

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

FILE NUMBERS: 247-21-000881-PA, 882-ZC (247-23-000398-A)

**APPLICANT/
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**APPLICANT'S
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REQUEST: The Applicant requests proceedings on remand from *Central Oregon Landwatch v. Deschutes County*, __ Or LUBA __ (LUBA No 2023-008, April 24, 2023) following the Board of County Commissioner's approval of original application file numbers 247-21-0000881-PA/882-ZC, and original Ordinance No 2022-011.

PROPOSAL: Comprehensive Plan Amendment to change the designation of the properties from Agriculture (AG) to Rural Industrial (RI) and a corresponding zoning map amendment to change the zoning from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial Zone (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. Procedural History: The Deschutes County Board of County Commissioners ("Board") adopted Ordinance No 2022-011, approving the requested Comprehensive Plan Amendment and Zone Change of Taxlots 305, 301, and 500 (the "Properties") to Rural Industrial, with the second and final ordinance reading occurring on December 14, 2022. Central Oregon Landwatch ("COLW") appealed Ordinance No 2022-011 to the Land Use Board of Appeals ("LUBA"). LUBA remanded the decision on April 24, 2023, denying all of COLW's arguments except for one. *See Central*

Oregon Landwatch v. Deschutes County, __ Or LUBA __ (LUBA No 2023-008, April 24, 2023) (the “LUBA Decision”). The Applicant (LBNW LLC) requested in writing on May 17, 2023, that the Board proceed with remand proceedings pursuant to Oregon Revised Statutes (“ORS”) 215.435 and Deschutes County Code (“DCC”) Chapter 22.34.

The Board limited the remand proceedings to the issue remanded by LUBA and permitted new evidence and testimony to address only the remanded issue. Following public notice, the Board conducted a remand public hearing on June 28, 2023. Prior to the hearing, the Applicant submitted written argument and evidence, including an initial draft economic, social, environmental, and energy analysis (“Initial ESEE Analysis”) as required by the LUBA Decision. During the hearing, both the Applicant and COLW provided oral testimony. At the conclusion of all oral testimony on June 28, 2023, the Board closed the hearing but left the record open until July 5, 2023, for additional written evidence, a rebuttal period ending July 12, 2023, and Applicant’s final argument required to be submitted prior to July 19, 2023.

Both parties submitted materials for the July 5, 2023, written evidence period. Among other arguments, COLW’s July 5 submittal criticized that the Initial ESEE Analysis did not comply with applicable state rules. Although disagreeing with the necessity of revising the Initial ESEE Analysis, the Applicant nevertheless requested a one-week extension to facilitate the preparation of an updated analysis (the “Updated ESEE Analysis”). (The Board notes that even when disagreeing with COLW’s arguments, the Applicant throughout these proceedings consistently consented to address all issues raised by COLW resulting in the Updated ESEE Analysis, additional proposed findings, etc.) The Board granted the Applicant’s request for more time and issued an order (Order No. 2023-031) extending the rebuttal period until July 19, 2023, and correspondingly extending Applicant’s final argument deadline to July 26, 2023. COLW did not submit rebuttal testimony and instead elected to end its participation in these proceedings following the July 5 open record deadline. The Applicant, however, submitted additional argument and evidence in addition to the Updated ESEE Analysis at the conclusion of the rebuttal period. The Applicant then submitted its final legal argument on July 26, 2023.

The Board deliberated on August 16, 2023, and voted 2-1 to again approve the Applicant’s land use application. Consistent with the Board’s August 16th motion, County staff prepared the required Ordinance packet, which was approved by the Board with first reading occurring on August 30, 2023, and second reading occurring on September 13, 2023.

- B. LUBA Decision and Guidance:** The LUBA Decision provides the basis for the remand. The relevant passage from that decision appears on pages 36-37, reproduced in part as follows:

"We agree with [COLW] that the [Board] misconstrued the applicable law. * * *
* The questions presented here are whether the new RI zoning allows uses on the subject propert[ies] that were not allowed under the previous EFU zoning and whether those uses could conflict with protected Goal 5 resources. That the county may have conducted an ESEE analysis in 1992 for other RI-zoned properties in other locations, even nearby locations, and concluded that the [Landscape Management Combining Zone] provided the impacted scenic resources sufficient protection does not change the requirements to apply Goal 5 to the PAPA for the subject property. * * *

"* * * the challenged decision allows new uses that could conflict with inventoried Goal 5 resources, and, for that reason, the county is required to comply with OAR 660-023-0250(3)."

As understood by this Board, the purpose of LUBA's remand was to provide this Board the opportunity – as required by applicable state rules - to consider both the consequences, if any, stemming from the subject land use application as it relates to the Goal 5 protected scenic views and perform an ESEE analysis to weigh those consequences before again deciding to approve or deny that application.

- C. Incorporated findings.** To the extent not in conflict with these findings or the LUBA Decision, the Board again adopts and incorporates herein the original findings supporting the County's previous Ordinance 2022-011. Those incorporated findings specifically include the Board's original findings, "Exhibit 'F' - Ordinance 2022-011," included herein as Exhibit "F," and the Hearings Officer's original decision and recommendation, "Exhibit 'G' to Ord. 2022-011," included herein as Exhibit "H."

II. CONCLUSIONS OF LAW:

OAR 660-023-0250, Applicability

(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;

FINDING: The Board notes that the initial issue in almost every remand proceeding is the scope of the remand. This case is no different, requiring the Board to first

resolve several different arguments debated by the parties relating to the scope of the remand.

The Board begins its analysis by acknowledging that the LUBA Decision specifically cited Oregon Administrative Rule (“OAR”) 660-023-0250(3) and further determined that the at-issue post-acknowledgment plan amendment (“PAPA”) application will allow new uses which could conflict with Deschutes County’s Goal 5 scenic view resources. The LUBA Decision therefore requires the Board to “apply Goal 5,” meaning that the Board must follow the *Procedures and Requirements for Complying with Goal 5* as set forth in OAR Chapter 660, Division 23, as part of again deciding to approve or deny the subject PAPA (“the Application”).

COLW’s July 5 record submittal argued that both County staff and the Applicant “inaccurately described LUBA’s remand order as ‘narrow.’” COLW further asserted “OAR 660-023-0250(3) requires a broad inquiry into the impacts on inventoried Goal 5 resources of a decision to allow, limit, or prohibit various conflicting uses.” To the extent COLW’s “broad inquiry” argument was meant to suggest that the County needs to do something beyond an ESEE Analysis or that the ESEE Analysis should consider issues beyond the enumerated economic, social, environmental, and energy consequences, the Board disagrees. Rather than an ill-defined “broad inquiry,” the Board unanimously finds that applicable rules specifically set forth in OAR Chapter 660, Division 23, shall guide these remand proceedings.

Next, the Board must resolve a related debate between the parties concerning which provisions within OAR Chapter 660, Division 23, are applicable to these remand proceedings. The Applicant’s initial June 23 record submittal proposed findings responding only to OAR 660-023-0040 governing the *ESEE Decision Process*. In response, COLW’s July 5 record submittal cited OAR 660-023-0230(2) and argued that “[f]or scenic view resources, ‘the requirements of OAR 660- 023-0030 through 660-023-0050 shall apply.’” COLW further asserted that “LUBA’s remand order requires the County to apply all three of these administrative rules to the subject PAPA.”

The Board notes that COLW quoted only a portion of OAR 660-023-0230(2), which appears in full as follows (emphasis added):

“Local governments are not required to amend acknowledged comprehensive plans in order to identify scenic views and sites. If local governments decide to amend acknowledged plans in order to provide or amend inventories of scenic resources, the requirements of OAR 660-023-0030 through 660-023-0050 shall apply.”

Given the underlined qualifier in the above-quoted rule, the Board questions COLW's insistence that any PAPA involving a local government's scenic view resources must address all three cited provisions: OAR 660-023-0030, OAR 660-023-0040, and OAR 660-023-0050. Instead, the Board suggests that complying with all three aforementioned rules is required only when a PAPA specifically seeks to "amend inventories of scenic resources." When it comes to OAR 660-023-0030 governing the Goal 5 *Inventory Process*, for example, the rule clearly does not apply in those circumstances when a local government does not undertake updating or otherwise redoing a previously completed Goal 5 inventory.

Despite disagreeing with COLW's argument, the Applicant's July 26 final legal argument nevertheless addressed COLW's concern and recommended that the Board adopt findings responding to all three state rule provisions. If nothing else, the Applicant's suggested findings respond to all three provisions to further explain how and why those provisions (or subparts therein) do not apply to the Board's decision on remand. The Board agrees with the Applicant's recommendation, and includes findings below addressing OAR 660-023-0030, OAR 660-023-0040, and OAR 660-023-0050.

OAR 660-023-0030, Inventory Process

(1) Inventories provide the information necessary to locate and evaluate resources and develop programs to protect such resources. The purpose of the inventory process is to compile or update a list of significant Goal 5 resources in a jurisdiction. This rule divides the inventory process into four steps. However, all four steps are not necessarily applicable, depending on the type of Goal 5 resource and the scope of a particular PAPA or periodic review work task. For example, when proceeding under a quasi-judicial PAPA for a particular site, the initial inventory step in section (2) of this rule is not applicable in that a local government may rely on information submitted by applicants and other participants in the local process. The inventory process may be followed for a single site, for sites in a particular geographical area, or for the entire jurisdiction or urban growth boundary (UGB), and a single inventory process may be followed for multiple resource categories that are being considered simultaneously. The standard Goal 5 inventory process consists of the following steps, which are set out in detail in sections (2) through (5) of this rule and further explained in sections (6) and (7) of this rule:

- (a) Collect information about Goal 5 resource sites;**
- (b) Determine the adequacy of the information;**
- (c) Determine the significance of resource sites; and**
- (d) Adopt a list of significant resource sites.**

FINDING: As stated within OAR 660-023-0030 (1), this rule’s purpose is “to compile or update a list of significant Goal 5 resources in a jurisdiction.” Importantly here, the inventory process has already been completed. Accordingly, the Board finds that Section 5.5 of the Deschutes County Comprehensive Plan (“DCCP”) entitled *Goal 5 Inventory: Open Spaces, Scenic Views and Sites* identifies an area extending ¼-mile on either side of the centerline of certain roadways, including Highway 97 between the Bend and Redmond Urban Growth Boundaries (“UGBs”), as a Goal 5 scenic view resource.

As shown on Exhibit B attached to the Applicant’s Initial ESEE Analysis, the entirety of Tax Lots 1612230000500 and 1612230000305 fall within that ¼ mile corridor and thereby are currently subject to the County’s Landscape Management Combining Zone (“LM Zone”). The majority of Tax Lot 161223000301 also falls within that ¼ mile corridor and thereby is currently also subject to the County’s LM Zone. Notably, the Applicant does not seek to remove the subject Properties from the County’s LM Zone, nor does the Applicant seek to otherwise amend or modify DCCP Section 5.5 or the LM Zone’s governing provisions contained in DCC Chapter 18.84. The subject PAPA only seeks to change the base zone from EFU to RI on the Properties. In such a case, the Board finds that OAR 660-023-0030 specifically provides as follows: “when proceeding under a quasi-judicial PAPA for a particular site, the initial inventory step in section (2) of this rule is not applicable in that a local government may rely on information submitted by applicants and other participants in the local process.”

The Board further finds that nothing in the LUBA Decision suggests or requires the County to amend or modify its long-standing Goal 5 scenic view inventories during these remand proceedings. The Board reiterates the Applicant’s comments in its July 26, 2023, record submittal explaining that the LUBA Decision “relied on the County’s existing Goal 5 program to conclude that uses allowed under the RI Zone could be conflicting uses.” If LUBA’s remand were to be interpreted as an invitation to the County to re-do its scenic view inventory, then the County could conceivably conclude that there are no longer any scenic view resources on the subject Properties that warrant protection under Goal 5. And, if there are no such scenic view resources, then clearly the new uses that would be allowed under the County’s RI zone would never “conflict with inventoried Goal 5 resources” because there would be no such identified Goal 5 resources in the first place. Accordingly, the Board’s only option if electing to update its scenic view inventory for the subject Properties would be to again conclude that there are significant resources deserving Goal 5 protection as any other decision would be in direct conflict with the LUBA Decision. The Board does not believe that LUBA intended the County to waste resources going through such a perfunctory inventory process.

Rather than inviting the County to begin anew by conducting an inventory pursuant to OAR 660-023-0050, the Board finds that the LUBA Decision relies on the County’s

existing Goal 5 scenic view inventory codified in the DCCP, thereby directing the County to do the same in these remand proceedings. Specifically, the LUBA Decision states that the subject PAPA “allows new uses that could conflict with inventoried Goal 5 resources” (emphasis added). The LUBA Decision does not direct the County to conduct a new inventory of Goal 5 scenic view resources and then decide if the uses allowed under the RI zone could conflict with those newly identified resources. Stated simply, the Board understands the LUBA Decision as requiring the County to complete the ESEE Decision Process set forth in OAR 660-023-0040 (and then potentially address OAR 660-023-0050) while relying on the County’s existing Goal 5 scenic view inventory.¹

Accordingly, the majority of the Board finds that the inventory process required by OAR 660-023-0030 has already been completed; the results of which are set forth in DCCP Section 5.5. That inventory includes the entirety of two of the subject Properties and the majority of the third. The Board’s subsequent findings issued in this decision rely on that existing inventory such that OAR 660-023-0030(2) specifically is not applicable.

(2) Collect information about Goal 5 resource sites: The inventory process begins with the collection of existing and available information, including inventories, surveys, and other applicable data about potential Goal 5 resource sites. If a PAPA or periodic review work task pertains to certain specified sites, the local government is not required to collect information regarding other resource sites in the jurisdiction. When collecting information about potential Goal 5 sites, local governments shall, at a minimum:

- (a) Notify state and federal resource management agencies and request current resource information; and**
- (b) Consider other information submitted in the local process.**

FINDING: As discussed in the preceding finding, the Board finds that OAR 660-023-0030(2) does not apply.

(3) Determine the adequacy of the information: In order to conduct the Goal 5 process, information about each potential site must be adequate. A local government may determine that the information about a site is inadequate to complete the Goal 5 process based on the criteria in this section. This determination shall be clearly indicated in the record of proceedings. The issue of adequacy may be raised by the department or objectors, but final determination is made by the

¹ The Board notes that the County’s program to achieve the Goal related to its Goal 5 scenic view inventory is the adopted LM Zone.

commission or the Land Use Board of Appeals, as provided by law. When local governments determine that information about a site is inadequate, they shall not proceed with the Goal 5 process for such sites unless adequate information is obtained, and they shall not regulate land uses in order to protect such sites. The information about a particular Goal 5 resource site shall be deemed adequate if it provides the location, quality and quantity of the resource, as follows:

(a) Information about location shall include a description or map of the resource area for each site. The information must be sufficient to determine whether a resource exists on a particular site. However, a precise location of the resource for a particular site, such as would be required for building permits, is not necessary at this stage in the process.

(b) Information on quality shall indicate a resource site's value relative to other known examples of the same resource. While a regional comparison is recommended, a comparison with resource sites within the jurisdiction itself is sufficient unless there are no other local examples of the resource. Local governments shall consider any determinations about resource quality provided in available state or federal inventories.

(c) Information on quantity shall include an estimate of the relative abundance or scarcity of the resource.

FINDING: As discussed above, the Board relies on the existing inventory of Goal 5 scenic view resources contained in DCCP Section 5.5. The previous Boards of County Commissioners that initially adopted the County's Goal 5 program and then subsequently re-adopted that same program several times throughout the past decades (most recently as part of the County's current 2020 DCCP update), deemed the information for the inventoried properties adequate. As the current Board is not seeking to amend that inventory, the Board does not question those previous determinations and thereby finds that information about the Goal 5 scenic view resources contained in the DCCP and elsewhere in the record for these proceedings is adequate.

(4) Determine the significance of resource sites: For sites where information is adequate, local governments shall determine whether the site is significant. This determination shall be adequate if based on the criteria in subsections (a) through (c) of this section, unless challenged by the department, objectors, or the commission based upon contradictory information. The determination of significance shall be based on:

(a) The quality, quantity, and location information;

**(b) Supplemental or superseding significance criteria set out in OAR 660-023- 0090 through 660-023-0230; and
(c) Any additional criteria adopted by the local government, provided these criteria do not conflict with the requirements of OAR 660-023-0090 through 660-023-0230.**

FINDING: The Board relies on the existing inventory of Goal 5 scenic view resources contained in DCCP Section 5.5. Accordingly, the Board does not seek to amend or alter previous County Commissioners' determinations that the Goal 5 scenic view resources on the subject Properties are significant.

As discussed above, if the County were to interpret the LUBA Decision as an invitation to redo the inventory process as part of these proceedings, the resulting decision under this subpart conceivably could be that there are no longer any significant Goal 5 scenic view resources on the subject Properties. The Board does discuss in later findings responding to OAR 660-023-0040 that that Goal 5 scenic view resources on the subject Properties are diminished when compared to other similarly situated properties within the LM Zone. However, the Board's finding recognizing those diminished scenic view resources in the vicinity of the subject Properties should not be interpreted to mean that the Board finds that there are no longer any Goal 5 scenic view resources, nor does it mean that the Board is challenging the veracity of the County's past Goal 5 scenic view decisions.

(5) Adopt a list of significant resource sites: When a local government determines that a particular resource site is significant, the local government shall include the site on a list of significant Goal 5 resources adopted as a part of the comprehensive plan or as a land use regulation. Local governments shall complete the Goal 5 process for all sites included on the resource list except as provided in OAR 660-023-0200(2)(c) for historic resources, and OAR 660-023-0220(3) for open space acquisition areas.

FINDING: The Board relies on the existing inventory of Goal 5 scenic view resources contained in DCCP Section 5.5, which specifically contains the list of significant resource sites.

(6) Local governments may determine that a particular resource site is not significant, provided they maintain a record of that determination. Local governments shall not proceed with the Goal 5 process for such sites and shall not regulate land uses in order to protect such sites under Goal 5.

FINDING: The Board relies on the existing inventory of Goal 5 scenic view resources contained in DCCP Section 5.5. Accordingly, this decision does not determine that any particular resource site is not significant. As discussed in response to OAR 660-023-0030(4) above, the Board specifically disavows any suggestion that the findings below discussing the diminished quality of the Goal 5 scenic view resources on the subject Properties suggest that there are no significant Goal 5 scenic view resources on the subject Properties.

(7) Local governments may adopt limited interim protection measures for those sites that are determined to be significant, provided:

- (a) The measures are determined to be necessary because existing development regulations are inadequate to prevent irrevocable harm to the resources on the site during the time necessary to complete the ESEE process and adopt a permanent program to achieve Goal 5; and**
- (b) The measures shall remain effective only for 120 days from the date they are adopted, or until adoption of a program to achieve Goal 5, whichever occurs first.**

FINDING: The Board relies on the existing inventory of Goal 5 scenic view resources contained in DCCP Section 5.5. Accordingly, the Board does not seek to adopt interim protection measures. This subsection (7) is inapplicable.

OAR 660-023-0040, ESEE Decision Process

(1) Local governments shall develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. This rule describes four steps to be followed in conducting an ESEE analysis, as set out in detail in sections (2) through (5) of this rule. Local governments are not required to follow these steps sequentially, and some steps anticipate a return to a previous step. However, findings shall demonstrate that requirements under each of the steps have been met, regardless of the sequence followed by the local government. The ESEE analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected. The steps in the standard ESEE process are as follows:

- (a) Identify conflicting uses;**
- (b) Determine the impact area;**
- (c) Analyze the ESEE consequences; and**
- (d) Develop a program to achieve Goal 5.**

FINDING: Consistent with the above findings, the Board finds that the LUBA Decision already “identified conflicting uses” in this case, i.e., the first step as set forth in OAR 660-023-0040(1)(a) and further identified in OAR 660-023-0040(2). The Board unanimously finds that those “identified conflicting uses” are those uses allowed outright or conditionally under the RI zone on the subject Properties that would not have otherwise been allowed under the current EFU zoning. Accordingly, these findings focus on the second, third, and fourth steps in the ESEE Decision Process as further detailed by OAR 660-023-0040(3) through (5).

(2) Identify conflicting uses. Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. * * *

FINDING: As noted above, the LUBA Decision already identified the conflicting uses in this case. The Board accepts and agrees with the identification of the conflicting uses as identified in the LUBA Decision, as those uses allowed outright or conditionally under the RI zone on the Subject properties that would not have otherwise been allowed under the current EFU zoning.

(3) Determine the impact area. Local governments shall determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site.

FINDING: As noted above, the subject PAPA concerns three Properties identified as Tax Lots 1612230000301, 1612230000305, and 1612230000500. The entirety of Tax Lots 1612230000500 and 1612230000305 fall within the existing LM Zone (i.e., the ¼-mile corridor extending from the centerline of Highway 97), and the majority of Tax Lot 1612230000301 also falls within the LM Zone.

Initially, the Applicant argued that the impact area in this case should be constrained to the three subject Properties. The Board presumes that the Applicant initially suggested such a limited impact area because of the second sentence in OAR 660-023-0040(3) stating that that the impact area should “include only the area in which allowed uses could adversely affect the identified resources.” This case concerns only the new uses allowed on the three subject Properties under the RI zone, thereby suggesting that the impact area is only those three subject Properties.

COLW’s July 5 record submittal argued that the Applicant’s identified impact area was too small of a geographical area, with COLW further noting that that the Applicant’s proposed ESEE analysis described “uses outside of this [identified] impact area.” More specifically,

COLW argued that the Applicant's ESEE Analysis repeatedly discussed "development further on the hillside west of the subject Properties [which] already significantly diminishes the scenic resources viewed from Highway 97 adjacent to the subject properties." Last, COLW argued that "minimizing the impacts of the conflicting uses on the subject property's Goal 5 scenic view resources based on conditions outside of the identified impact area is also contrary to OAR 660-023-0040(3), which requires that '[t]he impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site.'"

As understood by the Board, this "impact area" disagreement between the Applicant and COLW stems from the Applicant focusing on the second sentence set forth in OAR 660-023-0040(3) and COLW focusing on the third sentence. The Board further notes that it is hard to reconcile what appears to be contradictory direction provided by those two sentences. Nevertheless, the Board does not need to resolve that issue presently because the Applicant's July 19 rebuttal submittal and July 26 final legal argument both proposed an expanded impact area to address COLW's concerns. Consistent with the Applicant's aforementioned submittals, the Board unanimously finds that the appropriate impact area in this case includes "those properties to the west of Highway 97 and within the existing LM Zone (i.e., within ¼-mile of the centerline of Highway 97) between the 61st Street intersection to the north and the Tumalo Road off ramp to the south."

The Board favors this expanded impact area for three reasons. First, the expanded impact area corresponds directly to evidence in the record submitted in support of the Expanded ESEE Analysis. For example, the Applicant's Exhibits 3 and 4 are a video and pictures documenting the scenic views looking west from an automobile traveling both north and south on Highway 97 between the 61st Street intersection and the Tumalo Road off ramp.

Second, the expanded impact area is supported by case law, specifically *LandWatch Lane County v. Lane County*, __Or LUBA__ (LUBA No 2019-048, August 9, 2019). *LandWatch Lane County* similarly considered a quasi-judicial PAPA for a single property, and LUBA therein suggested that the impact area should include at least adjacent land with the same or similar Goal 5 protections.

Third, the expanded impact area addresses COLW's critique that the Initial ESEE Analysis documents impacts caused by "development further on the hillside west of the subject Properties * * *." Examining Applicant's Exhibits 2, 3, 4, and 5, it is clear that most of those developments built on the hillside and in plain view of Highway 97 are within the expanded impacted area – i.e., within the LM Zone west of Highway 97 between the 61st Street intersection and Tumalo Road.

Last, the Applicant's July 26 final legal argument raises two final issues related to the impact area that deserve further comment from this Board. First, the Applicant argued that the ESEE process is intended to be iterative, and it was thereby appropriate to expand the

impact area mid-way through the remand proceedings. To support that argument, the Applicant quoted language in OAR 660-023-004(1) suggesting that “[l]ocal governments are not required to follow [the ESEE Decision Process] steps sequentially, and some steps anticipate a return to a previous step.” The majority of the Board (agrees with the Applicant’s argument and finds that it was appropriate for the Applicant to “return to the previous [impact area] step” after submitting the Initial ESEE Analysis because the Applicant was responding to COLW’s comments concerning that Initial ESEE Analysis. The Board further notes that the expanded impact area was submitted concurrently with the Updated ESEE Analysis.

More directly related to COLW’s criticisms of the Initial ESEE Analysis, the Applicant also acknowledged in its July 26 final legal argument that the Updated ESEE Analysis includes “ESEE consequences to properties outside of the formal impact area.” The Applicant argued that including ESEE consequences outside of the impact area was appropriate because of the differing definitions of the terms “ESEE Consequence” and “Impact Area” contained in OAR 660-023-0010(2) and (3), respectively. As understood by the Board, the Applicant distinguished the two aforementioned terms specifically because the ESEE Consequence definition does not reference the Impact Area definition, nor does the ESEE Consequence definition include any language suggesting a geographical limit.

The Board agrees with the Applicant’s argument, and unanimously finds that it is appropriate for the Updated ESEE Analysis to document ESEE Consequences that extend beyond the impact area to the extent necessary to “enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected.” See OAR 660-023-0040(1). To the extent the Board’s understanding of OAR 660-023-0010(2) and (3) is incorrect, the Board further finds that those ESEE Consequences described in the Updated ESEE Analysis extending beyond the impact area were not dispositive to the Board’s subsequent OAR 660-023-0040(4) and (5) findings. Accordingly, the Board notes that it would have reached similar conclusions and issued similar findings responding to OAR 660-023-0040(4) and (5) even if all ESEE Consequences addressing properties outside of the impact area were struck from the Update ESEE Analysis.

(4) Analyze the ESEE consequences. Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site

containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation.

FINDING: The Applicant's Initial ESEE Analysis for the Board's consideration was prepared by Skidmore Consulting, LLC: Land Use Planning & Development Services. (See Applicant Exhibit 1). COLW's July 5 record submittal criticized that the Initial ESEE Analysis went too far in grouping "similar conflicting uses," thereby violating OAR 660-023-0040(4). In response, the Applicant submitted the Updated ESEE Analysis, again prepared by Skidmore Consulting, LLC: Land Use Planning & Development Services. That Updated ESEE Analysis analyzes all of the different uses allowed by the RI Zone in a more comprehensive manner. (See Applicant's Exhibit 6). Accordingly, the Board need not address COLW's arguments regarding the Initial ESEE Analysis. Instead, the majority of the Board finds that the Updated ESEE Analysis does not inappropriately group "similar conflicting uses" contrary to OAR 660-023-0040(4) because the numerous conflicting uses are all analyzed in the Updated ESEE Analysis.

The Board further notes that although separately analyzed in the Updated ESEE Analysis, many of the described consequences for each of the conflicting uses are still similar. But those similarly described consequences do not suggest that the Updated ESEE Analysis is incorrect or otherwise faulty. Instead, those similarly described consequences reflect the specific Goal 5 resource at issue. On that point, the Board notes that the County's original ESEE analysis contained in Ordinance 92-052 summarily described the Goal 5 resource at issue as the "scenic or natural appearance of the landscape as seen from the road or alteration of existing landscape by removal of vegetative cover." Viewed through that lens, the similarly described consequences are understandable for even differing conflicting uses because many of those differing uses allowed under the RI zone may require, for example, the removal of the same vegetative cover or otherwise will similarly detract from the natural appearance of the landscape as seen from an automobile traveling on Highway 97.

As understood by the Board, every ESEE analysis is intended to be context specific, and the Board is "afforded fairly broad discretion in considering potential impacts from allowing or prohibiting a particular use * **." See *Central Oregon LandWatch v. Deschutes County*, __ Or LUBA __ (LUBA No 202-019, March 22, 2021) (internal citations omitted). Pursuant to OAR 660-023-0040(1), the Board again notes that an "ESEE analysis need not be lengthy or complex but should enable the reviewers to gain a clear understanding of the conflicts and the consequences to be expected." In this case, the majority of the Board () finds that the Updated ESEE Analysis provides a "clear understanding of the conflicts and consequences to be expected" if the RI uses are allowed on the subject Properties.

The majority of the Board further finds that the Updated ESEE Analysis is supported by substantial evidence in the record, as it was prepared by a land use consultant with specific expertise and knowledge of Central Oregon. (See Attachment D to the Applicant's Exhibit 1.) Additionally, both the Applicant and the Applicant's consultant added select evidence to the record further confirming that consultant's expert opinions and observations. (See Attachment A to the Applicant's Exhibit 1, Attachment B to the Applicant's Exhibit 1, Exhibits 3, 4, and 5.) In fact, the Board notes that the record contains absolutely no evidence that contradicts those opinions and observations contained in the Updated ESEE Analysis. The only evidence in the record not submitted by County staff or the Applicant is COLW's singular July 5 record submittal which asserts only legal challenges and includes as attachments only Ordinance 92-052 and select portions of Ordinance PL-20.

Accordingly, the majority of the Board specifically adopts and incorporates as its own the Updated ESEE Analysis. That updated ESEE Analysis is further included as part of these findings, attached as Exhibit I. Last, the Board notes that these findings, including the Updated ESEE Analysis, will be included by reference in DCC Chapter 23.01 and Section 5.12 of the DCCP.

(5) Develop a program to achieve Goal 5. Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites. This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis. One of the following determinations shall be reached with regard to conflicting uses for a significant resource site:

(a) A local government may decide that a significant resource site is of such importance compared to the conflicting uses, and the ESEE consequences of allowing the conflicting uses are so detrimental to the resource, that the conflicting uses should be prohibited.

(b) A local government may decide that both the resource site and the conflicting uses are important compared to each other, and, based on the ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent.

(c) A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to

some extent should not be provided, as per subsection (b) of this section.

FINDING: In addition to being “afforded fairly broad discretion” in conducting the ESEE Analysis pursuant to OAR 660-023-0040(4), state law further provides the Board the same “broad discretion” when it comes to determining “whether, how, and to what extent a Goal 5 resource will be protected” pursuant to OAR 660-023-0040(5). *See Central Oregon LandWatch v. Deschutes County*, __Or LUBA __ (LUBA No 202-019, March 22, 2021) (internal citations omitted).

The Board notes that the Applicant’s recommendation pursuant to OAR 660-023-0040(5) to allow, limit, or prohibit the conflicting uses has evolved throughout the course of these proceedings. Initially, the Applicant’s June 23 record submittal advocated for what was described as the “middle ground” option pursuant to OAR 660-023-0040(5)(b) whereby the conflicting uses would be allowed in a “limited way,” with those limitations being imposed by the County’s existing LM Zone. The Applicant further noted that it never sought as part of these proceedings to remove the subject Properties from the LM Zone and the Applicant did not otherwise propose amending DCC Chapter 18.84 implementing that LM Zone.

COLW’s July 5 record submittal alternatively asserted that the Board should prohibit the conflicting use entirely pursuant to OAR 660-023-0040(5)(a). COLW further argued that “bootstrapping the existing LM Zone as a program to achieve Goal 5 to protect scenic view resources from the conflicting uses of the [RI] zone is not sufficient to comply with LUBA’s remand order, because the LM [Z]one was not designed with those industrial conflicting uses in mind.”

The Applicant responded to COLW’s July 5 argument in two ways. First, the Applicant’s July 19 rebuttal submittal included numerous documents (Exhibits 8 through 14) challenging COLW’s foundational assumption that the LM Zone was not designed to mitigate RI uses. The Applicant’s aforementioned exhibits demonstrate that from the LM Zone’s initial creation in the early 1990s, it has always overlaid other RI zoned properties adjacent to Highway 97. Second, and more importantly, the Applicant’s July 26 final legal argument pivoted away from recommending that the conflicting uses be allowed in a limited way pursuant to OAR 660-023-0040(5)(b). In response to COLW’s arguments regarding the LM Zone, the Applicant instead recommended that the Board allow the conflicting uses fully pursuant to OAR 660-023-0040(5)(c).

As explained further below, the majority of the Board agrees with the Applicant and finds that the conflicting uses in this case should be allowed fully pursuant to OAR 660-023-0040(5)(c). During deliberations, Commissioner Chang explained that he preferred the “middle ground” option allowing the conflicting use in a limited way pursuant to OAR 660-023-0040(5)(b). Accordingly, no commissioner agreed with COLW’s argument to prohibit the conflicting uses entirely pursuant to OAR 660-023-0040(5)(a).

The Board finds that the Updated ESEE Analysis (included as Exhibit I herein) comprehensively documents numerous positive consequences of allowing uses allowed under the RI zone on the subject Properties. Those positive consequences include, for example, economic opportunities for the subject Properties' owners, employment opportunities for future employees, and additional services for rural landowners between the cities of Bend and Redmond. Although the provision governing the RI zone (i.e., DCC Chapter 18.100) limited the size, scope, and intensity of any industrial use that could be permitted on the subject Properties, the Updated ESEE Analysis further documents that all industrial developments are in short supply in Deschutes County. The Board specifically notes that both industrial developments in the Cities of Bend and Redmond currently have a 0.80% and 2.45% vacancy rate, respectively. Industrial land as a whole in Deschutes County is limited.² The Updated ESEE Analysis further documents positive environmental consequences stemming from reduced travel distances lowering carbon emissions for the numerous rural property owners and existing businesses already located along the Highway 97 corridor between the Cities of Bend and Redmond.

The Board also finds that the Updated ESEE Analysis appropriately documents negative consequences that will stem from allowing RI uses on the subject Properties. The County's Goal 5 scenic view program primarily benefits what are best described as "social" and "environmental" values, and the Updated ESEE Analysis thereby primarily documents negative consequences under those categories.

However, the Board finds that the Updated ESEE Analysis demonstrates that the negative social and environmental consequences of allowing RI uses on the subject Properties are minimized by the numerous existing developments on surrounding properties. Many of those existing developments are in direct view of Highway 97, thereby diminishing the existing scenic view resources. These numerous existing developments, the majority of which are on properties that are also within the LM Zone, are documented further by the Applicant's Exhibits 2, 3, 4, and 5 submitted in conjunction with the Updated ESEE Analysis. Those exhibits demonstrate that a hill rises directly to the west of the subject Properties blocking the more expansive views enjoyed by other properties also adjacent to Highway 97. And, numerous structures were permitted to be developed on that hillside, even further diminishing the scenic view resources near the three subject Properties. Rather than new RI development in an otherwise unobstructed view shed, the Updated ESEE Analysis appropriately documents the minimal negative consequences of allowing RI development on the Properties already surrounded by existing and visible development. To be clear, the Board does not mean to suggest that the scenic view resources in the vicinity of the subject Properties are now entirely absent. Instead, the majority of the Board finds that these existing developments in plain view of Highway 97 already diminished the

² The RI Zone only permits rural industrial development and not urban development.

scenic view resources near the subject Properties such that the positive consequences of allowing RI uses outweigh the minimal negative consequences.

Consistent with the aforementioned analysis and as specifically required by OAR 660-023-0040(5)(c), the Board makes two additional findings. First, the majority of the Board finds that the Updated ESEE Analysis demonstrates that allowing RI uses on the subject Properties is “of sufficient importance” because the Goal 5 scenic view resources are already diminished in the vicinity of the subject Properties. Stated simply, the majority of the Board finds that the negative social and environmental consequences caused by visible development in the view shed has already occurred such that the positive social and environmental consequences of now allowing RI uses clearly outweigh any increased negatives.

Second, the majority of the Board finds that the Updated ESEE Analysis demonstrates why measures to protect the Goal 5 scenic view resources should not be provided. Specifically, the majority of the Board finds that the County’s existing Goal 5 program has not been as successful in protecting an unobscured view shed in this particular location because of the natural topography to the west of the subject Properties which makes any structure built thereon particularly notable from Highway 97. Accordingly, the majority of the Board finds that further burdening subsequent development on the subject Properties cannot cure the already obscured view shed, rendering such further burdens unwarranted.

OAR 660-023-0050, Programs to Achieve Goal 5

(1) For each resource site, local governments shall adopt comprehensive plan provisions and land use regulations to implement the decisions made pursuant to OAR 660-023-0040(5). The plan shall describe the degree of protection intended for each significant resource site. The plan and implementing ordinances shall clearly identify those conflicting uses that are allowed and the specific standards or limitations that apply to the allowed uses. A program to achieve Goal 5 may include zoning measures that partially or fully allow conflicting uses (see OAR 660-023-0040(5)(b) and (c)).

FINDING: As previously stated, the Board notes that these findings, including the Updated ESEE Analysis, will be included by reference in DCC Chapter 23.01 and Section 5.12 of the DCCP. The majority of the Board finds that no other amendments to the DCC or DCCP are required to implement the Board’s decision pursuant to OAR 660-023-0040(5).

An argument could be made that following the Board’s decision to allow the conflicting use fully, the County may now proceed with removing the subject Properties from the LM Zone. However, the Board finds that the County need not undertake any amendment to the DCC or the DCCP at this time because the Applicant’s July 26 final legal argument specifically

included a statement consenting to the three subject Properties remaining in the LM Zone until such time that the County elects to further alter or amend that zone in a manner effecting the subject Properties. The application before us does not propose to rezone the Properties to remove the LM zoning designation. The Applicant explained that its initial land use application did not seek the removal of the subject Properties from the LM Zone, and the County's public notices and notices to DLCD, for example, did not contemplate such an amendment. As understood by the Board, the Applicant is therefore voluntarily agreeing that the subject Properties should remain in the LM Zone, and that any subsequent development on the subject Properties needs to comply with DCC Chapter 18.84. If the County ever undertakes a broader amendment to the LM Zone, it will need to go through the Goal 5 process anew which could result in a later Board of County Commissioners' reaching a different decision. As understood by the Board, the Applicant is voluntarily agreeing that the subject Properties remain in the LM Zone, and that any subsequent development on the subject Properties must comply with DCC Chapter 18.84. Like the Applicant, the Board is not aware of any statute, rule, or case law that precludes a property owner from voluntarily consenting to comply with what otherwise could be argued are inapplicable land use regulations.

(2) When a local government has decided to protect a resource site under OAR 660-023-0040(5)(b) * * * >

FINDING: The Board elected to allow the conflicting use fully pursuant to OAR 660-023-0040(5)(c). This provision is therefore inapplicable.

(3) In addition to the clear and objective regulations required by section (2) of this rule, except for aggregate resources, local governments may adopt an alternative approval process * * *.

FINDING: The Board elected to allow the conflicting use fully pursuant to OAR 660-023-0040(5)(c). This provision is therefore inapplicable.

IV. DECISION:

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

1. The maximum development on the Properties 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 30th day of August 2023