



Deschutes County Board of Commissioners
1300 NW Wall St., Bend, OR 97701-1960
(541) 388-6570 - Fax (541) 385-3202 - www.deschutes.org

MINUTES OF BUSINESS MEETING
DESCHUTES COUNTY BOARD OF COMMISSIONERS
WEDNESDAY, JANUARY 28, 2015

Commissioners' Hearing Room - Administration Building - 1300 NW Wall St., Bend

Present were Commissioners Anthony DeBone, Alan Unger and Tammy Baney. Also present were Tom Anderson, County Administrator; Erik Kropp, Deputy County Administrator; David Doyle, County Counsel; Nick Lelack, Matt Martin and Paul Blikstad, Community Development; Susan Ross, Property & Facilities; Tom Kuhn, Health Services; and approximately thirty other citizens.

Chair DeBone opened the meeting at 10:00 a.m.

1. PLEDGE OF ALLEGIANCE

2. CITIZEN INPUT

None was offered.

3. Before the Board was Consideration of Board Signature of Document No. 2015-083, a Notice of Intent to Award Contract Letter to Griffin Construction, LLC, for Tenant Improvements to the Redmond Unger Building.

Susan Ross provided details on the bid process for tenant improvements. They used a low bid process.

Commissioner Unger explained that his father, Dr. Unger, built the building, but it was sold decades ago, and the Ungers have no involvement with it at all.

BANEY: Move Board signature.

UNGER: Second.

VOTE: BANEY: Yes.

UNGER: Yes.

DEBONE: Chair votes yes.

4. Before the Board was Consideration of Approval and Board Signature of Document No. 2015-041, a Decision regarding an Appeal and Remand of the Millican Mining Rezone (4-R Equipment).

Paul Blikstad gave a brief overview of the document. The hearing and deliberations occurred in November and December. This is the fourth decision and he believes this document covers all the requirements of the LUBA remand.

Commissioner Unger stated that there will be additional processes as the project moves forward. Chair DeBone feels it is very complete.

UNGER: Move Board signature.

BANEY: Second.

VOTE: BANEY: Yes.

UNGER: Yes.

DEBONE: Chair votes yes.

5. Before the Board was a Public Hearing on an Administrative Decision regarding the Designation of a Segment of Pilot Butte Canal as a Goal 5 Historic Resource.

Matt Martin began the opening statement, and the Board concurred. (*A copy is attached for reference.*) Chair DeBone opened the hearing. Regarding ex parte contacts, bias or conflicts of interest, Commissioner Unger stated that there have been various meetings and hearings, but claimed no conflicts of interest. There were no challenges from the audience.

Mr. Martin stated the text amendments or historic nature of the canals are not being addressed today. The question is the timing of an application and whether it fits the procedural timeline. An administrative decision was made that it did not, but the Board chose to hear the issue.

Mr. Martin listed the issues under review: the timing of the application, and property ownership. *(A copy of the PowerPoint presentation is attached for reference.)*

Issue #1, the timing of the application submittal, was explained, as was Issue #2, ownership. A previous Hearings Officer's decision indicted that there is an interest in the property. Property owners have an opportunity to refuse a historic designation, and COID has asked to be excluded.

This situation is unprecedented, so decisions are required on these issues.

Commissioner Baney asked if it is possible to have joint ownership, and whether an easement is at the same level of ownership. Mr. Martin said joint ownership is possible: the underlying landowner, but the easement owner also has an ownership right for that portion of the property. It depends on the terms of the easement, but it would be an equal ownership.

Commissioner Unger disclosed that he has property that is impacted by a COID easement, and what was a flume is now a pipe. He wanted to disclose he had a similar issue on his property. He added that he feels he can be objective in this situation.

Chair DeBone said the applicant's attorney will begin, followed by public testimony.

Bruce White, attorney for the applicant, Pilot Butte Canal Preservation Alliance, provided a handout *(a copy is attached for reference)*. Jeff Perreault was with him to provide factual details. There are two issues; one is the timing or getting in the door; and the other is ownership or staying inside the door.

He explained the nature of his handouts. He understands that the record includes everything filed and submitted to date. This is a matter of statutory interpretation. The methodology for this is set out in State law, to provide guidance. He referred to the previous Cline Falls decision.

He said the other thing to note is that detailed findings are not required, but they are dealing with interpretations and findings that need to show LUBA how they got where they did. The administrative decision did not address certain arguments, and the findings were inadequate. He feels there is a basis for the Board to overturn this decision.

This is an unusual situation since other issues involving the canal are being handled separately. He suggested this be sent to the Historic Landmarks Commission for clarification, with the whole package going to LUBA.

Regarding the timing issue, the problem with staff's interpretation is that (per Exhibit B, section 8b), it is critical 'for any building permit or . . . affected by the historical designation.' How do they interpret this? He feels that staff looked at this in isolation and took too narrow a view. It was given an ordinary meaning but does not stand alone, and needs to be considered in context. It could include a legislative action or development action. (See his supplemental memo, page 2.)

Context includes not just the current version but also the prior version of this language. The last paragraph was written as part of PL 21. The fact that it was originally written to include building permits or conditional uses, shows they were looking at it in larger scope. He is not sure why this language changed at some point. There is another provision in the Code regarding historic districts not affecting building permits or development.

This sets the stage for what is meant by any other application, such as the rule of statutory construction, which means that when general words such as 'other' follow, or as specifically mentioned. Oregon case law indicates this is particularly relevant. (He referred to case law in his notes.) There is a multiplicity of items listed before the term 'other', which is a catch-all; and the court said this would limit any other claims and the parties therefore could not claim economic damages.

Another rule (on the top of page 4), is that something is known by its associates; in this case the text surrounding the wording. An application for historical designation does not in itself affect all. The term 'application' is used in numerous places in Code, and refers to applications that are quasi-judicial. This is indicative of the Board's intent of using that term as adopted and then readopted in 1988. There is a strong basis to interpret this as not applying for legislative text amendments.

COID applied for a text amendment to allow for piping as an outright permitted use, but also wants to expand its power plant. This project has already been reviewed by LUBA as a hydroelectric facility. Therefore, this amendment is not supported by the facts. If the text amendment is approved, it won't get approval for its proposal due to the hydroelectric project, which is a conditional use in the zone. COID has applied for something that won't get them what they want. They need to approach this in another way.

There is a fairness issue here, with one part trying to shut out the other. A person concerned with a historic resource does not allow a use that might injure that resource, which should be protected by current Code. What happens here is out of the blue, a text amendment that would shut out the people concerned about the historic resources from even getting an application in the door.

He referred to a letter and a memo. The District submitted many arguments in its letter, which he refuted (page 1, B), property owner consent. He asked the Board to read through this but wants an opportunity for rebuttal.

Starting on page 4 of his response to the County decision, the crux of his argument is the issue of State law, as set out on page 2 of his October 27, 2014 letter. On page 5, there is a State Administrative Rule noted. They refer to the County's local definitions of property owner, but the County can't define State law. The County's definition of property owner is not relevant.

His letter explains the definition of property owner under State law, being property owners of record in the Assessor's records. There is no reference to COID having any ownership in these properties. Ownership runs with the underlying property owner. The easement interest allows for a right of use; but they don't own the property and are limited to what is allowed in the easement document. The property owners have ownership to the center line of the canal, and pay taxes based on the entire property including that within the easement.

The District has legal rights but this does not make them an owner, in particular as shown in State law. There is an issue with this. They dug a ditch that is integral to the property, and it is just part of the property. They have rights and access, but not ownership.

Regarding Administrative Rule, the District and staff say there is something to the ownership of historic resources that somehow make this more flexible. His argument on page 5 of his October letter states that the owner can object to the historic designation, and his position is that the District is not an owner.

Commissioner Baney asked if the historic designation was looked into before the application was submitted by the District. Mr. White said that he was approached earlier but the neighborhood had not yet organized. However, this came up during the text amendment proceedings.

Commissioner Baney said the Historic Landmarks Commission has a list of properties they'd like to have designated. Mr. White said the Landmarks Commission in 1994 did analyze the canals for historic designation, so there has been interest in the past. The neighbors had not coalesced around this issue.

Commissioner Baney stated that they don't want to predispose on the hydroelectric part of this. Mr. White said that this is their opinion and it involves more than just piping. It is hard for the District to say that it is just about piping and not also hydro. Commissioner Baney noted that this is a decision for another day. Mr. White said that the Board can certainly keep this in mind. Commissioner Baney stated that if this was a historic resource, that would change a lot of things.

Liz Dickson, representing COID, and Craig Horrell of COID, came before the Board. Mr. Horrell provided some background. They embrace the historic nature of the canals. However, they have to balance operations, maintenance and costs with all of the communities' needs for water, the neighbors and more. His predecessor entered into a contract to develop an inventory of all historic issues and findings about a year ago. There is a draft proposal that was given to the various parties, with an inventory of what is historic and what is more recent given to the State Historic Preservation Office.

The issue they have is that a nomination came in during the process, so it now has to be addressed out of order. They are working with their consultant and the State, and have a MOU with SHPO on how to proceed. They are doing a historic overview of Pilot Butte Canal and the main canal. They also have to struggle with public perception. He wants to do the right thing and hopes they can all get there.

Commissioner Baney asked for the date of the contract. He said the date is January 12, 2015, but was secured before he started at COID, probably a year ago. It is part of an inventory process that will take several more months to complete.

Mr. Martin said that they received the nomination of this part of the canal to be on the national register, to be considered this week. The document was to be part of that. Baney asked it be included in this record as well.

Ms. Dickson stated that staff made a decision not to process the amendment because of procedural grounds. First, the application came out after an existing application was pending. The basic premise is that under 228.060 of Code, a pending application means a historic designation cannot come in after it. This is the case here. The application was for historic designation of the same section of the canal that is to be piped. The matter is whether to allow this application even though another was underway. It was just filed on December 23, 2014, and a historic designation would negate all work that had been done. The historic designation is therefore not allowed per Code. Staff looked at Code and made a correct determination.

The second issue that is procedurally more complicated is ownership. The Hearings Officer's decision on the Smith case was whether easement holders were able to be involved in the process. They have an ownership right for land use purposes. The Hearings Officer interpreted that land use issues need to include these easement holders. This is not a State issue and the Board can interpret it. The Baker case deals with this specific issue, a listing on tax records. The Assessor's records are not authoritative as to who owns property or who has easements. State law allows easement holders to be owners in land use issues.

The COID application came first by almost a year. The County can review other cases, but the law is the law. Attorney White raised a number of issues, but nothing clearly refutes what is in the record. He tried to bring in the hydro expansion, but this is not material to the issue before the Board. Also, Deschutes County needs to decide eventually what hydro means.

She said Mr. White also raised a fairness argument, but these are not competing legislative proposals and he has over simplified the issue. He is asking you to nullify your own Code. If you want to rewrite Code regarding historic designations, that can be done at some point, but is not appropriate in this context.

Brian Sheets of Schroeder Law Offices in Portland, said he represents a client, Matt Gadow, who lives on Overtree Road. He said he disagrees with some of Ms. Dickson's points.

Regarding the timing issue, he wants to look at the bigger picture. This is a legislative issue with consequences. Staff said this is unprecedented. Code provision is 'any other application or permit that might be affected by a historic designation'. This Code is asking for speculation in the future on things that may or may not happen. A logical argument is between the historic designation application and a proposed text amendment.

The question is, does the historic designation affect the amendment, or can those two process independently. The text amendment has to do with the allowance of piping and maintenance as outright use in the zone. The historic designation limits this to a defined piece of property.

They hope to protect a specific piece of property versus allowing a use. These are mutually exclusive and not related to each other.

When the Code application and permit are not well defined, is this something to go before the County, State, a federal agency or other? This lack of clarity needs to be interpreted, such as what a permit means. Is it any permit, or does it have to do with water rights. This is too unclear and allows too much discretion. Complementing this is the rationale provided by staff. There is no logical link between the text amendment and use proposed with the historic designation. There has to be a use of the piping in the text amendment and it is not there. The text amendment does not say it is for piping, just for maintenance.

The standings issue is unclear. He agrees with Mr. White about this regarding ownership. They need to think about the bigger picture and policy results. They are being asked to let an easement rights holder be able to object to a historic designation. That means many others could, including special districts, utility owners or private owners, to be in control of the historic designation program. This could be a big problem with Goal 5 compliance, and could create superpowers who could object to this type of designation. The Board needs to reconsider this issue.

In the same historic preservation section, 2.28, there is a reference to the ownership or occupant thereof with consent of the owner.. It does not talk about what an occupant is in regard to historic designation. The appeals process covers this kind of thing, owners or occupants. If an easement holder is enough, what about a leaseholder or a renter; do they also have standing? There could be far-reaching consequences.

Commissioner Baney asked if this designation is solely for the preservation for a historic resources and has nothing to do with proposed piping. Mr. Sheets said that they are not related.

Matt Gadow said his letter outlines the overall plan. The reason the canal is historic is that when he bought his property in 1998, the rural and canal was a part of it. No one got upset when the area around it became developed. A development called Canal View was established, as permitted by the County. He wants to protect his neighborhood for the future. There may be an issue with timing, but there will be further arguments based on what COID wants to do there. He spent a lot of time and money working on this issue, as it impacts his property value, and he is being financially hurt by all this. He wants to see a decision so they can move forward. He has other things he would rather be doing than this.

Curtis Pell, a resident, provided a handout. He said that there are two issues holding up the application: ownership and the idea of multiple unrelated owners. Owners of record are provided a deed; he wanted to know where to find a COID deed for the property. A right of way is not the same as fee simple ownership. The County plat shows they own all the land, with no property lines carving out the canal bed. They pay taxes on all of it. On October 4, 1967, COID signed an, agreement with the County to allow a bridge over Old Deschutes Road. It shows that they do not own the property in fee. COID can't have the benefits of ownership without the responsibilities. In its own words, they do not hold fee title.

There are a number of easements, for neighbors, Pacific Power and others, and they don't get to say no to this designation if it doesn't change their easement. COID should not be able to, either. Regarding an application already being in process, they disagree. The two points delaying the historic designation are not applicable. They are sole owners of record. COID is not on the map in this situation, so the COID application should not impact this request.

Aleta Warren of 63535 Overtree asked Commissioner Unger about his parcel that was affected by COID. Commissioner Unger said he has 1.8 acres within city of Redmond, which includes an easement for the canal. The conveyance of the water changed, but the easement is still there.

Ms. Warren stated that they had tried to apply for historic designation in April 2014, but could not get it past the front offices. The City and County returned the documents due to it being incomplete. She wanted to reach the Historic Landmarks Commission. This is an issue for them, for them to decide if it is historic or not. Along the same line, one request is going to the State.

(She handed a document to the Board.) She said the document is a questionnaire that the Board needs to return to the State. It has nothing to do with piping or ownership. It asks if they feel the canal is historically relevant, asks for a description, how is it significant, whether the facts are correct, and whether photos or maps are correct. It might take 5 minutes for them to complete. The document was sent to the State in December and approved then. She wants the Board to fill out the questionnaire. It appears that staff already has preconceived ideas about it.

Commissioner Baney asked when the conversation began about an application for historic designation. Ms. Warren said that they are looking at the property owners. COID started everything without contacting any residents until they showed up at each property, asking for signatures for work to proceed. It was very unclear. The neighbors started talking about the designation then.

It took a while to organize because they did not know how. They did not have taxpayer funds like COID or professional people like Ms. Dickson to represent them. They started talking when COID showed up on the properties. This was in October 2012. It took them a while to figure out how to proceed, and it was very vague. It was still at LUBA for something.

Commissioner Baney noted that there are questions on the questionnaire that she is not prepared to complete since she does not have the information needed.

Mr. Perreault said he is a retired USGS hydrologist, and wanted to talk about hydro aspects. There have been numerous applications. He agreed that he had asked Matt Martin why there is a conflict. He feels the text amendment was not property specific and the historic designation is. He assumes that the only way it has weight is the text amendment is prop specific. The conflict would be to prevent piping for hydroelectric generation. He reminded the Board that prior submissions demonstrated the section of canal is not one that contributes significantly to groundwater recharge, and does not have significant head potential, so berms and other structures have to be used.

Chair DeBone reminded all that this is not part of the issue at hand.

Mr. Perreault said it is not a viable piping project, or hydro significant. And it has to do with groundwater recharge as well; the BLM and USFS have requested more information on this.

In regard to the questions of timing, retention of ICF by COID was in February 2014, after the request for a text amendment was filed in September 2013. They began working with Pat Kliewer around the same time, and he does not know who came first.

They are preparing multiple property designation that sets out a framework for a historic designation. When one property meets a criteria, it can then be fast tracked without further analysis. This section of the canal was found to have significance as far back as 1994. There would be no objections of the MPD on this.

There was an earlier question regarding submittals. The County found this had significance in 1994. The canal was assessed but was awaiting an application. It is sad, since it would have been nice if was done in 1994. There is no question about its significance. Referenced earlier was an MOU with SHPO and the Bureau of Reclamation and COID. The MOU was entered into because it was recognized that these projects would adversely affect historic designations.

He asked, does the Board want to step aside and allow these projects to go forward? The projects are going on, and they don't know if some that are already in place have destroyed something that would have been historically designated later.

He talked about the bristlecone tree, which was ancient but destroyed when it was analyzed. They are destroying historic resources without considering the idea that in the future someone might realize that they should have been saved.

Pat Kliewer stated that she does not live inside Bend. She thanked Bruce White for all his efforts. There are a lot of things being said or done that she does not feel are accurate. Peter Gutowsky went through the Code for historic designations in 1999 to clean up language and make it clearer. It is hard to think about the various interpretations.

Regarding other applications and permits, she sees this quite differently than others. Staff has done decisions on hundreds of issues, most having to do with building codes. The historic preservation code has different requirements. Historic as defined by the State and Federal means 50 years or older. It does not really refer to age or whether it is protected. A historic building could be put up in 1950 with no designation. Designation is the key word. The Board can designate properties as historic resources, as can the federal government. The State cannot designate a historic resource.

These applications are related. If someone wanted to change a 50 year old home, the County could require updating. There are special provisions in Code if it is historically designated. That has to come first. You can't have a neighbor say someone can't change an old porch if the property is not already protected. They can be designated by the County or the federal government. Part of the Code says the designation has to be in place first to change how it is handled. The designation has to be there first to be protected.

In 2001, she handled an application from a Redmond private property owner who did not want the designation, but the City had already done this for a separate owner. It was in the comprehensive plan as a resource. The new owner wanted to alter the building significantly as commercial. She asked the City to remove the designation, and they referred the owner to Ms. Kliewer. She called the sponsor of the Bill who got this into State law. The Attorney General wrote an opinion on how the law works. They had to get objections in writing or oral testimony given at the time of the designation. The City was able to remove it.

However, they never intended this to allow for a say by easement holders. The Attorney General's opinion can be submitted into evidence.

Another thing that bothers her about this, is that the text amendment which is being cited as competing applications, is for all SR-2.5 areas to be changed. Yet the application for the Historic Landmarks Commission is just a recommendation, which could result in a Code change. That application is for specific properties, a linear historic district. The text amendment is for all SR 2.5. If that property requires a designation first, it is not about the zone.

No further testimony was offered.

Bruce White offered rebuttal. He asked for the written record to be left open for a while. He added that his clients have no problem waiving the 150-day time limit.

The Board left the written record open until 5:00 p.m. on February 6, 2015. Final rebuttal will be due by 5:00 p.m. on February 13, 2015.

Before the Board was Consideration of Approval of the Consent Agenda.

BANEY: Move Board signature.

UNGER: Second.

VOTE: BANEY: Yes.

UNGER: Yes.

DEBONE: Chair votes yes.

Consent Agenda Items

6. Board Signature of Resolution No. 2015-001, Initiating the Vacation of a Right-of-Way off Tumalo Rim Drive
7. Board Signature of Order No. 2015-001, Vacating a Right-of-Way off Tumalo Rim Drive
8. Chair Signature of Document No. 2015-052, Funds Transfer Agreement with the Federal Highway Administration regarding the Fall Creek Bridge Replacement Project
9. Chair Signature of Document No. 2015-030, an Intergovernmental Agreement between the Local Public Health Department and the Oregon Health Authority regarding Youth Suicide Prevention & Early Intervention Strategies

10. Board Signature of Resolution No. 2015-004, Transferring Appropriations in the General Fund
11. Board Signature of Resolution No. 2015-009, Transferring Appropriations in the OHP-Mental Health Services Fund
12. Board Signature of Resolution No. 2015-006, Transferring Appropriations in the General County Projects Fund
13. Board Signature of Resolution No. 2015-012, Transferring Appropriations in the County Fair Fund
14. Board Signature of Resolution No. 2015-003, Transferring Appropriations to the District Attorney Department from General Fund Contingency
15. Board Signature of Resolution No. 2015-005, Transferring Appropriations in the Industrial Lands Proceeds Fund
16. Board Signature of Resolution No. 2015-007, Appropriating a New Grant in the Public Health Fund
17. Board Signature of Resolution No. 2015-008, Transferring Appropriations in the Public Health Fund
18. Board Signature of Resolution No. 2015-010, Transferring Appropriations in the OHP-Mental Health Services Fund
19. Approval of Award of Community Grants as Follows:
 - Deschutes Public Library Foundation - \$2,400
 - Cascades Theatrical Company - \$2,400
 - Deschutes County Historical Society – \$2,400
 - Volunteers in Medicine – \$11,000
 - Deschutes Family Recovery – \$3,000
 - Volunteers in Action - \$11,000
 - Big Brothers Big Sisters of Central Oregon - \$11,000
 - American Red Cross - \$5,000
20. Approval of Minutes:
 - Business Meeting of January 14, 2015
 - Work Session of January 14, 2015

**CONVENED AS THE GOVERNING BODY OF THE 911 COUNTY
SERVICE DISTRICT**

- 21. Before the Board was Consideration of Board Signature of Resolution No. 2015-011, Transferring Appropriations in the 911 County Service District's Operating Fund.**

UNGER: Move approval.

BANEY: Second.

VOTE: BANEY: Yes.

UNGER: Yes.

DEBONE: Chair votes yes.

- 22. Before the Board was Consideration of Approval of Weekly Accounts Payable Vouchers for the 9-1-1 County Service District in the Amount of \$32,331.05 (two weeks).**

UNGER: Move approval, subject to review.

BANEY: Second.

VOTE: BANEY: Yes.

UNGER: Yes.

DEBONE: Chair votes yes.

**CONVENED AS THE GOVERNING BODY OF THE EXTENSION/4-H
COUNTY SERVICE DISTRICT**

- 23. Before the Board was Consideration of Approval of Weekly Accounts Payable Vouchers for the Extension/4-H County Service District in the Amount of \$74,988.55 (two weeks).**

UNGER: Move approval, subject to review.

BANEY: Second.

VOTE: BANEY: Yes.

UNGER: Yes.

DEBONE: Chair votes yes.

RECONVENED AS THE DESCHUTES COUNTY BOARD OF COMMISSIONERS

24. Before the Board was Consideration of Approval of Weekly Accounts Payable Vouchers for Deschutes County in the Amount of \$1,267,196.06 (two weeks).

UNGER: Move approval, subject to review.

BANEY: Second.

VOTE: BANEY: Yes.

UNGER: Yes.

DEBONE: Chair votes yes.

25. ADDITIONS TO THE AGENDA

A. Before the Board was Consideration of Approval of an Application for an Oregon Health Authority Grant Request for Proposals.

Tom Kuhn explained this grant opportunity is time-sensitive and due to the State by Friday. It is to emphasize partnerships with the State, the CCO and others, as well as associated funding. It will provide institutes where the groups will meet to develop sustainable relationships regarding chronic disease prevention. It does not require additional FTE's or matching funds.

Commissioner Unger pointed out the County is a leader in health care reform and he is happy to see this type of involvement.

BANEY: Move approval.

UNGER: Second.

VOTE: BANEY: Yes.

UNGER: Yes.

DEBONE: Chair votes yes.

Being no other items brought before the Board, the meeting was adjourned at 12:05 p.m.

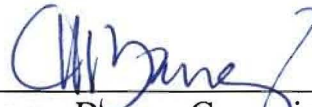
DATED this 25th Day of February 2015 for the
Deschutes County Board of Commissioners.



Anthony DeBone, Chair



Alan Unger, Vice Chair



Tammy Baney, Commissioner

ATTEST:



Recording Secretary



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Agenda Item of Interest POD / HISTORIC APPL Date 1/28/15

Name Bruce White

START 10:26 AM

Address _____

Phone #s _____

E-mail address _____

☐

In Favor

☐

Neutral/Undecided

☐

Opposed

Submitting written documents as part of testimony? ☐ Yes ☐ No



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Agenda Item of Interest Historic Designation - PBC Date 1/28/15

Name Brian Sheets

Address Schroeder Law Offices
Portland, OR

REPRESENTS MR. LADON

Phone #s 503-281-4100

11:12

E-mail address b.sheets@water-law.com

☒

In Favor

☐

Neutral/Undecided

☐

Opposed

Submitting written documents as part of testimony? ☒ Yes ☐ No

①



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Agenda Item of Interest #5 Date _____

Name CRAIG HORRELL

Address 1055 SW LAKE G.

REDMOND OR 97756

Phone #s (541) 480-7773

E-mail address CHORRELL@COLD.ORG

☐ In Favor ☐ Neutral/Undecided ☒ Opposed

Submitting written documents as part of testimony? ☐ Yes ☒ No

(4)



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Agenda Item of Interest Historic Designation^{PBC} Date 1/23/15

Name Math Gadow

Address 63435 Overice

Bend, OR 97701

Phone #s 541 410-1668

E-mail address m.gadow@Bendbroadband.com

☒ In Favor ☐ Neutral/Undecided ☐ Opposed

Submitting written documents as part of testimony? ☒ Yes ☐ No

(2)



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Agenda Item of Interest ^{#5} Pilot Butte Canal Goal 5 Date 1/28/15

Name Contis D. Pell *Historic Resource*

Address 20985 Scottsdale Dr.
Bend OR 97701

Phone #s 6507933964

E-mail address cpe/indiana@yahoo.com

☒ In Favor of Goals ☐ Neutral/Undecided ☐ Opposed

Historic Designation

Submitting written documents as part of testimony? ☒ Yes ☐ No

3



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Agenda Item of Interest Pilot Butte Canal Date 1/28/15

Name Alexa Warren *- WHO IS WE?*

Address 635 35 Overtree Rd
Bend

Phone #s 541-389-2126

E-mail address a.warren

☒ In Favor ☐ Neutral/Undecided ☐ Opposed

Historic application

Submitting written documents as part of testimony? ☒ Yes ☐ No



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Agenda Item of Interest

5

Date

1/28/15

Name

Peter Warner

Address

1107 NW Knoxville Ct
Bend, OR

Phone #s

410 9231

E-mail address

peterwarner@hotmail.com



In Favor



Neutral/Undecided



Opposed

Submitting written documents as part of testimony?



Yes



No



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Agenda Item of Interest

COVID/HISTORIC APPPL

Date

1/28/15

Name

JEFF PERIAULT

Address

20986 COUNTRY VIEW LN

Phone #s

E-mail address



In Favor



Neutral/Undecided



Opposed

Submitting written documents as part of testimony?



Yes



No



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Agenda Item of Interest _____ Date _____

Name Pat Klauer

Address 60465 Sunridge Dr Bend OR 97702

Phone #s _____

E-mail address _____

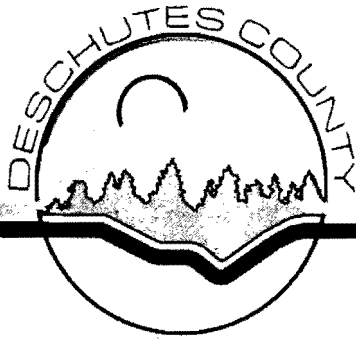
☒ In Favor ☐ Neutral/Undecided ☐ Opposed

Submitting written documents as part of testimony? ☐ Yes ☐ No

STATE DOES NOT DESIGNATE HISTORICAL

HEARING PROCEDURES: QUASI-JUDICIAL PUBLIC HEARING

- Timely notice of this hearing has been provided as required by ORS 197.763.
- Applicable criteria from the laws and regulations that apply to this application will be verbally identified by staff at the outset of the hearing. In addition, they are listed in the Staff Report, copies of which are available at this hearing, from the Community Development Department, and on the County's website.
- The applicants have the burden of proving that they are entitled to the approval requested.
- Testimony, arguments and evidence at this hearing must be directed toward the applicable criteria, as well as toward any other criteria in the comprehensive land use plan of the County or land use regulations which any person believes apply to this decision.
- Failure on the part of any person to raise an issue, in person or by letter, with sufficient specificity to afford this hearings body and parties to this proceeding an opportunity to respond to the issue precludes appeal to the Land Use Board of Appeals on that issue. Additionally, failure of the applicant to raise constitutional or other issues relating to the approval with sufficient specificity to allow the Board to respond to the issue precludes an action for damages in Circuit Court.
- The decision of the hearings body on this application will be based upon the record before it, including as applicable, the Hearings Officer's decision, the Staff Report, additional material within the record and the testimony and evidence presented at this hearing.
- Any participant at this hearing may request that the hearing or record or both be held open for an additional seven (7) days. If the request is granted, the hearings body will identify a date and time certain for the continuance or open record period.
- Unless waived by the applicant, the hearings body will allow the applicant at least seven (7) days after the record is closed to all other parties and participants to submit final written arguments in support of the application. Final written argument shall not include any new evidence.



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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

MEMORANDUM

DATE: January 8, 2015
TO: Board of County Commissioners
FROM: Matthew Martin, Associate Planner
RE: Order No. 2014-03 / Pilot Butte Canal Goal 5 Historic Resource

The Board of County Commissioners (BOCC) will hold a public hearing on January 28, 2015 at 10:00 a.m. to review an administrative decision rejecting the filing of a request to designate a segment of the Pilot Butte Canal as a Statewide Planning Goal 5 historic resource in the Deschutes County Comprehensive Plan.

BACKGROUND

On November 3, 2014, the Pilot Butte Canal Preservation Alliance (Preservation Alliance) submitted an application for a Comprehensive Plan amendment to designate an approximately one-mile segment of the Pilot Butte Canal as a Goal 5 historic resource in the Suburban Low Density Residential (SR 2 ½) Zone.¹ Upon review of the submittal, a threshold issue emerged under Deschutes County Code (DCC) 2.28.060(A)(2) regarding the timing of the application filing. DCC 2.28.060(A)(2) states:

"Any request for historical or cultural designation must be filed with the County planning division before the date of application for any building permit, or any other application or permit which might be affected by such historical designation." [emphasis added]

The Preservation Alliance's application, designating the Pilot Butte Canal as a historical resource may affect Text Amendment (TA) 13-4, which is currently pending before the BOCC. TA 13-4 is a proposed text amendment to DCC Title 19, Chapter 19.20, SR 2 ½ Zone to allow the operation, maintenance, and piping of existing irrigation systems as an outright use in the zone.

Given TA-13-4 and its relationship to the Pilot Butte Canal segment being proposed as a historic resource, staff issued an administrative decision on December 9 rejecting the filing of the Preservation Alliance's application. In addition, the administrative decision addressed a second procedural issue relating to ownership of the Pilot Butte Canal and an interpretation of ORS

¹ File No. 247-14-000373-HS.

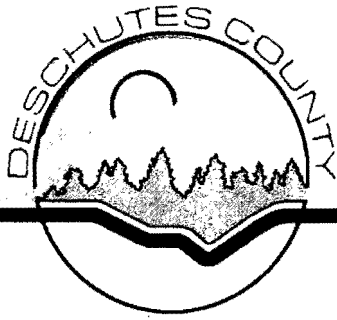
197.772, OAR 660-023-0200(5)² and DCC Chapter 2.28. The timing of the application and ownership were the only items addressed by the decision; staff did not examine the substantive merits proposing the canal as a historic resource. The Preservation Alliance argued for a different interpretation than staffs of both the language in DCC 2.28.060(A)(2) provided above and the definition of "owner".

The BOCC on December 15 approved Order No. 2014-03 initiating review of the administrative decision rejecting the filing of the Comprehensive plan amendment application. Because the BOCC will be interpreting the County Code regarding the timing of the application submittal, review will allow the BOCC to obtain deference from the Land Use Board Appeals (LUBA) related to interpretation in the event of an appeal. The BOCC will also be given deference regarding the ownership issue if the BOCC's interpretation rests on interpreting the County Code. If the BOCC's interpretation of the ownership issue relates only to the interpretation of state law, it will not be afforded deference on appeal but will provide a definitive interpretation of ownership in the event the decision is appealed.

Attachments:

1. Administrative Decision for File No. 241-14-000373-HS
2. Order No. 2014-03

² https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2013ors197.html;
http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_023.html



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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FINDINGS AND DECISION

FILE NUMBER: 247-14-000373-HS

APPLICANT: Pilot Butte Canal Preservation Alliance
20980 Country View Way
Bend, OR 97701

APPLICANT'S ATTORNEY: Bruce White
P.O. Box 1298
Bend, OR 97709

REQUEST: A Comprehensive Plan Amendment to designate a segment of the Pilot Butte Canal as a Goal 5 historic resource.

STAFF CONTACT: Matthew Martin AICP, Associate Planner

I. APPLICABLE CRITERIA:

Title 2, Deschutes County Administration Ordinance
Chapter 2.28. Historic Preservation and Historic Landmarks Commission

II. BASIC FINDINGS:

A. LOCATION: The subject properties (32 total) are located northeast of the City of Bend identified as follows:

Tax Map 17-12-15AA Lots 300, 600, 700, 702, 703, 705
Tax Map 17-12-15AC Lots 300, 400, 600, 700, 800
Tax Map 17-12-15AD Lots 105, 106, 107, 108, 109, 110, 111, 200, 400, 500, 600, 900
Tax Map 17-12-15BD Lots 1300, 1400, 1500
Tax Map 17-12-15CA Lots 200, 300
Tax Map 17-12-15DB Lots 100, 600, 700, 800

B. ZONING: The subject properties are zoned Suburban Low Density Residential (SR 2½).

C. PROPOSAL: The applicant has submitted a request for a Comprehensive Plan amendment to designate an approximately one-mile segment of the Pilot Butte Canal as a Goal 5 historic resource in the SR 2½ Zone. Upon review of the submittal, a

threshold issue emerged regarding the timing of the application filing as it relates to another pending application affecting the subject properties. In addition, there is a second procedural issue relating to ownership of the canal. Since this involves interpreting these two critical aspects of the application and process, staff is issuing an administrative decision. Staff notes that the substantive merits of the request to designate the canal as a historic resource are not addressed by this decision.

III. CONCLUSIONARY FINDINGS:

Title 2, Deschutes County Administration Ordinance
Chapter 2.28. Historic Preservation and Historic Landmarks Commission

A. 2.28.020. Definitions.

"Property Owner" means the owner of record or the contract purchaser and does not include a person or organization that holds a security interest.

FINDING: An easement runs along the length of Pilot Butte Canal. As it pertains to the applicant's proposal, the easement is located on 32 private properties. The applicant argues Central Oregon Irrigation District (COID), the operator of the facility and easement holder, does not have an ownership interest, and therefore COID's consent is not needed for the segment to be designated as a historic resource.

In a previous land use decision, A-10-2(NUV-09-1), a Deschutes County Hearings Officer addressed a similar easement and landowner relationship. The Hearings Officer found the holder of an easement across private property is an "owner of record" of an interest in the property, and therefore is a "property owner" as defined in DCC 22.08.010(A).¹ Based on this analysis, staff finds that COID, as the easement holder for the Pilot Butte Canal, is an owner of record along with the underlying real property owners.

The issue with this application, however, relates to the language in OAR 660-023-0200(5), which says:

"Local governments shall allow owners of inventoried historic resources to refuse historic resource designation at any time prior to adoption of the designation and shall not include a site on a list of significant historic resources if the owner of the property objects to its designation."

The previous finding of the Hearings Officer's decision is applicable to the language in the OAR that allows the owner of the resource to refuse designation. Therefore, because COID is an easement holder, COID is an owner for purposes of the OAR as well and has a right to refuse the historic designation of its canal. COID refused such designation in its letter dated November 14, 2014. As a result, the County cannot designate the canal as a historic resource at this time.

¹ DCC 22.08.010(A) Property Owner. For the purposes of DCC 22.08.010, the term "property owner" shall mean the owner of record or the contract purchaser and does not include a person or organization that holds a security interest.

B. Section 2.28.060. Procedures.

A. Historical Building or Site-Designation Procedure.

- ...
2. ***Any request for historical or cultural designation must be filed with the County planning division before the date of application for any building permit, or any other application or permit which might be affected by such historical designation.***

FINDING: COID submitted a Text Amendment application, File TA-13-4, on December 23, 2013. It is currently under review by Deschutes County. TA-13-4 proposes:

"...a text amendment to Deschutes County Code Chapter 19.20 Suburban Low Density Residential Zone – SR 2½ to allow the operation, maintenance, and piping of existing irrigation systems as an outright use within the zone..."

TA-13-14 proposes, as an outright permitted use, the ability to pipe approximately 4,500 feet of the Pilot Butte Canal, including segments that relate to the applicant's recent request for a Goal 5 historic designation.

The applicant submitted application 247-14-000373-HS on November 3, 2014. Staff interprets DCC 2.28.060(A)(2) and "any other application" to include TA-13-4 since it directly relates to this segment of canal located in the SR 2½ Zone. Staff finds the applicant's request to designate a segment of the Pilot Butte Canal as a Goal 5 historic resource cannot be filed until a decision is rendered for TA 13-4.

IV. CONCLUSION AND RECOMMENDATION:

Based on the information provided herein, staff finds:

1. The request to designate a segment of the Pilot Butte Canal as a Goal 5 historic resource cannot be filed until a decision is rendered for TA 13-4; and
2. The underlying real property owners and COID, as an easement holder, are both owners of record as it relates to Applicant's proposal to designate a segment of the Pilot Butte Canal as a Goal 5 historic resource.

DESCHUTES COUNTY PLANNING DIVISION



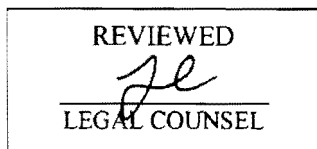
Written by: Matt Martin, Associate Planner



Reviewed by: Peter Gutowsky, Planning Manager

Dated this 9th day of December, 2014

Mailed this 9th day of December, 2014



For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Initiating Review of Administrative
Decision in File No. 247-14-00373-HS.

*
*

ORDER NO. 2014-038

WHEREAS, on December 9, 2014, staff issued an Administrative Decision on Application No. 347-14-00373-HS; and

WHEREAS, Section 22.28.050 of the Deschutes County Code allows the Deschutes County Board of County Commissioners ("Board") to initiate review of any administrative action within 12 days of the date of mailing of the final written decision of the Planning Director; and

WHEREAS, the Board has given due consideration as to whether to initiate review of this application; now therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

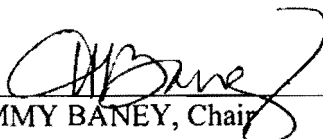
Section 1. The Board hereby initiates review of application 247-14-000373-HS pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. The review shall be heard de novo on the issues of interpretation of DCC 2.28.020 "Property Owner" and the applicability of DCC 2.28.060(A)(2).

Section 3. Staff shall set a hearing date and cause notice to be given to all persons or parties entitled to notice pursuant to DCC 22.24.030 and DCC 22.32.030.


Dated this 15th of Dec., 2014

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON


TAMMY BANEY, Chair


ANTHONY DEBONE, Vice Chair

ATTEST:


Recording Secretary


ALAN UNGER, Commissioner

Laura A. Schroeder
Licensed in Oregon, Idaho,
Nevada and Washington

Therese A. Ure
Licensed in Oregon
and Nevada

William F. Schroeder
Of Counsel to the Firm



SCHROEDER
LAW OFFICES, P.C.

Sarah R. Liljefelt
Licensed in Oregon & California

Wyatt E. Rolfe
Of Counsel
Licensed in Oregon & Washington

Matthew J. Curti
Licensed in Nevada & California

Brian R. Sheets
Licensed in Oregon

January 28, 2015

VIA HAND DELIVERY

Deschutes County Board of Commissioners
1300 NW Wall St. Suite 200
Bend, OR 97701

RE: File No. 247-14-000373-HS: Goal 5 Historic Designation Hearing

Dear Commissioners:

Our office represents Matt Gadow. His address is 63435 Overtree Rd., Bend, OR 97701. Please accept these written comments into the record for this hearing.

I. Timing Issue in DCC 2.28.060.

County Planning staff concluded that the application for historic preservation of a one-mile stretch of the Pilot Butte Canal is precluded by DCC 2.28.060, which states:

“Any request for historical or cultural designation must be filed with the County planning division before the date of application for any building permit, or any other application or permit which might be affected by such historical designation.”

“Any other application or permit which *might* be affected by such historical designation” fails to contain any measurable criteria to guide the discretionary application of the procedural rule, and therefore any decision on these grounds is subject to a hearing under these conditions due to its nature as a land use decision under *Nicolai v. City of Portland*, 19 Or LUBA 142 (1990).

The proposed text amendment is not so specific as to preclude accepting the historic designation application. The text amendment applies to an entire zone...does this lock up all of the zone for any historical designation because of the text amendment presently in abeyance? This is too speculative, and requires logical leaps to determine the effect on an “application.” Another more specific application, such as a construction or demolition permit would be needed to specifically identify the property for there to be an “effect.”

1915 NE Cesar E. Chavez Boulevard, Portland, Oregon 97212 (503) 281-4100

440 Marsh Avenue, Reno, Nevada 89509 (775) 786-8800

www.water-law.com counsel@water-law.com

The text amendment is for an outright use, not a specific application for a building permit or application for a particular property: this historical designation is specific. Whether the text amendment is approved or denied; historical designation may take place as there is not a pending application for the specific property: it applies to an entire zone for a *use*, not a specific *project* at a specific time, for a specific applicant.

An approval or a denial of an outright use does not preclude historic designation, therefore the application will not be affected.

The decision to deny the application conflates historic designation for a specific property with approving an outright use within a zone. The two are unrelated in cause and effect, and therefore the request for historic designation would not affect another application or permit.

The general application of the proposed text amendment is in contrast to the specific nature of the historic designation application. Permits may continue into perpetuity, and applications can be requested to be held in “abeyance” for unlimited amounts of time, so long as staff is willing to defer. This effectively shuts the door to any redress or determination, based on a staff decision.

“Application” is not defined, and “permit” is not defined. The overbroad allowance of “any other application or permit that *might* be affected . . .” is too tenuous and can lead to unintended consequences depending on the discretion of the planning official reviewing the application. Where does “any application or permit” end, and how speculative is “might?” The conclusion is that the discretionary allowance is overbroad, and will lead to abuses of discretion, such as the present case.

II. Standing to object to designation as an owner of property.

We agree with Bruce White’s October 27, 2014 letter attached as exhibit 16 to the Goal 5 comprehensive plan amendment application.

In relation to this Goal 5 Designation, COID has not provided evidence that they are “the owner” of the Canal. Mere statements within this proceeding, without more, cannot suffice to demonstrate the legal entitlement to object to this Goal 5 designation.

ORS 215.503 (1) in the context of providing notice to landowners for county land use actions defines “owner” to mean:

“the owner of the title to real property or the contract purchaser of real property, of record as shown on the last available complete tax assessment roll.”

COID is not the owner of these properties, and is not listed on at least Matt Gadow's County Tax Assessor's Name Ledger.¹

It is a dangerous precedent to declare an easement holder to be "the owner" in that it gives any easement holder standing to object to any Goal 5 nomination; utilities could object from utility easements. County definitions state "the owner," not "an owner," signifying a single owner as having authority to protest the designation. It specifically excludes a security interest, which is analogous to an easement holder: a fractional interest less than fee simple ownership. In the hierarchy of ownership interests, the fee owner maintains a higher priority of ownership than an easement holder, and granting standing to a mere easement holder is against the definition in the County Ordinances, The Oregon Administrative Rules, and the Oregon Revised Statutes.

Deschutes County Code aligns with this interpretation:

2.28.120. Signs/Plaques.

"The owner of a historic resource, or the occupant thereof with the consent of the owner, may install an identification plaque or sign..." This is precisely the same situation, the residents along Pilot Butte Canal owning the canal, and COID occupies it for irrigation delivery purposes...still needing permission from "*the* owner" not "*an* owner."

Granting standing to an easement holder frustrates Goal 5 by inconsequential outside interests. Is a reservation of rights to obtain minerals enough, erect a fence, maintain a road or a power line, or a light and airspace easement? How about a leasehold interest? Do commercial or residential renters have standing to object to resource designation? They own a leasehold interest, yet are they considered "the owner?" This interpretation is a tenuous interpretation, and unlikely to withstand challenge.

The appeals process allows for redress of occupants' concerns.

2.28.150. Appeals.

A. Appeals from actions of the Landmarks Commission shall be to the Board and may be filed by the applicant, the owner or occupant of the building, structure, site or district concerned, or by any other person who participated in the hearing."

This specifically mentions "the owner or occupant." Objection standing to resource designation specifically limited to "the owner" with the clear intent to not give the occupant of land the ability to object, which is precisely what is happening here. Redress for the occupant is available after the decision, and an easement holder's objection is not standing to prevent bringing the matter before the Commission.

¹ See Attachment 1.

III. The Importance of Preservation

Physical Scope: The proposed text amendment applies to entire SR 2 ½ zone; whereas Historic Resource Designation applies to limited segment as documented in application, and is a discrete application, the text amendment applies to any irrigation piping. Further, this application is to protect a historic resource, whereas the proposed text amendment could possibly allow its destruction. If this body has any interest in preserving Goal 5 sites, now is the time to act.

Time: If this application is not considered, there will never be an opportunity to add this to the Goal 5 resource. Much like razing a building or flooding a site on a river, if this body does not act, the opportunity will not present itself again.

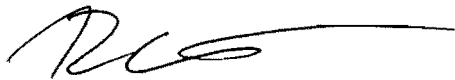
Subject matter: The text amendment is presented in such a manner that it obscures the true purpose of the piping project: increasing hydropower revenues. The text amendment is a separate legislative decision that is outside of the consideration for Goal 5 designation.

The Goal 5 Purpose is to keep protect natural resources and conserve scenic, historic, and open space resources for present and future generations.

The DCC Historic Commissions Purpose is:

Districts, buildings, structures and sites in Deschutes County which have special historic and prehistoric association or significance should be preserved as part of the heritage of the citizens of the County, and for the education, enjoyment and pride of the citizens, as well as for the beautification of the County and enhancement of the value of such property.

Very truly yours,
SCHROEDER LAW OFFICES, P.C.



Brian R. Sheets

DESCHUTES COUNTY ASSESSOR'S NAME LEDGER

1/27/2015 1:12:53 PM

Account ID 200765 Township 17 Range 12 Section 15 1/4 A 1/16 D Taxlot 00107 Special Interest

Sale Price \$132,000

Sale Date 01-Dec-2000

Effective Date 01-Dec-2000 12:00 AM Transaction ID -138112 Entry Date 01-Dec-2000 Recorded Date 01-Dec-2000

Seq	Voucher ID	Tax Year	Document Source	Type	ID #1	ID #2	PID	Source ID	PT	Operation	To/From Map
1	-169044	2000	CLERK - BOR		2000	49280	1			NAME CHANGE	

Size Totals	Code	Acres	Sqft	Alternate Size

Effective Date 15-May-2003 12:00 AM Transaction ID -5286 Entry Date 15-May-2003 Recorded Date 15-May-2003 Sale Date 15-May-2003

Seq	Voucher ID	Tax Year	Document Source	Type	ID #1	ID #2	PID	Source ID	PT	Operation	To/From Map
1	-5286	2003	ASSESSOR'S FILE		2003	200765	1	ASSESSOR'S FILE:CONVERSION:200765		CONVERSION	

Name Changes	Status	Name	Name Type	Ownership Type	Ownership %
	A	JOHANNESSEN, DEAN O	OWNER	OWNER	
	A	JOHANNESSEN, JUDI	OWNER	OWNER	

Size Changes	Code	+ / - Size	Alternate Size	Code Area Deleted	Move to Acct	Move To Code
	1003	2.49 Acres				

Size Totals	Code	Acres	Sqft	Alternate Size
	1003	2.49		

Action	Subdivision	Block	Lot	Direction	Part	Part Type
Add:	OVERTREE RANCH	0	3			

Sale Price \$950,000

Sale Date 08-Apr-2005

Effective Date 05-May-2005 12:00 AM Transaction ID 741207 Entry Date 05-May-2005 Recorded Date 15-Apr-2005

Seq	Voucher ID	Tax Year	Document Source	Type	ID #1	ID #2	PID	Source ID	PT	Operation	To/From Map
1	777404	2005	CLERK - BOR	WD	2005	22671	1			NAME CHANGE	

Name Changes	Status	Name	Name Type	Ownership Type	Ownership %
	D	JOHANNESSEN, DEAN O	OWNER	OWNER	
	D	JOHANNESSEN, JUDI	OWNER	OWNER	
	A	GADOW, MATTHEW M	OWNER	OWNER	100.0000
	A	TENANTS BY ENTIRETY~GADOW, SUZANNE FLORANCE	OWNER	OWNER	100.0000
	A	GADOW, SUZANNE FLORANCE	OWNER	OWNER	100.0000
	A	TENANTS BY ENTIRETY~GADOW, MATTHEW M			

Size Totals	Code	Acres	Sqft	Alternate Size
	1003	2.49		

Attachment 1

1/27/2015 1:12:53 PM

Account ID	Township	Range	Section	1/4	1/16	Taxlot	Special Interest
200765	17	12	15	A	D	00107	

Attachment 1

**Pilot Butte Canal Preservation Alliance (PBCPA) Historic Preservation Application
Supplemental Memo on DCC 2.28.060(A)(2) Threshold/ Jurisdictional Issues**

January 28, 2015

Bruce White, Attorney for PBCPA

I. "Get in the door" issue: DCC 2.28.060(A)(2)

- The issue here is how to interpret the term "any other application" with regard to whether it includes legislative applications (such as COID's application for a text amendment to amend the SR 2 ½ zone to include piping of irrigation canals as an outright permitted use) or whether it refers solely to quasi-judicial development applications for building and planning permit applications for specific development proposals. There is also a related factual inquiry as to whether under the facts in this case, COID's legislative text amendment is one that "might be affected by [a] historic designation".

A. Legal Interpretation:

- a. County staff interprets the term "any other application" as being broad enough to include legislative text amendments such as COID's pending text amendment. It is PBCPA's understanding that the basis of County staff's interpretation is the ordinary plain meaning of the term "any other application" viewed in isolation from any contextual provisions of DCC 2.28.060(A)(2) itself, the balance of DCC Chapter 2.28 or any other provisions of the County Code.
- b. PBCPA's argument is based upon the context of the term "any other application", including the balance of DCC 2.28.060(A), the language of DCC 2.28.060(A)(2), now and as originally drafted in 1980, the balance of DCC Chapter 2.28 and other related provisions of the County Code outside DCC Chapter 2.28 and commonly accepted principles of statutory interpretation.
- c. The methodology for interpreting or construing a statute, commonly known as "statutory construction" in Oregon occurs within a framework of appellate case law and Oregon statute. These precepts apply equally to construing local ordinances and to construing state law enacted by the Legislature. Failure to follow applicable statutory interpretation methodology can lead to remand of a local government's interpretation as was recently the case in the Board's Cline Falls decision.
- d. In interpreting a statutory provision, the starting point is the text itself that is at issue – this case the language "any other application", but the inquiry may

not stop with that text; inquiry and analysis of the context is required at the first level of statutory interpretation. *PGE v. BOLI*, 317 Or 606, 611, 859 P2d 1313 (1993). **Accordingly, it is not appropriate for County staff to simply view the term “any other application” in isolation and give to it its “ordinary plain meaning” of the words themselves without considering those words in context.** See, e.g., *Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 98 P3d 1116 (2004) illustrating how consideration of a word or phrase’s context can alter the “plain, ordinary meaning” of a word or phrase when considered in its context.

- e. In this case, the term “any other application” is not self-defining; when viewed in isolation, it could possibly refer to an application for development type activity, for an application for legislative action, or both. An examination of the context of the phrase is therefore necessary to cloak it with meaning. In rejecting the subject application, Staff did not perform this essential interpretive function.
- f. Starting with DCC 2.28.060(A)(2), the context of the phrase “any other application” in this case includes the terms “any building permit” and “any other . . . permit which might be affected by such historical designation” that are included in the balance of DCC 2.28.060(A)(2). *Stull v. Hoke*, 326 Or 70, 72-79, 948 P2d 722 (1997).
- g. The context also includes a prior version of DCC 2.28.060(A)(2), commonly referred to as “the historical context”. *State v. Perry*, 336 Or 49, 54-55, 77 P3d 313 (2003). In this case, the language of DCC 2.28.060(A)(2) was initially adopted by the County in 1980 in Section 4 of Ordinance PL 21. That language read as follows: “Any request for historic designation must be filed with the Landmarks Commission before the date of application for any building, conditional use or any other application or permit which might be affected by such historic designation.” Section 4(D), PL-21 (*emphasis supplied*). (See Exhibit A, attached.) The inclusion of the term “conditional use” in the list of types of application gives a clear indication that the original intent of the applicability of what is now DCC 2.28.060(A)(2) to planning applications was limited to quasi-judicial applications.¹

¹ The current language of the subject portion of DCC 2.28.060 was adopted by amendment to DCC. 2.28.040(B) in 1998 under Ordinance 1988-008. (See Exhibit B, attached hereto.) The elimination of the specific reference to “conditional use” in that enactment would appear to have simply been a house-keeping measure that recognized that retention of the specific term “conditional use” was not necessary, given that it would be picked up in the catch-all phrase “any other application or permit.” This is bolstered by the fact that under the procedures for designation of a historic district under DCC 2.28.060(C)(10), the reference to the term “conditional use” is retained. If there was a specific intent to change the scope of the coverage of the application prohibition to include legislative change applications as well as quasi-judicial

- h. In interpreting a statute or ordinance provision in context, the reviewing body may apply various rules of construction to help it in its task. Those rules have arisen over decades of case law and statutory enactments. The inclusion of the term "conditional use" and the use of "any other application or permit" as a catch-all phrase under the statutory construction rule *ejusdem generis* appear to have at least initially clearly signal a legislative intent to limit the scope of the term "application" to quasi-judicial applications as exemplified by the specific reference to "building" and "conditional use" permits, which operate only in the quasi-judicial permitting context. See, *State v. Hutchins*, 214 Or App 260, 267, 164 P3d 318 (2007), *rev. den.* 346 Or 590, 214 P3d 822 (2009).²
- i. In statutory construction, the "*ejusdem generis* rule" is that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. Black's Law Dictionary Online, 141 <http://thelawdictionary.org/ejusdem-generis>. This rule is particularly appropriate when the term "other," "other thing," "others," or "any other," is preceded by a specific enumeration. *McGrath v. Electrical Construction Company*, 230 Or 295, 364 P2d 604 (1961), *Kirkley v. Portland Electric Power Co.*, 136 Or 421, 298 P 237 (1931) (in construing statute that made it unlawful to drive a vehicle with any sign, poster or other nontransparent material" on the front windshield, driving with a sleet-covered windshield was not within the purview of the statute). In such cases, the term "other" is limited by the general nature of the term previously enumerated. While it might be preferable to have a broader list from which to divine a common trait or characteristic, courts have sometimes applied the principal when there was only a single enumerated term prior to the catch-all phrase. See, e.g., *McGrath, supra*, 610 (single reference to "industrial accidents" in front of catchall reference to "all other claims" was sufficient to preclude recovery of economic damages not related to "industrial accidents"). In this case, the specific term "building permit" and the repeated reference to the term "permit" immediately following the term "application" provides ample identification of the nature of applications being referenced and they do not include legislative applications.

change applications as well as quasi-judicial applications that change would have been included in the district designation procedures as well, but it wasn't.

² See footnote 1 with reference to why the changes in Ord 88-008 do not change this analysis.

- j. Under the related statutory construction rule of *noscitur a sociis* ("a thing is known by its associates"), a reviewing court looks to the words immediately surrounding the text at issue as a guide to legislative intent. *King City Rehab LLC v. Clackamas County*, 214 Or App 333, 341, 164 P3d 1190 (2007). In this case, in addition to the terms discussed above under the rule of *ejusdem generis*, the DCC 2.28.060(A)(2) includes a description of the type of situation intended to be addressed by the provision, where the application or permit is one that "might be affected by a historical designation" under DCC Chapter 2.28. Application for a historic designation does not in itself affect an application for a legislative text amendment to add a specific use to a zoning district. In addition, in this case, as set forth below, there is a factual issue as to whether the pending text amendment would even effect COID's current "piping" proposal for which COID is seeking the text amendment.
- k. The term "application" is used in numerous places in DCC Chapter 2.28. In all such additional uses of the term, it references applications that are quasi-judicial permit applications. See, e.g., DCC 2.28.090(B), (C), (F), (G) and (H), DCC 2.28.100(A), (B), (C), (D) and (F). There is not a single use of the term "application" to refer to an application involving a legislative text amendment. Under well-established rules of statutory interpretation, the same word or words appearing in a law or related laws are generally given the same meaning. *Penland v. Redwood Sanitary District*, 327 Or 1, 956 P2d 964 (1998).
- l. The term "permit" is used elsewhere in DCC 2.28.060(A)(2) and in Chapter 2.28 to refer to approval of specific development or construction activity. See, e.g., DCC 2.28.090(D), DCC 2.28.100(A), (B), (E), (F) and (G). This provides context for the meaning and applicability of the term "permit" found in DCC 2.28.060(A)(2) and provides a basis for characterizing "permit" as used therein to refer to approval of specific development or construction activity. *Penland, supra*.
- m. Given the foregoing, there is a strong basis for interpreting the restrictions of DCC 2.28.060(A)(2) as not applying to applications for legislative text amendments to the zoning code.

B. Factual Inquiry

- a. COID has applied for a text amendment to allow for piping in the County's Title 19 SR 2 ½ zone as an outright permitted use. At the same time, COID has put forward a proposal to expand its existing Juniper Ridge Hydroelectric Project on a Pilot Butte Canal segment lying within the SR 2 ½ zone, which involves piping the canal to achieve hydrostatic head for hydropower

development. This project has been determined by LUBA to be a hydropower facility that requires conditional use approval in the SR 2 ½ zone. *Curl v. Deschutes County*, ___ Or LUBA ___ (slip opinion 2013-86/95, March 20, 2014). Accordingly, as proposed, COID's text amendment at issue is irrelevant to COID's desire to allow for County land use approval of COID's proposed expansion of the Juniper Ridge Phase II Hydroelectric Project.

- b. Under these circumstances, even if a legal interpretation were to determine that DCC 2.28.060(A)(2) were to apply to legislative text amendments of the County's zoning code, any failure of the text amendment would not negatively affect COID's Juniper Ridge Phase II Hydroelectric Project, because there was never a chance that that project could be approved under the pending piping text amendment. Accordingly, if the intent of DCC 2.28.060(B)(2) is to guard against a pending development action from being defeated by a late-filed historic designation application, the instant case is not an example of such a situation.

C. Fairness Argument:

- a. Why should one side be able to shut out the other side when they have competing legislative proposals that may or may not affect the same historic resource?
- b. In a legislative setting, a person concerned with a historic resource but that does not allow a use that might injure that resource can confidently rest upon his knowledge that he is protected by the current code and need not make a filing for historic projection. Interpreting this provision in a manner that locks out any possibility for seeking historic preservation once a development proponent proposes to change the status quo unfairly upends the status quo in favor of the development interest.

- (I) The Landmarks Commission shall compile and maintain a current list of all historical districts, buildings and sites which have been so designated pursuant to this ordinance with a brief description of the district or site and the special reasons for its inclusion on the list. If lists of archaeological sites are developed, they would not have to be made public, pursuant to appropriate state and federal laws.
- (J) The Landmarks Commission shall notify all property owners of sites recommended for designation of such recommendation.
- (K) The Landmarks Commission shall have authority to take such steps as it finds appropriate or necessary to make available to the public information concerning its activities and various districts, buildings and sites to be designated pursuant to this ordinance.
- (L) The Landmarks Commission shall prepare, review and adopt guidelines, criteria or such other statements of policy as may be appropriate relating to the designation, development or preservation of historical districts, buildings and sites within nine months from the date the Landmarks Commission is fully appointed. Such guidelines criteria or policy statements shall not take effect until reviewed and approved by the Board of County Commissioners.
- (M) The Landmarks Commission shall assist and coordinate the work of district advisory councils with respect to historical districts.
- (N) The Landmarks Commission shall perform such other duties relating to historical districts, buildings and sites as the Board of County Commissioners may request.

SECTION 4. Designation of Historical Building or Site.

- (A) Upon receipt of a request to designate a particular building or site as an historical building or site, or upon direction by the Board of County Commissioners or the pertinent city council, the County Planning Department shall advise the owner of such building or site, abutting owners, the county and pertinent city planning commissions, and shall fix a date and time for a public hearing before the Landmarks Commission and the pertinent city council thereon. The Landmarks Commission shall hear and decide all proposals for designation as an historical building or site.
- (B) Each city council in the county shall have the opportunity to hold a public hearing or make a recommendation for any requested designation of an historical site within its adopted urban growth boundary.
- (C) At such public hearing the owner of the property involved, the owners of all abutting property, a representative of the Landmarks Commission, a representative from Deschutes County or the pertinent city, and a representative from the city or county building department shall be entitled to be heard, as well as all other interested parties.
- (D) Any request for historic designation must be filed with the Landmarks Commission before the date of application for any building, conditional use or any other application or permit which might be affected by such historic designation.

Exhibit A

Appendix "B", attached hereto and by this reference incorporated herein.

Section 7. Section 2.28.035, Deschutes County Code, Request for historical designation.

- A. Any person may request that a district building and/or structure or site be designated on the Deschutes County Inventory of Historic Places. A designation request may also be made to the landmarks commission, the board or city councils of Bend, Redmond or Sisters.
- B. A request for historical designation shall be in writing and, in all cases, transmitted to the landmarks commission.
- C. If the request for historical designation is made by a person other than the owner of the building, site or buildings/sites in a district, a copy of the request shall be sent to the owner.

Section 8. Section 2.28.040, Deschutes County Code, Historical building or site - Designation procedure, is amended to read as follows:

"A. Upon receipt of a request from the landmarks commission to designate a particular building or site as an historical building or site within Deschutes County or pertinent city, or upon direction by the board of county commissioners or the pertinent city council, or on its own motion, the Planning Division shall fix a date and time for a public hearing before the board of county commissioners on a particular building or site recommended for designation.

B. Any request for historical designation must be filed with the County Planning Division and/or pertinent city planning department before the date of application for any building permit, or any other application or permit which might be affected by such historical designation.

C. The Planning Division shall notify, in writing, the owner of the property, the Deschutes County Planning Commission and/or pertinent city planning commission, and shall transmit a copy of the request to the landmarks commission unless such a request for historical designation has come from the landmarks commission.

D. The landmarks commission shall submit its recommendation to the board and/or pertinent city

**Pilot Butte Canal Preservation Alliance (PBCPA) Historic Preservation Application
Threshold/ Jurisdictional Issues on Review
January 28, 2015**

"Owner" Consent Provision of ORS 197.772(2)

Bruce White, Attorney for PBCPA

A. "Get in the door" issues:

- **DCC 22.08.030(D)**
 - a. COID asserts that PBCPA's application is void under DCC 22.08.030(D) and cannot be renewed.
 - b. COID mischaracterizes the nature of the instant application. The instant application is an entirely new application and does not constitute an attempt to supply additional information to support a pending application. Accordingly, there is no basis for COID's argument under DCC 22.08.030(D).
 - c. Under DCC 22.28.040, an applicant can file a new application without restriction at any time after a previous application for the same proposal has been rejected.
- **DCC 22.08.010**
 - a. COID asserts that the PBCPA application is not supported by an adequate number of signatures to support the application. This is not true -- there is at least one signature for each property for which designation is sought -- but in any event landowner signatures are not required as a jurisdictional issue under DCC 22.28.010(B)(1). By its terms, the owner signature requirement applies only to quasi-judicial "development" or "land use action" applications. Under Title 22, "legislative changes" may be initiated by application of unspecified "individuals" upon payment of required fees. DCC 22.12.030. No connection to any particular properties is required.

B. "Staying in the door" issues:

- **"Property Owner" consent under ORS 197.772.**
 - 1. **Response to COID Letter**
 - a. See the October 27, 2014 letter of BWW outlining PBCPA position on this issue. The analysis contained herein constitutes an initial response to the analysis contained in COID's letter of November 14, 2014.

- b. As an initial factual matter, there is no question that the residential property owners own fee title to the property covered by the canal. (See representative title report for Pell property, tax maps, representative tax statement for Curl property and statement by County cartographer Greg Rossi in Burden of Proof and associated exhibits filed with PBCPA application.)
- c. The PBCPA letter focuses on the meaning of the term "property owner" as set forth in ORS 197.772 with specific analysis of the text and context of the term. As a general characterization of COID's response, that response does not analyze the actual text or context of the term "property owner" under ORS 197.772, but instead seeks support from "authority" that is not relevant to the meaning of the term "property owner" contained in ORS 197.772.
- d. The *Baker v. Washington County* LUBA case provides no support for COID's reading of ORS 197.772 because that decision is focused on the meaning of "property owner" as set forth under the Washington County Code and not ORS 197.772 and arises in the context of who must sign a quasi-judicial application for development rather than consent to a historic designation application (which need not be demonstrated at the time of actual application) under ORS 197.772. Because the issue at bar was whether the fee title owner must consent as a "property owner" to the filing of a development application and no party raised the issue of whether the easement holders constituted "property owners", the decision did not analyze whether the easement interest qualified the easement owner as a "property owner" but merely assumed that to be the case. Accordingly, the case is simply inapposite to any argument that an easement holder is necessarily included within ORS 197.772's reference to "property owner".
- e. The Deschutes County Hearings Officer's decision in Case No A-10-2 (Marvin Emil Smith) does not support inclusion of easement holders within the ORS 197.772 reference to "property owner". That case was decided under the definition of "property owner" under the Deschutes County Code with reference to who must sign an application to get an application in the door. This analysis is simply irrelevant to the interpretation of the state law reference to "property owner" contained in ORS 197.772. **The County Code provisions at issue in *Smith* were not analogous to the ORS 197.772 reference to "property owner". Moreover, as a legal matter, definitions in County Code do not control or have a bearing on the meaning of terms included in state statute. In addition, the local code provision analyzed by the Hearings Officer in A-10-2 serves a different purpose than the reference to "property owner" contained in ORS 197.772. The former is a jurisdictional determination required in order to determine whether a development application could be filed; the latter concerns a determination that needs to be made at some point in the hearings process as to whether a historic designation can be applied to the property.**¹ The Hearings Officer expressly noted in her decision in *Smith* that references to property ownership in the County's land use

¹ See jurisdictional bullet point below.

procedures code arise in different contexts and that in some cases (but not in that particular case) the issue of property ownership is determined solely with reference to owners as listed in the County assessors tax roll. *Smith*, p. 11, n. 8. Accordingly, the local *Smith* Hearing Officer decision provides no support for COID's argument that holders of an easement are necessarily included within ORS 197.772's reference to "property owner".

- f. COID dismisses PBCPA's textual analysis based upon the *Baker* and *Smith* decisions without any analysis of the PGE interpretation methodology or the specifics of the context examined in PBCPA's analysis.² That textual analysis shows that the term "property owner" in the land use context frequently refers to owners as "owners as shown on the most recent tax assessment roll". Accordingly, COID's argument is inadequate to counter PBCPA's textual analysis regarding the meaning of "property owner" under ORS 197.772. COID's bald assertion that the term "property owner" has been "clearly defined" has no basis, given the open-ended, undefined nature of the term as used in ORS 197.772.
- g. With regard to the nature of the easement in question and what law should be looked at to assist in describing the attributes and scope of the easement, COID disavows the *Alvis v. Swalley Irrigation District* Federal District Court precedent as having any bearing on interpretation of easement interests conveyed by the federal irrigation conveyance grants. This argument ignores the fact that the Federal District Court found it necessary to look to Oregon easement law in order to determine the scope of Swalley's irrigation easement rights. During the text amendment proceedings and at LUBA in *Curl v. Deschutes County*, COID repeatedly asserted *Alvis* as authority supporting its proposed piping actions. It is disingenuous for COID to now back away from that case when aspects of the case constitute an "inconvenient" reality for it. COID does not argue that it has a fee interest in the canal property; this leaves an easement interest – as the court in *Alvis* rightly found -- as the only applicable analogous property interest.³ COID's argument provides no basis in the text or context of the language of ORS 197.772 or its related statutes that the ORS 197.772 reference to property owner refers to anything less than a fee title interest in property.
- h. In addition, COID mischaracterizes the Court's decision in *Alvis*. Contrary to the District's assertion, the decision did not establish an irrigation district's "plenary authority" to use their rights of way for irrigation purposes, but expressly found that the

² This is similar to COID's refusal, expressly noted by LUBA, to engage the Petitioner's argument in *Curl v. Deschutes County*, _ Or LUBA _ (2014) (Case No. 2013-86/95, March 20, 2014) that the proposed canal piping constituted a "hydroelectric facility". One can certainly draw a strong inference here that COID simply has no good argument to counter PBCPA's contextual analysis.

³ COID argues that there is a difference between a federally granted right-of-way and an easement, but provides no information as to what that difference may be. Interestingly, in written materials drafted for a presentation Ms. Dickson made to the Special Districts Association in 2012, she makes several references to rights-of-way as if they are the same as easement interests. See Exhibit 7, pages 1 and 3.

irrigation's district's authority to make "system improvements" was limited by whether such improvements would as a factual matter increase the burdens of the easement burdening the underlying property owners. In *Alvis*, the Court found that the underlying property owners had not demonstrated that piping of the canal would increase the burdens they bear as the holders of servient easement interests on the property.⁴ In this case, COID has made no effort and shown no inclination to establish through declaratory proceedings, as Swalley did in *Alvis*, that its piping proposal falls within the scope of its easement rights.⁵

- i. COID continues to mischaracterize the historical designation owner consent provision as a jurisdictional requirement for filing of the designation application when in actuality the determination is a substantive one as to whether a historic designation can be applied to the subject property. Specifically, the administrative rule implementing the historic landmarks designation process requires notice to landowners as part of the process and requires local governments to "allow owners of inventoried historic resources to refuse historic resource designation at any time prior to adoption of the designation" (emphasis supplied) and precludes inclusion of a site on a list of significant historic resources if the owner of the property objects to its designation. See OAR 660-023-0200(4), (5).
- j. COID does not counter PBCPA's analysis and interpretation of OAR 660-023-0200(5).

2. Response to County Decision

- a. For the same reasons set forth above in paragraphs c, e and f in response to the COID position, the County's reference to the Emil Smith decision and the local definition of a property owner is a non-starter. The provision in question is a matter of state-enacted law. Accordingly, the state law provision at issue can only be interpreted in light of state law and not as the County supposes in its decision by referring to definitions in the County's code and decisions made under the County Code by the County Hearings Officer.
- b. With regard to language in OAR 660-023-0200(5), PBCPA stands by the analysis on page 5 of its letter of October 27, 2014.

⁴ From reading the decision, it appears that the property owners put on no evidence as to the increased burden they would suffer from piping of the canals, as the court relied solely on the representations of the irrigation district that no additional burdens would accrue to the property owners if piping were to be allowed.

⁵ COID's failure to address that issue may be because it realizes that due to topographical changes to affected properties resulting from burying the 9-foot diameter of the pipe (twice the diameter of the pipe in Swalley), increased maintenance responsibilities of property owners to care for the new ground created by the earthen berm hiding the pipe, the imposing nature of the pill box-like concrete vault forebay mounted on top of the berm resulting from burying the pipe and the uninsurable risks associated with potential failure of the earthen berms leading into the forebay that it simply cannot make the required showing.

BRUCE WHITE, ATTORNEY, LLC

October 27, 2014

Via Hand Delivery (as an Exhibit to the
PBCPA application for historic designation
of the Pilot Butte Canal) and by separate email

Nick Lelack
Director, Community Development Department
Deschutes County
117 NW Lafayette Ave.,
Bend, OR 97701

Peter Gutowsky
Deschutes County Planning Division
117 NW Lafayette Ave.
Bend, OR 97701

Dear Nick and Peter:

I have been asked by representatives of the Pilot Butte Canal Preservation Alliance (PBCPA) to assist in filing an application made by various property owners to have a segment of the Pilot Butte Canal located in Deschutes County designated and protected as a historic resource under Goal 5. In response to a prior submittal made on behalf of PBCPA earlier this year, the County summarily rejected the PBCPA application on the grounds that the Central Oregon Irrigation District (COID) had indicated in writing that it would not consent to such a designation and that pursuant to OAR 660-023-200 the application must be rejected.

At the time, in her letter of April 22, 2014 and in her submittal, Pat Kliewer provided evidence that the ownership of the canal area lay with the underlying residential property owners (see Exhibit 16-1 attached hereto). In its short letter of April 14, 2014, COID asserted ownership of the canal property that was the subject of the historic designation application, but provided no facts or supporting documentation to back up that assertion (See Exhibit 16-2, attached hereto). Despite the applicant's more thorough analysis of this issue, the County summarily rejected the PBCPA application and refused to process it.

At this time, the PBCPA wishes to renew its application. To counter COID's expected negative response and to assist county staff in responding, this letter provides a legal analysis demonstrating that COID has no veto power under ORS 197.722(1) to cause this designation application to be rejected by the County. If after reviewing this letter and any response by COID thereto, County staff still believes there to be an issue as to COID's authority under ORS 197.722, the proper response is to not summarily reject the application but to instead refer the matter to the hearings body for resolution. Given the detailed nature of the arguments made herein, there can be no question that the PBCPA application is complete as it relates to this issue.

P.O. BOX 1298 • BEND, OR • 97709
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(1) A textual Analysis of ORS 197.722 does not support a claim that COID consent is required.

ORS 197.722(1) reads as follows:

"Notwithstanding any other provision of law, a local government shall allow a property owner to refuse to consent to any form of historic designation at any point during the designation process. Such refusal to consent shall remove the property from any form of consideration for historic property designation under ORS 358.480 to 358.545 or other law except for consideration or nomination to the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.)."

An analysis of the terms "property" and "owner" shows that under their common usage and understanding they refer to real property ownership in fee title. In the absence of any specific definition, words of common usage are given their "plain, natural, and ordinary meaning". *Portland General Electric (PGE) v. BOLI*, 317 Or 606, 611, 859 P2d 1143 (1993)¹. In this case under the ordinary usage of those terms, COID is not the "owner" of a "property". As it relates to real property, the term "owner" commonly refers to the owner in fee title. (See, e.g., the term "owner" as defined in *Webster's Third New International Dictionary*, (Springfield, MA: G & C. Merriam Co., 1966), p. 1818,² referred to hereinafter as "Webster's") Common dictionary definitions of the word "property" typically refer to property in fee title. (See, e.g., the term "property" as defined in Webster's.³) In order to apply to COID's easement ownership, the language would need to include the phrase "owner of an interest in property". Under accepted standards for statutory interpretation, it is not permissible to in effect insert language into a statute in the guise of interpretation. ORS 174.010.

In addition, the context of the term "property owner" supports such a reading. Textual context is part of the first level of statutory interpretation under the PGE methodology of statutory interpretation. *PGE, supra*. The context of ORS 197.722(1) includes the balance of ORS Chapter 197, ORS Chapters 215 (relating to land use regulation by counties) and 227 (relating to land use regulation by cities) and ORS 195.300 et seq. (just compensation for land use regulation) as statutes bearing on the same subject matter. *PGE, supra*. In the land use statutory scheme, the term "property owner" has consistently referred to the owner in fee title, both before the enactment of ORS 197.722(1) and after. For example, ORS 197.195 (relating to limited land use decisions) was adopted during the same legislative session as SB 588. Significantly, ORS 197.195(3)(b) contains a notice provision that requires notice to be sent to "owners of property" within 100 feet of the subject site. The statute goes on to define those owners as

¹ See also, Deschutes County Code (DCC) Section 1.04.030.

² There, the term "owner" is defined as "one that owns: one that has the legal or rightful title whether the possessor or not".

³ There, the term "property" is defined as follows:

"a : something that is or may be owned or possessed: WEALTH, GOODS; specif: a piece of real estate . . . c : something to which a person has legal title: an estate in tangible assets (as lands, goods, money) or tangible rights (as copyrights, patents) in which or to which a person has a right protected by law." Webster's. p. 1612.

being the owners as shown on the most recent property tax roll.⁴ ORS 197.195(3)(b). The same is true of the description of "owners" entitled to notice of expedited land divisions, also adopted in the same legislative session as SB 588. See ORS 197.365(2)) and owners who are entitled to notice generally in local quasi-judicial land use proceedings under ORS 197.763(2)(a) (adopted in 1989).

Similar references to the term "property owner" appear in ORS Chapter 215, dealing with land use regulation by counties. For example, the procedures outlined for zone changes refer to such proceedings being initiated by the request of "a property owner" and requires that in such instances, notice be given to adjoining "record owners of property". ORS 215.223(3). The statute distinguishes between the fee ownership of the zone change initiator and the possessory interests of certain tenants. ORS 215.223(7). ORS 215.293 requires "landowners" of land on which dwellings in the EFU zone are to be located as needing to sign and record in the deed records a document binding the landowner to not pursue any tort claims related to accepted farm and forest practices. ORS 215.293. County land use procedures are required to give notice of land use decisions to "the owners of record of property on the most recent tax assessment roll". ORS 215.416(11)(c)(A).

These enactments were all made prior to the enactment of ORS 197.722(1) and as such provided the context known to the Legislature when it chose to use the term "property owner" in adopting ORS 197.722(1). To be valid as an indicator of legislative intent, such related statutes must have been enacted contemporaneously or prior in time to the subject enactment. *Stull v. Hoke*, 326 Or 72, 79-80, 948 P2d 722 (1997). In this case, the referenced statutes were all enacted either contemporaneously or prior in time to ORS 197.722(1).

In this case, the facts show that COID does not own fee title to the beds and banks of the Pilot Butte Canal. A representative title report shows that the title company in that case believes the owners of the underlying property are vested in fee title to the property on which the canal sits. (See Exhibit 15 to PBCPA burden of proof in application for historic designation.) The tax lots are all drawn on the assessors' tax maps showing the canal property as being part of the underlying property owners' property. (See Exhibit D to PBCPA application form.) The underlying property owners all pay ad valorem real property taxes on the property occupied by the canal.⁵ The deeds held by the underlying property owners all include in their description the property occupied by the canal to the centerline of the canal. (See Exhibit E to PBCPA application form.)

(2) Analysis of easement law shows that an easement holder does not hold fee title to any property.

In *Swalley Irrigation District v. Alvis*, the Federal District Court construed an irrigation right-of-way grant identical to that claimed by COID in this case. *Swalley Irrigation District v. Alvis*, Civ. No. 04-1721-AA (D. Or, March 1, 2006). In that case, the court deemed it appropriate to analyze the parties respective rights to the right-of-way under Oregon easement law. Under the common law of easements

⁴ The tax rolls show only ownership in fee title or buyers who by land sale contract have contracted to buy the fee title of property.

⁵ This was verified for me by Greg Rossi of the Deschutes County Assessor's office. We reviewed a representative tax account for the Curl property (Property 30 in the BOP) (Tax Lot 171215AA00703) and found that the area assessed for ad valorem tax purposes was the same as the area shown on the plat for net acreage (after deducting the area occupied by the road). (See DIAL report, Exhibit 15A of the PBCPA burden of proof.)

in Oregon, it is clear that easement holders do not acquire a fee title interest in the property that is the subject of an easement such that they could be referred to as the property "owner". See, e.g., *Marshall v. City of Yachats*, 973 P2d 374, 158 Or App 151 (1996), *rev. den.* 987 P2d 514 (an easement creates a right to use another's land but leaves title to the land itself in the owner of the fee). The easement holder's rights are limited to being "what is necessary for the reasonable and proper enjoyment of the easement, but the servient property owner retains the right of full dominion and use of the subject land, limited by those rights in the easement holder essential to the easement holder's fair enjoyment of the easement right. *Craft v. Weakland*, 23 P3d 413, 174 Or App 185 (2001), *Watson v. Banducci*, 973 P2d 395, 158 Or App 223. These principles have been expressed in Oregon case law going back decades. See, e.g., *Gamma Alpha Bldg Ass'n v. City of Eugene*, 184 P 873, 94 Or 80 (1919) (the conveyance of an easement in land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose no inconsistent with the easement).

Accordingly, when the Legislature enacted ORS 197.722(1), it did so in a legal context that clearly defined property ownership relative to easements. See *Fresk v. Kraemer*, 337 Or 513, 520, 99 P3d 282 (2004) (a statute's context also includes the common law in existence at the time the legislature enacted the statute). Under such circumstances, courts generally construe statutes "in a manner consistent with the common law, absent clear legislative intent to the contrary." *State v. Ford*, 310 Or 623, 637 n 21, 801 2d 754 (1990). In this case, there is no demonstrated legislative intent that "property owner" means anything other than what it says.

In this context, the Legislature's general reference to "property owner" can only mean the owner in fee title and not the holder of an easement interest in land, such as that held by COID in this case.

(3) As a factual matter, COID is the owner of nothing as it relates to the properties over which its easement crosses.

In this case, the subject of the easement and of this historic designation request is an earthen ditch excavated out of the ground on which the ditch sits. It lies on property that is owned in fee title by each of the underlying property owners (all of whom own to the center of the canal, which divides ownership between properties on opposite sides of the canal). (See Title Report, Exhibit 15 to PBCPA historic designation burden of proof and plats included as Exhibits 4 – 8 of the same.) As explained earlier in this letter, the property owners all pay property taxes on the canal portion of the underlying properties. Although the ditch may be viewed as a "structure", given that it is an artificial vessel through which water flows, it is an intrinsic part of each of the underlying properties and constructed largely with natural materials from those underlying lands and does not have a separate existence from those lands. (See photos in Exhibit 9 of the PBCPA burden of proof.) As it relates to the beds and banks of the segment of the Pilot Butte Canal at issue, there is nothing for COID to separately "own". The canal is an integral part of the underlying owners' property.

(4) OAR 660-023-0200(5) provides no basis for requiring COID's consent.

In its April 14, 2014 letter, COID referenced OAR 660-023-0200(5) in support of its contention that its consent was required. That administrative rule reads as follows:

October 30, 2014

"Local governments shall allow owners of inventoried historic resources to refuse historic resource designation at any time prior to adoption of the designation and shall not include a site on a list of significant historic resources if the owner of the property objects to its designation."

OAR 660-023-0200(5).

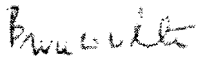
At first blush, the phrase "owners of inventoried historic resources" might tempt one to construe the rule to allow a broader reach of the consent provision to include "resources" other than those that are possessed by an underlying property owner. However, the inclusion of the term "owner" and the later reference in OAR 660-023-0200(5) to the owner as the "owner of the property" shows that the policy expressed in the administrative rule is no different than that expressed in the statute. To focus on the phrase "owners of inventoried historic resources" to the exclusion of the phrase "owner of the property" in interpreting the rule to the effect that consent could be required of a purported "owner" or possessor of some property interest other than fee title would have the effect of reading the phrase "owner of the property" out of the rule, which is not allowed under maxims of statutory construction. ORS 174.010 ("where there are several provisions or particulars [in a statute] such construction is, if possible, to be adopted as will give effect to all"). In addition, under that same rule of construction, enactments are to be construed to harmonize the statutes in an effort to give effect to all of the language in an enactment. *Daly v. Horsefly Irrigation District*, 143 Or 441, 445, 21 P2d 787 (1933). In this case, the administrative rule can be harmonized by construing the term "inventoried historic resources" to refer to the manner in which candidate properties are referenced or listed and not as a term of description defining who is required to give consent.

(5) Conclusion: COID has no substantive right to veto a designation by withholding its consent

For all the reasons set forth above, there is no requirement that COID consent to any designation of the subject Pilot Butte Canal segment as a historic resource.

Thank you for your consideration of this letter.

Sincerely,



Bruce W. White

c. Clients
David Doyle

January, 27, 2015

Curtis and Stacy Pell
20985 Scottsdale Dr.
Bend, OR 97701

VIA HAND DELIVERY

Commissioner Tony DeBone
Commissioner Alan Unger
Commissioner Tammy Baney
Deschutes County Board of Commissioners
1300 NW Wall Street, Suite 200
Bend, OR 97701

Dear Commissioners DeBone, Unger, and Baney:

We are writing today to provide testimony for the January, 28, 2015 discussion regarding designating a section of the Pilot Butte Canal as a Goal 5 historic resource.

There are two issues that are holding up the application, the first is a question of property ownership. The idea that there can be multiple, unrelated owners for a piece of property is wrong on its face. My wife and I are the owners of record of 20985 Scottsdale Drive in Bend, OR. I have attached a copy of our Deed as well as a Fee Title Document provided by our title company. Where is Central Oregon Irrigation District's (COID's) Deed for my property? The court has held that a right-of-way is not tantamount to fee simple ownership. The property referenced above is very clearly owned by Curtis and Stacy Pell alone.

The attached county plat map shows that my neighbors and I own all of the land in the request for historic designation. There are no property lines carving out the canal bed as having a different owner than my neighbors and us.

We pay property taxes on 2.51 acres including our property that the water runs over. What does COID pay in property taxes for my property? We contend they pay nothing in property taxes for this land.

I have attached a document from October 4, 1967 signed by COID President Arthur L. Horsell. This documents an agreement between COID and Deschutes County to allow a bridge over the canal on Old Deschutes Road. On page 2 of this document, President Horsell specifically denies that COID owns fee title to the land under the bridge ('IT IS EXPRESSLY UNDERSTOOD AND AGREED That the Grantor does not claim to be the owner in fee of said tract.'). COID cannot have it both ways. They can't have benefits of ownership without the responsibilities that go along with ownership. They can't contend they have ownership rights for some purposes (like denying an application for a Goal 5 historic resource) and not ownership responsibilities for other purposes. In its own words cited above, COID does not own fee title to the tract under the bridge. COID does not own fee title to any of the land in question.

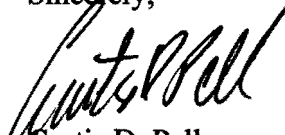
We have a number of easement holders for our property. They include our next door neighbors and The Pacific Power Company. They are not owners of record of our property either. They don't get to say 'no' to a designation that does nothing to change the nature and scope of their easements. COID should not have this right either.

The second issue preventing historical designation by the County deals with there being an application already in process. We disagree with staff's interpretation on this matter as we view TA 13-4, submitted by COID December, 2013, not as an "application" but as a request to change general zoning rules.

In summary, the two points that have delayed the designation of a section of the Pilot Butte Canal as a Goal 5 historic resource are not applicable in this case. We have shown that we are the sole owners of record for 20985 Scottsdale Dr. We have shown that our neighbors are owners of the rest of the land that the water runs over. COID is literally 'not on the map' in this situation.

We contend that TA13-4 does not qualify as an application, per se, that should derail this very specific, geographically-bounded Goal 5 historic resource request. It is a general zoning rule change request for the entire SR 2.5 zone. It is not, and cannot be, a specific application for future development.

Sincerely,



Curtis D. Pell



Stacy M. Pell

Enc.

SCHEDULE A

AmeriTitle
15 Oregon Avenue
Bend, OR 97701

File No.: 153877-RGS/kg
Policy No.: 73306-91480769

Address Reference
20985 Scottsdale Dr, Bend, OR 97701

Amount of Insurance: \$580,000.00
Premium: \$1,470.00
Date of Policy: JUNE 30, 2014 AT 1:10 P.M.

1. Name of Insured:

CURTIS PELL and STACY PELL

2. The estate or interest in the Land that is insured by this policy is:

A FEE

3. Title is vested in:

CURTIS PELL and STACY PELL

4. The Land referred to in the Policy is described as follows:

Lot Three (3), OLD DESCHUTES WEST, recorded February 11, 1999, in Cabinet E, Page 178, Deschutes County, Oregon.

SB153877LR

THIS SPACE RESERVED FOR RECORDER'S USE

AmériTitle

After recording return to:

Curtis Pell

20985 Scottsdale Drive

Bend, OR 97701

Until a change is requested all tax statements
shall be sent to the following address:

Curtis Pell

20985 Scottsdale Drive

Bend, OR 97701

Escrow No. SB153877LR

Title No. 153877

SWD r.020212

Deschutes County Official Records **2014-021035**

D-D

06/30/2014 01:10:37 PM

Stn=2 PG

\$10.00 \$11.00 \$10.00 \$6.00 \$21.00

\$58.00

I, Nancy Blankenship, County Clerk for Deschutes County, Oregon,
certify that the instrument identified herein was recorded in the Clerk
records.

Nancy Blankenship - County Clerk

STATUTORY WARRANTY DEED

Michael Hall Smith and Margaret Helen Smith,

Grantor(s), hereby convey and warrant to

Curtis Pell and Stacy Pell, as tenants by the entirety,

Grantee(s), the following described real property in the County of **DESCHUTES** and State of Oregon free of
encumbrances except as specifically set forth herein:

**Lot Three (3), OLD DESCHUTES WEST , recorded February 11, 1999, in Cabinet E, Page 178, Deschutes
County, Oregon.**

The true and actual consideration for this conveyance is **\$580,000.00**.

The above-described property is free of encumbrances except all those items of record, if any, as of the date of this
deed and those shown below, if any:

2014-2015 Real Property Taxes a lien not yet due and payable.

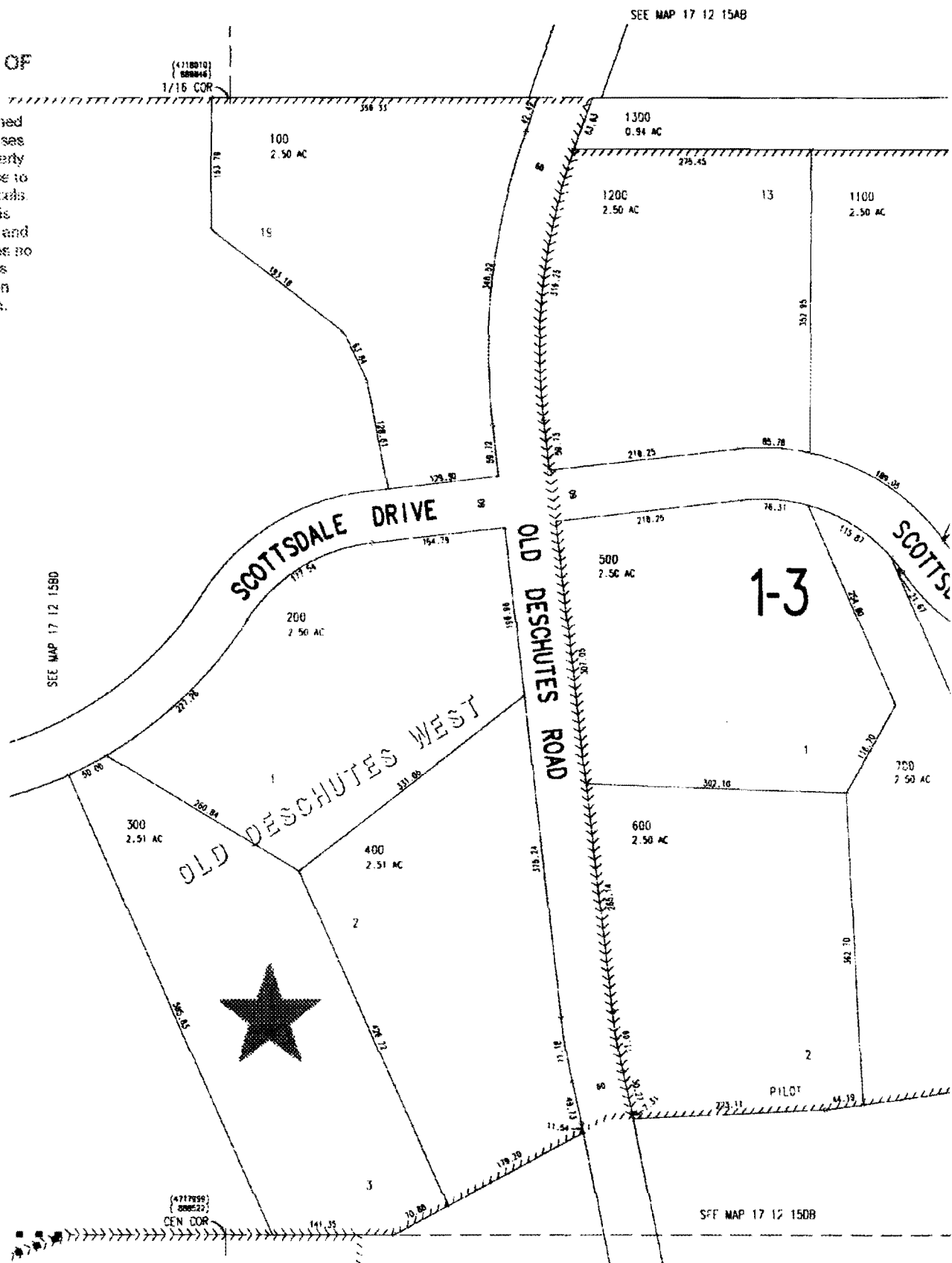
Return To
AmériTitle



COMPLIMENTS OF
AmeriTitle

This sketch is furnished
for information purposes
only to assist in property
location with reference to
streets and other parcels.

No representation is
made as to accuracy and
the Company assumes no
liability for any loss
occurring by reason
or reliance thereon.



These directions are for planning purposes only. You may find that construction projects, traffic, weather, or other events may cause conditions to differ from the map results, and you should plan your route accordingly. You must obey all signs or notices regarding your route.

166 314

AGREEMENT

THIS AGREEMENT, Entered into this 4th day of October, 1967, by and between DESCHUTES COUNTY, a Political Subdivision of the State of Oregon, hereinafter referred to as the "COUNTY", and CENTRAL OREGON IRRIGATION DISTRICT, a Municipal Corporation of the State of Oregon, hereinafter referred to as "C. O. I.", and in consideration of the mutual covenants contained herein, and,

WHEREAS, The COUNTY and C. O. I. desire to construct a bridge across the main Pilot Butte Canal in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15, Township 17 South, Range 12, E. W. M.; and

WHEREAS, The C. O. I. will execute an easement to the COUNTY for public use across its right-of-way as described above, at a point where there has existed a bridge in the past; and

WHEREAS, The anticipated cost of said bridge is \$2,500.00;

NOW, THEREFORE, IT IS AGREED as follows:

1. The COUNTY will construct said bridge and be responsible for the continuing maintenance of the bridge;
2. C. O. I. will pay to the COUNTY upon completion of the bridge the sum of \$1,000.00 for its share in the construction of said bridge;
3. The specifications of said bridge will be agreed upon by both C. O. I. and the COUNTY;
4. The C. O. I. agrees to granting to the COUNTY an easement for public use as long as the bridge is dedicated to public use;
5. C. O. I. and the COUNTY agree that this agreement will be in effect as long as the easement mentioned above in Paragraph 4 exists.

DESCHUTES COUNTY COURT

Arthur L. Horsell
Commissioner
Betty Stanard
Commissioner
Anthony G. Thomas
Commissioner

CENTRAL OREGON IRRIGATION DISTRICT

By Arthur L. Horsell
Arthur L. Horsell, President
By Betty Stanard
Betty Stanard, Secretary

EASEMENT

VOL 155 PAGE 315

KNOW ALL MEN BY THESE PRESENTS, That CENTRAL OREGON IRRIGATION DISTRICT, a municipal corporation, Grantor, for valuable consideration, does hereby grant and convey to DESCHUTES COUNTY, a political subdivision of the State of Oregon, its successors in interest, the following easement, to-wit:

The right to construct and maintain a bridge, as now located, over and across the Pilot Butte Canal, the point of intersection with the center line of the Pilot Butte Canal being 472 feet West and 108 feet North of the Southwest Quarter Northeast Quarter of Section 15, Township 17 South, Range 12, E. W. M., Deschutes County, Oregon.

Together with the right in the public of ingress and egress over and across said bridge at said location; provided, however, that such crossing, right of ingress and egress and maintenance thereof shall not interfere with operation of said Canal by the Grantor, and expressly reserving to the Grantor the joint use of said bridge with the public.

IT IS EXPRESSLY UNDERSTOOD AND AGREED That the Grantor does not claim to be the owner in fee of said tract.

The acceptance and use of this grant shall constitute a waiver on the part of all the users of said bridge of any claims or demands arising out of the use thereof, and/or the operation of said Canal by the Grantor.

DATED This 4th day of October, 1967.

CENTRAL OREGON IRRIGATION DISTRICT

By Arthur L. Horsell
Arthur L. Horsell, President

By Betty Stanard
Betty Stanard, Secretary

STATE OF OREGON, County of Deschutes) ss. October 4, 1967

Personally appeared Arthur L. Horsell and Betty Stanard, who, each being duly sworn, did say that he is the President and she is the Secretary of Central Oregon Irrigation District, the within corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors; and they acknowledged said instrument to be its voluntary act and deed.

Before me:

John M. Copeland
Notary Public for Oregon. My Commission expires December 6, 1967

January 27, 2015

Deschutes County Commissioners
Anthony Debone
Tammy Baney
Alan Unger

Dear Commissioners:

Imagine moving to Bend, and finding a property adjacent to an old ranch (Overtree Ranch), with a freely flowing canal and beautiful pond. That was our family's first introduction to the beauty of this NE Bend neighborhood. We 'settled' here in 1998, and for the first few years, I remember riding horses with my Mom through the as yet undeveloped Overtree and Scottsdale Ranch Properties, and riding along the Pilot Butte Canal, with it's many waterfalls and rapids. We especially enjoyed seeing the old Overtree Ranch Pond, a stock pond created over 100 years ago for cattle grazing on the Overtree Ranch and the beautiful waterfall just downstream (now destroyed for an intake basin for COID's hydroelectric project in Juniper Ridge).

We liked the area and the running water so much, that when the Overtree Ranch development was built, we purchased the property which contained the historic Overtree Ranch Pond specifically for it's onsite historic pond and the running water in the canal beside it. Friends and neighbors purchased properties in a development called "Canal View". Why would you permit the recent development of these areas, and then allow COID to remove that feature from our property to put a hydroelectric project in our backyards, without being bound to the basic land use rules already in place?

I am writing to support the Application for Pilot Butte Canal's Historic designation. While you apparently have issue with the timing, it is precisely because of threats like the previously proposed TA-13-4 zoning change (that you cite as a reason to deny our request) that we need your help in protecting our neighborhood. A historic protection seems to be the only way we can find to stop this project from proceeding, and severely affecting our property values and the livability and marketability of our community. Like many of my neighbors, I have been in Bend a long time, and we have seen the development of the Juniper Ridge Hydroelectric project (phase 1, on public land) first hand. I was told by COID when they completed Phase 1, that they were done. Then they came back, and with a heavy hand of authority they told me that they now were going to do Phase two, in our yards "immediately, it's already approved", and that I needed to sign an agreement to let them excavate, or "they would put the pipe right on top of the existing canal"

They also lied to me and told me most of my neighbors had already signed similar agreements. When I pressed them (several times, in writing) for a working agreement of how they would be doing this project, how I would be held harmless from any damage they caused, how they were going to put this pipe in the canal with my 1 acre pond in their way, they continually promised to get back to me, but never once have put any such agreement in writing.

I have not signed any agreement for them to excavate my property, and I feel I could never be compelled to sign one under the current text amendment approval process. Based on my legal understanding and advice (after spending significant time and money to learn the facts), I do not believe COID has the legal right to modify the canal for this hydroelectric project, and they do not have the right to excavate my property to enable any part of a hydroelectric project.

Now COID is applying for permission through a Text amendment to do something they still contend they already have the right to do. If this was true, you would not be hearing this issue, and they simply would have already been digging in my backyard. This is now the second year that I have been prevented from making an effort at the possible sale of my home because of the uncertainty of this issue and the disclaimer I would have to file if I listed my property.

Despite clear signs from LUBA and your own planning commission that TA-13-4 is not the right way to go about approving this project The Board of County Commissioners have failed to complete this decision, and are currently hindering the marketability of properties in these neighborhoods. Many residents like myself have taken significant time, effort and money to inform you of the illegal 'taking' of property this hydroelectric project represents, and why it is actually illegal for many reasons.

You have already received my attorney's letter outlining my position on this matter. Please review the serious legal issues raised related to this project, Including:

- Your responsibility to levy land use decisions and review land use activities within the county,
- That Oregon law prohibits Irrigation districts from using eminent domain to facilitate a hydropower project
- That an easement or right of way is not tantamount to fee simple ownership, and thereby, COID has no status to reject this Historic Application.

~~After review~~ After reviewing my legal position, I also feel compelled to tell you that I strongly feel that it would be unwise for me to participate in a mediation process with COID over the piping project because I believe they flatly do not have the authority to use a Text Amendment to change zoning in our area for this hydroelectric project. It is disingenuous for them to assume that if they mediate,

they somehow gain a way to pipe for hydroelectric profits on our property without going through the proper land use process. If at some time that they properly apply for and receive permission for their hydroelectric project with the county under the appropriate land use laws in place, I could foresee they would need to mediate or negotiate some incentive with the property owners as a part of completing their project in the least obtrusive way, as required by current law.

In addition, the current Historic Preservation applications are underway, and while an option might exist that would properly preserve my desire to NOT pipe the canal, I have no motivation to mediate on the current TA-13-4 plan, which will no doubt be tied up in court if approved, due to the serious legal issues already raised by LUBA and others, or if not approved, by COID as they try and find a way to use my property for their profits.

Until such time as they complete an application, go through the required land use processes and receive county approval for their hydroelectric project, and/or permanently remove their illegal text amendment request currently in abeyance with the county, it would be foolish for me to participate in the mediation process.

At this point, I consider COID a hostile easement holder, and look to the county to fairly help me defend my private property interest and that of the many other property owners against COID overstepping their right of way. As Commissioners, please step up and make a decision to deny the text amendment zoning change, and then consider the legally valid requests to protect the livability of this historic part of our community, which is so valuable to the residents of Deschutes County and the City of Bend, with approval of a historic designation application.

Remember, COID does not lose the ability to deliver water with a historic designation. This has been and continues to be their reason to exist, and they have no current legal right to our properties other than a "right of way" easement to maintain delivery of Oregonian's water. COID is a quasi-governmental entity, and is under your jurisdiction. Please hold them to the highest standard of forthrightness, a standard they have definitely not met in my eyes.

I am also fully aware of the objections that COID and others have raised to this nomination in regards to water conservation. If there were already a program in place whereby the county had piped their own land along the canal (miles and miles of it), and then asked me to participate in some type of water conservation as well, I might be more understanding to "do my part" to conserve water. However, it is ludicrous to argue that this historic short reach of the Pilot Butte Canal, which being the original portion, has the most historic value, but is imperative to their hydroelectric project, would be piped for "water conservation".

Let me reiterate the ways that I am personally invested in this situation:

1. I have paid taxes, which will go to piping my own backyard, via DEQ money already allocated to this project.
2. I have paid property taxes to the county, which has now spent hours of staff and board time listening to COID's arguments to do something that LUBA and your staff have deemed illegal.
3. I have paid an attorney for a solid legal opinion to try and protect my own and my neighbor's property rights and value.
4. I have suffered (and will suffer more) from a marked decline in my property value if you take the most valuable feature of my property (open water, historic canal frontage) and give it to COID for a hydroelectric project they are not chartered to operate on my property.
5. As a Customer of COID, I pay them fees and usage charges to continually lobby and hire lawyers to find a way around this illegality, and/or convince government and non-profit agencies to help them approve a right they do not have.
6. I pay property taxes on a bond for Juniper Ridge, a project that was supposed to include restoration of the piped canal's waterfall feature and a public water feature as part of COID'S mitigation for piping that reach of canal. No restoration has been done there thus far, and Juniper Ridge sits mostly empty, and devoid of any of the promised improvements. (The most recent-2008 Juniper Ridge master plan still promises these improvements)

Believe me, I love water and conservation principals as much as any Deschutes County Citizen. However, I don't believe COID or the County has the right to make me pay so much more than everyone else to achieve their "water conservation" and Hydropower generation goals, and I strongly urge you take away this threat to our community, by protecting this original historic stretch of AM Drake's Pilot Butte canal for our future generations to enjoy.

Sincerely,

Matt and Suzanne Gadow
63435 Overtree Rd
Bend, OR 97701

NATIONAL REGISTER NOMINATION EVALUATION SHEET
Certified Local Governments / Historic Landmark Commissions

The following property is being nominated to the National Register of Historic Places and will be reviewed by the State Advisory Committee on Historic Preservation (SACHP) at its meeting on 2/19/2015.

PROPERTY NAME: **PILOT BUTTE CANAL HISTORIC DISTRICT**

ADDRESS: **YEOMAN RD**
BEND, DESCHUTES COUNTY

☐ **OK** ☐ **Concerns** **INTEGRITY:** Major alterations or additions? New materials? Altered setting? Moved? etc.

☐ **OK** ☐ **Concerns** **DESCRIPTION:** Is the property adequately described? Have contributing and non-contributing features been clearly identified?

☐ **OK** ☐ **Concerns** **SIGNIFICANCE and CONTEXT:** Has the appropriate criterion been used? Has it been justified? Is the context sufficient in breadth and depth to support the claims of significance?

☐ **OK** ☐ **Concerns** **FACTS AND SOURCES:** Are the appropriate and best sources used? Are key dates and facts accurate?

☐ **OK** ☐ **Concerns** **SUPPORTING MATERIALS:** Adequate photos, maps, drawings, etc.?

_____ The Commission recommends that the property or properties appear to meet the National Register criteria and should be listed in the National Register.

_____ The Commission recommends that the property or properties do not appear to meet the National Register criteria and should not be listed in the National Register.

Return to: Oregon State Historic Preservation Office
ATTN: National Register Coordinator
725 Summer Street, N.E., Suite C
Salem, OR 97301

Signature of Commission Chairman (or Designee) Date

Name of Local Historic Preservation Commission

Public Hearing

File 247-14-000373-HS

Deschutes County
Board of County Commissioners
January 28, 2015





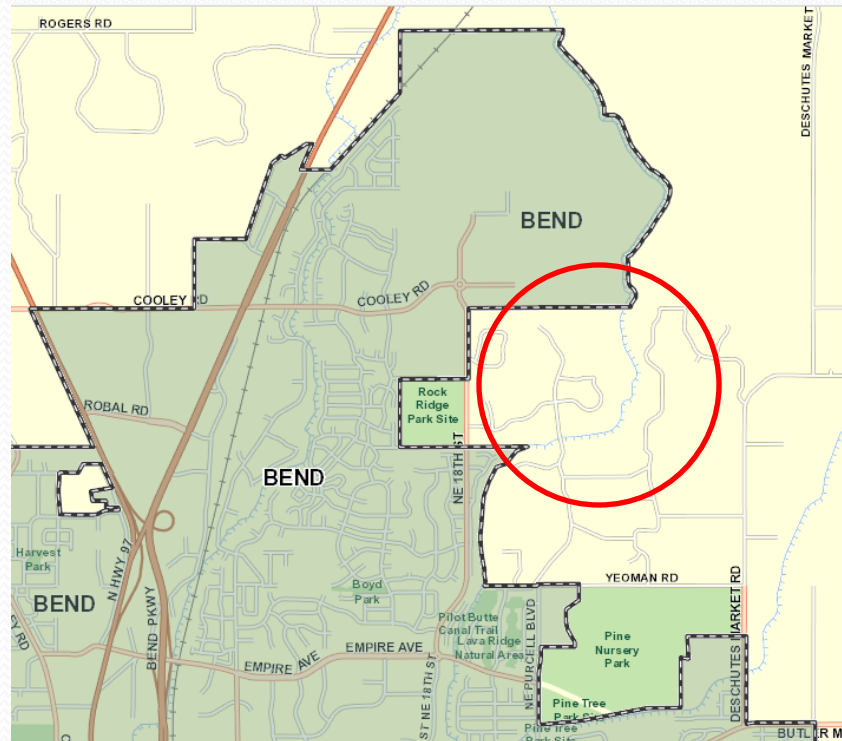
HEARING PROCEDURE

- **The Board's decision on this application will be based upon the record, Staff administrative decision, and the testimony and evidence presented at this hearing.**
- **The hearing will be conducted in the following order.**
 - 1. Staff will provide a brief report.**
 - 2. The applicant will present its testimony and evidence.**
 - 3. Opponents and proponents will testify and present evidence.**
 - 4. Other interested persons will then present testimony or evidence.**
 - 5. The applicant presents rebuttal testimony.**
 - 6. Staff will be afforded an opportunity to make any closing comments.**

Proposal

A Plan Amendment to Designate a Segment of the Pilot Butte Canal as a Goal 5 Historic Resource

Applicant: Pilot Butte Canal Preservation Alliance



Procedural Timeline

- | | |
|-------------------|---|
| 11/3/2014 | Application Submitted |
| 12/9/2014 | CDD Staff Issued Decision
Rejecting Filing of Application |
| 12/15/2014 | BOCC Issued Order Initiating
Review of Decision Rejecting
Filing of Application |

Issues Under Review

Issue #1 – Timing of Application Submittal

Are There Other Pending Applications That Might be Affected by Historic Resource Designation?

Issue #2 – Property Ownership

Is Central Oregon Irrigation District (COID) an Owner of the Canal Eligible to Refuse Historic Resource Designation of This Segment of Canal?

Applicable Criteria

Title 2 Deschutes County Administration Ordinance

Chapter 2.28. Historic Preservation and Historic Landmarks Commission

Section 2.28.020. Definitions.

“Property Owner”

Section 2.28.060. Procedures.

A. Historical Building or Site-Designation Procedure.

Issue #1

Timing of Application Submittal

Section 2.28.060. Procedures

A. Historical Building or Site- Designation Procedure

- 2. Any request for historical or cultural designation must be filed with the County planning division before the date of application for any building permit, or any other application or permit which might be affected by such historical designation.***

Issue #1

Timing of Application Submittal

Section 2.28.060. Procedures

A. Historical Building or Site- Designation Procedure

2. *Any request for historical or cultural designation must be filed with the County planning division before the date of application for any building permit, or any other application or permit which might be affected by such historical designation.*

Issue #1

Timing of Application Submittal

Text Amendment File TA-13-4

Submitted 12/23/2013

“...a text amendment to Deschutes County Code Chapter 19.20 Suburban Low Density Residential Zone – SR 2½ to allow the operation, maintenance, and piping of existing irrigation systems as an outright use within the zone...”

Issue #2

Property Ownership

Section 2.28.020. Definitions

"Property Owner" means the owner of record or the contract purchaser and does not include a person or organization that holds a security interest.

Issue #2

Property Ownership

Hearings Officer Decision A-10-2(NUV-09-1)

Decision found the holder of an easement across private property is an “owner of record” of an interest in the property, and therefore is a “property owner” as defined in DCC 22.08.010(A)

OAR 660-023-0200(5)

“Local governments shall allow owners of inventoried historic resources to refuse historic resource designation at any time prior to adoption of the designation and shall not include a site on a list of significant historic resources if the owner of the property objects to its designation.”

BOCC Decision Options

Issue #1 – Timing of Application Submittal

Are There Other Pending Applications That Might be Affected by Historic Resource Designation?

YES TA-13-4 might be affected by historic resource designation therefore this application cannot be filed while TA-13-4 is pending.

NO TA-13-4 will not be affected by historic resource designation therefore this application can be filed.

BOCC Decision Options

Issue #2– Property Ownership

Is COLD an Owner of the Canal Eligible to Refuse Historic Resource Designation of This Segment of Canal?

YES COLD is an owner of the canal and can refuse historic resource designation.

NO COLD is not an owner of the canal.

BOCC Decision Options

Issue #1 – Timing of Application Submittal

Are There Other Pending Applications That Might be Affected by Historic Resource Designation?

Issue #2– Property Ownership

Is COLD an Owner of the Canal Eligible to Refuse Resource Historic Designation of This Segment of Canal?



Deschutes County Board of Commissioners
1300 NW Wall St., Bend, OR 97701-1960
(541) 388-6570 - Fax (541) 385-3202 - www.deschutes.org

BUSINESS MEETING AGENDA

DESCHUTES COUNTY BOARD OF COMMISSIONERS

10:00 A.M., WEDNESDAY, JANUARY 28, 2015

Commissioners' Hearing Room - Administration Building - 1300 NW Wall St., Bend

1. PLEDGE OF ALLEGIANCE

2. CITIZEN INPUT

This is the time provided for individuals wishing to address the Board, at the Board's discretion, regarding issues that are not already on the agenda. Please complete a sign-up card (provided), and give the card to the Recording Secretary. Use the microphone and clearly state your name when the Board calls on you to speak.

PLEASE NOTE: Citizen input regarding matters that are or have been the subject of a public hearing will NOT be included in the official record of that hearing.

3. CONSIDERATION of Board Signature of Document No. 2015-083, a Notice of Intent to Award Contract Letter to Griffin Construction, LLC, for Tenant Improvements to the Redmond Unger Building – *Susan Ross, Property & Facilities*

Suggested action: Move Board signature of Document No. 2015-083.

4. CONSIDERATION of Approval and Board Signature of Document No. 2015-041, a Decision regarding an Appeal and Remand of the Millican Mining Rezone (4-R Equipment) – *Paul Blikstad, Community Development*

Suggested action: Move Board signature of Document No. 2015-041.

5. **A PUBLIC HEARING** on an Administrative Decision regarding the Designation of a Segment of Pilot Butte Canal as a Goal 5 Historic Resource – *Matthew Martin, Community Development*

Suggested Actions: Open the public hearing and take testimony; decide whether to continue the hearing, or close the hearing and deliberate.

CONSENT AGENDA

6. **Board Signature** of Resolution No. 2015-001, Initiating the Vacation of a Right-of-Way off Tumalo Rim Drive
7. **Board Signature** of Order No. 2015-001, Vacating a Right-of-Way off Tumalo Rim Drive
8. **Chair Signature** of Document No. 2015-052, Funds Transfer Agreement with the Federal Highway Administration regarding the Fall Creek Bridge Replacement Project
9. **Chair Signature** of Document No. 2015-030, an Intergovernmental Agreement between the Local Public Health Department and the Oregon Health Authority regarding Youth Suicide Prevention & Early Intervention Strategies
10. **Board Signature** of Resolution No. 2015-004, Transferring Appropriations in the General Fund
11. **Board Signature** of Resolution No. 2015-009, Transferring Appropriations in the OHP-Mental Health Services Fund
12. **Board Signature** of Resolution No. 2015-006, Transferring Appropriations in the General County Projects Fund
13. **Board Signature** of Resolution No. 2015-012, Transferring Appropriations in the County Fair Fund
14. **Board Signature** of Resolution No. 2015-003, Transferring Appropriations to the District Attorney Department from General Fund Contingency
15. **Board Signature** of Resolution No. 2015-005, Transferring Appropriations in the Industrial Lands Proceeds Fund
16. **Board Signature** of Resolution No. 2015-007, Appropriating a New Grant in the Public Health Fund

17. **Board Signature** of Resolution No. 2015-008, Transferring Appropriations in the Public Health Fund
18. **Board Signature** of Resolution No. 2015-010, Transferring Appropriations in the OHP-Mental Health Services Fund
19. **Approval** of Award of Community Grants as Follows:
 - Deschutes Public Library Foundation - \$2,400
 - Cascades Theatrical Company - \$2,400
 - Deschutes County Historical Society – \$2,400
 - Volunteers in Medicine – \$11,000
 - Deschutes Family Recovery – \$3,000
 - Volunteers in Action - \$11,000
 - Big Brothers Big Sisters of Central Oregon - \$11,000
 - American Red Cross - \$5,000
20. **Approval of Minutes:**
 - Business Meeting of January 14, 2015
 - Work Session of January 14, 2015

CONVENE AS THE GOVERNING BODY OF THE 9-1-1 COUNTY SERVICE DISTRICT

21. **CONSIDERATION of Board Signature** of Resolution No. 2015-011, Transferring Appropriations in the 911 County Service District's Operating Fund

Suggested action: Move Board signature of Resolution No. 2015-011.

22. **CONSIDERATION of Approval** of Weekly Accounts Payable Vouchers for the 9-1-1 County Service District

CONVENE AS THE GOVERNING BODY OF THE EXTENSION/4-H COUNTY SERVICE DISTRICT

23. **CONSIDERATION of Approval** of Weekly Accounts Payable Vouchers for the Extension/4-H County Service District

RECONVENE AS THE DESCHUTES COUNTY BOARD OF COMMISSIONERS

24. CONSIDERATION of Approval of Weekly Accounts Payable Vouchers for Deschutes County

25. ADDITIONS TO THE AGENDA

Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please call (541) 388-6572, or send an e-mail to bonnie.baker@deschutes.org.

PLEASE NOTE: At any time during this meeting, an executive session could be called to address issues relating to ORS 192.660(2) (e), real property negotiations; ORS 192.660(2) (h), litigation; ORS 192.660(2)(d), labor negotiations; ORS 192.660(2) (b), personnel issues; or other executive session items.

FUTURE MEETINGS:

(Please note: Meeting dates and times are subject to change. All meetings take place in the Board of Commissioners' meeting rooms at 1300 NW Wall St., Bend, unless otherwise indicated. If you have questions regarding a meeting, please call 388-6572.)

Monday, January 26

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Tuesday, January 27

- 7:30 a.m. Legislative Update with Lobbyist and Legislators (Conference Call)

Wednesday, January 28

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Budget Committee Meeting (no Work Session)

Thursday, January 29

5:30 p.m. Public Hearing on Tumalo Irrigation District Appeal

Monday, February 2

10:00 a.m. Board of Commissioners' Business Meeting

1:30 p.m. Administrative Work Session – could include executive session(s)

Tuesday, February 3

3:30 p.m. Public Safety Coordinating Council Meeting

Wednesday, February 4

10:00 a.m. Board of Commissioners' Business Meeting

1:30 p.m. Administrative Work Session – could include executive session(s)

6:00 p.m. Sisters School Board Meeting

Tuesday, February 10

7:30 a.m. Legislative Update with Lobbyist and Legislators (Conference Call)

6:30 p.m. Joint Meeting with the Redmond City Council, **Redmond City Hall**

Wednesday, February 11

8:00 – 5:00 Annual Board Goal Setting Retreat – **Health Building**

Thursday, February 12

6:00 p.m. Joint Meeting with the Sisters City Council, **Sisters City Hall**

Monday, February 16

Most County offices will be closed to observe Presidents' Day.

Tuesday, February 17

10:00 a.m. 911 Executive Board Meeting, **at 911**

Monday, February 23

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Tuesday, February 24

- 7:30 a.m. Legislative Update with Lobbyist and Legislators (Conference Call)

Wednesday, February 25

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Monday, March 2

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Tuesday, March 3

- 3:30 p.m. Public Safety Coordinating Council Meeting

Wednesday, March 4

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Wednesday, March 11

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Monday, March 16

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Tuesday, March 17

- 10:00 a.m. 911 Executive Board Meeting, **at 911**

Monday, March 23

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Wednesday, March 25

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Monday, March 30

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Wednesday, April 1

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Monday, April 6

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Tuesday, April 7

- 3:30 p.m. Public Safety Coordinating Council Meeting

Wednesday, April 8

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Monday, April 20

- 10:00 a.m. Board of Commissioners' Business Meeting
1:30 p.m. Administrative Work Session – could include executive session(s)

Monday, April 20

10:00 a.m. Board of Commissioners' Business Meeting

1:30 p.m. Administrative Work Session – could include executive session(s)

Tuesday, April 21

10:00 a.m. 911 Executive Board Meeting, **at 911**

Wednesday, April 22

10:00 a.m. Board of Commissioners' Business Meeting

1:30 p.m. Administrative Work Session – could include executive session(s)

Monday, April 25

10:00 a.m. Board of Commissioners' Business Meeting

1:30 p.m. Administrative Work Session – could include executive session(s)

Wednesday, April 27

10:00 a.m. Board of Commissioners' Business Meeting

1:30 p.m. Administrative Work Session – could include executive session(s)

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ADDITION TO BUSINESS MEETING AGENDA

DESCHUTES COUNTY BOARD OF COMMISSIONERS

10:00 A.M., WEDNESDAY, JANUARY 28, 2015

Commissioners' Hearing Room - Administration Building - 1300 NW Wall St., Bend

A. CONSIDERATION of Approval of an Application for an Oregon Health Authority Grant Request for Proposals – *Tom Kuhn, Health Department*

Suggested Action: Move approval of the grant application.