



## Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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### STAFF REPORT

**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  
Deschutes County Services Center  
1300 NW Wall Street  
Bend, OR 97701

**AGENT:** Liz Fancher, Attorney  
644 NW Broadway Street  
Bend, OR 97701

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

#### I. APPLICABLE CRITERIA:

Title 18 of the Deschutes County Code, County Zoning  
Chapter 18.16, Exclusive Farm Use (EFU) Zone  
Chapter 18.80, Airport Safety (AS) Combining Zone

Title 22, Deschutes County Development Procedures Ordinance

#### II. BASIC FINDINGS:

- 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. 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 according to the applicant, has 16.08 acres of irrigation water rights. 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.
- F. SURROUNDING LAND USES:** The properties located directly north and east are zoned Multiple Use Agricultural (MUA-10). 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.

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 subject property contains the following 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.

- 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 10% of the property.

**H. PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice to several public agencies and received the following comments:

**County Transportation Planner:**

I have reviewed the transmittal materials for 247-15-000035-CU to develop a nonfarm dwelling on 18.1 acres in the Exclusive Farm Use (EFU) zone at 22075 Erickson Road, aka 17-13-30, Tax Lot 200.

The most recent edition of the Institute of Traffic Engineers (ITE) Trip Generation Handbook indicates a single-family residence (Land Use 210) generates an average of approximately 10 daily weekday trips. Deschutes County Code (DCC) at 18.116.310(C)(3)(a) states no traffic analysis is required for any use that will generate less than 50 new weekday trips. The proposed land use will not meet the minimum threshold for additional traffic analysis.

Board Resolution 2013-020 sets an SDC rate of \$3,758 per p.m. peak hour trip. County staff has determined a local trip rate of 0.81 p.m. peak hour trips per single-family dwelling unit; therefore the applicable SDC is \$3,044 ( $\$3,758 \times 0.81$ ).

**Bend Fire Department:**

**FIRE APPARATUS ACCESS ROADS:**

- Approved fire apparatus access roads shall be provided for every facility, building or portion of building hereafter constructed or moved into or within the jurisdiction. The fire apparatus access road shall comply with the requirements of this section and shall extend to within 150 feet of all portions of the facility and all portions of the exterior walls of the first story of the building as measured by an approved route around the exterior of the building or facility. 2014 OFC 503.1.1
- Fire apparatus access roads shall have an unobstructed width of not less than 20 feet, exclusive of shoulders, except for approved security gates in accordance with Section 503.6, and an unobstructed vertical clearance of not less than 13 feet 6 inches. Where a fire hydrant is located on a fire apparatus road, the minimum width shall be 26 feet, exclusive of shoulders. Traffic calming along a fire apparatus road

shall be approved by the fire code official. Approved signs or other approved notices or markings that include the words NO PARKING FIRE LANE shall be provided for fire apparatus access roads to prohibit parking on both sides of fire lanes 20 to 26 feet and on one side of fire lanes more than 26 feet to 32 feet wide. 2014 OFC 503.2.1, D103.1, 503.4.1, 503.3

- Fire apparatus access roads shall be designed and maintained to support the imposed loads of fire apparatus (60,000 pounds GVW) and shall be surfaced (asphalt, concrete or other approved driving surface) as to provide all weather driving capabilities. Inside and outside turning radius shall be approved by the fire department. All dead-end turnarounds shall be of an approved design. Bridges and elevated surfaces shall be constructed in accordance with AASHTO HB-17. The maximum fire grade of fire apparatus access roads shall not exceed 10 percent. Fire apparatus access road gates with electric gate operators shall be listed in accordance with UL 325. Gates intended for automatic operation shall be designed, constructed and installed to comply with the requirements of ASTM F 2200. A Knox Key Switch shall be installed at all electronic gates. 2014 OFC D102.1, 503.2.4

#### **FIRE PROTECTION WATER SUPPLIES:**

- An approved water supply capable of supplying the required fire flow for fire protection shall be provided to premises upon which facilities, buildings or portions of buildings are hereafter constructed or moved into or within the jurisdiction.

#### **OTHER FIRE SERVICE FEATURES:**

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

#### **County Assessor's Office:**

Property is currently under deferral.

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. Several letters were received,

all in opposition to the proposed request, with some statements about the farm use of the subject property.

- 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, 2015. 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.

### III. **CONCLUSIONARY FINDINGS:**

#### **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 proposing to establish a nonfarm dwelling on a parcel that is considered high value farmland.

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**

**FINDING:** The County has applied an area of analysis that covers all properties within a one-mile radius of the subject property. This radius has been determined to be sufficient to identify farm or forest uses that might be impacted by a proposed nonfarm dwelling. 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, staff finds that 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.

The subject property is surrounded by properties in some kind of farm use, consisting mainly of irrigated pasture or grass hay and livestock. The applicant is proposing a dwelling location on the subject property that is in the northeast corner of the property. The applicant has submitted a drawing that shows a nonfarm dwelling building site that is approximately 1.2 acres. Also submitted was a map showing a transfer of water rights off of an approximately .58-acre area on the property. The applicant needs to clarify the difference in these two figures, as the .58-acre water rights transfer does not match the 1.2-acre area shown as the possible dwelling site on the property. The proposed building site is larger than the transfer area, and the 1.2-acre area has water rights remaining on a .62-acre portion of it.

The proposed homesite will be located at least 100 feet from any adjacent farm uses to the north and east. Staff believes that this dwelling location will create adequate separation between the proposed homesite and the adjacent farm use. With this separation, staff believes that the proposed dwelling will not force a significant change in accepted farm practices, nor will it significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use.

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. The applicants would be required to sign and record in the 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 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 subject property has 16.82 acres of water rights. Those water rights appear to currently cover the area where the proposed home is to be located. The applicants have proposed transferring off .58-acre of water rights, leaving 16.27 acres of water rights on the property.

**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:** Staff finds 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, staff finds it requires the applicant to demonstrate the proposed nonfarm dwelling homesite is the least suitable location *on the subject property*.

The applicant has argued that the northeast corner of the property is the area on the subject property that is least suitable for the production of farm crops or livestock. However, the detailed soils analysis submitted by the applicant is limited 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. Staff notes that the southeast corner of the property is also encumbered with the underground pipeline.

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.***

**FINDING:** The applicant is proposing to establish a nonfarm dwelling on the subject property. The applicant would be required, as part of any approval, to record the waiver listed above prior to issuance of a building permit for the dwelling. 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 received that the activities associated with the dwelling – more traffic and people, would impact the rural lifestyle. However, staff believes that the letters do not demonstrate that the increased traffic from a dwelling or accessory use would impact farming in the area. Based on the above and the

foregoing findings for these subsections, which are incorporated herein by reference, staff finds 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"). Staff finds 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 that both 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. These tax lots range in size from 2 to 479.82 acres. Four of these 78 tax lots are in public ownership (BLM, City of Bend, Central Electric Cooperative, Bend Metro Parks and Recreation District), 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). Forty-four (44) tax lots are receiving special assessment for farm use and all but eight (8) of them appear to have irrigation water rights. Within the study area approximately 631 acres are irrigated and 369 acres are not irrigated.

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. The high value farmland is located on and near the subject property.

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.

Staff finds 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 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)). Since this proposal does not involve the creation of any new parcels for a nonfarm dwelling, staff finds that it is not necessary to determine whether a new parcel will lead to the creation of other nonfarm parcels, to the detriment of agriculture in the area.
6. **Potential Nonfarm Dwellings.** There are 21 vacant privately owned tax lots in the study area, including the subject property. Therefore, there is the potential for an additional 21 nonfarm dwellings.

It is not clear whether a nonfarm dwelling can be approved on each parcel, since they are reviewed on a case by case basis. The dwellings have to be reviewed for their effect on the stability of the land use pattern, whether they are on land generally unsuitable land for the production of crops or livestock, and

whether they will cause a significant change in or significantly increase the cost of accepted farming practices on adjacent land.

Staff will assume for purposes of review that up to 21 new nonfarm dwellings could be developed on other properties.

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 nonhigh 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.

8. **Stability and Character of the Land Use Pattern of the Area.** Based upon the above findings, staff finds the land use pattern and character of the study area is a mix of farms, rural residences and some juniper woodland. Approximately one-half of the study area consists of EFU-zoned land. The typical parcel size varies from around 5 to 40 acres. Approximately seventy (70) percent of the properties are developed with dwellings. Staff finds that land use in the area has been stable, with farming and residential land uses remaining consistent over the years. The proposed dwelling will be somewhat different than the current land use pattern of the area, which allows a nonfarm dwelling on dry, unproductive land. The subject property is mostly irrigated, and the proposed dwelling is to be placed on land that has been irrigated in the past. At least two 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.
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. 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 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 applicant argues below that the proposed homesite is currently unproductive. If the Hearings Officer concurs, the removal of the homesite from production will not diminish the amount of land in production for farm use.

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. 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 staff finds that the proposed nonfarm dwelling will not materially alter the stability of the land use pattern in the area.

For these reasons, staff finds this criterion is satisfied.

- 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.***

**FINDING:** Staff notes 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. Staff recommends that if the Hearing Officer approves the request, that the applicant confirms a proposed homesite that will have no irrigation rights prior to any approval of this application.

The proposed homesite is to be located on land that is currently irrigated and appears to have some grass growing at the site<sup>1</sup>. This area appears to be irrigated agriculture in aerial photos dated 1953, 1994, 2000, 2003, 2005, 2006, 2011, 2012 and 2014. Staff also notes that the northeast corner and the northwest corner are visually indistinguishable in the May 2012 street level staff has included in the record.

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<sup>1</sup> The application refers to this area as growing Plantain, which, according to the applicants, is “a weed that is not suitable for grazing by livestock. It is a weed that grows in poor soils and “outcompetes” pasture grass.”

Staff finds that the above criterion is paramount in the review of the proposed nonfarm dwelling, given the location on a portion of the site that has been previously irrigated and appears to have been part of the ongoing farm use on the site. Staff has received at least two letters indicating that the subject property, including the area where the dwelling is proposed, has been in farm use for many years.

In order to approve the applicant's proposed nonfarm dwelling, staff believes that the Hearings Officer must find the homesite 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." The record includes evidence concerning the listed physical characteristics of the proposed homesite.

As described in detail below, the applicant does not argue that the proposed homesite is unsuitable based on terrain, adverse land conditions, drainage, flooding, location or size of the tract. Rather the applicant argues that the property is unsuitable based on adverse soil conditions and vegetation.

**Terrain.** The record indicates that although the subject property is generally level, a staff site visit determined that the proposed nonfarm dwelling homesite is located on slightly higher ground. 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." Staff believes there is nothing in particular about 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.** The applicant submitted a soils analysis prepared by Sage West, LLC (Roger Borine). The 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.”*

Staff has a few questions about the soils report. 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.

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 is also concerned 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.

Staff recommends the Hearings Officer obtain additional information on the soil study methodology prior to accepting it as the basis of analysis for this property. Staff notes that the DLCD evaluation of this study in the record was only for completeness and not accuracy.

In addition, Staff notes that the agricultural production numbers from the submitted soils study report appear to have a number of inconsistencies when compared with the NRCS Web Soil Survey (WSS) data obtained by staff and 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 believes that the information from the WSS indicates that the subject soils are generally supportive of irrigated pasture use or Alfalfa Hay production.

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."*

Staff notes that homesite cannot be located over the 100-foot-wide gas pipeline right-of-way and the effects of the pipeline on agricultural production do not impact the proposed homesite. Staff recommends the Hearings Officer request a revised letter from Mr. Barbin to clarify his professional opinion specific to the designated homesite. Staff also recommends the Hearings Officer request additional information on what management actions, if any, have been applied to the proposed homesite area. Staff notes that the level and detail of information on the suitability of the proposed homesite for hay production in the present application falls far short of what was provided in a similarly situated approval for a non-farm dwelling (CU-14-6).

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."*

Staff recommends the Hearings Officer obtain additional information on the soil conditions, as described above, prior to any finding that the homesite soil conditions are adverse.

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

**Vegetation.** The application lists "Plantain" as the vegetation growing where the proposed homesite is located. The vegetation would not appear to render the proposed homesite unsuitable for farm use. Staff is uncertain if management actions, like those described in CU-14-6, could improve the irrigated production of the proposed homesite area.

**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 believes that the applicants need to address the difference in the water to be transferred (.58-acre) against the 1.2-acre dwelling site. The applicants do not claim that the proposed homesite is generally unsuitable because of its size, but rather because of the poor quality of its soils. Staff believes



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.

Finally, 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.

Should the Hearings Officer determine that Class VII and VIII soils exist on-site, and that these soils are generally unsuitable for farm use, Staff recommends a condition of approval 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. To the extent that the Hearings Officer finds that the Class VII and VIII soils are generally unsuitable, soils exist in locations other than those mapped in the submitted soils analysis, staff recommends a condition of approval requiring the applicant to revise the plot plan indicating the location of 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, meeting this criterion.

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

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

1. *Electricity.* The applicant submitted a letter from Central Electric Cooperative dated January 10, 2014 indicating they can serve the property.
2. *Road access.* The applicant intends 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 applicant 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, staff finds that required services are adequate for the use.

- 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 property was created by a partition in 1982. This criterion is satisfied.

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.***

**FINDING:** The subject property is not considered unsuitable solely because of its size or location, but rather because of what is perceived as the poor quality of its soils. It is currently 18.08 net acres, with relatively level topography. 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 proposed homesite has been managed for agricultural use together with adjacent land since at least 1953. The property is not under forest assessment and the only trees on the site are juniper trees which have no commercial value.

- 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.***

**FINDING:** The applicant does not claim that the proposed homesite is generally unsuitable for farm use because of its small size, but rather because of the poor quality of its soils.

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 proposed homesite has been managed for agricultural use together with adjacent land since at least 1953. In addition, staff notes that post-2005 aerial photography shows the homesite area irrigated by a single pivot that services the property to the south (17-13-30, 206) as well.

The NRCS Web Soil Survey shows the homesite area as Class 3s, which is presumed to be suitable under this criterion. The presumption would be removed if the Hearings Officer found the proposed homesite was comprised of Class 7 soils, as proposed under the soils study. As also stated in a foregoing finding, the property is not under forest assessment.

- c. If a lot or parcel under forest assessment can be sold, leased, rented or otherwise managed as a part of a forestry operation, it is not "generally unsuitable". If a lot or parcel is under forest assessment, it is presumed suitable if it is composed predominantly of soil capable of producing 20 cubic feet of wood fiber per acre per year. If a lot or parcel is under forest assessment, to be found compatible and not seriously interfere with forest uses on surrounding land it must not force a significant change in forest practices or significantly increase the cost of those practices on the surrounding land.***

**FINDING:** The property is not under forest assessment and there are no properties within the study area that have any forest practices.

- 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. If this application is approved, a condition of approval must be included that requires to applicant 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 applicant did not specify a building height. However, staff finds that with an appropriate condition of approval, this criterion can be satisfied.

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.

- 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.

- 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.

- 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:** Staff is not aware of any greater setbacks required by applicable building or structural codes. However, that will be determined 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 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 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. If the applicant wishes to go above the 30-foot height limit, and proposes a 35-36-foot high dwelling, notice under this section is required. 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. Notice of 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 proposed dwelling is subject to the 30-foot height, meeting the standard under “B” above. If the applicants request a height exception, they will be limited to 35 feet in overall height.

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. 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 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.

- 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. 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.

- 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.

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:***
- | <b><i>Longest Runway</i></b> | <b><i>Proximity to Runway</i></b> | <b><i>Slope</i></b>    |
|------------------------------|-----------------------------------|------------------------|
| <b><i>&gt; 3,200'</i></b>    | <b><i>Within 20,000'</i></b>      | <b><i>100 to 1</i></b> |
| <b><i>3,200' or less</i></b> | <b><i>Within 10,000'</i></b>      | <b><i>50 to 1</i></b>  |
| <b><i>For a Heliport</i></b> | <b><i>Within 5,000'</i></b>       | <b><i>25 to 1</i></b>  |
- 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. No FAA notice is required for the proposed dwelling.

**IV. CONCLUSIONS AND RECOMMENDATION:**

The applicant needs to address the following issues prior to any approval of this application:

- There is an area difference between the 1.2-acre proposed building envelope and the .58-acre transfer of water from a portion of the 1.2-acre envelope. In order to be considered generally unsuitable, water rights should not be attached to the building envelope.
- There is uncertainty if the information in the applicant-submitted soils study supports the study's conclusions.
- The applicant-submitted information on the difficulty managing the proposed homesite for agricultural production is significantly less detailed than provided in a similar approved application (CU-14-6)
- It is unclear why the proposed homesite is the least suitable for the production of farm crops or livestock when the southeast corner of the property is identified as the same soil type as the proposed homesite and is also encumbered by the underground pipeline.

If the applicant addresses the above or any other concerns to the satisfaction of the hearings officer, staff recommends the following conditions of approval:

1. Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application.
2. The applicants shall meet all requirements of the Deschutes County Building Safety and Environmental Soils Divisions.

3. The applicants shall produce evidence from the County Assessor's Office that the subject property has been disqualified under ORS 308A.113 or ORS 308A.116 for special assessment at value for farm use under ORS 308A.062 or other special assessment under ORS 308A.068, 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. The final plat shall be signed by the County Assessor and County Tax Collector.
4. Prior to issuance, the applicants/owners shall sign and record with the County Clerk 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 forestry practices for which no action or claim is allowed under ORS 30.936 to 90.937.
5. The maximum building height for the dwellings is 30 feet, unless a height exception is approved under DCC 18.120.040.

**DURATION OF APPROVAL:**

The applicant shall apply for a building permit for the proposed nonfarm dwelling within four (4) years of the date this decision becomes final, or obtain approval of an extension under Title 22 of the County Code, or this approval shall be void.

Dated this 12<sup>th</sup> day of May, 2015

Mailed this 12th day of May, 2015