COMMUNITY DEVELOPMENT

HEARINGS OFFICER HEARING - LAND USE: FILE NOS. 247-23-000124-DR & 247-23-000125-DR

6:00 PM, TUESDAY, MAY 30, 2023
Barnes Sawyer Rooms - Deschutes Services Bldg - 1300 NW Wall St – Bend
(541) 388-6575|www.deschutes.org

AGENDA

MEETING FORMAT

This meeting will be conducted electronically, by phone, in person, and using Zoom.

Members of the public may view the meeting in real time via the Public Meeting Portal at www.deschutes.org/meetings.

Members of the public may listen, view, and/or participate in this meeting using Zoom. Using Zoom is free of charge. To login to the electronic meeting online using your computer, copy this link:

https://us02web.zoom.us/j/84887799169

Using this option may require you to download the Zoom app to your device.

Members of the public can access the meeting via telephone, dial: 1-719-359-4580. When prompted, enter the following Webinar ID: 848 8779 9169. Written comments can also be provided for the public comment section to avery.johnson@deschutes.org by 4 PM on May 30th. They will be entered into the record.

PUBLIC HEARING

1. Declaratory Ruling to determine whether the marijuana production facilities approved under file nos. 247-17-000907-AD & 247-17-000908-AD have been initiated.

Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please call (541) 617-4747.

STAFF REPORT

FILE NUMBER:	247-23-000124-DR
SUBJECT PROPERTY/ OWNER:	Mailing Name: BEND RENTALS SW LLC Map and Taxlot: 1714260000800 Account: 151597 Situs Address: 26285 WILLARD RD, BEND, OR 97701
APPLICANT:	John Watson
REQUEST:	Declaratory Ruling to determine if the marijuana production facility approved under file no. 247-17-000908-AD has been initiated.
HEARING DATE:	May 30, 2023
HEARING LOCATION:	Videoconference (Zoom) and Barnes & Sawyer Rooms Deschutes Services Center 1300 NW Wall Street Bend, OR 97708
ZOOM LINK:	https://us02web.zoom.us/j/84887799169
STAFF CONTACT:	Avery Johnson, Assistant Planner Phone: 541-385-1704 Email: Avery.Johnson@deschutes.org
RECORD:	Record items can be viewed and downloaded from: https://www.deschutes.org/bendrentals, or www.buildingpermits.oregon.gov

I. APPLICABLE CRITERIA

Title 22, Deschutes County Development Procedures Ordinance

II. BASIC FINDINGS

LOT OF RECORD: The subject property is recognized as a legal lot of record pursuant to Lot of Record Verification file no. LR-05-58.

SITE DESCRIPTION: The subject property is approximately 25.0 acres in size and irregular in shape. The property receives access from Willard Road via a private driveway. The property is relatively flat and contains trees and other vegetation throughout. Development on the property is concentrated to the southeast portion of the property and includes a dwelling, accessory structure, and two large agricultural buildings.

PUBLIC COMMENTS: The Notice of Application was mailed on March 10, 2023. Additionally, the applicant submitted the Land Use Sign Affidavit indicating the land use action sign was posted on March 13, 2023. No public comments were received.

AGENCY COMMENTS: In response to the Notice of Application, the following comments were received from public agencies.

Deschutes County Senior Transportation Planner: Peter Russell, March 13, 2023

> I have reviewed the transmittal materials for 247-23-000124-DR to determine if the marijuana growing operation approved under 247-17-000908-AD for a marijuana production (growing) operation has been initiated. The subject property is a 25-acre site in the Exclusive Farm Use (EFU) zone at 26285 Willard Road, aka 17-14-26, Tax Lot 800.
>
> Staff notes the transportation system development charge of $15,488 from 247-17-000908-AD has not been paid, according to County records. If the declaratory ruling determines the use has been initiated, staff recommends the SDC be paid as a condition of approval.
>
> For reference, staff includes the SDC comment from the 2017 land use with emphasis added about the due date.
>
> Board Resolution 2013-020 sets an SDC rate of $3,937 per p.m. peak hour trip. The County uses the most recent edition of the Institute of Traffic Engineers (ITE) trip generation manual to assess SDCs. The ITE manual does not contain a category for marijuana production. In consultation with the Road Department Director and Planning staff, the County has determined the best analog use is Warehouse (Land Use 150) based on the storage requirements and employees of this activity. The ITE indicates Warehouse generates 0.32 p.m. peak hour trips per 1,000 square feet. The applicant proposes 12,600 square feet of greenhouses (4,200 X 3). The County's SDC is based on the buildings' total square footage related to cannabis production and support and not the square footage of the mature canopy. A 12,600-square foot of greenhouses would produce 4.0 p.m. peak hour trips (12.6 X 0.32). The resulting SDC is $15,488 (4.0 X $3,937). The SDC is due prior to issuance of

certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final.

Bureau of Land Management, Prineville District – Deschutes Field Manager: Lisa Clark, March 12, 2023

Thank you for the opportunity to comment of the Notice of Application, 247-23-000124 regarding Mr. Watson's ruling on a marijuana production facility.

While the BLM has concerns about the smell produced by such a facility located about 1 ½ miles north of the Oregon Badlands Wilderness and Reynolds Pond, of greater concern is the potential for this facility to need access across public lands to bring in/remove marijuana product. Marijuana remains illegally federally, including transport, and the main road that leaves this property and extends north to Willard Road is primarily on public land. The southern edge of the property also borders BLM-administered land and any new route proposed there would need to be formally surveyed to ensure it did not cross onto federal property.

Bureau of Land Management, Prineville District – Deschutes Field Manager: Lisa Clark, May 3, 2023

...the driveway itself wasn't a concern - it was the action to remove the product on the road from the property. I understand it's outside the scope of this application from the county's purview. Hopefully the applicant is aware that they could face criminal charges if they haul across federal land. This is a federal law so it would not be affected by whether or not we participate in this process.

Other Agencies

The following agencies did not respond to the Notice of Application or responded with "No Comment": Deschutes County Assessor, Deschutes County Environmental Soils Division, Deschutes County Building Safety, and Alfalfa Fire District.

REVIEW PERIOD: The subject application was submitted on February 22, 2023, and deemed incomplete by the Planning Division on March 21, 2023. After the submittal of additional information, the application was deemed complete by the Planning Division on April 7, 2023. The 150th day on which the County must take final action on this application is September 4, 2023.

III. FINDINGS & CONCLUSIONS

Title 22, Deschutes County Development Procedures Ordinance

Chapter 22.08, General Provisions.

Section 22.08.010, Application Requirements.

A. Property Owner. For the purposes of DCC 22.08.010, the term "property owner" shall mean the owner of record or the contract purchaser and does not include a person or organization that holds a security interest.

B. Applications for development or land use actions shall:

1. Be submitted by the property owner or a person who has written authorization from the property owner as defined herein to make the application;

2. Be completed on a form prescribed by the Planning Director;

FINDING: The subject application was submitted by the property owner, John Watson.

Chapter 22.36, Limitations on Approvals.

Section 22.36.010, Expiration of Approval.

Duration of Approvals.

...

B. Except as otherwise provided under DCC 22.36.010 or under applicable zoning ordinance provisions, a land use permit is void two years after the date the discretionary decision becomes final if the use approved in the permit is not initiated within that time period.

FINDING: Under this criterion, a permit is void if not timely initiated. Staff believes that, as of the expiration of extensions of the subject permit, the permit can only have one of two status: initiated or void. Staff believes any actions (or inactions) taken after this date are irrelevant to the determination of initiation of use. Further, as detailed below, staff finds that actions taken prior to the land use receiving approval are also not relevant to the question of whether the use was initiated.

Section 22.36.020, Initiation of use.

A. For the purposes of DCC 22.36.020, development action undertaken under a land use approval described in DCC 22.36.010, has been "initiated" if it is determined that:

1. The proposed use has lawfully occurred;

FINDING: It appears that no party argues that the proposed use has lawfully occurred.

2. Substantial construction toward completion of the land use approval has taken place; or

FINDING: The applicant argues substantial construction towards completion of the land use approval has taken place. For this reason, staff addresses subsection B and the definition of 'substantial construction' below.

> ***3. Where construction is not required by the approval, the conditions of a permit or approval have been substantially exercised and any failure to fully comply with the conditions is not the fault of the applicant.***

FINDING: This criterion applies where construction was not required by the approval. In 247-17-000908-AD, the staff planner found, under "Duration of Approval":

> The applicant shall complete all conditions of approval and obtain any necessary building permits for the proposed use within two (2) years of the date this decision becomes final, or obtain an extension of time as allowed by county code, or the approval shall be void.

In the "Proposal" section, the staff planner found:

> The applicant requests approval of an Administrative Determination to establish a marijuana production facility with a maximum mature plant canopy area of 5,000 square feet. The applicant proposes to construct three 4,200 square-foot greenhouses to house the mature canopy area (5,000 square foot maximum) and a vegetative growth area. The applicant is also proposing to place a 320 square-foot storage container on the property to use for security, storage, drying, and curing of the marijuana product on site.

While the "Duration of Approval" findings do not expressly require construction, it appears to staff that "obtain any necessary building permits" would require that there be structures constructed to achieve the establishment of the greenhouses and storage facility and initiate the use. Based on the above, staff finds this criterion does not apply.

Staff notes that this criterion has been before a Hearings Officer, the Board of Commissioners, and LUBA. Staff includes County file No. DR-11-8 and A-13-8 in this record.

> ***B. For the purposes of DCC 22.36.020, "substantial construction" has occurred when the holder of a land use approval has physically altered the land or structure or changed the use thereof and such alteration or change is directed toward the completion and is sufficient in terms of time, labor or money spent to demonstrate a good faith effort to complete the development.***

FINDING: Staff notes that interpretation of this criterion above has been before a Hearings Officer and is currently pending at the Oregon Court of Appeals. The Hearings Officer's decision in file no. 247-22-000246-DR is included in this record.

The Hearings Officer decision referenced above describes an "Initiation Analysis" based on the three (3) elements of criterion (A) in DCC 22.36.020, shown below, to determine if an approved use has been initiated. Staff follows that Initiation Analysis here.

Based on DCC 22.36.020, "substantial construction" has occurred when:

1) The holder of the approval has physically altered the land or structure or changed the use thereof;
2) such alteration or change is directed toward the completion [of the development]; and
3) [such alteration or change] is sufficient in terms of time, labor or money spent to demonstrate a good faith effort to complete the development

The Initiation Analysis from the referenced Hearings Officer decision includes a three (3) step analysis. The three steps are listed below:

1) Step 1 – Do Expenditures Result in Alterations or Change of Use?

2) Step 2 – Are Expenditures Directed Toward Completion of Development?

3) Step 3 – Do the Expenditures Demonstrate a Good Faith Effort to Complete the Development?

Based on this guidance, staff finds that at least some physical alteration of the land or structure or change of use has occurred during the pendency (as extended) of the permit. The referenced Hearings Officer decision found that only time, labor, or money spent prior to the end of the applicable time period of a land use approval can be considered in the Initiation Analysis. In this case, the question before the Hearings Officer is not whether time, labor or money were expended prior to the expiration of the land use approval. Rather, the question is whether the expenditure of time, labor or money made prior to approval of the land use permit can be considered.

The building permits for the two agriculture buildings (greenhouses), for which costs were claimed, were approved and issued on October 27, 2017. The land use decision which approved the marijuana production facility became final on April 24, 2018. Because the building permits for these structures were issued prior to the land use approval it's unclear to staff whether the expenditures were directed towards completion of the approved development and whether they demonstrate a good-faith effort to complete development, especially considering the Hearing Officer determination above.

Staff also reads this criterion to require that any alteration or change, to be considered under this criterion, must be directed towards the completion of the development. Thus, any alterations or changes that are uniquely directed to other developments not included in the permit must be disregarded. For example, in the case of a non-farm dwelling, a separate on-site driveway to an agricultural barn would not be directed toward the residential permit on the property. Per the Statement of Intended Use submitted for both agricultural buildings[1], these structures were intended, "For and in conjunction with Farm use and agricultural activities including, but not limited

[1] Reference building permits 247-17-005140-STR and 247-17-005146-STR.

to, raising livestock and producing crops." Staff recognizes that marijuana is considered a farm crop. For this reason, it could be argued that the establishment of the agricultural structures was ultimately directed toward the production of marijuana. That said, and as noted above, the production of marijuana requires land use approval. Consequently, it is unclear to staff whether it is appropriate to consider the expenditures related to the establishment of agricultural structures for a 'farm crop' as part of the Initiation Analysis when the farm crop required land use approval and the structures were established prior to that land use approval.

The final prong of this criterion presents a significant interpretive challenge. A "good faith effort" measured in "time, labor or money" offers no objective evaluation. While not binding in this case, staff finds the following caselaw helpful:

> "Good faith effort" is defined as "what a reasonable person would determine is a diligent and honest effort under the same set of facts or circumstances." *Troutt v. City of Lawrence*, 2008 U.S. Dist. LEXIS 61641 (S.D. Ind. Aug. 8, 2008)

Additionally, the referenced Hearings Office decision made a finding on good-faith and what that means in the context of county code and prior case law. His finding is cited below:

> Based on the foregoing, I find that, for purposes of DCC 22.36.020(B), an applicant can demonstrate a good faith effort to complete a development if the applicant shows the relevant expenditures were made reasonably and honestly, and that the applicant, based on the evidence in the record, more than likely did not act in bad faith. An applicant will no doubt present an application that asserts expenditures were made reasonably and honestly, but that assertion is rebuttable, and other participants have an opportunity to show the applicant acted in bad faith if that is indeed the case. The decision-maker can then look at all the evidence to determine whether good faith or bad faith more likely exists.

Under this approach to good faith effort, the analysis would be specific to the evidence in the record and would be evaluated by what a reasonable person would determine is a reasonable and honest effort, given the evidence in the record. Staff believes the Hearings Officer will have to make the initial interpretive choice, whether the reasonable and honest effort is met considering the expenditures to complete the development for the marijuana production facilities were expended prior to the property owner being a holder of a land use approval as required in DCC 22.36.020 (B). Staff believes the Hearings Officer will need to address this issue to determine if the "time, labor or money" invested in the project was "sufficient" to constitute a good faith effort. Staff appreciates the Hearing Officer's careful review of this matter and includes applicant testimony on this issue below.

The Burden of Proof (BoP) details actions undertaken by the applicant to initiate the use. For the purposes of this review, staff includes a table summarizing those actions and expenditures. The table includes a column for the claimed expenditure; the amount expended; whether staff agrees the action was a physical alteration or change of use of the land that is directed towards completion of the marijuana production facility; and the date range that these expenditures took place. Staff

requests the Hearings Officer make specific findings regarding which of the cited expenses comply with the requirements of this criterion.

Infrastructure	Amount	Physical Alteration/Changed the use thereof?	Date
Pre-engineered buildings	$88,686	Yes	June 2017 – December 2017
Concrete for pad	$122,838	Yes	June 2017 – December 2017
Building Construction	$85,484	Yes	June 2017 – December 2017
Insulation	$34,736	Yes	June 2017 – December 2017
HVAC	$63,768	Yes	June 2017 – December 2017
Electrical	$42,638	Yes	June 2017 – December 2017
Permits	$2,000	Yes	2017-2018
Utilities Install	$18,299	Yes	June 2017 – December 2017
Contingency Costs	$25,500	No	June 2017 – December 2017
Temp. Utilities	$5,508	Yes	June 2017 – December 2017
Odor and Noise Engineering	$13,707	No	June 2017 – December 2017
	Grand Total for Physical Alteration/Change of use thereof	**$463,957**	

Staff notes the expenditures for the Odor and Noise Engineering were not accounted for as the applicant relayed in the incomplete letter response that this expenditure was for the design and development of these systems along with mechanical and electrical engineering services provided by the manufacturer related to the development. However, these systems have not been physically installed yet.

Below staff includes excerpts from the incomplete letter response from the applicant's attorney in support of the initiation of use findings.

Re: File No. 247-23-000124-DR; 26285 Willard Road, Bend, OR

Agriculture Buildings

Mr. Watson purchased this property for the purpose of obtaining an OLCC license. When the property was purchased, it needed work and almost everything that has been done to the property and all the financial expenditures to date have been directly related to the completion of the development of the property for OLCC licensing. By 2017, Mr. Watson was actively pursuing land use with the County for OLCC licensing, including having a pre-application meeting that year.

As such, Mr. Watson began to make considerable purchases and investments into this property related to the OLCC license in 2017 and before the land use decision was final in 2018. This included obtaining building permits on this property and erecting the agricultural buildings, as evidenced by the "Draw Schedule" or Exhibit F for the Burden of Proof.

These buildings were erected for the purpose of obtaining an OLCC licenses to grow cannabis and to help complete the development of the property for that purpose. During 2017, the applicant was working with the County on obtaining approval for this use pursuant to the County Code at the time. The applicant had several variations of their application prior to the final version that was submitted and approved. The applicant adjusted their business plans so as to start their operation smaller, but with the ability to scale up their operations.

Finally, these expenditures demonstrate a good faith effort to complete the development. The land use approval allowed for OLCC production. The actions by the applicant of prepping the ground, erecting the buildings, and bringing in irrigation, shows a good faith effort on behalf of the applicant to complete the development as approved for OLCC production. The fact he did this prior to the approval bolsters this good-faith effort by the applicant. The expenditures for this property account for a large amount of the development's overall costs. The applicant spent a considerable amount of money on these expenditures knowing they were in the process of obtaining land use approval. The applicant and his attorney had been working with the County since 2017 regarding this issue. The expenditures in this matter do demonstrate a good faith effort to complete the development.

Chapter 22.40, Declaratory Ruling.

Section 22.40.010, Availability of Declaratory Ruling.

A. Subject to the other provisions of DCC 22.40.010, there shall be available for the County's comprehensive plans, zoning ordinances, the subdivision and partition ordinance and DCC Title 22 a process for:

…

3. Determining whether an approval has been initiated or considering the revocation of a previously issued land use permit, quasi judicial plan amendment or zone change;

...

Such a determination or interpretation shall be known as a "declaratory ruling" and shall be processed in accordance with DCC 22.40. In all cases, as part of making a determination or interpretation the Planning Director (where appropriate) or Hearings Body (where appropriate) shall have the authority to declare the rights and obligations of persons affected by the ruling.

FINDING: The applicant is requesting a determination on whether the approval of land use file no. 247-17-000908-AD has been initiated.

B. A declaratory ruling shall be available only in instances involving a fact-specific controversy and to resolve and determine the particular rights and obligations of particular parties to the controversy. Declaratory proceedings shall not be used to grant an advisory opinion. Declaratory proceedings shall not be used as a substitute for seeking an amendment of general applicability to a legislative enactment.

FINDING: The applicant is requesting a determination on whether the approval of land use file no. 247-17-000908-AD has been initiated. Staff finds this is an instance involving a fact-specific controversy, and will resolve and determine the particular rights and obligations of parties to the controversy. The applicant has not requested an advisory opinion. This proceeding is not being used as a substitute for seeking an amendment of general applicability to a legislative enactment.

C. Declaratory rulings shall not be used as a substitute for an appeal of a decision in a land use action or for a modification of an approval. In the case of a ruling on a land use action a declaratory ruling shall not be available until six months after a decision in the land use action is final.

FINDING: The applicant is requesting a determination on whether the approval of land use file no. 247-17-000908-AD has been initiated. Staff finds this application is not an appeal of a decision in a land use action or for a modification of an approval. The proposal does not include a ruling on a land use action under this criterion.

D. The Planning Director may refuse to accept and the Hearings Officer may deny an application for a declaratory ruling if:

1. The Planning Director or Hearings Officer determines that the question presented can be decided in conjunction with approving or denying a pending land use application or if in the Planning Director or Hearing Officer's judgment the requested determination should be made as part of a decision on an application for a quasi-judicial plan amendment or zone change or a land use permit not yet filed; or

2. The Planning Director or Hearings Officer determines that there is an enforcement case pending in district or circuit court in which the same issue necessarily will be decided as to the applicant and the applicant failed to file the request for a declaratory ruling within two weeks after being cited or served with a complaint.

The Planning Director or Hearings Officer's determination to not accept or deny an application under DCC 22.40.010 shall be the County's final decision.

FINDING: Staff finds the applicant's request for a declaratory ruling is not a question that can be decided in conjunction with some other land use application, plan amendment or zone change. In addition, there is no formal enforcement case pending in district or circuit court on this matter at this time. These criteria do not apply.

Section 22.40.020, Persons Who May Apply.

A. DCC 22.08.010(B) notwithstanding, the following persons may initiate a declaratory ruling under DCC 22.40:

1. The owner of a property requesting a declaratory ruling relating to the use of the owner's property.

2. In cases where the request is to interpret a previously issued quasi-judicial plan amendment, zone change or land use permit, the holder of the permit; or

3. In all cases arising under DCC 22.40.010, the Planning Director.

FINDING: The applicant is the holder of the previously issued land use permit (247-17-000908-AD) and is the owner of the subject property, although the name of ownership for this property is listed as Bend Rentals SW, LLC. This criterion is met.

B. A request for a declaratory ruling shall be initiated by filing an application with the planning division and, except for applications initiated by the Planning Director, shall be accompanied by such fees as have been set by the Planning Division. Each application for a declaratory ruling shall include the precise question on which a ruling is sought. The applicant shall set forth whatever facts are relevant and necessary for making the determination and such other information as may be required by the Planning Division.

FINDING: The applicant is requesting a determination on whether the approval of land use file no. 247-17-000908-AD has been initiated. The applicant filed the necessary declaratory ruling application and paid the required fee.

Section 22.40.030, Procedures.

Except as set forth in DCC 22.40 or in applicable provisions of a zoning ordinance, the procedures for making declaratory rulings shall be the same as set forth in DCC Title 22 for land use actions. Where the Planning Division is the applicant, the Planning Division shall bear the same burden that applicants generally bear in pursuing a land use action.

FINDING: The declaratory ruling application is being processed according to Title 22. The decision will be noticed and sent to all required parties. This criterion will be met.

Section 22.40.040, Effect of Declaratory Ruling.

A. A declaratory ruling shall be conclusive on the subject of the ruling and bind the parties thereto as to the determination made.

B. DCC 22.28.040 notwithstanding, and except as specifically allowed therein, parties to a declaratory ruling shall not be entitled to reapply for a declaratory ruling on the same question.

C. Except where a declaratory ruling is made by the Board of County Commissioners, the ruling shall not constitute a policy of Deschutes County.

FINDING: Staff finds these criteria apply to this application and limit reapplication for a declaratory ruling on the same question. This declaratory ruling does not constitute a policy of Deschutes County.

IV. CONCLUSION

Based on the foregoing findings, staff asks the Hearings Officer to determine whether or not the marijuana production facility approved under file no. 247-17-000908-AD has been initiated.

Other permits may be required. The applicants are responsible for obtaining any necessary permits from the Deschutes County Building Division and Deschutes County Environmental Soils Division as well as any required state and federal permits.

V. RECCOMENDED CONDITIONS OF ANY APPROVAL

Should the Hearings Officer determine the marijuana production facilities have been initiated, staff recommends the following condition of approval:

A. The conditions of approval associated with 247-17-000908-AD remain in effect.

VII. DURATION OF APPROVAL

Staff recommends the Hearing Officer include specific language describing the duration of approval in the event the use is found to be initiated.

DESCHUTES COUNTY PLANNING DIVISION

Written by: Avery Johnson, Assistant Planner

Reviewed by: Will Groves, Planning Manager

STAFF REPORT

FILE NUMBER: 247-23-000125-DR

SUBJECT PROPERTY/ OWNER:
Mailing Name: WATSON, JOHN SHELBY JR
Map and Taxlot: 1714260001000
Account: 131856
Situs Address: 26295 WILLARD RD, BEND, OR 97701

APPLICANT: John Watson

REQUEST: Declaratory Ruling to determine if the marijuana production facility approved under file no. 247-17-000907-AD has been initiated.

HEARING DATE: May 30, 2023

HEARING LOCATION:
Videoconference (Zoom) and
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

ZOOM LINK: https://us02web.zoom.us/j/84887799169

STAFF CONTACT:
Avery Johnson, Assistant Planner
Phone: 541-385-1704
Email: Avery.Johnson@deschutes.org

RECORD: Record items can be viewed and downloaded from:

www.buildingpermits.oregon.gov, or

https://www.deschutes.org/watson

I. APPLICABLE CRITERIA

Title 22, Deschutes County Development Procedures Ordinance

II. BASIC FINDINGS

LOT OF RECORD: The subject property is recognized as two as a legal lot of record pursuant to Lot of Record Verification file no. 247-17-000782-LR

SITE DESCRIPTION: The subject property is approximately 10.0 acres in size and irregular in shape. The property receives access from Willard Road via a private driveway. The southern portion of the property appears to be irrigated pasture, with development concentrated toward the center of the property. The site contains two lawfully established dwellings, a stick built single-family dwelling built in 1970 and a manufactured home placed on the property in 1977. There are also several accessory structures. The topography of the site is generally level throughout. Trees and other vegetation are located outside of the irrigated areas of the property.

PUBLIC COMMENTS: The Notice of Application was mailed on March 10, 2023. Additionally, the applicant submitted the Land Use Sign Affidavit indicating the land use action sign was posted on March 13, 2023. No public comments were received.

AGENCY COMMENTS: In response to the Notice of Application, the following comments were received from public agencies.

Deschutes County Building Division: Randy Scheid, March 10, 2023

> NOTICE: The Deschutes County Building Safety Divisions code mandates that Access, Egress, Setbacks, Fire & Life Safety, Fire Fighting Water Supplies, etc. must be specifically addressed during the appropriate plan review process with regard to any proposed structures and occupancies.
>
> Accordingly, all Building Code required items will be addressed, when a specific structure, occupancy, and type of construction is proposed and submitted for plan review.

Deschutes County Senior Transportation Planner: Peter Russell, March 13, 2023

> I have reviewed the transmittal materials for 247-23-000125-DR to determine if a marijuana production operation approved under 247-17-000907-AD in the Exclusive Farm Use (EFU) zone was ever initiated. The subject property is a 10-acre site at 26295 Willard Road, aka 17-14-26, Tax Lot 1000.
>
> Staff notes the transportation system development charge of $5,118 from 247-17-000907-AD has not been paid, according to County records. If the declaratory ruling determines the use has been initiated, staff recommends the SDC be paid as a condition of approval.
>
> For reference, staff includes the SDC comment from the 2017 land use with emphasis added

about the due date.

Board Resolution 2013-020 sets an SDC rate of $3,937 per p.m. peak hour trip. The County uses the most recent edition of the Institute of Traffic Engineers (ITE) trip generation manual to assess SDCs. The ITE manual does not contain a category for marijuana production. In consultation with the Road Department Director and Planning staff, the County has determined the best analog use is Warehouse (Land Use 150) based on the storage requirements and employees of this activity. The ITE indicates Warehouse generates 0.32 p.m. peak hour trips per 1,000 square feet. The applicant proposes 5,000 square feet of mature canopy spread. The County's SDC is based on the buildings' total square footage related to cannabis production and support and not the square footage of the mature canopy. A 4,200-square foot greenhouse would produce 1.3 p.m. peak hour trips (4.2 X 0.32). The resulting SDC is $5,118 (1.3 X $3,937). The actual SDC likely will be higher as it will be based on building square footage and staff is unsure how 5,000 square feet of mature canopy can be grown in a 4,200-square-foot greenhouse. Regardless of the final amount, the SDC is due prior to issuance of certificate of occupancy; if a certificate of occupancy is not applicable, then the SDC is due within 60 days of the land use decision becoming final.

Other Agencies

The following agencies did not respond to the Notice of Application or responded with "No Comment": Deschutes County Assessor, Deschutes County Environmental Soils Division, and Alfalfa Fire District.

REVIEW PERIOD: The subject application was submitted on February 22, 2023, and deemed incomplete by the Planning Division on March 21, 2023. After the submittal of additional information, the application was deemed complete by the Planning Division on April 6, 2023. The 150th day on which the County must take final action on this application is September 3, 2023.

III. FINDINGS & CONCLUSIONS

Title 22, Deschutes County Development Procedures Ordinance

Chapter 22.08, General Provisions.

Section 22.08.010, Application Requirements.

A. Property Owner. For the purposes of DCC 22.08.010, the term "property owner" shall mean the owner of record or the contract purchaser and does not include a person or organization that holds a security interest.

B. Applications for development or land use actions shall:

1. Be submitted by the property owner or a person who has written authorization from the property owner as defined herein to make the application;

2. Be completed on a form prescribed by the Planning Director;

FINDING: The subject application was submitted by the property owner, John Watson.

Chapter 22.36, Limitations on Approvals.

Section 22.36.010, Expiration of Approval.

Duration of Approvals.

...

B. Except as otherwise provided under DCC 22.36.010 or under applicable zoning ordinance provisions, a land use permit is void two years after the date the discretionary decision becomes final if the use approved in the permit is not initiated within that time period.

FINDING: Under this criterion, a permit is void if not timely initiated. Staff believes that, as of the expiration of extensions of the subject permit, the permit can only have one of two status: initiated or void. Staff believes any actions (or inactions) taken after this date are irrelevant to the determination of initiation of use. Further, as detailed below, staff finds that actions taken prior to the land use receiving approval are also not relevant to the question of whether the use was initiated.

Section 22.36.020, Initiation of use.

A. For the purposes of DCC 22.36.020, development action undertaken under a land use approval described in DCC 22.36.010, has been "initiated" if it is determined that:

1. The proposed use has lawfully occurred;

FINDING: It appears that no party argues that the proposed use has lawfully occurred.

2. Substantial construction toward completion of the land use approval has taken place; or

FINDING: The applicant argues substantial construction towards completion of the land use approval has taken place. For this reason, staff addresses subsection B and the definition of 'substantial construction' below.

3. Where construction is not required by the approval, the conditions of a permit or approval have been substantially exercised and any failure to fully comply with the conditions is not the fault of the applicant.

FINDING: This criterion applies where construction was not required by the approval. In 247-17-000907-AD, the staff planner found, under "Duration of Approval":

The applicant shall complete all conditions of approval and obtain any necessary building permits for the proposed use within two (2) years of the date this decision becomes final, or obtain an extension of time as allowed by county code, or the approval shall be void.

In the "Proposal" section, the staff planner found:

The applicant requests approval of an Administrative Determination to establish a marijuana production facility with a maximum mature plant canopy area of 5,000 square-feet. The applicant proposes to construct a new 4,200 square-foot greenhouse on the property which will serve as the mature canopy area. The applicant is also proposing to place a 320 square-foot container on the property to use for security, storage, drying, and curing of the marijuana product on site.

While the "Duration of Approval" findings do not expressly require construction, it appears to staff that "obtain any necessary building permits" would require that there be structures constructed to achieve the establishment of the greenhouse and storage facility and initiate the use. Based on the above, staff finds this criterion does not apply.

Staff notes that this criterion has been before a Hearings Officer, the Board of Commissioners, and LUBA. Staff includes County file No. DR-11-8 and A-13-8 in this record.

B. For the purposes of DCC 22.36.020, "substantial construction" has occurred when the holder of a land use approval has physically altered the land or structure or changed the use thereof and such alteration or change is directed toward the completion and is sufficient in terms of time, labor or money spent to demonstrate a good faith effort to complete the development.

FINDING: Staff notes that interpretation of this criterion above has been before a Hearings Officer and is currently pending at the Oregon Court of Appeals. The Hearings Officer's decision in file no. 247-22-000246-DR is included in this record.

The Hearings Officer decision referenced above describes an "Initiation Analysis" based on the three (3) elements of criterion (A) in DCC 22.36.020, shown below, to determine if an approved use has been initiated. Staff follows that Initiation Analysis here.

Based on DCC 22.36.020, "substantial construction" has occurred when:

1) The holder of the approval has physically altered the land or structure or changed the use thereof;
2) such alteration or change is directed toward the completion [of the development]; and
3) [such alteration or change] is sufficient in terms of time, labor or money spent to demonstrate a good faith effort to complete the development

The Initiation Analysis from the referenced Hearings Officer decision includes a three (3) step analysis. The three steps are listed below:

1) Step 1 – Do Expenditures Result in Alterations or Change of Use?
2) Step 2 – Are Expenditures Directed Toward Completion of Development?
3) Step 3 – Do the Expenditures Demonstrate a Good Faith Effort to Complete the Development?

Based on this guidance, staff finds that at least some physical alteration of the land or structure or change of use has occurred during the pendency (as extended) of the permit. The referenced Hearings Officer decision found that only time, labor, or money spent prior to the end of the applicable time period of a land use approval can be considered in the Initiation Analysis. In this case, the question before the Hearings Officer is not whether time, labor or money were expended prior to the expiration of the land use approval. Rather, the question is whether the expenditure of time, labor or money made prior to approval of the land use permit can be considered.

Based on evidence in the record, it appears that no building permits for the greenhouse were ever applied for. However, the submitted Burden of Proof (BoP) details that electrical permits and a gas fuel line piping permit were issued in relation to the development of the property. However, these permits were issued in 2016, prior to the land use decision which approved the marijuana production facility becoming final on April 24, 2018. Because the electrical and mechanical permits for the greenhouse were issued prior to the land use approval, it's unclear to staff whether the expenditures were directed towards completion of the approved development and whether they demonstrate a good-faith effort to complete development, especially considering the Hearing Officer determination above.

Additionally, as detailed in the incomplete letter response, the applicant details that the greenhouse and equipment for this property were purchased and erected in sometime in 2017, which again is prior to the land use approval for the marijuana production facility becoming final. Because of this, it's unclear to staff whether the expenditures were directed towards completion of the approved development and whether they demonstrate a good-faith effort to complete development, especially considering the Hearing Officer determination above.

Staff also reads this criterion to require that any alteration or change, to be considered under this criterion, must be directed towards the completion of the development. Thus, any alterations or changes that are uniquely directed to other developments not included in the permit must be disregarded. For example, in the case of a non-farm dwelling, a separate on-site driveway to an agricultural barn would not be directed toward the residential permit on the property. Per the BoP and incomplete letter response, the applicant argues that the establishment of the greenhouse and related equipment was ultimately directed toward the production of marijuana and OLCC licensing. That said, and as noted above, the production of marijuana requires land use approval. Consequently, it is unclear to staff whether it is appropriate to consider the expenditures related to the establishment of the greenhouse and equipment for OLCC licensing as part of the Initiation Analysis when the marijuana production required land use approval and the greenhouse and related equipment were established prior to the land use approval.

The final prong of this criterion presents a significant interpretive challenge. A “good faith effort” measured in “time, labor or money” offers no objective evaluation. While not binding in this case, staff finds the following caselaw helpful:

> "Good faith effort" is defined as "what a reasonable person would determine is a diligent and honest effort under the same set of facts or circumstances." *Troutt v. City of Lawrence*, 2008 U.S. Dist. LEXIS 61641 (S.D. Ind. Aug. 8, 2008)

Additionally, the referenced Hearings Office decision made a finding on good-faith and what that means in the context of county code and prior case law. His finding is cited below:

> Based on the foregoing, I find that, for purposes of DCC 22.36.020(B), an applicant can demonstrate a good faith effort to complete a development if the applicant shows the relevant expenditures were made reasonably and honestly, and that the applicant, based on the evidence in the record, more than likely did not act in bad faith. An applicant will no doubt present an application that asserts expenditures were made reasonably and honestly, but that assertion is rebuttable, and other participants have an opportunity to show the applicant acted in bad faith if that is indeed the case. The decision-maker can then look at all the evidence to determine whether good faith or bad faith more likely exists.

Under this approach to good faith effort, the analysis would be specific to the evidence in the record and would be evaluated by what a reasonable person would determine is a reasonable and honest effort, given the evidence in the record. Staff believes the Hearings Officer will have to make the initial interpretive choice, whether the reasonable and honest effort is met considering the expenditures to complete the development for the marijuana production facilities were expended prior to the property owner being a holder of a land use approval as required in DCC 22.36.020 (B). Staff believes the Hearings Officer will need to address this issue to determine if the “time, labor or money” invested in the project was “sufficient” to constitute a good faith effort. Staff appreciates the Hearing Officer’s careful review of this matter and includes applicant testimony on this issue below.

The Burden of Proof (BoP) details actions undertaken by the applicant to initiate the use. For the purposes of this review, staff includes a table summarizing those actions and expenditures. The table includes a column for the claimed expenditure; the amount expended; whether staff agrees the action was a physical alteration or change of use of the land that is directed towards completion of the marijuana production facility; and the date range that these expenditures took place. Staff requests the Hearings Officer make specific findings regarding which of the cited expenses comply with the requirements of this criterion.

Infrastructure	Amount	Physical Alteration/Changed the use thereof?	Date
Greenhouse	$34,785.26	Yes	2017
Equipment	$112,458.73	Yes	2017
Odor and Noise Engineering	$8,954	No	2017
Grand Total for Physical Alteration/Change of use thereof	**$147,243.99**		

Staff notes the expenditures for the Odor and Noise Engineering were not accounted for as the applicant relayed in the incomplete letter response that this expenditure was for the design and development of these systems along with mechanical and electrical engineering services provided by the manufacturer related to the development. However, these systems have not been physically installed yet.

Below staff includes excerpts from the incomplete letter response from the applicant's attorney in support of the initiation of use findings.

> **Re: File No. 247-23-000125-DR; 26295 Willard Road, Bend, OR**
>
> **<u>Greenhouse and Equipment</u>**
>
> Mr. Watson purchased this property for the purpose of obtaining an OLCC license. When the property was purchased, it needed work and almost everything that has been done to the property and all the financial expenditures to date have been directly related to the completion of the development of the property for OLCC licensing. By 2017, Mr. Watson was actively pursuing land use with the County for OLCC licensing, including having a pre-application meeting that year.
>
> As such, Mr. Watson began to make considerable purchases and investments into this property related to the OLCC license in 2017 and before the land use decision was final in 2018. This included purchasing the greenhouse and equipment for this property, as evidence by the invoice provided as an exhibit to the Burden of Proof. The greenhouse frame was erected sometime in 2017, though Mr. Watson is not certain of the exact date. It likely would have been late summer or early fall, but after he began working on the process of obtaining approval from the County for such a use. It was erected for the purpose of obtaining an OLCC licenses to grow cannabis and to help complete the development of the property for that purpose.
>
> All of these expenditures were directed towards the completion of the development for the use which was approved in the land use decision. These considerable expenditures

constitute a large percentage of the overall costs needed to complete this development for OLCC production. The development on this property is almost completed because of these expenditures. The greenhouse and equipment's only purpose was to complete the development for OLCC production. Thus, the second part of the analysis has been met by the applicant.

Finally, these expenditures demonstrate a good faith effort to complete the development. The land use approval allowed for OLCC production. The greenhouse and equipment were purchased for that reason and that reason only. Mr. Watson was working on local land use with the County the same year he purchased the equipment and erected the greenhouse. He did so for the purpose of completing the proposed development. These expenditures show a good faith effort to complete the development. In fact, expenditures for this property account for a large amount of the development's overall costs and the development is nearly complete on this property. The incomplete letter questions the expenditures occurring in 2017 and before the land use decision was final. If anything, purchasing the equipment and erecting the greenhouse prior to the approval shows good faith on the part of the applicant. The applicant spent a considerable amount of money on these expenditures knowing they were in the process of obtaining land use approval. The applicant and his attorney had been working with the County since 2017 regarding this issue.

Chapter 22.40, Declaratory Ruling.

Section 22.40.010, Availability of Declaratory Ruling.

A. Subject to the other provisions of DCC 22.40.010, there shall be available for the County's comprehensive plans, zoning ordinances, the subdivision and partition ordinance and DCC Title 22 a process for:

…

3. Determining whether an approval has been initiated or considering the revocation of a previously issued land use permit, quasi judicial plan amendment or zone change;

…

Such a determination or interpretation shall be known as a "declaratory ruling" and shall be processed in accordance with DCC 22.40. In all cases, as part of making a determination or interpretation the Planning Director (where appropriate) or Hearings Body (where appropriate) shall have the authority to declare the rights and obligations of persons affected by the ruling.

FINDING: The applicant is requesting a determination on whether the approval of land use file no. 247-17-000907-AD has been initiated.

B. A declaratory ruling shall be available only in instances involving a fact-specific controversy and to resolve and determine the particular rights and obligations of particular parties to the controversy. Declaratory proceedings shall not be used to

grant an advisory opinion. Declaratory proceedings shall not be used as a substitute for seeking an amendment of general applicability to a legislative enactment.

FINDING: The applicant is requesting a determination on whether the approval of land use file no. 247-17-000907-AD has been initiated. Staff finds this is an instance involving a fact-specific controversy, and will resolve and determine the particular rights and obligations of parties to the controversy. The applicant has not requested an advisory opinion. This proceeding is not being used as a substitute for seeking an amendment of general applicability to a legislative enactment.

C. Declaratory rulings shall not be used as a substitute for an appeal of a decision in a land use action or for a modification of an approval. In the case of a ruling on a land use action a declaratory ruling shall not be available until six months after a decision in the land use action is final.

FINDING: The applicant is requesting a determination on whether the approval of land use file no. 247-17-000907-AD has been initiated. Staff finds this application is not an appeal of a decision in a land use action or for a modification of an approval. The proposal does not include a ruling on a land use action under this criterion.

D. The Planning Director may refuse to accept and the Hearings Officer may deny an application for a declaratory ruling if:

1. The Planning Director or Hearings Officer determines that the question presented can be decided in conjunction with approving or denying a pending land use application or if in the Planning Director or Hearing Officer's judgment the requested determination should be made as part of a decision on an application for a quasi-judicial plan amendment or zone change or a land use permit not yet filed; or

2. The Planning Director or Hearings Officer determines that there is an enforcement case pending in district or circuit court in which the same issue necessarily will be decided as to the applicant and the applicant failed to file the request for a declaratory ruling within two weeks after being cited or served with a complaint.

The Planning Director or Hearings Officer's determination to not accept or deny an application under DCC 22.40.010 shall be the County's final decision.

FINDING: Staff finds the applicant's request for a declaratory ruling is not a question that can be decided in conjunction with some other land use application, plan amendment or zone change. In addition, there is no formal enforcement case pending in district or circuit court on this matter at this time. These criteria do not apply.

Section 22.40.020, Persons Who May Apply.

A. DCC 22.08.010(B) notwithstanding, the following persons may initiate a declaratory ruling under DCC 22.40:

1. ***The owner of a property requesting a declaratory ruling relating to the use of the owner's property.***
2. ***In cases where the request is to interpret a previously issued quasi-judicial plan amendment, zone change or land use permit, the holder of the permit; or***
3. ***In all cases arising under DCC 22.40.010, the Planning Director.***

FINDING: The applicant is the holder of the previously issued land use permit (247-17-000907-AD) and is the owner of the subject property. This criterion is met.

B. A request for a declaratory ruling shall be initiated by filing an application with the planning division and, except for applications initiated by the Planning Director, shall be accompanied by such fees as have been set by the Planning Division. Each application for a declaratory ruling shall include the precise question on which a ruling is sought. The applicant shall set forth whatever facts are relevant and necessary for making the determination and such other information as may be required by the Planning Division.

FINDING: The applicant is requesting a determination on whether the approval of land use file no. 247-17-000907-AD has been initiated. The applicant filed the necessary declaratory ruling application and paid the required fee.

Section 22.40.030, Procedures.

Except as set forth in DCC 22.40 or in applicable provisions of a zoning ordinance, the procedures for making declaratory rulings shall be the same as set forth in DCC Title 22 for land use actions. Where the Planning Division is the applicant, the Planning Division shall bear the same burden that applicants generally bear in pursuing a land use action.

FINDING: The declaratory ruling application is being processed according to Title 22. The decision will be noticed and sent to all required parties. This criterion will be met.

Section 22.40.040, Effect of Declaratory Ruling.

A. A declaratory ruling shall be conclusive on the subject of the ruling and bind the parties thereto as to the determination made.

B. DCC 22.28.040 notwithstanding, and except as specifically allowed therein, parties to a declaratory ruling shall not be entitled to reapply for a declaratory ruling on the same question.

C. Except where a declaratory ruling is made by the Board of County Commissioners, the ruling shall not constitute a policy of Deschutes County.

FINDING: Staff finds these criteria apply to this application and limit reapplication for a declaratory ruling on the same question. This declaratory ruling does not constitute a policy of Deschutes County.

IV. CONCLUSION

Based on the foregoing findings, staff asks the Hearings Officer to determine whether or not the marijuana production facility approved under 247-17-000907-AD has been initiated.

Other permits may be required. The applicants are responsible for obtaining any necessary permits from the Deschutes County Building Division and Deschutes County Environmental Soils Division as well as any required state and federal permits.

V. RECCOMENDED CONDITIONS OF ANY APPROVAL

Should the Hearings Officer determine the marijuana production facility has been initiated, staff recommends the following condition of approval:

A. The conditions of approval associated with 247-17-000907-AD remain in effect.

VII. DURATION OF APPROVAL

Staff recommends the Hearing Officer include specific language describing the duration of approval in the event the use is found to be initiated.

DESCHUTES COUNTY PLANNING DIVISION

Written by: Avery Johnson, Assistant Planner

Reviewed by: Will Groves, Planning Manager