

**RECOMMENDATION AND FINDINGS OF
THE DESCHUTES COUNTY HEARINGS OFFICER**

FILE NUMBER: 247-24-000097-PA, 247-24-000098-ZC, 247-25-000021-MA

HEARING DATE: May 9, 2025

HEARING LOCATION: Videoconference and
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

**SUBJECT PROPERTY/
OWNER:** Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Tax lot: 1712360000100
Account: 109118
Situs Address: 21875 NEFF RD, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Tax lot: 1712360000400
Account: 109115
Situs Address: 21850 HWY 20, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Tax lot: 1712360001000
Account: 111676
Situs Address: 21700 BEAR CREEK RD, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Tax lot: 1712360000900
Account: 111677
Situs Address: 62098 WARD RD, BEND, OR 97701

APPLICANT: BCL LLC

APPLICANT ATTORNEY: Christopher Kobak

REQUEST: The Applicant requested approval of a Comprehensive Plan Amendment to change the designation of the Subject property from Agricultural (AG) to Rural Residential Exception Area (RREA). The Applicant also requested a corresponding Zone Change to rezone the Subject Property from Exclusive Farm Use – Tumalo-Redmond-Bend subzone (EFU-TRB) to Multiple Use Agricultural (MUA10).

STAFF CONTACT: Audrey Stuart, Associate Planner
Phone: 541-388-6679

Email: Audrey.Stuart@deschutes.org

RECORD:

Record items can be viewed and downloaded from:

<https://www.deschutes.org/cd/page/247-24-000097-pa-247-24-000098-zc-bcl-llc-comprehensive-plan-amendment-and-zone-change>

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 18.32, Multiple Use Agricultural (MUA10).

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 33, Agricultural Land

Oregon Revised Statutes (ORS)

Chapter 215.010, Definitions

Chapter 215.211, Agricultural Land, Detailed Soils Assessment

II. BASIC FINDINGS

LOT OF RECORD: The submitted Burden of Proof includes the following response regarding lot of record status:

“Deschutes County determined that Tax Lots 100, 300, and 400 (combined with Tax Lot 1100) were a lot of record in LR-91-54 and LR-91-55, as corrected by Planning Staff Letter dated December 17, 1998. Exhibit 1. Deschutes County determined that Tax Lot 1000 was a lot of record in 247-20-000077-LR. Exhibit 2.”

The application materials also include a request for Lot of Record Verification for Tax Lot 900 and provide an analysis on the deed history of this tax lot. However, Staff noted (Staff Report, pages 2 & 3) that a Lot of Record Verification is a separate application type that requires its own form and fee, which were not submitted. Staff (Staff Report, pages 2 & 3) concluded that a lot of record analysis for Tax Lot 900 was not required in order to process Applicant’s current Comprehensive Plan Amendment and Zone Change requests.

DCC 22.04.040(B)(1) specifies the types of land use applications that require lot of record verification, and a Comprehensive Plan Amendment and Zone Change is not listed. In the *Powell/Ramsey* (PA-14-2, ZC-14-2) decision, a County Hearings Officer held to a prior zone change decision (*Belveron* ZC-08-04; page 3) that a property’s lot of record status was not required to be verified as part of a plan amendment and zone change application. Rather, an applicant would be required to receive lot of record verification prior to any *development* on the property. The Hearings Officer concurs with Staff’s analysis and finds that this criterion does not apply.

SITE DESCRIPTION: The properties included in Applicant’s proposal in this case (the “Subject Property”) consists of four tax lots, which are summarized in the table below.

<i>Tax Lot</i>	<i>Size (Acres)</i>
100	100.89
400	38.06
900	43.89
1000	57.33

Applicant’s Burden of Proof for file 247-25-000021-MA provides the following description of the Subject Property:

“The subject tract is designated agricultural and zoned EFU. However, there is no history of any agricultural use. As the Applicant will explain more below, the tract is comprised predominantly of 58C soils which are not considered suitable for agricultural uses. Tax Lots 900, 1000, and 400 are, with the exception of one dwelling recently constructed on Tax Lot 1000, vacant unirrigated parcels with no use. Each tax lot has only a few trees and is primarily comprised of sagebrush, rabbit brush, and bunch grasses. No part of Tax Lot 900 is irrigated, and it has no water rights. Tax Lot 100, like similar parcels north and west, is developed with a solar farm that consumes all but the southeast corner of the lot, which portion is vacant. No part of Tax Lot 100 is irrigated, nor does it have any water rights.

The subject tract extends east from Ward Road west to Erickson Road. The tract extends north to Neff Road and south to Bear Creek Road. The following aerial photograph shows the approximate locations of the subject property and the general character of the property and surrounding area.”

The parcels making up the Subject Property are located east of Bend, to the north and south of Highway 20. At its closest point, the Subject Property is approximately 0.26 miles from the City of Bend’s Urban Growth Boundary (UGB). The Subject Property consists primarily of undeveloped land, with two exceptions. Tax Lot 1000 is developed with a Lot of Record Dwelling which was approved through Deschutes County file 247-21-000119-CU. Tax Lot 100 is developed with a solar voltaic array (“Solar Array”) that was originally approved through Deschutes County files 247-15-000170-CU, 171-SP and have subsequently been modified. The fenced area developed as the Solar Array encompasses an area of approximately 62.6 acres.

PROPOSAL: The Applicant requested approval of a Comprehensive Plan Map Amendment to change the designation of the Subject Property from an Agricultural (“AG”) designation to a Rural Residential Exception Area (“RREA”) designation. The Applicant also requested approval of a corresponding Zoning Map Amendment to change the zoning of the subject properties from Exclusive Farm Use (“EFU”) to Multiple Use Agricultural (“MUA10”). The Applicant asked that Deschutes County change the zoning and the plan designation because the Subject Property does not qualify as “Agricultural Land” under Oregon Revised Statutes (“ORS”) or Oregon Administrative Rules (“OAR”) definitions.¹ The Applicant proposed that no exception to Statewide Planning Goal 3, Agricultural Land was required because the Subject Property is not “agricultural land.”

The original proposal included five tax lots, with a total area of 259 acres. On January 8, 2025, the Applicant submitted a Modification of Application (Deschutes County file 247-25-000021-MA). This modified the proposal to reduce the size of the area to be rezoned, by removing Tax Lot 300 on Assessor’s Map 17-12-36. The materials for 247-25-000021-MA also supplemented the analysis provided in the original application materials regarding agricultural lands and provided a professional soil report.

¹ As defined in OAR 660-033-0020, 660-033-0030

Submitted with the application is a review of the Subject Property soil characteristics, titled *Bear Creek Analysis of Agricultural Land* (hereafter referred to as the “Red Hills Soils Report”) prepared by soil scientist Andy Gallagher, CPSSc/SC of Red Hill Soils. The Applicant also submitted a traffic analysis prepared by Ferguson and Associates, Inc. dated February 28, 2025, hereafter referred to as the “Traffic Study.” Additionally, the Applicant submitted an application form, a Burden of Proof statement (the “Burden of Proof”), and other supplemental materials, all of which are included in the record for the subject applications.

SOILS: According to Natural Resources Conservation Service (“NRCS”) maps of the area, the Subject Property contains three different soil types as described below. The Subject Property contains 58C – Gosney-Rock Outcrop-Deskamp complex, 36B – Deskamp loamy sand (3 to 8 percent slopes) and 36A – Deskamp loamy sand (0 to 3 percent slopes). The 36A and 36B soil units are defined as high-value soil by DCC 18.04 when it is irrigated. The 58C soils complex is not defined as high-value farmland, regardless of irrigation.

The applicant submitted the Red Hills Soils Report (exhibit to 247-25-000021-MA application materials), which was prepared by a certified soils scientist and soil classifier. The purpose of the Red Hills Soils Report was to inventory and assess the soils on the Subject property and to provide additional insight related to the NRCS soil classifications and ratings. Additional discussion of the Red Hills Soils Report can be found in the Preliminary Findings section titled Certification of Soils Report (III.A.2).

The NRCS soil map units identified on the properties are described, for background information, below.

36A, Deskamp loamy sand, 0 to 3 percent slopes: This soil complex is composed of 85 percent Deskamp soil and similar inclusions, and 15 percent contrasting inclusions. The Deskamp soils are somewhat excessively drained with a rapid over moderate permeability, and about 5 inches of available water capacity. Major uses of this soil type are irrigated cropland and livestock grazing. The agricultural capability rating for 36A soils are 3S when irrigated, and 6S when not irrigated. This soil is high-value when irrigated. Approximately 33 percent of the subject parcel is made up of this soil type.

36B, Deskamp loamy sand, 3 to 8 percent slopes: This soil is composed of 85 percent Deskamp soil and similar inclusions, and 15 percent contrasting inclusions. This soil is somewhat excessively drained, with rapid permeability and an available water capacity of approximately 3 inches. The major uses of this soil are irrigated cropland and livestock grazing. This Deskamp soils have a capability rating of 6E when unirrigated, and 3E when irrigated. This soil type is considered high-value when irrigated. The 36B soils are limited to the northern, irrigated portion of the site and comprise approximately 0.2 percent of the property.

58C, Gosney-Rock Outcrop-Deskamp complex, 0 to 15 percent slopes: This soil type is comprised of 50 percent Gosney soil and similar inclusions, 25 percent rock outcrop, 20 percent Deskamp soil and similar inclusions, and 5 percent contrasting inclusions. Gosney soils are somewhat excessively drained with rapid permeability. The available water capacity is about 1 inch. Deskamp soils are somewhat excessively drained with rapid permeability. Available water capacity is about 3 inches. The major use for this soil type is livestock grazing. The Gosney soils have ratings of 7e when unirrigated, and 7e when irrigated. The rock outcrop has a rating of 8, with or without irrigation. The Deskamp soils have ratings of 6e when unirrigated, and 4e when irrigated. Approximately 66 percent of the subject properties is made up of this soil type, all located within the northern parcel.

SURROUNDING LAND USES: The general surrounding area of the Subject Property is defined by the City of Bend’s Urban Growth Boundary (“UGB”) to the west and then a mix of residential and agricultural uses spreading out to the north, east, and south. Adjoining properties are zoned MUA10 and EFU, and range in size and type of development. The general surrounding area includes small-scale farms that predominantly consist of irrigated fields and pasture, and are located to the east of the Subject Property. The area to the west of the Subject

Property provides a transition from the UGB to rural land use, and is developed with a number of uses such as solar farms, a church, a fire station, and a public park.

Applicant provided (Burden of Proof) the following description of adjacent properties:

“West: Tax Lot 900 fronts Ward Road. West of Ward Road, the majority of properties are zoned MUA10 and not used for agricultural purposes. The property that abuts Ward Road on the west is an approximate 53-acre tract consisting of three tax lots, 17-12-36, Tax Lots 1400, 1600, and 1601. In 2018, in Files 24 7-18-000485 and 24 7-18-000486, the County approved a change in the designation to Rural Residential Exception area and a change in the zoning to MUA10. In 2021, in Files 247-22-000353 and 354, the County approved the same redesignation and zone change on a parcel identified as 18-12-02, Tax Lot 201. Northeast of Tax Lot 900, the parcel immediately east of Tax Lot 900 (17-12-36 Tax Lot 800), is a vacant EFU-TBR. The other properties east of the Subject Property are either MUA10 with dwellings or EFU parcels and most include dwellings and hobby farms uses.

The properties northwest of the Subject Property are a mixture of MUA10 land recently rezoned, EFU land developed with commercial solar farms and institutional uses such as a church, a Christian Center, and a Pacific Power facility. Just north of Highway 20 and west of Hamby Road, in 2022, the County approved a similar request involving a 94-acre tract that consisted of two parcels identified as 17-12-35, Tax Lots 1200 and 1201. There are a few large acre dwellings as well. There does not appear to be any active farming operations within close proximity to the Subject Property to the northwest.

North: The properties north of Tax Lot 900 are the same as that east of Tax Lot 100. They are EFU and MUA-10 zoned parcels with the above-described commercial, institutional, and residential uses. The property immediately north of Tax Lot 100 is a 118-acre parcel zoned EFU and MUA-10. It has a dwelling on pa1i and a large solar farm on the remainder. Northeast of Tax Lot 100 the properties are predominantly all MUA-10 zoned parcels developed with residential uses.

South: The land south and southeast of Tax Lot 900 is zoned MUA-10 and is developed with single-family homes. Most of the parcels are within Dobbins Estate, a large acre subdivision. South of Tax Lot 100 the properties are primarily EFU zoned parcels developed with large acre residential dwellings. One parcel appears to have a small hobby horse farm on it. There are no active farming operations.

East: The properties east of Tax Lot 900 are predominantly EFU zoned with most being less than 20 acres and many less than 10 acres. The primary development pattern is large acre residential uses with one horse farm noted above. One property directly east of Tax Lot 1000 appears to be developed with a personal moto-cross course. East of Tax Lot 100 the properties lying east of Erickson Road are predominantly all MUA-10 zoned parcels developed with large acre residential estate-type dwellings. There is an irrigation canal that runs diagonally through some of those properties.”

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on March 12, 2024, to several public agencies and received the following comments:

Deschutes County Senior Transportation Planner, Tarik Rawlings, March 5, 2025, Comments

I’ve reviewed the revised TPR analysis prepared by Ferguson & Associates, Inc dated February 28, 2025. Reflective of the applicant’s pending Modification of Application file (no. 247-25-000021-MA) to remove Tax Lot 300 from the scope of the project (resulting in a 12.41-acre reduction in acreage from the original application), the revised analysis provides updated information related to the total ~240.17 acres of subject property. The full build-out scenario included in the revision (considering redevelopment of the

existing solar farm portions of the subject property) aligns with staff's comments from 6/11/24. The report's inclusion of modified acreage and assumed development credit for one existing single-family dwelling complies with additional comments from staff's 6/11/24 email correspondence regarding the MUA10 Zone's worst case scenario analysis. I agree with the assumptions, methodologies, and conclusions outlined in the revised analysis.

Deschutes County Senior Transportation Planner, Tarik Rawlings, June 11, 2024, Comments

Thank you for forwarding the revised TPR analysis produced by Ferguson & Associates, Inc., dated April 22, 2024.

While the revised TPR analysis has addressed some of the transportation-related comments issued on behalf of the County Road Department on March 29, 2024, there are some outstanding issues with the revised analysis that should be addressed by the applicant in order to comply with TPR:

1. The translation of the "farm manufacturing" analysis into the category of "farm stand" is not a reasonable conclusion and the revised analysis does not clearly demonstrate how a "farm stand" derived from the 18.16.025(I)(1-2) "facility for the processing of farm crops" (and termed "farm manufacturing" at multiple points in the report) constitutes a reasonable worst case scenario for outright EFU use categories even when compared to other uses within DCC 18.16.025. The applicant should provide demonstrable analysis (derived from real local or regional examples of farm crop processing facilities) showing how this use category constitutes a reasonable worst case scenario for outright EFU use categories.
2. At the conclusion of the "Trip Generation Forecast – Outright Permitted Uses – Land Use Scenario for Existing EFU Zoning" section of the revised analysis (beginning on page 3 of the revised report), the applicant concludes with an assumption that three of the five parcels making up the subject properties would each respectively support a dog training class use, a farm stand use, and a Winery/Farm Brewery/Cider business use. The remaining two parcels within the subject properties are not included within this analysis and the applicant must account for these additional 2 parcels in their reasonable worst case scenario analysis. If the applicant continues their revisions under the analytical framework that each of the 5 individual lots within the subject properties would support different reasonable worst case scenario uses, then the applicant must clearly state which use is assigned to which tax lot. Further, that analysis should be tailored to the unique aspects of each individual lot such as acreage and location. Alternatively, if the applicant decides to revise their report to analyze all 5 lots as one contiguous property for the purpose of reasonable worst case scenario analysis, that analysis should focus on one reasonable worst case scenario use category across the contiguous 5 lots. Staff notes that, of the identified EFU reasonable worst case scenario uses included on pages 3-6 of the revised report, winery or dog training classes are likely the highest trip-generative uses. For the purposes of quantifying the anticipated impacts from the EFU reasonable worst case scenario uses, staff encourages the applicant to base any methods and assumptions of these uses on real local or regional examples.
3. Staff disagrees with the applicant's assertion that the existing solar farm would not be redeveloped as part of the reasonable worst case scenario analysis for the requested MUA10 Zone. As the requested MUA10 Zone is outright permissive of single-family dwellings, staff finds that it would be reasonable to assume that the existing solar farm would be redeveloped with single-family dwellings as an economically-advantageous land use and the applicant should produce revised analysis reflecting the full build-out of residential single-family dwellings as the reasonable worst case scenario for the requested MUA10 Zone.
4. Pursuant to bullet #3, above, staff also requests that the applicant revise the single-family dwelling analysis for the requested MUA10 Zone included in Table 5 (page 8 of the revised

report) to reflect a total “Number of Single-Family Residentials” of 25 (revised from 13). Based on the acreage of the subject properties (252.58 acres), the ability to redevelop the existing solar farm, and the purpose of this exercise as a scenario forecast for trip generation, staff finds that the subject properties would be able to support a maximum of 25 single-family dwellings as the reasonable worst case scenario for the requested MUA10 Zone.

5. Pursuant to bullets #3 and #4, above, the applicant must revise Table 7 (page 9 of the revised report) to reflect a total of 25 single-family dwelling units for the purpose of P.M. Peak hour and daily weekday trip generation forecasting.

Deschutes County Senior Transportation Planner, Tarik Rawlings, March 29, 2024, Comments

I have reviewed the transmittal materials for 247-24-000097-PA, 98-ZC for properties totaling approximately 259 acres to change the Comprehensive Plan designation from Agriculture (AG) to Rural Residential Exception Area (RREA) and the zoning from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA10). The properties are within the Exclusive Farm Use (EFU) Zone, and the Airport Safety (AS) and Landscape Management (LM) Combining Zones associated with the following identifying property information:

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000100
Account: 109118
Situs Address: 21875 NEFF RD, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360001000
Account: 111676
Situs Address: 21700 BEAR CREEK RD, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000300
Account: 109116
Situs Address: **NO SITUS ADDRESS**

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000900
Account: 111677
Situs Address: 62098 WARD RD, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000400
Account: 109115
Situs Address: 21850 HWY 20, BEND, OR 97701

I have reviewed traffic analysis provided by Ferguson & Associates, Inc., dated February 2, 2024, included as Exhibit 12 of the submitted application materials. The analysis included within the submitted Ferguson & Associates, Inc. report does not comply with the relevant provisions of OAR 660-012-0060, known as the Transportation Planning Rule (TPR). In order to determine whether the proposal will produce a significant effect on transportation facilities, the applicant must revise their traffic analysis to comply with TPR including OAR 660-012-0060(1)(a-c). Due to the scope of the proposal, staff notes that the applicant’s revised analysis must comply with the requirements for a Traffic Impact Analysis (TIA) (DCC 18.116.310(C)(3)(c)) outlined in DCC 18.116.310 including the minimum TIA requirements at DCC 18.116.310(G)(1-16), the study time frame requirements at DCC 18.116.310(E), the operation and safety standards at DCC 18.116.310(H) (20-year study time frame) and the mitigation standards at DCC 18.116.310(I), should any mitigations be required as the result of the revised analysis. The TIA should include a review of existing and future levels of service (LOS), average vehicle delay, and volume/capacity (V/C) ratios associated with the subject properties and surrounding project area. The V/C ratios would be applicable to any ODOT facilities included in the TIA.

Regarding the reasonable worst case scenario(s) put forward in the submitted traffic analysis, staff disagrees with the scenario proposed for the existing EFU Zone. For the existing EFU Zoning, staff does not agree that “farm use” or farm crop processing is the reasonable worst case scenario associated with the EFU Zone and notes that “winery” has been used in past applications for PA/ZC proposals from

EFU to MUA10. The assertion that “farm use” constitutes the reasonable worst case scenario for the EFU Zone is antithetical to the analysis provided in the submitted Burden of Proof statement, demonstrating that the subject properties are not currently suited for farm use.

The properties have frontage on Highway 20, Bear Creek Road, Erickson Road, and Neff Road. Highway 20 is a public road maintained by the Oregon Department of Transportation (ODOT), functionally classified as a Primary Arterial Highway. Staff recommends the applicant work closely with representatives from ODOT for any access permitting or other requirements related to Highway 20. Based on ODOT’s jurisdiction over Highway 20, the access permit requirements of DCC 17.48.210(A) do not apply. Bear Creek Road and Erickson Road are public roads maintained by Deschutes County and functionally classified as Rural Collectors. Neff Road is a public road maintained by Deschutes County and functionally classified as a Rural Arterial. If the applicant intends to utilize access from Bear Creek Road, Erickson Road, or Neff Road, the applicant must address the provisions of DCC 17.48.210(B) related to access on Rural Collectors and Arterials.

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$5,603 per p.m. peak hour trip. As the plan amendment/zone change by itself does not generate any traffic, no SDCs apply at this time. SDCs will be assessed based on development of the property. When development occurs, the SDC is due prior to issuance of certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final.

THE PROVIDED SDC RATE IS ONLY VALID UNTIL JUNE 30, 2024. DESCHUTES COUNTY’S SDC RATE IS INDEXED AND RESETS EVERY JULY 1. WHEN PAYING AN SDC, THE ACTUAL AMOUNT DUE IS DETERMINED BY USING THE CURRENT SDC RATE AT THE DATE THE BUILDING PERMIT IS PULLED.

BEGINNING JULY 1, 2024, THE SDC RATE WILL INCREASE AND LAST UNTIL JUNE 30, 2025. AGAIN, THIS IS INFORMATIONAL ONLY AS SDCS ARE NOT ASSESSED UNTIL DEVELOPMENT OCCURS.

Oregon Department of Transportation, Principal Planner Ken Shonkwiler

Thank you for the opportunity to review 247-24-000097-PA, 247-24-000098-ZC: Erickson Ward Zone Change. Our comments are attached in a comment log and I also provided a letter on the applicant’s TPR assessment memo with regards to OAR 660-012-0060.

Oregon Department of Agriculture, John Harrang

No involvement needed by ODA Food Safety Program.

Department of Land Conservation and Development, Natural Resource Specialist Amanda Punton

Good to know, thanks. Do you anticipate including finding on how new uses allowed by the proposed rezoning will affect the Goal 5 scenic resource? There is mention of the combining zone in the applicant’s material but nothing about the Goal 5 origins of the combining zone. This is the piece of OAR chapter 660, division 23 that speaks to new uses that could impact a significant Goal 5 resource.

OAR 660-023-0250(3)(b)

(3) Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if: . .

(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or . . .

There is a good chance the county will find that no additional Goal 5 work is needed. I'm happy to discuss further if you like.

The following agencies did not respond to the notice: Avion Water Company, Bend-La Pine School District, Bend Fire Department, City of Bend Growth Management, Bend Municipal Airport, City of Bend Planning Department, Central Oregon Irrigation District, Deschutes County Assessor, and Deschutes County Road Department.

PUBLIC COMMENTS: The Planning Division mailed notice of the application to all property owners within 750 feet of the subject property on March 12, 2024. The Applicant also complied with the posted notice requirements of Section 22.24.030(B) of Title 22. The Applicant submitted a Land Use Action Sign Affidavit indicating the Applicant posted notice of the land use action on June 11, 2024.

Christopher Koback appeared at the Hearing and testified on behalf of Applicant. Robin Hayakawa appeared at the Hearing and testified on behalf of COLW. Submissions were made into the public record, prior to the Hearing, and are set forth below. Issues raised in the public comments below related to relevant approval criteria are addressed in the findings of this recommendation.

Rory Isbell, Central Oregon LandWatch, March 12, 2024

“Central Oregon LandWatch is concerned whether file no. 247-24-000097-PA/98-ZC, an application that proposes to redesignate and rezone 259 acres of agricultural land for residential use, meets the applicable criteria. Please notify us of any decisions or hearings on the application. Our address is 2843 NW Lolo Drive Ste 200, Bend, OR 97703.”

Jordi Stiffler, March 19, 2024

“I’m writing on the proposed land use action regarding the applicant, which I believe is Mr. Steele and his wife Shelby, petitioning to change their property, 21700 Bear Creek Rd, from Agricultural to Rural Residential Exception Area (RREA).

I am contesting the right for the applicant to change the zoning. Two years ago the county sent out letters to everyone in the vicinity of the applicants property when he wanted to split the land into separate tax lots. When I talked to the county planner at that time he assured me that the land was zoned only for one residential house and that other residential homes could not be built on it. The neighbors, including myself, had to put up with 18 months of construction with dirt, heavy equipment, litter, excessive traffic, noise. The land that they built on was home to coyotes, deer, and other wildlife which has pretty much disappeared.

The narrow Ward Rd can’t sustain more traffic to include a new residential area. The road is dangerous as Ward Rd is used by the car dealers for test drives at high rates of speed, and young drivers who fly down Ward Rd to “catch air” in the rise of the road heading east. I have seen numerous dogs and deer get killed on that road in front of my house. The neighbor hood bought our houses outside the urban boundary area for one main purposes ... acreage without multiple housing infringing on us.”

Audrey Henry, March 20, 2024

"I am writing in response to the proposed land use application paperwork I received recently. I am an adjacent property owner and I oppose this proposal for a number of reasons.

This land has been a wildlife habitat for many years and most recently has been home to red fox who have finally come back to this area. There are deer who live there and many other wildlife as well. I moved here over 15 years ago for the peacefulness and serenity and I would hate to see that taken away.

Recently, I was approached by a representative of the gas company that has an easement and line going through that property. He stated one house needed to be removed due to the close proximity of the gas line. It appears due to the new house construction on 21700 Bear Creek Road, they are over the amount of housing allowed for that gas line so I am concerned that after recently being asked to sell my home to them so it could be vacated that we would now have to deal with additional homes, businesses here by the gas line.

I will reach out to you via phone and in person soon to further discuss."

Courtney Eastwood, March 20, 2024

"I am writing this email to inform you that as a property owner on Bear Creek Road - I am completely opposed to this change in zoning. There is already a housing development going in on Bear Creek that is going to bring more traffic and cars. Also the property across the street from the current development was just approved to also rezone to Multiple Use. This open land should be protected. We have lots of wildlife including deer, hawks, an eagle, and other critters that currently utilize these fields for their survival. Also I, and my neighbors, purchased land because we wanted land - not to stare at homes and increased traffic. Please re-evaluate how much land is going to be developed in this area and how much more you are proposing."

Amy and Matt Ruff, March 27, 2024

"We are responding to the mail correspondence in regards to File #247-24-000097-PA and File #247-24-000098-ZC. As residents of Filly Court, we are opposed to the change of designation from Agricultural (AG) to Rural Residential Exception Area (RREA) and the rezoning of Exclusive Farm Use (EFU-TRB) to Multiple Use Agricultural (MUA10). We feel the current designations are appropriate as is and there should be no further opportunity for building on those pieces of land.

With many people in the city and in the county wanting to expand the urban growth boundary, we feel we need to hold the line firm. Part of the reason we chose to move to this area was because of the open space. These changes in designation and rezoning are concerning due to the unknown type of housing that may go in. We are DEFINITELY not in favor of managed campsites for the homeless or for low income properties that could lower the value of the nearby homes and be a safety concern. Furthermore, additional residences could increase traffic.

It is difficult not knowing the full intentions of the land owner. We would appreciate transparency on this matter and would like to be made aware of any hearings that relate to these file numbers."

Rob DuValle, March 21, 2024

“Why would they want to rezone the land where they just put the solar panel farm in? That is concerning from an impact on my quality of life/ property value as a neighbor.

The whole land use process is very confusing from a community member perspective. I may be totally supportive or not depending on what actually goes in the ground, but without that information it leaves me without the ability to provide an informed response.

The list of potential ‘conditional uses’ has many that I would be opposed to. Shouldn’t the property owner be required to declare their intentions upfront and be legally held to them upon approval? That would seem to be the honorable way to do business. Please put me on the notification lists you mentioned.

NOTICE REQUIREMENT: On April 17, 2025, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the Subject Property and public agencies. A Notice of Public Hearing was published in the Bend Bulletin on Sunday, April 13, 2025. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on April 3, 2025.

REVIEW PERIOD: According to Deschutes County Code 22.20.040(D), the review of the proposed quasi-judicial plan amendment and zone change application is not subject to the 150-day review period.

III. FINDINGS & CONCLUSIONS

A. PRELIMINARY FINDINGS

1. Procedural Issues

Two record related procedural issues were raised in this case. Both issues relate to Central Oregon Land Watch (“COLW”) submissions. The first dispute relates to a COLW May 23, 2025 submission and the second relates to a COLW June 2, 2025 submission.

A brief background discussion should assist in understanding the Hearings Officer’s findings related to both record related issues. At the conclusion of the May 9, 2025 public hearing (the “Hearing”) the Applicant requested the record remain open for what is often referred to, in Deschutes County, as the “standard 7/7/7 open-record period.” The Hearings Officer, at the Hearing described the “standard 7/7/7 open-record period” as allowing new evidence to be submitted by any interested person during the first 7 day open-record period (“1st 7-day open-record period”), evidence in rebuttal to evidence submitted during the initial 7 day open-record period (“2nd 7-day open-record period”) and an applicant has a right to submit final argument during the third open-record period (“3rd 7-day open record period”).

The Hearings Officer announced, at the conclusion of the Hearing, the following open-record periods:

- * Submission of new evidence to be received by the County until 4:00 pm on May 16, 2025 (1st 7-day Open-Record Period); and
- * Submission of evidence in response to evidence submitted during the 1st Open-Record Period to be received by the County until 4:00 pm on May 23, 2025 (2nd 7-day Open-Record Period); and
- * Submission by Applicant of its final legal argument until 4:00 pm on May 30, 2025 (3rd 7-day Open-Record Period).

Deschutes County Planning Staff (“Staff”) contacted the Hearings Officer (email sent at 4:14 pm on May 23, 2025) and informed the Hearings Officer, in part, the following:

“The applicant submitted timely testimony during the new evidence & testimony period which ended Friday, May 16th. Unfortunately, that submittal was not uploaded to the record until today [May 23, 2025]. For this

reason, the county is requesting that the rebuttal period to be extended for a period of 7 days from the date that a Hearings Officer Order can be sent to all parties or to some other date certain - assuming you consent to the extended rebuttal period..."

The Hearings Officer issued a *Hearings Officer Order Extending Written Record* modifying the Open-Record Periods that were announced at the Hearing. The Hearings Officer, in the *Hearings Officer Order Extending Written Record*, allowed the submission of rebuttal evidence (original deadline May 23, 2025) to be submitted until 4:00 pm on May 30, 2025 and the submission of Applicant's final argument (original deadline May 30, 2025) to be submitted until 4:00 pm on June 6, 2025.

On May 23, 2025 COLW submitted an open-record document which included the following statement:

"Central Oregon LandWatch ('LandWatch') offers the following comments in response to Applicant's submittal during the Hearings Officer Hearing's Open Record Period on May 9, 2025 ('2025-05-09 Applicant Submittal')."

Applicant objected to COLW's May 23, 2025 submission and provided the following comments:

"In its May 30, 2025 letter, the applicant asserted an objection to the written testimony that Central Oregon LandWatch ('COLW') submitted on May 23, 2025. The applicant renews that objection. In its May 23, 2025 letter, COLW acknowledged that its written testimony was directed at the applicant's May 9, 2025 submission. In an apparent effort to avoid the consequences of missing the submittal window for new evidence in response to evidence submitted at the public hearing, COLW stated: 'LandWatch offers the following comments in response to Applicants submittal during the open record period on May 9, 2025 (2025-05-09 Applicant Submittal).'

The May 9, 2025 Applicant submittal was not submitted during the open record period. It was submitted prior to the public hearing on May 9, 2025. The submittal included a letter addressing the hearing issues and the applicant's ESEE analysis chart. COLW requested that the record be kept open for new evidence to address the evidence submitted at the public hearing. Under the order that the Hearings Officer entered, all parties had until May 16, 2025, to submit any new evidence based on what was submitted at the public hearing. The order allowed parties until May 23, 2025, to submit testimony and evidence strictly in rebuttal to the new testimony and evidence submitted on May 16, 2025.

The applicant submits that under ORS 197.797, COLW was required to submit new evidence in response to the applicant's May 9, 2025 material within the initial seven-day period, or by May 16, 2025. COLW did not do that. It waited until May 23, 2025 to submit what it admits is testimony directed that the material submitted before the public hearing on May 9, 2025. None of COLW's May 23, 2025 testimony is directed at the applicant's May 16, 2025 submittal. COLW's May 23, 2025 submission should be stricken and disregarded."

It is clear to the Hearings Officer that COLW's May 23, 2025 submission was made during the originally announced "rebuttal evidence" time-period (per discussion above during the 2nd Open-Record Period). It is also clear to the Hearings Officer, based upon COLW's own statement (May 23, 2025 submission), that COLW's evidence and arguments contained in the COLW May 23, 2025 submission was directed towards Applicant's May 9, 2025 Hearing submission. Restated, the Hearings Officer finds Applicant's primary concern about COLW's May 23, 2025 submission was that the COLW May 23, 2025 evidence was directed towards Applicant evidence submitted **during the evidentiary Hearing** (which preceded the Open-Record Period) and not directed towards Applicant's evidence submitted **during** the "original" Open-Record Period (per discussion above the "original" 1st Open-Record Period).

The Hearings Officer finds that he explained the Open-Record process to all present at the Hearing and included a statement that evidence submitted during the 2nd Open-Record Period should be related to and in response to evidence submitted during the 1st Open-Record Period. The Hearings Officer asked those present at the Hearing

if they had any questions related to the Hearings Officer's explanation of what was appropriate to be submitted during each stage of the Open-Record. The Hearings Officer finds that the Applicant and COLW representatives are experienced land use hearing participants and believes that they both understood the Hearings Officer's expectations for Open-Record submissions.

The Hearings Officer finds that his decision related to the admission (or not) of the COLW May 23, 2025 submission is procedural in nature. The Hearings Officer finds that the appropriate legal procedural decision-making standard is for the Hearings Officer to assess whether or not the admission would substantially prejudice Applicant's and/or COLW's rights.

The Hearings Officer takes note that the Hearings Officer, in this case, issues a *recommendation* (not decision). Pursuant to Deschutes County code the Hearings Officer's recommendation will undergo a de novo review before the Deschutes County Commission (DCC 28.030). In this instance COLW will have the right to submit the evidence and argument contained in its May 23, 2025 Open-Record submission to the Commission for its consideration.

The Hearings Officer is disappointed in the approach taken by COLW and feels that technically the Hearings Officer could reject the admission/consideration of the COLW May 23, 2025 submission. The Hearings Officer does take note that Applicant provided, in its Final Argument Open-Record submission, a "precautionary" response to evidence/argument raised by COLW in its May 23, 2025 submission.

The Hearings Officer finds it appropriate, in this case only, to admit and consider the COLW's untimely May 23, 2025 submission. The Hearings Officer finds such admission and consideration will not substantially prejudice the Applicant's rights.

The Hearings Officer finds that COLW's June 2, 2025 email to Planner Stuart was filed/submitted during the Applicant's final argument time and cannot be considered in this case.

2. Certification of Soils Report

COLW argued that the Red Hills Soils Report (soils report submitted by Applicant) was required to be **certified** by the Oregon Department of Land Conservation and Development ("DLCD"). COLW (May 9, 2025, page 10) provided the following comments:

"... OAR 660-033-0030(5)(d) provides that after October 1, 2011, 'only those soil 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.'

Here, the Applicant has submitted a soil assessment dated January 2, 2025, well after the effective date provided in OAR 660-033-0030(5)(d). Furthermore, the Applicant did not submit that the soil assessment was certified by the DLCD as complete and consistent with the Department's requirements. This application relies heavily on the soils assessment from Mr. Gallagher in asserting that the subject property does not contain a predominance of NRCS Class I-VI soils. Because the soils assessment was not certified by DLCD as required under OAR 660-033-0030(5)(d), the local government may not consider its contents as substantial evidence of whether the subject property is agricultural land."

COLW supplemented its above-quoted comments in an Open-Record submission, (May 30, 2025, pages 1 – 5). The Hearings Officer includes a portion of the COLW May 30, 2025 comments below:

"In response to LandWatch's 5/9/2025 submittal where we noted that the Applicant's Soil Assessment has not been certified by DLCD, Mr. Gallagher of Red Hill Soils submitted a brief letter which concluded:

Because this is not a “Soil Assessment” this work does not need to be ‘certified by DLCD’ or anyone else. It is just an interpretive summary of the NRCS WEBSOILSURVEY Data. No new information or original or onsite information is provided or claimed in my report. The COLW has mistaken my report for something it is not and has attached certain rules to it that do not apply.

2025-05-016 Applicant Submittal at p. 3-4

At issue here is whether the applicant has submitted ‘more detailed soils information than that contained in the Web Soil Survey operated by the NRCS’ in order to assist the county in making a determination of whether the subject property qualifies as agricultural land. ORS 215.211(1); OAR 660-033-0030(5)(b). These sections and OAR 660-033-0045 specifically apply to ‘change[s] to the designation of a lot or parcel 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’. OAR 660-033-0030(5)(c)(A). The purpose of requiring DLCD review of the soil assessments that may be used to remove lands from the protections of Goal 3 is to ensure that ‘the soils assessment is soundly and scientifically based’. OAR 660-033-0045(6)(b)(B). If more detailed information than what is contained in the NRCS Web Soil Survey was provided, then the Applicant was required to request that DLCD arrange the soil assessment. ORS 215.211(1).

In this case, the Applicant has submitted ‘more detailed soils information’ than what is contained in the NRCS Web Soil Survey, necessitating DLCD’s review and quality control. Specifically, Mr. Gallagher provided more detailed information about the total amount of acreage contained in each NRCS soil mapping unit within the subject property.”

Applicant, in its Final Argument (June 6, 2025, pages 5 & 6) responded to COLW’s comments set forth above, as follows:

“COLW incorrectly asserts that the applicant was required to submit for DLCD approval the January 2, 2025 report prepared by Red Soils that explained the NRCS mapping for the property. COLW relied on and quoted one subsection from OAR 660-033-0030. Specifically, COLW argues that under OAR 660-033-0030(5)(b), if an applicant believes that a more detailed soil information, other than that contained in the Websoils Survey operated by NRCS, would assist the county to make a better determination of whether the land qualifies as agricultural land, the person must request that the department arrange for an assessment of the capacity of the land by a professional soil classifier.

COLW is misconstruing the requirements in OAR 660-033-0030(5). The text, examine in context, informs that a more detailed assessment of soil capacity is an assessment that relies on data other than that in the NRCS maps and soil surveys. COLW did not mention OAR 660-033-0030(5)(a), which provides:

More detailed data on soil capability than is contained in the USDA Natural Resources Conservation Service 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.

Clearly, the assessment referred to in OAR 660-033-0030(5)(b) is an assessment of detailed data on soil capability not contained in the existing NRCS maps and soil surveys. Mr. Gallagher’s report does not contain data on soils from the site or data other than what is contained in the existing NRCS maps and soils surveys. Mr. Gallagher expressly stated in his report:

Baseline information for this report is the NRCS WEBSOILS SURVEY and does not include an onsite evaluation or a Soil Assessment as defined by the State of Oregon.

Mr. Gallagher is one of the certified professionals who DLCD lists on its website as a resource for people who require an assessment of their soils. His professional statement that his report is not a soils assessment

as defined by the State is wholly credible and persuasive. Moreover, as the applicant testified, DLCD received formal notice of the application and did not voice a position contrary to Mr. Gallagher. Furthermore, Mr. Gallagher knows what a soil assessment under the State regulations looks like. The applicant submitted a copy of the study that Mr. Gallagher prepared in File No. 247-000404-PA/000405-ZC. One can readily see a soils assessment under the regulations is based on soil data gathered from samples taken from many locations on the property, which is then evaluated.

Mr. Gallagher's report further confirms that his work was based on the NRCS Websoils Survey and not on more detailed soil data that one would obtain from an on-site evaluation. In section 3 of his report, Mr. Gallagher explains only what the NRCS maps illustrate about the soil composition. In discussing soil fertility and suitability for grazing, Mr. Gallagher relied on the existing information in the NRCS soil surveys. See Table 5 of the NRCS Websoils Survey on page 4 of his report. He did not rely on soil data from the site. In discussing existing and future availability of water for irrigation, Mr. Gallagher relied on the NRCS information to conclude that the soil will remain Class 7 and Class 8 whether irrigated or not. None of the issues that Mr. Gallagher addressed relied on more detailed soil data.

In response to COLW's May 9, 2025 testimony, Mr. Gallagher, an expert in the field, explained that his report is not a soil assessment under OAR 660-003-0045 and did not have to be submitted to DLCD. The applicant submitted an example of a soil assessment that Mr. Gallagher prepared pursuant to OAR 660-033-0045 that was submitted to DLCD. It is easy to discern the remarkable difference between a report that relies on soils studies that supplement the NRCS maps and a report that merely explains how the NRCS spoils assessment works."

The Hearings Officer finds the following are relevant subsections of OAR 660-033-0030:

(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, 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.

...

(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.

(e) This section and OAR 660-033-0045 authorize a person to obtain additional information for use in the determination of whether a lot or parcel 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.

The Hearings Officer notes that OAR 660-033-0030 is titled "Identifying Agricultural Land." This section of the Oregon Administrative Rules defines Agricultural Lands and provides guidance in how to determine if land is in fact Agricultural Land. Subsection (5) deals, in part, with the possibility of using more detailed "soil assessments" to demonstrate that certain land is, or is not, Agricultural Land. COLW argues that the Red Hills Soil Report is a "soil assessment" that required Applicant to secure DLCD approval/certification. Applicant counters that its soil expert simply interpreted existing NCRS information and therefore Applicant was not required to secure DLCD approval/certification.

OAR 660-033-0030 (5)(a) states, in part, that "**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” [**bolding and italics** added by the Hearings Officer]. The Hearings Officer reviewed the Red Hills Soils Report to determine if the report in fact provided **more detailed data** than what is contained in the NCRS soils maps and soil surveys.

Gallagher, in the Red Hills Soils Analysis, concluded:

“The NRCS WEBSOILSURVEY shows the subject property is predominantly non-high value farmland, Class 7 and 8 and does not meet the definition of 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.”

Gallagher, in a May 15, 2025 letter (Applicant May 16, 2025 submission, attachment), stated

“I want to clarify for the record that my report only contained information taken from the NRCS database, and it did not include nor pretend to include any results from onsite investigations, and it is not an Order-1 Soil Survey. It is not a ‘Soil Assessment’ by the definition cited in OAR. It was not presented as such and was not called such in the title or body of the report. The specific reason I did not do a ‘Soil Assessment’ of this property is that the NRCS maps already showed a predominance of Class 7 and 8, non-high value farmland soils on these properties. There was no ‘Soil Assessment’ done or submitted so there is no failure to comply with OAR, as COLW stated in their letter.”

The Hearings Officer finds, based upon a review of the Red Hills Soils Report and Gallagher’s May 15, 2025 letter, that Gallagher did not generate, produce or otherwise utilize **more detailed data** on soil capability than what is contained in the NCRS soil maps and surveys. The Hearings Officer finds, consistent with OAR 660-033-0030 (5)(a), that the Red Hills Soils Report is not a “soil assessment” requiring DLCD certification.

The Hearings Officer also finds that Gallagher, in the Red Hills Soils Report, was “interpreting” existing NCRS maps and data. The Hearings Officer finds that if “interpreting” NCRS maps and data necessitated DLCD certification then COLW’s “interpretation” (See, for example, COLW comments in its May 9, 2025 and May 30, 2025 submissions) of the NCRS maps and data would require DLCD certification. It is not unusual in cases involving disputes as to whether a particular property is Agricultural Land to have multiple “interpretations” of NCRS maps and data. The Hearings Officer finds mere interpretation of existing NCRS maps and data does not trigger the need for OAR 660-033-0030 DLCD certification.

Title 22 of the Deschutes County Code, Procedures Ordinance

Chapter 22.20, Review of Land Use Action Applications

Section 22.20.055, Modification Of Application

- A. *An applicant may modify an application at any time during the approval process up until the close of the record, subject to the provisions of DCC 22.20.052 and DCC 22.20.055.***

FINDING: The Applicant submitted a Modification of Application (Deschutes County file 247-25-000021-MA) on January 8, 2025. The Applicant provided the following description of the Modification in the submitted Burden of Proof:

“The Applicant has reevaluated the application and is proposing to modify the application to reduce the number of acres subject to the request to 240.17 acres... The modification application also supplements certain evidence included in the original application demonstrating further that the subject property is not agricultural land as defined in the applicable laws and regulations. The Applicant is submitting a supplemental report from a certified soils scientist who applied an accepted weighted distribution analysis to the NRCS mapping and determined that the subject property is comprised predominantly of

Class 7 and Class 8 soils which are not agricultural soils.”

The Hearings Officer concurs with Applicant’s above-quoted statement.

- B. *The Planning Director or Hearings Body shall not consider any evidence submitted by or on behalf of an applicant that would constitute modification of an application (as that term is defined in DCC 22.04) unless the applicant submits an application for a modification, pays all required modification fees and agrees in writing to restart the 150-day time clock as of the date the modification is submitted. The 150-day time clock for an application, as modified, may be restarted as many times as there are modifications.***

FINDING: The Applicant provided the following response to this criterion:

“The Applicant is providing additional evidence within an application for a modification of application and with the required fee. Thus, the hearing body may consider the new evidence.”

The Hearings Officer concurs with Applicant’s above-quoted statement.

- C. *The Planning Director or Hearings Body may require that the application be re-noticed and additional hearings be held.***

FINDING: The Modification of Application was submitted prior to the date the Notice of Public Hearing was mailed, and the Modification materials were available as part of the public record. Furthermore, Staff (Staff Report page 14) noted that the Modification reduced the size of the Subject Property and therefore would have reduced the size of the mailing radius. For these reasons, Staff concluded that an additional mailed notice of application or notice of hearing date are not required. The Hearings Officer concurs with Staff’s statement and conclusion.

- D. *Up until the day a hearing is opened for receipt of oral testimony, the Planning Director shall have sole authority to determine whether an applicant's submittal constitutes a modification. After such time, the Hearings Body shall make such determinations. The Planning Director or Hearings Body's determination on whether a submittal constitutes a modification shall be appealable only to LUBA and shall be appealable only after a final decision is entered by the County on an application.***

FINDING: Staff (Staff Report, page 14) stated that it agreed with the Applicant’s conclusion that the materials submitted with 247-25-000021-MA constituted a Modification of Application. The Hearings Officer concurs with this Staff conclusion.

Title 18 of the Deschutes County Code, County Zoning

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

Section 18.136.020, Rezoning Standards

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

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

FINDING: The Applicant provided the following comments in its Burden of Proof statement:

“The Comprehensive Plan's introductory statement explains that land use must comply with the Statewide Planning System and sets out the legal framework set by State law. It summarizes the Statewide Planning Goals. It also explains the process the County used to adopt the current Comprehensive Plan. This application is consistent with this introductory statement because the requested change has been shown to be consistent with State law and County plan provisions and zoning code that implement the Statewide Planning Goals.

The following provisions of Deschutes County's Amended Comprehensive Plan set out goals or text that may be relevant to the County's review of this application. Other provisions of the plan do not apply.”

The Applicant utilized the above-referenced 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, which are listed in the Comprehensive Plan section of this recommendation in further detail. Staff (Staff Report, page 15) generally agreed with the Applicant's analysis and finds the above provision to be met based on Comprehensive Plan conformance as demonstrated in subsequent findings.

Staff requested that the Hearings Officer make specific findings regarding whether the Subject Property qualifies as agricultural land, which may impact the findings for compliance with certain Comprehensive Plan policies. The Hearings Officer provides such requested findings below and concludes that this criterion/standard is met.

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

FINDING: Staff, Applicant and COLW raised a number of issues related to this criterion. Staff expressed concern related to the Solar Array located on the Subject Property. Staff (Staff Report, page 17) asked the Hearings Officer to determine “*if the applicant has sufficiently addressed DCC 18.36.020 (B) demonstrating that the change will be consistent with the purpose and intent of the proposed zoning classification, specifically with respect to creation of a nonconforming use.*” COLW expanded upon Staff's above-quoted concerns and argued that the Solar Array would not be consistent with the purpose statement for the MUA10 zone. (COLW submissions: May 9 2025, page 2). Staff, Applicant and COLW also addressed this criterion during hearing testimony.

The Hearings Officer finds Applicant (Final Argument, 6/2/2025, pages 2 – 5) best outlines the issues raised by Staff and COLW. The Hearings Officer includes Applicant's final argument comments below:

“A. DCC 18.136.010 – Consistency with purpose and intent of MUA-10 zone.

COLW asserts that rezoning the subject 240 acres to MUA-10 is not consistent with the purpose and intent of the MUA-10 zone because 63 acres of the site has a previously approved solar farm on it. COLW does not specifically argue that rezoning the remaining 177 acres is inconsistent with the purpose and intent of the MUA-10 zone.

The purpose statement for the MUA-10 zone has several statements about the purpose of the zone, including:

- To preserve the rural character of various areas of the County while permitting development consistent with the character;
- Preserve and maintain agricultural lands not suited to full-time commercial farming for diversified or part time agricultural uses;
- Conserve open spaces and protect natural and scenic resources; to maintain and improve quality of air, water and land resources;
- Establish standards and procedures for the use of those lands designated for intense development by the Comprehensive Plan;
- Provide for orderly and efficient transition from rural to urban land use.

COLW’s argument has two fundamental flaws. First, COLW does not even attempt to apply DCC 18.136.010 to most of the site; it limits its argument to one 63-acre portion of the larger 240-acre tract.^{Applicant’s footnote 1} Second, COLW’s arguments are backed by nothing other than bare conclusions and unsupported supposition.

Applicant’s footnote 1: The applicant notes that ironically, later in its May 9, 2025 opposition when asserting that the subject site qualifies as agricultural land, COLW advocates that one must take into account the entire site.

COLW’s argument is that rezoning just one part of the site that includes 63 acres is not consistent with the purpose statement. As noted, COLW never tried to address the remaining 177 acres. DCC 18.136.020(B) is specifically directed at the entire subject property. It cannot be applied to isolated portions of an application site. When applied to the entire subject tract, the standard in DCC 18.136.020(B) is satisfied. First, hearings officers in Deschutes County have consistently found that the uses permitted in the MUA-10 zone are rural in nature. LUBA has upheld those findings. See, Applicant’s May 9, 2025 Letter citing File Nos. 247-24-000392-PA, 247-24-000404-PA and Central Oregon LandWatch v. Deschutes County, ____ Or LUBA ____ (LUBA No. 2023-049, Feb. 15, 2024). Consequently, it is appropriate for the Hearings Officer to find that, as applied to the entire site, redesignating the subject site to MUA-10 is consistent with the purpose of preserving the rural character.

Second, rezoning the property to MUA-10 is consistent with preserving land for diversified, part-time agricultural use. Because the minimum parcel size in the MUA-10 zone is 10 acres, it is conducive to creating parcels where owners can more economically maintain small hobby farm operations that require less water, fertilizer, and labor. The application material establishes that the subject site with poor soil and no water is not suitable for any large-scale farming. As the data included in the Amended Burden of Proof Statement (page 23) and Mr. Gallagher’s report illustrate, the cost of conducting such operations outweighs the economic benefits. Permitting smaller parcels where hobby farming can occur is consistent with this element of the purpose statement. Further, the application material demonstrates that there are other MUA-10 parcels that have diversified, small-scale agricultural uses.

Rezoning the property to MUA-10 is consistent with preserving open space and natural resources. For example, the MUA-10 does permit clustering of residential dwellings on parcels smaller than 10 acres. However, that permitted use is also consistent with the purpose statement. A cluster

development requires that 65% of the sites be preserved as open space. Creating such an open space preserves natural features and scenic resources. In turn, the low-intensity development permitted maintains and improves the quality of air, water, and land resources.

Rezoning the land to MUA-10 is consistent with the purpose of establishing standards and procedures for the use of land unsuitable for intense development. DCC 18.32.020 lists the uses permitted outright and they are all low-intensity uses that the county has already deemed consistent with the rural MUA-10 zoning. DCC 18.32.030 lists the conditional uses which can be viewed as being slightly more intense than the permitted uses. The county's conditional use standards ensure that uses conditionally permitted are developed to be compatible with the properties in the area.

Finally, rezoning the subject site to MUA-10 will promote orderly transition to urban use. The subject site is close to the current city limit and in an area of growth. A public street network and other public facilities are close to the property and can be extended to serve it when the city expands east. The subject site is large enough to accommodate annexation and any master planning that is appropriate.

COLW supposes that an existing transmission corridor presents challenges to an attempt to rezone. However, COLW does not link that argument to any specific approval criterion. Many land use proposals come with challenges. The amount of bare land in Deschutes County close to city limits is not increasing. There will be challenges and competing interests. The reality is that there are utilities all over Deschutes County, and in all zones. It is difficult to imagine a site that does not have some utility lines that impact the site. However, a general concern over the existence of utilities is not a basis in the code to deny an application to change a zoning designation. In fact, when one examines COLW's diagrams in its May 9, 2025 letter, particularly Figure 9, the existing transmission lines run north/south through property east of the subject site. Compared to the application material, one can see that the existing transmission lines continue south through a residential development in an MUA-10 zone. That demonstrates that transmission lines are commonplace in our world and not inconsistent with the purpose of the MUA-10 zone; the existence of utilities is not a basis to reject a rezoning request.

In more rank speculation, COLW asserts that there are 'almost certainly additional potential non-conforming structures as DCC 18.32.040(C) prohibits structures from exceeding 30 feet in height within the MUA-10 zone.' Not only is that assertion void of all substance, COLW does not even try to link it to any criterion relevant to the application. How is the current rezoning request going to "potentially" create more non-conforming structures? If the height limit in MUA-10 is 30 feet, there will be no structure approved that is over 30 feet.

COLW further asserts that one can imagine more conflicts because PacifiCorp shows one possible route for a transmission line near the subject tract. Based on the mere possibility of a new transmission line in the area, COLW projects that conflicts are destined to occur. Where is the evidence to support such obvious speculation? As of the time that the Hearings Officer must make a decision, any PacifiCorp transmission line is theoretical.

B. The existence of a non-conforming use does not create an inconsistency with the purpose or intent of a new zone.

On a related point, COLW makes a very confusing non-conforming use argument. In response to a question from county planning staff, the applicant explained that although solar farms are not permitted in the MUA-10 zone, rezoning to MUA-10 is not inconsistent with the MUA-10 zoning standards because the solar farm is a lawfully established use that will continue with non-conforming use rights until redevelopment presents itself. That is not an uncommon situation in any jurisdiction. Indeed, if the existence of non-conforming

use/development was a bar to rezoning, it is hard to imagine cities ever being able to annex property. When property is annexed, it gets a city urban zone. Invariably, there will be older uses/developments that are not in conformance with the new zoning. The fundamental notion embodied in non-conforming use law is that such uses may continue but the long-range goal is to bring such sites into conformity over time. Thus, the existence of a non-conforming use is not an inconsistency that precludes rezoning. It is something that local codes and state law accommodate in the process of rezoning.

COLW tries to twist the applicant's response to have said that the county must approve the rezoning because the solar farm has non-conforming rights. That is entirely not true. That was the situation in Jackson v. Clackamas County, where the petitioner argued that it was entitled to a conditional use permit for a use because that use had lawful non-conforming use rights. The applicant here never asserted that the existence of a non-conforming use entitles it to a rezone. The applicant merely pointed out to staff that approving the rezoning request with a non-conforming use is not inconsistent with any county regulation and is commonplace in most rezoning and annexation actions."

The Hearings Officer finds no argument in the record that disputes the concept that if a zone change is granted that the Solar Array, if confirmed as a legal nonconforming use, would have a legal right to continue. *Holmes v. Clackamas County*, 265 Or 193 (1973) The Hearings Officer finds, however, that Staff is *uncertain* whether the Solar Array can be considered consistent with the purpose and intent of the purpose statement of the MUA10 zone. COLW argued that the Solar Array (if in fact a legal nonconforming use) *cannot* be considered consistent with the purpose and intent of the MUA-10 zone.

Applicant addressed Staff's and COLW's concerns in two ways. First, Applicant addressed the overarching issue of nonconforming uses in the context of zone change applications. Second, Applicant addressed each of the factors set forth in the MUA10 purpose statement.

The Hearings Officer first addresses the overarching issue involving zone change applications where a nonconforming use may exist if the zone change application is approved. Applicant and COLW both cited, in support of their position, *Holmes v. Clackamas County*, 265 Or 193 (1973) and *Jackson v. Bd. Of Cnty. Comm'rs for Clackamas Cnty*, 26 Or App 265 (1976).

COLW included the following excerpt from the *Holmes* Oregon Supreme Court opinion:

"In light of ORS 215.130, DCC 18.120.010, and Oregon Supreme Court precedent, it is not possible to find that rezoning the subject property resulting in an existing use having lawful nonconforming status is inconsistent with the MUA zone. Indeed, there are lawfully established nonconforming uses throughout the county and the state. Each time the city or county rezones property in an area, it is common for there to be uses that become nonconforming. The fact that those uses become lawfully established nonconforming uses does not mean that having such use is inconsistent with the purposes of the new zone. The well-established laws on nonconforming uses that allow them to continue in a new zone are designed to assure consistency with the new zone. If the standard is that a rezoning can only be found consistent with the purpose of the new zone if after the rezoning there are no lawfully established nonconforming uses, it would frustrate the city's ability to rezone property as well. It makes no legal difference whether the County initiates a rezoning, or a property owner exercises their right to request a rezoning. The law on nonconforming rights makes no legal distinction. 2024-5-28 Applicant Response to Issues Letter at p. 4-5."

COLW argued (following the above quote) that "Applicant mistakenly relies upon ORS 215.130(5) that the proposed zone change complies with the requirements of DCC 18.136.020(B)" (footnote omitted). The Hearings Officer finds that COLW mischaracterizes Applicant's argument and the clear and plain language set forth in the

above-quoted section of the *Holmes* Supreme Court decision. The Hearings Officer finds two sentences included in the above-quoted *Holmes* Supreme Court decision are worthy of repeating:

“The fact that those uses become lawfully established nonconforming uses does not mean that having such use is inconsistent with the purposes of the new zone. The well-established laws on nonconforming uses that allow them to continue in a new zone are designed to assure consistency with the new zone.”

The Hearings Officer finds this language is clear and directly on point in this case. The Hearings Officer finds, based upon the *Holmes* Supreme Court case, that the Solar Array if in fact a legal nonconforming use, can be considered consistent with the purpose of the MUA10 zone.

Applicant and COLW also referenced *Jackson v. Bd. Of Cnty. Comm’rs for Clackamas Cnty* in support of their nonconforming use positions. The Hearings Officer, having reviewed the cited *Jackson* opinion and finds that such opinion is not relevant to the nonconforming issue presented in this case.

Both Applicant and COLW addressed the introductory language of DCC 18.136.020 (B) and the purpose statement for the MUA10 zone (See COLW 5/9/2025 submission pages 2-8 and Applicant 5/9/2025 submission pages 2-4, and Applicant 6/2/2025 Final Argument, pages 2-5). Staff also addressed this MUA10 purpose statement in the Staff Report (pages 15-20).

COLW provided the following statement related to DCC 18.136.020 (COLW 5/9/2025 submission, page 2):

“DCC 18.136.020 provides that the applicant for a quasi-judicial rezoning must establish the public interest is ‘best served’ by rezoning the subject property. Use of the word ‘best’ in DCC 18.136.020 means that rezoning of the property should be superior to the existing zoning classification based on the series of factors provided in subsections (A) – (D).”

The Hearings Officer has not addressed COLW’s “best” argument in prior zone change application cases. The Hearings Officer notes that the DCC use of the word “best” in the DCC 18.136.020 introductory language is difficult to harmonize with the language used in each of the “factors” listed in DCC 18.136.020 A., B., C and D. For example, the language in DCC 18.136.020 A and B does not use comparative language (e.g., best or better, etc.). Rather DCC 18.136.020 A and B utilize “consistent with” terminology. Being “consistent” does not imply that the proposed zone classification is somehow “best” or even “better” than the existing zone. The factors listed in DCC 18.136.020 C address adequacy of public services and facilities and impacts on surrounding land uses will be consistent with the Comprehensive Plan. DCC 18.136.020 C, once again, does not imply a comparative standard (e.g. “best” or “better”) but rather requires “adequate” services and a determination that impacts on surrounding uses will be “consistent” with the Comprehensive Plan.

The Hearings Officer, in this case, is asked to interpret the intent of the Deschutes County Commission when drafting DCC 18.136.020; specifically, the import and meaning of the word “best.” The Hearings Officer, takes note of the following two Deschutes County Code sections:

1.04.030 Interpretation Of Language

All words and phrases not specifically defined in this title or elsewhere in this code shall be construed according to the common and approved usage of the words or phrases. However, technical words and phrases and such others as may have acquired a particular meaning in the law shall be construed and understood according to such particular meaning.

1.04.060 General Construction

The ordinances of the County, and all proceedings under them, are to be construed in order to carry out their objectives and to promote justice.

The Hearings Officer finds, strictly from a definitional perspective (common and approved usage), that COLW's interpretation of the word "best" in DCC 18.136.020 is reasonable. However, when considering the Hearings Officer's context comments related to DCC 18.136.020 A., B., C and D the Hearings Officer finds that the word "best" in the introductory language **conflicts** with the language used in each of the relevant factors.

The Hearings Officer finds applying the word "best" (as argued by COLW) would frustrate the clear intention of the Board of County Commissioners adoption of the factors listed in DCC 18.136.020 A, B, C and D. The Hearings Officer finds that following COLW's "best" argument would necessitate replacing the word "consistent" in DCC 18.136.020 A, B and D with the word "best." The Hearings Officer finds following COLW's "best" argument would require a finding that the word "presently" would be replaced with the word "best." The Hearings Officer finds that DCC 136.020 C.1. simply requires a showing that public services and facilities are adequate and presently available. DCC 18.136.020 C.1 does not require a demonstration that changing the zone will result in "better" or "best" public services as compared to the existing zoning. DCC 18.136.020 C.2, once again uses the word "consistent" and not the word "best." The COLW "best" argument is simply irrelevant to DCC 18.136.020 D.

The Hearings Officer finds that for the purposes of this recommendation the term "best" used in the introductory statement to DCC 18.136.020 can be reasonably interpreted to mean that the public interest is "best served" if the proposal meets the factors set forth in DCC 18.136.020 A, B, C and D.

The Hearings Officer finds the evidence set forth in Applicant's final argument (quoted above) is credible and constitutes substantial evidence that the factors set forth in DCC 18.136.020 A., B., C and D are met. The Hearings Officer concurs with Applicant's analysis of the evidence in the context of the factors set forth in DCC 18.136.020.

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 Hearings Officer incorporates the findings for DCC 18.136.020 B set forth above as additional findings for this criterion.

Staff included (Staff Report, pages 17 & 18) the following comments:

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

Necessary public facilities and services are available to serve the subject property. Central Oregon Electric Cooperative, Pacific Power, and Avion Water Company, Inc. currently serve properties in the area and can continue to serve the subject property if rezoned. There is no perceived capacity issue and that can be addressed in future development application if the property is rezoned.

The subject property is located along Highway 20 east of the roundabout in Ward Road/Hamby Road and west of Erickson Road. Neff Road is to the north and Bear Creek Road is to the south, all of which can accommodate added traffic that may result from rezoning. The impact of rezoning the subject property will be extremely minor. With its current zoning, it is theoretically possible to divide the property into 10-

acre parcels. However, with the solar farm on a large part of Tax Lot 100, the amount of property that could be developed with houses in the foreseeable future is much less. The existing road network is available to serve the use. This is confirmed by a transportation system impact review conducted by Scott Ferguson.

The property receives police services from the Deschutes County Sheriff. The southern half of the property is in a rural fire protection district and the nearest fire station is less than one mile away. All of the property is located in the Rural Fire District #2. Access to the subject property by fire trucks is provided by aerial streets. It is efficient to provide necessary services to the property because the property is already served by these service providers and adjacent to large tracts of land zoned MUA-10 that have been extensively developed with rural residences on small lots and parcels.

Adjacent properties include a mix of vacant land, residential development, and utility facilities, and the general surrounding area includes several other public and commercial uses. Neighboring properties are served by wells, on-site sewage disposal systems, electrical service, and telephone service. No issues have been identified in the record regarding service provision to the surrounding area. The southwest corner of the subject property is located 0.26 miles from the City of Bend UGB. This close proximity to urban development will allow for efficient service provision.

There are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare. Prior to development of the properties, the applicant would be required to comply with the applicable requirements of the Deschutes County Code, including possible land use permit, building permit, and sewage disposal permit processes. Through these development review processes, assurance of adequate public services and facilities will be verified. Staff finds this provision is met.”

The Hearings Officer concurs with Staff’s above-quoted comments.

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

FINDING: The Hearings Officer incorporates the findings for DCC 18.136.020 B set forth above as additional findings for this criterion.

Staff included (Staff Report, pages 18 & 19) the following comments:

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

The MUA-10 zoning is consistent with the specific goals and policies in the Comprehensive Plan discussed above. The MUA-10 zoning is the same as the zoning of many other properties in the area of the subject property and is consistent with that zoning.

The only adjoining or nearby lands in farm use is a single property east of Tax Lot 1000. The proposed zone change and plan amendment will impose no impacts on this EFU zoned farmland because these lands are separated from the subject property by a large rock rim and that property is isolated with its own water supply and access. There is smaller scaled farming on discrete parcels in the greater area ancillary to the primary residential use but said farming is so far removed from the subject property, it has no bearing on this application.

In addition to these comments, the applicant provided specific findings for each relevant Comprehensive Plan goal and policy, which are addressed below. Staff finds the applicant has demonstrated the impacts on

surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan, but asks the Hearings Officer to amend or add to these findings as the Hearings Officer sees fit.”

The Hearings Officer concurs with Staff’s above-quoted comments and conclusions. The Hearings Officer finds no need to amend or add to Staff’s comments/findings.

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

FINDING: The Hearings Officer incorporates the findings for DCC 18.136.020 B set forth above as additional findings for this criterion. The Applicant proposed to rezone the properties from EFU to MUA10 and re-designate the properties from Agriculture to Rural Residential Exception Area. The Applicant provided the following response in the submitted burden of proof statement:

“There has been a change in circumstances since the subject property was last zoned and a mistake in designating the subject property EFU/ Agriculture when soils did not merit a designation and protection as ‘Agricultural Land.’ This zone was applied to the property in 1979 and 1980 when Deschutes County adopted zones, a zoning ordinance, and comprehensive plan that complied with the Statewide Goals.

In 1979 and 1980, undeveloped and undeveloped rural lands that contained poor soils, but were zoned EFU without regard to the specific soil characteristics of the property. Landowners were required to apply for a zone change to move their unproductive EFU properties out of the EFU zone. The County's zoning code allowed these owners a one-year window to complete the task. This approach recognized that some rural properties were mistakenly classified as EFU because their soils and other conditions did not merit inclusion of the property in the EFU zone.

Some of the other property owners of lands east of Bend received approval to rezone their properties from EFU to MUA-10 because their properties contained poor soils and were improperly included in the EFU zone. The soils on the subject property are similarly poor and also merits MUA-10 zoning. The NRCS maps and how the County Board has determined they should be used confirm that the subject property is not agricultural land. Since 1979 and 1980, there has been a change of circumstance related to this issue. The County's Comprehensive Plan has been amended to specifically allow individual property owners to have improperly classified land reclassified.

Additionally, circumstances have changed since the property was zoned EFU. The City of Bend has been developed to the east toward the subject property. The Bend Airport has grown significantly in this time period and now provides many aviation-related jobs. The property is located within easy commuting distance of Saint Charles Medical. It has grown significantly and its need for workers has increased. The area now includes large solar farms, churches, a Christian Center, and utility facilities.

Specific to the subject property, Tax Lot 100, which is about 100 acres, has been committed to use as a commercial solar farm. It has been irrevocably removed from farming due to the poor soil and other factors making farming infeasible. The proposed zone change to MUA-10 will not impact that use. Because it was lawfully established on the applicable zoning, pursuant to DCC 18.120.010, that use has the right to continue operating on the subject property. Thus, Tax Lot 100 will never be available for farming alone or in combination with any other parcel. The County should include a finding to this effect.

Since the property was zoned, it has become evident that farm uses are not viable on the property or on other area properties. 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 2022, according to Table 4 of the 2022 US Census of Agriculture, **Exhibit 8**, only 18.6% of farm operators achieved a net profit from farming (293 of 1572 farm operations). In 2017, according to Table 4 of the 2017 US Census of Agriculture, **Exhibit 9**, 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 10**. The number of farms with net losses increase from 1,246 in 2017 to 1,279 in 2022. The vast majority of farms in Deschutes County have soils that is superior to those found on the subject property. As farming on those 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.*

The Hearings Officer incorporates findings for Deschutes County Comprehensive Plan, Goal 2 and the findings for OAR 660-033-0020 as additional findings for this goal.

The Hearings Officer finds, based upon the Applicant's above-quoted Burden of Proof Statement and the record as a whole, that there has been a change in circumstances since the Subject Property was last zoned. The Hearings Officer finds changes in circumstances include the clarification of the correct soil classification of the Subject Property as evidenced by the Red Hills Soils Report and the evolution of development progressing eastward from the City of Bend. Further, based upon Applicant's above-quoted statement the Hearings Officer finds the current Comprehensive Plan and zoning designation were based upon a mistake. The Hearings Officer finds the specific mistake was that the current zoning was selected based upon an incorrect designation of the Subject Property as Agricultural Land. Based upon the Red Hills Soils Report the Subject Property is not Agricultural Land as that phrase is defined in law.

Deschutes County Comprehensive Plan

Chapter 2, Resource Management

Section 2.2 Agricultural Lands

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

FINDING: The Hearings Officer notes that there are numerous relevant goals and approval criteria relating to the preservation and maintenance of Agricultural Lands. The Hearings Officer has attempted to include findings for many of the Agricultural Land criteria issues within the findings for Goal 1. Where appropriate the Hearings Officer incorporates the findings for Goal 1 into the findings for other relevant goals and/or approval criteria.

Applicant provided the following overview of the Agricultural Land issue (Burden of Proof):

"The Applicant presented in the original application that the County's historic reliance on the NRCS mapping for determining whether parcels are comprised predominantly of agricultural land or not. If the NRCS maps are not adequate to make that determination, the County can consider a site-specific soil study prepared by a certified soil scientist. In this matter, the NRCS maps require a finding that the subject property is predominantly not agricultural land.

To supplement the application in this modification request, the Applicant is submitting a detailed report from Red Hill Soils. The report is primary to provide more detail on the composition of the two soil types mapped on the property because each soils type is a complex soil type. The majority of the property is comprised of 58C-Gosney Rock Outcrop-Deskamp complex. The following table from the Red Hills Soils

Report breaks out each soil type found on the subject property. The Red Hill Soils report presents a detailed evaluation of the soil on the subject property accounting for each component in the 58C complex soil type...

The Red Hills Soils Report confirms that the subject property is comprised predominantly of Class 7 and Class 8 soils which are not agricultural land.

The Red Hill Soils Report also evaluated soil fertility concluding that that the soil fertility and productivity are very limiting to crop production. The soil has low fertility, lacking nutrients, and has a limited capacity for retaining water.

The vast majority of the subject property is comprised of Class 7 and Class 8 non-agricultural soils, and the property has no known history of agricultural use. As noted in the Eastside Bend decision, Class 7 and Class 8 soils have severe limitations for farm use as well as poor soil fertility, shallow and very shallow soils, surface stoniness, low available water capacity, and limited availability of livestock forage. According to Agricultural Handbook No. 210 published by the Soil Conservation Service of the USDA, soils in Class 7 ‘have very severe limitations that make them unsuited to cultivation and that restrict their use largely to grazing, woodland, or wildlife.’ Class 8 soils ‘have limitations that preclude their use for commercial plant production and restrict their use to recreation, wildlife, or water supply or to esthetic purposes.’”

Applicant, in its Final Argument, provided the following comments relating the evidence in the record to the relevant Agricultural Land law:

“D. The subject site is not agricultural land under OAR 660-033-0020.

COLW asserts that notwithstanding the NRCS maps and soil data that demonstrates that the property is predominantly not agricultural land, it is suitable for farm use considering the factors in OAR 660-033-0020(1)(a)(B): Soil fertility, Suitability for grazing, Climate Conditions, Existing and future availability of water for farm irrigation, existing land use patterns, technology and energy inputs, and accepted farming practices.

COLW completely ignores a fundamental issue that has been decided against it in prior cases. In applying the factors identified above, it is appropriate for counties to also consider economic factors, particularly the profitability or lack thereof of farming specific property. Wetherall v. Douglas County, 342 Or 666 (2007); Central Oregon LandWatch, et al v. Deschutes County, ___ Or LUBA ___ (LUBA No. 2023-006, July 28, 2023). As LUBA noted in Central Oregon LandWatch v. Deschutes County, ORS 215.203(2)(a) defines farm use as the current employment of land for the primary purpose of obtaining profit in money. The applicant provided data from reliable sources that demonstrates the economic infeasibility of conducting profitable farming on the subject site. The cost to fertilize poor soil, deal with lack of water, and the limited amount of crops that will grow even with those costly measures makes it unreasonable for any owner to expect to make any profit.

COLW also does not effectively address the applicant’s evidence on how the above factors illustrate that the subject site is not agricultural land.

Soil fertility: COLW’s discussion on this topic is more speculation that someone could, in theory, add enough amendments to the soil to improve fertility or make some use of the property that does not require fertile soils. The application demonstrates that one could expect, at best, about \$4,181.40 in annual gross profit from dry grazing. Adding in the cost of amending soil, fertilizer, and other expenses, no reasonable farmer will

attempt to farm the subject property. Further, Mr. Gallagher's professional report explains that the lack of soil fertility makes it impracticable to engage in farm use on the property. As to other farming use activities that may not rely on fertile soil, the applicant used dry grazing because it is anticipated to be the most profitable of all activities. Amended Burden of Proof Statement, p. 22. The suggestion that someone could board horses for a profit is unreasonable. One can imagine the enormous cost of constructing facilities that do not now exist to even begin such an operation. It does not square with the definition of current employment of land for obtaining a profit in money.

Suitability for grazing: Again, the application material and Mr. Gallagher explained in detail why the economics of dry grazing in this area on bad soil is not practicable and economically infeasible. Economic infeasibility is a valid consideration that COLW just ignores. Interesting though, when discussing this element, COLW agrees that the entire subject tract must be evaluated, as the applicant and Mr. Gallagher did. However, when discussing whether a change in the zoning to MUA-10 is consistent with the purpose and intent of that zone, COLW does not address the entire tract.

Climactic conditions: Mr. Gallagher addressed this element in detail, including data from reliable sources. COLW does nothing to refute his conclusions.

Existing and future availability of water for irrigation: COLW did not even address the issue. Mr. Gallagher confirmed what the applicant provided that the property does not have irrigation rights. COLW focuses on whether it is possible to get irrigation equipment on the property. Mr. Gallagher addressed this issue, but the main point is the equipment on the property does nothing without water flowing through it. COLW ignored that aspect altogether.

COLW relies on old photographs that illustrate that up to about 1968, there may have been pocket farming on portions of the subject property. The photographs alone do not establish what activity was being conducted at that time. Moreover, the definition of farm use is the current employment of land for farming activities. ORS 215.203. There is no evidence in the record that there has been any farming conducted in the past 56 years. The material in the application supported by Mr. Gallagher supports a finding that the poor soil, lack of irrigation, and rising cost of farming on dry land made it infeasible to currently conduct any farming on the property.

Existing land use patterns: COLW confirms that to the extent there is any agricultural use in the area, it is isolated to small hobby farms. The application included a detailed chart of the surrounding properties, and which ones had any such activity. The chart confirms that much of the hobby farming is being done on smaller MUA-10 parcels. That fact supports the finding that rezoning to MUA-10 is consistent with the existing land use pattern and consistent with the purpose and intent of the MUA-10 zone.

Technology and energy inputs required: COLW does not address this topic in substance. It does not refute the evidence in the application and the information from Mr. Gallagher that technology will not overcome the fact that the property has shallow soils with abundant rocks and no possibility of irrigation water.

Accepted farming practices: COLW provided nothing beyond its unsupported opinion that "nothing about the subject property indicates that it could not operate with accepted farming practices common in the area." COLW's May 9, 2025 Letter, p. 18. The detailed material in the application and supported by Mr. Gallagher demonstrates that the only large-scale farming practice in the area is irrigated hay production. The application material explains in detail why that cannot be done on the subject property. Mr. Gallagher further explains that the only agricultural use in the area is small-scale farming that can be managed with the limitations posed and is consistent with rezoning. The existing small agricultural uses are largely on MUA-10 property. Rezoning the subject property to MUA-10 will have no negative impact on the continuation of

that activity. In fact, by allowing the creation of 10-acre parcels, rezoning to MUA-10 will afford more opportunities for small-scale farming on parcels that are manageable from a cost/labor standpoint.

E. The subject property is not necessary to permit farming on adjacent land.

The applicant provided detailed information on why the subject property is not necessary to conduct farming on adjacent or nearby properties. Amended Burden of Proof Statement, pp. 25-27. COLW does not dispute that the subject property is not necessary to conduct farming on any of the parcels included in the applicant's charts. Rather, COLW argues that the subject property is necessary to permit farming on a 12-acre parcel adjacent to it at the intersection of Highway 20 and Erickson Road (TL 300). COLW offers no evidence to support that argument but rather provides more subjective opinions. It recites that TL 300 is likely not large enough to support a dryland grazing operation or other farm practices on its own, but it "almost certainly would" be with the subject property. COLW does not offer any explanation for how TL 300 could support a farming operation even if it were used with the subject property. The evidence is to the contrary.

The overwhelming evidence in the application material and supported by Mr. Gallagher proves that dry grazing and other farm operations are not feasible on the subject property. The question that COLW avoids is if the subject property itself is not suitable to support farm operations, how would it be necessary to support farm operations on adjacent property that is also unsuitable for farm practices? Stated otherwise, how would the subject property that is not suitable for farming facilitate farming on the adjacent parcel that COLW agrees is, by itself, not suitable for farming? It is intuitive that if one has 12 acres that is not suitable for farming and one combines it with adjacent property that is also unsuitable for farming, the combined properties are not magically suitable for farming. The subject property is not even a source for access to TL 300. One can easily see from the photographs in the record that it is not even possible to access TL 300 from the subject property due to the location of the solar farm and associated fencing.

COLW, as noted in the above-quoted Applicant comments, argued the Subject Property was properly classified by the NCRS maps as Agricultural Land (COLW, 5/9/2025, pages 10 – 20 and 5/30/2025, pages 6 – 8). COLW asserted that the Red Hills Soil Report omitted the area under the Solar Array during its consideration of the suitability for grazing factor. The Hearings Officer review of the Red Hills Soils Report confirms the area under the Solar Array was not considered in the suitability for grazing analysis. The Hearings Officer responds threefold. First, the Hearings Officer would have preferred the area under the Solar Array to have been included in the suitability for grazing analysis. Second, the Hearings Officer finds that a rational and reasonable inference, based upon evidence contained in the NCRS mapping and the Red Hills Soil Report, may be drawn that suitability for grazing under the Solar Array is functionally the same as the remainder of Subject Property. Third, the Hearings Officer finds no evidence in the record submitted by COLW supporting the proposition that adding the area under the Solar Array to the balance of the Subject Property analyzed in the Red Hills Soils Report would change the Red Hills Soils Report conclusion that the Subject Property is not suitable for grazing.

While the Hearings Officer would have preferred the Red Hills Soils Report consider the entire Subject Property in its suitability for grazing analysis the Hearings Officer finds that omission alone is not sufficient to alter the Hearings Officer's conclusion that the Subject Property is not Agricultural Land.

The Hearings Officer finds that the most persuasive Agricultural Land evidence in the record is the Red Hills Soils Report. The Hearings Officer finds that the Red Hills Soils Report, in addition to other evidence supplied by Applicant into the record, is substantial evidence and justifies the conclusion that the Subject Property is not Agricultural Land.

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 MUA-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 incorporates the findings for the Deschutes County Comprehensive Plan, Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1 as set forth above as additional findings for this policy.

The Applicant requested approval of a plan amendment and zone change to re-designate the Subject Property from Agricultural to Rural Residential Exception Area and rezone the property from EFU to MUA10. 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 defined in Statewide Planning Goal 3 (OAR 660-033-0020).

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

“The Applicant is seeking a comprehensive plan amendment from Agriculture to RREA, and a zone change from EFU-TRB to MUA-10 for non-resource land. This is the same change approved by Deschutes County in the Division of State Lands file PA-11-7 /ZC-11-2. In findings attached, Deschutes County determined that State law, as interpreted in Wetherell v. Douglas County, 52 Or LUBA 677 (2006), allows this type of amendment. LUBA said, in Wetherell 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 used this case as an opportunity to change 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, 343 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. In this case, the Applicant has shown that the subject property is primarily composed of Class VII and VIII non-agricultural soils when irrigated and when not irrigated making farm-related endeavors unprofitable. The property is not currently employed for any type of farm use and has no known history of that use. Accordingly, this application complies with Policy 2.2.3.”

Staff (Staff Report, page 23) generally agreed with Applicant’s above-quoted Burden of Proof statements. Staff (Staff Report, page 23) found that Applicant provided sufficient evidence in the record addressing whether the Subject Property qualifies as non-resource land. Staff concluded that the Applicant “*has the potential to prove the properties are not agricultural land and do not require an exception to Goal 3 under state law.*”

Based upon the incorporated findings, Applicant’s Burden of Proof statements quoted above and Staff’s analysis the Hearings Officer finds this policy can be satisfied.

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 stated (Staff Report, page 23) that it concurred with the County’s previous determinations in plan amendment and zone change applications and concluded that Applicant’s proposal in this case is consistent with this policy. The Hearings Officer agrees with Staff’s analysis and conclusion and finds Applicant’s proposal in this case is consistent with this policy.

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

Policy 2.2.13 Identify and retain accurately designated agricultural lands.

FINDING: The Hearings Officer incorporates the findings for the Deschutes County Comprehensive Plan, Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1 as set forth above as additional findings for this policy.

This plan policy requires the County to identify and retain Agricultural Lands that are accurately designated. The Applicant argued that the Subject Property was not accurately designated as demonstrated. Based upon the incorporated findings found later in this recommendation the Hearings Officer finds this policy can be satisfied.

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 in this application. The Hearings Officer finds that the Applicant is not required to address water impacts associated with development. The Hearings Officer finds that 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 Applicant provided the following response in the submitted Burden of Proof:

“Irrigation is essential for commercial farm use in Central Oregon. Irrigating poor farm ground consumes a large amount of the area's precious water resources without the resulting economic benefits of profitable agricultural production. Homes consume less water than would be needed for farm field irrigation on the subject property.

In its findings in Division of State Land, Deschutes County found that impacts of any proposed future development of the state property on water resources would be reviewed by Deschutes County in future development applications. That finding was sufficient to demonstrate compliance with this plan policy. Together with the findings above and then later review by Deschutes County, this policy is satisfied.”

Staff (Staff Report, page 24) agreed with the Applicant’s above-quoted analysis. Staff (Staff Report, page 24) also provided a portion of the findings from Aceti IV (247-20-000438-PA, 439-ZC). Staff stated that in the Aceti IV decision the Hearings Officer and the Board of County Commissioners (Board) made the following findings which appear to support the Applicant’s analysis:

“The Hearings Officer found in Aceti 1 that this policy is directed at the County. In said decision, the Hearings Officer cited a previous decision of Hearings Officer Green for file nos. PA-14-2 and ZC-14-2 that stated, "Nevertheless, in my decision in NNP I held it is not clear from this plan language what ‘water impacts’ require review -- impacts to water supplies from use or consumption on the subject property, or Impacts to off-site water resources from development on the subject property.’ The Applicant has not proposed any particular land use or development, and any subsequent applications for development of the subject property would be reviewed under the County's land use regulations that include consideration of a variety of on- and off-site impacts.

The Hearings Officer finds it is premature to review "water impacts" because the Applicant has not proposed any particular land use or development. Thus, there are no ‘significant land uses or developments’ that must be reviewed or addressed in this decision. Any subsequent applications for development of the subject property will be reviewed under the County's land use regulations, which include consideration of a variety of on- and off-site impacts. Notwithstanding this statement, the Hearings Officer includes the following findings.

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

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

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

The Hearings Officer finds Staff's reference to *Aceti IV* (quoted above) to be relevant and persuasive. Based upon the Staff's analysis and conclusions and the findings for *Aceti IV* the Hearings Officer finds Applicant demonstrated compliance with this Comprehensive Plan policy.

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 Hearings Officer adopts as additional findings for this policy the findings for Goal 5 (including analysis of Applicant's submitted ESEE). Staff (Staff Report, pages 25 & 26) stated that these policies are fulfilled by the County's Goal 5 program. Staff stated that the County protects scenic views and sites along major rivers and roadways by imposing Landscape Management (LM) Combining Zones to adjacent properties. A portion of the Subject Property is located within the LM associated with Highway 20.

Staff (Staff Report, page 25) noted in *Te Amo Despacio*, File 24 7-22-000313/314 that the standards and requirements of that overlay can be implemented at the time of any future development. The Hearings Officer finds that these provisions of the plan are not impacted by approval of the proposed zone change and plan amendment.

Chapter 3, Rural Growth

Section 3.2, Rural Development

Growth Potential

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

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

FINDING: 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:

"This part of the Comprehensive Plan is not a relevant approval criterion for a plan amendment and zone change application. Instead, it is the County's assessment of the amount of population growth that might occur on rural residential lands in the future based on its understanding of the types of changes allowed by law. Comprehensive Plan Policy 2.2.3 specifically authorizes rezoning and comprehensive plan map amendments for any property zoned EFU and is the code section that defines the scope of allowed zone changes.

This section makes it clear, however, that EFU zoned land with poor soils adjacent to rural residential development is expected to be rezoned for rural residential development during the planning period. The subject property has extremely poor soils that does not qualify as agricultural land that must be protected by Goal 3. The subject property is sandwiched between large areas recently rezoned to MUA-10 to the west and MUA zoned property to the east. Most of the intervening EFU land interspersed is committed to rural residential uses. There is a single active farming operation in the immediate vicinity. The property east of Erickson Road is developed with single-family homes.

The MUA-10 zone is a rural residential zone. It will provide for an orderly and efficient transition from rural to urban land use as intended by the purpose of the MUA-10 zone. As a result, rezoning the subject property MUA-10 is consistent with Section 3.2.”

Staff provided (Staff Report, pages 26 & 27) the following comments related to this section:

“Staff notes that the MUA10 Zone is a rural residential zone and as discussed in the Findings of Fact above, adjacent properties to the north, northwest, and southwest are zoned MUA10. One of these surrounding MUA10 properties has received approval for a Comprehensive Plan Amendment and Zone Change to change the zoning of the property from EFU to MUA10. This property is identified on Assessor’s Map 17-12-35 as Tax Lot 1600, and is located adjacent to the subject property, to the west of Tax Lot 900. Staff notes this policy also references the soil quality, which staff discusses in more detail below. Staff is uncertain if this policy is met by the available information in the record and requests the Hearings Officer make specific findings on this topic.”

The Hearings Officer agrees with Applicant that this part of the Comprehensive Plan is not a relevant approval criteria. The Hearings Officer finds the language in this section is purely aspirational and provides no clear and objective standards which must be met by an applicant for a plan and zone change. The Hearings Officer finds the aspirational issues raised by this section are addressed throughout this recommendation.

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:

“Staff and the County Board have conformed in prior decisions that the quoted language is part of the background text of the County's Comprehensive Plan. It is not a plan policy or directive, and it is not an approval standard for this application. Staff made this point in (Porter Kelly Burns). County zone change and plan amendment use decisions adopted by the Board of Commissioners have so found.”

The Applicant also provided an alternate argument that applying the RREA Comprehensive Plan designation to the subject property does not require an exception to a Statewide Planning Goal, even if this policy were interpreted as an approval criterion.

Staff (Staff Report, page 27) stated that it agreed with prior Deschutes County Hearings Officer interpretations and concluded that the above language in this section is not a policy and does not require an exception to the applicable Statewide Planning Goal 3. The Applicant provided evidence in the record addressing whether the property qualifies or does not qualify as agricultural or forest land. Staff asks the Hearings Officer to make specific findings related to this language.

The Hearings Officer concurs with Applicant and Staff that the language in this section is not an independent relevant approval criterion. In the alternative, the Hearings Officer incorporates the findings for the Deschutes County Comprehensive Plan, Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1 as set forth above as additional findings for this policy. The Hearings Officer finds, based upon the incorporated findings and findings found throughout this recommendation, that the Subject Property does not meet the definition of Agricultural Land.

Section 3.7, Transportation

Appendix C – Transportation System Plan ARTERIAL AND COLLECTOR ROAD PLAN

...

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

...

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

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

OREGON ADMINISTRATIVE RULES CHAPTER 660, LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

Division 6, Goal 4 – Forest Lands

OAR 660-006-0005, Definitions

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

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

FINDING: The Subject Property is not zoned for forest lands, nor are any of the properties within a 4.5-mile radius. The Subject Property does not contain merchantable tree species and there is no evidence in the record that the Subject Property has been employed for forestry uses historically. The Hearings Officer finds this section is not relevant/applicable because the Subject Property is not “forest land.”

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

OAR 660-015-0000(3)

To preserve and maintain agricultural lands.

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

FINDING: Goal 3 defines Agricultural Land, which is repeated in OAR 660-033-0020(1). The Hearings Officer incorporates the findings for the Deschutes County Comprehensive Plan, Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1 as set forth above as additional findings for Goal 3, OAR 660-015-0000(3).

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 Oregon²;

FINDING: The Hearings Officer incorporates the findings for the Deschutes County Comprehensive Plan, Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1 as set forth above as additional findings for this section. The Hearings Officer also incorporates as additional findings for this section the Preliminary Findings for Certification of Soils Report (III.A.2).

The Red Hills Soils Report included the following conclusion language:

“The NRCS WEBSOILSURVEY shows the subject property is predominantly non-high value farmland, Class 7 and 8 and does not meet the definition of 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.”

As noted in prior findings the Hearings Officer finds the Red Hills Soils Report to be prepared by a qualified professional soil scientist. The Hearings Officer finds the Red Hills Soils Report is credible and persuasive evidence. Based upon the incorporated findings and the Red Hills Soils Report the Hearings Officer finds the

² OAR 660-033-0020(5): "Eastern Oregon" means that portion of the state lying east of a line beginning at the intersection of the northern boundary of the State of Oregon and the western boundary of Wasco County, then south along the western boundaries of the Counties of Wasco, Jefferson, Deschutes and Klamath to the southern boundary of the State of Oregon.

Subject Property is made up of predominately NCRS Class 7 and 8 soils. Considering all relevant factors, including the soil characteristics, the Hearings Officer finds the Subject Property is not Agricultural Land as defined by relevant laws/regulations.

- (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 Hearings Officer incorporates the findings for the Deschutes County Comprehensive Plan, Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1 as set forth above as additional findings for this section. The Hearings Officer also incorporates as additional findings for this section the Preliminary Findings for Certification of Soils Analysis (III.A.2).

Staff concluded its findings for this criterion by stating:

“Staff agrees with the applicant that many of the factors surrounding the subject property – such as level of development in the surrounding area, soil fertility, and amount of irrigation required result in a relatively low possibility of farming on the subject property. Staff requests the Hearings Officer make specific findings on this issue.”

The Hearings Officer responds to Staff’s quoted request for “specific findings on this issue” by stating that the Hearings Officer, based upon the incorporated findings and the Red Hills Soil Report, finds that Applicant considered and addressed each of the factors set forth in the criterion with substantial credible evidence. The Hearings Officer finds that based upon the incorporated findings and the Red Hills Soil Report that each of the relevant factors set forth in this criterion was adequately considered and addressed.

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

FINDING: The Applicant offered the following response in its submitted Burden of Proof statement:

“The subject property is not land necessary to permit farm practices to be undertaken on adjacent or nearby lands. The following facts are shown by the Applicant's discussion of surrounding development in Section E of this application above, and by the additional information provided below.”

The submitted Burden of Proof also included the following summary of all EFU-zoned properties within an area of approximately one mile of the subject property.

“West: Properties to the west of the subject property, with one exception, are separated from the subject property by Ward/Hamby Roads. The road makes it infeasible to use the subject property for farm use in conjunction with these properties and much of that property was recently rezoned to MUA-10 (Marken Trust, East Bend LLC, and Te Amo Despacio). Additionally, the subject property is not necessary to permit farm practices to be undertaken on adjacent or nearby lands to the west. There is no recent history of farming on properties to the west.

ADJOINING PROPERTIES SOUTH OF PROPERTY

Tax Lots 900 and 1000 abut Bear Creek Road. The property south of Bear Creek Road is within Dobbin Estates, an approved residential subdivision. There is no farming or potential for farming on that property.

FARM PROPERTIES NEARBY TO WEST, SOUTH AND SOUTHWEST, AND NORTHWEST OF ADJOINING PROPERTIES

North: *Most of the land north of the subject property is privately owned and currently used for institutional purposes and commercial enterprises. There are several large solar farms, a church, a Christian center, and an electric power facility. Further to the northeast is Big Sky Park. Any farming is far to the north, a significant distance from the subject property. Moreover, it is separated physically from the subject property by Highway 20, other major roads, and intervening non-farm uses making it infeasible to farm with the subject property.*

East: *The non-adjacent property to the east of Tax Lots 900 and 1000 is primarily devoted to large acre residential uses and hobby farms. In light of the many surrounding non-farm uses that have been in existence for years and the amount of MUA-10 zoned property in the area already, rezoning the subject property will not impact farming on that parcel. The properties east of Tax Lots 100, 300, and 400 are primarily MUA zoned large estate properties that are not used in farming operations and are separated by Erickson Road.*

South: *The property south of Tax Lots 300, 400, and 100 is either part of the subject property or the property described above. As discussed earlier, the property south of Tax Lots 900 and 1000 are part of a platted residential subdivision. Rezoning the subject property to MUA-10 will not impact farming on any of that property.”*

Pages 26 to 27 of the Burden of Proof include tables that list surrounding properties and include information on potential farm uses. These tables provide detailed information on the existing surrounding uses, potential farm practices, and reasons why they do not require the subject property to operate. Applicant also addressed this criterion/standard in its Final Argument (June 6, 2025, page 9).

Staff (Staff Report, pages 33 & 34) addressed this criterion/standard as follows:

“Staff agrees 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 discussed in the Findings of Fact section above, or the larger area more generally. This finding is based in part on poor quality, small size, and existing development on surrounding EFU and MUA10 properties. If the Hearings Officer disagrees with Staff’s assessment, Staff requests the Hearings Officer make specific findings on this issue.”

The Hearings Officer does not disagree with Staff’s above-quoted assessment. The Hearings Officer, based upon the incorporated findings, the Red Hills Soil Report and Applicant’s final argument statements finds that the Applicant adequately address and consider the factors listed in this criterion/standard and that the conclusion reached that the Subject Property is not Agricultural Land is reasonable and appropriate.

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

FINDING: The Applicant provided the following response in its Burden of Proof:

“The subject property is not and has not been a part of a farm unit. It has not been farmed. As a result, this rule does not apply to the County's review of this application.

Even if the subject property is considered to be a ‘farm unit’, despite the fact it has never been farmed, Goal 3 applies a predominant soil test to determine if a property is ‘agricultural land.’ The predominant soils classification of the subject property is Class VII and VIII which provides no basis to inventory the property as agricultural land, unless the land is shown to be, in fact, productive farmland.

As confirmed by the accepted soils maps, the predominant soil types found on the property are Class VII and VIII, non-agricultural land. Some Class VI soils are intermingled with the non-agricultural soil, not vice versa. As a result, this rule does not require the Class VII and VIII soils to be classified agricultural land.”

Applicant also included comments related to this criterion/standard in its Final Argument (page 9). The Hearings Officer finds the Applicant’s above-quoted comments, its Final Argument statements and the Red Hills Soils Report to be credible and persuasive evidence and argument. The Hearings Officer finds, based upon evidence contained in the Applicant’s Burden of Proof, its Final Argument comments and the Red Hills Soil Report, that Applicant considered and provided substantial evidence that it considered (inventoried) adjacent properties in the context of this criterion/standard.

(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 Hearings Officer incorporates the findings for the Deschutes County Comprehensive Plan, Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1 as set forth above as additional findings for this section. The Hearings Officer also incorporates as additional findings for this section the Preliminary Findings for Certification of Soils Analysis (III.A.2).

The Applicant argued that the Subject Property is not Agricultural Land, as referenced in OAR 660-033-0030(1) above, because of the existence of barriers for farm use including poor quality soils and the development pattern of the surrounding area. The Hearings Officer finds that Applicant adequately addressed OAR 660-033-0030(2) by submitting substantial evidence addressing the factors set forth in the findings of OAR 660-033-00020(1), including OAR 660-033-0020(1)(a)(b) in findings above. The Hearings Officer incorporates the findings for OAR 660-033-00020(1), including OAR 660-033-0020(1)(a)(b) as findings for this criterion/standard.

The Hearings Officer, based upon the incorporated findings, the Red Hills Soil Report and Applicant's Final Argument statements, finds that this criterion was adequately considered and addressed and that the Subject Property is not Agricultural Land and is also "not suitable for farm use."

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

FINDING: The Hearings Officer incorporates the findings for the Deschutes County Comprehensive Plan, Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1 as set forth above as additional findings for this section. The Hearings Officer also incorporates as additional findings for this section the Preliminary Findings for Certification of Soils Analysis and the findings for OAR 660-033-00020(1), including OAR 660-033-0020(1)(a)(b).

The Hearings Officer finds that Applicant provided in the record substantial evidence showing the Subject Property is not Agricultural Land, is not "suitable for farm use" and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands. The Hearings Officer finds that the ownership of the Subject Property was not used to determine whether the parcel is Agricultural Land.

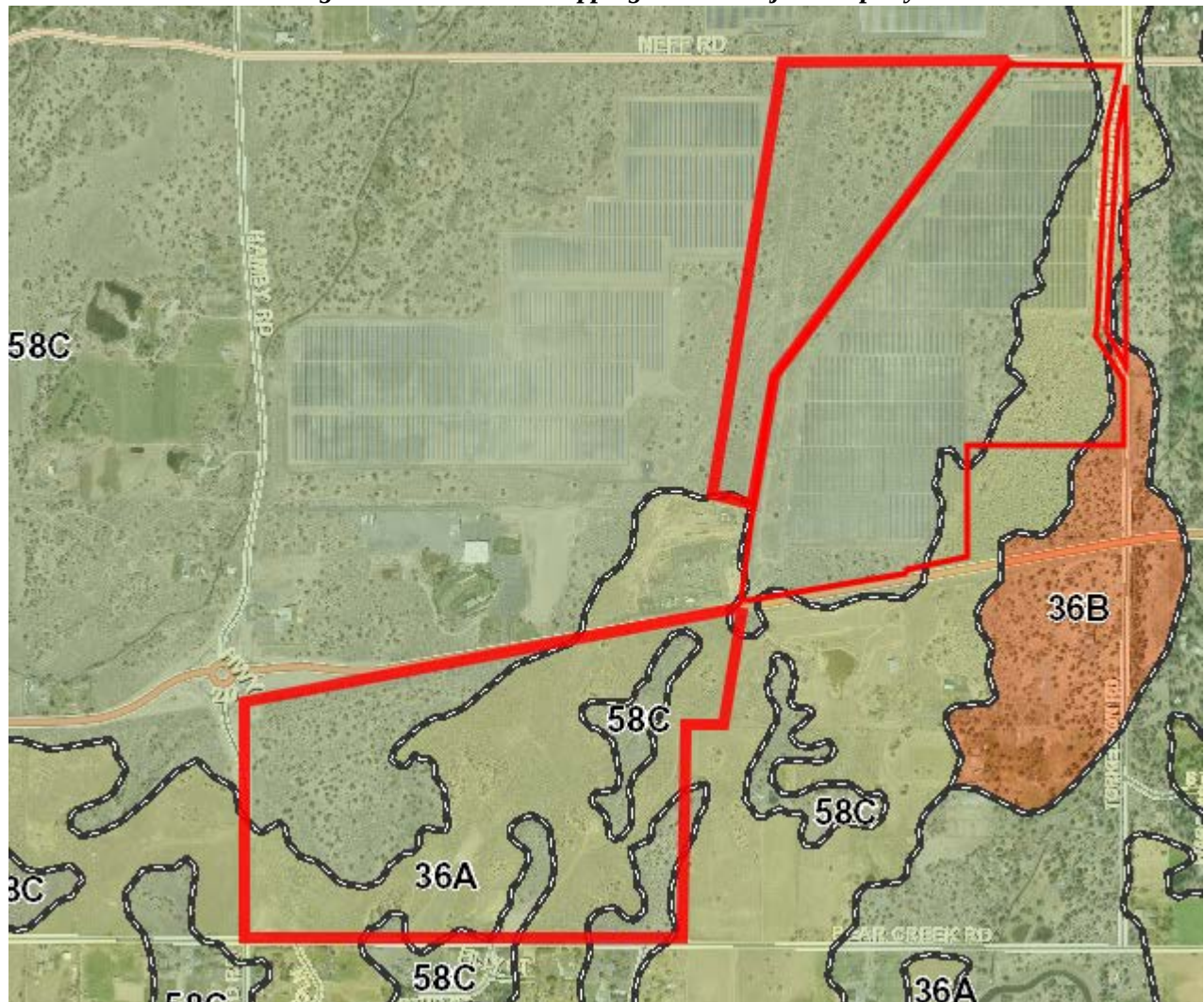
- (5)(a) *More detailed data on soil capability than is contained in the USDA Natural Resources Conservation Service (NRCS) soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the NRCS land capability classification system.***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

FINDING: The Hearings Officer incorporates as additional findings for this section the Preliminary Findings for Certification of Soils Analysis (III.A.2). The Hearings Officer finds that based on the incorporated Preliminary Findings COLW's issue with this section is adequately addressed. However, as additional findings for this criterion the Hearings Officer adopts the following Staff comments (Staff Report, pages 36 - 29).

"The soil study prepared by Mr. Gallagher provides more detailed soils information than contained in the NRCS Web Soil Survey. NRCS sources provide general soils data for large units of land and provide a Land Capability Classification (LCC) system that classifies soils class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS, and the soil units that are mapped on the subject property are complexes made up of soils with various LCC ratings.

The NRCS mapping for the subject properties is shown below in **Figure 1**. According to the NRCS Web Soil Survey tool, the subject property contains approximately 80 acres of soil unit 36A, 0.6 acres of soil unit 36B, and 160 acres of soil unit 58C.

Figure 1: NRCS Soil Mapping on the Subject Property



The submitted soil study does not dispute the NRCS soils map for the subject property, or provide updated mapping. Instead, the soil study provides a methodology for calculating the LCC rating for the complex soil units identified within the subject property.

Table 1: Composition of Soil Types within Subject Property

Table 3. Coverage of soils after distributing weighted amounts of 58C by Capability classification.

Map Symbol	Map Unit Component	High-value Farmland Status	Agricultural lands	Nonirrigated Capability Class	Acres NRCS soil map by unit	Coverage
						-%-
36A, 36B	Deskamp	N (not irrigated)	Yes	6	115	48
58C	Gosney	N	No	7	83	35
58C	Rock outcrop	N	No	8	42	17
	Total				240	100

The soil study included the following conclusion regarding the productivity of soils within the subject property:

The NRCS WEBSOILSURVEY shows the subject property is predominantly non-high value farmland, Class 7 and 8 and does not meet the definition of 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.

The soil study applies a weighted average methodology to calculate the LCC rating of the 58C soil unit, Gosney-Rock outcrop- Deskamp Complex, which comprises the majority of the subject property. As described above, this soil unit is a complex and may contain both high value soils and non-high value soils. Mr. Gallagher applied information from the NRCS, which estimates the following amount of Class 6, Class 7, and Class 8 soils within this complex:

The NRCS gives percentages of three of the main components of this map unit as 50 percent Gosney (Class 7) 25 percent rock outcrop (Class 8) and 20 percent Deskamp (Class 6 and high value). NRCS includes five percent unspecified contrasting soils in the map unit composition. In my acreage calculations the unspecified five acres were equally divided between class 6, 7 and 8 soils.

In his report, Mr. Gallagher utilizes the information provided by NRCS on the typical composition of the 58C soil unit. He multiplies the 160 acres of 58C soils by the percentage of Class 6, 7, and 8 soils within the 58C soil unit. This information appears to be based on general information provided by NRCS on the composition of the 58C soil unit and is not specific to the subject property.

The applicant cites the Board of County Commissioners decision for file PA-11-7, ZC-11-2 (Department of State Lands) in support of this methodology³. In this prior Zone Change decision, testimony was provided by staff from NRCS and a weighted average was presented as one of three potential methodologies for calculating the LCC ratings within a complex soil unit. In the Department of State Lands decision, the Board found that they had discretion to choose any of the three methodologies to determine whether the soils on the property qualified as ‘agricultural land.’ Staff requests the Hearings

³ Staff references a letter from the Applicant dated May 28, 2024.

Officer make specific findings on this issue and determine whether the proposed methodology is consistent with OAR 660-033-0030.”

The Hearings Officer finds that the Red Hills Soil Report was prepared by a certified soil scientist. As such, the Hearings Officer finds that the author of the Red Hills Soil Report is a duly recognized expert in the soil science field. The Hearings Officer also finds that COLW offered no evidence from a soil scientist. Rather, COLW soils arguments were presented by a staff attorney who did not provide the Hearings Officer any evidence he was trained or experienced as a soil scientist. The Hearings Officer, comparing the testimony of the Applicant’s recognized soil scientist and the testimony presented by COLW, finds that the testimony of the Applicant’s soil scientist is significantly more credible and persuasive than the statements and opinions offered by COLW. The Hearings Officer also represents that he is not a professionally trained soil scientist and therefore finds that he must rely upon the professional opinions to determine appropriate methodologies to assess the factors required in OAR 660-033-0030. The Hearings Officer finds that there is simply no substantial and credible evidence in the record to dispute the methodologies used in the Red Hills Soil Report.

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

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

FINDING: The Hearings Officer incorporates the findings for the Deschutes County Comprehensive Plan, Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1 as set forth above as additional findings for this section. The Hearings Officer also incorporates as additional findings for this section the Preliminary Findings for Certification of Soils Analysis (III.A.2) and the findings for OAR 660-033-00020(1), including OAR 660-033-0020(1)(a)(b).

The Applicant requested approval of a non-resource plan designation on the basis that the Subject Property is not Agricultural Land as that phrase is defined by relevant laws/rules. The Hearings Officer finds, based upon the incorporated findings, that this criterion/standard is satisfied.

(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 as additional findings for this section the Preliminary Findings for Certification of Soils Analysis (III.A.2).

(Staff Report, page 39) provided the following comments related to this criterion/standard:

“The applicant did not submit acknowledgement from Department of Land Conservation and Development (DLCD) that the soil study is complete and consistent with DLCD’s reporting requirements. However, it is not apparent to staff whether a DLCD completeness review is required for this soil study, since it expands on the NRCS soil map but does not include a full on-site assessment. The applicant relies on the soils report from Mr. Gallagher to determine whether the subject property consists predominantly of Class 1-6 soils. As described below, staff requests the Hearings Officer make specific findings regarding the submitted soil study and whether it has been correctly applied in the context of this section.”

The Hearings Officer, based upon the incorporated findings, finds that the Red Hills Soil Report is not a “soil assessment” as referenced in this criterion.

- (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 the Deschutes County Comprehensive Plan, Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1 as set forth above as additional findings for this section. The Hearings Officer also incorporates as additional findings for this section the Preliminary Findings for Certification of Soils Analysis (III.A.2) and the findings for OAR 660-033-00020(1), including OAR 660-033-0020(1)(a)(b).

Staff (Staff Report, pages 39 & 40) provided the following comments related to this criterion/standard:

“Based on the information above, it is not clear to staff if the submitted soil study was prepared according to the procedures set forth in OAR 660-033-0045. Staff requests the Hearings Officer make findings regarding the submitted soil study, and whether it provides sufficient information to determine the percentage of the subject property that is comprised of Class 7 and Class 8 soils.”

The Hearings Officer finds that the Red Hills Soil Report was prepared by a certified soil scientist and utilized methodologies consistent with professional standards. The Hearings Officer finds the Red Hills Soil Report is not a “soil assessment” as described in OAR 660-033-0030 and was prepared consistent with OAR 660-033-0045.

DIVISION 12, TRANSPORTATION PLANNING

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

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

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

FINDING: This above language is applicable to the proposal because it involves an amendment to an acknowledged comprehensive plan. The proposed plan amendment would change the designation of the Subject Property from AG to RREA and change the zone from EFU to MUA10. The Applicant is not, as part of this current application, proposing any land use development of the Subject Property.

The Applicant submitted a Transportation Planning Rule (“TPR”) assessment (Exhibit 12, dated February 2, 2024) prepared by Scott Ferguson of Ferguson and Associates, Inc. As noted in the agency comments section above, the County Transportation Planner identified deficiencies with the submitted TPR analysis and requested additional information. Specifically, the County Transportation Planner requested additional information to allow a determination as to whether the proposal would have a significant effect on transportation facilities. The Applicant then submitted a revised TPR analysis dated February 28, 2025, prepared by Scott Ferguson, PE, of Ferguson and Associates, Inc.

The revised TPR assessment was reviewed by the County Transportation Planner, who agreed with the report’s methodologies and conclusions. The Hearings Officer finds that the proposed plan amendment and zone change will be consistent with the identified function, capacity, and performance standards of the County’s transportation facilities in the area. The Hearings Officer finds 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. Regarding the TPR analysis dated February 28, 2025, the County Transportation Planner provided the following comments in an email dated March 5, 2025:

“...The revised analysis provides updated information related to the total ~240.17 acres of subject property. The full build-out scenario included in the revision (considering redevelopment of the existing solar farm portions of the subject property) aligns with staff’s comments from 6/11/24. The report’s inclusion of modified acreage and assumed development credit for one existing single-family dwelling complies with additional comments from staff’s 6/11/24 email correspondence regarding the MUA10 Zone’s worst case scenario analysis. I agree with the assumptions, methodologies, and conclusions outlined in the revised analysis.”

Based on the County Senior Transportation Planner’s comments and the revised traffic study from Ferguson and Associates, Inc., the Hearings Officer finds compliance with the Transportation Planning Rule has been effectively demonstrated.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

FINDING: The Statewide Planning Goals and the Applicant’s proposed findings are set forth 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, so Goal 3 does not apply.

Goal 4, Forest Lands. The existing site 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 ‘[w]here ****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.

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 cause a measurable impact on Goal 6 resources. Approval will make it more likely that the irrigation and pond water rights associated with the property will ultimately be returned to the Deschutes River or used to irrigate productive farm ground found elsewhere in Deschutes County.

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

Goal 8, Recreational Needs. This goal is not applicable because the property is not planned to meet the recreational needs of Deschutes County residents and does not directly impact areas that meet Goal 8 needs.

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 impact 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. 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. Utility service providers have confirmed that they have the capacity to serve the maximum level of residential development allowed by the MUA-10 zoning district.

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 in a part of the community that contains a large amount of rural residential development. 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.*

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

Goal 15, Willamette Greenway. *This goal does not apply because the subject property is not located in the Willamette Greenway.*

Goals 16 through 19. *These goals do not apply to land in Central Oregon.”*

Staff (Staff Report, page 43) provided the following comments:

“Staff generally accepts the applicant’s responses and finds compliance with the applicable Statewide Planning Goals has been effectively demonstrated. However, staff notes additional analysis may be required regarding Goal 5, Natural Resources, Scenic and Historic Areas and Open Spaces. A portion of the subject property is located within the Landscape Management Combining Zone associated with Highway 20, and this scenic corridor is identified in the County’s Goal 5 inventory.

The Board decision for Deschutes County files 247-22-000573-ZC, 574-PA included the following findings:

Pursuant to 660-023-0250(3), the county does not have to apply Goal 5 as part of a Post Acknowledgement Plan Amendment (‘PAPA’) unless the PAPA affects a Goal 5 resource. Pursuant to OAR 660-023-250(3)(b), a PAPA affects a Goal 5 resource if the PAPA would allow new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list. In this case, the Goal 5 resource is the Highway 97 scenic corridor.

In the decision for files 247-22-000573-ZC, 574-PA, the Board ultimately determined that the proposed Zone Change would not require a new Economic, Social, Environmental, and Energy (ESEE) analysis. The Board found that the ESEE analysis that established the Highway 97 scenic corridor considered a wide range of potential uses, and the change in zoning from EFU to Rural Industrial would not introduce new conflicting uses. The applicant has not submitted specific arguments regarding whether the proposed MUA10 zoning would allow new, conflicting uses within the Landscape Management Combining Zone associated with Highway 20. Staff requests the Hearings Officer make findings on whether the applicant has sufficiently demonstrated compliance with Statewide Planning Goal 5.”

The Applicant provided (May 9, 2025 submission, pages 7 – 11 [plus an attached ESEE analysis]) a general response to Staff’s above-stated Statewide Goals and a specific response to Staff’s ESEE concerns. The Hearings

Officer finds it is important to include, within this recommendation, the entirety of Applicant's May 9, 2025 statement related to Statewide Goals. Applicant, in the May 9, 2025 submission, stated:

“OAR 660-015-0010, Statewide Planning Goals and Guidelines

A. Statewide Planning Goals

On pages 32 and 33 in the Burden of Proof, the applicant discussed each of the applicable Statewide Planning Goals. Neither County staff nor any public participant provided any contrary position. Thus, the applicant will not address each of the Goals again in this letter but will discuss the two that appear most prominent in prior similar applications.

Goal 14-Urbanization: Goal 14 addresses how counties must evaluate urban uses on rural land. Goal 14 does not apply to this application and an exception to it is not required because the County has consistently determined that the uses allowed in the MUA-10 zone are not urban uses. See File 247-24-000392-PA/393-ZC. As the hearings officer in that case noted, LUBA had accepted the County's determination. *Central Oregon LandWatch v. Deschutes County*, __ Or LUBA __ (LUBA No. 2023-049, Feb. 15, 2024). This Hearings Officer made the same finding in File 247-24-000404-PA/000405-ZC.

The recent decision in Department of Land Conservation and Development v. Clackamas County, 335 Or App 207 (2024), does not impact the County and LUBA's conclusion. That case involved the regulation that applies to amendments to properties already within a residential exception area reducing parcel size from 10 acres to two acres. The applicant understands that this issue was addressed in File 247-24-000404-PA/000405-ZC.

Goal 5-Natural Resources, Scenic and Historic Areas, and Open Spaces: As County staff noted, there is one Goal 5 resource on the subject property—a scenic corridor subject to the LM Overlay. The County conducted its Goal 5 assessment in 1992. The LM Combining Overlay was implemented to achieve consistency with Goal 5. However, in a recent hearings officer decision involving Cascade Academy, a hearings officer applied a recent LUBA decision to conclude that because a change to MUA-10 zoning allows uses on the property that would not necessarily been considered then, a new ESEE and analysis is required.

OAR 660-023-0250:

(3) Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:

(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;

(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or

(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.

The applicant believes that the County is not required to apply Goal 5 to this application because uses allowed in the requested MUA-10 zone will not conflict with the Goal 5 resources identified. First, the uses allowed in the MUA-10 zone are rural, low-intensity uses that leave ample opportunity to preserve any scenic view from Highway 20 that may exist. Second, development allowed under the MUA-10 zone reviewed for consistency with the LM standards will not have any negative impact on the view from Highway 20. Indeed, even the formal agency comment from DLCD questioned the need for any new ESEE evaluation in this application.

However, to the extent the applicant must address Goal 5, the applicant will demonstrate how the Goal 5 considerations in the OARs support a decision by the County to allow conflicting uses to compel a conclusion that to the extent the MUA-10 zone allows for conflicting uses, those uses should be allowed in a limited manner after the application of all applicable development standards in Chapter DCC 18.032 and the LM Overlay.

Impact of the Board's decision on File 247-21-00081-PA/247-21-000882-ZC (LBNW LLC)

The Board's recent decision in the above file is instructive and should guide the Hearings Officer here. In that decision, the County Board explained in detail how the County applies the Goal 5 conflicting use analysis.

OAR 660-23-0030-Inventory Process

In LBNW, LLC, the Board determined that the inventory process required under this rule does not have to be completed for a PAPA zoning amendment. The County may rely on the existing inventory. As noted, the existing inventory identifies a single resource-the scenic corridor.

OAR 660-023-0040-ESEE Decision Process

OAR 660-023-0040 describes the process for evaluating potentially conflicting uses.

OAR 660-023-0040(1):

(1) Local governments shall develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. This rule describes four steps to be followed in conducting an ESEE analysis, as set out in detail in sections (2) through (5) of this rule. Local governments are not required to follow these steps sequentially, and some steps anticipate a return to a previous step. However, findings shall demonstrate that requirements under each of the steps have been met, regardless of the sequence followed by the local government. The ESEE analysis need not be lengthy or complex but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected. The steps in the standard ESEE process are as follows:

- (a) Identify conflicting uses;*
- (b) Determine the impact area;*
- (c) Analyze the ESEE consequences; and*
- (d) Develop a program to achieve Goal 5.*

(a) Identify conflicting uses;

Consistent with the decision in File 247-21-000881-PA/247-000882-ZC, the potentially conflicting uses

are those uses permitted outright or conditionally in the proposed MUA-10 zone. DCC 18.32.020 lists the outright permitted uses. Some uses present no conflict such as agriculture uses and propagation of forest products. Some of the more common uses are large acre residential developments, accessory dwellings, equestrian/horse facilities, home occupations, irrigation systems, and road projects.

DCC 18.32.030 identifies the conditional uses permitted in the MUA-10 zone. They include commercial activities in conjunction with farm use, dude ranches, guest houses, private parks/playgrounds, personal use landing strips, golf courses planned development, and cluster developments.

(b) Determine impact area;

For the Scenic LM resource, the impact area is portions of Tax Lots 900, 1000, 100, and 400 within .25 miles of the centerline of Highway 20.

(c) Analyze the ESEE consequences;

The applicant included a chart that presents the required ESEE analysis in a simple, short manner as allowed under OAR 660-023-0040(1). There is no requirement that an applicant has the analysis prepared outside. Further, OAR 660-004-0040(4) directs that the County adopt the ESEE analysis. The rules permit an applicant to present its information on the consequences and the County Board is allowed to accept, reject, or supplement those during the review process. The applicant's chart allows the County to make any required findings to support the application for Goal 5 considerations.

The applicant submits that another factor to consider, as was the case in File 247-21-000881-PA/882-ZC, is that as to the property north of Highway 20, the impact area has already been developed with uses at least as intense and impactful as the conflicting uses allowed under the MUA-10 zoning that the applicant requests. There is a church, a Christian Life Center, a PGE service building, and a large solar farm. Any additionally approved uses will not have any further appreciable impact on that side of Highway 20.

(d) Develop a program to achieve Goal 5.

The County, after completing its ESEE consideration process, has three options for treating conflicting uses.

(a) A local government may decide that a significant resource site is of such importance compared to the conflicting uses, and the ESEE consequences of allowing the conflicting uses are so detrimental to the resource, that the conflicting uses should be prohibited.

(b) A local government may decide that both the resource site and the conflicting uses are important compared to each other, and, based on the ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent.

(c) A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided, as per subsection (b) of this section.

The applicant submits that based on the ESEE considerations, the County should find that both the scenic resource and the conflicting uses allowed in the MUA-10 zone are important to each other and that conflicting uses should be allowed in a limited manner that protects the resource site to the extent desired. In other words, the applicant advocates for the middle ground in the above regulation.

Conflicting uses should be allowed only after the application of the development standards in DCC Chapter 18.32 and the LM Overlay to ensure protection of any scenic resource.”

The Hearings Officer finds Applicant’s above-quoted statement, along with the ESEE Analysis attached to the May 9 2025 submission, is a comprehensive evidentiary presentation and accurately reflects relevant laws and rules. The Hearings Officer finds the ESEE Analysis adequately addresses issues relevant to Goal 5. The Hearings Officer finds Applicant’s May 9, 2025 submission sufficiently addressed Goal 5 requirements.

The Hearings Officer agrees with Applicant’s Goal 14 comments.

The Hearings Officer addressed the Applicant’s May 9, 2025 nonconforming use issue in earlier findings. As noted in those findings the Hearings Officer concluded that it would be inappropriate to opine as to the current or future legality of the Solar Array as Applicant did not formally apply for a verification of the validity of the Solar Array. If Applicant desires to “validate” the Solar Array the Applicant must follow relevant application steps (including a formal application and payment of fees) to accomplish that goal.

IV. CONCLUSION & RECOMMENDATION

The application in this case is to change the comprehensive plan and zoning designations for the Subject Property. Staff questioned, in the Staff Report, whether the Applicant provided adequate evidence to support findings that various approval criteria/policies were met/satisfied. COLW argued that the application should be denied for a number of reasons. COLW’s primary issues related to whether or not the application met the standards set forth in DCC 18.136.020 and whether the Subject Property is Agricultural Land. COLW also argued that the Applicant’s soil report (Red Hills Soils Report) could not be considered by the Hearings Officer as evidence in this case because the Red Hills Soils Report had not been certified by the Oregon Division of Land Conservation and Development.

The Hearings Officer addressed Staff’s concerns and COLW’s arguments in the findings for this recommendation. The Hearings Officer, based upon the evidence in the record and the arguments made by Staff, Applicant, COLW and other participants, concluded that all relevant approval criteria and goals were, or could be, met/satisfied.

The Hearings Officer recommends approval of Applicant’s proposal.

DESCHUTES COUNTY HEARINGS OFFICER

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

Gregory J. Frank
Deschutes County Hearings Officer