



Mailing Date:
Thursday, May 1, 2025

COMMUNITY DEVELOPMENT

FINDINGS AND DECISION

FILE NUMBER: 247-24-000097-PA, 247-24-000098-ZC, 247-25-000021-MA

HEARING: May 9, 2025, 1:30 p.m.
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

**SUBJECT PROPERTIES/
OWNER:** Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000100
Account: 109118
Situs Address: 21875 NEFF RD, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000400
Account: 109115
Situs Address: 21850 HWY 20, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360001000
Account: 111676
Situs Address: 21700 BEAR CREEK RD, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000900
Account: 111677
Situs Address: 62098 WARD RD, BEND, OR 97701

APPLICANT: BCL LLC

**ATTORNEY
FOR APPLICANT:** Christopher Kobak

REQUEST: The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the subject property from Agricultural

(AG) to Rural Residential Exception Area (RREA). The applicant also requests a corresponding Zone Change to rezone the subject property from Exclusive Farm Use – Tumalo-Redmond-Bend subzone (EFU-TRB) to Multiple Use Agricultural (MUA10).

STAFF CONTACT: Audrey Stuart, Associate Planner
Phone: 541-388-6679
Email: Audrey.Stuart@deschutes.org

RECORD: Record items can be viewed and downloaded from:
<https://www.deschutes.org/cd/page/247-24-000097-pa-247-24-000098-zc-bcl-llc-comprehensive-plan-amendment-and-zone-change>

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 (MUA10).
- Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance

Deschutes County Comprehensive Plan

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

Oregon Administrative Rules (OAR), Chapter 660

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

Oregon Revised Statutes (ORS)

- Chapter 215.010, Definitions
- Chapter 215.211, Agricultural Land, Detailed Soils Assessment

II. BASIC FINDINGS

LOT OF RECORD: The submitted Burden of Proof includes the following response regarding lot of record status:

Deschutes County determined that Tax Lots 100, 300, and 400 (combined with Tax Lot 1100) were a lot of record in LR-91-54 and LR-91-55, as corrected by Planning Staff Letter dated December 17, 1998. Exhibit 1. Deschutes County determined that Tax Lot 1000 was a lot of record in 247-20-000077-LR. Exhibit 2.

The application materials also include a request for Lot of Record Verification for Tax Lot 900 and

provide an analysis on the deed history of this taxlot. However, staff notes that a Lot of Record Verification is a separate application type that requires its own form and fee, which were not submitted. As discussed below, staff finds a lot of record analysis for Tax Lot 900 is not required in order to process the subject Comprehensive Plan Amendment and Zone Change.

DCC 22.04.040(B)(1) specifies the types of land use applications that require lot of record verification, and a Comprehensive Plan Amendment and Zone Change are not listed. In the *Powell/Ramsey* (PA-14-2, ZC-14-2) decision, the Hearings Officer held to a prior zone change decision (*Belveron* ZC-08-04; page 3) that a property's lot of record status was not required to be verified as part of a plan amendment and zone change application. Rather, the applicant would be required to receive lot of record verification prior to any development on the subject property. Therefore, this criterion does not apply.

SITE DESCRIPTION: The subject property consists of four tax lots, which are summarized in the table below.

<i>Tax Lot</i>	<i>Size (Acres)</i>
100	100.89
400	38.06
900	43.89
1000	57.33

The Burden of Proof for file 247-25-000021-MA provides the following description of the subject property:

The subject tract is designated agricultural and zoned EFU. However, there is no history of any agricultural use. As the Applicant will explain more below, the tract is comprised predominantly of 58C soils which are not considered suitable for agricultural uses. Tax Lots 900, 1000, and 400 are, with the exception of one dwelling recently constructed on Tax Lot 1000, vacant unirrigated parcels with no use. Each tax lot has only a few trees and is primarily comprised of sagebrush, rabbit brush, and bunch grasses. No part of Tax Lot 900 is irrigated, and it has no water rights. Tax Lot 100, like similar parcels north and west, is developed with a solar farm that consumes all but the southeast corner of the lot, which portion is vacant. No part of Tax Lot 100 is irrigated, nor does it have any water rights.

The subject tract extends east from Ward Road west to Erickson Road. The tract extends north to Neff Road and south to Bear Creek Road. The following aerial photograph shows the approximate locations of the subject property and the general character of the property and surrounding area.

The subject parcels are located east of Bend, to the north and south of Highway 20. At its closest point, the subject property is approximately 0.26 miles from the City of Bend's Urban Growth Boundary (UGB). The subject property consists primarily of undeveloped land, with two exceptions. Tax Lot 1000 is developed with a Lot of Record Dwelling which was approved through Deschutes County file 247-21-000119-CU. Tax Lot 100 is developed with a solar voltaic array (solar farm) that

was originally approved through Deschutes County files 247-15-000170-CU, 171-SP and have subsequently been modified. The fenced area developed as the solar farm encompasses an area of approximately 62.6 acres.

PROPOSAL: The applicant requests approval of a Comprehensive Plan Map Amendment to change the designation of the subject properties from an Agricultural (AG) designation to a Rural Residential Exception Area (RREA) designation. The applicant also requests approval of a corresponding Zoning Map Amendment to change the zoning of the subject properties from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA10). 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 properties are not agricultural land.

The original proposal included five tax lots, with a total area of 259 acres. On January 8, 2025, the applicant submitted a Modification of Application (Deschutes County file 247-25-000021-MA). This modified the proposal to reduce the size of the area to be rezoned, by removing Tax Lot 300 on Assessor’s Map 17-12-36. The materials for 247-25-000021-MA also supplemented the analysis provided in the original application materials regarding agricultural lands and provided a site-specific soil study.

Submitted with the application is an analysis of the soils on the subject property, titled *Bear Creek Analysis of Agricultural Land* (hereafter referred to as the “soil study”) prepared by soil scientist Andy Gallagher, CPSSc/SC of Red Hill Soils. The applicant has also submitted a traffic analysis prepared by Ferguson and Associates, Inc. dated February 28, 2025, hereafter 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 three different soil types as described below. The subject properties contain 58C – Gosney-Rock Outcrop-Deskamp complex, 36B – Deskamp loamy sand (3 to 8 percent slopes) and 36A – Deskamp loamy sand (0 to 3 percent slopes). The 36A and 36B soil units are defined as high-value soil by DCC 18.04 when it is irrigated. The 58C soils complex is not defined as high-value farmland, regardless of irrigation.

The applicant submitted a soil study (exhibit to 247-25-000021-MA application materials), which was prepared by a certified soils scientist and soil classifier. The purpose of this soil study was to inventory and assess the soils on the subject properties and to provide more detailed data on soil classifications and ratings than is contained in the NRCS soils maps. Staff notes the submitted soils report does not include an onsite evaluation, and instead it is intended to provide additional information on the NRCS soils map for the subject property. The content and methodology of this soil study is discussed in more detail below, and the report concludes that the subject property is comprised of soils that do not qualify as Agricultural Land.¹

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

The NRCS soil map units identified on the properties 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 percent of the subject parcel is made up of this soil type.

36B, Deskamp loamy sand, 3 to 8 percent slopes: This soil is composed of 85 percent Deskamp soil and similar inclusions, and 15 percent contrasting inclusions. This soil is somewhat excessively drained, with rapid permeability and an available water capacity of approximately 3 inches. The major uses of this soil are irrigated cropland and livestock grazing. This Deskamp soils have a capability rating of 6E when unirrigated, and 3E when irrigated. This soil type is considered high-value when irrigated. The 36B soils are limited to the northern, irrigated portion of the site and comprise approximately 0.2 percent of the property.

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 percent of the subject properties is made up of this soil type, all located within the northern parcel.

Further discussion regarding soils is found in Section III below.

SURROUNDING LAND USES: The general surrounding area of the subject property is defined by the City of Bend's Urban Growth Boundary (UGB) to the west and then a mix of residential and agricultural uses spreading out to the north, east, and south. Adjoining properties are zoned MUA10 and EFU, and range in size and type of development. The general surrounding area includes small-scale farms that predominantly consist of irrigated fields and pasture, and are located to the east of the subject property. The area to the west of the subject property provides a transition from the UGB to rural land use, and is developed with a number of uses such as solar farms, a church, a fire station, and a public park.

The adjacent properties are outlined below in further detail:

West: Tax Lot 900 fronts Ward Road. West of Ward Road, the majority of properties are zoned MUA-10 and not used for agricultural purposes. The property that abuts Ward Road on the west is an approximate 53-acre tract consisting of three tax lots, 17-12-36, Tax Lots 1400,

1600, and 1601. In 2018, in Files 24 7-18-000485 and 24 7-18-000486, the County approved a change in the designation to Rural Residential Exception area and a change in the zoning to MUA-10. In 2021, in Files 247-22-000353 and 354, the County approved the same redesignation and zone change on a parcel identified as 18-12-02, Tax Lot 201. Northeast of Tax Lot 900, the parcel immediately east of Tax Lot 900 (17-12-36 Tax Lot 800), is a vacant EFU-TBR. The other properties east of the subject tract are either MUA-10 with dwellings or EFU parcels, most with dwellings and hobby farms unit one reached the city limits where the properties are residentially zoned and developed.

The properties northwest of the subject tract is a mixture of MUA-10 land recently rezoned, EFU land developed with commercial solar farms and institutional uses such as a church, a Christian Center, and a Pacific Power facility. Just north of Highway 20 and west of Hamby Road, in 2022, the County approved a similar request involving a 94-acre tract that consisted of two parcels identified as 17-12-35, Tax Lots 1200 and 1201. There are a few large acre dwellings as well. There does not appear to be any active farming operations within close proximity to the subject tract to the northwest.

North: The properties north of Tax Lot 900 are the same as that east of Tax Lot 100. They are EFU and MUA-10 zoned parcels with the above-described commercial, institutional, and residential uses. The property immediately north of Tax Lot 100 is a 118-acre parcel zoned EFU and MUA-10. It has a dwelling on part and a large solar farm on the remainder. Northeast of Tax Lot 100 the properties are predominantly all MUA-10 zoned parcels developed with residential uses.

South: The land south and southeast of Tax Lot 900 is zoned MUA-10 and is developed with single-family homes. Most of the parcels are within Dobbins Estate, a large acre subdivision. South of Tax Lot 100 the properties are primarily EFU zoned parcels developed with large acre residential dwellings. One parcel appears to have a small hobby horse farm on it. There are no active farming operations.

East: The properties east of Tax Lot 900 are predominantly EFU zoned with most being less than 20 acres and many less than 10 acres. The primary development pattern is large acre residential uses with one horse farm noted above. One property directly east of Tax Lot 1000 appears to be developed with a personal moto-cross course. East of Tax Lot 100 the properties lying east of Erickson Road are predominantly all MUA-10 zoned parcels developed with large acre residential estate-type dwellings. There is an irrigation canal that runs diagonally through some of those properties.

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on March 12, 2024, to several public agencies and received the following comments:

Deschutes County Senior Transportation Planner, Tarik Rawlings, March 5, 2025, Comments

I've reviewed the revised TPR analysis prepared by Ferguson & Associates, Inc dated February 28, 2025. Reflective of the applicant's pending Modification of Application file (no. 247-25-

000021-MA) to remove Tax Lot 300 from the scope of the project (resulting in a 12.41-acre reduction in acreage from the original application), the revised analysis provides updated information related to the total ~240.17 acres of subject property. The full build-out scenario included in the revision (considering redevelopment of the existing solar farm portions of the subject property) aligns with staff's comments from 6/11/24. The report's inclusion of modified acreage and assumed development credit for one existing single-family dwelling complies with additional comments from staff's 6/11/24 email correspondence regarding the MUA10 Zone's worst case scenario analysis. I agree with the assumptions, methodologies, and conclusions outlined in the revised analysis.

Deschutes County Senior Transportation Planner, Tarik Rawlings, June 11, 2024, Comments

Thank you for forwarding the revised TPR analysis produced by Ferguson & Associates, Inc., dated April 22, 2024.

While the revised TPR analysis has addressed some of the transportation-related comments issued on behalf of the County Road Department on March 29, 2024, there are some outstanding issues with the revised analysis that should be addressed by the applicant in order to comply with TPR:

1. The translation of the "farm manufacturing" analysis into the category of "farm stand" is not a reasonable conclusion and the revised analysis does not clearly demonstrate how a "farm stand" derived from the 18.16.025(l)(1-2) "facility for the processing of farm crops" (and termed "farm manufacturing" at multiple points in the report) constitutes a reasonable worst case scenario for outright EFU use categories even when compared to other uses within DCC 18.16.025. The applicant should provide demonstrable analysis (derived from real local or regional examples of farm crop processing facilities) showing how this use category constitutes a reasonable worst case scenario for outright EFU use categories.
2. At the conclusion of the "Trip Generation Forecast – Outright Permitted Uses – Land Use Scenario for Existing EFU Zoning" section of the revised analysis (beginning on page 3 of the revised report), the applicant concludes with an assumption that three of the five parcels making up the subject properties would each respectively support a dog training class use, a farm stand use, and a Winery/Farm Brewery/Cider business use. The remaining two parcels within the subject properties are not included within this analysis and the applicant must account for these additional 2 parcels in their reasonable worst case scenario analysis. If the applicant continues their revisions under the analytical framework that each of the 5 individual lots within the subject properties would support different reasonable worst case scenario uses, then the applicant must clearly state which use is assigned to which tax lot. Further, that analysis should be tailored to the unique aspects of each individual lot such as acreage and location. Alternatively, if the applicant decides to revise their report to analyze all 5 lots as one contiguous property for the purpose of reasonable worst case scenario analysis, that analysis should focus on one reasonable worst case scenario use category across the contiguous 5 lots. Staff notes that, of the identified

EFU reasonable worst case scenario uses included on pages 3-6 of the revised report, winery or dog training classes are likely the highest trip-generative uses. For the purposes of quantifying the anticipated impacts from the EFU reasonable worst case scenario uses, staff encourages the applicant to base any methods and assumptions of these uses on real local or regional examples.

3. Staff disagrees with the applicant's assertion that the existing solar farm would not be redeveloped as part of the reasonable worst case scenario analysis for the requested MUA10 Zone. As the requested MUA10 Zone is outright permissive of single-family dwellings, staff finds that it would be reasonable to assume that the existing solar farm would be redeveloped with single-family dwellings as an economically-advantageous land use and the applicant should produce revised analysis reflecting the full build-out of residential single-family dwellings as the reasonable worst case scenario for the requested MUA10 Zone.
4. Pursuant to bullet #3, above, staff also requests that the applicant revise the single-family dwelling analysis for the requested MUA10 Zone included in Table 5 (page 8 of the revised report) to reflect a total "Number of Single-Family Residentials" of 25 (revised from 13). Based on the acreage of the subject properties (252.58 acres), the ability to redevelop the existing solar farm, and the purpose of this exercise as a scenario forecast for trip generation, staff finds that the subject properties would be able to support a maximum of 25 single-family dwellings as the reasonable worst case scenario for the requested MUA10 Zone.
5. Pursuant to bullets #3 and #4, above, the applicant must revise Table 7 (page 9 of the revised report) to reflect a total of 25 single-family dwelling units for the purpose of P.M. Peak hour and daily weekday trip generation forecasting.

Deschutes County Senior Transportation Planner, Tarik Rawlings, March 29, 2024, Comments

I have reviewed the transmittal materials for 247-24-000097-PA, 98-ZC for properties totaling approximately 259 acres to change the Comprehensive Plan designation from Agriculture (AG) to Rural Residential Exception Area (RREA) and the zoning from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA10). The properties are within the Exclusive Farm Use (EFU) Zone, and the Airport Safety (AS) and Landscape Management (LM) Combining Zones associated with the following identifying property information:

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000100
Account: 109118
Situs Address: 21875 NEFF RD, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360001000
Account: 111676
Situs Address: 21700 BEAR CREEK RD, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000300
Account: 109116
Situs Address: **NO SITUS ADDRESS**

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000900
Account: 111677
Situs Address: 62098 WARD RD, BEND, OR 97701

Mailing Name: ERICKSON-WARD LAND TRUST LLC
Map and Taxlot: 1712360000400
Account: 109115
Situs Address: 21850 HWY 20, BEND, OR 97701

I have reviewed traffic analysis provided by Ferguson & Associates, Inc., dated February 2, 2024, included as Exhibit 12 of the submitted application materials. The analysis included within the submitted Ferguson & Associates, Inc. report does not comply with the relevant provisions of OAR 660-012-0060, known as the Transportation Planning Rule (TPR). In order to determine whether the proposal will produce a significant effect on transportation facilities, the applicant must revise their traffic analysis to comply with TPR including OAR 660-012-0060(1)(a-c). Due to the scope of the proposal, staff notes that the applicant's revised analysis must comply with the requirements for a Traffic Impact Analysis (TIA) (DCC 18.116.310(C)(3)(c)) outlined in DCC 18.116.310 including the minimum TIA requirements at DCC 18.116.310(G)(1-16), the study time frame requirements at DCC 18.116.310(E), the operation and safety standards at DCC 18.116.310(H) (20-year study time frame) and the mitigation standards at DCC 18.116.310(I), should any mitigations be required as the result of the revised analysis. The TIA should include a review of existing and future levels of service (LOS), average vehicle delay, and volume/capacity (V/C) ratios associated with the subject properties and surrounding project area. The V/C ratios would be applicable to any ODOT facilities included in the TIA.

Regarding the reasonable worst case scenario(s) put forward in the submitted traffic analysis, staff disagrees with the scenario proposed for the existing EFU Zone. For the existing EFU Zoning, staff does not agree that "farm use" or farm crop processing is the reasonable worst case scenario associated with the EFU Zone and notes that "winery" has been used in past applications for PA/ZC proposals from EFU to MUA10. The assertion that "farm use" constitutes the reasonable worst case scenario for the EFU Zone is antithetical to the analysis provided in the submitted Burden of Proof statement, demonstrating that the subject properties are not currently suited for farm use.

The properties have frontage on Highway 20, Bear Creek Road, Erickson Road, and Neff Road. Highway 20 is a public road maintained by the Oregon Department of Transportation (ODOT), functionally classified as a Primary Arterial Highway. Staff recommends the applicant work closely with representatives from ODOT for any access permitting or other requirements related to Highway 20. Based on ODOT's jurisdiction over Highway 20, the access permit requirements of DCC 17.48.210(A) do not apply. Bear Creek Road and Erickson Road are public roads maintained by Deschutes County and functionally classified as Rural Collectors. Neff Road is a public road maintained by Deschutes County and functionally classified as a Rural Arterial. If the applicant intends to utilize access from Bear Creek Road, Erickson Road, or Neff Road, the applicant must address the provisions of DCC 17.48.210(B) related to access on Rural Collectors and Arterials.

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$5,603 per p.m. peak hour trip. As the plan amendment/zone change by itself does not generate any traffic, no SDCs apply at this time. SDCs will be assessed based on development of the property. When development occurs, the SDC is due prior to issuance of certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final.

THE PROVIDED SDC RATE IS ONLY VALID UNTIL JUNE 30, 2024. DESCHUTES COUNTY'S SDC RATE IS INDEXED AND RESETS EVERY JULY 1. WHEN PAYING AN SDC, THE ACTUAL AMOUNT DUE IS DETERMINED BY USING THE CURRENT SDC RATE AT THE DATE THE BUILDING PERMIT IS PULLED.

BEGINNING JULY 1, 2024, THE SDC RATE WILL INCREASE AND LAST UNTIL JUNE 30, 2025. AGAIN, THIS IS INFORMATIONAL ONLY AS SDCS ARE NOT ASSESSED UNTIL DEVELOPMENT OCCURS.

Oregon Department of Transportation, Principal Planner Ken Shonkwiler

Thank you for the opportunity to review 247-24-000097-PA, 247-24-000098-ZC: Erickson Ward Zone Change. Our comments are attached in a comment log and I also provided a letter on the applicant's TPR assessment memo with regards to OAR 660-012-0060.

STAFF NOTE: The referenced comment log and letter, dated March 19, 2024, are available in the public record.

Oregon Department of Agriculture, John Harrang

No involvement needed by ODA Food Safety Program.

Department of Land Conservation and Development, Natural Resource Specialist Amanda Punton

Good to know, thanks. Do you anticipate including finding on how new uses allowed by the proposed rezoning will affect the Goal 5 scenic resource? There is mention of the combining zone in the applicant's material but nothing about the Goal 5 origins of the combining zone. This is the piece of OAR chapter 660, division 23 that speaks to new uses that could impact a significant Goal 5 resource.

OAR 660-023-0250(3)(b)

(3) Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if: . . .

(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or . . .

There is a good chance the county will find that no additional Goal 5 work is needed. I'm happy to discuss further if you like.

The following agencies did not respond to the notice: Avion Water Company, Bend-La Pine School District, Bend Fire Department, City of Bend Growth Management, Bend Municipal Airport, City of Bend Planning Department, Central Oregon Irrigation District, Deschutes County Assessor, and Deschutes County Road Department.

PUBLIC COMMENTS: The Planning Division mailed notice of the application to all property owners within 750 feet of the subject property on March 12, 2024. 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 11, 2024. Six public comments were received and are described below.

Rory Isbell, Central Oregon LandWatch, March 12, 2024

Central Oregon LandWatch is concerned whether file no. 247-24-000097-PA/98-ZC, an application that proposes to redesignate and rezone 259 acres of agricultural land for residential use, meets the applicable criteria. Please notify us of any decisions or hearings on the application. Our address is 2843 NW Lolo Drive Ste 200, Bend, OR 97703.

Jordi Stiffler, March 19, 2024

I'm writing on the proposed land use action regarding the applicant, which I believe is Mr. Steele and his wife Shelby, petitioning to change their property, 21700 Bear Creek Rd, from Agricultural to Rural Residential Exception Area (RREA).

I am contesting the right for the applicant to change the zoning. Two years ago the county sent out letters to everyone in the vicinity of the applicants property when he wanted to split the land into separate tax lots. When I talked to the county planner at that time he assured me that the land was zoned only for one residential house and that other residential homes could not be built on it. The neighbors, including myself, had to put up with 18 months of construction with dirt, heavy equipment, litter, excessive traffic, noise. The land that they built on was home to coyotes, deer, and other wildlife which has pretty much disappeared.

The narrow Ward Rd can't sustain more traffic to include a new residential area. The road is dangerous as Ward Rd is used by the car dealers for test drives at high rates of speed, and young drivers who fly down Ward Rd to "catch air" in the rise of the road heading east. I have seen numerous dogs and deer get killed on that road in front of my house. The neighborhood bought our houses outside the urban boundary area for one main purposes ... acreage without multiple housing infringing on us.

Audrey Henry, March 20, 2024

I am writing in response to the proposed land use application paperwork I received recently. I am an adjacent property owner and I oppose this proposal for a number of reasons.

This land has been a wildlife habitat for many years and most recently has been home to red fox who have finally come back to this area. There are deer who live there and many other wildlife as well. I moved here over 15 years ago for the peacefulness and serenity and I would hate to see that taken away.

Recently, I was approached by a representative of the gas company that has an easement and line going through that property. He stated one house needed to be removed due to the close proximity of the gas line. It appears due to the new house construction on 21700 Bear Creek Road, they are over the amount of housing allowed for that gas line so I am concerned that after recently being asked to sell my home to them so it could be vacated that we would now have to deal with additional homes, businesses here by the gas line.

I will reach out to you via phone and in person soon to further discuss.

Courtney Eastwood, March 20, 2024

I am writing this email to inform you that as a property owner on Bear Creek Road - I am completely opposed to this change in zoning. There is already a housing development going in on Bear Creek that is going to bring more traffic and cars. Also the property across the street from the current development was just approved to also rezone to Multiple Use. This open land should be protected. We have lots of wildlife including deer, hawks, an eagle, and other critters that currently utilize these fields for their survival. Also I, and my neighbors, purchased land because we wanted land - not to stare at homes and increased traffic. Please re-evaluate how much land is going to be developed in this area and how much more you are proposing.

Amy and Matt Ruff, March 27, 2024

We are responding to the mail correspondence in regards to File #247-24-000097-PA and File #247-24-000098-ZC. As residents of Filly Court, we are opposed to the change of designation from Agricultural (AG) to Rural Residential Exception Area (RREA) and the rezoning of Exclusive Farm Use (EFU-TRB) to Multiple Use Agricultural (MUA10). We feel the current designations are appropriate as is and there should be no further opportunity for building on those pieces of land.

With many people in the city and in the county wanting to expand the urban growth boundary, we feel we need to hold the line firm. Part of the reason we chose to move to this area was because of the open space. These changes in designation and rezoning are concerning due to the unknown type of housing that may go in. We are DEFINITELY not in favor of managed campsites for the homeless or for low income properties that could lower the value of the nearby homes and be a safety concern. Furthermore, additional residences could increase traffic.

It is difficult not knowing the full intentions of the land owner. We would appreciate transparency on this matter and would like to be made aware of any hearings that relate to these file numbers.

Rob DuValle, March 21, 2024

Why would they want to rezone the land where they just put the solar panel farm in? That is

concerning from an impact on my quality of life/ property value as a neighbor.

The whole land use process is very confusing from a community member perspective. I may be totally supportive or not depending on what actually goes in the ground, but without that information it leaves me without the ability to provide an informed response.

The list of potential “conditional uses” has many that I would be opposed to. Shouldn’t the property owner be required to declare their intentions upfront and be legally held to them upon approval? That would seem to be the honorable way to do business. Please put me on the notification lists you mentioned.

NOTICE REQUIREMENT: On April 17, 2025, the Planning Division mailed a Notice of Public Hearing to all property owners within 750 feet of the subject property and public agencies. A Notice of Public Hearing was published in the Bend Bulletin on Sunday, April 13, 2025. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on April 3, 2025.

REVIEW PERIOD: 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 22 of the Deschutes County Code, Procedures Ordinance

Chapter 22.20, Review of Land Use Action Applications

Section 22.20.055, Modification Of Application

- A. *An applicant may modify an application at any time during the approval process up until the close of the record, subject to the provisions of DCC 22.20.052 and DCC 22.20.055.***

FINDING: The applicant submitted a Modification of Application (Deschutes County file 247-25-000021-MA) on January 8, 2025. The applicant provided the following description of the Modification in the submitted Burden of Proof:

The Applicant has reevaluated the application and is proposing to modify the application to reduce the number of acres subject to the request to 240.17 acres... The modification application also supplements certain evidence included in the original application demonstrating further that the subject property is not agricultural land as defined in the applicable laws and regulations. The Applicant is submitting a supplemental report from a certified soils scientist who applied an accepted weighted distribution analysis to the NRCS mapping and determined that the subject property is comprised predominantly of Class 7 and Class 8 soils which are not agricultural soils.

- B. *The Planning Director or Hearings Body shall not consider any evidence submitted by or on behalf of an applicant that would constitute modification of an application (as that term is defined in DCC 22.04) unless the applicant submits an application for a modification, pays all required modification fees and agrees in writing to restart the 150-day time clock as of the date the modification is submitted. The 150-day time clock for an application, as modified, may be restarted as many times as there are modifications.***

FINDING: The applicant provided the following response to this criterion:

The Applicant is providing additional evidence within an application for a modification of application and with the required fee. Thus, the hearing body may consider the new evidence.

- C. *The Planning Director or Hearings Body may require that the application be re-noticed and additional hearings be held.***

FINDING: The Modification of Application was submitted prior to the date the Notice of Public Hearing was mailed, and the Modification materials were available as part of the public record. Furthermore, staff notes the Modification reduced the size of the subject property and therefore would have reduced the size of the mailing radius. For these reasons, staff finds an additional mailed notice of application or notice of hearing date are not required.

- D. *Up until the day a hearing is opened for receipt of oral testimony, the Planning Director shall have sole authority to determine whether an applicant's submittal constitutes a modification. After such time, the Hearings Body shall make such determinations. The Planning Director or Hearings Body's determination on whether a submittal constitutes a modification shall be appealable only to LUBA and shall be appealable only after a final decision is entered by the County on an application.***

FINDING: Staff agrees with the applicant's conclusion that the materials submitted with 247-25-000021-MA constitute a Modification of Application.

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, with written consent from 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 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:

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

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

The applicant utilized this analysis, as well as analyses provided in prior Hearings Officers' decisions to determine and respond to only the Comprehensive Plan Goals and policies that apply, which are listed in the Comprehensive Plan section of this staff report in further detail. Staff generally agrees with the applicant's analysis and finds the above provision to be met based on Comprehensive Plan conformance as demonstrated in subsequent findings. As discussed in more detail below, staff asks the Hearings Officer to make specific findings regarding whether the subject property qualifies as agricultural land, which may impact the findings for compliance with certain Comprehensive Plan policies.

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 approval of this 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 and has no history of farm use. The MUA-10 zone will preserve non-agricultural soils for future part-time or diversified agricultural use. The low-density of development allowed by the MUA-10 zone will conserve open spaces and protect natural and scenic resources. This low level of possible development will also help maintain and improve the quality of the air, water, and land resources of the County by encouraging the future owners of the property to return irrigation water to area waterways or to more productive farm ground elsewhere in the County rather than to waste it on unproductive lands.

The subject property adjoins lands zoned MUA-10. The recent decision on properties east of the subject property confirms that those properties and the subject property provide a proper transition zone from EFU rural zoning to urban land uses in the City of Bend UGB.

Staff notes the subject property is partially developed with an existing solar farm, which received land use approval under the current EFU zoning of the property. DCC 18.16.030, Conditional Uses Permitted; High Value And Non-High Value Farmland, allows for "Photovoltaic solar power generation facilities..." as a conditional use in the EFU Zone. The MUA10 Zone does not include a corresponding use category that allows for a photovoltaic solar facility. Therefore, the applicant proposes to rezone the property to the MUA10 Zone, and the solar farm would not be a permitted use under the new zoning designation.

The application materials indicate that the applicant proposes to continue the use of the solar farm, and the applicant states it would become a legal nonconforming use after the Zone Change. It is not apparent to staff if the proposed change in zoning is consistent with the purpose and intent of the MUA10 Zone if it would create a nonconforming use. In a letter dated May 28, 2024, the applicant provided the following response to this criterion:

The solar farm is a lawfully established use. It was established as an approved conditional use under DCC 18.16.030. If the subject property is rezoned, it will be rezoned on the adoption of an ordinance. DCC 18.120.010 clearly provides that the solar farm will have lawful nonconforming use rights.

With respect to staff's request for case law involving the rezoning of properties that resulted in the existence of nonconforming rights, the relevant case law goes back to 1973. The

seminal case on property owner's rights to continue with lawfully established uses after a rezoning is *Holmes v. Clackamas County*, 265 Or 193 (1973). That case involved the use of property for a chicken processing plant. Before the plant was even open, the county rezoned the property to residential use under which processing plants were not permitted. The Oregon Supreme Court confirmed that when a property is rezoned, uses that existed and uses that have reached a certain stage in the development process have the legal right to remain as lawfully established nonconforming uses.

In light of ORS 215.130, DCC 18.120.010, and Oregon Supreme Court precedent, it is not possible to find that rezoning the subject property resulting in an existing use having lawful nonconforming status is inconsistent with the MUA zone. Indeed, there are lawfully established nonconforming uses throughout the county and the state. Each time the city or county rezones property in an area, it is common for there to be uses that become nonconforming. The fact that those uses become lawfully established nonconforming uses does not mean that having such use is inconsistent with the purposes of the new zone. The well-established laws on nonconforming uses that allow them to continue in a new zone are designed to assure consistency with the new zone. If the standard is that a rezoning can only be found consistent with the purpose of the new zone if after the rezoning there are no lawfully established nonconforming uses, it would frustrate the city's ability to rezone property as well. It makes no legal difference whether the County initiates a rezoning, or a property owner exercises their right to request a rezoning. The law on nonconforming rights makes no legal distinction.

Staff notes that DCC 18.120.010(C) and DCC 22.40.010 outline the procedure for verifying a lawful nonconforming use. Staff does not address these provisions and a future Verification of a Nonconforming Use for the solar farm would require a separate application and fee. The subject staff report is not a determination on the legal status of the solar farm, should the requested Zone Change be approved. In addition, this decision does not confer any rights to the existing solar farm or modify previous land use approvals, including 247-15-000170-CU and 247-15-000171-SP.

Staff asks the Hearings Officer to determine if the applicant has sufficiently addressed DCC 18.136.020(B) demonstrating that the change will be consistent with the purpose and intent of the proposed zoning classification, specifically with respect to creation of a nonconforming use.

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 properties in their current state, the above criterion specifically asks if the proposed zone exchange will *presently* serve public health, safety, and welfare. The applicant provided the following response in the submitted burden of proof statement:

Necessary public facilities and services are available to serve the subject property. Central Oregon Electric Cooperative, Pacific Power, and Avion Water Company, Inc. currently serve properties in the area and can continue to serve the subject property if rezoned. There is no perceived capacity issue and that can be addressed in future development application if the property is rezoned.

The subject property is located along Highway 20 east of the roundabout in Ward Road/Hamby Road and west of Erickson Road. Neff Road is to the north and Bear Creek Road is to the south, all of which can accommodate added traffic that may result from rezoning. The impact of rezoning the subject property will be extremely minor. With its current zoning, it is theoretically possible to divide the property into 10-acre parcels. However, with the solar farm on a large part of Tax Lot 100, the amount of property that could be developed with houses in the foreseeable future is much less. The existing road network is available to serve the use. This is confirmed by a transportation system impact review conducted by Scott Ferguson.

The property receives police services from the Deschutes County Sheriff. The southern half of the property is in a rural fire protection district and the nearest fire station is less than one mile away. All of the property is located in the Rural Fire District #2. Access to the subject property by fire trucks is provided by aerial streets. It is efficient to provide necessary services to the property because the property is already served by these service providers and adjacent to large tracts of land zoned MUA-10 that have been extensively developed with rural residences on small lots and parcels.

Adjacent properties include a mix of vacant land, residential development, and utility facilities, and the general surrounding area includes several other public and commercial uses. Neighboring properties are served by wells, on-site sewage disposal systems, electrical service, and telephone service. No issues have been identified in the record regarding service provision to the surrounding area. The southwest corner of the subject property is located 0.26 miles from the City of Bend UGB. This close proximity to urban development will allow for efficient service provision.

There are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare. Prior to development of the properties, the applicant would be required to comply with the applicable requirements of the Deschutes County Code, including possible land use 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 provided the following response in the submitted burden of proof statement:

The MUA-10 zoning is consistent with the specific goals and policies in the Comprehensive Plan discussed above. The MUA-10 zoning is the same as the zoning of many other properties in the area of the subject property and is consistent with that zoning.

The only adjoining or nearby lands in farm use is a single property east of Tax Lot 1000. The proposed zone change and plan amendment will impose no impacts on this EFU zoned farmland because these lands are separated from the subject property by a large rock rim and that property is isolated with its own water supply and access. There is smaller scaled farming on discrete parcels in the greater area ancillary to the primary residential use but said farming is so far removed from the subject property, it has no bearing on this application.

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

D. That there has been a change in circumstances since the property was last zoned, or a mistake was made in the zoning of the property in question.

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

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

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

Some of the other property owners of lands east of Bend received approval to rezone their properties from EFU to MUA-10 because their properties contained poor soils and were improperly included in the EFU zone. The soils on the subject property are similarly poor and also merits MUA-10 zoning. The NRCS maps and how the County Board has determined they should be used confirm that the subject property is not agricultural land. Since 1979 and 1980, there has been a change of circumstance related to this issue. The County's

Comprehensive Plan has been amended to specifically allow individual property owners to have improperly classified land reclassified.

Additionally, circumstances have changed since the property was zoned EFU. The City of Bend has been developed to the east toward the subject property. The Bend Airport has grown significantly in this time period and now provides many aviation-related jobs. The property is located within easy commuting distance of Saint Charles Medical. It has grown significantly and its need for workers has increased. The area now includes large solar farms, churches, a Christian Center, and utility facilities.

Specific to the subject property, Tax Lot 100, which is about 100 acres, has been committed to use as a commercial solar farm. It has been irrevocably removed from farming due to the poor soil and other factors making farming infeasible. The proposed zone change to MUA-10 will not impact that use. Because it was lawfully established on the applicable zoning, pursuant to DCC 18.120.010, that use has the right to continue operating on the subject property. Thus, Tax Lot 100 will never be available for farming alone or in combination with any other parcel. The County should include a finding to this effect.

Since the property was zoned, it has become evident that farm uses are not viable on the property or on other area properties. The economics of farming have worsened over the decades making it difficult for most Deschutes County property owners to make money farming good ground and impossible to earn a profit from attempting to farm Class 7 and 8 farm soils. In 2022, according to Table 4 of the 2022 US Census of Agriculture, **Exhibit 8**, only 18.6% of farm operators achieved a net profit from farming (293 of 1572 farm operations). In 2017, according to Table 4 of the 2017 US Census of Agriculture, **Exhibit 9**, only 16.03% of farm operators achieved a net profit from farming (238 of 1484 farm operations). In 2012, the percentage was 16.45% (211 of 1283 farm operations). In 2007, according to the 2012 US Census of Agriculture, that figure was 17% (239 of 1405 farm operations). **Exhibit 10**. The number of farms with net losses increase from 1,246 in 2017 to 1,279 in 2022. The vast majority of farms in Deschutes County have soils that is superior to those found on the subject property. As farming on those soils is typically not profitable, it is reasonable to conclude that no reasonable farmer would purchase the subject property for the purpose of attempting to earn a profit in money from agricultural use of the land.

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

Deschutes County Comprehensive Plan

Chapter 2, Resource Management

Section 2.2 Agricultural Lands

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

FINDING: The applicant provided the following response in the application materials for file 247-25-000021-MA:

The Applicant presented in the original application that the County's historic reliance on the NRCS mapping for determining whether parcels are comprised predominantly of agricultural land or not. If the NRCS maps are not adequate to make that determination, the County can consider a site-specific soil study prepared by a certified soil scientist. In this matter, the NRCS maps require a finding that the subject property is predominantly not agricultural land.

To supplement the application in this modification request, the Applicant is submitting a detailed report from Red Hill Soils. The report is primary to provide more detail on the composition of the two soil types mapped on the property because each soils type is a complex soil type. The majority of the property is comprised of 58C-Gosney Rock Outcrop-Deskamp complex. The following table from the Red Hills Soils Report breaks out each soil type found on the subject property. The Red Hill Soils report presents a detailed evaluation of the soil on the subject property accounting for each component in the 58C complex soil type...

The Red Hills Soils Report confirms that the subject property is comprised predominantly of Class 7 and Class 8 soils which are not agricultural land.

The Red Hill Soils Report also evaluated soil fertility concluding that that the soil fertility and productivity are very limiting to crop production. The soil has low fertility, lacking nutrients, and has a limited capacity for retaining water.

The vast majority of the subject property is comprised of Class 7 and Class 8 non-agricultural soils, and the property has no known history of agricultural use. As noted in the Eastside Bend decision, Class 7 and Class 8 soils have severe limitations for farm use as well as poor soil fertility, shallow and very shallow soils, surface stoniness, low available water capacity, and limited availability of livestock forage. According to Agricultural Handbook No. 210 published by the Soil Conservation Service of the USDA, soils in Class 7 "have very severe limitations that make them unsuited to cultivation and that restrict their use largely to grazing, woodland, or wildlife." Class 8 soils "have limitations that preclude their use for commercial plant production and restrict their use to recreation, wildlife, or water supply or to esthetic purposes.

The subject property does not appear to have any history of farm use, and the property does not contain any irrigation or water rights. As described in more detail below, the applicant relies on the NRCS soil maps for the subject property and a report by a certified soil scientist that applies a weighted distribution to the soil complexes shown on the NRCS maps. To the extent the Hearings Officer agrees with the conclusion of the soils report, staff finds the applicant has demonstrated compliance with this Comprehensive Plan policy. In later sections, staff requests the Hearings Officer make specific findings regarding the soils report submitted with the application materials.

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 did not ask to amend the subzone that applies to the subject property; rather, the Applicant requested a change under Policy 2.2.3 and has provided evidence to support rezoning the subject properties to MUA10.

Policy 2.2.3 Allow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, for individual EFU parcels as allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan.

FINDING: The applicant requested approval of a plan amendment and zone change to re-designate the property from Agricultural to Rural Residential Exception Area and rezone the property from EFU to MUA10. The applicant did not seek an exception to Goal 3 – Agricultural Lands, but rather 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:

The Applicant is seeking a comprehensive plan amendment from Agriculture to RREA, and a zone change from EFU-TRB to MUA-10 for non-resource land. This is the same change approved by Deschutes County in the Division of State Lands file PA-11-7 /ZC-11-2. In findings attached, Deschutes County determined that State law, as interpreted in *Wetherell v. Douglas County*, 52 Or LUBA 677 (2006), allows this type of amendment. LUBA said, in *Wetherell* at pp. 678-679:

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

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

"Under Goal 3, land must be preserved as agricultural land if it is suitable for "farm use" as defined in ORS 215.203(2)(a), which means, in part, "the current employment of land for the primary purpose of obtaining a profit in money" through specific farming-related endeavors." *Wetherell*, 343 Or at 677.

The *Wetherell* court held that when deciding whether land is agricultural land, "a local government may not be precluded from considering the costs or expenses of engaging in those activities." *Wetherell*, 342 Or at 680. In this case, the Applicant has shown that the subject property is primarily composed of Class VII and VIII non-agricultural soils when irrigated and when not irrigated making farm-related endeavors unprofitable. The property is not currently employed for any type of farm use and has no known history of that use. Accordingly, 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. The applicant provided evidence in the record addressing whether the property qualifies as non-resource land. Therefore, the applicant has the potential to prove the properties are not agricultural land and do not require an exception to Goal 3 under state law.

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

FINDING: This plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations. Staff concurs with the County's previous 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 and the applicant's burden of proof. Further, discussion on the soil analysis provided by the applicant is detailed under the OAR Division 33 criteria below.

Section 2.5, Water Resources Policies

Goal 6, Coordinate land use and water policies.

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

FINDING: The applicant has not proposed a specific development application at this time. Therefore, the applicant is not required to address 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). The applicant provided the following response in the submitted Burden of Proof:

Irrigation is essential for commercial farm use in Central Oregon. Irrigating poor farm ground consumes a large amount of the area's precious water resources without the resulting economic benefits of profitable agricultural production. Homes consume less water than would be needed for farm field irrigation on the subject property.

In its findings in Division of State Land, Deschutes County found that impacts of any proposed future development of the state property on water resources would be reviewed by Deschutes County in future development applications. That finding was sufficient to demonstrate compliance with this plan policy. Together with the findings above and then later review by Deschutes County, this policy is satisfied.

Staff concurs with the applicant's analysis and includes the following findings from *Aceti IV* (247-20-000438-PA, 439-ZC). In this previous land use decision, the Hearings Officer and the Board of County Commissioners (Board) made the following findings, which appear to support the applicant's analysis:

The Hearings Officer found in *Aceti 1* that this policy is directed at the County. In said decision, the Hearings Officer cited a previous decision of Hearings Officer Green for file nos. PA-14-2 and ZC-14-2 that stated, "Nevertheless, in my decision in NNP I held it is not clear from this plan language what "water impacts" require review -- impacts to water supplies from use or consumption on the subject property, or Impacts to off-site water resources from development on the subject property." The Applicant has not proposed any particular land use or development, and any subsequent applications for development of the subject property would be reviewed under the County's land use regulations that include consideration of a variety of on- and off-site impacts.

The Hearings Officer finds it is premature to review "water impacts" because the Applicant has not proposed any particular land use or development. Thus, there are no "significant land uses or developments" that must be reviewed or addressed in this decision. Any subsequent applications for development of the subject property will be reviewed under the County's land use regulations, which include consideration of a variety of on- and off-site impacts. Notwithstanding this statement, the Hearings Officer includes the following findings.

The Applicant's requested zone change to RI would allow a variety of land uses on the subject property. The land east of the subject property (57 acres) is zoned RI and developed with a variety of rural industrial uses. Consequently, it is likely that similar development may occur

on the property if it were re-designated and rezoned to RI. In light of existing uses in the surrounding area, and the fact that Avion Water Company provides water service in the Deschutes Junction area, and a 12-inch diameter Avion water line and two fire hydrants are already installed on site, future development of the subject property with uses permitted in the RI Zone will have water service.

The subject property has 16 acres of irrigation water rights and, therefore, the proposed plan amendment and zone change will result in the loss or transfer of water rights unless it is possible to bring some irrigated water to the land for other allowed beneficial uses, such as irrigated landscaping. As stated in the Applicant's Burden of Proof, the 16 acres of irrigation water rights are undeliverable and are not mentioned in the property deed. The Applicant has not grown a crop on the subject property or effectively used his water right since the overpass was constructed in 1998.

The Hearings Officer finds that the proposal will not, in and of itself, result in any adverse water impacts. The proposal does not request approval of any significant land uses or development.

For these reasons, staff finds the applicant has demonstrated compliance with this Comprehensive Plan policy. However, staff requests the Hearings Officer modify these findings as they see fit.

Section 2.7, Open Spaces, Scenic Views and Sites

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

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

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

FINDING: These policies are fulfilled by the County's Goal 5 program. The County protects scenic views and sites along major rivers and roadways by imposing Landscape Management (LM) Combining Zones to adjacent properties. A portion of the subject property is located within the Landscape Management Combining Zone associated with Highway 20.

These policies are fulfilled by the County's Goal 5 program. The County protects scenic views and sites along rivers and roadways by imposing Landscape Management Zoning overlay zones. The subject property is within the Landscape Management Combined Zoning for Highway 20. Staff noted in Te Amo Despacio, File 24 7-22-000313/314 that the standards and requirements of that overlay can be implemented at the time of any future development. These provisions of the plan, therefore, are not impacted by approval of the proposed zone change and plan amendment.

Furthermore, no new development is proposed under the present application. These provisions of the plan, therefore, are not impacted by the proposed zone change and plan amendment.

Chapter 3, Rural Growth

Section 3.2, Rural Development

Growth Potential

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

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

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

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

This section makes it clear, however, that EFU zoned land with poor soils adjacent to rural residential development is expected to be rezoned for rural residential development during the planning period. The subject property has extremely poor soils that does not qualify as agricultural land that must be protected by Goal 3. The subject property is sandwiched between large areas recently rezoned to MUA-10 to the west and MUA zoned property to the east. Most of the intervening EFU land interspersed is committed to rural residential uses. There is a single active farming operation in the immediate vicinity. The property east of Erickson Road is developed with single-family homes.

The MUA-10 zone is a rural residential zone. It will provide for an orderly and efficient transition from rural to urban land use as intended by the purpose of the MUA-10 zone. As a result, rezoning the subject property MUA-10 is consistent with Section 3.2.

Staff notes that the MUA10 Zone is a rural residential zone and as discussed in the Findings of Fact above, adjacent properties to the north, northwest, and southwest are zoned MUA10. One of these

surrounding MUA10 properties has received approval for a Comprehensive Plan Amendment and Zone Change to change the zoning of the property from EFU to MUA10. This property is identified on Assessor's Map 17-12-35 as Tax Lot 1600, and is located adjacent to the subject property, to the west of Tax Lot 900. Staff notes this policy also references the soil quality, which staff discusses in more detail below. 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 initiating a nonresource plan amendment and zone change by demonstrating the property does not meet the definition of agricultural or forest land, or taking exceptions to farm, forest, public facilities and services and urbanization regulations, and follow guidelines set out in the OAR.

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

Staff and the County Board have conformed in prior decisions that the quoted language is part of the background text of the County's Comprehensive Plan. It is not a plan policy or directive, and it is not an approval standard for this application. Staff made this point in (Porter Kelly Burns). County zone change and plan amendment use decisions adopted by the Board of Commissioners have so found.

The applicant also provided an alternate argument that applying the RREA Comprehensive Plan designation to the subject property does not require an exception to a Statewide Planning Goal, even if this policy were interpreted as an approval criterion.

Staff agrees with prior 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. The applicant provided evidence in the record addressing whether the property qualifies or does not qualify as agricultural or forest land. Staff asks the Hearings Officer to make specific findings related to this language.

Section 3.7, Transportation

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

...

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

...

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

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

**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 4.5-mile radius. The property does not contain merchantable tree species and there is no evidence in the record that the properties have been employed for forestry uses historically. The property does not appear to qualify as forest land, however, staff asks the Hearings Officer to modify these findings if the record does not sufficiently demonstrate that the subject property is not forest lands, as defined above.

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 Oregon²;***

FINDING: The applicant's basis for not requesting an exception to Goal 3 is based on the premise that the subject properties are not defined as "Agricultural Land." In support, the applicant offered the following response as included in the burden of proof for file 247-25-000021-MA:

State law allows the County to rely on either the NRCS maps or individual site soil studies. The Red Hill Soils Report contains a detailed evaluation of the NRCS maps and how they demonstrate that the subject property is not agricultural land.

Staff has reviewed the soil study prepared by Andy Gallagher, certified soil scientist, and requests the Hearings Officer to make findings regarding whether the subject property qualifies as agricultural land.

- (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 that the subject properties are not defined as "Agricultural Land." The applicant provided the following analysis in the Burden of Proof for file 247-25-000021-MA:

² 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.

The Red Hill Soils Report is supplemental evidence demonstrating that the application is consistent with this regulation. The report evaluates soils classification, soil fertility, suitability for grazing, existing land use patterns, and accepted farming practices. Based on that detailed evaluation under this regulation, the certified soils classifier concluded that the property is predominantly Class 7 and Class 8 soil not meeting the definition of agricultural land.

In the original Burden of Proof for files 247-24-000097-PA, 98-ZC, the applicant provided the following analysis of this criterion:

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

The primary agricultural use conducted on properties that lack irrigation water rights and have poor soils is grazing cattle. The extremely poor soils found on the property, however, makes it a poor candidate for dryland grazing. The dry climate, the proximity to the city limits, major roadways (Highway 20, Ward Road, Bear Creek Road, and Erickson Road), and area development prevent grazing from being a viable or potentially profitable use of the property. The soils, also, are so poor that they would not support the production of crops even if irrigation water rights could be obtained for that purpose. The soils simply do not hold enough water to sustain and support crop growth.

Given the high cost of irrigating and maintaining the property as pasture or cropland (high labor costs, labor-intensive, high cost of irrigation equipment and electricity, high cost of fertilizer, etc.), dry land grazing is the accepted farm use of poor soils in Deschutes County. This use can be conducted until the native vegetation is removed by grazing (see the discussion of the suitability of the property for grazing, below). When assessing the potential income from dry land grazing, Deschutes County uses a formula and assumptions developed by the OSU Extension Service. **Exhibit 11**. This formula is used by the County to decide whether EFU zoned land is generally unsuitable for farm use. It assumes that one acre will produce 900 pounds of forage per year. The subject property will, however, for several reasons, including its extremely poor soil, produce significantly less. The 101 acres within Tax Lot 100 is committed to non-farm use for a long period and will never be farmed. Tax Lots 400 and 300 are on either side of TL 100 separated by the solar farm. Individually, Tax Lots 300 and 400 are not large enough to support grazing particularly with the poor soils. They cannot be used together either due to the intervening solar farm.

Tax Lots 900 and 1000 are combined about 101 acres. Applying an evaluation that has been used previously in similar rezoning requests and apparently accepted because they were

approved, the OSU Extension Service formula assumes that one acre of land will produce 900 pounds of forage per year. Based on the poor soils, and other factors, those parcels combined will produce no more than 60% of that assumed number, or 540 pounds. Applying the OSU assumptions and formulas, it is easy to conclude that it is not economically feasible to use Tax Lots 900 and 1000 for grazing.

- One AUM is the equivalent to the forage required for a 1,000-pound cow and calf to graze for 30 days (900 pounds of forage).
- On good quality forage, an animal unit will gain two pounds per day.
- Two animal units will eat as much in one month as one animal unit will eat in two months.
- Forage production on dry land is not continuous. Once the forage is consumed, it typically will not grow back until the following spring.
- An average market price for beef is \$1.20 per pound.

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

$30 \text{ days} \times 2\#/\text{day}/\text{acre} = 60.0 \text{ lbs. Beef}/\text{acre}$
(1 acre per AUM)

$60.0 \text{ lbs. Beef}/\text{acre} \times 101 \text{ acres} \times \$1.15/\text{lb.} = \$6,969 \text{ per year for good rangeland}$

Adjust expected income based on forage on subject property:

101 acres x 540 lbs. of forage per acre per year.

540 pounds/900 assumed pounds = 60%

60% of \$6,969 annual income for good range land= **\$4,181.40** annual income for subject property.

Because there is no way to feasibly use Tax Lots 100, 300, or 400 for grazing, the total gross beef production potential for the subject property would be approximately \$4,181.40 annually. This figure represents gross income and does not take into account real property taxes, fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production which would exceed income.

OAR 660-033-0020 contains several considerations to help evaluate whether poor soils are suitable for farming:

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

Suitability for Grazing: The climate is cold and dry. The growing season is very short. According to the OSU Extension Service, the growing season is only 80 to 90 days long. **Exhibit 11.** The average annual precipitation is only 11.36 inches. This means that the amount of forage available for dry land grazing is low. This also means that a farmer has a short period of amount of time to irrigate pastures. This makes it difficult for a farmer to raise sufficient income to offset the high costs of establishing, maintaining, and operating an irrigation system. The small hobby horse farm on the parcel south of Tax Lot 1000 cannot grow enough hay on site to feed even the small number of horses it has.

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. There is not an abundance of water rights in the area making it unlikely that any owner will give those rights up.

Even if transfer rights were available, 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 poor soils found on the subject property.

Existing Land Use Patterns: The Applicant's analysis of existing land use patterns provided earlier in this burden of proof shows that the subject property is located in an area of small lots and marginal farmland that is primarily devoted to residential and hobby farm uses, with solar farms and other institutional uses mixed in. Areas of MUA-10 zoning are interspersed with EFU-TRB zoning. The subject property adjoins MUA-10 properties on the west (Tax Lot 900 borders East Bend LLC MUA property) and east (Tax Lot 100 borders MUA parcel east of Erickson Road). The predominant use of parcels around the subject property are rural large acre dwellings, institutional/religious uses, public services, and private utilities (solar farms).

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

Accepted Farming Practices: As determined by the County in prior files, farming lands comprised of soils that are predominately Class VII and VIII is not an accepted farm practice in Central Oregon. Dryland grazing, the farm use that can be conducted on the poorest soils in the County, typically occurs on Class VI non-irrigated soils that have a higher soils class, if irrigated. Crops are typically grown on soils in soil Class III and IV.

Staff agrees with the applicant that many of the factors surrounding the subject property – such as level of development in the surrounding area, soil fertility, and amount of irrigation required result in a relatively 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 offered 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 following facts are shown by the Applicant's discussion of surrounding development in Section E of this application above, and by the additional information provided below.

The submitted burden of proof also included the following summary of all EFU-zoned properties within an area of approximately one mile of the subject property.

West: Properties to the west of the subject property, with one exception, are separated from the subject property by Ward/Hamby Roads. The road makes it infeasible to use the subject property for farm use in conjunction with these properties and much of that property was recently rezoned to MUA-10 (Marken Trust, East Bend LLC, and Te Amo Despacio). Additionally, the subject property is not necessary to permit farm practices to be undertaken on adjacent or nearby lands to the west. There is no recent history of farming on properties to the west.

ADJOINING PROPERTIES SOUTH OF PROPERTY

Tax Lots 900 and 1000 abut Bear Creek Road. The property south of Bear Creek Road is within Dobbin Estates, an approved residential subdivision. There is no farming or potential for farming on that property.

FARM PROPERTIES NEARBY TO WEST, SOUTH AND SOUTHWEST, AND NORTHWEST OF ADJOINING PROPERTIES

North: Most of the land north of the subject property is privately owned and currently used for institutional purposes and commercial enterprises. There are several large solar farms, a church, a Christian center, and an electric power facility. Further to the northeast is Big Sky Park. Any farming is far to the north, a significant distance from the subject property. Moreover, it is separated physically from the subject property by Highway 20, other major roads, and intervening non-farm uses making it infeasible to farm with the subject property.

East: The non-adjacent property to the east of Tax Lots 900 and 1000 is primarily devoted to large acre residential uses and hobby farms. In light of the many surrounding non-farm uses

that have been in existence for years and the amount of MUA-10 zoned property in the area already, rezoning the subject property will not impact farming on that parcel. The properties east of Tax Lots 100, 300, and 400 are primarily MUA zoned large estate properties that are not used in farming operations and are separated by Erickson Road.

South: The property south of Tax Lots 300,400, and 100 is either part of the subject property or the property described above. As discussed earlier, the property south of Tax Lots 900 and 1000 are part of a platted residential subdivision. Rezoning the subject property to MUA-10 will not impact farming on any of that property.

Pages 26 to 27 of the Burden of Proof include tables that list surrounding properties and include information on potential farm uses. These tables provide detailed information on the existing surrounding uses, potential farm practices, and reasons why they do not require the subject property to operate.

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 any nearby parcels discussed in the Findings of Fact section above, or the larger area more generally. This finding is based in part on poor quality, small size, and existing development on surrounding EFU and MUA10 properties. 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. It has not been farmed. As a result, this rule does not apply to the County's review of this application.

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

As confirmed by the accepted soils maps, the predominant soil types found on the property are Class VII and VIII, non-agricultural land. Some Class VI soils are intermingled with the non-agricultural soil, not vice versa. As a result, this rule does not require the Class VII and VIII soils to be classified agricultural land.

The submitted soils analysis indicates the subject property contains complex soil types, which may include some Class 1-6 soils. However, the subject property does not contain any water rights or irrigated land, and there is no evidence of farm use on the property.

- (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 applicant states the subject property is not "agricultural land," as referenced in OAR 660-033-0030(1) above, and contain barriers for farm use including poor quality soils and the development pattern of the surrounding area.

The soil study produced by Mr. Gallagher focuses solely on the land within the subject property and the applicant has provided responses indicating the subject property is not necessary to permit farm practices undertaken on adjacent and nearby lands. Staff requests the Hearings Officer make specific findings on this issue, in part based on the applicant's responses to OAR 660-033-0020(1), above.

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

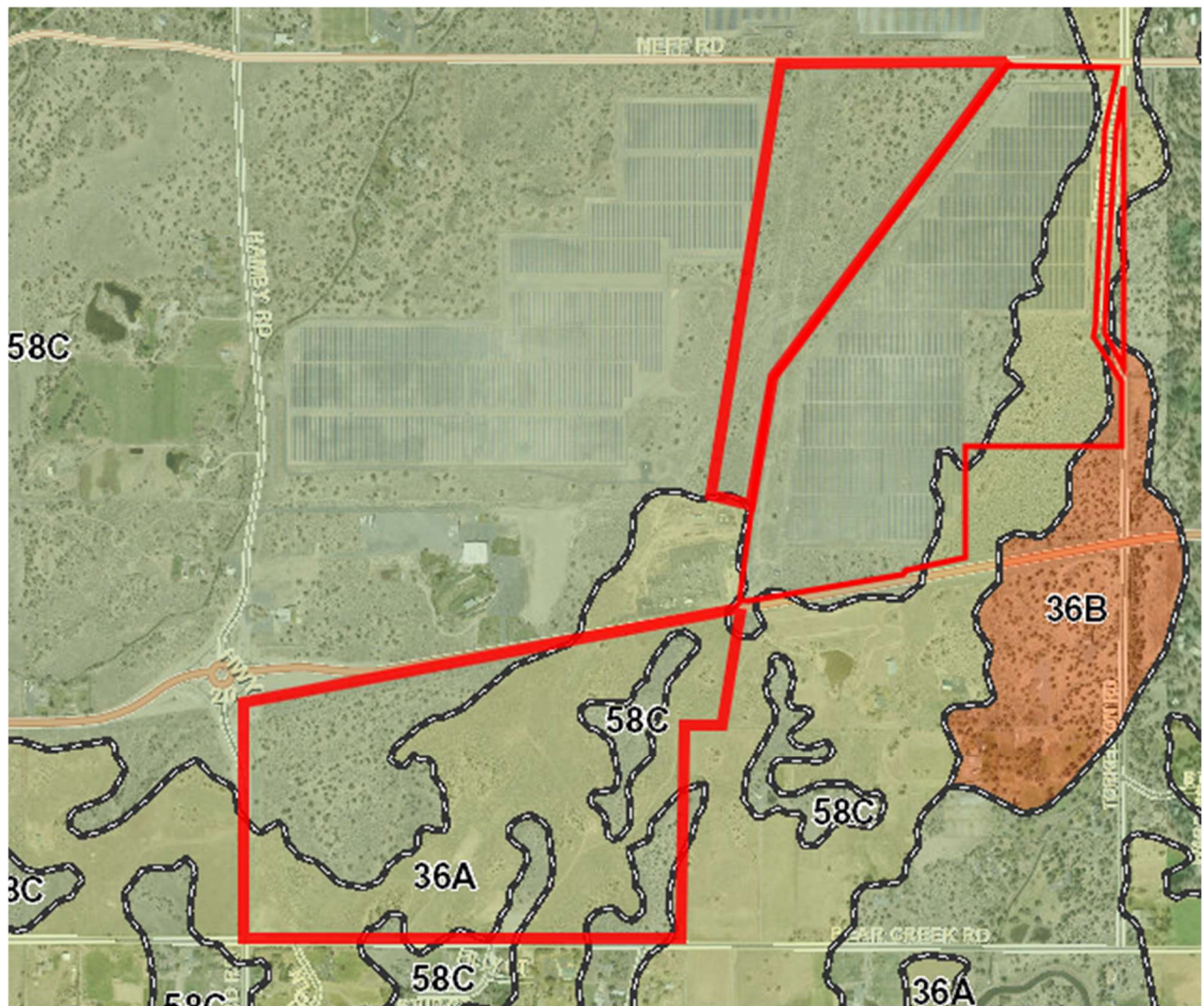
FINDING: The applicant submitted evidence showing the subject property is not suitable for farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands. The ownership of the subject parcels is not used to determine whether the parcel is “agricultural land.”

- (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 and provide a 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, and the soil units that are mapped on the subject property are complexes made up of soils with various LCC ratings.

The NRCS mapping for the subject properties is shown below in **Figure 1**. According to the NRCS Web Soil Survey tool, the subject property contains approximately 80 acres of soil unit 36A, 0.6 acres of soil unit 36B, and 160 acres of soil unit 58C.

Figure 1: NRCS Soil Mapping on the Subject Property



The submitted soil study does not dispute the NRCS soils map for the subject property, or provide updated mapping. Instead, the soil study provides a methodology for calculating the LCC rating for the complex soil units identified within the subject property.

Table 1: Composition of Soil Types within Subject Property

Table 3. Coverage of soils after distributing weighted amounts of 58C by Capability classification.

Map Symbol	Map Unit Component	High-value Farmland Status	Agricultural lands	Nonirrigated Capability Class	Acres NRCS soil map by unit	Coverage
						-%-
36A, 36B	Deskamp	N (not irrigated)	Yes	6	115	48
58C	Gosney	N	No	7	83	35
58C	Rock outcrop	N	No	8	42	17
	Total				240	100

The soil study included the following conclusion regarding the productivity of soils within the subject property:

The NRCS WEBSOILSURVEY shows the subject property is predominantly non-high value farmland, Class 7 and 8 and does not meet the definition of agricultural land within the meaning of OAR 660-033-0020(1)(b), as it is not adjacent to or intermingled with land in capability classes 1-6 within a farm unit. There is no clear evidence that the Capability Class 6 non-irrigated soils on the subject property were farmed or utilized in conjunction with any farming operation in the past.

The soil study applies a weighted average methodology to calculate the LCC rating of the 58C soil unit, Gosney-Rock outcrop- Deskamp Complex, which comprises the majority of the subject property. As described above, this soil unit is a complex and may contain both high value soils and non-high value soils. Mr. Gallagher applied information from the NRCS, which estimates the following amount of Class 6, Class 7, and Class 8 soils within this complex:

The NRCS gives percentages of three of the main components of this map unit as 50 percent Gosney (Class 7) 25 percent rock outcrop (Class 8) and 20 percent Deskamp (Class 6 and high value). NRCS includes five percent unspecified contrasting soils in the map unit composition. In my acreage calculations the unspecified five acres were equally divided between class 6, 7 and 8 soils.

In his report, Mr. Gallagher utilizes the information provided by NRCS on the typical composition of the 58C soil unit. He multiplies the 160 acres of 58C soils by the percentage of Class 6, 7, and 8 soils within the 58C soil unit. This information appears to be based on general information provided by NRCS on the composition of the 58C soil unit and is not specific to the subject property.

The applicant cites the Board of County Commissioners decision for file PA-11-7, ZC-11-2 (*Department of State Lands*) in support of this methodology³. In this prior Zone Change decision, testimony was provided by staff from NRCS and a weighted average was presented as one of three

³ Staff references a letter from the applicant dated May 28, 2024.

potential methodologies for calculating the LCC ratings within a complex soil unit. In the *Department of State Lands* decision, the Board found that they had discretion to choose any of the three methodologies to determine whether the soils on the property qualified as 'agricultural land.' Staff requests the Hearings Officer make specific findings on this issue and determine whether the proposed methodology is consistent with OAR 660-033-0030.

(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 requested 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 dated January 2, 2025. The soil study was submitted following the ORS 215.211 effective date.

The applicant did not submit acknowledgement from Department of Land Conservation and Development (DLCD) that the soil study is complete and consistent with DLCD's reporting requirements. However, it is not apparent to staff whether a DLCD completeness review is required for this soil study, since it expands on the NRCS soil map but does not include a full on-site assessment. The applicant relies on the soils report from Mr. Gallagher to determine whether the subject property consists predominantly of Class 1-6 soils. As described below, staff requests the Hearings Officer make specific findings regarding the submitted soil study and whether it has been correctly applied in the context of this section.

(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 analysis from a certified soil scientist, which expands on the information provided in the NRCS soils map. The soil study submitted with file 247-25-000021-MA includes the following disclaimer:

Baseline information for this project is the NRCS WEBSOILSURVEY and does not include an onsite evaluation or a Soil Assessment as defined by the State of Oregon.

Based on the information above, it is not clear to staff if the submitted soil study was prepared according to the procedures set forth in OAR 660-033-0045. Staff requests the Hearings Officer make findings regarding the submitted soil study, and whether it provides sufficient information to determine the percentage of the subject property that is comprised of Class 7 and Class 8 soils.

DIVISION 12, TRANSPORTATION PLANNING

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

- (1) *If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would:***
- (a) *Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);***
 - (b) *Change standards implementing a functional classification system; or***
 - (c) *Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.***
 - (A) *Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;***
 - (B) *Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or***
 - (C) *Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.***

FINDING: This above language is applicable to the proposal because it involves an amendment to an acknowledged comprehensive plan. The proposed plan amendment would change the designation of the subject properties from AG to RREA and change the zone from EFU to MUA10. The applicant is not proposing any land use development of the properties at this time.

The applicant submitted a Transportation Planning Rule ("TPR") assessment, Exhibit 12, dated February 2, 2024, and prepared by Scott Ferguson of Ferguson and Associates, Inc. As noted in the agency comments section above, the County Transportation Planner identified deficiencies with the

submitted TPR analysis and requested additional information. Specifically, the County Transportation Planner requested additional information in order to determine whether the proposal would have a significant effect on transportation facilities. The applicant then submitted a revised TPR analysis dated February 28, 2025, prepared by Scott Ferguson, PE, of Ferguson and Associates, Inc.

The revised TPR assessment was reviewed by the County Transportation Planner, who agreed with the report's conclusions. Staff finds that the proposed plan amendment and zone change will be consistent with the identified function, capacity, and performance standards of the County's transportation facilities in the area. The proposed zone change will not change the functional classification of any existing or planned transportation facility or change the standards implementing a functional classification system. Regarding the TPR analysis dated February 28, 2025, the County Transportation Planner provided the following comments in an email dated March 5, 2025:

...The revised analysis provides updated information related to the total ~240.17 acres of subject property. The full build-out scenario included in the revision (considering redevelopment of the existing solar farm portions of the subject property) aligns with staff's comments from 6/11/24. The report's inclusion of modified acreage and assumed development credit for one existing single-family dwelling complies with additional comments from staff's 6/11/24 email correspondence regarding the MUA10 Zone's worst case scenario analysis. I agree with the assumptions, methodologies, and conclusions outlined in the revised analysis.

Based on the County Senior Transportation Planner's comments and the traffic study from Ferguson and Associates, Inc., staff finds compliance with the Transportation Planning Rule has been effectively demonstrated. 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 and the applicant's findings are quoted outlined below:

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

Goal 2, Land Use Planning. Goals, policies, and processes related to zone change applications are included in the Deschutes County Comprehensive Plan and Titles 18 and 23 of the Deschutes County Code. The outcome of the application will be based on findings of

fact and conclusions of law related to the applicable provisions of those laws as required by Goal 2.

Goal 3, Agricultural Lands. The Applicant has shown that the subject property is not agricultural land, so Goal 3 does not apply.

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

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

Goal 6, Air, Water, and Land Resources Quality. The approval of this application will not cause a measurable impact on Goal 6 resources. Approval will make it more likely that the irrigation and pond water rights associated with the property will ultimately be returned to the Deschutes River or used to irrigate productive farm ground found elsewhere in Deschutes County.

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

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

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

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

Goal 11, Public Facilities and Services. The approval of this application will have no adverse impact on the provision of public facilities and services to the subject site. Utility service providers have confirmed that they have the capacity to serve the maximum level of residential development allowed by the MUA-10 zoning district.

Goal 12, Transportation. This application complies with the Transportation System Planning Rule, OAR 660-012-0060, the rule that implements Goal 12. Compliance with that rule also demonstrates compliance with Goal 12.

Goal 13, Energy Conservation. The approval of this application does not impede energy conservation. The subject property is located in a part of the community that contains a large amount of rural residential development. Providing homes in this location, as opposed to more remote rural locations, will conserve energy needed for residents to travel to work, shopping, and other essential services.

Goal 14, Urbanization. This goal is not applicable because the Applicant's proposal does not involve property within an urban growth boundary and does not involve the urbanization of rural land. The 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.

Goal 15, Willamette Greenway. This goal does not apply because the subject property is not located in the Willamette Greenway.

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

Staff generally accepts the applicant's responses and finds compliance with the applicable Statewide Planning Goals has been effectively demonstrated. However, staff notes additional analysis may be required regarding Goal 5, Natural Resources, Scenic and Historic Areas and Open Spaces. A portion of the subject property is located within the Landscape Management Combining Zone associated with Highway 20, and this scenic corridor is identified in the County's Goal 5 inventory.

The Board decision for Deschutes County files 247-22-000573-ZC, 574-PA included the following findings:

Pursuant to 660-023-0250(3), the county does not have to apply Goal 5 as part of a Post Acknowledgement Plan Amendment ("PAPA") unless the PAPA affects a Goal 5 resource. Pursuant to OAR 660-023-250(3)(b), a PAPA affects a Goal 5 resource if the PAPA would allow new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list. In this case, the Goal 5 resource is the Highway 97 scenic corridor.

In the decision for files 247-22-000573-ZC, 574-PA, the Board ultimately determined that the proposed Zone Change would not require a new Economic, Social, Environmental, and Energy (ESEE) analysis. The Board found that the ESEE analysis that established the Highway 97 scenic corridor considered a wide range of potential uses, and the change in zoning from EFU to Rural Industrial would not introduce new conflicting uses. The applicant has not submitted specific arguments regarding whether the proposed MUA10 zoning would allow new, conflicting uses within the Landscape Management Combining Zone associated with Highway 20. Staff requests the Hearings Officer make findings on whether the applicant has sufficiently demonstrated compliance with Statewide Planning Goal 5.

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 properties 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

A handwritten signature in black ink that reads "Audrey Stuart". The script is cursive and fluid.

Written by: Audrey Stuart, Associate Planner

A handwritten signature in black ink that reads "Anthony Raguine". The script is cursive and fluid.

Reviewed by: Anthony Raguine, Principal Planner

owner	agent	inCareof	address	cityStZip	type	cdd id	email
BCL LLC			250 NW Franklin Ave, Suite 401	Bend, OR 97703	Staff Report	24-97-PA, 98-ZC, 25-21-MA	larrykine@gmail.com
Erickson-Ward Land Trust, LLC			PO Box 5609	Bend, OR 97708	Staff Report	24-97-PA, 98-ZC, 25-21-MA	tcollier@uci.net
Christopher Kobak			937 NE Newport, Suite 220	Bend, OR 97703	Staff Report	24-97-PA, 98-ZC, 25-21-MA	chris@hathawaylarson.com