



**MEMORANDUM**

**TO:** Deschutes County Board of Commissioners (Board)  
**FROM:** Kyle Collins, Associate Planner  
**DATE:** January 26, 2022  
**SUBJECT:** Public Hearing – Dave Swisher Plan Amendment and Zone Change

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The Board of County Commissioners (Board) is conducting a public hearing on February 2, 2022 to consider a request for a Plan Amendment and Zone Change (file nos. 247-21-000616-PA, 617-ZC) for two (2) 40-acre properties located on Abbey Road, approximately 1.3 miles east of the City of Bend. This will be the second of two required public hearings.

**I. BACKGROUND**

The Applicant, Dave Swisher, is requesting a Comprehensive Plan Amendment to redesignate the subject properties from Agriculture to Rural Residential Exception Area and a Zoning Map Amendment to rezone the properties from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA-10). The Applicant’s reasoning for the request is that the properties were mistakenly identified as farmland, do not contain high-value soils or other characteristics of high value farmland, and therefore should be redesignated and rezoned for residential use. The Applicant has provided a supplementary soil study that identifies non-high value soils on a majority (~96%) of the subject properties. Additionally, the Applicant has provided findings within the burden of proof that demonstrate compliance with state and local requirements and policies.

**II. PUBLIC COMMENTS**

Staff received two (2) public comments from neighboring property owners and residents located within the surrounding area of the subject properties. These comments expressed concern and opposition related to growth management impacts, wildlife concerns, open space values, traffic impacts along Abbey Road and Butler Market Road, property value impacts, and impacts to irrigation water sources and availability. Additionally, staff received two (2) public comments from Central Oregon LandWatch (COLW) and 1000 Friends of Oregon. These comments expressed concern and opposition regarding growth management impacts, loss of productive farmland and wildlife habitat, and the viability/accuracy of the supplementary soils report.

### **III. HEARINGS OFFICER RECOMMENDATION**

The Deschutes County Hearings Officer held the initial public hearing on September 21, 2021. Two (2) individuals (Sue Conrad, a neighboring property owner, and Carol Macbeth, a representative of COLW) stated their opposition to the subject application and concerns regarding growth management, the perceived loss of productive farmland, the viability/accuracy of the supplementary soils report, wildlife habitat impacts, and traffic impacts along neighboring rights of way.

On November 24, 2021, the Hearings Officer issued a decision evaluating compliance with all applicable review criteria and recommending approval of the proposed Plan Amendment and Zone Change.

### **IV. BOARD CONSIDERATION**

As the property includes lands designated for agricultural use, Deschutes County Code 22.28.030(C) requires the application to be heard de novo before the Board, regardless of the determination of the Hearings Officer. Per DCC Section 22.20.040(D), the review of the proposed quasi-judicial Plan Amendment and Zone Change is not subject to the 150-day review period typically associated with land use decisions. The complete record is available for inspection at the Planning Division and at the following link: <https://www.deschutes.org/cd/page/247-21-000616-pa617-zc-applicant-initiated-plan-amendment-and-zone-change>. Moreover, the complete record will be available at the public hearing.

### **V. NEXT STEPS**

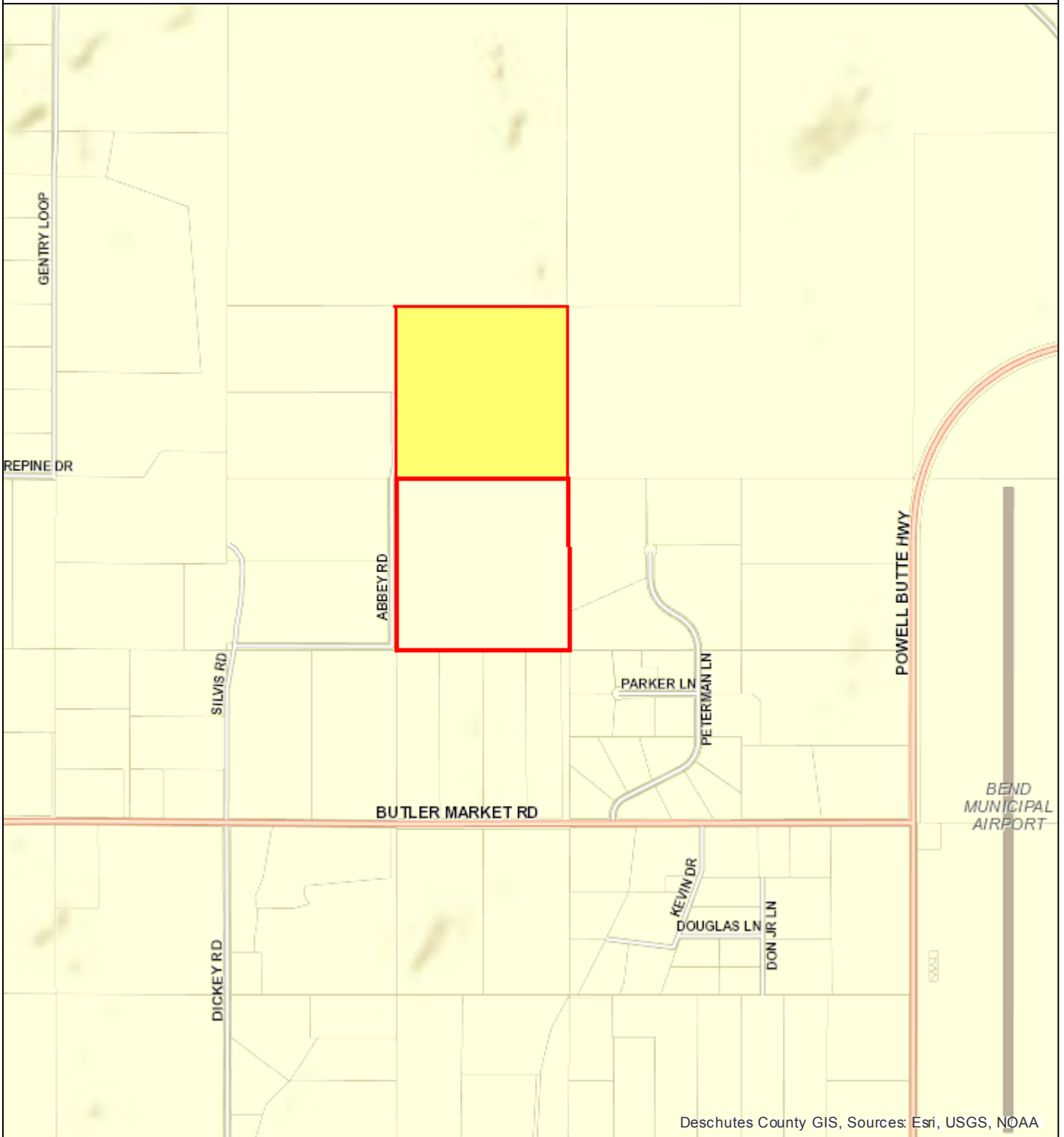
At the conclusion of the public hearing, the Board can choose one of the following options:

- Continue the hearing to a date and time certain;
- Close the oral portion of the hearing and leave the written record open to a date and time certain;
- Close the hearing and commence deliberations.

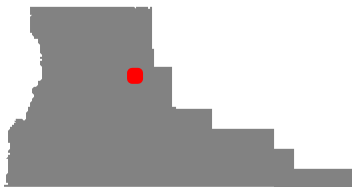
### **ATTACHMENTS:**

- 1) Area Map
- 2) Hearings Officer Recommendation/Decision

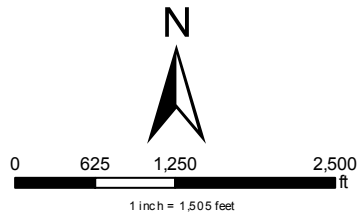
# 247-21-000616-PA, 617-ZC



Deschutes County GIS, Sources: Esri, USGS, NOAA



Date: 1/7/2022



**DECISION OF THE DESCHUTES COUNTY HEARINGS OFFICER**

**FILE NUMBERS:** 247-21-0000616-PA, 617-ZC

**HEARING:** September 21, 2021, 6:00 p.m.  
Barnes & Sawyer Rooms  
Deschutes Services Center  
1300 NW Wall Street  
Bend, OR 97708

**APPLICANT/  
OWNER:**

Dave Swisher  
250 NW Franklin Avenue, Suite 401  
Bend, OR 97703

Property 1:

Don Swisher Trust, Dave Swisher, Successor Trustee  
Carolyn J. Swisher Trust, Dave Swisher Successor Trustee

Mailing Name: DON SWISHER TRUST ET AL  
Map and Taxlot: 171318C000100  
Account: 109158  
Situs Address: 63350 ABBEY RD, BEND, OR 97701

Property 2:

Don Swisher Trust, Dave Swisher, Successor Trustee  
Carolyn J. Swisher Trust, Dave Swisher Successor Trustee  
MacCloskey Revocable Trust, Craig and Jane I. MacCloskey,  
Trustees

Mailing Name: DON SWISHER TRUST ET AL  
Map and Taxlot: 1713180000600  
Account: 106933  
Situs Address: NO SITUS ADDRESS

**SUBJECT PROPERTY:** Tax Lot 100, Assessor's Map 17-13-18C ("Tax Lot 100")  
Tax Lot 600, Assessor's Map 17-13-18 (Tax Lot 600")

**ATTORNEY  
FOR APPLICANT:**

Liz Fancher  
2465 NW Sacagawea Lane  
Bend, OR 97703



**TRANSPORTATION ENGINEER:** Joe Bessman  
Transight Consulting, LLC

**REQUEST:** The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the property from Agricultural (AG) to Rural Residential Exception Area (RREA). The applicant also requests approval of a corresponding Zone Change to rezone the property from Exclusive Farm Use – Tumalo/Redmond/Bend subzone (EFU-TRB) to Multiple Use Agricultural (MUA-10) as the subject property does not qualify as “Agricultural Land” pursuant to State Law and administrative rules

**HEARINGS OFFICER:** Stephanie Marshall

**STAFF CONTACT:** Kyle Collins, Associate Planner  
Phone: 541-383-4427  
Email: [Kyle.Collins@deschutes.org](mailto:Kyle.Collins@deschutes.org)

**RECORD CLOSED:** October 15, 2021<sup>1</sup>

**I. STANDARDS AND 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 Zone (MUA10)  
Chapter 18.80, Airport Safety Combining Zone (AS)  
Chapter 18.113, Destination Resorts Zone (DR)  
Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance

Deschutes County Comprehensive Plan

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<sup>1</sup> At the conclusion of the public hearing, the Hearings Officer made an oral ruling, granting a request to leave the record open through October 5, 2021. Thereafter, on October 5, 2021, staff contacted the Hearings Officer, informing her of the fact that Central Oregon LandWatch submitted a letter and exhibits at the conclusion of the first open record period on September 28, 2021. The submission was misidentified with the wrong file number and thus was not initially included in the file for the referenced applications. The Hearings Officer issued an Order Extending Open Record Period dated October 5, 2021, extending the open record period through October 15, 2021. The Order is included in the record.

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

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

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

## **II. FINDINGS OF FACT**

**A. LOCATION:** Property 1 described above has a situs address of 63350 Abbey Road, Bend, OR 97701. Property 2 described above does not have a situs address. Property 2 is directly adjacent to the north of Property 1. The subject property is generally east of the City of Bend, north of Butler Market Road and west/northwest of Powell Butte Highway and the Bend Airport. Property 1 and Property 2 are referred to collectively herein as the “Subject Property.”

**B. LOT OF RECORD:** Property 1 described above was found to be a legal lot of record pursuant to local land use decision 247-20-000396-LR. Property 2 described above was found to be a legal lot of record pursuant to local land use decision 247-20-000395-LR.

**C. ZONING AND PLAN DESIGNATION:** The Subject Property is zoned EFU-TRB and is designated Agricultural (AG) in the Deschutes County Comprehensive Plan. The Airport Safety Overlay Zone (AS) and the Destination Resort Overlay Zone (DR) also apply to the Subject Property. The Subject Property does not have any Goal 5 resource designations.

**D. PROPOSAL:** The Applicant requests 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 requests approval of a corresponding Zoning Map Amendment to change the zoning of the Subject Property from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA10). The Applicant asks 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. The Applicant submits that no exception to Statewide Planning Goal 3, Agricultural Land is required because the Subject Property is not agricultural land.

Submitted with the application is an Order 1 Soil Survey of the Subject Property, titled "Soil Assessment for Two 40-acre Parcels, Bend Oregon" (hereafter referred to as the "soil study") prepared by soil scientist Andy Gallagher, CPSSc/SC 03114 of Red Hill Soils. The Applicant has also submitted a traffic analysis prepared by Transight Consulting, LLC titled "Swisher Rezone" hereafter referred to as "traffic study." Additionally, the Applicant has submitted an application form, a burden of proof statement, and other supplemental materials, all of which are included in the record for the subject applications.

**E. SITE DESCRIPTION:** Property 1 and Property 2 each are approximately 40 acres in size and adjacent to one another in a north-south orientation. The Subject Property is relatively level with mild undulating topography. Vegetation consists of juniper trees, sage brush, bunch grasses, and other native vegetation. Property 1 and Property 2 are both undeveloped and not irrigated. Access to the Subject Property is provided by Abbey Road, a designated local access road which extends from Butler Market Road to the southwest. The nearest portion of the City of Bend's Urban Growth Boundary (UGB) is located approximately 1.3 miles to the southwest, and the Bend Municipal Airport is located approximately 0.5 miles to the east. The Subject Property is 0.25 miles south of Butler Market Road and adjoins Abbey Road.

Neither Property 1 nor Property 2 have water rights, and neither has been farmed or used in conjunction with any farming operation in the past. The Applicant's Burden of Proof statement at page 3 states, "According to COID, the seller of this property entered into a contract with the predecessor of the district to purchase 25 acres of water for each of the two tax lots. See, **Exhibit C**. The contract was, however, never fulfilled and no water rights were adjudicated to these properties." An old COID ditch crosses Property 1. There are no COID facilities on Property 2.

The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies two soil complex units on the Subject Property: 38B, Deskamp-Gosney complex and 58C, Gosney-Rock outcrop-Deskamp complex. Neither soil complex 38B, the predominant soil complex on the Subject Property, nor soil complex 58C, are defined as high-value soils by DCC 18.04. The Applicant's Burden of Proof statement states on pages 3-4:

*The applicant obtained a professional soils assessment for the two properties. The assessment was made by Andy Gallagher, CPSSc/SC 03114. Mr. Gallagher determined that 88% of Tax Lot 100 is comprised of LCC 7 and 8 soils and 82% of Tax Lot 600 is comprised of LCC 7 and 8 soils. The remainder of each property is comprised of soils that are rated LCC 6 when not irrigated. A copy of Mr. Gallagher's soils assessment is included as part of **Exhibit D** to this burden of proof. Mr. Gallagher also provided a professional estimate of the amount of dryland forage each tax lot might produce. He found that Tax Lot 100 would produce approximately 494 pounds per acre per year and that Tax Lot 600 would produce approximately 440 pounds per acre per year.*

As discussed in detail below in the Soils section, there is no irrigation on the Subject Property and an Agricultural Soils Capability Assessment (Order 1 soil survey) conducted on the properties determined Class 3 irrigated and 6 nonirrigated are mapped as a consociation and the Gosney, rock outcrop and very shallow soils mapped as a complex in which all three components are either Capability Class 7 or 8. The soils in both of the 40 acre parcels are predominantly shallow and ashy-skeletal and rock outcrops Land Capability Class 7 and 8.

**F. SOILS:** According to Natural Resources Conservation Service (NRCS) maps of the area, the Subject Property contains two different soil types as described below: 58C – Gosney-Rock Outcrop-Deskamp complex, and 36A – Deskamp loamy sand.

The Applicant submitted a soil study report (Applicant's ), which was prepared by a certified soil scientist and soil classifier that determined the Subject Property is comprised of soils that do not qualify as Agricultural Land<sup>3</sup>. The purpose of this soil study was to inventory and assess the soils on the Subject Property and to provide more detailed data on soil classifications and ratings than is contained in the NRCS soils maps. The NRCS soil map units identified on the properties are described below. The Applicant's soils study has been verified by DLCD.

38B, Deskamp-Gosney complex, 0 to 8 percent slopes: This soil is composed of 50 percent Deskamp soil and similar inclusions, 35 percent Gosney soil and similar inclusions, and 15 percent contrasting inclusions. The Deskamp soils are somewhat excessively drained with rapid permeability, and an available water capacity of about 3 inches. The Gosney soils are somewhat excessively drained with rapid permeability, and an available water capacity of about 1 inch. The contrasting inclusions contain Clovkamp soils in swales, soils that are very shallow to bedrock, and are on ridges with occasional rock outcrops. The major use of this soil is for livestock grazing. The Deskamp soils have ratings of 6e when unirrigated, and 3e when irrigated. The Gosney soils have ratings of 7e when unirrigated, and 7e when irrigated. This soil type is not considered high-value soil. Approximately 96.3 percent of the Subject Property is made up of this soil type.

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

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<sup>3</sup> As defined in OAR 660-033-0020, 660-033-0030

when unirrigated, and 4e when irrigated. Approximately 3.7 percent of the Subject Property is made up of this soil type, all located within the northern parcel.

**G. SURROUNDING LAND USES:** The Subject Property is located in Northeast Bend near the Bend Airport. Its south boundary adjoins a large tract of land zoned MUA-10 that is developed with rural residences. EFU-TRB and MUA-10 zones are intermixed in the greater area around the subject property. EFU-zoned lands in the vicinity are developed with small scale agricultural operations and single-family dwellings. The remaining parcels consist of County exception lands zoned MUA10, which are predominately developed with single-family dwellings and host small-acreage irrigation for pasture and hobby farm uses. There are also significant EFU-zoned parcels which contain no irrigation or substantial agricultural operations. The nearest portion of the City of Bend's UGB is located approximately 1.3 miles to the southwest, and the Bend Municipal Airport is located approximately 0.5 miles to the east.

The adjacent properties are outlined below in further detail:

*North:* The City of Bend's sewage treatment plant tract is north of the Subject Property. The developed part of the City's treatment plant is at least 0.6 miles north, the land between the plant and the Subject Property is vacant, dry, open land. The predominant soil mapping units on these properties are 58C and 59C soils that are primarily comprised of Class 7 and 8 soils. The adjacent property to the north, Tax Lot 104 (Assessor's Map 17-13-00) is a 1,213.82 acre EFU-zoned property owned by the City of Bend that is unirrigated and predominately undeveloped, with the major exception of the city's wastewater treatment facility. Northeast is Tax Lot 105 (Assessor's Map 17-13-00), an 80 acre EFU-zoned property also owned by the City of Bend that is unirrigated and undeveloped.

*West:* Immediately west of the Subject Property are four EFU-zoned parcels. Tax Lots 700 and 701 (Assessor's Map 17-13-18) are 19.6 acres and 19.2 acres in size respectively. Tax Lots 200 and 300 (Assessor's Map 17-13-18C) are 17.9 acres and 16.3 acres in size respectively. All four parcels are developed with single-family dwellings (land use file nos. CU-89-133 for Tax Lot 300. The dwellings on Tax Lots 201 and 700 predate modern land use standards and requirements. It is unclear what land use decision formally approved the dwelling on Tax Lot 700, which was constructed in 1986 pursuant to building permit no. 247-B13811), accessory structures, and three of the properties (Tax Lots 700, 200, and 300) are partially irrigated. Tax Lot 701 lacks irrigation water rights. None of these properties appear to be engaged in commercial farm use.

*East:* The Bend Airport is one half mile east of the Subject Property. It is developed with commercial and industrial uses related to aviation and as an airport. Tax Lot 100 is separated from the airport by Powell Butte Highway and small parcels zoned EFU-TRB. Immediately east of the Subject Property is a 40-acre square that has been divided into four small EFU-zoned parcels. Tax Lots 100, 200, 300, and 400 (Assessor's Map 17-13-18DB) are 8.5 acres,

12.2 acres, 8.0 acres, and 10.0 acres in size respectively. All four parcels are developed with single-family dwellings (land use file nos. CU-02-18 for Tax Lot 100, CU-03-8 for Tax Lot 200, CU-90-35 for Tax Lot 300, and CU-88-146 for Tax Lot 400). It does not appear that any of these parcels contain irrigation rights, but several of the properties do appear to contain very minor hobby farming operations. Continuing east are two additional EFU-zoned parcels. Tax Lots 100 and 200 (Assessor's Map 17-13-18D) are both 19.5 acres in size respectively. Tax Lot 100 contains several agricultural buildings and Tax Lot 200 is undeveloped. Farther east is an assemblage of properties associated with the Bend Municipal Airport. The block of nonfarm properties to the east of the Subject Property (which are not receiving farm tax deferral) precludes it from being farmed with small farm parcels further to the east.

*South:* Immediately south of the Subject Property are four MUA-10-zoned properties all located within the Butler subdivision. All the parcels are approximately 9.85 acres in size, and all are developed with single-family dwellings and assorted residential accessory structures. Southwest of the subject properties is an EFU-zoned parcel (Tax Lot 500, Assessor's Map 17-13-18C) that is approximately 19.3 acres in size and is developed with a single-family dwelling (land use file no. CU-99-46). Tax Lot 500 does not appear to contain any irrigation water rights, but does appear to have some minor agricultural operations onsite. Continuing southeast are numerous MUA-10-zoned properties located within the Classic Estates subdivision – 16 lots - all of which are developed with single-family dwellings and a variety of residential accessory structures. These lot sizes range from 2.12 to 2.59 acres. A large amount of land south of Classic Estates and south of Butler Market Road is also zoned MUA-10.

**H. PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice on June 23, 2021, to several public agencies and received the following comments:

Deschutes County Senior Transportation Planner, Peter Russell

*I have reviewed the transmittal materials for 247-21-000616-PA/617-ZC to amend the Comprehensive Plan designation Zone of the subject properties from Agriculture and Exclusive Farm Use (EFU) to Rural Residential Exception Area (RREA) and Multiple Use Agriculture (MUA-10). The two 40-acre properties are at 63350 Abbey Road, aka County Assessor's Map 17-13-18C, Tax Lot 100 and a property with no situs address but described as 17-13-18, Tax Lot 600.*

*The applicant's traffic study dated Feb. 22, 2021, uses marijuana production as one of the outright permitted uses in the EFU zone when comparing and contrasting a reasonable worst case scenario of traffic generation from EFU vs. MUA-10. The County has banned marijuana production so this appears to staff to be an inappropriate choice. Nevertheless, in looking at the other outright permitted uses in EFU vs. MUA-10, staff agrees the plan amendment/zone change will not result in any significant adverse effect and thus the complies with the Transportation Planning Rule.*

*The property accesses Abbey Road, a public road not maintained by Deschutes County and otherwise known as a Local Access Road (LAR) and functionally classified as a local road. The County remains the road authority. The applicant will need to either provide a copy of a driveway permit approved by Deschutes County prior to development or be required obtain one as a condition of approval prior to development occurring to comply with the access permit requirements of DCC 17.48.210(A).*

*The County will assess transportation system development charges (SDCs) when development occurs based on the type of proposed use. However, as a plan amendment or a zone change by itself does not generate any traffic, no SDCs are triggered at this time.*

Deschutes County Building Official, Randy Scheid

*The Deschutes County Building Safety Divisions code mandates that Access, Egress, Setbacks, Fire & Life Safety, Fire Fighting Water Supplies, etc. must be specifically addressed during the appropriate plan review process with regard to any proposed structures and occupancies.*

*Accordingly, all Building Code required items will be addressed, when a specific structure, occupancy, and type of construction is proposed and submitted for plan review*

Oregon Department of Aviation, Seth Thompson

*Thank you for providing the opportunity for the Oregon Department of Aviation (ODA) to comment on File Number: 247-21-000616-PA, 617-ZC.*

*The ODA has no comment on the subject proposal. However, future development on the subject parcels will be subject to the following requirements by the ODA and FAA:*

*1) Prior to issuance of any subsequent building permits on these parcels, the applicant must file and receive aeronautical determinations from the ODA and FAA as required by OAR 738-070-0060 on FAA Form 7460-1 Notice of Proposed Construction or Alteration to determine if any new structures will pose an obstruction to aviation safety at the Bend Municipal Airport.*

*2) The height of any new structures shall not penetrate FAA Part 77 Imaginary Surfaces, as determined by the ODA and FAA.*

Central Oregon Irrigation District, Kelley O'Rourke

*Please be advised that Central Oregon Irrigation District (COID) has reviewed the provided application dated June 22, 2021 of the above referenced project. COID has no facilities or water rights on the subject property (1713180000600).*

*Please note that COID facilities are located within the vicinity of the project; contact COID if any work and/or crossings will be done near the COID facilities and not shown on the provided plans.*

The comments from COID only referenced one property (Map and Tax Lot: 1713180000600), Property 2 described above. However, the subject application references two parcels (secondary property: Map and Tax Lot 171318C000100). Based on internal County records and comments within the submitted application materials, both Property 1 and Property 2 are located within the boundaries of the Central Oregon Irrigation District, but neither parcel contains any listed water rights.

**I. PUBLIC COMMENTS:** The Planning Division mailed notice of the application to all property owners within 750 feet of the subject property on June 23, 2021. The Applicant also complied with the posted notice requirements of Section 22.24.030(B) of Title 22. The Applicant submitted a Land Use Action Sign Affidavit indicating the Applicant posted notice of the land use action on June 23, 2021. Two public comments were received from neighboring property owners.

The first comment was received from Michael and Donna Grace Higham, residents and owners of property located at 63225 Peterman Lane, Bend, OR 97701 on June 26, 2021:

*"We OPPOSE this change of rezoning of this land.*

*We are extremely surprised that proposed development of 40 acres is being looked at. We have so much traffic from the airport and Prineville. WE ARE SHORT OF COI WATER. The amount of people and activities will increase by 200%. Having development should be closer to Bend City.*

*Then the next development will be Don Swishers other 40 acres next to this property.*

*This is NOT an orderly development from Bend City to urban growth boundaries. Bend was developing from the city out."*

The second comment was received from Kurt and Sue Conrad, a residents and owners of property located at 22220 Parker Lane, Bend, OR 97701 on July 1, 2021:

*"We are opposed to the above-referenced land use application. Listed below are our reasons broken down into collective and personal:*

***Collective: Zoning change request***

*When Don and Carolyn Swisher purchased this land, they did so with the knowledge it could not be developed for residential use. The LCDC laws had been in place for 15 years at that time.*



*This attempt to develop the properties has been requested only after the passing of Mr. and Mrs. Swisher. And coincidentally, (?) when there is little to no available land to develop in the appropriate zoning. The current applicant is a well-established local developer.*

*The land use laws that were in place at the time were designed by a group of citizens and elected officials who genuinely love Oregon for the greater good of all citizens. To quote Tom McCall in 1973, it was to prevent the "unfettered despoiling of the land, **sagebrush subdivisions**, coastal condomania, and the ravenous rampage of suburbia in the Willamette Valley all threaten to mock Oregon's status as the environmental model for the nation."*

*This proposal would be breaking the protective laws in place for the singular purpose of personal gain.*

*Changing from EFU to RREA/MUA10 will set a precedent that will be the ruin of our lovely area, County and State. Just like Covenants, Codes and Restrictions in a neighborhood, once they are broken and not rectified they are no longer enforceable. Others in the State will use this as a reason they, too, will be able to develop subdivisions wherever they please.*

### **End Game of Part One – arbitrary development and subdivision**

*We who live here purchased this property in good faith that multi-home developments would not be allowable in the remaining vacant lands. We are a reasonable distance from the UGB/reserve to believe we were protected from subdivisions – even ten-acre lot ones.*

*How will the lack of irrigation rights be handled? Are xeriscaped properties required, or will homeowners be using potable water for their lawns? Or, will water be sucked directly from the aquifer for landscaping aesthetic purposes when natural supplies are dwindling? What about the additional fire risk 8 or more properties will bring? Will fire hydrants be a requirement now that excessive heat and red flag warnings are a concern?*

*Ten acres per home may sound large, but 8 homes clustered together is significant change for the worse. We moved out to the country for the quiet enjoyment of our homes and yards. We all have numerous pets and animals used to the peaceful country sounds who be affected by the constant noise.*

*Since there is rock at the surface of our 2-1/2 acres in many places, this will most likely involve extreme measures for the foundation. All this chaos will go on for years.*

*There is abundant wildlife in these two parcels. It is their homes and who knows where they be forced to retreat. We see them regularly.*

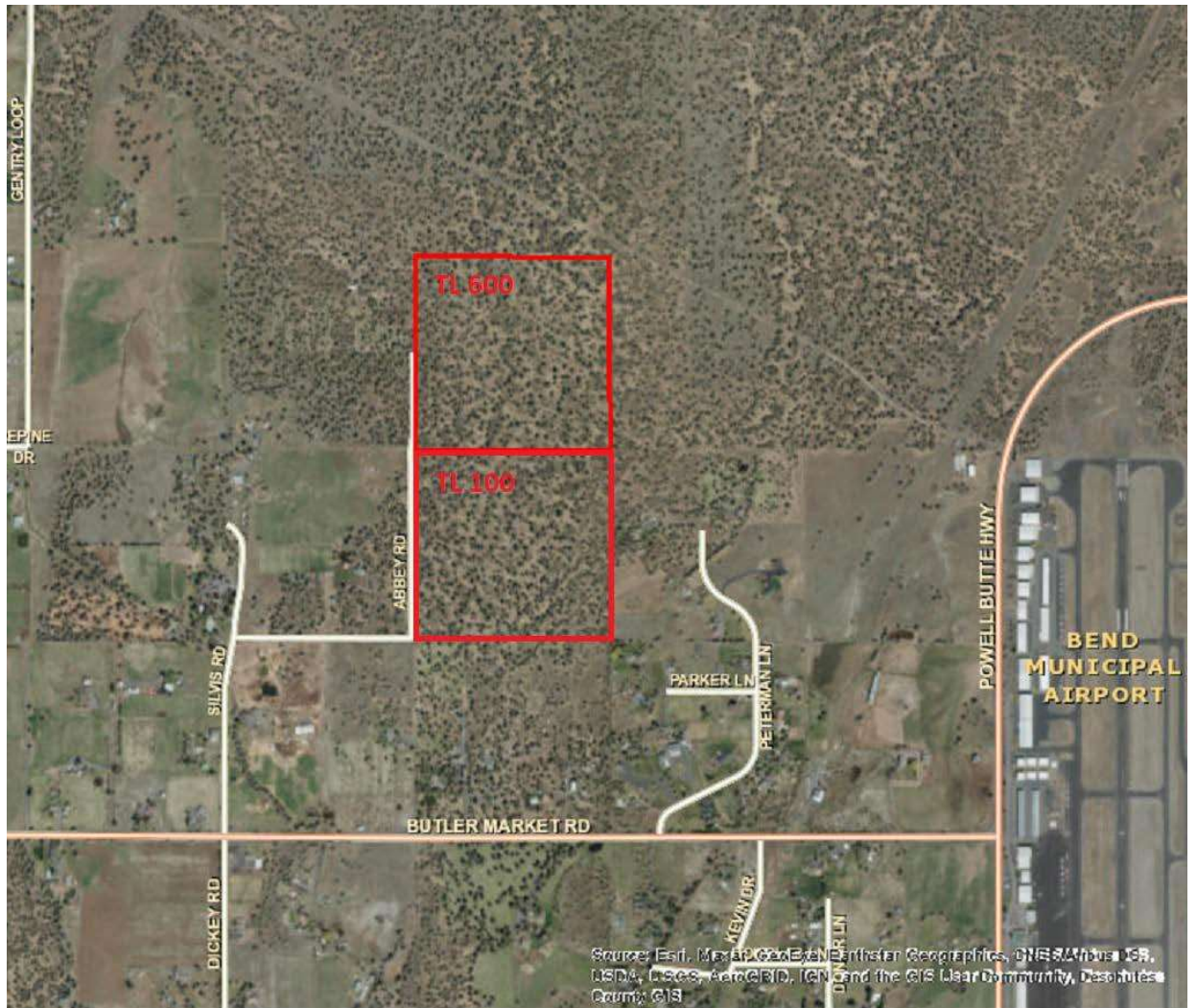
*In finishing, I circle back to the “why” of this zoning change. The general public will not reap the greater good, just a developer and 8 additional high-end homebuyers in Central Oregon.*

*LCD’s far-ranging planning prohibited endless building during the frenzy of the early 2000s. They also enabled us to come back stronger. We must stay the course. This is not the time to be changing our structured laws in places. It is time for honoring what we have here in extraordinary Oregon.”*

(emphasis in original).

**Applicant Response:** After submission of the public comments above, the Applicant provided the following response on September 13, 2021:

*“A. Location: The location of the subject properties is marked as TL 100 and TL 600 on the following aerial photograph. The owners of two small properties (about 2.5 acres each), Conrad and Higham, filed comments opposing approval of the requested zone change and plan amendment. Their properties are located southeast of the subject property on Peterman Lane and Parker Lane in the Classic Estates subdivision. These roads are shown on the aerial photograph, below.*



**B. Zoning:** *The zoning of the Classic Estates lots is MUA-10, the same zoning proposed by the applicant for TL 100 and 600. Deschutes County has not applied a WA overlay zone to this property to protect wildlife. Protections for wildlife must be sanctioned by the County's Goal 5 ESEEs and WA or similar wildlife overlay zoning to be relevant to review of this application.*

**C. Road Impacts:** *Access to Classic Estates lots is provided by Peterman Lane and Parker Lane. Traffic associated with new development of the subject property will not rely on either road for access. Impacts to the greater area arterial street network will be negligible as shown by the traffic impact analysis filed with the land use applications.*

**D. Classic Estate Subdivision:** *A copy of the Classic Estates subdivision plat is included to illustrate the lot pattern and roads established by it.*

**E. Properties Owned by Opponents:** *The following photographs are aerial photographs that show the setting of the properties owned by opponents Conrad and Higham. The*

northwest corner of the Conrad property touches the southeast corner of TL 100.



*The Higham property does not adjoin the subject properties. Its northwest corner is approximately 700 feet from the southeast corner of TL 100. There are two developed single-family home lots between it and TL 100.*





**F. Development Under EFU-TRB Zoning:** Tax Lots 100 and 600 are legal lots of record. Each, based on its poor soil conditions, should qualify to be divided into two nonfarm parcels with a nonfarm dwelling on each of the tax lots. Such divisions would allow a total of four nonfarm dwellings on the subject property. The subject property will not remain vacant land even if this application is denied.

**F. Water for Homes and Irrigation:** The applicant has shown that the subject property can obtain water service from Avion Water System as shown by **Exhibit F** and **G** of the application materials we filed with Deschutes County Planning.

**G. Purpose of EFU Zoning/Land Use Planning:** *The purpose of EFU zoning, as stated by Statewide Goal 3, is “to preserve and maintain agricultural lands.” The term “Agricultural Land” is defined by Goal 3. The subject properties do not meet the definition of “Agricultural Land.” As a result, they may be zoned MUA-10, a zoning district that allows low-density rural residential development. The MUA-10 zone has been acknowledged by the Land Conservation and Development Commission as being compliant with the Statewide Goals that protect the community from urbanization of rural lands that formerly occurred in “sagebrush subdivisions.”*

**H. Location of City of Bend UGB and Airport:** *The density of development allowed by the proposed plan amendment and zone change is not urban development. Instead, the MUA-10 zone has been determined, through the land use planning process, to be a zoning district that is both an appropriate zone for nonagricultural land and one that does not allow urban development. Nonetheless, the subject property is only approximately 1.25 miles east of the City of Bend’s UGB and approximately one-half mile from the Bend Airport. The relatively large lot sizes required by the MUA-10 zone will preserve this land for future urban development. If the City makes the logical decision to expand its boundaries toward the Bend Airport, a location that is an employment area of the community, the subject properties will likely remain suitable for redevelopment given their size.*

Central Oregon LandWatch (COLW), through its attorney Carol Macbeth, participated in the public hearing and submitted materials into the record during the open record period objecting to the applications.

The Applicant submitted Post-Hearing Evidence on September 28, 2021 as follows:

- “Rural Resource Lands Research Report” dated May 16, 2019 prepared by DLCD Public Research Lands Fellow Stephanie Campbell (part)
- “Agricultural Soils Assessment” webpages published by and obtained from DLCD website on 9/28/2021
- Central Oregon LandWatch v. Deschutes County*, LUBA No. 2016-12 (relevant part)
- “Conservation Neighbor: Andy Gallagher” article by Teresa Matteson dated December 29, 2020 published on Benton County Soil and Water Conservation District’s website
- “Soil Survey Deschutes Area Oregon” published by USDA Soil Conservation Service
- December 1958 (obtained from Web Soil Survey of the NRCS) (part)

- Resume for Andy Gallagher
- “Soil Survey of the Upper Deschutes River Area” published by the USDA and NRCS (part)
- WebSoil Survey “Custom Soil Resource Report” for the subject property (location approximate) obtained from NRCS
- ORS 215.211, Agricultural land
- OAR 660-033-0030, Identifying Agricultural Land
- OAR 660-033-0045, Soils Assessments by Professional Soils Classifiers

The Applicant also submitted Rebuttal and Final Argument on October 15, 2021 which included, among other attachments, a letter from soils scientist Andy Gallagher dated October 14, 2021.

The Hearings Officer addresses the submitted public comments and testimony in the Conclusions of Law below.

**J. LAND USE HISTORY:** As noted above, Property 1 and Property 2 both have been determined to be legal lots of record. There is no other land use history for Property 1 or Property 2. In its burden of proof, the Applicant included the following:

*In 1979, Deschutes County adopted its first comprehensive plan and zoning ordinance that implemented the Statewide Land Use Planning Goals. The County’s comprehensive plan map was, however, developed without the benefit of reliable, detailed soils mapping information. The map was prepared prior to the USDA/NRCS’s publication of the “Soil Survey of Upper Deschutes River Area, Oregon.” This soil survey is more comprehensive than prior soils mapping efforts but continues to provide general soils information – not an assessment of soils on each parcel in the study area. This land application use application includes a more detailed and accurate Order 1 soils survey that is a part of **Exhibit D**. It provides Deschutes County with the information required to find that the subject property does not qualify as “agricultural land” as defined by Statewide Goal 3, Agricultural Land. Consistent with the requirements of ORS 215.211, this survey has been approved for use by Deschutes County by the Department of Land Conservation and Development (“DLCD”) as shown by **Exhibit D**. This approval was sent directly to Deschutes County Planning by DLCD on June 17, 2021.*

*When the County first implemented Statewide Goals, it applied resource zoning using a broad brush. All rural lands were assumed to be resource land. Then-existing development lands not suited for resource use were granted exceptions to the Goals that protect*

resource lands. The County allowed landowners a brief period of time after adoption of PL-15 (1979) to petition the County to remove nonresource properties from resource zone protections but made no effort to determine whether lands might be nonresource lands that do not merit the imposition of stringent land use regulations that protect rural resources – typical farm and forest resources.

Beginning around 2007, Deschutes County has rezoned properties from EFU to MUA-10 zoning and has applied a Rural Residential Exceptions Plan designation to lands found to be nonresource land. The County's comprehensive plan was also amended to authorize this type of change. This type of an amendment has been approved when soils are shown to be "nonagricultural" soils and not otherwise suited for farm use. Some of the ordinances and decisions that have approved this type of zone change and plan amendment include:

**Ordinance No. 2013-009** for File PA-11, ZC-11-2, State of Oregon DSL, **Exhibit H**. The Board's findings in this decision conclude that the current comprehensive plan allows the county to approve applications to change the plan designation of nonagricultural land from Agricultural to RREA. The Board's findings also conclude that a goal exception is not required to allow the county to approve an RREA plan designation for nonagricultural land because Goal 3 does not require protection of nonagricultural land and that an RREA designation is appropriate for nonagricultural land.

**Ordinance No. 2007-025**, PA-07-1/ZC-07-1, Pagel, **Exhibit J**.

**Ordinance No. 2011-014**, PA-08-1/ZC-08-1, The Daniels Group, **Exhibit K**.

**Ordinance No. 2019-006**, 247-18-000485-PA/247-18-000486-ZC, Eastside Bend, LLC, **Exhibit L**.

**Central Oregon Landwatch v. Deschutes County (Aceti)**, LUBA NO. 2016-012, August 10, 2016, **Exhibit M**. LUBA's decision is relevant to this application for the following reasons:

1. LUBA found that it was appropriate for Deschutes County to rely on a site-specific soils survey prepared by soils scientist Roger Borine to find that a majority of the property is comprised of Class VII and VIII soils rather than on information provided by the NRCS Soil Survey. LUBA noted that the NRCS's maps are intended for use at a higher landscape level rather than on a property-by-property basis.
2. LUBA affirmed the County's determination that property that had been irrigated and used to grow hay in 1996 and earlier years was not agricultural land based on the Borine Order 1 soils survey that showed that



*the poor soils on the property are Class VII and VIII soils when irrigated, as well as when not irrigated. The Swisher property has no history of irrigation, a fact confirmed by Central Oregon Irrigation District, Exhibit C.*

3. *LUBA accepted the following evidence provided by the applicant, to establish that the Aceti property is not “other than Class I-VI Lands taking into consideration farming practices.*

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

*In Aceti, the County also found that commercial agricultural uses in the vicinity were limited.*

*The Swisher property, like the Aceti property, is located in close proximity to dense residential development, the Bend Airport and two major arterial roads (Butler Market Road and Powell Butte Highway). Adjoining EFU-zoned lands are vacant or engaged in hobby farming only. Farming in the area is not “commercial” agriculture. As with the Aceti property “irrigating rocks [on the Swisher property] is not productive.”*

**K. PUBLIC SERVICES:** The Subject Property receives police services from the Deschutes County Sheriff and is within the Deschutes County Rural Fire Protection District (DCRFPD) No. 2. DCRFPD No. 2 provides fire protection and ambulance services to the property through a contract with the City of Bend Fire Department. Fire Station 304 is located about three miles from the Subject Property at 2500 NE Neff Road, Bend. The Subject Property is easily accessed from this location via the arterial roadways of Hamby Road and Butler Market Road. Access to the Subject Property by fire trucks is provided by arterial streets with the exception of a small stretch of Abbey Road that will be required to be improved as a condition of a future land division of the subject property. The Subject Property is included in the Bend-LaPine School District. The Pine Nursery and Big Sky Park will serve the park needs of future new residents of the Subject Property.

**L. UTILITY SERVICES:** The Subject Property is in the service area for Central Electric Cooperative, Inc (CEC). CEC is willing to serve the Subject Property with electricity. Avion Water is willing to serve the Subject Property with public water services.

**M. NOTICE REQUIREMENT:** On August 20, 2021, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the subject property and agencies. A Notice of Public Hearing was published in the Bend Bulletin on Sunday, August 24, 2021.

Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on August 12, 2021.

The Applicant complied with the posted notice requirements of DCC 22.24.030(B). The applicant submitted a Land Use Action Sign Affidavit, dated June 23, 2021, indicating the Applicant posted notice of the land use action on June 23, 2021.

Deschutes County sent notice of the proposed change to its comprehensive plan and land use regulation to the Oregon Department of Land Conservation and Development, received by DLCD on August 12, 2021.

**N. REVIEW PERIOD:** The subject application(s) were submitted on June 18, 2021, and deemed complete by the Planning Division on July 18, 2021. 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. CONCLUSIONS OF LAW**

#### **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, also the property owner, requested a quasi-judicial plan amendment and filed the applications for a plan amendment and zone change. The Applicant filed the required Planning Division's land use application forms for the proposal. The application is reviewed utilizing the applicable procedures contained in Title 22 of the Deschutes County Code. The Hearings Officer finds these criteria are met.

###### 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 response in its submitted burden of proof statement:

*The 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 utilizes this analysis, as well as analyses provided in prior Hearings Officers' decisions to determine consistency with and respond to the Comprehensive Plan Goals and policies that apply, which are listed in the Comprehensive Plan section of this Decision in further detail.

Kurt and Sue Conrad submitted public comments in opposition to the applications, stating that the public interest will not be served by rezoning the property and that the only beneficiaries will be the Applicant and future buyers of new residences constructed on the Subject Property. Mr. and Mrs. Conrad assert that the proposal would be "breaking the protective laws in place for the singular purpose of personal gain." They further argue that a change from EFU to RREA/MUA10 will set a precedent that will adversely affect the surrounding area, the County and the State as a whole. Mr. and Mrs. Conrad argue, "Just like Covenants, Codes and Restrictions in a neighborhood, once they are broken and not rectified they are no longer enforceable." The Conrads' residence is situated on property zoned MUA-10, the same zoning classification to which the Applicant requests changing the Subject Property.

The Applicant submitted rebuttal to these arguments stating that, because the Subject Property is not agricultural land that is protected by Oregon land use laws, "they will not be unwound by approval of this application." The Applicant filed an additional ten (10) photographs that show the condition of the land, stating, "[t]hese confirm our position and the results of the soil study that show that this property is not suitable for agricultural use and is not 'agricultural land.'" The Applicant further argued, "The system designed to protect resource lands will in no way be harmed by allowing nonresource land to be developed with somewhat more housing than the four homes that should be able to be approved on this property given its current EFU zoning."

The Applicant noted that the Conrads' testimony and submissions state that "there is not a lot of potential for farming that 80 acres [the Subject Property]." The Conrads also expressed

concern that because there is rock at the surface of their property, development of homes on the Subject Property “will most likely involve extreme measures for the foundation.”

The Applicant detailed a list of potential uses of the Subject Property under current EFU zoning and noted that the uses permitted outright in the MUA-10 zone are much more limited than the uses allowed outright in the EFU zone. *Compare* DCC 18.32.020 with DCC 18.16.020 and DCC 18.16.025.

The Hearings Officer finds that the question of whether the public interest is best served in approving the applications requires analysis of each of the factors set forth in DCC 18.136.020(A) through (D). The Applicant is correct in its argument that Oregon’s protection of resource lands will not be “unwound” or otherwise undermined by approval of the applications if the Subject Property is determined not to be agricultural land.

The Hearings Officer further finds that approval of the applications will not set a negative precedent nor result in a “free for all” rush to rezone and develop EFU lands because each rezone application is decided on its own merits and must be supported by substantial evidence in the record for a requested rezone to be approved. The Deschutes County zoning regulations in Title 18 of the Deschutes County Code do not constitute “covenants, conditions and restrictions” that become unenforceable when a rezone of a particular property is approved. Zoning regulations are not set in stone, as evidenced by the fact that the Deschutes County Code includes a process and standards for rezoning properties where applicable standards are met and consistency with the Comprehensive Plan and Statewide Planning Goals is established.

The Hearings Officer finds the above provision is met, based on Comprehensive Plan conformance as set forth in subsequent findings.

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

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

*The approval of this application is consistent with the purpose of the MUA-10 zoning district which stated in DCC 18.32.010 as follows:*

*“The purposes of the Multiple Use Agricultural Zone are to preserve the rural character of various areas of the County while permitting development consistent with that character and with the capacity of the natural resources of the area; to preserve and maintain agricultural lands not suited to full-time commercial farming for diversified or part-time agricultural uses; to conserve forest lands for forest uses; to conserve open spaces and protect natural and scenic resources; to*

*maintain and improve the quality of the air, water and land resources of the County; to establish standards and procedures for the use of those lands designated unsuitable for intense development by the Comprehensive Plan, and to provide for an orderly and efficient transition from rural to urban land use."*

*The subject property is not suited to full-time commercial farming and has no history of farm use.*

*The MUA-10 zone will preserve nonagricultural soils for future part-time or diversified agricultural use. The low-density of development allowed by the MUA-10 zone will conserve open spaces and protect natural and scenic resources. This low level of development will also help maintain and improve the quality of the air, water and land resources of the county by encouraging the future owners of the property to return irrigation water to area waterways or to more productive farm ground elsewhere in the county rather than to waste it on unproductive lands.*

*The subject property adjoins lands zoned MUA-10. They and the subject property provide a proper transition zone from EFU rural zoning to urban land uses in the City of Bend UGB.*

The Hearings Officer finds that the purpose of the MUA-10 zoning classification is to allow low-density rural residential development. The MUA-10 zone has been acknowledged by LCDC as being compliant with the Statewide Goals that protect the community from urbanization of rural lands that formerly occurred on "sagebrush subdivisions." This zoning district is both an appropriate zone for nonagricultural land and one that does not allow urban development. For these reasons, the Hearings Officer finds that the density of development allowed by the proposed plan amendment and zone change is not, and will not lead to, urban development. Therefore, the Hearings Officer finds that the proposed rezone of the Subject Property is consistent with the purpose of the MUA-10 zoning classification.

The Hearings Officer notes that, in recent years, Deschutes County has recognized the value in rezoning non-productive agricultural lands and has issued decisions in support of plan amendments and zone changes where the applicant demonstrates the property is not agricultural land and, therefore, Statewide Goal 3, Agricultural Lands, does not apply. This is further supported by the plain language in Policy 2.2.3 of the Deschutes County Comprehensive Plan ("Allow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, for individual EFU parcels...") and Section 3.3 of the Comprehensive Plan ("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...").

Cases pertinent to the proposed request include:

**Kelly Porter Burns Landholdings LLC (“Landholdings”)/File nos. 247-16-000317-ZC/318-PA**

On November 1, 2017, the Board of County Commissioners approved Kelly Porter Burns Landholdings LLC’s request to change the plan designation on certain property from Agricultural to Rural Residential Exception Area and to change the zone designation from EFU-TRB to MUA-10 zone. The property consists of about 35 acres.

Based on the Order 1 soil survey for the property and the submitted evidence, the Hearings Officer found that the Landholdings property does not constitute agricultural land and does not merit protection under Goal 3, and therefore, approved the change in Plan designation and Zoning of the property from Agriculture/EFU-TRB to RREA/MUA-10.<sup>4</sup>

**Division of State Lands Decision/File Nos. PA-11-7 and ZC-11-2**

The *Division of State Lands* decision was a 2013 approval by the Board for a plan amendment from Agriculture to Rural Residential Exception Area and a zone change from EFU-TRB to Multiple Use Agricultural (MUA-10). Based on the Order 1 soil survey for the property and the submitted evidence, the Board found that the property was not agricultural land and therefore, Goal 3 did not apply.

**Paget Decision/File Nos. PA-07-1, ZC-07-1**

The *Paget* decision was a 2007 approval of a plan amendment from Agriculture to Rural Residential Exception Area and a zone change from EFU to MUA-10. The Board adopted the Hearings Officer’s decision, which found that the property did not constitute “agricultural land” and therefore, the plan amendment and zone change to MUA-10 was consistent with Goal 3.

**The Daniels Group/File Nos. PA-08-1, ZC-08-1**

The Daniels Group decision was a 2011 Board decision approving a change to the Comprehensive Plan map from Surface Mine and Agriculture to Rural Residential Exception Area and a zone change from EFU-LB and Surface Mining to Rural Residential (RR-10). The Board found that the property did not constitute “agricultural land” as defined in Goal 3, was

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<sup>4</sup> The Board adopted as its findings the Hearings Officer’s decision with one exception: that if the property is divided, it must be developed as a cluster development and the two irrigation ponds must be included in the common area. In addition, the Board required the applicant to sign a Conditions of Approval agreement to “*assure that future residential development of the property will be harmonious with existing development in the area and so that a part of the property may be developed at urban densities if and when the property is annexed to the City of Bend.*”

not subject to protection under Goal 3, and therefore, the plan amendment and zone change did not require an exception to Goal 3. (Exhibit 4).

The Hearings Officer finds the Applicant has demonstrated that the requested change in classification is consistent with the purpose and intent of the MUA-10 Zone. A change in classification will preserve the rural character of the Subject Property, due to the low density of development allowed in the MUA-10 zone, while permitting development consistent with that character. As set forth in the findings below, the Subject Property is not suited to full-time commercial farming but could be used for hobby farming. Low density development will also conserve open spaces and protect natural and scenic resources. The Hearings Officer finds that approval of the proposed rezone to MUA-10 would permit applications for low-density development. The Hearings Officer's findings regarding agricultural land, consistency with the Comprehensive Plan and Goal 3 are set forth in the findings below.

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

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

**FINDING:** There is no proposal to develop the property at this time. The above criterion asks if the proposed zone change will *presently* serve public health, safety, and welfare. The Applicant provided the following response in the submitted burden of proof statement:

*Necessary public facilities and services are available to serve the subject property. Will-serve letters from Central Oregon Electric Cooperative and Avion Water Company, Inc., Exhibits E, F and G of this application show that electric power and water services are available to serve the property.*

*The subject property is located a short distance to the north of Butler Market Road, an arterial street. It is also approximately one-half mile west of the Powell Butte Highway. The impact of rezoning the subject property will be extremely minor. With its current zoning, it is theoretically possible to divide each 40-acre parcel into two nonfarm dwelling parcels. This would allow a total of four dwellings to be built on the subject property. If MUA-10 zoning is applied, the approval of a standard subdivision would allow the creation of eight residential lots. If cluster development approval is allowed as a conditional use, the maximum number of houses allowed would be ten (one per 7.5 acres) – an increase of six houses over the number allowed in the EFU zone. An increase of six houses is a de minimus impact. The existing road network is available to serve the use. This has been confirmed by the transportation system impact review conducted by Transight Engineering, Exhibit N of this application.*

*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 about three miles away. The applicant is pursuing annexation of the northern parcel to the rural fire protection district and believes, based on conversations with District representative, that inclusion in the district will be obtained. Access to the subject property by fire trucks is provided by arterial streets with the exception of a small stretch of Abbey Road that will be required to be improved as a condition of a future land division of the subject property. It is efficient to provide necessary services to the property because the property is already served by these service providers and adjacent to and large tracts of land zoned MUA-10 that have been extensively developed with rural residences on small lots and parcels.*

The record shows that neighboring properties contain residential and small scale agricultural uses, which have water service primarily from wells, on-site sewage disposal systems, electrical service, telephone services, etc. The record does not contain any evidence of known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare.

Mr. and Mrs. Conrad expressed concern about the lack of irrigation rights and queried whether homeowners would be using potable water for their lawns. They also asked whether fire hydrants will be required, alleging additional fire risk associated with new development.

The Hearings Officer finds that the Applicant has demonstrated public water is available to the Subject Property through submittal of a will-serve letter from Avion Water Company, Inc. Irrigation water is not required for approval of the requested rezone. Although no development is proposed at this time, prior to development, the Applicant will 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.

For the foregoing reasons, the Hearings Officer finds this criterion is met.

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

**FINDING:** The Applicant 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 lands in farm use – and marginally, noncommercial farm use at that – are those west of the subject property. The proposed zone change and plan amendment will impose new impacts on this EFU-zoned farm land because these lands are separated from the subject property by Abbey Road, each parcel is under twenty acres in size and is developed with a single-family residence. Furthermore, these farm parcels are close proximity to the J-Bar-J therapeutic boarding school. The Academy at Sisters. Farm uses in the greater area, also, are occurring on properties that have been developed with residences and/or are in close proximity to lands zoned MUA-10 that are developed with residences.*

In addition to this statement, the Applicant provided specific findings for each relevant Comprehensive Plan goal and policy, which are addressed below. The Applicant's Rebuttal and Final Argument details the uses permitted outright in the EFU zone, compared to those allowed outright in the MUA-10 zone, which are more limited. *Compare* DCC 18.32.020 with DCC 18.16.020 and 18.16.025. The Hearings Officer finds that a change in zoning of the Subject Property will not materially alter the impacts on neighbors and the environment that may occur as a result of development of the property.

Mr. and Mrs. Conrad object to the applications in part because they believed their property would be protected from subdivisions, given the distance from the UGB/reserve. They further stated concern regarding pets and animals "used to the peaceful country sounds who will be affected by the constant noise." The Hearings Officer notes that a belief that surrounding properties would not ever be rezoned is not evidence of "impact on surrounding land use," or inconsistency with specific goals and policies within the Comprehensive Plan. Moreover, there is no evidence in the record to support a finding that rezoning the Subject Property to MUA-10 would result in "constant noise." Any future development and use of the Subject Property will be required to be consistent with the County Noise Control Ordinance, DCC Chapter 8.08, which sets forth regulations to protect the public peace, health, safety and general welfare from unreasonably loud or raucous noise.

The Hearings Officer 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. Specifically, the Hearings Officer finds that the MUA-10 zoning is the same zoning of many other properties in the areas west, northwest, east and south of the Subject Property. There is no evidence that the requested zone change will impose new impacts on EFU-zoned land in the vicinity of the Subject Property.

For the foregoing reasons, the Hearings Officer finds this criterion is met.

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

**FINDING:** The Applicant is proposing to rezone the Subject Property from EFU to MUA10 and re-designate the Subject Property 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 rural lands that contained poor soils but undeveloped were zoned EFU without regard to the specific soil characteristics of the property. Land owners 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 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 merit MUA-10 zoning to correct the "broad brush" mapping done in 1979 and 1980. Since 1979/1980, there is a change of circumstances 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 to Saint Charles Medical. It has grown significantly and its need for workers has increased. The area now includes The Academy at Sisters, a 20 student and 20 employee therapeutic boarding school for girls.*

*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 2017, according to Table 4 of the 2017 US Census of Agriculture, **Exhibit O**, 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 P**. The vast majority of farms in Deschutes County have soils that are 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 makes the following findings. First, whether or not owners of other properties may, or may not, request a change of comprehensive plan designation and zoning in the future is not relevant to the Hearings Officer's consideration of the current applications. Each application must be considered on its own merits.

Second, concerns regarding development encroachment support a finding of change of circumstances. As set forth in more detail in the findings below, the Subject Property is not comprised of agricultural soils, and is not land that could be used for agricultural uses in conjunction with adjacent property.

Third, the Hearings Officer does not have authority to deny the requested applications on the basis of concerns about growth. While understandable, the applications may be granted where, as here, all applicable criteria are met.

Finally, concerning wildlife concerns, the Hearings Officer finds the Subject Property is not within a Wildlife Area combining zone and is not subject to wildlife protections sanctioned by the County's Goal 5 ESEEs. Moreover, there is no evidence that the requested rezone, in and of itself, will impact wildlife.

For all the foregoing reasons, and based on evidence in the record that shows declining farm operations and limited numbers of financially successful farm operations, the Hearings Officer finds that a change of circumstances since the time the Subject Property was last zoned exists. Based on the soils report and the detailed findings below, the Hearings Officer finds that a mistake was made in designating the Subject Property EFU/Agriculture because the soils on the property did not merit a designation and protection as "Agricultural Land." Classification and zoning of the Subject Property as EFU/Agricultural was a mistake due to the poor soils on the Subject Property which must be revised to correct the "broad brush" mapping done in 1979 and 1980. The Hearings Officer finds this criterion is met.

## **Deschutes County Comprehensive Plan**

### **Chapter 2, Resource Management**

#### Section 2.2 Agricultural Lands

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

**FINDING:** The Applicant and Central Oregon LandWatch (COLW) disagree on whether the NRCS soil mapping units are the most detailed soils information for determining land capability class. The Applicant and COLW both submitted extensive argument concerning

classification of the Subject Property as agricultural land. Statewide Land Use Planning Goal 3 states:

*“**Agricultural Land** ... in eastern Oregon is land predominantly Class I, II, II, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service ... “*

### **APPLICANT’S EVIDENCE AND ARGUMENTS**

Summarized briefly, the Applicant submits that Goal 3 does not say that “agricultural land” is land mapped by NRCS soil studies as Class I, II, III, IV, V and VI. The Applicant argues that DLCDC rules supplement the goal; they say that NRCS mapped soils in Class I-VI are agricultural land, but they also provide property owners with the right to challenge NRCS soil study results. This is done by hiring a certified soil scientist to conduct a more detailed soils study and obtaining DLCDC approval to use the study in the present application. The Applicant states that a soil classification system and soil study maps are not one and the same thing.

The Applicant notes that the right to challenge NRCS mapping is allowed both by the text of Goal 3 itself and by ORS 215.211. In the event of conflict, ORS 215.211 controls over the conflicting provisions of the Goal 3 rules adopted by LCDC. The law requires soil scientists to study and report on the soils based on the SCS soil classification. OAR 660-033-0030(5)(a). The Applicant submits that it is permissible to use the results of the soils survey to determine whether soils on a particular property are properly classified as being in Class I-VI. It states, “Nothing in the soils study rules suggests that the results of the study are confined to addressing the suitability of Class VII and VIII for farm use.”

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

*The applicant’s soils study, **Exhibit D**, and the findings in this burden of proof demonstrate that the subject property is not agricultural land. This goal, therefore, does not apply. The vast majority of the subject property is comprised of Class 7 and 8 nonagricultural soils and the property has no known history of agricultural use. As noted in the Eastside Bend decision, **Exhibit L**, “these [Class 7 and 8] soils [according to soils scientist and soils classifier Roger Borine] 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 VIII 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.”*

The Applicant also submitted an Applicant’s Response to Staff Report Supplement to Burden

of Proof addressing this Chapter, Section and Goal 1:

*The evidence clearly shows that the subject property is not agricultural land. The property is not comprised predominantly of Class VI or better soils. So, it does not qualify for protection as agricultural land based on the classification of its soils. Only if the extremely poor Class VII and VIII soils on the subject property are "suitable for farm use" taking into consideration a host of factors. Lands are suitable for "farm us" only if a farmer can expect a profit from growing crops or raising livestock on the property. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007).*

*In Deschutes County it is clear that farming Class VII and VIII soils will not be profitable. Only 16.03% of farmers in Deschutes County made a profit in 2017 according to the 2017 US Census of Agriculture. From my twenty-nine years of experience working in Deschutes County with a focus on rural land use, I can say that the subject property has one of the highest percentages of Class VII and VIII soils of any EFU-zoned property in the County. This makes it evident that it would be unreasonable for a property owner to expect to make a profit by attempting to farm on the subject property.*

*The subject property has never been irrigated and has no known history of farm use. Approximately 85% of the soils on the property are Class VII and VIII nonagricultural soils. This percentage is higher than the percentage of these soils found to warrant rezoning to MUA-10 in the following similar applications for lands on the eastside of Bend. The following are the percentages:*

<i>Eastside Bend, LLC</i>	<i>58% for TL 1600 and 1601 56% for TL 1400</i>
<i>Porter Kelly Burns</i>	<i>67%</i>
<i>DSL</i>	<i>51.5%</i>

*LCC VII and VIII soils are so poor that the NRCS Soil Survey of Upper Deschutes River Area says that the soils "have very severe limitations that make them unsuitable for cultivation." The LCC VII and VIII soils are described by soil scientist Andy Gallagher as predominantly shallow and ashy-skeletal with interspersed rock outcrops. The only possible agricultural use of the property is livestock grazing. The soils report shows that these soils are so poor they produce only approximately one-half the typical amount of forage expected based on the soil classification – far below the level of forage production expected on typical Central Oregon rangeland.*

*Only 15 percent of the soils on the combined properties are rated Class VI and these areas are not suitable for farm use given their limited extent and location. According to the NRCS, Class VI soils also "have severe limitations that make them generally unsuitable for*

*cultivation.” They are [sic] do not support the growth of cultivated crops.*

The Applicant’s Rebuttal and Final Argument, submitted on October 15, 2021 states, in relevant part:

*The evidence in this matter is clear. The subject property is not suitable for farm use or forest use. As stated by adjoining property owner Sue Conrad “there is not a lot of potential for farming that 80 acres.”<sup>5</sup> As Ms. Conrad observed in pre-hearing comments “[s]ince there is rock at the surface of our 2 ½ acres in many places, this [development of homes on the Swisher Trust property] will most likely involve extreme measures for the foundation.” Land of this type is not “agricultural land” of the type Statewide Land Use Planning Goal 3 seeks to protect.*

*Like the Conrad property, there is rock at the surface in many places throughout the subject property. A set of ten photographs have been filed with the County to illustrate the fact that this is the condition of the property. ...*

*Ms. Conrad argues that EFU zoning and Oregon’s statewide land use planning require that this property be remain [sic] undeveloped open space and that the Swishers purchased the property knowing it could not be developed. Her arguments against approval of the zone change and plan amendment assume that retaining EFU zoning will assure that the Swisher/MacCloskey property will remain undeveloped. This is an unwarranted assumption.*

*EFU zoning does not preclude development of the Swisher/MacCloskey property. The EFU zoning that applies to the property now allows the applicant to see approval of any of the following developments without approval of the requested zone and plan change.<sup>6</sup>...[list omitted]*

*If the property contained soils that could support farm use, the property might qualify for approval of the following additional uses. ... [list omitted].*

*Additionally, the uses permitted outright in the MUA-10 zone are much more limited than the uses allowed outright in the EFU zone. Compare, DCC 18.32.020 (single-family dwelling, stables, horse events, Type I home occupation and other uses allowed in EFU zone) with DCC 18.16.020 and 18.16.025 (exploration of minerals, fire service facilities, exploration and production of geothermal resources, outdoor mass gathering, composting, relative*

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<sup>5</sup> This comment was offered in Ms. Conrad’s testimony at the 9/21/2021 hearing.

<sup>6</sup> Most listed uses require County review either to confirm they meet special provisions to be allowed without conditional use review or to demonstrate they meet conditional use criteria. Mining and processing would occur only if resource is determined to be present on the property. Some uses such as a fire station are allowed subject only to site plan review.

*farm assistance dwelling, church and cemeteries, utility facilities including wetland waste treatment systems, winery, farm stands, model aircraft "airport," processing farm crops). Given these facts, it is clear that a change of zoning will not materially alter the impacts on neighbors and the environment that may occur as a result of development of the property.*

Additional materials submitted by the Applicant include the "Rural Resource Lands Research Report" dated May 16, 2019 prepared by DLCD Public Research Lands Fellow Stephanie Campbell (part). This Report states on page 6 with respect to the definition of Agricultural lands in OAR 660-033-0020(1):

*The agricultural land definition includes land based on soil capability but also requires an in-depth analysis of whether the land is suitable for farm use, which typically requires the use of discretion by local decision makers. **OAR 660-033-0030 provides additional guidance on identifying agricultural land and provides an option for the use of soil assessments that are more detailed than NRCS mapping.** In addition, there is substantial case law which has served to further refine how suitability for farm use should be addressed.*

(emphasis added). This Report continues on page 7, in relevant part:

***Presently, counties may designate rural resource lands through two methods. The first, and to date only process utilized, is by identifying land that does not meet the definition of "Agricultural Land" or "Forest Land" and thus is not subject to Goal 3 or 4 protection.*** These lands are typically designated in the county comprehensive plan as "nonresource lands" and may be developed for residential or other uses not allowed in farm and forest zones. ...

*Ten Oregon counties have utilized this method to rezone land from EFU and forest. The primary purpose for nonresource designations appears to be the creation of rural residential parcels.<sup>7</sup> Between 2008 and 2018, DLCD identified 24 zone changes associated with nonresource designations. These zone changes did not require an exception from Statewide Planning Goals 3 or 4.*

(emphasis added). In the "Agricultural Soils Assessment" submitted by the Applicant, published by and obtained from DLCD website, it states, in relevant part:

*Oregon has some of the most productive soil in the world,. Soil mapping done by the USDA Natural Resources Conservation Service (NRCS) is the most common tool used for identifying the types of soils in an area. The NRCS provides a rating for each soil type that indicates how suited the soil is for agriculture. Oregon's land use laws help keep the best soils for crop cultivation and agricultural use. Soils that are less productive have more*

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<sup>7</sup> Clatsop, Crook, Deschutes, Douglas, Jackson, Josephine, Klamath, Linn, Lane, Wasco.

*opportunities for development than higher quality soils.*

*NRCS does not have the ability to map each parcel of land, so it looks at larger areas. This means that the map may miss a pocket of different soils. DLCD has a process landowners can use to challenge NRCS soils information on a specific property. Owners who believe soil on their property has been incorrectly mapped may retain a "professional soil classifier ... certified by and in good standing with the Soil Science Society of America (ORS 215.211) through a process administered by DLCD. This soils professional can conduct an assessment that may result in a change of the allowable uses for a property.*

*Soil capability is a measure the soil's productivity potential for farm crops and forests. The rules for an assessment of a soil's productivity apply to land zoned exclusive farm use or for mixed farm and forest use (OAR 660-033-0045). They also apply to rezoning forestland for non-resource use when the applicant relies on alternate soils information to show that the land should not be agricultural. The rules can apply to other changes as well, including those for comprehensive plan designations, zoning, non-farm land divisions, and certain dwellings.*

In the Applicant's Rebuttal submitted October 5, 2021 at page 4, the Applicant states:

*The Class 38B soils are a soils complex. This means that a large unit of land is mapped as containing a mix of soils of different types. In this case, the Deskamp soils are Class VI and the Gosney soils are Class VII. Soil classifier Andy Gallagher's soil survey that was approved by DLCD determined that the subject property contains much a [sic] percentage of Gosney and Class VIII rock outcrop soils than Deskamp soils than found in the entire Class 38B soil mapping unit that applies to the subject property.*

*Ms. Macbeth filed color photographs of other Bend area properties that are mapped 38B by the NRCS soil survey. The pattern of development shown in the aerial photos is a mix of irrigated and non-irrigated land that is not in farm use - presumably a pattern dictated by the location of the suitable Deskamp and unsuitable Gosney soils. Large non-irrigated areas much like the subject property that are not employed in visible farm use are shown in Figure 1.*

*Photos of farm pastures in areas allegedly mapped as being Class 38B soils by the NRCS soil survey were filed by Ms. Macbeth. The COLW photos prove little or nothing of relevance to the subject property because it is unknown whether any of the photographs depict land mapped Class 38B that is 85% Gosney soil or whether they are similar to the subject property. It is highly unlikely that they do. The subject property contains rock outcrops and surface rock not seen in Ms. Macbeth's photos of farm uses occurring on 38B soil (excluding the aerial photograph).*

*Ms. Macbeth claims that the applicant could irrigate the subject property by obtaining*



*rights to irrigate the subject property. The applicant disagrees. The subject property has no legal right to obtain water from Central Oregon Irrigation District. It has no access to irrigation water. The subject property was previously owned by the District and it did not establish irrigation water rights on the property. It is very telling that the district which delivers and holds irrigation water rights chose not to irrigate its own property – most logically due to its nonagricultural soils.*

*Furthermore, irrigation water must, by law, be put to beneficial use. Irrigating land that is comprised of 85% Class VII and VIII is not a beneficial use of water and one COID would surely not allow. Drilling a well and purchasing water rights to irrigate to irrigate [sic] these nonagricultural soils in a futile attempt to farm them is cost prohibitive and not an accepted farm practice in Central Oregon. Such an approach would require a person farming good farm ground to retire their water right and transfer it to the applicant to irrigate rocks because no new water rights are available in the Deschutes Basin to serve the subject property. See, photographs of the subject property.*

The Applicant submitted the following in its Rebuttal and Final Argument:

- 1. Goal 3's definition of "agricultural land" does not say that counties must rely on the soils maps and rating provided by NRCS soil surveys. Instead, it says that the determination of whether soil is agricultural land is based on the soil classes (I-VIII) described in the Soil Capability Classification System of the US Soil Conservation Service. COLW's arguments erroneously conflate the two (soil classification system and soils mapping). ...*
- 2. OAR 660-033-0020(1)(a)(A), Definitions, broadens the definition of "agricultural land" provided in Goal 3 to include "lands classified by the US Natural Resources Conservation Service (NRCS) as predominantly \*\*\* Class I-VI soils in Eastern Oregon." This broadening, however, does not remove the language of Statewide Goal 3 that specifically allows counties to rely on more detailed soils data to determine whether land is or is not "Agricultural Land." ... The purpose of Goal 3 is to preserve agricultural land. It is not intended to preserve land that does not meet the definition of "agricultural land." A more detailed soils study helps Counties properly sort one from the other by making a better determination of whether land qualifies as agricultural land due to soil classification (LCC).*
- 3. The Oregon Legislature adopted ORS 215.211(1) to assure property owners the right to provide local governments with more detailed soils information than provided by the NRCS's Web Soil Survey to "assist a county to make a better determination of whether land qualifies as agricultural land." ORS 215.211 sets the conditions for such "more detailed" surveys. It requires that soil scientists who conduct the assessment belong to the narrow pool of persons who are soils classifiers and are certified in good standing with the Soil Science Society of America. It also requires that reports be reviewed by DLCD before use by local governments in deciding whether land qualifies as agricultural land. Mr. Swisher obtained DLCD's permission to rely on the Red Hill Soils/Gallagher soils study to address*

the "agricultural land" issue.

4. ... It is clear that the report is expected by DLCD to be used in this zone change and plan amendment application [under OAR 660-033-0030(5)(c)(A)]. ... The fact that the soils report must report results based on the NRCS soil classification makes it clear that its classification based on the NRCS system may be used in lieu of the more general information on the topic provided by the NRCS soils study to determine whether a property meets the definition of agricultural land. COLW's argument to the contrary, therefore, should be rejected as it renders meaningless the LCC-based survey results that must be provided to the county to decide whether a property is "agricultural land."
5. DLCD describes its understanding of the role NRCS soils mapping and the more detailed soils surveys play in "defining agricultural land" on its website....
6. COLW's argument that the less-detailed NRCS soil study conducted at a landscape level must control over the more detailed information provided by an Order 1 soils survey for a particular property is illogical. It is an argument rejected by the Oregon Legislature when it adopted ORS 215.211 and by DLCD. ...

The Applicant submitted a rebuttal letter from Andy Gallagher dated October 14, 2021 to address COLW's "layperson arguments about soils mapping and the suitability of Soil Mapping Unit 38B for agricultural use." Among other things, Mr. Gallagher stated:

1. *It would be a mistake to confuse farms in the photographs filed by COLW with the Swisher property. They have no bearing on the conditions that exist on the Swisher property which are "rough, rocky land, lava blisters and native vegetation, not farmland."*
2. *COLW misstates the information provided by the NRCS soil survey.*
3. *Even if the NRCS soil study data is used and the contrasting inclusions in the 38B soil mapping unit are correctly identified as Bedrock Outcrop, the subject property is predominantly Class VII and higher.*
4. *The Order 1 more detailed soil survey shows that the NRCS soil survey is very inaccurate for the Swisher property.*

The following constitutes an excerpt from Mr. Gallagher's October 14, 2021 letter:

*In the letter [COLW] erroneously claim the parcel is mapped only as Class III irrigated and Class VI nonirrigated soils,. Why didn't the letter mention the Class VII and Class VIII land that is mapped here? The fact is that the 38B soil map unit is a complex. **Soil complexes are used in soil mapping where two or more dissimilar soils are mapped together where they either follow a regular pattern or are unpredictable in distribution but***

**are too complexly associated at the given scale to delineate individually and have a legible map. Typically, in a complex each major component occurs in each delineation, although the proportions may vary appreciably from one delineation to another.** This last point is key in this case that the proportions may vary appreciably from one delineation to another. Also critical in this case is that if the soils are mapped as a complex and the percentages can vary appreciably from one delineation to the other then the NRCS soil survey does not actually report a hard number for acres of Class 3 and Class 6 soils as the COL letter states and it is open to interpretation or better yet, more intensive soil mapping.

... [T]hese percentages in the NRCS soil survey are not hard facts but are ballpark estimates that vary appreciably between delineations. ...

Fine detail needed for land use decisions cannot usually be shown at the scale of the NRCS soil survey, nor is this the intent of the soil survey. The minimum size map delineation is very scale-dependent. This is where the Order-1 soil mapping is important and provides a distinct advantage over the NRCS map. The Order-1 soil survey map is a larger scale map and the minimum map delineation can be much smaller than at the Order-2 scale of the Soil Survey. More detail can be determined because there is more intensive sampling, and more detail can be shown because the map scale is larger. ... The intensive sampling of the Order-1 soil survey supplies a much more realistic measure of map composition of a parcel than the NRCS soil survey. In this case, I was able to map the Deskamp soil as a consociation, separately from the Gosney and Bedrock Outcrop, which gets directly at the issue at hand here of calculating acreage of soils that are Class VI and lower and soils that are Class VII and higher.

Another strength the Order-1 soil survey has over the NRCS for detailed land use planning decisions is that all field observations are located with GPS and their positions are shown on the map and each profile is logged in the soil profile descriptions section of the report. This is verifiable information that the NRCS soil survey just does not have and cannot provide.

**If the NRCS soil survey is to be followed like a hard fact, then all the 38B map delineations would have to have the identical markup of 50% Deskamp, 35% Gosney and 15% contrasting inclusions. This defies all reason and experience. These published percentages are simply an estimate based on limited data and projected over the survey area, and this is often far off from the truth on the ground. It is a mistake to believe that the percentages NRCS publishes are anything but the approximation of a concept.**

(emphasis added).

With respect to arguments regarding "accuracy" of Order 1 soil surveys and, in particular, the

Red Hill Soils/Gallagher study, Mr. Gallagher commented in his October 14, 2021 letter:

*The real issue is “map accuracy” which is based upon set standards for maps. National Map Accuracy Standard (NMAS) provides insurance that maps conform to established accuracy specifications, thereby providing consistency and confidence in their use in geospatial applications. An example of such a standard: “maps on publication scales larger than 1:20,000, not more than 10 percent of the points tested shall be in error by more than 1/30 inch, measured on the publication scale; for maps on publication scales of 1:20,000 or smaller, 1/50 inch.” The error stated is specific for a percentage of points, and to suggest that accuracy in maps is the unattainable freedom from error as the COL letter does, is not a relevant or a serious argument.*

*When one map shows point data like an Order-1 soil survey the accuracy can be measured, and when another map does not (like the NRCS soil map) there is a shortage of information, so the accuracy of the NRCS map cannot be determined for point data. The accuracy of the NRCS estimate of the percentage of components in the 38B soil complex can be shown to be very inaccurate in this case, and it clearly underestimates the Class 7 and Class 8.*

Finally, Mr. Gallagher commented on the photographs submitted by COLW that purport to show successful farming operations on properties with the same LCC soils classification as the Subject Property:

*In her long letter Ms. Macbeth [of COLW] references the soil assessment that I made for the Swishers on eighty acres northeast of Bend and while she does not deny any of the basic findings of my soil assessment report, there are a number of claims in her letter that are not correct.*

*She submits aerial photographs and landscape images that seem to be selected specifically to mislead the decision makers by trying to portray this land as having much more agricultural potential than it has. The photos offered are claimed to be from land mapped as 38B and they may well be, but it is a mistake to confuse the farms in the pictures with this land, because this land is not 38B.*

*I did not map any 38B on the eighty acres, so all the landscape photos are irrelevant. If anything these photos provide further evidence that the NRCS soil map here is unreliable. It raises suspicion that COL did not include photos of the Swisher property in their collection of photos. For if they had included photos of the Swisher’s land the photos would have shown rough, rock land, lava blisters and native vegetation, not farmland.*

## **CENTRAL OREGON LANDWATCH EVIDENCE AND ARGUMENTS**

COLW argues that it is impermissible for the County to rely on the Order 1 Red Hill

Soils/Gallagher soils survey because the NRCS conducted a less-detailed soil survey that included the Subject Property. Summarized briefly, COLW asserts that the NRCS soil survey is controlling and cannot be directly or indirectly challenged by a landowner's submission of an Order 1 soil survey conducted on a particular property. COLW argues that the landscape level NRCS soil survey on which classification of "agricultural land" in eastern Oregon was based means that any lands comprised of Class I-VI soils in eastern Oregon are *per se* agricultural and cannot be rezoned or reclassified without a Goal 3 exception.<sup>8</sup> COLW submitted a number of photographs of property alleged to be comprised of 38B soils with the same NRCS classification as the Subject Property. These photographs show green fields and farming operations on these other properties.

COLW argues that it would be disingenuous to "mislead" the Hearings Officer into believing that use of an Order 1 survey replaces or changes the NRCS soil survey. COLW asserts that "accuracy means free from error," and states that the Applicant's Order 1 survey is not free from error.

In a September 21, 2021 email to Staff, COLW submitted:

*It is not the qualifications of the person hired to prepare a report, but the demonstrably incorrect legal theory the report is being used to support that LandWatch argues against.*

*For the Hearings Officer's information please find attached a copy of Edward Sullivan's (a member of the law faculty at Lewis and Clark Law School) article in the San Joaquin Agricultural Law Review explaining the history of protection of farmland in Oregon, in which Edward Sullivan explains that the NRCS capability classifications, as LandWatch stated this evening, were expressly and deliberately chosen as the basis for the definition of agricultural land protected by Statewide Planning Goal 3.*

*"As adopted in 1975, Goal 3 incorporated the approach first proposed by OSPiRG during the 1973 legislative session to identify and define agricultural lands using the Soil Conservation Service soil capability ratings, rather than merely "prime farmlands," preferring protection of all suitable agricultural lands. It defined "agricultural land" differently for two distinct regions of the state (East and West): those lands predominantly composed of Class I-IV soils in western Oregon and Class I-VI in eastern Oregon, as well as other lands "suitable for farm use" and other lands necessary to permit farm practices" on adjacent or nearby lands. These are the lands required to be inventoried and preserved."*

*The applicant's statements in the hearing to the contrary are incorrect.*

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<sup>8</sup> In response, the Applicant notes that this same argument was presented to and rejected by LUBA in *Central Oregon LandWatch v. Deschutes County (Aceti)*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2016-012, August 10, 2016)

COLW submitted into the record a copy of the cited Agricultural Law Review article entitled "The Long and Winding Road: Farmland Protection in Oregon 1961-2009."

In its September 25, 2021 submission COLW stated, in relevant part:

*We respectfully urge the Hearings Officer to deny the application. The fallowed subject property is classified as Class III and Class VI land by the NRCS and so is agricultural land by definition. An exception to Goal 3 is required. Because no exception has been justified, the application must be denied.*

*Applicant's theory of the case is erroneous for three main reasons. First, the Oregon Court of Appeals has already determined that additional detail such as that provided by the applicant's paid report has no effect on whether land determined by the NRCS to be Class I-VI in eastern Oregon is agricultural land. Such data are relevant only to whether land not comprised of the specified classes determined by the NRCS is also agricultural land. Second, the paid report is an "Order 1 survey." Application, 7. Order 1 surveys, by definition, do not affect the NRCS land capability classifications of the official soil survey, which here are Class III and Class VI. Third, the applicant misinterprets the meaning of "accurate" and the relationship between detail and accuracy, and thus confuses the significance of the paid report, an Order 1 survey. Each of these reasons is explained in more detail below.*

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*The applicant's land is predominantly 38B according to the official survey of the NRCS. Att. 1. The land is classified by the NRCS as a "farmland of statewide importance." Id. The same 38B land is shown to be in use across Deschutes County for irrigated crop production. Figures 1-12.*

*The Court of Appeals has interpreted Goal 3 to mean land comprised of the specified classes I-VI is per se agricultural land. Any additional information, such as the applicant's paid report, is relevant only to whether land which is not predominantly comprised of such soils is also agricultural land. 1000 Friends of Oregon v. LCDC, 85 Or App 18, 22-23, 735 P.2d 645 (1987). While applicant correctly noted that more detailed information may be used, the purpose of such information is to identify whether more land may qualify as agricultural land in addition to the lands identified as Class I-VI by the NRCS.*

*The Oregon Court of Appeals decision accords with the legislative history of Goal 3. The legislative history leading to the adoption of the NRCS land capability classifications as the applicable legal standard is summarized in Edward Sullivan's law review article on the history of protection of Oregon farmland. ... As the article further explains, the underlying assumption of the Oregon program to protect agricultural lands is that long-term resource decisions should not be based on short-term economics or finances. Id. Here, the applicant's lack of interest in farming is irrelevant to Oregon's agricultural land use policy*

to preserve the state's agricultural industrial land base for future generations of farmers.

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*The Court of Appeals decision in 1000 Friends of Oregon v. LCDC, the legislative history of the definition of agricultural land in Oregon, and the plain language of both Goal 3 and OAR 660-033-0020 mean that agricultural land include all lands classified by the NRCS as Class I, II, III, IV, V, and VI in eastern Oregon, and thus include the fallowed subject property. **Order 1 surveys have no effect on NRCS land capability classifications.***

(emphasis in original). COLW states on page 4 of its submittal:

*The NRCS explains in the attached official published document from the U.S. Department of Agriculture that an Order 1 Survey has no effect on the results of the NRCS survey. Att. 3:*

*“Order 1 soil surveys and site-specific data collected are supplements to the official soil survey, but they do not replace or change the official soil survey.”*

*An Order 1 survey is used to support a determination of whether a manure storage facility, or other highly specialized land use, can be placed on land like the applicant's land that is currently lying fallow. ... The evidence presented by the applicant is supplemental to, but does not change, the official NRCS survey information. Applicant's paid report provides detailed, but irrelevant, data for this inquiry.*

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*Goal 3 defines agricultural land as land in classes I-VI in eastern Oregon as determined by the official NRCS soil survey. The applicant's evidence is not directed at this legal standard and has no effect on it. The land is agricultural land by definition, an exception to Goal 3 is required, and the application must be denied. **Applicant misrepresents the nature of map units and the effect of more detail***

(emphasis in original).

## **HEARINGS OFFICER'S ANALYSIS AND FINDINGS**

The Hearings Officer finds that NRCS soil survey maps are not definitive or “binding” with respect to a determination of whether the Subject Property is, or is not, agricultural land. As LUBA determined in the *Aceti* case, OAR 660-033-0030(5)(a) and (5)(b) allow the County to rely on more detailed data on soil capability than provided by NRCS soil maps to define agricultural land, provided the soils survey has been certified by DLCD. The NRCS provides an Order 2 soil survey, which extrapolates more limited data from the Upper Deschutes River

Survey to determine LCC soil classifications at a landscape level. On the other hand, the Applicant's soil scientist, Mr. Gallagher, conducted a more detailed Order 1 survey.

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

With respect to COLW's arguments regarding "accuracy," the Hearings Officer finds that DLCD confirmed in its review of the Applicant's soils report that the Red Hills Soils/Gallagher soils report is more detailed than the NRCS soils survey. The Applicant notes that, "If it were not, DLCD would not have allowed the applicant to rely on the report in this proceeding." The Hearings Officer agrees. The Hearings Officer finds persuasive Mr. Gallagher's October 14, 2021 letter in which he stated, "When one map shows point data like an Order-1 soil survey the accuracy can be measured, and when another map does not (like the NRCS soil map) there is a shortage of information, so the accuracy of the NRCS map cannot be determined for point data. The accuracy of the NRCS estimate of the percentage of components in the 38B soil complex can be shown to be very inaccurate in this case, and it clearly underestimates the Class 7 and Class 8."

The Hearings Officer finds that the Subject Property is mapped by the NRCS soil survey as being comprised predominantly of 38B soils, which is a soils complex. The Applicant's Order 1 soils study shows that about 85% of the Subject Property is Class VII and VIII soil. This is explained by the Red Hills Soils/Gallagher report which found that the Subject Property contains a much higher percentage of Gosney and Class VIII rock outcrop soils than Deskamp soils, as compared to those found in the entire Class 38B soil mapping unit that applies to the Subject Property. The findings and conclusions in the Red Hills Soils/Gallagher report are supported by photographs of the Subject Property submitted by the Applicant that show rocky, shallow soils.

COLW's evidence of other properties alleged to be comprised of 38B soils does not change this determination as there is no supporting documentation that includes any Order 1 soil survey of the photographed properties. The Hearings Officer cannot determine, based on evidence in the record, that the photographs of farming operations submitted by COLW are on lands comprised of 85% Class VII and Class VIII soils, such as the Subject Property, and/or on lands that lacked irrigation rights and had to acquire such rights. Thus, the Hearings Officer finds the photographs submitted by COLW are not relevant to the determination of whether the Subject Property is "agricultural land."



The Hearings Officer rejects COLW's implied assertion that the Red Hill Soils/Gallagher soils study is unreliable because it is a "paid report." The Applicant retained a certified soil scientist and DLCDC reviewed and approved the Order 1 soils report prepared by the certified soil scientist. There is no persuasive evidence that the Red Hill Soils/Gallagher soils study is erroneous, or should not be given weight by the County in these proceedings. Neither COLW nor any neighbor opposing the applications submitted any competing evidence to challenge the findings of the Red Hills Soils/Gallagher report.

The Hearings Officer also rejects COLW's argument that NRCS land classifications based on its soil maps cannot be varied, unless a landowner requests an Order 1 soils study to qualify **additional** land as agricultural land. This is directly contrary to LUBA's holding in *Central Oregon Landwatch v. Deschutes County and Aceti*, LUBA No. 2016-012: "The Borine Study is evidence a reasonable person would rely on and the county was entitled to rely on it. As intervenor notes, the NRCS maps are intended for use at a higher landscape level and include the express statement 'Warning: Soil Ratings may not be valid at this scale.' Conversely, the Borine Study extensively studied the site with multiple on-site observations and the study's conclusions are uncontradicted, other than by petitioner's conclusions based on historical farm use of the property. This study supports the county's conclusion that the site is not predominantly Class VI soils." COLW's assertion is also directly contrary to ORS 215.211 and OAR 660-033-0030(5)(a), (5)(b) and (5)(c)(A).

ORS 215.211(1) specifically allows for the submittal by a certified soil scientist of an assessment of the capability of the land based on more detailed soils information than that contained in the Web Soil Survey operated by the NRCS to "assist a county to make a better determination of whether land qualifies as agricultural land." The Applicant followed this procedure by selecting a professional soil classifier who is certified by and in good standing with the Soil Science Society of America to prepare the Order 1 soils report. DLCDC reviewed the soils report pursuant to ORS 215.211(2) and determined it could be utilized in this land use proceeding.

The Hearings Officer finds the County is entitled under applicable law to rely on the Order 1 soils survey in these applications in making a determination that the soils on the Subject Property are not predominantly Class I-VI soils and are thus not "agricultural land" and/or otherwise suitable for farm use. The Hearings Officer finds that the more detailed, onsite soil study submitted by the Applicant provides property-specific information not available from the NRCS mapping. The Hearings Officer finds that the Applicant's soil study supports a finding that the Subject Property does not constitute agricultural land and thus is not subject to Section 2.2, Goal 1 of the Comprehensive plan as "agricultural lands" to be preserved and maintained.

The Hearings Officer finds substantial evidence in the record supports a finding that the Subject Property is not "agricultural land," and is not land that could be used in conjunction with adjacent property for agricultural uses. I find that the requested plan amendment and

rezone will not contribute to loss of agricultural land in the surrounding vicinity. The agricultural industry will not be negatively impacted by re-designation and rezoning of the subject property. Therefore, the Hearings Officer finds the applications are consistent with Section 2.2, Goal 1, "preserve and maintain agricultural lands and the agricultural industry."

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

**FINDING:** The Applicant is not requesting to amend the subzone that applies to the Subject Property; rather, the Applicant is seeking a change under Policy 2.2.3 and has provided evidence to support rezoning the Subject Property to MUA-10. The Hearings Officer finds this Policy is inapplicable.

***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 Applicant is seeking approval of a plan amendment and zone change to re-designate and rezone the properties from Agricultural to Rural Residential Exception Area on the basis that the Subject Property qualifies as non-resource land. The Applicant is not seeking an exception to Goal 3 – Agricultural Lands, but rather seeks to demonstrate that the subject properties do 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 and UAR-10 to MUA-10 for non-resource land. This is the same change approved by Deschutes County in PA-11-1/ZC-11-2 on land owned by the State of Oregon (DSL). In findings attached as **Exhibit H**, 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); DLCDC 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 nonagricultural soils when irrigated and when not irrigated making farm-related endeavors unprofitable. The property is not currently employed in any type of farm use and has no known history of that use. Accordingly, this application complies with Policy 2.2.3.*

COLW argued that the County's comprehensive plan requires that "no more housing will be approved [in rural residential areas] without the required exceptions [to Statewide Planning Goals]." The text of the Comprehensive Plan, Section 3.3 Rural Housing, Rural Residential Exception Areas states:

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

The Hearings Officer finds that the text above does not require the Applicant to obtain plan amendments for approval of its applications where, as here, the Applicant has demonstrated that its land is not Goal 3 "agricultural land." The Hearings Officer further finds that a goal exception is not required by the Comprehensive Plan.

The Hearings Officer finds that the facts presented by the Applicant in the burden of proof for the subject applications are similar to those in the *Wetherell* decisions and in the aforementioned Deschutes County plan amendment and zone change applications.

Therefore, the Hearings Officer finds the Applicant has met its burden of proving the property is not agricultural land and does not require an exception to Goal 3 under state law. The Hearings Officer finds the applications are consistent with Policy 2.2.3.

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

**FINDING:** This plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations. The policy is not directed to an individual applicant, as the Board of Commissioners held in File No. 247-16-000317-ZC/318-PA, *Porter Kelly Burns Landholdings, LLC*.

The Hearings Officer finds that the County's prior land use decisions hold that EFU land may be converted to RREA designation when shown that the land does not meet the definition of "Agricultural Land" provided by Statewide Land Use Planning Goal 3. In the *DSL* findings, Deschutes County found that this policy does not impose a moratorium on requests for applications of the type filed by property owners (**Exhibit H**). The Board of Commissioners also noted that it had approved the conversion of EFU land to an RREA plan designation and MUA-10 zoning in the *Page* decision (**Exhibit J**) and that nothing in this plan policy prohibits that action. The Applicant stated that the County's interpretation of Policy 2.2.3 indicates when and how EFU parcels can be converted to other designations.

The Hearings Officer finds that, based on the County's previous determinations in plan amendment and zone change applications, and based on substantial evidence in the record regarding soils on the Subject Property and use of surrounding lands, the proposal is consistent with this Policy.

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

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

**FINDING:** This plan policy provides direction to the County to identify and retain agricultural lands that are accurately designated. The policy is not directed to an individual applicant. Nonetheless, the Hearings Officer finds that the Subject Property was not accurately designated as demonstrated by the soil study, NRCS soil data, and use of surrounding lands, as discussed in the findings above. The County is not required to retain the Subject Property as "agricultural lands" because it was not accurately so designated.

The Hearings Officer finds the proposal is consistent with this Policy.

Section 2.5, Water Resources Policies

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

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

**FINDING:** The Applicant is not proposing a specific development at this time. Therefore, the Hearings Officer finds the Applicant is not required to demonstrate water impacts associated with development. Rather, the Applicant will be required to address this criterion during development of the Subject Property, which would be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat). The Applicant included the following in its 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 DSL findings, **Exhibit L**, Deschutes County found that impacts of any proposed future development of the DSL 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 the later review by Deschutes County, this policy is satisfied.*

*Future development on the subject property will be able to be served by Avion Water System when developed as shown by **Exhibit F and G**.*

The Hearings Officer finds that substantial evidence in the record shows the applications are consistent with this policy given the fact that future development applications require review of water resources impacts and the fact that future development of the Subject Property will be served by Avion Water System. Moreover, rezoning and reclassifying the Subject Property will allow for some productive use of the property. Uses permitted in the MUA-10 zone and RREA classification will result in less consumption of water than if Applicant was somehow able to obtain irrigation rights to irrigate the poor soils on the Subject Property for farm uses.

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 finds these policies are fulfilled by the County's Goal 5 program. The County protects scenic views and sites along rivers and roadways by imposing Landscape Management Zoning overlay zones, The County has not, however, imposed the LM overlay zone on the Subject Property. Further, no new development is proposed. The Hearings Officer finds 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. In response to this section, the Applicant's burden of proof provided the following:

*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 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 do not qualify as agricultural land that must be protected by Goal 3. The subject property also adjoins a sizeable area of property zoned MUA-10 that is bisected by Butler Market Road. This area 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.*

The Applicant also submitted an Applicant's Response to Staff Report Supplement to Burden of Proof with respect to this Section:

*The staff report asks the hearings officer to determine whether the subject property has soils of poor quality. The soils analysis and other information in the record establishes that the soils are poor quality soils that are not "agricultural land."*

The Hearings Officer finds that the County's Comprehensive Plan provisions anticipate the need for additional rural residential lots as the region continues to grow. This includes providing a mechanism to rezone farm lands with poor soils to a rural residential zoning designation. The Hearings Officer notes this policy references the soil quality, which is discussed above.

The Hearings Officer finds that, while the rezone application does not include the creation of new residential lots, the Applicant has demonstrated the Subject Property is comprised of poor soils that are in the vicinity of rural residential MUA-10 zone uses to the south, west, northwest and east. Rezoning the subject property to MUA-10 is consistent with this criterion, as it will provide for an orderly and efficient transition from the City of Bend to rural and agricultural lands.

The Hearings Officer finds that rezoning the Subject Property to MUA-10 is consistent with Section 3.2, Chapter 3 of the Deschutes County Comprehensive Plan as it will provide for an orderly and efficient transition from urban to rural and agricultural lands.

### 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 in the burden of proof:

*The quoted language is a part of the background text of the County's comprehensive plan. It is not a plan policy or directive and is not an approval standard for this application. This fact was confirmed by former Deschutes County Senior Planner Terri Hansen Payne, AICP during the County's review of the DSL rezoning and plan amendment application. See **Exhibit I**. County zone change and plan amendment decisions adopted by the Board of Commissioners have so found.*

*Even if this plan language were found to be relevant to the County's review of this application, it does not bar application of the RREA plan designation to non-resource land. This application does not require that an exception be taken to apply the RREA designation to non-resource land. Instead, as stated by the Board's findings in Exhibit H, the language "appears to be directed at a fundamentally different situation than the one presented in this application." The text is written to require that exceptions be taken for resource lands that required an exception; not to require goal exceptions for non-resource lands that do not require such exceptions. As LUBA and the Oregon Supreme Court recognized in the Wetherell decision, there are two ways a county can justify a decision to allow non-resource use of land previously designated and zoned for farm or forest uses. The first is to take an exception to Goal 3 and Goal 4 and the other is to adopt findings that demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. Here, the applicant is pursuing the latter approach. The quoted plan text addressed the former. If the quoted plan text were read to require an exception to Goal 3 or 4 where the underlying property does not qualify as either Goal 3 or Goal 4 resource land, such a reading would be in conflict with the rule set forth in Wetherell and Policy 2.2.3 of the Comprehensive Plan.*

*The Deschutes County Board of Commissioners has interpreted its RREA plan designation to be the proper "catchall" designation for non-resource land in its approval of the Daniels Group amendment and zone change by adopting the following finding by Hearings Officer Ken Helm:*

*"I find that Deschutes County has interpreted the RREA plan designation as the property "catchall" designation for non-resource land."*

*As a result, the RREA plan designation is the appropriate plan designation for the subject property.*



The Hearings Officer finds that prior Hearings Officer's decisions have found that Section 3.3 is not a plan policy or directive<sup>9</sup>. Further, I find that no goal exception to Statewide Planning Goal 3 is required for the rezone application because the subject property does not qualify as farm or forest zoning or agricultural lands under the statewide planning goals, as discussed in more detail in the findings above. The County has interpreted the RREA plan designation as the proper "catchall" designation for non-resource land and therefore, the Rural Residential Exception Area (RREA) plan designation is the appropriate plan designation to apply to the subject property<sup>10</sup>.

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

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**

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<sup>9</sup> See PA-11-17/ZC-11-2, 247-16-000317-ZC, 318-PA, and 247-18-000485-PA, 486-ZC

<sup>10</sup> The Hearings Officer's decision for PA-11-17/ZC-11-2 concerning this language of Section 3.3 states: *To the extent that the quoted language above represents a policy, it appears to be directed at a fundamentally different situation than the one presented in this application. The quoted language addresses conversions of "farm" or "forest" land to rural residential use. In those cases, the language indicates that some type of exception under state statute and DLCD rules will be required in order to support a change in Comprehensive Plan designation. See ORS 197.732 and OAR 660, Division 004. That is not what this application seeks to do. The findings below explain that the applicant has been successful in demonstrating that the subject property is composed predominantly of nonagricultural soil types. Therefore, it is permissible to conclude that the property is not "farmland" as defined under state statute, DLCD rules, and that it is not correctly zoned for exclusive farm use. As such, the application does not seek to convert "agricultural land" to rural residential use. If the land is demonstrated to not be composed of agricultural soils, then there is no "exception" to be taken. There is no reason that the applicant should be made to demonstrate a reasons, developed or committed exception under state law because the subject property is not composed of the type of preferred land which the exceptions process was designed to protect. For all these reasons, the Hearings Officer concludes that the applicant is not required to obtain an exception to Goal 3.*

***shall assure that proposed land uses do not exceed the planned capacity of the transportation system.***

**FINDING:** The Hearings Officer finds this plan policy applies to the County and advises it to consider the roadway function, classification and capacity as criteria for plan amendments and zone changes. The County will comply with this direction by determining compliance with the Transportation Planning Rule (TPR) aka 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 seven-mile radius. The Subject Property does not contain merchantable tree species and there is no evidence in the record that the Subject Property has been employed for forestry uses historically. None of the soil units comprising the parcels is rated for forest uses according to NRCS data. The Hearings Officer finds that the Subject Property does not constitute 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’s findings above are incorporated herein by reference.

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

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

**(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon<sup>11</sup>;**

**FINDING:** The Applicant does not request an exception to Goal 3 because the Subject Property does not meet the definition of "Agricultural Land." In support, the Applicant offers the following response in the submitted burden of proof statement:

*State law allows the County to rely on the more detailed and accurate information provided by the Exhibit D study, That study shows that approximately 85% of the subject property is comprised of Class VII and VIII (88% of Tax Lot 100 and 82% of Tax Lot 600). As a result, the land is not predominantly comprised of Class I-VI soils.*

*The subject property is not properly classified as Agricultural Land and does not merit protection under Goal 3. The soils are predominately Class 7 and 8 soils as shown by the more detailed soils report prepared by soils scientist Andy Gallagher, which State law, OAR 660-033-0030, allows the County to rely on for more accurate soils information. Mr. Gallagher found that approximately 64% of the soils on the subject property (about 24 acres) is Land Capability Class 7 and 8 soils that have severe limitations for farm use. He also found the site to have low soil fertility, shallow and very shallow soils, abundant rock outcrops and rock fragments in the surface, lava tubes, and irrigation ditches, low available water capacity, and limiting areas suitable for grazing and restricting livestock accessibility, all of which are considerations for the determination for suitability for farm use. Because the subject property is comprised predominantly of Class 7 and 8 soils, the property does not meet the definition of "Agricultural Lands" under OAR 660-033-0020(1)(a)(A) listed above, that is having predominantly Class I-VI soils.*

The Hearings Officer finds that the soil study provided by Mr. Gallagher of Red Hill Soils is an accurate representation of the data for the Subject Property. Therefore, the Hearings Officer finds, based on the submitted soil study and the above OAR definition, that the Subject Property is comprised predominantly of Class 7 and 8 soils and, therefore, does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A) above.

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<sup>11</sup> OAR 660-033-0020(5): "Eastern Oregon" means that portion of the state lying east of a line beginning at the intersection of the northern boundary of the State of Oregon and the western boundary of Wasco County, then south along the western boundaries of the Counties of Wasco, Jefferson, Deschutes and Klamath to the southern boundary of the State of Oregon.

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

**FINDING:** The Applicant's decision not to request an exception to Goal 3 is based on the premise that the Subject Property is not defined as "Agricultural Land." The Applicant provided the following analysis of this determination in the burden of proof.

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

*The primary agricultural use conducted on properties that lack irrigation water rights and have poor soils is grazing cattle. The extremely poor soils found on the property, however, make it a poor candidate for dryland grazing. The dry climate, the proximity to two major roadways (Butler Market Road and the Powell Butte Highway) and area development prevent grazing from being a viable or potentially profitable use of the property. The soils, also, are so poor that they would not support the production of crops even if irrigation water rights could be obtained for that purpose. The soils simply do not hold enough water to sustain and support crop growth.*

*Given the high cost of irrigating and maintaining the property as pasture or cropland (high labor costs, labor-intensive, high cost of irrigation equipment and electricity, high cost of fertilizer, etc.), dry land grazing is the accepted farm use of poor soils in Deschutes County. This use can be conducted until the native vegetation is removed by grazing (see the discussion of the suitability of the property for grazing, below). When assessing the potential income from dry land grazing, Deschutes County uses a formula and assumptions developed by the OSU Extension Service. This formula is used by the County to decide whether EFU-zoned land is generally unsuitable for farm use. It assumes that one acre will produce 900 pounds of forage per year. The subject property will, however, due to its extremely poor soils, only produce at little more than one half that amount of forage in a normal year – 440 pounds per acre for Tax Lot 600 and 494 pounds per acre for Tax Lot 100.*

- *One AUM is the equivalent to the forage required for a 1000 lb. cow and calf to*

- graze for 30 days (900 pounds of forage).
- On good quality forage, an animal unit will gain 2 pounds per day.
- Two animal units will eat as much in one month as one animal unit will eat in two months.
- Forage production on dry land is not continuous. Once the forage is consumed, it typically will not grow back until the following spring.
- An average market price for beef is \$1.20 per pound.

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

$30 \text{ days} \times 2\#/\text{day}/\text{acre} = 60.0 \text{ lbs. Beef}/\text{acre}$   
(1 acre per AUM)

$60.0 \text{ lbs. Beef}/\text{acre} \times 80 \text{ acres} \times \$1.15/\text{lb.} = \$5,520 \text{ per year for good rangeland}$

Adjust expected income based on forage on subject property:

$440 + 494 / 2 = 467 \text{ pounds of forage per acre per year}$   
 $467 \text{ pounds}/900 \text{ pounds of forage per acre per year assumed in OSU formula} = 51.89\%$   
 $51.89\% \text{ of } \$5,520 \text{ annual income for good range land} = \mathbf{\$2,708.66}$  annual income for subject Property.

Thus, the total gross beef production potential for the subject property would be approximately \$2,708.66 annually. This figure represents gross income and does not take into account real property taxes, fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production which would exceed income. Property taxes, alone, were \$4,341.64 for the two tax lots in 2020.

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

**Soil Fertility:** Class 7 and 8 soils are not fertile soils. They are not suited for the production of farm crops. This fact has been recognized in numerous County land use cases, including the zone change and plan amendment applications being filed with this land use application. Farm use on these soils is limited to rangeland grazing at a level that does not qualify as "farm use." No person would expect to make a profit by grazing livestock on the subject property.

**Suitability for Grazing:** *The climate is cold and dry. The growing season is very short. According to the OSU Extension Service the growing season is only 80 to 90 days long. Exhibit Q. The average annual precipitation is only 11.36 inches. This means that the amount of forage available for dry land grazing is low. This also means that a farmer has a short period of amount of time to irrigate pastures. This makes it difficult for a farmer to raise sufficient income to offset the high costs of establishing, maintaining and operating an irrigation system.*

**Existing and Future Availability of Water for Farm Irrigation Purposes:** *No new irrigation water rights are expected to be available to the Central Oregon Irrigation District (COID) in the foreseeable future. In order to obtain water rights, the applicant would need to convince another COID customer to remove water rights from their property and sell them to the applicant and obtain State and COID approval to apply the water rights to the subject property. In such a transaction, water rights would be taken off productive farm ground and applied to the nonagricultural soils found on the subject property. Such a transaction runs counter to the purpose of Goal 3 to maintain productive Agricultural Land in farm use. Most of the soils on the property are Class VII and VIII soils. The subject property does not have irrigation water rights. The property is located within the boundary of the Central Oregon Irrigation District. Given the poor quality of these soils, however, it is highly unlikely that Central Oregon Irrigation District would approve a transfer of water rights to this property. In addition, no person intending to make a profit in farming would go to the expense of purchasing water rights, mapping the water rights and establishing an irrigation system to irrigate the poor soils found on the subject property.*

**Existing Land Use Patterns:** *The applicant's analysis of existing land use patterns provided earlier in this burden of proof shows that the subject property is located in an area of small lots and marginal farm land that is primarily devoted to residential and hobby farm uses. Areas of MUA-10 zoning are interspersed with EFU-TRB zoning. The subject property adjoins MUA-10 properties on the south and lots developed at a density of one lot per 10 acres on its eastern boundary. The properties to on its west boundary are small parcels less than 20 acres in size. The only large EFU-TRB property adjoining the subject property (north and east of TL 600) is owned by the City of Bend and used as the City's sewage treatment plant. It is not in farm use.*

**Technological and Energy Inputs Required:** *Given its poor soils, this parcel would require technology and energy inputs over and above accepted farming practices. Excessive fertilization and soil amendments; very frequent irrigation, and marginal climatic conditions restrict cropping alternatives. Pumping irrigation water requires energy inputs. The application of lime and fertilizer typically requires the use of farm machinery that consumes energy. The irrigation of the property requires the installation and operation of irrigation systems. All of these factors are why Class 7 and 8 soils are not considered suitable for use as cropland.*

**Accepted Farming Practices:** *As determined by the County in the Aceti case, farming lands comprised of soils that are predominately Class VII and VIII is not an accepted farm practice in Central Oregon. Dryland grazing, the farm use that can be conducted on the poorest soils in the County, typically occur on Class VI non-irrigated soils that have a higher soils class if irrigated. Crops are typically grown on soils in soil class III and IV.*

The Hearings Officer finds that many of the factors surrounding the Subject Property, such as the current residential and non-agricultural related land uses in the area, soil fertility, and lack of availability of water rights result in an extremely low possibility of successful farming on the Subject Property.

The Hearings Officer finds that soils on the Subject Property can only be made fertile through artificial means, which is cost prohibitive from a profitability standpoint. The Subject Property is not suitable to grazing on a commercial scale given management limitations and expected low production of suitable vegetation. Climactic conditions result in difficulty for production of most crops. Given the fact that no new irrigation water rights are expected to be available to the COID in the foreseeable future and the poor quality of soils on the Subject Property, it is unlikely COID would approve a transfer of water rights to the Subject Property. Moreover, a transfer of water rights to the Subject Property would be contrary to the purpose of Goal 3 to maintain productive agricultural land in farm use. Expenses associated with irrigation of pastures on the poor soils of the Subject Property limit the suitability of grazing animals on the Subject Property and result in required technological and energy inputs over and above accepted farming practices.

The Hearings Officer finds that existing land use patterns consist of a pattern of relatively small lots, primarily devoted to residential and hobby farm uses, interspersing MUA-10 zoned property with EFU-TRB zoning. The only large EFU-TRB property adjoining the subject property is owned by the City of Bend and used as the City's sewage treatment plant.

The Hearings Officer finds that accepted farm practices in Central Oregon do not include farming lands comprised of soils that are predominantly Class 7 and 8. In order to conduct dryland grazing on the subject property, the applicant would have to take measures beyond accepted farming practices, including attempting to obtain a water rights transfer.

For all the foregoing reasons, the Hearings Officer finds that the Subject Property, primarily comprised of Class 7 and 8 soils, is not suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration the soil fertility, suitability for grazing, climactic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy outputs required and accepted farming practices. Substantial evidence in the record supports a determination that the Subject Property cannot be employed for the primary purpose of obtaining a profit in money through farming-related endeavors, considering the costs of engaging in farm use. *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007).

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

**FINDING:** The Applicant offers the following response in the 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.*

**West:** *Properties to the west of the subject property, with one exception, are separated from the subject property by Abbey Road. The road makes it infeasible to use the subject property for farm use in conjunction with these properties. Additionally, the subject property is not necessary to permit farm practices to be undertaken on adjacent or nearby lands to the west. Farm practices have been occurring on these properties for decades without any need to use the juniper covered subject property to conduct farm practices.*

<b>Tax Map, Lot and Size</b>	<b>Farm Use</b>	<b>Potential Farm Practices</b>	<b>Need Subject Property?</b>
17-13-18C 400 19.32 acres	Wilderness Horse Adventures (trail riding business not a farm use); dwelling.	Grazing Dry lot feeding Fertilizing field Herbicide use Irrigation	No, TL 400 about 660' west of subject property. Horses used for trail riding out of area. Adjoins nonfarm dwelling.
17-13-18C 500 19.32 acres	Nonfarm dwelling, irrigated pasture for grazing.	Grazing Fertilizing field Herbicide use Irrigation	No, self-contained hobby farm use.
17-12-13D 200 & 300, 6.6 acres and 15.01 acres	Small pasture and horses. A part of property is MUA-10 and developed with a private boarding school.	Grazing Fertilizing field Herbicide use Irrigation	No, about 1200' away from subject property. Also, the horse use is incidental to boarding school use and is not conducted to earn a profit in money.
17-12-13D 100 22.64 ac	Irrigated pasture with interspersed juniper	Grazing Fertilizing field	No, about 1320' west of subject property



	<i>trees. Dwelling and vacation cabin on property.</i>	<i>Herbicide use Irrigation</i>	<i>and separated by other farm properties.</i>
<i>17-12-13A 100 39.26 acres</i>	<i>Irrigated pasture; patchy growth of grass. Approved for Measure 49 dwelling.</i>	<i>Grazing Fertilizing field Herbicide use Irrigation</i>	<i>No, too remote (1320') and separated by other farm properties.</i>
<i>17-12-13A 200</i>	<i>Nonfarm parcel; Measure 49 dwelling approval.</i>	<i>None</i>	<i>No.</i>
<i>17-12-13A 300</i>	<i>Irrigated pasture; patchy growth of grass. Single-family dwelling and two machine sheds.</i>	<i>Grazing Fertilizing field Herbicide use Irrigation</i>	<i>No, too remote (about 1500') and separated by other farm properties.</i>

**North:** *All of the land north of the subject property is owned by the City of Bend and is operated as a sewer treatment plant. Farm practices are not occurring on this property.*

**East:** *The City of Bend's sewer treatment plan adjoins the eastern boundary of Tax Lot 600. No farm practices are occurring on this property. Two tax lots adjoin the eastern boundary of Tax Lot 100. One is 8 acres in size. The other is 12.21 acres in size. Both tax lots are developed with residences. Neither receive special assessment for farm use. East of them are two other small parcels that are not in farm deferral. One is 8.48 acres and the other is 10 acres. All four parcel are developed with dwellings. As the properties are not recognized by the Tax Assessor as being in farm use, the activities occurring on the properties are not farm practices. Even if they are viewed as such, the agricultural uses are limited to the irrigation of small areas of land and horse facilities and one of the parcels is not irrigated. The practices associated with these uses are similar to those of pastures and horse operations outlined in the charts above. The agricultural practices related to this "hobby farming" do not require the subject property to remain in its current vacant state to allow them to conduct agricultural practices.*

**South:** *All of the land south of the subject property is zoned MUA-10 and is not engaged in farm use.*

The Hearings Officer finds the Subject Property is not necessary for the purposes of permitting farm practices on adjacent or nearby land, or the larger surrounding area generally, based on the factors discussed in the previous finding, the current use of adjacent properties, and separation of the Subject Property by Abbey Road from properties to the west.

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

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

*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.*

*All parts of the subject property were studied by the applicant's soils analysis, **Exhibit D**. The analysis shows that the predominant soil type found on the property is Class VII and VIII, nonagricultural land. Some Class VI soils are intermingled with the nonagricultural soil not vice versa. As a result, this rule does not require the Class VII and VIII soils to be classified agricultural land.*

The Applicant also provided a Supplement following the Staff Report which states, in relevant part:

*Oregon case law explains the meaning of this rule. It applies to lands to land [sic] that have a recent a recent [sic] history of farm operations. In particular, it applies where land is divided to create a parcel of nonagricultural land from a larger farm property that was formerly operated as a farm across the entire property. *Wetherell v. Douglas County*, 235 Or App 246, 230 P3d 976, rev den 349 Or 57 (2010). The rule is written to prevent the "piecemeal fragmentation" of large farm properties to carve out areas for rezoning to a nonagricultural zoning designation. This rule does not apply to the subject property because it has never been farmed at all. This rule does not supplant and render meaningless the predominance and suitability test set by Goal 3 to determine whether land is or is not agricultural land by requiring all land on a property to be inventoried as agricultural land if there is any Class VI soil on the property.*

The Hearings Officer finds that there are no bases on which to find that the Subject Property must be inventoried as agricultural lands under this criterion. The farm unit rule is written to preserve large farming operations in a block. It does this by preventing property owners from dividing farmland into smaller properties that, alone, do not meet the definition of "agricultural land." The Subject Property is not formerly part of a larger area of land that is

or was used for farming operations and was then divided to isolate poor soils so that land could be removed from EFU zoning. As demonstrated by the historic use patterns and soils report, it does not have poor soils adjacent to or intermingled with good soils within a farm unit. The Subject Property is not in farm use and has not been in farm use of any kind. It has no history of commercial farm use and contains soils that make the property generally unsuitable for farm use as the term is defined by State law. It is not a part of a farm unit with other land. The Subject Property does not relate to land in active farming, and there are no parcels in the area that were once part of the Subject Property.

Goal 3 applies a predominant soil type test to determine if a property is "agricultural land". If a majority of the soils is Class I-VI in Central or Eastern Oregon, it must be classified "agricultural land." Case law indicates that the Class I-VI soil test applies to a subject property proposed for a non-agricultural plan designation while the farm unit rule looks out beyond the boundaries of the subject property to consider how the subject property relates to lands in active farming in the area that were once a part of the area proposed for rezoning. The Hearings Officer finds it is not a test that requires that 100% of soils on a subject property be Class I-VI. A majority of the soils on the Subject Property are not Class I-VI. Therefore, under the predominance test, the Subject Property is not agricultural. The farm unit rule does not mandate a different result.

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

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

OAR 660-033-0030, Identifying Agricultural Land

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

***findings supported by substantial evidence that addresses each of the factors set forth in 660-033-0020(1).***

**FINDING:** The Applicant addressed the factors in OAR 660-033-0020(1) above and the Hearings Officer made findings thereon above. The Applicant's burden of proof statement also includes the following:

*The subject property is, in no way, necessary to permit farm practices to be undertaken on adjacent and nearby lands.*

*Lands to the west are divided from the subject property by the right-of-way for Abbey Road making it infeasible to farm the properties together. The adjoining farm activities are occurring on small properties that are both developed with single-family homes. The future residential development allowed by MUA-10 zoning will not introduce a new use to the area that will impact farm practices. The more distant EFU properties to the west adjoin MUA-10 zoned lands that are fully developed – primarily with residences – and in no way rely on the subject property remaining in EFU zoning in order to conduct farm practices on their properties.*

*Land to the north is owned by the City of Bend and is not in farm use and the applicant's property is not necessary to permit farm practices to be undertaken on this property which would likely be limited to livestock grazing given the soil type and lack of irrigation water rights for this large property. This property also adjoins the east boundary of Tax Lot 600.*

*The properties to the east are zoned EFU but are all divided into very small parcels that average 10 acres gross. They are developed with houses similar to those found in the MUA-10 zoning district and do not receive special assessment for farm use indicating that they are not employed in farm use. The subject property is not needed by these land owners to conduct farm practices on their properties.*

*The property south of the subject property is zoned MUA and is not engaged in farm use. Land on the subject property is not necessary to permit farm practices to be undertaken on these adjacent and nearby lands.*

As the Hearings Officer has found herein, the Subject Property is not "agricultural land," as referenced in OAR 660-033-0030(1), and contains barriers for farm use including poor quality soils and lack of irrigation. The soil study prepared by Mr. Gallagher focuses solely on the land within the Subject Property and the Applicant provided responses supporting a finding that the Subject Property is not necessary to permit farm practices undertaken on adjacent and nearby lands.

The Hearings Officer finds that substantial evidence in the record shows the Subject Property is not "agricultural land" because the property is predominantly Class 7 and 8 soils. The

Subject Property is not necessary to permit farm practices to be undertaken on adjacent or nearby lands.

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

**FINDING:** The Applicant set forth the following in the submitted burden of proof statement:

*The evidence that shows that the subject property is not suitable for farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands has assigned no significance to the ownership of adjoining properties.*

*The City of Bend property to the north and east of the subject [sic] is very similar to the subject property and its predominant soil types are Class 58C and 59C. Both of these soil types are predominantly Class VII and VIII soils that do not support farm use – agricultural uses intended to secure a profit in money. This property is not necessary for others in the area to undertake farm practices.*

*The EFU subdivision to the east is developed with single-family homes on lots averaging 10 acres in size gross. These parcels are committed to rural residential development. The land not so committed is too small to be utilized for agricultural uses intended to obtain a profit in money from the use.*

*The land to the south is not agricultural and is not in farm use.*

*The land to the west is 80 acres in size and comprised of four twenty-acre parcels, There is an area of 36A soils on the southern two of these parcels that are high-value soils when irrigated. These soils are located almost entirely on one of these parcels at 63400 Silvas Road. It is the only property that is high-value farmland. The 36A soils are an irrigated farm field. The 36A soils do not extend onto the subject property and this parcel is separated from the subject property by Abbey Road which provides a buffer between uses that protects farm uses on this parcel.*

*A small part of mapping unit 16A is found on the property to the south and it is also irrigated but that parcel is not high-value farmland by definition. This field is about 500 feet to the west of the south part of the subject property.*

Hearings Officer finds that substantial evidence in the record, including examination of lands outside the boundaries of the Subject Property, shows the subject property is not "agricultural land." Substantial evidence shows that the Subject Property is not suitable for

farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands.

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

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

*The Red Hills Soils report, **Exhibit D**, provides more detailed soils information than contained on the Web Soil Survey, the Internet soil survey of soils data and information produced by the National Cooperative Soil Survey. Those sources provide general soils data for large units of land. The Red Hills Soils report provides detailed and accurate information about a single property based on numerous soil samples taken from the subject property. The depth of these soils was also determined. The soils samples taken from the subject property were tested to determine soil type and water-carrying capacity of the soils. The results of this analysis were used to develop an accurate soils map of the subject property. The soils assessment is related to the NRCS land capability classification system that classified soils Class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.*

The NRCS mapping for the Subject Property is shown below in **Figures 1 and 2**. According to the NRCS Web Soil Survey tool, the Subject Property contains approximately 96.3% 38B soil and approximately 3.7% 58C soil. The soil study conducted by Mr. Gallagher of Red Hill Soils finds the soil types on the Subject Property vary from the NRCS identified soil types.

The soil types described in the Red Hill Soils soil study are described below (as quoted from **Exhibit D** of the submitted application materials) and the characteristics and LCC rating are shown in **Tables 1 and 2** below.

### **GR Gosney-Rock Outcrop Complex**

#### **Capability Class 7**

*These soils are mapped together in a complex because both components are Capability Class 7 or greater, and it was not practical to map them separately. These soils are*

estimated to be about 25 percent Rock Outcrop and 75 percent Gosney. They have lower productivity than NRCS map unit 38B because they do not contain a mappable area of Deskamp soils that were mapped separately. The productivity reported in Table 2 for Gosney-Rock Outcrop are 20 percent less than the 58C map unit to account for more shallow and very shallow soils in the GR map unit in the revised map unit. Based on the observations here the map unit is about 40 percent very shallow soils, 35 percent Gosney soils and 25 percent rock outcrops.

**Gosney (0 to 15 percent slopes)**

**Description:** Gosney series consists of shallow 10 to 20 inches to hard basalt bedrock, somewhat excessively drained soils on lava plains. These soils have rapid permeability. They formed in volcanic ash over hard basalt bedrock. Slopes are 0 to 15 percent. The mean annual precipitation is less than 12 inches, and the mean annual temperature is about 45 degrees F.

**Capability Class:** 7

**Soil Variability:** Depth to bedrock is from surface exposures of bedrock to 20 inches depth. There may be small inclusions of soils like Deskamp that are moderately deep (>20 inches). Many of the pedons are sandy skeletal family. This unit includes very shallow soils <10 inches.

**Very shallow phase 0-15 percent slopes**

**Description:** this component of the complex is less than 10 inches to basalt.

**Capability Class:** 7

**Soil Variability:** Depth to bedrock is from 1 to 10 inches. This soil is a very shallow soil that is similar to Gosney but shallower. It has lower available water holding capacity and an estimated 40 percent lower productivity.

**Rock Outcrop (0 to 15 percent slopes)**

**Description:** This is a large proportion of the map unit and represents areas where bedrock is at the surface often times standing several feet about the general grade, and in places where suspected lava tubes collapsed the rock out crops are rimrock

**Capability Class:** 8

**Soil Variability:** In places rocks are an inch or two below the surface but mainly are surface exposed and are detectible in aerial photographs.

**Dk Deskamp**

**Description:** Moderately Deep somewhat excessively drained soils with rapid permeability on lava plains. They formed in ash and have hard basalt at 20 to 40 inches. Slopes are 1 to 15 percent. The A and AB horizon are loamy sand. The 2B is loamy sand and gravelly loamy sand. The NRCS soil survey mapped Deskamp and Gosney in a complex described as 50% Deskamp and 35% Gosney. In this Dk unit I broke out the Deskamp component of the former complex based on much more detailed soil sampling than the NRCS soil survey.

**Capability Class:** 3 irrigated and 6 non-irrigated

**Soil Variability:** There are inclusions of rock outcrop and of deep soils with sandy skeletal family. Any rock outcrop I observed in the field was delineated from the Deskamp unit, but because not all rock outcrops could be resolved at the one boring per acre average soil observation given the brushy conditions.

**Table 1 - Summary of Order I Soil Survey (Tax Lot 600)**

Previous Map Symbol	Revised Map Symbol	Soil Series Name	Capability Class (subclass) nonirrigated	Previous Map*		Revised Map	
				Ac	-%-	Ac	-%-
38B	--	Deskamp-Gosney complex, 0 to 8 percent slopes	6 and 7	36.8	92	0	0
58C	--	Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes	6, 7 and 8	3.2	8	0	0
--	Dk	Deskamp	6	0	0	7.2	18
--	GR	Gosney-Rock Outcrop Complex	7 and 8	0	0	32.8	82

\*Soils that were previously mapped as components of a complex that are mapped as consociations in revised map.

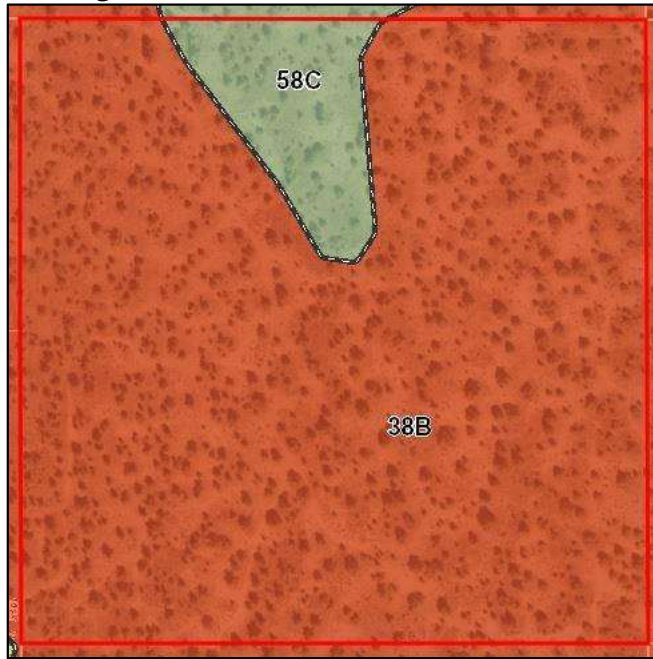
**Table 2 - Summary of Order I Soil Survey (Tax Lot 100)**

Previous Map Symbol	Revised Map Symbol	Soil Series Name	Capability Class (subclass) non-irrigated	Previous Map*		Revised Map	
				Ac	-%-	Ac	-%-
38B	--	Deskamp-Gosney complex, 0 to 8 percent slopes	6 to 7	40	100	0	0
--	Dk	Deskamp	6	0	0	4.7	12
--	GR	Gosney-Rock Outcrop Complex	7 and 8	0	0	35.3	88

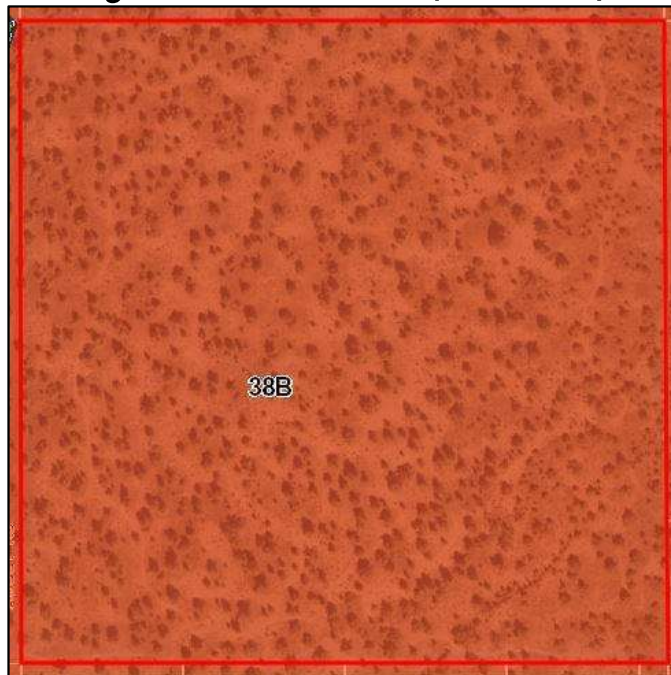
\*Soils that were previously mapped as components of a complex that are mapped as consociations in revised map.



**Figure 1 - NRCS Soil Data (Tax Lot 600)**



**Figure 2 - NRCS Soil Data (Tax Lot 100)**



Mr. Gallagher’s soils assessment report provides a high intensity Order-1 soil survey and soil assessment – a detailed and accurate soils assessment on the Subject Property based on numerous soil samples – to determine if the subject property is “agricultural land” within the meaning of OAR 660-033-0020. The soils report is related to the NRCS Land Capability Classification (LCC) system that classifies soils class 1 through 8. An LCC rating is assigned to

each soil type based on rules provided by the NRCS. The soils report provides more detailed soils information than contained on the Web Soil Survey operated by the NRCS, which provides general soils data at a scale generally too small for detailed land use planning and decision making.

The state's agricultural land rules, OAR 660-033-0030, allow the County to rely on the high intensity Order-1 soil survey and soil capability analysis prepared by Mr. Gallagher, which is more detailed than the general NRCS soil maps and soil surveys and the Web Soil Survey operated by the NRCS as of January 2, 2012. The Hearings Officer finds that the Order-1 soil survey is related to the NRCS land capability classification system.

The Hearings Officer finds that the more detailed soils information in the report prepared by Mr. Gallagher assists the County to make a better determination of whether the Subject Property qualifies as agricultural land. As set forth above, DLCD completed a Soil Assessment Completeness Review pursuant to OAR 660-033-0045(6)(a), confirming the report prepared by Mr. Gallagher meets the requirements for agricultural soils capability reporting.

Based on Mr. Gallagher's qualifications as a certified Soil Scientist and Soil Classifier, the Hearings Officer finds the submitted soil study to be definitive and accurate in terms of site-specific soil information for the Subject Property. For all the foregoing reasons, the Hearings Officer finds the Subject Property is not "agricultural land."

- (c) This section and OAR 660-033-0045 apply to:**
  - (A) A change to the designation of land planned and zoned for exclusive farm use, forest use or mixed farm-forest use to a non-resource plan designation and zone on the basis that such land is not agricultural land; and**

**FINDING:** The Applicant is seeking approval of a non-resource plan designation on the basis that the Subject Property is not defined as agricultural land.

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

**FINDING:** The Applicant submitted a soils study by Mr. Gallagher of Red Hill Soils dated November 2, 2020. The soils study was submitted following the ORS 215.211 effective date. Staff received acknowledgement via email on June 16, 2021, from Hilary Foote, Farm/Forest Specialist with the DLCD that the soils study is complete and consistent with DLCD's reporting

requirements. The Hearings Officer finds this criterion to be met based on the submitted soils study and confirmation of completeness and consistency from DLCD.

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

**FINDING:** The Applicant has provided a DLCD-certified soils study as well as NRCS soils data. The Hearings Officer finds that the Applicant has complied with the soils analysis requirements of OAR 660-033-0045 in order to obtain DLCD certification. DLCD's certification establishes compliance with OAR 660-033-0045.

The Hearings Officer finds this criterion is met.

## **DIVISION 12, TRANSPORTATION PLANNING**

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

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

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

**FINDING:** The Hearings Officer finds the 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 properties from AG to RREA and change the zone from EFU to MUA10. The Applicant is not proposing any land use development of the properties at this time.

The Applicant has submitted a transportation impact analysis (TIA) with the application. The TIA was reviewed by the County Transportation Planner, who agreed with the report's conclusions. No rebuttal evidence was introduced into the record and there was no testimony in opposition to the conclusions in the TIA.

Public comments received by the County indicate concerns with potential traffic impacts as a result of the proposed plan amendment and zone change. These comments are non-specific in nature, do not include any findings contrary to the findings set forth in the Transight Consulting, LLC analyses, and do not include any information that is inconsistent with the Transight Consulting, LLC's reports. Public comments express a generalized concern about traffic impacts associated with additional growth if the subject property is developed. The Hearings Officer notes that additional transportation/traffic review will be required at the time of any future development application(s).

The Applicant further noted that access to Classic Estates lots is provided by Peterman Lane and Parker Lane. Traffic associated with potential future development of the Subject Property will not rely on either road for access. As shown in the TIA, impacts to the greater area arterial street network will be negligible.

The Hearings Officer finds that the proposed rezone will not significantly affect an existing or planned transportation facility for the following reasons: (1) it will not change the functional classification of an existing or planned transportation facility; (2) it will not change standards implementing a functional classification system; and (3) it will not result in any of the following effects – types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility, degradation of the performance of an existing or planned transportation facility such that it would not meet performance standards identified in the TSP or comprehensive plan, or degradation of the

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

Based on the TIA, the Hearings Officer finds 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 proposed changes will not change the functional classification of any existing or planned transportation facility or change the standards implementing a functional classification system. The changes will not allow types or levels of land uses, which would result in levels of travel or access, which are inconsistent with the functional classification of nearby transportation facilities. Furthermore, it will not reduce the performance standards of the facility below the minimum acceptable level in the County's transportation system plan.

The Hearings Officer finds that, based on OAR 660-012-060(1), the County is not required to put in place measures as provided in Section (2) of this rule. Based on the County Senior Transportation Planner's comments and the traffic study from Transight Consulting LLC, the Hearings Officer finds the Applicant has demonstrated compliance with the TPR. These criteria are met.

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

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

**FINDING:** The Statewide Planning Goals are addressed below, as set forth in the Applicant's burden of proof:

**Goal 1, Citizen Involvement.** *Deschutes County will provide notice of the application to the public through mailed notice to affected property owners and by requiring the applicant to post a "proposed land use action sign" on the subject property. Notice of the public hearings held regarding this application will be placed in the Bend Bulletin. A minimum of two public hearings will be held to consider the application.*

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

**Goal 3, Agricultural Lands.** *The applicant has shown that the subject property is not agricultural land 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 <sup>\*\*a</sup> 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 stat 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.*

**Goals 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.*

The Hearings Officer finds consistency with Goal 1 (Citizen Involvement) has been established with the public notice requirements required by the County for these applications (mailed notice, posted notice and two public hearings). Similarly, the Hearings Officer finds consistency with Goal 2 (Land Use Planning) based on the applications' consistency with goals, policies and processes related to zone change applications as set forth in the Comprehensive Plan and Titles 18 and 23 of the Deschutes County Code.

Based on the findings above, the Hearings Officer finds consistency with Goal 3 (Agricultural Lands) has been demonstrated because the Subject Property is not Agricultural Land. The property is not comprised of Forest Lands; Goal 4 is inapplicable.

With respect to Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), the Hearings Officer finds that the Subject Property does not include any inventoried Goal 5 resources. While the Subject Property is currently open and undeveloped, the County Goal 5 inventory does not include the subject property as an "open space" area protected by Goal 5. Members of the public expressed concern regarding potential impact on wildlife. However, the Hearings Officer notes that the property does not include a wildlife overlay (WA) designation and, more importantly, no development is proposed at this time. Rezoning the Subject Property will not, in and of itself, impact wildlife on the subject property. Protections for wildlife must be sanctioned by the County's Goal 5 ESEEs and WA or similar wildlife

overlay zoning. The Hearings Officer finds there are no wildlife protections applicable to these applications.

The Hearings Officer finds consistency with Goal 6 (Air, Water and Land Resources Quality) because there is no measurable impact of approval of the application to rezone the Subject Property from EFU to MUA-10. Future development activities will be subject to local, state and federal regulations that protect these resources.

With respect to Goal 7 (Areas Subject to Natural Disasters and Hazards), the Hearings Officer finds consistency with this Goal based on the fact that rezoning the Subject Property to MUA-10 does not change the Wildfire Hazard Area designation that is applicable to the entirety of Deschutes County. The subject property is within the Rural Fire Protection District #2. Any application(s) for future development activities will be required to demonstrate compliance with fire protection regulations.

The Hearings Officer finds consistency with Goal 8 (Recreational Needs) given the fact that no development is currently proposed and that rezoning, in and of itself, will not impact recreational needs of Deschutes County. Members of the public commented regarding concerns of loss of the currently vacant property as open space and for recreational uses. The Hearings Officer finds that the Subject Property is not planned to meet the recreational needs of Deschutes County residents and does not directly impact areas that meet Goal 5 needs.

The Hearings Officer finds Goal 9 (Economy of the State) is inapplicable because the Subject Property is not designated as Goal 9 economic development land and approval of the application will not adversely impact economic activities of the state or area.

The Hearings Officer finds the applications are consistent with Goal 10 (Housing) because the Comprehensive Plan Goal 10 chapter anticipates that farm properties with poor soils will be converted from EFU to MUA-10 or RR-10 zoning, making such properties available to meet the need for rural housing. Although no development of the Subject Property is proposed at this time, rezoning the Subject Property from EFU to MUA-10 will enable consideration of the property for potential rural housing development in the future.

The Hearings Officer finds the applications are consistent with Goal 11 (Public Facilities and Services). The record establishes that utility service providers have capacity to serve the Subject Property if developed at the maximum level of residential development allowed by the MUA-10 zoning district. The proposal will not result in the extension of urban services to rural areas.

Based on the findings above regarding the Transportation System Planning Rule, OAR 660-012-0060, the Hearings Officer finds the applications are consistent with Goal 12 (Transportation).



The Hearings Officer finds the applications are consistent with Goal 13 (Energy Conservation) because there is no evidence approval of the applications will impede energy conservation. Rather, if the Subject Property is developed with residential dwellings in the future, energy conservation will be increased – not impeded – as residents will not be required to travel as far to work, shopping and other essential services provided in the City of Bend.

The Hearings Officer finds the applications are consistent with Goal 14 (Urbanization). The Subject Property is not within an urban growth boundary and does not involve urbanization of rural land because the MUA-10 zone does not include urban uses as permitted outright or conditionally. The MUA-10 zone is an acknowledged rural residential zoning district that limits the intensity and density of developments to rural levels. The state acknowledged compliance of the MUA-10 zone with Goal 14 when the County amended its comprehensive plan.

The Hearings Officer finds that Goals 15-19 do not apply to land in Central Oregon.

For all the foregoing reasons, the Hearings Officer finds compliance with the applicable Statewide Planning Goals has been demonstrated.

#### **IV. DECISION & RECOMMENDATION**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds the Applicant has met the burden of proof necessary to justify the request for a Comprehensive Plan Map Amendment to re-designate the subject property from Agriculture to Rural Residential Exception Area and a corresponding request for a Zone Map Amendment (Zone Change) to reassign the zoning of the subject property from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA-10).

The Deschutes County Board of Commissioners is the final local review body for the applications before the County. DCC 18.126.030. The Hearings Officer recommends approval of the applications based on this Decision of the Deschutes County Hearings Officer.



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Stephanie Marshall, Deschutes County Hearings Officer

Dated this 24<sup>th</sup> day of November, 2021

Mailed this 24<sup>th</sup> day of November, 2021

Owner	Agent	InCareOf	Address	CityStZip	Type	cdd id
HIGHAM,MICHAEL E & DONNA G			63225 PETERMAN LN	BEND, OR 97701	Hearings Officer Decision	21-616-PA, 21-617-ZC
CONRAD,KURT J & SUSAN L			22220 PARKER LN	BEND, OR 97701	Hearings Officer Decision	21-616-PA, 21-617-ZC
FANCHER, LIZ			2465 SACAGAWEA LN	BEND, OR 97701	Hearings Officer Decision	21-616-PA, 21-617-ZC
Joe Bessman	Transight Consulting		Via Email		Hearings Officer Decision	21-616-PA, 21-617-ZC
SWISHER, DAVE			250 NW FRANKLIN AVE, STE 401	BEND, OR 97703	Hearings Officer Decision	21-616-PA, 21-617-ZC
Central Oregon LandWatch	Carol Macbeth		2843 NW Lolo Drive	Bend, OR 97703	Hearings Officer Decision	21-616-PA, 21-617-ZC
1000 Friends of Oregon	Andrew Mulkey		PO Box 40367	Portland, OR 97240	Hearings Officer Decision	21-616-PA, 21-617-ZC



Mailing Date:  
Wednesday, November 24, 2021

## COMMUNITY DEVELOPMENT

### NOTICE OF HEARINGS OFFICER'S DECISION

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

**FILE NUMBERS:** 247-21-000616-PA, 617-ZC

**LOCATION:** Property 1:

Map and Taxlot: 171318C000100  
Account: 109158  
Situs Address: 63350 ABBEY RD, BEND, OR 97701

Property 2:

Map and Taxlot: 1713180000600  
Account: 106933  
Situs Address: NO SITUS ADDRESS

**OWNER/  
APPLICANT:** Dave Swisher

**ATTORNEY  
FOR APPLICANT:** Liz Fancher  
2465 NW Sacagawea Lane  
Bend, OR 97703

**SUBJECT:** The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the properties from Agricultural (AG) to Rural Residential Exception Area (RREA). The applicant also requests approval of a corresponding Zone Change to rezone the properties from Exclusive Farm Use – Tumalo/Redmond/Bend subzone (EFU-TRB) to Multiple Use Agricultural (MUA-10) as the subject property does not qualify as "Agricultural Land" pursuant to State Law and administrative rules.

**STAFF CONTACT:** Kyle Collins, Associate Planner  
Phone: 541-383-4427  
Email: [Kyle.Collins@deschutes.org](mailto:Kyle.Collins@deschutes.org)

**RECORD:** Record items can be viewed and downloaded from:  
[www.buildingpermits.oregon.gov](http://www.buildingpermits.oregon.gov)

**APPLICABLE CRITERIA:** The Hearings Officer reviewed this application for compliance against criteria contained in Chapters 18.04, 18.16, 18.32, 18.80, 18.113, and 18.136 in Title 18 of the Deschutes County Code (DCC), the Deschutes County Zoning Ordinance, the procedural requirements of Title 22 of the DCC, Chapters 2, 3 and Appendix C of the Deschutes County Comprehensive Plan, Divisions 6, 12, 15, and 33 of the Oregon Administrative Rules (OAR) Chapter 660, and Chapter 215.211 of the Oregon Revised Statutes.

**DECISION:** The Hearings Officer finds that the application meets applicable criteria, and recommends approval of the applications.

*As a procedural note, the hearing on September 21, 2021, was the first of two required de novo hearings per DCC 22.28.030(c). The second de novo hearing will be heard in front of the Board of County Commissioners at a date to be determined.*

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

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

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

Owner	Agent	InCareOf	Address	CityStZip	Type	cdd id
HIGHAM,MICHAEL E & DONNA G			63225 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CONRAD,KURT J & SUSAN L			22220 PARKER LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
FANCHER, LIZ			2465 SACAGAWEA LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
Joe Bessman	Transight Consulting		Via Email		Hearings Officer NOD	21-616-PA, 21-617-ZC
SWISHER, DAVE			250 NW FRANKLIN AVE, STE 401	BEND, OR 97703	Hearings Officer NOD	21-616-PA, 21-617-ZC
Central Oregon Irrigation District			1055 SW Lake Ct	Redmond, OR 97756	Hearings Officer NOD	21-616-PA, 21-617-ZC
Central Oregon LandWatch	Carol Macbeth		2843 NW Lolo Drive	Bend, OR 97703	Hearings Officer NOD	21-616-PA, 21-617-ZC
1000 Friends of Oregon	Andrew Mulkey		PO Box 40367	Portland, OR 97240	Hearings Officer NOD	21-616-PA, 21-617-ZC
WILCOX,COREY D & JANELLE D			63370 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CHONG TRUST			63358 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
JAMES A WEEKS REVOCABLE TRUST			63325 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
EMICK,ANTHONY C & BALL,TINA M			63355 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
DON SWISHER TRUST ETAL	SUCCESSOR TRUSTEE	C/O DAVE SWISHER	250 NW FRANKLIN AVE #STE 401	BEND, OR 97703-2814	Hearings Officer NOD	21-616-PA, 21-617-ZC
RICHARD SUTTER LIVING TRUST	SUTTER, RICHARD I TTEE		63488 ABBEY RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
SCHRIER LIVING TRUST ET AL	SCHRIER, MICHAEL L TTEE ET AL		PO BOX 126	HUBBARD, OR 97032	Hearings Officer NOD	21-616-PA, 21-617-ZC
JARVIS,MARK S & CYNTHIA M			63400 SILVIS RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
FREEMAN, MATTHEW B & JAMIE			22050 NE BUTLER MARKET RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
MCOMBER HOLDINGS LLC			PO BOX 1851	BEND, OR 97709	Hearings Officer NOD	21-616-PA, 21-617-ZC
TURLEY, BRANDON L			22110 BUTLER MARKET RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
PALMER,KINGDON P JR & CINDY A			22130 BUTLER MARKET RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
BARTZ, EDWARD G ET AL			22160 BUTLER MKT RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
BROWN, JOHN A ET AL			22190 BUTLER MKT RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
EDWARD & JULIE DENFELD TRUST	DENFELD, EDWARD JAMES TTEE ET AL		63215 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
BLACKMAN, TERESA ANNE & SCOTT			22249 PARKER LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
MCCAUL, KEVIN E & JANETTE M			22229 PARKER LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
SWEEEN, TODD A & MELISA V			22240 PARKER LN	BEND, OR 97701-9762	Hearings Officer NOD	21-616-PA, 21-617-ZC
PEVERIERI, LEONARD & ANGELA M			63285 PETERMAN LN	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CITY OF BEND			PO BOX 431	BEND, OR 97709	Hearings Officer NOD	21-616-PA, 21-617-ZC
DINGER, PAUL & LAURA ANN			63311 ABBEY RD	BEND, OR 97701	Hearings Officer NOD	21-616-PA, 21-617-ZC
CENTRAL OREGON IRRIGATION DIST.			ELECTRONIC		Hearings Officer NOD	21-616-PA, 21-617-ZC
DEPT. OF LAND CONSERV. & DEVEL.			1011 SW EMKAY DR., SUITE 108	Bend, OR 97702	Hearings Officer NOD	21-616-PA, 21-617-ZC
DESCHUTES CO. SR. TRANS. PLANNER			ELECTRONIC		Hearings Officer NOD	21-616-PA, 21-617-ZC
OREGON DEPT. OF AVIATION, PROJ. & PLANNING DIV.			Electronic		Hearings Officer NOD	21-616-PA, 21-617-ZC
WATERMASTER - DISTRICT 11			ELECTRONIC		Hearings Officer NOD	21-616-PA, 21-617-ZC
BEND MUNICIPAL AIRPORT (CITY OF BEND)	AIRPORT MANAGER / ECONOMIC DEVELOPMENT		P.O. BOX 431	Bend, OR 97709	Hearings Officer NOD	21-616-PA, 21-617-ZC