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LEGAL COUNSEL

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**DECISION OF
DESCHUTES COUNTY BOARD OF COMMISSIONERS**

FILE NUMBER: 247-14-000373-HS

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

APPLICANT'S ATTORNEY: Bruce White
PO Box 1298
Bend, Oregon 97709

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

I. APPLICABLE STANDARDS AND CRITERIA:

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

II. FINDINGS OF FACT:

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

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

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

C. PROPOSAL: The applicant submitted a request for a Comprehensive Plan amendment to designate an approximately one-mile segment of the Pilot Butte Canal as a Goal 5 historic resource in the SR 2½ zone. Upon review of the submittal, a threshold issue emerged regarding the timing of the application filing as it relates to another pending application affecting the subject properties. In addition, there is a second procedural issue relating to ownership of the canal. Since this involves interpreting these two critical aspects of the application and process, staff issued an administrative decision. The

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substantive merits of the request to designate the canal as a historic resource are not addressed by this decision.

- D. **PROCEDURAL HISTORY:** The application was submitted on November 3, 2014. The Planning Division issued an administrative decision for File No. 247-14-000373-HS on December 9, 2014. The Board of County Commissioners (“BOCC”) adopted Order No. 2014-038 on December 15, 2014, initiating review of this land use decision. The BOCC conducted a de novo hearing on January 28, 2015, to determine whether staff properly interpreted county code provisions applicable to the land use decisions. The BOCC left the record open until February 6, 2015, for all parties to submit written legal argument, and until March 6, 2015, for the applicant’s final rebuttal. Six letters were submitted during the comment period. The BOCC rendered its oral decision on March 25, 2015, affirming the Planning Division decision and providing additional clarification to the findings.

III. **CONCLUSIONS OF LAW:**

Title 2, Deschutes County Administration Ordinance

Chapter 2.28. Historic Preservation and Historic Landmarks Commission

A. **2.28.020. Definitions.**

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

FINDING: An easement runs along the length of the Pilot Butte Canal. As it pertains to the applicant’s proposal, the easement is located on 32 private properties. The applicant argues Central Oregon Irrigation District (COID), the operator of the facility and easement holder, does not have an ownership interest, and therefore COID’s consent is not needed for the segment to be designated as a historic resource. COID argues that it does have an ownership interest in the canal facilities in the easement and, therefore, has a right to refuse the historical designation of the facility it owns per DCC 2.28.040(P). That code provision says in the second sentence, “The site will not be approved for a historic designation unless the property owners at the time of designation support the local designation of their property as a historic or cultural resource.”

In a previous land use decision, A-10-2(NUV-09-1), a Deschutes County Hearings Officer addressed a similar easement and landowner relationship. The Hearings Officer found the holder of an easement across private property is an “owner of record” of an interest in the property, and therefore is a “property owner” as defined in Deschutes County Code (DCC) 22.08.010(A).¹ The BOCC used this finding as a basis, further determining that COID has an ownership interest that ensures changes to the easement area does not interfere with or hinder uses that are authorized by the easement. This ownership interest is not a right to the possession or with free reign over the land, but a right to custody and control of the easement to use and manage the irrigation facility as set out for that easement.

The issue with this application also relates to the language in Oregon Administrative Rule (OAR) 660-023-0200(5) that says:

¹ DCC 22.08.010(A) “Property Owner. For the purposes of DCC 22.08.010, the term ‘property owner’ shall mean the owner of record or the contract purchaser and does not include a person or organization that holds a security interest.” The definition of “Property Owner” in DCC 2.28.010 is identical.

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

The previous finding of the Hearings Officer and BOCC is applicable to OAR 660-023-0200(5) and the BOCC's interpretation of the definition of "property owner" in DCC 2.28.010 and 2.28.040(P) that allows the owner of the resource to refuse designation. Therefore, because COID is an easement holder, COID is an owner for purposes of OAR 660-023-0200(5) and DCC 2.28.040(P) and has a right to refuse the historic designation of its canal. COID refused such designation in its letter dated November 14, 2014. As a result, the BOCC finds Deschutes County cannot designate the canal as a historic resource at this time.

B. Section 2.28.060. Procedures.

A. Historical Building or Site-Designation Procedure.

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

FINDING: COID submitted a text amendment application, file TA-13-4, on December 23, 2013. That text amendment application was under review by Deschutes County at the time of the BOCC's deliberations on this issue for this application. TA-13-4 proposes,

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

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

The applicant submitted application 247-14-000373-HS on November 3, 2014. The BOCC interprets DCC 2.28.060(A)(2) and "any other application" to include legislative matters in general and TA-13-4 specifically since the historic designation application directly relates to the segment of canal located in the SR 2½ zone in the same area where the text amendment would be applicable. Therefore, the BOCC finds the applicant's request to designate a segment of the Pilot Butte Canal as a Goal 5 historic resource cannot be filed until a decision is final for TA 13-4.

IV. DECISION:

The BOCC **affirms** the Planning Division decision rejecting the application based on the following:

1. COID is an owner of interest in the easement containing the subject segment of the Pilot Butte Canal and can refuse designation as a Goal 5 historic resource.
2. The request to designate a segment of the Pilot Butte Canal as a Goal 5 historic resource cannot be filed until a decision is final for TA 13-4 because it is affected by the proposed historic resource designation.

Dated this 6th of April, 2015

BOARD OF COUNTY COMMISSIONERS

Anthony DeBone
ANTHONY DeBONE, Chair

Alan Unger
ALAN UNGER, Vice Chair

ATTEST:

Bonnie Baker
Recording Secretary

- absent -
TAMMY BANEY, Commissioner

Mailed this 7th day of April, 2015.

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