

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,
5 *Petitioner,*

6
7 vs.

08/28/18 PM 1:22 LUBA

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11
12 and

13
14 HORSE BUTTE EQUESTRIAN CENTER, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2018-044

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Deschutes County.

23
24 Carol Macbeth, Bend, filed a petition for review and argued on behalf
25 petitioner.

26
27 D. Adam Smith, Assistant Deschutes County Counsel, Bend, filed a joint
28 response brief and argued on behalf of respondent. With him on the brief was
29 Tia M. Lewis and Schwabe Williamson & Wyatt PC.

30
31 Tia M. Lewis, Bend, file a joint response brief and argued on behalf of
32 intervenor-respondent. With her on the brief was D. Adam Smith, Assistant
33 Deschutes County Counsel, and Schwabe Williamson & Wyatt PC.

34
35 ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board
36 Member, participated in the decision.

37
38 AFFIRMED

08/28/2018

1 You are entitled to judicial review of this Order. Judicial review is
2 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county board of commissioners' order declining local review of a county hearings officer's decision that grants conditional use approval for a nonfarm dwelling in an exclusive farm use (EFU) zone.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. There is no opposition to the reply brief and it is allowed.

FACTS

The subject 22.27-acre property is zoned EFU and is a single legal lot of record composed of three smaller tax lots. The hearings officer referred to portions of the property by specific tax lot number. The property is vegetated with scattered juniper and pine trees, grass, and brush. The property has 5.78 acres of irrigation rights and an irrigation pond on the northern portion of the property (tax lot 600). Surrounding properties to the east, north, west, and southwest are zoned EFU. Surrounding properties to the south and southeast are zoned rural residential and range in size from approximately two acres to five acres.

Intervenor-respondent Horse Butte Equestrian Center, LLC (intervenor) owns abutting property to the north and east. The northern abutting property is developed with Horse Butte Equestrian Center, a horse training and boarding

1 facility that intervenor has operated since 1999. Intervenor applied for a
2 nonfarm dwelling to be located in a 0.7-acre building envelope on the southern
3 portion of the subject property, which is unirrigated and is located near to and
4 accessed from Horse Butte Road, a paved county road.¹ Multiple dwellings are
5 developed on relatively smaller parcels zoned rural residential south of the
6 building envelope. Record 361.

7 According to Natural Resources Conservation Service (NRCS) maps of
8 the area, there are three soil units on the subject property.² Approximately 71
9 percent of the property contains 38B soil, which is rated 3e when irrigated and
10 6e when not irrigated. Approximately 27 percent of the property contains 58C
11 soil which contains a rock outcrop that is rated 8, with or without irrigation,
12 Gosney soils, which are rated 7e with or without irrigation, and Deskamp,
13 which is rated 4e when irrigated and 6e when unirrigated. The remaining two

¹ Petitioner refers to the building envelope as a “nonfarm parcel.” The application and challenged decision concern siting a nonfarm dwelling as a conditional use on an existing 22.27-acre parcel. The nonfarm dwelling building envelope does not create a new, nonfarm parcel. We refer to the nonfarm dwelling site as the “building envelope” throughout this opinion.

² Implementation of Statewide Planning Goal 3 (Agricultural Lands), relies in part on the NRCS Soil Capability Classification System, also referred to as the land capability classification system. *See* OAR 660-033-0020(1)(a)(A) (defining “agricultural land” by soil class). Soil class indicates general suitability for agricultural purposes. Limitations increase from Class I to Class VIII so that a lower class indicates fewer limitations, or higher productivity. Actual limitations and productivity vary by site-specific circumstances such as climate, irrigation, and erosion. In eastern Oregon, capability classes I to VI are generally considered capable of producing farm crops and/or livestock. *Id.*

1 percent of the property contains 157C soil. Record 32. Intervenor submitted a
2 site-specific soil study for the 0.7-acre building envelope that identified all the
3 soils in the building envelope as “unsuited for farm crop production including
4 grazing and hay and pasture.” Record 33–34. The NCRS soil maps are “Order
5 III,” which is accurate at five to ten acres. Intervenor’s site-specific soil
6 analysis is an “Order I” soil survey, which is accurate at 0.25 to 0.50 of an acre.
7 Record 77.

8 The hearings officer approved intervenor’s proposed nonfarm dwelling
9 based on findings that the building envelope is generally unsuitable for the
10 production of farm crops or livestock and is the least suitable for the
11 production of farm crops or livestock. We will refer to those standards as the
12 “generally unsuitable” standard and the “least suitable” standard.

13 On April 4, 2018, at 4:00 p.m., petitioner filed a timely appeal of the
14 hearings officer’s decision to the county board of commissioners and paid an
15 appeal fee of \$3,361. However, prior to 4:00 p.m. on April 4, 2018, the board
16 of county commissioners signed an order stating that county commissioners
17 would not hear any appeal of the hearings officer’s decision and ordered that a
18 portion of the appeal fee be refunded, which resulted in petitioner having paid a
19 fee of \$504.15.³ Record 8. According to the county, on June 25, 2018, after the

³ County planning staff had recommended that the board of commissioners decline review because allowing review would cause a final decision to be made later than the time allowed in ORS 215.427. Record 27.

1 petition for review was filed and served, the county decided to refund the
2 remaining fee of \$504.15 to petitioner after concluding that it had been
3 erroneously charged. Declaration of Planning Manager for the Deschutes
4 County Community Development Department.

5 **THIRD AND SIXTH ASSIGNMENTS OF ERROR**

6 In its third assignment of error, petitioner argues that the county
7 misinterpreted Deschutes County Code (DCC) 22.32.015, which provides that
8 an appellant must submit an appeal fee and, if the board of county
9 commissioners declines review, a portion of the appeal fee may be refunded
10 based on the actual costs incurred by the county in reviewing the appeal.⁴ In its
11 related sixth assignment of error, petitioner argues that the county exceeded its
12 authority under ORS 215.422 because according to petitioner, ORS 215.422
13 does not allow the county to charge a fee for declining to review an appeal,

⁴ DCC 22.32.015 provides:

“A. To file an appeal, an appellant must file a completed notice of appeal on a form prescribed by the Planning Division and an appeal fee.

“* * * * *

“C. If the Board of County Commissioners is the Hearings Body and the Board declines review, a portion of the appeal fee may be refunded. The amount of any refund will depend on the actual costs incurred by the County in reviewing the appeal. When the Board declines review and the decision is subsequently appealed to LUBA, the appeal fee may be applied toward the cost of preparing a transcript of the lower Hearings Body’s decision.”

1 because the county has not “act[ed] upon an appeal” within the meaning of
2 ORS 215.422(1)(c).⁵ Petitioner argues that when the county declines review of
3 an appeal, “it does not act upon the appeal but refrains from acting upon the
4 appeal.” Petition for Review 40. Petitioner argues that it was impossible for the
5 county to incur any actual costs in reviewing its appeal to the board of
6 commissioners because the board had decided to decline review before the
7 appeal was filed.

8 On July 11, 2018, respondent filed a “motion to dismiss” the third and
9 sixth assignments of error for lack of jurisdiction. Because respondent and
10 intervenor agree that the challenged county decision is a “land use decision”
11 within the meaning of ORS 197.015(10)(a), we treat respondent’s motion as an
12 argument that the third and sixth assignments of error are not within LUBA’s
13 scope of review under ORS 197.835(9). LUBA’s scope of review under ORS
14 197.835(9) includes authority to determine whether the local government
15 “[i]mproperly construed the applicable law.”⁶ Where LUBA has jurisdiction to

⁵ ORS 215.422(1)(c) provides, in part:

“The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript.”

⁶ ORS 197.835(9) provides, in part:

1 review a land use decision, it also has jurisdiction to review challenges to that
2 decision’s construction of “applicable law.” *Carlsen v. City of Portland*, 39 Or
3 LUBA 93, 98–100 (2000); *Bend/Sisters Garden RV Resort LLC v. City of*
4 *Sisters*, 72 Or LUBA 200 (2015).

5 Respondent argues that the third and sixth assignments of error are
6 “moot” because the county has refunded petitioner the entire appeal fee that the
7 county concedes was erroneously charged. Petitioner responds that LUBA
8 should reach the third and sixth assignments of error because the county “needs
9 to understand its future obligations in charging appeal fees” and the limitations
10 in ORS 215.422(1)(c). Petitioner’s Response to Motion to Dismiss 12.

“[T]he board shall reverse or remand the land use decision under review if the board finds:

“(a) The local government or special district:

“(A) Exceeded its jurisdiction;

“(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

“(C) Made a decision not supported by substantial evidence in the whole record;

“(D) Improperly construed the applicable law; or

“(E) Made an unconstitutional decision[.]”

1 We agree with the county. ORS 197.805 directs that LUBA is to perform
2 its review function “consistently with sound principles governing judicial
3 review.” LUBA typically declines to issue what are in essence advisory
4 opinions. All appeal fees that the county originally charged have now been
5 refunded and with that action the county has conceded that no appeal fee
6 should have been charged in the circumstances presented. Accordingly, our
7 resolution of the third and sixth assignments of error would be advisory only.

8 We do not reach the third and sixth assignments of error.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioner argues that the hearings officer misinterpreted and misapplied
11 OAR 660-033-0130(4)(c), which provides, in part:

12 “(4) A single-family residential dwelling not provided in
13 conjunction with farm use requires approval of the governing body
14 or its designate in any farmland area zoned for exclusive farm use:

15 “* * * * *

16 “(c) In counties located outside the Willamette Valley
17 require findings that:

18 “* * * * *

19 “(B)(i) The dwelling, including essential or accessory
20 improvements or structures, is situated upon a
21 lot or parcel, or, in the case of an existing lot or
22 parcel, upon a portion of a lot or parcel, that is
23 generally unsuitable land for the production of
24 farm crops and livestock or merchantable tree
25 species, considering the terrain, adverse soil or
26 land conditions, drainage and flooding,
27 vegetation, location and size of the tract. A lot
28 or parcel or portion of a lot or parcel shall not

1 be considered unsuitable solely because of size
2 or location if it can reasonably be put to farm or
3 forest use in conjunction with other land; and

4 “(ii) A lot or parcel or portion of a lot or parcel is
5 not ‘generally unsuitable’ simply because it is
6 too small to be farmed profitably by itself. If a
7 lot or parcel or portion of a lot or parcel can be
8 sold, leased, rented or otherwise managed as a
9 part of a commercial farm or ranch, then the lot
10 or parcel or portion of the lot or parcel is not
11 ‘generally unsuitable.’ A lot or parcel or
12 portion of a lot or parcel is presumed to be
13 suitable if, in Western Oregon it is composed
14 predominantly of Class I-IV soils or, in Eastern
15 Oregon, it is composed predominantly of Class
16 I-VI soils. Just because a lot or parcel or
17 portion of a lot or parcel is unsuitable for one
18 farm use does not mean it is not suitable for
19 another farm use[.]”

20 The hearings officer found that the only abutting property with a commercial
21 farm or ranch is the Horse Butte Equestrian Center. The hearings officer
22 concluded, based on intervenor’s testimony, that the building envelope could
23 not be managed for farm purposes as part of the equestrian center. The hearings
24 officer observed that there was no evidence in the record, except petitioner’s
25 assertions, that any other commercial farm or ranch could incorporate the
26 building envelope into its operation. Record 59–60. The hearings officer
27 rejected petitioner’s contention that the building envelope could be managed as
28 part of farm operations to the northeast of the subject property and explained
29 that he would “not assume just because a commercial farm operation exists
30 nearby, [that] it can incorporate another property into its commercial

1 operation.” Record 59. The hearings officer explained that even if the building
2 envelope contained horse trails, as petitioner asserted, horse trails alone do not
3 establish that the building envelope is suitable for commercial farming. Record
4 60.

5 Petitioner argues that evidence in the record establishes that the proposed
6 building envelope can be sold, leased, rented or otherwise managed as part of a
7 commercial farm. Petitioner asserts that the building envelope is currently in
8 use as part of the horse farms in the immediate vicinity relying on aerial
9 photographs, which show what petitioner alleges are horse trails in the area of
10 the building envelope. Intervenor responds that the aerial photographs do not
11 support petitioner’s assertion and no other evidence in the record supports
12 petitioner’s assertion.

13 We agree with intervenor. Intervenor testified that the building envelope
14 is not managed as part of its equestrian center and the hearings officer accepted
15 that testimony as credible. There is no evidence in the record that the building
16 envelope is currently used for farming or ranching purposes.

17 Petitioner asserts that the building envelope can be farmed profitably and
18 managed as a part of intervenor’s existing equestrian center, either as irrigated
19 pasture for horses or dry land pasture for other livestock. Assuming without
20 deciding that the “reasonable farmer” standard is relevant to this case, we reject
21 petitioner’s argument that a reasonable farmer would attempt to make the
22 building envelope productive by clearing vegetation and transferring

1 intervenor’s limited irrigation rights that are currently used on a portion of the
2 property with significantly better soils to the building site, which has
3 unproductive soils. *See Wetherell v. Douglas County*, 50 Or LUBA 167, 183–
4 186 (2005), *aff’d in part, rem’d in part on other grounds* 204 Or App 732, 132
5 P3d 41 (2006), *rev allowed* 341 Or 140, 139 P3d 258 (2006), *aff’d in part, rev*
6 *and rem’d in part* 342 Or 66 (2007) (explaining the “reasonable” farmer
7 standard for determining whether property is “agricultural land” under OAR
8 660-033-0020); *accord Central Oregon Land Watch v. Crook County*, ___ Or
9 LUBA ___ (LUBA No. 2017-108, Feb 16, 2018) (slip op at 9) (observing that
10 possibility of future irrigation could improve suitability of a property for
11 production of farm crops or livestock, but any significance assigned to that
12 possibility “must take into account that it is not currently irrigated and may
13 never be irrigated”).

14 Petitioner incorrectly asserts that the hearings officer “ignored” its
15 argument about unirrigated livestock production. The hearings officer
16 expressly addressed that argument and explained that while production of other
17 livestock occurs elsewhere in Deschutes County, there is nothing in the record
18 to indicate that those farm uses are proper on the proposed building site.
19 Record 60. That is a correct conclusion based on whole record.

20 The second assignment of error is denied.

1 **SEVENTH ASSIGNMENT OF ERROR**

2 Petitioner argues that the hearings officer misinterpreted the “used in
3 conjunction” standard in ORS 215.284(2)(b).

4 ORS 215.284(2)(b) provides that a nonfarm dwelling may be established
5 upon a finding that:

6 “The dwelling is situated upon a lot or parcel or portion of a lot or
7 parcel that is generally unsuitable land for the production of farm
8 crops and livestock or merchantable tree species, considering the
9 terrain, adverse soil or land conditions, drainage and flooding,
10 vegetation, location and size of the tract. A lot or parcel or portion
11 of a lot or parcel may not be considered unsuitable solely because
12 of size or location if it can reasonably be put to farm or forest use
13 in conjunction with other land[.]”

14 Similarly, DCC 18.16.050(G)(2)(a) provides that, for the purposes of siting a
15 nonfarm dwelling, “[a] lot or parcel or a portion of a lot or parcel shall not be
16 considered unsuitable solely because of size or location if it can reasonably be
17 put to farm or forest use in conjunction with other land.” The parties appear to
18 agree that the operative language is identical, and intervenor does not dispute
19 that the hearings officer’s decision applied ORS 215.284(2)(b).

20 The hearings officer reasoned that he need not reach the “used in
21 conjunction with other lands” issue because the building envelope is unsuitable
22 due to conditions other than size and location—*viz.*, adverse soil conditions.
23 Record 58. The hearings officer relied on *Central Oregon Land Watch v. Crook*
24 *County*, ___ Or LUBA ___ (LUBA No. 2017-108, Feb 16, 2018), which also
25 involved conditional use approval for a nonfarm dwelling. The petitioner in

1 that case contended that the county erred in finding that the subject property
2 could not be used for farm use in conjunction with other land. Because the
3 county had not established that the subject property was generally unsuitable
4 for farm use based on factors other than size and location, LUBA remanded on
5 the “used in conjunction” issue. *Id.* (slip op at 10–15). We explained that, if the
6 intervenor and the county demonstrated in remand proceedings that the subject
7 property is generally unsuitable for farm use based on factors other than size
8 and location, then the county need not consider whether the subject property
9 can be used for farm use in conjunction with other lands. Conversely, if size
10 and location are “the determining factors in establishing that the subject
11 property is generally unsuitable for farm use,” then the county must consider
12 whether the subject property can reasonably be put into farm use in conjunction
13 with other land. *Id.* (slip op at 13).

14 Petitioner argues that the hearings officer was required to consider the
15 “used in conjunction with other lands” standard because he determined that the
16 building envelope is generally unsuitable due *in part* to its size and location.
17 ORS 215.284(2)(b) prohibits a decision maker from determining that a portion
18 of a parcel is “unsuitable *solely* because of size or location if it can reasonably
19 be put to farm or forest use in conjunction with other land.” (Emphasis added.)
20 The hearings officer did not err in concluding that he need not reach the “used
21 in conjunction with other lands” issue because he determined that the building
22 envelope was unsuitable due, in part, to adverse soil conditions. Record 58.

1 Accordingly, the building envelope was not “considered unsuitable *solely*
2 because of size or location.” The hearings officer’s ruling is consistent with the
3 operative limiting language in the statute and our decision in *Central Oregon*
4 *Land Watch v. Crook County*, ___ Or LUBA ___ (LUBA No. 2017-108, Feb
5 16, 2018).

6 The seventh assignment of error is denied.

7 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

8 Petitioner’s fourth and fifth assignments of error are directed at the
9 generally unsuitable standard and we address them together. In the fifth
10 assignment of error, petitioner argues that the hearings officer misinterpreted
11 the phrase “generally unsuitable” in ORS 215.284(2)(b).

12 As noted earlier, ORS 215.284(2)(b) provides, in part, that a nonfarm
13 dwelling may be established upon a finding that:

14 “The dwelling is situated upon a lot or parcel or portion of a lot or
15 parcel that is generally unsuitable land for the production of farm
16 crops and livestock or merchantable tree species, considering the
17 terrain, adverse soil or land conditions, drainage and flooding,
18 vegetation, location and size of the tract.”

19 DCC 18.16.050(G)(1)(a)(iii) provides that the hearings body must find:

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

1 The hearings officer agreed with petitioner that “the question is whether
2 the land is suitable for farm production under proper management, not whether
3 it has historically been put to farm use.” Record 52. The hearings officer
4 clarified that “[t]he question is not whether the land is generally unsuitable for
5 all farm use; the question is whether the land is generally unsuitable to produce
6 crops, livestock, or merchantable trees.” Record 52 n 7 (citing *Griffin v.*
7 *Jackson County*, 48 Or LUBA 1 (2004)).

8 The hearings officer adopted staff findings that based on detailed adverse
9 soil conditions and lack of irrigation, the building envelope is not suitable for
10 the production of farm crops or livestock. Record 60–61. The hearings officer
11 concluded:

12 “While the site might barely be suitable for some grazing, it is far
13 from ‘generally’ suitable. The Hearings Officer specifically notes
14 the standard is ‘generally suitable.’ Thus, some nominal
15 production may occur, that does not mean the land is ‘generally
16 suitable.’ Given the above analysis, the Hearings Officer finds that
17 the building envelope is not generally suitable for production of
18 livestock.” Record 61.

19 Petitioner argues that the hearings officer misconstrued the “generally
20 unsuitable” inquiry because “[t]here is no ‘generally suitable’ standard.”
21 Petition for Review 38.

22 The hearings officer adopted detailed findings and discussed soil
23 conditions, irrigation, existing farm uses and land development patterns and
24 concluded that the building envelope is generally unsuitable for farm crop or
25 livestock production. The hearings officer’s findings and analysis demonstrate

1 that the hearings officer understood and applied the statute correctly. In context
2 of the hearings officer’s analysis, petitioner’s fifth assignment of error
3 inappropriately attempts to elevate word choice over substantive analysis and
4 reasoning. *See Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA
5 291, 295–96 (2011) (rejecting argument that the county misconstrued
6 applicable law where the petitioner relied on isolated findings “without citing
7 to or acknowledging other findings in the decision that address the same
8 approval criteria”).

9 In the fourth assignment of error, petitioner argues that the hearings
10 officer erred in finding that the building envelope is unsuitable for the
11 production of farm crops and livestock because, in petitioner’s view, the
12 building envelope is identical in the “legally-relevant characteristics” to nearby
13 land that petitioner asserts is in agricultural use of the production of livestock.
14 Petition for Review 27. Petitioner relies on the NRCS soil classification for the
15 building envelope and photographs that petitioner asserts shows similar soils
16 cleared and irrigated for farm use.

17 The hearings officer reasoned that soil elements in 58C soils vary in
18 productivity and the fact that some 58C soils are productive does not support a
19 conclusion that all 58C soils are generally suitable. Based on the site-specific
20 soil survey, the hearings officer concluded that the soils in the building
21 envelope “render that site generally unsuitable.” Record 54. On appeal,
22 petitioner essentially reprises the same argument it presented to the hearings

1 officer—that other 58C soils are suitable for farm use, the building envelope is
2 situated on 58C soil, and therefore the site is not generally unsuitable for farm
3 use. Petitioner disagrees with the hearings officer’s reasoning and conclusion.
4 However, petitioner has not demonstrated that the hearings officer
5 misconstrued the applicable law or made findings not supported by substantial
6 evidence.

7 The fourth and fifth assignments of error are denied.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioner argues that the hearings officer misapplied DCC
10 18.16.040(A)(3) and made a decision not based on substantial evidence
11 because “there is no evidence in the record to support a finding that the
12 nonfarm dwelling will be located in the portion of the nonfarm parcel that is
13 least suitable for the production of farm crops and livestock.” Petition for
14 Review 8.

15 Nonfarm dwellings are a conditional use permitted on farmland under
16 DCC 18.16.030(A), subject to DCC 18.16.040(A)(3), which requires a finding
17 “[t]hat the actual site on which the use is to be located is the least suitable for
18 the production of farm crops or livestock.” The Deschutes County Board of
19 Commissioners previously interpreted the “least suitable” standard to be
20 satisfied when the “generally unsuitable” criterion is satisfied. The “generally
21 unsuitable” criterion was discussed earlier in this opinion. Petitioner argued,

1 and the hearings officer agreed, that interpretation is inconsistent with the plain
2 language of the code. Record 43. The hearings officer explained:

3 “Use of the word ‘least’ indicates that there is only one site on a
4 subject parcel that can meet the criteri[on]. So, you may have
5 several locations on a property that are not suitable for production
6 of farm crops or livestock, but due to various factors, perhaps soil,
7 irrigation, or even existing development, one of the sites is the
8 ‘least’ suitable. The plain meaning of this criterion requires that
9 the proposed conditional use be located on the single site on the
10 subject property that is least suitable. On the other hand, the term
11 ‘generally unsuitable’ is broader and may encompass large swaths
12 of land if it is all generally unsuitable for farm land.

13 “Since, by definition, every property will have a site that is the
14 least suitable for farm production, the question is whether other
15 sites on the subject property are less suitable than the proposed
16 site.” Record 44 (footnote omitted).

17 The hearings officer found:

18 “• The northern portion of the property (tax lot 600) is
19 irrigated and in farm use, so it is more suitable than the
20 subject site for farm use (which has no irrigation and is
21 adjacent to residential uses).

22 “• The proposed building envelope is immediately adjacent to
23 existing rural residential development to the south, and thus
24 is less suitable for farm use than portions of the subject
25 property that are adjacent to existing farm operations and
26 lands zoned for farm use. As noted above, farm use can lead
27 to conflict, including drifting of herbicides from spraying,
28 vehicle noise from trucks, manure odor from fertilizing, and
29 possible water runoff from irrigation, and grazing livestock
30 can generate dust, manure order, possible interference with
31 vehicular traffic, and property damage if livestock escape.

32 “• The proposed building site is mostly on soils classified as
33 58C Gosney-Rock. Its capability classification is 7e whether
34 irrigated or not. The site-specific soil study submitted by the

1 applicant shows the building site is comprised of mostly
2 Class VII and VIII soils. Other soils on the subject property
3 (as shown by the NRCS) are 38B Deskamp-Gosney (3e
4 when irrigated, and 6e when not) and 157 Wanoga Fremkle
5 (4e when irrigated, and 6e when not). Accordingly, the
6 proposed building envelope is located on the worst soil on
7 the subject property and is less suitable than areas of the
8 property that have better soil.” Record 44.

9 Petitioner argues that the hearings officer erred interpreting the “least
10 suitable” standard. The hearings officer concluded that the term “least” in DCC
11 18.16.040(A)(3) required him to compare the “actual site”—the building
12 envelope—to other areas of the property. That comparison necessarily includes
13 identifying and describing sites that are more suitable than the building
14 envelope. The hearings officer correctly considered the suitability of the site in
15 context of soil capability, existing development patterns, including the location
16 of roads, dwellings, and farm operations. The hearings officer observed that
17 there was no evidence in the record that the property contained a less suitable
18 site. While we agree with petitioner that intervenor had the burden to establish
19 that the building envelope was the least suitable for farm use, petitioner does
20 not point to any evidence in the record that the subject property contains a less
21 suitable site. We conclude that the hearings officer properly construed and
22 applied the least suitable standard.

23 Petitioner argues that intervenor “failed to produce *any* evidence” to
24 support a conclusion that the building envelope is the least suitable because
25 intervenor “did not provide any information about the relative merits” of the

1 building envelope compared to any other part of the parcel. Petition for Review
2 11–12 (emphasis in original). Petitioner asks for reversal.

3 Intervenor argues that the hearings officer correctly concluded that the
4 nonfarm dwelling site is located on the least suitable site for the production of
5 farm crops or livestock based on soil capabilities as mapped by NRCS and
6 refined by the site-specific soil survey, irrigation, and existing development
7 patterns, including the location of roads and dwellings. Petitioner argues that
8 those considerations are “irrelevant sub-findings” because the site-specific soil
9 study does not provide comparison to soils outside the building envelope and
10 intervenor could transfer its irrigation rights to the building envelope. Petition
11 for Review 11. We understand petitioner to argue that, to conclude that the
12 building envelope is the least suitable site, the applicant must conduct a similar
13 Order I survey of all other portions of the subject property.

14 Intervenor responds that it would be cost-prohibitive to require
15 intervenor to provide a detailed, Order I, soil study of the entire subject
16 property and that, in all events, the site-specific soil study, along with the other
17 evidence, constitute substantial evidence that the building envelope is the least
18 suitable site. We agree with intervenor. In *Williams v. Jackson County*, 55 Or
19 LUBA 223, 228 (2007), we concluded that “[i]t was reasonable for the county
20 to rely [on] intervenors’ more accurate survey rather than the NRCS survey” in
21 finding that the property was generally unsuitable for the production of farm
22 crops and livestock or merchantable tree species.

1 The hearings officer also relied on the fact that the building envelope is
2 unirrigated and composed of unproductive soils. The hearings officer
3 explained, and petitioner does not dispute, that the productive northern portion
4 of the parcel is more suitable for farming than the building envelope. The
5 hearings officer also explained that the building envelope is less suitable for
6 farm use than the middle portion of the property, which has similar soils to the
7 building envelope according to NRCS maps, but which is located closer to
8 farm uses, and further away from the residentially developed lands to the south.
9 Those findings are adequate to explain why the building envelope is the least
10 suitable portion of the parcel for development of nonfarm dwelling. We again
11 reject petitioner's argument that a reasonable farmer would clear the building
12 envelope and transfer irrigation from more productive soils to the site. We
13 conclude that the hearings officer's findings were based on substantial
14 evidence in the whole record.

15 The first assignment of error is denied.

16 **CONTINGENT MOTION TO TRANSFER**

17 Petitioner filed a contingent motion to transfer to circuit court pursuant
18 to ORS 34.102(4) and OAR 661-010-0075(11)(a), which provide that an
19 appeal be transferred to the circuit court in the event the Board determines the
20 appealed decision is not reviewable as a land use decision. The Board did not
21 determine that the board of commissioners' order declining review and

- 1 partially refunding the appeal fee is not reviewable as a land use decision.
- 2 Accordingly, we deny petitioner's contingent motion to transfer to circuit court.
- 3 The county's decision is affirmed.