

REVIEWED

LEGAL COUNSEL

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**DECISION OF THE BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON**

FILE NUMBERS: 247-14-000-238-PS, 247-14-000274-A
247-14-000452-A, 247-14-000453-A

APPLICANT: Tumalo Irrigation District (“TID”)
64697 Cook Avenue
Bend, Oregon 97701

PROPERTY OWNER: KC Development Group, LLC (“KCDG”)
63560 Johnson Road
Bend, Oregon 97701

**APPLICANT’S AND
PROPERTY OWNER’S
ATTORNEY:** Elizabeth A. Dickson
Hurley Re, P.C.
747 S.W. Mill View Way
Bend, Oregon 97702

APPELLANTS: Tumalo Irrigation District
64697 Cook Avenue
Bend, Oregon 97701

Thomas and Dorbina Bishop,
Trustees of the Bishop Family Trust
63382 Fawn Lane
Bend, Oregon 97701

BISHOPS’ ATTORNEY: Jennifer Bragar
Garvey Schubert Barer
121 SW Morrison Street, 11th Floor
Portland, Oregon 97204

SUBJECT: Appeals of Hearings Officer decision to reverse the
Planning Division’s issuance of a Land Use Compatibility
Statement (LUCS) to transfer 108 acre-feet of Tumalo
Creek water from Tumalo Reservoir to Klippel Acres
Mining Pit.

STAFF REVIEWER: Anthony Raguine, Senior Planner

HEARING DATE: January 29, 2015

RECORD CLOSED: February 13, 2015

I. APPLICABLE STANDARDS AND CRITERIA:

A. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance

1. Chapter 18.04, Title, Purpose and Definitions
 - * Section 18.04.030, Definitions
2. Chapter 18.60, Rural Residential (RR-10) Zone
 - * Section 18.60.020, Uses Permitted Outright
 - * Section 18.60.030, Conditional Uses Permitted
3. Chapter 18.88, Wildlife Area Combining Zone – WA
4. Chapter 18.120, Exceptions

B. Title 22 of the Deschutes County Code, the Development Procedures Ordinance

1. Chapter 22.04, Introduction and Definitions
 - * Section 22.04.020, Definitions
2. Chapter 22.08, General Provisions
 - * Section 22.08.010, Application Requirements
 - * Section 22.08.020, Acceptance of Application
3. Chapter 22.16, Development Action Procedures
 - * Section 22.16.010, Review of Development Action Applications
4. Chapter 22.20, Review of Land Use Action Applications
 - * Section 22.20.010, Action on Land Use Action Applications
 - * Section 22.20.020, Administrative Land Use Decisions with Prior Notice
 - * Section 22.20.030, Administrative Decision without Prior Notice
5. Chapter 22.24, Land Use Action Hearings
 - * Section 22.24.030, Notice of Hearing or Administrative Action
 - * Section 22.24.140, Continuances and Record Extensions
6. Chapter 22.32, Appeals
 - * Section 22.32.050, Development Action Appeals

II. BASIC FINDINGS:

A. Location: The subject property (the “Property”) is identified as Tax Lots 824 and 828 on Deschutes County Assessor’s Map 17-11-13. It is the site of the former Klippel Surface Mine (SM Site 294) and is located east of Johnson Road, north and east of Fawn Lane, south and north of Klippel Road, and west of Tumalo Creek west of Bend.

B. Zoning and Plan Designation: The Board adopts and incorporates herein by reference the Hearings Officer’s findings regarding zoning and plan designation, as set forth in pages 2-3 of the Hearing Officer’s December 15, 2014 Decision (the “Hearings Officer’s Decision”).

C. Site Description: The Board adopts and incorporates herein by reference the Hearings Officer’s findings regarding site description, as set forth in page 3 of the Hearing Officer’s Decision.

D. Surrounding Zoning and Land Uses: The Board adopts and incorporates herein by reference the Hearings Officer’s findings regarding surrounding zoning and land uses, as set forth in page 3 of the Hearing Officer’s Decision.

E. Land Use/Development/Code Enforcement History: The Board adopts and incorporates herein by reference the Hearings Officer’s findings regarding land use, development and code enforcement history, as set forth in pages 3-5 of the Hearing Officer’s Decision.

F. Procedural History: The Board adopts and incorporates herein by reference the Hearings Officer’s findings regarding procedural history, as set forth in pages 5-7 of the Hearing Officer’s Decision, with the following additions:

The Hearings Officer issued her decision on December 15, 2014 and the decision was mailed to the parties on December 16, 2014. Both the Tumalo Irrigation District and Thomas and Dorbina Bishop timely appealed the Hearings Officer decision to the Deschutes Board of County Commissioners, requesting *de novo* review.

On January 7, 2015, by Order No. 2015-009, the Board of County Commissioners accepted the appeals and consolidated them into a single, *de novo* proceeding. On January 29, 2015 the Board of County Commissioners held a public hearing on the appeals. At the hearing all Commissioners disclosed their participation in a work session on these appeals, and Chair DeBone disclosed ex parte contacts with the Neizdewiecke family, the Bishops, and the applicant before the LUCS phase to receive information in the last year. No party objected to Chair DeBone or any other Commissioner’s participation in hearing this appeal. The Board of County Commissioners received testimony and evidence, left the written record open through February 13, 2015, and allowed the applicant through February 20, 2015 to submit final written argument pursuant to ORS 197.763.

On February 20, 2015 Ms. Dickson electronically submitted TID’s final written argument. By letter dated February 24, 2015, the Board received additional testimony from Ms. Dickson, but the Board did not consider that testimony in reaching this decision.

On February 25, 2015, the County's Senior Planner, Anthony Raguine, submitted an Agenda Request and Staff Report explaining that he had rejected Exhibit B to TID's February 20, 2015 final written argument, and had redacted a statement from Exhibit C of TID's February 20, 2015 final written argument, as containing new evidence that had not been submitted prior to close of the record.¹ At the beginning of the Board's deliberations on March 4, 2015 Mr. Raguine explained to the Board that paragraph 6 of page 4 of TID's February 20, 2015 final written argument should also be redacted, and advised the Commissioners to consider a vote to (a) affirm rejection of Exhibit B and the statement in Exhibit C referring to Exhibit B, in TID's February 20, 2015 final written argument and (b) remove from the record paragraph 6 of page 4 of TID's final written argument. Commissioner Baney made a motion to affirm staff's rejection of Exhibit B and the statement in Exhibit C referring to Exhibit B and also to not consider paragraph 6 of page 4 of TID's February 20, 2015 letter, Commissioner Unger seconded and the motion passed unanimously. These documents or portions of documents are rejected from the record and were not considered in making this decision.

The applicant extended the 150-day period to April 15, 2015.

G. Proposal: The Board adopts and incorporates herein by reference the Hearings Officer's findings regarding the proposal, as set forth in page 7 of the Hearings Officer's Decision, with the following additions:

TID appealed the Hearings Officer's Decision to the Deschutes County Board of County Commissioners (the "Board"). TID raises three issues on appeal:

1. Whether the Hearings Officer's Decision omitted or failed to consider the threshold statutory question of whether the LUCS approval was a land use decision;
2. Whether the Hearings Officer's Decision made and relied upon significant factual errors that prejudiced TID's rights; and
3. Whether the Hearings Officer's Decision made several legal errors that prejudiced the rights of both TID and the underlying property owner, KCDG.

TID requested that the Board find the LUCS should issue, as the reservoirs are outright permitted uses under Section 18.60.020(I).

The Bishops also appealed the Hearings Officer's Decision. The Bishops raise the following issues on appeal:

1. Whether the Hearings Officer erred in finding the LUCS was a development action under the Deschutes County Code;

¹ The Agenda Request incorrectly refers to the "February 13, 2015" submittal of TID's final legal argument.
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2. Whether the Hearings Officer's Decision erred in determining that TID and/or KCDG do not need conditional use approval for a cluster development prior to issuance of the LUCS at this time.
3. Whether Exhibit J to TID's final written argument submitted November 20, 2014 should be stricken from the record as new evidence; and
4. Whether KCDG should have been required to sign the LUCS application.

The Bishops requested that the Board find the LUCS should not issue until KCDG obtains a conditional use permit for a cluster development.

On January 7, 2015, by Order 2015-009, the Board ordered that it would hear both TID's and the Bishops' appeals in a single proceeding, and that the Board's review would be de novo.

H. Public Agency Comments: The Board adopts and incorporates herein by reference the Hearings Officer's findings regarding public agency comments, as set forth in page 7 of the Hearings Officer's Decision, with the following addition:

No additional public agency comments were submitted for the appeal to the Board.

I. Public Notice and Comments: The Board adopts and incorporates herein by reference the Hearing Officer's findings regarding public notice and comments, as set forth in page 7 of the Hearings Officer's Decision, with the following additions:

Subsequent to the appeals of the Hearings Officer's decision, the Planning Division mailed notice of the Board's public hearing to all parties of record and published the notice in the Bend "Bulletin" newspaper. Nineteen electronic mail messages and letters were received in response to this notice. Twenty-one members of the public testified before the Board at the public hearing.

J. Lot of Record: The Board adopts and incorporates herein by reference the Hearings Officer's findings regarding lot of record, as set forth on page 7 of the Hearings Officer's Decision.

III. FINDINGS:

A. Preliminary Issues.

1. Applicant.

FINDINGS: TID requested a LUCS for property owned by KCDG. The County did not require KCDG to sign the request or give written authorization for TID to submit it, although Section 22.08.010(B) of the Deschutes County Code states applications for development actions or land use actions shall be submitted by the property owner or person who has written authorization from the property owner. The Bishops raised this issue on appeal, but the Board makes no findings regarding this objection because TID's application for a LUCS is reversed on other grounds.

2. Mootness.

FINDINGS: The Board agrees with the Hearings Officer that this appeal is not moot and adopts and incorporates herein by reference the Hearings Officer's findings regarding mootness, as set forth in page 9 of the Hearings Officer's Decision.

3. Admissibility of Exhibit "J" FINDINGS: Bishops claim that TID's November 20, 2014 final argument to the Hearings Officer included new evidence in the form of "Exhibit J" that should not have been accepted or considered by the Hearings Officer. The Board finds the issue to be irrelevant at this stage because the Board heard the appeal of this application in a *de novo* hearing

B. Nature of LUCS Decision and Appeal.

FINDINGS: TID applied for a LUCS for the transfer in place of use of a storage water right from Tumalo Reservoir to the Klippel Mining Pit, claiming its proposal constitutes an outright permitted use in the RR-10 Zone under DCC 18.60.020(I) as the "operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District." The County's LUCS decision found the proposed use is permitted without review under this section. Pursuant to DCC 22.16.010(B), Director Nick Lelack chose to treat TID's LUCS request as a "land use action" rather than as a "development action."

1. LUCS – Development Action vs. Land Use Action

FINDINGS: The Board agrees with the Hearings Officer that the LUCS decision at issue in this case is a development action, and adopts and incorporates herein by reference the Hearing's Officers findings on this issue, as set forth in pages 10 through 12 of the Hearings Officer's Decision.

2. Local Appeal

FINDINGS: The Board agrees with the Hearings Officer that the Planning Director has the authority to treat a development action as a land use action for the purposes of DCC Title 22, and adopts and incorporates herein by reference the Hearings Officer's findings on this issue, as set forth in page 12 of the Hearings Officer's Decision.

C. Categorization of Proposed Use.

1. New Reservoirs

FINDINGS: Both TID and the Bishops, as well as the Board, agree that the water bodies on the Property are reservoirs – "a place where water is collected and kept in quantity for use when wanted."² At the time the Property was rezoned from SM to RR-10, the Klippel site had been reclaimed by grading and re-contouring the mining pits and reseeding them with pasture grasses to prevent erosion. The numerous aerial and ground-level photographs in the record show the

² *Webster's Third New Int'l Dictionary* 1931 (unabridged ed 2002). Although the County Code does not define "reservoir," the Board relies on the ordinary meaning contained in the cited dictionary relied upon by Oregon courts.

new reservoirs bear little if any resemblance to the reclaimed and reseeded mining pits that existed at the time of rezoning. The evidence in the record indicates the pits have been converted to reservoirs within the past 12 to 18 months, by excavating a large volume of aggregate and grading the area to create impoundments, building islands at each end of the southern reservoir, creating a dock area and boat ramp, lining both reservoirs with an impermeable fabric, and affixing that fabric to the ground with an overlay of sand and gravel. The record provides that the northern reservoir was filled with water during May 2014 and the southern reservoir was filled to a low level beginning in the last week of June 2014.

The new reservoirs were built and constructed on property owned by KCDG -- not TID. At the time the reservoirs were created, the only component of TID's irrigation system located on the Property was a TID pipeline (formerly canal) along the perimeter of tax lot 828; tax lot 824 contained no component of any TID irrigation system.

Under DCC 18.60.020(I), a permitted use in the RR-10 zone includes "operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District, except as provided in DCC 18.120.050."³ TID claims that its storage of irrigation water in the new reservoirs is a permitted use under 18.60.020(I) because (a) all activities occurring within the Tumalo Irrigation District's boundaries constitute part of TID's "existing irrigation system" for purposes of DCC 18.60.020(I), and (b) any newly constructed structures, such as KCDG's reservoirs, are part of that existing system so long as they are constructed within TID's boundaries.

The reservoirs have a fixed connection to the ground and constitute "structures" for purposes of the Deschutes County Code. Consequently, the Board finds that TID's LUCS request mischaracterized the proposed use of the Property, by omitting any reference to the construction of the reservoirs. This omission was material to the LUCS request and decision, because the surface mining required to construct the reservoirs is a conditional use in the RR-10 Zone under DCC Title 18.

The newly created reservoirs do not constitute part of TID's "existing irrigation system" for purposes of DCC 18.60.020(I). As a result, storage of TID irrigation water in the newly-created reservoirs does not constitute "operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District". As such, the Board finds that the proposed use is not an outright permitted use under Deschutes County Code.

2. Surface Mining

FINDINGS: The Board finds that the excavation, grading, and related activities conducted on-site to create the new reservoirs constituted surface mining. The Board adopts and incorporates herein by reference the Hearings Officer's findings on this issue, as set forth in pages 18-20 of the Hearings Officer's Decision. Therefore, TID's LUCS request mischaracterized the proposed use of the Property, by omitting any reference to the construction of the reservoirs. This omission was material to the LUCS request and decision, because the surface mining required to construct the reservoirs is a conditional use in the RR-10 Zone under DCC Title 18.

³ The exceptions provided in Section 18.120.050 do not apply to this application.

3. Recreation-Oriented Facility

FINDINGS: The Board adopts and incorporates herein by reference the Hearings Officer's findings regarding use of the Property for recreation-oriented facilities requiring large acreage, as set forth on page 20-21 of the Hearings Officer's Decision. Additionally, the Board finds as follows:

The record includes undisputed evidence that the southern reservoir has been used for water skiing. It is also apparent from the evidence in the record that the southern reservoir was designed specifically for water skiing, with its unique long, narrow shape, circular islands at each end, boat ramp, boat dock, and pilings for a boat house. The county issued a stop work order to halt KCDG from constructing a boat house foundation without a building permit, and the county issued a Notice of Violation to KCDG for operating a recreation-oriented facility requiring large acreage without land use approval. The June, 2014 contract between TID and KCDG specifically requires KCDG to indemnify TID for any liability arising from KCDG's use of the reservoirs.

The northerly reservoir has also been used for recreational purposes. Specifically, the record contains evidence that the northerly reservoir has been used for paddle boarding.

DCC section 18.60.030 permits conditionally in the RR-10 zone "recreation-oriented facility requiring large acreage such as off-road vehicle track or race track." Title 18 does not define "recreation-oriented facility." The Hearings Officer relied on Webster's New World Dictionary and Thesaurus, Second Edition that includes the following relevant definitions:

"Recreation: any form of play, amusement, etc. used to relax or refresh the body or mind.

Orient: to adjust . . . to a particular situation."

The Board agrees with the Hearings Officer's finding that a "recreation-oriented facility" is one that is designed and constructed to provide opportunities for recreational activity. Therefore, the Board finds that the reservoirs are "recreation-oriented facilities requiring large acreage", as that term is used in DCC 18.60.030.

TID's LUCS request mischaracterized the proposed use of the Property, by omitting any reference to the use of the reservoirs as recreation-oriented facilities. This omission was material to the LUCS request and decision, because recreation-oriented facilities are a conditional use in the RR-10 Zone per DCC 18.60.030(G).

By failing to consider the Property's use as a "recreation-oriented facility requiring large acreage," the County's LUCS determination did not correctly categorize the proposed use of the Property.

D. Cluster Development

FINDINGS: An issue was raised as to whether this proposal is part of a cluster development. Because the Board finds that this application must be denied on other grounds and no application for a cluster development has been submitted to the County, the Board makes no findings on that issue.

IV. DECISION:

Based on the foregoing findings and conclusions, the Deschutes Board of County Commissioners **FINDS:**

1. TID materially mischaracterized the use of the Property on the LUCS form, by failing to mention the construction of the two new reservoirs on the subject property.
2. TID materially mischaracterized the use of the Property on the LUCS form, by failing to mention the use of the Property for recreation-oriented facilities requiring large acreage.
3. The County incorrectly categorized TID’s proposed use on the LUCS form as a use allowed without review.
4. The County erred in issuing a LUCS decision finding TID’s proposed use was allowed without review.
5. The County’s LUCS decision is reversed.
6. The LUCS shall characterize the use as requiring additional review pursuant to DCC 18.60.030(G) for surface mining in conjunction with an irrigation district, including the excavation for reservoirs.
7. The LUCS shall characterize the use as requiring additional review pursuant to 18.60.030(W) for a recreation facility requiring large acreage.

Dated this ____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS

ANTHONY DEBONE, Chair

ALAN UNGER, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner

Mailed this ____ day of _____, 2015.

THIS DECISION BECOMES FINAL UPON MAILING. PARTIES MAY APPEAL THIS DECISION TO THE LAND USE BOARD OF APPEALS WITHIN 21 DAYS OF THE DATE ON WHICH THIS DECISION IS FINAL.