



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/>

STAFF REPORT

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 Kliewer
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: June 16, 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

* 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 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. 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 property is bordered by Highway 97 on the east and Tumalo Road bisects the property. Additionally, 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.
- 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.

There are 19.71 acres of Swalley Irrigation District water rights on the property. 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.

- E. Surrounding Zoning and Land Uses:** Zoning in the area is generally residential (RR-10 and MUA-10) to the north with farm use (EFUTRB) 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, are approximately 60 acres zoned Rural Industrial (RI).

Property to the south (161226C000200) is zoned EFUTRB 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 are the Burlington Northern-Santa Fe (BNSF) railroad tracks. Also across the Highway to the southeast is land zoned RI and used for mineral processing,

- 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.

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 is scheduled for June 16, 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 sent notice of the applicant's proposal to a number of public and private agencies and received the following responses:

County Transportation Planner:

Background

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.

Swalley Irrigation District:

There are 19.71 acres of Swalley Irrigation District water rights on the property. Applicant will need to contact the District to discuss any development on top of water rights and resulting disposition of those water rights.

Redmond Airport and Avion Water Company:

No comments responses.

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 will mail 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. Notice of the initial public hearing will also be published in the Bend "Bulletin" newspaper, and the subject property will be posted with a notice of proposed

land use action sign. As of the date of this staff report, one letter has been received in support of the applications.

- 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 submitted applications for a plan amendment, zone change and goal exception. The applications are being reviewed under the procedures of Title 22 of the Deschutes County Code.

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 numerous 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. Each of these requirements is discussed below.

1. Conformance with Comprehensive Plan. The applicants have requested approval of a plan amendment to redesignate the subject property from Agriculture to Rural Industrial, and therefore the proposed rezoning from EFU-TRB to RI will be consistent with its proposed new plan designation.

2. Consistency with the Plan's Introductory Statement and Goals. In several 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. 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). Staff and the applicant have identified the following plan goals and policies as potentially requiring 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 that this is an aspirational goal and not an approval criterion. The applicant addressed the soil productivity on pages 137/138 of the burden of proof statement. The soils study found that the subject property is 80% class 7 and 8 soils, and 20% class 3-6 soils and therefore not predominantly Agricultural Land.

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 for x years. The subject property does not appear to have been farmed in at least the last two years. Aerial photos from (years), show the subject property receiving irrigation and engaged in agriculture. In 1997, the applicant received a conditional use permit and site plan approval (CU-97-72/SP97-49). On page 3 of that decision, it states, “the record indicates the applicant currently grows hay on approximately 21 of 23 acres on the subject 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.”

Staff requests the Hearings Officer determine if 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.¹

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 that this policy is directed at the county rather than at an individual application. 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 that this policy also is directed at the county rather than an individual applicant. 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 requested an exception 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 that this policy also is directed at the county rather than at an individual application. The Hearings Officer found that “In any event, in my decision in *N/P* (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.” Staff believes 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 that this policy also is directed at the county. According to the Borine study, the applicant has enrolled 19.71 acres of water rights for

¹ In 2014, the Board of County Commissioners upheld a Hearings Officer decision, PA-13-1, ZC-13- 1. While the Board found that the property contains a majority of class 7 soil, they found it is suitable for farm use based on the factors of OAR 660-033-0020.

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 for x years. The subject property does not appear to have been farmed in at least the last two years. Aerial photos from (years), show the subject property receiving irrigation and engaged in agriculture. In 1997, the applicant received a conditional use permit and site plan approval (CU-97-72/SP97-49) consisting of the sale of hay and specialized hay equipment. On page 3 of that Hearings Officer decision, it states, "the record indicates the applicant currently grows hay on approximately 21 of 23 acres on the subject 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."

Staff requests the Hearings Officer determine if 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 the factors in the Goal 3 administrative rule.

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 that this policy is directed at the county. And stated: "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."

The applicant has not proposed any particular land use or development, and 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. Staff believes that it is likely similar development 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, staff believes that future development of the subject property with uses permitted in the RI Zone will have water service.

The record indicates 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. 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 subject property does not appear to have been farmed in at least the last two years.

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/Ramsney that the above-underscored language indicates these policies are directed at the county and not at individual applications. 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 that the language of these policies suggests they were intended to apply to quasi-judicial applications. Staff notes 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 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. In any case, the applicant submitted a transportation impact analysis (hereafter “traffic study”). The traffic study, dated March, 2015 and prepared by Sage Engineering Associates, is included in the record as Exhibit 28 to the applicant’s burden of proof.

As identified in the County Transportation Planner’s comment, the TIA does not comply with the TPR at OAR 660-012-0060(4). While this comment identifies a potential solution, the applicant has not proposed this or some other resolution of this issue as of the writing of this staff report.

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 that the above-underscored language indicates 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.

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 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 identified in the County Transportation Planner’s comment, the TIA does not comply with the TPR at OAR 660-012-0060(4). While this comment identifies a potential solution, the applicant has not proposed this or some other resolution of this issue as of the writing of this staff report.

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

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.

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.

The applicant's proposed plan amendment and zone change from EFU to RI, if approved, would be 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. Staff believes that the proposed plan amendment and zone change will be consistent with the intent and purpose of the RI zone.

- C. That changing the zoning will presently serve the public health, safety and welfare considering the following factors:**
 - 1. The availability and efficiency of providing necessary public services and facilities.**

FINDINGS: Staff finds 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 identified in the County Transportation Planner's comment, the TIA does not comply with the TPR at OAR 660-012-0060(4). While this comment identifies a potential solution, the applicant has not proposed this or some other resolution of this issue as of the writing of this staff report.

- 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. If the Hearings Officer finds that the applicant's proposal is consistent with all applicable goals and policies, this criterion would be 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. Staff finds the original EFU zoning of the subject property was not a mistake. Rather, 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. The applicant's burden of proof lists in two places the change in circumstances. On page 147 the applicant identifies several changes in circumstances justifying the proposed plan amendment and zone change from EFU to RI as follows:

- The reduction of the number of acres in the applicant's parcel due to road projects.
- 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.
- The re-routing of commuter traffic onto roads that go around the subject property.
- The construction and realignment of Tumalo Place, Tumalo Road, Deschutes Market Road and Pleasant Ridge Road around the property.
- The changes in the source of and delivery systems for irrigation water from Central Oregon Irrigation District (COID) and the Pilot Butte Canal to the Swalley Irrigation District.
- The lack of a Swalley easement to allow the delivery of irrigation water to the property.
- The construction of the Swalley hydroelectric facility which adversely affected applicant's in-stream leasing of irrigation water.
- 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.

Staff believes that the applicant needs to further provide evidence substantiating changes in circumstances to COID and Swalley irrigation delivery systems, the hydro plant affecting the applicant's ability to obtain irrigation water, and the specific location of "platting and replatting" of lots/parcels in the vicinity. Staff has contacted Swalley Irrigation District and they have indicated that the hydroelectric facility has no bearing on Swalley's in-stream leasing policy. Also, Swalley does not get their water from COID's Pilot Butte Canal. And lastly, Swalley has indicated that they do not acquire or administer any private easements for water delivery, so there is no "Swalley easement."

The applicant also listed the changes of circumstances on page 47-53 of the burden of proof as follows:

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. Aceit 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 he \$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 1991.²
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?

² Staff is not including the applicant's table 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." Staff recommends the Hearings Officer clearly identify which changes in circumstance form the basis of approval under this criterion.

While staff broadly agrees with the factual history presented in this list, staff also notes that there are a number of items on the list that staff believes overstate or under explain the impact on the subject property. For example, how does development across the highway or on non-adjacent lands impact the agricultural use of the subject property? Staff is also uncertain if the difficulty in farming the land have irrevocably committed it to urban uses.

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).

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.

Goal 3, Agricultural Lands. Goal 3 is "[t]o preserve and maintain agricultural lands." The Hearings Officer will need to determine if the applicant's submitted soil study demonstrates 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, which would be consistent with Goal 3.

Goal 4, Forest Lands. Staff finds 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. Staff finds 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. Staff finds 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.

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

Goal 8, Recreational Needs. Staff finds 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. Staff finds that this goal is to provide adequate opportunities throughout the state for a variety of economic activities. Staff finds 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. Staff finds 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. Staff finds that 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. Staff finds this goal is not applicable to the applicant's proposal because it will not result in the extension of urban services to rural areas. And 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 identified in the County Transportation Planner's comment, the TIA does not comply with the TPR at OAR 660-012-0060(4). While this comment identifies a potential solution, the applicant has not proposed this or some other resolution of this issue as of the writing of this staff report.

Goal 13, Energy Conservation. Staff finds 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.

Goal 14, Urbanization. Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use." Staff finds the proposed plan amendment and zone change 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, Staff believes 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 must demonstrate the proposal qualifies for an "irrevocably committed" exception to Goal 14.

Goals 15 through 19. Staff finds 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.

If the Hearings Officer finds that the applicant's proposal is consistent with statewide planning goals or with an exception to Goal 14, this criterion would be met.

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;**
 - (b) Change standards implementing a functional classification system; or**
 - (c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.**
 - (A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;**
 - (B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or**
 - (C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.**

- (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: Staff finds the TPR is applicable to the applicant's proposal because it requests an amendment to an acknowledged plan. As discussed in the findings above, the applicant submitted a traffic study dated March 2015.

County Transportation Planner Peter Russell has reviewed the traffic study and has determined that the study correctly indicates all intersections will meet the County's mobility standard level of service D in 2035, except for the intersection of Tumalo Road/Tumalo Place. This

intersection failure of the Tumalo Road/Tumalo Place intersection in 2035 makes the plan amendment/zone change significant under the TPR. The Transportation Planner has listed two options for the project's compliance with the TPR. They are:

- Fund or construct a southbound right turn lane at the Tumalo Road/Tumalo Place intersection; or
- 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 Transportation Planner states: "The above alternatives, coupled with the options allowed under the 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."

As identified in the County Transportation Planner's comment, the TIA does not comply with the TPR at OAR 660-012-0060(4). While this comment identifies a potential solution, the applicant has not proposed this or some other resolution of this issue as of the writing of this staff report.

(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 of Fact 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. Staff believes that this notice provided adequate opportunity for coordination with affected transportation and service providers and local governments.

Agricultural Land

3. Division 33, Agricultural Land

FINDINGS: The applicant requests approval of a plan amendment and zone change for the subject property. At the outset, the applicant argues the subject property does not constitute "agricultural land" requiring protection under Goal 3 and therefore no exception to that goal is required. 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 Resourced 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 states 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). Staff 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. The southern portion of the subject property is located adjacent to the Seventh Day Adventists School, which appears to have grass areas.

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-Deskmap 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. Therefore, the NRCS data shows the subject property is predominantly Class I-VI soils with irrigation and therefore “agricultural land.”

As noted in the Findings of Fact 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 the same soil units on the subject property as is 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 Deskmap 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 soil 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.

Symbol	Revised Map Units	Soil	%	LCC NIRR	LCC IRR	TL 104 (1.3 ac)		TL 201 (20.3 ac)		TL 104/201 (21.6 ac)	
						ac	%	ac	%	ac	%
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	6	6	-	-	2.6	13	2.6	12
			25	6	3						
C	Gosney-Zeta complex, 0-3% slopes	Gosney	70	7	7	0.2	15	12.6	62	12.8	59
		Zeta	25	7	7						
D	Urban Land		95	8	8	1.1	85	3.4	17	4.5	21

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 Swalley Irrigation District, the water rights have been leased for 5 out of the last 15 years. The subject property does not appear to have been farmed in several years. Aerial photos from (years), show the subject property receiving irrigation and engaged in agriculture as recently as 1996. In 1997, the applicant received a conditional use permit and site plan approval (CU-97-72/SP97-49). On page 3 of that decision, it states, "the record indicates the applicant currently grows hay on approximately 21 of 23 acres on the subject 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."

Staff requests the Hearings Officer determine if 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. .

(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: If the Hearings Officer determines the applicant's soil study shows the subject property is predominantly Class VII and VIII soils, 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.

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."

The Hearings Officer in the Powell/Ramsey decision stated she is aware that DLCD's administrative rules define Class VII and VIII soils as having very severe limitations that make them unsuited for cultivation.

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 7th and earlier than September 15th 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 6th and earlier than October 12th 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.³ 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

³ Staff is not sure where this testimony occurred, as it does not appear to be a part of these applications.

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.”

While staff concurs that commercial agricultural uses in the vicinity of the subject property are limited, staff is uncertain if the subject property and surrounding land are “committed to urbanization”.

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

The Hearings Officer will need to make a finding of whether or not the subject property constitutes agricultural land, and whether it is suitable for farm use 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.

(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."

Staff 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."

If the Hearings Officer concurs with the applicant's soils study, it is the class 6 soils that are intermingled with the class 7 and 8 soils and not vice versa. The subject property is predominantly class 7 and 8 soils and would not be considered a farm unit based on the poor soils.

- (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 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: Staff requests the Hearings Officer determine if 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: Staff requests the Hearings Officer determine if the Borine study shows the subject property is predominantly non-agricultural land based on the soil’s capability classification. The findings above address the factors under OAR 660-033-0020(1). The applicant submitted a very extensive narrative of the surrounding zoning and land uses in Section 16 of the burden of proof statement (pages 59-132). Property located at 64835 Hwy 97, tax lot 16-12-27D, 1100 is zoned EFU and presently receiving farm deferral. It abuts the applicant’s property at the southwest corner. The applicant has stated the following with respect to this property: “Immediately southwest of the subject site is an unused 30-acre parcel owned by a corporation, East Slope Development, on tax lot 161227D001100. The Corporation is associated with the Seventh Day Adventist Church. The parcel is fallow. The owners plan to use the property for school-related recreational uses in the future.” Staff has no confirmation from the property owner about any intended use for it.

- (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 nearly adjoins 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 soil study concluded that the subject property is 80% class 7 and 8 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 DLCDC in accordance with the process in OAR 660-033-0045 and the NRCS land capability classification system. Staff finds 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 soil study was reviewed and certified by DLCDC.

(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 DLCDC pursuant to OAR 660-033-0045.

Based on the foregoing findings and conclusions, the Hearings Officer will need to determine if the applicant has demonstrated that the subject property does not constitute “agricultural land” as defined in Goal 3 and OAR 660-033-0020, and therefore 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 660-004-0010, 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. The applicant has requested a plan amendment and zone change from EFU to RI. As discussed in detail in the findings above, a Hearings Officer will need to determine if 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.

With respect to the first *Curry County* factor, the subject site could be potentially developed at a high density as an industrial subdivision. While a "worst case" analysis was provided as a basis for the traffic study, no specific development is proposed at this time.

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. Since no specific development is proposed at this time, it is not possible to tell if the development will attract customers from nearby cities. Staff assumes the development could attract customers from nearby urban areas.

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.

Considering the three *Curry County* factors, staff finds the potential uses of the subject property may be "urban" in nature. Staff believes that it is appropriate to require an exception to Goal 14 to determine if the proposed "reasons" match the potential uses, and so that the Hearings Officer can establish development limitations as part of the goal exception to assure the subject site is not developed with "urban" uses. Staff notes that such a goal exception was required by the Hearings Officer in ZC-14-2, where this was a much closer question.

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

* * *

- (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.**

“REASONS” EXCEPTION

FINDINGS: At the outset, staff notes that many of the “reasons” criteria below require an analysis of the “use”. The applicant has provided a “worst case” development scenario for the purposes. However, staff believes that the Hearings Officer 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. With no minimum lot size in the zone, it is unclear what constrains the ultimate development density of the site. Following the Hearings Officer in ZC-14-2/PA-14-2 (where the Hearings Officer rejected a “reasons” exception), staff believes that a property is not eligible for a “reasons” exception without a clearly defined use. Staff recommends the Hearings Officer compare the rigor of the Hearing Officer’s analysis of the approved “reasons” exception in PA-10-3/ZC-10-2.

(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.

However, the applicant has not proposed to limit the allowed uses on the subject property, except for the pulp and paper manufacturing use listed under DCC 18.100.020(H). This means that all but one of the outright or conditional uses in the RI zone could be potentially developed on the property. To the extent the applicant has limited the uses, that limit is all uses allowed outright or conditionally in the RI zone, except pulp and paper manufacturing. Staff is uncertain if this proposed use exclusion can be implemented through a condition of approval, or if a limited use combining zone is required.

No new public services or facilities are proposed, beyond the extension of electric, phone and water services to any new proposed lots.

- (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: Staff finds 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 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 argues that “the policy embodied in Goal 14 should not apply to the subject property because of its location adjacent to and surrounded by existing industrial and commercial operations and its non-agricultural soils that make its use for agriculture inefficient.

The Borine study which concludes that agricultural use of the land is inefficient, given the poor soils. Staff is uncertain if the Rural Industrial development of the property, consisting of an unknown development from the list of outright and conditional uses in the RI zone would provide an orderly transition from rural to urban uses, given the private school, agricultural, and residential uses to the west.

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.”

However, the applicant has not proposed a limited use combining zone or other mechanism to ensure that the future developer of the site will adhere to this development vision. Staff believes that the Hearings Officer must assume that any of the list of outright and conditional use in the RI zone could be developed on the property⁴, subject to the requirements of that zone, site plan review (DCC 18.124), and conditional use criteria where applicable. With no minimum lot size in the zone, it is unclear what constrains the ultimate development density of the site. Frequently, development density in industrial parks is constrained by landscaping and parking requirements, setback, or septic availability. Staff recommends the Hearings Officer make findings under this criterion based on any possible development scenario unless and until the applicant’s example development is a binding limitation.

The Hearings Officer will need to determine whether the state policy embodied in Goal 14 applies, and whether the proposed change will ensure efficient use of the land and provide for livable communities, and not result in a disorderly transition from rural to urban level development.

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:

⁴ Except the pulp and paper manufacturing use.

“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.

However, the applicant has not proposed a limited use combining zone or other mechanism to ensure that the future developer of the site will adhere to this development vision. Staff believes that the Hearings Officer must assume that any of the list 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.

Staff notes that 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.

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:

“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.”

Staff notes that 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.”

Staff believes the Hearings Officer in this case must address this factor if the subject property is found to be “Agricultural Land” or not.

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.”

Staff believes that the applicant makes a similar argument in this case and, similarly, the applicant has not demonstrated the proposed uses identified in the applicant’s traffic study, or other uses permitted in the RI Zone, *require* a location on resource land.

(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, staff finds 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. 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, staff believes, to comply with this criterion, the applicant would need to provide a regional (Bend, Tumalo, and Redmond) availability analysis for each outright and conditional use in the RI zone.

Staff believes that the applicant needs to more fully demonstrate how the uses allowed in the RI zone are not compatible in urban areas, and what uses would “create many other problems with urban planning, safety and livability.” Staff believes that some semblance of an analysis of existing industrial lands in the county, including the cities, and why they would not accommodate the rural industrial uses allowed in the RI zone, is needed to address this standard.

- (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;**

FINDINGS: The applicant has not provided the map(s) listed above, but instead has referenced three other RI-zoned properties: the wrecking yard north of Bend; acreage in the City of La Pine and federally-owned land near Redmond.⁵ Staff is somewhat familiar with these properties, but the applicant should provide maps for the Hearings Officer’s review of these RI zoned areas.

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, staff believes, to comply with this criterion, the applicant would need to provide a regional (Bend, Tumalo, and Redmond) map showing availability for each outright and conditional use in the RI zone.

- (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**

⁵ Staff notes that the Hearings Officer’s decision on PA-14-2/ZC-14-2 lists four other RI areas on page 35 of the written decision, as opposed to the applicant’s three areas.

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: The applicant has submitted a map identifying the area for which the exception is proposed, but has not submitted a map showing three RI-zoned properties that are alternative areas the applicant considered for the use.

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, than cannot be farmed.”

For item I above, the Hearings Officer will need to determine whether the applicant has demonstrated that the use cannot be accommodated on existing RI zoned property. Staff believes that the applicant has not adequately addressed ii and iii above. As indicated in “C” below, the applicant can conduct a broad review of similar types of areas rather than a review of specific alternative sites. Staff is not sure what, if any, alternative sites would be brought up at the hearing by other parties.

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

FINDINGS: Staff finds 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 to support the assertion that the sites are more reasonable by another party during the local exceptions proceeding.

FINDINGS: Staff believes that the applicant needs to conduct at least a broad review of similar types of areas (beyond just the RI Zone), including the urban areas. This requirement for a broad review of alternative sites should be confirmed or denied by the hearings officer.

- 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 has addressed these four standards (environmental, economic, social and energy consequences) on pages 178-182 of the burden of proof statement. The Hearings Officer will need to determine whether the applicant has adequately addressed these standards. With Avion water serving the property, there should be no impact on the water table. If the plan amendment and zone change are approved, and the land is developed with industrial uses, transportation system development charges (SDC's) will be assessed to each use. This revenue could help with the costs of improving roads in the area. There does not appear to be any added costs to any service districts, as no comments from them have been submitted.

Staff notes that the Hearing Officer provided detailed analysis under this requirement in ZC-14-2/PA-14-2. Staff recommends that the Hearings Officer review that analysis and compare it with the current application materials, prior to any finding that the applicant has complied with this criterion.

- (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 has addressed this standard on page 184 of the burden of proof. Additionally, the applicant listed the adjacent uses in the burden of proof on pages 59 to 133. 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.

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, staff believes, to comply with this criterion, the applicant would need to provide compatibility analysis for each outright and conditional use in the RI zone. The Hearings Officer will need to determine that impacts from industrial development of RI Zone uses on the subject site will be compatible with other adjacent uses, or could be so rendered through measures designed to reduce adverse impacts. Staff believes potential uses are unlikely to adversely impact existing industrial uses across Highway 97. With regard to compatibility with adjacent school and residential uses, Staff believes the Hearings Officer would need to include a detailed review of the protections in DCC 18.100 for adjacent uses prior to any finding of compatibility with this criterion.

- (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: Staff finds 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 applicant states that because the soils on the subject property are non-agricultural soils the subject property is not “resource land.” 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 has 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 users 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.”

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, staff believes to be eligible for an exception this criterion 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”. Staff believes this finding can not be made where these uses are outright or conditional uses in Redmond’s or Bend’s urban industrial zones.

The Hearings Officer will need to determine whether the applicant has demonstrated that the uses that might occur on the subject property cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas.

- (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: The applicant has addressed this standard on pages 186-187 of the burden of proof statement.

Location. 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, staff believes, to comply with this criterion, the applicant would need 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.

Benefit to County Economy. Following the Hearings Officer in ZC-14-2/PA-14-2, staff believes 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.

Minimal Loss of Productive Resource Lands. The applicant has 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 7 and 8 soils. It would result in only a minimal loss of resource lands (20% of 21.59 acres = 4.3 acres), and would benefit the County economy. The Hearings Officer will need to determine whether the proposed use meets the above standard.

The Hearings Officer will also need to determine whether the applicant has meet the burden of proof necessary for a “reasons” exception to Goal 14.

“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).**
- (b) **For the purposes of this rule, an "exception area" is that area of land for which a "committed exception" is taken.**
- (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 applicant's burden of proof states the following:

"The subject land cannot be farmed for reasons of poor shallow soil, location, parcel configuration, being surrounded by roads, and adjacent industrial and commercial uses. Efforts by all previous and current owners to farm the parcels have resulted in unprofitable agricultural operations. Since the 1960's, the vicinity has been committed to urbanization and existing adjacent uses and other factors make uses allowed by the applicable goal impracticable. The Applicant is entitled to an "irrevocably committed" exception to Goal 14 because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable. Compliance with the requirements for the exception is addressed in findings below."

(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 has addressed this standard on page 188 of the burden of proof.

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

FINDINGS: The applicant has addressed this standard on pages 188-197. Staff notes that the "mini-storage business" referenced by the applicant was approved as an agricultural storage building only, under application no. LM-95-96 (16-12-26B, 303). A detailed description of the surrounding lands is provided in Section II(E) above and incorporated herein by reference. Staff notes that industrial uses are limited to existing uses east of Highway 97 and Rural Commercial

uses are limited to the northeast of the property. School, residential, and small scale agricultural uses predominate to the west and north.

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

FINDINGS: The applicant has addressed this standard on page 198 of the burden of proof. Staff notes that the Seventh Day Adventist School appears to have a manufactured home on it that may be inhabited. Staff requests the Hearings Officer make specific findings on adverse impacts imposed on the subject property by nearby Rural Industrial and Rural Commercial zoned lands.

- (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 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: The applicant is requesting an exception to Goal 14, Urbanization, to rezone and re-designate the subject site to RI and Rural Exception Area, respectively, on the basis that the subject site is irrevocably committed to non-resource use due to its characteristics and its relationship to the surrounding land. 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.”

Staff notes that the applicant is proposing a goal exception to Goal 14, so the limitations in sections (a), (b), and (c) of this criterion do not apply. The site's current EFU-TRB zoning allows outright or conditionally a variety of uses. These uses include many uses 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. Staff requests the Hearings Officer specifically analyze if these uses are impracticable.

- (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 (6) 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 applicant's proposed exception area consists of two tax lots (16-12-26C, 201, and 16-12-27D, 104). Tax lot 201 has the existing approximately 23,460⁶ square foot storage building that was once used as part of the hay distribution operation at the site. Additionally

⁶ This figure was listed by the applicant on page 20 of the burden of proof statement.

there are gravel areas surrounding the storage building, which make those areas impracticable for any future farming.

(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, which are listed in the applicant's 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) above and incorporated herein by reference.

(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). 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.

(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 has submitted a very extensive assessment of the exception area and adjacent lands. 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). The applicant has addressed the above standard on pages 200 to 202 of the burden of proof. The primary factor in the changes to the resource use of the site appears to be the construction of the Highway 97 overpass, as well as the applicant's construction of the warehouse which was intended for hay storage and sales. These uses took up to 5 acres of land, and the overpass essentially cut the lot in half, making farm use more difficult.

- (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 addresses 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."

(d) Neighborhood and regional characteristics;

FINDINGS: The applicant has addressed the above standard on pages 203-204 of the burden of proof. 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 describes the neighborhood and regional characteristics. The applicant states in part:

“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.”

(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: The applicant states 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.

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

FINDINGS: The applicant addresses the above standard as follows:

“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.”

(g) Other relevant factors.

FINDINGS: The applicant addresses this standard on pages 204-205 of the burden of proof. The other relevant factors according to the applicant are the roads, irrigation water delivery changes, and the poor soils on the property.

- (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. The Hearings Officer will need to determine if these resources support the proposed exception by demonstrating the nature of the subject site and the significant existing industrial development on nearby land.

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 did address the four factors in Goal 2 and OAR 660-004-0020(2) on pages 172 to 187 of the burden of proof. The applicant states 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.

- (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.”

- (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:**

FINDINGS: The burden of proof states that the applicant has provided substantive evidence, maps, documents, photos and deeds in order to support the points made and conclusions reached.

- (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. Staff believes the applicant has accurately characterized the commercial and industrial uses in the area, with the exception of the mini-storage business.⁷

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

FINDINGS: The applicant addressed the above standard on pages 207-208 of the burden of proof. Staff believes that the applicant has adequately indicated the location, number and density of residential dwellings.

- (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. Staff is aware that the closest

⁷ Staff has previously indicated that the “mini-storage business” was approved as an agricultural storage building.

of such facilities are located within the Bend UGB which is at its closest point is approximately 3.25 miles south of the exception area.

(d) Parcel sizes and ownership patterns.

FINDINGS: The applicant has addressed the above standard on page 209 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).

- (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 has addressed this standard in 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.”

- (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 states in response to the above standard the following in the burden of proof statement:

“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.”

Staff requests the Hearings Officer make specific findings if the property “is currently built upon at urban densities.”

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: The applicant addressed the above standard on page 213 of the burden of proof as follows:

“Based on the detailed reasons set forth in the findings above, the application has demonstrated the subject site is “irrevocably committed” to urban development. Some development has occurred on the non-resource land, including, in 1998, an important statewide transportation facility that resulted in its being irrevocably committed to urbanization. OAR 660-12-0060 allows adverse impacts on transportation facilities to be partially mitigated if the proposal creates industrial or traded-sector jobs. Surrounding development further makes agricultural uses infeasible. County zoning and development codes will guide appropriate levels of Rural Industrial development for this site.

The following February 4, 2015 email from James R. Bryant, ODOT Region 4 Principal Planner to Rod Cathcart, ODOT and forwarded to Sage Traffic Engineering tells of the impacts from transportation facilities and the appropriateness of RI zoning on this site.

The Hearings Officer will need to determine whether the applications submitted justify either a “reasons” or an “irrevocably committed” goal exception to Statewide Planning Goal 14 Exceptions to determine if this rule is applicable to this proposal.

If the Hearings Officer approves the applications, the following conditions of approval should be included:

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. Prior to the public hearing on the plan amendment, zone change and goal exception before the Board of Commissioners, the applicant/owner shall submit to the Planning

Division a metes-and-bounds description of the subject site to be re-designated and rezoned.

3. A right-turn lane for the Tumalo Place/Tumalo Road intersection shall be constructed to all Deschutes County and State of Oregon standards for roads, prior to construction of any new structures on the subject property.
4. The pulp and paper manufacturing use shall not be allowed within the subject property.

Dated this 2nd day of June, 2015

Mailed this 2nd day of June, 2015