Exhibit "F" – Ordinance 2022-011

BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON
FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILE NUMBERS: 247-21-0000881-PA/882-ZC

APPLICANT: LBNW LLC
c/o Jake Hermeling
65315 Hwy 97
Bend, OR 97701

OWNERS: Taxlots 1612230000305 ("Taxlot 305") & 1612230000500 ("Taxlot 500")
LBNW LLC
65314 Hwy 97
Bend, OR 97701

Taxlot 1612230000301 ("Taxlot 301")
Dwight E. & Marilee R. Johnson
18550 Walton Road
Bend, OR 97701

APPLICANT'S ATTORNEY: Ken Katzaroff
D. Adam Smith
Schwabe, Williamson & Wyatt, P.C.
360 SW Bond Street, Suite 500
Bend, OR 97702

STAFF PLANNER: Tarik Rawlings, Associate Planner
tarik.rawlings@deschutes.org, 541-317-3148

REQUEST: Applicant requests approval of a Comprehensive Plan amendment to change the designation of the properties from Agricultural (AG) to Rural Industrial (RI) and a corresponding zoning map amendment to change the zoning of the properties from Exclusive Farm Use – Tumalo/Redmond/Bend subzone (EFU-TRB) to Rural Industrial (RI)

LOCATION: Taxlot 305 (3.00 acres) – 65301 Hwy 97, Bend, OR 97701
Taxlot 301 (15.06 acres) – 65305 Hwy 97, Bend, OR 97701
Taxlot 500 (1.06 acres) – 65315 Hwy 97, Bend, OR 97701

I. FINDINGS OF FACT:

A. Incorporated Findings of Fact: The Findings of Fact from the Hearings Officer's decision and recommendation dated July 12, 2022 and adopted as Exhibit G of this ordinance (cited herein as "Hearings Officer Decision"), is hereby incorporated as part of this decision, except to the extent said findings are inconsistent with the supplemental findings and conclusions of law herein, and except as modified below. The Board further adopts as its own all Hearings Officer interpretations of the Deschutes County Code ("DCC") and Deschutes County Comprehensive Plan ("DCCP"), except to the extent said interpretations are inconsistent with the Board's interpretations set forth herein, and except as modified below. The Board corrects and modifies the Hearings Officer Decision as follows:

1. Amend the enumerated "Request" on page 1 as follows (deletions ~~struck through~~; additions <u>underlined</u>):

> "The applicant requests approval of a Comprehensive Plan Amendment to change the designation of the property from Agricultural (AG) to ~~Rural Residential Exception Area (RREA)~~ <u>Rural Industrial Area (RIA)</u>. The applicant also requests approval of a corresponding Zone Change to rezone the property from Exclusive Farm Use (EFU) to ~~Multiple Use Agricultural (MUA-10)~~ <u>Rural Industrial (RI)</u>. The applicant requests approval of the applications without the necessity for a Statewide Planning Goal 3 and/or a Goal 14 Exception, but includes an application for a Goal 14 Exception in the alternative, if determined to be necessary for approval of the requested PAPA and Zone Change"

B. Procedural History: Deschutes County's land use Hearings Officer conducted the initial public hearing regarding the LBNW LLC comprehensive plan amendment / zone change application on April 26, 2022. At the conclusion of the hearing, the Hearings Officer closed the hearing for oral testimony but left the written record open until June 7, 2022. On May 19, 2022, the Hearings Officer issued an order extending the written record period until June 14, 2022. On July 12, 2022, the Hearings Officer issued a written decision recommending approval of the applications by the Deschutes County Board of County Commissioners ("County Commissioners" or "Board").

The Board conducted a *de novo* land use hearing on September 7, 2022, at the conclusion of which the Board closed the hearing for both oral and written testimony. The Board deliberated and a majority of the commissioners voted to approve the applications on September 28, 2022.

C. Deschutes County Land Use Regulations: The DCCP and Title 18 of the DCC were acknowledged by the Land Conservation and Development Commission ("LCDC") as

being in compliance with every statewide planning goal, including Goal 14. The County amended the DCC and its DCCP in 2002 (Ordinances 2002-126 and 2002-127) in response to LCDC's Unincorporated Communities Rule. Those 2002 ordinances ensured that areas zoned Rural Industrial ("RI") and Rural Commercial ("RC") "remain rural" by "allow[ing] fewer uses and smaller industrial structures * * *." *Central Oregon LandWatch v. Deschutes County,* 75 Or LUBA 253, 257, *aff'd*, 298 Or App 375, 449 P3d 534 (2019). LCDC acknowledged those 2002 ordinances as compliant with every statewide planning goal, including Goal 14.

In 2018, the County amended the DCCP (Ordinance 2018-008) to allow the RI designation and zoning to be applied to land outside of existing exception areas. On appeal, the Land Use Board of Appeals ("LUBA") upheld that 2018 ordinance, finding – in part – that the appellant's argument that the County's RI zone regulations violated Goal 14 by allowing urban uses on rural lands was an impermissible collateral attack on acknowledged land use regulations. *Id.* at 260-61. LCDC acknowledged that 2018 ordinance as compliant with every statewide planning goal, including Goal 14.

II. ADDITIONAL FINDINGS AND CONCLUSIONS OF LAW:

The Board of County Commissioners approves the requested plan designations and zone change applications and provides the following supplemental findings and conclusions of law, organized in the same manner as the "Board Deliberation Matrix" presented by County staff during the September 28, 2022 deliberations.

A. Goal 14 and the *Shaffer* Factors; Board Deliberation Matrix Issues 1 and 2.

Opponents Central Oregon LandWatch ("COLW") and 1000 Friends of Oregon ("1000 Friends") argued that the subject applications could not be approved without an exception to Goal 14. The Hearings Officer disagreed, concluding that the applications complied with Goal 14 without an exception. The Board agrees with the Hearings Officer, and adopts the Hearings Officer's findings on this issue as our own. The Board further adopts the following supplemental findings to clarify two persistent issues that arose in these proceedings.

The RI Zone Does Not Allow Urban Uses On Rural Lands

First, this Board already conclusively determined in the findings supporting the adoption of Ordinance No 2021-002 that the County's RI zone does not allow urban uses on rural land. That determination was predicated on six findings which were first recommended by the Hearings Officer and then adopted by this Board as part of the aforementioned ordinance. Although remanded to allow the Board to adopt additional findings on a separate (albeit related) matter discussed below, the six aforementioned findings demonstrating that the RI

zone does not allow urban uses on rural land were reviewed by both LUBA and the Court of Appeals. *Central Oregon LandWatch v. Deschutes County*, __Or LUBA__ (LUBA No 2021-028) ("*Aceti*"), *aff'd*, 315 Or App 673, 501 P3d 1121 (2021). For its part, LUBA summarized and described those six findings by noting that "the county determined that even the most intensive industrial use that could be approved on the subject property under the RI regulations and use limitation would not constitute an urban use." *Id.* (slip op at *11). The Hearings Officer in this matter again repeated those six findings, concluding that they were "not constrained to the facts and circumstances at issue in the *Aceti* application" meaning that those "findings apply universally to any application submitted relying on the County's DCC and DCCP RI provisions." *See* Hearing Officer Decision, pg 42. For ease of reference, those six findings are repeated herein:

> *"First, LUBA has rejected the argument that DCC 18.100.010 allows urban uses as constituting an impermissible collateral attack on an acknowledged land use regulation. [Central Oregon LandWatch v. Deschutes County, 79 Or LUBA 253, aff'd, 298 Or App 37s,449 P3d 534 (2019)].*
>
> *"Second, DCC Chapter 18.100 implements DCCP Policies 3.4.9 and 3.4.23, which together direct land use regulations for the Rural Commercial and Rural Industrial zones to 'allow uses less intense than those allowed in unincorporated communities as defined by Oregon Administrative Rule 660-022 or its successor,' to 'assure that urban uses are not permitted on rural industrial lands.' The BOCC adopted this finding in support of Ordinance 2018-126, which was appealed and sustained by LUBA and the Court of Appeals.*
>
> *"Third, as the BOCC found in adopting Ordinance 2018-126, which was appealed and sustained by LUBA and the Court of Appeals, the application of DCC Title 18 to any development proposed on Rural Commercial or Rural Industrial designated land will ensure that the development approved is consistent with the requirements set forth in DCCP Policies 3.4.12 and 3.4.27 do not adversely affect surrounding area agricultural or forest land, or the development policies limiting building size (DCCP Policies 3.4.14 and 3.4.28), sewers (DCCP Policies 3.4.18 and3.4.3l) and water (DCCP Policies 3.4.19 and 3.4.32) intended to limit the scope and intensity of development on rural land.*
>
> *"Fourth, DCCP Policy 3.4.28 includes a direction that, for lands designated and zoned RI, new industrial uses shall be limited to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural area, for which there is no floor area per use limitation.*
>
> *"Fifth, DCCP Policy 3.4.31 includes a direction that, for lands designated and zoned RI, residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.*

"Sixth, DCCP Policy 3.4.32 includes a direction that, for lands designated and zoned RI, residential and industrial uses shall be served by on-site wells or public water systems."

Neither COLW nor 1000 Friends provided argument in these proceedings that directly responded to the six aforementioned findings or otherwise presented any argument that gives this Board pause when it comes to re-adopting those same findings. Accordingly, this Board follows suit with the Hearings Officer and again adopts the six aforementioned findings as our own, conclusively demonstrating that the RI zone does not allow urban uses on rural lands.

In the interest of consistency, we also take note that this Board reached a similar conclusion when considering the aforementioned *Aceti* application on remand. Those findings, adopted as Exhibit F to Ordinance No 2022-010 state the following:

> "* * * the Board of County Commissioners now expressly finds that the policies and provisions of the DCCP and DCC are independently sufficient to both demonstrate that post-acknowledgment plan amendments that apply the Rural Industrial (RI) plan designation and zoning to rural land are consistent with Goal 14 and that uses and development permitted pursuant to those acknowledged provisions constitute rural uses, do not constitute urban uses, and maintain the land as rural land. Given that finding, any further analysis under *Shaffer* is redundant and precautionary only."

Pursuant to ORS 40.090(7), the Board takes judicial notice of Ordinance No 2022-010, and incorporates by reference herein the findings adopted as Exhibit F in that matter.

The *Shaffer* Factors Are Inapplicable

Second, the Board finds that the "*Shaffer* factors" are not relevant to these proceedings. *See Shaffer v. Jackson County*, 17 Or LUBA 922 (1989). LUBA explained the "*Shaffer* factors" as follows: "whether a residential, commercial, industrial or other type of use is 'urban' or 'rural' requires a case by case determination, based on relevant factors identified in various opinions by [[LUBA]] and the courts" *Aceti* (slip op at *14) (*quoting Shaffer*, 17 Or LUBA at 946). Notably, COLW and 1000 Friends disagreed in these proceedings on the necessity of utilizing the *Shaffer* factors to determine if Goal 14 was implicated. Specifically, COLW's April 26, 2022 submittal argued that the County was required to use the *Shaffer* factors to determine that "all of the allowed uses in the County's RI zone are rural." But 1000 Friends' April 26, 2022 submittal argued that the "*Shaffer* factors are not appropriate * * * because the eventual use of the property is uncertain, making it impossible to determine whether the *Shaffer* factors are satisfied."[1]

[1] On the narrow issue of the *Shaffer* factors' applicability, the Hearings Officer generally agreed with 1000 Friends argument. *See* Hearings Officer Recommendation, pg 39.

Both COLW and 1000 Friends' arguments in these proceedings neglect LUBA's recent *Aceti* decision. Responding to 1000 Friends' view of the *Shaffer* factors, LUBA held that "[w]hile it may be more difficult for [the *Aceti* applicant] to demonstrate that all of the uses that RI zoning authorized on the subject property are not urban uses, petitioner * * * cited no authority that require[d] [the *Aceti* applicant] to propose specific industrial uses before the county can determine whether the plan designation or zone change would violate Goal 14." *Aceti* (slip op at *12). Responding to COLW's view of the *Shaffer* factors, LUBA held that the *Aceti* applicant did not need to analyze all of the RI uses because "the county determined that even the most intensive industrial use that could be approved on [that] subject property under the RI regulations and use limitation would not constitute an urban use." *Id.* (slip op at *11).

As understood by this Board, LUBA's two aforementioned holdings suggest that the *Shaffer* factors were not necessarily dispositive in the recent *Aceti* matter. Further bolstering that point of view is LUBA repeatedly describing in the *Aceti* matter that applying the *Shaffer* factors was a "belt-and-suspenders approach in response to petitioner's Goal 14 challenge." *Id.* (slip op at *13). LUBA remanded the *Aceti* matter back to the County to allow this Board to further bolster that *Shaffer* analysis.

Consistent with Board findings in the *Aceti* remand decision (i.e. Ordinance No 2022-010 discussed above), this Board finds that Applicant herein was not required to apply the *Shaffer* factors in this case or otherwise conduct a *Shaffer* analysis because the County already conclusively determined in past proceedings that the RI zone does not allow urban uses on rural land. This Board further finds that any argument that suggests that RI zone does allow urban uses on rural lands is inconsistent with Board findings supporting the remanded Ordinance No 2021-002 (original *Aceti* decision), the recent Ordinance No 2022-010 (remanded *Aceti* decision), and the findings herein, and is also an inappropriate collateral attack on the acknowledged 2002 and 2018 amendments originally implementing the RI zone. Last, this Board finds that the analysis of the *Shaffer* factors in the *Aceti* remand proceedings, and any findings issued in Ordinance No 2022-010 regarding *Shaffer*, were in direct response to the facts and circumstances at issue in that matter and were thereby not intended to set precedent for future applications of the RI zone.

B. Goal 5 Compliance; Board Deliberation Matrix Issue 3

COLW initially argued in its May 31, 2022 submittal that the subject application violates Goal 5 because the map amendment / zone change will introduce new "conflicting uses" – i.e. those uses allowed in the RI zone – on properties governed by the County's Landscape Management Combining Zone. The Landscape Management Combining Zone was adopted as part of the County's Goal 5 program to protect scenic resources in Deschutes County. COLW's May 31 submittal included as an attachment a copy of Ordinance No 92-05 initially codifying the County's Landscape Management Combining Zone as part of DCC Chapter

18.84. COLW renewed its Goal 5 argument in a September 7, 2022 letter provided to this Board (cited herein as "COLW Sep 7 Letter").

Applicant responded to COLW's argument with a record submittal dated June 7, 2022, and in its final legal argument before the Hearings Officer, dated June 14, 2022. Therein, Applicant argued that the uses allowed by the RI zone are not new "conflicting uses" because the County's original "economic, social, environmental, and energy" ("ESEE") analysis adopted as part of Ordinance No 92-05 specifically considered all "Development within the one-quarter mile overlay zone which would excessively interfere with the scenic or natural appearance of the landscape as seen from the road or alteration of the existing landscape by removal of vegetative cover." Stated simply, Applicant argued that uses allowed by the RI zone were not new conflicting uses because they were implicitly already considered by Ordinance No 92-05 as uses that could "excessively interfere with the scenic or natural appearance of the landscape as seen from the road."

The Hearings Officer agreed with Applicant's argument and added findings noting that "the proposed plan amendment and zone change does not remove the subject property from the [Landscape Management Combining Zone] and thus does not change or diminish the protection afforded to Goal 5 resources on the property, specifically the [Landscape Management] designations of lands within ¼ mile from the centerline of Highway 97."[2] The Landscape Management Combing Zone will still overlay portions of the subject properties despite changes to the applicable base zoning. Accordingly, the RI base zone would not alter the requirement pursuant to DCC 18.84.050(A) that "any new structure or substantial exterior alteration of a structure requiring a building permit or an agricultural structure within [the Landscape Management Combining Zone] shall obtain site plan approval in accordance with DCC 18.84 prior to construction."

The Board agrees with the arguments and analysis set forth by both Applicant and the Hearings Officer, and thereby adopts and incorporates those arguments as our findings.

C. Transportation Impacts; Board Deliberation Matrix Issue 4.

COLW objects that a "trip cap," first proposed by Applicant and then imposed by the Hearings Officer, will not adequately limit the traffic entering and exiting the subject property. *See* COLW Sep 7 Letter, pg 10. Citing both Goal 12 (as implemented by OAR 660-012-0060) and DCC 18.136.020(C) (requiring the map amendment / zone change to be in the "public interest"), the main thrust of this traffic argument stems from COLW's assertion that "[t]he record shows that a 'trip cap' will be inadequate to prevent significant effects to an existing transportation facility." *See* COLW Sep 7 Letter, pg 10. The Board agrees with

[2] 247-21-000881-PA, 882-ZC Hearings Officer Recommendation pg. 83

COLW that this issue requires an evaluation of the substantial evidence in the record. But the Board disagrees that the record in this case supports COLW's conclusion.

The record shows that three separate traffic experts were all involved with the formulation of the trip cap and ultimately concurred with its utilization in this case. As noted by the Hearings Officer, those experts included the applicant's own traffic engineer, Ferguson & Associates, the County's own Senior Transportation Planner, and traffic engineers with the Oregon Department of Transportation. *See* Hearings Officer Decision, pgs 74-77. The Hearings Officer further explained that COLW's argument suggesting that neither County staff nor ODOT supported the trip cap, or that the trip cap will be "unenforceable," were predicated on earlier comments in the record and failed to account for updated comments from the aforementioned experts. *Id.* at 77. Last, the Hearings Officer summarized COLW's traffic arguments, concluding that "[n]ot only did COLW misread comments provided by ODOT and County staff, it presented no evidence or expert testimony to contradict the evidence included in the record by the Applicant regarding the [Transportation Planning Rule.]" *Id.* at 78.

Following the Hearings Officer proceedings, COLW renewed its traffic arguments relating to Goal 12 and DCC 18.136.020(C) but failed to provide any evidence or expert testimony to support its assertions, instead relying entirely on statements submitted by its "Staff Attorney and Rural Lands Program Manager." Following suit with the Hearings Officer, the Board accordingly defers to the expert testimony provided by Applicant's engineer, County staff, and ODOT and finds that the substantial evidence in the record clearly supports that imposing a trip cap will address any lingering concerns stemming from Goal 12, OAR 660-012-0060 implementing Goal 12, and/or DCC 18.136.020(C).

D. Goal 3 Compliance and Order 1 Soil Survey Validity; Board Deliberation Matrix Issue 5.

COLW raised numerous arguments directly or indirectly invoking Goal 3, each of which are addressed below.

Legal Challenge:

COLW's Goal 3 legal challenge can be easily dismissed. This Board has repeatedly found that an applicant can rely on a site-specifies soil survey when applying for a map amendment / zone change. That practice is supported by state statutes (*See,* e.g. ORS 215.211 (1) and (5)), state rules (*See* OAR 660-033-0030(5) and 660-033-0045), and case law (*See, e.g., Central Oregon LandWatch v. Deschutes County*, 74 Or LUBA 156 (2016)). COLW's September 7 letter conceded that the aforementioned *Central Oregon LandWatch v. Deschutes County* decision stands in direct opposition to its legal position asserted before this Board, arguing that the aforementioned case "was incorrectly decided and should be

overturned." *See* COLW Sep 7 Letter, pg 3. The County is not in a position to "overturn" LUBA. The Board's findings and conclusions herein follow applicable law.

Substantial Evidence Challenge:
COLW's substantial evidence argument with regard to Goal 3 raised in its September 7 letter is an entirely new argument not addressed by the Hearings Officer and thereby requiring more substantive findings from this Board. However, COLW's new Goal 3 argument is similar to its Goal 12 argument discussed above in that COLW failed to provide any expert testimony to support either argument. Enabling "a county to make a better determination of whether land qualifies as agricultural land," ORS 215.211(1) specifically allowed evidence to be provided into the record for these proceedings consisting of "more detailed soils information than that contained in the Web Soil Survey operated by the United States Natural Resources Conservation Service." However, ORS 215.211(1)(a) further provides that such evidence must be prepared by a "professional soil classifier" "certified by and in good standing with the Soil Science Society of America." *See, also* OAR 660-033-0045(1) and (2). The record demonstrates that Applicant's soil expert, Gary A. Kitzrow, possess the qualifications required by ORS 215.211 and OAR 660-033-0045(1) and (2). The record does not include similar evidence demonstrating that COLW's staff member who provided contrary soil testimony before this Board likewise possesses the requisite qualifications as required by ORS 215.211(1)(a) and OAR 660-033-0045(1) and (2).

As COLW's staff member was not qualified to provide such testimony, the Board can likely entirely disregard COLW's September 7 letter attempting to discredit Applicant's Order 1 Soil Surveys. The Board nevertheless still examined that testimony and finds it unpersuasive. Applicant's expert's Order 1 Soil Studies show that 53.1% of the 15.06 acre Taxlot 301, 87.7% of the 3.00 acre Taxlot 305, and 87.7% of the 1.06 acre Taxlot 500 consist of generally unsuitable soils. COLW challenges the methodology utilized to calculate those percentages, arguing that the acreage under a canal crossing two of the three subject properties should be excluded because including the canal acreage "artificially increased the denominator in [the Order 1 Soils studies'] calculation of Class I-VI soils." *See* COLW Sep 7 Letter, pg 3. Similarly, COLW further argues that Applicant's "hired soil scientist also improperly exclude[d] land underneath certain developed portions of the subject property." *Id*. page 4. Last, COLW argues that the entirety of the acreage under the canal and some of the developed acreage should instead be counted as "agricultural land" because those uses fall within the "farm uses" definition pursuant to ORS 215.203(2)(b)(F).

The Board finds COLW's arguments unpersuasive for two primary reasons. First, COLW's arguments are internally inconsistent. If understanding the "denominator" to represent the total acreage of a property and the numerator to represent the acreage of generally unsuitable soil on that property, then deducting the acreage under the canal and the developed portions of the properties from the "denominator" as initially asserted by COLW suggests that said acreage should be ignored in its entirety and not play any role in determining the percentage of generally unsuitable soil on each property. For the

calculation to align with COLW's argument, the canal and developed acreage would need to be deducted from both the denominator and the numerator because deducting said acreage from only the denominator actually increases the resulting percentage of "generally unsuitable soil."

Second, the Board presumes that perhaps COLW intended to advocate that the canal and developed acreage should be deducted instead from the "numerator" if calculating the percent of generally unsuitable soil. That suggestion would be consistent with the rest of COLW's September 7 testimony wherein COLW argued that both the canal and developed acreage should be treated as "agricultural land" based on their current usage of that acreage. The Board finds that COLW's argument is not supported by state rules requiring Applicant's Order 1 Soil Surveys to analyze the "land," not the current uses of the subject properties. OAR 660-033-0030(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.")

Stated simply, COLW's argument that the canal and developed acreage should be ignored in its entirety and deducted from the "denominator" violates OAR 660-033-0030(2) because said acreage is clearly still "land within the lot or parcel being inventoried." Similarly, COLW's argument that the canal and developed acreage should be considered "agricultural land" focuses on the current usage of that acreage rather than the "land" itself, again violating OAR 660-033-0030(2). The current usage of the canal and developed acreage are certainly relevant to the broader determination if the subject properties are "suitable for farm use." On that point, the Board specifically agrees with and incorporates by reference the Hearings Officer's analysis of those "factors beyond the mere identification of scientific soil classifications" referenced by OAR 660-033-0030(2). *See* Hearings Officer Decision, pgs 26-38. Returning to the actual "scientific soil classification," COLW's reliance on those other factors to try and undermine Applicant's Order 1 Soils Surveys is not persuasive to the Board.

As the only party to offer testimony from a qualified expert, the substantial evidence in the record favors the Applicant. But the Board is nevertheless further persuaded by the fact that the Department of Land Conservation and Development ("DLCD") performed a "completeness check" on all three Order 1 Soil Surveys in this case pursuant to OAR 660-033-0045(6)(a). Each Order 1 Soil Survey contains the same DLCD certification confirming that the "soils assessment is complete and consistent with reporting requirements for agricultural soils capability." OAR 660-033-0045(4)(b) further requires "[a] soils assessment that is soundly and scientifically based and that meets reporting requirements as established by [DLCD]." If the Order 1 Soil Surveys in this case were not "soundly and scientifically based" – which is the main thrust of COLW's arguments - the Board trusts that DCLD's certification process would have called that issue to our attention. DLCD did not do

so, and it is reasonable to rely upon Applicant's Order 1 Soil Survey and DLCD's acceptance of that survey.

Finally, the Board is persuaded by testimony offered by Kitzrow, Applicant's expert, during the September 7, 2022 public hearing. Responding directly to COLW's September 7 written and oral testimony, Kitzrow explained why the acreage labelled as "impact areas" or "infrastructure" in his Order 1 Surveys were so labelled. Specifically, Kitzrow testified that he classified that acreage as something other than Class I-VI soils because the rehabilitation of those previously developed (or still developed) areas was not practical or economical. For example, the Order 1 Soils Surveys for Taxlot 305 more fully explains that past development of the subject property in essence destroyed the minimal amounts of original, native soil. When it comes to the canal acreage on two of the three subject properties, the development of the canal decades ago impacted any potential Class I-VI soils within that acreage in the same manner. The Board notes that pursuant to the "Agricultural Land" definition in OAR 660-033-0020(1)(a)(A), Kitzrow's charge was specifically to identify if the properties contained "predominantly Class I-VI soils." Rather than fixating on the obviously impacted areas, Kitrow's focus was accordingly on determining the maximum extent of the Class I-VI soils remaining on the properties. That is precisely what Kitzrow did as evidenced by that fact that the majority of the 22 test pits spread across the 19.12 total acres were in areas of the properties that Kitrow's initial assessment suggested the desired soils would be contained. The Board finds Mr. Kitzrow is a competent expert and has no reason to doubt the conclusions contained in each of the Order 1 Soils Surveys.

Consistent with those Order 1 Soil Surveys, the Board finds that only 46.9% of Taxlot 301, 18.7% of Taxlot 305, and 12.3% of Taxlot 500 are comprised of Class I-VI soils. The Board further finds that the soil on these three properties are uniquely poor such that even with supplemental irrigation water, the soils on all three properties are predominantly Class VII and VIII.

Miscellaneous Arguments:
In addition to its Goal 3 legal challenge and substantial evidence argument, COLW raised several other arguments, each of which were not persuasive and thereby can be addressed summarily.

The Hearing Officer Decision, (pg 38), set forth detailed findings rejecting COLW's argument that the County's definition of "agricultural use" in DCC 18.04.030 is intended to be more stringent than case law and the state's definition of agricultural land in OAR 660-033-0020(1)(a) because the County's "agricultural use" definition includes the term "whether for profit or not." COLW renewed this argument in its September 7 letter. The Board rejects this argument for the same reasons as set forth in the Hearings Officer Decision and notes that DCC 18.04.030 includes a definition of "agricultural land" which is entirely consistent with the state definition of the same term. The Board further notes that the term "agricultural use" is purposely and specifically used throughout the DCC, for example (but

not limited to) DCC 18.16.050(G)(1)(a)(4) with regard to buffering non-farm dwellings, DCC 18.32.020 establishing uses permitted outright in the multiple use agricultural zone, and DCC 18.52.110(J)(2) imposing limitations on drilling and blasting for surface mining activity. The Board concurs with the Hearings Officer's interpretations and findings on this issue, and specifically adopts those interpretations and findings as our own.

COLW also argues that the subject properties are currently in farm use because the canal on two of the three properties is a "water impoundment." *See* COLW Sep 7 Letter, pgs 8-9. COLW's water impoundment argument was presented for the first time to the Board. However, COLW's new water impoundment theory does not change the Hearings Officer's findings regarding OAR 660-033-0020(1)(a) (*See* Hearings Officer Decision, pgs 26-38), because Central Oregon Irrigation District's Pilot Butte Canal running through Applicant's properties is not an agricultural activity with the primary purpose of obtaining a profit in money for Applicant. As previously noted, the Board agrees with and adopts the Hearings Officer's findings regarding OAR 660-033-0020(1)(a) as the Board's own findings, except to the extent inconsistence with the findings set forth herein.

Although only indirectly related to Goal 3, the Board notes COLW's new argument in its September 7 letter regarding DCCP Policy 2.5.24 and water use on the subject properties. The Board agrees with and incorporates the Hearing Officer's findings on that issue (*See* Hearings Officer Decision, pgs 58-59), noting that the proposed map amendment / zone change application does not yet propose a specific development at this time and that this policy will be reviewed under any necessary land use process for the site (e.g. conditional use permit, tentative plat).

Also only indirectly related to Goal 3, the Board notes that COLW renewed in its September 7 letter a persistent argument suggesting that Order 1 Soil Surveys do not constitute a "change in circumstances" as required for a map amendment / zone change application pursuant to DCC 18.136.020(D). The Board again agrees with the Hearings Officer's findings and interpretation on this issue, which specifically note that the Order 1 Soil Surveys were just one of several enumerated "changes in circumstances." *See* Hearings Officer Decisions, pgs 50-54. The Board includes this supplemental finding to address COLW's assertion that only "changes" to properties subject to a map amendment / zone change application qualify for consideration under DCC 18.136.020(D). COLW noted that such changes that would qualify include, for example, "soil and agricultural suitability of the subject property." COLW Sep 7 Letter, pg 12. The Board first notes that the record does support that the soil and agricultural suitability of Applicant's properties have likely changed, as discussed by the Order 1 Soil Surveys. More importantly, the Board disagrees with COLW's narrow interpretation. Rather than just a change to the subject property, DCC 18.136.020(D) more broadly allows a "change in circumstances." Interpreting that provision, the Board finds that one such relevant "circumstances" is the accuracy of information available to the County, a property owner, and the public with regard to quality of a property's soils. Accordingly, the Board finds that the availability of more accurate

Order 1 Soils Surveys constitutes a "change in circumstances" pursuant to DCC 18.136.020(D).

E. DCC 22.20.015 Code Enforcement and Land Use; Board Deliberation Matrix Issue 6.

Although not raised by COLW's September 7 letter submitted to this Board, County staff asked during the Board's September 28, 2022 deliberations that the Board address COLW's previous argument regarding DCC 22.20.015. The Board affirms that the Hearings Officer's findings on this issue (*See* Hearing Officer Decision, pg 43) are consistent with the Board's past interpretations of DCC 22.20.015.

IV. DECISION:

Based upon the foregoing Findings of Fact and Conclusions of Law, the Board of County Commissioners hereby **APPROVES** Applicant's applications for a DCCP amendment to re-designate the subject properties from Agriculture (AG) to Rural Industrial Area (RI) and a corresponding zone map amendment to change the zoning of the properties from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial (RI) subject to the following conditions of approval:

1. The maximum development on the three subject parcels shall be limited to produce no more than 32 trips in the PM peak hour and/or 279 daily trips as determined by the Institute of Engineers Trip Generation Manual, 11th Edition. The County may allow development intensity beyond these maximum number of vehicle trips only if the applicant submits to the County a traffic impact analysis that demonstrates that the proposed intensification of use would be consistent with the Transportation Planning Rule and the Deschutes County Code.

Dated this ____ day of _____, 2022