



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

AGENDA REQUEST & STAFF REPORT

For Board Business Meeting of May 23, 2016

DATE: May 20, 2016

FROM: Will Groves CDD 541-388-6518

TITLE OF AGENDA ITEM:

Board of County Commissioners (Board) signature and approval of Board decision Doc No. 2016-291 on conditional uses, non-conforming use, and Landscape Management site plan review (247-15-000113-CU, 114-CU, 115-NUV, 116-LM, 670-A) to establish new dock and decks, verification of non-conforming structures (bathhouse), alteration of the bathhouse, and verification of nonconforming uses consisting of fill within the flood plain and wetlands.

PUBLIC HEARING ON THIS DATE? No.

BACKGROUND AND POLICY IMPLICATIONS:

The Hearings Officer issued a decision on December 9, 2015 finding that the proposal does not comply with all applicable regulations. Specifically, the "bathhouse" was found to have been unlawfully established while PL-5 was the active zoning code, aboveground decks were found to be not allowed in the 100-foot river setback, and the dock was found not to comply with a number of regulations. On December 22, 2015, the applicant appealed the decision to the BOCC.

The Board conducted a de novo public hearing on March 30, 2016. The written record closed on April 20, 2016. Board deliberations occurred on May 16, 2016. The Board directed Staff to prepare a written decision taking into account the Board's statements at the deliberations for their decision.

FISCAL IMPLICATIONS:

None.

RECOMMENDATION & ACTION REQUESTED:

Approve and sign Doc No. 2016-291, Decision of Board of County Commissioners on land use file numbers 247-15-000113-CU, 114-CU, 115-NUV, 116-LM, 670-A.

ATTENDANCE: Will Groves and Legal Counsel

DISTRIBUTION OF DOCUMENTS:

Will Groves, CDD
Legal Counsel

For Recording Stamp Only

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

FILE NUMBERS: 247-15-000113-CU, 247-15-000114-CU,
247-15-000115-NUV, 247-15-000116-LM, 247-15-000670-A

APPLICANT: Peter Dreifuss
14226 Midland Road
Poway, California 92064

PROPERTY OWNERS: Peter Dreifuss & Sandra Bovenzi
14226 Midland Road
Poway, California 92064

**APPLICANT'S
ATTORNEYS:** Elizabeth Dickson and Ken Katzaroff
Hurley Re, PC
747 S.W. Mill View Way
Bend, Oregon 97702

PROPOSAL: Verification of a non-conforming structure (bathhouse), approval to alter/expand the bathhouse into the bunkhouse, and verification of nonconforming uses consisting of driveway and riprap fill within the flood plain and wetlands as well as a septic system. Conditional use approval for a dock and associated fill and removal, conditional use and Landscape Management Site Plan approval for a garage and bunkhouse, conditional use approval for a well house and decks on property zoned RR-10, FP, WA and LM, and located adjacent to the Deschutes River south of Bend.

STAFF REVIEWER: Will Groves, Senior Planner

HEARINGS OFFICER: Karen Green

**HEARINGS OFFICER
HEARING DATE:** August 25, 2015

DATE OF HEARINGS

OFFICER DECISION: December 9, 2015

**DATE OF BOARD OF
COMMISSIONERS**

HEARING: March 30, 2016

RECORD CLOSED: April 20, 2016

I. NATURE OF THE PROCEEDINGS AND SUMMARY OF DECISION:

This matter comes before the Board of Commissioners (the "Board") as the result of an appeal filed by the Applicant pursuant to DCC 22.32.020 of a December 9, 2015, decision of Deschutes County Hearings Officer Karen Green denying the Applicant's request to approve the subject application.

Hearings Officer Green found that the Applicant had demonstrated compliance with many of the criteria applicable to the application, but concluded the bathhouse was not established lawfully in 1976 under PL-5, that new decks could not be established within the 100-foot river setback, the subject property did not meet river frontage requirements for a dock, the applicant had not demonstrated compliance with applicable fill and removal standards, and that expansion of the bathhouse could not be permitted within the 100-foot river setback.

The Applicant appealed the Hearings Officer Decision to the Board and the appeal was heard *de novo* on the issues raised by the Applicant.

In this decision, the Board finds and concludes:

- Adopting the Hearings Officer's findings verifying nonconforming uses consisting of the driveway and riprap fill within the flood plain and wetlands and allowing maintenance of those uses.
- That the preponderance of the evidence demonstrates that the bathhouse was lawfully established as a structure associated with the non-conforming recreational use of the property in 1976.
- The expansion of the bathhouse into the bunkhouse cannot be permitted as a either a conditional use or an alteration of a non-conforming use.
- The subject property does not meet frontage standards for a new "individual dock" and the dock is therefore denied.
- The existing dock does not comply with applicable width and area limitations for individual docks, regardless if the dock is viewed as a single structure or a dock and walkway.

- The garage, wellhouse, and decking beyond the 100-foot river setback comply with applicable conditional use criteria.
- The garage complies with applicable Landscape Management criteria.
- New decking within the 100-foot river setback is denied.
- Fill and removal associated with the dock does not comply with DCC 18.125.015(A) and is denied.
- That the PL-5 zoning code is properly before the Board and that a procedural defect before the Hearings Officer, if any, is cured. Also, the Uniform Building Code in effect in 1976 is not in the record and is not being relied upon as part of this decision.

The Board therefore finds that portions of the application satisfy, or will satisfy with conditions of approval, the applicable approval criteria in the provisions of Titles 18 and 22 of the Deschutes County Code. Specifically, the Board denies the applicant's request for approval of the dock, fill and removal associated with the dock, decking within the 100-foot river setback, and bunkhouse expansion. The Board approves the applicant's request for:

- Verification of a nonconforming use consisting of the gravel driveway and riprap and previous maintenance thereon, and for future maintenance of the driveway through application of up to eight (8) cubic yards of gravel every five years, and placement of additional rocks on the riprap to stabilize it.
- Verification of the nonconforming use consisting of the recreational use of the property and the associated bathhouse structure as established in 1976. This use does not include residential use or overnight occupancy of any structure on the property. This use also does not include recreational vehicle use of the property not in compliance with DCC 18.116.095.
- Conditional use approval for the wellhouse and decking located outside the 100-foot river setback.
- Conditional use and Landscape Management Site Plan review for the garage.

II. APPLICABLE STANDARDS AND CRITERIA:

The Board adopts and incorporates by reference the description of the applicable standards and criteria set forth in Sections I.A. and I.B. of the Hearings Officer's Decision, with the following additions.

Chapter 22.32

Section 22.32.027

Section 22.32.030

APPEALS

Scope of Review

Hearing on Appeal

III. BASIC FINDINGS:

The Board adopts and incorporates by reference the code interpretations, findings of fact, and conclusions of law set forth in the Hearings Officer's Decision in Sections II.A (Location), B

(Zoning and Plan Designation), C (Surrounding Zoning and Land Uses), D (Site Description), E (Chronology and Land Use History), F (Procedural History), G (Proposal), H (Public/Private Agency Comments), I (Public Comments), and J (Lot of Record), with the following additions.

- F. Procedural History:** The Board finds that Hearings Officer Green issued her decision on December 9, 2015. On December 22, 2015, the Applicant filed a timely appeal of the decision pursuant to DCC 22.32.020. Pursuant to DCC 22.32.027(2) and (4), the Applicant requested that the Board hear the appeal *de novo* on the issues raised in the appeal.

On January 27, 2016, the Board met and elected to hear the appeals *de novo*.

The Board held its duly noticed hearing on March 30, 2016. At the conclusion of the hearing and at the request of the parties, the Board held the record open pursuant to ORS 197.763(6) until April 20, 2016, for additional evidence, arguments or testimony.

The Board conducted deliberations at its regular meeting on May 16, 2016.

III. FINDINGS:

- A.** The Board strikes the Hearings Officers Conclusions of Law Section III.A. These Conclusions of law are provided under relevant criteria throughout this decision and summarized above.
- B.** The Board adopts and incorporates by reference the code interpretations, findings of fact, and conclusions of law contained in the Hearings Officer's Decision Section III.B (Preliminary Issue).
- C.** The Board adopts and incorporates by reference the code interpretations, findings of fact, and conclusions of law contained in the Hearings Officer's Decision Section III.C (Title 18 of the Deschutes County Code) pages 8 to 60, except for the findings relating to DCC Sections identified below, which are modified as follows:

DCC 18.96.040(F): The Board adds to the Hearing's Officers findings that the fill-and-removal associated with the dock within the bed and banks of the Deschutes River is also a conditional use under this criterion.

DCC 18.96.040(G and I) "Bunkhouse": The record indicates the original bathhouse was constructed in 1976. As discussed in detail in the findings below under DCC 18.120.010, the Board has found the bathhouse was legal when it was constructed. Therefore, the Board finds it is a nonconforming use. However as described below, the bunkhouse expansion, including attached decking, does not satisfy non-conforming structure expansion approval criteria because it violates the 100-foot river setback from the Deschutes River in the FP and LM Zones and does not qualify for an exception thereto.

The Board finds the bunkhouse, including attached decking, clearly falls within the definition of "structure" in Section 18.04.030. The bunkhouse is not a dwelling and therefore is a "nonresidential structure." It also is a "recreational use requiring only

structures having an insignificant effect on flood waters outside the floodway” because it was established to, and does, support the recreational use of the property, and it is located outside the surveyed flood plain so is very unlikely to affect flood waters. For these reasons, the bunkhouse is subject to the conditional use approval criteria in the FP Zone and in Chapter 18.128. Compliance with those criteria is discussed in the findings below.

Wellhouse: The Board supplements the Hearings Officer’s findings in this section with findings on the wellhouse. The wellhouse also did not exist prior to 1988. Therefore, the Board finds it is not a lawful nonconforming use. The Board finds the wellhouse clearly constitutes a “structure.” The record indicates the wellhouse is used to shelter well equipment and provide supplemental recreational storage. Therefore, the wellhouse is a “nonresidential structure,” and a “recreational use requiring only structures having an insignificant effect on flood waters outside the floodway” because it is located above the BFE. As such, the wellhouse is a conditional use in the FP Zone and is subject to the applicable conditional use approval criteria in the FP Zone and in Chapter 18.128. Compliance with those criteria is discussed in the findings below.

DCC 18.96.040(J)(1, 2, and 3): The record indicates the stretch of the Deschutes River adjacent to the subject property is at or near river mile 194.5, and therefore it falls within an area of the river approved for docks under Paragraph (J)(3) of this section. As shown in photographs included in the record (e.g., Hearing Exhibits D and F to the applicant’s burden of proof), the dock includes two connected parts – a deck or landing platform fixed to the ground, and a dock extending out over the river and supported by pilings in the bed and banks of the river.¹ As discussed in the Findings of Fact above, the existing dock was not present in 1988 when the county’s flood plain regulations took effect or in 1989 when the county’s fill-and-removal regulations took effect. In addition, the aforementioned 2008 administrative decision (NCU-08-1) found the deck built by the applicant’s predecessor was not a nonconforming use because it was abandoned in 1987.² For these reasons, the Board finds the dock is not a nonconforming use.

Therefore, the Board finds the individual dock is subject to the conditional use approval criteria in the FP Zone and in Chapter 18.128, compliance with which is addressed in the findings below.

As described in detail below, the Board has found the applicant’s previous placement of gravel on the driveway and rocks on the riprap constitute lawful maintenance of nonconforming uses. The Board finds that the dock, fill-and-removal associated with the dock, free-standing decks, wellhouse, garage, and bunkhouse (including attached decking) are conditional uses in the FP Zone subject to the applicable conditional use approval criteria addressed in the findings below.

¹ The terms “dock” and “pier” are not defined in Title 18. *Webster’s New World Dictionary and Thesaurus, Second Edition*, defines these terms as “a structure built out over the water and supported by pillars.”

² The administrative decision found the old pilings on which the original deck was built did constitute a lawful nonconforming use.

DCC 18.96.060 (A, B, C, and D): The Board finds the criteria in Paragraphs (A), (B), and (C) of this section are not applicable because the dock, free-standing decks, wellhouse, garage and bunkhouse are not dwellings or a subdivision or partition. The Board finds Paragraph (D) is applicable to the dock and decks because of their location within the flood plain and wetlands. The Board has, however, found that the dock and decks have been denied for failure to comply with applicable criteria and, thus, no condition of approval to ensure compliance with Paragraph (D) is required.

DCC 18.96.080 (D): The Board finds that all criteria under (D) pertain to those structures in the flood plain, as surveyed, rather than those structures in the mapped FP zone. The Board has found the dock and free-standing decks are located within the surveyed flood plain and constitute “structures” for purposes of the FP Zone provisions. The dock falls within the definition of “structure” in Section 18.04.030 because it was built or constructed with a fixed base on and a fixed connection to the ground – i.e., it is connected to posts buried in the ground and pilings buried in the riverbank. Therefore, the Board finds both the dock and free-standing decks are subject to the standards in this paragraph.

DCC 18.96.080 (G)(1): The Board finds that all criteria under (G) pertain to structures in the mapped FP zone, rather than those structures in the flood plain, as surveyed.

Section 18.04.030 includes the following relevant definitions:

“Residential” means any dwelling unit or group of units built or used for human occupancy.

“Dwelling unit” means one or more rooms in a building designed for occupancy by one family and having not more than one cooking area or kitchen.

The Board finds the dock and decks are not “residential construction” because they are not a dwelling unit or a part thereof. As discussed in the findings above, the Board finds the bunkhouse is not a dwelling and neither the garage nor wellhouse is a dwelling. Therefore, the Board finds the dock, decks, bunkhouse, wellhouse and garage are not subject to the standards for “residential construction.”

DCC 18.96.080 (G)(2): The Board supplements the Hearings Officer’s findings to find that the record indicates the wellhouse is also located above the BFE and therefore does not have a “lowest floor” or “basement” that must be elevated above the BFE. Therefore, the Board finds the standards for nonresidential construction in the FP Zone also do not apply to the wellhouse.

DCC 18.96.080 (G)(4)(a): Section 18.04.030 defines “boat dock or pier, individual” as:

*** * * a personal use boating structure that is built over or floats upon the water of a lake, river or stream, and that serves one property owner for mooring boats or as a landing place for marine transport, and that has a surface area of 160 square feet or less.**

The applicant requests approval of the dock as an “individual dock.” The applicant

argues the subject property meets the 200-foot river frontage standard for the following reasons:

Hearings Officer Green found that the precise method of measurement used by Surveyor Tim Weishaupt to measure the amount of river frontage on the Subject Property was not acceptable, because she "[found] it unlikely the drafters of Title 18 intended river frontage to be such a variable measurement." Decision at page 22. In Applicant's Open Record Submittal dated April 6, 2016, we presented evidence that proves that all real property is measured precisely, down to inches and degrees, and that property descriptions can in fact be variable, particularly where the land borders a body of water. The Subject Property should be measured no differently. If Applicant's property was not adjacent to the Deschutes River, but instead another parcel of dry land, the only acceptable measurement method for measuring those property lines would be the precise method employed by Mr. Weishaupt. Further, other docks approved by the County in the past have been approved using this same precise method of measurement to determine river frontage measurements. See Exhibits TT and UU to Applicant's Open Record Submittal dated April 6, 2016. The Subject Property's individual dock should also be approved, both as to river frontage needed and the size of the structure over the water.

Applicant's first survey was done in November of 2015, in snow and frazzle ice, making it difficult to precisely measure the shoreline on the Subject Property. That survey was also the same survey that measured the property from the northern fence line, which encroaches on the Dreifuss property approximately 12 feet, instead of the true property line. Revisions were made to survey maps to include supplemental information like the dock informational inlays, but the essential information has remained the same. Only two surveyed measurements of the property and its boundaries have been conducted, one relying on the encroaching fence by Scott Freshwaters, and a later one using surveyed property line boundaries by Tim Weishaupt. Applicant has submitted evidence from Licensed Professional Surveyor Tim Weishaupt of Sun Country Engineering and Surveying, which explains the reasons for the discrepancies between the first survey and the second. See Exhibit DO to the Supplemental Submittal. Scott Freshwaters was not available to conduct the second survey at the time it was needed, which is why Applicant hired a second surveyor.

The Board finds the applicant's arguments are not persuasive. The Board finds that the appropriate measurement of a lot's river frontage is not its cumulative length measured by every "nook and cranny" of the irregular shoreline as depicted on the applicant's survey. Because the river frontage of the subject property is predominantly a linear feature, the Board finds that the Sun Country survey, consisting of segments that average just over 1 foot in length, circumvents the intent of the river frontage standard. The Board finds that the intent of the river frontage standard is to provide spacing between docks and limit the overall density of docks on the Deschutes River. The "nook

and cranny” survey increases the amount of “frontage” by about 20 percent in the subject property. Since most properties on the Deschutes River have river frontages complicated by wetlands or small-scale non-linear bank features, affirming this measurement technique would effectively reduce the dock spacing well below the intended 200 feet and set precedent for increasing density of docks along the Deschutes River. The Board finds that, as a matter of policy and code interpretation, river frontage for the purposes 18.96.080(G)(4) shall be measured as a single line or a single curve. The applicant’s submitted site plan depicts the lineal river frontage of the subject property and shows it is approximately 175 feet long. The existing dock does not comply with the river frontage requirement of this criterion.

DCC 18.96.080 (G)(4)(b): The applicant has clarified that this application does not include a “community dock”. This criterion is not applicable.

DCC 18.96.080 (G)(4)(c): The applicant has argued that the dock is comprised of approximately 138 square feet of over-water structure that complies with the definition of "Boat dock or pier, individual" and an approximately 120 square foot over-land portion that constitutes “walkway”. Regardless if the structure is viewed as a dock or dock-walkway combination, at 24.1 feet wide, the existing dock does not comply with maximum 8-foot width allowed under this criterion.

DCC 18.96.080 (G)(4)(d): The applicant has clarified that this application does not include a “community dock”. This criterion is not applicable.

DCC 18.96.080 (G)(4)(h, i, and j): The Hearings Officer had recommended conditions of approval to ensure compliance with these criteria. The Board has, however, found that the dock does not comply with applicable criteria and has been denied. Thus, no condition of approval to ensure compliance with Paragraph (h, i, and j) is required.

DCC 18.96.080 (G)(4)(l and m): The applicant has argued that the dock is comprised of approximately 138 square feet of over-water structure that complies with the definition of "Boat dock or pier, individual" and an approximately 120 square foot over-land portion that constitutes a “walkway”. To the extent the structure includes a walkway, at 24.1 feet wide, any such walkway would not comply with maximum 4-foot width allowed under this criterion.

DCC 18.96.080 (G)(4)(h)(2): The dock and fill removal associated with the dock are the only project components located in a mapped floodway. Other applicable sections of DCC Title 18 have been identified and finding made for these sections by the Hearings Officers, as modified by the Board. The Hearings Officer had recommended a condition of approval to ensure that all necessary federal, state and local government agency permits have been or can be obtained. The Board has found neither the dock nor the fill and removal associated with the construction of the dock comply with applicable criteria and the Board has denied these uses. As such, no floodway activity is permitted and no condition to ensure compliance with this criterion is required.

DCC 18.96.85: The Board finds this criterion does not apply to the wellhouse because, as discussed in the findings above, it is located outside the flood plain above the BFE.

DCC 18.96.100 (B) “Bunkhouse”: The submitted site plan shows approximately the northern half of the bunkhouse and portions of the attached decking are located within 100 feet of the river – including both the original bathhouse and a portion of the applicant’s subsequent addition to the bathhouse to create the bunkhouse. As discussed elsewhere in this decision, the Board has found the bathhouse was a nonconforming use when it was established. The addition to the bathhouse to create the bunkhouse, including portions of the attached decking, fall with the 100-foot river setback and does not comply with this criterion.

The Board finds the bunkhouse encroachment into the 100-foot river setback can be permitted only through a setback exception. As discussed in the findings below, exceptions to the 100-foot river setback are authorized under Section 18.120.030(D) and (E). However, these exceptions expressly apply only to new dwellings and additions thereto. The Board has found the bunkhouse is not a dwelling, and therefore no river setback exception is available for the bunkhouse.

For the foregoing reasons, the Board cannot approve the free-standing decks, bunkhouse, and portions of the bunkhouse-attached decking in their current locations within the 100-foot river setback because they neither comply with the river setback nor qualify for a river setback exception.

DCC 18.96.110 (A and B): The Board finds the lot-coverage criterion in Paragraph (A) applies to the “buildings” on the property, defined in Section 18.04.030 as “a structure built for the support, shelter or enclosure of persons, animals, chattels or property of any kind.” The only buildings on the property are the bunkhouse, wellhouse, and garage. The combined area of all structures on the subject property does not exceed 30 percent of the subject property’s area.

DCC 18.96.130: As discussed in the findings above, incorporated herein, the Board has found this provision authorizes the county to determine the location of the flood plain on the subject property based on the applicant’s site-specific flood plain survey. That survey shows that only the dock, free-standing decks, riprap, and a portion of the driveway are located in the flood plain.

DCC 18.84.040: As discussed in the findings above, the Board has found the gravel driveway and riprap and the applicant’s previous maintenance thereof are nonconforming uses. The Board has also found all remaining improvements on the subject property – the dock, free-standing decks, bunkhouse including attached decking, wellhouse, and garage qualify as conditional uses in the FP Zone which applied to the subject property in 1988. Therefore, these uses also are conditional uses in the LM Zone.

DCC 18.84.090 (C): The Board has found the existing septic system is not properly before the Board in these applications. The record indicates the garage is set back at least 100 from the OHWM of the river, therefore satisfying this criterion. As discussed above, the bunkhouse and portions of the attached decking encroaches in the 100-foot river setback applicable in the FP Zone. The Board has also found it does not qualify for a river setback exception. Therefore, the bunkhouse, including those portions of the

attached decking located in the 100-foot river setback, does not satisfy the setback requirements in the LM Zone.

DCC 18.88.040 (A): As discussed in the findings above, the Board has found the gravel driveway and riprap are nonconforming uses and the applicant's previous maintenance thereof was authorized as normal maintenance of a nonconforming use. The Board has found the remaining improvements on the subject property – the dock, free-standing decks, garage, wellhouse, and bunkhouse qualify as conditional uses in the FP Zone. Therefore, these improvements also qualify as conditional uses in the WA Zone, subject to the applicable standards therein.

DCC 18.120.010 (A)(1, 2, and 3): To the extent the pre-existing bathhouse or expanded bunkhouse constitute a non-conforming structure for the purposes of these criteria, the Board finds that the expansion cannot be permitted under Paragraph (2) because the expansion includes additional encroachment in the 100-foot river setback area. The expansion cannot be permitted under Paragraph (3) because this section does not expressly refer to encroachment into the river setback, but rather only to the front, rear and side yard setbacks – none of which is co-existent with the river setback.

DCC 18.120.010 (B)(2)(a): As discussed above, the Board finds the provisions of Paragraphs (B), (C), (D), and (E) of this section address nonconforming uses -- a broader focus than that in Paragraph (A) of this section which addresses nonconforming structures. That is because Section 18.04.030 defines "use" as "the purpose for which land or a structure is designed, arranged or intended, or for which it is occupied or maintained."

Gravel Driveway And Riprap: Regulation of fill and removal within the flood plain took effect with the adoption of two ordinances. The flood plain provisions in Title 18 took effect on August 17, 1988, with the adoption of Ordinance No. 88-030. The fill-and-removal provisions of Title 18 took effect on March 29, 1989, with the adoption of Ordinance No. 89-009. Therefore, the Board finds that to the extent the gravel driveway and riprap on the subject property pre-date adoption of these ordinances, they could qualify as nonconforming uses that can lawfully be maintained.

The record includes numerous aerial photographs of the subject property and vicinity dating from June of 1979 (Exhibit B to the applicant's burden of proof) through 2014 (photos submitted by staff on August 6, 2015). The Board finds that due to the small scale of the 1979 aerial photos, it is not possible to determine the size and location of any gravel driveway on the subject property at that time. However, it is clear from the 1985 and 1987 aerial photos that the gravel driveway was in place and extended all the way to the riverbank when those photos were taken. That is because the 1985 aerial photo shows a gravel area adjacent to the dock that appears to provide access to the dock, and the 1987 aerial photo shows that the gravel area has been expanded across the property line to the east where it is supported with concrete debris. With respect to the riprap, the aerial photos beginning in 1985 show a straight riverbank line, strongly suggesting the riverbank was stabilized with riprap at that time.

The Board finds from the above-described evidence that both the gravel driveway and the riprap were placed on the subject property prior to 1988, and therefore these features constitute lawfully established nonconforming uses.

Recreational Use of the Property: As discussed throughout this decision, the use of the subject property is and always has been recreational in nature – i.e., to serve RVs and their occupants on the subject property. The Board finds that all of the structures on the subject property are “designed, arranged or intended” to serve these recreational needs. Accordingly, the bathhouse is an accessory to that use.

The record indicates the original bathhouse was constructed on the subject property in 1976. The county’s official records indicate that in 1976 the subject property was zoned RR-1, Rural Recreational Residential Zone, under PL-5, the county’s first zoning ordinance which took effect in December of 1971. Sections 3.150 and 3.155 of the RR-1 Zone listed the uses permitted outright and conditionally in that zone. PL-5 makes no mention of recreational vehicle use of any property.

The Board finds that, rather than explicitly or implicitly prohibiting the recreational vehicle use, of any property, PL-5 did not regulate such use of property. The Board makes this finding based on the fact that a septic system in support of the recreational vehicle use of the property was issued by the County in 1976. The Board therefore finds that recreational use of the property, including recreational vehicle use, was lawfully established at that time.

Bathhouse: The Applicant has submitted undisputed evidence to the Record in the form of letters from the prior owner of the property, who also constructed the original bathhouse. In his letter dated October 1, 2009, attached as Exhibit C to Applicant’s original Application dated March 6, 2016 (“Application”), prior owner James Cate states that he checked with the County about building permits for the Bath House in 1976, and was told that they were not necessary, as long as the septic system to serve the Bath House was approved. There has been no evidence to the contrary of Mr. Cate’s written testimony, nor has his testimony been challenged or disputed in any way. Mr. Cate’s first-hand account of the circumstances of the legal construction of the Bath House and connected septic system is substantial evidence in the Record, and is undisputed. The Board finds that the bathhouse was lawfully established as a structure accessory to the recreational use of the property in 1976.

DCC 18.120.010 (B)(2)(b): The Board finds that the record indicates that nature and the extent of the use of the property, including the gravel, riprap, recreational use and bathhouse in association with the recreational use, has continued without abandonment or interruption. The Board incorporates by reference herein findings made under DCC 18.120.010 (B)(3)(a, b, c, d, e, and f), below.

DCC 18.120.010 (B)(2)(c): The Board finds that the record indicates that nature and the extent of the use of the property, including the gravel, riprap, recreational use has continued without alteration. However, the applicant has altered the nature and extent of the recreational use of the property by expanding the bathhouse by adding a living and sleeping area to the structure. This is based on the findings made below under DCC 18.120.010 (B)(3)(f) and incorporated herein by reference. This alteration was not done

in compliance with applicable zoning ordinance standards governing alterations of non-conforming uses, given that permits were not obtained prior to the alteration and the Board has found in this decision that the alteration of the bathhouse cannot comply with applicable zoning ordinance standards governing alterations of non-conforming uses.

The Board, therefore, finds that the nature and extent of the nonconforming use of the bathhouse is limited to the pre-expansion configuration of the bathhouse, as established in 1976. This use does not include residential use or overnight occupancy of any structure on the property. This use also does not include recreational vehicle use of the property not in compliance with DCC 18.116.095.

DCC 18.120.010 (B)(3)(a, b, c, d, e, and f): The Board has found that the applicant has altered the nature and extent of the recreational use of the property by adding a living and sleeping area to the bathhouse, as this is a change in the structures associated with the recreational use of the property. The Board also finds that, even if the use of the bedroom was reduced to storage of recreational equipment, the expansion would still constitute an alteration. However, the Board finds that this alteration does not constitute an interruption or abandonment under these criteria because the Board finds that there are common elements between the activities of the previous use (bathhouse) and the current use (bunkhouse). Specifically, the Board finds that the bunkhouse maintains all elements of the original bathhouse and continues to support recreational use of the property.

DCC 18.120.010 (E)(2 and 3): The applicant requests approval for his previous alteration/expansion of the bathhouse to become the bunkhouse. As discussed in the findings above, the Board has found that the bathhouse was lawfully established as a structure accessory to the recreational use of the property in 1976.

The applicant clearly altered the structure of the bathhouse by adding a bedroom and nearly tripling its size. The Board has found that this expansion constitutes an alteration of the recreational use of the property under DCC 18.120.010 (B)(3)(f), as it constitutes a change in structures associated with the use. As such the applicant must demonstrate that the alteration complies with all applicable provisions of DCC Title 18. The Board finds that the 100-foot river setback standard of the FP, WA, and LM zone is an applicable provision of Title 18 with which the bathhouse expansion must comply.

The Board has found that the bunkhouse encroachment into the 100-foot river setback can be permitted only through a setback exception. As discussed in the findings below, exceptions to the 100-foot river setback are authorized under Section 18.120.030(D) and (E). However, these exceptions expressly apply only to new dwellings and additions thereto. The Board has found the bunkhouse is not a dwelling, and therefore no river setback exception is available for the bunkhouse. Therefore, the alteration/expansion of the bathhouse to the bunkhouse cannot be permitted and is denied.

DCC 18.120.010 (F)(3)(a)(b): The applicant clearly altered the structure of the bathhouse by adding a bedroom and nearly tripling its size. The Board has found that this expansion constitutes an alteration of the recreational use of the property under DCC 18.120.010 (B)(3)(f), as it constitutes a change in structures associated with the use. Therefore, any presumption that the nature and extent of the use sought to be

verified is of the same nature and extent as the use of the property for the ten-year period immediately preceding the application, without interruption or abandonment, is refuted.

DCC 18.120.010 (F)(4): The applicant has demonstrated the continued existence of a valid non-conforming use, but of a different nature or extent than that claimed by the applicant. Specifically, the valid non-conforming use is the recreational use of the property as established in 1976 with the bathhouse as a structure associated with that use. The Board finds there to be a valid nonconforming use to the extent proven, which does not include the expansion of the bathhouse into the bunkhouse.

DCC 18.120.010 (F)(5): The nonconforming use verification is not conditioned. The Board finds that this approval is sufficiently detailed to describe the allowed parameters of the verified use. No alteration of the non-conforming use is approved, therefore, no conditions calculated to ensure mitigation of adverse impacts so that the change has no greater adverse impact to the neighborhood are required.

DCC 18.120.030 (D): The Board finds that this exception “provides the only pathway to expand structures in the 100-foot river setback and is only afforded to residential dwellings.” Because the Board has found neither the original bathhouse nor the bunkhouse is a dwelling, this exception is not available.

DCC 18.128.010 (A and B): The Board has found that the bunkhouse, wellhouse, dock, decks, and garage fall within the listed conditional uses in the FP Zone. The Board has found the bunkhouse, dock, and decks do not satisfy the applicable conditional use criteria in the FP Zone, and therefore the Board need not consider whether they satisfy the conditional use approval criteria in Chapter 18.128. However, the garage and well house do comply with the applicable conditional use criteria in the FP Zone and the Board includes findings concerning whether both the garage and wellhouse complies with the criteria in this chapter. In addition, the fill and removal associated with the construction of the dock is a conditional use in the FP zone subject to the criteria in this chapter.

DCC 18.128.015 (A)(1): The site is a lot in a residential subdivision abutting the Deschutes River. The record indicates many lots in this subdivision – particularly riverfront lots -- are or have been utilized for recreation. The design and operating characteristics of the garage are a 724-square-foot prefabricated metal building with a large garage door and a separate hinged door and in which is used to store the applicant’s pontoon boat and boat trailer as well as other materials and equipment utilized to maintain the subject property for recreation purposes. The design and operating characteristics of the wellhouse are a small building which is used to house the well and store other materials and equipment utilized to maintain the subject property for recreation purposes.

The garage and well house are set back near the access driveway and are more than 100 feet from the river.

Photos in the record show the garage is screened from the river by a moderate cover of the trees and shrubs. The structure is finished in non-reflective, earth-toned colors.

Opponents have questioned whether and to what extent the garage may encroach on or interfere with the existing septic system on the subject property. The Board understands these concerns. The record includes in Exhibit "P" to the applicant's burden of proof a diagram of the septic system prepared for Blanche Tucker and submitted to the county as part of Mrs. Tucker's 1992 request for an authorization notice. That diagram shows both the sewer line and the two drain field lines are located near the center of the subject property and farther west than the location of the garage as depicted on the submitted site plan. Based on this evidence, the Board finds the subject property is suitable for the garage considering the location of the on-site septic system.

For these reasons, the Board finds the subject property is suitable for the garage considering its site, design, and operating characteristics.

The Board has found that the property does not meet the river frontage standards for an individual dock, resulting in denial of the dock application. Therefore, the Board finds that the site is not a suitable location for fill and removal associated with construction of the dock and this fill and removal use is denied.

DCC 18.128.015 (A)(2): The subject property has access from a gravel driveway off Satterlee Way, a rural local road. In his comments on the applicant's proposal, Senior Transportation Planner Peter Russell stated that because a very low volume of traffic is predicted to be generated by the recreational use of the subject property – estimated at no more than 10 daily weekday vehicle trips – no traffic analysis is required. The Board finds from this evidence that the subject property is suitable for the garage, wellhouse, and fill and removal associated with construction of the dock considering transportation access to the site.

DCC 18.128.015 (A)(3): The subject property has generally level topography and a moderate cover of native vegetation. The Board finds natural hazards on and in the vicinity of the property include potential flood hazards and wildfire hazards. However, the garage and wellhouse are located well above the BFE and at least 100 feet from the Deschutes River, and therefore the Board finds the risk of flooding at the garage and wellhouse site is minimal.

In its comments on the applicant's proposal, the La Pine Fire Department identified the subject property as in a High Wildland Fire Hazard Area, and recommended that the county require the applicant to comply with certain fire protection standards. However, the Board finds the risk of wildfire on the subject property is no greater than on any other residential lot in the surrounding area. And in any case, the Board finds the fire risk for the garage is minimal inasmuch as it is a prefabricated metal building that will be fire resistant.

The Board finds that the natural resource values on the subject property consist of the river, riparian habitat and wetlands, the deer migration corridor, and other wildlife habitat. Because the garage and wellhouse are located above the BFE and more than 100 feet from the river, and are substantially screened from view of the river by intervening trees and other vegetation, it will have minimal if any impact on or from these natural resource values.

For the foregoing reasons, the Board finds the subject property is suitable for the garage considering the natural and physical features of the site, topography, natural hazards, and natural resource values.

The Board finds that any fill-and-removal associated with the dock would have no adverse impacts on the hydrologic characteristics of the river such as direction and velocity of flow, elevation of water surface, sediment transportation capacity, stabilization of the bank, and flood hazards. The applicant submitted a "no-rise certification" provided by a registered professional engineer stating the dock and any associated fill-and-removal would remain in place during a flood event. The Board also finds that natural resource values are not adversely impacted by fill and removal associated with construction of the dock, as comments from ODWF and USWFS do not recommend additional vegetation to protect aquatic life habitats, functions of the ecosystem, wildlife values, aesthetic resources, or to prevent erosion. However, The Board has found that the dock cannot be permitted and that the fill and removal necessary to construct the dock do not comply with DCC 18.128.015(A) and that this fill and removal use has been denied .

DCC 18.128.015 (B): The record indicates surrounding properties include rural residences, accessory structures, and docks/piers along the riverbank. Following the Hearings Officer's site visit observations, the Board finds a number of lots within the Oregon Water Wonderland Subdivision are developed with dwellings and with garages and similar structures for the shelter and storage of cars, boats, and other vehicles and equipment. The garage and well house are similar in size, scale and appearance to similar structures. The garage and wellhouse are located outside the flood plain and are substantially screened from both the river and Satterlee Way by trees and other vegetation. For these reasons, the Board finds the garage and well house will be compatible with existing and projected uses on surrounding properties.

The Board finds that the fill and removal associated with construction of the dock would have no adverse impacts on the hydrologic characteristics of the river such as direction and velocity of flow, elevation of water surface, sediment transportation capacity, stabilization of the bank and flood hazards. The applicant submitted a "no-rise certification" provided by a registered professional engineer stating the dock any associated fill-and-removal would remain in place during a flood event. As such the fill and removal associated with construction of the dock would have no adverse impact on nearby properties. The Board has found that the dock cannot be permitted and that the fill and removal necessary to construct the dock do not comply with DCC 18.128.015(A) and that this fill and removal use has been denied .

DCC 18.128.270: The Board finds these fill-and-removal standards apply only to the activities conducted in the bed and banks of a stream or river or in any wetland. Specifically, the applicant has maintained the gravel driveway, maintained the riprap bank armoring, and constructed a dock in these areas. The Board finds that the maintenance of the non-conforming gravel driveway and riprap are not subject to the standards of 18.128.270. The Board has found that the dock cannot be permitted and that the fill and removal necessary to construct the dock do not comply with DCC

18.128.015(A) and that this fill and removal use has been denied. As such, the Board need not make findings under DCC 18.128.270 for the prohibited fill and removal use.

IV. **DECISION:**

Based on the findings of fact and conclusions of law set out above, the Board hereby:

A. DENIES the applicant's request for approval of the dock, fill and removal associated with the dock construction, decking within the 100-foot river setback, and bunkhouse expansion.

B. APPROVES the applicant's request for:

- Verification of a nonconforming use consisting of the gravel driveway and riprap and previous maintenance thereon, and for future maintenance of the driveway through application of up to eight (8) cubic yards of gravel every five years, and placement of additional rocks on the riprap to stabilize it.
- Verification of the nonconforming use consisting of the recreational use of the property and the associated bathhouse structure as established in 1976. This use does not include residential use or overnight occupancy of any structure on the property. This use also does not include recreational vehicle use of the property not in compliance with DCC 18.116.095.
- Conditional use approval for the wellhouse and decking located outside the 100-foot river setback.
- Conditional use and Landscape Management Site Plan review for the garage.

The Board adopts and incorporates the Conditions of Approval in the Hearings Officer's Decision with the following deletions (shown by ~~striketrough~~) and additions (shown by underline):

1. The applicant/owner shall not be entitled to reapply under Section 22.28.040 of the Deschutes County for another verification determination involving the same use of the property.

C. APPROVES the garage, **SUBJECT TO THE FOLLOWING CONDITIONS OF APPROVAL:**

2. The applicant/owner shall obtain all necessary building plan review, permits and inspections for the garage within 30 days of the date this decision becomes final.
3. The applicant/owner shall retain all existing tree and shrub cover screening the garage from the river.
4. The applicant/owner shall assure all exterior lighting is shielded so that it is directed downward and is not directly visible from the Deschutes River
5. The applicant/owner shall assure than any signage on the subject property is limited to property protection signs (no trespassing, no hunting, etc.), does not include any form of outdoor advertising, and receives a sign permit from the county before installation.

6. The applicant/owner shall construct any fences on the subject property in compliance with Section 18.88.070 of the Deschutes County Code.
7. The applicant/owner execute and record with the Deschutes County Clerk a conservation easement as defined in Section 18.04.280 of the Deschutes County Code, "Conservation Easement," and as specified in Section 18.116.220 of the Deschutes County Code.

~~In the event the Board of County Commissioners approves the dock and/or free-standing decks on appeal, THE HEARINGS OFFICER RECOMMENDS IMPOSITION OF THE FOLLOWING CONDITIONS OF APPROVAL:~~

- ~~8. Within 30 days of the date this decision becomes final, the applicant/owner shall assure:~~
 - ~~a. the dock on the adjacent property to the east (Ferris lot) is removed;~~
 - ~~b. execution and recording with the Deschutes County Clerk of a document or documents that provide access to the applicant's dock for the owners of the adjacent property to the east (Ferris lot) and provide for maintenance of a "community dock" on the subject property; and~~
 - ~~c. if the requirements under Paragraphs (a) and (b) of this condition are not satisfied within the specified period of time, the dock on the subject property is removed.~~
9. The applicant/owner shall obtain any all necessary federal and state agency and local government permits and approvals (e.g., from ODFW, DSL, USFS, the Corps, etc.) for the applicant's activities in the flood plain and wetlands, or provide to the Planning Division written documentation from these entities that no such permits or approvals are required.
10. The applicant/owner shall submit to the Planning Division written documentation from a registered professional engineer that the dock materials comply with any and all applicable DEQ and EPA regulations for dock or pier construction materials.
11. The applicant/owner shall submit to the Planning Division written documentation that the treated wood dock components were fully cured or dried prior to their placement in the river.
12. The applicant shall submit to the Planning Division a "free-flow analysis" from the USFS under the federal Wild and Scenic Rivers Act, or provide to the Planning Division written documentation from the USFS that such analysis is not required for the dock.

Dated this ____ day of _____, 2016 BOARD OF COUNTY COMMISSIONERS

ALAN UNGER, Chair

TAMMY BANEY, Vice Chair

ATTEST:

Recording Secretary

ANTHONY DeBONE, Commissioner

Mailed this _____ day of _____, 2016

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