



Deschutes County Board of Commissioners  
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## **AGENDA REQUEST & STAFF REPORT**

### **For Board Business Meeting of 5/16/16**

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**DATE:** May 5, 2016

**FROM:** Will Groves                      CDD                      (541) 388-6518

**TITLE OF AGENDA ITEM:**

Deliberation on a conditional uses, non-conforming use, and Landscape Management site plan review (247-15-000113-CU, 114-CU, 115-NUV, 116-LM, 670-A) to establish new community dock and decks, verification of non-conforming structures (bunkhouse and garage), alteration of the bunkhouse, and verification of nonconforming uses consisting of fill within the flood plain and wetlands.

**PUBLIC HEARING ON THIS DATE?** No.

**BACKGROUND AND POLICY IMPLICATIONS:**

In approximately 1976, applicant's predecessor 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 2009 and 2010, the applicant built several structures on the subject property, including the existing dock, freestanding decks, walkways, garage, and an addition to the "bathhouse" consisting of a bedroom and attached decking (effectively 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). The applicant submitted the subject land use applications seeking after-the-fact authorization/permits.

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

The Board conducted a de novo public hearing on March 30, 2016. The written record closed on April 20, 2016. Staff has developed this memo and a decision matrix to help the Board engage with the key decision points in this matter.

**FISCAL IMPLICATIONS:**

None.

**RECOMMENDATION & ACTION REQUESTED:**

Conduct deliberation and give direction to Staff.

**ATTENDANCE:** Will Groves, Legal

**DISTRIBUTION OF DOCUMENTS:**

Will Groves, Legal



## Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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### MEMORANDUM

**DATE:** April 29, 2016  
**TO:** Board of County Commissioners  
**FROM:** Will Groves, Senior Planner  
**RE:** Appeal of a Hearings Officer's decision. File Nos. 247-15-000113-CU, 247-15-000114-CU, 247-15-000115-NUV, 247-15-000116-LM (247-15-000670-A)

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### BACKGROUND

In approximately 1976, applicant's predecessor 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 2009 and 2010, the applicant built several structures on the subject property, including the existing dock, freestanding decks, walkways, garage, and an addition to the "bathhouse" consisting of a bedroom and attached decking (effectively 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). The applicant submitted the subject land use applications seeking after-the-fact authorization/permits.

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

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## II. Key Issues

**This deliberation summary of party positions is largely composed of direct quotes. Some quotes have been edited for brevity, clarity, or issue focus.**

### **M1 - Can new above-grade decks be constructed within 100' of a river?**

**Issue Summary:** The applicant constructed two connected raised decks within 100 feet of the Deschutes River. DCC 18.96.100(B) requires, "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."

**Applicant:** Applicant's decks fall under the definition of "landscaping" pursuant to the Deschutes County Code, and are not structures. Landscaping is not regulated in the Flood Plain Zone, so the decks should be allowed outright as an accessory use to the primary use of the subject property.

Applicant has also offered to lower the decks so that they are at-grade with the ground, should it be required as a condition of approval.

**Hearings Officer:** 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.

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.

**Staff Comment:** Staff believes that the decks are structures under the DCC 18.04.030 definition:

*"Structure" means something constructed or built having a fixed base on, or fixed connection to, the ground or another structure."*

Staff believes that the decks have a fixed connection to the ground or are a "similar permanent fixture". To the extent they also might also fall within an expanded definition of "landscaping" the decks are not exempt them from the requirement to be set back from the river.

At one point, staff thought that placing the decks at-grade would allow them to comply with the code. This is because the definitions of "yard" and "setback" require these areas to be "unobstructed from the ground upward". However, upon further study of the relevant code quoted above, neither "yard" nor "setback" is used in these sections. Rather, permanent fixtures must be "set back" from the river, regardless of their relation to grade.

Therefore, staff believes the decks cannot be permitted within 100' of the Deschutes River.

### **M2 – Does the dock comply with river frontage standards?**

**Issue Summary:** Dock construction is subject to the provision of DCC 18.96.080(G)(4). One criterion requires that, “No individual boat dock or pier shall be allowed on any lot with less than 200 feet of river frontage.” There is significant debate in the record if the property complies with this requirement. This debate hinges on the methodology used for measuring frontage.

The river frontage is primarily a lineal feature. A straight-line measurement of the river frontage comes to approximately 175 feet.

Staff and Hearings Officers have previously admitted “nook and cranny” surveys performed by Scott Freshwaters, Surveyor, which capture the detailed frontage of a property. Mr. Freshwaters “nook and cranny” survey of the subject property broke the frontage into 63 segments measuring a total of 196.82 feet. This is largely because of the unevenness of the concrete riprap armoring the bank.

Sun Country Engineering & Surveying conducted an additional survey on September 16, 2015 with 183 segments totaling 209.5 feet of shoreline. The difference when compared to the Freshwaters survey is accounted for in a letter from Tim Weishaupt, P.E. (Exhibit DD) and is primarily attributed to ice-free conditions for the Sun Country survey.

**Applicant:** All real property is measured precisely, down to inches and degrees, and that property descriptions can in fact be variable, particularly where the land borders a body of water. The Subject Property should be measured no differently. If Applicant's property was not adjacent to the Deschutes River, but instead another parcel of dry land, the only acceptable measurement method for measuring those property lines would be the precise method employed by Mr. Weishaupt. Further, other docks approved by the County in the past have been approved using this same precise method of measurement to determine river frontage measurements.

**Hearings Officer:** 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.

**Staff Comment:** Staff believes the intent of the river frontage standard is to provide spacing between docks and limit the overall density of docks on the Deschutes River. Because the river frontage of the property is predominantly a linear feature, Staff believes the Sun Country survey, consisting of segments that average just over 1 foot in length, circumvents the intent of the river frontage standard. The “nook and cranny” survey increases the amount of “frontage” by about 20 percent. Since most properties on the Deschutes River have river frontages complicated by wetlands or small-scale non-linear bank features, staff believes affirming this measurement technique would effectively reduce the dock spacing and density well below the intended 200 feet.

While it might be tempting to simply measure “frontage” from property line to property line, other properties on river bends may have strongly convex or concave frontages that significantly extend the river frontage of these property. Measuring these frontages with a single best-fit curve would preserve the dock-to-dock spacing and density as intended by the code.

Staff recommends the board find that the intent of the river frontage standard is provide spacing between docks and limit the overall density of docks on the Deschutes River. Staff recommends that the Board find that, as a matter of policy and code interpretation, river frontage for the purposes 18.96.080(G)(4) shall be measured as a single line or a single curve.

### **M3 – Does the dock comply with dock square footage standards?**

**Issue Summary:** Dock construction is subject to the provision of DCC 18.96.080(G)(4). One criterion requires that, “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.” This section also specifies, “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.” Two definitions are also relevant to this issue:

*"Boat dock or pier, individual" means 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.*

*"Walkway" means a structure that is built over or floats upon the waters of a lake, river or stream and that provides access to a boat dock or pier.*

The submitted site plan shows the dock is 10.6 long, and 24.1 feet wide, for an area of 255.46 square feet.

**Applicant:** Applicant has demonstrated that while the structure referenced as the "dock" may look like it is all one structure, it is actually two distinct structures, only one of which falls under the definition of the term "dock" as it is defined in the Deschutes County Code. Pursuant to DCC 18.04.030, term "dock" is defined as " ... a structure that is over or floats upon the water... ". Only 138 square feet of the structure meets the dock definition when the water level is at the ordinary high water mark. The other portion is an at-grade walkway that provides safe access to the dock, and was built on separate weight-bearing supports, though it is directly adjacent to the dock portion, making it appear as though the two are connected.

Applicant has also offered to reduce the size of the dock and/or walkway as a condition of approval should the BOCC require it.

**Hearings Officer:** The Hearings Officer found that the property was not eligible for an individual boat dock and did not provide detailed findings on this issue.

**Staff Comment:** If the dock is viewed as a single structure, it exceeds the width and square footage allowance for an individual dock. If the dock is viewed as two structures, the “dock” portion of the structure exceeds the width allowance for an individual dock. The “walkway” exceeds the width allowance for a walkway approach to an individual dock. In either case the dock structure does not conform to applicable standards.

The applicant has offered to reduce the size of the dock as a condition of approval. Even if the Board finds that the dock complies with the river frontage standard under M3, above, staff believes that a reduction in size of the dock cannot be conditioned at this point. Such a project would involve work in the bed and banks of the Deschutes River that cannot be evaluated for compliance with DCC 18.96.080(G), 18.120.050, and/or 18.128.270 without a detailed project description and agency comments from ODFW, DSL, ACOE, and USFWS.

#### **M4 – Does the dock comply with applicable fill-removal standards?**

**Issue Summary:** Work in the Bed and Banks of the Deschutes River must comply with a variety of criteria under DCC 18.128.270. The Hearings Officer found that 18.128.270(D)(2)(e) was inadequately addressed in the Applicant's materials. This section requires, "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."

**Applicant:** Staff was unable to locate the applicant's briefing on this issue in the record.

**Hearings Officer:** 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.

**Staff Comment:** Relying on available aerial photography, Staff believes that preexisting vegetation in the dock location was sparse reeds and rushes growing among the concrete riprap. While the construction of the dock may have reduced available light to such plants, staff believes the dock construction did not change the essential character, quality, and density of existing vegetation at the site. Comments from ODWF and USWFS do not recommend additional vegetation to protect aquatic life habitats, functions of the ecosystem, wildlife values, aesthetic resources and to prevent erosion. Staff recommends the Board find the applicant has complied with this criterion.

#### **M5 – Was the bathhouse lawfully established?**

**Issue Summary:** The applicant has requested verification of the Bath House as a non-conforming use under DCC 18.120.010(B). In order to qualify as a non-conforming use, the Bath House must have been lawfully established when it was constructed. This means that it needed to comply with any applicable zoning code, PL-5 in this case, and building codes effective in 1976.

The Hearings Officer found that the Bath House was not one of the authorized uses allowed in the RR-1 zone under PL-5 and that the structure should have obtained building permits at that time.

DCC 18.120.010(F)(3) requires that the preponderance of the evidence demonstrate that the use was lawfully established.

**Applicant:** The HO misinterpreted PL-5 to only authorize two "accessory uses in the RR-1 Zone - "not more than one private garage" and "home occupation." PL-5, RR-1 zone, does not authorize accessory uses. It places limitations on specific accessory uses. If the Bath House structure does not meet the description of any of the accessory uses listed under Section 3.160, then it was unregulated by those provisions, and there were no limitations on that particular accessory use in the RR-1 Zone.

The Hearings Officer also erred when she denied the verification of the Bath House as a non-conforming use because the structure may have "potentially" required a building permit when it was constructed, due to its size. Applicant argues that it is not appropriate for the Hearings Officer to make concrete findings based on unconfirmed recollections of third party standards that are not the laws of the State of Oregon or Deschutes County, and that it is not appropriate to make concrete findings based on the potential that a structure may have required a building permit, particularly when there is substantial evidence in the actual Record that proves otherwise.

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

**Hearings Officer:** Hearings Officer Green denied applicant's request for verification of the Bath House as a nonconforming use because the Bath House was not lawfully established at the time it was constructed in 1976. Specifically, she found that the construction of the Bath House was not legal under the applicable zoning code in 1976, PL-5, Rural Recreational Residential Zone ("RR-1"), because the Bath House did not conform to any of the accessory use limitations listed under 3.160 of PL-5. She also found that the Bath House structure "potentially" required a building permit when it was constructed.

**Staff Comment:** Staff believes that Recreation Vehicle use of the property was an unregulated use in 1976. This is because it is not mentioned in PL-5 and the County issued a septic permit to support that use on the property in 1976.

Could the Bath House have been constructed in 1976 as an accessory structure to the RV use of the property? Staff believes that this is unclear. Staff is unaware of other similar structures from this time period. However, Mr. Cate testified that he confirmed with the County that permits were not required to construct the structure and connect it to the approved septic system and this testimony is unrebutted. Staff believes that the preponderance of the evidence suggests that the Bath House was lawfully established as an accessory to the RV use of the property in 1976. Since overnight occupancy of structures on the property has not been lawfully established, staff recommends a condition of any approval requiring:

- 1) *Overnight occupancy of structures on the property is prohibited unless such use is otherwise lawfully established.*



The applicant has not asked to change the extent or nature of RV camping on the property nor have they asked to establish the RV use of the property as a non-conforming use. As such, RV use of the property should be subject to DCC 18.116.095, Recreational Vehicle as a Temporary Residence on an Individual Lot. Staff recommends a condition of any approval requiring:

- 2) *Any recreational vehicle use of the property shall be conducted in accordance with DCC 18.116.095.*

**Alternatively**, the Board could find, consistent with the Hearings Officer, that the Bath House was not a lawful use under PL-5. In this context, testimony by a prior owner of the property suggesting that the County did not enforce then-applicable requirements is legally insufficient to deem establishment of the Bath House lawful.

### **M6 – Did the HO make a procedural error by referring to PL-5?**

**Issue Summary:** The Hearings Officer needs to make a decision based on information available on the record. The applicant objects that the Hearings Officer, in part, relied on the text of PL-5, which was not introduced to the record during the open record period.

The Hearings Officer has long held that she may take notice of County Ordinances and Land Use decisions without these materials being formally introduced to the record.

**Applicant:** At the time the Record Period closed for the Hearings Officer's proceedings for the instant applications, on October 13, 2015, neither PL-5 nor the Uniform Building Code were a part of the Record for the instant applications, and the Record was not re-opened. Applicant was not notified of the Record change, so had no chance to respond to the new evidence. The Hearings Officer unfairly raised and then relied upon the new arguments and evidence to make her Decision, without allowing Applicant to consider and respond to arguments raised for the first time by the Hearings Officer. This is a violation of the DCC.

**Staff Comment:** To the extent Hearings Officer may have improperly taken notice of PL-5, that zoning code is properly before the Board and that defect, if any, is cured. The Uniform Building Code in effect in 1976 has not been introduced into the record and cannot be (and is not being) relied upon as part of this record.

### **M7 – Can the bathhouse's expansion within the river setback be permitted?**

**Issue Summary:** Under DCC 18.96.100(B) and 18.84.090(C), new structures and additions must be set back 100 feet from the Ordinary High Water Mark of the Deschutes River. The Bath House expansion occurred, in part, in the 100-foot river setback. To the extent the Board finds that the Bath House was lawfully established, it is unclear how the how that can expansion can be approved under the non-conforming use code.

Expansions of non-conforming structures are allowed in the "...front, side or rear yard setback area..." under DCC 18.120.010(A)(3). Both Staff and the HO concur that the river setback is not a "...front, side or rear yard setback area..." and that expansions in the river setback are governed by 18.120.030(D).

Expansion of "...an existing residential dwelling which is within 100 feet from the ordinary high water mark along a stream..." is allowed under 18.120.030(D). It is undisputed in the record

that neither the Bath House nor the Bunk House is a dwelling eligible for expansion under 18.120.030(D).

**Applicant:** The Bath House is a lawfully established nonconforming use that was not subject to any setback provisions when it was constructed in 1976, and that the new addition "does not project into the required setback area at any point." Therefore, the addition of the Bunk House to the backside of the Bath House is permitted as an alteration or expansion of a non-conforming use, which is not subject to river setback provisions.

**Hearings Officer:** Referring to 18.120.010(A)(3): "...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."

Referring to 18.120.030(D): "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."

**Staff Comment:** Staff and the Hearings Officer read the non-conforming structure code to disallow structural expansions in the 100-foot river setback generally, but allow a specific exception for dwellings under 18.120.030(D). Staff is concerned that the applicant's proposed reading of the non-conforming use code is both textually implausible and would set a policy weakening the significant riverfront/riparian protections that come from the 100-foot river setback. A text amendment is the appropriate venue for evaluating this sort of policy change.

**M8 – Has the applicant demonstrated that the expansion will have no adverse impact on the neighborhood with regard to wastewater?**

**Issue Summary:** DCC 18.120.010(E)(2) requires a finding that a non-conforming use alteration will have no greater adverse impact on the neighborhood. The HO declined to evaluate potential wastewater impacts, finding that this was subject to DEQ regulation.

Todd Cleveland, Deschutes County Environmental Soils Supervisor, has testified that the existing system is contaminating ground water and that increased use of the existing system would increase the contamination. Mr. Cleveland has also testified that the existing system should have been decommissioned in 1992, following an evaluation for residential development of the property. He also testified that other nearby, similarly situated, septic systems have typically degraded over time and fail to prevent groundwater contamination.

**Applicant:** There is proof that the on-site septic system was permitted when built and has been used since that time. If the 1992 denial had intended to decommission the entire existing system, it should have said so. The letter states absolutely nothing about entirely decommissioning the existing system on the property, or denial of anything more than the specific request to expand the existing system.

The Applicant has argued that the RV use of the septic system was a permitted use and that the connection of the Bath House to the system is presumed lawful through Mr. Cate's un rebutted testimony.

The septic system is used infrequently, and only during the 2-3 months out of the year that

applicant visits the property. The addition of the bedroom to the Bath House does not "change the nature or extent of the use of the property" or on-site septic system or cause further adverse impacts to the surrounding neighborhood.

**Hearings Officer:** The Hearings Officer found that the issue of the on-site septic system was not before her, and declined to make findings on the issue.

The HO 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.

**Deschutes County Environmental Soils:** There is "no indication of prior use" in the history of the on-site septic system, and that the 1992 denial for a request to expand the use of the existing septic system for a year-round expanded residence was also a notice that the entire existing system was to be decommissioned.

**Staff Comment:** Staff believes that the applicant has confused this issue by incorrectly assuming that the septic system is a non-conforming land use subject to DCC 18.120. Staff recommends that the Board find that the lawfulness of the installation, alteration, or continued use of the system is not subject to Title 18 (except regarding some locational requirements), and falls under DEQ regulation.

However, staff also believes that Hearings Officer incorrectly concluded any adverse impacts stemming from changes to the use of the system are not subject to DCC 18.120.010(E)(2). The proposed alteration of the non-conforming use includes the addition of living and sleeping areas to the Bath House. If this addition results in unmitigated adverse wastewater impacts, this application should be denied for failure to comply with 18.120.010(E)(2).

Increased use: The applicant has added a bedroom and neighbors have testified that guests arriving in a passenger vehicle have stayed at the site. This results in use of the septic system that is not associated with the RV use of the property. The addition of the bedroom has the potential to increase the quantity of wastewater beyond the historic RV-only use of the property.

Adverse impact: Given the shallow groundwater in the vicinity, there is no septic system that could completely avoid contamination of the groundwater (See Mr. Cleveland's testimony). Increased use will result in increased contamination unless the septic treatment technology is enhanced, if this enhancement is even feasible.

The applicant has not proposed use restrictions that would ensure there would be no increased wastewater discharge. The applicant has not proposed to enhance the wastewater treatment system to offset any increases in groundwater contamination. Therefore, staff believes the applicant has failed to demonstrate that the alteration of the Bath House to include a bedroom will not adversely impact the neighborhood by increasing groundwater contamination. Staff recommends the following conditions of any decision to ensure the use will not increase groundwater contamination:

- 1) *Overnight occupancy of structures on the property is prohibited unless such use is otherwise lawfully established.*

- 2) *Any recreational vehicle use of the property shall be conducted in accordance with DCC 18.116.095.*

#### Attachments

1. Decision matrix.

DREIFUSS DELIBERATION MATRIX

	Issue	Information in Record	Staff Comment	Board Options
1.	<b>Can new above-grade decks be constructed within 100' of a river?</b>	<p><b>HO:</b> 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.</p> <p><b>Applicant:</b> Applicant's decks fall under the definition of "landscaping" and are not structures. Landscaping is not regulated in the Flood Plain Zone, so the decks should be allowed outright as an accessory use to the primary use of the subject property.</p>	<p><b>Staff Comment:</b> Decks are structures under the DCC 18.04.030 definition. Staff believes the decks cannot be permitted within 100' of the Deschutes River.</p> <p>Sample motion for BOCC: <b>“Move that the Board adopt the Hearings Officer’s findings on this issue.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Find that decks are “landscaping” that is exempt from setbacks.</p>
2.	<b>Does the dock comply with river frontage standards?</b>	<p><b>HO:</b> 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).</p> <p><b>Applicant:</b> .All real property is measured precisely, down to inches and degrees, and that property descriptions can in fact be variable, particularly where the land borders a body of water. Other docks approved by the County in the past have been approved using this same precise method of measurement to determine river frontage measurements.</p>	<p><b>Staff Comment:</b> Staff recommends the board find that the intent of the river frontage standard is provide spacing between docks and limit the overall density of docks on the Deschutes River. Staff recommends that the Board find that, as a matter of policy and code interpretation, river frontage for the purposes 18.96.080(G)(4) shall be measured as a single line or a single curve.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that the intent of the river frontage standard is to provide spacing between docks and limit the overall density of docks on the Deschutes River. As a matter of policy and code interpretation, river frontage for the purposes of 18.96.080(G)(4) shall be measured as a single line or a single curve.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Adopt Staff’s recommendation.</p> <p>Find that real property is measured precisely down to inches and degrees, and that property descriptions can be variable</p>
3.	<b>Does the dock comply with dock square footage standards?</b>	<p><b>HO:</b> The Hearings Officer found that the property was not eligible for an individual boat dock and did not provide detailed findings on this issue.</p> <p><b>Applicant:</b> Applicant has demonstrated that while the structure referenced as the "dock" may look like it is all one structure, it is actually two distinct structures, only one of which falls under the definition of the term "dock" as it is defined in the Deschutes County Code. The other portion is an at-grade walkway that provides safe access to the dock, and was built on separate weight-bearing supports, though it is directly adjacent to the dock portion, making it appear as though the two are connected.</p>	<p><b>Staff Comment:</b> If the dock is viewed as a single structure, it exceeds the width and square footage allowance for an individual dock. If the dock is viewed as two structures, the “dock” portion of the structure exceeds the width allowance for an individual dock. The “walkway” exceeds the width allowance for a walkway approach to an individual dock. In any case the dock structure does not conform to applicable standards.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that the dock/walkway does not comply with required dimensional standards for docks or walkways.”</b></p>	<p>Adopt Staff’s recommendation.</p> <p>Provide a novel interpretation.</p>

	Issue	Information in Record	Staff Comment	Board Options
4.	<b>Does the dock comply with applicable fill-removal standards?</b>	<p><b>HO:</b> Evidence in the record is sparse concerning the character, quality and density of the vegetation that existed prior to construction. The Hearings Officer agrees with staff's conclusion that the record is inadequate from which to find this criterion is satisfied.</p> <p><b>Applicant:</b> Evidence placed in the Record satisfies this criterion, and proves there was no existing vegetation disturbed when Applicant's dock was constructed over bank impacted from existing non-conforming riprap, and that the dock is in a location where another dock had been located as recently as December 2008.</p>	<p><b>Staff Comment:</b> Relying on available aerial photography, Staff believes that preexisting vegetation in the dock location was sparse reeds and rushes growing among the concrete riprap. While the construction of the dock may have reduced available light to such plants, staff believes the dock construction did not change the essential character, quality, and density of existing vegetation at the site. Staff recommends the Board find the applicant has complied with this criterion.</p> <p>Sample motion for BOCC: <b>"Move that the Board find that the applicant's project complies with 18.128.270(D)(2)(e)."</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Adopt Staff's recommendation.</p>
5.	<b>Was the bathhouse lawfully established?</b>	<p><b>HO:</b> The Bath House was not lawfully established at the time it was constructed in 1976. Construction of the Bath House was not legal under the applicable zoning code in 1976, PL-5, Rural Recreational Residential Zone ("RR-1"), because the Bath House did not conform to any of the accessory use limitations listed under 3.160 of PL-5. The Bath House structure "potentially" required a building permit when it was constructed.</p> <p><b>Applicant:</b> PL-5, RR-1 zone, does not authorize accessory uses. It places limitations on specific accessory uses. If the Bath House structure does not meet the description of any of the accessory uses listed under Section 3.160, then it was unregulated by those provisions, and there were no limitations on that particular accessory use in the RR-1 Zone.</p> <p>The Hearings Officer also erred when she denied the verification of the Bath House as a non-conforming use because the structure may have "potentially" required a building permit when it was constructed, due to its size. Applicant argues that it is not appropriate for the Hearings Officer to make concrete findings based on unconfirmed recollections.</p> <p>Undisputed evidence from prior owner James Cate states that he checked with the County about building permits for the Bath House in 1976, and was told that they were not necessary, as long as the septic system to serve the Bath House was approved. Mr. Cate's first-hand account of the circumstances of the legal construction of the Bath House and connected septic system is substantial evidence in the Record, and is undisputed.</p>	<p><b>Staff Comment:</b> Staff believes that Recreation Vehicle use of the property was an unregulated use in 1976. This is because it is not mentioned in PL-5 and the County issued a septic permit to support that use on the property in 1976.</p> <p>Could the Bath House have been constructed in 1976 as an accessory structure to the RV use of the property? Staff believes that this is unclear. Staff is unaware of other similar structures from this time period. Mr. Cate's testimony is unrebutted. Staff believes that the preponderance of the evidence suggests that the Bath House was lawfully established as an accessory to the RV use of the property in 1976.</p> <p>Sample motion for BOCC: <b>"Move that the Board find that the preponderance of the evidence demonstrates that the Bath House was lawfully established as an accessory to the RV use of the property in 1976. The Board finds that the conditions of approval recommended by staff under topic M5 in the deliberation memorandum shall be imposed as conditions of approval to limit use of the Bath House to the verified nonconforming use."</b></p> <p>Alternative Sample motion for BOCC: <b>"Move that the Board find, consistent with the Hearings Officer, that the Bath House was not a lawful use under PL-5."</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Adopt Staff's recommendation.</p>

	Issue	Information in Record	Staff Comment	Board Options
6.	<p><b>Did the HO make a procedural error by referring to PL-5?</b></p>	<p><b>HO:</b> Did not directly address issue.</p> <p><b>Applicant:</b> Neither PL-5 nor the Uniform Building Code were a part of the Record before the HO. Applicant was not notified of the Record change, so had no chance to respond to the new evidence. The Hearings Officer unfairly raised and then relied upon the new arguments and evidence to make her Decision, without allowing Applicant to consider and respond to arguments raised for the first time by the Hearings Officer. This is a violation of the DCC.</p>	<p><b>Staff Comment:</b> To the extent Hearings Officer may have improperly taken notice of PL-5, that zoning code is properly before the Board and that defect, if any, is cured. The Uniform Building Code in effect in 1976 has not been introduced into the record and cannot be (and is not being) relied upon as part of this record.</p> <p>Sample motion for BOCC: <b>“Move that the Board find that PL-5 code is properly before the Board and that a procedural defect, if any, is cured. The Uniform Building Code in effect in 1976 is not being relied upon as part of this record.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Find that any procedural defect has been cured.</p>
7.	<p><b>Can the bathhouse’s expansion within the river setback be permitted?</b></p> <p><b>(Only required if the Bath House is found to be lawful under M5)</b></p>	<p><b>HO:</b> Referring to 18.120.010(A)(3): “...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.”</p> <p>Referring to 18.120.030(D): “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.”</p> <p><b>Applicant:</b> The Bath House is a lawfully established nonconforming use that was not subject to any setback provisions when it was constructed in 1976, and that the new addition "does not project into the required setback area at any point." Therefore, the addition of the Bunk House to the backside of the Bath House is permitted as an alteration or expansion of a non-conforming use, which is not subject to river setback provisions.</p>	<p><b>Staff Comment:</b> Staff and the Hearings Officer read the non-conforming structure code to disallow structural expansions in the 100-foot river setback generally, but allow a specific exception for dwellings under 18.120.030(D). The applicant’s proposed reading of the non-conforming use code is both textually implausible and would set a policy weakening the significant riverfront/riparian protections that come from the 100-foot river setback. .</p> <p>Sample motion for BOCC: <b>“Move that the Board adopt the Hearings Officer’s findings on this issue.”</b></p> <p>Alternative Sample motion for BOCC: <b>“Move that the Board find that non-conforming non-residential additions in the river setback are subject to DCC 18.120.010(A)(3).”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Find that non-conforming non-residential additions in the river setback are subject to DCC 18.120.010(A)(3).</p>

	Issue	Information in Record	Staff Comment	Board Options
8.	<p><b>Has the applicant demonstrated that the expansion will have no adverse impact on the neighborhood with regard to wastewater?</b></p> <p><b>(Only required if the Bath House is found to be lawful under M5)</b></p>	<p><b>HO:</b> The HO 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.</p> <p><b>Applicant:</b> There is proof that the on-site septic system was permitted when built and has been used since that time. If the 1992 denial had intended to decommission the entire existing system, it should have said so. The letter states absolutely nothing about entirely decommissioning the existing system on the property, or denial of anything more than the specific request to expand the existing system.</p> <p>The Applicant has argued that the RV use of the septic system was a permitted use and that the connection of the Bath House to the system is presumed lawful through Mr. Cate’s unrebutted testimony.</p> <p>The septic system is used infrequently, and only during the 2-3 months out of the year that applicant visits the property. The addition of the bedroom to the Bath House does not "change the nature or extent of the use of the property" or on-site septic system or cause further adverse impacts to the surrounding neighborhood.</p> <p><b>Deschutes County Environmental Soils:</b> There is "no indication of prior use" in the history of the on-site septic system, and the 1992 denial for a request to expand the use of the existing septic system for a year-round expanded residence was also a notice that the entire existing system was to be decommissioned. Given the shallow groundwater in the vicinity, there is no septic system that could completely avoid contamination of the groundwater. Increased use will result in increased contamination unless the septic treatment technology is enhanced, if this enhancement is even feasible.</p>	<p><b>Staff Comment:</b> Staff believes that the applicant has confused this issue by incorrectly assuming that the septic system is a non-conforming land use subject to DCC 18.120. Staff recommends that the Board find that the lawfulness of the installation, alteration, or continued use of the system is not subject to Title 18 (except regarding some locational requirements), and falls under DEQ regulation.</p> <p>However, staff also believes that Hearings Officer incorrectly concluded any adverse impacts stemming from changes to the use of the system are not subject to DCC 18.120.010(E)(2). The proposed alteration of the non-conforming use includes the addition of living and sleeping areas to the Bath House. If this addition results in unmitigated adverse wastewater impacts, this application should be denied for failure to comply with 18.120.010(E)(2).</p> <p>Staff believes the applicant has failed to demonstrate that the alteration of the Bath House to include a bedroom will not adversely impact the neighborhood by increasing groundwater contamination. Staff recommends the following conditions of any decision to ensure the use will not increase groundwater contamination:</p> <p>Sample motion for BOCC: <b>“Move that the Board find that the applicant has not demonstrated the addition of living and sleeping areas to the Bath House will not adversely impact the neighborhood by increasing groundwater contamination. The Board finds that the conditions of approval recommended by staff under topic M8 in the deliberation memorandum shall be imposed as conditions of approval to prevent increased groundwater contamination.”</b></p>	<p>Adopt HO decision findings, with or without modification.</p> <p>Adopt Staff’s recommendation.</p> <p>Concur with the Applicant that the addition of living and sleeping areas to the Bath House will not adversely impact the neighborhood.</p>





## Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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### MEMORANDUM

**DATE:** April 28, 2016

**TO:** Board of County Commissioners

**FROM:** Will Groves, Senior Planner

**RE:** Elizabeth A. Dickson's appeal of a Hearings Officer's decision. File Nos. 247-15-000113-CU, 247-15-000114-CU, 247-15-000115-NUV, 247-15-000116-LM (247-15-000670-A)

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### BACKGROUND

In approximately 1976, Applicant's predecessor 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 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). The applicant submitted the subject land use applications to permit the work performed after-the-fact.

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

The Board conducted a de novo public hearing on May 30, 2016. The written record closed on April 20, 2016. Staff has developed this memo and a decision matrix to help the Board engage with the key decision points in this matter.

## II. Key Issues

**This deliberation summary of party positions is largely composed of direct quotes. Some quotes have been edited for brevity, clarity, or issue focus.**

### **M1 - Can new above-grade decks be constructed within 100' of a river?**

**Issue Summary:** The applicant constructed two connected raised decks within 100 feet of the Deschutes River. DCC 18.96.100(B) requires, "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."

**Applicant:** Applicant's landscaping decks fall under the definition of "landscaping" pursuant to the Deschutes County Code, and are not structures. Landscaping is not regulated in the Flood Plain Zone, so the landscaping decks should be allowed outright as an accessory use to the primary use of the subject property.

Applicant has also offered to lower the decks so that they are at-grade with the ground, should it be required as a condition of approval.

**Hearings Officer:** 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.

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.

**Staff Comment:** Staff believes that the decks are structures under the DCC 18.04.030 definition:

*"Structure" means something constructed or built having a fixed base on, or fixed connection to, the ground or another structure."*

Staff believes that the decks have a fixed connection to the ground or are a "similar permanent fixture". To the extent they also might also fall within the definition of "landscaping" does not exempt them from the requirement to be set back from the river.

Staff thought that making the decks at-grade would allow them to comply with the code. This is because the definitions of "yard" and "setback" require these areas to be "unobstructed from the ground upward". However, upon careful reading of the relevant code quoted above, neither "yard" nor "setback" is used in these sections. Rather, permanent fixtures must be "set back" from the river, regardless of their relation to grade.

Therefore, staff believes the decks cannot be permitted within 100' of the Deschutes River.

## **M2 – Does the dock comply with river frontage standards?**

**Issue Summary:** Dock construction is subject to the provision of DCC 18.96.080(G)(4). One criterion requires that, “No individual boat dock or pier shall be allowed on any lot with less than 200 feet of river frontage.” There is significant debate in the record if the property complies with this requirement. This debate hinges on the methodology used for measuring frontage.

The river is frontage is primarily a lineal feature. A straight-line measurement of the river frontage comes to approximately 175 feet.

Staff and Hearings Officers have previously admitted “nook and cranny” surveys performed by Scott Freshwaters, Surveyor, which capture the detailed frontage of a property. Mr. Freshwaters “nook and cranny” survey of the subject property broke the frontage into 63 segments measuring a total of 196.82 feet. This is largely because of the unevenness of the concrete rip-rap armoring the bank.

Sun Country Engineering & Surveying conducted an additional survey on September 16, 2015 with 183 segments totaling 209.5 feet of shoreline. The difference when compared to the Freshwaters survey is accounted for in a letter from Tim Weishaupt, P.E. (Exhibit DD) and is primarily attributed to ice-free conditions for the Sun Country survey.

**Applicant:** All real property is measured precisely, down to inches and degrees, and that property descriptions can in fact be variable, particularly where the land borders a body of water. The Subject Property should be measured no differently. If Applicant's property was not adjacent to the Deschutes River, but instead another parcel of dry land, the only acceptable measurement method for measuring those property lines would be the precise method employed by Mr. Weishaupt. Further, other docks approved by the County in the past have been approved using this same precise method of measurement to determine river frontage measurements.

**Hearings Officer:** 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.

**Staff Comment:** Staff believes the intent of the river frontage standard is to provide spacing between docks and limit the overall density of docks on the Deschutes River. Because the river frontage of the property is predominantly a linear feature, Staff believes the Sun Country survey, consisting of segments that average just over 1 foot in length, circumvents the intent of the river frontage standard. The “nook and cranny” survey increases the amount of “frontage” by about 20 percent. Since most properties on the Deschutes River have river frontages complicated by wetlands or small-scale non-linear bank features, staff believes affirming this measurement technique would effectively reduce the dock spacing and density well below the intended 200 feet.

While it might be tempting to simply measure “frontage” from property line to property line, other properties on river bends may have strongly convex or concave frontages that significantly extend the river frontage of these property. Measuring these frontages with a single best-fit curve would preserve the dock-to-dock spacing and density as intended by the code.

Staff recommends the board find that the intent of the river frontage standard is provide spacing between docks and limit the overall density of docks on the Deschutes River. Staff recommends that the Board find that, as a matter of policy, river frontage for the purposes 18.96.080(G)(4) shall be measured as a single line or a single best-fit curve.

### **M3 – Does the dock comply with dock square footage standards?**

**Issue Summary:** Dock construction is subject to the provision of DCC 18.96.080(G)(4). One criterion requires that, “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.” This section also specifies, “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.” Two definitions are also relevant to this issue:

*“Boat dock or pier, individual” means 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.*

*“Walkway” means a structure that is built over or floats upon the waters of a lake, river or stream and that provides access to a boat dock or pier.*

The submitted site plan shows the dock is 10.6 long, and 24.1 feet wide, for an area of 255.46 square feet.

**Applicant:** Applicant has demonstrated that while the structure referenced as the “dock” may look like it is all one structure, it is actually two distinct structures, only one of which falls under the definition of the term “dock” as it is defined in the Deschutes County Code. Pursuant to DCC 18.04.030, term “dock” is defined as “... a structure that is over or floats upon the water...”. Only 138 square feet of the structure meets the dock definition when the water level is at the ordinary high water mark. The other portion is an at-grade walkway that provides safe access to the dock, and was built on separate weight-bearing supports, though it is directly adjacent to the dock portion, making it appear as though the two are connected.

Applicant has also offered to reduce the size of the dock and/or walkway as a condition of approval should the BOCC require it.

**Hearings Officer:** The Hearings Officer found that the property was not eligible for an individual boat dock and did not provide detailed findings on this issue.

**Staff Comment:** If the dock is viewed as a single structure, it exceeds the width and square footage allowance for an individual dock. If the dock is viewed as two structures the “dock” portion of the structure exceeds the width allowance for an individual dock. The “walkway” exceeds the width allowance for a walkway approach to an individual dock. In either case the dock structure does not conform to applicable standards.

The Applicant has offered to reduce the size of the dock as a condition of approval. Even if the Board has found the dock complies with the river frontage standard under M3, above, staff believes that a reduction in size of the dock cannot be conditioned at this point. This is because such a project would involve work in the bed and banks of the Deschutes River that cannot be evaluated for compliance with DCC 18.96.080(G), 18.120.050, and/or 18.128.270 without a detailed project description and agency comments from ODFW, DSL, ACOE, and USFWS.

#### **M4 – Does the dock comply with applicable fill-removal standards?**

**Issue Summary:** Work in the Bed and Banks of the Deschutes River must comply with a variety of criteria under DCC 18.128.270. The Hearings Officer found that 18.128.270(D)(2)(e) inadequately addressed in the Applicant's materials. This section requires, "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."

**Applicant:** Staff was unable to locate the Applicant's briefing on this issue in the record.

**Hearings Officer:** 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.

**Staff Comment:** Relying on available aerial photography, Staff believes that preexisting vegetation in the dock location was sparse reeds and rushes growing among the concrete riprap. While the construction of the dock may have reduced available light to such plants, Staff believes the dock construction did not change the essential character, quality, and density of existing vegetation at the site. Comments from ODWF and USWFS do not not recommend additional vegetation to protect aquatic life habitats, functions of the ecosystem, wildlife values, aesthetic resources and to prevent erosion. Staff recommends the Board find the applicant has complied with this criterion.

#### **M5 – Was the bathhouse lawfully established?**

**Issue Summary:** The applicant has requested verification of the Bath House as a non-conforming use under DCC 18.120.010(B). In order to qualify as a non-conforming use, the Bath House must have been lawfully established when it was constructed. This means that it needed to comply with any applicable zoning code, PL-5 in this case, and building codes effective in 1976.

The Hearings Officer found that the Bath House was not one of the authorized uses allowed in the RR-1 zone under PL-5 and that the structure should have obtained building permits at that time.

DCC 18.120.010(F)(3) requires that the preponderance of the evidence demonstrate that the use was lawfully established.

**Applicant:** The HO misinterpreted PL-5 to only authorize two "accessory uses in the RR-1 Zone - "not more than one private garage" and "home occupation." PL-5, RR-1 zone, does not authorize accessory uses. It places limitations on specific accessory uses. If the Bath House structure does not meet the description of any of the accessory uses listed under Section 3.160, then it was unregulated by those provisions, and there were no limitations on that particular accessory use in the RR-1 Zone.

The Hearings Officer also erred when she denied the verification of the Bath House as a non-conforming use on the grounds that the structure may have "potentially" required a building permit when it was constructed, due to its size. Applicant argues that it is not appropriate for the Hearings Officer to make concrete findings based on unconfirmed recollections of third party standards that are not the laws of the State of Oregon or Deschutes County, and that it is not appropriate to make concrete findings based on the potential that a structure may have required a building permit, particularly when there is substantial evidence in the actual Record that proves otherwise.

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

**Hearings Officer:** Hearings Officer Green denied Applicant's request for verification of the Bath House as a nonconforming use because the Bath House was not lawfully established at the time it was constructed in 1976. Specifically, she found that the construction of the Bath House was not legal under the applicable zoning code in 1976, PL-5, Rural Recreational Residential Zone ("RR-1"), because the Bath House did not conform to any of the accessory use limitations listed under 3.160 of PL-5. She also found that the Bath House structure "potentially" required a building permit when it was constructed.

**Staff Comment:** Staff believes that Recreation Vehicle use of the property was an unregulated use in 1976. This is because it is not mentioned in PL-5 and the County issued a septic permit to support that use on the property in 1976.

Could the Bath House have been constructed in 1976 as an accessory structure to the RV use of the property? Staff believes that this is unclear. Staff is unaware of no other similar structures from this time period. However, Mr. Cate testified that he confirmed with the County that permits were not required to construct the structure and connect it the approved septic system and this testimony is unrebutted. Staff believes that the preponderance of the evidence suggests that the Bath House was lawfully established as an accessory to the RV use of the property in 1976. Since overnight occupancy of structures on the property has not been lawfully established, staff recommends a condition of any approval requiring:

- 1) *Overnight occupancy of structures on the property is prohibited unless such use is otherwise lawfully established.*

The applicant has not asked to change the extent or nature of RV camping on the property nor have they asked to establish the RV use of the property as a non-conforming use. As such, RV use of the property should be subject to DCC 18.116.095, Recreational Vehicle as a Temporary Residence on an Individual Lot. Staff recommends a condition of any approval requiring:

- 2) *Any recreational vehicle use of the property shall be conducted in accordance with DCC 18.116.095.*

**Alternatively**, the Board could conclude, following the Hearings Officer, the Bath House was not a lawful use under PL-5 and testimony by a prior owner of the property suggesting that the County was not enforcing applicable requirements does not make the establishment of the Bath House lawful.

### **M6 – Did the HO make a procedural error by referring to PL-5?**

**Issue Summary:** The Hearings Officer needs to make a decision based on information available on the record. The applicant objects that the Hearings Officer, in part, relied on the text of PL-5, which was not introduced to the record during the open record period.

The Hearings Officer has long held that she may take notice of County Ordinances and Land Use decisions without these materials being formally introduced to the record.

**Applicant:** At the time the Record Period closed for the Hearings Officer's proceedings for the instant applications, on October 13, 2015, neither PL-5 nor the Uniform Building Code were a part of the Record for the instant applications, and the Record was not re-opened. Applicant was not notified of the Record change, so had no chance to respond to the new evidence. The Hearings Officer unfairly raised and then relied upon the new arguments and evidence to make her Decision, without allowing Applicant to consider and respond to arguments raised for the first time by the Hearings Officer herself. This is a violation of the DCC.

**Staff Comment:** To the extent Hearings Officer may have improperly taken notice of PL-5, that zoning code is properly before the Board and that defect, if any, is cured. The Uniform Building Code in effect in 1976 has not been introduced into the record and cannot be (and is not being) relied upon as part of this record.

### **M7 – Can the bathhouse's expansion within the river setback be permitted?**

**Issue Summary:** Under DCC 18.96.100(B) and 18.84.090(C), new structures and additions must be set back 100 feet from the Ordinary High Water Mark of the Deschutes River. The Bath House expansion occurred, in part, in the 100-foot river setback. To the extent the Board finds that the Bath House was lawfully established, it is unclear how the how that can expansion can be approved under the non-conforming use code.

Expansions of non-conforming structures are allowed in the "...front, side or rear yard setback area..." under DCC 18.120.010(A)(3). Both Staff and the HO concur that the river setback is not a "...front, side or rear yard setback area..." and that expansions in the river setback are governed by 18.120.030(D).

Expansion of "...an existing residential dwelling which is within 100 feet from the ordinary high water mark along a stream..." is allowed under 18.120.030(D). It is undisputed in the record

that neither the Bath House nor the Bunk House is a dwelling eligible for expansion under 18.120.030(D).

**Applicant:** The Bath House is a lawfully established nonconforming use that was not subject to any setback provisions when it was constructed in 1976, and that the new addition "does not project into the required setback area at any point." Therefore, the addition of the Bunk House to the backside of the Bath House is permitted as an alteration or expansion of a non-conforming use, which is not subject to river setback provisions.

**Hearings Officer:** Referring to 18.120.010(A)(3): "...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."

Referring to 18.120.030(D): "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."

**Staff Comment:** Staff and the Hearings Officer read the non-conforming structure code to intentionally disallow structural expansions in the 100-foot river setback generally, but to make a specific exception for dwellings under 18.120.030(D). Staff is concerned that the Applicant's proposed reading of the non-conforming use code is both textually implausible and would set a policy weakening the significant riverfront/riparian protects that come from the 100-foot river setback. A text amendment is the appropriate venue for evaluating this sort of policy change.

**M8 – Has the applicant demonstrated that the expansion will have no adverse impact on the neighborhood with regard to wastewater?**

**Issue Summary:** DCC 18.120.010(E)(2) requires a finding that a non-conforming use alteration will have no greater adverse impact on the neighborhood. The HO declined to evaluate potential wastewater impacts, finding that this was subject to DEQ regulation.

Todd Cleveland, Deschutes County Environmental Soils Supervisor, has testified that the existing system is almost certainly contaminating ground water and that increased use of the existing system would increase the contamination. Mr. Cleveland has also testified that the existing system should have been decommissioned in 1992, following an evaluation for residential development of the property. He also testified that other nearby, similarly situated, septic systems have typically degraded over time and fail to prevent groundwater contamination.

**Applicant:** There is proof that the on-site septic system was permitted when built and has been used since that time. If the 1992 denial had intended to decommission the entire existing system, it should have said so. The letter states absolutely nothing about entirely decommissioning the existing system on the property, or denial of anything more than the specific request to expand the existing system.

The Applicant has argued that the RV use of the septic system was a permitted use and that the connection of the Bath House to the system is presumed lawful through Mr. Cate's un rebutted testimony.

The septic system is used infrequently, and only during the 2-3 months out of the year that



Applicant visits the property. The addition of the bedroom to the Bath House does not "change the nature or extent of the use of the property" or on-site septic system or cause further adverse impacts to the surrounding neighborhood.

**Hearings Officer:** The Hearings Officer found that the issue of the on-site septic system was not before her, and declined to make findings on the issue.

The HO 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.

**Deschutes County Environmental Soils:** There is "no indication of prior use" in the history of the on-site septic system, and that the 1992 denial for a request to expand the use of the existing septic system for a year-round expanded residence was also a notice that the entire existing system was to be decommissioned.

**Staff Comment:** Staff believes that the Applicant has confused this issue by incorrectly assuming that the septic system is a non-conforming land use subject to DCC 18.120. Staff recommends that the Board find that the lawfulness of the installation, alteration, or continued use of the system is not subject to Title 18 (except regarding some locational requirements, which falls under DEQ regulation).

However, staff also believes that Hearings Officer incorrectly concluded any adverse impacts stemming from changes to the use of the system are not subject to DCC 18.120.010(E)(2). The proposed alteration of the non-conforming use includes the addition of living and sleeping areas to the Bath House. If this addition results in unmitigated adverse wastewater impacts, this application should be denied for failure to comply with 18.120.010(E)(2).

Increased use: The applicant has added a bedroom and neighbors have testified that guests arriving in a passenger vehicle have stayed at the site. This results in use of the septic system that is not associated with the RV use of the property. The addition of the bedroom has the potential to increase the quantity of wastewater beyond the historic RV-only use of the property.

Adverse impact: Given the shallow groundwater in the vicinity, there is no septic system that could completely avoid contamination of the groundwater (See Mr. Cleveland's testimony). Increased use will result in increased contamination unless the septic treatment technology is enhanced, if this enhancement is even feasible.

The applicant has not proposed use restrictions that would ensure there would be no increased wastewater discharge. The applicant has not proposed to enhance the wastewater treatment system to offset any increases in groundwater contamination. Therefore, staff believes the applicant has failed to demonstrate that the alteration of the Bath House to include a bedroom will not adversely impact the neighborhood by increasing groundwater contamination. Staff recommends the following conditions of any decision to ensure the use will not increase groundwater contamination:

- 3) *Overnight occupancy of structures on the property is prohibited unless such use is otherwise lawfully established.*

- 4) *Any recreational vehicle use of the property shall be conducted in accordance with DCC 18.116.095.*

If the dock has to go, do we specify how (timing)?

If the Bathhouse has to go do we specify how (timing)?

#### Attachments

1. Decision matrix.