan from Agricultural designation to Rural Residential Exception Area (RREA) is unnecessary because the sought use of a public park is conditionally allowed in agricultural zones.*

The Hearings Officer finds this COLW argument is legally unsupportable. The Hearings Officer does not disagree with COLW that park use is permitted as a conditional use in the EFU zone. However, the Hearings Officer finds COLW failed to cite any relevant section of the DCC or any state law/regulation that precludes the Applicant from filing this application. The Hearings Officer finds Applicant, in this case, exercised its legal discretion to select an application avenue that it believes best meets its development goals. The Hearings Officer finds it common that a specific land use may be allowed in multiple zoning designations; here parks are allowed, for example, in EFU, MUA, RREA, F-1 and other zones.

An Applicant has the right to determine what land use application to file and the Hearings Officer is allowed only to consider the relevant approval criteria for that application. Thereafter, the Hearings Officer must, based upon the evidence and argument in the record, determine if the application meets relevant approval criteria. In this case COLW did not provide the Hearings Officer substantial evidence or persuasive argument that its "unnecessary" argument (as quoted above) is based upon a relevant approval criterion.

4. Public Interest (DCC 18.136.020)

COLW argued, that

> *Pursuant to DCC 18.136.020, the application for a quasi-judicial rezoning must establish that the public interest is best served by rezoning the property.*

DCC 18.136.020 C. states:

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

The Hearings Officer takes exception to COLW's inclusion of the word "best" in its above-quoted statement. DCC 18.136.020 does not include the word "best." The Hearings Officer finds that an applicant's burden is to demonstrate that a proposed zone change will serve the public health, safety and welfare considering the factors in subsections 1. and 2.

The Hearings Officer takes notice of the following facts: First, the Applicant is the parks district for Bend and has publicly announced that the Subject Property will be used for park purposes and second, the Amended Reclamation Plan and Modification and Decision for 247-23-000709-MC are founded upon and approved for the eventual use of the Subject Property's use as a park. The Hearings Officer finds the use proposed through this application is the development of a public park.

The Hearings Officer finds Applicant's proposed park use serves the public health, safety and welfare of the nearby and surrounding land uses. The Hearings Officer finds no evidence in the record that public services will not be available when the Subject Property is developed even if for residential purposes. The Hearings Officer finds, based upon evidence in the record, that impacts on surrounding land uses will be consistent with the specific goals and policies contained in the Comprehensive Plan.

B. General Findings

Title 18 of the Deschutes County Code, County Zoning

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 Hearings Officer incorporates Preliminary Findings for Reclamation (Section II, A. 1. **Reclamation of the SM Zoned Land**) as additional findings for this section.

Applicant's Burden of Proof states:

This standard requires that Site No. 392 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. In the 2010 Decision, the County found the applicant met the first two prongs of this test based on Page 9 of 50 247-24-000404-PA, 405-ZC the evidence in the public record from the pit operator that the mine was closed in 2005 because all the usable material had been removed and that there is not a significant resource of fill material remaining on site. See Decision of the Deschutes County Hearings Officer, PA10-5; ZC-10-3, pg. 11. Furthermore, the Wallace Group Surface Mine Reclamation Evaluation, dated September 15, 2023 (Exhibit 8), which was submitted in support of the recent County Decision approving a modified Reclamation Plan for the subject property, 247-23-00079-MC, attached hereto as Exhibit 4 substantiates the evidence that the majority of the fill material has been removed and the site no longer contains a significant resource. The ESEE for site 392 is attached as Exhibit 9. The site was listed as significant for the presence of fill

material (sand and gravel) and not for aggregate. Mining at the site ceased in 2005 and it has remained in a partial state of reclamation since that time. All DOGAMI files for Site 392 have been closed since 2011. (Exhibit 10).

The mining element of the Comprehensive Plan does not identify a subsequent use for Site No. 392 and subsequent uses are not identified in the ESEE analysis for Site No. 392 adopted by the County. The Hearings Officer in the 2010 Decision questioned the requirement that the original topsoil be retained and replaced as being an indication the subsequent use may be for agriculture. However the Wallace Group Report demonstrates the amount of fill and topsoil originally thought to be present was not accurate and was relied upon as the evidentiary basis to modify the reclamation requirement based on existing and accurate site conditions. The evidence submitted herein and in the Modification Decision establishes the soils for the entire site are predominantly Class 7 and 8 and were improperly classified under NCRS mapping in 1992 at the time the Site Plan decision and reclamation requirements were originally imposed. Because the property does not meet the definition of Agricultural land, the Applicant proposes rezoning the property to RR-10 to allow its use in conjunction with the adjoining property to be master planned as a public park.

Staff (Staff Report, page 10 of 50) concurred with the Applicant's analysis and concluded that the proposal complied with the above criterion.

The Hearings Officer, consistent with the incorporated Preliminary Findings (II.A.2 **Reclamation of SM Zoned Land**) finds that there is substantial evidence in the record to demonstrate that mining no longer occurs at the Subject Property. The Hearings Officer finds the Amended Reclamation Plan and the Findings and Decision for 247-23-000709-MC are the controlling documents related to reclamation at the Subject Property. The Hearings Officer finds DOGAMI reclamation requirements are met/satisfied. The Hearings Officer finds that the reclamation requirements of DCC 18 will be met consistent with the Amended Reclamation Plan and Findings and Decision for 247-23-000709-MC.

The Hearings Officer finds the application in this case meets the requirements of this criterion.

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 Burden of Proof states:

The applicant proposes to remove the SMIA overlay zone associated with Site No. 392 concurrent with the rezone because protection for Goal 5 resources will no longer be necessary.

Staff (Staff Report, page 10 of 50) concurred with the Applicant's analysis. The Hearings Officer concurs with Applicant and Staff comments. The Hearings Officer finds that the applicable standards for rezoning are addressed herein.

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 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: The Burden of Proof states:

Per prior Hearings Officers decisions for plan amendments and zone changes on resource zoned property, this paragraph establishes two requirements: (1) that the zone change conforms to the Comprehensive Plan; and (2) that the change is consistent with the plan's introductory statement and goals. Both requirements are addressed below:

1. Conformance with the Comprehensive Plan: *The applicant proposes a plan amendment to change the Comprehensive Plan designation of the subject property from Surface Mine and Agriculture to Rural Residential Exception Area. The proposed rezoning from SM and EFU-TRB to RR-10 will need to be consistent with its proposed new plan designation.*

2. Consistency with the Plan's Introductory Statement and Goals. *In previous decisions, the Hearings Officer found the introductory statement and goals are not approval criteria for the proposed plan amendment and zone change. [footnote states: Powell/Ramsey decision (PA-14-2 / ZC-14-2) and Landholdings decision (247-16-000317-ZC / 318-PA).] However, the Hearings Officer in the Landholdings decision found that depending on the language, some plan provisions may apply and found the following amended comprehensive plan goals and policies require consideration and that other provisions of the plan do not apply as stated below in the Landholdings decision:*

> *"Comprehensive plan statements, goals and policies typically are not intended to, and do not, constitute mandatory approval criteria for quasi-judicial/and use permit applications. Save Our Skyline v. City of Bend, 48 Or LUBA 192 (2004). There, LUBA held:*

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

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

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

*The Hearings Officer previously found that the above-underscored language strongly suggests the county's plan statements, goals and policies are not intended to establish approval standards for quasi-judicial/and use permit applications. In Bothman v. City of Eugene, 51 Or LUBA 426 (2006), LUBA found it appropriate also to review the language of specific plan policies to determine whether and to what extent they may in fact establish decisional standards. The policies at issue in that case included those ranging from aspirational statements to planning directives to the city to policies with language providing 'guidance for decision making' with respect to specific rezoning proposals. In Bothman LUBA concluded the planning commission erred in not considering in a zone change proceeding a plan policy requiring the city to '[r]ecognize the existing general office and commercial uses located * * * [in the geographic area including the subject property] and discourage future rezonings of these properties.' LUBA held that:*

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

*that require * * * consistency with applicable plan provision.' (Emphasis added.)*

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

Hearings Officer Karen Green adhered to these findings in the Powell/Ramsey decision (file nos. PA-14-2/ZC-14-2), and found the above-referenced introductory statements and goals are not approval criteria for the proposed plan amendment and zone change. This Hearings Officer also adheres to the above findings herein. Nevertheless, depending upon their language, some plan provisions may require "consideration" even if they are not applicable approval criteria. Save Our Skyline v. City of Bend, 48 Or LUBA 192, 209 (2004). I find that the following amended comprehensive plan goals and policies require such consideration, and that other provisions of the plan do not apply:"

The comprehensive plan goals and polices that the Landholdings Hearings Officer found to apply include the following . . .

The present application is nevertheless consistent with the introductory statement because the requested change, as demonstrated herein, is consistent with State law and County plan provisions and zoning code provisions implementing the Statewide Planning Goals.

The Hearings Officer finds that the Applicant utilized the above-quoted analysis, as well as analyses provided in prior Hearings Officers' decisions, to determine and respond to only the Comprehensive Plan Goals and policies that apply. Staff (Staff Report, page 13 of 50) concurred with the Applicant's analysis and the Hearings Officer concurs with Applicant and Staff that the above provision shall be met based on Comprehensive Plan conformance as demonstrated in subsequent findings.

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

FINDING: The Burden of Proof states:

The applicant is proposing to change the zone classification from SM and EFU to RR-10. Approval of the application is consistent with the purpose of the RR-10 zoning district, which is stated in DCC 18.60.010 as follows:

18.60.010 Purposes

The purposes of the Rural Residential Zone are to provide rural residential living environments; to provide standards for rural land use and development consistent with desired rural character and the capability of the land and natural resources; to manage the extension of public services; to provide for public review of nonresidential uses; and to

balance the public's interest in the management of community growth with the protection of individual property rights through review procedures and standards.

The subject property is not suited to full-time commercial farming as discussed in the findings above. The RR-10 zone will allow property owners to engage in recreational uses, hobby farming, and redevelop the property in conjunction with the adjacent lands under a park Master Plan. The low-density of development allowed by the RR-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. 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 (Staff Report, page 14 of 50) requested the Hearings Officer make specific findings for this criterion. The Hearings Officer incorporates the findings for Goal 14 as additional findings for this policy. The Hearings Officer finds Applicant's above-quoted statement is consistent with the intent of this policy. Based upon the incorporated findings and the Applicant's statements contained in the Burden of Proof the Hearings Officer finds this policy is met.

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: The Burden of Proof states:

Necessary public facilities and services are available to serve the subject property. Transportation access to the property is available from Rickard Road to the north, Arnold Market Road to the east, Back Alley to the south and Bobcat Road to the west.

The Transportation Study prepared by Joe Bessman of Transight Consulting (Exhibit 12) submitted herewith establishes that considering the most intense residential scenario (clustered or planned units on 5-acre equivalent lots) the site would generate about 175 additional weekday daily trips, including about 29 more trips during the weekday p.m. peak hour. Comparatively, if the site were developed as a public park, the daily trips would be reduced, but a small increase in weekday p.m. peak hour trips could be generated. Again, with the current approval for a Surface Mining operation the type of trips would change, and passenger cars would have much less impact on the system than aggregate trucks. The study includes operational analysis of the SE 27th Street / SE Rickard Road intersection. Table 5 of the report, as set forth below, shows that within each of the scenarios the SE 27th Street / SE Rickard

Road intersection performs acceptably per the adopted City of Bend Standards.

Table 5. Intersection Operational Results Summary, Weekday PM Peak Hour

Scenario	Jurisdiction/ Standard	LOS	v/c Ratio	Delay (s)	95th % Queue (ft)	Acceptable?
Existing Zoning (Figure 5 Volumes)	City of Bend Peak Hour v/c Ratio <1.0	WB: LOS E	WB: 0.67	WB: 35.5 s	WB: 125 ft	✓
#1: Outright Uses		WB: LOS E	WB: 0.66	WB: 35.8 s	WB: 125 ft	✓
#2: Conditional Uses		WB: LOS E	WB: 0.71	WB: 40.3 s	WB: 125 ft	✓
#3: Park Use		WB: LOS E	WB: 0.67	WB: 36.5 s	WB: 125 ft	✓

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

Applicant provided evidence related to traffic impacts. County transportation staff reviewed Applicant's traffic analysis and concurred with the Applicant's assumptions, methodology and conclusions. The Hearings Officer finds no evidence in the record to dispute the Applicant's traffic analysis and concludes that the proposed zoning will serve the public health, safety and welfare considering traffic impacts. Applicant noted that the Subject Property is served by the Deschutes County Sheriff, and is in Rural Fire Protection District #2. Applicant also noted that the Subject and immediately surrounding area are served by either a municipal water source or by wells and that electrical and telephone services are available. Applicant stated that the Subject Property, including many nearby properties are served by on-site sewage disposal services.

The Hearings Officer finds evidence in the record that public services to serve the Subject Property, in the event this application is approved, are available. The Hearings Officer finds no evidence is in the record suggesting public services will not be available to the Subject Property if rezoned as requested by Applicant.

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

FINDING: The Burden of Proof states (pages 22 & 23):

The RR-10 zoning is consistent with the specific goals and policies in the comprehensive plan discussed above. The RR-10 zoning allows rural uses consistent with the uses of many other properties in the area of the subject property. In addition, the RR-10 zoning provides a proper transition zone from the City, to rural zoning, to EFU zoning.

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. The historic use of the property for surface mining created greater impacts to surrounding properties than the proposed RR-10 zoning would allow.

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. Gallagher, 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.

Staff requested that the Hearings Officer make specific findings for this criterion. The Hearings Officer reviewed the Applicant's submittals (Burden of Proof, Supplemental Burden of Proof, Open-record evidence submission and Final Argument). The Hearings Officer finds that Applicant did identify and provide extensive evidence related to comprehensive plan policies related to Applicant's assertion that the Subject Property was not agricultural land. The Hearings Officer finds Applicant's evidence related to other "relevant" Comprehensive Plan goals/policies was less comprehensive. However, the Hearings Officer finds that Applicant met the minimum standard in providing evidence that its proposal will create minimal impacts. The Hearings Officer finds Applicant's proposal, in this case, sufficiently addresses this policy.

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: COLW (11/12/2024, page 5) argued that this criterion was not satisfied. COLW stated the following:

DCC18.136.020(D) requires the applicant to show that there has been a mistake in the initial zoning or a change in circumstances since the property was last zoned to justify such a rezone. Here, there is no initial mistake or change in circumstances that would justify a rezoning to RR-10.

1. Mistake: As the 2010 Hearings Officer Decision has already determined, zoning the relevant 91 acres

for surface mining was not a mistake, nor was a mistake made in zoning the remainder of the property EFU under PL-15 in 1979. "As an initial matter, Staff concluded that there was not a mistake made in either the decision to zone the 91 acres for surface mining, nor a mistake in zoning the remainder of the property exclusive farm use under PL-15 in 1979. Staff also speculated that the land holding was large, and the 450 or so acres would likely not have qualified for a rural residential exception area in 1979 because there was little development in the area and there was no evidence that the property was committed to any development proposal. The Hearings Officer agrees." Exhibit 1, 2010 Hearings Officer Decision p. 20.

Applicant, in its Burden of Proof states (pages 23 & 24):

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. [footnotes 3 and 4 state the following:

[3]Mr. Gallagher's soils analysis report for the subject property determined that the subject property was previously mapped by the USDA-SCS Soil Survey of the Deschutes County Area and compiled by NRCS into the Web Soil Survey. The property was previously mapped at 1:20,000 scale, which is generally too small a scale for detailed land use planning and decision making, according to Mr. Gallagher.
[4]Source: Agricultural Lands Program, Community Involvement Results, Community Development, Deschutes County. June 18, 2014]

The Hearings Officer incorporates as additional findings for this criterion, the findings (set forth later in this recommendation) for *Chapter 2, Resource Management, Section 2.2, Goal 1, Preserve and Maintain Agricultural Lands and Industry* and the findings for *Oregon Administrative Rules Division 33-Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands*. The Hearings Officer rejects COLW's assertion that the 2010 Hearings Officer decision referenced in the quoted material above

is determinative in this case.

The Hearings Officer finds the evidence provided in the record of this case is persuasive that the *initial* EFU zoning was based upon generalized soils mapping data and that the evidence (Applicant's soil study/analysis) in this case more accurately and precisely identified soil characteristics at the Subject Property. The Hearings Officer finds that the *initial* designation of EFU for the Subject Property was a mistake.

In the alternative, the Hearings Officer considers whether there has been a change in circumstances since the property was last zoned. COLW argued that this criterion was not met because there was not change in circumstances. COLW (11/12/24, page 5) stated the following:

> *No change in circumstances, especially regarding the EFU-zoned portion of the property, can justify a rezone of the property.*
>
> *The applicant has alleged that the soils have changed. Application Materials, p. 40. This is not true. The soils are the same agricultural soils that were properly mapped and zoned previously. Both the DOGAMI reclamation permit and the 2023 Amended Reclamation Plan required that the top soil initially stripped from the property be the same top soil that is restored to the property. In areas zoned EFU and not impacted by surface mining activity, the soil is the same.*
>
> *The applicant also alleges that the viability of commercial farming has significantly changed based on water availability. This is unconvincing for several reasons. First, the subject property derives its water rights from Arnold Irrigation District (Arnold). Arnold holds water rights that are relatively senior within the basin and at minimal risk of being undeliverable. Second, many farm uses, including livestock grazing, do not necessarily require irrigation.*

Applicant, in its Burden of Proof (pages 24 & 25) stated the following:

> *There has clearly been a change in circumstances since the property was last zoned in the 1970s:*
>
> *<u>Soils</u>: New soils data provided in Mr. Gallagher's soils report shows the property does not have agricultural soils.*
>
> *<u>Surface Mining Complete</u>: The Wallace Group Report (Exhibit 8) and Amended Reclamation Plan (Exhibit 11) approved by the County in 2023 established mining on the property is complete and the remaining reclamation activities can be completed in conjunction with the site development and master plan for a public park.*
>
> *<u>Farming Economics and Viability of Farm Uses</u>: 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

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 13, 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 14. 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 the completion of surface mining, the 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. Gallagher's soil assessment confirms that the subject property does not have agricultural soils.

COLW's asserted that Applicant claimed that the "soils have changed." COLW referenced stockpiled soil that will be used to re-cover a portion of the mining section of the Subject Property as basis for Applicant's alleged claim that the "soils have changed." This COLW claim is not supported by evidence in the record.

The Hearings Officer reviewed Applicant's soil analysis carefully and concluded that Applicant's soil professional located test/bore pits throughout the Subject Property. The Hearings Officer finds the test/bore pits locations fairly and accurately provided representative results which can be relied upon in in meeting the legal requirements of relevant state law/regulations.

The Hearings Officer finds the "changed circumstances" factors discussed in the Applicant's above-

quoted statements best address the changed circumstances portion of this approval criterion. The Hearings Officer concurs with Applicant that there have been changes in circumstances since the Subject Property was last zoned.

The Hearings Officer finds this criterion is met.

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 Applicant's proposal in this case 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 was held before a Hearings Officer on November 12, 2024, and members of the public were given an opportunity to 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. The Hearings Officer 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. The Hearings Officer finds that this criterion will be met.

Chapter 2, Resource Management

Section 2.2 Agricultural Lands

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

FINDING: Applicant provided the following comments specifically related to Goal 1:

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.

The Hearings Officer finds that COLW did not clearly address the import of Goal 1 (approval criterion or aspirational). Further, the Hearings Officer finds, consistent with prior decisions/recommendations, that Goal 1 is aspirational. However, despite Goal 1 being considered aspirational and not a relevant approval criterion, the Hearings Officer (in the alternative) provides

the following findings.

Issues related to this Goal 1 were extensively covered by the Applicant and COLW. The issues raised by Goal 1 are interwoven with other relevant Goals and State laws/regulations and policies and DCC approval criteria. The Hearings Officer intends to address comprehensively many of the issues related to the determination of whether the Subject Property is "Agricultural Land" in this section and will incorporate and supplement these findings in later relevant Goals and approval criteria.

Applicant asserts that the Subject Property is not "Agricultural Land" and COLW that the Subject Property is, based upon the factual evidence and relevant law, "Agricultural Land." The Hearings Officer provides the following "Soils" and "Agricultural Land" findings.

Soils.

COLW provided extensive comments related to "soils" (11/12/2024, pages 6-9). Those comments follow:

> *ORS 215.211(1) allows a person to provide more detailed soil information to the county to the extent that it would "assist a county to make a better determination of whether land qualifies as agricultural land." Here, the applicant's soil survey should not be relied upon by the county because it is deficient for several reasons.*
>
> *First, the applicant's soil study varies so substantially from the existing NRCS data as to be unbelievable. The applicant's soils report ("Gallagher Report") asserts that the subject property is predominantly class VII and VIII soils, finding that "the combined percentage of Class 7 and 8 non-high value farmland soils is 66 percent (183 acres)." Application Materials, Page 91. This is a surprising departure from the NRCS soils information on file. Existing NRCS data shows that there are no class VII and VIII soils on the property. Instead, the entire property consists of exclusively class VI or below soils, including substantial acreage which would be class III soil if irrigated. Application Materials, p. 94. Put another way, according to NRCS data, far from containing 66% nonagricultural soils, the subject property consists entirely of the best agricultural soils available for farm use in the region.*
>
> *DLCD has previously noted in 2010 that it is "surpris[ing] that the NRCS data would be off to such an extent." Exhibit 1, p. 6. LandWatch agrees. Such a discrepancy seems hard to reconcile, especially considering that another independent soil scientist found that "[t]he NRCS soil survey on this study area was reviewed on-site and determined to be accurate at the time of mapping." (emphasis added) Exhibit 4, p. 5. The Borine Soil Study at Exhibit 4 was provided to the County during the 2010 failed attempt to rezone the subject property to rural residential.*
>
> *The second reason that the Gallagher Report is unreliable is the creation of a new "Mined Land and Filled" (MF) soil mapping unit within the subject property. Application Materials, p. 94. The MF mapping unit is the "reclaimed" area where mining excavation took place. The Gallagher Report revised the 68 acres (24%) within the MF mapping unit to a land capability class of VII and declared it non-suitable for farm use. Application Materials, p. 91. As a reminder, the 2023 Amended Reclamation Plan was approved based on findings that the surface mined area was presently covered with 6-12 inches of*

27A Clovekamp sandy loam soil. Application Materials, p. 270. As a result, the revision of the MF mapping unit to Class VII soil is hard to reconcile with the Amended Reclamation Plan because it suggests that the agricultural-quality topsoil was either never restored, or the Gallagher Report is misleading.

The creation of a revised nonagricultural soil mapping unit in the reclaimed mining area by a private soil study was similarly problematic during the 2010 failed attempt to rezone the property. LandWatch notes that in the Hearings Officers' 2010 Decision denying the previous rezone attempt, the County HO stated that they could not "recommend that the 91 acre former surface mine be counted in the ratio of agricultural land to nonagricultural land to determine predominance under OAR 660- 003-0020(1)(a)(A)." Exhibit 1, p. 21-22. The 2010 County HO reasoned that based on evidence in the record, either (1) conditions of reclamation requiring the restoration of 27A Clovecamp Loamy sand to the former surface mine area had not been adhered to; or (2) the conditions were adhered to and the former surface mine area is properly covered with a layer of Class VI nonirrigated/Class III irrigated High-Value agricultural soil. Exhibit 1, p. 22. In either case, the circumstances would not allow the subject property to be rezoned consistent with Goal 3 and OAR 660- 033- 0020(1)(a)(A). Exhibit 1, p. 22. Moreover, the HO observed that based on the 1992 ESEE analysis for SP-92-98, there is a "strong inference that the surface mine could be reclaimed and used consistent with its former agricultural land status after mining was completed." Exhibit 1, p. 23. The 2010 decision concluded, "For this reason alone, the Hearings Officer cannot recommend approval of this application." Exhibit 1, p. 23.

The reasoning behind the 2010 HO denial remains persuasive. Based on the Gallagher Report, it is apparent that the MF mapping unit has not been properly reclaimed to its prior agricultural capability and therefore, should not be counted into the ratio of agricultural to nonagricultural land for the purposes of analysis under OAR 660-003-0020(1)(a)(A). The Gallagher Report describes various individual sample sites within MF mapping unit as "v. compacted," "extremely compacted," and "2-3 layers in compacted fill". Application Materials, p. 120. Other sample sites in the MF mapping unit contain "asphalt chunks," "chunks concrete," and "pea gravel". Application Materials, p. 109, p. 120, p. 123. Site 168 on the property is described as having been "eroded to bedrock on surface", and that it has been either "eroded or dug channel, all rocks." Application Materials, p. 128. Site 3 within the MF mapping unit does not contain any sort of sampling at all, and instead simply notes that there is a "Steep sided sand pile" and "stockpiled top soil". Application Materials, p. 109. Site 11 is described as a "Rock Pile" with notes providing that there was "only rock on surface". Application Materials, p. 110. Overall, of the 38 sample sites occurring in the MF mapping unit, 32 resulted in "refusal"which is to say termination of a borehole if the hammer does not advance more than six inches after fifty blows.[footnote omitted] Figure 1. Other test sites on the subject property, with the appropriate amount of agricultural soils, resulted in refusal less than 10% of the time. Figure 1. This suggests that the extent to which "soil" within the "reclaimed" area is compacted is the result of neglect by the property owner or that 6-12 inches of 27A Clovekamp soil was not restored at all.

Figure 1: Gallagher Report Test Sites resulting in "Refusal"

	Total Number	Number resulting in "refusal"	Percentage of sites resulting in "refusal"
Sample Sites Revised to MF	38	32	84%

Other Sample Sites	194	15	17%

If the 68 acres (24%) within the MF mapping unit was considered class VI soil or better (consistent with the NRCS information), when combined with the other 96 acres (35%) of Class III irrigated/class VI non-irrigated soil, the subject property would be predominantly soils suitable for agriculture under OAR 660-033-020(1)(a)(A). LandWatch respectfully requests the Hearings Officer to find that the subject property is agricultural land based on the fact that it is predominantly (>59%) Class III irrigated/Class VI non-irrigated soils.

The Hearings Officer accepts COLW's comments as lay observations but not as expert testimony. The Hearings Officer finds COLW did not provide persuasive authoritative evidence disputing the Applicant's professional soil expert's evidence or analysis.

Applicant's Burden of Proof states:

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. Gallagher's soils assessment demonstrates that the subject property consists predominantly (66%) of Class 7 and 8 non-agricultural soils.

According to Mr. Gallagher, these soils have severe limitations for agricultural use of the subject property. The soils found on the subject property are low fertility, being ashy sandy loams with a low cation exchange capacity (CEC) of 7.5 meq/100 gm and organic matter is very low for Gosney 0.75% and low for Deskamps 1.5%. These soils do not have a large capacity to store soil nutrients especially cations, and nitrogen fertilizers readily leach in sandy soils. The soil depth is further limiting because it limits the overall volume of soil available for plant roots and limits the size the overall soil nutrient pool. Additionally, the soil available water holding capacity is very low for Gosney and Henkle less than 1.8 inches for the whole soil profile, and for the very shallow soils it is half this much. The Deskamps soils have only about 2 to 4 inches AWHC for the entire profile. The combination of low fertility and low AWHC translate into low productivity for crops. NRCS does not provide any productivity data for non-irrigated crops on these soils. This site does not have water infrastructure for irrigation so the productivity is lower.

According to Mr. Gallagher the subject property is not suited for livestock grazing on a commercial scale. The soils here have major management limitations including ashy and sandy surface texture. The majority of the area has soils that are very shallow to shallow with many rock outcrops and very stony to extremely stony surface which makes seeding impractical with conventional equipment. The mined and filled area has low available water holding capacity and from the barren cover on the surface and very compacted subsoil they also have low potential for forage production.

Wind erosion is a potential hazard and is moderately high when applying range improvement practices. Because the soil is influenced by pumice ash, reestablishment of the native vegetation is very slow if the vegetation is removed or deteriorated. Pond development is limited by the soil depth. The restricted soil depth limits the choice of species for range seeding to drought-tolerant varieties. Further, range seeding with ground equipment is limited by the rock fragments on the surface. The

areas of very shallow soils and rock outcrop limit the areas suitable for grazing and restrict livestock accessibility.

Based on the revised Order-1 map the annual productivity in a normal year is about 74 tons annual range production for the entire property. This is lower (50 tons) for an unfavorable year and higher (98 tons) for a favorable year. The animal use months (AUMs) for this property is about 163 (based on the revised soil map and a monthly value of 910 pounds forage per 1 AUM equivalent to pounds per cow calf pair). This model assumes the cow's take to be 25% of annual productivity in order to maintain site productivity and soil health (NRCS 2009). This limits the grazing to 14 cow calf pairs for 12 months in a normal year and fewer 9 cow calf pairs in unfavorable year and more 18 in a favorable year. This is not at an economical cattle production scale because the productivity of the land is too poor and is not conducive to rangeland improvements.

The Hearings Officer finds Applicant's soil study/report represents a soil analysis conducted by a qualified expert/professional. The Hearings Officer finds that Applicant's soil study/report professionally and accurately reflects the soil characteristics on the Subject Property. The Hearings Officer finds overall the Subject Property consists predominantly (66%) of Class 7 and 8 non-agricultural soils.

Agricultural Lands

COLW disputed Applicant's claim that the Subject Property is "Agricultural Land" as that phrase is defined in relevant law (Hearing testimony of Robin Hawakawa and record submissions dated 11/12/24 and 12/3/24). Applicant responded to each of COLW's "Agricultural Land" arguments in a thorough and comprehensive manner in its Final Argument (12/9/24). The Hearings Officer finds that Applicant's Final Argument comments are persuasive. Rather than attempt to summarize or characterize (or mischaracterize) Applicant's Final Argument statements the Hearings Officer includes Applicant's Final Argument statements related to "Agricultural Land") (including discussion of "farm unit") in full. Those comments follow for multiple pages:

A. Background

COLW conflates any agricultural activity with "farm use," which is a defined term and the central component of the determination of whether land is "agricultural land" as used in Goal 3 and the administrative rules. COLW likewise conflates EFU zoned and irrigated land with "agricultural land," again which is a defied term with distinct components the subject property lacks.

The relevant definitions for the analysis are as follows:

*"**Agricultural land**" is land which includes:*

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

(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a),

taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and

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

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

OAR 660-033-0020(1)(a)." Emphasis added.

"***Farm use***" *is:*

"The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm use" also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. "Farm use" does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees or land described in ORS 321.267 (Lands not eligible for special assessment) (3) or 321.824 (Lands not eligible for special assessment) (3)."

ORS 215.203(2)(a). Emphasis added.

"***Farm unit***" *is:*

"[T]he contiguous and noncontiguous tracts in common ownership used by the farm operator for farm use as defined in ORS 215.203.

ORS 215.203. Emphasis added.

To qualify as "agricultural land" in Central Oregon, the land must be composed predominantly of Class 1-6 soils or it must be suitable for farm use, which means it must be capable of being farmed for a profit. As is evident from the local nonresource cases, it is rare to have land in Central Oregon that does not have predominantly Class 1-6 soils and that can be farmed for a profit. The present case is

no exception as demonstrated by the evidence in the record.

B. Nonresource Process—Definition of Agricultural land

OAR 660-033-0030 requires that "all land defined as 'agricultural land' in OAR 660-0330020(1) be inventoried as agricultural land." As is relevant here, OAR 660-033-0020(1)(a)(A) defines "agricultural land" to include soils classified predominantly Class I-VI soils in Eastern Oregon.[footnote omitted] The Property would meet this definition under the NCRS soil map but this classification is not controlling when, as here, a more detailed soils analysis is provided. Both Statewide Goal 3 and ORS 215.211 allow the county to utilize information provided by a more detailed soil study to provide a better determination of whether land is "Agricultural Land" than provided by the NRCS soils survey. The soil study provided by the Applicant confirms the property is predominantly Class 7 and 8 soils and is the only evidence in the record other than the NCRS map, which is based on a scale of 1:20,000 and provides only a generalized map of soils in the area, not the detailed site-specific analysis provided by the Applicant.

COLW argues the soil study submitted by the Applicant's certified soils examiner and certified by DLCD is somehow deficient because it varies significantly from the NCRS data and because it determined the soils in the mined area were poor and not Class 1-6, as was presumed when the original site plan for the mine was approved in 1998. None of COLW's arguments or speculation about the soil study are sufficient to undermine the study or the qualifications of the soils examiner. It is neither surprising nor uncommon for the site specific study, which includes 232 samples from combined soil test pits, soil borings and surface observations to vary from the more generalized, non-site specific NCRS maps based on a 1:20,000 scale. Furthermore, the lack of agricultural soils in the mined area is also not surprising nor suspicious based on the site conditions discovered subsequent to the 1998 site plan and the bulk of evidence in the record substantiating the lack of agricultural soils.

OAR 660-033-0020(1)(a)(B) and (C) then expands the definition of "Agricultural Land" to include:

> *(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and*
>
> *(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.*

OAR 660-033-0020(1)(a)(C) is addressed in more detail below, however it is important to note that even when the "considerations" found in sub (B) point towards the Property being suitable for "farm use," none of the considerations, on their own, are determinative and all are qualified by the term "farm use as defined in ORS 215.203(2)(a)[.]" OAR 660-033-0020(1)(a)(B).

In relevant part, ORS 215.203(2)(a) states that:

> *""farm use" means the current employment of land for the primary purpose of obtaining a profit*

in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof.
Emphasis added.

What is clear in this definition is that "farm use" (as it is used in Oregon law) requires more than just having a cow or horses, growing a patch of grapes, or having a passion for rural living. What the law requires is that the land be used for "the primary purpose of obtaining a profit in money[.]" ORS 215.203(2)(a). In that, the law is clear.

Oregon courts have consistently addressed profitability as an element of the definition of "agricultural land." In Wetherell v. Douglas County, 342 Or 666 (2007), the Oregon Supreme Court held that profitability is a "profit in money" rather than gross income. In Wetherell, the Court invalidated a rule that precluded a local government from analyzing profitability in money as part of this consideration. Id. At 683. As may be helpful here, the Court stated:

"We further conclude that the meaning of "profitability," as used in OAR 660033-0030(5), essentially mirrors that of "profit." For the reasons described above, that rule's prohibition of any consideration of "profitability" in agricultural land use determinations conflicts with the definition of "farm use" in ORS 215.203(2)(a) and Goal 3, which permit such consideration. OAR 660-0330030(5) is therefore invalid, because it prohibits consideration of "profitability" The factfinder may consider "profitability" which includes consideration of the monetary benefits or advantages that are or may be obtained from the farm use of the property and the costs or expenses associated with those benefits, to the extent such consideration is consistent with the remainder of the definition of "agricultural land" in Goal 3.

*Finally, the prohibition in OAR 660-033-0030(5) of the consideration of "gross farm income" in determining whether a particular parcel of land is suitable for farm use also is invalid. As discussed above, "profit" is the excess or the net of the returns or receipts over the costs or expenses associated with the activity that produced the returns. To determine whether there is or can be a "profit in money" from the "current employment of [the] land * * * by raising, harvesting and selling crops[,]" a factfinder can consider the gross income that is, or could be, generated from the land in question, in addition to other considerations that relate to "profit" or are relevant under ORS 215.203(2)(a) and Goal 3.*

We therefore hold that, because Goal 3 provides that "farm use" is defined by ORS 215.203, which includes a definition of "farm use" as "the current employment of land for the primary purpose of obtaining a profit in money[,]" LCDC may not preclude a local government making a land use decision from considering "profitability" or "gross farm income" in determining whether land is "agricultural land" because it is "suitable for farm use" under Goal 3. Because OAR 660-033-0030(5) precludes such consideration, it is invalid. Emphasis added. Id., at 681-683.

COLW argues that the Property is suitable for farm use because other properties in the surrounding area have irrigated land and appear to be engaged in some form of agricultural activity. However, the

*fact of the matter is that most Deschutes County EFU properties simply cannot meet this state definition because the land cannot be put to profitable use. The 2017 Census of Agriculture [footnote omitted] (**Exhibit 13**) makes it clear that most farms in the area lose money – a lot. And, while it is the Applicant's burden to show it meets the applicable criteria, the applicable criteria do not ask the Applicant to prove that no agricultural use could ever occur on the Property. The Applicant need only demonstrate that no reasonable farmer would attempt to make a "farm use" as that term is defined by ORS 215.203 – for the primary purpose of obtaining a profit. In essence, the applicant need only prove that the land is not suitable for farm use because it cannot make a profit from engaging in agricultural activities on the subject property. The Applicant has done so through the evidentiary submissions in the original application materials and as supplemented with the testimony of the farmer growing hay under the pivot on the adjacent parcel, Ethan O'Brien, **Exhibit 22**, and a local farmer/rancher Rand Campbell, **Exhibit 23**.*

COLW's continued reference to TL300 being engaged in "commercial farm use" and being forced out of agricultural production is disingenuous and not supported by the evidence in the record. COLW offers its unsubstantiated opinions about the testimony of the two independent local farmers/ranchers about the unsuitability of the subject property for farm use with a complete lack of evidentiary support. These speculative arguments are not evidence and are insufficient to undermine the actual experience of the farmers and their first-hand experiences and impressions of the land based on their years of experience conducting viable commercial farm operations in Central Oregon.

C. Suitability Factors

(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;

OAR 660-033-0020(1)(a)(B).

Broken apart individually, this leaves the decision maker with the following considerations:

- *Soil fertility;*
- *Suitability for grazing;*
- *Climatic conditions;*
- *Existing and future availability of water for farm irrigation purposes;*
- *Existing land patterns;*
- *Technological and energy inputs required; and*
- *Accepted farm practices.*

This list of considerations is just that: considerations. None of them are determinative of whether a property is suitable for farm use. As is described on pages 30-34 of the original application materials, and pages 8-11 of the Soil Assessment, Exhibit 6, [footnote – summarized mistaken labeling of Exhibits] and further supported below, each of these considerations, on balance, can reasonably determine that the Property is not suitable for farm use.

a. Soil Fertility

The Property, as already established, has shallow, rocky soils. COLW argues that the Property will become suitable under the "soil fertility" consideration once reclamation has properly occurred. COLW is wrong. It is established in the Reclamation Evaluation and the Amended Reclamation Plan, there is 6-12 inches of topsoil over reclaimed wasterock. Even with the additional topsoil, the property will not be suitable for farm use without significant expenditure as established in the testimony of Ethan O'Brien, Exhibit 22, and Rand Campbell, Exhibit 23. COLW opines that once reclaimed, the property could be suitable for farm use. However, it is not substantial evidence for COLW to simply argue that there must be some agricultural use that may be made on the property. It is substantial evidence that the Applicant has submitted testimony of 2 farmers and ranchers, both of whom are familiar with and have been onsite, testifying that they would not attempt to establish such uses on the Property, or, that other cost concerns make it infeasible. COLW has submitted no actual evidence to the contrary and it is insufficient to merely attempt to poke holes in the Applicant's evidence as opposed to offering evidence to support its own position. See May Trucking Co. v. Dept. of Transportation, 203 Or App. 564, 572-573, 126 P.3d 695, 700-701 (2006).

Furthermore, the Applicant's DLCD-accepted Soil Study that was prepared by Mr. Andy Gallagher, Red Hills Soils, contains several notable findings within the Soil Study. For example, Mr. Gallagher found:

> *"Important soil properties affecting the soil fertility and productivity of the soils are very limiting to crop production on this parcel. The soils here are low fertility, being ashy sandy loams with a low cation exchange capacity (CEC) of 7.5 meq/100 gm and organic matter is very low for Gosney 0.75% and low for Deskamps 1.5%. These soils do not have a large capacity to store soil nutrients especially cations, and nitrogen fertilizers readily leach in sandy soils. The soil depth is further limiting because it limits the overall volume of soil available for plant roots and limits the size the overall soil nutrient pool. Additionally, the soil available water holding capacity is very low for Gosney and Henkle less than 1.8 inches for the whole soil profile, and for the very shallow soils it is half this much. The Deskamps soils have only about 2 to 4 inches AWHC for the entire profile. The combination of low fertility and low AWHC translate into low productivity for crops. NRCS does not provide any productivity data for non-irrigated crops on these soils." **Exhibit 6**, page 8.*

*These findings are further supported by the experience of Ethan O'Brien in farming of the adjacent parcel under the pivot who testified that the parcel, even when irrigated, was not worth farming based on a number of factors affecting the fertility including soil capacity, expense of soil amendments, spraying, seeding, etc. **Exhibit 22**. Likewise, Rand Campbell corroborated these findings based on his experience farming and ranching in Central Oregon and his onsite assessment of the subject property. Mr. Campbell found even if the mined area were improved with additional topsoil, the cost to purchase water and improve the land with irrigation facilities would far outweigh any anticipated profit given the low productivity of the land.*

b. Suitability for Grazing

COLW argues that the Property is suitable for grazing, if not by itself than in conjunction with other lands, seasonally. COLW is incorrect. Suitability for grazing was addressed in the Soil Assessment,

*pages 8-9, **Exhibit 6**, and again in the onsite assessment conducted by Rand Campbell, a Central Oregon farmer and rancher. **Exhibit 23**. Mr. Campbell found the soil condition and topography were not suitable for grazing considering the necessary costs to improve the soil for crop production sufficient to graze livestock. Ethan O'Brien corroborated this testimony based on his own experience and agreed no reasonable farmer would undertake the expense to improve this property to permit livestock grazing given the low productivity of the land. **Exhibit 22**.*

c. Climatic Conditions

The climatic conditions were addressed in the Soil Assessment, pages 9-10, Exhibit 6 and corroborated by the testimony of both local farmers. The bottom line is this: the climatic conditions on the Property do not make it suitable for farm use. This is because the Property receives very little precipitation such that the growing season is very short and the cultivation of crops or forage is extremely limited.

d. Existing and Future Availability of Water for Farm Irrigation Purposes

*The question of whether water is available necessary implicates whether, if irrigated, the Property could viably support an irrigated agriculture farm use. It cannot. Soils on the property are predominantly Class 7 and 8 based on 232 samples from combined soil test pits, soil borings and surface observations. Oregon case law establishes that it is reasonable to look at nearby farm properties for what are accepted farming practices in the area. The only irrigated agriculture in the area includes the raising of hay and grass crops and, almost all of these neighboring farms have testified that they have been unable to make a profit in money, despite having access to irrigation water. **Exhibit 19**.*

*Moreover, the cost of providing additional irrigation water and the required infrastructure is cost prohibitive and no reasonable farmer would attempt to do so. **Exhibits 20-23**.*

e. Existing Land Patterns

*Applicant has provided extensive information related to the various non-farm uses in the area. **Exhibit 19**. The Applicant attempted to contact every EFU-zoned property identified by COLW as being irrigated and engaged in some agricultural activity. Many of the commenters themselves live on properties that have received approvals for non-farm dwellings. This is relevant only to show that existing land use patterns in the area are not dissimilar from the proposed designation here, that is, rural residential use. This evidence also demonstrates that rural residential uses have been established in the area without any measurable harm to area agricultural uses.*

Applicant has also shown that the vast majority of surrounding privately owned properties are either not engaged in any farm use or are engaged in some agricultural activity with small amounts of irrigated land but not making a profit as a working farm. This information shows that the surrounding land use pattern is clearly characterized by non-farm and non-agricultural uses that exist in harmony with area rural and agricultural activities.

f. Technological and Energy Inputs Required

As has already been discussed in detail, the test is whether the land itself can support a particular farm use. It cannot. This consideration then includes additional costs outside of the already prohibitive cost of purchasing irrigation water. ***Exhibits 20 and 21****. This includes specialized equipment or structures to establish a legitimate farm use, including bringing power to the property, drilling wells and installing pumps, purchasing and installing irrigation equipment and using electricity to power pumps to obtain water from wells. It would also include the costs of developing breeding facilities for farm animals. All of these improvements would require significant financial expense, as testified in writing by two professional ranchers/farmers.* ***Exhibits 22 and 23****.*

g. Accepted Farm Practices

COLW argues that there is "agricultural activity occurring in the area" but that is not the test. The test is whether there is a "farm use" as that term is defined in ORS 215.203(2)(a). As explained in Wetherell, the definition of "farm use" is related to that established under the taxation code found at ORS 308A.056. Wetherell, at 681. ORS 308A.056 also defines "accepted farm practice" as "a mode of operation that is common to farms of a similar nature, necessary for the operation of these similar farms to obtain a profit in money and customarily utilized on conjunction with farm use."

As it may pertain to the availability of irrigation water, in the Aceti case, LUBA accepted the County's finding that it is not an accepted farming practice in Central Oregon to irrigate and cultivate Class VII and VIII soils.

No other party has credibly argued that an accepted farm practice could be initiated on the Property.

D. OAR 660-033-0020(1)(a)(C)

For the purposes of Goal 3, "agricultural land" includes "[l]and that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands." OAR 660-0330020(1)(a)(C). LUBA has explained what that means, explaining that:

"in order to be 'agricultural land' under OAR 660-033-0020(1)(a)(C), 'there must be some connection between the subject property and adjacent or nearby farm practices, such that the subject property must remain as 'agricultural land' in order to permit such practices on other lands to be undertaken." Emphasis in original.

Central Oregon LandWatch et al v. Deschutes County, __ Or LUBA __ (LUBA No. 2023-006/009, slip op 57-58)(hereinafter "LUBA 710 Decision") quoting Wetherell v. Douglas County, 50 Or LUBA 167, 190-91 (2005).

In further explaining the rule, LUBA discusses the case of Walker v. Josephine County, 60 Or LUBA 186 (2009) in which it held that in determining whether "resource use of the subject property [was] necessary to permit the farm and forest practices on nearby BLM land, including operation of the BLM's seed orchard" and stated that the "possibility that certain potential uses might cause some conflicts with the existing farm and forest uses [did] not demonstrate that the subject property [was]

necessary for continued farm and forest operations." 60 Or LUBA at 19293.

In the LUBA 710 Decision, LUBA then stated that:

> *"OAR 660-033-0020(1)(a)(C) asks not only whether the land itself is necessary to permit farm practices on adjacent or nearby lands but, also, whether the land's resource designation and zoning, and the presumed lack of impacts or conflicts with farming on adjacent or nearby lands, are necessary to permit farm practices on adjacent or nearby lands." LUBA 710 Decision, slip op 59.*

More simply stated, the test is whether or not the existing designation of the property and its presumed lack of impacts is necessary for nearby and adjacent farm practices. In this case, the "impacts" that have been identified are water, traffic, and nuisance or trespass.

Before addressing potential impacts, however, it is important to further frame the test as to what is "necessary" under the rule. The Court of Appeals said it best:

> *"we note that we also agree with LUBA that 'necessary to permit farm practices on adjacent or nearby agricultural lands' is a 'high standard.' Webster's Third New Int'l Dictionary 1510 (unabridged 2002) ('necessary' means 'whatever is essentially for some purpose' and 'things that must be had"). That is, we do not understand land to be agricultural land under OAR 660-033-0020(1)(a)(C) merely because its designation as such would merely be 'useful' or 'desirable' for nearby farm practices. Rather, for 'land' to be agricultural land under OAR 660-033-0020(1)(a)(C), that land, considering its resource designation and zoning, must truly be necessary to adjacent nearby farm practices." Emphasis added. Central Oregon LandWatch et al v. Deschutes County, 33 Or App 321, 333 (2024).*

The subject property has no history of farm use and has been in mining use or post-mining use since the early 1990s. Contrary to the assertions of COLW, the property line adjustment between the subject property (TL200) and the adjacent parcel (TL300) completed in 2016 was to separate the property being put to agricultural use (TL300) from the nonagricultural use subject property. This is further supported by the Arnold piping project which stubbed irrigation to TL300 and not to the subject property. And it is corroborated by the testimony of Ethan O'Brien, Exhibit 22, who testified he has never farmed the subject property, sees no evidence it has ever been farmed, and would not farm or otherwise use the subject property in his operation. The historicalnonagricultural purposes establishes it is not necessary for any farm practices to be undertaken on adjacent lands. This is further corroborated by the testimony of the land owners in the area engaging in agricultural activities. Exhibit 19.

E. OAR 660-033-0020(1)(b) – Farm Unit

This provision provides:

> *"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." Emphasis added.

The important consideration for the above language is the lands must be a part of a farm unit for this requirement to be implicated. Farm unit is defined as "the contiguous and noncontiguous tracts in common ownership used by the farm operator for farm use as defined in ORS 215.203." The present case does not involve a farm unit as the subject property is not currently being used for a farm use and there is no evidence it ever has been. It therefore does not constitute land intermingled with higher value lands "within a farm unit" as described by the rule quoted above. As demonstrated by the testimony of both farmers/ranchers familiar with the property, it is not productive land, shows no evidence of having been farmed, and has not been used as a part of the existing operation on TL300.

COLW's argument that the subject property is a part of a farm unit is patently false and not supported by the evidence in the record. The lot line adjustment they cite to as evidence the properties were "jointly managed for agriculture" shows exactly the opposite. The lot line application materials show that the subject property was being separated from TL300 because TL300 was being used for agricultural purposes, although at a loss, COLW Ex 5, p. 5 and therefore not "farm use"; and the area which now makes up TL200 (the subject property) was not. The testimony of Ethan O'Brien and Rand Campbell further supports the fact that the subject property has not been used as a part of any farm use on the adjacent parcel, or any other parcel.

Likewise, the exhibits COLW cites to in support of their incorrect narrative that the property could be farmed profitably (see COLW Dec 3 letter, pg. 4) do not support the conclusion. There is no evidence that the numbers on COLW EX 5, p. 17 include any portion of the subject property. In fact, those income numbers are from 2008-2010 when the Reclamation Evaluation establishes that 70-90 acres of the subject property was being mined up to 2005 and incrementally reclaimed through 2010, ***Exhibit 8****, page10 , which was verified by DOGAMI in 2011. Exhibit 10. Lastly, the numbers COLW cites to in support of its claim the subject property could be farmed profitably in conjunction with TL300 were submitted by the applicant in that case to support its position that the farm activities operate "at a consistent loss." COLW* ***Exhibit 5****, pg. 5. This fact is confirmed by the testimony of both farmers familiar with the subject property and what it takes to make a profit farming in Central Oregon.*

End of Applicant's Final Argument "Agricultural Land" Comments

The Hearings Officer, as noted above, finds the Applicant's above-quoted "Soils" and "Agricultural Land" comments correctly connect the evidence in the record to an appropriate interpretation of relevant laws. The Hearings Officer takes note that COLW (12/9/24, pages 2 through 6) argued that emails from Ethan O'Brien and Rand Campbell are "not conclusive to prove the subject property is not suitable for farm use." The Hearings Officer agrees with COLW that the O'Brien and Campbell comments are not *conclusive* with respect to whether the Subject Property is suitable for farm use. However, the Hearings Officer does find that the O'Brien and Campbell comments can be considered in this case. The Hearings Officer finds the O'Brien and Campbell comments constitute substantial evidence that the Subject Property is not suitable for farm use.

The Hearings Officer finds the above-quoted Applicant Final Argument comments and the sections of the Burden of Proof cited by Staff (Staff Report, pages 33 through and including 39) adequately

address each COLW argument raised in oral testimony at the Hearing and in record submissions (11/12/24 and 12/9/24). The Hearings Officer finds that the Subject Property is not "Agricultural Land" as defined by relevant law. The Hearings Officer finds, to the extent it could be considered relevant, this policy is satisfied.

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 did not ask to amend the subzone that applies to the Subject Property; rather, the Applicant requested a change under Policy 2.2.3 and has provided evidence to support rezoning the Subject Property to RR-10.

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

FINDING: The Hearings Officer adopts as additional findings for this Policy the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands.*

The Applicant requested approval of a plan amendment and zone change to re-designate the property from Agricultural to Rural Residential Exception Area and rezone the property from EFU to RR-10. The Applicant did not seek an exception to Goal 3 – Agricultural Lands, but rather to demonstrate that the Subject Property does not meet the state definition of "Agricultural Land" as set forth in Statewide Planning Goal 3 (OAR 660-033-0020). The Hearings Officer found, in the referenced incorporated and adopted findings, that the Subject Property is not "Agricultural Land" as described in relevant law. The Hearings Officer notes that the Land Use Board of Appeals ("LUBA") allowed this approach in Wetherell v. Douglas County, 52 Or LUBA 677 (2006), where LUBA states, at pp. 678-679:

Applicant, in its Burden of Proof provided the following comments related to this Policy:

Deschutes County has allowed this approach in previous Deschutes County Board and Hearings Officer's decisions as previously cited and summarized herein. Additionally, the Land Use Board of Appeals (LUBA) allowed this approach in Wetherell v. Douglas County, 52 Or LUBA 677 (2006), where 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).

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 Wetherall 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.

Staff, in the Staff Report (page 22), stated that:

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 the aforementioned Deschutes County plan amendment and zone change applications. The Applicant provided evidence in the record addressing whether the property qualifies as non-resource land. Therefore, the Applicant has the potential to prove the property is not agricultural land and does not require an exception to Goal 3 under state law.

The Hearings Officer concurs with Applicant's above-quoted analysis and Staff's conclusions. The Hearings Officer finds this application does not require an exception to Goal 3 under state law.

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. Staff concurred with the County's previous determinations in plan amendment and zone change applications, and concluded that 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. The Hearings Officer agrees with Staff's interpretation.

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 requires the County to identify and retain agricultural lands that are accurately designated. The Applicant proposed that the Subject Property was not accurately designated as demonstrated by the soil study, Applicant's Burden of Proof and Final Argument. The Hearings Officer adopts as additional findings for this Policy the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands.*

The Hearings Officer finds Applicant identified and accurately designated the Subject Property as not being "Agricultural Land" under relevant law.

Section 2.3, Forests

FINDING: The Subject Property has a Comprehensive Plan designation of Surface Mine and Agriculture and is therefore not categorized as forest land. The Hearings Officer finds forest land policies do not apply.

Section 2.4 Goal 5 Overview Policies

Goal 1 Protect Goal 5 Resources

FINDING: The Hearings Officer adopts as additional findings for this Goal the findings for *Preliminary Issues, Reclamation* (Section II, A. 2.)

The Hearings Officer finds that the surface mine site has concluded all mining activities. Individual resources within this section are addressed independently.

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 Hearings Officer adopts as additional findings for this Goal the findings for *Preliminary Issues, Reclamation* (Section II, A. 2.)

The Burden of proof states:

This application provides new information supporting rezoning of Site No. 392 and removal of Site No. 392 from the County's Surface Mining Mineral and Aggregate Inventory (Comprehensive Plan Table 5.8.1). Mining of the subject property ceased in 2005, DOGAMI closed its file in 2011 and the County recently approved an Amended Reclamation Plan (Exhibit 11 to allow any remaining reclamation to be conducted in conjunction with the master planning and redevelopment of the site as a public park. (Exhibit 4). Furthermore, the Gallagher 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.

The Hearings Officer concurs with the Applicant's analysis.

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 has not proposed a specific development application at this time. Therefore, the Applicant is not required to address water impacts associated with development. Rather, the Applicant will be required to address this criterion during development of the Subject Property, which would be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat). The Hearings Officer finds that this criterion does not apply to the subject application.

Section 2.6, Wildlife

FINDING: The Hearings Officer finds that there are no Goal 5 listed wildlife species present on the Subject Property, based on the Goal 5 inventory nor threatened or endangered species. The Hearings Officer finds that 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 view and sites.

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

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

FINDING: The Burden of Proof states:

As the County Hearings Officer recently ruled in a similar file under Deschutes County File Nos. 247-21-001043-PA, 247-21-001044-ZC, these policies are fulfilled by the County's Goal 5 program. The County protects scenic views and sites along major rivers and roadways by imposing Landscape Management (LM) Combining Zones to adjacent properties. There is no LM combining zone applicable to the subject property, nor is the subject property identified as a Goal 5 resource for Open Space or Scenic Views/Site[5] [footnote 5 is set forth immediately below] Furthermore, no new development is proposed under the present application. These plan provisions are not applicable to consideration of the proposed zone change and plan amendment.

Footnote [5] SM site 392 is listed on the County's Surface Mining Mineral and Aggregate inventory. The present application, together with the previously approved Amended Reclamation Plan, establishes the necessary basis for removal of the site from the inventory and rezoning for a subsequent use.

The Hearings Officer concurs with the Applicant's above-quoted analysis.

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 2.10.4 Review surface mining codes and revise as needed to consider especially mitigation factors, imported material and reclamation.

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: Applicant's Burden of Proof states:

The present application asks the County to rezone Site No. 392 from SM to RR-10 because it no longer has a significant mineral resource and will be reclaimed in accordance with the Amended Reclamation Plan (Exhibit 11) approved by the County in 2023. 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 associated with Site No. 392 also be removed.

Staff provided the following comments:

Staff concurs with this analysis but requests the Hearings Officer modify as they see fit. Staff notes that Policy 2.10.4 is not addressed by the applicant in the Burden of Proof. However, no amendment is proposed to the provisions of the Surface Mining Zone or the Surface Mining Impact Area Combining

Zone.

The Hearings Officer finds Applicant's comments, as quoted above, adequately address these policies. The Hearings Officer concurs with Staff's comment that no amendment is proposed to the provisions of the Surface Mining Zone or Surface Mining Impact Area Combing Zone. The Hearings Officer finds these policies, as relevant, are 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. The Applicant provided the following response to this section in its Burden of Proof:

The above part of the plan is not a plan policy and is not an applicable approval criterion but rather an explanation of how the County calculated expected growth. 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 and is near (within ½ mile) of the City limits of Bend.

Rezoning the subject property to RR-10 to facilitate its redevelopment with recreational uses, including a public park is consistent with this criterion, as it will provide for an orderly and efficient transition from the Bend Urban Growth Boundary to rural and agricultural lands. Additionally, it will link the non-productive lands of the subject property with existing rural and urban development and street systems, furthering the creation a buffer of RR-10 zoned land along the City's southeastern boundary where the quality of soils are poor and the land is not conducive for commercial agriculture.

Staff provided the following comments:

Staff notes this policy references the soil quality, which staff has discussed above. Staff requests the Hearings Officer make specific findings on this topic.

The Hearings Officer adopts as additional findings for this section the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands*. The Hearings Officer finds the soil quality of the Subject Property can fairly be characterized as "poor." The characterization of the Subject Property as having "poor" quality soil qualifies the Subject Property to be rezoned as rural residential.

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 initiating a nonresource plan amendment and zone change by demonstrating the property does not meet the definition of agricultural or forest land, or taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR.

FINDING: The Applicant provided the following response to this provision in the Burden of Proof:

Prior Hearings Officer's decisions have found that Section 3.3 is not a plan policy or directive.[footnote references prior decisions/recommendations] Further, no goal exception to Statewide Planning Goal 3 is required for the rezone application because the subject property does not qualify as farm or forest zoning or agricultural lands under the statewide planning goals. The County has interpreted the RREA plan designation as the proper "catchall" designation for non-resource land and therefore, the Rural Residential Exception Area (RREA) plan designation is the appropriate plan designation to apply to the subject property.[footnote 7 included, in full, below]

Footnote 7:
The Hearings Officer's decision for PA-11-17/ZC-11-2 concerning this language of Section 3.3 states:

To the extent that the quoted language above represents a policy, it appears to be directed at a fundamentally different situation than the one presented in this application. The quoted language addresses conversions of "farm" or "forest" land to rural residential use. In those cases, the language indicates that some type of exception under state statute and DLCD rules will be required in order to support a change in Comprehensive Plan designation. See ORS 197.732 and OAR 660, Division 004. That is not what this application seeks to do. ***The findings below explain that the applicant has been successful in demonstrating that the subject properly is composed predominantly of nonagricultural soil types. Therefore, it is permissible to conclude that the properly is not "farmland" as defined under state statute, DLCD rules, and that it is not correctly zoned for exclusive farm use. As such, the application does not seek to convert "agricultural/and" 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 reason set forth in the Hearings Officer Green's decision in Pagel, I cannot find a reason why the County would be prohibited from this practice. (emphasis added).*

I find that Deschutes County has interpreted the RREA plan designation as the property "catchall" designation for non-resource land. As a result, the Hearings Officer finds that the RREA plan designation is the appropriate plan designation for the subject property.

The Hearings Officer finds the above-quoted Applicant statement (including footnotes) fairly and accurately reflect the law as applied to Section 3.3, Rural Housing, Rural Residential Exception Areas.

Section 3.7, Transportation

Appendix C – Transportation System Plan
ARTERIAL AND COLLECTOR ROAD 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.

Goal 4. Establish a transportation system, supportive of a geographically distributed and diversified economic base, while also providing a safe, efficient network for residential mobility and tourism.

…

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

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

OREGON ADMINISTRATIVE RULES CHAPTER 660, LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

Division 6, Goal 4 – Forest Lands

OAR 660-006-0005, Definitions

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

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

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

FINDING: Applicant's Burden of Proof states:

The subject property and surrounding areas do not include any lands that are suited for forestry operations. Goal 4 says that forest lands "are those lands acknowledged as forest lands as of the date

*of adoption of this goal amendment." The subject property does not include lands acknowledged as forest lands as of the date of adoption of Goal 4. Goal 4 also says that "where**a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources." This plan amendment does not involve any forest land. The subject property does not contain any merchantable timber and is not located in a forested part of Deschutes County. The subject property is not zoned for forest lands, nor are any of the properties within a 3.5mile radius.*

The subject 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. The soil mapping unit on the subject property does not contain wood fiber production capabilities and the subject property does not qualify as forest land.

The Subject Property is not zoned for forest lands, nor are any of the adjacent properties. Staff noted (Staff Report, page 29) that forest zoning is present on lands to the southwest and directly south of the Subject Property. The Subject Property does not contain merchantable tree species and there is no evidence in the record that the Subject Property has been employed for forestry uses historically. The Hearings Officer finds that the Subject Property does not qualify as forest land.

Division 23 - Procedures and requirements for Complying with Goal 5

OAR 660-023-0180, Mineral and Aggregate Resources

(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 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 Burden of Proof states:

Under OAR 660-023-010, the term "post acknowledgement plan amendment" (PAPA) encompasses actions taken in accordance with ORS 197.610 through 197.625, including amendments to an acknowledged comprehensive plan or land use regulation and the adoption of any new plan or land use regulation. In the Stott (PA-98-12/ZC-98-6) and Kimble (PA-07-2/ZC-07-2) decisions, the Hearings Officer held that a plan amendment and zone change to "de-list" and rezone an inventoried surface mining site constitutes a PAPA, and therefore the provisions of OAR 660-023-0180 concerning mineral and aggregate resources apply to such an application to the extent they reasonably can be applied to a decision to remove a site from the County's adopted inventory.

The proposed amendment constitutes a PAPA as outlined in the Stott and Kimball decisions. 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.

The Hearings Officer takes note of Applicant's above-quoted statement and shall address sections (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 Burden of Proof states:

The County's Goal 5 inventory indicates that Site No. 392 contains the following:

#	Taxlot	Name	Type	Quantity*	Quality	Access/Location
392	**181223-00-00300**	**Rose**	**Rock**	**10 M Est.**	**Mixed**	
392	**181223-00-00300**	**Rose**	**Dirt**	**7.5 M**	**Good**	

*Quantity in cub [sic] yards

The County's Goal 5 mineral and aggregate inventory lists site 392 as a sand and gravel site and the findings in the ESEE establish the County did not find the aggregate resource on site worthy of protection. 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. The DOGAMI files for the subject property have been closed since 2011.

The Hearings Officer finds Applicant's statement and analysis is credible and reflects relevant law.

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

FINDING: No lower threshold has been established by Deschutes County.

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

FINDING: The Burden of Proof states:

Site No. 392 is included in the County's inventory for the sand and gravel resource not for aggregate. This criterion does not apply.

The Hearings Officer concurs with the Applicants' analysis.

(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) 17 feet in Linn and Benton counties.

FINDING: The Burden of Proof states:

The criterion does not apply. The subject property does not contain any Class I, Class II, or Unique soils as confirmed by the Wallace Group Report (Exhibit 8) and Amended Reclamation Plan (Exhibit 11), as well as the Site-Specific Soil Survey that was conducted by Certified Soil Scientist, Andy Gallagher and has been submitted to the Department of Land Conservation and Development (DLCD) in accordance with OAR 660-033-0045(6)(a) (Exhibit 6). Staff concurs with the applicant's analysis.

The Hearings Officer concurs with Applicant's analysis.

(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 Burden of Proof states:

The criterion does not apply. Site No. 392 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. Gallagher confirms the site is composed

predominantly of Class 7 and 8 soils and therefore does not meet the definition of agricultural land. (Exhibit 6).

The Hearings Officer concurs with the Applicant's analysis.

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: The Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings for this section.

OAR 660-033-0020, Definitions

For purposes of this division, the definitions in ORS 197.015, the Statewide Planning Goals, and OAR Chapter 660 shall apply. In addition, the following definitions shall apply: (1)(a) "Agricultural Land" as defined in Goal 3 includes:

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

FINDING: The Applicant's stated reason for not requesting an exception to Goal 3 is based on the premise that the Subject Property is not "Agricultural Land." The Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings for this section. The Hearings Officer also found persuasive Applicant's Burden of Proof statements as set forth in the Staff Report (pages 33 through and including 45). Based upon the incorporated findings the Hearings Officer finds that the Subject Property is comprised predominantly of Class 7 and Class 8 soils. The Hearings Officer finds that the Subject Property is not "Agricultural Land" as defined in OAR 660-033-0020(1)(a)(A) above.

(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's stated reason for not requesting an exception to Goal 3 is based on the premise that the Subject Property is not "Agricultural Land." The Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings for this section. The Hearings Officer also found persuasive Applicant's Burden of Proof statements as set forth in the Staff Report (pages 33 through and including 38).

Based upon the incorporated findings the Hearings Officer finds that the Subject Property is comprised predominantly of Class 7 and Class 8 soils and based upon the factors identified in (B) above that the Subject Property is not "Agricultural Land" and not "suitable for farm use" as defined by ORS 215.203(2)(a).

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

FINDING: The Applicant's stated reason for not requesting an exception to Goal 3 is based on the premise that the Subject Property is not "Agricultural Land." The Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings for this section. The Hearings Officer also found persuasive Applicant's Burden of Proof statements as set forth in the Staff Report (page 39).

Staff (Staff Report, page 39) concurred with the Applicant's analysis and finds no feasible way that the Subject Property is necessary for the purposes of permitting farm practices on any nearby parcels. The Hearings Officer finding that the Subject Property is not necessary for purposes of permitting farm practices on any nearby parcels is based in part on poor soil quality and existing development on surrounding EFU properties.

(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's stated reason for not requesting an exception to Goal 3 is based on the premise that the Subject Property is not "Agricultural Land" and by extension not part of a "farm unit." The Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings for this section. The Hearings Officer also finds persuasive the Applicant's Burden of Proof statements included by Staff in the Staff Report (Staff Report, pages 39 and 40). Staff included the

following Burden of Proof comments:

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. As demonstrated by the historic use patterns and soils reports, it does not have poor soils adjacent to or intermingled with good soils within a farm unit. The subject property is not in farm use and has not been in farm use of any kind. 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. Gallagher, the predominant soil type found on the subject property is Class 7 and 8, nonagricultural land (66%). 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 6 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 6.

The Hearings Officer, based upon the incorporated findings and the Applicant's above-quoted Burden of Proof statements, that the Subject Property does not include 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.

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

FINDING: The Subject Property is not within an acknowledged urban growth boundary or land within acknowledged exception areas for Goals 3 or 4.

OAR 660-033-0030, Identifying Agricultural Land

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

FINDING: The Applicant's stated reason for not requesting an exception to Goal 3 is based on the premise that the Subject Property is not "Agricultural Land" and by extension not part of a "farm unit." The Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings for this section. The soil study produced by Mr. Gallagher focuses on the land within the Subject Property and the Applicant provided responses indicating the Subject Property is not necessary to permit farm practices undertaken on adjacent and nearby lands. The Hearings Officer finds that the Subject Property is not "Agricultural Land" based upon the incorporated findings and that the Subject Property is not necessary to permit arm practices undertaken on adjacent and/or nearby lands.

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

FINDING: The Applicant's stated reason for not requesting an exception to Goal 3 is based on the premise that the Subject Property is not "Agricultural Land" and by extension not part of a "farm unit." The Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings

for this section. The Hearings Officer attached no significance to the ownership of the Subject Property or adjacent parcels in considering whether or not the Subject Property was "suitable for farm use" or "necessary to permit farm practices to be undertaking on adjacent or nearby lands."

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

FINDING: The Applicant's stated reason for not requesting an exception to Goal 3 is based on the premise that the Subject Property is not "Agricultural Land" and by extension not part of a "farm unit." The Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings for this section.

Applicant's Burden of Proof states:

Attached as Exhibit 6 is a more detailed agricultural soil assessment related to the NRCS land capability classification system conducted by Andy Gallagher, a Certified Professional Soil Scientist authorized by the Department of Land Conservation and Development (DLCD).

The soils assessment prepared by Mr. Gallagher 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. Gallagher'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. Gallagher'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."

As explained in Mr. Gallagher's report, the NRCS soil map of the subject property shows three soil mapping units, 27A Clovkamp loamy sand 0 to 3% slopes, 155C Wanoga sandy loam 0 to 15% slopes, 157C Wanoga-Fremkle-Rock outcrop complex 0 to 15% which is estimated to be 35 percent Wanoga, 30 percent Fremkle and 20 percent Rock Outcrop. The more detailed Order-1 survey conducted by Mr. Gallagher included 232 samples from combined soil test pits, soil borings and surface observations of bedrock outcrops. The results of the previous and revised soils mapping units with land capacity class are provided in the Table 1 below from Mr. Gallagher's report:

TABLE 1…PREVIOUS AND REVISED SOIL MAPPING UNITS WITH LAND CAPABILITY CLASS.

Previous Map Symbol	Revised Map Symbol	Soil Series Name	Capability Class	Previous Map*		Revised Map	
				Ac	-%-	Ac	-%-
27A	--	Clovkamp	6	111	40	0	0
155C	--	Wanoga sandy loam	6	10	4	0	0
157C	--	Wanoga-Fremkle-Rock outcrop	6 (80%) 8 (20%)	158	56	0	0
--	GR	Gosney-Henkle-Outcrop	7 (%) 8 (%)	0	0	115	42
--	WD	Wanoga-Deskamp complex	6	0	0	96	34
--	MF	Mined and Filled Area	7	0	0	68	24
Total				279	100	279	100

Based on the findings and analysis of the Order-1 soil survey and soil assessment, Mr. Gallagher made the following summary and conclusions in determining whether the subject property is agricultural land:

Soils were remapped in a high intensity (Order-1) soil survey 279.25-acre tract currently zoned partly SM and partly EFU. Previously this area was mapped as Clovkamp loamy sand in the basin, Wanoga-Fremkle-Rock outcrop and Wanoga sandy loam were mapped in the surrounding wooded rangelands and hillsides. These collectively range from Land Capability Class 6 to Class 8 with a predominance of Class 6 high-value farmland.

In the revised Order-1 soil mapping soils were reclassified and remapped as predominantly Class 7 and 8, based on 232 samples from combined soil test pits, soil borings and surface observations of bedrock outcrops. Most of the area formerly mapped Clovkamp by NRCS was mined and then filled and graded so that most of it (68 acres, 24 percent of total parcel) is made-land that is Class

7 based on stoniness and low AWHC remapped as ML. There are 115 acres (42 percent of total parcel) of shallow and very to extremely stony, very shallow and rock outcrop that are remapped as GR unit. These two units of Class 7 and 8 land are 183 acres combined. The remaining acres 96 acres (34 percent of total parcel) are remapped as Class 6 and include mostly Deskamp and Wanoga soils. Based upon the findings of this Order-1 soil survey, the subject parcel is predominantly, 66 percent (183 acres), Class 7 and 8 soils and therefore is not "agricultural land" within the meaning of OAR 660033-0020(1)(a)(A).

The soil mapping and on-site studies also show the subject property is not agricultural land within the meaning of OAR 660-033-0020(1)(b) as it is not adjacent to or intermingled with land in capability classes 1-6 within a farm unit. There is no clear evidence that the Capability Class 6 non-irrigated soils on the subject property were farmed or utilized in conjunction with any farming operation in the past.

With few exceptions the Wanoga soils exist in irregularly shaped pockets interspersed with short steep slopes, rocky, shallow soils creating severe limitations for any agricultural use either alone or in conjunction with other lands.

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. Gallagher. The applicant has submitted the soils assessment to DLCD 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 Hearings Officer finds that Applicant's professional soil study/analysis provides more detailed and site specific soils information than contained in the NRCS Web Soil Survey. NRCS sources provide general soils data for large units of land. The Applicant's soil study/analysis provided detailed and accurate information about individual parcels based on numerous soil samples taken from the Subject Property. The Applicant's soil study/analysis is related to the NCRS Land Capability Classification ("LLC") system that classifies soils class 1 through 8 and provided ratings for each soil type based on rules provided by the NRCS.

According to the NRCS Web Soil Survey tool, the Subject Property contains a mix of 157C (GosneyRock Outcrop-Deskamp complex), 27A (Clovkamp loamy sand) 155C (Wanoga sandy loam). The Hearings Officer finds that the Gallagher soil study meets the requirements of these sections and allows the Hearings Officer to rely upon the Gallagher soil study conclusions.

(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's stated reason for not requesting an exception to Goal 3 is based on the premise that the Subject Property is not "Agricultural Land" and by extension not part of a "farm unit." The Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan,*

Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings for this section.

The Burden of Proof states:

> *The applicant is seeking approval of a non-resource plan designation and zone on the basis that the subject property is not agricultural land. The recognition of the nonresource process to rezone lands which do not qualify as resource lands and therefore do not implicate the protections of the resource designations under the Statewide Planning Goals is well established under state law and local Deschutes County code provisions and land use decisions. Attached as Exhibit 16 is the County Comprehensive Plan Section 5.12 detailing the plan amendment, zone changes under the nonresource process which have occurred since 2011. In 2016, the County specifically adopted Ordinance 2016-005, Exhibit 17, which included Policy 2.2.3 recognizing the process and explicitly authorizing comprehensive plan and zoning map amendments, including nonresource lands, for EFU properties. The findings included in the Comprehensive Plan text at 3.3 specifically provide that "[a]s of 2010 any new Rural Residential Exception Areas need to be justified through initiating a non-resource plan amendment and zone change by demonstrating the property does not meet the definition of agricultural or forest land, or taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR."*

The Hearings Officer, based upon the incorporated findings and the Applicant's Burden of Proof statement above, finds the Subject Property is not "Agricultural Land" as defined and described by relevant laws.

> **(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 Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings for this section. The Applicant submitted a soil study dated May 24, 2024. Applicant's soil study/analysis was submitted to DLCD in conformance with ORS 215.211. Staff received acknowledgement from Hilary Foote, Farm/Forest Specialist with the DLCD, on October 9, 2024, that Applicant's soil study/analysis was complete and consistent with DLCD's reporting requirements. The Hearings Officer finds this criterion to be met based on Applicant's soil study/analysis and that soil study/analysis was submitted and confirmed by DCLD to be complete and consistent with relevant laws/rules.

> **(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 Hearings Officer incorporates the findings for *Deschutes County Comprehensive Plan, Chapter 2, Resource Management Section 2.2 Agricultural Lands Goal 1, Preserve and Maintain Agricultural Lands and the Agricultural Industry* and also the findings for *Oregon Administrative Rules Division 33- Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands* as additional findings for this section. The Applicant has provided a DLCD certified soil study/analysis as well as NRCS soil data. The Hearings Officer finds the Applicant has demonstrated compliance with this provision.

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 Applicant provided the following response in the submitted Burden of Proof:

Attached as Exhibit 11 is a transportation impact analysis memorandum dated June 18, 2024 prepared by traffic engineer, Joe Bessman, PE. Mr. Bessman made the following key findings with regard to the proposed zone change and concluded that a significant affect does not occur with the proposed rezone:

• Rezoning of the approximately 279-acre "Rose Pit" property from Surface Mining and Exclusive Farm Use to Rural Residential results in a small increase in the trip generation potential of the property. A slightly higher difference occurs in consideration of conditionally allowed uses (such as the use of the density bonus or provision of a future park). Conservatively, these analysis scenarios were also included within this review.
• The small increase in trips could impact the Rickard Road corridor or the SE 27th Street/Rickard Road intersection. An operational assessment was prepared to determine whether these locations operate adequately with the proposed rezone, using each of the potential trip generation scenarios.
• The assessment shows that even with the inclusion of conditional uses the Rickard Road segment and SE 27th Street/Rickard Road intersection will continue to operate acceptably. As the impacted facilities can continue to meet adopted performance standards, a significant impact does not occur with this rezone.
• Coordination of this rezone application with the City of Bend will be required by the Transportation Planning Rule.

Based on the traffic analysis and findings by Mr. Bessman, the application complies with the County transportation code requirements, transportation system plan and the TPR.

The Applicant submitted a traffic study (Exhibit 12) dated June 18, 2024, prepared by Joe Bessman of Transight Consulting LLC. As noted in the agency comments section above, the County Transportation Planner, agreed with the report's conclusions. The Hearings Officer, based upon Applicant's traffic study and analysis, finds that the proposed plan amendment and zone change will be consistent with the identified function, capacity, and performance standards of the County's transportation facilities in the area. The Hearings Officer finds, based upon the Applicant's traffic study and analysis, that the proposed zone change will not change the functional classification of any existing or planned transportation facility or change the standards implementing a functional classification system.

The Hearings Officer finds, considering the Applicant's traffic study/analysis, along with the above-quoted Applicant comments, that approval of the application in this case will not significantly affect an existing or planned transportation facility. The Hearings Officer finds Applicant's traffic analysis and findings comply with the County transportation code requirements, transportation system plan and the TPR.

The proposed plan amendment would change the designation of the Subject Property from AG to RREA and change the zone from EFU to RR10. The Applicant is not proposing any land use development of the property at this time.

The Hearings Officer finds, based upon the County Senior Transportation Planner's comments and

Applicant's traffic study and analysis from Transight Consulting LLC, the application in this case complies with the Transportation Planning Rule.

Division 15, Statewide Planning Goals

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

FINDING: The Statewide Planning Goals and the Applicant's responses from Applicant's Burden of Proof are outlined below:

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 660005-0010 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 27A, 155C and 157 C. 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 18). None of the soils mapped on the subject property are listed in Table 8 as suitable for wood crop production.*

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces. *The subject property does not contain any inventoried Goal 5 resources.*

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.*

***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. The planned regional park will serve the surrounding rural community and 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.*

***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. The subject property is located within 1 mile from the city limits of Bend. If the property is developed with additional residential dwellings in the future, providing homes in this location as opposed to more remote rural locations will conserve energy needed for residents to travel to work, shopping and other essential services provided in the City of Bend. If the property is developed with the regional park, as planned, it will provide recreational opportunities in close proximity to rural and urban residences, thereby conserving energy and vehicle miles traveled.*

***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 RR-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.*

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

Staff (Staff Report, page 29) generally accepted the Applicant's responses and finds compliance with the applicable Statewide Planning Goals had been effectively demonstrated. Staff did take note of public comments concerning potential loss of farmland, increased rural density, and traffic. Staff stated that these comments detail concerns related to specific potential use patterns.

Staff concluded that the overall proposal appears to comply with the applicable Statewide Planning Goals for the purposes of this review. Further, Staff indicated that issues related to a specific future development will be addressed at that time. The Hearings Officer concurs with Staff's summary comments related to statewide goals.

The Hearings Officer takes note that COLW alleged that the application in this case somehow violates or is not consistent with Goal 14. The Hearings Officer includes COLW's comments related to Goal 14 (11/12/24, pages 17 and 18) below:

In its Curry County decision, the Oregon Supreme Court established a series of factors used to assess whether a particular land use change qualifies as urban or rural for purposes of Goal 14 compliance. 1000 Friends of Oregon v. Land Conservation & Development Commission ("Curry County"), 301 Or 447, 474 (1986); Oregon Shores Conservation Coalition v. Coos County, 55 Or LUBA 545, 550 (2008); 1000 Friends of Oregon v. Josephine County (Marvin I), __ Or LUBA__, slip op at 25 (LUBA No. 2021-116, June 2, 2022). These factors must be considered holistically rather than in isolation from one another. Oregon Shores, 55 Or LUBA 545, 556. LUBA summarized the Curry factors in Oregon Shores, 55 Or LUBA at 550: "(a) the size of the area in relationship to the developed use (density); (b) its proximity to an acknowledged UGB and whether the proposed use is likely to become a magnet attracting people from outside the rural area; and (c) the types and levels of services which must be provided to it." Here, under the Curry County factors, the proposed PAPA decision, if approved, would violate Goal 14 by allowing urban population outside of a UGB and undermining the effectiveness of an established UGB.

a. Density *The application proposes to rezone the subject property to allow greatly increased residential density. Under RR-10 zoning, Deschutes County Code allows either a 10 acre minimum lot size, or 5-acre equivalent density for planned and cluster developments within one mile of the UGB:*

> *"Minimum lot size shall be 10 acres, except planned and cluster developments shall be allowed an equivalent density of one unit per 7.5 acres. Planned and cluster developments within one mile of an acknowledged urban growth boundary shall be allowed a five-acre minimum lot size or equivalent density. For parcels separated by new arterial rights of way, an exemption shall be granted pursuant to DCC 18.120.020." (DCC 18.60.060(C))*

In a planned developments, there is no minimum lot size:

> *"The minimum lot area, width, frontage and yard requirements otherwise applying to individual buildings in the zone in which a planned development is proposed do not apply within a planned development. An equivalent overall density factor may be utilized in lieu of the appropriate minimum lot area." (DCC 18.128.210(D)(3))*

In this way, should the re-zone be approved, up to 56 rural residences could be conditionally permitted on the subject property with no consideration of Goal 14. This is an urban level of density.

***b*. Proximity to UGB and magnet for attracting people** *The subject property is about one mile from the City of Bend UGB and will become a magnet for attracting urban population outside the UGB. The allowed uses in the RR-10 zone will both attract people who would otherwise reside in the UGB, and attract people who could reside on the subject property into the UGB for urban services. Both outcomes will undermine the effectiveness of the UGB in violation of Goal 14.*

c. Types and levels of services *The proposed rezoning is also likely to make the potential residents of a new neighborhood in the RR-10 zone reliant on urban public services and infrastructure. The "types and levels of services" that will be provided to the subject property will nearly all be from urban service providers. Oregon Shores Conservation Coalition v. Coos County, 55 Or LUBA 545, 550 (2008). Future residents will attend urban schools, ride urban public transit, visit urban libraries, use urban healthcare services, rely on urban public safety services, and patronize urban commercial services. Just like the first two Curry County factors, this also frustrates and undermines the effectiveness of the UGB in violation of Goal 14.*

The increase in density, proximity to a UGB and potential to undermine the effectiveness of the UGB, and reliance of urban services all point toward the decision urbanizing rural land in violation of Goal 14 in the absence of an exception to Goal 14.

Applicant (Final Argument, pages 15 through and including 17) provided the following response to COLW's Goal 14 arguments:

In section XI of its November 12 letter, COLW argues that the application does not comport with Statewide Planning Goal 14. However, COLW's analysis is predicated entirely under what are often referred to as the Curry County factors derived from 1000 Friends of Oregon v. Land Conservation & Development Commission, 301 Or 447, 474, 724 PO2d 268 (1986) ("Curry County").[footnote omitted] Although helpful when determining if a use is "rural" versus "urban," not ever Goal 14 issue turns on that nuanced distinction. In this case, COLW's argument ignores that the Curry County factors were not the dispositive Goal 14 analysis in three similarly-situated cases arising out of Deschutes County, two of which reached the Court of Appeals. Central Oregon LandWatch v. Deschutes County, __ Or LUBA __ (LUBA No 2023-006/009, July 28, 2023) (slip op at 80-84), aff'd, 330 Or App 321, 543 P3d 736 (2024) (concerning the RR-10 zone); Central Oregon LandWatch v. Deschutes County, __ Or LUBA __ (LUBA No 2023-008, April 24, 2023) (slip op at 12) (concerning the Rural Industrial zone); Central Oregon LandWatch v. Deschutes County,__ Or LUBA __ (LUBA No 2022-075, Dec 6, 2022) (slip op at 17-18), aff'd without opinion, 324 Or App 655 (2023) (concerning the Rural Industrial zone).

*In another Deschutes County case, COLW raised essentially the identical Curry County factor density argument as raised herein to try and compel the County to adopt a Goal 14 exception as a prerequisite to approving that map amendment / zone change application. See Central Oregon LandWatch v. Deschutes County, __ Or LUBA__ (LUBA No 2023-049, February 15, 2024), aff'd, 333 Or App 263 (2024) (concerning the MUA-10 zone). Although mostly decided on preservation grounds, both LUBA and the Court of Appeals directly addressed and rejected COLW's undeveloped density argument. Id (slip op at 23; slip op at *2).*

In short, COLW's Goal 14 argument entirely misses the mark because it fails to address that the RR-10

zone was acknowledged by DLCD as consistent with Goal 14. In the aforementioned cases, both LUBA and the Court of Appeals confirmed that such an acknowledgement means in this case that all uses allowed in the RR-10 zone are "rural," therefore not prompting or requiring any further Goal 14 inquiry. As a party in all of the above-cited matters, it is further notable that COLW is yet again recycling tired Goal 14 arguments without citing or distinguishing any of the aforementioned cases.

While not conceding that an analysis of Goal 14, Urbanization is required, we provide one below.

The RR-10 zoning district does not authorize urban development that violates Statewide Goal 14. DCCP Chapter 1, Section 1.3 p. 15 (Definitions) says that RREAs provide opportunities for rural residential living; not urban living that violates Goal 14. A review of the factors identified by the Supreme Court in Curry County all confirm that the zoning district does not allow urban development

i. Density

The RR-10 imposes a maximum density of 1 dwelling per 10 acres. The only exception is that a higher density may be allowed in planned or cluster developments not burdened by the WA overlay zone; but only if such development complies with the County's conditional use criteria, comprehensive plan and rules that require the dedication of 65% open space. The large open space areas created by this type of development create large areas that maintain the rural character of the parent parcel. The maximum density for properties like the subject property is one house per 7.5 acres. This is not an urban density. Such a density would never be allowed in any urban residential zoning district other than a reserve or holding zone. For instance, in the City of Bend, a density of 1.1 dwellings per acre is the lowest density allowed for an urban residential district. This density is allowed only for areas not served by sewer. For properties served by sewer, a minimum density of 4.0 dwellings per one acre is required.

In Curry County, the Supreme Court accepted the concession of 1000 Friends a density of one house per ten acres is generally "not an urban intensity." COLW argues that the comprehensive plan requires a 10-acre minimum parcel size. If they are correct, this minimum will apply during a review of any subdivision on the subject property and assure that development is "not an urban intensity. Furthermore, in Curry County, 1000 Friends argued that densities greater than one dwelling per three acres (e.g., one dwelling per one or two acres) are urban.

The density allowed by the RR-10 zone in a planned development is 2.5 times less dense. For a standard subdivision, the density allowed (1 house per 10 acres) is over 3 times less dense. The density of the RR-10 zone is not, as claimed by COLW, 8 times greater than the density allowed in the EFU-zone. Deschutes County's EFU zone allows for non-irrigated land divisions for parcels as small as 40 acres that create two nonfarm parcels (1:20 acres density). It also allows for 2-lot irrigated land divisions that, in Deschutes County, can occur on parcels less than 30 acres in size (23 acres irrigated, no minimum lot size for the nonfarm parcel) that result in a density of one house per less than 15 acres.

ii. Lot Size

The RR-10 zoning district requires a minimum lot size of one house per ten acres. An exception to the minimum lot size is allowed only if 65% of the land being divided is dedicated as open space and a maximum density of 1 dwelling per 7.5 acres is achieved on the subject property.

The EFU zone that applies to the subject property imposes no minimum lot size for new nonfarm parcels. DCC 18.16.055. The only exception is that 5-acre minimum is required for non-irrigated land divisions of properties over 80 acres in size. DCC 18.16.055(C)(2)(a)(4). The EFU zone requires that other nonfarm uses be on parcels that are "no greater than the minimum size necessary for the use."

Lot size by itself is not determinative of urban vs. rural use, this is particular try given that irrigated land division may result in lots of only 5-acres. Although not relevant to this Application, OAR 660-004-0040 contemplates lot sizes as small as two acres in rural residential areas.

iii. Proximity to Urban Growth Boundaries

The County's zoning map shows that the subject Property is less than 1 mile from the City of Bend UGB. As recognized by COLW, the planned regional park is allowed on EFU lands. The zone change to allow park development on the former SM lands and unproductive EFU lands will therefore not have the effect of drawing residents outside of the City for services since those services are allowed without the change. The magnet effect was an issue of concern to the Oregon Supreme Court in the Curry County case. LCDC currently strictly limits the size of magnet uses in the EFU zoning district if they are within 3 miles of an urban growth boundary by OAR 660-033-0130(2) and Table OAR 660-033-0120, thereby addressing the proximity issue.

iv. Services

Sewer service is prohibited by Goal 11. An increase in the density of development is not allowed if a public water system is developed to serve the subject Property. The plan is to use septic systems and well water to serve the park development.

v. Conclusion of Factors

In totality, none of the above-factors indicates that the Applicant's rezone request implicates Goal 14. As discussed at the Hearing, the Property already qualifies for the regional park given the existing requirements in the Code and state law. Applicant's proposal would increase the flexibility to permit additional structures in the park, but not to urban levels. Instead, approval of the proposal will enable the land to remain in a rural state, and to avoid the haphazard land use patterns that could otherwise result from serial non-farm dwelling applications.

This Hearings Officer notes that he has considered essentially the same COLW Goal 14 argument in prior plan/zone change recommendation cases. (See, for example, Hearings Officer recommendation for cases 247-22-000436-ZC/247-22-000443-PA/247/23/000651-MA) This Hearings Officer has consistently found that a Comprehensive Plan change from AG to RREA and a

zone change from EFU to RR-10 does not ***require*** a Goal 14 exception. The Hearings Officer appreciates that each case is unique and that in certain instances a contrary decision could result.

The Hearings Officer takes note that LUBA has held that that the RR-10 zone is a "rural zone." (See, for example, *Central Oregon LandWatch v. Deschutes County*, LUBA 2023-006 (2023).[1] Applicant's perspective is that "COLW's Goal 14 argument entirely misses the mark because it fails to address that the RR-10 zone was acknowledged by DLCD as consistent with Goal 14."

The Hearings Officer notes that the Comprehensive Plan RREA designation describes rural (not urban) use of land. The purpose section for the RR-10 zone (DCC 18.60.010) states the following:

> *The purposes of the Rural Residential Zone are to provide rural residential living environments; to provide standards for rural land use and development consistent with desired rural character and the capability of the land and natural resources; to manage the extension of public services; to provide for public review of nonresidential uses; and to balance the public's interest in the management of community growth with the protection of individual property rights through review procedures and standards.*

The Hearings Officer finds the Applicant's discussion and analysis quoted above to be persuasive. The Hearings Officer finds COLW's discussion and analysis quoted above is not persuasive. The Hearings Officer finds Applicant's discussion and analysis correctly reflect the current status of Goal 14 law and that Applicant appropriately applied such law to this case. The Hearings Officer finds no Goal 14 exception is required in this case.

[1] *Central Oregon LandWatch v. Deschutes County*, LUBA 2023-006 (2023), "The DCCP provides that the RREA comprehensive plan designation is implemented by the RR-10 and Multiple Use Agriculture (MUA) zones. We have no reason to believe that DLDC's acknowledgement of the 2015 amendments as consistent with Goal 14 was premised on anything other than the conclusion that the RREA plan designation facially does not allow urban urban uses of rural land…We similarly conclude that the board of commissioners did not err in relying on DLCD's acknowledgment of the 2016 amendments to conclude that the RR-10 zone facially complies with Goal 14."

III. CONCLUSION AND RECOMMENDATION:

The Hearings Officer finds that the Applicant has met the burden of proof necessary to justify changing the Plan Designation from Agricultural (AG) and Surface Mining (SM) to Rural Residential Exception Area (RREA) and Zoning of the Subject Property from Exclusive Farm Use – Tumalo/Redmond/Bend subzone (EFU-TRB) & Surface Mining (SM) to Rural Residential (RR-10) by 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 Oregon statutory and regulatory law.

The Hearings Officer recommends approval of the Applicant's proposal.

DESCHUTES COUNTY HEARINGS OFFICER

Gregory J. Frank
Deschutes County Hearings Officer