



MARION COUNTY BOARD OF COMMISSIONERS

## Board Session Agenda Review Form

Meeting date: September 23, 2020

Department: Public Works


Agenda Planning Date: Sept. 17, 2020

Time required: None

☐ Audio/Visual aids

Contact: Joe Fennimore

Phone: 503-566-4177

Department Head Signature: 

**TITLE**

Receive hearings officer's decision approving Floodplain/Greenway (FP/GW) 20-003/Marion County/ Friends of Historic Butteville.

**Issue, Description & Background**

The Marion County Hearings Officer conducted a public hearing on June 18, 2020 and the written record was left open until July 27, 2020. On September 9, 2020, the hearings officer issued a decision approving the case. As part of the land use process the board must officially receive the hearings officer's decision.

**Financial Impacts:**

None

**Impacts to Department & External Agencies**

None

**Options for Consideration:**

1. Receive notice of the decision.
2. Receive notice of the decision and call the matter up.

**Recommendation:**

Staff recommends the board of commissioners receive notice of the decision.

**List of attachments:**

Hearings officer's decision

**Presenter:**

Joe Fennimore

*Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)*

**Copies to:**

Joe Fennimore - gfennimore@co.marion.or.us

## BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of:	)	Case No. FP/GW 20-003
	)	
Marion County/Friends of Historic	)	<b>Floodplain Development/</b>
Butteville	)	<b>Greenway Permit</b>

### ORDER

#### I. Nature of the Application

This matter came before the Marion County hearings officer on appeal by Scott Putnam, Shaloe Putnam, Julia Kraemer, Patrick Stilwell, Iraj Rafei, and Shaheen Brodle of the Planning Director's approval of the application of Marion County/Friends of Historic Butteville (FOHB) for a floodplain and greenway development permit to install a dock and gangway in the identified 100 year floodplain of the Willamette River at Butteville Landing (River Mile 42.9), in the 20,500 block of Butte Street NE, Aurora. Although Marion County is the owner<sup>1</sup> of the subject property, FOHB filed this application, as discussed below.

#### II. Relevant Criteria

The standards and criteria relevant to this application are found in the Marion County Code (MCC), title 17, especially chapters 17.110.680, 17.178, and 17.179.

#### III. Hearing

A public hearing was held on this appeal on June 18, 2020. At hearing, the Planning Division file was made part of the record. The following persons appeared at the hearing and provided testimony:

- |     |                  |                         |
|-----|------------------|-------------------------|
| 1.  | Brandon Reich    | Planning Division       |
| 2.  | Elisabeth Holmes | Attorney for FOHB       |
| 3.  | Ben Williams     | For FOHB                |
| 4.  | Bill Kabeiseman  | Attorney for Appellants |
| 5.  | Julie Kraemer    | Appellant               |
| 6.  | Patrick Stilwell | Appellant               |
| 7.  | Steve Roberts    | For Appellant           |
| 8.  | Susan Roberts    | For Appellant           |
| 9.  | Scott Putnam     | Appellant               |
| 10. | Shaloe Putnam    | Appellant               |

The following documents were entered into the record as exhibits at hearing:

1. Marion County Parks Commission meeting minutes from May 23, 2017
2. Photograph of "No Parking 10:00 pm to 5:00 am" sign
3. Petition in support of Appeal

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<sup>1</sup> Ownership of the property is discussed below.

4. Submittal by John Rasmussen from Marion County Public Works, including Memorandum of Understanding, Work in Right-of-Way Permit, and Butteville Landing modified lower landscape plan
5. Appellants' pre-hearing memorandum and associated exhibits
6. FOHB written testimony
7. Appellants' documents and written testimony

No objections were raised at hearing to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at the hearing. The record remained open until July 27, 2020.

The following documents were submitted into the record during the open record period:

1. Revised Appeal Notice properly referencing exhibits, received July 1, 2020
2. Letter from Steve and Sue Roberts, received July 1, 2020
3. Supplemental testimony of FOHB; FOHB memorandum; exhibits 18-23, received July 2, 2020
4. Annotated photographs of recent incidents at Butteville Landing, received July 2, 2020
5. Third written testimony of FOHB, received July 20, 2020
6. Appellants' Rebuttal Submission, received July 20, 2020
7. Appellant Julia Kraemer's Comments and Responses, received July 20, 2020
8. Appellant Julie Kraemer's Response to Applicant's second testimony, received July 20, 2020
9. FOHB Final Memorandum, received July 27, 2020
10. Appellants' Objection to Applicant's Final Written Argument, received July 29, 2020

Appellants objected to FOHB's Final Memorandum (Final Memo), submitted on July 27, 2020. Under MCC 17.111.060(F), unless waived, the applicant shall be allowed at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence.

Appellants argue that FOHB's Final Memo provides at least five instances of new evidence that are not previously found in the record. The hearings officer finds that the following list of information in the Final Memo contains new evidence, and these portions of the Final Memo are struck from the record:

- Page 2 – Factual descriptions of parks, taken from parks brochures that are not part of the Marion County Comprehensive Plan (MCCP)
- Page 5 – List of various river access points alleged to be unsuitable for paddle craft
- Pages 7-8 – Factual description of a boat ramp and review of facts regarding how the County obtained several parks
- Pages 15-16 – Descriptions of changes in use in several parks over time

The hearings officer finds that the following information in the Final Memo does not contain new evidence:

- Page 20 – Generic description of boat ramps

#### **IV. Executive Summary**

Applicant requests a floodplain and greenway development permit to install a dock and gangway in the identified 100 year floodplain of the Willamette River at Butteville Landing (River Mile 42.9), in the 20,500 block of Butte Street NE, Aurora. Applicant has met the burden of proving that the applicable criteria have been met, and the application is **APPROVED**, with conditions.

#### **V. Findings of Fact**

The hearings officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

1. The subject property constitutes an existing right-of-way and is designated Rural Residential and correspondingly zoned AR (Acreage Residential) (Public). The portion of the property within the Willamette River is in the floodway of the river. Portions of the property outside of the river are in the 500-year flood plain of the Willamette River. The property is also within the Willamette River Greenway.
2. The property is located in the rural community of Butteville in the 23,700 block of 1st Street NE.
3. Surrounding properties in all directions are zoned AR and developed with dwellings. Property to the northeast is zoned CC (Community Commercial) and owned by Oregon State Parks.
4. Applicant Friends of Historic Butteville (hereinafter Applicant or FOHB) is proposing to construct a gangway and dock in the Willamette River.

Marion County Public Works Land Development and Engineering Permits (LDEP) provided the following:

#### **ENGINEERING REQUIREMENTS**

- A. Work in the public right-of-way requires a PW Engineering Work in Right-of-Way Permit. Applicant has begun the application process; a file having reference #555-2 0-000324-PW has been established.
- B. The project area is located within the County's DEQ-defined Stormwater Management Area. The contractor will be required to sign a PW Engineering Erosion Prevention Acknowledgement Form as a stipulation for being issued the Work in Right-of-Way Permit. A Stormwater Management Plan was submitted with the Floodplain Application.

- C. Issuance of a PW Engineering Permit is also contingent upon evidence of a relevant DSL/ACOE Permit; a copy of the DSL Permit plus ACOE Special Conditions letter has already been provided to PW Engineering.

### ENGINEERING ADVISORY

The traversable eastern one-third of Butte Street situated west of 1st Street is designated as a non-County maintained Local Access Road. Upkeep of Local Access Roads defaults to adjacent property owners.

All other contacted agencies either failed to respond or stated no objection to the proposal.

Kevin Klupenger, Michael Denton, Randy Harris, Julie Harris, and Stephen and Christina Schade provided written comments in opposition to the application.

### **VI. Additional Findings of Fact and Conclusions of Law**

1. Applicant has the burden of proving all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

“Preponderance of the evidence’ means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests.” (Citation omitted.)

Applicant must prove, by substantial evidence in the whole record, that it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, Applicant has not met its burden and the application must be denied. If the evidence for every criterion is in Applicant's favor, then the burden of proof is met and the application must be approved.

2. Applicant seeks approval for a floodplain and greenway development permit to install a dock and gangway. It is important to clarify at the outset that this is the decision that is before the hearings officer – whether approval for such a proposal may be granted under the applicable provisions of the Marion County Code. There has been much discussion between the parties, both at hearing and during the open record period, regarding improvements that have already been made to the site, including, but not limited to, the installation of a concrete path/road, picnic tables, and signage. While such arguments will be addressed in this order, the standards and criteria relevant to this application and under which the hearings officer must reach a determination are found in MCC chapters 17.110.680, 17.178, and 17.179.
3. Butte Street was created as a public road by the recording of the St Alexcie Plat on July 28, 1871. A “public road” is defined in ORS 368.001(5) as “a road over which the public

has a right of use that is a matter of public record.” “Road” is defined in ORS 368.001(6) as “the entire right of way of any public or private way that provides ingress to or egress from property by means of vehicles or any other means or that provides travel between places by means of vehicles.”

4. OAR 660-012-0000(1)(c) recognizes that one of the purposes of a transportation network is to provide safe, convenient access:

(1) This division implements Statewide Planning Goal 12 (Transportation) to provide and encourage a safe, convenient and economic transportation system. This division also implements provisions of other statewide planning goals related to transportation planning in order to plan and develop transportation facilities and services in close coordination with urban and rural development. The purpose of this division is to direct transportation planning in coordination with land use planning to: [...]

(c) Provide for safe and convenient vehicular, transit, pedestrian, and bicycle access and circulation[.]

5. Historically, Butte Street provided access to a dock in the Willamette River, and it continues to provide access to the river to pedestrians. Therefore, Butte Street is a right-of-way that functions as a public road for the purposes of use for travel and access.
6. Because the road exists outside of a city’s incorporated boundaries, Marion County has jurisdiction over the right-of-way. The rural floodplain chapter of the Marion County Code (MCC 17.178.050) describes a floodplain permit as a type of conditional use permit. The greenway chapter of the Marion County Code (MCC 17.179.060) applies the conditional use process to a greenway permit.
7. In late 2016, Marion County Public Works entered into discussions with FOHB to develop a government-NGO partnership to restore, improve, and make safe the Historic Butteville Riverboat Landing (the landing). By its own description, FOHB is a nonprofit 501(c)(3) organization dedicated to the preservation, documentation, and presentation of the history of Butteville. A Memorandum of Understanding (MOU) was entered into on June 13, 2019 between Marion County and FOHB relating to the development and maintenance of the landing.
8. Beginning in 2017, FOHB began restoration of the first approximately 250 feet of Butte Street running from the Willamette River toward 1st Street NE. FOHB poured a concrete path/road leading down to the water, landscaped, and placed picnic tables within the Butte Street right-of-way. These amenities are intended to serve the dock and gangway for which FOHB now seeks floodplain and greenway permits.
9. FOHB states that the concrete road was specifically engineered and built as a “road,” measuring ten feet wide with six inch steel mesh reinforced concrete, engineered at

5,000 to 6,000 pounds per square foot to provide vehicular passage to the river, should ambulance use be required.<sup>2</sup>

10. Other improvements are directed around use of the right-of-way as a roadway. According to FOHB, the landing has three main elements. The first is the roadway. The second is landscaped slopes, which were stabilized to prevent erosion, and wherein invasive species were replaced with native species. The third is three grass areas. The upper grass area was placed to enable required Americans with Disability Act (ADA) public access to the landing and for staging of canoes and kayaks. The two lower grass areas were designed and placed to capture runoff from the impermeable surface of the roadway during heavy rain. Both are bioswales, are part of the stormwater management program designed to meet National Marine Fisheries Service requirements, and are necessary due to the impermeable surface of the road.
11. According to FOHB, before restoration began, access was overgrown with invasive vegetation and was unsafe due to the breakdown of century-old cement dock structure, though it continued to be used by the public to access the Willamette River. Since a flood destroyed the dock in 1980, FOHB asserts that the access point to the river had become dangerous, with a broken up old cement dock, exposed metal rods, and a steep slope. Appellants dispute the purported lack of safety before restoration began, but the record contains photographs supporting FOHB's claim.
12. Marion County's right is that of an easement holder for public use, with the underlying fee held by the abutting property owners. The intended purpose of the easement is ingress to and egress from the river, and it has continued to be used by the public, despite overgrowth.
13. The purpose of the Floodplain Overlay Zone is to promote public health, safety and general welfare to minimize public and private losses due to flood conditions. In order to ensure that the development is reasonably safe from flooding, the County requires the development comply with the criteria and standards listed in MCC Section 17.178.050 and 17.178.060.
14. Marion County Flood Insurance Rate Map #41047C0050G indicates that the development site is within the floodway of the Willamette River. Based on the Flood Profile, the Base Flood Elevation (BFE) at the development site is approximately 94.2 feet mean sea level.
15. Under MCC 17.178.030(F), the County Planning Director is appointed as the floodplain administrator to administer, implement, and enforce the Floodplain Overlay Zone chapter by granting or denying development permits in accordance with its provisions. The Planning Director had authority to make the subject determination.

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<sup>2</sup> The parties have disputed the use of the terms "road" vs. "path" to describe the concrete way to the river. Under ORS 368.001(6)(a), "road" includes, but is not limited to, ways described as streets, highways, throughways or alleys. The hearings officer finds that the concrete improvement as described falls under this definition, regardless of the term used.

16. Under MCC 17.119.140, after the Director's final action on the application, interested persons may appeal the decision no later than 15 days after the decision is mailed. Under MCC 17.119.15, if the Director's decision is appealed, the hearings officer or planning commission shall conduct a public hearing in accordance with Chapter 17.111 MCC. The hearings officer may hear and decide this matter.
17. The floodplain development permit is a conditional use permit. Under MCC 17.119.025, an application for a conditional use permit shall include the following signatures:
  1. Signatures of all owners of the subject property;
  2. The signatures of the purchasers of the property under a duly executed, recorded, written contract of sale or earnest-money agreement;
  3. The signatures of the lessee in possession of the property with the written consent of all the owners; or
  4. The signatures of the agents of those identified in MCC 17.119.020(A), (B), or (C) when authorized in writing by those with the interests described in MCC 17.119.020(B) or (C), and all the owners of the property;
  5. The signature of an authorized agent of a public agency or utility holding an easement or other right that entitles the applicant to conduct the proposed use on the subject property without the approval of the property owners; or
  6. The signature of co-tenants owning at least a one-half undivided interest in the property, when the property is owned by tenants in common; provided, that the signing co-tenant provides current addresses for all co-tenants who have not signed the application so the planning division can give them notice of the decision.

#### Signature on Application

The application was signed by Benjamin Williams, President of FOHB. As provided above, Marion County holds the easement over the right-of-way on which the project is proposed. The record contains an MOU between Marion County and FOHB regarding the development and maintenance of the right-of-way, but the MOU specifies that neither party is an agent of the other and that the MOU does not constitute a partnership or joint venture agreement.

The MOU states both the County's and FOHB's desire that the landing be improved to allow the public to access the river, but acknowledged that the County did not have current operating funds to undertake development. Pursuant to the agreement, FOHB shall, in concert with the County, prepare plans for development of the landing and shall present to the County all plans for development, and the County shall have the right to timely disapprove of any aspect of the plans. The parties anticipated that later phases of the project would include a gangway and dock.

MCC 11.15.020 states:

The county roads, highways and bridges of Marion County have been located, established and maintained under the direction and authority of the board of commissioners of Marion County for such purposes and in such manner as has been determined to be in the public interest. The board of commissioners has the authority to prescribe the methods and manner of working, improving, repaving, and access to all county and public roads, highways and bridges. The office of the director of public works of Marion County is best equipped by reason of knowledge and information to administer issuance and administration of permits for the construction, reconstruction, alteration, and use of public roads, highways and bridges and is hereby designated to undertake said activities on behalf of the board of commissioners.

Therefore, the administrative responsibilities of issuance of permits for the construction, reconstruction, repair, or alteration of any sidewalk, curb, curb-cut, road, highway, or bridge; permits for the laying, installing, or connection to any sewer pipeline, water main, or storm drain within public rights-of-way; shall be the administrative responsibilities of the director of public works for Marion County.

Under ORS 368.001(6), "road" (including ways described as streets) means the entire right-of-way of any public or private way that provides ingress to or egress from property by means of vehicles or other means or that provides travel between places by means of vehicles. Pursuant to MCC 11.15.020, the Director of Public Works has the authority to prescribe the methods and manner of working and improving public roads, which includes the right-of-way. Under MCC 17.119.025(5), the Director of Public Works may sign the application. As stated, the application was signed by the president of FOHB. **The Director of Public Works will be required to sign the application as a condition of approval.** As conditioned, MCC 17.119.025 will be met.

18. Ownership and Use of Butte Street

Appellants claim and the hearings officer finds that the land underlying Butte Street between the Willamette River and 1st Street is owned in fee by them, as the adjacent landowners. They claim the County's interest in the street is that of trustee holding an easement to the land in trust for the public to use as a street. They argue the original dedication was not a grant, but rather a right created in favor of the public, and the rights of the property not incompatible with the public enjoyment as a "way" remained in the fee owners. They claim the purpose of the dedication was to serve as a 60-foot wide public street.

Butte Street was implicitly dedicated to the public by the St Alexcie plat for use as a street, a street connecting 1st Street to the Willamette River. This was reaffirmed by a 1962 resolution, contained in the record, which recognizes the need for access to a county-owned public boat ramp and to the Willamette River, and wherein the County accepted Butte Street into the County road system. Appellants claim the street was not

dedicated in order to provide the public with a *general* connection to the Willamette River, but rather to link two complementary transportation systems: the Willamette River, and Butteville's local streets. They argue that the intent behind the dedication was to provide a commercial and public transportation link, not to provide public access to the Willamette for recreation.

This distinction is unsupported by the record. Nowhere is this indicated on the plat map, and Appellants do not point to other supporting documentation. As provided in ORS 368.001(6), a road provides ingress to or egress from property by means of vehicles or other means. The right-of-way was dedicated for public use for ingress to and egress from the Willamette River, and that use continues now and under the proposal at issue.

## **FLOODPLAIN DEVELOPMENT PERMIT**

19. MCC 17.178.050 contains conditional use procedures and requirements for a floodplain development permit. Under MCC 17.178.050(A), except as provided in MCC 17.178.040, a conditional use permit (floodplain development permit) shall be obtained before construction or development begins within any area horizontally within the floodplain overlay zone (which includes the area of special flood hazard). The floodplain development permit shall be required for all structures, including manufactured dwellings, and for all other development, as defined in MCC 17.178.020. The conditional use permit shall include conditions ensuring that the flood protection standards in MCC 17.178.060 are met.

As part of the application, Applicant is seeking a floodplain development permit. MCC 178.050(A) is satisfied.

20. Under MCC 17.178.050(B), when base flood elevation data and floodway data have not been provided in accordance with MCC 17.178.030, the applicant, with the assistance of the floodplain administrator, shall obtain and reasonably utilize any base flood elevation data or evidence available from a federal, state or other source in order to determine compliance with the flood protection standards. If data are insufficient, the floodplain administrator may require that the applicant provide data derived by standard engineering methods.

Marion County Flood Insurance Rate Map #41047C0050G indicates that the development site is within the floodway of the Willamette River. Based on the Flood Profile, the Base Flood Elevation (BFE) at the development site is approximately 94.2 feet mean sea level. MCC 178.050(B) is satisfied.

21. Under MCC 17.178.050(C), prior to obtaining a building permit the owner shall be required to sign and record in the deed records for the county a declaratory statement binding the landowner, and the landowner's successors in interest, acknowledging that the property and the approved development are located in a floodplain.

No building permit was necessary as part of this application. MCC 17.178.050(C) is satisfied.

22. Under MCC 17.178.050(D), prior to obtaining a building permit, commencing development or placing fill in the floodplain the applicant shall submit a certification from a registered civil engineer demonstrating that a development or fill will not result in an increase in floodplain area on other properties and will not result in an increase in erosive velocity of the stream that may cause channel scouring or reduce slope stability downstream of the development or fill.

The record contains a letter from Corbey Boatwright, a registered professional engineer, certifying that the installation of the proposed pilings will not produce an increase in the floodplain area on other properties; that the development may cause localized scouring but will not produce channel scouring and will not reduce slope stability downstream of the development site; and that the installation of the proposed pilings will not produce an increase in flood levels within the community during the occurrence of the base flood discharge. MCC 17.178.050(D) is satisfied.

23. MCC 17.178.050(E) exempts property owners from the requirement of providing an elevation certificate for a gangway or dock since they are water-dependent uses that rise and fall with the height of the river.
24. MCC 178.060 contains the flood protection standards. MCC 178.060(A) concerns structures. Under MCC 17.178.020(KK), "structure" means, for floodplain management purposes, a walled and roofed building, including a gas or liquid storage tank, that is principally above ground, as well as a manufactured dwelling. No structures are contemplated in the floodplain under this application. Therefore, MCC 178.060(A) does not apply.
25. MCC 178.060(B) relates to recreational vehicles and does not apply.
26. MCC 178.060(C) concerns structures and does not apply.
27. MCC 17.178.060(D)(1) concerns new construction and substantial improvements, and (D)(2) concerns manufactured dwellings. No manufactured dwelling is proposed. Under MCC 17.178.020(DD), "new construction" means, for floodplain management purposes, structures for which the "start of construction" commenced on or after the effective date of a floodplain management regulation adopted by Marion County and includes any subsequent improvements to such structures. Under MCC 17.178.020(MM) "substantial improvement" means any reconstruction, rehabilitation, addition, or other improvement of a structure. As stated, no structures are contemplated in this application to be constructed or improved. MCC 17.178.060(D) does not apply.
28. MCC 17.178.060(E) concerns new construction and substantial improvements and does not apply.
29. MCC 17.178.060(F), Utilities, requires:
1. All new and replacement water supply systems shall be designed to minimize or eliminate infiltration of floodwaters into the system as approved by the State Health Division.

2. New and replacement sanitary sewage systems shall be designed to minimize or eliminate infiltration of floodwaters in the systems and discharge from the systems into floodwaters.
3. On-site waste disposal systems shall be designed and located to avoid impairment to them or contamination from them during flooding consistent with the requirements of the Oregon State Department of Environmental Quality.
4. Electrical, heating, ventilation, plumbing, duct systems, air-conditioning and other equipment and service facilities shall be elevated to one foot above the level of the base flood elevation. Where the base flood elevation is not available, the electrical, heating, ventilation, plumbing and air-conditioning equipment shall be elevated to one foot above the highest adjacent natural grade (within five feet) of the building site. If replaced as part of a substantial improvement the utility equipment and service facilities shall meet all the requirements of this subsection.

No water supply systems, sanitary sewage systems, on-site waste disposal systems, electrical, heating, ventilation, plumbing, duct systems, air-conditioning or other equipment or service facilities are proposed as part of this application. The record contains a letter from Kelly LaFave, a registered professional engineer, certifying that the conditions applicable to pile supported, floating dock, and walkway structures of MCC 17.178, Floodplain Overlay Zone, specifically subchapter 17.178.60 sections (C), (D1), (E), and (F) will be met by the proposed design. MCC 17.178.060(F) is satisfied.

30. MCC 17.178.060(G) relates to residential developments involving more than one single-family residential structure and does not apply.
31. Under MCC 17.178.060(H), materials that are buoyant, flammable, obnoxious, toxic or otherwise injurious to persons or property, if transported by floodwaters, are prohibited. Storage of materials and equipment not having these characteristics is permissible only if the materials and equipment have low damage potential and are anchored or are readily removable from the area within the time available after forecasting and warning.

**The criteria in MCC 178.060(H) shall be a condition of approval.** As conditioned, MCC 178.060(H) will be satisfied.

32. MCC 178.060(I) concerns the alteration or modification of a watercourse and does not apply.
33. MCC 178.060(J) states: Located within areas of floodplain established in MCC 17.178.030 are areas designated as floodways. Since the floodway is an extremely hazardous area due to the velocity of floodwaters which carry debris, potential projectiles and erosion potential the following provisions shall apply in addition to the requirement in subsection (I) of this section:

1. Prohibit encroachments, including fill, new construction, substantial improvements and other development, within the adopted regulatory floodway

unless certification by a registered professional civil engineer is provided demonstrating through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment shall not result in any increase in flood levels within the community during the occurrence of the base flood discharge.

2. If subsection (J)(1) of this section is satisfied, all new construction, substantial improvements, and other development shall comply with all applicable flood hazard reduction provisions of this section.
3. The area below the lowest floor shall remain open and unenclosed to allow the unrestricted flow of floodwaters beneath the structure.

The record contains a letter from Corbey Boatwright, a registered professional engineer, certifying that the installation of the proposed pilings will not produce an increase in the floodplain area on other properties; that the development may cause localized scouring but will not produce channel scouring and will not reduce slope stability downstream of the development site; and that the installation of the proposed pilings will not produce an increase in flood levels within the community during the occurrence of the base flood discharge. The area beneath the gangway and dock will remain open and unenclosed because the gangway and dock float on the waters of the river. **As a condition of approval, all development shall comply with all applicable flood hazard reduction provisions of this section.** As conditioned, MCC 17.178.060(J) is satisfied.

34. MCC 178.060(K) concerns standards for shallow flooding areas (AO zones) and does not apply.
35. MCC 178.060(L) concerns tanks and does not apply.

Based on the above, **compliance with the floodplain development permit requirements have been or can be met.**

#### **GREENWAY DEVELOPMENT PERMIT**

36. Under MCC 17.179.010, the purpose of the GM (greenway management) overlay zone is to:
  - A. Protect the natural, scenic and recreation qualities of lands along the Willamette River in Marion County;
  - B. Preserve and allow the restoration of historical sites, structures and facilities along the Willamette River;
  - C. Implement the goals and policies of the state of Oregon's Willamette River Greenway Program;
  - D. Implement the goals and policies of Marion County's Comprehensive Plan;

- E. Establish standards and requirements for the use of lands within the Willamette River greenway in Marion County; and
- F. Provide for the review of any intensification of use, change of use, or development on properties located within the Willamette River greenway of Marion County.

Under MCC 17.179.050, in reviewing an application for a greenway development permit, compliance with the following considerations and criteria shall be determined:

- A. Agricultural lands shall be preserved and maintained for farm use.

The subject property is in a residential zone, is surrounded by residential use, and is not being farmed. Agricultural practices would not be impacted. This criterion is met.

- B. Significant fish and wildlife habitats shall be protected.

Applicant states that the project has received approval from the National Marine Fisheries Service, which is included in the record. This criterion is met.

- C. Significant natural and scenic areas, viewpoints and vistas shall be preserved.

The gangway and dock provide a means for the public to access and experience both the river and the views along the river. This criterion is met.

- D. Areas of ecological, scientific, historical or archeological significance shall be protected, preserved, restored, or enhanced to the maximum extent possible.

A cultural survey and State Historic Preservation Office (SHPO) listing has been complete. The SHPO recommended an archeologist be on-site for dock and gangway construction, and FOHB states it intends to follow this recommendation. The SHPO also suggested building the dock and gangway without direct contact with the old dock ruins, and FOHB stated its intent to follow this guidance. FOHB states the original plans were modified to move the gangway close to the upstream property line so it could pass over the most stable parts of the old footings. This criterion is met.

- E. The quality of the air, water and land resources in and adjacent to the greenway shall be preserved in the development, change of use or intensification of use of land within the greenway management zone.

The property has been an open area space and has relatively recently been developed with a concrete path/road and related improvements for river use. There is no evidence that the quality of the air, water, or land resources will be affected by this proposal. Applicant states the dock and gangway were designed with licensed professionals to ensure the integrity of the river bank. Such structures will primarily be used by paddlecraft, which do not emit air or water

pollution. The record contains evidence of regular clean-up crews to remove trash from the site. This criterion is met.

- F. Areas of annual flooding, floodplains and wetlands shall be preserved in their natural state to the maximum possible extent to protect water retention, overflow and other natural functions.

Portions of the subject property are located within the floodway of the Willamette River. The portions of the land in the floodway are subject to the permit described above and will have minimal impact on flooding because the dock and gangway will float on the river. The previous restoration phase of the project removed invasive species, stabilized the lower landing to prevent stormwater runoff and erosion, and the natural vegetative fringe below the ordinary high water level was left intact. This criterion is met.

- G. The natural vegetative fringe along the river shall be maintained to the maximum extent that is practical in order to assure scenic quality, protection of wildlife, protection from erosion and screening of uses from the river.

In a prior stage of this project, native species were planted on the subject property in order to preserve the vegetative fringe. The recreation nature of the use will ensure that scenic qualities, protection of wildlife, and protection of erosion and screening is preserved to the maximum extent practical. This criterion is met.

- H. The commercial harvesting of timber shall be done in a manner which will ensure that wildlife habitat and the natural scenic qualities of the greenway will be maintained or will be restored. Only partial harvesting shall be permitted beyond the vegetative fringes. Limitations on the extent or type of harvest shall be those necessary to satisfy the appropriate use management consideration and criteria in this section.

No harvesting of timber is proposed. This criterion does not apply.

- I. The proposed development, change or intensification of use is compatible with existing uses on the site and the surrounding area.

The proposed development will not change the use of the property, which is to provide ingress to and egress from the Willamette River. Historically, the site contained a dock, and recent improvements, including construction of a concrete pathway, have improved river access. This provides river access to both nearby residents and those coming to the area to recreate.

Appellants have suggested that an increase in crime associated with increased use of the landing makes the use incompatible with the uses in the surrounding area. FOHB submitted into the record a Marion County Sheriff's Office incident search report for seven street addresses it states are immediately around the landing for crimes reported from 2016 to July 1, 2020. The report shows the

following addresses searched: 10767 Butte St NE, 23635 Butteville Rd NE, 23985 Butteville Rd NE, 23561 Butte Ln NE, 23591 Butte Ln NE, 23776 Butteville Rd NE, and the 1st and Butteville Rd/Butte Rd intersection. The hearings officer notes that 10767 Butte St NE is the address for the Butteville Store, and 1st and Butteville Rd/Butte Rd is the intersection in front of the landing.<sup>3</sup> The hearings officer also notes that 23635 Butteville Rd NE, 23985 Butteville Rd NE, 23561 Butte Ln NE, 23591 Butte Ln NE, and 23776 Butteville Rd NE are in the area, but are not immediately adjacent to the landing, and that Appellants' addresses were not included in the search.

Of the eight incidents shown on the report, two are from before restoration began at the landing in the fall of 2017, and one was from Ben Williams at FOHB, alerting the Sheriff's Office that a "Temporarily Closed" sign had been placed at the landing by neighbors. Of the remaining five, one report was from 2018, and the four remaining incidents, which included complaints of theft, drugs, and noise, were reported between April 17, 2020 and June 10, 2020. Appellants also provided case numbers for two trespassing complaints made to the Sheriff's Office on June 5 and June 23, 2020, as well as a Sheriff's Office Dispatch Report for theft from June 7, 2020.

FOHB acknowledges a two to three month period in spring of 2020 where usage of the landing increased, as well as drug use, drinking, and crime, but attributes that increase to state and county parks being closed during that time due to the COVID-19 pandemic. There is nothing in the record indicating that any significant changes were made to the site between the restoration in 2017 and the date of the hearing. Therefore, it is reasonable to conclude that the increase in criminal activity in 2020 was a result of park closures surrounding COVID-19.

The proposed use is compatible with the existing use on the site and enhances that use. It is well-established in the record that Butte Street has existed as a public right-of-way in some form since 1871. The proposed use remains ingress and egress to and from the river. Such use has substantially existed in harmony with the surrounding area for many decades. Appellants point to negative externalities they believe have resulted from FOHB's improvement of the property, and their concerns are valid and substantiated to some extent by Sheriff's Office reports. However, the uptick in reported crime corresponding with the timing of a limited period of park closures does not rise to the level of causing the use of the street as a means of ingress and egress to be incompatible with the surrounding area. This criterion is met.

- J. Areas considered for development, change or intensification of use which have erosion potential shall be protected from loss by appropriate means which are compatible with the provisions of the greenway management zone.

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<sup>3</sup> The hearings officer takes judicial notice of the street map of the area at issue, accessed via the Marion County Planning Viewer on August 26, 2020 at: <https://apps.intra.co.marion.or.us/gis/planningviewer/>.

Erosion protection was approved by the National Marine Fisheries Service as part of the joint Army Corp of Engineers and Division of State Lands permit. This criterion is met.

- K. Extraction of aggregate deposits shall be conducted in a manner designed to minimize adverse effects on water quality, fish and wildlife, vegetation, bank stabilization, stream flow, visual quality, noise and safety and to guarantee necessary reclamation.

The subject property is not in a mineral/aggregate overlay zone. This criterion does not apply.

- L. Any public recreational use or facility shall not substantially interfere with the established uses on adjoining property.

The proposal will improve safe public access to the river. Prominent in the division between FOHB and Appellants is whether the landing is a transportation link or a park. The record shows that the landing contains features that may also exist in a park, features such as picnic tables and grassy areas. Yet such amenities are centered around the concrete pathway leading to the river and support use of the path. Paddlecraft sports such as those contemplated to use the landing require staging at launch and takeout. Paddlecraft need to be removed from vehicles and transported to the launch point, equipment stowed, and paddles readied so that they can be rolled down the gangway to the dock to be launched. The staging areas facilitate the recreational use of the river.

As demonstrated in the record, a route to the river has existed at this location for many decades. That the route has been further developed, not only with more substantial materials but also with other features that support its purpose, does not transform the use into that of a park. Rights-of-way commonly contain landscaping, and under ORS 368.001(6), a road includes, but is not limited to, road-related structures that are in the right-of-way such as tunnels, culverts or similar structures, and structures that provide for continuity of the right-of-way, such as bridges. Such structures contribute to a road's ability to provide ingress and egress. Appellants emphasize the differences between this site and other roads, noting, for example, that few local access roads include ADA accessible picnic areas, garbage cans, or similar improvements. But the project need not mirror other roads in the County in order to meet the necessary criteria. As a short connection between 1st Street NE and the Willamette River intended only for pedestrian and non-motorized vehicle use, the improvements are tailored to this road's particular intended use. A road that crosses a waterway may likely include a bridge, though such a structure would be inappropriate for many other roads, including the one at issue. The hearings officer finds that the non-pathway improvements at the landing, including the picnic tables and grassy areas, support that landing's purpose as a means of providing ingress and egress for use of the river. This criterion is met.

- M. Maintenance of public safety and protection of public and private property, especially from vandalism and trespass, shall be provided to the maximum extent practical.

As discussed above, an uptick in reported crime in the area over the past few months coincides with local park closures due to the COVID-19 pandemic, rather than any recent changes to the landing. There is a five-foot tall fence between the right-of-way and the adjoining properties to deter trespassers. The final phase of the project includes not only placement of pilings, dock, and gangway, but also installation of handrails on the roadway and installation of a four-foot high guardrail across the bottom of the landing from the entrance to the gangway to the downstream property line, directing access to the river over the gangway to the dock. There are barriers at the head of the cement pathway to deter motorized vehicles from entering the area. Parking for the landing is closing between 10 p.m. and 6 a.m., and Marion County Sheriff's Office patrols the area.

Appellants argue not enough has been done to maintain public safety and protect private property. They note that while parking has limited hours, access to the landing is 24 hours a day. This is in keeping with a public street. Fencing, signage, and other improvements to the landing serve to maintain public safety and protect public and private property to the maximum extent practical. This criterion is met.

- N. A minimum building setback line of 30 feet from the ordinary high water line of the Willamette River will be specified that will minimize adverse impacts upon the scenic qualities of lands along the river, except for buildings and structures in conjunction with a water-related or a water-dependent use.

The construction proposed for development – the gangway and dock – are both water-related and water-dependent uses. This criterion does not apply.

- O. Public access to and along the river shall be considered in conjunction with subdivision, commercial and industrial development and public lands acquisition where appropriate. This access should be located and designed to minimize trespass and other adverse affects on adjoining property.

As stated above, there is a five-foot tall fence between the right-of-way and the adjoining properties to deter trespassers. The final phase of the project includes installation of handrails on the roadway and installation of a four-foot high guardrail across the bottom of the landing from the entrance to the gangway to the downstream property line, directing access to the river over the gangway to the dock. There are barriers at the head of the cement pathway to deter motorized vehicles from entering the area. Parking for the landing is closed between 10 p.m. and 6 a.m., and Marion County Sheriff's Office patrols the area. This criterion is met.

- P. The development shall be directed away from the river to the greatest possible extent.

Proposed improvements are a dock and gangway, which are in the river. Other development, such as open areas, a pathway, and picnic tables, is designed to enhance access to the river. The proposal complies with this criterion.

- Q. The development, change or intensification of use shall provide the maximum possible landscaped area, open space or vegetation between the activity and the river.

The subject property has been re-landscaped with native species. **A condition of approval will require the natural native vegetation and habitat on the subject property within the riparian area and greenway to be maintained to the maximum extent practical.** As conditioned, this criterion is met.

- R. Private docks, wharfs, and covered storage shall be limited to one per property ownership, shall not extend more than 10 feet above water level, and shall be limited to 300 square feet of gross area. Walkways to the dock, wharf or covered storage shall be not more than five feet wide.

The dock is public. This criterion does not apply.

## **VII. Order**

It is hereby found that Applicant has met its burden of proving the applicable standards and criteria for approval of a floodplain and greenway development permit to install a dock and gangway in the identified 100 year floodplain of the Willamette River at Butteville Landing have been met. Therefore, the Floodplain Development/Greenway Permit is **APPROVED**, with the following conditions:

1. The Director of Public Works shall sign the Application on behalf of the County, pursuant to MCC 17.119.025.
2. Applicant shall obtain any permits required by the Marion County Building Inspection Division.
3. Materials that are buoyant, flammable, obnoxious, toxic or otherwise injurious to persons or property, if transported by floodwaters, are prohibited. Storage of materials and equipment not having these characteristics is permissible only if the materials and equipment have low damage potential and are anchored or are readily removable from the area within the time available after forecasting and warning.
4. All development shall comply with all applicable flood hazard reduction provisions of MCC 17.178.
5. The natural native vegetation and habitat on the subject property within the riparian area and greenway shall be maintained to the maximum extent practical.

### VIII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court St. NE, Salem, OR 97301) by 5:00 p.m. on the 24<sup>th</sup> day of September 2020. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 9<sup>th</sup> day of September, 2020.

  
Stephanie L. Schuyler  
Marion County Hearings Officer

## CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

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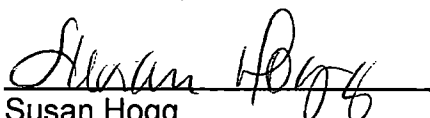
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By mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 9<sup>th</sup> day of September, 2020, and that the postage thereon was prepaid.

  
Susan Hogg  
Administrative Assistant to the  
Hearings Officer