



## Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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<http://www.co.deschutes.or.us/cdd/>

### MEMORANDUM

**DATE:** August 12, 2015  
**TO:** Deschutes County Board of Commissioners  
**FROM:** Paul Blikstad, Senior Planner  
**RE:** 247-15-000035-CU (247-15-000403-A)

#### Background

The applicants, Dana and Karen Clough, applied for a Conditional Use Permit for a nonfarm dwelling on an approximately 20-acre parcel in the Exclusive Farm Use (EFU-TRB) Zone. The application was referred to a public hearing due to the fact that the proposed homesite was located on irrigated ground, as well as receiving opposition from neighbors.

A public hearing was held on May 26, 2015, and the written record closed on July 10, 2015. The Hearings Officer denied the application in the written decision dated July 21, 2015 (Attachment 4). The applicants appealed the decision within the 12-day appeal period required under County Code.

#### Hearings Officer's Decision

The County Hearings Officer denied the conditional use permit application based on the following standard under Deschutes County Code 18.16.040(A) which states:

- "A. Conditional uses permitted by DCC 18.16.030 may be established subject to ORS 215.296 and applicable provisions in DCC 18.128 and upon a finding by the Planning Director or Hearings Body that the proposed use:**
- 3. That the actual site on which the use is to be located is the least suitable for the production of farm crops or livestock (emphasis added).**

The Hearings Officer's decision differentiated between the "least suitable" standard above and the "generally unsuitable" standard in DCC 18.16.050(G)(1)(a)(iii). The Hearings Officer found that the applicant did not address in greater detail why the southeast corner of the subject property was the "least suitable" site for farm use on the property.<sup>1</sup> The applicant's reasoning was that this portion of the property did not provide enough area for the dwelling, septic system and reserve area, and any residential accessory structures (there is an existing farm-related

<sup>1</sup> The Hearings Officer did find that the proposed homesite area met the "generally unsuitable" standard.

structure already in place in the southeast corner of the property). Additionally, this southeast area of the subject property has topographic implications (Attachment 3). Finally, the Natural Gas Pipeline easement restricts where structures can be located (i.e. not within the easement).

Staff notes that the "least suitable" standard in Deschutes County Code goes beyond the Oregon Revised Statutes and Oregon Administrative Rules language for nonfarm dwellings, which includes only the "generally unsuitable" standard.

The question to be answered in the appeal is how the County interprets the "least suitable" standard in relation to the "generally unsuitable" standard. Should a finding of a generally unsuitable standard qualify as meeting the least suitable standard?

### **Attachments**

Attached with this memorandum are the following:

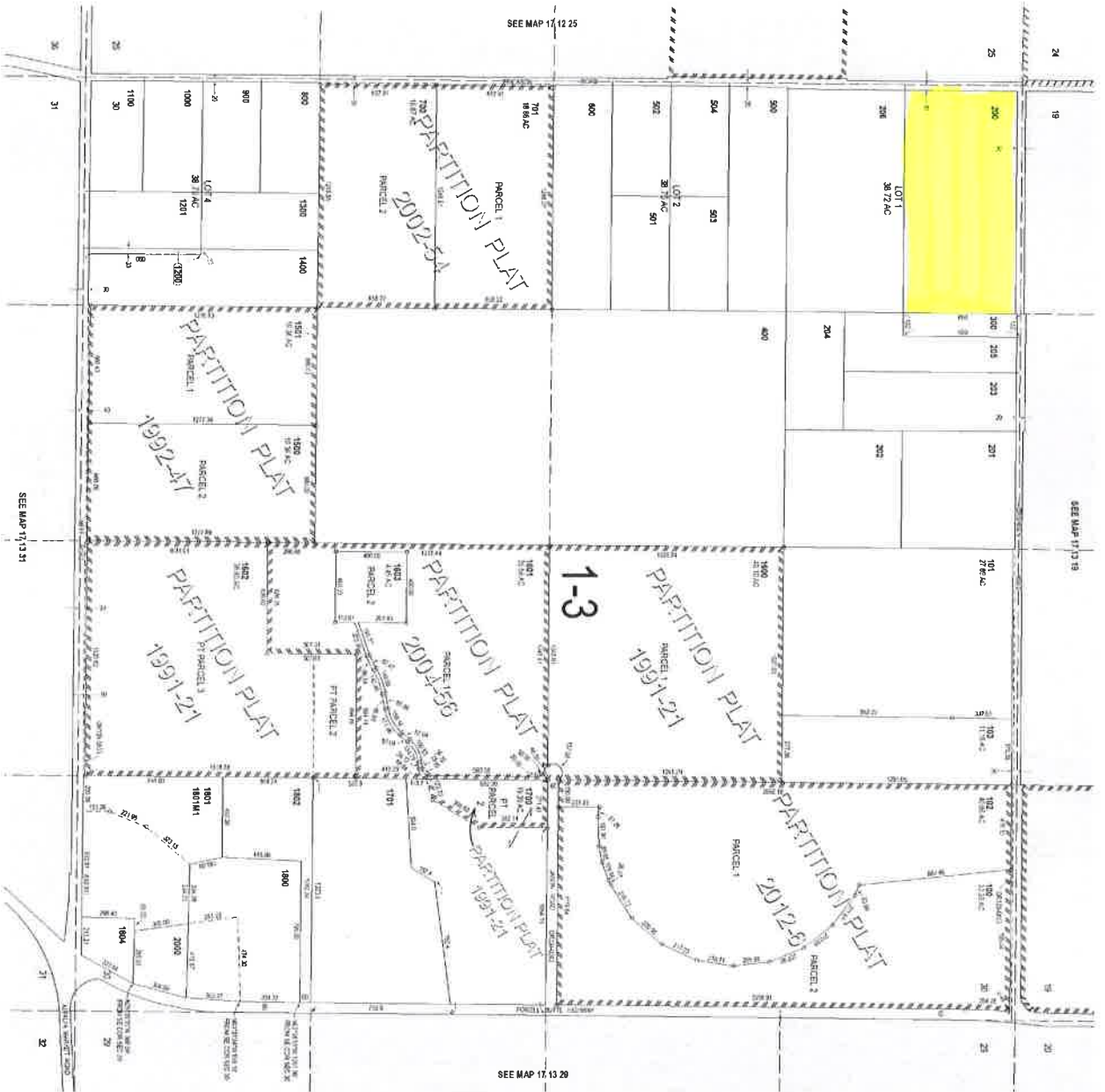
1. Assessor's map showing the subject property
2. Aerial photo showing subject property and surrounding area
3. Soils report map showing class 7 soils area
4. Hearings Officer's Decision
5. Applicant's notice of appeal

THIS MAP WAS PREPARED FOR  
ASSESSMENT PURPOSE ONLY

5/15/2014

SECTION 30 T.17S. R.13E. WM.  
DESCHUTES COUNTY

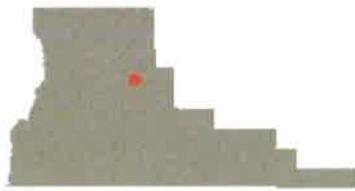
1" = 400'



Cancelled Nos  
1980

17 13 30

17 13 30



**Figure 3:** Building Site for Nonfarm Dwelling:



**Considerations for determining suitability of the property for crop, livestock, or merchantable tree production:**

NRCS estimates that 36A-*Deskamp loamy sand, 0-3% slopes* will produce 4.0 tons of alfalfa per acre and 1.5 AUMs per acre for pasture, irrigated. The Gosney soil, a contrasting inclusion, will produce 2.0 tons of alfalfa per acre and 0.5 AUMs per acre for pasture, irrigated. Neither soil is rated for non-irrigated farm crops.

NRCS estimates that soils in 58C-*Gosney-Rock outcrop-Deskamp, 0-15% slopes* will produce 150 #/ac forage on the Gosney soil and 250 #/ac on the Deskamp soil for grazing by livestock. Production is very low. Under a high level of management an acre of this soil would support a cow/calf pair for 15 days in late spring, irrigated.

NRCS does not recognize the Gosney or Deskamp soils being capable of producing merchantable trees.



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### DECISION OF THE DESCHUTES COUNTY HEARING OFFICER

**FILE NUMBER:** 247-15-000035-CU

**APPLICANT/OWNER:** Dana E. and Karen E. Clough  
63080 Stenkamp Road  
Bend, OR 97701

**REQUEST:** Conditional use permit for a nonfarm dwelling on an 18.08-acre parcel  
in an Exclusive Farm Use (EFU-TRB) Zone

**HEARING DATE:** Tuesday, May 26, 2015  
6:30 p.m.  
Deschutes County Services Center  
1300 NW Wall Street  
Bend, OR 97701

**APPLICANT'S ATTORNEY:** Liz Fancher, Attorney  
644 NW Broadway Street  
Bend, OR 97701

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

**RECORD CLOSED:** July 10, 2015<sup>1</sup>

I. **APPLICABLE STANDARDS AND CRITERIA:**

A. **Title 18, Deschutes County Zoning Ordinance**

1. **Chapter 18.16, Exclusive Farm Use (EFU) Zone**

**\* Section 18.16.030, Conditional uses permitted - High value and non-high value farmland**

<sup>1</sup> The record in this matter originally was closed May 26, 2015. Because the Hearings Officer was contacted ex parte after the record was closed, the Applicant's attorney requested the record to be re-opened for an opportunity to respond to the matters raised outside of the record. An Order granting the motion to re-open was issued on July 6, 2015, which also granted the Applicant's attorney leave to file a final closing argument by July 17, 2015.

- \* Section 18.16.040, Limitations on Conditional Uses
- \* Section 18.16.043, Single Permit
- \* Section 18.16.060, Dimensional Standards
- \* Section 18.16.070, Yards

**2. Chapter 18.80, Airport Safety Combining (AS) Zone**

- \* Section 18.80.020, Application of Provisions
- \* Section 18.80.028, Height Limitations
- \* Section 18.80.044, Land Use Compatibility Requirements
- \* Section 18.80.054, Conditional Uses

**B. Title 22, Deschutes County Development Procedures Ordinance**

**C. Oregon Revised Statutes (ORS) Chapter 215, County Planning, Zoning, Housing Codes**

1. **ORS 215.296, Standards for Approval of Certain Uses in Exclusive Farm Use Zones**
2. **ORS 215.427, Final Action on Permit or Zone Change Application**

**II. FINDINGS OF FACT:**

- A. LOCATION:** The subject property has an assigned address of 22075 Erickson Road. It is identified on Deschutes County Assessor's Map 17-13-30 as Tax Lot 200.
- B. LOT OF RECORD:** The subject property is a legal lot of record pursuant to being parcel 1 of Partition MP-82-14.
- C. ZONING:** The property is zoned Exclusive Farm Use – Tumalo/Redmond/Bend subzone (EFU-TRB). The property is also located within the Airport Safety (AS) Combining Zone. The property is designated Agriculture by the Deschutes County Comprehensive Plan.
- D. PROPOSAL:** The applicants are proposing to establish a nonfarm dwelling on the subject 18.08-acre parcel in the EFU Zone. The applicants have submitted a conditional use permit application that includes an agricultural soils suitability assessment by Sage West, LLC (Roger Borine).
- E. SITE DESCRIPTION:** The subject property is 18.08 acres and has 16.08 acres of irrigation water rights. On June 2, 2014, the applicants quitclaimed .58 acres of water rights for a water rights transfer in the northeast corner of the property (Exhibit E to Burden of Proof). The property has been used to grow hay, producing approximately 6 tons annually. Livestock have not been grazed on the property within the last five years. The property is generally level and has an existing storage shed and small fenced area, and the property is fenced on three sides (west, north, east). It also has an existing pond, an irrigation pivot, and a driveway extending south from Erickson Road. A PGT gas pipeline and associated easement extends through the eastern portion of the property, including a portion of the proposed homesite, in a general north-south direction.

The applicants' burden of proof states that the northeast corner of the property where the single-family dwelling is proposed "is a part of the pasture that contains Class VII nonagricultural soils that grow weeds rather than forage for livestock." The proposed homesite area includes a lava rock ledge with shallow soils that the applicants state "further impairs the ability of the area to produce crops or support a pasture." According to the Assessor's records, the property is receiving special assessment for farm use.

**F. SURROUNDING ZONING AND LAND USES:** The properties located directly north and east are zoned Multiple Use Agricultural (MUA-10). Dickey Road borders the property to the west and Erickson Road comprises the northern boundary. The properties to the west and immediately south are zoned EFU-TRB, and farther south are other properties also zoned MUA-10. The surrounding area includes some farming in the form of grass hay and pasture, as well as livestock (horses, cattle). Most of the properties in the vicinity are developed with a single-family dwelling. Further east and northeast are several MUA-10 zone subdivisions including Eastmont Estates, Vista Del Sol, Los Serranos, Los Serranos First Addition and Cleves Acres.

Excluding the subject parcel, there are 80 EFU-zoned parcels in the study area (76 privately owned). Of these, 55 parcels have dwellings on them. 33 of the parcels are not receiving farm tax deferrals. 51 of the parcels are twenty acres or smaller. There are 25 parcels that have not been developed with a house. (Exhibit G to Burden of Proof). The applicants state that farming in the study area is limited by the presence of properties with a high percentage of Class VII and VIII soils (Soil Class 58C), as shown on the County's EFU Analysis Soils map.

19 dwellings were constructed during or prior to 1978. 13 dwellings were constructed from 1979 to 1992. 23 dwellings were constructed during or after 1993.

The attributes of the adjoining and nearby EFU properties are summarized in the following table.

**Table: Adjacent and Nearby EFU Tax Lots**

Owner	Tax Lots	TL Acre/ Err. Ac.	Farm Tax	DU	Soil Mapping Units
Leonard	17-12-25, 101	9.77/0	N	1989	36A, 58C
Couch <i>West</i>	17-12-25, 102	19.6/13.9	Y	1990	36A, 58C
Grant <i>South</i>	17-13-30, 206	18.9/15.8	Y	1989	36A, 36B, 58C

**G. SOILS:** The Natural Resources Conservation Service (NRCS) data show the subject property contains the following two soil types:



- 36A, Deskamp loamy sand 0 to 3% slopes. This soil type is comprised of 85% Deskamp soil and similar inclusions, and 15% contrasting inclusions. The Deskamp soil is somewhat excessively drained with a rapid permeability and an available water capacity of about 3 inches. Major use for this soil type is irrigated cropland and livestock grazing. Native vegetation includes Western juniper, mountain big sagebrush, antelope bitterbrush, Idaho fescue and needleandthread. The soil capability rating for the Deskamp soil is 6s/3s. This soil type is considered high-value farmland when irrigated and makes up approximately 93.5% of the property. The proposed homesite is located on this soil type. The applicants state that the area proposed for development is in this mapping unit on soils that are contrasting inclusions similar to those found in the nearby area mapped 58C, Gosney-Rock outcrop-Deskamp.
- 58C, Gosney-Rock outcrop-Deskmap complex, 0 to 15% slopes. This soil type is comprised of 50% Gosney soil and similar inclusions, 25% Rock outcrop, 20% Deskamp and similar inclusions, and 5% contrasting inclusions. The Gosney soil is somewhat excessively drained with a rapid permeability and an available water capacity of about 1 inch. The Deskamp soil is somewhat excessively drained with a rapid permeability and available water capacity of about 3 inches. Major use for this soil type is livestock grazing. The soil capability rating of the Gosney soil is 7E, 8s for the Rock outcrop, and 6e for the Deskamp soil. (There is no irrigated soil capability rating for this soil complex) This soil type is not considered a high-value soil when irrigated. This soil type makes up approximately 6.5% of the property.

As discussed in detail in the findings below, the applicants submitted a site-specific soils analysis showing the soils on the proposed nonfarm dwelling homesite consist of Class VII soils. The applicants state that they irrigate the northeast corner of the property, despite its poor soils, to control dust and erosion. The applicants also state that the hay grown on the east side of the subject property is of poor quality and yield. This is corroborated by Don Barbin of Custom Hay Farming, who has been providing custom hay farming services for the applicants over the past three years. Mr. Barbin states that the northeast corner of the parcel is characterized by poor/low hay production (Exhibit F to Burden of Proof).

The applicants' soils scientist, Roger Borine is a professional soil classifier under OAR 660-033-0030 and 0045. Mr. Borine took soil samples on the subject property on March 1, 2008 and October 15, 2014 and mapped the location of each soil unit in his soils report. The area of Class VII soils identified by Mr. Borine are shown in his report. Katherine Daniels, Farm and Forest Lands Specialist, Community Services Division, Oregon Department of Land Conservation and Development reviewed the soils assessment for completeness and determined it is consistent with reporting requirements for completeness. The Department did not make a determination with respect to the accuracy and acceptability of the soils assessment.

- H. PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice to several public agencies and received comments from the Deschutes County Transportation Planner, Bend Fire Department, and the Deschutes County Assessor. These public agency comments are addressed below. The following agencies did not respond to the notice: Deschutes County Environmental Soils Division, Deschutes County Road Department,

Central Electric Cooperative, Centurylink, Central Oregon Irrigation District and Avion Water Company.

- I. **PUBLIC COMMENTS:** The Planning Division mailed notice of the application to all property owners within 750 feet of the subject property. In addition, notice of the public hearing was published in the Bend "Bulletin" newspaper on April 21, 2015, and the subject property was posted with a notice of proposed land use action sign. Several letters were received, all in opposition to the proposed request, with some statements about the farm use of the subject property. Public comments are addressed in the findings below.
- J. **REVIEW PERIOD:** This application was submitted on January 27, 2015. The Planning Division sent the applicants an incomplete application letter on February 18, 2015, requiring that the applicant submit a hearings officer deposit, as the application was being referred to a public hearing process. The applicants submitted the hearing officer deposit fee on March 20, 2105. The Planning Division deemed the application completed on the date the deposit was submitted, based on receipt of the hearings officer deposit per DCC 22.08.030(C). The 150<sup>th</sup> day upon which a final decision from the County is required will be August 17, 2015.

The applicant submitted an affidavit showing that the Notice of Land Use Action sign was posted on the property on February 3, 2015.

- K. **LAND USE HISTORY:** The subject property has had the following land use application:

MP-82-14, Minor land partition to divide an approximately 40-acre parcel into two 20-acre parcels.

Supplemental Information for the George Cleveland Partition (MP-82-14) states, "The past use of this property has been a limited amount of pasture and the intended use will be for single family residential use along with pasture land. (Exhibit B to Burden of Proof).

III. **CONCLUSIONS OF LAW:**

**TITLE 18 OF THE DESCHUTES COUNTY CODE, COUNTY ZONING.**

A. **Chapter 18.16, Exclusive Farm Use Zones.**

1. Section 18.16.030, Conditional uses permitted - High value and non-high value farmland.

***The following uses may be allowed in the Exclusive Farm Use zones on either high value farmland or non-high value farmland subject to applicable provisions of the Comprehensive Plan, DCC 18.16.040 and 18.16.050, and other applicable sections of Title 18.***

***A. Nonfarm dwelling***

**FINDING:** The applicant is requesting conditional use approval to establish a nonfarm dwelling on the subject property.

2. Section 18.16.040, Limitations on Conditional Uses.

A. ***Conditional uses permitted by DCC 18.16.030 may be established subject to ORS 215.296 and applicable provisions in DCC 18.128 and upon a finding by the Planning Director or Hearings Body that the proposed use:***

1. ***Will not force a significant change in accepted farm or forest practices as defined in ORS 215.203(2)(c) on surrounding lands devoted to farm or forest uses; and***
2. ***Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest uses; and***

**FINDINGS:** The County has applied an area of analysis ("study area") that covers all properties within a one-mile radius of the subject property, shown in geographic information system (GIS) and aerial photographs. The Hearings Officer determines this radius is sufficient to identify farm or forest uses that might be impacted by a proposed nonfarm dwelling, as it includes at least 2,000 acres and is comprised of approximately 55% of EFU-zoned land in both private and public ownership.

**Accepted Forest Practices:** There are no properties zoned for forest use in the surrounding area; the predominant tree species in the surrounding area is juniper, which is not a commercial species. For these reasons, the Hearings Officer finds the proposed nonfarm dwelling will not force a significant change in, or significantly increase the cost of, accepted forest practices on surrounding lands devoted for forest use.

**Accepted Farm Practices:** Three adjoining properties are zoned EFU and are currently in farm use, consisting mainly of irrigated pasture or grass hay and livestock. All three properties have been developed with single-family residences. One of these residences is a nonfarm dwelling. The applicant is proposing a dwelling location on a building site of 1.2 acres in the northeast corner of the property. The proposed homesite is located at least 100 feet from any adjacent farm uses to the north and east. The proposed site is clustered near existing homes and buildings. The north and east boundaries of the subject property are adjacent to lands zoned MUA-10, developed with rural residences. As evidenced on Exhibit G to the Burden of Proof, a majority of the tax-deferred farm parcels are distantly located from the proposed nonfarm dwelling.

The record includes information from the Oregon State University Extension Service describing the types of impacts the farming practices in the surrounding area could generate on nearby lands. Maintaining irrigated pasture can generate dust from re-seeding, drifting of herbicides from spraying, vehicle noise from trucks, manure odor from fertilizing, and possible water runoff from irrigation. Grazing livestock can generate dust, manure odor, possible interference with vehicular traffic, and property damage if livestock escape. Danny Sheridan submitted a comment letter stating that he is a large parcel landowner close to the subject property and has been subject to complaints about field burning, burning in general for land clearing, driving tractors at night, and loud noises from irrigation pipe digging. He questions whether residents of the proposed nonfarm dwelling will be tolerant of general farming practices.

The applicants would be required as a condition of approval to sign and record in the Deschutes County Clerk's office, a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.396 or 30.397. The Hearings Officer finds that recordation of this document with the County Clerk will help ensure that the proposed nonfarm dwelling will not significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use, nor will it significantly increase the cost of accepted farm practices.

The record indicates that most of the dwellings in the study area are either nonfarm dwellings or replacement dwellings – dwellings not related to farm use. I find the presence of dwellings not related to farm use in the study area has not changed the nature of the existing farm practices. The existing close proximity of homes to farmland are already felt in the study area. The Hearings Officer determines that approval of the proposed nonfarm dwelling will not create any new or different impacts. Further, the dwelling location allows sufficient buffers and will create adequate separation between the proposed homesite and the adjacent farm uses. I find that the proposed nonfarm dwelling will not force a significant change in accepted farm practices on surrounding properties devoted to farm use. For the same reasons, I find the proposed nonfarm dwelling will not significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use.

Fred and Sheryl Trachsel submitted a letter in opposition expressing concern that approval of the proposed nonfarm dwelling will open the door for more approvals. I find that, because each application for nonfarm dwelling must be decided on the individual characteristics of the subject property, including but not limited to a soils analysis and a determination of whether each code criterion is met, approval of one specific application for a nonfarm dwelling will not "open the flood gates" to allow for additional approvals.

**3. *That the actual site on which the use is to be located is the least suitable for the production of farm crops or livestock.***

**FINDING:** The Hearings Officer finds that this approval criterion is different from the "generally unsuitable" standard discussed in the findings below. That is because this criterion requires the applicant to demonstrate that the proposed nonfarm dwelling homesite is the ***least suitable*** for the production of farm crops or livestock. Reading this standard in conjunction with the "generally unsuitable" standard, the applicant is required to demonstrate the proposed nonfarm dwelling homesite is the least suitable location on the subject property as a whole. In other words, even if the Hearings Officer finds that substantial evidence in the record supports a determination that the soils are "generally unsuitable" for farming, additional proof is required to meet the criterion that the actual proposed homesite is the "least suitable" for the production of farm crops or livestock.

The applicant has submitted evidence and testimony to show that the east part of the property does not support farm use as the term is defined in ORS 215.203(2)(a), in relevant part, as "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock." The nonproductive part of the property includes a PGT underground gas line. Heat from the gas line dries out the land and retards the growth of the pasture and crops. The applicant has attempted to grow pasture grass in this area without success. The area is covered with Plantain, a weed that grows in poor soils. On the other hand, Staff noted that the entire property has been irrigated and that there does not appear to be any difference in

vegetation between the Northeast corner (where the proposed homesite is), and the Northwest corner. Staff stated that the northeast corner and the northwest corner are visually indistinguishable in the May 2012 street level included in the record.

The applicants have stated that, over five years ago, they unsuccessfully attempted to use the subject property as pasture for horses. Since that time, the property has been used to raise hay. Hay from the west part of the property is harvested. There is conflicting evidence in the record as to whether the amount of hay that grows on the east part of the property is so low that it is not harvested.<sup>2</sup> The cost to harvest the area exceeds the value of the small amount of low quality hay that is produced. The applicant contracts with a custom hay farmer to cut the hay on the property. Don Barbin submitted a letter that opines the conditions of the property in the proposed homesite area are generally unsuitable for farm use. Notably, this opinion does not speak to the "least suitable" standard.

One opposition letter from a neighboring property owner on Erickson Road states that the applicants have stopped watering and fertilizing the portion of the property on which they desire approval for a nonfarm dwelling. Specifically, "[t]hey bring in large fertilizer trucks to fertilize the lower portion of this property but neglect to care for the rest of the soil. There is an irrigation pivot that used to provide the land water that they no longer put to use." These property owners have lived nearby for 6 years and have witnessed multiple cuttings of hay on the subject property year after year. The applicants have shown that, even with fertilizer added to the subject homesite area, it will not significantly change the crop yield, and would essentially be putting "money down a rat hole."

The argument that an applicant has "created" the unsuitable or "least suitable" circumstances has been considered by the Hearings Officer in the Newell application for a nonfarm dwelling in File No. CU-14-6, based on the specific facts of the proposed nonfarm dwelling homesite:

The record indicates that in 2003, Robert Seliger transferred irrigation water rights for this area to another part of the subject property and to his adjacent Tax L 1403, and that this area has not been irrigated with TID irrigation water since that time. The record also indicates the remainder of the subject property has high value soils and is irrigated and engaged in farm use consisting of livestock grazing on irrigated pasture and hay production. As discussed in detail in the findings below concerning the "generally unsuitable" standard, the applicant submitted a soil analysis of the proposed homesite showing it has poor quality soils classified as Class VII and VIII soils with or without irrigation.

Opponents argue the applicant has not demonstrated compliance with this approval criterion because Mr. Seliger improperly modified the soils on, and removed irrigation from, the proposed nonfarm dwelling homesite. In addition, opponents argue the soils analysis is not credible or reliable for a number of reasons. The Hearings Officer finds no merit to these arguments. As discussed in the findings below concerning the "generally unsuitable" standard, incorporated by reference herein, I have found the soil analysis is credible and reliable, and that modification of soils on and removal of irrigation from the proposed nonfarm dwelling homesite did not render unsuitable an area of the subject property that previously was suitable for the production of farm crops and livestock. For these reasons, and because the remainder of the subject property

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<sup>2</sup> There is also evidence in the record that shows that hay from the east side of the property is harvested, but is of poor quality and it is difficult to sell such hay for a profit.

has high value soils, is irrigated, and is engaged in farm use, I find the proposed nonfarm dwelling homesite is the "least suitable" site on the subject property for the production of farm crops or livestock.

There are several important differences between the quality and quantity of evidence in the record in Newell, CU-14-6, and the subject application.

First, the record shows that the proposed NE area for the homesite is currently, or has recently been irrigated, unlike the situation in Newell. Staff witnessed wheel lines and a pivot in the general location during a site visit. The applicant does not dispute that they use irrigation water to control dust. As discussed in detail in the findings below, I find that the question of past or present irrigation is not dispositive with respect to a determination of suitability of soils. This question turns on an examination of the soils methodology used by the applicant's soils engineer, specific data points, a consideration of NRCS data compared to on-site data, surrounding soils data and past farming of the subject property, specifically, the northeast corner that the applicant claims is the "least suitable" for farming. Second, for the same reasons, I find that the question of whether or not the Cloughs have been consistently fertilizing the entire parcel of property is not determinative, just as the Hearings Officer found that alleged "modification" of soils in Newell, without more, did not render the soils unsuitable for farming.

The applicant states that the northeast area of the property is the part of the property that produces the lowest yields of hay, which makes it the least suitable site for farm use. They posit that its Class VII soils are not superior to the Class VII soils in the southeast part of the property, but offer no concrete evidence to support their reasoning. Ms. Fancher, on behalf of the applicant, noted that, similar to the Newell application, the Clough property is producing approximately ½ ton of hay per acre, which is not a commercial yield. She urges that such low producing land is the type that should be considered for placement of a nonfarm dwelling, where all other criteria may be met.

The applicant's soils expert, Roger Borine, went into great detail testifying about the method used for his soils analysis on the subject property and the "on-ground" conditions that may or may not be accurately reflected in the generalized NRCS mapping. Specifically, Mr. Borine testified that there are "lava blisters" on the property that exist in a NE to SW direction of the property. The lava area on the ridge predicts shallow soils. Mr. Borine concentrated his soil samples in these locations because he stated there is "no reason to spend time where good soils are." He commented that the western half of the property is "all good soil."

Mr. Weinman testified in opposition to the application, opining that the SE corner of the property, rather than the NE corner is the "least suitable." He stated that the SE corner is all fill and consists of buried rocks. Mr. Wienman's opinion is based on the fact that he used to provide custom haying services in the 1980s and 1990s for the subject property. He also testified that the property yielded 60-70 tons/year of alfalfa hay, when the property was 40 acres in size (prior to its partition). Ms. Fancher countered that such a yield is considered low and not profitable.

Mr. Borine testified that the east side of the property was the least suitable for farming, given soils conditions, and noted that there was "not room" in the SE corner of the property for a homesite. Staff noted, and I agree that the detailed, gridded, data-point location map showing where test pits were dug does not wholly coincide within the proposed homesite area. The analysis of the southern quarter of the homesite area appears to be based upon a single test pit. Also, the revised soils map is continued to the southern half of the property with no data

points taken or test pits dug in the southern half of the property. Mr. Borine's testimony was generally focused on a comparison of east vs. west sides of the property. Given the fact that the lava blister flows toward the SW corner of the property (and the western half of the property is said to be suitable for farm use), and given that the existing pipeline affects more than just the NE corner of the property, the Hearings Officer finds that the applicant has failed to meet its burden of proving the 1.2 acre proposed homesite in the NE corner of the property is the "least suitable" for farming, without more. Moreover, there is not substantial evidence in the record to support such a finding.

This is not to say that the 1.2 acre proposed homesite is "suitable" for farming. However, without a showing that the proposed site is the "least suitable," for farming, I conclude this criterion is not met.

I find that the applicant erred in limiting the detailed soils analysis submitted to the northeast corner of the property. Without this same level of detailed analysis in the southeast corner, it is not possible to compare depth-to-basalt, the primary limitation of agricultural productivity between the two areas. The record does not show evidence to support a finding that the proposed homesite is the least suitable for the production of farm crops or livestock.

3. Section 18.16.050, Standards for Dwellings in the EFU Zones

***Dwellings listed in DCC 18.16.025 and 18.16.030 may be allowed under the conditions set forth below for each kind of dwelling, and all dwellings are subject to the landowner for the property upon which the dwelling is placed, signing and recording in the deed records for the County, a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.***

**G. Nonfarm Dwelling.**

**1. One single-family dwelling, including a manufactured home in accordance with section 18.116.070 of this title, not provided in conjunction with farm use may be permitted on an existing lot or parcel subject to the following criteria:**

**a. The Planning Director or Hearings Body shall make findings that:**

**i. The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming practices, as defined in ORS 215.203(2)(c), or accepted forest practices on nearby lands devoted to farm or forest use.**

**FINDINGS:** If the application was approved, the applicant would be required as a condition of approval to execute and record the waiver listed above with the Deschutes County Clerk prior to issuance of a building permit for the dwelling. Therefore, I find that this criterion could be met.

As discussed in the findings above, the record indicates there are no forest practices occurring within the study area, and for that reason the Hearings Officer has found the proposed nonfarm dwelling will not force a significant change in, or significantly increase the cost of, accepted forest practices on nearby lands devoted to forest use.

With respect to potential impacts on farming practices, I find that this criterion is virtually identical to DCC 18.16.040(A)(1) and (2), with the exception that this standard lists the dwelling and the activities associated with the dwelling. There was concern expressed by the letters in opposition that the activities associated with the dwelling – more traffic and people, would impact the rural lifestyle. Specifically, a property owner on Erickson Road noted that the road is a narrow, rural road, home to families with children that use the road. They expressed concern that the applicants intend to operate an equestrian boarding facility once a dwelling is built, that will bring increased traffic. Brad and Carol Davis also submitted a letter in opposition that expressed safety concerns on Erickson Road from additional car and truck traffic on the narrow road.

The Hearings Officer finds that potential impacts of a future, but not yet proposed use will be analyzed if and when such a proposal is made. Speculative impacts of a speculative use are not appropriately considered at this time. I have determined that the record does not support a determination that increased traffic from a dwelling or accessory use would impact farming in the area. Impact on a "rural lifestyle," as alleged by some of the opponents, is not a criterion to be considered under the Code. Based on the above findings on the criteria set forth in DCC 18.16.040.A, which are incorporated herein by reference, I find this criterion is satisfied.

- ii. The proposed nonfarm dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, the County shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated, by applying the standards under OAR 660-033-0130(4)(a)(D), and whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area.***

**FINDING:** On June 1, 1998, the Land Conservation and Development Commission adopted amendments to the administrative rules implementing Goal 3, Agricultural Lands (OAR Chapter 660-033) to incorporate case law and to clarify the analysis under the "stability" approval criterion. The rules continue to apply the three-step "stability" analysis first articulated in *Sweeten v. Clackamas County*, 17 Or LUBA 1234 (1989). The rules are as follows:

***(C) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated by applying the standards set forth in paragraph (4)(a)(D) of this rule. If the application involves the creation of a new parcel for the nonfarm dwelling, a county shall consider whether creation of the parcel will lead to creation of other***



**nonfarm parcels, to the detriment of agriculture in the area. To address this standard, the county shall:**

- (i) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas. Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area;**
- (ii) Identify within the study area the broad types of farm uses (irrigated or nonirrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, nonfarm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of nonfarm/lot of record dwellings that could be approved under subsections (3)(a) and section 4 of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993, and the parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4). The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible nonfarm dwellings under this subparagraph;**
- (iii) Determine whether approval of the proposed nonfarm/lot of record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area;**

- 1. Cumulative Impacts Analysis Area.** The County has applied an area of analysis including all EFU-zoned land located within a one-mile radius of the subject property's boundaries and including approximately 2,000 acres (hereafter called "study area"). I find this area of analysis is suitable to provide a comprehensive analysis of the character of the area surrounding the subject property because of its size and the number of parcels located within it. The study area includes land within the Exclusive Farm Use (EFU) zone. There are several areas of Multiple Use

Agricultural (MUA-10) zoning in the study area also. Staff estimates and I agree that the EFU and the MUA-10 zones each cover approximately one-half of the study area.

There are 78 EFU-zoned tax lots within the study area excluding the subject parcel. These tax lots range in size from .41 acres to 479.82 acres. Four of these 78 tax lots are in public ownership (BLM, City of Bend, School District #1 and Eastern Star Grange), including the largest one of 479.82 acres. Forty-nine (49) of the tax lots are 20 acres or smaller in size. Twenty (20) of the tax lots are between 20+ and 40 acres; six (6) of the tax lots are between 40+ and 80 acres in size, and three (3) tax lots are larger than 80 acres in size.

2. **Types of Farm Uses.** The study area contains farm uses that are either grass hay or irrigated pasture and livestock grazing (horses and cattle). 47 tax lots are receiving special assessment for farm use and all but five of such lots have irrigation water rights. Within the study area, approximately 711 acres have irrigation water rights and approximately 1,321 acres are without irrigation water rights (Exhibit G to Burden of Proof).

The record indicates that the study area is located within the boundaries of Central Oregon Irrigation District. The study area includes soil types classified as both high value and nonhigh value farmland. High value farmland is mapped as existing on and near the subject property.

The Natural Resources Conservation Service Web Soil Survey, dated January 2, 2014 indicates that of 345.2 acres in the subject area of interest (AOI), 62.9% of the soils are 36A Deskamp loamy sand, 0 to 3 percent slopes, 2.7% of the soils are 36B Deskamp loamy sand, 3-8 percent slopes, and 34.3% of the soils are 58C Gosney-Rock outcrop Deskamp complex, 0 to 15 percent slopes.

3. **Existing Dwellings.** The record indicates that 53 of the 74 privately owned tax lots in the study area have dwellings. These dwellings were built in the following years: nineteen (19) dwellings prior to 1979, twelve (12) dwellings from 1979 to 1992, and twenty-two (22) dwellings from 1993 to present.

I find that the dwellings developed prior to 1979 predated the County's EFU zone and therefore were not subject to EFU zoning requirements. The twelve dwellings developed between 1979 and 1992 included ten farm dwellings, and two nonfarm dwellings. The dwellings constructed up until the late 1980's in this time period were not necessarily reviewed as either farm or nonfarm dwellings. Of the twenty-two dwellings constructed in 1993 or after, nine were nonfarm dwellings, three were farm dwellings, and nine were replacement dwellings. The record is unclear as to the type of dwelling constructed in 2006 on a parcel across Dickey Road to the

southwest of the subject property. The farm dwellings were approved under the prior "tier" standards, which are no longer in existence.

The record shows that the nonfarm dwellings approved since 1993 are located on properties generally without irrigation water rights, and have poor soils.

4. **Dwelling Development Trends Since 1993.** As discussed above, nine of the twenty-two dwellings constructed in 1993 or after were nonfarm dwellings, three were farm dwellings, and nine were replacement dwellings.
5. **Potential Nonfarm Parcels.** In the EFU zone, two types of land divisions are possible, those where the parent parcel is irrigated (See: DCC 18.16.055(B)) and those where the parent parcel is not irrigated (See: DCC 18.16.055(C)). Because this proposal does not involve the creation of any new parcels for a nonfarm dwelling, I find that it is not necessary to include in this analysis a determination of whether a new parcel will lead to the creation of other nonfarm parcels, to the detriment of agriculture in the area. Rather, the analysis must consider the cumulative impact of approval to the proposed nonfarm dwelling on other similarly-situated parcels – i.e., vacant parcels that are similar in size, soils and irrigation.
6. **Potential Nonfarm Dwellings.** There are 21 vacant privately owned tax lots in the study area, including the subject property. The applicant correctly points out that two of the 21 lots are, together, a single legal lot of record. Two other properties are developed with structures other than single-family residential (school buildings and power lines). Four of the vacant properties have obtained conditional use approval for the placement of nonfarm dwellings, which approvals have expired.

I find that there is a potential for an additional 18 nonfarm dwellings if all existing, vacant, privately-owned parcels could meet the standards for approval for a nonfarm dwelling.

7. **Potential Lot of Record Dwellings.** Under Section 18.16.050(E) and OAR 660-033-130(3), a lot of record dwelling may be sited on an EFU-zoned parcel on non-high value farmland if the parcel was created and acquired by the current owner prior to January 1, 1985, has continuously been owned by the present owner since then, and if the lot or parcel on which the dwelling will be sited was part of a tract on November 4, 1993, no dwelling exists on another lot or parcel that was part of that tract.

Under Section 18.16.050(F) and OAR 660-033-130(3)(c), a lot of record dwelling may be sited on high value farmland if it meets the criteria for a lot of record dwelling on non-high value farmland and

the Planning Division finds the parcel cannot practically be managed for farm use "due to extraordinary circumstances inherent in the land or its physical setting," such as "very steep slopes, deep ravines ... or other similar natural or physical barriers."

The Planning Division has previously determined that lot of record dwellings can be difficult to obtain, given the requirement for ownership prior to 1985, and the land cannot be suitable for farming based on the above factors. Some parcels may qualify for a lot of record dwelling, but without a specific analysis of each and every parcel, this determination cannot be made. No lot of record dwellings have been approved in the study area to date. The Hearings Officer has found in the past that only a small number of tax lots are likely to qualify for lot of record dwellings because the creation and ownership requirements and because of the "extraordinary circumstances" approval criterion.

The County's Hearings Officers consistently have held that while it is possible some parcels in the nonfarm dwelling study areas to qualify for a lot-of-record dwelling, without a specific and detailed analysis of each parcel, that determination cannot be made. This Hearings Officer adheres to that holding in this case. I further note that the staff report does not indicate the approval of any lot-of-record dwellings within the study area.

- 8. Stability and Character of the Land Use Pattern of the Area.** Based upon the above findings and data in the record, the Hearings Officer finds that the land use pattern and character of the study area is a mix of farms, rural residences and some juniper woodland. Privately-owned parcels range in size from .41-118.71 acres in size. Over half of the parcels have been developed with residences and are less than 20 acres in size. 29 of the privately-owned parcels are not receiving farm tax deferral.

I find that, in light of the history of dwelling permits described above, land use in the area has been stable, with farming and residential land uses remaining consistent over the years. The record indicates that in the approximately 20 years since the County adopted its EFU subzones and implemented more restrictive rules for farm dwellings, most dwellings approved in the study area have been nonfarm dwellings and replacement dwellings – i.e., dwellings not in conjunction with farm use. However, the record also indicates that in spite of the large number of such dwelling approvals, the study area has retained its predominant agricultural character.

The subject property is mostly irrigated, and the proposed dwelling is to be placed on land that has been irrigated in the past. Several of the letters received indicate that the property has had farm use for a number of years, including the area where the

dwelling is proposed. Five witnesses who live, or have lived, near the subject property testified in opposition at the hearing that they have witnessed crops growing on the property.

9. **Effect on Stability from Proposed Non-irrigated Partition and Nonfarm Dwellings.** Approval of the proposed nonfarm dwelling will make a total of 54 dwellings in the study area. This criterion focuses on what would be the cumulative impact on the stability of the land use pattern in the study area from approving the proposed nonfarm dwelling and whether the approval would set a precedent for approval of additional nonfarm dwellings, thereby driving up the price of land and making it more difficult for existing farms to continue to operate.

For the reasons discussed in the findings above, incorporated herein by reference, approval of dwellings in the study area that are not in conjunction with farm use has not caused farm land to increase in cost so that it is no longer affordable for lease or purchase by farmers. I find that the cumulative effect of adding this nonfarm dwelling will not "materially alter the stability of the land use pattern in the area" by making it more difficult for the existing farms to continue operation due to diminished opportunities to expand, purchase of lease farmland, acquire water rights or by diminishing the number of tracts or acreage in farm use. This is because the applicant has proposed to keep everything but the homesite in irrigated agriculture and because the homesite is buffered from all adjacent farm uses by on-site farm use. Therefore, the approval of this nonfarm dwelling should have no effect on the ability of existing farms to expand, purchase or lease farmland or acquire water rights. The Hearings Officer finds that, based on substantial evidence in the record, removal of the homesite from production will not diminish the amount of land in production for farm use.

As set forth in the findings above, the approval of the proposed nonfarm dwelling will not set a precedent for the wholesale approval of nonfarm dwellings to the detriment of surrounding farming. The record indicates that, in spite of the relatively large number of dwellings in the study area and the predominance of relatively small tax lots, the vast majority of EFU-zoned land in the study area has continued to be engaged in farm use consisting of livestock grazing on irrigated pasture and hay production. Historical aerial photos show that all of the properties currently employed in farm use have remained virtually the same over several years. Each proposed nonfarm dwelling is reviewed on the conditions that pertain to a subject property and the surrounding area. For these reasons the Hearings Officer finds that the proposed nonfarm dwelling will not materially alter the stability of the land use pattern in the area. This criterion is met.

iii. ***The proposed nonfarm dwelling is situated on an existing lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock, or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.***

2. For the purposes of DCC 18.16.050(G) only, "unsuitability" shall be determined with reference to the following:

a. **A lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land.** If the parcel is under forest assessment, the dwelling shall be situated upon generally unsuitable land for the production of merchantable tree species recognized by the Forest Practices Rules, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the parcel.

b. **A lot or parcel is not "generally unsuitable" simply because it is too small to be farmed profitably by itself. If a lot or parcel can be sold, leased, rented or otherwise managed as part of a commercial farm or ranch, it is not "generally unsuitable." A lot or parcel is presumed to be suitable if it is composed predominantly of Class I-VI soils. Just because a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use.** If the parcel is under forest assessment, the area is not "generally unsuitable" simply because it is too small to be managed for forest production profitably by itself.

\* \* \* (emphasis added).

**FINDING:** Most of the testimony and evidence presented in this matter concerns application of the "generally unsuitable" standard. The applicants state that the subject property is unsuitable due to poor quality of its soils, and not because of its size or location. The applicants also argue that the property is unsuitable based on vegetation. The applicants do not argue unsuitability based on adverse land conditions, drainage, flooding, location or size of the tract. More specifically, the applicants state that the *eastern half* of the subject property is generally unsuitable; they admit success in raising marketable hay on the western half of the property. In this regard, the applicants' position is that the homesite is on a *portion* of a lot or parcel that is generally unsuitable. The applicants posit that, by approving a non-farm dwelling on the proposed homesite, it will be more feasible to farm the balance of the property with a resident farmer onsite.

The subject property has existing farm use, which appears to have been conducted on the approximately 40-acre parent parcel as one farm unit in the past. The parcel on which the proposed homesite would be sited has been managed for agricultural use together with

adjacent land since at least 1953. It is currently receiving farm deferral. The property is not under forest assessment and the only trees on the site are juniper trees, which have no commercial value. The record includes post-2005 aerial photography which shows the homesite area is irrigated by a single pivot that services the property to the south (17-13-30, 206) as well. The applicants state that the soils in the northeast part of the property produce ½ ton of low quality hay per acre, whereas the NRCS Soil Survey expects yields of 4 tons per acre on the 36A soils found on the west part of the property.

**Terrain.** The record shows that the proposed nonfarm dwelling homesite is located on slightly higher ground than the balance of the subject property. The Borine Study describes the geology of the area: "This study area is primarily volcanic flows overlain by a mantle of volcanic ash deposited during the eruption of Mt. Mazama. Soils on these flows are ashy and sandy in texture. Varying amounts of volcanic ash have been eroded from rock outcroppings and re-deposited in depressions." The Hearings Officer finds that there is nothing concerning the terrain on the subject property or the proposed homesite that renders it "generally unsuitable for the production of farm crops and livestock."

**Adverse soil or land conditions.** During a site visit, staff noted that the proposed homesite is to be located on land that is currently irrigated and appears to have some grass growing on site. The record includes aerial photographs dated 1953, 1994, 2000, 2005, 2006, 2011, 2012 and 2014, which appear to show the homesite area is irrigated agriculture. The applicant testified that biomass is different than forage, and that the existence of biomass is not relevant to the question of whether the property is suitable for farming. The applicant admitted to irrigating the homesite area, but to control dust.

The NRCS Web Soil Survey shows the homesite area as consisting of Class 3s soils, which is presumed to be suitable under this criterion. However, the applicants obtained a soils analysis of the proposed nonfarm dwelling homesite performed by Roger Borine of Sage West LLC. The report is attached as Exhibit C to the Burden of Proof.

**Class 3 soils have "severe limitations that reduce the choice of plants or that require special conservation practices, or both." 36A soils are typically given a rating of 3 when irrigated and a rating of 6 nonirrigated.**

**Class 6 soils have "severe limitations that make them generally unsuitable for cultivation and that restrict their use mainly to pasture, rangeland, forestland or wildlife habitat."**

**Class 7 soils have "very severe limitations that make them unsuitable for cultivation and that restrict their use mainly to grazing, forestland or wildlife habitat." 58C soils are typically given a rating of 7 regardless of whether they are irrigated.**

The Borine Study found soils on the proposed homesite are Class VII soils that are not considered suitable for the production of hay or pasture. Opponents argue that the Borine Study is not credible and should not be considered by the Hearings Officer. Staff also expressed concerns regarding the position that the soils are unsuitable for farm crops and livestock.

The Borine report states:

*"The purpose for the soils investigation was to inventory and locate a site for a nonfarm dwelling that is situated on this parcel that is generally unsuitable for the production of farm crops and livestock or merchantable tree species per Deschutes County Code (DCC) 18.16.050(G) – Standards for Dwellings in the EFU Zones – Nonfarm dwelling. This report provides and documents more detailed data on soil classification and soil ratings than is contained in the USDA-NRCS soil maps and soil survey at the published level of detail. This more detailed soils data is directly related to the NRCS Land Capability Classification system (LCC) designation."*

The NRCS maps show the proposed homesite being located in soil type 36A, Deskamp loamy sand 0 to 3 percent slopes. The NRCS information indicates that this soil type has a land capability classification (LCC) of class 3s (irrigated) and 6s (non-irrigated). The soils analysis/report by Sage West LLC states the following:

*"An area was identified as LCC 7 soils and has severe limitations that restrict their use. The area is illustrated as LCC 7 in the Soils Map – Order 1 in Figure 2.*

*This area is a gently sloping convex lava flow. Soils are shallow and very shallow and gravelly and very gravelly in the substratum over hard basalt bedrock. The soils and landscapes for a larger area surrounding Tax Lot 200 are illustrated on the NRCS soils map in the Attachments section. The area for the proposed nonfarm dwelling within the red lines was omitted or not observed during mapping of the Soil Survey of the Upper Deschutes River Area, Oregon likely due to road and gas pipeline construction that eliminated the visible connection of the blister ridge that existed between the two 58C mapping units.*

*A proposed building site is located within the required 100 foot setback on the east and 60 foot setback on the north boundaries. The property lines presenting the north and east boundaries of the LCC 7 land should be confirmed by a legal survey since no property corner monuments were located. This will ensure the setback requirements are met. The area of LCC 7 soils is approximately 4.52 acres (Figure 2); and the proposed nonfarm building site within LCC 7 soils and required setbacks is approximately 1.2 acres and 54,700 sq ft (Figure 3). Within this area of LCC 7 soils there is adequate space to locate the initial and reserve septic drain fields with a 10 foot property line setback."*

The soils analysis/report also states the following:

***"Considerations for determining suitability of the property for crop, livestock, or merchantable tree production:***

*NRCS estimates that 36A-Deskamp loamy sand 0-3% slopes will produce 4.0 tons of alfalfa per acre and 1.5 AUMs per acre for pasture, irrigated. The Gosney soil, a contrasting inclusion, will produce 2.0 tons of alfalfa per acre and 0.5 AUMs per acre for pasture, irrigated. Neither soil is rated for non-irrigated farm crops.*

*NRCS estimates that soils in 58C Gosney-Rock outcrop-Deskamp 0-15% slopes will produce 150#/ac forage on the Gosney soil and 250#/ac on the Deskamp soil for grazing by livestock. Production is very low. Under a high level of management an acre of this soil would support a cow/calf pair for 15 days in late spring, irrigated.*



NRCS does not recognize the Gosney or Deskamp soils being capable of producing merchantable trees.

**Conclusion:**

*The purpose for this soils investigation was to inventory and locate a potential site for a nonfarm dwelling that is situated on this parcel that is generally unsuitable for the production of farm crops and livestock or merchantable tree species per Deschutes County Code (DCC) 18.16.050(G) – Standards for Dwellings in the EFU Zones – Nonfarm dwelling.*

*This report provides and documents more detailed data on soil classification and soil ratings than is contained in the USDA-NRCS soil maps and soil survey at the published level of detail. This more detailed soils data is directly related to the NRCS Land Capability Classification system (LCC) designation. Soil mapping units were designed to separate soils in LCC 3-6 from those in LCC 7/8.*

*One area was identified as predominantly LCC 7 soils with severe limitations for farm use. Further, poor soil fertility, shallow soils, low available water capacity, and limited availability of livestock forage are considerations for the determination for suitability for farm use. The building site is located within required setbacks. Within the areas of LCC 7 soils there is adequate space to locate the initial and reserve septic drainfields with the required setbacks. Areas were inventoried in detail and maps with supporting data are included in the report.”*

As set forth the findings above, the Hearings Officer has found that the detailed, gridded, data-point location map showing where test pits were dug does not wholly coincide within the proposed homesite area. The analysis of the southern quarter of the homesite area appears to be based upon a single test pit. Also, the revised soils map is continued to the southern half of the property with no data points taken or test pits dug in the southern half of the property. Accordingly, there is not substantial evidence to support a finding that the NE corner of the property is the least suitable for farming. Notwithstanding this particular finding, the general unsuitability of the parcel as a whole must be determined independently, as follows.

The report states that soils less than 10 inches deep and with less than 2 inches of Available Water Capacity (AWC) are Class 7 soils regardless of irrigation. The report states that the subject soils would need to be at least 17 inches deep to have 2 inches of Available Water Capacity. In the portion of the map determined to be class 7 soils by the study, 26 of 29 test pits were at least 10 inches deep to basalt and 11 of 29 test pits were at least 17 inches deep to basalt. Staff noted a concern that the soils of at least 17 inches in depth appear to be clustered in a northeast to southwest band across the center of the proposed homesite. The applicant responded that the deeper soils were the result of the installation of the underground gas line, and did not result in correspondingly more favorable soils depth.

A comparison of the agricultural production numbers from the submitted soils study report appear with the NRCS Web Soil Survey (WSS) data shows the following discrepancies, summarized below.

Rangeland forage: For 36A soils, the WSS lists 900 pounds, or 1 AUM per acre of “normal-year” rangeland forage. For 58C soils, the WSS lists 558 pounds, or 0.62 AUM per acre of “normal-year” rangeland forage. Normal-year rangeland forage isn’t a meaningful number in

the analysis of this property, since the property has irrigation rights and has been managed for irrigated production, not rangeland forage.

Alfalfa Hay: The WSS list 4 tons per acre of alfalfa hay for the 36A soils. Staff calculates this as 8.9 AUM per acre (4 tons = 8,000 pounds, 900 pounds = 1 AUM). Staff was unable to obtain an alfalfa hay production for the 58C soils from the WSS. Staff notes that the USDA soils interpretation sheets, upon which staff relied prior to the WSS, show the 58C soils as a soil complex comprised of Gosney, Rock Outcrop and Deskamp components. Component production is listed as Gosney production at 2 tons of alfalfa hay per acre, irrigated; rock outcrop with no production, and Deskamp production at 4 tons of alfalfa hay per acre.

Pasture: The WSS list 1.5 AUM per acre when managed as irrigated pasture for the 36A soils. Staff was unable to obtain a pasture AUM estimate for the 58C soils from the WSS.

Staff observed that the information from the WSS indicates that the subject soils are generally supportive of irrigated pasture use or Alfalfa Hay production. I agree with such a statement. However, the Hearings Officer finds that the Borine Report calculations are based on "on site" tests and observations of actual conditions on the property and thus, supersede those generalized estimates of the WSS. The Report is focused on the eastern half of the property, and most specifically, on the proposed homesite in the NE corner.

Mr. Borine testified in detail at the hearing in support of his report and findings. In particular, he explained the difference between the level of detail of NRCS mapping and specific, on-site analysis of soils. Specifically, the NRCS soil mapping is "correct" for its purpose and detail, which is limited. The NRCS maps 300-1500 acres per day, and its maps are not to be used for regulatory purposes. In this case, the NRCS missed the lava blister area onsite and did not take into consideration the underground pipeline and impacts of road construction on the soils existing on the subject property. According to Mr. Borine, the underground pipeline dries out soil and radiates heat.

The applicant also submitted a letter from Don Barbin which states:

*"Custom hay farming is my sole job and source of income. My hay cutting experience spans 15 years plus.*

*I have been providing custom hay farming services for the Cloughs over the past 3 years. This letter is to report the very poor/low hay production located in the North East corner of the Clough's parcel 200, commonly known as 22075 Erickson Rd. The main reason for this poor/low hay production is based on several things.*

- 1. Because the "TransCanada" gas lines run through this area, the soil is shallow and the pipes generate heat causing the soil there to be dry. It can be observed in the winter when there is a dusting of snow on the ground, the snow over the pipe lines dissipates rapidly.*
- 2. To the west of the pipe line, hay growth is sparse with primarily drought tolerant "Plantain" (weed) which grows in that area.*
- 3. Shallow soils mixed in among a lava rock ledge.*

*In my view these conditions contribute to very low hay production in that area."*

In the Staff Report, several concerns were raised regarding location of the homesite over the 100-foot-wide gas pipeline right-of-way and whether the effects of the pipeline on agricultural production do not impact the proposed homesite. The Hearings Officer finds that substantial evidence in the record shows the impact of the gas pipeline has increased heat and dryness of the soils and surrounding soils, reducing the ability to successfully use that portion of the property for hay production. Staff also noted that additional information on the applicants' farming management actions is required. Mrs. Clough testified at length at the hearing concerning their failed efforts to produce marketable crops and/or raise vegetation for livestock forage.

Mrs. Clough testified that when they purchased the subject property, it was infested with plantain. They conducted weed abatement of their fields for 2 successive years, including burning the fields. During this time, they managed to increase the yield of hay but plantain persisted in the poor soils found in northeastern part of pasture. Mrs. Clough stated that plantain is difficult to eradicate and that the costs of attempting to do so would further the losses incurred for raising hay. She also testified that the property is a "poor location" for farming because it is surrounded by numerous nonfarm residences. Dogs kept by neighbors roam off leash and make it infeasible to use the property to pasture horses. Mrs. Clough stated that they cannot raise animals without a resident farmer because dogs run onto the property. Mrs. Clough also testified that the small size of the property is a factor in rendering it difficult to farm. They cannot purchase their own farm equipment and thus must rely on contract hay farmers to harvest and bale the hay. The Cloughs estimate losses of \$508 per acre per year. The applicants' efforts to make the property productive were confirmed by a July 9, 2015 letter from Mrs. Hogan.

The applicants state that raising hay on the eastern part of the property is not profitable and no reasonable farmer would expect to make a profit raising hay on this property. The applicants rely on *Wetherall v. Douglas County*, 342 Or 666, 678, 160 P.3d 614 (2007) and the definition of farm use in ORS 215.203(2) as agricultural activities conducted "for the primary purpose of obtaining a profit in money." The LCDC rule defines profit as gross income rather than net income.

The Borine Study and the letter from Don Barbin state that the soils on the proposed nonfarm dwelling homesite are of poor quality. The Borine Study states:

*"One area was identified as predominantly LCC 7 soils with severe limitations for farm use. Further, poor soil fertility, shallow soils, low available water capacity, and limited availability of livestock forage are considerations for the determination for suitability for farm use. The building site is located with required setbacks. Within the areas of LCC 7 soils there is adequate space to locate the initial and reserve septic drainfields with the required setbacks. Areas were inventoried in detail and maps with supporting data are included with this report."*

The applicants' burden of proof estimates annual gross beef production potential for the subject property to be \$1,301.76 based on assumptions identified by the OSU Extension Service:

- One AUM is the equivalent to the forage required for a 1000 pound cow and calf to graze for 30 days (900 pounds forage)
- On good quality forage an animal unit will gain 2 pounds per day
- Two animal units will eat as much in one month as one animal unit will eat in two months

- Forage production on dry land is not continuous. Once the forage is eaten, it generally will not grow back until the following spring
- An average market price for beef is \$1.20 per pound

The value of beef production on the subject property can be calculated using the following formula: 30 days x 2#/day/acre = 60.0 pounds beef/acre (1 acre per AUM)

60.0 pounds beef/acre x 18.08 acres x 1.20/lb = \$1,301.76

The applicants posited that the area proposed for nonfarm development would produce enough forage to feed one cow-calf pair for 18 days per year. However, the Hearings Officer notes that the question is whether the subject parcel as a whole is suitable for farming, or alternatively, that the eastern half of the parcel is unsuitable for farming. The suitability of the NE corner in isolation is not dispositive of the question.

Staff noted that the proposed homesite is to be located on land that is currently irrigated and appears to have some grass growing at the site. This area appears to be irrigated agriculture in aerial photos dated 1953, 1994, 2000, 2003, 2005, 2006, 2011, 2012 and 2014.

Numerous property owners in the vicinity testified that they have witnessed the production of hay crops over many years on the subject property. Mr. Wyman has lived in the area for 35 years and farmed the parcel for several years in the 1980s. He testified that a wheelline and handline were used for irrigation, and that now it has a center pivot, which should make it even more productive. Mr. and Mrs. Donald McHone have lived in the area for 38 years and they have seen "great hay crops" harvested on the land. Joseph and Linda Worlein have lived (40 years) – directly across Erickson Road for 40 years. They submitted a letter stating that the land is farmable and has been for all the years they have been there. The Worleins have witnessed "large quantities" of hay having been raised on the property. They also purchased hay raised on the land from previous owners. With adequate fertilizer and water, this land is capable of growing ample forage crops. Brad and Carol Davis have lived near the subject property for 19 years. They state that there have been 2 to 3 cuttings of hay and/or alfalfa per year.

This evidence is contrary to the position of the applicant that the property, or at least the eastern half of the property, is dry, unproductive land. However, there is no evidence that the prior farming practices made a "profit," or that the current property owners may do so under existing circumstances. Accordingly, although the record appears to show past successes of prior property owners farming such property, the applicants presented evidence of their own, failed efforts to farm the property and their inability to make a profit in doing so.

In support of the application, the applicants' custom hay farmer, Mr. Barbin advised the applicants that they should not continue to harvest hay from the northeast part of their property due to the poor quality of the hay and the high cost of producing and harvesting it. The hay grown there must be sold at a discount. Mr. Barbin testified that he sold hay to Steve Schroeder for 2 years and that the hay was so poor that the goats and horses would not eat it unless mixed with higher quality hay. This customer no longer purchases hay grown on this portion of the subject property. Supplemental letter May 6, 2015 (Ex. H to response to staff report). According to Mr. Barbin, the area has never produced a good yield which is typically 2 – 2.5 tons of hay per acre. He stated that even when the area is planted, watered and fertilized, the soils are so poor that the yield is only .5 tons per acre. Mr. Barbin also stated that the crop is so low in height it was difficult to stay in the bale when cutting and baling. At a rate of ½ ton

per acre, the applicants will suffer significant financial losses of \$300 per acre times 2 cuttings per season. Mr. Barbin testified that there are large surface rocks and that he cannot disc and reseed due to issues with equipment.

Ms. Fancher, on behalf of the applicants, pointed to evidence that farming in Central Oregon is generally not profitable, and that the majority of farm parcels in the region lost money in 2007. The Hearings Officer notes that the region as a whole was in a recession in 2007 and does not find this point to be persuasive on the question of whether the subject property is "suitable for farming," particularly considering other evidence in the record of its past farming use.

The applicants also testified that when the property was partitioned in 1982, the expectation was that a non-farm dwelling would be constructed on the subject property. The partition approval did not approve a non-farm dwelling, or any other dwelling on the subject property. I find it is irrelevant what the "intention" was at the time of the prior application. Unless the applicants can meet current approval standards for a non-farm dwelling on this EFU-zoned parcel, the application must be denied. Similarly, I find it irrelevant whether or not the property owner that purchased the parcel to the south of the subject property in 2014 considered the alleged "difficulty" of farming the property. As clarified in the record, the purchaser did not wish to undertake an attempt to develop the subject parcel with a non-farm dwelling.

Finally, staff noted, and I agree that the application materials are unclear regarding the size of the homesite, given the discrepancy between the proposed homesite in some figures and the area shown for water rights removal. The applicants stated that COID has approved the removal of 1.18 acres of irrigation water rights from the 1.2 proposed building envelope and that .58 acres have been sold to COID. They further stated that the remaining .6 acres have been removed from the homesite but may be replaced elsewhere on the property or sold. If this application was approved, a condition of approval that prohibits the return of water to any part of the nonfarm dwelling area could be imposed to address such concerns.

Based on all of the foregoing, despite the competing evidence, I find that there is evidence in the record to support a finding that the proposed homesite would be situated on a portion of the subject parcel or lot that is generally unsuitable for farming.

**Drainage and flooding.** There does not appear to be any drainage or flooding issues that would render the proposed homesite or any portion of the property as a whole unsuitable for the production of farm crops and livestock.

**Vegetation.** There is conflicting evidence in the record concerning the vegetation in this area. The applicants state that the area supports the growth of weeds (Plantain) but not pasture grass.<sup>3</sup> However, they also presented evidence that poor quality/low yield hay is also grown in the subject area. The application lists "Plantain" as the vegetation growing where the proposed homesite is located. Evidence in the record shows that plantain can be eradicated; Mrs. Clough herself testified that they worked hard to replace the areas infested with plantain after purchasing the subject property. It appears that efforts have diminished in recent years, at the same time that

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<sup>3</sup> The applicant testified that the vegetation on the homesite is plantain, which is a weed that is not suitable for grazing by livestock. It is a weed that "outcompetes" pasture grass and grows in poor soils. Evidence in record shows that plantain is a perennial herb – a common and noxious weed. Mr. Sheridan testified that plantain is not a weed, but a nutritious weed. Mr. Wyman presented evidence that plantain can be eradicated. The applicants state that the type of plantain growing on the property is its Buckhorn Plantain, not Broadleaf Plantain.

the northeastern (and/or eastern) portion of the property has not been fertilized or consistently irrigated. While the cost of eradicating plantain may be costly, I find that, by itself, such vegetation does not render the proposed homesite unsuitable for farm use.

**Location and size of tract.** The subject property is approximately 18.08 acres in size and the proposed nonfarm dwelling homesite is approximately 1.2 acres in size. Staff finds and I agree that there is nothing about the proposed homesite's location or size that renders it generally unsuitable for the production of farm crops and livestock.

In *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008), LUBA held the portion of the parcel that is "generally unsuitable for the production of farm crops and livestock or merchantable tree species" must be large enough to accommodate not only the dwelling but essential or accessory components of that dwelling, such as residential outbuildings such as garages, well, septic system and reserve area. However, LUBA held the proposed homesite need not be large enough to accommodate a driveway. This requirement could be met with a condition of approval requiring the applicant to: (1) revise the plot plan indicating the location of Class VII and VIII soils on-site and (2) requiring the nonfarm dwelling and all accessory dwelling uses, including a detached garage, well, septic drainfield and septic reserve area, to be located within these soils.

- iv. ***The proposed nonfarm dwelling is not within one-quarter mile of a dairy farm, feed lot or sales yard, unless adequate provisions are made and approved by the Planning Director or Hearings Body for a buffer between such uses. The establishment of a buffer shall be designed based upon consideration of such factors as prevailing winds, drainage, expansion potential of affected agricultural uses, open space and any other factor that may affect the livability of the nonfarm dwelling or the agriculture of the area.***

**FINDING:** The property is not within one-quarter mile of a dairy farm, feed lot or sales yard. The Hearings Officer finds this criterion is met.

- v. ***Road access, fire and police services and utility systems (i.e. electrical and telephone) are adequate for the use.***

**FINDING:** The applicants submitted the following information to demonstrate that public services and utilities are adequate:

1. ***Electricity.*** The applicants submitted a letter from Central Electric Cooperative dated January 10, 2014 indicating they can serve the property.
2. ***Road access.*** The applicants intend to access the property from Erickson Road from an existing driveway. The applicant has submitted a copy of an access permit from 1982, which appears to be for the existing driveway.

3. *Telephone.* The number of existing dwellings in the area indicates that phone service is available, and additionally cellular phone service is available in the area.
4. *Domestic water.* The applicants submitted a letter from Avion Water Company dated December 23, 2014 indicating they can serve the property.
5. *Fire protection.* The subject property is located within the Deschutes County Rural Fire Protection District No. 2.
6. *Police protection.* Deschutes County Sheriff.

Based on these findings, required services are adequate for the use. The Hearings Officer finds this criterion is met.

- vi. ***The nonfarm dwelling shall be located on a lot or parcel created prior to January 1, 1993, or was created or is being created as a nonfarm parcel under the land division standards in DCC 18.16.055(B) or (C).***

**FINDING:** The subject parcel was created by a partition in 1982. The Hearings Officer finds this criterion is satisfied.

3. ***Loss of tax deferral. Except as provided in DCC 18.16.050(1)(2), pursuant to ORS 215.236, a nonfarm dwelling on a lot or parcel in an Exclusive Farm Use zone that is or has been receiving special assessment may be approved only on the condition that before a building permit is issued, the applicant must produce evidence from the County Assessor's Office that the parcel upon which the dwelling is proposed has been disqualified for special assessment at value for farm use under ORS 308.370 or other special assessment under ORS 308.765, 321.352, 321.730 or 321.815, and that any additional tax or penalty imposed by the County Assessor as a result of disqualification has been paid.***

**FINDING:** According to Assessor's records, the property is receiving special assessment for farm use. The Hearings Officer determines that a condition of approval must be included that requires the applicants, prior to submitting an application for building permit, to produce evidence from the County Assessor's Office that the subject property has been disqualified for special assessment at value for farm use under ORS 308.370 or other special assessment under ORS 308.765, 321.352, 321.730 or 321.815, and that any additional tax or penalty imposed by the County Assessor as a result of disqualification has been paid.

5. Section 18.16.060, Dimensional Standards

- E. ***Building height. No building or structure shall be erected to exceed 30 feet in height, except as allowed under DCC 18.120.040.***

**FINDING:** The applicants did not specify a building height. However, the Hearings Officer finds that this criterion could be satisfied by a condition of approval limiting the height of the nonfarm dwelling to 30 feet.

6. Section 18.16.070. Yards

- A. ***The front yard shall be a minimum of: 40 feet from a property line fronting on a local street, 60 feet from a property line fronting on a collector street, and 100 feet from a property line fronting on an arterial street.***

**FINDING:** The subject property is a corner parcel that has frontage on two portions of Erickson Road: the north-south portion of Erickson Road, and the east-west portion of Erickson Road that runs between the Powell Butte Highway and the north-south portion of Erickson Road. The north-south segment of Erickson Road is a designated rural collector road, and the east-west portion of Erickson Road is a designated rural local road. The front yard minimum setbacks are 60 feet and 40 feet, respectively, for these two portions of Erickson Road. The applicant has requested a building envelope that accounts for the required front setbacks. The Hearings Officer finds that this criterion will be satisfied by a condition of approval requiring compliance with these required setbacks.

- B. ***Each side yard shall be a minimum of 25 feet, except that for a nonfarm dwelling proposed on property with side yards adjacent to property currently employed in farm use, and receiving special assessment for farm use, the side yard shall be a minimum of 100 feet.***

**FINDING:** The proposed nonfarm dwelling will abut a property to the south that is in farm use and that is receiving special assessment for farm use. The proposed setback from this adjacent property is approximately 400 feet, meeting the minimum 100-foot setback standard above. The Hearings Officer finds that this criterion could be satisfied by a condition of approval requiring compliance with these required setbacks.

- C. ***Rear yards shall be a minimum of 25 feet, except that for a nonfarm dwelling proposed on property with a rear yard adjacent to property currently employed in farm use, and receiving special assessment for farm use, the rear yard shall be a minimum of 100 feet.***

**FINDING:** The east property line is the rear property line for the subject property. The proposed dwelling is a nonfarm dwelling and the property directly east is in farm use and receiving special assessment for farm use. The minimum rear setback is 100 feet. The building envelope is shown to incorporate a 100-foot setback from the east property line, meeting the above standard. The Hearings Officer finds that this criterion could be satisfied by a condition of approval requiring compliance with these required setbacks.

- D. ***In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.***

**FINDING:** There do not appear to be any greater setbacks required by applicable building or structural codes. The Hearings Officer finds that this criterion could be satisfied by a condition of approval requiring compliance with any greater setbacks determined to be required by the Building Division when a building permit is submitted.



7. Section 18.16.080, Stream Setbacks

**To permit better light, air, vision, stream pollution control, protection of fish and wildlife areas and preservation of natural scenic amenities and vistas along streams and lakes, the following setbacks shall apply:**

- A. All sewage disposal installations, such as septic tanks and septic drainfields, shall be set back from the ordinary high water mark along all streams or lakes a minimum of 100 feet, measured at right angles to the ordinary high water mark. In those cases where practical difficulties preclude the location of the facilities at a distance of 100 feet and the County Sanitarian finds that a closer location will not endanger health, the Planning Director or Hearings Body may permit the location of these facilities closer to the stream or lake, but in no case closer than 25 feet.**
- B. All structures, buildings or similar permanent fixtures shall be set back from the ordinary high water mark along all streams or lakes a minimum of 100 feet measured at right angles to the ordinary high water mark.**

**FINDING:** The subject property has no streams or rivers within or adjacent to it. The Hearings Officer finds that the above criteria do not apply to the proposed dwelling.

8. Section 18.16.090, Rimrock Setback

**Notwithstanding the provisions of DCC 18.16.070, setbacks from rimrock shall be as provided in DCC 18.116.160 or 18.84.090, whichever is applicable.**

**FINDING:** The subject property has no rimrock within or adjacent to it. The Hearings Officer finds that the above criterion does not apply to the proposed dwelling.

**B. CHAPTER 18.80, AIRPORT SAFETY COMBINING ZONE - AS**

1. Section 18.80.026, Notice of Land Use and Permit Applications.

**Except as otherwise provided herein, written notice of applications for land use or limited land use decisions, including comprehensive plan or zoning amendments, in an area within this overlay zone, shall be provided to the airport sponsor and the Department of Aviation in the same manner as notice is provided to property owners entitled by law to written notice of land use or limited land use applications. [ORS 836.623(1); OAR 738-100-010; ORS 215.416(6); ORS 227.175(6)]**

**For the Redmond, Bend, Sunriver, and Sisters airports:**

- A. Notice shall be provided to the airport sponsor and the Department of Aviation when the property, or a portion thereof, that is subject to the land use or limited land use application is located within 10,000 feet of the sides or ends of a runway:**
- B. Notice of land use and limited land use applications shall be provided within the following timelines.**
  - 1. Notice of land use or limited land use applications involving public hearings shall be provided prior to the public hearing**

- at the same time that written notice of such applications is provided to property owners entitled to such notice.*
- 2. Notice of land use or limited land use applications not involving public hearings shall be provided at least 20 days prior to entry of the initial decision on the land use or limited land use application.*
  - 3. Notice of the decision on a land use or limited land use application shall be provided to the airport sponsor and the Department of Aviation within the same timelines that such notice is provided to parties to a land use or limited land use proceeding.*
  - 4. Notices required under DCC 18.80.026(B)(1-3) need not be provided to the airport sponsor or the Department of Aviation where the land use or limited land use application meets all of the following criteria:*
    - a. Would only allow structures of less than 35 feet in height;*
    - b. Involves property located entirely outside the approach surface;*
    - c. Does not involve industrial, mining or similar uses that emit smoke, dust or steam; sanitary landfills or water impoundments; or radio, radiotelephone, television or similar transmission facilities or electrical transmission lines; and*
    - d. Does not involve wetland mitigation, enhancement, restoration or creation.*

**FINDING:** The proposed dwelling is subject to the 30-foot height limit in the EFU zone. The subject property is not within the approach surface of the airport. The proposed dwelling does not involve industrial, mining or similar uses that would emit smoke, dust or steam, sanitary landfills or water impoundments, radio, radiotelephone, television or similar transmission facilities or electrical transmission lines. It also does not involve wetland mitigation, enhancement, restoration or creation. For these reasons, the Hearings Officer finds that notice to the Bend Airport sponsor (the City of Bend) and the Oregon Department of Aviation is not required for the proposed dwelling.

2. Section 18.80.028, Height Limitations.

*All uses permitted by the underlying zone shall comply with the height limitations in DCC 18.80.028. When height limitations of the underlying zone are more restrictive than those of this overlay zone, the underlying zone height limitations shall control. [ORS 836.619; OAR 660-013-0070]*

- A. Except as provided in DCC 18.80.028(B) and (C), no structure or tree, plant or other object of natural growth shall penetrate an airport imaginary surface. [ORS 836.619; OAR 660-013-0070(1)]*
- B. For areas within airport imaginary surfaces but outside the approach and transition surfaces, where the terrain is at higher elevations than the airport runway surfaces such that existing structures and permitted development penetrate or would penetrate the airport imaginary surfaces, a local government may authorize structures up to 35 feet in height.*

- C. **Other height exceptions or variances may be permitted when supported in writing by the airport sponsor, the Department of Aviation and the FAA. Applications for height variances shall follow the procedures for other variances and shall be subject to such conditions and terms as recommended by the Department of Aviation and the FAA (for Redmond, Bend and Sunriver.)**

**FINDING:** The Hearings Officer finds that the proposed dwelling is subject to the 30-foot height that could be met with a required condition of approval meeting the standard under "B" above.

3. Section 18.80.044, Land Use Compatibility.

**Applications for land use or building permits for properties within the boundaries of this overlay zone shall comply with the requirements of DCC 18.80 as provided herein. When compatibility issues arise, the Planning Director or Hearings Body is required to take actions that eliminate or minimize the incompatibility by choosing the most compatible location or design for the boundary or use. Where compatibility issues persist, despite actions or conditions intended to eliminate or minimize the incompatibility, the Planning Director or Hearings Body may disallow the use or expansion, except where the action results in loss of current operational levels and/or the ability of the airport to grow to meet future community needs. Reasonable conditions to protect the public safety may be imposed by the Planning Director or Hearings Body. [ORS 836.619; ORS 836.623(1); OAR 660-013-0080]**

- A. **Noise. Within airport noise impact boundaries, land uses shall be established consistent with the levels identified in OAR 660, Division 13, Exhibit 5 (Table 2 of DCC 18.80). Applicants for any subdivision or partition approval or other land use approval or building permit affecting land within airport noise impact boundaries, shall sign and record in the Deschutes County Book of Records, a Declaration of Anticipated Noise declaring that the applicant and his successors will not now, or in the future complain about the allowed airport activities at the adjacent airport. In areas where the noise level is anticipated to be at or above 55 Ldn, prior to issuance of a building permit for construction of a noise sensitive land use (real property normally used for sleeping or as a school, church, hospital, public library or similar use), the permit applicant shall be required to demonstrate that a noise abatement strategy will be incorporated into the building design that will achieve an indoor noise level equal to or less than 55 Ldn. [NOTE: FAA Order 5100.38A, Chapter 7 provides that interior noise levels should not exceed 45 decibels in all habitable zones.]**

**FINDING:** The proposed use is not within a noise impact boundary. The Hearings Officer finds that this criterion is not applicable to the proposed dwelling.

- B. **Outdoor lighting. No new or expanded industrial, commercial or recreational use shall project lighting directly onto an existing runway or taxiway or into existing airport approach surfaces except where necessary for safe and convenient air travel. Lighting for**

***these uses shall incorporate shielding in their designs to reflect light away from airport approach surfaces. No use shall imitate airport lighting or impede the ability of pilots to distinguish between airport lighting and other lighting.***

**FINDING:** The proposed dwelling is not considered an industrial, commercial or recreational use. The Hearings Officer finds that the above criterion is not applicable to the proposed dwelling.

- C. *Glare. No glare producing material, including but not limited to unpainted metal or reflective glass, shall be used on the exterior of structures located within an approach surface or on nearby lands where glare could impede a pilot's vision.***

**FINDING:** The proposed use is not located in an approach surface according to the Bend Airport Safety Combining Zone map. The proposed dwelling would not produce glare that would impede a pilot's vision. The Hearings Officer finds that the above criterion is met.

- D. *Industrial emissions. No new industrial, mining or similar use, or expansion of an existing industrial, mining or similar use, shall, as part of its regular operations, cause emissions of smoke, dust or steam that could obscure visibility within airport approach surfaces, except upon demonstration, supported by substantial evidence, that mitigation measures imposed as approval conditions will reduce the potential for safety risk or incompatibility with airport operations to an insignificant level. The review authority shall impose such conditions as necessary to ensure that the use does not obscure visibility.***

**FINDING:** The proposed use is not a new industrial, mining or similar use. It is a residential use. The Hearings Officer finds that this criterion is not applicable to the proposed dwelling.

- E. *Communications Facilities and Electrical Interference. No use shall cause or create electrical interference with navigational signals or radio communications between an airport and aircraft. Proposals for the location of new or expanded radio, radiotelephone, and television transmission facilities and electrical transmission lines within this overlay zone shall be coordinated with the Department of Aviation and the FAA prior to approval. Approval of cellular and other telephone or radio communication towers on leased property located within airport imaginary surfaces shall be conditioned to require their removal within 90 days following the expiration of the lease agreement. A bond or other security shall be required to ensure this result.***

**FINDING:** The proposed use does not include a communication facility, and would not cause or create electrical interference. The Hearings Officer finds that this criterion is not applicable to the proposed dwelling.

- F. *Limitations and Restrictions on Allowed Uses in the RPZ, Approach Surface, and Airport Direct and Secondary Impact Areas.***

**For the Redmond, Bend, Sunriver, and Sisters airports, the land uses identified in DCC 18.80 Table 1, and their accessory uses, are permitted, permitted under limited circumstances, or prohibited in the manner therein described. In the event of conflict with the underlying zone, the more restrictive provisions shall control. As used in DCC 18.80.044, a limited use means a use that is allowed subject to special standards specific to that use.**

**FINDING:** The proposed dwelling will not be located within the RPZ, Approach Surface or the Airport Direct Impact Areas. The dwelling will be within the Secondary Impact area. Under DCC 18.80 Table 1 a dwelling is a permitted use in the Secondary Impact Area. The Hearings Officer finds that this criterion is met.

4. Section 18.80.078. FAA Notification (Form 7460-1).

- A. **Federal Aviation Regulation (FAR) Part 77 requires that anyone proposing to construct anything which may obstruct the use of airspace by aircraft to provide a notice to that effect to the FAA. Generally, construction proposals in the vicinity of airports may obstruct airspace. Notice to the FAA is required for anything which may affect landing areas, either existing or planned, which are open to the public, or are operated by one of the armed forces.**
- B. **FAA Form 7460-1 "Notice of Proposed Construction or Alteration" is the notification form. It is to be submitted by the applicant directly to the FAA. Forms are available from the Oregon Department of Aviation or the Northwest Regional Office of the FAA.**
- C. **FAA Form 7460-1 should be submitted if the proposed construction or alteration meets the following criteria:**
  - 1. **Anything over 200' AGL (above ground level at the site).**
  - 2. **Proposals in the vicinity of an airport, if the proposal would be higher than a slope from the nearest point on a runway and increasing its elevation at a ratio of:**

Longest Runway	Proximity to Runway	Slope
> 3,200'	Within 20,000'	100 to 1
3,200' or less	Within 10,000'	50 to 1
For a Heliport	Within 5,000'	25 to 1
- D. **For identification purposes, Deschutes County has established FAA Notification Areas around each of the public use airports within Deschutes County. The boundaries of these areas are based on the runway length. If a proposed construction project is located in one of these areas, the applicant shall determine if the height of the proposed project will require FAA notification as per DCC 18.80.076(C). In Deschutes County, each of the public-use airports has a runway longer than 3,200 feet. Therefore, each FAA notification area includes all land within 20,000 feet of each airport's runway(s), and the slope to be used is 100 to 1.**
- E. **FAA notification is NOT required for any of the following construction or alteration:**
  - 1. **Any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or**

*topographic features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it is evident beyond all reasonable doubt that the structure so shielded will not adversely affect safety in air navigation.*

2. *Any antenna structure of 20 feet or less in height except one that would increase the height of another antenna structure.*
3. *Any air navigation facility, airport visual approach or landing aid, aircraft arresting device, or meteorological device, of a type approved by the Administrator, or an appropriate military service on military airports, the location and height of which is fixed by its functional purpose.*
4. *Any construction or alteration for which notice is required by any other FAA regulation.*

**FINDING:** The subject property is located approximately one mile from the airport. The proposed dwelling will not affect any landing area. The Hearings Officer finds that no FAA notice is required for the proposed dwelling.

**IV. DECISION:**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby **DENIES** the applicants' proposed conditional use to establish a nonfarm dwelling on the subject property because the applicants failed to establish that the proposed homesite is the least suitable for farming on the subject parcel.



Stephanie Marshall Hicks, Hearings Officer

Dated this 20<sup>th</sup> day of July, 2015

Mailed this 21<sup>st</sup> day of July, 2015

**THIS DECISION BECOMES FINAL IF NOT APPEALED WITHIN 12 DAYS OF THE DATE OF THE DECISION.**



## Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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

### CERTIFICATE OF MAILING

**FILE NUMBER:** 247-15-000035-CU

**DOCUMENT/S MAILED:** Hearings Officer's Decision

**MAP/TAX LOT NUMBER:** 17-13-30, 200

I certify that on the 21<sup>st</sup> day of July, 2015 the attached Hearings Officer's Decision, dated July 21, 2015, was mailed by first class mail, postage prepaid, to the persons and addresses set forth on the attached list.

Dated this 21<sup>st</sup> day of July, 2015.

### COMMUNITY DEVELOPMENT DEPARTMENT

By: Sher Buckner

Dana and Karen Clough 63080 Stenkamp Road Bend, OR 97701	Brad and Carol Davis 22121 Erickson Road Bend, OR 97701
Liz Fancher, Attorney 644 NW Broadway Street Bend, OR 97701	Richard Wyman 22170 Erickson Road Bend, OR 97701
Donald and Sharon McHone P.O. Box 7976 Bend, OR 97708	Danny Sheridan 62664 Erickson Road Bend, OR 97701
Fred and Cheryl Trachsel 62850 Dickey Road Bend, OR 97701	Joseph and Linda Worlein 22070 Erickson Road Bend, OR 97701
Janet Hogan 62680 Erickson Road Bend, OR 97701	Jan Leonard 62777 Erickson Road Bend, OR 97701
Kurt and Jennifer Bomke 22105 Erickson Road Bend, OR 97701	Grant Carroll 22079 Erickson Road Bend, OR 97701

## APPEAL OF 247-15-000035-CU

Dana and Karen Clough, the applicants and parties in File 247-15-000035-CU, an application for approval of a nonfarm dwelling, hereby appeal the decision of said case written by Deschutes County Hearings Officer Stephanie Hicks. The decision was mailed on July 21, 2015.

In this application, the Cloughs sought approval of a nonfarm dwelling on a portion of their property found to be generally unsuitable for farm use by the hearings officer. This area is comprised of Class VII nonagricultural soils.

The hearings officer denied the Cloughs' application solely because she questioned whether Class 7 soils where the home was proposed were the "least suitable for the production of farm crops or livestock" of all areas mapped as Class 7 soils by soil scientist Roger Borine as required by DCC 18.16.040, Limitations on Conditional Uses.

### STATEMENT OF ISSUES

The hearings officer's findings on the "least suitable" issue should be reversed or replaced because:

- A. This new interpretation conflicts with the County's established interpretation that any land generally unsuitable for farm use is the "least suitable."<sup>1</sup> The County's established interpretation is the best interpretation. The term "least suitable" was developed at the State level to require that nonresource uses be located on the "least suitable" parts of lands that are suitable for resource use (farm or forest).
- B. State law does not require that the nonfarm dwelling be located on the area "least suitable" for the production of farm crops and livestock. State law allows nonfarm dwellings and related development on any part of a property that is generally unsuitable for the production of farm crops and livestock.
- C. The hearings officer faulted soil scientist Roger Borine for failing to study nonagricultural soils in parts of the property that are off-limits to nonfarm development in the same level of detail as he studied other soils – in this case land subject to nonfarm dwelling setbacks (100') and land that is occupied by a gas pipeline and burdened by a pipeline easement to find the worst of the worst soils. This finding should be replaced because:

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<sup>1</sup> Prior to the adoption of this interpretation, County land use decisions did not apply the "least suitable" requirement to nonfarm dwelling applications and nonfarm dwellings were approved in the Cloughs' neighborhood without meeting the "least suitable" test.



- a. It is unreasonable to require a soils study of lands that are off-limits to development. For instance, on properties that include the rock cliffs of the Deschutes River, it would be unreasonable to deny approval of a nonfarm dwelling because the house and septic drain field are not built on the rock cliffs or within the 50' rimrock setback area.
  - b. Mr. Borine's professional findings and opinion that soils in the unbuildable part of the Cloughs' property are Class VII soils that are equally unsuitable for farm use should have been accepted by the hearings officer. The hearings officer's rejection of his opinion is based on her misunderstanding of the soils report and the extent and location of the testing conducted by Mr. Borine. Also, her findings should have but do not reflect Mr. Borine's explanation of the basis for this opinion.
- D. This interpretation, if followed, will require County staff to require that a nonfarm dwelling and associated development, such as a septic drain field, be located on the "worst of the worst" soils on a property. This will make it nearly impossible to approve nonfarm dwellings because, since LUBA's decision of *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008), septic tanks and drain fields and accessory residential structures are considered a part of the nonfarm dwelling use. Even advanced septic systems require land of marginally decent soils. On properties with Class 8 rock outcrops, the hearings officer's reading of the "least suitable" requirement would require that septic drain fields be sited on Class 8 rock outcrops where they cannot function.

#### REASON FOR BOARD REVIEW

The Board of Commissioners should hear this case in order to resolve a conflict between the way its professional planning staff and a new land use hearings officer address the "least suitable" requirement. The Board is the appropriate entity to make decisions of County-wide policy like the one presented by this appeal. The hearings officer's interpretation, if applied, will result in absurd and unfair results. Lands of uniformly poor farm land (Class 6 and 7) will be able to qualify for nonfarm dwellings while those properties with areas of the very worst unbuildable soil, Class 8 rock outcrops, will not. Lands that have extremely poor soils in County-required setback areas will be denied home dwelling approvals while those that have excellent soils in those areas will not.

The "least suitable" requirement is not required by State law. The Board is given broad discretion to adopt any interpretation of the requirement as long as it is plausible. *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). This means that the Board may

interpret the policy in a way that is consistent with good policy and State law – as allowing nonfarm dwelling development on land like the Cloughs’ property that is generally unsuitable for farm use.

#### REQUEST FOR DE NOVO HEARING ON ISSUES APPEALED ONLY

The Cloughs ask that the Board hear this appeal *de novo* on the issues set forth in this notice of appeal only. This case is unusual in that it seeks review of an unprecedented interpretation of the County’s code and that interpretation was the only basis for denial. The applicants’ request *de novo* review so that they will have the option to submit additional soils evidence about the unbuildable part of their property. Although the Cloughs believe that this evidence should not be required, if the Board decides otherwise they would like to be sure that the Board has the evidence the hearings officer thought should have been provided to address the new interpretation of “least suitable.”

The applicant asks that the issues be limited to a review of the hearings officer’s new interpretation of the “least suitable” requirement. This is allowed by DCC 22.23.027(4). None of the other issues raised in this case are new and none present questions of law that should be resolved by the Board. Rehearing the entire case, also, will be more time-consuming for the Board and more costly for the applicants and the parties.



# Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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

## APPEAL APPLICATION

FEE: \$3,238.70  
**SCANNED**  
AUG 4 2015

### EVERY NOTICE OF APPEAL SHALL INCLUDE:

1. A statement describing the specific reasons for the appeal.
2. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons the Board should review the lower decision.
3. If the Board of County Commissioners is the Hearings Body and *de novo* review is desired, a request for *de novo* review by the Board, stating the reasons the Board should provide the *de novo* review as provided in Section 22.32.027 of Title 22.
4. If color exhibits are submitted, black and white copies with captions or shading delineating the color areas shall also be provided.

It is the responsibility of the appellant to complete a Notice of Appeal as set forth in Chapter 22.32 of the County Code. The Notice of Appeal on the reverse side of this form must include the items listed above. Failure to complete all of the above may render an appeal invalid. Any additional comments should be included on the Notice of Appeal.

Staff cannot advise a potential appellant as to whether the appellant is eligible to file an appeal (DCC Section 22.32.010) or whether an appeal is valid. Appellants should seek their own legal advice concerning those issues.

Appellant's Name (print): Dana E. and Karen E. Clough Phone: (541) 771-2870  
 Mailing Address: 63080 Stenkamp Rd City/State/Zip: Bend, OR 97701  
 Land Use Application Being Appealed: 247-15-00003S-CU  
 Property Description: Township 17 Range 13 Section 30 Tax Lot 200  
 Appellant's Signature: Karen Clough Dana Clough

**EXCEPT AS PROVIDED IN SECTION 22.32.024, APPELLANT SHALL PROVIDE A COMPLETE TRANSCRIPT OF ANY HEARING APPEALED, FROM RECORDED MAGNETIC TAPES PROVIDED BY THE PLANNING DIVISION UPON REQUEST (THERE IS A \$5.00 FEE FOR EACH MAGNETIC TAPE RECORD). APPELLANT SHALL SUBMIT THE TRANSCRIPT TO THE PLANNING DIVISION NO LATER THAN THE CLOSE OF THE DAY FIVE (5) DAYS PRIOR TO THE DATE SET FOR THE DE NOVO HEARING OR, FOR ON-THE-RECORD APPEALS, THE DATE SET FOR RECEIPT OF WRITTEN RECORDS.**

(over)