

## HEARING OFFICER FINDINGS AND RECOMMENDATIONS

**FILE NUMBERS:** 247-22-000353-PA, 354-ZC

**HEARING:** September 6, 2022, 6:00 p.m.  
Virtual (Zoom), and  
In Person @ Barnes & Sawyer Rooms  
Deschutes Services Center  
1300 NW Wall Street  
Bend, OR 97708

**SUBJECT PROPERTIES/  
OWNER:**

Property 1:  
Mailing Name: HAROLD K MARKEN REV TRUST ETAL  
Map and Tax Lot: 1812020000201  
Account: 119057  
Situs Address: 21495 BEAR CREEK RD, BEND, OR 97701

Property 2:  
Mailing Name: HAROLD K MARKEN REV TRUST ETAL  
Map and Tax Lot: 1812020000203  
Account: 265281  
Situs Address: 21493 BEAR CREEK RD, BEND, OR 97701

(Property 1 and 2 collectively referred to as the "Subject Property")

**APPLICANT:** Harold Marken

**ATTORNEY  
FOR APPLICANT:** Liz Fancher  
2465 NW Sacagawea Lane  
Bend, OR 97703

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

**REQUEST:** The Applicant requested 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 requested 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/247-22-000353-pa-and-247-22-000354-zc-marken-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:** Property 1 described above is a legal lot of record because it is Parcel 1 of Partition Plat 2009-36. Property 2 described above is a legal lot of record because it is Parcel 2 of Partition Plat 2009-36.

**SITE DESCRIPTION:** The Subject Property consists of two tax lots. Tax Lot 201 is 53.3 acres in size and Tax Lot 203 is 5.74 acres in size. Both tax lots contain frontage on Bear Creek Road to the north and Modoc Lane to the south. Bear Creek Road is designated as a County-maintained Rural Collector and Modoc Lane is designated as a privately-maintained Rural Local Road.

The grade of the Subject Property slopes up gently from the north to the southwest, with areas of more pronounced slopes and rock outcrops. A significant portion of the Subject Property was

previously cleared and used as pasture and to grow hay. A portion of the Subject Property was previously irrigated. Vegetation on the Subject Property differs between areas that were previously irrigated and areas that were retained as native vegetation, including juniper trees, sagebrush, rabbit brush and bunch grasses. Vegetation in areas that were formerly irrigated consists of sparse grasses.

Property 1 is developed with a dwelling and agricultural accessory structure, which are both located in the southeast portion of the Subject Property. Property 2 is developed with a manufactured home. Both residences take access from Bear Creek Road via a shared driveway that extends south along the west boundary of Property 1.

The Subject Property has 9.49 acres of water rights with Central Oregon Irrigation District ("COID"). The Subject Property has previously been in farm use with Property 1 currently receiving special tax assessment for farm use. The Applicant indicated that he intends to relinquish the farm tax status. The submitted Burden of Proof includes the following background on the Subject Property's current water rights:

*"Given continued financial losses over approximately four decades, the applicant relinquished most of his Central Oregon Irrigation District water rights so that they could be applied on properties better suited for irrigated farm use. A part of the subject property is irrigated to maintain a lawn for the Marken residence on TL 201. There is also an irrigation pond on this tax lot."*

The nearest portion of the City of Bend's Urban Growth Boundary ("UGB") is located approximately 0.13 miles to the east of the Subject Property, to the north of Bear Creek Road. Two parcels located to the north of the Subject Property, across Bear Creek Road, are pending a Comprehensive Plan Amendment and Zone Change for inclusion in the City of Bend's UGB. These properties are identified on Assessor's Map 17-12-35D, as Tax Lots 100 and 200. Assuming this UGB expansion receives all final approvals, the Subject Property will only be separated from the UGB by 90 feet of Bear Creek Road right-of-way. The south portion of the Subject Property is located approximately 0.25 miles from the City of Bend's UGB.

**PROPOSAL:** The Applicant requested approval of a Comprehensive Plan Map Amendment to change the designation of the Subject Property from an Agricultural ("AG") designation to a Rural Residential Exception Area ("RREA") designation. The Applicant also requested approval of a corresponding Zoning Map Amendment to change the zoning of the Subject Property from Exclusive Farm Use ("EFU") to Multiple Use Agricultural ("MUA10"). The Applicant requested a Deschutes County plan and zone change for the Subject Property because the Subject Property does not qualify as "agricultural land" under Oregon Revised Statutes ("ORS") or Oregon Administrative Rules ("OAR") definitions. The Applicant proposed that no exception to Statewide Planning Goal 3, Agricultural Land, is required because the Subject Property is not 'Agricultural Land.'

Submitted with the application was an Order 1 Soil Survey of the Subject Property, titled *Site-Specific Soil Survey of Property Located at 21493 and 21495 Bear Creek Road, also known as T18S, R12E, Section 2, Tax Lots 203 and 201 (total of 59.04 acres), East of Bend in Deschutes County, Oregon* (hereafter referred

to as the "Applicant Soil Study") prepared by soil scientist Brian T. Rabe, CPSS, WWSS of Valley Science and Engineering (hereafter collectively referred to as "Rabe/Valley"). The Applicant also submitted a traffic analysis prepared by Transight Consulting, LLC titled *Marken Property Rezone* (hereafter referred to as "Traffic Study"). Additionally, the Applicant submitted an application form, a burden of proof statement ("Burden of Proof"), and other supplemental materials, all of which are included in the record for the subject applications.

**SOILS:** The composition/characterization of the soils at the Subject Property is in dispute in this case. Central Oregon LandWatch ("COLW") argued that the Subject Property soil composition/characterization should be based upon the Natural Resources Conservation Service ("NRCS") maps of the area. Based upon the NRCS maps, the Subject Property contains two different soil types as described below. The Subject Property, per the NRCS maps, contains 58C – Gosney-Rock Outcrop-Deskamp complex, and 36A – Deskamp loamy sand. The 36A soil unit, per the NRCS maps/descriptions, is 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. Using the NRCS maps, COLW argued that the Subject Property is comprised of soils that do qualify as Agricultural Land<sup>1</sup>.

The Applicant Soil Study was prepared by Rabe/Valley. The purpose of the Applicant Soil Study was to inventory and assess the soils on the Subject Property and to provide more detailed data on soil classifications and ratings than is contained in the NRCS soils maps. The Applicant Soil Study determined the Subject Property contained approximately 61 percent Land Capability Class 7 and 8 non-irrigated soils, which was primarily observed as shallow, sandy Gosney soils and smaller rock outcroppings. The Land Capability Class 6 soil identified by the Applicant Soil Study was entirely classified as Deskamp soils, which is consistent with the NRCS soils unit map. The Gosney and Deskamp soils are interspersed throughout the Subject Property in pockets that range in size from 6.9 acres to less than one acre. The rock outcroppings were primarily observed in the southeast portion of the Subject Property. Based upon the Applicant Soil Study the Subject Property is comprised of soils that do not qualify as Agricultural Land.

The NRCS soil map units identified on the Subject Property is 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.

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

---

<sup>1</sup> As defined in OAR 660-033-0020, 660-033-0030

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 3.7 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 the relevant findings below.

**UTILITY SERVICES, PUBLIC SERVICES AND COUNTY ZONING AND COMPREHENSIVE PLAN HISTORY:** Applicant, in its Burden of Proof (pages 12 – 14), provided a summary of utility services, public services and the county zoning and comprehensive plan history.

**SURROUNDING LAND USES:** The general surrounding area of the Subject Property is defined by the City of Bend's UGB to the west and then a mix of residential and agricultural uses spreading out to the east. The Subject Property is surrounded on three sides by lands zoned MUA10, including a 35.32-acre parcel located to the north of Bear Creek Road which is pending annexation into the City of Bend for development with affordable housing. Other surrounding MUA10 properties are developed with dwellings, and hobby farming primarily consisting of stables and fenced pastures. The northwest corner of the Subject Property adjoins land zoned UAR10, which is developed with dwellings and hobby farming consisting of irrigated fields. Adjoining properties to the west and northwest are zoned EFU and located immediately between the Subject Property and the City of Bend's UGB.

The adjacent properties are outlined below in further detail:

**North:** The property immediately north of the Subject Property (Tax Lots 100 and 200 on Assessor's Map 17-12-35D) is zoned MUA10 and is pending an application for inclusion in the City of Bend's UGB. In 2017, Deschutes County previously approved a Comprehensive Plan Amendment from Agriculture to Rural Residential Exception Area and Zone Change from EFU to MUA10 through file numbers 247-16-000317-ZC, 247-16-000318-PA for this property. The current application with City of Bend (file number PLUGB20220115) is for a Comprehensive Plan designation change to Residential Medium Density and a concurrent Zone Change to Urbanizable Area. If approved, the Subject Property will be located across Bear Creek Road from the City of Bend UGB. To the northeast of the Subject Property are three other MUA10 zoned parcels, two of which are developed with single-family dwellings (Tax Lots 1601 and 1600 on Assessor's Map 17-12-35). Farther north are properties zoned UAR10 (Urban Area Reserve) and EFU, none of which appear to be engaged in farm use. Overall, surrounding properties to the north appear to be undeveloped or developed with single-family dwellings.

**West:** Adjacent properties to the west of the Subject Property are all zoned EFU. Beyond that, the City of Bend UGB is located 0.25 miles from the western boundary of the Subject Property. These adjacent EFU parcels (Tax Lots 200, 1003, and 1001 on Assessor's Map 18-12-2) are 16.99 acres, 27.19, and 12.45 acres in size and all appear to contain some type of farm use. Tax Lot 1003 contains pivot irrigation system and no structures, but was recently approved for a Lot of Record Dwelling through Deschutes County file 247-21-000018-CU. Tax Lot 1001 contains a nonfarm dwelling

approved through Deschutes County file CU-01-75 and Tax Lot 200 contains a 1969 dwelling that predates the EFU Zone. The property northwest of the Subject Property is comprised of urban area reserve and urban lands. One UAR10 property grows hay and the remainder of the UAR10 lands are either developed with single-family homes or vacant.

**East:** All properties due east of the Subject Property for a distance of one mile are zoned MUA10 and developed with single-family dwellings. The Dobbin Acres subdivision is located to the east of Ward Road, approximately 0.25 miles from the Subject Property. Lots within the Dobbin Acres subdivision generally range in size from one to two acres. Surrounding MUA10 properties to the east that are not within the Dobbin Acres subdivision range in size from approximately one acre to 19.52 acres (Tax Lot 1312 on Assessor's Map 18-12-2) and are developed with single-family dwellings in addition to small-scale hobby farming. Properties to the northeast of the Subject Property primarily consist of large, undeveloped lots that are zoned MUA10 and EFU. These larger properties do not appear to be in active farm use and contain two churches, a Pacific Power substation, and two commercial-scale solar farms. The remainder of this area to the northeast includes vacant, non-irrigated lands with the exception of a few small EFU-zoned properties north of Highway 97 that have irrigated fields. These smaller, irrigated properties are almost one-half mile away from the Subject Property and separated by Bear Creek Road, Highway 20, and large undeveloped tracts.

**South:** Immediately south of the Subject Property are four MUA10-zoned parcels that are approximately five acres each in size. Tax Lots 1102, 1105, 1104, and 1100 (Assessor's Map 18-12-2) are each developed with a dwelling, residential and agricultural accessory structures, and irrigated and non-irrigated pasture. This development pattern continues farther south to Stevens Road, and properties to the east and west of Thunder Road are also approximately five acres each in size and are developed with single-family dwellings, with several appearing to contain small-scale agriculture uses. Tax Lot 1208 on Assessor's Map 18-12-2 is 36.65 acres in size and consists of undeveloped land with native vegetation. This parcel is owned by Central Oregon Irrigation District and the Central Oregon canal passes through this property and runs from southwest to northeast. The majority of land to the south of the Subject Property is zoned MUA10; only two parcels located to the south of the Subject Property and to the west of Ward Road are zoned EFU. These parcels, Tax Lot 1005 and Tax Lot 1308 on Assessor's Map 18-12-2, are 3.34 and 39.18 acres in size, respectively. Both parcels contain a dwelling, and Tax Lot 1308 is currently receiving special tax assessment for farm use and appears to contain some pasture or hay production.

The Applicant, in its Burden of Proof (pages 8 – 12), provided a detailed inventory of nearby properties setting forth the specific tax lot, size, physical improvements, tax status and comments related to the use (i.e., "farm use") of each property.

**PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice on May 12, 2022, to several public agencies and received the following comments:

Deschutes County Senior Transportation Planner, Peter Russell, May 20, 2022, Comments

*"I have reviewed the transmittal materials for 247-22-000353-PA/354-ZC to amend the Comprehensive Plan designation of two abutting properties totaling approximately 59 acres from Agriculture (AG) to Rural Residential Exception Area (RREA) and change the zoning for those same properties from Exclusive Farm Use (EFU) to Multiple Use Agriculture (MUA-10). The properties are located at 21493 and 21495 Bear Creek Rd., aka County Assessors Map 18-12-02, Tax Lots 203 and 18-12-02, Tax Lot 201, respectively. For reasons discussed below, staff finds more information is needed to address the Transportation Planning Rule (TPR) and County code.*

*The applicant's traffic study dated April 22, 2022, is incomplete for two reasons. The TPR at Oregon Administrative Rule (OAR) 660-012-0060 requires the demonstration of whether a plan amendment/zone change will have a significant effect or not. To determine that, the traffic study must include the operational analysis of the affected intersections pre-development and post-development. The traffic study lacks this information and thus does not comply with the TPR. Second, Deschutes County Code (DCC) 18.116.310(G)(4) requires zone changes to include a 20-year analysis. DCC 18.116.310(G)(10) requires existing and future years levels of service (LOS), average vehicle delay, and volume/capacity (V/C) ratios both with and without the project. (The V/C ratios are only applicable if ODOT facilities are analyzed.) The TIA lacks this feature and thus does not comply with County code. Further, the combination of the TPR and County code helps identify whether the transportation system has adequate capacity to serve the plan amendment/zone change or if the system is already overcapacity regardless of the proposed plan amendment/zone change. By contrast, the applicant has submitted what is in essence a trip generation memo.*

*The property accesses Bear Creek Road, a public road maintained by Deschutes County and functionally classified as a collector. The property has a driveway permit approved by Deschutes County (#247-SW8923) and thus complies with the access permit requirements of DCC 17.48.210(A).*

*The County will assess transportation system development charges (SDCs) when development occurs based on the type of proposed use. However, as a plan amendment or a zone change by itself does not generate any traffic, no SDCs are triggered at this time."*

In response to Mr. Russell's comments, above, the Applicant made two subsequent revisions to their traffic study. Updated traffic information was submitted on June 23, 2022, and June 29, 2022.

Deschutes County Senior Transportation Planner, Peter Russell, June 29, 2022, Comments

*"I have reviewed the June 23, 2022, revised traffic analysis for 22-353-PA/354-ZC. While it is better, it still does not provide the information requested in my original comments on April 22, which is attached. Specifically, the revised traffic impact analysis still lacks any data on Level of Service (LOS) of affected County roads pre- and post-plan amendment. Similarly, if there are affected State highways, there is no pre- and post-plan amendment Volume to Capacity (V/C) ratios. The traffic analysis needs to provide that information for the 20-year horizon year. A traffic analysis has two major components: 1) the trip generation from the proposed use and 2) the current and*

*projected traffic volumes from the affected facilities. The combination of information from #1 and #2 then informs how the affected intersections perform now and in 20 years.”*

Deschutes County Senior Transportation Planner, Peter Russell, June 30, 2022, Comments

*This is exactly what I needed. The information demonstrates the project complies with the Transportation Planning Rule (TPR) and Deschutes County Code (DCC) 18.116.310. Appreciate the fast response.*

Central Oregon Irrigation District

*“Please be advised that Central Oregon Irrigation District (COID) has reviewed the application received on May 13, 2022 for the above referenced project located 21495 BEAR CREEK RD, BEND, OR 97701/tax lot: 1812020000201 and 21493 BEAR CREEK RD, BEND, OR 97701/ tax lot: 1812020000203. 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).*

*Tax lot 1812020000201 has 9.49 acres of mapped water rights appurtenant COID irrigation water. COID has facilities (point of delivery) adjacent to the southern boundary of tax lot 1812020000201. There appears to be a private irrigation ditch adjacent to the eastern boundary of tax lot 1812020000203.*

*Listed below are COIDs initial comments to the provided pre-application site plan. All development affecting irrigation facilities shall be in accordance with COID’s Development Handbook and/or as otherwise approved by the District.*

- *Map and Tax lot: 1812020000201 has 9.49 acres of appurtenant COID irrigation water. Historically there were 36.0 acres of irrigation appurtenant to this tax map. Since 2018, 26.51 acres of irrigation were voluntarily removed by the property owner. Prior to removal, the 36.0 acres was under active irrigation and producing crop.*
- *Map and Tax lot: 1812020000203: There are no COID water rights appurtenant to this parcel.*
- *Irrigation infrastructure and rights-of-way are required to be identified on all maps and plans*
- *Any irrigation conveyance, District or private, which passes through the subject property shall not be encroached upon without written permission from this office.*
- *No structures of any kind, including fence, are permitted within COID property/easement/right of way without written permission from this office.*
- *Policies, standards and requirements set forth in the COID Developer Handbook must be complied with.*



*Our comments are based on the information provided, which we understand to be preliminary nature at this time. Our comments are subject to change and additional requirements may be made as site planning progresses and additional information becomes available. Please provide updated documents to COID for review as they become available."*

The following agencies did not respond to the notice: Bend Fire Department, City of Bend Planning Department, Oregon Department of Agriculture, Oregon Department of Land Conservation and Development, Deschutes County Assessor, Deschutes County Building Division, Deschutes County Road Department, and District 11 Watermaster.

**PUBLIC COMMENTS:** The Planning Division mailed notice of the application to all property owners within 750 feet of the Subject Property on May 12, 2022. 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 May 12, 2022.

Prior to the public hearing, four public comments were received into the record. Courtney Eastwood ("Eastwood") requested the application in this case be denied because approval would impact wildlife and increase density in the general area. Julia and Justin Geraghty ("Geraghty") (May 23, 2022), as neighboring property owners, requested the application be denied. Drew Mills (May 23, 2022) also requested the application be denied. Kristy Sabo, on behalf of COLW (May 27, 2022), indicated that COLW was reviewing the application but indicated that it appeared that all relevant approval criteria were not met by the application.

At the September 6, 2022, hearing (the "Public Hearing") Joleyne Brown ("Brown") and Geraghty testified in opposition to the application's approval. Brown testified that she is concerned with how an approval of the application would impact her adjacent property. In addition, Brown stated that the Applicant had removed rocks on the Subject Property and that Applicant had grown hay for many years. Brown stated that she believed the Subject Property could be successfully farmed with the application of water (irrigation) and fertilizer. Geraghty questioned whether or not the Applicant had made beneficial use of irrigation water within the last five years. Geraghty also questioned whether the application in this case was attempting to circumnavigate urban growth boundary rules.

COLW, through attorney Rory Isbell, submitted a document on the date of the hearing (September 6, 2022) setting forth its evidence/arguments related to the application. In summary, the 9/6/22 COLW submission argued that the application did not meet the Goal 3 agricultural land requirements, did not meet the requirements of Goal 14 and did not satisfy the change/mistake requirements of DCC 18.136.020(D). After the public hearing, and during the open-record period, COLW submitted two additional documents into the record (September 13, 2022 and September 20, 2022). These two COLW documents expanded upon the COLW 9/6/22 submission arguments; excepting that the 9/13/2022 submission also argued that the County had "previously rejected a similar application."

Brown submitted a post-hearing document (September 11, 2022) indicating that she and her husband had grown hay on their property suggesting that hay could be successfully grown on the

Subject Property. Brown also (9/11/2022) expressed her belief that additional traffic that would result if the application in this case is approved.

Tamara Sullivan Holcomb submitted a document (September 6, 2022) indicating she was neutral related to approval/denial of this application in this case. 143 Investments LLC submitted a document on September 2, 2022, indicating general support for approval of the application. The 143 Investments LLC document also indicated that it owns property adjacent to the Subject Property and that the 143 Investment property has poor soil (rocky and unproductive) similar to the Subject Property.

The Hearings Officer addressed relevant public comments in the findings below.

**NOTICE REQUIREMENT:** On August 9, 2022, 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, August 14, 2022. Notice of the first evidentiary hearing was submitted to the Department of Land Conservation and Development on July 26, 2022.

**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**

#### **Preliminary Findings:**

Central Oregon LandWatch raised an issue that did not neatly fit into the relevant approval criteria discussed below. The Hearings Officer addresses that issue in this Preliminary Findings section.

#### **COLW's Argument: Similar Application Rejected.**

COLW, in its 9/13/2022 record submission (page 2), stated the following:

*"In 1980, a previous owner of the subject property applied to allow non-farm uses, similar to what is proposed in the current application, arguing that the property is not properly agricultural land. The County squarely denied that application, finding that "[s]ome type of farming and/ or grazing can [be] put to use on this property." Exhibit 1 (Deschutes County File No. TP-596). The application in that file also included a soil study, which concluded that the property is predominantly Class I-VI soils and suitable for farm use."*

Applicant responded to COLW's similar application rejected argument (Final Argument, page 18) as follows:

*"COLW claims that a similar application was previously denied by the County. The application, however, was not similar. It was an application that sought approval of the Moore View Acres*

*subdivision. The subdivision proposed lot sizes smaller than allowed by the then-applicable EFU-20 zoning district. As stated by Planning Director John Anderson, 'evidence regarding low soil capability might justify a change to a non-EFU zone but would not permit residential subdivision in a farm use district. \*\*\* A zone change to a Multiple Use Agricultural Zone to be followed by a conditional use for a cluster development would appear to be more productive for the applicant and more consistent with the Plan.'*

*The finding quoted by COLW that 'some type of farming and/or grazing' may occur on the property is correct but those activities are not 'farm use' as defined by ORS 215.203. COLW's claim that a soils study concluded in 1980 that the Marken property is predominantly Class I-VI soils is correct but the 'study' is not one of the quality and detail provided by Mr. Rabe.*

*No formal, scientific soils study was conducted. The applicant's engineer, William Tye, PE provided soils information based on an aerial photograph, visual observations and the application of general soils maps from three different sources (Deschutes Irrigation Project maps circa 1945, 1958 Soil Survey Deschutes Area based on 1945 mapping and Assessor's tax lot maps with soils information. Mr. Tye was not a soils scientist and did not conduct an Order 1 soil survey. The Supplemental Report provided by Mr. Tye says that he subject property 'has limited farm capabilities and has been farmed very little due to location of the farmable land use to rock outcropping and Class VII type soils.'*

*COLW claims, without citing any specific document, that the soils study found that the subject property was suitable for farm use. We have searched the materials filed by COLW and have been unable to find any statement in a document that might be considered a soil study that concludes that the subject property is suitable for farm use."*

The Hearings Officer concurs with Applicant's above-quoted comments. The Hearings Officer reviewed the Moore Acres 1980 land use documents included in the record of this case. The Hearings Officer notes (Applicant Rebuttal, 9/20/2022, Exhibit R-3) that County Staff indicated that the Subject Property (at the time of Moore Acres land use decision) was "not in agricultural use." (Staff Conclusion D.) The Moore Acres application was not a comprehensive plan or zone change application; rather it was requesting a variance. The Hearings Officer also notes that the Moore Acres application (see Burden of Proof, Applicant Rebuttal, 9/20/2022 Exhibit R-3) did not directly and/or comprehensively address the applicability of Goal 3 or whether the Subject Property was Goal 3 "agricultural land."

The Hearings Officer finds COLW's "similar application" argument to have little applicability or relevance, if any, to this case.

## **Title 18 of the Deschutes County Code, County Zoning**

### **Chapter 18.136, Amendments**

#### Section 18.136.010, Amendments

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

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

Section 18.136.020, Rezoning Standards

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

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

**FINDING:** The Applicant provided the following response (Burden of Proof, pages 19 & 20) related to this standard:

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

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

The Applicant 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 decision/recommendation. The Hearings Officer agrees with the Applicant's Burden of Proof analysis. The Hearings Officer finds, as demonstrated in subsequent findings, that this provision is met.

***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 (Burden of Proof, pages 14 & 15) related to this criterion:

*"The approval of this application is consistent with the purpose of the MUA-10 zoning district which [is] 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 approval of the application will allow the property to provide rural residential living on land that is not suited to full-time commercial farming without eliminating part-time, non-commercial agricultural use of the land. The large lot size of the MUA-10 zone and planned development rules both help conserve open spaces and protect scenic resources. The location of the property near the City of Bend will help maintain air quality by reducing vehicle trip lengths by future residents of the property and provide an orderly and efficient transition from rural to urban land use."*

The Hearings Officer concurs with the above-quoted Applicant comments. The Hearings Officer finds the Applicant has demonstrated the change in classification is consistent with the purpose and intent of the MUA10 Zone.

**C. That changing the zoning will presently serve the public health, safety and welfare considering the following factors:**

**1. The availability and efficiency of providing necessary public services and facilities.**

**FINDING:** Although there are no disclosed plans to develop the Subject Property, the above criterion specifically asks if the proposed zone exchange will *presently* serve public health, safety, and welfare. The Applicant provided the following response (Burden of Proof, page 20) related to this criterion:

*"Necessary public facilities and services are available to serve the subject property. Will-serve letters from Pacific Power, **Exhibit C** and Avion Water Company, **Exhibit D** show that electric power is available to serve the property.*

*The existing road network is adequate to serve the use. This has been confirmed by the transportation system impact review conducted by Joe Bessman, PE of Transight Consulting, LLC, **Exhibit L** of this application. The property receives police services from the Deschutes County Sheriff. The Marken property is within the boundaries of a rural fire protection district and is close to the City of Bend."*

Adjacent properties on all sides contain dwellings, with the exception of one property that has received approval for a dwelling which has not been constructed yet. 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 northwest corner of the Subject Property is located 0.13 miles from the City of Bend UGB. This close proximity to urban development will allow for, in the future, efficient service provision. The application materials include will-serve letters indicating electrical service and water service are available to the Subject Property.

There are no known deficiencies in public services or facilities that would negatively impact public health, safety, or welfare. Prior to development of the Subject Property, the Applicant would be required to comply with the applicable requirements of the Deschutes County Code, including possible land use permits, building permits, and sewage disposal permits processes. Assurance of adequate public services and facilities will be verified in future land use permitting processes. The Hearings Officer 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 (Burden of Proof, pages 20 & 21) related to this criterion:

*“The application of MUA-10 zoning to the subject property is consistent with the specific goals and policies in the comprehensive plan as shown by the discussion of non-resource land plan policies above.*

*Four EFU-zoned properties lie between the City of Bend and the Marken property. These properties will remain protected for farm use by the EFU zoning district as intended by the goals and policies of the comprehensive plan, including Policy 2.2.1. None of the four properties is, however, engaged in commercial farm use and they, also, appear to be good candidates to be rezoned MUA-10 and designated RREA so that they are positioned to be considered for annexation into the City of Bend...*

*...*

*All other surrounding properties for a distance of .25 miles and more are zoned MUA- 10 and developed with single-family homes on lots that are predominantly much smaller than 10 acres in size. The rezoning of the Marken property will not have impacts that are inconsistent with any specific comprehensive plan goal or policy.”*

In addition to these comments, the Applicant provided specific findings for each relevant Comprehensive Plan goal and policy, which are addressed below the Burden of Proof (pages 15 - 20). These findings are included later in this recommendation in the Findings section titled: DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES, OAR 660-015, Division 15, Statewide Planning Goals and Guidelines. The Hearings Officer incorporates the findings for DIVISION 15, STATEWIDE PLANNING GOALS AND GUIDELINES, OAR 660-015, Division 15, Statewide Planning Goals and Guidelines as additional findings for this criterion.

The Hearings Officer finds Applicant's Comprehensive Plan goal/policy specific findings (Burden of Proof, pages 15 – 20) are reasonable and appropriate, and constitute substantial evidence that this criterion has been met. The Hearings Officer finds the Applicant demonstrated the impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan.

**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 Subject Property from EFU to MUA10 and re-designate the properties from Agriculture to Rural Residential Exception Area. COLW argued that the Applicant had failed to provide substantial evidence in the record that this criterion had been met. COLW (September 6, 2022, page 3) stated the following:

*"There has been no change in circumstances since the property was last zoned. The soils and agricultural suitability of the subject property have also not changed since it was planned and zoned for agricultural use by the County. There has further been no mistake in the current EFU zoning of the subject property. The County embarked on legislative efforts in both 2014 and 2019 to establish whether errors exist in its EFU zoning designations, but concluded both times that no such errors exist. In 2015, the County consulted with Jon Andersen, who was a Senior Planner, and later became the Community Development Department Director, when the County developed its first comprehensive plan. Mr. Andersen confirmed that none of the County's agricultural land designations were made in error. Exhibit 1 (January 15, 2015 Deschutes County Community Development Department notes from phone conversation with John Andersen). DLCD also commented to the County at the time that it was 'unable to determine the nature and scope of the mapping error' of agricultural land designations. Exhibit 2 (January 8, 2015 DLCD letter)."*

The Hearings Officer notes that "DLCD" refers to the *Oregon Department of Land Conservation and Development*. Applicant provided the following responsive comments to COLW's above-quoted evidence and argument (Final Argument, 9/26/2022, pages 12 -14):

*"There are numerous changes in circumstance that merit approval of a zone change and plan amendment for the Marken property. Zoning the Marken property EFU in 1979/1980 was also a mistake because its soils were far less productive than believed at the time. Additionally, zoning Marginal Land believed to be unprofitable to farm was a mistake as shown by the Supreme Court's Wetherell decision. The following are some of the many changes that have occurred since the Marken property was zoned EFU and mistakes that support approval of the Markens' applications:*

- A. *Since the time the property was zoned EFU, a large tract of land zoned EFU has been rezoned MUA-10 (Porter Kelly Burns and Eastside Bend) and annexed to the City of Bend. The residential development area of the Porter Kelly Burns property will be developed at an urban density of 11 units per acre.*

- B. *In 2022, the COID property that adjoins the SE corner of the Marken property was rezoned from EFU to MUA-10. Its plan designation was changed from Agriculture to RREA, Rural Residential Exception Area.*
- C. *The State of Oregon located a short distance due south of the Marken and COID properties obtained County approval to rezone and redesignate 640 acres of land from Agricultural Land and EFU to RREA and MUA-10 by ordinances approved in 2013 and 2018. The land rezoned in 2013 has been annexed to the City of Bend.*
- D. *The adjoining 143 Investments, LLC property (TL 1003, Map 18-12-02) recently received approval of a lot of record dwelling after demonstrating that approximately 86.5% of the soils on that property are LCC VII (Gosney) and VIII (Rock outcrop) nonagricultural soils. NRCS mapping was mistaken in mapping the majority of the 143 Investments property Class 36A, Deskamp loamy sand – the same soil the NRCS erred in mapping as being found on more than 50% of the Marken property.*
- E. *US Census data shows that the population of Deschutes County has increased by at least 336% since the time the County last zoned the Marken property.*
- F. *The potential viability of farming has decreased since 1979/1980 when the Marken property was zoned for farm use. Even when the plan was adopted, it was recognized that farming the area that includes the Marken property was marginal and not likely to produce a profit in money.*
- G. *The Oregon Supreme Court decided the Wetherell case and struck LCDC's administrative rule that defined "farm use" as any agricultural activity that generates gross income.*
- H. *The applicant obtained a more-detailed soils survey that shows that NRCS mapping was in error. This is both a change of circumstances and an error that justify rezoning and redesignating the Marken property.*

*COLW argues no that no mistake or change in circumstances exist to support approval of the Marken applications. This argument is based on the following representation that is not correct:*

*'The County embarked on legislative efforts in both 2014 and 2019 to establish whether errors exist in its EFU zoning designations, but concluded both times that no such errors exist.'*

*The County did not conclude that mapping errors do not exist and the legislative efforts were not designed to establish whether error exist in its EFU zoning designations.*

*COLW offered two documents to support its erroneous assertions –notes of a phone conversation with former CDD Director John Andersen ("Anderson Notes") and a January 8, 2015 letter written by Rob Hallyburton, Community Services Division Manager for DLCD (DLCD letter).*

*The Anderson Notes do not, however, "confirm that none of the County's agricultural land designations were made in error" as is claimed by COLW. The Anderson Notes indicate only that the County relied on what was the best available information available in 1979/1980 – historic soil maps no longer in use that were general and incomplete and information regarding irrigated*



*lands provided by irrigation districts. The Anderson Notes do not say that the County mapping efforts were conducted without error or that soils information was such that it was infallible. The County's 1979 comprehensive plan's Resource Element explains that a "general soil study" was completed in 1973 and that detailed mapping was done only for land north of Bend (not the Marken property). The 1979 plan relied on this general information; not property specific Order 1 soils surveys. Exhibit PH-6. The very general nature of the soils mapping information relied on to apply EFU zoning to the Marken property is evident on the Soils Associations map included in the Resource Element, Exhibit PH-6.*

*Furthermore, as documented by our Post-Hearing Evidence, the County's 2014 and 2019 legislative efforts were not undertaken to determine whether errors exist in its EFU zoning designation. In fact, Deschutes County believed that it was not necessary for it to make such a determination. Exhibit PH-12. The County's 2014 legislative effort was confined to 840 acres of the County. DLCD questioned whether the County would be able to establish that an error in mapping had occurred for the 840 acres but the claim that the County concluded no errors existed is not correct. The 2014 effort was paused by the Board of Commissioners in 2015 with a request for LCDC rulemaking because DLCD and the County held differing views of whether HB 2229 is limited to properties with mapping errors or may be applied more broadly to any resource property based on changed circumstances. Exhibit PH-12, PH-7 (Applicant's PostHearing Evidence).*

*Likewise, the DLCD Letter says that the County's 2014 HB 2229 "re-acknowledgment" effort relates to "several non-contiguous problem areas" – not to the entire County. The letter notes that it was unable to determine the nature and scope of the mapping error the county intends to address in rezoning "the areas the county has shared with the department" (a number of small areas totaling 840 acres). The DLCD Letter clearly does not support COLW's claim that no errors were made by Deschutes County in mapping resource lands.*

*The County's 2019 legislative review revitalized efforts to rezone the 840 acres and to create a zoning district to apply to non-resource lands. The County did not seek to determine whether mapping errors exist in designating resource lands. See, Exhibits PH-3 and PH-6 Considering the Applicant's above response, staff requests the Hearings Officer make specific findings on this issue."*

The Hearings Officer finds the above-quoted Applicant's Final Argument comments, along with the accompanying referenced exhibits, represent credible substantial evidence. The Hearings Officer adopts the above-quoted Applicant comments as the Hearings Officer's findings for this criterion. The Hearings Officer finds, based upon the Applicant's above-quoted comments, that there have been changes in circumstances since the Subject Property was last zoned. Further, the Hearings Officer finds, based upon the Applicant's above-quoted comments and the record as a whole, that the NRCS soil classifications were imprecise (mistaken) and that the Applicant's site-specific soil study accurately represents the correct soil classifications.

## **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:** COLW and Applicant disagree as to whether the Subject Property is Goal 3-defined "Agricultural Land" (see, COLW's 9/6/2022, 9/13/2022 and 9/2022 record submissions and Applicant's Burden of Proof plus Applicant's 9/6/2022, 9/20/2022 and 9/26/2022 record submissions). The "Agricultural Land" issue is closely related to the Applicant and COLW disagreement with respect to whether the Subject Property is "Non-resource Land." The "Agricultural Land" issue is relevant to a number of approval criteria in this case. The Hearings Officer, in these findings for Section 2.2 Agricultural Lands, Goal 1, provides general findings related to the "Agricultural Land" issue.

The Hearings Officer finds that COLW most concisely set forth its "Agricultural Land" evidence and arguments in its 9/6/2022 record submission. The Hearings Officer quotes the relevant COLW comments below:

*"The subject property is agricultural land and protected for exclusive farm use by statewide land use planning Goal 3 because it is predominantly comprised of Class I-VI soils as determined by the NRCS. Goal 3, OAR 660-033-0020(1)(a), DCC 18.040.030. According to the NRCS, the soils of the subject property are predominantly Class III irrigated and Class VI unirrigated, as documented in the application. Application at Exhibit A, Appendix A (NRCS Web Soil Survey).*

*It is also well documented in the application that the property has a long history of farm use, and that the primary purpose of that use has been to obtain a profit. The application readily admits that the applicants obtained the property in 1981 and since then "grew hay and occasionally raised cattle." The application explains that while the profit from those agricultural activities has varied, the applicants made "efforts to make a profit in money by farming the property." Application at 24. The purpose of those agricultural activities was to obtain a profit from raising crops. The property is agricultural land because it has been in farm use for over 30 years.*

*Further, the County's definition of "agricultural use" specifically excludes considerations of profit. DCC 18.04.030 ("Agricultural use" means any use of land, whether for profit or not, related to raising, harvesting and selling crops[.]")*

*The property is additionally in farm use because it contains an impoundment of water. ORS 215.203(2)(b)(G).*

*The applicant's hired soil scientist's study is deficient for excluding "water" and "developed land" from its analysis. Application Exhibit A Figure 4.*

*The soil study further finds that 29 of its observation sites found "conditions most closely matching Deskamp soils" which are Class III irrigated and Class VI unirrigated; and finds that only 24 of its*

observation sites found “conditions mostly closely matching Gosney soils” which are Class VII. Application Exhibit A at page 4. Despite this majority of the soil study’s observations showing Class III/VI soils, the soil study finds a majority of the property as Class VII-VIII. This conclusion cannot be squared with the reported results of the 58 observation locations, which show a majority of Class III/VI Deskamp soils.

*The property currently has 9.49 acres of water rights. The application explains that it used to have 36 acres of water rights, but the applicant chose to sell the majority of those water rights. Application at 26. That choice is now being used to argue that the property’s limited water rights detract from its suitability for agriculture. This applicant’s own willful choice to reduce water availability on the property should not now be considered as a reason the property’s agricultural land status. The applicant could buy back water rights just as readily as they sold them.”*

Applicant, through its Burden of Proof, hearing testimony of attorney Fancher, and its record submissions, addressed each of the “Agricultural Land” issues raised above by COLW. Applicant also provided a Subject Property site-specific soil study/survey (the “Applicant Soil Study”) and supplemental comments provided by Rabe/Valley. The Hearings Officer finds that Applicant’s Final Argument (September 26, 2022 submission), while lengthy, provides a credible and persuasive analysis of the “Agricultural Land” issue. The Hearings Officer includes Applicant’s Final Argument “Agricultural Land” comments below:

**“1. Central Oregon LandWatch’s Claim that Marken Property is Goal 3 “Agricultural Land” based on its NRCS Soils Mapping (COLW Letters of September 6, 2022 and September 20, 2022)**

**Summary of Response:** *The text of Statewide Goal 3 allows counties to rely on soil surveys that are more detailed than soil surveys prepared by the NRCS. ORS 215.211 allows property owners to obtain and submit soil surveys to a county to determine whether land is “Agricultural Land.” DLCD reviews all such surveys. It requires that the surveys be prepared by soils classifiers and that the NRCS (SCS) land capability classification system (LCC Classes I through VIII) be used in the survey. This process provides an exception to LCDC’s rule that says that soils classified LCC I-VI in Eastern Oregon by the NRCS are agricultural land. DLCD’s program and website recognize this fact.*

**Detailed Response:** *COLW repeats an argument that it has made without success before – that the County must rely on NRCS soils mapping work to determine whether land is “Agricultural Land” and that it must disregard the more-detailed soil survey results presented by DLCD approved soils classifier, Brian Rabe. COLW’s argument was presented and rejected by LUBA Page 2 – Applicant’s Final Argument (Marken) in Central Oregon LandWatch v. Deschutes County (Aceti), 74 Or LUBA 156 (2016). It was also presented and rejected in the Swisher plan amendment and zone change application by the County’s hearings officer and Board of Commissioners at pages 28-43 of **Exhibit E** to Ordinance 2022-003 (decision filed 9/6/2022 by Liz Fancher). **PH-10 and PH-11** (Applicant’s Post-Hearing Evidence).*

*In Aceti, COLW argued that the results of an Order 1 soil survey were not supported by substantial evidence because the data in the Order 1 soil survey and the NRCS soil survey conflict. LUBA found*

that OAR 660-033-00030 allows the county to rely on more detailed data on soil capability than provided by NRCS soil maps to define agricultural land provided the soils survey has been certified for use by Deschutes County by DLCD. LUBA also noted that "NRCS maps are intended for use at a higher landscape level and include the express statement "Warning: Soil Ratings may not be valid at this scale." The Order 1 survey prepared by Mr. Rabe for the Markens is a higher order survey than the NRCS survey. This fact was confirmed by DLCD's review of the soil survey, **Exhibit A** (Applicant's Burden of Proof). The Rabe soil survey was approved by DLCD for use by the County to determine whether the Marken Property is "Agricultural Land" as defined by Statewide Goal 3. As a result, COLW's argument lacks merit.

The following is a step-by-step analysis of the applicable law. It shows that LUBA's decision is correct and should be followed by Deschutes County:

1. Goal 3's definition of 'agricultural land' does not say that counties must rely on the soils maps and ratings provided by NRCS soil surveys. Instead, it says that the determination of whether land is agricultural land is based on the soil classes (I-VIII) described in the Soil Capability Classification System of the US Soil Conservation Service.

The following is the relevant part of the Goal 3 definition:

*"Agricultural Land - \*\*\* in eastern Oregon is land predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service \*\*\*"*

The Soil Capability Classification System of the US Soil Conservation Service (now NRCS) is the NRCS Land Capability Classification (LCC) system used to rate soils in classes from Class I to VIII based on soil characteristics. It is described on page 187 of the Soil Survey of Upper Deschutes River Area, Oregon (hereinafter "NRCS Soil Survey"). It is not an NRCS soil survey or survey maps that show the approximate locations of soil mapping units based on the NRCS's "landscape level" soils work. The NRCS mapping is less detailed than Mr. Rabe's Order 1 soil survey.

2. Goal 3 specifically allows local governments to rely on more detailed soils data than provided by the NRCS. It says:

*'More detailed soil data to define agricultural land may be utilized by local governments if such data permits achievement of this goal.'*

*The purpose of Goal 3 is to preserve agricultural land. It is not intended to preserve land that does not meet the definition of "agricultural land."*

3. LCDC administrative rule OAR 660-033-0020(1)(a)(A), Definitions, says that "agricultural land" includes "lands classified (mapped) by the US Natural Resources Conservation Service (NRCS) as predominantly \*\*\* Class I-VI soils in Eastern Oregon." The rule broadens the definition of Agricultural Land provided by Statewide Goal 3 to rely on

*NRCS mapping. This is permissible, however, only if the rule is consistent with Goal 3. Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007) (administrative rule that conflicts with definition of Agricultural Land in Goal 3 is invalid). The rule is consistent with Statewide Goal 3 only if it respects the plain language of the Goal and State law that allows counties to rely on more detailed soils data to determine whether land is "Agricultural Land" in lieu of the less accurate NRCS soils maps.*

4. *The Oregon Legislature adopted ORS 215.211(1) to regulate the more-detailed soil surveys allowed by Goal 3. The statute also assures property owners the right to provide local governments with more detailed soils information than provided by the NRCS's Web Soil Survey to "assist a county to make a better determination of whether land qualifies as agricultural land." ORS 215.211 requires that the soil scientists who conduct the more-detailed assessment be soils classifiers who are certified in good standing with the Soil Science Society of America and who have received approval from DLCD to conduct more-detailed soil surveys. ORS 215.211 also requires that soils reports be reviewed and approved for use by counties by DLCD. Mr. Marken obtained DLCD's permission to rely on the Valley/Rabe soils study to address the question whether his property is "agricultural land."*

*ORS 215.211(5) recognizes the fact that this "additional information" may be used "in the determination of whether land qualifies as agricultural land" and explains that the soils report information does not "otherwise affect the process by which a county determines whether land qualifies as agricultural land. The use of the word "**otherwise**" makes it clear that more-detailed soils information does affect the process of determining whether land is agricultural land.*

5. *LCDC's Goal 3 rules plainly state that property owners may rely on more detailed data to define "agricultural land." The rules require that the more detailed data be related to the NRCS land capability classification system (LCC) which places soils in LCC I-VIII based on their suitability for agricultural use. OAR 660-033-0030(5)(a) states:*

*'(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.**' (emphasis added by Applicant)*

*The fact that this LCDC rule requires that the soils survey report results be based on the NRCS soil classification system (LCC I through VIII) makes it clear that the classifications determined by the survey are intended to be considered by counties when they determine whether land is "Agricultural Land."*

6. *Subsection (5)(b) of OAR 660-033-0030, Identifying Agricultural Land, says:*

*'If a person concludes that **more detailed soils information than that contained in the Web Soil Survey operated by the NRCS**, 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 in OAR 660-033- 0045.'* (emphasis added by Applicant)

Mr. Marken followed the process in OAR 660-033-0045 to obtain permission to provide the County with more detailed soils information about the subject property. He hired a soil scientist certified by DLCD to conduct a more detailed soils study. The Order 1 soils detailed study prepared by soils classifier Brian Rabe relates to the soil classification system of the NRCS as required by OAR 660-033-0030(5)(a). **Exhibit A**, Burden of Proof. The more-detailed Order 1 soil study prepared by soil classifier Brian Rabe was then reviewed and approved for use by Deschutes County by DLCD for the purpose of determining whether the Marken property "qualifies as agricultural land" protected by Statewide Goal 3. **Exhibit A**, Burden of Proof.

7. LCDC rules explain that the more-detailed soils study may be used during the review of a zone change and plan amendment application. OAR 660-033- 0030(5)(c)(A) says that its soils study rules apply to:

*'A change to the designation of a lot or parcel planned and zoned for exclusive farm use to a non-resource plan designation and zone on the basis that such land is not agricultural land.'*

8. DLCD understands that the more detailed soils surveys allowed by Statewide Goal 3 and ORS 197.211 may be used in lieu of NRCS soils surveys. On its website, DLCD explains:

*'Soil mapping done by the USDA Natural Resources Conservation Service (NRCS) is the most common tool used for identifying the types of soils in an area. The NRCS provides a rating for each soil type that indicates how suited the soil is for agriculture. \*\*\**

*NRCS does not have the ability to map each parcel of land, so it looks to larger areas. This means that the map may miss a pocket of different soils. DLCD has a process landowners can use to challenge NRCS soils Page 5 – Applicant's Final Argument (Marken) information on a specific property. Owners who believe soil on their property has been incorrectly mapped may retain a 'professional soil classifier ... certified by and in good standing with the Soil Science Society of America' \*\*\* through a process administered by DLCD. This soils professional can conduct an assessment that may result in a change of the allowable uses for the property.'*

*Exhibit PH-2, pp. 1-2 (Applicant's Post-Hearing Comments).*

9. *The NRCS states, in the Web Soil Survey report provided with the Rabe soils survey, Exhibit A of the Burden of Proof (Appendix A), that:*

*'Although soil survey information can be used for general farm, local, and wider area planning, onsite investigation is needed to supplement this information in some cases. \*\* Great differences in soil properties can occur within short distances.'*

*\* \**

*'The objective of mapping is not to delineate pure taxonomic classes but rather to separate the landscape into landforms or landform segments that have similar use and management requirements. The delineation of such segments on the map provides sufficient information for the development of resource plans. If intensive use of small areas is planned, however, onsite investigation is needed to define and locate the soils and miscellaneous areas.'* Page 13, Appendix A, **Exhibit A** (Applicant's Burden of Proof).

*In the Soil Survey of Upper Deschutes River Area, the NRCS explains on page 16 that the average size of the delineations of soils for the typical higher-level survey (Order 2) provided by NRCS maps is 40 acres and the smallest mapped delineation is five acres. Exhibit PH-1. Mr. Rabe's Order 1 soil survey surveyed the entire Marken property in far greater detail. DLCD's review of the Rabe soil survey confirms that the survey is an Order 1 survey and that it is more detailed than the NRCS soil survey. **Exhibit A**, Burden of Proof, pdf page 2.*

10. *State law, including DLCD's rules and Goal 3, would not allow use of a more-detailed soils survey based on the NRCS soil classification system if the soils classifications provided by NRCS soils studies that utilize the same system at a less detailed less were intended to be unassailable.*

## **II. COLW's Challenge to Expert Evidence Provided by Order 1 Soils Survey (COLW Letters of September 6, 2022 and September 20, 2022)**

**Summary of Response:** *Brian Rabe's soil survey for the Marken property provides substantial evidence upon which the county may rely on to determine whether the Marken property is 'Agricultural Land' as defined by Statewide Goal 3. It has been approved by DLCD for this purpose. It is more-detailed than the NRCS soils survey and it utilizes the NRCS soil classification system as required by OAR 660-033-0030(5)(a).*

*COLW's criticism of Mr. Rabe's professional and expert assessment of soils reflects a lack of understanding of the fundamentals of the soil classification system. COLW's attempt to equate the percentage of observation points documented in the soils report with the percentage of land in each soil classification presents an illogical argument that is thoroughly disproven by the detailed soils map provided with the Rabe study and the text of the Rabe report.*

**Detailed Response:** *Mr. Rabe is an expert soil scientist and soils classifier. He has been qualified by the Department of Land Conservation to conduct more detailed soils surveys for use by the County in determining whether the Marken property is Statewide Goal 3 "Agricultural Land." Mr. Isbell is a lawyer. He has no known expertise or training in soils science. His comments should be considered in that light. Oregon Coast Alliance v. City of Brookings, 72 Or LUBA 222 (2015)(the nature of certain issues may be such that some technical expertise is necessary to provide substantial evidence to support required findings; attorney's opinion that stormwater runoff will not adversely impact salmon is not substantial evidence).*

*Mr. Isbell claims that Mr. Rabe erred by "excluding" water and developed land from his soils survey. Mr. Rabe did not, however, exclude water and developed land from his survey. Instead, Mr. Rabe correctly classified these areas according to the NRCS land capability classification system. This is what he is required to do by OAR 660-033-0030(5)(a), quoted in Section I, Number 5, above.*

*The NRCS soil classification system classifies miscellaneous areas including ponds and urban/developed land Class VIII and this is the classification applied by Mr. Rabe. Mr Rabe explained in his post-hearing comments, Exhibit PH-8 (Applicant's Post-Hearing Evidence):*

*'Miscellaneous areas are addressed in the Soil Survey Manual (USDA/NRCS Soil Survey Staff, 1993). "Miscellaneous areas have essentially no soil and support little or no vegetation . . . Map units are designed to accommodate miscellaneous areas, and most map units named for miscellaneous areas have inclusions of soil." Specifically listed and defined miscellaneous areas include "Urban land (identified as Developed Land in my report) is land mostly covered by streets, parking lots, buildings, and other structures of urban areas." The roadways on this property are mostly paved and, together with the structures and other developed elements, meet the definition of this miscellaneous area. Another applicable miscellaneous area is water. "Water includes streams, lakes, ponds, and estuaries that in most years are covered with water at least during the period warm enough for plants to grow . . ." Rock outcrop is another miscellaneous area. All miscellaneous areas are considered Class VIII.*

*The areas identified and delineated as Water and Developed Land in the sitespecific soil survey are consistent with the definitions in the Soil Survey Manual. Even if, for the sake of argument, the acreage represented by these two map units were excluded from the analysis, the property would still predominantly consist of Class VII and VIII soils. The Water and Developed Page 7 – Applicant's Final Argument (Marken) Land represent 5.19 acres, or 8.67% of the property. Gosney and Rock outcrop represent 52.51% of the remaining acreage.'*

*Mr. Isbell's September 6, 2022 letter then makes the illogical claim that the Rabe soil survey cannot be correct because more of the observation sites listed in the survey reported Class III or VI soils than reported Class VII and VIII soils. Mr. Rabe responded:*



*The analysis by Central Oregon Land Watch misrepresents what was presented in the soil report. "Conditions most closely matching Gosney soils were observed at 24 grid locations and at least 21 additional locations along boundaries between grid points."1 The additional locations were used to refine the boundary conditions between differing grid points (e.g. between 36 and 53, 39 and 42, 43 and 44, etc.). Although the additional locations were not shown on the map or tabulated, they were identified and noted nonetheless. In addition, there are 55 spot symbols (R) for Rock outcrops too small to delineate. The number of observation points identifying Class VII and Class VII conditions were more than 3 times the number of observation points identifying Class VI conditions and fully support the delineated boundaries and associated acreages.*

*Gosney is only given a better rating for irrigation when mapped as a minor component in a complex, such as with Deskamp (Map Unit 38B, Deskamp-Gosney complex, 0 to 8% slopes). In this example, the incidental production from the Gosney acreage is expected to be only 1/3 to 1/2 that of the Deskamp. That equates to 1/3 to 1/2 the gross revenue but with the same expenses for fertilizer, water, power, equipment, and labor. When mapped alone or as the major component of a complex, Gosney is not rated when irrigated. Irrigation of Gosney soils would not change the NRCS rating of this soil and irrigation is an inefficient and inappropriate use of a scarce resource.'*

*On September 20, 2022, Mr. Isbell responded to Mr. Rabe's comments by claiming that the table of test hole location in the Marken soils survey is "the only substantial evidence in the soil scientist report." This claim is not correct. The soils survey sets out Mr. Rabe's expert opinion about the soil types found on the Marken property and the land capability classifications for each soil found. Mr. Rabe's determinations are based on all information gathered during his survey of the Marken property. The results of the survey are reported on a Site Specific Soils Map that delineates the areas of land of each identified soil type. This map is Figure 4 of Exhibit A of the Applicant's Burden of Proof.*

*The NRCS reports soil mapping units using a similar but less detailed map than provided by Mr. Rabe. The NRCS soils survey (included in Rabe report) provides no observation point information whatever. Despite the complete lack of observation point information, COLW argues that the information presented by the NRCS map is reliable and that Mr. Rabe's map is not substantial evidence. It only follows that if the NRCS map is substantial evidence of the information it provides, the same must be true for the more-detailed Rabe soils survey map. It, together with the rest of the Rabe soil survey document, is substantial evidence upon which to find that 61.2% of the subject property is comprised of Class VII and VIII soils classified according to the NRCS soil classification system.*

### **III. COLW Argument that the Marken Pond is a Farm Use**

*COLW argues that the Marken pond is a farm use due to the provisions of ORS 215.203(2)(b)(G). This argument is not correct as applied to the Marken property. Furthermore, even if it were correct, this argument has no bearing on the results of the Rabe soils survey which must be based on the NRCS land capability classification system.*

No agriculture use has been occurring on the Marken property for many years. The use of the property is residential. Ponds are in "farm use" only when "lying in or adjacent to and in common ownership with farm use land." Farm use is defined in ORS 215.203(1) as the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of livestock and similar activities not occurring on the Marken property. As explained further below, the Markens have never engaged in "farm use." They have never believed they would make a profit in money by using their land for agricultural purposes. They hoped they would break even but ended up losing money.

#### **IV. COLW re County Definition of 'Agricultural Use'**

The County Code definition of the term "Agriculture Use" is not relevant to a resolution of the issues presented by this application. The issue presented is whether the Marken property is "Agricultural Land" as defined by Statewide Goal 3; not whether the property is suitable for "agricultural use" as the term is defined by the County. Goal 3 asks whether the Marken property is suitable for "farm use" as defined by ORS 215.203(1) – a use conducted with an intention of making a profit in money.

#### **V. Repurchase of Water Rights**

The applicant is not arguing that the limited water rights appurtenant to the Marken property detract from its suitability for farm use. Instead, as explained in the Rabe soils survey and post-hearing comments, irrigating Class VII and VIII soils will not increase their soil classification and will not make them suitable for farm use. In this case, irrigating more of the property would be a waste of water that is a precious resource in the Deschutes Basin.

#### **VI. COLW's Claim of Long History of Farm Use (September 6, 2022 Letter)**

COLW's claim that the Markens' evidence shows that primary purpose of engaging in agricultural activities was to obtain a profit. This claim is, however, erroneous. The burden of proof does not say, as COLW alleges, that "profit has varied." Instead, it says that unsuccessful efforts were made to make a profit in money by farming the property. This statement was made by the Markens' attorney based on an unwitting and erroneous assumption.

In discussing this specific issue with Mr. Marken, the applicant's attorney learned that the Markens purchased their property hoping to break even on their agricultural activities. They purchased the subject property but did not expect to make a profit. Given the poor soil conditions of the property and the fact that the property was considered marginal farmland by the County's 1979 comprehensive plan, the Markens hope to break even was overly optimistic – hope that quickly evaporated due to an unbroken string of farm losses.

Any reasonable farmer would, like the Markens, consider it unlikely that they would make a profit farming the Marken property due to its extremely poor soils, high cost of inputs and

*extensive amount of rock existing on the property when purchased (rocks have been removed from some areas of the property but it remains unsuitable for 'farm use). The County's 1979 comprehensive plan (see **Exhibit R-3**, Applicant's Rebuttal) classified the subject property Marginal Farm Land which it describes as "land [that] will support agricultural production only if subsidized to some extent." In other words, it is land that is not suitable for 'farm use' as defined by ORS 215.213(1), the Supreme Court's Wetherell decision and Statewide Goal 3.*

*The 1979 Deschutes County Comprehensive Plan's Resource Element (**Exhibit PH-6**) noted that many farmers could only hope to make a profit when selling their property. This situation has not improved over time. The 2017 Census of Agriculture shows that 83.96% of farm operators report significant farm losses that average \$12,866 per year per farm and that a similar situation existed in 2012. This issue is discussed further in Section IX, below.*

*The Markens' experience is mirrored by that of their former neighbor[s], Dick Springer. The Springer family, until recently, owned the 143 Investments, LLC property (TL 1003, Map 18-12-02) that adjoins the west boundary of the Marken property for decades. Mr. Springer explained in comments filed with Deschutes County that Tax Lot 1003 "is too rocky to farm and too small for major, profitable grazing," "barren, rock bound" and "anything but farmland." According to Mr. Springer, due to zone changes "[w]e have become an island with Harold Marken directly to the east of us, between/among the City/UGB and County five acre parcels." Mr. Springer explained that his family typically lost \$8,000 to \$10,000 per year to obtain gross farm income of \$3,000. His effort to grow grass hay resulted in a loss of \$35,000 over a period of two years despite Mr. Springer's reliance on expert advice and his installation of an irrigation pivot system. The prior owner of the property, Bill Tye, also attempted to farm the property and gave up due to the rocky soil conditions. **Exhibit PH-6**, Applicant's Post-Hearing Evidence"*

The Hearings Officer, after considering the COLW and Applicant evidence and arguments, addresses COLW's specific "Agricultural Land" arguments in the following findings.

**COLW ARGUMENT: NCRS soil mapping designations (COLW 9/6/2022 submission – page 1)**

The Hearings Officer finds that the essence of this COLW argument is whether or not the NRCS soil mapping designations constitute the only or the persuasive authority when determining, for Oregon land use planning purposes, the soil classifications of a discrete parcel of real property (such as the Subject Property). The Hearings Officer finds Applicant's above-quoted discussion related to NCRS mapping and site-specific soils study mapping accurately reflects Oregon law. The Hearings Officer finds that the clear and unequivocal language of Goal 3 and OAR 660-033-0030(5) allows Deschutes County and the Applicant to use more detailed soil capability studies, than the NCRS, to determine if a specific parcel/property is "Agricultural Land." (See also, *Wetherell v. Douglas County*, 342 Or 666 (2007) and *Central Oregon Landwatch v. Deschutes County (Aceti)* (2016)).

Applicant employed Rabe/Valley to conduct a site-specific soil study/survey of the Subject Property (the "Applicant Soil Study" - Burden of Proof, Exhibit A). Based upon the review of the record, the Hearings Officer finds Rabe/Valley is a currently certified soil classifier and recognized as such by

DLCD (Burden of Proof, Exhibit A – DLCD Soil Assessment Completeness Review). The Hearings Officer finds that DLCD reviewed the Applicant Soil Study and found that it met all OAR 660-033-0030 requirements (Burden of Proof, Exhibit A). The Hearings Officer finds that the Applicant Soil Study utilized the required NCRS land capability system (“LCC”). The Hearings Officer finds that the Applicant Soil Study is a more detailed site-specific analysis of the soil conditions and classifications at the Subject Property than the NCRS soil survey. The Hearings Officer finds the County may rely upon the detailed site-specific Applicant Soil Study in determining whether or not the Subject Property is “Agricultural Land.”

**COLW ARGUMENTS: History of Farm Use & Impoundment of Water  
(COLW 9/6/2022 submission, pages 1 and 2)**

COLW, in its 9/6/2022 submission, stated the following:

*“It is also well documented in the application that the property has a long history of farm use, and that the primary purpose of that use has been to obtain a profit. The application readily admits that the applicants obtained the property in 1981 and since then “grew hay and occasionally raised cattle.” The application explains that while the profit from those agricultural activities has varied, the applicants made “efforts to make a profit in money by farming the property.” Application at 24. The purpose of those agricultural activities was to obtain a profit from raising crops. The property is agricultural land because it has been in farm use for over 30 years.”*

The Hearings Officer finds COLW did not reference any legal authority that would empower the Hearings Officer to conclude the Subject Property is “Agricultural Land” on the sole basis that it has a long *history* of “farm use.” The Hearings Officer finds that COLW’s historical use argument could possibly be relevant to the COLW “primary purpose is profit” or Goal 3; OAR 660-033-0020(1)(b) arguments. The Hearings Officer discusses those arguments in findings below.

The Hearings Officer takes notice of the ORS 215.203 (2)(a) definition of “farm use” which, in part, states the following:

*“As used in this section, ‘farm use’ means the **current employment** of land for the primary purpose of obtaining a profit in money by...harvesting and selling crops...” (bolding emphasis added by the Hearings Officer)*

The Hearings Officer finds that “farm use,” as defined by ORS 215.203(2)(a), means the **current employment** of land *not* the **historical** employment of land. “Current employment” is defined in ORS 215.203(2)(b) by a listing of very specific activities (or, non-activities). The Hearings Officer finds that COLW did argue that the Subject Property is being used for a specific activity that meets the current employment of land requirement of ORS 215.203(2)(a). Specifically, COLW argued that the existence of a water impoundment on the Subject Property is a ORS 215.203(2)(b)(G) current use of land.<sup>2</sup>

---

<sup>2</sup> COLW, in its 9/6/2022 submission, made the following statement: “The property is additionally in farm use because it contains an impoundment of water. ORS 215.203(2)(b)(G).”

Applicant responded with the following comments related to COLW's ORS 215.203(2)(b)(G) water impoundment argument as follows:

*"COLW argues that the Marken pond is a farm use due to the provisions of ORS 215.203(2)(b)(G). This argument is not correct as applied to the Marken property. Furthermore, even if it were correct, this argument has no bearing on the results of the Rabe soils survey which must be based on the NRCS land capability classification system.*

*No agriculture use has been occurring on the Marken property for many years. The use of the property is residential. Ponds are in "farm use" only when "lying in or adjacent to and in common ownership with farm use land." Farm use is defined in ORS 215.203(1) as the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of livestock and similar activities not occurring on the Marken property. As explained further below, the Markens have never engaged in "farm use." They have never believed they would make a profit in money by using their land for agricultural purposes. They hoped they would break even but ended up losing money."*

The Hearings Officer concurs with Applicant's above-quoted comments and incorporates them as findings for this COLW Argument. In addition, the Hearings Officer finds that the plain language of ORS 215.203(2)(b)(G) refutes the COLW "water impoundment" argument. ORS 215.203(2)(b)(G) says that "current employment" of land for farm use includes:

*"Water impoundments lying in or adjacent to and in common ownership with farm use land."*

The Hearings Officer finds that Applicant does not dispute there is a pond on the Subject Property and does not dispute that the pond is a water impoundment as described in ORS 215(2)(b)(G). The Hearings Officer finds the Subject Property is not "farm use" land, per ORS 215.203 (2)(a), because the Subject Property is not currently being employed for the primary purpose of obtaining a profit from engaging in farm related activities. The Hearings Officer incorporates, as additional findings for this COLW argument, the findings for COLW Argument: Primary Purpose is Profit. The Hearings Officer finds that that the Subject Property water impoundment (pond) does not lay in or adjacent to and in common ownership with "farm use" land. The Hearings Officer finds that the COLW water impoundment argument is not persuasive.

The Hearings Officer finds COLW's only reference to the pond (water impoundment) and ORS 215.203(2)(b)(G) is the quoted statement above (COLW, 9/6/2022, page 2 – see footnote 2 above). Therefore, as alternative findings, the Hearings Officer notes that COLW did not provide the Hearings Officer, Applicant or any participant in this case even a basic analysis of ORS 215.203(2)(b)(G) in the context of the Subject Property. Therefore, the Hearings Officer finds that COLW failed to present any persuasive legal support for its Impoundment of Water (ORS 215(2)(b)(G)) argument. The Hearings Officer finds that COLW's Impoundment of Water argument

was not sufficiently developed and supported to allow the Hearings Officer to authoritatively make a decision. The Hearings Officer finds COLW's Impoundment of Water argument is not persuasive.

**COLW ARGUMENT: Primary Purpose is Profit (COLW 9/6/2022 submission, pages 1 and 2)**

The Hearings Officer incorporates the findings for the preceding section (COLW ARGUMENTS: History of Farm Use & Impoundment of Water) as additional findings for this COLW Argument.

As noted above, ORS 215.203(2)(a), includes the following language:

*"As used in this section, 'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by...harvesting and selling crops..."*

The Hearings Officer finds the **current employment** of the Subject Property is not for the primary purpose of growing/harvesting any crop or any other activity described in ORS 215.203(2)(a).

The Hearings Officer incorporates as additional findings for this COLW Final Argument the quoted sections of the above-quoted Applicant's Burden of Proof statements related to soil fertility, suitability for grazing, climate, and existing and future availability of water for farm irrigation purposes (Burden of Proof, pages 24 – 26). The Hearings Officer interprets Applicant's Burden of Proof statements as credible and substantial evidence that the Applicant did not farm the Subject Property for the primary purpose of making a profit. The Hearings Officer finds, based upon the evidence in the record, that Applicant's intent or purpose of farming the Subject Property, in the past, was to break even financially. The Hearings Officer also finds no persuasive evidence in the record that either the Subject Property or any adjacent or nearby parcel of real property is being farmed for the primary purpose of making a net profit.

The Hearings Officer finds, based upon the record of this case, that the Subject Property is not currently employed for the primary purpose of obtaining a profit from raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the production of livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use.

**COLW Argument: DCC 18.04.030 (COLW 9/6/2022 submission, page 2)**

COLW, in its 9/6/2022 submission, made the following statement:

*"... the County's definition of 'agricultural use' specifically excludes considerations of profit. DCC 18.04.030 ('Agricultural use' means any use of land, whether for profit or not, related to raising, harvesting and selling crops[.]")"*

Applicant, in its Final Argument quoted above (section VI. COLW re County Definition of 'Agricultural Use'), asserted that the County definition of "Agricultural Use" is not relevant to this case/application. The Hearings Officer agrees with Applicant's statement that the issue in this case is whether or not

the Subject Property is “Agricultural Land” under Goal 3. Determining if a Goal 3 exception is required is the issue to be decided; not whether DCC 18.04.030 is satisfied.

The Hearings Officer finds the Oregon Supreme Court’s *Wetherell* analysis clearly pointed out that if there is a conflict between the language of the statute (ORS 215.203) and enabling regulation (OAR 660-033-030(5)), the statute prevails. In this instance a relevant statute (ORS 215.203) includes reference to obtaining a profit and a County Code section (DCC 18.04.030) states “agricultural use” means “any use of land, whether for profit or not...” The Hearings Officer finds that the “Agricultural Land” or “agricultural use” issue must be decided consistent with the relevant ORS 213.203 statutory language and not by a contrary/conflicting DCC 18.04.030 provision.

The Hearings Officer concurs with and adopts as the Hearings Officer findings the Applicant’s analysis quoted above (section VI. COLW re County Definition of ‘Agricultural Use’). The Hearings Officer finds COLW’s DCC 18.04.030 argument is not persuasive.

**COLW Argument: Soil Study Excluded “Water” and “Developed Land.”  
(COLW 9/6/2022 submission, page 2)**

COLW, in its 9/6/2022 submission, made the following statement:

*“The applicant’s hired soil scientist’s study is deficient for excluding “water” and “developed land” from its analysis. Application Exhibit A Figure 4.”*

The Hearings Officer incorporates as findings for this COLW argument the Applicant’s above-quoted comments related to “water” and “developed land” (Section II. COLW’s Challenge to Expert Evidence Provided by Order 1 Soils Survey). Applicant also provided a post hearing record submission (Applicant’s Post-Hearing Evidence, Exhibit PH-8) addressing this COLW assertion.

*“Miscellaneous areas are addressed in the Soil Survey Manual (USDA/NRCS Soil Survey Staff, 1993). ‘Miscellaneous areas have essentially no soil and support little or no vegetation . . . Map units are designed to accommodate miscellaneous areas, and most map units named for miscellaneous areas have inclusions of soil.’ Specifically listed and defined miscellaneous areas include ‘Urban land (identified as Developed Land in my report) is land mostly covered by streets, parking lots, buildings, and other structures of urban areas.’ The roadways on this property are mostly paved and, together with the structures and other developed elements, meet the definition of this miscellaneous area. Another applicable miscellaneous area is water. “Water includes streams, lakes, ponds, and estuaries that in most years are covered with water at least during the period warm enough for plants to grow . . .” Rock outcrop is another miscellaneous area. All miscellaneous areas are considered Class VIII.*

*The areas identified and delineated as Water and Developed Land in the site-specific soil survey are consistent with the definitions in the Soil Survey Manual. Even if, for the sake of argument, the acreage represented by these two map units were excluded from the analysis, the property would still predominantly consist of Class VII and VIII soils. The Water and Developed Land*

*represent 5.19 acres, or 8.67% of the property. Gosney and Rock outcrop represent 52.51% of the remaining acreage."*

The Hearings Officer finds COLW's assertion that Applicant excluded "water" and "developed land" from the Applicant Soil Study is a mere allegation unsupported by substantial evidence or persuasive legal argument. The Hearings Officer finds Applicant's above-quoted Final Argument comments and the Rabe/Valley post hearing comments to be credible and persuasive. The Hearings Officer finds that Rabe/Valley did consider "water" and "developed land" in the Applicant Soil Study. The Hearings Officer finds COLW's Soil Study Excluded "Water" and "Developed Land" argument is not persuasive.

### **COLW ARGUMENT: Predominant Soils (COLW 9/6/2022 submission, page 2)**

COLW, in its 9/6/2022 submission, made the following statement:

*"The soil study further finds that 29 of its observation sites found 'conditions most closely matching Deskamp soils' which are Class III irrigated and Class VI unirrigated; and finds that only 24 of its observation sites found 'conditions mostly closely matching Gosney soils' which are Class VII. Application Exhibit A at page 4. Despite this majority of the soil study's observations showing Class III/VI soils, the soil study finds a majority of the property as Class VII-VIII. This conclusion cannot be squared with the reported results of the 58 observation locations, which show a majority of Class III/VI Deskamp soils."*

COLW also addressed the issue of "predominant soils" in a 9/20/2022 record submission. The Hearings Officer considered both the COLW 9/6/2022 statements quoted above and the COLW 9/20/2022 submission in making these findings.

Applicant, in its above-quoted comments (Section II. COLW's Challenge to Expert Evidence Provided by Order 1 Soils Survey – pages 5 to 8 of the Final Argument), responded to COLW's Predominant Soils arguments. Rabe/Valley responded to COLW's Predominant Soils arguments in a September 12, 2022, email (Applicant's Post-Hearing Evidence, Exhibit PH-8). In relevant part, Rabe/Valley stated, in Exhibit PH-8, the following:

*"The analysis by Central Oregon Land Watch misrepresents what was presented in the soil report. 'Conditions most closely matching Gosney soils were observed at 24 grid locations and at least 21 additional locations along boundaries between grid points.' The additional locations were used to refine the boundary conditions between differing grid points (e.g. between 36 and 53, 39 and 42, 43 and 44, etc.). Although the additional locations were not shown on the map or tabulated, they were identified and noted nonetheless. In addition, there are 55 spot symbols (R) for Rock outcrops too small to delineate. The number of observation points identifying Class VII and Class VI conditions were more than 3 times the number of observation points identifying Class VI conditions and fully support the delineated boundaries and associated acreages.*

*Gosney is only given a better rating for irrigation when mapped as a minor component in a complex, such as with Deskamp (Map Unit 38B, Deskamp-Gosney complex, 0 to 8% slopes). In this*



*example, the incidental production from the Gosney acreage is expected to be only 1/3 to 1/2 that of the Deskamp. That equates to 1/3 to 1/2 the gross revenue but with the same expenses for fertilizer, water, power, equipment, and labor. When mapped alone or as the major component of a complex, Gosney is not rated when irrigated. Irrigation of Gosney soils would not change the NRCS rating of this soil and irrigation is an inefficient and inappropriate use of a scarce resource."*

The Hearings Officer reviewed the Rabe/Valley Applicant Soil Study (Application Materials, Exhibit A). The Hearings Officer finds that DLCD conducted a Soil Assessment Completeness Review and concluded that the Applicant Soil Study was "complete and consistent with reporting requirements." The Hearings Officer finds the Applicant Soil Study was conducted by Rabe/Valley; a currently certified soil scientist/classifier. The Hearings Officer finds the opinions and conclusions of Rabe/Valley should be considered as opinions and conclusions of an expert soil scientist/classifier.

Isbell, an attorney representing COLW and the person making the above-quoted COLW comments, objected to "predominant soils" conclusions made by Rabe/Valley. Isbell argued that the percentage of soils (i.e., LLC Class IV, V, VI or VII, etc.) should be based on data points used by Rabe/Valley. Specifically, Isbell argued that the Rabe/Valley general characterization of soil types as either Deskamp or Gosney provided the correct basis to determine which LLC soil class or classes were predominant. Isbell also argued that the Rabe/Valley comments contained in Exhibit PH-8 related to "additional locations" did not constitute "substantial evidence." Isbell argued that the "additional locations" were not shown on the Applicant Soil Study map and therefore not "actually analyzed for their capability."

Applicant argued that the Isbell comments were made by a lawyer who had not provided, into the record, any evidence that he (Isbell) was also trained or had special expertise in the preparation, interpretation or technically critiquing soil studies. Citing *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015) Applicant included the following statement:

*"The nature of certain issues may be such that some technical expertise is necessary to provide substantial evidence to support required findings; attorney's opinion that stormwater runoff will not adversely impact salmon is not substantial evidence."*

The Hearings Officer finds Isbell provided no evidence in the record that he is qualified in the science of soil analysis and classification. The Hearings Officer finds that Isbell provided no persuasive evidence to support his statement that the utilization of only the raw number of data points is a justified technique (i.e., by reference to recognized soil scientist industry conventions or standards). The Hearings Officer finds that Isbell's opinion related to the use of the raw number of data points as the appropriate technique/method in determining soil classifications, in this case, is not substantial evidence of the actual soil classifications at the Subject Property.

The Hearings Officer finds that Rabe/Valley is a qualified soil classifier. The Hearings Officer finds, following review of the Applicant Soil Study and the September 12, 2022 supplemental submission (Exhibit PH-8), that the methods used by Rabe/Valley are reasonable and appropriate. The Hearings Officer finds that the Rabe/Valley soil classification conclusions reached in the Applicant Soil Study constitute credible and substantial evidence in this case. The Hearings Officer finds the Rabe/Valley

September 12, 2022 supplemental submission (Exhibit PH-8) provided a rational and plausible response to Isbell's Predominant Soils arguments. The Hearings Officer finds the Rabe/Valley conclusion (Application Materials, Exhibit A, page 7) that "36.62 acres, or 61.2%, of the Site consists of Class VII and Class VIII soils" is supported by substantial evidence in the record.

**COLW ARGUMENT: Water Rights (COLW 9/6/2022 submission, page 2)**

COLW, in its 9/6/2022 submission, made the following statement:

*"The property currently has 9.49 acres of water rights. The application explains that it used to have 36 acres of water rights, but the applicant chose to sell the majority of those water rights. Application at 26. That choice is now being used to argue that the property's limited water rights detract from its suitability for agriculture. This applicant's own willful choice to reduce water availability on the property should not now be considered as a reason the property's agricultural land status. The applicant could buy back water rights just as readily as they sold them."*

The Hearings Officer is uncertain as to what, if any, relevant approval criterion is being addressed by COLW in the above-quoted comments. The Hearings Officer finds that COLW failed to provide into the record, with sufficient specificity, evidence or legal argument related to the COLW Water Rights issue.

In the alternative, the Hearings Officer finds that the current status at the Subject Property is that it owns 9.49 acres of water rights. The Hearings Officer finds that evidence of water rights held by the Subject Property, in the past, is not relevant to making the current decision as to whether the Subject Property is "Agricultural Land."

**COLW ARGUMENT: Goal 3; OAR 660-033-0020(1)(b) (COLW 9/13/2022 submission, page 1)**

COLW, in its 9/13/2022 submission, made the following statement:

*"In addition to the reasons we explained in our September 6, 2022 submittal, the subject property is also "agricultural land" and protected by Goal 3 because it is a farm unit. The definition of "agricultural land" at OAR 660-033-0020(1)(b) includes land that may include some soils Class VI-VIII when that land is intermingled with soils Class I-VI in a farm unit:*

*'(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;' (OAR 660-033- 0020(1)(b))*

*Oregon courts have interpreted the meaning of this rule, finding that the history of farm operations on a parcel and whether there is a significant obstacle to resuming farm operations are key factors in determining whether land is a "farm unit" for purposes of OAR 660-033-0020(1)(b):*

*'[W]hen farm operations have recently ceased on a parcel that historically has been used for farming operations with other lands as part of a single 'farm unit,' the parcel is within the unit unless the applicant can demonstrate circumstances—the most important of 2 which is whether there is a significant obstacle to resumed joint operation—that dictate a contrary result.'* (Wetherell v. Douglas County, 235 Or App 246, 260, 230 P3d 976, 984 (2010), rev den, 349 Or 57 (2010))

*Here, the subject property was historically used for farm operations for decades as one single farm unit operation, as documented in the application, and only recently ceased. Now, the applicant argues that because its hired soil scientist found portions of the subject property as having Class VII-VIII soils, which are intermingled with Class I-VI soils, those portions of the subject property cannot be cropped or grazed and should not be identified as agricultural land. The "farm unit" rule at OAR 660-033-0020(1)(b) specifically precludes that conclusion.*

*Further, the application's response to this criterion fails to identify any significant obstacle that would prevent resumed operation of the farming operation on the subject property. Instead, the application argues this rule does not apply: "This rule does not apply here because the Markens are seeking to rezone an entire farm tract rather than a part of it." Application at 27. Although some cases applying the "farm unit" rule have dealt with factual circumstances where a parcel had previously been part of a larger farm unit operation, there is nothing in the rule limiting the rule to those circumstances. The 59.1 acre property here has been a single farm unit operation for decades, and OAR 660-033-0020(1)(b) requires it remain agricultural land protected by Goal 3."*

Applicant responded to the COLW above-quoted Goal 3; OAR 660-033-0020(1)(b) comments (Final Argument, pages 16 & 17) as follows:

*"The Wetherell v. Douglas County, 235 Or App 246, 230 P3d 976 (2010) rev den 349 Or 57 (2010)(Wetherell/Garden Valley) case cited by COLW applies the farm unit rule to a part of a farm property that had been removed from a farm tract and operated separately that had been operated profitably before being divided. According to DLCD, the rule is 'a rule designed to address a parcel's relationship to surrounding land' – 'by its location with respect to neighboring land in certain soil classes and its relationship to those lands as a farm unit.' Wetherell/Garden Valley, 235 Or App at 256. The Wetherell/Garden Valley court applied this purpose to interpret the meaning of the rule. With this in mind, it is clear that the farm unit rule prevents the rezoning of land that was a part of and then removed from a tract of land employed in 'farm use.' This is how the rule has been applied by Oregon's appellate courts. Given this intent, it would be erroneous for the County to apply the farm unit rule to the Marken property because it has not since the later half of the 1970s [been] farmed in conjunction with other area properties. [footnote omitted]*

*The Oregon Supreme Court has stated, when applying a tract analysis to EFU farm land, that "the philosophy of SB 101 was 'to keep the economical farm units intact.'" Smith v. Clackamas County, 313 Or 519, 836 P2d 716 (1992). In the case of the entire unit of land that the Markens attempted to farm is before the County for rezoning in its entirety. It is not a part of an 'economical farm unit' that merits protection by the farm unit rule. The land, in its entirety, does not meet Goal 3's*

*definition of Agricultural Land.*

*In Meyer v. Lord, 37 Or App 59, 586 P2d 367(1978)(“Meyer”), the Court of Appeals laid the groundwork for the ‘farm unit’ rule. The Court held that a 70-acre parcel of a 250-acre commercial farm that might not by itself be an economically profitable farm unit is within the definition of ‘farm use’ if employed as part of a ‘profit-capable farming operation.’ The purpose of this approach was to assure that an unproductive part of a farm unit is not considered for rezoning as an isolated tract. In this case, all land the Markens attempted to farm is proposed for rezoning. All of it is not productive farm land.*

*The farm unit rule is an LCDC rule. It supplements Goal 3. The rule says that it applies when ‘land’ is ‘adjacent and intermingled’ within a farm unit. The term ‘land’ is not defined but, as it has been applied by appellate courts, it means a parcel or area of land that is or was a part of a larger farm property proposed to be rezoned without addressing the zoning of the rest of the tract that has historically been engaged in farm use. It is not applied to convert the results of a soils survey from a mix of Class I-VI soils and VII-VII soils into 100% Class I-VI soils/Agricultural Land.*

*COLW’s argues that the farm unit rule should be applied to any piece of property proposed for rezoning from EFU to a nonresource zoning district. This, however, differs from how the rule has been applied and is inconsistent with the intent of the rule. It is also an interpretation conflicts with and renders meaningless the predominance test set out in Goal 3. An interpretation of an LCDC rule must be consistent with Goal 3 or it will not be applied by Oregon courts. Wetherell v. Douglas County, 204 Or App 732, 132 P3d 41 (2005), *aff’d* and *reversed* 342 Or 666, 160 P3d 614 (2007). When the farm unit rule is applied to parcels removed from a larger ‘profit-capable’ farm unit, Oregon courts have held that it is. When the rule is applied to a single tract of land like the Marken property, it is not consistent with Goal 3 or the intent of the rule set out in Meyer. [footnote: We have found no appellate court case that applies the farm unit rule in any situation other than one where a unit of ‘land’ was removed from a tract of land that was used in one farm operation and then proposed for rezoning. Deschutes County has declined to apply the rule as requested by COLW in prior decisions. [footnote: Deschutes County has declined to apply the farm unit rule to applications where the entire unit of land formerly used for agricultural activities was before it for rezoning/redesignation. The ‘farm unit’ rule issue was an issue and was addressed in two cases with similar facts to those presented by the Marken application (prior unsuccessful farm use and a mix of Class VI and VII/VIII soils): Kelly Porter Burns (adjoins N boundary of Marken) and Eastside Bend (property touches NE corner of Marken).*

*To read the farm unit rule to apply within the boundaries of land proposed for rezoning if any Class VI-VIII soils are present and any effort was to farm it would render the predominance soils test used by Goal 3 to define ‘Agricultural Land’ meaningless. To do so would replace the predominance test of the Goal (over 50%) with a 100% rule of DLCD’s own making for essential any EFU-zoned property because few if any EFU-zoned properties are comprised 100% of Class VII and VIII soils.”*

The Hearings Officer adopts as additional findings for this section the above-quoted Applicant Final Argument comments. The Hearings Officer finds that the above-quoted Applicant Final Argument

comments related to OAR 660-033-020 (b) are legally correct. The Hearings Officer finds the Subject Property to be a single tract of land that is not, because of soil classifications, Goal 3 “Agricultural Land.” The Hearings Officer finds that the Subject Property is not adjacent to or intermingled with one/more “farm unit” unit as defined by Oregon law. The Hearings Officer finds COLW’s Goal 3; OAR 660-033-0020(1)(b) argument is not supported by substantial evidence or persuasive legal argument contained in the record of this case.

***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 Property 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 Subject Property from Agricultural to Rural Residential Exception Area and rezone the Subject Property from EFU to MUA10. The Applicant did not seek an exception to Goal 3 – Agricultural Lands, but rather sought to demonstrate that the Subject Property does not meet the state definition of “Agricultural Land” as defined in Statewide Planning Goal 3 (OAR 660-033-0020).

The Applicant provided the following response in its Burden of Proof (pages 15 & 16):

*“This plan policy has been updated to specifically allow non-resource land plan and zone change map amendments on land zoned EFU. The applicant is seeking a comprehensive plan amendment from Agriculture to RREA and a zone change from EFU-TRB to MUA-10 for non-resource land. This is the same change approved by Deschutes County in PA-11-1/ZC-11-2 on land owned by the State of Oregon (DSL) on a property with a significantly lower percentage of Class VII and VIII soils. In findings in the decision attached as Exhibit G, 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 (emphasis added).

*The Wetherell court held that when deciding whether land is agricultural land "a local government may not be precluded from considering the costs or expenses of engaging in those activities." Wetherell, 342 Or at 680. In this case, the applicant has shown that the subject property is primarily composed of Class VII and VIII nonagricultural soils making farm-related endeavors, including livestock grazing, unprofitable. The property is not currently employed in any type of agricultural activity and prior efforts at farming were unprofitable. The property is not forest land. Accordingly, this application complies with Policy 2.2.3."*

The Hearings Officer adopts and incorporates as additional findings for this policy the findings for Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1, *Preserve and maintain agricultural lands and the agricultural industry* (findings related to COLW specific arguments). The Hearings Officer finds the above-quoted Applicant Final Argument statements to be credible and persuasive. The Hearings Officer finds that Applicant provided evidence in the record adequately addressing whether the Subject Property qualified as non-resource land. The Staff also noted that the Applicant provided evidence in the record addressing whether the Subject Property qualifies as non-resource land. The Hearings Officer, based upon the incorporated findings (Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1, *Preserve and maintain agricultural lands and the agricultural industry*), the above-quoted Applicant Final Argument statements, and the Staff Report comments referenced above, finds that the Subject Property is not Goal 3 "Agricultural Land" and does not require an exception to Goal 3 under state law.

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

**FINDING:** This plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations. Staff, in the Staff Report (page 16) indicated that it concurred with Applicant's conclusion that this application was consistent with prior County determinations in similar plan amendment and zone change applications. The Hearings Officer agrees with these Staff comments. The Hearings Officer finds that Applicant's proposal in this case 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 asserted that the Subject Property was not accurately designated as “Agricultural Land”. Restated, the Applicant asserted that the NRCS map soil designations did not accurately reflect the actual soil conditions on the Subject Property. The Applicant, through the Applicant Soil Study, demonstrated that the Subject Property was not Goal 3 “Agricultural Land.”

The Hearings Officer adopts and incorporates as additional findings for this policy the findings for Chapter 2, Resource Management, Section 2.2 Agricultural Lands, *Goal 1, Preserve and maintain agricultural lands and the agricultural industry* (findings related to COLW specific arguments). The Hearings Officer also adopts and incorporates as additional findings for this policy the findings for Policy 2.2.3. The Hearings Officer finds approval of Applicant’s application in this case would accurately reflect the actual soil conditions at the Subject Property. The Hearings Officer finds that approval of Applicant’s application would accurately reflect the fact that the Subject Property is not Goal 3 “Agricultural Land.” 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 Hearings Officer finds that 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 (i.e., conditional use permit, tentative plat). The Hearings Officer finds that this criterion does not apply to the application in this case.

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. Staff noted, in the Staff Report (page 17), that no LM Combining Zone applies to the Subject Property at this time. Furthermore, no new development is proposed under the present application. The Hearings Officer finds that these provisions of the plan 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 in the language set forth above. The Applicant provided the following response to this section in its Burden of Proof (page 18):

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

*This section makes it clear, however, that EFU-zoned land with poor soils adjacent to rural residential development is expected to be rezoned for rural residential development during the planning period. The subject property has poor soils and it adjoins rural residential areas and uses on three sides. The property that adjoins the Marken property to the north is pending annexation to the City of Bend for the development of affordable housing."*



Staff noted that the MUA10 Zone is a rural residential zone and, as discussed in previous findings, is located adjacent to properties to the north, east and south that are zoned MUA10. One of these surrounding MUA10 properties has received approval for a Comprehensive Plan Amendment and Zone Change to be included in the City of Bend UGB. This property is identified on Assessor's Map 17-12-35 as Tax Lot 1500, and is located to the north of the Subject Property, across Bear Creek Road. Staff noted this policy also references the soil quality. Soil quality is discussed in the findings for Chapter 2, Resource Management, Section 2.2 Agricultural Lands, *Goal 1, Preserve and maintain agricultural lands and the agricultural industry.*

The Hearings Officer finds that this policy is not an approval criterion applicable to this case. The Hearings Officer finds this policy is aspirational. Further, the Hearings Officer incorporates the findings for Chapter 2, Resource Management, Section 2.2 Agricultural Lands, *Goal 1, Preserve and maintain agricultural lands and the agricultural industry.* The Hearings Officer finds that even if this policy is determined to apply, the incorporated findings adequately address the policy.

### 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 its Burden of Proof (page 18 & 19):

*"The quoted language is a part of the background text of the County's comprehensive plan. It is not a plan policy or plan goal written to guide the review of zone change and plan amendment applications. It does, however, recognize the fact that a Rural Residential Exception Area designation is an appropriate plan designation to apply to nonresource lands.*

*As LUBA and the Oregon Supreme Court recognized in the Wetherell decision, there are two ways a county can justify a decision to allow non-resource use of land previously designated and zoned*

*for farm or forest uses. The first is to take an exception to Goal 3 and Goal 4 and the other is to adopt findings that demonstrate the land does not qualify either as forest lands or agricultural lands under the statewide planning goals. Here, the applicant is pursuing the latter approach.”*

The Hearings Officer incorporates the Applicant’s above-quoted statements as findings for this policy. The Hearings Officer finds Applicant sought to demonstrate that the Subject Property was nonrecourse land. The Hearings Officer adopts and incorporates the findings for Chapter 2, Resource Management, Section 2.2 Agricultural Lands, *Goal 1, Preserve and maintain agricultural lands and the agricultural industry* as additional findings for this policy. The Hearings Officer also adopts and incorporates as additional findings for this policy the findings for Policy 2.2.3.

The Hearings Officer takes note that Staff agreed (Staff Report, pages 18 & 19) with prior Deschutes County Hearings Officers’ interpretations and decisions which concluded that the above language is not a policy and does not require an exception to the applicable Statewide Planning Goal 3. The Hearings Officer agrees with this Staff approach and conclusion. The Hearings Officer finds that the proposed RREA plan designation is the appropriate plan designation to apply to the Subject Property.

#### Section 3.7, Transportation

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

...

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

...

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

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

- (7) **“Forest lands” as defined in Goal 4 are those lands acknowledged as forest lands, or, in the case of a plan amendment, forest lands shall include:**
- (a) **Lands that are suitable for commercial forest uses, including adjacent or nearby lands which are necessary to permit forest operations or practices; and**
  - (b) **Other forested lands that maintain soil, air, water and fish and wildlife resources.**

**FINDING:** The Applicant provided the following response to Goal 4 in their burden of proof:

*“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 as the term is defined by OAR 660-005-0010. That rule says that lands suitable for commercial forest use and protection under Goal 4 shall be identified using NRCS soils survey mapping to determine the average annual wood production figures. The NRCS maps the subject property as soil mapping units 364 and 58C. The NRCS Soils Survey of the Upper Deschutes River lists all soils mapped by its survey that are suitable for wood crop production in Table 8. Neither 36A nor 58C soils are soil mapping units the NRCS considers suitable for wood crop production because neither is listed on Table 8 as such.”*

The Subject Property is not zoned for forest lands, nor are any of the properties within a 3.5-mile radius. The Subject Property does not contain merchantable tree species and there is no evidence in the record that the Subject Property has been employed for forestry uses historically. The Hearings Officer finds that the Subject Property does not qualify as forest land.

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

**FINDINGS:** The Hearings Officer incorporates as additional findings for this section the findings for Chapter 2, Resource Management, Section 2.2 Agricultural Lands, *Goal 1, Preserve and maintain agricultural lands and the agricultural industry*. The Hearings Officer also adopts and incorporates as additional findings for this policy the findings for Policy 2.2.3. In addition, the Hearings Officer finds that the Staff proposed findings set forth in the Staff Report (pages 20-34), except as modified or supplemented by the Hearings Officer in this recommendation, are factually and legally correct. The Hearings Officer includes (unedited) the Staff Report proposed findings from pages 20-34 as additional findings for Division 33 – Agricultural Lands & Statewide Planning Goal 3 – Agricultural Lands.

## Quoted Staff Report Findings (Pages 20-34)

"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.***

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 Oregon[footnote omitted];***

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

*ORS 215.211 grants a property owner the right to rely on more detailed information than provided by the NRCS Web Soil Survey of the NRCS to "assist the county to make a better determination of whether land qualifies as agricultural land." Statewide Goal 3, discussed above, and OAR 660-033-0030(5) also allow the County to rely on the more detailed and accurate information by a higher order soil survey rather than information provided by the NRCS. The law requires that this survey use the NRCS soil classification system in conducting the survey, making it clear that the point of the survey is to provide better soil classification information than provided by the NRCS for use in making a proper decision whether land is or is not "Agricultural Land."*

## Continued: Quoted Staff Report Findings (Pages 20-34)

*The more detailed **Exhibit A** soils survey prepared by certified soil classifier Brian Rabe shows that approximately 61.2% of the subject property is composed of Class VII and VIII soils and, therefore, is not predominantly Class I-VI soils.*

Staff has reviewed the soil study provided by Brian Rabe of Valley Science and Engineering, and agrees with the Applicant's representation of the data for the Subject Property. Staff finds, based on the submitted soil study and the above OAR definition, that the Subject Property is comprised

predominantly of Class 7 and 8 soils and, therefore, does not constitute "Agricultural Lands" as defined in OAR 660-033-0020(1)(a)(A) above.

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

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

*This part of the definition of "Agricultural Land" requires the County to consider whether the Class 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 **Exhibit A** soils report includes an evaluation of whether the subject property is land in other soil classes that is suitable for farm prepared by soil classifier, Brian Rabe that begins on page 4 of the study. The review considers all of factors set out in the rule, above, and concludes that the Marken property is not suitable for farm use as defined in ORS 215.203(2)(a).*

*The applicant offers the following additional information regarding the seven considerations:*

**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*

**Continued: Quoted Staff Report Findings (Pages 20-34)**

*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. Additionally, it is not profitable to irrigate the islands of Class VI or better soils that are located on the property.*

*The primary agricultural activity that has occurred on the subject property during the time the property has been owned by the Markens is growing hay. The Markens acquired the property in 1981 and thereafter made determined and unsuccessful efforts to make a profit in money by farming the property. The Markens grew hay and occasionally raised cattle. Neither endeavor was profitable. The Markens removed rocks from the land to improve crop yields but this and accepted*

*farm practices (irrigation, fertilization, etc.) did not yield a profit in money from their agricultural enterprises. The Markens suffered financial losses in every year of farm operations, including the following years:*

<b>Year</b>	<b>Loss</b>
2016	\$5,153
2015	\$3,049
2014	\$6,020
2013	\$1,480
2012	\$7,571
2011	\$6,316
2009	\$11,417
2008	\$3,949
2007	\$13,854

*From 2017 until present, the Markens continued to irrigate their property but did not grow hay or attempt to earn a profit in money from farming. This, on average, resulted in smaller losses as follows:*

<b>Year</b>	<b>Loss</b>
2021	\$2,762
2020	\$3,395
2019	\$2,276
2018	\$4,704
2017	\$4,407

**Suitability for Grazing:** *The primary agricultural use conducted on properties that lack irrigation water rights and have poor soils is grazing cattle. The poor soils and development pattern of the surrounding area make the Marken property a poor candidate for dryland grazing at an economic scale. The dry climate makes it difficult to produce adequate forage on the property to support a viable or potentially profitable grazing operation or other agricultural use of the property. This issue is addressed in greater detail in the **Exhibit A** soils study.*

*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 only accepted farm use of poor soils in Deschutes County. This use can be conducted until the native vegetation is removed by grazing (see the discussion of the suitability of the property for grazing, below). The soils study includes an analysis of the level of cattle grazing that would be able to be conducted on the property without overgrazing it. It finds that the Marken property would support from 9 to 14 cow-calf pairs (AUMs) for a month or about one cow-calf pair for a year.*

*Deschutes County uses a more aggressive formula to assess potential income from dry land grazing. It assumes that the Marken property would support 49 AUMs per year which is approximately 4 cow-calf pairs per year. We've been told that this formula was developed by the*

OSU Extension Service. It assumes that one acre will produce 900 pounds of forage per year and makes no allowance for good soil stewardship.

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

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

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

$60.0 \text{ lbs. Beef}/\text{acre} \times 49 \text{ acres of undeveloped land with Deskamp and Gosney soils} \times \$1.15/\text{lb.} =$   
\$ 3,381 of gross income per year

Using the OSU/County formula, the total gross beef production potential for the subject property would yield approximately \$3,381 annually. This figure represents gross income. It does not take into account real property taxes, fencing costs, land preparation, purchase costs of livestock, veterinary costs, labor costs or any other costs of production. These costs would far exceed gross income. One veterinary emergency could easily erase all \$3,381 of annual gross income.

Property taxes for the subject properties were \$7,886.01 in 2021. The payment of a modest wage of \$15.00 per hour to the rancher and/or employee for one FTE would cost the ranch operation \$31,200 in wages and approximately an additional \$7,800 to \$12,480 (1.25 to 1.4 of salary) for employment taxes paid by the employer and standard employee benefits. Even at part-time only, labor costs would far exceed the income received from the sale of cattle.

While the amount of forage will be higher on irrigated land, the costs of farm operations and cost to purchase irrigation water rights impose costs that are not offset by the additional income obtained because the quality of the soil is so poor. Additionally, raising hay on the irrigated acreage, although unprofitable, makes better economic sense due to higher gross income, lower labor costs and a lack of a need for veterinary care and fencing. It, however, is not profitable.

**Climate:** The climate is cold and dry. The growing season is very short. The subject property is located between Redmond and Sisters. According to the OSU Extension Service the growing season for Bend is only 80 to 90 days long. **Exhibit O.** The average annual precipitation for Bend is only 11.36 inches. This means that the amount of forage available for dry land grazing is low and will be slow to regrow. This also means that a farmer has a short period of amount of time to grow crops. Crops require irrigation to supplement natural rainfall. This makes it difficult for a farmer

to raise sufficient income to offset the high costs of establishing, maintaining and operating an irrigation system and to purchase water from Central Oregon Irrigation District.

**Existing and Future Availability of Water for Farm Irrigation Purposes:** *The subject property is located in the Central Oregon Irrigation District. The subject property has 9.49 acres of irrigation water rights. He originally had 36 acres of COID water rights but sold them because he was unable to make a profit from farm the poor soils present on his property. Water rights in the Deschutes Basin are limited because surface water is fully or over appropriated and now new groundwater withdrawals are allowed without retiring existing water rights - typically water rights from other irrigated land in Central Oregon that, most likely, is better suited for farm use than the subject property. Such a transaction would run counter to the purpose of Goal 3 to maintain productive Agricultural Land in farm use.*

**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 surrounded on three sides by properties zoned MUA-10. On one side (west) it on adjoins a narrow strip of EFU-zoned land that lies between the Bend UGB and the Marken property. This strip contains a total of four properties that total approximately 60 acres and that are not engaged in commercial farm activities intended to make a profit in money. The only property being assessed as farm land contains 86.5% Class VII and VIII soils that do not yield farm profits. **Exhibit P.** The proposed MUA-10 zoning will allow future development that will be consistent with this established land use pattern.*

**Technological and Energy Inputs Required:** *Given its poor soils, the Marken property requires technology and energy inputs over and above accepted farming practices. The poor soils and dry climate create a need for excessive fertilization and soil amendments and very frequent irrigation. Pumping irrigation water requires energy inputs. The application of lime and fertilizer typically requires the use of farm machinery that consumes energy. The irrigation of the property requires the installation and operation of irrigation systems.*

**Accepted Farming Practices:** *As determined by the County in the Aceti case, farming lands comprised of soils that are predominately Class VII and VIII is not an accepted farm practice in Central Oregon. Dryland grazing, the farm use that can be conducted on the poorest soils in the County, typically occurs on Class VI non-irrigated soils. Crops are typically grown on soils in soil class III and IV when irrigated. These soils are Class VI without irrigation. No accepted farm practice will enable the Markens to obtain a profit in money from agricultural use of the property.*

Staff agrees with the Applicant that many of the factors surrounding the subject property – such as the current residential land uses in the area, soil fertility, and amount of irrigation required result in a relatively low possibility of farming on the subject property.

The submitted burden of proof indicates the subject property has historically been used for agriculture but this use consistently did not generate a profit in money. Staff also notes the owner of the subject property has relinquished 25.61 acres of Central Oregon Irrigation District water rights. 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. None of the properties in the small strip of EFU-zoned land between the Marken property and the Bend UGB relies on the Marken property to undertake farm uses.*

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.

<b>Tax Lot</b>	<b>Size</b>	<b>House/ Structures</b>	<b>Tax Status</b>	<b>Farm practices/farm use?</b>
TL 200, 18-12-02	16.99 acres	1969 house	Not deferred	Irrigation ponds; property irrigated to keep green; no farm use
TL 202, 18-12-02	1.47 acres	1961 house	Not deferred	Not in farm use
TL 1003, 18-12-02	27.19 acres	Approved for Lot of Record dwelling	Deferred	Soil class of property was changed for purpose of Lot of Record application to 86.5% LCC 7 and 8 based on soils study and by review of the study by OR Dept of Agriculture  An irrigation pivot was purchased in an attempt to grow hay and maintain farm tax deferral but not profitable due to poor soils.
TL 1001, 18-12-02	12.45 acres	Nonfarm Dwelling	Not deferred	No farming; may be keeping a horse for riding (not a farm use)
TL 1000, 18-12-02	36.65 acres	Vacant COID property	Exempt	BOCC voted to change zoning to MUA-10 from EFU-TRB and is expected to adopt ordinances rezoning property and changing plan designation to RREA; no farm use
TL 1005 18-12-02	3.34 acres	1980 single-family home and utility building	Not deferred	No farm use
TL 1308, 18-12-02	39.18 acres	1965 single-family house and shed	Deferred	Some irrigation (15 of 40 acres per Assessor) and pond; unclear whether there is any farm use; most likely farm use, if any, based on aerial photography

				would be pasturing livestock or growing hay
TL 701, 18-12-12	12.12 acres	1973 single-family home and GP building	Deferred	Landscape Maintenance of Bend (landscape and lawn maintenance business) per Assessor Some irrigation (5 acres per Assessor)
TL 700, 18-12-12	26.22 acres	2000 machine shed (2595 sq ft)	Deferred; will be disqualified when approved nonfarm dwelling is built	Hemp Farm/hemp flower/hemp biomass/hemp trimming in 2020 About one acre in row crops; likely hemp. Aerial includes two greenhouses and a pasture/hay field on part of the property.  CU-08-78 approval for nonfarm dwelling notes 7.53 acres of irrigation/hay.  247-17-000891-CU/247-18-000552-MC nonfarm dwelling approval; extension granted 247-21-000915-E.
TL 600, 18-12-12	41.37 acres	2006 farm building	Deferred	Two cell towers Irrigated field (wheel lines and hand lines); likely grows hay.
TL 601, 18-12-12	4.0 acres	1999 nonfarm dwelling authorized by CU-99-19	Not deferred	No visible farm use; nonfarm dwelling.
TL 900, 17-12-36	43.89 acres	vacant	Deferred	Not irrigated; no visible farm use Mostly 58C soil per NRCS which is predominantly Class VII nonagricultural soil.
TL 1000, 17-12-36	57.33 acres	vacant	Deferred	Not irrigated; no visible farm use.
TL 500, 17-12-36D	19.46 acres	2000 single-family nonfarm dwelling per CU-99-123	Not deferred	Hay and paddocks suitable for one or two horses.
TL 500, 17-12-36D	16.97 acres	1976 single-family home	Deferred	May or may not be irrigated; no signs of commercial farm use (hay or fenced

		and loft barn and lean-to		pastures); may be flood irrigating to keep green.
TL 400, 17-12-36D	16.36 acres	2000 single-family nonfarm dwelling, CU-99-124	Not deferred	No farm use; appears to be a race track for dirt bikes
TL 100, 17-12-36	100.89 acres	Solar farm	Not deferred	No farm use
TL 700, 17-12-36	83.40 acres	Solar farm	Not deferred	No farm use
TL 500, 17-12-36	51.54 acres	Solar farm	Not deferred	No farm use
TL 400, 17-12-36	38.06 acres	Vacant; part of solar farm site	Not deferred	No farm use
TL 600, 17-12-36	18.78 acres	1994 single-family nonfarm dwelling CU-93-46 and utility building	Not deferred	No signs of farm use
TL 601, 17-12-36	19.29 acres	Nonfarm dwelling, CU-98-27	Not deferred	No signs of farm use
TL 801, 17-12-36	34.99 acres	Church and amphitheater	Some exempt; rest taxed	No farm use
TL 200, 17-12-36	3.09 acres	Church	exempt	No farm use
TL 800, 17-12-36	8.89 acres	vacant	Not deferred	No farm use
TL 1401, 17-12-35	2.19 acres	Approved for dog training facility and kennel; no kennel yet	Not deferred	No farm use; no visible irrigation or farming
TL 1200 & 1201, 17-12-35	93.36 acres	vacant	Not deferred	No apparent farm use; not irrigated
TL 1205, 17-12-35	2.78 acres	Single-family nonfarm dwelling	Not deferred	No farm use
TL 1001, 17-12-35	1.76 acres	1948 single-family	Not deferred	No farm use

		dwelling and outbuildings		
TL 1402, 17-12-35	4.97 acres	1978 single-family home and outbuildings	Not deferred	No visible farm use; Google Maps shows as location for Destination Sideways, LLC (car rebuilding).
TL 1403, 17-12-35	10.0 acres	vacant	Not deferred	No apparent farm use per aerial photography (road closed).
TL 1301, 17-12-35	10.0 acres	2003 house (replacement dwelling)	Deferred	Pond and irrigated acres; unclear if in farm use; might be able to be used as a pasture.
TL 1300 and 1302, 17-12-35	28.01 acres 2.06 acres	Farm parcel Nonfarm dwelling	Deferred Not deferred	Tax lots owned as a tract – one parcel is a nonfarm dwelling and the surrounding property is a farm parcel. Unable to drive by property. Aerials may show some grapevines, a pond and an irrigated field (pasture or hay).
TL 1203, 17-12-35	.92 acres	2016 nonfarm dwelling	Not deferred	No farm use

*This review shows that a significant majority of EFU-zoned properties inventoried (about 70%) are not receiving farm tax deferral. Additionally, two large properties that are receiving farm tax deferral are dry parcels that do not appear to be engaged in any type of farm use.*

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 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:

*This rule applies when a property owner seeks to rezone a parcel that was formerly a part of a farm unit without addressing the land capability of the entire farm unit. This rule does not apply here because the Markens are seeking to rezone an entire farm tract rather than a part of it. Furthermore, all parts of the subject property were studied by the applicant’s soils analysis, **Exhibit A**. The analysis shows that the predominant soil type found on the property is Class VII and VIII,*

*nonagricultural land. Some Class VI soils are intermingled with the nonagricultural soil not vice versa. As a result, this rule does not require the Class VII and VIII soils to be classified agricultural land.*

The submitted soils analysis indicates the subject property contains land in capability classes other than I-IV that is adjacent to or intermingled with lands in capability classes I-IV. Given the soil capability and prior agricultural use of the subject property, staff requests the Hearings Officer make specific findings on this issue.

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

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

OAR 660-033-0030, Identifying Agricultural Land

- (1) ***All land defined as "agricultural land" in OAR 660-033-0020(1) shall be inventoried as agricultural land.***
- (2) ***When a jurisdiction determines the predominant soil capability classification of a lot or parcel it need only look to the land within the lot or parcel being inventoried. However, whether land is "suitable for farm use" requires an inquiry into factors beyond the mere identification of scientific soil classifications. The factors are listed in the definition of agricultural land set forth at OAR 660-033-0020(1)(a)(B). This inquiry requires the consideration of conditions existing outside the lot or parcel being inventoried. Even if a lot or parcel is not predominantly Class I-IV soils or suitable for farm use, Goal 3 nonetheless defines as agricultural "lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands". A determination that a lot or parcel is not agricultural land requires findings supported by substantial evidence that addresses each of the factors set forth in 660-033-0020(1).***

**FINDING:** The Applicant addressed the factors in OAR 660-033-0020(1) above. The properties are 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. Rabe 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. Rabe provides more detailed soils information than contained in the NRCS Web Soil Survey. NRCS sources provide general soils data for large units of land. The soil study provides detailed and accurate information about individual parcels based on numerous soil samples taken from the subject property. The soil study is related to the NRCS Land Capability Classification (LCC) system that classifies soils class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.

The NRCS mapping for the subject properties is shown below in **Figure 1**. According to the NRCS Web Soil Survey tool, the subject properties contain approximately 85.3% 36A soil and contain approximately 14.7% 58C soil.

**Figure 1: NCRS Soil Mapping on the Subject Property**



The soil study finds the soil types on the subject property vary from the NRCS identified soil types. The soil types described in the soil study are described below (as quoted from Exhibit A of the submitted application materials) and the characteristics and LCC rating are shown in **Table 1** below.

Continued: Quoted Staff Report Findings (Pages 20-34)

**Table 1: Site-Specific Map Unit Acreage and LCC Rating**

Site-Specific Symbol	Unit Name	Acreage	%	Land Capability Class <sup>1</sup>	
				non-irrigated	irrigated
36A	Deskamp loamy sand, 0 to 3% slopes	23.23	38.81%	6s	3s
57A	Gosney stony loamy sand, 0 to 3% slopes	25.76	43.0%	7e	--
57C	Gosney stony loamy sand, 0 to 15% slopes	3.85	6.4%	7e	--
109	Rock outcrop	1.82	3.0%	8s	--
D	Developed land	4.57	7.6%	8s	--
W	Water	0.62	1.0%	8s	--
<b>Total</b>		<b>59.85</b>	<b>100%</b>		

NOTES:

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

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

*Delineations of map unit 36A, Deskamp loamy sand, 0 to 3% slopes and map unit 58C, Gosney-Rock outcrop-Deskamp complex, 0 to 15% slopes were mapped on the Site by the NRCS. As shown in Table 1, the NRCS classifies Gosney soils as Class VII and Rock outcrops as Class VIII. Deskamp soils are Class VI. Map unit 58C is expected to consist of about 75%o Class VII and VIII soils. The conditions observed on the Site are generally consistent with the published soil survey (Appendix A), except that much more of the shallower Gosney soils were encountered throughout the Site. There were no issues with access across the Site. Conditions most closely matching Gosney soils were observed at 24 grid locations and at least 21 additional locations along boundaries between grid points. Rock outcrops large enough to delineate were noted at 9 locations with smaller rock outcrops observed at over 55 additional locations. Conditions most closely matching Deskamp soils were observed at 29 locations. The area between points and along boundaries was walked and often probed for confirmation. The native vegetation typically associated with both Gosney and Deskamp soils are similar. However, most of the native vegetation at the Site had been cleared in an effort to establish a stand of pasture grass with mixed results. This required a higher density of points than typical.*

*Slopes were typically within the range associated with letter "A" used to identify the slope class of 0 to 3% for slope phases of map units. A few areas with slopes greater than 3% were better represented by the letter "C" used to identify slope classes of 8 to 15 percent or 0 to 15% for slope phases of map units. This is the only difference between the map units formally defined by the NRCS in the published soil survey and this site-specific soil survey.*

The soil study concludes that 61.2% of the subject property consists of Class 7 and Class 8 soils. The submitted soil study is accompanied in the submitted application materials by correspondence from the Department of Land Conservation and Development (DLCD). The DLCD correspondence



confirms that the soil study is complete and consistent with the reporting requirements for agricultural soils capability as dictated by DLCD. Based on Mr. Rabe's qualifications as a certified Soil Scientist and Soil Classifier, staff finds the submitted soil study to be definitive and accurate in terms of site-specific soil information for the subject properties. Staff requests the Hearings Officer make specific findings on this issue.

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

**FINDING:** The Applicant 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 September 7, 2021. The soils study was submitted following the ORS 215.211 effective date. The Applicant also submitted acknowledgement from Hilary Foote, Farm/Forest Specialist with the DLCD, dated December 6, 2021, that the soil study is complete and consistent with DLCD's reporting requirements. Staff finds this criterion to be met based on the submitted soil study and confirmation of completeness and consistency from DLCD.

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

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

#### **End of Quoted Staff Report Findings (Pages 20-34)**

Based upon the Hearings Officer's findings for Chapter 2, Resource Management, Section 2.2 Agricultural Lands, Goal 1, Preserve and maintain agricultural lands and the agricultural industry, the Staff Report findings quoted above, and evidence and argument provided by the Applicant, the Hearings Officer finds that the Subject Property is not Goal 3 "Agricultural Land" and that the application in this case does not require a Goal 3 exception.

## DIVISION 12, TRANSPORTATION PLANNING

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

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

**FINDING:** The Hearings Officer finds the 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 Property from AG to RREA and change the zone from EFU to MUA10. The Applicant is not proposing any land use development of the Subject Property at this time.

The Applicant submitted a traffic impact analysis (“TIA”), Exhibit L, dated April 22, 2022, prepared by Joe Bessman, PE of Transight Consulting LLC. As noted in the agency comments section above, the County Transportation Planner identified deficiencies with the submitted TIA and requested additional information. The Applicant then submitted a revised TIA dated June 23, 2022. The County Transportation Planner determined that additional information was still required regarding Level of Service and Volume to Capacity ratios in order to fully address OAR 660-012-0060. The Applicant then submitted a revised TIA dated June 29, 2022.

The revised TIA was reviewed by the County Transportation Planner, who agreed with the supplemented TIA report's conclusions. Based upon a review of the revised TIA and the County Transportation Planner's comments, the Hearings Officer finds that the proposed plan amendment and zone change will be consistent with the identified function, capacity, and performance standards of the County's transportation facilities in the area. The Hearings Officer finds that 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 TIA dated June 29, 2022, the County Transportation Planner provided the following comments in an email dated June 30, 2022:

*"The information demonstrates the project complies with the Transportation Planning Rule (TPR) and Deschutes County Code (DCC) 18.116.310."*

Based on the County Senior Transportation Planner's comments and the supplemented TIA, the Hearings Officer finds compliance with the Transportation Planning Rule has been effectively demonstrated.

## **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 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 as the term is defined by OAR 660-005-0010. That rule says that lands suitable for commercial forest use and protection under Goal 4 shall be identified using NRCS soils survey mapping to determine the average annual wood production figures. The NRCS maps the subject property as soil mapping units 364 and 58C. The NRCS Soils Survey of the Upper Deschutes River lists all soils mapped by its survey that are suitable for wood crop production in Table 8. Neither 36A nor 58C soils are soil mapping units the NRCS considers suitable for wood crop production because neither is listed on Table 8 as such.

**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.** The subject property is not identified by the comprehensive plan as a known natural disaster or hazard area with the exception that the entire county is recognized as being a wildfire hazard area. The change of zoning and plan designation is not, however, precluded by this fact. Development is allowed despite the recognized hazard and the county has taken steps to develop programs that minimize this known risk.

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

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

**Goal 10, Housing.** The County's comprehensive plan Goal 10 analysis anticipates that farm properties with poor soils, like the subject property, will be converted from EFU to MUA-10 or MUA-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, addressed above, 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 acknowledged when the County amended its comprehensive plan in 2011. The comprehensive plan recognizes the fact that the MUA-10 and RR zones are the zones that will be applied to lands designated Rural Residential Exception Area.*

**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."*

COLW (September 6, 2022, page 2) provided the following comments related to Goal 14:

*"The application has not shown that it complies with Goal 14. The requested zoning would allow 1 dwelling per 10 acres on this 60-acre property, or perhaps more under cluster or planned development conditional uses. As the property currently has only one dwelling, a six-fold increase in the residential density on this property would urbanize rural lands in violation of Goal 14, and thus requires an exception to Goal 14."*

Applicant, in its Final Argument (pages 9 – 12), provided the following response to COLW's Goal 14 arguments:

*Central Oregon LandWatch ("COLW") argues that the County must approve an exception to Statewide Goal 14, Urbanization, in order to apply the MUA-10 zone and RREA plan designation to the Marken property even if it is found to be non-agricultural land. An exception to Goal 14 is only required, however, if the proposed zone and designation allows urban development of the subject property.*

*In another similar plan amendment and zone change case, COLW relied on the legal case of 1000 Friends of Oregon v. LCDC (Curry County), 310 Or 447, 498-511, 724 P2d 268 (1986) for the proposition that a county may need to approve a goal exception to apply the RREA plan Page 10 – Applicant's Final Argument (Marken) designation and RR-10 zoning districts to the subject property. The Curry County case, however, does not support that argument.*

*In Curry County, the Oregon Supreme Court determined that rural residential zoning for exception areas must be proven to be rural in nature when first adopted, even for zones and plans adopted prior to the allowance of exceptions to Goal 14. Curry County at 476. This means that when Deschutes County's comprehensive plan and zoning code were acknowledged by LCDC around 1980, it was necessarily determined that RREA plan designation and zoning comply with Goal 14 and do not allow urban development.*

*Deschutes County Comprehensive Plan ('DCCP') Policy 2.2.3 specifically allows nonresource lands zoned EFU to be redesignated and rezoned and identifies the property zoning and plan designations to be applied to non-agricultural lands. The plan also states, in Section 3.3, Rural Residential Exception Areas:*

*'As of 2010 any new Rural Residential Exception Areas need to be justified through initiating a non-resource plan amendment and zone change by demonstrating the property does not meet the definition of agricultural or forest land \*\*\*'*

*The Plan states that '[e]ach Comprehensive Plan map designation provides the land use framework for establishing zoning districts. Zoning defines in detail what uses are allowed for each area.' DCCP Section 1.3, p. 15. Rural Residential Exception Areas, according to the DCCP, 'provide opportunities for rural residential living outside urban growth boundaries and unincorporated communities \*\*\*' DCCP Section 1.3, p. 15. DCCP Table 1.3.3 provides that Title 18's RR-10 and MUA-10 are the 'associated Deschutes County Zoning Code[s]' for the RREA plan designation.*

*The determination that the RREA plan designations and RR-10 and MUA-10 zoning districts should apply to non-agricultural lands was made when the County amended the DCCP in 2016. Ordinance 2016-005. The comprehensive plan, with that amendment, has been acknowledged by DLCD as complying with the Statewide Goals. This means that the lot sizes and uses allowed by the RREA plan designation and RR-10 zone are Goal 14-compliant. The proposed plan amendment simply proceeds exactly as described by the County's acknowledged comprehensive plan. It provides no occasion for the County to revisit the issue of whether the MUA-10 zone and RREA plan designation allow urban development that violates Goal 14. [footnote 2: In Deschutes Development Co. v. Deschutes County, 5 Or LUBA 218 (1982) LUBA held that 'We lack authority after acknowledgment of a comprehensive plan to review goal issues related to the plan. Fujimoto v. MSD, 1 Or LUBA 93, 1980, aff'd, 52 Or App 875, 630 P2d 364 (1981).] COLW's challenge to the application of MUA-10 zoning to the Markens' property that is nonagricultural land is an impermissible collateral attack on the County's acknowledged comprehensive plan.*

*This issue is addressed in detail by the Oregon Court of Appeals in Central Oregon LandWatch v. Deschutes County, 301 Or App 701, 457 P3d 369 (2020)(TID). In TID, the Court held that a decision made by Deschutes County decades earlier not to apply a resource plan designation to the subject property made it unnecessary for the property owner to establish that the property is nonresource land when remapping it from Surface Mining to RREA and MUA-10. This is consistent with earlier Court of Appeals decisions that hold that Goal 5 is not a relevant issue in a plan amendment and zone change application if the subject property has not been identified as a Goal 5 resource by*

the applicable comprehensive plan. *Urquhart v. Lane Council of Governments*, 80 Or App 176, 181-182, 721 P2d 870 (1986); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 350, *rev den* 323 Or 136 (1996).

The case of *Jackson County Citizens' League v. Jackson County*, 171 Or App 149, 15 P3d 42 (2000) holds that it is unnecessary to establish compliance with Goal 14 for uses conditionally allowed by the EFU zone; just as it is unnecessary for the Markens to establish that Deschutes County's comprehensive plan, a plan that provides that the RREA plan designation and RREA zones (RR-10 and MUA-10) should be applied to nonagricultural lands, complies with Statewide Goal 14.

**a. RREA Argument and Goal 14 Factors**

While not conceding that an analysis of Goal 14, Urbanization is required, we provide one below. The MUA-10 zoning district does not authorize urban development that violates Statewide Goal 14. DCCP Chapter 1, Section 1.3 p. 15 (Definitions) says that RREAs provide opportunities for rural residential living; not urban living that violates Goal 14. A review of the factors identified by the Supreme Court in Curry County all confirm that the MUA-10 zoning district does not allow urban development.

**i. Density**

The MUA-10 zone imposes a maximum density of 1 dwelling per 10 acres. This is not an urban density. Such a density would never be allowed in any urban residential zoning district other than a reserve or holding zone. By way of comparison, the Porter Kelly Burns property will be developed at a density of 11 homes per acre (excluding a small park). In *Curry County*, the Supreme Court accepted the concession of 1000 Friends a density of one house per ten acres is generally "not an urban intensity." COLW argues that the comprehensive plan requires a 10-acre minimum parcel size. If they are correct, this minimum will apply during a review of any subdivision on the subject property and assure that development is "not an urban intensity. Furthermore, in *Curry County*, 1000 Friends of Oregon argued that densities greater than one dwelling per three acres (e.g. one dwelling per one or two acres) are urban. The density allowed by the RR-10 zone in a planned development is 2.5 times less dense. For a standard subdivision, the density allowed (1 house per 10 acres) is over 3 times less dense.

The density of the RR-10 zone is not, as claimed by COLW, six times greater than the density of development allowed in the EFU-zone. Deschutes County's EFU zone allows for non-irrigated land divisions for parcels as small as 40 acres to create two nonfarm parcels (1:20 acres density). It also allows for 2-lot irrigated land divisions that, in Deschutes County can occur on parcels zoned EFU-TRB subzone that are less than 30 acres in size. This division requires 23 acres of irrigated land and imposes no minimum lot size on the nonfarm parcel or parcels. This is a density greater than one house per 15 acres. A density of one house per 10 acres is not an urban density of development.

**ii. Lot Size**

*The MUA-10 zoning district requires a minimum lot size of one house per ten acres. Smaller lots are allowed only if 65% to 80% of the land being divided is dedicated as open space.*

*The EFU zone that applies to the subject property imposes no minimum lot size for new nonfarm parcels. DCC 18.16.055. The only exception is that 5-acre minimum is required for non-irrigated land divisions of properties over 80 acres in size. DCC 18.16.055(C)(2)(a)(4). The EFU zone requires that other nonfarm uses be on parcels that are “no greater than the minimum size necessary for the use.” Although not relevant to this Application because the property is nonresource land rather than land in an exceptions area, OAR 660-004-0040 contemplates lot sizes as small as two acres in rural residential exceptions areas.*

**iii. Proximity to Urban Growth Boundaries**

*The Marken property adjoins the City of Bend. This makes it an excellent candidate for inclusion in the Bend UGB if properly identified as non-agricultural land. Skipping over the Marken property to annex the MUA-10 zoned properties east of the Marken property to the City of Bend will require an inefficient extension of urban services and urban sprawl.*

**iv. Services**

*Sewer service is prohibited by Goal 11. An increase in the density of development is not allowed if a public water system is developed to serve the subject Property so the approval of this application will not result in a violation of Goal 11.*

**v. Conclusion of Factors**

*In totality, the above-factors do not indicate that the Applicant’s rezoning request implicates Goal 14. Applicant’s proposal would increase that allowable density, but not to urban levels. Instead, approval of the proposal will enable the land to remain in a rural state until such time as it is included in the Bend UGB. At that time, it can be developed at urban densities.”*

Staff, in the Staff Report (page 38) stated that it generally accepted *“the Applicant’s responses and finds compliance with the applicable Statewide Planning Goals has been effectively demonstrated.”* Staff, in the Staff Report, also stated that it took:

*“note of public comments concerning potential loss of farmland, impacts to wildlife, and potential for increased housing density. While these comments detail concerns related to specific potential use patterns, staff finds the overall proposal appears to comply with the applicable Statewide Planning Goals for the purposes of this review.”*

The Hearings Officer concurs with and adopts, as additional findings for this section, the Applicant’s legal analysis and conclusions (Burden of Proof, page 33, Final Argument, pages 9-11) related to the applicability of Goal 14 to this case. Applicant concluded, and the Hearings Officer agrees, that Goal 14 does not apply to this case. As alternative findings (if it is later determined that Goal 14 does apply to this case) the Hearings Officer adopts Applicant’s “RREA Argument and Goal Factors” as



findings. The Hearings Officer finds that if Goal 14 is applicable to this case the analysis provided by Applicant (Final Argument, pages 11 and 12) demonstrates the requirements of Goal 14 are met.

#### **IV. CONCLUSIONS**

The Hearings Officer considered the comments of neighboring property owners and the objections expressed by COLW in making this recommendation. The Hearings Officer finds the primary issues raised by neighboring property owners involved potential impacts resulting from approval of the application and the ability of the Subject Property to be farmed. The Hearings Officer finds that COLW's primary issues related to (1) the Applicant's soil scientist/classifier soil classifications at the Subject Property were not correct or relevant, (2) the application did not comply with Goal 14 and, (3) the application was not consistent with DCC 18.136.020(D).

The Hearings Officer reviewed and considered each neighboring property owner and COLW objection to the approval of the application. The Hearings Officer concluded that the application did meet all relevant policies and approval criteria. The Hearings Officer recommends approval of the Applicant's Comprehensive Plan Amendment and Zone Change requests.

#### **V. RECOMMENDATIONS**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer recommends the Deschutes County Board of County Commissioners approval Applicant's request to change the designation of the Subject Property from Agricultural (AG) to Rural Residential Exception Area (RREA) and approval of Applicant's request for a Zone Change to rezone the Subject Property from Exclusive Farm Use-Tumalo-Redmond-Bend subzone (EFU-TRB) to Multiple Use Agricultural (MUA10).

Dated: November 4<sup>th</sup>, 2022



---

Gregory J Frank  
Deschutes County Hearings Officer