



MEMORANDUM

DATE: May 11, 2022

TO: Deschutes County Board of Commissioners

FROM: Nicole Mardell, Senior Planner – Long Range

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

On May 18, 2022, the Board of Commissioners (“Board”) will hold a *limited de novo* public hearing to consider a remanded decision of the Oregon Land Use Board of Appeals (“LUBA”) regarding a plan amendment and zone change application proposed by Anthony Aceti (“Applicant”). This hearing is a continuation of an existing application (247-20-000438-PA/439-ZC), the full record is located on the project webpage¹.

I. HEARING PROCEDURE

Deschutes County Code 22.32.040 notes that the scope of the proceeding for an application on remand must be limited to review the issues that LUBA requires to be addressed, although the Board may use its discretion to reopen the record where it seems necessary. During the May 4, 2022 work session, the Board determined this hearing would be held *limited de novo* meaning that only testimony directed at the issue on remand, the number of workers resulting from the proposed Rural Industrial zoning and plan designation, will be considered. Testimony on other matters will not be accepted during the public hearing.

II. BACKGROUND

On June 30, 2020, an application was filed for a Plan Amendment and Zone change application for a 21.59-acre parcel located at 21235 Tumalo Place, Bend (Taxlot ID 161226CC000201 and 161227D000104). The applicant is requesting to rezone and re-designate the property from Agriculture/Exclusive Farm Use - Tumalo/Redmond/Bend subzone (EFU-TRB) to Rural Industrial (RI).

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

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

Central Oregon Landwatch appealed the county decision to LUBA. On June 18, 2021 LUBA issued its Final Opinion and Order remanding the decision to the County for further findings and conclusions of law. Central Oregon Landwatch then appealed the decision further to the Oregon Court of Appeals. On November 17, 2021 the Court of Appeals issued an opinion affirming LUBA's decision to remand the application. On April 7, 2022, the Applicant initiated remand proceedings under local file no. 247-22-000287-A. The final day in which the County must issue a final decision on this application is August 5, 2022.

III. LUBA REMAND AND APPLICANT RESPONSE

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

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

The final opinion and order provides the following guidance:

(pg. 30) In *Shaffer*², we explained that

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

We derived the following factors from case law:

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

(pg. 31) With respect to the *Shaffer* factors, the county found that the potential uses would employ a small number of workers and do not require public facilities or services. The county determined that the DCCP RI policies and implementing DCC RI use and dimensional limitations will limit the scope and

² *Shaffer v. Jackson County*, 17 Or LUBA 922, (1989)
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intensity of industrial development to rural use. In particular, the county references limitations on maximum floor area and requirements for on-site sewage disposal and on-site wells or public water systems. The county determined that there was insufficient evidence in the record to determine whether the potential uses are the types of uses typically located in rural areas or whether they are significantly dependent on a site-specific resource.

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

(pg. 35) We decline to reach that conclusion under ORS 197.835(11)(b). It is not obvious to us that the RI zone regulations will necessarily result in a small number of workers. Accordingly, we agree with petitioner that remand is required for the county to explain why it concluded that the potential uses would employ a small number of workers.

On May 9, 2022, the applicant provided additional materials for Board consideration to address the item on remand from LUBA, the estimated number of employees generated by the requested plan amendment and zone change. The full version of these materials can be accessed through the project website, as noted above. Staff provides an overview of the material in this section.

Estimated Number of Employees

A letter, dated January 19, 2022, from Joe Bessman, P.E. of Transight Consulting was included in the submittal to provide findings and justification on the estimated number of employees on the property. The applicant's engineer notes that no use has been identified on the property, and have instead provided an analysis of a variety of outright permitted uses that could reasonably be developed on the property and constitute a reasonable "worst case" scenario in terms of trip generation and transportation impacts. Anticipated land uses include: specialty trade contractor, building materials and lumber store, animal hospital/veterinary clinic, warehousing, and manufacturing. Staff notes there is a 7,500 square foot limitation per building in the RI zone, therefore the applicant's engineer has anticipated several buildings with several different uses on the 21.54-acre property.

The worst case scenario identifies a total of 63,160 square-feet of development area within the follow use categories.

Table 1. Estimated “With Rezone” Scenario (Table 2 in June 2020 Report)

Land Use	ITE Code	Size	Weekday Daily Trips	Weekday PM Peak Hour		
				Total	In	Out
Specialty Trade Contractor (two sites)	180	12,000 SF	123	24	8	16
Building Materials and Lumber Store	812	7,500 SF	135	15	7	8
Animal Hospital/Veterinary Clinic	640	3,000 SF	65	11	4	7
Warehousing (multiple uses)	150	20,330 SF	35	4	1	3
Manufacturing (multiple uses)	140	20,330 SF	80	14	4	10

The applicant then used this information to estimate the anticipated number of employees shown in the table below.

Table 2. Estimated General Urban/Suburban Employment

Land Use	ITE Code	“Worst Case” Scenario Estimated Size	Avg. ITE Space per Employee	Total Employees
Specialty Trade Contractor	180	12,000 SF	1/350 SF	34 Employees
Building Materials and Lumber Store	812	7,500 SF	1/1,500 SF	5 Employees
Animal Hospital/Veterinary Clinic	640	3,000 SF	1/600 SF	5 Employees
Warehousing	150	20,330 SF	1/3,000 SF	7 Employees
Manufacturing	140	20,330 SF	1/525 SF	39 Employees
Total				90 Employees

The applicant’s engineer estimates approximately 90 total employees³ as the worst case development scenario on the property. Several caveats were included to explain the methodology of this number. First, the applicant’s engineering used the ITE manual to identify the approximate number of employees associated with each use. The ITE manual does not include any rural data within its dataset, instead, most industrial uses are classified using General Urban/Suburban data. Although imperfect, the applicant’s engineer finds this provides a general approximation of the number of employees that could be associated with each use and the estimate will likely skew higher than will actually occur on the site in the rural context.

Additionally, the applicant’s engineer notes that the 90 employees are not anticipated to be on site at all times, due to a mixture of full and part time staff, and varying hours of all of the listed uses. The applicant’s engineer states there is an anticipated average of 68 weekday p.m. peak hour trips including deliveries and public trips to the property, which supports the conclusion that less than half of employees would be on-site at a given time.

³ Per the Institute of Traffic Engineers Manual (ITE) 11th Edition: Employee—a full-time, part-time, or per diem/contract worker. The number of employees refers to the total number of persons employed at a facility, not just those in attendance at the hour or day the data are collected.

The applicant's attorney Bill Kloos, further explains that even if all employees were on site at one time, the amount would be approximately 4.2 employees per acre, or 2.1 employees per acre in accommodating varying or part time schedules.

Restrictions on Uses

The applicant notes in the submitted materials that there are several code provisions in Deschutes County Code (DCC) Section 18.100.010 and 020(A) that restrict the type and intensity of development that could occur on the property. Specifically, building size is limited to 7,500 square feet and proximity to residential uses and the highway trigger additional requirements that limit the developable area of the property. The applicant notes this, in combination with the findings from the Transight Consulting letter, demonstrate that the square footage of the uses will be limited, the number of employees, based on this square footage is relatively small, and supports the conclusion that the use is rural in nature.

Alternative Findings Request

The applicant requests the County adopt precautionary alternative findings in the event the analysis above is rejected by LUBA. The *Shaffer* case noted above and interpretation resulting from discussion of the *Shaffer* analysis process within the Columbia Riverkeeper⁴ decision are used to determine whether or not a proposed use is a rural use or urban use on rural land. The test is comprised of two parts.

The first as cited in *Columbia Riverkeeper* is to review four questions, none of which are intended to be conclusive on their own, but instead must be considered together. If each factor is clearly affirmative – the use is rural in nature. If one factor is negative, additional analysis is necessary.

The questions ask whether the industrial use:

1. Employs a small number of workers;
2. Is significantly dependent on a site-specific resource and there is a practical necessity to site the use near the resource;
3. Is a type of use typically located in rural areas; and
4. Does not require public facilities or services

The original Board decision provides extensive analysis on each of these items, and additional detail on the number of workers is provided above. With that, the applicant acknowledges there is not site-specific resource and additional analysis would likely be required.

The second step, as required if one or more of the items above are negative, requires the County to do one or more of the following:

1. Limit the allowed uses to effectively prevent urban use of rural land;
2. Take an exception to Goal 14; or
3. Adequately explain why the proposed use, notwithstanding the presence of one or more factors pointing toward an urban nature, should be viewed as a rural use.

⁴ Columbia Riverkeeper v. Columbia County, 70 Or LUBA 171 (2014)
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The applicant notes in the supplemental materials, that the Deschutes County code already limits Rural Industrial Uses (as cited above), to levels less intensive than those allowed for unincorporated communities. Restrictions on uses, dimensional standings, off-street parking, and site design will all apply to rural industrial development in this zone, and were adopted and acknowledged by the Oregon Department of Land Conservation and Development to effectively prevent urban uses on rural land. With this assertion, the applicant feels that there is no additional information required to demonstrate the use is rural in nature and therefore the application should be approved.

IV. RESOLVED ISSUES AND PUBLIC COMMENT

The following are issues that have been resolved by LUBA or were not included in the remand and therefore cannot be considered by the Board in its decision:

- Whether the applicant's TIA evidence provided the 'worst case' development scenario that assumes the most intensive level of development that could be allowed under RI zoning on the property given that any rural industrial use is subject to zone, site plan review and conditional use criteria that apply not only as a result of any specific use, but also as a result of the property's location and relationships to adjacent residential uses.
- Challenges to the accuracy or credibility of the traffic-related evidence and analysis including but not limited to traffic counts, whether it represents a worst case scenario, or is otherwise valid.
- Whether the Deschutes County Comprehensive Plan limits the Rural Industrial plan designation to existing rural industrial development and cannot be applied to the subject property.
- That the proposal fails to comply with Goals 6 and/or 11.
- That industrial development is a *per se* urban use that requires a Goal 14 exception if on rural land.
- That the County misconstrued the *Curry County* decision as it applies to Goal 14.
- That the County is prohibited as a matter of law from analyzing Goal 14 compliance in the context of RI zoning in the absence of a specific proposed industrial use.
- Challenges to the finding that the RI zone "effectively prevent[s] urban use of rural land" by subjecting all development in the RI zone to the requirements of DCC chapter 18.100, which allow development that is less intense than that allowed under the Unincorporated Communities Rule."
- Challenges to the finding that "the policies of the DCCP, implemented by DCC Chapter 18.100, which is an acknowledged land use regulation, do not allow urban uses on RI designated and zoned land."

- Challenges to the finding that “[t]he property is located about 3.25 miles north of Bend and 6.5 miles south of Redmond via US 97.”
- Challenges to the finding that the subject property is served with existing water service.

Staff received one comment from Central Oregon Landwatch regarding the applicable criteria listed in the notice of public hearing. The comment has been uploaded to the project website. Testimony submitted after the date of this memorandum will be uploaded to the project website.

V. NEXT STEPS

The Board will conduct a hearing on this item on May 18, 2022. Following the hearing the Board may choose to:

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