

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

FILE NUMBER: 247-21-001043-PA, 247-21-001044-ZC

HEARING: April 19, 2022, 6:00 p.m.
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

**SUBJECT PROPERTY/
OWNER:**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412280000100
Account: 163920
Situs Address: 10315 NW COYNER AVE, REDMOND, OR
97756

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412280000200
Account: 250543
Situs Address: 10325 NW COYNER AVE, REDMOND, OR
97756

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412280000300
Account: 124845
Situs Address: 10311 NW COYNER AVE, REDMOND, OR
97756

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 141228D000101
Account: 273062
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000300
Account: 276793
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000400
Account: 276794
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000500
Account: 276791
Situs Address: **NO SITUS ADDRESS**

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000600
Account: 124846
Situs Address: 70000 BUCKHORN RD, TERREBONNE, OR
97760

Mailing Name: EDEN CENTRAL PROPERTIES LLC
Map and Taxlot: 1412210000700
Account: 276792
Situs Address: **NO SITUS ADDRESS**

APPLICANT: 710 Properties, LLC
PO Box 1345
Sisters, OR 97759

ATTORNEYS FOR APPLICANT: Liz Fancher
2464 NW Sacagawea Lane
Bend, Oregon 97703

J. Kenneth Katzaroff
Schwabe Williamson & Wyatt
1420 5th Avenue, Suite 3400
Seattle, WA 98101

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 – Terrebonne subzone (EFU-TE) to Rural Residential (RR-10).

HEARINGS OFFICER: Stephanie Marshall

STAFF CONTACT: Haleigh King, Associate Planner
Phone: 541-383-6710
Email: Haleigh.King@deschutes.org

RECORD: Record items can be viewed and downloaded from:
<https://www.deschutes.org/cd/page/247-21-001043-pa-and-247->

RECORD CLOSED: May 3, 2022

I. STANDARDS AND APPLICABLE CRITERIA

Title 18 of the Deschutes County Code, the County Zoning Ordinance:

- Chapter 18.04, Title, Purpose, and Definitions
- Chapter 18.16, Exclusive Farm Use Zones (EFU)
- Chapter 18.60, Rural Residential Zone (RR-10)
- Chapter 18.113, Destination Resorts Combining Zone (DR)
- 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. FINDINGS OF FACT

A. 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 247-21-000400-PA, 401-ZC 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. The Hearings Officer adheres to this ruling and finds this criterion does not apply.

B. SITE DESCRIPTION: The subject property encompasses approximately 710.5 acres and includes nine tax lots described below (together hereafter referred to as the “subject property”):

Map and Tax Lot	Situs Address	Area (acres)
1412280000100	10315 NW COYNER AVE, REDMOND, OR 97756	±149.78
1412280000200	10325 NW COYNER AVE, REDMOND, OR 97756	±150.09
1412280000300	10311 NW COYNER AVE, REDMOND, OR 97756	±120.6
141228D000101	NO SITUS ADDRESS	±8.66
1412210000300	NO SITUS ADDRESS	±101.68
1412210000400	NO SITUS ADDRESS	±9.47
1412210000500	NO SITUS ADDRESS	±4.54
1412210000600	70000 BUCKHORN RD, TERREBONNE, OR 97760	±163.87
1412210000700	NO SITUS ADDRESS	±1.79

The subject property is undeveloped except for one tax lot (10325 NW Coyner Avenue), which is developed with a nonfarm dwelling (County Land Use File #CU-05-103). Two other lots of record have valid nonfarm dwelling approvals. Access to the property is provided at the western terminus of NW Coyner Avenue, a County-maintained rural local roadway, and the northern terminus of NW 103rd Street, a County-maintained rural local roadway.

A majority of the property sits on a plateau running from the southwest to the northeast of the subject property boundary. Topography is varied with portions of lava rimrock present along the west and northwest edges with steep to very steep slopes below. Vegetation is typical of the high desert and includes juniper trees, sage brush, rabbit brush, and bunch grasses. The Applicant emphasizes the steep topographical decline on the property, the fact that there is “lava rock all over the property,” and “sparse ground cover and juniper.”

The subject property does not have water rights and is not currently being farmed or irrigated in conjunction with farm use. There is no known history of the property having had irrigation rights. There is no known history of agriculture or farm use, as defined in ORS 215.203 on the subject

property.¹ According to the Deschutes County Assessor's office, only one tax lot within the project area, Assessor's Map 14-12-28, Tax Lot 300, is currently receiving farm tax deferral, but does not appear to be engaged in farm use. The record does not include any evidence the subject property is engaged, or has ever been engaged, in farm use.

The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies six soil complex units on the property: 63C, Holmzie-Searles complex, 106E, Redslide-Lickskillet complex, 101D, Redcliff-Lickskillet-Rock outcrop complex, 106D, Redslide-Lickskillet complex, 71A, Lafollette sandy loam, and 31B, Deschutes sandy loam. Per DCC 18.04, Soil complex 31A and 71A are considered high-value soils when irrigated.

As discussed in detail below in the Soils section, there is no irrigation on the subject property, except for water applied to landscaping associated with the nonfarm dwelling on Tax Lot 301. A soil study conducted on the property determined the subject property contains approximately 71 percent Land Capability Class 7 and 8 nonirrigated soils, including stony shallow soils over bedrock, more characteristic of the Lickskillet series, along with significant rock outcrops. Where surface stoniness was not apparent, the soils were typically moderately deep with sandy loam textures throughout or with some loam textures in the subsurface, more consistent with the Statz series.

C. PROPOSAL: The Applicant requests approval of a Comprehensive Plan Map Amendment to change the designation of the subject property from an Agricultural (AG) designation to a Rural Residential Exception Area (RREA) designation. The Applicant also requests approval of a corresponding Zoning Map Amendment to change the zoning of the subject property from Exclusive Farm Use (EFU) to Rural Residential – 10 Acre Minimum (RR10). The subject property is not within a Wildlife Area (WA) combining zone.

The Applicant requests Deschutes County to change the zoning and the plan designation and does not request a Statewide Planning Goal 3, Agricultural Land" exception because the Applicant submits the subject property does not qualify as "agricultural land" under Oregon Revised Statutes (ORS) or Oregon Administrative Rules (OAR) definitions. The Applicant submitted evidence that 71% of the property is comprised of Class VII and Class VIII soils and that the property could not be employed for "farm use," for the primary purpose of obtaining a profit in money.

The Applicant submitted with the application an Order 1 and 2 Soil Survey of the subject property, titled "Site-Specific Soil Survey of Property Located at or Near 10325 Coyner Avenue, West of Redmond in Deschutes County, Oregon" dated June 22, 2021, and a supplemental addendum titled "Response – Eden Soils Report" dated January 13, 2022 (together hereafter referred to as the "Soil Study") prepared by soil scientist Brian T. Rabe, CPSS, WWSS of Valley Science and Engineering. The Applicant also submitted a traffic impact analysis prepared by Christopher M. Clemow, PE, PTOE titled "710 Properties Plan Amendment and Zone Change – Deschutes County, Oregon" dated November 12, 2021 and revised on January 17, 2022, hereinafter referred to as "Traffic Study." (Applicant's Exhibit S) Additionally, the Applicant submitted an application form, a burden of proof

¹ The Hearings Officer finds that growing a lawn and/or watering a lawn with a domestic exempt well on a portion of the subject property is not "agriculture" and does not constitute "farm use" under the statutory definition in ORS 215.203.

statement,² and other supplemental materials, all of which are included in the record for the subject applications.

D. SOILS: According to Natural Resources Conservation Service (NRCS) maps of the area, the subject property contain six different soil types including 63C, Holmzie-Searles complex, 106E, Redslide-Licksillet complex, 101D, Redcliff-Licksillet-Rock outcrop complex, 106D, Redslide-Licksillet complex, 71A, Lafollette sandy loam, and 31B, Deschutes sandy loam.

The Applicant submitted a soil study report (Applicant's Exhibit F), which was prepared by a certified soils scientist and soil classifier that determined the subject property is comprised of soils that do not qualify as Agricultural Land⁴. The purpose of this soil study was to inventory and assess the soils on the subject property and to provide more detailed data on soil classifications and ratings than is contained in the NRCS soils maps. The NRCS soil map units identified on the properties are described below.

31B, Deschutes Sandy Loam, 0 to 8 percent slopes: This soil map unit predominantly consists of Deschutes soils on lava plains. Deschutes soils are typically moderately deep, well drained, and formed in volcanic ash. This soil map unit is expected to be composed of 85 percent Deschutes soils and similar inclusions, and 15 percent contrasting inclusions. This soil type is considered high-value soil when irrigated. Deschutes Sandy Loam has a rating of 6s when unirrigated. Approximately 0.01 percent of the subject property is made up of this soil type.

63C, Holmzie-Searles complex, 0 to 15 percent slopes: This soil map unit predominantly consists of Holmzie and Searles soils on lava plains and hills. Holmzie soils are typically moderately deep, well drained, and formed in ash over residuum on hills. Searles soils are typically moderately deep, well drained, and formed in ash on lava plains and hills. The primary difference between the Holmzie and Searles soils is depth and texture. This soil map unit represents areas where the soil characteristics vary in a pattern that was not practical to delineate separately at the scale of the published survey. This soil map unit is expected to be composed of 50 percent Holmzie soils and similar inclusions, and 35 percent Searles soils and similar inclusions, and 15 percent contrasting inclusions. This soil type is not considered high-value soil. The Holmzie and Searles soils have a rating of 6e when unirrigated. Approximately 74.4 percent of the subject property is made up of this soil type.

71A, Lafollette sandy loam, 0 to 3 percent slopes: This soil map unit predominantly consists of Lafollette soils on stream terraces. Lafollette soils are typically moderately deep to very gravelly old alluvium, well drained and formed in volcanic ash over old alluvium. This soil map unit is expected to be composed of 85 percent Lafollette soils and similar inclusions, and 15 percent contrasting inclusions. This soil type is considered high-value soil when irrigated. The Lafollette sandy loam soil has a rating of 6s when unirrigated. Approximately 1.6 percent of the subject property is made up of this soil type.

² The Applicant filed a revised burden of proof statement with its final legal argument on May 11, 2022.

³ As defined in OAR 660-033-0020, 660-033-0030.

⁴ As defined in OAR 660-033-0020, 660-033-0030.

101D, Redcliff-Lickskillet-Rock outcrop complex, 15 to 30 percent south slopes: This soil map unit predominantly consists of Redcliff and Lickskillet soils on hills and canyon sides. Redcliff soils are typically moderately deep, well drained, and formed in ash and colluvium. Lickskillet soils are typically shallow, well drained, and formed in colluvium. The primary difference between the Redcliff and Lickskillet soils is depth and coarse fragment content. This soil map unit represents areas where the soil depth varies in a pattern that was not practical to delineate separately at the scale of the published survey. This soil map unit is expected to be composed of 60 percent Redcliff soils and similar inclusions, 20 percent Lickskillet soils and similar inclusions, and 15 percent Rock outcrop, and 5 percent contrasting inclusions. This soil type is not considered high-value soil. The Redcliff soils have rating of 6e when unirrigated. The Lickskillet soils have rating of 7e when unirrigated. The rock outcrop has a rating of 8. Approximately 5 percent of the subject property is made up of this soil type.

106D, Redslide-Lickskillet complex, 15 to 30 percent north slopes: This soil map unit predominantly consists of Redslide and Lickskillet soils on hills and canyon sides. Redslide soils are typically moderately deep, well drained, and formed in ash and colluvium. Lickskillet soils are typically shallow, well drained, and formed in colluvium. The primary difference between the Redslide and Lickskillet soils is depth and coarse fragment content. This soil map unit represents areas where the soil depth varies in a pattern that was not practical to delineate separately at the scale of the published survey. This soil map unit is expected to be composed of 50 percent Redcliff soils and similar inclusions, 35 percent Lickskillet soils and similar inclusions, and 15 percent contrasting inclusions. This soil type is not considered high-value soil. The Redslide soils have rating of 6e when unirrigated. The Lickskillet soils have rating of 7e when unirrigated. Approximately 2.18 percent of the subject property is made up of this soil type.

106E, Redslide-Lickskillet complex, 30 to 50 percent north slopes: This soil map unit is similar to map unit 106D with steeper slopes. Redslide soils have a soil rating of 6e when unirrigated. Lickskillet soils have a rating of 7e when unirrigated. Approximately 16.7 percent of the subject property is made up of this soil type.

E. SURROUNDING LAND USES: The subject property is predominately surrounded by EFU-zoned lands with large-scale farm/agricultural uses apparent near the northwest boundary of the subject property. Per Deschutes County Assessor records, many abutting properties, also zoned EFU, are federally owned and appear to be undeveloped and unirrigated. These surrounding properties contain vegetation typical of the high desert, including juniper and sagebrush, similar to the subject property.

There are existing properties developed with residential uses near the southeastern boundary of the subject property and larger scale farm uses to the east along NW Coyner Avenue. There is property zoned Rural Residential-10 Acre Minimum (RR-10) to the northeast of the subject property containing large-lot rural residential uses within the Lower Bridge Estates Subdivision. All properties on the south side of NW Coyner Avenue have been developed or approved for development with nonfarm dwellings. Two farm and five nonfarm parcels adjoin the north side of this part of NW Coyner Avenue.

The adjacent properties are outlined below in further detail:

North: The northernmost boundary of the subject property abuts land zoned RR-10 and EFU. The property zoned RR-10 is part of the Lower Bridge Estates residential subdivision platted in 1981. Abutting property to the northeast is ±80-acre property zoned EFU and appears to be unirrigated and undeveloped. An EFU-zoned property to the south of the NW Lower Bridge Way and NW Teater Avenue intersection contains a non-farm dwelling (Assessor's Map 14-12-00, Tax Lot 1506). Nearby property to the north also includes a former surface mine zoned RR-10 on the north side of NW Lower Bridge Way, west of the Deschutes River. The adjacent property to the north/northwest is a 193.52-acre EFU-zoned property owned by Volwood Farms, LLC. The property contains irrigated pivot fields and appears to be part of a larger ±368-acre farm property also owned by Volwood Farms, LLC. According to the Applicant, the primary farm uses include alfalfa, orchard grass and hay.

West: Lands to the immediate west of the subject property are zoned EFU. Property to the west abutting the southern boundary of the project site includes a ±1,588-acre parcel (Assessor's Map 14-12-00, Tax Lot 3200) federally owned and managed by the Bureau of Land Management. This property appears to be unirrigated, is undeveloped, and contains vegetation similar to the subject property. Moving north along the subject property's western boundary, there are apparent large-scale farm uses occurring in the EFU Zone, within the Lower Bridge subzone. As discussed above, the Volwood Farms property is located to the west and contains larger-scale farm uses. The Lower Bridge area also includes an alpaca ranch (70397 Buckhorn Road) approximately 1.3 miles to the west. An existing vineyard and winery at 70450 NW Lower Valley Drive is approximately 1.5 miles west of the subject property's western boundary.

East: Tax Lot 700 (Assessors Map 14-12-22B), Tax Lot 500 (Assessor's Map 14-12-22C), and Tax Lot 200 (Assessors Map 14-12-27), totaling 320 acres are federally owned and abut the eastern boundary of the subject property. These lots are vacant and are zoned EFU. Property zoned RR-10 and platted as part of the Lower Bridge Estates is located further east beyond the abutting federal land along NW 93rd Street. One privately-owned tax lot zoned EFU, Tax Lot 301 (Assessor's Map 14-12-27), abuts the eastern boundary of the subject property and is developed with a nonfarm dwelling (247-18-000796-CU). There are some larger scale farm uses occurring further east, on the north side of NW Coyner Avenue at 9805 NW Coyner Avenue (Tax Lot 300, Assessor's Map 14-12-27) and 9293 NW Coyner Avenue (Tax Lot 400, Assessor's Map 14-12-27). These farms adjoin other irrigated and non-irrigated lands on their eastern boundary developed with single-family residences.

South: The land south of the subject property is zoned EFU and includes undeveloped open space federally owned and managed by BLM. There are three nonfarm dwellings and parcels zoned EFU on the north side of NW Coyner Avenue that do not appear to be engaged in farm use, 10305 NW Coyner Avenue, 10255 NW Coyner Avenue, and 10135 NW Coyner Avenue. These nonfarm parcels range in size from 19 to 28 acres. A 37.5-acre parcel at the southeast corner of NW Coyner and NW 103rd Street (10142 NW Coyner Avenue) is developed with a non-farm dwelling (CU-90-97) and appears to have portions of the property in agricultural use.

E. PUBLIC AGENCY COMMENTS: The Planning Division mailed notice of the applications on December 9, 2021, to several public agencies and received the following comments:

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the transmittal materials for 247-21-0001043-PA/1044-ZC to amend the Comprehensive Plan designation of nine abutting properties totaling approximately 710 acres from Agriculture (AG) to Rural Residential Exception Area (RREA) and change the zoning for those same properties from Exclusive Farm Use (EFU) to Rural Residential (RR-10). The properties are located at 10315, 10325, and 10311 NW Coyner Ave., 7000 Buckhorn Rd., and five properties with no assigned address. The NW Coyner properties are County Assessors Map 14-12-28, Tax Lots 100, 200, and 300; the Buckhorn Road property is 14-12-21, Tax Lot 600; and the properties with no assigned addresses are 14-12-28D, Tax Lot 101, 14-12-21, Tax Lot 300, 14-12-21, Tax Lot 400, 14-12-21, Tax Lot 500, and 14-12-21, Tax Lot 700.

The applicant's traffic study dated November 12, 2021, is problematic in two areas. First, staff does not agree with the trip distribution. While Redmond is the logical origin/destination, the applicant's traffic engineer offers no rationale why all trip would only use paved roads. The traffic study simply sends all traffic down the same route to OR 126. Staff finds this a flawed approach for several reasons. Rural residents are accustomed to using unpaved roads to reach their destinations. The traffic study does not offer any time savings of paved vs. unpaved to justify all traffic using the same route to access OR 126. Finally, the access to OR 126 requires a left turn onto the highway to continue to Redmond, a move which can have significant delays [due] to volumes on the highway. Second, the traffic analysis continually states due to the combination of low existing volumes on the affected roadway and the low traffic generation of the proposal, the cited intersections will meet relevant Deschutes County and Oregon Department of Transportation (ODOT) mobility standards. This statement does not indicate if that is for the current year or the planning horizon. While this is likely true, the traffic study provides no actual calculations to prove this statement. Thus the traffic study does not meet the requirements of DCC 18.116.310(G)(10). The lack of supporting calculations also means the traffic study does not comply with the Transportation Planning Rule (TPR) at OAR 660-012-0060(1)(c) to demonstrate the use will have no significant effect. The applicant's traffic engineer may have this information, but I did not see it in the application materials.

The property is proposed to directly access NW Coyner Road, a public road maintained by Deschutes County and functionally classified as a local road. The County [sic] the applicant will need to either provide a copy of a driveway permit approved by Deschutes County prior to development or be required obtain one as a condition of approval prior to development occurring 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 November 12, 2021, the Applicant provided an updated traffic study dated January 17, 2022.

In response to the updated traffic study, Mr. Russell provided the following comment, via email dated January 18, 2022:

I received an earlier draft of the revised TIA last week and reviewed it. They wanted my two cents before they submitted. The revised version provided the info I had requested. I've attached my e-mail from last week back to Chris Clemow, the applicant's traffic engineer.

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.

Department of State Lands, Lynne McAllister

It is unlikely that there are jurisdictional wetlands or waterways on the property based upon a review of wetland maps, the county soil survey and other available information.

A state permit will not be required for the proposed project because, based on the submitted site plan, the project avoids impacts to jurisdictional wetlands, waterways or other waters.

A state permit is required for 50 cubic yards or more of fill removal or other ground alteration in wetlands, below ordinary high water of waterways, within other waters of the state, or below highest measured tide.

There may be some minor headwater stream drainages on the property. Although jurisdictional features are unlikely and minor, the reason a permit will not be required for this project is because it is only an administrative action that does not involve placement of fill material or other physical ground disturbance. Therefore, a land use notice is not necessary.

Department of Land Conservation and Development, Agriculture and Fish and Wildlife,
Jon Jinings (Community Services Specialist, DLCD), James W. Johnson (Land Use and Water
Planning Coordinator, ODA), Corey Heath (Deschutes Watershed District Manager, ODFW)

The Departments of Land Conservation and Development (DLCD), Agriculture (ODA) and Fish and Wildlife (ODFW) would like to thank Deschutes County for the opportunity to review and comment on the land use proposal referenced above. Please accept this letter as the joint comments of our three Agencies. We understand the applicant is requesting the change the designation of 710 acres from Agriculture to Rural Residential Exception Area and change the zoning of the same property from Exclusive Farm Use Terrebonne Subzone to Rural Residential with a ten-acre minimum parcel size.

Most rural residential areas in Oregon have been designated through what is often referred to as an “exception” or the “exceptions process.” The exceptions process is designed to provide an opportunity to demonstrate that an existing settlement pattern has irrevocably committed an area to something other than commercial agriculture or forestry and, therefore, does not qualify for protection under Statewide Planning Goals 3 (Agricultural Lands) or 4 (Forest Lands). Please see OAR 660-004-0028. The most common type of exception areas are rural residential neighborhoods that include both existing residences, as well as the presence of supportive infrastructure and public services. Lands subject to an acknowledged exception must also show, among other things, that the subsequent zoning designation will not negatively impact nearby farming and forestry activities. Please see OAR 660-004-0018.

The applicant is not pursuing an exception. There is no existing settlement pattern on the subject property. Instead, they are seeking a determination that the property fails to satisfy the definitions of “Agricultural Land” and “Forest Land” found in relevant state law. This approach is often referred to as a “nonresource process” or “nonresource lands determination.”

We have separated our primary comments into three parts. Part 1 includes our responses to applicable Oregon Administrative Rules and Oregon Revised Statutes. Part 2 includes commentary on other issues. These issues may not constitute review criteria in relation to state law although they may have a bearing on whether local county provisions have been satisfied. Either way, we believe they are important and have chosen to include them here. Part 3 includes our recommended outcome.

Please enter these comments into the record for all hearings on the proposal.

Part 1: Oregon Administrative Rules and Oregon Revised Statutes

Definition of Agricultural Land

The applicant is requesting this change on the basis that the property does not qualify as “Agricultural Land” as defined in State law and is therefore not resource land. OAR 660-033-0020 defines Agricultural Land. The specific administrative rule language and our comments are included below:

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

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

State Agency Comments

The applicant has provided a report indicating that the subject property is predominantly comprised of Class VII soils. The State Agencies are not challenging this position. However, please note that “approval” of a soils report by DLCD does not equate to any agreement with the conclusions of the report.

We would also like to emphasize that soil type is only one indicator of whether a property qualifies for protection under Statewide Planning Goal 3. Tracts in Eastern Oregon that are predominantly Class VII soils may be a candidate for reconsideration, but Goal 3 protection may only be removed if they fail to satisfy the other important tests in this definition. Put another way, all tracts planned for Exclusive Farm Use that are determined undeserving of Goal 3 protection must be predominantly comprised of Class VII-VIII soils. However, not all tracts planned for Exclusive Farm Use that are predominantly comprised of Class VII-VIII soils are undeserving of Goal 3 protection.

(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

State Agency Comments

This test requires a detailed analysis of many different factors. Failure to satisfy individual factors does not mean that the subject property fails to qualify as Agricultural Land pursuant to Goal 3 and OAR 660- 0330-0020(1).

We have separated the various factors included in this administrative rule provision and included our comments below:

Farm use as defined in ORS 215.203(2)(a)

The definition of “farm use” at ORS 215.203(2)(a) is very broad and includes many different types of pursuits.⁵ Essentially any type of “agricultural or horticultural use or animal husbandry or any combination thereof” is included in this definition. Also included are “stabling and training equines” as well as “...the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission.” Furthermore, “farm use” as defined in this statute includes “the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use”

⁵ (2)(a) As used in this section, “farm use” means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. “Farm use” includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. “Farm use” also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows.

“Farm use” also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. “Farm use” includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection.

“Farm use” does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees or land described in ORS 321.267 (3) or 321.824 (3).

and “the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection.”

A determination that lands deserve protection under Goal 3 need not show that all of the activities described in ORS 215.203(2)(a) are available on a subject tract. A tract that is not suited for one type of farm use may be suited for another type of farm use. For example, a tract that is not suited for cultivated crop production may be well suited for livestock production and other aspects of animal husbandry. In addition to seasonal grazing requirements, commercial livestock operators also need areas for winter activities such as feeding and hay storage, calving or lambing grounds and locations for males (e.g., bulls and rams) that need to be separated from the main herd until breeding season occurs. Such lands may also be sufficiently capable of supporting, among other things, the boarding and training of horses, raising poultry, honeybees or even ungulate species like elk or raising game birds such as pheasants, chuckar, or quail.

Having observed the subject property, we believe that it is capable of any number of activities included in the definition of “farm use” at ORS 215.203(2)(a).

Soil fertility

Soil fertility can be an important factor in commercial agricultural operations. However, the presence of productive soils is not always necessary. Many types of farm uses are not dependent on specific soil types and others tend to benefit from less productive soils. Feedlots, whether commercial or personal, are frequently located on lands with low soil fertility. Having dryland areas to store and maintain equipment when not in use (also a farm use under ORS 215.203(2)(a)) can be very important for farming and ranching operations. Simply stated, having access to areas with low soil fertility can be an advantage for commercial agriculture operations because it allows for necessary activities that could otherwise interfere with the management of areas with more productive soils.

Having observed the subject property, we believe that it has soil fertility sufficient to support any number of activities included in the definition of “farm use” at ORS 215.203(2)(a).

Suitability for grazing

The application presents information regarding the capacity for grazing on the subject tract.

The identified number of Animal Unit Months (AUM) are, more or less, in line with our own assessment and represent average rangeland pastures found in central Oregon. However, we believe the value of this grazing capacity has been understated. Lands such as this have been successfully managed for livestock grazing since cattle and sheep were introduced to the area.

According to the USDA NRCS Rangeland Analysis Platform and the NRCS Heatmap,⁶ the subject property appears to be a perfectly average piece of native rangeland for the area. The NRCS Heatmap provides a spatial map of the biomass production over the entire area and demonstrates the consistency of the land use for the surrounding landscape. If the subject land isn't productive agricultural land, then one would have to believe that no piece of Deschutes County rangeland in the larger area is. Overall, the subject area is in good shape, it has a little bit of annual grass but - sub 10% for shrub and annual grass cover. It looks like over time it averages about a 500lbs/acre in the perennial biomass production, with it having wet year production of 700lbs/acre and drought years and this year with several years of drought, it may get as low as 300lbs/acre. Grazing efficiency is generally around 30% - 100-210 of grass tonnage is what livestock will actually eat. That means that its' AUM/acre ranges from 1 AUM to 10 acres in bad years and 1 to 5 in good years and in most years it's 1 to 6 or 7. This equates to this area being the productive norm for native rangeland in the region.

According to the application, the property is capable of supporting between eight (8) and 15 cow/calf pairs for a year (40-75 sheep or goats). While this may not be technically mistaken, it does not account for customary grazing practices that utilize a five to six month grazing season. In other words, a better metric would be to recognize that the property would be capable of supporting 16-30 cow/calf pairs or an equivalent number of sheep or goats for a typical grazing season, which would be much more worthwhile to a commercial operation, particularly when managed in conjunction with other lands. Another scenario would be to graze a much higher number of livestock for a more limited duration of time. For instance, having a location available between the time cattle are taken off winter pasture and the time they are hauled to summer range can be an important factor in commercial livestock operations.

Ranchers commonly transport livestock significant distances to pasture. Assuming that the property would need to be independently relied on or used by adjacent or nearby operations is not in keeping with the nature of livestock management largely practiced in this region.

Having observed the subject property, we believe that it is sufficiently suitable for grazing.

Climatic Conditions

The subject property is in the rain shadow of the Cascade Mountain Range on the edge of the Oregon High Desert. In other words, the area is dry with cold winters and the potential for frost nearly every month. These climatic conditions are not ideal for commercial agriculture. However, commercial agriculture is active in similar settings in the local area and throughout the mountain and intermountain regions of the United States. For example, the hay and cattle producing regions of Ft. Rock and Christmas Valley share similar precipitation constraints and are located at an elevation of 4,699 and 4,318 feet above sea level, respectively, compared to an elevation of 2,871 at Terrebonne, Oregon. The hay and

⁶ <https://rangelands.app/>
247-21-001043-PA/1044-ZC

cattle producing region of the Big Hole basin near Wisdom, Montana sits at an elevation of over 6,000 feet above sea level.

Having observed the subject property, we believe the relevant climatic conditions are suitable to sustain commercial agriculture.

Existing and future availability of water for irrigation purposes

Irrigation water is critical for irrigated agriculture. However, many types of farm uses are not dependent on irrigation.

Having observed the subject property, we do not believe that water for irrigation purposes is necessary to conduct many of the activities included in the definition of “farm use” at ORS 215.203(2)(a).

Existing land use patterns

The existing land use pattern of the area is unmistakably rural and characterized by farming and ranching activities.

Having observed the subject property, we do not believe that the introduction of rural residential development would be consistent with the existing land use pattern.

Technology and energy inputs required

Every endeavor, agriculture or otherwise, requires technological and energy inputs. As with anything else, high levels of financial investments for agricultural purposes may not make economic sense in every instance. Fortunately, investments in farm use activities may be tailored to fit the circumstances. Lands where installing a series of irrigation pivots would not lead to a suitable return may be well positioned for the development of an indoor riding area. Developing a confined animal feeding operation is likely to incur similar capital costs wherever it is sited.

This proposed application raises several examples of potential costs and asserts that they would have a prohibitive result. We agree that some investments may not be worthwhile on the subject property. However, as previously mentioned, many types of farm uses have similar capital costs wherever they may be established. Furthermore, we believe that many other aspects of technology and energy inputs may be suitably mitigated. For instance, this particular tract is not included in a livestock district, so a livestock operator is not legally required to fence their animals in. Instead, it is incumbent upon other properties to fence them out. If limiting animal movement to the subject property is desired, completing fencing around the perimeter of the tract and cross-fencing the interior for better forage utilization can be accomplished using electric fence, or “hot-wire”, which is much more affordable than traditional fencing products. While the application confirms that power is available to the subject property, a solar electric charger may also be used for powering miles of electric fence. Trucking water to livestock in dryland pastures is not uncommon in this part

of country if a well is not available or convenient and portable panels can be used for working pens rather than having to construct such facilities if they are not present.

We do not believe the cost of labor to be an impediment. Folding the subject property into an existing operation is unlikely to require hiring additional help, neither would managing a grazing operation comprised only of the subject project, unless of course the owner or lease holder is unable to do the work. Costs of additional labor needed to establish other types of stand-alone operations, including but not limited to, boarding, or training horses, raising game birds, or a confined animal feeding operation would be supported by that use.

Having observed the subject property, we do not believe that technological or energy inputs present an overwhelming barrier to conducting farm uses described at ORS 215.203(2)(a).

Accepted farming practices

Commercial farming and ranching operations are often not confined to one particular parcel or tract. Instead, they are regularly comprised of a combination of owned and leased land. These lands may be in close proximity, or they may be dozens (or more) miles apart. The fact that a single property may struggle to be managed profitably by itself does not mean that it does not have important value when managed in conjunction with other lands.

We believe that all the farm uses described above constitute accepted farming practices, many which are currently practiced in the surrounding area.

Having observed the subject property, we believe that it is entirely available for accepted farming practices.

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

State Agency Comments

There is little discussion that we found in the information provided in support of the plan amendment that adequately discusses impacts to area farm operations. The discussion provided by the applicant focuses primarily on an assertion that any subsequent development of the subject property (because of the proposed plan amendment and rezone) would not adversely impact surrounding farming and ranching operations primarily because the property is separated by topography that would provide adequate buffers. This conclusion is not supported by any comprehensive evaluation of the farming and ranching practices that are associated with existing and potential future farm uses in the surrounding area. Without an adequate analysis of the impact on adjacent or nearby agricultural lands, there are many questions that have not been evaluated. For example, what would the cumulative impacts of additional residential water use be to water supply for area irrigated agriculture in the region? Unlike applications for irrigation use,

residential wells are exempt uses and thus there would be no evaluation for injury to other water users in the area. What would be the traffic implications? What would the siting of more dwellings do to the ability to utilize certain agricultural practices? Would the expansion of residential development in the area provide greater opportunities for trespass from adjacent properties onto area farming operations?

(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;

State Agency Comments

It does not appear that the subject property is currently within a farm unit that includes lands in a capability class I-VI. This observation is not meant to dismiss the fact that the property's status in this regard could change in the future.

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

State Agency Comments

We agree that the subject property is not within an acknowledged urban growth boundary or and acknowledged exception area for Goal 3 or 4.

State Agency Agricultural Land Definition Conclusion

Agricultural Land includes all three categories of land described above as part of OAR 660-033-0020(1)(a)(A)-(C). We find that categories (B) and (C) are insufficiently addressed by the burden of proof included with the application. Based on the current application materials, we disagree with findings that asserts the property is not Agricultural Land. We find the subject property is characteristic in soils, terrain, hydrology, and size to many central Oregon properties that have been historically or are currently used for livestock and grazing operations. Utilizing several non-contiguous properties to meet the needs of livestock over the course of a typical year is an accepted farming practice across much of Oregon. To assume that a property of this nature could not be used as standalone or as part of a nearby livestock operation by the current or future landowner or lessee would have significant consequences to existing agriculture operations either by reducing the amount of land available for legitimate agricultural practices or through the introduction of conflicting uses.

We also point to Agricultural Land Policy (ORS 215.243) direction provided to the State from the Legislative Assembly upon passage of Oregon Land Use Bill, Senate Bill 100 and its' companion Senate Bill 101; as important considerations that must be addressed prior to the redesignation or rezoning of any Agriculture Land. ORS 215.243 states:

The Legislative Assembly finds and declares that:

(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.

(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.

(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.

(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones. [1973 c.503 §1]

Finally, we would like to offer a response to this statement included in the application materials:

“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 T, only 16.03% of farm operators achieved a net profit from farming (238 of 1 484 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 U. The vast majority of farms in Deschutes County have soils that are superior to those found on the subject property. As farming on those 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.”

First, this statement assumes that the subject land would be put into farm use as a single, separate unit. As previously discussed, it is very common for farming and ranching operations to be comprised of multiple, constituent parcels that are operated as a single farm/ranch operation.

Second, the Census of Agriculture numbers provided do not provide the entire context and nature of Deschutes County agriculture. It is important to note that the Census of Agriculture defines a farm as “any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold during the census year.”⁷ Thus, the total number of farms in any given Census statistic can be skewed by a large number of small farms that might better be

⁷ 2017 Census of Agriculture, Oregon State and County Data, Volume 1, Geographic Area Series 37, USDA National Agricultural Statistics Service, page VIII Introduction.

characterized as hobby or lifestyle farms. In the case of Deschutes County, the numbers quoted by the applicant may be better considered upon recognizing that of the 1484 farms in the county, 92.7% (1376) are less than 100-acres in size. These same farms constitute only 19.59% (26,367 acres) of the total land area of land in farms. Taken further, 92.1% (1268) of these farms are less than 50-acres in size and comprise but 13.8% (18,531 acres).⁸ The character of Deschutes County “commercial” agriculture is perhaps better considered by looking at the larger footprint of land in farms which is better described as large operations many of which operate using constituent parcels, many times not contiguous to each other.

Definition of Forest Land

The Applicant also asserts that the subject property is not Forest Land. OAR 660-06-0005 defines Forest Lands, it states:

(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.

OAR 660-006-0010(2) states:

(2) Where a plan amendment is proposed:

(a) Lands suitable for commercial forest uses shall be identified using a mapping of average annual wood production capability by cubic foot per acre (cf/ac) as reported by the USDA Natural Resources Conservation Service. Where NRCS data are not available or are shown to be inaccurate, other site productivity data may be used to identify forest land, in the following order of priority:

(A) Oregon Department of Revenue western Oregon site class maps;

(B) USDA Forest Service plant association guides; or

(C) Other information determined by the State Forester to be of comparable quality.

(b) Where data of comparable quality under paragraphs (2)(a)(A) through (C) are not available or are shown to be inaccurate, an alternative method for determining productivity may be used as described in the Oregon Department of Forestry’s Technical Bulletin entitled “Land Use Planning Notes, Number 3 April 1998, Updated for Clarity April 2010.”

⁸ 2017 Census of Agriculture, Oregon State and County Data, Volume 1, Geographic Area Series 37, USDA National Agricultural Statistics Service, Table 8.

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

State Agency Comments

We find the burden of proof does not satisfactorily address OAR 660-06-0005(7)(a) because it does not contain the analysis required by OAR 660-06-0010(2) addressing the wood production capabilities of the property. As a result, it does not verify whether or not it is suitable for commercial forest uses.

Statewide Planning Goal 14 (Urbanization)

Goal 14 does not allow urban uses to be placed on rural lands.

State Agency Comments

The application proposes to include the subject property in an RR-10, Rural Residential Zoning district. It is unclear to us whether such an arrangement is set forth in the County Comprehensive Plan. If so, the issue is settled in this case and our Goal 14 comments would be addressed.

If not, the applicant must demonstrate that the 10-acre minimum parcel size allowed by the RR-10 Zone is compliant with Goal 14. We have regularly expressed concerns that introducing a 10-acre settlement pattern into a rural area that is devoid of development is not consistent with the policies of Goal 14.

Part 2: Other Concerns and Observations

Wildlife Habitat Concerns

It is the policy of the state to protect and enhance Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations (ORS 496.012).

This proposal is within ODFW designated biological mule deer and elk winter range,⁹ which are considered Habitat Category 2 per the ODFW Fish and Wildlife Habitat Mitigation Policy.¹⁰ Habitat Category 2 is essential habitat for a wildlife species, population, or unique assemblage of species and is limited either on a physiographic province or site-specific basis depending on the individual species, population or unique assemblage. Winter habitat includes areas identified and mapped as providing essential and limited function and values (e.g., thermal cover, security from predation and harassment, forage quantity, adequate nutritional quality, escape from disturbance) for deer and elk from December through April. Winter survival and subsequent reproduction of big game is the primary limiting factor influencing species abundance and distribution in Oregon. Winter habitats vary in area, elevation, aspect, precipitation, and vegetation association all

⁹ <https://nrimp.dfw.state.or.us/DataClearinghouse/default.aspx?p=202&XMLname=885.xml>

¹⁰ https://www.dfw.state.or.us/lands/mitigation_policy.asp

influencing the relative quantity and quality of available habitat on both an annual and seasonal basis.

While this property is not currently designated as an acknowledged Goal 5 resource for wildlife habitat in the Deschutes County Comprehensive Plan, it is within the biological big game habitat areas ODFW recommended be included as part of the proposed Goal 5 Wildlife Inventory Update process in 2021.¹¹ ODFW relies on local and state compliance with the land use planning goals to consider natural resources and protect large parcel sizes necessary for habitat connectivity and resource land. The relatively open, undeveloped parcel that is often associated with a resource designated zoning such as Agricultural and EFU, provides valuable habitat for mule deer, elk, and other wildlife species. The open space inherently provided by the land use protections under those designations is not only important in maintaining the farming and ranching practices and rural characteristics of the land, but also preserving the wildlife habitat function and values that the land is providing.

The proposed plan amendment and zone change would allow for the property to be divided into 10 acre lots. Development, including residential development, within big game habitat can result in individual and cumulative impacts. Residential development conflicts with wildlife habitat because it results in the direct loss of habitat at the home site and the fragmentation of the remaining habitat by the structures and associated roads results in increased disturbance and loss of habitat function and values necessary for wildlife, such as fawning or calving areas.

Allowing the change in designation of the subject properties and rezoning to Rural Residential will open the possibility for future parceling and development of the land, resulting in habitat fragmentation, increased disturbance and a loss of important functions and values for wildlife life history needs. If that occurs, ODFW will not respond to any wildlife damage complaints within the development, due to the change in land use.

Water Availability Concerns

The state agencies are concerned with ongoing impacts to surface water and groundwater in the Deschutes basin. We have several primary concerns regarding potential impairment to fish and wildlife habitat from a new water use, the first being potential impact to surface flows necessary for fish and wildlife resources in the Deschutes River system (including a reduction in surface water quantity from groundwater pumping), and the second being the potential for an increase in water temperature as a result of flow reductions or impairment to cold water derived from seeps and springs. Seeps and springs provide unique habitat for a number of plant and animal species, including fish. Seep and spring flows, especially in the summer and fall, are typically cooler than the water flowing in the main stream, providing a natural relative constancy of water temperature. This cooler water provides thermal refuge for salmonids which thrive in cooler water.

We currently do not know if there are existing water rights for the subject property and if so, if they could be utilized for the proposed 10-acre lots intended for residential use. We recognize that

¹¹ <https://www.deschutes.org/cd/page/wildlife-inventory-update>

any new water use, unless exempt, must be appropriately permitted through the Oregon Water Resources Department (OWRD). However, the state relies on both OWRD and Deschutes County processes to ensure that new water use is mitigated in a manner that results in no net loss or net degradation of fish and wildlife habitat quantity and quality and potentially provides a net benefit to the resource. It is becoming increasingly difficult to obtain mitigation to offset impairment to water quality and quantity in the Deschutes basin, when required, due to ongoing declines in groundwater and streamflow in the area. Recent studies by the USGS have reported groundwater levels in the Redmond Area showing a modest and spatially variable decline in recent decades, about 25 ft since 1990, and 15 ft between 2000- 2016. Simulation of pumping 20 cfs from a hypothetical well east-northeast of Sisters and east of the Sisters fault zone shows declines in groundwater discharge not only in the Deschutes River between Lower Bridge and the gage near Culver, but also in the lower Crooked River and Opal Springs.¹²

Therefore, in the face of a changing climate and current and potential human impacts both regionally and in the vicinity of the proposed change in designation, we recommend any required mitigation through OWRD and County processes be carefully analyzed to ensure the intended ecological functions of mitigation are achievable and able to be maintained in perpetuity. We urge the County to consult with ODFW regarding any mitigation proposals and the likelihood of achieving mitigation goals, particularly under the framework of ODFW's Fish and Wildlife Habitat Mitigation Policy and ODFW's Climate and Ocean Change Policy.¹³

Wildfire

The existence of structures, particularly dwellings, can significantly alter fire control strategies and can increase the cost of wildfire protection by 50-95%.¹⁴ More than half of wildfires in the Northwest and more than 80% of wildfires in Northern California are human-caused.¹⁵ Additionally, the cost of the State of Oregon's catastrophic fire insurance policy has dramatically increased in the previous years and future availability is in jeopardy due to the recent escalation in wildfire fighting costs. Additional landscape fragmentation has the potential to exacerbate the costs and risks associated with wildfire.¹⁶

We appreciate Deschutes County's leadership on this issue and your participation in the conversations related to SB 762, the omnibus wildfire bill from the 2021 Legislative Session.

Planning and Zoning

The County Comprehensive Plan calls for the application of a Rural Residential Exception Area plan designation for lands successfully converted from an Agricultural plan designation. This is what the application proposes and we do not object. However, we would like to observe that

¹² Gannett, M.W., Lite, K.E., Jr., Risley, J.C., Pischel, E.M., and La Marche, J.L., 2017, Simulation of groundwater and surface-water flow in the upper Deschutes Basin, Oregon: U.S. Geological Survey Scientific Investigations Report 2017-5097, 68 p., <https://doi.org/10.3133/sir20175097>

¹³ https://www.dfw.state.or.us/climate_ocean_change/docs/plain_english_version.pdf

¹⁴ <http://headwaterseconomics.org/wphw/wp-content/uploads/fire-costs-background-report.pdf>

¹⁵ http://www.fs.fed.us/rm/pubs/rmrs_gtr299.pdf

¹⁶ https://tools.oregonexplorer.info/OE_HTMLViewer/index.html?viewer=wildfireplanning
247-21-001043-PA/1044-ZC

applying this plan designation to lands using the conversion pathway proposed by the application is confusing. Specifically, these lands are not “exception areas” as that term is commonly understood.

The same is true of applying an RR-10, Rural Residential Zoning District. We have already addressed the possibility of Goal 14 implications so we will not repeat them here. Instead, we would like to reiterate that these types of areas are not subject to an acknowledged exception and are viewed differently. For example, should the county choose to offer Accessory Dwelling Units (ADU) in the RR-10 zone pursuant to SB 391, this opportunity may not be extended to lands converted through a nonresource process.

Part 3: State Agency Recommendation

Thank you again for the opportunity to provide comments. We have concerns regarding the conversion of open rural lands to housing development. Much of the nonirrigated rural land in Deschutes County is similar to the subject property. Many of these areas provide essential functions and values to Deschutes County’s citizens which also benefit natural resources, such as open space, recreation, habitat and other environmental services. In addition, these lands are critical buffers to protect working farms and forests from conflicting uses. Many of these same areas are not appropriate for the encouragement of residential development. Remoteness, an absence of basic services and a susceptibility to natural hazards like wildland fire are all reasons why rural areas are not well suited to residential settlement even if they have little value for forestry or agricultural production.

Based on our review of the application materials and for the reasons expressed above, we believe that the subject property qualifies as resource land. It is our recommendation that the subject property retain an Exclusive Farm Use designation and not be converted to allow rural residential development. Please feel free to contact us if you have any questions.

The following agencies did not respond to the notice: Deschutes County Forester, Deschutes County Property Management, Deschutes County Road Department, Redmond City Planning, Redmond Fire and Rescue, Redmond School District 2, Redmond Public Works, Redmond Area Parks and Recreation District, District 11 Watermaster, Bureau of Land Management.

F. PUBLIC COMMENTS: The Planning Division mailed notice of the application to all property owners within 750 feet of the subject property on December 9, 2021. The Hearings Officer finds that the Applicant 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 December 9, 2021. At the public hearing, staff testified that Deschutes County received approximately one hundred (100) public comments on the application. At the public hearing on April 19, 2022, ten (10) members of the public testified in opposition to the applications.

Comments received in support of the applications reference the Applicant’s soil analysis, potential expansion of rural housing inventory, and protection from wildfire through better access and vegetation management as a basis for support. Commentators noted the steep cliffs and distance

from other farms, as well as the lack of irrigation rights and poor soils on the subject property.

Comments received in opposition cite concerns with traffic and emergency access impacts, availability of groundwater, compatibility with and preservation of agricultural land, and impacts to wildlife.

At the conclusion of the public hearing, the Hearings Officer left the record open for two (2) seven-day periods, closing on April 26, 2022 (new evidence) and May 3, 2022 (rebuttal evidence), and permitted the Applicant until May 10, 2022 to submit closing argument. Staff directed that submissions during the open record period be transmitted by 4:00 p.m. on the deadlines. Several submissions, from Nunzie Gould, Andrew Mulkey of 1000 Friends of Oregon and S. Gomes were submitted after the 4:00 p.m. April 26, 2022 deadline and thus were not timely. The Hearings Officer does not consider the untimely evidence and arguments in this Decision and Recommendation.

All public comments timely received are included in the record in their entirety and incorporated herein by reference.

Applicant Responses:

On April 8, 2022, the Applicant provided the following response to public comments received as of that date:

Inaccuracies in Opposition Comments

Ed Stabb, 12/13/2021 Letter

Mr. Stabb claims that his property at 9805 NW Coyner Avenue is contiguous to the subject property. In one part, it is close but not contiguous. The Stabb property is separated from the subject property by the “flagpole” part of a nonfarm parcel and nonfarm dwelling at 9307 NW Coyner Avenue that Mr. Stabb created (Parcel 2 of Partition Plat 2004-85). The “flagpole” part of nonfarm Parcel 2 runs along the west side of the main irrigated farm field on the Stabb property on land formerly irrigated by the property owner (per page 18, Decision MP-04-11/CU-04-42). Furthermore, the Stabb property is surrounded by nonfarm parcels on all sides.

Mr. Stabb’s description of properties in the Odin Valley along the west end of NW Coyner Avenue asserts that area is primarily agricultural. The following facts, however, show that the predominant parcel type along Coyner Avenue west of 91st Street (a length of approximately .75 miles) are not receiving farm tax deferral and are nonfarm parcels or parcels that are developed with nonfarm dwellings. Only two parcels are farm parcels that are farm tax deferred farm properties. In particular beginning at the west end of Coyner Avenue:

10305 NW Coyner Avenue (Witherill), PP 2015-15 nonfarm parcel created; 247-15-000107-CU/-000108-CU nonfarm dwelling (28.6 acres)

10255 NW Coyner Avenue (Bendix), PP 2004-101, nonfarm parcel created; CU-03-55 and CU-03-56 nonfarm dwelling (19.11 acres)
10142 NW Coyner Avenue (Buchanan), CU-95-11 nonfarm dwelling (37.51 acres)
10135 NW Coyner Avenue (Hayes), PP 2004-101, nonfarm parcel created; CU-03-55 and CU-03-56 nonfarm dwelling (19.65 acres)
9307 NW Coyner Avenue (Birklid), PP 2004-85, nonfarm parcel created; 247-18-000796-CU nonfarm dwelling (17.50 acres)
9600 NW Coyner Avenue (MT Crossing), PP 2006-40 non-irrigated parcel created (80 acres); 247-19-000375-CU nonfarm dwelling (80 acres)
9805 NW Coyner Avenue (Stabb), PP 2004-85, irrigated parcel created (in addition to nonfarm parcel); receives farm tax deferral (62.58 acres)
9299 NW Coyner Avenue (Nelson), PP 2005-25 nonfarm parcel created (10.21 acres); nonfarm dwelling approved but not built
9295 NW Coyner Avenue (Grossman), PP 2005-25 nonfarm parcel created (11.08 acres); nonfarm dwelling approved but not built
4691 91st Street (intersection Coyner and 91st)(Omlid), PP 2006-40 non-irrigated land division/nonfarm parcel (39.20 acres); 247-17-000220-CU nonfarm dwelling approved
9293 NW Coyner Avenue (Grossman), irrigated parcel created by PP-2005-25 (irrigated land division created two nonfarm parcels and one farm parcel)(185.06 acres)

Jason and Tammy Birklid, 12/13/2021 Letter

The Birkkids refer to their home as a “family farmhouse.” The dwelling was, however, approved by Deschutes County as a nonfarm dwelling on a non-irrigated parcel of land that was determined by Deschutes County to be unsuited for the production of farm crops and livestock.

The Birkkids and others repeat the same claim as Mr. Stabb (discussed above) re the character of the west end of NW Coyner Avenue. The evidence shows, however, that the primary parcel type and development in this area is a nonfarm dwelling parcel and nonfarm dwellings.

RR-10 Subdivisions

The Johnson properties, TL 200 and 300, Map 14-12-34D (parcels created in 2022 by PP 2022-10 as a farm and a nonfarm parcel) touch, at one point across a road a large area of land zoned RR-10 that includes the Kachina Acres and Odin Crest subdivisions where lots of about 5 acres in size are common. The property owned by opponent Kelsey Pereboom/Colter Bay Investments, LLC adjoins Kachin acres along the entire southern boundary of her property. Opponents Steele and the Elliots live in the RR-10 zoned Odin Crest subdivision.

Destination Resort Overlay Zoning of Subject Property

Under the current zoning, almost 250 acres of the subject property is zoned as eligible for development with a destination resort. The development of this area of the property as a

resort would have far greater impacts on the surrounding area than would development of the property allowed by the RR-10 zone.¹⁷

On May 3, 2022, the Applicant provided the following rebuttal to evidence and arguments presented during the open record period:

This letter constitutes the Applicant's second post-hearing record submittal (rebuttal period) and provides evidence to respond to evidence and arguments presented during the open record period. Unless otherwise denoted herein, previously defined terms have the same meaning.

I. Subject Property Information

*Ms. Lozito submitted past photographs of the Property that she claims to have paid for (presumably when she previously listed the house for sale). Ms. Lozito claims these photos show the Property can support grass growing. There is no date on these photographs, but they do show patchy areas of grass with significant yellowing, rocks, and patches. Importantly, Ms. Lozito's claim that the land can support this growth is easily disproven. By August of 2020, several months before the Applicant purchased the Property, the grass was gone and the area had reverted back to dusty and non-productive land. **Exhibit 84.**¹⁸*

*Mr. Jim McMullen asserted that the property is not within the Redmond Fire Service boundaries. That is incorrect; the Property is within the Redmond Fire & Rescue District. **Exhibit 98.***

II. Soil Classification and Mapping System; Soil Scientists; and DLCD Administrative Rules on "Agricultural Land":

Ms. Macbeth claims that DLCD's administrative rules prevent landowners from hiring a State-approved soil classifier to conduct a more detailed soils analysis of property mapped by the NRCS and to use the superior property-specific information obtained by such a study instead of information provided by soils mapping conducted at a landscape scale by the NRCS. The Agency Letter does not advance this argument in comments on the Application. In fact, DLCD disagrees with this argument, stating the following on their website:

"NRCS does not have the ability to map each parcel of land, so it looks at larger areas. This means that the map may miss a pocket of different soils. DLCD has a process landowners can use to challenge NRCS soils information on a specific property. Owners who believe soil on their property has been incorrectly mapped may retain a "professional soil classifier...certified by and in good standing with the Soil Science Society of America" (ORS 215.211) through a process

¹⁷ At the public hearing, the Applicant's attorney clarified that, although a portion of the property could be developed as a destination resort because it meets the criteria, the Applicant is not requesting such approval. The Applicant's attorney also noted that a rezone to RR-10 precludes future destination resort development in the future.

¹⁸ Exhibits continue numbering from Applicant's open record submittal.

administered by DLCD. This soils professional can conduct an assessment that may result in a change of the allowable uses for a property.”

*Source: <https://www.oregon.gov/lcd/FF/Pages/Soils-Assessment.aspx> **Exhibit 93**. This process, as DLCD states, requires a site-specific soil assessment by a soil professional accepted by DLCD. *Id.* There are only a handful of these professionals, with Applicant’s expert, Mr. Brian Rabe, being one of them. *Id.**

III. Response to Central Oregon LandWatch and Farm Income Analysis

*Central Oregon LandWatch (“COLW”), through its attorney Ms. Carol MacBeth, advances a number of erroneous arguments. Ms. Macbeth filed information provided by the 2012 US Census of Agriculture. This information is not the most current. The most current information is provided by the County Profile 2017 Census of Agriculture (**Exhibit 91**).*

COLW’s letter includes a list of “agricultural commodities” that it claims, according to the 2012 US Census of Agriculture, are produced in Deschutes County. The 2012 US Census of Agriculture does not support this assertion. First, contrary to COLW’s letter, the 2012 Census shows that tobacco, cotton and cottonseed are not produced in Deschutes County. Second, many of the listed commodities are listed by “commodity groups.” The Census reports income from any one or more of the commodities in the entire group. It does not indicate whether or not each commodity in a group is produced in Deschutes County. So, for instance, “fruits, tree nuts, and berries” are one commodity group. The group is so small, presumably one, that the Census withholds income information to “avoid disclosing data for individual operations.” Whether this lone producer harvests fruits, tree nuts or berries is unknown and it cannot be said which crop is harvested.

*COLW’s claim that “soil capability ** is irrelevant” because some farm uses are “unrelated to soil type” is erroneous because the definition of “Agricultural Land” provided by Goal 3 makes soil fertility and the suitability of the soil for grazing the exact issues that must be considered by the County to determine whether the subject property is “land in other soil classes that is suitable for farm use.” DLCD, ODFW and ODA make the same mistake in ignoring the ability of the land itself, rather than imported feed, to support a farm use. The fact that the suitability test is tied to the specific soil found on a subject Property by the Goal 3 definition makes it clear that the proper inquiry is whether the land itself can support a farm use. Otherwise, any land, no matter how barren, would be classified as farmland – which it is not and should not be. ORS 215.203(2) defines “farm use” and it requires that the land be used for “the primary purpose of obtaining a profit in money[.]”*

COLW claims that the \$48,990 gross income estimate contained in the burden of proof shows that the subject property is suitable for farm use because it would, allegedly, produce three times as much income as grossed by the average farm in Deschutes County in 2012. The \$48,990 figure is, however, overstated. It is based on an OSU formula that assumes that rangeland will support one AUM per acre. The Property will, however, only

*support one AUM per 10 acres in dry years, and one AUM in wet years, a fact established by DLCD, ODFW, and ODA. This means the \$48,990 gross income figure is overstated by **ten times** during the dry years and by **five times** during wet years.*

*When the OSU formula is adjusted to reflect the State's AUM:acres ratios, the range of gross income per year is a mere **\$4,899 to \$9,798** for a 710-acre property. This is lower than the \$16,033 average gross farm income of the average County farm in 2012 – the average farm being a 102-acre farm. If the subject Property were as productive as the average 2012 Deschutes County farm per acre, it would gross \$111,602 not \$4,899 to \$9,798 per year. Expenses that would be incurred to raise a gross income of \$4,899 to \$9,798 per year, based on information obtained from ranchers and extension service publications, include the following:*

- Vaccinations, medicine, veterinary services, monitoring pregnancies, deworming, breeding, calving, soundness exams*
- Branding, castrating bull calves*
- Purchase and care and feeding of a horse to round up cattle and associated shoeing and veterinary expenses; horse tack*
- Water supply for cattle (trucked or well); water troughs*
- Fencing materials, maintenance and repair*
- Freight/trucking of cattle between ranch and auction*
- Ranch vehicles e.g. 5th Wheel 4WD Pickup, 5th Wheel Stock Trailer and ATV and maintenance and operating expenses*
- Portable cattle working facilities (hydraulic or manual squeeze)*
- Labor; hired and farm owner/operator, including taxes, payroll, health care, etc.*
- Livestock insurance*
- Liability insurance*
- Fire insurance*
- Office expense*
- Cost to service farm loans for the purchase of the subject property, farm equipment and improvements*
- Property taxes*

Given the more refined and projected potential income (supported by the Agency Letter), the property taxes alone for the subject Property would exceed the projected, potential income. Even if the Property was able to qualify for farm tax deferred status, other expenses would clearly exceed income. For instance, annual farm loan payments for purchasing the property (excluding loans for farm equipment and improvements) far exceed projected gross income. If a person were able to purchase the Property at a cost of \$2.8 million dollars², a price well below the fair market value set by the Deschutes County Tax Assessor, annual payments for a 15-year loan at a USDA loan rate of just 3.25% would be \$238,808.02 per year for a 15-year fixed loan and \$147,508.81 for a 30-year fixed loan (excluding loan-related costs) from the USDA.³ Interest only on the 15-year fixed rate loan would be \$782,120.35 or an average of \$52,141.36 per year. Interest on a 30-year fixed

rate loan would be \$1,625,264.22 or an average of \$54,175.47 per year. No party has argued that potential farm revenues on the Property could reach anywhere near the levels necessary to service this debt; notwithstanding the fact that other farm infrastructure and startup costs (like the cost of irrigation water) would further add to debt service costs.

If the Property were grazed seasonally (as suggested by the Agency Letter), the operator would incur costs to lease grazing lands elsewhere or to feed cattle hay grown on other properties. These costs would not be deducted from the estimated income for the subject Property because the projected income is based on the productivity of the subject Property to support grazing – not the ability of other lands to support grazing either by lease or by the purchase of forage grown on other lands. Conversely, only one-half of the cattle income derived from an operation that utilizes two properties to raise cattle would be attributable to the subject property if it were able to support grazing six months of the year. The fact that twice as many cattle can be grazed on a property for six months compared to year-round is of no consequence to the property assessment of gross income attributable to the subject Property.

IV. Additional Responses to Specific Parties

This section provides specific responses to various parties' arguments during the open record period.

Redside Restoration and Jordan Ramis

Redside Restoration implies that its small vineyard located close to the Deschutes River in the Deschutes River canyon at an elevation about 400 to 500 feet below the plateau on the subject Property has similar conditions to those found on the subject Property. Presumably, Redside wishes the County to conclude that the Property might be suitable for development as a vineyard. It is not. This is rebutted by:

- E-Mail dated May 2, 2022 from soils scientist Brian Rabe, **Exhibit 107**
- Certificate 66868 Dunn, **Exhibit 87**.
- Certificate 66868 map – Dunn (shows that vineyard area of property is irrigated), **Exhibit 88**.
- OSU impact of smoke on grapes and wine, **Exhibit 97**.

The Property also would not meet most of the site selection and climate concerns related to vineyard selection. Exhibit 90.

Equally important, is the fact that the soil depth is simply not enough to establish productive grapes. For example, in Mr. Rabe's comprehensive soil analysis, he made 135 test holes. Of those 135 test holes, only 5 (less than 4%) had soil more than 30 inches in depth. The average (mean) depth was 16.8 inches, the median depth was 16 inches, and the modal depth (most common) was 14 inches. Grapes typically require 2 to 3 feet of soil depth. **Exhibit 106**.

Richard and Lori Johnson

*The Johnsons claim that farms adjacent to the subject property have deepened their wells. As the Johnsons note based on information provided by Central Oregon LandWatch regarding a 2008 USGS study, climate change, groundwater pumping and irrigation canal pumping have been identified as causing declines. The referenced study shows that the primary cause of groundwater decline is climate change. The study attributes a part of the decline to increased groundwater pumping in the region. Maps provided by the USGS report suggests that groundwater use in the Odin Valley area (farm irrigation) and water use by the Eagle Crest (golf course and other irrigation and domestic use) increased significantly between 1997 and 2008. Irrigation water use consumes far more ground water than used for domestic use – a fact that supports the conclusions of the GSI water study that the applicant filed with Deschutes County prior to the land use hearing. This report is re-filed for convenience as **Exhibit 105**. We provide the following supporting documentation:*

- *Understanding Water Rights, Deschutes River Conservancy, **Exhibit 101**.*
- *Analysis of 1997-2008 Groundwater Level Changes in the Upper Deschutes Basin, Central Oregon (relevant part). **Exhibit 104**.*

The Johnsons express a concern that creating 10-acre parcels will result in a loss of open space and wildlife habitat. They claim that using the land for low-density housing will increase the cost of farming for adjacent farms. The Johnsons did not have this concern earlier this year when they divided their farm property to create a 4.049-acre nonfarm parcel right next to their irrigated farm fields. See Partition Plat 2022-10. The location of this new parcel is shown in the aerial photo below (from DIAL): [image omitted]

The following documents are also filed to respond to this argument:

- *Land use application filed by the Johnsons to create a nonfarm parcel and dwelling adjacent to irrigated farm fields (Johnson nonfarm 2021), **Exhibit 94**.*
- *Amended Annual Report for Horse Guard, Inc., a highly successful horse vitamin/mineral supplement product with a primary place of business of 3848 NW 91st Street, Redmond, OR (the Johnson property), **Exhibit 99**.*
- *Tax Assessor's Improvement Report for Johnson property. **Exhibit 83**.*
- *Recent Google Earth Photograph of Johnson house and outbuildings below:*

It appears that the Johnsons keep horses on their property but there is no indication they are engaged in a commercial horse boarding or training operation. The primary farm use of the property is growing alfalfa hay which is stored in the farm building shown on the right in the photo above. [image omitted]

League of Women Voters

The League of Women Voters submitted a comment that the Deschutes River has been designated by DEQ as having impaired water quality. That is true, but only for a portion

of South Deschutes County and not this area. **Exhibit 92**. See also, Testimony of Brian Rabe, **Exhibit 107**.

Pam Mayo Phillips

Ms. Mayo Phillips argues that the subject property is in the heart of farm country and that the Odin Valley consists of parcels that vary in size from 20 to 200 acres in size. While some agricultural uses are occurring in the Odin Falls area, the area contains a mix of farm, nonfarm, and rural residential development as documented by the Johnsons' land division application. Many of the farm properties in the Odin Valley have been divided to create nonfarm parcels that are smaller than the size stated by Ms. Phillips (size listed after current owner) that have received approvals to locate dwellings adjacent to irrigated farm fields: Stabb/Birklid (17.50 acres), Johnson/Nonella (4.05 acres) Grossmann/Nelson (11.08 and 10.21 acres), Stephan/Bessette (4.36 acres), Thoradarson (3.18 acres) and a number of non-irrigated properties have been divided and/or developed with nonfarm dwellings – in particular on the properties closest to the subject property along NW Coyner. Thus far, the farm practices identified by Ms. Mayo Phillips have not been of sufficient significance to merit denial of the many nonfarm dwellings in Odin Valley.

Ms. Mayo Phillips expresses concerns about the condition of area roads. The roads, however, are adequate to handle additional traffic as documented by the applicant's traffic engineer and Deschutes County will address road improvements, provided the pending applications are approved, when a subdivision application is filed with and reviewed by the County.

*Ms. Phillips argues that power is not available to serve the subject Property. This is incorrect. CEC has provided a "will serve" letter and has advised the applicant that it is able to provide power to the property from Buckhorn Road with upgrades that would be paid for by the property owner. **Exhibit 16**.*

*Ms. Phillips expresses concern that the nearest fire station is too far away and that fires are a significant concern. The subject property is located in the Redmond Fire & Rescue service area and the closest fire station in that district is located at 100 NW 71st Street, a short distance north of Highway 126 on the west side of Redmond. Highway 126 provides excellent access to the Odin Valley and the subject property which is approximately six miles away on paved roads (travel time 9 minutes per Google Maps for vehicles traveling at or below the speed limit). Additionally, according to opponent Ted Netter a fire protection association has been formed to provide fire protection to lands that are located outside of fire districts to the west of the subject property which should serve to lessen fire risks in the area. The subject Property is not in the fire association area, contrary to Mr. Netter's assertion, because it is located inside the Redmond Fire district. **Exhibit 95**.*

Nunzie Gould

Ms. Gould's untimely filed post-hearing submittal contains errors of fact. The subject Property is not located in or close to the Three Sisters Irrigation District ("TSID"). The

TSID webpage indicates that the District is currently providing spring irrigation water at 30%. Marc Thalacker, TSID's manager, also had a telephone conversation with one of the principals of the Applicant, Robert Turner. Mr. Thalacker told Mr. Turner that it would not be feasible for TSID to provide water to the Property, nor would it be feasible for other irrigations districts to do so. Mr. Thalacker also indicated that, based upon his conversation with Mr. Turner, placing irrigation water on the Property would be a reckless and poor use of water.

Ms. Gould's claim that agriculture is occurring on the subject property is simply incorrect.

Ms. Gould's claim that 320 acres of BLM land adjoins the east side of the subject Property is correct. This area is not, as Ms. Gould's comments reflect however, engaged in farm use of any kind. It is open space for wildlife use. The Cline Buttes Recreation Area ATV recreational area adjoins the south and southwest sides of the subject property. One of the ATV trails is located in close proximity to the south boundary of the subject property. This large area of public lands, also, is not engaged in farm use.

Andrew Mulkey, 1000 Friends of Oregon

Mr. Mulkey's untimely filed post-hearing submittal claims that the suitability analysis in the applicant's soils report is "simply speculation" because the soils scientist does not purport to have experience farming and ranching in Deschutes County. This is an absurd statement and is contrary to the State's requirements for certified soil scientists (addressed above). The purpose of soils analysis is to determine its suitability to support farm crops, livestock and merchantable tree species. Additionally, the Soil Science Society of America reports that Mr. Rabe has been a member of the American Society of Agronomy for 30 years. The Society describes its membership as follows:

*"The American Society of Agronomy is the professional home for scientists dedicated to advancing the discipline of the agronomic sciences. Agronomy is highly integrative and employs the disciplines of soil and plant sciences to crop production, with the wise use of natural resources and conservation practices to produce food, feed, fuel, fiber, and pharmaceutical crops for our world's growing population. A common thread across the programs and services of ASA is the dissemination and transfer of scientific knowledge to advance the profession."
Membership | American Society of Agronomy*

- *Soil Science Society of America report re soil scientist and classifier Brian Rabe, **Exhibit 85**.*

Mr. Mulkey provides maps and information about wildlife. None of the maps have been made applicable to the subject Property by land use regulations. The Mule Deer Overlay map also shows that the subject Property is just inside the area proposed by ODFW as an addition to the WA zone and that the number of deer using the area is far lower than areas located closer to the City of Sisters and less populated than areas east of Bend that are not

proposed for inclusion in the WA zone. But again, these maps simply do not apply nor have they been adopted by the County.

DLCD Letter

DLCD provided additional comment that Goal 4 had not been adequately addressed. Forestry expert John Jackson provides additional response (**Exhibit 89**) to evidence and analysis previous placed in the record by Ms. Fancher.

V. Additional Evidence for the Record

In further response to COLW's arguments that certain farm uses my profitably occur on the Property, the Applicant provides the following additional rebuttal evidence.

- Hemp market information, email from hemp farm owner Paul Schutt, **Exhibit 100**.
- Impacts of grazing and increased desertification, **Exhibit 82**.
- Alfalfa production, **Exhibit 96**.

VI. Conclusion

The evidence we provide in this submittal will be used further in final legal argument

G. NOTICE REQUIREMENT: On March 18, 2022, 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, March 20, 2022. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on March 2, 2022.

H. REVIEW PERIOD: The subject applications were submitted on December 2, 2021. The applications were deemed incomplete by the Planning Division on December 30, 2021 and a letter detailing the information necessary was mailed on December 30, 2021. The Applicant provided a response to the incomplete letter and the applications were subsequently deemed complete on January 17, 2022. According to Deschutes County Code 22.20.040(D), review of the proposed quasi-judicial plan amendment and zone change application is not subject to the 150-day review period.

III. FINDINGS & CONCLUSIONS

A. PRELIMINARY FINDINGS AND CONCLUSIONS

1. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING USE OF ORDER 1 SOILS SURVEY

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

developed without the benefit of detailed soils mapping information. The map was prepared and EFU zoning was applied to the subject property prior to the USDA/NRCS's publication of the "Soil Survey of Upper Deschutes River Area, Oregon." That soil survey provides general soils information, but not an assessment of soils on each parcel in the study area.

The NRCS soil survey maps are Order 2 soil surveys, which extrapolate data from the Upper Deschutes River Survey to determine LCC soil classifications at a landscape level. The Applicant's soil scientist, Mr. Rabe, conducted a more detailed Order 1 survey, which analyzed actual on-the-ground soil compositions on the subject property. The Hearings Officer finds that it is not "suspect" that an Order 1 soils survey contradicts NRCS soil classifications performed at a higher, landscape level.

The argument advanced by COLW, 1000 Friends of Oregon and Redside Restoration that an Order 1 survey cannot contradict NRCS soil survey classifications for a particular property has been rejected by the Oregon Legislature in ORS 215.211(1) and DLCD in OAR 660-033-0030. It has also been rejected by Deschutes County Hearings Officers and the Board of County Commissioners.

In recent years, Deschutes County has recognized the value in rezoning non-productive agricultural lands and has issued decisions approving plan amendments and zone changes where the applicant has demonstrated the property is not agricultural land. Deschutes County has approved the reclassification and rezoning of EFU parcels based on data and conclusions set forth in Order 1 soils surveys and other evidence that demonstrated a particular property was not "agricultural land," due to the lack of viability of farm use to make a profit in money and considering accepted farming practices for soils other than Class I-VI. *See, e.g.,* Kelly Porter Burns Landholdings LLC Decision/File Nos. 247-16-000317-ZC/318-PA; Division of State Lands Decision/File Nos. PA-11-7 and ZC-11-2; Paget Decision/File Nos. PA-07-1, ZC-07-1; The Daniels Group/File Nos. PA-08-1, ZC-08-1; Swisher Decision/File Nos. 247-21-000616-PA/617-ZC. The Board of County Commissioners recently affirmed the Hearings Officer's decision in the Swisher files and adopted Ordinance No. 2022-003.

On the DLCD website, it explains:

NRCS does not have the ability to map each parcel of land, so it looks at larger areas. This means that the map may miss a pocket of different soils. DLCD has a process landowners can use to challenge NRCS soils information on a specific property. Owners who believe soil on their property has been incorrectly mapped may retain a "professional soil classifier ... certified and in good standing with the Soil Science Society of America (ORS 215.211) through a process administered by DLCD. This soils professional can conduct an assessment that may result in a change of the allowable uses for a property.

Exhibit 93 (<https://www.oregon.gov/lcd/FF/Pages/Soils-Assessment.aspx>).

The Hearings Officer agrees with the Applicant's final legal argument, submitted on May 11, 2022 which states on page 3, in relevant part:

This statutory and regulatory scheme makes sense, as it would have been impracticable for a county to have conducted an individualized soils analysis on a farm-by-farm basis when it adopted its original zoning ordinances. Precluding the availability of a property owner to achieve a new zoning designation based upon a superior, more detailed and site-specific soils analysis would, to put it mildly, be absurd and cannot be what the legislature intended.¹⁹

The Soil Survey of the Deschutes Area, Oregon²⁰ describes Class VII soils as “not suitable for cultivation and of severely limited use for pasture or as woodland.” It describes Class VIII soils as “not suitable for growing vegetation for commercial uses.” The Soil Survey of Upper Deschutes River Area, Oregon describes the broad, general level of soil surveying completed by NRCS on page 16, “At the less detailed level, map units are mainly associations and complexes. The average size of the delineations for most management purposes was 160 acres. Most of the land mapped at this level is used as woodland and rangeland. At the more detailed level, map units are mainly consociations and complexes.... Most of the land mapped at the more detailed level is used as irrigated and nonirrigated cropland.”

As quoted in the Hearings Officer’s Decision and Recommendation to the Deschutes County Board of Commissioners in the Swisher decision, File Nos. 247-21-000616-PA/617-ZC:

The real issue is “map accuracy” which is based upon set standards for maps. National Map Accuracy Standard (NMAS) provides insurance that maps conform to established accuracy specifications, thereby providing consistency and confidence in their use in geospatial applications. An example of such a standard: “maps on publication scales larger than 1:20,000, not more than 10 percent of the points tested shall be in error by more than 1/30 inch, measured on the publication scale; for maps on publication scales of 1:20,000 or smaller, 1/50 inch.” The error stated is specific for a percentage of points, and to suggest that accuracy in maps is the unattainable freedom from error as the COL letter does, is not a relevant or a serious argument.

When one map shows point data like an Order-1 soil survey the accuracy can be measured, and when another map does not (like the NRCS soil map) there is a shortage of information, so the accuracy of the NRCS map cannot be determined for point data. The accuracy of the NRCS estimate of the percentage of components in the 38B soil complex can be shown to be very inaccurate in this case, and it clearly underestimates the Class 7 and Class 8.

The Hearings Officer finds that NRCS soil survey maps are not definitive or “binding” with respect to a determination of whether the subject property is, or is not, agricultural land. This is consistent with the ruling of the Land Use Board of Appeals (LUBA) in ***Central Oregon Landwatch v. Deschutes County (Aceti)***, ___ Or LUBA ___ (LUBA NO. 2016-012, August 10, 2016 (Aceti I)). There, LUBA confirmed that OAR 660-033-0030(5)(a) and (5)(b) allow the County to rely on more detailed data on soil capability than provided by NRCS soil maps to define agricultural land,

¹⁹ The stated public purpose of the EFU zone is to preserve “Agricultural Lands” (ORS 215.243) but “Agricultural Lands” are not present on a subject property.

²⁰ https://www.nrcs.usda.gov/Internet/FSE_MANUSCRIPTS/oregon/OR620/0/or620_text.pdf

provided the soils survey has been certified by DLCD, which has occurred here. The *Aceti* ruling is summarized as follows:

First, LUBA affirmed the County's determination that the subject property, which had been irrigated and used to grow hay in 1996 and earlier years, was not agricultural land based on the Order 1 soils survey which showed that the poor soils on the property are Class VII and VIII soils when irrigated, as well as when not irrigated.

Second, LUBA determined the applicant had established that the subject property was not "agricultural lands," as "other than Class I-VI Lands taking into consideration farming practices." LUBA ruled:

"It is not an accepted farm practice in Central Oregon to irrigate and cultivate poor quality Class VII and VIII soils – particularly where, as here those soils are adjacent to rural industrial uses, urban density residential neighborhoods that complain about dust and chemicals and to high traffic counts on the surrounding roads and highways. Irrigating rock is not productive."

The Hearings Officer rejects the argument that NRCS land classifications based on its soil maps cannot be varied, unless a landowner requests an Order 1 soils study to qualify **additional** land as agricultural land. This is directly contrary to LUBA's holding in *Central Oregon Landwatch v. Deschutes County and Aceti*, LUBA No. 2016-012:

"The Borine Study is evidence a reasonable person would rely on and the county was entitled to rely on it. As intervenor notes, the NRCS maps are intended for use at a higher landscape level and include the express statement 'Warning: Soil Ratings may not be valid at this scale.' Conversely, the Borine Study extensively studied the site with multiple on-site observations and the study's conclusions are uncontradicted, other than by petitioner's conclusions based on historical farm use of the property. This study supports the county's conclusion that the site is not predominantly Class VI soils."

ORS 215.211(1) specifically allows for the submittal by a certified soil scientist of an assessment of the capability of the land based on more detailed soils information than that contained in the Web Soil Survey operated by the NRCS to "assist a county to make a better determination of whether land qualifies as agricultural land." The Applicant followed this procedure by selecting a professional soil classifier who is certified by and in good standing with the Soil Science Society of America to prepare the Order 1 soils report. DLCD reviewed the soils report pursuant to ORS 215.211(2) and determined it could be utilized in this land use proceeding.

The Hearings Officer agrees that soils classifications are not the only determining factor with respect to whether a parcel is "agricultural land." The Hearings Officer's findings on all relevant factors to be considered in determining whether the subject property is "agricultural land," are set forth in detail below.

The Hearings Officer does not accord less weight to the Applicant's soil scientist because he was "privately commissioned." Brian T. Rabe, CPSS, WWSS of Valley Science and Engineering is a

listed, accepted soils scientist by DLCD and is certified by and in good standing with the Soil Science Society of America. He has been a certified soils scientist for 30 years.

Public comments submitted by the Jordan Ramis law firm on behalf of Redside Restoration Project One, LLC are correct to the extent that DLCD's certification of an Order 1 soils survey is not a determination of whether a particular property constitutes "agricultural land." The certification constitutes a determination that the soil study is complete and consistent with reporting requirements of OAR 660-033-0045. Pursuant to ORS 215.211, the Applicant's soils survey has been approved for use by Deschutes County by DLCD. If the Applicant's soils survey was deficient in any manner, DLCD would not have allowed the County to rely on the survey in this proceeding. Ultimately, the County – not DLCD - must decide whether the Order 1 soils survey, together with other evidence in the record, supports a determination of whether the subject property is "agricultural land." *See* ORS 215.211(5).

For all the foregoing reasons, the Hearings Officer finds that the County is not bound by the landscape level NRCS Order 2 study on which classification of soils on the subject property is based. The Hearings Officer finds it is appropriate for the County to consider the Applicant's Order 1 soils survey, certified for the County's consideration by DLCD.

2. HEARINGS OFFICER'S FINDINGS AND CONCLUSIONS REGARDING WHETHER THE SUBJECT PROPERTY IS "AGRICULTURAL LAND"

For purposes of this Decision and Recommendation, the Hearings Officer considers the definition of "Agricultural Land," in OAR 660-033-020(1)(a), as defined in Goal 3, which includes:

(A) lands classified by the NRCS as predominantly Class I-VI soils in Eastern Oregon;

(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

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

a. OAR 660-033-0020(1)(a)(A) Findings and Conclusions

As the Hearings Officer found above, the County may rely on the DLCD-certified Order 1 soil survey submitted by the Applicant. That study shows that the soils on the subject property are not predominantly Class I-VI soils, as they are comprised of 71% Class VII-Class VIII soils. The County is entitled under applicable law to rely on the Order 1 soils survey in these applications in making a determination that the soils on the Subject Property are not predominantly Class I-VI soils. The Hearings Officer finds that the more detailed, onsite soil study submitted by the Applicant provides property-specific information not available from the NRCS mapping.

There is no evidence in the record to rebut the Applicant's soils study. Therefore, the Hearings Officer finds that the subject property does not constitute "agricultural land" under OAR 660-033-0020(1)(a)(A). Specific findings on each applicable criterion are set forth in Section III(B) of this Decision and Recommendation.

b. OAR 660-033-0020(1)(a)(C) Findings and Conclusions

The Hearings Officer finds there is no evidence in the record that the subject property is "land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands. While DLCD, ODA and ODFW question the "impact on adjacent or nearby agricultural lands," at page 6 of the agencies' comment letter, those questions do not answer the inquiry of whether the subject property is "necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands." OAR 660-033-0020(1)(a)(C). Moreover, the reclassification and rezoning of the subject property in and of itself will not change the current use (or lack thereof) of the subject property. Impacts of future development must be reviewed when land use applications are submitted. Simply put, there is no showing that the subject property is necessary for farming practices on any surrounding agricultural lands. There is no evidence that the subject property contributes to any such practices, nor that other lands depend on use of the subject property to undertake any farm practices.

Therefore, the Hearings Officer finds that the subject property does not constitute "agricultural land" under OAR 660-033-0020(1)(a)(C). Specific findings on each applicable criterion are set forth in Section III(B) of this Decision and Recommendation.

c. OAR 660-033-0020(1)(b) Findings and Conclusions

The Hearings Officer finds there is no evidence in the record that the subject property is adjacent to or intermingled with lands in capability classes I-VI within a farm unit. Therefore, the Hearings Officer finds that the subject property does not constitute "agricultural land" under OAR 660-033-0020(1)(b). Specific findings on each applicable criterion are set forth in Section III(B) of this Decision and Recommendation.

d. OAR 660-033-0020(1)(a)(B) Findings and Conclusions

The Hearings Officer reviews evidence in the record to determine whether the subject property constitutes "agricultural land" under OAR 660-033-0020(1)(a)(B) as "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." Competing evidence was presented by the Applicant, the Department of Land Conservation and Development, Agriculture and Fish and Wildlife, and numerous commentators.

OAR 660-033-0020(1)(a)(B) refers to the statutory definition of "farm use" in ORS 215.203(2)(a) which informs the determination of whether a property is "*suitable* for farm use." The Hearings Officer finds that the analysis must begin with a determination of whether the subject property can

be employed for the “**primary purpose of obtaining a profit in money** by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairying products or any other agricultural or horticultural use or animal husbandry or any combination thereof.” ORS 215.203(2)(a) (emphasis added).

The state agencies and other commentators left out the highlighted portion of the statutory language. “Farm use” is not whether a person can engage in any type of agricultural or horticultural use or animal husbandry on a particular parcel of property. It is informed by whether such use can be made for the primary purpose of obtaining a profit in money. Therefore, the Hearings Officer rejects the argument that the subject property is “capable of any number of activities included in the definition of farm use,” because “farm use” as defined by the Oregon Legislature “**means the current employment of land for the primary purpose of obtaining a profit in money.**” ORS 215.203(2)(a); *see also* Goal 3. This is a critical omission by the state agencies and other commentators in their submissions.

The state agencies repeatedly assert that the barriers to farming the subject property set forth by the Applicant could be alleviated by combining farm operations with other owned and/or leased land, whether adjacent to the subject property or not. The Hearings Officer finds that the definition of “farm use” in ORS 215.203(2)(a) refers to “**land,**” - not “lands,” - and does not include any reference to “combination” or requirement to “combine” with other agricultural operations. Therefore, if the subject property, in and of itself cannot be engaged in farm use for the primary purpose of obtaining a profit in money, it does not constitute agricultural land. There is no requirement in ORS 215.203(2)(a) or OAR Chapter 660-033 that a certain property must “combine” its operations with other properties in order to be employed for the primary purpose of obtaining a profit in money and thus, engaged in farm use.

What the statutory definition of “farm use” means is that, merely because a parcel of property is zoned EFU and *some* type of agricultural activity could take place on it, or whether the property owner could join forces with another agricultural operations, does not mean that a property owner is forced to engage in agricultural activity if the property owner cannot use its own property for farming to obtain a profit in money. This is so, whether the barrier to obtaining a profit in money is due to soil fertility, suitability for grazing, climactic conditions, existing and future irrigation rights, existing land use patterns, technology and energy inputs required and accepted farming practices, any or all of these factors.

The Applicant correctly cited controlling law on page 5 of its final legal argument:

Oregon courts have consistently addressed profitability as an element of the definition of “agricultural land.” In Wetherell v. Douglas County, 342 Or 666 (2007), the Oregon Supreme Court held that profitability is a “profit in money” rather than gross income. In Wetherell, the Court invalidated a rule that precluded a local government from analyzing profitability in money as part of this consideration. Id. at 683. As may be helpful here, the Court stated:

“We further conclude that the meaning of profitability,” as used in OAR 660-033-0030(5), essentially mirrors that of “profit.” For the reasons described above, that rule’s prohibition of any consideration of “profitability” in agricultural land use determination conflicts with the definition of “farm use” in ORS 215.203(2)(a) and Goal 3, which permit such consideration. OAR 660-033-0030(5) is therefore invalid, because it prohibits consideration of “profitability.” The factfinder may consider “profitability” which includes consideration of the monetary benefits or advantages that are or may be associated from the farm use of the property and the costs or expenses associated with those benefits, to the extent such consideration is consistent with the remainder of the definition of “agricultural land” in Goal 3.

*Finally, the prohibition in OAR 660-033-0030(5) of the consideration of “gross farm income” in determining whether a particular parcel of land is suitable for farm use also is invalid. As discussed above, “profit” is the excess or the net of the returns or receipts over the costs or expenses associated with the activity that produced the returns. To determine whether there is or can be a “profit in money” from the “current employment of [the] land *** by raising, harvesting and selling crops[.]” a factfinder can consider the gross income that is, or could be generated from the land in question, in addition to other considerations that relate to “profit” or are relevant under ORS 215.203(a) and Goal 3.*

We therefore hold that, because Goal 3 provides that “farm use” is defined by ORS 215.203, which includes a definition of “farm use” as “the current employment of land for the primary purpose of obtaining a profit in money[.]” LCDC may not preclude a local government making a land use decision from considering “profitability” or “gross farm income” in determining whether land is “agricultural land” because it is “suitable for farm use” under Goal 3. Because OAR 660-033-0030(5) precludes such consideration, it is invalid. Emphasis added. Id. at 681-683.

Substantial evidence in the record supports a determination that each of the listed factors in OAR 660-033-020(1)(a)(B) preclude “farm use” on the subject property because no reasonable farmer would expect to make a profit in money by engaging in agricultural activities on the land. as detailed in the findings on individual criteria below.

Soil Fertility

The lack of soil fertility is not in debate. The Applicant’s soils study determined that the soils “are predominately shallow with sandy textures (low clay content) and low organic matter content. These conditions result in a low Cation Exchange Capacity (CEC) that limits the ability of these soils to retain nutrients. Fertilizer must be applied to achieve optimum yields. Proper management requires fertilizers be applied in small doses on a frequent basis. The revenue from most locally adapted crops will not cover the costs of inputs and management.” Applicant’s final legal argument, Attachment C, p. 7. Moreover, the evidence shows that the shallow nature of the soils differs from those present at the Redside Restoration property, given that typical wine grapes

require a “minimum of 2 feet to 3 feet of soil depth” to be successful (Exhibit 106). On the subject property, the common depth of soils in the 135 test holes made by Mr. Rabe was merely 14 inches.

While several commentators argued that soil fertility is not always necessary for commercial agricultural operations because farm equipment could be stored on the property, the Hearings Officer agrees with the Applicant that the subject property’s resource capability is the proper determination. The Applicant is not required to engage in joint management or use with other lands that do constitute productive farm land. Moreover, storage and maintenance of equipment is not, in and of itself, a farm use unless such equipment is for the production of crops or a farm use on the subject property. Therefore, the Hearings Officer rejects the arguments of the state agencies and COLW that certain uses of the subject property could be made that are not dependent on soil type because none of the suggested uses constitute “farm use,” without any associated cultivation of crops or livestock. The Applicant has also produced substantial, persuasive evidence that the property cannot be used for a profit in money for a feedlot considering the limited gross farm income from cattle grazing, the lack of irrigation water, limited forage and other factors including the generation of biological waste.

Suitability for Grazing

The lack of suitability for grazing is also established by substantial evidence in the record. Although the state agencies letter agreed with the Applicant’s analysis that a maximum of 15 cow/calf pairs could be supported in a grazing operation, it suggested that an additional up to 15 pairs could be sustained in rotation or if the land was left bare for months at a time. There is no evidence in the record to rebut the Applicant’s conclusion that it could not make a profit in money from grazing operations on the property, such that grazing would not constitute “farm use” under the statutory definition. As shown in Exhibit 107 p. 2, “the gross revenue potential for weight gain associated with the estimated forage available on the 710 acres would range from \$7,209 per year in an unfavorable (dry) year to 414,058 in a favorable (wet) year, or about \$10,000 in an average year. As documented in detail by others, the cost of production and management would exceed the potential revenue.”

Evidence presented by Billy and Elizabeth Buchanan regarding suitability for grazing is distinguishable and therefore not relevant. The Buchanan property is mapped with productive, high-value soils, unlike the Applicant’s property. It also has a groundwater irrigation right and may irrigate up to 14.6 acres of their property. Nonetheless, as the Applicant noted, there is no evidence in the record that the Buchanans make a profit in money by allegedly grazing cattle on their property. In fact, the evidence does not support a finding that the Buchanans’ cattle even graze on dry-land. As shown on their company website, Keystone Cattle claims its cattle are “grass fed & grass finished.”

Climactic Conditions

There is little debate that climactic conditions contribute to the inability to engage in “farm use” for the purpose of making a profit in money. Even the state agencies admit that local climactic conditions “are not ideal for commercial agriculture.” Pointing to other properties to show that climactic conditions should not preclude “farm use,” again does not take into consideration

whether or not agricultural activities can be engaged in for the purpose of making a profit in money. The limited precipitation, the plateau on which the property sits, plus the fact that the property lacks irrigation water rights are all unfavorable to a determination the property could be used for farming to make a profit in money.

Existing and Future Availability of Water for Farm Irrigation Purposes

Regarding existing and future availability for water for farm irrigation purposes, the state agencies merely state that “we do not believe that water for irrigation purposes is necessary to conduct many of the activities included in the definition of ‘farm use.’” Again, this does not take into consideration whether any of such activities could be utilized for the primary purpose of making a profit in money on the property. There is no evidence that the subject property could be used for any of the listed activities in ORS 215.203(2)(a) in a profitable manner, particularly given the lack of irrigation water. The Applicant has presented substantial evidence of the prohibitive costs and other hurdles that preclude bringing irrigation to the subject property (E.g. Exs. 49, 87, 88, 2, 3 and 76). When such costs are factored in, no reasonable farmer would expect to be able to obtain farm irrigation water and still obtain a profit in money from agricultural uses on the property.

Existing Land Use Patterns

The Hearings Officer finds the Applicant has established that existing land use patterns are also a factor in determining the subject property is not “agricultural land” under OAR 660-033-020(1)(a)(B). The area is characterized by rural uses; approval of the requested plan map amendment and rezone will not change the use of the property to urban. There are various non-farm uses in the area, including a number of non-farm dwellings constructed or approved. The surrounding area has substantial areas of land zoned RR-10 and MUA-10. The Hearings Officer finds that this determination does not ask whether the proposal is “consistent with existing land use pattern,” but instead asks whether, considering the existing land use pattern, the property is agricultural land. Given the property’s location on the top of a plateau, any uses in conjunction with surrounding lands are impracticable due to the substantial physical barrier to cross-property use.

Technological and Energy Inputs Required

Technological and energy inputs required for agricultural use of the subject property also factor into the fact the property is not suitable for “farm use,” because it cannot be so employed for “*primary purpose of obtaining a profit in money.*” Suggested uses by the state agencies and other commentators do not address the profitability component of the definition of “farm use,” and do not rebut substantial evidence in the record that shows the subject property cannot be used for agricultural purposes for the primary purpose of obtaining a profit in money. This is due to the costs associated with trucking in water, fencing requirements, livestock transportation, winter hay, fertilizer, attempting to obtain irrigation water rights, labor costs, and energy/power requirements to pump enough groundwater to support agricultural use.

The Hearings Officer also notes that, as discussed above, certain uses, such as storing equipment or an indoor riding arena are not, in and of themselves “farm use,” as confirmed by LUBA in

Oregon Natural Desert Association v. Harney County, 42 Or LUBA 149 (2002). The state agencies and other commentators agree that the cost of technology and energy inputs required for agricultural use on the subject property can be daunting. No one presented any evidence to rebut the Applicant’s evidence that such costs prohibit the ability to make a profit in money from farming the subject property (See, e.g. Exhibits 35 and 91).

Accepted Farm Practices

The Applicant submitted evidence regarding accepted farming practices in Deschutes County, published by the Oregon State University Extension Service (Exhibit 8). The definition of “accepted farm practice,” like that of “farm use,” turns on whether or not it is occurring for the primary purpose of obtaining a profit. The *Wetherell* court relied on ORS 308A.056 to define “accepted farm practice” as “a mode of operation that is common to farms of a similar nature, necessary for the operation of these similar farms to obtain a profit in money and customarily utilized in conjunction with farm use.” *Wetherell, supra*, 52 Or LUBA at 681. Numerous farmers and ranchers, including Rand Campbell, Brian Rabe, James Stirewalt, Russell Mattis, Matt Cyrus, Fran Robertson and Marc Thalacker, testified and presented evidence that the subject property is not suitable for farm use and that operations required to turn a profit are unrealistic. This evidence is based on their own analysis of the subject property and understandings and experience as to what would be required to commence a farm use for profit on the property. Moreover, LUBA determined in the *Aceti I* case that it is not an accepted farming practice in Central Oregon to irrigate and cultivate Class VII and VIII soils.

In summary, the Applicant is not required to show that no agricultural use could ever be made on the property; only that no reasonable farmer would attempt to engage in “farm use,” which is for the primary purpose of obtaining a profit. As set forth in additional detail in the findings on specific criteria below, the Hearings Officer finds that substantial evidence in the record supports a determination that the subject property is not suited to commercial farming because no reasonable farmer would believe he or she could make a profit in money therefrom, considering all of the factors listed in OAR 660-033-020(1)(a)(B).

The Hearings Officer finds that the Applicant has met its burden of showing the subject property cannot be used for agricultural purposes for the primary purpose of obtaining a profit in money and such is not “agricultural land” under OAR 660-033-020(1)(a)(B). There are various barriers to the Applicant, or any other person, that preclude using the subject property to engage in farming activities for a profit. For this reason, and as set forth in more detail below, no exception to Statewide Planning Goal 3 is required.

B. HEARINGS OFFICER’S FINDINGS AND CONCLUSIONS REGARDING APPLICABLE CRITERIA

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. The Hearings Officer finds these criteria are met.

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 statement²¹:

The Plan's introductory statement explains that land use must comply with the statewide planning system and sets out the legal framework set by State law. It summarizes the Statewide Planning Goals. It also explains the process the County used to adopt the current comprehensive plan. This application is consistent with this introductory statement because the requested change has been shown to be consistent with State law and County plan provisions and zoning code that implement the Statewide Planning Goals.

The following provisions of Deschutes County's amended comprehensive plan set out goals or text that may be relevant to the County's review of this application. Other provisions of the plan do not apply.

The Applicant utilizes this analysis, as well as analyses provided in prior Hearings Officers' decisions to determine and respond to only the Comprehensive Plan Goals and policies that apply, which are listed in the Comprehensive Plan section of this Decision and Recommendation. The Hearings Officer's findings addressing compliance with applicable Comprehensive Plan Goals and policies are set forth in the Comprehensive Plan section of this Decision and Recommendation below.

- B. *That the change in classification for the subject property is consistent with the***

²¹ As noted above, the Applicant filed a revised burden of proof statement with its final legal argument on May 11, 2022. Both the original and revised burden of proof statements are part of the record.

purpose and intent of the proposed zone classification.

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

The approval of this application is consistent with the purpose of the RR-10 zoning district which stated in DCC 18.60.010 as follows:

“The purposes of the Rural Residential Zone are to provide rural residential living environments; to provide standards for rural land use and development consistent with desired rural character and the capability of the land and natural resources; to manage the extension of public services; to provide for public review of nonresidential uses; and to balance the public's interest in the management of community growth with the protection of individual property rights through review procedures and standards.”

The approval of the application will allow the property to provide rural residential living environments in a rural location that is not suitable for farm use and where impacts of the new use will be minimized by topography and adjoining public lands. The zoning district and subdivision ordinance provide standards that will control land use to be consistent with the desired rural character and capability of the land and natural resources. The zoning district provides for public reviews of nonresidential uses. The approval of this application will allow the property owner to proceed with a low level of development on land that will not support farm use.”

The Hearings Officer finds that the proposed change in classification will allow for potential future development of rural residential living. No application for development is before the County at this time; future application(s) must be consistent with the standards for rural land use and development considering desired rural character, the capability of the land and natural resources and managed extension of public services. Future development will be subject to public review which will require, among other things, a balancing of the public's interest in the management of community growth with the protection of individual property rights.

The Hearings Officer finds the Applicant has demonstrated the proposed change in classification is consistent with the purpose and intent of the RR-10 Zone.

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: There are no plans to develop the properties in their current state; the above criterion 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. A will-serve letter from Central Oregon Electric Cooperative, Exhibit G shows that electric power

is available to serve the property. Well logs, Exhibits H through K, show that wells are a viable source of water for rural residential development.

The existing road network is adequate to serve the use. This has been confirmed by the transportation system impact review conducted by Christopher M. Clemow, PE, PTOE of Clemow Associates LLC, Exhibit S of this application. The property receives police services from the Deschutes County Sheriff. The property is in the Redmond Fire and Rescue rural fire protection district.

The closest neighboring properties which contain residential uses are located on the north side of NW Coyner Avenue, on the south end of the subject property boundary, and nearby RR-10 residential lots along NW 93rd Street. These properties have water service primarily from wells, on-site sewage disposal systems and electrical service, cellular telephone services, etc.

The Applicant provided a will-serve letter from Central Electric Cooperative indicating that it is willing and able to serve the specified project location. The Applicant also included well logs from nearby properties with the application submittal demonstrating water availability in the general area.

Several commentators raised concerns regarding the general availability of groundwater in the area. The Applicant stated that rural residential development would use less water than water required for farming the subject property. There is no evidence that use of groundwater for farm use would be greater than use of groundwater for rural residential development. The Hearings Officer notes that there are no irrigation rights on the subject property, which would be required for most farm operations. The Hearings Officer finds that subjective opinions and anecdotal testimony regarding availability of groundwater for domestic use is not substantial evidence to rebut the Applicant's well log evidence in the record.

Any new water use, unless exempt, must be appropriately permitted through the Oregon Water Resources Department (OWRD). At this time, no development is proposed and no approval for new water use has been requested. The Hearings Officer finds that water availability concerns of the state agencies and other commentators will be reviewed at the time of development applications. Without adequate water availability, future residential development may be limited or denied

The Hearings Officer finds there are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare as the result of reclassifying the zoning of the subject property to RR10. Prior to development of the properties, the Applicant will be required to comply with the applicable requirements of the Deschutes County Code, including land use permitting, building permits, and sewage disposal permit processes, as well as to obtain a permit from the OWRD, if necessary, for a new water use unless exempt. The Hearings Officer finds that, through these development review processes, assurance of adequate public services and facilities will be verified. This criterion is met.

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

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

The RR-10 zoning is consistent with the specific goals and policies in the comprehensive plan as shown by the discussion of plan policies above. The existing EFU zoning and comprehensive plan already support development of the subject property with a number of nonfarm dwellings because the property is generally unsuitable for farm or forest uses. The property is comprised of nine lots of record that could qualify for development with up to approximately 24 dwellings including an existing nonfarm dwelling and two approved nonfarm dwellings. The RR-10 zoning will allow more dwellings to be built on the subject property but the impacts imposed will be the same as the minimal impacts imposed by a nonfarm dwelling.

The only adjoining land in farm use is Volwood Farms. It is located to the west of the subject property. Most of this farm property is located far below the subject property. This geographical separation will make it unlikely that the rezone will impose new or different impacts on Volwood Farms than imposed on it by existing farm and nonfarm dwellings. There are other farms in the surrounding area but all, like the Volwood Farms property, are functionally separated from the subject property by the steep hillside and rocky ridges of the subject property. Farm uses in the greater area, also, are occurring on properties that have been developed with residences. These properties are, however, separated from the subject property by a sufficient distance that RR-10 development will not adversely impact area farm uses or lands.

In addition to these comments, the Applicant provided specific findings for each relevant Comprehensive Plan goal and policy, which are addressed below. The Hearings Officer finds the impacts of reclassification of the subject property to RR10 on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan for the reasons set forth in the Comprehensive Plan section of this Decision and Recommendation. This criterion is met.

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: The Applicant proposes to rezone the properties from EFU to RR-10 and re-designate the properties from Agriculture to Rural Residential Exception Area. The Applicant provided the following response in the submitted burden of proof statement:

There has been a change in circumstances since the subject property was last zoned and a mistake in designating the subject property EFU/Agriculture when soils did not merit a designation and protection as "Agricultural Land." This zone was applied to the property in 1979 and 1980 when Deschutes County adopted zones, a zoning ordinance and comprehensive plan that complied with the Statewide Goals.

In 1979 and 1980, undeveloped rural lands that contained poor soils but undeveloped were zoned EFU without regard to the specific soil characteristics of the property. Land owners were required to apply for a zone change to move their unproductive EFU properties out of the EFU zone. The County's zoning code allowed these owners a one-year window to complete the task. This approach recognized that some rural properties were mistakenly classified EFU because their soils and other conditions did not merit inclusion of the property in the EFU zone.

Some Deschutes County property owners of lands received approval to rezone properties but many eligible parcels were not rezoned during this short window of time. The soils on the subject property are similarly poor and also merit RR-10 Zoning to correct the "broad brush" mapping done in 1979 and 1980. Also, since 1979 and 1980, there is a change of circumstances related to this issue. The County's Comprehensive Plan has been amended to reinstate the right of individual property owners to seek this type of zone change and plan amendment.

Additionally, 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.

*Since the property was zoned, it has become evident that farm uses are not viable on the property or on other area properties. 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 T**, 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 U**. The vast majority of farms in Deschutes County have soils that are superior to those found on the subject property. As farming on those 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.*

For the reasons set forth above in the Hearings Officer's Preliminary Findings and Conclusions, incorporated herein by this reference, the Hearings Officer finds a mistake was made by Deschutes County in zoning the subject property for Exclusive Farm Use given the predominately poor (Class VII and VIII) soils on the property and the evidence that the property owner cannot engage in "farm use," with the primary purpose of making a profit in money on the subject property. The Hearings Officer further finds that there has been a change in circumstances from the time the property was originally zoned EFU due to a rapid increase in population and a dwindling supply of rural residential lots to accommodate the added residents in the area. The Hearings Officer finds this criterion is met.

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's soils study, **Exhibit F**, and the findings in this burden of proof demonstrate that the subject property is not agricultural land. This goal, therefore, does not apply. The vast majority of the subject property is comprised of Class 7 and 8 nonagricultural soils and the property has no known history of agricultural use. As noted in the Eastside Bend decision, **Exhibit L**, "these [Class 7 and 8] soils [according to soils scientist and soils classifier Roger Borine] have severe limitations for farm use as well as poor soil fertility, shallow and very shallow soils, surface stoniness, low available water capacity, and limited availability of livestock forage." According to Agricultural Handbook No. 210 published by the Soil Conservation Service of the USDA, soils in Class 7 "have very severe limitations that make them unsuited to cultivation and that restrict their use largely to grazing, woodland, or wildlife." Class VIII soils "have limitations that preclude their use for commercial plant production and restrict their use to recreation, wildlife, or water supply or to esthetic purposes."*

As set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds substantial evidence in the record supports a finding that the subject property is not "agricultural land," and is not land that could be used in conjunction with adjacent property for agricultural uses. There is no evidence that the requested plan amendment and rezone will contribute to loss of agricultural land in the surrounding vicinity. I find that the agricultural industry will not be negatively impacted by re-designation and rezoning of the subject property. Therefore, the Hearings Officer finds the applications are consistent with Section 2.2, Goal 1, "preserve and maintain agricultural lands and the agricultural industry."

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 RR10. The Hearings Officer finds this policy is inapplicable to the subject applications.

Policy 2.2.3 Allow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, for individual EFU parcels as

allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan.

FINDING: The 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:

*This plan policy has been updated specifically to allow non-resource land plan and zone change map amendments on land zoned EFU. The applicant is seeking a comprehensive plan amendment from Agriculture to RREA and a zone change from EFU-TE to RR-10 for non-resource land. This is essentially the same change approved by Deschutes County in PA-11-1/ZC-11-2 on land owned by the State of Oregon (DSL). In findings attached as **Exhibit N**, Deschutes County determined that State law as interpreted in *Wetherell v. Douglas County*, 52 Or LUBA 677 (2006) allows this type of amendment. LUBA said, in *Wetherell* 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 used this case as an opportunity to change 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*, 343 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. In this case, the applicant has shown that the*

subject property is primarily composed of Class VII and VIII nonagricultural soils making farm-related endeavors, including livestock grazing, unprofitable. The property is not currently employed in any type of farm use and exhibits no evidence of such use. It is known that the property has not been employed in farm use for the past 20 years. Accordingly, this application complies with Policy 2.2.3.

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. For the reasons set forth above in the Preliminary Findings and Conclusions, incorporated herein by this reference, the Hearings Officer finds the subject property is not agricultural land and does not require an exception to Statewide Planning Goal 3 under state law. The applications are consistent with this Policy.

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. The Hearings Officer adheres to the County's previous determinations in plan amendment and zone change applications 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. Substantial evidence in the record supports a finding that the subject property was not accurately designated as agricultural land as detailed above in the Preliminary Findings and Conclusions, incorporated herein by this reference. Further discussion on the soil analysis provided by the Applicant is detailed under the OAR Division 33 criteria below. The Hearings Officer finds the applications are consistent with this policy.

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 future development. Rather, the Applicant will be required to address this criterion during development of the subject property, which would be reviewed under any required land use process for the site (e.g. conditional use permit, tentative plat). The Hearings Officer finds this policy does not apply to the subject applications.

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. The Hearings Officer finds that no LM combining zone applies to the subject property, nor is the subject property identified as a Goal 5 resource. Furthermore, no new development is proposed under the present application.

The state agencies and several commentators suggested that the subject property should be left “as is” because it is allegedly being used by wildlife as a “wildlife sanctuary.” There is no applicable statute or regulation that requires the property to be subject to wildlife protections given that there is no LM combining zone applicable to the subject property and it is not designated as a Goal 5 resource. Nor is there any state law that prohibits redesignation and rezoning of a property in and of itself on this basis. There is nothing in OAR 660-033-0030, “Identifying Agricultural Land,” that makes any reference to wildlife or wildlife use.

For these reasons, the Hearings Officer finds that these provisions of the plan are inapplicable to consideration of 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:

This part of the comprehensive plan is not a relevant approval criterion for a plan amendment and zone change application. Instead, it is the County's assessment of the amount of population growth might occur on rural residential lands in the future based on its understanding of the types of changes allowed by law. Comprehensive Plan Policy 2.2.3 specifically authorizes rezoning and comprehensive plan map amendments for any property zoned EFU and is the code section that defines the scope of allowed zone changes.

This section makes it clear, however, that EFU-zoned land with poor soils adjacent to rural residential development is expected to be rezoned for rural residential development during the planning period. The subject property has extremely poor soils that do not qualify as agricultural land that must be protected by Goal 3. The subject property also adjoins EFU lands developed with rural residential uses (nonfarm dwellings) – Tax Lots 100, 200, 300, Map 14-12-28D and Tax Lot 301, Map 14-12-27. It is also located in close proximity to a large area of RR-10 land to the north and northeast that includes the large Lower Bridge Estates subdivision.

The RR10 Zone is a rural residential zone and as discussed in the Findings of Fact above, and there are several nearby properties to the north and northeast that are zoned RR10 as well as nearby EFU zoned property developed with residential uses and others that have been approved for development of nonfarm dwellings. This policy references the soil quality, which is discussed above.

The Hearings Officer finds that 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. The Hearings Officer notes this policy references the soil quality, which is discussed in detail above. The Hearings Officer finds that, the rezone application does not include the creation of new residential lots. However, read in conjunction with Comprehensive Plan Policy 2.2.3, which specifically authorizes rezoning and comprehensive plan map amendments for any property zoned EFU that is comprised of poor soils and are in the vicinity of other rural residential uses, the Hearings Officer finds that rezoning the subject property to RR-10 is consistent with this policy. The Applicant has demonstrated the Subject Property is comprised of poor soils, cannot be used for "farm use," as defined in ORS 215.203 and that is in the vicinity of other rural residential uses.

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 initiating a nonresource plan amendment and zone change by demonstrating the property does not meet the definition of agricultural or forest land, or taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR.

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

The quoted language is a part of the background text of the County's comprehensive plan. It is not a plan policy or directive and it is not an approval standard for this application. It does, however, recognize the fact that a Rural Residential Exception Area designation is an appropriate plan designation to apply to nonresource lands.

As LUBA and the Oregon Supreme Court recognized in the Wetherell decision, there are two ways a county can justify a decision to allow non-resource use of land previously designated and zoned for farm or forest uses. The first is to take an exception to Goal 3 and Goal 4 and the other is to adopt findings that demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. Here, the applicant is pursuing the latter approach. The quoted plan text addressed the former. If the quoted plan text were read to require an exception to Goal 3 or 4 where the underlying property does not qualify as either Goal 3 or Goal 4 resource land, such a reading would be in conflict with the rule set forth in Wetherell and Policy 2.2.3 of the Comprehensive Plan.

The Deschutes County Board of Commissioners has interpreted its RREA plan designation to be the proper "catchall" designation for non-resource land in its approval of the Daniels Group plan amendment and zone change by adopting the following finding by Hearings Officer Ken Helm:

"I find that Deschutes County has interpreted the RREA plan designation as the property "catchall" designation for non-resource land."

As a result, the RREA plan designation is the appropriate plan designation for the subject property.

The Hearings Officer adheres to the past Deschutes County Hearings Officer interpretations and finds that the above language is not a policy and does not require an exception to Statewide

Planning Goal 3. The Hearings Officer finds the proposed RREA plan designation is the appropriate plan designation to apply to the subject property as a “catch-all” rural designation for the subject property, which is not agricultural land.

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 complies with this direction by determining compliance with the Transportation Planning Rule (TPR), also known as OAR 660-012, as set forth below in subsequent findings.

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 existing site 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 involved 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 seven-mile radius. The properties do not contain merchantable tree species and there is no evidence in the record that the properties have been employed for forestry uses historically. The NRCS has determined that the soil mapping units on the subject property are not suitable for wood crops and, therefore, has excluded them from Table 8 of the NRCS Soil Survey of the Upper Deschutes River Area. The Hearings Officer finds this satisfies OAR 660-06-0005(7)(a) and OAR 660-06-0010(2). There are no wood production capabilities of the subject property.

For the foregoing reasons, the Hearings Officer finds the subject property does not 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 includes a definition of “Agricultural Land,” which is repeated in OAR 660-033-0020(1). The Hearings Officer has made Preliminary Findings and Conclusions set forth above, and incorporated herein by this reference, that the subject property does not constitute “agricultural land.”

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 Oregon²²;*

²² 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.

FINDING: The Applicant’s basis for not requesting an exception to Goal 3 is founded on the premise that the subject property does not meet the definitions of “Agricultural Land.” In support, the Applicant offered the following response as included in the burden of proof statement:

*Statewide Goal 3, above, ORS 215.211 and OAR 660-033-0030(5) allow the County to rely on the more detailed and accurate information provided by the **Exhibit F** soil study to determine whether land is agricultural land. ORS 215.211 give a property owner the right to rely on more detailed information than is 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.” The more detailed soils survey obtained by the applicant shows that approximately 71% of the subject property is composed of Class VII and VIII soils. As a result, it is clear that the tract is not predominantly composed of Class I-VI soils.*

The soil study provided by Mr. Rabe of Valley Science and Engineering (dated June 22, 2021) and the soil report addendum (dated January 13, 2022) support the Applicant’s representation of the data for the subject property. This data was not rebutted by any party.

As set forth in detail in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds, based on the submitted soil study and the above OAR definition, that the subject property is comprised predominantly of Class VII and VIII soils and, therefore, does not constitute “Agricultural Lands” as defined in OAR 660-033-0020(1)(a)(A).

(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 founded on the proposal that the subject property are not defined as “Agricultural Land.” The Applicant provides the following analysis in the burden of proof.

This part of the definition of “Agricultural Land” requires the County to consider whether the Class VII and VIII soils found on the subject property are suitable for farm use despite their Class VII and VIII 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 primary agricultural use conducted on properties that lack irrigation water rights and have poor soils is grazing cattle. The extremely poor soils found on the property, however, make it a poor candidate for dryland grazing. The dry climate makes it difficult to produce adequate forage on the property to support a viable or potentially profitable grazing

operation or other agricultural use of the property. This issue is addressed in greater detail in the Exhibit F soils study. Photographs of various parts of the subject property provide a visual depiction of the land in question and its characteristics:

[Please see the burden of proof for photos submitted by the applicant]

Given the high cost of irrigating and maintaining the property as pasture or cropland (high labor costs, labor-intensive, high cost of irrigation equipment and electricity, high cost of fertilizer, etc.), dry land grazing is the accepted farm use of poor soils in Deschutes County. This use can be conducted until the native vegetation is removed by grazing (see the discussion of the suitability of the property for grazing, below). The soils study includes an analysis of the level of cattle grazing that would be able to be conducted on the property, without overgrazing it. It finds that the entire 710 acres would support from 8 to 15 cow-calf pairs for a year based on proper management of the land for year-round grazing.

When assessing the potential income from dry land grazing, Deschutes County uses a formula and assumptions developed by the OSU Extension Service. This formula is used by the County to decide whether EFU-zoned land is generally unsuitable for farm use. It assumes that one acre will produce 900 pounds of forage per year.

- One AUM is the equivalent to the forage required for a 1000 lb. cow and calf to graze for 30 days (900 pounds of forage).*
- On good quality forage, an animal unit will gain 2 pounds per day.*
- Two animal units will eat as much in one month as one animal unit will eat in two months.*
- Forage production on dry land is not continuous. Once the forage is consumed, it typically will not grow back until the following spring.*
- An average market price for beef is \$1.15 per pound.*

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

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

60.0 lbs. Beef/acre x 710 acres x \$1.15/lb. = \$48,990 per year of gross income

Thus, using the OSU/County formula, the total gross beef production potential for the subject property if it was comprised of more productive soils than found on the subject property would be approximately \$48,990 annually. This figure represents gross income and does not take into account real property taxes, fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production which would exceed income. Property taxes, alone, were \$15,706.62 for the eight tax lots that comprise the subject property in 2020. The payment of a modest wage of \$15.00 per hour to the rancher and/or employee for only one FTE would cost the ranch operation \$31,200 in

wages and approximately an additional \$7,800 to \$12,480 (1.25 to 1.4 of salary) for employment taxes paid by the employer and standard employee benefits. An expired internet job listing (at least two years old) for a farmer to farm the Volwood Farms property located to the west of the subject property offered wages of \$15 to \$25 an hour and medical insurance. **Exhibit V.** A wage of \$25 per hour provides an annual salary of \$52,000 and costs the farm approximately \$15,000 to \$20,800 in taxes and benefits.

A review of the seven considerations listed in the administrative rule, below, provided in the soils survey report, Exhibit F, and in the findings provided below explain why the poor-quality soils found on the subject property are not suitable for farm use:

Soil Fertility: Class 7 and 8 soils are not fertile soils. They are not suited for the production of farm crops. This fact has been recognized in numerous County land use cases, including the zone change and plan amendment applications being filed with this land use application. Farm use on these soils is limited to rangeland grazing at a level that does not qualify as “farm use.” No person would expect to make a profit by grazing livestock on the subject property.

Suitability for Grazing: The climate is cold and dry. The growing season is very short. The subject property is located between Redmond and Sisters. According to the OSU Extension Service the growing season for Redmond is only 80 to 90 days long. **Exhibit W.** The growing season for Sisters is shorter. The average annual precipitation for Redmond is only 8.8 inches. This means that the amount of forage available for dry land grazing is low and will be slow to regrow. This also means that a farmer has a short period of amount of time to irrigate pastures, if irrigation water rights can be secured. This makes it difficult for a farmer to raise sufficient income to offset the high costs of establishing, maintaining and operating an irrigation system and groundwater well. That cost also would include the cost of purchasing and retiring water rights from another area farm property to mitigate for the impacts of pumping groundwater – something that is cost-prohibitive for almost any farm operation. This is clearly the case for irrigating non-agricultural Class VII and VIII soils.

Existing and Future Availability of Water for Farm Irrigation Purposes: The subject property is not located in an irrigation district. It is too remote from any irrigation district in terms of distance and elevation (above) to be able to obtain irrigation water from a district for farming as shown by **Exhibit X.** In order to obtain water rights, the applicant would need to acquire a water right from Oregon Water Resources Department (OWRD). If such a right were able to be secured, the property owner would need to purchase and retire water rights from irrigated farm land in Central Oregon that is surely more productive than the subject property (71% Class VII and VIII soils). Such a transaction would run counter to the purpose of Goal 3 to maintain productive Agricultural Land in farm use. The cost of purchasing water rights, obtaining a groundwater permit and establishing an irrigation system are significant and would not be reasonably expected to result in farm income that would offset the cost incurred for the subject property.

Existing Land Use Patterns: *The applicant's analysis of existing land use patterns provided earlier in this burden of proof shows that the subject property is located primarily on a plateau above farm lands. The lands on the plateau are either undeveloped open space owned by the USA or RR-10 zoned subdivision lots developed with single-family homes. The addition of RR-10 zoned lots and homes rather than nonfarm dwellings is consistent with land use of other privately-owned property on the plateau. Below the plateau are public lands and a small number of farms and farm and nonfarm dwellings on or adjacent to existing farm operations. The addition of homes here would not impose significant new impacts on farm operations in the area.*

Technological and Energy Inputs Required: *Given its poor soils, this parcel would require technology and energy inputs over and above accepted farming practices. Excessive fertilization and soil amendments; very frequent irrigation, and marginal climatic conditions would restrict cropping alternatives. Pumping irrigation water requires energy inputs. The application of lime and fertilizer typically requires the use of farm machinery that consumes energy. The irrigation of the property requires the installation and operation of irrigation systems. All of these factors are why Class 7 and 8 soils are not considered suitable for use as cropland.*

Accepted Farming Practices: *As determined by the County in the Aceti case, farming lands comprised of soils that are predominately Class VII and VIII 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 occur on Class VI non-irrigated soils. Crops are typically grown on soils in soil class III and IV when irrigated that Class VI without irrigation.*

The Hearings Officer incorporates herein by this reference the Preliminary Findings and Conclusions above and finds that the subject property does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(B).

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

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

The subject property is not land necessary to permit farm practices to be undertaken on adjacent or nearby lands. The following facts are shown by the applicant's discussion of surrounding development in Section E of this application, above and by the additional information provided below.

West: *Properties to the west of the subject property are separated from the subject property by topography. The dramatic change in topography makes it infeasible to use the subject property for farm use in conjunction with these properties. Additionally, the subject property is not necessary to permit farm practices to be undertaken on adjacent or nearby lands to the west. Farm practices have been occurring on these properties for decades without any need to use the subject property*

to conduct farm practices on these properties.

EFU Properties to the West (South to North)

<i>Tax Map, Lot and Size</i>	<i>Farm Use</i>	<i>Potential Farm Practices</i>	<i>Need Subject Property?</i>
<i>14-12-00, 300 1588.55 acres</i>	<i>Open space; public land</i>	<i>Dry land grazing</i>	<i>No, property accessible from Buckhorn Road</i>
<i>14-12-21, 200 & 100 372.71 acres Volwood Farms</i>	<i>Irrigated fields currently growing orchard grass, hay and alfalfa</i>	<i>Irrigation Growing/harvesting crops Fertilizing field Baling hay Herbicide use</i>	<i>No, Tax Lot 200 and 100 are below the level of a majority of subject property. They are comprised of good farm soils while the subject property is not. Separation due to elevation has prevented conflicts between existing nonfarm dwelling on subject property and this farming operation.</i>
<i>14-12-20, 200 146.37 acres</i>	<i>Irrigated field suitable for growing orchard grass, hay, and alfalfa</i>	<i>Irrigation Growing/harvesting crops Fertilizing field Baling hay Herbicide use</i>	<i>No, TL 200 is located west of Buckhorn Road and separated from subject property by Volwood Farms property. Property also separated from subject property by topography.</i>

North: All of the land north of the subject property that might rely on the subject property for farm practices, other than the Volwood Farms property inventoried above and an open space tract of land owned by the USA, is zoned RR-10 and is not in farm use. Cattle grazing would be able to occur on the USA property at a very limited scale due to sparse vegetation without need for the subject property to conduct the activity.

East:

EFU Properties to East (North to South)

<i>Tax Map, Lot and Size</i>	<i>Farm Use</i>	<i>Potential Farm Practices</i>	<i>Need Subject Property?</i>
<i>14-12-22B, 700 80 acres</i>	<i>Open space public land</i>	<i>Livestock grazing</i>	<i>No, grazing can occur without reliance on subject property.</i>
<i>14-12-22C, 500 120 acres</i>	<i>Open space public land</i>	<i>Livestock grazing</i>	<i>No, grazing can occur without reliance on subject property.</i>
<i>14-12-27, 200 120 acres</i>	<i>Open space public land</i>	<i>Livestock grazing</i>	<i>No, grazing can occur without reliance on subject property.</i>
<i>14-12-27, 301 17.50 ac</i>	<i>None. Nonfarm parcel and dwelling</i>	<i>None</i>	<i>No, no farm use and property not suitable for farm use.</i>
<i>14-12-00, 300 62.58 acres</i>	<i>Irrigated cropland suitable for growing orchard grass, hay, and alfalfa</i>	<i>Irrigation Growing/harvesting crops Fertilizing field Baling hay Herbicide use</i>	<i>No, separated from subject property by Tax Lot 301 and elevation. Property created by partition that found that nonfarm dwelling would not interfere with farm use on Tax Lot 300 and other area farms.</i>
<i>14-12-14B, 200 80 acres</i>	<i>Approved for nonfarm dwelling</i>	<i>None</i>	<i>No</i>

South: *Most of the land to the south of the subject property is open space land owned by the USA and nonfarm dwelling parcels comprised of land determined by Deschutes County to be generally unsuitable for the production of farm crops, livestock and merchantable tree species.*

EFU Properties to South

Tax Map, Lot and Size	Farm Use	Potential Farm Practices	Need Subject Property?
14-12-280, 100 28.60 acres	None, nonfarm dwelling	None	No
14-12-280, 200 19.11 acres	None, nonfarm dwelling	None	No
14-12-280, 300 19.65 acres	None, nonfarm dwelling	None	No
14-12-20, 3200 1588.55 acres	Open space public land	Livestock grazing	No, grazing can occur without reliance on subject property. Accessible from Buckhorn Road and Coyner Avenue.
14-12-00, 1923 37.51 acres	Nonfarm dwelling. Small irrigated pasture for horses and small pivot suitable for growing hay, grass or alfalfa.	Irrigation Growing/harvesting crops Fertilizing field Baling hay Herbicide use	No, separated from subject property by other nonfarm properties.

The Applicant provided a detailed analysis of land uses and agricultural operations surrounding the subject property. The Hearings Officer finds that barriers for the subject property to engage with in farm use with these properties include: poor quality soils, lack of irrigation, proximity and significant topography changes.

The Hearings Officer incorporates herein by this reference the Preliminary Findings and Conclusions above and finds that the subject property does not constitute “Agricultural Lands” as defined in OAR 660-033-0020(1)(a)(C).

- (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 burden of proof statement:

The subject property is not a part of a farm unit. The property is a tract of land that is generally unsuitable for the production of farm crops and livestock and

merchantable trees species that is eligible to be developed with nonfarm dwellings. As a result, this rule does not apply to the County's review of this application.

The apparent purpose of this rule is to prevent the rezoning of portions of a farm property that function together as a farm. That is not the case here. In this case, the property in its entirety is not agricultural land and is not a farm unit because it is not engaged in farm use and has not been engaged in that use for 20 years or more. The applicant is not seeking to remove unproductive lands from an otherwise productive farm property.

Even if the subject property is considered to be a "farm unit" despite the fact it has never been farmed, Goal 3 applies a predominant soil test to determine if a property is "agricultural land." The predominant soils classification of the subject property is Class VII and VII which provides no basis to inventory the property as agricultural land unless the land is shown to be, in fact, productive farmland.

*All parts of the subject property were studied by the applicant's soils analysis, **Exhibit F**. The analysis shows that the predominant soil type found on the property is Class VII and VIII, nonagricultural land. Some Class VI soils are intermingled with the nonagricultural soil not vice versa. As a result, this rule does not require the Class VII and VIII soils to be classified agricultural land.*

The Hearings Officer incorporates by this reference the Preliminary Findings and Conclusions set forth above and finds that the subject property does not constitute "Agricultural Lands," as defined in OAR 660-033-0020(1)(b).

- (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. The Hearings Officer finds this criterion is inapplicable.

OAR 660-033-0030, Identifying Agricultural Land

- (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. For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the subject property is not "Agricultural Lands," as defined in OAR 660-033-0030(1). The subject property is not necessary to permit farm practices undertaken on adjacent and nearby lands.

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

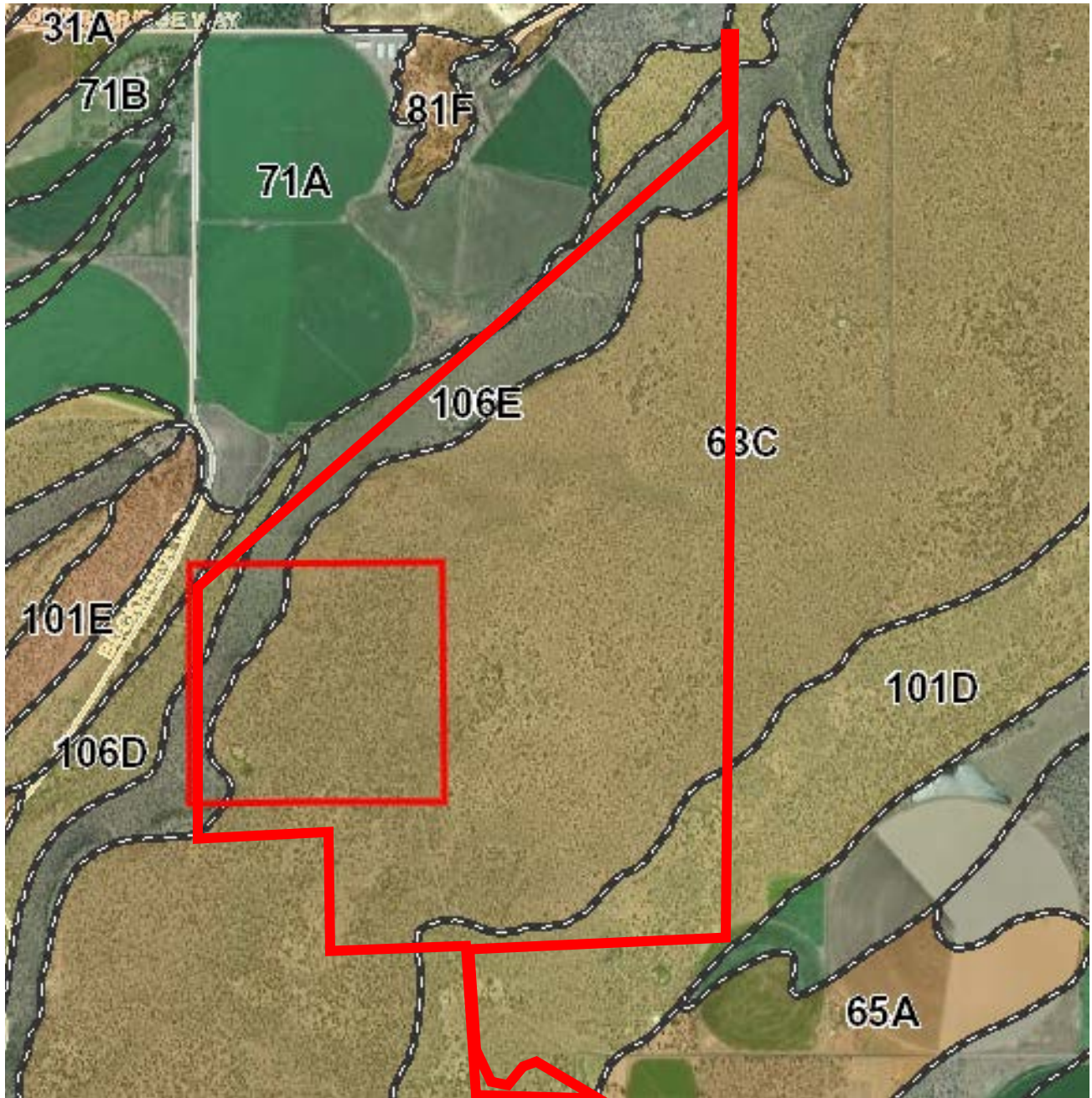
FINDING: As the Hearings Officer found above, the subject property is not suitable for farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands, regardless of ownership of the subject property and ownership of nearby or adjacent land. For the reasons set forth in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the subject property is not "Agricultural lands," and thus that no exception to Goal 3 is required.

- (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 soil study prepared by Mr. Rabe provides more detailed soils information than contained in the NRCS Web Soil Survey. NRCS sources provide general soils data for large units of land. The Hearings Officer finds the soil study provides detailed and accurate information about individual parcels based on numerous soil samples taken from the subject property. The soil study is related to the NRCS Land Capability Classification (LCC) system that classifies soils class I through VIII. An LCC rating is assigned to each soil type based on rules provided by the NRCS.

The NRCS mapping for the subject property is shown below in **Figure 1**. According to the NRCS Web Soil Survey tool, the subject property predominantly contains 63C soil (75 percent) and 106E soil (17 percent) with the remaining property containing smaller amounts of 31B, 71A, 101D, and 106D soils.

Figure 1 - NRCS Soil Map (Subject Property, appx.)



The soil study conducted by Mr. Rabe of Valley Science and Engineering finds the soil types on the subject property vary from the NRCS identified soil types. The soil types described in the soil study are described below and the characteristics and LCC rating are shown in **Table 1** below

Table 1 - Summary of Order 1 and 2 Soil Survey (Subject Property)

Site-Specific Symbol	Unit Name	Acreage	%	Land Capability Class ¹	
				non-irrigated	irrigated
36B	Deskamp loamy sand, 0 to 8% slopes	5.05	0.7%	6s	3s
81C	Lickskillet stony sandy loam, 0 to 15% slopes	375.03	52.5%	7e	--
81D	Lickskillet stony sandy loam, 15 to 30% slopes	54.03	7.6%	7e	--
81E	Lickskillet stony sandy loam, 30 to 50% slopes	64.73	9.1%	7e	--
106D(R)	Redslide sandy loam, 15 to 30% slopes	22.88	3.2%	6e	--
127C	Statz sandy loam, 0 to 15% slopes	178.72	25.0%	6s	4s
109	Rock outcrop	14.16	2.0%	8s	--
Total		714.60	100%		
Subtotal Class I - VI		206.65	29%		
Subtotal Class VII - VIII		507.95	71%		

NOTES:

Abbreviations: "--" = no data, e = erosion, NRCS = Natural Resources Conservation Service, s = shallow.

¹ Land Capability Class as published in the Soil Survey of Upper Deschutes River Area, Oregon (Soil Survey Staff, Natural Resources Conservation Service, 2002).

Mr. Rabe’s soil study concludes that the subject property contains 71 percent Class VII and VIII soils. The submitted soil study prepared by Mr. Rabe is accompanied in the submitted application materials by correspondence from the Department of Land Conservation and Development (DLCD) (Applicant’s Exhibit F).

The DLCDC correspondence confirms that Mr. Rabe’s prepared soil study is complete and consistent with the reporting requirements for agricultural soils capability as dictated by DLCDC. Based on Mr. Rabe’s qualifications as a certified Soil Scientist and Soil Classifier, and as set forth in detail in the Preliminary Findings and Conclusions above, incorporated herein by this reference, the Hearings Officer finds the submitted soil study to be definitive and accurate in terms of site-specific soil information for the subject property.

- (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. Therefore, this section and OAR 660-033-0045 applies to these applications.

- (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. Rabe of Valley Science and Engineering dated June 22, 2021, and an addendum dated January 13, 2022. The soils study was submitted following the ORS 215.211 effective date. The Applicant's Exhibit F includes acknowledgement from Hilary Foote, Farm/Forest Specialist with the DLCDC, dated September 13, 2021, that the soil study is complete and consistent with DLCDC's reporting requirements. The Hearings Officer finds this criterion is met.

- (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 provided a DLCDC certified soil study as well as NRCS soil data. The Hearings Officer finds this criterion is met.

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: The Hearings Officer finds this provision 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 zoning from EFU to RR10. The Applicant is not proposing any land use development of the property at this time.

As referenced in the agency comments section in the Findings of Fact, 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 Christopher M. Clemow, PE, PTOE of Clemow Associates, LLC dated January 17, 2022, 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 had been addressed and he was satisfied with the amended report. Mr. Clemow included the following conclusions in the traffic impact analysis dated January 17, 2022:

The following conclusions are made based on the materials presented in this analysis:

- 1. The proposed Deschutes County Comprehensive Plan Amendment and Zone Change from Exclusive Farm Use – Terrebonne Subzone (EFUTE) to Rural Residential – 10 Acre Minimum (RR-10) will not significantly affect the transportation system.*
- 2. All roadways along the primary travel route to/from the development are constructed to an adequate County standard, including paved 12-foot travel lanes.*
- 3. All study intersections will operate well with agency mobility standards/targets in the plan year and no intersection mitigation is necessary.*
- 4. The proposed site access is in the same location as the existing access and forms the west intersection leg. There is no horizontal or vertical roadway curvature limiting sight distance, nor is there any obstructing vegetation. As such, there is adequate sight distance at the proposed access location.*
- 5. There are no recorded crashes at any of the study intersections or the roadway segments during the study period. As such, the roadway and intersections are considered relatively safe, and no further evaluation of safety deficiencies is necessary.*

6. *Additional transportation analysis is not necessary to address Deschutes County Code Transportation Planning Rule criteria outlined in Oregon Administrative Rule 660 012-0060.*

Based on the County Senior Transportation Planner's comments and the traffic study from Clemow Associates, LLC, the Hearings Officer finds compliance with the Transportation Planning Rule has been effectively demonstrated. Based on the TIA, the Hearings Officer finds 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.

The Hearings Officer notes that, despite the transportation information provided by the Applicant and via agency comment, public comments received by the County indicate concerns with potential traffic impacts as a result of the proposed plan amendment and zone change. The Hearings Officer finds that no development application is before me at this time. At the time of any land use application(s) for the subject property, analysis and review of transportation and traffic impacts of any proposed development will be required.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

FINDING: The Statewide Planning Goals are addressed as follows 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 so Goal 3 does not apply.*

Goal 4, Forest Lands. *The existing site 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 "[w]here **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.

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 cause a measurable impact on Goal 6 resources. Approval will make it more likely that the irrigation and pond water rights associated with the property will ultimately be returned to the Deschutes River or used to irrigate productive farm ground found elsewhere in Deschutes County.*

Goal 7, Areas Subject to Natural Disasters and Hazards. *This goal is not applicable because the subject property is not located in an area that is recognized by the comprehensive plan as a known natural disaster or hazard area.*

Goal 8, Recreational Needs. *This goal is not applicable because the property is not planned to meet the recreational needs of Deschutes County residents and does not directly impact areas that meet Goal 8 needs.*

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 impact economic activities of the state or local 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. Utility service providers have confirmed that they have the capacity to serve the maximum level of residential development allowed by the RR-10 zoning district.*

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 in a part of the community that contains a large amount of rural residential development. 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.

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 RR-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, Willamette Greenway. *This goal does not apply because the subject property is not located in the Willamette Greenway.*

Goals 16 through 19. *These goals do not apply to land in Central Oregon.*

The Hearings Officer finds consistency with Goal 1 (Citizen Involvement) has been established with the public notice requirements required by the County for these applications (mailed notice, posted notice and two public hearings). Similarly, the Hearings Officer finds consistency with Goal 2 (Land Use Planning) based on the applications' consistency with goals, policies and processes related to zone change applications as set forth in the Comprehensive Plan and Titles 18 and 23 of the Deschutes County Code.

Based on the findings above, the Hearings Officer finds consistency with Goal 3 (Agricultural Lands) has been demonstrated because the Subject Property is not Agricultural Land. The property is not comprised of Forest Lands. Therefore, Goal 4 is inapplicable.

With respect to Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), the Hearings Officer finds that the Subject Property does not include any inventoried Goal 5 resources. While the Subject Property is currently open and undeveloped, the County Goal 5 inventory does not include the subject property as an "open space" area protected by Goal 5. Members of the public expressed concern regarding potential impact on wildlife. However, the Hearings Officer notes that the property does not include a wildlife overlay (WA) designation and, more importantly, no development is proposed at this time. Rezoning the subject property will not, in and of itself, impact wildlife on the subject property. Protections for wildlife must be sanctioned by the County's Goal 5 ESEEs and WA or similar wildlife overlay zoning. The Hearings Officer finds there are no wildlife protections applicable to these applications.

The Hearings Officer finds consistency with Goal 6 (Air, Water and Land Resources Quality) because there is no measurable impact of approval of the application to rezone the subject property from EFU to RR-10. Future development activities will be subject to local, state and federal regulations that protect these resources.

With respect to Goal 7 (Areas Subject to Natural Disasters and Hazards), the Hearings Officer finds consistency with this Goal based on the fact that rezoning the subject property to RR-10 does not change the Wildfire Hazard Area designation that is applicable to the entirety of Deschutes

County. The subject property is within the Rural Fire Protection District #2. Any application(s) for future development activities will be required to demonstrate compliance with fire protection regulations. The subject property is located in Redmond Fire and Rescue jurisdiction. The Hearings Officer finds that rezoning the properties to RR10 does not change the Wildfire Hazard Area designation. Any future development of the properties will be required to demonstrate compliance with any fire protection regulations and requirements of Deschutes County.

The Hearings Officer finds consistency with Goal 8 (Recreational Needs) given the fact that no development is currently proposed and that rezoning, in and of itself, will not impact recreational needs of Deschutes County.

The Hearings Officer finds Goal 9 (Economy of the State) is inapplicable because the subject property is not designated as Goal 9 economic development land and approval of the application will not adversely impact economic activities of the state or area.

The Hearings Officer finds the applications are consistent with Goal 10 (Housing) because the Comprehensive Plan Goal 10 chapter anticipates that farm properties with poor soils will be converted from EFU to MUA-10 or RR-10 zoning, making such properties available to meet the need for rural housing. Although no development of the subject property is proposed at this time, rezoning it from EFU to RR-10 will enable consideration of the property for potential rural housing development in the future.

The Hearings Officer finds the applications are consistent with Goal 11 (Public Facilities and Services). The record establishes that utility service providers have capacity to serve the subject property if developed at the maximum level of residential development allowed by the RR-10 zoning district. The proposal will not result in the extension of urban services to rural areas.

Based on the findings above regarding the Transportation System Planning Rule, OAR 660-012-0060, the Hearings Officer finds the applications are consistent with Goal 12 (Transportation).

The Hearings Officer finds the applications are consistent with Goal 13 (Energy Conservation) because there is no evidence approval of the applications will impede energy conservation.

The Hearings Officer finds the applications are consistent with Goal 14 (Urbanization). The subject property is not within an urban growth boundary and does not involve urbanization of rural land because the RR-10 zone does not include urban uses as permitted outright or conditionally. The RR-10 zone is an acknowledged rural residential zoning district that limits the intensity and density of developments to rural levels. The state acknowledged compliance of the RR-10 zone with Goal 14 when the County amended its comprehensive plan.

The Hearings Officer finds that Goals 15-19 do not apply to land in Central Oregon.

For all the foregoing reasons, the Hearings Officer finds compliance with the applicable Statewide Planning Goals has been demonstrated.

IV. DECISION & RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds the Applicant has met the burden of proof necessary to justify the request for a Comprehensive Plan Map Amendment to re-designate the subject property from Agriculture to Rural Residential Exception Area and a corresponding request for a Zone Map Amendment (Zone Change) to reassign the zoning of the subject property from Exclusive Farm Use (EFU) to Rural Residential (RR-10).

The Deschutes County Board of Commissioners is the final local review body for the applications before the County. DCC 18.126.030. The Hearings Officer recommends approval of the applications based on this Decision and Recommendation of the Deschutes County Hearings Officer.

A handwritten signature in black ink, appearing to read 'Stephanie Marshall', is written over a faint, illegible stamp.

Stephanie Marshall, Deschutes County Hearings Officer

Dated this 2nd day of June, 2022

Mailed this 2nd day of June, 2022

owner	agent	inCareOf	address	cityStZip	type	cdd id
J. Kenneth Katzaroff	Schwabe, Williamson & Wyatt		1420 5th Avenue, Suite 3400	Seattle, WA 98101	Hoff Decision	247-21-001043-PA, 1044-ZC
Liz Fancher			2465 NW Sacagawea Lane	Bend, OR 97703	Hoff Decision	247-21-001043-PA, 1044-ZC
710 Properties, LLC			PO Box 1345	Sisters, OR 97750	Hoff Decision	247-21-001043-PA, 1044-ZC
Eden Central Properties, LLC			PO Box 1345	Sisters, OR 97751	Hoff Decision	247-21-001043-PA, 1044-ZC
Chris Clemow			2237 NW Torrey Pines	Bend, OR 97703	Hoff Decision	247-21-001043-PA, 1044-ZC
Brian Rabe			3511 Pacific Blvd SW	Albany, OR 97321	Hoff Decision	247-21-001043-PA, 1044-ZC