



Deschutes County Board of Commissioners  
1300 NW Wall St., Suite 200, Bend, OR 97701-1960  
(541) 388-6570 - Fax (541) 385-3202 - [www.deschutes.org](http://www.deschutes.org)

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## **AGENDA REQUEST & STAFF REPORT**

### **For Board Business Meeting of January 28, 2015**

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**DATE:** January 7, 2014

**FROM:** Matthew Martin                      CDD                      541-330-4620

**TITLE OF AGENDA ITEM:**

A public hearing on the Administrative Decision regarding the application timing and ownership issues related to File No. 247-14-000373-HS, an application for a Comprehensive Plan amendment to designate an approximately one-mile segment of the Pilot Butte Canal in the Suburban Residential 2 ½ zone as a Goal 5 historic resource.

**PUBLIC HEARING ON THIS DATE?** Yes

**BACKGROUND AND POLICY IMPLICATIONS:**

The Pilot Butte Canal Preservation Alliance 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 2 ½ zone. Upon review of the submittal, a threshold issue emerged regarding an interpretation of DCC 2.28.060(A)(2) and 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 an interpretation of the term "owner" as it relates to the canal. Staff has issued an administrative decision rejecting the filing of the request.

On December 15, 2014, the Board approved Order No. 2014-038 initiating review of this decision. Staff recommended this action in order to interpret the timing criteria and obtain deference from the Land Use Board of Appeals (LUBA) in the event the decision is appealed. The ownership issue is also important to decide at this point because it may be dispositive of whether or not the County can adopt the proposed plan amendment.

**FISCAL IMPLICATIONS:**

The cost of a hearing before the Board since no appeal fee will be paid.

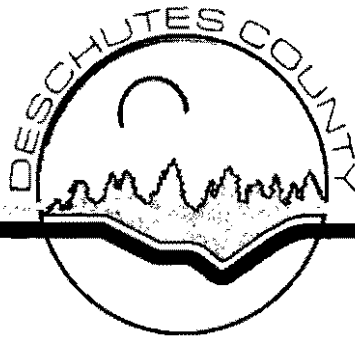
**RECOMMENDATION & ACTION REQUESTED:**

Open public hearing and take testimony; deliberate if appropriate.

**ATTENDANCE:** Matthew Martin and Legal Counsel

**DISTRIBUTION OF DOCUMENTS:**

Matt Martin, CDD



## 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

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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.<sup>1</sup> 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

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<sup>1</sup> File No. 247-14-000373-HS.

197.772, OAR 660-023-0200(5)<sup>2</sup> 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".

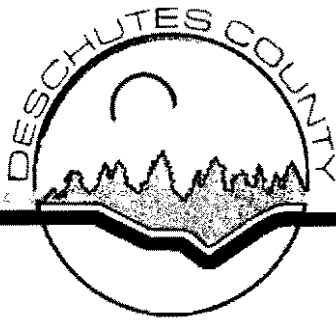
The BOCC on December 15 approved Order No. 2014-03 initiating review of the administrative decision rejecting the filing of the Comprehensive plan amendment application. Because the BOCC will be interpreting the County Code regarding the timing of the application submittal, review will allow the BOCC 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

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<sup>2</sup> [https://www.oregonlegislature.gov/bills\\_laws/lawsstatutes/2013ors197.html](https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2013ors197.html);  
[http://arcweb.sos.state.or.us/pages/rules/oars\\_600/oar\\_660/660\\_023.html](http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_023.html)



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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).<sup>1</sup> 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.

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<sup>1</sup> 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.

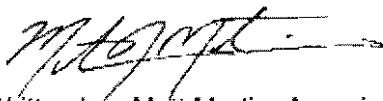
The applicant submitted application 247-14-000373-HS on November 3, 2014. Staff interprets DCC 2.28.060(A)(2) and "any other application" to include TA-13-4 since it directly relates to this segment of canal located in the SR 2½ Zone. Staff finds the applicant's request to designate a segment of the 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.

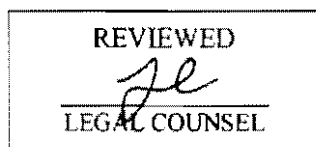
**DESCHUTES COUNTY PLANNING DIVISION**

  
Written by: Matt Martin, Associate Planner

  
Reviewed by: Peter Gutowsky, Planning Manager

Dated this 9th day of December, 2014

Mailed this 9<sup>th</sup> 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 15<sup>th</sup> of Dec., 2014

BOARD OF COUNTY COMMISSIONERS  
OF DESCHUTES COUNTY, OREGON

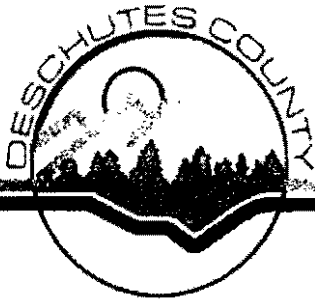
  
TAMMY BANEY, Chair

  
ANTHONY DEBONE, Vice Chair

ATTEST:

  
Recording Secretary

  
ALAN UNGER, Commissioner



## Community Development Department

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