**EXHIBIT F - Ordinance 2022-013**

**BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON**
**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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| **FILE NUMBERS:** | 247-21-001043-PA, 247-21-001044-ZC |
| **APPLICANT:** | 710 Properties, LLC<br>PO Box 1345<br>Sisters, OR 97759 |
| **OWNER:** | Eden Central Properties, LLC |
| **ATTORNEY(S) FOR APPLICANT:** | Liz Fancher<br>2464 NW Sacagawea Lane<br>Bend, Oregon 97703<br><br>J. Kenneth Katzaroff<br>Schwabe Williamson & Wyatt<br>1420 5th Avenue, Suite 3400<br>Seattle, WA 98101 |
| **STAFF PLANNER:** | Haleigh King, AICP, Associate Planner<br>Haleigh.King@deschutes.org, 541-383-6710 |
| **APPLICATION:** | Comprehensive Plan Amendment to re-designate the subject property from Agriculture (AG) to Rural Residential Exception Area (RREA) and a corresponding Zone Change to change the zoning from Exclusive Farm Use – Terrebonne (EFU-TE) to Rural Residential (RR-10). |
| **SUBJECT PROPERTY:** | Assessor's Map 14-12-28, Tax Lots 100, 200, 300<br>Assessor's Map 14-12-28D, Tax Lot 101<br>Assessor's Map 14-12-21, Tax Lots 300, 400, 500, 600 and 700 |

## I. FINDINGS OF FACT:

**A. Hearings Officer's Decision:** The Hearings Officer's decision dated June 2, 2022, adopted as **Exhibit G** of this ordinance, is hereby incorporated as part of this decision, including any and all interpretations of the County's code and Comprehensive Plan, and modified as follows:

1. Replace the discussion of the tax history of the subject property in Section II. B., page 5 with the following:

"According to the Deschutes County Assessor's office, no part of the subject property is currently receiving farm tax deferral. Tax Lot 300, Map 14-12-28 erroneously received farm tax deferral but was disqualified in 2014 because the property was not engaged in farm use. The record does not include any evidence the subject property is engaged, or has ever been engaged, in farm use."

2. Add the following sentence to the findings related to Section 3.2, Rural Development on page 54:

"In the event Section 3.2 is determined to establish relevant approval criteria, it has been met. The subject property is comprised of poor soils and it is adjacent to the rural residential zone and rural residential uses on its northern boundary."

In the event of conflict, the findings in this decision control.

**B.** **Procedural History:** The County's land use hearings officer conducted the initial hearing regarding the 710 Properties, LLC Comprehensive Plan Amendment and Zone Change applications on April 19, 2022, and recommended approval of the applications by the Deschutes County Board of Commissioners ("Board") in a decision dated June 2, 2022. The Board conducted a de novo land use hearing on August 17, 2022. The Board deliberated and voted to approve the applications on September 28, 2022.

**C.** **Deschutes County Land Use Regulations:** The Deschutes County Comprehensive Plan and Title 18 of the Deschutes County Code have been acknowledged by LCDC as being in compliance with every statewide planning goal, including Goal 14. The County specifically amended its Comprehensive Plan in 2016 to provide that the Rural Residential Exception Area Plan and its related MUA-10 and RR-10 zones should be applied to non-resource lands. Ordinance 2016-005. This amendment is acknowledged, which means that the RREA plan designation and its related zoning districts, when applied to non-resource lands such as the subject property, do not result in a violation of Goal 14.

## II. ADDITIONAL FINDINGS AND CONCLUSIONS OF LAW:

The Board of County Commissioners approves the requested plan designation and zone change applications and provides the following supplemental findings and conclusions of law and the analysis provided by its Decision Matrix:

## A. Statewide Goal 3 Definition of Agricultural Land

The following is the definition of Agricultural Land provided by Statewide Goal 3:

> ***"Agricultural Land*** *-- ***in Eastern Oregon is land of predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use 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, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event.*
>
> *More detailed soil data to define agricultural land may be utilized by local governments if such data permits achievement of this goal.*
>
> *Agricultural land does not include land within acknowledged urban growth boundaries or land within acknowledged exceptions to Goals 3 or 4."*

## B. Class I-VI Soils identified in Soil Classification System of the US Soil Conservation Service, Decision Matrix page 1

The Board finds, based on the Site-Specific Soils Survey prepared by Soils Classifier Brian Rabe, that 71 percent of the subject property is comprised of Class VII and VIII soils and that the remaining 29 percent is comprised of Class VI soils.

OAR 660-033-0030(5)(a) implements Goal 3's allowance of the use of "more detailed soil data" to define agricultural land. It requires that the soils data provided to the County must be related to the NRCS land capability classification system. This makes it clear that soils information must be reported by soil classification, LCC I through VIII, and that this information may be used in lieu of the NRCS soil surveys. Mr. Rabe classified the soils on the subject property using the NRCS system.

Per OAR 660-033-0030(5)(b), if an applicant concludes that a more detailed soils analysis would assist the county "to make a better determination of whether the land qualifies as agricultural land," the applicant is required to hire a soils scientist approved by DLDC to conduct agricultural land soil surveys that provide more detailed soils information than contained in the Web Soil Survey of NRCS. Mr. Rabe has been approved by DLCD to conduct such studies and his soils study was reviewed and approved for use by Deschutes County by DLCD. The study, according to OAR 660-033-0030(5)(c)(A), may support "a change to the designation of a lot or parcel planned and zoned for exclusive farm use to a non-resource plan designation and zone on the basis that such land is not agricultural land." This is

consistent with LUBA's decision in *Central Oregon LandWatch v. Deschutes County*, 74 Or LUBA 156 (2016)("*Aceti*").

## C. Suitability for Farm Use as Defined by ORS 215.203(2)(a), Decision Matrix page 2

### *Definition of Farm Use*

The relevant definition of "farm use" is provided by ORS 215.203(2)(a). To constitute "farm use" various agricultural activities must be undertaken for "the primary purpose of obtaining a profit in money." The evidence in the record establishes that no person would undertake agricultural activities on the subject property for the primary purpose of obtaining a profit in money. The costs of conducting such activities are too high and the income derived therefrom are too low. According to the 2017 US Census of Agriculture, farms in Deschutes County averaged losses of $12,866 and approximately 84% of farms do not obtain a profit in money. The average cash farm income of Deschutes County farms that lost money in 2017 was only $21,386. Farms that had net operating income averaged income of only $31,739. This data suggests that only farms with ideal farm conditions (good soils, irrigation water rights, favorable climate) obtain a profit in money. It supports the collective opinions of experienced ranchers and farmers that the subject property is not suitable for any type of farm use. We agree.

Given the high cost of irrigating and maintaining the subject 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 only generally accepted farm use of poor soils (predominantly Class VII and VIII) in Deschutes County. However, the collective opinion submitted by several professional ranchers in this case (and discussed below) makes it clear that grazing would not be profitable on the subject property nor would any professional rancher attempt to integrate the subject property with other ranchland holdings or operations.

### *Income from Livestock Grazing*

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. While it does not assess income from all types of livestock, it looks at income from a type of livestock operation that typically occurs in Deschutes County on dry land. The formula assumes that one acre will produce 900 pounds of forage per year and support one Animal Unit Month per acre. The Oregon Department of Agriculture ("ODA"), DLCD and ODFW offered their professional opinion in a letter dated April 19, 2022 that the subject property produces enough forage in dry years to allow grazing by one AUM per 10 acres. In wet years, the agencies estimate that the property might be able to support grazing by one AUM per five acres. This means that the income results of using the OSU formula must be divided by five and ten to obtain the range of potential gross income that might be achieved from grazing.

- 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 $1.15 per pound.

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

30 days x 2#/day/acre = 60.0 lbs. Beef/acre
(1 acre per AUM)

60.0 lbs. Beef/acre x 710 acres x $1.15/lb. = $ 48,990 per year of gross income
$48,990/10 = $4,899 per year of gross income in dry years
$48,990/5 = $9,798 per year of gross income in wet years

Thus, using the OSU/County formula based on ODA forage calculations, the total gross beef production potential for the subject property would be approximately $4,899 to $9,798 annually.

The State agencies argued that the applicant's analysis of grazing capacity overlooks the fact that it is an accepted farm practice to graze cattle for five to six months of the year allowing the property owner to double the number of cattle raised by a farm operation. While this is correct, it would not alter the amount of income attributable to grazing on the subject property. The income formula produces the same result whether cattle graze year-round or for a part of the year. Any additional income from a larger herd would be grazing attributable to the other lands where the livestock graze at other times of the year and not be attributable to use of the subject property. Transporting cattle to distant pastures and paying to lease land elsewhere for a larger herd would also impose additional operating costs making it less likely that a livestock grazing operation would generate a profit in money from grazing operations.

***Suitability of Property for Dryland Grazing***

The record contains a considerable amount of evidence regarding the suitability of the property for dryland grazing. The evidence is generally consistent on two points; the property may be used for grazing livestock but there is inadequate forage on the property to generate net income for a rancher from grazing.

We have considered the vast amount of combined experience of these farmers and ranchers in conducting similar operations and find their testimony more probative and persuasive than that offered by the opposition on the issue of whether the subject property is suitable for farm use as defined by ORS 215.203. Based on evidence and comments submitted into the record from ranchers and farmers, including James M. Stirewalt, Rand Campbell, Matt and Awbrey Cyrus, Russ Mattis, Zach Russell, Craig May, the Board finds the subject property is not suitable for dryland grazing. No reasonable farmer would conduct a cattle or other livestock operation on the subject property intending to make a profit in money from the endeavor.

***Other Potential Farm Uses***

Arguments were presented that a host of activities, in addition to dryland livestock grazing, that might constitute farm use could occur on the subject property. No claim was made, however, that these activities could be undertaken on the subject property with an intention of making a profit in money use. Instead, the argument was the same argument rejected by the Oregon Supreme Court in *Wetherell v. Douglas County* – that "profit" is "gross income" without the consideration of farm expenses.

All other farm uses that might be conducted on the subject property, other than dryland grazing, would require the property owner to expend extraordinary amounts of money to speculatively attempt to make the subject property suitable for farm use. Furthermore, it is not an accepted farm practice in Deschutes County to irrigate and cultivate Class VII and VIII soils.

The following conditions further support a determination that the property is not suitable for farm use as defined in ORS 215.203:

- Property lacks irrigation water rights and is outside of an irrigation district
- The cost to finance the purchase of groundwater rights and to establish an irrigation system would overwhelm gross farm income
- Property lacks natural source of water for livestock
- Property contains an excessive amount of rocks that would need to be removed to allow the property to be cultivated
- Shallow depth of soil will not hold sufficient water to support the growth of crops
- High plateau location results in exposure to the elements unfavorable for most crops (extreme high temperatures, extreme low temperature, and wind/erosion)
- Low rainfall

First and foremost, irrigation water rights would need to be purchased and would need to be sourced from groundwater. With the cost of purchasing water rights being approximately $21,000 per acre, the cost of obtaining irrigation water for just 405 acres of the subject property (three 135-acre) pivots would be $7,800,000.00. The cost of installing agricultural

wells and pumps is approximately $595,000. This totals approximately $8,635,000 to establish an irrigation system and supply water for only 405 acres of the 710-acre subject property (three pivots). While these expenditures are capital expenses rather than operating expenses, the cost of debt service is an operating expense that would offset farm income.

In the unlikely event that a farmer could obtain a USDA loan at the favorable rate of interest of four percent per year, the annual cost of funding these improvements on an interest only loan would be approximately $345,400 per year. Funding from a commercial lender would be even more expensive as interest rates currently range from 5.75 to 8.5 percent. Additionally, the approximate cost of electricity to operate an irrigation system would, based on costs incurred by Dry Creek Ranch, add between $10,000 and $12,000 per year to the expense of irrigating the subject property due to the cost of electricity needed to pump groundwater.

The expenses to establish an irrigation system and the shallow, poor quality soils present on the subject property would prevent a reasonable farmer from believing that he or she would ever make a profit in money by conducting irrigation water-dependent farm uses on the subject property. According to the US Census of Agriculture, in 2017, the average Deschutes County farm lost $12,866 per farm; up from $11,538 per farm in 2012. A reasonable farmer would also consider the fact that only 22 percent of farm land in the County is cropland and only 27 percent of farm land is irrigated; in other words, only the best soils in the County support irrigated crop production. Only 16 percent of farms in the County in 2017 had net farm income from farm operations. The average income of the successful farms in the County in 2017 was only $31,739 – not enough to justify the huge expense of bringing water to the subject property or of clearing the land of surface and subsurface rock that would impede tilling – assuming that that is even feasible.

COLW argued that the applicant must show that the subject property is not suitable for any farm use mentioned by a table in the 2012 Census of Agriculture that reports on farm use in Deschutes County. COLW, however, misunderstands the table. It does not represent, as alleged, that all uses listed on the table are occurring in Deschutes County. Instead, it provides income information for groups of uses that are occurring in Deschutes County without disclosing which activities are occurring in our county. COLW mentioned lavender as a potential farm crop, but evidence provided by the applicant shows that lavender farms require irrigation and that the cost paying the interest on the expense of purchasing irrigation water and installing a system would impose interest costs that would be too significant to allow such an operation to be profitable in addition to the other costs of operations – especially considering the track record of other Central Oregon farms. Additionally, lavender farms are typically conducted on much smaller properties with fields less than five acres in size. Further, most lavender farms rely upon public visitation. No reasonable lavender grower would attempt to establish a lavender farm on the Property given the poor quality of the soil, lack of water, and other operational constraints – including lack of close proximity to area roadways and population centers.

Additionally, COLW made no substantiated claim that a reasonable farmer would undertake any of the listed uses with the intention of making a profit in money. Instead, COLW argued that gross income from farming the land is synonymous with a profit in money – a claim rejected by the Oregon Supreme Court in *Wetherell v. Deschutes County*. The commenting State agencies and opponents made similar claims arguing that certain farm uses could be established on the subject property without claiming that the uses would be able to be conducted with an intention to make a profit in money[1].

DLCD/ODA/ODFW argued that the subject property "may also be sufficiently capable of supporting *** the boarding and training of horses, raising poultry, honeybees or even ungulate specifies like elk or raising game birds such as pheasants, chukar or quail." They did so without suggesting that a farmer might expect to make a profit in money from conducting any of these activities on the subject property. The suitability test, as indicated by DLCD/ODA/ODFW comments, relates to whether the subject property itself can support a farm use. This means that the land must be able to produce crops or forage adequate to feed livestock raised on the property; something that severely limits the size of any operation.

Almost all farm uses require irrigation water and, for those that do, it is simply cost-prohibitive to purchase water rights and install wells, pump and irrigation infrastructure on the subject property. The extensive amount of rock would also make almost any agricultural activity infeasible unless the rocks are removed at a cost that would be too expensive to merit either the initial expenditure (capital cost) or finance costs (operating expense that reduces gross income). The DLCD/ODA/ODFW comments recognize this fact and argue that uses that do not rely on irrigation water might be conducted on the subject property.

The applicant provided extensive evidence that a wide array of farm activities, including those identified by the State agencies, would not be feasible on the subject property and would not be able to be conducted with an intention to make a profit in money. This evidence includes, but is not limited to, unrebutted evidence from Fran Robertson, owner of Robertson Ranch, that she would never consider attempting to establish a horse operation on the subject property due to a lack of irrigation, rocky land, location and numerous juniper trees. Horses eat hay, and, according to opponent Pam Mayo-Phillips "[t]he property is not suitable for hay ground ***." The State agencies did not contest the fact that the subject

[1]To the extent arguments in the record are read to present a claim that a farmer or rancher would use the subject property for farm activities with an intention of making a profit in money, we find the evidence to the contrary offered by farmers and ranchers who toured the subject property and the overwhelming evidence in the record that supports their opinions more persuasive and find that no reasonable farmer would attempt to farm the subject property with an intention to obtain a profit in money.

property is not suitable for the production of crops, presumably due to the expense and difficulty of obtaining irrigation water rights for such a large, infertile property. Without hay and other feed crops, the subject property will not support the farm uses of breeding, boarding or training horses.

The suggestion that elk might be raised on the subject property overlooks the reality that elk ranching requires permits from ODFW. OAR 635-049-0015(1). Additionally, the subject property lacks irrigation which is essential to establish the pastures that should be provided for elk. Elk ranches incur significant expenses to comply with ODFW regulations that make it difficult for them to make a profit in money on any property. This includes disease testing and double fencing with fences at least 8 feet high. OAR 635-049-0245. The costs of installing this fencing would be substantial due to the rocks present on the subject property.

The State agencies' letter of April 19, 2022 states that establishing a confined animal feeding operation (feed lot) would have similar costs wherever located and might be established on the subject property. This is not correct, however, because it would be necessary to remove a substantial quantity of rock from the subject property to make it suitable for this use. It would also be necessary to grade and install a new road (in rock) that will accommodate the trucks used to transport cattle or other livestock to and from the property. Furthermore, the Rabe soils analysis show that the soils on the property are shallow which means that the site is not suitable for a large concentration of animals due to the septic disposal needs of such an operation. Additionally, the number of animals that can be sustained by vegetation produced on the subject property is very low. While hay and feed may be imported to increase production of livestock, that is not a correct measure of whether the land proposed for rezoning can support a particular farm use – the question asked by the definition of Agricultural Land in Goal 3.

As to the other uses mentioned in the State agency letter, Brittany Dye of Brittany's Bees LLC estimated gross income of only $4,000 per year from the property. Taxes, insurance, transportation, interest on farm loans and labor would make this use one that would not be profitable. The applicant has also provided evidence that shows that conducting a commercial chicken operation is not feasible. The land itself will not produce crops to feed the chickens. The costs of bringing power to the site, obtaining water for the chickens, installing predator control fencing and constructing farm buildings, would make it unreasonable to assume that a farmer would expect to make a profit in money by conducting such an operation on the subject property. Additionally, evidence in the record shows that farm pastures are a key element for a successful chicken (eggs and meat) farm operation such as Great American Egg in Powell Butte, Oregon. Evidence in the record shows that game birds, like poultry, require water and feed not present on the subject property and that these uses are not likely to be profitable.

Redside Restoration, LLC argued that the Class VII soils on the subject property may be used to produce grapes. Its reasoning is that it grows grapes on its property north of the subject

property but their property is substantially different than the subject property. The Redside property has conditions uniquely suited to growing Marquette grape vines that are absent on the subject property. According to the Oregon Wine Press, these conditions are "a south-facing vineyard slope and wind protection" that allow the vines to survive temperatures that drop to the negative teens and twenties in the winter. Additionally, the Redside property is located "within grape seed spitting distance of the Deschutes River" and is fully irrigated. The Redside soils are alluvial because they are next to the river whereas the subject property is a considerable distance from the river. The Redside property is also at a significantly lower elevation than the subject property, which may contribute to the success of operations due to climatic pressures being diminished (warmer, less exposure to the elements). Redside claims its vineyard is growing on land in NRCS map unit 81F. While this is the mapped soil type, soil classifier Brian Rabe, based on a review of the information provided by Redside, offered his expert opinion that the Redside vineyard does not have the characteristics of 81F soil because it has slopes of between 10 and 20 percent rather than the 45 to 80 percent slopes found in areas of 81F soils. Information in the record also establishes that the soils on the subject property are too shallow, with a typical depth of approximately 14 inches, to support a productive and profitable vineyard.

Hemp was mentioned as a potential crop, but former hemp farmer Matt Cyrus is of the opinion that the subject property would not support any working farm use. Mr. Cyrus did not grow hemp in 2021 and 2022 due to poor market conditions. Hemp growers have an oversupply and back inventory of product not yet sold. Mr. Cyrus advised that the subject property is poorly suited for hemp production because it is too rocky and the soils are too shallow for proper tillage and that greenhouse production is not financially feasible. The viability of hemp was also questioned by other commenters including Paul Schutt.

It was also argued that rocks on the subject property might be sold as field stone but this activity is not a farm use or accepted farm practice. Instead, if conducted at a commercial scale it would be surface mining. It was also argued that veterinary clinics are a farm use because they are animal husbandry. The Board disagrees and finds that in the context of the definition of Agricultural Land and farm use, the use described is the day-to-day care, breeding and raising of livestock not a veterinary clinic. This interpretation is consistent with the intention of the EFU zone to preserve land for farm uses that require productive farm land to produce farm products.

In a determination of farm suitability, capital costs may also be considered as a technological and energy input in order to establish the use. The record shows that the cost of establishing an irrigation system (as well as other required capitals costs) on the subject property, would far exceed the sales price that could be obtained if the subject property were improved. Therefore, no reasonable farmer with the intention of making a profit would attempt to establish such a system. This is particularly true given that the record shows at least one example of an existing farm operation that has farm soils and over 500 acres of irrigation

water rights, and that that operation has failed to sell for over 18-months at a sales price below the cost of just purchasing the irrigation water appurtenant to that property.

In conclusion, based on a consideration of evidence in the record that might suggest that the subject property might be suitable for "farm use" and the evidence to the contrary, we find the evidence to the contrary more persuasive and find that the subject property is not "other lands which are suitable for farm use 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, or accepted farming practices." Statewide Goal 3.

**D. Land Necessary to Permit Farm Practice on Nearby Agricultural Land, Decision Matrix page 3**

The State agencies raised the issue of traffic impacts related to the Goal 3 issue of whether land is necessary to permit farm practices to be undertaken on nearby lands. Traffic issues are not, however, a relevant consideration in addressing this issue because Goal 3 asks whether the "land" to be rezoned, the subject property, is needed by area farms to conduct farm practices on their properties. Additionally, the record supports the finding that the small amount of traffic associated with the proposed change will not prevent farm practices associated with area farm uses of growing hay and grazing livestock from occurring in the area.

Arguments were also made that grazing might occur on the subject property and on other area land, but that is not the question posed by Goal 3. The question is whether the subject property is necessary to allow farm practices to occur on other properties, and it is clear that it is not necessary.

**E. Traffic Impacts and the TPR, Decision Matrix page 4**

The applicant filed expert evidence from transportation system engineer Chris Clemow that demonstrates compliance with the Transportation System Planning Rule, OAR 660-012-0060. The hearings officer and County Transportation Planner both reviewed the analysis and found it demonstrated compliance with the rule and this has not been an issue of dispute. Instead, it has been argued that road conditions are not currently adequate to support the traffic associated with a rural residential subdivision of the property. We find, however, that road condition issues will be addressed during subdivision review because the County's code allows the County to impose roadway improvement requirements to address identified inadequacies and have considered the availability and efficiency of providing all necessary

public services and facilities, including roadways, in approving the 710 applications.[2] DCC 18.136.020(1).

Additionally, without subdivision review a maximum of only six additional homes in addition may be built on the subject property as a matter of right under the proposed zoning. It is highly likely, however, that the same six additional homes could be approved as nonfarm dwellings on the subject property given the fact that three other nonfarm dwellings have been approved on the property and the fact that 71 percent of the property is comprised of Class VII and VIII soils.

**F. Definition of Forest Lands, Decision Matrix page 5**

The State agencies argued that the County must address the definition of forest land. We address that definition below.

***(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.***

The subject property is not forested land. It is not suitable for commercial forest uses and none are occurring on adjacent or nearby lands. Western Juniper is not a forest tree species. The Department of Forestry has determined that there is no forestland on the subject property or on adjacent or nearby lands. The Board agrees with the Hearings Officer on this issue.

***OAR 660-006-0010(2) states:***

***(2) Where a plan amendment is proposed:***

***(a) Lands suitable for commercial forest uses shall be identified using a mapping of average annual wood production capability by cubic foot per acre (cf/ac) as reported by the USDA Natural Resources Conservation Service. ******

The NRCS Soil Survey of the Upper Deschutes River Area includes maps of the subject property and reports the average annual wood production capability (cf/ac) for all forest soils in Table 8 of the survey. Soils not suitable for wood crops are indicated by their omission from the table (zero production). All of the soils identified by the NRCS Soil Survey as being

[2] *See*, DCC 17.16.100(B)(adequate facilities), DCC 17.16.115 (Traffic Impact Study), DCC 17.36.040 (Existing Streets), DCC 17.48.160 (Road Development Requirements; Standards).

present on the subject property are not suitable for producing wood crops. The same is true for all soils identified as present on the property by soils classifier Brian Rabe. The subject property, therefore, is not land suitable for commercial forest uses.

***(c) Counties shall identify forest lands that maintain soil air, water and fish and wildlife resources.***

The subject property is not "forest lands."

**G. Goal 14, Urbanization, Goal Exception, Decision Matrix page 6**

Opponents argued that the County must approve an exception to Statewide Goal 14, Urbanization, in order to apply the RR-10 zone and RREA plan designation to the subject property. An exception to Goal 14 is, however, only required if the proposed zone and designation allow urban development of the subject property. The Board agrees with the Hearings Officer on this issue.

Furthermore, opponents reference the legal case of *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 498-511, 724 P2d 268 (1986) for the proposition that a county may need to approve a goal exception to apply the RREA plan designation and RR-10 zoning districts to the subject property. The *Curry County* case, however, does not support COLW's argument.

In *Curry County*, the Oregon Supreme Court determined that rural residential zoning for exception areas must be proven to be rural in nature when first adopted, even for zones and plans adopted prior to the allowance of exceptions to Goal 14. *Curry County* at 476. This means that when Deschutes County's Comprehensive Plan and zoning code were acknowledged by LCDC around 1980, it was necessarily determined that RREA plan designation and zoning comply with Goal 14 and do not allow urban development.

Deschutes County Comprehensive Plan ("DCCP") Policy 2.2.3 specifically allows nonresource lands zoned EFU to be redesignated and rezoned and identifies the property zoning and plan designations to be applied to non-agricultural lands. The plan also states, in Section 3.3, Rural Residential Exception Areas:

> *"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 ***"*

The Plan states that "[e]ach Comprehensive Plan map designation provides the land use framework for establishing zoning districts. Zoning defines in detail what uses are allowed for each area." DCCP Section 1.3, p. 15. Rural Residential Exception Areas, according to the DCCP, "provide opportunities for rural residential living outside urban growth boundaries and unincorporated communities ***." DCCP Section 1.3, p. 15. DCCP Table 1.3.3 provides

that Title 18's RR-10 and MUA-10 are the "associated Deschutes County Zoning Code[s]" for the RREA plan designation.

The determination that the RREA plan designations and RR-10 and MUA-10 zoning districts should apply to non-agricultural lands was made when the County amended the DCCP in 2016. Ordinance 2016-005. That ordinance was acknowledged by DLCD as complying with the Statewide Goals. This means that the lot sizes and uses allowed by the RREA plan designation and RR-10 zone are Goal 14 compliant. The proposed Comprehensive Plan Amendment simply acts in accordance with the DCCP provisions. It provides no occasion for the County to revisit the issue of whether the RR-10 zone and RREA designation violate Goal 14 by allowing urban development.[3]

This issue is addressed in detail by the Oregon Court of Appeals in *Central Oregon LandWatch v. Deschutes County*, 301 Or App 701, 457 P3d 369 (2020)("*TID*"). In *TID*, the Court held that a decision made by Deschutes County decades earlier not to apply a resource plan designation to the subject property made it unnecessary for the property owner to establish that the property is nonresource land when remapping it from Surface Mining to RREA and MUA-10. This is consistent with earlier Court of Appeals decisions that hold that Goal 5 is not a relevant issue in a plan amendment and zone change application if the subject property has not been identified as a Goal 5 resource by the applicable comprehensive plan. *Urquhart v. Lane Council of Governments*, 80 Or App 176, 181-82, 721 P2d 870 (1986); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 350, *rev den* 323 Or 136 (1996).

The case of *Jackson County Citizens' League v. Jackson County*, 171 Or App 149, 15 P3d 42 (2000) holds that it is unnecessary to establish compliance with Goal 14 for uses conditionally allowed by the EFU zone; just as it is unnecessary for 710 Properties, LLC to establish that Deschutes County's Comprehensive Plan, a plan that provides that the RREA plan designation and RREA zones (RR-10 and MUA-10) should be applied to non-agricultural lands, complies with Statewide Goal 14.

COLW Goal 14 argument is also based on erroneous facts. COLW's argument assumes that the RREA plan designation and RR-10 and MUA-10 zones were granted exceptions to Statewide Goal 14. In fact, the only required exceptions granted to Deschutes County by LCDC were to Statewide Goals 3 and 4 – not to Goal 14. The DCCP explains:

- **"1979 Exceptions** *Comprehensive Plan entire County – PL 20 - 1979*
  During the preparation of the 1979 Comprehensive Plan it was apparent that many rural lands had already received substantial development and were committed to

[3] In *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218 (1982) LUBA held that "We lack authority after acknowledgment of a comprehensive plan to review goal issues related to the plan. *Fujimoto v. MSD*, 1 Or LUBA 93, 1980, *aff'd*, 52 Or App 875, 630 P2d 364 (1981)."

non-resource uses. Areas were examined and identified where Goal 3 and 4 exceptions were taken. At this time exceptions to Goals 11 and 14 were not required."

DCCP, Chapter 5, p. 40. An exception to Goal 14 was not required because the plan and rural residential zoning districts complied with Goal 14 and because Goal 14 exceptions were not yet allowed by LCDC's rules.

**Curry County Goal 14 Analysis**

While not agreeing that an analysis of Goal 14, Urbanization is required, we provide the following alternative findings below to address the issue.[4]

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

**i. Density**

The RR-10 imposes a maximum density of one dwelling per ten acres. The only exception is that a higher density may be allowed in planned or cluster developments if they are not subject to the WA overlay zone.[5] This higher density is not, however, allowed by approval of this zone change. This increased density is allowed only if it is shown that the development complies with the County's conditional use criteria, Comprehensive Plan and zoning ordinance that require the dedication of 65 percent natural, undisturbed open space. The large natural open space areas created by this type of development act to maintain the rural character of the parent parcel. The maximum density for properties like the subject property is one house per 7.5 acres. This is not an urban density. Such a density would never be allowed in any urban residential zoning district other than a reserve or holding zone. For instance, in the City of Bend, a density of 1.1 dwellings per acre is the lowest density allowed for an urban residential district. This density is allowed only for areas not served by sewer. For properties served by sewer, a minimum density of four dwellings per one acre is required.

In *Curry County*, the Supreme Court accepted the concession of 1000 Friends that a density of one house per ten acres is generally "not an urban intensity." COLW argues that the comprehensive plan requires a ten acre minimum parcel size. If correct, this minimum parcel size will apply during our review of any subdivision on the subject property and assure that

[4] Alternative findings are common and permitted. *Oregon Coast Alliance, et al. v. Tillamook County*, __ Or LUBA __ (LUBA Nos. 2021-101/104, Sep 30, 2022)(slip op 24).
[5] DCC 18.60.060.C also permits a density bonus if a property is within one mile of an urban growth boundary. That provision does not apply here.

development is not developed at an urban intensity. Furthermore, in *Curry County*, 1000 Friends argued that densities greater than one dwelling per three acres (e.g. one dwelling per one or two acres) are urban. The density allowed by the RR-10 zone in a planned development is 2.5 times less dense. For a standard subdivision, the density allowed (one house per ten acres) is over three times less dense. The record in this case, also includes DLCD guidance that suggests that a low level of residential urban density is two to six units per buildable acre (Applicant's Exhibit BOCC-4). Clearly, a density equivalency of one unit per *ten* acres is not urban; and the same is true for a density of one unit per 7.5 acres.

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

**ii. Lot Size**

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

The EFU zone that applies to the subject property imposes no minimum lot size for new nonfarm parcels. DCC 18.16.055. The only exception is that 5-acre minimum is required for non-irrigated land divisions of properties over 80 acres in size. DCC 18.16.055(C)(2)(a)(4). The EFU zone requires that other nonfarm uses be on parcels that are "no greater than the minimum size necessary for the use." Furthermore, although not applicable to non-resource lands, OAR 660-004-0040 allows lot sizes as small as two acres in rural residential areas without need for approval of a goal exception – indicating LCDC's view that parcels of this size are not urban lots.

**iii. Proximity to Urban Growth Boundaries**

The County's zoning map shows that the subject property is over four miles from the nearest UGB, the UGB for the City of Redmond. This separation assures that uses established on the subject property will remain rural and not have a "magnet effect" of drawing urban residents to rural lands for commercial services. The magnet effect was an issue of concern to the Oregon Supreme Court in the *Curry County* case. LCDC currently strictly limits the size of magnet uses in the EFU zoning district if they are within three miles of an urban growth boundary by OAR 660-033-0130(2) and Table OAR 660-033-0120 but does not limit the same uses on properties that are more than three miles from a UGB.

**iv. Services**

Sewer service is prohibited by Goal 11. An increase in the density of development is not allowed if a public water system is developed to serve the subject property. The property may be served by exempt domestic wells, as intended by the applicant.

#### v. Conclusion of Factors

In totality, none of the above-factors indicates that the Applicant's rezone request implicates Goal 14. The applicant asserts that the property as it is currently zoned could qualify for approval of approximately 21 non-farm dwellings given the existing requirements in the Code and state law. This approval increases the potential density of development, but not to urban levels.

### H. Change in Circumstances or Mistake in Zoning, Decision Matrix page 7

The Board concurs with the Hearings Officer's findings regarding a mistake in zoning and change in circumstances. Additionally, the County adopted comprehensive plan language in 2016 that clearly allows changes of the type proposed by the applicant. In this case, the Board agrees there has been a change in circumstance since the property was originally zoned EFU around 1979 that merits approval of the 710 Properties applications.

### I. Impacts on Surrounding Land Use, Decision Matrix page 8

DCC 18.136.020(C)(2) requires a consideration of whether the impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan. All specific goals and policies were identified by the County's hearings officer and were considered by the Board in deciding to approve the zone change and plan amendment applications. Additionally, approval does not violate any specific plan goal or policy. Furthermore, Policy 2.2.3 specifically allows for the proposed changes on EFU land that does not meet Goal 3's definition of Agricultural Land. The Board concurs with the Hearing's Officer findings.

### J. Wildlife Impacts, Decision Matrix page 9

The County's Goal 5 program considered and applied mapping to protect all Goal 5 resources in the County. It did not identify any Goal 5 resource on the subject property and did not impose any Goal 5 protections. The Board understands that wildlife agencies are asking the County to apply new Goal 5 protections to a wide swath of lands in the County, including the subject property but the County has not yet conducted an ESEE analysis to determine whether Goal 5 protections should be applied. At this time, however, Goal 5 is not a relevant issue in the review of this application because no Goal 5 resources have been inventoried as being present on the property. Applying *ad hoc* protections at this time would not be appropriate. *Urquhart v. Lane Council of Governments, 80 Or App 176, 181-182, 721 P2d 870 (1986)*; *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 350, *rev den* 323 Or 136 (1996). *See also*, *Central Oregon LandWatch v. Deschutes County*, 301 Or App 701, 457

P3d 369 (2020). Furthermore, approval of the zone change and plan amendment application will not prevent the application of Goal 5 resource protections to the property, if merited, in the future.

## K. Fire Hazard, Decision Matrix page 10

The entire County is identified as a Wildfire Hazard Area designation. The plan amendment and zone change does not change this designation.

The subject property, if subdivided, will be required to comply with emergency access requirements or development of the property will be limited by the applicable fire code unless appropriate fire risk and hazard reduction measures are taken by property owners.

The measures identified by the Comprehensive Plan have been acknowledged as complying with Statewide Goal 7. As approval of the application does not violate the plan, it does not violate Statewide Goal 7.

## L. Availability of Water and Water Impacts, Decision Matrix page 11

Evidence in the record is generally consistent regarding the availability of water. Water is available in the regional aquifer and is adequate to serve residents of new homes that might be built on the subject property.[6] According to Kyle Gorman of Oregon Water Resources Department, the aquifer has declined by a modest amount of 9 feet over 25 years in the area closest to the subject property. The level of water in the upper levels of the aquifer above the regional aquifer is declining for multiple reasons; none are attributable to the proposed plan amendment and zone change application. The result of groundwater decline is that older wells that are shallow need to be redrilled.

A professional water study conducted by GSI Water Solutions, Inc. found, that the use of exempt wells to meet the water needs of new residents would be unlikely to have a measurable interference on agricultural wells and domestic wells in the area around the subject property. Given this fact, it is not necessary for the subject property to remain undeveloped in order to permit farm practices from being undertaking on adjacent or nearby agricultural lands. Additionally, domestic water use is only a very small percentage of water use occurring in the Deschutes River Basin. The largest use of water is irrigation, particularly irrigation of farm properties. Water use issues, also, will be addressed during subdivision review as required by DCCP Policy 2.5.24.

Under DCC 18.136.020(C)(1), the water availability issue is limited to a consideration of whether water will be available to the subject property and does not address water availability for other properties. That standard has been met by the applicant.

[6] The cost of water for farm use purposes makes that use unrealistic.

## M. HB 2229 and Related Comprehensive Plan Policies, Decision Matrix page 12

Opponents argued that the County cannot approve the Applicant's request without first obtaining a "work plan" that has been supported by DLCD. The Board finds the requirements and allowances of HB 2229 (2009) are not applicable to the quasi-judicial process proposed with this application.

The Deschutes County Comprehensive Plan ("***DCCP***") Policies 2.2.2 and 2.2.3 allow the rezoning of an "individual parcel" of land. In fact, in 2016, the County adopted changes to the DCCP to *specifically authorize* the approval of quasi-judicial plan amendments to nonagricultural land and these plan provisions are acknowledged.

HB 2229 authorizes a County-led "Big Look" of resource lands and has no bearing on a quasi-judicial rezone initiated by an applicant which is permitted Deschutes County's Comprehensive Plan. According to former DLCD Director Richard Whitman, the bill authorizes counties to "take a county wide look at all of their farm and forest lands and whether they [are] appropriately zoned or not." [7] Nothing in HB 2229 precludes the County from approving property-specific plan amendment and zone change applications for properties incorrectly inventoried as resource lands.

## III. DECISION:

Based upon the foregoing Findings of Fact and Conclusions of Law, the Board of County Commissioners hereby **APPROVES** Applicant's applications for a DCCP amendment to re-designate the subject properties from Agriculture (AG) to Rural Residential Exception Area (RREA) and a corresponding zone map amendment to change the zoning of the properties from Exclusive Farm Use – Terrebonne (EFU-TE) to Rural Residential (RR-10).

Dated this ____ day of _____, 2022

[7] Applicant's Exhibit BOCC-24.