



STAFF REPORT

FILE NUMBERS: 247-22-000792-PA, 793-ZC

HEARING: February 28, 2023, 6:00 p.m.
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

**SUBJECT PROPERTY/
OWNER:** Mailing Name: GRIFFIN, KEVIN J
Map and Taxlot: 181201D000200
Account: 109857
Situs Address: 21900 RASTOVICH RD, BEND, OR 97702

APPLICANT: Kevin Griffin and Libby Renfro
21900 Rastovich Road
Bend, OR 97702

**ATTORNEY FOR
APPLICANT:** Tia M. Lewis
Schwabe, Williamson & Wyatt, P.C.
360 SW Bond Street, Suite 500
Bend, OR 97702

REQUEST: The Applicant requests approval of a Comprehensive Plan Amendment to change the designation of the subject property from Agricultural (AG) to Rural Residential Exception Area (RREA). The Applicant also requests a corresponding Zone Change to rezone the subject property from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA-10).

STAFF CONTACT: Rachel Vickers, Associate Planner
Phone: 541-388-6504
Email: Rachel.Vickers@deschutes.org

RECORD: Record items can be viewed and downloaded from:
<https://www.deschutes.org/cd/page/247-22-000792-pa-793-zc-%E2%80%93-comprehensive-plan-amendment-and-zone-change>

I. APPLICABLE CRITERIA

Deschutes County Code (DCC)

- Title 18, Deschutes County Zoning Ordinance:
 - Chapter 18.04, Title, Purpose, and Definitions
 - Chapter 18.16, Exclusive Farm Use Zones (EFU)
 - Chapter 18.32, Multiple Use Agricultural Zone (MUA10)
 - Chapter 18.136, 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. BASIC FINDINGS

LOT OF RECORD: Per DCC 22.04.040 Verifying Lots of Record, lot of record verification is required for certain permits:

B. Permits Requiring Verification.

- 1. Unless an exception applies pursuant to subsection (B)(2) below, verifying a lot or parcel pursuant to subsection (C) shall be required prior to the issuance of the following permits:***
 - a. Any land use permit for a unit of land in the Exclusive Farm Use Zones (DCC Chapter 18.16), Forest Use Zone – F1 (DCC Chapter 18.36), or Forest Use Zone – F2 (DCC Chapter 18.40);***
 - b. Any permit for a lot or parcel that includes wetlands as shown on the Statewide Wetlands Inventory;***
 - c. Any permit for a lot or parcel subject to wildlife habitat special assessment;***
 - d. In all zones, a land use permit relocating property lines that reduces in size a lot or parcel;***

- e. ***In all zones, a land use, structural, or non-emergency on-site sewage disposal system permit if the lot or parcel is smaller than the minimum area required in the applicable zone;***

In the *Powell/Ramsey* (PA-14-2, ZC-14-2) decision, the Hearings Officer held to a prior zone change decision (*Belveron* ZC-08-04; page 3) that a property's lot of record status was not required to be verified as part of a plan amendment and zone change application. Rather, the Applicant would be required to receive lot of record verification prior to any development on the subject property. Therefore, this criterion does not apply.

SITE DESCRIPTION: The subject property is approximately 40 acres in size and consists of one tax lot. It is adjacent to properties within the MUA-10 zone and is approximately one mile from the City limits of Bend and the Bend Urban Growth Boundary to the west. In between the subject property and the City boundary is the Stevens Road Tract, a 261 acre parcel approved for UGB expansion for affordable housing via HB 3318 (Applicant's Exhibit 3). The center and northeast areas of the property contain rocky slopes. The remainder of the property contains undulating topography generally sloping to the east, north, and west. Rocky outcrops and areas of rocky shallow soils are dispersed throughout the property. Vegetation consists of western juniper, sagebrush, and bunch grasses.

The subject property has 5 acres of water rights and it has not been farmed or used in conjunction with any farming operation in the past.¹ The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies three soil complex units on the property: 38B Deskamp-Gosney complex, 0 to 8 percent slopes, 58C Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes, and 36B Deskamp loamy sand, 3 to 8 percent slopes (Exhibit 4).

Soil complex unit 38B is estimated to be 50 percent Deskamp soil and similar inclusions, 35 percent Gosney soil and similar inclusions, 15 percent contrasting inclusions, and Capability Class 6 and 7. 38B is not a high-value farmland soil as defined by Deschutes County Code.²

¹ The applicants have been unable to use the water rights for the past several years due to inadequate water supply and delivery within the district.

² Deschutes County code, 18.04, defines "High Value Farmland" as:

"High-value farmland" means land in a tract composed predominantly of the following soils when they are irrigated: Agency loam (2A and 2B), Agency sandy loam (1A), Agency-Madras complex (3B), Buckbert sandy loam (23A), Clinefalls sandy loam (26A), Clovkamp loamy sand (27A and 28A), Deschutes sandy loam (31A, 31B and 32A), Deschutes-Houstake complex (33B), Deskamp loamy sand (36A and 36B), Deskamp sandy loam (37B), Era sandy loam (44B and 45A), Houstake sandy loam (65A, 66A and 67A), Iris silt loam (68A), Lafollette sandy loam (71A and 1B), Madras loam (87A and 87B), Madras sandy loam (86A and 86B), Plainview sandy loam (98A and 98B), Redmond sandy loam (104A), Tetherow sandy loam (150A and 150B) and Tumalo sandy loam (152A and 152B). In addition to the above described land, high-value farmland includes tracts growing specified perennials as demonstrated by the most recent aerial photography of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture taken prior to November 4, 1993. For purposes of this definition, "specified perennials" means perennials grown for market or research purposes including,

Soil complex unit 36B is estimated to be 85 percent Deskamp soil and similar inclusions, 15 percent contrasting inclusions, and Capability Class 3 when irrigated and 6 when nonirrigated. When nonirrigated, 36B is not a high-value farmland soil as defined by Deschutes County Code.

Soil complex unit 58C is estimated to be 50 percent Gosney soil and similar inclusions, 25 percent Rock outcrop, 20 percent Deskamp soil and similar inclusions, 5 percent Contrasting inclusions, and Capability Class 6, 7, and 8. 58C is not a high-value farmland soil as defined by Deschutes County Code.

An Agricultural Soils Capability Assessment (Order 1 soil survey) conducted on the property determined that the property is not agricultural land, the higher capability Deskamp soils make up only 39.5 percent of the subject property, and the Gosney-Rock Outcrop Complex soils, Capability Class 7 and 8, make up 58.5 percent of the subject property. The home site, surrounding yard, outbuildings, and septic drain field make up approximately 2 percent of the subject property and are not rated for Land Capability Class.

SOILS: A soils assessment conducted by a qualified soils professional approved by the Department of Land Conservation and Development (DLCD) can be used by property owners to determine the extent of agricultural land as defined in Oregon Administrative Rule (OAR) 660-033 Agricultural Land. Submitted as Exhibit 5, is an Order 1 soil assessment titled, *Soil Assessment for a 40-acre parcel Bend*, (Dated July 29, 2022), prepared by Certified Professional Soil Scientist Andy Gallagher.

The field work conducted by Mr. Gallagher included six soil borings and 43 soil observations. Mr. Gallagher's soil observations included 24 soil test pits and many observations of rock outcrops and steep slopes throughout the subject property.

The soils found on the subject property include Gosney-Rock Outcrop Complex capability class 7 and Deskamp ashy sandy loam capability class 3 when irrigated and 6 when nonirrigated. The home site, surrounding yard, outbuildings, and septic drain field make up approximately 2 percent of the subject property and are not rated for land capability class. Below are Mr. Gallagher's summary and conclusions of his findings:

Soils were remapped in a high intensity (Order-1) soil survey on a 40 acre parcel (Lot 200) that is currently zoned EFU. Previously this area was mapped as two soil map units, one that included soils that ranged from Land Capability Class 3 irrigated to Class 8, and the other that was Class 3 irrigated and Class 6 non-irrigated.

In the revised Order-1 soil mapping, the Deskamp soils (Class 3 irrigated and 6 nonirrigated) are mapped as a consociation and make up 39.5 percent of the parcel. The Gosney soils along with Very Shallow soils and rock outcrops are mapped as the Gosney-Rock Outcrop Complex because

but not limited to, nursery stock, berries, fruits, nuts, Christmas trees or vineyards but not including seed crops, hay, pasture or alfalfa.

all three components of the complex are Capability Class 7 or 8. This complex makes up 58.5 percent of the parcel. The home site and surrounding yard, outbuildings, septic drain field make up about 2 percent of the parcel and are not rated for Land Capability Class. Based upon the findings of this Order-1 soil survey, the subject parcel is predominantly Class 7 and 8 soils and therefore is not "agricultural land" within the meaning of OAR 660-033-0020(1)(a)(A).

The soil mapping and on-site studies also show the subject property is not agricultural land within the meaning of OAR 660-033-0020(1)(b) as it is not adjacent to or intermingled with land in capability classes 1-6 within a farm unit. The class 3 irrigated and 6 non irrigated soils on the subject property are not known to have been farmed or utilized in conjunction with any farming operation in the past. These soil units exist in small pockets interspersed with steep rocky slopes and rocky shallow soils creating severe limitations for any agricultural use either alone or in conjunction with other lands.

As demonstrated above, the subject property is not agricultural land as it is comprised of approximately 58.5 percent of nonproductive class 7 or 8 soils.

SURROUNDING LAND USES: The subject property is in an area of rural residential development approximately one mile east of the City limits. See Locational Map, Applicant's Exhibit 3. In between the property and the City limits is the 261 acre Stevens Tract currently being planned under HB 3318 for UGB inclusion as a complete urban community with an affordable housing component. See Stevens Road Tract Concept Plan map and description, Exhibit 10 and HB 3318, Applicant's Exhibit 11. County exception lands zoned MUA-10 and developed with homes are adjacent to the west boundary of the property and additional MUA-10 zoned properties are approximately 0.28 miles to the southwest. EFU zoned properties abut the subject property to the north, east, and south. Rural residential properties in the RR-10 zone are approximately 0.25 miles to the southeast.

The adjacent properties are outlined below in further detail:

North: North of the subject property are properties within the EFU zone. Some of these properties are developed with dwellings and some are undeveloped. The parcels to the north of the subject property range from 6.19 to 20.00 acres in size. These properties are receiving farm tax deferral and are engaged in hobby farm use.

West: West of the subject property are residential subdivisions located in the MUA-10 zone. The Somerset subdivision is adjacent to the subject property and the Arrowhead Acres subdivision lies to the northeast. There are four residential lots, each approximately 5 acres, which abut the west boundary of the subject property.

East: East of the subject property are properties within the EFU zone. One parcel containing approximately 80.96 acres abuts the east boundary of the subject property. This parcel, Tax Lot 1100 on Assessor's Map 18-13-06, is receiving farm tax deferral and appears to be partially irrigated and used for livestock grazing. Further east, across Tax Lot 1100, is a 79.60-acre parcel owned by the Bend Metro Park and Recreation District. This parcel, Tax Lot 1700 on Assessor's Map 18-13-06,

is not receiving farm tax deferral and does not appear to be used for any farming or livestock grazing activities.

South: South of the subject property are properties within the EFU zone. A nonfarm parcel developed with a nonfarm dwelling abuts the southwest portion of the subject property. This nonfarm parcel is Parcel 1 of Partition Plat 2003-79. Parcel 2 of Partition Plat 2003-79 abuts the subject property to the southeast. This parcel is approximately 37.84 acres in size. It is receiving farm tax deferral and appears to be partially irrigated and engaged in farming activity. To the southeast of the subject property is Tax Lot 301 on Assessor's Map 18-13-07. This parcel appears to be used for livestock grazing and as a livestock feed lot operation.

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on October 5, 2022, to several public agencies and received the following comments:

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the transmittal materials for 247-22-000792-PA/793-ZC to amend the Comprehensive Plan designation of a 40-acre parcel from Agriculture (AG) to Rural Residential Exception Area (RREA) and change the zoning from Exclusive Farm Use (EFU) to Multiple Use Agriculture (MUA-10). The property is located at 21900 Rastovich Rd., aka County Assessors Map 18-12-01D, Tax Lots 200. For reasons discussed below, staff finds more information is needed to address the Transportation Planning Rule (TPR) and County code.

The Applicant's traffic study dated August 17, 2022, does not comply with County code and thus by extension, it does not comply with the Transportation Planning Rule (TPR) at Oregon Administrative Rule (OAR) 660-012-0060. On page 6 the traffic memo cites to DCC 18.116.310(C)(3)(b) regarding whether a Site Traffic Report (STR) is needed based on projected traffic volumes. However, DCC 18.116.310(E)(4) specifically cites zone changes as requiring traffic analysis and no numerical parameters are cited. The traffic memo on pages 8-9 and Tables 3 and Table 4 uses the Average Daily Traffic (ADT) of 13,000 as being Level of Service (LOS) D and thus meets the County's standard as set forth in DCC 18.116.310(H). However, that 13,000 ADT is from the County's draft 2040 Transportation System Plan (TSP), which is still being completed and has not had public hearings before either the Planning Commission or the Board of County Commissioners, let alone being adopted. The TSP standards in effect remain the 2010-2030 TSP that on Page 125 sets 9,600 ADT as LOS D. The traffic memo indicates on Table 3 and Table 4 the projected traffic volumes will be below 13,000 ADT, but the salient question is will they be below 9,600 ADT.

The TPR requires the demonstration of whether a plan amendment/zone change will have a significant effect or not. To determine that, the traffic study must include the operational analysis based on the 2012 TSP standard of the affected road segments pre-development and post-development. The traffic study needs to determine whether the affected roadway segments are below 9,600 ADT in the current year and 2040. Once this information is provided, staff can determine if there is compliance with the TPR or not. The combination of the TPR and County code helps identify whether the transportation system has adequate capacity to serve the plan amendment/zone change or if the system is already overcapacity regardless of the proposed plan amendment/zone change.

The property accesses Rastovich Road, a public road maintained by Deschutes County and functionally classified as a local. The Applicant will need to either provide a copy of a driveway permit approved by Deschutes County or be required to obtain one as a condition of approval to comply with the access permit requirements of DCC 17.48.210(A).

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

In response to Mr. Russell's comment above regarding the traffic impact analysis (TIA) dated August 17, 2022, the Applicant provided an updated traffic study dated January 3, 2023.

In response to the updated traffic study, Mr. Russell provided the following comment, via email dated January 6, 2023:

The revised traffic analysis answers my concerns.

Deschutes County Building Official, Randy Scheid

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

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

Arnold Irrigation District, Juanita Harvey

The property does not have any Arnold Irrigation District facilities within its boundaries. The property does have 5.00 acre water right appurtenant to it. If any construction is to take place on this property, the construction is not to be within the mapped water right. If it were, the property owner would have to complete a water right transfer with the District

The following agencies did not respond to the notice: Deschutes County Assessor, Department of State Lands, Deschutes County Road Department, Deschutes County Onsite Wastewater, Deschutes County Property Management, Oregon Department of Fish and Wildlife, Watermaster's District 11, Oregon Department of Agriculture, Avion Water Company, Bend Metro Park and Recreation, Oregon Parks and Recreation, Bend Fire Department, BLM – Prineville, Department of Land Conservation and Development, Bend Public Works, Bend Planning Department, and Bend La Pine School District.

PUBLIC COMMENTS: The Planning Division mailed notice of the application to all property owners within 750 feet of the subject property on October 5, 2022. The Applicant also complied with the posted notice requirements of Section 22.24.030(B) of Title 22. The Applicant submitted a Land Use Action Sign Affidavit indicating the Applicant posted notice of the land use action on February 6,

2023. As of the date of this staff report, staff received two (2) public comments in opposition of this application.

One of the opposition comments that staff received was from Central Oregon Land Watch stating they did not believe the Applicant met all of the applicable criteria to receive approval for a comprehensive plan amendment and related zone change. The second opposition comment the staff received was from Jerry Wilke, a nearby resident. Mr. Wilke's comment included opposition to the establishment of a commercial use on the property in the form of drug rehabilitation center. Staff notes no development is proposed at this time.

The public comments are included in the record in their entirety and incorporated herein by reference.

Applicant Response: After submission of the public comments referenced herein and included in the record, the Applicant provided the following response via email on January 17, 2023:

We noticed the attached letter in our land use file and want to comment on it. The neighbor clearly has our application confused with something else. The problem is he refers specifically to Kevin Griffin and attributes some public comments to our client. Kevin Griffin has made no public/neighborhood comments about the application and, in fact, has no development plans. He did reach out to 2 adjacent neighbors before beginning the application process (we submitted those letters into the record) but has not otherwise made any representations that Mr. Wilke could be referring to. Please include this into the land use record for our file. We believe Mr. Wilke is mistaken in his comments and referring to a project on a different property.

NOTICE REQUIREMENT: On February 3, 2023, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the subject property, agencies, and parties of record. A Notice of Public Hearing was published in the Bend Bulletin on Sunday, February 5, 2023. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on January 17, 2023.

REVIEW PERIOD: The subject applications were submitted on September 30, 2022. According to Deschutes County Code 22.20.040(D), the review of the proposed quasi-judicial plan amendment and zone change application is not subject to the 150-day review period.

III. FINDINGS & CONCLUSIONS

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.136, Amendments

Section 18.136.010, Amendments

DCC Title 18 may be amended as set forth in DCC 18.136. The procedures for text or legislative map changes shall be as set forth in DCC 22.12. A request by a property owner for a quasi-judicial map amendment shall be accomplished by filing an application on forms provided by the Planning Department and shall be subject to applicable procedures of DCC Title 22.

FINDING: The Applicant, also the property owner, has requested a quasi-judicial plan amendment and filed the applications for a plan amendment and zone change. The Applicant has filed the required land use application forms for the proposal. The application will be reviewed utilizing 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: The Applicant provided the following response in its submitted burden of proof statement:

Per prior Hearings Officers decisions for plan amendments and zone changes on EFU-zoned property, this paragraph establishes two requirements: (1) that the zone change conforms to the Comprehensive Plan; and (2) that the change is consistent with the plan's introductory statement and goals. Both requirements are addressed below:

- 1. Conformance with the Comprehensive Plan:*** *The applicant proposes a plan amendment to change the Comprehensive Plan designation of the subject property from Agriculture to Rural Residential Exception Area. The proposed rezoning from EFU-TRB to MUA-10 will need to be consistent with its proposed new plan designation.*
- 2. Consistency with the Plan's Introductory Statement and Goals.*** *In previous decisions, the Hearings Officer found the introductory statement and goals are not approval criteria for the proposed plan amendment and zone change.³ However, the Hearings Officer in the Landholdings decision found that depending on the language, some plan provisions may apply and found the following amended comprehensive plan*

³ Powell/Ramsey decision (PA-14-2 / ZC-14-2) and Landholdings Decision (247-16-000317-ZC / 318-PA).

goals and policies require consideration and that other provisions of the plan do not apply as stated below in the Landholdings decision:

"Comprehensive plan statements, goals and policies typically are not intended to, and do not, constitute mandatory approval criteria for quasi-judicial/and use permit applications. Save Our Skyline v. City of Bend, 48 Or LUBA 192 (2004). There, LUBA held:

'As intervenor correctly points out, local and statutory requirements that land use decisions be consistent with the comprehensive plan do not mean that all parts of the comprehensive plan necessarily are approval standards. [Citations omitted.] Local governments and this Board have frequently considered the text and context of cited parts of the comprehensive plan and concluded that the alleged comprehensive plan standard was not an applicable approval standard. [Citations omitted.] Even if the comprehensive plan includes provisions that can operate as approval standards, those standards are not necessarily relevant to all quasi-judicial land use permit applications. [Citation omitted.] Moreover, even if a plan provision is a relevant standard that must be considered, the plan provision might not constitute a separate mandatory approval criterion, in the sense that it must be separately satisfied, along with any other mandatory approval criteria, before the application can be approved. Instead, that plan provision, even if it constitutes a relevant standard, may represent a required consideration that must be balanced with other relevant considerations. [Citations omitted.]'

LUBA went on to hold in Save Our Skyline that it is appropriate to 'consider first whether the comprehensive plan itself expressly assigns particular role to some or all of the plan's goals and policies.' Section 23.08.020 of the county's comprehensive plan provides as follows:

The purpose of the Comprehensive Plan for Deschutes county is not to provide a site-specific identification of the appropriate land uses which may take place on a particular piece of land but rather it is to consider the significant factors which affect or are affected by development in the county and provide a general guide to the various decision which must be made to promote the greatest efficiency and equity possible, which managing the continuing growth and change of the area. Part of that process is identification of an appropriate land use plan, which is then interpreted to make decision about specific sites (most often in zoning and subdivision administration) but the plan must also consider the sociological, economic and environmental consequences of various actions and provide guidelines and policies for activities which may have effects beyond physical changes of the land (Emphases added.)

The Hearings Officer previously found that the above-underscored language strongly suggests the county's plan statements, goals and policies are not intended to establish approval standards for quasi-judicial/and use permit applications.

In Bothman v. City of Eugene, 51 Or LUBA 426 (2006), LUBA found it appropriate also to review the language of specific plan policies to determine whether and to what extent they may in fact

establish decisional standards. The policies at issue in that case included those ranging from aspirational statements to planning directives to the city to policies with language providing 'guidance for decision-making' with respect to specific rezoning proposals. In *Bothman LUBA* concluded the planning commission erred in not considering in a zone change proceeding a plan policy requiring the city to '[r]ecognize the existing general office and commercial uses located * * * [in the geographic area including the subject property] and discourage future rezonings of these properties.' LUBA held that:

** * * even where a plan provision might not constitute an independently applicable mandatory approval criterion, it may nonetheless represent a relevant and necessary consideration that must be reviewed and balanced with other relevant considerations, pursuant to ordinance provisions that require * * * consistency with applicable plan provision.' (Emphasis added.)*

The county's comprehensive plan includes a large number of goals and policies. The applicant's burden of proof addresses goals for rural development, economy, transportation, public facilities, recreation, energy, natural hazards, destination resorts, open spaces, fish and wildlife, and forest lands. The Hearings Officer finds these goals are aspirational in nature and therefore are not intended to create decision standards for the proposed zone change."

*Hearings Officer Karen Green adhered to these findings in the Powell/Ramsey decision (file nos. PA-14-2/ZC-14-2), and found the above-referenced introductory statements and goals are not approval criteria for the proposed plan amendment and zone change. This Hearings Officer also adheres to the above findings herein. Nevertheless, depending upon their language, some plan provisions may require "consideration" even if they are not applicable approval criteria. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 209 (2004). I find that the following amended comprehensive plan goals and policies require such consideration, and that other provisions of the plan do not apply:"*

The comprehensive plan goals and polices that the Landholdings Hearings Officer found to apply include the following . . .

The present application is nevertheless consistent with the introductory statement because the requested change, as demonstrated herein, is consistent with State law and County plan provisions and zoning code provisions implementing the Statewide Planning Goals.

Considering the Applicant's above response, staff requests the Hearings Officer make specific findings on this issue.

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

FINDING: In response to subsection (B) of this policy, the Applicant's burden of proof provides the following:

The applicant is proposing to change the zone classification from EFU to MUA-10. Approval of the application is consistent with the purpose of the MUA-10 zoning district, which 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. "

The subject property is not suited to full-time commercial farming as discussed in the findings above. The MUA-10 zone will allow property owners to engage in hobby farming. The low-density of development allowed by the MUA-10 zone will conserve open spaces and protect natural and scenic resources. In the Landholdings case, the Hearings Officer found:

I find that the proposed change in zoning classification from EFU is consistent with the purpose and intent of the MUA-10 zone. Specifically, the MUA-10 zone is intended 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. Approval of the proposed rezone to MUA-10 would permit applications for low-density development, which will comprise a transition zone between EFU rural zoning, primarily to the east and City zoning to the west.

The maximum density of the approximately 40.0-acre property, if developed with a cluster development under Title 18, is 7 lots. This low density will preserve open space, allow owners to engage in hobby farming, if desired, and preserve natural and scenic resources and maintain or improve the quality of air, water, and land resources. The MUA-10 zoning provides a proper transition zone from the City, to rural zoning, to EFU zoning.

Staff accepts the Applicant's response and finds compliance has been demonstrated.

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: Although there are no plans to develop the property in its current state, the above criterion specifically asks if the proposed zone change will *presently* serve public health, safety, and welfare. The Applicant provided the following response in the submitted burden of proof statement:

Necessary public facilities and services are available to serve the subject property, including electrical power from Pacific Power and water service from [Avion] Water Company (Exhibit 7).

Transportation access to the property is available from Rastovich Road, a rural local road to the west.

MUA-10 zoning and a standard subdivision would allow the creation of up to 4 residential lots and a cluster development would allow up to 7 residential lots. If developed with a cluster development, the property could generate up to 66 additional weekday trips from the current use. However, the study also found that outright uses allowed under the existing EFU zoning could generate as much or more trips than uses under the requested MUA-10 zone. According to the traffic report prepared by Transight Consulting the proposed zone change could result in a slight increase in trips from the existing use, but the impact of these trips is negligible on the transportation system and the functional classification of all the adjacent roadways will not be affected with the proposed rezone. The study includes operational analysis of the Stevens Road and Ward Road corridors demonstrating they remain well within Deschutes County performance thresholds.

The property receives police services from the Deschutes County Sheriff. It is in Rural Fire Protection District #2 and the nearest fire station is approximately 2 miles northwest of the subject property. Neighboring properties contain residential uses, which have water service from a municipal source or wells, on-site sewage disposal systems, electrical service, telephone services, etc. There are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare.

The surrounding areas outside of the UGB contain numerous properties that are residentially developed and have water service from a quasi-municipal source or wells, on-site sewage disposal systems, electrical service, telephone services, etc. There are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare. Staff notes the record includes a 'will-serve' letter from Avion Water indicating the availability of potable water. Prior to development of the properties, the Applicant would be required to comply with the applicable requirements of the Deschutes County Code, including possible land use, building, and sewage disposal permits. Through these development review processes, assurance of adequate public services and facilities will be verified.

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

FINDING: In response, the Applicant's burden of proof provides 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 west and south of the subject property. In addition, the MUA-10 zoning provides a proper transition zone from the City, to rural zoning, to EFU zoning.

The zone change will not impose new impacts on the EFU-zoned land adjacent to the subject property because many of those properties are residential properties, hobby farms, already developed with dwellings, not engaged in commercial farm use, are idle, or are otherwise not suited for farm use due to soil conditions, topography, or ability to make a profit farming.

Some of the properties adjacent and near the subject property are in small, hobby farm use and are receiving farm tax deferral. Tax Lots 1100, 100, 301, and 200 are adjacent to the east and southwest and are in common ownership and part of Rastovich Farm. Most of the Rastovich properties are receiving farm tax deferral and are being used for raising livestock. One of the Rastovich parcels adjacent to the subject property is a nonfarm parcel developed with a nonfarm dwelling. Submitted herewith as Exhibit 12 is a letter from Robert and Colleen Rastovich stating they have no objection to the requested zone change and attesting to the fact that the subject property is not intermingled and is not necessary or useful to them for any farming on the Rastovich parcels.

The adjacent properties to the north and northeast, Tax Lots 101, 102, 1101, are currently receiving farm tax deferral and appear to be used as residential properties with hobby farms. Attached hereto as Exhibit 13 are letters from David Nader, owner of Tax lot 101 adjacent to the north of the subject property and Steve and Keri Sawyer, owners of Tax lot 1101 adjacent to the northeast of the subject property stating they have no objection to the requested zone change and attesting to the fact that the subject property is not intermingled and is not necessary or useful to them for any farming occurring on their parcels. These properties will not suffer new impacts from the proposed zone change because they are hobby farms, already developed with dwellings, not engaged in commercial farm use, and are smaller size than the subject property. The zone change would allow the subject property to be divided into parcels similar size to the adjacent properties to the north and be used for similar hobby farming uses.

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, Mr. Gallagher, the nonproductive soils on the subject property make it not suitable for commercial farming or livestock grazing. The subject property 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.

In addition to these comments, the Applicant provided specific findings for each relevant Comprehensive Plan goal and policy, which are addressed below. Staff finds the Applicant demonstrated the impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan, but asks the Hearings Officer to amend or add to these findings as the Hearings Officer sees fit.

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: In response, the Applicant's burden of proof provides the following:

Mistake: In 1979, Deschutes County adopted its first comprehensive plan and zoning ordinance that implemented the Statewide Land Use Planning Goals. The County's comprehensive plan map was prepared prior to the USDA/NRCS's publication of the "Soil Survey of Upper Deschutes River Area, Oregon." This study replaced a prior study that provided very general information about soils. This Soil Survey of the Upper Deschutes River Area is more comprehensive than the prior soils mapping publication but it continues to provide only general soils information rather than not an assessment of soils on each parcel in the study area.

When the County first implemented the Statewide Goals, it applied resource zoning using a broad brush. All undeveloped rural lands were assumed to be resource land. Then-existing developed rural lands not suited for resource use were granted exceptions to the Goals that protect resource lands. The County allowed landowners a brief period of time after adoption of PL-15 (1979) to petition the County to remove nonresource properties from resource zone protections but made no effort to determine whether lands might be nonresource lands that do not merit the imposition of stringent land use regulations that protect rural resources – typical farm and forest resources.

The EFU zoning designation 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 and when agricultural zoning was applied to land with no history of farming.^{4,5}

Change in Circumstances: There has clearly been a change in circumstances since the property was last zoned in the 1970s:

Soils: New soils data provided in Mr. Gallagher's soils report shows the property does not have agricultural soils.

Farming Economics and Viability of Farm Uses: The economics of farming and the viability of commercial farm uses in Deschutes County have significantly changed. Making a profit in farming 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 property. The reality of the difficulties agricultural producers face in Deschutes County is demonstrated below in the stakeholder interview of the Deschutes County Farm Bureau in the County's 2014 Agricultural Lands Program, Community Involvement Results:

Today's economics make it extremely difficult for commercial farmers in Deschutes County to be profitable. Farmers have a difficult time being competitive because other regions (Columbia Basin, Willamette Valley) produce crops at higher yields,

⁴ Mr. Gallagher's soils analysis report for the subject property determined that the subject property was previously mapped by the USDA-SCS Soil Survey of the Deschutes County Area and compiled by NRCS into the Web Soil Survey. The property was previously mapped at 1:20,000 scale, which is generally too small a scale for detailed land use planning and decision making, according to Mr. Gallagher.

⁵ Source: Agricultural Lands Program, Community Involvement Results, Community Development, Deschutes County. June 18, 2014

have greater access to transportation and consumer markets, and experience more favorable growing climates and soils. Ultimately, the global economy undermines agricultural opportunities in the county because commodities derived from outside the region can be produced at a lower cost. Water limitations also play a role. Junior water right holders are constrained as the summer progresses and they lose their rights to those with higher priority dates.

Decline in Farm Operations: The number of farm operations have steadily declined in Deschutes County between 2012 and 2017, with only a small fraction of farm operators achieving a net profit from farming in 2017. Since the property was zoned, it has become evident that farm uses are not viable on the subject property. The economics of farming have worsened over the decades making it difficult for most Deschutes County property owners to make money farming good ground and impossible to earn a profit from attempting to farm Class 7 and 8 farm soils. In 2017, according to Table 4 of the 2017 US Census of Agriculture, Exhibit 14, only 16.03% of farm operators achieved a net profit from farming (238 of 1484 farm operations). In 2012, the percentage was 16.45% (211 of 1283 farm operations). In 2007, according to the 2012 US Census of Agriculture, that figure was 17% (239 of 1405 farm operations). Exhibit 15. The vast majority of farms in Deschutes County have soils that are superior to those found on the subject property. As farming on those superior soils is typically not profitable, it is reasonable to conclude that no reasonable farmer would purchase the subject property for the purpose of attempting to earn a profit in money from agricultural use of the land.

Population Changes; Encroaching development: The population of Deschutes County has, according to the US Census, increased by 336% between 1980 when the County's last zoned this property and 2021 from 62,142 persons to 209,266 persons. The supply of rural residential dwelling lots has been diminishing in the same time period. Encroaching development east of Bend's Urban Growth Boundary has brought both traffic and higher density residential uses and congestion to the area, and within a mile of the subject property.

The above analysis regarding farming economics, viability of farm uses, decline in farm operations, and changing population data and encroaching development demonstrates that a change in circumstances has occurred since the property was last zoned. In addition, Mr. Gallagher's soil assessment confirms that the subject property does not have agricultural soils.

It is unclear to staff why the subject property was initially zoned EFU. Staff is unaware of any evidence such as soil classification, availability of irrigation, or historic farming, which explains its current zoning. Staff agrees with the Applicant's findings that there have been several particularly relevant changes in circumstances that warrant a zone change. Staff finds the Applicant has demonstrated compliance with this criterion, but asks the Hearings Officer to amend or add to these findings as the Hearings Officer sees fit.

Deschutes County Comprehensive Plan

Chapter 2, Resource Management

Section 2.2 Agricultural Lands

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

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

The applicant is pursuing a plan amendment and zone change on the basis that the subject property does not constitute "agricultural lands", and therefore, it is not necessary to preserve or maintain the subject lands as such and this goal does not apply. In the Landholdings decision (and the Powell/Ramsey decision) the Hearings Officer found that Goal 1 is an aspirational goal and not an approval criterion.

As demonstrated in this application, the subject property does not constitute "agricultural land" and therefore, is not necessary to preserve and maintain the County's agricultural industry. Mr. Gallagher's soils assessment demonstrates that the subject property consists predominantly (58.5%) of Class 7 and 8 non-agricultural soils (Gosney-Rock Outcrop Complex).

According to Mr. Gallagher, these soils have severe limitations for agricultural use of the subject property. The soils found on the subject property have low soil fertility and the productivity of the soils are very limiting for crop production or raising livestock. The soils are ashy loamy sands, which do not have a large capacity to store soil nutrients, especially cations and nitrogen fertilizers. The low cation exchange capacity as well as the very low level of organic matter in the soil means that even if fertilizers are used to supplement crops grown on the property those fertilizers are readily leached into the sandy soils.

The sandy shallow soils found on the subject property also have a very low water holding capacity. The Gosney soils have approximately one inch of water holding capacity for the entire soil profile and the very shallow soils have approximately half as much water holding capacity. The Deskamp soils have approximately two to four inches of water holding capacity for the entire soil profile. The combination of low soil fertility and low water holding capacity mean the soils on the subject property have low productivity for crop production. The shallow soil depth further limits crop production because the shallow soil depth limits the volume of soil that is available for plant roots and size of the overall nutrient pool available to plants.

According to Mr. Gallagher, the subject property is not suited for livestock grazing on a commercial scale. The nonproductive soil types present major management limitations for livestock grazing. The very shallow soils and shallow soils with rocky outcrops are prone to wind erosion when applying range improvement practices. If vegetation is removed or deteriorated, by livestock grazing or other events, reestablishment of lost vegetation is very slow. The development of irrigation ponds and livestock watering ponds on the property is also limited by the shallow soils depth. The restricted soil depth also limits the choice of species available for range seeding and only drought-tolerant species could be used on the property. Using ground equipment for range

seeding is also limited by the numerous rocky outcrops found throughout the property and rock fragments on the soil surface. The areas of very shallow soils and rock outcrops further restrict livestock accessibility and limit the areas that are suitable for livestock grazing.

Staff notes the Applicant's soil study demonstrates the subject property is predominantly comprised of Class 7 and 8 soils, and the property has no known history of agricultural use. However, based on the Applicant's response, staff requests the Hearings Officer make specific findings on this topic.

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

FINDING: The Applicant is not asking to amend the subzone that applies to the subject property; rather, the Applicant is seeking a change under Policy 2.2.3 and has provided evidence to support rezoning the subject property to MUA-10.

Policy 2.2.3 Allow comprehensive plan and zoning map amendments for individual EFU parcels as allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan.

FINDING: The Applicant is seeking approval of a plan amendment and zone change to re-designate and rezone the properties from Agricultural to Rural Residential Exception Area. The Applicant is not seeking an exception to Goal 3 – Agricultural Lands, but rather seeks to demonstrate that the subject property does not meet the state definition of "Agricultural Land" as defined in Statewide Planning Goal 3 (OAR 660-033-0020).

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

Deschutes County has allowed this approach in previous Deschutes County Board and Hearings Officer's decisions as previously cited and summarized herein. Additionally, the Land Use Board of Appeals (LUBA) allowed this approach in Wetherell v. Douglas County, 52 Or LUBA 677 (2006), where LUBA states, at pp. 678-679:

"As we explained in DLCD v. Klamath County, 16 Or LUBA 817, 820 (1988), there are two ways a county can justify a decision to allow nonresource use of land previously designated and zoned for farm use or forest uses. One is to take an exception to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). The other is to adopt findings which demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. When a county pursues the latter option, it must demonstrate that despite the prior resource plan and zoning designation, neither Goal 3 or Goal 4 applies to the property. Caine v. Tillamook County, 25 Or LUBA 209, 218 (1993); DLCD v. Josephine County, 18 Or LUBA 798, 802 (1990)."

LUBA's decision in *Wetherell* was appealed to the Oregon Court of Appeals and the Oregon Supreme Court but neither court disturbed LUBA's ruling on this point. In fact, the Oregon Supreme Court changed the test for determining whether land is agricultural land to make it less stringent. *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007). In that case, the Supreme Court stated that:

"Under Goal 3, land must be preserved as agricultural land if it is suitable for "farm use" as defined in ORS 215.203(2)(a), which means, in part, "the current employment of land for the primary purpose of obtaining a profit in money" through specific farming-related endeavors." Wetherell, 342 Or at 677.

The Wetherell court held that when deciding whether land is agricultural land "a local government may not be precluded from considering the costs or expenses of engaging in those activities." Wetherell, 342 Or at 680. The facts presented in the subject application are sufficiently similar to those in the Wetherell decisions and in the above-mentioned Deschutes County plan amendment and zone change applications. The subject property is primarily composed of Class 7 and 8 nonagricultural soils making farm-related endeavors not profitable. This application complies with Policy 2.2.3.

Staff agrees that the facts presented by the Applicant in the burden of proof for the subject application are similar to those in the *Wetherell* decisions and in the aforementioned Deschutes County plan amendment and zone change applications. Therefore, the Applicant has the potential to prove the properties are not agricultural land and do not require an exception to Goal 3 under state law.

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

FINDING: This plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations. Staff concurs with the County's previous plan amendment and zone change determinations (see PA-11-7, also 247-16-000318-PA, PA-10-5, PA-07-1), and finds the proposal is consistent with this policy.

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

Policy 2.2.13 Identify and retain accurately designated agricultural lands.

FINDING: This plan policy requires the County to identify and retain agricultural lands that are accurately designated. The Applicant proposes that the subject property was not accurately designated as agricultural land as demonstrated by the soil study and the findings in the Applicant's burden of proof. Further discussion on the soil analysis provided by the Applicant is detailed under the OAR Division 33 criteria below.

Section 2.5, Water Resources Policies

Goal 6, Coordinate land use and water policies.

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

FINDING: The Applicant is not proposing a specific development application at this time. Therefore, the Applicant is not required to demonstrate the water impacts associated with development. Rather, the Applicant will be required to address this criterion during development of the subject property, which would be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat). This criterion does not apply to the subject application.

Section 2.7, Open Spaces, Scenic Views and Sites

Goal 1, Coordinate with property owners to ensure protection of significant open spaces and scenic view and sites.

Policy 2.7.3 Support efforts to identify and protect significant open spaces and visually important areas including those that provide a visual separation between communities such as the open spaces of Bend and Redmond or lands that are visually prominent.

Policy 2.7.5 Encourage new development to be sensitive to scenic views and sites.

FINDING: 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. Staff notes that no LM combining zone applies to the subject property at this time. The subject property is also not located within the Open Space and Conservation (OS&C) zone. Furthermore, no new development is proposed under the present application. These provisions of the plan, therefore, are not impacted by the proposed zone change and plan amendment.

Chapter 3, Rural Growth

Section 3.2, Rural Development

Growth Potential

As of 2010, the strong population growth of the last decade in Deschutes County was thought to have leveled off due to the economic recession. Besides flatter growth patterns, changes to State regulations opened up additional opportunities for new rural development. The following list identifies general categories for creating new residential lots, all of which are subject to specific State regulations.

- ***2009 legislation permits a new analysis of agricultural designated lands***
- ***Exceptions can be granted from the Statewide Planning Goals***
- ***Some farm lands with poor soils that are adjacent to rural residential uses can be***

rezoned as rural residential

FINDING: This section of the Comprehensive Plan does not contain Goals or Policies, but does provide the guidance above. In response to this section, the Applicant provided the following response in the burden of proof:

The above part of the plan is not a plan policy and is not an applicable approval criterion but rather an explanation of how the County calculated expected growth. As shown above, the County's Comprehensive Plan provisions anticipate the need for additional rural residential lots as the region continues to grow. This includes providing a mechanism to rezone farm lands with poor soils to a rural residential zoning designation. While this rezone application does not include the creation of new residential lots, the applicant has demonstrated the subject property is comprised of poor soils that are adjacent to rural residential, MUA-10 zone, uses to the west as well as near rural residential, RR-10 zone and MUA-10 zone, uses to the south and is near (within 1 mile) of the City limits of Bend to the west and even closer to the Stevens Road Tract, which will be brought inside the UGB pursuant to HB 3318.

Rezoning the subject property to MUA-10 is consistent with this criterion, as it will provide for an orderly and efficient transition from the Bend Urban Growth Boundary to rural and agricultural lands. Additionally, it will link the non-productive lands of the subject property with existing residential development and street systems to the west, 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.

Staff notes that the MUA-10 zone is a rural residential zone and as discussed in the Basic Findings section, there are several nearby properties to the north and northeast that are zoned MUA-10 as well as nearby EFU zoned properties developed with residential uses. Staff notes this policy references the soil quality, which staff has discussed above. Staff agrees with the Applicant's response and finds the proposal complies with this policy.

Section 3.3, Rural Housing

Rural Residential Exception Areas

In Deschutes County most rural lands are designated for farms, forests or other resources and protected as described in the Resource Management chapter of this Plan. The majority of the land not recognized as resource lands or Unincorporated Community is designated Rural Residential Exception Area. The County had to follow a process under Statewide Goal 2 to explain why these lands did not warrant farm or forest zoning. The major determinant was that many of these lands were platted for residential use before Statewide Planning was adopted.

In 1979 the County assessed that there were over 17,000 undeveloped Rural Residential Exception Area parcels, enough to meet anticipated demand for new rural housing. As of 2010 any new Rural Residential Exception Areas need to be justified through taking

exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR.

FINDING: The Applicant provided the following response to this provision in the burden of proof:

Prior Hearings Officer's decisions have found that Section 3.3 is not a plan policy or directive.⁶ Further, no goal exception to Statewide Planning Goal 3 is required for the rezone application because the subject property does not qualify as farm or forest zoning or agricultural lands under the statewide planning goals. The County has interpreted the RREA plan designation as the proper "catchall" designation for non-resource land and therefore, the Rural Residential Exception Area (RREA) plan designation is the appropriate plan designation to apply to the subject property.⁷

⁶ See PA-11-17/ZC-11-2, 247-16-000317-ZC/318-PA, and 247-18-000485-PA/486-ZC

⁷ The Hearings Officer's decision for PA-11-17/ZC-11-2 concerning this language of Section 3.3 of the Comprehensive Plan states:

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

*There is one additional related matter which warrants discussion in connection with this issue. It appears that part of Staff's hesitation and caution on the issue of whether an exception might be required is rooted in the title of the Comprehensive Plan designation that would ultimately apply to the subject property – which is "Rural Residential Exception Area." There appears to be seven countywide Comprehensive Plan designations as identified in the plan itself. These include "Agriculture, Airport Development, Destination Resort Combining Zone, Forest, Open Space and Conservation, Rural Residential Exception Area, and Surface Mining." Of the seven designations, only rural Residential Exception Area provides for associated zoning that will allow rural residential development. **As demonstrated by reference to the Pagel decision discussed above, there appears to be instances in which rural residential zoning has been applied without the underlying land necessarily being identified as an exception area.** This makes the title of the "Rural Residential Exception Area" designation confusing and in some cases inaccurate, because no exception is associated with the underlying land in question. However, it is understandable that since this designation is the only one that will allow rural residential development, that it has become a catchall designation for land types that are authorized for rural residential zoning. That is the case with the current proposal, and again, for the same reason set forth in the Hearings Officer Green's decision in Pagel, I cannot find a reason why the County would be prohibited from this practice.*

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

Section 3.7, Transportation

**Appendix C – Transportation System Plan
ARTERIAL AND COLLECTOR ROAD PLAN**

...

Goal 4. Establish a transportation system, supportive of a geographically distributed and diversified economic base, while also providing a safe, efficient network for residential mobility and tourism.

...

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

FINDING: This policy applies to the County and advises it to consider the roadway function, classification and capacity as criteria for plan amendments and zone changes. The County will comply with this direction by determining compliance with the Transportation Planning Rule (TPR), also known as OAR 660-012, as described below in subsequent findings.

(emphasis added). I find that Deschutes County has interpreted the RREA plan designation as the property "catchall" designation for non-resource land. As a result, the Hearings Officer finds that the RREA plan designation is the appropriate plan designation for the subject property.

OREGON ADMINISTRATIVE RULES CHAPTER 660, LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

Division 6, Goal 4 – Forest Lands

OAR 660-006-0005, Definitions

- (7) “Forest lands” as defined in Goal 4 are those lands acknowledged as forest lands, or, in the case of a plan amendment, forest lands shall include:**
- (a) Lands that are suitable for commercial forest uses, including adjacent or nearby lands which are necessary to permit forest operations or practices; and**
 - (b) Other forested lands that maintain soil, air, water and fish and wildlife resources.**

FINDING: The Applicant provided the following in response to Goal 4:

*The subject property and surrounding areas do not include any lands that are suited for forestry operations. Goal 4 says that forest lands “are those lands acknowledged as forest lands as of the date of adoption of this goal amendment.” The subject property does not include lands acknowledged as forest lands as of the date of adoption of Goal 4. Goal 4 also says that “where**a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources.” This plan amendment does not involve any forest land. The subject property does not contain any merchantable timber and is not located in a forested part of Deschutes County.*

The subject property is not zoned for forest lands, nor are any of the properties within a 3.5-mile radius. The subject property does not contain merchantable tree species and there is no evidence in the record that the property has been employed for forestry uses historically. The soil mapping unit on the subject property does not contain wood fiber production capabilities and the subject property does not qualify as forest land.

The subject property is not zoned for forest lands, nor are any of the properties within a three-mile radius. The property does not contain merchantable tree species and there is no evidence in the record that the properties have been employed for forestry uses historically. None of the soil units comprising the parcel are rated for forest uses according to the NRCS data. The property does not appear to qualify as forest land.

Division 33 - Agricultural Lands & Statewide Planning Goal 3 - Agricultural Lands;

OAR 660-015-0000(3)

To preserve and maintain agricultural lands.

Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural land use policy expressed in ORS 215.243 and 215.700.

FINDING: Goal 3 continues on to define "Agricultural Land," which is repeated in OAR 660-033-0020(1). Staff makes findings on this topic below and incorporates those findings herein by reference.

OAR 660-033-0020, Definitions

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 Oregon⁸;**

FINDING: The Applicant's basis for not requesting an exception to Goal 3 is based on the premise that the subject property is not defined as "Agricultural Land." In support, the Applicant offers the following response as included in the submitted burden of proof statement:

ORS 215.211 grants a property owner the right to rely on more detailed information that provided by the NRCS Web Soil Survey of the NRCS to "assist the county to make a better determination of whether land qualifies as agricultural land." Statewide Goal 3, discussed above, and OAR 660-033-0030(5) also allow the County to rely on the more detailed and accurate information by a higher order soil survey rather than information provided by the NRCS. The law requires that this survey use the NRCS soil classification system in conducting the survey, making it clear that the point of the survey is to provide better soil classification information than provided by the NRCS for use in making a proper decision whether land is or is not "Agricultural Land." The subject property is not properly classified as Agricultural Land and does not merit protection under Goal 3. The soils are predominately Class 7 and 8, as demonstrated by the site-specific soils assessment conducted by Mr. Gallagher, a certified soils scientist. State law, OAR 660-033-0030, allows the County to rely on for more accurate soils information, such as Mr. Gallagher's soil assessment. Mr. Gallagher found that approximately 58.5 percent of the soils on the subject property (approximately 23.4 acres) are Land Capability Class 7 and 8 soils that have severe limitations for farm use. He also found the site to have low soil fertility, shallow and very shallow soils, abundant rock outcrops, rock fragments on the soil surface, restrictive for livestock accessibility, and low available water holding capacity, all of which are considerations for the determination for suitability for farm use.

⁸ OAR 660-033-0020(5): "Eastern Oregon" means that portion of the state lying east of a line beginning at the intersection of the northern boundary of the State of Oregon and the western boundary of Wasco County, then south along the western boundaries of the Counties of Wasco, Jefferson, Deschutes and Klamath to the southern boundary of the State of Oregon.

Because the subject property is comprised predominantly of Class 7 and 8 soils, the property does not meet the definition of "Agricultural Land" under OAR 660-033-020(1)(a)(A), listed above as having predominantly Class I-VI soils.

Staff has reviewed the soil study provided by Andy Gallagher of Red Hill Soils (dated September 26, 2022) and agrees with the Applicant's representation of the data for the subject property. Staff finds, based on the submitted soil study and the above OAR definition, that the subject property is comprised predominantly of Class 7 and 8 soils and, therefore, does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A) above, but asks the Hearings Officer to amend or add to these findings as the Hearings Officer sees fit.

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

FINDING: The Applicant's basis for not requesting an exception to Goal 3 is based on the proposal that the subject property is not defined as "Agricultural Land." The Applicant provides the following analysis of this determination in the burden of proof.

This part of the definition of "Agricultural Land" requires the County to consider whether the Class 7 and 8 soils found on the subject property are suitable for farm use despite their Class 7 and 8 soil classification. The Oregon Supreme Court has determined that the term "farm use" as used in this rule and Goal 3 means the current employment of land for the primary purpose of obtaining a profit in money through specific farming-related endeavors. The costs of engaging in farm use are relevant to determining whether farm activities are profitable and this is a factor in determining whether land is agricultural land. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007).

The subject property has only 5 acres of water rights, has not been farmed, or used in conjunction with any farming operation in the past. The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies three soil complex units on the property: 38B Deskamp-Gosney complex, 0 to 8 percent slopes, 58C Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes, and 36B Deskamp loamy sand, 3 to 8 percent slopes.

Soil complex unit 38B is Capability Class 6 and 7. Soil complex unit 58C is Capability Class 6, 7, and 8. 38B and 58C are not a high-value farmland soil as defined by Deschutes County Code. Soil complex unit 36B is Capability Class 3 when irrigated and 6 when nonirrigated. When nonirrigated, 36B is not a high-value farmland soil as defined by Deschutes County Code. The subject property has only 5 acres of water rights and the small amount of semi-productive Deskamp soils are interspersed in pockets throughout the subject property. It is not feasible for an agricultural producer to farm interspersed areas of higher quality soils and is it not feasible to

irrigate these interspersed areas, especially when it would require spreading only 5 acres of water rights over a 40-acre property.

An Agricultural Soils Capability Assessment (Order 1 soil survey) conducted on the property by Mr. Gallagher determined that the property is not agricultural land, the higher capability Deskamp soils make up only 39.5 percent of the subject property, and the Gosney-Rock Outcrop Complex soils, Capability Class 7 and 8, make up 58.5 percent of the subject property, and that the restrictive soils depth and limited soil fertility create severe limitations for any agricultural use on the property or in conjunction with other neighboring lands.

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

Soil Fertility: *Mr. Gallagher made the following findings regarding soil fertility on the subject property:*

Important soil properties affecting the soil fertility and productivity of the soils are very limiting to crop production on this parcel. The soils here are low fertility, being ashy loam sands with a low cation exchange capacity (CEC) of 7.5 meq/100 gm and organic matter is very low for Gosney 0.75% and low for Deskamps 1.5%. These soils do not have a large capacity to store soil nutrients especially cations, and nitrogen fertilizers readily leach in sandy soils. The soil depth is further limiting because it limits the overall volume of soil available for plant roots and limits the size the overall soil nutrient pool. Additionally, the soil available water holding capacity is very low for Gosney about one inches for the whole soil profile, and for the very shallow soils it is half this much. The Deskamps soils have only about 2 to 4 inches AWHC for the entire profile. The combination of low fertility and low AWHC translate into low productivity for crops.

The fact that the soils are low fertility unless made fertile through artificial means supports the applicant's position that the Class 7 and 8 soils and the entire property is not suitable for farm use. The costs to purchase and apply fertilizer and soil amendments and the costs to sample and test soils are a part of the reason why it is not profitable to farm the subject property. Additionally, the soils on the property are shallow and very shallow further limiting any potential for commercially farming the property because the shallow soil depth limits the overall volume of soil available for plant roots and limits the size of the overall nutrient pool.

Unsuitability for Grazing: *Mr. Gallagher also analyzed whether the parcel is suitable for grazing and found:*

This 40- acre parcel is not suited to grazing on a commercial scale. The soil here have major management limitations including ashy and sandy surface texture. The majority of the area has soils that are very shallow to shallow with many rock outcrops and rock fragments in the surface. Wind erosion is a potential hazard is moderately high when applying range improvement practices. Because the soil is influenced by pumice ash, reestablishment of the native vegetation is very slow if the vegetation is removed or

deteriorated. Pond development is limited by the soil depth. The restricted soil depth limits the choice of species for range seeding to drought-tolerant varieties. Further, range seeding with ground equipment is limited by the rock fragments on the surface. The areas of very shallow soils and rock outcrop limit the areas suitable for grazing and restrict livestock accessibility. [Emphasis added]

Total Range Production from NRCS Websoil survey and estimate based soil percentages in revised soil map units

Soil Map Unit	Total annual range production pounds per acre (Normal Year)
36A	900
38C	818
58C	558
Dk	900
GR ¹	370
HM	0

¹ Estimated based on weighted average of soils, 700 for Goney (40%) and 300 for very shallow (30%) and zero for rock outcrop (30%).

Total range production is the amount of vegetation that can be expected to grow annually in a well-managed area that is supporting the potential natural plant community. It includes all vegetation, whether or not it is palatable to grazing animals. It includes the current year's growth of leaves, twigs, and fruits of woody plants. It does not include the increase in stem diameter of trees and shrubs. It is expressed in pounds per acre of air-dry vegetation. In a normal year, growing conditions are about average. Yields are adjusted to a common percent of air-dry moisture content. The productivity provided for Dk map unit is from Websoil survey for the Deskamp soil and that provided for the GR map unit is based on 30% very shallow soils, 40% Gosney and 30% rock outcrop.

Based on the revised Order-1 map the annual productivity for this 40 acres is 22,878 pounds per acre. It is reported that the cow's take of the total annual productivity is about 25 percent (NRCS 2009). So based on this figure and a monthly value of 910 pounds forage per 1 AUM, (the equivalent of pounds per cow calf pair.) This yields six animal use months (AUMs) for this 40-acre parcel. This limits the grazing to one cow calf pair for roughly 6 months annually. This is not an economical model for livestock production.

Inappropriate grazing causes a reduction in desirable grasses and where present cheatgrass will increase and granite prickly gilia increases and grasses decline. Cheatgrass becomes dominant along with grey rabbitbrush. Ground fire potential increases with increasing cheatgrass. Cutting of juniper leads to an increase in grey rabbitbrush and an increase in cheatgrass with or without grazing. Idaho fescue is eliminated from areas where trees are removed due to harsh microclimate

and cheatgrass replaces it. The addition of inappropriate grazing would lead to a decline in the other deep-rooted perennial bunchgrasses and an increase in annuals and granite prickly gilia. [Emphasis added]

Climatic Features The climate in Central Oregon is cold and dry, with a very short growing season. According to the OSU Extension Service the growing season for Bend is only 80-90 days long. Exhibit 17. According to Mr. Gallagher, climatic conditions of this area make it difficult for production of most crops, as stated below:

The low annual precipitation, high summer temperature and evapotranspiration rates, and shortened frost-free growing season make this a difficult climate for production of most crops. Irrigation is needed on area farms to meet crop needs given only 8 to 10 inches precipitation that falls mainly between November and June, with a long summer drought. The soil temperature regime is mesic. The average annual air temperature is 46 degrees F with extreme temperatures ranging from -26 to 104 degrees F. The frost-free period is 50 to 90 days. The optimum period for plant growth is from late March through June. Freeze-free period (average) 140 days. (NRCS 2020) These harsh climatic conditions coupled with very low soil available water holding capacity limits the potential of irrigated crop production to the Deskamps soils. [Emphasis added]

Existing and Future Availability of Water for Farm Irrigation Purposes: The subject property is within the boundaries of the Arnold Irrigation District and has 5 acres of water rights. No new irrigation water rights are expected to be available to the subject property in the foreseeable future. In order to obtain additional water rights and be able to irrigate other areas of the subject property, the applicant would need to convince another Arnold Irrigation District patron to remove water rights from their property and sell them to the applicant and obtain State and Arnold Irrigation District approval to apply the water rights to the subject property. In such a transaction, water rights would be taken off productive farm ground and applied to the nonagricultural soils found on the subject property. Such a transaction runs counter to the purpose of Goal 3 to maintain productive Agricultural Land in farm use.

Given the poor quality of these soils and the location of the property, it is highly unlikely that Arnold Irrigation District would approve a transfer of water rights to this property. In addition, no person intending to make a profit in farming would go to the expense of purchasing water rights, mapping the water rights, and establishing an irrigation system to irrigate the lands on the subject property. The Applicants have not received the water in many years as they are located at the end of the ditch and have been told the district loses more water in delivery to them than they have in water rights. Attached hereto as Exhibit 16 is a letter from Arnold Irrigation District confirming the Applicant is at the end of the ditch and that remaining water from the subject property will not affect other patrons within the district.

Given the dry climate and poor soil quality, it is necessary to irrigate and fertilize the subject property in order to grow a crop which could be harvested and sold, such as alfalfa and grass hay. A farmer would need to spend significant sums of money to purchase additional water rights, purchase irrigation systems, maintain the systems, purchase fertilizer, purchase herbicides and pesticides, pay laborers to move and monitor irrigation equipment and tend to the crops and

pastures, obtain electricity, pay irrigation district assessments, and pay increased liability insurance premiums for the risks involved with farming operations.

Irrigating the soils found on the subject property as described by Mr. Gallagher, that have low fertility, low capacity to store nutrients, and very low available water holding capacity translates into low productivity for crops that would amount to no profit for the farm operator.

Existing Land Use Patterns: *Existing land use patterns in the area are primarily non-agricultural related land uses including County exception lands zoned MUA-10 which are developed with homes on relatively small properties to the west and hobby farm uses on partially irrigated parcels zoned EFU-TRB to the north and northeast.*

The adjacent EFU-zoned properties to the east and south that are receiving farm tax deferral are the Rastovich properties which include:

Some of the properties adjacent and near the subject property appear to be in farm use and are receiving farm tax deferral. Tax Lots 1100, 100, 301, and 200 are in common ownership and part of Rastovich Farm. Most of the Rastovich properties are receiving farm tax deferral and appear to be used for raising livestock. One of the Rastovich parcels adjacent to the subject property is a nonfarm parcel developed with a nonfarm dwelling.

- *Tax Lot 18-13-06-1100. This parcel is 80.93 acres in size and livestock grazing and hay crop production appears to be occurring on this parcel.*
- *Tax Lot 18-12-12-100. This parcel is 37.84 acres in size and is partially irrigated. It is developed with a dwelling and outbuildings and appears to be used for crop and livestock production. This parcel is a remainder parcel of a nonfarm partition. A nonfarm dwelling was approved on this property (file numbers CU-02-110 and MP-02-40), and a nonfarm parcel (Tax Lot 101) was carved out of Tax Lot 100. Both parcels, the nonfarm dwelling parcel and the remainder farm parcel, remain under common ownership and a nonfarm dwelling has been constructed on the nonfarm parcel.*
- *Tax Lot 18-13-07-301. This parcel is 41.22 acres in size and does not appear to be irrigated. It appears to be used for livestock grazing and primarily as a cattle feedlot. No dwelling has been constructed on this parcel and it has been developed with cattle handling equipment, sorting corrals, and cattle feed bunks.*
- *Tax Lot 18-13-07-200. This parcel is 40.0 acres in size and is not irrigated. There are no structures located on this parcel and it appears to be used for livestock grazing.*

The close proximity to the City of Bend and residential areas limits the types of agricultural activities that could reasonably be conducted for profit on the subject property. The size and location of the subject property make it unsuitable for raising livestock for any profit. Additionally, the property owner would bear the burden of paying for harm that might be caused by livestock escape, in particular livestock and vehicle collisions. Any agricultural use that requires the application of pesticides and herbicides would be very difficult to conduct on the property given the numerous homes located in close proximity to west boundary of the property. In addition, the

creation of dust which accompanies the harvesting of crops is a major concern on this property due to the close proximity of residential use.

Technological and Energy Inputs Required: According to Mr. Gallagher:

The very shallow and shallow soils and abundant rock outcrops limit practical agricultural crop production on all but about 7 acres out of the 10 acres of Deskamps soils. The Deskamps soils are divided into four delineations that are separated by rocky and shallow soils and rock outcrops and steep slopes. The landscape is so cut up it is impractical to farm. NRCS does not provide any productivity data for non-irrigated crops on these soils. The productivity of irrigated alfalfa is 4 tons per acre for Deskamps, and no rating for Gosney is same as a zero. There are perhaps 15 acres of Deskamp that could produce alfalfa with irrigation, but the current water right is only for five acres so the best case scenario for crop production would be about 20 tons alfalfa under irrigation and high fertility. At a Spring 2022 price of \$220 per ton (USDA's Agricultural Prices report) this would yield \$4400.00 gross. After expenses are deducted for land costs, site preparation, planting, costs of production like irrigation, fertilizer, weed control, costs of harvest including swath, rake, and bale, stack, and costs of handling, storage and marketing there would be no profit associated with producing hay crops on this parcel. [Emphasis added]

Accepted Farming Practices: Farming lands comprised of soils that are predominately Class 7 and 8 is not an accepted farm practice in Central Oregon. Dryland grazing, the farm use that can be conducted on the poorest soils in the County, typically occurs on soils that have a higher soils class if irrigated. The applicant would have to go above and beyond accepted farming practices to even attempt to farm the property for dryland grazing. Crops are typically grown on soils in soil class 3 and 4 that have irrigation, which this property has neither.

Staff agrees with the Applicant that many of the factors surrounding the subject property – such as nearby residential and non-agricultural related land uses, high-cost of dryland grazing, soil fertility, and lack of availability of water rights result in an extremely low possibility of farming on the subject property.

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

FINDING: The Applicant offers the following response as included in the submitted burden of proof statement:

The subject property is not land necessary to permit farm practices to be undertaken on adjacent or nearby lands. The nearest properties to the subject property that are agriculturally zoned and engaged in farm use are the Rastovich properties located to the south and east on Tax Lots 18-13-06-1100, 18-12-12-100, 18-13-07-301, and 18-13-07-200 and hobby farm uses to the north on Tax Lots 101, 102, 1101.

As discussed above, most of the Rastovich properties are receiving farm tax deferral and appear to be used for crop and livestock production and a cattle feedlot. One of the Rastovich parcels adjacent to the subject property is a nonfarm parcel developed with a nonfarm dwelling. The Rastovich properties operate independently and are not dependent upon the subject property to conduct their farm practices. Rastovich Letter, see Exhibit 12. This is further evidenced by the fact that the farm operators of the Rastovich Farm do not graze their livestock on the subject property, the subject property and the Rastovich properties are not fenced in a way that would allow livestock to be grazed on the subject property in conjunction with the Rastovich parcels, and there are no water sources on the subject property suitable for livestock.

The adjacent properties to the north and northeast, Tax Lots 101, 102, and 1101, are currently receiving farm tax deferral and appear to be used as residential properties with hobby farms. These properties will not suffer new impacts from the proposed zone change because they are hobby farms, already developed with dwellings, not engaged in commercial farm use, and are smaller size than the subject property. The zone change would allow the subject property to be divided into parcels similar size to the adjacent properties to the north and be used for similar hobby farming uses. Additionally, Tax Lots 101, 102, and 1101 are not currently and have not been used in the past for agricultural activities in conjunction with the subject property.

Farming operations occurring on the Rastovich properties as well as Tax Lots 101, 102, and 1101 will be able to continue to occur if the subject property is rezoned to MUA-10. Further, the poor-quality soils and lack of irrigation on the subject property are not suited to agricultural production and make the subject property unsuitable for farm practices on the nearby agricultural land.

The above analysis shows that the subject property is not land "necessary to permit farm practices to be undertaken on any adjacent nearby lands."

The Applicant provided an analysis of land uses and agricultural operations surrounding the subject property, as included above. The Applicant found that barriers for the subject property to engage with these properties in a farm use include: poor quality soils, lack of irrigation, proximity and significant topography changes. Considering the Applicant's response above, staff requests the Hearings Officer make specific findings on this issue.

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

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

The subject property is not, and has not, been a part of a farm unit that includes other lands not currently owned by the applicant. The property has no history of farm use and contains soils that make it unsuitable for farm use and therefore, no basis to inventory the subject property as agricultural land.

Goal 3 applies a predominant soil type test to determine if a property is "agricultural land." If a majority of the soils are Class 1-6 in Central or Eastern Oregon, it must be classified "agricultural land." 1000 Friends position is that this is a 100% Class 7-8 soils test rather than a 51% Class 7 and 8 soils test because the presence of any Class 1-6 soil requires the County to identify the entire property as "agricultural land." Case law indicates that the Class 1-6 soil test applies to a subject property proposed for a non-agricultural plan designation while the farm unit rule looks out beyond the boundaries of the subject property to consider how the subject property relates to lands in active farming in the area that was once a part of the area proposed for rezoning. It is not a test which requires that 100% of soils on a subject property be Class 1-6.

The farm unit rule is written to preserve large farming operations in a block. It does this by preventing property owners from dividing farmland into smaller properties that, alone, do not meet the definition of "agricultural land." The subject property is not formerly part of a larger area of land that is or was used for farming operations and was then divided to isolate poor soils so that land could be removed from EFU zoning. As demonstrated by the historic use patterns and soils reports, it does not have poor soils adjacent to or intermingled with good soils within a farm unit. The subject property is not in farm use and has not been in farm use of any kind. It has no history of commercial farm use and contains soils that make the property generally unsuitable for farm use as the term is defined by State law. It is not a part of a farm unit with other land.

The subject property is predominately Class 7 and 8 soils and would not be considered a farm unit itself nor part of a larger farm unit based on the poor soils and the fact that it has not been used in conjunction with any adjacent farm properties.

As shown by the soils assessment conducted by Mr. Gallagher, the predominant soil type found on the subject property is Class 7 and 8, nonagricultural land (58.5%). The predominance test says that the subject property is not agricultural soil and the farm unit rule does not require that the Class 7 and 8 soils that comprise the majority of the subject property be classified as agricultural land due to the presence of a small amount of Class 3 irrigated and 6 nonirrigated soils on the subject property that are not employed in farm use and are not part of a farm unit. As a result, this rule does not require the Class 7 and 8 soils on the subject property to be classified agricultural land because a minority of the property contains soils rated Class 3 and 6.

Staff agrees with the Applicant's findings surrounding agricultural lands. However, given the presence of Class 3 irrigated and 6 nonirrigated soils, staff requests the Hearings Officer make specific findings on this issue.

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

FINDING: The subject property is not within an acknowledged urban growth boundary or land within acknowledged exception areas for Goals 3 or 4.

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

FINDING: The Applicant addressed the factors in OAR 660-033-0020(1) above. The properties are not "agricultural land," as referenced in OAR 660-033-0030(1) above, and contain barriers for farm use including poor quality soils and lack of irrigation. The soil study produced by Mr. Gallagher focuses solely on the land within the subject property and the Applicant has provided responses indicating the subject property is not necessary to permit farm practices undertaken on adjacent and nearby lands. Staff requests the Hearings Officer make specific findings on this issue, in part based on the Applicant's responses to OAR 660-033-0020(1), above.

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

FINDING: The Applicant-submitted evidence showing that the subject property is not suitable for farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands. The ownership of the subject property is not used to determine whether the parcel is "agricultural land."

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

the capability of the land by a professional soil classifier who is chosen by the person, using the process described in OAR 660-033-0045.

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

Attached as Exhibit 5 is a more detailed agricultural soil assessment related to the NRCS land capability classification system conducted by Andy Gallagher, a Certified Professional Soil Scientist authorized by the Department of Land Conservation and Development (DLCD).

The soils assessment prepared by Mr. Gallagher provides more detailed soils information than contained on the Web Soil Survey operated by the NRCS, which provides general soils data at a scale generally too small for detailed land use planning and decision making. Mr. Gallagher's soils assessment report provides a high intensity Order-1 soil survey and soils assessment – a detailed and accurate soils assessment on the subject property based on numerous soil samples – to determine if the subject property is "agricultural land" within the meaning of OAR 660-033-020. Mr. Gallagher's Order-1 soil survey is included as evidence in the application to assist the County in making a better determination of whether the subject property qualifies as "agricultural land."

As explained in Mr. Gallagher's report, the NRCS soil map of the subject property shows three soil mapping units, 38B Deskamp-Gosney complex, 0 to 8 percent slopes, 58C Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes, and 36B Deskamp loamy sand, 3 to 8 percent slopes. The more detailed Order-1 survey conducted by Mr. Gallagher included six soil borings and 43 soil observations. Mr. Gallagher's soil observations included 24 soil test pits and many observations of rock outcrops and steep slopes throughout the subject property. The results of the previous and revised soils mapping units with land capacity class are provided in the Table 1A below from Mr. Gallagher's report:

Table 1A: Lot 200. PREVIOUS AND REVISED SOIL MAPPING UNITS WITH LAND CAPABILITY CLASS.

Previous Map Symbol	Revised Map Symbol	Soil Series Name	Capability Class	Previous Map		Revised Map	
				Ac	%-	Ac	%-
36B	Dk	Deskamp	3 -irrigated 6 -nonirrigated	16.2	40.5	15.8	39.5
38B	--	Deskamp-Gosney complex,	6 and 7	23.7	59.3	0	0
58C	--	Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes	6, 7 and 8	0.14	0.2	0	0
--	GR	Gosney-Rock Outcrop Complex	7 and 8	0	0	23.4	58.5
--	HM	Homestead, buildings, septic field and yard	Not rated	0	0	0.8	2

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

Based on the findings and analysis of the Order-1 soil survey and soil assessment, Mr. Gallagher made the following summary and conclusions in determining whether the subject property is agricultural land:

Soils were remapped in a high intensity (Order-1) soil survey on a 40 acre parcel (Lot 200) that is currently zoned EFU. Previously this area was mapped as two soil map units, one that included soils that ranged from Land Capability Class 3 irrigated to Class 8, and the other that was Class 3 irrigated and Class 6 non-irrigated.

In the revised Order-1 soil mapping, the Deskamp soils (Class 3 irrigated and 6 nonirrigated) are mapped as a consociation and make up 39.5 percent of the parcel. The Gosney soils along with Very Shallow soils and rock outcrops are mapped as the Gosney-Rock Outcrop Complex because all three components of the complex are Capability Class 7 or 8. This complex makes up 58.5 percent of the parcel. The homesite and surrounding yard, outbuildings, septic drain field make up about 2 percent of the parcel and are not rated for Land Capability Class. Based upon the findings of this Order-1 soil survey, the subject parcel is predominantly Class 7 and 8 soils and therefore is not "agricultural land" within the meaning of OAR 660-033-0020(1)(a)(A).

The soil mapping and on-site studies also show the subject property is not agricultural land within the meaning of OAR 660-033-0020(1)(b) as it is not adjacent to or intermingled with land in capability classes 1-6 within a farm unit. The class 3 irrigated and 6 non irrigated soils on the subject property are not known to have been farmed or utilized in conjunction with any farming operation in the past. These soil units exist in small pockets interspersed with steep rocky slopes and rocky shallow soils creating severe limitations for any agricultural use either alone or in conjunction with other lands.

As previously discussed, the State's agricultural land rules, OAR 660-033-0030, allow the county to rely on the more detailed soil capability analysis prepared by Mr. Gallagher. The applicant has submitted the soils assessment to DLCD for review of the soils assessment and will submit the certification as a condition of approval. Based on the Order-1 soils report, the subject property is not "agricultural land."

Mr. Gallagher's soil study concludes that the subject property contains 58 percent Class 7 and 8 soils. The submitted soil study prepared by Mr. Gallagher is accompanied in the submitted application materials by correspondence from the Department of Land Conservation and Development (DLCD). The DLCD correspondence confirms that Mr. Gallagher's prepared soil study is complete and consistent with the reporting requirements for agricultural soils capability as dictated by DLCD. Based on Mr. Gallagher's qualifications as a certified Soil Scientist and Soil Classifier, staff finds the submitted soil study to be definitive and accurate in terms of site-specific soil information for the subject property. Staff requests the Hearings Officer make specific findings on this issue.

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

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

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

FINDING: The Applicant submitted a soil study by Mr. Gallagher of Red Hill Soils dated September 26, 2022. The soils study was submitted following the ORS 215.211 effective date. The Applicant submitted to the record an acknowledgement from Hilary Foote, Farm/Forest Specialist with the DLCD, dated October 27, 2022, that the soil study is complete and consistent with DLCD's reporting requirements. Staff finds this criterion to be met based on the submitted soil study and confirmation of completeness and consistency from DLCD.

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

FINDING: The Applicant has submitted for DLCD's certification of its soils analysis, attached as Exhibit 5, and has complied with the soils analysis requirements of OAR 660-033-0045 in order to obtain that certification. DLCD's certification establishes compliance with OAR 660-033-0045 and will be submitted as soon as it is received.

DIVISION 12, TRANSPORTATION PLANNING

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

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

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

FINDING: This above language is applicable to the proposal because it involves an amendment to an acknowledged comprehensive plan. The proposed plan amendment would change the designation of the subject property from AG to RREA and change the zone from EFU to MUA-10. The Applicant is not proposing any land use development of the properties at this time.

As referenced in the agency comments section in the Basic Findings section above, the Senior Transportation Planner for Deschutes County requested additional information to clarify the conclusions provided in the traffic study. The Applicant submitted an updated report from Joe Bessman, PE of Transight Consulting, LLC dated January 3, 2023, to address trip distribution, traffic volumes, and Transportation Planning Rule (TPR) criteria. The updates were reviewed by the Senior Transportation Planner who indicated his comments were satisfied with the amended report. Mr. Bessman includes the following conclusions in the traffic impact analysis dated January 3, 2023:

- *Rezoning of the 40-acre property from EFU-TRB to MUA provides nearly identical potential impacts as the existing zoning, with the potential for a reduction in weekday daily and weekday p.m. peak hour trips, even with inclusion of the conditionally allowed uses within the MUA zoning.*
- *With a comparative assessment of outright allowable uses the rezone reduces the trip generation of the property in comparison to what could be built within the EFU zoning.*
- *The lack of a change in trip generation potential trip generation potential between reasonable build-out scenarios does not meet Deschutes County, ODOT, or City of Bend thresholds of significance at any nearby locations.*
- *Comparison of the maximum outright development in the MUA zoning to the single existing home would only show seven additional weekday p.m. peak hour trips and 66 additional weekday daily trips.*

- *Operational analysis shows that the Stevens Road and Ward Road corridors remain within Deschutes County's performance thresholds using either the adopted 2030 TSP or values within the pending 2040 TSP Update.*

Based on the County Senior Transportation Planner's comments and the traffic study from Transight Consulting, LLC, staff finds compliance with the Transportation Planning Rule has been effectively demonstrated. Based on the revised traffic study, staff believes that the proposed plan amendment and zone change will be consistent with the identified function, capacity, and performance standards of the County's transportation facilities in the area. Staff asks the Hearings Officer to make specific findings related to these criteria.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

FINDING: The Statewide Planning Goals are outlined below in the Applicant's burden of proof:

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

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

Goal 3, Agricultural Lands. *The applicant has shown that the subject property is not agricultural land because it is comprised predominantly of Class 7 and 8 soils that are not suitable for farm use. Therefore, the proposal is consistent with Goal 3.*

Goal 4, Forest Lands. *Goal 4 is not applicable because the subject property does not include any lands that are zoned for, or that support, forest uses. Forest land is defined by OAR 660-005-0010 as lands suitable for commercial forest use protection under Goal 4, which are identified using NCRS soil survey maps to determine average annual wood fiber production figures. The NCRS maps for the subject property map it with soil mapping units 36B, 38B and 58C. The NCRS Soils Survey for the upper Deschutes River lists all soils mapped by its survey that are suitable for wood crop production in Table 8 (Exhibit 18). None of the soils mapped on the subject property are listed in Table 8 as suitable for wood crop production.*

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces. *The subject property does not contain any inventoried Goal 5 resources.*

Goal 6, Air, Water and Land Resources Quality. *The approval of this application will not impact the quality of the air, water, and land resources of the County. Any future development of the property would be subject to 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 entire Deschutes County, including the subject property, is located in a Wildfire Hazard Area. The subject property is 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 property 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 property is 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 does not apply to this application because the subject property is not designated as Goal 9 economic development land. In addition, the approval of this application will not adversely 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 property, will be converted from EFU to MUA-10 or RR-10 zoning and that these lands will help meet the need for rural housing. Approval of this application, therefore, is consistent with Goal 10 as implemented by the acknowledged Deschutes County comprehensive plan.*

Goal 11, Public Facilities and Services. *The approval of this application will have no adverse impact on the provision of public facilities and services to the subject site. Pacific Power has confirmed that it has the capacity to serve the subject property 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 property is located within 1 mile from the city limits of Bend. If the property is developed with additional 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 applicant's proposal does not involve property within an urban growth boundary and does not involve the urbanization of rural land. The MUA-10 zone is an acknowledged rural residential zoning district that limits the intensity and density of developments to rural levels. The compliance of this zone with Goal 14 was recently acknowledged when the County amended its comprehensive plan. The plan recognizes the fact*

that the MUA-10 and RR zones are the zones that will be applied to lands designated Rural Residential Exception Areas.

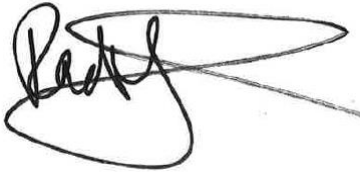
Goals 15 through 19. *These goals do not apply to land in Central Oregon.*

Staff generally accepts the Applicant's responses and finds compliance with the applicable Statewide Planning Goals has been effectively demonstrated. Staff finds the overall proposal appears to comply with the applicable Statewide Planning Goals for the purposes of this review.

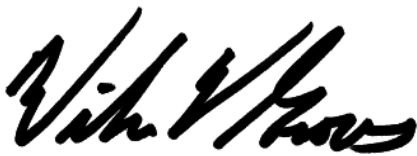
IV. CONCLUSION & RECOMMENDATION

Staff requests the Hearings Officer determine if the Applicant has met the burden of proof necessary to justify changing the Plan Designation from Agriculture to Rural Residential Exception Area and Zoning of the subject property from Exclusive Farm Use to Multiple Use Agricultural - 10 Acre Minimum through effectively demonstrating compliance with the applicable criteria of DCC Title 18 (the Deschutes County Zoning Ordinance), the Deschutes County Comprehensive Plan, and applicable sections of OAR and ORS.

DESCHUTES COUNTY PLANNING DIVISION



Written by: Rachel Vickers, Associate Planner



Reviewed by: Will Groves, Planning Manager