



## Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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### STAFF REPORT

**FILE NUMBERS:** 247-16-000317-ZC / 318-PA

**HEARING DATE:** September 27, 2016, 6:00 p.m.  
Barnes & Sawyer Rooms  
Deschutes Services Center  
1300 NW Wall Street  
Bend, OR 97708

**APPLICANT/OWNER:** Porter Kelly Burns Landholdings, LLC  
152 Champanelle Way  
Bend, OR 97701

**ATTORNEY FOR APPLICANT:** Liz Fancher  
644 NW Broadway Street  
Bend, OR 97701

**PROPOSAL:** The applicant requests approval of a Plan Amendment to change the designation of the subject property from Agriculture to Rural Residential Exception Area, and a Zone Change from Exclusive Farm Use (EFU-TRB) to Multiple Use Agricultural (MUA-10).

**STAFF REVIEWER:** Chris Schmoyer, Associate Planner

#### I. APPLICABLE STANDARDS AND CRITERIA:

Title 18 of the Deschutes County Code, the County Zoning Ordinance  
Chapter 18.16, Exclusive Farm Use Zone  
Chapter 18.32, Multiple Use Agricultural Zone  
Chapter 18.136, Amendments

Title 22, Deschutes County Development Procedures Ordinance

Title 23 of the Deschutes County Code, Deschutes County Comprehensive Plan (DCCP)  
Chapter 2, Resource Management  
Chapter 3, Rural Growth  
Chapter 23.64, Transportation System Plan

Oregon Administrative Rules (OAR), Chapter 660

Division 12, Transportation Planning  
OAR 660-012-0060, Plan and Land Use Regulation Amendments  
Division 33, Agricultural Land  
Division 15, Statewide Planning Goals and Guidelines

Oregon Revised Statutes (ORS)  
ORS 215.211

## II. **FINDINGS OF FACT:**

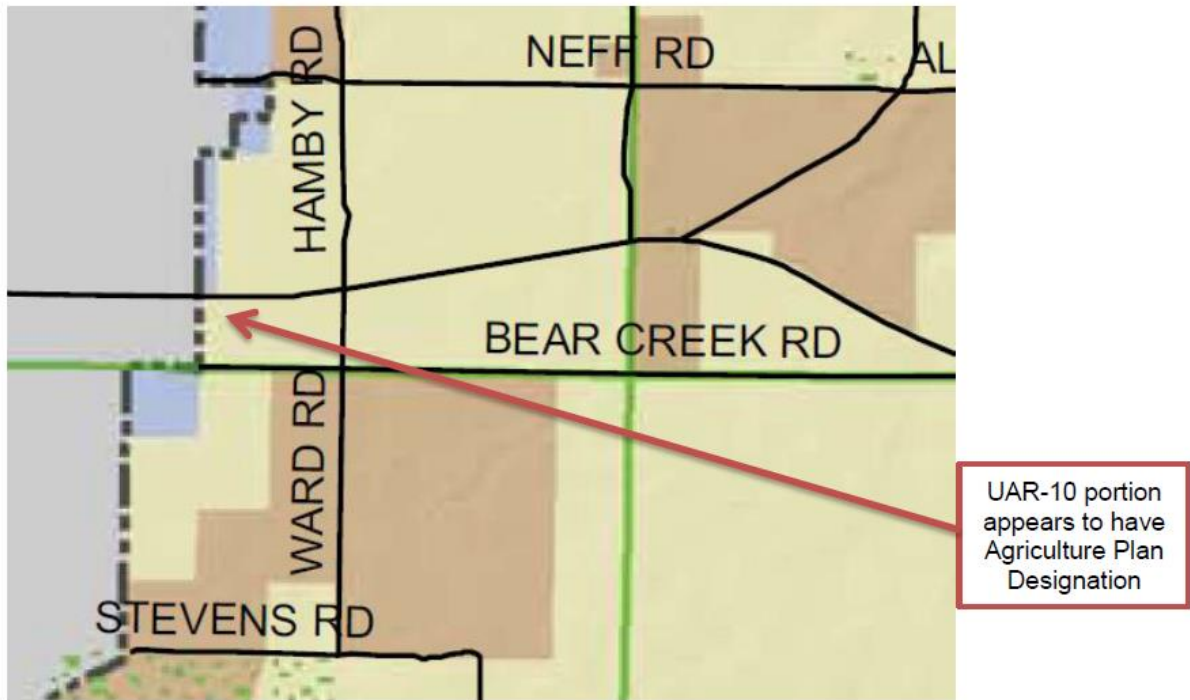
- A. LOCATION:** The subject property has an assigned address of 21455 Highway 20, Bend and is also identified on County Tax Map 17-12-35 as Tax Lot 1500. According to the application, this proposal excludes land in the NW corner of the tax lot lying west of the Central Oregon Irrigation District (COID) canal that is zoned UAR-10.
- B. LOT OF RECORD:** The subject property is a legal lot of record pursuant to the Planning Division's policy on what determines a legal lot of record. More specifically, the subject property is considered a legal lot record as it was lawfully developed with a single-family dwelling prior to the County's involvement in the permit process. Per Deschutes County Assessor's data, the property supports a single-family dwelling that was constructed in 1940, long before the County regulated septic and building permits for construction. However, staff concurs with the applicant that the subject property was lawfully created via deed instrument in 1947 prior to the County's adoption of the first Zoning Ordinance, PL-5 which became effective on 11/1/72. A copy of the 1947 deed that conveys the subject property as a single unit of land is included with the submitted application materials (Volume 80, Page 553 of the deed records of the Deschutes County Clerk).
- C. ZONING AND PLAN DESIGNATION:** The subject property is zoned Exclusive Farm Use – Tumalo/ Redmond/Bend subzone (EFU-TRB) and Urban Area Reserve 10 (UAR-10). The subject property is designated Agriculture on the Deschutes County comprehensive plan map. The subject property has not been mapped by Deschutes County as containing Goal 4 or Goal 5 resources. According to the applicant, that portion of the subject property zoned UAR-10 is situated west of the COID canal is not subject to the proposal; it is part of an exceptions area.<sup>1</sup> The applicant indicates that the UAR-10 zoned portion is expected to be included in the Bend urban growth boundary later this year and is identified on the most recent map of the expansion area. The entirety of the subject property is situated within the Landscape Management Combining Zone associated with Highway 20.<sup>2</sup>

Below is an excerpt of the Deschutes County Comprehensive Plan Map identifying the approximate location of the subject property:

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<sup>1</sup> The Deschutes County Comprehensive Plan Map identifies the portion of the property zoned UAR-10 as having a Plan Designation of Agriculture.

<sup>2</sup> The proposed amendment is not subject to LM site plan review as no development is proposed at this time. However, future development for a structure requiring a building permit, or substantial alteration to an existing structure, will required LM site plan review prior to permit issuance.



**Source:** Deschutes County Comprehensive Plan Map dated March 29, 2016

- D. SITE DESCRIPTION:** The subject property is approximately 34.89 acres in size and according to County Assessor’s data, the property supports a 1940 house, a 1959 single-wide manufactured home and outbuildings.<sup>3</sup> The subject property abuts the Bend City limits boundary and Urban Growth Boundary, which are located along the properties west lot line. The property lies between State Highway 20 to the north and Bear Creek Road to the south. A Central Oregon Irrigation District canal traverses the property from the western property line through the northwest corner of the subject property. It appears that another canal traverses along the southern portion of the property, west to east, terminating at the east property line. The application indicates the property possesses approximately .25 acre of an acre of irrigation water rights and 9.75 acres of pond water rights distributed into two ponds. The application materials illustrate that the house was constructed over a significant portion of the .25 acres of irrigation water. The applicant indicates that the remaining water right is used to irrigate the lawn associated with the home. According to the applicant, the water rights manager for Central Oregon Irrigation District (COID) has informed them that because the house was built over the water rights that the rights under the house have been lost and nor be transferred to another part of the subject property or to another irrigation district customer. Vegetation on the property consists primarily of big sagebrush, annual grasses and scattered juniper trees, with clusters of coniferous trees surrounding the dwelling and two ponds on the property.<sup>4</sup>

<sup>3</sup> Although Staff references the house and manufactured home identified by the County Assessor’s data, Staff is not acknowledging the legality of these dwelling units which requires a separate land use permit and process.

<sup>4</sup> According to Deschutes County GIS mapping, the larger of the two ponds is identified as a mapped wetland.

According to County GIS Mapping, based on the Natural Resource Conservation Service (NRCS) data, the subject property is predominantly comprised of Deskamp Loamy Sand soils, Unit 36A. NRCS Soil Unit 36A has an agricultural soil classification of IVS and is classified as high value where irrigated and a classification of VIS where unirrigated. The property is predominantly unirrigated and classified as non-high value farmland. To clarify the soils composition of the property, the applicant submitted a Soil Investigation Report, dated September 10, 2015, prepared by soil scientist Roger Borine, CPSC, CPSS, PWS of Sage West, LLC. This detailed soils survey shows that 67% of the soils on the property are Class VII or Class VIII nonagricultural soils when not irrigated, with no agricultural rating when irrigated. The report indicates that the soils on the property are too poor to benefit from irrigation as reflected by the history of water rights on the property. Water rights were lost, over the decades, due to the lack of beneficial use. A water rights map has been included with the submitted application materials.

Below is a recent aerial photograph providing perspective of the subject property from the south:



Source: Google Earth Image 2016

- E. SURROUNDING LAND USES:** The subject property lies between Highway 20 to the north and Bear Creek Road to the south. The western edge of the property borders the city limits for the City of Bend and land zoned UAR-10 that is a part of the legal lot of record that includes the subject property. Abutting the subject property to the west are small residential lots within the City Limits and UGB of Bend that are zoned Residential Urban Standard Density (RS). Zoning surrounding the property consists of UAR-10 and EFU-TRB to the north across Highway 20. To the south is EFU-TRB zoning, the southwest is UAR-10 and the southeast is MUA-10 (across Bear Creek Road).

The applicant's burden of proof statement provides the following description of the development pattern in the area surrounding the subject property:

**West:** Properties adjacent to the western edge of the subject property are zoned RS – Residential Urban Standard Density and are located within the city limits of the City of Bend. The south part of this area has been divided and developed with single-family homes on urban lots and the Light and Life Church. Three of the adjoining tax lots are part of the Traditions East Subdivision. One large tax lot which lies adjacent to Highway 20 is used by Landsystems Nursery for the growing of trees, plants and shrubbery. It adjoins the UAR-10 part of the subject property. Landsystems Nursery sells its nursery stock from a property located directly across Highway 20 from this tax lot.

**Southwest:** Properties located across Bear Creek Road to the southwest of the subject property are located within the UAR-10 (Urban Area Reserve) zone and all except one are developed with single-family residences. One tax lot is developed for use by an RV. One of the single-family home lots is also used for the production of hay.

**South:** Three tax lots lie directly south of the subject property across Bear Creek Road. A fourth small tax lot is located within the boundaries of one of these lots. They are zoned EFU-TRB. All four lots are developed with single-family dwellings. Tax Lot 201, Assessor's Map 18-12-02 received approval for a farm/nonfarm partition in 2009 in CU-09-56/MP-09-20. This property contains approximately 36 acres of irrigation water rights and is currently used for the production of hay. Tax Lot 200, Assessor's Map 18-12-02 is not irrigated and has native grasses, sagebrush and junipers. The homes on the other two lots are not farm residences.

**Southeast:** Properties to the southeast, across Bear Creek Road, are zoned MUA-10 and are RREA (Rural Residential Exception Area) on the comprehensive plan. These lots range in size from approximately 1.77 acres to about 10 acres in size. This area of MUA-10 properties includes several subdivisions: Dobbin Acres, Dobbin Acres First Addition, Somerset Phase 1, Arrowhead Acres, Arrowhead Acres 1<sup>st</sup> Addition, 2<sup>nd</sup> Addition and Third Addition. Numerous parcels have also received partition approvals. Most of the MUA-10 properties within this area have been developed with single-family homes.

**East:** Two tax lots adjoin the eastern property line and are under the same ownership. Tax Lot 1600, Assessor's Map 17-12-35 is developed with a manufactured home and Tax Lot 1601 is developed with a single-family residence. Neither tax lot appears to be irrigated nor employed in farm use.

**North:** Highway 20 separates the subject property from four (4) tax lots to the north. One of these tax lots is located within the UAR-10 zone. The remaining three (3) tax lots are zoned EFU-TRB. Three of these four lots are developed with single-family residences while the fourth, one zoned EFU, is undeveloped. None appear to have any irrigation water rights. None appear to be used for farm use.

- F. PROPOSAL:** The applicant asks that Deschutes County change the zoning of the subject property from EFU-TRB to MUA-10 and the plan designation from Agriculture to Rural Residential Exceptions Area (RREA) because the subject property does not qualify as "agricultural land" under state law or administrative rule. No exception to Statewide Planning Goal 3, Agricultural Land is required because the subject property is not agricultural land.



The area west of the COID canal that is a part of the tax lot but that is not a part of the proposed amendment is approximately 1.63 acres in size and is zoned Urban Area Reserve (UAR-10) and is a part of an exceptions area. The applicant indicates that this area is expected to be included in the Bend urban growth boundary later this year and is depicted on the most recent map of the expansion area.

Submitted with the application is an Order 1 Soil Survey of the subject property, titled "Agricultural Soils Capability Assessment" (hereafter referred to as "Soils Assessment"), The Soils Analysis was prepared by soil scientist Roger Borine, CPSC, CPSS, PWS of Sage West, LLC.<sup>5</sup> Additionally, the applicant has submitted an application form, a burden of proof statement and supplemental materials, which are incorporated herein by reference.

**G. PUBLIC/PRIVATE AGENCY COMMENTS:** The Planning Division mailed notice of the public hearing, on July 27, 2016, to several agencies and the following comments were received:

**1) County Transportation Planner:** Peter Russell, Senior Transportation Planner provided the following comment:

*I have reviewed the transmittal materials for 247-15-000317-ZC/318-PA for a plan amendment from Agriculture to Rural Residential Exception Area and a rezone from Exclusive Farm Use (EFU) to Multiple Use Agricultural (MUA-10) on a 35-acre parcel at 21455 U.S. 20, aka 17-12-35, Tax Lot 1500.*

*The applicant has not provided a traffic analysis by a registered engineer as required by Deschutes County Code (DCC) at 18.116.310(E)(4), which requires a traffic study for zone changes. Additionally, a traffic analysis is needed to demonstrate compliance with the Transportation Planning Rule (OAR 660-012-0060) to demonstrate there is no adverse effect to the operations of the affected facility(ies) either now or in 20 years. The applicant asserts on page 25 that the proposed plan amendment/zone change would have a de minimis effect from a traffic generation standpoint. However, the applicant has not provided any evidence that there is capacity on US 20 under the following four scenarios: 1) in 2016 under the current zoning; 2) in 2016 under the proposed zoning; 3) in 2036 under the current zoning; and 4) 2036 under the proposed zoning. Finally, the TPR analysis needs to assume a reasonable "worst case" scenario, which means the trip generation rate must compare the highest trip-generation rate allowed outright under the EFU and MUA-10 zones. The burden of proof states the site could accommodate four (4) new homes, but needs to demonstrate that is the reasonable "worst case" scenario from a traffic generation standpoint. Reviewing the outright permitted uses in MUA-10 at DCC 18.32.020 that does seem a reasonable assumption, admittedly.*

*Board Resolution 2013-020 as amended sets an SDC rate of \$3,852 per p.m. peak hour trip. County staff has determined given the residential mix of housing units between primary and secondary residences in the County, that a single-family home will generate 0.81 p.m. hour trips, so the applicable SDC is \$3,120 (\$3,852 X 0.81) per lot for a total of*

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<sup>5</sup> Mr. Borine soils report was submitted to the Department of Land Conservation and Development (DLCD), which has been certified for use by Deschutes County in review of this proposed Plan Amendment and Zone Change request.

\$6,240 (\$3,120 X 2). The SDC does not come into play with the plan amendment/zone change, but rather is triggered by development of the sites. The SDC amount is for informational purposes only.

**STAFF COMMENT:** In response to the applicant's transportation memo, dated 9-9-16, Mr. Russell provided the following comments:

*I have reviewed the Sept. 9, 2016, transportation memo from the applicant's traffic engineer, which was prepared in response to staff's determination the transportation planning rule (TPR) analysis requirements have not been met for the Exclusive Farm Use (EFU) to Multiple Use (MUA-10) for demonstrating no significant effect. The property's sole access currently is a driveway onto US 20; the Deschutes County TSP shows this segment fails in 2030.*

*In this most recent memo the applicant's engineer focused on establishing a baseline for trip generation in the existing zoning by using what would be the highest trip rate from a use permitted outright in the EFU zone and contrasting it to the highest trip generator permitted outright in the MUA-10. The applicant's traffic engineer concluded that based on this comparison the highest trip generator for EFU would be a church of less than 100 seats whereas the highest trip generator in the MUA-10 would be two additional houses, both with Type I home occupations. The church would generate more trips than the homes, thus the rezone would result in fewer trips, thus proving no significant effect.*

*Staff agrees this would be an appropriate method if either 1) the EFU parcel was vacant or 2) the applicant was proposing a church simultaneously with the rezone or a church application already had been approved. Neither 1) nor 2) are true. The parcel is developed with a single-family home and staff feels the baseline trip generation should be based on that use. This has been past County practice in cases where parcels were developed and there was no simultaneous application for a new land use. Thus, the parcel would have more trips generated under the MUA-10 zoning than EFU and the applicant has not demonstrated no significant effect.*

*Staff will defer to the hearings officer on whether the applicant's approach to trip generation is allowable; however, staff points out TPR compliance can be met via a different route. While the affected segment of US 20 is forecast to fail in 2030, the Deschutes County TSP lists planned improvements at Table 5.3.T1 (County Road and Highway Projects). Adding additional travel lanes on US 20 between Providence and Hamby is listed as a \$2 million dollar medium priority project (next 6-10 years). The applicant, under the TPR, can rely on planned improvements as a mitigation. Staff also agrees with the applicant that the amount of additional traffic that would be generated by the proposed zone change is minimal. While all parties agree the resulting trips would be under the County's 50-trip threshold for traffic studies as stated in Deschutes County Code (DCC) 18.116.310(C)(3)(a), staff points out DCC 18.116.310(E)(4) requires traffic analysis for zone changes*

*Again, staff agrees with the applicant's traffic engineer that there is no significant effect to US 20 from this EFU to MUA-10 zone change; we just arrived at the same destination via different routes.*

**2) Oregon Department of Transportation (ODOT):** David Knitowski, Region 4 Access Management Engineer, provided the following comment:

Facts, adopted policies, or any other comments that apply to this application:

The driveway serving this property connecting to US Hwy 20 is permitted for a single-family house. Any future development will be subject to review under ODOT's Change of Use rule (OAR 734-051-2030). If the proposed future development will generate 50 peak hour vehicle trips more than the permitted use, 500 daily vehicle trips more than the permitted use, or 20 daily heavy truck trips more than the permitted use, that would constitute a change of use, and ODOT will require a new Application for State Highway Approach.

The Deschutes County Transportation System Plan (TSP) contains Access Management Policy 5.3, which says, "Wherever practical, access to state highways shall be provided via frontage roads, alternate local roads or other means, rather than direct access to the highway. Therefore, when this property redevelops with MUA-10 uses, access shall be provided via Bear Creek Road, and not US Hwy 20.

Suggested action by Deschutes County:

Enforce Access Management Policy 5.3 when this property redevelops and require that access shall be provided via Bear Creek Road, and not US Hwy 20.

**STAFF COMMENT:** In response to the Mr. Knitowski's comments, Peter Russell, County Transportation Planner, provided the following comment:

*I'd be hesitant to include the condition of approval language proposed by ODOT for a couple of reasons. First, ODOT is the road authority for the State highway system. Deschutes County has no legal ability to close a private approach to US 20. Second, while ODOT can close an approach to its own system, there is a protocol set forth in OAR 734-051-5110 about what is required. There is also a remedy process when closing a highway approach described in OAR 734-051-6010 with offer of remedies listed in OAR 734-051-6030, which includes monetary compensation. Third, typically the County cannot require conditions of approval under which it has not control or requires an action by another entity.*

*Should this property redevelop, ODOT can certainly weigh whether to use its own processes to close the approach to US 20 or not and then present the outcome to Deschutes County for consideration regarding the County approving an access to Bear Creek Road where none currently exists.*

*I would point out Access Management Policy 5.2 that states "Deschutes County shall require new development to minimize direct access points onto arterials and collectors by encouraging the use of common driveways." The TSP classifies Bear Creek as a collector. Thanks.*

**3) Bend Fire Department:** Jeff Bond, Deputy Fire Marshal, provided the following comment:

*I'm not quite sure if this potentially involves the addition of any structures, but in case it does, here are my comments.*

**FIRE APPARATUS ACCESS ROADS:**

- *Approved fire apparatus access roads shall be provided for every facility, building or portion of a building hereafter constructed or moved into or within the jurisdiction.*



**The fire apparatus access road shall comply with the requirements of this section and shall extend to within 150 feet of all portions of the facility and all portions of the exterior walls of the first story of the building as measured by an approved route around the exterior of the building or facility. 2014 OFC 503.1.1**

- **Fire apparatus roads shall have an unobstructed width of not less than 20 feet, exclusive of shoulders, except for approved security gates in accordance with Section 503.6, and an unobstructed vertical clearance of not less than 13 feet 6 inches. Where a fire hydrant is located on a fire apparatus road, the minimum width shall be 26 feet, exclusive of shoulders. Traffic calming along a fire apparatus road shall be approved by the fire code official. Approved signs or other approved notices or markings that include the words NO PARKING-FIRE LANE shall be provided for fire apparatus roads to prohibit parking on both sides of fire lanes 20 to 26 feet wide and on one side of fire lanes more than 26 feet to 32 feet wide. 2014 OFC 503.2.1, D103.1, 503.4.1, 503.3**
- **Fire apparatus access roads shall be designed and maintained to support the imposed loads of fire apparatus (60,000 pounds GVW) and shall be surfaced (asphalt, concrete or other approved driving surface) as to provide all weather driving capabilities. Inside and outside turning radius shall be approved by the fire department. All dead-end turnarounds shall be of an approved design. Bridges and elevated surfaces shall be constructed in accordance with AASHTO HB-17. The maximum grade of fire apparatus access roads shall not exceed 10 percent. Fire apparatus access road gates with electric gate operators shall be listed in accordance with UL325. Gates intended for automatic operation shall be designed, constructed and installed to comply with the requirements of ASTM F 2200. A Knox® Key Switch shall be installed at all electronic gates. 2014 OFC D102.1, 503.2.4,**

**FIRE PROTECTION WATER SUPPLIES:**

- **An approved water supply capable of supplying the required fire flow for fire protection shall be provided to premises upon which facilities, buildings or portions of buildings are hereafter constructed or moved into or within the jurisdiction. 2014 OFC 507.1**
- **Fire flow requirements for buildings or portions of buildings shall be determined by an approved method. Documentation of the available fire flow shall be provided to the fire code official prior to final approval of the water supply system.**
- **In areas without water supply systems, the fire code official is authorized to use NFPA 1142 in determining fire flow requirements. 2014 OFC B107.1**

**OTHER FIRE SERVICE FEATURES:**

- **New and existing buildings shall have approved address numbers, building numbers or approved building identification placed in a position that is plainly legible and visible from the street or road fronting the property. These numbers shall be Arabic numbers or alphabetical letters. Numbers shall be a minimum 4 inches high with a minimum stroke width of 0.5 inch. Where access is by means of a private road and the building cannot be viewed from the public way, a monument, pole, or other sign or means shall be used to identify the structure. Address numbers shall be visible under low light conditions and evening hours. Provide illumination to address numbers to provide visibility under all conditions. Address signs are available through the Deschutes Rural Fire Protection District #2. An address sign application can be obtained from the City of Bend Fire Department website or by calling 541-388-6309 during normal business hours. 2014 OFC 505.1**

**Codes and Referenced Standards:**

2014 Oregon Fire Code (OFC)

2012 NFPA 1142

**No responses were received from:** Avion Water Company, Central Oregon Irrigation District, Watermaster District 11, Bend Parks and Recreation, Deschutes County Environmental Soils, County Road Department and the County Building Division.

- H. PUBLIC COMMENTS:** On July 27, 2016, the Planning Division sent notice of the proposed land use application to all property owners within 750 feet of the subject property. Written comments, or email correspondence, were received from the following individuals:

John Foote: Submitted a letter, received August 1, 2016, expressing his support for approval of the proposed plan amendment and zone change request based on listed reasons. The letter has been entered into the record.

Doug and Jane Cleavenger: Emailed staff with questions regarding the proposal. The email correspondence has been entered into the record.

Phil Tracy: Emailed staff with questions regarding the proposal and expressed concern regarding traffic along Bear Creek Road. The email correspondence has been entered into the record.

- I. NOTICE REQUIREMENT:** The applicant complied with the posted notice requirements of Section 22.23.030(B) of Deschutes County Code (DCC) Title 22. The applicant submitted a Land Use Action Sign Affidavit, dated July 14, 2016, indicating the applicant posted notice of the land use action on the property on that same date. Notice of the public hearing was sent to all property owners within 750 of the subject property on July 27, 2016. And the notice of public hearing was published in the Bend Bulletin on Sunday, July 31, 2016.
- J. REVIEW PERIOD:** These applications were submitted on June 2, 2016. According to Deschutes County Code 22.20.040(D), the review of the proposed quasi-judicial plan amendment application is not subject to the 150-day review period.
- K. PREVIOUS LAND USE HISTORY:** Staff did not locate any previous land use decisions associated with the subject property.<sup>6</sup>
- L. OVERVIEW OF IMPLEMENTATION OF COUNTYWIDE ZONING:** Staff finds that the applicant's burden of proof statement provides a helpful historical overview of land use planning in Deschutes County:

*In 1979, Deschutes County adopted its first comprehensive plan and zoning ordinance that implemented the Statewide Goals. The County's comprehensive plan map was developed without the benefit of reliable, detailed soils mapping information. The map was prepared prior to the USDA/NRCS's publication of the "Soil Survey of Upper*

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<sup>6</sup> A scanned document for the subject property account in Deschutes County DIAL includes documentation of an Oregon Department of Fish and Wildlife (ODFW) Land Use Compatibility Statement (LUCS) for fish propagation associated with the ponds on the property. Planning Division signed the form on 12-16-92.

Deschutes River Area, Oregon.” This survey is more comprehensive than prior soils mapping efforts but continues to provide general soils information. This land application includes a more detailed and accurate Order 1 soils survey, **Exhibit D**, for the subject property based on specific soils sampling and testing of the subject property. Consistent with the requirements of ORS 215.211, this survey has been approved for use by Deschutes County by the Department of Land Conservation and Development. It provides Deschutes County with the information needed to conclude that the subject property does not qualify as “agricultural land” as defined by state administrative rule.

When the County first implemented Statewide Goals, it applied resource zoning using a broad brush. Since that time, Deschutes County has rezoned properties from EFU to MUA-10 zoning and has applied a Rural Residential Exceptions Plan designation to lands found to be nonresource land. Recent examples include PA-07-1/ZC-07-1, Pagel (the hearings officer’s decision adopted by the Board is **Exhibit K**), PA-08-1/ZC-08-1, The Daniels Group (Board Decision, **Exhibit L**) and PA-11-7/ZC-11-2 State of Oregon Department of State Lands (Board Decision, **Exhibit M**).

The Board’s findings in **Exhibit M** conclude that the current comprehensive plan allows the county to approve applications to change the plan designation of nonagricultural land from Agricultural to RREA. The Board’s findings also conclude that a goal exception is not required to allow the county to approve an RREA plan designation for nonagricultural land.

### III. CONCLUSIONS OF LAW

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

##### A. Chapter 18.136, Amendments

###### 1. 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.***

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

###### 2. 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.**

**STAFF COMMENT:** The following provisions of Deschutes County's amended comprehensive plan are the relevant provisions of the plan that should be considered in reviewing applications to change the zoning of Agricultural Land to a plan designation of RREA and MUA-10 zoning. Other provisions of the plan do not apply.

## **Chapter 2, Resource Management**

### **1. Section 2.2, Agricultural Lands Policies**

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

**STAFF COMMENT:** The applicant's soils study and the findings in the submitted burden of proof effectively demonstrate that the subject property is not suitable agricultural land. This goal, therefore, does not apply.

***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.***

**STAFF COMMENT:** The applicant is not asking to amend the subzone that applies to the subject property; rather, the applicant is seeking a change under Policy 2.2.3 and has provided adequate findings to support rezoning the subject property MUA-10.

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

**STAFF COMMENT:** In response to this criterion, the applicant's burden of proof provides the following:

*The applicant is seeking a comprehensive plan amendment from Agriculture to RREA and a zone change from EFU-TRB and UAR-10 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). In findings attached as **Exhibit M** of the applicant's burden of proof statement, 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, 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 changed the test for determining whether land is agricultural land to make it less stringent. *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007). In that case, the Supreme Court stated that:

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

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

Staff concurs with the applicant's response and believes the proposal is allowed pursuant to this policy.

***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.***

**STAFF COMMENT:** In response to this criterion, the applicant's burden of proof provides the following:

*This plan policy provides direction to Deschutes County to develop new policies to provide clarity when EFU parcels can be converted to other designations. In the DSL findings, Deschutes County found that this policy does not impose a moratorium on requests for applications of the type filed by DSL and, in this case, by the applicant. See **Exhibit M**. Deschutes County also noted that it had approved the conversion of EFU land to an RREA plan designation and MUA-10 zoning in the Pagel decision, **Exhibit K** and that nothing in this plan policy prohibits that action. The County's interpretation of Policy 2.2.3 above, spells out when and how EFU parcels can be converted to other designations. The facts presented by this case merit conversion of the subject property to a new plan designation under the County's interpretation of Policy 2.2.3.*

Staff concurs with the applicant's response and believes the proposal is consistent with this policy.

***Policy 2.2.13 Identify and retain accurately designated agricultural lands.***

**STAFF COMMENT:** This plan policy makes it clear that it is county policy to identify and retain agricultural lands that are accurately designated. The subject property was not accurately designated as demonstrated by the soils report and the applicant's burden of proof.

## 2. Section 2.5 Water Resources Policies

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

**STAFF COMMENT:** In response to this criterion, the applicant's burden of proof provides the following:

*Water impacts under this application will be neutral to positive. It is possible that water rights will not be affected as the water rights are primarily pond rights. Only the residential lawn on the subject property is irrigated land. Much of the existing .25 acres of irrigation water rights are mapped under the house and cannot be used or transferred.*

*Irrigating poor farm ground consumes a large amount of the area's precious water resources without the resulting economic benefits of profitable agricultural production. Homes consume less water than would be needed for farm field irrigation on the subject property. In addition, if the subject property is annexed to the City of Bend, it is likely that the irrigation water rights will be transferred to more productive farm properties or used to enhance flows in the Deschutes River. On balance, based on the lack of productive resource land on the subject property, water resources will be better preserved and conserved under this application by reapplication to a more beneficial use.*

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

Staff concurs with the applicant's response and adds that proposed water use for the development of the subject property would be reviewed under any necessary land use process for the site (i.e. conditional use, tentative plat) in the future.

## Chapter 3, Rural Growth

### 1. 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.***

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- ***Some farm lands with poor soils that are adjacent to rural residential uses can be rezoned as rural residential***

**STAFF COMMENT:** In response to this criterion, the applicant's burden of proof provides the following:



The County's Comprehensive Plan anticipates that EFU-zoned land with poor soils will be rezoned for rural residential development when it adjoins rural residential exceptions areas. The County's code provides mechanisms to amend the County's zoning maps when such changes are appropriate. The subject property has extremely poor soils. It is adjacent to the city limits for the City of Bend and adjoins a large area of properties in rural residential exception areas that are developed with rural residential uses at its southwest and southeast corners. The property adjoins land zoned UAR-10 (rural residential zoning) to the north. A part of the subject property is already zoned UAR-10.

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

Staff concurs with the applicant's response and believes the proposal complies with this policy.

## 2. Section 3.3, Rural Housing

### **Rural Residential Exception Areas**

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

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

**STAFF COMMENT:** In response to this section, the applicant's burden of proof provides the following:

*The quoted language is a part of the background text of the County's comprehensive plan. It is not a plan policy or directive and it is not an approval standard for this application. This fact was confirmed by former Deschutes County Senior Planner Terri Hansen Payne, AICP during the County's review of the DSL rezoning and plan amendment application. See **Exhibit M**. Nonetheless, given the fact that the above-quoted text was discussed in the context of that application, the applicant has elected to address it in the context of this application.*

*This plan language does not bar application of the RREA plan designation to non-resource land. It does not require that an exception be taken to apply the RREA designation to non-resource land. Instead, as stated by the Board's findings in **Exhibit M**, the language "appears to be directed at a fundamentally different situation than the one presented in this application." The text is written to require that exceptions be taken for resource lands that require an exception; not to require goal exceptions for*

*non-resource lands that do not require such exceptions. 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 quoted plan text addressed the former. If the quoted plan text were read to require an exception to Goal 3 or 4 where the underlying property does not qualify as either Goal 3 or Goal 4 resource land, such a reading would be in conflict with the rule set forth in Wetherell and Policy 2.2.3 of the Comprehensive Plan.*

*Deschutes County has interpreted its RREA plan designation to be the proper “catchall” designation for non-resource land. As a result, the RREA plan designation is the appropriate plan designation for the subject property.*

Staff concurs with the applicant’s response and adds that on Page 11 the Hearings Officer’s decision for PA-11-17/ZC-11-2, Hearings Officer Kenneth Helm, provides the following excerpted finding in response to this language of Section 3.3 of the DCCP:

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

*There is one additional related matter which warrants discussion in connection with this issue. It appears that part of Staff’s hesitation and caution on the issue of whether an exception might be required is rooted in the title of the Comprehensive Plan designation that would ultimately apply to the subject property – which is “Rural Residential Exception Area.” There appears to be seven countywide Comprehensive Plan designations as identified in the plan itself. These include “Agriculture, Airport Development, Destination Resort Combining Zone, Forest, Open Space and Conservation, Rural Residential Exception Area, and Surface Mining.” Of the seven designations, only Rural Residential Exception Area provides for associated zoning that will allow rural residential development. As demonstrated by reference to the Pagel decision discussed above, there appears to be instances in which rural residential zoning has been applied without the underlying land necessarily being identified as an exception area. This makes the title of the “Rural Residential Exception Area”*

*designation confusing, and in some cases inaccurate, because no exception is associated with the underlying land in question. However, it is understandable that since this designation is the only one that will allow rural residential development, that it has become a catchall designation for land types that are authorized for rural residential zoning. That is the case with the current proposal, and again, for the same reasons set forth in Hearings Officer Green's decision in Pagel, I cannot find a reason why the County would be prohibited from this practice.*

Based on the above, staff agrees with the applicant and the Deschutes County Hearings Officer that the above language is not a policy and does not require an exception to the applicable Statewide Planning Goals, thus, the 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**

- 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.**

##### **Policies**

- 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.**

**STAFF COMMENT:** This policy applies to the County and advises it to consider the roadway function, classification and capacity as criteria for plan map amendments and zone changes. The County will comply with this direction by determining compliance with the Transportation System Planning Rule, as described below.

- B. That the change in classification for the subject property is consistent with the purpose and intent of the proposed zone classification.**

**STAFF COMMENT:** In response to subsection (B) of this policy, the applicant's burden of proof provides the following:

*The approval of this application is consistent with the purpose of the MUA-10 zoning district which stated in DCC 18.32.010 as follows:*

*"The purposes of the Multiple Use Agricultural Zone are to preserve the rural character of various areas of the County while permitting development consistent with that character and with the capacity of the natural resources of the area; to preserve and maintain agricultural lands not suited to full-time commercial farming for diversified or part-time agricultural uses; to conserve forest lands for forest uses; to conserve open*

spaces and protect natural and scenic resources; to maintain and improve the quality of the air, water and land resources of the County; to establish standards and procedures for the use of those lands designated unsuitable for intense development by the Comprehensive Plan, and to provide for an orderly and efficient transition from rural to urban land use.”

The subject property is not suited to full-time commercial farming. The MUA-10 zone will allow property owners to engage in hobby farming. The low-density of development allowed by the MUA-10 zone will conserve open spaces and protect natural and scenic resources. This low level of development will also help maintain and improve the quality of the air, water and land resources of the county by encouraging the future owners of the property to return irrigation water to area waterways or to more productive farm ground elsewhere in the county rather than to waste it on unproductive lands.

The subject property adjoins the City of Bend. The MUA-10 zoning provides a proper transition zone from EFU rural zoning to City zoning.

Staff concurs with the applicant’s response and believes compliance with this subsection of this policy has been demonstrated.

**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.**

**STAFF COMMENT:** In response to this criterion, the applicant’s burden of proof provides the following:

*Necessary public facilities and services are available to serve the subject property as shown by the following evidence. Will-serve letters from PacifiCorp and Avion Water Company, Inc., Exhibits H and I of this application show that electric power and water services are available to serve the property.*

*The subject property adjoins two major roadways: Highway 20 and Bear Creek Road. The impact of rezoning the subject property will be extremely minor. With its current zoning, it is theoretically possible to divide the property into a farm and nonfarm dwelling parcel if 23 acres of irrigation water rights were purchased. This would allow two dwellings on the subject property. MUA-10 zoning and a standard subdivision would allow the creation of three residential lots – an increase of one home. If cluster development approval were obtained, the maximum number of houses allowed in the development would be six – an increase of four houses over the number allowed in the EFU zone (2). An increase of four houses is a de minimus impact. The existing road network is available to serve the use.*

*The property receives police services from the Deschutes County Sheriff. The property is in a rural fire protection district and the nearest fire station is nearby. It is efficient to provide necessary services to the property because the property is already served by these service providers and the property is close to the corporate limits of the City of Bend and adjacent to large tracts of land zoned MUA-10 and UAR-10 that has been extensively developed with rural and urban density residences.*

Staff concurs with the applicant's response and believes compliance with this subsection of this policy has been demonstrated. Staff adds that development of the property, under MUA-10 zoning, would need to comply with applicable requirements of the code and many uses would require a formal land use permit and process. Through the land use process, assurance of adequate public services and facilities will be verified.

**2. *The impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan.***

**STAFF COMMENT:** In response to this criterion, the applicant's burden of proof provides the following:

*The MUA-10 zoning is consistent with the specific goals and policies in the comprehensive plan discussed above. The MUA-10 zoning is the same as the zoning of many other properties in the area southeast of the subject property. The zone change will not impose new impacts on EFU-zoned farm land to the south because these lands are separated from the subject property by Bear Creek Road and because the area along Bear Creek Road has been developed with a number of single-family homes.*

Staff concurs with the applicant's response and believes compliance with this subsection of this policy has been demonstrated.

**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.***

**STAFF COMMENT:** In response to this criterion, the applicant's burden of proof provides the following:

*There has been a change in circumstances since the subject property was last zoned and a mistake, evident in 20-20 hindsight, in designating the subject property EFU/Agriculture. This zone was applied to the property in 1979 and 1980 when Deschutes County adopted zones, a zoning ordinance and comprehensive plan that complied with the Statewide Goals.*

*The change in circumstance that has occurred is that the City of Bend has developed out to the edge of the subject property. Prior to 1979 and 1980, this area was a rural area of open spaces along a State highway. It is now an area that includes a brew pub, apartments, major shopping centers and retailers, banks, restaurants, gyms, churches and car dealerships in close proximity – with all the traffic and impacts those uses generate. The rural areas around the property have developed with single-family homes. There are only a handful of farm properties in the area. Most of the EFU-zoned land is not engaged in farm use.*

*In response to this change in the character of the area and a need for higher density development in the Bend UGB, the City of Bend rezoned and redesignated the land that adjoins the west boundary of the subject property from RL, Low Density Residential to RS, Standard Density Residential.<sup>7</sup> This allows urban density residential housing along*

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<sup>7</sup> The City's general plan map from 1994 shows that the subject property was designated RL.

west boundary of the property. That type of housing has been built along the south half of the boundary.

Traffic along Highway 20 and Bear Creek Road has increased dramatically since the property was designated EFU making it impractical to operate farm equipment on either road or to allow cattle to use these road to travel to other agricultural lands in the area that might be used for grazing.<sup>8</sup>

Since the property was zoned, it has become evident that farm uses are not viable on the property or on other area properties. The economics of farming have worsened over the decades making it virtually impossible for a Deschutes County property owner to make money farming good ground. Central Oregon Irrigation District has provided us with an irrigation map prepared by the State Engineer/Surveyor around 1945 to 1948, attached as **Exhibit N** of this burden of proof. It shows that lands in the area of the subject property had extensive water rights. Since that time, almost none of the lands shown continue to irrigate their properties.

Between 2007 and 2012, the number of farm operations in the county dropped from 1405 to 1283 farms (8.68% decrease). This is not surprising as only 16.45% of farm operators achieved a net profit from farming in 2012 (211 of 1283 farm operations). That figure was 17% in 2007 (239 of 1405 farm operations). A copy of the Table 4, Net Cash Farm Income of the Operations and Operators: 2012 and 2007 from the 2012 US Census of Agriculture, the source of this information, is **Exhibit O** of this burden of proof. The vast majority of farms in Deschutes County have soils that are superior to those found on the subject property. As farming on those soils is problematic and generally not profitable, it is reasonable to conclude that no reasonable farmer would purchase the subject property for the purpose of attempting to earn a profit in money from agricultural use of the land.

In 1979 and 1980, lands that contained poor soils but were mostly undeveloped were zoned EFU without regard to the specific soil characteristics of the property. Land owners were required to apply for a zone change to move their unproductive EFU properties out of the EFU zone. The County's zoning code allowed these owners a one-year window to complete the task. The zone change approach in 1979 and 1980 recognized that some properties would be mistakenly classified EFU even though soils and other conditions did not merit inclusion of the property in the EFU zone. Other property owners of lands east of Bend received approval to rezone their properties from EFU to MUA-10 because their properties contained poor soils and were improperly included in the EFU zone. The soils on the subject property are similarly poor and also merited MUA-10 zoning to correct the broad brush mapping done in 1979 and 1980. Furthermore, there is a change of circumstances since the application of EFU zoning – the County's comprehensive plan was amended to specifically allow individual property owners to, again, have improperly classified land reclassified.

Staff concurs with the applicant's response and believes compliance with this subsection of this policy has been demonstrated.

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<sup>8</sup> There are currently no properties in the surrounding, nearby area that are currently available for this type of use.



## C. STATE LAW

### 1. Statewide Goal 3

The applicant's burden of proof provides the following:

State law requires the County to determine if the subject property has resource values that merit protection under State law. In 1979, Deschutes County applied agricultural plan designation to the property based on limited and general information about the nature of the soils found in the area of the property. The County has also implemented Goal 5 resource protection programs throughout Deschutes County. No Goal 5 resources were identified and protected on the subject property. The question before the County, at this time, is whether the subject property meets the definition of Agricultural land and, if not, whether it merits protection under Goal 3. The County must also determine if the property has forest resources that merit protection under Goal 4. In this case, it is clear that the subject property is not Goal 4 forest land. The requirements of Goal 4 are addressed near the end of this document.

Goal 3 provides that it is a Statewide Goal "[t]o preserve and maintain agricultural lands." The Goal states that "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." Farm use is an activity undertaken for the purpose of making a profit in money.

Goal 3 defines agricultural land. That definition is restated in OAR 660-033-0020 which is addressed below.

### 2. OAR 660, Division 33, Agricultural Land

#### **OAR 660-033-0020**

***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;***

**STAFF COMMENT:** In response to (1)(a)(A) above, the applicant's burden of proof provides the following:

*The soils found on the subject property are not predominately Class I through VI soils when irrigated or when not irrigated as shown by the more detailed soil data provided by **Exhibit D**. Over 67% of the property is Class VII or VIII soil when not irrigated and is not rated for irrigation use due to its unsuitability for that purpose. State law allows the County to rely on the more detailed and accurate information provided by the **Exhibit D** study.*

Staff concurs with the applicant's response and believes compliance with this subsection of the rule has been demonstrated.

**(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**

**STAFF COMMENT:** In response to subsection (1)(a)(B) above, the applicant's burden of proof provides the following:

*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 subject property was owned by John A. and Chrissie Ensworth from approximately 1972 through 1998. Internet research revealed that John A. Ensworth was a public school teacher at Kenwood Elementary School who received the 1973 National Teacher of the Year Award. According to an application filed with the County, starting around 1978 Mrs. Ensworth raised bass and crappies in the two ponds that are located on the property. The fish were sold to the owners of private ponds. This operation is described in a letter to David Leslie, a Deschutes County Planner, in 1992, **Exhibit P**. This use was abandoned long ago.*

*Using the subject property to raise bass and crappies would not provide sufficient income to achieve a profit in money. This fact is a likely reason the use was abandoned. This assumption is supported by Table 22 of the 2012 Census of Agriculture which shows that there is only one aquaculture operation in Deschutes County and that it raises trout; not bass and crappies for stocking in private ponds. If the relatively small area set aside for this use is considered as being suitable for farm use, the majority of the property still is comprised of Class VII and VIII soils.*

*It is unknown whether any other agricultural use occurred on the property during the time the property was owned by the Ensworths but it is known that they lost water rights due to nonuse for a period of at least five years. It is possible that they had a few head of cattle they raised for personal consumption but the vegetation on the property is not sufficient to support a commercial herd of cattle.*

*The extremely poor soils found on the property prevent it from providing sufficient feed for livestock for dryland grazing. The dry climate, the proximity to US Highway 20 and area development prevent grazing from being a viable or potentially profitable use of the property. The soils, also, are so poor that they would not support the production of crops for a profit, assuming irrigation water rights could be obtained for that purpose.*

The primary agricultural use conducted on properties with poor soils is grazing cattle. Given the high cost of irrigating and maintaining the property as pasture or cropland (high labor costs, labor-intensive, high cost of irrigation equipment and electricity, high cost of fertilizer, etc.), dry land grazing is the accepted farm use of poor soils in Deschutes County. This use can be conducted until the native vegetation is removed by grazing (see the discussion of the suitability of the property for grazing, below). When assessing the potential income from dry land grazing, Deschutes County uses a formula and assumptions developed by the OSU Extension Service. This formula is used by the County to decide whether EFU-zoned land is generally unsuitable for farm use.

- 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 eaten, it generally will not grow back until the following spring.
- An average market price for beef is \$1.20 per pound.

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

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

$$60.0 \text{ lbs. beef/acre} \times 36.39 \text{ acres} \times \$1.20/\text{lb.} = \$2,620.08 \text{ per year gross income}$$

Thus, the total gross beef production potential for the subject property would be approximately \$2,620.08 annually. This figure represents gross income and does not take into account real property taxes, fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production which would exceed income. In addition, as the subject property abuts a busy state highway, the cost for liability insurance due to the risk of livestock escape and the potential for a vehicle/livestock accident, would most likely be extremely high.

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

**Soil Fertility:** Without soil sampling, lab analyses, proper fertilization and soil amendment the soils found on the subject property are non-productive and infertile according to soils scientist Roger Borine. According to Mr. Borine's soils study, **Exhibit D**, organic matter is "extremely low" and clay content is less than five percent, resulting in a very low Cation Exchange Capacity (CEC). According to Mr. Borine, "CEC is important because it provides a reservoir of nutrients for plant uptake." **Exhibit D**, p. 6. Mr. Borine also determined that soils have a low level of nitrogen, phosphorous, potassium and sulfur. As a result, "[h]igh levels of fertilization are required for a grass crop to be produced. Without an ability of the soil to attract and absorb nutrients (low CEC) they are readily leached out of the soil by irrigation and precipitation thus becoming unavailable for plant use and lost into the surface and ground water." **Exhibit D**, p. 6. Mr. Borine noted that while the soils found on the subject property have

an adequate pH, the use of needed fertilizers reduce the nutrients available to plant. "Lime as a soil amendment must be added to raise soil pH to an acceptable range for plant nutrient intake." **Exhibit D**, p. 6. Mr. Borine concluded that "[t]o maintain a minimum level of essential nutrients for proper crop growth multiple yearly application of very high rates of fertilizer and soils amendments are required."

The fact that the soils are infertile unless made fertile through artificial means supports the applicant's position that the Class VII soils and the entire property is not suitable for farm use. The costs to purchase and apply fertilizer and soil amendments and the costs to sample and test soils are a part of the reason why it is not profitable to farm the subject property. This claim is consistent with data provided by the 2012 Census of Agriculture that shows that 83.55% of farms in the County loss money from farming, **Exhibit O**.

**Suitability for Grazing:** The climate is cold and dry. The growing season is very short – just half the length of the growing season in the more temperate Madras region of Central Oregon. The average annual precipitation is only 11.7 inches. This means that the amount of forage available for dry land grazing is low. This also means that a farmer has a short period of amount of time to irrigate pastures. This makes it difficult for a farmer to raise sufficient income to offset the high costs of establishing, maintaining and operating an irrigation system.

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

Most of the soils on the property are Class VII soils that are not irrigated. Given the poor quality of these soils, it is highly unlikely that Central Oregon Irrigation District would approve a transfer of water rights to this property. In addition, no person intending to make a profit in farming would go to the expense of purchasing water rights, mapping the water rights and establishing an irrigation system to irrigate the lands on the subject property.

A part of the small amount of irrigation water rights assigned to the subject property is currently used for irrigation around the existing residence located on the property and not for crops and/or livestock. The remainder of the water right is located under the house and is not transferable. Given the dry climate, it is necessary to irrigate the subject property to grow a hay crop and to maintain a pasture. Irrigating the soils found on the subject property, according to Mr. Borine, leaches nutrients from the soil so that expensive testing, soils amendments and fertilizers are needed to grow crops. A farmer would need to also spend significant sums of money to purchase additional water rights, purchase irrigation systems, maintain the systems, pay laborers to move and monitor equipment, obtain electricity, pay irrigation district assessments and pay increased liability insurance premiums for the risks involved with farming operations.

### **Termination of Historic Irrigation Water Rights:**

*According to Central Oregon Irrigation District, the subject property had water rights in the distant past but failed to put the water to beneficial use. As a result, the water rights were terminated. The lack of beneficial use of the water rights, at times prior to high land values and development pressure, is a true reflection of the fact that irrigating this property and its very poor soils was not prudent. The property to the east and lands to the north have, also, not been irrigated for decades.*

*According to COID, 5.0 acres of irrigation water rights were transferred off the property in 1946. In 1955, 3.0 acres of irrigation water rights were removed as the result of a court decree due to nonuse. In 1996, 9.75 acres were transferred from an irrigation water right to a pond right (7.50 acres and 2.25 acres) and 9.0 additional acres were transferred to a property that was over-irrigating. The transfer document explains that the owner was under-irrigating. In 2000, a final 9.0 acre transfer occurred that removed all water other than the .25 acre water right that is located around the house and the pond water rights. According to COID, the 1996 and 2000 transfers were done as part of a cleanup of water rights that removed water from lands not putting the water rights to a beneficial use.*

*These terminated water rights, if restored, would not improve the NRCS soils rating of the property to the point where a majority of the property would be Class I through VI soils – making the property “Agricultural Land” as defined by Statewide Goal 3.*

**Existing Land Use Patterns:** *The applicant’s analysis of existing land use patterns earlier in this document shows that the properties located to the west are located within the city limits for the City of Bend and a majority of these lots are located in and developed with single-family homes, a nursery and a church. The property is bordered by Highway 20 to the north with the properties to the north of the highway being zoned UAR-10 and EFU. None of these properties appear to be employed in farm use. Two properties adjoin the eastern edge of the subject property and are zoned EFU-TRB. Neither is employed in farm use. One of the properties received conditional use approval for the placement of a manufactured home and the other property has a home which was constructed in 1935 but appears to be vacant at this time. Bear Creek Road adjoins the southern edge of the subject property with the properties south of Bear Creek Road zoned EFU-TRB. These properties appear to be small hobby farms with horses, irrigated pasture and some small hay production. One property is a nonfarm dwelling parcel that was created by a “farm/nonfarm” partition. The close proximity to the City of Bend, the busy highway and residential areas limits the types of agricultural activities that could reasonably be conducted for profit on the subject property. The subject property would not be suitable for raising animals that are disturbed by noise. Additionally, the property owner would bear the burden of paying for harm that might be caused by livestock escape along the extremely busy highway, in particular livestock and vehicle collisions. Any agricultural use that requires the application of pesticides and herbicides would be very difficult to conduct on the property given the numerous homes located in close proximity to the property and the heavy traffic along Highway 20 due to aerial drift of these chemicals. In addition, the creation of dust which accompanies the harvesting of crops is a major concern on this property due to the close proximity of Highway 20 and the significant amount of traffic using the highway on a daily basis. Heavy dust could limit vision along the highway and be a concern for major traffic accidents in this area.*

**Technological and Energy Inputs Required:** According to Mr. Borine, “[t]his parcel requires technology and energy inputs over and above that considered acceptable farming practices. Excessive fertilization and soil amendments; very frequent irrigation applications pumped from a pond with limited availability; and marginal climatic conditions restrict cropping alternatives.” Pumping 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:** Farming lands comprised of soils that are predominately Class VII 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 occur on Class VI non-irrigated soils that have a higher soils class if irrigated. Crops are typically grown on soils in soil class III and IV.

Staff concurs with the applicant’s response and believes compliance with this subsection of the rule has been demonstrated.

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

**STAFF COMMENT:** In response to subsection (1)(a)(C) above, the applicant’s burden of proof provides the following:

*The subject property is not land necessary to permit farm practices to be undertaken on adjacent or nearby lands. The following facts are shown by the applicant’s discussion of surrounding development in Section E of this application, above, which is discussed further below:*

**West:** All of the properties to the west of the subject property are located within the city limits for the City of Bend, zoned RS – Residential Urban Standard Density and designated RM (Medium Density Residential on the Comprehensive Plan Map. Several of the adjoining tax lots are part of the Traditions East Subdivision. The largest adjoining tax lot to the west is operated by Landsystems Nursery and is used for the storing and growing of trees, plants, shrubbery and other items used in their retail nursery operation located directly across Highway 20 to the north.

**North:** All of the land north of the subject property is separated from the subject property by US Highway 20, a state highway providing access between the City of Bend and small towns located to the east including Burns and on to the Idaho state line. This is a major east/west connector through the State of Oregon. It is not practicable to operate these properties as a single farm unit due to this separation. Furthermore, these properties are not employed in farm use and one property, tax lot 900, Assessor’s Map 17-12-35 is zoned UAR-10 and designated URA (Urban Reserve Area) on the comprehensive plan map.

The properties to the north that are zoned EFU-TRB and that are not employed in farm use are mapped by the NRCS as being located in Mapping Unit 58C. The vast majority of the soils in this mapping unit are nonagricultural soils (Class VII and VIII). Mapping unit 58C contains Gosney-rock outcrop-Deskamp complex soils. The Gosney soil is rated Class VII and is 50% of the mapping unit. Rock outcrops are rated Class VIII and are 25% of this mapping unit. These poor soils are the likely reason these properties are not employed in farm use.



**East:** Two tax lots adjoin the eastern boundary of the subject property. Both tax lots are developed with residences. Tax Lot 1600 has a double-wide manufactured home with a hay cover and machine shed. Tax Lot 1601 has a one-story residence built in 1935 and appears to be vacant at this time. Neither of these tax lots is currently engaged in any farm use. According to information provided by the NRCS Soil Survey of the Upper Deschutes River Area, both of these tax lots are comprised of the identical soil types identified on the subject property. Tax Lot 1600 is surrounded on three sides by major roads including Highway 20 to the north, Ward Road to the east and Bear Creek Road to the south.

**South:** All of the land south of the subject property is separated from the subject property by Bear Creek Road, a major rural collector, and is zoned EFU-TRB. Bear Creek Road is a major road that provides access to businesses, schools and commercial businesses located within the City of Bend. It is not practicable to operate these properties as a single farm unit due to this separation. The subject property, also, is not needed to permit farm practices to be undertaken on any of the lands found south of Bear Creek Road. These farm operations, are independent operations that can continue to operate after the subject property is zoned MUA-10 to match other MUA-10 zoning that adjoins EFU property that is south of the subject property.

The above analysis shows that the subject property is not land “necessary to permit farm practices to be undertaken on any adjacent nearby lands.”

Staff concurs with the applicant’s response and believes compliance with this subsection of the rule has been demonstrated.

**(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;**

**STAFF COMMENT:** In response to subsection (1)(b) above, the applicant’s burden of proof provides the following:

*The subject property is not and has not been a part of a farm unit that includes other lands not currently owned by the applicant. The applicant owns a triangular UAR-10 property that is separated from the subject property by a major canal. This land is not located in an exclusive farm zone so is not subject to scrutiny under this rule. This land is in an acknowledged exceptions area so it cannot, by definition, be agricultural land (see below).*

*This land was acquired by the Ensworths in 1976, according to the Official Record of Descriptions of Real Property. We have found no evidence that the area was used as a part of the farming operations conducted by the Ensworths (aquaculture). It is unlikely that the area was used for farm operations as part of the farm unit as it is located to the west of the canal and does not have irrigation water rights.*

*If this UAR-10 property is viewed to be a part of the farm unit, the majority of soils in the farm use are Class VII and VIII nonagricultural soils as shown by the Borine soils report submitted to DLCD, **Exhibit D**. This merits a finding that this parcel is not agricultural land and is properly zoned UAR-10.*

*All parts of the subject property were studied by the applicant’s soils analysis, **Exhibit D**. 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.*

Staff concurs with the applicant's response and believes compliance with this subsection of the rule has been demonstrated.

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

**STAFF COMMENT:** The portion of Tax Lot 1500 west of the COID canal is part of the legal lot of record for the subject property and is also owned by the applicant. It is zoned UAR-10. The applicant indicates that this is an acknowledged exceptions area for Goal 3 and is not "Agricultural Land". However, Staff's review of the Deschutes County Comprehensive Plan Map reveals a designation of Agriculture has been applied to that portion as well.

As previously mentioned, this portion of the property has been identified on the latest Bend UGB map for inclusion into the Bend UGB. If the property is officially adopted into the UGB, Staff does not believe this is an issue as both its zoning and comprehensive plan designation will be changed by the City.

#### **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).**

**STAFF COMMENT:** In response to this criterion, the applicant's burden of proof provides the following:

*The applicant has provided substantial evidence that addresses the factors set forth in OAR 660-033-0020(1), the definition of Agricultural Land, in this document. The applicant's findings in subsection (3), below, show that the uses of all adjoining and nearby lands and that the lands on the subject property are not "necessary to permit farm practices to be undertaken on adjacent nearby lands."*

Staff concurs with the applicant's response and believes compliance with this subsection of the rule has been demonstrated.

- (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.***

**STAFF COMMENT:** In response to this criterion, the applicant's burden of proof provides the following:

*The evidence that shows that the subject property is not suitable for farm use and is not necessary to permit farm practices to be undertaken on adjacent or nearby lands has assigned no significance to the ownership of adjoining properties. It has, also, involved a detailed examination of lands outside the boundaries of the subject property.*

Staff concurs with the applicant's response and believes compliance with this subsection of the rule has been demonstrated.

***(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.***

**STAFF COMMENT:** In response to this criterion, the applicant's burden of proof provides the following:

*The Sage West soils assessment, **Exhibit D** provides more detailed soils information than contained on the Web Soil Survey, the Internet soil survey of soils data and information produced by the National Cooperative Soil Survey. Those sources provide general soils data for large units of land. The Sage West, LLC soils assessment provides detailed and accurate information about a single property based on numerous soil samples taken from the subject property. The depth of these soils was also determined. The soil samples taken from the subject property were tested to determine soil type and water-carrying capacity of the soils. The results of this analysis were used to develop an accurate soils map of the subject property. The Sage West, LLC soils assessment is related to the NCRS land capability classification system that classified soils Class 1 through 8. An LCC rating is assigned to each soil type based on rules provided by the NRCS.*

Staff concurs with the applicant's response and believes compliance with this subsection of the rule has been effectively demonstrated.

***(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***

**STAFF COMMENT:** The applicant is seeking approval of a non-resource plan designation on the basis that the subject property is not 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.***

**STAFF COMMENT:** The applicant's soil assessment has been certified by DLCD as required by this rule and is included in the applicant's submitted materials.

***(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.***

**STAFF COMMENT:** As mentioned above, the applicant has provided DLCD's certification of its soils analysis with the submitted application materials and has complied with the soils analysis requirements of OAR 660-033-0045 in order to obtain that certification. DLCD's certification establishes compliance with OAR 660-033-0045.

### **3. OAR 660, DIVISION 12, TRANSPORTATION RULE**

#### **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.***

**STAFF COMMENT:** In response to this criterion, the applicant's burden of proof provides the following:

*The proposed rezoning and change in plan map designation will not significantly affect any existing or planned transportation facility. As a result, this application complies with the TPR. The maximum potential increase in traffic caused by this application is the traffic generated by four new homes. At standard vehicle trip rates, the County's code that implements this administrative regulation does not require a traffic impact analysis and this impact is considered de minimus. This fact can be confirmed by the County's transportation planner during the review of this application.*

At the request of the County Senior Transportation Planner, Peter Russell, the applicant submitted a transportation memo, dated September 9, 2016, which was received on September 10, 2016. In response to the letter, Mr. Russell provided the following comments:

*I have reviewed the Sept. 9, 2016, transportation memo from the applicant's traffic engineer, which was prepared in response to staff's determination the transportation planning rule (TPR) analysis requirements have not been met for the Exclusive Farm Use (EFU) to Multiple Use (MUA-10) for demonstrating no significant effect. The property's sole access currently is a driveway onto US 20; the Deschutes County TSP shows this segment fails in 2030.*

*In this most recent memo the applicant's engineer focused on establishing a baseline for trip generation in the existing zoning by using what would be the highest trip rate from a use permitted outright in the EFU zone and contrasting it to the highest trip generator permitted outright in the MUA-10. The applicant's traffic engineer concluded that based on this comparison the highest trip generator for EFU would be a church of less than 100 seats whereas the highest trip generator in the MUA-10 would be two additional houses, both with Type I home occupations. The church would generate more trips than the homes, thus the rezone would result in fewer trips, thus proving no significant effect.*

*Staff agrees this would be an appropriate method if either 1) the EFU parcel was vacant or 2) the applicant was proposing a church simultaneously with the rezone or a church application already had been approved. Neither 1) nor 2) are true. The parcel is developed with a single-family home and staff feels the baseline trip generation should be based on that use. This has been past County practice in cases where parcels were developed and there was no simultaneous application for a new land use. Thus, the parcel would have more trips generated under the MUA-10 zoning than EFU and the applicant has not demonstrated no significant effect.*

*Staff will defer to the hearing's officer on whether the applicant's approach to trip generation is allowable; however, staff points out TPR compliance can be met via a different route. While the affected segment of US 20 is forecast to fail in 2030, the Deschutes County TSP lists planned improvements at Table 5.3.T1 (County Road and Highway Projects). Adding additional travel lanes on US 20 between Providence and Hamby is listed as a \$2 million dollar medium priority project (next 6-10 years). The applicant, under the TPR, can rely on planned improvements as a mitigation. Staff also agrees with the applicant that the amount of additional traffic that would be generated the proposed zone change is minimal. While the all parties agree the resulting trips would be under the County's 50-trip threshold for traffic studies as stated in Deschutes*

County Code (DCC) 18.116.310(C)(3)(a), staff points out DCC 18.116.310(E)(4) requires traffic analysis for zone changes

Again, staff agrees with the applicant's traffic engineer that there is no significant effect to US 20 from this EFU to MUA-10 zone change; we just arrived at the same destination via different routes.

Staff defers to the Hearings Officer to determine whether a Transportation Impact Analysis, required by DCC 18.116.310 (E)(4) is warranted for the proposed Plan Amendment and Zone Change. Specifically, DCC 18.116.310 (E)(4) states:

4. *Generators of large volumes of traffic (>5,000 daily and >500 peak hour trips), zone changes, and any destination resort development will also require an analysis of traffic conditions in a twenty-year horizon.*

Based on the County Senior Transportation Planner's conclusion that there is no significant effect to US 20 resulting from the proposed Plan Amendment and Zone Change, based on the submitted transportation letter, staff believes compliance with the Transportation Planning Rule has been effectively demonstrated.

### **OAR 660, Division 15, Statewide Planning Goals and Guidelines**

**STAFF COMMENT:** The applicant's burden of proof statement addresses applicable Statewide Planning Goals and Guidelines below:

#### **Goal 1, Citizen Involvement**

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

#### **Goal 2, Land Use Planning**

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

#### **Goal 3, Agricultural Lands**

*The applicant has shown that the subject property is not agricultural land so Goal 3 does not apply.*

#### **Goal 4, Forest Lands**

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

**Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces**

*The subject property does not contain any inventoried Goal 5 resources.*

**Goal 6, Air, Water, and Land Resources Quality**

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

**Goal 7, Areas Subject to Natural Disasters and Hazards**

*This goal is not applicable because the subject property is not located in an area that is recognized by the comprehensive plan as a known natural disaster or hazard area.*

**Goal 8, Recreational Needs**

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

**Goal 9, Economy of the State**

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

**Goal 10, Housing**

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

**Goal 11, Public Facilities and Services**

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

**Goal 12, Transportation**

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

**Goal 13, Energy Conservation**

*The approval of this application does not impede energy conservation. The subject property is located adjacent to the city limits for the City of Bend. Providing homes in this location as opposed to more remote rural locations will conserve energy needed for residents to travel to work, shopping and other essential services provided in the City of Bend.*

**Goal 14, Urbanization**

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

**Goal 15, Willamette Greenway**

*This goal does not apply because the subject property is not located in the Willamette Greenway.*

**Goals 16 through 19**

*These goals do not apply to land in Central Oregon.*

Staff concurs with the applicant's response and believes compliance with the applicable Statewide Planning Goals has been effectively demonstrated.

**IV. CONCLUSION:**

Staff believes that the applicant has met the burden of proof necessary to justify changing the Plan Designation and Zoning of the subject property from Agriculture/EFU-TRB to RREA/MUA-10 through effectively demonstrating compliance with the applicable criteria of DCC Title 18 (The Deschutes County Zoning Ordinance), The Deschutes County Comprehensive Plan, and applicable sections of OAR and ORS. The only exception to this, is whether the Hearings Officer believes that a Traffic Impact Analysis is necessary and warranted pursuant to DCC 18.116.310 (E)(4).

Dated this 20<sup>th</sup> day of September, 2016      Mailed this 20<sup>th</sup> day of September, 2016