



STAFF REPORT

FILE NUMBER: 247-22-000246-DR

SUBJECT PROPERTY/

OWNER:

RUNNING WATERS PROPERTIES OF OREGON LLC
Map and Taxlot: 1409000000800
Account: 144544
Situs Address: 71017 INDIAN FORD RD, SISTERS, OR 97759

APPLICANT: Michael Gemmet

REQUEST: Declaratory Ruling to determine whether the guest ranch approved under file no. CU-01-120 has been initiated.

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

I. APPLICABLE CRITERIA

Title 22, Deschutes County Development Procedures Ordinance

II. BASIC FINDINGS

LOT OF RECORD: The subject property is recognized as two separate legal lots of record; one lot consisting of tax lots 800 and 801, and the other lot consisting of tax lots 400 and 401, pursuant to land use file no. DR-00-08.

SITE DESCRIPTION: The subject property is approximately 160 acres in size, pursuant to land use file no. DR-00-8, and consists of four tax lots and is developed with a single-wide manufactured home, ten partially constructed cabins, a few accessory sheds, and a hay cover. The rest of the property consists of two ponds, as well as fenced corral areas and pasture areas. The property contains a cover of ponderosa pine and juniper trees where the land is unirrigated. The property is

rectangular in shape and fronts on Indian Ford Road. The grade of the property is relatively even.

PUBLIC COMMENTS: The Notice of Application was mailed on April 8th, 2022. Additionally, the applicant submitted the Land Use Sign Affidavit indicating the land use action sign was posted on April 8th, 2022. A number of comments were received, which staff addresses in the body of the staff report. The public comments, in their entirety, are included in the record and incorporated herein by reference.

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

Deschutes County Building Division: Randy Scheid, April 11th, 2022

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, April 27th, 2022

I have reviewed the transmittal materials for 247-22-000246-DR to determine if a guest ranch approved by CU-01-120 has been initiated. The site is located in the Exclusive Farm Use (EFU) zone at 71017 Indian Ford Rd., aka County Assessor's Map 14-09-00, Tax Lot 800.

As this is a declaratory ruling there are no requirements for traffic analysis or transportation system development charges (SDCs).

The property accesses Indian Ford Road, a public road maintained by Deschutes County and functionally classified as a collector. The property has a driveway permit approved by Deschutes County (247-SW1620) and therefore the access permit requirements of DCC 17.48.210(A) have been met.

Department of State Lands: Daniel Evans, April 29th, 2022

It appears that the proposed project may impact wetlands and may require a State permit.

An onsite inspection by a qualified wetland consultant is recommended prior to site development to determine if the site has wetlands or other waters that may be regulated. The determination or delineation report should be submitted to DSL for review and approval. Approved maps will have a DSL stamp with approval date and expiration date.

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 National Forest, Sisters-Camp Sherman Rural Fire Department.

REVIEW PERIOD: The subject application(s) were submitted on March 23rd, 2022 and deemed incomplete by the Planning Division on April 22nd, 2022. After the submittal of additional information, the application was deemed complete by the Planning Division on May 20th, 2022. The 150th day on which the County must take final action on this application is October 17th, 2022.

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: A letter submitted to the record challenges whether the application was signed by the property owner. The application was signed by Michael Gemmet. Per the Burden of Proof, Michael Gemmet is a registered agent of the property owner, Running Waters Properties of Oregon LLC.

Staff asks the Hearing Officer to focus his review on this issue.

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.

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 CU-01-120, SP-01-56 the Hearings Officer found, under "Duration of Approval":

The applicant shall satisfy the conditions of this approval and begin operation of the guest ranch facility 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 Hearings Officer found:

The applicant proposes to establish a guest ranch facility to include overnight lodging within 10 proposed cabins and a lodge/kitchen building and passive activities and food services. The applicant states the proposed cabins will be approximately 800 to 1000 square feet in size and consist of a small cooking area, bathroom and one bedroom.

The decision cites the definition of "Guest Ranch"

"Guest ranch" means a facility for overnight lodging incidental and accessory to an existing and continuing livestock operation, using accepted livestock practices that qualifies as a farm use under ORS 215.203. Guest ranch facilities may include a lodge, bunkhouse or cottage accommodations as well as passive recreational activities and food services as set forth in DCC 18.128.360(4) and (5).

While the "Duration of Approval" findings do not expressly require construction, it appears to staff that "operation of the guest ranch facility" would require that there be lodging constructed to achieve the lodging of guests and initiate the use. Staff believes that this criterion does not apply to the present application and requests the Hearings Officer to make specific findings on this issue.

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: At the outset, staff notes that interpretation of this criterion has not been before a Hearings Officer or the Board of County Commissioners previously. DCC 22.26.020 was adopted by the county in Ordinance No. 95-018, in 1995 and has changed since.

Staff believes this criterion presents a multi-pronged test to determine when "substantial construction" has occurred:

Staff reads this criterion to require 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. This appears to have occurred in this case.

Staff 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. Staff believes that the partial construction of the overnight lodging, among other actions summarized below, was directed towards the completion of the development.

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)

Under this approach to good faith effort, the analysis would be specific to the facts or circumstances of the case and would be evaluated by what a reasonable person would determine is a diligent and honest effort, given those facts and circumstances. Staff believes the Hearings Officer will have to make the initial interpretive choice, whether the diligent and honest effort is generic to the type of application or is specific to the circumstances that prevented the holder of the permit from completing the development.

Next, staff believes, the Hearings Officer will need 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 and opponent 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 physical alteration and whether staff agrees the action was a physical alteration of the land that is directed towards completion of the guest ranch. 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?
Power Improvements Vaults/ Conduit/ Trenching/ Backfill/ 6000 feet at \$37.32	\$223,920	Yes
1.2 Miles Road 1 foot Subgrade, 6 inches Finish Grade	\$116,750	Yes
Well and Cistern	\$384,670	Yes
Cabins	Amount	Physical Alteration?
Temp Utilities	\$6,000	Yes
Sitework/ Excavation/ Backfill	\$45,000	Yes
Concrete-Footings/ Foundation	\$95,000	Yes
Framing - Materials	\$156,000	Yes
Framing - Labor	\$90,000	Yes
Trusses	\$12,600	Yes
Roofing - Material	\$87,500	Yes
Roofing - Labor	\$28,000	Yes
Windows	\$29, 698	Yes

Septic Tanks and Drain Field leachline	\$80,000	Yes
Plumbing	\$22,500	Yes
Electrical	\$26,400	Yes
HVAC	\$15,000	Yes
Plans and Engineering Costs	\$45,000	No
Well Houses	Amount	Physical Alteration?
Sitework/ Excavation/ Backfill	\$3,412	Yes
Concrete-Footings/Foundation	\$5,984	Yes
Concrete – Slab Floor	\$5,184	Yes
Framing – Materials	\$19,704	Yes
Framing - Labor	\$11,368	Yes
Trusses	\$1,600	Yes
Roofing - Material	\$8,148	Yes
Roofing - Labor	\$4,000	Yes
Grand Total for Physical Alteration	\$1,137,768	

Below staff includes excerpts from the Burden of Proof statement from the applicant’s attorney as well as a Declaration of Jackie Herring in support of the initiation of use findings.

PROPOSED FINDINGS IN RE. INITIATION OF USE:

22.36.20 Initiation of Use

FINDING:

[T]he applicant has “initiated use” of CU-01-120. This finding is supported by evidence demonstrating “substantial construction” as that term is defined by the applicable statute. The evidence supports staff determination that the applicant has initiated use of, and maintained, the approved Guest Ranch.

The applicant has submitted supporting evidence independently sufficient to support this finding. The evidence submitted by the applicant includes: facts, documents, data, photographs, declaration, and other information that conclusively demonstrates compliance with the applicable provisions of the DCC relating to initiation of use and substantial construction, as well as proof that, contrary to the three opposition emails, the livestock operation (as defined by LUBA) at the approved Guest Ranch is, and prior to has at all times since the Guest Ranch approval remained active contrary to the three opposition emails

[T]he following evidence specifically helpful in determining the applicant has “initiated use” of the approved Guest Ranch:

1. Photographs of the subject parcel showing major alterations to the land, completion of all livestock and agricultural infrastructure, and completion or near completion of the Guest amenities. Photographs also show an installed and well-maintained perimeter fence and interior post-and-rail wood fencing necessary to keep livestock contained and separated from the guest amenities.

2. Documents evidencing more than \$1.2+ million in development expenses, and several years of invested time and labor.

3. The Applicant submitted evidence showing the Ranch has remained in agricultural and livestock use during the validation of the Guest Ranch permit designation.

[4]. The applicant has submitted the Declaration of Jackie Herring, who operated the livestock operation (including horses, mules, and cows) between 2000 and 2009 and who was responsible for management and oversight of construction, finances, and maintenance of the Guest Ranch amenities and ranch infrastructure.

[5]. Spreadsheets summarizing permits in furtherance of the Guest Ranch, including 10 fully installed and finally approved septic systems (one for each of the 10 cabins).

[6]. Evidence of substantial improvements to the electrical infrastructure to support operation and maintenance of the Guest Ranch. Electrical upgrades include adding power to the well houses, storage buildings, office and cabins and placing all electrical infrastructure below grade. The electrical infrastructure is well maintained and provides necessary power to the Guest Ranch.

The evidence submitted conclusively demonstrates compliance with the applicable provisions of the DCC, the Guest Ranch, and consistency with the conditions of approval.

For each of the foregoing reasons, the applicant has shown that the determination of use for the approved Guest Ranch was initiated.

DECLARATION OF JACKIE HERRING IN SUPPORT OF FINDING OF INITIATED USE

I, Jackie Herring, declare:

1. I am personally familiar with the subject Guest Ranch. The following statements are true and correct and, if called upon, I could competently testify to the facts averred herein.

2. I have been actively involved in the management, caretaking, and oversight of the property since the year 2000.

3. Between the year 2000 and 2009 I estimate I dedicated approximately 30 plus hours of labor toward development of the Guest Ranch.

4. During the same period I was personally involved in the financial decisions, budgeting, and monetary expenditures to develop the Guest Ranch, including more than \$1.2 million dollars in development expenses comprising approximately 40% of the total monies needed to complete the project.

5. I personally dedicated more than three years toward the intensive development of the approved Guest Ranch, completing all of the infrastructure necessary for livestock operations to continue with the inclusion of the Guest Ranch amenities, (separating Guest Ranch amenities from the livestock operation in place). I spent the next seven years maintaining and improving the livestock operation in active use today.

6. I was responsible for oversight of the following construction, land alterations, and installation of critical infrastructure required for the aforementioned ranch operations and Guest Ranch improvements:

- a. More than 5,000 linear feet of perimeter fencing plus 4000 linear feet of interior fencing comprised of New Zealand and post-and-rail wood fencing, all necessary for livestock operations over the entire parcel,
- b. Design, preparation, installation, and maintenance of irrigation system necessary to provide water for livestock, agriculture, and guest ranch infrastructure and amenities,
- c. Purchase, operation, and maintenance of farm and ranch equipment and supplies necessary for the guest ranch and livestock operations,

7. I am still involved with the Guest Ranch and livestock operation today. I continue to manage and support the current livestock operation, ranch, and maintenance of the existing infrastructure and amenities.

8. After the Guest Ranch was approved I oversaw the design, layout, construction, and development of the guest ranch amenities and livestock operation and related infrastructure, I was personally responsible for the:

- a. Purchase of materials for, construction of, and maintenance of all improvements and infrastructure for guest ranch (inclusive of 10 existing guest cabins under various stages of construction) and livestock ranch infrastructure.
- b. Design, purchase, installation, and maintenance of 10 fully permitted and finalized septic systems (one for each of the 10 cabins).
- c. Design, purchase, installation, maintenance, and upgrades to the electrical infrastructure necessary for operation of the ranch and guest amenities (collectively the "Guest Ranch").
- d. Upgrades to existing electrical infrastructure and installation of power to well houses, storage buildings, the office, and guest cabins.

e. Management of the excavation and placement of electrical, irrigation, plumbing, and septic infrastructure and service connections underground. All in furtherance of continued improvement and beautification of the Guest Ranch, and livestock operation.

9. In total, I personally oversaw expenditures totaling more than \$1,200,000 toward the development of the approved Guest Ranch and livestock operation. I dedicated more than nine years directly toward the permitting, approval, design, development, and construction of the approved (1) ranch, (2) livestock operation, and (3) guest ranch infrastructure and amenities.

Dated May 11th, 2022

Below, staff includes the opposition comments and letters from Carol Macbeth, Chris Simons, and Ginger Durdan-Shaw / Kanoe Godby.

Carol Macbeth of Central Oregon LandWatch (March 29th, 2022)

LandWatch is concerned this application does not qualify for the requested declaratory ruling of initiation of use. The amount expended on the framing of a handful of shacks before all permits for the property expired and became void is inconsequential.

...

Until recently all shacks on the property were apparently derelict, lacking windows, doors, etc. and open to the elements. There appears to be recent construction activity on the shacks. Since county records show all permits for the property are void having expired over a decade ago, the current work, which may include wrapping of the shacks, appears to be proceeding without permits. Moreover if there has been current work this could give the impression more permitted work had been completed than actually was completed before the project was apparently abandoned and left to rot in approximately 2009.

Carol Macbeth of Central Oregon LandWatch (May 20th, 2022)

LandWatch has the following additional comments regarding the abandonment of the guest ranch on Indian Ford Road.

There was a complete cessation of ranch use on this property, if there ever was a ranch here, which is in significant doubt. The use was abandoned and there is no evidence of a single cow-calf pair or any other livestock on the property since that time.

The approval that has expired and which was never initiated was a land use approval, not building permit approvals. No construction was required for completion of the land use approval, thus it is necessary that the conditions of approval were substantially exercised, for example, that a livestock operation have been in existence and any guest ranch be

incidental to it. This has not occurred and appears to have never occurred. Failure to comply is wholly the fault of the applicant.

The applicant was required to operate a ranch as a condition of approval but has never done so. This triggered the requirement of submittal and approval of a new application.

The conditions of approval also specify that a replacement dwelling for "the" livestock operator was to have been completed before the issuance of any building permits. Since there is no evidence there was ever a livestock operator there is no evidence that a replacement dwelling for a livestock operator has ever been lived in on this property.

Chris Simons, General Counsel for Juniper Financial Services

I am General Counsel for Juniper Financial Services, LLC (formerly known as MaLeCo), owner of 70825, 70875, and 70885 Indian Ford Road, Sisters, Oregon.

Juniper hereby submits a challenge to the above referenced application. The County should deny this application, which is nothing but an attempt to resurrect the expired approval of a Guest Ranch application from 20 years ago.

First, as previously noted, the party who filed the above referenced application (Michael Gemmet) is not the owner of the property. For that reason alone, the current application for declaratory ruling must be denied.

Second, the approval of the Guest Ranch application expired 13 years ago. As the applicant admits in his application packet: "the work completed would need to have been done by August 8, 2009." However, the work was not completed by that date. After receiving a series of extensions to complete the project (the original application approval required completion within two years), the prior owners abandoned the project in 2009. Allowing this abandoned project to continue in 2022, some 13 years after it was abandoned, would set a dangerous precedent for the County, and is clearly in conflict with Deschutes County Code section 22.36.010.

If the new owners of the subject property would like to file a new application for approval of a Guest Ranch, they should follow the appropriate process to do so. This would allow the appropriate opportunity for a thorough and complete review of a new land use application. It should be noted that the basis for the Guest Ranch application approval in 2002 was DCC sections 18.16.037 and 18.128.360. Those code sections have been amended several times since the original approval was granted. It would be inappropriate 20 years later to allow this expired approval to stand when the code today is not the same as it was in 2002.

Lastly, it must be noted that the explicit requirements of DCC sections 18.16.037 and 18.128.360 are not met. The property here is less than 160 acres. Further, there is no existing and continuing "livestock operation" on the property. The County should not allow the

perpetuation of this attempt to commercially develop land that is designated for exclusive farm use.

Ginger Durdan-Shaw – Kanoe Godby, adjacent property owners to the subject property

Our family owns the property adjacent to the subject property on Indian Ford Road in Sisters. We have owned this property since 1961 and, as full-time residents we are very familiar with the history of the properties along Indian Ford Road, as well as their past and current uses. After reviewing the applications and information available through DIAL and reading the Oregon State Land Use regulations and requirements for Guest Ranch designation, we have a number of concerns.

- 1- The requirement of 160 acres has not been met.
- 2- The requirement that the subject property has an on-going livestock operation and a owner/operator residing on the property has not been met.
- 3- The income from the Guest Ranch operation must be secondary to the on-site livestock operation is questionable.

It is important to note that we share the complete eastern boundary with the subject property and have open view of the complete parcel. In the approximately 15 years since the old CUP was invalidated and work ceased, conditions have changed. First, the land use code for guest ranch has changed. Also, there has been no evidence of an ongoing working cattle ranch on the subject property during this time. We do not believe that moving cattle on to the property from time to time to maintain an appearance of ranching qualifies as a continuous and on-going operation.

The original intent of the Guest Ranch designation in the State of Oregon statutes was twofold. First, to help existing ranchers create a supplemental income and second to offer guests the chance to experience life on a working ranch. Activities must be incidental and subordinate to the ranching operation.

In the situation at hand, it appears that the new owner of the property is approaching this backwards - first to get approvals to develop Guest Ranch facilities, then secondly to, hopefully start a livestock operation. In this scenario it would be almost impossible to meet the criteria of Guest Ranch income to be secondary to the on-site ranching income, or meet the original intent of the Guest Ranch designation.

The application approval for a “Declaratory Ruling to determine the initiation of use for a guest ranch pursuant to file #CU-01-120” only addresses the amount and cost of previous work that was done on the cabins and does not address the fact that all work ceased in 2009 when the permit expired. At that time the cabins were completely abandoned and left open to the weather and it appeared that no effort was made to protect them for future use. Only in the last few months has any work been done on the cabins by the new owner, Rolling Waters Properties LLC. to protect them from continuing destruction from the elements.

It appears that the current owner, who is a resident of Portland does not reside on the property and if a manager has been recently installed, it still doesn't qualify as an on-going livestock operation, a "working ranch". A more reasonable approach would be to establish an on-site, working ranch with a resident owner or manager and verifiable income, then reapply for a new CUP for guest ranch designation.

As adjacent homeowners and neighbors, we fully support land use rights if the criteria is fully met and the governing entity takes in to consideration the complete situation as well as the original intent of the law. We treasure our beautiful open range and value our neighboring ranchers. We also value appropriate oversight to keep our precious EFU land intact.

Staff notes several arguments are made regarding the time since the permit, as extended, has elapsed. Again, staff believes that, as of the date of 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.

Staff notes that most approvals, with the notable exception of non-conforming uses, are not subject to becoming void through interruption or abandonment.

Based on the BoP and evidence in the record, staff agrees with the applicant and finds the applicant has demonstrated substantial construction of the guest ranch has been made. Staff requests the Hearings Officer make detailed findings on these issues.

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. CU-01-120 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. CU-01-120 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. CU-01-120 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 a registered agent for the current property owner, which is Running Waters Properties of Oregon 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. CU-01-120 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.

TITLE 18, DESCHUTES COUNTY ZONING ORDINANCE.

Chapter 18.16, Exclusive Farm Use Zone.

Section 18.16.037, Guest Ranch.

- A. ***A guest ranch may be established in conjunction with an existing and continuing livestock operation, using accepted livestock practices that qualifies as a farm use under DCC 18.04.030, subject to the applicable provisions set forth in DCC 18.16.040(A)(1), (2) and (3), the applicable provisions of DCC 18.128, and the provisions of the applicable Oregon Revised Statutes. A guest ranch shall not be located within the boundaries of or surrounded by:***
 - ...
 - 4. ***An area established by an Act of Congress for the protection of scenic or ecological resources.***
- B. ***“Guest ranch” means a facility for overnight guest lodging units, including passive recreational activities and food services, as set forth in ORS 215 that are incidental and accessory to an existing livestock operation that qualifies as a farm use under DCC 18.04.030.***
- C. ***A guest lodging unit means a guest room in a lodge, bunkhouse, cottage or cabin used only for transient overnight lodging and not for permanent residence accommodations.***
- D. ***For the purposes of DCC 18.16.037, “livestock” means cattle, sheep, horses, and bison.***
- E. ***A proposed division of land in an exclusive farm use zone for a guest ranch or a division of a lot or parcel that separates a guest ranch from the dwelling of the person conducting the livestock operation shall not be allowed.***
- F. ***Notwithstanding DCC 18.16.055, a proposed division of land in an exclusive farm use zone for a guest ranch shall not be allowed.***

FINDING: At the outset, staff notes the present code is slightly different that the code at the time of the time of the original approval. On December 1, 2001, under Ordinance No 2001-043, this section read:

18.16.037. Guest ranch.

- A. A guest ranch may be established in conjunction with an existing and continuing livestock operation, using accepted livestock practices that qualifies as a farm use under ORS 215.203, subject to the applicable provisions set forth in DCC 18.16.040(A)(1), (2) and (3), the applicable provisions of DCC 18.128, and the provisions of ORS 215.296(1) and (2).
- B. "Guest ranch" means a facility for overnight lodging incidental and accessory to an existing livestock operation that qualifies as a farm use under ORS 215.203. Guest ranch facilities may include a lodge, bunkhouse or cottage accommodations as well as passive recreational activities and food services as set forth in DCC 18.128.360(4) and (5).
- C. For the purposes of DCC 18.16.037, "livestock" means cattle, sheep, horses, and bison.
- D. A proposed division of land in an exclusive farm use zone for a guest ranch or a division of a lot or parcel that separates a guest ranch from the dwelling of the person conducting the livestock operation shall not be allowed.

(Ord. 2001-043 § 1, 2001; Ord. 98-056 § 1, 1998)

Note: DCC 18.16.037 is repealed December 31, 2004~~5~~.

Letters submitted to the record raise concerns regarding whether a livestock operation existed at the time of the CU-01-120 application and whether a livestock operation exists today. Below staff includes excerpts from these letters highlighting these issues.

Carol Macbeth of Central Oregon LandWatch (March 29th, 2022)

The evidence suggests there has never been a livestock operation on the property that qualifies as a farm use as required by law, and there is not one now. Nor is there a livestock operator who resides on the property as required by law, if there ever was one. The construction permits expired because Deschutes County determined at the time that the landowner did not show sufficient progress toward completion of the work.

Carol Macbeth of Central Oregon LandWatch (May 20th, 2022)

There was a complete cessation of ranch use on this property, if there ever was a ranch here, which is in significant doubt. The use was abandoned and there is no evidence of a single cow-calf pair or any other livestock on the property since that time.

The approval that has expired and which was never initiated was a land use approval, not building permit approvals. No construction was required for completion of the land use approval, thus it is necessary that the conditions of approval were substantially exercised, for example, that a livestock operation have been in existence and any guest ranch be incidental to it. This has not occurred and appears to have never occurred. Failure to comply is wholly the fault of the applicant.

Chris Simons, General Counsel for Juniper Financial Services

Further, there is no existing and continuing "livestock operation" on the property. The County should not allow the perpetuation of this attempt to commercially develop land that is designated for exclusive farm use.

Ginger Durdan-Shaw – Kanoë Godby, adjacent property owners to the subject property

[W]e have a number of concerns.

...

2- The requirement that the subject property has an on-going livestock operation and a owner/operator residing on the property has not been met.

...

It is important to note that we share the complete eastern boundary with the subject property and have open view of the complete parcel. In the approximately 15 years since the old CUP was invalidated and work ceased, conditions have changed. First, the land use code for guest ranch has changed. Also, there has been no evidence of an ongoing working cattle ranch on the subject property during this time. We do not believe that moving cattle on to the property from time to time to maintain an appearance of ranching qualifies as a continuous and on-going operation.

...

In the situation at hand, it appears that the new owner of the property is approaching this backwards - first to get approvals to develop Guest Ranch facilities, then secondly to, hopefully start a livestock operation.

...

It appears that the current owner, who is a resident of Portland does not reside on the property and if a manager has been recently installed, it still doesn't qualify as an on-going livestock operation, a "working ranch". A more reasonable approach would be to establish an on-site, working ranch with a resident owner or manager and verifiable income, then reapply for a new CUP for guest ranch designation.

To address this issue the applicant provides responses, which staff excerpts below.

1. Photographs of the subject parcel showing major alterations to the land, completion of all livestock and agricultural infrastructure, and completion or near completion of the Guest amenities. Photographs also show an installed and well-maintained perimeter fence and interior post-and-rail wood fencing necessary to keep livestock contained and separated from the guest amenities.
3. The Applicant submitted evidence showing the Ranch has remained in agricultural and livestock use during the validation of the Guest Ranch permit designation.
- [4]. The applicant has submitted the Declaration of Jackie Herring, who operated the livestock operation (including horses, mules, and cows) between 2000 and 2009 and who was responsible for management and oversight of construction, finances, and maintenance of the Guest Ranch amenities and ranch infrastructure.

Staff is uncertain if these concerns are relevant to the requested initiation of use decision. Staff asks the Hearings Officer to focus his review on this issue.

Chapter 18.128, Conditional Uses.

Section 18.128.360, Guest Ranch.

A guest ranch established under DCC 18.16.037 shall meet the following conditions:

...

B. The guest ranch shall be located on a lawfully established unit of land that:

- 1. Is at least 160 acres in size;***

FINDING: At the outset, staff notes the present code is slightly different than the code at the time of the original approval. On December 1, 2001, under Ordinance No 2001-043, this section read:

18.128.360. Guest ranch.

A guest ranch established under DCC 18.128.360 shall meet the following conditions:

A. Except as provided in DCC 18.128.360(C), the lodge, bunkhouses or cottages cumulatively shall:

1. Include not less than four nor more than 10 overnight guest rooms exclusive of kitchen areas, rest rooms, storage and other shared indoor facilities, and;
2. Not exceed a total of 12,000 square feet in floor area.

B. The guest ranch shall be located on a lawfully created parcel that is:

1. At least 160 acres in size;
2. The majority of the lot or parcel is not within 10 air miles of an urban growth boundary containing a population greater than 5000;
3. The parcel containing the dwelling of the person conducting the livestock operation; and
4. Not classified as high value farmland as defined in DCC 18.04.030.

C. For every additional 160 acres to the initial 160 acres required under DCC 18.128.360(B), up to five additional overnight guest rooms and 3,000 square feet of floor area may be added to the guest ranch for a total of not more than 25 guest rooms and 21,000 square feet of floor area.

D. A guest ranch may provide recreational activities in conjunction with the livestock operation's natural setting, including but not limited to hunting, fishing, hiking, biking, horseback riding or swimming. Intensively developed recreational facilities such as a golf course or campground as defined in DCC Title 18, shall not be allowed in conjunction with a guest ranch, and a guest ranch shall not be allowed in conjunction with an existing golf course or with an existing campground.

E. Food services shall be incidental to the operation of the guest ranch and shall be provided only for the guests of the guest ranch. The cost of meals provided to the guests shall be included as part of the fee to visit to stay at the guest ranch. The sale of individual meals to persons who are not guests of the guest ranch shall not be allowed.

F. The exterior of the buildings shall maintain a residential appearance.

G. To promote privacy and preserve the integrity of the natural setting, guest ranches shall retain existing vegetation around the guest lodging structure.

H. All lighting shall be shielded and directed downward in accordance with DCC 15.10, Outdoor Lighting Control.

I. Signage shall be restricted to one sign no greater than 20 square feet, nonilluminated and posted at the entrance to the property.

J. Occupancies shall be limited to not more than 30 days.

K. The guest ranch shall be operated in a way that will protect neighbors from unreasonable disturbance from noise, dust, traffic or trespass.

L. One off-street parking space shall be provided for each guestroom in addition to parking to serve the residents.

M. Any conversion or alterations to properties designated as historic landmarks shall be approved by the Deschutes County Historical Landmarks Commission.

(Ord. 2001-043 § 1, 2001; Ord. 98-056 § 2, 1998)

Note: DCC 18.128.360 is repealed December 31, 2004.

The Hearings Officer's decision in CU-01-120, SP-01-56 provides the finding detailed below.

As determined by the Hearings Officer in file no. DR-00-8, the subject property (all four tax lots) constitutes lawfully created parcels that together meet the 160-acre minimum standard under this section.

Staff is uncertain if these concerns are relevant to the requested initiation of use decision. Staff asks the Hearings Officer to focus his review on this issue.

2. *Contains the dwelling of the person conducting the livestock operation; and*

FINDING: As noted above, comments in the record question whether a dwelling for the livestock operator has ever existed onsite. The applicant provides a declaration that addresses who operated and maintained the livestock operation during the approval of CU-01-120.

Staff is uncertain if these concerns are relevant to the requested initiation of use decision. Staff asks the Hearings Officer to focus his review on this issue.

IV. CONCLUSION

Based on the foregoing findings, staff asks the Hearings Officer to determine whether or not the Guest Ranch approved under CU-01-120 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. RECOMMENDED CONDITIONS OF ANY APPROVAL

Should the Hearings Officer determine the Guest Ranch has been initiated, staff recommends the following condition of approval:

- A.** The conditions of approval associated with CU-01-120 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

A handwritten signature in black ink, appearing to read "Will Groves". The signature is written in a cursive, flowing style with some loops and flourishes.

Reviewed by: Will Groves, Planning Manager