

## DECISION OF THE DESCHUTES COUNTY HEARINGS OFFICER

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

**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

**REQUEST:** Applicant requests approval to establish a community dock and decks, verification of non-conforming structures (bunkhouse and garage) and approval to alter the bunkhouse, verification of nonconforming uses consisting of fill within the flood plain and wetlands and a septic system, and LM review for the bunkhouse and garage, 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

**HEARING DATE:** August 25, 2015

**RECORD CLOSED:** October 13, 2015

### **I. APPLICABLE STANDARDS AND CRITERIA:**

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

##### **1. Chapter 18.04, Title, Purpose and Definitions**

**\* Section 18.04.030, Definitions**

##### **2. Chapter 18.60, Rural Residential Zone – RR-**

**\* Section 18.60.020, Uses Permitted Outright**

**\* 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**

3. **Chapter 18.84, Landscape Management Combining Zone – LM**
    - \* Section 18.84.020, Application of Provisions
    - \* Section 18.84.030, Uses Permitted Outright
    - \* Section 18.84.040, Uses Permitted Conditionally
    - \* Section 18.84.050, Use Limitations
    - \* Section 18.84.080, Design Review Standards
    - \* Section 18.84.090, Setbacks
    - \* Section 18.84.095, Scenic Waterways
  4. **Chapter 18.88, Wildlife Area Combining Zone – WA**
    - \* Section 18.88.020, Application of Provisions
    - \* Section 18.88.030, Uses Permitted Outright
    - \* Section 18.88.040, Uses Permitted Conditionally
    - \* Section 18.88.060, Siting Standards
    - \* Section 18.88.070, Fence Standards
  5. **Chapter 18.96, Flood Plain Zone – FP**
    - \* Section 18.96.020, Designated Area
    - \* Section 18.96.040, Conditional Uses Permitted
    - \* Section 18.96.060, Limitations on Conditional Uses
    - \* Section 18.96.080, Criteria to Evaluate Conditional Uses
    - \* Section 18.96.090, Yard and Setback Requirements
    - \* Section 18.96.100, Stream Setback
    - \* Section 18.96.110, Dimensional Standards
    - \* Section 18.96.130, Interpretation of FIRM Boundaries
  6. **Chapter 18.116, Supplementary Provisions**
    - \* Section 18.116.040, Accessory Uses
  7. **Chapter 18.120, Nonconforming Uses**
    - \* Section 18.120.010, Nonconforming Uses
    - \* Section 18.120.030, Exceptions to Yard Requirements
  8. **Chapter 18.128, Conditional Use**
    - \* Section 18.128.010, Operation
    - \* Section 18.128.015, General Standards Governing Conditional Uses
    - \* Section 18.128.020, Conditions
    - \* Section 18.128.270, Fill and Removal
- B. Title 22 of the Deschutes County Code, the Development Procedures Ordinance**
1. **Chapter 22.24, Land Use Action Hearings**
    - \* Section 22.24.140, Continuances and Record Extensions

## II. FINDINGS OF FACT:

- A. **Location:** The subject property has an assigned address of 17266 Satterlee Way, Bend, 97707. It is further identified as Tax Lot 4300 on Deschutes County Assessor's Map 20-11-18C, and as Lot 2, Block 57, in the Oregon Water Wonderland Unit II Subdivision.
- B. **Zoning and Plan Designation:** The subject property is zoned Flood Plain (FP), Wildlife Area Combining Zone (WA) to protect a deer migration corridor, and Landscape Management (LM) due to its proximity to the Deschutes River. The property is designated Flood Plain on the Deschutes County Comprehensive Plan map.
- C. **Surrounding Zoning and Land Uses:** Surrounding land consists of residential subdivisions lots zoned RR-10, FP and LM developed with dwellings and accessory structures.
- D. **Site Description:** The subject property is 1.41 acres in size and roughly rectangular. It abuts the Deschutes River on the north and Satterlee Way on the south and has access from Satterlee Way via a 400-foot-long gravel driveway. The property is improved with: an on-site septic system including an underground tank and drain field; a well house; a structure including a bathroom, bedroom, laundry facilities, gas fireplace, and attached deck (hereafter "bunkhouse"); a prefabricated detached metal storage building (hereafter "garage"); free-standing decks; a dock/pier; raised wood walkways connecting the bunkhouse, garage and decks; and a gravel driveway and RV parking area.<sup>1</sup>
- E. **Chronology and Land Use History:**<sup>2</sup> The subject property was purchased by Sherman and Blanche Tucker in November of 1976. At about that time, James and Fannie Cate purchased the adjacent lot to the west, Lot 1 of Block 57. The two lots initially shared a well and electrical service. In October of 1976, Mr. Tucker installed and received a certificate of satisfactory completion for an on-site septic system on the subject property that included a 900-gallon metal septic tank, 75 feet of sewer line, and 100 feet of drain field line. The certificate stated the septic system was for an "R.V." It indicated the system would be 150 feet from the river and that there was a well on the property. Shortly after receiving this certificate, the Tuckers constructed a small structure on the property, referred to as the "bathhouse," that had a sink, toilet, shower, and laundry facilities inside and a faucet and sink outside.

In 1977, the Tuckers and Cates built a boat slip on the subject property for use by the owners of both lots. In 1978, the boat slip was replaced with a dock. Sometime between 1985 and 1987 the dock was removed or destroyed. In 1992, Blanche Tucker applied for a septic authorization notice to use the on-site septic system on the subject property for a new dwelling. The authorization notice was denied. The letter of denial stated in relevant part:

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<sup>1</sup> These improvements are depicted in numerous photographs in the record, including the photos in Exhibit V to the applicant's burden of proof and photos submitted at the public hearing by Joseph Craig (Hearing Exhibits 1-6).

<sup>2</sup> This chronology is based upon information in the record submitted by county staff, interested parties, and the applicant, including comments the applicant made to the Hearings Officer during my site visit.

*"Your existing septic system was installed and a certificate of satisfactory completion issued October 20, 1976, as specified in OAR [Oregon Administrative Rules] 340-71-200; prior construction permits or approvals, a certificate of satisfactory completion is valid for one year, for connection of the system to the facility for which it was constructed. (Ref. OAR 340-71-175(8)). After the one year period, rules for Authorization Notices or Alteration Permits apply, as outlined in OAR 340-71-205 and 340-71-210.*

*The information gathered from our files and the on-site inspection will in the judgment of Deschutes County Environmental Health Section; [sic] 'proposed operation of this system would cause pollution of public waters or create a public health hazard, therefore system installation or use shall not be authorized.' (Ref. OAR 340-71-130(1))."*

In January of 1994, Blanche Tucker sold the subject property to the Cate family.

In September of 2005, the Cate family sold both Lots 1 and 2 to Ronald Cunningham. Sometime after he purchased the lots, Mr. Cunningham constructed another dock on the subject property. In 2007, a code violation complaint concerning construction of this dock and installation of a sign on the property without permits was filed (C-07-232). In January of 2008, Mr. Cunningham requested verification of the dock as a non-conforming use and permission to alter it. The county denied the request in an administrative decision dated April 17, 2008 (NCU-08-1). The decision stated in relevant part:

*"Staff finds that boat docks were first regulated by the County on July 14, 1989, in Ordinance 89-009. The adoption of this ordinance made existing boat docks nonconforming uses. Boat docks are now identified as uses permitted conditionally in DCC Section 18.96.040. \* \* \* .*

*The information provided by the applicant consists of a letter written by the former owner of this lot, which describes the history of this dock since it was first built in 1978. It describes how the dock was modified over time.\* \* \* .*

*County Assessor's records show that there was a dock on this lot, tax lot 4300, as of August 29, 1985. \* \* \* Staff finds that there is sufficient evidence in the record to determine that there was a dock established on this lot prior to July 14, 1989, and that it was lawfully established.*

*\* \* \* Aerial photographs from 1996, 2000 and as recently as June 2005 do not show a dock on this lot.\* \* \* .*

*In summary, the record shows that there was a dock on this lot in 1985, and that there is now a row of old pilings that are used to support the river side of the new dock. \* \* \* Staff believes the new dock was built sometime around 2005; however, there is not sufficient evidence to confirm this date. Based on aerial records and neighbor's comments on the record, it appears that there have been long periods of time during which there was not a dock here. In summary, staff does not believe that there is sufficient physical or factual evidence to show that there was a dock in this location which has been used continuously, without abandonment or interruption,*

from July 14, 1989 to 2005. For these reasons, staff finds the nonconforming use has been abandoned.

\* \* \* [S]taff concludes that the subject boat dock (consisting of the decking, beams, new structural system and railings) is not a legal nonconforming use. Staff finds that the existing row of old round pilings used to support the nonpermitted deck are a legal nonconforming use. Regarding the aspect of the application pertaining to the alteration of the nonconforming use of a dock, staff finds that it does not comply with applicable standards and criteria of the Deschutes County zoning ordinance.” (Emphasis added.)

Sometime after this decision was issued, the Cunningham dock was removed.<sup>3</sup>

In August of 2009, Mr. Cunningham sold the subject property to the applicant and his wife. In 2009 and 2010, the applicant built several structures on the subject property, including the existing dock, free-standing decks, walkways, garage, and an addition to the “bathhouse” consisting of a bedroom and attached decking, creating the bunkhouse. The applicant also placed eight cubic yards of gravel on the driveway. In 2013, the county received code violation complaints concerning construction and use of improvements on the subject property without necessary permits and approvals: 247-13205-CE (septic system); 247-13206-CE (work without building permits); and 247-C13207-CE (work without land use approval).

- F. Procedural History:** On March 6, 2015, the applicant submitted the subject applications to address the code violations. By a letter dated April 1, 2015, the Planning Division advised the applicant that the application was incomplete. The applicant submitted the missing information on July 15, 2015, and the application was accepted as complete on that date. Therefore, the 150-day period for issuance of a final local land use decision under ORS 215.427 would have expired on December 2, 2015.

A public hearing on the applications was scheduled for August 25, 2015. On that date, the Hearings Officer conducted a site visit to the subject property and vicinity accompanied by Senior Planner Will Groves. At the public hearing, the Hearings Officer disclosed her observations and impressions from the site visit, received testimony and evidence, left the written evidentiary record open through October 6, 2015, and allowed the applicant through October 13, 2015, to submit final argument pursuant to ORS 197.763. The record closed on October 13, 2015. Because the applicant agreed to extend the written record from August 25 through October 13, 2015, under Section 22.24.140 of the development procedures ordinance, the 150-day period was extended for 49 days and now expires on January 21, 2016.<sup>4</sup> As of the date of this decision there remain 44 days in the extended 150-day period.

<sup>3</sup> The record includes a copy of a May 2008 determination by DSL that no state fill-and-removal permit was required for the dock because it involved less than 50 cubic yards of fill.

<sup>4</sup> By an electronic mail message dated September 14, 2015, the applicant's attorney Ken Katzaroff stated the applicant agreed to toll the 150-day period as necessary to allow the county to issue its final decision.

- G. Proposal:** The applicant built the existing dock, free-standing decks and garage, altered the bunkhouse, and placed gravel on the driveway and rocks on the riverbank, without necessary permits and approvals. The applicant requests conditional use approval to make lawful the dock, free-standing decks and garage. The applicant seeks verification of the bunkhouse and maintenance of the gravel driveway as lawful nonconforming uses. The applicant also seeks approval to alter the bunkhouse with the addition of a room and attached decking, and approval to maintain the gravel driveway in the future by adding gravel. The applicant also requests verification of a nonconforming use consisting of the existing on-site septic system. Finally, the applicant requests LM site plan approval for the bunkhouse and garage.
- H. Public/Private Agency Comments:** The Planning Division sent notice of the applicant's proposal to a number of public and private agencies and received responses from: the Deschutes County Transportation Planner, Building Division, and Environmental Soils Division; the La Pine Fire Department; the Oregon Department of Fish and Wildlife (ODFW) and Department of State Lands (DSL); and the U.S. Forest Service (USFS) and U.S. Army Corps of Engineers (Corps). These comments are set forth verbatim at pages 2-4 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 Road Department and Assessor; the Upper Deschutes Watershed Council; and the U.S. Fish and Wildlife Service.
- I. Public Comments:** The Planning Division mailed individual written notice of the applicant's proposal and the public hearing to the owners of record of all property located within 250 feet of the subject property. The record indicates these notices were mailed to the owners of twenty tax lots. In addition, notice of the 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 the record in this matter closed, the county had received public comments consisting of four letters and a petition signed by thirty-four persons. In addition, three members of the public testified at the public hearing. Public comments are addressed in the findings below.
- J. Lot of Record:** The subject property is a lot of record as Lot 2, Block 57, in the Oregon Water Wonderland Unit II Subdivision.

### **III. CONCLUSIONS OF LAW:**

#### **A. Summary.**

**1. Zoning.** The Hearings Officer finds the FP Zone on the flood plain on the subject property is located at or below the site-specific surveyed base flood elevation (BFE). However, for purposes of determining the lawfulness of the applicant's improvements on the subject property, I find I must consider the entire subject property to have been zoned FP when those improvements were constructed.

**2. Septic System.** The Hearings Officer finds the status of the septic system on the subject property is not properly before me because I lack authority to determine its lawful use through nonconforming use verification.

**3. Gravel Driveway and Riprap.** The Hearings Officer finds the gravel driveway and riprap are nonconforming uses.<sup>5</sup> I find the applicant's previous placement of gravel on the driveway and rocks on the riprap, as well as the applicant's proposed future placement of gravel on the driveway every five years, constitute normal maintenance of a nonconforming use.

**4. Free-standing Decks.** The Hearings Officer finds these structures are conditional uses in the FP Zone. However, they cannot be approved because they violate the 100-foot setback from the Deschutes River in the FP and LM Zones and don't qualify for a river setback exception.

**5. Dock.** The Hearings Officer finds the dock can be approved as the conditional use of "community dock" in the FP Zone with imposition of conditions of approval. However, I find the applicant has not demonstrated the dock complies with the fill-and-removal conditional use criteria to the extent its construction involved fill and removal.

**6. Original Bathhouse.** The Hearings Officer finds this structure was not a nonconforming use because it was illegal when it was constructed in 1976, and because it qualified as a conditional use when the subject property was zoned FP in 1988. However, I find it does not satisfy the applicable conditional use criteria for such use because it violates the 100-foot river setback and does not qualify for an exception thereto.

**7. Bunkhouse.** The Hearings Officer finds that because the bathhouse was not a nonconforming use, its enlargement into the bunkhouse was not a lawful expansion or alteration of a nonconforming use. The bunkhouse does qualify as a conditional use in the FP Zone. However, the bunkhouse does not satisfy all conditional use 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 bunkhouse also does not qualify as an "accessory structure" under Section 18.116.040 because it does not satisfy all requirements applicable to the primary recreational use of the property – i.e., the river setback.

**8. Garage.** The Hearings Officer finds the garage qualifies as a conditional use in the FP Zone, but does not satisfy all conditional use approval criteria. However, the garage can be approved as an "accessory structure" under Section 18.116.040. And the garage satisfies the applicable LM Zone site plan approval criteria.

**B. Preliminary Issue.** The applicant's burden of proof statements request nonconforming use verification for the septic system. The applicant submitted evidence and argument concerning the history and status of that system. On-site septic systems are not identified in Title 18 as uses permitted outright or conditionally in any zone. Title 18 makes reference to septic systems only in the context of minimum stream setbacks. For example, Section 18.60.050 of the RR-10 Zone and Section 18.96.100 of the FP Zone require septic systems to be set back at least 100 feet from streams. Section 18.84.090(C) of the LM Zone states in relevant part:

**The placement of on-site sewage disposal systems shall be subject to joint review by the Planning Director or Hearings Body and the Deschutes County Environmental Health Division. The placement of such systems shall minimize the impact on vegetation along the river and shall allow a dwelling to be constructed on the site as far from the stream or lake as possible. Sand filter systems may be**

<sup>5</sup> *Webster's Dictionary* defines "riprap" as "a foundation or sustaining wall of stone or chunks of concrete thrown together without order (as in deep water); also: a layer of this or similar material on an embankment slope to prevent erosion."

**required as replacement systems when this will allow a dwelling to be located further from the stream or to meet the 100-foot setback requirement.**

The Hearings Officer finds the stream setback provisions in Title 18 regulate only the *location* of a septic system and not its lawful use. That is because on-site sewage disposal systems are regulated by Chapter 13.08 of the Deschutes County Code which regulates on-site sewage disposal and septic tanks. Chapter 13.08 implements the on-site sewage disposal administrative rules of the Oregon Department of Environmental Quality (DEQ) in OAR Chapter 340. As discussed in the Findings of Fact above, the 1976 certificate of completion and the 1992 denial of an authorization notice for the septic system were issued by the county's Environmental Soils Division pursuant to these administrative rules.

In a September 24, 2015, electronic mail message to the applicant's attorney, included in the record as Exhibit NN to the applicant's burden of proof, Todd Cleveland of the Environmental Soils Division stated in relevant part:

*"Authorization Notices are required to place an existing system into service, reconnect to, change the use of, or increase the projected daily flow into an existing onsite system (OAR 340-071-0205(1))."*

*The Certificate of Completion for the system was issued on October 20, 1976. This means that the system was classified as an existing system and no record shows that the system was placed into service. There is no record other than the information you gathered that shows the bath house existed in 1976/77.*

*Authorization Notice from 1992: Upon looking at the application, the plot plan and the letter, my conclusion regarding the 1992 Authorization Notice is that the proposal to place the system into service was denied. \* \* \**

*If the bath house is determined to have existed then we will address it as a pre-existing use. This depends on the final decision of the Hearings Officer. \* \* \* The outcome would likely result in Environmental Soils following our policy addressing existing residences on high groundwater properties with upgrades to the existing system required. \* \* \**

In other words, according to Mr. Cleveland, the question of whether the existing septic system can lawfully be used to serve the uses on the subject property, with or without upgrades, is a matter for the Environmental Soils Division to determine under DEQ's rules.

For these reasons, the Hearings Officer finds I lack authority to determine the lawful status of the existing on-site septic system through the applicant's request for verification of a nonconforming use under Title 18.

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

**FLOOD PLAIN ZONE STANDARDS**

**1. Chapter 18.96, Flood Plain Zone**

**a. Section 18.96.020, Designated Area**



The areas of special flood hazard identified by the Federal Insurance Administration in a scientific and engineering report entitled "Flood Insurance Study for Deschutes County, Oregon and Incorporated Areas" revised September 28, 2007, with accompanying Flood Insurance Rate Maps is hereby adopted by reference and incorporated herein by this reference. The Flood Insurance Study is on file at the Deschutes County Community Development Department.

The Flood Plain Zone shall include all areas designated as "Special Flood Hazard Areas" by the Flood Insurance Study for Deschutes County. When base flood elevation data has not been provided in the Flood Insurance Study, the Planning Director will obtain, review and reasonably utilize any base flood elevation or floodway data available from federal, state or other sources, in determining the location of a flood plain or floodway.

b. Section 18.96.130, Interpretation of FIRM Boundaries

The Planning Director shall make interpretations where needed, as to exact location of the boundaries of the areas of special flood hazards (for example, where there appears to be a conflict between a mapped boundary and actual field conditions). Such interpretations shall be processed as a development action pursuant to Chapter 22.16. (Emphasis added.)

**FINDINGS:** The threshold question under these provisions is whether and to what extent the FP Zone applies to the subject property. "Special Flood Hazard Areas" on the FEMA Flood Insurance Rate Maps (FIRM) are lands that would be inundated by a 100-year flood event – i.e., that are at or below the base flood elevation (BFE). The record indicates the entire subject property is zoned FP on the basis of the FIRM for the section of the Deschutes River near this lot – Map No. 41017C1130E, revised September 28, 2007.

The applicant submitted a site-specific flood plain survey, performed by Scott Freshwaters, Licensed Professional Surveyor, that states the BFE at the subject property is at an elevation of 4164.2 feet. The survey shows the dock, free-standing decks, and portions of the gravel driveway are at or below the BFE, but that the rest of the driveway and the bunkhouse, well house, garage and septic system are located above the BFE. The staff report notes that in prior decisions, the county has concluded that where a site-specific flood plain survey showed the actual flood plain to be different than the area mapped by FEMA, the FP Zone provisions do not apply to areas or uses outside the surveyed flood plain, and that in such circumstances the county considers the appropriate adjacent zone to apply to the land above the surveyed BFE.

The Hearings Officer finds Sections 18.96.020 and 18.96.130 authorize the county to interpret the extent of the flood plain based on site-specific flood plain surveys. Therefore, the only improvements within the flood plain on the subject property are the dock, free-standing decks, and portions of the gravel driveway located below the BFE.

Surrounding land outside the FP Zone is zoned RR-10. Therefore, in accordance with past county practices, the appropriate adjacent zoning district would be the RR-10 Zone. However, the Hearings Officer finds it would not appropriate to apply the RR-10 Zone to the uses on the

subject property above the BFE because the entire subject property was zoned FP when the applicant constructed the improvements in question. To the extent the applicant considered the subject property's zoning when undertaking those improvements, he was entitled to rely on the county's official zoning maps that zoned the entire property FP. Therefore, my determination of whether the applicant's improvements to the subject property above the BFE – the bunkhouse and garage -- are, or can be made, lawful is based on the provisions of the FP Zone.

**c. Section 18.96.040, Conditional Uses Permitted**

**The following uses may be allowed subject to applicable sections of this title:**

\* \* \*

**C. Single-family dwelling \* \* \* on an individual lot. \* \* \***

**FINDINGS:** Section 18.04.030 includes the following relevant definitions:

**“Dwelling, single family” means a detached building containing one dwelling unit and designed for occupancy by one family only, not including temporary structures such as tents, teepees, travel trailers and other similar structures.**

**“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 applicant's July 15, 2015 supplemental burden of proof describes the bunkhouse as a “vacation home” used by the applicant in tandem with an RV. The Hearings Officer finds that characterization is not accurate. As discussed in the Findings of Fact above, the original bathhouse was a small structure that contained only bathroom and laundry facilities. The applicant added a bedroom to create the bunkhouse.

Neither the bathhouse nor the bunkhouse included a kitchen or cooking are. The language describing a “dwelling unit” as having “not more than one” kitchen is somewhat ambiguous because the phrase “not more than one” kitchen could mean zero kitchens. Nevertheless, the Hearings Officer finds that in the context of the rest of the definitions of “dwelling unit” and “dwelling, single family,” and in particular the requirement that a dwelling unit be “designed” for occupancy by a family, the most reasonable interpretation of the definition of “dwelling unit” is that it must have a kitchen or cooking area. For these reasons, I find the bunkhouse is not a conditional use as a single-family dwelling.

**F. Excavation, grading and fill and removal within the bed and banks of a stream or river or in a wetland, subject to DCC 18.120.050 and 18.128.270. Excavation, grading and fill within any area of special flood hazard identified in DCC 18.96.020.**

**FINDINGS:** This paragraph authorizes as a conditional use fill and removal within the bed and banks of a river, wetlands, and flood plain. Based on aerial photographs in the record and the Hearings Officer's site visit observations, I find a significant amount of gravel and some large rocks added to the riprap have been placed at or below the BFE, and therefore are within the flood plain associated with the Deschutes River. In addition, according to the South County Local Wetland Inventory (LWI), much of the subject property is mapped wetland.

The applicant argues placement of the additional gravel on the driveway and rocks on the riprap should not be considered "fill and removal" based on the following reasoning:

*"Deschutes County only defines the term 'fill and removal' as a term that includes any deposit or removal of material. No threshold volume amount or other criteria, such as type of material, are defined. Absent additional criteria, the movement of even one pebble could qualify as 'fill and removal' under the Deschutes County Code. For clarification, we turn to State statutes and regulatory authority.*

*The purpose of 'fill and removal' regulations under state regulations is to prevent significant addition or removal of material that would affect the river or the riverbank's integrity. These regulations were adopted pursuant to Oregon's Removal-Fill Law (ORS 196.795-990). That law requires that any person planning to 'remove or fill' material 'within the waters of the state' shall obtain a permit from the Oregon Department of State Lands ('DSL'). This means that permits are only required when performing work below the ordinary high watermark of a river or stream such as the Deschutes River. See Removal Fill Guide, Exhibit T at page 24."*

Section 18.04.030 defines "fill and removal" as:

**. . . the deposit or removal by artificial means of material at a location within the waters of any lake, river or stream, or in wetlands or riparian areas.**

The Hearings Officer finds this definition is clear and unambiguous in applying to the deposit or removal of *any* material in the flood plain, wetlands or riparian areas. Therefore, it is neither necessary nor appropriate to look to the statutory language to interpret the county code definition. The staff report states, and I concur, that under the plain language of this definition, the applicant's deposition of gravel and rocks below the BFE and in the NWI-mapped wetlands constitutes fill that is a conditional use in the FP Zone unless it falls within one of the exceptions established in Chapter 18.120 of the code.

Section 18.120.050 authorizes certain fill-and-removal activities as exceptions. The Hearings Officer finds none of those exceptions includes the applicant's fill. However, Section 18.120.010, addressing nonconforming uses, states in relevant part:

**Except as otherwise provided in DCC Title 18, the lawful use of a building, structure or land existing on the effective date of DCC Title 18, any amendment thereto or any ordinance codified therein may be continued although such use or structure does not conform with the standards for new development specified in DCC Title 18. A nonconforming use or structure may be altered, restored or replaced subject to DCC 18.120.010. No nonconforming use or structure may be resumed after a one-year period of interruption or abandonment unless the resumed use conforms with the provisions of DCC Title 18 in effect at the time of the proposed resumption.**

\* \* \*

**C. Maintenance of a Nonconforming Use. Normal maintenance of a verified nonconforming use or structure shall be permitted. Maintenance does not**

**include alterations which are subject to DCC 18.120.010(E). \* \* \*** (Emphasis added.)

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 Hearings Officer 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 Hearings Officer finds the questions under the nonconforming use provisions in Section 18.120.010 are: (1) whether the gravel driveway and riprap are nonconforming uses; (2) whether the applicant's placement of additional gravel on the driveway and additional rocks on the riprap constituted "normal maintenance of a verified nonconforming use;" (3) whether maintenance of a verified nonconforming use can occur prior to formal verification of that use; and (4) if the applicant's fill-and-removal activities do not qualify as normal maintenance of a verified nonconforming use, do they satisfy the applicable conditional use approval criteria? Each of these questions is addressed in the findings below.

**1. Nonconforming Use.** 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 Hearings Officer 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, I find 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.<sup>6</sup>

The Hearings Officer 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 constituted nonconforming uses.

**2. Applicant's Previous Maintenance Activities.** The applicant testified that in 2009-2010 he planted grass over portions of the pre-existing gravel driveway and placed rocks on the top of the riverbank at the edge of the lawn to create a boundary. He also added approximately eight cubic yards of gravel to the driveway to fill in potholes and to level the driveway surface. The applicant requests that this previous fill activity be authorized as normal maintenance of nonconforming uses, and also requests authority to continue such maintenance in the future by adding up to eight cubic yards of gravel every five years. The applicant also testified that when he purchased the subject property, the riverbank already was stabilized with riprap, and that he placed some additional rocks on the riprap to maintain the bank in its present location and

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<sup>6</sup> The only ground-level photograph in the record that predates the applicant's fill activities is dated September 30, 2009, is attached to a November 12, 2014 letter from Bonnie Brown, and is included in the record as Exhibit O to the applicant's burden of proof. This photo shows riprap along a portion of the riverbank. However, I find that because of its date, this photo does not establish the presence of riverbank armoring with rocks prior to March of 1989.

configuration and to prevent erosion. The Hearings Officer finds both the applicant's previous fill activities on the driveway and riprap, and his proposed future maintenance of the driveway, constitute normal maintenance of nonconforming uses.

**3. Timing of Nonconforming Use Verification.** Paragraph (B)(3)(c) of Section 18.120.010 authorizes normal maintenance of a "verified" non-conforming use. Staff questions whether use of the term "verified" to modify non-conforming use means the nonconforming use must have been verified *before* such maintenance lawfully could occur. The applicant's fill activities were not "verified" as a nonconforming use before he undertook them.

The Hearings Officer finds "verified" as used in Section 18.120.010 is a term of art because Paragraph (B) of that section establishes a specific process and specific standards for "verification" of a nonconforming use. Therefore, the *text* of this paragraph could be read to require verification *prior to* maintenance of a nonconforming use. However, I find the *context* of this language does not support that interpretation. That is because some provisions of Section 18.120.010 authorize certain activities concerning nonconforming uses without reference to whether they are "verified." For example, Paragraph (A) authorizes the expansion or replacement of a nonconforming structure as long as it was "lawfully established." Similarly, Paragraph (E) authorizes alteration of a nonconforming use without reference to whether it was "verified." In contrast, Paragraphs (C) and (D), respectively, authorize "maintenance" and "restoration or replacement" of a "verified" nonconforming use. More importantly, Section 18.120.010(B)(1) states verification of a nonconforming use is required "prior to *or concurrent with*" any application to alter or restore the use. (Emphasis added.) The quoted language authorizes what the applicant did here – i.e., concurrently requesting verification of and permission to maintain a nonconforming use.

For the foregoing reasons, the Hearings Officer finds the applicant's deposit of gravel on the driveway and rocks on the riprap was normal maintenance thereof without *prior* verification of the driveway and riprap as nonconforming uses. Accordingly, I find these fill activities do not require conditional use approval in the FP Zone.

- G. Recreational uses requiring only structures having an insignificant effect on flood waters outside the Floodway, such as golf courses, tennis courts, driving ranges, archery ranges, picnic grounds, boat launching ramps, swimming areas, wildlife or nature preserves, game farms, fish hatcheries, shooting preserves and hunting or fishing areas subject to DCC 18.128, except in areas designated "Forest" or "Agriculture" on the Comprehensive Plan Map.

\* \* \*

- I. All new construction, expansion or substantial improvement of an existing dwelling, an agricultural related structure, a commercial, industrial or other non residential structure, or an accessory building. (Emphasis added.)

**FINDINGS:** The subject property has a long history of use for recreational purposes. Initially it was developed by the Tuckers as an RV lot with a gravel driveway, on-site septic system, and bathhouse. Subsequently, the Cates and Cunningham added a boat slip and a dock which later was removed. The applicant improved the property with a gravel RV parking space, and constructed another dock, free-standing decks, wellhouse, connecting walkways, and the

garage, and expanded the bunkhouse, all to support the continuing recreational use of the property. The question, then, is whether the dock, decks, bunkhouse and garage constitute conditional uses in the FP Zone, and if not, whether they qualify as nonconforming uses.<sup>7</sup>

**Decks.** Unlike the gravel driveway and riprap discussed above, the free-standing decks did not exist prior to 1988. Therefore, the Hearings Officer finds these structures are not lawful nonconforming uses and require conditional use approval in the FP Zone. The applicant argues the free-standing decks are permitted outright in the FP Zone because decks are included in the definition of "landscaping" in Section 18.04.030 which states:

**"Landscaping" means trees, grass, bushes, shrubs, flowers, and garden areas, and incidental arrangements of fountains, patios, decks, street furniture and ornamental concrete or stonework and artificial plants, bushes or flowers.**

The applicant reasons as follows:

*"Applicant is seeking approval for landscaping in the form of an at-grade platform deck. Under Deschutes County Code 18.04.030, decks are included in the definition of landscaping. The deck on the subject property is used for viewing of the Deschutes River. The deck is a split-level deck that is built near grade on pier blocks. The deck is a water-dependent use. The only utility provided by the deck is as a viewing platform. Because of how narrow the lot is, and because of the existing trees and existing nonconforming structure (Bunkhouse), moving the deck outside of the actual flood plain would not serve the intended purpose. It is designed without rails or stairs as a platform only, placed on the ground. Therefore, under this criteria [sic], it would not block water flows and so it has an insignificant effect on flood waters outside of the Floodway. This criteria [sic] is met."*

The Hearings Officer finds the applicant's argument is not persuasive. In the first place, I find inclusion of "decks" in the "landscaping" definition means only that when the term "landscaping" is used in Title 18 it may include decks. In addition, I find decks clearly fall within the definition of "structure" in Section 18.04.030 – i.e., "something constructed or built having a fixed base on, or fixed connection to, the ground or another structure." Photographs of the decks included in the record (e.g., Exhibits I and JJ to the applicant's burden of proof) clearly show the decks have a fixed base on and are connected to the ground through attachment to buried posts. Finally, the applicant has not identified, nor have I found, any provision in Title 18 supporting the applicant's assertion that the FP Zone allows outright "water-dependent uses."

For the foregoing reasons, the Hearings Officer finds the free-standing decks fall within the conditional use of "nonresidential structures" under Section 18.96.040(I). I also find the decks fall within the conditional use of "recreational uses requiring only structures having an insignificant effect on flood waters outside the floodway" under Section 18.96.040(G) because they are used for recreation and have a very low profile so would not have any effect on flood waters. Accordingly, I find the free-standing decks are 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.

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<sup>7</sup> The Hearings Officer notes the definition of "walkway" in Section 18.04.030 doesn't appear to cover the walkways on the subject property because they are not built over or floating on water, and don't provide access to the dock. Therefore, I find the applicant's walkways appear not to be regulated by Title 18.

**Garage.** The garage also did not exist prior to 1988. Therefore, the Hearings Officer finds it is a not a lawful nonconforming use. The Hearings Officer finds the garage clearly constitutes a "structure." The record indicates the garage is used to store the applicant's pontoon boat and trailer as well as other equipment related to the applicant's use and maintenance of the subject property. Therefore, I find the garage 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 garage 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.

**Bunkhouse.** The record indicates the original bathhouse was constructed in 1976. As discussed in detail in the findings below under Section 18.120.010, the Hearings Officer has found the bathhouse was illegal when it was constructed. Therefore, I find it was not a nonconforming use and its conversion to the bunkhouse was not a lawful expansion or alteration to a nonconforming use. The question, then, is whether the bunkhouse can be approved as a conditional use in the FP Zone even though it may not have been lawfully established.

The Hearings Officer finds the circumstances presented by the applicant's request to make the bunkhouse lawful are similar to those in *Morris v. Clackamas County*, 27 Or LUBA 438 (1994). In that case, the applicants placed a manufactured home on their property in violation of its zoning. The zone later was amended to permit a manufactured home as a conditional use, and the applicants requested and obtained conditional use approval for the manufactured home. The zone was again amended in a manner that allowed residential use in limited circumstances not applicable to the applicants' manufactured home. The applicants requested verification of the manufactured home as a nonconforming use, and the hearings officer denied their request, reasoning that the county's issuance of a conditional use permit made the manufactured home "lawfully located" on the property, subject only to the conditions of approval attached to the conditional use permit. Both the Board of County Commissioners (board) and LUBA affirmed the hearings officer's decision.

In the subject application, the Hearings Officer has found the bathhouse was illegal when it was constructed in 1976. However, with the adoption of the FP Zone provisions in 1988, the bathhouse could have become a conditional use on the subject property, and the applicant is now seeking conditional use approval for the bunkhouse. Therefore, I find that if the bunkhouse can satisfy the applicable conditional use approval criteria, it can be approved as a conditional use and would not be a nonconforming use.

The Hearings Officer finds the bunkhouse clearly falls within the definition of "structure" in Section 18.04.030. As discussed above, I have found the bunkhouse is not a dwelling and therefore is a "nonresidential structure." I find 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, I find 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.

**J. A boat dock or pier, either individual or community, on private property which lies in the following areas:**

1. On the Deschutes River between river miles 226.4 and 224.5. This area is identified in the Scenic Waterway Management Plan as the Wickiup River Community Area;
2. On the Deschutes River between river miles 217.5 and 216.5. This area is identified in the Scenic Waterway Management Plan as the Pringle Falls River Community Area; and
3. On the Deschutes River between river miles 207 and 192. This area is identified in the Scenic Waterway Management Plan as River Community Areas and Recreational River Area respectively.

**FINDINGS:** 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.<sup>8</sup> 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.<sup>9</sup> For these reasons, the Hearings Officer finds the dock is not a nonconforming use.

As discussed in the findings below, the Hearings Officer has found the dock can qualify as a "community dock" under Paragraph (J) of this section. Therefore, the Hearings Officer finds the 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.

For the foregoing reasons, the Hearings Officer finds the applicant's previous placement of gravel on the driveway and rocks on the riprap constitute lawful maintenance of nonconforming uses. I find the dock, free-standing decks, wellhouse, garage and bunkhouse are conditional uses in the FP Zone subject to the applicable conditional use approval criteria addressed in the findings below.

**d. Section 18.96.060, Limitations on Conditional Uses**

**The following limitations shall apply to all uses allowed by DCC 18.96.040:**

- A. No new construction of a dwelling (including manufactured housing), accessory structure or farm use structure shall be allowed in the floodway of any river or stream except for**

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<sup>8</sup> 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."

<sup>9</sup> The administrative decision found the old pilings on which the original deck was built did constitute a lawful nonconforming use.



replacement in conformance with the applicable provisions of DCC 18.96 of a dwelling lawfully in existence as of the effective date of Ordinance 88 030.

- B. No new construction of a dwelling (including manufactured housing), accessory structure or farm use structure shall be located in the flood plain unless it can be demonstrated by the applicant that no alternative exists on the subject property which would allow the structure to be placed outside of the flood plain.
- C. No subdivision or partition shall be allowed which creates the potential for additional residential dwellings in the flood plain.
- D. All necessary federal, state and local government agency permits shall be obtained.

**FINDINGS:** The Hearings Officer 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. I find Paragraph (D) is applicable to the dock and decks because of their location within the flood plain and wetlands. Therefore, I find that if the dock or free-standing decks are approved by the board on appeal, the applicant should be required as a condition of approval to 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 to provide to the Planning Division written documentation from these entities that no such permits or approvals are required.

**e. Section 18.96.080, Criteria to Evaluate Conditional Uses**

- A. A conditional use permit in a Flood Plain Zone shall not be approved unless all standards established by the Federal Emergency Management Agency and DCC Title 18 are addressed and findings are made by the Hearings Body or Planning Director that each of the standards and criteria are satisfied.

**FINDINGS:** The Hearings Officer finds that compliance with the applicable provisions of the FP Zone will assure compliance with FEMA standards because such standards are implemented through the FP Zone requirements.

- C. A conditional use permit shall be based upon findings which relate to the property and existing and proposed structure(s). They shall not pertain to the property owner, inhabitants, economic or financial circumstances.

**FINDINGS:** The Hearings Officer finds this criterion is satisfied because this decision is based upon findings that relate to the property and existing and proposed structure(s) and not to the property owner, inhabitants, economic or financial circumstances.

- D. All structures in the flood plain shall meet the following standards.

**FINDINGS:** The Hearings Officer 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 applicant argues the dock is not a "structure." I disagree. I have found 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, I find both the dock and free-standing decks are subject to the standards in this paragraph.

**1. Anchoring.**

- a. All new construction and substantial improvements shall be anchored to prevent flotation, collapse or lateral movement of the structure.**

**FINDINGS:** The record includes numerous photos of the dock and decks during and after construction (e.g., Exhibits D and F to the applicant's burden of proof). The Hearings Officer finds from these photos that both the decks and dock are anchored by being fixed to the ground through connection to posts buried in the ground and pilings buried in the riverbank, respectively. I find these anchoring methods are sufficient to prevent the flotation, collapse or lateral movement of the decks and dock.

- b. All manufactured homes must be anchored to prevent flotation, collapse or lateral movement, and shall be installed using methods and practices that minimize flood damage. Anchoring methods may include, but are not limited to, use of over the top or frame ties to ground anchors.**

**FINDINGS:** The Hearings Officer finds this criterion is not applicable because the applicant does not propose a manufactured home.

**2. Construction Materials and Methods.**

- a. All new construction and substantial improvements shall be constructed with materials and utility equipment resistant to flood damage.**

**FINDINGS:** The applicant's burden of proof states, and based on photos in the record and the Hearings Officer's site visit observations I agree, that the free-standing decks and the dock are constructed of treated wood and/or composite materials designed to resist water and flood damage. The dock and decks do not contain electrical, heating, or other service facilities. Therefore, I find the dock and free-standing decks satisfy this standard.

- b. All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damage.**

**FINDINGS:** The Hearings Officer finds the “methods and practices that minimize flood damage” required by this standard contemplate proper anchoring to prevent these structures from floating downstream and damaging other property during a flood. As discussed in the findings above, I have found the dock and free-standing decks are adequately anchored. Therefore, I find these structures satisfy the standard in this paragraph.

- c. **Electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or otherwise elevated or located so as to prevent water from entering or accumulating within the components during conditions of flooding.**

**FINDINGS:** The Hearings Officer finds this standard is not applicable because the dock and decks do not contain any electrical, heating, or other service facilities.

**3. Utilities.**

- a. **All new and replacement water supply systems shall be designed to minimize or eliminate infiltration of flood waters into the system.**
- b. **New and replacement sanitary systems shall be designed to minimize or eliminate infiltration of floodwaters into the system and discharge from the system into flood waters.**
- c. **On site waste disposal systems shall be located to avoid impairment to them or contamination from them during flooding.**

**FINDINGS:** The Hearings Officer finds the standards in Paragraphs (a) and (b) are not applicable because the applicant does not propose new or replacement water or sanitary systems. I have found the existing septic system is not properly before me in these applications.

**4. Below-grade crawlspace is allowed subject to the standards in FEMA Technical Bulletin 11-01.**

**FINDINGS:** The Hearings Officer finds this standard is not applicable because the applicant does not propose any below-grade crawlspaces.

**G. Specific Standards. In the Flood Plain Zone, the following requirements must be met:**

**1. Residential Construction. \* \* \***

**FINDINGS:** 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 Hearings Officer 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, I have found the bunkhouse is not a dwelling. I also find the garage is not a dwelling. Therefore, I find the dock, decks, bunkhouse and garage are not subject to the standards for “residential construction.”

- 2. Nonresidential Construction. New construction and substantial improvement of any commercial, industrial or other nonresidential structure shall either have the lowest floor, including basement, elevated at least one foot above the level of the base flood elevation, or, together with attendant utility and sanitary facilities, shall:**

\* \* \*

**FINDINGS:** The Hearings Officer finds the dock and free-standing decks are “nonresidential structures.” However, I find the standards in this paragraph do not apply to the dock and decks because Paragraph (G)(4) of this section separately addresses “docks, piers and walkways,” and the standards for nonresidential structures address components like “lowest floor” and “basement” that are not characteristic of docks and decks. The staff report notes that FEMA’s website<sup>10</sup> provides guidance and specific standards for accessory structures as defined and described in FEMA’s rules.<sup>11</sup> These standards include the following:

*“These accessory structures must be low value and not be used for human habitation.*

*They must also meet the following requirements:*

*Accessory structures shall be designed to have low flood damage potential.*

*Accessory structures shall be constructed and placed on the building site so as to offer the minimum resistance to the flow of floodwaters.*

*Accessory structures shall be firmly anchored to prevent flotation which may result in damage to other structures.*

*Service facilities such as electrical and heating equipment shall be elevated or floodproofed.*

*Accessory structures shall have openings as required under 60.3(c)(5).*

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<sup>10</sup> The staff report states the FEMA website address is: <https://www.fema.gov/accessory-structures>.

<sup>11</sup> The FEMA guidelines refer to accessory structures as appurtenant structures and indicate an accessory structure is a structure which is on the same parcel of property as a principal structure and of which the use is incidental to the use of the principal structure. For example, a residential structure may have a detached garage or storage shed for garden tools as accessory structures. Other examples of accessory structures include gazebos, picnic pavilions, boathouses, small pole barns, storage sheds, and similar buildings. The staff report states that National Flood Insurance Program (NFIP) regulations for new construction generally apply to new and substantially improved accessory structures.

- (5) *Require, for all new construction and substantial improvements, that fully enclosed areas below the lowest floor that are usable solely for parking of vehicles, building access or storage in an area other than a basement and which are subject to flooding shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement must either be certified by a registered professional engineer or architect or meet or exceed the following minimum criteria: A minimum of two openings having a total net area of not less than one square inch for every square foot of enclosed area subject to flooding shall be provided. The bottom of all openings shall be no higher than one foot above grade. Openings may be equipped with screens, louvers, valves, or other coverings or devices provided that they permit the automatic entry and exit of floodwaters.*

*Floodway encroachment provision of 60.3 (d) (3) must be met."*

Assuming for purposes of discussion that these FEMA standards are relevant to the applicant's proposal, the Hearings Officer finds the dock and free-standing decks satisfy them. The dock and decks are low value structures not intended for human habitation. They are constructed of water- and flood-resistant materials and have no electrical or heating facilities. They do not have fully enclosed areas below the lowest floor. No floodway encroachments are proposed. Finally, I have found the dock and decks are anchored so as to prevent flotation, collapse or lateral movement of the structure.

The record indicates the bunkhouse and garage are located above the BFE and therefore do not have a "lowest floor" or "basement" that must be elevated above the BFE. Therefore, the Hearings Officer finds the standards for nonresidential construction in the FP Zone do not apply to the bunkhouse and garage.

**4. Docks, Piers and Walkways.**

- a. No individual boat dock or pier shall be allowed on any lot with less than 200 feet of river frontage.**

**FINDINGS:** 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 a "community dock." However, the applicant also argues the subject property is eligible for an individual dock for the following reasons:

*"The individual dock criteria under DCC 18.96.080.G.4.a requires [sic] 200 feet of river footage. The Subject Property has waterfront of 196.82 feet. See Shoreline Survey, Exhibit J. Applicant believes that this substantially complies with this criterion, and so it has been satisfied. Additionally, under DCC 18.96.080.G.4.c, individual docks must not exceed 160 square feet, and cannot extend into the water more than 20 feet. Here, the dock is 255.46 square feet but only extends*

*into the water approximately 8 feet. As already discussed, the dock's size is a function of its utility and use to dock pontoon boats, and although the total surface area is larger than the individual dock criteria, the impact to the free-flowing waterway is less significant and public safety is enhanced. Therefore, we believe the intent of this criteria to be satisfied and the dock may be approved as an individual dock." (Emphasis added.)*

The Hearings Officer finds the applicant's arguments are not persuasive. First, the dock clearly exceeds the maximum size for an individual dock. In addition, as the applicant acknowledges, its "Shoreline Survey" shows the subject property has less than the minimum 200 feet of river frontage. The applicant has not identified, nor have I found, any provision in the FP Zone allowing approval of an individual dock based on "substantial compliance" with the minimum frontage requirement. I find 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 "Shoreline Survey." If that were the case, a property's frontage on the Deschutes River, the level of which is highly regulated and has dramatic seasonal variations, could be different depending on the time of measurement. I find it unlikely the drafters of Title 18 intended river frontage to be such a variable measurement. For these reasons, I find river frontage should be measured by means of a recognized and objective demarcation – i.e., the ordinary high water mark (OHWM), defined in Section 18.04.030 as "the highest level on the bank of shore of a lake, river or stream to which the water ordinarily recedes annually in season." The applicant's submitted site plan depicts the OHWM on the subject property and shows it is approximately 175 feet long.

- b. No community boat dock or pier shall be allowed on any lot with less than 100 feet of river frontage.**

**FINDINGS:** Section 18.04.030 defines "boat dock or pier, community" as:

**\* \* \* a personal use boating structure that is built over or floats upon the water of a lake, river or stream that serves more than one property owner for the mooring of boats or as a landing place for marine transport, and that has a surface area of 320 square feet or less.**

The subject property has more than 100 feet of frontage on the Deschutes River, measured at the OHWM, and the dock is less than 320 square feet in size.<sup>12</sup> Therefore, the dock meets the locational and dimensional requirements in this section. With respect to whether the dock serves more than one property owner, the applicant's burden of proof states in relevant part:

*"Applicant proposes to share the community dock with Gordon & Linda Ferris, adjacent neighbors to the Subject Property. The Ferrises have an existing, floating dock that is in disrepair. The Ferrises would like to use the Applicant's dock as a community dock instead of going to the significant expense of repairing their individual dock. Applicant is prepared to execute a reciprocal use and access agreement for this shared use."*

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<sup>12</sup> The submitted site plan shows the dock is 10.6 feet deep measured perpendicular to the river, and 24.1 feet long measured parallel to the river.

The Hearings Officer finds the applicant's dock may qualify as a community dock if the existing dock on the Ferris property, which received conditional use approval in 2007 (CU-07-66), is removed.<sup>13</sup> The applicant's July 15, 2015 supplemental burden of proof states the Ferrises would like to use the applicant's dock as a community dock "rather than going to the significant expense of repairing their individual dock." However, the record does not include any correspondence from, or agreement with, the Ferrises stating they will remove their dock and share the applicant's dock.

The staff report notes there is nothing in Title 18 that prohibits a property with an existing individual dock from also being a "member" of a community dock. However, the staff report states, and the Hearings Officer agrees, that interpreting Title 18 to allow such "membership" would not be consistent with the clear intent reflected in the definition of community dock to limit their density to not more than one dock per 200 feet of river frontage. For these reasons, I find the applicant's dock will qualify as a "community dock" only if another property owner *without an individual dock* shares the applicant's dock. I find compliance with this criterion can be assured through imposition of conditions of approval requiring that within a specified period of time: (1) the Ferris dock is removed; (2) the applicant records a document or documents that provide access to the applicant's dock for the Ferrises and provide for maintenance of a "community dock" on the subject property; and (3) the applicant removes the dock on the subject property if the requirements under paragraph (1) are not satisfied within the specified time.

- c. **No individual boat dock or pier shall be more than 20 feet in length or more than eight feet in width. The total surface area shall not exceed 160 square feet.**

**FINDINGS:** As discussed in the findings above, the Hearings Officer has found the subject property is not eligible for an individual boat dock.

- d. **No community boat dock or pier shall be more than 20 feet in length. The total surface area shall not exceed 320 square feet.**

**FINDINGS:** The applicant's submitted site plan shows the dock is 10.6 feet deep measured perpendicular to the river, and 24.1 feet long measured parallel to the river, for a surface area of 255.46 square feet. Therefore, the Hearings Officer finds the dock satisfies this criterion.

- e. **A boat dock or pier shall not extend into or over the water more than 20 feet as measured from the ordinary high water mark (OHM), or five percent of the distance between the ordinary low water mark (OLM) on each river or stream bank measured at right angles to the shoreline, whichever is less, unless it can be shown that a greater extension:**

- i. **Is necessary to allow access to the OHM;**
- ii. **Will not increase flood hazard; and**

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<sup>13</sup> An aerial photo of the Ferris deck is included in the record as Hearing Exhibit 3.

- iii. **Will not cause the deterioration or destruction of marine life or wildlife habitat. When the lines of ordinary high or low water cannot be determined by survey or inspection, then such lines shall be determined by a registered professional engineer using the annual mean high or low water for the preceding year, using data from the State of Oregon Watermaster. (Emphasis added.)**

**FINDINGS:** The Hearings Officer finds this criterion is intended to minimize encroachment of a dock over the river by requiring a "whichever is less" calculation. The applicant's submitted site plan shows the dock extends between five and twelve feet beyond the OHWM measured at a right angle. However, neither the site plan nor the applicant's burden of proof shows the calculations for the other prong of this encroachment limitation – i.e., the location of and distance between the ordinary low water mark (OLWM) on both sides of the river. The applicant's burden of proof states in relevant part:

*"We have consulted with Registered Professional Engineer, Timothy James Weishaupt, who mapped the Site Plan, Exhibit A. He stated that he is unaware of a documented OLM for this stretch of river, particularly since the Deschutes River is a highly-regulated river in terms of flow. Deschutes County planning staff suggested we measure the river at its current level; however, this provides no objective standard with which to judge the community dock's existence by. Therefore, because the dock meets the objective standard of not extending more than 20 feet from the OHM, this criteria [sic] has been met."*

The staff report states, and the Hearings Officer agrees, that the plain language of Paragraph (e)(iii) of this section requires the applicant to submit an OLWM determination made by a licensed professional engineer using data from the State of Oregon Watermaster. The applicant did not do so and therefore did not demonstrate compliance with this standard.

The staff report notes available aerial photography appears to show that the location of the OLWM for the adjacent stretch of the Deschutes River is located near the OHWM on the south side of the river, and near the wetland fringe on the north side of the river where the subject property is located. Based on this photography, staff estimates the distance between the OLWM on each side of the river measured at right angles from bank to bank is approximately 130 feet, and therefore the dock's projection over the water would be limited under the "whichever is less" standard to approximately 6.5 feet. The site plan shows part of the dock exceeds that distance.

Assuming for purposes of discussion that the deck exceeds the maximum encroachment over the river based on the OLWM calculations, the applicant must demonstrate compliance with all three criteria for an exception. Each of those criteria is discussed in the findings below.

**1. Is Necessary To Allow Access to the OHWM.** As discussed above, the applicant's submitted site plan shows the OHWM on the subject property is located beneath the dock, and the dock projects approximately five to twelve feet beyond the OHWM over the river. While the dock could have been constructed not to extend beyond the OHWM, such design would not have allowed the structure to function as a dock because it would not have provided mooring for



boats or a landing place for marine transport. Therefore, the Hearings Officer finds the dock satisfies this criterion for an exception.

**2. Will Not Increase Flood Hazard.** As discussed elsewhere in this decision, the Hearings Officer has found the dock is adequately anchored by attachment to buried posts and pilings so that it will not become detached and create a hazard to downstream properties. The applicant has submitted a "no-rise certification" provided by a registered professional engineer stating the dock would remain in place during a flood event. For these reasons, I find the dock satisfies this criterion for an exception.

**3. Will Not Cause the Deterioration or Destruction of Marine Life or Wildlife Habitat.** The record includes comments from the Corps, USFS and ODFW expressing concern about possible impacts to fish and wildlife habitat from the applicant's construction and improvements in the bed and banks of the river and in associated wetlands including the dock. ODFW suggested wetlands and riparian areas on the subject property are habitat for the Oregon Spotted Frog which is an endangered species. However, in response the applicant submitted a letter from Jay Bowerman, Principal Researcher with the Sunriver Nature Center, included in the record as Exhibit Z to the applicant's burden of proof, stating that his on-site examination of the subject property produced no critical habitat for the frog, and that in his opinion the applicant's activity in wetlands on the subject property would not impact critical habitat. Mr. Bowerman's opinion was not rebutted by ODFW or any other agency. Therefore, the Hearings Officer finds the applicant's proposal satisfies this criterion for an exception.

- f. **Individual boat docks and piers shall have a minimum five foot setback from adjoining property boundaries projected over the water surface.**

**FINDINGS:** The Hearings Officer has found the subject property is not eligible for an individual boat dock.

- g. **Dock, pier and walkway structures shall not be covered or enclosed.**

**FINDINGS:** The Hearings Officer finds this criterion is not applicable because the dock is not covered or enclosed.

- h. **All materials used in dock, pier or walkway construction must be in compliance with all DEQ and EPA regulations.**

**FINDINGS:** The record does not include evidence of what, if any, DEQ or EPA (Environmental Protection Agency) regulations exist regarding materials used in dock, pier or walkway construction. The Hearings Officer finds that compliance with this criterion can be assured by imposition of a condition of approval requiring the applicant to 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.

- i. **Docks, piers and walkways shall use either pilings or Styrofoam floats if such floats are fully enclosed and sealed.**

**FINDINGS:** The Hearings Officer finds the dock satisfies this criterion because it is constructed with pilings.

- j. Docks, piers and walkways shall not impede water movement or cause deposition on waterway beds.**

**FINDINGS:** Based on photographs in the record and the Hearings Officer's site visit observations, I find the dock and pilings have a very low profile above the water. For this reason, I find the dock and pilings would not impede water movement or cause deposition on waterway beds. In its comments on the applicant's proposal, the USFS stated the applicant must obtain a free-flow analysis from the USFS under the federal Wild and Scenic Rivers Act.<sup>14</sup> I find that if the board approves the dock on appeal, the applicant should be required as a condition of approval to obtain and provide to the Planning Division such an analysis, or submit to the Planning Division written documentation from the USFS that such analysis is not required for the dock.

- k. Docks, piers and walkways containing concrete or wood preservatives shall be fully cured or dried prior to placement in the water.**

**FINDINGS:** The record indicates the dock does not contain concrete but does include treated wood posts and potentially other structural components. The applicant did not address this criterion with respect to the posts. The Hearings Officer finds compliance with this criterion can be assured through imposition of a condition of approval requiring the applicant to submit to the Planning Division written documentation that the treated wood deck components were fully cured or dried prior to their placement in the river.

- l. No walkway shall be more than four feet in width. The length of the walkway shall be no more than the minimum required to allow access to a dock.**
- m. Walkways shall include at least one handrail if the structure is elevated 30 inches or more from ground level.**

**FINDINGS:** The Hearings Officer finds these standards are not applicable because I have found the dock is not a "walkway" as defined in Section 18.04.030.

- n. All docks, piers and walkways shall meet the test of noninterference with navigation.**

**FINDINGS:** As discussed in the findings above, the dock projects only approximately five to twelve feet over the river. For this reason, and based on the Hearings Officer's site visit observations and the submitted site plan and photographs of the subject property and vicinity, I find the dock will not interfere with navigation.

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<sup>14</sup> The Hearings Officer finds it is not clear from this record whether the stretch of the Deschutes River adjacent to the subject property is a designated federal wild and scenic river.

**H. Floodways. In floodways the following provisions shall apply:**

- 1. Encroachments, including fill and removal, replacement of a dwelling lawfully in existence on the effective date of Ordinance 88 030 and other development are prohibited unless certification by a registered professional engineer is provided demonstrating that the proposed encroachments will not result in any increase in flood levels during a base flood discharge.**

**FINDINGS:** The dock encroaches into the floodway. The applicant submitted a certification by a registered professional engineer, included in the record as Exhibit V to the applicant's burden of proof, demonstrating the dock does not create an encroachment that will result in any increase in flood levels during a base flood discharge, therefore satisfying this criterion.

- 2. The applicant must demonstrate that all necessary federal, state and local government agency permits have been or can be obtained and that all other applicable sections of DCC Title 18 have been satisfied.**

**FINDINGS:** All applicable sections of Title 18 are addressed in this decision. The Hearings Officer finds that if the dock is approved by the board on appeal, the applicant should be required as a condition of approval to submit to the Planning Division written documentation from federal and state agencies and local governments that all necessary permits and approvals have been or can be obtained, or that no permit or approval is required.

For the foregoing reasons, the Hearings Officer finds the dock can satisfy all applicable requirements for a community dock with imposition of the conditions of approval described in the findings above.

**e. Section 18.96.085, Elevation Certification**

**Elevation of all new construction, including replacement and substantial improvements, relative to mean sea level of the lowest floor shall be documented before the framing inspection with a survey certified by a State of Oregon registered professional engineer or land surveyor.**

**FINDINGS:** The staff report states the FEMA elevation certificate form provides:

*"This information is being collected for the primary purpose of estimating the risk premium rates necessary to provide flood insurance for new or substantially improved structures in designated Special Flood Hazard Areas."*<sup>15</sup>

However, staff notes the dock and free-standing decks are not eligible for flood insurance as specified in FEMA's publication entitled *National Flood Insurance Program, Answers to*

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<sup>15</sup> The staff report states the FEMA form can be viewed on the FEMA website at the following address: <https://www.fema.gov/media-library/assets/documents/160>.

*Questions About the NFIP.*<sup>16</sup> The staff report states that for this reason, the county has not previously required elevation certificates for structures that don't have two or more outside rigid walls and a fully secured roof. Therefore, the Hearings Officer finds this criterion does not apply to the dock and free-standing decks in the flood plain. And I find it does not apply to the bunkhouse and garage because, as discussed in the findings above, I have found they are located outside the flood plain above the BFE.

**f. Section 18.96.090, Yard and Setback Requirements**

**In an FP Zone, the following yard and setback requirements shall be maintained:**

- A. The front setback shall be a minimum of 20 feet from a property line fronting on a local street, 30 feet from a property line fronting on a collector and 50 feet from an arterial.**
- B. There shall be a minimum side yard of 10 feet for all uses.**
- C. The minimum rear yard shall be 20 feet.**
- D. The setback from a north lot line shall meet the solar setback requirements in DCC 18.116.180.**
- E. The minimum yard setback for a nonfarm use from the property line adjacent to a farm use not owned by the applicant shall be 100 feet.**
- F. 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:** All structures on the property, including the dock and free-standing decks, are located over 20 feet from Satterlee Way, a rural local street, and over 10 feet from the side yards. The Hearings Officer finds the solar setback requirements in Section 18.116.180 do not apply because the north property lot line abuts the river which is not a potential location of a structure that would cast a shadow.<sup>17</sup>

The rear property line of the subject property is the Deschutes River. The record does not indicate that the adjacent stretch of the river is considered navigable so that the state owns its

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<sup>16</sup>The staff report states that publication can be found at [http://www.fema.gov/media-library-data/20130726-1438-20490-0889/f084\\_atq\\_11aug11.txt](http://www.fema.gov/media-library-data/20130726-1438-20490-0889/f084_atq_11aug11.txt), and provides in relevant part:

*"28. What types of property may be insured against flood loss?*

*Insurance may be written on any building eligible for coverage with two or more outside rigid walls and a fully secured roof that is affixed to a permanent site. Buildings must resist flotation, collapse, and lateral movement. The structure must be located in a community that participates in the NFIP."*

<sup>17</sup>Section 18.04.030 defines "potential structure" for purpose of solar access protection as any structure or building that could be built as a permitted use in a particular location under existing development standards under the existing county comprehensive plan.

bed and banks. For that reason, the Hearings Officer agrees with staff that the rear setback for the subject property would be measured from the centerline of the river. The record indicates all structures on the property are over 20 feet from the centerline of the river. However, the staff report states, and I concur, that the specific locational/encroachment standards for the dock relative to the OHWM and OLWM, discussed in the findings above, supersede the general 20-foot rear yard setback under these criteria. As discussed in those findings, I have found the applicant has not demonstrated the dock meets the exceptions for exceeding the maximum river encroachment standard.

**g. Section 18.96.100, Stream Setback**

**To permit better light, air, vision, stream and pollution control, to protect fish and wildlife areas and to preserve the natural scenic amenities along streams and lakes, the following setbacks shall apply:**

- A. All sewage disposal installations such as septic tanks or septic drain fields shall be setback from the ordinary high water mark along all streams or lakes a minimum of 100 feet, measured at right angles to the ordinary high water mark. In those cases where practical difficulties preclude the location of the facilities at a distance of 100 feet, and the County Sanitarian finds that a closer location will not endanger public health or safety, a setback exception may be permitted to locate these facilities closer to the stream or lake, but in no case closer than 25 feet.**

**FINDINGS:** The Hearings Officer finds this criterion is not applicable because I have found I lack authority to consider the status of the existing on-site septic system as a nonconforming use. Moreover, the applicant is not proposing to site a new system.

- B. All structures, buildings or similar permanent fixtures shall be set back from the ordinary high water mark along all streams or lakes a minimum of 100 feet measured at right angles from the ordinary high water mark.**

**FINDINGS:** The submitted site plan depicts the location of the OHWM and shows the dock, free-standing decks, and a portion of the bunkhouse are located within the 100-foot setback from the OHWM.

**Dock.** The Hearings Officer has found the specific locational standards for the *dock* relative to the OHWM and OLWM supersede the general 100-foot setback under these criteria. And as discussed in those findings, I have found the applicant has demonstrated the dock complies with the exception criteria for exceeding the maximum encroachment over the river under the specific dock standards.

**Decks.** With respect to the location of the free-standing decks within the 100-foot river setback, the applicant's burden of proof states in relevant part:

*"The landscape platform deck qualifies as 'landscaping' under DCC 18.04.030, and therefore is not subject to setback requirements. DCC 18.04.030 provides:*

*'Landscaping' means trees, grass, bushes, shrubs, flowers, and garden areas, and incidental arrangements of fountains, patios, decks, street furniture and ornamental concrete or stonework and artificial plants, bushes, or flowers. (Emphasis added.)*

*In this case, the landscape deck was added to highlight the landscaped areas of the subject property. Special care was taken to preserve existing vegetation, including large trees, by improving around the trees. As evident by the Landscaping Photos, Exhibit N, the area around the landscaping deck has been further landscaped, including adding shrubs and bark, to improve water and soil retention. See also Landscape Deck, Exhibit I.*

*In the alternative, if Deschutes County decides that the landscaping deck can only qualify as a structure subject to a 100 foot setback and not as landscaping as defined by the code, we ask that Deschutes County grant an exception to the setback requirement.*

*The purpose of the landscape deck is to passively view and enjoy the Deschutes River, as evident by the introduction of a bench for viewing and relaxation. The landscaping deck was specifically laid out to maintain the existing vegetation and trees. Due to the amount of vegetative screening, compliance with the 100 foot setback requirement would extinguish the utility of the landscape deck because the view of the Deschutes River would be obscured. This would greatly restrict the use and value of the property because the water frontage could not be viewed and enjoyed, considering Applicant's care to maintain the natural setting and existing vegetation. Thus, site-specific conditions warrant this exception.*

*The policy implication of denying an exception would be to encourage the removal and thinning of existing vegetation, including established trees, in the FP Zone and at the water's edge. Applicant chose to leave existing vegetation and designed the landscape deck to maximize preservation of natural resources, including the view of the river and the existing native trees. Therefore, a setback exception should be granted and this criterion may be deemed satisfied." (Underscored emphasis in original.)*

The Hearings Officer has found the inclusion of "decks" in the definition of "landscaping" does not mean that decks are not also "structures" that are subject to provisions such as the river setback in this section.

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 *dwelling*s and additions thereto. As discussed above, the Hearings Officer has found the bunkhouse is not a dwelling and the free-standing decks are not a part of the bunkhouse. In addition, the Hearings Officer finds the free-standing decks are not "architectural features" allowed within the required setback under Paragraph (B) of Section 18.120.030. That is because the illustrative list includes features that are part of, or attached to, a *dwelling* – e.g., cornices, eaves, gutters, chimneys, steps, and porches – and not separate, free-standing features such as decks.

Finally, the applicant has not identified, nor has the Hearings Officer found, any provision in FP Zone or elsewhere in Title 18 that would permit the free-standing decks to be located within the

100-foot river setback simply because they are “river-dependent” – i.e., facilitating river viewing. And as the staff report correctly notes, the purpose of the 100-foot river setback is to prevent construction of structures – other than docks and piers – in close proximity to the river and potentially within riparian areas and wetlands.

**Bunkhouse.** The submitted site plan shows approximately the northern half of the bunkhouse is 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. The applicant argues the bathhouse is a nonconforming use and therefore its expansion/alteration need not comply with the 100-foot river setback. However, as discussed elsewhere in this decision, the Hearings Officer has found the bathhouse was not a nonconforming use because it was illegal when it was established, and because it subsequently became a conditional use with adoption of the FP Zone and its application to the subject property.

Based on the above findings, the Hearings Officer finds the bunkhouse encroachment into the 100-foot river setback can be permitted only through a setback exception. As discussed in the findings above, 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 *dwelling*s and additions thereto. The Hearings Officer has found the bunkhouse is not a dwelling, and therefore no river setback exception is available for the bunkhouse.

For the foregoing reasons, the Hearings Officer finds I cannot approve the free-standing decks or bunkhouse in their current locations within the 100-foot river setback because they do not qualify for a river setback exception.

**h. Section 18.96.110, Dimensional Standards**

**In an FP 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.**
- 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:** The Hearings Officer 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 and garage. I find the combined area of all structures on the subject property does not exceed 30 percent of the subject property’s area.

**i. Section 18.96.130, Interpretation of FIRM Boundaries**

**The Planning Director shall make interpretations where needed, as to exact location of the boundaries of the areas of special flood hazards (for example, where there appears to be a conflict between a mapped boundary and actual field conditions). Such interpretations shall be processed as a development action pursuant to Chapter 22.16.**

**FINDINGS:** As discussed in the findings above, incorporated herein, the Hearings Officer 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 and a portion of the driveway are located in the flood plain.

**Based on the foregoing findings and conclusions, the Hearings Officer finds the applicant's proposal does not satisfy all applicable standards in the FP Zone.**

### ***RR-10 ZONE STANDARDS***

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

**FINDINGS:** The Hearings Officer has found the county is authorized to interpret the FP Zone to apply only to those portions of the subject property located at or below the BFE based on a site-specific flood plain survey. The staff report raises the question of whether and to what extent the RR-10 Zone applies to the subject property because the entire property is zoned FP, which is a base or "primary" zone.<sup>18</sup> As discussed in the findings above, in prior decisions the county has found that where, as here, a site-specific survey shows the flood plain is less extensive than the area mapped by FEMA, the provisions of the FP Zone are not applied to uses outside the surveyed flood plain and the provisions of the adjacent zone do apply. However, I have concluded that for purposes of the analysis in this decision, I will consider the entire subject property to be zoned FP. Therefore, I find the provisions of the RR-10 Zone do not apply to the applicant's proposal.

### ***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.**

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<sup>18</sup> Section 18.12.010 identifies several types of zones, including "primary zones" such as the FP and RR-10 Zones, and "combining zones" such as the WA and LM Zones. The difference between these zones is that "primary zones" exclusively occupy mapped and designated property, whereas "combining zones" overlay the "primary zones" and apply concurrently with the "primary zones."



**FINDINGS:** The record indicates the entire subject property is located within one-quarter mile of the Deschutes River. Therefore it is within the LM Zone and subject to the standards thereof.

**b. Section 18.84.030, Uses Permitted Outright**

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

**c. 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:** As discussed in the findings above, the Hearings Officer has found the gravel driveway and riprap and the applicant's previous maintenance thereof are nonconforming uses. I also have found all remaining improvements on the subject property – the dock, free-standing decks, bunkhouse and garage qualify as conditional uses in the FP Zone which applied to the subject property in 1988. Therefore, I find these uses also are conditional uses in the LM Zone.

**d. 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 Hearings Officer finds the threshold question under this standard is whether any structures on the subject property or alterations thereto required a building permit. The staff report states, and I agree, that because the well house is less than 200 square feet in size it likely did not require a building permit. I find the 724-square-foot garage did require a building permit. With respect to the bunkhouse, in his September 21, 2015 comments on the applicant's proposal Deschutes County Building Official Randy Scheid stated the framing required for the bedroom addition to the bunkhouse required a building permit. Therefore, I find the garage and bunkhouse require LM site plan review.

**e. Section 18.84.080, Design Review Standards**

**A. Except as necessary for construction of access roads, building pads, septic drainfields, public utility easements, parking areas, etc., the existing tree and shrub cover screening the development from the designated road, river or stream shall be retained. This provision does not prohibit maintenance of existing lawns, removal of dead, diseased or hazardous vegetation; the commercial harvest of forest products in accordance with the Oregon Forest Practices Act or agricultural use of the land.**

**FINDINGS:** The applicant's burden of proof states he retained all existing tree and shrub cover not required to be removed for construction of the garage, and between the bunkhouse and the river. Based on the Hearings Officer's site visit observations, I find the subject property retains significant screening vegetation between the river and these two structures. The staff report recommends, and I agree, that the applicant should be required as a condition of approval to retain all existing tree and shrub cover screening the garage from the river.

- B. It is recommended that new structures and additions to existing structures be finished in muted earth tones that blend with and reduce contrast with the surrounding vegetation and landscape of the building site.**

**FINDINGS:** The applicant's burden of proof and attached photographs show both the garage and the bunkhouse are finished in muted earth-toned colors that blend with the surrounding vegetation and landscape, therefore satisfying this criterion.

- C. No large areas, including roofs, shall be finished with white, bright or reflective materials. Metal roofing material is permitted if it is non-reflective and of a color which blends with the surrounding vegetation and landscape. This subsection shall not apply to attached additions to structures lawfully in existence on April 8, 1992, unless substantial improvement to the roof of the existing structure occurs.**

**FINDINGS:** The record indicates the roofs of the garage and bunkhouse are a muted brown color. The staff report notes the garage door is finished with white materials. However, the Hearings Officer finds that relative to the overall size of the garage, this door does not represent a "large area" such as a roof or side of the building, and therefore is not subject to the limitation in this paragraph.

- D. Subject to applicable rimrock setback requirements or rimrock setback exception standards in Section 18.84.090, all structures shall be sited to take advantage of existing vegetation, trees and topographic features in order to reduce visual impact as seen from the designated road, river or stream.**

**FINDINGS:** The Hearings Officer finds there is no rimrock on the subject property. As discussed above, the Hearings Officer has found the applicant retained significant screening vegetation between the river and the bunkhouse and garage. For these reasons, I find both structures have been sited to take advantage of existing vegetation in order to reduce visual impact as seen from the river.

- E. Structures shall not exceed 30 feet in height measured from the natural grade on the side(s) facing the road, river or stream. Within the LM zone along a state scenic waterway or federal wild and scenic river, the height of a structure shall include chimneys, antennas, flag poles or other projections from the roof of the structure. This section shall not apply to agricultural structures located at least 50 feet from a rimrock.**

**FINDINGS:** The record indicates the tallest structure on the subject property is the garage which is approximately 16 feet in height. Therefore, this criterion is satisfied.

- F. New residential or commercial driveway access to designated landscape management roads shall be consolidated wherever possible.**

**FINDINGS:** The Hearings Officer finds this criterion is not applicable because the applicant does not proposal any new residential or commercial driveway access to a designated landscape management road.

- G. New residential exterior lighting, including security lighting, shall be sited and shielded so that it is directed downward and is not directly visible from the designated road, river or stream.**

**FINDINGS:** The applicant's burden of proof states the garage and bunkhouse have minimal exterior lighting, and that the exterior light fixtures are directionally shielded. For these reasons, the Hearings Officer finds the applicant's proposal satisfies this criterion. The staff report recommends, and I agree, that the applicant will be required as a condition of approval to assure all exterior lighting continues to satisfy this criterion.

- H. The Planning Director or Hearings Body may require the establishment of introduced landscape material to screen the development, assure compatibility with existing vegetation, reduce glare, direct automobile and pedestrian circulation or enhance the overall appearance of the development while not interfering with the views of oncoming traffic at access points of views of mountains, forests and other open and scenic areas as seen from the designated landscape management road, river or stream. Use of native species shall be encouraged.**

**FINDINGS:** The staff report states, and based on the Hearings Officer's site visit observations I agree, that the garage and bunkhouse have adequate on-site screening from Deschutes River that no introduced landscape material is necessary to screen the development, assure compatibility with existing vegetation, reduce glare, direct automobile and pedestrian circulation or enhance the overall appearance of the development.

- I. No signs or other forms of outdoor advertising that are visible from a designated landscape management river or stream shall be permitted. Property protection signs (no trespassing, no hunting, etc.) are permitted.**

**FINDINGS:** The applicant has not proposed any signage on the property. The Hearings Officer finds that to assure compliance with this criterion the applicant will be required as a condition of approval to install any signage in accordance with this criterion.

- J. A conservation easement as defined in Section 18.04.280 "Conservation Easement" and specified in Section 18.116.220 shall be required as a condition of approval for all landscape**

management site plans involving property adjacent to the Deschutes River, Crooked River, Fall River, Little Deschutes River, Spring River, Squaw Creek and Tumalo Creek. Conservation easements required as a condition of landscape management site plans shall not require public access.

**FINDINGS:** The Hearings Officer finds the applicant will be required as a condition of approval to execute and record a conservation easement as required by this criterion.

**e. Section 18.84.090, Setbacks**

- A. Except as provided in DCC 18.84.090, minimum setbacks shall be those established in the underlying zone with which the LM Zone is combined.**
- B. Road Setbacks. All new structures or additions to existing structures on lots fronting a designated landscape management road shall be set back at least 100 feet from the edge of the designated road right-of-way unless the Planning Director or Hearings Body finds that:**
  - 1. A location closer to the designated road would more effectively screen the building from the road; or protect a distant vista; or**
  - 2. The depth of the lot makes a 100-foot setback not feasible; or**
  - 3. Buildings on both lots abutting the subject lot have front yard setbacks of less than 100 feet and the adjacent buildings are within 100 feet of the lot line of the subject property, and the depth of the front yard is not less than the average depth of the front yards of the abutting lots.**

If the above findings are made, the Planning Director or Hearings Body may approve a less restrictive front yard setback which will be appropriate to carry out the purpose of the zone.

**FINDINGS:** Compliance with setbacks applicable in the underlying zones is discussed in the findings for those zones. The subject property does not front on a designated landscape management road, and therefore the setbacks from the road do not apply.

- C. River and Stream Setbacks. All new structures or additions to existing structures shall be set back 100 feet from the ordinary high water mark of designated streams and rivers or obtain a setback exception in accordance with DCC 18.120.030. For the purpose of DCC 18.84.090, decks are**

considered part of a structure and must conform with the setback requirement.

The placement of onsite sewage disposal systems shall be subject to joint review by the Planning Director or Hearings Body and the Deschutes County Environmental Health Division. The placement of such systems shall minimize the impact on the vegetation along the river and shall allow a dwelling to be constructed on the site as far from the stream or lake as possible. Sand filter systems may be required as replacement systems when this will allow a dwelling to be located further from the stream or to meet the 100-foot setback requirement.

**FINDINGS:** The Hearings Officer has found the existing septic system is not properly before me 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 encroaches in the 100-foot river setback applicable in the FP Zone. I also have found it does not qualify for a river setback exception. Therefore, I find the bunkhouse does not satisfy the setback requirements in the LM Zone.

- D. **Rimrock Setback.** New structures (including decks or additions to existing structures) shall be set back 50 feet from the rimrock in an LM Zone. An exception to this setback may be granted pursuant to the provisions of DCC 18.84.090(E).

**FINDINGS:** The Hearings Officer finds this criterion is not applicable because there is no rimrock on the subject property.

- f. **Section 18.84.095, Scenic Waterways**

Approval of all structures in a State Scenic Waterway shall be conditional upon receipt of approval of the Oregon Department of Parks and Recreation.

**FINDINGS:** The Hearings Officer finds this criterion is not applicable because the subject property is not located in a state scenic waterway.

For the foregoing reasons, the Hearings Officer finds the garage satisfies all applicable standards in the LM Zone but the bunkhouse does not.

## **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 WA Zone on the subject property is for protection of a deer migration corridor.

**b. Section 18.88.030, Uses Permitted Outright**

**In a zone with which the WA Zone is combined, the uses permitted outright shall be those permitted outright by the underlying zone.**

**c. 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:** As discussed in the findings above, the Hearings Officer 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. I have found the remaining improvements on the subject property – the dock, free-standing decks, garage and bunkhouse qualify as conditional uses in the FP Zone. Therefore, I find these improvements also qualify as conditional uses in the WA Zone, subject to the applicable standards therein.

**d. 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 in the underlying FP Zone is 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 criterion is not applicable because the applicant is not proposing a new dwelling.

**e. Section 18.88.070, Fence Standards**

**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 this criterion is not applicable because the applicant does not propose any new fencing. However, I find that to assure compliance with this standard, the applicant will be required as a condition of approval to construct any fences on the subject property in compliance with these standards.

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

***EXCEPTIONS***

**5. Chapter 18.120, Exceptions**

**a. Section 18.120.010, Nonconforming Uses**

Except as otherwise provided in DCC Title 18, the lawful use of a building, structure or land existing on the effective date of DCC Title 18, any amendment thereto or any ordinance codified therein may be continued although such use or structure does not conform with the standards for new development specified in DCC Title 18. A nonconforming use or structure may be altered, restored or replaced subject to DCC 18.120.010. No nonconforming use or structure may be resumed after a one-year period of interruption or abandonment unless the resumed use conforms with the provisions of DCC Title 18 in effect at the time of the proposed resumption.

**A. Expansion or Replacement of a Nonconforming Structure.**

1. **Nonconforming Structure.** For the purposes of DCC 18.120.010, a nonconforming structure is one that was lawfully established and violates current setbacks of

DCC Title 18 but conforms with respect to use.  
(Emphasis added.)

**FINDINGS:** The Hearings Officer finds Paragraph (A) of this section focuses on *structures* that may be nonconforming rather than nonconforming *uses*, the latter addressed in Paragraphs (B), (C), (D) and (E) of this section.

**Bunkhouse.** As discussed in the findings above, the bunkhouse began as a small structure built in 1976 that included bathroom and laundry facilities. In 2009-2010 the applicant expanded this structure to include a bedroom. The expanded structure constitutes the bunkhouse. The bunkhouse is located approximately 80 feet from the OHWM at its closest point and therefore violates the 100-foot minimum river setback in the FP Zone.

The remaining questions under this paragraph are: (1) whether the bunkhouse conforms with uses permitted in the applicable zone; and (2) if so, whether the bunkhouse was lawfully established. Each of these questions is addressed in the findings below.

**1. Conforming Use.** The Hearings Officer has found the bunkhouse does not constitute a dwelling because it is not designed for occupancy by a family and it does not have a kitchen or cooking area. I have found the bunkhouse qualifies as a conditional use in the FP Zone consisting of a "non-residential structure" or an "accessory building," and/or a "recreational use requiring only structures having an insignificant effect on flood waters" due to its location well above the BFE where it would not have any effect on flood waters.

**2. Lawfully Established.** 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. The Hearings Officer finds none of those uses includes the original bathhouse. Section 3.160 of PL-5 authorized two "accessory uses" in the RR-1 Zone -- "not more than one private garage" and "home occupation." I find neither of these uses includes the original bathhouse.

The applicant asserts the bathhouse would not have required land use approval in 1976 because of its small size and its use in support of and RV on the property. However, when the bathhouse was built, the septic system -- approved for "RV" use and not for use with any structure -- had been installed. Therefore, the Hearings Officer finds it likely some sort of land use review would have been required for the bathhouse in 1976 to assure the bathhouse was not constructed in a manner or at a location that would interfere with the septic system. In fact, during my site visit, the applicant advised me and Senior Planner Will Groves that the bathhouse had been constructed partially over the septic tank.

The record does not indicate whether the original bathhouse required a building permit when it was constructed in 1976. The staff report states structural permits have been required in Deschutes County since 1973. However, the Hearings Officer is aware the Uniform Building Code limits the building permit requirement to structures of a minimum size, and that for many years that minimum size was 150 square feet. The evidence in the record is conflicting as to the size of the original bathhouse. Some evidence indicates it was 144 square feet in size (12 feet by 12 feet). However, the applicant's September 29, 2015 submission states it was 225 square



feet in size (15 feet by 15 feet), a size that potentially would a building permit.<sup>19</sup> For the foregoing reasons, I find the bathhouse was illegal when it was constructed in 1976.

In 1988, the county adopted the current FP Zone provisions and applied the FP Zone to the subject property based on the adoption of FEMA flood plan maps.<sup>20</sup> As discussed in the findings above, the FP Zone established conditional uses that include the bathhouse and bunkhouse. Therefore, under the reasoning in *Morris v. Clackamas County*, discussed above, I have found that as long as the bathhouse/bunkhouse receives conditional use approval it no longer would be considered a nonconforming structure or use.

**Garage.** The Hearings Officer finds the garage does not constitute a “nonconforming structure” because it did not exist before the FP Zone was adopted and applied to the subject property in 1988. However, as is the case with the bunkhouse, under the reasoning in *Morris v. Clackamas County*, I find that as long as the bathhouse/bunkhouse receives conditional use approval it no longer would be considered a nonconforming structure or use.

2. **Replacement or Expansion without Additional Encroachment in Setback Area. A nonconforming structure may be replaced with a new structure of the same size on the same footprint as the preexisting nonconforming structure or may be expanded with an addition that does not project into the required setback area at any point, subject to all other applicable provisions of DCC Title 18.** (Emphasis added.)

**FINDINGS:** The Hearings Officer has found that neither the bunkhouse nor the garage is a nonconforming structure as long as it receives conditional use approval. Therefore, I find this paragraph is not applicable. However, as discussed in the findings above, I have found the bathhouse/bunkhouse does not satisfy the applicable conditional use approval criteria because it violates the 100-foot stream setback and does not qualify for an exception thereto.

3. **Replacement or Expansion with Additional Encroachment in Setback Area. Replacement or expansion of a nonconforming structure that would involve an additional projection into the front, side or rear yard setback area at any point along the footprint of the existing or preexisting structure may be allowed provided such additional projection into the setback area (1) does not exceed 900 square feet; (2) does not exceed the floor space of the existing or preexisting structure; (3) does not cause the structure to project further toward the front, side or rear property lines than the closest point of the existing or preexisting**

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<sup>19</sup> The Hearings Officer recognizes the county may not have official building permit records back to 1976, and therefore it simply may not be possible to establish whether a building permit was required for the original bathhouse.

<sup>20</sup> PL-15 adopted an FP Zone (Section 3.210), but the zone contained no substantive provisions and was “preserved” for future fleshing out, and the record indicates no flood plain maps were adopted in 1979.

structure; and (4) meets the variance approval standards set forth in DCC 18.132.025(A)(1) through (4).

Such replacements or expansions must conform with all other applicable provisions of DCC Title 18. (Emphasis added.)

**FINDINGS:** The Hearings Officer has found neither the bunkhouse nor the garage is a nonconforming structure, and therefore I find this paragraph is not applicable. I also find this paragraph is not applicable because it does not expressly refer to encroachment into the *river* setback, but rather only to the front, rear and side setbacks – none of which is co-existent with the river setback. In addition, I find that because the expansion of the bathhouse with the addition of the bedroom is not an additional projection into the front, side or rear yard setback.

#### B. Verification of Nonconforming Use

1. Subject to the procedures set forth in DCC 18.120.010 and in DCC Title 22 for processing declaratory rulings, the planning division will verify whether or not a use constitutes a valid nonconforming use in accordance with the provisions of DCC 18.120.010 and applicable state law. Verification of the existence of a nonconforming use is required prior to or concurrent with any application to alter or restore the use.
2. Subject to DCC 18.120.010(F)(2), the applicant shall demonstrate all of the following:
  - a. The nonconforming use was lawfully established on or before the effective date of the provisions of the zoning ordinance prohibiting the use or had proceeded so far toward lawful completion as of the date it became nonconforming that a right to complete and maintain the use would be vested (Emphasis added):

**FINDINGS:** As discussed above, the Hearings Officer 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." 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. I find all of the structures on the subject property are "designed, arranged or intended" to serve these recreational needs.

The Hearings Officer has found the gravel driveway and riprap are nonconforming uses because they were established before any regulations within the flood plain took effect and applied to the subject property. The applicant has requested nonconforming use verification for the existing on-site septic system, and I have found I cannot consider the septic system

because its lawful use is governed by provisions in other parts of the county code and in DEQ administrative rules.

The applicant also requests nonconforming use verification for the original bathhouse. The applicant's burden of proof states in relevant part:

*"Deschutes County applicable zoning regulations came into effect in November, 1979. The Applicant is seeking verification of nonconforming use for the Bunkhouse and the septic system that serves it, as well as alteration of the Bunkhouse. The Subject Property has a colorful history as a cherished vacation home for almost 40 years.*

*In 1975, the Subject Property was purchased by James Cate and Sherman Tucker. Mr. Cate lived on the Subject Property full time, from 1975 until 2005. Attached as Exhibits C and O are a number of letters from Mr. Cate, and a neighbor, Bonnie Brown.*

*In 1976, Mr. Cate built a bathhouse on the property to serve guests when they visited. The bathhouse contained personal hygiene facilities, a bed, and a small kitchenette. Deschutes County approved the existing septic system in 1976. The septic system was originally approved for RV use, but the County informed Mr. Cate that that it could be connected to the bathhouse, so long as the septic system was approved. See attached septic certificate, Exhibit L. Mr. Cate subsequently used the existing septic to serve the bathhouse. The existence of the bathhouse was confirmed by Ms. Brown to be in existence since at least 1985, when her family moved in across the river.*

*Therefore, because the existing septic system was approved in 1976, it was in existence before Deschutes County zoning regulations (1979), and is a verified nonconforming use.*

*In 1992, Mr. Tucker, the joint-owner of the Subject Property, sought to expand the existing septic system to build a new house on the Subject Property. That permit was denied. See Exhibit P. Thereafter, Mr. Tucker sold his interest in the property to Mr. Cate, who continued to use the existing bathhouse and septic system instead of building a new residence. Presumably, that sale was because Mr. Tucker could not expand the septic to build a new residence on the Subject Property.*

*In 2009, Applicant, Mr. Dreifuss, purchased the Subject Property. Applicant seeks verification for the existing bathhouse (now called Bunkhouse by the Applicant), as well as the existing septic, approved for use in 1976. Because both uses existed as a singular use as a plumbed guest facility prior to Deschutes County adoption of zoning regulations (1979), both uses should be verified as nonconforming use and this criteria has been satisfied.*

*The primary use and footprint of the Bunkhouse has been minimally altered. Applicant has installed exterior decking. However, because the Bunkhouse is entirely above the FEMA Flood Elevation Line, see Exhibit A, we believe no substantial changes or impacts have been made and the criteria has been met.*

*In the alternative, the existence of the nonconforming Bunkhouse and septic system can be verified because they have been in continuous use since the mid-1970s. Applicant has submitted ample evidence to establish such use. See letters from Mr. Cate, Exhibit C, and letter from Ms. Brown, Exhibit O. Under ORS 215.130, Applicant receives a presumption that a verified nonconforming use exists if evidence shows the existence and continuity of the use for the 10-year period preceding application. In this case, Applicant has shown continuous use for 40 years, and so Applicant is entitled to this presumption."*

The Hearings Officer has found that when the original bathhouse was built, the county's original zoning ordinance, PL-5, was in effect and did not establish any uses that would include the bathhouse. For this reason, I have found the bathhouse/bunkhouse is not a nonconforming use because it was likely was not lawfully established when it was constructed. Finally, as discussed above, I have found that the bathhouse/bunkhouse falls within conditional uses allowed in the FP Zone, and therefore is not a nonconforming use as long as it satisfies the applicable conditional use approval criteria in the FP Zone and in Chapter 18.128. I have found the bunkhouse does not satisfy those criteria because it violates the 100-foot river setback and doesn't qualify for an exception.

For the foregoing reasons, the Hearings Officer finds the bathhouse was not "lawfully established" as required by this paragraph for verification of a nonconforming use.

- b. The nonconforming use as it existed on the date it became nonconforming, considering the nature and the extent of the actual use of the property, has continued without abandonment or interruption; and**

**FINDINGS:** Because the Hearings Officer has found the original bathhouse was not lawfully established when it was constructed in 1976, I find the rest of the criteria in this paragraph for verification of a nonconforming use are not applicable. However, assuming for purposes of discussion that his paragraph is applicable, I find the record indicates use of the bathhouse/bunkhouse has existed without abandonment or interruption since 1976.

- c. Any alteration in the nature and extent of the nonconforming use was done in compliance with applicable zoning ordinance standards governing alterations of non-conforming uses.**

**FINDINGS:** Assuming for purposes of discussion that this paragraph is applicable, the Hearings Officer finds that while the applicant significantly altered the size of the original bathhouse, its *recreational use* has not been altered in nature or extent. The structure has been used continuously to support the recreational use of the subject property by providing bathroom, laundry and (in the bunkhouse) sleeping facilities for RV users.

- 3. For purposes of determining whether an abandonment or interruption of use has occurred, the following shall apply:**
  - a. The reference period for determining whether an abandonment or interruption of a**

nonconforming use or an aspect thereof has occurred shall be one year.

- b. An abandonment or interruption in a use or portion thereof may arise from the complete cessation of actual use of a property for a one-year period or may arise from a change in the nature or extent of the use made of the property for a one-year period or more.
- c. An interruption or abandonment that constitutes less than full cessation of the use or a portion thereof may, in accordance with DCC 18.120.010(F)(4), result in a declaration of a continuing use, but of a lesser intensity or scope than what would have been allowable if the nature and extent of the use as of the date it became nonconforming had continued.
- d. Absent an approved alteration, a change in the nature of the use may result in a determination that the use has been abandoned or has ceased if there are no common elements between the activities of the previous use and the current use.

**FINDINGS:** The Hearings Officer has found the *recreational use* of the bathhouse/bunkhouse has not been abandoned or interrupted.

- e. Change of ownership or occupancy shall not constitute an interruption or abandonment, provided that, absent an approved alteration, the continuing use made of the property falls within the allowed scope of use made of the property by previous owners or occupants.

**FINDINGS:** The Hearings Officer finds the change of ownership of the subject property does not constitute an abandonment or interruption of the recreational use of the bathhouse/bunkhouse to support the RV use of the subject property.

- f. Factors to be considered in determining whether there has been a change in the nature and/or extent of a use shall include, but are not limited to, consideration of the type of activities being conducted, the operating characteristics of the activities associated with the use (including off-site impacts of those activities), the frequency of use, the hours of operation, changes in structures associated with the use and changes in the degree to which the activities associated with the use occupy the site.

**FINDINGS:** The Hearings Officer has found there has been no change in the nature and/or extent of the recreational use of the bathhouse/bunkhouse since it was constructed in 1976. It has been used continuously to support the recreational/RV use of the property.

- C. Maintenance of a nonconforming use. Normal maintenance of a verified nonconforming use or structure shall be permitted. Maintenance does not include alterations which are subject to DCC 18.120.010(E).**

**FINDINGS:** As discussed in the findings above, incorporated by reference herein, the Hearings Officer has found the applicant's previous placement of additional gravel on the driveway and additional rocks on the riprap constituted normal maintenance of the driveway and riprap which I have found are nonconforming uses. I also find future maintenance of the driveway as proposed by the applicant – i.e., placement of an additional eight yards of gravel every five years – constitutes normal maintenance of the driveway and can be approved under this paragraph. Finally, I find applicant's significant expansion of the original bathhouse into the bunkhouse does not constitute "normal maintenance" of the bathhouse. The ordinary definition of the term "maintain" is "to keep in continuance or in a certain state." *Webster's New World Dictionary and Thesaurus, Second Edition*. The applicant's expansion of the bathhouse did not keep the bathhouse in its original state.

- D. Restoration or replacement of a nonconforming use. A verified nonconforming use may be restored or replaced if all of the following criteria are met:**

- 1. Restoration is made necessary by fire, natural disaster or other casualty;**
- 2. The nonconforming use is restored or replaced on the same location and is the same size or smaller than it was prior to the damage or destruction; and**
- 3. The restoration or replacement of the nonconforming use is commenced within one year of the damage or destruction.**

**FINDINGS:** The Hearings Officer finds this paragraph is not applicable because the applicant does not propose restoration or replacement of a nonconforming use.

- E. Alteration of a nonconforming use.**

- 1. The alteration of a nonconforming use shall be permitted when necessary to comply with any lawful requirement.**

**FINDINGS:** The applicant seeks verification of that bathhouse as a nonconforming use, and authorization of its alteration into the bunkhouse. Although this application was prompted by code violation complaints, it is clear the applicant's *alteration of the bathhouse* was not for the purpose of complying with a lawful requirement. Rather, it was to include a bedroom in the

structure. The Hearings Officer finds that is not the type of alteration authorized by this subparagraph.

2. **Any other alteration to a nonconforming use may be permitted subject to all applicable provisions of DCC Title 18, including site plan review and upon a finding that the alteration will have no greater adverse impact on the neighborhood.**
3. **For the purposes of DCC 18.120.010(E)(2), an "alteration of a nonconforming use" shall include any change in the use of the property that would constitute a change in the nature or extent of the use of the property.**

**FINDINGS:** At the outset, the staff report addresses the applicant's previous placement of additional rock on the riprap as an "alteration" subject to this subparagraph. Based on the evidence in this record, the Hearings Officer finds that activity constituted "normal maintenance" of the nonconforming use consisting of riprap. As discussed in the findings above, I have found the riprap on the subject property has been in place since at least 1985 – i.e., before the county's flood plain regulations took effect in 1988 and before the fill-and-removal regulations took effect in 1989. The applicant does not propose through this ongoing maintenance to extend the riprap farther into the river or over a wider area of the subject property than already is covered.

The applicant requests approval for his previous alteration of the bathhouse to become the bunkhouse. As discussed in the findings above, the Hearings Officer has found the bathhouse is not a nonconforming use because it was not lawfully established when it was constructed in 1976. Therefore, I find these subparagraphs are not applicable because the applicant is not authorized to alter a nonconforming use that was not lawfully established. However, assuming for purposes of discussion that such alteration could be authorized, I include the following findings.

The applicant clearly altered the structure of the bathhouse by adding a bedroom and nearly tripling its size. However, the Hearings Officer finds the applicant did not alter its recreational use. I have found the bunkhouse does not constitute a dwelling. Therefore, the addition of a bedroom to the original bathhouse did not alter its use from recreational to residential. Staff and opponents question whether the alteration of the bathhouse to become the bunkhouse nevertheless should be considered an alteration of the recreational use because it could increase the "extent" of the use by increasing flow to the existing septic system which is located in an area of documented shallow groundwater. I understand these concerns. However, as discussed above, I have found the status and use of the septic system on the subject property – and in particular whether or not it has been or can be approved for use in connection with the bunkhouse -- must be evaluated and authorized by the Environmental Soils Division pursuant to the applicable DEQ regulations. In other words, the Environmental Soils Division must determine whether the addition of a bedroom to the bathhouse would result in an increase in flow to the septic system. And because use of the subject property for sleeping in conjunction with RV use of the property preceded the addition of the bedroom to the bathhouse, I find the addition of the bedroom did not change the nature or extent of the recreational use of the property.

**F. Procedure.**

1. Any application for verification of a nonconforming use or to expand, alter, restore or replace a nonconforming use shall be processed in conformance with the applicable procedures set forth in DC 18.120.010 and the applicable procedures of DCC Title 22, the Deschutes County Uniform Development Procedures Ordinance.

**FINDINGS:** The Hearings Officer finds the process for evaluating the applicant's nonconforming use application conforms with the applicable procedures in Section 18.120.010 and the applicable provisions of the county's land use procedures ordinance in Title 22 of the Deschutes County Code.

2. Notwithstanding DCC 22.20.010, the initial decision on an application for an alteration of a nonconforming use shall be made administratively, without a public hearing. The Planning Director may give prior notice of the pending application pursuant to DCC 22.20.020.

**FINDINGS:** The record indicates the applicant's nonconforming use application was not processed administratively, but rather was referred to the Hearings Officer for decision. No one objected to the process used by the county. In any case, I find the process that has been followed has not prejudiced the substantial rights of any party. Rather, the process has provided additional public participation.

3. Except as allowed by DCC 18.120.010(F)(3)(a), the burden of proof shall be on a verification applicant to prove the existence, continuity, nature and extent of the use.

**FINDINGS:** The Hearings Officer finds the applicant's burden of proof and supplemental materials satisfy this criterion.

- a. Notwithstanding DCC 22.24.050, if an applicant demonstrates by a preponderance of the evidence 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, it shall be presumed that the nonconforming use, as proven, lawfully existed at the time the use became nonconforming and has continued without interruption or abandonment until the date of application.
- b. The presumption may be rebutted by a preponderance of evidence showing that the use was unlawful prior to the time it became



**nonconforming**, or that the use prior to the ten-year period was of a different nature or different in extent than the use, as proven, or that the use prior to the ten-year period was interrupted or abandoned. If the presumption is so rebutted, the presumption shall disappear and be of no further aid to the applicant. (Emphasis added.)

**FINDINGS:** The Hearings Officer has found the bathhouse was not lawfully established when it was built in 1976 because it was not permitted under PL-5. Therefore, I find the presumption established in this subparagraph is not applicable. However, I have found that under the reasoning in *Morris v. Clackamas County*, discussed above, the bathhouse became a conditional use with the 1988 adoption of the FP Zone and its application to the subject property based on FEMA flood plain mapping. I also have found the nature and extent of the recreational use on the subject property has not changed since the bathhouse was constructed.

4. **If the proof demonstrates the continued existence of a valid non-conforming use, but of a different nature or extent than that claimed by the applicant, the Hearings Body may declare there to be a valid nonconforming use to the extent proven.**

**FINDINGS:** The Hearings Officer finds this subparagraph is not applicable because I have found the bathhouse is not a valid nonconforming use.

5. **An approval of a verification, replacement or restoration of a nonconforming use verification shall not be conditioned; an approval shall be sufficiently detailed to describe the allowed parameters of the verified use. However, an approval of an alteration of a nonconforming use may be conditioned in a manner calculated to ensure mitigation of adverse impacts so that the change has no greater adverse impact to the neighborhood.**

**FINDINGS:** The Hearings Officer finds this criterion is not applicable because the applicant is not requesting approval of replacement or restoration of a nonconforming use, and I have found I cannot approve verification of the bathhouse as a nonconforming use on the subject property.

6. **After a decision has been rendered on an application for a verification of a nonconforming use (including any appeals provided for under DCC Title 22 and under state law), the applicant shall not be entitled to reapply under DCC 22.28.040 for another verification determination involving the same use of the property.**

**FINDINGS:** The Hearings Officer finds this provision applies and is reflected in a condition of approval in this decision.

**b. Section 18.120.030, Exceptions to Yard Requirements**

The following exceptions to yard requirements are authorized for a lot in any zone:

\* \* \*

- D. An addition to an existing residential dwelling which is within 100 feet from the ordinary high water mark along a stream or lake may be constructed provided that the addition is for residential dwelling purposes, no part of the addition is closer to the stream or lake than the existing residential structure, the addition is 900 square feet in area or smaller and does not exceed the area of floor space of the existing structure and the addition conforms with all other setbacks and building limitations. (Emphasis added.)<sup>21</sup>

**FINDINGS:** The staff report states, and the Hearings Officer agrees, that this exception “provides the only pathway to expand structures in the 100-foot river setback and is only afforded to residential dwellings.” Because I have found neither the original bathhouse nor the bunkhouse is a dwelling, I find this exception is not available.

For the foregoing reasons, the Hearings Officer finds the bathhouse/bunkhouse is not a nonconforming use that can be verified or altered under Section 18.120.010 because it was not lawfully established at the time it was constructed.

#### **SUPPLEMENTARY PROVISIONS**

##### **5. Chapter 18.116, Supplementary Provisions**

###### **a. Section 18.116.040, Accessory Uses**

An accessory use shall comply with all requirements for a principal use, except as DCC Title 18 specifically allows to the contrary, and shall comply with the following limitations:

- A. The primary use of the property must be established or applied for prior to issuance of any building or land use permits for accessory structures.

**FINDINGS:** Section 18.04.030 defines “accessory use or accessory structure” as a “use or structure incidental and subordinate to the main use of the property, and located on the same lot as the main use.” The question presented under this section is whether the bunkhouse and/or garage could be permitted on the subject property as “accessory uses.”

At the outset, the Hearings Officer finds it is not clear from the language of this section whether it operates as an *independent authorization* for approval of an “accessory use” in any zone, or

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<sup>21</sup> The Hearings Officer notes that although the title of this section states it relates to “yard” exceptions, the exceptions in Paragraphs (D) and (E) related to the river setback which is not a “yard,” defined in Section 18.04.030 as “an open space on a lot which is unobstructed from the ground upward.” See, *Murray*, (A-13-2, LM-13-13), a copy of which is included in this record.

whether it addresses only the siting of an "accessory use" *expressly authorized in the applicable zone*. I find the text does not make the drafter's intent clear. However, I find the context – i.e., the rest of Chapter 18.116 – provides more support for the latter interpretation. That is because most of the sections in this chapter either address the siting of specific uses that are expressly authorized, or impose specific requirements for such uses, within the zoning districts – e.g., manufactured homes, hydroelectric facilities, residential homes, rock crushing, and home occupations. However, I find I need not reach that question because, as discussed in the findings above, "accessory building" is a use permitted conditionally in the FP Zone under Section 18.96.040(I), and I have found both the bunkhouse and the garage could be considered an "accessory building." I find that in light of the broad definition of "use" in Section 18.04.030, an "accessory use" can include an "accessory building," and therefore it is appropriate to analyze the bunkhouse and garage under these provisions.

The Hearings Officer finds I must first determine the nature of the "primary" or "main" use of the subject property unless one of the exceptions set forth below applies.

**1. Exception:**

- a. **Building permit for a ramada or carport may be issued without establishment or application of primary use if all other criteria for issuance are met.**

**FINDINGS:** The Hearings Officer finds this exception is not applicable because the applicant does not propose a carport<sup>22</sup> or ramada.<sup>23</sup>

- b. **Land use, building or environmental health permits or extensions of such permits sought to correct existing code violations for the subject property shall be issued if all other criteria for issuance are met.**

**FINDINGS:** The applicant submitted the subject applications in order to correct code violations. However, as discussed throughout this decision, the Hearings Officer has found that neither the bunkhouse nor the garage meets all applicable criteria. Therefore, I find this exception also is not applicable.

- c. **A building permit for an accessory structure or structures not exceeding a combined total of 2,000 square feet in size, with no windows, with**

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<sup>22</sup> Section 18.04.030 defines "carport" as

**\* \* \* a structure used to shelter a vehicle, having no enclosed uses above and entirely open on two or more sides.**

<sup>23</sup> Section 18.04.030 defines "ramada" as:

**\* \* \* a stationary structure having a roof extending over a manufactured structure which may also extend over a patio or parking space of motor vehicles and is used principally for protection from snow, sun or rain. A ramada is open on two or more sides and has no enclosed uses.**

**only one floor, an operable garage door, no plumbing or stack vents through the roof or walls and not requiring plumbing or mechanical permits.**

**FINDINGS:** The Hearings Officer finds this paragraph allows an exception for certain accessory structures from the requirement that the primary use of the property must be established or applied for prior to issuance of any building or land use permits. I find it *does not* create an exception from the requirement that the accessory structure “comply with all requirements for the principal use.” In other words, an accessory structure meeting the physical characteristics of this paragraph may be authorized if complies with the requirements for the principal use. As discussed throughout this decision, I have found the principal use of the subject property is recreational and not residential.

**Garage.** The Hearings Officer finds the garage does meet the physical characteristics of accessory structures under this paragraph because it is less than 2,000 square feet in size, it has no windows, only one floor, an operable garage door, no plumbing or stack vents, and doesn't require any plumbing or mechanical permits. Therefore, I find the garage is eligible for the exception under this subparagraph.

The remaining question is whether the garage complies with the requirements for the principal use – i.e., the recreational use of the property as allowed in the FP Zone. I have found the garage falls within the use described as “recreational uses requiring only structures having an insignificant effect on flood waters.” I also have found the garage is “accessory” to that use because its purpose is to store the applicant's boat, trailer, and equipment necessary to maintain the subject property. Accordingly, I find the garage is incidental and subordinate to the main recreational use of the subject property – i.e., recreational use of the property through occupying the property with an RV. In addition, as discussed in the findings above, I have found the garage satisfies the LM site plan approval criteria.

For the foregoing reasons, the Hearings Officer finds the garage qualifies as an “accessory use” meeting the applicable criteria in this section.<sup>24</sup>

**Bunkhouse.** The Hearings Officer finds the bunkhouse does not qualify for the exception under this subparagraph because the bunkhouse has windows and plumbing, required plumbing and mechanical permits, and does not have an operable garage door. Therefore, the remaining question is whether the bunkhouse nevertheless can be approved as an “accessory use” because it complies “with all requirements for a principal use,” and the “primary use” of the subject property has been established. For purposes of discussion, the Hearings Officer finds the terms “primary use” and “principal use” are equivalent.

As discussed in the findings above, the Hearings Officer has found the primary use of the subject property has been and continues to be recreational – i.e., the applicant's use of the property for placement of an RV and for recreational uses related to the river including boating and viewing the river. I have found all improvements on the subject property, including the bunkhouse, support that use.

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<sup>24</sup> The Hearings Officer finds the remaining criteria in Section 18.116.040 do not apply to the applicant's request.

With respect to the other prong of this standard – i.e., compliance with all requirements for a principal use – the Hearings Officer finds the requirements for the principal use are those approval criteria applicable to the conditional use in the FP Zone. As discussed in the findings above, incorporated herein, I have found the bunkhouse satisfies all conditional use approval criteria, but does not satisfy the 100-foot stream setback applicable to all uses in the FP Zone, and does not qualify for an exception to that setback. Therefore, I find the bunkhouse cannot be approved as an “accessory use” under this section because it does not comply with all requirements for the principal recreational use of the property.

**7. Chapter 18.128, Conditional Uses**

**a. Section 18.128.010, Operation**

**A. A conditional use listed in DCC Title 18 shall be permitted, altered or denied in accordance with the standards and procedures of this title; DCC Title 22, the Uniform Development Procedures Ordinance; and the Comprehensive Plan.**

**B. In the case of a use existing prior to the effective date of DCC Title 18 and classified in DCC Title 18 as a conditional use, any change in use or lot area or an alteration of structure shall conform with the requirements for a conditional use.**

**FINDINGS:** The Hearings Officer has found both the bunkhouse and the garage fall within two of the listed conditional uses in the FP Zone. I have found the bunkhouse does not satisfy the applicable conditional use criteria in the FP Zone, and therefore I need not consider whether it satisfies the conditional use approval criteria in Chapter 18.128. However, because I anticipate this decision will be appealed, and the board may elect to hear the appeal, I include findings concerning whether both the bunkhouse and the garage comply with the criterion in this chapter.

**b. 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:**

**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:** 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 bunkhouse are an approximately 500-square-foot wood-framed structure that includes bathroom and laundry facilities, a bedroom, a gas fireplace, and attached decking. The bunkhouse is located 80 feet from the river at its closest point.

The bunkhouse is used as bathroom and sleeping facilities in addition to such facilities in RVs parked on the subject property. 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 garage is set back near the access driveway and more than 100 feet from the river.

Photos in the record show both the bunkhouse and garage are screened from the river by a moderate cover of the trees and shrubs. Both structures are 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 Hearings Officer 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, I find the subject property is suitable for the garage considering the location of the on-site septic system.

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

## **2. Adequacy of transportation access to the site; and**

**FINDINGS:** 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 Hearings Officer finds from this evidence that the subject property is suitable for the bunkhouse and garage considering transportation access to the site.

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

**FINDINGS:** The subject property has generally level topography and a moderate cover of native vegetation. The Hearings Officer finds natural hazards on and in the vicinity of the property include potential flood hazards and wildfire hazards. However, the garage is located well above the BFE and at least 100 feet from the Deschutes River, and therefore I find the risk of flooding at the garage 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, I find 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, I find the fire risk for the garage is minimal inasmuch as it is a prefabricated metal building that will be fire resistant.

The Hearings Officer finds the natural resource values on the subject property consist of the river, riparian habitat and wetlands, the deer migration corridor, and other wildlife habitat. I find that because the garage is located above the BFE and more than 100 feet from the river, and is 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.

As discussed above, a portion of the bunkhouse is within 100-feet of the river. However, the bunkhouse is located well outside the flood plain and riparian areas.

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

- 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 record indicates surrounding properties include rural residences, accessory structures, and docks/piers along the riverbank. Based on the Hearings Officer's site visit observations, I find 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. I find the bunkhouse, while not a dwelling, is similar in size and appearance to dwellings in the surrounding area. I also find the garage is similar in size, scale and appearance to similar structures. Both the bunkhouse and garage 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, I find the bunkhouse and garage will be compatible with existing and projected uses on surrounding properties.

**c. Section 18.128.020, Conditions**

In addition to the standards and conditions set forth in a specific zone or in DCC 18.124, the Planning Director or the Hearings Body may impose the following conditions upon a finding that additional restrictions are warranted.

- A. Require a limitation on manner in which the use is conducted, including restriction of hours of operation and restraints to minimize environmental effects such as noise, vibrations, air pollution, glare or odor.**
- B. Require a special yard or other open space or a change in lot area or lot dimension.**
- C. Require a limitation on the height, size or location of a structure.**
- D. Specify the size, number, location and nature of vehicle access points.**

- E. Increase the required street dedication, roadway width or require additional improvements within the street right of way.
- F. Designate the size, location, screening, drainage, surfacing or other improvement of a parking or loading area.
- G. Limit or specify the number, size, location, height and lighting of signs.
- H. Limit the location and intensity of outdoor lighting and require shielding.
- I. Specify requirements for diking, screening, landscaping or other methods to protect adjacent or nearby property and specify standards for installation and maintenance.
- J. Specify the size, height and location of any materials to be used for fencing.
- K. Require protection and preservation of existing trees, vegetation, water resources, wildlife habitat or other significant natural resources.
- L. Require that a site plan be prepared in conformance with DCC 18.124.

**FINDINGS:** The Hearings Officer has found the applicant will be required to meet several conditions of approval.

**d. Section 18.128.270, Fill and Removal**

**Except as otherwise provided in DCC Title 18, no person shall fill or remove any material or remove any vegetation, regardless of the amount, within the bed and banks of any stream or river or in any wetland, unless such fill or removal is approved as a conditional use subject to the following standards:**

**FINDINGS:** The Hearings Officer finds these fill-and-removal standards are not applicable to either the bunkhouse or the garage because they are not located in the flood plain and are at least 80 feet from the bed and banks of the river.

With respect to the structures located within the flood plain and mapped wetlands, the Hearings Officer has found the free-standing decks are not permitted uses and cannot be approved. I have found the dock could be approved as a community dock with imposition of a condition of approval requiring the applicant to execute and record documents including an easement allowing the owners of the adjacent Ferris property to use the dock, and an agreement by the owner of the Ferris property to abandon and remove the dock on that property. I have found the dock does not qualify for an exception to the maximum encroachment over the river.



The staff report notes that the dock location falls within wetlands mapped on the LWI.<sup>25</sup> And the dock projects over the bed and banks of the Deschutes River.<sup>26</sup> Therefore, the Hearings Officer finds the fill-and-removal provisions in this section are applicable to the dock if any material was placed or removed from the bed and banks of the river or any wetland for or during construction of the dock. Photographs in the record of the dock during construction (e.g., Exhibit F to the burden of proof) show the dock is anchored to the riverbank by posts buried in the ground and pilings buried in the riverbank. However, I find it is unclear from these photos whether any material was filled or removed in this area to facilitate dock construction. I find it also is unclear from these and other photos in the record whether the dock was built in a wetland. The dock is located in an area of the riverbank occupied by the terminus of a gravel driveway and riprap, both of which have been in place since at least the mid-1980's. Based on my site visit observations and photographs in the record, it appears the area immediately adjacent to and below the dock no longer constitutes wetland because it no longer supports wetland vegetation. Nevertheless, it is located in a mapped wetland.

The applicant's burden of proof does not address the fill-and-removal conditional use criteria in a meaningful way. Rather, as discussed above, the applicant simply argues the county's fill-and-removal provisions go too far and should not be interpreted to apply to activities that do not cause property damage, divert water flow, or increase flood elevation or hazard. The Hearings Officer finds this argument does not satisfy the applicant's burden of demonstrating compliance with this conditional use approval criterion with respect fill and removal for the dock.

**A. An application shall be filed containing a plan with the following information:**

\* \* \*

**FINDINGS:** The applicant did not file an application for conditional use approval for fill and removal associated with construction of the dock. The applicant only requested approval of the fill-and-removal activity associated with the driveway and riprap as maintenance of a nonconforming use. Therefore, the Hearings Officer finds the applicant's proposal does not satisfy this requirement with respect to the dock.

**D. Except for uses identified in DCC 18.128.270(B) and (C), an application for a conditional use permit for activity involving fill or removal of material or vegetation within the bed and banks of a stream, river or wetland:**

**1. Shall be granted only after consideration of the following factors:**

---

<sup>25</sup> Section 18.04.030 defines "wetland" as:

**\* \* \* an area that is inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include swamps, marshes, bogs and other similar areas.**

<sup>26</sup> Section 18.04.030 defines "bed or banks of stream or river" as:

**\* \* \* the physical container of the waters of a stream or river lying below bank full stage and the land 10 feet on either side of the container.**

- a. **The effects on public or private water supplies and water quality.**

**FINDINGS:** Assuming for purposes of discussion that conditional use approval for fill and removal associated with the dock is properly before the Hearings Officer, I find any such fill-and-removal activity will have no adverse impact on private water supplies or water quality.

- b. **The effects on aquatic life and habitat, and wildlife and habitat. The Oregon Department of Fish and Wildlife will be requested to review and comment on the application.**

**FINDINGS:** The record includes comments from the Corps, USFS and ODFW expressing concern about possible impacts to fish and wildlife habitat from the applicant's construction and improvements in the bed and banks of the river and in associated wetlands. As discussed in the findings above, incorporated by reference herein, the Hearings Officer has found that based on the opinion of the applicant's expert Jay Bowerman, the subject property contains no critical Oregon Spotted Frog habitat, and the applicant's activity in wetlands on the subject property would not impact any critical habitat. Therefore, the Hearings Officer finds any fill and removal for dock construction satisfies this criterion.

- c. **Recreational, aesthetic and economic values of the affected water resources.**

**FINDINGS:** The Hearings Officer finds the dock and any fill-and-removal associated with its construction will have no adverse impacts on the recreational, aesthetic and economic values of the Deschutes River. The record indicates there are numerous docks along the river in the vicinity of the subject property that are used for recreation. Based on my site visit observations, I find the applicant's dock is aesthetically pleasing because of its very low profile and the construction materials used.

- d. **Effects on the hydrologic characteristics of the water body such as direction and velocity of flow, elevation of water surface, sediment transportation capacity, stabilization of the bank and flood hazards.**

**FINDINGS:** The Hearings Officer finds 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. That is because the dock has a very low profile. In addition, the applicant submitted a "no-rise certification" provided by a registered professional engineer stating the dock would remain in place during a flood event. The staff report notes that in its comments on the applicant's proposal the USFS stated the applicant must obtain a free flow analysis from the USFS under the Wild and Scenic Rivers Act. The Hearings Officer has found that if the board approves the dock on appeal, the applicant should be required to do so as a condition of approval.

- e. **The character of the area, considering existing streambank stabilization problems and fill or removal projects which have previously occurred.**

**FINDINGS:** The dock replaces previous docks historically built on the subject property. Aerial photos in the record show numerous docks along the stretch of the river near the subject property. The applicant's dock has a very low profile and is constructed of water- and flood-resistant materials. As such, the Hearings Officer finds the dock will not have an adverse impact on, and will be consistent with, the character of the area, considering the existing streambank stabilization problems and fill or removal projects which have previously occurred.

**2. Shall not be granted unless all of the following conditions are met:**

**a. That all necessary state and federal permits will be obtained as a condition of approval of the conditional use.**

**FINDINGS:** The Hearings Officer has found that if the dock is approved on appeal, the applicant should be required as a condition of approval to obtain all necessary state and federal permits for fill and removal associated with the dock.

**b. That there is no practical alternative to the proposed project which will have less impact on the surrounding area, considering the factors established in DCC 18.128.270(D)(1).**

**FINDINGS:** The staff report suggests the dock guidelines provided by ODFW represent practical alternatives to the applicant's dock. Those guidelines are attached to a July 28, 2015 electronic mail message from Nancy Doran of ODFW and include a number of recommendations concerning dock widths, construction materials, maximum river encroachment, float materials, and pilings. However, the Hearings Officer finds this exception requires the applicant to demonstrate there is no practical alternative to his fill-and-removal *project* – i.e., the dock itself – rather than the physical characteristics of the dock. Therefore, I find the ODFW dock guidelines are not relevant to this criterion. And I find that because the purpose of the dock is to provide mooring for boats and a landing place for marine transport, there is no practical alternative to the dock.

**c. That there will be no significant impacts on the surrounding area, considering the factors established in DCC 18.128.270(D)(1).**

**FINDINGS:** As discussed in the findings above, the Hearings Officer has found the dock will not have an adverse impact on fish and wildlife habitat, water flow and quality, or the character of the surrounding area considering the factors established in Section 18.128.270(D)(1).

**d. That erosion will be adequately controlled during and after the project.**

**FINDINGS:** The dock has been constructed, and therefore erosion during the project no longer is a relevant consideration. With respect to erosion *after* dock construction, the Hearings Officer finds the combination of adequately anchoring the dock and maintenance of the existing riprap adjacent to the dock will adequately control future erosion, therefore satisfying this criterion.

- e. **That the essential character, quality, and density of existing vegetation will be maintained. Additional vegetation shall be required if necessary to protect aquatic life habitats, functions of the ecosystem, wildlife values, aesthetic resources and to prevent erosion.**

**FINDINGS:** The dock already has been constructed. Evidence in the record is sparse concerning the character, quality and density of the vegetation that existed prior to construction. The aerial photos in the record do not provide sufficient detail to assess the vegetation, although, as discussed above, the dock was constructed at the terminus of the gravel driveway and adjacent to existing riprap. Photos of the dock under construction appear to have been taken during the winter and as such do not depict the nature of vegetation during the growing season when it likely is more abundant. For these reasons, the Hearings Officer agrees with staff's conclusion that the record is inadequate from which to find this criterion is satisfied.

- f. **That the proposed fill or removal activity will be consistent with all relevant goals and policies of the Deschutes County Comprehensive Plan.**

**FINDINGS:** The Hearings Officer finds that whether a proposal is "consistent with" comprehensive plan goals and policies must be determined by whether those goals and policies address the specific actions for which approval is sought. The only comprehensive plan goal or policy identified in the staff report as potentially relevant to the applicant's proposal is the riparian corridor inventory set forth in Table 5.3.2 of the plan which includes the subject property. Chapter 2 of the plan, Resource Management, sets forth water resource policies in Section 2.5 and wildlife policies in Section 2.6. I have examined the goals and policies in Sections 2.5 and 2.6 and find that all of them establish actions the *county* should or must take to protect water and wildlife resources. Therefore, I find these goals and policies are not applicable, and the applicant's proposal need not be "consistent" with them.

- g. **That a conservation easement, as defined in DCC 18.04.030, "Conservation Easement," shall be conveyed to the County, which provides, at a minimum, that all elements of the project will be carried out and maintained as approved, in perpetuity, for the regulated fill or removal area and all real property on the same lot, within 10 feet of any wetland, river or stream.**

**FINDINGS:** As discussed in the findings above, the Hearings Officer has found the applicant will be required as a condition of approval to execute and record a conservation easement.

#### **IV. DECISION:**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby:

- A. **DENIES** the applicant's request for approval of the dock, free-standing decks, and bunkhouse.

**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, **SUBJECT TO THE FOLLOWING CONDITION OF APPROVAL:**

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 and wellhouse, **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 and wellhouse from the river.
4. The applicant/owner shall assure all exterior lighting on the garage and wellhouse is shielded so that it is directed downward and is not directly visible from the Deschutes River
5. The applicant/owner shall assure that 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.

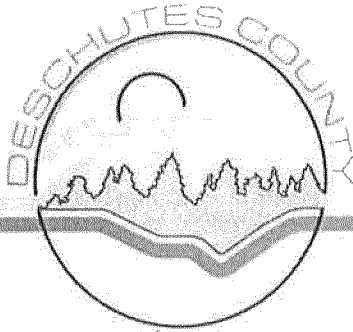
Dated this 9th day of December, 2015

Mailed this 9<sup>th</sup> day of December, 2015



Karen H. Green, Hearings Officer

**THIS DECISION BECOMES FINAL TWELVE DAYS AFTER MAILING UNLESS TIMELY APPEALED.**



## Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005  
(541)388-6575 FAX (541)385-1764  
<http://www.co.deschutes.or.us/cdd/>

### CERTIFICATE OF MAILING

**FILE NUMBERS:** 247-15-000113-CU / 114-CU / 115-NUV / 116-LM

**DOCUMENT MAILED:** Hearings Officer's Decision

**MAP/TAX LOT NUMBERS:** 20-11-18C00-4300

I certify that on the 9<sup>th</sup> day of December, 2015, the attached notice(s)/report(s), dated December 9, 2015, was/were mailed by first class mail, postage prepaid, to the person(s) and address(es) set forth below/on the attached list.

Dated this 9<sup>th</sup> day of December, 2015.

### COMMUNITY DEVELOPMENT DEPARTMENT

By: Moonlight BPO

Peter Dreifuss c/o Hurley Re, P.C. 747 SW Mill View Way Bend OR, 97702	Peter Dreifuss & Sandra Bovenzi 17266 Satterlee Way Bend, OR 97707
Elizabeth Dickson & Ken Katzaroff Hurley Re, P.C. 747 SW Mill View Way Bend, OR 97702	Jack & Norene Delance 1390 SW Maplecrest Dr. Portland, OR 97291
John and Beverly Heimes 17288 Satterlee Way Bend, OR 97707	Gene & Laura Mildren 13 Bernini St Lake Oswego, OR 97035
Joseph M Craig P.O. Box 8176 Bend, OR 97708	Mary Ann And Robert Stephens 56179 Solar Dr. Bend, OR 97707
Mark A & Barbara J Peressini 56332 Solar Dr. Bend, OR 97707	Hickman, Terry H & Nancy C 56324 Solar Dr. Bend, OR 97707

Howard Faul 56308 Solar Dr Bend, OR 97707	Marie S Turney 56290 Solar Dr Bend, OR 97707
Gordon And Linda Ferris 15460 S Paradise Mulino, OR 97042	Jim And Barbie Roberts 17227 Merganser Dr. Bend, OR 97707
Ian Mckey 56270 Solar Dr. Bend, OR 97707	Jeffery Eorio 56250 Solar Dr Bend, OR 97707
Mary Felder 56222 Solar Bend, OR 97707	Dana Stanley And Beverly Christiansen 56186 Solar Dr. Bend, OR 97707
Peter And Diana Gustavson 56180 Solar Dr. Bend, OR 97707	Larry And Pat Birdsell 17103 Milky Way Bend, OR 97707
Dana Brown 17295 Merganser Ct Bend, OR 97707	Becky Haskin 939 Sherwood Pl Eugene, OR 97401
Don Mckelvey 6466 Parkhill Way Portland, OR 97239	David & Sheila Schmerber 17271 Merganser Dr. Bend, OR 97707
Rick And Darla Curry 17265 Merganser Dr. Bend, OR 97707	Vernon And Koni Jo Jememica 17251 Merganser Dr. Bend, OR 97707