



Community Development Department

Planning Division Building Safety Division Environmental Health Division

117 NW Lafayette Avenue Bend Oregon 97701-1925
(541)388-6575 FAX (541)385-1764
<http://www.co.deschutes.or.us/cdd/>

STAFF REPORT

The Deschutes County Hearings Officer will hold a public hearing on November 10, 2015, at 6:30 p.m. in the Barnes and Sawyer Rooms of the Deschutes Services Center, 1300 NW Wall Street, Bend, to consider the following request:

FILE NUMBER: 247-15-000221-CU

SUBJECT: The applicant requests approval to complete the construction of an agricultural pond located in the Exclusive Farm use and Flood Plain zones and in an area mapped as wetlands on the National Wetlands Inventory.

APPLICANT/OWNER: KG Ranch, LLC
26720 Horsell Road
Bend, OR 97701

ATTORNEY: Myles Conway
Marten Law
404 SW Columbia, Suite 212
Bend, OR 97702

LOCATION: The property is identified on the County Assessor's Map 17-14-13, Tax Lot 800 and has an assigned address of 26720 Horsell Road, Bend.

STAFF CONTACT: Will Groves, Senior Planner

I. APPLICABLE CRITERIA:

Title 18, Deschutes County Zoning Ordinance
Chapter 18.04. Title, Purpose and Definitions
Chapter 18.16 Exclusive Farm Use Zone
Chapter 18.96. Flood Plain Zone – FP Zone
Chapter 18.116. Supplementary Provisions
Chapter 18.128. Conditional Use
Title 22, Deschutes County Development Procedures Ordinance

II. BASIC FINDINGS:

A. Location: The subject property is identified as Tax Lot 800 on Deschutes County Assessor's Map 17-14-13 and has an assigned address of 26720 Horsell Road, Bend.

B. Zoning and Plan Designation: The subject property is zoned FP (Flood Plain) and EFU-AL (Exclusive Farm Use – Alfalfa Subzone).

C. Site Description: The subject property is rectangular, approximately 120 acres in size, and is developed with a dwelling. Approximately 50 acres have been altered from the natural juniper scrub woodland in support of grazing and crop production on site. An impoundment was constructed prior to 1953 to pond Central Oregon Irrigation District (COID) irrigation water that would otherwise flow north off the property in the “Dry Creek” channel. The applicant states that the historic pond varied in size from 2.6 to 6.2 acres.

The owner/applicant expanded the pond to 9.02 acres with a large berm surrounding the pond. Although the expanded pond has the elongated shape, turn-around islands, and boat access ramp typical of a water-skiing facility, no recreational use of the pond is proposed at this time. Approximately 35 acres of the property are mapped Flood Plain and this includes much of the project area. Approximately 12-acres of the subject property are mapped as wetland on the National Wetland Inventory, and this includes much of the project area as well.

D. Proposal: The application materials state:

This application has been prepared to provide the information necessary to obtain land use approval permitting the expansion of an existing farm pond located on the subject property. The applicant seeks to expand its existing pond to provide for the multi-purpose storage of a sufficient volume of irrigation water to be used for both existing irrigation uses and planned agricultural industrial uses. Approximately one-half of the proposed pond expansion areas lie within an area designated by the Federal Emergency Management Agency ("FEMA") as the Dry River flood plain. This area of the subject property has been zoned Flood Plain (FP) under DCC Chapter 18.96.

In addition, a portion of the expanded pond area is referenced on the U.S. Fish and Wildlife Service, National Wetland Inventory map ("NWI"). As a general matter, both the EFU and FP zones require conditional use authorization for grading and excavation activities conducted in streams, rivers and areas of wetland or flood plain. See DCC 18.16.030(T) and 18.96.040(F). However, the code specifically exempts accepted farming practices from the requirements of DCC Title 18. DCC 18.04.030 provides that, "excavation, grading and fill and removal as used in Title 18, these activities shall not include practices that constitute accepted farming practices as defined in ORS chapter 215."

As outlined in greater detail below, the excavation, grading, fill and removal at issue in this application were conducted to facilitate expanded agricultural operations on the subject property and constitute accepted farming practices under ORS 215.203. As such, it is the applicant's position that conditional use authorization is not required in connection with the proposed pond expansion. In the alternative and to the extent required by applicable law, the applicant offers substantial evidence to support the issuance of a conditional use permit authorizing excavation, grading and fill within the EFU and FP zones in accordance with applicable "approval standards.

Staff understands this application to address the earthmoving required for the pond expansion as well as the piping of the existing irrigation ditch, also located in mapped wetlands and floodplain. Staff also understands that the applicant intends to seal the pond and staff recommends the Hearings Officer request additional information on the material to be used, total volume, and timing of this project. It is unclear if the piping necessary to connect the future greenhouses to the pond is included in this review. It is also unclear if an 18.16.025(I), facility for the processing of farm crops, is included in this proposal. Staff recommends the Hearings Officer request additional information on these issues.

E. Surrounding Zoning and Land Uses: The area surrounding the subject property consists mostly of agricultural properties on lands zoned EFU-AL with FP zoning along the “Dry River¹”. Surrounding uses include crop productions, pasture, rangeland, BLM lands and rural residences.

F. Public Agency Comments:

Deschutes County Road Department: This property is accessed by SW Austin Road which is a local access road that connects with Horsell Road, a County maintained Road. Austin Road is a public right of way that was dedicated and accepted as a public right of way by the Board of County Commissioners in September of 2013, prior to that the road was located within a tax lot owned by Deschutes County. The Road Department has met with Dave Fox and Rich Williams, two residents that live off of Austin Road in Crook County on two separate occasions:

1. 09/06/2013: Teresa Rozic, Property Manager at that time and I met with Mr. Fox and Mr. Williams to discuss the maintenance of Austin Road. At the time of this meeting, Austin Road was located within a County owned tax lot and was not a dedicated public right of way. I have attached notes from this meeting.
2. 01/14/2015: I met with Mr. Fox and Mr. Williams again to discuss the following:
 - a. Use of Austin Road by properties located off of a private easement that runs parallel to Austin Road
 - b. Why the road was dedicated to the public by Deschutes County in September 2013
 - c. Concerns the two of them had concerning the irrigation/ski pond that KG Ranch was in the process of building. The main concern they had concerning this pond was the possibility of increased traffic and maintenance of the road. Austin Road is a local access road and it is

¹ The Dry River is an intermittent tributary, 88 miles (142 km) long, of the Crooked River in the U.S. state of Oregon. The stream arises near Hampton Buttes north of Hampton and U.S. Route 20 between Brothers and Riley in the Oregon High Desert. Beginning in eastern Deschutes County near its border with Crook County, it flows generally northwest along the Deschutes–Crook county line, crossing briefly into Crook County before turning slightly south and returning to Deschutes County. Along these upper reaches, it flows roughly parallel to the highway, under which it passes several times before turning sharply north near the Horse Ridge Research Natural Area, 19 miles (31 km) southeast of Bend. Continuing north and re-entering Crook County, it passes under Powell Butte Highway, Oregon Route 126 (Ochoco Highway), and Oregon Route 370 (O'Neil Highway) before entering the Crooked River 34 miles (55 km) from the larger stream's confluence with the Deschutes River. Source: [https://en.wikipedia.org/wiki/Dry_River_\(Crooked_River\)](https://en.wikipedia.org/wiki/Dry_River_(Crooked_River))

maintained by the residents living alongside the road. I have attached notes from this meeting.

It is my understanding that since this application is only for an irrigation pond and not a ski pond or other land use that would generate additional traffic on Austin Road, road improvements and/or a maintenance agreement for Austin Road would not apply in this situation.

Deschutes County transportation Planner: I have reviewed the transmittal materials for 247-15-000221-CU to expand an existing agricultural pond from 2.6 acres to 9.02 in the Exclusive Farm Use (EFU) zone at 26270 Horsell Road, aka 17-14-13, Tax Lot 800.

The most recent edition of the Institute of Traffic Engineers (ITE) Trip Generation Handbook indicates a single-family residence (Land Use 210) generates an average of approximately 10 daily weekday trips. Deschutes County Code (DCC) at 18.116.310(C)(3)(a) states no traffic analysis is required for any use that will generate less than 50 new weekday trips. The proposed land use will not meet the minimum threshold for additional traffic analysis.

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$3,852 per p.m. peak hour trip. However, as this is agricultural pond will not consume any additional road capacity, no transportation SDCs apply.

Central Oregon irrigation District: COID submitted a comment email dated October 19, 2015 that is incorporated herein by reference.

The following agencies did not respond or had no comments as of the writing of this Staff Report: Deschutes County Environmental Soils, Deschutes County Code Enforcement, Watermaster, Oregon Department of Fish and Wildlife, Department of State Lands, Deschutes County Transportation Planner, US Army Corps of Engineers, US Fish and Wildlife Service, and Oregon Department of Agriculture.

- G. Public Comments:** As of the date of this staff report, no comments were received from the public.
- H. Notice:** A notice of the public hearing was mailed on October 13, 2015 and published in The Bulletin. Comments from the public and from public agencies are detailed above.
- I. Lot of Record:** The subject property is a legal lot of record, as it was issued building and septic permits in 1979.
- J. Review Period:** The subject application was submitted on April 27, 2015. An incomplete letter was mailed April 15, 2015 and the applications were deemed complete by the Planning Division on August 31, 2015. The applicant has also agreed to toll the 150-day clock from October 20, 2015 through November 10, 2015.

III. CONCLUSIONARY FINDINGS:

Title 18, Deschutes County Zoning Code

A. Chapter 18.04, TITLE, PURPOSE AND DEFINITIONS

1. Section 18.04.030. Definitions.

"Agricultural use" means any use of land, whether for profit or not, related to raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof not specifically covered elsewhere in the applicable zone. Agricultural use includes the preparation and storage of the products raised on such land for human and animal use and disposal by marketing or otherwise. Agricultural use also includes the propagation, cultivation, maintenance and harvesting of aquatic species. Agricultural use does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees.

FINDING: Staff notes that "Agricultural use" is used in place of "Farm use" in DCC 18.96. The potential salience of this difference is discussed below, under DCC 18.96.

"Excavation, grading and fill and removal" as used in DCC Title 18, these activities shall not include practices that constitute accepted farming practices as defined in ORS chapter 215.

FINDING: Staff believes that this definition provides a broad exemption for "excavation, grading and fill and removal" practices that constitute accepted farming practices as defined in ORS Chapter 215.

ORS 215.203 Zoning ordinances establishing exclusive farm use zones; definitions.

(2)(c) As used in this subsection, "accepted farming practice" means a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use.

The LUBA "Headnotes" for *Ehler v. Washington County*, 52 Or LUBA 663 (2006), state:

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Any inquiry into what is a customarily accepted agricultural activity necessarily requires whether other similar farms have engaged in the proposed activity. A hearings officer does not err in considering the absence of evidence that other farms have placed 100,000 cubic yards of fill in a 13-acre area to prepare the land for cultivation.

Staff believes that, in order to determine if the project is an "accepted farming practice", the Hearings Officer will need to determine if other similar farms have engaged in the project activity. Staff believes that the creation and maintenance of irrigation canals, piping of irrigation facilities, and ponds to regulate irrigation water are accepted farming practices engaged in by many farms.

The applicant's proposal to use the pond as part of an evaporative cooling and heat exchange system for the proposed greenhouses is a less common farm practice. While staff believes that the heating/cooling system is likely an "accepted farming practice", staff recommends the Hearings Officer request additional information to confirm that it is a common practice used by "farms of a similar nature".

Staff notes that that the high berm surrounding the pond and size/configuration of the pond are two design elements that may not be typical of agricultural ponds. Staff is uncertain if consideration of these design elements is required in determining if the pond, as designed, is a farming practice common to farms of a similar nature.

To the extent the sizing of the pond is at issue, the applicant has provided a water budget for the farm. In emails dated October 14 and 15, Staff asked the applicant for clarification on projected water consumption at the site. The Hearings Officer may find additional applicant provided calculations, both on the necessary scale of the irrigation facility and the needs of the heat exchange system, helpful in making a determination if the lake is sized to the agricultural need of the property.

The applicant states that the property has 11 acres of COID water rights. In prior discussions with the applicant, COID "industrial" water rights were discussed as well. COID identifies 22.35 acre equivalent of industrial water in a submitted comment. Staff recommends the Hearings Officer request additional information to confirm if and how "industrial" water will be used in this proposal and if the designation of the water right type has any bearing on the analysis of accepted farming practices.

"Farm use" means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm Use" also includes the current employment of the land for the primary purpose of obtaining a profit in money by stabling or training equines, including but not limited to, providing riding lessons, training clinics and schooling shows. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described above. "Farm use" does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in ORS 215.203(3). Current employment of the land for farm use also includes those uses listed under ORS 215.203(2)(b).

FINDING: The applicant describes on-site farm use as including 11-acres of potato production and cattle grazing. The applicant has also proposed future commercial greenhouse production supported by a heat exchange/cooling system. Staff believes that the agricultural production

plainly falls within the definition of "farm use". The applicant notes that ORS 215-203(2)(b) provides that:

(b) "Current employment" of land for farm use includes:

...

(G) Water impoundments lying in or adjacent to and in common ownership with farm use land;

Staff, therefore, also believes that the water impoundment function of the pond is included as part of the current employment of the subject property for farm use.

"Fill and removal" means 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.

FINDING: Staff notes "Excavation, grading and fill and removal" and "Fill and removal" have separate definitions in DCC 18.04.030. "Excavation, grading and fill and removal" is a use category in DCC 18.96 while "Fill and removal" is a category of specific use standards in DCC 18.128 (See 18.128.040 and .270). Staff believes the drafters of these definitions intended to exempt accepted farming practices as defined in ORS chapter 215 from all Title 18 references to excavation, grading and fill and/or removal. As such, staff believes that "Fill and removal", as a defined category also excludes accepted farming practices as defined in ORS chapter 215. Staff requests the Hearings Officer make findings on this issue.

"Surface mining" means

A. Includes:

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

B. Does not include:

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

FINDING: Staff believes the project does not include “surface mining”. Although the project includes “removal of the overburden and extraction of natural mineral deposits”, it falls under the exceptions for “excavation or grading operations conducted in the process of farming” and “other on site construction”. See the Hearings Officer’s findings in 247-14-000-238-PS, as adopted by the Board, for additional context.

"Wetland" means 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.

FINDING: The subject property and project area includes lands mapped as wetland on the National Wetland Inventory (NWI), Horse Butte map. With regard to this definition of “wetland”, staff believes that there are lands on the subject property that meet the definition quoted above. Portions of the subject property have been flooded by irrigation water since 1946.

The Borine “Wetland Delineation/Determination” included in the application materials states:

Flooding during the summer months created artificial wetlands in the PABFh and PEMFh NWI mapped wetlands as both have hydrophytic vegetation, hydric soils, and wetland hydrology. The PEMAh NWI mapped wetland did not develop wetland indicators. For determining wetland characteristics lost by pond construction and irrigation water management the comparison of remaining sites to those with similar soils, vegetation, and hydrology is appropriate and an acceptable procedure for wetland identification.

Two remaining artificial wetlands were identified and are labeled AW-1 and AW-2. These two wetlands will no longer exist as wetland hydrology has been removed by irrigation water management and new pond construction. Hydrophytic vegetation and hydric soil indicators still remain at this time.

Staff reads this report section to say that, prior to the expansion of the pond, areas mapped PABFh and PEMFh on the NWI were “wetlands” as they were, “...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.” Staff notes that this definition does not take into consideration the cause or source of the inundating water.

The construction of the pond buried much of this “wetland” area and left AW-1 and AW-2 as isolated remnant wetlands. Staff, therefore, believes the property and project area includes current and buried former wetlands, under this definition. A second question of what constitutes a wetland, as protected by relevant code provisions and the Goal 5 inventory, is discussed in detail below.

The Comprehensive Plan describes wetlands as:

Wetlands are those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, under normal conditions, a prevalence of vegetation typically adapted for life in saturated soil conditions. Deschutes County Ordinance 92-045 adopted all wetlands identified on the U. S.

Fish and Wildlife Service National Wetland Inventory (NWI) Maps as the Deschutes County wetland inventory. Additionally, Deschutes County Ordinance 2011-008 adopted a Local Wetland Inventory (LWI) covering 18,937 acres in South Deschutes County. These mapped wetlands are subject to County, state and federal fill and removal regulations.

The NWI Map shows an inventory of wetlands based on high-altitude aerial photos and limited field work. While the NWI can be useful for many resource management and planning purposes, its small scale, accuracy limitations, errors of omission that range up to 55 percent (existing wetlands not shown on NWI), age (1980s), and absence of property boundaries make it unsuitable for parcel-based decision making. An LWI for areas in addition to South Deschutes County would greatly improve Deschutes County's ability to conserve wetland resources, which are vital to maintaining water quality and healthy fish and wildlife populations in the Upper Deschutes basin. Fish species dependent on riparian and wetland areas in the County include: Bull Trout, Redband Trout, and Summer Steelhead.

With the exception of narrowly defined riparian buffers (100 ft from top of bank for all Class 1 and Class 2 streams), Deschutes County does not protect wetlands; instead development activities proposed in a NWI are required to initiate a land-use procedure and notify the Oregon Department of State Lands (DSL). According to the County's zoning requirements, no person shall fill or remove any material or remove any vegetation, within the bed and banks of any stream or river or in any wetland, unless approved as a conditional use or exception. All necessary state and federal permits must be obtained as condition of approval.

Staff is uncertain, when Title 18 refers to wetlands, if it is referring to those lands A) meeting the 18.04.030 definition of wetlands or B) mapped areas shown on the NWI and LWI wetland inventories. It may be also referring to some set of these lands, such as:

- All lands meeting either "A" or "B"
- Only lands meeting both "A" and "B"
- Only "B" lands also meeting "A"
- Only "A" lands also meeting "B"

The applicant also references a DSL letter regarding wetlands on the subject property and the Army Corps of Engineers Wetlands Delineation Manual. Staff is uncertain if either of these references have a bearing on the meaning in Title 18, where "wetlands" are defined and included in a Goal 5 inventory.

As a matter of policy, staff has ceased to treat NWI/LWI mapped lands as wetlands where DSL has approved a wetland delineation² or determination demonstrating that some NWI/LWI mapped lands do not meet the DSL definition of wetland. The Hearings Officer appears to follow this policy in prior decisions, including in CU-05-63, for example. Staff is uncertain if this policy is based on a theory that the DSL approved wetland delineation or determination:

² See OAR 141-090-0005 - *ADMINISTRATIVE RULES FOR WETLAND DELINEATION REPORT REQUIREMENTS AND FOR JURISDICTIONAL DETERMINATIONS FOR THE PURPOSE OF REGULATING FILL AND REMOVAL WITHIN WATERS OF THE STATE*

- 1) Removes the delineated upland from “wetlands” as defined in 18.04.030 and the Goal 5 inventory, or
- 2) Removes the delineated upland from “wetlands” as defined in 18.04.030, with no need to change the Goal 5 inventory, or
- 3) Removes the delineated upland from “wetlands” from the Goal 5 inventory.

It is unclear if the Goal 5 inventory has a “built-in” provision for site specific refinement or could only be changed by ordinance. As an additional alternative, it is possible that a DSL approved wetland delineation or determination does not remove the land from the Goal 5 inventory, but development of delineated upland tacitly compiles will all the requirements of DCC 18.128.270.

To the extent a DSL letter can remove land from the Title 18 wetland requirements, the present case is unusual in that the June 18, 2015 DSL letter does not delineate wetland from upland, but rather states that the wetlands on the site “are not subject to state removal-fill permit requirements because they are considered exempt artificially created wetlands and ponds”. This includes a citation to OAR 141-085-515(7)(d), which specifies:

(7) *Exempt Artificially Created Wetlands and Ponds. Artificially created wetlands and ponds created entirely from upland, regardless of size, are not waters of this state if they are constructed for the purpose of:*

...

(d) *Agricultural crop irrigation or stock watering;*

This means that wetlands on the subject property are not waters of the state where DSL has jurisdiction under OAR 141-085-0510.

OAR 141-085-0510

Definitions

The following definitions are used in addition to those in ORS 196.600 to 196.990.

...

(95) *“Waters of This State” means all natural waterways, tidal and non-tidal bays, intermittent streams, constantly flowing streams, lakes, wetlands, that portion of the Pacific Ocean that is in the boundaries of this state, all other navigable and non-navigable bodies of water in this state and those portions of the ocean shore, as defined in ORS 390.605, where removal or fill activities are regulated under a state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Control Act, as amended.*

Staff notes wetland is also defined at OAR 141-085-0510(101) as:

(101) *“Wetlands” means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.*

Staff is uncertain what impact the DSL letter has, if any, on the Title 18 requirements for wetlands.

Additionally, the on-site wetlands in this case appear only to exist due to irrigation water. Staff can find no prior cases or other guidance on whether such man-made wetlands are afforded any protections or different protections from natural wetlands under Title 18.

In summary, Staff requests the Hearings Officer make findings on what constitutes a wetland for the purposes of Title 18 and through what process, if any, NWI/LWI mapped lands might be removed from the protections of DCC 18.128.270.

B. Chapter 18.16, EXCLUSIVE FARM USE ZONES

1. Section 18.16.020, Uses Permitted Outright.

The following uses and their accessory uses are permitted outright:

A. *Farm use as defined in DCC Title 18.*

FINDING: At the outset, staff notes that the provisions of DCC 18.16 only apply to the portions of the subject property zoned EFU and not FP. This zoning boundary divides the constructed pond northwest to southeast.

As discussed above, under the definition of “Farm use”, staff believes that on-site farm use includes 11-acres of potato production and cattle grazing. The applicant has also proposed future commercial greenhouse production supported by a heat exchange system. Staff believes that the agricultural production plainly falls within the definition of “farm use”. Staff also believes that the water impoundment function of the pond is included as part of the current employment of the subject property for farm use. Staff requests the Hearings Officer make specific findings on the impact, if any, the size and/or design of the water impoundment might have on this analysis.

L. *Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.*

FINDING: Staff believes that the proposed use does not fall within this category, as the facility is not owned or “operated by an Irrigation District” and the significant expansion of the pond goes well beyond, “operation, maintenance, and piping of existing irrigation systems.”

2. Section 18.16.025, Uses Permitted Subject to the Special Provisions Under DCC Section 18.16.038 or DCC Section 18.16.042 and a Review Under DCC Chapter 18.124 where applicable.

I. *A facility for the processing of farm crops, or for the production of biofuel as defined in ORS 315.141, if the facility is located on a farm operation that provides at least one-quarter of the farm crops processed at the facility, or an establishment for the slaughter, processing or selling of poultry or poultry products pursuant to ORS 603.038.*

- a. ***If a building is established or used for the processing facility or establishment, the farm operator may not devote more than 10,000 square feet of floor area to the processing facility or establishment, exclusive of the floor area designated for preparation, storage or other farm use.***
- b. ***A processing facility or establishment must comply with all applicable siting standards but the standards shall not be applied in a manner that prohibits the siting of the processing facility.***
- c. ***The County shall not approve any division of a lot or parcel that separates a processing facility or establishment from the farm operation on which it is located.***

FINDING: The applicant has previously discussed with staff a produce washing facility and the submitted figures show “Proposed Produce Wash Water Irrigation” and “Approx. Area of Proposed Produce Wash Water Pond”. Staff believes that such a facility for the processing of off-site grown produce is not included with the current proposal and would require an application for an administrative determination under 18.16.025(I). Staff recommends the Hearings Officer request additional information to determine if a facility for the processing of farm crops is included in this proposal or if the pond has been sized or designed to support processing facility use.

3. Section 18.16.030, Conditional Uses Permitted High Value and Non-high Value Farmland.

- T. ***Excavation, grading and fill and removal within the bed and banks of a stream or river or in a wetland.***

FINDING: Although most of the NWI mapped wetland fall within the Flood Plain zoned portion of the property, approximately 0.03 acres are located in EFU zoned areas. In order to determine if the project is a conditional use under this criterion, the Hearings Officer will need to determine if the establishment of the pond in this NWI mapped wetland area constitutes “excavation, grading and fill and removal” as defined in DCC 18.04.030, as discussed above, and if the mapped wetland is a “wetland” for the purposes of this criterion. The questions of what constitutes a wetland, as protected by relevant code provisions and the Goal 5 inventory, were discussed in detail above.

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

FINDING: Staff believes the project does not include “surface mining”. Although the project includes “removal of the overburden and extraction of natural mineral deposits”, it falls under the exceptions for “excavation or grading operations conducted in the process of farming” and “other on site construction”. In addition, it is not “in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District”. See the Hearings Officer’s findings in 247-14-000-238-PS, as adopted by the Board, for additional context.

4. Section 18.16.031. Conditional Uses on Non-high Value Farmland Only.

D. Private parks, playgrounds, hunting and fishing preserves and campgrounds.

FINDING: The applicant has indicated that no recreational use of the pond is proposed at this time and that this would be addressed in a future conditional use application for a private park. Staff recommends the Hearings Officer include a condition of any approval precluding recreational use of the lake, including but not limited to swimming, water skiing, and boating unless explicitly approved by a subsequent land use decision.

If the Hearings Officer finds that some recreation use of the pond is permissible without a private park approval, staff believes such a finding would need to be made with reference to the Board's decision in 247-14-000-238-PS, DCC 18.116.040, and the DCC 18.04.030 definition of "accessory use".

5. Section 18.16.040, Limitations on Conditional Uses.

A. Conditional uses permitted by DCC 18.16.030 may be established subject to ORS 215.296 and applicable provisions in DCC 18.128 and upon a finding by the Planning Director or Hearings Body that the proposed use:

FINDING: At the outset, staff notes that these criteria only apply to conditional uses. If the Hearings Officer finds that no conditional uses in the EFU zone are proposed, these criteria do not apply.

1. **Will not force a significant change in accepted farm or forest practices as defined in ORS 215.203(2)(c) on surrounding lands devoted to farm or forest uses; and**
2. **Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use; and**

FINDING: There are no nearby forest practices, as juniper is not a merchandisable tree species. Surrounding farm practices include hay and livestock production. As the pond is significantly setback from property lines, staff believes the on-site impoundment of water would not have any possible adverse impact on farm practices on surrounding lands and would not increase the cost of accepted farm practices on surrounding lands devoted to farm use.

3. **That the actual site on which the use is to be located is the least suitable for the production of farm crops or livestock.**

FINDING: The pond is located across two soil types according to available NRCS data:

- 27A, Clovkamp loamy sand (0-3% slopes). This soil type is comprised of 85% Clovkamp soil and similar inclusions, and 15% contrasting inclusions. The Clovkamp soil is somewhat excessively drained, with a rapid over moderate permeability and an available water capacity of about 5 inches. Major use for this soil type is livestock grazing and irrigated cropland. Native vegetation includes western juniper, mountain big sagebrush, antelope bitterbrush. The soil capability

rating for the Clovkamp soil is 6s/3s. This soil type is considered high-value farmland when irrigated and makes up approximately 25% of the property.

- 59C, Gosney-Rock outcrop-Deskamp complex 0-15% slopes. This soil type is comprised of 50% Gosney soil and similar inclusions, 25% Rock outcrop, 20% Deskamp soil and similar inclusions, and 5% contrasting inclusions. The Gosney soil is somewhat excessively drained, with a rapid permeability and an available water capacity of about one inch. The Deskamp soil is somewhat excessively drained with a rapid permeability and an available water capacity of about 3 inches. Major use for this soil type is livestock grazing. Native vegetation includes western juniper, mountain big sagebrush, blue bunch wheatgrass, Thurber needlegrass, Sandberg bluegrass, needleandthread, Idaho fescue, western needle grass. The soil capability rating for the Gosney soil is 7e with or without irrigation; This soil capability rating for the Rock outcrop is 8s without irrigation, with no rating with irrigation. The Deskamp soil has a rating of class 6e without irrigation and 4e with irrigation. This soil type is not considered high-value farmland when irrigated and makes up approximately 75% of the property.

The applicant states that the excavated area has not been historically utilized for the production of farm crops or the grazing of livestock. However, based on review of aerial photography from 1953 to 2014, staff believes that farm use has occurred on the portion of the property northeast of the present home site on 27A and 59C soils that is currently under the pond. This area was partially cleared in 1953, expanded south in 1973, expanded north and possibly irrigated in 1985, and cleared and partially irrigated in 2000, 2003, and 2005. Given that much of the property is 59C soils with no history of clearing or irrigation, it is unlikely the prime if irrigated, historically farmed, land northeast of the homesite are the least suitable location on the property for the production of farm crops or livestock. However, staff again notes that these criteria only apply if the Hearings Officer finds that the project includes a conditional use in the EFU zone.

6. Section 18.16.070, Yards.

- A. ***The front yard shall be a minimum of: 40 feet from a property line fronting on a local street, 60 feet from a property line fronting on a collector street, and 100 feet from a property line fronting on an arterial street.***
- B. ***Each side yard shall be a minimum of 25 feet, except that for a nonfarm dwelling proposed on property with side yards adjacent to property currently employed in farm use, and receiving special assessment for farm use, the side yard shall be a minimum of 100 feet.***
- C. ***Rear yards shall be a minimum of 25 feet, except that for a nonfarm dwelling proposed on property with a rear yard adjacent to property currently employed in farm use, and receiving special assessment for farm use, the rear yard shall be a minimum of 100 feet.***
- D. ***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.***

FINDING: The property fronts on SW Austin Road, a rural local road. Required setbacks are 40 feet (front, south) and 25 feet (side and rear). The pond and berm are setback over 50 feet from any property line. Staff believes the berm is subject to setback requirements, as it an

obstruction above the ground. (See DCC 18.04.030 definition of “yard”³ and the Hearings Officer’s analysis of “structure” in 247-14-000-238-PS, p. 16)

7. Section 18.16.080, Stream Setbacks.

To permit better light, air, vision, stream pollution control, protection of fish and wildlife areas and preservation of natural scenic amenities and vistas along streams and lakes, the following setbacks shall apply:

- A. All sewage disposal installations, such as septic tanks and septic drainfields, shall be set back 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 health, the Planning Director or Hearings Body may permit the location of these facilities closer to the stream or lake, but in no case closer than 25 feet.***
- 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 to the ordinary high water mark.***

FINDING: Staff is uncertain if these setback provisions apply to the pre-existing irrigation pond, new man-made lake, or the Dry River. While Dry River is not recognized in the Comprehensive Plan as a Goal 5 Riparian Inventory (Section 5.3.2.), it is recognized in Table 5.3.3 as a Goal 5 Floodplain adjacent to rivers and streams. If these setback provisions apply, an ordinary high water mark for the Dry River would need to be established. Staff requests the Hearings Officer make findings on these issues.

The applicant has stated that the house and existing septic system are located over 100 feet from the new water impoundment.

C. CHAPTER 18.96, FLOOD PLAIN ZONE

1. 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

³ DCC 18.04.030 -"Yard" means an open space on a lot which is unobstructed from the ground upward except as otherwise provided in DCC Title 18.

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.

FINDING: The County Flood Plain (FP) Zone includes all areas designated as “Special Flood Hazard Areas” on the Federal Flood Insurance Rate Maps (FIRM). The FIRM map No. 41017C0750E, dated September 28, 2007, indicates that portions of the project area are located within the mapped 100-year flood plain. Staff believes that the provisions of this chapter apply to the portion of the project in the Flood Plain Zone.

2. Section 18.96.030, Uses Permitted Outright.

The following uses and their accessory uses are permitted outright

A. *Agricultural use conducted without establishing or utilizing a structure. For purposes of DCC 18.96.030(A), a "structure" does not include a boundary fence as long as such fence is designed to impede as little as possible the movement of floodwaters and flood carried material.*

FINDING: Staff notes that this criterion refers to “agricultural use” rather than “farm use”, these two definitions are similar except that farm use includes:

....
“Farm use” includes the on-site construction and maintenance of equipment and facilities used for the activities described above

....
Current employment of the land for farm use also includes those uses listed under ORS 215.203(2)(b).

While “farm use” expressly includes on-site facilities and the ORS 215.203(2)(b)(G), “agricultural use” does not. Therefore, staff is uncertain if the construction of the pond constitutes an outright agricultural use.

Staff reads the Hearings analysis of “structure” in 247-14-000-238-PS, as affirmed by the Board to potentially include development such as the pond and berm. However, staff notes that this criterion is intended to implement FEMA requirements. FEMA defines structure as:

For floodplain management purposes, a structure is a walled and roofed building, including a gas or liquid storage tank, that is principally above ground, as well as a manufactured home. The terms "structure" and "building" are interchangeable in the National Flood Insurance Program (NFIP). Residential and non-residential structures are treated differently. A residential building built in a floodplain must be elevated above the Base Flood Elevation (BFE). Non-residential buildings may be elevated or floodproofed.⁴

Staff recommends the Hearings Officer find the berm is not a “structure” as used in DCC 18.96. Staff recommends, however, that the Hearings Officer rely on the DCC 18.04.030 definition of structure for the purposes of review under other Chapters of Title 18.

⁴ <http://www.fema.gov/structure>

3. Section 18.96.040, Conditional uses permitted.

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

- 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.***

FINDING: In order to make findings under this criterion, the Hearings Officer will need to determine if any portion of the project includes “excavation, grading and fill and removal”, as defined in DCC 18.04.030. This definition is discussed in detail above.

If the pond project is found to fall, wholly or in part, within the “excavation, grading and fill and removal” definition exemption for accepted farming practices, staff requests the Hearings Officer to make specific findings on whether the project activity becomes an implicit outright use, implicitly prohibited (like other uses not listed as conditional or outright uses), or unregulated. Staff believes that the drafters of the code intended to make accepted farming practices in the floodplain zone unregulated or outright uses.

If the project, wholly or in part, includes “excavation, grading and fill and removal”, staff notes that this activity plainly occurred within an “area of special flood hazard identified in DCC 18.96.020” and, as such, would be a conditional use in in the FP zone.

It is unclear if the “Dry River”, as shown on the USGS topo for the subject property and which the applicant characterizes as a “remnant paleo-channel from glacial activity during the Pleistocene Era”, constitutes a river for the purposes of this criterion. Aerial photography shows an irrigation water wetted channel extending north from the subject property approximately 4 miles to the County line and beyond that generally corresponds with the USGS topo making for “Dry River”. Staff requests the Hearings Officer make findings on whether the project impacted the bed and banks of a “river” under this criterion.

The questions of what constitutes a wetland, as protected by relevant code provisions and the Goal 5 inventory, are discussed in detail above. Staff requests the Hearings Officer to make findings whether the project includes an 18.96.040(F) use.

- 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.***

FINDING: The applicant has indicated that no recreational use of the pond is proposed at this time and that this would be addressed in a future conditional use application for a private park. Staff recommends the Hearings Officer include a condition of any approval precluding recreational use of the lake, including but not limited to swimming, water skiing, and boating unless explicitly approved by a subsequent land use decision.

If the Hearings Officer finds that some recreational use of the pond is permissible without a private park approval, staff believes such a finding would need to be made with reference to the Board's decision in 247-14-000-238-PS, DCC 18.116.040, and the DCC 18.04.030 definition of "accessory use".

- 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.***

FINDING: Staff requests the Hearings Officer make findings if the pond and/or berm constitute a structure for the purposes of this criterion, based on the discussion of the 18.04.030 definition and FEMA definition, provided above.

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

FINDING: Staff believes the project does not include "surface mining". Although the project includes "removal of the overburden and extraction of natural mineral deposits", it falls under the exceptions for "excavation or grading operations conducted in the process of farming" and "other on site construction". In addition, it is not "in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District". See the Hearings Officer's findings in 247-14-000-238-PS, as adopted by the Board, for additional context.

4. Section 18.96.060, Limitations on Conditional Uses.

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

FINDING: Staff notes that these provisions only apply if the Hearings Officer finds that the project includes a conditional use in the FP zone.

- 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 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.***

FINDING: The subject property contains no mapped floodway.

- 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.***

FINDING: Staff requests the Hearings Officer make findings if the pond and berm constitute a structure for the purposes of this criterion and, if so, require the applicant to demonstrate “that no alternative exists on the subject property which would allow the structure to be placed outside of the flood plain”.

- B. ***No subdivision or partition shall be allowed which creates the potential for additional residential dwellings in the flood plain.***

FINDING: No subdivision or partition is proposed.

- D. ***All necessary federal, state and local government agency permits shall be obtained.***

FINDING: Staff recommends the Hearings Officer include this requirement as a condition of any approval, if this criterion is found to be applicable.

5. Section 18.96.070, Application for Conditional Use.

All records of any application for a conditional use permit and all certification of elevations shall be maintained in the records of the Community Development Department for public inspection. An application for a conditional use permit in the Flood Plain Zone shall, at a minimum, contain the following information:

FINDING: Staff notes that these provisions only apply if the Hearings Officer finds that the project includes a conditional use in the FP zone. Staff believes the applicant submitted material meet these requirements, except as noted below.

- A. ***A detailed explanation of why it is necessary to conduct the proposed use in the Flood Plain Zone. Where base flood elevation data is not available from the Flood Insurance Study or from another authoritative source, it shall be generated and submitted with the application for subdivision proposals and other proposed developments which contain at least 50 lots or five acres (whichever is less).***

FINDING: Staff notes that base flood elevation data is not available from the Flood Insurance Study or from another authoritative source for the subject property. Since the pond is over 5 acres, staff believes the applicant is required to submit base flood elevation data developed in accordance with *The Zone A Manual: Managing Floodplain Development in Approximate Zone A Area*⁵. This criterion also requires a detailed explanation of why it is necessary to conduct the proposed use in the Flood Plain Zone.

- B. ***A site plan, drawn to scale and accompanied by drawings, sketches and descriptions which describe and illustrate the proposed use. This site plan shall include, at a minimum, existing and proposed site contours in relation to the base flood elevation, existing and***

⁵ <http://www.fema.gov/library/viewRecord.do?id=2215>

proposed structures, drainage facilities, and an explanation of how erosion will be dealt with during and after construction of the use.

FINDING: Staff believes that this criterion, if applicable, requires the applicant to update the submitted figures with base flood elevation developed under sub-section (A).

- C. *The location of the property relative to the channel of the river or stream.***
- D. *The location of existing and proposed diking or abutments, if any.***
- E. *The elevation of the lowest habitable floor and of any basement floor for any dwelling unit or structure.***
- F. *The elevation to which the structure is to be floodproofed, if applicable.***
- G. *Elevations on the site plan shall be established by a licensed surveyor or engineer, and shall be in relation to mean sea level.***

...

FINDING: The applicant submitted figures appear to be simply based on the USGS topo. Staff is uncertain if the USGS topo elevations, alone and without a survey of the pond/berm, are sufficient to comply with this criterion and requests the Hearings Officer to make findings on this issue.

6. Section 18.96.080, Criteria to evaluate conditional uses.

FINDING: Staff notes that these provisions only apply if the Hearings Officer finds that the project includes a conditional use in the FP zone.

- 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.***

FINDING: Staff believes this criterion will be met if the Hearings Officer finds that applicable provisions of DCC 18.96 have been satisfied, as staff believes these requirements cover all standards established by the Federal Emergency Management Agency. Applicable standards are addressed below.

- B. *Approval to alter or relocate a water course shall require notification to adjacent communities, the Department of Land Conservation and Development and Department of State Lands, prior to any such alteration or relocation and submit evidence to the Federal Insurance Administration. Maintenance shall be provided within the altered and relocated portion of said watercourse so that the flood carrying capacity is not diminished.***

FINDING: The applicant argues that no alteration of a water course is proposed. It is unclear if the "Dry River", shown on the USGS topo for the subject property and which the applicant characterizes as a "remnant paleo-channel from glacial activity during the Pleistocene Era", constitutes a watercourse for the purposes of this criterion. Aerial photography shows an irrigation water wetted channel extending north from the subject property approximately 4 miles

to the County line and beyond that generally corresponds with the USGS topo making for “Dry River”. Staff requests the Hearings Officer make findings on whether the project altered a water course under this criterion.

Staff recommends the applicant provide evidence that the notice required in this criterion has been provided by the applicant to the identified agencies prior to the public hearing, in an abundance of caution.

- 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.***

FINDING: This land use decision shall be based upon findings which relate to the property and existing and proposed structure(s). Staff’s recommended findings do not pertain to the property owner, inhabitants, economic or financial circumstances.

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

FINDING: Staff requests the Hearings Officer make findings if the pond and/or berm constitute a structure for the purposes of this criterion, based on the discussion of the 18.04.030 definition and FEMA definition, provided above.

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

FINDING: To the extent this criterion applies, staff believes the pond and berm are “anchored” in that no flotation, collapse or lateral movement is possible.

- 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.***

FINDING: This criterion only applies to manufactured homes. No manufactured home is proposed.

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

FINDING: To the extent this criterion applies, staff believes the pond and berm are constructed with materials resistant to flood damage. No utility equipment is proposed.

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

FINDING: To the extent this criterion applies, staff believes the pond and berm are constructed using methods and practices that minimize flood damage.

- 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.**

FINDING: The pond and berm contain no 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.**

FINDING: No new water supply or sanitary systems are proposed.

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

FINDING: No below-grade crawlspaces are proposed.

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.**

FINDING: There is no mapped floodway on the property.

- 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.**

FINDING: Staff recommends that the applicant be required as a condition of any approval to demonstrate all necessary federal, state and local government agency permits have been or can be obtained. Staff believes that all other applicable sections of DCC Title 18 have been addressed in this staff report.

5. 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.

FINDING: The FEMA elevation certificate form⁶ states:

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.

Ponds and berms are not eligible for flood insurance, as specified in *National Flood Insurance Program, Answers to Questions About the NFIP*.

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.⁷

Staff has not, to date, required elevation certificates for structures which do not have two or more outside rigid walls and a fully secured roof. Staff believes this criterion does not apply.

6. 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.***

⁶ <https://www.fema.gov/media-library/assets/documents/160>

⁷ http://www.fema.gov/media-library-data/20130726-1438-20490-0889/f084_atq_11aug11.txt

FINDING: The property fronts on SW Austin Road, a rural local road. Required setbacks are 20 feet front (south) and 10 feet sides and 20 feet rear. The pond and berm are setback over 50 feet from any property line.

7. 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.***
- B. ***All structures, buildings or similar permanent fixtures shall be setback 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.***

FINDING: Staff is uncertain if these provisions apply to the pre-existing irrigation pond, new man-made lake, or the “Dry River”. If so, an ordinary high water mark for the Dry River would need to be established. Staff requests the Hearings Officer make findings on these issues.

The applicant has stated that the house and existing septic system are located over 100 feet from the new water impoundment.

8. 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.***

FINDING: The existing main building and accessory buildings cover well under 5 percent of the subject property. No structure on the property exceeds 30 feet in height, as measured from natural grade.

9. 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.

FINDING: No interpretation of FIRM boundaries has been proposed by the applicant.

E. Chapter 18.128, Conditional Uses

1. 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:

FINDING: Staff notes that these provisions only apply if the Hearings Officer finds that the project includes a conditional use in the FP or EFU zone.

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;*

FINDING:

Site: Staff incorporates by reference the site description provided above.

Design: The design of the facility includes a 9.02-acre pond with a large berm surrounding the pond. Although the expanded pond has the elongated shape, turn-around islands, and boat access ramp typical of a water-skiing facility, no recreational use of the pond is proposed at this time. Water is delivered on-site to the pond by a new pipeline system that replaced a pre-existing irrigation ditch. The pond is designed to accommodate a water depth of approximately 6 feet and a storage volume of 39 acre-feet. Excavated materials for the pond expansion were used to construct a berm around the pond.

Operating Characteristics: The pond will store water provided by COID at a maximum depth of approximately 6 feet and a storage volume of 39 acre-feet. That water will be used for onsite crop irrigation, heating and cooling of future greenhouses, and washing of produce.

Staff believes the 120-acre property is a suitable location for agricultural pond in support of accepted farming practices on the property.

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

FINDING: The Deschutes County Road Department reviewed the applicant and commented:

This property is accessed by SW Austin Road which is a local access road that connects with Horsell Road, a County maintained Road. Austin Road is a public right of way that was dedicated and accepted as a public right of way by the Board of County Commissioners in September of 2013, prior to that the road was located within a tax lot owned by Deschutes County.

...

It is my understanding that since this application is only for an irrigation pond and not a ski pond or other land use that would generate additional traffic on Austin Road, road improvements and/or a maintenance agreement for Austin Road would not apply in this situation.

Although the road to the property is seasonally in very rough condition, staff believes the site has adequate access for the expansion of a pond on an agricultural property.

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

FINDING: Staff finds that natural and physical features of the site include juniper-scrub woodlands, cleared areas for agricultural use, and generally level topography. Staff finds that there is nothing about these features that makes the property unsuitable for the proposed use.

Staff believes that this criterion focuses on on-site impacts from natural hazards. Approximately one-quarter of the property is mapped as a Special Flood Hazard Area. Because this area is mapped as an unnumbered A-zone, no base flood depths are provided by FEMA, but may be developed by the applicant in accordance with *The Zone A Manual: Managing Floodplain Development in Approximate Zone A Area*. Without knowing pre- and post- project base flood depths, it is difficult to evaluate if the dwelling is at increased or decreased hazard from flooding, considering the potential depth, duration, timing and velocity of floodwaters. Staff recommends the Hearings Officer review the applicant's response to this criterion and assess if additional information is required to determine if the project exacerbates on-site flooding hazard.

Staff believes that, since the pond is at or below grade and the berm serves no function as a dam that the increased on-site impoundment of water is unlikely to create a new flooding hazard on-site.

On-site natural resource values include the "prime if irrigated" soils in the southern portion of the property. As discussed above, staff is uncertain if these soils are a suitable location for the pond and requests the Hearings Officer make findings on this issue.

Staff is also uncertain if the man-made wetlands, as shown on the NWI and identified in the Borine wetland delineation constitute a natural resource under this criterion. Staff notes that natural wetlands are regularly regarded as a natural resource in administrative and Hearings Officer decisions. The project may also change the number and types of wildlife that visit the site and this may impact the suitability of the site for the use. Staff requests the Hearings Officer make findings on these issues.

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).*

FINDING: The area surrounding the subject property consists mostly of agricultural properties on lands zoned EFU-AL with FP zoning along the "Dry River". Surrounding uses include crop productions, pasture, rangeland, BLM lands, and rural residences. Staff believes that the expanded pond will not adversely impact the site, design or operating characteristics of these surrounding uses. Staff also believes that the expanded pond will not adversely impact the transportation access to these uses.

Staff believes that the expanded pond will not adversely impact off-site natural features or topography. Since the project is located in the Dry River floodplain, the project could potentially impact the potential depth, duration, timing, and velocity of floodwaters downstream from the project. Without knowing pre- and post- project base flood depths, it is difficult to evaluate if downstream properties are at increased or decreased hazard from flooding. Staff recommends the Hearings Officer review the applicant's response to this criterion and assess if additional information is required to determine if the project exacerbates off-site flooding hazard.

It is likely that the expanded pond and irrigation piping will change the flow, timing, and/or total volume of water leaving the site to the north. Staff is uncertain if the off-site flows, available to downstream wildlife and farmers since at least 1953 constitute a natural resource impacted under this criterion and requests the Hearings Officer make findings on this issue.

1. 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.***

FINDING: Staff notes that the Hearings Officer may impose conditions upon a finding that additional restrictions are warranted.

2. 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:

...

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:

...

FINDING: For reasons described above, staff is uncertain if the following criteria apply to the pond expansion project. The Hearings Officer will need to determine if the project includes fill and/or removal and if such work occurred in the bed and banks of the Dry River or in a "wetland". Staff requests the Hearings Officer make findings on the applicability of the 18.128.270(D) criteria to this application.

IV. CONCLUSIONS:

Based upon the preceding analysis, staff believes that additional information is necessary to determine if the applicant can meet all of the required approval criteria.

Dated this 23rd day of October, 2015

Mailed this 23rd day of October, 2015