



FINDINGS AND DECISION

FILE NUMBER: 247-21-0000400-PA, 401-ZC

HEARING: August 31, 2021, 6:00 p.m.
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

**SUBJECT PROPERTY/
OWNER:** Mailing Name: CENTRAL OREGON IRRIGATION DISTRICT
Map and Taxlot: 1812020001000
Account: 151653
Situs Address: 61781 WARD RD, BEND, OR 97702

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

**TRANSPORTATION
ENGINEER:** Joe Bessman
Transight Consulting, LLC

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

STAFF CONTACT: Tarik Rawlings, Associate Planner
Phone: 541-317-3148
Email: Tarik.Rawlings@deschutes.org

DOCUMENTS: Can be viewed and downloaded from:
www.buildingpermits.oregon.gov and <http://dial.deschutes.org>

I. 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 18.32, Multiple Use Agricultural Zone (MUA10)
- Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance

Deschutes County Comprehensive Plan

- Chapter 2, Resource Management
- Chapter 3, Rural Growth Management
- Appendix C, Transportation System Plan

Oregon Administrative Rules (OAR), Chapter 660

- Division 6, Forest Lands
- Division 12, Transportation Planning
- Division 15, Statewide Planning Goals and Guidelines
- Division 33, Agricultural Land

Oregon Revised Statutes (ORS)

- Chapter 215.211, Agricultural Land, Detailed Soils Assessment

II. BASIC FINDINGS

LOT OF RECORD: Tax Lot 1000 is 36.65 acres in size and has not previously been verified as a legal 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 parcel pursuant to subsection (C) shall be required 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 show on the Statewide Wetlands Inventory;***
 - c. Any permit for a lot or parcel subject to wildlife habitat special assessment;***
 - d. In all zones, a land use permit relocating property lines that reduces in size a lot or parcel'***
 - e. In all zones, a land use, structural, or non-emergency on-site sewage disposal system permit if the lot or parcel is smaller than the minimum area required in the applicable zone;***

In the Powell/Ramsey (PA-14-2, ZC-14-2) decision, the Hearings Officer held to a prior Zone Change

Decision (Belveron ZC-08-04) that a property's lot of record status was not required to be verified as part of a plan amendment and zone change application. Rather, the applicant would be required to receive lot of record verification prior to any development on the subject property. Therefore, this criterion does not apply.

SITE DESCRIPTION: The subject property is approximately 36.65 acres in size and is adjacent to both Bend's city limits and Urban Growth Boundary (UGB) to the west. The property is relatively level with mild undulating topography and collapsed lava tube features. Vegetation consists of juniper, sage brush, and grasses. A portion of the site was historically mined for dirt and fill for maintenance purposes of Central Oregon Irrigation District's (COID) delivery systems. The site is undeveloped except for COID's main canal located along the southern border and offshoot irrigation ditches in the southwestern and southeastern portions of the subject property. Access to the site is provided by stubbed local street connections including Darnel Avenue and Daylily Avenue that are located in the City of Bend's subdivisions to the west.

The subject property does not have water rights, and has not been farmed or used in conjunction with any farming operation in the past. The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies two soil complex units on the property: 36A, Deskamp loamy sand and 58C, Gosney-Rock outcrop-Deskamp complex. The predominant soil complex on the subject property is 58C, which is not a high-value soil as defined by DCC 18.04; 36A is not considered a high-value soil when irrigated. However, as discussed in detail below in the Soils section, there is no irrigation on the subject property and an Agricultural Soils Capability Assessment (Order 1 soil survey) conducted on the property determined: that the property is not agricultural land; Class 3 irrigated and Class 6 non-irrigated soils exist in small pockets interspersed with lava tubes and rocky, shallow soils, creating severe limitations for any agricultural use on the property or in conjunction with other neighboring lands.

PROPOSAL: The applicant requests approval of a Comprehensive Plan Map Amendment to change the designation of the subject property from 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 Multiple Use Agricultural (MUA-10). The applicant asks that Deschutes County change the zoning and the plan designation because the subject property does not qualify as "agricultural land" under Oregon Revised Statutes (ORS) or Oregon Administrative Rules (OAR) definitions. The applicant proposed that no exception to Statewide Planning Goal 3, Agricultural Land is required because the subject property is not agricultural land.

Submitted with the application is an Order 1 Soil Survey of the subject property, titled "Soil Assessment for 37.7-Acre Parcel Lot 1000, Bend, Oregon" (hereafter referred to as the "soil study") prepared by soil scientist Andy Gallagher, CPSSc/SC 03114 of Red Hill Soils. The applicant has also submitted a traffic analysis prepared by Transight Consulting, LLC titled "61781 Ward Road Rezone" hereby referred to as "traffic study." Additionally, the applicant has submitted an application form, a burden of proof statement, and other supplemental materials, all of which are included in the record for the subject applications.

SOILS: According to Natural Resources Conservation Service (NRCS) maps of the area, the subject property contains two different soil types as described below. The subject property contains 58C – Gosney-Rock Outcrop-Deskamp complex and 36A – Deskamp loamy sand.

The applicant submitted a soil study report (applicant’s Exhibit 5), 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 Land². 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 property are described below.

36A, Deskamp loamy sand, 0 to 3 percent slopes: This soil complex is composed of 85 percent Deskamp soil and similar inclusions, and 15 percent contrasting inclusions. The Deskamp soils are somewhat excessively drained with a rapid over moderate permeability, and about 5 inches of available water capacity. Major uses of this soil type are irrigated cropland and livestock grazing. The agricultural capability rating for 36A soils are 3S when irrigated, and 6S when not irrigated. This soil is high-value when irrigated. Approximately 33.7 percent of the subject parcel is made up of this soil type.

58C, Gosney-Rock Outcrop-Deskamp complex, 0 to 15 percent slopes: This soil type is comprised of 50 percent Gosney soil and similar inclusions, 25 percent rock outcrop, 20 percent Deskamp soil and similar inclusions, and 5 percent contrasting inclusions. Gosney soils are somewhat excessively drained with rapid permeability. The available water capacity is about 1 inch. Deskamp soils are somewhat excessively drained with rapid permeability. Available water capacity is about 3 inches. The major use for this soil type is livestock grazing. The Gosney soils have ratings of 7e when unirrigated, and 7e when irrigated. The rock outcrop has a rating of 8, with or without irrigation. The Deskamp soils have ratings of 6e when unirrigated, and 4e when irrigated. Approximately 66.3 percent of the subject parcel is made up of this soil type.

Further discussion regarding soils is found in Section III below.

SURROUNDING LAND USES: The subject property is surrounded by urban development to the west within the Bend City limits; to the east and south are County exception lands zoned MUA10 developed with homes and small-acreage irrigation for pasture and hobby farm uses; and irrigated farmland zoned EFUTRB to the north and northeast. The adjacent properties are outlined below in further detail:

North: North and northeast of the subject property is an area of EFU-zoned property. The adjacent property to the north, Tax Lot 1001 (Assessor’s Map 18-12-02) is a 12.45-acre EFU-zoned property that is partially irrigated and developed with a nonfarm dwelling (approved under County file CU-01-75). Northeast is Tax Lot 201 (Assessor’s Map 18-12-02), a 53.30-acre farm parcel that is irrigated, receiving farm tax deferral, and developed with a single-family dwelling and accessory structures.

¹ As defined in OAR 660-033-0020, 660-033-0030

² As defined in OAR 660-033-0020, 660-033-0030

East: East of the subject property are two parcels zoned MUA10. Tax Lot 1102 (Assessor's Map 18-12-02) is a 5.55-acre parcel developed with a single-family dwelling, accessory structures, and is partially irrigated. Tax Lot 1001 (Assessor's Map 18-12-02) is a 2.5-acre parcel developed with a single-family dwelling, accessory structures, and is partially irrigated.

West: West of the subject property are residential subdivisions located in the City of Bend and developed to urban standards. These include Rosengarth Estates and Gardenside PUD in the RS Zone. Northwest is a 2-acre parcel zoned RL and developed with a residence.

South: The abutting parcel southeast of COID's main canal is a 3.34-acre lot zoned EFUTRB and developed with a single-family dwelling and is partially irrigated. Southwest is Hansen Park (Tax Lot 1404 of Assessor's Map 18-12-02), a 5-acre undeveloped park zoned MUA10 and owned by Bend Metro Parks and Recreation District. East of Hansen Park is a 5-acre parcel zoned MUA10 and developed with a residence (Tax Lot 1407 of Assessor's Map 18-12-02).

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on June 11, 2021, to several public agencies and received the following comments:

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the Transight April 13, 2021, traffic study to change the comp plan designation from Agriculture to Rural Residential Exception Area (RREA) and the zoning from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA-10) for 36.65 acres at 61781 Ward Rd, aka 18-12-02, TL 1000. Staff finds the study needs to be modified to comply with the Transportation Planning Rule and Deschutes County's accepted practices to analyze plan amendments and zone changes.

For "reasonable worst-case scenario" the County compares and contrasts the highest trip generator permitted outright in both the current zone and the requested zone. DCC 18.16.020 lists those uses permitted outright in EFU. DCC 18.16.025 lists other outright permitted uses that meet applicable criteria in either DCC 18.16.038, 18.16.042, and review under DCC 18.124. The TIA cites to marijuana production facility, which the County has analyzed under the Warehouse category of the Institute of Traffic Engineers (ITE) Trip Generation Manual. However, the County has opted out of the state's marijuana processing program and thus this use and its analog of Warehouse should not be used. Instead, staff would utilize Winery (DCC 18.16.025(F)) as a reasonable worst case scenario.

DCC 18.32.020 lists outright permitted uses for MUA-10. The highest trip generator is a cluster development of single-family homes within one-mile of a UGB, per DCC 18.32.040(A), as the traffic study correctly notes.

The study needs to be redone to show the difference between winery and a cluster development to determine if there is a significant effect and any difference in the number of p.m. peak hour trips. This would also require the volumes for the trip distribution figures to be redone as well.

STAFF COMMENT: Upon receipt of the County Senior Transportation Planner's initial comment, above, the applicant submitted a revised traffic study, dated June 8, 2021. No further comments were offered by the County's Senior Transportation Planner.

The following agencies did not respond to the notice: Deschutes County Assessor, Bend Fire Department, City of Bend Planning Department, City of Bend Public Works Department, ODOT Region 4, and City of Bend Growth Management Department.

PUBLIC COMMENTS: The Planning Division mailed notice of the conditional use application to all property owners within 750 feet of the subject property on June 11, 2021. The applicant also complied with the posted notice requirements of Section 22.24.030(B) of Title 22. The applicant submitted a Land Use Action Sign Affidavit indicating the applicant posted notice of the land use action on June 25, 2021. Public comments were received from neighboring property owners.

The first comment was received from Jeff Sundberg, a resident and owner of property located at 61710 Gibson Drive, Bend, OR 97702 on June 15, 2021:

"I received a letter from Deschutes County regarding COID applying for new permits. I live at 61710 Gibson Drive, Bend, OR 97702. I live next to the property in question, 61781 Ward Road. It looks like COID is requesting to go from agriculture and farm use zoning to rural residential exception area and multiple use agricultural zoning. Does this mean they want to put in a housing development? I was wondering if this response by email will suffice if I want to be notified of public hearings related to this application or if I still have to write a letter requesting to be notified of any decision or public hearing. Does any of this change my easement with COID or should I contact them directly? Thanks and let me know anything you can about this land use change please."

The second comment was received from Kecia Weaver, a resident of 21435 Modoc Lane, Bend, OR 97702 on June 18, 2021:

"My name is Kecia Weaver I live at 21435 Modoc Lane Bend, OR 97702 with my spouse who is listed property owner, Patrick McCoy. On 6/17/21 I read the notice of application for the above listed property. I would like to formally dispute the requested zoning changes. I have several concerns, to include the following:

- 1) *Irrigation/Water Rights – As a small farm operator with seasonal livestock I am concerned that the proposed changes may further draw from my water access which has been limited and may be further limited due to drought conditions. More users in the proposed Multiple Use Agriculture may further draw down water allocations.*
- 2) *Wildlife Habitat – Having lived here for over 6 years. I know the proposed area to be home to deer, rabbits, birds and other wildlife which will be disturbed.*
- 3) *Extensive residential development in the immediate area- Over the past few months, extensive development has been proposed both to the north and south of our neighborhood specifically several hundred acres south of Stevens Road and north of Bear Creek Road adjacent to Ward Road.*
- 4) *Traffic concerns – increased traffic will occur in the area with other proposed*

- developments. I am concerned the points of entrance and egress to this proposed area will add to the impact to our neighborhood as well.*
- 5) *Overall rapid growth concerns for Deschutes County- As observed by pitfalls of the rapid growth in the City of Bend over the past decade, I would encourage Deschutes County to adhere to a slower growth model.*
 - 6) *Decrease in property value- This proposed change will drastically impact the view to the west of my property when it is developed.*

With respect to the natural beauty and appeal of this County we have chosen to call home and as a taxpayer and voter, I implore the Deschutes County planning department to deny this application at this time. I wish to be notified of all public hearings related to this application and any decision. My address is 21435 Modoc Lane Bend, OR 97702."

The third comment was received from Patrick McCoy, a neighboring property owner and resident of 21435 Modoc Lane, Bend, OR 97702 on June 18, 2021:

"My name is Patrick McCoy a home and landowner at 21435 Modoc Lane Bend, OR 97702. On 6/17/21 I received the notice of application for the above listed property. With little time to research to this proposal, based on the information I have obtained, I would like to formally dispute the requested zoning changes. My concerns are numerous and I will highlight the following:

- 1) *Irrigation/Water Rights – As a small farm operator with seasonal livestock I am concerned that the proposed changes may further draw from my water access which has been limited and may be further limited due to drought conditions. More users in the proposed Multiple Use Agriculture may further draw down water allocations.*
- 2) *Wildlife Habitat – Having lived here for over 6 years. I know the proposed area to be home to deer, rabbits, birds and other wildlife which will be disturbed.*
- 3) *Extensive residential development in the immediate area- Over the past few months, extensive development has been proposed both to the north and south of our neighborhood specifically several hundred acres south of Stevens Road and north of Bear Creek Road adjacent to Ward Road.*
- 4) *Traffic concerns – increased traffic will occur in the area with other proposed developments. I am concerned the points of entrance and egress to this proposed area will add to the impact to our neighborhood as well.*
- 5) *Overall rapid growth concerns for Deschutes County- As observed by pitfalls of the rapid growth in the City of Bend over the past decade, I would encourage Deschutes County to adhere to a slower growth model.*
- 6) *Decrease in property value- This proposed change will drastically impact the view to the west of my property when it is developed.*

With respect to the natural beauty and appeal of this County we have chosen to call home and as a taxpayer and voter, I implore the Deschutes County planning department to deny this application at this time. I wish to be notified of all public hearings related to this application and any decision. My address is 21435 Modoc Lane Bend, OR 97702."

The fourth public comment was received from Kyle Weaver on June 18, 2021:

"I am writing to express my objection to the proposed changes east of 27th in the pursuit of yet another neighborhood development. The East side of Bend is the current hotspot for housing expansion but some caution must be taken and not simply rubber stamping these applications through and knocking down yet more trees and eliminating farm lands and mountain views. Neighborhoods are popping up in all directions all over town and the construction industry frenzy is full throttle with little interest in these types of nature/aesthetic concerns. I don't begrudge people making some money and Bend is certainly a desirable place to live, but things need to be planned out in a more thoughtful and deliberate fashion. There is nothing wrong with taking a slower and more measured approach as we all consider Bend's growth in the coming years. I have lived in Bend for just over 20 years and have family and friends in the proposed development area and it would drastically reduce their enjoyment of their property. I urge you to decline this request on behalf of many other community members who feel the same way."

The fifth public comment was received from Treva Weaver on June 18, 2021:

"Re: 1812020001000 Central Or. Irrigation District

I am opposed to the proposed land use change by the above referenced owner.....

The loss of open space in Central Oregon continues as the growth proponents seem mainly interested in jumping on the bandwagon and making as much profit as possible. The East side of Bend, where I have lived the past 21 years, has hundreds, if not thousands of housing sites already started or proposed. Until all this land is developed and houses sold, there is no need to venture east of 27th where this property is located.....My great grandfather came to Oregon at age 9 in 1846 and our family has very deep roots in this state. I spend a large amount of time at my daughter's home which is directly east of the proposed development. We enjoy riding our horses in her arena and also enjoy family gatherings in her backyard. The view would be drastically changed if this land is developed. What is wrong with leaving some land in its natural state? It will be many many years before additional housing is needed in this area. Please decline this request change and leave some land in its more natural state."

The sixth public comment was received from John Schaeffer, a neighboring property owner at 61677 Thunder Road, Bend, OR 97702 on June 19, 2021:

"I am writing on behalf of myself and several neighbors in the Stevens Road - Thunder Road neighborhood. We are opposed to COID's proposed changes to the Comprehensive Plan and Zoning for taxlot 1812020001000. We realize this is not a request for development but know that it will lead to development in the next few years, that it is the first step in making the property more marketable, should it be brought into the UGB during the next update.

Development has been increasing in this area, especially with the inclusion of the Stevens Road tract in the current UGB, and its subsequent sale by the state. We feel it is important to leave some natural open areas for people and animals near the city limits. This is especially critical now that the Stevens Road tract is being developed, along with all the other development in this area. A few years ago, it was possible to

take our dogs walking in the Stevens Road tract and meet few people. The use in this area has increased remarkably over the last several years, consistent with Bend's growth.

The COID parcel is isolated and not readily accessible by cars, with varied topography, including a small canyon. It has significant native vegetation and, when I was there a couple of days ago, there were many birds, much more than in the nearby areas where there are houses and the vegetation has been cleared. Right now, the average size of the parcels between the city limits to the west and Ward Road to the east, and between Stevens Road to the south and to approximately where Skyline View Drive would be if extended into the area on the north, is 8 acres. If you consider only the MUA zoned parcels, the average size is 4.8 acres. If the COID property was developed to that level, this would mean 7-8 houses in the area. I do not know what would be allowed under the Rural Residential Exception area but suspect it would probably be even denser housing.

As Bend continues to grow at what may be an unsustainable pace the value of open space increases. We urge you to consider open space as a relevant and beneficial resource when you weigh the issues inherent in this kind of a zoning change.

*Sincerely,
John Schaeffer and Patti Bailey
James and Janet Lake
Julie Naslund, Michael, and Miles Nevill
Mike Quick
Jill Harrell and Mike King"*

The seventh public comment was received from Cathy DeCoursey, a property owner and resident of 61718 Rigel Way, Bend, OR 97702 on June 21, 2021:

"I am responding to a letter I received regarding COID's application to rezone the property behind me. File # 247-21-0000400-PA, 401-ZC. 36.65 Acres. My understanding is they want to change the zoning from Agriculture and Exclusive Farm Use Zone to Rural Residential Exception Area and Multiple Use Agricultural. I've read the Application prepared by Tia M. Lewis. I have 3 concerns:

- 1. The water supply says wells are to be drilled for household use. There are 2 very old (55yrs) Well Reports included in her submission. I find this very odd that 7 new homes will be drilling and using well water for approximately 5 acre mini ranches. Surely the water table has lowered over time? The depth of one shows 619 feet. One report seems to be missing the gallons per minute amount. Would you explain where the household and irrigation water will be coming from for these 7 lots?*
- 2. At what point can the MUA-10 Zoning be changed to create a subdivision of smaller sized lots?*
- 3. Will there be more than 7 lots created? The stubbed access roads listed are already narrow and congested with parked cars and traffic coming and going to 27th which has no turn lanes onto or off of Darnel.*

Thank you for your time and response."

The eighth public comment was received from Jennifer Neil, a property owner and resident of 61723 Rigel Way, Bend, OR 97702 on June 21, 2021:

"My name is Jennifer Neil, and I am Bend homeowner concerned about the above-mentioned proposed land use. The proposed land use will change what is a small, open space next to the Central Oregon canal from farm use to more residential use. I'm saddened to not only lose the space I walk on twice a day, but to see it turned into more overpriced homes that the city and the community is not able to support. The area of SE Bend where this property is located has already out-grown all of the infrastructure to support more housing. It has become extremely difficult to access my home because of the traffic and congestion along 27th street. This congestion will only increase with the addition of the new High School. Finally, I'm also very concerned that 4 of my neighbors, who are also homeowners and have properties directly next to this proposed land use change, did not receive any notice of this land use. I notified them! I hope that the city planners will consider the impact more houses will have in this area, and improve the infrastructure first that is already necessary before destroying more open space."

The ninth public comment was received from Brent N. Wilkins, an owner and resident of property at 61764 SE Camellia Street, Bend, OR 97702, on June 21, 2021:

"I am a resident of the Rosengarth Subdivision. I am submitting these written comments relating to the proposed zoning changes by the Central Oregon Irrigation District ("COID") for the real property located at 61781 Ward Road, Bend, OR 97702 ("Property").

For the reasons noted below, including due to the level of development in East Bend in close proximity to the Property, the Property's rural nature that serves as a place of recreation, and the high level of traffic and lack of a left-hand turn lane from the major arterial (27th Street) that will likely service the Property if/once developed, I ask that the Deschutes County Planning Division ("Planning Division") not approve COID's application. I request to be notified of any decision or public hearing related to this application, and this notice may be sent to:

*Brent N. Wilkins
61764 SE Camellia Street
Bend, OR 97702*

As noted on page 3 of COID's Burden of Proof Statement, COID will have the ability to attempt to develop and subdivide the Property into a subdivision if the permit is granted. This would potentially occur through Title 17 or Title 18 of Deschutes County's rules. This permit should not be granted as further development in the proximity of the Property will not serve the County or community.

A. Development & Traffic Impacts

The Property at issue is surrounded by areas that have been recently developed. This includes the DR Horton subdivision off of Pettigrew Drive, the Hayden Homes Subdivision off of Pettigrew Drive, as well as the Rosengarth Subdivision. 27th Street has not been able to keep up resulting increased traffic flow as a result of the development to date. Excluding this Property, there is now significant further development occurring in this immediate area that 27th Street will service. The development at this time includes a new commercial lot being developed at 27th Street and Reed Market that will consist of multiple businesses, a new subdivision between Reed Market and Starlight Drive on the east side of 27th Street, and significant

development off of 27th Street on Stevens Road. The Property will also heavily utilize 27th Street through the likely extension of Darnel Avenue and/or Daylily Avenue.

The collective effect of all of this development is that the rural nature of East Bend is being lost and 27th Street is becoming unsafe. 27th Street at this time does not adequately handle the levels of traffic that occur each morning around 8:00 am, each afternoon around 5:00 pm as well as when school lets out, and during the weekends. I have routinely sat in my car for more than two minutes trying to turn left onto 27th Street. I have also waited more than a minute to even to try to turn right onto 27th Street. A photograph showing the line of traffic on 27th Street is enclosed. (See Ex. 1). Also, there is no left turn lane when turning left from 27th Street onto Darnel Avenue from 27th. This has resulted in unsafe conditions, including vehicles passing the turning vehicle on the right where there is no developed shoulder or lane. There are tracks on the ground where this happens, and it is not safe for those vehicles, the turning vehicle, or oncoming traffic. Eastside Gardens is also located at 27th Street and Darnel Avenue. Vehicles pull in and out of that parking lot at that intersection and from the parking lot itself. This cause an irregular, unsafe traffic flow that will only be exacerbated by further use.

Moreover, due to Darnel Avenue serving as a primary access point for homes throughout the existing neighborhoods and Gardenside Park, there is already a high level of traffic and vehicles often driving fast. There is also significant on street parking that restricts views for drivers and pedestrians. This includes large 'sprinter' vans, large trucks, and sometimes trailers. (See Ex. 2). There are numerous young families in the neighborhoods, including along Camellia Street, Darnel Avenue and Gardenside Park. These families have children that run, play, skateboard, ride scooters, and bike throughout the neighborhood, including on the streets. The existing neighborhood traffic levels poses a danger to children. The proposed permit will likely result in increased traffic within the neighborhood and pose additional risk to these young families and children. Any consideration of the Permit, and any possible approval, must address this dynamic.

Finally, with the recent approval of the Southeast Area Plan for the 'Elbow', the level of traffic in East Bend and 27 Street will only increase. This will also result in the displacement of birds and other wildlife, which is further covered below, and will need a place to go.

B. Preservation

The Property at issue is an area that is highly utilized for recreation and embodies Central Oregon high desert landscape. In the winters, the area can serve as a place for cross-country skiing. (See Ex. 3). People regularly ride bikes, run, and go for walks. The aerial photo that was enclosed with the Notice of Application also shows the walking path through the middle of the Property. The wildlife that calls this place home includes ducks, jackrabbits, geese, and numerous other birds. There is also a rimrock canyon on the Property that is quite unique and should be preserved (See Ex. 4). The Property also has views of the Cascades, Powell Butte, and Newberry Caldera (See Ex. 5). It is also quite peaceful and has a gentle, rolling landscape full of trees, grasses, and sagebrush. (See Ex. 6). During the mornings and evenings one can go for walks and hear the songs of birds and enjoy an escape from the busy work day and pace of life. In other words, changing the Property's zoning classification and leading to the possibility (if not the eventual or imminent likelihood) of development that will further change the rural nature of Bend is not in the public's interest for rezoning standards or otherwise.

C. Conclusion

The existing development and use of 27 Street, the development already approved and under construction, and the future development of Stevens Road and the 'Elbow' makes changing the Property's zoning classification to not be in the public interest. There simply is not adequate infrastructure to support all of these additions in a safe manner. Until the access to the neighborhoods from 27th Street is improved, no further development or changes of zoning classifications should occur. Approving the permit will also likely result in the irreparable loss of rural landscape and habitat once the Property is developed, including possibly without any restrictions or preservation criteria.

In sum, the proposed permit application should be denied, or at least not approved in its current form. At a minimum, a hearing should be set for in person comments and for further deliberation to occur."

The public comment from Mr. Wilkins includes 10 photographs depicting the various conditions outlined in his written comment. These photographs and the full written comment are included in public record for the subject application.

The tenth public comment was received from Crystal Garner on June 22, 2021:

"I would like to request a hearing for the proposed land development for 61781 Ward Rd, Bend, OR 97702. We live about 4 houses down from this property, it is a great and safe place for our family and so many others in the neighborhood to take walks, ride bikes, and walk dogs. The thought of this land being developed on and losing those opportunities, as well as possibly compromising the safety of our children in our neighborhood bring a heavy heart to so many of us. Please consider a hearing to recant this decision."

The eleventh public comment was received from William Kepper on June 29, 2021:

"Sorry for the late response to the changes associated with Map and Taxlot: 1812020001000. The notification was not received timely. The notification is vague to exactly what changes will occur. If the changes have anything to do with the cultivation of marijuana or hemp we and our neighbors are against it. It would destroy ours and our neighbors quality of life. There are numerous small children and teenagers in the neighborhoods who should not be subjected to these types of grow farms. Also there is a child day care facility close by off 27th Street. I hope I'm wrong about the 'Rural Residential Exception Area and Multiple Use Agricultural, respectively" statement. Thanks for listening to my concerns. I'd appreciate additional information on exactly what Multiple Use Agricultural Zone (MUA10) means."

NOTICE REQUIREMENT: On August 6, 2021, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the subject property and agencies. A Notice of Public Hearing was published in the Bend Bulletin on Sunday, August 8, 2021. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on July 26, 2021.

REVIEW PERIOD: The subject application(s) were submitted on April 20, 2021, and deemed complete by the Planning Division on May 20, 2021. According to Deschutes County Code

22.20.040(D), the review of the proposed quasi-judicial plan amendment and zone change application is not subject to the 150-day review period.

III. FINDINGS & CONCLUSIONS

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.136, Amendments

Section 18.136.010, Amendments

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

FINDING: The applicant, also the property owner, has requested a quasi-judicial plan amendment and filed the applications for a plan amendment and zone change. The applicant has filed the required Planning Division's land use application forms for the proposal. The application will be reviewed utilizing the applicable procedures contained in Title 22 of the Deschutes County Code.

Section 18.136.020, Rezoning Standards

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

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

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

Per prior Hearings Officers decisions [Powell/Ramsey (file no. PA-14-2 / ZC-14-2) and Landholdings (file no. 247-16-000317-ZC, 318-PA)] for plan amendments and zone changes on EFU-zoned property, this paragraph establishes two requirements: (1) that the zone change conforms to the Comprehensive Plan and (2) that the change is consistent with the plan's introductory statements and goals. Both requirements are addressed below:

- 1. Conformance with the Comprehensive Plan: The applicant proposes a plan amendment to change the Comprehensive Plan designation for the subject property from Agriculture to Rural Residential Exception Area. The proposed rezoning from EFU-TRB to MUA-10 will need to be consistent with its proposed new plan designation.*

2. *Consistency with the Plan's Introductory Statement and Goals.* In previous decisions, the Hearings Officer found the introductory statements and goals are not approval criteria for the proposed plan amendment and zone change. However, the Hearings Officer in the Landholdings decision found that depending on the language, some plan provisions may apply and found the following amended comprehensive plan goals and policies require consideration and that other provisions of the plan do not apply as stated below in the Landholdings decision:

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

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

LUBA went on to hold in Save Our Skyline that it is appropriate to 'consider first whether the comprehensive plan itself expressly assigns particular role to some or all of the plan's goals and policies.' Section 23. 08. 020 of the county's comprehensive plan provides as follows:

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

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

*In Bothman v. City of Eugene, 51 Or LUBA 426 (2006), LUBA found it appropriate also to review the language of specific plan policies to determine whether and to what extent they may in fact establish decisional standards. The policies at issue in that case included those ranging from aspirational statements to planning directives to the city to policies with language providing 'guidance for decision-making' with respect to specific rezoning proposals. In Bothman LUBA concluded the planning commission erred in not considering in a zone change proceeding a plan policy requiring the city to '[r]ecognize the existing general office and commercial uses located * * * [in the geographic area including the subject property] and discourage future rezonings of these properties.' LUBA held that:*

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

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

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

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

The applicant utilizes the analysis 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 staff report in further detail. Staff agrees with the applicant's analysis and finds the above provision to be met based on Comprehensive Plan conformance as demonstrated in subsequent findings.

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

purpose and intent of the proposed zone classification.

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

The applicant is proposing to change the zone classification from EFU to MUA-10. Approval of the application is consistent with the purpose of the MUA-10 zoning district, which stated in DCC 18.32.010 as follows:

"The purposes of the Multiple Use Agricultural Zone are to preserve the rural character of various areas of the County while permitting development consistent with that character and with the capacity of the natural resources of the area; to preserve and maintain agricultural lands not suited to full-time commercial farming for diversified or part-time agricultural uses; to conserve forest lands for forest uses; to conserve open spaces and protect natural and scenic resources; to maintain and improve the quality of the air, water and land resources of the County; to establish standards and procedures for the use of those lands designated unsuitable for intense development by the Comprehensive Plan, and to provide for an orderly and efficient transition from rural to urban land use."

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

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

The maximum density of the approximately 36.65-acre property if developed with a cluster development under Title 18 is 7 lots. This low density will preserve open space, allow owners to engage in hobby farming, if desired, and preserve natural and scenic resources and maintain or improve the quality of air, water, and land resources. The MUA-10 zoning provides a proper transition zone from City, to rural zoning to EFU zoning.

Staff finds the applicant has demonstrated the change in classification is consistent with the purpose and intent of the MUA-10 Zone but asks the Hearings Officer to amend or add to these findings as the Hearings Officer sees fit.

- C. That changing the zoning will presently serve the public health, safety and welfare considering the following factors:**
 - 1. The availability and efficiency of providing necessary public services and facilities.**

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

Necessary public facilities and services are available to serve the subject property, including electrical power from Pacific Power and well logs showing water services are available to serve the property. Exhibit 7.

Transportation access to the property is available from the stubbed local street connections of Darnel Avenue and Daylily Avenue to the west in the City of Bend Urban Growth Boundary. MUA-10 zoning and a standard subdivision would allow the creation of up to 3 residential lots and a cluster development would allow up to 7 residential lots. If developed with a cluster development, the property could generate up to 49 additional daily trips, which according to the traffic report by Transight Consulting is a slight increase in trips, but the impact of these trips is negligible on the transportation system and the functional classification of all the adjacent roadways will not be affected with the proposed rezone. The existing road network is available to serve the use of the property if developed.

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

Neighboring properties contain residential and commercial uses, which have water service from a quasi-municipal source or wells, on-site sewage disposal systems, electrical service, telephone services, etc. There are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare. Prior to development of the property, the applicant would be required to comply with the applicable requirements of the Deschutes County Code, including possible land use permit, building permit, and sewage disposal permit processes. Through these development review processes, assurance of adequate public services and facilities will be verified. Staff finds this provision 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's submitted burden of proof statement addresses potential impacts on surrounding land uses as related to each individual policy and goal item within the County's Comprehensive Plan in subsequent findings. Further analysis is detailed below.

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 is proposing to rezone the property from EFU to MUA10 and re-designate the property from Agriculture to Rural Residential Exception Area. The applicant has provided the following response in the submitted burden of proof statement:

1. Mistake: *The EFU zoning designation was likely based on the best available soils data that the County had at the time in the County in the late 1970's when the comprehensive plan and map were adopted and where agricultural zoning was applied to land with no history of farming³⁴.*

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

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

Farming economics and viability of farm uses in Central Oregon have significantly changed. Making a profit in farming, particularly on smaller parcels such as the subject property, is difficult as stated below in the stakeholder interview of the Deschutes County Farm Bureau in the County's 2014 Agricultural Lands Program, Community Involvement Results:

Today's economics make it extremely difficult for commercial farmers in Deschutes County to be profitable. Farmers have a difficult time being competitive because other regions (Columbia Basin, Willamette Valley) produce crops at higher yields, have greater access to transportation and consumer markets, and experience more favorable growing climates and soils. Ultimately, the global economy undermines agricultural opportunities in the county because commodities derived from outside the region can be produced at a lower cost. Water limitations also play a role. Junior water right holders are constrained as the summer progresses and they lose their rights to those with higher priority dates.

Decline in farm operations have steadily declined in Deschutes County between 2012 and 2017, with only a small fraction of farm operators achieving a net profit from farming in 2017. (Exhibit 8).

Encroaching development east of Bend's Urban Growth Boundary has brought both traffic and higher density residential uses and congestion to the area.

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

Deschutes County Comprehensive Plan

³ Gallagher's soils analysis report for the subject property determined that the subject property was previously mapped by the USDA-SCS Soil Survey of the Deschutes County Area and compiled by NRCS into the Web Soil Survey. The property was previously mapped at 1:20,000 scale, which is generally too small a scale for detailed land use planning and decision making, according to Gallagher.

⁴ Source: Agricultural Lands Program, Community Involvement Results, Community Development, Deschutes County. June 18, 2014.

Chapter 2, Resource Management

Section 2.2 Agricultural Lands

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

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

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

As demonstrated in this application, the subject property does not constitute "agricultural land" and therefore, is not necessary to preserve and maintain the County's agricultural industry. The Gallagher soils report shows the subject property to consist predominantly (63.7%) of Class 7 and 8 non-agricultural soils (Gosney-Rock Outcrop complex). According to Mr. Gallagher, these soils have severe limitations for agricultural use as well as low soil fertility, shallow and very shallow soils, abundant rock outcrops and lava tubes, low available water capacity, and major management limitations for livestock grazing. In addition, the minor amount of Deskamp soils (Class 3 irrigated and 6 nonirrigated) are in small isolated pockets and severely restricted by lava tubes, shallow rocky soils, irrigation ditches and property lines that they cannot be used in farming in conjunction with the non-productive Gosney-Rock outcrop. The property also is physically remote from productive farmland as it is adjacent to the City of Bend's urban development to the west and rural residential development to the east and south. Mr. Gallagher concludes that the "landscape is so cut up it is impractical to farm".

Staff is uncertain if this goal is met by the available information in the record and requests the Hearings Officer make specific findings on this topic.

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

FINDING: The applicant is not asking to amend the subzone that applies to the subject property; rather, the applicant is seeking a change under Policy 2.2.3 and has provided evidence to support rezoning the subject property to MUA10.

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

FINDING: The applicant is seeking approval of a plan amendment and zone change to re-designate and rezone the property 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 has provided the following response in the submitted burden of proof statement:

Deschutes County has allowed this approach in previous Hearings Officer’s decisions including Porter Kelly Burns Landholdings (247-16-000317-ZC/318-PA), Department of State Lands (PA-11-7/ZC-11-2), Pagel (PA-08-1/ZC-08-1), and the Daniels Group (PA-08-1, ZC-08-1). Additionally, the Land Use Board of Appeals (LUBA) allowed this approach in Wetherell v. Douglas County, 52 Or LUBA 677 (2006), where LUBA states, at pp.678-679:

“As we explained in DLCD v. Klamath County, 16 Or LUBA 817, 820 (1988), there are two ways a county can justify a decision to allow nonresource use of land previously designated and zoned for farm use or forest uses. One is to take an exception to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). The other is to adopt findings which demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. When a county pursues the latter option, it must demonstrate that despite the prior resource plan and zoning designation, neither Goal 3 nor 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 has appealed to the Oregon Court of Appeals and the Oregon Supreme Court but neither court disturbed LUBA’s ruling on this point. In fact, the Oregon Supreme Court changed the test for determining whether land is agricultural land to make it less stringent. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007). In that case, the Supreme Court stated that:

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

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

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

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

FINDING: This plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations. Staff concurs with the County's previous 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. The applicant proposes that the subject property was not accurately designated as demonstrated by the soil study, NRCS soil data, and the applicant's burden of proof. Further discussion on the soil analysis provided by the analysis is detailed under the OAR Division 33 criteria below.

Section 2.5, Water Resources Policies

Goal 6, Coordinate land use and water policies.

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

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

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.

...

- ***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's burden of proof provides the following:

As shown above, the County's Comprehensive Plan provisions anticipate the need for additional rural residential lots as the region continues to grow. This includes providing a mechanism to rezone farm lands with poor soils to a rural residential zoning designation. While the rezone application does not include the creation of new residential lots, the applicant has demonstrated the subject property is comprised of poor soils that are adjacent to rural residential MUA-10 zone uses to the east and south as well as urban residential zones within the Bend city limits to the west. Rezoning the subject property to MUA-10 is consistent with this criterion, as it will provide for an orderly and efficient transition from the Bend Urban Growth Boundary to rural and agricultural lands.

Staff notes that the MUA-10 Zone is a rural residential zone and as discussed in the Findings of Fact above, there are many adjacent properties to the south and east that are zoned MUA-10. Additionally, the properties to the west are within urban residential zones within the city limits of Bend. Staff notes this policy references the soil quality, which staff has discussed above. Staff is uncertain if this policy is met by the available information in the record and requests the Hearings Officer make specific findings on this topic.

Section 3.3, Rural Housing

Rural Residential Exception Areas

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

In 1979 the County assessed that there were over 17,000 undeveloped Rural Residential Exception Area parcels, enough to meet anticipated demand for new rural housing. As of 2010 any new Rural Residential Exception Areas need to be justified through taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR.

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

Prior Hearings Officer's decisions have found that Section 3.3 is not a plan policy or directive⁵. Further, no goal exception to Statewide Planning Goal 3 is required for the rezone application because the subject property does not qualify as farm or forest zoning or agricultural lands under the statewide planning goals. The County has interpreted the RREA plan designation as the proper "catchall" designation for non-resource land and therefore, the Rural Residential Exception Area (RREA) plan designation is the appropriate plan designation to apply to the subject property⁶.

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

Section 3.7, Transportation

Appendix C – Transportation System Plan ARTERIAL AND COLLECTOR ROAD PLAN

...

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

...

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

FINDING: This policy applies to the County and advises it to consider the roadway function, classification and capacity as criteria for plan amendments and zone changes. The County will

⁵ See PA-11-17/ZC-11-2, 247-16-000317-ZC, 318-PA, and 247-18-000485-PA, 486-ZC

⁶ The Hearings Officer's decision for PA-11-17/ZC-11-2 concerning this language of Section 3.3 states:

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

comply with this direction by determining compliance with the Transportation Planning Rule (TPR) aka OAR 660-012, as described 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 subject property is not zoned for forest lands, nor are any of the properties within a two-mile radius. The property does not contain merchantable tree species and there is no evidence in the record that the property has been employed for forestry uses historically. None of the soil units comprising the parcel is rated for forest uses according to NRCS data. The property does not appear to qualify as forest land.

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

OAR 660-015-0000(3)

To preserve and maintain agricultural lands.

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

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

OAR 660-033-0020, Definitions

For purposes of this division, the definitions in ORS 197.015, the Statewide Planning Goals, and OAR Chapter 660 shall apply. In addition, the following definitions shall apply:
(1)(a) "Agricultural Land" as defined in Goal 3 includes:

(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon⁷;

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

The subject property is not properly classified as Agricultural Land and does not merit protection under Goal 3. The soils are predominately Class 7 and 8 soils as shown by the more detailed soils report prepared by soils scientist Andy Gallagher, which State law, OAR 660-033-0030, allows the County to rely on for more accurate soils information. Mr. Gallagher found that approximately 64% of the soils on the subject property (about 24 acres) is Land Capability Class 7 and 8 soils that have severe limitations for farm use. He also found the site to have low soil fertility, shallow and very shallow soils, abundant rock outcrops and rock fragments in the surface, lava tubes, and irrigation ditches, low available water capacity, and limiting areas suitable for grazing and restricting livestock accessibility, all of which are considerations for the determination for suitability for farm use. Because the subject property is comprised predominantly of Class 7 and 8 soils, the property does not meet the definition of "Agricultural Lands" under OAR 660-033-0020(1)(a)(A) listed above, that is having predominantly Class I-VI soils.

Staff has reviewed the soil study provided by Mr. Gallagher of Red Hill Soils and agrees with the applicant's representation of the data for the subject property. Staff finds, based on the submitted soil study and the above OAR definition, that the subject property is comprised predominantly of Class 7 and 8 soils and, therefore, does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A) above.

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

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

This part of the definition of "Agricultural Land" requires the County to consider whether the Class 7 and 8 soils found on the subject property are suitable for farm use despite their Class 7 and 8 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

⁷ 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.

activities are profitable and this is a factor in determining whether land is agricultural land. *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007).

The subject property does not have water rights, has not been farmed, or used in conjunction with any farming operation in the past. The Natural Resources Conservation Service (NRCS) map shown on the County's GIS mapping program identifies two soil complex units on the property: 36A, Deskamp loamy sand and 58C, Gosney-Rock outcrop-Deskamp complex. The predominant soil complex on the subject property is 58C. 58C is not a high value soil as defined by Deschutes County Code. 36A is considered a high value soil when irrigated. However, as discussed in detail below, there is no irrigation on the property and an Agricultural Soils Capability Assessment (Order 1 soil survey) conducted on the property by soil scientist, Andy Gallagher, determined that the property is not agricultural land; that the class 3 irrigated and 6 non irrigated soils exist in small pockets interspersed with lava tubes, rocky, shallow soils creating severe limitations for any agricultural use on the property or in conjunction with other neighboring lands. (See Exhibit 5 for Mr. Gallagher's Soil Assessment Report).

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

Soil Fertility:

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

*"Important soil properties affecting the soil fertility and productivity of the soils are **very limiting to crop production** [emphases added by applicant] on this parcel. The soils here are low fertility, being ashy sandy loams with a low cation exchange capacity (CEC) of 7.5 meq/100 gm and organic matter is very low for Gosney 0.75% and low for Deskamps 1.5%. These soils do not have a large capacity to store soil nutrients especially cations, and nitrogen fertilizers readily leach in sandy soils. The soil depth is further limiting because it limits the overall volume of soil available for plant roots and limits the size the overall nutrient pool. Additionally, the soil available water holding capacity is very low for Gosney less than 1.8 inches for the whole soil profile, and for the very shallow soils it is half this much. The Deskamps soils have only about 2 to 4 inches AWHC translate into low productivity for crops. NRCS does not provide any productivity data for non-irrigated crops on these soils. The productivity of irrigated alfalfa is 4 tons per acre for Deskamps, and no rating for Gosney is same as a zero. There are perhaps 7 acres that could produce alfalfa with irrigation that could produce 28 tons alfalfa under irrigation and high fertility but after costs this would amount to no profit."*

The fact that these soils are low fertility unless made fertile through artificial means supports the applicant's position that the Class 7 soils and the entire property is not suitable for farm use. The costs to purchase and apply fertilizer and soil amendments and the costs to sample and test soils are a part of the reason why it is not profitable to farm the subject property.

Unsuitability for Grazing:

Mr. Gallagher also reviewed whether the parcel is suitable for grazing and found:

*"This 37.7-acre parcel is **not suited to grazing on a commercial scale** [emphases added by applicant]. The soils here have major management limitations including ashy and sandy surface texture. The majority of the area has soils that are very shallow to shallow with many rock outcrops and rock fragments in the surface. Wind erosion is a potential hazard is moderately high when applying range improvement practices. Because the soil is influenced by pumice ash, reestablishment of the native vegetation is very slow if the vegetation is removed or deteriorated. Pond development is limited by the soil depth. The restricted soil depth limits the choice of species for range seeding to drought-tolerant varieties. Further, range seeding with ground equipment is limited by the rock fragments on the surface. The areas of very shallow soils and rock outcrop limit the areas suitable for grazing and restrict livestock accessibility.*

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

Soil Map Unit	Total annual range production pounds per acre		
	Unfavorable year	Normal year	Favorable year
36A	700	900	1100
58C	411	558	705
Dk	700	900	1100
GR ¹	315	441	567

¹ Estimated based on weighted average of soils

Total range production is the amount of vegetation that can be expected to grow annually in a well-managed area that is supporting the potential natural plant community. It includes all vegetation, whether or not it is palatable to grazing animals. It includes the current year's growth of leaves, twigs, and fruits of woody plants. It does not include the increase in stem diameter of trees and shrubs. It is expressed in pounds per acre of air-dry vegetation. In a normal year, growing conditions are about average. Yields are adjusted to a common percent of air-dry moisture content. The productivity provided for Dk map unit is from Websoil survey for the Deskamp soil and that provided for the GR map unit is based on 40% very shallow soils, 35% Gosney and 25% rock outcrop.

*Based on previous NRCS map has a weighted average annual productivity of 669 pounds per acre in a normal year. Based on the revised Order-1 map the annual productivity is even lower, 540 pounds per acre. The animal use months (AUMs) for this 37.7 acre parcel is 5.5 based on the revised soil map and a monthly value of 910 pounds forage per 1 AUM equivalent to pounds per cow calf pair. This model assumes the cow's take to be 25% of annual productivity in order to maintain site productivity and soil health (NRCS 2009). This limits the grazing to one cow calf pair roughly 5 to 6 months annually. **This is not an economical model for livestock production** [emphases added by applicant].*

Inappropriate grazing causes a reduction in desirable grasses and where present cheatgrass will increase and granite prickly gilia increases and grasses decline. Cheatgrass becomes dominate along with grey rabbitbrush. Ground fire potential increases with increasing cheatgrass. Cutting of juniper leads to an increase in grey rabbitbrush and an increase in cheatgrass with or without

grazing. Idaho fescue is eliminated from areas where trees are removed due to harsh microclimate and cheatgrass replaces it. The addition of inappropriate grazing would lead to a decline in the other deep-rooted perennial bunchgrasses and an increase in annuals and granite prickly gilia."

Climatic Conditions

According to Mr. Gallagher, climatic conditions of this area make is [sic] difficult for production of most crops, as stated below:

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

Existing and Future Availability of Water for Farm Irrigation Purposes:

No new irrigation water rights are expected to be available to the Central Oregon Irrigation District (COID) in the foreseeable future. In order to obtain water rights, the applicant would need to convince another COID customer to remove water rights from their property and sell them to the applicant and obtain State and COID approval to apply the water rights to the subject property. In such a transaction, water rights would be taken off productive farm ground and applied to the nonagricultural soils found on the subject property. Such a transaction runs counter to the purpose of Goal 3 to maintain productive Agricultural Land in farm use.

Given the poor quality of these soils, it is highly unlikely that Central Oregon Irrigation District would approve a transfer of water rights to this property. In addition, no person intending to make a profit in farming would go to the expense of purchasing water rights, mapping the water rights and establishing an irrigation system to irrigate the lands on the subject property.

Given the dry climate, it is necessary to irrigate the subject property to grow an alfalfa crop and to maintain a pasture. A farmer would need to spend significant sums of money to purchase water rights, irrigation systems, maintain the systems, pay laborers to move and monitor equipment, obtain electricity, pay irrigation district assessments and pay increased liability insurance premiums for the risks involved with farming operations.

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

Existing Land Use Patterns

Existing land use patterns in the area are primarily non-agricultural related land uses including urban development to the west within the Bend City limits, County exception lands zoned MUA-10 developed with homes and small acres of irrigation for pasture and other hobby farm uses to the east and south, and irrigated farmland zoned EFU-TRB to the north and northeast.

The EFU-zoned properties to the north and northeast include:

North and northeast of the subject property is a pocket of EFU-zoned property. The adjacent property to the north, tax lot 18-12-02-1001, is a 12.45-acre EFU-zoned property that is partially irrigated and developed with a nonfarm dwelling (file no. CU-01-75). Northeast is tax lot 18-12-02-201, a 53.30-acre farm parcel that is irrigated and engaged in hay production, receiving farm tax deferral, and developed with a dwelling and outbuildings.

The close proximity to the City of Bend and residential areas limit the types of agricultural activities that could reasonably be conducted for profit on the subject property. The subject property would not be suitable for raising animals that are disturbed by noise. Additionally, the property owner would bear the burden of paying for harm that might be caused by livestock escape, in particular livestock and vehicle collisions. Any agricultural use that requires the application of pesticides and herbicides would be very difficult to conduct on the property given the numerous homes located in close proximity to the property. In addition, the creation of dust which accompanies the harvesting of crops is a major concern on this property due to the close proximity residential use.

Technological and Energy Inputs Required:

According to Mr. Gallagher:

*"The very shallow and shallow soils and abundant rock outcrops limit practical agricultural crop production on all but about 7 acres out of the 10 acres of Deskamps soils. The Deskamps soils are into four separate delineations that are separated by rocky and shallow soils and rock outcrops and lava tubes as well as irrigation ditches. **The landscape is so cut up it is impractical to farm** [emphases added by applicant]. The best case scenario for crop production is for an area approximately seven acres along the north edge of the parcel that is spotted with rock outcrops and is of a very irregular shape. This area could at most produce about 28 tons of alfalfa under high fertilizer inputs and high irrigation water inputs. Current hay prices are from \$200.00 to \$250.00 per ton which would give an annual gross of about \$5,600.00 to \$7,000.00, before expenses. After expenses are deducted for land costs, site preparation, planting, costs of production like irrigation, fertilizer, weed control, costs of harvest including swath, rake, and bale, stack, and costs of handling, storage and marketing there would be **no profit associated with producing hay crops on such a small area** [emphases added by applicant]."*

Accepted Farming Practices:

Farming lands comprised of soils that are predominately Class 7 and 8 is not an accepted farm practice in Central Oregon. Dryland grazing, the farm use that can be conducted on the poorest soils in the County, typically occurs on Class 6 non-irrigated soils that have a higher soils class if irrigated. The applicant would have to go above and beyond accepted farming practices to even attempt to farm the property for dryland grazing. Crops are typically grown on soils in soil class 3 and 4 that have irrigation, which this property has neither.

Staff agrees with the applicant that many of the factors surrounding the subject property – such as the proximity to the Bend city limits, current residential and non-agricultural related land uses in the area, soil fertility, and lack of availability of water rights result in an extremely low possibility of farming on the subject property. Staff requests the Hearings Officer make specific findings on this issue.

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

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

The subject property is not land necessary to permit farm practices to be undertaken on adjacent or nearby lands. The nearest agriculturally zoned land engaged in farm use to the subject property is located northeast on tax lot 18-12-02-201. This property is a 53.30-acre farm parcel that is irrigated and engaged in hay production, receiving farm tax deferral, and developed with a dwelling and outbuildings. The farm operations on tax Lot 201 operate independently and are not dependent upon the subject property to conduct its farm practices. This is evidenced by the subject property being owned by the applicant since 1930 and has never been farmed, much less combined with tax lot 201 in any way for agricultural purposes. Farming operations on tax lot 201 will be able to continue to occur if the subject property is rezoned to MUA-10. Further, the poor quality soils and lack of irrigation are not suited to agricultural production and make the subject property unsuitable for farm practices on the nearby agricultural land.

Staff agrees with the applicant's analysis and finds no feasible way that the subject property is necessary for the purposes of permitting farm practices on the nearby Tax Lot 201 (Assessor's Map 18-12-02) based in part on poor quality soils and lack of irrigation. If the Hearings Officer disagrees with Staff's assessment, Staff requests the Hearings Officer make specific findings on this issue.

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

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

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

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

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

The subject property is predominately Class 7 and 8 soils and would not be considered a farm unit itself nor part of a larger farm unit based on the poor soils and the fact that none of the adjacent property is farmed.

As shown by the soils capability study by Mr. Gallagher, the predominant soil type found on the subject property is Class 7 and 8, nonagricultural land (63.7%). The predominance test says that the subject property is not agricultural soil and the farm unit rule does not require that the Class 7-8 soils that comprise the majority of the subject property be classified as agricultural land due to the presence of a small amount of Class 1-6 soils on the subject property that are not employed in farm use and are not part of a farm unit. As a result, this rule does not require the Class 7 and 8 soils on the subject property to be classified agricultural land because a minority of the property contains soils rated Class 6.

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

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

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

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

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

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

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

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

FINDING: The soil study prepared by Mr. Gallagher 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 soil study provides detailed and accurate information about a single property based on numerous soil samples taken from the subject property. The soil study is related to the NCRS Land Capability Classification (LCC) system that classifies soils class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.

The NRCS mapping for the subject portion of the property is shown below in **Figure 1**. According to the NRCS Web Soil Survey tool, the subject property contains approximately 33.7% 36A soil and contains 66.3% 58C soil. The soil study conducted by Mr. Gallagher of Red Hill Soils finds the soil types on the subject property vary from the NRCS identified soil types. The soil types described in the Red Hill Soils soil study are described below (as quoted from Exhibit 5 of the submitted application materials) and the characteristics and LCC rating are shown in **Table 1** below.

GR Gosney-Rock Outcrop Complex

Capability Class: 7 and 8 mapped as complex

These soils are mapped together in a complex because both components are Capability Class 7 or greater, and it was not practical to map them separately. These soils are estimated to be about 25 percent Rock Outcrop and 75 percent Gosney. They have lower productivity than NRCS map unit 38B because they do not contain a mappable area of Deskamp soils that were mapped separately. The productivity reported in Table 2 for Gosney-Rock Outcrop are 20 percent less than the 58C map unit to account for more shallow and very shallow soils in the GR map unit in the revised map unit. Based on the observations here, the map unit is about 40 percent very shallow soils, 35 percent Gosney soils, and 25 percent rock outcrops.

Gosney loamy sand and stony loamy sand (0 to 15 percent slopes)

Description: *Gosney series consists of shallow (10 to 20 inches) to hard basalt bedrock, somewhat excessively drained soils on lava plains. These soils have rapid permeability. They formed in volcanic ash over hard basalt bedrock. Slopes are 0 to 15 percent. The mean annual precipitation is less than 12 inches, and the mean annual temperature is about 45 degrees F.*

Capability Class: 7

Soil Variability: *Depth to bedrock is from surface exposures of bedrock to 20 inches depth. There may be small inclusions of soils like Deskamp that are moderately deep (>20 inches to 40 inches). Many of the pedons are very stony. This unit includes very shallow soils <10 inches.*

Very shallow phase 0-15 percent slopes

Description: *This component of the complex is less than 10 inches to basalt.*

Capability Class: 7

Soil Variability: *Depth to bedrock is from 1 to 10 inches. These soils are very shallow and of similar parent material to Gosney. These soils have lower available water holding capacity and an estimated 40 percent lower productivity.*

Rock Outcrop (0 to 15 percent slopes)

Description: This part of the map unit is areas where bedrock is at the surface.

Capability Class: 8

Soil Variability: In places, rocks are right at the surface and often times bedrock is standing several feet above the surface of the adjacent soils. In some areas (borings 39-41) there is rimrock, large boulders and other surface stone where suspected lava tubes collapsed.

Dk Deskamp loamy sand

Description: This map unit is mainly moderately deep, somewhat excessively drained soils with rapid permeability on lava plains. These soils formed in ash and have hard basalt at 20 to 40 inches. Slopes are 1 to 15 percent. The A and AB horizon are loamy sand. The 2B is loamy sand and gravelly loamy sand. The NRCS soils survey mapped Deskamp and Gosney in a complex described as 50% Deskamp and 35% Gosney. In this Dk unit I delineated the Deskamp component of the former complex and mapped it as a consociation based on more detailed soil sampling than the NRCS soil survey. This soil covers approximately 11 acres of the parcel and is broken up into several small delineations two of which are less than an acre. These small and isolated areas are impractical to farm. The largest delineation is 8.5 acres and has at least three areas of rock outcrop that were delineated within.

Capability Class: 3-irrigated and 6 non-irrigated

Soil Variability: There are small inclusions of rock outcrop and of deep soils with sandy skeletal family. Any rock outcrop I observed in the field was delineated from the Deskamp unit, but because not all rock outcrops could be resolved at the one boring per acre average sampling intensity, given the brushy conditions.

CN Irrigation Canals

Description: These canals are non-soil areas that consist of water and steep banks. When canals are dry they are hard rock bottom.

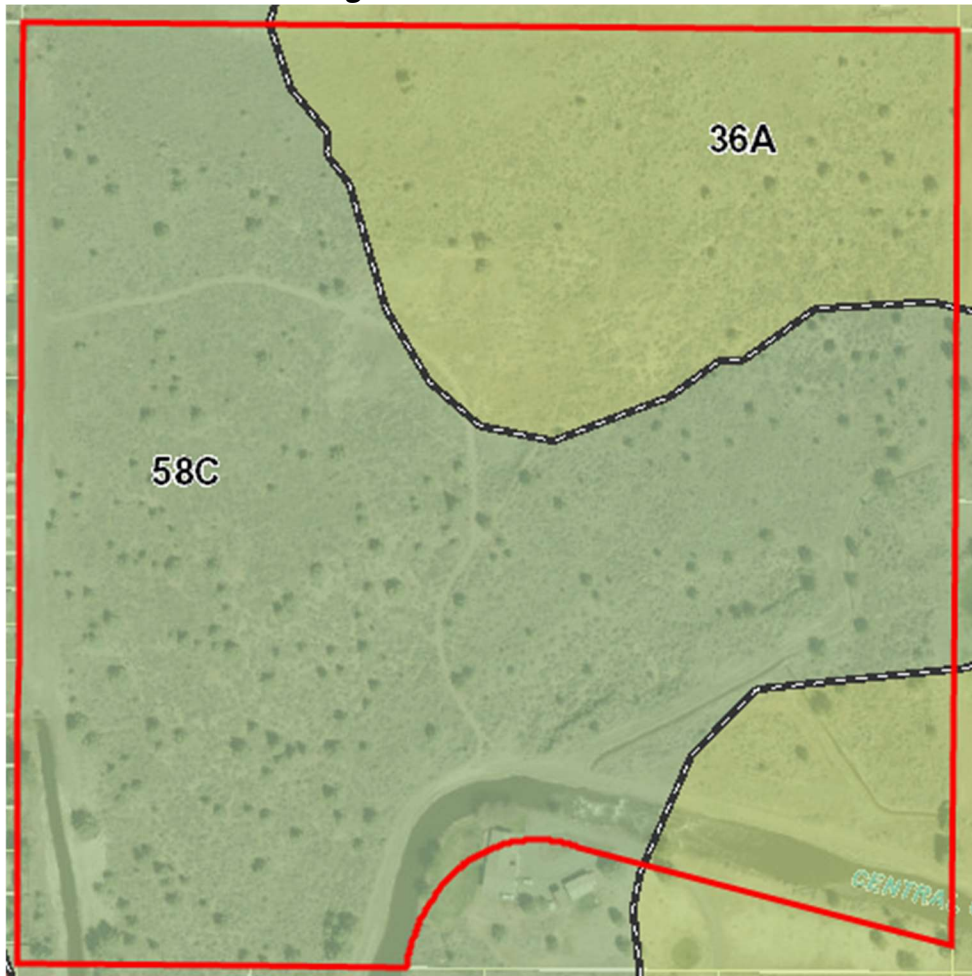
Capability Class: Not Rated

Table 1 - Summary of Order I Soil Survey

Previous Map Symbol	Revised Map Symbol	Soil Series Name	Capability Class	Previous Map*		Revised Map	
				Ac	-%-	Ac	-%-
36A	Dk	Deskamp loamy sand 0 to 3 percent slopes	3 irrigated 6 non-irrigated	12.2	32.3	10.9	28.90
58C	--	Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes	6, 7 and 8	25.5	67.7	0	0
--	GR	Gosney-Rock Outcrop Complex	7 and 8	0	0	24	63.7
	CN	Irrigation Canal	not rated	0	0	2.8	7.4
Total				37.7	100	37.7	100

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

Figure 1 - NRCS Soil Data



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

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

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

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

FINDING: The applicant submitted a soil study by Mr. Gallagher of Red Hill Soils dated December 2, 2020. The soils study was submitted following the ORS 215.211 effective date. Staff received acknowledgement via email on February 16, 2021, from Hilary Foote, Farm/Forest Specialist with the DLCD that the soil study is complete and consistent with DLCD's reporting requirements. Staff finds this criterion to be met based on the submitted soil study and confirmation of completeness and consistency from DLCD.

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

FINDING: The applicant has provided a DLCD certified soil study as well as NRCS soil data. Staff finds the applicant has demonstrated compliance with this provision.

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: As referenced in the agency comments section in the Findings of Fact above, the Senior Transportation Planner for Deschutes County requested revised details than what the initial traffic study materials provided. The applicant submitted an updated report from Transight Consulting LLC dated June 8, 2021, to address identified concerns and no further comments were received from the County's Senior Transportation Planner. The update includes adjustments to the review of potential high impact land use scenarios to include comparisons between a winery and a cluster development, deemed the "worst case scenario" outright uses allowed in EFU and MUA10 Zones, respectively. In response to these criteria, the applicant's burden of proof provides the following statement:

Attached as Exhibit 9 is a transportation impact analysis memorandum prepared by traffic engineer, Joe Bessman, PE. Mr. Bessman made the following key findings with regard to the proposed zone change and concluded that a significant affect does not occur with the proposed rezone:

(Staff has included the updated key findings below, submitted by Transight Consulting on June 8, 2021, with the revised traffic study.)

- Rezoning of the 36.65-acre COID property from EFU-TRB to MUA provides similar potential impacts to the existing zoning, with the potential for a trip reduction within a "worse case" trip generation scenario.*
- The reduction in trips does not meet Deschutes County, ODOT, or City of Bend thresholds of significance at any nearby locations.*
- The site will be served with stubbed local street connections west through the adjacent Marketplace Subdivision that connect to the SE 27th Street corridor. This access configuration does not impact Deschutes County streets.*
- The nearest classified intersection of SE 27th Street/SE Reed Market Road has a very low crash rate. There are no documented safety needs within the project vicinity.*

Based on this review a significant affect does not occur with rezoning from EFU to MUA zoning. With the range of outright allowable uses identified within ORS 215.213(1) and 215.283(1) as a "property right" additional trip generation scenarios could be shown resulting in a trip reduction. Regardless of the scenario, the overall impact of the rezone is negligible on the transportation system and the rezone reflects the more appropriate use of the property given its unsuitability for farming.

Staff notes the subdivisions to the west of the subject property are named Westbrook Village Phase III, Gardenside PUD Phase 2, and Rosengarth Estates Phases 1-3. Based on the County Senior Transportation Planner's comments and the amended traffic study from Transight Consulting LLC, staff finds compliance with the Transportation Planning Rule has been effectively demonstrated. Staff further 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. Staff asks the Hearings Officer to make specific findings related to these criteria.

DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES

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

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

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

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

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

Goal 4, Forest Lands. *Goal 4 is not applicable because the subject property does not include any lands that are zoned for, or that support, forest uses.*

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces. *Deschutes County DIAL property information and Interactive Map show the subject property has "wetlands" that correspond with COID's irrigation distribution system within the property including the developed canals and ditches. According to the Comprehensive Plan (Chapters 2, Resource Management and 5, Supplemental Sections), in 1992 Deschutes County Ordinance 92-045 adopted all wetlands identified on the U.S. Fish and Wildlife Service National Wetland Inventory (NWI) Maps as the Deschutes County wetland inventory. In addition, as described in the Comprehensive Plan, the NWI Map "shows an inventory of wetlands based on high-altitude aerial photos and limited field work. While the NWI can be useful for many resource management and planning purposes, its small scale, accuracy limitations, errors of omission that range up to 55 percent (existing*

wetlands not shown on NWI), age (1980s), and absence of property boundaries make it unsuitable for parcel-based decision making.”

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

- C. Fill and removal activities conducted by an Irrigation District involving piping work in existing canals and ditches within wetlands are permitted outright.

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

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

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

Goal 8, Recreational Needs. *This goal is not applicable because no development is proposed and the property is not planned to meet the recreational needs of Deschutes County. The Bend Parks and Recreation District has an undeveloped park site, Hansen Park, located to the south of the property with plans to develop the park trailhead that would serve the Central Oregon Historic Canal Trail System. The proposed rezone does not impact the recreational needs of Deschutes County as no development is proposed.*

Goal 9, Economy of the State. *This goal does not apply to this application because the subject property is not designated as Goal 9 economic development land. In addition, the approval of this application will not adversely affect economic activities of the state or area.*

Goal 10, Housing. *The County’s Comprehensive Plan Goal 10 analysis anticipates that farm properties with poor soils, like the subject property, will be converted from EFU to MUA-10 or RR-10 zoning and that these lands will help meet the need for rural housing. Approval of this application, therefore, is consistent with Goal 10 as implemented by the acknowledged Deschutes County Comprehensive Plan.*

Goal 11, Public Facilities and Services. *The approval of this application will have no adverse impact on the provision of public facilities and services to the subject site. Pacific Power has confirmed that it has the capacity to serve the subject property and the proposal will not result in the extension of urban services to rural areas.*

Goal 12, Transportation. *The 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 adjacent to the city limits for the City of Bend. If the property is developed with residential dwellings in the future, providing homes in this location as opposed to more remote rural locations will conserve energy needed for residents to travel to work, shopping and other essential services provided in the City of Bend.*

Goal 14, Urbanization. *This goal is not applicable because the applicant's proposal does not involve property within an urban growth boundary and does not involve the urbanization of rural land. The MUA-10 Zone is an acknowledged rural residential zoning district that limits the intensity and density of developments to rural levels. The compliance of this zone with Goal 14 was recently acknowledged when the County amended its comprehensive plan. The plan recognizes the fact that the MUA-10 and RR zones are the zones that will be applied to lands designated Rural Residential Exception Areas.*

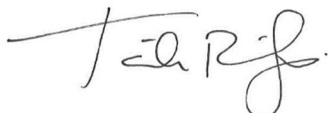
Goals 15 through 19. *These goals do not apply to land in Central Oregon.*

Staff accepts the applicant's responses and finds compliance with the applicable Statewide Planning Goals has been effectively demonstrated. Staff makes note of public comments concerning potential traffic impacts and impacts to potential open space and outdoor recreational opportunities highlighted by neighboring property owners and residents. While these comments detail concerns related to specific potential use patterns, staff finds the overall proposal appears to comply with the applicable Statewide Planning Goals for the purposes of this review.

IV. CONCLUSION & RECOMMENDATION

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

DESCHUTES COUNTY PLANNING DIVISION



Written by: Tarik Rawlings, Associate Planner



Reviewed by: Peter Gutowsky, Planning Manager