



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](http://www.deschutes.org)

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## **AGENDA REQUEST & STAFF REPORT**

**For Board Business Meeting of December 21, 2015**

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**DATE:** December 8, 2015

**FROM:** Peter Gutowsky                      CDD                      (541) 385-1709

**TITLE OF AGENDA ITEM:**

Board deliberations on Ordinance Nos. 2016-001 and 2016-002 for a Plan Amendment and Zone Change from Exclusive Farm Use (EFU-TRB) to Rural Industrial (RI) for a 21.59-acre site located at Deschutes Junction north of Bend. The proposal includes a Goal Exception to Statewide Planning Goal 14, Urbanization.

**PUBLIC HEARING ON THIS DATE?** No

**BACKGROUND AND POLICY IMPLICATIONS:**

Anthony Aceti applied for the Plan Amendment and Zone Change above. The applications went before the County Hearings Officer at a public hearing on July 14, 2015. The Hearings Officer approved the applications on October 1, 2015. The County Procedures Ordinance (DCC 22.28.030(C)) requires that applications for a plan amendment/zone change that involve lands designated for agricultural use, and including those involving a goal exception, shall be heard de novo by the Board. The Board's hearing was held on November 23, 2015. Written record was left open until December 7, 2015.

**FISCAL IMPLICATIONS:**

None.

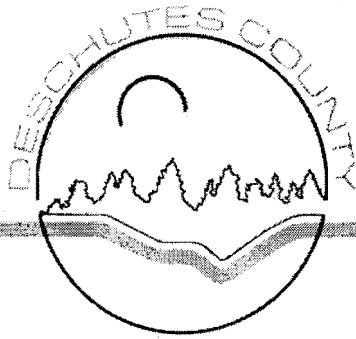
**RECOMMENDATION & ACTION REQUESTED:**

Conduct deliberations and consideration of first reading of Ordinance Nos. 2016-001 and 2016-002.

**ATTENDANCE:** Peter Gutowsky, Planning Manager, Paul Blikstad, Senior Planner

**DISTRIBUTION OF DOCUMENTS:**

The Planning Division will distribute



## 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/>

### MEMORANDUM

**DATE:** December 9, 2015

**TO:** Deschutes County Board of Commissioners

**FROM:** Peter Gutowsky, Planning Manager  
Paul Blikstad, Senior Planner

**RE:** Deliberation: Plan Amendment/Zone Change applications for Tony Aceti (File Nos. 247-14-000456-ZC; 247-14-000457-PA)

The Board of County Commissioners (Board) conducted a de novo public hearing regarding File Nos. 247-14-000456-ZC; 247-14-000457-PA on November 23, 2015. The written record was left open until November 30 for additional testimony, and the applicant was allowed to submit final argument by December 7, 2015. The Board deliberates on December 21.

#### I. Board Options

The Board has two options:

- Uphold the Hearings Officer's decision approving the applications, including the irrevocably committed exception to Goal 14, Urbanization; or
- Deny the applications based on the applicant not meeting specific criteria.

#### II. Additional Written Testimony and Final Argument

The following materials, enclosed with this memorandum, were submitted into the record by November 30:

- Central Oregon Landwatch submitted additional materials on November 23, 2015, which include: Letter (18 pages); Oregon weekly hay report (2 pages); Hay export information (12 pages); Capital Press "No Place to Graze" article (4 pages); DLCD Guide to Resource Land Capability Challenges (7 pages); Aerial photo, ground photo (2 pages); Upper Deschutes hydrologic unit profile (12 pages); Aerial and ground photos (4 pages); NRCS information and maps (3 pages); Aerial and ground photos (4 pages)
- Jack Holt letter dated November 28, 2015 (2 pages)
- Tony Aceti letter dated November 30, 2015 (2 pages); Memorandum of Meeting 5-29-1996 (3 pages); Tony Aceti letter to BOCC 4-30-1997 (1 page); Bend Bulletin article 7-20-1998 (1 page); Aceti hearing notes 11-23-2015 (1 page); Google Earth aerial photo (1 page)

- Roger Borine letter dated December 1, 2015 addressing soil classification studies methodology<sup>1</sup> and suitability for farm use

Tony Aceti (and Pat Kliwer) submitted final argument on December 7, 2015, entitled "Rebuttal of Central Oregon Landwatch's Testimony of November 23, 2015" (104 pages).

### **III. Background**

The applicant submitted a Plan Amendment to change the Comprehensive Plan designation from Agriculture to Rural Industrial, and a Zone Change from Exclusive Farm Use – Tumalo/Redmond/Bend subzone (EFU-TRB), to Rural Industrial (R-I). Also included is a Goal Exception to Statewide Planning Goal 14, Urbanization. The property is 21.59 acres in size and located at Deschutes Junction. The two tax lots for the subject property are: 16-12-26C, 201, and 16-12-27D, 104. The physical address is 21235 Tumalo Place, Bend.

Hearings Officer Stephanie Hicks on October 1, 2015 approved the applications, including the Goal Exception to Goal 14. Her decision included eight conditions of approval. Because the applications involve resource land, Deschutes County Code (DCC) 22.28.030(C) requires an automatic de novo review before the Board.

#### *Hearings Officer Key Findings*

##### Not Agricultural Land

The Hearings Officer found that the subject property does not constitute "agricultural land" as defined in Goal 3, OAR 660-033-0020(1). An Agricultural Soils Capability Assessment produced by Mr. Roger Borine determined that the subject property is approximately 80% class VII and VIII soils (17.2 acres), and 20% class III-VI soils (4.3 acres) and therefore not predominantly Agricultural Land. Substantial evidence in the record supports a finding that the subject property does not constitute "agricultural land." The soils study is adequate for determining whether the subject property consists of predominantly Class VII and VIII soils and whether it is unsuitable for farm use, considering profitability and factors in the Goal 3 administrative rule, as set forth in the findings below:

- The property is unsuitable for farm use considering, among other things:
  - difficulties associated with irrigating the property (lack of easement to access the irrigation pond/ditch constructed pursuant to a settlement between previous owner Gary Barrett and ODOT);
  - surrounding road network, impacts of nearby heavy traffic and transportation, impacts on the subject property of the expansion of Highway 97, the bisection of the property with the construction of Tumalo Road interchange/overpass; and,
  - surrounding commercial and industrial uses, the lack of surrounding farm uses, and the relatively small size of the parcel, which impacts economies of scale.

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<sup>1</sup> The Borine letter came in on December 1, 2015, which was one day after the November 30<sup>th</sup> date for additional submittals. If this letter is not considered final argument, the Board may not be allowed to consider it.

### Transportation Planning Rule Compliance

The Hearings Officer found that the components listed below of the Transportation Management Plan (TMP) satisfy OAR 660-012-0060(4) for this rezone and Goal exception application. They are recommended as conditions of approval.

As part of any development of the property, the developer shall:

1. Create a system of access easements that connect the three driveways with any lots created by partitioning or subdividing of the land.
2. Work with Commute Options to assist in preparing a two year start-up Transportation Demand Management program (TDM). The program will include:
  - A. Conducting workshops and training on TDM alternatives;
  - B. Provide posters and brochures promoting smart commuting choices;
  - C. A plan to have employees from on-site businesses have staggered start and end work hours.
3. Prepare an internal Traffic Control Plan (in accordance with the MUTCD), that includes:
  - A. Directional signing to Redmond, Bend, Tumalo at each intersection;
  - B. Time-restrictive (4 PM – 6 PM) "NO LEFT TURN" sign at the driveway onto Tumalo Place;
  - C. Bridge undercrossing shall be signed "ONE LANE ROAD";
  - D. Prepare a site map, with the aid of DCPWD, showing the location of traffic control devices.
4. Have the Deschutes County Transportation Planner approve Traffic Management Plan.

### Change in Circumstances

The Hearings officer found the following general circumstances have changed with respect to the subject property and/or to other property in the vicinity since 1990 and are not representative of a change in the property owner's circumstances or needs:

- The reduction of the number of acres in the applicant's parcel due to road projects.
- The reduction in the average parcel size within 1 mile of the subject property from 80 acres to 5 acres.
- The reconfiguration of the parcel into two distinct, irregularly shaped portions that are difficult, expensive, and nearly impossible to farm and irrigate.
- The construction of the Deschutes Junction overpass across the subject property which resulted in lack of irrigation water, and adverse changes in location, size, configuration and soils rendering the property un-farmable.
- The fact that the ODOT Highway 97 widening project in February 1991, cut through a shared irrigation pond, reducing it by 75% and making it inoperable.
- The fact that the land has not been irrigated since the overpass was constructed and cut through the established irrigation system.
- The re-routing of commuter traffic onto roads around the subject property.
- The construction and realignment of Tumalo Place, Tumalo Road, Deschutes Market Road and Pleasant Ridge Road around the property.

- The rezone of some of the adjacent United Pipe property and some of Ron Robinson's property (4R Equipment) to RI.
- The continuous subdivision, platting and replatting of new residential lots in the vicinity and the fact that no parcel within ½ mile of the subject property is being commercially farmed today.
- The fact that commercial, industrial, wholesale and retail businesses now surround the property on its northern and eastern sides, and a school is on the western side; and the fact that no one farms the 4-acre parcel developed with a rental house adjacent to the southern end of the property.
- The fact that Mr. Aceti did not receive an easement or written agreement to irrigate the property when he purchased the property; despite the fact that ODOT paid in 1991 to have a new ditch and pond dug along Half Mile Lane on TL 1100, Mr. Aceti did not receive any easement or right to use TL 1100 or 1200 or the equipment for delivery of irrigation water to the subject property.

#### Irrevocably Committed to Urban Development (Goal 14 Exception – Urbanization)

The Hearings Officer found the applicant appropriately requested an "irrevocably committed" exception based on existing parcel sizes and contiguous ownerships considered together. The analysis of existing adjacent uses showed that the Deschutes Junction area has been committed to residential development to the north, with a mix of commercial and rural industrial development served by the transportation hub roads and overpass and proximity to Highway 20 and Highway 97, and the Burlington Northern railroad. Development (e.g., physical improvements such as roads and underground facilities) on the subject property has made unsuitable its resource use and the resource use of nearby lands. This occurred via the Highway 97 expansion project and the Deschutes Junction overpass/Tumalo Road project, and the Highway 97 on-off ramps via Tumalo Place, forming the northern boundary of the subject property. The subject property does not stand alone amidst larger farm or forest operations because no such operations exist in the surrounding area. Substantial evidence in this record shows that the subject property bears a greater relation to the existing industrial uses to the east, accessed via the Tumalo Road/Highway 97 overpass that bisects the property, and to the commercial uses to the north of the property, than to rural residential uses to the south and west. This is due to the location of the property in the center of the primary existing transportation hub between the cities of Bend and Redmond.

The Hearings Officer found the subject property is unsuitable for agricultural uses because of its size, poor quality soils, lack of irrigation, and location virtually surrounded by existing industrial development. These conditions also make use of the site with rural/non-urban uses impracticable. Based on these facts, coupled with the adjacent industrial, commercial and rural residential uses, the existence of an extensive network of roads and highways, and the overpass that cuts through the applicant's subject property, the Hearings Officer found that it was not appropriate to apply Goal 14's requirement prohibiting the establishment of urban uses on rural lands with respect to the subject property.

#### Attachments:

- A. Central Oregon Landwatch submittal
- B. Jack Holt submittal
- C. Roger Borine submittal
- D. Toni Aceti submittal
- E. Applicant's final arguments

REVIEWED

*nm*

LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Code  
Title 18, the Deschutes County Zoning Map, to  
Change the Zone Designation on Certain Property  
from Exclusive Farm Use (EFU-TRB) to Rural  
Industrial (R-I).

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ORDINANCE NO. 2016-002

WHEREAS, Anthony Aceti applied for a Zone Change to the Deschutes County Code ("DCC) Title 18, Zoning Map, to rezone certain property from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone ("EFU-TRB") to Rural Industrial ("R-I"); and

WHEREAS, after notice was given in accordance with applicable law, public hearings were held on June 16, 2015 and July 14, 2015 before the Deschutes County Hearings Officer, and on October 1, 2015 the Hearings Officer recommended approval of the exception to Goal 14, a Plan Amendment, and a Zone Change; and

WHEREAS, after notice was given in accordance with applicable law, a de novo public hearing was held on November 23, 2015 before the Board of County Commissioners ("Board") ; and

WHEREAS, on this same date, the Board adopted Ordinance 2016-001, adopting a goal exception to Statewide Planning Goal 14 and amending DCC Title 23, the County Comprehensive Plan, changing the plan designation of the property from Agriculture to Rural Industrial; and

WHEREAS a change to the Deschutes County Zoning Map is necessary to implement the amendment adopted in Ordinance 2016-001; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. AMENDMENT. DCC Title 18, Zoning Map, is amended to change the zone designation from Exclusive Farm Use ("EFU") to Rural Industrial ("R-I") for certain property depicted on the map set forth as Exhibit "A," attached and incorporated by reference herein, and described in Exhibit "B," incorporated by reference herein.

Section 2. FINDINGS. The Board adopts as its findings in support of this Ordinance, the Decision of the County Hearings Officer, attached to Ordinance 2016-001 as Exhibit "F," and incorporated by reference herein.

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Dated this \_\_\_\_\_ of \_\_\_\_\_, 2016

BOARD OF COUNTY COMMISSIONERS  
OF DESCHUTES COUNTY, OREGON

\_\_\_\_\_  
ALAN UNGER, CHAIR

\_\_\_\_\_  
TAMMY BANEY, VICE CHAIR

ATTEST:

\_\_\_\_\_  
Recording Secretary

\_\_\_\_\_  
ANTHONY DEBONE, COMMISSIONER

Date of 1<sup>st</sup> Reading: \_\_\_\_\_ day of \_\_\_\_\_, 2016.

Date of 2<sup>nd</sup> Reading: \_\_\_\_\_ day of \_\_\_\_\_, 2016.

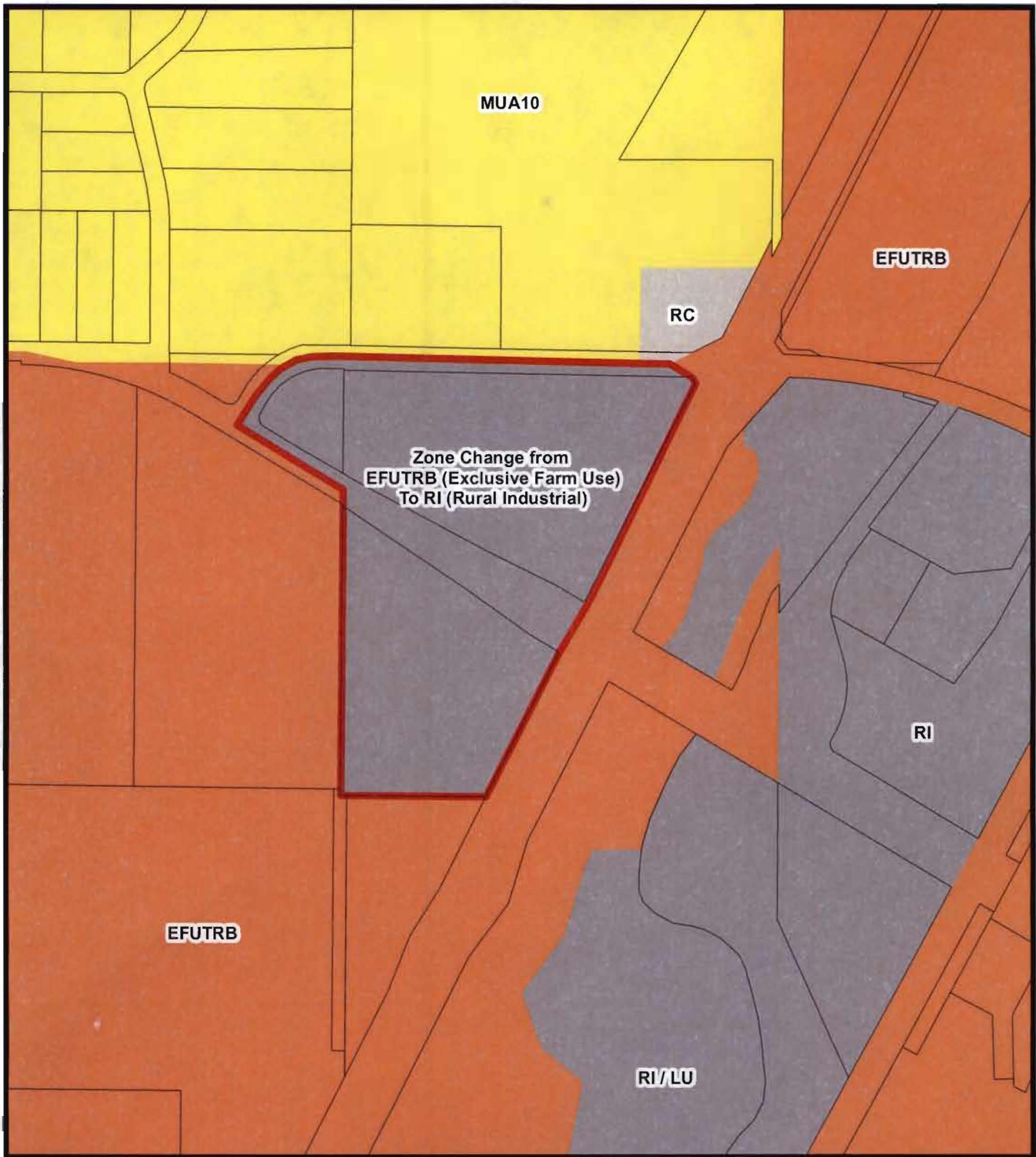
	Record of Adoption Vote			
Commissioner	Yes	No	Abstained	Excused
Alan Unger	_____	_____	_____	_____
Tammy Baney	_____	_____	_____	_____
Anthony DeBone	_____	_____	_____	_____

Effective date: \_\_\_\_\_ day of \_\_\_\_\_, 2016.

ATTEST:

\_\_\_\_\_  
Recording Secretary





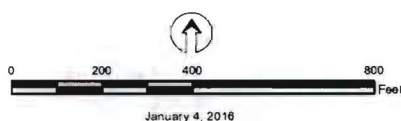
## PROPOSED ZONE CHANGE

### Legend

- Subject Property
- EFUTRB - Tumalo/Redmond/Bend Subzone
- MUA10 - Multiple Use Agricultural
- RI - Rural Industrial
- RC - Rural Commercial

Anthony J. Aceti  
21235 Tumalo Place, Bend

Exhibit "A"  
to Ordinance 2016-002



BOARD OF COUNTY COMMISSIONERS  
OF DESCHUTES COUNTY, OREGON

Alan Unger, Chair

Tammy Baney

Anthony DeBone

ATTEST: Recording Secretary

Dated this \_\_\_\_ day of January, 2016  
Effective Date: \_\_\_\_, 2016



**LEGAL DESCRIPTIONS**  
**TAX LOTS 16-12-26-C-00201 & 16-12-27-D-00104**

A parcel of land located in the Southwest one-quarter of Section 26 and the Southeast one-quarter of Section 27, Township 16 South, Range 12 East of the Willamette Meridian, Deschutes County, Oregon, more fully described as follows:

**TAX LOTS 16-12-26-C-00201:**

Commencing at a brass disk at the 1/4 corner between said Sections 26 and 27; thence along the east-west centerline of said Section 27, North 89°49'46" West 20.00 feet; thence leaving said east-west centerline, South 00°03'15" East, parallel to and 20 feet westerly of the line common to said Sections 26 and 27, 40.35 feet to a point on the southerly line of the 15.00 foot dedication to the southerly 30.00 foot right-of-way of Tumalo Road per Deed No. 98-29504, and the **Point of Beginning** for this description; thence along said 15-foot dedication line, 67.90 feet along the arc of a 12818.89 foot radius curve right (the long chord of which bears South 89°35'07" East 67.90 feet); thence South 89°26'01" East 997.75 feet to the westerly right-of-way of the Dalles-California Highway per Deed recorded March 22, 1991, in Book 231, Page 81, Deschutes County Records; thence leaving said 15-foot dedication line and along said westerly right-of-way, South 37°03'52" East 23.10 feet, said point being 85.00 feet from the centerline of said Dalles-California Highway; thence continuing along said 85-foot right-of-way line, South 26°22'14" West 1419.88 feet to a point on the south line of the property described in Deed No. 97-45542; thence leaving said 85-foot right-of-way line and along said south line, South 89°56'45" West 447.62 feet to the southwest corner of said 97-45542 property, said point lying 20.00 feet westerly of the line common to Sections 26 and 27; thence leaving said south line, North 00°03'15" West 1301.34 feet to the point of beginning;

EXCEPTING THEREFROM: the new alignment of Tumalo Road per Deed No. 98-32048, further modified for turn lanes per Deed No. 2001-22023, fully described as follows:

Commencing at a brass disk at the 1/4 corner between said Sections 26 and 27; thence along the east-west centerline of said Section 27, North 89°49'46" West 20.00 feet; thence leaving said east-west centerline, South 00°03'15" East, parallel to and 20 feet westerly of the line common to said Sections 26 and 27, 357.34 feet to the northerly right-of-way of the new road alignment, and the **Point of Beginning** for this description; thence leaving said parallel line and along the new right-of-way line, South 59°39'01" East 50.46 feet; thence South 62°39'40" East 442.65 feet; thence South 63°56'22" East 250.70 feet; thence South 59°39'01" East 95.51 feet to the westerly 85 foot right-of-way line of the Dalles-California Highway; thence leaving said new road right-of-way and along said westerly 85 foot right-of-way line, South 26°22'14" West 170.41 feet to the southerly right-of-way line of the new road; thence leaving said westerly 85 foot right-of-way line and along said southerly right-of-way line, North 59°39'01" West 107.34 feet; thence North 55°21'40" West 250.70 feet; thence North 56°38'22" West 442.65 feet, said point lying 20.00 feet westerly of the line common to Sections 26 and 27; thence North 00°03'15" East 99.71 feet to the point of beginning.

Net area for this property is 20.46 acres.

October 14, 2015  
Prepared by Baxter Land Surveying, Inc.  
P.O. Box 7022, Bend, OR 97708 (541) 382-1962

2015186-Desc.doc

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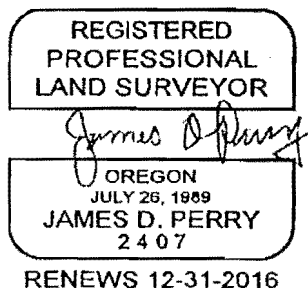
**TAX LOTS 16-12-27-D-00104:**

That portion of Deed No. 97-40139 described as "Parcel 3," further modified by the excepting of Tract 1 and Tract 2 of Deed No. 98-32049, and more fully described as follows:

Beginning at the Point of Beginning for the previous description of TAX LOT 16-12-27-C- 00201, said point being on the southerly 45 foot right-of-way of Tumalo Road and lying 20.00 feet westerly of the line common to Sections 26 and 27; thence along said 20 foot westerly line, North 00°03'15" West 5.00 feet to a point on a 40.00 foot right-of-way of Tumalo Road, per said 98-32049 Deed; thence leaving said 20 foot line, 31.74 feet along the arc of a 12823.89 foot radius curve left (the long chord of which bears North 89°48'29" West 31.74 feet); thence North 89°52'44" West 26.42 feet; thence 219.07 feet along the arc of a 210.00 foot radius curve left (the long chord of which bears South 60°14'07" West 209.27 feet); thence South 30°20'59" West 40.03 feet; thence 47.12 feet along the arc of a 30.00 foot radius curve left (the long chord of which bears South 14°39'01" East 42.43 feet); thence South 59°39'01" East 145.00 feet; thence South 60°51'23" East 142.53 feet to a point lying 20.00 feet westerly of the line common to said Sections 26 and 27; thence North 00°03'15" West 317.00 feet to the point of beginning for this description;

Contains 1.30 acres.

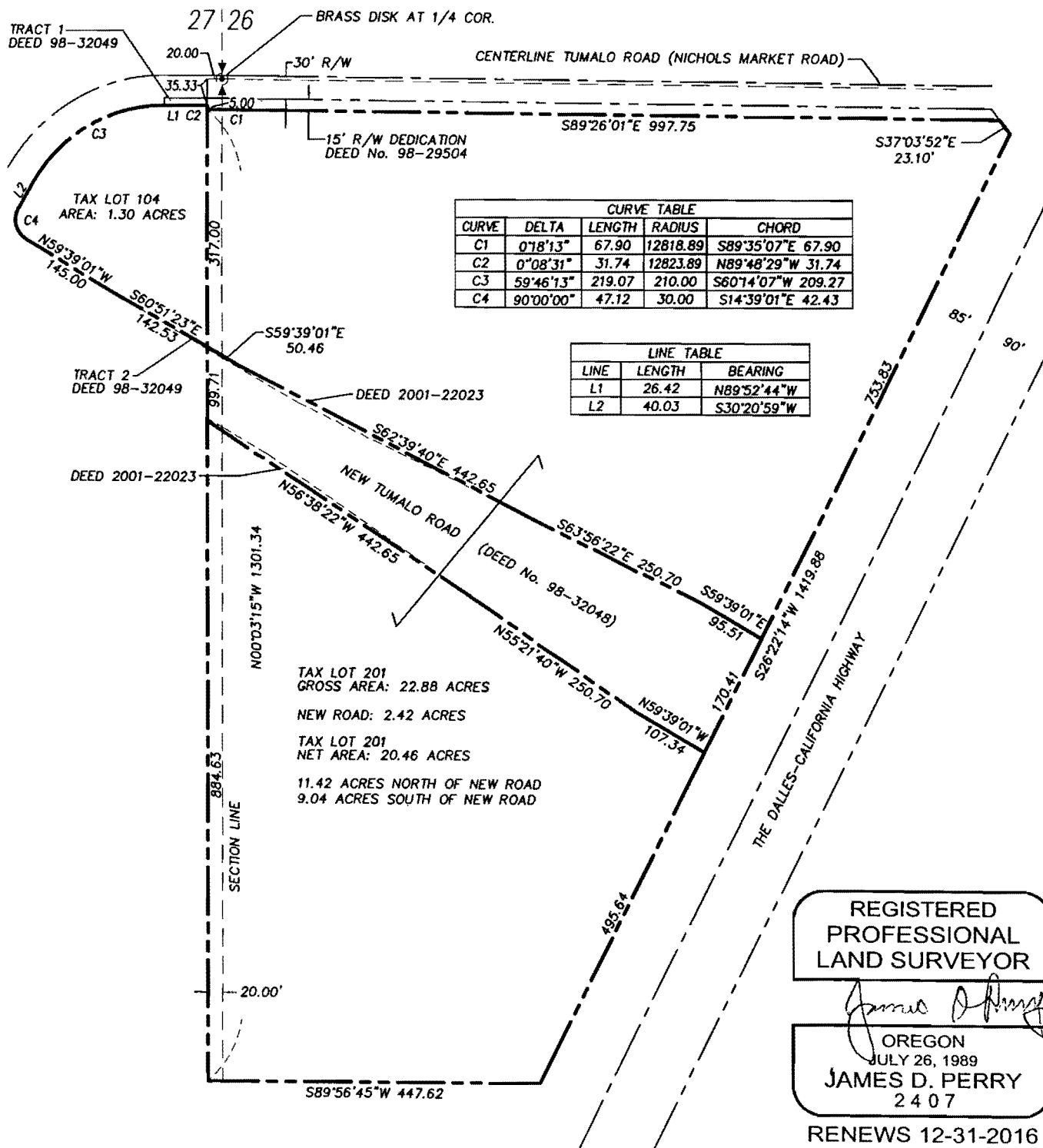
Note: All corners are marked with monuments per recorded survey No. CS14491 by Michael Berry.



October 14, 2015  
Prepared by Baxter Land Surveying, Inc.  
P.O. Box 7022, Bend, OR 97708 (541) 382-1962

2015186-Desc.doc

**EXHIBIT MAP**  
**TAX LOTS 16-12-26-C-00201**  
**AND 16-12-27-D-00104**  
 Located in the SW1/4 Sec. 26 and the SE1/4 Sec. 27,  
 T.16S., R.12E., W.M.,  
 DESCHUTES COUNTY, OREGON



PREPARED BY BAXTER LAND SURVEYING, INC. P.O. BOX 7022 BEND, OR 97708  
 20370 EMPIRE AVE. SUITE C-3, BEND, OR 97701 (541) 382-1962

REVIEWED

  
LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Code,  
Title 23, and Amending Deschutes County  
Comprehensive Plan, Sections 5.10 and 5.12, to  
Adopt an Exception to Goal 14 and to Change the  
Plan Designation for Certain Property From  
Agriculture to Rural Industrial.

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ORDINANCE NO. 2016-001

WHEREAS, Anthony Aceti proposed an “irrevocably committed” exception to Goal 14 and a Plan Amendment to Deschutes County Code (“DCC”), Section 23.01.010, Introduction, and Deschutes County Comprehensive Plan, Section 5.10, Goal Exception Statements, and Section 5.12, Legislative History, to change the comprehensive plan designation of certain property from Agriculture to Rural Industrial; and

WHEREAS, after notice was given in accordance with applicable law, public hearings were held on June 16, 2015 and July 14, 2015 before the Deschutes County Hearings Officer, and on October 1, 2015 the Hearings Officer recommended approval of the exception to Goal 14, and a Plan Amendment; and

WHEREAS, after notice was given in accordance with applicable law, a de novo public hearing was held on November 23, 2015 before the Board of County Commissioners (“Board”); and

WHEREAS, the Board, after review conducted in accordance with applicable law, approved the goal exception to Goal 14 to change the comprehensive plan designation from Agriculture to Rural Industrial; now therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. AMENDMENT. DCC Section 23.01.010, Introduction, is amended to read as described in Exhibit “A” attached and incorporated by reference herein, with new language underlined.

Section 2. AMENDMENT. Deschutes County Comprehensive Plan Section 5.10, Goal Exception Statements, is amended to read as described in Exhibit “B,” attached and incorporated by reference herein with new language underlined.

Section 3. AMENDMENT. Deschutes County Comprehensive Plan Section 5.12, Legislative History, is amended to read as described in Exhibit “C,” attached and incorporated by reference herein with new language underlined.

Section 4. AMENDMENT. The Deschutes County Comprehensive Plan Map, is amended to change the plan designation for certain property described in Exhibit “D” and depicted on the map set forth as Exhibit “E,” with both exhibits attached and incorporated by reference herein, from Agriculture to Rural Industrial.

Section 5. FINDINGS. The Board adopts as its findings in support of this Ordinance, the Decision of the Hearings Officer, Exhibit “F,” and incorporated by reference herein.

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Dated this \_\_\_\_\_ of \_\_\_\_\_, 2016

BOARD OF COUNTY COMMISSIONERS  
OF DESCHUTES COUNTY, OREGON

\_\_\_\_\_  
ALAN UNGER, CHAIR

\_\_\_\_\_  
TAMMY BANEY, VICE CHAIR

ATTEST:

\_\_\_\_\_  
Recording Secretary

\_\_\_\_\_  
ANTHONY DEBONE, COMMISSIONER

Date of 1<sup>st</sup> Reading: \_\_\_\_ day of \_\_\_\_\_, 2016.

Date of 2<sup>nd</sup> Reading: \_\_\_\_ day of \_\_\_\_\_, 2016.

	Record of Adoption Vote			
Commissioner	Yes	No	Abstained	Excused
Alan Unger	_____	_____	_____	_____
Tammy Baney	_____	_____	_____	_____
Anthony DeBone	_____	_____	_____	_____

Effective date: \_\_\_\_ day of \_\_\_\_\_, 2016.

ATTEST:

\_\_\_\_\_  
Recording Secretary

## **Chapter 23.01 COMPREHENSIVE PLAN**

### **Chapter 23.01 COMPREHENSIVE PLAN**

#### **23.01.010. Introduction.**

- A. The Deschutes County Comprehensive Plan, adopted by the Board in Ordinance 2011-003 and found on the Deschutes County Community Development Department website, is incorporated by reference herein.
- B. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2011-027, are incorporated by reference herein.
- C. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-005, are incorporated by reference herein.
- D. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-012, are incorporated by reference herein.
- E. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-016, are incorporated by reference herein.
- F. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-002, are incorporated by reference herein.
- G. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-009, are incorporated by reference herein.
- H. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-012, are incorporated by reference herein.
- I. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-007, are incorporated by reference herein.
- J. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-005, are incorporated by reference herein.
- K. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-006, are incorporated by reference herein.
- L. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-012, are incorporated by reference herein.
- M. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-021, are incorporated by reference herein.
- N. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-027, are incorporated by reference herein.
- O. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-021, are incorporated by reference herein.
- P. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-029, are incorporated by reference herein.
- Q. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-018, are incorporated by reference herein.
- R. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-010, are incorporated by reference herein.
- S. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-001, are incorporated by reference herein.

(Ord. 2016-001 §1, 2016; Ord. 2015-010 §1, 2015; Ord. 2015-018 § 1, 2015; Ord. 2015-029 § 1, 2015; Ord. 2015-021 § 1, 2015; Ord. 2014-027 § 1, 2014; Ord. 2014-021 §1, 2014; Ord. 2014-12 §1, 2014;

Ord. 2014-006 §2, 2014; Ord. 2014-005 §2, 2014; Ord. 2013-012 §2, 2013; Ord. 2013-009 §2, 2013; Ord. 2013-007 §1, 2013; Ord. 2013-002 §1, 2013; Ord. 2013-001 §1, 2013; Ord. 2012-016 §1, 2012; Ord. 2012-013 §1, 2012; Ord. 2012-005 §1, 2012; Ord. 2011-027 §1 through 12, 2011; Ord. 2011-017 repealed; Ord.2011-003 §3, 2011)

Click here to be directed to the Comprehensive Plan (<http://www.deschutes.org/compplan>)



## Section 5.12 Legislative History

### Background

This section contains the legislative history of this Comprehensive Plan.

**Table 5.11.1 Comprehensive Plan Ordinance History**

Ordinance	Date Adopted/ Effective	Chapter/Section	Amendment
2011-003	8-10-11/11-9-11	All, except Transportation, Tumalo and Terrebonne Community Plans, Deschutes Junction, Destination Resorts and ordinances adopted in 2011	Comprehensive Plan update
2011-027	10-31-11/11-9-11	2.5, 2.6, 3.4, 3.10, 3.5, 4.6, 5.3, 5.8, 5.11, 23.40A, 23.40B, 23.40.065, 23.01.010	Housekeeping amendments to ensure a smooth transition to the updated Plan
2012-005	8-20-12/11-19-12	23.60, 23.64 (repealed), 3.7 (revised), Appendix C (added)	Updated Transportation System Plan
2012-012	8-20-12/8-20-12	4.1, 4.2	La Pine Urban Growth Boundary
2012-016	12-3-12/3-4-13	3.9	Housekeeping amendments to Destination Resort Chapter
2013-002	1-7-13/1-7-13	4.2	Central Oregon Regional Large-lot Employment Land Need Analysis
2013-009	2-6-13/5-8-13	1.3	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2013-012	5-8-13/8-6-13	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Bend Urban Growth Boundary
2013-007	5-29-13/8-27-13	3.10, 3.11	Newberry Country: A Plan for Southern Deschutes County

<b>Ordinance</b>	<b>Date Adopted/ Effective</b>	<b>Chapter/Section</b>	<b>Amendment</b>
2013-016	10-21-13/10-21-13	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Sisters Urban Growth Boundary
2014-005	2-26-14/2-26-14	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Bend Urban Growth Boundary
2014-012	4-2-14/7-1-14	3.10, 3.11	Housekeeping amendments to Title 23
2014-021	8-27-14/11-25-14	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Sunriver Urban Unincorporated Community Forest to Sunriver Urban Unincorporated Community Utility
2014-027	12-15-14/3-31-15	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Industrial
2015-021	11-9-15/2-22-16	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Surface Mining.
2015-029	11-23-15/11-30-15	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Tumalo Residential 5-Acre Minimum to Tumalo Industrial
<u>2016-002</u>	<u>12-21-15/x-x-16</u>	<u>23.01.010</u>	<u>Comprehensive Plan Map Amendment, changing designation of certain property from, Agriculture to Rural Industrial (exception area)</u>

**LEGAL DESCRIPTIONS**  
**TAX LOTS 16-12-26-C-00201 & 16-12-27-D-00104**

A parcel of land located in the Southwest one-quarter of Section 26 and the Southeast one-quarter of Section 27, Township 16 South, Range 12 East of the Willamette Meridian, Deschutes County, Oregon, more fully described as follows:

**TAX LOTS 16-12-26-C-00201:**

Commencing at a brass disk at the 1/4 corner between said Sections 26 and 27; thence along the east-west centerline of said Section 27, North 89°49'46" West 20.00 feet; thence leaving said east-west centerline, South 00°03'15" East, parallel to and 20 feet westerly of the line common to said Sections 26 and 27, 40.35 feet to a point on the southerly line of the 15.00 foot dedication to the southerly 30.00 foot right-of-way of Tumalo Road per Deed No. 98-29504, and the **Point of Beginning** for this description; thence along said 15-foot dedication line, 67.90 feet along the arc of a 12818.89 foot radius curve right (the long chord of which bears South 89°35'07" East 67.90 feet); thence South 89°26'01" East 997.75 feet to the westerly right-of-way of the Dalles-California Highway per Deed recorded March 22, 1991, in Book 231, Page 81, Deschutes County Records; thence leaving said 15-foot dedication line and along said westerly right-of-way, South 37°03'52" East 23.10 feet, said point being 85.00 feet from the centerline of said Dalles-California Highway; thence continuing along said 85-foot right-of-way line, South 26°22'14" West 1419.88 feet to a point on the south line of the property described in Deed No. 97-45542; thence leaving said 85-foot right-of-way line and along said south line, South 89°56'45" West 447.62 feet to the southwest corner of said 97-45542 property, said point lying 20.00 feet westerly of the line common to Sections 26 and 27; thence leaving said south line, North 00°03'15" West 1301.34 feet to the point of beginning;

**EXCEPTING THEREFROM:** the new alignment of Tumalo Road per Deed No. 98-32048, further modified for turn lanes per Deed No. 2001-22023, fully described as follows:

Commencing at a brass disk at the 1/4 corner between said Sections 26 and 27; thence along the east-west centerline of said Section 27, North 89°49'46" West 20.00 feet; thence leaving said east-west centerline, South 00°03'15" East, parallel to and 20 feet westerly of the line common to said Sections 26 and 27, 357.34 feet to the northerly right-of-way of the new road alignment, and the **Point of Beginning** for this description; thence leaving said parallel line and along the new right-of-way line, South 59°39'01" East 50.46 feet; thence South 62°39'40" East 442.65 feet; thence South 63°56'22" East 250.70 feet; thence South 59°39'01" East 95.51 feet to the westerly 85 foot right-of-way line of the Dalles-California Highway; thence leaving said new road right-of-way and along said westerly 85 foot right-of-way line, South 26°22'14" West 170.41 feet to the southerly right-of-way line of the new road; thence leaving said westerly 85 foot right-of-way line and along said southerly right-of-way line, North 59°39'01" West 107.34 feet; thence North 55°21'40" West 250.70 feet; thence North 56°38'22" West 442.65 feet, said point lying 20.00 feet westerly of the line common to Sections 26 and 27; thence North 00°03'15" East 99.71 feet to the point of beginning.

Net area for this property is 20.46 acres.

October 14, 2015  
Prepared by Baxter Land Surveying, Inc.  
P.O. Box 7022, Bend, OR 97708 (541) 382-1962

2015186-Desc.doc

*D*

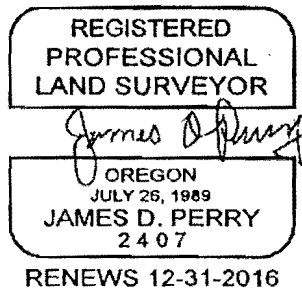
**TAX LOTS 16-12-27-D-00104:**

That portion of Deed No. 97-40139 described as "Parcel 3," further modified by the excepting of Tract 1 and Tract 2 of Deed No. 98-32049, and more fully described as follows:

Beginning at the Point of Beginning for the previous description of TAX LOT 16-12-27-C- 00201, said point being on the southerly 45 foot right-of-way of Tumalo Road and lying 20.00 feet westerly of the line common to Sections 26 and 27; thence along said 20 foot westerly line, North 00°03'15" West 5.00 feet to a point on a 40.00 foot right-of-way of Tumalo Road, per said 98-32049 Deed; thence leaving said 20 foot line, 31.74 feet along the arc of a 12823.89 foot radius curve left (the long chord of which bears North 89°48'29" West 31.74 feet); thence North 89°52'44" West 26.42 feet; thence 219.07 feet along the arc of a 210.00 foot radius curve left (the long chord of which bears South 60°14'07" West 209.27 feet); thence South 30°20'59" West 40.03 feet; thence 47.12 feet along the arc of a 30.00 foot radius curve left (the long chord of which bears South 14°39'01" East 42.43 feet); thence South 59°39'01" East 145.00 feet; thence South 60°51'23" East 142.53 feet to a point lying 20.00 feet westerly of the line common to said Sections 26 and 27; thence North 00°03'15" West 317.00 feet to the point of beginning for this description;

Contains 1.30 acres.

Note: All corners are marked with monuments per recorded survey No. CS14491 by Michael Berry.



October 14, 2015  
Prepared by Baxter Land Surveying, Inc.  
P.O. Box 7022, Bend, OR 97708 (541) 382-1962

2015186-Desc.doc

27 26

TRACT 1  
DEED 98-32049

20.00

35.33

30' R/W

CENTERLINE TUMALO ROAD (NICHOLS MARKET ROAD)

15' R/W DEDICATION  
DEED No. 98-29504

S89°26'01"E 997.75

S37°03'52"E 23.10'

TAX LOT 104  
AREA: 1.30 ACRES

N59°39'01"W 145.00

S60°51'23"E 142.53

S59°39'01"E 50.46

TRACT 2  
DEED 98-32049

DEED 2001-22023

DEED 2001-22023

NEW TUMALO ROAD  
(DEED No. 98-32048)

S62°39'40"E 442.65

N56°38'22"W 442.65

S63°56'22"E 250.70

S59°39'01"E 95.51

N55°21'40"W 250.70

N59°39'01"W 107.34

S26°22'14"W 1419.88

THE DALLES-CALIFORNIA HIGHWAY

SECTION LINE

20.00'

884.63

170.41

495.64

S89°56'45"W 447.62

CURVE	DELTA	LENGTH	RADIUS	CHORD
C1	0°18'13"	67.90	12818.89	S89°35'07"E 67.90
C2	0°08'31"	31.74	12823.89	N89°48'29"W 31.74
C3	59°46'13"	219.07	210.00	S60°14'07"W 209.27
C4	90°00'00"	47.12	30.00	S14°39'01"E 42.43

LINE	LENGTH	BEARING
L1	26.42	N89°52'44"W
L2	40.03	S30°20'59"W

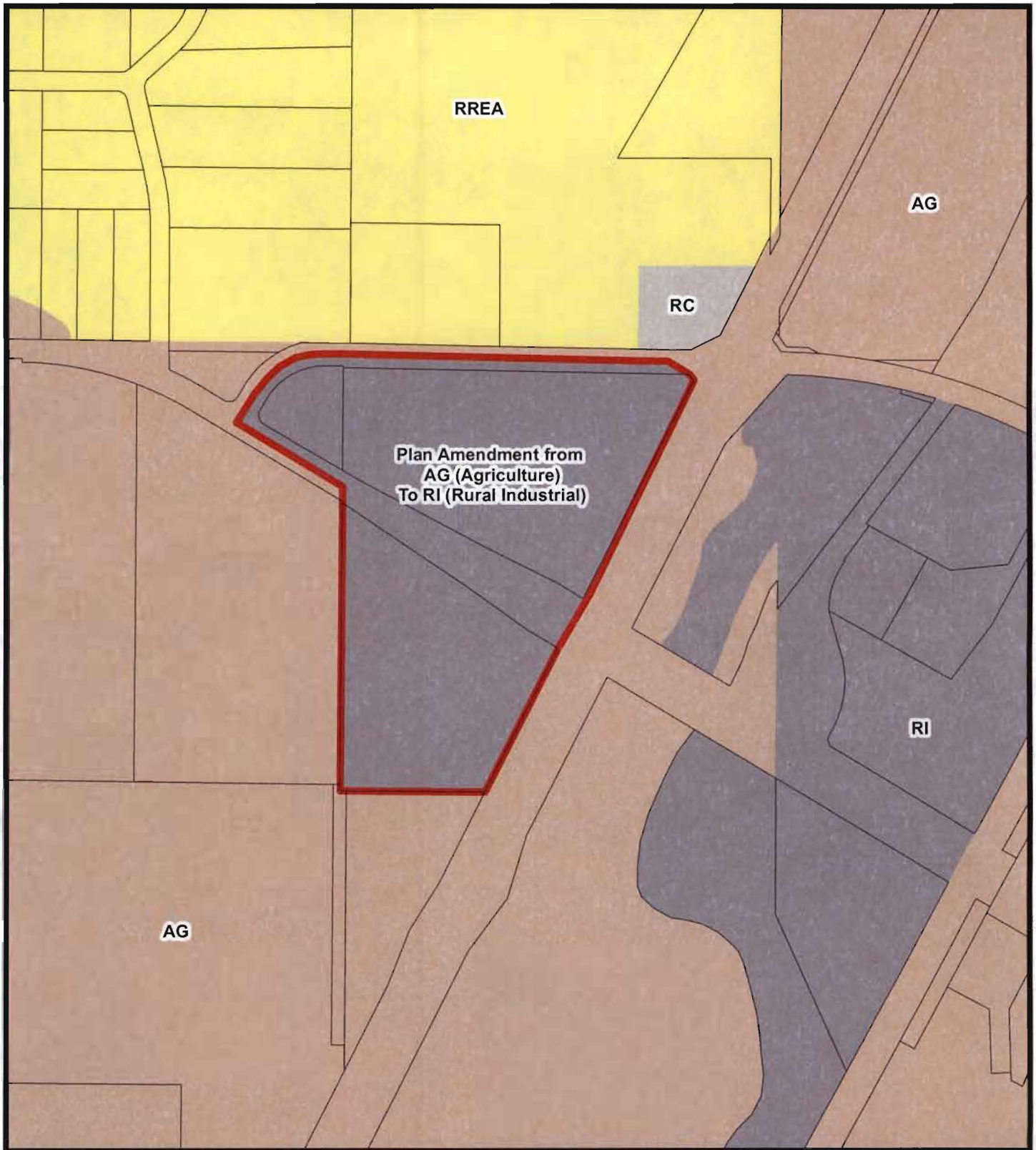
TAX LOT 201  
GROSS AREA: 22.88 ACRES  
NEW ROAD: 2.42 ACRES  
TAX LOT 201  
NET AREA: 20.46 ACRES  
11.42 ACRES NORTH OF NEW ROAD  
9.04 ACRES SOUTH OF NEW ROAD

REGISTERED  
PROFESSIONAL  
LAND SURVEYOR

JAMES D. PERRY

OREGON  
JULY 26, 1989

PAGE 3 OF 3 - EXHIBIT "D" TO ORDINANCE 2016-001



## PROPOSED PLAN AMENDMENT

### Legend

- Subject Property
- AG - Agriculture
- RREA - Rural Residential Exception Area
- RI - Rural Industrial
- RC - Rural Commercial

Anthony J. Aceti  
21235 Tumalo Place, Bend

Exhibit "E"  
to Ordinance 2016-001



0 200 400 800 Feet

January 4, 2016

BOARD OF COUNTY COMMISSIONERS  
OF DESCHUTES COUNTY, OREGON

Alan Unger, Chair

Tammy Baney

Anthony DeBone

ATTEST: Recording Secretary

Dated this \_\_\_\_ day of January, 2016  
Effective Date: \_\_\_\_, 2016



## Community Development Department

Planning Division Building Safety Division Environmental Health Division

117 NW Lafayette Avenue Bend Oregon 97701-1925  
(541)388-6575 FAX (541)385-1764  
<http://www.co.deschutes.or.us/cdd/>

### DECISION OF THE DESCHUTES COUNTY HEARING OFFICER

**FILE NUMBERS:** 247-14-000456-ZC, 247-14-000457-PA

**APPLICANT/OWNER:** Anthony J. Aceti  
21235 Tumalo Place  
Bend, OR 97701

**APPLICANT'S REPRESENTATIVE:** Pat Kliwer  
60465 Sunride Drive  
Bend, OR 97702

**REQUEST:** The applicant requests approval of a plan amendment and zone change from Exclusive Farm Use to Rural Industrial, and a goal exception, for a 21.59-acre site located at Deschutes Junction north of Bend.

**STAFF REVIEWER:** Paul Blikstad, Senior Planner

**HEARING DATE:** July 14, 2015  
6:30 p.m.  
Barnes and Sawyer Rooms of the Deschutes Services Building  
1300 N.W. Wall  
Bend, OR 97701

**RECORD CLOSED:** July 14, 2015

#### **I. APPLICABLE STANDARDS AND CRITERIA:**

Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance  
Chapter 18.136, Amendments  
\* Section 18.136.020, Rezoning Standards  
Chapter 18.100, Rural Industrial Zone  
Title 22 of the Deschutes County Code, the Development Procedures Ordinance  
Chapter 22.20, Review of Land Use Action Applications  
Chapter 22.24, Land Use Action Hearings  
\* Section 22.24.140, Continuances and Record Extensions  
Title 23 of the Deschutes County Code, the Year 2000 Comprehensive Plan  
Chapter 2, Resource Management

*Quality Services Performed with Pride*



- \* Section 2.2, Agricultural Lands Policies
- Chapter 3, Rural Growth
- \* Section 3.7, Transportation System Plan

Oregon Administrative Rules (OAR) Chapter 660, Land Conservation and Development Commission

Division 4, Interpretation of Goal 2 Exception Process

- \*OAR 660-004-0010, Application of the Goal 2 Exception Process to Certain Goals
- \*OAR 660-004-0018, Planning and Zoning for Exception Areas
- \*OAR 660-004-0020, Goal 2, Part II (c), Exception Requirements
- \*OAR 660-004-0022, Reasons Necessary to Justify An Exception Under Goal 2, Part II (c)
- \*OAR 660-004-0028, Exception Requirements for Land Irrevocably Committed to Other Uses

Division 12, Transportation Planning Rule

- \*OAR 660-012-0060, Plan and Land Use Regulation Amendments

Division 14, Application of the Statewide Planning Goals to Newly Incorporated Cities, Annexation, and Urban Development on Rural Lands

- \* OAR 660-014-0040, Establishment of New Urban Development on Undeveloped Rural Lands

Division 15, Statewide Planning Goals and Guidelines

Division 33, Agricultural Land

- \*OAR 660-033-0010, Purpose
- \*OAR 660-033-0020, Definitions
- \*OAR 660-033-0030, Identifying Agricultural Land

Oregon Revised Statutes, ORS Chapter 215, County Planning  
ORS 215.010, Definitions

**II. FINDINGS OF FACT:**

- A. Location:** The subject property is located at 21235 Tumalo Place, Bend, and is further identified as Tax Lot 201 on Deschutes County Assessor's Map 16-12-26C, and Tax Lot 104 on Assessor's Map 16-12-27D. The property is located at the intersection of Highway 97 and Tumalo Road in the area commonly known as Deschutes Junction.
- B. Zoning and Plan Designation:** Tax Lots 201 and 104 are zoned Exclusive Farm Use—Tumalo/Redmond/Bend Subzone (EFU—TRB) and are designated Agriculture under the Deschutes County Comprehensive Plan. The property also is located within a Landscape Management Combining (LM) Zone because of its proximity to Highway 97.
- C. Site Description:** The entire subject property – Tax Lots 201 and 104 combined -- are approximately 21.59 acres in size. The on-off ramps to southbound Highway 97 form the north boundary of the subject property. The property is bordered by Highway 97 on the east (the right of way is fenced along the Aceti property) and Tumalo Road bisects the portion of the property identified as Tax Lot 201. The section line between Sections 26 and 27 forms the western property line. Tumalo Road constitutes the access from Highway 97 to the community of Tumalo. Highway 97 is a four-lane divided highway that runs north-south and is maintained by the Oregon Department of Transportation (ODOT). The west half of the Deschutes Junction Highway 97 overpass crosses the

subject property. The approach to the overpass on the property is approximately 800 feet long and tapers from 93 feet wide at the west end to 170 feet wide at the east end of the property. The perimeter of the property is fenced with metal fence posts and three strands of barbed wire. The Applicant presented photographic and video evidence of damage to the fencing due to destruction by vehicles crashing through it, particularly at the northern property line that is adjacent to the on/off ramps to Highway 97 on Tumalo Place and in the approach to the overpass. The County has fenced both sides of the right-of-way for the approach to the overpass on the property with metal agricultural fence posts and three-strand barbed wire. Some culverts divert precipitation from the roadway to the subject property.

The Tumalo Road approach to Highway 97 crosses the subject property and is owned by Deschutes County. A 16x16 foot tunnel was constructed during the Deschutes Junction Overpass project to allow vehicles and livestock to move directly between the northern and southern portions of the property without crossing the overpass approach. Three 40-foot by 120-foot long asphaltic concrete entry roads into the subject property were constructed by the County when the roads were realigned and the overpass was constructed. One is on each side of the approach to the overpass and the third is on the north property line. Each entrance has a dedicated turn lane to aid entrances from Tumalo Place and Tumalo Road.

Tax Lot 104 was created when the overpass was constructed and was declared remnant land. TL 104 is adjacent to TL 201 to the west, and is situated to the north of Tumalo Road. Tumalo Place forms the northern border of the property. The property is generally level, and has an existing large warehouse building and gravel parking areas on three sides of the building. There is also a loading bay on the west end of the building. The site is accessed from existing driveways off of Tumalo Place and Tumalo Road.

The Burden of Proof states, among other things, that there is sparse stubble left from a failed hay crop 15 years ago that spots the land. The land is relatively level and cleared of native vegetation. Minor variation in elevation is present at the northeast corner which rises about four feet and is dotted by juniper trees and native shrubs. There is a concrete pad for displaying farm equipment for sale on the top of the rise. South of the display pad, near the eastern boundary of the property is an irregular, rocky excavation and crevasses left from a failed effort to create an irrigation water retention pond in the northwest corner of the property. Gravel has been spread for truck back-up and turn-around for the loading docks on the west side of the storage building. Noise from truck and automobile traffic on the adjoining roads and highways is nearly constant, as further evidenced in the video submitted by the applicant at the hearing.

- D. **Soils:** According to the most recent National Resource Conservation Service (NRCS) Web Soil Survey data, the subject property consists of three soil units:

**36A Deskamp loamy sand, 0-3% Slopes.** The NRCS data shows 85 percent of this soil unit consists of Deskamp soils, and 15 percent consists of contrasting inclusions. The Deskamp soils have a land capability classification of Class III with irrigation and Class VI without irrigation.

**38B, Deskamp-Gosney Complex, 0-8% Slopes.** The NRCS data shows 50 percent of this soil unit consists of Deskamp soils, 35 percent consists of Gosney soils, and 15 percent consists of contrasting inclusions. The Deskamp soils have a land capability

classification of Class III with irrigation and Class VI without irrigation. The Gosney soils have a capability rating of Class VII with or without irrigation.

**58C, Gosney-Rock outcrop-Deskamp complex, 0 to 15 % Slopes.** The NRCS data shows 50 percent of the soil unit consists of Gosney and similar soils, 25 percent Rock outcrop, 20% Deskamp and similar soils, and 5 percent contrasting inclusions. The Gosney and Deskamp soils have the capability classifications as stated above. The Rock outcrop is Class VIII.

As discussed in detail in the findings below, the applicant submitted a more detailed soil study of the subject property conducted by Roger Borine (hereafter "Borine study"). The Borine study concluded the subject property is predominantly non-agricultural soils, Class VII and VIII. There are 19.71 acres of Swalley Irrigation District water rights on the property. As set forth in the Burden of Proof, about 20% of the property is covered with nearly flat, above-ground volcanic rock flows. The remainder of the land has about 4-8 inches of volcanic soils.

- E. Surrounding Zoning and Land Uses:** Zoning in the area is generally residential (RR-10 and MUA-10) to the north with farm use (EFU-TRB) to the south and west. Northeast of the subject property is an approximately 2-acre Rural Commercial zone (RC) developed with a building/landscaping supply business. East of Highway 97 and beyond a strip of EFUTRB zoned land, is approximately 60 acres zoned Rural Industrial (RI).

Property to the south (161226C000200) is zoned EFU-TRB and is developed with a rural residence. To the southwest (161227D001100) is an undeveloped parcel in farm tax deferral and assessed as having 26 acres of irrigation rights. To the west (161227D000100) is the Three Sisters Adventist School. Property to the north and northwest is zoned MUA-10 and is vacant or developed with single family dwellings. Property to the northeast is Rural Commercial (RC) and is developed with a building/landscaping supply business.

Across Highway 97 to the east and beyond the EFU zoned strip of land adjacent to the Highway, are RI zoned lands developed with Willamette Graystone, a concrete products manufacturing facility and a second business site, (formerly United Pipe) on the west side of Graystone Lane, is vacant. Farther to the east is the Burlington Northern-Santa Fe (BNSF) railroad tracks. Across Highway 97 to the southeast is land zoned RI and used for mineral processing,

There are no active agricultural uses adjoining the subject property. One agricultural use in the vicinity is a recreational cattle cutting ranch called the "Used Cow Lot," east of Highway 97, one-half mile northeast of the subject site. There are no agricultural uses within one mile north of the property. Within one-half mile west of the property, two 20-acre parcels are in pasture and occasionally have a few head of horses. There are 4 10-acre parcels along Half Mile Lane and some properties south of Tumalo Road (.5 to 5 acres in size) that may be characterized as "hobby farms" with a few head of horses, sheep, cattle, alpacas or llamas. None of these properties are to grow crops and instead only consist of irrigated pasture. The largest parcel, zoned MUA-10, is 20 acres in size and is currently being subdivided into 20 homesites.

The total number of platted lots, rural and urban density subdivisions, is 1,252, as of the date of the subject applications.

Deschutes County Assessor's Tax Map 161226C includes the applicant's largest parcel. The tax map includes approximately 150 acres, plus acreage devoted to roadways. According to page 68 of the Burden of Proof:

The Applicant's largest parcel is in this tax map. 57.58 acres in this tax map are zoned EFU. Of them, the subject property contains 20.26 fallow or unfarmable acres that are not agricultural soils. 4-R Equipment owns a 26.85 acre parcel that is undeveloped and unimproved sagebrush land. The remaining EFU acreage is used for roads, rental homes, and a mobile home park. Only one acre in this tax map is used for pasture. 18.60 acres are used for roadways. 27.50 acres are used by Burlington Northern Railroad. The remaining zone is Rural Industrial. 53.84 acres are zoned and used for rural industrial uses.

See Figure 22, Detailed Table of Surrounding Uses, by Tax Lots, pages 74-132 of the Burden of Proof.

**F. Land Use History:** The subject property has been part of the following land use applications:

- LR-89-148, Lot of Record determination for tax lot 201 (included two other tax lots).
- RN-91-11, Road name change from Nichols Market Road to Tumalo Road (affected all of Nichols Market Road).
- LM-95-63, Landscape Management Review for a barn.
- CU-96-45, Replace the intersection of Deschutes Market Road and Tumalo Road with a grade separated interchange (Deschutes County was the applicant).
- CU-97-72/SP-97-49, Conditional Use Permit and Site Plan for commercial uses in conjunction with farm use.
- LL-99-19, Property Line Adjustment for the property
- MC-99-1, Modification to CU-97-72/SP-97-49 to include the word processing in the approval and expand the hours of operation and daily truck-trailer operations.
- MC-02-12, Modify CU-97-72/SP-97-49 to expand the commercial activity in conjunction with farm use. This application was denied.
- MC-07-5, Modify CU-97-72/SP-97-49 to expand commercial uses at the site.

Currently, TL 104 is vacant and used for storage and parking. TL 201 is occupied by a 100x200 foot barn that houses a hay sales business and hay press (compressor) operation, constructed in 1995. In 1999, the building was expanded to add a 12x80 foot office/shop and a 50x50 foot loading dock. The building includes 23,460 square feet and can store 70 truckloads of hay (2,100 tons). It is used to store, process and sell bales of hay, agricultural crops and seed, and to manufacture, protect, service and repair farm equipment and vehicles. The building also includes a combination asphalt concrete and concrete floor with a concrete loading dock on the western side of the building. An associated shop allows repair and fabrication of farm equipment and vehicles, and operation of the business takes place out of the office space.

The Applicant's Burden of Proof states at page 27 that the Hay Depot is operated from the northwestern portion of the property and the remainder of the land is sitting fallow. Currently, the Hay Depot business is at a low point due to the recent recession. Hay prices have dropped due to low demand and as a result of the increase in the purchase

and sale of traditional livestock ranching properties for views, open spaces and recreational activities since 2000, reducing the number of customers for hay. Hobby farmers also have been forced out of the livestock business by the recession, further reducing demand for hay each year since 2008. The storage building is currently used to store farm products, hay and seed and machinery. Seven acres are leased to the Bonneville Power Administration (BPA) for storage of supplies to maintain and upgrade high voltage transmission lines in the region.

The approvals in 1997 granted to the Applicant by the County included approval to construct an additional 100x200 foot building on the property. However, the overpass was constructed by the County across the site for the second building shortly thereafter in 1998. The second building could not be re-sited on the north portion of the property due to the proximity to the overpass and the new setbacks required on each side of the new overpass itself. The Applicant and the County entered into an agreement pursuant to which the County agreed the second building can be constructed anywhere on the existing property provided it meets required setbacks.

In 1998, Aceti sold and traded land to the County and to ODOT for Tumalo Place and the new on and off ramps to Highway 97 and for the new Deschutes Junction Overpass Project that crossed his land on a diagonal. Aceti granted a 40-foot wide easement along the west side of the property for ingress and egress to the property southwest of his and a 20-foot wide easement to Avion for the north-south length of his property. He also donated 15 feet of property along the northern boundary of TL 201 (approximately 1,000 feet long) to Deschutes County for the purpose of widening Tumalo Place right-of-way so that the left-hand turn lane onto his property could be constructed. Exhibit 21 to Burden of Proof.

- G. **Procedural History:** The applications for a plan amendment, zone change and goal exception were originally submitted on December 31, 2014. The applicant, by letter dated January 5, 2015, requested that the timeline for the applications be tolled for eight (8) weeks, to allow the applicant to make some additions to the applications. By the letter dated March 31, 2015, the applicant requested that the review on the applications proceed. The revised applications were accepted by the county as complete on April 30, 2015.

Because the request involves a plan amendment, under Section 22.20.040(D) the applications are not subject to the 150-day period for issuance of a final local land use decision under ORS 215.427. The initial public hearing on the applications was held on June 16, 2015 and was continued to July 14, 2015.

- H. **Proposal:** The applicant requests approval of a plan amendment and zone change from Agriculture and EFU-TRB, to Exception Area and Rural Industrial, respectively, for 21.59 acres. The applicant has requested both a reasons and irrevocably committed exception to Statewide Planning Goal 14, Urbanization. The application does not include a development proposal.
- I. **Public/Private Agency Comments:** The Planning Division mailed notice to several agencies and received comments from the Deschutes County Transportation Planner, Oregon Department of Transportation and Swalley Irrigation District. These public agency comments are set forth in the findings below. The following agencies responded with "no comments" to the application: Redmond Airport and Avion Water Company.

The following agencies did not respond to the notice: Bend Fire Department, Central Oregon Irrigation District, Deschutes County Environmental Soils Division, County Assessor's Office, County Road Department, Central Electric Cooperative, Pacific Power and Light, Centurylink, Oregon Department of Land Conservation and Development

- J. **Public Notice and Comments:** The Planning Division mailed individual written notice of the applicant's proposal to the owners of record of the surrounding property owners within 750 feet of the subject property, at least 20 days prior to the initial public hearing on June 16, 2015. The public hearing was opened on June 16, 2015 and officially continued to July 14, 2015 at the applicant's request. Notice of the initial public hearing was also published in the Bend "Bulletin" newspaper, and the subject property was posted with a notice of proposed land use action sign.

The following written comments were received:

- Ron Robinson, Jr., 4R Equipment in support of the application
- Harry S.R. and Bev Fagen in support of the application
- Carl Juhl in support of the application, discussing why the subject property is not suitable for grazing of livestock due to issues with irrigation of the small parcel and disruptive noise from traffic on Highway 97 and Tumalo Road
- Judd Weirbach in support of the application, discussing why the subject property consists of poor soils and is not "farmable" due to its small size and irregular shape and bisection by the Highway 97 overpass project
- Steve Mulkey in support of the application discussing why the subject property is not farmable due to poor soils, size, shape and condition of the land, impact of vehicular traffic and because it would be a waste of valuable water resources
- Lesley Bangert in support of the application because of the impact of the overpass project on the property and the surrounding industrial/commercial businesses and lack of farming activity on adjacent properties
- Ed Galazzo in support of the application due to adjacent RI uses, noise from the highway, access to the property to accommodate large vehicles, and the difficulty in farming on the existing soils and considering issues associated with using an irrigation system ¼ mile away and potential danger to livestock due to vehicles running into fences surrounding the subject property
- Jack Holt in support of the application due to surrounding industrial and commercial uses
- Central Oregon Landwatch in opposition to the application on the basis that the subject property consists of agricultural land, has a past farm use, is suitable for grazing, has irrigation rights, is predominantly composed of land in capability classes I-IV, and neighboring lands are in agricultural use
- The State Department of Land Conservation and Development submitted written comments concerning the fact that the County does not have plan policies to guide rezoning resource to nonresource zones, commenting on the difference between the soils report and NRCS mapping and noting that even if irrigation rights may have been transferred, such a fact would not render the property non-irrigated.

At the public hearing, there was no testimony in opposition to the applications. The following persons testified in support of the applications, in addition to testimony presented by the applicant and the applicant's representatives:

- Rod Fraley
- Jim Lawrence
- Dean Pattijean

K. **Lot of Record:** The record indicates that the two tax lots (16-12-26C, 201 and 16-12-27D, 104) together constitute one legal lot of record.

### III. CONCLUSIONS OF LAW:

#### **PLAN AMENDMENT AND ZONE CHANGE**

##### **County Code Standards**

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

##### 1. **Chapter 18.136, Amendments**

##### a. **Section 18.136.010, Amendments**

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

**FINDINGS:** The applicant requests a quasi-judicial map amendment and properly submitted applications for a plan amendment, zone change and goal exception. The applications are reviewed under the procedures of Title 22 of the Deschutes County Code. This criterion is met.

##### b. **Section 18.136.020, Rezoning Standards**

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

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

**FINDINGS:** In previous decisions, the Hearings Officer has found this paragraph establishes two requirements: (1) that the zone change conforms with the plan; and (2) that it is consistent with the plan's introductory statement and the plan's goals. I agree with and adhere to this finding of other Hearings Officers in previous decisions. I find that each of these requirements is met, as discussed below.



**1. Conformance with Comprehensive Plan.** The applicants request approval of a plan amendment to change the Comprehensive Plan designation of the subject property from Agriculture to Rural Industrial. The proposed rezoning from EFU-TRB to RI will be required to be consistent with its proposed new plan designation.

**2. Consistency with the Plan's Introductory Statement and Goals.** In previous decisions, the Hearings Officer has made the following findings concerning this requirement:

*"Comprehensive plan statements, goals and policies typically are not intended to, and do not, constitute mandatory approval criteria for quasi-judicial land use permit applications. Save Our Skyline v. City of Bend, 48 Or LUBA 192 (2004). There, LUBA held:*

*'As intervenor correctly points out, local and statutory requirements that land use decisions be consistent with the comprehensive plan do not mean that all parts of the comprehensive plan necessarily are approval standards. [Citations omitted.] Local governments and this Board have frequently considered the text and context of cited parts of the comprehensive plan and concluded that the alleged comprehensive plan standard was not an applicable approval standard. [Citations omitted.] Even if the comprehensive plan includes provisions that can operate as approval standards, those standards are not necessarily relevant to all quasi-judicial land use permit applications. [Citation omitted.] Moreover, even if a plan provision is a relevant standard that must be considered, the plan provision might not constitute a separate mandatory approval criterion, in the sense that it must be separately satisfied, along with any other mandatory approval criteria, before the application can be approved. Instead, that plan provision, even if it constitutes a relevant standard, may represent a required consideration that must be balanced with other relevant considerations. [Citations omitted.]'*

LUBA went on to hold in *Save Our Skyline* that it is appropriate to 'consider first whether the comprehensive plan itself expressly assigns a particular role to some or all of the plan's goals and policies.' Section 23.08.020 of the county's comprehensive plan provides as follows:

*The purpose of the Comprehensive Plan for Deschutes County is not to provide a site-specific identification of the appropriate land uses which may take place on a particular piece of land but rather it is to consider the significant factors which affect or are affected by development in the County and provide a general guide to the various decisions which must be made to promote the greatest efficiency and equity possible, while managing the continuing growth and change of the area. Part of that process is identification of an appropriate land use plan, which is then interpreted to make decisions about specific sites (most often in zoning and subdivision administration) but the plan must also consider the sociological, economic and environmental consequences of various actions and provide guidelines and policies for activities which may have effects beyond physical changes of the land. (Emphasis added.)*

*The Hearings Officer previously found that the above-underscored language strongly suggests the county's plan statements, goals and policies are not intended to establish approval standards for quasi-judicial land use permit applications.*

*In Bothman v. City of Eugene, 51 Or LUBA 426 (2006), LUBA found it appropriate also to review the language of specific plan policies to determine whether and to what extent they may in fact establish decisional standards. The policies at issue in that case included those ranging from aspirational statements to planning directives to the city to policies with language providing 'guidance for decision-making' with respect to specific rezoning proposals. In Bothman LUBA concluded the planning commission erred in not considering in a zone change proceeding a plan policy requiring the city to '[r]ecognize the existing general office and commercial uses located \* \* \* [in the geographic area including the subject property] and discourage future rezonings of these properties.' LUBA held that:*

*\* \* \* even where a plan provision might not constitute an independently applicable mandatory approval criterion, it may nonetheless represent a relevant and necessary consideration that must be reviewed and balanced with other relevant considerations, pursuant to ordinance provisions that require \* \* \* consistency with applicable plan provisions.'(Emphasis added.)*

*The county's comprehensive plan includes a large number of goals and policies. The applicant's burden of proof addresses goals for rural development, economy, transportation, public facilities, recreation, energy, natural hazards, destination resorts, open spaces, fish and wildlife, and forest lands. The Hearings Officer finds these goals are aspirational in nature and therefore are not intended to create decision standards for the proposed zone change."*

Hearings Officer Karen Green adhered to these findings in the Powell/Ramsey decision (file nos. PA-14-2/ZC-14-2), and found the above-referenced introductory statements and goals are not approval criteria for the proposed plan amendment and zone change. This Hearings Officer also adheres to the above findings herein. Nevertheless, depending upon their language, some plan provisions may require "consideration" even if they are not applicable approval criteria. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 209 (2004). I find that the following plan goals and policies require such consideration.

## **Chapter 2, Resource Management**

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

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

**FINDINGS:** The Hearings Officer found in the Powell/Ramsey decision, and I agree in this Decision, that this is an aspirational goal and not an approval criterion. Nonetheless, I find that the subject property does not constitute "agricultural land" as defined in Goal 3, OAR 660-033-0020(1) for the reasons set forth in this Finding and as discussed in more detail in the findings below.

The applicant addressed the soil productivity on pages 137-138 of their burden of proof statement and in a July 13, 2015 submittal from Mr. Borine, CPSC, CPSS, PWS, of Sage West, LLC. An Agricultural Soils Capability Assessment, dated May 8, 2012 is attached as Exhibit 14 to the Burden of Proof. The Borine study determined that the subject property is approximately 80% class VII and VIII soils (17.2 acres), and 20% class III-VI soils (4.3 acres) and therefore not predominantly Agricultural Land. The study further shows that, together with the LCC soil

ratings as non-agricultural soils, the determination of suitability for farm use of the subject property is "generally unsuitable" based upon low fertility, limited soil depth for cultivation and ability to store and hold water, lack of forage production for livestock grazing, limited length of growing season and high levels of energy input with limited outcome. Specifically, Mr. Borine found that organic matter for these sites is "extremely low to non-measurable and clay content is less than five percent, resulting in a very low Cation Exchange Capacity (CEC); the higher the CEC the better." He also determined the "soil is unsuitable for cultivation due to limited and inconsistent soil depth throughout." Suitability for grazing is limited by cold climate and soil temperatures that delay growth of forage and shorten the growing season, restricted depth limit, past land alterations and rock outcrop. Mr. Borine concluded, among other things, "This parcel requires technology and energy inputs over and above that considered accepted farming practices in this region. Excessive fertilization and soil amendments; very frequent irrigation applications pumped from a pond with limited availability; and marginal climatic conditions restrict cropping alternatives."

Mr. Borine explained his methodology, in part, at page 3 of the Borine study:

*Prior to the initial field visit the property boundaries, soil maps and interpretations, geology maps, aerial photos and satellite imagery were reviewed. The initial site visit included an overview and inventory of the landforms, soils, vegetation and land uses on the site. Following the initial on-site investigation an overview of landscapes and soils for an extended off-site area was completed. Soil mapping units, their composition and extent, which occur on the subject property, were observed on the ground and remotely throughout their extent on the landscape.*

*The Soil Survey of Upper Deschutes River Area, Oregon, including parts of Deschutes, Jefferson, and Klamath Counties was mapped at two levels of intensity. At the less detailed level (Order 3), map units are mainly complexes. The average size of delineations for most management purposes was 160 acres. At the more detailed level (Order 2), map units are mainly consociations and complexes. The average size of delineations for purposes of management was 40 acres and the minimum size was 5 acres. Most of the land mapped at the more detailed level is used as irrigated and non-irrigated cropland. Inclusions of contrasting soils or miscellaneous areas are described in the map unit if they are a significant component of the unit. The NRCS soil survey (Order 2 and 3) at the landscape level was reviewed and determined to be predominately accurate. The soil/landscaping relationships were accurate. Soil boundary placements were general. At this Order 2 and 3 level of mapping, miscellaneous land types were not mapped or identified as inclusions. In addition, original placement of soil boundary lines by field soil scientists on aerial photos are often modified and straightened during the map digitizing process.*

*The three NRCS soil mapping units occurring in this study area were reviewed at the landscape level throughout their extent. All have contrasting inclusions listed in their map unit descriptions that may exceed the size of this study area. The initial on-site inventory showed a high percentage of contrasting shallow soils and miscellaneous areas in*

*the 36A-Deskamp loamy sand, 0-3% slopes map unit. This map unit is approximately 76% of the study area. If this area is predominately shallow and very shallow soils and miscellaneous areas the study area may be predominately non-agricultural soils.*

*\*\*\**

*An Order 1 soil survey is prudent to accurately define soils, mapping units, and miscellaneous areas and accurately locate their boundaries. Methods to investigate the soil included the use of shovel, auger, probe and backhoe. Point observations and transects were used to identify soil characteristics, map unit composition and accurately locate soil boundaries. In addition, two sites were sampled for laboratory analysis of nutrient levels and cation exchange capacity.*

Mr. Borine's findings in the Borine study include the following:

*Prior to 1960 this area was highly modified from natural conditions. Shallow soil and rock outcroppings in the higher landscape position were removed and leveled and moderately deep soils were used as fill and overburden for rocky areas. This activity resulted in concave depressions now having shallow and moderately deep soils, and convex areas having shallow and very shallow soils with some rock outcrops. The area was then smoothed, planted to grass and sprinkler irrigated with a wheel-line system (See 1960 B/W aerial photo in attachments).*

*\*\*\**

*The initial inventory and study identified the Deskamp and Gosney series. In unit 38B a very shallow contrasting inclusion was described and identified as a potential major component at an Order 1 level. It is not referenced as a contrasting inclusion in unit 36A. For clarity the very shallow contrasting soil will be referenced as Zeta soil for this study only and is a non-correlated soil series name. The miscellaneous areas Urban Land was also identified as a potential major component at an Order 1 level. It lacks soil and supports little or no vegetation. It is mostly agricultural buildings, land modifications for staging, equipment movement, parking, crop storage, pond development and areas of fill material.*

*\*\*\**

*The average AWC is 0.12 inches/inch for a loamy sand texture and is typical for Gosney soils on this property (Web Soil Survey – Soil Survey of Upper Deschutes River Area, Oregon). A soil seventeen (17) inches deep with no rock fragments will hold 2 inches of available water. Soils less than 17 inches deep in this study area whether irrigated or non-irrigated are LCC 7. In this report the soils referenced as Gosney are 10-16 inches deep and LCC 7; and the Gosney, deep phase is 16-20 inches deep and is LCC 6. The Gosney's official typical pedon is 14 inches deep to basalt and the series ranges from 10 to 20 inches deep.*

The Borine study separated this study area into four mapping units that distinguish lands in LCC III-VI from those in LCC VII-VIII. This soil mapping at an Order 1 level accurately delineates the

following mapping units. Tables 2 and 3 of the study shows that *Deskamp loamy sand, 0-3% slopes* have an LCC rating 6 non-irrigated and 3 irrigated. It comprises 8% (1.7 acres) of TL 201 and is not present on TL 104. *Gosney, deep-Deskamp complex 0-8% slopes* have an LCC rating VI non-irrigated; the Gosney deep soils also have an LCC rating VI irrigated, while the Deskamp soils have an LCC rating III irrigated. It comprises 13% (2.6 acres) of TL 201 and is not present on TL 104. *Gosney-Zeta complex, 0-3% slopes* have an LCC rating VII non-irrigated and VII irrigated. It comprises 59% of the subject property (12.7 acres). Finally, the Urban Land soils have an LCC rating of VIII non-irrigated and VIII irrigated. It comprises 21% of the subject property (4.5 acres).

According to the Borine study, the applicant has enrolled 19.71 acres of water rights for tax lot 201 in the Oregon Water Resources Department's Instream Leasing Program. According to Oregon Water Resources Department, the water rights have been leased on and off for approximately 10 years. Swalley Irrigation District explained in a May 29, 2015 email to staff:

About 5 years ago Swalley changed it's [sic] instream-leasing policy from allowing this practice every year to only allowing it once every 5 years so that if a water user had not irrigated in 4 years they had the option to in-stream lease rather than use the water in the 5<sup>th</sup> year. State water law requires that irrigation water be used fully (beneficial use) once every five years or it is forfeited. In stream leasing is considered beneficial use.

Swalley Irrigation District further confirmed that Mr. Aceti has instream leased his Swalley ID water as follows: Year 2000 – 4.5 acres, 2001 - 6.4 acre, 2005 – 19.71 acres, 2007 – 19.71 acres, 2013 - 19.71 acres. Swalley Irrigation District disagreed with Mr. Aceti's statement in his burden of proof that "the construction of the Swalley hydroelectric facility .... adversely affected applicant's in-stream leasing of irrigation water," clarifying in its May 29, 2015 email to staff that the new instream-leasing policy was tightened as a result of its main canal piping project (not the hydroelectric facility built in 2010) and a reduction in Swalley's water right from 125 cfs to 81 cfs.

As set forth in Exhibit 1A, submitted by the applicant at the hearing and dated July 8, 2015, the applicant is in the process of reducing the number of acres of irrigation water at Swalley's request. There have been a number of significant changes to the water delivery system for the subject parcel, as set forth in Exhibit 1A, summarized as follows:

- The Acetis purchased the property in 1995 from Bruce and Gary Barrett. Mr. Aceti did not receive an easement or written agreement to irrigate the property. When Aceti tried and failed to raise a crop in 1995, he thereafter saved his water right by keeping the irrigation water in the Deschutes River through an in-stream lease of his water.
- The 1995 Barrett-Aceti deed contains a misleading reference to a water easement because several of Barretts parcels that were not conveyed to Aceti are also described in it. The easement itself does not refer to Aceti's property.
- The chain of title for the property traces back from Aceti to Barrett to Lawrence to Waltons and then to the original homesteader, James Low, who made homestead entry at The Dalles on December 3, 1903.
- Charles B. Swalley and G.W. Swalley filed in 1892 for Deschutes River water to irrigate their ranches north of Bend near Deschutes Junction. The water would be diverted from the Deschutes River near Bend. The project was funded by selling shares. James Low

owned 3 shares of the capital stock of the Deschutes Irrigation and Rec. Co carrying water sufficient to reclaim his tract.

- A canal was built over three decades, which reached 13 miles long. By 1933, 6,638 acres were irrigated. At some unknown date, the Swalley lateral called the Deschutes Lateral that ran north from the main canal to Benjamin and James Low's homesteads along the rock spine and Half Mile Lane was dug. From Minnie Low's ditch, called the Low Lateral, water was delivered by gravity in September 1912. Minnie Low was the ex-wife of Benjamin Low. Today, all of Minnie Low's property is subdivided into Whispering Pines First Addition.
- By 1931, the Deschutes Lateral ran north from the Swalley Canal at a point just west of the current hydropower plant to a "Y" at the southwest corner of James Low's homestead. The open ditch also flowed east across the rock spine and into a now abandoned irrigation pond that is today next to Highway 97.
- In 1933, Low sold the State of Oregon 6.73 acres in a strip of land 100 feet wide to construct the new The Dalles-California Highway. Wooden pipes were put under the highway to allow for irrigation water to flow between the Pilot Butte Canal that crossed Low's land to the farmable land on its western edge. None of Low's land was served by the Pilot Butte Canal
- Sometime before 1947, a larger pond on the west side of the highway and southeast of the rock spine was constructed and water flowed by gravity from the Swalley Irrigation Canal. It flowed north to a point near Half Mile Lane and turned east and ran across the peak of the rock spine and then downhill to his pond. It was pumped to irrigate Low's field.
- James Low's former homestead was broken into smaller parcels in multiple ownerships by 1967.
- The Barretts acquired the property in 1967 from the Lawrences and thereafter purchased several other parcels in the area, eventually owning 120 acres of homesteader James Low's original 160 acres.
- In 1986, Barretts sold the land west of the subject property to the Western Conference Association of Seventh Day Adventists, an Oregon Corporation for the Three Peaks School.
- In February 1991, the Barretts sold 1.18 acre to ODOT to widen Highway 97 to four lanes. 24.02 acres remained in the subject property. The widening project cut through a shared irrigation pond, reducing it by 75% and making it inoperable. ODOT paid to have a new ditch and pond dug along Half Mile Lane on TL 1100. However, when Aceti purchased the property from Barretts in 1995, he did not receive any easement or right to use TL 1100 or 1200 or the equipment for delivery of irrigation water to the subject property.
- In 2003, Mr. Aceti attempted to build a new irrigation pond near the high point of his property. Photographic evidence in the record shows that crews using heavy equipment to dig it, hit solid rock between the surface and four feet down. The bulldozers dug about eight inches until they hit a solid lava flow slab. The soil was scraped and pushed up to form the brim of the pond and Aceti imported bentonite to make the base impermeable. The shattered lava flow could not be sealed and the process was abandoned.
- In 2006, the Barretts sold TL 1100 (30 acres) to a group affiliated with the Three Peaks School, Rymilaka LLC. They do not farm the land and have plans to use it to expand the outdoor and athletic facilities for the school. It has not been farmed since 2005.
- The irrigation pond and irrigation ditch on Half Mile Lane created in 1992 have not been filled for most or all of the last ten years. It is currently dry and no irrigation water is

flowing from the Deschutes Lateral into the new pond. Water in the pond is backflow from overfilling the Twigg pond with the older ditch. Rymilaka LLC owns the pond and the pump in the pumpline and the ¼ mile long mainline irrigation pipes.

- In order for Aceti to irrigate his land from the pond, he would need to obtain a written agreement with the landowners, install a new electrical panel, a new pump and ¼ mile of new mainline pumps across the Rymilaka LLC property and the Lawrence property to his property. Given the unfarmable shallow soil and rock discovered after his 1995 purchase, Mr. Aceti determined not to pursue the matter further.
- Swalley has no water easement to TL 104. The easement to deliver water to TL 201 is actually to the irrigation pond on a different parcel Aceti has never owned and that is south of a rock ridge.
- TL 104, a 1.32 acre parcel, was created when Tumalo Road and Deschutes Market Road were realigned and the Highway 97 overpass was constructed by a joint project of Deschutes County and ODOT. It was deeded by the Western Oregon Conference Association of Seventh-Day Adventist to ODOT in 1997. ODOT deemed it to be a "remnant" at the completion of the transportation project and granted it to Mr. Aceti on July 6, 1998, as part of the settlement for the financial losses Aceti incurred as a result of the project and for the taking of several acres of his land for the new transportation facilities.

Swalley Irrigation District sent a letter to Mr. Aceti, dated January 14, 2013 (Exhibit 12 to Burden of Proof), which confirmed that Aceti has not used his Swalley water right for many years other than participating in the Deschutes River Conservancy In-Stream Leasing Program. The letter states that, "[w]hen you wish to use your water it will be delivered from Gate # 0040 on the Swalley Deschutes Lateral, then enter the private ditch system on the Eastslope investments parcel to the southwest of you. How the water then reaches your parcel is a private matter between yourself and Eastslope investments."

In a May 29, 2015 email from Central Oregon Irrigation District to Paul Blikstad, COID confirmed that the subject property is not within COID boundaries.

Aerial photos from 1953, 1959, 1972, 1980, 1994, and 1996 show the subject property receiving irrigation. Aerial photographs in 2000 and 2003 only show the southern portion of the tract as receiving irrigation. Aerial photographs in 2005, 2006, 2010, 2011, 2012 and 2014 show the subject property as non-irrigated and not growing crops. The applicant did receive a conditional use permit and site plan approval (CU-97-72/SP97-49) that states, among other things that "the record indicates the applicant currently grows hay on approximately 21 of 23 acres on the subject property." However, the bypass was constructed the following year and the applicant has not engaged in agricultural use of the property since that time due in part to bisection of the property. In 2002, the applicant requested a modification of condition (MC-02-12) of CU-97-72/SP97-49, to expand the existing commercial activity to include the sale of field crops, nursery, landscaping and horticultural products, and holding special promotion and fund raising events. The applicant proposed converting the entire portion of the subject property north of Tumalo Road off-ramp to commercial activity. On page 11 of the Hearings Officer decision denying the request, it states, "while the soils on the northern irrigated area are less deep and productive than the soils on the southern irrigated area, nevertheless they are in hay production." Mr. Aceti produced evidence that, before he could obtain a building permit for the approved CUP and site plan, the County and ODOT took three acres of his property for construction of the new overpass and new Tumalo Place, bisecting the property and further increasing the difficulties experienced by Mr. Aceti in irrigating his property and growing crops.



He also presented evidence that the conditions of approval of the CUP require him to grow hay on the property, which he has been unable to do since 1998.

In 1998, Tumalo Road was constructed, bisecting the property. ODOT and the county took three acres in the middle of the Aceti property for construction of a new overpass and realignment of Tumalo and Deschutes Market Road. The project also realigned the on and off ramps to the highway. Mr. Aceti submitted information that irrigation and hay farming on site became impossible as a result. Exhibit 1A, submitted at the public hearing stated, among other things:

After the overpass was constructed and the traffic system was changed, he could not farm even a meager crop of hay on site. He couldn't get irrigation water to the site and even if he could, the overpass made any hand line sprinkler system layout impractical. Other options such as attempting to dig a new pond in the northeast corner or to dig a well were explored without success. When one looks at the rock and shallow non-resource soils, the small parcel size, the overpass bisecting the property and heavy noisy traffic, it makes sense to find a different more appropriate use for the land.

Ex. 1A at page 24. Pages 35 and 39 of the Burden of Proof further state that the first owner of the property, James R. Low sold 6.73 acres of the property to ODOT when the route of The Dalles-California Highway was surveyed diagonally through his homestead. When constructed, it severed his connection to the Pilot Butte Irrigation Canal on the east side of the highway and separated most of his land from the water in the canal. Wooden irrigation pipes were buried under the roadway to serve his land and to fill the irrigation pond, just below his house that was on the lava spine at the western edge of the highway. Because the site was a regional transportation hub, successive owners lost the use of land for the construction and widening of roads.

According to page 41 of the Burden of Proof, Lester and Jennie Walton were the first owners to break up the 160-acre homestead parcel when they sold a 25.2 acre parcel to Carroll and Mary D. Lawrence in 1967. The Lawrences resold the parcel to the Barretts 5 weeks later after determining it was nearly worthless farmland and cost more to farm than any income that could be derived from it. The Barretts sold the parcel to Anthony Aceti for \$196,480. Mr. Aceti is a second-generation hay farmer and hay broker from Christmas Valley. He determined that the proximity of the property to Highways 20 and 97 made it ideal for his business.

As set forth at page 59 of the Burden of Proof, According to OSU Extension Agent Mylen Bohle, it takes 200-250 acres of productive, regularly-shaped, irrigated farmland to break even on producing hay crops in Deschutes County at today's prices if the farmer can rent equipment or purchase used equipment. It takes 3,500 to 6,000 acres of hay to make enough profit to support a family. Some or all of the following expenses may be involved: (1) hay professionals to cut and sell hay locally; (2) leasing the land to an expert farmer to produce hay; (3) custom baling at \$45-75 per ton; (4) fuel and farm machinery and truck prices for driving tractors and sprayers to driving trucks haling the hay containers. In addition, there are many steps required for preparing a local parcel to produce a crop, which further adds to the cost (removal of native brush, fertilizing, sterilizing soil, removal of rocks, plowing and tilling soil, planting seeds, irrigation system, prevention of noxious weeds, harvesting, baling and shipping).

Substantial evidence in the record supports a finding that the subject property does not constitute "agricultural land." The soils study is adequate for determining whether the subject property consists of predominantly Class VII and VIII soils and whether it is unsuitable for farm use, considering profitability and factors in the Goal 3 administrative rule, as set forth in the findings below. The property is unsuitable for farm use considering, among other things, difficulties associated with irrigating the property (lack of easement to access the irrigation pond/ditch constructed pursuant to a settlement between Barrett and ODOT), the surrounding road network, impacts of nearby heavy traffic and transportation, impacts on the subject property of the expansion of Highway 97, the bisection of the property with the construction of Tumalo Road, surrounding commercial and industrial uses, the lack of surrounding farm uses, and the relatively small size of the parcel, which impacts economies of scale.

**Policy 2.2.2, Exclusive Farm Use sub-zones shall remain as described in the 1992 Farm Study shown in the table below, unless adequate legal findings for amending the sub-zones are adopted or an individual parcel is rezoned as allowed by Policy 2.2.3.**

**FINDINGS:** The Hearings Officer found in the Powell/Ramsey decision, and I agree in this Decision, that this policy is directed at the county rather than at an individual applicant. In any case, the applicant is not requesting an amendment to the subzone (EFU-TRB) that applies to the subject property.

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

**FINDINGS:** The Hearings Officer found in Powell/Ramsey, and I agree in this Decision, that this policy is directed at the county rather than an individual applicant. In any event, the applicant has requested a quasi-judicial plan amendment and zone change to remove the EFU designation and zoning from the subject property and has submitted information to establish the subject property is not "Agricultural Land" subject to Goal 3. The applicant's proposal is authorized by policies in the comprehensive plan and is permitted under state law.

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

**FINDINGS:** The Hearings Officer found in Powell/Ramsey, and I agree in this Decision, that this policy is directed at the county rather than at an individual applicant. Hearings Officer Green stated in Powell/Ramsey that "In any event, in my decision in *NNP* (PA-13-1, ZC-13-1) I held any failure on the county's part to adopt comprehensive plan policies and code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation and zoning does not preclude the county from considering quasi-judicial plan amendment and zone change applications to remove EFU zoning. I adhere to that holding here." This Hearings Officer agrees with such determination; I find that until such time as the County establishes policy criteria and code on how EFU parcels can be converted to other designations, the current legal framework can be used and must be addressed.

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

**FINDINGS:** The Hearings Officer found in Powell/Ramsey and I agree in this Decision, that this policy is directed at the county rather than the applicant. Nonetheless, substantial evidence in the record supports a finding that the property consists of predominantly Class VII and VIII soils and is unsuitable for farm use considering profitability and factors in the Goal 3 administrative rule. Accordingly, as set forth in the findings herein, the subject property does not constitute "Agricultural Land."

## **Section 2.5, Water Resource Policies**

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

**FINDINGS:** The Hearings Officer found in Powell/Ramsey, and I agree in this Decision, that this policy is directed at the County. Hearings Officer Green stated in the Powell/Ramsey decision: "Nevertheless, in my decision in *NNP* I held it is not clear from this plan language what "water impacts" require review -- impacts to water supplies from use or consumption on the subject property, or impacts to off-site water resources from development on the subject property. As a result, I addressed both issues in that decision, and I do so here as well." This Hearings Officer likewise addresses both issues as set forth below.

I find that it is premature to review "water impacts" because the applicant has not proposed any particular land use or development. Any subsequent applications for development of the subject property would be reviewed under the County's land use regulations which include consideration of a variety of on- and off-site impacts.

The applicant's requested zone change to RI would allow a variety of land uses on the subject property. As discussed in the Findings of Fact above, some of the land near the subject property is zoned RI and developed with industrial uses. The record supports a determination that similar development likely would occur on the subject property if it were re-designated and rezoned to RI. Moreover, in light of existing uses in the surrounding area, and the fact that Avion Water Company provides water service in the Deschutes Junction area, the record supports a determination that future development of the subject property with uses permitted in the RI Zone will have water service.

The subject property has 19.71 acres of irrigation water rights and therefore the proposed plan amendment and zone change will result in the loss or transfer of water rights unless it is possible to bring some irrigated water to the land for other allowed beneficial uses, such as irrigated landscaping. In its comments on the applicant's proposal, Swalley Irrigation District stated that the applicant will need to work with the District to discuss any development on top of irrigated ground. The Applicant has not grown a crop on the subject property or effectively used his water right since the overpass was constructed in 1998. I find that any water impacts with respect to irrigation water rights can be addressed in a condition of approval, set forth below. This criterion is met.

## **Rural Economy**

**Goal 1, Maintain a stable and sustainable rural economy, compatible with rural lifestyles and a healthy environment.**

**Policy 3.4.23, To assure that urban uses are not permitted on rural industrial lands, land use regulations in the Rural Industrial zones shall**

ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successors.

**Policy 3.4.27, Land use regulations shall ensure that new uses authorized within the Rural Industrial sites do not adversely affect agricultural and forest uses in the surrounding area. (Emphasis added.)**

**FINDINGS:** The Hearings Officer found in Powell/Ramsey, and I agree in this Decision, that these policies are directed at the County and not at individual applications and are inapplicable to the applicant. In any case, the applicant's proposal does not change the land use regulations in the RI Zone.

**Policy 3.4.28, New industrial uses shall be limited in size to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural areas, for which there is no floor area per use limitation.**

**Policy 3.4.31, Residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.**

**Policy 3.4.32, Residential and industrial uses shall be served by on-site wells or public water systems.**

**FINDINGS:** The Hearings Officer found in Powell/Ramsey, and I agree in this Decision, that these policies apply to quasi-judicial applications and are inapplicable to the applicant for the proposed rezone and plan amendment. The Hearings Officer agrees with Staff's notation that these policies are codified in Chapter 18.100 governing the RI Zone and are implemented through those provisions. The applicant's proposal does not change the land use regulations in the RI Zone.

**Section 3.7, Transportation System Plan  
Executive Summary  
Arterial and Collector Road Plan  
Goal 4**

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

**Policies**

**4.1 Deschutes County shall:**

- a. Consider the road network to be the most important and valuable component of the transportation system.**

- 4.3 Deschutes County shall make transportation decisions with consideration of land use impacts, including but not limited to, adjacent land use patterns, both existing and planned, and their designated uses and densities.**

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

**FINDINGS:** The Hearings Officer found in Powell/Ramsey, and I agree in this Decision, that the above-underscored language indicates these plan policies provide direction to the county but do not create approval criteria for a quasi-judicial plan amendment and zone change. This Hearings Officer agrees with such determination. Accordingly, the criteria are not applicable to review of the subject applications.

Under DCC 17.16.115.C.4.c, the proposal will create more than 200 trips per day or require a zone change. Accordingly, the applicant was required to and did submit a transportation impact analysis ("TIA"), dated March, 2015 and prepared by Sage Engineering Associates, which is included in the record as Exhibit 28 to the applicant's burden of proof. Six intersections were analyzed in the TIA using ODOT methodologies and standards for the highway intersections and County standards for the other intersections. Trip generation was based on "worst case scenario" because no development is proposed. This includes division of the subject property into 20 lots with proposed buildings at the maximum size of 7,500 square feet in the RI zone. Examples of permitted uses under DCC 18.100.010 include contractor/building materials businesses, plumbing, electrical, roofing, siding contractors, welding, sheet metal or machine shop, veterinary clinic. The study area includes property frontage, road connections and impacted intersections. Study years (with and without the project) include background (2015), five years (2020) and twenty years (2035). Analysis period is the weekday P.M. peak hour. The TIA includes volume and distribution of traffic generated by the development, existing nearby land uses, safety issues and study of all access points. Existing driveways onto Tumalo Place and Tumalo Road will be used to serve the proposed development

Among other things the TIA analyzed existing conditions, crash data, driveway sight distance, existing traffic volumes (and adjustments), background traffic, site generated traffic, adjustments to trip generation, driveways directional distribution, trip assignment and distribution, future traffic, peak hour factor, capacity analysis, standards and mitigations, and the transportation planning rule ("TPR"). The TIA concluded that by 2035, both with and without the project, the intersection of Tumalo Road/Tumalo Place will operate at a level of service ("LOS") F for SB movements. The minimum standard for approach delay is LOS D.

Both the County Transportation Planner and ODOT submitted the following written comments with respect to traffic and transportation impacts of the proposed rezone and plan amendment:

Staff from County Planning, the Road Department, and the applicant's traffic engineer have met several times regarding the proposed land uses to include a traffic impact analysis (TIA) for the proposed zone change and plan amendment from Exclusive Farm Use (EFU) to Rural Industrial (RI). The TIA is for the approximately 22 acres on the northwest and southwest quadrants of the US97/Tumalo Road/Deschutes Market Road interchange. We all agreed upon the relevant intersections to be analyzed, the land uses and trip generation rates, and trip distribution. The resulting TIA was to satisfy both the Deschutes County Code (DCC) for traffic studies at DCC 18.116.310 and the Transportation Planning Rule (TPR) at Oregon Administrative Rule (OAR) 660-012-0060.

### **Issue with submitted TIA and TPR compliance**

The March 2015 TIA, which is Exhibit 28 in the burden of proof, indicates all intersections will meet the County's mobility standard Level of Service (LOS) D in 2035, save for the exception of Tumalo Road/Tumalo Place, which will be LOS F with or without the project. The Deschutes County Transportation System Plan (TSP) did not show any failure of this intersection in the plan's horizon year of 2030 and thus no improvements are listed for Tumalo Road/Tumalo Place in the TSP.

The failure of the Tumalo Road/Tumalo Place intersection in 2035 makes the plan amendment/zone change significant under the TPR at OAR 660-012-0060(1)(B) or (C). The TIA lists no mitigation by the applicant, but does suggest on Page 9 monitoring the intersection or the construction of a roundabout, which would make the intersection function at LOS A.

Neither a roundabout, nor any other improvement, is listed in the TSP's Table 5.3.1 "County Road and Highway Projects," the County's Capital Improvements Program (CIP), nor ODOT's Statewide Transportation Improvement Program (STIP). Thus, the TIA does not comply with the TPR at OAR 660-012-0060(4). Additionally, the TIA in its worksheet for the Tumalo Road/Tumalo Place intersection in 2035 demonstrates the intersection while LOS F with or without the projects, has more delay and queuing with the project. Specifically, the approach delay is 87.6 seconds per vehicle without the project and 129.1 seconds with the project, an increase in delay of 47%. Similarly, the number of vehicles in the southbound queue increases from 13.31 to 16.53 or 24%.

### **Solution**

The TIA in its worksheet for Tumalo Road/Tumalo Place in 2035 with and without the project shows while the intersection functions at LOS F in either case, a southbound right turn lane (SBRTL) will improve operations of the north leg of the intersection. Specifically, the approach delay decreases from 87.6 seconds per vehicle to 78.3 seconds, a decrease of 10.62%. Similarly, the number of vehicles in the southbound queue decreases from 13.31 to 11.77, a decrease of 11.6%. A turn lane is a fairly small scale improvement and one that typically does not rise to a level requiring an amendment to either the TSP or County CIP.

The applicant can comply with the TPR with either of these conditions of approval:

- Fund or construct a southbound right turn lane at Tumalo Road/Tumalo Place.
- Record a Transportation Demand Management (TDM) Program that will require industrial uses to begin or end their shifts outside of the 4-6 p.m. peak hours.

The above alternatives, coupled with the options allowed under TPR at OAR 660-012-0060(11) for industrial uses, would mean the TIA and the land use application could be found to be consistent with the TPR and to have provided sufficient mitigation.

### **Oregon Department of Transportation:**

Thank you for the opportunity to comment on this proposed land use action. ODOT has no adverse comments on the proposal. We do, however, want to clarify that there are no planned capacity improvements to the Deschutes Junction interchange.

The controlling transportation plan for US 97 in this area is the Deschutes County Transportation System Plan (TSP) which was adopted in 2012. The TSP has a horizon year of 2030 and showed no need for capacity improvements to the interchange. This is, with the projected 2030 traffic volumes, the Deschutes Junction interchange will continue to operate acceptably and well within ODOT mobility standards.

The applicant's burden of proof identifies "Changes in Circumstances" and #23 of page 53 states that ODOT and the County "are circulating designs and discussing a diamond interchange at Deschutes Junction..." and on page 58 shows a primitive line-drawing sketch with a diamond interchange imposed over the existing interchange. The accompanying text calls it "ODOT's long-term plan." Again, there is no long term to replace or upgrade the existing interchange at Deschutes Junction. The current interchange is projected to operate acceptably through the year 2030. As stated in the Deschutes County TSP (pg 144):

*"The agency has no plans to upgrade the facility at this time as the interchange is sufficient for the rural uses allowed under the zoning. ODOT has emphasized its desire to extend a raised median from the current one. The initial extension of the raised median would be north to Gift Road as well as south for an undetermined distance. The agency recognizes the out of direction travel that would result and thus has stated the current raised median would not be extended until a frontage road was in place on the west side of US 97."*

As stated in the TSP, ODOT and County looked at providing a frontage road on the west side of US 97 between Gift and Tumalo Roads. In response to a question about how the frontage road would operate if the interchange was upgraded to an urban design, ODOT provided the sketch drawing discussed above. It should be noted that the existing interchange was specifically designed to serve rural land uses and is fully expected to operate as designed into the foreseeable future.

Staff initially stated in the Staff Report that, because the County Transportation Planner determined the TIA does not comply with the TPR at OAR 660-012-0060(4), the applicant must propose a resolution of this issue. In response, the applicant submitted a Traffic Management Plan ("TMP"), dated June 8, 2015, which states that, as part of any development of the property, the developer shall:

1. Create a system of access easements that connect the three driveways with any lots created by partitioning or subdividing of the land.
2. Work with Commute Options to assist in preparing a two year start-up Transportation Demand Management program (TDM). The program will include:
  - A. Conducting workshops and training on TDM alternatives;
  - B. Provide posters and brochures promoting smart commuting choices;
  - C. A plan to have employees from on-site businesses have staggered start and end work hours.
3. Prepare an internal Traffic Control Plan (in accordance with the MUTCD), that includes:
  - A. Directional signing to Redmond, Bend, Tumalo at each intersection;
  - B. Time-restrictive (4 PM – 6 PM) "NO LEFT TURN" sign at the driveway onto Tumalo Place;
  - C. Bridge undercrossing shall be signed "ONE LANE ROAD";

- D. Prepare a site map, with the aid of DCPWD, showing the location of traffic control devices.
4. Have the Deschutes County Transportation Planner approve Traffic Management Plan.

The Hearings Officer finds that these components of the TMP satisfy OAR 660-012-0060(4) for this rezone and Goal exception application and will be included as a condition of approval of the applications. Review by the County Transportation Planner will be required for each and every proposed development of the property in the future. Such specific proposals may be conditioned or denied on the basis of failure to meet applicable traffic/transportation criteria if warranted by the terms of such proposals.

### **Section 3.10, Area Specific Policies**

#### **Deschutes Junction**

**Policy 3.10.11, Maximize protection of the rural character of neighborhoods in the Deschutes Junction area while recognizing the intended development of properties designated for commercial, industrial and agricultural uses.** (Emphasis added.)

**FINDINGS:** The Hearings Officer found in Powell/Ramsey, and I agree in this Decision, that this policy is directed at the county and not intended to be an approval criterion for quasi-judicial plan amendment and zone change applications for land in the Deschutes Junction area. Nevertheless, substantial evidence in the record shows that Deschutes Junction has had an extensive, well-developed transportation system of county and state highways and roads that have resulted in non-agricultural development. This is supported by evidence of 1,756 tax lots within a 2.5 mile radius of the subject property, including 1,250 urban sized lots, 60.4 acres of land zoned and used for Rural Industrial and other commercial uses. The road and highway network, the State Highway interchange and the railroad tracks and spurs are dominant features of the Deschutes Junction area. The record shows that there are more roads coming into Deschutes Junction than any other part of the county. According to Tim Berg, County GIS System Analyst, there are 121.9 acres of RI zoned land in Deschutes County, nearly 50% of which is located within Deschutes Junction. The record shows that the subject property, in particular, is more impacted by the road/highway development in Deschutes Junction than any other adjacent or adjoining property given its bisection in 1998 for construction of Tumalo Road and the Highway 97 overpass. Based on this fact, I find that potential industrial development of the subject property will not negatively impact any remaining "rural character" of Deschutes Junction because the remaining rural uses are to the south and northwest of the property and more distant from the impacts of highway, overpass and road system. Arterial roads surrounding the property, including its bisection by the overpass project, connect rural commercial and industrial existing uses that constitute the "core" of Deschutes Junction with the subject property itself. Rural neighborhoods to the northwest of the property are located at enough of a distance from the highway/road interchange to be protected from any impact of commercial/industrial development of the property. I find that approval of the requested applications will protect any remaining rural character of neighborhoods in the Deschutes Junction area, while recognizing the intended development of properties designated for commercial, industrial and agricultural uses.

**Policy 3.10.12, Review cumulative impacts of future development and future traffic improvements in the Deschutes Junction area in a manner consistent with Deschutes County traffic study requirements at 17.16.115,**



the Oregon Highway Plan, access management standards of OAR Chapter 734, Division 51, and OAR Chapter 660, Division 12, the Transportation Planning Rule (TPR). (Emphasis added.)

**Policy 3.10.13, Support safe and efficient travel around Deschutes Junction, including a frontage road extending north from Tumalo Road on the west side of Highway 97.** (Emphasis added.)

**FINDINGS:** The Hearings Officer found in Powell/Ramsey, and I agree in this Decision, that the above-underscored language in these policies indicates they are directed at the county rather than establishing approval criteria for quasi-judicial plan amendment and zone change applications.

As discussed in the findings above, staff initially stated that, because the County Transportation Planner determined the TIA does not comply with the TPR at OAR 660-012-0060(4), the applicant must propose a resolution of this issue. In response, the applicant submitted a TMP, dated June 8, 2015, which requires among other things, a TDM program requiring staggered start and end work hours and a Traffic Control Plan that prohibits southbound turning movements from Tumalo Road onto Tumalo Place during the 4-6 p.m. peak hours, addressing the concerns set forth by the County Transportation Planner in his comments on the proposal and TIA. As set forth above, the components of the TMP satisfy OAR 660-012-0060(4) for this rezone and Goal exception application and will be included as a condition of approval of the applications.

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

**FINDINGS:** The comprehensive plan has the following language for the rural industrial zone:

*Rural Industrial*

*The Rural Industrial plan designation applies to specific exception areas located outside unincorporated communities and urban growth boundaries. The Rural Industrial plan designation brings these areas into compliance with state rules by adopting zoning to ensure they remain rural and that uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022.*

Section 18.100.010 states the purpose of the RI Zone is:

*"... to encourage employment opportunities in rural areas and to promote the appropriate economic development of rural service centers which are rapidly becoming urbanized and soon to be full-service incorporated cities, while protecting the existing rural character of the area as well as preserving or enhancing the air, water and land resources of the area."*

I find that the Applicant's proposed plan amendment and zone change from EFU-TRB to RI would create employment opportunities in rural areas in general and in the Deschutes Junction area in particular. The "rural character" is described in the findings above and the zone change is consistent with the current character of the US Highway 97 interchange and surrounding rural industrial uses surrounding the subject property. There are more than 4,000 people living in the

Deschutes Junction area who largely commute to Redmond or Bend. Some could seek employment in the new RI zone, meeting goals for fewer miles traveled to work and enhancing air quality and reducing fuel usage. The provisions of the RI Zone, as well as any mitigation or other requirements imposed in the subsequent conditional use permit and/or site plan approval criteria applied to future development proposals in the RI Zone are designed to minimize adverse impacts on air and water quality and other land uses in the area. This criterion is met.

**Policy 3.4.23 To assure that urban uses are not permitted on rural industrial lands, land use regulations in the Rural Industrial zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-022 or any successor.**

**Policy 3.4.27 Land use regulations shall ensure that new uses authorized within the Rural Industrial sites do not adversely affect agricultural and forest uses in the surrounding area.**

**FINDINGS:** The applicant's proposed plan amendment and zone change from EFU to RI is subject to DCC Chapter 18.100, including 18.100.030, Use Limitations and 18.100.040 Dimensional Standards, which are intended to protect the surrounding area from intense industrial uses. I find that the proposed plan amendment and zone change will be consistent with the intent and purpose of the RI zone for the reasons set forth in the findings below.

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

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

**FINDINGS:** The record shows that necessary public facilities and services are available to serve future industrial development on the subject property. The property receives fire protection from the Deschutes County Rural Fire District No. 2 through the City of Bend Fire Department. No comments from the Fire Department were submitted on the applicant's proposal. The property receives police protection from the Deschutes County Sheriff. The applicant submitted into the record a letter from Pacific Power indicating that they can provide electrical service and a letter from Avion Water Company indicating they can provide water service to the Deschutes Junction area. Any future development at the site will require a septic system for sewage treatment.

As discussed in the findings above, staff initially stated that, because the County Transportation Planner determined the TIA does not comply with the TPR at OAR 660-012-0060(4), the applicant must propose a resolution of this issue. In response, the applicant submitted a TMP, dated June 8, 2015, which requires among other things, a TDM program requiring staggered start and end work hours and a Traffic Control Plan that prohibits southbound turning movements from Tumalo Road onto Tumalo Place during the 4-6 p.m. peak hours, addressing the concerns set forth by the County Transportation Planner in his comments on the proposal and TIA. As set forth above, the components of the TMP satisfy OAR 660-012-0060(4) for this rezone and Goal exception application and will be included as a condition of approval of the applications.

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

**FINDINGS:** The proposal's compliance with the relevant comprehensive plan goals and policies is addressed in the findings above, specifically Policy 3.10.11, "Maximize protection of the rural character of neighborhoods in the Deschutes Junction area while recognizing the intended development of properties designated for commercial, industrial and agricultural uses." For the reasons discussed in the Findings above, I find that this criterion is met.

- 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:**

**1. Mistake.** I find that the original EFU zoning of the subject property was not a mistake at the time of its original designation. The property's EFU designation and zoning were appropriate in light of the soil data available to the county in the late 1970s when the comprehensive plan and map were adopted.

**2. Change in Circumstances.** Substantial evidence was submitted with the application and at the public hearing showing changes in circumstances that have occurred since the property was originally zoned EFU-TRB by the County. The applicant listed certain changes of circumstances that have taken place in the last 15 years alone, from 1990 to the present, on page 47-53 of the burden of proof:

1. The average parcel size within a mile of the subject property has been reduced from 80 acres to 5 acres.
2. Deschutes County GIS Analyst Programmer Tim Berg states, "In the Deschutes Junction Vicinity there are 1,756 platted lots; 339 buildable lots which was a 20% increase in two years; 9 lots built out for industrial and commercial uses; 1,417 residential built out lots; and there are five different zones in the vicinity." More residential lots and rural subdivisions with lots to less than ¼ acre in size are within two miles.
3. The adjacent parcel 161226C000107 was rezoned RI in 2014.
4. A portion of Nichols Market Road, now called Tumalo Place, has been realigned and reconstructed as on and off ramps to the south-bound US Highway 97. Its realignment required the "taking" of land from the Applicant, reducing his parcel size and adding traffic adjacent to his property. The southern right-of-way of Tumalo Place forms the northern property line of the Applicant's property. The Applicant's property was "dog-eared" at the south-bound on-ramp.
5. Aceti's Hay Depot business is the last commercial agricultural business that provides the primary income for the owner in the vicinity. Due to changes in the hay market, the reduction in livestock being raised in the country and the reduction in parcel sizes throughout the area, the business is no longer viable. The area is shifting to a tourism/retirement based business.

6. The Deschutes Junction US Highway 97 Overpass western approach was constructed across the Applicant's land, bisecting it into two irregularly shaped portions, that made irrigation impossible and farming more difficult.
7. No longer can anyone see across the overpass approach from one side of the parcel to the other.
8. The land has not been irrigated since the overpass was constructed and cut through the established irrigation system.
9. The overpass construction reduced the parcel size and thereby removed the owner's ability to qualify for a farm dwelling.
10. Three paved dedicated turn lanes and three 120 foot long driveways that accommodate hay trucks were constructed into the parcel from the new roads. One entrance is from Tumalo Place and two entrances from Tumalo Road.
11. To partially address the lack of connectivity between the newly created northern and southern portions of the parcel, a 16 x 16 foot concrete tunnel was designed and constructed through the underpass approach for trucks, farm vehicles and livestock.
12. On January 22, 2001, an "unrestricted use easement," water line easement and an underground utility easement were granted by Deschutes County to Aceti in perpetuity for future development.
13. Aceti paid for a new 12-inch diameter Avion domestic water line to be brought from Tumalo Place through his land to the southern boundary line. He installed two fire hydrants, one in each portion of the parcel.
14. Tax lot 161227D000104 was created with remnant land at the end of the on and off ramp and overpass construction. It was deeded to the Applicant as a partial settlement for land lost to the new road right-of-ways. The lot allows for turn around and backing space to trucks to use his loading docks on the storage building.
15. The 1991 widening of US Highway 97 from two to four lanes took land from the subject parcel. It cut off the historic source of irrigation water from the Pilot Butte Canal and took 2/3 of the historic irrigation pond.
16. Aceti in 2003 attempted to build a new irrigation pond near the high point on his property. Using heavy equipment to dig it, the crews hit solid rock between the surface and four feet down. The attempt failed. During that process, the bulldozers dug about eight inches until they hit a solid lava flow slab. The meager soil was scraped and pushed up to form the brim of the pond, in order to create some depth to it. The applicant imported bentonite (an absorptive clay used as a sealant or filler) to make the base impermeable. But the shattered lava flow could not be sealed, and the process was abandoned.
17. The new overpass, the new south-bound on and off ramps to US Highway 97 and the reconfiguration of Tumalo Road, Deschutes Market Road and Pleasant

Ridge Road and the changes in the irrigation water access points have resulted in an unfarmable property because of its lack of irrigation water, location, size, configuration and soils.

In 1996 ODOT requested mitigation for the loss of the irrigation system and secured a proposal from Thompson Pump and Irrigation.

18. Aceti purchased and installed a water pump to draw water from the irrigation pond on Half Mile Road, filled with Swalley Irrigation System water. With cooperation from the owners of tax lot 161227D001100, the Applicant shared the water pipes on the neighboring property. However, the current owners who are associated with the Seventy Day Adventist Church do not farm and do not use the irrigation system. They plan to use the 30 acres for recreational uses for the present school on the adjacent property, tax lot 161227D000100. Even with all the money spent and the effort made, due to the overpass, it is infeasible to irrigate the northern portion and therefore grow a crop on the northern portion of this property.
19. Rural and urban density residential subdivisions and commercial and industrial development in the area have resulted in a parcel that is nearly impossible to farm and irrevocably committed to urbanization. That action began with the platting of Centralo in 1911 and continues today. No parcel within a half mile of the subject site is being commercially farmed today.
20. The new Swalley Hydroelectric plant is south of Deschutes Junction, on the west side of US Highway 97. When the Applicant tried unsuccessfully to use his 19 acres of irrigation water rights, he put the water back into the Deschutes River through the Deschutes River Conservancy's In-Stream leasing program. His annual Swalley Irrigation District bill dropped from \$1,000 per year to \$300 per year. However, Swalley then piped much of its canal and constructed a hydroelectric plant upstream from the subject property. Swalley rescinded his annual in-stream lease because the irrigation water was needed to turn the turbine. His bill returned to \$1,000 annually, even though he is not using the water and agreed to in-stream leasing. Swalley's new in-stream leasing policies only allow Aceti to lease the water to the Deschutes River Conservancy's in-stream leasing program once every five years, but the \$1,000 per year assessment fees continue, even though he is not using the water.
21. Commercial, industrial, wholesale, and retail businesses now surround the property on its northern and eastern side and a school on the western side. No one farms the 4 acre parcel with a rental house on the ridge at the southern end of his property.
22. ODOT and the County have been discussing and circulating designs to eliminate the unsafe intersection of US Highway 97 and Gift Road. The current proposed solution is to eliminate the intersection entirely and direct traffic to a new road paralleling the west side of the highway south to Tumalo Place, ending at the northern property line of the subject property.

23. ODOT and the County are circulating designs and discussing a diamond interchange at Deschutes Junction that will either be on the Applicant's property or just north of it.
24. The following table summarizes changes to the subject property and adjacent property since 1991.<sup>1</sup>
25. On November 6, 1997 Hearings Officer Karen Green signed a conditional approval of a conditional use permit for the subject parcel. Many of her 3.5 pages of conditions were urban in nature, adding to the urbanization of the parcel. They interfered with the ability of the Applicant to farm, took land out of the farm, and increased overhead so much that the hay farming operation became infeasible. The Applicant made many fire safety improvements. Many of them such as the "fire apparatus access roads" took more land out of farming. The most expensive was that he paid to bring the 12-inch diameter Avion water line from Tumalo Place into the property and the ditch was dug through the rock and the pipe was put in for the entire length of the property, north to south. This created a twenty-foot wide easement that could not be farmed or developed. Then he paid to install two fire hydrants surrounded by bollards, one on the northern portion and one on the southern end of the parcel. At that time, there only was one parcel, 161226C000201. The smaller parcel of remnant land from the road projects had not been created. How many farms in Deschutes County have 12-inch domestic water lines or two fire hydrants on them? Home many farmers have been required to make these urban types of improvements on EFU zoned land in order to sell hay?

The listed changes in circumstances are summarized in Figure 19 at pages 54-57 of the Burden of Proof. In addition, Exhibit 1A, dated July 8, 2015, summarizes the changes to the water delivery system and irrigation difficulties associated with the subject property, as detailed in the findings above. The Applicant also submitted video evidence at the hearing which showed, among other things, the surrounding property uses, including commercial, industrial and residential, the impact of the proximity to Highway 97 on the subject property, the bisection of the subject property by the overpass project, damage to the fence surrounding the property by traffic, noise from adjacent highway and other high intensity uses. Finally, the new site-specific soils data for the subject property (Exhibit 14 to the Burden of Proof) is a significant change of circumstances justifying the proposed plan amendment and zone change, given that the property is comprised predominantly of Class VII and Class VIII soils that are unsuitable for farm use.

Staff noted, and I agree that statements regarding the alleged impact of the construction of the Swalley hydroelectric facility on the applicant's in-stream leasing of irrigation water are misplaced, as noted in the findings above. Also, Swalley does not get their water from COID's Pilot Butte Canal. Finally, Swalley has indicated that they do not acquire or administer any private easements for water delivery, so there is no "Swalley easement." However, as detailed in the findings above, there are significant changes in circumstances concerning the water delivery system and irrigation to the subject property that have occurred since the property was originally zoned EFU-TRB, as detailed in Exhibit 1A, dated July 7, 2015.

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<sup>1</sup> The applicant's table was not included in the Staff Report.

In ZC-01-1, the Hearings Officer found that, "...any change in circumstance justifying a zone change must be to the subject property or other property in the vicinity and not to the property owner's circumstances or needs." I find that the following general circumstances have changed with respect to the subject property and/or to other property in the vicinity since 1990 and are not representative of a change in the property owner's circumstances or needs:

- The reduction of the number of acres in the applicant's parcel due to road projects.
- The reduction in the average parcel size within 1 mile of the subject property from 80 acres to 5 acres
- The reconfiguration of the parcel into two distinct, irregularly shaped portions that are difficult, expensive, and nearly impossible to farm and irrigate.
- The construction of the Deschutes Junction overpass across the subject property which resulted in lack of irrigation water, and adverse changes in location, size, configuration and soils rendering the property un-farmable.
- The fact that the ODOT Highway 97 widening project In February 1991, cut through a shared irrigation pond, reducing it by 75% and making it inoperable.
- The fact that the land has not been irrigated since the overpass was constructed and cut through the established irrigation system
- The re-routing of commuter traffic onto roads around the subject property.
- The construction and realignment of Tumalo Place, Tumalo Road, Deschutes Market Road and Pleasant Ridge Road around the property.
- The rezone of some of the adjacent United Pipe property and some of Robinson's property to RI.
- The continuous subdivision, platting and replatting of new residential lots in the vicinity and the fact that no parcel within ½ mile of the subject property is being commercially farmed today
- The fact that commercial, industrial, wholesale and retail businesses now surround the property on its northern and eastern side, and a school is on the western side, and the fact that no one farms the 4-acre parcel developed with a rental house at the southern end of the property
- The fact that Mr. Aceti did not receive an easement or written agreement to irrigate the property when he purchased the property; despite the fact that ODOT paid in 1991 to have a new ditch and pond dug along Half Mile Lane on TL 1100, Mr. Aceti . did not receive any easement or right to use TL 1100 or 1200 or the equipment for delivery of irrigation water to the subject property.

For all the foregoing reasons, the Applicant has established the public interest is best served by rezoning the property under the criteria set forth in DCC 18.136. The criteria are met.

#### **Statewide Land Use Planning Goals**

#### **B. Oregon Administrative Rules, Chapter 660, Land Conservation and Development Commission**

##### **1. Division 15, Statewide Planning Goals and Guidelines**

## **FINDINGS:**

**Goal 1, Citizen Involvement.** The Planning Division provided notice of the proposed plan amendment and zone change to the public through individual mailed notices to nearby property owners, publication of notice in the Bend "Bulletin" newspaper, and posting of the subject property with a notice of proposed land use action sign. In addition, a public hearing will be held before the Hearings Officer on the proposal, and a public hearing on the proposal will also be held by the Deschutes County Board of Commissioners ("Board"), per DCC 22.28.030(C). The proposal is consistent with Goal 1.

**Goal 2, Land Use Planning.** Goals, policies and processes related to plan amendment and zone change applications are included in the county's comprehensive plan and land use regulations in Titles 18 and 22 of the Deschutes County Code and have been applied to the review of these applications. The proposal is consistent with Goal 2.

**Goal 3, Agricultural Lands.** Goal 3 is "[t]o preserve and maintain agricultural lands." As LUBA has explained in various cases including *DLCD v. Klamath County*, 16 Or LUBA 817, 820 (1998) and *Wetherall v. Douglas County*, LUBA No. 2006-122 (October 9, 2006), a county can follow one of two paths to support a decision to allow non-resource use of land previously designated and zoned for farm use. One option is to take an exception to Statewide Planning Goal 3. The other is to adopt findings which demonstrate that the land does not qualify as agricultural under the applicable statewide planning goal. The latter path has been selected as the preferred procedure which is a option permitted by state law. As discussed in the findings above, the subject property does not constitute "agricultural land" because it is comprised predominantly of Class VII and VIII soils that are not suitable for farm use. The proposal is consistent with Goal 3.

**Goal 4, Forest Lands.** I find that this goal is not applicable because the subject property does not include any lands that are zoned for, or that support, forest uses.

**Goal 5, Open Spaces, Scenic and Historic Areas and Natural Resources.** I find that this goal is not applicable because the record indicates there are no identified Goal 5 resources on the subject property.

**Goal 6, Air, Water and Land Resources Quality.** I find that the applicant's proposal to rezone the property from EFU-TRB to RI, in and of itself, will not impact the quality of the air, water, and land resources of the county. Any future RI Zone development of the property would be subject to local, state, and federal regulations protecting these resources. The proposal is consistent with Goal 6.

**Goal 7, Areas Subject to Natural Disasters and Hazards.** I find that this goal is not applicable because the subject property is not located in a known natural disaster or hazard area.

**Goal 8, Recreational Needs.** I find that this goal is not applicable because the proposed plan amendment and zone change do not affect recreational needs, and no specific development of the property is proposed.

**Goal 9, Economy of the State.** This goal is to provide adequate opportunities throughout the state for a variety of economic activities. I find that the proposed plan amendment and zone change is consistent with this goal because it will provide opportunities for economic



development in the county in general, and in the Deschutes Junction area in particular, by allowing the currently undeveloped and unused property to be put to a more productive use.

**Goal 10, Housing.** I find that this goal is not applicable because the proposed plan amendment and zone change will not affect existing or needed housing.

**Goal 11, Public Facilities and Services.** This goal requires planning for public services, including public services in rural areas, and generally has been held to prohibit extension of urban services such as sewer and water to rural lands outside urban growth boundaries. I find that this goal is not applicable to the applicant's proposal because it will not result in the extension of urban services to rural areas. As discussed in the findings above, public facilities and services necessary for development of the subject property in accordance with the RI Zone are available and will be adequate.

**Goal 12, Transportation.** As discussed in the findings above, staff initially stated that, because the County Transportation Planner determined the TIA does not comply with the TPR at OAR 660-012-0060(4), the applicant must propose a resolution of this issue. In response, the applicant submitted a TMP, dated June 8, 2015, which requires among other things, a TDM program requiring staggered start and end work hours and a Traffic Control Plan that prohibits southbound turning movements from Tumalo Road onto Tumalo Place during the 4-6 p.m. peak hours, addressing the concerns set forth by the County Transportation Planner in his comments on the proposal and TIA. As set forth above, the components of the TMP satisfy OAR 660-012-0060(4) for this rezone and Goal exception application and will be included as a condition of approval of the applications. Accordingly, the Applicant's proposal is consistent with Goal 12.

**Goal 13, Energy Conservation.** I find that the applicant's proposed plan amendment and zone change, in and of themselves, will have no effect on energy use or conservation since no specific development has been proposed in conjunction with the subject applications. In any case, providing additional economic opportunities on the subject property may decrease vehicle trips for persons working in the Deschutes Junction area, therefore conserving energy. The proposal is consistent with Goal 13.

**Goal 14, Urbanization.** Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use." I find that the subject property is "nonresource land" based on the fact that it is not Agricultural Land subject to Goal 3, but the proposed plan amendment and zone change is subject to Goal 14. This is because it could result in the "urbanization" of the subject site by allowing development with RI Zone uses that are more "urban" in nature including both retail and service uses. For this reason, an exception to Goal 14 is required for the proposed plan amendment and zone change. As discussed in detail in the findings below, the applicant has demonstrated the proposal qualifies for an "irrevocably committed" exception to Goal 14.

**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.

I find that the applicant's proposal is consistent with all applicable statewide planning goals except Goal 14; this criterion is met with an exception to Goal 14, as set forth in the findings below.

#### **Transportation Planning Rule**

2. Division 12, Transportation Planning Rule

a. OAR 660-012-0060, Plan and Land Use Regulation Amendments.

(1) If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would:

(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan;

**FINDINGS:** The applicant is not asking the County to change the functional classification of an existing or planned transportation facility. Therefore, this criterion is met.

(b) Change standards implementing a functional classification system; or

**FINDINGS:** The applicant is not asking the County to standards that implement a functional classification system. Therefore, this criterion is met.

(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.

(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;

(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or

(C) Degrade the performance of an existing or planned transportation facility that is otherwise

projected to not meet the performance standards identified in the TSP or comprehensive plan.

**FINDINGS:** In March 2015, Gary Judd, PE, of Sage Engineering and Associates, completed a Traffic Impact Analysis (TIA) for the applications (Exhibit 28 to Burden of Proof). As discussed in the findings above, staff initially stated that, because the County Transportation Planner determined the TIA does not comply with the TPR at OAR 660-012-0060(4), the applicant must propose a resolution of this issue. In response, the applicant submitted a TMP, dated June 8, 2015, which requires among other things, a TDM program requiring staggered start and end work hours and a Traffic Control Plan that prohibits southbound turning movements from Tumalo Road onto Tumalo Place during the 4-6 p.m. peak hours, addressing the concerns set forth by the County Transportation Planner in his comments on the proposal and TIA. As set forth above, the components of the TMP satisfy OAR 660-012-0060(4) for this rezone and Goal exception application and will be included as a condition of approval of the applications. In addition, the TIA states that the three existing driveways with dedicated turn lanes designed for truck traffic that provide safe access into and out of the property from Tumalo Road and Tumalo Place and the tunnel under the overpass approach that allows vehicles to move between the southern and northern portions of the property, each serve to reduce traffic impacts around the site. In addition to the TDM program that will address the LOS "F" conditions predicted to exist at Tumalo Road and Tumalo Place – with or without the proposed rezone – these existing transportation improvements result in options to enter and exit the property and thereby reduce impacts to the intersection at Tumalo Place and Tumalo Road.

- (2) If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below, unless the amendment meets the balancing test in subsection (2)(e) of this section or qualifies for partial mitigation in section (11) of this rule. A local government using subsection (2)(e), section (3), section (10) or section (11) to approve an amendment recognizes that additional motor vehicle traffic congestion may result and that other facility providers would not be expected to provide additional capacity for motor vehicles in response to this congestion.

  - (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) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.
  - (d) Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures 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.
  - (e) Providing improvements that would benefit modes other than the significantly affected mode, improvements to facilities other than the significantly affected facility, or improvements at other locations, if the provider of the significantly affected facility provides a written statement that the system-wide benefits are sufficient to balance the significant effect, even though the improvements would not result in consistency for all performance standards.
- (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) 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;
  - (b) 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;
  - (c) The amendment does not involve property located in an interchange area as defined in paragraph (4)(d)(C); and

- (d) 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 (c) of this section.

**FINDINGS:** I find that the TPR is applicable to the applicant's proposal because it requests an amendment to an acknowledged plan. The zone change will have an adverse effect on the identified function, capacity and performance standards of the transportation facilities in the impact area, specifically, the intersection of Tumalo Road and Tumalo Place, which is projected to operate at LOS "F" in the year 2035, with or without the proposed rezone. As discussed in the findings above, the applicant submitted a traffic study dated March 2015 and a TMP dated June 8, 2015 which requires among other things, a TDM program requiring staggered start and end work hours and a Traffic Control Plan that prohibits southbound turning movements from Tumalo Road onto Tumalo Place during the 4-6 p.m. peak hours, addressing the concerns set forth by the County Transportation Planner in his comments on the proposal and TIA. As set forth above, the components of the TMP satisfy OAR 660-012-0060(4) for this rezone and Goal exception application and will be included as a condition of approval of the applications.

- (4) Determinations under sections (1)-(3) of this rule shall be coordinated with affected transportation facility and service providers and other affected local governments.

**FINDINGS:** As discussed in the findings above, the Planning Division sent written notice of the applicant's proposal to a number of public and private agencies, including the City of Bend Fire Department, the county road department and ODOT. I find that this notice provided adequate opportunity for coordination with affected transportation and service providers and local governments.

For the foregoing reasons, the application complies with the TPR, as conditioned in the conditions of approval below.

### **Agricultural Land**

#### **3. Division 33, Agricultural Land**

**FINDINGS:** The applicant requests approval of a plan amendment and zone change for the subject property. The applicant submits, and I agree that the subject property does not constitute "agricultural land" requiring protection under Goal 3 and therefore no exception to that goal is required for the reasons set forth in the findings herein. The standards and procedures for identifying and inventorying agricultural land are found in OAR Chapter 660, Division 33, discussed in the findings below.

**a. OAR 660-033-0010, Purpose**

**The purpose of this division is to preserve and maintain agricultural lands as defined by Goal 3 for farm use, and to implement ORS 215.203 through 215.327 and 215.438 through 215.459 and 215.700 through 215.799.**

**FINDINGS:** Goal 3 defines "agricultural land" in relevant part as follows:

**Agricultural Land – \* \* \* in eastern Oregon is land of predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the U.S. Natural Resources Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability for farm irrigation purposes, existing land-use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event.**

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

**b. OAR 660-033-0020, Definitions**

**For purposes of this division, the definitions in ORS 197.015, the Statewide Planning Goals, and OAR chapter 660 shall apply. In addition, the following definitions shall apply:**

**FINDINGS:** This rule defines "agricultural land" by essentially the same terminology used in the language of Goal 3, and describes it as consisting of:

- land that is predominantly Class I-VI soils (in Eastern Oregon) without a goal exception;
- land that is predominantly Class VII and VIII soils and that is "suitable for farm use" considering the factors set forth in OAR 660-033-0020(1)(a)(B) of this rule;
- land that is necessary to permit farm practices on adjacent or nearby agricultural lands; and
- Class VII and VIII land that is adjacent to or intermingled with Class I-VI land within a farm unit.

The applicant submits and I agree that the subject property does not constitute "agricultural land" under any of these categories, each of which is discussed in the findings below.

**Predominantly Class I-VI Soils**

- (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;

**FINDINGS:**

**Appropriate Unit of Land.** In the Hearings Officer's decision in *NNP* (PA-13-1, ZC-13-1), the "predominant soils" prong of the agricultural land definition cannot be applied until an appropriate unit of land is selected to determine whether Class I-VI soils are predominant within that unit of land based on the decision of the Land Use Board of Appeals (LUBA) in *Wetherell v. Douglas County*, 50 Or LUBA 71 (2005). I agree with and apply this approach. The Hearings Officer finds that the entire 21.59-acre subject property is the appropriate unit of land because it is two tax lots under single ownership which will be used together. The northern portion of the subject property is physically separated from the nearest EFU-zoned parcels by roads. They are under single ownership. Neither parcel is comprised of Agricultural Land.

**Predominant Soils.** The NRCS soils maps for the subject property show it is composed of three soil units: 36A, Deskamp loamy sand, 0 to 3% slopes; 38B, Deskamp-Gosney complex, 0-8% Slopes, and 58C, Gosney-Rock outcrop-Deskamp complex, 0 to 15% slopes. The Deskamp soils are designated Class III when irrigated and Class VI without irrigation. The Gosney soils are designated Class VII with or without irrigation, and the Rock Outcrop is Class VIII. The NRCS data shows the subject property is predominantly Class I-VI soils with irrigation and therefore "agricultural land." As noted in the Findings above, the applicant submitted a site-specific "Agricultural Soils Capability Assessment" of the subject property – the Borine study. This study is dated May 8, 2012, was prepared by Roger Borine of Sage West, LLC, and is included in the record as Exhibit 14 to the applicant's original burden of proof.

The record indicates that in January of 2013, the Department of Land Conservation and Development (DLCD) certified the study pursuant to OAR 660-033-0030 and 0045, by an electronic mail message from Katherine Daniels of DLCD to Deschutes County Community Development Director Nick Lelack. Mr. Borine's submission and the certification document are included in the record as part of Exhibits 14 and 15 to the applicant's original burden of proof. DLCD's certification states in relevant part:

*"The department has reviewed the attached certified soils assessment prepared by a professional soil classifier under OAR 660-033-0030 and 0045, along with the submittal, release and report requirement forms. A completeness check indicates that the soils assessment is consistent with reporting requirements. Please note the wide variation in NRCS and consultant-reported soil capability classifications. The county may make its own determination as to the accuracy and acceptability of the soils assessment."*

The Borine study identified different soils units on the subject property than are identified on the NRCS maps. However, Mr. Borine conducted an on-site investigation to provide a more detailed soil analysis and mapping. His methodology is described at page four of the soil study in relevant part as follows:

*"An Order 1 soil survey is prudent to accurately define soils, mapping units, and miscellaneous areas and accurately locate their boundaries. Methods to investigate the soil included the use of shovel, auger, probe and backhoe. Point observations and transects were used to identify soil characteristics, map unit composition and accurately located soil boundaries. In addition, two sites were sampled for laboratory analysis of nutrient levels and cation exchange capacity.*

*\* \* \**

*Prior to 1960 this area was highly modified from natural conditions. Shallow soil and rock outcroppings in the higher landscape position were removed and leveled and moderate deep soils were used as fill and overburden for rocky areas. This activity resulted in concave depressions now having shallow and moderately deep soils and convex areas having shallow and very shallow soils with some rock outcrops. There area was then smoothed, planted to grass and sprinkler irrigated with a wheel line system.*

*In 1995 the land was purchased by the present owner. Agricultural buildings, land modifications for staging, equipment movement, parking, crop storage, and a pond development have been constructed. In 1997 a portion of land was purchased by the State of Oregon for a highway overpass. This overpass diagonally bisected tax lot 201. The overpass impedes the efficient design and operation of wheel or pivot irrigation systems. Since construction of the overpass, the land has been idle. Tax lot 201 has irrigation water rights for 19.71 acres and has been enrolled in the Oregon Water Resources Department's Instream Leasing Program.*

*The initial inventory and study identified the Deskamp and Gosney series. In unit 38B a very shallow contrasting inclusion was described and identified as a potential major component at an Order 1 level. It is not referenced as a contrasting inclusion in unit 36A. For clarity the very shallow contrasting soil will be referenced as Zeta soil for this study only and is a non-correlated soil series name. The miscellaneous area Urban Land was also identified as a potential major component at an Order 1 level. It lacks soil and supports little or no vegetation. It is mostly agricultural buildings, land modifications for staging, equipment movement, parking, crop storage, pond development and areas of fill material.*

*\* \* \**

*In this study area the soil depth and available water capacity (AWC) were the primary criteria for designing soil mapping units. AWC is the volume of water that should be available to plants in a soil holding water at full potential. When roots are excluded by bedrock this is considered the effective soil depth for plant growth. The Oregon LCC guide rates soils having an AWC less than 2 inches at LCC 7 when irrigated or non-irrigated and soils less than 10 inches deep as LCC 7."*



*This study area was separated into four mapping units that distinguish lands in LCC 3-6 from those in LCC 7-8. This soil mapping at an Order 1 level accurately delineates the following mapping units.*

*A – Deskamp loamy sand, 0-3% slopes: This mapping unit is on lava plains. Soils are volcanic ash over basalt. Slopes are 0 to 3%. The Deskamp and similar soils are 85 percent and dissimilar soils are 15 percent. The Deskamp soil is loamy sand and gravelly loamy sand, 20 to 40 inches deep over basalt.*

*B – Gosney, deep-Deskamp complex, 0-8% slopes: This mapping unit is on lava plains. Soils are volcanic ash over basalt. Slopes are 0 to 8%. The Gosney, deep phase and similar soils are 65 percent and Deskamp is 25 percent. The Gosney, deep phase is loamy sand, 16 to 20 inches deep over basalt. The Deskamp soil is loamy sand, 20 to 40 inches deep over basalt.*

*C – Gosney-Zeta complex, 0-3A% slopes: This mapping unit is on lava plains. Soils are volcanic ash over basalt. Slopes are 0-3%. The Gosney and similar soils are 70 percent and Zeta soils are 25 percent. The Gosney soil is loamy sand, 10 to 16 inches deep over basalt. The Zeta soil is loamy sand, 2-10 inches deep over basalt.*

*D – Urban Land: This miscellaneous area has essentially no soil and supports little or no vegetation. It is mostly agricultural buildings, land modifications for equipment movement, parking, crop storage, pond development and areas of fill material.*

Table 2 of the Borine study, set forth below, shows that of the 21.6 acres comprising the subject property only 4.3 acres (20%) consist of Soil Unit 36A, and the remaining 80% of the subject property consists of Urban Land (already developed with the warehouse use), and the Gosney-Zeta complex. As seen in Table 2, Mr. Borine concluded that the majority of the soils on the subject property are Class VII or VIII soils and therefore predominantly non-agricultural soils.

Mr. Borine concluded soils on the subject property are Classes 6, 7 or 8 without irrigation and classes 3, 6, 7 and 8 when irrigated. 8% of the soils are Class 3 when irrigated and 59% are Class 7 when irrigated. 21% of the soils are Class 8 when irrigated. Therefore, about 90% of the soils are non-agricultural soils.

Mapping Unit	Soil Type	Soil Description	Area (Acres)	Percentage (%)	Class	Area (Acres)	Percentage (%)	Class	Area (Acres)	Percentage (%)	Class
A	Deskamp loamy sand 0 to 3% slopes	Deskamp	85	6	3	-	-	1.7	8	1.7	8
B	Gosney, deep Deskamp complex, 0 to 8% slopes	Gosney, deep Deskamp	65 25	6 6	6 3	-	-	2.6	13	2.6	12
C	Gosney-Zeta complex,	Gosney	70	7	7	0.2	15	12.6	62	12.8	59
		Zeta	25	7	7						

	0-3% slopes										
D	Urban Land		95	8	8	1.1	85	3.4	17	4.5	21

On page 8, Borine concludes that, "The inventory and analysis of this parcel T16S,R12E, Section 26, tax lot 201 and Section 27, tax lot 104 determined that approximately 80% (17.2 acres) is Land Capability Class 7 and 8 soils, and 20% (4.3 acres) is Land Capability Class 3-6 soils. The parcel as defined is not predominantly Agricultural Land." (emphasis in original).

Substantial evidence in the record supports a finding that the property is not Agricultural Land as it consists of predominantly Class VII and VIII soils and is further unsuitable for farm use considering profitability and factors in the Goal 3 administrative rule, including, among other things, difficulties associated with irrigating the property, impacts of nearby heavy traffic and transportation, the bisection of the property with the construction of Tumalo Road, surrounding commercial and industrial uses, and the relatively small size of the parcel.

- (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

**FINDINGS:** The applicant's soil study shows the subject property is predominantly Class VII and VIII soils. The Hearings Officer noted in the Powell/Ramsey decision, and I agree with the statement that DLCD's administrative rules define Class VII and VIII soils as having very severe limitations that make them unsuited for cultivation. Thus, the next question under this administrative rule is whether the Class VII and VIII soils on the subject property nevertheless constitute "agricultural land" based on the factors listed in this paragraph. For the following reasons, I find that the answer to the question is "no."

**Soil Fertility.** The Borine study states the following with respect to soil fertility:

*"Organic matter for these sites is extremely low to non-measurable and clay content is less than five percent, resulting in a very low Cation Exchange Capacity (CEC); the higher the CEC the better. The CEC is important because it provides a reservoir of nutrients for plant uptake. Both sample sites have low levels of nitrogen, phosphorus, potassium, and sulfur. High levels of fertilization are required for grass crop to be produced. Without an ability of the soil to attract and absorb nutrients (low CEC) they are readily leached out of the soil by irrigation and precipitation thus becoming unavailable for plant use and lost into the surface and ground water. Presently, the pH (acidity/basicity) of soils is adequate, but soils with a low CEC can quickly be reduced by additions of nitrogen and sulfur fertilizers, also making nutrients unavailable to plants. To maintain a minimum level of essential nutrients for proper crop growth continual applications of very high rates of fertilizer and soil amendments are required. Without these yearly inputs, soils are non-productive and infertile."*

**Soil Depth.** The Borine study states the following:

*"More than 60% of soil on this parcel is 2 to 16 inches deep. Typical depth for cultivation is 6-8 inches deep. This soil is unsuitable for cultivation due to limited and inconsistent soil depth throughout. The AWC is very low due to shallow depths and sandy soil. Evapotranspiration in summer months exceed the ability of the soil to hold adequate moisture for plant growth. Frequent irrigations, irrigation water management techniques, and inconsistent flow of irrigation water cannot meet crop requirements."*

**Suitability for Grazing.** The Borine study states the following with respect to the subject property's suitability for grazing:

*"Landscape and soil characteristics determine the suitability for grazing livestock. Limitations that are recognized on this site include the cold climate and soil temperatures that delay growth of forage and shorten the growing season. Reestablishment of the native vegetation is likely impossible due to the pumice ash surface layer, and past land alterations; restricted depth limits seeding only to drought tolerant species, and rock outcrop limits the areas suitable for grazing."*

**Climatic Conditions.** The Borine study states the following with respect to the subject property's climatic conditions:

*"This parcel is located very close to the Bend Weather Station. Climatic data is available from 1) AgriMet BEWO (2003-present) and 2) Bend Weather Station (1971-2000). The Soil Survey of the Upper Deschutes River Area, OR cites the Bend Weather Station for analysis. Pertinent conditions for this parcel using this weather station data show that 5 years in 10 the freeze (killing frost – 28 degrees F) dates are later than June 7<sup>th</sup> and earlier than September 15<sup>th</sup> with the growing season of 91 days, and growing degree days are 3,264. Average annual precipitation is 11.7 inches at 3,600 ft. elevation. The Madras area, also in central Oregon, will be used for comparison as it is known to produce a variety of field crops successfully."*

*The Madras Weather Station dates show that 5 years in 10 the freeze dates are later than May 6<sup>th</sup> and earlier than October 12<sup>th</sup> with the growing season of 184 days, and growing degree days of 3,911. Average annual precipitation is 11.4 inches at 2,400 ft. elevation. The comparison of data shows the Madras area that is known to successfully produce a large variety of field crops has greater than 60 days with less chance of having a killing frost, has twice the growing season, and 120% greater number of growing degree days as the Bend weather station and this parcel. Climatic conditions that exist on this parcel greatly restrict production of most field crops. Grass for pasture and hay is the only crop climatically that can be grown successfully."*

**Existing and Future Availability of Water for Farm Irrigation Purposes.** The applicant submitted the following to address this standard:

*"As previously stated, the subject property has some rights to the water conveyed by the Pilot Butte Canal that date back to the 1904 homesteader James R. Low. In 1991 when US Highway 97 was widened to four lanes, steel pipes under the highway from the Pilot Butte Canal were removed. There is no longer a lateral, pipe or ditch onto his property. No neighbor who is irrigating their property shares a delivery system with the Applicant. An agreement between COID and the Swalley District allows the owner to use Swalley water, if it can be delivered to his property. If that could happen, it would be nearly impossible to configure a piping system to irrigate the northern portion of this land, north*

of the Deschutes Junction Overpass. The smaller constrained angled portion south of the overpass is also very difficult to irrigate, as the previous owner, Bruce Barrett has testified to the County.<sup>2</sup> Efforts to dig a water storage pond on site have failed (See letter of Thompson Pump and Irrigation, Figure 17, page 51). Drilling a well is cost prohibitive and logistically difficult because you have to remove the water rights from the Swalley Irrigation District which would reduce the water going through the hydropower turbine, apply for new rights under the state's jurisdiction of groundwater allocation, among other issues. Even if using irrigation water was feasible, the subject property's soils are too poor to justify irrigating them."

**Existing Land Use Patterns.** The applicant submitted the following to address this standard:

*"As discussed thoroughly and in detail in the Surrounding Uses Section of this application, the subject property is surrounded with non-agricultural uses and is already committed to urbanization. On the western property line are roads and the Seventh Day Adventist Christian School. The school is located on 15.42 landscaped acres (Tax Lot 161227D000100). The two parcels to the south of the school, and southwest of the subject parcels, including a 30.45 acre parcel and a 7.60 acre parcel are owned by a subsidiary to the Seventh Day Adventist Church and are held for future educational or recreational uses (Tax Lots 1100 and 1300). Directly north of the subject sites are lots used for industrial, retail and commercial uses. Immediate east of the subject site are many parcels zoned Rural Industrial. Directly south of the subject site is a pie-shaped lot of 4.15 acres that is also difficult to farm and is not farmed and is used as a residential rental. The nearest parcel of 20 acres or more, off Half Mile Lane, is farmed for personal pasture for horses. The owner intends to subdivide it. The next largest parcel is pasture is over a half mile away on the other side of the highway.*

*As the Borine study notes, the majority of the subject property is either already developed with the storage barn, three associated driveways, parking and turnaround areas, or it is too poor a soil to cultivate."*

The record shows that commercial agricultural uses in the vicinity of the subject property are limited.

**Technological and Energy Inputs Required.** The applicant states the following in the burden of proof:

*"Borine's report says that excessive technological and energy inputs – including heavy use of fertilizer and soil amendments and frequent irrigation – would be required to make the soils on the subject property somewhat productive, given the soil's very poor quality, and they are likely to fail, as efforts to farm it in the past 110 years have failed."*

**Accepted Farming Practices.** The applicant states the following in the burden of proof statement:

*"It is not an accepted farm practice in Central Oregon to irrigate and cultivate poor quality Class VII and VIII soils – particularly where, as here, those soils are adjacent to rural industrial uses, urban density residential neighborhoods that complain about dust*

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<sup>2</sup> Staff is not sure where this testimony occurred, as it does not appear to be a part of these applications.

*and chemicals and to high traffic counts on the surrounding roads and highways. Irrigating rock is not productive.*

Substantial evidence in the record shows that the subject property does not constitute "agricultural land" under the Goal 3 administrative rule factors first because it is comprised of Classes VI and VII soils, and second, based on a consideration each of following factors, addressed by the Borine report: 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.

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

**FINDINGS:** The burden of proof states the following to address this standard:

*"As discussed on the Findings of Fact above, most of the subject property and surrounding lands are engaged in rural industrial, educational, commercial, or nonfarm uses. The record indicates that to the east of Graystone Lane is Willamette Graystone, a concrete products manufacturing facility. North of Deschutes Pleasant Ridge Road is land zoned EFU-TRB but is developed with a quasi-commercial park and gift/antique shop called "The Funny Farm." To the south of Deschutes Market Road is land zoned RI and used for pumice processing, and farther south is publically owned and undeveloped land along both sides of US Highway 97. Immediately to the west are the Three Sisters Adventist School and 30 acres of associated educational properties and other rural and urban density residences in subdivisions platted before Senate Bill 100 was contemplated. Along Half Mile Lane, west of the school land are a handful of 3 to 20 acre hobby farms that will not be affected by this rezone. West of Highway 97 and north of Tumalo Road is a building/landscaping supply business on land zoned RC. Some owners of parcels located over a half mile away to the northeast across US Highway 97, are engaged in recreational, non-commercial farm uses. The subject property is not land necessary to permit farm practices to be undertaken on those lands because none of those farm uses is dependent upon the subject property, nor close to it."*

The Hearings Officer finds that the subject property is not land necessary to permit farm practices to be undertaken on adjacent or nearby lands because none of the identified farm uses on those lands is dependent upon the subject property.

**(b) Land in capability classes other than I-IV/I-VI that is adjacent to or intermingled with lands in capability classes I-IV/I-VI within a farm unit, shall be inventoried as agricultural lands even though this land may not be cropped or grazed.**

**FINDINGS:** The applicant states in the burden of proof the following to address this standard:

*"As discussed in the findings above, the Borine study found in Table 3 that 80% of the subject property consists of Class 7 and 8 soils, and that the soils on the subject site are not adjacent to or intermingled with the higher capability soils. In addition, the property is neither a farm unit itself nor part of a larger farm use. None of the adjacent property is farmed."*

The Hearings Officer finds that the subject property is predominantly class VII and VIII soils and would not be considered a farm unit itself nor part of a larger farm unit based on the poor soils and the fact that none of the adjacent property is farmed.

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

**FINDINGS:** The Hearings Officer finds that the subject property is not within an acknowledged urban growth boundary (UGB) or acknowledged exception area.

**b. OAR 660-033-0030, Identifying Agricultural Land**

- (1) **All land defined as "agricultural land" in OAR 660-033-0020(1) shall be inventoried as agricultural land.**

**FINDINGS:** The Hearings Officer finds that the applicant has shown through the Borine study that the subject property is predominantly Class VII and VIII soils. The findings above address the sub-factors in OAR 660-033-0020(1).

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

**FINDINGS:** The Hearings Officer finds that the Borine study shows the subject property is predominantly non-agricultural land based on the soil's capability classification. The findings above address the additional factors under OAR 660-033-0020(1), none of which support a determination that the subject property is "agricultural land." Further, as set forth in detail above, substantial evidence in the record shows that the conditions existing outside the subject property on surrounding properties support a determination that the subject property is not needed to permit farm practices to be undertaken on adjacent or nearby lands.

- (3) **Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land. Nearby or adjacent land, regardless of ownership, shall be examined to the extent that a lot or parcel is either "suitable for farm use" or "necessary to permit farm practices to be**

**undertaken on adjacent or nearby lands" outside the lot or parcel.**

**FINDINGS:** As stated in foregoing findings, property located at 64835 Hwy 97, tax lot 16-12-27D 1100 is zoned EFU and presently receiving farm deferral. It is proximate to the applicant's property at the southwest corner. The subject property is not necessary for any farm use to occur on adjacent or nearby lands, including tax lot 1100 above. Additionally, as stated in foregoing findings, the Borine study concluded that the subject property is 80% class VII and VIII soils.

- (5) (a) **More detailed data on soil capability that is contained in the USDA Natural Resources Conservation Service (NRCS) soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the NRCS land capability classification system.**

(b) **If a person concludes that more detailed soils information that that contained in the Internet soil survey of soil data and information produced by the National Cooperative Soil Survey operated by the NRCS of the USDA as of January 2, 2012, would assist a county to make a better determination of whether land qualifies as agricultural land, the person must request that the department arrange for an assessment of the capability of the land by a professional soil classifier who is chosen by the person, using the process described in OAR 660-033-0045.**

**FINDINGS:** The applicant submitted the Borine study discussed in the foregoing findings. The record indicates this study was reviewed and certified by DLCD in accordance with the process in OAR 660-033-0045 and the NRCS land capability classification system. I find that the Borine study is credible based on Mr. Borine's qualifications and the methodology and detailed analysis in the study.

- (c) **This section and OAR 660-033-0045 apply to:**

- (A) **A change to the designation of land planned and zoned for exclusive farm use, forest use or mixed farm-forest use to a non-resource plan designation and zone on the basis that such land is not agricultural land;**

**FINDINGS:** The applicant proposes a change in plan designation from farm use to a non-resource use (Rural Industrial Zone). The Borine study was reviewed and certified by DLCD.

- (d) **This section and OAR 660-033-0045 implement Oregon Laws 2010, chapter 44, section 1, effective on October 1, 2011. After this date, only those soils assessments certified by the department under section (9) of this rule may be considered by local governments in land use proceedings described in subsection (c) of this section. However, a local government may consider**

soils assessments that have been completed and submitted prior to October 1, 2011.

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

**FINDINGS:** As indicated in foregoing findings, the Borine study was reviewed and certified by DLCD pursuant to OAR 660-033-0045.

Based on the foregoing findings and conclusions, the Hearings Officer finds that the applicant has demonstrated that the subject property does not constitute "agricultural land" as defined in Goal 3 and OAR 660-033-0020. Accordingly, I find that no exception to Goal 3 is required for the applicant's proposed plan amendment and zone change from EFU to RI.

#### **GOAL EXCEPTIONS**

##### **4. Division 4, Interpretation of Goal 2 Exception Process**

a. OAR 660-004-0005, Definitions. For the purpose of this division, the definitions in ORS 197.015 and the Statewide Planning Goals shall apply. In addition, the following definitions shall apply:

(1) An "Exception" is a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan, that:

- (a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;
- (b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and
- (c) Complies with ORS 197.732(2), the provisions of this division and, if applicable, the provisions of OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040.

(2) "Resource Land" is land subject to one or more of the statewide goals listed in OAR 660-004-0010(1)(a) through (g) except subsections (c) and (d).

(3) "Nonresource Land" is land not subject to any of the statewide goals listed in OAR 660-004-0010(1)(a) through (g) except subsections (c) and (d). Nothing in these definitions is meant to imply that other goals, particularly Goal 5, do not apply to nonresource land.

**FINDINGS:** Notwithstanding the finding that the subject property is not "Agricultural Land," based on the Borine study, the subject property is "resource land," given its current designation as EFU-TRB, in accordance with the Hearings Officer's decision in ZC-14-2/PA-14-2. I find that the application is subject to Goal 14 (OAR 660-004-0010(a)(d)) and thus requires a Goal 14 Exception.



b. OAR 660-004-0010, Application of the Goal 2 Exception Process to Certain Goals

- (1) The exceptions process is not applicable to Statewide Goal 1 "Citizen Involvement" and Goal 2 "Land Use Planning." The exceptions process is generally applicable to all or part of those statewide goals which prescribe or restrict certain uses of resource land or limit the provision of certain public facilities and services. These statewide goals include but are not limited to:

GOAL 3

- (a) Goal 3 "Agricultural Lands"; however, an exception to Goal 3 "Agricultural Lands" is not required for any of the farm or nonfarm uses permitted in an Exclusive Farm Use Zone under ORS Chapter 215 and OAR chapter 660 division 033, "Agricultural Lands"

**FINDINGS:** The subject property is zoned EFU-TRB. Notwithstanding the finding that the subject property is not "Agricultural Land," based on the Borine study, the subject property is "resource land," given its current designation as EFU-TRB, in accordance with the Hearings Officer's decision in ZC-14-2/PA-14-2. The applicant has requested a plan amendment and zone change from EFU to RI. As discussed in detail in the findings above, an exception to Goal 3 is not required for the proposed plan amendment and zone change because the Borine study demonstrates the subject property does not constitute "agricultural land."

GOAL 14 (OAR 660-004-0010)

- (d) Goal 14 "Urbanization" as provided for in the applicable paragraph (1)(c)(A), (B), (C) or (D) of this rule:

\* \* \*

- (D) For an exception to Goal 14 to allow urban development on rural lands, a local government must follow the applicable requirements of OAR 660-014-0030 or 660-014-0040, in conjunction with applicable requirements of this division:

**FINDINGS:** As discussed in the findings above, Goal 14 is:

To provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities.

The Statewide Planning Goals define "rural land" as:

Land outside urban growth boundaries that is:

- (a) Non-urban agricultural, forest or open space,
- (b) Suitable for sparse settlement, small farms or acreage homesites with no or minimal public services, and not suitable, necessary or intended for urban use, or
- (c) In an unincorporated community.

The subject property is currently zoned Exclusive Farm Use, which is by definition agricultural land (non-urban). The applicant has requested both a reasons and irrevocably committed exception to Goal 14, Urbanization, for the proposed plan amendment and zone change.

In *Shaffer v. Jackson County*, 17 Or LUBA 922 (1989), LUBA held that industrial uses are not inherently urban in nature, and "whether a particular industrial use of rural land is urban or rural requires a case-by-case determination, based on factors identified in the case law." *Id.*, at 931. In *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 724 P2d 268 (1986), the Supreme Court identified three factors to be considered in determining whether a use is "urban" or "rural" for purposes of a Goal 14 exception:

- (a) the size of the area in relationship to the developed use (density);
- (b) its proximity to an acknowledged UGB and whether the proposed use is likely to become a magnet attracting people from outside the rural area; and
- (c) the types and levels of services which must be provided to it.

In *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008), LUBA held the court intended the *Curry County* factors to be analyzed together rather than in isolation.

The applicant addressed the above factors on pages 170-171 of the burden of proof as follows:

*"With respect to the first Curry County factor, as discussed in the findings above, the subject parcels are 1.33 and 20.26 acres in size. The subject site is surrounded on the east by large parcels zoned RI and developed with rural industrial uses. For these reasons, the size of the subject property is relatively small compared to the developed industrial uses in the immediate vicinity.*

*With respect to the second factor, the subject site is located a considerable distance from the nearest UGB's, approximately 3.25 miles north of the Bend UGB and approximately 6.25 miles south of the Redmond UGB. The types of potential uses allowed by DCC 18.100.010, Uses Permitted Outright in the RI Zone, are inappropriate for an urban area and emphasize storing and processing natural resources or that serve the rural landowners. Some allowed businesses may attract a few customers outside the Deschutes Junction area. On the other hand, some low intensity businesses such as a veterinary clinic for large animals could be located within the Bend and Redmond UGB's. Therefore, alternatives may exist in the UGB and residents of Bend and Redmond might not choose to travel to the subject site to do business, resulting in the subject property serving residents of the surrounding rural area or regionally. Many of the businesses simply process materials on site and deliver finished products to customers in the region.*

*With respect to the third factor, the subject property will be served by an existing rural fire protection district and the county sheriff, and by Avion, a private water company that serves rural and suburban uses in the Bend area. Sewage disposal will be provided by appropriate on-site septic systems designed and engineered for the specific users on the subject property. Bend's municipal water and sewer systems do not extend north of the UGB, and in light of the distance between the UGB and the subject property it is unlikely either of these systems would be extended to serve the subject site.*

*Considering the three Curry County factors, the proposed uses in the applicant's traffic study could be considered "urban" in nature. However, the developable land in the subject site's small size, relatively large distance from the nearest UGB's, and unique location and setting, suggest uses on the subject site may be more likely to serve rural residents in the Deschutes Junction area. Therefore, it is appropriate to require an exception to Goal 14 for the uses identified in the traffic study so that the proposed "reasons" match the proposed uses, and so that reasonable and necessary development limitations can be established as part of the goal exception to assure the subject site is not developed with "urban" uses. The Applicant welcomes the County's view on the best way to develop the site to meet all criteria.*

Details regarding potential future development of the subject property were set forth at page 168 of the Burden of Proof, wherein the applicant stated that the proposed use is rural in nature, rather than urban, and will not require urban services:

1. No buildings will be built on 1.32 acres of TL 104
2. One acre of the northern portion of TL 201 will continue to be used for the existing storage building, parking and access
3. The remainder of the northern portion of TL 201 has 8.13 acres of developable land
4. The southern portion of TL 201 has 6.28 acres of developable land
5. The total number of developable acres, not including setbacks, minimum building distances, landscaping and space for parking and roads is 14.41 acres
6. The northern and southern portions of TL 201 will be planned separately
7. The developable land portions are irregularly shaped
8. There are two completed and dedicated turn lanes and paved driveways into the northern portion of TL 201 and one completed and dedicated turn lane and paved driveway into the southern portion. All three turn lanes were designed to handle 90-foot trucks
9. Allowable uses under RI zoning include low-intensity uses
10. The applicant is proposing 20 businesses on the 21.56 acres of land
11. A 12-inch Avion water pipe was purchased and installed for the entire length of the property
12. Two fire hydrants are already in place
13. Pacific Power electricity is already on site
14. There is no need for any urban facilities or utilities
15. Wastewater and sewage will be handled on site through an engineered and appropriate disposal system
16. The applicant has considered and analyzed a collection of maximum 7,500 square foot buildings, each serving a reasonable outright permitted use
17. The applicant proposes to eliminate the opportunity for a business that is involved with pulp and paper manufacturing to be located on the subject property; otherwise, approval for any and/or all uses permitted outright, as set forth in DCC 18.100.010, could be requested by the applicant or his successor in the future

With respect to the first *Curry County* factor, I find that the size of the subject parcel, 21.59 acres, in relation to the existing approximately 60 acres of RI-zoned property in Deschutes Junction, constitutes a relatively large addition to the RI zone in this area. Accordingly, this factor supports a determination that the use is "urban," rather than rural.

With respect to the second factor, the record indicates the subject site is located a considerable distance from the nearest UGBs -- approximately 3 miles north of the Bend UGB and approximately 6 miles south of the Redmond UGB. Because no specific development is proposed at this time, it is not possible to definitively determine the extent to which customers from nearby cities could be attracted to the subject property. Nonetheless, I find it is reasonable to conclude that RI development of the subject property is likely to attract customers from nearby urban areas based on adjacent RI uses in the Deschutes Junction area, the proximity of the subject property to Highway 97, Highway 20 and other road networks. Accordingly, this factor also supports a determination that the use is "urban" rather than rural.

With respect to the third factor, the record indicates the subject property will be served by an existing rural fire protection district and the county sheriff, and by a private water company that serves rural and suburban uses in the Bend area. Sewage disposal would be provided by on-site septic systems. Bend's municipal water and sewer systems do not extend north of the UGB, and in light of the distance between the UGB and the subject property, it is unlikely either of these systems would be extended to serve the subject site. Accordingly, under this factor, the use would qualify as "rural," rather than urban.

Considering the three *Curry County* factors, the Hearings Officer finds that potential uses of the subject property may be "urban" in nature if it is rezoned from EFU-TRB to RI. I find that it is appropriate to require an exception to Goal 14 to determine if the proposed "reasons" match the potential uses, and so that development limitations may be established as part of the goal exception to assure the subject site is not developed with "urban" uses. I note that such a goal exception was required by the Hearings Officer in ZC-14-2.

The applicant submitted evidence and argument supporting both a "reasons" and an "irrevocably committed" exception. Compliance with the requirements for those exceptions to Goal 14 is addressed in the findings below.

**b. OAR 660-004-0018, Planning and Zoning for Exception Areas**

**(1) Purpose.** This rule explains the requirements for adoption of plan and zone designations for exceptions. Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 and 660-014-0030 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule.

**FINDINGS:** I find that this application concerns "adoption of plan and zoning provisions that would allow changes in existing types of uses, densities or services," which requires application of the standards outlined in this rule.

(2) For "physically developed" and "irrevocably committed" exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those:

- (
- (a) That are the same as the existing land uses on the exception site;
  - (b) That meet the following requirements:
    - (A) The rural uses, density, and public facilities and services will maintain the land as "Rural Land" as defined by the goals, and are consistent with all other applicable goal requirements;
    - (B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and
    - (C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses;
  - (c) For uses in unincorporated communities, the uses are consistent with OAR 660-022-0030, "Planning and Zoning of Unincorporated Communities", if the county chooses to designate the community under the applicable provisions of OAR chapter 660, division 22; and
  - (d) For industrial development uses and accessory uses subordinate to the industrial development, the industrial uses may occur in buildings of any size and type provided the exception area was planned and zoned for industrial use on January 1, 2004, subject to the territorial limits and other requirements of ORS 197.713 and 197.714.

**FINDINGS:** I find that because the applications do not involve a residential plan and zone designation, these criteria do not apply.

- (3) Uses, density, and public facilities and services not meeting section (2) of this rule may be approved on rural land only under provisions for a reasons exception as outlined in section (4) of this rule and applicable requirements of OAR 660-004-0020 through 660-004-0022, 660-011-0060 with regard to sewer service on rural lands, OAR 660-012-0070 with regard to transportation improvements on rural land, or OAR 660-014-0030 or 660-014-0040 with regard to urban development on rural land.

**FINDINGS:** The applicable criteria are set forth in OAR 660-014-0030 or OAR 660-014-0040 because the proposal is for a zone change that would allow "urban development on rural land." Compliance with these criteria are set forth in the findings below.

#### **"REASONS" EXCEPTION**

The applicant relies on the history, changes in circumstances and surrounding uses as evidence supporting both a "reasons" and "irrevocably committed" exception. The Hearings Officer finds that many of the "reasons" criteria below require an analysis of the "use". The applicant has provided a "worst case" development scenario for these purposes because there is no proposed use at this time. Thus, I must assume that any of the suite of outright and conditional use in the RI zone could be developed on the property, subject to the requirements of that zone, site plan review (DCC 18.124), and conditional use criteria where applicable. There is no minimum lot size in the zone that would constrain the ultimate development density of the site. Following the Hearings Officer's reasoning in ZC-14-2/PA-14-2, I find that the property is not eligible for a "reasons" exception without a clearly defined use as discussed in the findings below.

#### **(4) "Reasons" Exceptions:**

- (a) When a local government takes an exception under the "Reasons" section of ORS 197.732(1)(c) and OAR 660-004-0020 through 660-004-0022, plan and zone designations must limit the uses, density, public facilities and services, and activities to only those that are justified in the exception;**

**FINDINGS:** The applicant requests a "reasons" exception to Goal 14 to allow the subject site to be rezoned to RI. This criterion requires that the RI zoning, if approved through a "reasons" exception, must limit the uses, density, public facilities and services, and activities to only those that are justified in the exception. As discussed in the findings above, for purposes of demonstrating compliance with the TPR, the applicant's revised traffic study identified the "worst case scenario" for industrial development on the subject site to include equal amounts of space (7,500 square feet each) for the following uses: 9 contractors or building materials businesses; 5 plumbing, electrical, roofing or siding contractors; 5 welding, sheet metal or machine shops; 1 veterinary clinic. No new public services or facilities are proposed, beyond the extension of electric, phone and water services to any new proposed lots.

The applicant has not proposed to limit the allowed uses on the subject property, except for the pulp and paper manufacturing use. This means that all but one of the outright or conditional uses in the RI zone could be potentially developed on the property. There is no limit on the uses, density, and activities, other than to exclude the pulp and paper manufacturing use listed under DCC 18.100.020(H). Therefore, I find that this criterion is not met.

- (b) When a local government changes the types or intensities of uses or public facilities and services within an area approved as a "Reasons" exception, a new "Reasons" exception is required;**

**FINDINGS:** I find that this criterion is not applicable because the subject property is not located in a previously approved "reasons" exception area.

c. **OAR 660-004-020, Goal 2, Part II(c), Exception Requirements:**

- (1) **If a jurisdiction determines there are reasons consistent with OAR 660-04-022 to use resource lands for uses not allowed by the applicable Goal, the justification shall be set forth in the comprehensive plan as an exception.**

**FINDINGS:** The proposal's compliance with OAR 660-04-022 is discussed in the findings below.

- (2) **The four standards of Goal 2 Part II(c) required to be addressed when taking an exception to a Goal are:**
  - (a) **"Reasons justify why the state policy embodied in the applicable goals should not apply": The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land:**

**FINDINGS:** The Hearings Officer found in Powell/Ramsey, and I agree in this Decision, that to comply with this administrative rule, the applicant must demonstrate or explain: (1) the basis for determining that state policy embodied in the applicable goals should not apply; (2) the amount of land that is required for the use being planned; and (3) why the use requires a location on resource land. Each of these factors is addressed separately in the findings below:

**1. Basis for Determining State Policy Embodied in the Goals Should Not Apply.**

The state policy embodied in Goal 14, Urbanization, includes providing an orderly transition from rural to urban uses and assuring efficient use of the land. The subject property is considered "rural" because it is not located within a UGB or an Urban Unincorporated Area. The applicant is correct that the property is adjacent to and surrounded by existing industrial and commercial operations, as well as 1,756 platted residential lots, 339 buildable lots (a 20% increase in 2 years), 9 lots for build-out for industrial and commercial uses and 1,417 residential built-out lots. There are five different zones in the vicinity. As discussed in the findings above, the non-agricultural soils on the subject property, lack of irrigation water easement, bisection of the property by the overpass and proximity to Highway 97 make its use for agriculture inefficient. Moreover, the existence of adjacent commercial and industrial uses, as well as Highway 97, on-off ramps to the Highway from Tumalo Place, and the Tumalo Road/Highway 97 overpass, which connects the subject property to the east-west corridor that becomes Deschutes Market Road to the east of Highway 97 make any use of the subject property for other rural uses impracticable. The positioning of the property at the center of this transportation hub results in negative impacts with respect to safety, noise, traffic and fumes.

The Applicant is proposing 20 businesses on his 21.56 acres of land, less than one business per acre. The applicant further addresses this standard on pages 173-174 of the burden of proof. The last paragraph addressing this standard states:

*"If the proposed plan amendment and zone change to RI are approved, the Applicant intends to develop the subject property with some attractive, generously-spaced, landscaped, compatible uses allowed in the RI zone and some existing neighborhood uses similar to the Whistlestop Nursery, Willamette Graystone, United Pipe, the business manufacturing wood products just north of the applicant's land, and farm equipment and agricultural products storage. Because of the unique nature and location of the subject site, and its 3.25 and 6.26 miles distance from the Bend and Redmond UGB's, and the use limitations required for a goal exception, such development is not likely to result in a disorderly transition from rural to urban development, and therefore the state policy embodied in Goal 14 should not apply."*

I find that the state policy embodied in Goal 14 applies and that the proposed rezone (and potential uses allowed outright and conditionally) will ensure more efficient use of the land than under current circumstances, particularly given that the property has not been farmed since construction of the overpass project and is largely in a fallow, undeveloped state. I further find that the proposed rezone will provide for an orderly transition from rural to urban development, considering the existing transportation "hub" nature of Deschutes Junction, the bisection of the subject property by Tumalo Road and the overpass, which connects the subject property to rural commercial and rural industrial properties to the east of Highway 97, and the other adjacent surrounding commercial and industrial uses.

## **2. The Amount of Land Required for the Use Being Planned.**

The applicant addressed this standard on page 174 of the burden of proof as follows:

*"The Applicant is proposing that 14.41 acres of the 21.56 acre subject site could be developed with a wide range of industrial uses. However, the applicant's traffic study identified a "worst case" development scenario to demonstrate compliance with the TPR that would include 7,500 square feet each for 20 light rural industrial uses, including nine (9) contractor's or building materials and other construction-related businesses; five (5) plumbing, electrical, roof, siding contractors; five (5) welding, sheet metal or machine shop businesses; and one (1) veterinary clinic. That proposal leaves generous acreage for internal roads, landscaping, outside storage of goods, parking and maneuvering of vehicles. The land for the proposed uses is more than adequate, but is not excessive."*

The Hearing Officer in ZC-14-2/PA-14-2 used that applicant's "worst-case" scenario, generated for traffic analysis purposes, to find that the amount of land was adequate for the use being planned. I must assume that any of the list of outright and conditional use in the RI zone could be developed on the property<sup>3</sup>, subject to the requirements of that zone, site plan review (DCC 18.124), and conditional use criteria where applicable. Moreover, there is no minimum lot size in the zone. However, there is no reason on this record to conclude that the amount of land for the potentially proposed uses will be inadequate.

## **3. Why the Use Requires a Location on Resource Land.**

The applicant addressed this standard on page 174 of the burden of proof as follows:

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<sup>3</sup> Except the pulp and paper manufacturing use.



*"As discussed in the findings above, the Borine study finds that the subject property does not constitute agricultural land because it consists entirely of Class VII and VIII soils. Based on the soil study the subject property is not "resource land." However, because the zoning of the subject property presently EFU-TRB it is in a resource zone and the applicant must address this factor. The Applicant did not need the Borine Report to know that the land is not capable of producing a crop of hay. He is a lifelong, second generation hay farmer, an expert hay farmer and hay broker, providing custom hay farming to others who do not have that skill. He has not been able to grow a crop on the land since he bought it in 1995. The last attempt was over 15 years ago, before the overpass was constructed, and it was not worth harvesting.*

*The subject property and surrounding area are developed with educational, industrial and commercial uses that surround the property and transportation facilities that surround and cross the subject site. No agricultural operations are nearby. For these reasons it is appropriate to include the subject site in the existing RI designation and zoning because of its unique location, changes in circumstances, and characteristics. See Sections 15 and 16."*

The Hearing Officer, in ZC-14-2/PA-14-2, found that:

*"As discussed in the findings above, the Hearings Officer has found that based on the Borine study the subject property does not constitute agricultural land because it consists entirely of Class VII and VIII soils. Based on the soil study the applicant argues the subject property is not "resource land." However, the staff report states, and I agree, that because the subject property presently is zoned EFU-TRB it is resource land and the applicant must address this factor."*

Notwithstanding the finding that the subject property is not "Agricultural Land," based on the Borine study, the subject property is "resource land," given its current designation as EFU-TRB.

The Hearing Officer in ZC-14-2/PA-14-2 also found that:

*"The subject property and surrounding area are developed with industrial and quasi-commercial uses that virtually surround the subject site. For these reasons the applicant argues it is appropriate to include the subject site in the existing RI designation and zoning because of its unique location and characteristics, and so that it can be used in conjunction with the remainder of the subject property. While the Hearings Officer can't argue with that logic, I find it is not sufficient to demonstrate the proposed uses identified in the applicant's revised traffic study, or other uses permitted in the RI Zone, require a location on resource land."*

The applicant has made a similar argument in this case. Similarly here, the applicant has not demonstrated the proposed uses permitted in the RI zone require a location on resource land. This criterion is not met.

**(b) Areas which do not require a new exception cannot reasonably accommodate the use:**

**FINDINGS:** The applicant addressed this standard on pages 175-176 of the burden of proof statement. Paragraphs 4-6 for the applicant's response to this standard states:

*"The Applicant is not proposing a specific use or a number of specific uses of the property. When the zone change and plan amendment is approved, the full list of uses allowed in the rural industrial zone could be allowed, subject to subsequent site plan review. An in-depth, parcel by parcel analysis of all non-resource or urban lands in the county that could possibly accommodate each allowed use, when each future business is looking for a site that could be developed or redeveloped, or could be rezoned, and would be for lease or for sale at any given time for each and every one of those uses is impossible to do. Factors out of our control include the price any owner may ask for the properties, whether or not a particular owner would ask for a rezone or lot consolidation, whether or not a city council would actually rezone or consolidate the urban lots or if a certain parcel would remain available at the time it is needed by a future use. Another reason this criterion is not effective or realistic in reaching the desired statewide land use goals is that many rural industrial uses do not belong in the urban areas and are incompatible with them, and therefore locating them there creates many other problems with urban planning, safety and livability.*

*The County GIS staff Tim Berg did a study of non-resource lands zoned in the county for the Applicant and reported that 121.90 acres are already zoned RI. The majority, 60.4 acres of RI, is located at Deschutes Junction. The other RI parcels include 13.4 acres at the auto wrecking yard north of Bend along the east side of US Highway 97, 12.7 acres owned by Vick Russell Construction in a country RI holding zone inside the city limits of La Pine, and 35.4 acres of federally-owned military land adjacent to Robert's Field (Redmond Airport) east of Redmond.*

*The non-resource land under Deschutes County jurisdiction that could accommodate uses allowed in the RI zone must be already zoned RI. Those 121.9 acres cannot accommodate the list of allowed rural industrial uses because: (1) there is limited land in the county zoned RI; (2) other RI-zoned land either is fully developed or is located near La Pine which is 30 miles away, (3) is federally owned and outside Deschutes Junction, or (4) there is no other adequate transportation system and overpass over 97 near the other areas that would make industrial trucks entering and exiting the highway safe.*

*The subject property is uniquely suited for this rezone and can reasonably accommodate the use. It is adjacent to the other 60.4 acres of RI zoned lands located at Deschutes Junction and the parcels zoned RI will be contiguous."*

Following the Hearings Officer's findings in ZC-14-2/PA-14-2, I find that the applicant cannot limit its review under this factor to land currently zoned RI inasmuch as other land zoned for industrial use within the Bend and Redmond UGBs may be available and therefore should be included in the analysis. The applicant has not proposed to preclude any uses from the suite of outright and conditional uses in the RI zone that could be developed on the property (except the pulp and paper manufacturing use. However, the applicant failed to provide a regional (Bend, Tumalo, and Redmond) availability analysis for each outright and conditional use in the RI zone.

Further, although the applicant argued that the uses allowed in the RI zone are not compatible in urban areas, due to alleged impacts on urban planning, safety and livability primarily due to large trucks accessing the site, I find that many of the uses allowed outright or conditionally in the RI zone may be, and have been sited within UGBs including, but not limited to kennel/veterinary clinic, building materials businesses, medical marijuana dispensaries, mini-storage, wireless telecommunications facilities, and electrical substations. See DCC 18.100.010 (uses allowed outright); DCC 18.100.020 (conditional uses). The record does not

support a finding that areas which do not require a new exception cannot reasonably accommodate the use. This criterion is not met.

- (A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use, which do not require a new exception. The area for which the exception is taken shall be identified;
- (B) To show why the particular site is justified, it is necessary to discuss why other areas which do not require a new exception cannot reasonably accommodate the proposed use. Economic factors can be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under the alternative factor the following questions shall be addressed:
  - (i) Can the proposed use be reasonably accommodated on nonresource land that would not require an exception, including increasing the density of uses on nonresource land? If not, why not?
  - (ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses, not allowed by the applicable Goal, including resource land in existing rural centers, or by increasing the density of uses on committed lands? If not, why not?
  - (iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?

**FINDINGS:** Although the applicant has not provided a map, he has otherwise described the location of other RI-zoned properties and alternative areas available for RI uses (13.4 acres at the auto wrecking yard north of Bend along Highway 97, 12.7 acres owned by Vic Russell Construction in a county holding zone inside the city of La Pine and 35.4 acres of federal military land adjacent to Robert's Field east of Redmond. The applicant states the following for these three RI-zoned areas:

*"The alternatives are not unused, are not available and suggesting that they be used for future RI uses does not solve the problem at hand, that of defining a compatible and appropriate zone among the non-resource zoning options in the county, and of determining the appropriate use for the subject non-resource property, that cannot be farmed."*

The applicant presented evidence that alternative sites for potential RI uses within the County are not unused and not available, thus demonstrating that the potential uses cannot be

accommodated on existing RI-zoned property. No person introduced testimony or other evidence that the proposed use can be reasonably accommodated on nonresource land that would not require an exception, or on resource land that is already irrevocably committed to nonresource uses. However, the applicant failed to adequately address the criteria in subsections (ii) and (iii) above. Specifically, there is no evidence that the potential uses cannot be located on other resource land irrevocably committed to nonresource uses, not allowed by the applicable Goal, including resource land in existing rural centers, or by increasing the density of uses on committed lands. As discussed in the findings above, the applicant has not shown that any use allowed outright or conditionally in the RI zone cannot be reasonably accommodated inside an urban growth boundary. These criteria are not met.

- (iv) **Can the proposed use be reasonably accommodated without the provision of a proposed public facility or service? If not, why not?**

**FINDINGS:** I find that this factor is not applicable because no public facilities or services are proposed.

- (C) **The alternative areas standard can be met by a broad review of similar types of areas rather than a review of specific alternative sites. Initially, a local government adopting an exception need assess only whether those similar types of areas in the vicinity could not reasonably accommodate the proposed use. Site specific comparisons are not required of a local government taking an exception, unless another party to the local proceeding can describe why there are specific sites that can more reasonably accommodate the proposed use. A detailed evaluation of specific alternative sites is thus not required unless such sites are specifically described with facts to support the assertion that the sites are more reasonable by another party during the local exceptions proceeding.**

**FINDINGS:** As noted in the findings above, the applicant reviewed specific alternative RI sites within the County, rather than conducting a broad review of similar types of areas. Site specific comparisons are not required because no other party to the proceeding has described any specific site that can more reasonably accommodate the proposed use. However, as set forth in the findings above, the applicant has not fully complied with the alternative areas standard because there is no evidence that the potential uses cannot be located on other resource land irrevocably committed to nonresource uses, not allowed by the applicable Goal, including resource land in existing rural centers, or by increasing the density of uses on committed lands and the applicant has not shown that any use allowed outright or conditionally in the RI zone cannot be reasonably accommodated inside an urban growth boundary.

- c) **The long-term environmental, economic, social and energy consequences resulting from the use at the**

proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in other areas requiring a Goal exception. The exception shall describe the characteristics of each alternative areas considered by the jurisdiction for which an exception might be taken, the typical advantages and disadvantages of using the area for a use not allowed by the Goal, and the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The exception shall include the reasons why the consequences of the use at the chosen site are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site. Such reasons shall include but are not limited to, the facts used to determine which resource land is least productive; the ability to sustain resource uses near the proposed use; and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts include the effects of the proposed use on the water table, on the costs of improving roads and on the costs to special service districts;

**FINDINGS:** The applicant addressed these four standards (environmental, economic, social and energy consequences) on pages 178-182 of the burden of proof statement. However, I find that the applicant's submission does not meet the requirements of this criterion because it lacks any analysis comparing the environmental, economic, social and energy consequences of allowing RI uses on the subject property, or the level of any such consequences if the RI uses are sited on an alternative property. Specifically, there is no evidence to address "the reasons why the consequences of the use at the chosen site are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site." The applicant's burden of proof only addresses the attributes of the subject property itself. This criterion is not met.

- (d) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts. The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resource and resource management or production practices. "Compatible" is not intended as

an absolute term meaning no interference or adverse impacts of any type with adjacent uses.

**FINDINGS:** The applicant addressed this standard on page 184 of the burden of proof:

*The Applicant's study of surrounding uses covers the vicinity. The study shows the rezone is compatible with surrounding land uses. The study includes all parcels within ¾ of a mile from the subject site. The study area followed tax lot maps. Some tax lot maps ended ¾ mile from the subject property, such as to the north. Others, due to large publicly-owned parcels, ended 1.25 miles from the subject site, such as to the south. It was completed after several weeks of work. It is more thorough than any similar analysis in any other application previously submitted to the County. This exhaustive work was done so that it could be confidently determined whether or not the proposed RI zone will be compatible with the surrounding natural resources, built environment and existing uses.*

*It was determined that the proposed RI zone will be similar to the commercial and industrial uses and zoning that are assigned to the adjacent properties to the north and east.*

(emphasis added). The applicant listed the adjacent uses in the burden of proof on pages 59 to 133. Again, the applicant has not proposed to preclude any uses from the suite of outright and conditional uses in the RI zone that could be developed on the property (except the pulp and paper manufacturing use. Accordingly, all of the outright and conditional uses in the RI zone must be shown to be compatible with other adjacent uses, or that they can be rendered compatible with other adjacent uses.

There do not appear to be any active adjacent natural resource uses, and resource management or production practices. All of the uses that might be accommodated in the RI zone on the subject property would be required to go through site plan review, and depending upon the use, conditional use permit review. The record shows that potential uses are unlikely to adversely impact existing industrial uses across Highway 97, directly to the east across the overpass that connects the subject property via Tumalo Road with existing industrial and commercial uses to the east of the subject property. Tumalo Road runs west to east and connects to Deschutes Market Road. I find that compliance with Use Limitations set forth in DCC 18.100.030, Dimensional Requirements in DCC 18.100.040, Parking and Loading requirements in DCC 18.100.050, Site Plan Review requirements in DCC 18.100.060 (and DCC Ch. 18.124), Conditional Use Review under DCC Ch. 18.128 (where required) and Additional Requirements in DCC 18.100.070 may be applied and enforced to ensure compatibility of any proposed RI use with other surrounding uses, including the school property and rural residential development to the west, the EFU-zoned property developed with a single rural residence to the south, and the MUA-10 zoned rural residential properties to the northwest.

- (4) For the expansion of an unincorporated community defined under OAR 660-022-0010. The exception requirements of subsections (2)(b), (c), and (d) of this rule are modified to also include the following:

**FINDINGS:** This criterion is not applicable because the subject site and subject property do not constitute an "unincorporated community," defined in OAR 660-022-0010(10)(e) and Section 18.04.030 of the county code as land having a zoning designation "Urban Unincorporated Community," "Rural Service Center," "Resort Community" or Rural Community."

**d. OAR 660-04-022, Reasons Necessary to Justify an Exception Under Goal 2, Part II(c):**

**An exception under Goal 2, Part II(c) can be taken for any use not allowed by the applicable goal(s). The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule:**

**\* \* \***

**(3) Rural Industrial Development: For the siting of industrial development on resource land outside an urban growth boundary, appropriate reasons and facts include but are not limited to the following:**

- (a) The use is significantly dependent upon a unique resource located on agricultural or forest land. Examples of such resources and resource sites include geothermal wells, mineral or aggregate deposits, water reservoirs, natural features, or river or ocean ports; or \* \* \***

**FINDINGS:** The property is zoned EFU-TRB and is still presently "resource land", following the Hearing Officer's analysis in ZC-14-2/PA-14-2. There does not appear to be uses with which the subject site could be developed that are "significantly dependent upon a unique resource" on the subject property or other properties in the vicinity of this site.

- (b) The use cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas; or**

**FINDINGS:** The applicant addressed this standard on pages 185-186 of the burden of proof. The applicant has indicated that the types of uses that might occur at the site would be those that have large trucks and bulky loads. The applicant states that "several of the potential uses would be difficult to site in the urban areas, due to the needed wide turn radii, and to the size of delivery and services vehicles, trucks and trailers. A regular volume of long trucks or trucks with long booms or wheelbases are hazardous in the urban areas and cause traffic hazards in urban intersections." The applicant further noted that "other problems businesses or services face in finding available large lots in the UGBs of Redmond and Bend are that the infrastructure for industrial lots are either already overtaxed or failing or is not developed."

As set forth in the findings above, since the applicant has not proposed to preclude any uses from the suite of outright and conditional uses in the RI zone that could be developed on the property (except the pulp and paper manufacturing use), the applicant would need to demonstrate, for each outright and conditional use in the RI zone, that these uses "are hazardous or incompatible in densely populated areas". This finding cannot be made given the

fact that many of these uses are outright or conditional uses in Redmond's or Bend's urban industrial zones. This criterion is not met.

- (c) The use would have a significant comparative advantage due to its location (e.g. near existing industrial activity, an energy facility, or products available from other rural activities), which would benefit the county economy and cause only minimal loss of productive resource lands. Reasons for such a decision should include a discussion of the lost resource productivity and values in relation to the county's gain from the industrial use, and the specific transportation and resource advantages which support the decision.

**FINDINGS:** Since the applicant has not proposed to preclude any uses from the suite of outright and conditional uses in the RI zone that could be developed on the property, except the pulp and paper manufacturing use, in order to comply with this criterion, the applicant is required to provide a regional (Bend, Tumalo, and Redmond) analysis showing the comparative advantage due to its location (e.g. near existing industrial activity, an energy facility, or products available from other rural activities) for each outright and conditional use in the RI zone, were they to be located on the subject property, rather than on other land that allowed these uses. The applicant failed to provide any comparison analysis, but instead focused on the attributes of the subject property with respect to location, benefit to the county economy and only minimal loss of productive resource lands. As such, this criterion is not met.

The applicant described many of the advantages of the location of the subject property at page 186 of the Burden of Proof:

*The location is a unique transportation hub, with county and state roads surrounding and bisecting the subject property. (See FIGURE 1. REGIONAL MAP, page 10). Many businesses that are dependent on the rural economy and rural products need good access to highways to that do not have to send trucks on urban residential streets or local roads. They may locate here. This site also can help the economy by reducing thousands of miles traveled per year due to its central location between Sisters, Bend, and Redmond and its immediate access to major highways. Costs to develop the transportation infrastructure would be none or minimal due to the unique excellent system already in place and the three existing, relatively new, turn lanes in the subject property. The traffic study by Gary Judd (See Exhibit 28, TIA), shows there will be no adverse impacts on the existing system. Depending on which businesses or services locate on site, they may or may not be related to existing businesses in Deschutes Junction and may enhance them.*

Specific transportation advantages which support the decision are set forth at pages 28-32 of the Burden of Proof. Of note is the fact that the Burlington Northern Railroad is located 1/8 mile to the east of the site, with two sets of tracks, a main north-south line and a parallel passing spur and a loading spur at the 4-R Construction Co. property that used to serve the Cascade Pumice plant at Deschutes Junction. As set forth in detail in the findings above, Tumalo Road, a paved county two-lane rural collector bisects the property east to west, providing a connection



to the Bend-Redmond Road and Highway 20. Tumalo Place also is a paved county, two-lane rural collector road that serves as the on and off ramp to Highway 97. Second to Interstate-5, Highway 97 is the most important north-south highway corridor in Oregon and is the main corridor east of the Cascade Mountains. Deschutes Market Road is a paved county two-lane Rural Arterial road which connects to the Tumalo Road overpass and provides a secondary access to Bend and Highway 20 east. According to the County Surveyor Mike Berry, Deschutes Junction has been a primary transportation hub since the late nineteenth century. The ambient traffic noise generated by 25,600 average daily trips on Highway 97 at a point only 1/10<sup>th</sup> of a mile south of the Deschutes Overcrossing is adjacent to the subject property, and is loud and incessant. The ADT and noise increase annually.

The subject property has three legal access points with dedicated turn refuges on Tumalo Road and Tumalo Place, granted to Aceti by the County via (1) Settlement Agreement dated May 14, 1997 (Exhibit 18 to Burden of Proof) and (2) the Deschutes Junction Overcrossing, Corrected Legal Description for Additional Turn Lane Right-of-Way Acquisition in 161226C Tax Lot 201, dated May 4, 2001, recorded by Deschutes County Clerk as Volume 2001, Page 22023 (Exhibit 19 to Burden of Proof). The access points and turn refuges were designed to accommodate 90-foot long tractor trailer truck combinations entering and exiting the subject property.

**Benefit to County Economy.** Following the Hearings Officer in ZC-14-2/PA-14-2, I find that because the applicant has not identified a particular use of the site it has not demonstrated that industrial development of the site would be of any greater benefit than similar development on another industrial-zoned site. However, as noted in the findings above, development of the site with RI uses will benefit the County economy as it will increase the productive use of the subject property which today is largely unused and in a fallow state, with the exception of the existing Hay Depot business.

**Minimal Loss of Productive Resource Lands.** The applicant addressed this standard on pages 186-187 of the burden of proof statement. According to the Borine report, the applicant's property is 80 percent class VII and VIII soils. Accordingly, I find that it would result in only a minimal loss of resource lands (20% of 21.59 acres = 4.3 acres).

Again, analysis of each of these factors (transportation, benefit to the county economy and minimal loss of productive resources lands) with respect to the subject property is not enough to meet the requirements of this standard. A comparative analysis is required, and the applicant failed to meet this criterion.

For all the foregoing reasons set forth in the findings above, I find that a "reasons" exception is not warranted for the requested Goal 14 Exception.

#### **"IRREVOCABLY COMMITTED" EXCEPTION**

**d. OAR 660-004-0028, Exception Requirements for Land Irrevocably Committed to Other Uses**

- (1) A local government may adopt an exception to a goal when the land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable:

- (a) A "committed exception" is an exception taken in accordance with ORS 197.732(2)(b), Goal 2, Part II(b), and with the provisions of this rule, except where other rules apply as described in OAR 660-004-0000(1).

**FINDINGS:** The applicant requests a "committed exception," as detailed herein. The following statutory and regulatory provisions apply.

**ORS 197.732(2):** A local government may adopt an exception to a goal if:

(b) The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable.

OAR 660-004-0000(1)(c): The purpose of this division is to interpret the requirements of Goal 2 and ORS 197.732 regarding exceptions. This division explains the three types of exceptions set forth in Goal 2 "Land Use Planning, Part II, Exceptions." Rules in other divisions of OAR 660 provide substantive standards for some specific types of goal exceptions. Where this is the case, the specific substantive standards in the other divisions control over the more general standards of this division. However, the definitions, notice, and planning and zoning requirements of this division apply to all types of exceptions. The types of exceptions that are subject to specific standards in other divisions are:

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Standards to determine irrevocably committed exceptions pertaining to urban development on rural land are provided in OAR 660-014-0030, and standards for demonstration of reasons for urban development on rural land are provided in OAR 660-014-0040.

As detailed in the findings below, existing adjacent uses and other relevant factors, namely close proximity to Highway 97 and the bisection of the property via Tumalo Road, a major east-west connecting road, make uses allowed by the applicable goal impracticable. Compliance with the standards set forth in OAR 660-014-0030 is set forth in the findings below. For the reasons stated below, standards for demonstration of reasons for urban development on rural land under OAR 660-014-0040 are inapplicable to the applications.

- (b) For the purposes of this rule, an "exception area" is that area of land for which a "committed exception" is taken.

**FINDINGS:** The exception area is the subject property, as described above.

- (c) An "applicable goal," as used in this rule, is a statewide planning goal or goal requirement that would apply to the exception area if an exception were not taken. (Emphasis added).

**FINDINGS:** The subject goal for which an exception is required is Goal 14.

- (2) **Whether land is irrevocably committed depends on the relationship between the exception area and the lands adjacent to it. The findings for a committed exception therefore must address the following:**

- (a) **The characteristics of the exception area;**

**FINDINGS:** The applicant addressed this standard on page 188 of the burden of proof, in which they submit that the subject site is irrevocably committed to a non-agricultural use:

*It is comprised of Class VII and VIII soils. As previously discussed in detail, agricultural use is impracticable in light of the subject site's location, configuration, the changes in circumstances, the overpass and road construction, the changes in irrigation water service and its isolation from farms in the surrounding area. As also discussed above, the subject site is separated from most properties by roads and highways.*

Although the applicant also discussed the surrounding and adjacent properties in this portion of the burden of proof, this subsection requires a consideration of the characteristics of the exception area alone. As set forth in the findings above, the property does not constitute Agricultural Land under state law. Findings of fact regarding whether characteristics of the exception area support an "irrevocably committed" exception are set forth below.

- (b) **The characteristics of the adjacent lands;**

**FINDINGS:** The applicant addressed this standard on pages 188-197 of the burden of proof, and also in detail in Section 16 of the burden of proof, pages 59-132. A detailed description of the surrounding zoning and land uses of each adjacent property and their current uses is provided in Section II(E) of this Decision above and is incorporated herein by reference. The applicant's Burden of Proof includes analysis of eight (8) Tax Maps, ranging in size from 80 acres to one (1) square mile. Briefly summarized, there are no active agricultural uses that adjoin the subject property. Parcels to the south that are zoned EFU are either completely undeveloped or used only for one residence and otherwise are unimproved. To the west is the Three Sisters Seventh Day Adventist Christian School site, 19 rural residential homes and an additional six rural residential parcels. To the south, there are three rental houses and an unused horse barn (161227D001300 and 161226C000200). Remaining land to the south is undeveloped and publically owned. The City of Bend acquired 1500 acres from the County to bring into the Bend Urban Growth Boundary. The urban development is known as Juniper Ridge and is ¼ mile southeast of the subject property. On both sides of Highway 97 and both sides of Tumalo Road to the north are commercial, retail, wholesale and industrial uses, including Fagan Landscaping, The Funny Farm, Fagan logging and construction company, a bus repair and resale business, a pickup truck canopy sales business, a business selling and renting shipping containers, the Whistle Stop retail nursery, Route 97 Antiques, an equipment rental business and other smaller businesses. To the east are industrial and commercial uses including Willamette Graystone, United Pipe, 4-R Equipment, a historic school adaptively used as a residence, a mobile home park, and Cascade Pumice, which uses the railroad spur and a fuel distributor.

I note that the term "adjacent" is not defined in ORS 197.015, or in the Deschutes County Code. However, "adjoining," is defined to mean contiguous, touching or connected. DCC 18.04.030. Following the reasoning of the Hearings Officers in Powell/Ramsey and 4-R Equipment, and the Oregon Land Use Board of Appeals in, for example, *King v. Clackamas County*, LUBA No. 2015-022 (Or LUBA, September 21, 2015) at p. 22. I find that "adjacent" includes nearby and neighboring properties, including properties across existing roads, as well as those properties directly adjoining the subject property. I further find that the Applicant's adjacent lands study, which includes all parcels within  $\frac{3}{4}$  of a mile from the subject property and followed tax lot maps, sufficiently describes adjacent lands characteristics.

Findings of fact regarding whether characteristics of the adjacent lands support an "irrevocably committed" exception are set forth below.

**(c) The relationship between the exception area and the lands adjacent to it; and**

**FINDINGS:** The applicant addressed this standard on page 198 of the burden of proof:

*The record indicates the subject Property does not abut any residential or resource uses. As previously discussed in detail, the subject site is surrounded by roads, highways, industrial and commercial uses and by a school. The southern property line abuts a 4-acre unfarmed triangular parcel with a rock spine running through [sic] it that cannot be farmed. A remodeled 112-year old single-story box-house in poor condition sits on the rock ridge a distance from the subject property. The relationship between the exception area and the lands adjacent to it leads to the conclusion that the subject site is especially well suited to be a part of the existing Deschutes Junction industrial and commercial complex. These adjacent uses include mining operations, aggregate processing, heavy equipment operations, cement products manufacturing, an antique store, a wood products manufacturing business and a logging business. See Table of uses in area. These surrounding uses, coupled with the poor quality of the site's soils and the high volume of traffic noise, make the subject site unsuitable for agricultural or residential uses.*

Findings of fact regarding whether the relationship between the exception area and the lands adjacent to it support an "irrevocably committed" exception are set forth below. Substantial evidence in the record shows a greater "relationship" between the subject property and the commercial and industrial lands to the north and east, than between the subject property and rural residential uses to the south and west. Again, there are no adjoining active agricultural uses. My finding is based primarily due to the bisection of the subject property by the Tumalo Road overpass that connects the industrial and commercial uses on the east of Highway 97 to the subject property itself. The Tumalo Road east-west connector becomes Deschutes Market Road further to the east. The County and ODOT construction projects have essentially placed the Aceti property at the center of the transportation interchange hub of Deschutes Junction. This is clear from photographic evidence, maps and the video submitted by the applicant at the hearing. Low density rural residential uses to the west and south of the subject property are located a distance from the Highway 97 overpass and Tumalo Road such that impacts felt by the subject property by such transportation projects are more remote.

Safety and noise concerns are most acute on the subject property, compared to any other adjacent use, given the Tumalo Road bisection and Highway 97 on-off ramps from Tumalo Place, which forms the northern boundary of the subject property. No other property that is still in "rural" use within the study area is as proximate to the Highway 97 overpass and on-off ramps as the subject property.

The record shows that other potential non-urban uses on the property, e.g. rural residential development via rezone to RR-10 or MUA-10, are impracticable due to the close proximity of the subject property to Highway 97 and the overpass/interchange project. For example, fencing surrounding the property has been repeatedly impacted by truck and other vehicular traffic missing turns. In addition to these safety concerns, highway noise, traffic and fumes would be substantially disruptive to residential use, particularly as the Deschutes Junction area continues to evolve into a commercial/industrial hub characterized by the only highway overpass between the cities of Bend and Redmond. Considering the impact of adjacent lands and existing roads, the most significant impact is that of the dedication of land to ODOT and the County for the widening of Highway 97 and the construction of the overpass project. The taking and dedication of portions of the subject property for these projects has occurred to create an interconnected transportation hub in the middle of Deschutes County.

**(d) The other relevant factors set forth in OAR 660-004-0028(6).**

**FINDINGS:** The relevant factors in OAR 660-004-0028(6) are addressed in the findings of fact below.

**(3) Whether uses or activities allowed by an applicable goal are impracticable as that term is used in ORS 197.732(2)(b), in Goal 2, Part II(b), and in this rule shall be determined through consideration of factors set forth in this rule, except where other rules apply as described in OAR 660-004-0000(1). Compliance with this rule shall constitute compliance with the requirements of Goal 2, Part II. It is the purpose of this rule to permit irrevocably committed exceptions where justified so as to provide flexibility in the application of broad resource protection goals. It shall not be required that local governments demonstrate that every use allowed by the applicable goal is "impossible." For exceptions to Goals 3 or 4, local governments are required to demonstrate that only the following uses or activities are impracticable:**

- (a) Farm use as defined in ORS 215.203;**
- (b) Propagation or harvesting of a forest product as specified in OAR 660-033-0120; and**
- (c) Forest operations or forest practices as specified in OAR 660-006-0025(2)(a). (Emphasis added.)**

**FINDINGS:** Because the Goal Exception request is not for an exception to Goal 3 or Goal 4, subsections (3)(a), (b) and (c) are inapplicable.

The applicant addressed the above standard on pages 198-199 of the burden of proof statement as follows:

*"The subject site is irrevocably committed to non-resource use due to its characteristics and its relationship to the surrounding land, most of which is engaged in non-resource (industrial) uses. Farming is impracticable. The site's current EFU-TRB zoning allows outright and conditionally a variety of uses. The farm and forest uses allowed in the EFU Zone, along with the uses related to or dependent upon those uses, would be impracticable due to its constraints due to the overpass and realignment of roads around the property, the reduction in the parcel size since 1995, the inaccessibility of the northern portion for farming practices, the inaccessibility of irrigation water that will still not make the soils productive, the less than 20 acre size, the poor quality of the site's soils, and the site's inaccessibility of irrigation water and the difficulty in irrigating triangular shaped sections of land that were created by the overpass construction. Other resource-related uses allowed in the EFU Zone, e.g., mining, wetland creation, wildlife habitat conservation, would be impracticable considering the site's size, location, configuration, noise, and dry rocky soil.*

*With respect to residential and related uses allowed by the zone (e.g. nonfarm dwelling, church, community center, park, room-and-board facility, etc.) the site's location surrounded by industrial uses, major roads and excessive road noise would make the establishment of such uses undesirable and impracticable. With respect to irrigation-related uses, every effort has already been made to bring water to the land, although it is not cost effective to do so. The assortment of utility and similar uses allowed in the EFU Zone (e.g. utility facilities, transmission towers, personal use airports, solar power generating facilities, etc.) also would be impracticable on the subject site due to its having only 14 developable acres in two separate portions and its constrained, urbanized location."*

The site's current EFU-TRB zoning allows outright or conditionally a variety of uses. These uses include some which are not dependent on the quality of the soil, including kennel, church, non-farm dwellings (and associated home occupations), farm stands, community centers, room and board arrangements, and landscape contracting business. However, the standard above states that local governments are not required to demonstrate that every use allowed by the applicable goal is "impossible," but only that farm use, propagation or harvesting of a forest product, and forest operations or forest practices are impracticable. As set forth in the findings above, the applicant submitted evidence to show that the uses listed herein are not practicable given the close proximity to Highway 97, the Tumalo Road overpass, and the Highway 97 on-off ramps at Tumalo Place, including noise and safety impacts. These criteria are met.

- (4) A conclusion that an exception area is irrevocably committed shall be supported by findings of fact that address all applicable factors of section (6) of this rule and by a statement of reasons explaining why the facts support the conclusion that uses allowed by the applicable goal are impracticable in the exception area.**

**FINDINGS:** Compliance with the factors in section (4) is addressed in the findings below.

- (5) Findings of fact and a statement of reasons that land subject to an exception is irrevocably committed need not be**

**prepared for each individual parcel in the exception area. Lands that are found to be irrevocably committed under this rule may include physically developed lands.**

**FINDINGS:** The findings of fact herein cover the single parcel for which the exception is requested. The applicant's proposed exception area consists of two tax lots (16-12-26C, 201, and 16-12-27D, 104).

**(6) Findings of fact for a committed exception shall address the following factors:**

**(a) Existing adjacent uses;**

**FINDINGS:** The applicant submitted an extensive section on adjacent uses, listed in Section 16 (pages 59-133) of the burden of proof statement. A detailed description of the surrounding lands is also provided in Section II(E) of this Decision above and incorporated herein by reference. Analysis and consideration of existing adjacent uses shows that the Deschutes Junction area has been committed to residential development to the north, with a mix of commercial and rural industrial development served by the transportation hub roads and overpass and proximity to Highway 20 and Highway 97, and the Burlington Northern railroad. Notably, Deschutes County Assessor's Tax Map 161226C includes the applicant's largest parcel. The tax map includes approximately 150 acres, plus acreage devoted to roadways. Only one acre in this tax map is used for pasture. 18.60 acres are used for roadways. 27.50 acres are used by Burlington Northern Railroad. The remaining zone is Rural Industrial. 53.84 acres are zoned and used for rural industrial uses. The Applicant's study area included analysis of eight (8) separate tax maps, ranging in size from 80 acres to one (1) square mile, which include all adjoining and adjacent property within at least  $\frac{3}{4}$  mile of the subject property. Highway 97 forms the eastern boundary of the subject property and thus is properly considered an adjacent use. Tumalo Road and the overpass are also considered adjacent uses because they were constructed on property deeded to ODOT and the County in part by the applicant himself. Tumalo Place, which connects to the Highway 97 on-off ramps and forms the northern boundary of the subject parcel is also an existing adjacent use.

As set forth in detail in the findings above, the applicant appropriately described existing adjacent uses to support the request for an "irrevocably committed" exception.

**(b) Existing public facilities and services (water and sewer lines, etc.);**

**FINDINGS:** The record indicates there are no public water or sewer facilities in the vicinity of the subject property. The subject property is served by an on-site septic system and water from a private water company (Avion Water). However, the applicant's proposal to develop the subject site with RI Zone uses will not require public water or sewer facilities. The subject property will continue to receive fire and police protection from the Deschutes Rural Fire Protection District No. 2 (through the Bend Fire Department), and the Deschutes County Sheriff.

The applicant appropriately described existing public facilities and services to support the request for an "irrevocably committed" exception

**(c) Parcel size and ownership patterns of the exception area and adjacent lands:**

- (A) Consideration of parcel size and ownership patterns under subsection (6)(c) of this rule shall include an analysis of how the existing development pattern came about and whether findings against the goals were made at the time of partitioning or subdivision. Past land divisions made without application of the goals do not in themselves demonstrate irrevocable commitment of the exception area. Only if development (e.g., physical improvements such as roads and underground facilities) on the resulting parcels or other factors makes unsuitable their resource use or the resource use of nearby lands can the parcels be considered to be irrevocably committed. Resource and nonresource parcels created and uses approved pursuant to the applicable goals shall not be used to justify a committed exception. For example, the presence of several parcels created for nonfarm dwellings or an intensive commercial agricultural operation under the provisions of an exclusive farm use zone cannot be used to justify a committed exception for the subject parcels or land adjoining those parcels.

**FINDINGS:** The applicant submitted an extensive assessment of the exception area and adjacent lands. Information on Tax Lots and Property Lines is set forth in Section 4 of the Burden of Proof at page 12-15. The information on the subject property is in section 6 of the Burden of Proof (pages 18-27), as well as the surrounding area is described in detail in section 16 (pages 59 to 133), incorporated herein by reference. The applicant further addressed the above standard on pages 200 to 202 of the burden of proof. As set forth at page 201:

*"By 1980, Deschutes Junction became irrevocably committed to industrial and commercial uses. There was pre-existing industrial and commercial development occurring on adjacent lands and subsequent zone changes have added to the amount of industrial zoned property, creating a nearly urban density neighborhood and rural service center."*

As set forth in the Powell/Ramsey decision at pages 42-43:

[T]he Deschutes Junction area and the establishment of its industrial uses resulted from a combination of goal exceptions and legislative zone changes. In addition . . . some of the existing uses – e.g., Cascade Pumice and Willamette Graystone – pre-existed adoption of the county's initial zoning ordinance. The record indicates the existing RI zoning on the subject property resulted from the county's granting of an exception to Goal 3 and subsequent zone change from EFU to RI on the basis of findings that the soils were not suitable for agriculture. The applicant states, and the Hearings Officer agrees, that the existing



exception area at Deschutes Junction did not become irrevocably committed on account of a land division, but rather from pre-existing industrial development occurred [sic] on adjacent lands, the county's 1980 approval of an industrial use on the RI-zoned portion of the subject property (CU-90-145) and construction of the Deschutes Market/Tumalo Road/Highway 97 overpass.

I incorporate these findings by reference herein. I further note that the key finding in support of this requirement is the fact that development (e.g., physical improvements such as roads and underground facilities) on the subject property has made unsuitable its resource use and the resource use of nearby lands. This occurred via the Highway 97 expansion project and the overpass/Tumalo Road project, and the Highway 97 on-off ramps via Tumalo Place, forming the northern boundary of the subject property. Accordingly, I find that the subject property may be considered to be irrevocably committed under this standard. Although the applicant described parcel size and ownership patterns of the exception area and adjacent lands to support the request for an "irrevocably committed" exception, such findings are not required to find compliance with this criteria, consistent with Powell/Ramsey.

- (B) Existing parcel sizes and contiguous ownerships shall be considered together in relation to the land's actual use. For example, several contiguous undeveloped parcels (including parcels separated only by a road or highway) under one ownership shall be considered as one farm or forest operation. The mere fact that small parcels exist does not in itself constitute irrevocable commitment. Small parcels in separate ownerships are more likely to be irrevocably committed if the parcels are developed, clustered in a large group or clustered around a road designed to serve these parcels. Small parcels in separate ownerships are not likely to be irrevocably committed if they stand alone amidst larger farm or forest operations, or are buffered from such operations;

**FINDINGS:** The applicant addressed this standard on page 203 of the burden of proof as follows:

*"The RI-zoned parcels in Deschutes Junction range in size from 1.41 to 18.69 acres. Jack Robinson and Sons and 4-R Equipment, a related owner, own the majority of the RI-zoned land, approximately 63 of 77 RI-zoned acres at Deschutes Junction. Although some of the existing RI-zoned parcels are small, it is not the size of the RI-zoned parcels that makes the exception area – the subject site -- irrevocably committed to non-resource uses. Rather, the exception area is irrevocably committed because it is a relatively small and isolated parcel surrounded by contiguous RI-zoned parcels and uses and physical barriers. RI-zoned parcels do not stand alone amidst larger farm or forest operations because no such operations existing in the surrounding area. FIGURE 22, TABLE OF SURROUNDING USES, is a parcel by parcel analysis of all tax lots in the*

surrounding area. The actual owners' names, as found on DIAL, are given for all lots over 3 acres. As can be seen, very few people own more than one tax lot.

*There is no surrounding agricultural parcel, under any ownership, that can be joined together with the subject site that would allow productive farming on the subject site. To the east is RI property and a state highway. To the north is Tumalo Place and RC and MUA-10 property. To the west is a school on 15 acres and to the south is an unfarmable triangular 4-acre tax lot with a rock spine crossing it."*

As the Hearings Officer found in Powell/Ramsey, it is not the size of the parcels that makes the exception area irrevocably committed to non-resource uses. Rather, the subject parcel is "irrevocably committed" due to its bisection by the Tumalo Road/Highway 97 overpass, the on-off-ramps to Highway 97 from Tumalo Place and Highway 97 to the east. The subject property does not stand alone amidst larger farm or forest operations because no such operations exist in the surrounding area. I adopt the reasoning and findings of the Hearings Officer in Powell/Ramsey to support a finding that the applicant has appropriately requested an "irrevocably committed" exception based on existing parcel sizes and contiguous ownerships considered together. The applicant is not relying on the fact or existence of any small parcels in separate ownerships.

**(d) Neighborhood and regional characteristics;**

**FINDINGS:** The applicant addressed the above standard on pages 203-204 of the burden of proof.

*"The seven square miles of the Long Butte/Deschutes Junction community has been developed with non-resource uses for over 60 years. Bordering Deschutes Junction are large parcels of up to a square mile each that were never selected for homesteading, never taken out of public ownership and never developed. They can be characterized as predominantly undeveloped native vegetation on rocky parcels of large size owned by public agencies and government. ...*

*As noted in the parcel survey, agricultural uses are scattered small hobby farms. Due to the small parcel sizes, the infertility of the soil, the shallow soils, the surface rock and the expense of farming small parcels, most EFU-zoned land at Deschutes Junction is either fallow or reverting back to native vegetation. The entire south side of Long Butte is subdivided into urban sized residential lots. The largest EFU lot is 20 acres and it is located south of Tumalo Road (off Half Mile Lane). In the early 2000s, the current owner wanted to subdivide it for residences under Measure 37 claim. He continues to plan to do so when the opportunity arises. The Deschutes Junction neighborhood consists of a pocket of 62 acres of industrial and commercially zoned land mixed with a pre-kindergarten through 10<sup>th</sup> grade school, few hobby farms and rural residences. Non-conforming uses were grandfathered in. Manufacturing, retail and commercial uses are on EFU-zoned parcels immediately south of the subject property and site are physically separated from them by roads, the school, and existing industrial and commercial uses. Although there are primarily 3-5 acre hobby farms in the neighborhood, the subject property and site are physically separated from them by roads, the school, and existing industrial and commercial uses. Approval of the proposed exception to add land to the existing exception area would be consistent with the historic and current character and land use pattern in the neighborhood."*

With this information, as well as the applicant's detailed description of the surrounding area on pages 59 to 133 of the burden of proof, the applicant appropriately described the neighborhood and regional characteristics to support the request for an "irrevocably committed" exception. I further adopt the reasoning of the Hearings Officer in Powell/Ramsey in this regard: "The Deschutes Junction neighborhood consists of a pocket of industrial and quasi-commercial uses mixed with a few farms and rural residences." Substantial evidence in this record shows that the subject property bears a greater relation to the existing industrial uses to the east, accessed via the Tumalo Road/Highway 97 overpass that bisects the property, and to the commercial uses to the north of the property than to rural residential uses to the south and west. This is due to the location of the property in the center of the primary existing transportation hub between the cities of Bend and Redmond. I find that approval of the proposed exception to add land to the exception area would result in little if any change to the character of the neighborhood.

- (e) **Natural or man-made features or other impediments separating the exception area from adjacent resource land. Such features or impediments include but are not limited to roads, watercourses, utility lines, easements, or rights-of-way that effectively impede practicable resource use of all or part of the exception area;**

**FINDINGS:** I find that this subsection focuses on infrastructure improvements, specifically, and not general commercial, industrial and urban density residential development. The applicant stated at page 204 of the burden of proof that: "As discussed throughout this application, the proposed exception area – the subject site -- is nearly surrounded by roads, commercial, industrial and urban density residential development. Contiguous connection with adjacent resource land occurs on the 22 percent of the property's boundary lines to the south and west. A county collector road diagonally bisects the property as well." Notwithstanding the reference to other non-infrastructure development, I find that the applicant appropriately described the natural or man-made features or other impediments separating the exception area from adjacent resource lands to support the request for an "irrevocably committed" exception.

- (f) **Physical development according to OAR 660-004-0025; and**

**FINDINGS:** The applicant addressed the above standard as follows at page 204 of the burden of proof:

*"The record indicates the physical development on the exception area consists of two fire hydrants, a 1,420 foot long 12-inch diameter water line within a 20-foot easement running north to south down the middle of the parcel, four power/utility poles, a 150-by-60-foot commercial equipment display and sales pad in the northeast corner, fences installed by the County along roadways and highways, three 120-foot long by 60-foot wide paved driveways, a 23,460 square foot metal storage building, two 12-foot wide by 18-foot tall billboards, internal gravel roads, a failed irrigation storage pond, cindered vehicle maneuvering areas and outdoor storage. The largest development and biggest impediment over the parcel is the 442-foot long by approximately 170-foot wide Deschutes Junction Overpass over the primary highway in Central Oregon, US Highway 97 and its associated concrete tunnel and drainage culverts. The development, the roads and the Deschutes Junction Overpass bisecting the land does effectively preclude*

*resource uses (agriculture and forestry) in the exception area for reasons discussed in previous sections."*

OAR 660-004-0025 requires that "the extent and location of existing physical development on the land," be set forth in findings, including "information on structures, roads, sewer and water facilities and utility facilities." I find that the applicant appropriately described the physical development of the exception area to support the request for an "irrevocably committed" exception.

**(g) Other relevant factors.**

**FINDINGS:** The applicant addressed this standard on pages 204-205 of the burden of proof, discussing the other relevant factors, including the road system and bisection of the property, highway truck and vehicle noise, prevailing winds that blow across the property towards the roads causing a hazard, the hazards associated with spraying herbicides or fertilizers near a school and major state highway, theft, litter and property damage (especially vehicles running into fences and gates), the non-resource soils, lack of access to irrigation water, small size and irregular configuration of the property, and lack of agricultural uses in the immediate area.

The applicant appropriately described these other relevant factors to support the request for an "irrevocably committed" exception.

- (7) The evidence submitted to support any committed exception shall, at a minimum, include a current map or aerial photograph that shows the exception area and adjoining lands, and any other means needed to convey information about the factors set forth in this rule. For example, a local government may use tables, charts, summaries, or narratives to supplement the maps or photos. The applicable factors set forth in section (6) of this rule shall be shown on the map or aerial photograph.**

**FINDINGS:** The applicant's submitted materials include parcel maps, zoning and tax lot maps, vicinity maps, historic maps, aerial photographs of the subject property and surrounding area as well as ground-level photos of the subject site and surrounding properties. This criterion is met.

**e. OAR 660-014-0030, Rural Lands Irrevocably Committed to Urban Levels of Development**

- (1) A conclusion, supported by reasons and facts, that rural land is irrevocably committed to urban levels of development can satisfy the Goal 2 exceptions standard (e.g., that it is not appropriate to apply Goals 14's requirement prohibiting the establishment of urban uses on rural lands). If a conclusion that land is irrevocably committed to urban levels of development is supported, the four factors in Goal 2 and OAR 660-004-0020(2) need not be addressed.**

**FINDINGS:** The applicant addressed the above standard on page 206 of the burden of proof as follows:

*"The applicant has demonstrated that the proposed exception area, the subject site, is irrevocably committed to non-resource uses in general and to industrial and commercial uses at urban levels in particular. Among other reasons, the exception area is unsuitable for rural uses because of its size, configuration, non-resource soils, lack of usable irrigation, and location virtually surrounded by existing roads and major highways, industrial and commercial development which makes use of the site with rural uses impracticable. Because the exception area has been irrevocably committed, the Applicant does not need to address the four factors in Goal 2 and OAR 660-004-0020(2).*

The applicant addressed the four factors in Goal 2 and OAR 660-004-0020(2) on pages 172 to 187 of the burden of proof. As set forth in the findings above, the subject property is unsuitable for agricultural uses because of its size, poor quality soils, lack of irrigation, and location virtually surrounded by existing industrial development. These conditions also make use of the site with rural/non-urban uses impracticable. Based on these facts, coupled with the adjacent industrial, commercial and rural residential uses, the existence of an extensive network of roads and highways, and the overpass that cuts through the applicant's subject property, I find that it is not appropriate to apply Goal 14's requirement prohibiting the establishment of urban uses on rural lands with respect to the subject property. The applicant is correct, and I find that, because the exception area has been irrevocably committed, the four factors in Goal 2 and OAR 660-004-0020(2) need not be addressed.

- (2) A decision that land has been built upon at urban densities or irrevocably committed to an urban level of development depends on the situation at the specific site. The exact nature and extent of the areas found to be irrevocably committed to urban levels of development shall be clearly set forth in the justification for the exception. The area proposed as land that is built upon at urban densities or irrevocably committed to an urban level of development must be shown on a map or otherwise described and keyed to the appropriate findings of fact.**

**FINDINGS:** The applicant states the following for this standard:

*"The exception area includes the subject property. It includes the two Deschutes County tax lots: 16-12-26C000201 and 161227D000104. Tax lot maps of both parcels are included in the background information. The description of the land that is irrevocably committed to urban level of development, is set forth in detail in the findings and burden of proof above. As discussed in those findings, the Applicant submitted maps and aerial photos depicting the subject site. Exhibits include the deeds to subject properties containing a metes and bounds description of the exception area. Deeds are in Exhibits 8 and 9."*

The determination that the subject property is irrevocably committed to an urban level of development is based on the situation at the specific site. As set forth in the findings above, the subject property is unsuitable for agricultural uses because of its size, poor quality soils, lack of irrigation, and location virtually surrounded by existing industrial development which makes use of the site with rural uses impracticable. The adjacent industrial, commercial and rural residential uses, the existence of an extensive network of roads and highways, and the

overpass that cuts through the applicant's subject property support a finding that the property is irrevocably committed to an urban level of development.

The area proposed as land that is irrevocably committed to an urban level of development is shown on maps and other materials submitted by the applicant.

- (3) **A decision that land is committed to urban levels of development shall be based on findings of fact, supported by substantial evidence in the record of the local proceeding, that address the following:**

- (a) **Size and extent of commercial and industrial uses;**

**FINDINGS:** The applicant addressed the above standard on pages 207-208 of the burden of proof statement. Specifically, the applicant detailed land intensive businesses to the north and east of the subject property. Among other things, the 1.77 lot directly north of the subject property is zoned Rural Commercial and includes at least 10 individual land intensive businesses detailed in the findings above. There is a 9.05 acre RI zoned land directly east of the subject property. Jack Robinson & Sons and a subsidiary, 4-R Equipment, owns and uses 58.39 acres mostly zoned Rural Industrial and a railroad spur east of the subject property.

I find that the applicant's description of these commercial and industrial uses is more expansive than would be required, because it includes properties several miles from the subject site. Nonetheless, the standard is not limited to "adjoining" or "adjacent" commercial and industrial uses. Moreover, the Applicant's study area is generally limited to ¾ mile from the subject site. The size and extent of commercial and industrial uses include, among other things, landscaping services, antiques and wedding services, logging and construction company, bus repair and bus resale business, pickup truck canopy sales, a business selling and renting shipping containers, the Whistle Stop retail nursery, Route 97 antiques, an equipment rental business, Willamette Graystone, 4-R Equipment, United Pipe, Cascade Pumice, the Pilot Butte Irrigation Canal, City of Bend Sewage Treatment Facility, COID's Juniper Ridge Phase I Hydroelectric Plant and Swalley's Hydroelectric Plant. The commercial and industrial uses most proximate to the subject site are those relevant in this finding that the land is committed to urban levels of development. Such uses include Willamette Graystone, 4-R Equipment, United Pipe, Cascade Pumice and the RC zone to the north that includes building/landscape businesses. The applicant appropriately described the size and extent of commercial and industrial uses to support the request for an "irrevocably committed" exception

- (b) **Location, number and density of residential dwellings;**

**FINDINGS:** The applicant addressed the above standard on pages 208-209 of the burden of proof. The total number of platted lots in nearby subdivisions is 1,252. In addition, there is one rural residence about 300 feet south of the site and a mobile home is located near the bus barn on a 15.42 acre parcel owned by the Three Sisters School. North of Tumalo Place is a rental house on property zoned MUA-10. Consistent with the Powell/Ramsey decision, I find that this criterion requires a description of residences on surrounding lands, and not limited to the exception area. For the reasons set forth in findings above, the applicant has adequately indicated the location, number and density of residential dwellings to support the request for an "irrevocably committed" exception.

**(c) Location of urban levels of facilities and services; including at least public water and sewer facilities; and**

**FINDINGS:** The record indicates there are no public water or sewer facilities on or near the subject property. Avion water company is a private water system. The closest of such facilities is located within the Bend UGB which is at its closest point is approximately 3.25 miles south of the exception area. The applicant appropriately described the location of urban levels of facilities and services to support the request for an "irrevocably committed" exception

**(d) Parcel sizes and ownership patterns.**

**FINDINGS:** The applicant addressed the above standard on page 209-211 of the burden of proof, which references the applicant's detailed analysis of the surrounding area (pages 59 to 133 of the burden of proof). Most parcels are under 2 acres in size. RI-zoned parcels in the Deschutes Junction area total approximately 60 acres in several tax lots, with most properties under 10 acres in size. Most of the RI-zoned land is owned by two related businesses and consists of aggregate processing and the construction of concrete products and supplies. Consistent with the Powell/Ramsey decision, I find that this criterion requires a description of parcel sizes and ownership patterns on surrounding lands, and not limited to the exception area. The applicant appropriately described parcel sizes and ownership patterns to support the request for an "irrevocably committed" exception.

**(4) A conclusion that rural land is irrevocably committed to urban development shall be based on all of the factors listed in section (3) of this rule. The conclusion shall be supported by a statement of reasons explaining why the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than a rural level of development.**

**FINDINGS:** The applicant addressed this standard at page 212 of the burden of proof as follows:

*"As discussed extensively in the findings above, the proposed exception area -- the subject site -- is irrevocably committed to non-resource uses and urban development because: (1) it does not constitute agricultural land and is not suitable for farm or forest use; (2) it is a relatively small parcel isolated from other EFU-zoned land; (3) it is virtually surrounded by industrial, commercial and transportation uses; and (4) The two northern portions are completely surrounded by roads and highways, and (5) it is surrounded by man-made barriers including roads and extensive industrial, educational and commercial development. The public facilities and services -- e.g. water and sewer -- are not available to the exception area but there is sufficient private infrastructure in place to support the level of uses that are predominate at Deschutes Junction and that could be developed on the subject property with RI zoning. Looking at the evidence presented about surrounding land uses, the parcel sizes and zoning, one concludes that this is an inappropriate and constrained site for agriculture and an appropriate site for Rural Industrial development."*

Substantial evidence in the record supports the applicant's statement above. Again, as set forth in the findings above, I find that the subject property is rural land that is irrevocably committed to urban development. This finding is based on the fact that it is impracticable to use the subject

property rural uses because of its size, and location virtually surrounded by existing industrial development. Most importantly, the adjacent industrial, commercial and rural residential uses, the existence of an extensive network of roads and highways, and the overpass that cuts through the applicant's subject property support a finding that the property is irrevocably committed to an urban level of development. Findings set forth above to address the criteria in OAR 660-014-0030 (3)(a), (b), (c) and (d) are hereby incorporated by this reference.

- (5) More detailed findings and reasons must be provided to demonstrate that land is committed to urban development than would be required if the land is currently built upon at urban densities.**

**FINDINGS:** The applicant addressed this standard at page 212 of the burden of proof as follows:

*"The subject parcel has one large storage building, 23,460 square feet. It also has a highway overpass crossing it. Previous criteria have asked for a complete list of all structures on the site. The Application has tediously documented the historic and current urbanization in the area and surrounding the subject site in great detail. Deschutes Junction area application supports the proposed exception and demonstrates that the subject site is irrevocably committed to urban development. Especially see applicable sections of this application: Section 15. Changes in Circumstances, and Section 16. Surrounding Zoning and Land Uses."*

The Hearings Officer's detailed findings and reasons set forth above in support of the proposed exception demonstrate the subject site is irrevocably committed to urban development, although the subject property is not currently built upon at urban densities. The applicant requests a Goal Exception on the basis that the land is committed to urban development. I find that the applicant has met the more stringent standard required in this criterion. For the foregoing reasons and with the imposition of the conditions of approval set forth below, the applicant's proposed exception complies with the criteria in this rule.

- 3. Division 14, Application of the Statewide Planning Goals to Newly Incorporated Cities, Annexation, and Urban Development on Rural Lands**
  - a. OAR 660-014-0040, Establishment of New Urban Development on Undeveloped Rural Lands**

- (1) As used in this rule, "undeveloped rural land" includes all land outside of acknowledged urban growth boundaries except for rural areas committed to urban development. This definition includes all resource and nonresource lands outside of urban growth boundaries. It also includes those lands subject to built and committed exceptions to Goals 3 or 4 but not developed at urban density or committed to urban level development.**

**FINDINGS:** I find that the applicant's proposal is not subject to this administrative rule because it is not for new urban development on "undeveloped rural land" since the subject site is committed to urban development. Based on the detailed reasons set forth in the findings above, I have found the applicant has demonstrated the subject site is "irrevocably committed"



to urban development. Moreover, as also discussed in the findings above, I have found that the applicant did not demonstrate it is entitled to a "reasons" exception to Goal 14. Therefore, I find this rule is not applicable to the applicant's proposal.

#### **IV. DECISION:**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby **APPROVES** the Applicant's applications for a Comprehensive Plan Map Amendment to re-designate the subject property from Agriculture to Rural Industrial and a corresponding Zone Map Amendment (Zone Change) to reassign the zoning from Exclusive Farm Use Tumalo/Bend Subzone (EFU-TRB) to Rural Industrial Zone (R-I) and a Goal 14 Exception, subject to the following conditions of approval:

1. This approval is based upon the applicant's submitted burdens of proof, supplemental materials, and written and oral testimony. Any substantial change to the approved plan amendment, zone change, and goal exception will require new land use application(s) and approval(s).
2. This approval allows on the subject property all uses allowed outright and conditionally in the Rural Industrial use, except that any pulp and paper manufacturing use shall not be allowed within the subject property.
3. The Deschutes County Year 2011 Comprehensive Plan shall be amended to include an updated description of the Deschutes Junction rural industrial site in Chapter 3.4, as follows:

**The Deschutes Junction site consists of the following tax lots: 161226C000107 (9.05 acres), 16126C000106 (4.33 acres), 161226C000102 (1.41 acres), 161226C000114 (2.50 acres), portions 161226C000300 (12.9 acres), 161226C000301 (8.93 acres), 161226A000203 (1.5 acres), those portions of 161226C000111 located west of the Burlington Northern-Santa Fe railroad tracks (16.45 acres), 161226C000201 (20.27 acres) and 161227D000104 (1.32 acres). Generally, the Deschutes Junction site extends to property to the west of Highway 97, bordered by Tumalo Road and Tumalo Place and is bordered on the east by the Burlington Northern Railroad, on the north by Nichols Market Road (except for a portion of 161226A000111), and on the south by EFU-zoned property owned by the City of Bend.**

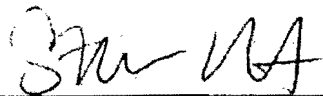
4. The Deschutes County Year 2011 Comprehensive Plan shall be amended to include a new Rural Economy Policy in Chapter 3.4, setting forth the following language for the Deschutes Junction Limited Use Combining Zone:

**To ensure that the uses in the Rural Industrial Zone on Tax Lot 201 on Deschutes County Assessor's Map 16-12-26C, and Tax Lot 104 on Assessor's Map 16-12-27D as described in Exhibit "\_\_\_\_" and depicted on Exhibit "\_\_\_\_" to Ordinance \_\_\_\_\_ and incorporated by reference herein, are limited in nature and scope, the Rural Industrial zoning on the subject parcel shall be subject to a Limited Use Combining Zone, which will prohibit the use on that site for any pulp and paper manufacturing use.**

5. The Deschutes County Year 2011 Comprehensive Plan shall be amended to include a new Rural Economy Policy in Chapter 3.4, setting forth the following language for the Deschutes Junction Limited Use Combining Zone:

**A 2015 exception (Ordinance \_\_\_\_\_) included an irrevocably committed exception to Goal 14 to allow rural industrial use with a Limited Use Combining Zone for any use allowed outright or conditionally in the Rural Industrial zone, except for pulp and paper manufacturing use.**

6. Prior to the public hearing before the Deschutes County Board of Commissioners to approve the subject plan amendment, zone change and exception to Goal 14 for the subject property, the applicant/owner shall submit to the Planning Division a metes-and-bounds description of the subject site to be re-designated and rezoned.
7. Prior to any development of the property, the developer shall work with Swalley Irrigation District to transfer some or all of the existing 19.71 acres of irrigation water rights associated with the subject property to ensure that there will not be any development on top of irrigated land; only those irrigation water rights that can be dedicated to beneficial uses, such as irrigated landscaping, may be retained.
8. As part of any development of the property, the developer shall:
- a. Create a system of access easements that connect the three driveways with any lots created by partitioning or subdividing of the land.
  - b. Work with Commute Options to assist in preparing a two year start-up Transportation Demand Management program (TDM). The program will include:
    - 1) Conducting workshops and training on TDM alternatives;
    - 2) Provide posters and brochures promoting smart commuting choices;
    - 3) A plan to have employees from on-site businesses have staggered start and end work hours.
  - c. Prepare an internal Traffic Control Plan (in accordance with the MUTCD), that includes:
    - 1) Directional signing to Redmond, Bend, Tumalo at each intersection;
    - 2) Time-restrictive (4 PM – 6 PM) "NO LEFT TURN" sign at the driveway onto Tumalo Place;
    - 3) Bridge undercrossing shall be signed "ONE LANE ROAD";
    - 4) Prepare a site map, with the aid of DCPWD, showing the location of traffic control devices.
  - d. Have the Deschutes County Transportation Planner approve Traffic Management Plan.



Stephanie Marshall Hicks, Hearings Officer

Dated this 30<sup>th</sup> day of September, 2015

Mailed this 1<sup>st</sup> day of ~~September~~, 2015  
October

REVIEWED

*nm*

LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Code  
Title 18, the Deschutes County Zoning Map, to  
Change the Zone Designation on Certain Property  
from Exclusive Farm Use (EFU-TRB) to Rural  
Industrial (R-I).

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ORDINANCE NO. 2016-002

WHEREAS, Anthony Aceti applied for a Zone Change to the Deschutes County Code ("DCC) Title 18, Zoning Map, to rezone certain property from Exclusive Farm Use – Tumalo/Redmond/Bend Subzone ("EFU-TRB") to Rural Industrial ("R-I"); and

WHEREAS, after notice was given in accordance with applicable law, public hearings were held on June 16, 2015 and July 14, 2015 before the Deschutes County Hearings Officer, and on October 1, 2015 the Hearings Officer recommended approval of the exception to Goal 14, a Plan Amendment, and a Zone Change; and

WHEREAS, after notice was given in accordance with applicable law, a de novo public hearing was held on November 23, 2015 before the Board of County Commissioners ("Board") ; and

WHEREAS, on this same date, the Board adopted Ordinance 2016-001, adopting a goal exception to Statewide Planning Goal 14 and amending DCC Title 23, the County Comprehensive Plan, changing the plan designation of the property from Agriculture to Rural Industrial; and

WHEREAS a change to the Deschutes County Zoning Map is necessary to implement the amendment adopted in Ordinance 2016-001; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. AMENDMENT. DCC Title 18, Zoning Map, is amended to change the zone designation from Exclusive Farm Use ("EFU") to Rural Industrial ("R-I") for certain property depicted on the map set forth as Exhibit "A," attached and incorporated by reference herein, and described in Exhibit "B," incorporated by reference herein.

Section 2. FINDINGS. The Board adopts as its findings in support of this Ordinance, the Decision of the County Hearings Officer, attached to Ordinance 2016-001 as Exhibit "F," and incorporated by reference herein.

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Dated this \_\_\_\_\_ of \_\_\_\_\_, 2016

BOARD OF COUNTY COMMISSIONERS  
OF DESCHUTES COUNTY, OREGON

\_\_\_\_\_  
ALAN UNGER, CHAIR

\_\_\_\_\_  
TAMMY BANEY, VICE CHAIR

ATTEST:

\_\_\_\_\_  
Recording Secretary

\_\_\_\_\_  
ANTHONY DEBONE, COMMISSIONER

Date of 1<sup>st</sup> Reading: \_\_\_\_\_ day of \_\_\_\_\_, 2016.

Date of 2<sup>nd</sup> Reading: \_\_\_\_\_ day of \_\_\_\_\_, 2016.

	Record of Adoption Vote			
Commissioner	Yes	No	Abstained	Excused
Alan Unger	_____	_____	_____	_____
Tammy Baney	_____	_____	_____	_____
Anthony DeBone	_____	_____	_____	_____

Effective date: \_\_\_\_\_ day of \_\_\_\_\_, 2016.

ATTEST:

\_\_\_\_\_  
Recording Secretary