



Deschutes County Board of Commissioners
1300 NW Wall St., Suite 200, Bend, OR 97701-1960
(541) 388-6570 - Fax (541) 385-3202 - www.deschutes.org

AGENDA REQUEST & STAFF REPORT

For Board Business Meeting of April 22, 2015

DATE: April 15, 2015

FROM: Will Groves CDD 541-388-6518

TITLE OF AGENDA ITEM:

Consideration and Signature of Order No. 2015-027, Extending Resolution of Intent to Rezone 2009-035.

PUBLIC HEARING ON THIS DATE? No.

BACKGROUND AND POLICY IMPLICATIONS:

On April 9, 2009, the Board resolved to rezone the western portion of the Lower Bridge Mine, as identified by Exhibits A and B to Resolution 2009-035, from Surface Mining to Rural Residential upon the fulfillment of the ten conditions listed in Resolution 2009-035. Condition #7 of Resolution 2009-035 specified the Resolution of Intent to Rezone would expire in five years unless extended. Deschutes County Code ("DCC") 18.136.030(B) allows the extension of a Resolution of Intent to Rezone, subject to Board approval.

Lower Bridge Road, LLC, has applied to extend the Resolution to April 9, 2016. The applicant states that all conditions are complete, excluding Conditions #1 and #2. These conditions require that the applicant obtain (1) a "No Further Action" ("NFA") determination from the Oregon Department of Environmental Quality ("DEQ") and (2) a determination of "no apparent public health hazard" from the Oregon Department of Human Services for a residential use designation for the 410 acre area. The applicant is working toward completing this requirement and has developed and partially executed a work plan in coordination with these agencies. Progress on completing these conditions was slowed during the economic downturn.

Staff recommends that the Board extend the Resolution as requested.

FISCAL IMPLICATIONS:

None.

RECOMMENDATION & ACTION REQUESTED:

Motion: Approve signature of Order 2015-027.

ATTENDANCE: Will Groves and Legal Counsel

DISTRIBUTION OF DOCUMENTS:

Will Groves, CDD
Legal Counsel

INSTRUCTIONS FOR COMPLETING THE AGENDA REQUEST FORM

Use “tab” to move between fields. You can use as much space as necessary within each field. You may want to save this document to your computer and set it up with your department’s specific information for use the next time. You can remove the editing restrictions by going to review/restrict editing (stop protection), after you have saved it to your computer.

Do not leave any fields incomplete. Don’t forget the “preferred meeting date” section. Incomplete documents will be returned to the Department Director. This could cause your agenda item to miss the deadline for submission.

The Board conducts business meetings on Mondays and Wednesdays beginning at 10 a.m. Please note, if there are not enough agenda items to justify holding two meetings in one week, items may be combined and addressed at either the Monday or Wednesday meeting. There are weeks that the Board does not meet at all; much depends on the Commissioners’ schedules and availability. If your item is time-sensitive or you need to notice a specific date for a hearing or decision, please contact the Board’s Secretary.

The agenda request and backup documents should be submitted to the Board’s secretary no later than Wednesday afternoon prior to the following week’s meetings. It can be submitted as far in advance as you want.

If you are submitting a contract or other document where more than one original is needed (for instance, one original for the County and one for the contractor), please submit the correct number of original documents.

Unless your agenda item is an Order, Ordinance, Resolution or letter, a document summary form is required as well.

Please also e-mail the agenda request form and the document summary form to the Board Secretary so that minor changes can be made if needed.



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Lower Bridge Road, LLC, has applied to extend the Resolution to April 9, 2016. The applicant states that all conditions are complete, excluding Conditions #1 and #2. These conditions require that the applicant obtain (1) a “No Further Action”(“NFA”) determination from the Oregon Department of Environmental Quality (“DEQ”) and (2) a determination of “no apparent public health hazard” from the Oregon Department of Human Services for a residential use designation for the 410 acre area. The applicant is working toward completing this requirement and has developed and partially executed a work plan in coordination with these agencies. Progress on completing these conditions was slowed during the economic downturn.

Staff recommends that the Board extend the Resolution as requested.

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None.

RECOMMENDATION & ACTION REQUESTED:

Motion: Approve signature of Order 2015-027.

ATTENDANCE: Will Groves and Legal Counsel

DISTRIBUTION OF DOCUMENTS:

Will Groves, CDD
Legal Counsel

REVIEWED

LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Extending Resolution of Intent to
Rezone 2009-035.

*
*

ORDER NO. 2015-027

WHEREAS, the Board resolved to rezone certain real property identified by Exhibits A and B to Resolution 2009-035 upon the fulfillment of the ten conditions listed in Resolution 2009-035; and

WHEREAS, Condition #7 of Resolution 2009-035 specified the Resolution of Intent to Rezone would expire in five years unless extended; and

WHEREAS, the resolution was extended in 2014 for one year; and

WHEREAS, Deschutes County Code ("DCC") 18.136.030(B) allows the extension of a Resolution of Intent to Rezone by the Board; and

WHEREAS, although the above DCC provision does not list any criteria for the extension, the Board has given due consideration as to whether to extend Resolution 2009-035; now therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON,
HEREBY ORDERS as follows:

Section 1. The Board hereby extends the expiration date of Resolution 2009-035 to October 26, 2018.

Dated this _____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DeBONE, Chair

ALAN UNGER, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner

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SECTION I	APPLICATION FORM
SECTION II	BURDEN OF PROOF STATEMENT



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
(541)388-6575 FAX (541)385-1764
<http://www.co.deschutes.or.us/cdd/>

APPLICATION FOR EXTENSION OF A LAND USE PERMIT

FEE: _____

Applicant's Name (print): Lower Bridge Road, LLC Phone: (____) _____

Mailing Address: 205 E. 11th Street, Ste. 200 City/State/Zip: Vancouver, WA 98660

Property Owner's Name (if different)*: _____ Phone: (____) _____

Mailing Address: _____ City/State/Zip: _____

Nature of Application: Extension of Resolution of Intent to Rezone

Property Description: Township 14 Range 12 Section _____ Tax Lot 1501, 1502, 1600

Deschutes County Application Number: ZC-08-1 / PA-08-1

Date of Approval: 4/9/2009 Permit Expiration Date: 4/9/2015

Property Zone: SM to RR-10

On the reverse side, or on a separate sheet of paper, please respond to the following:

1. Describe any action that has been taken to fulfill any or all conditions of approval.
2. Describe the reason(s) for not beginning or continuing development or meeting conditions of approval within the approval period.

Applicant's Signature: *Tia M. Lewis, CEO of Robert Corp, Manager* Date: 03/03/2015

Property Owner's Signature (if different)*: _____ Date: _____

Agent's Name (if applicable): Tia M. Lewis Phone: (541) 749-4048

Mailing Address: 360 SW Bond Street, Ste. 500 City/State/Zip: Bend, OR 97702

*If this application is not signed by the property owner, a letter authorizing signature by the applicant must be attached.

(over)

BURDEN OF PROOF

1. GENERAL INFORMATION

- A. **Request:** The applicant, Lower Bridge Road, LLC, as successor in interest to the Daniels Group, LLC submits the following burden of proof statement addressing the applicable criteria for an extension of approval of the Deschutes County land use approval ZC-08-1 / PA-08-1. A prior one-year extension was granted pursuant to E-14-6 to April 9, 2015. This is the applicant's second request for an extension.
- B. **Location:** The subject property is located west of Lower Bridge Way in Terrebonne and contains approximately 410 acres. It is identified on Deschutes County Assessor's Map 14-12, tax lots 1501, 1502 and 1600.
- C. **Zoning:** The subject property is zoned surface mining but subject to the Resolution of Intent to Rezone to RR-10, which is the subject of the present extension request.
- D. **Surrounding Uses:** The area surrounding the subject property consists of parcels zoned EFU, RR-10 and Flood Plain, with surrounding uses being a mixture of agricultural and rural residential.
- E. **Site Description:** The subject property is approximately 410 acres in size and is located to the west of Lower Bridge Way. It is the former site of a diatomaceous earth mine, portions of which have been reclaimed and portions of which have been planted and maintained with pasture grass to restore the land and prevent airborne dust.

2. CRITERIA

Conformance with Deschutes County Code, Section 22.36.010, Expiration of Approval.

C. Extensions.

- 1. The Planning Director may grant one extension of up to one year for a land use approval or a phase of a land use approval, and two years for those dwellings listed in DCC 22.36.010(B)(4) above, regardless of whether the applicable criteria have changed, if:
 - a. An applicant makes a written request for an extension of the development approval period;
 - b. The request, along with the appropriate fee, is submitted to the County prior to the expiration of the approval period;
 - c. The applicant states reasons that prevented the applicant from beginning or continuing development or meeting conditions of approval within the approval period;
 - d. The County determines that the applicant was unable to begin or continue development or meet conditions of approval during the approval period for reasons for which the applicant was not responsible, including, but not limited, delay by a state or federal agency in issuing a required permit; and

2. Up to two additional one-year extensions, or two-year extensions for those dwellings listed under DCC 22.36.010(B)(4) above, may be granted under the above criteria by the Planning Director or the Planning Director's designees where applicable criteria for the decision have not changed.

FINDING: The present Resolution of Intent to Rezone issued under Deschutes County file number ZC-08-1 / PA-08-1 contains a condition 7 which reads as follows:

7. This Resolution shall expire (5) years from the date this approval Decision is final, unless the conditions and stipulations set forth above have been satisfied or an extension is granted pursuant to DCC Title 22.

The Decision was final April 9, 2009. On March 19, 2014, the applicant made a written request for a one year extension pursuant to DCC 22.36.010(c)(1) above as contemplated by condition 7 of the land use approval decision. The County granted that extension until April 9, 2015 under County file no. E-14-6. Pursuant to Section 2 above, the applicant requests an additional one-year extension as the applicable criteria for approval of the Resolution of Intent have not changed. This request is submitted together with the appropriate fee and is timely as it is submitted prior to the expiration of the approval period as extended in E-14-6.

The applicant has completed all conditions of the land use approval except for conditions 1 and 2. Conditions 1 and 2 contain the requirements for no further action letters or the equivalent from DEQ and DHS related to the environmental conditions on the subject property. The applicant has taken steps toward fulfilling conditions 1 and 2 by implementing the reclamation plan, planting and watering the site and monitoring the progress. However, the severe economic recession impeded financing and progress in the past few years. The applicant has focused its efforts on the east area (not subject to the Resolution) to prepare it for eventual rural cluster subdivision development and is preparing to make a tentative subdivision application for 19 lots on the east side property within the next several months. The applicant expects to be able to complete the steps necessary to complete or make significant progress toward completion of the remaining two conditions within the time period for the extension.

3. CONCLUSION

For the reasons set forth herein, the applicant's request for extension of the approval period for ZC-08-01 / PA 08-1 for one year, until April 9, 2016, should be approved.

DATED this 10th day of March, 2015.

Schwabe, Williamson & Wyatt



Tia M. Lewis, OSB # 933437
Of Attorneys for Applicant

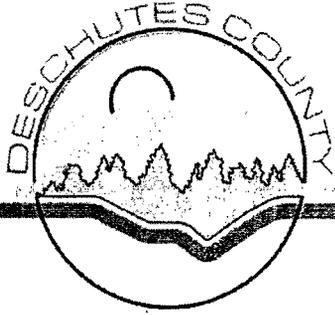
CDD COVER SHEET FOR SLB
04/04/2014 09:09:39

PL
1 PAGES



FILE ID	1412000001501PL20140404090939
TAXMAP	1412000001501
SERIAL	124834
DIVISION	PL
SITUS	70420 NW LOWER BRIDGE WAY
HOUSE#	70420
STREET	LOWER BRIDGE
CONTENT	E146 Decision Ltr.
RECORD ID	E146
LOCATED IN	DATE FILE

Cover Sheet Identifier
AHJKMTWX



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
(541)388-6575 FAX (541)385-1764
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April 7, 2014

Lower Bridge Road, LLC
David Fuhrer, Chief Financial Officer
205 E. 11th Street, Suite 200
Vancouver, WA 98660

Re: E-14-6; Extension of Applications PA-08-1/ZC-08-1 on Property Identified on Deschutes County Assessor's Map 14-12 as Tax Lot 1501

Dear Mr. Fuhrer:

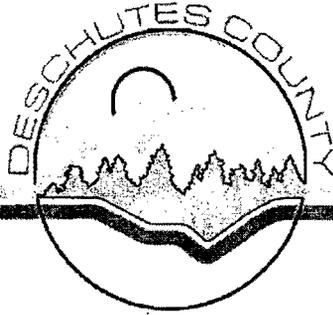
The Planning Division has reviewed your request for an extension of applications PA-08-1/ZC-08-1 against the criteria contained in Section 22.36.010(C) of the Deschutes County Code (DCC). Based on the burden of proof statement submitted with the application, it is staff's opinion the request satisfies all applicable criteria for approval.

This extension will allow a one-year extension of PA-08-1/ZC-08-1 to April 9, 2015. **PLEASE NOTE: This is your first extension. You are eligible for two additional one-year extensions and one additional two-year extension pursuant to DCC 22.36.010(C)(3). The approval granted under PA-08-1/ZC-08-1 will expire on April 9, 2015 unless the use is initiated or further extended.** If you have any questions regarding this matter, please feel free to contact me at (541) 385-1401.

Sincerely,

DESCHUTES COUNTY PLANNING DIVISION

Kevin Harrison, Principal Planner



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
(541)388-6575 FAX (541)385-1764
<http://www.co.deschutes.or.us/cdd/>

CERTIFICATE OF MAILING

FILE NUMBER: E-14-6

DOCUMENT MAILED: Decision Letter

MAP/TAX LOT NUMBER: 14-12, Tax Lot 1501

I certify that on the 7th day of April, 2014 the attached notice(s)/report(s), dated April 7, 2014, was/were mailed by first class mail, postage prepaid, to the person(s) and address(es) set forth on the attached list.

Dated this 7th day of April, 2014.

COMMUNITY DEVELOPMENT DEPARTMENT

By: Sher Buckner

Lower Bridge Road, LLC c/o David Fuhrer, CFO 205 E. 11 th Street, Suite 200 Vancouver, WA 98660	Schwabe, Williamson & Wyatt Tia Lewis, Attorney 360 SW Bond Street, Suite 400 Bend, OR 97702
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REVIEWED
je
LEGAL COUNSEL

DESCHUTES COUNTY OFFICIAL RECORDS CJ 2009-1189
NANCY BLANKENSHIP, COUNTY CLERK
COMMISSIONERS' JOURNAL 05/07/2009 08:20:24 AM

2009-1189

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

A Resolution of Intent to Rezone a Portion of the
Property at 70420 NW Lower Bridge Way,
Terrebonne from Surface Mine to Rural
Residential 10

*
*
*

RESOLUTION NO. 2009-035

WHEREAS, the Daniels Group, LLC applied to change the zoning from surface Mining (SM), Exclusive Farm Use – Lower Bridge Subzone (EFU-LB) to Rural Residential 10 (RR-10) for property described in Exhibit “A” and shown in Exhibit “B”, attached and incorporated by reference herein; and

WHEREAS, the Board of County Commissioners (“Board”) conducted public hearings on December 3, 2008, December 17, 2008 and December 29, 2008, 2009 and approved the zone change for the 410 acre portion of the subject property as described in the Findings and Decision, attached as Exhibit “C” and incorporated by reference herein, subject to the fulfillment of specific conditions prior to rezoning the property; and

WHEREAS, the Deschutes County Code Section 18.136.030 allows the Board to adopt a Resolution of Intent to Rezone which defers the adoption of effecting ordinances to a future date once certain clear and objective conditions are met; now, therefore,

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, as follows:

Section 1. The Board intends to rezone the property described in Exhibit “A” and shown in Exhibit “B” to RR-10 upon the fulfillment of the following conditions:

1. Within five (5) years of the date the decision in Exhibit C is final or prior to final plat approval for any residential subdivision on the 410 acre area that is the subject of File No. ZC-08-1/PA-08-1, whichever is earlier, the applicant shall obtain from the Oregon Department of Environmental Quality (“DEQ”) a “No Further Action”(“NFA”) determination or the equivalent for a residential use designation for this 410 acre area.
2. Within (5) five years of the date the decision in Exhibit C is final or prior to final plat approval for any residential subdivision on the 410 acre area that is the subject of File No. ZC-08-1/PA-08-1, whichever is earlier, the applicant shall obtain from the Oregon Department of Human Services a determination of “no apparent public health hazard” for a residential use designation for this 410 acre area.
3. Contemporaneously with the site development and prior to the issuance of any residential building permit, the applicant shall complete the County-approved reclamation of the 18-acre area covered by SP-85-23 through a modified reclamation plan substantially consistent with the plan submitted by the applicant dated December 3, 2008.
4. The applicant shall submit a Modification Application for the modified reclamation plan within six months of the date the decision in Exhibit “C” is final.

5. For the purposes of these conditions, the date the decision in Exhibit C is final shall be the date the final County decision of approval is signed and mailed or, if the final County decision is appealed, the date the final appellate body affirms the County decision or dismisses the appeal.

6. During the pendency of this Resolution and continuing in conjunction with the DEQ Voluntary Compliance Program and site development, the owner shall implement the DEQ approved Planting Plan dated May 20, 2008 (Exhibit PH-6 in the record for Exhibit "C") and the DEQ approved Watering Monitoring Plan dated May 20, 2008 (Exhibit PH-7 6 in the record for Exhibit "C") as the Dust Abatement Plan for the 410-acre site.

7. This Resolution shall expire five (5) years from the date this approval Decision is final , unless the conditions and stipulations set forth above have been satisfied or an extension is granted pursuant to DCC Title 22.

8. Upon the applicant's successful fulfillment of the above conditions and pursuant to DCC 18.136.030B, the County shall amend the County comprehensive plan text and map designation for the 410 acre area in accordance with the Board Decision (Exhibit "C") from Surface Mine (SM) and Agriculture (AG) to Rural Residential Exception Area (RREA) and remove Surface Mining Site 461 from the County's Goal 5 inventory of significant mineral and aggregate resource sites and shall amend the zoning map designation for the 410 acre area from Surface Mining (SM) and Exclusive Farm Use (EFU) to Rural Residential-10 (RR-10).

9. As part of any residential development approval for the site, the applicant shall include an informational section in its CC&Rs that details the history of the site, including the remediation efforts taken by the applicant and its predecessors in interest.

10. If fill is brought onto the 410 acre site, the applicant shall identify the general location of the fill, and if the site is used for development, the applicant shall either certify that the fill is suitable for development, or specifically declaim any knowledge of its suitability.

Dated this 8th of April, 2009

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON



TAMMY BANEY, Chair

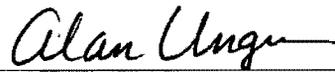


DENNIS R. LUKE, Vice Chair

ATTEST:



Recording Secretary



ALAN UNGER, Commissioner

RES. 2009-035

EXHIBIT A

"410" acre Area

Parcel 1 of Partition Plat 1991-47, located in the West half of Section 16, Township 14 South, Range 12 East, Willamette Meridian, Deschutes County, Oregon, as per Partition plat recorded as Survey CS 04248, Deschutes County Surveyor Records;

Together with the following described portion of the East half of Section 16, and portion of the southeast quarter of Section 9, Township 14 South, Range 12 East Willamette Meridian, Deschutes County, Oregon,

Beginning at the North quarter corner of said Section 16 as shown on Partition Plat 1991-47 recorded as Survey CS 04248, Deschutes County Surveyor Records, and as shown on Minor Land Partition MP-80-96, as per Partition Plat recorded as Survey CS 00169, Deschutes County Surveyor Records, said North Quarter corner also being on the North line of Parcel 3 of said Minor Partition MP-80-96;

Thence along said North line of said Parcel 3 the following three courses;

Thence North 39°46' East 375.00 feet;

Thence North 47°20' East 300.00 feet;

Thence South 73°20' East 631.85 feet;

Thence leaving said North line, and along the approximate westerly "rim" of the Deschutes River canyon the following eight courses;

Thence South 20°56'42" West 366.00 feet;

Thence South 10°31'16" West 397.00 feet;

Thence South 17°31'44" West 218.00 feet;

Thence South 2°16'05" West 253.00 feet;

Thence South 18°11'14" East 249.00 feet;

Thence South 32°05'58" East 241.00 feet;

Thence South 43°12'39" East 260.00 feet;

Thence South 51°57'00" East 312.00 feet;

Thence leaving said "rim" South 8°34'08" West 735.00 feet;

Thence South 38°35'41" West 230.00 feet;

Thence South 4°48'14" East 163.00 feet;

Thence South 27°35'54" East 211.00 feet;

Thence South 49°17'51" East 130.00 feet;

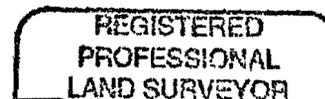
Thence North 87°33'23" East 149.00 feet;

Thence North 57°05'52" East 304.00 feet plus or minus to the centerline of Lower Bridge Road (Way) as it is now located;

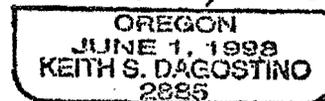
Thence Southerly and Westerly along said centerline of Lower Bridge Road (Way) as it is now located, to the South line of said Section 16;

Thence Westerly along said South line, to the South Quarter corner of said Section 16, said corner also being the Southeast corner of Parcel 1 of Partition Plat 1991-47;

Thence North 00°23'53" West 5333.11 feet along the East line of said Parcel 1 to the Point of Beginning.

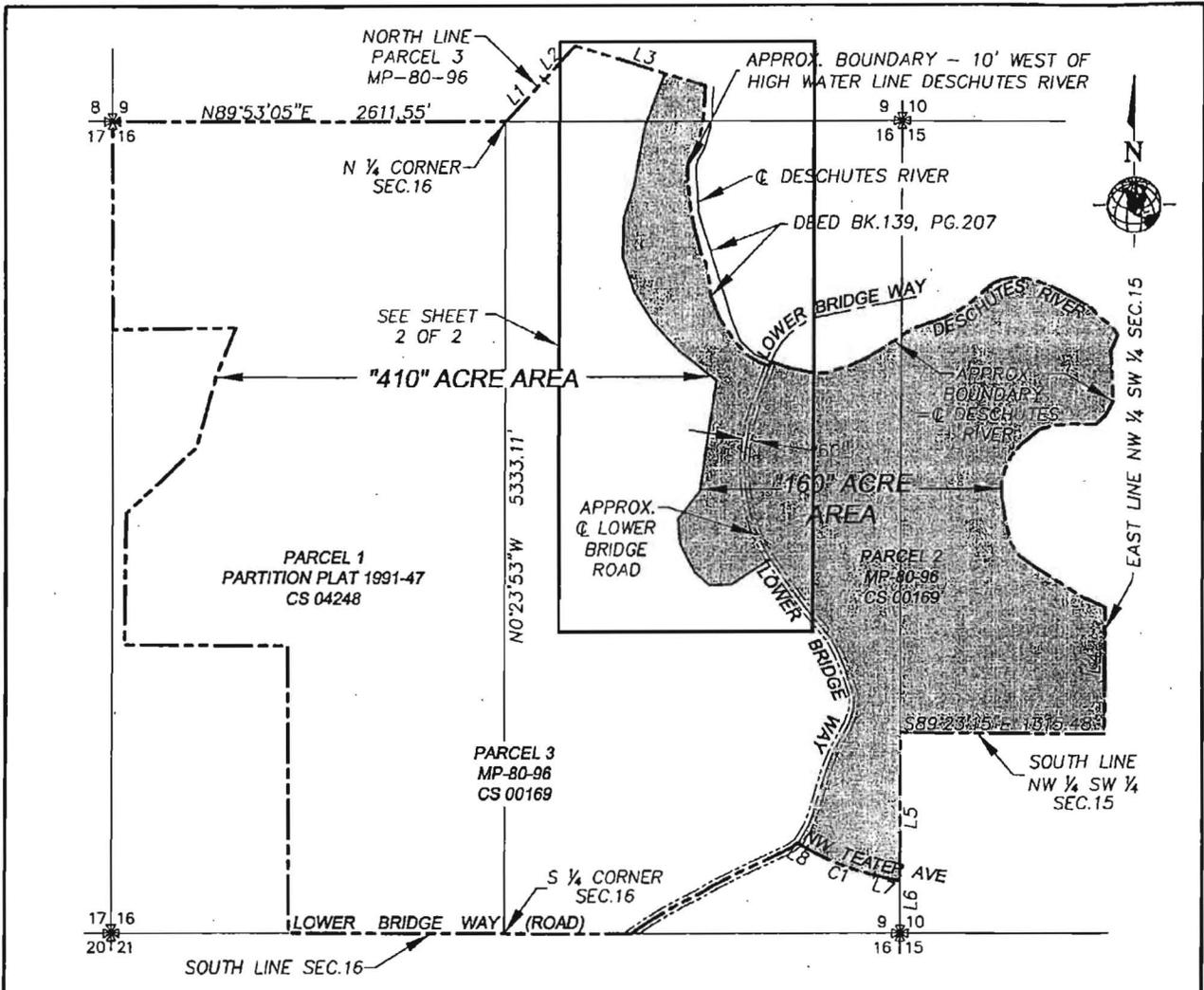


Keith Dagostino 3-10-09



RENEWAL DATE: 12-31-09

RES 2009-035 EXHIBIT B



LINE TABLE		
LINE	LENGTH	BEARING
L1	375.00	N39°46'00"E
L2	300.00	N47°20'00"E
L3	987.27	S73°20'00"E
L4	793.36	N00°09'48"W
L5	969.02	N00°05'01"W
L6	388.52	N00°05'01"W
L7	167.14	N77°39'52"W
L8	68.98	N60°07'02"W

CURVE TABLE					
CURVE	LENGTH	RADIUS	DELTA	CHORD	BEARING
C1	517.26	1689.00	17°32'49"	515.24	N68°53'27"W

ALL DIMENSIONS IN FEET

SHEET:
1 of 2

DESIGNED: KSD
 DRAWN BY: ARS
 APP'D BY: KSD
 CHECK'D BY: KSD
 LAST EDIT: 03/09/09
 PLOT DATE: 03/09/09

SCALE:
1"=1000'

THE DANIELS GROUP, LLC
LOWER BRIDGE ROAD PROPERTY

EXHIBIT MAP

DESCHUTES OREGON

PROJECT: DAN001

DRAWING FILE NAME: DAN001-CONCEPT-PLAN-3.09.09

D'Agostino Parker, LLC
 CIVIL ENGINEERING / LAND DEVELOPMENT SERVICES

231 SCALEHOUSE LOOP, SUITE 203
 BEND, OR 97702
 P: (541) 322-8807
 F: (541) 322-8827

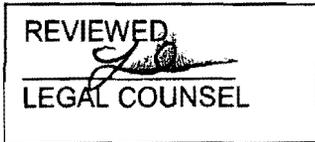


Exhibit C to Res. 2009-035

For Recording Stamp Only

DECISION OF THE DESCHUTES COUNTY BOARD OF COMMISSIONERS

FILE NUMBERS: ZC-08-1, PA-08-1

LOCATION: The property is identified on the County Assessor's Tax Map as 14-12, Tax Lots 1501, 1502, 1503, part of 1505, and 1600.

APPLICANT: The Daniels Group, LLC
1111 Main Street, Suite 700
Vancouver, WA 98660

OWNER: Norman L. Wiegand, et al.
895 SW 23rd St.
Redmond, OR 97756

ATTORNEY /PLANNER: Tia M. Lewis
Mark Rust, AICP
Schwabe, Williamson & Wyatt, PC
549 SW Mill View Way, Suite 101
Bend, OR 97702

REQUEST: Comprehensive plan text and map amendment and zone change from Surface Mining to Rural Residential to allow redevelopment of extensively mined site.

STAFF CONTACT: Will Groves, Senior Planner

I. APPLICABLE STANDARDS AND CRITERIA:

A. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance

1. Chapter 18.52, Surface Mining

2. Chapter 18.60, Rural Residential zone

* Section 18.52.200, Termination of the Surface Mining Zoning and Surrounding Surface Mining Impact Area Combining Zone

3. Chapter 18.136, Amendments

* Section 18.136.020, Rezoning Standards

4. Chapter 18.116. Supplementary Provisions

DC - 2009 - 168

* Section 18.116.220, Conservation Easements on Property Adjacent to Rivers and Streams Prohibitions.

B. Title 22 of the Deschutes County Code, the Development Procedures Ordinance

1. Chapter 22.20, Review of Land Use Action Applications

* Section 22.20.040, Final Action in Land Use Actions

C. Title 23 of the Deschutes County Code, the Deschutes County Comprehensive Plan

1. Chapter 23.100, Surface Mining

D. Statewide Land Use Goals and Oregon Administrative Rules (OAR) Chapter 660

1. Division 12, Transportation Planning Rule (TPR)

* OAR 660-12-0060, Plan and Land Use Regulation Amendments

2. Division 15, Statewide Planning Goals and Guidelines

3. Division 23-0180, Mineral and Aggregate Resources

II. FINDINGS OF FACT:

A. Location: The property is identified on the County Assessor's tax map as 14-12, tax lots 1501, 1502, 1503, part of 1505, and 1600. Tax Lot 1501 has an assigned address of 70420 NW Lower Bridge Way, Terrebonne.

B. Zoning and Plan Designation: The site is generally designated "Surface Mining" on the Comprehensive Plan Map, although the exact boundaries are unclear. The mine is included in the county's Goal 5 inventory of significant mineral and aggregate resource sites as Site 461.

Tax lot 1501:	249.1 acres zoned Surface Mining (SM), including 9.8 acres in Landscape Management Combining Zone (LM)
Tax Lot 1502:	188.1 acres zoned SM, including 82.3 acres zoned LM
Tax Lot 1503:	64.4 acres zoned SM, including 64.4 acres zoned LM
Tax Lot 1505:	Only 42.1 acres of this 72.47 acre tax lot are subject to this application. The most southerly portion of this lot adjacent to Teater Road and zoned EFU is not subject to the proposed zone change.
Tax Lot 1600:	10.6 acres total includes 9.6 acres of Exclusive Farm Use 1.0 acre zoned Flood Plain, 10.6 acres zoned LM, and 10.6 acres zoned SMIA

C. Site Description: The 556.9 acre site is a geologically unique tract straddling Lower Bridge Way about 6 miles north of Terrebonne, as shown on the Site Map, submitted as Exhibit 1 and on the aerial photograph, submitted as Exhibit 2. To an observer driving

Lower Bridge Way, the site is notable for the chalky white appearance of the exposed diatomite layers.¹

As illustrated on the submitted Site Map, the subject property includes Tax Lots 1501, 1502, 1503, 1505, 1600, but excludes the EFU-zoned portion of Tax Lot 1505 bordering Teater Road. There are two areas of the property that are marked by their historical uses and that are separated by the existing Lower Bridge Way. For ease of reference, these areas are referred to as the area East of Lower Bridge Way and the area West of Lower Bridge Way.

The subject property can be also divided into five geographic regions based on topography and geology: eastern, northern, Deep Canyon, western, and central. The land includes four general landscape types: quarry operations (old and recent), hills/buttes (natural and formed), plains (unmined, mostly natural vegetation), and canyons and drainages (natural vegetation, unmined).

The eastern region includes tax lot 1503 and 1505, is east of Lower Bridge Way, and extends east along a steep slope, descending approximately 100 feet to the Deschutes River. Except for the slope of the river canyon, the eastern region is generally level and covered with overburden rock apparently removed from the former diatomite mining operations. The river is lined with wetlands depicted on the National Wetlands Inventory Cline Falls map. This area had little mining activity and was primarily used for a staging area.

The northern region includes tax lots 1501 and 1600, stretches west along the river from Lower Bridge Way to Deep Canyon, then south along the southern rim of Deep Canyon. The ground is relatively level, except for steep canyons that reach down to the Deschutes and Deep Canyon. North of the diatomite mining area is a relatively undisturbed "plains" landscape with mature juniper. The subject property is separated from the river in this area by Tax Lot 14-12 1509, owned by the Oregon Parks and Recreation Department.

Deep Canyon is primarily located on tax lot 1501, and is a small canyon with a spring and a seasonal pond that drain to the Deschutes River. Two unimproved roads cross the canyon. Across the northern bridge is the western region, a flat area formerly mined for diatomite. The central region, includes tax lots 1501 and 1502, and is a quarry landscape. This region comprises about half of the subject property. A thick diatomite layer and stockpiles make up much of this area, which is accessible only with an all-terrain vehicle. This section of subject property is traversed by several unimproved roads. The area was extensively mined for diatomite, and several derelict buildings, including a former processing building, water tower, pump house, concrete foundations, settling ponds and miscellaneous debris piles remain. The applicant has drilled a well in

¹ The site has been mined for several materials, including aggregate, sand and diatomaceous earth. Most of the aggregate and sand on the site have been removed, and the area containing those materials have been reclaimed. The diatomaceous earth is described as "a chalky rock, high in amorphous silica content formed from the structures (or diatomite) of tiny fresh- or salt-water organisms called diatoms."

¹ The applicant argues that the vast majority of the site does not contain agricultural soils and therefore a Goal 3 exception is not needed. The Board agrees.

this area, and has installed a pivot sprinkler, which is being used to control dust and provide water for irrigation to revegetate the area with native grasses and shrubs. The applicant proposes to remove the remaining derelict structures.

This reach of the Deschutes River, which forms the east and northeast boundary of the site, is designated as a Federal Wild and Scenic River and an Oregon Scenic River. A steep bank limits pedestrian access to the river. However, the river is accessible from Lower Bridge Way, and from the public park near the bridge.

- D. **Soils:** Approximately 80% of the soils on the site are defined as Class VII and VIII. Steve Wert, a consulting soil scientist, visited the site and conducted preliminary research of the soils present on the site. His findings are summarized in a letter dated October 4, 2006: "According to NRCS maps, the great majority of the property does not even have a "soil type," but is classified as a "land type" called "Unit 97" which is rock and gravel pits. Unit 97 is rated Class VII and VIII, and NRCS will stand by that rating." However, not all of the property is class VII or VIII. The following table summarizes soils data by tax lot.

///

Approximate Acreage of Soil Type by Tax Lot

Tax Lot	NRCS Land / Soil Type	Soil Classes	Approximate acreage ²	Zoning
1501 249.1 acres (central /western)	97 81F 138A 138B 71A 71B 31A	7 & 8 7 & 8 6, not prime 6, not prime 6, prime if irrigated 6, prime if irrigated 6, prime if irrigated	159 acres 24 acres 48 acres 1.1 acres 12.2 acres 1.8 acres 3.3 acres	SM, SMIA, LM
1502 188.1 Acres (central)	97 81F 138A	7 & 8 7 & 8 6, not prime	160 acres 9 acres 19 acres	SM, SMIA, LM, FP
1503 64.4 acres (eastern)	97 31B 71A	7 & 8 6, prime if irrigated 6, prime if irrigated	42 acres 18 acres 3.4 acres	SM, SMIA, LM, FP, EFU
1505 41.2 acres (eastern)	97 81F	7 & 8 7 & 8	39 acres 2 acres	SM, SMIA, LM, FP
1600 10.6 acres (northern)	138A 81F	6, not prime 7 & 8	8.2 acres 2.4 acres	SMIA, FP, EFU
TOTAL 553.4 acres		7 & 8 6, not prime 6, prime if irrigated	79 % = 438 acres 14% = 76 acres 7% = 39 acres	

E. Surrounding Zoning and Land Uses: This section describes zoning and land uses within a 2-mile radius of the center of the subject property. Surrounding zoning in the area of the subject property includes Exclusive Farm Use—Lower Bridge (to the north, west and south), Exclusive Farm Use—Terrebonne (to the east and further to the south), Surface Mining (to the northeast), Rural Residential (to the east and southeast) and Flood Plain associated with the Deschutes River. The Landscape Management combining zone extends along the Deschutes River.

The subject property is predominantly surrounded by active agricultural lands, as shown in the 2008 Google Earth aerial photo included in the record. The surface mining zoned land to the northeast appears to be in agricultural production. Properties to the west and southwest and east are sparsely developed with rural residences. Most of the dwellings in the immediate area have been constructed within the last 25 years. Within a 3-mile radius there are nearly 700 parcels with over 400 residences.

- F. Mining History:** The subject property has a long, inconsistently documented mining history. Diatomite mining began on the property prior to the 1920s. Large scale production began in 1936. The Great Lakes Carbon Company mined the property from 1944 to 1961. The mining history between 1966 and 1980 is unclear; however, it appears the diatomite extraction occurred primarily on the western portion of the site. The Oregon Department of Geology and Mineral Industries (DOGAMI) file for this site begins in 1980. That file indicates that multiple companies have mined the site, mostly for diatomite but also for aggregate. Although multiple mining permits were issued over the years, various companies were cited for violating environmental laws, mining permits, or operating without permits.

By 1980 Deschutes Valley Farms owned the site and leased it to Northwest Diatomite. In January 1982, DOGAMI exempted Mid-Oregon Ready Mix from reclamation requirements because the land was a mined prior to the effective date of the reclamation rules. Mid-Oregon Crushing and Mid-Oregon Ready Mix were extracting aggregate by 1985. Various diatomite and gravel extraction activities occurred in the subsequent years. By 1994, E.A. Moore was extracting, screening and crushing gravel on the eastern portion of the site. Several DOGAMI inspections occurred over the years, which found reclamation plans being implemented. By 2006, DOGAMI was ready to close the file on the site. A Limited Exemption Closure Plan was submitted in late July, 2006. On July 31st DOGAMI closed the file on the site.

Due to incomplete DOGAMI records and an apparent history of unpermitted mining, the total quantity of aggregate and mineral removed from the site during over 80 years of mining is unclear.

- G. Zoning History:** In 1985, 339 acres of the subject property was rezoned from Surface Mining Reserve to Surface Mining. The applicants apparently anticipated that diatomite mining would become economically viable again because a processing plant was being constructed in Malheur County, which would enable the applicant to export it. The Hearings Officer found that there was little local demand for diatomite, but that export of the product after off-site processing partially justified the rezone.

In 1988, the Deschutes County Goal 5 Aggregate Inventory identified the site as an aggregate resource (as opposed to a mineral resource, which includes diatomite) of 350,000 cubic yards. In the ESEE analysis for site 461, the Board identified the key values that form the basis for the application of SM zoning to the mine site. These include the importance of aggregate resources to development in Deschutes County, the value to the County economy terms of materials and jobs, the presence of an estimated 350,000 cubic yards of aggregate on the site, and that the site is located near a major roadway for highway maintenance and construction jobs.

Relevant Previous Land Use Decisions:

CU-74-156 – This record contains plan information for a solid and liquid waste disposal site on the subject property. It appears that this application was approved, as solid and liquid waste storage occurred on a portion of property located West of Lower Bridge Way. A variety of wastes, including hazardous wastes were stored on the western portion of the site and subsequently removed. This is discussed more fully later in the findings.

MP-80-96 – Divided modern tax lots 1503 and 1505, as Parcel 2, and 1506, as Parcel 3 from the remainder of the mining site.

ZC-85-3 - A zone change from surface mining reserve to surface mining on tax lots 1501, 1502, 1600, and 704. Condition 3 of this decision required a reclamation plan.

SP-85-23 – A site plan to allow surface mining, aggregate mining, and rock crushing on tax lots 1501, 1502, 1600, and 704. This decision included reclamation specifications attached as Exhibit C to the Hearings Officer Decision for SP-85-23, but materials are missing from the record, including any map of the subject area and the updated reclamation plan required by Condition 1. The applicant submitted testimony and evidence demonstrating the area covered by the reclamation requirements for SP-85-23 encompasses an 18-acre area just north of Lower Bridge Way and west of the site access road off Lower Bridge Way. Compliance with a County approved reclamation plan is made a condition of this approval as discussed further herein.

ESEE Analysis #461 – On October 24, 1989 the Board of County Commissioners rezoned the remainder of the site (comprised of modern tax lots 1501, 1502, 1503, and 1507) to SM. This decision contains information about the quality and quantity of aggregate and mineral resources on the property.

MP-90-74 – Divided historic tax lots 1501, 1507 and 1508 into two legal lots of 66 and 254 acres.

All of the above files are incorporated into this record by reference.

- H. **Proposal:** The applicant requests approval of a plan amendment to change the designation of the subject property from Surface Mine (SM) and Agriculture (AG) to Rural Residential Exception Area (RREA) and to remove Surface Mining Site 461 from the county's Goal 5 inventory of significant mineral and aggregate resource sites. The applicant also requests approval of a zone change from SM and EFU-LB to RR-10 for the subject property. The removal of the SM zoning on the subject property also would remove the existing Surface Mining Impact Area Combining Zone (SMIA) zoning on property located within one-half mile of the SM Zone.

The site map submitted as Applicant's Exhibit 1 depicts areas presently zoned Flood Plain (FP) as part of this rezoning proposal. Discussions with the applicant have clarified that this proposal is not intended to rezone FP zoned lands.

- I. **Public/Private Agency Comments:** The Planning Division mailed notice to several agencies and received written comments and oral testimony in response. The agency responses are summarized in the staff report, in this Decision, or are included in the record. To the extent the comments pertain to the applicable approval criteria, they are addressed in the findings. Certain agency comments that relate to conditions of approval are discussed below.

Oregon Department of Human Services, Environmental Health Assessment Program (EHAP): In a document received October 23, 2008, EHAP made the following recommendations regarding management and development of the site were made:

Dilapidated buildings and piles of scrap wood and metal should be removed. In the meantime, the public should stay off the property and children and teens should be prevented from accessing the area.

Soil sampling and air monitoring should be conducted in order to analyze them for cristobalite (crystalline silica) content and particulate matter size (PM2.5).

Continue efforts to control dust, and include dust suppression plans for any future activities.

If future zoning of the site changes to residential, site owners should: Consult with EHAP to develop a comprehensive site-sampling plan that would address issues raised in the report.

In oral testimony provided at the December 17, 2008 hearing, David Farrar of EHAP stated that the existing EHAP evaluation of environmental conditions at the site only dealt with the present use of the property. Mr. Farrar recommended that the landowner obtain a letter of "No Apparent Public Health Hazard" from EHAP for the site prior to residential use. This would require additional environmental sampling and cleanup of any identified environmental concerns.

Oregon Department of Environmental Quality (DEQ): In correspondence dated December 9, 2008, DEQ stated that the site has currently only been evaluated with respect to environmental safety for its current use as a mine and an industrial property. In prior correspondence, DEQ supported a rezone of the site from industrial to residential use, which would require a re-evaluation of the site for residential use. The re-evaluation of the site, applicable exposure routes, and pathways may result in some scenarios requiring deed restrictions, active cleanup and/or monitoring. Following a cleanup of any identified environmental concerns, DEQ could issue a "No Further Action Letter" (NFA) or equivalent for residential use.

- J. Public Notice and Comments:** The Planning Division mailed individual written notice of the applicant's proposal and the public hearing to the owners of record of all property located within 750 feet of the subject property. In addition, notice of the public hearing before the Hearings Officer was published in the *Bend Bulletin*, and the subject property was posted with a notice of proposed land use action sign on February 2, 2008.

Numerous residents submitted written testimony and evidence, and provided oral testimony at the public hearing. The residents identified concerns regarding dust (including health concerns specific to diatomite dust), chemical contamination of the site, radiological contamination of the site, site reclamation, traffic impacts, aesthetic impacts of the existing mine and structures, water quality, water rights, and aesthetics of future development. Public comments have also questioned if a new ESEE analysis or Goal 5 exception would be required. These comments are more fully addressed in the findings below.

- K. Lot of Record:** The applicant submitted evidence regarding the status of the tax lots incorporated into these applications. The evidence shows that the property is comprised of legal lots of record created through deed or partition.
- L. Procedural History:** On August 6, 2008, the Hearings Officer issued a decision denying the subject application. Section 22.28.030(C) requires: "[Z]one changes . . . concerning lands designated for forest . . . use shall be heard de novo before the Board

of County Commissioners without the necessity of filing an appeal, regardless of the determination of the Hearings Officer[.]” Pursuant to that section, the Board held a de novo public hearing on the subject application on December 3, 2008. The hearing was continued to December 17, 2008 and again to December 29, 2008.

The entire record of the proceeding to date was placed before the Board at the public hearing, and the Board closed the record at the conclusion of the December 29, 2008 hearing. At this hearing, the Board deliberated and voted to approve the subject application and to adopt the Hearings Officer’s findings and conclusions, as revised and supplemented herein.

III. CONCLUSIONS OF LAW:

PLAN AMENDMENTS

The applicant requests the following: (1) approval of a plan map amendment from Surface Mining and Agriculture to Rural Residential Exception Area, and (2) removal of Surface Mining Site 461 from the county’s Goal 5 inventory of significant mineral and aggregate resource sites. The county plan and development code do not set out a process for quasi-judicial amendments to the plan map and text. Rather, the county relies on consistency with the Statewide Land Use Goals and ORS 197.610 through 197.625 (post-acknowledgement plan amendment procedures) to provide both the process and the substantive review criteria. Those criteria are addressed in Section C.

While there are no substantive approval criteria in the plan, it is useful to review the plan designation history of the subject property, and address the parties’ arguments regarding plan policies at the onset.

1. Plan Designation History. In the late 1980s the county undertook a lengthy process to inventory its mineral and aggregate resources, to develop a plan to preserve and protect those resources, and to amend the county’s comprehensive plan and zoning ordinance to adopt the inventory and measures to protect sites. These plans were adopted through several ordinances and included listing Site 461 on the inventory of significant sites, adoption of a site-specific ESEE (Economic, Social, Environmental and Energy) analysis for Site 461, and adoption of ordinances designating the subject property for surface mining, on October 24, 1989.

2. Current Plan Designation. The subject property is currently designated SM and AG (Tax lot 14-12 1600 only).

3. Applicable Comprehensive Plan Provisions. The following plan policies are relevant to the proposed plan amendment from Surface Mining and Agriculture to Rural Residential Exception Area.

A. Title 23 of the Deschutes County Code, the Deschutes County Comprehensive Plan

1. Chapter 23.24, Rural Development

Section 23.24.020, Goals.

A. To preserve and enhance the open spaces, rural character, scenic values and natural resources of the County.

FINDINGS: The subject property is a former mine site which is exempt from most reclamation or other regulatory requirements requiring any revegetation. As a result, it has little vegetation and approximately 350 acres of the site consists of exposed diatomite which can create dust during large wind events. The proposed plan amendments by themselves will not alter open spaces, scenic values, or spoil rural character, but instead will create an opportunity to redevelop and mitigate existing adverse conditions of the site following historical mining and industrial operations. The present condition of the site adversely affects the scenic value of the area with rusting structures and extensive unvegetated mined areas. Any future development, not included in this application, would be required to conform to development standards for Rural Residential (RR-10) zoned lands, that are designed to preserve and enhance the open spaces, rural character, and scenic values of the County. Moreover, future development of any structures in the LM zone will be subject to individual site plan review to ensure the protection of the scenic values associated with the Deschutes River.

Some neighbors commented that the proposal is inconsistent with this policy because a future planned development proposal could cluster dwellings along the top of the riverbank. The neighbors asserted that clustered residential development is inconsistent with the local residential development pattern, and therefore a more appropriate zoning designation is EFU-20. The Board agrees with the Hearings Officer on this issue and finds that the unrefuted evidence shows that the site does not contain agricultural soils. The proposed RR-10 zoning designation would maintain the residential density that occurs within the area, and if a planned unit development is proposed, the layout of the lots can be arranged to minimize their visual impacts on neighboring property owners.

The removal of Site 461 from the County's surface mining inventory would preclude access to diatomaceous earth and aggregate materials on the site. The applicant has argued that there is insufficient remaining aggregate to economically extract, and there is little need for diatomite in modern industrial manufacturing. Neighbors dispute this finding, arguing that there are viable industrial uses for diatomite, and that the applicant's present desire to convert the land to residential use does not alter the significance of the site for diatomite production. These issues are discussed in greater depth below.

B. To guide the location and design of rural development so as to minimize the public costs of facilities and services, to avoid unnecessary expansion of service boundaries, and to preserve and enhance the safety and viability of rural land uses.

FINDINGS: The applicant argues that the proposal is consistent with this goal because a future developer, and not the public, will bear costs of extending facilities to the property. Opponents disagree that the extension of public services is the only consideration under this goal, arguing that it also requires a showing that the proposed rural residential uses "preserve and enhance the safety and viability of rural land uses." Opponents argue that unless reclamation and remediation measures are included in this approval, neither the neighbors nor the future residents of the site can be assured that the site is safe for development or that development on their properties will remain viable.

Public Facility/Service Availability and Capacity

This goal requires the county to thoughtfully consider development locations to minimize urban sprawl and to ensure that public facilities and infrastructure are adequate to accommodate anticipated development. This includes consideration of service availability and capacity. Low density residential development allowed in the RR-10 zone does not require urban services such as sewer and water, as those needs can be served by on-site systems. Service boundaries will not be expanded. Public services, such as police and fire, already serve the area. With respect to these facilities and services, the proposed redesignation will have little to no effect.

The site borders on Lower Bridge Way, a publicly maintained county road. The applicant's traffic study concludes the intersection of Lower Bridge Way/U.S. 97 will not meet either the performance standards of Deschutes County or ODOT with or without this development. There is an ODOT project going to bid this Spring to reconfigure the Lower Bridge Way/Highway 97 intersections. This improvement will increase safety but not necessarily capacity at this intersection. Based on the evidence submitted by the applicant, including the traffic studies and the evidence of historical use as discussed further herein and incorporated by references, the Board finds that the traffic likely to be generated by development uses allowed under the current zoning is equal to or greater than the traffic likely to be generated under the proposed residential zoning. Therefore, the proposal should have no significant impact on the transportation facilities. See the discussion below for DCC 23.60.610. The Board further finds that Code criteria in the subdivision and conditional use chapters will allow the imposition of conditions requiring transportation facility improvements prior to or contemporaneous with subdivision or cluster development approval. Both the subdivision and conditional use processes require notice and an opportunity for full public participation.

"To Preserve and Enhance the Safety and Viability of Rural Land Uses"

As noted above, opponents argue that before this site is rezoned for rural residential uses, the applicant must demonstrate that it is safe for those residential uses, and that the safety of other local uses, including residential and agricultural uses are preserved and/or enhanced. The neighbors expressed concerns that hazardous wastes from mining activities since 1985 have not been adequately addressed, and that the 1984-85 remediation and removal of hazardous and radioactive wastes were inadequate. Further, the neighbors argue that the applicant has not yet demonstrated that there is sufficient water to accommodate the proposed site reclamation and provide domestic water for the number of dwelling units that could be developed on the property. In addition, the neighbors argue that there is no evidence that the applicant will take steps to address water contamination from the remaining mining materials. Finally, the neighbors insist that this site will not be safe for residential use or preserve the viability of existing rural residential uses in the area until the diatomite is fully contained.

Given the environmental history of the site, the Board finds that the rezoning the property for residential use, prior to establishing that the site is safe for residential use, will not preserve and enhance the safety and viability of rural land uses. However, in previous County decisions, it has been held that, absent a comprehensive plan amendment, comprehensive plan goals and policies do not constitute mandatory approval criteria for quasi-judicial zone changes, but rather are implemented through the zoning ordinance, and therefore if the proposed zone change is consistent with the applicable provisions of the zoning ordinance, it also will be consistent with the plan. While not required under this Comprehensive Plan Goal, findings and relevant conditions of approval intended to establish that the site is safe for residential use prior to development are set forth under DCC 18.136.020, as discussed below.

The Board agrees with the Hearings Officer that the proposed map designation is consistent with other rural residential zoning in the area. In addition, if the mineral and aggregate resources are no longer needed/available, the site cannot be put to resource use. It includes few agricultural and no forest soils, and there is no dispute that the former mine site is not suitable for farm or forest activities. In addition, permitting rural residential development on the property will certainly be more compatible with neighboring residential uses than mining. Particular development concerns, including water quality and quantity, and dust suppression can be addressed in conjunction with a particular development plan for the site.

Based on the above, the Board finds that the proposal, as conditioned under DCC 18.136.020, is consistent with this goal.

- C. To provide for the possible long-term expansion of urban areas while protecting the distinction between urban (urbanizing) land and rural lands.**

FINDINGS: The unincorporated community of Terrebonne is located approximately seven miles southeast of the site. The proposed zone change and plan amendment would not preclude the possible long-term expansion of the community boundaries, although such expansion to the subject property is not foreseeable at this time. Any future development, not included in that application, would be required to conform to development standards for Rural Residential (RR-10) zoned lands, that are designed to protect the distinction between urban (urbanizing) land and rural lands.

Section, 23.24.030, Policies.

Residential/recreational development.

- 1. Because 91 percent of the new County population will live inside an urban area, with only 3,039 new rural lots required, and in light of the 17,377 undeveloped rural tracts and lots as well as the energy, environmental and public service costs, all future rural development will be stringently reviewed for public need before approval. As a guideline for review if a study of existing lots within three miles of the proposed development indicates approximately 50 per cent or more of those lots have not had structures constructed thereon, then the developer shall submit adequate testimony justifying additional lots in that area. This will permit development in areas where such is needed (other policies considering energy, public facilities, safety and other development aspects shall also be considered) while restricting future division in areas where many undeveloped lots already exist.**

FINDINGS: The Hearings Officer found that it was not entirely clear whether this policy pertains to a proposal to rezone property from SM to RR-10, as a rezoning is not "development" per se, and development of this site will require further review. The evidence in the record demonstrates the proposal is consistent with this policy based on staff's analysis of existing lots within three miles of the subject property. That analysis, set forth below, shows approximately 58 percent of those lots have been developed with structures:

Zone	Parcels	Parcels with at least one structure	
EFUTE	92	33	

EFUSC	16	3	
EFULB	113	54	
MUA10	388	292	
RR10	75	23	
SM	9	0	
Total	693	405	58%

The Board finds the proposal is consistent with this policy, and therefore the applicant does not need to submit additional justification for the requested zone change.

2. Chapter 23.60, Transportation

a. Section 23.60.010, Transportation

***** The purpose of DCC 23.60 is to develop a transportation system that meets the needs of Deschutes County residents while also considering regional and state needs at the same time. This plan addresses a balanced transportation system that includes automobile, bicycle, rail, transit, air, pedestrian and pipelines. It reflects existing land use plans, policies and regulations that affect the transportation system.**

FINDINGS: This goal is implemented through the provisions of DCC 17.16.115(l)(1) and (2), and the TPR. As noted below, the proposal is consistent with both the county development code and the TPR because the re-designation will not significantly affect a transportation facility.

3. Chapter 23.68, Public Facilities

a. Section 23.68.020, Policies

1. Public facilities and services shall be provided at levels and in areas appropriate for such uses based upon the carrying capacity of the land, air and water, as well as the important distinction that must be made between urban and rural services. In this way public services may guide development while remaining in concert with the public's needs.

3. Future development shall depend on the availability of adequate local services in close proximity to the proposed site. Higher densities may permit the construction of more adequate services than might otherwise be true. Cluster and planned development shall be encouraged.

9. New development shall not be located so as to overload existing or planned facilities, and developers or purchasers should be made aware of potentially inadequate power facilities in rural areas.

FINDINGS: These policies address public facilities and services that may be needed to serve residential uses on the site.³ With the exception of the local road system, future development is unlikely to overload existing or planned public facilities. Concerns regarding transportation facilities are discussed below. The existing rural residential development in the area indicates that public facilities and services are available. Future development of the property can be served by private wells and septic systems. Utility lines and facilities can be located so as not divide any existing farm units.

4. Chapter 23.88, Agricultural Lands

Section 23.88.020, Goal.

To preserve and maintain agricultural land.

FINDINGS: As noted above, this proposal would result in the conversion of approximately 39 acres of "high value if irrigated" farmland to rural residential use.⁴ However, the subject property does not have potential for long term irrigation. Impacts imposed on agricultural uses by adjacent residential uses typically include vandalism, trespassing, disturbance to livestock, and dust. However, development of the project is likely to result in better dust suppression, to the benefit of nearby agricultural operations. Overall, the Board concludes that the proposal is consistent with these policies because it absorbs some of the pressure to develop on agricultural lands.

a. Section 23.88.030, Zoning Policies.

- 1. All lands meeting the definition of agricultural lands shall be zoned Exclusive Farm use, unless an exception to State goal 3 is obtained so that the zoning may be Multiple Use Agriculture or Rural Residential.**
- 2. Lands not meeting the agricultural lands definition but having potential for irrigation according to the Bureau of Reclamation Special Report - Deschutes Project, Central Division, Oregon, although presently without water, shall receive exclusive farm use zoning.**

FINDING: As explained at length below, the subject property, as a whole, is not "agricultural land." The property does not have potential for long-term irrigation according to the Bureau of Reclamation Special Report - Deschutes Project, Central Division, Oregon.

A. OAR 660, Division 33, Agricultural Land.

660-033-0020

(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;

(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

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

(D) 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;

FINDINGS: The threshold inquiry for determining whether land is "agricultural" is whether the soils are predominately class I-VI. *Miles v. Bd. of Comm. of Clackamas County*, 48 Or App 951, 955, 618 P2d 986 (1980); *Flury v. Land Use Bd. of Appeals*, 50 Or App 263, 267 (1981). The evidence demonstrates that the subject property does not qualify as either high value agricultural or forest land. Soil studies conducted by Wert & Associates confirm that approximately 20% of soils are class VI; in fact only 5% of those are considered high value with irrigation. Staff reaches a similar conclusion, estimating that approximately 21% of soils are class VI, and only 7% of those are considered high value with irrigation. The record demonstrates the subject property is not irrigated and is not necessary to permit farm practices on adjacent agricultural lands, and the soils are not intermingled with agricultural soils within a farm unit. The Forage Report concludes that the property "is not suited for profitable, accepted agricultural use." Because a vast majority of the property contains class VII & VIII soils, and the poorer soils are not intermixed with higher class soils within an existing farm unit, it falls outside of the default category of "agricultural lands" set out in Goal 3 and OAR Chapter 660, division 33.

The Hearings Officer noted that the site was originally designated for Surface Mining in the county's comprehensive plan and zoned Surface Mining Reserve. The site was rezoned SM in the 1985. The Board agrees with the Hearings Officer that the evidence in the record shows that the only "resource" designation on this site is for mining, a Goal 5 use, and not farm or forest, Goal 3 and 4 uses, respectively.

For these reasons, the Board agrees with the Hearings Officer and finds that subject property does not constitute "agricultural land" as defined in Goal 3, is not subject to protection under Goal 3, and therefore the proposed plan amendment and zone change do not require an exception to Goal 3.

B. OAR 660, Division 6, Goal 4 Forest Land.

Goal 4 defines "forest land" as follows:

Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or 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.

FINDINGS: The subject property is not and never has been zoned for forest use. The detailed soil study prepared by Steve Wert included an analysis of the subject property's soils for production of merchantable tree species, and shows the soil units identified on the subject

property are not listed in the NRCS' Woodland Productivity soils table, and therefore are not considered suitable for the production of wood crops by the NRCS. Finally, the record indicates the predominant tree species on the property are juniper trees which historically have not had commercial value and have not been harvested commercially either on the subject property or on nearby lands. Accordingly, OAR Chapter 660, division 6 does not apply.

5. Chapter 23.96, Open Space, Areas of Special Concern, and Environmental Quality

a. 23.96.020, Goals.

1. To conserve open spaces and areas of historic, natural or scenic resources.

FINDINGS: The site abuts the Deschutes River, a designated federal Wild and Scenic River and Oregon Scenic River. The river and property abutting it are subject to the Landscape Management Combining Zone and that designation will not change with the proposed designation to Rural Residential Exception Area. To the extent that rural residential development may affect open spaces and areas of historic, natural or scenic resources, the Board finds that the proposed designation will better preserve those resources than the existing mining designation. For instance, much of the mined area on the site is exempt from reclamation. Unless the site is put to some other use, the existing conditions will remain.

In addition, the density standards for the proposed RR-10 zoning will ensure that development on the site will be low density and will preserve significant areas of open space on the property, particularly if the site is developed with a PUD.

Therefore, the Board concludes that the proposal is consistent with this policy.

2. To maintain and improve the quality of the air, water and land resources of Deschutes County.

FINDINGS: As noted above, the majority of the site, primarily west of Lower Bridge Way, has a long history of industrial use, and some of those uses have resulted in significant environmental impacts. Those impacts include dust from the diatomite, hazardous and radioactive waste disposal and remediation, and violations of environmental quality regulations. Neighbors expressed concerns regarding the impact of the proposal on water quantity and quality, arguing that the water needed to reclaim the site will adversely affect the area's water supply. Those issues are addressed as follows:

Diatomite dust. According to the applicant, the exposed diatomite on the western portion of the property is from fresh-water diatoms. The applicant supplied testimony and evidence that shows that fresh-water diatomite contains a smaller percentage of crystalline silica, the type of silica that has been identified as a health hazard if inhaled in quantity. The applicant argues that this type of diatomite poses no more risk than other dust in the area. The applicant also argues that before this site is redeveloped for residential uses, the diatomite will be graded and seeded to prevent dust from blowing from the site to neighboring properties. The neighbors expressed

reservations about this assertion, arguing that the cost and feasibility of that type of reclamation is unlikely to be recouped as part of development on this site.⁵

The evidence shows that blowing dust has been an issue for many years, although recent grading activities exacerbated the situation. The recent activities led the Department of Environmental Quality (DEQ) to issue a notice of violation. In response to the notice, the owners obtained a temporary water permit, purchased mitigation credits, installed a pivot and began using an existing well to water a portion of the site to minimize dust. The applicant is also proposing to implement best management practices to ensure that blowing dust during development is minimized. These measures are adequate to assure that local air quality is maintained.

Water quality/quantity. According to the evidence in the record, seven wells have been drilled on the site. These wells are proposed to be used for dust suppression, and may be converted to domestic wells in the future. The applicant proposes to develop individual, shared or group wells (serving up to three lots) as part of its residential development. The residents may use up to 15,000 gallons per day for domestic and yard irrigation (up to one-half acre) and remain exempt from water rights regulation. Similarly, wells developed to serve three or fewer dwellings are exempt from water quality standards. Neighbors expressed concerns regarding potential water contamination from past industrial uses, and also argue that the introduction of 17 or more new wells (assuming 72 dwelling units, and at least one well per three dwelling units minus the seven existing wells) could significantly affect their water quality and quantity.

The Board agrees with the Hearings Officer and finds that this goal does not directly address the availability (or quantity) of domestic water supplies. Rather, it is intended to assure that *quality* of air, water and land resources is maintained and improved. Here, the evidence (including evidence from testing of nearby community water wells) shows that existing water quality in the area is adequate, and that past activities on the site have not affected nearby well water quality. With respect to water quality at the site, the Board finds that the question can be better addressed at the time a development proposal is submitted for the site. At this point, the evidence shows that the proposed plan amendment/zone change will not have any effect on water quality.

Erosion/Fill. One of the neighbors expressed concerns regarding slope stability at the site, asserting that new grading may undermine the slope along the edges of the river bank. Other neighbors expressed concerns that the fill used for residential foundations be adequate for the purpose, noting that a school in Deschutes County is sinking, in part because the fill used by the contractor was not stable enough to accommodate the building. The evidence shows that diatomite mining occurred closer to the center of the site, and that the aggregate mining has ceased. There is no evidence that past mining has undermined slope stability along the river edge. The applicant has proposed to grade some of the taller diatomite mounds to reduce the

⁵ The opponents argue that the diatomite has been converted to crystalline silica during through an on-site manufacturing process. They cited evidence showing that crystalline silica is hazardous to worker health, and argued that until the diatomite at the site has been removed or covered with top soil, there is no guarantee that existing or future residents' health will not be affected. They further argue that diatomite doesn't grow much, and unless the applicant plans to import a significant amount of topsoil, it is unlikely that the reseeding efforts will be successful. While the former evidence tends to support a finding that processing of diatomite at the site needs to be regulated, the evidence of the health effects of freshwater diatomite on neighboring property owners is not sufficient to undermine the applicant's evidence that such effects are limited, and consistent with the effects of blowing dust in general.

areas susceptible to blowing dust. As for future development, land division and development standards impose setbacks from the edge of the bank. Deschutes County does not require grading permits and does not presently regulate fill to determine if it is suitable for residential use. As a condition of approval, if fill is brought onto the site, the applicant will be required identify the general location of the fill, and if the site is used for development, the applicant shall either certify that the fill is suitable for development, or specifically disclaim any knowledge of its suitability. The Board concludes that these measures are adequate to assure that development on the site will not adversely affect air, water or land quality.

Dumping/Environmental Issues. A portion of the site west of Lower Bridge Way was an approved waste facility in the mid-1970s, and consequently, sludge, radioactive materials as well as standard solid waste was brought to the site during that time. According to the applicant, the dumping grounds were limited to the central portion of the site, near the former lagoons, and included 55-gallon drums filled primarily with caustic sand. The site was subject to a DEQ-mandated clean up, which was completed by January 1985. The evidence shows that all of the materials located at the site prior to 1985 were removed to approved hazardous waste disposal sites, including Arlington and the Hanford Reservation. According to Maul Foster and Alongi, Inc., the applicant's environmental consultant, the standards used to evaluate the clean-up was based on one of two standards "clean up to the maximum extent practical" or "clean up to background conditions." Maul Foster and Alongi, Inc. representatives testified that these standards are higher than the current risk-based standards, which permit less comprehensive clean up where the site will be used for industrial purposes than is required for sites that will be redeveloped for residential uses.⁶ With respect to spills or activities that have occurred since that time, including disposal of mining solvents and industrial burning, the evidence shows that the violations have been addressed by meeting industrial use standards. The Board has included conditions, as discussed more fully herein, to ensure the property is clean enough to meet residential use standards.

Based on these findings, the Board finds that residential development of the property will not significantly impair air, water or land quality in the area.

a. **Section 23.96.030, Policies**

10. **As part of subdivision or other development review, the County shall consider the impact of the proposal on the air, water, scenic and natural resources of the County. Specific criteria for such review should be developed. Compatibility of the development with those resources shall be required as deemed appropriate at the time given the importance of those**

⁶ The Hearings Officer found that a question remains as to whether the 1985 standards (based on 1985 technology) are equivalent to the clean-up standards that would be imposed if the site were subject to current standards for residential re-development. Evidence placed in the record since that time establishes that different regulatory standards exist for residential use. The Hearings Officer found that this goal requires a demonstration that the site meets applicable DEQ clean-up standards, which in this case, are the 1985 standards. The Hearings Officer then concluded that the applicant had met its burden of demonstrating that those standards have been satisfied, therefore, the proposed plan amendment and zone change are consistent with these standards. The Board agrees with and adopts these findings. The Board further imposes conditions to require the applicant to submit a DEQ release for residential use.

resources to the County while considering the public need for the proposed development.

FINDINGS: This plan policy is not applicable to the proposed plan amendment because the applicant is not seeking subdivision approval or development review. If the plan amendment and zone change are approved, then future development will need to satisfy this standard.

6. Chapter 23.108. Historic And Cultural

a. 23.108.020, Goals.

1. To preserve and protect historic and cultural resources of Deschutes County.

a. 23.108.040, Goal 5 Inventory - Historic Resources.

21. Lynch and Roberts Store Advertisement: Ad advertising sign painted on a soft volcanic ash surface. Only area example of early advertising on natural material. Lynch and Roberts established mercantile in Redmond in 1913. Roberts Field near Redmond was named for J. R. Roberts. Site includes the bluff. 14-12-00 TL 1501.

FINDINGS: The Lynch and Roberts Store Advertisement sign is painted on a large boulder located on the subject property. As this zone change, in itself, does not authorize any development of the property, no adverse impacts to historical resources on the subject property are anticipated. The applicant has proposed several measures to protect this historic resource. The applicant has proposed to not develop any area within a 100 yard radius of the historic sign and has proposed to post markers to denote the historic significance of the sign and to prevent trespass, prior to development of the site. The applicant has also proposed that any Covenants, Conditions and Restrictions (CC&Rs) created as a part of a residential development of the subject property will contain obligations to protect the area within a 100 yard radius of the historic sign from development and trespass and to maintain the historic markers. The Board finds that the proposed measures will be sufficient to meet the goal of protecting this historic resource. These measures to protect the Lynch and Roberts Store Advertisement sign have been included as conditions of approval.

B. Oregon Administrative Rules

1. OAR 660, Division 12, Transportation Planning Rule

(1) Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. 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) **As measured at the end of the planning period identified in the adopted transportation system plan:**
 - (A) **Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;**
 - (B) **Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or**
 - (C) **Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan.**
- (2) **Where a local government determines that there would be a significant effect, compliance with section (1) shall be accomplished through one or a combination of the following:**
- (a) **Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.**
 - (b) **Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.**
 - (c) **Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.**
 - (d) **Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.**
 - (e) **Providing other measures as a condition of development or through a development agreement or similar funding method, including transportation system management measures, demand management or minor transportation improvements. Local governments shall as part of the amendment specify when**

measures or improvements provided pursuant to this subsection will be provided.

- (3) Notwithstanding sections (1) and (2) of this rule, a local government may approve an amendment that would significantly affect an existing transportation facility without assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility where:
- (a) The facility is already performing below the minimum acceptable performance standard identified in the TSP or comprehensive plan on the date the amendment application is submitted;
 - b) In the absence of the amendment, planned transportation facilities, improvements and services as set forth in section (4) of this rule would not be adequate to achieve consistency with the identified function, capacity or performance standard for that facility by the end of the planning period identified in the adopted TSP;
 - (c) Development resulting from the amendment will, at a minimum, mitigate the impacts of the amendment in a manner that avoids further degradation to the performance of the facility by the time of the development through one or a combination of transportation improvements or measures;
 - (d) The amendment does not involve property located in an interchange area as defined in paragraph (4)(d)(C); and
 - (e) For affected state highways, ODOT provides a written statement that the proposed funding and timing for the identified mitigation improvements or measures are, at a minimum, sufficient to avoid further degradation to the performance of the affected state highway. However, if a local government provides the appropriate ODOT regional office with written notice of a proposed amendment in a manner that provides ODOT reasonable opportunity to submit a written statement into the record of the local government proceeding, and ODOT does not provide a written statement, then the local government may proceed with applying subsections (a) through (d) of this section.

FINDINGS:

The Transportation Planning Rule ("TPR") applies to these applications because they involve an amendment to an acknowledged plan. The proposed plan amendment would change the designation of the subject property from SM and EFU-LB to RREA, and the applicant has requested approval of a zone change from SM and EFU to RR-10 for the subject property.

The TPR, OAR 660-012-0060, is triggered when uses allowed under a plan amendment/zone change would "significantly affect" a transportation facility by generating more traffic than what would be generated by those uses allowed under the current zoning. To properly compare the trips, the trips generated by the most traffic intensive uses in the existing zone must be compared to the trips generated by the most traffic intensive uses under the proposed zoning. *Mason v. City of Corvallis*, 49 Or LUBA 199 (2005); *Griffiths v. City of Corvallis*, 50 Or LUBA 588

(2005). Where the most traffic intensive uses allowed under the proposed zoning would generate an equal or lesser amount of trips than those allowed under the existing zoning, the proposed amendment would not significantly affect a transportation facility. Mason, 49 Or LUBA at 222; Griffiths, 50 Or LUBA at 593. In other words, the initial question under the TPR is whether the amendment causes a net increase in trips by comparing uses allowed under the existing zoning to those allowed under the proposed zoning. If the answer to that questions is no, as here, the amendment does not "significantly affect" a transportation facility. Griffiths, at 593.

The applicant's December 2007 traffic study finds the intersection of Lower Bridge Way/U.S. 97 will not meet either the performance standards of Deschutes County or ODOT with or without this development. The County sets a standard of Level of Service (LOS) D for existing roads while the applicable ODOT volume/capacity (V/C) ratio is 0.70 for the highway and 0.80 for the side street based on functional classification and posted speed. An ODOT project planned for Spring 2009 will reconfigure the Lower Bridge Way/97 and 11th Street/97 intersections. This project will improve the operations and safety at these intersections, but it will not address the capacity issue, as the project focuses more on storage issues on the side streets.

Staff, ODOT, and the applicant worked together to identify rural surface mining sites that are comparable to the applicant's 550-acre roughly six miles west of Terrebonne. The resulting comparable surface mines included one west of Sisters and two on the O'Neil Highway near the Deschutes/Crook County line. In particular, the O'Neil Highway sites (Hooker Creek and Lone Pine) were the closest equivalent sites to the applicant's in terms of both geography and relative proximity to nearby urban markets. A review of the Dec. 19, 2007, April 22, 2008, and May 20, 2008, traffic analyses indicated these comparable sites were analyzed in one or more of the applicant's traffic studies.

The traffic analysis of the three sample sites demonstrated surface mines generate p.m. peak hour trips at a range of 0.041 to 0.16 trips per acre. Applying those trip generation values to the land presently zoned SM could generate 23 to 88 trips in the p.m. peak. Applying the trip generation rates for the O'Neil Highway surface mines, which again are the best comparable sites, to the Terrebonne site results in 72 to 88 p.m. peak hour trips.

Under the proposed zoned change to RR-10, the applicant could construct 55 single-family homes on the 550 acres. This would result in 55 p.m. peak trips on the system, according their Dec. 19, 2007, traffic impact analysis. Therefore, as the existing SM zone can generate 72 to 88 p.m. peak hour trips whereas the RR-10 zone could generate 55 p.m. peak hour trips, the proposed zone would generate fewer trips than the existing zoning.

To further substantiate the finding of equivalent or greater trips under the SM zoning, the applicant submitted testimony and evidence documenting the historic levels of activity at the site. Historically, it was used for a wide variety of uses allowed under the SM zone including aggregate and diatomite mining and processing, an asphalt plant, a rock crushing operation, a staging area for road construction, and a hazardous waste materials facility. See, Exhibits PH-1 and PH-2. In fact, previous operators at the site estimated there were as many as 22 trucks per hour hauling sand and gravel during the period from 2004 to 2007 and as many as 150 trucks per day during the period of 1978 through 1988 when the site was used as a batch plant and crushing operation. Records also show the site employed over 100 workers in shifts of 35 employees each during the diatomite mining. See Exhibit PH-2.

Furthermore, the current owners of the site hold the mineral rights to mine the adjacent surface mining (SM site no. 322) property to the east (Exhibit PH-3). Thus, the evidence in the record shows that the subject property could be used as staging and processing area for material mined from the adjacent property and other sites in the area. The applicant also submitted the deed records showing the owners of the subject property hold mineral rights to adjacent properties.

Given the historic level of use at the site, the remaining diatomite resource, the proximity of the site to a state highway with upcoming construction projects and its central location between two rapidly growing communities, the Board finds that the site would generate at least the same or more trips under the surface mining zoning as it would under the proposed residential zoning. This is especially true if the present owners are left with environmental clean up costs/responsibilities and mining or mining related uses as the only economically viable uses of the property. Therefore, the Board finds the proposal will not significantly affect a transportation facility, and is, therefore, consistent with the TPR as defined by OAR 660-012-0060.

2. OAR 660, Division 15, Statewide Planning Goals and Guidelines

FINDINGS:

Goal 1, Citizen Involvement. The proposed plan amendment satisfies this goal because the Planning Division provided public notice of the applicant's proposal through individual mailed notice to affected property owners, posting of the subject property with a notice of proposed land use action sign, and published notice of the public hearing in the "Bend Bulletin" newspaper. In addition, four public hearings were held, one before the Hearings Officer and three before the Board. There was extensive public participation in this process, including oral and written testimony and evidence.

Goal 2, Land Use Planning. The proposal has been reviewed in accordance with the county's acknowledged planning review processes, and was the subject of four public hearings. Further, no Goal 2 exceptions are required. The proposal is consistent with this goal.

Goal 3, Agricultural Lands. The property contains few agricultural soils and has not been cultivated for crops or livestock. The site is not "agricultural" within the meaning of Goal 3.

Goal 4, Forest Lands. This goal is not applicable because the subject property is not zoned or designated for forest use.

Goal 5, Open Spaces, Scenic and Historic Areas and Natural Resources. According to the applicant, the site no longer contains aggregate in sufficient quantities to qualify as a "significant site" under Goal 5 and OAR Chapter 660, division 23. The evidence shows that the majority of the aggregate resource is located on the southeastern portion of the site, south of Lower Bridge Way. The site has been closed in accordance with DOGAMI regulations, and the evidence shows that little of the resource remains. While the parties apparently agree that vast quantities of diatomite remain, they dispute whether the materials will be needed for industrial or construction uses in the near future, and whether other locations are available to supply long term future needs. The Board agrees with the Hearings Officer and finds that because the market for diatomite is a global market and the supply of the mineral is available on a global scale, there is no evidence that there is a local market for diatomite that could be accommodated by retaining this site in Surface Mining zoning. The Board further finds that removal of this site from the County's Goal 5 inventory is justified because the unrefuted

evidence in the record shows that there is not a significant quantity of aggregate resource, which is the resource for which the site was listed on the Goal 5 inventory.

In response to comments that the proposal will only be consistent with Goal 5 if the ESEE analysis for Site 461 is amended to address the relative merits of allowing or not allowing mining on the site based on current conditions, the Board finds that such a revised analysis is not necessary if the purpose of the amendment is to remove a resource from the protection afforded by the inventory designation. The applicant has requested that the site be removed from the inventory, and there is little or no benefit to retain it. Therefore, further analysis is unnecessary.

Goal 6, Air, Water and Land Resources Quality. While a number of environmental quality concerns have been identified, the Board finds that those concerns are addressed through environmental quality and health administrative rules. The conditions imposed herein will require the environmental agencies to ensure the property is clean enough to meet applicable regulations for residential use standards prior to development. Likewise, residential development on the site will not be permitted unless the applicant demonstrates that adequate area is available for on-site sewage disposal.

Opponents argue Goal 6 requires the site to be cleaned up before a residential zoning or use can be approved. The Board disagrees. Goal 6 requires findings that waste and process discharges from a proposed use will be able to comply with applicable state and federal environmental quality standards. It is limited by its terms to wastes and discharges from future development. The evidence in the record establishes the proposed use as a maximum of 74 single family residences served by individual wells and on-site septic systems. The applicant submitted evidence showing there is a sufficient quantity and quality of water available to serve the development without measurable impact to adjacent properties, the groundwater aquifer or the Deschutes River. Any future residential development will have to receive approval from Deschutes County Environmental Health for the establishment of septic systems to serve the proposed residences. Any subdivision or land division would have to show the lot lines are configured in a way to support an area for an on-site septic system. There is no evidence to suggest that waste or other discharges from the proposed residential use would not meet any applicable state or federal environmental quality standards.

Goal 7, Areas Subject to Natural Disasters and Hazards. The subject property contains areas subject to flooding along the Deschutes River, as shown on FIRM panel 41017C0300E. This proposal does not include any development in floodplain areas. Any future development in these areas would be required to comply with the provisions of DCC 18.96, which has been reviewed and approved by FEMA.

Goal 8, Recreational Needs. The proposed plan amendment and zone change do not reduce or eliminate any opportunities for recreational facilities either on the subject property or in the impact area, and to the extent the development of residential uses on the property will generate a need for recreational opportunities, the Board finds that those needs can be served on-site or by existing recreational areas/services.

Goal 9, Economy of the State. This goal is to provide adequate opportunities throughout the state for a variety of economic activities. This goal is met because the subject property no longer constitutes a significant mineral and aggregate resource, and therefore allowing it to be re-designated and rezoned for rural residential development will not have adverse economic impacts.

Goal 10, Housing. Goal 10 defines needed housing as being housing within urban growth boundaries. This property is outside the urban growth boundary, and therefore Goal 10 is not applicable.

Goal 11, Public Facilities and Services. This Goal requires planning for public services, including public services in rural areas. Goal 11 has generally been held to prohibit the extension of urban services (namely sewer and water) to rural lands outside urban growth boundaries. The present application will not result in the extension of urban services because the low-density development allowed in the RR-10 zone does not require urban services. Any residential development will be of a density that can be served by on-site septic and individual wells.

Goal 12, Transportation. This goal is to "provide and encourage a safe, convenient and economic transportation system." It is implemented through OAR 660-012, commonly known as the TPR. Based on the findings in response to the TPR, the Board finds the proposal is consistent with Goal 12.

Goal 13, Energy Conservation. Goal 13 is to conserve energy. Planning Guideline 3 notes that "[l]and use planning should, to the maximum extent possible, seek to recycle and re-use vacant land..." Surface mining activities have ceased on the site and it has been vacant for some years. The applicant proposes re-use of the land consistent with this guideline, and thus this proposal is consistent with Goal 13.

Goal 14, Urbanization. The applicant's proposal does not affect property within an urban growth boundary and the proposed RR-10 zoning designation does not permit urban density levels. Goal 14 therefore does not apply.

Goals 15 through 19. These goals, which address river, ocean, and estuarine resources, are not applicable because the subject property is not located in or adjacent to any such areas or resources.

ZONE CHANGE

FINDINGS: The applicant has requested approval of a zone change from EFU-LB and SM to RR-10 for the subject property, and to remove the associated Surface Mining Impact Area (SMIA) overlay from property located within a one-half mile radius of the site. However, because the site is within a one-half mile radius of Site 322, the applicant requests that the SMIA be applied to this property, to protect mining uses at that site.

C. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance

- 1. Chapter 18.52, Surface Mining Zone (SM)**
- a. Section 18.52.130, Site Reclamation Plan.**

Prior to the start of mining activity, a site reclamation plan shall be submitted and approved which demonstrates that the mineral and aggregate extraction site can be reclaimed for a subsequent beneficial land use consistent with the designation of such subsequent use in the surface mining element of the Comprehensive Plan.

- A. When a site reclamation plan is required by DOGAMI, the site reclamation plan shall be approved by DOGAMI. To the extent practicable, review of the site reclamation plan shall be conducted jointly between DOGAMI and the County.
- B. When a site reclamation plan is not required by DOGAMI, the site reclamation plan shall be approved by the County in conjunction with the site plan review described in DCC 18.52.070. The County shall review such site reclamation plans for consistency with the site-specific ESEE analysis in the surface mining element of the Comprehensive Plan and the standards and conditions set forth in DCC 18.52.110 and 18.52.140. The County also shall follow the applicable DOGAMI standards and criteria for a site reclamation plan.

FINDINGS: As previously discussed, much of the mining activity on the site took place prior to any County or State regulation and is therefore exempt from reclamation requirements. The evidence in the record shows that all reclamation required by DOGAMI was completed to DOGAMI's satisfaction and DOGAMI has closed its file on the site. Specifically, the evidence shows that the areas southeast of Lower Bridge Way were subject to a DOGAMI reclamation plan and have been reclaimed in accordance with that plan. The mine site northwest of Lower Bridge Way did not have a DOGAMI required reclamation plan. However, a County reclamation plan for the removal of the aggregate resource was required under SP-85-23, and was attached to that decision as Exhibit C. The evidence shows this area encompasses an 18-acre area on the 410-acre site that is north of Lower Bridge Way and west of the site access road. The applicant proposes to reclaim this area of the site to allow for residential development and to submit a modified reclamation plan as described in the applicant's December 3, 2008 plan. The Board finds that this criterion can be met through the imposition of a condition of approval requiring the applicant to complete County approved reclamation of the 18-acre area covered by SP-85-23 through a modified reclamation plan substantially consistent with the plan submitted by the applicant dated December 3, 2008. The modification will be processed as a land use application with notice and an opportunity for full public participation.

- b. **Section 18.52.200, Termination of the Surface Mining Zoning and Surrounding Surface Mining Impact Area Combining Zone**
 - A. When a surface mining site has been fully or partially mined, and the operator demonstrates that a significant resource no longer exists on the site, and that the site has been reclaimed in accordance with the reclamation plan approved by DOGAMI or the reclamation provisions of DCC 18, the property shall be rezoned to the subsequent use zone identified in the surface mining element of the Comprehensive Plan.

FINDINGS: The County's inventory of significant mineral and aggregate sites describes SM Site 461 as follows:

Site No.	Legal Description	Type	Quantity	Quality

461	141300-00-01500, 1501, 1502, 1503, 1505, 1600	Aggregate [Diatomite]	350,000 y ³ 2,000,000 y ³	Good
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Subsection (A) requires the operator to demonstrate that: 1) the site has been fully or partially mined; 2) a significant resource no longer exists on site; and 3) the site has been reclaimed in accordance with DOGAMI, or DCC Section 18.52.130 standards. The applicant asserts that all three conditions are satisfied here. The Board agrees.

As discussed in detail below Site 461 has been mined. The section below discusses significant resource status. In the County's previous decision in *Stott* (PA-98-12/ZC-98-6), the Hearings Officer held that the provisions of OAR 660 Division 23 regarding compliance with Goal 5 are relevant to this question. OAR 660-023-0250 provides in pertinent part:

- (1) **[OAR 660, division 23] replaces OAR 660, division 16 * * *. Local governments shall follow the procedures and requirements of this division * * * in the adoption or amendment of all plan or land use regulations pertaining to Goal 5 resources. The requirements of Goal 5 do not apply to land use decisions made pursuant to acknowledged comprehensive plans and land use regulations.**
- (2) **The requirements of this division are applicable to [post-acknowledgment plan amendments (PAPAs)] initiated on or after September 1, 1996. * * ***
- (3) **Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:**
 - (a) **The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5[.] * * ***

In *Stott*, the Hearings Officer concluded that a plan amendment and zone change to "de-list" and rezone a surface mining site constitutes a "PAPA," and therefore the provisions of OAR 660-023-0180 concerning mineral and aggregate resources apply to such an application to the extent they reasonably can be applied to a decision to *remove* a site from the county's adopted inventory. The Board agrees with this conclusion. The Hearings Officer further found OAR 660-023-180(3) identifies the pertinent standards for determining "significance." This paragraph provides:

- (3) **An aggregate resource site shall be considered significant if adequate information regarding the quantity, quality, and location of the resource demonstrates that the site meets any one of the criteria in subsections (a) through (c) of this section, except as provided in subsection (d) of this section:**
 - (a) **A representative set of samples of aggregate material in the deposit on the site meets applicable Oregon Department of Transportation (ODOT) specifications for base rock for air degradation, abrasion, and soundness, and the estimated amount of material is more than**

2,000,000 tons in the Willamette Valley, or more than 500,000 tons outside the Willamette Valley;

- (b) The material meets local government standards establishing a lower threshold for significance than subsection (a) of this section; or
- (c) The aggregate site was on an inventory of significant aggregate sites in an acknowledged plan on September 1, 1996.

FINDING:

Significant Resources: Mineral and aggregate are not the same resources. Mineral resources refer generally to all inorganic materials that are extracted from the earth and put to beneficial use. It includes precious metals, valuable minerals, diatomite, as well as rock and sand. "Aggregate," on the other hand, refers to those inorganic substances that are used in road or other construction activities. OAR 660-023-0180 only addresses "aggregate" resources. The county's Goal 5 program primarily addresses aggregate resources, although the definition of "mineral" is broader than the definition of "aggregate" set out in OAR 660, division 23.

Aggregate resource is significant if it meets one of the three criteria set out in OAR 660-023-0180(3). Here, the only potentially applicable standard is OAR 660-023-0180(3)(a).⁷

OAR 660-023-0180(3)(a) requires a demonstration that the aggregate at the site: 1) meets ODOT specs for air degradation; 2) abrasion; 3) sodium sulfate soundness; and 4) include more than 500,000 tons. The Aggregate Resource Assessment Report prepared by GeoDesign, Inc. and submitted as Exhibit 7 ("Aggregate Report") concludes that subject site does not satisfy the criteria because it fails sodium sulfate soundness requirements and contains less than 500,000 tons of aggregate. Based on a site-specific analysis, the Aggregate Report estimates the quantity of the aggregate at 211,000 cubic yards. Assuming a tons-per-cubic yard ratio of 2.1, the Report finds 443,100 tons of aggregate on site, less than the "significant" threshold above.

The Board agrees with the Hearings Officer that the unrefuted evidence demonstrates that the site no longer contains a significant aggregate supply.

With respect to diatomite, the aggregate significance standards do not apply because diatomite is a mineral, not aggregate, resource. Neither local law nor administrative rule define what a significant "mineral" resource is. Furthermore, the ESEE analysis for the site makes it clear that the site was listed on the County's Goal 5 Mineral and Aggregate inventory based solely on the quantity of aggregate on the site, not diatomite. While the value of diatomite in the global market justified the rezoning of the property to SM, and the approval of mining in 1985, the applicant has provided information in the submitted burden of proof that there is no economic incentive to mine diatomite on the subject property due to ample global supply, low profitability, less expensive substitute materials, and undesirable environmental impacts. Due to its limited usefulness in the local market, and the evidence that other materials provide a more suitable replacement, the Board agrees with the Hearings Officer that the diatomite on the site is not a "significant" mineral warranting protection.

⁷ OAR 660-023-0180(3)(b) does not apply because the local government has not established lower standards. OAR 660-023-0180(3)(c) does not apply to requests to remove a site from the acknowledged inventory. See Hearings officer decisions PA-98-12 and ZC-98-6, PA-04-4 at page 30 (Exhibit 15) and PA-06-2 at page 14 (Exhibit 19).

Reclamation: The Deschutes County Code requires that the site be reclaimed in accordance with a reclamation plan approved by DOGAMI or the reclamation provisions of DCC 18.52. DOGAMI has found the site to be reclaimed according to its standards. As the DOGAMI memo explains, 61 acres on tax lots 1503 and 1505 were covered by an operating permit for gravel extraction, and reclamation has been completed there. The overburden stockpiles on that area have been revegetated, are stable, and may remain until used for on-site development. The former DIATOMITE mining site (west of Lower Bridge Way) is exempt from reclamation requirements under ORS 517.770 because it was part of a mine that existed before 1972.

Site Plan approval SP-85-23 included reclamation specifications. Below is a summary of the applicant submitted reclamation plan, attached as Exhibit C to the Hearings Officer Decision in SP-85-23.

The applicant has stated that the topsoil is stockpiled and will be replaced on the area mined approximately 12 inches deep. The applicant proposed to motorgrade the site and seed it with fortress red fescue, Idaho fescue, and mixed bunchgrass at a rate of 40 pounds per acre planted in the fall with fertilizer and mulch. The applicant also proposes to plant evergreens for shade and windbreaks on the site.

Condition 1 of SP-85-23 also required an updated reclamation plan to include measures to prevent materials from eroding into the Deschutes River. Staff has been unable to locate this updated reclamation plan or a map showing the area covered by SP-85-23. The applicant submitted testimony and evidence establishing an 18-acre area north of Lower Bridge Way and west of the site access road on the area mined for aggregate under the permit issued in SP-85-23. The evidence establishes that some but not all of the components of the reclamation plan summarized above were completed.

There is significant confusion as to the relationship between the DOGAMI reclamation standards and DCC 18.52.200(A). DOGAMI has the statutory authority to regulate reclamation over sites located in Deschutes County, and its reclamation standards supersede local standards. Therefore, unless the applicant agrees otherwise, sites that are exempt from reclamation under DOGAMI regulations are similarly exempt from other, more restrictive local standards that could be imposed as a condition of land use approval. Thus, as a practical matter, the only role the county has in the reclamation process is to identify a post-mining use. If the post-mining use is established prior to the adoption of a reclamation plan, the plan must be consistent with that post-mining use.

Here, the evidence shows that the applicant proposed a reclamation plan for the area mined for aggregate in SP-85-23. Those reclamation activities were not required in the DOGAMI reclamation plan, but rather were solely imposed as conditions in SP-85-23, enforceable by the County. The Board finds that the condition discussed previously requiring the applicant to complete a County approved reclamation plan is sufficient to show compliance with the earlier condition, since it actually increases the ultimate likelihood of compliance.

Based on the above, the Board finds the site has been partially mined, a significant resource no longer exists and the site has been or will be, through the fulfillment of conditions of approval, fully reclaimed in accordance with DOGAMI and DCC requirements.

B. Concurrent with such rezoning, any surface mining impact area combining zone which surrounds the rezoned surface

mining site shall be removed. Rezoning shall be subject to chapter 18.136 and all other applicable sections of this title, the Comprehensive Plan and Deschutes County Code Title 22, the Uniform Development Procedures Ordinance.

FINDINGS: The present zone change will also remove the surface mining impact area combining zone which surrounds the rezoned surface mining site. However, as noted above, Site 322 is located within one-half mile of the site. Therefore, a SMIA that covers a one-half mile radius of that site must remain on nearby property and must be applied to this site.

2. Chapter 18.136, Amendments

a. 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:

FINDINGS: The Board finds that this section requires that a quasi-judicial rezoning must establish that the public interest is best served by rezoning the property. The Board finds this analysis must include, but is not limited to, to factors described in this section. The record indicates that the subject property was historically used to mine and process diatomaceous earth. The record also indicates that the processing of diatomaceous earth can create cristobalite, classified by the International Agency for Research on Cancer as carcinogenic to humans. There is no evidence in the record that the property has been tested or evaluated for potential hazard from this carcinogen. The site has also been used for hazardous and radioactive waste disposal and has been subject to numerous violations of environmental quality regulations.

The Oregon Department of Human Services, Environmental Health Assessment Program (EHAP) stated that the existing EHAP evaluation of environmental conditions at the site only dealt with the present use of the property. EHAP recommended that the landowner obtain a letter of "No Apparent Public Health Hazard" from EHAP for the site prior to residential use. This would require additional environmental sampling and cleanup of any identified environmental concerns. EHAP has also found that airborne dust from any source can cause short-term respiratory irritation, but more information is needed to evaluate possible long-term effects at this site. EHAP considers inhalation of airborne dust emanating from this site to be an indeterminate health hazard.

The Oregon Department of Environmental Quality (DEQ) stated that the site has currently only been evaluated with respect to environmental safety for its current use as a mine and an industrial property. A rezone of the site from industrial to residential use would require a re-evaluation of the site for residential use. The re-evaluation of the site, applicable exposure routes, and pathways may result in some scenarios requiring deed restrictions, active cleanup and/or monitoring. Following a cleanup of any identified environmental concerns, DEQ could issue a "No Further Action Letter" (NFA) for residential use.

Given the environmental history of the site, the Board finds that the public interest will not be served by rezoning the property for residential use, prior to establishing that the site is safe for

residential use⁸. The Board finds, however, that the applicant can meet this criterion through conditions of approval. In establishing these conditions of approval, the Board recognizes that the majority of the environmental concerns pertain to dust and hazardous waste storage that occurred on the a portion of property located West of Lower Bridge Way. Therefore, separate conditions of approval are imposed for 1) the area to the East of Lower Bridge Way (together with approximately 30 acres along the river west of Lower Bridge Way; and, 2) the area West of Lower Bridge Way, the latter requiring a Resolution of Intent to Rezone rather than a current rezoning of that section.

East Area:

1. Prior to final plat approval for any residential subdivision, the applicant shall obtain from the Department of Environmental Quality (DEQ) a "No Further Action" (NFA) determination or the equivalent for a residential use designation for the 160 acres.
2. Prior to final plat approval for any residential subdivision, the applicant shall obtain from the Department of Human Services (DHS) a determination of "no apparent public health hazard" for a residential use designation for the 160 acres.

West Area:

1. Within five (5) years or prior to final plat approval for any residential subdivision on the 410 acre area that is the subject of File No. ZC-08-1/PA-08-1, whichever is earlier, the applicant shall obtain from DEQ an NFA determination or the equivalent for a residential use designation for this 410 acre area.
2. Within (5) five years or prior to final plat approval for any residential subdivision on the 410 acre area that is the subject of File No. ZC-08-1/PA-08-1, whichever is earlier, the applicant shall obtain from DHS a determination of "no apparent public health hazard" for a residential use designation for this 410 acre area.
3. During the pendency of this Resolution and continuing in conjunction with the DEQ VCP program and site development, the owner shall implement the DEQ approved Planting Plan dated May 20, 2008 (Exhibit PH-6) and the DEQ approved Watering Monitoring Plan dated May 20, 2008 (Exhibit PH-7) as the Dust Abatement Plan for the site.

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

FINDINGS: In previous County decisions, it has been held that comprehensive plan goals and policies do not constitute mandatory approval criteria for quasi-judicial zone changes, but rather are implemented through the zoning ordinance, and therefore if the proposed zone change is consistent with the applicable provisions of the zoning ordinance, it also will be consistent with the plan.

The applicant has argued that the public interest is best served by taking the subject property out of mining use. Due to increased rural residential development in the area and decreased value and demand for diatomite, the applicant argues that diatomite mining is no longer

⁸ With regard to environmental issues, the Board lacks the expertise to determine if the subject property is safe for residential use and will look to DEQ and DHS to provide this determination.

compatible with the area or desirable for the landowners. Rezoning for residential use will provide incentive and the economic resources to clean up the aesthetic and environmental impacts of decades of mining.

As noted above, the proposed plan map amendment and removal of the site from the county's inventory of significant mineral and aggregate sites are consistent with applicable plan policies and the Statewide Land Use Planning Goals. The proposed RR-10 and SMIA zoning designations are consistent with the proposed plan designations. Therefore, the proposal, so long as it is also consistent with the zoning ordinance, is consistent with the plan.

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

FINDINGS: The applicant is proposing a zone change from Surface Mining to Rural Residential (RR). The purpose of the RR zone, set forth at DCC 18.60.10 is:

The purposes of the Rural Residential Zone are to provide rural residential living environments; to provide standards for rural land use and development consistent with desired rural character and the capability of the land and natural resources; to manage the extension of public services; to provide for public review of nonresidential uses; and to balance the public's interest in the management of community growth with the protection of individual property rights through review procedures and standards.

FINDINGS: The proposed zone change is consistent with this purpose statement because re-development of the site will create a rural residential living environment consistent with the rural character and capabilities of the land and resources. To the extent existing conditions affect the carrying capacity of the land, air and water, those issues can be addressed through compliance with applicable state health and environmental quality regulations, or through compliance with the county's development standards.

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

FINDINGS: The Board finds that this section requires that a quasi-judicial rezoning must establish that changing the zoning will presently serve the public health, safety and welfare. The Board finds this analysis must include, but is not limited to, to factors described in this section.

The site is currently an unused diatomite and aggregate surface mine. Prior activities on the site have in some cases adversely affected public health, safety and welfare, although some of those impacts have been ameliorated. The concerns with public health, safety and welfare arose primarily from the previous use of the western portion of the site as a hazardous waste facility. Additionally, the presence of loose diatomite on the western portion of the property raises concerns with blowing dust, as described above. The Board has conditioned this decision to address these concerns.

Opponents have raised limited issues with concerns about the portion of the property East of Lower Bridge Way. While the Board finds no evidence of any continued public health, safety

and welfare concerns with the eastern portion of the property, this area has not been evaluated with respect to environmental concerns for residential use. The Board has conditioned this decision to address this concern, as described above.

The Board agrees with the Hearings Officer and concludes that overall, redevelopment of the site for rural residential uses, as conditioned, will presently serve the public health safety and welfare by providing the developer with an incentive to reclaim the site.

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

FINDINGS: All utilities are available and currently serving other nearby properties, including the RR-10 zoned subdivision to the southeast, and adequate County road frontage is available. The Board also concludes that the applicant has demonstrated that the proposed rural residential zoning will not significantly affect local transportation facilities. The Board agrees with the Hearings Officer that "public services and facilities" within the meaning of this standard does not include private domestic wells, individual subsurface sewage facilities or private roads. To the extent water availability and water quality fall within the category of "public services and facilities," the applicant provided evidence that it has a limited use water permit to allow for dust suppression and irrigation of re-vegetated areas. The applicant also testified and submitted evidence that its preliminary testing shows that adequate water is available to develop individual or group wells for domestic water supplies. Domestic wells must be drilled in accordance with Oregon Water Resources Department well drilling standards, which includes a requirement that the well not inject contaminated water into an aquifer, or cause perched water to move to another aquifer. There is substantial evidence in the record to show that these standards are met or can be met through conditions of development approval.

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

FINDINGS: The evidence shows that rezoning the property will not adversely impact surrounding property because residential use is consistent with the existing residential uses adjacent to the subject property, and will not increase adverse impacts on agricultural uses on other nearby properties. Several neighboring land owners testified that they supported the proposal as a means of revegetating the site and controlling dust.

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.

FINDINGS: There have been several changes in circumstances, and new information that shows that mistaken assumptions were the premise of the current zoning. Part of the subject property was zoned Surface Mining in 1985 and the remainder in 1989.

The 1985 zoning focused on only the diatomite resource, and was premised on the assumption that diatomite would be economically productive for export. At that time the property was zoned Surface Mine Reserve, and the applicable Comprehensive Plan assumed that land so designated "will ultimately be mined." The applicable Plan also lowered the burden of proof for changing the zoning to Surface Mining because "the material here sought to be mined consists of non-aggregate materials which are most probably to be used for export as there is currently

little local demand." In spite of low local demand, the Hearings Officer found that the potential to export diatomite satisfied "the need question." Applicants were "in the process of negotiating large scale contracts for the delivery of [diatomite]" and the county found that construction of a processing plant in Malheur County would "enable exportation by the applicants." Because the site had already been used for diatomite mining, the Hearings Officer found that rezoning would simply facilitate more use and exportation of the resource.

However, circumstances have changed since 1985. Because the identified global supply of diatomite will satisfy global demand for a very long time, the Lower Bridge Way site is not needed. Environmental regulation and fuel costs have increased, while profits for diatomite have decreased. Therefore, according to the applicant, mining diatomite from the site is no longer economically viable or necessary.

The second rezoning, as part of the ESEE analysis for site 461, in 1989-1990 focused on the site's aggregate (as opposed to a mineral) resource. It followed the 1988 Deschutes County Goal 5 Aggregate Inventory, which identified an aggregate resource of 350,000 cubic yards. It is unclear from the record how this amount was estimated.

In the ESEE analysis for site 461, the Board identifies the key values that form the basis for the determination of SM zoning for the mine site. These include the importance of aggregate resources to development in Deschutes County, the value to the County economy in terms of materials and jobs, the presence of an estimated 350,000 cubic yards of aggregate on the site, and that the site is located near a major roadway for highway maintenance and construction jobs.

Neither the mine location nor the importance of aggregate resources to Deschutes County have changed since the last zoning of the property. However, the current estimate of aggregate resources on the property has fallen to 211,000 cubic yards. Also, the current Aggregate Resource Assessment Report indicates that the aggregate on the site does not meet ODOT specifications. This report also indicated that the aggregate resource cannot be profitably mined. These issues constitute a change in circumstances within the meaning of this criterion.

4. Chapter 18.116, Supplementary Provisions

a. Section 18.116.220. Conservation Easements on Property Adjacent to Rivers and Streams Prohibitions.

A. As a condition of approval of all land use actions involving property adjacent to the Deschutes River, Crooked River, Fall River, Little Deschutes River, Spring River, Paulina Creek, Whychus Creek and Tumalo Creek, the property owner shall convey to the County a conservation easement, as defined in DCC 18.04.030, "Conservation Easement," affecting all property on the subject lot which is within 10 feet of the ordinary high water mark of the river or stream.

B. The form of the conservation easement shall be as prescribed by the County and may contain such conditions as the County deems necessary to carry out the purposes described in DCC 18.04.030, "Conservation Easement."

C. Any public access required as part of a conservation easement shall be subject to the following conditions:

1. Public access shall be limited to foot traffic for recreational purposes and the putting in or taking out of boats.

2. Unless otherwise permitted by the affected property owner, public access does not allow public passage through other private property to gain access to the property subject to the conservation easement.

3. Unless otherwise permitted by state law, County ordinance or the property owner, no person on the subject property as a result of a public access requirement of a conservation easement shall deposit solid waste, damage or remove any property, (including wildlife and vegetation) maintain or ignite fires or fireworks, discharge firearms or camp.

FINDINGS: The subject property is adjacent to the Deschutes River. A conservation easement, as described in this criterion has been included as a condition of approval.

IV. DECISION

This Decision is separated into two parts representing two distinct areas of the subject property: 1) the area to the East of Lower Bridge Way (together with approximately 30 acres along the river west of Lower Bridge Way; and, 2) the area West of Lower Bridge Way

I. East Area:

The Board **APPROVES** the request for a comprehensive plan text and map amendment and zone change from Surface Mining to Rural Residential on the area East of Lower

Bridge Way, together with approximately 30 acres along the river west of Lower Bridge Way (approximately 160 acres)⁹ subject to the following conditions of approval:

1. Prior to final plat approval for any residential subdivision, the applicant shall obtain from the Department of Environmental Quality (DEQ) a "No Further Action" (NFA) determination or the equivalent for a residential use designation for the 160 acres.
2. Prior to final plat approval for any residential subdivision, the applicant shall obtain from the Department of Human Services (DHS) a determination of "no apparent public health hazard" for a residential use designation for the 160 acres.
3. Prior to or contemporaneously with final plat approval for any residential subdivision, the applicant shall record a conservation easement in substantially the form attached hereto as Exhibit C and covenant (by deed or plat) to restrict in perpetuity the use of the approximately 30-acre area to open space uses and preventing the construction of any residential structure.
4. The applicant shall not develop any area within a 100-yard radius of the historic Lynch and Roberts Store Advertisement sign. The applicant shall post markers to prevent trespass, prior to development of the site. Any Covenants, Conditions and Restrictions (CC&Rs) created as a part of a residential development of the subject property will contain obligations to protect the area within a 100-yard radius of the historic sign from development and trespass and to maintain the posted markers.
5. As part of any residential development approval for the site, the applicant shall include an informational section in its CC&Rs that detail the history of the site, including the remediation efforts taken by the applicant and its predecessors in interest.
6. If fill is brought onto the site, the applicant shall identify the general location of the fill, and if the site is used for development, the applicant shall either certify that the fill is suitable for development, or specifically disclaim any knowledge of its suitability.
7. Prior to final plat approval for any residential subdivision, a conservation easement as defined in Section 18.04.030, "Conservation Easement" and specified in Section 18.116.220, shall be required.

⁹ As more particularly described in the legal description, attached to this decision as Exhibit A.

II. West Area:

The Board FINDS that rezoning the remainder of the subject property located West of Lower Bridge Way (approximately 410 acres)¹⁰, from Surface Mining to Rural Residential will best serve the public health, safety, welfare and convenience if certain conditions are fulfilled. Thus, the Board **APPROVES** the proposed rezoning subject to a resolution of intent to rezone. The resolution shall include the following conditions:

The following conditions shall be included in the Resolution:

1. Within five (5) years or prior to final plat approval for any residential subdivision on the 410 acre area that is the subject of File No. ZC-08-1/PA-08-1, whichever is earlier, the applicant shall obtain from the Oregon Department of Environmental Quality ("DEQ") a "No Further Action" ("NFA") determination or the equivalent for a residential use designation for this 410 acre area.
2. Within (5) five years or prior to final plat approval for any residential subdivision on the 410-acre area that is the subject of File No. ZC-08-1/PA-08-1, whichever is earlier, the applicant shall obtain from the Oregon Department of Human Services a determination of "no apparent public health hazard" for a residential use designation for this 410 acre area.
3. Contemporaneously with the site development and prior to the issuance of any residential building permit, the applicant shall complete the County-approved reclamation of the 18-acre area covered by SP-85-23 through a modified reclamation plan substantially consistent with the plan submitted by the applicant dated December 3, 2008.
4. The applicant shall submit a Modification Application for the modified reclamation plan within six months of the date this decision is final.
5. The date the above described decision is final shall be the date the final County decision of approval is signed and mailed or, if the final County decision is appealed, the date the final appellate body affirms the County decision or dismisses the appeal.
6. During the pendency of this Resolution and continuing in conjunction with the DEQ Voluntary Compliance Program and site development, the owner shall implement the DEQ approved Planting Plan dated May 20, 2008 (Exhibit PH-6 in the record) and the DEQ approved Watering Monitoring Plan dated May 20, 2008 (Exhibit PH-7 6 in the record) as the Dust Abatement Plan for the 410-acre site.
7. This Resolution shall expire five (5) years from the date this approval Decision is final, unless the conditions and stipulations set forth above have been satisfied or an extension is granted pursuant to DCC Title 22.
8. Upon the applicant's successful fulfillment of the above conditions and pursuant to DCC 18.136.030B, the County shall amend the County comprehensive plan

¹⁰ As more particularly described in the legal description, attached to this decision as Exhibit B.

text and map designation for the 410 acre area in accordance with this Decision from Surface Mine (SM) and Agriculture (AG) to Rural Residential Exception Area (RREA) and remove Surface Mining Site 461 from the County's Goal 5 inventory of significant mineral and aggregate resource sites and shall amend the zoning map designation for the 410 acre area from Surface Mining (SM) and Exclusive Farm Use (EFU) to Rural Residential-10 (RR-10).

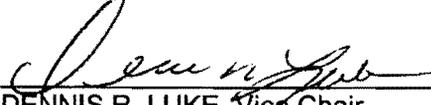
9. As part of any residential development approval for the site, the applicant shall include an informational section in its CC&Rs that details the history of the site, including the remediation efforts taken by the applicant and its predecessors in interest.
10. If fill is brought onto the 410 acre site, the applicant shall identify the general location of the fill, and if the site is used for development, the applicant shall either certify that the fill is suitable for development, or specifically declaim any knowledge of its suitability.

Dated this 8th of April, 2009

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON



TAMMY BAHEY, Chair



DENNIS R. LUKE, Vice Chair

ATTEST:



Connie J. Thomas
Recording Secretary



ALAN UNGER, Commissioner

Mailed this 9th day of April, 2009

THIS DECISION BECOMES FINAL UPON MAILING. PARTIES MAY APPEAL THIS DECISION TO THE LAND USE BOARD OF APPEALS WITHIN 21 DAYS OF THE DATE ON WHICH THIS DECISION IS FINAL.