

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

FILE NUMBERS: 247-22-000313-ZC, 247-22-000314-PA

HEARING DATE: November 15, 2022, 6:00 p.m.

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

APPLICANTS/OWNERS: Te Amo Despacio, LLC and CTH Investments, LLC

SUBJECT PROPERTIES: Map and Taxlot: 1712350001200
Account: 119020
Situs Address: 62385 HAMBY RD, BEND, OR 97701

Map and Taxlot: 1712350001201
Account: 119038
Situs Address: 21480 HWY 20, BEND, OR 97701

REQUEST: Applicants request approval of a Comprehensive Plan Amendment to change the designation of the Subject Properties from Agricultural (AG) to Rural Residential Exception Area (RREA). Applicants also requests a corresponding Zone Change to rezone the Subject Properties from Exclusive Farm Use – Tumalo/ Redmond/ Bend subzone (EFU-TRB) to Multiple Use Agricultural (MUA-10).

HEARINGS OFFICER: Tommy A. Brooks

SUMMARY OF RECOMMENDATION: The Hearings Officer finds that the Applicants have met their burden of proof with respect to the requested Comprehensive Plan Amendment and Zone Change and, therefore, recommends APPROVAL of the Application based on the Findings set forth in this Recommendation.

I. APPLICABLE STANDARDS AND CRITERIA

Title 18 of the Deschutes County Code, the County Zoning Ordinance:
Chapter 18.04, Title, Purpose, and Definitions
Chapter 18.16, Exclusive Farm Use Zones (EFU)
Chapter 18.32, Multiple Use Agricultural (MUA10).
Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance
Deschutes County Comprehensive Plan
 Chapter 2, Resource Management
 Chapter 3, Rural Growth Management
 Appendix C, Transportation System Plan
Oregon Administrative Rules (OAR), Chapter 660
 Division 12, Transportation Planning
 Division 15, Statewide Planning Goals and Guidelines
 Division 33, Agricultural Land
Oregon Revised Statutes (ORS)
 Chapter 215.010, Definitions
 Chapter 215.211, Agricultural Land, Detailed Soils Assessment

II. BACKGROUND AND PROCEDURAL FINDINGS

A. Nature of Proceeding

This matter comes before the Hearings Officer as a request for approval of a Comprehensive Plan Map Amendment (“Plan Amendment”) to change the designation of the Subject Properties from Agricultural (AG) to Rural Residential Exception Area (RREA). The Applicants also request approval of a corresponding Zoning Map Amendment (“Zone Change”) to change the zoning of the Subject Properties from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA10). The basis of the request in the Application is the Applicants’ assertion that the Subject Properties do not qualify as “agricultural land” under the applicable provisions of the Oregon Revised Statutes or Oregon Administrative Rules governing agricultural land. Based on that assertion, the Applicants are not seeking an exception to Statewide Planning Goal 3 for the Plan Amendment or Zone Change.

B. Notices and Hearing

The Application was filed on April 14, 2022. On April 27, 2022, the County issued a Notice of Application to several public agencies and to property owners in the vicinity of the Subject Properties (together, “Application Notice”). The Application Notice invited comments on the Application.

Following additional submittals by the Applicants, the County mailed a Notice of Public Hearing on October 7, 2022 (“Hearing Notice”) announcing an evidentiary hearing (“Hearing”) for the requests in the Application. Pursuant to the Hearing Notice, I presided over the Hearing as the Hearings Officer on November 15, 2022, opening the Hearing at 6:03 p.m. The Hearing was held via videoconference, with Staff and a representative of the Applicants in the hearing room. The Hearings Officer appeared remotely. On October 7, 2022, the Deschutes County Planning Division (“Staff”) issued a report setting forth the applicable criteria and presenting the evidence in the record at that time (“Staff Report”).¹

¹ The Staff Report is styled “Findings and Decision”. During the Hearing, it was acknowledged that the Staff Report was not a decision and, rather, was Staff’s summary of the record as applied to the criteria.

At the beginning of the Hearing, I provided an overview of the quasi-judicial process and instructed participants to direct comments to the approval criteria and standards, and to raise any issues a participant wanted to preserve for appeal if necessary. I stated I had no *ex parte* contacts to disclose or bias to declare. I asked for but received no objections to the County’s jurisdiction over the matter or to my participation as the Hearings Officer.

No participant requested that the record remain open. The Hearing concluded at approximately 6:36 p.m. At that time, I closed the Hearing and the record, and I took this matter under advisement.

C. 150-day Clock

Because the Application includes a request for the Plan Amendment, the 150-day review period set forth in ORS 215.427(1) is not applicable.² The Staff Report also notes that the 150-day review period is not applicable by virtue of Deschutes County Code (“DCC” or “Code”) 22.20.040(D). No participant to the proceeding disputed that conclusion.

III. SUBSTANTIVE FINDINGS AND CONCLUSIONS

A. Adoption of Factual Findings in Staff Report

The Staff Report contains a comprehensive summary of evidence in the record as it relates to each of the applicable criteria. The Staff Report, although it expresses agreement with the Applicants in many places, does not make a final recommendation. Instead, the Staff Report asks the Hearings Officer to determine if the Applicants have met the burden of proof necessary to justify the Plan Amendment and the Zone Change. That being said, no participant challenged the specific evidence or findings presented in the Staff Report. As a result, I hereby adopt as fact the evidentiary findings in the Staff Report as my evidentiary findings. To the extent any of the findings in this Recommendation conflict with the findings in the Staff Report, my intent is to have these findings control. The remainder of this Recommendation sets forth the legal criteria and adopts legal findings based on those factual findings.

B. Legal Findings

The legal criteria applicable to the requested Plan Amendment and Zone Change were set forth in the Application Notice and also appear in the Staff Report. No participant to this proceeding asserted that those criteria do not apply, or that other criteria are applicable. This Recommendation therefore addresses each of those criteria, as set forth below.

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² ORS 215.427(7).

1. Title 18 of the Deschutes County Code, County Zoning

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 Applicants are the owners of the Subject Properties and have requested a quasi-judicial Plan Amendment and filed applications for that purpose, together with the request for a Zone Change. No participant to this proceeding objects to this process. It is therefore appropriate to review the Application using the applicable procedures contained in Title 22 of the Deschutes County Code.

Section 18.136.020, Rezoning Standards

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

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

FINDING: According to the Applicants, the County applies this Code provision by considering whether: (1) the Zone Change conforms to the Comprehensive Plan; and (2) the change is consistent with the Comprehensive Plan's introductory statement and goals.

With respect to the first factor, the Applicants note that they are also seeking a Plan Amendment, which will change the Comprehensive Plan designation of the Subject Properties from Agriculture to Rural Residential Exception Area. If that Plan Amendment is approved, which is addressed in more detail below, the proposed change from the EFU-TRB zone to the MUA-10 zone will be consistent with the new Comprehensive Plan designation. No participant to this proceeding disputes that conclusion.

With respect to the second factor, the Applicants note that introductory statements and goals in the Comprehensive Plan are not approval criteria, and no participant to this proceeding asserts otherwise. Instead, the Applicants identify several Comprehensive Plan policies and goals and analyzes whether the Application is consistent with those policies and goals. Those policies and goals are set forth in more detail below, and the findings in that section are adopted here in full by this reference.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that this Code provision is satisfied.

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

FINDING: Only the Applicants and Staff offer any evidence or argument with respect to the purpose of the MUA-10 zone. The purpose of the MUA-10 zoning district is 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.

According to the Applicants, the Subject Properties are not suited to full-time commercial farming. The MUA-10 zone will instead allow the owners to engage in hobby farming, and the low-density of development allowed by the MUA-10 zone will conserve open spaces and protect natural and scenic resources. As a result, the MUA-10 zoning provides a proper transition zone from city, to rural, to EFU zoning. The Staff Report agrees that the change in classification is consistent with the purpose and intent of the MUA10 Zone, and no participant to this proceeding disputes that conclusion.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that this Code provision is satisfied.

- 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: As noted in the Staff Report, this criterion specifically asks if the Zone Change will *presently* serve public health, safety, and welfare. The Applicants and the Staff Report provided the following as support for why this criterion is met:

- Necessary public facilities and services are available to serve the Subject Properties.
- Transportation access to the Subject Properties is available, and the impact of increased traffic on the transportation system is negligible.
- The Subject Properties receive police services from the Deschutes County Sheriff and fire service from Rural Fire Protection District # 2, which has a fire station adjacent to the northeast corner of the Subject Properties.
- There are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare.

- The close proximity of the Subject Properties to urban development will allow for efficient service provision.
- Prior to development of the properties, the Applicants would be required to comply with the applicable requirements of the 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.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that this Code provision is satisfied.

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

FINDING: Only the Applicants and Staff offer any evidence or argument with respect to this criterion. Specifically, the Applicants noted the following:

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 north and south of the subject property. In addition, the MUA-10 zoning provides a proper transition zone from City, to rural zoning, to EFU zoning. The zone change will not impose new impacts on the EFU- zoned land to the east of the subject property because those properties are not engaged in commercial farm use, are idle, are small parcels, and most are developed with dwellings. The three EFU-zoned parcels to the east which are currently receiving farm tax deferral will not suffer new impacts from the proposed zone change because they are hobby farms, are already developed with dwellings, and are not engaged in commercial farm use. As discussed below, the subject property is not agricultural land, is comprised of predominantly Class 7 and 8 soils, and as described by the soil scientist, Andy Gallagher, the subject property is impractical to farm due to the cut up landscape. It is not land that could be used in conjunction with the adjacent property and any future development of the subject property would be subject to building setbacks.

The Staff Report agrees that the Applicants have demonstrated the impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that this Code provision is satisfied.

- 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: Only the Applicants offer any evidence or argument with respect to this criterion. According to the Applicants, a mistake in zoning was made and the EFU zoning designation on the Subject Properties

was likely based on the best soils data that was available to the County at the time it was originally zoned, during the late 1970's, when the Comprehensive Plan and Map were first adopted. The EFU designation was applied even though there was no history of farming on the Subject Properties. The Applicants also assert that there has been a change in circumstances since that time. Specifically, the Applicants note that there are new data regarding soils on the Subject Properties and that the updated soils report shows the Subject Properties do not have agricultural soils. The Applicants also assert that the economics of farming and the viability of commercial farm uses in Deschutes County have significantly changed, and farming for a profit has become increasingly difficult, particularly on parcels that are relatively small for livestock grazing and that have inadequate soils or irrigation for raising crops such as the Subject Properties.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that this Code provision is satisfied.

2. Deschutes County Comprehensive Plan Goals and Policies

Chapter 2 of the Comprehensive Plan relates to Resource Management. Section 2.2 of that Chapter relates specifically to Agricultural Lands. The Applicants and Staff have identified the following goals and policies as relevant to the Application.

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

FINDING: According to the Applicants, they are pursuing the Plan Amendment and Zone Change because the Subject Properties do not constitute "agricultural lands", and therefore, it is not necessary to preserve or maintain the Subject Properties as such. In support of that conclusion, the Applicants rely on a soils report showing the Subject Properties consist predominantly (73%) of Class 7 and 8 non-agricultural soils. Such soils have severe limitations for agricultural use as well as low soil fertility, shallow and very shallow soils, abundant rock outcrops, low available water capacity, and major management limitations for livestock grazing.

The Staff Report notes the Subject Properties have no history of agricultural use and lack water rights.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Comprehensive Plan.

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 Applicants have not asked to amend the subzone that applies to the Subject Properties. Instead, the Applicants requested a change under Policy 2.2.3 and have provided evidence to support rezoning the subject properties as MUA-10.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Comprehensive Plan.

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 Applicants request approval of the Plan Amendment and Zone Change to re-designate the Subject Properties from Agricultural to Rural Residential Exception Area and rezone the Subject Properties from EFU to MUA-10. The Applicants do not seek an exception to Goal 3 for that purpose, but rather seek 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).

In support of this approach, the Applicants rely in part on the Land Use Board of Appeals’ decision in *Wetherell v. Douglas County*, 52 Or LUBA 677 (2006), where LUBA states as follows:

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.

The Applicants assert that the facts presented in the Application are sufficiently similar to those in the *Wetherall* decision and in other Deschutes County plan amendment and zone change applications. The Staff Report agrees and concludes the Applicants have the potential to prove the Subject Properties are not agricultural land and do not require an exception to Goal 3 under state law.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Comprehensive Plan.

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: The Applicants assert this plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations and that the Application is consistent with this policy. The Staff Report also concludes the proposal is consistent with this policy.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Comprehensive Plan.

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

Policy 2.2.13 Identify and retain accurately designated agricultural lands.

FINDING: The Applicants assert that this Comprehensive Plan policy requires the County to identify and retain agricultural lands that are accurately designated. The Applicants propose that the Subject Properties were not accurately designated as demonstrated by the soil study in the record.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Comprehensive Plan.

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Section 2.5 of Comprehensive Plan Chapter 2 relates specifically to Water Resource Policies. The Applicants and Staff have identified the following goal and policy in that section as relevant to the Application.

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 Applicants and Staff assert that the Applicants are not required to address water impacts associated with development because they have not proposed a specific development application at this time. Instead, the Applicants will be required to address this criterion during development of the Subject Properties, which would be reviewed under any necessary land use process for the site.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Comprehensive Plan.

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Section 2.7 of Comprehensive Plan Chapter 2 relates specifically to Open Spaces, Scenic Views and Sites. The Applicants and Staff have identified the following goal and policies in that section as relevant to the Application.

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 Applicants assert these policies are fulfilled by the County’s Goal 5 program. The County protects scenic views and sites along major rivers and roadways by imposing Landscape Management (LM) Combining Zones to adjacent properties. Because there is no LM combining zone applicable to the Subject Properties, the Subject Properties are not identified as a Goal 5 resource, and no new development is proposed, the Applicants argue there is no applicable regulation that requires the Subject Properties to be protected as open space or for scenic views.

The Staff Report notes that the Subject Properties are within the Landscape Management Combining Zone for Highway 20, which is designated as landscape management feature by the Comprehensive Plan. However, the Staff Report finds that any future development within the LM Zone will be reviewed for compliance at that time.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Comprehensive Plan.

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Chapter 3 of the Comprehensive Plan relates to Rural Growth. Within that chapter, Section 3.2 relates specifically to Rural Development. The Applicants and Staff have identified the following language in that section as relevant to the Application.

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: According to the Applicants, this portion of the Comprehensive Plan anticipates 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. While the Applicants do not seek the creation of new residential lots in the Application, they assert the Subject Properties can ultimately support that goal, as they will provide for an orderly and efficient transition from the Bend Urban Growth Boundary to rural and agricultural lands. The Applicants also assert the Subject Properties, as rezoned, will link the pocket of MUA-10 zoned land to the north with the MUA-10 zoned land to the south, furthering the creation a buffer of MUA-10 zoned land along the City’s eastern boundary where the quality of soils are poor and the land is not conducive for commercial agriculture.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Comprehensive Plan.

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Section 3.3 of Comprehensive Plan Chapter 3 relates specifically to Rural Housing. The Applicants and Staff have identified the following language in that section as relevant to the Application.

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: According to the Applicants, prior Hearings Officer’s decisions have found that Section 3.3 is not a plan policy or directive. Further, the Applicants state that no Exception to Statewide Planning Goal 3 is required for the rezone application because the Subject Properties do not qualify as farm or forest zoning or agricultural lands under the statewide planning goals. The Applicants believe the County has interpreted the Rural Residential Exception Area (RREA) plan designation as the proper “catchall” designation for non-resource land and, therefore, the RREA plan designation is the appropriate plan designation to apply to the Subject Properties.

The Staff Report agrees that this Comprehensive Plan language is not a policy and does not require an Exception to Goal 3. The Staff Report also agrees the proposed RREA plan designation is the appropriate plan designation to apply to the Subject Properties.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Comprehensive Plan.

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Section 3.7 of Comprehensive Plan Chapter 3 relates specifically to Transportation. The Applicants and Staff have identified the following goal and policy in that section as relevant to the Application.

Appendix C – Transportation System Plan
ARTERIAL AND COLLECTOR ROAD PLAN

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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.

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

FINDING: The Applicants and the Staff Report asserts this policy advises the County to consider the roadway function, classification and capacity as criteria for Comprehensive Plan amendments and zone changes. Compliance with OAR 660-012, also known as the Transportation Planning Rule (TPR), is described below in subsequent findings, and the Applicants and Staff assert that such compliance is sufficient to demonstrate compliance with these transportation goals and policies.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this portion of the Comprehensive Plan.

3. *Oregon Administrative Rules*

The Applicants and the Staff Report identify several administrative rules as potentially applicable to the Application. No other participant in this proceeding identified other applicable rules.³

OAR 660-006-0005

- (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 Applicants and the Staff Report assert that the Subject Properties do not appear to qualify as forest land and, therefore, the administrative rules relating to forest land are not applicable. The Subject Properties are not zoned for forest lands, nor are any of the Subject Properties within a 4-mile radius of forest lands. The Subject Properties do not contain merchantable tree species and there is no evidence in the record that the Subject Properties have been employed for forestry uses historically.

³ Some administrative rules the Applicants address, or which appear in the Staff Report, have been omitted from this Recommendation where the rule does not expressly impose an approval criterion.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with these administrative rules.

OAR 660-033-0020

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

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

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

FINDING: The Applicants' proposed Plan Amendment and Zone Change is premised on its assertion that Subject Properties are not defined as "Agricultural Land." The Applicants specifically argue that the Subject Properties are not properly classified as Agricultural Land and therefore do not merit protection under Goal 3. As noted in earlier findings, the soils are predominately Class 7 and 8 soils that have severe limitations for farm use.

The Staff Report agrees with the Applicants' representation of the soil data for the Subject Properties and that the Subject Properties do not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A).

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Subject Properties should not be considered agricultural land under this part of the administrative rules.

- (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: According to the Applicants, this part of the definition of "Agricultural Land" requires the County to consider whether the Class 7 and 8 soils found on the Subject Properties are suitable for farm use despite their Class 7 and 8 soil classification. The Applicants rely on a decision by the Oregon Supreme Court that determined 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.⁴ Applying that definition, the Applicants describe various limitations on the ability of the Subject Properties to support farm uses, including, among other factors, a lack of water rights and low soil fertility.

⁴ *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007).

The Staff Report agrees with the Applicants that many factors – such as the current residential land uses in the area, soil fertility, and amount of irrigation required – result in a relatively low possibility of farming on the Subject Properties.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Subject Properties should not be considered agricultural land under this part of the administrative rules.

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

FINDING: According to the Applicants, the Subject Properties are not land necessary to permit farm practices to be undertaken on adjacent or nearby lands. The nearest properties to the Subject Properties that are agriculturally zoned and engaged in farm use are located across Hamby Road to the east on tax lots 17-12-35-1300, 17-12-35-1301, and 17-12-35-1403, and an MUA-10 zoned parcel planned for urbanization and upon which ODOT is currently constructing a highway roundabout is located in between the Subject Properties and these EFU parcels. The Applicants analyzed those properties and concluded the Subject Properties are not necessary to permit farm practices to be undertaken on those properties.

The Staff Report concurs with the Applicants’ analysis and finds no feasible way that the Subject Properties are necessary for the purposes of permitting farm practices on any nearby parcels.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Subject Properties should not be considered agricultural land under this part of the administrative rules.

(1)(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: According to the Applicants, the Subject Properties are not part of a farm unit that includes other lands not currently owned by the Applicants. The Subject Properties have no history of farm use and contain soils that make them unsuitable for farm use. Therefore, there is no basis to inventory the Subject Properties as agricultural land.

The record indicates the Subject Properties contain land in capability classes other than I-VI that is adjacent to or intermingled with lands in capability classes I-VI.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Subject Properties should not be considered agricultural land under this part of the administrative rules.

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OAR 660-033-0030

- (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: As noted above, this Recommendation finds that the Subject Properties do not qualify as agricultural land as defined by administrative rule, and they are not suitable for farming. Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the administrative rules do not require the Subject Properties to be inventoried as agricultural land.

- (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: As concluded in other findings above, the Subject Properties are not suitable for farm use and are not necessary to permit farm practices to be undertaken on adjacent or nearby lands. The ownership of the Subject Properties is therefore not being used as a factor to determine whether the Subject Properties are agricultural land.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this part of the administrative rules.

- (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.*
- (5)(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 Applicants have elected to provide a more detailed agricultural soil assessment, conducted by Andy Gallagher, a Certified Professional Soil Scientist approved by the Department of Land Conservation and Development. No participant to this proceeding disputes the information provided in that report or otherwise objects to the use of the date in that report. Based on the undisputed facts in that report, the Subject Properties do not qualify as “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: I find that this administrative rule does not establish a particular standard and simply confirms when this section of the administrative rules applies.

(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 Applicants submitted a soil study dated March 15, 2022. The soils study was submitted following the ORS 215.211 effective date. The Staff Report notes that Staff received acknowledgement from Hilary Foote, Farm/Forest Specialist with the DLCDC, on May 5, 2022, that the soil study is complete and consistent with DLCDC’s reporting requirements. The Staff Report therefore finds this criterion to be met based on the submitted soil study, and confirmation of completeness and consistency from DLCDC.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application is consistent with this part of the administrative rules.

OAR 660-012-0060

(1) *If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would:*

- (a) *Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);*
- (b) *Change standards implementing a functional classification system; or*
- (c) *Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.*
 - (A) *Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;*
 - (B) *Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or*
 - (C) *Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.*

FINDING: This administrative rule is applicable to the Plan Amendment and the Zone Change because they involve an amendment to an acknowledged comprehensive plan. The Applicants assert that the zone change will not result in a significant effect to the transportation system. In support of that assertion, the Applicants submitted a transportation impact analysis memorandum dated March 22, 2022, prepared by traffic engineer, Joe Bessman, PE, which is later supplemented. No participant to this proceeding disputed the information in the impact analysis or otherwise objected to the use of that information.

The County Transportation Planner agreed with the report's conclusions, as supplemented. As a result, the Staff Report finds that the 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 Staff Report also concluded the proposed zone change will not change the functional classification of any existing or planned transportation facilities or change the standards implementing a functional classification system.

Based on the foregoing, and in the absence of any countervailing evidence or argument, I find that the Application satisfies this administrative rule.

Statewide Planning Goals and Guidelines

Division 15 of OAR chapter 660 sets forth the Statewide Planning Goals and Guidelines, with which all comprehensive plan amendments must demonstrate compliance. The Applicants assert the Application is consistent with all applicable Goals and Guidelines, which no participant to this proceeding disputes. In light of the foregoing, and in the absence of any counter evidence or argument, I adopt the Applicants' position and find that the Plan Amendment and Zone Change are consistent with the applicable Goals and Guidelines as follows:

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 Applicants to post a "proposed land use action sign" on the Subject Properties. Notice of the Hearings held regarding this application was 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 Applicants have shown that the Subject Properties are not agricultural land because they consists predominantly of Class 7 and 8 soils that are not suitable for farm use.

Goal 4, Forest Lands. Goal 4 is not applicable because the Subject Properties do not include any lands that are zoned for, or that support, forest uses.

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces. Deschutes County DIAL property information and Interactive Map show the Subject Properties have "wetlands" that correspond with Central Oregon Irrigation District's irrigation distribution system within the Subject Properties. According to the Comprehensive Plan (Chapters 2, Resource Management and 5, Supplemental Sections), in 1992 Deschutes County Ordinance 92-045 adopted all wetlands identified on the U. S. Fish and Wildlife Service National Wetland Inventory (NWI) Maps as the Deschutes County wetland inventory. In addition, as described in the Comprehensive Plan, the NWI Map "shows an inventory of wetlands based on high-altitude aerial photos and limited field work. While the NWI can be useful for many resource management and planning purposes, its small scale, accuracy limitations, errors of omission that range up to 55 percent (existing wetlands not shown on NWI), age (1980s), and absence of property boundaries make it unsuitable for parcel-based decision making."

The Comprehensive Plan has no specific protections for wetlands; protections are provided by ordinances that implement Goal 5 protections (for example, fill and removal zoning code regulations). In the case of irrigation district performing work within wetlands, DCC 18.120.050(C) regarding fill and removal exceptions allows fill and removal activities as a use permitted outright.

Because the Plan Amendment and Zone Change are not development, there is no impact to any Goal 5 resource. Any potential future development of a wetland – no matter what zone the wetland is in – will be subject to review by the County’s fill and removal regulations.

Goal 6, Air, Water, and Land Resources Quality. The approval of this Application will not impact the quality of the air, water, and land resources of the County. Any future development of the Subject Properties will be subject to applicable local, state, and federal regulations that protect these resources.

Goal 7, Areas Subject to Natural Disasters and Hazards. According to the Deschutes County DIAL property information and Interactive Map, the entirety of Deschutes County, including the Subject Properties, is located in a Wildfire Hazard Area. The Subject Properties are also located in Rural Fire Protection District #2. Rezoning the property to MUA-10 does not change the Wildfire Hazard Area designation. Any future development of the Subject Properties would need to demonstrate compliance with any fire protection regulations and requirements of Deschutes County.

Goal 8, Recreational Needs. This goal is not applicable because no development is proposed and the Subject Properties are not planned to meet the recreational needs of Deschutes County. Therefore, the proposed rezone will not impact the recreational needs of Deschutes County.

Goal 9, Economy of the State. This goal is not applicable because the Subject Properties are not designated as Goal 9 economic development land. In addition, the approval of this application will not adversely affect economic activities of the state or area.

Goal 10, Housing. The County's comprehensive plan Goal 10 analysis anticipates that farm properties with poor soils, like the Subject Properties, 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 Properties. Pacific Power has confirmed that it has the capacity to serve the Subject Properties and the proposal will not result in the extension of urban services to rural areas.

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 Properties are located adjacent to the city limits for the City of Bend. If the Subject Properties are developed with residential dwellings in the future, providing homes

in this location as opposed to more remote rural locations will conserve energy needed for residents to travel to work, shopping and other essential services provided in the City of Bend.

Goal 14, Urbanization. This goal is not applicable because the Applicants' 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 Comprehensive Plan recognizes the fact that the MUA-10 and RR zones are the zones that will be applied to lands designated Rural Residential Exception Areas.

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

III. OTHER COMMENTS IN THE RECORD

Although only the Applicants and Staff participated in the Hearing, Staff did receive some comments on the Application in response to the Application Notice. The Record contains public comments concerning potential loss of farmland, impacts to wildlife, and potential for increased housing density. I find that each of these comments is generic in nature, and none address specific criteria applicable to the request for the Plan Amendment or Zone Change. The existence of those comments in the record, therefore, does not affect the factual findings in the Staff Report or the findings in this Recommendation.

IV. CONCLUSION

Based on the foregoing findings, I find the Applicants have met their burden of proof with respect to the standards for approving the requested Plan Amendment and Zone Change. I therefore recommend to the County Board of Commissioners that the Application be APPROVED.

Dated this 12th day of December 2022



Tommy A. Brooks _____
Deschutes County Hearings Officer

owner	agent	inCareOf	address	cityStZip	type	cdd id
Te Amo Despacio LLC			2464 SW Glacier PL. #110	Redmond, OR 97756	HOR	22-313-ZC, 22-314-PA
CTH Investments LLC			14787 SW Millikan Way	Beaverton, OR 97003	HOR	22-313-ZC, 22-314-PA
Schwabe, Williamson & Wyatt, P.C.	Tia M. Lewis		360 SW Bond Street, Suite 500	Bend, OR 97702	HOR	22-313-ZC, 22-314-PA