

Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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APPEAL APPLICATION

FEE: \$4,772

EVERY NOTICE OF APPEAL SHALL INCLUDE:

1. A statement describing the specific reasons for the appeal.
2. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons the Board should review the lower decision.
3. If the Board of County Commissioners is the Hearings Body and *de novo* review is desired, a request for *de novo* review by the Board, stating the reasons the Board should provide the *de novo* review as provided in Section 22.32.027 of Title 22.
4. If color exhibits are submitted, black and white copies with captions or shading delineating the color areas shall also be provided.

It is the responsibility of the appellant to complete a Notice of Appeal as set forth in Chapter 22.32 of the County Code. The Notice of Appeal on the reverse side of this form must include the items listed above. Failure to complete all of the above may render an appeal invalid. Any additional comments should be included on the Notice of Appeal.

Staff cannot advise a potential appellant as to whether the appellant is eligible to file an appeal (DCC Section 22.32.010) or whether an appeal is valid. Appellants should seek their own legal advice concerning those issues.

Appellant's Name (print): Thomas and Dorbina Bishop, Trustees of the Bishop Family Trust Phone: (503) 553-3208

Mailing Address: 121 SW Morrison, 11th Floor City/State/Zip: Portland, OR 97204

Land Use Application Being Appealed: 247-15-000226-CU; 247-15-000227-CU; 247-15-000228-LM; 247-15-000383-MA;
247-15-000384-SP; 247-15-000385-V

Property Description: Township Range Section Tax Lot See Next Page

Appellant's Signature: Thomas E Bishop

EXCEPT AS PROVIDED IN SECTION 22.32.024, APPELLANT SHALL PROVIDE A COMPLETE TRANSCRIPT OF ANY HEARING APPEALED, FROM RECORDED MAGNETIC TAPES PROVIDED BY THE PLANNING DIVISION UPON REQUEST (THERE IS A \$5.00 FEE FOR EACH MAGNETIC TAPE RECORD). APPELLANT SHALL SUBMIT THE TRANSCRIPT TO THE PLANNING DIVISION NO LATER THAN THE CLOSE OF THE DAY FIVE (5) DAYS PRIOR TO THE DATE SET FOR THE DE NOVO HEARING OR, FOR ON-THE-RECORD APPEALS, THE DATE SET FOR RECEIPT OF WRITTEN RECORDS.

(over)

NOTICE OF APPEAL

See letter and exhibits in the enclosed binder.

Property Description:

Tax Lot 601, Map 17-11-13 63344 Palla Lane

Tax Lot 819, Map 17-11-13 63560 Johnson Road

Tax Lot 820, Map 17-11-13 19436 Klippel Road

Tax Lot 822, Map 17-11-13 63570 Johnson Road

Tax Lot 823, Map 17-11-13 19275 Klippel Road

Tax Lot 825, Map 17-11-13 63410 Palla Lane

Tax Lot 826, Map 17-11-13 63380 Palla Lane

Tax Lot 827, Map 17-11-13 63280 Palla Lane

Tax Lot 829, Map 17-11-13 No situs address

Tax Lot 11401, Map 17-11-14 63566 Johnson Road

Tax Lot 11600, Map 17-11-14 19190 Klippel Road

Tax Lot 824, Map 17-11-13

Tax Lot 828, Map 17-11-13

(This page may be photocopied if additional space is needed.)



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February 1, 2016

Deschutes County Board of Commissioners
c/o Anthony Raguine
Deschutes County Community Development Department
117 NW Lafayette Avenue
Bend, OR 97708-6005

RE: Appeal of Hearings Officer's Decision on File Numbers:
247-15-000226-CU; 247-15-000227-CU; 247-15-000228-LM;
247-15-000383-MA; 247-15-000384-SP; 247-15-000385-V

Dear Chair Unger and Commissioners:

This office represents Thomas and Dorbina Bishop, Trustees of the Bishop Family Trust, who live at 63382 Fawn Lane, Bend, Oregon and are members of the Tumalo Irrigation District ("TID" or "District"), as well as residents of unincorporated Deschutes County. This letter is submitted in support of the Bishops' appeal application for the above-referenced files and Hearings Officer Decision dated January 21, 2016 ("Decision"). See Exhibit 1. For purposes of this letter, the District and KC Development Group, LLC ("KCDG") are collectively referred to herein as "the Applicants."

The Bishops request a hearing by the Board of County Commissioners ("Board") *de novo* under DCC 22.32.027 because the Hearings Officer's findings are difficult to follow, inconsistent and not cohesive. The appeal should be granted to prepare a consistent decision and findings should be entered that

- KCDG must obtain a zone change to allow surface mining on private property because the surface mining was not in conjunction with an irrigation district;
- TID and KCDG must obtain a conditional use approval for a cluster development;
- The graveled westerly road must be removed;
- Water skiing and recreational use of the northerly and southerly reservoirs is prohibited under DCC 18.88.040.B, thus, the conditional use applications for these recreational facilities requiring large acreage should be denied;
- Both the northerly and southerly reservoirs violate the County's setback requirements;



- Any findings under DCC 18.128.280 are premature and/or inadequate;
- The record should reflect that the Oregon Water Resources Department (“OWRD”) has withdrawn its limited license to allow KCDG to store any water in the lakes on the subject property, and entered an Order that storage of water in these reservoirs is illegal; and
- The Hearings Officer’s alternative conditions of approval are untimely and do not protect the interest of the public and project neighbors.

The factual misstatements included in the 88-page Decision are red herrings for any further appeal. Therefore, the Board should take *de novo* review to correct the record.

If the Board decides to take *de novo* review, the Bishops request that they and their attorneys receive up to 45 minutes to present their arguments to the Board at the public hearing. As you are aware, the Bishops have been attempting to hold the Applicants accountable for their unpermitted and illegal behavior for two years and are now required to pay appeal fees of nearly \$5,000. Yet, during the Hearings Officer public hearing, the Hearings Officer limited the Bishops’ presentation to just 15 minutes. Many of the most important legal points have been raised during the Bishops’ presentations at public hearings. The Bishops want the Board to have ample opportunity to understand the full set of issues in this case. Therefore, the Bishops respectfully request up to 45 minutes to present the information during the public hearing on this appeal.

- I. KCDG must obtain zone change approval to allow surface mining on the subject property.
 - A. The Hearings Officer erred in finding the surface mining was “in conjunction” with the irrigation district activities.

While the Board required a permit under DCC 18.60.030.W as part of its decision on the land use compatibility statement (“LUCS”) for the District’s proposed water storage transfer, it is clear on this record that the surface mining activity was not “in conjunction” with an irrigation district.¹ Under this Code provision, surface mining may be conditionally allowed if it satisfies the following,

“Surface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for... reservoirs, and the off-site use... of excavated material.” (emphasis added).

¹ The Hearings Officer found that the LUBA decision in the Bishops’ appeal of the LUCS conclusively settled the required conditional use permits. However, LUBA’s decision was only jurisdictional and not conclusive as to which conditional uses are required for the Applicants to obtain land use approval. See *Bishop v. Deschutes County*, slip op. at p. 18-19. See Exhibit 2. The only matter that LUBA settled is that the County categorized the proposed uses on the LUCS form and those uses require future land use reviews. LUBA did not have jurisdiction to review the categorization at that time. *Id.*



The Decision included findings to define “in conjunction with,”

The phrase “in conjunction with” is not defined in Title 18. The ordinary definition of the term “conjunction” includes “coincidence.” Webster’s New World Dictionary and Thesaurus, Second Edition (hereafter “Webster’s”). Webster’s defines “coincidence” as “a coinciding” and defines “coincide” as “to occur at the same time.” Thus, use of the phrase “in conjunction with” in Section 18.60.030(W) suggests the conditional use consists of surface mining coinciding with the irrigation district’s operation and maintenance activities.

The timing of KCDG’s surface mining for the reservoirs raises a question about TID’s involvement with the reservoirs when they were created. The record indicates excavation for the reservoirs occurred at least as early as March of 2014. The original contract between TID and KCDG for use of TID’s water to fill the reservoirs wasn’t signed until June of 2014, and stated KCDG’s water use payments to TID would commence June 1, 2014. In October of 2014, after the Planning Director issued the original LUCS and the Bishops filed their appeal therefrom, TID and KCDG signed an amended contract for use of the reservoirs. Among other provisions, the amended contract modified the water use payment commencement date to March 1, 2014, closer to the time surface mining for the reservoirs commenced. Decision p. 27 (footnotes omitted).

The Applicants cannot satisfy the criteria under DCC 18.60.030.W because the surface mining was not done in conjunction with a reservoir for an irrigation district. The Hearings Officer explains the meaning of “in conjunction with” as to “occur at the same time.” She then follows with an explanation of what occurred but fails to draw the only supportable conclusion from the last paragraph quoted above. The Hearings Officer could not properly find that retroactively changing the date of payment to March 1, 2014 transformed the earlier surface mining into an activity connected to the District. Rather, this paragraph is a recitation of facts that corroborate the Bishops’ argument that the Applicants have failed in their attempt at a post-hoc justification. No matter how much the Applicants continue to try to bolster their misleading claims that re-regulation was always the plan, the actions of Applicants and the record in this matter just do not support the idea that in March 2014 TID contemplated or had any involvement in the excavation, design, construction or operation of the reservoirs, any right to enter upon or use KCDG’s property for such purposes, or to have any such work performed on its behalf.

With respect to the surface mining performed by KCDG, all of the excavation of the northerly reservoir, which was filled with water in early May 2014, and about 95% of the excavation of the water ski lake was complete before June 10, 2014 when TID and KCDG first entered an irrigation contract solely for the purpose of moving storage water rights to the KCDG property for use in the water ski and northerly recreational lakes. See Exhibit 3. While the Hearings Officer places much reliance on the irrigation contract between KCDG and the District, this is error. The irrigation contract only describes the intent of the District to store water on the property, not to engage in any sort of agreement related to surface mining activities to create reservoirs in the first phase of a cluster development or to use such water for re-regulation



purposes.

Virtually all of the surface mining activity occurred when there was no contract between KCDG and TID and KCDG's activities were not for, with respect to, or occurring at the same time as any related activity by TID. See Exhibit 4 where TID confirms that in regards to this activity it did not perform work for a fee, or have work performed for it for a fee. Most importantly, when surface mining activities took place no required state-issued permit to construct irrigation reservoirs had even been applied for or issued to KCDG or TID – and still, no such application has been approved. No TID irrigation equipment or systems existed on KCDG's tax lots 824 or 823 (on both of which excavation occurred) and the only District owned and operated system in the vicinity was the pipeline located along the western perimeter of KCDG's tax lot 828; the pipeline was not connected with, or a part of, the two reservoirs constructed by KCDG for KCDG's private use. The reservoirs are brand new construction created through surface mining by KCDG on its own initiative, without any involvement by TID, and for KCDG'S own purposes.²

Contrary to the manner in which the District has planned for any major piece of District infrastructure, TID had not defined, designed, designated, initiated, or approved any project to be constructed by, for, or in conjunction with TID on KCDG's property at the time the excavation of KCDG's property occurred. TID had no easement over the property to the reservoir sites where KCDG engaged in the excavation that occurred from March 2014 until early June 2014. TID was not a party to any contract or agreement with Taylor NW or BLT Liners or other contractors to KCDG for excavation and construction for KCDG in 2014. TID did not participate in the design of the excavation and construction on the KCDG site that occurred in 2014. In essence, there was no public-private partnership. This was a one-sided venture for KCDG's benefit and for some unknown reason, TID went along with providing the water for this private development without any agreement that would allow TID to control, operate, or use the stored water in the normal course of its operations or for re-regulation purposes.

In February 2015, by letter from its counsel, Carl Hopp, TID expressly disavowed that it had anything to do with KCDG's surface mining,

"I ask that the Commissioners realize that this application has nothing to do with cluster developments, recreational water ski lakes, or surface mining. If these items require permits, then they are subject to application by KCDG, not TID." See Exhibit 5. (emphasis added).

Yet, here we find TID as one of the Applicants – indeed the necessary applicant to meet the conditional use option for surface mining in conjunction with an irrigation district. In addition, the same letter from TID's lawyer, Mr. Hopp, states that TID is not an applicant for the required

² See also, footnote 1, *supra*. LUBA's conclusion to the contrary in the Order on the Motion to Dismiss the appeal of the 2014 LUCS associated with this KCDG/TID Application is incorrect dicta. The parties did not brief the merits of the case, and the Bishops never had the opportunity to respond to whether the Applicants could meet the conditional use criteria under DCC 18.60.030.W and DCC Chapter 18.128. That full record is developed here and allows this timely challenge.



surface mining operator's permit from DOGAMI. Thus, no finding of surface mining in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District can be made on this record.

Moreover, the new southern reservoir appears to have been constructed in accordance with the Water Ski Federation guidelines, which generally recommend private water ski lakes with dimensions of about 2000 x 300 feet and a depth of at least 5 feet, with reinforced edges, and turn around islands to eliminate backwash.³ The southerly reservoir constructed by KCDG has dimensions that appear to match the federation's suggestions, and include turn around islands, reinforced edges, and a depth of 10 feet or more. Photographic evidence in the record shows that the new reservoir is not designed as an irrigation reservoir. There is a significant difference in design between water-ski lakes and irrigation reservoirs created and used solely for irrigation purposes (or the alleged re-regulation purpose).

Further, the record shows that KCDG spent nearly \$2,000,000 for the liner of the water ski lake and northerly lake, not including the cost of the mining activity, yet never installed a \$5,000 re-regulation pipe.⁴ Why would it compromise such expensive structures by not building the re-regulating portion as part of the original construction to ensure operational integrity? It is unbelievable to accept the Applicants' explanation that they needed to "test" the liner of the pond before installing the re-regulation facility. Even if that were a reasonable assertion, the "test" would not require filling the lake to full capacity and then later having to empty it, thus compromising the efficacy of the liner in order to install the necessary re-regulation infrastructure. To this day, KCDG's two new lakes are not physically connected or integrated with any of TID's existing systems, except as to one-way water delivery into KCDG's reservoirs. Where, as here, the purpose of the southerly reservoir is a private water ski lake, and there are no facilities designed or intended to use water from either lake for re-regulation purposes, the post-hoc justification of a re-regulation reservoir cannot be used as a way around the required land use approvals.

This ruse, perpetuated in the current application, is a transparent post-hoc justification for surface mining to create a private recreational water ski lake, northerly recreational lake, and first phase of a cluster development that would not otherwise be permitted uses in the RR-10 zone.

The surface mining application claims involvement of the irrigation district only as a deceptive attempt to avoid the full land use review that KCDG would be subject to if it sought to construct these private recreational facilities. A zone change is required to allow KCDG, a private party, to surface mine at this site.

³ The Applicants have never provided a plan that shows the dimensions of the reservoirs. The Bishops still contend that the applications should not have been deemed complete, certainly not without having submitted information as to the size, scale, depth, and specifics of the siting of the lakes in proximity to other properties, and the surface area disrupted in their creation, as well as the volumes of material mined and relocated, including the volume removed from the site.

⁴ Notably, the cost of this appeal is nearly the same as the \$5,000 quoted for the re-regulation part described during public hearings by TID's Manager Rieck that has never been constructed.



- B. The County's surface mining definition is preempted by DOGAMI's regulations that require a surface mining operator's permit for the mining activities on the subject property.

As the Bishops argued during the LUCS review, the County's definition of surface mining is out of date in relation to the state law exemptions for onsite mining. In 2009, DOGAMI adopted regulations that exempt excavation by a landowner for the primary purpose of on-site construction. See Exhibit 6 that shows the 2009 OAR 632-030-0016 that contains no on-site construction exemption as compared to the 1993 version which contained an on-site construction exemption.⁵ Under ORS 517.780(1), state law preempts the out of date County definition of surface mining under DCC 18.04.030⁶ that exempts mining operations for onsite construction from permit requirements. Therefore, the surface mining activities on KCDG's property are not exempt under the local code.

The reservoirs were built with private funds on private property with the primary purpose to serve as water ski and recreational lakes that are the centerpiece of a cluster development. KCDG must apply for a zone change to allow surface mining on the property.

- C. Prior to private surface mining, KCDG must apply for a zone change to allow surface mining on its property.

The Bishops agree with the Hearings Officer that surface mining occurred on the subject property, however, the mining activity was not "in conjunction" with irrigation district activities

⁵ Significantly, the surface mining activity resulted in the offsite removal of aggregate and unauthorized and unpermitted use of the same on the Klippel Water, Inc. property. The on-site construction exemption would not apply. The Applicants do not refute this removal activity because they cannot.

⁶ Under DCC 18.04.030, surface mining is defined as:

"Surface mining" means

A. Includes:

1. All or any part of the process of mining by removal of the overburden and extraction of natural mineral deposits thereby exposed by any method including, open pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits, except those constructed for access roads; and
2. Mining which involves more than 1,000 cubic yards of material or excavation prior to mining of a surface area of more than one acre.

B. Does not include:

* * *

2. Excavation and crushing of sand, gravel, clay, rock or other similar materials conducted by a landowner, contractor or tenant on the landowner's property for the primary purpose of construction, reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming or cemetery operations, on-site road construction and other on-site construction, or nonsurface impacts of underground mines; and

* * *



under DCC 18.60.030.W. As set forth in great detail by the Bishops before the Hearings Officer on September 29, 2015, the RR-10 zone does not allow the private surface mining project that occurred on KCDG's property.⁷ The Applicants' evidence supports the Bishops' position. According to the County's Ordinance 90-028,

"the Surface Mine (SM) zone shall be prohibited in critical and sensitive resource areas (such as fish and wildlife habitats....) when such areas and resources have been evaluated in light of all comprehensive plan goals and policies, and are determined through the Goal 5 process to conflict with the SM site and to be of such importance relative to an inventoried mineral and aggregate resource site as to require complete protection." See Applicants' Exhibit GGG, page 12.

KCDG member Harris Kimble pursued a zone change in 2007 which applied the Wildlife ("WA") Overlay. He did not appeal that decision. The WA zone implements Goal 5. As stated over and over again, KCDG must rezone the property to allow the private surface mining that occurred here, and appear to concede through submission of Exhibit GGG that it will be impossible because the application of the WA Overlay as the County's implementation of Goal 5 to the property establishes that wildlife protection so conflicts with surface mining that such rezoning is prohibited.

Before the Hearings Officer, the Applicants seemed to argue that surface mining to construct a reservoir is different from commercial mining, and that the distinction matters. The Bishops do not see how the distinction affects the analysis under DCC 18.60.030.W. But, even if the County were to believe that a distinction between commercial and non-commercial extraction were necessary, the County has not authorized non-commercial extraction in the RR-10 zone. The County's Ordinance 90-028, provides that, "On lands not zoned SM, non-commercial extraction may be allowed as a conditional use." See Applicants' Exhibit GGG, page 14 (emphasis added). However, the County's Code does not list such use under DCC 18.60.030. Meanwhile, the Code does offer the opportunity to surface mine for irrigation districts under the circumstances identified in DCC 18.60.030.W. Thus, the County knows how to allow surface mining when it wants to, and has not done so for private surface mining. As a result of the County's decisions in drafting the Code, private party surface mining - commercial or non-commercial - cannot occur in the RR-10 zone.

- II. The Applicants must obtain approval for a cluster development because, taken together, the surface mining, construction of the westerly road, installation of the domestic well, construction of the reservoirs, the initial construction of a boat house, a guest parking area, and inclusion of all the properties owned by KCDG or its members in its applications for land use approvals constitute the first phase of a cluster development.

⁷ The KCDG surface mining activity involved removal of excavated material from the subject property and offsite use at the Klippel Water, Inc. property. KCDG's excavation constitutes surface mining under DOGAMI's regulations, which as described above, preempts the County Code's definition of surface mining that contains an outdated exemption for onsite construction. But even if the County Code's definition does apply, the onsite construction exemption is not available because KCDG removed aggregate from the site and used it on Klippel Water's property.



A. The Hearings Officer's reliance on the *Truth in Site v. City of Bend* decision is misplaced, and the Applicant must seek approval for a cluster development.

The Hearings Officer erred in relying on the *Truth in Site v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2015-098, June 8 2015) decision to find that the Applicants are not required to obtain a conditional use permit for the first phase of their cluster development. See Exhibit 7. The Hearings Officer's findings state,

The Hearings Officer finds the question concerning the nature and scope of the applicant's proposal is somewhat similar to that considered by LUBA in *Truth in Site v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2015-098, June 8, 2015). There, Oregon State University (OSU) sought approval to establish a branch campus on a 10-acre parcel. OSU had an option to purchase an adjacent 46-acre parcel, and indicated in public statements its intent ultimately to expand the campus onto the 46-acre site. Opponents argued that in light of OSU's stated intent to develop a much larger campus of which the 10-acre parcel would be a component, the city erred in not requiring OSU to submit a master development plan for the entire 56-acre area. In affirming the city's decision not to require such a master plan, LUBA held in relevant part:

*"OSU does not own the adjacent property and the property's owner did not sign the application for site plan and design review. Accordingly, the city found that 'the 'project' is the 10.44 acre project * * *." The city imposed a condition of approval that requires OSU to comply with the provisions of BDC Chapter 4.5 11 [master development plan] if OSU seeks to develop the 46 acres. * * **

*A portion of petitioners' third assignment of error argues that the second sentence of BDC 4.5.300(A) requires OSU to seek Master Neighborhood Development Plan approval because OSU's own submissions to the record demonstrate that OSU plans to develop a 56-acre campus, beginning with the subject 10.44-acre property, and then expanding onto the adjacent 46-acre property that it currently has an agreement to purchase. Therefore, according to petitioners, OSU is proposing a 'project' consisting of one or more properties totaling 20 acres or larger' under BDC 4.5.300(A). * * **

LUBA is required to affirm the city council's interpretation of BDC 4.5.300 unless that interpretation is 'inconsistent with' the express language of 4 [sic.] the BDC or inconsistent with the purpose of the BDC. ORS 197.829(1)(a) and 5 (b). While there is evidence in the record that supports a conclusion that OSU eventually plans to develop a larger campus than the 10.44-acre proposal, we agree

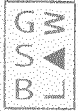


with respondents that the city's interpretation of the word 'project' as used in BDC 4.5.300(A) in context with the phrase 'one or more properties' in the same code section as limiting the 'project' to the property that an applicant controls is not inconsistent with the operative language of BDC 4.5.300 or inconsistent with the purpose of BDC Chapter 4.5. The city's interpretation of BDC 4.5.300(A) is affirmed."

The Deschutes County code does not define "project" or include analogous terminology for identifying the scope of land use review. Rather, Section 22.08.020 of the procedures ordinance appears to give the Planning Director broad discretion in identifying the scope of the proposed development when determining whether to accept a land use application. Moreover, LUBA noted in its decision dismissing the LUCS appeals that the county was not obligated to accept the property owners' characterization of the proposed use for purposes of a LUCS determination, and suggested the county also did not err in rejecting the Bishops' characterization of the proposed uses as requiring approval as a cluster development.

The record indicates that when Planning Director Nick Lelack accepted the subject conditional use and site plan applications as complete, he was aware of opponents' assertions that the reservoirs are the first phase of a residential cluster development. Nevertheless, Mr. Lelack concluded the proposed land uses were as represented by the applicant – i.e., surface mining to create the reservoirs and recreational use on the southern reservoir. The Hearings Officer finds that in this context, the question is whether the Planning Director abused his discretion in not characterizing the applicant's proposal as the first phase of a residential cluster development, and in not finding that the applications failed to adequately address the cluster development conditional use approval criteria under Section 18.128.200 and the applicable subdivision standards under Title 17.

The Hearings Officer finds the evidence in this record strongly suggests KCDG intends ultimately to develop the subject property with some type of residential subdivision of which the reservoirs would be a component, such as recreational amenities and required open space for a residential cluster development. In particular, the size and design of the southern reservoir are more consistent with a community facility that [sic] with one serving a single property owner. Nevertheless, I again find that where, as here, the applicant has not applied for cluster development approval, and the proposed uses do not include all requirement elements of a residential cluster development, the Planning Director did not err in concluding the applicant's proposal is limited to its stated request for conditional use approval for surface mining for the reservoirs and recreational use of the southern reservoir. I also find it would not be appropriate for me to issue what in effect would be an advisory opinion as to whether a cluster



development on the subject property would satisfy the applicable approval criteria. Decision, pp. 16-18 (underlined emphasis added) (footnotes omitted).

In *Truth in Site*, Oregon State University (OSU) sought site plan and design review approval for a university campus on a 10.44 acre parcel. The petitioners claimed that OSU should be subject to the city's master plan requirements because of its ultimate plan to expand the campus to an adjacent 46 acre site. But, in stark contrast to the 149-acre KCDG property, which is in single-ownership, the OSU expansion plans involved property that OSU did not own at the time of the city's decision.⁸ See *Truth in Site*, slip op. p. 13. Thus, the petitioners in *Truth in Site* were not able to meet the single-ownership that triggers the master plan requirement under the Bend City Code.

Further, in *Truth in Site*, the city's code required master plan approval prior to a "subdivision." See *Truth in Site*, slip op. p. 15. However, no similar limitation is imposed on the timing for an applicant to seek cluster development approval under the County's Code. The County defines cluster development under DCC 18.04.030 as,

[a] development permitting the clustering of single or multi-family residences on part of the property, with individual lots of not less than two acres in size and not exceeding three acres in size. No commercial or industrial uses not allowed by the applicable zoning ordinance are permitted."

But nothing in DCC Chapters 18.60 or 18.128 defines when a cluster development permit application is required. The Hearings Officer attempted to read in such a trigger, when she described that a cluster development application would contain numerous components such as open space and amenities, dwellings, utility infrastructure, streets, and water and sewer systems. See Decision p. 16. But the absence of those additional application materials in the Applicants' submittal does not answer the question whether such an application must be submitted in the first instance. KCDG owns all of the subject property, in contrast to the OSU case. KCDG should not be allowed to avoid review by submitting its plans in a piecemeal fashion, and the Hearings Officer erred by taking that piecemeal approach at face value. The Bishops have consistently argued that the County must find that construction of the first phase of KCDG's cluster development has occurred. Nothing in the Decision suggests otherwise

B. The record supports a finding that KCDG has built the first phase of its cluster development.

The primary use of the KCDG reservoirs is and always has been for the private benefit of the owner and future owners of KCDG's properties as recreational facilities for water skiing and paddle boarding, boating, and fishing as the centerpiece of KCDG's cluster development.⁹ A

⁸ Not to mention the fact that OSU had not already excavated or constructed the first phase of its project. KCDG's actions involved the exact opposite approach.

⁹ The excerpts of TID Board meeting Minutes and copies of full Minutes in Exhibit 8 shows that absolutely no mention is made about the use of the KCDG reservoirs by TID or anyone else for re-regulation purposes. Moreover, at the May 14, 2014 meeting, Harris Kimble's attempt to attack Mr. Bishop sets forth clearly KCDG's cluster



description of the cluster development on a website since 2011 promoting the sale of the property that is now held through KCDG by the Kimbles and the Cadwells, as well as other documents circulated to potential investors by Harris Kimble, a member of KCDG, show the full extent of the cluster development. See Exhibit 11, Exhibit 12, Exhibit 13, and Exhibit 14.¹⁰ In the attached video, Brianna Cadwell, a member of KCDG, acknowledges that the water ski lake will serve a private residential development. KCDG made a conscious decision to proceed with the first phase of the cluster development - the construction of the water ski and northerly recreational lakes, the westerly road, boat house, guest parking area, and installation of the domestic well - before applying for land development approval, and Harris Kimble made this intent explicitly clear beginning in 2011.

The current application describes KCDG as owning approximately 149 acres surrounding the subject property, and states that owners of their property will have the right to use the water ski lake. The property is currently owned by an LLC and no limits are specified as to who is considered a member or how ownership of the KCDG property may change. The access to and private use of a competition water ski lake and recreational northern lake are the focal points of the cluster development.

As early as November and December 2013, Mr. Cadwell and Mr. Kimble were planning for the implementation of the cluster development by gathering investment funds and starting to map the layout for the project and ingress/egress easement agreements that would apply to current and future owners of properties presently owned by KCDG and/or directly or indirectly by its members. At about that time a \$4.2 million revolving line of credit in favor of KCDG had been put into place and recorded to provide sufficient funds not only for the construction of the two new reservoirs but other features of the cluster development, as well such as the new domestic well, new roads and other road improvements, site preparation, grading, and undergrounding and relocating utilities. See Exhibit 15.

The original irrigation contract between TID and KCDG memorializes the cluster development intent,

“KCDG and its successors shall require the purchasers/lessees at the time of purchase or lease of **residential lots in the development** to sign and record a document acknowledging that the purchaser/lessee has read and accepted this Contract.” (emphasis added). See Exhibit 3.

development operated by a homeowners association with the water ski reservoir as the centerpiece. See also Exhibit 9 that contains quotes from people who testified at TID’s June 10, 2014 Board meeting, as well as Rachael Reams’ notes of the June 10, 2014 TID Board meeting, Gene Bishop’s comments submitted to TID on June 10, 2014, and a comment letter from another person in Tumalo who know or were told by Eric Cadwell or Harris Kimble that KCDG is developing the first phase of its cluster development. Exhibit 10 contains the full hearing tape of TID’s June 10, 2014 Board meeting. LUBA reviewed the foregoing information and concluded that KCDG purchased the property with the intent of developing it as a residential cluster development, which is a conditional use in the RR-10 zone. *Bishop v. Deschutes County*, slip. op. at p. 5 (LUBA No. 2015-027, 028, and 030, September 9, 2015).

¹⁰ The video included as part of the final listed exhibit was broadcast on June 4, 2014. See the website printout accompanying the mp4 file of the video.



The current water contract similarly suggests that adjacent lots will have rights to the water ski lake,

“KCDG and its successors shall require the purchasers/lessees at the time of purchase or lease of adjacent lots which are encumbered by this Water Storage Easement... to sign and record a document acknowledging that the purchaser/lessee has read and accepted this Agreement...” See Exhibit 16.

Moreover, County staff knows of this intent, including its former Code Enforcement Official, Mr. Grundeman, who verified that the installation of the water ski lake and northerly recreational reservoir constituted the first phase of the KCDG cluster development. See Exhibit 17. KCDG has also drilled a well as the domestic water supply for the cluster development. See Exhibit 18.

In a Deed of Trust from borrowers, Harris and Nancy Kimble, to lender, Carlton M. Cadwell, the cluster development is referenced as the development project according to terms of the “Development Agreement” entered into on October 24, 2013.¹¹ See Exhibit 19.¹² The “Development Agreement” was not recorded and its contents are not publicly known. However, in line with previous submittals evidencing the Kimbles’ plan for a cluster development, it is reasonable to assume the “Development Agreement” refers to this planned cluster development with the water ski lake and northerly recreational lake as the centerpiece. The deed also contemplates community association dues, fees, and assessments, further indicating that the parties consider KCDG’s property a cluster development project.¹³ It further contemplates that the source of revenue for the Kimbles to repay their line of credit will be proceeds from the sale of properties that are the subject of the “Development Agreement.”

The latest inclusion of all 13 contiguous tax lots owned by KCDG or the Cadwell Family Trust and Harris and Nancy Kimble in the amended application shows that owners, or successor owners, are intended to participate in the use of the recreational lakes and the guest parking facility. These uses are elements of the cluster development plan, the first phase of which has already been constructed. Approval to build a boathouse, the guest parking facility, and for use of the water ski lake by such subsequent owners or their guests should be vetted through a cluster development application.

Further evidence of KCDG’s attempts to build portions of its planned development piecemeal is provided by KCDG’s recent dealings with Klippel Water, Inc. Klippel Water owns

¹¹ The Deed provides that the Kimbles may borrow up to \$120,000 divided in monthly installments. See Exhibit 19, page 16. These amounts are earmarked for the borrower’s living expenses during the development period as defined in the October 24, 2013, Development Agreement. Further, the promissory note states that principal and interest of advances of personal funds must be paid within 36 months or upon the sale of two additional lots. Tying repayment of the note to the sale of the additional lots is further evidence that all parties involved are engaged in cluster development of the KCDG properties.

¹² Although executed two years ago, on October 24, 2013, the deed was not recorded until October 6, 2015. The Kimbles subsequently sold this property to Carlton and Lynda Cadwell, Eric Cadwell’s parents, on December 11, 2015. See Exhibit 20. As a result, Carlton and Lynda Cadwell should be required to sign these land use applications before the applications can be deemed complete.

¹³ See Section H of the deed. Exhibit 19, page 1.



Tax Lot 800 adjacent to the southern end of the water ski lake. KCDG is currently attempting to strong-arm Klippel Water into providing an access easement to KCDG for access to its property from the south. See Exhibit 21. The letters and emails from KCDG request an easement and threaten to file a lawsuit in an effort to establish an easement if Klippel Water does not agree to grant one. KCDG offers as a bargaining point to prohibit construction traffic on the proposed road during future development. In fact, the October 4, 2015 e-mail from Eric Cadwell to Klippel Water members includes a comment that KCDG would rather spend money on improvements than attorneys. These references to future development further signify the developers' intent to complete construction of a cluster development on the property subject to this Application. Because the water ski lake and northerly recreational lakes are the centerpiece of the cluster development, and the newly constructed westerly road and the newly installed domestic well are meant to serve that development, the Applicants should not be granted partial approval now without fully presenting the cluster development to the County.

KCDG must disclose to the County its full development plans so that, if the requested land use permits for recreational use are approved, adequate conditions can be adopted to protect the public and project neighbors.

C. Access to Tax Lots 824 and 828 is not by public access along Palla Lane, nor from Fawn Lane.

The Applicants' Exhibits C, U, and V all incorrectly show Buck Drive turning into Palla Lane south of about the middle of Tax Lot 2700, just past the intersection with Stag Drive. A blown up portion of this section of Applicants' Exhibit C is attached here as Exhibit 22. However, Buck Drive does not turn into or connect with Palla Lane; Buck Drive terminates east of Tax Lot 2700 and west of Klippel Water's Tax Lot 800. There is no public road access to Tax Lots 824 and 828. Instead, as shown on the attached recorded surveys prepared for the Klippel Water property (Tax Lot 800), Buck Drive ends well before, and to the west, of where Palla Lane begins. Indeed, barriers are in place between the easterly terminus of Buck Drive and the southerly terminus of Palla Lane such that physical transit by vehicle is not possible across the intervening land owned by Klippel Water. In addition, a survey prepared by HWA, the same consultants who prepared exhibits for the current application, identified the correct endpoint of Buck Drive on surveys prepared for KCDG's property line adjustments on February 13, 2014. See Exhibit 23. The Applicants' manipulations of the facts are in place to try to smooth the approval process for a cluster development that is clearly set in play by the first phase construction of the water ski and northerly recreational lakes, because KCDG otherwise has no adequate access for the contemplated lots.¹⁴

¹⁴ The Applicants' Exhibits C, U, and V also incorrectly portray the westerly road as if it is the "ditch rider" road and as if the "ditch rider" road splits in two separate directions north of Tax Lot 2300. East of Lots 2300, 2400 and 2500 the "ditch rider" road is on top of the TID pipeline and follows an entirely different alignment than does the westerly road to the east of the "ditch rider" road. It does not split into two "ditch rider" roads north of Tax Lot 2300 as Applicants have falsely portrayed.



At page 4 of the Decision, the second to last sentence of section C states that “Access to the subject property is from a gravel drive off Fawn Lane on the south...” This is not accurate. There is no access from Fawn Lane, and also no access from the easterly end of Buck Drive with which Fawn Lane intersects, as demonstrated above, or from anywhere else from the south or southwest of the subject property. Fawn Lane is a paved dead end road; it only intersects with Buck Road. The historic “ditch rider” road is only for exclusive use by TID personnel and is not an access road.

As described during the LUCS proceeding, the Wildlife Overlay zone will prevent construction of new roads to serve a cluster development. The street names and boundaries should be corrected in this Application to accurately reflect the facts as identified here.¹⁵

III. The newly constructed graveled westerly road must be removed.

The Decision limits the site plan review required under DCC 18.124.060 to the water ski lake. See Decision p. 56. The Bishops disagree with this limited review. The surface mining should have been subject to the site plan review under DCC 18.124.060 here, because, for example (and among other things), review of access and parking should have been required for the surface mining activities, and the public should have an opportunity to address such proposals.¹⁶

The Decision describes a road near the western boundary of the subject property as the “ditch rider” road. The Bishops and others demonstrated that the graveled westerly road was newly constructed and was necessary for the Applicants to carry out their surface mining uses proposed in this application. The westerly road is not the “ditch rider” road, which now runs on top of the TID pipeline.¹⁷

In any event, the westerly road is described as an access point for the water ski lake and is subject to site plan review under the Code. Pursuant to DCC 18.124.060.E, the County must find that the access points to the site shall be harmonious with proposed structures. The findings state:

The applicant proposes to provide access to the southern reservoir and its associated guest parking area via an existing private driveway off Johnson Road,

¹⁵ The portrayal of the “ditch rider” road as having its own discrete alignment on the shared property lines for Lots 2300, 2400, and 2500 with Lot 828, separate and apart from the alignment of the newly constructed westerly road, should also be corrected.

¹⁶ Analysis of access in relation to surface mining must be reviewed either under DCC 18.128.280 or directly through 18.124.060 because the impacts to the neighborhood must be analyzed, including as it relates to haul roads such as the newly constructed, westerly road. In a public review of the surface mining activity, with full knowledge of the plans (which have never been provided) the neighbors would and have objected to the creation in 2014 and use of the new westerly road for the surface mining activity.

¹⁷ If the Board grants *de novo* review, the Bishops will provide a summary of construction of the new westerly road. The description of the construction history is already available in the record. See discussion from the Bishops’ September 29, 2015 letter, pp. 2-4, the Bishops’ September 29, 2015 PowerPoint Presentation slides 5 and 6, and the Bishops’ October 26, 2015 letter, pp. 7-9.



as well as from the “ditch rider” road on the west side of the southern reservoir. The record indicates an approximately 10-foot-wide strip of land separates the private access driveway from the property at 63550 Johnson Road, Tax Lot 1400 on Assessor’s map 17-11-13. The Hearings Officer finds this driveway, which serves the existing residence on the subject property, is sufficient to provide access to the reservoir. The staff report states, and I agree, that although this driveway is located close to the aforementioned residential property, the low volume of additional trips generated by recreational use on the southern reservoir will create minimal impacts on the nearby property.

The record indicates the private driveway and guest parking area will be located at least 300 feet from any other residences, and will not be adjacent to any pedestrian walkways. The applicant’s submitted site plan shows the guest parking area will be located approximately 100 feet from the marina on the southern reservoir, and will include a fire apparatus turnaround. The applicant does not propose to remove any of the surrounding tree cover that provides screening from adjacent residences, and the Hearings Officer has found that if the applicant’s proposal is approved on appeal, it should be subject to a condition of approval requiring the property to retain all existing screening vegetation. For these reasons, I find the applicant’s proposal satisfies this criterion. Decision p. 70.

These findings do not provide any description of the newly constructed westerly road and whether it is harmonious with neighboring residences.¹⁸ This newly constructed road is not harmonious with the neighboring residences. The neighbors even opposed the “ditch rider” road when it was relocated and constructed on top of the TID pipeline that replaced the former canal in 2011. In response to the neighbors’ concerns, the “ditch rider” road remained a dirt path and the surrounding area, including the area that is now the new westerly road, had been restored to open space and planted with native grasses by TID after having been disrupted by the canal piping project in 2011 when the pipeline replaced the former canal. The new westerly road should be removed because of the invasion of privacy it has caused to neighbors, as well as the disturbance that was caused by the construction and surface mining activities related to the implementation of the first phase of the cluster development. Further, the westerly road along with the reservoirs should be removed because they convert open space for wildlife to a use by man that violates the Goal 5 resource treatment of the KCDG properties.¹⁹

Further, under DCC 18.124.060.G, the Decision must address:

“Areas, structures and facilities for storage, machinery and equipment, services (mail, refuse, utility wires, and the like), loading and parking and similar accessory areas and structures shall be designed, located and buffered or screened to minimize adverse impacts on the site and neighboring properties.”

¹⁸ The findings do reference the “ditch rider” road but make no analysis of the road against this criterion.

¹⁹ As the Board is aware, the KCDG property is subject to the wildlife overlay and is part of the protected deer winter range.



The findings under this section do not provide any analysis of the newly constructed westerly road or even of the “ditch rider” road, which has been described as necessary for TID to provide services to the reservoir, including access to its weir. While the pre-existing “ditch rider” road that runs over the TID pipeline would be adequate for the District to provide this service, the findings must address the Applicants’ proposal - use of the newly constructed westerly road. A finding cannot be made that the newly constructed westerly road was “designed, located and buffered or screened to minimize adverse impacts on the site and neighboring properties.”²⁰

Moreover, the Decision is absolutely silent about the newly constructed westerly road (or even the “ditch rider” road) in its analysis under DCC 18.124.060.C. This code section requires the design of the water ski lake and associated roads to “[p]rovide a safe environment while offering appropriate opportunities for privacy and transition from public to private spaces.” The Applicants’ decision to locate a brand new gravel road alongside adjoining properties to the west does not appropriately provide for privacy between neighbors.

The newly constructed westerly road is not necessary to serve the water ski uses, has not been properly reviewed in conjunction with these applications, and should be removed.

IV. The recreational uses on the water ski lake and northerly lake are prohibited under DCC 18.88.040.B because the lakes are owned and operated by a government agency.

A. Conditional use approval is required for recreational activities on the northerly lake.

Preliminarily, the Bishops point out that the Applicants have failed to submit a land use application for the northerly reservoir to authorize its use as a recreational facility requiring large acreage. The Decision ignores the Bishops’ argument and claims the question has been settled. Decision p. 34. However, this record shows that the Applicants are required to obtain conditional use approval for the northerly lake for the below reasons.²¹

The northerly lake’s surface area and water capacity is very nearly the same as that of the water ski lake. The northerly lake covers 8.5 acres compared to 13 acres for the water ski lake, and the lakes hold 58.89 and 67.90 acre-feet of water, respectively. The size, capacity and use of both of the lakes are essentially the same for land use purposes. The Applicants’ claim that the northern reservoir acts like KCDG’s irrigation pond, but this is a gross misrepresentation. If KCDG is even allowed to hold irrigation water on its property as a bulge-in-the-system, then the 14.4 acre feet of water that could be stored on site could only be maintained for 10 days and only during the irrigation season. See Exhibit 24.²² The capacity of the northern lake is 57 acre feet – four times the volume than would be needed or potentially allowed for a bulge-in-the-system.

²⁰ Similarly, the conditional use criteria under DCC 18.128.015.A.1 require analysis of the newly constructed westerly road, but no analysis is provided. See Decision p. 75.

²¹ See footnotes 1 and 2 *supra*.

²² OWRD’s Enforcement Order describes that the northern reservoir could hold at most 14.4 acre feet of water as a bulge-in-the-system.



The rural residential zone is not the place for recreational facilities of this size or nature. While the northerly lake has a 10,000 square foot house and massive multi-car garage as a backdrop, it is not simply an ornamental pond. Instead it is a regularly used recreational area tantamount to a public use. See Exhibit 25. Gatherings like those that occurred in the spring and summer of 2015, as well as the summer of 2014, with boating, paddle boarding, kayaking, parties, weddings, church events, and other activities deter from the quiet and sanctity that neighbors expect in this RR-10 area. Noise travels over water and uphill with an amphitheater effect and the more people who recreate at the property the more substantial the impacts are to the neighbors. Certainly these pictures show many more people using the facility than Mr. and Mrs. Kimble or Mr. and Mrs. Cadwell – owners of KCDG. Plenty of public parks are available in “Oregon’s backyard” to address the demand for this type of recreation. The property owners should not be allowed to use the northerly lake for recreation without an approved conditional use for a large acreage recreational facility.

The impacts of the recreational uses on the northerly lake must be fully examined and mitigated through the conditional use review process. Therefore, the Applicants should submit their full proposal for the cluster development with an explanation of the level of use for both lakes so that the public can fully comment. The County should be proactive in this matter to require full applications for the intended use of the property, instead of waiting for more detrimental impacts to wildlife and neighbors - especially since the County planning staff was advised as early as October 2013, by KCDG and its then attorney of KCDG’s intent to proceed with a cluster development of the property. This intent was reaffirmed in June 2014 by KCDG’s current attorney. See Decision p. 6.

- B. The Hearings Officer’s findings under DCC 18.88.040.B.7 are inadequate because the Decision does not address that the District is an applicant for the water ski lake and northerly lake recreational activities, and owns the water upon which water skiing and other recreational activities will occur.

In order to accomplish the purposes of the WA zone, and specifically to protect property designated as deer winter range, the County adopted prohibitions on uses under DCC 18.88.040.B. Among the prohibited uses listed is a recreation facility owned and operated by a government agency. See DCC 18.88.040.B.7. TID is one of the Applicants for a conditional use to allow water skiing. The County cannot simply excise the District from the ownership and operations of the water ski lake to conveniently avoid the prohibition under DCC 18.88.040.B.7.

The Decision, at pages 43-45, only addresses a legal argument regarding the meaning of the terms used in DCC 18.88.040.B.7. The Hearings Officer provides no findings regarding the Bishops’ argument that the District’s status as an applicant, and the District’s ownership of the personal property water storage right, are necessary to accomplish water skiing on the southerly reservoir and recreational activities on the northerly lake. Therefore, the Hearings Officer’s decision is incomplete.

If the County agrees that surface mining was done for a TID reservoir, which the Bishops contest, then the only reasonable conclusion is that any use of those reservoirs for water skiing or



other recreational uses constitute the use of recreation facilities owned and operated by a government agency.²³ The government has held itself to a high standard elevating the protection of mule deer habitat over recreational use of WA-zoned land by humans. This is an unsurprising result given the pressures on mule deer and elk in Deschutes County. TID should not be allowed to violate this standard.

If, instead, the reservoirs really are a privately owned facility, and KCDG does not believe it is limited by DCC 18.88.040.B.7, then the reservoirs are private and the surface mining was for a private purpose. The result is that, as argued above, KCDG must seek a zone change to allow surface mining. The Applicants cannot have it both ways.

V. The Hearings Officer's findings regarding setbacks are inadequate because both reservoirs obstruct from the ground up.

The Hearings Officer's decision makes lengthy findings about whether the setback requirements under 18.60.040 apply to the reservoirs. Decision pp. 35-36. The findings explain that the reservoirs were constructed across lot lines and then focus on whether the reservoirs qualify as a building that must comply with the setbacks. Under the County Code, the definition of "building" means a structure built for the enclosure of property of any kind. The Hearings Officer found,

The Bishops argue that the reservoirs are "buildings" because [they] were constructed to enclose and support water. However, I find that interpretation stretches the meaning of "building" too far. I find the reservoirs are not "buildings" and accordingly the minimum setbacks in the RR-10 Zone do not apply to them. Decision p. 36.

But, the Hearings Officer does not explain how the reservoirs that hold water, which is personal property, escape the County's definition that includes the enclosure of property of any kind.

Moreover, in the LUCS decision, the County found that the reservoirs are structures for purposes of the County Code because they have a fixed connection to the ground.²⁴ The fixed connection to the ground is created by above-ground obstructions to affix the reservoirs' liner in place, and through the construction of berms. The Decision ignores the definition of a setback that means an open space which is unobstructed from the ground upwards. The reservoirs, the liners affixed to the ground with rocks and other materials, and the reservoirs' berms are above-ground obstructions that are not allowed within the setbacks. The proposed uses do not comply with the setbacks and must be denied.

²³ TID has vehemently argued, despite its patent lack of control of KCDG's facilities, that the water in the reservoirs will remain its property and its water right. Thus, if its assertion is true, any recreation that requires water in the lakes, is done on water owned by a government agency - TID.

²⁴ See page 7 of the Board's decision on the LUCS attached to the Bishops' September 29, 2015 letter as Exhibit 1.



VI. Any findings under DCC 18.128.280 are premature or inadequate.

The Hearings Officer provided advisory findings for the conditional use criteria that apply to surface mining of Non-Goal 5 Mineral and Aggregate Resources. As the Decision notes, the subject property is not on the Comprehensive Plan's Non-Goal 5 Mineral and Aggregate Resources Inventory. This fact alone should prevent the County from issuing any findings under these conditional use criteria prior to amendment of the Comprehensive Plan because it is unclear what site could be approved in such amendment.

Notwithstanding this error, the Hearings Officer's findings are inadequate for at least the following reasons.²⁵ Primarily, the record contains no information about the design, extent, and operation of the surface mining activity. The Hearings Officer's statement that the boat has already sailed does not excuse the County from applying its standards.

The Hearings Officer's findings under DCC 18.128.280.B.5 are also erroneous. The proposed lakes' impact on wildlife habitat should cause the excavation application to be denied in accordance with comments from ODFW that the surface mining should not be approved. See Exhibit 26. KCDG destroyed about 50 to 70 acres or more of wildlife habitat in doing the excavation and converting much of that acreage to land that cannot serve wildlife needs well, including lining about 25 to 30 of the acres and covering more than 16 acres with surface water. This has, without County review or approval or public input into the process, substantially reduced the winter deer range - land that is irreplaceable and should be restored to the use to which the County has committed it - for wildlife protection consistent with rural residential living. Further, the surface mining most certainly adversely impacted the historic use of the adjacent properties as residential uses. This criterion cannot be met.

Further, the Hearings Officer erred in her application of Section 18.128.280.C.1. See Decision p. 82. This criterion requires that "if the surface mining actively involves the maintenance or creation of man-made lakes, water impoundments or ponds, the applicant shall also demonstrate, at the time of site plan review" that "there is adequate water legally available to the site to maintain the water impoundment and to prevent stagnation."

The Hearings Officer did not, and could not, find that adequate water is legally available. Indeed, she stated that "as of the date the record in this matter closed, TID's previous license to store water in the reservoirs had expired." However, the Limited License issued by OWRD on June 16, 2015 in conjunction with its Enforcement Order holding that TID was not authorized to store water in the two KCDG reservoirs did not expire but was expressly *withdrawn* by OWRD on November 23, 2015. See Exhibit 27. The Board should revise the decision to state accurately that OWRD withdrew the license and TID has no legal basis or approval from OWRD to hold water on the KCDG property.

Further, the Hearings Officer applied the wrong test under DCC 18.128.280.C.1. The Decision states that "there is no evidence in the record that TID is *legally prohibited* from

²⁵ The Bishops reserve the right to respond to the conditional use criteria for surface mining of a Non-Goal 5 Mineral and Aggregate Resources at the time the Applicants make such an application and it is deemed complete.



obtaining” a permit to store water (emphasis in original), but that is not the proper standard. See Decision p. 82. Webster’s Third New International Dictionary (2002) defines “available” as “capable of use for the accomplishment of a purpose: immediately utilizable.” That is quite a different test than “not legally prohibited” and the decision is therefore in error.

It is undisputed that TID does not have any water “immediately utilizable” to legally fill the KCDG reservoirs. From the beginning of this dispute, the Bishops have argued that the proper legal path for KCDG and TID to follow in order to store water on KCDG’s property is to apply for a reservoir permit as required by state statute, but TID has chosen a different path. However, TID’s chosen path - trying to use the irrigation district transfer statutes to move water to unpermitted private reservoirs - is not legally available to them, and OWRD has agreed with the Bishops in that regard. Rather than trying to legalize the KCDG reservoirs, TID has insisted on sticking to its chosen path, to the point that the District has now filed two separate petitions for judicial review against OWRD, trying to impose the District’s position on the Department. With two lawsuits pending, TID certainly cannot demonstrate that it has water legally available for its project. In fact, even if the Board were to apply the Hearings Officer’s erroneous standard, at this point, TID is in fact legally prohibited from water storage. The County cannot speculate that maybe someday, somehow, TID could get some kind of a permit to hold water in these reservoirs, and thereby find that this Code provision is currently satisfied.

The Hearings Officer also erred in her treatment of DCC 18.128.280.C.2. Under the Code, the County must make a specific finding that “the soil characteristics or proposed lining of the impoundment are adequate to contain the proposed water and will not result in the waste of water.” The Hearings Officer did not fully deal with the evidence on this issue, but found instead that “the TID board’s decisions concerning how to manage its water resources are not before me in these proceedings.” See Decision p. 82. This finding misses the point. The lining only partially “contains” water. It may limit seepage, but, in conjunction with the shallowness of the reservoirs, it increases evaporation and thus contributes to waste. Further, there is no out-take capability installed in the reservoirs for TID or any of its other water patrons to use any of the water. Since 2014, all of the water illegally held by KCDG has been wasted by being precluded from use by TID or the public, and through high rates of evaporation over the past two years.

According to the District’s own Water Conservation Plan Update (2005), Central Oregon’s net evaporation rate is 2.5 - 3 feet per year. See Exhibit 28. The surface area of the KCDG reservoirs, which according to TID is 21.46 acres, multiplied by the evaporation rate, yields approximately 53.65 - 64.38 acre feet of evaporation per year. Thus, the District will lose approximately half of the water stored at the site each year, and these figures do not even account for additional evaporation that will be caused by the reservoirs’ black liner and shallow depth. Based on this evidence, it is wasteful to store water in the KCDG ponds, and it is error for the Hearings Officer to avoid making a specific finding on this issue.

As a result of the advisory nature of this portion of the Decision, any conditions of approval related to the surface mining to create the reservoirs or potential subsequent use of the reservoirs for recreational uses as the centerpiece of the Applicants’ cluster development are



premature. In any event, the conditions of approval are wholly inadequate to protect the public and neighbors or help the proposed uses qualify as suitable under the conditional use standards.

In addition to all of the foregoing arguments, the Bishops reserve all previous arguments made in this matter before the Hearings Officer.

CONCLUSION

The County should grant *de novo* review of the above-referenced Decision because there are too many unanswered questions and errors to allow it to stand. Further, the applications should be denied and the subject property should be remediated to comply with the 1992 reclamation plan in File No. A-92-2 that required the slope on reclaimed land to be no more than 5:1. Thank you for your consideration.

Sincerely,

GARVEY SCHUBERT BARER

By

A handwritten signature in dark ink, appearing to read "Jennifer Bragar".

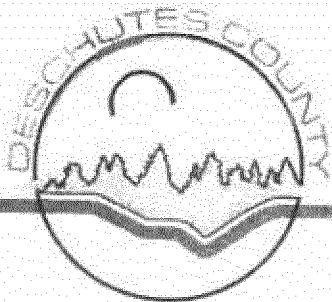
Jennifer Bragar

JB:jcl

Attachments

cc: Clients

Janet Neuman



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
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APPEAL APPLICATION

FEE: \$4,772

EVERY NOTICE OF APPEAL SHALL INCLUDE:

1. A statement describing the specific reasons for the appeal.
2. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons the Board should review the lower decision.
3. If the Board of County Commissioners is the Hearings Body and *de novo* review is desired, a request for *de novo* review by the Board, stating the reasons the Board should provide the *de novo* review as provided in Section 22.32.027 of Title 22.
4. If color exhibits are submitted, black and white copies with captions or shading delineating the color areas shall also be provided.

It is the responsibility of the appellant to complete a Notice of Appeal as set forth in Chapter 22.32 of the County Code. The Notice of Appeal on the reverse side of this form must include the items listed above. Failure to complete all of the above may render an appeal invalid. Any additional comments should be included on the Notice of Appeal.

Staff cannot advise a potential appellant as to whether the appellant is eligible to file an appeal (DCC Section 22.32.010) or whether an appeal is valid. Appellants should seek their own legal advice concerning those issues.

Appellant's Name (print): Thomas and Dorbina Bishop, Trustees of the Bishop Family Trust Phone: (503) 553-3208

Mailing Address: 121 SW Morrison, 11th Floor City/State/Zip: Portland, OR 97204

Land Use Application Being Appealed: 247-15-000226-CU; 247-15-000227-CU; 247-15-000228-LM; 247-15-000383-MA;
247-15-000384-SP; 247-15-000385-V

Property Description: Township Range Section Tax Lot See Next Page

Appellant's Signature: Thomas E Bishop

EXCEPT AS PROVIDED IN SECTION 22.32.024, APPELLANT SHALL PROVIDE A COMPLETE TRANSCRIPT OF ANY HEARING APPEALED, FROM RECORDED MAGNETIC TAPES PROVIDED BY THE PLANNING DIVISION UPON REQUEST (THERE IS A \$5.00 FEE FOR EACH MAGNETIC TAPE RECORD). APPELLANT SHALL SUBMIT THE TRANSCRIPT TO THE PLANNING DIVISION NO LATER THAN THE CLOSE OF THE DAY FIVE (5) DAYS PRIOR TO THE DATE SET FOR THE *DE NOVO* HEARING OR, FOR ON-THE-RECORD APPEALS, THE DATE SET FOR RECEIPT OF WRITTEN RECORDS.

(over)

NOTICE OF APPEAL

See letter and exhibits in the enclosed binder.

Property Description:

Tax Lot 601, Map 17-11-13 63344 Palla Lane

Tax Lot 819, Map 17-11-13 63560 Johnson Road

Tax Lot 820, Map 17-11-13 19436 Klippel Road

Tax Lot 822, Map 17-11-13 63570 Johnson Road

Tax Lot 823, Map 17-11-13 19275 Klippel Road

Tax Lot 825, Map 17-11-13 63410 Palla Lane

Tax Lot 826, Map 17-11-13 63380 Palla Lane

Tax Lot 827, Map 17-11-13 63280 Palla Lane

Tax Lot 829, Map 17-11-13 No situs address

Tax Lot 11401, Map 17-11-14 63566 Johnson Road

Tax Lot 11600, Map 17-11-14 19190 Klippel Road

Tax Lot 824, Map 17-11-13

Tax Lot 828, Map 17-11-13

(This page may be photocopied if additional space is needed.)

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GARVEY SCHUBERT BARER
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206 464 3939

THE COMMERCE BANK OF WASHINGTON
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SEATTLE, WASHINGTON 98101
(206) 292-3900

19-801/1250

244820

PAY FOUR THOUSAND SEVEN HUNDRED SEVENTY-TWO AND 00/100 DOLLARS

DATE

CHECK AMOUNT

01-28-16

\$*****4,772.00

TO THE
ORDER
OF

DESCHUTES COUNTY

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS


AUTHORIZED SIGNATURE

⑈ 244820⑈ ⑆ 125008013⑆ 001101382⑈

DECISION OF DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS: 247-15-000226-CU (CU for Surface Mining for Reservoirs)
247-15-000227-CU (CU for Recreation Facility)
247-15-000228-LM (LM for Recreation Facility)
247-15-000383-MA (Modification)
247-15-000384-SP (Site Plan for Recreation Facility)
247-15-000385-V (Setback Variance for Reservoir)

APPLICANT: Hurley Re, PC
747 Millview Way
Bend, Oregon 97702¹

PROPERTY OWNERS: KC Development Group, LLC
63560 Johnson Road
Bend, Oregon 97703
(Tax Lots 601, 820, 823, 824, 825, 826, 827, 828, 829, 11401, 11600)

Cadwell Family Trust
63560 Johnson Road
Bend, Oregon 97703
(Tax Lot 819)

Harris and Nancy Kimble
63570 Johnson Road
Bend, Oregon 97703
(Tax Lot 822)

Tumalo Irrigation District
64697 Cook Avenue
Bend, Oregon 97701
(Holder of Easement on Tax Lots 824 and 828)

PROPERTY OWNERS' ATTORNEY: Elizabeth Dickson and Ken Katzaroff
Hurley Re, PC
747 Millview Way
Bend, Oregon 97702
Attorneys for TID and KCDG

OPPONENTS' ATTORNEYS: Jennifer Bragar
Garvey Schubert Barer
121 S.W. Morrison Street
Portland, Oregon 97204-3141
Attorney for Opponents Thomas and Dorbina Bishop, Trustees of the Bishop Family Trust

¹ The applicant is the law firm representing the property owners and Tumalo Irrigation District.

Paul J. Dewey and Carol Macbeth
Central Oregon LandWatch
50 S.W. Bond Street, Suite 4
Bend, Oregon 97702
Attorneys for Opponent Central Oregon LandWatch

REQUEST: The applicant requests conditional use approval to make lawful previous surface mining that created two reservoirs on the subject property, which is located west of Bend and zoned RR-10, SMIA, LM and WA. The applicant also requests approval of a variance to the yard setbacks for one of the reservoirs. The applicant requests conditional use and site plan approval to establish a recreation-oriented facility requiring large acreage, consisting of private motorized boating and water skiing on one of the reservoirs.

STAFF REVIEWER: Anthony Raguine, Senior Planner

HEARING DATES: July 1 and September 29, 2015

RECORD CLOSED: November 3, 2015

I. APPLICABLE STANDARDS AND CRITERIA:

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

1. Chapter 18.56, Surface Mining Impact Area Combining Zone (SM)

- * Section 18.56.020, Location
- * Section 18.56.050, Conditional Uses Permitted
- * Section 18.56.070, Setbacks
- * Section 18.56.080, Use Limitations

2. Chapter 18.60, Rural Residential Zone (RR-10)

- * Section 18.60.030, Conditional Uses Permitted
- * Section 18.60.040, Yard and Setback Requirements
- * Section 18.60.050, Stream Setback
- * Section 18.60.060, Dimensional Standards
- * Section 18.60.070, Limitations on Conditional Uses
- * Section 18.60.080, Rimrock Setback

3. Chapter 18.84, Landscape Management Combining Zone (LM)

- * Section 18.84.020, Application of Provisions
- * Section 18.84.040, Uses Permitted Conditionally
- * Section 18.84.050, Use Limitations

4. Chapter 18.88, Wildlife Area Combining Zone (WA)

- * Section 18.88.020, Application of Provisions
- * Section 18.88.040, Uses Permitted Conditionally
- * Section 18.88.060, Siting Standards
- * Section 18.88.070, Fence Standards

5. Chapter 18.116, Supplemental Provisions
 - * Section 18.116.020, Clear Vision Areas
 - * Section 18.116.030, Off-Street Parking and Loading
 - * Section 18.116.031, Bicycle Parking
6. Chapter 18.124, Site Plan Review
 - * Section 18.124.030, Approval Required
 - * Section 18.124.060, Approval Criteria
 - * Section 18.124.070, Required Minimum Standards
7. Chapter 18.128, Conditional Use
 - * Section 18.128.015, General Standards Governing Conditional Uses
 - * Section 18.128.280, Surface Mining of Resources Exclusively for On-Site Personal, Farm or Forest Use or Maintenance of Irrigation Canals
8. Chapter 18.132, Variances
 - * Section 18.132.020, Authority of Hearings Body
- B. Title 22 of the Deschutes County Code, the Development Procedures Ordinance
 1. Chapter 22.08, General Provisions
 - * Section 22.08.010, Application Requirements
 - * Section 22.08.020, Acceptance of Application
 2. Chapter 22.20, Review of Land Use Action Applications
 - * Section 22.20.055, Modification of Application
 3. Chapter 22.24, Land Use Action Hearings
 - * Section 22.24.140, Continuances and Record Extensions
- C. Deschutes County Comprehensive Plan
 1. Former Chapter 23.100, Surface Mining
 - * Former Section 23.100.080, Non-significant Inventory
- D. Oregon Revised Statutes (ORS)
 1. Chapter 197, Comprehensive Land Use Planning
 - * ORS 197.763, Conduct of Local Quasi-Judicial Land Use Hearings

II. FINDINGS OF FACT:

- A. **Location:** The subject property is located west of Bend. It is east of Johnson Road, north of Fawn Lane, south of Klippel Road, and west of Tumalo Creek. The original applications identified the subject property as Tax Lots 824 and 828 on Deschutes County Assessor's Map 17-11-13 with an assigned address of 19210 Klippel Road, Bend. The modified applications describe the property as thirteen tax lots, including Tax Lots 824 and 828 and the following contiguous tax lots and associated addresses:

<i>Tax Lot</i>	<i>Address</i>
Tax Lot 601, Map 17-11-13	63344 Palla Lane
Tax Lot 819, Map 17-11-13	63560 Johnson Road
Tax Lot 820, Map 17-11-13	19436 Klippel Road
Tax Lot 822, Map 17-11-13	63570 Johnson Road
Tax Lot 823, Map 17-11-13	19275 Klippel Road
Tax Lot 825, Map 17-11-13	63410 Palla Lane
Tax Lot 826, Map 17-11-13	63380 Palla Lane
Tax Lot 827, Map 17-11-13	63280 Palla Lane
Tax Lot 829, Map 17-11-13	No situs address
Tax Lot 11401, Map 17-11-14	63566 Johnson Road
Tax Lot 11600, Map 17-11-14	19190 Klippel Road

- B. **Zoning and Plan Designation:** The subject property is zoned Rural Residential (RR-10). Portions of the property are located within the Landscape Management (LM) Combining Zones associated with Tumalo Creek to the east and Johnson Road to the west. All of the property is within the Wildlife Area (WA) Combining Zone protecting the Tumalo Deer Winter Range. Portions of the property are located in a Surface Mining Impact Area (SMIA) Zone due to the property's proximity to two active surface mines. The property is designated Rural Residential Exception Area (RREA) on the Deschutes County Comprehensive Plan map.
- C. **Site Description:** Assessor's data indicate the subject property consists of approximately 155 acres in thirteen contiguous tax lots described in the findings above. Tax Lots 824 and 828 were the site of the Klippel Surface Mine (former SM Site 294) previously zoned Surface Mining (SM). When mining and reclamation of Site 294 was completed, the mine was rezoned to RR-10. The property has approximately 55 acres of irrigation water rights administered by the Tumalo Irrigation District (TID). The property is developed with two man-made, lined reservoirs filled with water. A dwelling, garage, and outbuildings are located on the property. Access to the subject property is from a gravel drive off Fawn Lane on the south, a gravel drive off Klippel Road on the north, and a private driveway off Johnson Road on the north that provides access to the dwelling. There also is a "ditch rider" road near the western boundary of the subject property providing access to TID's irrigation facilities.

The smaller of the two reservoirs ("northern reservoir") is located in the northwestern portion of Tax Lot 828, is round in shape, and has a capacity of approximately 57 acre-feet of water. The larger reservoir ("southern reservoir") is located on Tax Lots 824 and 828 and has a capacity of approximately 68 acre-feet of water. The southern reservoir is long and narrow and has two round man-made gravel and dirt islands, one at each end, to facilitate waterskiing. At its north end, the southern reservoir has a small marina consisting of a boat ramp, dock, and pilings to support a boat house. Near the southern end of the southern reservoir are a weir and a head gate regulating the flow of water from TID's piped irrigation canal ("Tumalo Feed Canal") into the southern reservoir. In addition, there is a

pipe connecting the two reservoirs. The undeveloped portion of the property has a vegetative cover of scattered pine and juniper trees and native brush and grasses.

- D. **Surrounding Zoning and Land Uses:** The subject property is adjacent to the Klippel Acres Subdivision which is zoned RR-10 and WA and developed with rural residences. Approximately 350 feet to the east is Tumalo Creek. To the west are Johnson Road and the Saddleback Subdivision zoned RR-10 and WA and developed with rural residences. Also to the west is TID's piped Tumalo Feed Canal and the "ditch rider" road. Two active surface mines are located within a quarter mile of the subject property. Approximately 1,700 feet to the north is SM Site 293. Approximately 350 feet to the east is SM Site 308. Land zoned Exclusive Farm Use-Tumalo/Redmond/Bend Subzone (EFU-TRB) is located approximately 1,000 feet to the north and is engaged in small-scale farming consisting of hay production and livestock grazing on irrigated pasture. Approximately 900 feet to the northwest are lands zoned Forest Use (F-2) that are primarily undeveloped. Tumalo Creek adjoins the property to the east along tax lots 601 and 827. Aerial and ground-level photographs in the record show surrounding land is characterized by a moderate to dense tree cover as well as more open pasture areas.²
- E. **Land Use/Code Enforcement History:** The land use history of the subject property is extensive. The following chronology provides context for these applications.³

Klippel Surface Mine. The record indicates former SM Site 294 was fully mined and reclaimed, and received reclamation approval from the Oregon Department of Geology and Mineral Industries (DOGAMI) on September 27, 2005. In May of 2007, Harris Kimble applied for a plan amendment, zone change and goal exception to redesignate SM Site 294 from Surface Mining and Agriculture to RREA, and to rezone the site from SM and Exclusive Farm Use-Tumalo/Redmond/Bend Subzone (EFU-TRB) to RR-10. In a decision dated November 8, 2007, this Hearings Officer approved the plan amendment, zone change and goal exception (PA-07-2, ZC-07-2).⁴ In my decision, I described the rezoned property as follows:

"The subject property is approximately 160 acres in size and very irregular in shape. A significant portion of the property has been disturbed due to previous surface mining and reclamation activities. The disturbed area consists of reclaimed extraction pits and berms created from overburden removed from the extraction sites. The undisturbed portions of the property have varying topography and a mixture of native vegetation including scattered stands of pine and juniper trees, as well as native brush and grasses, and pasture grasses seeded as part of the surface mine reclamation. Part of the eastern border of the subject property is located in the canyon of Tumalo Creek and includes steep slopes and rock outcrops."

² See, e.g., the applicant's site plan/aerial photograph included in the record as Hearing Exhibit 5.

³ This chronology is taken largely from this Hearings Officer's December 15, 2014 decision on appeal from the county's issuance of a Land Use Compatibility Statement (LUCS) (247-14-000-238-PS, 247-14-00274-A).

⁴ A copy of this decision is included in the record as Exhibit "QQ" to the applicant's burden of proof. The applicant submitted two burden of proof statements: the original burden of proof and the burden of proof in support of the modified applications. However, the applicant's exhibits are numbered in one unified sequence. Therefore, for purposes of clarity this decision refers to a single burden of proof.

The record indicates the subject property has 58.91 acres of irrigation water rights administered by TID

The record indicates some of these water rights currently are leased for in-stream use. There is a small irrigation ditch that traverses the subject property within an easement.”

2013. KC Development Group (hereafter “KCDG”) purchased the majority of the subject property in October of 2013. On October 8, 2013, staff from the county’s Community Development Department (CDD) met with representatives of KCDG and their then-attorney Tia Lewis to discuss development of the subject property with a residential cluster development. No development proposal was submitted at that time.

2014. On March 18 and 19, 2014, CDD received three code violation complaints alleging that rock crushing, construction of a lake with a boat dock and fuel tanks, and use of a private road were occurring on the subject property without required land use approval. These complaints were investigated by Deschutes County Code Enforcement Technician Tim Grundeman who concluded that no code violations had occurred. KCDG applied for a temporary use permit to allow rock crushing on the subject property in association with private road maintenance and landscaping. On April 2, 2014, CDD issued a temporary use permit for such use (TU-14-8).⁵ On June 4, 2014, CDD received another code violation complaint related to “unpermitted activities” on the property.

On June 13, 2014, CDD staff, Deschutes County Assistant Legal Counsel John Laherty, representatives of TID, TID’s attorney William Hopp, and TID’s and KCDG’s attorney Elizabeth Dickson met to discuss the need and process for obtaining a Land Use Compatibility Statement (LUCS) for TID’s request to the Oregon Water Resources Department (WRD) for permission to transfer the place of use of TID’s water storage right from Upper Tumalo Reservoir to the subject property. Ms. Dickson advised CDD staff that an application for a residential cluster development on the subject property would be submitted in the future, potentially within six months. On or about June 16, 2014, CDD Director Nick Lelack determined to treat any request for a LUCS submitted by TID as a “land use action” and to process it according to the county’s procedures therefor.

On June 11, 2014, TID submitted to WRD an application (T-11833) to transfer the place of use of a portion of TID’s water storage right from Upper Tumalo Reservoir to the two reservoirs on the subject property.

On June 17, 2014, KCDG submitted applications for a building permit (247-14-003315-STR) and an electrical permit (247-14-003315-ELEC-01) for a boat house and boat slip on the southern reservoir. CDD staff advised KCDG that the county could not sign off on the building or electrical permit while any LUCS request was pending. On June 19, 2014, CDD received a letter from Ken Rieck, TID Manager, explaining the need for the transfer in place of use of its water storage right and TID’s belief that the proposed transfer is a use permitted outright in the RR-10 Zone.

On July 25, 2014, John Laherty sent a letter to Elizabeth Dickson stating in relevant part:

⁵ A copy of the TU is included in this record as Exhibit “I” to the applicant’s burden of proof.

“ . . . [T]o the extent KC Development Group LLC has expended, or intends to expend, resources to create reservoirs, install footings for a dock or boathouse, or otherwise perform work on the subject property that does not [sic] require County approval, it does so at its own risk and without any guarantee that future County permits or approvals – including, without limitation, land use approval for construction of a cluster development or recreational lake, or building division approval for construction of a boat house or dock – will be granted.

The County has encouraged KC Development Group LLC and its principals to apply for necessary land use approvals first – before devoting significant resources to improving the property – so as to avoid the risk of commencing projects it will ultimately be unable to complete. Your client has chosen to disregard this advice.

Please inform your client (again) that Deschutes County will review any future land-use or building permit application on its own merits, and the County's decision on such application will be governed solely by consideration of appropriate criteria. Your client's decision to expend resources on improvements prior to obtaining necessary County approval for his intended development project will not be given undue weight or consideration in this process.”

On July 25, 2014, CDD staff and county legal counsel conducted a site visit to the subject property at the request of neighboring property owners.

On August 4, 2014, TID submitted its LUCS request on a form provided by WRD. The form stated TID intended to submit to WRD an application for a “water right transfer – storage,” and described the intended use of the water in relevant part as follows:

“This is an intra-district transfer in place of use of 108 a.f. [acre feet] of Tumalo Creek Water. TID to TID (Storage water). The transfer of this storage water is necessary for the operation and maintenance of our irrigation system, and allowed as an outright use in the RR-10 zone. The current site was built in the 1920's and no longer serves TID's needs. The new site is a significant upgrade that will enable TID to reduce dependence on Tumalo Creek for natural flow, provide emergency water supplies for the District and Emergency Services responders, and provide increased efficiency in the operations and maintenance of the TID system overall.”

Attached to the LUCS form was a two-page letter dated June 19, 2014 from Ken Rieck, to Nick Lelack describing the reason for the LUCS request.

By a letter dated August 6, 2014, Deschutes County Building Official Dave Peterson issued a stop work order to KCDG for work performed on the boat house foundation on the southern reservoir without a building permit. The previously submitted building and electrical permit applications were withdrawn by KCDG.

On August 13, 2014, Mr. Lelack completed and issued the WRD LUCS form by checking the box stating:

"Land uses to be served by the proposed water uses (including proposed construction) are allowed outright or are not regulated by your comprehensive plan. Cite applicable ordinance section(s)."

Mr. Lelack attached to the form a three-page "Notice of Decision" dated August 13, 2014. The decision cited Section 18.60.020(l) listing "operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District," and included the following findings:

"According to information provided by Tumalo Irrigation District, TID 'has decided to move its Regulation Pond storage to [the Klippel Mining Pit] a site upstream from our current in-district storage at Tumalo Reservoir.' TID states that the existing Reservoir 'was designed and built in the 1920's and does not adequately serve TID's needs,' and that the new site 'will be a significant upgrade to operations and maintenance.' The Planning Director finds that transferring in-district storage from the Tumalo Reservoir upstream to the Klippel Acres Mining Pit in order to improve the operations of TID's existing irrigation system is a use permitted outright in this zone."

On August 22, 2014, opponents Thomas and Dorbina Bishop, Trustees for the Bishop Family Trust (hereafter "Bishops"), filed an appeal from the LUCS. The appeal was referred to this Hearings Officer for hearing.

On September 16, 2014, CDD received a code violation complaint for construction of a new road on the subject property. The complaint was again investigated by Tim Grundeman who found no code violation. On September 22, 2014, CDD received a code violation complaint regarding waterskiing occurring on the southern reservoir.

On September 25, 2014, TID filed with WRD a notice of intent to change the location of a portion of its water right to the reservoirs on the subject property (T-11951).

On October 3, 2014, the Hearings Officer conducted a site visit to the subject property and vicinity accompanied by Senior Planner Anthony Raguine. On October 7, 2014, the Hearings Officer held a public hearing on the appeal. At that hearing, the Hearings Officer disclosed her observations and impressions from the site visit.⁶

On October 10, 2014, CDD issued a Notice of Violation to KCDG for operating a "recreation-oriented facility requiring large acreage" without land use approval.

On December 15, 2014, the Hearings Officer issued a final decision on the LUCS appeal, holding in relevant part that:

- "1. The county incorrectly categorized TID's proposed use on the WRD LUCS form as a use allowed without review.*
- 2. The county erred in issuing a LUCS decision finding TID's proposed use was allowed without review.*

⁶ At the continued public hearing on the subject applications, the Hearings Officer requested that the portion of the LUCS hearing recording that included my site visit observations be included in the record for the subject applications. However, that recording was inadvertently omitted from this record.

3. *The county's LUCS decision is reversed and remanded for the CDD Director to reissue the WRD LUCS form and the LUCS decision to categorize TID's proposed use as one involving discretionary land use approval(s) that have not yet been obtained – i.e., the conditional use of surface mining for reservoirs in conjunction with operation and maintenance of irrigation systems under Section 18.60.030(W), and/or a recreation-oriented facility requiring large acreage under Section 18.60.030(G)."*⁷

Both TID and the Bishops appealed the Hearings Officer's decision to the Deschutes Board of County Commissioners (hereafter "board").

2015. On January 7, 2015, by Order No. 2015-009, the board accepted the TID's and the Bishops' appeals of the Hearings Officer's LUCS decision and elected to consolidate them into a single *de novo* proceeding. On January 29, 2015 the board held a public hearing on the appeals. On April 8, 2015, the board issued its decision affirming the Hearings Officer's decision.⁸ On April 24, 2015, Nick Lelack re-issued the WRD LUCS form and checked the box stating:

*"Land uses to be served by the proposed water uses (including proposed construction) involve discretionary land use approvals as listed in the table below. (Please see attached documentation of applicable land use approvals which have already been obtained. Record of Action/land use decision and accompanying findings are sufficient.) **If approvals have been obtained but all appeal period have not ended, check "Being pursued."*** (Bold emphasis in original.)

The table on the LUCS form listed conditional use permits as required to establish a recreation facility and for surface mining. The board's and the Hearings Officer's decisions were attached to the re-issued LUCS.

On April 29, 2015, WRD issued two orders concerning TID's request for permission to transfer the place of use of part of its water right from Upper Tumalo Reservoir to the reservoirs on the subject property. WRD denied TID's application (T-11833) for a temporary transfer in place (Special Order Volume 95, Pages 1018-1025). It also denied TID's request for approval of a permanent transfer in place (Special Order Volume 95, Pages 1026-1032).⁹ The stated reason for WRD's denials was that land use approval was required for the transfer and TID had not obtained it.

In May of 2015, KCDG, TID and the Bishops filed appeals with the Land Use Board of Appeals (LUBA) from the board's LUCS decision, and from Nick Lelack's re-issuance of the WRD LUCS form, stating additional land use review was required for the reservoirs.

⁷ A copy of the Hearings Officer's LUCS decision is included in this record as Exhibit "XX" to the applicant's burden of proof.

⁸ A copy of the board's decision is included in this record as Exhibit "PP" to the applicant's burden of proof.

⁹ Copies of these orders are included in the record as attachments to the Bishops' May 26, 2015 memorandum.

On May 14, 2015, a code violation complaint was filed alleging unpermitted construction on the subject property including piping and concrete work. On May 15, 2015, TID's and KCDG's attorney Ken Katzaroff submitted an affidavit from Robert Varco, TID's Field Supervisor, describing the nature and purpose of the construction work. According to the affidavit, the construction was to replace an existing concrete weir in order to improve TID's existing water delivery system. Mr. Varco stated TID installs approximately 20 new or replacement weirs in its system each year. On May 18, 2015, Senior Planner Anthony Raguine and Code Enforcement Technician John Griley met with Harris Kimble on the subject property to investigate the construction. Based on the investigation and Mr. Varco's affidavit, the county determined this construction work did not require building or electrical permits, and that the work was allowed outright under Section 18.60.020(l) of the Deschutes County Code as the "operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District." The code enforcement case was closed.

On September 9, 2015, LUBA issued its decision on TID's/KCDG's and the Bishops' appeals from the county's LUCS decisions. *Bishop v. Deschutes County*, ____ Or LUBA ____ (LUBA No. 2015-027, 2015-028, and 2015-030; September 9, 2015).¹⁰ TID's/KCDG's appeals included motions to dismiss all appeals, and the Bishops' appeals included a motion to transfer its appeals to the Deschutes County Circuit Court on the basis that LUBA lacked jurisdiction to hear the appeals. In its decision, LUBA held: (1) the board correctly found both TID/KCDG and the Planning Director mischaracterized the nature of the use for which the LUCS was requested; (2) the Planning Director did not err in re-issuing the LUCS stating land use approval for the reservoirs was required; (3) LUBA lacked jurisdiction to hear the appeals because they are excluded from LUBA jurisdiction under ORS 197.015(10)(b)(H)(iii);¹¹ (4) the Bishops' LUBA appeals were transferred to the Deschutes County Circuit Court based on the Bishops' motion for transfer; and (5) TID's/KCDG's appeals were dismissed because they did not timely file a motion for transfer to the circuit court.

- F. Procedural History:** Based on the board's April 8, 2015 LUCS decision and Nick Lelack's April 24, 2015 re-issuance of the LUCS, the applicant submitted applications on April 29, 2015 for conditional use approval for the surface mining that created the reservoirs, and for the recreation-oriented facility requiring large acreage on the southern reservoir. The applications were accepted by the county as complete on May 29, 2015. Therefore, the 150-day period for issuance of a final local land use decision under ORS 215.427 would have expired on October 26, 2015. A public hearing on the applications was scheduled for July 1, 2015. By a letter dated June 26, 2015, the applicant requested a continuance of the hearing in order to submit modified applications addressing the site plan review criteria and questions raised by planning staff about the number of guests using the subject property for recreation and a guest parking plan. The letter included the applicant's agreement to toll the 150-day period for decision on the original applications to November 23, 2015. Because the request for continuance was submitted after notice of the public hearing was published, pursuant to Section 22.24.140 of the county's land use procedures ordinance, the Hearings Officer opened the public hearing on July 1, 2015, received limited evidence and argument, and continued the hearing to September 29, 2015.

¹⁰ A copy of LUBA's decision is included in this record as Exhibit "YY" to the applicant's burden of proof.

¹¹ ORS 197.015((10)(b)(H)(iii) excludes from LUBA's jurisdiction a decision by a local government that a state agency action could be compatible with the county's acknowledged comprehensive plan and zoning ordinance but requires future land use review.

On July 17, 2015, the applicant submitted modified applications adding eleven tax lots, requesting conditional use approval for the recreation-oriented facility requiring large acreage to allow use thereof by up to twenty accompanied guests of the property owners, site plan approval for the recreation-oriented facility including access and parking for such guests, and approval of a variance to the minimum setbacks in the RR-10 Zone to allow the southern reservoir to cross a property line. Under Section 22.20.055(B) of the procedures ordinance, filing the modification application restarted the 150-day period on July 17, 2015. Therefore, the 150-day period on the modified applications would have expired on December 14, 2015.

By an electronic mail message dated July 30, 2015, Elizabeth Dickson requested county approval to operate a motorized boat on the southern reservoir in order to conduct audio testing of boat noise. By an electronic mail message dated August 3, 2015, Senior Planner Raguine advised Ms. Dickson the county would give permission for the audio testing. At the county's request, on August 12, 2015 the applicant mailed written notice of the audio testing to the owners of record of all property located within 500 feet of the subject property, notifying these owners that testing would take place on August 20, 22, 23, and 24 at various times.

At the continued public hearing on September 29, 2015, the Hearings Officer received testimony and evidence, left the written evidentiary record open through October 27, 2015, and allowed the applicant through November 3, 2015 to submit final argument pursuant to ORS 197.763. The record closed on November 3, 2015. Because the applicant agreed to extend the written record from the hearing on September 29, 2015 through November 3, 2015, under Section 22.24.140 of the procedures ordinance the 150-day period was tolled for 35 days and would have expired on January 19, 2016.¹²

By a letter dated December 22, the applicant agreed to extend the 150-day period to January 27, 2016. By a letter dated January 4, 2016, the applicant agreed to further extend the 150-day period to February 17, 2016, and requested that its December 22, 2015 letter be withdrawn. As of the date of this decision, there remain 27 days in the extended 150-day period.

- G. Proposal:** The applicant requests conditional use approval to make legal KCDG's previous surface mining that created the two reservoirs on the subject property. The applicant proposes that the primary use of the reservoirs would be storage and re-regulation of TID irrigation water. The applicant also requests a variance to the minimum setbacks in the RR-10 Zone to allow the southern reservoir to cross a lot line.

The applicant requests conditional use and site plan approval to establish a recreation-oriented facility requiring large acreage on the southern reservoir, consisting of motorized boating, waterskiing and wakeboarding thereon. The applicant proposes that this use would be secondary to the water storage use of the southern reservoir. The requested conditional use and site plan approval would include approval of related facilities at the north end of the southern reservoir consisting of the existing dock, and proposed 952-square-foot boathouse and ten-space guest parking area.

As part of the proposed recreation-oriented facility requiring large acreage, the applicant requests approval for use thereof by up to 20 guests in addition to the property owners. Guests would access the subject property via a private, gated driveway from Johnson

¹² January 18, 2016, was a holiday and therefore not counted in the time calculation.

Road to the proposed guest parking area. The applicant proposes that guests would congregate in the "harbor area" at the north end of the southern reservoir.

The applicant proposes that motorized boating, waterskiing and wakeboarding on the southern reservoir would not occur from December 1 through March 31 to protect the deer winter range. The applicant also proposes a number of restrictions for operation of the motor boat and waterskiing/wakeboarding activity, discussed in detail in the findings below.

- H. **Public/Private Agency Comments:** The Planning Division sent notice of the applicant's original and modified applications to a number of public and private agencies, and received responses from: the Deschutes County Building Division (building division), Road Department (road department), and Senior Transportation Planner; and the Oregon Department of Fish and Wildlife (ODFW). These comments are set forth verbatim at pages 6-7 of the staff report and are included in the record. The following agencies did not respond to the request for comments, or submitted a "no comment" response: the Deschutes County Assessor, Environmental Health Division, and Code Enforcement; DOGAMI; and the U.S. Fish and Wildlife Service.
- I. **Public Comments:** The Planning Division mailed individual written notice of the applicant's original and modified applications and the initial public hearing to the owners of record of all property located within 250 feet of the subject property. In addition, notice of the initial public hearing was published in the Bend "Bulletin" newspaper, and the subject property was posted with a notice of proposed land use action sign. As of the date of the record in this matter closed, the county had received 92 letters in response to these notices. In addition, 32 members of the public testified at the initial and continued public hearings. Public comments are addressed in the findings below.
- J. **Lot of Record:** The staff report states Tax Lot 601 is a legal lot of record pursuant to a 1990 lot-of-record determination (LR-90-158). The staff report also states the remaining tax lots that comprise the subject property were determined to be separate legal lots of record pursuant to a 2005 lot-of-record determination (LR-05-8). The staff report states these legal lots subsequently were modified through several property line adjustments (LL-06-7, LL-08-75, LL-08-76, LL-11-4, LL-11-5, LL-11-7, LL-11-18, LL-13-46, LL-13-47, LL-13-48, LL-13-49, LL-13-51 and LL-13-52).

III. CONCLUSIONS OF LAW:

A. **Summary.** The Hearings Officer finds I cannot approve the applicant's proposal for the following reasons.

Reservoirs. With respect to the two new reservoirs on the subject property, I have found the surface mining to create the reservoirs is a conditional use in the RR-10 Zone as surface mining "in conjunction with" the operation and maintenance of TID's irrigation system under Section 18.60.030(W). However, I have found I cannot grant conditional use approval for this surface mining because under Section 18.128.280 it is not permitted unless and until the subject property is placed on the county's comprehensive plan inventory of non-significant mineral and aggregate resource sites. I also have found the surface mining to create the southern reservoir does not comply with all applicable site plan and conditional use approval criteria. In particular, I have found the southern reservoir is not compatible with the surrounding natural environment and rural residential development considering its scale, the steepness of its banks, and the lack of vegetation adjacent to and surrounding the reservoir.

Recreational Use of Southern Reservoir. I have found the proposed recreational use of the southern reservoir is a conditional use in the RR-10 Zone as a “recreation-oriented facility requiring large acreage” under Section 18.60.030(G). I have found this use is not prohibited in the WA Zone under Section 18.88.040(B)(7). However, I have found the proposed recreational does not comply with all applicable site plan and conditional use approval criteria because it is not compatible with the surrounding natural environment and existing rural residential uses due to its scale, intensity and duration.

Because the Hearings Officer anticipates this decision will be appealed to the board, and the board may elect to hear the appeal, I have included in this decision recommended findings and conclusions on all applicable approval criteria, as well as recommended conditions of approval.

B. Preliminary Issues. The Hearings Officer has identified, and the parties have raised procedural questions and several issues that have little if any relevance to the applicable approval criteria for the applicant’s proposal. Because these issues may be raised in an appeal to the board, I address each of them in the findings below.

1. Property Owner Authorization. Section 22.08.010(B) allows a land use application to be submitted by the property owner or a person who has written authorization from the property owner to submit the application. Under Paragraph (C) of that section, land use applications submitted by public entities or utilities having the power of eminent domain need not satisfy the “written authorization” requirement. These applications were submitted by Hurley Re, PC, the law firm representing KCDG and TID. In the Hearings Officer’s LUCS decision, I held that because TID is an irrigation district with the power of eminent domain, and because the subject property is located within TID’s boundaries and includes TID’s irrigation facilities, TID did not need to provide written property owner authorization for submission of the LUCS application. Nevertheless, both TID and KCDG submitted letters authorizing Hurley Re, PC to submit the subject applications on their behalf.

The original applications identified the subject property as consisting of only Tax Lots 824 and 828. As discussed in the Findings of Fact above, the modified applications include a total of thirteen tax lots. Assessor’s data and the applicant’s burden of proof show that two of those thirteen tax lots are owned by two entities in addition to KCDG: the Cadwell Family Trust (Tax Lot 819), and Harris and Nancy Kimble (Tax Lot 822). The record does not include letters from these two property owners authorizing the applicant to submit the applications on their behalf.

Section 22.08.020(A) states the county shall not accept a land use application until the planning director determines the requirements of Section 22.08.010 have been met, including the written owner authorization requirement. However, the record indicates the modified applications were accepted by the county on July 17, 2015. The Hearings Officer finds it is not clear from this record whether the county was aware of the lack of authorization from the Cadwells and Kimbles when the modified applications were accepted. In any case, because both Eric Cadwell and the Kimbles participated in these proceedings, I find it likely the applicant had their authorization to appear on their behalf.¹³ Therefore, I find the lack of written authorization can be remedied by the applicant’s submission of the required authorization letters from the Cadwell Family Trust and from Harris and Nancy Kimble prior to the date this decision becomes final.

2. Retroactive Rule Change. The property owners and their supporters argue at length that the county has improperly changed and/or reinterpreted the applicable code provisions to their detriment, requiring them to obtain conditional use approval for the surface mining creating the

¹³ In addition, in this Hearings Officer’s LUCS decision I found Mr. Kimble is a partner in KCDG.

reservoirs, and for the proposed recreational use of the southern reservoir, contrary to previous county direction. Specifically, the property owners assert they were told by former Principal Planner Kevin Harrison that they did not need any permits or approvals for either use.

Mr. Harrison did not submit testimony in this matter. Therefore, the Hearings Officer cannot determine from this record what information Mr. Harrison had when he consulted with the property owners and their attorneys. However, in light of TID's material misrepresentation of the nature of its proposal when it sought a LUCS from the county, I find it likely Mr. Harrison was not aware of the full panoply of uses the property owners contemplated for the subject property. In any case, I find Mr. Harrison could not authorize the property owners to undertake any use of the subject property without necessary land use approval.¹⁴ Moreover, as noted in the Findings of Fact above, in July of 2014, Assistant County Counsel John Laherty advised the property owners' attorney Elizabeth Dickson that KCDG should obtain necessary land use approval before undertaking development work on the reservoirs "in order to avoid the risk of commencing projects it will ultimately be unable to complete." Mr. Laherty's communication with Ms. Dickson stated KCDG had "chosen to disregard this advice."

In the Hearings Officer's LUCS decision, I found TID, KCDG and the Planning Director mischaracterized the nature of the proposed uses on the subject property when the applicant requested, and the Planning Director issued, a LUCS for TID's request to WRD for permission to transfer the place of water storage from Upper Tumalo Reservoir to the reservoirs on the subject property. I found both the surface mining to create the reservoirs and the recreational use of the southern reservoir require conditional use approval. My characterization of these uses was appealed to, and affirmed by, the board and LUBA. The property owners' attorney acknowledged the nature of the county's LUCS determination in its October 20, 2015 memorandum, stating in relevant part:

"The County's position changed when it re-interpreted the law at a higher level. Despite Staff interpretations, a closer look by Hearings Officer Green and the BOCC yielded a different decision." (Emphasis added.)

For the foregoing reasons, the Hearings Officer finds there is no merit to claims the county has improperly changed or re-interpreted code provisions applicable to the applicant's proposal, or is bound by prior verbal representations made by county planning staff.

3. Retroactive Approval. Opponents argue the Hearings Officer should deny the subject applications because TID and the property owners failed to obtain the necessary state water permit and county land use approvals *before* undertaking the surface mining for the reservoirs and recreational use thereon. They contend county approval of their proposal after the fact will encourage property owners to ignore the county's land use regulations. I find the extensive process TID and the property owners have been required to follow in order to make the activities on the subject property lawful is not likely to encourage anyone to avoid obtaining land use approval. In any case, nothing in the county code prohibits an applicant/property owner from

¹⁴ Section 22.20.005 provides:

Any informal interpretation or determination, or any statement describing the use to which a property may be put, made outside the declaratory ruling process (DCC 22.40) or outside the process for approval or denial of a land use permit (DCC 22.20-22.28) shall be deemed to be supposition only. Such informal interpretations, determinations, or statements shall not be deemed to constitute final County action effecting a change in the status of a person's property or conferring any rights, including any reliance rights, on any person.

obtaining after-the-fact approval. To the contrary, the county's land use regulations and code enforcement process are intended to facilitate bringing nonconforming land uses into compliance when possible. That is precisely what the applicant and property owners are seeking to do through these applications. Accordingly, I find no merit to opponents' argument.

4. Regulation of Private Use on Private Property. The property owners and their supporters also argue at length that the county's land use regulations are not applicable to, and exceed the county's regulatory authority for, private uses on private property – i.e., recreation on the southern reservoir. They also claim it is unconstitutional for the county to impose a limit on the number of persons who may use the southern reservoir for recreation. The Hearings Officer finds no merit to these claims. The county's land use regulations clearly apply to land uses listed in the county's zoning ordinance on land over which the county has land use authority – i.e., non-federal land within the county's borders. The property owners and their supporters have not identified, nor have I found, any provision in the county code that generally exempts private use on private land from applicable land use regulations.¹⁵

The Hearings Officer also rejects the claim made by the property owners and their supporters that they are being singled out for disparate treatment. To the contrary, the surface mining and recreational use at issue in these applications are subject to the same conditional use approval criteria applicable to any other conditional use proposed for private property. Moreover, the applicant's proposal is not materially different from other proposed private uses on private land the county's hearings officers previously have considered.¹⁶

Finally, the property owners' supporters argue the county cannot impose "commercial" regulations on private use of private property. Again, the Hearings Officer finds this argument is without merit. Neither the surface mining to create the reservoirs nor the proposed recreational use of the southern reservoir constitutes "commercial" activity, but both have been found to constitute conditional uses in the RR-10 Zone. Among other requirements, the applicable site plan and conditional use criteria state the proposed uses must be compatible with surrounding uses considering access, design, operating characteristics, and impacts on natural resources and existing development.

5. Degree of Support. The applicant argues its proposal enjoys wide support in the community in general and within the surrounding neighborhood in particular. The applicant submitted a color-coded diagram entitled "Project Supporters Map," included in the record as Hearing Exhibit 6, purporting to show that a majority of adjacent and nearby property owners support the applicant's proposal. The Hearings Officer finds the degree of community support is not relevant to any applicable approval criteria for the applicant's proposal.

6. Residential Cluster Development. The Bishops and other opponents argue the Hearings Officer cannot approve the applicant's proposal because the reservoirs constitute the first phase of a residential cluster development on the subject property for which the applicant has not sought or received approval. The Bishops also argue I should preemptively deny cluster development

¹⁵ The property owners' attorney acknowledged the legitimate purpose for limitations on the intensity of the proposed recreational in the applicant's October 20, 2015 submission as follows:

"Applicant has also voluntarily proposed a 20 guest limit. Applicant suggested such limit in conversations with Deschutes County Staff in order to provide a way to quantify impacts of the proposed use." (Emphasis added.)

¹⁶ For example, this Hearings Officer granted conditional use approved for a private paintball park on private property (*Dorsett*, CU-07-79). Hearings Officer Dan Olsen granted conditional use approval to modify a private park used for private shooting sports (*High Desert Shooting Sports Foundation*, (247-15-000263-CU, 247-15-000264-SP).

approval through these applications because, in their opinion, the property owners cannot meet the applicable cluster development approval criteria.

The Hearings Officer addressed these arguments in my LUCS decision in relevant part as follows:

"The record includes evidence that KCDG's predecessor in title, Harris Kimble, stated his intent to develop the subject property with a residential cluster development featuring the new reservoirs. [Footnote omitted.] Both TID and KCDG disavow any representations made by Mr. Kimble as the plans of a 'previous owner.' However, the record indicates Mr. Kimble is a partner in KCDG. [Footnote omitted.] Accordingly the Hearings Officer finds TID's and KCDG's position somewhat disingenuous. The record also includes similar representations made by KCDG representatives. As noted in the Findings of Fact above, at a June 13, 2014 meeting with CDD staff, Ms. Dickson stated KCDG planned to submit an application for a residential cluster development within six months. In addition, Paragraph (15) of the June 14, 2014 contract between TID and KCDG states:

'KCDG and its successors shall require the purchasers/lessees at the time of purchase or lease of residential lots in the development to sign and record a document acknowledging that the purchaser/lessee has read and accepted this Contract.' (Emphasis added.)

TID and KCSG argue that since no land use application for residential cluster development approval has been submitted by KCDG, there is no basis to conclude the new reservoirs constitute the unpermitted 'first phase' of such a development as claimed by appellants. Although the Hearings Officer finds there clearly is some basis to suspect the new reservoirs are planned to be part of a future residential cluster development, I agree with TID and KCDG that it is not reasonable to characterize the new reservoirs as the first phase of such development. That is because the cluster development conditional use in the RR-10 and WA Zones under Section 18.60.030(F) and 18.88.040(A), respectively, includes numerous components in addition to open space and amenities therein, such as dwellings, utility infrastructure, streets, and water and sewer systems. Therefore, I find the county did not err in failing to identify the cluster development conditional use in categorizing TID's proposal on the LUCS form or in its LUCS decision.

Because the Hearings Officer has found the county's LUCS decision was in error and must be reversed and remanded, I do not address the parties' extensive arguments concerning whether the new reservoirs would satisfy the conditional use approval criteria for "recreation-oriented facility requiring large acreage" or for a residential cluster development."

The Hearings Officer finds the question concerning the nature and scope of the applicant's proposal is somewhat similar to that considered by LUBA in *Truth in Site v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2015-098, June 8, 2015). There, Oregon State University (OSU) sought approval to establish a branch campus on a 10-acre parcel. OSU had an option to purchase an adjacent 46-acre parcel, and indicated in public statements its intent ultimately to expand the campus onto the 46-acre site. Opponents argued that in light of OSU's stated intent to develop a much larger campus of which the 10-acre parcel would be a component, the city erred in not

requiring OSU to submit a master development plan for the entire 56-acre area. In affirming the city's decision not to require such a master plan, LUBA held in relevant part:

*"OSU does not own the adjacent property and the property's owner did not sign the application for site plan and design review. Accordingly, the city found that 'the project' is the 10.44 acre project * * *." The city imposed a condition of approval that requires OSU to comply with the provisions of BDC Chapter 4.5 11 [master development plan] if OSU seeks to develop the 46 acres. * * **

*A portion of petitioners' third assignment of error argues that the second sentence of BDC 4.5.300(A) requires OSU to seek Master Neighborhood Development Plan approval because OSU's own submissions to the record demonstrate that OSU plans to develop a 56-acre campus, beginning with the subject 10.44-acre property, and then expanding onto the adjacent 46-acre property that it currently has an agreement to purchase. Therefore, according to petitioners, OSU is proposing a 'project' consisting of one or more properties totaling 20 acres or larger' under BDC 4.5.300(A). * * **

LUBA is required to affirm the city council's interpretation of BDC 4.5.300 unless that interpretation is 'inconsistent with' the express language of 4 the BDC or inconsistent with the purpose of the BDC. ORS 197.829(1)(a) and 5 (b). While there is evidence in the record that supports a conclusion that OSU eventually plans to develop a larger campus than the 10.44-acre proposal, we agree with respondents that the city's interpretation of the word 'project' as used in BDC 4.5.300(A) in context with the phrase 'one or more properties' in the same code section as limiting the 'project' to the property that an applicant controls is not inconsistent with the operative language of BDC 4.5.300 or inconsistent with the purpose of BDC Chapter 4.5. The city's interpretation of BDC 4.5.300(A) is affirmed."

The Deschutes County code does not define "project" or include analogous terminology for identifying the scope of land use review. Rather, Section 22.08.020 of the procedures ordinance appears to give the Planning Director broad discretion in identifying the scope of the proposed development when determining whether to accept a land use application.¹⁷ Moreover, LUBA noted in its decision dismissing the LUCS appeals that the county was not obligated to accept the property owners' characterization of the proposed use for purposes of a LUCS determination, and suggested the county also did not err in rejecting the Bishops' characterization of the proposed uses as requiring approval as a cluster development.

The record indicates that when Planning Director Nick Lelack accepted the subject conditional use and site plan applications as complete, he was aware of opponents' assertions that the reservoirs are the first phase of a residential cluster development. Nevertheless, Mr. Lelack concluded the proposed land uses were as represented by the applicant – i.e., surface mining to create the reservoirs and recreational use on the southern reservoir. The Hearings Officer finds that in this context, the question is whether the Planning Director abused his discretion in not characterizing the applicant's proposal as the first phase of a residential cluster development,¹⁸ and in not finding

¹⁷ That section states the Planning Director may accept a land use application as complete if he finds the application requirements have been met and that all applicable issues have been addressed.

¹⁸ Section 18.04.030 defines "cluster development" as:

that the applications failed to adequately address the cluster development conditional use approval criteria under Section 18.128.200 and the applicable subdivision standards under Title 17.

The Hearings Officer finds the evidence in this record strongly suggests KCDG intends ultimately to develop the subject property with some type of residential subdivision of which the reservoirs would be a component, such as recreational amenities and required open space for a residential cluster development. In particular, the size and design of the southern reservoir are more consistent with a community facility that with one serving a single property owner. Nevertheless, I again find that where, as here, the applicant has not applied for cluster development approval, and the proposed uses do not include all requirement elements of a residential cluster development, the Planning Director did not err in concluding the applicant's proposal is limited to its stated request for conditional use approval for surface mining for the reservoirs and recreational use of the southern reservoir. I also find it would not be appropriate for me to issue what in effect would be an advisory opinion as to whether a cluster development on the subject property would satisfy the applicable approval criteria.

7. TID Board Decisions. The Bishops and other opponents are highly critical of the actions of the TID Board of Directors (TID board) concerning the creation and use of the reservoirs, and in particular the TID board's decision to contract with KCDG for use of the reservoirs for water storage. Opponents accuse the TID board of violating its fiduciary duty to water users within TID's system. The Hearings Officer finds the legitimacy and correctness of the TID board's decisions related to the reservoirs and the transfer of water storage thereto are not before me in this matter. The TID board's decisions may be relevant to the subject applications *only* insofar as they relate to the question of whether and to what extent TID operates the reservoirs, as discussed in the findings below.

8. Contents of Record.

a. Applicable Statutory and Ordinance Provisions. Records in the county's land use proceedings are governed by ORS 197.763 and by Chapter 22.24 of the land use procedures ordinance. ORS 197.763 provides in pertinent part:

- (6) (a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection, or by leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

* * *

- (c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.

* * * a development permitting the clustering of single or multi-family residences on part of the property, with individual lots of not less than two acres in size and not exceeding three acres in size. No commercial or industrial uses not allowed by the applicable zoning ordinance are permitted.

* * *

(9) For purposes of this section:

- (a) Argument means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed to be relevant by the proponent to a decision. Argument does not include facts.
- (b) Evidence means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision. (Emphasis added.)

Section 22.24.140 of the procedures ordinance essentially mirrors the above-quoted statutory language, but includes the following additional language in Paragraph (D) addressing rebuttal:

If at the conclusion of the initial hearing the Hearings Body leaves the record open for additional written evidence or testimony, the record shall be left open for at least 14 additional days, allowing at least the first seven days for submittal of new written evidence or testimony and at least seven additional days for response to the evidence received while the record was held open. Written evidence or testimony submitted during the period the record is held open shall be limited to evidence or testimony that rebuts previously submitted evidence or testimony. (Emphasis added.)

Although the county code language does not expressly authorize the submission of argument during the open record period, the Hearings Officer finds such submission clearly is authorized under ORS 197.763.

b. Bishops' Rebuttal Submission. At the close of the public hearing, the Hearings Officer established a schedule for the post-hearing submission of evidence and argument. Pursuant to Section 22.24.140(D), I left the written record open through October 20, 2015, for submission of new evidence and argument, through October 27, 2015, for submission of rebuttal evidence and argument, and through November 3, 2015, for submission of the applicant's final argument.

In its final argument, the applicant identified and objected to several parts of the Bishops' October 26, 2015 submission on the grounds that they constitute new evidence and argument. The applicant asked the Hearings Officer to strike these materials.¹⁹ I address each of the applicant's record claims in the findings below.

(1) DOGAMI Surface Mining Regulations. The applicant argues the Bishops' presentation of argument concerning application of DOGAMI regulations violates the Hearings Officer's post-

¹⁹ On November 5, 2015, the Bishops submitted a response to the applicant's request to strike. The record includes an electronic mail message dated November 5, 2015, from Senior Planner Raguine to the Bishops' attorney Jennifer Bragar stating that because the Bishops' submittal was made after the close of the record, it would not be forwarded to the Hearings Office. Therefore, the Bishops' November 5, 2015 response is not before me.

Ms. Bragar could have requested that the Hearings Officer reopen and extend the written record to allow the Bishops to respond to any new evidence they believed the applicant submitted during the rebuttal period, and/or to submit their response to the request to strike. However, she did not do so. Ms. Bragar may be able to submit her response to the request to strike in a *de novo* appeal before the board.

hearing schedule. I disagree. There is nothing in Section 22.24.140(D) or ORS 197.763 that prohibits the submission of new *argument* during the rebuttal period.

The applicant also argues that as a matter of fairness, the Hearings Officer should not allow *any* new argument during the rebuttal period because to do so would prevent the applicant and other parties from adequately responding to it, and would prevent the applicant from submitting rebuttal evidence. I also find no merit to this argument. As noted above, ORS 197.763(6)(c) provides that any party, including the applicant, may request that the written record be reopened and extended in order to respond to new evidence submitted during the rebuttal period. No requests to reopen the record were filed.²⁰ Moreover, the applicant could have requested that the period for submission of its final argument be extended in order to address new arguments presented during the rebuttal period. The applicant did not make such a request.

The applicant argues the Hearings Officer should not consider the DOGAMI surface mining statutes and administrative rules, and related argument, submitted by the Bishops in their rebuttal because they constitute *new* evidence and argument. I find no merit to this argument. Nothing in ORS 197.763 or the county's procedures ordinance prohibited the Bishops from submitting new evidence and argument during the rebuttal period. The pertinent question is whether this evidence and argument constitutes rebuttal. I find it clear from the Bishops' October 26, 2015 memorandum that the evidence and argument concerning the DOGAMI rules were submitted to rebut the applicant's argument that the surface mining that created the reservoirs does not constitute "surface mining."

For the foregoing reasons, the Hearings Officer finds no basis to strike the Bishops' arguments or evidence concerning DOGAMI surface mining regulations submitted during the rebuttal period.

(2) Tree Debris Photos. The applicant appears to object to the Bishops' submission of photographs of tree cuttings the Bishops argue are relevant to the question of whether or not a "ditch rider" road on the subject property was abandoned. The Bishops' October 26, 2015 memorandum, to which the photographs are attached, states they were presented to rebut photographs the applicant submitted as Exhibit "VV" to its burden of proof. For this reason, the Hearings Officer finds the Bishops' tree debris photos were in rebuttal of evidence submitted by the applicant during the first open record period, and therefore should not be stricken.

(3) Post LUCS Submittals. The applicant objects to inclusion in the record of the Exhibit 4 to the Bishops' October 26, 2015 memorandum. That exhibit consists of a one-page summary of what the Bishops believe is KCDG's unpermitted conduct on the subject property, as well as a three-page letter dated February 6, 2015 from Ms. Bragar to the board stating it is "additional evidence" in support of the Bishops' LUCS appeal to the board. The Bishops claim these documents are not "new information" but rather are summaries of previous information placed in the record. I agree with the Bishops' characterization of their Exhibit 4. I also find these documents constitute rebuttal to evidence submitted by the applicant during the first open record period, and therefore should not be stricken.

(4) Oregon Health Authority Rules. The applicant objects to the Bishops' submission of evidence and argument concerning application of Oregon Health Authority (OHA) rules to the reservoirs on the subject property. As discussed above, the Hearings Officer has found nothing in ORS 97.763 or the county's procedures ordinance prohibited the Bishops from submitting new

²⁰ At the close of the public hearing during the discussion of the post-hearings schedule, the Hearings Officer stated all parties have the right to request that the record be reopened to respond to new evidence. (September 29, 2015, Hearing Video, 4:21:50.)

evidence and argument in their October 26, 2015 memorandum. Again, the pertinent question is whether the evidence and argument are rebuttal.

The OHA evidence submitted by the Bishops includes: (a) Exhibit 9 which consists of copies of OHA rules; (b) Exhibits 6 and 7 which consist of information about Klippel Water Company's wells and the Klippel Water Company's system, as well as copies of water right certificates and related documents issued by WRD for the Klippel Water Company (Certificate of Water Right 89406 dated July 24, 2014 and "Claim of Beneficial Use Map for Klippel Water, Inc." with an WRD "received" stamp date of February 12, 20130); and (c) Exhibit 7 consisting of well logs kept by WRD for the Klippel Water Company. Finally, the Bishops' October 26, 2015 memorandum includes statements regarding the percentage of Klippel Water Company's capacity represented by one of its wells. The Bishops October 26, 2015 memorandum states the above-described evidence and argument was submitted to rebut the applicant's evidence and argument concerning potential impacts from the reservoirs on the Klippel facilities. The Hearings Officer agrees with the Bishops' characterization of this evidence and argument and therefore finds it should not be stricken.

(5) Minutes of Klippel Water Inc. Board. The applicant objects to inclusion in the record of the discussion in Footnote 26 to the Bishops' October 26, 2015 memorandum, and Exhibits 10 to the memorandum, which address possible trespass by Harris Kimble on Klippel Water Company property. The applicant argues this submission was impermissible in the rebuttal period because it was the first time the Bishops argued KCDG was on notice of alleged trespass. Footnote 26 refers to Exhibit 6 to the Bishops' September 29, 2015 memorandum. That exhibit consists of two letters dated May 29, 2014 and July 7, 2014, from an attorney for the Klippel Water Company to Eric Cadwell and Harris Kimble putting them on notice of trespass by construction on behalf of K-C Development Group, LLC. The footnote also states Klippel Water Company was aware of trespass by Harris Kimble in 2007, based on the minutes of the Klippel Water Company in Exhibit 10 to the Bishops' October 26, 2015 memorandum.

According to Footnote 26, the Bishops' stated reason for submitting Exhibit 10 is to show the 2014 trespass on Klippel Water Company's property "was particularly egregious because this was not the first time it had happened." The Hearings Officer finds this statement is insufficient to explain how Exhibit 10 rebuts evidence submitted by the applicant in the first open record period that ended on October 20, 2015. Therefore, I find Exhibit 10 to the Bishops' October 26, 2015 memorandum, and all discussion thereof in the memorandum, should be stricken from the record as not constituting rebuttal, and I will not consider them.

(6) New Arguments and Evidence for So-Called "One-Fill Rule." The applicant argues the Bishops submitted new argument including case law in Exhibit 12 to their October 26, 2015 memorandum, concerning the so-called "one-fill rule." The Hearings Officer understands this "rule" to constitute an alleged prohibition against TID emptying and filling the reservoirs on the subject property more than once. As discussed above, there is nothing in the statute or the county's procedures ordinance that prohibited the Bishops from submitting new evidence and argument in the rebuttal period. Again, the pertinent question is whether this evidence and argument constitutes rebuttal. The Bishops' memorandum states their Exhibit 12 and supporting argument were submitted to challenge TID's statements in its October 20, 2015 memorandum that it was not aware of the "no fill rule."

The applicant also argues Exhibit 13 to the Bishops' October 26, 2015 memorandum should be stricken. Exhibit 13 is a three-page WRD form entitled "Water Master Review Form: Water Right Transfer," dated July 11, 2014, that addresses TID's proposed water right transfer to the reservoirs on the subject property. Again, the Hearings Officer finds nothing prohibited the Bishops from submitting this evidence and argument about it during the rebuttal period. And I find

this evidence constitutes rebuttal because it also addresses TID's claim not to have been aware of the "no fill rule."

For the foregoing reasons, the Hearings Officer finds both Exhibits 12 and 13 to the Bishops' October 26, 2015 memorandum, and the discussion thereof in the memorandum, constitute rebuttal and therefore should not be stricken from the record.

(7) Bishops' Arguments on Seepage. The applicant asserts the Bishops' arguments in their October 26, 2015 memorandum about calculation of water seepage, and Exhibit 14 to the memorandum, constitute impermissible new argument and evidence. As discussed above, the Hearings Officer has found nothing in the statute or the county's procedures ordinance prohibits the submission of new evidence and argument during the rebuttal period. Exhibit 14 is a four-page "Administrator's Memorandum" from a staff member of the Idaho Department of Water Resources addressing how reservoir seepage should be calculated. The Bishops' memorandum states Exhibit 14 was submitted to rebut the applicant's evidence and argument in its October 20, 2015 memorandum about the proper way to measure seepage. For this reason, I find Exhibit 14 and the Bishops' discussion thereof constitute rebuttal and should not be stricken.

For the foregoing reasons, the Hearings Officer finds the only evidence and argument submitted by the Bishops during the rebuttal period that does not constitute rebuttal and therefore must be stricken is Exhibit 10 to the Bishops' October 26, 2015 memorandum, and all discussion thereof in the memorandum.

c. LUBA Record. The record for the subject applications consists of several thousand pages of written testimony, documents, and video recordings of the two public hearings. The Bishops have proposed to add to that record the entire 5,600-page LUBA record for the LUCS appeals, submitted as Exhibit 79 to the Bishops' September 29, 2015 memorandum as a compact disk (CD). Footnote 57 to the Bishops' September 29, 2015 memorandum states the LUBA record was submitted "for purposes of creating a complete record."

In its October 20, 2015 memorandum, the applicant objected to inclusion of the LUBA record for the following reasons:

*"OARs 661-010-0025 and 661-010-0026 [LUBA's administrative rules] govern how land use records can be used in land use decisions. * * * Records that do not conform to such standards cannot be used or relied upon when making decisions. In Mar-Dene v. City of Woodburn, LUBA opined that a record cannot be used or relied upon unless it has been 'settled' pursuant to these OARs. See Mar-Dene v. City of Woodburn, 32 Or LUBA 481, * * *."*

*In this case, Attorney Bragar attempts to submit a Record that has not been settled. In fact, Attorney Bragar herself signed off on a Stipulated Motion that asked LUBA to consider a Motion to Dismiss before it ruled on the Record, because both Attorney Bragar and TID/KCDG believed there were substantial issues with the Record. LUBA granted the Stipulated Motion and the Motion to Dismiss, without ordering the Record settled. Therefore, it cannot be used and should not be considered in this decision. * * *"*

The Bishops responded in their October 26, 2015 memorandum in relevant part as follows:

"Under ORS 197.763, the Bishops have the right to present any evidence they believe addresses approval criteria, including the disk of documents prepared as a record for LUBA. The status of the record before LUBA during the appeal of the LUCS decision does not provide grounds to reject documentation that the Bishops

submitted as evidence in the record for this Application.⁴² The Bishops raised many pertinent arguments and presented much responsive information in the LUCS matter and simply brought that information into the current record as Exhibit 79 to their September 29, 2015 [sic] because such information continues to apply.

⁴² *In any event, the only disputes remaining in the record objection were the County's incorrect inclusion of evidence submitted by the Applicants that was rejected by the Board of Commissioners, and the County's omission of a few documents that should have been produced in the record in color." (Underscored emphasis added.)*

The Hearings Officer finds LUBA's administrative rules and the *Mar-Dene* decision pertain to records *before LUBA* and not to records in local government proceedings. Therefore, I find nothing in these rules or *Mar-Dene* supports the applicant's objection to the LUBA record. Nevertheless, I find the Bishops must demonstrate the relevance of the LUBA record to the subject applications. That is because the definition of "evidence" in ORS 197.763(9) – i.e., facts *believed by the proponent to be relevant to the decision* -- effectively places the burden of demonstrating the relevance of proffered evidence on the party submitting it. The Bishops assert the LUBA record is relevant because they submitted "many pertinent arguments and ... much responsive information" in the LUCS proceeding and the LUBA appeal. I find this vague "description" is not sufficient to demonstrate the relevance in this proceeding of *any*, let alone *all*, of the LUBA record. Moreover, I am not obligated to search the LUBA record to identify relevant evidence. For these reasons, I will not consider the LUBA record submitted as the Bishops' Exhibit 79.

The Hearings Officer anticipates this decision will be appealed to the board by both the applicant and the Bishops, and the board may elect to hear the appeal. If the board elects to hear any appeal *de novo*, the Bishops will have the opportunity to identify specific components of the LUBA record they believe are relevant to this decision and that the board should consider.

9. Bishops' Motivation. Several of the property owners' supporters assert the Hearings Officer should ignore the Bishops' submittals, and approve the applicant's proposal, because they believe the Bishops' reasons for opposing the applicant's proposal are not legitimate. Specifically, these parties claim the Bishops object to the reservoirs and recreation thereon *solely* because Harris Kimble allegedly refused to let the Bishops purchase some of the subject property and/or invest in a residential cluster development thereon.²¹ I find these claims -- and the countless other aspersions in this record cast against the Bishops, Cadwells, Kimbles, TID, other parties, attorneys, county staff, and the Hearings Officer -- have no relevance whatsoever to the question of whether the applicant's proposal satisfies the applicable approval criteria.²²

²¹ E.g., Affidavit of Darrin Kelleher, included in the record as an attachment to an electronic mail message from Judy Campuzano dated October 4, 2015.

²² For example, the record includes correspondence submitted by the property owners' supporters about a complaint to the Oregon State Bar filed by a TID board member against the Bishops' attorney Jennifer Bragar, and the Bar's official response finding no merit to the complaint, submitted by Ms. Bragar. None of this material is relevant.

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

RURAL RESIDENTIAL ZONE STANDARDS

1. Chapter 18.60, Rural Residential Zone – RR10

a. Section 18.60.020, Uses Permitted Outright

The following uses and their accessory uses are permitted outright.

* * *

- (I) Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in Section 18.120.050.^[23]

b. Section 18.60.030, Conditional Uses Permitted

The following uses may be allowed subject to DCC 18.128:

* * *

- G. Recreation-oriented facility requiring large acreage such as off road vehicle track or race track, but not including a rodeo grounds.

* * *

- W. Surface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material.

FINDINGS: Pursuant to the board's April 5, 2015 LUCS decision and the Planning Director's April 23, 2015 re-issuance of the LUCS, the applicant applied for conditional use approval to make lawful the prior surface mining creating the two reservoirs and to establish on the southern reservoir a recreation-oriented facility requiring large acreage.

At the outset, the applicant argues the excavation and grading creating the new reservoirs is not "surface mining" subject to county regulation. In the alternative, the applicant argues such surface mining is permitted outright under Section 18.60.020(I). The Bishops argue KCDG's surface mining was prohibited based on previous land use decisions affecting the subject property. The Hearings Officer addresses these arguments in the findings below.

A. Surface Mining.

1. Definitions. Section 18.04.030 includes the following definition:

"Surface mining" means:

²³ Section 18.120.050 addresses fill-and-removal exceptions and is not relevant to these proceedings.

A. Includes:

1. All or any part of the process of mining by removal of the overburden and extraction of natural mineral deposits thereby exposed by any method including open pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits, except those constructed for access roads; and
2. Mining which involves more than 1,000 cubic yards of material or excavation prior to mining of a surface area of more than one acre.

B. Does not include:

1. The construction of adjacent or off-site borrow pits which are used for access roads to the surface mine.
2. Excavation and crushing of sand, gravel, clay, rock or other similar materials conducted by a landowner, contractor or tenant on the landowner's property for the primary purpose of construction, reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming or cemetery operations, on-site road construction and other on-site construction, or nonsurface impacts of underground mines; and . . . (Emphasis added.)

The Hearings Officer found in my LUCS decision that KCDG engaged in “surface mining” on the subject property, and that such surface mining did not constitute an outright permitted use under Section 18.16.020(I) because excavation for reservoirs is specifically authorized as a conditional use under Section 18.60.030(W). I also found KCDG’s surface mining did not fall within the exclusions in Section 18.04.030(B)(2) based on my analysis of the text, context and legislative history of the surface mining conditional use authorized in the RR-10 Zone under Section 18.60.030(W). In particular, I found surface mining in conjunction with the operation and maintenance of irrigation district systems does not fall within the exclusion from the definition of “surface mining” in Section 18.04.030 for “on-site construction” on a landowner’s property.²⁴ Finally, I found the temporary use permit KCDG obtained for rock crushing within the new reservoirs was limited to crushing for road construction and did not authorize excavation and grading for the reservoirs.

The board’s April 5, 2015 LUCS decision affirmed the Hearings Officer’s decision. The board also held the new reservoirs on the subject property are not part of TID’s “existing irrigation system”

²⁴ As discussed in the findings above, the Bishops’ October 26, 2015 memorandum includes copies of DOGAMI’s administrative rules, as amended in 2009, which no longer include the exception to surface mining for landowner on-site construction. The Bishops’ memorandum also cites ORS 517.780(1)(a) for the proposition that DOGAMI’s surface mining rules preempt the county’s “surface mining” definition. Because of the Hearings Officer’s resolution of the definitional issue, I find I need not reach the preemption question.

and therefore do not constitute an outright permitted use in the RR-10 Zone. With respect to the nature of KCDG's surface mining, the board's decision stated:

"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."

LUBA's decision dismissing the Bishops' and TID's/KCDG's appeals for lack of jurisdiction affirmed the board's categorization of KCDG's surface mining to create the new reservoirs as a use requiring conditional use approval under Section 18.60.030(W). *Bishop v. Deschutes County*, Slip Opinion at 17. For these reasons, the Hearings Officer finds the question of whether KCDG's excavation to create the reservoirs constituted "surface mining" and was permitted outright or required conditional use approval under Section 18.60.030(W) has been settled and is not before me in these proceedings.

Finally, the Bishops argue KCDG's surface mining to create the reservoirs was prohibited by the approved reclamation plan for the former Klippel Surface Mine. If the Hearings Officer understands this argument correctly, the Bishops believe the findings in my 2007 decision rezoning the Klippel mine from SM to RR-10 precluded any further surface mining on the subject property. The Bishops rely in particular on my findings that the Klippel site had been fully mined and reclaimed and that no significant resource remained thereon. I find this argument is without merit. As discussed in the findings above, I found in my LUCS decision that KCDG's surface mining to create the reservoirs was authorized under Section 18.60.030(W), and the board affirmed my finding. The Bishops have not identified, nor have I found, anything in Title 18 that precludes a previously SM-zoned site from being mined in conjunction with the operation and maintenance of irrigation systems which, and/or being mined under Section 18.128.280 authorizing mining for non-Goal 5 mineral and aggregate resources and discussed in detail in the findings below under Chapter 18.128.

2. Section 18.60.030(W). This section authorizes as a conditional use in the RR-10 Zone:

Surface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material.

The Bishops argue here, as they did in the LUCS proceedings, that KCDG's surface mining to create the reservoirs was not "in conjunction with the operation and maintenance of" TID's irrigation systems, but rather constitute construction by KCDG of private lakes that would be central features in a planned residential cluster development. In the Hearings Officer's LUCS decision, I made the following relevant findings:

"Such surface mining need only be performed 'in conjunction with' the irrigation district's operation and maintenance of its systems for it to fall within the parameters of the conditional use. There is no dispute in this record that the new reservoirs were created in coordination with TID and, at least in part, in order to facilitate TID's operation of its irrigation systems."¹⁶

¹⁶ *The Hearings Officer finds that whether the new reservoirs were excavated by TID or by KCDG on TID's behalf is irrelevant. There is no requirement that the excavation actually be conducted by the irrigation district.*"

Assuming for purposes of discussion that the Hearings Officer's LUCS findings, affirmed by the board, did not resolve this question adversely to the Bishops, I again find KCDG's surface mining for the reservoirs was performed "in conjunction with" TID's operation and maintenance of its irrigation system.

The phrase "in conjunction with" is not defined in Title 18. The ordinary definition of the term "conjunction" includes "coincidence." *Webster's New World Dictionary and Thesaurus, Second Edition* (hereafter "*Webster's*"). *Webster's* defines "coincidence" as "a coinciding" and defines "coincide" as "to occur at the same time." Thus, use of the phrase "in conjunction with" in Section 18.60.030(W) suggests the conditional use consists of surface mining coinciding with the irrigation district's operation and maintenance activities.

The timing of KCDG's surface mining for the reservoirs raises a question about TID's involvement with the reservoirs when they were created. The record indicates excavation for the reservoirs occurred at least as early as March of 2014. The original contract between TID and KCDG for use of TID's water to fill the reservoirs wasn't signed until June of 2014, and stated KCDG's water use payments to TID would commence June 1, 2014.²⁵ In October of 2014, after the Planning Director issued the original LUCS and the Bishops filed their appeal therefrom, TID and KCDG signed an amended contract for use of the reservoirs.²⁶ Among other provisions, the amended contract modified the water use payment commencement date to March 1, 2014, closer to the time surface mining for the reservoirs commenced.

The Bishops and other opponents also argue the lack of any outflow facility for the reservoirs indicates neither reservoir could be used for "re-regulation" of irrigation water flow by returning water to the Tumalo Feed Canal. At the continued public hearing, Ken Rieck, TID's manager, testified TID intends to construct an outflow facility, but decided to delay that project and its cost until the storage of TID water in the reservoirs receives final land use approval and a permit from WRD. The Hearings Officer understands this approach, particularly since nothing in the record suggests TID could not remove water from the reservoir(s) if/when necessary simply by utilizing a portable pump.

The Bishops also argue the contract between TID and KCDG does not give TID sufficient control over the reservoirs on the subject property for them to function as part of TID's irrigation system. The Hearings Officer disagrees. I find the amended contract between KCDG and TID includes numerous provisions giving TID control over the water stored in the reservoirs as part of its irrigation system. For example:

- Paragraph (5) of the contract provides the water stored in the reservoirs remains the property of TID to be used in accordance with TID's WRD water right certificate.
- Paragraph (8) grants TID an easement across the subject property for the storage, reregulation, and delivery of TID's water, and states that TID retains "sole authority over operations and maintenance for said water delivery, storage, and redistribution."

²⁵ A copy of the original contract is included in the record as Exhibit 12 to the Bishops' September 29, 2015 memorandum.

²⁶ A copy of the amended contract is included in the record as Exhibit "A" to the applicant's burden of proof.

- Paragraph (16) states TID may use its water stored in the reservoirs “as an integral part of the operations and maintenance of its irrigation system” including removing water from the reservoirs for use by TID or emergency service providers.
- Paragraph (17) states TID does not guarantee water will be available for storage in the reservoirs and is not liable to KCDG for any loss or damage KCDG suffers resulting from TID’s failure to supply, or withdrawal of, stored water.

Finally, the record includes evidence supporting TID’s and KCDG’s claim that the surface mining to create the reservoirs was performed specifically to provide TID with a new water storage facility. Ken Rieck and TID’s Field Manager Bob Varco submitted written and oral testimony that TID had been interested for some time in finding a site for another reservoir upstream from Upper Tumalo Reservoir which is located near the end of its irrigation system, and that they had previously discussed with Jeremy Giffin, Watermaster for WRD’s District 11, the benefits of providing water storage in a location and manner that would prevent seepage losses and increase the efficiency of TID’s system. Mr. Varco testified that TID could not afford to construct a new reservoir because the district has only 660 water users and therefore would need to find a public/private partnership to provide new water storage facilities. Several TID water users testified they believe the new reservoirs are a much-needed component of TID’s irrigation system because they will allow better storage and regulation of irrigation water within the system.

The Bishops respond that the contract between TID and KCDG is a subterfuge. The Hearings Officer disagrees. While reasonable people can differ about whether the new reservoirs are the best means of conserving and regulating delivery of TID’s irrigation water to its members, I find there is nothing nefarious or deceptive about TID’s collaboration with KCDG. To the contrary, the contract between TID and KCDG provides a significant benefit to TID, described in the contract recitals as follows:

“WHEREAS, TID holds a valid water right pursuant to Oregon Water Resources Department Certificate Number 76684 (‘Certificate’) to store 1100 acre feet of surface water at what is commonly known as Upper Tumalo Reservoir in Deschutes County, Oregon; and

WHEREAS, TID uses said stored water for reregulation purposes to adjust water deliveries to its patrons throughout its system; and

WHEREAS, TID’s current use of the Upper Tumalo Reservoir precludes use for reregulation to a significant portion of TID’s delivery system due to location; and

WHEREAS, TID’s current use of the Upper Tumalo Reservoir is challenged by its porous surfaces which require additional supplement to accommodate seepage; and

WHEREAS, TID’s reliance on Tumalo Creek as a reregulation source hampers its ability to accommodate fish habitat needs; and

WHEREAS, KCDG desires to assist with TID’s operational challenges noted above by providing a new storage location for part of the stored water that is better placed at the head of its system and with a lined surface to significantly reduce seepage, providing TID the ability to store and reregulate approximately 125 acre feet of water (the ‘Stored Water’) currently stored at Upper Tumalo Reservoir, by transferring said storage to KCDG property described herein in ‘Exhibit A (‘Subject Property’); and

WHEREAS, TID desires to transfer the Stored Water to the Subject Property owned by KCDG in exchange for KCDG payment to TID, KCDG grant of easement to TID, and retaining TID's access to the Stored Water for operations and maintenance, including reregulation of TID's irrigation system; . . ."

In addition, the contract provides compensation to TID for water storage in the reservoirs at the rate of \$50 per acre foot per year, or \$6,250 per year for 125 acre feet of stored water. Moreover, the contract addresses a critical need to conserve water. TID's 2000 "Water Conservation Plan," included in the record as Exhibit 18 to the Bishops' September 29, 2015 memorandum, states that at that time TID's water loss was estimated at 70 percent.

For the foregoing reasons, the Hearings Officer finds KCDG's surface mining to create the reservoirs was "in conjunction with" TID's operation and maintenance of its irrigation systems, and therefore falls within the conditional use in Section 18.60.030(W).

3. Non-Goal 5 Surface Mining. The Bishops argue that if KCDG's surface mining to create the new reservoirs was "in conjunction with" TID's operation and maintenance of its irrigation system, such surface mining is subject to the county's regulations for "non-Goal 5 mineral and aggregate resources," and therefore is prohibited under Section 18.128.280. Before turning to that section, it is useful to review the history of the county's non-Goal 5 surface mining regulations.

Pursuant to Goal 5, the county adopted and maintains a comprehensive plan inventory of significant mineral and aggregate resource sites. The county adopted Economic, Social, Environmental, and Energy (ESEE) conflict analyses for each inventoried significant site, and implemented a program to achieve the goal for these sites through the SM and SMIA Zones in Chapters 18.52 and 18.56, respectively.

Prior to 2001, surface mining on property not zoned SM was limited to "on-site personal, farm or forest use or maintenance of irrigation," a conditional use under former Section 18.128.280. In 2001, at the request of Squaw Creek Irrigation District (now Three Creeks Irrigation District) the county adopted Ordinances 2001-038 and 2001-039 amending the comprehensive plan and Title 18, respectively, to authorize irrigation districts to conduct surface mining activities related to the operation and maintenance of their facilities on non-SM zoned land.²⁷ The staff report for Ordinances 2001-038 and 2001-039 includes the following discussion:

"1. Background. The County's zoning ordinance lacks clarity regarding operations and maintenance activities conducted by Irrigation Districts in Deschutes County. In addition, operation and maintenance activities conducted by Irrigation Districts require the on-going removal of accumulated sand, silt, topsoil, and other sediment matter from their canals, ditches and reservoirs.

The applicant would like to sell this material. However, excavating more than 1,000 cubic yards to be used and sold off-site involves an extensive process that requires the site to be zoned Surface Mining (SM), be listed on the County's Goal 5 Mineral and Aggregate Resource Inventory list, and have an Economic, Social, Environmental, and Energy (ESEE) conflict analysis adopted by the Board.

Further, to be placed on the County's mineral and aggregate resource inventory list, State law requires that an applicant demonstrate that the aggregate resources is 'significant' – that is, 100,000 tons of aggregate material meeting the Oregon

²⁷ Copies of these ordinances are included in the record as Exhibit 41 to the Bishops' September 29, 2015 memorandum.

Department of Transportation's specifications for base rock, which is primarily used in road building. [Footnote omitted.]

Meeting the State's significance threshold is unlikely to occur for Irrigation Districts because the excavated material produced by Irrigation Districts predominantly consists of sand, silt and topsoil, which typically will not meet the State's significance standard to be placed on the County's Mineral and Aggregate Resource list." (Bold emphasis in original.)

The staff report goes on to state that after its review of Squaw Creek Irrigation District's proposal, the Planning Commission recommended that the board adopted ordinances and policies:

- "1. To allow the operation, maintenance, and piping of existing irrigation systems operated by Irrigation Districts as a use permitted outright in those zones.*
- 2. To adopt a non-significant mineral and aggregate resource list to accommodate surface mining activities that involve the off-site use and sale of material on sites owned and operated by Irrigation Districts in Deschutes County.*
- 3. To amend Title 18 by adding a new category specific to Irrigation Districts to the Conditional Uses permitted section in each of the base zones. The new Conditional Use category could allow Irrigation Districts to excavate and mine for facilities, ponds, reservoirs, and the off-site use and sale of excavated material subject to Conditional Use approval.*
- 4. To defer regulatory authority of piping work conducted in existing canals and ditches within jurisdictional wetlands to the Division of State Lands by adding an additional category to the fill and removal exceptions list contained in Section 18.120.050 of the Deschutes County Code."*

Based on planning staff's and the Planning Commission's recommendations, the board adopted Ordinance 2001-038 to amend the comprehensive plan to include a "Non-Significant Inventory – Mineral and Aggregate Sites." That inventory included four reservoir sites owned and operated by Squaw Creek Irrigation District. The ordinance also amended former Section 23.40.040(G) of the codified comprehensive plan to include a new Paragraph (4) providing:

4. Non-Goal 5 Aggregate Resources.

- a. The County shall develop a mineral and aggregate resource list that includes mineral resource sites exclusive of those intended for protection under Goal 5.**
- b. A mineral and aggregate resource site may be placed on the inventory when the following conditions are met.**
 - 1. A report is provided verifying the location, type and quantity of the resource.**
 - 2. The mineral and aggregate resource does not meet the Goal 5 significance criteria listed in OAR 660-023-0180(3) for a significant mineral and aggregate site.**

- c. Mineral and aggregate resource sites listed on the non-significant inventory shall not be operated for extraction unless a conditional use permit, including mitigation measures where required, has been approved by the County. (Emphasis added.)

Title 23 of the comprehensive plan, the codified version of the comprehensive plan, was repealed in 2011 and replaced with the county's current comprehensive plan which does not include the above-quoted language. However, the plan still includes the non-significant mineral and aggregate resource inventory. The subject property is not included in that inventory.

4. Section 18.128.280. This section establishes specific conditional use criteria for "Surface Mining of Non-Goal 5 Mineral and Aggregate Resources." It was amended by Ordinance 2001-039 as part of the above-described package addressing surface mining by irrigation districts. Although neither the comprehensive plan nor Title 18 defines the phrase "non-Goal 5 mineral and aggregate resources," the Hearings Officer finds that in the context of the legislative history of Ordinances 2001-038 and 2001-039, it means surface mining sites and resources *not included in* the county's Goal 5 inventory of significant mineral and aggregate sites. Therefore, I find it applies to surface mining on the subject property.

Section 18.128.280 provides as follows with respect to "surface mining of non-Goal 5 mineral and aggregate resources:

These uses are subject to the following standards:

- A. An application shall be filed containing the following information:
1. A detailed explanation of the project and why the surface mining activity is necessary.
 2. A site plan drawn to scale and accompanied by any drawings, sketches and descriptions necessary to describe and illustrate the proposed surface mining.
- B. A conditional use permit shall not be issued unless the applicant demonstrates at the time of site plan review that the following conditions are or can be met:
1. The surface mining is necessary to conduct or maintain a use allowed in the zone in which the property is located.
 2. Erosion will be controlled during and after the surface mining.
 3. The surface mining activity can meet all applicable DEQ noise control standards and ambient air quality and emission standards.
 4. Sufficient water is available to support approved methods of dust control and vegetation enhancement.
 5. The surface mining does not adversely impact other resources or uses on the site or adjacent properties, including, but not limited to, farm use, forest use, recreational use, historic use and fish and wildlife habitat as designed or through mitigation measures required to minimize these impacts.

C. If the surface mining actively involves the maintenance or creation of man made lakes, water impoundments or ponds, the applicant shall also demonstrate, at the time of site plan review, that the following conditions are or can be met:

1. There is adequate water legally available to the site to maintain the water impoundment and to prevent stagnation.
2. The soil characteristics or proposed lining of the impoundment are adequate to contain the proposed water and will not result in the waste of water.
3. Where the impoundment bank slope is steeper than three feet horizontal to one foot vertical, or where the depth is six feet or deeper, the perimeter of the impoundment is adequately protected by methods such as fences or access barriers and controls.
4. The surface mining does not adversely affect any drainages, all surface water drainage is contained on site, and existing watercourses or drainages are maintained so as not to adversely affect any surrounding properties.

D. Limitations

1. Excavation does not include crushing or processing of excavated material.
2. A permit for mining of aggregate shall be issued only for a site included on the County's non-significant mineral and aggregate resource list.
3. Hours of operation shall be 7:00 a.m. to 6:00 p.m. Monday through Saturday. No surface mining shall be conducted on Sundays or the following legal holidays: New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day. (Emphasis added.)

The Bishops argue that because the subject property is not included in the county's non-significant mineral and aggregate resource inventory, under Paragraph (D) of Section 18.128.280 KCDG's surface mining to create the reservoirs cannot be approved unless and until the subject property is added to that inventory through a text amendment to the comprehensive plan. The applicant responds in its October 20, 2015 memorandum as follows:

"Deschutes County's definition of 'surface mining' discussed above, does not appear to include Facilities Mining. [28] That said, we include it here in the interest of responding completely to Opponent allegations.

Opponents do not specifically address this [sic] criteria, except to say that any mining activity is prohibited unless TID seeks a Comprehensive Plan amendment

²⁸ The applicant uses the term "facilities mining" to refer to mining in conjunction with irrigation district operations and maintenance authorized under Section 18.60.030(V).

or KCDG seeks a zone change for individual mining. Respectfully, the code requires neither.

Applicant believes that criteria under Section 18.128.280 does [sic] not directly apply, because Facilities Mining under DCC 18.60.030.W for irrigation districts does not meet the definition of surface mining. Additionally, material was not exported from the site or sold – prerequisites for Deschutes County or DOGAMI regulation. (Underscored emphasis added.)

As discussed above, the Hearings Officer has found KCDG's excavation to create the new reservoirs constitutes "surface mining," and that categorization was affirmed by the board and LUBA. Therefore, I find this argument is without merit. .

However, the Hearings Officer finds that is not the end of the inquiry. The above-underscored language in Paragraph (D) seems unambiguously to require placement on the non-significant mineral and aggregate resources inventory as a prerequisite to surface mining approval under Section 18.128.280. However, in its context, this provision could be read to suggest placement on the inventory is required *only* if the irrigation district seeks to sell and/or use the excavated material off-site, and the record indicates neither KCDG nor TID did so. For example, the staff report for Ordinances 2001-038 and 2001-039 states Squaw Creek Irrigation District sought the proposed amendments to the comprehensive plan and Title 18 because the irrigation district wanted to sell material removed from canals, ditches and reservoirs, and understood that excavating more than 1,000 cubic yards "to be used and sold off-site" involved an extensive Goal 5 process requiring listing on the county's significant resource inventory, for which the irrigation district's sites likely would not qualify.

Other context suggests a different interpretation. Paragraph (C) of 18.128.280 makes clear the county intended to strictly regulate surface mining *to create water impoundments* without regard to whether material mined at the impoundment site is moved or sold off-site. In light of this paragraph, the Hearings Officer finds it is unlikely the intent of Section 18.128.280 was to allow significant surface mining activities to create a reservoir at any location in the county without a process to identify the site and its characteristics and to place it on the inventory of non-Goal 5 mineral and aggregate sites. As noted above, the four sites that are on the county's non-significant inventory are *reservoir* sites.

Finally, the Hearings Officer finds Section 18.60.030(W), adopted with the amendments to ORS 18.128.280, provides additional interpretive context. As discussed above, this section authorizes as a conditional use in the RR-10 Zone surface mining in conjunction with the operation and maintenance of irrigation districts' irrigation systems consisting of:

. . . the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material. (Emphasis added.)

I find from the text of this provision that it authorizes *two separate types* of surface mining activities by irrigation districts on non-SM zoned land: (1) excavation and mining of mineral and aggregate; and (2) off-site use, storage and sale of excavated materials. In other words, its authorization goes beyond what Squaw Creek Irrigation District requested (authority to sell excavated material) to allow excavation and mining for reservoirs regardless of whether it is taken off-site or sold.

For the foregoing reasons, the Hearings Officer finds the prohibition in Section 18.128.280(D) applies to the subject property. In other words, inclusion of the subject property on the county's non-significant mineral and aggregate resource list is a prerequisite to conditional use approval of surface mining on the subject property to create reservoirs. To my knowledge, neither planning

staff nor the parties in the LUCS proceedings identified this provision as applicable to the reservoirs. And I was not aware of it until it was cited by the Bishops in these proceedings. Consequently, these applications are the first cases in which I have been asked to interpret and apply Section 18.128.280. Nevertheless, I find the applicant had ample opportunity to address Section 18.128.280 once it was identified as potentially applicable.

Because the subject property is not on the county's non-significant inventory, the Hearings Officer finds I cannot grant conditional use approval for KCDG's surface mining that created the reservoirs. And because I have found the reservoirs were not legally created, I cannot approve the proposed recreation-oriented facility requiring large acreage for the southern reservoir. However, because I anticipate my decision will be appealed to the board, and the board may elect to hear the appeal, I include in this decision recommended findings and conclusions as to the remaining approval criteria applicable to the surface mining and recreation-oriented facility.

B. Recreation-Oriented Facility. The Hearings Officer found in my LUCS decision that the property owners' use of the southern reservoir for motorized boating and water skiing made the reservoir a "recreation-oriented facility requiring large acreage such as off-road vehicle track or race track, but not including a rodeo grounds," a conditional use in the RR-10 Zone under Section 18.16.030(G). The board affirmed my finding in its LUCS decision. And in dismissing the TID's/KCDG's and the Bishops' appeals, LUBA affirmed the board's categorization of the proposed recreational use of the southern reservoir as requiring conditional use approval.

The Bishops raise two issues under Section 18.16.030(G). First, they claim the northern reservoir also requires conditional use approval. The Hearings Officer finds that claim lacks merit. Neither the board nor I found the northern reservoir requires conditional use approval as a recreation-oriented facility, and LUBA affirmed that categorization in its decision dismissing the Bishops' and TID's/KCDG's appeals. Therefore, I find the question of whether the northern reservoir requires conditional use approval as a recreation-oriented facility has been settled.

Second, the Bishops argue the boathouse cannot be approved because it does not qualify as an "accessory use" to the recreation on the southern reservoir. They rely on the provisions of Section 18.116.040 which provides an exception to the requirement that an "accessory use" comply with all approval criteria for the "principal use" for buildings less than 2,000 square feet in size, no windows, only one floor, an operable garage door, and not requiring plumbing or electrical permits. The Bishops state, and I concur, that the boathouse does not meet those characteristics. However, I find boathouse is not an "accessory use" subject to the provisions of this section. Rather, I find it is an essential component of the recreational use of the southern reservoir – i.e., the use of motorized boats on the reservoir.

b. Section 18.60.040, Yard and Setback Requirements

In an RR 10 Zone, the following yard and setbacks shall be maintained.

- A. The front setback shall be a minimum of 20 feet from a property line fronting on a local street right of way, 30 feet from a property line fronting on a collector right of way and 50 feet from an arterial right of way.**
- B. There shall be a minimum side yard of 10 feet for all uses, except on the street side of a corner lot the side yard shall be 20 feet.**
- C. The minimum rear yard shall be 20 feet.**

- D. The setback from the north lot line shall meet the solar setback requirements in DCC 18.116.180.
- E. In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.

FINDINGS: Section 18.04.030 includes the following relevant definitions:

“Building” means a structure built for the support, shelter, or enclosure of persons, animals, chattels or property of any kind.

“Setback” means an open space on a lot which is unobstructed from the ground upward except as otherwise provided in DCC Title 18.

“Setback, front” means a setback between side lot lines, measured horizontally at right angles to the front lot line and the front lot line to the nearest point of a building.

“Setback, rear” means a setback between side lot lines, measured horizontally at right angles to the rear lot line from the rear lot line to the nearest point of a building.

“Setback, side” means a setback between the front and rear yard measured horizontally at right angles from the side lot line to the nearest point of a building.

“Yard” means an open space on a lot which is unobstructed from the ground upward except as otherwise provided in Title 18.

“Yard, front” means a yard between side lot lines measured horizontally at right angles to the front lot line from the front lot line to the nearest point of a building. Any yard meeting this definition and adjoining on a street other than an alley shall be considered a front yard.

“Yard, rear” means a yard between side lot lines measured horizontally at right angles from the rear lot line to the nearest point of a building.

“Yard, side” means a yard between front and rear yard measured horizontally at right angles from the side lot lines to the nearest point of a building. (Emphasis added.)

The questions presented under this section are: (1) whether the southern reservoir and the proposed dock, pilings for the boathouse, and boathouse are subject to the setbacks in the RR-10 Zone; and (2) if so, whether they comply with the setbacks.

1. Reservoirs. The subject property consists of thirteen contiguous tax lots and lots of record. The applicant’s submitted site plan shows approximately one-quarter of the southern reservoir is located on Tax Lot 828 and the remainder of the reservoir is located on Tax Lot 824, and therefore the southern reservoir crosses a lot line.

The applicant argues the southern reservoir is not subject to the minimum setbacks in this section because it is not a feature that “obstructs” from the ground upward. The applicant also argues the reservoir is not a “building” and therefore because the minimum setbacks are measured from the nearest point of a building, they do not apply to the reservoir. The applicant also argues that even if parts of the reservoirs could be considered to “obstruct” from the ground upward, there is no justification for applying the setbacks to the reservoirs and therefore the setbacks should be “waived.” Finally, the applicant argues that if the setbacks do apply to the southern reservoir, the reservoir qualifies for a variance to the setbacks.²⁹

The Bishops respond that the setbacks in the RR-10 Zone do apply to the reservoir because the uppermost portion thereof, the banks and areas where the liners are secured with gravel, project above the ground. The Bishops and other opponents also argue that both reservoirs constitute “obstructions” to the movement of wildlife across the subject property.

The Hearings Officer found in my LUCS decision that the reservoirs are “structures” for purpose of determining whether they constitutes a “reservoir and water impoundment” permitted in certain zones. That finding was affirmed by the board. However, “building” is defined as a *distinct type of structure* – i.e., one built “for the support, shelter, or enclosure of persons, animals, chattels or property of any kind.” The Bishops argue that the reservoirs are “buildings” because were constructed to enclose and support water. However, I find that interpretation stretches the meaning of “building” too far. I find the reservoirs are not “buildings” and accordingly the minimum setbacks in the RR-10 Zone do not apply to them.³⁰

For the foregoing reasons, the Hearings Officer finds the reservoirs are not subject to the minimum yards and setbacks in the RR-10 Zone.

2. Dock, Pilings and Boathouse. Photographs in the record show the dock and pilings for the boathouse project above the water level. The applicant’s burden of proof states, and the boathouse drawings included in the record as Exhibit “BP to the burden of proof, state the peak of the boathouse roof would be approximately 23 feet above the water line. The Hearings Officer finds that height also would place the roof peak above ground level. In his October 21, 2015 comments on the applicant’s proposal, Deschutes County Building Official Randy Scheid stated the dock would not require a building permit but that the boathouse and it pilings would.

The Hearings Officer finds the boathouse is a “building” as it would be designed and constructed to shelter up to two boats, and therefore both the boathouse and its pilings are subject to the minimum yards and setbacks in the RR-10 Zone. However, the applicant’s submitted site plan shows the pilings and boathouse would be located entirely on Tax Lot 828 and would be at least 250 feet from any lot line, therefore satisfying any applicable minimum setbacks. In addition, I find that because of the proposed height and location of the boathouse, it will satisfy the solar setback from the northern lot line of Tax Lot 828. Finally, I find any additional setbacks required by applicable building codes will be addressed at the time of building permit review.

c. Section 18.60.060, Dimensional Standards

In an RR 10 Zone, the following dimensional standards shall apply:

- A. Lot Coverage. The main building and accessory buildings located on any building site or lot shall not cover in excess of 30 percent of the total lot area.**

²⁹ Compliance with the variance criteria is discussed in the findings below under Chapter 18.132.

³⁰ The county’s building official determined the reservoirs do not require building permits.

FINDINGS: The Hearings Officer has found the reservoirs are not “buildings,” but the proposed boathouse would be a building. The applicant’s burden of proof states the boathouse would have a footprint of 924 square feet. The record indicates Tax Lot 828 is 63.45 acres, or 2,763,882 square feet, in size. Therefore, the boathouse will have lot coverage of less 0.03 percent, satisfying this criterion.

- B. Building Height. No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed under DCC 18.120.040.**

FINDINGS: As noted previously, the proposed boathouse would have a height of approximately 23 feet above the water line which is below ground level, therefore satisfying this criterion.

- C. Minimum lot size shall be 10 acres, except planned and cluster developments shall be allowed an equivalent density of one unit per 7.5 acres. Planned and cluster developments within one mile of an acknowledged urban growth boundary shall be allowed a five acre minimum lot size or equivalent density. For parcels separated by new arterial rights of way, an exemption shall be granted pursuant to DCC 18.120.020.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant’s proposal does not include creation of any new lots or parcels.

d. Section 18.60.070, Limitations on Conditional Uses

The following limitations shall apply to uses allowed by DCC 18.60.030:

- A. The Planning Director or Hearings Body may require establishment and maintenance of fire breaks, the use of fire resistant materials in construction and landscaping, or may attach other similar conditions or limitations that will serve to reduce fire hazards or prevent the spread of fire to surrounding areas.**

FINDINGS: The Hearings Officer finds that the nature of the proposed uses – two reservoirs, a dock and a boathouse – coupled with the minimal vegetation adjacent to the reservoirs and structures, and the limited flammable materials proposed on-site (boathouse, docks), establishment of fire breaks or use of fire resistant materials is not necessary.

- B. The Planning Director or Hearings Body may limit changes in the natural grade of land, or the alteration, removal or destruction of natural vegetation in order to prevent or minimize erosion or pollution. (Emphasis added.)**

FINDINGS: Section 18.04.030 defines “grade” as “the average of the finished ground elevations of all walls of a building.” However, Title 18 does not define “natural” grade. The Hearings Officer is aware the county has interpreted “natural grade” to mean the average of the ground level elevations *before* excavation or construction. In this case, the grade that existed before excavation of the reservoirs was not “natural.” Rather, it had been significantly altered as the result of surface mining and reclamation of the Klippel mining site. Photographs in the record taken during reservoir excavation show significant excavation and grading took place to create the

reservoirs, along with removal of nearly all of the vegetation in the reclaimed mining pits. However, those photos also show the moderate tree cover that existed around the perimeter of the Klippel mine was not altered by the reservoir excavation.³¹

Nevertheless, the Hearings Officer finds the question under this criterion is whether the excavation, grading, contouring and removal of vegetation to create the reservoirs would have necessitated imposition of any limitations prior to construction "in order to prevent or minimize erosion or pollution." The staff report states, and I agree, that lining the reservoirs will minimize erosion within the reservoirs themselves. However, the parties disagree as to whether the grade of the reservoir banks, and the lack of vegetation around the reservoirs, will increase erosion such that remediation measures should be required through the subject applications. As discussed in detail in the findings below, incorporated by reference herein, I have found the banks of the southern reservoir are in some places steeper than were the banks of the reclaimed mining pits. Moreover, these banks are comprised of gravel, rocks and dirt and are not covered or anchored with any vegetation, thus susceptible to erosion into the reservoir or onto adjacent land.

For this reason, and the reasons set forth in the findings below concerning the applicable site plan and conditional use approval criteria, the Hearings Officer finds that if the applicant's proposal is approved on appeal, it should be subject to conditions of approval requiring the property owners to re-contour the banks of the southern reservoir so that no slopes exceed a grade of three feet horizontal to one foot vertical, and to plant native vegetation in the areas between the side of the banks facing away from the southern reservoir and the forested areas surrounding it. I find this planting will also provide suitable wildlife habitat and forage.

e. Section 18.60.080, Rimrock Setback

Setbacks from rimrock shall be as provided in DCC 18.116.160.

FINDINGS: Section 18.04.030 defines "rimrock" as

... any ledge, outcropping or top or overlying stratum of rock, which forms a face in excess of 45 degrees, and which creates or is within the canyon of the following rivers and streams: (1) Deschutes River, (2) Crooked River, (3) Fall River (4) Little Deschutes River (5) Spring River (6) Paulina Creek (7) Whychus Creek and (8) Tumalo Creek. For the purpose of DCC Title 18, the edge of the rimrock is the uppermost rock ledge or outcrop of rimrock.

Based on photographs in the record, the Hearings Officer finds there is no rimrock on the subject property, and therefore I find this criterion does not apply.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal does not satisfy all applicable standards in the RR-10 Zone.

³¹ For example, see the photograph at page 7 of the Bishops' Power Point presentation given at the September 29, 2015 public hearing, and the photograph at page 6 of Exhibit 9 to the Bishops' September 29, 2015 hearing memorandum.

SMIA ZONE STANDARDS

2. Chapter 18.56, Surface Mining Impact Area Combining Zone – SMIA

a. Section 18.56.020, Location

The SMIA zone shall apply to all property located within one half mile of the boundary of a surface mining zone. However, the SMIA zone shall not apply to any property located within an urban growth boundary, city or other county. The extent and location of the SMIA Zone shall be designated at the time the adjacent surface mining zone is designated.

FINDINGS: The record indicates that with the exception of the southern two-thirds of Tax Lot 824 and the southern half of Tax Lot 828, the subject property is located within the SMIA Zone associated with SM Sites 293 and 308, and therefore the provisions of Chapter 18.56 apply to the applicant's proposal.

b. Section 18.56.050, Conditional Uses Permitted

Uses permitted conditionally shall be those identified as conditional uses in the underlying zone(s) with which the SMIA Zone is combined and shall be subject to all conditions of the underlying zone(s) as well as the conditions of the SMIA Zone.

FINDINGS: The Hearings Officer has found the surface mining to create the reservoirs and the use of the southern reservoir as a recreation-oriented facility requiring large acreage constitute conditional uses in the RR-10 Zone. Therefore, I find these uses also constitute conditional uses in the SMIA Zone. However, as discussed in the findings above, I have found the surface mining to create the reservoirs was prohibited under Section 18.128.280.

c. Section 18.56.070, Setbacks

The setbacks shall be the same as those prescribed in the underlying zone, except as follows:

- A. No noise sensitive or dust sensitive use or structure established or constructed after the designation of the SMIA Zone shall be located within 250 feet of any surface mining zone, except as provided in DCC 18.56.140; and**
- B. No noise sensitive or dust sensitive use or structure established or constructed after the designation of the SMIA Zone shall be located within one quarter mile of any existing or proposed surface mining processing or storage site, unless the applicant demonstrates that the proposed use will not prevent the adjacent surface mining operation from meeting the setbacks, standards and conditions set forth in DCC 18.52.090, 18.52.110 and 18.52.140, respectively.**
- C. Additional setbacks in the SMIA Zone may be required as part of the site plan review under DCC 18.56.100.**

- D. An exception to the 250 foot setback in DCC 18.56.070(A), shall be allowed pursuant to a written agreement for a lesser setback made between the owner of the noise sensitive or dust sensitive use or structure located within 250 feet of the proposed surface mining activity and the owner or operator of the proposed surface mine. Such agreement shall be notarized and recorded in the Deschutes County Book of Records and shall run with the land. Such agreement shall be submitted and considered at the time of site plan review or site plan modification.

FINDINGS: The Hearings Officer has found the reservoirs are not subject to the minimum yard and setback requirements in the RR-10 Zone, and the pilings and proposed boathouse are subject to, and satisfy, those minimum setbacks.

With respect to the SMIA Zone setbacks, Section 18.04.030 includes the following relevant definitions:

"Dust sensitive use" means real property normally used as a residence, school, church, hospital or similar use. Property used in industrial or agricultural activities is not "dust sensitive" unless it meets the above criteria in more than an incidental manner. Accessory uses such as garages and workshops do not constitute dust sensitive uses.

"Noise sensitive use" means real property normally used for sleeping or normally used as schools, churches, hospitals or public libraries. Property used in industrial or agricultural activities is not "noise sensitive" unless it meets the above criteria in more than an incidental manner. Accessory uses such as garages or workshops do not constitute noise sensitive uses.

The Hearings Officer finds the reservoirs, dock, pilings and boathouse, and recreational use of the southern reservoir are not dust- or noise-sensitive uses, and therefore the SMIA Zone setbacks do not apply to the applicant's proposal.

d. **Section 18.56.080, Use Limitations**

No dwellings or additions to dwellings or other noise sensitive or dust sensitive uses or structures shall be erected in any SMIA Zone without first obtaining site plan approval under the standards and criteria set forth in DCC 18.56.090 through 18.56.120.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose dwellings or other noise- or dust-sensitive use.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies all applicable standards in the SMIA Zone.

LM ZONE STANDARDS

3. **Chapter 18.84, Landscape Management Combining Zone – LM**

a. **Section 18.84.020, Application of Provisions**

The provisions of DCC 18.84 shall apply to all areas within one fourth mile of roads identified as landscape management corridors in the Comprehensive Plan and the County Zoning Map. The provisions of DCC 18.84 shall also apply to all areas within the boundaries of a State scenic waterway or Federal wild and scenic river corridor and all areas within 660 feet of rivers and streams otherwise identified as landscape management corridors in the comprehensive plan and the County Zoning Map. The distance specified above shall be measured horizontally from the centerline of designated landscape management roadways or from the nearest ordinary high water mark of a designated landscape management river or stream. The limitations in DCC 18.84.020 shall not unduly restrict accepted agricultural practices.

FINDINGS: The record indicates the northwest portion of the subject property is located within the LM Zone associated with Johnson Road, a designated LM roadway, and the southern portion of the subject property is located within the LM Zone associated with Tumalo Creek, a designated LM stream. The record indicates the only part of the applicant's proposal located within the LM Zone boundaries is the southern portion of the southern reservoir located within one-quarter mile of Tumalo Creek. The dock, pilings, and proposed boathouse on the southern reservoir, and all of the northern reservoir, are or will be located outside the LM Zone boundary. Therefore, the Hearings Officer finds the LM Zone applies only to the portion of the southern reservoir within the LM Zone boundary.

b. Section 18.84.040, Uses Permitted Conditionally

Uses permitted conditionally in the underlying zone with which the LM Zone is combined shall be permitted as conditional uses in the LM Zone, subject to the provisions in DCC 18.84.

FINDINGS: The Hearings Officer has found the surface mining to create the reservoirs and the recreational use on the southern reservoir constitute conditional uses in the RR-10 Zone. Therefore, I find they also are conditional uses in the LM Zone. However, as discussed above, I have found the surface mining to create the reservoirs is prohibited under Section 18.128.280.

c. Section 18.84.050, Use Limitations

A. Any new structure or substantial alteration of a structure requiring a building permit, or an agricultural structure, within an LM Zone shall obtain site plan approval in accordance with DCC 18.84 prior to construction. As used in DCC 18.84 substantial alteration consists of an alteration which exceeds 25 percent in the size or 25 percent of the assessed value of the structure.

FINDINGS: The county's Building Official Randy Scheid determined the reservoirs and the dock at the north end of the southern reservoir do not require building permits, but that the boathouse and its pilings do. For this reason, the Hearings Officer finds LM site plan approval for the reservoirs is not required. And because the pilings and proposed boathouse are located outside the LM Zone boundaries, they do not require LM site plan review.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies all applicable standards in the LM Zone.

WA ZONE STANDARDS

4. Chapter 18.88, Wildlife Area Combining Zone – WA

a. Section 18.88.020, Application of Provisions

The provisions of DCC 18.88 shall apply to all areas identified in the Comprehensive Plan as a winter deer range, significant elk habitat, antelope range or deer migration corridor. Unincorporated communities are exempt from the provisions of DCC 18.88.

FINDINGS: The record indicates the entire subject property is located within the WA Zone associated with Tumalo Deer Winter Range. Therefore, the Hearings Officer finds the WA Zone provisions apply to the applicant's proposal.³²

b. Section 18.88.040, Uses Permitted Conditionally

A. Except as provided in DCC 18.88.040(B), in a zone with which the WA Zone is combined, the conditional uses permitted shall be those permitted conditionally by the underlying zone subject to the provisions of the Comprehensive Plan, DCC 18.128 and other applicable sections of this title.

FINDINGS: The Hearings Officer has found the surface mining to create the reservoirs and the recreational use of the southern reservoir constitute conditional uses in the RR-10 Zone. Therefore, they also are conditional uses in the WA Zone. However, as discussed above, I have found the surface mining to create the reservoirs is prohibited under Section 18.128.280.

B. The following uses are not permitted in that portion of the WA Zone designated as deer winter ranges, significant elk habitat or antelope range:

- 1. Golf course, not included in a destination resort;**
- 2. Commercial dog kennel;**
- 3. Church;**
- 4. Public or private school;**
- 5. Bed and breakfast inn;**

³² In its final argument, the applicant questions the "strict imposition of the WA Zone standards" to its proposal because, according to the applicant, ODFW "no longer considers this area to be of critical importance" and "has recently re-drawn the boundary within the Tumalo Winter Deer Range that it regulates as critical range habitat" so that it no longer includes the subject property. The Hearings Officer finds no merit to this argument. If the applicant believes the county's WA Zone boundaries should be modified to exclude the subject property, it can apply for a plan amendment and zone change to do so. Otherwise, the WA Zone applies to the subject property.

The applicant also argues in its October 20, 2015 memorandum that the Tumalo Winter Deer Range is not a Goal 5 resource. The applicant is wrong. The county's comprehensive plan Goal 5 inventory of significant fish and wildlife habitat includes this winter range.

6. Dude ranch;
7. Playground, recreation facility or community center owned and operated by a government agency or a nonprofit community organization;
8. Timeshare unit;
9. Veterinary clinic;
10. Fishing lodge. (Emphasis added.)

FINDINGS: The Bishops and other opponents argue recreational use of the southern reservoir is prohibited under Paragraph (B)(7) of this section. As discussed above, in my LUCS decision I categorized the southern reservoir and the applicant's proposed recreational use thereon as the conditional use of "recreation-oriented facility requiring large acreage" under Section 18.60.030(G) of the RR-10 Zone. That categorization was affirmed by the board and by LUBA.

The Hearings Officer finds the prohibited use in the WA Zone under Paragraph (B)(7) is a *different* conditional use in the RR-10 Zone from "recreation-oriented facility requiring large acreage." The "recreation" use prohibited in Paragraph (B)(7) is "playground, recreation facility or community center owned and operated by a government agency or nonprofit community organization." That language is virtually identical to the conditional use authorized in the RR-10 Zone under Section 18.60.030(A) – "public park, playground, recreation facility or community center owned and operated by a government agency or nonprofit community organization." The only difference between the prohibition in Paragraph (B)(7) and the conditional use in Paragraph (A) is that the prohibition does not include "public park."

The "recreation-oriented facility" use has been a conditional use in the RR-10 Zone since PL-15 was adopted in 1979. The parties have not identified, and the Hearings Officer has not found, any legislative history that would explain why the drafters of PL-15 elected to create two separate "recreation" uses. It may be that use of the term "recreation-oriented facility" was intended to authorize a distinct use like that proposed by the applicant – i.e., a facility providing for recreation along with one or more non-recreation uses. In any case, I find that because the "recreation-oriented facility" authorized under Section 18.60.030(G) is described very differently from the use prohibited by Section 18.88.040(B)(7), the prohibition does not apply to it. While I find it odd that the drafters of Section 18.88.040(B)(7) did not include the "recreation-oriented facility requiring large acreage" in the list of uses prohibited in the WA Zone protecting winter deer range, I cannot read into the prohibition paragraph language that is not there.

Even assuming for purposes of discussion that the applicant's proposed "recreation-oriented facility requiring large acreage" *a/so* constitutes a "recreation facility" under Section 18.60.030(A), the Hearings Officer finds an examination of the text and context of the prohibition in Section 18.88.040(B)(7) does not support opponents' position.

1. Text. The use prohibited in Subparagraph (B)(7) is:

Playground, recreation facility or community center owned and operated by a government agency or a nonprofit community organization.

This subparagraph lists three uses – playground, recreation facility and community center – and includes the descriptive phrase "owned and operated by a government agency or a nonprofit

community organization.” The county’s hearings officers consistently have treated the descriptive phrase as applying to *all three uses*. In other words, they have considered only government-owned and operated recreation facilities to be prohibited in the WA Zone.³³ In this Hearings Officer’s decision in *Shepherd* (MA-13-3, CU-13-13),³⁴ I held a proposed private park did not fall within the prohibition in Subparagraph (B)(7) because:

*“The plain language of Subsection (7) limits the prohibited recreational uses to those ‘owned and operated by a government agency or nonprofit community organization,’ neither of which applies to the applicant. While it is odd that the prohibition on recreation uses in this section does not include private parks which could have similar impacts on wildlife habitat, I cannot read into this section language that is not there.”*³⁵

In *Bend Trap Club* (MA-07-12, CU-07-63, SP-07-32) I held a private shooting club facility located in an antelope range was not prohibited under Section 18.88.040(B)(7) because it was a private park not owned or operated by a “nonprofit community organization.” However, I noted the proposed shooting range “could have impacts on the antelope range similar to or even greater than those from some of the prohibited uses listed in” the section.³⁶

In its October 20, 2015 memorandum, LandWatch argues the county’s interpretation of Subparagraph (B)(7) is not correct under the “doctrine of last antecedent,” citing *Liberty Northwest Ins. Corp. v. Watkins*, 347 Or 687, 227 P3d 1134 (2010) and *State v. Webb*, 324 Or 380, 927 P2d 79 (1996). In *Webb*, the Oregon Supreme Court explained the “last antecedent” rule as follows:

*“Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence. Thus a proviso usually is construed to apply to the provision or clause immediately preceding it. * * **

Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedent by a comma.”

LandWatch argues the “last antecedent” in Paragraph (B)(7) is “community center” because it is the provision immediately preceding the descriptive clause. Accordingly, LandWatch argues the phrase “owned and operated by a government agency or nonprofit community organization” applies *only* to “community center,” and therefore a private recreation facility is prohibited. The Hearings Officer notes that only “playground” is separated from the referential phrase by a

³³ E.g., *Shepherd* (MA-13-3, CU-13-13); *Dorsett*, CU-07-79 (private paintball park); *Bend Trap Club*, MA-07-12, CU-07-63, SP-07-32 (private trap club shooting range).

³⁴ A copy of this decision is included in the record as an attachment to an electronic mail message from Senior Planner Anthony Raguine to the applicant’s attorney Ken Katzaroff dated October 13, 2015.

³⁵ The Hearings Officer’s *Shepherd* decision was not appealed. LUBA’s subsequent decision reversing the board’s later approval of a smaller private park in *Shepherd*, ____ Or LUBA ____ (LUBA No. 2015-034, August 17, 2015) did not address the application of Section 18.88.040(B)(7).

³⁶ The applicant argues the Hearings Officer is required to follow the county’s precedent interpreting this criterion to apply only to facilities that are both owned and operated by a government agency. Assuming for purposes of discussion that prior hearings officer decisions constitute precedent in subsequent cases, I find prior decisions implicating this ordinance language do not provide meaningful assistance because they contain little or no analysis of the text and context of the language at issue.

comma. “Recreation facility” and “community center” are joined by the conjunction “and.” For this reason, I find it is unclear whether “recreation facility” is part of the “last antecedent.” In any case, I find the court acknowledged in *Webb* that the relevant issue is the drafters’ intent. I find the language of Paragraph (B)(7) does not reveal a clear intent with respect to how the referential phrase is to be applied.

2. Context. LandWatch asserts the context of Section 18.88.040(B)(7) includes two documents attached to its October 20, 2015 memorandum: (a) a July 2009 document entitled “Updated Wildlife Information and Recommendations for the Deschutes County Comprehensive Plan Update” prepared by an interagency working group; and (b) a January 2011 document entitled “Oregon Mule Deer Initiative” prepared by ODFW. With respect to the first document, LandWatch states the “working group specifically considered” the existing language in Section 18.88.040(B)(7). The Hearings Officer finds these documents are not relevant interpretive context. LandWatch has not identified, nor have I found, any recommendations in either document concerning the interpretation or application of Section 18.88.040(B)(7). And the “Mule Deer Initiative” does not address mule deer habitat in the Upper Deschutes Wildlife Management Unit where the subject property is located. Most important, both of these documents were prepared long after Section 18.88.040(B)(7) was adopted in 1992.

LandWatch also asserts the relevant context for interpreting Section 18.88.040(B)(7) includes what it claims is the source of the prohibition language in Section 18.88.040(B)(7) – i.e., provisions in ORS Chapter 215.283 establishing uses permitted in the EFU Zones. ORS 215.283(2)(d) and (e), respectively, authorize as separate conditional uses in the EFU Zone “public parks,” and “community centers owned by a government agency or nonprofit community organization.” LandWatch argues that this language indicates the government ownership modifier in the WA Zone was intended to apply only to community centers. The applicant responds in its final argument that EFU statutory language by definition cannot be relevant context for interpreting the county’s WA Zone provisions.

The Hearings Officer finds the EFU statutory language relied upon by LandWatch cannot be categorically excluded as a source of context for interpreting language in the WA Zone inasmuch as it is similar to the referential phrase in Section 18.88.040(B)(7). Nevertheless, because the statutory language does not include “recreation facility,” and it allows as a separate conditional use “private park and playground,” I find the EFU statutory language does not support the conclusion that the applicant’s proposed private “recreation-oriented facility” would not be permitted in the EFU Zones.

The *county’s* EFU Zone provisions in effect in 1992 when the WA Zone prohibition was adopted through Ordinance 92-042 were identical to the statutory language relied upon by LandWatch. In 1992, Section 18.16.030 and 18.16.031 *separately* authorized as conditional uses *private* parks and playgrounds, and *government-operated* parks and playgrounds. However, when the county adopted Section 18.88.040(B)(7) in 1992, it combined “playground” and “recreation facility” with “community center.” And, the RR-10 Zone provisions in effect in 1992 authorized “recreation-oriented facility” as a separate conditional use.

The legislative history of Section 18.88.040(B)(7) does not explain the county’s choice of terminology and syntax, or address whether the county considered the EFU Zone provisions when it adopted the prohibition in (B)(7). The recitals in Ordinance 92-042 indicate the prohibition was adopted as part of Deschutes County’s required “periodic review” to assure compliance with Goal 5 with respect to fish and wildlife habitat. Exhibit “C” to the ordinance contains the board’s supportive findings. Paragraph (9) of the findings states “ODFW provided information to support zoning ordinance provisions to resolve conflicts between fish and wildlife resource protection and development.” However, none of the findings addresses the language in Section 18.88.040(B)(7).

Based on the foregoing analysis, the Hearings Officer finds neither the text nor the context of Section 18.88.040(B)(7) supports LandWatch's argument that this provision was intended to prohibit a "recreation-oriented facility requiring large acreage" in the WA Zone.

3. Governmental Agency. The Bishops, LandWatch, and other opponents argue that if the southern reservoir is not prohibited as a *private* recreation facility under Section 18.88.040(b)(7), it is prohibited as a government-owned and operated recreation facility because TID is a quasi-governmental entity organized under ORS Chapter 545.³⁷ The Hearings Officer finds this argument is without merit. In the first place, TID does not own the southern reservoir. It is owned by KCDG, a private entity that has granted TID a non-exclusive easement to store water in the southern reservoir, to move water into and out of the reservoir as part of its irrigation system, and to come onto the subject property to operate and maintain its irrigation facilities. This easement is not tied to KCDG's use of the reservoir for recreation. Because the text of Section 18.88.040(B)(7) describes the prohibited recreation facility as one owned *and* operated by a government agency, I find TID's lack of ownership of the reservoir takes it out of the prohibition.

Second, even assuming for purposes of discussion that TID "owns" the southern reservoir based on its easement, the Hearings Officer finds TID does not "operate" the southern reservoir as a "recreation-oriented facility." The term "operate" is not defined in Title 18. Its ordinary definition is "to direct; manage." *Webster's*. Nothing in this record indicates TID directs or manages the southern reservoir as a *recreation-oriented facility*. To the contrary, TID's contract with KCDG authorizes TID to operate the southern reservoir as *part of its irrigation system*. As discussed in the findings above, TID has authority under its contract with KCDG to remove water from the reservoir, and TID is not required under the contract to keep sufficient water in the reservoir to permit boating and water skiing. I know of no legal prohibition against operating the southern reservoir for more than one purpose like other reservoirs throughout the state that provide water for hydroelectric generation, provide flood control, and allow for boating and other water-related uses.

For the foregoing reasons, the Hearings Officer finds the applicant's proposed "recreation-oriented facility requiring large acreage" is not prohibited in the WA Zone under Section 18.88.040(B)(7).

c. Section 18.88.060, Siting Standards

A. Setbacks shall be those described in the underlying zone with which the WA Zone is combined.

FINDINGS: The applicable setbacks of the underlying RR-10 Zone are addressed in the findings above.

B. The footprint, including decks and porches, for new dwellings shall be located entirely within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992 unless it can be found that: * * *

FINDINGS: The Hearings Officer finds this standard is not applicable because the applicant does not propose any new dwellings.

3. Section 18.88.070, Fence Standards

³⁷ *Withers v. Reed*, 194 Or 541, 243 P2d 283 (1952).

The following fencing provisions shall apply as a condition of approval for any new fences constructed as a part of development of a property in conjunction with a conditional use permit or site plan review.

A. New fences in the Wildlife Area Combining Zone shall be designed to permit wildlife passage. The following standards and guidelines shall apply unless an alternative fence design which provides equivalent wildlife passage is approved by the County after consultation with the Oregon Department of Fish and Wildlife:

1. The distance between the ground and the bottom strand or board of the fence shall be at least 15 inches.
2. The height of the fence shall not exceed 48 inches above ground level.
3. Smooth wire and wooden fences that allow passage of wildlife are preferred. Woven wire fences are discouraged.

B. Exemptions:

1. Fences encompassing less than 10,000 square feet which surround or are adjacent to residences or structures are exempt from the above fencing standards.
2. Corrals used for working livestock.

FINDINGS: The Hearings Officer finds these fencing standards are not applicable because the applicant does not propose any new fencing. However, I find that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring that any future fencing be installed in conformance with the standards in this section.

The Bishops argue the applicant is required to fence the perimeter of the reservoirs – and with fencing that cannot comply with the WA Zone fencing standards -- because the reservoirs constitute public swimming pools regulated by the Oregon Health Authority, Public Health Division, under Oregon Administrative Rules Chapter 333-060. In its final argument, the applicant responds as follows:

“ * * Deschutes County Environmental Health Division ('EHD') is the local agency that is responsible for regulating public swimming pools. The EHD did not provide comments, and so it would seem that they do not consider the New Reservoir to be a facility that requires regulation. Second, LandWatch cites to OAR 333-060-015(25)(k), which provides definitions for public swimming pools. [Footnote omitted.] LandWatch then misreads the rule. By its plain text, examples given for 'water recreation' are for things such as 'waterslide plunge pools, lazy or slow rivers, tubing pools, and wave pools.' OAR 333-060-0015(25)(k). Motorized boating and waterskiing is [sic] not included in this list and is wholly distinguished from activities mentioned.*

Further, OAR 333-060-0015 states that the authority of such rules comes from ORS 448.011. That statute authorizes regulations for public swimming pools only, no expressly private uses. Therefore, LandWatch's argument that this is a public swimming pool fails because it is without support in the law."

The Hearings Officer concurs with the applicant's analysis. I also find the definition of "public swimming pool" in OAR 333-060-0015(19) clearly does not include the southern reservoir because it is not "open to the public." In addition, as discussed in the conditional use findings below under Section 18.128.280, incorporated by reference herein, I have found the property owners are not required to fence the reservoirs where other access control measures are in place. Therefore, I find there is no legal or factual basis for me to find the applicant is required to fence the southern reservoir at all, let alone in a manner inconsistent with the WA Zone standards.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies all applicable standards in the WA Zone.

SUPPLEMENTARY PROVISIONS

5. Chapter 18.116, Supplementary Provisions

a. Section 18.116.020. Clear Vision Areas.

- A. In all zones, a clear vision area shall be maintained on the corners of all property at the intersection of two streets or a street and a railroad. A clear vision area shall contain no planting, fence, wall, structure, or temporary or permanent obstruction exceeding three and one-half feet in height, measured from the top of the curb or, where no curb exists, from the established street centerline grade, except that trees exceeding this height may be located in this area provided all branches and foliage are removed to a height of eight feet above the grade.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property does not contain an area within two intersecting streets or an intersecting street and a railroad.

b. Section 18.116.030, Off Street Parking and Loading

- A. Compliance. No building or other permit shall be issued until plans and evidence are presented to show how the off street parking and loading requirements are to be met and that property is and will be available for exclusive use as off-street parking and loading. The subsequent use of the property for which the permit is issued shall be conditional upon the unqualified continuance and availability of the amount of parking and loading space required by DCC Title 18.**

FINDINGS: The applicant proposes to provide ten off-street parking spaces to accommodate up to twenty invited guests recreating on the southern reservoir. Compliance with the applicable approval criteria for these parking spaces is addressed in the findings below.

- B. Off-Street Loading. Every use for which a building is erected or structurally altered to the extent of increasing the floor area to equal a minimum floor area required to provide loading space**

and which will require the receipt or distribution of materials or merchandise by truck or similar vehicle, shall provide off-street loading space on the basis of minimum requirements as follows:

* * *

2. Restaurants, office buildings, hotels, motels, hospitals and institutions, schools and colleges, public buildings, recreation or entertainment facilities and any similar use which has a gross floor area of 30,000 square feet or more shall provide off street truck loading or unloading berths subject to the following table:

Sq. Ft. of Floor Area	No. of Berths Required
Less than 30,000	0
30,000-100,000	1
100,000 and Over	2

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant's proposal does not include any buildings with a gross floor area of 30,000 square feet or more. As noted above, the proposed boathouse would have a floor area of only 924 square feet.

- C. **Off-Street Parking.** Off-street parking spaces shall be provided and maintained as set forth in DCC 18.116.030 for all uses in all zoning districts. Such off-street parking spaces shall be provided at the time a new building is hereafter erected or enlarged or the use of a building existing on the effective date of DCC Title 18 is changed.

FINDINGS: The applicant proposes to provide a ten-vehicle parking area to accommodate up to twenty invited guests recreating on the southern reservoir. The Hearings Officer finds that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the applicant to construct the parking area concurrent with completion of the boathouse and prior to commencing recreational use on the southern reservoir.

- D. **Number of Spaces Required.** Off-street parking shall be provided as follows:

* * *

9. Other uses not specifically listed above shall be provided with adequate parking as required by the Planning Director or Hearings Body. The above list shall be used as a guide for determining requirements for said other uses.

FINDINGS: The proposed recreation-oriented facility is not a use specifically listed in this section. The applicant proposes to provide a ten-space parking area to accommodate up to twenty invited guests recreating on the southern reservoir. The Hearings Officer finds this number of parking spaces will be adequate to accommodate the proposed use.

- E. **General Provisions. Off-Street Parking**

1. **More Than One Use on One or More Parcels.** In the event several uses occupy a single structure or parcel of land, the total requirement for off-street parking shall be the sum of requirements of the several uses computed separately.
2. **Joint Use of Facilities.** The off-street parking requirements of two or more uses, structures or parcels of land may be satisfied by the same parking or loading space used jointly to the extent that it can be shown by the owners or operators of the uses, structures or parcels that their operations and parking needs do not overlap at any point of time. If the uses, structures or parcels are under separate ownership, the right to joint use of the parking space must be evidenced by a deed, lease, contract or other appropriate written document to establish the joint use.

FINDINGS: The southern reservoir is located on two tax lots (Tax Lots 824 and 828), and the reservoir will accommodate two uses – a water storage facility as part of TID’s irrigation system, and a recreation-oriented facility requiring large acreage. The Hearings Officer finds the water storage use will generate few TID maintenance vehicle trips, and there is sufficient space near the reservoirs to accommodate TID vehicles. For this reason, I find parking for TID’s maintenance vehicles likely will not overlap with parking for guests using the recreation-oriented facility. Therefore, I find the applicant’s proposed off-street parking area will be sufficient for both uses of the southern reservoir.

3. **Location of Parking Facilities.** Off-street parking spaces for dwellings shall be located on the same lot with the dwelling. Other required parking spaces shall be located on the same parcel or another parcel not farther than 500 feet from the building or use they are intended to serve, measured in a straight line from the building in a commercial or industrial zone. Such parking shall be located in a safe and functional manner as determined during site plan approval. The burden of proving the existence of such off-premise parking arrangements rests upon the applicant.

FINDINGS: The applicant proposes to locate the ten off-street parking spaces for the recreation-oriented facility on Tax Lot 828, one of the two tax lots on which the southern reservoir is located, therefore satisfying this criterion.

4. **Use of Parking Facilities.** Required parking space shall be available for the parking of operable passenger automobiles of residents, customers, patrons and employees only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.

FINDINGS: The Hearings Officer finds that if the applicant’s proposal is approved on appeal, it should be subject to a condition of approval requiring that all parking spaces on the subject

property be available for the parking of operable passenger automobiles of residents, customers, patrons and employees only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.

5. **Parking, Front Yard. Required parking and loading spaces for multi-family dwellings or commercial and industrial uses shall not be located in a required front yard, except in the Sunriver UUC Business Park (BP) District and the La Pine UUC Business Park (LPBP) District and the LaPine UUC Industrial District (LPI), but such space may be located within a required side or rear yard.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose a multi-family dwelling, commercial or industrial use.

- F. **Development and Maintenance Standards for Off-Street Parking Areas. Every parcel of land hereafter used as a public or private parking area, including commercial parking lots, shall be developed as follows:**

1. **Except for parking to serve residential uses, an off-street parking area for more than five vehicles shall be effectively screened by a sight obscuring fence when adjacent to residential uses, unless effectively screened or buffered by landscaping or structures. (Emphasis added.)**

FINDINGS: Section 18.04.030 defines “fence, sight obscuring” as:

. . . a continuous fence, wall, evergreen planting or combination thereof constructed and/or planted to effectively screen a particular use from view.

The proposed guest parking area would be located on Tax Lot 828 near the north end of the southern reservoir. The applicant states the proposed parking area is adequately screened from the nearest residences by existing trees and other vegetation. The staff report states that based on staff’s site visit, a band of trees located on the perimeter of the reservoir will provide “some screening” of the proposed parking area from adjacent residential uses. However, staff questions whether that screening is sufficient to satisfy the requirement of this subsection. The Hearings Officer finds that in light of the location of the proposed guest parking area in the center of the subject property, and the presence of moderate tree cover to the north, west and east of this location, existing vegetation will adequately screen vehicles in the parking area from surrounding residential uses.

2. **Any lighting used to illuminate off-street parking areas shall be so arranged that it will not project light rays directly upon any adjoining property in a residential zone.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose any illumination for the parking lot. However, I find that if the applicant’s proposal is approved on appeal, it should be subject to a condition of approval requiring that any parking area lighting installed in the future will not project light rays directly on any adjoining property in a residential zone.

3. **Groups of more than two parking spaces shall be located and designed to prevent the need to back vehicles into a street or right of way other than an alley.**

FINDINGS: The applicant's submitted site plan shows the proposed guest parking area will be located over 150 feet from Klippel Road and over 2,000 feet from Johnson Road. For these reasons, the Hearings Officer finds the location and design of the guest parking area will prevent the need to back vehicles onto a street or right-of-way, therefore satisfying this criterion.

4. **Areas used for standing and maneuvering of vehicles shall be paved surfaces adequately maintained for all weather use and so drained as to contain any flow of water on the site. An exception may be made to the paving requirements by the Planning Director or Hearings Body upon finding that:**
 - a. **A high water table in the area necessitates a permeable surface to reduce surface water runoff problems; or**
 - b. **The subject use is located outside of an unincorporated community and the proposed surfacing will be maintained in a manner which will not create dust problems for neighboring properties; or**
 - c. **The subject use will be in a Rural Industrial Zone or an Industrial District in an unincorporated community and dust control measures will occur on a continuous basis which will mitigate any adverse impacts on surrounding properties.**

FINDINGS: The subject property is located outside of any unincorporated community. The applicant proposes to maintain the gravel surfacing of the vehicle standing and maneuvering areas in a dust free manner. The applicant notes the area proposed for guest parking has been graveled since at least the summer of 2014 and that it has not been the subject of any dust complaints. The applicant also states there is adequate water available on the subject property to allow the property owners to maintain the vehicular standing and maneuvering areas in a dust free condition. For these reasons, the Hearings Officer finds the applicant's proposal qualifies for an exception to the paving standard in this subsection for all areas used for standing and maneuvering of vehicles. I further find that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to maintain the guest parking area in a dust-free condition.

5. **Access aisles shall be of sufficient width for all vehicular turning and maneuvering.**

FINDINGS: Table 1 of Section 18.116.030 provides the minimum aisle width for two-way travel is 24 feet. The applicant's submitted site plan shows a 26-foot-wide access aisle to the guest parking area and fire apparatus turnaround. The Bishops argue this turnaround is not adequate. The applicant responds that the turnaround was designed by the applicant's engineer to conform to the applicable requirements in the Oregon Fire Code. The applicant also notes that although the Bend Fire Department, which provides fire protection services to the subject property, was

sent notice of the applicant's proposal, it did not submit any comments, indicating the department had no concerns about the fire apparatus turnaround. For these reasons, the Hearings Officer finds the applicant's proposal satisfies this criterion.

6. **Service drives to off-street parking areas shall be designed and constructed to facilitate the flow of traffic, provide maximum safety of traffic access and egress and maximum safety of pedestrians and vehicular traffic on the site. The number of service drives shall be limited to the minimum that will accommodate and serve the traffic anticipated. Service drives shall be clearly and permanently marked and defined through the use of rails, fences, walls or other barriers or markers. Service drives to drive in establishments shall be designed to avoid backing movements or other maneuvering within a street other than an alley.**
7. **Service drives shall have a minimum vision clearance area formed by the intersection of the driveway centerline, the street right of way line and a straight line joining said lines through points 30 feet from their intersection.**

FINDINGS: The applicant's submitted site plan shows the proposed service drive to the guest parking area will be the existing driveway from Johnson Road, and will be separated from any public pedestrian walkways or public rights-of-way. The applicant's submitted site plan shows this service drive would be surrounded by irrigated and other undeveloped lands and would be clearly marked. The staff report states that based on staff's site visit, the required clear vision areas will be met. For these reasons, the Hearings Officer finds the applicant's proposal satisfies this criterion.

8. **Parking spaces along the outer boundaries of a parking area shall be contained by a curb or bumper rail placed to prevent a motor vehicle from extending over an adjacent property line or a street right of way.**

FINDINGS: The applicant's submitted site plan shows the proposed parking area will be located over 300 feet from any property line, and over 150 feet from the southern reservoir. For these reasons, the Hearings Officer finds vehicles parked in the guest vehicle parking area will not extend over an adjacent property line or street right-of-way, therefore satisfying this criterion.

- G. **Off-Street Parking Lot Design. All off-street parking lots shall be designed subject to County standards for stalls and aisles as set forth in the following drawings and table:**

(SEE TABLE 1 AT END OF CHAPTER 18.116)

1. **For one row of stalls use "C" + "D" as minimum bay width.**
2. **Public alley width may be included as part of dimension "D," but all parking stalls must be on private property, off the public right of way.**

3. For estimating available parking area, use 300-325 square feet per vehicle for stall, aisle and access areas.
4. For large parking lots exceeding 20 stalls, alternate rows may be designed for compact cars provided that the compact stalls do not exceed 30 percent of the total required stalls. A compact stall shall be eight feet in width and 17 feet in length with appropriate aisle width.

FINDINGS: The applicant's submitted site plan shows the proposed guest parking area includes stalls nine feet wide and twenty feet long, meeting the minimum standards for 90-degree parking in Table 1 of DCC 18.116. As discussed above, the two-way aisle will be 26 feet in width, meeting the minimum 24-foot-wide drive aisle width. For these reasons, the Hearings Officer finds the applicant's proposal satisfies these standards.

c. Section 18.116.031, Bicycle Parking

New development and any construction, renovation or alteration of an existing use requiring a site plan review under DCC Title 18 for which planning approval is applied for after the effective date of Ordinance 93-005 shall comply with the provisions of DCC 18.116.031.

A. Number and Type of Bicycle Parking Spaces Required.

1. General Minimum Standard.

- a. All uses that require off-street motor vehicle parking shall, except as specifically noted, provide one bicycle parking space for every five required motor vehicle parking spaces.
- b. Except as specifically set forth herein, all such parking facilities shall include at least two sheltered parking spaces or, where more than 10 bicycle spaces are required, at least 50 percent of the bicycle parking spaces shall be sheltered.
- c. When the proposed use is located outside of an unincorporated community, a destination resort, and a rural commercial zone, exceptions to the bicycle parking standards may be authorized by the Planning Director or Hearings Body if the applicant demonstrates one or more of the following:
 - i. The proposed use is in a location accessed by roads with no bikeways and bicycle use by customers or employees is unlikely.
 - ii. The proposed use generates less than 50 vehicle trips per day.

- iii. No existing buildings on the site will accommodate bicycle parking and no new buildings are proposed.
- iv. The size, weight, or dimensions of the goods sold at the site makes transporting them by bicycle impractical or unlikely.
- v. The use of the site requires equipment that makes it unlikely that a bicycle would be used to access the site. Representative examples would include, but not be limited to, paintball parks, golf courses, shooting ranges, etc. (Emphasis added.)

FINDINGS: The applicant argues bicycle parking should not be required because its proposal is for a private use on private property. As discussed above, the Hearings Officer has found the applicant's proposal is not exempt from the county's land use regulations. And as noted in the staff report, in *Dorsett* (CU-07-79), I found that in the absence of express authorization to approve exceptions the bicycle parking requirements, they apply to private parks.

With respect to exceptions, the subject property is located outside of any unincorporated community, destination resort and rural commercial zone. And because the applicant proposes to limit to 20 the number of guests using the southern reservoir for recreation at the same time, traveling in ten vehicles, the proposed recreational use will generate only 20 vehicle trips.³⁸ Finally, the Hearings Officer finds that given the location of the subject property and the nature of the proposed recreational use, it is unlikely guests will travel to the facility via bicycle. For these reasons, I find the applicant's proposal qualifies for an exception to the bicycle parking requirements under subparagraphs (i) and (ii) of this paragraph.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies, or with imposition of conditions of approval will satisfy, all applicable supplementary provisions in this chapter.

SITE PLAN REVIEW

6. Chapter 18.124, Site Plan Review

a. Section 18.124.030, Approval Required

- A. No building, grading, parking, land use, sign or other required permit shall be issued for a use subject to DCC 18.124.030, nor shall such a use be commenced, enlarged, altered or changed until a final site plan is approved according to DCC Title 22, the Uniform Development Procedures Ordinance.
- B. The provisions of DCC 18.124.030 shall apply to the following:
 - 1. All conditional use permits where a site plan is a condition of approval;

³⁸ The staff report notes the county considers a vehicle trip to consist of any in or out movement to or from a property, and therefore ten vehicles coming to and leaving the site would generate 20 vehicle trips.

2. Multiple family dwellings with more than three units;
3. All commercial uses that require parking facilities;
4. All industrial uses;
5. All other uses that serve the general public or that otherwise require parking facilities, including, but not limited to, landfills, schools, utility facilities, churches, community buildings, cemeteries, mausoleums, crematories, airports, parks and recreation facilities and livestock sales yards; and
6. As specified for Flood Plain Zones (FP) and Surface Mining Impact Area Combining Zones (SMIA).
7. Non-commercial wind energy system generating greater than 15 to 100 kW of electricity. (Emphasis added.)

FINDINGS: The applicant requests conditional use approval for the surface mining to create the reservoirs on the subject property, and for a recreation-oriented facility requiring large acreage consisting of motorized boating, water skiing and wakeboarding on the southern reservoir. The applicant also requests conditional use approval for a dock, boathouse, and ten-vehicle guest parking area as part of the recreation-oriented facility.

The Hearings Officer finds the provisions of Chapter 18.60 governing the RR-10 Zone do not expressly require site plan review *under Chapter 18.124* for either of these conditional uses. Section 18.128.280 requires an applicant to submit a site plan for non-Goal 5 surface mining and establishes specific site plan approval criteria for such mining, but makes no reference to site plan review under Chapter 18.124. Therefore, I find the specific surface mining site plan approval criteria in Section 18.128.280 supersede the general site plan approval criteria in Chapter 18.124. In addition, I find none of the use categories listed in this section as requiring site plan approval encompass the surface mining to create the reservoirs. Therefore, I find the site plan approval criteria in Chapter 18.124 do not apply to the surface mining to create the reservoirs.

The Hearings Officer finds site plan review under Chapter 18.124 does apply to the proposed recreation-oriented facility on the southern reservoir because it requires parking under Chapter 18.116. Compliance with the applicable site plan approval criteria in this chapter for the recreational use is discussed in the findings below.³⁹

b. Section 18.124.060, Approval Criteria

Approval of a site plan shall be based on the following criteria:

- A. The proposed development shall relate harmoniously to the natural environment and existing development, minimizing**

³⁹ Opponents argue site plan approval is also required for recreational use of the northern reservoir. However, as discussed in the findings above, the Hearings Officer has found the northern reservoir does not require conditional use approval as a recreation-oriented facility, and therefore I find it also does not require site plan review.

**visual impacts and preserving natural features including views
and topographical features.**

FINDINGS: The applicant's modified burden of proof describes the applicant's proposed recreation-oriented facility requiring large acreage as follows:

"Per DCC 18.60.030.E and Board of County Commissioner determinations, Applicant seeks approval for a 'recreation-oriented facility requiring large acreage such as off-road vehicle track or race track, but not including rodeo grounds.' This approval is being sought for motorized boating activity including waterskiing and wakeboarding on the South Pond of the New Reservoir. Motorized activity is limited to the South Pond of the New Reservoir and so conditional use approval regulation is only required for the South Pond.

The recreation-oriented facility requiring large acreage is for private use only by the owners of KCDG and limited accompanied guests. It is not and will not be open to the public. Access to the recreation-oriented facility is via the private, gated driveway that also serves the Cadwell residence on tax lot 819.

*The Cadwells, members of KCDG, are social people who enjoy their church and the broader Central Oregon community. They would like to share the recreational benefits of the South Pond with limited guests. To that end, Applicant seeks approval to host up to 20 accompanied guests of the Subject Property owners at the harbor area. Guests at the recreation-oriented facility will park and congregate in areas marked on the Site Plan, **Exhibit C**.*

*Applicant believes that regulation of motorized boating activity is beyond the scope and jurisdiction of Deschutes County's authority. Motorized boating regulation is under the sole jurisdiction of the Oregon State Marine Board. **Exhibit P**. Nevertheless, Subject Property characteristics dictate, and the Applicant has voluntarily agreed, to logical restrictions on use as it relates to impacts on adjoining residents.*

The South Pond's configuration dictates that it will be used by one boat at a time. KCDG will limit the motorized boating activity to daylight hours. Use of the recreation-oriented facility will be restricted to protect mule deer during the critical winter deer range season which extends from December 1st of one year through March 31st of the following year.

Other proposed conditions to be recorded against adjacent KCDG, Cadwell and Kimble properties as CC&Rs [covenants, conditions and restrictions] restricting uses on the South Pond are:

- 1. Prohibit motorized activity during Winter Deer Range season;*
- 2. Only one motorized boat may operate on the South Pond at a time;*
- 3. No jet skis allowed;*
- 4. Operational hours limited to daylight hours;*
- 5. Adhere to all Deschutes County noise ordinance standards, found currently at DCC Chapter 8.08;*

6. *Boat restrictions include:*
 - a. *Inboard engines only;*
 - b. *Self-contained engines with internal oil lubrication systems;*
 - c. *Stock mufflers or muffled noise equivalent;*
 - d. *Direct drive or V-drive transmission;*
 - e. *No two-stroke motors (prevents oil contamination);*
7. *No alcoholic consumption to be allowed on boats or by skiers; and*
8. *All motor boat operators must carry the Oregon mandatory boater education card.*

*TID's use of the New Reservoir will be the primary and dominant use of the New Reservoir. TID may restrict any conflicting uses. See executed and recorded Irrigation Contract, **Exhibit A**. This contract has been recorded against the Subject Property, and so is binding upon subsequent landowners, and will be incorporated into surrounding property CC&Rs belonging to KDCG, the Cadwells, and the Kimbles upon approval."* (Bold emphasis in original.)

In addition, the applicant seeks site plan approval for the existing dock and the proposed boathouse to be constructed on existing pilings at the north end of the southern reservoir. As discussed above, the design drawings for the boathouse show its roof peak would be 23 feet above the water line, and the building would have a footprint of 924 square feet, sufficient to enclose two boats. The applicant also requests site plan approval for the 10-vehicle guest parking area. Finally, as discussed above, the Hearings Officer has found the "recreation-oriented facility" includes the southern reservoir itself. Therefore, I find that for purposes of site plan review under this section, the "proposed development" consists of both the completed southern reservoir and its recreational use as proposed by the applicant.

Section 18.124.060 requires the Hearings Officer to find that the reservoir and recreational use thereof:

- relate harmoniously to the natural environment;
- relate harmoniously to existing development;
- minimize visual impacts; and
- preserve natural features including views and topographical features.

Each of these factors is discussed in the findings below. However, before turning to those factors, the Hearings Officer finds I must determine the meaning of the phrase "relate harmoniously." Title 18 does not define either of these terms. However, I find *Webster's* states the ordinary meaning of the terms includes the following:

- relate: "to have some connection or relation;" and
- harmonious: "having parts arranged in an orderly or pleasing way; agreeable; in harmony with; well matched."

Applying these definitions, the Hearings Officer finds that to “relate harmoniously,” the southern reservoir and the proposed recreational use thereon must relate to the surrounding natural environment and existing development in a pleasing and agreeable way – i.e., they must be compatible with the surrounding area.

1. Natural Environment. As discussed in the Findings of Fact above, the subject property was the site of the former Klippel surface mine. The record indicates that over 1 million cubic yards of mineral and aggregate material were removed from the Klippel mine before mining ceased. Consequently, mining dramatically altered the previous environment on the subject property. The Klippel mining pits were reclaimed through a combination of grading, re-contouring, and reseeding with native grasses. The record includes a number of photographs depicting the reclaimed mine and vegetation thereon, and showing that vegetation took hold on the majority of the reclaimed site. In 2007, the former Klippel mine received a “Mined Land Reclamation Award” from DOGAMI.⁴⁰

Because the portion of the subject property on which the reservoirs are located was mined and reclaimed, and because KCDG conducted additional, unpermitted, surface mining on the reclaimed site to create the reservoirs, the Hearings Officer finds that for purposes of this site plan approval criterion, the relevant “natural environment” is the condition of the subject property and surrounding land as it existed prior to KCDG’s mining for the reservoirs. The question, then, is whether the changes to the subject property to create the southern reservoir and to facilitate the recreation thereon are harmonious with that “natural environment.”

a. Reservoir Appearance. The Hearings Officer finds the best photographs depicting the subject property before and after KCDG’s mining for the reservoirs are the two “Google Earth” photographs dated 2012 and 2014 and included in the record as Exhibit 3 to the Bishops’ September 29, 2015 memorandum. These photographs show the vegetative cover (trees, shrubs and grasses) that existed on the majority of the subject property, and in particular around the perimeter of the reclaimed mining pits, remained intact following mining for the reservoirs. However, the photographs also show that much of the vegetation planted for reclamation was removed during excavation. As a result, the ground surrounding the southern reservoir, including its banks and the land between the banks and the forested areas, now consists of vast gravel and dirt areas devoid of vegetation. These barren areas can be seen in ground-level photographs that also show steep gravel, rock and dirt banks.⁴¹ The slopes of these banks appear much steeper in places than the sloped edges of the reclaimed mining pits.⁴² Moreover, the southern reservoir is long, narrow, and linear in shape and has two man-made dirt and gravel islands to facilitate waterskiing.

The Hearings Officer finds the southern reservoir has a distinctly unnatural look that contrasts unfavorably with the surrounding natural environment and is much less harmonious with that environment than were the reclaimed mining pits. The southern reservoir is less natural looking

⁴⁰ A summary of that award is included in this record as Exhibit “F” to the applicant’s burden of proof and includes a photograph of the reclaimed land with what appears to be a healthy cover of grass.

⁴¹ For example, see the photographs in: (a) Exhibit “DDD” to the applicant’s burden of proof; (b) Exhibit 21 to the Bishops’ 9-29-15 memorandum; and (c) Exhibit 38 to the Bishops’ 9-29-15 memorandum.

⁴² Exhibit 10A to the Bishops’ 9-29-15 memorandum is a letter from DOGAMI to Hap Taylor and Sons, the company that completed the Klippel mine reclamation, confirming that all reclaimed mining pit slopes were “3H:1V or flatter.”

than the northern reservoir which is round in shape and vegetation closer to its banks.⁴³ I understand that man-made reservoirs may not always have the look of a natural water body.⁴⁴ Nevertheless, I find that where, as here, the southern reservoir is surrounded by a natural environment that consists of forest -- much of which is undisturbed -- and irrigated pasture, the reservoir's stark appearance and unnatural shape simply are not harmonious with the natural environment. I find it is not reasonable to expect the property owners to modify the shape of the southern reservoir to make it more natural looking. However, I find the reservoir's appearance may be made more natural looking by re-contouring its steepest banks and revegetating the area between the banks and the surrounding forested areas. Therefore, I find that if the applicant's proposal is approved on appeal, it should be subject to conditions of approval requiring that any of the southern reservoir's slopes that are greater than three feet horizontal to one foot vertical be re-contoured so that they do not exceed that degree of slope, and that the areas between the side of the banks facing away from the southern reservoir and the surrounding forested areas be planted with native vegetation. Finally, as discussed in the findings below concerning wildlife habitat, incorporated by reference herein, I have found the property owners also should be required as a condition of approval to replant the barren areas in a manner consistent with ODFW's Fish and Wildlife Habitat Mitigation Policies.

b. Wildlife Habitat. The parties strongly disagree about the impact on wildlife from the southern reservoir and the proposed recreational use thereon. Opponents rely on ODFW staff comments in the record Nancy Breuner, ODFW Deschutes Habitat Biologist, submitted a letter dated June 29, 2015 in response to the original applications. Sara Gregory, Wildlife Habitat Biologist, submitted a letter dated September 17, 2015 in response to the modified applications. In her letter, Ms. Breuner identified ODFW's concerns with:

- (i) recreational use on the southern reservoir during the winter range closure period;
- (ii) disruption of deer migration corridors by the presence of two reservoirs and their proximity to one another;
- (iii) the steepness of and lack of vegetation on the reservoirs' banks;
- (iv) the loss of native wildlife habitat due to the reservoirs' construction; and
- (v) the denuding of upland areas adjacent to the reservoirs.

Ms. Breuner recommended that to address these concerns, the county require actions to improve habitat conditions for wildlife on the subject property, including:

- (i) prohibiting recreational use during the winter range closure period (December through March);
- (ii) limiting fencing and structures in the area between the two reservoirs;
- (iii) planting native riparian vegetation along the perimeters of both reservoirs; and

⁴³ Photographs of the northern reservoir are included in this record as Exhibit 45 to the Bishops' 9-29-15 memorandum.

⁴⁴ The record includes numerous photographs of reclaimed mines filled with water and man-made waterski lakes that do not resemble natural water bodies. See, e.g., photographs in Exhibit 39 to the Bishops' 9-29-15 memorandum.

- (iv) providing habitat mitigation pursuant to ODFW's policies, including planting native upland plants and restoring native habitat lost to reservoir construction.

Ms. Gregory's letter added the following recommendations:

"ODFW's primary concern regarding KCDG's July 17, 2015 modification of their application is the addition of a parking lot for ten vehicles and request to allow use of the area by up to 20 people. Construction of a parking lot has the potential to eliminate wildlife forage and cover where the lot sits and reduce wildlife use of the surrounding area. Increasing vehicle traffic may increase noise, spread noxious weeds, increase the potential for wildlife vehicle collisions and further diminish wildlife habitat values."

Ms. Gregory again recommended KCDG be prohibited from recreational use on the reservoirs during the deer winter range closure period, and be required as a condition of any approval to restore native wildlife habitat lost to construction of the reservoirs.

The applicant relies on the written and oral testimony of Paul Valcarce to rebut ODFW's concerns. At the continued public hearing, Mr. Valcarce testified that he is a wildlife biologist and conservationist, as well as a long-time friend of Harris Kimble who has seen the subject property on a regular basis over the last eight years. In a letter dated April 4, 2015, Mr. Valcarce stated that in his opinion, the reclaimed Klippel mining pits did not have suitable wildlife forage, that mule deer are extremely adaptable to human occupation, that "isolated small ponds and lakes have not been shown to have any major impacts on deer movements," and that construction of the reservoirs "provides an opportunity to increase the productivity of the mule deer winter range." Mr. Valcarce did recommend that "the disturbed areas" should be planted with forage plants such as Triticale or other high value cereal grains. In addition, supporters of the applicant's proposal submitted numerous photographs of deer, elk and waterfowl using the subject property and the reservoirs in particular.⁴⁵

The Bishops and other opponents argue the Hearings Officer should discount Mr. Valcarce's opinion because he is a friend of Harris Kimble. I disagree. I find Mr. Valcarce is qualified to give an expert opinion on wildlife habitat on the subject property. His letter indicates he has a degree in wildlife and fisheries science from the University of Utah, and that he has been employed by both the U.S. Fish and Wildlife Service and the Idaho Fish and Game Department in a variety of wildlife management capacities. Although Mr. Valcarce may well be motivated to testify in favor of the applicant's proposal to support his friend, I find his opinion is consistent with the opinion and recommendations of ODFW's wildlife experts for restoring destroyed wildlife habitat on the subject property through replanting unvegetated areas with suitable forage plants. In addition, I agree with Mr. Valcarce that the fact wildlife are using the reservoirs on the subject property does not signify they provide suitable wildlife habitat compared to what was removed by reservoir construction.

The Hearings Officer has found the banks of the southern reservoir and the area between the banks and the forested areas on the subject property now are devoid of vegetation. In addition, photographs in the record suggest that in some places the banks of the southern reservoir are steeper than the sloped edges of the reclaimed mining pits. I find these site conditions clearly show construction of the southern reservoir removed wildlife habitat and forage. For this reason, I find the southern reservoir is not harmonious with the natural environment. I find that if the applicant's proposal is approved on appeal, it should be subject to conditions of approval requiring the property owners to: (i) develop and submit to the Planning Division a wildlife habitat mitigation plan providing for replanting of all barren areas between the side of the banks facing away from

⁴⁵ See, e.g., photographs in Exhibits "AA" and "CC" to the applicant's burden of proof.

the southern reservoir and the surrounding forested areas on the subject property with native plants providing suitable forage for deer and elk, and consistent with ODFW's Fish and Wildlife Habitat Mitigation Policies; (ii) replant all such barren areas in accordance with the habitat mitigation plan; (iii) following such replanting, submit to the Planning Division written documentation from ODFW that such replanting is consistent with its habitat mitigation policies; and (iv) retain all existing vegetation on the subject property.

2. Existing Development. The area surrounding the subject property consists primarily of rural residential subdivisions (Klippel Acres and Saddleback) developed with dwellings and outbuildings on large lots. The surrounding area also includes two active surface mines, Tumalo Creek, and the Tumalo Feed Canal. Existing development on the subject property consists of a single family dwelling and outbuildings.

The staff report states, and the Hearings Officer agrees, that neither the southern reservoir nor the proposed recreational use thereon will have any impact on nearby surface mining uses. With respect to existing rural residential development, opponents argue the applicant's proposal is not harmonious considering several factors, each of which is addressed in the findings below.

a. Reservoir Size and Appearance. Opponents argue the large size and unnatural appearance of the southern reservoir are not harmonious with their rural residential neighborhood. With respect to size, the Hearings Officer understands that it is not unusual for rural areas to include man-made bodies of water such as irrigation ponds that provide water to irrigate adjacent pastures and landscaped areas. However, the size, shape, and appearance of the southern reservoir are quite different from the typical rural irrigation ponds. The southern reservoir, along with its associated disturbed and developed areas, dominates the southern half of the subject property and is much larger than the vast majority of surrounding lots. The record indicates adjacent and nearby lots in the Klippel Acres Subdivision average five acres in size. And all but three of the thirteen lots comprising the subject property are ten acres or smaller in size, with a mean size of approximately five acres. For these reasons, I find the size of southern reservoir is out of character with the size of the surrounding residential lots.

With respect to appearance, for the reasons discussed in the findings above concerning the "natural environment," incorporated by reference herein, the Hearings Officer finds the unnatural shape of the southern reservoir, its steep and denuded banks, and the lack of vegetation between the reservoir and the surrounding forested areas also renders the southern reservoir inharmonious with existing rural residential development.

b. Scale of Recreational Use. Opponents argue the scale, intensity, and duration of the proposed recreational use of the southern reservoir are not harmonious with existing rural residential development. The proposed recreational use consists of motorized boating, waterskiing and wakeboarding on the southern reservoir by the property owners and up to 20 invited guests, during daylight hours, seven days per week, and eight months per year. The Hearings Officer finds the RR-10 Zone allows as conditional uses other large-scale recreational and similar uses that could occur with such frequency and duration, such as golf courses, dude ranches, and personal use landing strips. However, only the latter use is permitted in the RR-10 Zone within a deer winter range. And I am aware that in at least one previous decision, the county conditioned approval of a personal use landing strip with specific limits on the number of total aircraft landings and takeoffs in order to assure compatibility with surrounding uses.⁴⁶ The applicant argues impacts on surrounding rural residences from recreational use on the southern reservoir would be no worse than the impacts from previous surface mining on the site.

⁴⁶ *Kennel* (CU-99-117, MA-99-8).

However, the staff report correctly notes this criterion does not include a “no greater adverse impact” standard. Rather, it requires a determination of whether the proposed recreational use would relate harmoniously to the existing rural residential development. And although it is unlikely the property owners and their invited guests would engage in motorized boating, waterskiing and wakeboarding on the southern reservoir all day, every day, for eight months, that is precisely what they are seeking permission to do. When that potential duration and intensity of use are combined with the large scale of the southern reservoir, the Hearings Officer finds the proposed use looks like the residential cluster development amenity the Bishops and other opponents suspect it is. For that reason, I agree with opponents that the southern reservoir appears out of scale with surrounding rural residential development.

Conditional uses are presumed to be compatible, or capable of being made compatible, through imposition of conditions of approval. The applicant has proposed conditions of approval that would have some effect on the impact of the proposed recreational use, including prohibiting motorized boating during the winter deer range season (December through March) and limiting recreational use to daylight hours. The applicant also has proposed “boat restrictions” addressing noise impacts, water pollution, and the fitness of boat operators and skiers. Nevertheless, the Hearings Officer finds these limitations would do little to reduce the overall impact of the proposed recreational use on the surrounding rural residential neighborhood given the scale of the southern reservoir and the proposed duration of the recreational use.

The applicant has the burden of demonstrating the proposed recreational use of the southern reservoir will relate harmoniously to existing development in the surrounding area. For the reasons set forth above, the Hearings Officer finds the applicant has not met that burden because of the scale, intensity and duration of the proposed use.

c. Noise. Opponents have expressed concern that the noise generated by motorized boating on the southern reservoir will disturb the quiet enjoyment of their rural lifestyle. The applicant has proposed several limitations on the recreational use related to boat noise, including using only one boat at a time on the reservoir, and using only boats with the following characteristics; (i) inboard engines;(ii) self-contained engines with internal oil lubrication systems; (iii) stock mufflers or muffled noise equivalent; and (iv) direct drive or V-drive transmissions.

In addition to the proposed limitations above, the applicant submitted a noise study measuring and evaluating noise generated by a motorized ski boat operating on the southern reservoir. The noise study is dated September 28, 2015, and was prepared by Kerrie G. Standlee of Daly Standlee & Associates, Inc. (“DSA”).⁴⁷ At the outset, the Bishops’ argue the Hearings Officer should not consider the noise study because operation of a motorized boat on the southern reservoir during the noise testing violated the county’s land use regulations and was illegal, and therefore the results of the testing are not admissible under the doctrine of “fruit of the poisonous tree.” I disagree. In the first place, that doctrine applies to criminal proceedings. Second, the doctrine makes inadmissible evidence that was secured through illegal means. However, the boat operation for the noise testing was approved by the county. The record includes an electronic mail message dated August 3, 2015 from Senior Planner Anthony Raguine to the property owners’ attorney Liz Dickson authorizing the applicant to operate a motorize boat on the southern reservoir for purposes of conducting a noise study. The record indicates the applicant mailed notice of the dates and times the boat would be operating to the owners of record of all property located within 500 feet of the subject property. For these reasons, I find there is no legal basis for me to exclude the applicant’s noise study.

⁴⁷ A copy of the noise study is included in the record as Exhibit “SSS” to the applicant’s burden of proof.

The noise study is detailed and extensive. The executive summary explains the timing and method of noise measurement as follows:

"In conducting the study, DSA measured the sound radiating from three (3) different models of ski boats, operating individually on the reservoir on Thursday, August 20, 2015, Saturday, August 22, 2015, Sunday, August 23, 2015, and Monday, August 24, 2015. In addition to measuring the boat engine sound, measurements were made of the associated sound typically experienced at properties around the reservoir. Sound measurements for the study were made at three (3) locations around the reservoir (see Figure 1):

- 1) On the west side of the reservoir at the residence at 63394 Fawn Lane,*
- 2) On the south side of the reservoir at the residence located at 19214 Buck Drive,*
- 3) On the east side of the reservoir near the residence located at 63460 Palla Lane.*

Observations were made during the measurements to help establish the sources that influenced sound levels found at the three (3) measurement locations both with and without the boats in operation. Information learned during the observation periods was used in conjunction with the measured sound level data to assess the impact of allowing ski boats to operate on the TID reservoir.

Data collected during the four (4) days of measurements were analyzed to establish the amount of ski boat sound reaching residences around the reservoir and the amount of ambient sound typically found at the residences without the ski boats. The results of the analysis corroborated what was observed during the measurements: that sound generated by a ski boat operating on the reservoir, while audible at times during observation periods at each measurement location, was typically audible only when the background sound at the measurement location was low enough to allow the boat noise to be distinguished from the background sound. And, the boat sound was audible only when the boat was near the measurement location. On many occasions, ski boat noise was not audible above the background sound caused by wind blowing through leaves in the trees, airplanes and helicopters flying near and far from the site, truck and motorcycle traffic from Johnson Road and automobile traffic on streets and roads local to the neighborhood. On those occasions when the background sound was low enough for the ski boat to be heard, it was generally audible at an individual location for only 20 to 40 seconds each time it approached the measurement location. The length of time it was audible depended on the location and the type of ski boat activity."

The noise study stated testing involved three types of tow sport activities: waterskiing, surfboarding, and wakeboarding.

The study stated the noise impacts from the boating and two sports were assessed utilizing Department of Environmental Quality (DEQ) noise standards, which provide that a new noise source located on a previously unused commercial or industrial site would not be allowed to radiate noise to a point within 25 feet of a residence that caused the ambient hourly noise levels (10% and 50% of the time during an hour) to rise by more than 10 decibels (dB). The noise study includes a chart depicting the increase in ambient noise levels at measurement locations with ski

boat operations, and showing that at no time during the measurement periods did the ski boat noise exceed DEQ's allowed dB increases. The executive summary went on to state:

"Based on the results shown in the table, DSA concludes the noise radiating from ski boat operations on the TID south reservoir on the KCDG property will have an insignificant impact on the acoustic environment typically found at residences around the reservoir. While the noise radiating from boat activity on the reservoir will at times be audible at the residences, the noise will not be out of character from that already found at the residences (both from a level and tonal standpoint) caused by airplanes, helicopters, trucks and motorcycles on Johnson Road, mining operations east and south of the area and wind blowing through the trees."

The staff report states Anthony Raguine was present for a portion of the August 24th testing period and includes the following description of Mr. Raguine's observations and impressions from that test.

"Staff immediately noted the sound of back-up signals from large equipment working to the east at Surface Mining Site No. 308 and the noise of large trucks traveling up a grade at the mining site. During this testing period, two motor boats were being used. According to one of the owners, Eric Cadwell, one boat was used for water skiing and one was used for wake boarding. Based on this conversation, it is staff's understanding that the wakeboard boat travels at approximately 16 miles per hour (mph) and the water skiing boat travels at approximately 35 mph. During this conversation, staff was standing approximately 40 feet from Mr. Cadwell when the wake boat passed by my location at a distance of approximately 100-150 feet. At its closest approach, although his voice was somewhat difficult to hear, staff could still hear Mr. Cadwell's responses to my questions.

Staff then indicated a desire to go along the westerly road to observe the motorboat noise along the residences to the west and adjacent to the southern reservoir. One of the owners, Harris Kimble, offered to drive staff along the westerly road. Staff asked Mr. Kimble to stop at three locations adjacent to 63394 and 63360 Fawn Lane, and 19214 Buck Drive. The eastern property line where staff observed the boating noise at 63394 Fawn Lane is approximately 500 feet from the water associated with the southern reservoir. The eastern property line where staff observed the boating noise at 63394 Fawn Lane is approximately 420 feet from the water. The eastern property line where staff observed the boating noise at 19214 Buck Drive is approximately 250 feet from the water.

At each location staff's impression of the boating noise [from both the wakeboard boat and the water ski boat] was as a low droning or buzzing sound. During staff's stop at 63360 Fawn Lane, staff met property owner Erika Lindquist and her two children. Ms. Lindquist and her son indicated that boating noise could be heard within their house via vent pipes and in the front yard, on the other side of the house away from the reservoir. Staff noted during the conversation with Ms. Lindquist that the discussion could continue without the need to elevate voice volume even when the boat passed at its closest point.

At all three locations, it is staff's impression that it was difficult to hear the boating noise when there was concurrent backup signals at Surface Mining Site No. 308. Additionally, during one stop at 63394 Fawn Lane, wind speed increased such that the rustling of leaves and branches from nearby trees drowned out all of the boating noise. It is staff's impression that although the boating noise is not loud in

terms of volume, it does present a persistent sound that increases in volume at every pass around the reservoir.”

Opponents challenge the validity and weight of the noise study’s conclusions for two reasons. First, they claim that whatever may be the decibel readings for the ski boats, opponents find the boat noise disturbing when they hear it. Second, they question the validity of the noise study’s results given the seasonal and time limits on noise measurement. Specifically, they note the noise study was conducted on only four summer days, and only between the hours of 1:00 p.m. and 5:00 p.m. on two measurement days, and between 10:00 a.m. and 2:00 p.m. on the other two measurement days. Opponents argue such limited measurements do not accurately reflect ambient noise and boat operation during other seasons when the property owners proposed to use a ski boat, as well as during early morning and evening hours when many people prefer to waterski – times when ambient noise in the neighborhood might be less.

The Hearings Officer finds the DSA noise study is comprehensive and constitutes substantial, credible evidence from which I can find there would be little if any impact from motorized boat noise on surrounding rural residences during the times in which noise measurements were taken. Nevertheless, I share opponents’ view that because DSA’s noise measurements were limited in time and season, it is not reasonable to extrapolate the study’s results, and the conclusions drawn therefrom, across the entire 8-month, daylight-hour period for which the applicant requests permission to operate a motorized boat on the southern reservoir. I have found there is not sufficient information in this record for me to craft conditions of approval that would sufficiently limit the scope, intensity and duration of the proposed recreational use of the southern reservoir to make it harmonious with the natural environment. I find a similar situation exists with respect to harmony with existing development. The exception is operational limits based on the noise study. I find that if the board approves the applicant’s proposal on appeal, it should be subject to a condition of approval limiting motorized boat operations on the southern reservoir, at the very least, to the hours of 10:00 a.m. to 5:00 p.m. to correspond with the times of day during which DSA determined there would be little if any impact from boat noise.

d. Impact on Wildlife. The entire subject property is located in the WA Zone protecting the Tumalo Winter Deer Range. At the outset, the Bishops argue that because KCDG conducted surface mining operations during the winter range closure period (in March of 2014), the Hearings Officer should deny the applicant’s proposal. The Bishops have not identified, nor have I found, any provision in Title 18 that would provide a basis to deny the applicant’s proposal for that reason. However, as discussed in the findings above, incorporated by reference herein, I have found the southern reservoir is not harmonious with the natural environment including wildlife habitat. I have recommended imposition of conditions of approval to mitigate the loss of wildlife habitat in the event the applicant’s proposal is approved on appeal.

e. Insects. Opponents argue the reservoirs on the subject property have become breeding grounds for insects, and submitted photographs of swarms of flying insects on their nearby residential properties. In response, TID Manager Ken Rieck submitted an affidavit dated June 19, 2015, and stating in relevant part:

- “3. Both the Upper Tumalo Reservoir and the District’s new reservoirs, located on KC Development Group LLC’s property, receive water from the same sources, are located at similar elevations, and each are large enough to develop wind driven wave action on their surfaces;*
- 4. In my 25 years of employment with the District, working in and around the Upper Tumalo Reservoir, I do not recall ever having heard a complaint with regard to nuisance mosquitos around any of the District’s reservoirs, nor*

have I observed mosquitos and I would expect the new reservoirs to perform similarly.”

In addition, in a June 30, 2015 letter, Paul Valcarce stated that in his opinion the design of the reservoirs with a liner and gravel substrate provides limited breeding areas for mosquitos, and that wave action and pond water circulation will obstruct potential insect breeding areas. According to Mr. Valcarce, the owners intend to stock both reservoirs with bluegill fish which feed on mosquito larvae and can inhibit their breeding. Mr. Valcarce also stated that if the swarming insects observed by neighboring property owners are gnats, the reservoirs will not provide breeding grounds for them because gnats breed in wet, moist areas next to canals and pastures rather than in open water. Finally, Mr. Valcarce stated black flies also will not breed in the reservoirs because they prefer breeding habitat with moving water with rocks like Tumalo Creek.

Based on the applicant's evidence, the Hearings Officer finds the reservoirs will not be breeding grounds for insects and therefore will not be inharmonious with surrounding rural residential uses for that reason.

f. Impact on Local Wells. Opponents argue the reservoirs on the subject property will harm local domestic wells, including wells providing water to the Klippel Water Company. The Hearings Officer understands these arguments to suggest the reservoirs threaten both the quantity and quality of water in these wells. The applicant's submitted materials indicating there are four Klippel wells located south of the southern reservoir at depths of 450 feet and 850 feet, and with yields ranging from 4 gallons per minute (gpm) to 60 gpm.⁴⁸ The Bishops respond that there are only two Klippel wells, but agree that they are located south of the southern reservoir.⁴⁹ In addition, the applicant submitted a well log for another local well (Hampers-Waters) and argues it shows no impact to that well from either the surface mining to create the reservoirs, or the lining and filling of the reservoirs.⁵⁰

The applicant argues that given the depth of the Klippel Water Company wells, it is highly unlikely they would be affected by the reservoirs, based on the fact that logs for these wells dating before and after surface mining in the Klippel pits show no impact on the depth or capacity of these wells from that activity. The Hearings Officer agrees with the applicant that the lined reservoirs are much less likely to affect the wells than surface mining. I also agree that if, as the Bishops suggest, the general direction of groundwater flow in the area is south to north, the location of the Klippel wells south of the reservoir would strongly suggest the reservoirs would not have any effect on the quantity and quality of the groundwater from which the Klippel Water Company draws its water.

For the foregoing reasons, the Hearings Officer finds there is substantial, credible evidence in this record from which I can find the reservoirs will not have negative impacts on local domestic wells in the surrounding area.

g. Impact on Avion Water Company Resources. The Bishops argue the reservoirs will have a negative impact on the water sources for Avion Water Company because the water with which TID filled the reservoirs will no longer be stored in Upper Tumalo Reservoir, and therefore seepage from Upper Tumalo Reservoir will not be sufficient to recharge the aquifer from which Avion draws its water. The Bishops rely on a 2014 hydrogeological study performed by Newton

⁴⁸ See, Exhibit “JJJ” to the applicant's burden of proof.

⁴⁹ See, Exhibit 7 to the Bishops' October 26, 2015, memorandum.

⁵⁰ The Hampers-Waters well log is included in the record as Exhibit “KKK” to the applicant's burden of proof.

Consultants, Inc.⁵¹ The stated purpose of the study was to determine whether the hydrogeology in the vicinity of Upper Tumalo Reservoir is conducive to providing groundwater recharge from surface water resources. The study states Avion had submitted to WRD an application for an aquifer recharge permit. The study concluded that “artificial recharge to the aquifer system in the general area of Tumalo Reservoir” is occurring. Even assuming for purposes of discussion that potential impacts from the reservoirs on distant property are a relevant consideration under this site plan criterion, the Hearings Officer finds the Newton study does not provide sufficient evidence from which I can find the reduction in water stored in Upper Tumalo Reservoir will impair Avion’s water supply.

h. Impact on TID Water Users. The Bishops argue the reservoirs will negatively impact TID customers who drink their irrigation water by introducing oil and other pollutants from ski boats into the reservoir and TID’s water supply. The Hearings Officer understands some irrigation district customers in Deschutes County drink irrigation water. I also understand that because this is not an approved use for irrigation water, TID and other irrigation districts are not required to, and do not, filter or otherwise treat irrigation water to assure it is safe for human consumption. Again, assuming for purposes of discussion that potential impacts from the reservoirs on distant properties are relevant under this site plan criterion, I find there is nothing in this record indicating use of motorized boats on the southern reservoir presents any greater risk to the health of people drinking irrigation water than any other environmental conditions affecting surface water.⁵²

3. Visual Impacts. This site plan criterion requires the applicant to demonstrate its proposal would minimize visual impacts. As discussed in the LM Zone findings above, the Hearings Officer has found the southern reservoir will not be visible from either Tumalo Creek or Johnson Road. In addition, I have found there is sufficient existing vegetation on the subject property surrounding the southern reservoir to adequately screen the parking area, boathouse and dock from surrounding residences. For the same reasons, incorporated by reference herein, I find the applicant’s proposal will minimize the visual impact of the parking area, boathouse, dock and reservoir on nearby residences.

4. Preservation of Natural Features Including Views and Topographical Features. Based on photographs in the record, the Hearings Officer finds existing views from and across the subject property are of terrain and vegetation and not of mountains or other more distance vistas. The Hearings Officer finds the southern reservoir is of such a low profile that its design minimizes visual impacts on nearby residences. With respect to the boathouse, dock, and guest parking area, I have found existing vegetation on the subject property is sufficient to adequately screen these features from surrounding residences.

With respect to topography, the Hearings Officer notes this site plan criterion in Paragraph (A) uses the term “topographical features,” while the criterion in Paragraph (B), discussed in the findings immediately below, uses the term “topography.” It is unclear whether there is any significance to this difference in terminology – e.g., are “features” special topographical characteristics that differ from the overall topography? Nevertheless, I find photographs in the record of the subject property prior to construction of the reservoirs show there were no special topographical features on the subject property requiring preservation.

For the foregoing reasons, the Hearings Officer finds the applicant’s proposal does not satisfy this sit plan criterion, but may be able to do so with imposition of recommended conditions of approval.

⁵¹ A copy of the study is included in this record as Exhibit “HHH” to the applicant’s burden of proof.

⁵² The Hearings Officer notes the record indicates TID takes its water from Crescent Lake, a large lake on which people recreate and use motorized boats.

- B. The landscape and existing topography shall be preserved to the greatest extent possible, considering development constraints and suitability of the landscape and topography. Preserved trees and shrubs shall be protected.**

FINDINGS: The staff report states, and the Hearings Officer agrees, that previous mining of the subject property significantly altered the subject property's landscape and topography. The record indicates over 1 million cubic yards of material were removed during the period the Klippel mine was active. As discussed above, photographs in the record taken before the reservoirs were constructed show the mining pits were reclaimed through re-contouring and revegetation. However, existing tree cover surrounding the reservoirs remained intact. Although construction of the new reservoirs took advantage of the pre-existing topography created by the reclaimed mining pits, the aforementioned construction-period photographs show the topography of the reclaimed mining pits was significantly altered to create the reservoirs. In particular, the mining pits were deepened and in places their walls were steepened.

In light of the alteration of the topography that occurred before the reservoirs were constructed, the Hearings Officer finds the question under this criterion is whether the pre-existing topography was "preserved to the greatest extent possible, considering development constraints and suitability of the landscape and topography." I find the relevant development constraints included the need to create a reservoir of sufficient size and depth to be lined and to hold the amount of water necessary to meet TID's needs as well as to facilitate the proposed recreational use of the reservoir. I further find the existence of the reclaimed mining pits made the landscape and topography suitable for the new reservoirs as it resulted in less excavation than would have been required if the pits had not existed.

The Hearings Officer finds the southern reservoir preserved the existing topography to the greatest extent possible considering development constraints and the suitability of the landscape and topography, with the exception of the steepness of the reservoir banks in some places. As discussed in the findings above, I have found that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to re-contour the banks of the southern reservoir so that none has a steeper slope than three feet horizontal to one foot vertical. I also have found any approval should be subject to a condition of approval requiring the property owners to retain and preserve all existing trees and shrubs.

- C. The site plan shall be designed to provide a safe environment, while offering appropriate opportunities for privacy and transition from public to private spaces.**

FINDINGS: Opponents have expressed concern about the potential for persons to drown in the southern reservoir, particularly if/when it ices over during winter months. The staff report states, and the Hearings Officer concurs, that the southern reservoir presents no greater hazard than is presented by any other accessible open water body such as Mirror Pond in downtown Bend, other ponds in the Bend area built and managed by the Bend Park and Recreation District, and the numerous irrigation ponds located throughout the county. Opponents also argue the reservoir must be fenced as a "public swimming pool." As discussed above, I have rejected that argument.

The Hearings Officer understands waterskiing and wakeboarding on the southern reservoir also present the potential for injury or drowning. However, again I find the risk from this activity on the subject property is no different from similar activity on other bodies of water. Moreover, I find the applicant has adequately addressed these safety concerns by proposing to limit motorized boating on the southern reservoir to a single boat at a time, to prohibit alcohol use by persons skiing and driving the boat, and to require that anyone driving the boat have an Oregon mandatory boater education card. In addition, the applicant notes the design of the marina area, which is physically

separated from the water skiing portion of the southern reservoir, will allow the safe maneuvering, loading and unloading of boats away from the water skiing area. And the applicant's site plan shows the proposed guest parking area would be located over 100 feet from the southern reservoir, providing significant separation between vehicles and pedestrians and boat operations and skiing on the reservoir. Finally, I find that because of the nature of the proposed use, there are no true "public" and "private" spaces requiring a transition area. All proposed activities will occur on Tax Lots 824 and 828, and on the access driveway, all of which would be located on private property controlled by the property owners.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies this criterion.

- D. When appropriate, the site plan shall provide for the special needs of disabled persons, such as ramps for wheelchairs and Braille signs.**

FINDINGS: The Hearings Officer finds compliance with applicable requirements of the Americans With Disabilities Act (ADA), if any, will be assured at the time of building permit review for the proposed boathouse.

- E. The location and number of points of access to the site, interior circulation patterns, separations between pedestrians and moving and parked vehicles, and the arrangement of parking areas in relation to buildings and structures shall be harmonious with proposed and neighboring buildings and structures.**

FINDINGS: The applicant proposes to provide access to the southern reservoir and its associated guest parking area via an existing private driveway off Johnson Road, as well as from the "ditch rider" road on the west side of the southern reservoir. The record indicates an approximately 10-foot-wide strip of land separates the private access driveway from the property at 63550 Johnson Road, Tax Lot 1400 on Assessor's map 17-11-13. The Hearings Officer finds this driveway, which serves the existing residence on the subject property, is sufficient to provide access to the reservoir. The staff report states, and I agree, that although this driveway is located close to the aforementioned residential property, the low volume of additional trips generated by recreational use on the southern reservoir will create minimal impacts on the nearby property.

The record indicates the private driveway and guest parking area will be located at least 300 feet from any other residences, and will not be adjacent to any pedestrian walkways. The applicant's submitted site plan shows the guest parking area will be located approximately 100 feet from the marina on the southern reservoir, and will include a fire apparatus turnaround. The applicant does not propose to remove any of the surrounding tree cover that provides screening from adjacent residences, and the Hearings Officer has found that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property to retain all existing screening vegetation. For these reasons, I find the applicant's proposal satisfies this criterion.

- F. Surface drainage systems shall be designed to prevent adverse impacts on neighboring properties, streets, or surface and subsurface water quality.**

FINDINGS: The record indicates the impervious surfaces associated with the applicant's proposal are the lined reservoirs and the 924-square-foot boathouse. The staff report states, and the Hearings Officer agrees, that in light of the small size of the boathouse, and the existing topography on the subject property, will assure runoff from the boathouse and banks of the

southern reservoir will be contained on-site. As discussed in the findings above, the guest parking area would have a pervious gravel surface. Given the lack of significant areas of impervious surfaces and the existing topography on the subject property, I find surface drainage on the subject property will have no adverse impacts on neighboring properties, streets, or surface or subsurface water quality.

- G. Areas, structures and facilities for storage, machinery and equipment, services (mail, refuse, utility wires, and the like), loading and parking and similar accessory areas and structures shall be designed, located and buffered or screened to minimize adverse impacts on the site and neighboring properties.**

FINDINGS: The only above-ground structures the applicant proposes are the dock and the 924-square-foot boathouse which can accommodate up to two motor boats. The applicant's submitted site plan shows the boathouse and dock will be located at least 400 feet from the nearest residential use not associated with the property owners. The staff report states, and the Hearings Officer agrees, that in light of the small size of the boathouse and dock, the distance between the boathouse and dock and the adjacent properties, and the recommended condition of approval requiring the property owners to retain all existing tree cover surrounding the southern reservoir, the boathouse and dock will have no adverse impact to the site or neighboring properties.

- H. All above ground utility installations shall be located to minimize adverse visual impacts on the site and neighboring properties.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose any above-ground utility installations.

- I. Specific criteria are outlined for each zone and shall be a required part of the site plan (e.g. lot setbacks, etc.).**

FINDINGS: Applicable criteria in the RR-10, LM, WA Zones are addressed in the findings above.

- J. All exterior lighting shall be shielded so that direct light does not project off site.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose any exterior lighting. However, to assure future compliance with this criterion, I find that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to assure any future exterior lighting is shielded so direct light does not project off site.

- K. Transportation access to the site shall be adequate for the use.**
 - 1. Where applicable, issues including, but not limited to, sight distance, turn and acceleration/deceleration lanes, right-of-way, roadway surfacing and widening, and bicycle and pedestrian connections, shall be identified.**
 - 2. Mitigation for transportation-related impacts shall be required.**

3. Mitigation shall meet applicable County standards in DCC 17.16 and DCC 17.48, applicable Oregon Department of Transportation (ODOT) mobility and access standards, and applicable American Association of State Highway and Transportation Officials (AASHTO) standards.

FINDINGS: The road department, through County Engineer George Kolb, did not express any issues with the applicant's proposal or the adequacy of transportation access to the southern reservoir. In his comments on the applicant's proposal, Senior Transportation Planner Peter Russell stated in relevant part:

"According to the applicant's burden of proof on Page 7, the reservoirs will only be used by existing property owners/members of KC Development Group (KCDG) for recreation; thus no new traffic will be generated. The most recent edition of the Institute of Traffic Engineers (ITE) Trip Generation Handbook indicates a single-family residence (Land Use 210) generates an average of approximately 10 daily weekday trips. Deschutes County Code (DCC) at 18.116.310(C)(3)(a) states no traffic analysis is required for any use that will generate less than 50 new weekday trips. The proposed land use will not meet the minimum threshold for additional traffic analysis."

After these comments, the applicant submitted its modified applications, proposing that the recreational use on the southern reservoir would include up to twenty invited guests of the property owners. As discussed above, the applicant has proposed a 10-vehicle parking area to accommodate guest parking, based on a maximum of 10 projected vehicle trips. Therefore, a maximum of 20 new vehicle trips would be generated by the proposed use. Nevertheless, according to Mr. Russell's comments, even adding these 20 guest vehicle trips to the estimated 20 daily vehicle trips generated by the existing single-family residence using the private access driveway would generate a total of up to 30 daily vehicle trips, still under the 50-trip threshold for a traffic analysis. For these reasons, the Hearings Officer finds the proposed private access drive will provide adequate transportation access to the site.

c. Section 18.124.070, Required Minimum Standards

A. Private or shared outdoor recreation areas in residential developments.

FINDINGS: The Hearings Officer finds the applicant's proposed recreational use of the southern reservoir qualifies as a private outdoor recreation area. As discussed in the findings above, I have found it is not appropriate for me to review the applicant's proposal as the first phase in a residential cluster development. Therefore, I find this criterion is not applicable because the reservoir and recreational uses thereon are not associated with a "residential development."

B. Required Landscaped Areas.

1. The following landscape requirements are established for multi family, commercial and industrial developments, subject to site plan approval:

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose a multi-family, commercial or industrial development.

2. In addition to the requirement of DCC 18.124.070(B)(1)(a), the following landscape requirements shall apply to parking and loading areas:

- a. A parking or loading area shall be required to be improved with defined landscaped areas totaling no less than 25 square feet per parking space.

FINDINGS: The Hearings Officer finds the applicant's submitted site plan shows no defined landscaping near the guest parking area that would comply with this criterion. The staff report states, and I agree, that this criterion requires a total of 250 square feet of defined landscaping associated with the parking area (10 parking spaces multiplied by 25 square feet of landscaping). I find that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the property owners to install this landscaping prior to initiation of the recreational use of the southern reservoir.

- b. In addition to the landscaping required by DCC 18.124.070(B)(2)(a), a parking or loading area shall be separated from any lot line adjacent to a roadway by a landscaped strip at least 10 feet in width, and from any other lot line by a landscaped strip at least five feet in width.

FINDINGS: The proposed guest parking area is not located adjacent to any roadway and is separated by at least 400 feet from all other lot lines not on lots owned by the property owners. The Hearings Officer finds that with retention of the existing tree cover surrounding the southern reservoir, there is a landscape strip between the parking area and adjacent properties that will provide screening. As discussed in the findings above, I have found that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to retain all existing vegetation on the subject property.

C. Non-motorized Access.

1. **Bicycle Parking.** The development shall provide the number and type of bicycle parking facilities as required in DCC 18.116.031 and 18.116.035. The location and design of bicycle parking facilities shall be indicated on the site plan.

FINDINGS: As discussed in the findings above, the Hearings Officer has found the applicant's proposal qualifies for an exception to the bicycle parking standards. Therefore, I find no bicycle parking is required under this subsection.

2. Pedestrian Access and Circulation:

- a. Internal pedestrian circulation shall be provided in new commercial, office and multi family residential developments through the clustering of buildings, construction of hard surface pedestrian walkways, and similar techniques.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose a commercial, office or multi-family residential development.

- b. Pedestrian walkways shall connect building entrances to one another and from building entrances to public streets and existing or planned transit facilities. On site walkways shall connect with walkways, sidewalks, bikeways, and other pedestrian or bicycle connections on adjacent properties planned or used for commercial, multi family, public or park use.
- c. Walkways shall be at least five feet in paved unobstructed width. Walkways which border parking spaces shall be at least seven feet wide unless concrete bumpers or curbing and landscaping or other similar improvements are provided which prevent parked vehicles from obstructing the walkway. Walkways shall be as direct as possible.

FINDINGS: The Hearings Officer finds these criteria are not applicable because the applicant does not propose any buildings with pedestrian access to another building or to a public street or transit facility.

- d. Driveway crossings by walkways shall be minimized. Where the walkway system crosses driveways, parking areas and loading areas, the walkway must be clearly identifiable through the use of elevation changes, speed bumps, a different paving material or other similar method.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose any access driveway crossing any pedestrian walkways.

- e. To comply with the Americans with Disabilities Act, the primary building entrance and any walkway that connects a transit stop to building entrances shall have a maximum slope of five percent. Walkways up to eight percent slope are permitted, but are treated as ramps with special standards for railings and landings.

FINDINGS: The proposed boathouse is a “building.” However, as discussed in the findings above, the Hearings Officer has found no pedestrian walkways are required for the boathouse because such walkway would not connect the boathouse to any other building or to a public street or transit facility. Therefore, I find this criterion is not applicable to the applicant’s proposal.

D. Commercial Development Standards:

FINDINGS: The Hearings Officer finds this paragraph is not applicable because the applicant does not propose a commercial development.

For the foregoing reasons, the Hearings Officer finds the applicant’s proposal does not comply with all applicable site plan approval criteria in Chapter 18.124. However, I have found that with imposition of the conditions of approval recommended above, the proposal may comply with those criteria.

CONDITIONAL USE APPROVAL CRITERIA

7. Chapter 18.128, Conditional Uses

a. Section 18.128.015, General Standards Governing Conditional Uses

Except for those conditional uses permitting individual single family dwellings, conditional uses shall comply with the following standards in addition to the standards of the zone in which the conditional use is located and any other applicable standards of the chapter:

FINDINGS: The applicant does not propose an individual single-family dwelling. Therefore, the Hearings Officer finds the general conditional use standards in this chapter apply to the applicant's proposed conditional uses – i.e., surface mining to create the reservoirs, and the use of the southern reservoir as a recreation-oriented facility requiring large acreage consisting of motorized boating, waterskiing and wakeboarding. As discussed above, I have found the specific conditional use criteria applicable to the surface mining creating the reservoirs under Section 18.128.280 *also* apply to the southern reservoir. The standards in that section are discussed separately in findings below.⁵³

A. The site under consideration shall be determined to be suitable for the proposed use based on the following factors:

1. Site, design and operating characteristics of the use;

FINDINGS:

1. Site. The applicant is requesting conditional use approval to make lawful the land uses TID and KCDG undertook without approval. For this reason, the Hearings Officer finds that for purposes of this approval criterion the “site” is the 155-acre subject property *as it existed prior to KCDG's excavation for the reservoirs*. As discussed above, photographs in the record show that prior to the reservoir excavation, the site consisted of the reclaimed former Klippel mining pits which had been re-contoured and planted with grasses.

2. Design. As discussed in the Findings of Fact above, the northern reservoir is round in shape, and the southern reservoir is long, narrow and linear. The southern reservoir also has two man-made islands, one at each end. Both reservoirs are lined. The banks of both reservoirs consist primarily of unvegetated gravel, rock and dirt. There is a head gate at the southern end of the southern reservoir regulating water flow into the reservoir from the Tumalo Feed Canal. There also is a pipe in the area between and connecting the two reservoirs. TID proposes to install an outflow device to facilitate the return to the Tumalo Feed Canal of water stored in the reservoirs.

At the north end of the southern reservoir is a marina that includes a boat ramp, dock, and pilings. The applicant's proposal includes construction of a boathouse on the pilings with the capacity to store two boats, and construction of a ten-space guest parking area including a fire apparatus turnaround approximately 100 feet from the marina. Access to the marina and parking area are from a gated private driveway off Johnson Road.

⁵³ The Hearings Officer finds the conditional use criteria in Section 18.128.280 add to the general conditional use approval criteria in this section because Paragraph (C) of Section 18.128.015 states the standards in Section 18.128.015 “and any other standards in DCC 18.128” may be met by the imposition of conditions of approval. I find the quoted language mean both the general and more specific conditional use standards, if any, apply.

3. Operating Characteristics.

Reservoirs. The two reservoirs together have the capacity to hold 125 acre feet of water in addition to the 55 acres of irrigation water right appurtenant to the subject property. Water from the Tumalo Feed Canal would be diverted into the southern reservoir through the head gate at the south end of the reservoir, and into the northern reservoir through the pipe connecting the two reservoirs. When installed, the proposed outflow facility would allow water stored in the reservoirs to be returned to the Tumalo Feed Canal. As discussed in the findings above, TID's contract with KCDG authorizes TID to regulate the amount of water in the reservoirs, and to remove some or all of the stored water – not including KCDG's 55 acres of water rights – for irrigation and emergency purposes. The lining of the reservoirs is designed to minimize water loss from seepage.

Recreational Use. The applicant proposes that the southern reservoir would be used for motorized boating, waterskiing and wakeboarding by the property owners and up to twenty invited guests during daylight hours seven days a week and eight months per year (April through November). The applicant proposes that the recreational use would be subject to the following limitations:

1. no motorized boating from November 1 through March 31st;
2. only one motorized boat on the southern reservoir at a time;
3. no jet skis allowed;
4. adherence to all Deschutes County noise ordinance standards;
5. no alcohol use on boats or by skiers;
6. all motor boat operators must carry the Oregon mandatory boater education card;
7. no more than 20 invited guests will utilize the recreation facility per day; and
8. boats limited to those with the following characteristics:
 - a. inboard engines only;
 - b. self-contained engines with internal oil lubrication systems;
 - c. stock mufflers or quieter mufflers;
 - d. direct drive or V-drive transmission; and
 - e. no two-stroke motors.

4. Suitability.

Reservoirs. The Hearings Officer finds the subject property is suitable for the reservoirs considering its site because it includes the reclaimed Klippel mining pits that already had been excavated and disturbed and could be converted to reservoirs. I find the subject property also is suitable for the reservoirs considering its site because the reservoirs are located in close proximity to the Tumalo Feed Canal which allows TID to divert and store water in the reservoirs as part of its irrigation system. Similarly, I find the subject property is suitable for the use of the reservoirs as water storage facilities considering their design and operating characteristics which allow water to

be stored in lined facilities and moved within TID's irrigation system. However, as discussed in detail in the findings above, I have found the size and design of the southern reservoir are not harmonious with the natural environment or existing development in the surrounding area.

Recreational Use. The Hearings Officer finds the subject property is suitable considering its site for the proposed recreational use because the southern reservoir is large enough to accommodate motorized boating and waterskiing. However, as discussed in the findings above, I have found the size and design of the southern reservoir is not harmonious with the natural environment or existing development in the surrounding area. As also discussed above, I have found the operating characteristics of the proposed recreational use are not harmonious with existing development because they will allow the recreational use to be of a scale, intensity, and duration exceeding what is reasonable and appropriate in a rural residential area.

For the foregoing reasons, the Hearings Officer finds that while the subject property is suitable for the reservoirs and proposed recreational use in some respects considering site, design and operating characteristics, it is not suitable in other respects. Therefore, I find the applicant's proposal does not satisfy this approval criterion.

2. Adequacy of transportation access to the site; and

FINDINGS: The reservoirs and recreation-oriented facility will have access from the existing gated private driveway from Johnson Road and from the "ditch rider" road. As discussed in the findings above under the site plan approval criteria in Chapter 18.124, incorporated by reference herein, the Hearings Officer has found transportation access to the reservoirs will be adequate. For the same reasons, I find the subject property is suitable for the reservoirs and recreation-oriented facility considering the adequacy of transportation access.

3. The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values.

FINDINGS: As discussed in the findings above, the natural and physical features of the subject property prior to excavation for the reservoirs consisted of the reclaimed Klippel mining pits, the dwelling, outbuildings and landscaping, and the undeveloped areas including native vegetation.

1. General Topography. Photographs in the record show the general topography on the subject property prior to excavation for the reservoirs consisted primarily of level areas up to the edge of Tumalo Creek Canyon, and the reclaimed Klippel mining pits which comprised a large depressed area with contoured slopes. The topography of the mining pits was altered significantly to create the reservoirs by making the pits deeper to accept a liner and hold water, and by making the banks steeper in some places. In addition, although creation of the reservoirs left the existing tree cover intact, it removed most or all of the vegetation in and around the reclaimed pits, resulting in large areas of gravel, rock and dirt completely denuded of vegetation. As discussed in the findings above, although the Hearings Officer has found the subject property was suitable for creation of the reservoirs considering the presence of the reclaimed mining pits, I have found the resulting change in topography and landscape that obliterated vegetation rendered the southern reservoir inharmonious with the surrounding natural environment and existing rural residential development.

2. Natural Hazards. The Hearings Officer finds the only natural hazard that existed on the subject property prior to creation of the reservoirs (and which exists at present) is the risk of wildfire. I find that risk is no greater on the subject property than elsewhere on the west side of Bend. And the record includes evidence that water in the reservoirs has been made available and used for wildfire suppression.

3. Natural Resource Values. The Hearings Officer finds the natural resource values that existed on the subject property before creation of the reservoirs and commencement of motorized boating and waterskiing on the southern reservoir were native vegetation and wildlife habitat. I further find the wildlife habitat consisted of vegetation providing both forage and cover, a water source from Tumalo Creek, gently rolling topography, and a relatively quiet and undisturbed rural environment

As discussed in the findings above under the site plan approval criteria in Chapter 18.124, I have found construction of the reservoirs removed most or all of the vegetation in the reclaimed Klippel mining pits and the surrounding land outside the forested areas, and thereby removed the wildlife habitat that vegetation provided. Based on those findings, incorporated by reference herein, I have found that if the applicant's proposal is approved on appeal, it should be subject to conditions of approval requiring the property owners to develop and implement a wildlife habitat mitigation plan consistent with ODFW's Fish and Wildlife Habitat Mitigation Policies, submit to the Planning Division written documentation from ODFW that the habitat mitigation plan has been completed consistent with those policies, retain all existing vegetation, and leave the area between the two reservoirs free of fencing and other physical barriers.

The Bishops and other opponents argue the proposed recreational use will negatively impact wildlife *use* of the subject property because the sight and sound of motorized boating on the southern reservoir and the increase in vehicular traffic from the property owners' guests will disturb wildlife. The applicant has stated no motorized boating will occur on the southern reservoir during the winter range closure period from December 1 through March 31 each year. The Hearings Officer concurs with the applicant that this limitation will eliminate conflicts between the recreation use and *wintering* deer.

The record contains conflicting evidence concerning the impacts on wildlife from recreational use of the southern reservoir *outside* the winter range closure months. The applicant's expert Paul Valcarce testified that deer adapt to human presence and activities, and for that reason in his opinion neither the reservoirs nor the recreational use on the southern reservoir will have negative impacts on wildlife. In addition, the record includes numerous photographs of wildlife including deer, elk and waterfowl utilizing the subject property and the reservoirs. However, as discussed above, ODFW expressed concern about impacts on wildlife and their habitat from the reservoirs and recreation thereon. ODFW recommended that the property owners be required to undertake several measures to address loss of habitat and the potential for the reservoirs to create barriers to deer and elk movement. The Hearings Officer has recommended that if the applicant's proposal is approved on appeal, such approval should be subject to conditions of approval requiring the property owners to mitigate for lost habitat and refrain from creating physical barriers in the space between the two reservoirs such as fencing.

The Hearings Officer finds that whether the subject property is suitable for the reservoirs and the proposed recreational use on the southern reservoir considering natural resource values -- and in particular wildlife habitat -- is a close question. Construction of the reservoirs removed large amounts of vegetation that provided forage, and changed the topography on the subject property from the previous level to rolling terrain to a deeper and steeper-banked depression holding water. The applicant's proposed recreational use of the southern reservoir will generate continuous noise and human activity eight months per year of a much greater intensity and duration than existed before the reservoirs were created. I find all of these factors have and/or will adversely affect wildlife habitat. On the other hand, it appears the reservoirs have provided a new source of water for wildlife. However, on balance, I find the addition of this water source to the existing source of Tumalo Creek does not outweigh the overall negative effects on habitat from the reservoirs and recreational use on the southern reservoir. For these reasons, I find the applicant has not demonstrated the subject property is suitable for the reservoirs and the proposed recreational use on the southern reservoir considering natural resource values including wildlife habitat.

- B. The proposed use shall be compatible with existing and projected uses on surrounding properties based on the factors listed in DCC 18.128.015(A).**

FINDINGS: The Hearings Officer has found existing uses on surrounding land include rural residences, some small-scale farming, and two active surface mines. I find projected uses on surrounding lands would be the same. As discussed in the findings above under the site plan approval criteria in Chapter 18.124, I have found the reservoirs and the proposed recreational use on the southern reservoir will not have any impact on nearby mining uses. In addition, I concur with staff's assessment that these uses also will not negatively impact residential or farm uses on the EFU- and Forest-zoned land in the surrounding area because of the distances between the reservoirs and these lands. However, I have found the reservoirs and the proposed recreational use on the southern reservoir do not relate harmoniously to rural residential uses on surrounding land because of the size and appearance of the southern reservoir, and because of scale, intensity and duration of the recreational use.

The Hearings Officer finds the site plan approval standard requiring that the proposed uses "relate harmoniously" to existing development on surrounding land is equivalent to the conditional use approval criterion that the proposed uses be "compatible with" existing and projected uses on surrounding properties considering their site, design and operating characteristics, adequacy of transportation access, and natural features and resources.⁵⁴ Therefore, for the reasons set forth in the site plan findings above, incorporated by reference herein, I find the applicant's proposal also is not compatible with existing and projected uses on surrounding properties. .

- C. These standards and any other standards of DCC 18.128 may be met by the imposition of conditions calculated to insure that the standard will be met.**

FINDINGS: As discussed throughout this decision, the Hearings Officer has found that if the applicant's proposal is approved on appeal, it should be subject to a number of conditions of approval, set forth at the end of this decision.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal does not satisfy all applicable conditional use approval criteria in this section.

b. Section 18.128.280, Surface Mining of Non-Goal 5 Mineral and Aggregate Resources

These uses are subject to the following standards:

- A. An application shall be filed containing the following information:**
- 1. A detailed explanation of the project and why the surface mining activity is necessary.**

FINDINGS: The Hearings Officer has found KCDG's surface mining to create the reservoirs constituted surface mining of non-Goal 5 mineral and aggregate resources, and therefore such surface mining is subject to the standards in this section. Because the surface mining already has taken place, I find the applicant must demonstrate that the standards in this section *were* met before, during, and after the mining, as applicable.

⁵⁴ Webster's lists "harmonious" as a synonym for "compatible."

The applicant's burden of proof states the purpose of the surface mining was to convert the reclaimed Klippel mining pits into two reservoirs to store TID's water, and in the case of the southern reservoir to provide a recreation facility for motorized boating and waterskiing. In particular, the applicant states the surface mining was necessary to deepen and re-contour the reclaimed mining pits to allow liners to be installed to prevent loss of stored water due to seepage. I find the applicant's burden of proof is sufficiently detailed to explain the nature and purpose of the project.

2. **A site plan drawn to scale and accompanied by any drawings, sketches and descriptions necessary to describe and illustrate the proposed surface mining.**

FINDINGS: The applicant submitted a site plan, photographs, and other materials depicting and describing the existing and pre-existing conditions on the subject property and the proposed boathouse and guest parking area for the recreation-oriented facility. Because the surface mining has been completed, this site plan is not precisely what would have been submitted before mining commenced. Nevertheless, I find the applicant's materials illustrate the size and configuration of the surface mined areas and the final grades surrounding the reservoirs.

- B. **A conditional use permit shall not be issued unless the applicant demonstrates at the time of site plan review that the following conditions are or can be met:**

1. **The surface mining is necessary to conduct or maintain a use allowed in the zone in which the property is located.**

FINDINGS: The Hearings Officer has found the surface mining to create the reservoirs, and the recreation-oriented facility on the southern reservoir, are conditional uses in the RR-10 Zone under Section 18.60.030(W) and (G), respectively. The board and LUBA affirmed these categorizations. Therefore, I find KCDG's surface mining was necessary to conduct and maintain these uses, therefore satisfying this standard.

2. **Erosion will be controlled during and after the surface mining.**

FINDINGS: As discussed in the findings above, the Hearings Officer has found the reservoirs are constructed so that they will not cause surface water runoff onto adjacent properties or streets. I also have found that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the banks on the southern reservoir to be re-contoured to reduce their slope to a grade no steeper than three feet horizontal to one foot vertical.

However, the staff report notes that because the reservoirs have been completed, it is not possible to determine whether this criterion – and others that follow – were satisfied *during the surface mining*. The record does not include detailed information about what, if any, erosion control measures were employed and whether they were effective. The applicant has the burden of proving compliance with this criterion. The Hearings Officer finds the applicant has not met that burden, and therefore I cannot find this criterion was met. The applicant may be able to supplement the record with evidence addressing erosion control during mining. If there is a *de novo* appeal to the board.

3. The surface mining activity can meet all applicable DEQ noise control standards and ambient air quality and emission standards.

FINDINGS: Again, because the surface mining to create the reservoirs has been completed, the Hearings Officer cannot review any proposed noise and air quality control measures. The applicant states that all surface mining work was completed within the scope of the approved county temporary use permit (TU-14-8). However, as discussed above, that permit was limited to crushing for on-site road construction and did not authorize surface mining to create the reservoirs, and therefore it is not relevant. Because of the lack of evidence in this record about compliance with DEQ noise, air quality and emissions standards, I find the applicant has not met its burden of proving compliance with this criterion. However, as discussed above, the applicant may be able to provide sufficient additional evidence in a *de novo* appeal of this decision to demonstrate compliance, such as records from Taylor Northwest which conducted the surface mining.

4. Sufficient water is available to support approved methods of dust control and vegetation enhancement.

FINDINGS: Again, because the surface mining to create the reservoirs has been completed, the Hearings Officer cannot determine whether any dust control measures were employed during the surface mining and whether they were effective. Therefore, I find the applicant has not met its burden of proving compliance with this criterion. The applicant may be able to supplement the record with information from Taylor Northwest concerning dust control measures during surface mining. Photos in the record show that Taylor Northwest had water tankers on the site during construction of the reservoirs.

With respect to vegetation enhancement, the Hearings Officer has found the surface mining to create the reservoirs removed most of the vegetation planted to reclaim the Klippel mining pits and wildlife habitat thereon, leaving barren the banks of both reservoirs and much of the surrounding land between the banks and the forested areas. I have found that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to replant these areas in accordance with ODFW's wildlife habitat mitigation policies. The record indicates the subject property has 55 acres of irrigation water rights which I find can be used to irrigate any enhanced required by the board in any decision on appeal.

5. The surface mining does not adversely impact other resources or uses on the site or adjacent properties, including, but not limited to, farm use, forest use, recreational use, historic use and fish and wildlife habitat as designed or through mitigation measures required to minimize these impacts.

FINDINGS: The impacts from KCDG's *completed* surface mining are addressed in detail in the site plan and conditional use findings above, and incorporated by reference herein. For the reasons set forth in those findings, I have found the completed surface mining adversely affects wildlife habitat and rural residential uses on the subject property and adjacent properties. However, because the surface mining has been completed, the remaining question is whether evidence in the record demonstrates there were no adverse impacts of the identified uses and resources *during construction*. Again, the applicant may be able to provide sufficient information through a *de novo* appeal to demonstrate compliance with this criterion.

C. If the surface mining actively involves the maintenance or creation of man made lakes, water impoundments or ponds,

the applicant shall also demonstrate, at the time of site plan review, that the following conditions are or can be met:

- 1. There is adequate water legally available to the site to maintain the water impoundment and to prevent stagnation.**

FINDINGS: KCDG's surface mining was to create two reservoirs, and therefore the standards in this paragraph apply. This subparagraph requires the applicant to demonstrate there is water "legally available to the site" to maintain the reservoirs. As discussed in the Findings of Fact above, the lawfulness of the reservoirs first came to the county's attention when TID requested a LUCS as part of its request to WRD for permission to transfer the place of storage of water from Upper Tumalo Reservoir to the reservoirs on the subject property. The record includes permits, certificates, orders and correspondence to and from WRD concerning TID's request. These documents indicate that as of the date the record in this matter closed, TID's previous license to store water in the reservoirs had expired. The parties disagree as to the significance of that expiration and about what are TID's rights with respect to extending that license. For these reasons, the staff report recommends the Hearings Officer impose a condition of approval requiring the applicant to demonstrate TID has all necessary water permits and approvals from WRD before commencing recreational use on the southern reservoir. The Bishops and other opponents argue I must deny the applicant's proposal because, in their view, TID will not be able to secure the necessary permit from WRD.

The Hearings Officer finds that where, as here, TID must acquire a state agency permit in order to store water in the reservoirs, and there is no evidence in the record that TID is *legally prohibited* from obtaining such a permit, the county may impose a condition of approval requiring TID obtain a WRD permit without determining that it is feasible to do so. *Wal-Mart Stores v. City of Bend*, 52 Or LUBA 261 (2006); *Bouman v. Jackson County*, 23 Or LUBA 626 (1992). Therefore, I find that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to submit to the Planning Division written documentation WRD that TID has all necessary permits to store its water in the reservoirs before commencing recreational use on the southern reservoir.

- 2. The soil characteristics or proposed lining of the impoundment are adequate to contain the proposed water and will not result in the waste of water.**

FINDINGS: The record indicates the reservoirs are lined with a polymer material described in Exhibit "JJ" to the applicant's burden of proof. This exhibit indicates this lining is highly effective in containing water. The Bishops and other opponents argue storage of TID water in the reservoirs is not the best way to conserve water. However, as discussed in the findings above, the Hearings Officer has found the TID board's decisions concerning how to manage its water resources are not before me in these proceedings.

- 3. Where the impoundment bank slope is steeper than three feet horizontal to one foot vertical, or where the depth is six feet or deeper, the perimeter of the impoundment is adequately protected by methods such as fences or access barriers and controls.**

FINDINGS: The applicant's burden of proof states the banks of the reservoirs have slopes no greater than three feet horizontal to one foot vertical. However, as discussed above, the Hearings Officer has found from photographs in the record that some banks appear to be steeper than that maximum grade. For that reason, I have found that if the applicant's proposal is approved on

appeal, it should be subject to a condition of approval requiring the property owners to re-contour the banks to assure they do not exceed a slope of three feet horizontal to one foot vertical.

The record indicates the depth of the reservoirs is greater than six feet. Therefore, this subsection requires "perimeter fencing, access barriers or controls." The applicant argues no perimeter fencing is necessary because "access controls" are in place – i.e., private ownership of the reservoirs and their location on private property not accessible to the public. Opponents argue the reservoirs present a drowning hazard if a trespasser should gain entry.

The Hearings Officer understands opponents' concerns. Nevertheless, I agree with the applicant that perimeter fencing is not necessary or appropriate. I am aware that reservoirs generally do not have perimeter fencing due to practical considerations. I am also aware that access to boat ramps and docks on reservoirs may be controlled through gates or other barriers on access roads. In this case, access to the reservoirs is from private roads, including the gated private access driveway to the subject property, and the "ditch rider" road utilized by TID for irrigation system management. I find these controls, coupled with the reservoirs' location on private property, adequately protect the perimeter of the reservoirs.

- 4. The surface mining does not adversely affect any drainages, all surface water drainage is contained on site, and existing watercourses or drainages are maintained so as not to adversely affect any surrounding properties.**

FINDINGS: Because the surface mining to create the reservoirs has been completed, the applicant has the burden of demonstrating that while the surface mining was occurring there were no adverse effects from the mining on surface water drainage and on Tumalo Creek. The Hearing Officer finds there is not sufficient evidence in the record for me to find the applicant has met its burden. However, as discussed in the findings above, I have found the design and configuration of the *completed* reservoirs, and the existing grades and contours on the subject property, will prevent surface water drainage onto surrounding properties and streets.

D. Limitations

- 1. Excavation does not include crushing or processing of excavated material.**

FINDINGS: As discussed in the Findings of Fact above, KCDG received a temporary use permit to crush excavated material for purposes of road building (TU-14-8). However, there is nothing in this record that indicates crushing was involved in the surface mining to create the reservoirs.

- 2. A permit for mining of aggregate shall be issued only for a site included on the County's non-significant mineral and aggregate resource list.**

FINDINGS: As discussed in the findings above, incorporated by reference herein, the Hearings Officer has found that because the subject property is not included in the county's comprehensive plan inventory of non-significant mineral and aggregate resources, the surface mining to create the reservoirs was prohibited under this subsection.

- 3. Hours of operation shall be 7:00 a.m. to 6:00 p.m. Monday through Saturday. No surface mining activity shall be conducted on Sundays or the following legal**

holidays: New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day.

FINDINGS: The Hearings Officer finds that because the surface mining to create the reservoirs has been completed, the time restrictions in this subsection cannot be imposed.

- C. **These standards and any other standards of DCC 18.128 may be met by the imposition of conditions calculated to insure that the standard will be met.**

FINDINGS: As discussed throughout this decision, the Hearings Officer has found that if the applicant's proposal is approved on appeal to the board, such approval should be subject to a number of conditions of approval to assure compliance with applicable approval criteria.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal does not satisfy all applicable conditional use criteria in Chapter 18.128.

VARIANCE STANDARDS

8. Chapter 18.132, Variances

a. Section 18.132.020, Authority of Hearings Body

A variance may be granted unqualifiedly or may be granted subject to prescribed conditions, provided that the Planning Director or Hearings Body shall make all of the following findings:

FINDINGS: The applicant has requested approval of a variance to the minimum setbacks in the RR-10 for the southern reservoir which crosses lot lines. As discussed in the findings above, the Hearings Officer has found the setbacks do not apply to the southern reservoir, and therefore no variance is required. However, because I anticipate my decision will be appealed to the board, and the board may elect to hear the appeal, I include the following findings under the applicable variance criteria.

Section 18.04.030 includes the following definitions:

"Variance" means an authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance.

- A. **"Area variance" means a variance which does not concern a prohibited use. Usually granted to construct, alter, or use a structure for a permitted use in a manner other than that prescribed by the zoning ordinance.**
- B. **"Use variance" means a variance which permits a use of land other than that prescribed by the zoning or other applicable ordinances.**

The Hearings Officer finds the applicant's requested variance to the setbacks in the RR-10 Zone is an "area variance" subject to the criteria applicable thereto.

A. Area variance.

1. **That the literal application of the ordinance would create practical difficulties resulting in greater private expense than public benefit.**

FINDINGS: The applicant argues imposition of the minimum RR-10 Zone setbacks to the southern reservoir would result in shrinking its size to an area that would not provide TID the operational flexibility it needs, and could require additional surface mining and movement of the southern reservoir closer to western boundary of the subject property and the nearby rural residences. The applicant argues that for these reasons there would be no public benefit from imposing the setback standards. The Hearings Officer finds the applicant's argument is not persuasive because the applicant has a practical solution to the problem created by the setbacks – i.e., obtaining lot line adjustments to alter the location of the lot lines over which the southern reservoir encroaches.

2. **That the condition creating the difficulty is not general throughout the surrounding area but is unique to the applicant's site.**

FINDINGS: The applicant argues the condition creating the difficulty is unique to the subject property because of the location of the reclaimed Klippel surface mining pits within which the southern reservoir was created and the proximity of the Tumalo Feed Canal. Again, the Hearings Officer does not find this argument persuasive. The condition creating the difficulty is the location of lot lines on the lots on which the southern reservoir is located. These lots are owned and controlled by KCDG which can remove the condition creating the difficult by obtaining lot line adjustments to alter the location of the lot lines the southern reservoir crosses.

3. **That the condition was not created by the applicant. A self created difficulty will be found if the applicant knew or should have known of the restriction at the time the site was purchased.**

FINDINGS: The locations of the lot lines on the subject property were created by the applicant's predecessor in title, or by the applicant through a series of lot line adjustments described in the Findings of Fact above. Nevertheless, the Hearings Officer cannot find the applicant knew or should have known that the RR-10 setbacks might be applicable to the southern reservoir. As discussed in the findings above, the parties disagree as to whether the southern reservoir is a "building" for purposes of the setbacks, and I have found in this decision that it is not.

4. **That the variance conforms to the Comprehensive Plan and the intent of the ordinance being varied.**

FINDINGS: Staff and the applicant have not identified, and the Hearings Officer has not found, any provisions in the comprehensive plan that have a bearing on the applicant's requested variance. I find the intent of the minimum yards and setbacks in the RR-10 Zone is to assure the open space between buildings is free of obstructions. I find that although the edges and banks of the southern reservoir do project above the ground, that is not the type of "obstruction" intended to be addressed by the minimum setbacks.

Because the Hearings Officer has found that not all of the "area variance" criteria are met, I find the applicant has not demonstrated its proposal qualifies for such a variance.

IV. DECISION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby **DENIES** the applicant's proposal.

The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be **SUBJECT TO THE FOLLOWING RECOMMENDED CONDITIONS OF APPROVAL:**

1. This approval is based on the applicant's submitted original and modified burden of proof statements and exhibits, supplemental materials, and written and oral testimony. Any substantial change to the uses approved in this decision will require new land use applications and approvals.

PRIOR TO THE DATE THIS DECISION BECOMES FINAL:

2. The applicant shall submit to the Planning Division written authorization from the Cadwell Family Trust and from Harris and Nancy Kimble for the applicant to submit the subject applications on their behalf.

PRIOR TO COMMENCEMENT OF RECREATIONAL USE ON THE SOUTHERN RESERVOIR:

3. The property owners shall construct the guest parking area concurrent with completion of the boathouse and prior to commencing recreational use on the southern reservoir.
4. The property owners shall install two hundred fifty (250) square feet of defined landscaping with the parking area.
5. The property owners shall submit to the Planning Division written documentation from the Oregon Water Resources Department that Tumalo Irrigation District has all necessary permits to store its water in the reservoirs.
6. The property owners shall:
 - a. develop and submit to the Planning Division a wildlife habitat mitigation plan providing for replanting of all barren areas between the side of the banks facing away from the southern reservoir and the surrounding forested land with native plants providing suitable forage for deer and elk, consistent with the Oregon Department of Fish and Wildlife's Fish and Wildlife Habitat Mitigation Policies;
 - b. replant all barren areas between the side of the banks facing away from the southern reservoir and surrounding forest land in accordance with the habitat mitigation plan;
 - c. following the replanting required in Paragraph (5)(b), submit to the Planning Division written documentation from the Oregon Department of Fish and Wildlife that such replanting has been completed consistent with its habitat mitigation policies;
 - d. retain all existing vegetation on the subject property; and
 - e. install no fencing or other barriers in the space between the two reservoirs.

AT ALL TIMES:

7. The property owners shall maintain all guest parking spaces for the parking of operable passenger automobiles of guests only and shall not allow these parking spaces to be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.
8. The property owners shall maintain the guest parking area in a dust-free condition.
9. The property owners shall retain and preserve all existing trees and shrubs.
10. The property owners shall conduct the approved recreational use of the southern reservoir subject to the following limitations:
 - a. no recreational activity on the southern reservoir will take place from December 1 through March 31 each year;
 - b. only one boat will operate on the reservoir at any given time;
 - c. motorized boating activity will be limited to the hours of 10:00 a.m. to 5:00 p.m.
 - d. no jet skis will be used;
 - e. all applicable Deschutes County noise ordinance standards shall be followed;
 - f. boats operating on the southern reservoir will have the following characteristics:
 - (i) inboard engines only;
 - (ii) self-contained engines with internal oil lubrication systems;
 - (iii) stock mufflers or muffled noise equivalent;
 - (iv) direct drive or V-drive transmission; and
 - (v) no two-stroke motors.
 - g. no alcoholic consumption on boats or by skiers; and
 - h. all motor boat operators will carry the Oregon mandatory boater education card.
11. The property owners will assure any future exterior lighting is shielded so direct light does not project off site.
12. The property owners will assure that any future fencing on the subject property is installed in conformance with the standards in the Wildlife Area Combining Zone.

13. The property owners will install any parking area lighting so that light rays do not project directly onto any adjoining property in a residential zone.

Dated this 21st day of January, 2016.

Mailed this 21st day of January, 2016



Karen H. Green, Hearings Officer

THIS DECISION BECOMES FINAL TWELVE DAYS AFTER MAILING UNLESS TIMELY APPEALED BY A PARTY.

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

THOMAS BISHOP and DORBINA BISHOP,
TRUSTEES OF THE BISHOP FAMILY TRUST,
Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

TUMALO IRRIGATION DISTRICT
and KC DEVELOPMENT GROUP, LLC,
Intervenors-Respondents.

LUBA No. 2015-027 and 2015-030

and

TUMALO IRRIGATION DISTRICT,
and KC DEVELOPMENT GROUP, LLC,
Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

THOMAS BISHOP and DORBINA BISHOP,
TRUSTEES OF THE BISHOP FAMILY TRUST
Intervenors-Respondents.

LUBA No. 2015-028

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FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Jennifer M. Bragar, Portland, represented petitioners/intervenors-respondents Bishop et al.

Elizabeth A. Dickson and J. Kenneth Katzaroff, Bend, represented petitioners/intervenors-respondents Tumalo Irrigation District et al.

Laurie E. Craghead, Assistant County Counsel, Bend, represented respondent.

BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN Board Member, participated in the decision.

TRANSFERRED (LUBA Nos. 2015-027/030)	09/09/2015
DISMISSED (LUBA No. 2015-028)	09/09/2015

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISIONS**

3 These consolidated appeals concern two decisions concluding that a
4 proposal to transfer irrigation water to two newly constructed reservoirs
5 requires conditional use permit approvals from the county. The appealed
6 decisions are (1) a board of county commissioners' decision that reviews and
7 remands an earlier land use compatibility statement (LUCS) issued by county
8 planning staff and (2) a planning staff decision that reissues the LUCS in
9 accordance with the board of county commissioners' remand.

10 **MOTIONS TO INTERVENE**

11 In LUBA No. 2015-027, Thomas and Dorbina Bishop, trustees of the
12 Bishop Family Trust (the Bishops), appeal the board of county commissioners'
13 April 8, 2015 decision that characterizes the proposed use as one requiring
14 conditional use permit approvals under the county's land use code. The
15 Bishops oppose the proposed use, and we understand them to challenge the
16 April 8, 2015 decision at least in part because they believe additional
17 discretionary approvals by the county are required. The applicants below, the
18 Tumalo Irrigation District (TID) and KC Development Group LLC (KCDG),
19 move to intervene on the side of the county in LUBA No. 2015-027. We refer
20 to the applicants collectively as T/K. There is no opposition to T/K's motion to
21 intervene in LUBA No. 2015-027, and it is allowed.

22 In LUBA No. 2015-028, T/K appeals the same April 8, 2015 board of
23 county commissioners' decision. T/K believes that the proposed use is a
24 permitted use under the county's land use code, and that the board of
25 commissioners erred in concluding that the use requires any conditional use

1 permit approvals. The Bishops move to intervene on the side of the county in
2 LUBA No. 2015-028. There is no opposition to the motion, and it is allowed.

3 In LUBA No. 2015-030, the Bishops appeal an April 23, 2015 planning
4 staff decision that issues a LUCS that, consistent with the board of
5 commissioners' April 8, 2015 decision, concludes that the proposed use
6 requires conditional use permit approval. T/K moves to intervene on the side
7 of the county in LUBA No. 2015-030. There is no opposition to the motion,
8 and it is allowed.

9 On May 12, 2015, LUBA consolidated these three appeals for review.

10 **MOTION TO FILE REPLY**

11 T/K moves for permission to file a 15-page reply to the responses to its
12 motion to dismiss. The Bishops object to the reply, arguing that LUBA's
13 practice is to consider a reply to a response to a motion only if the reply is
14 limited to new issues raised in the response. *Frevach Land Company v.*
15 *Multnomah County*, 38 Or LUBA 729, 732 (2000). The Bishops argue that the
16 reply is not limited to new issues, but in large part simply embellishes on
17 arguments in the motion to dismiss. T/K subsequently filed a response to the
18 objection, arguing that the reply is appropriate.

19 We tend to agree with the Bishops that much of the 15-page reply merely
20 embellishes arguments made in the motion to dismiss. Nonetheless, we shall
21 consider it, for what it is worth. The reply includes a section responding to the
22 Bishops' alternative motion to transfer their appeals, and that response to a
23 motion is entirely appropriate. OAR 661-010-0065(2). We decline to evaluate
24 the parties' lengthy disputes regarding whether other sections of the 15-page
25 reply are limited to new issues.

26

1 **MOTION TO DISMISS**

2 T/K moves to dismiss all three appeals, including its own, arguing that
3 LUBA lacks jurisdiction over the challenged decisions. We first set out the
4 relevant facts.

5 **A. Factual Background**

6 The subject property is a 79-acre property that is the site of a reclaimed
7 surface mine. Approximately 10 years ago the property was rezoned from
8 Surface Mining to Rural Residential 10-acre minimum (RR-10). In 2013,
9 KCDG acquired the property with the intent of developing it as a residential
10 cluster development, which is a conditional use in the RR-10 zone.

11 In 2014, KCDG removed 259,000 cubic yards of gravel from the
12 property in order to construct two lined reservoirs. The larger, southern
13 reservoir (South Pond) has a capacity of approximately 68 acre-feet of water
14 and includes two constructed islands comprised of gravel and dirt along with a
15 small marina, boat ramp, dock, and pilings to support a boat house at its north
16 end. The northern reservoir (North Pond) has a capacity of approximately 57
17 acre-feet of water. The reservoirs were filled in May and June 2014 with water
18 from TID's existing reservoir located elsewhere in the county.

19 On June 13, 2014, TID and KCDG representatives met with the county
20 to discuss the transfer of water from TID's system to the new reservoirs, and to
21 advise the county that an application for a residential cluster development on
22 the property would be submitted within a short period of time. On June 16,
23 2014, the county planning director issued a determination that the county
24 would process any request for a LUCS regarding transfer of water to the
25 subject property as a "land use action," which under the county's code is a type
26 of decision that requires notice and opportunity for hearing and appeals,

1 consistent with ORS 197.763 and ORS 215.416. Typically, under the county's
2 code a LUCS request would be processed as a "development action," which
3 does not require public notice and opportunity for hearing, and which limits
4 local appeals to the applicant.

5 TID applied to Oregon Water Resources Department (OWRD) for
6 permission to transfer 108 acre-feet of water held in TID's irrigation system to
7 the two new lined reservoirs.¹ Because the transfer involved "structural
8 changes and/or the creation of new impoundment facilities," under OWRD's
9 agency coordination rules OWRD required TID to obtain a LUCS from the
10 county, to determine whether agency action to approve the transfer would be
11 consistent with the county's land use laws. Record 277. On August 4, 2014,
12 TID submitted the LUCS request to the county, and argued to the county that
13 the proposed transfer is compatible with the county's land use regulations,
14 because it is a use permitted outright in the RR-10 zone, as the "[o]peration,
15 maintenance, and piping of existing irrigation systems operated by an Irrigation
16 District[.]" Deschutes County Code (DCC) 18.60.020(I).

17 On August 13, 2014, the county planning director issued a LUCS
18 decision, on a form provided by OWRD. The August 13, 2014 LUCS decision
19 concluded that the proposed transfer of water constituted the "[o]peration,
20 maintenance, and piping of existing irrigation systems operated by an Irrigation
21 District[.]" and thus is a use permitted outright in the RR-10 zone. Pursuant to

¹ TID's application to OWRD was for a temporary transfer, apparently in order to test the functionality of the two lined reservoirs. TID later applied for a permanent transfer. We understand from the parties' pleadings that OWRD has denied both applications in light of the county's responses to the LUCS request, although OWRD has allowed the reservoirs to remain filled under a limited license.

1 the planning director's June 16, 2014 decision to treat the application as one for
2 a land use action, the planning director provided notice of the decision to
3 adjoining property owners, including the Bishops.

4 The Bishops timely appealed the planning director's August 13, 2014
5 LUCS decision to the county hearings officer. The hearings officer conducted
6 a site visit, and held a *de novo* evidentiary hearing on October 7, 2014. On
7 December 15, 2014, the hearings officer reversed the August 13, 2014 LUCS
8 decision and remanded to the planning director to reissue the LUCS "to
9 categorize TID's proposed use as one involving discretionary land use
10 approval(s) that have not yet been obtained[.]" Rec. 44. Specifically, the
11 hearings officer concluded that the proposed use involves not only the transfer
12 of water, but the construction of two new reservoirs. As such, the hearings
13 officer found, the proposed use requires conditional use permits, because
14 construction of the new reservoirs involved "surface mining" in conjunction
15 with operation of an irrigation system to create a "reservoir," which is a
16 conditional use in the RR-10 zone. DCC 18.60.030(W).² Further, the hearings
17 officer concluded that at least the South Pond had been constructed as a private
18 recreational lake, and thus constituted a "recreation-oriented facility requiring
19 large acreage," which is also a conditional use in the RR-10 zone. DCC

² DCC 18.60.030(W) authorizes as a conditional use in the RR-10 zone "[s]urface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage and sale of excavated material."

1 18.60.030(G).³ Finally, the hearings officer rejected the Bishops' argument
2 that the LUCS must address whether the reservoirs require conditional use
3 approval as the first phase of a cluster development. On a procedural issue, the
4 hearings officer found that the August 13, 2014 LUCS decision remained a
5 "development action" rather than a "land use action" as those terms are defined
6 in the county's code, but the hearings officer held that the planning director had
7 authority under DCC 22.16.010 to process the LUCS request as a land use
8 action, *i.e.*, a decision requiring notice, opportunity for hearing and appeal.⁴

9 Both TID and the Bishops appealed the hearings officer's decision to the
10 board of county commissioners. TID's appeal raised a number of procedural
11 and evidentiary issues, but primarily argued that the commissioners should
12 reverse the hearings officer and conclude that the reservoirs are outright
13 permitted uses in the RR-10 zone. The Bishops' appeal challenged the hearings
14 officer's conclusion that the August 13, 2014 LUCS decision constituted a
15 "development action" rather than a "land use action." The Bishops also
16 challenged the hearings officer's conclusion that the reservoirs do not require
17 conditional use approval as the first phase of cluster development.

18 On January 29, 2015, the commissioners held a consolidated hearing on
19 the appeals. On April 8, 2015, the commissioners issued the decision
20 challenged in LUBA No. 2015-027 and LUBA No. 2015-028. The April 8,

³ DCC 18.60.30(G) authorizes as a conditional use in the RR-10 zone a "[r]ecreation-oriented facility requiring large acreage such as an off-road vehicle track or race track, but not including a rodeo grounds."

⁴ DCC 22.16.010(B) provides that the planning director "has the discretion to determine that for the purposes of DCC Title 22 a development action application should be treated as if it were a land use action application."

1 2015 decision addressed a number of issues. First, the commissioners agreed
2 with the hearings officer that the August 13, 2014 LUCS decision remained a
3 “development action,” notwithstanding that the planning director elected to
4 process the LUCS request as a “land use action.” The commissioners also
5 agreed that the planning director had authority to treat the LUCS request as a
6 “land use action.” Second, the commissioners concluded that TID’s LUCS
7 request had mischaracterized the proposed use. Because the proposed use
8 involved the construction of new reservoirs, the commissioners concluded that
9 the proposed use was not allowed without review as the “operation,
10 maintenance, and piping of an existing irrigation system[.]” Third, the
11 commissioners agreed with the hearings officer that construction of the new
12 reservoirs constituted “surface mining” that requires a conditional use permit in
13 the RR-10 zone. Fourth, the commissioners agreed with the hearings officer
14 that the South Pond had been constructed as a water-skiing lake, and was
15 therefore a “recreation-oriented facility requiring large acreage[.]” a
16 conditional use in the RR-10 zone. Finally, the commissioners declined to
17 reach the issue of whether the new reservoirs must be reviewed as the first
18 phase of cluster development, because “this application must be denied on
19 other grounds and no application for cluster development has been submitted
20 * * *.” Record 21.⁵

⁵ On the last page of their April 8, 2015 decision, the commissioners summarized their conclusions:

- “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.

1 As noted, both the Bishops and T/K appealed the commissioners' April
2 8, 2015 decision to LUBA, and those appeals are assigned LUBA Nos. 2015-
3 027 and 2015-028.

4 On April 23, 2015, the planning director re-issued the LUCS decision,
5 on the OWRD form, stating that the proposed use requires discretionary land
6 use approvals, specifically conditional use permits for surface mining and a
7 recreation facility. The commissioners' April 8, 2015 decision is attached to
8 the April 23, 2015 LUCS. As noted, the Bishops appealed the April 23, 2015
9 LUCS decision to LUBA, and that appeal is assigned LUBA No. 2015-030.

-
- "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." Record 22.

1 **B. LUBA’s Jurisdiction**

2 T/K moves to dismiss all three appeals, including its own appeal of the
3 April 8, 2015 decision, arguing that the challenged decisions are excluded from
4 LUBA’s jurisdiction under one or more theories. The Bishops and the county
5 filed responses opposing the motion. The Bishops also filed a motion to
6 transfer LUBA Nos. 2015-027 and 2015-030 to circuit court in the event that
7 LUBA concludes that it lacks jurisdiction over those appeals. T/K has not
8 moved to transfer its appeal.

9 Initially, we note that T/K’s motion to dismiss does not actually seek
10 *dismissal* of these appeals. T/K asks LUBA to sustain T/K’s various procedural
11 and substantive challenges to the commissioners’ April 8, 2015 decision,
12 “reverse[.]” that decision, and order that the original planning director’s August
13 13, 2014 LUCS decision be “reinstated.” Motion to Dismiss 44. However, if
14 LUBA agrees with T/K that it lacks jurisdiction over the April 8, 2015
15 decision, we must dismiss the appeals of that decision (or transfer the appeals if
16 a motion to transfer had been filed). We could not reverse the challenged
17 decision, and we certainly could not order the county to reinstate a different
18 decision instead of the challenged decision. At least T/K identifies no
19 authority by which we could grant such relief, and we are aware of none.

20 With that observation, we turn to T/K’s jurisdictional challenges.

21 **1. The April 8, 2015 decision is a “land use decision” unless**
22 **an exclusion applies**

23 As relevant here, LUBA’s jurisdiction is limited to review of land use
24 decisions as defined at ORS 197.015(10)(a)(A). As defined, “land use
25 decision” includes a local government decision that concerns the application of

1 a land use regulation.⁶ To the extent that T/K argues that the commissioners'
2 April 8, 2015 decision does not fall within the definition of "land use decision"
3 at ORS 197.015(10)(a)(A), those arguments are not well-founded. On its face,
4 the commissioners' April 8, 2015 decision applied numerous land use
5 regulations in the course of resolving the evidentiary, procedural and
6 substantive issues raised in both local appeals of the hearings officer's
7 decision. Therefore, unless some statutory or other exclusion applies, the April
8 8, 2015 decision meets the definition of "land use decision," and is subject to
9 LUBA's jurisdiction.

10 The only statutory exclusion that T/K argues applies is ORS
11 197.015(10)(b)(H), which as discussed below excludes from the definition of
12 "land use decision" certain local government decisions on a LUCS request.
13 Although not quite with the consequences T/K argues for, we conclude below
14 that both the county commissioners' April 8, 2015 decision and the planning
15 director's April 23, 2015 decisions fall within the scope of the exclusion at
16 ORS 197.015(10)(b)(H)(iii).

⁶ ORS 197.015(10)(a)(A) provides that "land use decision" includes

"A final decision or determination made by a local government or
special district that concerns the adoption, amendment or
application of:

- "(i) The goals;
- "(ii) A comprehensive plan provision;
- "(iii) A land use regulation; or
- "(iv) A new land use regulation[.]

1 **2. ORS 197.015(10)(b)(H)**

2 ORS 197.015(10)(b)(H) provides that a “land use decision” subject to
3 LUBA’s jurisdiction does not include a decision by a local government:

4 “That a proposed state agency action subject to ORS 197.180(1) is
5 compatible with the acknowledged comprehensive plan and land
6 use regulations implementing the plan, if:

7 “(i) The local government has already made a land use decision
8 authorizing a use or activity that encompasses the proposed
9 state agency action;

10 “(ii) The use or activity that would be authorized, funded or
11 undertaken by the proposed state agency action is allowed
12 without review under the acknowledged comprehensive
13 plan and land use regulations implementing the plan; or

14 “(iii) The use or activity that would be authorized, funded or
15 undertaken by the proposed state agency action requires a
16 future land use review under the acknowledged
17 comprehensive plan and land use regulations implementing
18 the plan[.]”

19 The subject of the exclusions at ORS 197.015(10)(b)(H) are certain
20 decisions issued by local governments on a LUCS request, which conclude that
21 a proposed state agency action is compatible with the local government’s
22 comprehensive plan and land use regulations, for one or more of the three
23 reasons listed in (i) through (iii). Other types of decisions resulting from a
24 LUCS request, however, do not fall within those three exclusions. For
25 example, if a local government decides that the proposed agency action is *not*
26 compatible with its plan and land use regulations, or that the action is
27 compatible for reasons other than the three listed at (i)-(iii), or if the local
28 government decides that land use review is necessary, conducts that review and
29 approves or denies the proposed use, then the resulting decision does not fall

1 within the exclusions at ORS 197.015(10)(b)(H)(i)-(iii). *See Campbell v.*
2 *Columbia County*, 67 Or LUBA 53, 59-60 (2013) (a LUCS decision that also
3 verifies a nonconforming use and approves alterations is not subject to the
4 exclusions at ORS 197.015(10)(b)(H)(i)-(iii)).

5 In addition, we have held that ORS 197.015(10)(b)(H)(i)-(iii) is so
6 worded that, in order to determine whether an exclusion applies, LUBA must
7 address at least some of the likely merits of the appeal, and determine whether
8 the local government *correctly* categorized the proposed action so as to bring it
9 within the terms of the relevant exclusion. *McPhillips Farm Inc. v. Yamhill*
10 *County*, 66 Or LUBA 355, 360-62 (2012), *aff'd* 256 Or App 402, 300 P3d 299
11 (2013) (dismissing the appeal where LUBA found that the county correctly
12 concluded that the proposed action is encompassed by a previous land use
13 decision, and so fell within the scope of the exclusion at OAR
14 197.015(10)(b)(H)(i)). If so, then the exclusion applies and LUBA lacks
15 jurisdiction over the decision.⁷

⁷ In *McPhillips*, we relied on *Southwood Homeowners v. City Council of Philomath*, 106 Or App 21, 23-25, 806 P2d 162 (1991), for the proposition that, depending on the wording of a statutory exclusion to the definition of “land use decision,” LUBA must determine whether the decision is correct to the extent necessary to determine if the decision falls within the scope of the exclusion. We commented:

“This is a rather odd result, because if one of the exclusions to the definition of ‘land use decision’ in ORS 197.015(10)(b)(H) applies, then exclusive jurisdiction to review the LUCS decision lies in circuit court, via writ of review. ORS 34.020, ORS 34.102. This means that if LUBA concludes that the local government was correct that the agency action is compatible with its plan and regulations for one of the listed reasons, and therefore the exclusion at ORS 197.015(10)(b)(H) applies, the challenged

1 In sum, where a local government issues a LUCS decision concluding
2 that a proposed agency action is compatible with the local government's plan
3 and land use regulations for one of the three reasons listed at ORS
4 197.015(10)(b)(H)(i-iii), LUBA must determine whether the LUCS decision
5 correctly categorized the proposed use in order to determine whether the
6 exclusion applies. If the answer is yes, as we concluded in *McPhillips*, LUBA
7 lacks jurisdiction over the appeal of that decision.

8 In the present case, the commissioners' April 8, 2015 decision concluded
9 that the proposed action is appropriately categorized as one requiring
10 conditional use permit approvals under DCC 18.60.030(W) for surface mining
11 in conjunction with operation of an irrigation system, including the excavation
12 of reservoirs, and under DCC 18.60.030(G), for a recreational-oriented facility
13 requiring large-acreage, for the South Pond. On its face, that determination
14 falls squarely within the exclusion at ORS 197.015(10)(b)(H)(iii), for a LUCS
15 determination that the proposed action "requires a future land use review under
16 the acknowledged comprehensive plan and land use regulations implementing
17 the plan[.]" Consistent with *McPhillips*, the key jurisdictional question in the
18 present case is whether the commissioners correctly categorized the proposed
19 action in a manner that brings the decision within the exclusion at ORS
20 197.015(10)(b)(H)(iii).

LUCS decision can be transferred to circuit court for review, if transfer has been requested pursuant ORS 34.102 and OAR 661-010-0075(11). However, such circuit court review would make little sense in that circumstance, because LUBA would have just resolved the only likely merits of the appeal. Nonetheless, that appears to be what *Southwood* requires." 66 Or LUBA at 260-61 (footnote omitted).

1 T/K devotes the majority of the motion to dismiss to arguing that the
2 commissioners' *incorrectly* categorized the proposed use as one that requires
3 future land use reviews. T/K argues on appeal, as it did below, that the
4 proposed action is correctly categorized solely as an outright permitted use in
5 the RR-10 zone, as the "operation, maintenance, and piping of an existing
6 irrigation system[.]" As we understand it, that argument is based on T/K's
7 narrow view of the scope of the LUCS request. We understand T/K to argue
8 that the LUCS request encompassed solely the request to transfer water from
9 TID's existing reservoir, and did not encompass the construction of KCDG's
10 new reservoirs.

11 To the extent T/K argues that the county is obligated to accept the LUCS
12 applicant's characterization of the proposed use or the scope of the proposed
13 use in reviewing a LUCS request, we disagree. T/K identifies no statute or
14 other authority, and we are aware of none, that obligates the county to accept a
15 LUCS applicant's characterization of the proposed use or the scope of the
16 proposed use, in determining whether the proposed state agency action is
17 compatible with the county's land use legislation.

18 OWRD required TID to obtain a LUCS from the county under its agency
19 coordination rules because it recognized that the proposed action was not
20 limited to the mere transfer of water, but also entailed the construction of new
21 facilities to store the transferred water. The county's conclusion that the
22 proposed action encompasses the construction and use of the two new
23 reservoirs is supported by substantial evidence. Further, to the extent that
24 conclusion embodies an interpretation of the relevant DCC use categories, that
25 interpretation is consistent with the text of those code provisions. DCC
26 18.60.030(W) allows as a conditional use in the RR-10 zone "[s]urface mining

1 of mineral and aggregate resources in conjunction with the operation or
2 maintenance of irrigation systems operated by an Irrigation District, including
3 the excavation and mining for facilities, ponds, [and] reservoirs[.]” See n 2. A
4 governing body’s code interpretation made in the course of rendering a
5 decision on a LUCS request is subject to the deferential standard of review set
6 out in ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d
7 776 (2010). *McPhillips*, 256 Or App at 414 n 9. Even without that deferential
8 standard of review, the conclusion that the proposed use entails the
9 construction of two new reservoirs to store irrigation water, and therefore falls
10 within the use category described in DCC 18.60.030(W), is correct and must be
11 affirmed.

12 It may be that the transfer of water, viewed in isolation, will be correctly
13 viewed as a permitted use in the RR-10 zone, as part of the “operation” of an
14 “existing irrigation system,” once the two reservoirs into which the transferred
15 water is stored have received any necessary conditional use permit approvals,
16 and thereby become part of an “existing irrigation system” for purposes of
17 DCC 18.60.020(I). However, T/K has not demonstrated that the commissioners
18 erred in rejecting their claim that the use proposed in the LUCS is limited to the
19 transfer of water, or otherwise must be categorized as a permitted use in the
20 RR-10 zone. More importantly for our jurisdictional inquiry, T/K has not
21 demonstrated that the county erred in concluding that the proposed action
22 requires future land use reviews. As discussed above, the commissioners
23 correctly determined that the proposed use requires future conditional use
24 permit approvals under at least DCC 18.60.030(W). That conclusion falls
25 squarely within the exclusion at ORS 197.015(10)(b)(H)(iii), for a
26 determination that the proposed action requires future land use reviews.

1 The county's and the Bishops' countervailing arguments are not well-
2 taken. Both the county and the Bishops note that the commissioners exercised
3 discretion and adopted several code interpretations in concluding that future
4 land use reviews are required for the proposed use. Both argue that the
5 exclusions at ORS 197.015(10)(b)(H) are not intended to encompass
6 discretionary decisions or decisions that require interpretation of ambiguous
7 land use standards. However, LUCS decisions almost always require the
8 exercise of discretion and the need for interpreting code language, in order to
9 determine how the proposed use should be characterized and categorized under
10 the local government's land use regulations. A LUCS decision that did not
11 require the exercise of discretion or the need to interpret code language would
12 be excluded from LUBA's jurisdiction under an entirely separate exclusion, at
13 ORS 197.015(10)(b)(A), for decisions made under land use standards that do
14 not require interpretation or the exercise of policy or legal judgment. The
15 county and the Bishops' argument would conflate those two exclusions. We
16 conclude that the exclusions at ORS 197.015(10)(b)(H) are not limited to
17 decisions on LUCS requests that require no interpretation or the exercise of
18 discretion.

19 The county also argues that it is the planning director's subsequent April
20 23, 2015 decision to issue the revised LUCS that is the only decision that is
21 subject to the exclusion at ORS 197.015(10)(b)(H)(iii). We agree with the
22 county that the April 23, 2015 LUCS decision falls squarely within the
23 exclusion at ORS 197.015(10)(b)(H)(iii). However, that does not mean that the
24 commissioners' April 8, 2015 decision does not also fall within the exclusion.
25 The commissioners' April 8, 2015 decision determined the substance of the
26 planning director's April 23, 2015 LUCS decision, namely, that the proposed

1 use requires future land use reviews. The April 23, 2015 LUCS merely
2 implements the commissioners' April 8, 2015 decision. Both decisions are
3 subject to the exclusion at ORS 197.015(10)(b)(H)(iii).⁸

4 Finally, the Bishops argue that LUBA should not determine whether the
5 ORS 197.015(10)(b)(H)(iii) exclusion applies until the parties have fully
6 briefed the merits. The Bishops argue that resolving whether the county
7 correctly categorized the proposed use as requiring future land use reviews
8 requires LUBA to evaluate the Bishops' anticipated challenges to the April 8,
9 2015 decision, specifically their contention that the commissioners erred in
10 concluding that the proposed use does not require *additional* future land use
11 reviews, for cluster development, or for the North Pond as a "recreation-
12 oriented facility."

13 However, the Bishops do not dispute that the commissioners correctly
14 categorized the proposed use as one that requires future land use reviews, and
15 thus that the decision squarely falls within the exclusion at ORS
16 197.015(10)(b)(H)(iii). The Bishops seek a ruling that the proposed use
17 requires *additional* future land use reviews, but such a ruling would have no
18 jurisdictional consequences as far as we can tell. Even if we agreed with the

⁸ We note that if we accepted the county's position that the April 23, 2015 LUCS decision is subject to the exclusion at ORS 197.015(10)(b)(H)(iii), but the commissioners' April 8, 2015 decision is not, the consequence might be that LUBA would retain jurisdiction to review the challenges to the April 8, 2015 decision, while the circuit court would review the challenges to the April 23, 2015 LUCS decision, if that appeal is transferred as the Bishops request. However, that jurisdictional division of labor would be highly problematic. If the April 23, 2015 LUCS decision simply implements the April 8, 2015 decision, then the challenges to both decisions would likely be identical, leading to the possibility of overlapping or conflicting dispositions.

1 Bishops on that point, the ultimate conclusion would still remain that the
2 county correctly categorized the proposed use as one that requires future land
3 use reviews, and thus the decision falls within the exclusion at ORS
4 197.015(10)(b)(H)(iii).

5 Accordingly, we conclude that the exclusion at ORS
6 197.015(10)(b)(H)(iii) applies to the April 8, 2015 and April 23, 2015
7 decisions, and LUBA lacks jurisdiction over all three appeals. The only
8 remaining question is the disposition of these appeals.

9 On that point, T/K argues:

10 “The consequence of the [commissioners’] findings that additional
11 land use review was required is to exclude this LUCS under ORS
12 197.015(10)(b)(H)(iii). This excludes the LUCS from the
13 definition of ‘land use decision.’ By excluding this LUCS from
14 the definition of ‘land use decision,’ *Deschutes County then lacks*
15 *land use jurisdiction over it and the lower appeals must be*
16 *reversed for lack of jurisdiction.* Similarly, LUBA also lacks
17 jurisdiction and so this consolidated appeal must be dismissed and
18 the original LUCS Decision reinstated.” Motion to Dismiss 35-36
19 (emphases added).

20 We generally agree with the above argument, with the exception of the
21 italicized and underlined language. We disagree with the italicized argument
22 that by concluding that the use proposed in the LUCS requires future land use
23 reviews, and thus rendering a decision that falls within the exclusion at ORS
24 197.015(10)(b)(H)(iii), the county thereby loses “land use jurisdiction” over the
25 LUCS request.

26 T/K’s arguments on that point are circular and difficult to follow. T/K
27 appears to argue that where an ORS 197.015(10)(b)(H)(iii) exclusion applies,
28 and thus a LUCS decision is excluded from the definition of “land use
29 decision,” the consequence is that the county loses “land use jurisdiction” over

1 the LUCS request, and therefore the county erred in processing the LUCS
2 request as a “land use action,” under procedures that provide for notice, hearing
3 and local appeal. To the extent we understand the argument, we reject it. ORS
4 197.015(10)(b)(H) is silent regarding what procedures a local government may
5 apply to LUCS requests, and no other statute that we are aware of prohibits a
6 county from processing a LUCS request under land use procedures. A
7 conclusion that the county’s final decision on a LUCS request falls within one
8 of the exclusions at ORS 197.015(10)(b)(H) does not mean that the county errs
9 in processing that request under procedures that generally apply to land use
10 decisions, or that the county otherwise loses “land use jurisdiction” over the
11 LUCS request.

12 T/K makes a similar argument that the county’s code requires the LUCS
13 request to be treated as a “development action” rather than as a “land use
14 action,” and therefore the county had no “jurisdiction” to process the LUCS
15 request under procedures that allow for notice, hearing and local appeal, or to
16 allow the Bishops to appeal the planning director’s decision to the hearings
17 officer. There are a number of problems with that argument, but it suffices to
18 observe that any alleged violation of local procedures the county may have
19 committed in processing the LUCS request can be asserted as a basis for
20 reversal or remand under review by LUBA, or the circuit court, whichever
21 body has jurisdiction to review the county’s final decision on a LUCS request.
22 ORS 197.835(9)(a)(B); ORS 34.040(1)(b).⁹ However, we do not understand

⁹ It seems highly unlikely that T/K can demonstrate that the county violated the county code in processing the LUCS request as a “land use action.” DCC 22.16.010(B) expressly grants the planning director the discretion and authority to process development actions as “land use action[s],” *see* n 4, and
Page 21

1 the argument that any such procedural errors, if proved, means that the county
2 loses “land use jurisdiction” over the LUCS request. Whether the LUCS
3 request is processed as a development action or a land use action, the county
4 has “land use jurisdiction” to determine whether the proposed use is compatible
5 with its comprehensive plan and land use regulations. To the extent the
6 procedure the county follows in processing a LUCS request has any bearing on
7 the county’s “jurisdiction,” both LUBA and the circuit court have authority to
8 review challenges that in issuing the final decision the local government
9 “[e]xceeded its jurisdiction.” ORS 197.835(9)(a)(A); ORS 34.040(1)(a).

10 Finally, we disagree with the underlined language in the above-quoted
11 argument that, where the ORS 197.015(10)(b)(H)(iii) exclusion applies to the
12 county’s final decision on a LUCS request, the consequence is that LUBA must
13 order the county to “reinstate” a lower body’s decision on the LUCS request.
14 As explained, where an ORS 197.015(10)(b)(H) exclusion applies, LUBA must
15 dismiss the appeal or transfer the appeal of that final decision to circuit court, if
16 a motion to transfer has been filed. Nothing cited to us authorizes LUBA to
17 order the county in these circumstances to “reinstate” the planning director’s
18 August 13, 2014 decision, which never became a final decision.

19 To conclude, we agree with T/K that the ORS 197.015(10)(b)(H)(iii)
20 exclusion applies to the April 8, 2015 and April 23, 2015 decisions, although
21 we disagree with T/K’s argument about the consequences of that conclusion.

commissioners expressly affirmed that exercise of discretion. T/K does not directly challenge either the planning director’s exercise of discretion under DCC 22.16.010(B) or the commissioners’ findings that affirm that exercise of discretion.

1 **MOTION TO TRANSFER**

2 As noted, pursuant to OAR 661-010-0075(11) the Bishops filed an
3 alternative motion to transfer their two appeals to circuit court, in the event
4 LUBA concludes that we lack jurisdiction over their appeals.¹⁰

5 T/K opposes the motion to transfer the Bishops' appeals to circuit court,
6 on two grounds. First, T/K argues that the motion is untimely. OAR 661-010-
7 0075(11)(b) requires the motion to transfer to be filed within 14 days of a
8 challenge to LUBA's jurisdiction. The Bishops' motion was filed within 14
9 days of the date T/K filed its motion to dismiss. However, T/K argues that they
10 have consistently questioned the county's "land use jurisdiction" throughout
11 the proceedings below, and that the 14-day deadline to file a motion to transfer

¹⁰ OAR 661-010-0075(11) provides, as relevant:

- "(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in 197.015(10) or (12).
- "(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent's brief or motion that challenges the Board's jurisdiction is filed. * * *
- "(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made."

1 should be measured not from the date T/K's motion to dismiss was filed with
2 LUBA, but from some earlier date during the proceedings below. We reject the
3 argument. OAR 661-010-0075(11)(b) clearly imposes the 14-day deadline
4 from the date that LUBA's jurisdiction is challenged in the proceedings before
5 LUBA.

6 Second, T/K argues that the 60-day deadline to file a writ of review at
7 ORS 34.030 should be the proper deadline to invoke the circuit court's
8 jurisdiction, and therefore the Bishops' failure to file a writ of review in circuit
9 court within 60 days of the date the planning director's August 13, 2014
10 decision was issued should preclude transfer of the Bishops' appeals to circuit
11 court under OAR 661-010-0075(11).

12 There are too many problems with that argument to fully address, so we
13 will simply observe that the Bishops' appeals concern the April 8, 2015
14 decision and the April 23, 2015 LUCS decision, the county's final decisions on
15 the LUCS request, not the planning director's August 13, 2014 LUCS decision,
16 which never became a final decision. ORS 34.102(4) allows an appeal with
17 LUBA to be transferred to circuit court and treated as a writ of review, if the
18 notice of intent to appeal to LUBA was filed with LUBA within the 60-day
19 deadline for filing a writ of review.¹¹ Under ORS 34.030, the 60-day deadline

¹¹ ORS 34.102(4) provides:

"A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. If the notice was not filed with the board within the

1 is measured from the date of the challenged decision, in this case April 8, 2015,
2 and April 23, 2015. The Bishops' appeals to LUBA were filed well within 60
3 days of those dates.

4 In any case, a final problem is that ORS 34.102(4) requires only one
5 determination on LUBA's part, *i.e.*, that the appealed decision is not
6 reviewable as a land use decision or limited land use decision as defined in
7 ORS 197.015. Once LUBA concludes that it is not such a decision, the statute
8 appears to require that LUBA "shall" transfer the matter to circuit court where
9 it will be treated as a petition for writ of review. The last sentence of the
10 statute directs "[i]f the notice was not filed with the board within the time
11 allowed for filing a petition for writ of review pursuant to ORS 34.010 to
12 34.100, the court shall dismiss the petition." The statute therefore appears to
13 assign responsibility for determining whether the notice was timely filed to the
14 circuit court.

15 **DISPOSITION**

16 The Bishops' appeals of the April 8, 2015 decision and the April 23,
17 2015 decision, at issue in LUBA No. 2015-027 and 2015-030, are transferred
18 to Deschutes County Circuit Court.

19 T/K have not moved to transfer their appeal of the April 8, 2015 decision
20 at issue in LUBA No. 2015-028. Therefore, that appeal must be dismissed.
21 OAR 661-010-0075(11)(c); *Maguire v. Clackamas County*, 250 Or App 146,
22 160-61, 279 P3d 314 (2012).

time allowed for filing a petition for writ of review pursuant to
ORS 34.010 to 34.100, the court shall dismiss the petition."

DESCHUTES COUNTY OFFICIAL RECORDS
NANCY BLANKENSHIP, COUNTY CLERK

2014-28241



\$88.00

After Recording, Return to:
KC Development Group, LLC
63560 Johnson Rd
Bend, OR 97701

D-AG Crtcl Stmt SRB 08/27/2014 10:33:48 AM
\$40.00 \$11.00 \$21.00 \$10.00 \$6.00

No Changes to Tax Statements.

IRRIGATION CONTRACT

(WATER STORAGE EASEMENT AGREEMENT)

Tumalo Irrigation District, hereinafter referred to as "TID," is an Oregon Irrigation District established under ORS Chapter 545 Oregon Revised Statutes. KC Development Group, LLC, hereinafter referred to as "KCDG" is an Oregon limited liability company and the owner of real property described in "Exhibit A," attached hereto, and incorporated herein by this reference. Together, they are "Parties" to this Agreement.

RECITALS

WHEREAS, TID holds a valid water right pursuant to Oregon Water Resources Department Certificate Number 76684 ("Certificate") to store 1100 acre feet of surface water at what is commonly known as Upper Tumalo Reservoir in Deschutes County, Oregon; and

WHEREAS, KCDG desires to assist in storing 108 acre feet of water (the "Stored Water") currently stored at upper Tumalo Reservoir, on its property described herein in "Exhibit A" (Subject Property); and

WHEREAS TID is willing to allow KCDG to hold the Stored Water authorized to be stored under the Certificate in exchange for payment to TID;

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

AGREEMENT

1. The above recitals are incorporated herein.
2. TID will permit KCDG to store 108 acre feet of water in the ponds located on the Subject Property described in "Exhibit A," particularly in the ponds (the "Ponds") described in "Exhibit B," attached hereto and by this reference incorporated herein. (TID shall also deliver surface irrigation water to Subject Property, which water shall pass through the Ponds but shall not be stored on the Subject Property or in the Ponds, and such additional delivered water shall be used for irrigation in accordance with other irrigation rights held by KCDG, and not the subject of this Agreement.)

1 - WATER STORAGE EASEMENT AGREEMENT

3. KCDG agrees to pay to TID certain consideration to hold the Stored Water on KCDG's Subject Property. Said consideration shall be made by payment of \$50.00 per acre foot of water right, per year, payable by check or other form of payment to TID on or before March 1st of each year, commencing on JUNE 10, 2014 for the first year, and to be paid by March 1st in each subsequent year for the following irrigation season. The initial charge of \$50.00 per acre foot shall be adjusted annually by the same percentage change made by TID in the total annual assessment and other account charges for each acre of land on TID's Certificate and entitled to irrigation pursuant to ORS 545.444, or by subsequent statute as that may be changed by Oregon's Legislature in the future. Payment is based on one acre foot of storage allowed under the storage right. Failure to make payment following 30 days written notice to KCDG is a default under this Agreement.

4. The obligations represented in this Agreement are contingent upon the Oregon Department of Water Resources ("OWRD") approval of the transfer of the desired portion of the storage rights under the Certificate to the Exhibit "B" ponds. The approval of and a new certificate issued by the OWRD shall have the final proof submitted to OWRD by March 1, 2018. In the event OWRD does not approve the transfer of storage rights to the Ponds, this Agreement shall become null and void and of no further effect.

5. As further consideration for the transfer of the storage rights from Upper Tumalo Reservoir to the Ponds, KCDG shall pay all filing fees, engineering fees, reimburse TID for reasonable legal fees expended, staff time expended by TID personnel and any other costs or fees incurred by TID for the purpose of making the subject transfer or attempted transfer of storage rights from the certificate to the Ponds. Reimbursement to TID shall be made within 30 days of submission of the bill by TID to KCDG. Failure to make payment within 30 days of written notice is a default by KCDG under this Agreement. In the event OWRD does not approve said transfer, KCDG shall not be entitled to any refund of fees and costs paid to TID.

6. Upon execution of this Agreement and thereafter, and subject to approval of the transfer described in Paragraph 4, above, KCDG grants TID a perpetual Non-Exclusive Easement across the Subject Property and the Ponds for the purpose of examining the Ponds to assure itself of compliance by KCDG to this Agreement.

KCDG agrees to maintain the Ponds in acceptable condition to store the water allowed under the storage right. Maintenance of the Ponds, water conveyance lines, and any other construction necessary to accomplish the intent of this Agreement are to be borne by KCDG. Any repairs, adjustments or other construction deemed necessary by TID to comply with this agreement shall be performed by KCDG, or at KCDG's expense.

7. In the event KCDG fails to perform or is otherwise in default under this Agreement, upon 30 days written notice from TID or such longer period as it reasonably necessary to perform, TID shall be entitled to apply to OWRD to transfer the storage rights from the newly created certificate back to Upper Tumalo Reservoir, and KCDG hereby appoints TID its Attorney in Fact to consummate said transfer back to Upper Tumalo Reservoir.

2 - WATER STORAGE EASEMENT AGREEMENT

year is necessary for KCDG to prove up and accomplish all items required for the transfer of the stored water to the Ponds, such additional one year temporary transfer as needed will be filed. In order to qualify for a permanent transfer, KCDG shall be required to:

A. Fill the ponds with 108 acre feet of water, and in the event the ponds will not hold at least said amount, the permanent transfers shall be reduced to the amount of acre feet of water actually held by the Ponds.

B. KCDG will transfer the surface irrigation water rights currently appurtenant to the Subject Property area of the Ponds, and will transfer the rights to another irrigable area. The irrigation rights, when transferred, shall be proven up and are a further condition that must be completed before TID is required to apply for a permanent transfer of the stored water.

8. TID will renew the temporary transfers on a yearly basis as long as KCDG is proceeding in good faith to complete the preceding items A. and B. Once items A. and B. are completed, then TID agrees to consent to the permanent transfer. If water is available and KCDG fails to store the acre feet of water authorized for storage pursuant to the new storage water right certificate given by OWRD for a period of 5 irrigation seasons, fails to beneficially apply water to land with the water rights to be serviced by said Ponds for a period of 5 years, fails to maintain the Ponds in a proper, safe condition, complying with all applicable Federal, State and Local Laws, Rules and Ordinances, or to comply with the By-Laws, Rules, Regulations or other requirements of Tumalo Irrigation District then TID may proceed under ORS chapter 540 to have the water storage rights removed to another location.

9. This Agreement is binding upon the parties, their heirs, successors, and devisees.

10. The parties understand that the law firm of Carl W. Hopp, Jr., Attorney at Law, LLC, has served as legal counsel to Tumalo Irrigation District in the negotiation of the terms of this Agreement, and does not represent KCDG in connection with this Agreement.

11. The rule of construction that a written instrument is construed against the party preparing or drafting such written instrument shall specifically not be applicable to the interpretation of this Agreement, and any documents executed and delivered pursuant to, or in connection with this Agreement.

If any arbitration, mediation, or other proceeding is brought in lieu of litigation, or if suit or action is instituted to enforce or interpret any of the terms of this Contract, or if suit or action is instituted in a Bankruptcy Court for a United States District Court to enforce or interpret any of the terms of this Contract, to seek relief from an automatic stay, to obtain adequate protection, or to otherwise assert the interest of Seller in a bankruptcy proceeding, the party not prevailing shall pay the prevailing party's costs and

3 - WATER STORAGE EASEMENT AGREEMENT

disbursements, the fees and expenses or expert witnesses in determining reasonable attorney fees pursuant to ORCP 68, the actual cost of a litigation or foreclosure report, and such sum as the court may determine to be reasonable for the prevailing party's attorney fees connected with the trial and any appeal and by petition for review thereof.

12. KCDG shall indemnify, defend, and hold harmless TID and its directors, officers, employees, agents and contractors for, from and against any and all losses, claims, actions, damages, liabilities, penalties, fines or expense, of whatsoever nature, arising from, related to, or in any way connected to this Agreement, including, without limitation, reasonable attorneys' fees and costs on account of mechanics' lien claims, injury to persons, the death of any person, or damages to property arising from the use of the Subject Property, the Ponds, or adjoining areas, or from any activities contemplated by this Agreement, in each case undertaken by KCDG or any other person claiming by, through, or under KCDG. In the event litigation or proceedings brought against TID arising out of or in any way connected with any of the above events or claims, against which KCDG agrees to defend TID, KCDG will, on notice from TID, vigorously resist and defend such actions or proceedings in consultation with TID through legal counsel reasonably satisfactory to TID. The indemnity set forth in this paragraph shall be effective without regard to compliance or non-compliance with this Agreement by KCDG or TID.

13. TID reserves the right, in the event of drought or other emergencies, to pump out the Stored Water in the Ponds on KCDG's Subject Property for use by TID for as long as the drought or other emergency remains in effect.

14. TID makes no representation that storage water will be available. Fees under this Agreement are due TID whether or not water is available. TID is not liable for any loss, damage, or claim which may be made for failure to supply storage water or the withdrawal of storage water.


15. KCDG and its successors shall require the purchasers/lessees at the time of purchase or lease of residential lots in the development to sign and record a document acknowledging that the purchaser/lessee has read and accepted this Contract.

DATED this 10th day of June, 2014.

TUMALO IRRIGATION DISTRICT

KC DEVELOPMENT GROUP, LLC

By 
Ken Reick, Manager

By 
Eric Caldwell
Its managing member

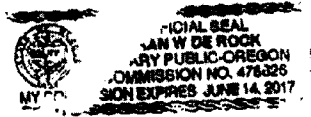
STATE OF OREGON)

County of Deschutes)

ss.

This instrument was acknowledged before me on June 10, 2014 by Kenneth B. Rieck as
Manager and Secretary to the Board of Tumalo Irrigation District.

Fran W. DeRock
NOTARY PUBLIC FOR OREGON



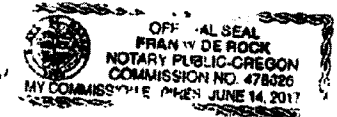
STATE OF OREGON)

County of Deschutes)

ss.

This instrument was acknowledged before me on June 10, 2014 by
ERIC ADWELL of KC Development Group,
LLC.

Fran W. DeRock
NOTARY PUBLIC FOR OREGON



5 - WATER STORAGE EASEMENT AGREEMENT

ATTACHMENT "A"

Subject Property located on the following lots

17-11-13-NE/NW-00819
17-11-13-NW/NE-00819
17-11-13-NW/NE-00820
17-11-13-NW/NE-00821
17-11-13-NW/NW-00822
17-11-13-NE/NW-00822
17-11-13-NE/NW-00823
17-11-13-NW/NE-00823
17-11-13-NW/SW-00823
17-11-13-SE/NW-00823
17-11-13-SW/NW-00823
17-11-13-NW/SW-00824
17-11-13-SE/NW-00824
17-11-13-SW/NW-00824
17-11-13-SW/NW-00828
17-11-13-NE/NW-00829
17-11-13-NW/NW-00829

The above tax lots are further described in the following books and pages:

Tax lots 171114 11401, 171114 11600, 171113 828, 171113 829, and 171113 823 are described in bk/pg 2014-00896, deed to KC Development Group Tax lot 171113 824 is described in bk/pg 2013-44753, deed to KC Development Group Tax lots 171113 825 and 171113 827 are described in bk/pg 2013-44609, deed to KC Development Group Tax lot 171113 826 is described in bk/pg 2013-44754, deed to KC Development Group Tax lot 171113 820 is described in bk/pg 2013-48433, deed to KC Development Group Tax lot 171113 819 is described in bk/pg 2013-48434, deed to Eric and Brianna Cadwell Tax lot 171113 822 is described in bk/pg 2013-48435, deed to Harris and Nancy Kimble

ATTACHMENT B

The Ponds located on the following tax lots

All are 17-11-13

Pond #1

NE/NW 00828

NW/NE 00828

Pond #2

NW/SW 00824 & 00828

SE/NW 00824 & 00828

SW/NW 00824 & 00828

NE/SW 00824

The above tax lots are further described in the following books and pages:

The north pond is situated entirely on Tax lot 171113 828, which is described in 2014-00896 The south pond is situated on tax lot 171113 828, described in 2014-00896, and tax lot 171113 824, described in 2013-44753, both being KC Development Group.

From: Receptionist at CW Hopp Attorney at Law [<mailto:reception@cwhepp.com>]
Sent: Monday, June 30, 2014 10:57 AM
To: Jennifer Bragar
Subject: Tumalo Irrigation District

Dear Ms. Bragar: This letter is in response to your letter of June 16, 2014 wherein you allege that the Agreement approved by the Tumalo Irrigation District Board of Directors with KC Development Group, LLC violates Oregon's Public Contracting laws. You are clearly in error. You allege that the irrigation contract is either a "(1) the purchase or acquisition of water storage, or (2) the sale or other disposal of a portion of TID's water and/or storage right held by the District pursuant to Oregon Water Resources Department Certificate Number 76684.

First, TID has not disposed of an asset. TID has moved a portion of a storage right from one location to another. TID retains the right to use the stored water. The new location is deemed to be in the irrigation district's best interest as it is higher in the system and provides less water loss; thus providing a significant upgrade to TID's water delivery system.

Secondly, the Agreement is not for specific work to be performed for the District. The Agreement does not provide for TID to either perform work for a fee, or to have work performed for it for a fee.

Thirdly, it is a matter of urgency that the contract be executed.

In conclusion, I believe you are confused by the title "Irrigation Contract". The fact that it is termed a Contract does not make it a Public Contract as defined in ORS 279A.010(1)(z). Rather, an Irrigation Contract is specifically defined under ORS 552.618.

In summation, TID has not violated any public contracting laws. The copy of the Agreement you possess is a placeholder, as I am sure you are aware the Exhibits attached are not recordable. The final Agreement is being put together and will be recorded in the near future.

Sincerely,

Carl W. Hopp, Jr.
Attorney at Law, LLC
168 NW Greenwood Avenue
Bend, OR 97701
(541) 388-3606 Fax 541-330-1519
email:reception@cwhepp.com

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seattle, washington
washington, d.c.
GSBLAW.COM

GARVEY SCHUBERT BARER

A PARTNERSHIP OF

Certified Article Number

7196 9008 9111 2038 0432

Please reply to JENNIFER BRAGAR
jbragar@gsblaw.com
Telephone 503 553 3208

June 16, 2014

SENDERS RECORD

VIA EMAIL AND CERTIFIED MAIL

Carl W. Hopp, Jr.
Attorney for Tumalo Irrigation District
Carl W. Hopp, Jr., LLC
168 NW Greenwood
Bend, OR 97701

Re: Notice to Tumalo Irrigation District of Violation of Public Contracting Laws Pursuant to
ORS 279B.420(3)

Dear Mr. Hopp:

Our office represents Thomas and Dorbina Bishop, trustees of the Bishop Family Trust dated December 3, 2003, who live at 63382 Fawn Lane, Bend, Oregon, within the Tumalo Irrigation District ("TID") boundaries. The Bishops' property receives irrigation water from the District pursuant to an appurtenant water right. This letter provides notice under ORS 279B.420(3)(e) that the Irrigation Contract awarded to KC Development Group, LLC ("KCDG") on June 10, 2014, violates Oregon's public contracting laws. To the extent that TID has adopted further administrative remedies or procedures for review of violations of the public contracting laws, consider this letter as a request for such further administrative review.¹

The Irrigation Contract is a public contract as defined in ORS 279A.010(1)(z):

"Public contract" means a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. "Public contract" does not include grants.

The Irrigation Contract is either a (1) the purchase or acquisition of water storage, or (2) the sale or other disposal of a portion of TID's water and/or water storage right held by the District pursuant to Oregon

¹ If further administrative review is available through TID's adopted procedures, please provide an explanation of that process and a copy of the adopted policy and/or procedures.



GARVEY SCHUBERT BARER

Carl W. Hopp, Jr.
June 16, 2014
Page 2

Water Resources Department Certificate Number 76684. In consideration for storing a portion of TID's water on KCDG's property, KCDG contracted to pay \$50/acre feet of water annually, for up to 108 acre feet of water. See Attachment 1.

Under ORS 279B.050, TID may not award a public contract for its water storage rights without undertaking a competitive sealed bidding process. As noted above, ORS 279A.010(1)(z) defines a public contract to include both purchases and sales of goods and services. Despite numerous letters and testimony to TID in regards to the low value being received by TID for the KCDG contract, as well as notice that Mr. and Mrs. Bishop questioned TID's compliance with public contracting laws, TID still entered the contract on June 10, 2014.

The TID/KCDG Irrigation Contract must be set aside because TID entered a public contract without undertaking a competitive sealed bidding process. If TID does not immediately respond to this letter and show that the contract has been set aside, Mr. and Mrs. Bishop will pursue all available legal remedies.

Sincerely,

GARVEY SCHUBERT BARER

By

Jennifer Bragar

JB:dw
Attachment

cc: Ken Rieck (by email and certified mail)
Fran DeRock (by email)
Clients

Certified Article Number

7196 9008 9111 2038 0449

SENDERS RECORD

PDX_DOCS:518797.5

After Recording, Return to:
KC Development Group, LLC
63560 Johnson Rd
Beav, OR 97701

No Changes to Tax Statements.

IRRIGATION CONTRACT

(WATER STORAGE EASEMENT AGREEMENT)

Tumalo Irrigation District, hereinafter referred to as "TID," is an Oregon Irrigation District established under ORS Chapter 545 Oregon Revised Statutes. KC Development Group, LLC, hereinafter referred to as "KCDG" is an Oregon limited liability company and the owner of real property described in "Exhibit A," attached hereto, and incorporated herein by this reference. Together, they are "Parties" to this Agreement.

RECITALS

WHEREAS, TID holds a valid water right pursuant to Oregon Water Resources Department Certificate Number 76684 ("Certificate") to store 1100 acre feet of surface water at what is commonly known as Upper Tumalo Reservoir in Deschutes County, Oregon; and

WHEREAS, KCDG desires to assist in storing 108 acre feet of water (the "Stored Water") currently stored at upper Tumalo Reservoir, on its property described herein in "Exhibit A" (Subject Property); and

WHEREAS TID is willing to allow KCDG to hold the Stored Water authorized to be stored under the Certificate in exchange for payment to TID;

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

AGREEMENT

1. The above recitals are incorporated herein.
2. TID will permit KCDG to store 108 acre feet of water in the ponds located on the Subject Property described in "Exhibit A," particularly in the ponds (the "Ponds") described in "Exhibit B," attached hereto and by this reference incorporated herein. (TID shall also deliver surface irrigation water to Subject Property, which water shall pass through the Ponds but shall not be stored on the Subject Property or in the Ponds, and such additional delivered water shall be used for irrigation in accordance with other irrigation rights held by KCDG, and not the subject of this Agreement.)

1 - WATER STORAGE EASEMENT AGREEMENT

3. KCDG agrees to pay to TID certain consideration to hold the Stored Water on KCDG's Subject Property. Said consideration shall be made by payment of \$50.00 per acre foot of water right, per year, payable by check or other form of payment to TID on or before March 1st of each year, commencing on JUNE 10, 2014 for the first year, and to be paid by March 1st in each subsequent year for the following irrigation season. The initial charge of \$50.00 per acre foot shall be adjusted annually by the same percentage change made by TID in the total annual assessment and other account charges for each acre of land on TID's Certificate and entitled to irrigation pursuant to ORS 545.484, or by subsequent statute as that may be changed by Oregon's Legislature in the future. Payment is based on one acre feet of storage allowed under the storage right. Failure to make payment following 30 days written notice to KCDG is a default under this Agreement.

4. The obligations represented in this Agreement are contingent upon the Oregon Department of Water Resources ("OWRD") approval of the transfer of the desired portion of the storage rights under the Certificate to the Exhibit "B" ponds. The approval of and a new certificate issued by the OWRD) shall have the final proof submitted to OWRD by March 1, 2018. In the even OWRD does not approve the transfer of storage rights to the Ponds, this Agreement shall become null and void and of no further affect.

5. As further consideration for the transfer of the storage rights from Upper Tumalo Reservoir to the Ponds, KCDG shall pay all filing fees, engineering fees, reimburse TID for reasonable legal fees expended, staff time expended by TID personnel and any other costs or fees incurred by TID for the purpose of making the subject transfer or attempted transfer of storage rights from the certificate to the Ponds. Reimbursement to TID shall be made within 30 days of submission of the bill by TID to KCDG. Failure to make payment within 30 days of written notice is a default by KCDG under this Agreement. In the event OWRD does not approve said transfer, KCDG shall not be entitled to any refund of fees and costs paid to TID.

6. Upon execution of this Agreement and thereafter, and subject to approval of the transfer described in Paragraph 4, above, KCDG grants TID a perpetual Non-Exclusive Easement across the Subject Property and the Ponds for the purpose of examining the Ponds to assure itself of compliance by KCDG to this Agreement.

KCDG agrees to maintain the Ponds in acceptable condition to store the water allowed under the storage right. Maintenance of the Ponds, water conveyance lines, and any other construction necessary to accomplish the intent of this Agreement are to be borne by KCDG. Any repairs, adjustments or other construction deemed necessary by TID to comply with this agreement shall be performed by KCDG, or at KCDG's expense.

7. In the event KCDG fails to perform or is otherwise in default under this Agreement, upon 30 days written notice from TID or such longer period as it reasonably necessary to perform, TID shall be entitled to apply to OWRD to transfer the storage rights from the newly created certificate back to Upper Tumalo Reservoir, and KCDG hereby appoints TID its Attorney in Fact to consummate said transfer back to Upper Tumalo Reservoir.

2 - WATER STORAGE EASEMENT AGREEMENT

To effectuate this transfer, TID shall use a District temporary transfer under ORS 540.570. This temporary transfer will be good for a period of one year. If an additional year is necessary for KCDG to prove up and accomplish all items required for the transfer of the stored water to the Ponds, such additional one year temporary transfer as needed will be filed. In order to qualify for a permanent transfer, KCDG shall be required to:

A. Fill the ponds with 108 acre feet of water, and in the event the ponds will not hold at least said amount, the permanent transfers shall be reduced to the amount of acre feet of water actually held by the Ponds.

B. KCDG will transfer the surface irrigation water rights currently appurtenant to the Subject Property area of the Ponds, and will transfer the rights to another irrigable area. The irrigation rights, when transferred, shall be proven up and are a further condition that must be completed before TID is required to apply for a permanent transfer of the stored water.

8. TID will renew the temporary transfers on a yearly basis as long as KCDG is proceeding in good faith to complete the preceding items A. and B. Once items A. and B. are completed, then TID agrees to consent to the permanent transfer. If water is available and KCDG fails to store the acre feet of water authorized for storage pursuant to the new storage water right certificate given by OWRD for a period of 5 irrigation seasons, fails to beneficially apply water to land with the water rights to be serviced by said Ponds for a period of 5 years, fails to maintain the Ponds in a proper, safe condition, complying with all applicable Federal, State and Local Laws, Rules and Ordinances, or to comply with the By-Laws, Rules, Regulations or other requirements of Tumalo Irrigation District then TID may proceed under ORS chapter 540 to have the water storage rights removed to another location.

9. This Agreement is binding upon the parties, their heirs, successors, and devisees.

10. The parties understand that the law firm of Carl W. Hopp, Jr., Attorney at Law, LLC, has served as legal counsel to Tumalo Irrigation District in the negotiation of the terms of this Agreement, and does not represent KCDG in connection with this Agreement.

11. The rule of construction that a written instrument is construed against the party preparing or drafting such written instrument shall specifically not be applicable to the interpretation of this Agreement, and any documents executed and delivered pursuant to, or in connection with this Agreement.

If any arbitration, mediation, or other proceeding is brought in lieu of litigation, or if suit or action is instituted to enforce or interpret any of the terms of this Contract, or if suit or action is instituted in a Bankruptcy Court for a United States District Court to enforce or interpret any of the terms of this Contract, to seek relief from an automatic stay, to obtain adequate protection, or to otherwise assert the interest of Seller in a bankruptcy proceeding, the party not prevailing shall pay the prevailing party's costs and

3 - WATER STORAGE EASEMENT AGREEMENT

disbursements, the fees and expenses or expert witnesses in determining reasonable attorney fees pursuant to ORCP 68, the actual cost of a litigation or foreclosure report, and such sum as the court may determine to be reasonable for the prevailing party's attorney fees connected with the trial and any appeal and by petition for review thereof.

12. KCDG shall indemnify, defend, and hold harmless TID and its directors, officers, employees, agents and contractors for, from and against any and all losses, claims, actions, damages, liabilities, penalties, fines or expense, of whatsoever nature, arising from, related to, or in any way connected to this Agreement, including, without limitation, reasonable attorneys' fees and costs on account of mechanics' lien claims, injury to persons, the death of any person, or damages to property arising from the use of the Subject Property, the Ponds, or adjoining areas, or from any activities contemplated by this Agreement, in each case undertaken by KCDG or any other person claiming by, through, or under KCDG. In the event litigation or proceedings brought against TID arising out of or in any way connected with any of the above events or claims, against which KCDG agrees to defend TID, KCDG will, on notice from TID, vigorously resist and defend such actions or proceedings in consultation with TID through legal counsel reasonably satisfactory to TID. The indemnity set forth in this paragraph shall be effective without regard to compliance or non-compliance with this Agreement by KCDG or TID.

13. TID reserves the right, in the event of drought or other emergencies, to pump out the Stored Water in the Ponds on KCDG's Subject Property for use by TID for as long as the drought or other emergency remains in effect.

14. TID makes no representation that storage water will be available. Fees under this Agreement are due TID whether or not water is available. TID is not liable for any loss, damage, or claim which may be made for failure to supply storage water or the withdrawal of storage water.

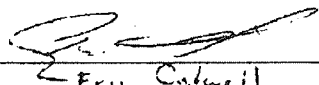
15. KCDG and its successors shall require the purchasers/lessees at the time of purchase or lease of residential lots in the development to sign and record a document acknowledging that the purchaser/lessee has read and accepted this Contract.

DATED this 10th day of June, 2014.

TUMALO IRRIGATION DISTRICT

KC DEVELOPMENT GROUP, LLC

By 
Ken Reick, Manager

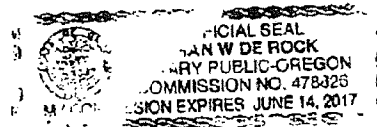
By 
Erin Caldwell
Its managing member

STATE OF OREGON)

County of Deschutes) ss.

This instrument was acknowledged before me on June 10, 2014 by Kenneth B. Rieck as Manager and Secretary to the Board of Tumalo Irrigation District.

Frank W. DeRock
NOTARY PUBLIC FOR OREGON

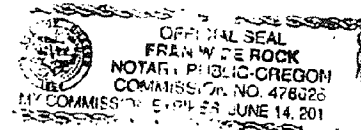
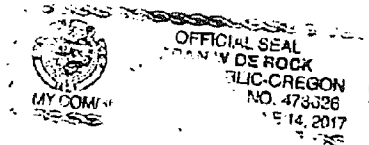


STATE OF OREGON)

County of Deschutes) ss.

This instrument was acknowledged before me on June 10, 2014 by ERIC ADWELL, of KC Development Group, LLC.

Frank W. DeRock
NOTARY PUBLIC FOR OREGON



5 - WATER STORAGE EASEMENT AGREEMENT

ATTACHMENT "A"

Subject Property located on the following lots

17-11-13-NE/NW-00819
17-11-13-NW/NE-00819
17-11-13-NW/NE-00820
17-11-13-NW/NE-00821
17-11-13-NW/NW-00822
17-11-13-NE/NW-00822
17-11-13-NE/NW-00823
17-11-13-NW/NE-00823
17-11-13-NW/SW-00823
17-11-13-SE/NW-00823
17-11-13-SW/NW-00823
17-11-13-NW/SW-00824
17-11-13-SE/NW-00824
17-11-13-SW/NW-00824
17-11-13-SW/NW-00828
17-11-13-NE/NW-00829
17-11-13-NW/NW-00829

ATTACHMENT B

The Ponds located on the following tax lots

All are 17-11-13

Pond #1

NE/NW 00828

NW/NE 00828

Pond #2

NW/SW 00824 & 00828

SE/NW 00824 & 00828

SW/NW 00824 & 00828

EXHIBIT E

CARL W. HOPP, JR.

ATTORNEY AT LAW, LLC

February 11, 2015

Board of County Commissioners of Deschutes County
c/o Anthony Raguine
Community Development Department
117 NW Lafayette Avenue
Bend, OR 97701

RE: Response of General Counsel of Tumalo Irrigation District to Jennifer Bragar's Letter of February 6, 2015

Dear Chair DeBone and Commissioners:

I am the general counsel for Tumalo Irrigation District ("TID" or the "District"). At the February 10, 2015 TID board meeting, the TID Board reviewed the February 6, 2015 submittal by Jennifer Bragar and found it so egregious that it asked me to respond directly to the Board of County Commissioners of Deschutes County. This response is supplemental to the formal response filed by Elizabeth Dickson, special counsel, representing TID in this matter.

There are several aspects of the application filed by TID for a LUCS that seem to require clarification. The first is that Tumalo Irrigation District is just that, an irrigation district serving approximately 600 water users in the Tumalo area of Deschutes County. KC Development Group, LLC ("KCDG") is the landowner and a water user of TID. TID was approached by Oregon Water Resources Department ("OWRD") and principals of KCDG with the idea that a storage reservoir on KCDG property would be beneficial to TID because of its location in the irrigation system.

TID has looked for additional reservoir space for decades. The desirability of having a reregulation reservoir has been well known within the District for years. In order to confirm this fact for third parties Ken Rieck took the time to go through numerous TID records and located the attached minutes from the May 24, 1948 Special Board Meeting (original on file at TID office). The purpose of the Special Board meeting was to request from the Bureau of Reclamation a new storage reservoir at Benham Falls. The minutes state that the reservoir would be used to allow TID to more timely adjust its system when "cool weather keeps the snow in the mountains from melting or at a time when the water

Exhibit E
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drops suddenly in Tumalo Creek and fails to start again because of the snow being only in the higher hills and then the storage water from Crescent Lake is turned out at the Lake, the storage at Benham Falls could be brought into our canals within a few hours and as it takes about four days for the water to come from Crescent Lake there would be considerable time saved in getting the storage water on the lands." Enclosed is a copy of the minutes of the special meeting of the TID Board of Directors held on May 24, 1948.

The problems facing the TID Board in 1948 are the same problems facing the Board today and are why TID is seeking to move 125 acre feet of storage to the KCDG property. The minutes of the May 24, 1948 meeting describe a reregulation reservoir. Based on OWRD's recommendation, the fact that KCDG is willing to pay the costs of the reservoirs, the reservoirs are lined and deeper than the existing Upper Tumalo Reservoir, thus reducing water loss, and the reservoirs are further up in the system so as to benefit more District patrons than the Upper Tumalo Reservoir, the TID Board has concluded that a transfer of storage water to the KCDG property would benefit the District. TID entered into an agreement with KCDG for these very reasons.

Ms. Bragar accuses TID of three misrepresentations. Ms. Bragar first alleges that TID mislead the County as to its interactions with County staff. This is clearly false. KCDG through its member, Harris Kimble, spoke with County staff as is indicated in his affidavit. TID's contacts with County staff were limited to requesting a LUCS which was freely given.

The second alleged TID misrepresentation is for a Stop Work Order for unpermitted construction of a boathouse and for a notice of violation for unpermitted water skiing on the reservoir. There is some debate as to whether a Stop Work Order was ever issued. Regardless of whether a Stop Work Order was ever issued, TID has no interest in a boathouse, did not construct the boathouse, and does not control activities upon any of its reservoirs unless they are harmful to its water delivery. As Mr. Bragar stated, the landowner received the alleged Stop Work Order, not TID.

The third alleged misrepresentation is that TID misrepresented the status of an Oregon Department of Geology and Mineral Industries ("DOGAMI") permit. The DOGAMI permit was not applied for by TID, nor does TID have anything to do with that permit. Further, the alleged violation of the winter range closure was stated in Ms. Bragar's letter as committed by the "property owner" and had nothing to do with TID.

TID is the applicant, not KCDG. KCDG is not even a party to this action. KCDG's actions cannot be attributed to TID and should have no bearing on TID's application to transfer the location of storage water. TID is not applying for recreational reservoirs or for cluster development and such issues are beyond the scope of the application at issue. Ms. Bragar's letter is replete with accusations of misdoing by TID and of the landowner, KCDG. TID is not KCDG, and thus not the actor behind the alleged misdoings. Ms. Bragar is simply trying to distract the Board of County

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Commissioners from the real issue which is whether TID can transfer the location of its storage water in accordance with its application.

The next item raised by Ms. Bragar is that the Wildlife Overlay Zone is meant to protect mule deer and other wildlife. At the hearing there was ample testimony supporting the fact that the two reservoirs on the KCDG property have enhanced wildlife, not hindered it. TID is not a developer, does not engage in recreational activity, and has no intent to be involved in a cluster development. If there is to be cluster housing development on the property I anticipate that the county will require additional permits. These would be permits required of the developer and owner of the property, KCDG. The same is true with recreational use. If recreational use is to take place on the reservoirs, it will be subject to any state or county regulations that exist and the burden will be on the landowner to comply with those regulations. However, regardless of whether regulations exist, if TID finds that the recreational activity is harmful to its water storage TID will act accordingly to eliminate the activity.

According to Ms. Bragar "ODFW was also aware that the property owner's ultimate plan is for a cluster development and indicated that it would provide further comments *at the appropriate time*." (emphasis added) As ODFW has recognized, this is not the appropriate time for comments on cluster development because TID is not applying for a cluster development. If and when an application for cluster development is submitted would be the appropriate time for Ms. Bragar to comment on cluster development on behalf of the Bishops or any other interested party. Now is not the time to address cluster development because the application in question is for the transfer of the location of storage water with TID as the applicant and TID has no intent or interest in applying for cluster development. Ms. Bragar is simply asking the Board of County Commissioners to analyze the adequacy of an application before that application has even been submitted. TID is the applicant in question and Ms. Bragar is suggesting that the Board review a potential application from KCDG. Such a suggestion by Ms. Bragar is illogical and unfair to TID as TID is in no position to, nor does it care to, defend future actions by KCDG. TID has applied to transfer storage water and respectfully requests that the Board analyze that issue and that issue alone.

In response to Ms. Bragar's statement that the county should "stop the applicants disregard of the County's Code," I would like to remind the Board that the applicant is TID and TID has not disregarded any of the County's Code. TID applied for a LUCS, the LUCS was approved by Deschutes County staff after due consideration, and TID proceeded with the water transfer application. Furthermore, the reservoirs are part of TID's system. There is a piped canal which delivers water to the reservoirs located on the KCDG property. KCDG has substantial water rights appurtenant to its property and thus is entitled to delivery of water for those rights. Water needed from the reregulation reservoirs will be pumped back into the pipeline, all of which is part of the existing irrigation system.

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Ms. Bragar goes on to say that OWRD requires new reservoirs to receive storage permits. TID has storage rights at Upper Tumalo Reservoir and is merely seeking to transfer 125 acre-feet of storage right from Upper Tumalo Reservoir to the KCDG reservoirs. No new permits or water rights are needed. If one reads the agreement between KCDG and TID, it is easily seen that TID retains complete control of the water, is legally entitled to restrict on site uses that adversely affect the reservoir, and can use the stored water as TID deems necessary.

Finally, Ms. Bragar states that the use of the reservoirs for reregulation is unsupported. To the contrary, it is supported by the testimony of Bob Varco, TID's Field Superintendent and the above mentioned TID Board minutes of May 24, 1948. The fact that pumps have not been installed is irrelevant. It would be unwise for TID to expend significant sums of money for pumps to return the water from the reservoirs to the piped canal until the water transfer is approved.

Ms. Bragar tries to tie-in a road, which the testimony indicates was already in existence, as an attempt by KCDG to avoid the application of code criteria. Once again, this is a KCDG issue, not a TID issue. TID constructed its buried canal pipeline and occasionally drives along the pipeline to ensure that there are no hazards or issues that would negatively impact the canal. Contrary to Ms. Bragar's assertion, TID is not asking "the County to sanction code violates so that KCDG may accomplish construction of its recreational use and first phase of cluster development[.]" TID is only asking that the County review its application to transfer storage water without allowing Ms. Bragar to muddy the waters with her assertions of wrongdoing and potential future activities by a third party. If there have been misdeeds, then TID is in support of addressing such behavior and only asks that the actions of another not be imputed to it.

Under Ms. Bragar's sixth point, she alleges that "TID does not have extensive support of this project[.]" To the contrary, numerous people testified in favor of the project at the hearing. Most of the support was from neighbors who liked the increased wildlife, improved view from their homes, and fire protection benefits. Ms. Bragar then goes on to state that TID is compromising the quality of its water by virtue of these new reservoirs. I would call the Commissioners' attention to the fact that water is currently delivered to Upper Tumalo Reservoir, a shallow mud flat and then water is run through pastures where it is susceptible to fertilizers, herbicides, pesticides, and animal feces. TID has approximately 30 owners that may use the stock runs for domestic water. Those homeowners have all signed affidavits that they utilize a water treatment system which is CDS compliant and contains a particulate filter to remove particulates, a charcoal filter to remove chemicals, and UV lights to kill bacteria. TID's legal obligations are met by these provisions.


In conclusion, TID is a separate entity not involved with KCDG other than for the purpose of locating reregulation reservoirs which are a benefit to TID's irrigation system and create additional revenue for the District. Ms. Bragar makes numerous accusations against KCDG and the landowner. TID is neither. TID is the sole applicant and as such,

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Ms. Bragar's accusations against KCDG and the landowner are irrelevant to this application. I ask that the Commissioners realize that this application has nothing to do with cluster developments, recreational water ski lakes, or surface mining. If these items require permits, then they are subject to application by KCDG, not TID. The County can address those issues when the permits are applied for. For now, TID respectfully requests that the Board analyze its application and its actions only. TID is confident that such an analysis will result in approval of its LUCS application.

Sincerely,



CARL W. HOPP, JR.
General Counsel for Tumalo Irrigation District

dh

Enc.

cc: client

Lovona Tietjens	Papering Office	30.00
Lorena Montgomery	" "	30.00
Farmers Auto. Ins.	Car Insurance	24.30
J.W. Copeland Yards	Cement 6 sacks	8.10
Bend Auto Parts Inc.	Spark Plugs	2.34
Duncan L. McKay	Preparing of Deed	2.50
G2434 Carl Mitchael Store	Supplies	1.19
Pacific Power & Light	Office Exp.	1.90
Band Sand & Gravel Co.	5 Yards Gravel	14.25
Bend Hardware Co.	Nails & Shovels	21.35
Claud Jackson	Welding & Iron	6.75
Standard Oil Co.	200 Gal. Diesel	27.10
S.I.A.C.	Insurance	15.06

A motion was made and seconded that a warrantee deed be given George and Thelma Silkworth on Lot No. 1 Block No. 9, River Terrace in the City of Bend. District to reserve a right of way of 20 feet along the northerly boundary also a right of way of 30 feet westerly from center of canal and 20 feet easterly from center of canal along the easterly part of the lot. Price to be \$325.00 less \$20.00 allowed for insured title to be obtained by purchaser. Motion carried by vote.

A new Pumice contract to C.R. Badger was held up until it was seen what the County assessor would do as to taxing the lands where pumice is being removed.

It was agreed to let the Swally Irrigation District have the use of the cat. to move dirt into the new rock cut, as leaks had developed.

The District books were audited for the years 1946-1947 by a State auditing member during the first part of April.

There being no further business the meeting adjourned.

J. L. Jones
President

G. W. Montgomery
Secretary

MINUTES OF SPECIAL MEETING
TUMALO, OREGON, MAY 24, 1948

The Board of Directors met at the Project Office in a special session on the above date at 8 P.M.

Present were Directors J.L. Jones, Delmer Davis and J.M. Johnson, also Secretary G.W. Montgomery.

Meeting was called for the purpose of determining the request to be sent along with the request of a number of other Districts for storage water at a proposed reservoir at Benham Falls. The request covering the different Districts will be sent

to the Bureau of Reclamation by Judge Sawyer chairman of the Irrigation Committee of the Bend Chamber of commerce. It was decided to apply for 3000 acre feet of storage water, to be used if needed in the early part of the season if cool weather keeps the snow in the mountains from melting or at a time when the water drops suddenly in Tumalo Creek and fails to start again because of the snow being only in the higher hills and then the storage water from Crescent Lake is turned out at the Lake, the storage at Benham Falls could be brought into our canals within a few hours and as it takes about four days for the water to come from Crescent Lake there would be considerable time saved in getting the storage water on the lands. As soon as the Crescent Lake water arrived at Benham Falls Reservoir, the water from the Lake would offset the flow from Benham Falls Reservoir.

The Secretary was instructed to send in the above request.

There being no further business the meeting adjourned.

J. L. Jones
President

G. W. Montgomery
Secretary

Minutes of Regular Meeting
Tumalo, Oregon, June 1, 1948

The Board of Directors met at the Project Office in regular session on the above date at 8 P.M.

Present were Directors J.L. Jones, Delmer Davis and J.M. Johnson, also the secretary G.W. Montgomery.

The minutes of the previous regular meeting were read and approved as read.

The following bills were audited and ordered paid;

C2435	Alex Lewis	Cat. Operator	25.23
	Bert Russell	Labor	55.37
	Albert Trueax	Patroling	95.00
	Kermit Peterson	Flume Work	9.89
	Roy Sloan	" "	9.89
C2436	J.L. Jones	Dir. Fee & Milage	5.80
	Delmer Davis	" " " "	5.80
	J.M. Johnson	" " " "	5.90
	G.W. Montgomery	Water Supt.	296.70
	Lovona Tietjens	Record Clerk	76.96
	H.H. DeArmond	Attorney Fee	25.00
C2437	J.D. Mayfield	Foreman	257.14
	Jerry Shepard	Labor	177.97
	Roy George	Patroling	207.60
	Jack Wilson	"	207.60
	Albert Trueax	"	112.60

632-030-0016

Total Exemptions

(1) Activities that would be included in the definition of surface mining in ORS 517.750(15) except for the fact that they are under the thresholds for excavation or disturbance in ORS 517.750(15)(a) and 517.755 or excluded under ORS 517.750(15)(b) are exempt from regulation under this rule division.

(a) The Department may require information to be provided by any person conducting mining activities to establish a total exemption.

(b) For operations producing less than 5,000 cubic yards of material per year and disturbing less than one acre of land per year that lose their total exemption under ORS 517.755 when mining operations affect more than five acres of land, all areas and operations at the site are subject to the Act and the rules adopted thereunder. When multiple mining areas are located within one parcel or contiguous parcels, the yards produced and disturbed acreage shall be calculated based on the total of all sites within the parcel or contiguous parcels.

(c) Excavation or other land disturbance operations reasonably necessary for farming include only the term "farming" as used in ORS 517.750(15)(b)(B) and means "farm use" as defined in ORS 215.203 but does not include other uses permitted in exclusive farm-use zones under ORS 215.213 or 215.263. Farm excavation or other land disturbance operations are reasonably necessary only if it substantially contributes to the profitability of the farm use and other alternatives to accomplish the same objective are significantly more expensive or otherwise impractical. Farming does not include excavation for ponds intended for recreational or aesthetics purposes or for fish or wildlife habitat.

(2) An operator may apply for a total exemption certificate, if desired. The application must be made to the Department using the established form. The Department may require the operator claiming this exemption to provide data to establish the validity of the exemption. The data required may include, but is not limited to:

(a) The name of the operator;

(b) Location of the excavation;

(c) Size of the site;

(d) Date of commencement of the excavation;

(e) A summary of the previous 36 months' activities and an estimate of the activity for the succeeding 36 months; and

(f) An explanation of why the activity is exempt.

Stat. Auth.: ORS 517.

Stats. Implemented: ORS 517.750.

Hist.: GMI 5, f. 12-20-73, ef. 1-11-74; GMI 7, f. 11-7-74, ef. 12-11-74; GMI 1-1990, f. 2-29-80, ef. 3-1-80; GMI 2-1982, f. & ef. 8-13-82; GMI 2-1985, f. 11-19-85, ef. 11-20-85; GMI 2-1986, f. 9-19-86, ef. 9-22-86; GMI 1-1988, f. 3-30-88, cert. ef. 3-11-88; GMI 2-1997, f. & cert. ef. 10-14-97; DGMI 1-1999, f. & cert. ef. 1-7-99; DGMI 1-2000, f. & cert. ef. 7-20-00; DGMI 1-2009, f. & cert. ef. 5-15-09.

OREGON ADMINISTRATIVE RULES
CHAPTER 632, DIVISION 30 — DEPARTMENT OF GEOLOGY AND MINERAL INDUSTRIES

(A) For which a permit is required but has not been obtained;

(B) Where a site has expanded outside the approved permit area without approval by the Department;

(C) That is in violation of ORS 517.750 - 517.900 and the rules adopted thereunder, the reclamation plan, or permit conditions;

(D) The Department may refer violations of Closure Orders to the Attorney General for legal proceedings under the provisions of ORS 517.880 or to the District Attorney for prosecution according to the provisions of ORS 517.990(3) and (4).

(b) An Operating Permit becomes invalid upon the expiration date if renewal has not been made, or at any time if the bond or alternate security has expired, has been cancelled without replacement, or is insufficient to cover the cost of reclamation. Reclamation obligations incurred prior to the date of cancellation of any bond or other security continue until the site is reclaimed;

(c) A Limited Exemption Certificate becomes invalid upon the expiration date if renewal has not been made.

(7) Reclamation by Department:

(a) Upon a finding of abandonment, the Department may perform the reclamation outlined in the reclamation plan to the extent possible, given the condition of the site when abandoned;

(b) The Department may perform alternative reclamation depending on site conditions. For example, the Department will not construct a lake if the excavation has not reached the water table; the Department shall not complete a proposed housing development;

(c) The Department may reclaim the site to:

(A) Eliminate or minimize hazards to the health and safety of the public;

(B) Eliminate or minimize any pollution or erosion;

(C) Rectify abuses of natural resources, including wildlife habitat and restoring drainage;

(D) A condition compatible with local agency regulations and with federal and state laws.

(8) Applicability of Laws and Rules. Permittees are subject to the provisions of statutes and rules in effect when their permits or certificates are issued. Permittees are also subject to provisions of statutes and rules enacted or adopted during the period of validity of their permits or certificates. To the extent there is conflict, the new statutes and rules apply.

Stat. Auth.: ORS 183.341, 197.180, 517.740 & 517.800(3) & (4)
Hist.: GMI 5, f. 12-20-73, ef. 1-11-74; GMI 7, f. 11-7-74, ef. 12-11-74; GMI 1-1980, f. 2-29-80, ef. 3-1-80; GMI 2-1982, f. & ef. 8-13-82; GMI 2-1985, f. 11-19-85, ef. 11-20-85; GMI 1-1988, f. 3-30-88, cert. ef. 3-11-88; GMI 4-1990, f. 9-8-90, cert. ef. 10-10-90; GMI 3-1991, f. 10-21-91, cert. ef. 11-1-91; GMI 1-1992, f. & cert. ef. 6-17-92; GMI 1-1993, f. 10-29-93, cert. ef. 11-4-93

Total Exemptions

632-30-016 (1) The following excavation or grading activities are exempt from these rules and do not require the payment of fees, posting of bond or submittal of reclamation plans:

(a) Access road excavation site. To maintain a total exemption, no more than 5,000 cubic yards of material from an access road mining site may be

used for another purpose during any period of 12 consecutive months;

(b) Farming and cemetery operations. Excavation or grading activities conducted in the process of farming or cemetery operations are exempt. To maintain this exemption, no more than 5,000 cubic yards of material may be used for another purpose during any period of 12 consecutive months;

(c) Beds and banks. Excavations of materials from the beds and banks of any waters of this state are exempt from these rules when conducted pursuant to a permit issued under ORS 541.605 to 541.625 and ORS 541.627 to 541.660;

(d) Operations producing less than 5,000 cubic yards of material per year and disturbing less than one acre of land are exempt;

(e) Exploration. Mineral exploration activities are exempt until the cumulative area affected by one operation exceeds one of the following:

(A) More than one acre within any eight contiguous acres explored including road construction;

(B) A total of five acres is disturbed;

(C) More than one contiguous acre is affected;

(D) More than 5,000 cubic yards of material is extracted per year.

(f) On-site construction operations. If more than 5,000 cubic yards of material are to be sold from a construction site, the Department may request documentation from the applicant establishing that removal of the material is an essential and integral part of the construction work. This documentation shall include evidence that the construction project has been approved by the appropriate land use authority and a construction time schedule has been filed. If removal of the material is not an essential and integral part of the construction project an Operating Permit must be obtained before any removal of material;

(g) On-site road construction. Excavation operations conducted within a road right-of-way or other easement for the primary purpose of road construction, reconstruction, or maintenance are exempt;

(h) Surface effects, created by underground mining prior to October 1, 1983, which have not been reclaimed.

(2) Applications for total exemption certificate if desired shall be made to the Department using the established form. The Department may require the applicant claiming this exemption to provide data to establish the validity of the exemption. The data required may include, but is not limited to, the name of the operator, location of the surface mining, size of the site, date of commencement of the surface mining, and a summary of the previous 12 months' surface mining and an estimate of the activity for the succeeding 12 months.

Stat. Auth.: ORS Ch. 517

Hist.: GMI 5, f. 12-20-73, ef. 1-11-74; GMI 7, f. 11-7-74, ef. 12-11-74; GMI 1-1980, f. 2-29-80, ef. 3-1-80; GMI 2-1982, f. & ef. 8-13-82; GMI 2-1985, f. 11-19-85, ef. 11-20-85; GMI 2-1986, f. 9-19-86, ef. 9-22-86; GMI 1-1988, f. 3-30-88, cert. ef. 3-11-88

Limited Exemption

632-30-017 (1) Limited exempt status is applicable to:

(a) Land surfaces which were affected by surface mining before July 1, 1972;

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

TRUTH IN SITE COALITION,
TRUTH IN SITE, LLC,
SCOTT MORGAN, MARIE R. MATTHEWS,
JOHN B. MATTHEWS and JUDY HECK,
Petitioners,

vs.

CITY OF BEND,
Respondent,

and

OREGON STATE UNIVERSITY – CASCADES,
Intervenor-Respondent.

LUBA No. 2014-098

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioners.

Mary Winters, City Attorney, Bend, filed a response brief and argued on behalf of respondent. With her on the brief was Gary Firestone.

Liz Fancher, Bend, and Stephen T. Janik, Portland, filed a response brief and argued on behalf of intervenor-respondent.

RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 06/08/2015

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

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision approving a site plan and design review
4 application for a university campus.

5 **FACTS**

6 Intervenor-respondent Oregon State University (OSU) applied for site
7 plan and design review approval for a new undergraduate college campus on a
8 10.44-acre parcel zoned Limited Commercial (CL). The proposed campus
9 includes student housing, a dining hall, several academic buildings, and a
10 parking lot on the north part of the property.

11 The subject property is located within the platted Century Washington
12 Center Subdivision and is bounded by SW Chandler Avenue on the south and
13 SW Century Drive on the east. A former surface mine is adjacent to the subject
14 property on the west, and OSU is a party to a purchase agreement to purchase
15 the former surface mine for possible expansion of the campus. A closed
16 landfill is adjacent to the subject property on the north. Properties located
17 directly to the south of the subject property are located in the Century
18 Washington Center Subdivision. The property located across SW Century
19 Drive to the east is developed with a hotel and restaurant.

20 The subject property is currently accessed from SW Chandler Avenue.
21 As part of its proposal, OSU proposes to add a second access point at SW
22 Century Drive, and to create a new private street on the northeastern edge of
23 the property that will connect SW Century Drive and SW Chandler Avenue. A
24 layout of the proposed development is appended to the opinion.

25 The hearings officer held hearings on the applications and approved the
26 applications. Petitioners and others appealed the decision to the city council.

1 The city council affirmed the hearings officer's decision with conditions. This
2 appeal followed.

3 **REPLY BRIEF**

4 Petitioners move for permission to file a reply brief to respond to new
5 matters raised in the response brief. OSU objects to the reply brief.

6 In its response brief, OSU alleges that several of the issues that
7 petitioners raise in the petition for review were not raised below either during
8 the evidentiary hearings or in petitioners' notice of appeal to the city council,
9 and are therefore waived. OSU also responds that LUBA's standard of review
10 for the challenged decision is not the standard of review identified in the
11 petition for review. We agree with petitioners that the reply brief is warranted
12 to address these new matters, and the reply brief is allowed.

13 **FIRST ASSIGNMENT OF ERROR**

14 As explained above, OSU proposes to add a second access point to the
15 subject property from SW Century Drive, and to create a new private street on
16 the northern edge of the property and the northern edge of the parking lot. The
17 new private street will connect SW Century Drive and SW Chandler Avenue.
18 As part of the approval, OSU is required to grant a public access easement over
19 the private street.

20 Bend Development Code (BDC) Chapter 3.4 provides requirements for
21 design and construction of public and private transportation facilities. BDC
22 3.4.200 sets out transportation improvement standards and provides in relevant
23 part:

24 "C. Creation of Rights-of-Way for Streets and Related Purposes.
25 Streets shall be created through the approval and recording
26 of a final subdivision or partition plat; except the City may
27 approve the creation of a Public Right-Of-Way by

1 acceptance of a deed, where no plat will be recorded; and
2 provided, that the street is deemed essential for the purpose
3 of implementing the Bend Urban Area Transportation
4 System Plan, and the deeded right-of-way conforms to this
5 code. All deeds of dedication shall be in a form prescribed
6 by the City and shall name 'the public' as grantee.

7 "D. Creation of Vehicular Access Easements. The City may
8 require a vehicular access easement established by deed
9 when the easement is necessary to provide for vehicular
10 access and circulation * * *."

11 In their first assignment of error, petitioners argue that BDC 3.4.200(C)
12 requires that the new private street can only be created through the approval
13 and recording of a final subdivision or partition plat, necessitating an
14 amendment of the recorded plat of Century Washington Center Subdivision.

15 In responding to petitioners' argument below, the city interpreted the
16 first part of the first sentence of BDC 3.4.200(C) to apply when a public street
17 or right of way is being created as part of a development that is also required to
18 be platted as a subdivision or partition. The city council concluded that the
19 second part of the first sentence of BDC 3.4.200(C) applies to OSU's proposed
20 creation of a private street without subdividing or partitioning the property, but
21 with a public access easement created by a deed. The city council found
22 support for that interpretation in another BDC provision, 3.1.200(D)(4), which
23 requires private streets to contain a public access easement if required to satisfy
24 block length and perimeter standards.¹

¹ The city council found:

"It is a routine practice for commercial or institutional development to go through development review utilizing the Site Plan Review process without needing to divide the land via a

1 As relevant here, under ORS 197.829(1)(a), the city council's
2 interpretation of the relevant provisions of the BDC is reversible only if it "is

subdivision or partition. If the property is to remain under one ownership there is no reason to formally divide the property; the property remains a single property even if a street runs through it. In these cases, public and private streets are created through separate documents and not with the recording of a plat, which is what is occurring with the construction of the new middle school on Skyliners Road for the extensions of Northwest Crossing Drive and Skyline Ranch Road. This is why the Code expressly allows the dedication of right of way via a deed and similarly allows the creation of access easements. The emphasized section of the above-cited Code recognizes that in some instances there is no plat to record, but a road must be created to serve the development. OSU-Cascades' proposal meets this Code provision because there is no new plat, and the creation of the private street is essential to meet the minimum block length and perimeter requirements of the Code.

"Another Code section that authorizes the creation of a private street with a public access easement is Section 3.1.200(7)(D)(4), which states: ' ... private streets, where authorized by this code, shall be constructed to public standards and contain a public access easement along the length and width of the private facility if required to satisfy the block length and perimeter standards.' Again, the Code requires private streets with public access easements be created when necessary to meet the block length and perimeter standards, which is the case with the new private street proposed by OSU- Cascades.

"Specific Finding

"The Bend City Council interprets 3.4.200(C) and 3.1.200(D)(4) to allow for the creation of a private street with a public access easement through recorded deed or easement document, and not necessarily through the recording of a subdivision or partition plat." Record 85 (emphases omitted).

1 inconsistent with the express language of the comprehensive plan or land use
2 regulation[.]” Under *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d
3 776 (2010), LUBA’s standard of review under ORS 197.829(1) is highly
4 deferential, and LUBA must defer to the city council’s interpretations unless
5 they are implausible. Petitioners focus on the express language in the first part
6 of the first sentence of BDC 3.4.200(C) to the exclusion of all of the other
7 express language that the city council relied on in interpreting the relevant
8 provisions, and argue that the city council’s interpretation is implausible.
9 Petitioners have not demonstrated that the city council’s interpretation is
10 “inconsistent with” the express language of all of the relevant BDC provisions,
11 and the city’s interpretation under ORS 197.829(1)(a) easily qualifies as
12 plausible.

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 As explained above, in the challenged decision the city council approved
16 an additional access point to the subject property from SW Century Drive. The
17 recorded plat of Century Washington Center Subdivision, of which the subject
18 property is a part, shows a “No Vehicle Access” strip over the parcels that are
19 adjacent to SW Century Drive. Record 3273. In their second assignment of
20 error, we understand petitioners to argue that the No Vehicle Access strip
21 prohibits the city from approving the new access.²

² BDC 3.1.400 allows the city to approve new access points in connection with a proposed development:

“C. Approval of Access Required. Proposals for new access shall comply with the following procedures:

-
- “1. Permission to access City streets shall be subject to review and approval by the City based on the standards contained in this chapter and the provisions of BDC Chapter 3.4, Public Improvement Standards. Access will be evaluated and determined as a component of the development review process.

“ * * * * *

- “F. Access Management Requirements. Access to the street system shall meet the following standards:

- “1. Except as authorized under subsection (F)(4) of this section, lots and parcels in all zones and all uses shall have one access point. * * *

“ * * * * *

- “4. Additional Access Points. An additional access point may be allowed when it is demonstrated that the additional access improves on-site circulation, and does not adversely impact the operations of the transportation system. If the second access point is only available to an arterial or collector roadway, the City may require one or more of these conditions of approval:

- “a. Locating the access the maximum distance achievable from an intersection or from the closest driveway(s) on the same side of the street;
- “b. Installation of turn restrictions limiting access to right-in and right-out when the new access would be located within 200 feet of an existing or planned traffic signal or roundabout and no left turn lane exists to accommodate left turn storage on the arterial or collector;

1 **A. Exhaustion Waiver**

2 ORS 197.825(2)(a) limits LUBA's jurisdiction "to those cases in which
3 the petitioner has exhausted all remedies available by right before petitioning
4 the board for review[.]" In *Miles v. City of Florence*, 190 Or App 500, 79 P3d
5 382 (2003), the Court of Appeals held that when the local appeal ordinance
6 requires an appealing party to specify the issues for appeal, and the local
7 ordinance expressly or impliedly limits the appeal body to the issues so
8 specified, the appeal body's review is generally limited to the specified issues.
9 190 Or App at 509-10. The Court of Appeals further held that ORS
10 197.825(2)(a) also limits LUBA's review to those issues that are raised on local
11 appeal. *Id.*

12 BDC 4.1.1120(A)(3) requires in relevant part that the specific criteria
13 relied on as the basis for an appeal must be set out in the notice of appeal with
14 a sufficient explanation of why the decision does not comply with the criteria,
15 so as to afford the city council the opportunity to respond to each issue.³ OSU

 "c. Establishing a shared access with an adjoining
 property when possible; and/or

 "d. Establishing a cross access easement with an
 adjoining property when possible."

³ BDC 4.1.1120(A)(3) provides that the appeal statement must contain:

 "A description of the issues sought to be raised by the appeal; and
 a statement that the issues were raised during the proceeding that
 produced the decision being appealed. This description must
 include the specific criteria relied upon as the basis for the appeal,
 and an explanation of why the decision has not complied with the
 standards or requirements of the criteria. The issues raised by the
 appeal must be stated with sufficient specificity to afford the
 reviewing authority an opportunity to resolve each issue raised."

1 responds, initially, that petitioners are precluded from raising the issue raised in
2 the second assignment of error because petitioners' appeal statement fails to
3 include "the specific criteria relied upon as the basis for the appeal[.]"

4 Petitioners respond that the issue presented in the second assignment of
5 error was raised at Record 739-40 with the specificity required by the BDC.
6 We have reviewed the cited pages from the Notice of Appeal and we agree with
7 petitioners that the issue was raised in the notice of appeal in a manner that
8 complies with BDC 4.1.1120(A)(3).

9 **B. "No Vehicle Access" Strip**

10 In response to petitioners' assignment of error arguing that the No
11 Vehicle Access strip precludes the city from approving the application, OSU
12 and the city (together, respondents) respond that the plat is not a "land use
13 regulation" as defined in ORS 197.015(11). Respondents contend therefore
14 that under ORS 197.828(2)(b), petitioners' arguments under the second
15 assignment of error provide no basis for reversal or remand of the decision.⁴

16 We agree with respondents. As explained below, ORS 197.828(2) sets
17 out our standard of review for limited land use decisions such as the site plan
18 review approval challenged in this appeal.⁵ ORS 197.828(2)(b) authorizes
19 LUBA to reverse or remand a limited land use decision that "does not comply
20 with applicable provisions of the land use regulations[.]" In our discussion of

⁴ ORS 197.015(11) defines "land use regulation" to mean "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

⁵ We set out and discuss in more detail ORS 197.828(2) in our resolution of the fourth assignment of error.

1 the fourth assignment of error below, we conclude that the decision before us
2 in this appeal is a limited land use decision as defined in ORS 197.015(12). If
3 the decision that is before us for review was a land use decision, rather than a
4 limited land use decision, our analysis and conclusion under the second
5 assignment of error might well have been different. That is because once
6 LUBA has jurisdiction to review a land use decision, LUBA's scope of review
7 in reviewing land use decisions under ORS 197.835 includes authority to
8 reverse or remand a decision that "[i]mproperly construes applicable law[.]"
9 ORS 197.835(9)(a)(D). We have construed the phrase "applicable law" as used
10 in ORS 197.835(9)(a)(D) to be broader than land use laws. *Cogan v. City of*
11 *Beaverton*, 57 Or LUBA 217, 225-26 (2008), *aff'd* 226 Or App 381, 203 P3d
12 303 (2009).

13 The plat is not a land use regulation and is not a part of BDC 3.1 or 3.4,
14 and petitioners have cited to nothing in BDC Chapter 3.1 or 3.4 that prohibits
15 the city from approving the access. Accordingly, petitioners' arguments
16 provide no basis for reversal or remand of the decision.

17 The second assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 As explained above, OSU is a party to an agreement to purchase the
20 adjacent 46-acre former mine site zoned Surface Mining (SM) from its current
21 owner, for potential expansion of the campus. During the proceedings below,
22 OSU presented informational concept plans for a potentially expanded campus
23 onto the adjacent 46-acre site. Record 2477-85. In their third assignment of
24 error, petitioners argue that in light of OSU's presentations included in the
25 record regarding the potentially expanded campus, the city improperly failed to

1 apply two of the provisions of BDC Chapter 4.5, Master Planning and
2 Development Alternatives, to the applications.

3 **A. BDC 4.5.300 Master Planned Development**

4 The first provision of BDC 4.5 that is relevant to the third assignment of
5 error, BDC 4.5.300, provides as relevant here:

6 “The Master Planned Development designation may be applied
7 over any of the City’s land use districts for any property or
8 combination of properties three acres or greater in size. For
9 projects consisting of one or more properties totaling 20 acres or
10 larger at the date of adoption of this code, a Master Neighborhood
11 Development Plan shall be required in conformance with BDC
12 4.5.400, Master Planned Neighborhood Development.”

13 The remainder of BDC 4.5.300 sets out review procedures and criteria for a
14 Master Planned Development. Master Planned Development approval requires
15 submission and approval of a concept development plan, a tentative
16 development plan, and a preliminary subdivision plat or a site design review
17 application. After all approvals are obtained, the property is designated as
18 master planned on a city map and a new provision is added to BDC Chapter 2.7
19 to reflect the new master planned district.

20 In general, then, the first sentence of BDC 4.5.300 provides an option for
21 an applicant to seek a Master Planned Development designation on any
22 property or combination of properties three acres or greater in size. The second
23 sentence of BDC 4.5.300 *requires* “projects consisting of one or more
24 properties totaling 20 acres or larger” to receive approval of a “Master
25 Neighborhood Development Plan” under BDC 4.5.400. We set out and
26 discuss BDC 4.5.400 below.

27 The word “project” is not defined in the BDC. The city council found
28 that the adjacent 46 acres zoned SM is not part of the “project” within the

1 meaning of BDC 4.5.300(A), because OSU does not own or control that
2 property. The city council interpreted the word “project” by looking at the
3 context provided by the phrase “one or more properties” in the same BDC
4 provision and the BDC requirement that a property owner must sign an
5 application to mean the proposal for which an applicant has the authority to
6 apply, either through ownership of a property or through the signature of a
7 property owner who is not the applicant. Record 25-31. OSU does not own
8 the adjacent property and the property’s owner did not sign the application for
9 site plan and design review. Accordingly, the city found that “the ‘project’ is
10 the 10.44 acre project * * *.” Record 26. The city imposed a condition of
11 approval that requires OSU to comply with the provisions of BDC Chapter 4.5
12 if OSU seeks to develop the 46 acres. Record 28.

13 A portion of petitioners’ third assignment of error argues that the second
14 sentence of BDC 4.5.300(A) requires OSU to seek Master Neighborhood
15 Development Plan approval because OSU’s own submissions to the record
16 demonstrate that OSU plans to develop a 56-acre campus, beginning with the
17 subject 10.44-acre property, and then expanding onto the adjacent 46-acre
18 property that it currently has an agreement to purchase. Therefore, according
19 to petitioners, OSU is proposing a “project[] consisting of one or more
20 properties totaling 20 acres or larger” under BDC 4.5.300(A). Petitioners
21 argue that the city’s interpretation of BDC 4.5.300 is inconsistent with (1) the
22 plain meaning of the word “project” as defined in *Webster’s Third New Int’l*
23 *Dictionary* (unabridged 2002), and (2) the purpose of BDC Chapter 4.5 set out
24 at BDC 4.5.100(A)(1)-(7).⁶ Petition for Review 26-30.

⁶ BDC 4.5.100 provides:

1 Respondents respond that the city's interpretation of BDC 4.5.300(A) is
2 not inconsistent with the dictionary definition of "project" as "1: a specific plan
3 or design[]" given that the only specific plan and design is for a 10.44 acre
4 college campus.⁷ Respondents also respond that the city's interpretation is not
5 inconsistent with the stated purpose of the master planning provisions because

"A. Purpose. The purpose of this section is to:

- "1. Encourage innovative planning that results in complete neighborhoods, more mixed-use development, improved protection of open spaces, transportation options, and site phasing of development;
- "2. Encourage developments that recognize the relationship between buildings, their use, open space, and transportation options, providing varied opportunities for innovative and diversified employment environments;
- "3. Facilitate the efficient use of land;
- "4. Promote an economic arrangement of land use, buildings, circulation systems, open space, and utilities;
- "5. Preserve to the greatest extent possible the existing landscape features and amenities that may not otherwise be protected through conventional development;
- "6. Encourage energy conservation and improved air and water quality; and
- "7. Assist the City in planning infrastructure improvements."

⁷ *Webster's Third New Int'l Dictionary 1813* (unabridged ed 2002).

1 the purpose statement is a general statement of purpose and that purpose is
2 implemented in the more specific provisions of BDC Chapter 4.5.

3 LUBA is required to affirm the city council's interpretation of BDC
4 4.5.300 unless that interpretation is "inconsistent with" the express language of
5 the BDC or inconsistent with the purpose of the BDC. ORS 197.829(1)(a) and
6 (b). While there is evidence in the record that supports a conclusion that OSU
7 eventually plans to develop a larger campus than the 10.44-acre proposal, we
8 agree with respondents that the city's interpretation of the word "project" as
9 used in BDC 4.5.300(A) in context with the phrase "one or more properties" in
10 the same code section as limiting the "project" to the property that an applicant
11 controls is not inconsistent with the operative language of BDC 4.5.300 or
12 inconsistent with the purpose of BDC Chapter 4.5. The city's interpretation of
13 BDC 4.5.300(A) is affirmed. ORS 197.829(1).

14 **B. BDC 4.5.400 Master Planned Neighborhood Development**

15 The second provision of BDC Chapter 4.5 that is relevant to the third
16 assignment of error, BDC 4.5.400, Master Planned Neighborhood
17 Development, provides in relevant part:

18 "The purpose of this section is to ensure the development of fully
19 integrated, mixed-use, pedestrian-oriented neighborhoods. The
20 intent is to minimize traffic congestion, urban and suburban
21 sprawl, infrastructure costs, and environmental degradation,
22 particularly as new development takes place on large parcels of
23 land.

24 "A. Applicability. This section applies to all properties
25 comprised of one or more lots, parcels, and/or tracts, in any
26 zoning district which totals 40 acres or larger at the date of
27 this code adoption.

28 "B. Master Plan Required. Prior to land division approval, a
29 master plan shall be prepared for all properties, lots, parcels

1 and/or sites meeting the criteria in subsection (A) of this
2 section. Master plans shall follow the procedures in BDC
3 4.5.300, Master Planned Developments. A master plan may
4 not be required if a Special Planned District has been
5 adopted for the subject area. * * *

6 BDC 4.5.400(A) thus provides that the Master Neighborhood Development
7 Plan provisions apply “to all properties comprised of one or more lots, parcels,
8 and/or tracts, in any zoning district which totals 40 acres or larger[.]” The
9 remainder of BDC 4.5.400 not quoted above sets out land use and design
10 standards for the Master Neighborhood Development Plan.

11 The city council found that BDC 4.5.400 does not apply to the
12 application because no land division is proposed as part of the development:

13 “Two sections of the [BDC] regulate when a master plan is
14 required. The first is Section 4.5.400(B), which requires master
15 plan approval for properties over 40 acres ‘[p]rior to land division
16 approval.’ Regardless of the size of the property subject to this
17 site plan review application, or the sizes of the properties adjacent
18 to it, there is no application for land division approval pending
19 before the City, which would be a subdivision or partition
20 application. Therefore, this master plan code provision does not
21 apply.” Record 25.

22 Petitioners argue that the city’s interpretation is inconsistent with the express
23 language of BDC 4.5.400(A). Petitioners argue that OSU’s property is located
24 in the CL zoning district and the adjacent property is located within the SM
25 zoning district, both of which contain more than 40 acres designated as such.
26 Accordingly, petitioners argue, the express language of BDC 4.5.400(A)
27 requires approval of a Master Neighborhood Development Plan. Petitioners
28 argue that the words “which totals 40 acres or larger” modify the noun
29 “district,” and that both the CL and the SM zoning districts are larger than 40
30 acres. Accordingly, petitioners argue, BDC 4.5.400(A) makes the provisions

1 of BDC 4.5.400 applicable to OSU’s proposal. Respondents respond that the
2 city correctly read the “applicability” section in BDC 4.5.400(A) together with
3 BDC 4.5.400(B) and the purpose statement contained in BDC 4.5.400 and
4 concluded that BDC 4.5.400 applies only when a proposal includes a land
5 division.

6 Petitioners do not address the city council’s interpretation that the
7 requirement for a Master Neighborhood Development Plan applies only when a
8 proposal includes a land division. We agree with respondents that the city
9 council’s interpretation of all of the relevant provisions of BDC 4.5.400 to
10 make the provision apply only when a proposal includes a land division is not
11 inconsistent with all of the relevant text of BDC 4.5.400. The city council’s
12 interpretation is affirmed. ORS 197.829(1).

13 The third assignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR**

15 Petitioners’ fourth assignment of error challenges the parking proposed
16 for the campus.

17 **A. BDC 3.3.300 Parking Management Plan**

18 BDC 3.3.300 sets out the minimum off-street parking requirements for
19 various uses listed in Table 3.3.300. “Schools (public and private) – college
20 and university campuses and trade schools” are not required to provide a
21 specific number of spaces, and no formula for calculating a required number of
22 spaces is set out in the BDC. Rather, university campuses must provide for
23 “[p]arking needs based on a Parking Management Plan [(PMP)] for all uses
24 contemplated for the entire campus[.]” Table 3.3.300. Thus, the only
25 requirement in the BDC for off-street parking for college campuses is to
26 provide a PMP to the city that accounts for parking for “all uses contemplated

1 for the entire campus.” Stated differently, in adopting BDC 3.3.300 and Table
2 3.3.300 as they regulate parking on a college or university campus, the city has
3 apparently chosen not to require precise numerical standards or develop a
4 formula for calculating off-street parking for that particular type of
5 development, but rather to rely on the information provided by an applicant in a
6 parking management plan.

7 OSU submitted a PMP prepared by a transportation engineering firm,
8 Kittleson, that concluded that OSU should be required to provide 310 parking
9 spaces.⁸ Record 51, 3022. The PMP based its conclusions on physical seating
10 capacity of spaces within campus buildings, users of the campus and modes of
11 travel, requirements of comparable cities where parking requirements for
12 colleges are determined by a formula, and comparison to the parking
13 management plan for Southern Oregon University. OSU also proposed to
14 employ transportation demand management measures, including requiring
15 students and faculty to register vehicles with the university. OSU’s
16 transportation engineers later updated the initial PMP to provide responses to
17 project opponents’ criticisms of the PMP’s assumptions. Record 1371-78.
18 Based on the PMP submitted by OSU, the city found that the BDC 3.3.300 and
19 Table 3.3.300 requirement to provide a PMP that provides for parking needs
20 for all uses contemplated for the campus was satisfied. Record 50-51. The city
21 found that petitioners’ challenges to the PMP did not call into question the
22 conclusions of the PMP. Record 51.

⁸ OSU’s site plan proposes 322 parking spaces, some of which are on-street.

1 **B. Assignment of Error**

2 In their fourth assignment of error, petitioners argue that the city's
3 finding that BDC 3.3.300 and Table 3.3.300 are satisfied is not supported by
4 substantial evidence in the record. Petitioners point to testimony submitted by
5 project opponents that questioned the assumptions in the PMP regarding the
6 uses and users of the campus, the proximity of the campus to student, faculty
7 and staff housing, modes of travel, census data, and requirements of other
8 colleges and universities. Petitioners argue that the opponents' evidence called
9 into question the conclusions set forth in the PMP and the city should not have
10 relied on the PMP to determine that BDC 3.3.300 is satisfied. Stated
11 differently, we understand petitioners to argue that the PMP is not *substantial*
12 evidence because petitioners' arguments undermined that evidence, such that
13 no reasonable person would rely on the PMP to conclude that the parking
14 requirements are met.

15 In the petition for review, petitioners take the position that LUBA's
16 standard of review of the challenged decision is set out at ORS
17 197.835(9)(a)(C), which provides in relevant part:

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

20 "(a) The local government * * *:

21 " * * * * *

22 "(C) Made a decision not supported by substantial
23 evidence in the whole record; [or]

24 "(D) Improperly construed the applicable law[.]"

25 Respondents respond by citing the standard of review at ORS 197.828(2) for a
26 limited land use decision:

1 “(1) The Land Use Board of Appeals shall either reverse, remand
2 or affirm a limited land use decision on review.

3 “(2) The board shall reverse or remand a limited land use
4 decision if:

5 “(a) The decision is not supported by substantial evidence
6 in the record. The existence of evidence in the record
7 supporting a different decision shall not be grounds
8 for reversal or remand if there is evidence in the
9 record to support the final decision;

10 “(b) The decision does not comply with applicable
11 provisions of the land use regulations;

12 “(c) The decision is:

13 “(A) Outside the scope of authority of the decision
14 maker; or

15 “(B) Unconstitutional; or

16 “(d) The local government committed a procedural error
17 which prejudiced the substantial rights of the
18 petitioner.”

19 According to respondents, LUBA’s scope of review of an evidentiary challenge
20 set out at ORS 197.828(2)(a) applies. Respondents argue that standard of
21 review is different from the standard of review of an evidentiary challenge to a
22 land use decision.

23 Petitioners respond that the city’s decision is a “land use decision” as
24 defined in ORS 197.015(10)(a) and is not a “limited land use decision” as
25 defined in ORS 197.015(12) because (1) the city’s decision was processed
26 according to the ORS 197.763 hearing procedures, and (2) the issues raised by
27 petitioners broadened the scope of the decision to make it a land use decision.
28 Reply Brief 1.

1 ORS 197.015(12) provides in relevant part:

2 “(12) ‘Limited land use decision’:

3 “(a) Means a final decision or determination made by a local
4 government pertaining to a site within an urban growth
5 boundary that concerns:

6 “ * * * * *

7 “(B) The approval or denial of an application based on
8 discretionary standards designed to regulate the
9 physical characteristics of a use permitted outright,
10 including but not limited to site review and design
11 review. * * *”

12 We agree with respondents that the challenged decision is a “limited land use
13 decision.” The decision approves OSU’s application for site plan and design
14 review and falls squarely within the definition at ORS 197.015(12)(a)(B). The
15 fact that the city applied the procedural protections of ORS 197.763 to the
16 hearings on the applications does not somehow convert the challenged decision
17 into something other than a limited land use decision. We also disagree with
18 petitioners that the issues raised by petitioners during the proceedings on the
19 application converted the decision into something other than a limited land use
20 decision.

21 We further agree with respondents that LUBA’s standard of review of
22 evidentiary challenges to a limited land use decision is not the same as the
23 standard of review of a land use decision. The language of ORS 197.828(2)(a),
24 as compared to ORS 197.835(9)(a)(C), does not include the phrase “substantial
25 evidence in the whole record.” For limited land use decisions, LUBA may not
26 reverse or remand a limited land use decision unless “the decision is not
27 supported by substantial evidence in the record.” Under ORS 197.828(2)(a), in

1 determining whether the decision is “supported by substantial evidence in the
2 record,” LUBA may not remand a decision on the basis that there exists
3 evidence in the record supporting a different decision.

4 The legislative history of the bill that was eventually codified at ORS
5 197.828 also supports the conclusion that the legislature intended LUBA’s
6 standard of review of evidentiary challenges to limited land use decisions to be
7 different from, and likely less rigorous than, the standard of review of
8 challenges to land use decisions. But the express language of ORS
9 197.828(2)(a) and the legislative history we have reviewed do not articulate
10 how substantial evidence review under ORS 197.828(2)(a) differs from
11 substantial evidence review under ORS 197.835(9)(a)(C). OSU does not posit
12 a theory for how the two reviews differ, but merely quotes the relevant
13 provisions of each statute and takes the position that substantial evidence
14 review of a limited land use decision is less rigorous than review of a land use
15 decision.

16 In the circumstances presented here, we need not define the precise
17 nature of substantial evidence review of a limited land use decision under ORS
18 197.828(2)(a). That is so because even under what we and the parties agree is
19 a more rigorous standard of review at ORS 197.835(9)(a)(C), a reasonable
20 decision maker could conclude based on the PMP that OSU has satisfied the
21 requirement to provide a PMP that accounts for parking for “all uses
22 contemplated for the entire campus.” OSU’s transportation engineer responded
23 to petitioners’ criticisms of the PMP’s assumptions and provided an updated
24 PMP, and the PMP and the update are evidence that a reasonable decision
25 maker would rely on, even under the more rigorous ORS 197.835(9)(a)(C)
26 “substantial evidence in the whole record” standard of review. Record 1371-86.

1 The fourth assignment of error is denied.

2 **FIFTH ASSIGNMENT OF ERROR**

3 In their fifth assignment of error, petitioners challenge two conditions of
4 approval, conditions 26 and 27, which require OSU to monitor and report
5 parking conditions within one-quarter mile of the campus and, if a problem is
6 found to exist in the future, submit a revised PMP and provide additional
7 parking. Record 95-97. In the fifth assignment of error, petitioners challenge
8 those conditions, arguing that the monitoring radius is too small, there is no
9 feasible enforcement mechanism, and additional parking facilities cannot be
10 provided.

11 The city adopted findings that conditions 26 and 27 were not adopted to
12 defer a finding of compliance with BDC 3.3.300 or to ensure compliance with
13 BDC 3.3.300, and petitioners do not challenge that finding or otherwise argue
14 that conditions 26 and 27 are related to any applicable BDC provision. Record
15 56. Because conditions 26 and 27 do not appear to function to ensure
16 compliance with any approval criterion, any inadequacy in those conditions to
17 achieve their intended purpose is harmless error and does not provide a basis
18 for reversal or remand of the decision.

19 The fifth assignment of error is denied.

20 **SIXTH ASSIGNMENT OF ERROR**

21 As explained above and shown in the layout for the site included in the
22 Appendix, the new private street is located entirely on-site, and access from the
23 new private street to the public streets is proposed over a public easement.
24 Circulation through the parking area and to the private street is over internal
25 driveways, two of which run north to south and intersect with the private street.

1 **A. Sight Distance**

2 Petitioners' sixth assignment of error is exceedingly difficult to follow.
3 In a portion of the sixth assignment of error, we understand petitioners to argue
4 that the city's conclusion that intersection sight distances at the internal
5 intersections of the north-south driveways (located in the parking lot) with the
6 new private street meet the requirements of BDC 4.7.300 is not supported by
7 substantial evidence in the record.⁹ Petition for Review 53.

8 Respondents respond, initially, that petitioners are precluded from
9 raising any of the issues raised in the sixth assignment of error under the
10 doctrine of exhaustion waiver. ORS 197.825(2); *Miles*. Petitioners respond
11 that the issues were raised in the notice of appeal at Record 737-39. We agree

⁹ BDC 4.7.300(B)(1) provides:

“The analysis methodology described herein shall apply to all required transportation impact analysis including Transportation Impact Studies and Trip Generation Letters.

“ * * * * *

“B. Required Information.

“1. Sight Distance Measurements. For all driveways, study area intersections, and new intersections created by the development (with the exception of single-family residential driveways), an intersection sight distance measurement shall be provided that shows compliance with City of Bend Standards and Specifications for the posted or eighty-fifth percentile speed (whichever is greater). Field measurements shall be used wherever possible, and plan measurements from civil drawings provided for planned intersections or driveways.”

1 with petitioners that the issues raised in the sixth assignment of error regarding
2 *sight distance* and *capacity* were raised in the notice of appeal at Record 737-
3 39. As we explain below, we disagree that the issues regarding *clear vision*
4 *areas* were raised in the notice of appeal.

5 The city council found that “[s]ight distance information per AASHTO
6 standards was provided on Sheet C2.0 and compliance is included as a
7 condition of approval. * * * The sight distance provided meets the standards
8 for the required design speeds as defined in BDC 4.7.300(B)(1).” Record 59.
9 The findings conclude that the sight distance for the intersection of the private
10 street and SW Chandler Avenue and the intersection of the private street and
11 SW Century Drive meet the AASHTO sight distance criteria. Record 59-60.

12 The city council also incorporated the hearings officer’s findings.
13 Record 76. The hearings officer relied on evidence in the record from OSU’s
14 traffic engineer that (1) low speeds and traffic volumes at the internal
15 intersections of the driveways at the west and east ends of the parking area with
16 the private street make meaningful analysis of those intersections difficult and
17 (2) the intersections will “meet City performance requirements” to conclude
18 that the intersections meet any applicable standards of the BDC. Record 80.

19 Although the findings could be clearer, we understand the city to have
20 concluded that the internal intersections of the driveways and the new private
21 street will meet applicable city standards when constructed. That conclusion is
22 supported by substantial evidence in the record. Record 80, 1381-83.

23 **B. Capacity**

24 BDC 4.2.200(F)(5) requires a finding that “[a]ll required public facilities
25 have adequate capacity as determined by the City, to serve the proposed use[.]”
26 Also in the sixth assignment of error, we understand petitioners to argue that

1 the city's conclusion that BDC 4.2.200(F)(5) is satisfied with respect to the
2 internal driveway intersections with the new private street is not supported by
3 substantial evidence in the record. Respondents respond, and we agree, that
4 BDC 4.2.200(F)(5) applies to public facilities and petitioners have not
5 demonstrated that the internal driveway intersections with the private street are
6 "public facilities" within the meaning of BDC 4.2.200(F)(5). Absent that
7 demonstration, petitioners' arguments provide no basis for reversal or remand
8 of the decision.

9 **C. Clear Vision Areas**

10 Finally in the sixth assignment of error, petitioners argue that the city's
11 decision that BDC 3.1.500's requirement for "clear vision areas" is met is not
12 supported by substantial evidence in the record.¹⁰ Respondents respond that

¹⁰ BDC 3.1.500 provides:

- "A. Purpose. Clear vision areas are established to ensure that obstructions do not infringe on the sight lines needed by motorists, pedestrians, bicyclists and others approaching potential conflict points at intersections.
- "B. Applicability. In all zones, clear vision areas as described below and illustrated in Figures 3.1.500.A and 3.1.500.B shall be established at the intersection of two streets, an alley and a street, a driveway and a street or a street and a railroad right-of-way in order to provide adequate vision of conflicting traffic movements as well as street signs. These standards are applicable to public and private streets, alleys and mid-block lanes, and driveways.
- "C. Standards. The clear vision areas extend across the corner of private property from one street to another. The two legs of the clear vision triangle defining the private property portion of the triangle are each measured 20 feet back from

1 petitioners are precluded from raising the issues raised in the sixth assignment
2 of error under the doctrine of exhaustion waiver. ORS 197.825(2); *Miles*. We
3 understand petitioners to respond that the issues were raised in the notice of
4 appeal at Record 737-39. Reply Brief 4-5. We have reviewed the cited record
5 pages and we disagree with petitioners that the cited pages from the appeal
6 statement are sufficient to raise the issue raised in the sixth assignment of error
7 regarding the BDC 3.1.500 “clear vision area” requirements. Petitioners do not
8 cite to anything in the notice of appeal that references either the term “clear
9 vision areas” or BDC 3.1.500(A), or uses any of the operative language found
10 in BDC 3.1.500. Petitioners failed to raise the issue in their notice of appeal as
11 required by BDC 4.1.1120(A)(3) and they are precluded from raising the issue
12 before LUBA. ORS 197.825(2)(a); *Miles*.

13 The sixth assignment of error is denied.

14 **SEVENTH ASSIGNMENT OF ERROR**

the point of intersection of the two corner lot lines, special setback line or access easement line (where lot lines have rounded corners, the lot lines are extended in a straight line to a point of intersection). Additional clear vision area may be required at intersections, particularly those intersections with acute angles, as directed by the City Engineer, upon finding that additional sight distance is required (i.e., due to roadway alignment, etc.).

There shall be no fence, wall, vehicular parking, landscaping, building, structure, or any other obstruction to vision other than a street sign post, pole (e.g., power, signal, or luminaire pole) or tree trunk (clear of branches or foliage) within the clear vision area between the height of two feet and eight feet above the level of the curb. In cut sections, embankments shall be graded to comply with these requirements.”

1 BDC 3.4.200 sets out improvement standards for public and private
2 streets.

3 **A. Sidewalks**

4 BDC 3.4.200(F), Table D requires 5-foot wide sidewalks on both sides
5 of the new private street. BDC 3.4.150 allows the city to waive improvement
6 standards if certain criteria are met.¹¹ The city council approved OSU's
7 application to construct the sidewalk on the south side of the parking area
8 rather than on the south side of the private street. The hearings officer found
9 that in order to construct a 5-foot wide sidewalk on the south side of the new

¹¹ BDC 3.4.150 provides in relevant part:

“A. Authority to Grant Waiver or Modification. Waivers and/or modifications of the standards of this chapter and/or the City of Bend Standards and Specifications may be granted as part of a development approval only if the criteria of subsection (B) of this section are met.

“B. Criteria. The Review Authority, after considering the recommendation of the City Engineer, may waive or modify the standards of this title and the City of Bend Standards and Specifications based on a determination that (1) the waiver or modification will not harm or will be beneficial to the public in general; (2) the waiver and modification are not inconsistent with the general purpose of ensuring adequate public facilities; and (3) one or more of the following conditions are met:

“1. The modification or waiver is necessary to eliminate or reduce impacts on existing drainage patterns or natural features such as riparian areas, significant trees or vegetation, or steep slopes.”

1 private street the parking lot would be required to be shifted approximately 30
2 feet to the south, to be able to provide the required drive aisle width (24 feet)
3 and curb width (6 feet). The hearings officer concluded that shifting the
4 parking lot to the south would require removal of significant trees.
5 Accordingly, the hearings officer concluded that a waiver was justified under
6 BDC 3.4.150(B)(1). Record 822, 1303. The city council adopted the hearings
7 officer's findings. Record 23, 60-61, 69.

8 In their seventh assignment of error, petitioners first argue that the city's
9 approval of the sidewalk waiver is not supported by substantial evidence in the
10 record. ORS 197.828(2)(a). Respondents respond by pointing to evidence in
11 the record that demonstrates the effect of constructing the sidewalk without the
12 waiver. Record 1303, 2897. We agree with respondents that substantial
13 evidence in the record supports the city's decision to waive the sidewalk
14 requirements.

15 Petitioners also argue that the city's finding that the sidewalk waiver is
16 "necessary * * * to eliminate or reduce impacts on * * * natural features such
17 as * * * significant trees" improperly construes BDC 3.4.150(B)(1).
18 Respondents respond that petitioners failed to raise any issue regarding
19 whether the waiver is "necessary" within the meaning of BDC 3.4.150(B)(1)
20 before the close of the evidentiary hearing before the hearings officer, as
21 required by ORS 197.763(1), and are precluded from raising it for the first time
22 at LUBA. ORS 197.835(3). In their reply brief, petitioners respond by citing
23 portions of their appeal statement at Record 735-36, and also cite to a transcript
24 of the appeal hearing before the city council at Petition for Review Appendix E
25 50-51.

1 We agree with respondents that the issue was not raised prior to the close
2 of the evidentiary hearing and petitioners are precluded from raising it for the
3 first time at LUBA.¹² Accordingly, the issue of whether the city’s findings are
4 adequate to explain why the waiver is “necessary” within the meaning of BDC
5 3.4.150(B)(1) is waived.

6 **B. Planter Strips**

7 BDC 3.4.200(F) Table B requires 5-foot wide planter strips for
8 “dedicated public roadways in commercial zones[.]” In another portion of their
9 seventh assignment of error, petitioners argue that the city improperly
10 construed BDC 3.4.200(F), Table B as not requiring planter strips on both sides
11 of the new private street. Table D sets out “Improvement Standards for Private
12 Streets” and does not require planter strips on private streets. Footnote 3 to
13 Table D provides “[p]rivate streets shall meet local street standards for
14 dedicated public roadways (Tables A through C) *except as modified by Table*
15 *D.*” (Emphasis added.) Accordingly, the hearings officer and the city council
16 correctly concluded that BDC 3.4.200(F), Table D does not require planter
17 strips for the new private street. Record 23, 69, 1302.

18 The seventh assignment of error is denied.

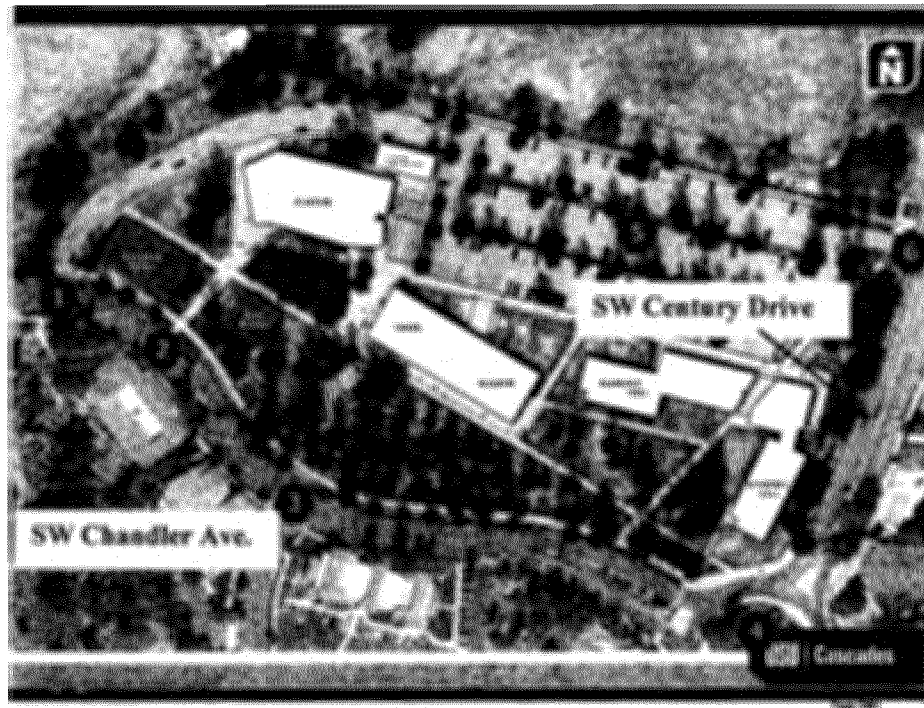
19 The city’s decision is affirmed.

20

¹² ORS 197.763(1) requires that issues in an appeal to LUBA must have been raised prior to the close of the evidentiary hearing. However, we also do not see where the issue was raised in petitioners’ appeal statement or during the on-the-record appeal hearing before the city council.

1

APPENDIX



2

Excerpts from Minutes of Tumalo Irrigation District's Board of Directors Meetings Pertaining to the Contemplated Transfer of Water Storage Rights to KC Development Group, LLC's Property and to KCDG's Plans for Residential Development of Property and Recreational Use of KCDG Reservoirs

November 18, 2013 TID Special Board Meeting Minutes:

HARRIS KIMBLE¹

"Harris Kimble, one of the District water users, wants to develop his property and put in two lakes for personal use by the future residents around the lakes. He is working with the District to figure out how to handle all of the water changes involved. TID needs to work with the watermaster and the state to be sure this process is handled properly. The District also needs to figure out how to charge Mr. Kimble if these water changes do take place. There is concern by some of the Board Members that TID could have problems with the transfers and/or the financial problems that may be encountered in working with the investment people involved with the project."

December 10, 2013 TID Board Minutes:

HARRIS KIMBLE

"Per Assistant Manager Rieck, Mr. Kimble is working on mapping his project and there is nothing new to report. Rieck stated the District has not decided how much to charge Kimble for the water right changes. The charge will be in addition to all of the costs incurred to making the changes. Rieck would like to have Kimble meet with two board members and himself to negotiate a contract for the project."

April 8, 2014 TID Board Minutes:

KC DEVELOPMENT

"KC Development is going to use the ponds they are developing for TID storage water from Tumalo Reservoir. Watermaster Jeremy Giffin explained how the 108 acre storage right transfer is only a change in place of use. The change in place of use is from Tumalo Reservoir to the newly created lakes KC Development is constructing. The District still holds the storage right and this will create a new revenue stream for the District since TID will charge KCD for the right to store the water. This transfer is a temporary transfer until it is determined exactly how many acres of storage right KC Development will use in the storage reservoirs."

"The contract TID is negotiating with KC Development is an evergreen (annually renewed) as long as KCD or the District does not default on their contract with the District."

¹ The all caps headings reflect the headings as they appear in the TID Board Minutes.

May 13, 2014 TID Board Minutes:

PROPOSAL FROM TOM BISHOP

"Harris Kimble who is a partner in KC Development Group stated that Mr. Bishop was interested in this development project when he was interested in being a part of the development investment funding for the project, but he just wanted a bigger piece of the pie for a lower level of the investment, and that didn't work out. He stated that 'Mr. Bishop, in as little as less than a month ago, contacted my partner to see if he could be a member of the homeowners association so he could use the lake...'"

June 10, 2014 TID Board Minutes:

KC DEVELOPMENT GROUP PROJECT

"Chairman Cochran opened the meeting by reviewing the issues regarding the KCDG project. He noted that the project has been ongoing for 5 to 10 years and that TID had been contacted last fall regarding the storage of water on their property. So this was not an overnight project. Also the contract for the storage that was presented at the last board meeting had been revised as per the board's direction to resolve issues that were discussed at the May meeting."

"Leslie Hudson spoke about the 'ski pond' and that he thought wildlife, among other issues, were not addressed properly. Veronica Hudson also commented that the ponds would have negative effects on wildlife."

"Chairman Cochran stated that the time for comment on the KCDG project had ended and the Board would take a five minute break and then resume the regular board meeting."

KCDG CONTRACT APPROVAL

"Director Putnam made a motion to approve the revised contract between Tumalo Irrigation District and KC Development group. The contract sets out the specifics of the TID water storage in the KCDG lakes. Vice Chair DeMaris seconded the motion and it passed unanimously."

WATER TRANSFER

"KCDG, Eric Cadwell, and Harris Kimble have filed for a transfer of 21.14 acres of irrigation rights from where the KCDG ponds are being built to other irrigable land owned by the same three entities. The transfer is "a self to self". Director Putnam made a motion to approve the transfer. Vice Chair DeMaris seconded the motion and it passed unanimously."

TID TEMPORARY WATER STORAGE TRANSFER APPROVAL

"Director Putnam made a motion to approve the TID temporary water storage transfer of 108 acre feet from Tumalo Irrigation District to Tumalo Irrigation District. This temporary transfer will change the place of storage from Tumalo Reservoir to the KCDG reservoirs. Vice Chair DeMaris seconded the motion and it passed unanimously."

September 4, 2014 TID Board Minutes:

PERMANENT WATER TRANSFER

"Director Kaye made a motion to approve the filing of a Notice of Intent to permanently change the POU - place of use - of 108 acre-feet out of the 1100 acre-foot Upper Tumalo Reservoir Right to Store Certificate #76684 from Tumalo Reservoir to the KCDG reservoirs. Director Putnam seconded the motion and it passed unanimously."

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**SPECIAL BOARD MEETING MINUTES
NOVEMBER 18TH, 2013, NOON
TUMALO IRRIGATION DISTRICT OFFICE
64697 Cook Avenue
Bend, Oregon 97701**

BOARD: Steve Putnam, Shirley DeMaris, Martin Warbington, Dean Tuftin, Ron Cochran (arrived at approximately 1:20 p.m.) and Member Elect, Ron Kaye
STAFF: Elmer McDaniels, Kenneth Rieck, Fran DeRock

Vice-Chairman Tuftin called the Special Board Meeting to order at 12:00 noon and appointed Fran DeRock scribe.

DECLARE SUCCESSFUL CANDIDATE ELECTED ON NOVEMBER 12TH, 2013

Director Warbington made a motion declaring Steve Putnam the winner of the November 12th, 2013 election for Division #1. Director DeMaris seconded the motion and it was approved unanimously.

BRUCE LAVEAU

Bruce LaVeau is having issues with a private canal across his neighbor's property. If the neighbor gives the District a written easement then the District will install new pipe underground and charge LaVeau for the work. LaVeau wants the District to apply his 2013 assessment charges to the work order for the pipe project.

Vice-Chairman Tuftin made a motion to deny the credit for the assessments and to carry the costs of the pipe project over 2014 without interest. Director Putnam seconded the motion and it passed unanimously.

HARRIS KIMBLE

Harris Kimble, one of the District water users, wants to develop his property and put in two lakes for personal use by the future residents around the lakes. He is working with the District to figure out how to handle all of the water changes involved. TID needs to work with the watermaster and the state to be sure this process is handled properly. The District also needs to figure out how to charge Mr. Kimble if these water changes do take place. There is concern by some of the Board Members that TID could have problems with the transfers and/or the financial problems that may be encountered in working with the investment people involved with the project.

REVIEW 2014 DRAFT BUDGETS

Copies of the 2014 Draft Budget were distributed to the Board. Assistant Manager Rieck reviewed the projected line items for expenses for 2014 as well as the year to date actual expenses for 2013. Some of the line items discussed were whether to continue with a newsletter on paper, the needed repairs at Steidl Dam, the legal costs to the District for Attorney Hopp to come to all Board Meetings, health insurance costs, maintenance costs, DWA legal expenses, HCP legal expenses, etc.

Rieck stated that the biggest increases to the budget are the Special Projects line item on the budget. The breakdown of the projects was reviewed by the Board. Steidl Dam repairs is a new \$50,000 plus line item but Rieck stated the repairs really need to be done to avoid future problems. The Booms and Liferings that need to

1

be installed are a safety precaution. The costs to increase the Bend Feed Canal capacity is a new special project. The Habitat Conservation Plan costs are increasing. The easement verification program should be decreasing for 2014. The total increase estimate for Special Projects is over \$55,000. Rieck requested the Board review these estimates before the next Board Meeting and discuss possible decreases in some of these costs as well as other budget items. He also requested the Board contact him before the next meeting if anyone has questions. He stated he will make a few adjustments discussed at the meeting and also do the calculations for the increased assessments needed to cover expenses.

ADJOURN

Director DeMaris made a motion to adjourn the Board Meeting at 2:05 p.m. The motion was seconded by Director Putnam and it passed unanimously.

REGULAR BOARD MEETING MINUTES
DECEMBER 10TH, 2013, 10:00 A.M.
TUMALO IRRIGATION DISTRICT OFFICE
64697 Cook Avenue
Bend, Oregon 97701

BOARD: Ron Cochran, Dean T uftin, Steve Putnam, Shirley DeMaris, Martin Warbington
STAFF: Elmer McDaniels, Kenneth Rieck, Fran DeRock, Bob Varco, Jan Wickham
ATTORNEY: Bill Hopp
ENGINEER: Jon Burgi
GUESTS: Mel Stout

Chairman Cochran called the Regular Board Meeting to order at 10:02 a.m. and appointed Fran DeRock scribe.

**APPROVE MINUTES OF OCTOBER 14TH, 2013 SPECIAL BOARD MEETING, NOVEMBER 12TH, 2013
REGULAR AND EXECUTIVE BOARD MEETINGS AND NOVEMBER 18TH, 2013 SPECIAL BOARD
MEETING.**

Attorney Hopp requested a correction to the November 12th, 2013 Executive Board Meeting Minutes, under Liens and Foreclosures. The correction states that " Hopp was instructed, at the September Board Meeting not the October Board Meeting, to file liens."

Director Putnam made a motion to approve all of the minutes with the change noted by Attorney Hopp. Director DeMaris seconded the motion and it passed unanimously.

APPROVE VOUCHER LIST

The December, 2013 voucher list was approved and signed by all the Board Members.

CRESCENT LAKE WATER REPORT

Per Manager McDaniels, the staff had hoped that the lake would end up at 60,000 a.f. but the lake is currently about 500 a.f. below that number. McDaniels and Assistant Manager Rieck hope the reservoir level will end up between 75,000 and 80,000 a.f. by the spring of 2014.

CITY OF BEND MATRIX

The matrix has not been developed at this point. (It is a list of potential projects and potential funding sources that would benefit the Tumalo Creek.) The City delayed developing the matrix because of a new injunction against the City which is another attempt to stop the water project. The City has requested a Declaration from the District, which is a statement of facts in support of the City's water project. Manager McDaniels will sign the Declaration.

HARRIS KIMBLE

Per Assistant Manager Rieck, Mr. Kimble is working on mapping his project and there is nothing new to report. Rieck stated the District has not decided how much to charge Kimble for the water right changes. The charge will be in addition to all of the costs incurred to making the changes. Rieck would like to have Kimble meet with two board members and himself to negotiate a contract for the project.

OWRC CONFERENCE REPORT

Manager McDaniels stated that the conference meetings were productive. McDaniels, Rieck, Burgi and Hopp had a meeting with Tim Personius of the BOR. They talked about TID's disadvantage when applying for WaterSmart grants due to not having hydro, etc. Personius suggested the District write a letter to the BOR highlighting the importance of our conservation efforts and quality of TID water and ask that these two items be acknowledged when they rank grant applications.

REPORT FROM P/R COMMITTEE & MEL STOUT COMMENTS

Director Warbington, one of the P/R sub-committee members, stated he wanted to put hiring a P/R person on hold. He could not justify the additional expense to the District at this time.

Mel Stout, one of the District water patrons, who sent-in recommendations via an email about how the District could develop a strategy to tell the District's story to water users and the general public, stated that the District needed to keep pushing the information out there that we want everyone to know about.

BY LAWS UPDATE – AMENDMENT

Director Putnam made a motion to amend By Law B.3, Budget Resolution, (1) to read: the number of acres and fractions thereof with an irrigation water right which is to be billed; as opposed to the current wording: The number of acres with an irrigation water right which is to be billed with fractional acres stated as whole acres; and (2) to read: the number of these acres and fractions thereof owned by each landowner; as opposed to the current wording: The number of these acres owned by each landowner.

Vice Chairman Tuftin seconded the motion and it passed unanimously. The amendment will be updated in the By Laws in writing and the motion will be made a second time at the next regular board meeting.

DRC – MOU MOTION

Director Warbington made a motion authorizing Manager McDaniels to sign the MOU for the 2014 Instream Lease program with the DRC. Director DeMaris seconded the motion and it passed unanimously.

OFFICE CLOSURE FOR HOLIDAYS

Director Putnam made a motion to close the office from December 25th, 2013 through January 1st, 2014. Director DeMaris seconded the motion and it passed unanimously.

BILL MARTIN ROAD LOT SALE

The District has accepted an offer for the full listing amount on 64850 Bill Martin Road. The sale is scheduled to close on December 27th, 2013.

BUDGET REVIEW

Manager McDaniels gave notice to the Board of Directors that he will retire from the District effective March 28, 2014. He requested that Assistant Manager Rieck step into the manager position. Rieck will reduce the administrative expense on the budget by \$10,000.00 for the start of the 2014 fiscal year as a result of this notice.

The Board discussed ways to reduce legal expenses. The DWA legal costs will be reduced from \$10,000 budget to \$7,500 budget. HCP legal, board meetings legal, OWRC conference legal and general legal will remain the same, as will the lobbyist.

Regular Minutes 12-10-13

The Board also discussed the P/R proposals and decided to eliminate the cost for a P/R person in the 2014 Budget. The Board agreed that Mel Stout should be involved in the P/R work that will be done by a committee. They requested that the newsletter be added back into the budget and increase the budget for this item.

The Stiedl Dam work estimate for the budget was reduced by \$10,000 to \$40,000 total for 2014.

The changes to the 2014 budget will project an approximate increase in the assessment billings of 7.44%. Approximately 1% of the 7.44% is attributed to the change in billing from rounding up fractional acres to the next whole acre to billing exact acres. The balance of the increase is Stiedl Dam work and cost increases.

Director Putnam made a motion to approve the 2014 budget with the changes discussed. Director DeMaris seconded the motion and it passed unanimously. The board will review the updated budget at the Annual Board Meeting on January 14th, 2014 and adopt the budget by resolution.

NEXT MEETING DATE AND MOTION TO APPOINT DIRECTOR PUTNAM TO TEMPORARY CHAIR

The current Chairman and Vice Chairman will not be at the January 14th, 2014 Board Meetings. Chairman Cochran made a motion appointing Director Putnam to the position of temporary Chairman for the January Board Meetings. Vice Chairman Tuftin seconded the motion and it passed unanimously.

ADJOURN

Director Putnam made a motion to adjourn the Regular Board Meeting at 11:52 a.m. Vice Chairman Tuftin seconded the motion and it passed unanimously.

REGULAR BOARD MEETING MINUTES
APRIL 8TH, 2014, 10:00 A.M.
TUMALO IRRIGATION DISTRICT OFFICE
64697 Cook Avenue
Bend, Oregon 97701

BOARD: Ron Cochran, Shirley DeMaris, Steve Putnam, Martin Warbington, Ron Kaye
STAFF: Kenneth Rieck, Fran DeRock, Bob Varco
ATTORNEY: Bill Hopp
ENGINEERS: Jon Burgi, Galen Norgang
GUESTS: Harris Kimble, Brianna Cadwell, Jeremy Giffin, Les Hudson, Veronica Hudson, Greg Mohnen, Bendt Broderson

Chairman Cochran called the Regular Board Meeting to order at 10:00 a.m. and appointed Fran DeRock scribe.

APPROVE MINUTES OF MARCH 11TH, 2014 REGULAR AND EXECUTIVE BOARD MEETINGS AND SPECIAL EXECUTIVE BOARD MEETING OF APRIL 17TH, 2014

Chairman Cochran requested the March 11th, 2014 Board Minutes be corrected. The last sentence under OWEB GRANT APPLICATION should read "would contribute to the in-kind and/or cash portion of the cost" instead of just "in-kind portion." Director Putnam made a motion to approve the March 11th, 2014 Regular, Executive and Special Executive Board Meeting Minutes as corrected. Director Kaye seconded the motion and it passed unanimously.

APPROVE MARCH VOUCHER LIST

The Board of Directors reviewed and signed the March voucher list. Director Putnam made a motion to approve the voucher list. Director DeMaris seconded the motion and it passed unanimously.

WATER SUPPLY REPORT

The Lake level has reached 73,000 acre feet. The snowpack in the mountains is 45-55% of average. The lakes have all come up in acre feet recently. Tumalo Creek is still low.

RETIREMENT PARTY EXPENSES

Manager Rieck informed the Board that the District charged Elmer's retirement parties to Staff/Board Travel Meals. Water patron Les Hudson suggested the District create a Staff Recognition category in the budget.

KC DEVELOPMENT

KC Development is going to use the ponds they are developing for TID storage water from Tumalo Reservoir.

Watermaster Jeremy Giffin explained how the 108 acre storage right transfer is only a change in place of use. The change in place of use is from Tumalo Reservoir to the newly created lakes KC Development is constructing. The District still holds the storage right and this will create a new revenue stream for the District since TID will charge KCD for the right to store the water. This transfer is a

temporary transfer until it is determined exactly how many acres of storage right KC Development will use in the storage reservoirs

The contract TID is negotiating with KC Development is an evergreen (annually renewed) as long as KCD or the District does not default on their contract with the District.

RYAN RANCH AND BENHAM FALLS DIKE REPAIR AND TOUR BRIEFING

COID has a permit to repair the dikes by Benham Falls and the Irrigation Districts want to do the repairs before the spotted frog is listed as threatened. The problem with the repairs is that it is too difficult to get equipment into the area of the dikes for repairs. The work would need to be done by hand.

The Forest Service has noted that the permits to do the repairs will expire in two years. The 4 Districts involved are considering dividing up the work among the Districts before the spotted frog listing and before the permits expire.

SDAO BOARD TRAINING REPORT

Manager Rieck, Chairman Cochran, Director DeMaris and Director Warbington attended the training. All who attended stated that the training covered items pertinent to irrigation districts. Some of the topics covered included what is permissible in an executive meeting and what needs to be in a regular session; what is a quorum; when attendees have the right to speak at meetings.

The District has DVDs which cover the same material from the training for those board members who didn't attend.

RESOLUTION 2014-03 DESIGNATING KEN RIECK AS REGISTERED AGENT

Director Putnam made a motion to pass resolution 2014-03 designating Manager Rieck as registered agent for the District. Director DeMaris seconded the motion and it passed unanimously.

RESOLUTION 2014-01A GIVING AUTHORITY TO MANAGER RIECK TO ENTER INTO AGREEMENT WITH BOR FOR WATERSMART GRANT PROGRAM

Director Putnam made a motion to pass resolution 2014-01A authorizing Manager Rieck to enter into an agreement with the Bureau of Reclamation for the Watersmart program. Director Warbington seconded the motion and it passed unanimously.

RESOLUTION 2014-02 REGARDING BOARD DUTIES AND RESPONSIBILITIES POLICY-FIRST READING

Director Putnam made a motion to pass resolution 2014-04 which updates the Board duties and responsibilities per the policy which was sent to all board members for review prior to the board meeting. Director DeMaris seconded the motion and it passed unanimously. This is the first reading of Resolution 2014-02. It will be read again at the next regular board meeting.

RESOLUTION 2014-04 REGARDING PROPERTY SALES AUTHORITY

The Board reviewed the resolution. Director Warbington noted that he did not want to pass the resolution since it didn't give the Board members the actual authority to say yay or nay on all sales offers. The board agreed and decided not to pass resolution 2014-04.

RESOLUTION 2014-05 AUTHORIZING MANAGER RIECK TO NEGOTIATE AND ENTER INTO AGREEMENT WITH OWEB FOR THEIR GRANT PROGRAM

Director Putnam made a motion to pass resolution 2014-05 which gives Manager Rieck authority to negotiate and enter into an agreement with OWEB to participate in their grant program. Director DeMaris seconded the motion and it passed unanimously.

MOTION TO DECLARE ELMER MCDANIELS VEHICLE SURPLUS PROPERTY

Director DeMaris made a motion declaring Elmer McDaniels district vehicle surplus property. Director Kaye seconded the motion and it passed unanimously.

Attorney Hopp noted that the District needs to state in any transaction on the vehicle that it is sold 'as is'. Chairman Cochran requested Manager Rieck find out what the Blue Book value is on the vehicle and also check Craig's list for comparables and notify him as well as another Board member before listing it.

STAFFING PLANS AND PROGRESS

Per Manager Rieck front office manager Jan Wickham gave the District a 2 week notice and retired. Ken and Fran are interviewing for the front office position and hope to cross train the successful candidate for both the office manager and front office position. This will allow each person to cover when the other is not in the office.

Manager Rieck and Maintenance Supervisor Bob Varco are collecting resumes for the field position that is open. They will interview for this position in the next 2 weeks.

Ditchrider Mick Ingram is learning the technical side of the telemetry system in the District. With this additional workload for Mick, Manager Rieck wants to consider adding a second new hire to the maintenance/ditchrider staff in the future.

ADJOURN

Director Putnam made a motion to adjourn the Regular Board Meeting at 10:59 a.m. Director DeMaris seconded the motion and it passed unanimously. Chairman Cochran stated that the board may need to return to the Regular Board meeting after the Executive Board Meeting.

RECONVENE

Chairman Cochran reconvened the Regular Board Meeting at 11:47 a.m.

PIPE FOR SALE AT TID SHOP

There are miscellaneous remnants of pipe at the shop that the District will sell for about \$5.00 a foot.

ADJOURN

Director Putnam made a motion to adjourn the Regular Board Meeting at 11:54 a.m. Director DeMaris seconded the motion and it passed unanimously

REGULAR BOARD MEETING MINUTES
MAY 13TH, 2014 8:59 A.M.
TUMALO IRRIGATION DISTRICT OFFICE
64697 Cook Avenue
Bend, Oregon 97701

BOARD: Ron Cochran, Shirley DeMaris, Steve Putnam, Martin Warbington, Ron Kaye
STAFF: Kenneth Rieck, Fran DeRock, Bob Varco, April Harris
ATTORNEY: Bill Hopp
ENGINEER: Jon Burgi
GUESTS: Thomas Bishop, Bendt Broderson, Peter Fullenweder, Veronica Hudson, Leslie Hudson, Jamie Hildebrandt, Beverly Morales, John Mayer, Erika Lindquist, Paul Dewey, Gene Bishop, Matt Lathrop, Harris Kimble.

Chairman Cochran called the Regular Board Meeting to order at 8:59 a.m. and appointed Fran DeRock scribe.

MOVE TO EXECUTIVE BOARD MEETING

Chairman Cochran announced the Board would move immediately to Executive Session to review HCP contract negotiations, foreclosures and contract negotiations with Yellowknife/Bend Broadband. The Board will return to regular session in one and a half to two hours.

RECONVENE

Chairman Cochran reconvened the regular board meeting at 10:56 a.m. and appointed Fran DeRock scribe.

RESOLUTION 2014-02 - BOARD DUTIES AND RESPONSIBILITIES POLICY-SECOND READING

Scribe DeRock read Resolution 2014-02 regarding Board Duties and Responsibilities policy. This was the second reading to adopt this policy. All Board members agreed to adopt the policy.

INTRODUCTION - APRIL HARRIS

Manager Rieck introduced April Harris to the Board. She has taken the office assistant position that Jan Wickham held. She will cross train with Fran on all office responsibilities.

WATER SUPPLY REPORT

Crescent Lake is currently about 87% full. The District is withdrawing about 57 cfs. The snowpack is low this year but precipitation has been really high this spring. The District can expect about 60% of normal fill from spring runoff in Crescent Lake.

DESCHUTES COUNTY AG LANDS DISCUSSION

Manager Rieck provided board members with a packet of information regarding the Ag Lands. He noted that the EFU Lands Development and Non-resource lands study is just beginning. If anyone has questions please let Manager Rieck know.

Rieck noted that the 'right to pipe' amendment needs to extend through any zoning changes. Also lot line adjustments should be treated the same as partitions and require a District sign off before approval by the county. The District needs to sign off on LLA's and partitions for easement and water right purposes. Manager Rieck introduced a draft of a DBBC letter being sent to Deschutes County addressing the districts concerns for the boards comment; the Board had no additional comments to add at this time.

BILL MARTIN ROAD PROPERTIES

Chairman Cochran requested that the discussion regarding pricing of the Bill Martin Road lots be transferred to the Executive Board Meeting.

OFFER ON THE SURPLUS SUBURBAN VEHICLE

Ed Bishop, one of the District's water patrons has made an offer of \$7,000 to purchase the Suburban vehicle that was driven by Elmer McDaniels until he retired. The Board agreed unanimously to turn down the offer.

JAMIE HILDEBRANDT PRESENTATION REGARDING TUMALO RESERVOIR PROPERTY

Mr. Hildebrandt hung on the wall two maps of the Tumalo Reservoir area. He asked if the District wanted to continue to pursue the land exchange with the Department of State Lands. Attorney Hopp stated that the acreage the District wanted to exchange is now in question since BLM is claiming they own the property. Hopp asked what whether the Board desired him to pursue the exchange of any other existing TID properties for the state land via a lot line adjustment.

Hildebrandt stated he doesn't know why we still want to exchange our lands for other DSL property. He stated he would protest any new division of our property in the Reservoir area and we are spending District money on acquiring land we have no use for. He said we aren't taking care of our lands now and he would like our lands posted the same as BLM lands. The BLM lands have signs now that state there is no off road motorized vehicles and no shooting unless it is during hunting season.

PROPOSAL FROM TOM BISHOP

Tom Bishop gave scribe DeRock copies of a handout he would like distributed to the Board Members after the Board Meeting. It has more detail and clarity about the comments he wanted to make. These comments will be filed with the Board Meeting minutes. He asked that the recording of the meeting be retained for the record. Mr. Bishop stated that the District will be giving away storage rights to a developer (KC Development Group) who has declared they will use this water for recreational purposes, primarily water skiing. He stated that there has been very little if any information provided to the public regarding this transfer. He stated he received scant few documents from the District regarding the KC Development water transfer. He will review the most recent documents he has received. Mr. Bishop thinks the proposed contract with KC provides no entitlement or right for the District to use the water again, provided the developer is not in default of the contract. He stated that the contract with KC Development is in violation of public contracting laws.

Per Chairman Cochran, the first mention of the contract with KC Development was in the November 2013 minutes of the District's Regular Board meeting. Cochran explained that the District will retain the water storage rights and that the District can use the storage water if it needs it.

Mr. Bishop asked that the Board defer a decision on the KC Development contract today until the public and he have the opportunity to further review the information. He feels that the contract is totally in favor of the developer and the District is giving up its rights to the storage water.

Harris Kimble who is a partner in KC Development Group stated that Mr. Bishop was interested in this development project when he was interested in being a part of the development investment funding for the project, but he just wanted a bigger piece of the pie for a lower level of the investment, and that didn't work out. He stated that "Mr. Bishop, in as little as less than a month ago, contacted my partner to see if he could be a member of the homeowners association so he could use the lake. When he didn't get the answer he wanted he pursued this track that we are on today." Mr. Kimble stated "it was like someone who didn't get to be on the ball team so the ball team doesn't get to play the game."

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Les Hudson stated that he would like to reinforce the request to retain the audio recording of this session. He also stated that this issue is becoming an issue of trust. He commented that the contract needs to be reviewed.

Per Director Warbington, there has been a fair amount of input about this water change. The Board is trying to do what it can within the bounds of state law and come to a fair medium on this issue.

Per Mr. Bishop the Board has a fiduciary obligation to knowingly judge what is in the best interest of the District and to make an informed judgment regarding this issue.

Maintenance supervisor Bob Varco asked Mr. Bishop to please remove the sign he placed in the middle of the ditchrider road which is by the construction area of the development project. Varco stated it is very hard to get around the sign with ditchrider vehicles.

KC DEVELOPMENT CONTRACT

Chairman Cochran requested that the review, further discussion and signing of the contract be tabled for now. Director Warbington seconded the request and all approved of tabling this.

COID SUIT

This suit should not affect TID and we will be going ahead with our future piping since the zones we will be piping through are EFU and piping is an allowed use. Those who may file suit against COID are trying to get the canal in question to be designated as historic.

UGB INFORMATION

The county land use is pushing on the UGB again and the City of Bend has hired a new contractor to get the UGB process finished. Manager Rieck commented that we need to have our policy on development and subdivisions completed before the UGB is complete.

MISCELLANEOUS

The DBBC has decided to slow down on the Basin Study Work Group for a month or two and work on the HCP first.

NEXT MEETING DATE

The next regular board meeting will be June 10, 2014 at 10:00 a.m.

ADJOURN

Director Putnam made a motion at 12:26 p.m. to adjourn the regular board meeting. Vice Chair DeMaris seconded the motion and it passed unanimously.

RECONVENE

The regular board meeting was reconvened immediately due to the fact that other guests at the meeting wanted to be heard.

KC DEVELOPMENT INFORMATION

Bev Morales, who lives on Klipple Road by the KC Development project stated the Development Group is offering 10 acre parcels for sale with 2 acres of dry land and the rest being irrigated. She thought the Group was selling water usage of the lake. Chairman Cochran stated that, at this point, it is hearsay.

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Mr. Hudson, Ms. Morales and Mr. Bishop had further comments regarding the future development of the KC Development property and the contract with the Development group.

APPROVE VOUCHER LIST

The Board of Directors approved the April voucher list by signature on the list...

ADJOURN

Director Putnam made a motion at 12:39 p.m. to adjourn the regular board meeting. Vice Chair DeMaris seconded the motion and it passed unanimously.

RECONVENE

Chairman Cochran reconvened the regular board meeting at 1:45 p.m. and appointed Fran DeRock scribe.

APPROVE MINUTES OF APRIL 8TH & APRIL 17TH, 2014 REGULAR, EXECUTIVE AND SPECIAL BOARD MEETINGS

Director Putnam made a motion to approve the board meeting minutes of April 8th & 17th, 2014 as amended. Vice Chair DeMaris seconded the motion and it passed unanimously.

REVISED LISTING PRICES ON LAIDLAW BUTTE PROPERTIES

Director Putnam made a motion to set the new listing price for the 42 acre piece of property at \$350,000 and the new listing price for the 31 acre piece of property at \$320,000. The counter offer for the offer on the 42 acre piece will be \$350,000. Vice Chair DeMaris seconded the motion and it passed unanimously.

KC DEVELOPMENT CONTRACT REVISIONS

The Board instructed Attorney Hopp to draft and discuss with opposing council the changes the board talked about and bring the draft to the next board meeting for review.

- clarifying language concerning TID reserving the right to pump out of the storage ponds if the storage water is needed
- clarifying additional language addressing a default on the contract by KCDG and the renewal provision of the contract
- add notary space so the document is recordable

MOTION TO CONTACT STATE REGARDING LOT LINE ADJUSTMENT

Director Putnam made a motion directing Attorney Hopp to contact the State regarding lot line adjustments on the land owned by the state in section 32, which is by Tumalo Reservoir. Director Kaye seconded the motion and it passed unanimously.

ADJOURN

Director Putnam made a motion to adjourn the Regular Board Meeting at 1:52 p.m. Director Kaye seconded the motion and it passed unanimously

REGULAR BOARD MEETING MINUTES
JUNE 10TH, 2014 10:55 a.m.
TUMALO IRRIGATION DISTRICT OFFICE
64697 Cook Avenue
Bend, Oregon 97701

BOARD: Ron Cochran, Shirley DeMaris, Steve Putnam, Martin Warbington, Ron Kaye

STAFF: Kenneth Rieck, Fran DeRock, Bob Varco, April Harris

ATTORNEY: Bill Hopp

ENGINEERS: Jon Burgi, Galen Norgang

GUESTS: Gene Bishop, Will Hammock, Brandon Anderchuck, Eric Cadwell, Brianna Cadwell, Darrin Kelleher, Melissa Clayton, Eric Nitschke, Brad Holt, Beverly Morales, Rachal Ream, Susan Manis, Rob Camprano, Judy Camprano, Judy Niedzwiecke, Andy Niedzwiecke, Jeremy Giffin, Josh Rodriguez, Marilyn Halper, Harris Kimble, Nancy Kimble, Kris Jewett, Leslie Hudson, Veronica Newton Hudson, Scott Waters, Terry Rennie, Tom Hamper, Seana McKenzie Alcalá, Greg Mohnen, Marianne Walker, Wm. ??, Nunzie Gould

ENGINEER JON BURGI LEAVING

Engineer Jon Burgi from David Evans and Associates notified everyone at the board meeting that he was leaving his position to work out of the country for a couple of years. He stated he had enjoyed working with everyone at TID very much. Galen Norgang will be the new contact for TID at DEA.

Chairman Cochran called the regular board meeting to order at 11:05 a.m. and appointed Fran DeRock scribe.

KC DEVELOPMENT GROUP PROJECT

Chairman Cochran opened the meeting by reviewing the issues regarding the KCDG project. He noted that the project has been ongoing for 5 to 10 years and that TID had been contacted last fall regarding the storage of water on their property. So this was not an overnight project. Also the contract for the storage that was presented at the last board meeting had been revised as per the board's direction to resolve issues that were discussed at the May meeting.

Cochran made several other points: TID is not selling an asset. TID is not reducing Tumalo Reservoir. TID has the right to draw the stored water out of the KCDG reservoirs if needed. TID has talked about other storage possibilities but has not found other suitable places. Hydrocarbons at Crescent Lake and at the storage sight are not an issue.

Cochran then asked that anyone who wanted to speak today should state their name before speaking.

Jeremy Giffin, the Deschutes Basin watermaster, explained how the developer of KCDG came to him regarding water storage on the property. After a careful review both locally and in Salem by the OWRD, the idea of using Tumalo Reservoir storage was deemed a legal means of obtaining the right to store water by TID.

Brianna Cadwell spoke for KCDG. She thanked TID for their help in going forward with the storage transfer. She noted that the firefighters of the Two Bulls Fire used the KCDG reservoirs for fighting the fire. She commented that the reservoirs will be a benefit to the community in case of future fires.

Gene Bishop spoke for the Bishop family. He requested that the audio recording of the meeting be saved. It has been saved. He read two pages of comments stating why the Bishops believed that the project was not properly permitted and why TID should not approve the water transfer. He then requested that his prepared statement be included in the administrative record. (These comments are attached to the minutes) Mr. Bishop's stated that the water rights transfer was improper and inadequate consideration has been given to the proposed transfer. He also stated that Oregon contracting laws would be violated if the KCDG contract is signed today.

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Andy Niedzwicki spoke in favor of the storage water by KCDG.

Leslie Hudson spoke about the 'ski pond' and that he thought wildlife, among other issues, were not addressed properly. Veronica Hudson also commented that the ponds would have negative effects on wildlife.

Harris Kimble of KCDG stated that Tumalo Reservoir levels would not be decreased by the transfer of storage rights. Regarding the argument that valuable range land was being used, he stated that the areas under the reservoirs had been mined in years prior and the ground could not be cultivated. The water rights that were moved out from under the reservoirs are now placed on irrigable land.

Several other attendees who stated that they would be affected by the project spoke for and against the project.

Manager Rieck also noted that District staff had received 46 individual letters in regards to the KCDG project. Of the 46 letters, 38 were in support of the project and 8 against the project.

Chairman Cochran stated that the time for comment on the KCDG project had ended and the Board would take a five minute break and then resume the regular board meeting.

APPROVE MINUTES OF MAY 13TH, 2014 REGULAR AND EXECUTIVE BOARD MEETINGS

Director Putnam made a motion to approve the regular and executive board meeting minutes. Vice Chair DeMaris seconded the motion and it passed unanimously.

WATER REPORT

Per Manager Rieck the storage water in Crescent Lake is about the same as last year. The District is taking about 119 cfs out of Tumalo Creek and 58 cfs from Bend Feed. The late spring rain was a help in boosting our water supply but since April we have been running a bit below average precipitation.

RYAN WILLIAMS INTRODUCTION

Manager Rieck introduced the District's newest employee, Ryan Williams, who will work in maintenance and will also fill in as ditch rider.

HOLT REQUEST TO CLOSE TO TRESPASSING 540 ACRE PROPERTY

Bradlaigh Holt has requested that TID close the 540 acre property – the old cinder pit - to trespassing Mrs. Holt also requested that a speed limit be posted on Bill Martin Road. She also would like to see a "no outlet" sign posted on road. Ms. Holt wants the community on the road to be gated community. Manager Rieck stated he would check into a gate but that it was a county owned road.

Chairman Cochran suggested the District try installing a video security camera sign and check on the possibility of a gate, but this may not be permissible under county rules.

Per attorney Hopp the District should advertise it is considering closing an area and again if TID decides to closing it. If the District does post the area, law enforcement will expect TID to prosecute all offenders.

Manager Rieck said he would pursue the items discussed and report back next month.

DECLARE OFFICE FURNITURE SURPLUS

Manager Rieck asked the Board to declare the desk, chairs and file cabinet in Elmer McDaniels prior office as surplus. Nunzie Gould suggested the District check with the Historical Society regarding the sale of the

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furniture. Director Putnam made a motion to declare the office furniture discussed as surplus. Vice Chair DeMaris seconded the motion and it passed unanimously.

SCHEDULE 2013 AUDIT REPORT FOR JULY MEETING

Manager Rieck informed the Board that he scheduled the audit report for the July board meeting. He apologized that the report was not done sooner but since the last two board meetings were lengthy he had postponed the review.

SDIS INSURANCE RESOLUTION & WORKERS' COMP RESOLUTION

Chairman Cochran recommended the Board schedule another meeting to review the SDIS Resolutions. It was scheduled for Thursday, June 12th, 2014 at 12:00 noon.

WATER TRANSFERS

Reece Madison had filed for a transfer of 3 acres irrigation right from her property to Nate & Penny Levin's property. Director Putnam made a motion to approve the transfer. Vice Chair DeMaris seconded the motion and it passed unanimously.

The second transfer is a temporary water storage transfer from TID to TID. The change in place of use is from Tumalo Reservoir to the KCDG reservoirs. The contract with KCDG needs to be reviewed first. The transfer and contract will be discussed in Executive session due to the fact that there may be threats of litigation.

WATERSMART GRANT

Per Manager Rieck, TID did not get its BOR Watersmart grant. Only one grant was awarded in Oregon and that was in the Klamath Basin. Rieck will check into an extension of the OWEB grant for \$750,000. He thinks OWEB may want to pull their grant funds.

The District needs to look into how to increase its "point allocation" with Watersmart and also look into different grant writers and how to cut costs on our project.

ADJOURN

Director Putnam made a motion to adjourn the regular board meeting at 1:07 p.m. Vice Chair DeMaris seconded the motion and it passed unanimously.

RECONVENE

Chairman Cochran reconvened the regular board meeting at 1:47 p.m. and appointed Fran DeRock scribe.

KCDG CONTRACT APPROVAL

Director Putnam made a motion to approve the revised contract between Tumalo Irrigation District and KC Development group. The contract sets out the specifics of the TID water storage in the KCDG lakes. Vice Chair DeMaris seconded the motion and it passed unanimously.

WATER TRANSFER

KCDG, Eric Cadwell, and Harris Kimble have filed for a transfer of 21.14 acres of irrigation rights from where the KCDG ponds are being built to other irrigable land owned by the same three entities. The transfer is "a self to self". Director Putnam made a motion to approve the transfer. Vice Chair DeMaris seconded the motion and it passed unanimously.

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TID TEMPORARY WATER STORAGE TRANSFER APPROVAL

Director Putnam made a motion to approve the TID temporary water storage transfer of 108 acre feet from Tumalo Irrigation District to Tumalo Irrigation District. This temporary transfer will change the place of storage from Tumalo Reservoir to the KCDG reservoirs. Vice Chair DeMaris seconded the motion and it passed unanimously.

ADJOURN

Director Putnam made a motion to adjourn the Regular Board Meeting at 1:49 p.m. Vice Chair DeMaris seconded the motion and it passed unanimously.

REGULAR BOARD MEETING MINUTES
September 4, 2014 10:00 a.m.
TUMALO IRRIGATION DISTRICT OFFICE
64697 Cook Avenue
Bend, Oregon 97701

BOARD: Ron Cochran, Shirley DeMaris, Steve Putnam, Martin Warbington, Ron Kaye
STAFF: Kenneth Rieck, Bob Varco, April Harris
ATTORNEY: Bill Hopp
GUESTS: Derek Hopp, Tom Turquand, Greg Mohnen, Taffee Murray, Mindy Wolfe, Mark Kachlein, Elizabeth Dickson, Ken Katzaross

Chairman Cochran called the regular board meeting to order at 10:00 a.m. and appointed April Harris scribe.

APPROVE MINUTES OF AUGUST 12TH, 2014 REGULAR AND EXECUTIVE BOARD MEETINGS

Chairman Cochran requested a change in the wording of a sentence in the minutes under the heading *Potential Water Theft and Private Ditch Policy*. Director Putnam made a motion to approve the August 12th, 2014 regular board meeting minutes as amended and executive board meeting minutes. Director Warbington seconded the motion and it passed unanimously.

WATER SUPPLY REPORT

Per Manager Rieck, Crescent Lake was 74% full, which is slightly above last year. The Three Creeks Lake SNOTEL site, up by Tumalo Creek, had jumped up to almost an average flow after being at 25% in January and February. Also, Summit Lake, which feeds Crescent Lake, was really low this summer due to a lack of rain this past spring. We have to watch this situation and try to conserve the water we have in the lake now and going into the winter so that we come out in the spring with as much as possible.

VOTE BY MAIL RESOLUTION

Manager Rieck read aloud the Vote by Mail Resolution and stated that we will also still accept hand delivered ballots. There are two directors running this year, Shirley DeMaris and Martin Warbington. Director Putnam made a motion to approve the Vote by Mail Resolution. Vice Chair DeMaris seconded the motion and it passed unanimously.

SECOND READING OF MOTION TO AMEND BY LAWS

Manager Rieck read the motion to amend 7(f) of the District By Laws titled *Minutes*. The sentence: *Minutes may be amended and shall be approved at the succeeding regular meeting, and signed by the President;* will have the words "and signed by the President" deleted. Director Warbington made a motion to accept the change to the By Laws. Director Putnam seconded the motion and it passed unanimously.

BANK REVIEW AND SIGNATURE CARDS

New bank signature cards were presented to the board for signatures, which allowed Manager Rieck to sign checks involving the long-term account.

SDAO YEARLY SAFETY GRANT, \$3000 MATCHING

Manager Rieck discussed the \$3000 SDAO Safety Grant we received last year to put the buoys in Tumalo Creek near the fish screen. Rieck would like to apply again this year, for the same amount, to put buoys at the

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Bend Feed Canal. Vice Chair DeMaris made a motion to approve the application of the SDAO Safety Grant. Director Putnam seconded the motion and it passed unanimously.

WATER TRANSFERS

Manager Rieck presented to the Board, for approval, the water transfer of 4.5 acres irrigation rights from Joyce E. Coats Revocable Trust to Lucky Lakes and a 1 acre transfer from Frank and Victoria Pride's property to Lorin and Terry Ann Freeland's property. Director Warbington made a motion to approve these transfers. Director Putnam seconded the motion and it passed unanimously.

BEND PARKS AND REC

Manager Rieck presented a request from Bend Parks and Rec to extend their trail down to Putnam Rd. The trail currently runs on top of our pipeline that ends about 1500 ft above Putnam Rd, right before the Redrock Siphon. They have recently obtained easements which will overlay the top of our easement. In talking to Steve Jorgenson, Bend Parks & Rec's Trail Manager, Rieck suggested the possibility of making an amendment to our existing MOU with them. Attorney Hopp recommended we defer action until the next board meeting, giving him the opportunity to review the current easement and MOU we have. Cochran agreed with Hopp's suggestion to defer action and directed Rieck to inform Bend Parks and Rec that we are working on it and will get back to them.

WATER THEFT AND PRIVATE DITCH POLICY

Chairman Cochran requested a couple of grammatical changes on the first page of the Water Theft Policy. Manager Rieck stated that these policies were based on state law, which we have always followed but never published. These documents were created for the purpose of clarification and to provide a path for everyone that is consistent across the board. There was a discussion with a few of our water patrons who were present about issues that they had been facing recently that are covered by the Private Ditch Policy and the Water Theft Policy. Director Putnam stated that these policies should help to resolve these issues. Cochran brought up the suggestion of private ditch owners creating sub-districts. However, it was decided that due to the potential expense to the water users, it is in their best interest to work things out among themselves and Rieck stated that the District was here to help. Elizabeth Dickson, Central Oregon Irrigation District's attorney, claimed that their Private Ditch Policy, which mirrors our own, is working well for their district in solving similar issues and they have not had to form any sub-districts. Director Putnam made a motion to approve the Private Ditch, Water Theft, and Management beyond the POD Staff Procedure policies, with the discussed changes. Director Kaye seconded the motion and it passed unanimously.

SIX MONTH BUDGET REVIEW

Manager Rieck stated that at our next Regular Board Meeting on October 14th, 2014, a special budget meeting will be scheduled for late October or early November.

APPROVE SEPTEMBER 2014 VOUCHER LIST

Director Putnam made a motion to approve the September 2014 voucher list. Vice Chair DeMaris seconded the motion and it passed unanimously.

ADJOURN

Chairman Cochran adjourned the Regular Board Meeting at 10:55 a.m.

RECONVENE

Chairman Cochran reconvened the Regular Board Meeting at 12:47 p.m. and appointed April Harris scribe.

PERMANENT WATER TRANSFER

Director Kaye made a motion to approve the filing of a Notice of Intent to permanently change the POU - place of use - of 108 acre-feet out of the 1100 acre-foot Upper Tumalo Reservoir Right to Store Certificate #76684 from Tumalo Reservoir to the KCDG reservoirs. Director Putnam seconded the motion and it passed unanimously.

ADJOURN

Director Putnam made a motion to close the regular board meeting at 12:48 p.m. Director Warbington seconded the motion and it passed unanimously.

REGULAR BOARD MEETING MINUTES

October 14, 2014 10:00 a.m.

TUMALO IRRIGATION DISTRICT OFFICE

64697 Cook Avenue

Bend, Oregon 97701

BOARD: Ron Cochran, Shirley DeMaris, Steve Putnam, Martin Warbington, Ron Kaye
STAFF: Kenneth Rieck, Bob Varco, Fran DeRock, April Harris
ATTORNEY: Bill Hopp, Derek Hopp
GUESTS: Greg Mohnen, Nunzie Gould, Gail Snyder, Jeff Perrault, Bendt Broderson

Chairman Cochran called the regular board meeting to order at 10:00 a.m. and appointed Fran DeRock scribe. The board acknowledged the passing of former board member Patricia Gainsforth on September 9th. Manager Rieck noted that there will be a celebration of life for her on October 19th, 2014 at the Old Stone Church in Bend from 1:00 p.m. to 3:00 p.m.

APPROVE MINUTES OF SEPTEMBER 4TH, 2014 REGULAR AND EXECUTIVE BOARD MEETINGS

Director Putnam made a motion to approve the September 4th, 2014 regular and executive board meeting minutes. Director Warbington seconded the motion and it passed unanimously.

WATER SUPPLY REPORT

Per Manager Rieck, Crescent Lake was 65% full, about the same as last year. Overall the water season was very good this year. As for predicting what will happen this winter, it is difficult since there are opposing long-range forecasts.

BYLAW CHANGE

Manager Rieck reviewed the bylaws recently and found that the "Emergency Reserve Fund" was a leftover from our old Bureau of Reclamation loan in the 70's. We no longer have this reserve fund and Manager Rieck suggested we delete the section of the bylaws addressing the fund. The board and attorney Hopp discussed whether to delete this bylaw or modify the bylaw for a new emergency fund. Since we have a long-term fund that now acts as our emergency fund also, Director Putnam made a motion to delete C-1 in the bylaws which designates a special emergency reserve fund and designate C-2 as C-1 with minor textual changes. Vice Chair DeMaris seconded the motion and it passed unanimously. Since this is a bylaw change it will be read and voted on again at the next regular board meeting.

HCP/BSWG PROGRESS

The Basin Study Work Group has finished their charter. Chairman Cochran commented that he hoped those on committees follow through with their various assigned tasks. Per Manager Rieck, the BSWG has two grants, one from BOR and one from the State of Oregon, each for \$750,000. The balance of the contributions will come from in-kind, mainly Rieck's time and Hopp's time for our district.

The next item to look at is the plan of study, then the studies themselves. Director Warbington and Director Kaye requested they be put on the mailing list for the meetings of the work groups. Kaye requested the meeting schedule be posted on our website.

The DBHCP proposal has been submitted. The organizations involved are studying the proposal and then there will be a period to respond to questions and concerns regarding the proposal. The spotted frogs are the biggest question for our district. Currently it is not known if we are benefitting them or not. Once all of the basic issues have been addressed, the plan will be re-worked for review by the government services.

MEETING WITH KEVIN CREW

Our district conservation plan will be up for renewal in late 2015. Manager Rieck has requested Black Rock Consulting (Kevin Crew) to do the update for 2015. The cost will be between \$3,000 and \$5,000 for the update. Rieck will put this cost in the budget. Manager Rieck would also like Black Rock to develop a Master Plan for the district that would include but not be limited to, the conservation plan, drought management plan, long range maintenance plan, storage, and Tumalo Creek and Crescent Creek restoration plans.

The district still has the \$750,000 Tumalo Feed Canal grant award from OWEB but has not been able to come up with the match monies. Rieck wants to re-package our plans for piping and hopefully get more support from the City of Bend, DRC, Oregon Trout and other organizations.

BEND PARKS TRAIL MOU

Per attorney Hopp, exhibit "A" that should have been attached to the MOU, which addresses the Bend Parks & Rec trail which is partially on TID easements, was not attached to either the Bend Parks copy or the District copy of the MOU. Bend Parks created a new exhibit "A" and it seems OK. The Parks attorney is reviewing the MOU and Hopp has reviewed it for us. A simple amendment to the MOU for additional trails on the Bend Feed Pipeline should not be a problem.

DISTRICT OWNED PROPERTY UNDER THE CANAL NEAR THE BEND FISH SCREENS

The district used to own many of the properties under the canal near the Bend fish screens. Most of that property was sold with easements but with at least one exception. One piece of property under the bend feed canal that the District still owns has been used by the owners with our consent. Potential new buyers of the property had expressed concerns with the arrangement and their exclusive use of the property. Rieck proposed to lease our property to these owners for their use but retain ownership. Rieck wanted to familiarize the board with the easements and will keep the board up to date on what happens since the potentially new owners have not closed on the property yet.

FLEX LEASE PAYOFF

The district now has the funds to pay off our flex lease. The payoff will eliminate over \$22,000 in interest each year. The flex lease payoff will total \$526,775 and needs to be received by U.S. Bank by November 15th in order to have the payment effective for January 1, 2015. Director Putnam made a motion to pay off the flex lease as outlined. Director Kaye seconded the motion and it passed unanimously.

SCHEDULE SPECIAL BUDGET MEETING

A special budget meeting was scheduled for October 28th, 2014 at 10:00 a.m.

DECLARE ELECTIONS

Shirley DeMaris and Martin Warbington were the only two people that submitted petitions for re-election in divisions 2 and 5 respectively. Manager Rieck certified the petitions along with office staff. Both parties have been re-elected for the term of January 2015 through December 2017.

RESOLUTION FOR LIENS

Director Putnam made a motion to place liens on the five water patrons who have not paid their assessments for 2014 and have not scheduled payment plans. Vice Chair DeMaris seconded the motion and it passed unanimously.

Regular Minutes 10-14-14

APPROVE SEPTEMBER 2014 VOUCHER LIST

Director Putnam made a motion to approve the October 2014 voucher list. Vice Chair DeMaris seconded the motion and it passed unanimously.

ADJOURN

Chairman Cochran adjourned the Regular Board Meeting at 10:55 a.m.

RECONVENE

Chairman Cochran reconvened the Regular Board Meeting at 11:43 a.m. and appointed Fran DeRock scribe.

INSTALLATION OF GATES ON HIGHWAY 20

The district has an existing gate along highway 20 which blocks the northeast access to Bill Martin Road, but it cannot be seen from highway. We will have to contact the state to see if a more visible gate placed on their property can resolve the problem of illegal access.

MOTION TO APPROVE NEW KC DEVELOPMENT GROUP CONTRACT

Director Putnam made a motion to authorize Manager Rieck to sign the newly revised contract with KC Development Group that was discussed in executive session. This contract replaces the previous contract with KCDG and notes that the transfer was for 125 acre feet and not 108 acre feet of water storage. Director Warbington seconded the motion and it passed unanimously.

OTHER

It was noted that the county hearings officer handling the land use appeal filed by Bishop should have a decision before the end of this year.

ADJOURN

Director Putnam made a motion to close the regular board meeting at 11:48 a.m. Vice Chair DeMaris seconded the motion and it passed unanimously.

Transcript of Pertinent Statements Made at June 10, 2014 Tumalo Irrigation District Board Meeting

Speakers:

Cochran = Ron Cochran, Chairman of the TID Board
 Giffin = Jeremy Giffin, Watermaster, OWRD
 Cadwell = Briana Cadwell, Member of KC Development Group, LLC ("KCDG")
 Kimble = Harris Kimble, Member of KCDG
 Hudson = Les Hudson, water patron
 Unidentified man #1 asking a question
 Unidentified man #2 speaking on behalf of KCDG
 Rieck = Kenneth Rieck, Manager, Tumalo Irrigation District

Time marker range(s), in minutes	Speaker	Statement
00:28 – 01:22	Cochran	...I'd like to start by taking a few minutes to review several issues concerning the KCDG development and the TID water storage project on their property. Although some of you may think this project is something that just came to life in the last couple of months, it has in fact been in progress for almost 10 years and it has been known to the real estate community for at least the last 5 years. It has also been stated that the two principals who will be commenting on the project today have had ongoing conversations about the housing lots, the lakes and others for more than 2 years. TID was contacted last fall about the possibility of storing water there and this was noted in TID's November minutes. Since then, there have been numerous discussions, contract negotiations--all of which have been noted in our monthly minutes.
02:35 – 03:04	Cochran	I want to go over some key points, and this is very important. TID is not selling an asset. We are entering an agreement to store water in a lined reservoir which is superior to the existing Tumalo Reservoir and this will not reduce the amount of water flowing through Tumalo Reservoir.
04:59 – 06:02	Cochran	We've also had comments from many patrons... about possible growth in the area. The lakes represent residential growth. TID has nothing to do with that. If you have those issues, they should be brought up with the County and the State. We, basically, believe it or not, are just in business to deliver water....If [your comments] are about the growth issues we will probably have to cut you off, because, again, TID has nothing to do with allowing these building lots to go in.

06:02 – 06:32	Giffin	The developer came to me with options for filling these facilities. One of the options that was brought up was taking a portion of Upper Tumalo Reservoir's storage right, with a 1961 water right from Tumalo Creek, and moving a portion of that over to the two facilities that did not leak.
31:50 – 33:58	Kimble	I'd like to address a couple of the points. One point is that the flow of water to Tumalo Reservoir is going to be decreased. That is not the case. ... We have 56 acres of irrigation right... The idea that water is being decreased to Tumalo Reservoir--that isn't the case. This water storage, once transferred--the water that went in to fill that pond--is our surface irrigation water. And we are still pumping out and irrigating with that....
34:16 – 34:18	Hudson	What about the ski pond? That is more important.
34:19 – 34:41	Kimble	The ski pond--the ski pond is one of those ponds. It's the storage area. And the bottom line is that Tumalo Irrigation is not going to have to give us additional water to maintain those ponds. When that water goes in there, that water is in there, and we maintain that with our surface irrigation rights.
38:40 – 38:58	(unidentified man #1)	One question. Is your plan...do you have a plan written up for your development as to how you handle your property? Is it already written up in ink--in stone--the fact that you are going to have a ski lake there or is that simply rumor?
38:59 – 39:01	(unidentified man #2, speaking for KCDG)	We are going to have a ski lake there.
39:02	(unidentified man #1)	Ok. It's silly.
39:03 – 40:13	Kimble	As far as a development, we have not applied for a development. Right now, we have a total of 10 large-acreage lots. OK. We do have an intention of applying for a PUD, so that we can shrink lots down, for every 2 acre lot it's going to require that we have 8 acres of open space. There's going to be...its...the reason it's called "conditional use" for the RR-10 zoning is because they are going to put conditions on us at that point. And there are going to be public meetings. There will be public input and the County will approve, we hope, a PUD at the point that we apply for one. But, at that point, they will take into consideration the public's input and they will have restrictions on us, they will have their input. So, that's what it is, conditional use. They are going to place conditions on whatever they approve.
47:22 –	Rieck	The ponds are filled initially with Spring run-off as it flows, because that

47:46		1961 water right runs mainly in the Spring and early summer and they [the ponds] are filled initially off of that and the remaining [surface irrigation] water would be measured as we put it in there and then he would irrigate...

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G A R V E Y S C H U B E R T B A R E R

MEMORANDUM

TO: Thomas and Dorbina Bishop
FROM: Rachael Ream
DATE: June 10, 2014
RE: Summary of TID Meeting on June 10, 2014

Following are comments made during the June 10, 2014 Tumalo Irrigation District Board Meeting (which I attended) that pertain to the residential development undertakings of the KC Development Group, LLC ("KCDG").

The meeting started with a closed executive session at 10:00am and was opened to the public at 11:05am. The Chairman began by stating that the Board would first address the KC Development Group ("KCDG") contract issue. The Chairman then made the following points:

- The development has been in process for almost 10 years and has been known among the real estate community for 5 years with ongoing conversations regarding the housing lots taking place for more than 2 years. TID believes that many of the comments it has received regarding the transfer of water are based on the proposed residential development, which is not TID's concern.
- TID was first approached regarding the proposal to transfer storage rights to KCDG in November 2013.
- TID is not selling water as an asset. TID is not reducing Tumalo Reservoir. It is entering into an agreement to have KCDG store the water in a lined reservoir that is superior to the Upper Tumalo Reservoir. TID will retain the right to release the stored water back into use at a moment's notice.
- TID has explored other potential storage sites, but no one except KCDG has the capacity to store the water or compensate TID for storing it.
- Hydrocarbons and animal waste could potentially contaminate the water, but that is also true of Crescent Lake where TID currently stores a majority of its water. There are also numerous miles of river, canals, and laterals where pollutants could enter the water.

The Water Master, Jeremy, stated that KCDG came to him with several potential offers. The first offer was to move a portion of the water from the Upper Tumalo Reservoir to a new facility under a temporary one-year transfer. Then, a permanent transfer could be put in place down the road.

June 10, 2014

Gene Bishop spoke. He requested that an audio recording be made of his remarks and that his statement be added to the minutes of the meeting. He read his statements (copy attached). The Board did not comment.

The Board invited anyone in attendance at the TID meeting to speak. Relevant comments that were made are as follow:

- Les Hudson spoke. He stated that the TID needed to develop an integrated plan to deliver the water efficiently for the district and to deal with water shortage issues. He stated that the contract with KCDG was not reviewed thoroughly or made publicly available for comment and that the TID should come up with a plan for efficiently dealing with the water supply. He stated that service on the Board is a remunerated position and the Board has a duty to manage the water efficiently.
- Veronica Hudson spoke. She stated that she was concerned regarding wildlife mitigation and the effects of transferring the water on the area around the Upper Tumalo Reservoir.
- Nunzie Gould spoke. She stated that it is important that TID have a management plan in place. She stated that changing the allocation of water between agricultural use and non-agricultural lands needs to be evaluated to ensure that agricultural lands can be maintained.
- Harris Kimble spoke. He stated that patrons' water usage is not being decreased. The water is being stored in a different locality where less water will be lost to seepage. He also stated that KCDG will manage the water by properly irrigating their land and that the only water to be replaced is that lost through evaporation. *He stated that TID will have no penalty to take the water out of storage. The only penalty would be the water needed to refill the lakes. He stated that the water used by KCDG would be for "conditional use" based on the zoning and county approval.*

The TID Board stated that pumping tankers would be used.

- Brandon Anderchuk spoke. He stated the Cadwells were working with the county and TID.

The TID Board stated that the water storage right is a multi-purpose right and not solely an irrigation right.

- Marilyn Hamper spoke. She stated her concern that KCDG might use more than their 56 acres of allotted water and might draw from the stored water. She asked how KCDG's water usage was to be monitored and if individuals could also monitor it independently.

The TID Board stated that a head gate would be built to set the rate of inflow. The ponds would be filled utilizing the spring flow and the remaining water would be measured as it goes into the ponds. The TID Board stated that if the water is shut off, KCDG will have a holdover supply because of the ponds, but it is the ditch rider's job to monitor the amount of water going to KCDG. The Board stated that individuals may ride with the ditch riders and can also measure the water at the weir, but the gate/valve will be locked and the Board will not give out keys.

June 10, 2014

- Chris Jewet spoke. She stated that Kenneth Rieck, Manager and Secretary to the Board, had told her in April that there was plenty of time to deal with the KCDG contract. She questioned why the Board was suddenly in a hurry to sign the contract. She also stated that there were no private reservoirs in Oregon.

The TID Board stated that the KCDG contract was first discussed and entered into the November 8, 2013 Board Meeting Minutes, which were available online. The Board acknowledged that the website was outdated and difficult to access. The Water Master replied that there are numerous private reservoirs in Oregon.

- Mark Rudin spoke. He stated KCDG was not paying enough for the right to store the water.

The TID Board stated that KCDG was paying two separate bills: one for the right to store the water and another for the irrigation water allotted to the property. The Board estimated that KCDG's annual cost would be around \$11,000.

- Les Hudson spoke. He stated that the TID had made the proposed contract public only when the ski pond became public knowledge. He restated that TID needs an efficient plan for storing and delivering the water and asked why the Tumalo Reservoir could not be lined to prevent seepage.

The TID Board stated that they are looking at options for Tumalo Reservoir as well. They asked Harris Kimble what the cost would be to line the Tumalo Reservoir and learned that it would be 35.5 cents per foot for liner plus 20 cents per foot for geotech on the slopes of the reservoir.

- Bob Varco, Superintendent of TID spoke. He stated that water has been shut off in the past due to shortages, that the transfer of storage to a lined lake is a positive move for the district, and that the water district patrons will ultimately benefit from the contract.
- Bradaigh Holt spoke. She stated that KCDG is not offering to store the water for altruistic reasons and that there need to be checks and balances in place to ensure fair usage.
- Nunzie Gould spoke. She requested that the water be put on hold pending the land use application that has yet to be filed. She stated that TID will likely be an agency of interest. She stated that the county has wildlife habitat standards and that at this point, no one knows the full impact of transferring the water and reducing the water in the reservoir on the local wildlife.
- Will Hammock spoke. He stated that he was in favor of the water being stored in a lined lake and that he was aware of the KCDG proposal to build a water ski lake and homes when he bought his land in 2005.

The TID Board moved for a break. Following the break, they discussed pending water transfers and various unrelated matters.

The final water transfer that was discussed was the temporary transfer of 108 feet of water from Tumalo Reservoir to KCDG. The TID attorney advised the Board that they should deal with the matter of the KCDG contract prior to voting on the transfer.

June 10, 2014

The Board convened a second executive session to discuss the KCDG contract and potential litigation related to the contract.

The Board returned from executive session, reconvened the public session and immediately approved the KCDG contract. The Board then unanimously approved the temporary water transfer to KCDG. The Board adjourned.

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**TID Board Meeting
June 10, 2014**

Comments of Gene Bishop

Mr. Chairman and members of the Board, I am Gene Bishop, speaking on behalf of my family who are water patrons of the district. We are very concerned because the Board is contemplating a contract to transfer water storage rights (a public asset) to a private party for its exclusive (but unlawful) use and pecuniary gain in a residentially zoned neighborhood for inadequate consideration. This is improper. The financial compensation is far below the value to which the water storage rights would be used. **Inadequate consideration** is proposed and will result in the loss to the water patrons as a whole of a valuable, strategic asset if this transfer occurs.

Moreover, **inadequate consideration** has been given to safety, health, environmental, wildlife and land use risks.

Simply stated, inadequate evaluation has been given to this proposal and materially important issues have not been addressed. Sufficient public input to date has neither been sought, nor considered. In fact, the public learned from reviewing the contents of the draft of the May 13, 2014 meeting minutes that without public notice and after the close of its regular meeting, the Board retreated into another Executive Session to contemplate the water storage right transfer to KC Development Group, LLC, Eric Cadwell, and/or Harris Kimble without notice to the public. This is an overt violation of the public meetings law, when members of this Board had heard the public at that meeting express concerns about the irrigation contract. Our attorneys advise us that a Public Meetings violation may carry with it personal liability to TID Board Members to pay our attorneys fees if we succeed in a public meetings violation lawsuit. You can review this obligation at ORS192.680(2), (3) and (4).

Approving today a transfer of water storage rights would be premature, imprudent and, if implemented, would do harm to the water patrons and residents of this district. The Board owes a fiduciary duty of trust to these, your constituents, who are entitled to due process. That has not been afforded to them. As a case in point, there are many relevant documents pertaining to this matter that you and others are seeing for the first time today. The Board will not yet have had the time to read and consider adequately and follow up with appropriate questions and analysis before deciding whether to proceed with this agreement to transfer water rights unless you continue the matter.

I mentioned safety concerns. There has been no public disclosure yet, and there seemingly are no provisions in the draft contract with the developer, addressing the risk to people and wildlife of drowning or injury that may occur at the attractive nuisance that KCDG is intending to establish in an existing residential neighborhood.

The Board may recall that, sadly, a few years ago, 7 year old Benjamin Evans drowned at the diversion point where water is taken from Tumalo Creek to supply water to the District when he fell thru the thin ice. I am close to the age he would have been today. No provisions have been made for public safety.

What provisions are there to ensure that the lakes are operated in a manner that is compatible with the residential zoning and will not damage the interests of residents and water patrons of the district, especially those who live in that neighborhood?

Most importantly, has the Board assured that no water patron's supply of water will be impaired or denied as a result of storing water on the property, and under the terms of the contract, with KCDG? If not, why would the Board consider approving a contract that favors one water patron (KCDG) while causing harm to the water irrigation rights of other water patrons?

The Board should step back and re-start this process. It should do adequate due diligence and public consultation to determine the highest and best use, for the benefit of the water patrons, of the water storage rights.

I ask that you include the written copy of these comments in the administrative record of this Board meeting.

My family will consider pursuing all administrative and judicial remedies to address our rights as water patrons and residents of TID and as citizens to ensure that the strategically essential and valuable water storage rights of TID, held for the benefit of the water patrons as a whole, are not misused or abused. You have in your board packet a letter prepared by our attorney and I recommend that you read it carefully, as any approval of the contract contemplated today, will most assuredly violate the public contracting laws.

Further, the contract contemplated today is only first being made available to the public at this meeting. The water patrons and members of the public have not had an adequate opportunity to consider and comment on its contents.

Thank you for your thoughtful consideration of these issues and please include the written copy of this testimony in the administrative record for the contemplated water storage right transfer to Eric Cadwell, Harris Kimble, and/or KC Development Group, LLC.

Please retain an audio recording of these proceedings.

June 9, 2014



Tumalo Irrigation District
Board of Directors
64697 Cook Ave
Bend, OR 97701

Dear Board of Directors:

I am writing to express my unconditional support for the pond and water ski lake development project owned by KC Development Group.

As a Deschutes County resident and irrigation water owner, I am acutely aware of the need to store and use water in this area. As I understand it, the project would transfer 108 acre feet of water out of the 1100 available to TID to KC Development Group to store—water that needs to be proved up or lost. It would be a terrible loss for this region if water rights were to be lost for any reason, but water loss on a scale of this magnitude would be tragic.

I have researched their project and feel it is a only a benefit to Deschutes County: KC Development will be storing water in lined ponds—water that otherwise experiences huge loss due to leakage in the Tumalo Reservoir; they will be storing water that otherwise will be lost in the region; TID will retain the water rights themselves, since KC Development will only be leasing it; and they will be paying TID for the privilege of storing the water. Additionally, their project will add diversity to the area, and diversity creates economic opportunity.

The Two Bulls Fire that started over the weekend is only further proof that this project will benefit not only TID and the KC Development Group, but the whole region. Having a large holding of water so close to the city makes it available to fight fires and protect homes that are vulnerable close to the city. The ponds are large enough that even fire-fighting helicopters can use it.

I have dealt with Eric Cadwell, an owner of KC Development, in a professional setting for 3 years. He has only displayed utter integrity, sincerity, and concern for others in his dealings in the community, even investing back into the community. He goes out of his way to research his projects, stay informed on the community, and follow proper channels for any venture he undertakes. If there is anyone suggesting any hint of deviation from those standards, it would be uncharacteristic and resolved easily through communication, as he is a very open and willing to be partners in any situation.

Please do not let a small, disgruntled minority ruin a wonderful opportunity for Deschutes County.

Sincerely,

Seana McKenzie Alcala
64660 Old Bend Redmond Highway
503-516-2263

RECEIVED
JUN 09 2014

BY:

Links to Information about Kimble Ranch Project

http://listings.realbird.com/Real_Estate/Elegant-NW-Estate/Bend/OR/D8C8F7D4/119465.aspx?tab=neighborhood

At the above website, promoting the sale of the house ultimately purchased by the Cadwells, was (and is) the following description of the plan (visible by selecting the "Neighborhood" tab at the main page at this link). For some reason, the website does not allow a print out, therefore, the text is copied below.

"Neighborhood Info

Kimble Ranch is a proposed Planned Unit Development that is expected to be the most unique and exclusive neighborhood in Bend, Oregon. The project is located on Bend's westside, east of Johnson Road and is just eight minutes from the downtown core. The proposed lots will be a minimum of two acres in size and will either front on the proposed lake or sit high atop the rim rock overlooking Tumalo Creek. Kimble Ranch will be a gated community with a focus on outdoor recreation. The homes will be built to exacting standards of quality and craftsmanship while retaining individuality and harmony with the surrounding environment.

Development will commence with the construction of a 2100 foot long water ski lake and surrounding landscaping. After completion of the lake and landscaping, a ten lot PUD will be submitted for approval. The PUD will include ten-two acre lots and over eighty acres of open space along with private paved roads and a private domestic water system. Water for the lake and the landscape irrigation will be provided for by the existing fifty-six acres of Tumalo Irrigation water rights. A sixteen to eighteen lot homeowners association will be formed to insure, maintain and protect the shared amenities and infrastructure."