



**MEMORANDUM**

**TO:** Board of County Commissioners (“Board”)  
**FROM:** Anthony Raguine, Principal Planner  
**DATE:** October 22, 2024  
**RE:** Appeal of Hearings Officer’s denial of an application to establish a nonfarm (single-family) dwelling in the Exclusive Farm Use Zone; Land use file no. 247-24-000209-CU, 247-24-000629-A

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On October 30, 2024, the Board will consider hearing an appeal of the Hearings Officer’s denial of a conditional use permit (CUP) to establish a nonfarm dwelling.

**I. PROCEDURAL HISTORY**

A public hearing for the proposed nonfarm dwelling was held before a Hearings Officer on August 29, 2024. After the close of the record, the Hearings Officer issued the denial on October 2, 2024. On October 10, 2024, the property owners, Jeff and Cindi Schutte, filed a timely appeal of the Hearings Officer’s decision.

**II. HEARINGS OFFICER’S DECISION**

The Hearings Officer denied the CUP for the following reasons:

- The “Farm Impacts Test”<sup>1</sup> requires the applicant to focus on the dwelling’s impact to nearby farm practices. The applicant did not address what specific farm practices are associated with nearby farm uses. Instead, the applicant focused on the dwelling’s compatibility with farm uses. The Hearings Officer stated that, “An impact that is compatible with a farm use may nevertheless force a significant change to the farm practices associated with that use, or significantly increase the costs of those practices.”
- The “Generally Unsuitable Test”<sup>2</sup> requires the applicant to demonstrate that the location of the proposed nonfarm dwelling is generally unsuitable for the production of, among other

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<sup>1</sup> Deschutes County Code (DCC) 18.16.040(A)(1) & (2) and Oregon Revised Statute (ORS) 215.296(1).

<sup>2</sup> DCC 18.16.040(A)(3), DCC 18.16.050(G)(1)(a)(iii), DCC 18.16.050(G)(2)(a) & (b), and Oregon Administrative Rule (OAR) 660-033-0130(4)(c)(B)(ii).

things, livestock. The Generally Unsuitable Test applies both to the subject property by itself and whether the property could be used in conjunction with (“Used in Conjunction Test”) other properties for the production of livestock. While the applicant argued that the property itself cannot support enough forage to economically raise cattle, the applicant did not address whether the property could be used in conjunction with other properties, particularly considering the surrounding area includes grazing leases.

- The “Stability Test”<sup>3</sup> requires the applicant to demonstrate that approval of the nonfarm dwelling would not, cumulatively, alter the existing pattern of land use in the area by making, “...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.” Approval of the CUP would result in 10 of the 19 privately owned lots in the study area being developed with a nonfarm dwelling. Consequently, a majority of the privately owned lots would be developed for nonfarm purposes. The Hearings Officer found this tipped the scales in favor of nonfarm dwellings over farm uses, thereby creating a new pattern of development.

### **III. SCHUTTE APPEAL**

The appellants request the Board review the Hearings Officer’s decision on appeal to address the following summarized issues.

- The Hearings Officer erroneously applied the Used in Conjunction Test to the Generally Unsuitable Test. The Used in Conjunction Test only applies when an applicant asserts that the property is not suitable for farm use based on the property’s size or location.<sup>4</sup> The applicant argues the property is unsuitable based on the soils on-site, as detailed in the soils study submitted to the record, not unsuitable due to size or location.
- The Hearings Officer did not apply the correct analysis to the Stability Test. The Hearings Officer erroneously applied a 50% rule that does not exist in County Code or state law.
- The Hearings Officer ignored evidence in the record addressing surrounding farm uses and impacts to those farm uses.

### **IV. BOARD OPTIONS**

There are two versions of Order No. 2024-042 attached to this memo; one to hear the appeal and one to decline to hear the appeal. In determining whether to hear an appeal, the Board may consider only:

1. The record developed before the Hearings Officer;

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<sup>3</sup> DCC 18.16.050(G)(1)(a)(ii) and OAR 660-033-0130(4)(a)(D).

<sup>4</sup> *Central Oregon LandWatch v Crook County*, 294 Or App 762 (2018).

2. The notice of appeal; and
3. Recommendation of staff.<sup>5</sup>

### Reasons not to hear

The Hearings Officer's decision is reasoned, well written, and could be supported, as the record exists today on appeal to LUBA. Additionally, the Board is unlikely to receive deference on matters involving state law, administrative rule, and its associated caselaw.

If the Board declines to hear the appeal, the Hearings Officer's decision shall be the final decision of the county and the appellants may continue the appeal as provided by law. The decision on the land use application and associated appeal becomes final upon the mailing of the Board's decision to decline review.

### Reasons to hear

The Board may want to take testimony and make interpretations relating to the Hearings Officer's decision. The Board may also want to reinforce or refute some or all of the decision findings/interpretations prior to Land Use Board of Appeals ("LUBA") review.

If the Board chooses to hear this matter, the appellants request the Board conduct a *de novo* hearing. Under Deschutes County Code 22.32.027(B)(3), the Board may choose to hear a matter *de novo* at their sole discretion. In addition, if the Board decides to hear the appeal, it may consider providing time limits for public testimony.

## **V. STAFF RECOMMENDATION**

Staff recommends the Board not hear this appeal because staff believes the appellants were able to present all relevant evidence for the Hearings Officer's consideration. Further, staff believes the Board would not receive deference at LUBA. Finally, while there may be enough time for the Board to conduct a hearing, deliberate, and issue a final decision by December 21, 2024 (see below), or the effective deadline date after any open record period, it is unclear to staff what the Board's availability would be in and around upcoming holidays.

## **VI. 150-DAY LAND USE CLOCK**

The deadline for a final County decision under ORS 215.427 – "the 150-day clock" – is December 21, 2024.

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<sup>5</sup> Deschutes County Code 22.32.035(D)

## **VII. RECORD**

The record for land use file nos. 247-24-000209-CU and 247-24-000629-A is as presented at the following Deschutes County Community Development Department website:

<https://www.deschutes.org/cd/page/247-24-000209-cu-schutte-nonfarm-dwelling>

Attachments:

1. Hearings Officer's decision on land use file no. 247-24-000209-CU
2. Appeal application, file no. 247-24-000629-A
3. DRAFT Board Order 2024-042 Accepting Review of the Hearings Officer's Decision
4. DRAFT Board Order 2024-042 Declining Review of the Hearings Officer's Decision