

DECISION AND FINDINGS OF THE DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBER: 247-23-000125-DR

HEARING DATE: May 30, 2023, 6:00 p.m.

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

OWNER: Mailing Name: John Shelby Watson Jr.

APPLICANT: John Watson (the “Applicant”)

**APPLICANT’S
REPRESENTATIVE:** Michael R. Hughes, Hughes Law,
Attorney for the Applicant

SUBJECT PROPERTY: Map and Tax Lot: 1714260001000
Account: 131856
Situs Address: 26295 WILLARD RD, BEND, OR 97701
(the “Property”)

ZONING: Exclusive Farm Use (“EFU”)

REQUEST: Declaratory Ruling to determine whether the marijuana
production facility approved under File No. 247-17-000907-
AD has been initiated.

HEARINGS OFFICER: Laura Westmeyer

SUMMARY OF DECISION: The Hearings Officer finds that the Applicant has met its burden of proof in demonstrating that all applicable criteria have been satisfied. The Hearings Officer therefore APPROVES the Application, and finds that the marijuana production facility approved under File No. 247-17-000907-AD has been initiated pursuant to DCC 22.36.020.

I. APPLICABLE STANDARDS AND CRITERIA

Deschutes County Code (“DCC” or “County Code”)

Title 22, Deschutes County Development Procedures Ordinance
Chapter 22.08.010, Application Requirements
Chapter 22.36.010, Expiration of Approval

II. BACKGROUND AND PROCEDURAL FINDINGS

A. Application

The Applicant has requested a Declaratory Ruling to determine whether the marijuana production facility approved under File No. 247-17-000907-AD has been initiated.

B. Notice and Hearing Summary

The notice of public hearing was published in The Bulletin on May 7, 2023 and was mailed pursuant to DCC 22.20 and DCC 22.24 on May 3, 2023. Pursuant to the notice of public hearing, the Hearings Officer presided over an evidentiary hearing on May 30, 2023, at 6:00 p.m. The hearing was held via videoconference, with County Planning Staff (“Staff”), the Applicant, and the Applicant’s legal counsel, Michael Hughes, Hughes Law, present in the hearings room.

At the start of the hearing, the Hearings Officer provided an overview of the quasi-judicial process, and instructed participants to direct their comments to the approval criteria and standards, and to raise any issues a participant wished to preserve for appeal. The Hearings Officer declared no *ex parte* contacts or bias to report, and asked for, but received no objections to the County’s jurisdiction or to the Hearings Officer presiding over the matter.

County Staff presented the staff report. Mr. Hughes presented the Application, on behalf of the Applicant. The Applicant testified at the hearing. There was no other testimony in favor of, in opposition to, or neutral to the Application.

C. 150-day Clock

The Application was submitted on February 22, 2023, and deemed complete on April 6, 2023. At the Hearing, the Applicant agreed to toll the clock by thirteen days, to allow time for final evidence, rebuttal, and legal argument. The 150th day on which Deschutes County (the “County”) must take final action is September 16, 2023, which is a Saturday.

D. The Record

The record materials provided to the Hearings Officer include all of the following items under County File No. 247-23-000125-DR, which are accepted into the record of this Hearing:

1. Document [Application Materials 23-125-DR](#)
2. Document [2023-03-21 Incomplete Letter 23-125-DR](#)
3. Document [2023-04-06 M. Hughes Incomplete Response](#)
4. Document [2023-03-10 R. Scheid Agency Comment.pdf](#)

5. Document [2023-03-13 P. Russell Agency Comment.pdf](#)
6. Document [2023-05-23 Staff Report 23-125-DR](#) (the “Staff Report”)
7. Document [2023-03-10 23-125-DR NOA](#)
8. Document [2023-05-03 NOPH 23-125-DR](#)
9. Document [2023-05-10 Affidavit of Publishing 23-125-DR](#)
10. Document [2023-06-02 M. Hughes Testimony](#)
11. Document [2023-06-12 Final Argument](#)

At the hearing, the Applicant requested to leave the record open for a period of thirteen days, in order to present final evidence and argument. The record was closed at the end of the open record period, on June 12, 2023.

III. SUBSTANTIVE FINDINGS AND CONCLUSIONS

A. Adoption of Staff Findings

I find that all of the applicable criteria and procedures relating to this Application are identified in the County’s Staff Report contained in the record to this Hearing. The Staff Report also contains a section of Basic Findings, which includes a determination that the Property is a legal lot of record and describes the general site. No participants to the hearing object to those portions of the Staff Report, and I adopt the Basic Findings contained therein as part of my Findings in this Decision, with the revised Review Period as identified above.

The Staff Report contains an analysis and proposed findings for each of the criteria, including whether each criterion has been met or is inapplicable. I adopt, as my findings, the proposed findings contained in the Staff Report concerning DCC 22.08.010 *Application Requirements*; DCC 22.40, *Declaratory Ruling*; and DCC 22.36.020(A)(1) and (3), which find that the criteria contained therein are either met or are inapplicable to this Application.

B. Compliance with DCC 22.36.010(B), Expiration of Approval; Duration of Approvals

Findings: This section of the County Code provides that a land use permit is void two years after the date the decision becomes final, if the use that was approved is not initiated within that time period. There are allowances for extensions. The Applicant received land use approval to establish a marijuana production facility (including one greenhouse and one storage container) on the Property under File No. 247-17-000907-AD on April 12, 2018, and the decision became final on April 24, 2018. The Applicant twice received extensions of the approval, making April of 2022 the final date to have initiated the use. For the reasons discussed below, I find that the use approved under File No. 247-17-000907-AD was initiated prior to April 2022.

D. Compliance with DCC 22.36.020(A)(2) and DCC 22.36.020(B), 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 . . . Substantial construction toward completion of the land use approval has taken place.

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.

Findings: Under this section of the County Code, the three elements for determining whether substantial construction has taken place are: (1) whether the holder of land use approval has physically altered or changed the use of the land; (2) whether the alteration or change was directed toward completion of the development; and (3) whether the expenditures of time, labor, or money demonstrate a good faith effort to complete the development.

The Property was approved for a marijuana production facility under File No. 247-17-000907-AD, which proposal was to construct one greenhouse for marijuana production and one storage container for security, storage, drying, and curing of marijuana product. At the Hearing, the Applicant testified that he bought the Property in 2015 for the sole purpose of marijuana production. He began working with the County in 2017 and said that he did not anticipate any issue with receiving land use approval because the proposed use fit within the allowable zoning uses on the Property; for this reason, he began working on the development while the land use application was in progress. The Applicant testified that the approved greenhouse and storage container had not yet been constructed on the Property, although the frame for the greenhouse had been placed. The Applicant testified that the Property had existing structures on it that he believed he could use for infrastructure; and that he upgraded the electrical system to allow for more service, which would be needed for the marijuana production, and to allow for odor and noise equipment, which were required as part of the land use approval. This testimony somewhat conflicts with the Staff Report, which states that the odor and noise control systems had not been physically installed, to-date. The Applicant testified that he installed security systems in place, including cameras and a steel door. The Applicant testified that he cleared the land on the Property to accommodate the greenhouse, and changed the water rights on the Property to accommodate the greenhouse. The Applicant testified that since 2016 through the date of the Hearing, he has employed a full-time employee for the marijuana production, and has used the Property for a medical marijuana grow. The Applicant stated that he purchased plastic for the greenhouse; that he put the frame of the greenhouse on the Property; and that 90-95% of what is needed for marijuana production is existing on the Property, all of which he installed and constructed in 2017, prior to receiving the land use approval and after discussing his land use application with the County.

The Applicant testified that, at the time of the land use approval, the market for marijuana production was less favorable and he therefore put the project on hold. He stated that all that is needed to complete the development is to erect the greenhouse.

I find that the first element of the substantial construction analysis—*whether the holder of land use approval has physically altered or changed the use of the land*—is met. This element may be broken down into two parts: requiring that: (1) a physical alteration or change in use of the land be made; and (2) that it be made by the holder of a land use approval. The parties are in agreement that there has been a physical alteration or change in use of the land, and I do so find. I base this finding on the Applicant's evidence and testimony of the greenhouse frame and equipment being placed on the Property in 2017, and the expenditures and system upgrades stated by the Applicant as occurring in 2017.

The second part of the analysis requires that the alteration or change be made by the holder of a land use approval. While the Applicant is the holder of a land use approval, the Applicant was not the holder of a land use approval at the time of the physical alteration or change in use, because the Applicant's work on the Property took place prior to receiving the land use approval. Read together with the remaining elements of DCC 22.36.020(B), and from the absence of any timing requirement on a plain text reading of this County Code provision, I find that the holder of land use approval need not hold the approval at the time of the alteration or change in use, so long as the work was directed toward completion of the development.

The second element of the substantial construction analysis is whether the alteration or change was directed toward completion of the development. There is no question as to whether the alteration or change in use need occur prior to the expiration of the land use approval (and any applicable extensions). Indeed, the parties are in agreement, and I also find, that the alteration or change took place prior to the expiration of the land use approval, because the changes took place in 2016-2017 and the land use approval was not granted until April 2018 and was not set to expire until April 2022. The question in this case is whether the alterations and changes that occurred prior to receiving land use approval may be considered as being directed toward completion of the development. As I understand the County's position in the Staff Report, it believes that expenditures made prior to the approval of the land use permit should not be considered as being directed toward the development, because no action may be considered directed toward an approved development, when there is no approved development. The County also posited that alterations and changes that are uniquely directed toward other developments that are not included in the permit must not be considered. The Applicant does not read the same chronology requirement into this element of the criterion, and argued that all of the efforts by the Applicant were directed toward the completion of the marijuana production development, even though the efforts were undertaken prior to the Applicant receiving approval for the same.

I agree with the Applicant that actions taken by an applicant may be considered directed toward the completion of a development prior to receiving land use approval. To hold otherwise would be counter to the commonplace occurrence of business decisions being made in anticipation of certain events occurring. Whether or not those events actually occur is insubstantial to actions being made in their anticipation (not without risk of their nonoccurrence, which would, and commonly do, factor into the cost and liability of those business decisions). Furthermore, as the Applicant suggested, it would be impractical to require the duplication of expenditures simply for the purpose of making them after a land use approval has been provided, particularly where the expenditures

were made with the reasonable expectation that the approval would be granted. In this case, the Applicant provided credible testimony that the sole purpose for his purchase of this Property was for a marijuana production development. The Applicant also provided credible testimony that, after consultation with the County in 2017, and with his attorney, he believed the land use approval would be granted, because he was proposing a farm use in a farm zone. The Applicant applied for land use approval in late 2017, and the application was not approved until about four months later, in April of 2018, it is reasonable to conclude that within that four-month period, actions toward the development of the project might be made, in anticipation of the approval being granted. It is also reasonable to conclude that actions taken after determining the land use approval would likely be granted might be made in anticipation of the approval. In other words, any of the Applicant's actions from the time of initial consultation or pre-application with the County, through the date of approval. It is less clear whether expenditures made prior to any consultation regarding the likelihood of approval of the proposed development could be considered directed toward the completion of the development, as any such actions taken may be seen as more speculative than based in any known likelihood of success of the proposed development. For this reason, I do not consider any of the expenditures made prior to 2017, which is the first year the Applicant stated that he first began conversations with the County regarding the application.

Regarding the expenditures made in 2017: At the Hearing, the Applicant described each of the expenditures and explained how they were made in furtherance of the marijuana production use. Based on the Applicant's testimony, I find that the Applicant met its burden of proof of establishing that the upgrades and expenditures made to the electrical, odor, and noise systems, existing buildings, permits, greenhouse frame and equipment, and other items on the list presented on page 8 of the Staff Report were undertaken for the purpose of completing the marijuana production facility and constitute an alteration or change in use. Further, there is no rebuttal evidence or testimony in the record that suggest these actions were taken for any other development purpose, nor were used for any other development purpose.

The third and final element of the substantial construction analysis is whether the expenditures of time, labor, or money demonstrate a good faith effort to complete the development. Whether someone has made a "good faith effort" is inherently a subjective standard. I find that the Applicant did make a good faith effort to complete the development, based on the same reasons noted above. Specifically, I base my finding on the Applicant's credible testimony that all of the work identified above which he completed on the Property was for the purpose of completing the development; his explanation of each expenditure in regard to how it was directly made for the purpose of developing the marijuana production facility; his accounting of the expenditures and testimony and assertion that the development on this Property is 90-95% complete; the Applicant's explanation of the timing of the market, and specifically his reasons for moving quickly to further the development at the time of the initial proposal and how he put the project on hold when the market became less lucrative for the approved development. I further find no evidence in the record to rebut the Applicant's assertion that his efforts were made in good faith, nor any evidence or assertions of taking actions in bad faith. I therefore find that this element is met.


IV. CONCLUSION, CONDITIONS OF APPROVAL, DURATION OF APPROVAL

Based on the foregoing Findings, the Application is APPROVED. I find that the marijuana production facility approved under File No. 247-17-000907-AD has been initiated pursuant to DCC 22.36.020, with the following conditions of approval:

1. The conditions of approval associated with File No. 247-17-000907-AD shall remain in effect.

As earlier noted, no party has asserted, and I do not find, that the proposed use has yet lawfully occurred; instead, I find that substantial construction toward completion of the land use approval has taken place under DCC 22.36.020, which in turn means that the use was initiated under DCC 22.36.010. The County requested that the duration of the approval be noted in this Decision; however, I do not find a basis in the County Code to impose a timeline for the duration of a decision made by declaratory ruling. In contrast, DCC 22.36.010(A)(2) specifically exempts declaratory rulings from the County Code regarding expirations of approval; and DCC 22.36.010(B) specifically provides for exemptions from any limitation on the duration of approval where an initiation of use has been found. Absent any County Code provision speaking to the duration of declaratory rulings; and absent any recommendation in the record from any party regarding the duration of this declaratory ruling, I therefore decline to impose any specific, additional duration restrictions to the land use approval under File No. 247-17-000907-AD.

Dated this 26th day of July, 2023



Laura Westmeyer
Deschutes County Hearings Officer