



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005

Phone: (541) 388-6575 Fax: (541) 385-1764

<http://www.deschutes.org/cd>

AGENDA

**DESCHUTES COUNTY PLANNING COMMISSION
JANUARY 11, 2018, 5:30 PM
BARNES AND SAWYER ROOMS
DESCHUTES SERVICES CENTER
1300 NW WALL STREET BEND, OR, 97703**

- I. **Call to Order**
- II. **Election of Officers**
- III. **Approval of October 23 and December 14, 2017 Minutes**
- IV. **Public Comments**
- V. **Code Enforcement Public Hearing**
 1. PC Hearing on Code Enforcement & Land Use Recommendation - *Peter Russell, Senior Planner*
- VI. **Planning Commission and Staff Comments**
- VII. **Meeting Adjourned**

FUTURE MEETINGS:

Next Meeting Date: January 25, 2018 5:30 PM

Additional meeting dates available at <https://deschutescountyor.igmp2.com/Citizens/Default.aspx>

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 the ADA Coordinator at (541) 617-4747.



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MEMORANDUM

DATE: December 29, 2017

MEETING: January 11, 2018

TO: Planning Commissioners

FROM: Peter Russell, Senior Transportation Planner

RE: Public hearing on recommendation to Board on whether to initiate amendments to Deschutes County Code, 1.16.010, Violations; 1.17.010, Applicability; and 22.20.015, Code Enforcement and Land Use

I. BACKGROUND

Last year, the Board of County Commissioners (Board) directed the Community Development Department (CDD) to reconvene a stakeholders group that helped staff formulate code enforcement amendments adopted by the Board in 2015. Those amendments applied to Deschutes County Code (DCC) 1.16.010 and 22.20.015. Based on a recent land use application, the Board wanted to ascertain if the amended code was working as the group intended. Staff reconvened the stakeholders committee which met face to face two times,¹ discussing the relevant land use application and whether DCC 22.20.015 contains sufficient language for when the public alleges a code violation during a land use process.

The Board is now weighing whether to amend DCC to balance the process requirements of DCC 1.17 to determine if a code violation exists with the review process of a land use application. DCC 22.20.015 provides guidance for land use review of properties with pre-existing code violations.

The Board on November 27, 2017, directed staff to bring the topic before the Planning Commission (PC) via a work session and a public hearing to discern the PC's preference for amending these applicable sections of DCC. Staff held a work session on December 14, 2017, to provide background and discussion. The goal of the public hearing is for the PC to receive testimony and then make a formal recommendation to the Board on whether the County should initiate a text amendment to DCC 1.16.010, 1.17.010, and 22.20.015.

¹ Oct. 3 and Nov. 15, 2017, after e-mail discussions in September.

II. WORK SESSION RECAP

During the PC work session, staff recapped its December 6, 2017, memo about the 2015 amendments to DCC 1.16.010 and the creation of 22.20.015. Staff discussed the reasons for the amendments, the stakeholder committee process, and the application of the new code to a proposed marijuana retail dispensary on the northwest corner of Deschutes Junction. Staff also discussed how the latter led the Board to reconvene the 2015 stakeholders group to mull if DCC 22.20.015 needed amending. The reconvened stakeholders committee was adamantly opposed to revising DCC 22.20.015.² At the work session, the PC requested additional information regarding the:

- Current code enforcement process;
- Reasons for the potential revisions; and,
- Differences between how code enforcement and land use applications interact under the current code and how that could change under the draft 2017 concepts.³

III. CURRENT CODE ENFORCEMENT PROCESS VS. LAND USE PROCESS

There are general similarities between the code enforcement process and procedures and those for review of land use applications. DCC 1.17 (Code Enforcement Hearings and Procedures) sets the process for violations while land use applications fall under DCC 22.20 (Deschutes County Development Procedures Ordinance). Both DCC 1.17 and 22.20 have a defined process regarding timelines, notifications, and hearings officer procedures.

Yet, there are also critical differences. Quasi-judicial land use applications, which are property specific, have a 150-day clock for a final decision at the local level; code enforcement cases are timeless. While the 150-day clock can be tolled, it cannot be tolled indefinitely. The timeline for a local land use decision cannot exceed 365 days.⁴ Not all applications require mailed notice to adjoining property owners prior to a land use decision.⁵ The majority of land use decisions in Deschutes County are administrative determinations (ADs), meaning there is no public hearing prior to staff making the decision.

By contrast, all code enforcement cases appear before a hearings officer whereas few land use applications do. In code enforcement, a hearings officer may require sworn testimony. In a code enforcement hearing the public may attend, but not testify. The testimony and submittal materials are limited to the complaining party and its legal counsel, alleged violator, and violator's legal counsel. The pre-hearing process of discovery is required, which is where each party must disclose all of its relevant information with the other within the bounds of attorney-client privilege. If the hearings officer determines there is a code violation, civil penalties can be set including monetary fines, which if not paid can potentially result in forfeiture of the property. In land use, the most severe conclusion to an application is a denial and the applicant can reapply, except for a few instances.

² Refer to the December 6, 2017, PC memo for further background.

<http://deschutescountyor.igmp2.com/Citizens/FileOpen.aspx?Type=1&ID=1754&Inline=True>

³ The substantive changes would be to DCC 22.20.015. Any changes to DCC 1.16.010 or 1.17.010 would be citations to DCC 22.20.

⁴ The timeline is as follows: 30 days to deem an application complete, 150 days to issue a local decision, and a maximum tolling of 215 days.

⁵ In these instances, notice of the land use decision is mailed to neighboring property owners and those who submitted comments by tracking the application on-line.

Finally, DCC 20.20.015(C) defines a code violation as follows:

- (C) *A violation means the property has been determined to not be in compliance either through a prior decision by the County or other tribunal, or through the review process of the current application, or through an acknowledgement by the alleged violator in a signed voluntary compliance agreement (“VCA”).*

III. LAND USE AFTER ADOPTION OF DCC 22.20.015

Either County staff or the public can originate code enforcement complaints. In the past, these complaints originated outside of the land use process. With the adoption of DCC 22.20.015 in 2015, the public has alleged code violations during the public hearing process of a land use application.

In the Deschutes Junction example the hearings officer reviewed the materials submitted during the public hearing, citing the clause in DCC 22.20.015(C) of “...or through the review of the current application,” and determined there was a code violation.⁶ As the land use application before the hearings officer did not cure either previously adjudicated code violations nor the newly determined code violations, the land use application was denied under DCC 22.20.015(A)(1) and/or (2). The language of DCC 22.20.015 gave the hearings officer no discretion; it was not possible to set conditions of approval to cure the old and new violations.

Another example pertains to Tumalo Irrigation District (TID), which recently applied for a zone change/plan amendment along Bill Martin Road, a local access road.⁷ Central Oregon LandWatch (COLW) in the December 12, 2017, public hearing alleged a code violation existed. COLW cited a pending lawsuit regarding the maintenance responsibilities of Bill Martin Road. Earlier partitions of TID and Deschutes County land to the north of the subject property created the public right of way for Bill Martin Road, which runs to and through the subject property. County legal counsel rejected COLW’s argument, as quoted in a December 22, 2017, memo sent to the hearings officer, as there has been no determination the County violated any land use regulations or that a code violation occurred. DCC 22.20.015(C) does not define a pending lawsuit as a violation.

Staff and the stakeholders agree the current DCC 22.20.015 provides adequate safeguards in the land use process when an already adjudicated code violation exists on the subject property.⁸ The challenge is twofold for code violations alleged during a land use application.

- First, in cases where the land use application goes before a hearings officer, is it possible for a hearings officer to review the submitted materials and make a determination if there is a code violation within the time mandated for a final land use decision? Not all alleged code violations are clear-cut and DCC 1.17.050 sets out requirements for notice, service, discovery process, etc., all of which take time. Additionally, both the County and the violator can request a continuance.

⁶ File 247-17-000751-SP/752-CU

⁷ File 247-17-000775-ZC/776-PA

⁸ DCC 22.20.015(A)(1) states the County cannot approve the proposed development. The County can only approve if the submitted land use application cures the adjudicated violation, as allowed under DCC 22.20.015(D).

- Second, the County processes many land use applications that do not have prior notice, let alone a public hearing. For those ADs without prior notice under DCC 22.20.030, staff sends notice of the decision to property owners within a prescribed distance. There are also ADs that do have prior notice and staff sends notice to comply with DCC 22.20.040. If the public then submits an allegation of a code violation, under both DCC 1.17.090 and 22.20.015(D), only a hearings officer can determine if there is a violation, staff cannot.

Either type of AD can be appealed to a hearings officer. Typically, the Planning Division does not require a \$5,000 hearing officer's deposit for an AD as the application fees for an AD range from \$512 to \$1,537. The fee to appeal an AD, prescribed in State law is \$250, meaning the Planning Division must absorb the remaining costs of the hearings officer. It is doubtful the Planning Division will begin to require a \$5,000 hearings officer deposit on all AD applications.

IV. 2017 CONCEPTS TO AMEND DCC 22.20.015(D)

The stakeholders group agreed the 2015 language ensured adjudicated code violations would be cured. An applicant under DCC 22.20.015(B)(1) has to certify the property is in compliance with prior land use approvals or the intent of the application is to bring the property into compliance as required by DCC 22.20.015(B)(2). If the land use reviewer agrees the application cures the adjudicated violation, DCC 22.20.015(D) makes the application approvable. Staff agreed with the stakeholders group overall, but did have reservations about consistency with DCC 1.17. The Board also acknowledged the current language made no distinction about the severity of the violation.

To address these issues, staff developed conceptual code language that covered the gamut of all possible outcomes of a land use application for a property with code violations, either previously adjudicated or newly determined. These concepts are:

- Approve the land use application regardless of the code violations;
- Approve the land use application if the permit cures the violations;
- Deny the land use application due to prior adjudicated violations that remain unresolved;
- Deny the land use application based on new findings that violations exist on the property;
- Continue the land use hearing to allow a code enforcement hearing to occur;
- Conditionally approve the land use application as long as violations, pre-existing or newly adjudicated, are resolved within a specified timeframe.

With two exceptions, the concepts are consistent with the current wording of DCC 22.20.015(D). The first exception is the first bullet, which allows the land use to be approved without addressing the code violation. The rationale is that code violations can range from the minor (improper color of house in the Landscape Management Combining Zone for example) to the major (illegal second dwelling or discharge of sewage onto bare ground). A land use application should be denied if the code violation endangers the public's health, safety, or welfare or there is an illegal use of the property. For a property with an inconsequential violation, perhaps the County should have discretion to approve the land use. This first bullet provides the review body with the ability to use discretion in reviewing a land use.

The fifth bullet provides the second exception, tolling the land use process to allow a code enforcement officer to hear the case and determine if there is a code violation. The reasoning

for this approach is it fully complies with the process requirements of DCC 1.17. The downsides are two. The first is whether there is sufficient time on the 150-day clock to accommodate a code enforcement hearing. The second is cost. Planning fees collected at time of application are insufficient to cover a code enforcement hearing.

V. NEXT STEPS

Staff will discuss this memo with the PC at the January 11, 2018 public hearing, and then the PC will accept public testimony. At the end of the public testimony, the PC can deliberate and make a recommendation to the Board on whether the County should initiate a text amendment to DCC 1.16.010, DCC 1.17.010, and 22.20.015.

If the Board ultimately decides to initiate a text amendment, staff will schedule another public hearing before the PC in late winter or early spring. The PC hearing must comply with the 35-day prior notice for text amendments set by the Department of Land Conservation and Development. The PC will make a recommendation to the Board, which will then hold a subsequent public hearing on the text amendment.

*Enclosures: Current code for DCC 1.16.010
Current code for DCC 1.17.010
Current code for DCC 22.20.015
Nov. 15th, 2017, version of proposed changes to DCC 1.16.030, 1.17.030, and
22.20.015*

Staff Draft – Code Enforcement Text Amendment

11/17/17

1.16.010. Violations Deemed Class A or B Classification-Penalties.

- A. Violation of a county ordinance shall be punishable, upon conviction, by fine or by the specific remedies specified within the County Code.
- B. Each county ordinance specifying a county offense shall classify the ordinance violation as a Class A or Class B violation.
- C. A sentence to pay a fine for a violation of a county ordinance shall be a sentence to pay an amount not exceeding the Maximum Fines provided in ORS 153.018.
- D. Notwithstanding this section and DCC 1.16.030, for violations of Chapters 13.04, 13.08, 13.36, 15.04 and 15.10 and Titles 17 18 and 19, the Presumptive and Minimum fine amount shall be the Maximum Fine amount described in DCC 1.16.010(C).
- E. For violations of County Code provisions not listed in DCC 1.16.010(D), the Presumptive and Minimum Fine amounts shall be as provided in ORS Chapter 153.
- F. A land use application for a property with an existing code violation will be ~~accepted, but not~~ processed by the County ~~pursuant to~~~~based on~~ DCC 22.20.015 in which case DCC 1.16.030 and DCC Chapter 1.17 shall not apply.
- G. Notwithstanding DCC 1.16.010(D), the court or the hearings officer may impose a fine lower than the fine provided in those two sections, upon a finding of mitigating factors including, but not limited to, indigence of the defendant, severity of the violation, number of times the defendant has been previously cited for Deschutes County Code violations; length of time the violation has existed; and reason(s) the violation has not been cured.

(Ord. 2017-XXX, §X, 2017; Ord. 2015-020, §1, 2015; Ord. 2014-003, §1, 2014; Ord. 2013-015, §1, 2013; Ord. 2008-026, §1, 2008; Ord. 2003-021 §3, 2003; Ord. 2002-016 §9, 2002; 86-076 §1, 1986)

1.17.010. Applicability, exception.

- A. Unless another procedure is expressly provided for, this chapter governs the procedure for the assessment of civil penalties authorized by the code.
- B. In all cases, a civil penalty is in addition to any other legal remedy available to redress violations of the code.
- C. This chapter does not apply to proceedings before and civil penalties imposed by the Animal Control Board of Supervisors.
- D. This chapter does not apply to land use application proceedings for a property with an existing code violation processed by the County pursuant to DCC 22.20.015.

(Ord. 2017-XXX, §X, 2017; Ord 2011-023 §2, 2011)

~~Chapter 22.20.015~~ Code Enforcement and Land Use

- A. ~~Except as described in (D) below, if~~ any property is in violation of applicable land use regulations, and/or the conditions of approval of any previous land use decisions ~~or building permits previously~~ issued by the County, the County shall, based on the severity of the violation and other mitigating or aggravating facts and circumstances, take one of the following actions concerning a pending application for land use development, application for a building permit, or other land use decision including land division and/or property line adjustment not:
1. Deny the permit or decision;
 2. Continue a hearing concerning the permit or decision until after the occurrence of a separate code enforcement hearing before a hearings officer designated to adjudicate civil penalty proceedings following procedures dictated by DCC Chapter 1.17;
 3. Approve the permit or decision conditioned on the property coming into full compliance within a specified period of time with all applicable provisions of the Deschutes County Code, and the issue is referred to Deschutes County Code Enforcement for further action including tracking compliance with said condition;
 4. Approve the permit or decision resulting in the property coming into full compliance with all applicable provisions of the Deschutes County Code, including sequencing of permits or other approvals as part of a voluntary compliance agreement;
 5. Approve the permit or decision if necessary to protect the public health or safety;
 6. Approve the permit or decision if authorizing work related to and within a valid easement over, on, or under the affected property;
 7. Approve the permit or decision if authorizing emergency repairs to make a structure habitable or a road or bridge to bear traffic; or
 8. Approve the permit or decision.
 1. ~~Approve any application for land use development;~~
 2. ~~Make any other land use decision, including land divisions and/or property line adjustments;~~
 3. ~~Issue a building permit.~~
- B. As part of the application process, the applicant shall certify:
1. That to the best of the applicant's knowledge, the property in question, including any prior development phases of the property, is currently in compliance with both the Deschutes County Code and any prior land use approvals for the development of the property; or
 2. That the application is for the purpose of bringing the property into compliance with the Deschutes County land use regulations and/or prior land use approvals.
- C. For purposes of this section, A violation means the property has been determined to not be in compliance either through a prior decision by the County or other tribunal, or through a determination by a hearings officer or the Board of County Commissioners during the review process of the current application, or through an acknowledgement by the alleged violator in a signed voluntary compliance agreement ("VCA").
- ~~D. A permit or other approval, including building permit applications, may be authorized if:~~
1. ~~It results in the property coming into full compliance with all applicable provisions of the federal, state, or local laws, and Deschutes County Code, including sequencing of permits or other approvals as part of a voluntary compliance agreement;~~

- ~~2. It is necessary to protect the public health or safety;~~
- ~~3. It is for work related to and within a valid easement over, on, or under the affected property; or~~
- ~~4. It is for emergency repairs to make a structure habitable or a road or bridge to bear traffic.~~

ED. Public Health and Safety.

1. For the purposes of this section, public health and safety means the actions authorized by the permit would cause abatement of conditions found to exist on the property that endanger life, health, personal property, or safety of the residents of the property or the public.
2. Examples of that situation include, but are not limited to issuance of permits to replace faulty electrical wiring, repair or install furnace equipment; roof repairs; replace or repair compromised utility infrastructure for water, sewer, fuel or power; and actions necessary to stop earth slope failure.

(Ord. 2017-XXX, §X, 2017; Ord. 2015-019, §1, 2015)

CURRENT LANGUAGE FOR DCC 1.16.010, 1.17.010, and 22.20.015

1.16.010. Violations Deemed Class A or B Classification-Penalties.

- A. Violation of a county ordinance shall be punishable, upon conviction, by fine or by the specific remedies specified within the County Code.
- B. Each county ordinance specifying a county offense shall classify the ordinance violation as a Class A or Class B violation.
- C. A sentence to pay a fine for a violation of a county ordinance shall be a sentence to pay an amount not exceeding the Maximum Fines provided in ORS 153.018.
- D. Notwithstanding this section and DCC 1.16.030, for violations of Chapters 13.04, 13.08, 13.36, 15.04 and 15.10 and Titles 17 18 and 19, the Presumptive and Minimum fine amount shall be the Maximum Fine amount described in DCC 1.16.010(C).
- E. For violations of County Code provisions not listed in DCC 1.16.010(D), the Presumptive and Minimum Fine amounts shall be as provided in ORS Chapter 153.
- F. A land use application for a property with an existing code violation will be accepted, but not processed by the County based on DCC 22.20.015.
- G. Notwithstanding DCC 1.16.010(D), the court or the hearings officer may impose a fine lower than the fine provided in those two sections, upon a finding of mitigating factors including, but not limited to, indigence of the defendant, severity of the violation, number of times the defendant has been previously cited for Deschutes County Code violations; length of time the violation has existed; and reason(s) the violation has not been cured.

(Ord. 2015-020, §1, 2015; Ord. 2014-003, §1, 2014; Ord. 2013-015, §1, 2013; Ord. 2008-026, §1, 2008; Ord. 2003-021 §3, 2003; Ord. 2002-016 §9, 2002; 86-076 §1, 1986)

1.17.010. Applicability, exception.

- A. Unless another procedure is expressly provided for, this chapter governs the procedure for the assessment of civil penalties authorized by the code.
- B. In all cases, a civil penalty is in addition to any other legal remedy available to redress violations of the code.
- C. This chapter does not apply to proceedings before and civil penalties imposed by the Animal Control Board of Supervisors.

(Ord 2011-023 §2, 2011)

Chapter 22.20.015 Code Enforcement and Land Use

- A. Except as described in (D) below, if any property is in violation of applicable land use regulations, and/or the conditions of approval of any previous land use decisions or building permits previously issued by the County, the County shall not:
1. Approve any application for land use development;
 2. Make any other land use decision, including land divisions and/or property line adjustments;
 3. Issue a building permit.
- B. As part of the application process, the applicant shall certify:
1. That to the best of the applicant's knowledge, the property in question, including any prior development phases of the property, is currently in compliance with both the Deschutes County Code and any prior land use approvals for the development of the property; or
 2. That the application is for the purpose of bringing the property into compliance with the Deschutes County land use regulations and/or prior land use approvals.
- C. A violation means the property has been determined to not be in compliance either through a prior decision by the County or other tribunal, or through the review process of the current application, or through an acknowledgement by the alleged violator in a signed voluntary compliance agreement "VCA").
- D. A permit or other approval, including building permit applications, may be authorized if:
1. It results in the property coming into full compliance with all applicable provisions of the federal, state, or local laws, and Deschutes County Code, including sequencing of permits or other approvals as part of a voluntary compliance agreement;
 2. It is necessary to protect the public health or safety;
 3. It is for work related to and within a valid easement over, on, or under the affected property; or
 4. It is for emergency repairs to make a structure habitable or a road or bridge to bear traffic.
- E. Public Health and Safety.
1. For the purposes of this section, public health and safety means the actions authorized by the permit would cause abatement of conditions found to exist on the property that endanger life, health, personal property, or safety of the residents of the property or the public.
 2. Examples of that situation include, but are not limited to issuance of permits to replace faulty electrical wiring, repair or install furnace equipment; roof repairs; replace or repair compromised utility infrastructure for water, sewer, fuel or power; and actions necessary to stop earth slope failure.

(Ord. 2015-019, §1, 2015)