



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: February 28, 2024

Department: Public Works

Title: Public hearing to consider appeal of Hearings Officer's decision approving Floodplain/Greenway Case 23-010/Friends of Historic Butteville

Agenda Planning Date: 2/15/2024 Management Update/Work Session Date: N/A Audio/Visual aids []

Time Required: 10 min Contact: Brandon Reich Phone: 503-566-4175

Requested Action: Receive testimony on appeal and approve or deny Floodplain/Greenway Case 23-010/Friends of Historic Butteville.

Issue, Description & Background: Floodplain/Greenway Case 23-010 pertained to a permit application for installing a gangway and dock at Butteville Landing in a public right of way within an Acreage Residential zone, situated in the 10700 block of Butte Street NE. Staff recommended approval to the hearings officer, who conducted a public hearing on August 17, 2023. The hearings officer approved the request subject to conditions. Subsequently, the decision was appealed. Appellants raised concerns regarding the compatibility of the proposed use with surrounding uses and whether the applicants have obtained, or can obtain, the required permits for the development of the use. Appellants also raised additional concerns related to the availability of the staff report, the notice of hearing, and documents in the record. These concerns have been resolved as a result of the board holding this hearing.

Financial Impacts: None

Impacts to Department & External Agencies: None

List of attachments: Appeal, Hearings Officer's Decision, Staff Report

Presenter: Brandon Reich

Department Head Signature: [Signature]

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MARION COUNTY BOARD OF COMMISSIONERS

BEFORE THE MARION COUNTY BOARD OF COMMISSIONERS

In the Matter of the

Marion County Case No. 23-010

Application of Friends of
Historic Butteville (“FOHB”)

**APPEAL OF FLOODPLAIN AND
GREENWAY DEVELOPMENT
PERMIT**

Shaloe Putnam and Julia Kraemer, homeowners whose properties include a portion of “Butte Street” in Butteville, appeal the decision of the Marion County Hearings Officer, dated November 9, 2023, in Case No. 23-010. In opposition to the Floodplain and Greenway Development Permit Application filed by Friends of Historic Butteville (“FOHB”), Ms. Putnam and Ms. Kraemer submitted through counsel:

- Two letters of opposition, describing the factual and legal issues that preclude Marion County from granting FOHB’s application; and
- Four sworn declarations, including 87 exhibits.

As explained in detail below, the Marion County Hearings Officer erred in granting FOHB’s Application.

I. The parties are engaged in litigation about the property at issue.

The parties are actively litigating whether and to what extent Marion County has a legal interest in the property that is the subject of FOHB’s Application (the “Disputed Property” or the “Landing”). In June 2023, Ms. Putnam and Ms. Kraemer filed their complaint in Marion County Circuit Court against both Marion County and FOHB (Case No. 23CV25486). Tatoi Decl. Ex. 26. The complaint seeks a declaration of rights concerning the property that is the subject of FOHB’s application (the “Disputed Property”). More specifically, the complaint seeks a declaration that neither Marion County nor FOHB have the right to use the Disputed Property in the way proposed in FOHB’s Application, *i.e.*, to install a gangway and dock. That litigation remains ongoing. Consequently, no permit should be granted to FOHB unless and until a court declares, at minimum, that Marion County (1) has a legal right to the Disputed Property; and (2) that right includes the right to construct a gangway and dock on the Disputed Property. Absent a final determination by the court about the existence and scope of Marion County’s right to the Disputed Property, if any, Marion County and FOHB risk wasting time and public resources.

The Hearings Officer acknowledged that the “litigation necessarily addresses significant issues that would impact the criteria for approval or denial of the Application,” but then concluded that “those issues have not been determined in the pending litigation [and so] Marion County presently has authority over the public right-of-way in the” Disputed Property. Decision at 2. That conclusion is nonsensical, and mistakenly places the burden on the *opponents* to disprove a matter that neither Marion County nor FOHB have proven in the first place.

As the applicant seeking the permit, it is FOHB's burden to establish that it has satisfied all the criteria necessary to obtain the permit. As part of that burden, FOHB must establish that it has a legal right to use and develop the property at issue. It failed entirely to do so. Indeed, its own application was woefully incomplete on that very issue.

According to the Planning Division "[i]ncomplete applications will not be accepted."¹ Among other things, the application "must" include a "copy of the officially recorded title transfer instrument (deed, warranty deed, or contract) that shows the legal description for the parent parcel." No such instrument was transmitted with FOHB's application, and Marion County staff did not check the appropriate box to prove otherwise. Consequently, Marion County should not have accepted the application because it was incomplete. More significantly, however, FOHB has failed to establish that Marion County has a legal right-of-way interest in the Disputed Property that would allow FOHB to develop the property as contemplated in FOHB's Application.

The ongoing litigation is also relevant for a second reason: While the Hearings Officer was deciding this issue, both Marion County and FOHB responded to Ms. Putnam and Ms. Kraemer's Requests for Admission. Those responses are enclosed, and will be referenced throughout this appeal because they refute the statements and conclusions of the Hearings Officer, FOHB, and Marion County in this proceeding. Most significantly,

- Both Marion County and FOHB admitted that Ms. Putnam and Ms. Kraemer are the fee title owners to the Disputed Property (Marion County Response to RFA No. 4, FOHB Response to RFA No. 3);
- Marion County admitted that "the county does not own the right of way unless the county owns the fee interest in the land over which the right of way exists; and admits that the county does not have a right to take anything away from the land unless it interferes with the use of the right of way. Defendant Marion County also admits that a fee title owner of property not only owns the land, but everything below, on, or in reasonable airspace above the land, including trees or other natural growth (Marion County Response to RFA No. 18);
- Marion County admitted that it has never compensated Ms. Putnam, Ms. Kraemer, or their predecessors for the public's use of the Disputed Property (Marion County Response to RFA No. 7);
- Marion County admitted "that it has never claimed a right to construct a park, dock, or recreation area on any street right of way, including the Disputed Property" (Marion County Response to RFA No. 8);
- Marion County admitted that "a property developer's dedication of a street right of way to the County does not confer a right to the County to develop a recreation area within the right-of-way unless expressly provided in the dedication instrument (Marion County Response to RFA No. 9);

¹ Marion County Floodplain/Greenway Application, available at <https://www.co.marion.or.us/PW/Planning/Documents/floodplain.pdf>.

- FOHB admitted that it “has no ownership rights in the Disputed Property” (FOHB Response to RFA No. 1);
- Both Marion County and FOHB admitted that FOHB’s 2017 “restoration work,” which included removing timber from the Disputed Property, placing boulder walls and property line fencing, and pouring concrete trail, was performed without applying for or obtaining (1) a right-of-way permit, (2) floodplain development permit; or (3) Willamette River Greenway development permit (FOHB Responses to RFA Nos. 7-9, Marion County Responses to RFA Nos. 19-21);
- FOHB admitted that neither Ms. Putnam nor Ms. Kraemer authorized FOHB to remove timber from the Disputed Property and that it did not compensate them for the value of that timber (FOHB Response to RFA Nos. 16-17); and
- Marion County admitted that it did not compensate Ms. Putnam or Ms. Kraemer for the value of the timber FOHB harvested from the Disputed Property (Marion County Response to RFA No. 25).

Ms. Putnam and Ms. Kraemer request that the Responses to Requests for Admissions—which have been filed by both FOHB and Marion County with the Marion County Circuit Court in Case No. 23CV25486—be included in this record.

II. Ms. Putnam and Ms. Kraemer opposed the application based on Marion County’s failure to comply with its code and applicable law concerning requisite notice.

The Hearings Officer incorrectly and summarily concluded that “[n]o objections were raised to notice[.]” Decision at 2. In fact, Ms. Kraemer and Ms. Putnam *did* object to Marion County’s notice. In their August 16, 2023, opposition letter, they argued the following:

Both Oregon law and the Marion County Rural Zoning Code require that, in all quasi-judicial hearings, the County must issue a notice of a public hearing. ORS 197.797; ORS 215.416(11)(A)(c); MCC 17.111.030. Marion County’s notice of public hearing was defective for two reasons: First, the notice includes an incorrect address for the Disputed Property. Second, the notice fails to state that the staff report will be available seven days prior to the hearing, and Marion County did not make the staff report available seven days prior to the hearing.

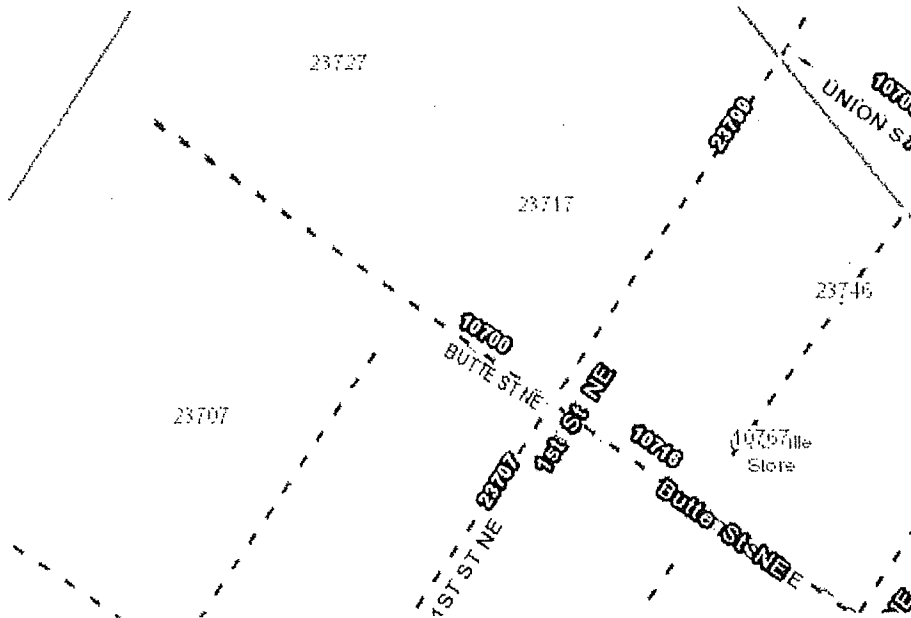
Adequate notice in compliance with the Rural Zoning Code is a procedural requirement for the conduct of quasi-judicial hearings. MCC 17.111.010 (“Public hearings, when required by this title, shall be conducted by the hearings officer, planning commission, or board of commissioners in a manner prescribed by state law and this chapter.”). Among other things, the notice “shall contain”:

“the address or other easily understood geographical reference to the subject property;” and

“[a] statement that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and that a copy will be provided at reasonable cost upon request[.]”

MCC 17.111.030(B)(3), (7); ORS 197.797(3)(c), (i) (same). ORS 197.797(4)(b) (“Any staff report used at the hearing shall be made available at least seven days prior to the hearing.”).

Here, Marion County’s notice of public hearing failed to properly identify the Disputed Property. The notice states that the property is “located at the 10800 block of Butte Street NE.” However, according to the Marion County Surveyor’s Office,² the Disputed Property is located at the 10700 block of Butte Street NE:



As a result, because Marion County failed to include the correct address for the Disputed Property, the hearing notice was fatally defective. The Hearings Officer later referenced the incorrect address when granting FOHB’s Application. Decision at 17.

The hearing notice was also defective because it did not include the requisite statement: it says nothing about the Staff Report or its availability. In any event, despite multiple requests for the Staff Report by undersigned counsel to Marion County counsel and staff, and a promise by Marion County’s Principal Planner to send a copy of the Staff Report once it was completed, Marion County did not provide it to counsel until August 11, 2023—six days before the hearing. See *Tatoian Decl.*, Exs. 27, 28. What’s more, the Staff Report is dated July 26, 2023, meaning, if that is the correct date of the Staff Report, Marion County withheld the requested record for 16 days before disclosing it. As of August 15, 2023, two days before the scheduled hearing, the Staff Report still was not available on Marion County’s website. *Tatoian Decl.*, Ex. 29. In fact, Marion

² Marion County Surveyor’s Office, Survey Graphic Index, available at <https://gis.co.marion.or.us/SurveyGraphicIndex/SGL.aspx>.

County only uploaded the Staff Report to its website *one day* before the hearing, and only because undersigned counsel informed it that it was missing. Tatoian Decl., Ex. 35.

By failing to comply with Oregon law and its own zoning code, Marion County has deprived the property owners of critical time to evaluate the Staff Report in advance of the public hearing. Consequently, Marion County's failure to comply with its own code and its unexplained withholding of the staff report renders the notice of the public hearing and the hearing itself defective. Additionally, the hearing notice cited ORS 215.428, a statute which was repealed in 1999. The Hearings Officer erred in concluding that no objections were raised as to notice.

III. The Hearings Officer applied an incorrect standard of proof.

The Hearings Officer's decision cannot withstand the most basic scrutiny because it fails to even identify the relevant standard of proof. In the decision, the Hearings Officer purports to describe the burden of proof underlying its review of FOHB's Application. In doing so, the Hearings Officer describes three different burdens. According to the Hearings Officer:

- FOHB has "the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met," Decision at 8;³
- FOHB "must prove, by substantial evidence in the record, it is more likely than not that each criterion is met," *id.*; and
- "If the evidence for every criterion there's a hair or breath in [FOHB's] favor the burden of proof is met and the application is approved," *id.*

These three standards cited by the Hearings Officer are distinct standards of proof (assuming that the third standard is legally legitimate, although we have been unable to find any authority to support that proposition).

An applicant in a land use proceeding has the burden to make certain that the record is adequate to support an affirmative decision. *Toth v. Curry County*, LUBA No. 91-070, 22 Or LUBA 488, 493 (1991). An applicant in a land use proceeding bears the burden of demonstrating that they satisfy the relevant criteria. *Jurgenson v. Cnty. Court for Union Cnty.*, 42 Or App 505, 510, 600 P2d 1241 (1979); *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994) (During the local proceedings, the applicant for development approval bears the burden of proof to establish its application satisfies relevant approval standards).

The applicant retains the burden of proof throughout the local process to demonstrate compliance with all applicable approval criteria. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998). When the local government shifted that burden to opponents of the development application, the challenged decision must be remanded. *Murphy Citizens Advisory Comm. v.*

3. The Hearings Officer cited to *Riley Hill Contractor, Inc. v. Tandy Corp.*, 303 Or 390 (1987) to support its statement that the burden of proof is a preponderance of the evidence. That citation is inexplicable, as *Riley Hill* had nothing to do with land use proceedings. The claims at issue in that case were civil claims of fraud, breach of warranty, and negligence.

Josephine County, 28 Or LUBA 274 (1994); *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995) (A local governing body in considering an appeal of a planning commission decision approving a subdivision may not shift the burden of proof from the applicant to the opponents of the subdivision.).

It is unclear from the Hearings Officer's decision which of the three stated standards of proof they applied when considering FOHB's Application. Regardless of whether an applicant's burden is preponderance or substantial evidence, FOHB failed to satisfy its burden throughout these proceedings under either standard. Moreover, in many instances, Hearings Officer erred by shifting the burden to Ms. Putnam and Ms. Kraemer to *disprove* whether FOHB satisfied applicable criteria.

IV. Marion County does not own the real property at issue and any interest it may have does not extend to the proposed installation of a gangway or dock.

The Hearings Officer found as a matter of "fact" that the Disputed Property "constitutes an existing right-of-way." Decision at 3. Whether real property is a public right-of-way is not a question of fact—it is a conclusion of law. *State v. Deal*, 191 Or 661, 681-82, 233 P2d 242 (1951). In opposing FOHB's Application, Ms. Putnam and Ms. Kraemer argued why—as a matter of law—Marion County did not have a valid right-of-way and, even if it did, why that interest would not allow it to grant FOHB's Application. Rather than grappling with this issue of great significance, the Hearings Officer appeared to accept FOHB's President's word that "Marion County is the owner of the right of way and has been since 1871." Decision at 6. In so doing, the Hearings Officer erred.

A. All parties agree that Ms. Putnam and Ms. Kraemer are the fee owners of the Disputed Property.

Marion County and FOHB have each admitted that Ms. Putnam and Ms. Kraemer are the fee owners of the Disputed Property. See Marion County Response to RFA No. 5; FOHB Response to RFA No. 3.

FOHB's Application relies on Marion County Rural Zoning Code 17.116.040(G) to assert that the "application is being completed in a manner consistent with Marion County as the owner of the Butteville Landing right of way rather than fee title holder."⁴ MCC 17.116.020(G) now permits applications for "adjustments" to be submitted by "a public agency or utility, or an entity authorized by a public agency or utility, if the public agency or utility holds an easement or other right that entitles the applicant to conduct the proposed use on the subject property without the approval of the property owner." (Emphasis added).⁵

⁴ It is unclear why FOHB relies on code provisions concerning adjustments, as opposed to the provisions governing conditional use permits, MCC 17.119. In any event, the text of the pertinent provisions is identical.

⁵ It is beyond dispute that FOHB and its Butteville Landing project was the impetus for the change to the Marion County zoning code. See Marion County Board of Commissioners Work Session, December 15, 2022, ("this is addressing the Butteville Landing," "this is the Butteville Landing").

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As the application admits, neither FOHB nor Marion County own the real property where FOHB seeks to install a gangway and dock. But what the application neglects to recognize is that neither FOHB nor Marion County have a legal right to conduct the proposed use on the subject property.

Marion County should deny FOHB's application because it fails to satisfy Marion County's own criteria. To the extent FOHB claims its permit is subject to MCC 17.116, its application fails to meet the code's requirement that the application include "the name or names of the owners of the property." See MCC 17.116.040 ("The application shall set forth * * * the name or names of the owners of the property."). Notably absent from FOHB's application are the names of Ms. Kraemer and Ms. Putnam—the undisputed owners of the Disputed Property.

Nor is there any explanation as to how Marion County—or FOHB—has a legal right to install a gangway and dock on the Disputed Property. It does not. First, there is no evidence that the Disputed Property was ever dedicated to Marion County. Marion County has claimed to have a right-of-way interest in the Disputed Property by virtue of a plat recorded in 1871. *Tatoian Decl.*, Ex. 33. But records describing the history of the platting of Butteville are ambiguous as to who platted the town and who recorded the plat with Marion County. For example, the Oregon Historical Society credits Francois Matthieu and R.V. Short for platting Butteville in 1851 and 1859, respectively. Meanwhile, the Willamette Heritage Center recognizes that "conflicting information exists about which group surveyed and laid the town. According to that source, it could have been John McCadden, George Abernathy, Alanson Beers, or Francois Matthieu. What cannot be disputed is that none of those individuals owned the real property at issue: The fee title was vested in Alexis Aubichon under a Donation Land Claim. See *Tatoian Decl.*, Ex. 18 at 6; Ex. 20 at 2. There also can be no dispute that Aubichon did not record the plat, as he died four years before it was recorded,⁶ and the only name appearing on the plat itself appears to be the county recorder. These ambiguous historical records are far from the "clear and convincing evidence" needed to demonstrate a "clear and unequivocal manifestation" of the fee owner's intent to dedicate land to public use. *Dayton v. Jordan*, 279 Or App 737, 749, 381 P3d 1031 (2016) (stating standard).

Because Ms. Putnam and Ms. Kraemer are the undisputed fee owners of the Disputed Property and because no record unambiguously establishes that Marion County has a right-of-way, Marion County cannot approve FOHB's Application.

B. Even if Marion County had a right-of-way interest in the Disputed Property, that interest would not extend to the construction of a recreation site.

Even if depiction of Butte Street on the 1871 plat were sufficient to demonstrate that Marion County has a right-of-way interest in the Disputed Property, any such interest would not

issue"); *Tatoian Decl.*, Ex. 7 (FOHB November 2022 minutes noting that "Scott Norris, counsel for the County, now suggests that changing the County Code is the best fix to clarify application procedures related to work on County right-of-way").

⁶ Oregon Secretary of State, Early Oregonian Search, "Aubichon, Alexis," available at <https://secure.sos.state.or.us/prs/personprofile.do?recordNumber=18906>.

permit Marion County to construct a gangway, dock, or *de facto* recreation site on the Disputed Property. In the parties' litigation, Marion County has admitted:

- “that a property developer’s dedication of a street right of way to the County does not confer a right to the County to develop a recreation area within the right-of-way unless expressly provided in the dedication instrument,” RFA No. 9;
- “that the county does not own the right of way unless the county owns the fee interest in the land over which the right of way exists; and admits that the county does not have the right to take anything away from the land unless it interferes with the use of the right of way. Defendant Marion County also admits that a fee title owner of property not only owns the land, but everything below, on, or in reasonable airspace above the land, including trees or other natural growth,” RFA No. 18.

Marion County’s own admissions defeat all claims that it can grant FOHB’s Application based on the 1871 plat. As neither FOHB nor Marion County have articulated what other evidence beyond the plat establishes that Marion County has a valid right-of-way over the Disputed Property, one must reasonably assume that it does not exist.

Even if Marion County’s admissions were not dispositive (they are), Oregon law is clear that any interest Marion County may have in the Disputed Property would not allow it to approve the developments in FOHB’s Application. The plat shows only that the platlor intended to provide lots abutting the Willamette River access to their properties. The plat does not depict a gangway or dock extending into the river. Nothing evident in the plat establishes that any right-of-way interest in the Disputed Property would extend to anything other than providing the adjacent property owners ingress and egress to their properties.

Because there is no express easement granting Marion County a right-of-way on the Disputed Property, any interest is by implication: “When the right of way is created by implication, the nature and extent of the right of way is measured by reasonable expectations at the time the easement was created. *Long v. Sendelbach*, 56 Or App 158, 162, 641 P2d 1136 (1982). This is seemingly consistent with Marion County’s understanding of its right-of-way interests,⁷

“The county does not own the right of way or have the right to take away anything from it unless it interferes with the use of the easement. As an example, the county can trim a tree that causes a vision hazard or remove a tree or other material to allow for a road widening. However, the county cannot remove the material for any other purpose not related to the road without the property owner’s permission.”

⁷ Marion County, Surveyor’s Office, Public Rights of Way, available at <https://www.co.marion.or.us/PW/Survey/rightofway/Pages/public.aspx#:~:text=The%20county%20does%20not%20own,allow%20for%20a%20road%20widening>.

Unlike the County, “[a] fee title owner of property owns not only the land, but everything below, on, or in the reasonable airspace above the land, including trees or other natural growth. By granting a public right of way, the owner is giving an easement across their land *for specific uses*, but retains ownership of the land.” *Id.* (emphasis added).

Here, Marion County has admitted that it believes the Disputed Property is a local access road. *See* Marion County’s Response to RFA No. 26. Similarly, FOHB President Ben Williams has admitted that Marion County’s interest in the Disputed Property requires it to remain a roadway:

“Ben provided an update on Butteville Landing. He said Marion County’s final position is that the right of way is an easement. Ben said the title is held by the neighbors with the county having an easement, which has a reversionary clause that it must remain a roadway and can’t be given away.”

Tatoian Decl., Ex. 25 at 3 (minutes of Marion County Parks Commission)]. Despite Mr. Williams’ admission that the Disputed Property “must remain a roadway,” FOHB has spent years fundraising to develop the property into a recreation site—a park. Although FOHB now represents that the project will provide a “transportation link from Butteville to the river,” it cannot reasonably be disputed that the goal is—and always has been—to develop a park at the Disputed Property. Among other things,

- In proposing the project to Marion County, FOHB’s President, Ben Williams, stated that “the proposed park would add a component to the community and supplement the Butteville store, which is struggling,” Tatoian Decl., Ex. 22;
- In considering the proposal and Mr. Williams’ appointment to the Marion County Parks Commission, the Marion County Board of Commissioners considered the “[p]ossible park area in Butteville because county owns-right-of-way” and because the “community needs a park,” Tatoian Decl. Ex. 23 at 2;
- When deciding where to construct a new park in Marion County, the County chose this location over others because, among other reasons, “the county doesn’t have many parks in the northern part of the county so this would be a nice addition,” Tatoian Decl., Ex. 24 at 4;
- FOHB’s Removal/Fill permit filed with the Oregon Department of State Lands described the project as providing a “park-like amenity,” indicated the project category as “recreational,” not “transportation,” and included renderings of the site with two picnic areas, Tatoian Decl., Ex. 16 at 9, 11, 22;
- FOHB received more than \$181,000 in grant funding from the Oregon Parks and Recreation Department under a grant intended “for projects that are primarily recreational

in nature, rather than serving a more utilitarian transportation function,”⁸ Tatoian Decl., Ex. 32;

- The Oregon Parks and Recreation Department considers the site to be a park. *See* Tatoian Decl., Ex. 11 (OPRD Park Manager describing the Disputed Property as a “park like amenity” necessitating closure “due to Covid-19”); and
- FOHB’s Application itself states that it the project is designed for “public recreational use” and its website seeks donations to “add park-like amenities” to the Disputed Property.⁹

Indeed, the only reason FOHB removed the picnic tables and bench from the Disputed Property was “to take away [Ms. Kraemer and Ms. Putnam’s] ability to claim the Landing is a ‘park.’” Tatoian Decl., Ex. 9 at 2.

The Hearings Officer paid no attention to Marion County and FOHB’s prior unambiguous statements, and instead adopted FOHB’s self-serving statement that the purpose of the project “is to provide ingress to and egress from the Willamette River for the benefit of the public.” Decision at 14. Yet when asked in litigation about the historical use of the Disputed Property for the past *century*, Marion County had insufficient information to respond. *See* Marion County Response to RFA No. 6. If it were true that the Disputed Property has historically been used to provide the public access to the Willamette River, Marion County certainly would have been able to respond to that request with more precision.

And, contrary to FOHB’s repeated representations, there is no basis to conclude that any historical right-of-way interest was to provide the public with a park or recreation site. The Butteville Landing in the mid-1800s was a privately-owned commercial dock, not a public park. *See* Tatoian Decl., Ex. 20 at 2-3 (Aubichon “constructed a landing or docking point that became known as Obeshaw’s” which was used to ship “wheat, hops, and other agricultural products”); Ex. 2 at 1 (FOHB’s historical narrative recognizing 1840s journal’s reference to the landing as “Obeshaw’s landing”). Again, the only evidence on this issue is FOHB’s self-serving statement, which is contrary to historical records.

By seeking to construct a gangway and dock on the Disputed Property, FOHB is requesting Marion County’s blessing to change the use of Marion County’s implied easement, if any, in a manner that will unlawfully and substantially increase the burden on the fee owners’ estates. If Marion County has a right-of-way interest in the Disputed Property, that interest is limited only to providing ingress and egress to the adjoining property owners. Nothing expressed or implied would allow Marion County to do anything more than that. For all these reasons, Marion County must deny FOHB’s Application, and the Hearings Officer erred in concluding otherwise.

⁸ Oregon Parks and Recreation Department, Recreational Trails Program Grant Manual, available at <https://www.oregon.gov/oprd/GRA/Documents/RTP-2022-Grant-Manual.pdf>.

⁹ Friends of Historic Butteville, “Support the Friends of Historic Butteville,” available at <https://butteville.org/support-us.html>.

V. FOHB's improvements to date have been unlawful and contrary to Marion County Code.

The Hearings Officer erred in failing to consider the totality of FOHB's "restoration work" on the Disputed Property. The entirety of the Disputed Property falls within the FEMA Flood Zone and Willamette River Greenway. Tatoian Decl., Ex. 31. As a result, all development of the Disputed Property is subject to Marion County Zoning Code provisions concerning the floodplain overlay zone and the greenway management overlay zone, MCC 17.178 and 17.179.

Under Marion County Code,

"No permit for the use of land * * * shall be issued and no land use approval shall be granted if the land for which the permit or approval is sought is being used in violation of any condition of approval of any land use action, is in violation of local, state or federal law * * * or is being used * * * in violation of the provisions of this title[.]"

MCC 17.110.680. Similarly,

"No building, structure, or premises shall hereafter be used or occupied, and no building or structure or part thereof shall hereafter be erected, constructed, moved, structurally altered, or enlarged unless in conformity with all the regulations herein specified for the zone in which it is located, and then only after applying for and securing all permits and licenses required by laws and ordinances[.]"

MCC 17.110.820. "All land uses shall be conducted in full compliance with any other county ordinance, code and requirement of state and federal law." MCC 17.110.680. The requirements under Marion County's zoning code are "the minimum requirements adopted for the promotion of the public health, safety, comfort, convenience, and general welfare and shall apply uniformly to each class or kind of structure or land." MCC 17.110.690.

In 2017, FOHB began its "restoration project, includ[ing] the removal of invasive species, cut and fill, placement of boulder walls to stabilize the slopes, installation of property line fencing, and replanting with native species, [and] a 10 ft. wide concrete trail" on and through the Disputed Property. FOHB's Application at 4 (Applicant Statement). In addition to these "improvements," Marion County constructed a parking lot, and FOHB installed numerous signs, clearcut the existing trees, and placed picnic tables and a park bench on the Disputed Property. Notably, these developments took place two years before FOHB and Marion County executed their Memorandum of Understanding, which purported to grant FOHB authority to develop the Disputed Property. Tatoian Decl., Ex. 14.

Marion County and FOHB have each admitted that FOHB did not apply for or obtain a right-of-way permit, floodplain development permit, or Willamette River Greenway Development permit in connection with its 2017 "restoration work." Marion County's Responses to RFA Nos. 19-21; FOHB Responses to RFA Nos. 7-9. Ms. Putnam and Ms. Kraemer's filings with the Hearings Officer extensively argued this issue, yet the Hearings Officer made no reference to those

arguments and failed entirely to explain why FOHB should be permitted to continue to develop the Disputed Property notwithstanding the fact that its prior work was done without the requisite permits and without compliance with Marion County Code.

FOHB should not be allowed to evade a thorough evaluation of the effects of its entire project, including the 2017 phase, by failing to comply with the law—that is, by failing to obtain permits in 2017 “before any development, change of use or intensification commences.” MCC 17.179.040 (emphasis added); MCC 17.178.050(A) (requiring a conditional use permit “before construction or development begins” within the floodplain). These are all defined terms in Marion County’s Code:

- Development” is defined to include “any manmade change to improved or unimproved real estate, including but not limited to * * * filling, grading, paving, excavation.” MCC 17.178.020(J) (emphasis added). At a minimum, the concrete path and grading expressly required a permit.
- “Change of use,” means “making a different use of the land or water than that which existed on December 6, 1975.” MCC 17.179.090(A). A change in use specifically includes “alterations of the land” that “substantially alters or affects the land or water.” In 1975, the Disputed Property was heavily vegetated with shrubs and mature trees, provided wildlife habitat, had no pathway or signage, and was seldom used by anyone but the local residents. The river access point, “Butteville Landing,” had been gone for decades. As a result, FOHB’s 2017 development effected a “different use of the land” and a substantial alteration. All of the 2017 improvements constituted a change of use that required a permit.
- Similarly, “intensification” means “any additions which increase or expand the area or amount of an existing use, or the level of activity.” MCC 17.179.090(B). The 2017 developments expanded the area into a public park, expanded the existing use, and increased the level of activity. On that separate basis, all of the components of FOHB’s 2017 development required a Greenway permit. Under MCC 17.179.040, the permit must “be obtained before any development, change of use or intensification commences within the Willamette River greenway boundary” (emphasis added).

Finally, Oregon law is clear that past code violations are relevant to a land use application. For example, LUBA remanded a county permit approval in 1992 because the record contained no evidence that the applicants had obtained a permit for a remodel in 1985, seven years before. *Mercer v. Josephine Cty.*, LUBA No. 92-070 (Aug. 21, 1992). In *Penland v. Josephine County*, LUBA No. 94-199, *4 (Apr. 27, 1995), LUBA remanded a county conditional use approval, concluding that “where approval is sought for the construction of a building to serve an existing use, whether that existing use is lawful is relevant to approval of the proposed building.”

Oregon law also is clear that development activities may not be artificially segmented to avoid code requirements. Thus, even where a prior activity received a conditional use permit, an application, two years later, to modify the use should have been reviewed “in context” with the existing conditions. Project opponents were entitled to raise “relevant issues regarding the

modified mining operation that could not have been raised when the original mining operation proposal was approved.” *Tolbert v. Clackamas Cty.*, LUBA No. 2014-043, *23 (Dec. 5, 2014). LUBA has also clarified that projects must be considered as a unified whole when evaluating impacts—such as the impacts on adjoining property and existing uses that are implicated here. In *Jacobs v. Clackamas County*, LUBA No. 2015-099 (May 5, 2016), LUBA remanded another approval, concluding that different components of a business operation must not be artificially segmented to avoid code limitations.

In this case, Ms. Putnam and Ms. Kraemer had no opportunity to raise issues concerning the 2017 developments because FOHB did not seek permits for its activities. This is the first time they have been provided any avenue to challenge FOHB’s development *on their land*. They must therefore have an opportunity to place evidence before the decision maker detailing all changes and intensification of use for the entire project, including the unpermitted 2017 developments.

Rather than turning a blind eye to the fact that FOHB evaded the requirements of Marion County Code, Marion County should be enforcing its code as to FOHB’s prior unlawful developments and denying its request to further develop its unpermitted activities. *See* MCC 17.110.680 (“It shall be unlawful for any person to violate any provision of this title, to permit or maintain any such violation, to refuse to obey any provision hereof, or to fail or refuse to comply with any such provision except as variation may be allowed under this title. Proof of such unlawful act or failure to act shall be deemed prima facie evidence that such act is that of the owner. Prosecution or lack thereof of either the owner or the occupant shall not be deemed to relieve the other.”); MCC 17.110.870 (“It shall be the duty of the director and county building official to enforce this title.”).

For all these reasons, FOHB’s 2017 activities and developments must be considered as an integral part of the dock project. The present application must be denied because the 2017 developments violated the MCC, FOHB never sought or obtained approval for its 2017 development, and because the total impacts within the Disputed Property, from 2017 to the present, are indisputably significant and do not meet the review criteria—particularly, but not limited to, the standards in MCC 17.179.050, subsections I, L, and M (discussed below). The Hearings Officer erred in failing to consider the totality of FOHB’s project.

VI. All parties disclaim responsibility for the Disputed Property.

The Hearings Officer failed entirely to consider that there is no long-term maintenance or support for FOHB’s project. FOHB’s proposed project will subject Marion County to permanent, long-term financial maintenance and exposure. Yet both Marion County and FOHB have each admitted that they are not liable for physical harm suffered by members of the public while using the Disputed Property. *See* FOHB’s Response to RFA No. 15; Marion County’s Response to RFA No. 15. Marion County further admits that it claims no responsibility for maintaining the Disputed Property. Marion County’s Response to RFA No. 16.

Marion County first entertained the idea of creating a park at the Disputed Property on the condition that the County not “be responsible for the asset; thus, so long as volunteers and others involved [are] responsible this is supported.” *Tatoian Decl.*, Ex. 24 at 4; *see also* Ex. 23 (Board of Commissioners discussing that there “has to be a funding vehicle to maintain a park”). In 2019,

FOHB and Marion County entered a Memorandum of Understanding (“MOU”). Tatoian Decl., Ex. 14. The MOU placed the financial burden on FOHB to raise the funds necessary to improve the Disputed Property. Under the MOU, capital improvements on the Disputed Property vest to the County. *Id.* Although the MOU states that the parties will share the responsibility for maintenance of the Disputed Property, the minutes of the Marion County Board of Commissioners suggest otherwise. The minutes provide that the MOU “puts the responsibility of upkeep and maintenance on” FOHB and that Marion County “does not want the county to be responsible for park improvements.” Tatoian Decl., Ex. 22.

FOHB is a nonprofit corporation reliant on contributions and one-off grants. According to information available to the property owners, the average age of the FOHB Board of Directors is between 73 and 78 years old. Kraemer Decl. ¶14. FOHB’s own records demonstrate that it does not have the fiscal integrity to maintain the Disputed Property long-term, especially because the Disputed Property is not FOHB’s only project. FOHB has contracted with the Oregon Parks and Recreation Department to operate the Butteville General Store. Staff from the Oregon Parks and Recreation Department have expressed concerns about FOHB’s ability to maintain its funding:

“The ability for [FOHB] to acquire these [grants] funds is great but also scary. If they quit applying or quit getting these unexpected funds, the hardship in its entirety will again fall upon the State.***.

“In addition to the funds directly related to the store, there have been many contributions to the [FOHB] for the landing they are spearheading. What that means for OPRD is the potential for a very quick spike in users to the buildings and grounds. The [FOHB] have already secured the dock and pilings for the landing and are working through the tail ends of a lengthy and costly law suit with DSL. Once they close this out I imagine the construction will happen quickly and like the saying goes – if we build it they will come. The river users will flock to the waterside café and store putting an exponential burden on the store and its aging infrastructure.

“The agreement we currently have with [FOHB] and then their agreement with the concessionaire is a 0% return for them to operate out of the store. The burden will likely fall on the State once again after the potential ‘love us to death’ mantra is repeated at this property.”

Tatoian Decl., Ex. 1 (email of OPRD Park Manager, Champoeg Management Unit). Some of FOHB’s grant funding for the Disputed Property is no longer available to it, making its financial situation worse. Tatoian Decl., Ex. 6 (FOHB Board Meeting minutes noting that the Oregon State Marine Board grant “vanished” because not spent); Ex. 8 (FOHB Board Meeting Agenda noting financial balance of \$28,292); *see also* Ex. 3 (“FOHB is a member supported nonprofit, and thus relies on annual dues and contributions to continue our work”); Ex. 5 (January 2023 minutes noting that FOHB’s income exceeded expenses because of a significant estate gift). FOHB has expressed its financial concerns to Marion County. *See* Tatoian Decl., Ex. 12 (FOHB “lost two potential

grants,” “contributions have dropped like a rock too,” and that “there could be some cash flow issues”).

With Marion County disclaiming responsibility for the Disputed Property and with FOHB’s fluctuating financial integrity and aging personnel, one must ask: Who will be responsible for maintaining the Disputed Property in the long run—10 or 20 years from now? Who will be responsible if a park visitor injures themselves on the dock? Marion County should bear these considerations in mind as it contemplates whether to approve FOHB’s Application and develop a permanent recreation site on the Disputed Property.

The park has no plan nor funding for permanent maintenance. The issue of on-going and future maintenance is relevant to the approval criteria, including the compatibility requirement in MCC 17.179.050(I), the substantial interference standard in MCC 17.179.050(L), and particularly the protection criterion MCC 17.179.050(M). Subsection M requires that “[m]aintenance of public safety and protection of public and private property, especially from vandalism and trespass, shall be provided to the maximum extent practical.”

MCC 17.179.050(M)’s text suggests an ongoing obligation to protect private property from vandalism and trespass. At the very least, a project with no plan for ongoing maintenance and no long-term funding cannot satisfy this standard. Marion County does not intend to provide funds. *See* Tatoian Decl., Exs. 14, 22-24. Marion County has previously claimed that the Disputed Property is designated as a Local Access Road, which the County has no obligation to maintain. *See* Marion County Surveyor’s Office Website (defining “local access road” and providing: “Maintenance of these roads is the responsibility of the local property owners”).¹⁰

To summarize, the Disputed Property is currently maintained by volunteers who lack any plan for permanent maintenance or funding. With the County saying it has no obligations with respect to FOHB’s project, they risk foisting FOHB’s dangerous project on people who never wanted it to be built in the first place. This manifest unfairness should be addressed through application of the Greenway review criteria—specifically, MCC 17.179.050, subsections I, L, and M.

VII. The FOHB Application fails to meet the criteria required by Marion County Code 17.178.

Marion County Code requires a conditional use permit for all applications for development in the floodplain. “All development within the floodplain (including areas of special flood hazard) is subject to the terms of this chapter and required to comply with its provisions and all other applicable regulations. No * * * land shall hereafter be constructed, located, extended, converted, or altered without full compliance with the terms of this chapter and other applicable regulations.” MCC 17.178.030(B).

As explained below, the FOHB Application fails to meet the requirements for a conditional use permit and the Hearings Officer erred in concluding otherwise. To summarize the Hearings Officer’s conclusions of the MCC 17.178 criteria, the Hearings Officer:

¹⁰ *See* <https://www.co.marion.or.us/PW/Survey/rightofway/Pages/Definitions.aspx>.

- Concluded that three criteria were inapplicable (MCC 17.178.050(C); 17.178.050(E); 17.178.060(C)(2));
- Failed to evaluate or mention one criterion (MCC 17.178.050(G));
- Found one criterion satisfied based on an engineering letter that was submitted without any of the nine attachments to the letter (MCC 17.178.050(D)); and
- Concluded that the remaining six criteria were satisfied because they could be made a condition of approval (MCC 17.178.060(C)(1) 17.178.060(D); 17.178.060(E); 17.178.060(F) 17.178.060(H); 17.178.060(J)).

In other words, the Hearings Officer—like the Staff Report before it—abdicated their responsibility to evaluate and determine the application’s compliance with the applicable criteria by concluding that compliance can just be made a condition of approval. The Hearings Officer decided FOHB’s Application should be approved based on its determination that, theoretically, criteria could be satisfied at some point—not based on a determination that FOHB had satisfied its burden of proving that it had satisfied the requirements to obtain approval for each criterion. *See Wilson v. Washington County*, 63 Or LUBA 314 (2011) (An applicant bears the burden of proof to demonstrate that an application complies with applicable approval standards, and a local government is not required to approve a noncomplying development proposal, even if conditions of approval might be imposed that would render the proposal consistent with the applicable criteria.).

With the Hearings Officer unable to conclude that the application meets any of the criteria, its support for the application is inexplicable. *See* MCC 17.178.030(G) (“Duties of the floodplain administrator” “shall include,” among other things, (1) reviewing “all development permits to determine that the permit requirements of this title *have been satisfied*,” (2) reviewing all development permits to determine that all necessary permits from various agencies “*have been obtained*,” (3) reviewing “all development permits to determine if the proposed development is located in the floodway. If located in the floodway, assure that the encroachment provisions of MCC 17.178.060(J) *are met*.”). Given that the severe burden of FOHB’s development of the Disputed Property falls entirely on neighboring residents, it simply is not acceptable for the County to rely on FOHB to satisfy the approval criteria AFTER it is granted the right to proceed with its plans.

A. 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.”

This criterion has not and cannot been met. The Hearings Officer decision states that this criterion “is not required because the development is located in a public right of way.” That conclusion tracks the staff report’s similar conclusion. As noted above, Marion County does not

own the Disputed Property and, even if it had a right-of-way interest, that interest would not extend to the proposed development.

Under Marion County's code, "owner" is defined to mean "the owner of record of real property as shown on the latest tax rolls or deed records of the county[.]" MCC 17.110.425.¹¹ Marion County and FOHB have agreed that Ms. Putnam and Ms. Kraemer are the fee owners of the Disputed Property. There is no evidence to support a conclusion that Marion County owns the Disputed Property.

Furthermore, there is no exception that would exempt FOHB from complying with MCC 17.178.050 because it desires to develop a county right-of-way. The Hearings Officer fails to point to any exception that would support its conclusion that this criterion is inapplicable. There is none.

Ms. Putnam and Ms. Kraemer are the undisputed fee title owners of the Disputed Property. They have not and will not sign and record a declaratory statement in accordance with MCC 17.178.050(C). As a result, this requirement has not—and cannot—be satisfied.

B. 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 the 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."

FOHB has failed to satisfy this criterion. This criterion has not been met. The Hearings Officer's decision cites to a letter by Professional Engineer Corbey Boatwright submitted in connection with FOHB's Application. As Ms. Putnam and Ms. Kraemer explained to the hearings officer, the Boatwright letter cannot be relied upon because it is incomplete. The letter from Boatwright Engineering Inc. references nine attachments—yet none of those attachments are included in the application. Thus, it is impossible for anyone to confirm whether Mr. Boatwright's analysis and calculations—and thus, his conclusions—are correct.

Both the Hearings Officer and the Staff Report ignore the fact that Mr. Boatwright's letter is wholly incomplete. Instead, they conclude that the "requirement for certification as required by MCC 17.178.050(d) can be made a condition of approval" and "can be met." Decision at 9. By its plain terms, the criterion must be satisfied "prior to obtaining" the permit. The very purpose of this adjudication is to determine whether FOHB has satisfied its burden of establishing the

¹¹ Marion County has not claimed that it is an "owner" because it has a "legal or equitable interest in a lot or parcel other than a leasehold or an interest less than a leasehold," MCC 17.110.425, and any such argument would be legally erroneous. The Disputed Property is neither a "lot" nor "parcel" as those terms are defined, and, even if it were, a right-of-way interest is less than a leasehold because it does not include exclusive rights to occupancy or use.

prerequisites for obtaining a permit. Marion County Code requires that the floodplain administrator to, among other things,

- “Review all developmental permits to determine that the permit requirements of this title have been satisfied;” and
- Review all development permits to determine that all necessary permits have been obtained from those federal, state, or local governmental agencies from which prior approval is required.

MCC 17.178.030(G) (emphasis added). By concluding that this criterion “can be made a condition of any approval,” the Hearings Officer has rendered this code provision superfluous, and has failed to comply with its obligations under Marion County Code 17.178.030(G).

C. MCC 17.178.050(G)

“In addition to other information required in a conditional use application, the application shall include: (1) Land elevation in mean sea level data at development site and topographic characteristics; (2) Base flood level expressed in mean sea level data on the site, if available; (3) Plot plan showing property location, floodplain and floodway boundaries where applicable, boundaries and the location and floor elevations of existing and proposed development, or the location of grading or filling where ground surface modifications are to be undertaken; (4) Any additional statements and maps providing information demonstrating existing or historical flooding conditions or characteristics which may aid in determining compliance with the flood protection standards of this overlay zone; (5) Proposed elevation in relation to mean sea level to which any nonresidential structure will be floodproofed; (6) Certification by a registered professional engineer or architect licensed in the state of Oregon that the floodproofing methods proposed for any nonresidential structure meet the floodproofing criteria for nonresidential structures in this chapter; (7) a description of the extent to which any watercourse will be altered or relocated; (8) Base flood elevation data for any subdivision proposals or other development when required per MC 17.178.060(G); Substantial improvement calculation(s) for any improvement, addition, reconstruction, renovation, or rehabilitation of an existing structure.”

FOHB has failed to satisfy this criterion. This criterion is not met. Neither the Hearings Officer nor the Staff Report mention this criterion. None of the project drawings provide base flood levels, floodplain and floodway boundaries, or existing or historical flood conditions. The drawings also lack any meaningful information to place the proposed site in context with the surrounding private property, despite the fact that the property owners have raised significant concerns and in fact have filed a lawsuit against FOHB and the County. Moreover, subsection

(G)(3) is not met because the application fails to show “the location of grading or filling where ground surface modifications are to be undertaken.”

Because FOHB’s Application fails to satisfy the requirements of MCC 17.178.050(G), FOHB has failed to satisfy its burden. Moreover, Marion County has failed to satisfy its obligations to ensure that this criterion is satisfied. MCC 17.178.030(G). The Hearings Officer erred in approving FOHB’s Application without ensuring that the required criterion had been satisfied.

D. MCC 17.178.060(C)(1)

“Nonresidential Development. 1. New construction and substantial improvement of any commercial, industrial or other nonresidential structures shall either have the lowest floor, including basement, elevated to two feet above the level of the base flood elevation, and where the base flood elevation is not available, the lowest floor, including basement, shall be elevated to two feet above the highest adjacent natural grade (within five feet) of the building site, or together with attendant utility and sanitary facilities shall: (a) Be floodproofed to an elevation of two feet above base flood elevation or, where base flood elevation has not been established, two feet above the highest adjacent grade, so that the structure is watertight with walls substantially impermeable to the passage of water. (b) Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy. (c) Be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice for meeting provisions of this subsection based on their development and/or review of structural design, specifications, and plans. This certificate shall include the specific elevation (in relation to mean sea level) to which such structures are floodproofed and shall be provided to the floodplain administrator. (d) Nonresidential structures that are elevated, not floodproofed, must meet the same standards for space below the lowest floor as described in (A)(5) and (6) of this section. (e) Applicants floodproofing nonresidential buildings shall be notified by the zoning administrator that flood insurance premiums will be based on rates that are one foot below the floodproofed level (e.g., a building constructed to the base flood level will be rated as one foot below that level). 2. New construction of any commercial, industrial or other nonresidential structures is prohibited in the floodway. An exception to this provision may be granted if a floodplain development permit and variance consistent with MCC 178.080 are obtained. This prohibition does not apply to functionally dependent uses.”

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer erroneously concluded that the required certifications “can be made a condition of any
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approval” and therefore “the criteria are met.” Decision at 10. That conclusion was wrong for at least two reasons.

First, Marion County is not the owner of the Disputed Property and therefore is prohibited from making any changes to the property.

Second, the FOHB Application makes no certification that this requirement can or will be satisfied. The only reference to the requirement is in Mr. Boatwright’s letter which says that the requirement is addressed “per the letter dated 29 May 2020 from Kelly D. LaFave, PE.” Yet that is one of the nine attachments that are omitted from Mr. Boatwright’s letter, and it is not included in FOHB’s Application.

Thus, despite FOHB making no effort to satisfy Marion County that this requirement has been satisfied, the Hearings Officer concludes that it has been met. In doing so, the Hearings Officer has rendered the criterion superfluous by not requiring FOHB to satisfy its burden of demonstrating that it can or will satisfy the requirements in MCC 17.178.060(C)(1). The Hearings Officer has also failed to carry out their duties under Marion County Code. MCC 17.178.030(G) (requiring county to determine that code requirements *have been satisfied* and that all necessary permits *have been obtained*). There is no basis to conclude that this criterion has been satisfied and the Hearings Officer erred in concluding otherwise.

E. MCC 17.178.060(D)

“Anchoring. 1. All new construction and substantial improvements shall be anchored to prevent flotation, collapse or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including effects of buoyancy.”

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer erroneously concluded that the required certifications “can be made a condition of any approval” and therefore “the criteria are met.” Decision at 11. Again, that conclusion was legally erroneous.

Marion County is not the owner of the Disputed Property and therefore is prohibited from making any changes to the property.

Moreover, the FOHB Application makes no certification that this requirement can or will be satisfied. The only reference to the requirement is in Mr. Boatwright’s letter which says that the requirement is addressed “per the letter dated 29 May 2020 from Kelly D. LaFave, PE.” That letter is one of the nine attachments that are omitted from Mr. Boatwright’s letter, and is not otherwise included in FOHB’s Application.

Thus, despite FOHB making no effort to satisfy Marion County that this requirement has been satisfied, the Hearings Officer concludes that that it has been met. In doing so, the Hearings Officer has rendered the criterion superfluous by not requiring FOHB to satisfy its burden of demonstrating that it can or will satisfy the requirements in MCC 17.178.060(C)(1). The Hearings Officer has also failed to carry out their duties under Marion County Code. MCC 17.178.030(G)

(requiring county to determine that code requirements *have been satisfied* and that all necessary permits *have been obtained*). There is no basis to conclude that this criterion has been satisfied and the Hearings Officer erred in concluding otherwise.

F. MCC 17.178.060(E)

“Construction Materials and Methods. 1. All new construction and substantial improvements shall be constructed with materials and utility equipment resistant to flood damage, and the design and methods of construction are in accord with accepted standards of practice based on an engineer’s or architect’s review of the plans and specifications. 2. All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damages.”

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer erroneously concluded that the required certifications “can be made a condition of any approval” and therefore “the criteria are met.” Decision at 11. The Hearings Officer erred.

Marion County is not the owner of the Disputed Property and therefore is prohibited from making any changes to the property.

Furthermore, the FOHB Application makes no certification that this requirement can or will be satisfied. The only reference to the requirement is in Mr. Boatwright’s letter which says that the requirement is addressed “per the letter dated 29 May 2020 from Kelly D. LaFave, PE.” That letter is one of the nine attachments that are omitted from Mr. Boatwright’s letter, and is not otherwise included in FOHB’s Application.

Thus, despite FOHB making no effort to satisfy Marion County that this requirement has been satisfied, the Hearings Officer concludes that that it has been met. In doing so, the Hearings Officer has rendered the criterion superfluous by not requiring FOHB to satisfy its burden of demonstrating that it can or will satisfy the requirements in MCC 17.178.060(C)(1). The Hearings Officer has also failed to carry out their duties under Marion County Code. MCC 17.178.030(G) (requiring county to determine that code requirements *have been satisfied* and that all necessary permits *have been obtained*). There is no basis to conclude that this criterion has been satisfied and the Hearings Officer erred in concluding otherwise.

G. MCC 17.178.060(F)

“Utilities. 1. All new and replacement water supply systems shall be designed to minimize or eliminate infiltration or 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 in 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 evaluation. Where the base flood evaluation 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 services shall meet all the requirements of this subsection.”

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer erroneously concluded that the required certifications “can be made a condition of any approval” and therefore “the criteria are met.” Decision at 11. The Hearings Officer erred.

First, Marion County is not the owner of the Disputed Property and therefore is prohibited from making any changes to the property.

Second, the FOHB Application makes no certification that this requirement can or will be satisfied. The only reference to the requirement is in Mr. Boatwright’s letter which says that the requirement is addressed “per the letter dated 29 May 2020 from Kelly D. LaFave, PE.” That letter is one of the nine attachments that are omitted from Mr. Boatwright’s letter, and is not otherwise included in FOHB’s Application.

Thus, despite FOHB making no effort to satisfy Marion County that this requirement has been satisfied, the Hearings Officer concludes that that it has been met. In doing so, the Hearings Officer has rendered the criterion superfluous by not requiring FOHB to satisfy its burden of demonstrating that it can or will satisfy the requirements in MCC 17.178.060(C)(1). The Hearings Officer has also failed to carry out their duties under Marion County Code. MCC 17.178.030(G) (requiring county to determine that code requirements *have been satisfied* and that all necessary permits *have been obtained*). There is no basis to conclude that this criterion has been satisfied and the Hearings Officer erred in concluding otherwise.

H. MCC 17.178.060(H)

“Storage of Materials and Equipment. Materials that are buoyant, flammable, obnoxious, toxic or otherwise injuries 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.”

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer erroneously concluded that the required certifications “can be made a condition of any approval” and therefore “the criteria are met.” Decision at 11. The Hearings Officer erred.

Marion County is not the owner of the Disputed Property and therefore is prohibited from making any changes to the property.

Moreover, the FOHB Application makes no certification that this requirement can or will be satisfied. The only reference to the requirement is in Mr. Boatwright's letter which says that the requirement is addressed "per the letter dated 29 May 2020 from Kelly D. LaFave, PE." That letter is one of the nine attachments that are omitted from Mr. Boatwright's letter, and is not otherwise included in FOHB's Application.

Thus, despite FOHB making no effort to satisfy Marion County that this requirement has been satisfied, the Hearings Officer concludes that that it has been met. In doing so, the Hearings Officer has rendered the criterion superfluous by not requiring FOHB to satisfy its burden of demonstrating that it can or will satisfy the requirements in MCC 17.178.060(C)(1). The Hearings Officer has also failed to carry out their duties under Marion County Code. MCC 17.178.030(G) (requiring county to determine that code requirements *have been satisfied* and that all necessary permits *have been obtained*). There is no basis to conclude that this criterion has been satisfied and the Hearings Officer erred in concluding otherwise.

I. MCC 17.178.060(J)

"Floodways. Located within areas of floodplain established in MCC 17.178.300 area 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."

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer concluded this criterion "can be met" because "the provision of this certification and required analyses can be made a condition of any approval." Decision at 12. As with its prior conclusions, the Hearings Officer erred for several reasons.

First, Marion County is not the owner of the Disputed Property and therefore is prohibited from making any changes to the property.

Second, to meet the “no rise” standard for development within the floodway, the application has been revised from its 2020 version to include more than 41.1 cubic yards of excavation. In other words, FOHB proposes to dig two large holes to compensate for the installation of pilings.

There are several serious flaws in this “solution.” First, as discussed above, excavating the shore for no reason other than compliance with the “no rise” requirement is inconsistent with the purpose of a road right-of-way and thus infringes upon the rights of the property owners.

Third, neither the site plans nor the engineer’s letter identify the excavation areas. The “Applicant Statement” identifies the locations of excavation only to explain that “[a]chieving a 0.0% no-rise certification * * * will require removal of some bank above OHW and downstream of the gangway.” The statement claims the “natural vegetative fringe below OHW has been preserved,” confirming that the excavation is above OHW. Because the regulatory floodway is the Willamette River channel, excavation above OHW cannot compensate for the impact of the pilings. Without identifying the location of excavation, either in his narrative or depicted in a drawing, the engineer writes that the excavation is in the “same cross section” as the piling installation. This is insufficient to show compliance with this criterion.

Finally, in Ms. Putnam and Ms. Kraemer’s experience, it is extremely dangerous to access the floodplain during the majority of the year because of the accumulation of debris in the waterway. Putnam Decl. ¶6, Ex. 1; Kraemer Decl. ¶10, Ex. 12 (describing floodway during rainy season and providing photographs of winter debris accumulation at proposed site of dock). The proposed development will only exacerbate the accumulation of debris in the area, as it will essentially trap the debris between Ms. Putnam’s property and FOHB’s dock.

In short, FOHB has failed to satisfy its burden of establishing that its plans will not result in any increase in flood levels. By failing to require FOHB to satisfy its burden of proof, the Hearings Officer punted its obligations to determine whether FOHB has satisfied the requirements to obtain the permit. It is Marion County’s obligation to evaluate and decide that issue before granting any permit to FOHB. MCC 17.178.030(G) (requiring county to determine that code requirements *have been satisfied* and that all necessary permits *have been obtained*). There is no basis to conclude that this criterion has been satisfied and the Hearings Officer erred in concluding otherwise.

VIII. The FOHB Application fails to meet the requirements of the Greenway Management Overlay Zone, MCC 17.179.

Marion County Code requires a conditional use permit for all applications for development in the greenway. MCC 17.179.040 (“[A] greenway development permit shall be obtained before any development, change of use or intensification commences within the Willamette River greenway permit.”).

Marion County’s Greenway Management Policies¹² specify that:

¹² Marion County Comprehensive Plan, Goals & Policies, Parks and Recreation: Willamette River Greenway, available at
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- “It is not necessary to acquire all of the land along the river for public use. The majority of these lands should remain in private ownership.”
- “Recreational needs at various levels should be provided for with minimal adverse impact upon adjacent private land.”
- “Private access to the river should be provided on a limited basis in rural areas. Most of the river access points should be in urban areas and public parks.”
- “All public access and recreational facilities should be located and designed to minimize trespass and vandalism on adjacent property.”

Furthermore, Marion County’s Comprehensive Land Use Plan does not identify the Disputed Property as an existing public recreation site, access point, or site for future recreational needs.¹³ Nor does it identify the Disputed Property as a “public land with scenic and natural areas” or a “historical site in rural Marion County.”¹⁴

As explained below, the FOHB Application fails to meet the requirements for a greenway development permit and the Hearings Officer erred in concluding otherwise. With limited exceptions, the Hearings Officer’s decision tracks the conclusions of the erroneous Staff Report verbatim.

A. MCC 17.179.050(B) – *Significant fish and wildlife habitats shall be protected.*

FOHB has failed to satisfy this criterion. This criterion is not met. Hearings Officer concludes that this criterion “appears” to be met because “the applicant states that the project has received approval from the National Marine Fisheries Service” and “no information to the contrary has been provided.” Decision at 13. In other words, rather than require FOHB to prove with actual *evidence* that it had obtained approval, the Hearings Officer shifted the burden to Ms. Putnam and Ms. Kraemer to *disprove* that fact. That was error.

Moreover, Ms. Putnam and Ms. Kraemer explained why FOHB’s statement that it had obtained approval lacked merit. FOHB’s Application relies on a single email from Marc Liverman, NOAA Fisheries, stating that the project complies with SLOPES (Standard Local Operating Procedures for Endangered Species). However, the letter is fundamentally unclear about compliance: The first paragraph states first that the “proposed action was found inconsistent

<https://www.codepublishing.com/OR/MarionCounty/#!/MarionComp02/MarionComp0207.html#WILLAMETTE%20RIVER%20GREENWAY>.

¹³ Marion County Comprehensive Land Use Plan, Background and Inventory Report, *available at* <https://www.co.marion.or.us/PW/Planning/zoning/Documents/backgroundinventory1.pdf> at p. 76-77.

¹⁴ Note that the Comprehensive Land Use Plan does identify the Wheatland Landing & Ferry site, Fairfield Landing Site, and Halls Ferry & Land Site as historic sites in Marion County. *See* Table No. 28 (“Willamette River Greenway: Historic Sites in Marion County”).

with the SLOPES opinion on Jul 17, 2019” and then that the current review “is based on a revised project submittal, received by NMFS on Jun 13, 2019.” These statements are contradictory.

Further, the email’s second paragraph states that the project “is likely to adversely affect ESA-listed species, designated critical habitat, and essential fish habitat,” while the third and fourth paragraphs state that the project is consistent with SLOPES. For these reasons, the Liverman email cannot be relied upon to satisfy the “significant fish and wildlife habitats” criterion.

The Oregon Department of Fish and Wildlife offers its own dock guidelines for the Willamette River, intended to “minimiz[e] potential impacts to fish, wildlife, and habitat resources.”¹⁵ The project does not meet those guidelines. For example, the guidelines specify that a new floating dock “must be placed at least 50 feet from the shoreline” measured from ordinary high water. Distances are not marked clearly on FOHB’s project drawings; however, it appears the dock does not meet this guideline. The guidelines also specify that docks “should have greater than 20 feet of water depth below the float (both criteria measured at mean low water).” Sheet 6 of FOHB’s Application, a cross section, shows a depth of only 10.3 feet between the float and the river bottom at ordinary low water.

As a result, the project does not meet basic state guidelines for the protection of fish, wildlife, and habitat, and it is not clear that it meets federal programmatic guidelines, either. FOHB has not met its burden to show compliance with this criterion, and the Hearings Officer does not satisfy its obligations under Marion County Code by not confirming the applicant’s statement of fact. MCC 17.178.030(G) (requiring county to determine that code requirements *have been satisfied* and that all necessary permits *have been obtained*); MCC 17.179.060 (“The director shall review greenway development permits *to determine that the requirements of this title have been met.*”). There is no basis to conclude that this criterion has been satisfied and the Hearings Officer erred in concluding otherwise.

B. MCC 17.179.050(C) – *Significant natural and scenic areas, viewpoints and vistas shall be preserved.*

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer concluded that this criterion is met because the “gangway and dock, and its related structures on land, provide a means for the public to access and experience the river.” Decision at 13. That explanation has nothing to do with the stated criterion, and it is factually questionable.

As to the actual criterion at issue, FOHB has already destroyed much of the natural and scenic areas without ever complying with Marion County Code requirements. *See* Putnam Decl. ¶7, Ex. 2; Kraemer Decl. ¶4, Ex. 2 (remains of 40+ year old shade trees destroyed at project location). What was once a shaded, wooded area has become a shadeless and unmaintained site for trash and debris. From empty alcohol bottles to used needles, trash and debris is frequently found on and along the Disputed Property as a result of the public’s increased use of the area and FOHB’s infrequent cleanup of the area. Putnam Decl. ¶7, Ex. 3. In addition, it is evident that

¹⁵ Oregon Department of Fish and Wildlife Residential Dock Guidelines, February 2016, available at https://www.dfw.state.or.us/lands/docs/Dock_Guidelines.pdf.

FOHB lacks the ability to maintain the Disputed Property, as weeds and dirt have become unmanageable at the site, and its own “native” plantings have long since died. Kraemer Decl. ¶4, Exs. 4-5.

As to FOHB’s representation that the project will reestablish access to the water in a manner that is consistent with historical use, that fact is questionable at best. As noted above, historical records describe a privately-owned, commercial dock at the landing site more than 170 years ago. Historical records also show that that use declined in the 1870s, when railroads were completed in the area, before terminating completely in 1908. Tatoian Decl., Ex. 18 at 7 (describing decline of Butteville as commercial shipper as of 1871); Kraemer Decl., Ex. 10 (FOHB-created sign listing active dates of Butteville Landing as 1851 -1908). That is, for the last approximately 115 years, the site has not been used as a commercial dock (or any dock). Indeed, for much of that time, the site has been masked by trees and vegetation. See Tatoian Decl., Ex. 18 at 4 (photo in 1938); Kraemer Decl., Ex. 1 (photos taken before 2017). Even FOHB’s own recitation of history acknowledges that, by 1938, the Disputed Property had not been used for “decades,” and “the access was overgrown.”¹⁶

Moreover, unlike historical use of the Disputed Property as a commercial shipping dock, FOHB is intending to develop a recreation site. On its own website, FOHB seeks public contributions “to restore the right-of-way down to the river and add park-like amenities to enhance the Butteville Community.”¹⁷ See, *supra*, at 6-7 (describing evidence that FOHB and Marion County intended to develop a park at the Disputed Property).

In concluding the criterion met, the Hearings Officer failed to grapple with the code requirement. Providing access to the river says nothing about how FOHB’s project will preserve significant natural and scenic areas, viewpoints and vistas. FOHB has failed to satisfy its burden to establish this criterion, and Marion County has failed to appropriately evaluate it. MCC 17.178.030(G) (requiring county to determine that code requirements *have been satisfied* and that all necessary permits *have been obtained*); MCC 17.179.060 (“The director shall review greenway development permits *to determine that the requirements of this title have been met.*”). There is no basis to conclude that this criterion has been satisfied and the Hearings Officer erred in concluding otherwise.

C. MCC 17.179.050(D) – Areas of ecological, scientific, historical or archaeological significance shall be protected, preserved, restored, or enhanced to the maximum extent possible.

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer concluded that this criterion was met because FOHB “states that a cultural survey has been conducted and the State Historic Preservation Office (“SHPO”) listing has been complete.”

¹⁶ Friends of Historic Butteville, Butteville Landing, available at https://butteville.org/butteville_landing.html.

¹⁷ Friends of Historic Butteville, Support the Friends of Historic Butteville, available at <https://butteville.org/support-us.html>; see also https://butteville.org/butteville_landing.html (describing future plans to include placement of picnic areas).

Decision at 13. Again, the Hearings Officer accepts FOHB's self-serving statement without actually requiring FOHB to establish that fact. Absent evidence that supports the FOHB's representation, Marion County cannot conclude that the criterion has been met.

Contrary to the assertion in the application, the property owners are unaware of any cultural resources survey having been conducted on the Disputed Property in connection with this project. That alone shows that the applicant has failed to meet this requirement.

The historic landing structure is registered as "Site 35MA394." FOHB has not shown that the structure will be "protected" or "preserved" in connection with the proposed dock and gangway construction. SHPO noted significant concerns in its comments on the 2020 application, stating,

"[i]f the gangway is to actually be built directly on top of the existing foundation, our office will want to receive sufficient information prior to construction that will assure us that no adverse effect to the structure will occur. If the gangway is built above the existing foundation, with no direct contact, we are less concerned about potential effect to the structure."

FOHB's Application does not address SHPO's concern. Sheet 5 of the project plans shows the gangway directly over the structure. Sheet 6 seems to show the gangway above the structure at ordinary low water, but only by about 3 feet, which means the gangway would come into contact with the structure when water elevations fall below ordinary low water. It is not clear from FOHB's Application whether SHPO's concerns about "adverse effect" to the historic landing have been or can be satisfied. In addition, nothing in the application indicates how the landing, or any other cultural resource, will be protected during construction, or during the excavation of 41.1 cubic yards of the bank. FOHB has the burden to show that the historic resource will be protected preserved to the maximum extent practicable. FOHB has not met that burden.

In addition, FOHB has not shown how the project will "restore" or "enhance" the historic structure "to the maximum extent possible." Installation of the gangway will block access to and views of the resource, and nothing in the application even addresses that issue.

FOHB has not carried its burden to show compliance with this standard. Marion County failed to carry out its obligations to determine whether the code requirements "have been satisfied" and that all necessary approvals "have been obtained." that the MCC 17.178.030(G); MCC 17.179.060 ("The director shall review greenway development permits *to determine that the requirements of this title have been met.*"). There is no basis to conclude that this criterion has been satisfied and the Hearings Officer erred in concluding otherwise.

D. MCC 17.179.050(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.

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer concludes that this criterion is met because the Disputed Property "has been an open area previously and has *recently been developed* into an accessway for staging paddlecraft and to allow

for safe river access. There is no evidence that the quality of the air, water and land resources will be affected by this proposal.” Decision at 13 (emphases added). This conclusion is against the weight of evidence in the record.

First, “change of use” in the Marion County Code “means making a different use of the land or water than which existed on December 6, 1975.” MCC 17.179.090(A). It cannot be disputed that, in 1975, the Disputed Property was not being used in the manner proposed by FOHB. Nor was the Disputed Property “an accessway for staging paddlecraft” in 1975. More significantly, it is factually inaccurate to state that the Disputed Property “has recently been developed into an accessway for staging paddlecraft and to allow for safe river access.” The current state of the Disputed Property is a concrete path that ends with an abrupt drop into the Willamette River.

Second, it cannot reasonably be disputed that FOHB’s Application, if approved, will not preserve the air, water, or land quality as it existed in 1975 or as it presently exists. For example, the FOHB Application acknowledges that the dock, as designed, has capacity to “accept” powercraft. It goes without saying that an increase in public access to and use of the area will increase the pollution in the air and land around the property. “Powercraft” boats generally use gasoline or other liquid fuels, which release, among other things, carbon monoxide and nitrogen oxides into the atmosphere. Moreover, many of those intending to use the dock to launch paddlecraft will need to haul their paddlecraft to the property, resulting in an increase of cars driving to the site. Finally, considering the extent of trash accumulation at the Disputed Property in its current state, it cannot reasonably be disputed that inviting more members of the public to the area will result in degradation of land resources.

For all these reasons, the only reasonable conclusion is that the criterion in MCC 17.179.505(E) has not been met, FOHB has failed to satisfy its burden, and Marion County has failed to carry out its obligations to determine whether the code requirements “have been satisfied” and that all necessary approvals “have been obtained.” that the MCC 17.178.030(G); MCC 17.179.060 (“The director shall review greenway development permits *to determine that the requirements of this title have been met.*”). There is no basis to conclude that this criterion has been satisfied and the Hearings Officer erred in concluding otherwise.

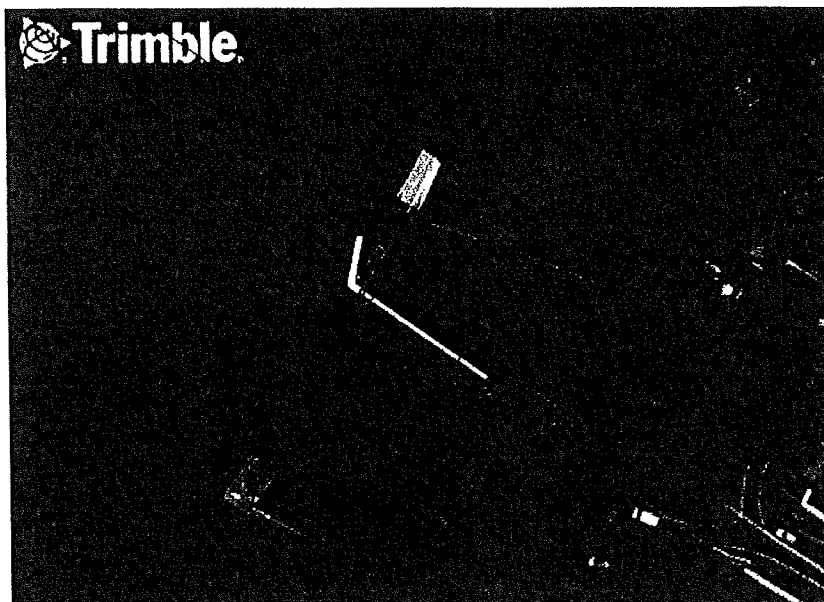
E. MCC 17.179.050(F) – Areas of annual flooding, floodplains and wetlands shall be preserved in their natural state to the maximum possible extent to protect water retention, overflow and other natural functions.

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer determined this criterion is met because the dock and gangway will float on the surface of the river. Decision at 13. This conclusion is erroneous for several reasons.

First, FOHB’s unpermitted and unregulated “restoration activities” violated this requirement by destroying vegetation and removing trees and constructing an impervious concrete roadway inside the floodplain and inside the Willamette River Greenway setback. As has been established by FOHB and Marion County’s own admissions, FOHB performed that work without any oversight or approval from Marion County, contrary to the express provisions of Marion County Code.

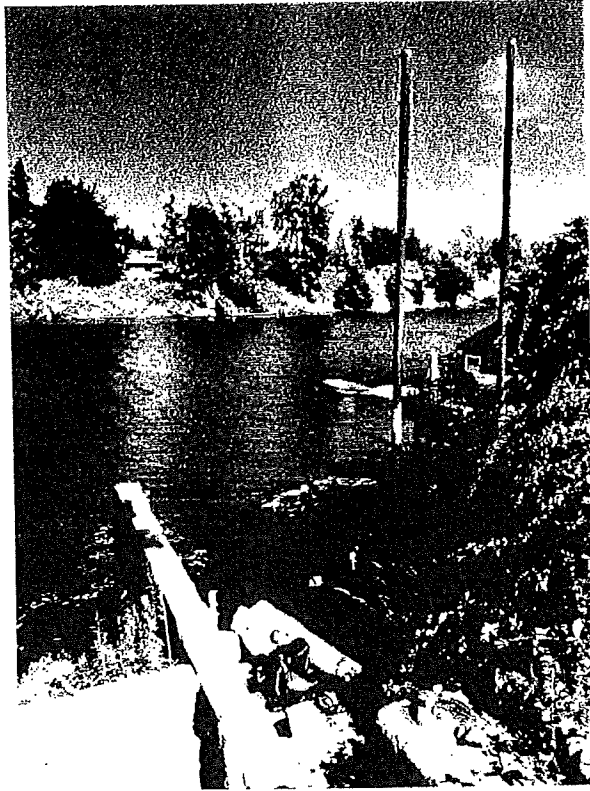
Second, as the property owners living at the site have explained in their declarations, areas of natural flooding are dangerous during the majority of the year. *See* Putnam Decl., Ex. 1; Kraemer Decl., Ex. 12 (photos depicting winter debris at site location). These dangerous conditions will only be exacerbated by constructing a third dock in the immediate vicinity, causing debris to become trapped between Ms. Putnam’s dock and FOHB’s dock. A reasonable person examining the evidence in the record would not conclude that introducing a third dock into the area would satisfy this criterion.

Below is an image of the dock proximities prepared by FOHB (but curiously not submitted in this record by FOHB):

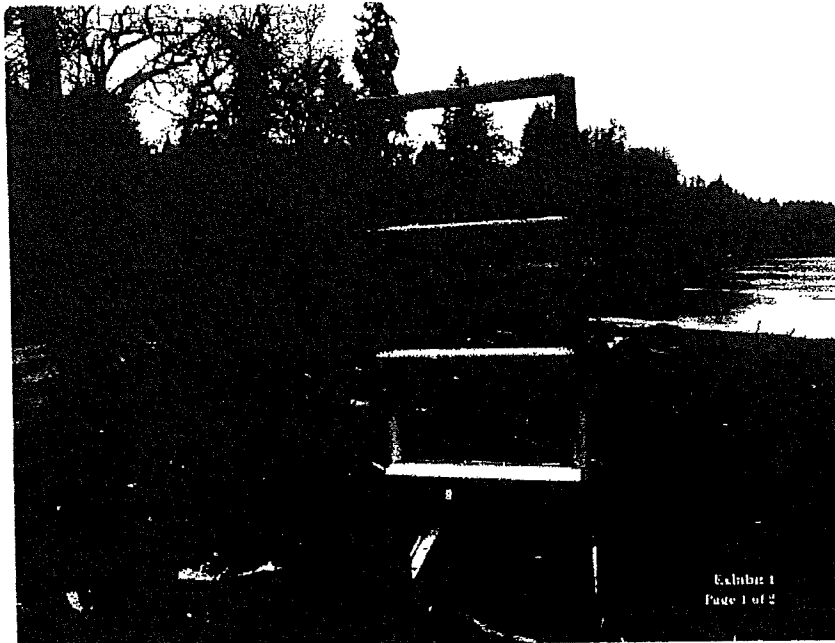


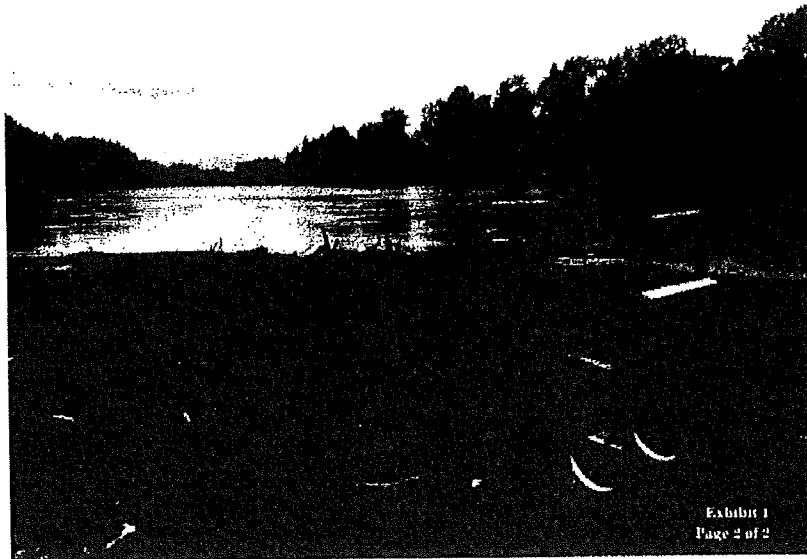
Second Tatoian Decl., Ex. 42. The southern most dock is Ms. Kraemer’s dock. The northernmost dock is Ms. Putnam’s dock. The center dock is FOHB’s proposed dock.

Similarly, below is an image of the proposed dock and its proximity to Ms. Putnam’s dock.



Putnam Decl., Ex. 6. Now, examine photos of the Willamette River taken from Ms. Putnam's dock and facing the exact location of FOHB's proposed dock:





Putnam Decl., Ex. 1.

A reasonable person examining these photographs in the record would not conclude that areas of annual flooding will be preserved in their natural state to the maximum possible extent to protect water retention, overflow, and other natural functions. Rather, a reasonable person could only conclude that introducing a third dock in between the two existing docks which are inundated with vegetative debris most of the year will damage the floodway by physically trapping that debris in the area. Because no evidence exists in this record to establish that FOHB has satisfied this criterion, the Hearings Officer erred in concluding that this criterion is met.

F. MCC 17.179.050(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.

FOHB has failed to satisfy this criterion. This criterion is not met. The Hearings Officer determined that this criterion is met because the area “has been planted with native species to prevent further erosion” and that the proposal “will have no negative effect on the natural vegetative fringe.” Decision at 14. The Hearings Officer expressly discounted the evidence in the record that FOHB had already destroyed the natural vegetative fringe, old-growth habitat and 40+ year old trees within the subject property, on the basis that “no further tree removal is contemplated.”

It is undisputed that FOHB did not obtain any permits or approvals from Marion County before removing the existing timber from the area and performing its “restoration work” in 2017. It is also undisputed that neither Ms. Putnam nor Ms. Kraemer authorized FOHB to perform that work. Accordingly, none of that prior activity was performed according to law.

Despite the undisputed evidence in the record, the Hearings Officer's decision demonstrates that it segregated the unlawful, unpermitted work from the work proposed by FOHB's application. As noted above, that is not permissible; several LUBA decisions have expressly held that development activities may not artificially be segmented to avoid code requirements and that projects must be considered a unified whole when evaluating impacts—such as the impacts to the vegetative fringe, wildlife, and erosion at issue in this criterion.

The record is clear: Since 2017, FOHB has destroyed the natural vegetative fringe, removed dozens of 40-year-old trees, causing a substantial increase in human traffic to the area, such that wildlife such as bald eagles, owls, deer, squirrels, nesting birds, hawks, etc. are no longer seen in the immediate vicinity. Putnam Decl., ¶8. Thus, neither the vegetative fringe, wildlife, or scenic quality have been preserved. The native species planted by FOHB have died, resulting in hard, bare ground. Kraemer Decl., ¶4, Exs. 4, 16. Thus, there is no protection from erosion.

FOHB did not prove that this criterion has been satisfied. The Hearings Officer's decision is contrary to law and all evidence in the record.

G. MCC 17.179.050(I) – *The proposed development, change or intensification of use is compatible with existing uses on the site and the surrounding area.*

FOHB did not prove that this criterion has been satisfied. This criterion is not met. The Hearings Officer concludes that this criterion is met because the installation of a gangway and dock will not intensify existing uses of the area. Decision at 14. The Hearings Officer then misstates all the evidence in the record to justify their conclusion.

As noted above, “change of use” is a defined term in the Marion County Code. “Change of use,” means “making a different use of the land or water than that which existed on December 6, 1975.” MCC 17.179.090(A). A change in use specifically includes “alterations of the land” that “substantially alters or affects the land or water.” There is no dispute in this record that, as of December 6, 1975, there was no public access to the Willamette River in the ways FOHB purports. Use of the Disputed Property as a private commercial dock had terminated around the turn of the twentieth century. Photos of the site as of the late 1930s depict a naturally wooded area with no visible access point:



Accordingly, the starting point for this analysis is not FOHB's present application—the project must be considered as a unified project with the activities that FOHB performed since 2017 that were unlawful and unpermitted. It is beyond reason that Marion County would ignore the undisputed fact that the “restoration work” in 2017 was done without any of the approvals required by its own code and focus only on the activities for which FOHB now seeks approval. We doubt that Marion County would turn such a blind eye to other applicants who, for example, construct an unpermitted building on their property and then seek approval to add a second story to that unpermitted building. The extremes to which Marion County appears willing to bypass all requirements imposed on others in Marion County to allow FOHB's project is unprecedented.

By segregating this project from FOHB's unpermitted “improvements, the Hearings Officer was able to ignore all the instances where FOHB's factual representations were proven demonstrably false. *See* August 31, 2023, opposition letter (describing twelve factual misrepresentations in record).

Second, no evidence supports the Hearings Officers' other conclusions.

- “The Landing has historically been used for access to the Willamette River.” Decision at 14. That the Disputed Property was the site of a private, commercial dock 170 years ago says nothing about whether the proposed development is a change or intensification of use compatible with existing uses and the surrounding area. Presently, with the exception of the Butteville General Store, the area is zoned as acreage residential. Tatoian Decl., Ex. 30. No one can dispute that, at least for the last 115 years, the area has been a quiet, residential area that, until FOHB's intervention, was not a site for public recreation.
- “The development is designed as a small dock to allow paddle craft or up to two small powercraft.” Decision at 14. The very purpose of this project is to increase public use and attract new recreational users to the Willamette River (and more importantly for FOHB, to the Butteville General Store). In other words, the project proposes to transform a site—which has not provided river access since at least 1908—into the functional equivalent of a public park and marina. Not only are those uses inconsistent with the County's right-of-way interest (if it has such an interest), they represent an extreme intensification of use, and a significant change of use, wedged into a space that cannot possibly be adequate to accommodate it. The purported right-of-way for this project comprises 24,000 square feet, about half an acre. According to data from the Oregon State Marine Board, the smallest public boat launch on the Willamette River in Marion County is the Riverfront Park Dock in Salem: It covers 26 acres.¹⁸ Moreover, Marion County's recreation standards for water-oriented parks, *i.e.*, those that “encourage access to and use of

¹⁸ Oregon State Marine Board, “Boat Oregon Online Map,” *available at* https://experience.arcgis.com/experience/72308dd6b893451690a14437cde89be8?data_id=da taSource_1-1890d01dcea-layer-11%3A1353.

waterways,” require a minimum of 5 acres or 2.5 acres/1,000 persons.¹⁹ The Disputed Property falls short of Marion County’s own standards.

- “The site * * * currently provides river access[.]” Decision at 14. The cement walkway constructed by FOHB does not provide access to the river. It abruptly ends at the edge of the bluff near concrete remnants. Kraemer Decl., Ex. 16.

The boat dock has not even been constructed yet, but the new pavement, vegetation removal, and signage has already resulted in impacts to the neighboring property and its owners, including criminal trespass, theft, alcohol and drug use, litter, blocked driveway access, and noise. The FOHB Application incorrectly states that the proposed use will not impact adjacent property owners’ use and enjoyment of their properties. The two, sole adjacent property owners say otherwise, and demonstrated as much by submitting dozens of photos and videos in the record. The adjacent property owners have already suffered from the current use of the Disputed Property. The Disputed Property was rarely used by the public before FOHB’s intervention. Now, the adjacent property owners’ properties are regularly the site of trespass, vandalism, and theft. They regularly awake in the middle of the night to members of the public recreating at the Disputed Property. They have been prevented ingress and egress to their own private properties because people visiting the Disputed Property have parked in front of their driveways. These issues will only increase if FOHB’s Application is approved, as the very purpose is to draw more people to the Disputed Property. Even the Oregon Parks and Recreation staff have acknowledged that the proposed project will put an “exponential burden on the store and its aging infrastructure.” Tatoian Decl., Ex. 1.

For all these reasons, FOHB has failed to satisfy its burden of establishing that its proposed project satisfies MCC 17.179.050(I), and Marion County has failed to carry out its obligations to determine whether the code requirements “have been satisfied” and that all necessary approvals “have been obtained.” that the MCC 17.178.030(G); MCC 17.179.060 (“The director shall review greenway development permits *to determine that the requirements of this title have been met.*”). There is no basis to conclude that this criterion has been satisfied, and the Hearings Officer’s decision cannot stand.

H. MCC 17.179.050(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.

FOHB did not prove that this criterion has been satisfied. This criterion is not met. The Hearings Officer concludes that the criterion “appears to be met” because “the applicant states that 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.” Decision at 15. FOHB’s self-

¹⁹ Marion County Comprehensive Plan, Goals & Policies, Parks and Recreation: Scenic Areas, Table No. 4 (Recreation Standards), available at <https://www.codepublishing.com/OR/MarionCounty/#!/MarionComp02/MarionComp0207.html#SCENIC%20AREAS>.

serving statement of approval—without any documented evidence of that approval in the record—is not sufficient evidence to satisfy its burden of proof.

In addition to lacking any documentary proof to support its self-serving statement, FOHB's Application relies on the Boatwright Engineering letter to sustain its claim that this satisfaction can be met. As noted above, the Boatwright Engineering letter lacks all nine attachments, rendering its analysis unreliable, and it should not be relied upon as a source of authority.

Marion County's obligation when evaluating a permit application is to determine whether the Marion County Code requirements "have been satisfied" and that all necessary approvals "have been obtained." that the MCC 17.178.030(G). Accepting an applicant's word, without more, is not fulfilling the obligations imposed by the Code. MCC 17.179.060 ("The director shall review greenway development permits *to determine that the requirements of this title have been met.*"). The Hearings Officer erred.

I. MCC 17.179.050(L) – Any public recreational use or facility shall not substantially interfere with the established uses on adjoining property.

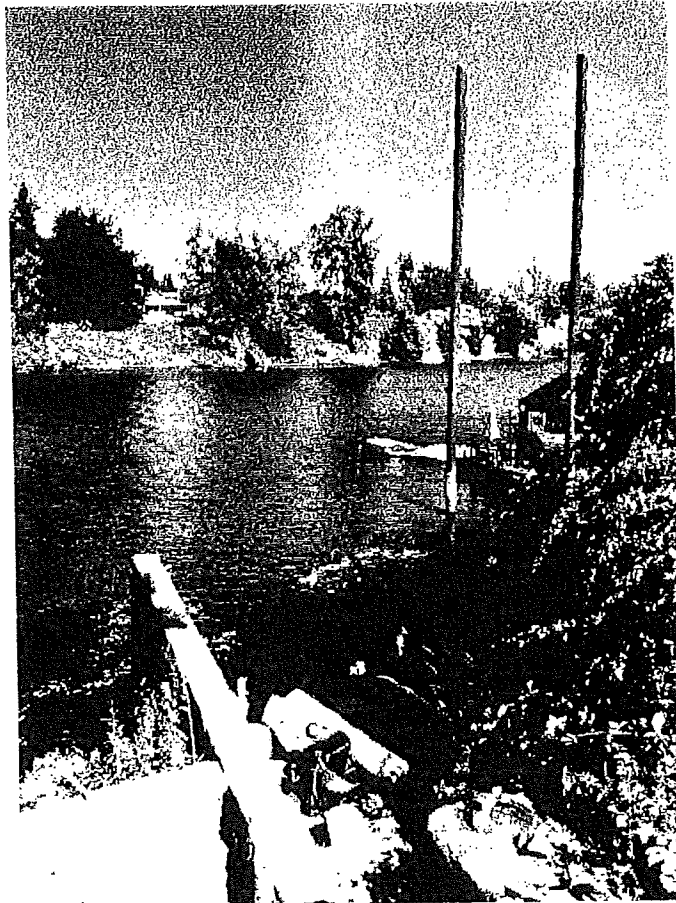
FOHB did not prove that this criterion has been satisfied. This criterion is not met. The Hearings Officer concluded that this criterion has been met. Each aspect of its reasoning is flawed.

First, the Hearings Officer accepted FOHB's self-serving statement that "the proposal will re-establish safe access to the river" and that the Disputed Property "by design is intended to be a passageway for the public to and from the river." Decision at 15. As a legal matter, Marion County does not have a right-of-way interest in the Disputed Property. Even if it did, that interest would not extend to the construction of a recreation site – as is proposed. The only document to support Marion County's purported right-of-way is the 1871 plat, depicting a *road*, not a recreation site.

As a factual matter, Marion County is again suggesting that a use employed 170 years ago should control the use of the property today. There is no logic to that conclusion. For the last 115 years, the Disputed Property has not had a gangway or dock, and has not been the site of a recreation area.

Second, the Hearings Officer again neglected to examine FOHB's project as a unified whole, instead ignoring the undisputed fact that all of its prior "restoration work" was done without compliance with Marion County Code and without allowing the fee title owners due process to challenge FOHB's project. That is a legal error. As the FOHB Application acknowledges, the adjoining properties are residential, single-family homes. It cannot reasonably be disputed that establishing a recreational site for members of the public to launch watercraft will substantially interfere with the residential community. Indeed, the current use of the Disputed Property—a use that never went through Marion County's permitting or public hearing processes—substantially interferes with the adjoining properties. The interference will only grow exponentially as more people are drawn to the area, requiring public facilities (*e.g.*, restrooms), parking, and other resources. It is not apparent from the application what plans, if any, FOHB or Marion County have to provide these needed resources.

Finally, by concluding that the spacing between the docks is adequate, the Hearings Officer shifted the burden of proof to Ms. Putnam and Ms. Kraemer. Decision at 15. It is FOHB's burden to prove that its proposed use will not substantially interfere with Ms. Putnam and Ms. Kraemer's properties, yet the Hearings Officer accepted FOHB's self-serving statement and ignored all contradicting evidence in the record. A reasonable person examining the area can easily see that spacing between the docks will not be adequate:



The proposed dock site is only a few yards, if that, from Ms. Putnam's dock. To suggest that members of the public will not, whether by accident or by intention, trespass onto Ms. Putnam and Ms. Kraemer's properties is to disregard all the factual evidence in the record. See Putnam Decl. and Kraemer Decl., and exhibits contained therein.

Finally, the Hearings Officer stated that "no evidence has been presented to establish that the proposed dock will substantially interfere with the established use of the docks on the adjacent properties." Decision at 16. The *only evidence* in the record demonstrated that the proposed dock would substantially interfere with Ms. Putnam and Ms. Kraemer's properties. As Ms. Putnam declared in her declaration,

"The proposed gangway and dock will substantially interfere with our established use of our property. The area immediately

surrounding the proposed dock is commonly used by my family—including small children—for swimming during summer months. Considering the proposed dock and its proximity to our private dock, we are concerned that swimming in the area will no longer be safe. In addition to our safety issues, the proposed dock is set to be placed very close to our private dock. We have already experienced trespassers swimming onto our private property. We fully expect that the public dock will draw more trespassers to enter our private property via our private dock.”

Putnam Decl., ¶11. Similarly, Ms. Kraemer declared:

“The proposed dock will substantially interfere with our established use of our property. * * *.

“Allowing FOHB to add an additional dock to the area within extremely close proximity to our pre-existing docks will allow for more trees and debris to become trapped, making it even more dangerous for members of the public to access the site.

“I’m greatly concerned for my grandchildren’s safety if FOHB’s application is approved. My grandchildren swim in the Willamette River by our dock, and FOHB’s plan is to place its dock in close proximity to ours. As a result, not only will we completely lose our privacy in our backyard, but the additional motorized boating will make it dangerous for my children to safely swim in the water.”

Kraemer Decl., ¶¶ 7, 10, 13.

Against the weight of evidence in the record and only by accepting FOHB’s self-serving statements, the Hearings Officer determined this criterion met. There is no evidence to conclude that this criterion has been met; the Hearings Officer erred.

J. MCC 17.179.050(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.

FOHB did not prove that this criterion has been satisfied. This criterion is not met. The Hearings Officer concluded that this criterion was met because “signage” “limits hours” of the public’s uses and “[t]he installation of guardrails across the bottom of the landing will prevent any access to adjoining properties.” Decision at 16. The Hearings Officer’s conclusion is unsupported by the record.

First, for brevity, Ms. Kraemer and Ms. Putnam incorporate the statements above about (1) Marion County not having a legal right to the Disputed Property or to establish a recreation site at the Disputed Property; and (2) the historical use of the property.

Second, the evidence in the record irrefutably demonstrates that the Disputed Property is open to the public 24 hours per day, seven days per week.

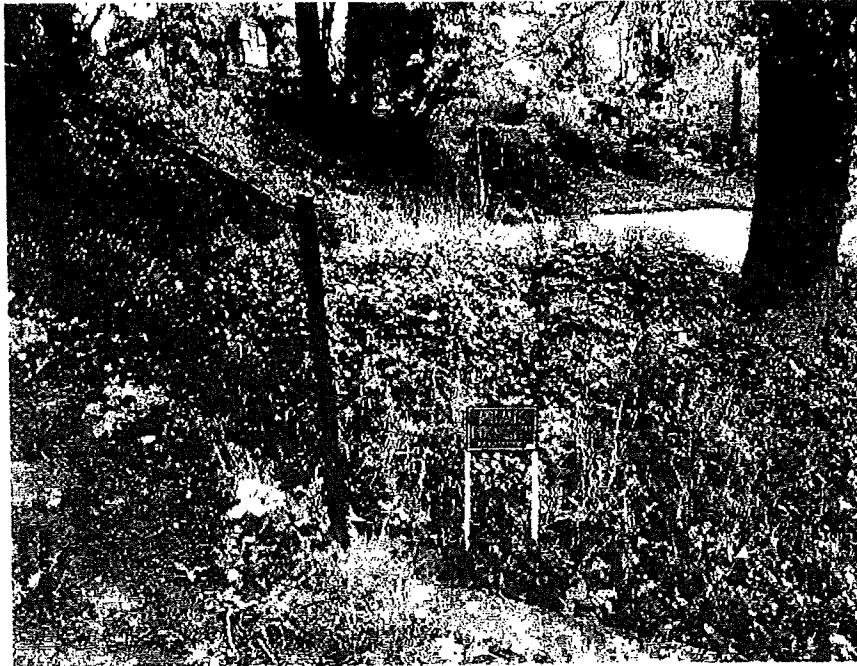


Marion County has admitted this very fact. See Marion County Response to RFA No. 12. That *parking signs* show more limited hours is irrelevant. The purpose of the project is to allow recreational boating to and from the Willamette River; those accessing the Disputed Property by watercraft will pay no mind to a parking sign. Second, the record is replete with evidence that the public access the Disputed Property at all hours—regardless of what the parking signs say. Members of the public rely on this sign to enter and remain on the Disputed Property at all hours of the day and night. Putnam Decl. ¶13; Kraemer Decl. ¶9.

Third, the public's unlimited access to the Disputed Property has caused significant safety issues to the adjoining properties. Although FOHB falsely stated that the Marion County Sheriff's Office regularly patrols the Disputed Property. Marion County Sheriff's Records introduced by Ms. Putnam and Ms. Kraemer demonstrated that was false: In the 13 months, the Sheriff's Office patrolled the Disputed Property only six times. See Tatioian Decl., Exs. 36-38. Law enforcement personnel response times exceed 45 minutes; Marion County Sheriff's Office simply does not have the resources to patrol the area to prevent criminal activity. Putnam Decl. ¶12; Kraemer Decl. ¶9. As a result, Ms. Putnam and Ms. Kraemer have had to resort to self-help, confronting those loitering on the Disputed Property at all hours of the night. The record is also replete with evidence that the public is consuming alcohol on the Disputed Property. Providing intoxicated persons easier access to the Willamette River is a critical public safety issue.

Fourth, the criterion concerns the protection of private property. Ms. Putnam and Ms. Kraemer submitted dozens of exhibits establishing that their private property has suffered from

vandalism, trespass, and theft. Contrary to the Hearings Officer's determination there is no "guardrail" installation that will prevent access to the adjoining properties:



FOHB's Application passively mentions the installation of a guardrail, but none of the drawings submitted by FOHB depict the guardrail, its dimensions, or its placement on the Disputed Property.

Finally, this criterion focuses on *maintenance* of the property. Assuming for the sake of argument that the Disputed Property were public property (which is contrary to FOHB and Marion County's admissions that the property is owned in fee by Ms. Putnam and Ms. Kraemer), there is no long-term maintenance plan for the project proposed by FOHB. Marion County disclaims all responsibility for maintaining the property. Marion County Response to RFA No. 16. Both Marion County and FOHB claim that they are not liable for physical harm suffered by members of the public while using the Disputed Property. Marion County Response to RFA No. 15; FOHB Response to RFA No. 15. It is unfathomable that Marion County would permit an entity with no reliable and steady source of income to construct a park on land which it admits it does not own and simultaneously disclaim responsibility for maintaining it and ensuring its safety.

To find that this criterion is satisfied is to ignore all the evidence in the record. Consequently, the Hearings Officer erred.

K. MCC 17.179.050(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.

FOHB did not prove that this criterion has been satisfied. This criterion is not met. The Hearings Officer concluded that this criterion was met despite the fact that FOHB did not even

address it in its application. Decision at 17. Nevertheless, the Hearings Officer determined that “the proposal will re-establish safe access to the river by developing the area for public use,” “the current condition of the waterfront is unsafe and unsightly,” and “there are areas of exposed rebar and deteriorating concrete where the old dock area was located.” For the reasons explained above, the first finding is untrue: The Disputed Property was a commercial dock 170 years ago, but it was never the site of a recreation area. The second and third findings are the result of FOHB’s intervention in the Disputed Property.

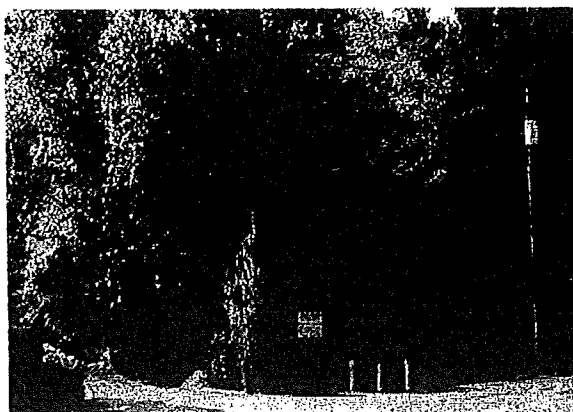
First, the adjoining properties are residential, single-family homes. For most of this century and the last century, the Disputed Property was a naturally wooded area, a habitat to wildlife.



1938



1998



2009

In 2017, however, FOHB decided to clear-cut the forest to pour a concrete trail. Kraemer Decl., Ex. 2; Putnam Decl., Ex. 2. In doing so, FOHB removed the habitat for the area's wildlife. And, in doing so, FOHB caused the area to become "unsafe and unsightly."

None of those issues, however, speak directly to the subject criterion. The criterion requires that public access "be located and designed to minimize trespass and other adverse effects on adjoining property." MCC 17.179.050(O). The Hearings Officer determined that installing the public dock and gangway will *minimize* trespass and other adverse effects on adjoining properties. Decision at 17. That conclusion makes no sense on this record. The adjoining properties have suffered extensive trespass and other adverse effects because of FOHB's development of the Disputed Property. Their property has been stolen, they are regularly awoken in the middle of the night to parties and drug use, they have had to clean up the trash left behind by the public, and their driveways are frequently blocked by cars visiting the Disputed Property. There is nothing preventing members of the public from accessing adjoining property owners' properties either by land or by river, and nothing in FOHB's proposal addresses this issue.

In fact, all these issues will be *exacerbated* by FOHB's proposal. FOHB's development seeks to increase the number of visitors to the Disputed Property—by river, car, and foot. Logically, more people mean more trash and debris, and more space needed for parking (among other resources, such as restrooms). It also means that the chance for trespass will increase as people are now more easily able to access Ms. Putnam and Ms. Kraemer's properties from the river. One cannot reasonably dispute that constructing a recreational water-oriented park at a site the size of the Disputed Property, in between two private residences, will result in trespass "and other adverse effects." There is no factual basis to find that this criterion is or can be satisfied, and the Hearings Officer's conclusion otherwise is beyond all reason.

L. MCC 17.179.050(P) – The development shall be directed away from the river to the greatest possible extent.

FOHB did not prove that this criterion has been satisfied. This criterion is not met. The Hearings Officer determined that this criterion is satisfied despite the fact that the very purpose of FOHB's Application is to construct improvements from the Disputed Property into the

Willamette River. There is no basis to conclude that this criterion has been satisfied. The Hearings Officer erred.

IX. Violation of Goal 5: Oregon Statewide Planning Goals and Regulations

In addition to violating the Marion County Code, approval of the application would violate the corresponding provisions of Oregon Statewide Planning Goal 15: Willamette River Greenway, including without limitation Sections F (Implementation Measures) and G (Notice of Proposed Intensification, Change of Use or Development). The Hearings Officer failed to consider this issue.

X. Violation of OAR 660-020-0060


By failing to comply with any or all of the above referenced requirements of the Marion County Code, approval of the application would violate OAR 660-020-0060, the Land Conservation and Development Department administrative rule adopting the order approving the Oregon Department of Transportation Willamette River Greenway Plan Segments for Marion County. The Hearings Officer failed to consider this issue.

XI. Conclusion

To the extent not addressed above, Ms. Putnam and Ms. Kraemer reiterate all the points and arguments made in their prior submissions to Marion County in connection with FOHB's Application. As is clear, the Hearings Officer's decision is erroneous for countless reasons. The Board of Commissioners should reverse the decision and deny FOHB's Application.

DATED this 21st day of November, 2023.

HARRANG LONG P.C.

By: 
C. Robert Steringer, OSB #983514
bob.steringer@harrang.com
Erica Tatoian, OSB #164896
erica.tatoian@harrang.com

Of Attorneys for Shaloe Putnam and Julie Kraemer

Enclosures: \$500 check payment; Marion County Response to Plaintiff's First Request for Admissions to Defendant Marion County; Friends of Historic Butteville's Response to Plaintiff's First Request for Admissions

CERTIFICATE OF SERVICE

I certify that on November 21, 2023, I served the foregoing Notice of Appeal on the following persons by following means:

Marion County Clerk (via hand delivery) 555 Court St. NE Suite 2130 Salem, Oregon 97301	
Shaloe Putnam (via email) shaloeputnam@yahoo.com	Julia Kraemer (via email) jkraem@gmail.com
Susan and Steven Roberts (via First Class Mail) 23708 1 st Street NE Aurora, OR 97002	Cheryl Maysels (via email) hanacheryl@icloud.com
Peter Koehler (via First Class Mail) 26117 Case Road NE Aurora, OR 97002	Ben Williams (via First Class Mail) 23013 Yearly Ln NE Aurora, OR 97002
Area Advisory Committee 6 (via email) Ben Williams Friends of French Prairie fofp22@gmail.com	Roger Kaye (via email) Friends of Marion County Rkaye2@gmail.com
County Agencies Notified: Assessor's Office (via email) assessor@co.marion.or.us	Tax Collector (via email) NMcVey@co.marion.or.us ADhillon@co.marion.or.us
Surveyor's Office (via email) Kinman@co.marion.or.us	Fire District: Aurora Fire District (via email) jwilliams@aurorafire.org
Planning Division (via email) breich@co.marion.or.us abarnes@co.marion.or.us ANajeraSanchez@co.marion.or.us	Building Inspection (via email) pwolterman@co.marion.or.us kaldrich@co.marion.or.us Abammes@co.marion.or.us CTate@co.marion.or.us
Public Works LDEP Section (via email) Jrasmussen@co.marion.or.us mcldep@co.marion.or.us	Division of State Lands (via email) carrie.landrum@state.or.us

School District: North Marion School District (via email) ginger.redlinger@nmarion.k12.or.us	Department of Fish & Wildlife (via email) Jennifer.b.ringo@odfw.oregon.gov
Code Enforcement (via email) CGoffin@co.marion.or.us JTaylor@co.marion.or.us rgoe@co.marion.or.us	State Agencies Notified: Oregon DEQ (via email) mary.camarata@state.or.us
Federal Agencies Notified: US Army Corps Engineers (via email) Kinsey.M.Friesen@usace.army.mil	FEMA – REGION X (via email) Roxanne.Pilkenton@fema.dhs.gov

HARRANG LONG P.C.

By: s/ Erica Tatoian
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Of Attorneys for Shaloe Putnam and Julia Kraemer

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

SHALOE ANN PUTNAM, JULIA ANNE)	Case no. 23CV25486
KRAEMER, and CHERYL MAYSELS,)	
)	DEFENDANT MARION COUNTY'S RESPONSE
Plaintiffs,)	TO PLAINTIFFS' FIRST REQUEST FOR
)	ADMISSIONS TO DEFENDANT MARION
vs.)	COUNTY
)	
MARION COUNTY, a municipal corporation,)	
and FRIENDS OF HISTORIC BUTTEVILLE, an)	
Oregon nonprofit corporation,)	
)	
Defendants.)	

DEFENDANT MARION COUNTY'S RESPONSE TO PLAINTIFFS' FIRST REQUEST FOR
ADMISSIONS

I.
PRELIMINARY STATEMENT

Defendant Marion County has not, at this time, fully completed its discovery and investigation in this action. All information contained herein is based solely upon such information and evidence as is presently available and known to Defendant Marion County upon information and belief at this time.

Further discovery, investigation, research and analysis may supply additional facts, and meaning to currently known information. Defendant Marion County reserves the right to amend any and all responses herein as additional facts are ascertained, legal research is completed, and analysis is undertaken. The responses herein are made in a good faith effort to supply as much information as is presently known to Defendant Marion County.

////

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II.
GENERAL OBJECTIONS

1. Defendant Marion County objects to the requests that impose or seek to impose any requirement or discovery obligation greater than or different from those under the Oregon Rules of Civil Procedure and the applicable Local Rules and Orders of the Court.

2. Defendant Marion County objects to the requests to the extent they seek disclosure of information protected under the attorney-client privilege, deliberative process privilege, attorney work product doctrine, or any other applicable privilege or immunity. Should any such disclosure by Defendant Marion County occur, it is inadvertent and shall not constitute a waiver of any privilege or immunity.

3. Defendant Marion County objects to the requests to the extent that they seek legal conclusions or opinions, or seek information that is the subject of expert discovery.

4. Defendant Marion County objects to the requests to the extent that they seek information that is not relevant to the subject matter in this action and not likely to lead to the discovery of admissible evidence in this action.

Subject to and without waiving the foregoing objections, Defendant Marion County, by and through counsel, hereby provides the following responses:

III.
DEFENDANTS' RESPONSES TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Admit that the St. Alexcie plat, attached as Exhibit 2 to plaintiffs' First Amended Complaint, is Marion County's sole basis for claiming a legal right-of-way interest to the Disputed Property.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 2: Admit that a property developer's dedication of a street right of way to the County does not confer a right to the County to allow a private party

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other than the adjacent property owners to construct and own improvements within the right of way, unless expressly provided in the dedication instrument.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 3: Admit that the 1962 Resolution adopted by Marion County and attached as Exhibit 3 to plaintiffs' First Amended Complaint does not relate to the Disputed Property.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 4: Admit that, by allowing FOHB to develop or improve the Disputed Property, Marion County is inviting members of the public to enter the Disputed Property for the purpose of engaging in recreation activities on the Disputed Property.

RESPONSE: Defendant Marion County admits that, by allowing FOHB to develop or improve the Disputed Property, Marion County is allowing the public to make use of the dedicated public right of way.

REQUEST FOR ADMISSION NO. 5: Admit that fee ownership of each of the plaintiffs' properties extend to the center line of the Disputed Property.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 6: Admit that from at least 1920 through 2017, the Disputed Property was not improved for any purpose other than to provide plaintiffs and their predecessors ingress and egress to their individual properties.

RESPONSE: Reasonable inquiry has been made and the information known or readily obtainable by Defendant Marion County is insufficient to enable it to admit or deny this request.

REQUEST FOR ADMISSION NO. 7: Admit that Marion County has never compensated plaintiffs or their predecessors for the public's use of the Disputed Property.

RESPONSE: Admit.

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REQUEST FOR ADMISSION NO. 8: Admit that Marion County has never claimed a right to construct a park, gangway, dock, or recreation area on a street right-of-way except with respect to its alleged right-of-way in the Disputed Property.

RESPONSE: Defendant Marion County admits that it has never claimed a right to construct a park, dock, or recreation area on any street right of way, including the Disputed Property. Defendant Marion County admits that it claims a right to allow the construction of a gangway on the Disputed Property.

REQUEST FOR ADMISSION NO. 9: Admit that a property developer's dedication of a street right of way to the County does not confer a right to the County to develop a recreation area within the right-of-way unless expressly provided in the dedication instrument.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 10: Admit that a property developer's dedication of a street right of way to the County does not confer a right to the County to develop a dock within the right-of-way unless expressly provided in the dedication instrument.

RESPONSE: Deny, if the dock is located within the right of way and not within the submerged or submersible lands of the state.

REQUEST FOR ADMISSION NO. 11: Admit that a property developer's dedication of a street right of way to the County does not confer a right to the County to develop a gangway within the right-of-way unless expressly provided in the dedication instrument.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 12: Admit that the County makes the Disputed Property open to the public 24 hours per day and seven days per week.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 13: Admit that Marion County is aware that remnant pylons from the Butteville Landing remain in the Willamette River.

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RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 14: Admit that Marion County is aware that no barrier, fence, or gate presently prevents members of the public from accessing the Willamette River from the Disputed Property.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 15: Admit that Marion County claims it is not liable for physical harm suffered by members of the public while using the Disputed Property.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 16: Admit that Marion County claims no responsibility for maintaining the Disputed Property.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 17: Admit that the Disputed Property is not a county road.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 18: Admit that the Marion County Surveyor's Office correctly describes the rights of the County and land owners when it states that the County "does not own the right of way or have the right to take anything away from it unless it interferes with the use of the easement," and that "a fee title owner of property not only owns the land, but everything below, on, or in reasonable airspace above the land, including trees or other natural growth."

RESPONSE: Defendant Marion County admits that the county does not own the right of way unless the county owns the fee interest in the land over which the right of way exists; and admits that the county does not have the right to take anything away from the land unless it interferes with the use of the right of way. Defendant Marion County also admits that a fee title owner of property not only owns the land, but everything below, on, or in reasonable airspace above the land, including trees or other natural growth.

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REQUEST FOR ADMISSION NO. 19: Admit that FOHB did not apply for or obtain a right-of-way permit in connection with its 2017 "restoration work," which included the removal of timber, "cut and fill, placement of boulder walls to stabilize the slopes, installation of property line fencing, [and] a 10 ft. wide concrete trail," among other things.

7

RESPONSE: Admit.

8

REQUEST FOR ADMISSION NO. 20: Admit that FOHB did not apply for or obtain a floodplain development permit in connection with its 2017 "restoration work," which included the removal of timber, "cut and fill, placement of boulder walls to stabilize the slopes, installation of property line fencing, [and] a 10 ft. wide concrete trail," among other things.

11

RESPONSE: Admit.

12

REQUEST FOR ADMISSION NO. 21: Admit that FOHB did not apply for or obtain a Willamette River Greenway Development permit in connection with its 2017 "restoration work," which included the removal of timber, "cut and fill, placement of boulder walls to stabilize the slopes, installation of property line fencing, [and] a 10 ft. wide concrete trail," among other things.

16

RESPONSE: Admit.

17

REQUEST FOR ADMISSION NO. 22: Admit that FOHB and Marion County relied on the 1962 Resolution adopted by Marion County and attached as Exhibit 3 to plaintiffs' First Amended Complaint to obtain grant funds from the State of Oregon Parks and Recreation Department.

21

RESPONSE: Defendant Marion County denies that it obtained grant funds from the State of Oregon Parks and Recreation Department for the Disputed Property.

22

REQUEST FOR ADMISSION NO. 23: Admit that neither Francois Matthieu, R.V. Short, John McCadden, George Abernathy, nor Alanson Beers were the fee title owners to the Disputed Property in 1871.

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RESPONSE: Reasonable inquiry has been made and the information known or readily obtainable by Defendant Marion County is insufficient to enable it to admit or deny this request.

REQUEST FOR ADMISSION NO. 24: Admit that plaintiffs did not authorize FOHB, Marion County, or any of their agents to remove timber from the Disputed Property in 2017.

RESPONSE: Reasonable inquiry has been made and the information known or readily obtainable by Defendant Marion County is insufficient to enable it to admit or deny this request.

REQUEST FOR ADMISSION NO. 25: Admit that Marion County did not compensate any plaintiff for the value of timber FOHB harvested from the Disputed Property in 2017.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 26: Admit that Marion County claims that the Disputed Property is a local access road.

RESPONSE: Admit.

Dated this 8th day of November, 2023

/s/ Scott A. Norris
Scott A. Norris, OSB #913834
snorris@co.marion.or.us
Assistant County Counsel
Of Attorneys for Marion County

CERTIFICATE OF MAILING

I hereby certify that I served true and correct copies of the foregoing Response to Plaintiff's First Request for Admissions to Defendant Marion County on the following persons:

Bob Steringer
Erica R. Tatoian
Harrang Long PC
111 SW Columbia St Ste 950
Portland OR 97201

Attorneys for Plaintiffs

Ken Walhood
Katie Smith
Walhood Law Group LLC
1830 Blankenship Rd Ste 200
West Linn OR 97068

Attorneys for Defendant Friends of Historic Butteville

by mailing said persons copies thereof. I further certify that said copies were placed in a sealed envelope and addressed as noted above, that said copies were deposited in the United States mail at Salem, Oregon, on the 8th day of November, 2023.

/s/ Scott A. Norris
Scott A. Norris
Assistant Legal Counsel
Of Attorneys for Marion County

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

SHALOE ANN PUTNAM, JULIA ANNE
KRAEMER, and CHERYL MAYSELS,

Plaintiffs,

v.

MARION COUNTY, a political
subdivision, and FRIENDS OF HISTORIC
BUTTEVILLE, an Oregon nonprofit
corporation,

Defendants.

Case No. 23CV25486

DEFENDANT FRIENDS OF HISTORIC
BUTTEVILLE'S RESPONSE TO PLAINTIFFS'
REQUESTS FOR ADMISSION

Defendant Friends of Historic Butteville ("FOHB") responds to plaintiffs Shaloe Ann Putnam, Julia Anne Kraemer, and Cheryl Maysels as follows:

PRELIMINARY STATEMENT

The following responses are made solely for the purpose of this action. Each response is subject to all appropriate objections, which would require the exclusion of any statement contained herein, if the request were made of, or if the response were made by, a witness present and testifying in court. Any and all such objections and grounds are reserved and may be interposed at the time of trial. This responding party has not yet completed its investigation of the facts relating to this action, has not yet completed its discovery in this action, and has not yet completed its preparations for trial. Consequently, the following responses contained herein are based solely upon such information and documents which are presently available to and specifically known to this responding party, and may disclose only that information which is presently available to such responding party. As discovery proceeds, witnesses, facts and evidence may be discovered which

1 are not set forth herein, but which may have been responsive to a request for admission.
2 Accordingly, the following responses are given with the reservation of the right to produce at trial
3 any and all subsequently discovered evidence relating to the proof of any presently known material
4 facts, and this responding party will produce all such evidence, whenever discovered, relating to
5 the proof of subsequently discovered material facts.

6 Facts and evidence now known may be imperfectly understood, or the relevance or
7 consequence of such facts and evidence may be imperfectly understood, and accordingly, such
8 facts and evidence may, in good faith, not be included in the following responses.

9 It is anticipated that further discovery, independent investigation, legal research and
10 analysis will supply additional facts, add meaning to the known facts, as well as establishing entire
11 new factual conclusions and legal contentions, all of which may lead to substantial additions to,
12 changes in and variations from the contentions set forth herein. The following discovery responses
13 are given without prejudice to this responding party's right to produce evidence of any
14 subsequently discovered facts, documents or witnesses which this responding party may later recall
15 or discover. Additionally, this responding party reserves the right to change any and all responses
16 herein as additional facts are ascertained, analyses are made, and legal research is completed. The
17 responses contained herein are made in a good-faith effort to supply as much factual information
18 and as much specification of legal contentions as is presently known but should in no way be to the
19 prejudice of this responding party in relation to further discovery, research or analysis.

20 These responses are based on the collective personal knowledge of this responding party
21 and/or the review of the relevant documents and/or other materials by this responding party. This
22 responding party assumes no obligation to voluntarily supplement or amend these responses to
23 reflect additional witnesses, facts, documents or other evidence following the filing of these
24 responses.

25 Except for the explicit facts submitted herein, no admissions of any nature whatsoever are
26 implied or should be inferred from these responses. This preliminary statement is, by this

1 reference, incorporated into each and every one of the following responses to requests for
2 admissions as if set forth fully therein.

3 **GENERAL OBJECTIONS**

4 1. Defendant FOHB objects to Plaintiffs' First Request for Admissions to the extent
5 that the requests seek information protected from disclosure under the attorney/client privilege,
6 work-product doctrine, ORCP 36B(3), or under any other applicable privilege, doctrine, protection,
7 statute, law, or rule.

8 2. Defendant FOHB objects to Plaintiffs' First Request for Admissions on the grounds
9 and to the extent that one or more of the requests are erroneously worded, are overly vague, and/or
10 are too confusing to accurately comprehend the requests and to properly respond. Defendant
11 FOHB has attempted to acknowledge and to respond to the requests as Defendant FOHB
12 reasonably understands and interprets the requests. Defendant FOHB's responses and objections
13 are necessarily limited to Defendant FOHB's reasonable understanding and interpretation of the
14 requests as worded by the Plaintiffs. In the event a different interpretation is later asserted by the
15 Plaintiffs, Defendant FOHB reserves the right to supplement and/or to amend these responses and
16 objections.

17 3. By responding to any of the requests stated in Plaintiffs' First Request for
18 Admissions, Defendant FOHB does not waive and does not intend to waive, but instead expressly
19 preserves, and is not estopped from asserting, the following objections: (a) all objections regarding
20 admissibility of the responses and information, including but not limited to privilege, competency,
21 relevancy, materiality, redundancy, unfair prejudice, vagueness, compliance with applicable law,
22 and ambiguity; and (b) all rights to object in the future, on any appropriate ground, to any other
23 request for admission or to other discovery requests.

24 4. Defendant FOHB's responses to Plaintiffs' First Request for Admissions are based
25 upon the limited information presently available to Defendant FOHB. Defendant FOHB's
26 responses, therefore, are based upon its current knowledge, information, and belief. However,

1 discovery in this action is incomplete and is ongoing. Defendant FOHB reserves the right to
2 modify or to change its responses should it become aware of additional or different facts through
3 discovery, or proceedings in this action, or otherwise, regarding the subjects of Plaintiffs' First
4 Request for Admissions.

5 5. Defendant FOHB objects to the definitions of "you" and "your" in the Plaintiffs'
6 First Request for Admissions as vague, compound, and overbroad, and Defendant FOHB hereby
7 responds to each of the requests as if the definitions of "you" and "your" refer to Defendant FOHB,
8 itself.

9 6. Defendant FOHB incorporates each of the above-stated General Objections into
10 each and every response to each of the requests as if the General Objections were restated and
11 repeated in full following each request, whether or not such objections are also expressly separately
12 set forth.

13 7. In addition to the above General Objections, Defendant FOHB makes the following
14 Specific Objections and Responses to the Requests, as set forth below.

15 **RESPONSES REQUESTS FOR ADMISSION**

16 **REQUEST FOR ADMISSION NO. 1:** Admit that FOHB has no legal interest in the Disputed
17 Property.

18 **ANSWER:**

19 In addition to the General Objections noted above, FOHB objects to this request on the
20 grounds that the term "legal interest" is undefined. Subject to these objections, FOHB admits and
21 denies in part. FOHB admits it has no ownership rights in the Disputed Property. FOHB denies,
22 with qualification, that it has no legal interest in the Disputed Property in that (1) FOHB is a
23 member of the public, (2) the Disputed Property is held out as a public right of way by Marion
24 County, and (3) as a member of the public, FOHB has a legally protected interest in the use of and
25 access to a public right.

26

1 **REQUEST FOR ADMISSION NO. 2:** Admit that the Disputed Property is not a county road
2 within Marion County's road system.

3 **ANSWER:**

4 In addition to the General Objections noted above, FOHB objects to this request on the
5 grounds that the terms "county road and "Marion County's road system" are undefined. Subject to
6 these objections, reasonable inquiry has been made and the information known or readily
7 obtainable by FOHB is insufficient to enable FOHB to admit or deny the remainder of this request.

8 **REQUEST FOR ADMISSION NO. 3:** Admit that fee ownership of each of the plaintiffs'
9 properties extend to the center line of the Disputed Property.

10 **ANSWER:**

11 Subject to the General Objections noted above, based upon information known or readily
12 obtainable by FOHB, FOHB believes this statement is accurate and admits with a reservation of its
13 right to amend this response, if necessary, once discovery is complete and FOHB has had the
14 opportunity to collect and review applicable warranty deeds and title reports.

15 **REQUEST FOR ADMISSION NO. 4:** Admit that, in 2017, FOHB removed timber or caused
16 timber to be removed from the Disputed Property.

17 **ANSWER:**

18 Subject to the General Objections noted above, FOHB admits.

19 **REQUEST FOR ADMISSION NO. 5:** Admit that, in 2017, FOHB performed what it called
20 "restoration work," on the Disputed Property, including "cut and fill, placement of boulder walls to
21 stabilize the slopes, installation of property line fencing, and replanting with invasive species,
22 [and] a 10 ft. wide concrete trail."

23 **ANSWER:**

24 Subject to the General Objections noted above, FOHB denies, but does admit that, in
25 conjunction with Marion County, FOHB performed restoration work on the Disputed Property that
26 included cut and fill, placement of boulder walls, installation of property line fencing, replanting

1 with non-invasive species, and the addition of a concrete trail with the understanding that the
2 Disputed Property was held out as a public right of way by Marion County and FOHB was acting
3 within the confines of authority granted by Marion County.

4 **REQUEST FOR ADMISSION NO. 6:** Admit that, in addition to the 2017 “restoration work”
5 described in Request No. 5, FOHB also installed numerous signs and placed a picnic table and a
6 park bench on the Disputed Property.

7 **ANSWER:**

8 Subject to the General Objections noted above, FOHB admits it installed or caused to be
9 installed signs and placed a picnic table and bench on the Disputed Property with the
10 understanding that the Disputed Property was held out as a public right of way by Marion County
11 and FOHB was acting within the confines of authority granted by Marion County.

12 **REQUEST FOR ADMISSION NO. 7:** Admit that, in connection with the 2017 “restoration
13 work” described in Request NO. 5, FOHB did not apply for or obtain a right of way permit from
14 Marion County.

15 **ANSWER:**

16 Subject to the General Objections noted above, FOHB admits, having acted (1) with the
17 understanding that the Disputed Property was held out as a public right of way by Marion County
18 and (2) within the confines of authority granted by Marion County, who had determined a permit
19 was not required.

20 **REQUEST FOR ADMISSION NO. 8:** Admit that, in connection with the 2017 “restoration
21 work” described in Request for No. 5, FOHB did not apply for or obtain a floodplain development
22 permit from Marion County.

23 **ANSWER:**

24 Subject to the General Objections noted above, FOHB admits, having acted (1) with the
25 understanding that the Disputed Property was held out as a public right of way by Marion County
26

1 and (2) within the confines of authority granted by Marion County, who had determined a permit
2 was not required.

3 **REQUEST FOR ADMISSION NO. 9:** Admit that, in connection with the 2017 “restoration
4 work” described in Request No. 5, FOHB did not apply for or obtain a Willamette River Greenway
5 development permit from Marion County.

6 **ANSWER:**

7 Subject to the General Objections noted above, FOHB admits, having acted (1) with the
8 understanding that the Disputed Property was held out as a public right of way by Marion County
9 and (2) within the confines of authority granted by Marion County, who had determined a permit
10 was not required.

11 **REQUEST FOR ADMISSION NO. 10:** Admit that FOHB and Marion County relied on the
12 1962 Resolution adopted by Marion County and attached as Exhibit 3 to Plaintiffs’ First Amended
13 Complaint to obtain grant funds from the State of Oregon Parks and Recreation Department.

14 **ANSWER:**

15 In addition to the General Objections noted above, FOHB objects to this request on the
16 grounds that it requires FOHB to speak on behalf of Marion County. As to FOHB only, and subject
17 to the objections noted, FOHB denies with qualification. FOHB admits the 1962 Resolution was
18 referenced in its efforts to obtain grant funds but denies it was exclusively relied upon as a basis
19 upon which such requested funds should be granted.

20 **REQUEST FOR ADMISSION NO. 11:** Admit that the 1962 Resolution adopted by Marion
21 County and attached as Exhibit 3 to plaintiffs’ First Amended Complaint does not relate to the
22 Disputed Property.

23 **ANSWER:**

24 Subject to the General Objections noted above, FOHB admits.

25 ///

26 ///

1 **REQUEST FOR ADMISSION NO. 12:** Admit that neither Francois Matthieu, R.V. Short, John
2 McCadden, George Abernathy, nor Alanson Beers were the fee title owners to the Disputed
3 Property in 1871.

4 **ANSWER:**

5 Subject to the General Objections noted above, a reasonable inquiry has been made and the
6 information known or readily obtainable by FOHB is insufficient to enable FOHB to admit or deny
7 the remainder of this request.

8 **REQUEST FOR ADMISSION NO. 13:** Admit that one of FOHB's purposes in developing the
9 Disputed Property is to invite members of the public to engage in recreation activities on the
10 Disputed Property.

11 **ANSWER:**

12 Subject to the General Objections noted above, FOHB denies with qualification. FOHB
13 denies that one of the express purposes for developing the Disputed Property is to invite members
14 of the public to engage in recreation activities on the Disputed Property. FOHB admits the primary
15 purpose of developing the Disputed Property is to facilitate ingress and egress to the Willamette
16 River by members of the public for their own purposes, which include recreation activities.

17 **REQUEST FOR ADMISSION NO. 14:** Admit that from at least 1920 through 2017, the
18 Disputed Property was not improved for any purpose other than to provide plaintiffs and their
19 predecessors ingress and egress to their individual properties.

20 **ANSWER:**

21 In addition to the General Objections noted above, FOHB objects to this request on the
22 grounds that the term "improved" is undefined and on the grounds that it requires FOHB to speak
23 on behalf of Marion County and others, which it cannot. Subject to these objections, and speaking
24 on behalf of FOHB only, FOHB denies.

25 **REQUEST FOR ADMISSION NO. 15:** Admit that FOHB claims it is not liable for physical
26 harm suffered by members of the public while using the Disputed Property.

1 **ANSWER:**

2 In addition to the General Objections noted above, FOHB objects to this request on the
3 grounds that it calls for a legal conclusion. Subject to these objections, FOHB admits it is not liable
4 for physical harm it did not cause.

5 **REQUEST FOR ADMISSION NO. 16:** Admit that plaintiffs did not authorize FOHB, Marion
6 County, or any of their agents to remove timber from the Disputed Property.

7 **ANSWER:**

8 In addition to the General Objections noted above, FOHB objects to this request on the
9 grounds that it requires FOHB to speak on behalf of Marion County, which it cannot. Subject to
10 these objections, and on speaking only for FOHB, FOHB admits plaintiffs did not authorize the
11 removal of timber from the Disputed Property and FOHB acted, in conjunction with Marion
12 County (1) with the understanding that the Disputed Property was held out as a public right of way
13 by Marion County and (2) within the confines of authority granted by Marion County, who
14 authorized the timber removal.

15 **REQUEST FOR ADMISSION NO. 17:** Admit that FOHB did not compensate any plaintiff for
16 the value of timber its agent harvested from the Disputed Property in 2017.

17 **ANSWER:**

18 In addition to the General Objections noted above, FOHB admits and denies in part. FOHB
19 admits it did not compensate any plaintiff for the value of timber harvested from the Disputed
20 Property in 2017, denies having taken the harvested timber, and after reasonable inquiry, is unable
21 to admit or deny, based on information known or readily obtainable to FOHB, whether Marion
22 County, who authorized the timber harvest in the area held out as a public right of way, offered to
23 and/or compensated plaintiffs for the value of the timber harvested.

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DATED this 7th day of November, 2023.

WALHOOD LAW GROUP, LLC

By: s/Kenneth L. Walhood
Kenneth L. Walhood, OSB #944572
Fax: 1-503-298-5843
E-mail: ken@walhoodlaw.com

Of Attorneys for Defendant Friends of Historic
Butteville

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date listed below, I served the foregoing DEFENDANT
3 FRIENDS OF HISTORIC BUTTEVILLE'S RESPONSE TO PLAINTIFFS' REQUESTS FOR
4 ADMISSION on the following persons in the matter indicated below at the following addresses:

5 C. Robert Steringer
6 Erica Tatoian
7 Harrang Long PC
8 111 SW Columbia Street, Ste. 950
9 Portland, OR 97201
10 Email: bob.steringer@harrang.com;
11 erica.tatoian@harrang.com
12 *Attorneys for Plaintiffs*

Scott A. Norris
Marion County Legal Counsel
PO Box 14500
Salem, OR 97309
Email: snorris@co.marion.or.us;
*Attorney for Defendant Marion
County*

- 11 First Class Mail
12 Facsimile
13 Hand Delivery
14 E-Mail
15 OJD File & Serve

16 DATED this 7th day of November, 2023.

17 By: *s/Kenneth L. Walhood*
18 Kenneth L. Walhood, OSB #944572
19 Fax: 1-503-298-5843
20 E-mail: ken@walhoodlaw.com
21 Of Attorneys for Defendant Friends of Historic
22 Butteville
23
24
25
26

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the) Case No. 23-010
)
Application of Friends of)
Historic Butteville (“FOHB”)) **FLOODPLAIN AND GREENWAY
DEVELOPMENT PERMIT**

ORDER

I. Nature of the Application

This matter came before the Marion County Hearings Officer on the Application of Friends of Historic Butteville for a floodplain development and greenway permit to install a gangway and dock at the Butteville Landing (River Mile 42.9) in a public right of way in an AR (Acreage Residential) zone located at the 10800 block of Butte Street NE (T3S; R1W; Section 32CC).

II. Relevant Criteria

The standards and criteria relevant to this application are found in the Marion County Code (MCC), Title 17, especially Chapters 178 (Floodplain Overlay Zone) and 179 (Greenway Management Overlay Zone).

III. Hearing

A public hearing was held on the Application on August 17, 2023. At hearing, the Planning Division file was made part of the record. The following persons appeared and provided testimony:

- | | | |
|-----|--|---------------------------------|
| 1. | Lindsay King | Marion County Planning Division |
| 2. | Benjamin Williams | Representative for Applicant |
| 3. | Attorney for Opponents
Putman and Kraemer | Jennie Bricker |
| 4. | Cheryl Maysels | Opponent |
| 5. | Julia Kraemer | Opponent |
| 6. | Patrick Stilwell | Opponent |
| 7. | Susan Roberts | Opponent |
| 8. | Steven Roberts | Opponent |
| 9. | Scott Putnam | Opponent |
| 10. | Shaloe Putnam | Opponent |

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

- | | |
|------------|-----------------------------------|
| Exhibit 1: | Noise Level Illustration |
| Exhibit 2: | Photos of Garbage Collection |
| Exhibit 3: | Photographs of Street Parking (2) |
| Exhibit 4: | Planning Map |

A request was made prior to the hearing to leave the written record open to submit additional materials by email on August 16, 2023 by counsel for Shaloe Putman and Julia Kraemer. Under ORS 197.763(6)(a), prior to the close of the initial evidentiary hearing, any participant may ask to present additional evidence, argument, or testimony on the application, and the hearings officer shall grant the request by continuing the hearing to a later date or by keeping the record open to submit information in writing. The hearings officer granted an open record period. The following documents were submitted during the open record period.

- | | |
|-------------------|--|
| August 31, 2023 | Submission on behalf of Shaloe Putman and Julia Kraemer from Jennie Bricker and Erica Tatoian regarding circuit court litigation, prior use and development of subject property, course of development, ongoing maintenance and funding, and challenging the veracity of information submitted by Applicant. The Submission also includes the Second Declaration of Erica Tatoian with Exhibits. |
| August 31, 2023 | Marion County Sheriff's Office Dispatch Report detailing multiple calls to MCSO for alleged criminal activity |
| September 7, 2023 | Submission on behalf of Friends of Historic Butteville with supporting documentation, including Marion County correspondence |

No objections were raised to notice, jurisdiction, conflicts of interest, or to evidence or testimony presented at the hearing.

IV. Executive Summary

This Application for installation of a dock and gangway at Butteville Landing is filed by the Friends of Historic Butteville (FOHB). The Application seeks a permit to complete the final phase of restoration of the Butteville Landing. Earlier phases of the restoration included the removal of invasive species, slope stabilization, installation of property line fencing, and replanting with native species. A ten (10) foot wide concrete trail from Butte Street to the Ordinary High Water (OHW) mark has been installed.

Adjacent residential neighbors not only oppose the Application but have brought a lawsuit against the Friends of Historic Butteville and Marion County seeking declaratory and injunctive relief, and claiming damages for trespass, nuisance, and unconstitutional taking. The Complaint alleges that Marion County has no legal interests in the subject property and that the development of the subject property constitutes trespass, nuisance, and an unconstitutional taking. The litigation necessarily addresses significant issues that would impact the criteria for approval or denial of the Application. However, those issues have not been determined in the pending litigation, and Marion County presently has authority over the public right-of way in the Landing. The scope of this Application is limited to the dock and gangway installation and the specific criteria in the Marion County Greenway and Floodplain codes. The Applicant meets the criteria for installation of a dock and gangway with conditions of approval, and the Application is APPROVED.

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. This matter is the Application of Friends of Historic Butteville (“FOHB”), by Benjamin Williams on behalf of FOHB, for a floodplain and greenway development permit to install a dock and gangway in identified 100-year floodplain of the Willamette River at Butteville Landing (River Mile 42.9), in the 10800 block of Butte Street NE, Aurora. (TS3; R1W; Section 32CC)
2. The subject property (also referred to as “The Landing”) constitutes an existing right-of-way and is designated Rural Residential and correspondingly zoned AR (Acreage Residential). A 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. The property is in the rural community of Butteville in the 23700 block of 1st Street NE. 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.

The finding of fact that the subject property constitutes an existing right-of-way is challenged by the Opponents, and is raised in the lawsuit filed by the Opponents (addressed below). The Opponents refer to the subject property as the “Disputed Property.” Opponents claim an ownership interest in the subject property.

3. The Applicant is proposing to construct a gangway and dock in the Willamette River for public access to and from the Willamette River. The Application seeks to complete the final phase for the restoration of the Butteville Landing, a Marion County right-of way. Earlier phases of the restoration project included the removal of invasive species, placement of boulder walls to stabilize the slopes, installation of property line fencing, and replanting of native species. A ten-foot-wide concrete trail from Butte Street to the Ordinary High Water (OHW) to accommodate emergency vehicles has been installed.
4. The Applicant Statement includes topography information, engineering drawings, and statements regarding criteria under MCC 17.179.050.
5. The Planning file includes letters of support noting public access to the river and historic use of the area submitted by Bernadine Croco, Steven Brown, Eric and Shirley Home, Tom Whittaker, Suzanne Brown, and Trevor and Jennifer Conroy.
6. The Planning file includes a letter of opposition to allowing a gangway and dock to be located at Butteville Landing by Steve and Susan Roberts. Mr. and Mrs. Roberts cite safety and parking concerns and notes the availability of public access at nearby Champoeg Park and French Prairie.

7. The Planning file includes notification that the proposed project is consistent with the National Marine Fisheries Service SLOPES IWOWS programmatic biological opinion issued to the Department of Army (Corps) on April 5, 2012 for project design, in-water work period, piling installation, heaving equipment use, stormwater management, new floats, and all other relevant project design criteria for construction practices.
8. The Planning file includes an opinion letter submitted by Boatwright Engineering, Inc. The proposed work requires certification by a registered professional engineer. Corbey Boatwright, PE, certifies that the installation of the proposed pilings and the soil removal based on the Conveyance Compensation Analysis will not produce an increase in floodplain area on other properties. Corbey Boatwright certifies that the development may cause localized scouring but will not produce channel scouring and will not reduce slope stability downstream of the development site. The area where the soil has been removed should resist scouring provided the ground cover has been reestablished. Corbey Boatwright certifies 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.
9. Marion County Planning sought comments from various agencies. The following comments were provided:

Marion County Building Inspection commented: No Building Inspection concerns. A structural or building permit is not required according to the 2022 Oregon Structural Specialty Code, Section 101.2.1. Separate electrical and/or plumbing permits may be required if these systems are proposed to be installed.

Other contacted agencies either had no comment or stated no objection to the proposal.
10. On June 13, 2019, a Memorandum of Understanding was entered between Friends of Historic Butteville (FOHB) and Marion County. The Memorandum of Understanding recited that Marion County owns a right of way at the Landing that has been in general disuse for many years. FOHB and Marion County desire that the Landing be improved to allow the public to access the river and to highlight the significant role that the Landing played in Oregon's history. FOHB, in cooperation with Marion County, agreed to develop the Landing with plans for installation of a gangway and dock.
11. On June 23, 2023, Shaloe Ann Putnam, Julia Anne Kraemer, and Cheryl Maysels filed a Complaint in Marion County Circuit Court, Case No. 23CV25486 against Marion County and Friends of Historic Butteville seeking declaratory and injunctive relief, and claiming damages for trespass, nuisance, and unconstitutional taking. The Complaint alleges that Marion County has no legal interests in the subject property and that the development of the subject property constitutes trespass, nuisance, and was an unconstitutional taking. The litigation is on-going, and the Hearings Officer is not aware of any orders that would preclude the Hearings Officer from issuing an Order in this land use action.

12. Benjamin Williams, on behalf of FOHB, testified at the hearing. Mr. Williams testified that he is the President of the Board of Directors for Friends of Historic Butteville. Mr. Williams testified that the purpose of the Application is to restore the historic landing at Butteville in an area with many docks with mixed use. Mr. Williams testified that the concrete at the base of the remaining structure is from the dock for the use of a sternwheeler that was used between 1900 and 1910. The dock has fallen into disrepair, and now consists of exposed metal rods and crumbling concrete. Mr. Williams stated that there will be no disruption of the historic footings. Mr. Williams addressed the approval from NOAA, protection of salmon habitat, and that approval of the application would provide additional public access to the Willamette River. Mr. Williams acknowledged that there has been increased noise and parking shortages. Mr. Williams states that the parking and noise concerns are the result of events at the Butteville Store, including dinners and live music. Mr. Williams posits that the enhanced use with the installation of the dock will be paddle craft making transient stops at the Landing, but likely using larger landings for ingress and egress.
13. Jennie Bricker, Harrang Long, attorney for Opponents Shaloe Putman and Julia Kraemer appeared and provided testimony on behalf of her clients. Ms. Bricker stated that the scope of the ownership is disputed, and to the extent that there is a right of way, it is a right of way for local access. Ms. Bricker stated that the Landing had become heavily vegetated until 2017 when the FOHB cut down trees, poured concrete, put up fencing, and created public access. Ms. Bricker stated that since 2017, her clients and surrounding neighbors have experienced theft, blocked driveways, trespass, and dealt with criminal activity in the area. Ms. Bricker stated that there is a significant law enforcement response time, and there is not regular sheriff's patrol of the area. Ms. Bricker stated that Marion County supports the project, but will not maintain the dock upon installation. FOHB vows to maintain the project, but it is a volunteer organization and their ability to long-term maintenance is questionable without long-term funding.
14. Cheryl Maysels testified in opposition to the Application and cited the excessive noise, parking problems, traffic congestion, safety concerns, and lack of public services as a basis for her opposition. Ms. Maysels posits that the proposed dock would be too close to other existing docks. Ms. Maysels argues that Champoege Park is only about a block away with sufficient parking, and public access to the river should be provided through the state parks. Ms. Maysels testified that the changes to the area in the last year have taken away the enjoyment of life for the residents of the area.
15. Julia Kraemer and Shaloe Putnam, represented by Ms. Bricker, testified at the hearing and addressed the "intolerable" problems created by the FOHB arising from parking problems that block their driveway access, trespass, theft, drug paraphernalia, and damage to the trees and wildlife habitat. Ms. Kraemer and Ms. Putnam also submitted Declarations referenced herein. The Opponents cite the expansion of the Butteville Store to become an event center and its impact on the quiet enjoyment of their property. The

Opponents also state that the docks are too close to the existing docks to safely accommodate children swimming and watercraft.

16. Patrick Stilwell testified at the hearing and expressed the unanimous opposition to the project by adjacent property owners. On behalf of the property owners, Mr. Stilwell expressed a concern that access is “open 24/7” which places a burden on the homeowners to monitor and respond to problems. Mr. Stilwell states that the FOHB present facts and data that do not address the property owners’ concerns.
17. Susan Roberts testified at the hearing. Ms. Roberts opposes the Application. Ms. Roberts stated that FOHB is responsible for operating the Butteville Store and seeks to install the dock to increase profits to the store. Ms. Roberts states that the additional river access will increase the use and difficulties to the adjacent homeowners. Ms. Roberts is concerned about whether ongoing maintenance will occur to the subject area, and is concerned about the lack of public restrooms. Ms. Roberts stated that the use of the parking area has dramatically increased since 2017.
18. Steven Roberts testified at the hearing in opposition to the Application. Mr. Roberts addressed the difficulties that the parking area has created and addressed the proximity of the floating dock to the existing dock, specifically the Putnams’ dock. Mr. Roberts also addressed concern about hidden pilings in the river.
19. Scott Putnam testified at the hearing in opposition to the Application. Mr. Putnam testified that he no longer feels he lives “in the country.” Because of the access and use of the Landing, his twin sons have been exposed to paraphernalia of IV drug use, drinking, smoking, trespass and unauthorized use of their chairs and floats, and excessive noise. Mr. Putnam addressed his concerns about debris on the bend of the river and the need for a professional crew to remove logs and debris. Mr. Putnam stated his concern that FOHB will not be able to provide the maintenance that the dock will require.
20. Shaloe Putman testified at the hearing in opposition to the Application. Ms. Putman addressed the parking concerns, residential local access, and safety concerns. Ms. Putman testified that if Butteville Street is an easement, it should remain a street, and not be developed as a park. Ms. Putman opposes the broad use of the easement to allow public access to the river. Ms. Putman also addressed safety concerns arising out of the proximity between the proposed dock and her existing dock.
21. Benjamin Williams testified in response to the statements of the Opponents. Mr. Williams stated that Marion County is the owner of the right of way and has been since 1871. Mr. Williams stated that Butte Street has been a county road since 1938. Mr. Williams stated that the trespass to the Kraemer property resulted from fence placement. Mr. Williams testified that there has always been historic access to the river at the Landing. Mr. Williams testified that FOHB has a 45-degree angled dock that will not be parallel with the river and will therefore not have the debris accumulation of neighboring docks. Mr. Williams also stated that after the work in 2017, the subject property has been replanted with native species.

22. On August 16, 2023, a request to deny the Application was presented by C. Robert Steringer and Erica Tatoian, attorneys for Shaloe Putman and Julia Kraemer, homeowners whose properties include a portion of “Butte Street” in Butteville. The request for denial of the Application cites the action filed in Marion County Circuit Court filed by Mr. Putman and Ms. Kraemer against Marion County and Friends of Butteville. The circuit court action seeks a declaration that would preclude the use proposed in the Application (installation of a gangway and dock). The request for denial urges that the Application is incomplete, notice inadequate and does not comply with zoning code. The request for denial argues that Marion County does not own the subject property or a valid right-of-way. The objection argues that even if Marion County had a right of way interest, it would not extend to the construction of a “recreation site.” The request for denial also urges that the improvement to the subject property raises substantial concerns about the legality of improvements by the Applicant.
23. A Declaration by Shaloe Ann Putnam was submitted to the record. Ms. Putman is a property owner in Butteville, Oregon whose property is north and to the center line of Butte Street NE, between 1st St NE and the Willamette River. Ms. Putnam opposes the Application and stated that when she moved to the property, the natural trail to the river was overgrown and did not appear to be a public access. Ms. Putman did not have an opportunity to comment before Applicant and Marion County constructed a parking lot, cut wooded areas, and developed the property. Ms. Putnam cites safety issues regarding access to the floodplain. Ms. Putnam cites substantial interference with the established use of her property. Ms. Putnam also cites safety concerns arising out of use of the subject property in reliance of the “public access” sign that has been posted. Ms. Putnam also submitted photographs illustrating vehicles parked during the night hours, loitering at the parking area, littering garbage, and individuals engaged in unsavory activities.
24. A Declaration by Julia Anne Kraemer was submitted to the record. Ms. Kraemer resides in the historic William Riley Scheuer House that was built by her great-great-grandfather who also built the commercial ferry dock known as “Butte Landing” to ship grains by steamship from his home. It is the remaining concrete remnants of the dock that are the subject of the Application. Ms. Kraemer opposes the Application on the grounds that she did not have an opportunity to comment prior to the construction of a parking lot, clearcut of the wooded area, and poured concrete. Ms. Kraemer states that the installation of the gangway and dock will result in further destruction to the significant natural and scenic areas and notes that all the 50 ft. tall deciduous and timber trees were clearcut. Ms. Kraemer argues that the proposed addition of a boat dock is a drastic change and intensification of use that is incompatible with existing uses and the surrounding areas. Ms. Kraemer states that she has personally witnessed drug use and witnessed children finding drug paraphernalia in the subject area. Ms. Kraemer states that the parking lot in the subject area has been increasingly worsening because the Butteville General Store has added new events that attract more attendees. The photographs included with Ms. Kraemer’s declaration evidence that her driveway and mailbox has been blocked by the vehicles. Ms. Kraemer states that the Butteville General Store is using the parking lot in the subject area for its employee parking. Ms. Kraemer states that the dock has not been used as a commercial dock since 1908. The Application seeks to add a recreational boat

dock in a local access which will significantly change the use of the area. Ms. Kraemer sites concerns of lack of privacy, threat of crime, delayed response time by law enforcement, and safety concerns for use of a gangway in the floodplain during the extended wet season.

25. On September 7, 2023, a submission on behalf of Friends of Historic Butteville with supporting documentation, including Marion County correspondence with the Opponents was received. The submission addresses the Opponents' participation in prior proceedings.

VI. Additional Finding of Fact and Conclusions of Law

1. Applicants have the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met as explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390, 394-395(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).

Applicants must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If the evidence for any criterion is equal or less, applicants have not met their burden and the application must be denied. If the evidence for every criterion there's a hair or breath in applicant's favor the burden of proof is met and the application is approved.

2. Opponents request denial based upon the ongoing litigation that challenges Marion County's right of way interest in the subject property. The Hearings Officer agrees that the result of the litigation could impact the Applicant's ability to meet the subject criteria for approval of the Application. However, no legal basis has been provided to support denial based upon the existence of pending litigation. The circuit court does not have jurisdiction over land use applications. Pursuant to ORS 215.416(8)(a), Marion County has exclusive jurisdiction to decide land use applications.

The subject property presently exists as a public right-of-way, and has since 1871. No evidence has been presented to the Hearings Officer that the recorded plat is invalid or that the right-of-way has been vacated. There is no evidence to support a finding as a land use matter that the opponents have an ownership interest in the property that consists of the right-of-way.

3. 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 Section 17.178.050 and 17.178.060 of the Marion County Code (MCC).
4. 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.
5. MCC 17.178.050 (C) requires:

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.

At the present time, no legal determination has been made that Marion County does not have a right of way interest. The development is located in a public right of way. The requirement for a declaratory statement is not required because the development is located in a public right of way.

6. MCC 17.178.050 (D) requires:

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.

Applicant provided a certification by Corbey Boatwright, PDE, Boatwright Engineering, Inc. Corbey Boatwright certified 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 requirement for certification as required by MCC 17.178.050 (D) can be made a condition of approval, and the criteria can be met.

7. MCC 17.178.050 (E) exempts applicants from the requirement of providing an elevation certificate for a gangway or dock, since it is a water dependent use that rises and falls with the height of the river. The criterion is not applicable.
8. MCC 17.178.060 contains additional standards for development in the floodplain:

C. Nonresidential Development.

1. *New construction and substantial improvement of any commercial, industrial or other nonresidential structures shall either have the lowest floor, including*

basement, elevated to two feet above the level of the base flood elevation, and where the base flood elevation is not available, the lowest floor, including basement, shall be elevated to two feet above the highest adjacent natural grade (within five feet) of the building site, or together with attendant utility and sanitary facilities, shall:

a. Be floodproofed to an elevation of two feet above base flood elevation or, where base flood elevation has not been established, two feet above the highest adjacent grade, so that the structure is watertight with walls substantially impermeable to the passage of water.

b. Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy.

c. Be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice for meeting provisions of this subsection based on their development and/or review of the structural design, specifications, and plans. This certificate shall include the specific elevation (in relation to mean sea level) to which such structures are floodproofed and shall be provided to the Floodplain Administrator.

d. Nonresidential structures that are elevated, not floodproofed, must meet the same standards for space below the lowest floor as described in subsections (A)(5) and (6) of this section.

e. Applicants floodproofing nonresidential buildings shall be notified by the zoning administrator that flood insurance premiums will be based on rates that are one foot below the floodproofed level (e.g., a building constructed to the base flood level will be rated as one foot below that level).

The provision of these certifications can be made a condition of any approval, and the criteria are met.

2. *New construction of any commercial, industrial or other nonresidential structures is prohibited in the floodway. An exception to this prohibition may be granted if a floodplain development permit and variance consistent with MCC 17.178.080 are obtained. This prohibition does not apply to functionally dependent uses.*

This restriction does not apply to uses that are functionally dependent, that is, uses that are required to be located on or near water, such as a gangway and dock. Since the proposal is for a gangway and dock which are functionally dependent uses, the criterion is not applicable.

D. Anchoring.

1. *All new construction and substantial improvements shall be anchored to prevent flotation, collapse or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy.*

The provision of this certification can be made a condition of any approval, and the criterion can be met.

E. Construction Materials and Methods.

1. *All new construction and substantial improvements shall be constructed with materials and utility equipment resistant to flood damage, and the design and methods of construction are in accord with accepted standards of practice based on an engineer's or architect's review of the plans and specifications.*
2. *All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damages.*

The provision of this certification can be made a condition of any approval, and the criterion can be met.

F. Utilities.

1. *All new and replacement water supply systems shall be designed to minimize or eliminate infiltration of flood waters 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 flood waters in the systems and discharge from the systems into flood waters.*
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.*

The provision of these certifications can be made a condition of any approval, and the criteria can be met.

H. Storage of Materials and Equipment. 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.

This standard can be made a condition of any approval, and the criterion is met.

J. Floodways. 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 provision of this certification and required analyses can be made a condition of any approval. As described above, the proposal meets or can meet the other standards for development in a regulated floodplain. The area beneath the gangway and dock will remain open and unenclosed because the gangway and dock float on the waters of the river.

The Opponents raise objections to the proposal based on the hazards inherent with the wet season, including the accumulation of debris, tree limbs, and trees. Ms. Kraemer and Ms. Putnam state that they must clean up debris that has become trapped between their two docks. FOHB argues that the angle of the small dock will minimize accumulation of debris. However, because the provision of this certification and required analyses can be made a condition of any approval, the criteria can be met.

9. The purpose of the Greenway Management Overlay Zone is to protect the natural, scenic, and recreational qualities of lands along the Willamette River in Marion County. In reviewing a request for a Greenway Development Permit the proposal is reviewed to ensure compliance with certain considerations and criteria, those that apply to this type of request are listed in Section 17.179.050 of the Marion County Code (MCC).

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

The subject property is in a residential zone and surrounded by residential use and is not currently 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. Applicant states that the dock shape and location, as well as stormwater management, were designed with the National Marine Fisheries Service (“NMFS”) and were approved by NMFS as part of the Applicant’s Joint Permit Application (“JPA”) with the United States Army Corp of Engineers (“Corps”) and the Oregon Department of State Lands (“DSL”). No information to the contrary has been provided. This criterion appears to be met.

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

The gangway and dock, and its related structures on land, provide a means for the public to access and experience 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.

Applicant states that a cultural survey has been conducted and the State Historic Preservation Office (“SHPO”) listing has been complete. This criterion appears to be 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 previously and has recently been developed into an accessway for staging paddlecraft and to allow for safe river access. There is no evidence to indicate that the right of way improvements will affect the quality of air, water, or land resources with the greenway. Applicant states that the improvements have been professionally designed to preserve the integrity of the riverbank and not to disturb the historic concrete footings. There is no evidence that the quality of the air, water and land resources will be affected by this proposal. 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 surface of the river. 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.

The subject of this Application is the installation of the dock and gangway on the surface of the Willamette River. The Opponents cite that FOHB have already destroyed shade trees in the project location. No further tree removal is contemplated in the Application. The subject area has been planted with native species to prevent further erosion and to stabilize the lower landing which is designed to prevent stormwater runoff and erosion. The proposal will have no negative effect on the natural vegetative fringe. 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 harvest of timber is proposed. This criterion is not applicable.

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

Applicant states that the development will not change the use of the right of way, which is to provide ingress to and egress from the Willamette River for the benefit of the public. Applicant states that it has four years of maintaining the right of way which has demonstrated that the right of way is compatible with the existing use of the subject property, which has historically been ingress and egress. Applicant states that the low impact project is intended to improve the existing right of way to provide more efficient and safe public access to the Willamette River.

Applicant states that adjacent property owners have their own private docks, and the proposed use will not impact adjacent property owners' use and enjoyment of their properties. Opponents zealously argue that the installation of the public access dock will cause an intensification of use that is incompatible with their existing residential uses.

Although the adjacent residents and opponents have experienced trespass, theft, increased traffic and parking difficulties, these unfortunate experiences have occurred since 2017 and have increased since the expansion of events at the Butteville Store. Because the improvements, including the parking spaces, and open access has already occurred, it must be considered whether the addition of the dock will cause an intensification of use that is incompatible with existing uses. The Landing has historically been used for access to the Willamette River. The development is designed as a small dock to allow paddle craft or up to two small powercraft. The site has previously been the site of a dock, and currently provides river access, albeit unsafe access, from the deteriorated structure. Based upon the evidence in the record, the intensification of use has already occurred by the prior development. Parking spaces have been placed in the Butte Street right of way. The propriety of the public parking is not at issue in review of the Application. The proposed use of the land, meaning only the installation of the mall dock to allow ingress

and egress to the Willamette River, will not change or intensify the use of the property such that it is incompatible with the existing use. The development will provide river access to both nearby residents and those coming to the area to recreate, and such access will be seasonal. 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.

The applicant states that 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. The new bank above the OHW was planted with native species for bank stabilization and erosion control. The removal area will be replanted with native vegetation as well. This criterion appears to be 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.

Applicant submits that the proposal will re-establish safe access to the river by developing the area into a public access way. The portion of land is designated as an existing Public Right of Way and by design is intended to be a passageway for the public both to and from the river.

Opponents argue that the installation of the dock and gangway will create an intensified use that will substantially interfere with their established residential uses.

The Opponents objections and frustrations to the impact on their residential uses are justified and their frustrations are understandable. However, the scope of this Application is limited to the dock and gangway installation. The impacts on the residential uses were occasioned by the improvements to the right-of-way, public parking spaces in the Butte Street right-of-way and the activities of the Butteville Store.

The Opponents argue that the proposed dock is inadequately spaced from their private docks. No requirements for spacing have been presented. Applicant states that the proposed dock is adequately spaced from the upstream and downstream docks, consistent with the existing development pattern in the neighborhood where adjoining residential properties have similar gangways and boat docks. Applicant states that the spacing allows adequate maneuvering areas for launching boats and other watercrafts from the various neighborhood docks.

This project is intended to improve the ongoing use of the right-of-way for access to the Willamette River. No evidence has been presented to establish that the proposed dock will substantially interfere with the established use of the docks on adjacent properties. 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.

The Applicant posits that the proposal will re-establish safe access to the river by developing the area into a public access corridor and that there is adequate signage for hours of use (6 am – 10 pm) and no overnight parking. Appellants state that Marion County Sheriff's Office regularly patrols the area.

The Opponents submit compelling evidence of the impact of the development on their residential use. The Opponents submitted evidence of incidents involving drugs, theft, and individuals refusing to leave the access area. The local residents opposing the Application cite instances of parked vehicles blocking their property access, theft from their residences, drinking and drug use, late night noise, trespass, and failure to maintain the Landing. The Opponents argue that approval of the Application will intensify the use such that their enjoyment of the residential use will be significantly reduced.

Submissions by Opponents include emails detailing increased incidents at Butteville Landing in March, 2020, including motorcycles using the cement sidewalk and after-dark access to the Landing. These situations, offensive and disturbing to the adjacent property owners, were occasioned by prior improvements.

The proposed public recreational use of the dock is likely to occur during daylight hours and in seasonable weather conditions. The provided parking is located on Butte Street above the Landing and the proposed dock will be located in the Willamette River. The parking includes signage that limits hours.

The installation of guardrails across the bottom of the landing will prevent any access to adjoining properties. 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 structures proposed for development, the gangway and dock, both are water-related and water-dependent uses. This criterion does not apply.

O. Public access to and along the river 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 effects on adjoining property.

The Applicant states that the proposal will re-establish safe access to the river by developing the area for public use. The current condition of the waterfront is unsafe and unsightly. There are areas of exposed rebar and deteriorating concrete where the old dock area was located. The inability to safely access the Willamette River may contribute to trespassing to adjoining properties. The installation of the public dock and gangway and signage will minimize trespass and other adverse effects on adjoining properties. This criterion is met.

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

The dock and gangway improvement are water dependent uses and must be located within the Willamette River. The remainder and existing restoration project has been designed to facilitate safe and easy 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 and will be revegetated with native species once the dock and gangway are installed. This criterion is met.

R. Private docks, wharfs, and covered storage shall be limited to one per property ownership, shall not extend more than ten 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 proposed dock and gangway is public. This criterion above does not apply.

VII. Order

It is hereby found that the Applicant has met the burden of proving the applicable standards and criteria for approval of the Friends of Historic Butteville's ("FOHB") Application for a floodplain and greenway development permit to install a dock and gangway in identified 100-year floodplain of the Willamette River at Butteville Landing (River Mile 42.9), in the 10800 block of Butte Street NE, Aurora. (TS3; RIW; Section 32CC). The Application is APPROVED subject to the following conditions of Approval:

Conditions of Approval:

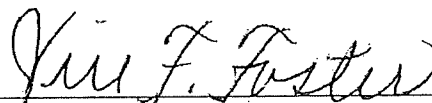
1. The Applicant shall obtain all permits required by the Marion County Building Inspection Division.
2. Prior to issuance of building permits for or beginning work on the gangway, dock and related structures and supports, a registered civil engineer shall certify the following standard of Marion County Code is met: MCC 17.178.050(D).

3. Prior to issuance of building permits for or beginning work on the gangway, dock and related structures and supports, a registered civil engineer shall certify the following standards of Marion County Code are met: MCC 17.178.060(C), (D)(1), (E), (F) and (J).
4. 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.
5. The natural native vegetation and habitat on the subject property within the riparian area and greenway shall be maintained to the maximum extent.

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, Suite 2130, Salem, Oregon) by 5:00 p.m. on the 24th day of November, 2023 (15 days after the date of the Order). 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 returned.

DATED at Salem, Oregon this 9th day of November, 2023.



Jill F. Foster
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Jennie Bricker
818 SW Third Ave
PMB 1817
Portland, OR 97204

Cheryl Maysels
23717 1st St. NE
Aurora, OR 97002

Julie Kraemer
23707 1st St. NE
Aurora, OR 97002

Susan Roberts
23708 1st St. NE
Aurora, OR 97002

Steven Roberts
23708 1st St. NE
Aurora, OR 97002

Shaloe Putnam
23727 1st St. NE
Aurora, OR 97002

Scott Putnam
23727 1st St. NE
Aurora, OR 97002

Ben Williams
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Aurora, OR 97002

Peter Koehler
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Area Advisory Committee 6:
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Friends of French Prairie
fofp99@gmail.com

Roger Kaye *(via email)*
Friends of Marion County
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Tax Collector *(via email)*
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ADhillon@co.marion.or.us

Surveyor's Office *(via email)*
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Planning Division *(via email)*
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Building Inspection *(via email)*
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Kaldrich@co.marion.or.us
ABammes@co.marion.or.us
CTate@co.marion.or.us

Public Works LDEP Section *(via email)*
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mcldep@co.marion.or.us

School District:

North Marion School District *(via email)*

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Code Enforcement *(via email)*

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JTaylor@co.marion.or.us

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State Agencies Notified:

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mary.camarata@state.or.us

Division Of State Lands *(via email)*

carrie.landrum@state.or.us

Department of Fish & Wildlife *(via email)*

Jennifer.b.ringo@odfw.oregon.gov

Federal Agencies Notified:

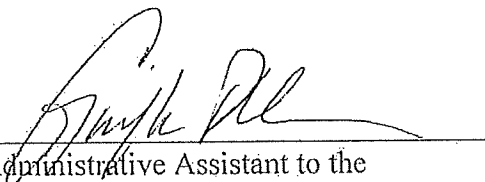
US Army Corps Engineers *(via email)*

Kinsey.M.Friesen@usace.army.mil

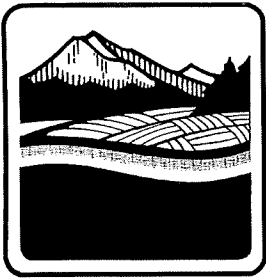
FEMA – REGION X *(via email)*

Roxanne.Pilkenton@fema.dhs.gov

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 9th day of November, 2023 and that the postage thereon was prepaid.



Administrative Assistant to the
Hearings Officer



Marion County OREGON

PUBLIC WORKS

BOARD OF
COMMISSIONERS
Colm Willis
Danielle Bethall
Kevin Cameron

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MEMORANDUM

TO: Marion County Hearings Officer

FROM: Marion County Planning Division/Lindsey King

SUBJECT: Floodplain/Greenway Permit 23-010

DATE: July 26, 2023

The Marion County Planning Division has reviewed the above-referenced application and offers the following comments:

FACTS:

1. Application of Friends of Historic Butteville (Ben Williams) for a floodplain and greenway development permit to install a dock and gangway in identified 100 year floodplain of the Willamette River at Butteville Landing (River Mile 42.9), in the 23,700 block of Butte Street NE, Aurora.
2. The subject property constitutes an existing right-of-way and is designated Rural Residential and correspondingly zoned AR (Acreage Residential). 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. The property is in the rural community of Butteville in the 23700 block of 1st Street NE. 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.
3. The applicant is proposing to construct a gangway and dock in the Willamette River for public access to and from the Willamette River.

COMMENTS:

Marion County Building Inspection commented: No Building Inspection concerns. A structural or building permit is not required according to the 2022 Oregon Structural Specialty Code, Section 101.2.1. Separate electrical and/or plumbing permits may be required if these systems are proposed to be installed.

Other contacted agencies either had no comment or stated no objection to the proposal.

STAFF FINDINGS AND ANALYSIS:

5. 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 Section 17.178.050 and 17.178.060 of the Marion County Code (MCC).
6. 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.
7. MCC 17.178.050 (C) requires:
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.

Since the development is on property in public right-of-way, the requirement for a declaratory statement is not necessary in this instance.

8. MCC 17.178.050 (D) requires:
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 provision of this certification can be made a condition of any approval.

9. MCC 17.178.050 (E) exempts applicants from the requirement of providing an elevation certificate for a gangway or dock, since it is a water dependent use that rises and falls with the height of the river.
10. MCC 17.178.060 contains additional standards for development in the floodplain:

C. Nonresidential Development.

1. *New construction and substantial improvement of any commercial, industrial or other nonresidential structures shall either have the lowest floor, including basement, elevated to two feet above the level of the base flood elevation, and where the base flood elevation is not available, the lowest floor, including basement, shall be elevated to two feet above the highest adjacent natural grade (within five feet) of the building site, or together with attendant utility and sanitary facilities, shall:*
 - a. *Be floodproofed to an elevation of two feet above base flood elevation or, where base flood elevation has not been established, two feet above the highest adjacent grade, so that the structure is watertight with walls substantially impermeable to the passage of water.*
 - b. *Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy.*
 - c. *Be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice for meeting provisions of this subsection based on their development and/or review of the structural design, specifications, and plans. This certificate shall include the specific elevation (in relation to mean sea level) to which such structures are floodproofed and shall be provided to the Floodplain Administrator.*
 - d. *Nonresidential structures that are elevated, not floodproofed, must meet the same standards for space below the lowest floor as described in subsections (A)(5) and (6) of this section.*

e. Applicants floodproofing nonresidential buildings shall be notified by the zoning administrator that flood insurance premiums will be based on rates that are one foot below the floodproofed level (e.g., a building constructed to the base flood level will be rated as one foot below that level).

The provision of these certifications can be made a condition of any approval.

- 2. New construction of any commercial, industrial or other nonresidential structures is prohibited in the floodway. An exception to this prohibition may be granted if a floodplain development permit and variance consistent with MCC 17.178.080 are obtained. This prohibition does not apply to functionally dependent uses.*

This prohibition does not apply to uses that are functionally development that is required to be located on or near water, such as a gangway and dock. Since the proposal is for a gangway and dock which are functionally dependent uses. The criterion is not applicable.

D. Anchoring.

- 1. All new construction and substantial improvements shall be anchored to prevent flotation, collapse or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy.*

The provision of this certification can be made a condition of any approval.

E. Construction Materials and Methods.

- 1. All new construction and substantial improvements shall be constructed with materials and utility equipment resistant to flood damage, and the design and methods of construction are in accord with accepted standards of practice based on an engineer's or architect's review of the plans and specifications.*
- 2. All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damages.*

The provision of this certification can be made a condition of any approval.

F. Utilities.

- 1. All new and replacement water supply systems shall be designed to minimize or eliminate infiltration of flood waters 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 flood waters in the systems and discharge from the systems into flood waters.*
- 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.*

The provision of this certification can be made a condition of any approval.

H. Storage of Materials and Equipment. 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.

This standard can be made a condition of any approval.

J. Floodways. 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 provision of this certification and required analyses can be made a condition of any approval. As described above, the proposal meets or can meet the other standards for development in a regulated floodplain. The area beneath the gangway and dock will remain open and unenclosed because the gangway and dock float on the waters of the river.

11. The purpose of the Greenway Management Overlay Zone is to protect the natural, scenic and recreational qualities of lands along the Willamette River in Marion County. In reviewing a request for a Greenway Development Permit the proposal is reviewed to ensure compliance with certain considerations and criteria, those that apply to this type of request are listed in Section 17.179.050 of the Marion County Code (MCC). The discussion below includes both information provided by the applicant with the application and staff conversations with the applicant about the proposal.

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

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

B. Significant fish and wildlife habitats shall be protected.

The applicant states that the project has received approval from the National Marine Fisheries Service. This criterion appears to be met.

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

The gangway and dock, and its related structures on land, provide a means for the public to access and experience 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.*

The applicant states that a cultural survey and State Historic Preservation Office listing has been complete. This criterion appears to be 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 previously and has recently been developed into an accessway for staging paddlecraft and to allow for safe river access. There is no evidence that the quality of the air, water and land resources will be affected by this proposal. 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 surface of the river. 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.*

The subject area has been planted with native species to prevent further erosion and to stabilize the lower landing which is designed to prevent stormwater runoff and erosion. The proposal will have no negative effect on the natural vegetative fringe. 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 harvest of timber is proposed. This criterion is not applicable.

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

The proposed use of the land will not change or intensify the use of the property. Previously, it had been the site of a dock and is currently a river access area. This provides river access to both nearby residents and those coming to the area to recreate. 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.*

The applicant states that 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. The new bank above the OHW was planted with native species for bank stabilization and erosion control. The removal area will be replanted with native vegetation as well. This criterion appears to be 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.*

According to the applicant, the proposal will re-establish safe access to the river by developing the area into a public access way. The portion of land is an existing Public Right of Way and by design is intended to be a passageway for the public both to and from the river. The proposal will be adequately spaced from other residential docks, which are consistent with the development pattern of the neighborhood. The dock spacing will allow for adequate maneuvering of boats and other watercrafts from the various neighboring docks. This project is intended to improve the ongoing use of the right-of-way for access to the Willamette 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.*

According to the applicant, the proposal will re-establish safe access to the river by developing the area into a public access corridor. There is adequate signage for hours of use (6 am – 10 pm) and no overnight parking. Marion County Sherriff's Office regularly patrols the area. The installation of guardrails across the bottom of the landing will assure and prevent any access to adjoining properties. 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 structures proposed for development, the gangway and dock, both are water-related and water-dependent uses. This criterion does not apply.

- O. *Public access to and along the river 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.*

According to the applicant, the proposal will re-establish safe access to the river by developing the area for public use. The current condition of the waterfront is unsafe and unsightly. There are areas of exposed rebar and deteriorating concrete where the old dock area was. This criterion is met.

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

The dock and gangway improvement are water dependent uses and must be located within the Willamette River. The remainder and existing restoration project has been designed to facilitate safe and easy 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 and will be revegetated with native species once the dock and gangway are installed. This criterion is met.

R. Private docks, wharfs, and covered storage shall be limited to one per property ownership, shall not extend more than ten 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.

Since the dock is public, this criterion above does not apply.

CONCLUSION:

12. Staff recommends **approval** of the proposal. Should the hearings officer grant the applicant's request for the conditional use to construct a dock and gangway on the Willamette River, the Planning Division recommends the following conditions be applied:
- a) The applicant shall obtain all permits required by the Marion County Building Inspection Division.
 - b) Prior to issuance of building permits for or beginning work on the gangway, dock and related structures and supports, a registered civil engineer shall certify the following standard of Marion County Code is met: MCC 17.178.050(D).
 - c) Prior to issuance of building permits for or beginning work on the gangway, dock and related structures and supports, a registered civil engineer shall certify the following standards of Marion County Code are met: MCC 17.178.060(C), (D)(1), (E), (F) and (J).
 - d) 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.
 - e) The natural native vegetation and habitat on the subject property within the riparian area and greenway shall be maintained to the maximum extent.