



## MEMORANDUM

**DATE:** May 4, 2022

**TO:** Deschutes County Board of Commissioners

**FROM:** Nicole Mardell, Senior Planner – Long Range

**RE:** Work Session: Remand of Deschutes Junction Plan Amendment and Zone Change application 247-20-000438-PA/439-ZC (247-22-000287-A)

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On May 4, 2022, the Board of Commissioners (“Board”) will hold a work session in preparation for a public hearing to consider the remanded decision of the Oregon Land Use Board of Appeals (“LUBA”) regarding a plan amendment and zone change application proposed by Anthony Aceti (“Applicant”). The full record is located on the project webpage<sup>1</sup>.

### I. BACKGROUND

On June 30, 2020, an application was filed for a Plan Amendment and Zone change application for a 21.59-acre parcel located at 21235 Tumalo Place, Bend (Taxlot ID 161226C000201 and 161227D000104). The applicant is requesting to rezone and re-designate the property from Agriculture/Exclusive Farm Use - Tumalo/Redmond/Bend subzone (EFU-TRB) to Rural Industrial (RI).

The Deschutes County Hearings Officer issued a decision recommending approval of the application on October 8, 2020. The second hearing, as required by the County procedures ordinance, was held before the Board on December 2, 2020. The Board then approved Ordinance 2021-002 on January 27, 2021 approving the application with conditions.

Central Oregon Landwatch appealed the county decision to LUBA. On June 18, 2021 LUBA issued its Final Opinion and Order remanding the decision to the County for further findings and conclusions of law. Central Oregon Landwatch then appealed the decision further to the Oregon Court of Appeals. On November 17, 2021 the Court of Appeals issued an opinion affirming LUBA’s decision to remand the application. On April 7, 2022, the Applicant initiated remand proceedings under local file no. 247-22-000287-A.

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<sup>1</sup><https://www.deschutes.org/cd/page/remand-deschutes-junction-plan-amendment-zone-change>

## II. LUBA REMAND

LUBA, in its Final Opinion and Order, remanded the county decision to address the following issue:

### A. Findings to quantify the number of workers resulting from the requested zone change/plan amendments and its impact on the *Shaffer* Test.

The final opinion and order provides the following guidance:

(pg. 30) In *Shaffer*, we explained that

"whether a residential, commercial, industrial or other type of use is 'urban' or 'rural' requires a case by case determination, based on relevant factors identified in various opinions by [LUBA] and the courts." *Shaffer*, 17 Or LUBA at 931.

We derived the following factors from case law:

"( 1) relevant characteristics of the proposed use (such as number of employees, noise, odor, dust and other pollutants emitted, associated traffic); (2) the ultimate use of the products of the proposed use (e.g., whether for urban or rural uses, and in what proportions); (3) the characteristics of urban development in nearby UGBs; (4) where other similar uses in the county are located; and ( 5) whether there is a practical necessity to locate the proposed use in the rural area, close to a site specific resource." *Shaffer*, 17 Or LUBA at 946.

(pg. 31) With respect to the *Shaffer* factors, the county found that the potential uses would employ a small number of workers and do not require public facilities or services. The county determined that the DCCP RI policies and implementing DCC RI use and dimensional limitations will limit the scope and intensity of industrial development to rural use. In particular, the county references limitations on maximum floor area and requirements for on-site sewage disposal and on-site wells or public water systems. The county determined that there was insufficient evidence in the record to determine whether the potential uses are the types of uses typically located in rural areas or whether they are significantly dependent on a site-specific resource.

(pg. 33) The county found that the potential industrial uses of the subject property would employ a small number of workers. Record 77. However, the challenged decision does not explain the basis for that finding at all or tie that finding to any specific RI zone regulation or to any evidence in the record regarding the potential number of workers.

(pg. 35) We decline to reach that conclusion under ORS 197.835(11)(b). It is not obvious to us that the RI zone regulations will necessarily result in a small

number of workers. Accordingly, we agree with petitioner that remand is required for the county to explain why it concluded that the potential uses would employ a small number of workers.

Staff notes that the applicant, in their initiation of remand materials has not yet provided any additional testimony in response to the issues on remand. Staff anticipates additional information will be submitted prior to, or during the public hearing for Board consideration.

### **III. HEARING PROCEDURE**

Deschutes County Code 22.32.040 notes that the scope of the proceeding for an application on remand must be limited to review the issues that LUBA requires to be addressed, although the Board may use its discretion to reopen the record where it seems necessary. In this case, staff recommends that the Board limit review to the issues on remand from LUBA.

Due to the narrow scope of review on this issue, staff recommends the Board hold a limited de novo hearing, meaning that new testimony may be entered only as it relates to the number of employees resulting from the requested zone change, and how that number will impact the determination of whether not the use is rural.

Per County hearing procedures, the entirety of the record must be before the board and can be found at the project website: <https://www.deschutes.org/cd/page/remand-deschutes-junction-plan-amendment-zone-change>

### **IV. NEXT STEPS**

The Board will conduct a hearing on this item on May 18, 2022.