

Friends of
Historic Butteville
AN OREGON NONPROFIT CORPORATION

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Marion County Hearing Officer

RE: Appeal of Notice of Decision

Floodplain Development/Greenway Permit Case No. 20-003

Applicant: Friends of Historic Butteville

PO Box 506, Donald, OR 97020

Appellants: Scott and Shaloe Putnam

23727 1st St. NE, Butteville OR 97002

Julia Kraemer and Patrick Stilwell

23707 1st St. NE, Butteville OR 97002

Iraj Rafei and Shaheen Brodle

23717 1st St. NE, Butteville OR 97002

Re: Floodplain Development/Greenway Permit Case No. 20-003

THIRD WRITTEN TESTIMONY OF FRIENDS OF HISTORIC BUTTEVILLE

This third written testimony and enclosed exhibits are provided in support of the Applicant Friends of Historic Butteville's (hereinafter "FOHB" or the "Applicant") Floodplain / Greenway Development Application to Marion County, filed April 2, 2020, and the April 23, 2020 Notice of Decision to grant a Floodplain Development/Greenway Permit to the Applicant.

Historic Butteville Riverboat Landing Roadway - the Butteville Landing right of way has always been a dedicated public right of way containing a roadway that did one thing: provide the public access to and from the Willamette River to Butteville. This project seeks to continue the landing's use as a public

access point to and from the Willamette River. This project has community support, and support from the greater public paddling community, as shown in the supportive emails. Exhibit 20, 21, 24, 25.

I. Misrepresentations in Appellants' Second Written Testimony

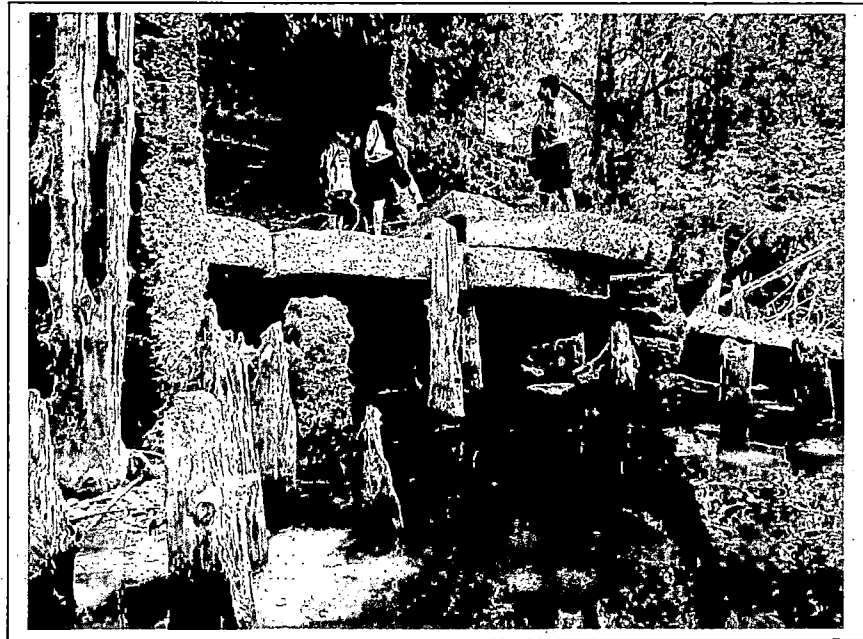
As a general matter, FOHB cannot emphasize enough how many of the continued allegations made by the Appellants are simply unsubstantiated. FOHB includes here as Exhibit 25 a letter and response from FOHB Vice President, Community Watch Organizer, Aurora Fire District # 63 Position # 5 President of Board of Directors, and former member of the Marion County Law Enforcement Coordinating Council submits a letter and response. Mr. Leo visits the Butteville Landing property regularly, and maintains active and ongoing communication with Marion County and French Prairie law enforcement. Mr. Leo is always on the lookout for potential criminal activity; as his statement shows, he has no reason to suspect the Appellants' fears are supported by fact. Mr. Leo further stated "Local residents should see many eyes as an advantage, not a barrier to a better, safer community." Exhibit 25.

Julia Kraemer, in her written testimony submitted June 15, 2020, made a number of false and incorrect statements that require response.

1. FOHB never had an "original plan" to "destroy the historic concrete footings and make a small piece of artwork out of them." The historic significance of the old concrete footings was a given, and recognition of their importance was confirmed by the cultural survey we engaged and paid for and the subsequent listing of the dock footings at Butteville with the State Historic Preservation Office.
2. "Expanding economic activity associated with the Butteville Store" has never been a primary driver in the restoration of the Landing project, though clearly a level of symbiotic relationship between members of the public using the Landing and frequenting the Butteville Store could potentially occur and benefit many different elements within the community. This is purely speculative, though, at this juncture.
3. The Butteville Store is an entirely independent entity from the nonprofit organization FOHB. Ben Williams is not the "concessions manager" of the Butteville Store. FOHB does operate the Store under an OPRD concessions contract, but FOHB in turn has a concessions contract (a mirror image of the OPRD contract) with Dori Brattain (dba Bread and Salt Catering) who is Chef and Store Manager and who operates the Store. **No revenue from the operations of the Butteville Store pass through FOHB.**
4. It is alleged that Ben Williams has "several conflicts of interest" because of the multiple roles he has in the community at large. As in many small communities, its members wear several hats. Mr. Williams served on the Marion County Parks Commission until July of 2019, ending that service as Chair, but has not been associated with the Parks Commission for a year. Both FOHB and the Commission are managed by multiple persons; this argument is spurious.
5. Ben Williams never signed an application swearing that he is an "owner of the right of way," rather he signed as President of FOHB, the applicant for the Floodplain/Greenway Permit, at the direction of Marion County Public Works given that FOHB had secured the funding and

would be paying for the improvements which at the end of the project would become the property of Marion County.

6. Appellants' reference to "Increase in Unsafe Access to Concrete Footings caused by Applicant" is ludicrous. Prior to the beginning of the restoration project, access to the crumbling cement footing and exposed rebar (documented by the SHPO Report) was directly available to the public over two dirt trails that ran down the Landing. See photo below, taken from the river July, 2017. The cement footings were retained at Kraemer's request, and at project end will not be accessible for public safety.



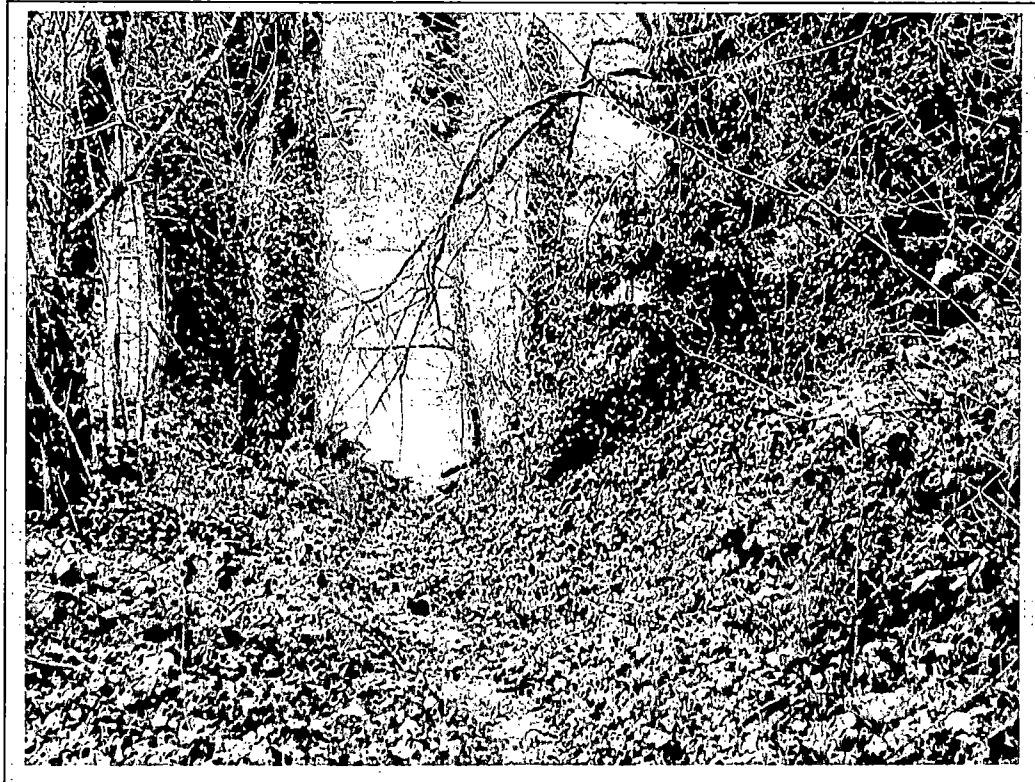
7. Appellants reference to "trespassing on Appellant Kraemer's property" is false. The assertion is made that referenced photographs "could not have been taken without trespassing on Appellant Julia Kraemer's private property." The topographical survey commissioned by FOHB had two parts: physical survey done on the ground from 1st Street down to Ordinary High Water (OHW), and from OHW down a combination of depth measurements taken from a kayak and use of a drone for aerial survey and photography. Referenced photographs were taken by drone.

Shay Putnam in her written testimony dated July 1, 2020 made a number of statements that misrepresent the facts.

1. Reference to Greenway Criteria (G) "The *natural* vegetative fringe along the river shall be maintained..." refers to just that, vegetation in the floodplain along the river, typically below Ordinary High Water, and not to invasive species overgrowth in the upper parts of the Landing,

which existed prior to FOHB's restoration landscaping work. The natural vegetative fringe was left in place below OHW, comprised of wild roses and berries and a few tree saplings. The floodplain was stabilized with a boulder wall at approximately OHW to prevent further erosion into the river. The photo below illustrates prior access to the river via one of the two trails that were there. This upper trail adjacent to the Kraemer property line which Julia Kraemer used to access her lower property levels with a riding mower. The "main trail" which followed the contour of the Landing down the center of the right of way to the water was much steeper and hard to traverse, as shown in the photo below.

2.



As shown below, the "main trail" was a steep unmaintained dirt trail, only dry and not slippery a few months out of the year, threatening to be overgrown with invasive ivy, and receiving no maintenance from the county or adjacent property owners.



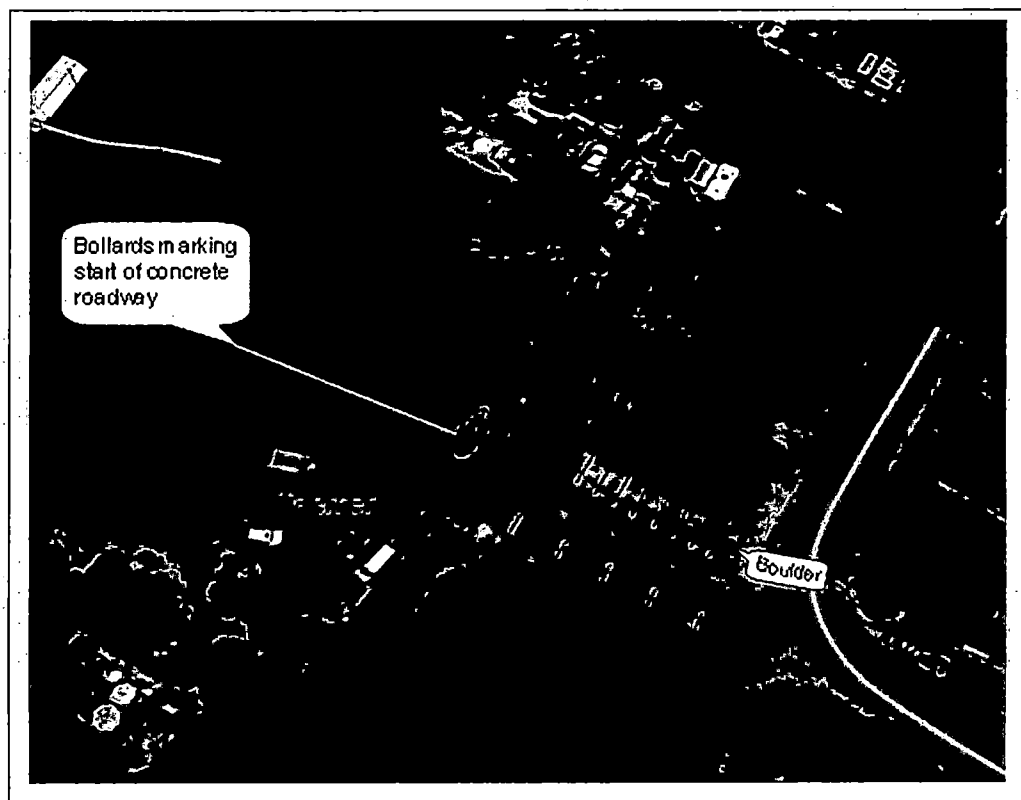
As seen above, overgrowth and downed trees and timber that had washed up from flood stages in the river, did, in fact, interfere with public ingress and egress to the bottom of the Landing. FOHB believes that the Applicants prefer the Landing remain in such condition to dissuade the public from using the property.

FOHB further notes that Appellants' efforts to privatize this public property are part of a repeated campaign. FOHB previously submitted the 2009 Encroachment and Removal Agreement (Exhibit 3), whereby two adjoining property owners had tried unsuccessfully to overtake the public landing but the County asserted its rights. In 2017, Appellant Kraemer unsuccessfully petitioned the County to vacate public rights to the Butteville Landing.

Furthermore, there is actually a second public access right of way on the upriver side of Kraemer's property, between Kraemer's property and the first property inside the private gated community. For years, the Kraemers and their neighbor have overtaken the top half of that public access point, using it for p as a private driveway and their own access road, and effectively closed off the rest of the public access with overgrown vegetation.

From a paddle boating perspective, that second public access point is a better site, but FOHB assessed all aspects and challenges to developing that site, one of them frankly being the difficulties of working with the property owners, and decided to work with the County on developing the current Butteville Landing project.

3. Reference the assertion that "Ben Williams of FOHB stated his intentions to put a park in place in a portion of the ROW Butte Street." See Exhibit 26, a 2017 email communication between Ben Williams and Shay Putnam and Robyn Brandt (then owner of the property now owned by Putnam) in which the restoration was described as a "park-like amenity focused on the Landing's history and access to the river" and making clear that the restoration and improvements were supported by the majority of Butteville residents, and that the decision by the County was to work with FOHB to "improve the right of way...in the best interests of all citizens." The statements about the end of the trail making the Landing more dangerous can be attributed to the fact that the project was not complete at that time, and this Appeal has further delayed completion. Per the project plans previously submitted, once the dock and gangway are placed, a guardrail will close off the bottom of the right of way limiting access to the river via the gangway and onto the dock.
4. Shay Putnam asserts "parking on most county roads is limited to some parallel parking. A local access road is limited to access..." The County has addressed the parking issue from the outset. The Butteville Landing right of way has provided public access to the river since the mid-1800's, and Marion County Public Works specifically undertook assessment of parking needs in its assessment at the outset of the project, and defined the space for 7 marked head-in and 4 parallel parking spots at the Butte Street beginning of the Landing. Blue markings show overflow parking at Butteville Store. See photo below.



In fact, to prepare the site for public access and the parking spots, the County improved the shoulders of the roadway, added concrete wheel blocks, and parking signage.

5. Reference: "safe access to our private residences." The entrances to both the Putnam and Kraemer properties are placed on Butte St. right at the transition from the street to the Landing, as can be seen above. That means there will be times when vehicles are parked in the County-designated parking spots as Putnam's and Kraemer's approach their property entrances. However, Appellants were well aware that the public right of way existed for more than a century prior to purchase of their properties. These property entrances have been in the same locations for decades. At the time Shay Putnam's parents (Iraj Rafei and Shaheen Brodle) purchased the vacant lot seen in the parking photo above, Shay Putnam represented that they intended to build a home there and use the driveway to 1st Street. They changed their plans and chose to continue to use the Butte St. access, knowing full well that their main property access would be adjacent to the designated parking for the Landing.

Steve Roberts in his written testimony of July 1, 2020 makes a number of statements that require clarification and correction.

1. Concerning changes in the community he states "with the addition of the Park..." and "a park for recreational purposes..." knowing full well as a Board member of FOHB that the project design from the outset was not a "park" but Landing restoration focused on a dock to provide safe access to and from the river for water recreation, and that any "park-like amenities" included are simply part of staging areas for canoe and kayak paddlers.
2. Mr. Roberts asks why the applicant "(Ben Williams) who has no ownership or jurisdiction over the said right of way able to file the application?" As a Board member of FOHB Mr. Roberts knows full well that the Applicant is Friends of Historic Butteville, not Ben Williams who signed as President of the nonprofit corporation with authorization of the FOHB Board, as Mr. Roberts knows full well that FOHB has been the Applicant for all the grant funding that made the entire project possible.
3. Mr. Roberts states that "Prior to 2017 there was a beautiful natural path which allowed access to the river. Unfortunately, many beautiful trees and natural vegetation was removed..." giving the impression that it was a safe and desirable location. As detailed above in response to Shay Putnam's assertions and as shown in the photos above, it was not a safe and desirable location. Mr. Roberts failed to say that in 2017 he was personally involved in rescuing an older and overweight gentleman who went down to the bottom of the Landing alone, couldn't get out by himself, and required Mr. Roberts' assistance.
4. Mr. Roberts states that "we have tried to express to FOHB the problems and concerns we're having and it continues to fall on deaf ears." During a multi-year internal and public vetting process, Mr. Roberts and the public had the opportunity to convey any problems or concerns to the County and FOHB. Any problems or concerns were fully discussed at Board meetings and responsive action taken. For example, one FOHB Board member (Greg Leo) organized a

neighborhood watch group and worked with Marion County Sheriff's Office to fund and appoint a "French Prairie Deputy." Additionally, FOHB has held numerous law enforcement and public meetings at the Butteville Store to enhance awareness of local community needs on the part of the Sheriff's office, as well as introduce community residents to the Sheriff's Office personnel and understand how they operate. As said in FOHB's previous testimony, FOHB is neither a security service nor a law enforcement agency, and we rely on the same law enforcement services as Butteville community residents. The Sheriff's Office has been very receptive to FOHB's outreach regarding the project and supportive of our efforts.

5. Mr. Roberts states that "most of the FOHB board members don't live in the area and won't understand the impact of additional improvement (gangway/dock) will have to the community. Four of FOHB's nine Board members live with 500 feet of the Landing. Three live within two miles, and the remaining two live within five miles. Additionally, the Ex Officio Board member is the Champoeg Park Manager who lives within four miles, and whose park responsibility includes the Butteville Store (part of Champoeg Park) and adjacent to the Landing. All of the FOHB Board Members referenced (excepting Mr. Roberts) support the Application.

II. Recent Public Activity and Trash at Butteville Landing

FOHB picks up garbage from the Landing's two trash cans on Monday morning. Loose refuse or garbage (paper cups, candy wrappers) have been extremely rare, and seldom have the garbage can liners been full. Volumes of garbage at a property with public access can serve as an indirect indicator of people using the site.

As previously submitted, on Monday June 22, 2020 after a full week and following Father's Day Weekend that saw a very large turn out of visitors to Champoeg State Park, both garbage can liners at the Butteville Landing were only half full. See photo below.

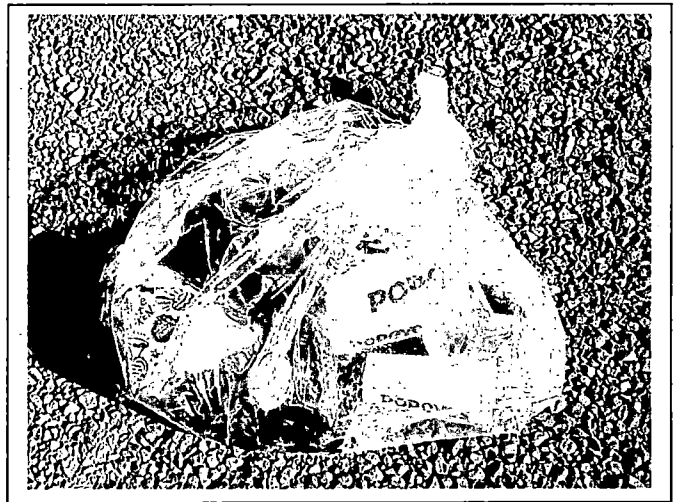
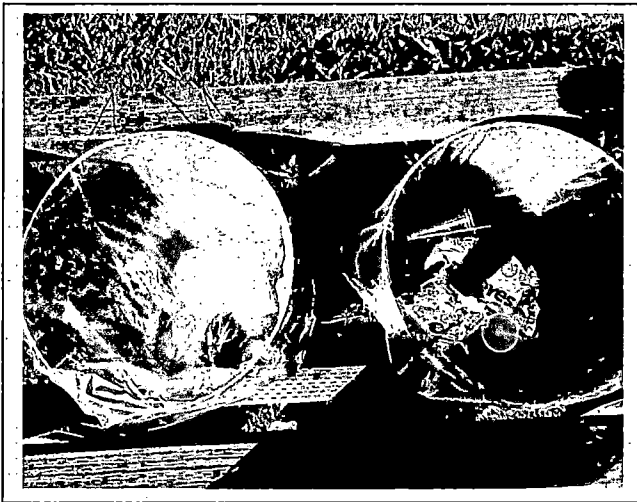


There was no litter or loose trash to be found in the Landing. Trash or garbage that blows in by the wind or is carried in by the flow of the river are beyond the control of FOHB, but are picked up during FOHB's regular trash cleanup visits. Correspondingly, visits by FOHB Board members confirmed no people at the Landing the night of Saturday, June 20.

July 4th Weekend

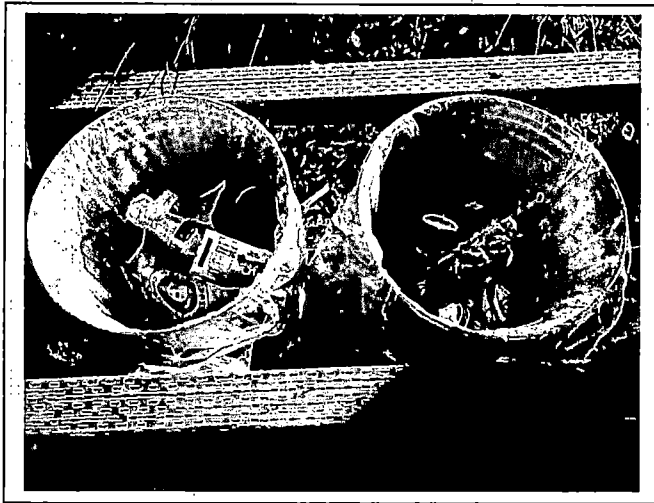
FOHB Board members visited the Landing during the day and evening on July 4, and saw only a few people on site reading the signs and appreciating the river view. In preparation for a possible large turn out, and concern expressed by an adjacent property owner about the potential disruption of many people appearing for the celebration and fireworks, Board members visited the Landing during the afternoon, evening and at 10:00 PM after dark. FOHB Board Members reported that no people were present at the Landing during any of these visits. Additionally, Greg Leo (FOHB Board member) specifically reached out to the Sheriff's Office to convey the expressed concern and request additional patrols on Saturday, July 5. The Sheriff's Office provided additional patrols, and reported that they saw no one at the Landing, and no disturbances or people congregating—this in spite of a resident of Butte Landing (gated community) holding a very loud fireworks display from his riverfront property over the river. See Exhibit 25, email report from Greg Leo.

Garbage at the Landing on the morning of July 6 confirms very low usage of the site by the public in the form of two partially filled garbage can liners that consolidated into less than one full liner.



July 12th Weekend

FOHB Board members visually inspected the Landing during the day to see a few people enjoying the river view with their children and generally recreating, as well as about 6:00 PM and again at 10:00 PM on Saturday, July 12, when no people were present. Garbage at the Landing the morning of July 13 confirms low public usage;



again with two half full garbage can liners that consolidated into a single liner.

The fact that there were less than one garbage can liner of trash across an entire week that concluded with the two major holidays (Father's Day and July 4th) confirms the fact that a low volume of people use the Butteville Landing, and use it for the reasons Appellants allege. Further, FOHB Board member visits on weekend nights have confirmed essentially no use of the Landing on weekend nights, belying the assertion by Appellants that the Landing is "a well known party site." Additionally, these facts confirm our previous testimony that as unsavory as the activities that resulted in calls to the Sheriff's department during the March to May COVID/pandemic shutdown across Oregon, these types of problems are not common or representative, and the occurrences during that extremely unusual circumstance cannot be used to forecast future usage or suggest any impacts upon adjacent properties.

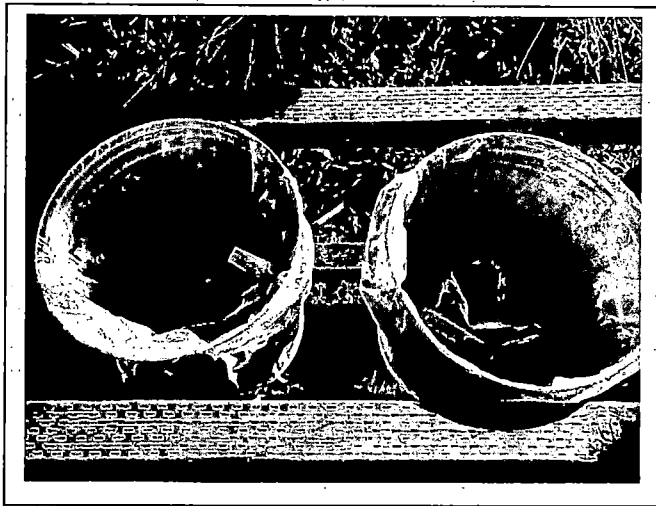
The typical daytime experience which almost all Butteville residents will confirm is the same as that described by email from John Mullen Champoege Park Manager on Sunday, July 12, 2020 (Exhibit 27):

I stopped in their twice yesterday, once in Ranger truck and uniform, once in personal. When in truck, I always park truck at Butteville Store and walk over Very peaceful and nice. First time a young man was reading a book on lower bench, two couples were hanging out enjoying the space, and a father with 3 kids asked about fishing. Later that day stopped by and a family was enjoying the lower picnic table and a couple were taking in the view of the river.

I continue to stop by when I can. I have yet to find any nefarious activity. Sure is a nice looking right-of-way!

July 19th Weekend

FOHB Board members visually inspected the Landing during the day on Saturday and Sunday, again seeing only a few people intermittently enjoying the river view and learning about the history.



Garbage at the Landing the morning of July 20 confirms low public usage,

The overwhelming usage of the Landing is by citizens engaging in typical outdoor recreational activities, and the focus is commonly on the river.

III. Enhanced Public Safety

As described above, at the outset of the restoration of the Butteville Landing, it was unsafe and hazardous. In spite of the Appellants' current claims about the nature of their "ownership" rights , and claims that FOHB is doing a poor job of maintenance, etc., the condition of the Landing in 2017 as documented in the photographs above and previously submitted show that the adjacent property owners did no more maintenance of the public right of way than that which server their personal interests and benefits – which means that by making it look inaccessible and keeping it slippery and unsafe, the public would not use the site. The Landing is now not only safe, but provides convenient access to and from the river for the public.

At the outset of the project the intersection of Butte St and 1st Street had multiple hazards on the corner of the Butteville Store property. FOHB requested a County Traffic Engineering assessment of the intersection, resulting in relocation of mail boxes and garbage dumpsters, removal of fence section and part of tall hedge (sight hazards blocking driver's view). These actions were taken by the County and FOHB and enhanced public safety.

Shay Putnam in her verbal testimony at the Permit hearing on June 18 made the assertion that FOHB was "not a friend of the community," hurtfully implying that FOHB is, in her eyes, the enemy of the

community. FOHB was formed by other members of Ms. Putnam's very same community in 2016. FOHB was formed to operate the Butteville Store for the benefit of the community and Champoeg State Park, and FOHB has undertaken substantial improvement efforts in and for the Butteville community. FOHB's goals are to preserve our small community's historic connections for all members of the community, and visitors, to enjoy and appreciate and share.

Butteville Store: FOHB secured or directly paid for landscaping, sprinkler system, sod lawn, dumpster storage area, air conditioning and a sound system to make the Store a vibrant amenity in the community.

Traffic: as detailed above, FOHB relocated hazards at the Butte St and 1st Street intersection, including building and placing a new mailbox frame for immediate residents, and coordinated with Marion County Public Works to improve parking at the Landing.

Law Enforcement: As described previously and above, FOHB has held multiple law enforcement meetings at the Store to connect community residents with Sheriff's Office including listening sessions to assure Sheriff's Office personnel are aware of local law enforcement issues and river ordinance violations. Understanding the COVID-related incidents that took place between March and May, and being well aware of local concerns about what could happen on the July 4th weekend, and FOHB Board member and Community Watch Member Greg Leo coordinated with Marion County Sheriff's Office re: additional patrols, which were provided. See Exhibit 25. As now documented by garbage levels and verbal reports from Sheriff's Officer personnel, there were no people at the Landing the nights of July 4th and 5th.

Contrary to the aspersions being made to disparage FOHB, its board, officers, and members, FOHB is comprised of other members of the community and has made and continues to make every effort to be exactly what it is named, a Friend of Historic Butteville. FOHB has 55 dues paying members, the majority living within five miles of the community. FOHB maintains an email list of 209 contacts, 195 of whom have subscribed. As previously submitted, restoration of the Landing has been supported from its beginning by the Butteville Community Church and Champoeg State Park. Other local businesses has supported FOHB's work to improve the Butteville Store, such as Oregon Turf and Tree Farms and Northwest Floriculture. In addition to grants from foundations to fund the Landing project, thirty six contributions have been received from local residents.

FOHB asks again that the Floodplain and Greenway Permits be granted so that we can finalize this amazing public access project that FOHB and the County have spent years and countless hours vetting and designing.

s/ Ben Williams

Ben Williams, President

Friends of Historic Butteville

**BEFORE THE HEARINGS OFFICER OF
MARION COUNTY, OREGON**

In re: FRIENDS OF HISTORIC BUTTEVILLE APPLICATION TO MARION COUNTY PLANNING DEPARTMENT FOR FLOODPLAIN AND GREENWAY DEVELOPMENT PERMIT	FP/GW PERMIT CASE NO. 20-003 APPLICANT FRIENDS OF HISTORIC BUTTEVILLE'S SECOND MEMORANDUM
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INTRODUCTION

Friends of Historic Butteville (FOHB) submits this Second Memorandum and Exhibits¹ in response to the Appellants' July 2, 2020 filings and support of FOHB's Application for Floodplain and Greenway permits to restore public access to the Butteville Landing, a public road right of way on the Willamette River. Appellants' position on the issues would result in impermissible and unreasonable restrictions on public's rights over the public road right of way, and Application should be allowed. FOHB notes that it has satisfied all Floodplain and Greenway criteria, and Appellants only have limited, unsupported challenges to these criteria; Appellants' attacks on other aspects of the project are factually and logically deficient.

ARGUMENT

I. Project is Consistent with the Purpose of a Public Road Right of Way.

The Butte Avenue road right of way at issue here was granted to the public without any stated limitations. *See* FOHB July 2, 2020 Memorandum at 3. This project does not in any way change, or thwart, the purpose of the property's use as a public road right of way, and is within the scope of the County's legal authority. *Id.* at 4-6. In fact, it is the Appellants' efforts to restrict

¹ The exhibits referenced herein continue from the Exhibit Lists Applicant provided on June 18, 2020 (Exhibits 1-17), July 2, 2020 (Exhibits 18-23) and commences here with Exhibits 24-28.

public access and use of the Butteville Landing that would substantially and unreasonably impair the public's use of the property, and would infringe upon the County's duty to hold the property in trust for the benefit of the public. Where a use does not unreasonably interfere with underlying fee owner rights, an easement use is allowable. In *Criterion Interests, Inc. v. Deschutes Club*, 136 Or. App. 239 (1995), an easement with general terms without limitations was granted to access the Deschutes River. The easement holder originally used the easement for his cattle business; a subsequent purchaser planned to use it for recreational purposes. The Oregon Court of Appeals upheld the easement for the subsequent owner's recreational use of the easement. Because the easement here was granted in an unlimited format, there is nothing to suggest it excludes any travel that may occur for any purpose – personal, recreational, commercial, or other.

The Butteville Landing cement road facilitates passage for the intended mode of transportation to and from the river – primarily by foot, but also by emergency stretcher for human safety purposes, and also by wheelchair. The fact that the road reasonably limits the nature of vehicle access does not mean the Butteville Landing no longer functions as a “road.” When the 1871 Plat established the public road right of way, motorized vehicles were not in use; there is no reason now to require, as Appellants appear to suggest, that the Landing accommodate cars in order to maintain its status as a public road right of way. Such a narrow reading is also inconsistent with ORS 368.001(6)'s definition of road (“road” includes vehicles or other means or that provide travel between places). And, similar to the Landing's prior use as a ferry site, there likely was staging areas for passengers and goods; thus the concept of picnic tables and grassy areas to accommodate paddlecraft users is entirely consistent with the original uses of the property.

Further, there is no legal support for Appellants' assumption that the public road right of way's use for transportation is mutually exclusive from its use for recreation. From a practical perspective, a road can be for transportation for a wide variety of uses – for example, Butteville Avenue like any other street, highway, throughway, or alley can be used for travel by residents or by tourists. It does not matter if a person is using the road for personal, commercial, or recreational purposes as each of those purposes involves a kind of transportation and thus is an allowable use of the public road right of way. Other Oregon cases acknowledge that public roads, where a public entity holds an easement for use, can and have been used by the public for recreational purposes. In *Rendler v. Lincoln Co.*, 76 Or. App. 339, 341 (1985) a public road established in 1890 was, by 1977, used by the public for “hiking, beach access, fishing, hauling firewood and other recreational activities.” When a portion of the original road eroded, the *Rendler* Court upheld – at the request of the county and a local nonprofit whose members used the road and easement - an easement over private property to continue to allow the public to use the road and the easement for recreational purposes. *Id.* at 348. In *Major v. Douglas County*, 6 Or. App. 544, 549-50 (1971), the Court found that a public road's “[u]se by the general public has included access to at least one developed recreation area, plus access to surrounding Bureau lands for hunting and fishing.” A public road right of way, granted without limitation, clearly can be used for a variety of travel or transportation purposes, including recreational uses.

In fact, between these different uses, arguably public recreation use of a public road right of way should be prioritized over personal use or commercial use, which represent private interests only. The County holds the Butteville Landing in public trust, and the property serves a public need for dock and gangway to access the Willamette River. This plan also has community support. *See, e.g.*, Exhibit 24 (letters of support from paddling community). These nuances are

recognized and specifically anticipated in the Marion County Comprehensive Plan (“Comprehensive Plan”). For example, the MCCP recognizes the interrelated aspects of land use and interactions of land use factors. Concurrent land use activities and interest are balanced under the MCCP and this balance is the “heart” of the Comprehensive Plan. *See, e.g.,* Comprehensive Plan Introduction.

Appellants’ reliance on *Public Interest Council v. Lincoln City*, 28 Or. App. 67 (1977) is inapplicable. In *Public Interest Council*, Lincoln City sought to create a blockage in a public street right of way, *obstructing* the prior use of the street as a public thoroughfare. Here, the opposite is occurring. The Butteville Landing project *re-establishes* fluid public access to and from the Willamette River over a public road right of way, after years of overgrowth and Appellants’ own efforts to block the property. Further, all actions FOHB and the County are taking continue to allow the Landing to be used for public access. Nothing removes or restrains the function of the property as a Landing, and nothing affects the underlying fee owners’ interests.

II. “Park” – Distinction Without a Difference

Appellants argue that the Butteville Landing project transforms a public road right of way from a legal “road” into a “park”, ostensibly to demonstrate that the project is not an allowed use. This argument is a distinction without a difference because the project’s primary purpose preserves public access to and from the Willamette River, and the property’s existence as a public road right of way is not mutually exclusive from it being available for a variety of uses.

A. Project’s Primary Purpose is Public Access To and From the Willamette River

The grant of a public road right of way did not limit the Butteville Landing to a certain kind of use. The fact that the public may use the road right of way for accessing paddling – instead of

for ferries or commercial shipping - is of no import and does not convert the Butteville Landing to a “park.” Nor does any incidental use of the public road right of way for walking, seeing the river, or picnicking convert the Butteville Landing into a “park.” Travel, for all purposes including recreational ones, is still travel.

Appellants’ efforts to trump up other uses of the Butteville Landing in an attempt to reframe the property as a “park” should be rejected. At the Butteville Landing, the primary purpose of the project is to facilitate access to and from the Willamette River. FOHB has clearly maintained that the primary proposed purpose of this project is, and has been, to facilitate public access to and from the Willamette River. *See* Exhibits 4, 7 at 4, 11, 12 at 2, 18. This purpose is consistent with the grant, and the 1962 Resolution identifying the property as a “public boat ramp.” Exhibits 1, 22. Under *Central Or. Landwatch*, 276 Or. App. 282, 294-95 (2016), review is limited to proposed use as represented in the application. Furthermore, Appellants’ arguments are also akin to the situation in *Smalley v. Benton Co.*, where LUBA rejected an “attempt[] to use incidental elements of a proposed primary use to fit within use category that does not encompass the proposed primary use.” *Smalley v. Benton Co.* – Or. LUBA – (LUBA No. 2014-110, Mar. 17, 2015). *See* Exhibit 28. In *Smalley*, LUBA concluded that “any incidental recreational activities that may or may not occur in association with the [primary] event do not qualify” the proposed project as a (private) park that would be permissible in EFU land. *Central Or. Landwatch*, 276 Or. App. at 287. Lastly, Appellants’ arguments on the issue of the project’s primary purpose are based on a mid-stream assessment of the project; Appellants have elected to ignore that the dock and gangway are not yet constructed, so the primary purpose of the project is not yet fulfilled. Any other activities unrelated to river use are incidental, minor, and subordinate to the primary purpose of the Landing, and should not block the FOHB Application for a Floodplain and

Greenway permit. Appellants' argument that other alleged uses are the primary purpose of this project should be rejected.

Appellants' other arguments are not supported by the information provided in the Application. For example, general statements from Oregon Parks and Recreation Department and Oregon Department of Transportation manuals are not determinative of the particular and specific uses of the Butteville Landing. The federally administered Rails to Trails grant program only requires that projects be *primarily* recreational in nature rather than "a more utilitarian transportation function." See Appellants' Exhibit 3 at 6. Simply because an Oregon public road right of way may have a recreational aspect, here accessing the Willamette River for non-motorized paddlecraft use, does not mean that *no* transportation or travel occurs. Further, Oregon's definition of "road" clearly simply contemplates "travel", regardless of its purpose. ORS 368.001(6). Receiving a federal grant under the Rails to Trails Program parameters does not bolster Appellants' argument that the Butteville Landing's redevelopment project seeking permitting under the Marion County Floodplain Overlay Zone and Greenway Zone code requirements is not allowed.

B. Project Embodies Multi-Use Nature of Public Lands and Comprehensive Goals

Contrary to Appellants' insinuation, the concepts of a public road right of way for travel and recreation are not mutually exclusive. The fact that the public may use the Butteville Landing as a means of accessing recreation does not convert the Landing into a "park", nor does it have any legal implication. Viewing and enjoying historic sites can be done by boat, by foot, or by bicycle thus constituting "travel". At the County level, Marion County's Parks and Recreation Subgoals include, for example, providing multi-purpose parks for active and passive recreation and providing "increased public access to rivers of the area and to encourage such uses as fishing,

boating, and swimming.” *See* Marion County Comprehensive Plan Parks & Recreation Subgoals (d) and (i). As previously noted in the supporting materials, the Butteville Landing is the only access point nearby and there is a public need for access in Butteville. *See* FOHB First Written Testimony at 14, Exhibits 22 (1962 County Resolution identifying a need for a public boat ramp in Butteville), 24 (paddlers’ letters of support). Without this access point, the public’s rights would be compromised. These factors also support the Application Greenway factors, namely MCC 17.179.050(C), (D), (I), (L), (O).

C. No Legal Definition of “Park”

Lastly, Appellants offer no legal definition for what constitutes a “park.” Oregon Revised Statutes do not define a “park”, and the County’s definition of “park” does not help Appellants. Under MCC 12.05.030, a “park” means “all grounds, buildings, improvements, and areas dedicated to use by the public for park, recreation or open space purposes and over which the county has acquired right of use for such purposes.” On the contrary, Applicant has discussed the concept of avenue (which the public road right of way was originally granted as in the 1871 Plat Map) and the landscaping concepts associated with an “avenue.” *See* FOHB July 2, 2020 Brief at 4-5. This project maintains the “avenue” natural aspects combined with facilitating travel, and is consistent with the original grant of the Landing as public road right of way.

III. Application Signatures are Authorized and Available

As the owner of a legal interest in the public road right of way, the County may file an application for conditional use. MCC 17.110.425, MCC 17.119.020. Here, the County’s actions and conduct clearly authorized and consented to FOHB filing the Application on its behalf. Through the County’s and FOHB’s relations and conduct, and their demonstrated consent, an implied agency relationship exists that authorized FOHB’s signing the Application. *See Durham*

v. Warnberg, 62 Or. App. 378, 382 (1983) (citations omitted) (“An agency may be implied from attending circumstances, and the apparent relations and conduct of the parties.”); *see also Eads v. Borman*, 351 Or. 729, 735-36 (2012) (citations omitted) (“Classically, an agency relationship ‘results from the manifestation of consent by one person to another that the other shall act on behalf and subject to his control, and consent by the other so to act.’... The agency relationship can arise either from actual consent (express or implied) or from the appearance of such consent. In either circumstance, the principal is bound by or otherwise responsible for the actual or apparent agent’s acts only if the acts are within the scope of what the agent is actually or apparently authorized to do.”).

The facts here overwhelmingly confirm the County authorized the project and the Application. The Floodplain and Greenway Application clearly lists the County as the public road right of way “Owner” and the “Applicant Representative” as FOHB. *See* Application pp. 1. The Application was submitted to the County, thus putting the County on notice of the filing of the Application and FOHB’s signature on the same. The County has repeatedly authorized FOHB to pursue federal, state, and county permit applications on its behalf as the Owner in connection with this project. *See, e.g.*, Exhibits 2 (Marion County Public Works letter to Marion County Community Services supporting FOHB’s Community Grant application), 12 (Application to U.S. Army Corps of Engineers and Oregon Department of State Lands),² 18 (Application to Marion County Public Works), Exhibits 14 and 15 (engineering certification letters regarding the project sent to Marion County, not FOHB). The County and FOHB executed

² Arguably, the dock and gangway are not even within the County’s jurisdiction, but DSL’s, and DSL and the Corps have authorized the dock and gangway. ORS 274.005(3) (DSL jurisdiction extends from ordinary high water line to ordinary low water line); ORS 274.005(7), (8) submerged and submersible lands.

a Memorandum of Understanding (MOU) authorizing FOHB to prepare the project “in concert” with the County. Exhibit 4. While the parties agreed that neither was the “agent” of the other for purposes of the MOU, the MOU focuses primarily and generally on the development and maintenance of the Landing project, not specifically on permit application forms. Clearly, though, the County’s actions confirm that it has authorized FOHB’s filing of the Floodplain and Greenway Application. If at any time the County decided to withdraw authorization for FOHB to represent its interests as the Owner, the County had ample opportunity to object. The County specifically reserved the right in the MOU to disapprove any aspect of the project. Exhibit 4. Yet it did not. In fact, in connection with the Appeal, the County submitted a legal memorandum supporting its ownership of the public road right of way and the Application. *See* May 18, 2020 Memorandum. Thus any alleged defect in the application signature provision has been cured. Appellants’ focus on an immaterial technicality cannot undermine the Application.

FOHB’s signature as the County’s authorized agent may be accepted as true. MCC 17.119.025(B). The FOHB signature on the Application is allowable under MCC 17.119.025(A)(1) because as the owner of the easement, the County’s rights are the only ones affected by the project and the County authorized FOHB’s signature. And, as provided in MCC 17.119.025(A)(5), an easement owner’s authorized agent may sign a conditional use application on its behalf, and to do so “without the approval of the property owners.” Under these scenarios, the County authorized FOHB’s signature on the Application.

Appellants’ further argument that the “Owner” sign and file a declaration is premature. MCC 17.178.050(C) only states that the owner sign and record a declaration *prior to obtaining a building permit*. The project is not yet at the stage where a building permit is necessary, and this requirement can readily be satisfied once the Floodplain permit is allowed, if it is required. The

April 23, 2020 Notice of Decision specifically states that “This decision does not include approval of a building permit.” Notice of Decision pp. 1. The County’s support of this project suggests that the County is available to sign a declaration when it is timely to do so.

Lastly, because the project is on the public road right of way and the activities are within the County’s authority (*see* FOHB July 2, 2020 Memorandum at 4-6), no consent of the underlying fee owners is required.

IV. Floodplain Overlay Zone Permit Purposes and Criteria Are Satisfied

A. MCC 17.178.060(J) Floodways

Appellants’ Open Record Submission Brief only focuses on one of the five MCC 17.178.060 criteria,³ MCC 17.178.060(J). The Decision found that any flood level increase could be made a condition of any approval, and that the project “meets the other standards for development in a regulated floodplain.” *See* Notice of Decision at 4-5. Appellants’ argument on this issue is not one of substance but semantics. Appellants appear to argue that simply because 0.02 is not the number “zero”, this must mean flooding is certain to occur, and insinuating that any such flooding will be to such a magnitude as to damage neighboring properties in violation of MCC 17.178.060(J). These arguments ignore the substance of FEMA’s review, the certified engineers’ conclusions, and are stretched rationales.

Consistent with MCC 17.178.060(J)(1), FOHB engaged two professional engineering companies and obtained certified technical evaluations of the proposed project. *See* Exhibit 14 (Marine Structures Engineering, Inc.) and Exhibit 15 (Boatwright Engineering). As Boatwright Engineering noted, one isolation section of the project on the south side, produces a 0.02 feet

³ FOHB address all MCC 17.178.060 criteria in its Application, at the June 18, 2020 hearing, and in its July 2, 2020 submissions. FOHB reserves the right to address other floodplain criteria Appellants may raise in their July 20, 2020 filings in its July 27, 2020 response.

vertical elevation increase. Exhibit 15 at 2. Boatwright Engineering certified that this increase “is below the 0.1 foot threshold that FEMA can monitor, **and is therefore regarded as no rise.**” *Id.* (emphasis added). FEMA only measures rises in terms of one-tenth of a foot, and uses rounding principles, so an 0.05 increase would be rounded up and a 0.04 increase would be rounded down. Thus, an 0.02 elevation increase is rounded down to zero, as it is only 20% of what FEMA can even detect. The result is that the Butteville Landing project will not result in any increase in flood levels. This is fully consistent with MCC 17.178.060(J). Boatwright Engineering further certified that “**the installation of the proposed pilings will not produce an increase in the floodplain area on other properties.**” Exhibit 15 at 2 (emphasis original). And, Boatwright Engineering directly addressed the community impacts requirement of MCC 17.178.060(J) when it certified that the proposed pilings “**will not produce an increase in flood levels within the community during the occurrence of base flood discharge.**” Exhibit 15 at 2 (emphasis original).

Lastly, Appellants’ argument on (J) ignores the purpose of the Marion County Code. Marion County’s Floodplain Overlay Zone requirements exist to protect communities from *impacts* of a project. For example, the purpose of the Floodplain Overlay Zone is to restrict or prohibit uses which are “dangerous to health, safety and property due to water or erosion hazards or *which result in damaging increases* in erosion or flood heights or velocities.” MCC 17.178.010(A). Here, the 0.02 foot vertical increase is not even measurable by FEMA, thus it cannot be a “damaging increase.” Appellants’ myopic focus on numbers misses the point; the Code is designed to protect against *damaging* increases. FOHB’s landscaping proposal (Exhibit 8 at 3) shows protection measures against any water rise, including two level boulder wall and a 4-foot

high retaining wall, and, higher up on the property, two 2-2.5 foot high retaining walls. Those interests are clearly satisfied here, and the Application should be allowed.⁴

B. Other Floodplain Overlay Criteria Satisfied

Aside from Appellants' Brief, Appellants' other July 2, 2020 filings are largely off-topic to the County's Floodplain Overlay Criteria. To the extent Floodplain issues are referenced, the Applicant refers back to its prior filings, including certified engineer reviews. *See* Exhibits 14, 15; Application (referencing construction materials, satisfying MCC 17.178.060(D)(1)); FOHB Application (referencing no utilities, satisfying MCC 17.178.060(F); FOHB Application (referencing no storage requirements, satisfying MCC 17.178.060(H)). Also, the Decision permitted certain Floodplain Overlay Criteria as conditions of approval, and Marine Structures Engineering, Inc., offered to provide additional information upon request should the County require them. Exhibit 14.

V. Greenway Management Zone Permit Purpose and Criteria Are Satisfied

Appellants' Open Record Submission Brief only focuses on six of the fourteen MCC 17.179.050 criteria the Decision found apply to this project. Appellants suggest the Decision's findings are "inadequate", but fail to identify sustain their allegations with substantial evidence.

- *Criteria (D) Areas of ecological, scientific, historical or archeological significance shall be protected, preserved, restored, or enhanced to the maximum extent possible. Applicant noted in its Application that "Cultural survey and SHPO listing completed." The Planning Director did not request further information on this point and permissibly deferred to the SHPO's expertise. At the Application stage, the Application only requires statements, not supporting documentation, unless requested. MCC 17.179.040. FOHB explicitly worked with Applicant Kraemer to preserve the old dock ruins, at her request and to develop signage for the public acknowledging the historical importance of the site. The SHPO recommended an archeologist be on-site for dock and gangway construction,*

⁴ Boatwright Engineering has recently informed FOHB that the 0.02 foot increase *could* be reduced to zero, but only if Appellants would agree to remove and / or excavate the dilapidated foundation structures of the old dock, which to date they have staunchly refused. Thus the minor increase at issue here is of Appellants' own making.

which FOHB intends to do. The SHPO also suggested building the new dock and gangway without direct contact to the old dock ruins, and FOHB intends to follow this guidance when it reaches the construction stage of the project. FOHB submitted the full Cultural survey and SHPO listing records to Planning on June 18, 2020 and the County has not altered its decision on this point.

- Criteria (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 submissions throughout this Appeal process demonstrate regular maintenance and clean-up crews to preserve the Landing site from trash.*
- Criteria (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 incorporates its discussion above on Floodplain Overlay Criteria, and further notes that the landscaping work included retaining near-shore river vegetation, and several retaining walls to protect against any water rise. See Exhibits 8 at 3, 14, and 15.*
- Criteria (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 removed invasive species, at suggestion of landscape design consultant. Natural vegetative fringe was retained, not removed as Appellants claim.*
- Criteria I The proposed development, change or intensification of use is compatible with existing uses on the site and the surrounding area. *The purpose as stated in the Application of installing a dock and gangway is to facilitate public access to the Willamette River over the public's road right of way. FOHB has been clear about the focus of this project from the start: to re-establish public access for a public boat landing. FOHB has also, from the start, sought local, state, and federal agency input on the process, held public meetings, and engaged professional engineers and landscapers in its efforts to keep all parties fully informed. The 1871 Plat Map provided the public road right of way without limitation of use. Disrepair of the site – and efforts of Appellants to encroach upon the site (see, e.g., Exhibit 3) have hindered the public's right to use the area as a boat launch, which is the public's right. See Exhibit 22 (1962 Resolution recognizing site as a public boat ramp). Users of the Willamette River are subject to Oregon State Marine Board rules will be responsible for following OSMB rules in and near the Butteville Landing, just as they are for all other parts of the Willamette River. Appellants' suggestion that somehow legally allowed travel over the site to access the river will intensify, and to such a degree that the use would be incompatible with Appellants' use of their own properties, is unsupported and the Application should be allowed.*
- Criteria L Any public recreational use or facility shall not substantially interfere with the established uses on adjoining property. *Appellants are not the only residents in and near*

the proposed Butteville Landing site. Indeed, four of FOHB's Board Members live within 500 feet of the project site and fully support the project. See Third Testimony of Friends of Historic Butteville at 7. Appellants' assertions that (1) the use of the public landing would substantially interfere with their residential uses of their own properties, and (2) will "significantly" change watercraft operations in the Willamette River are unfounded. Appellants purchased their properties with the knowledge that the site has long been a public road right of way and a boat landing. The watercraft use of the Landing is specifically targeted at non-motorized paddlecraft. In this stretch of the Willamette River, the waterway is an essential part of the culture and lifestyle, as Appellants' own docks are testament to. The addition of a small paddlecraft dock will not "substantially interfere" with Appellants' uses. Appellants' claims of interference are not supported by law enforcement records, nor are they tied to the Butteville Landing project. Long-time Community Watch Member, Aurora Fire District # 63 Position # 5 President of Board of Directors, former member of the Marion County Law Enforcement Coordinating Council, and FOHB Vice President Greg Leo has evaluated Appellants' alleged grievances and concluded that they are unsubstantiated. See Exhibit 25.⁵ FOHB has planned the project with professional input, including fencing and landscaping to deter access from the Landing to neighboring properties. It is Appellants' burden to show a substantial or unreasonable interference, which they have not and cannot show. Appellants are not deprived of any established uses on their adjoining properties and the Greenway permit should be allowed.

- Criteria 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. *From the beginning of this project three years ago, FOHB worked with the Appellants and the community to identify and respond to any vandalism or trespass concerns, and to deter assumptions from developing into alarm without justification. Between the Landing and the adjoining properties, there is a 6 foot high fence. There is one section between the water and the Kraemer property that cannot be completed until the dock and gangway are constructed. FOHB has communicated this to Appellant Kraemer several times. The Landing property is also lined with trees on the edges to discourage trespassing and to hide the adjoining properties from public view and access. The record does not contain any verified reports of vandalism. The reports provided to date suggest calls to the police during Covid-19 restrictions in place at State Parks, and after Appellant filed its appeal. FOHB Vice President Greg Leo has significant experience with community crime prevention and enforcement and has had an*

⁵ Mr. Leo reviewed Appellants' "Recent Incidents at Butteville Landing" Powerpoint. To summarize his conclusions: a picture of needles from any origin and a Deputy looking into a trash can does not allow a conclusion of illegal drug use; simply parking in a public right of way does not interfere with adjoining properties' rights; a "late night disturbance" at 8:59pm in the summertime without further information is hardly a "disturbance"; fireworks and gunshot sounds are relatively frequent in rural settings and there is no evidence the sound came from the Landing; the "Homeless Felon" in an RV is one well-known person in the area and the RV has since been destroyed; most of the allegations raised by Appellants are not verifiable. *See Exhibit 25.*

established relationship with the Marion County Sheriff's office for at least 8 years. See Exhibit 25. Mr. Leo has worked with FOHB and the community to anticipate issues at the Landing on long summer weekends, but there has been no evidence of crowds, drinking, drugs, or disruptive behavior. FOHB contends that the Appellants' claims are spurious, dramatized, and unsupported.

- Criteria (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. See discussions above.

CONCLUSION

FOHB has satisfied the Floodplain and Greenway criteria, and Appellants' efforts to attack the underpinnings of the public road right of way are wholly unsupported. For the reasons stated above and as stated and supported by Applicant's prior filings in this matter, Marion County should approve the April 23, 2020 Notice of Decision allowing FOHB's Floodplain and Greenway permit application.

Dated July 20, 2020

s/ Elisabeth Holmes

Elisabeth Holmes, OSB # 120254

Blue River Law, P.C.

P.O. Box 293

Eugene, Oregon 97440

Tel. (541) 870-7722

Email: eli.blueriverlaw@gmail.com

Counsel for Applicant Friends of Historic Butteville

Friends of Historic Butteville
Marion County Floodplain / Greenway Application No. 20-003

Index of Exhibits

June 18, 2020 Hearing (Exhibits 1-17) and July 2, 2020 Submission (Exhibits 18 -23) and July 20, 2020 Submission (Exhibits 24 - 28)

Exhibit Number	Description
1	St. Alexie Plat Map (1871)
2	Letter from Marion Co. Public Works to Marion Co. Community Services (Jan. 20, 2017)
3	Marion Co. Office of Legal Counsel re: Removal Agreements with Kraemer Property, Anderson Property (April 29, 2009) and communications with Sheriff (June 2008)
4	Marion Co. and Friends of Historic Butteville Memorandum of Agreement (June 13, 2019)
5	1883 Landing Photograph and Description
6	2017 Pre-project photographs
7	Oregon Parks and Recreation Department State Historic Preservation Office letter to Army Corps of Engineers, site review, and photographs (April 20, 2018)
8	Excerpts from Friends of Historic Butteville Community Meeting Powerpoint (May 23, 2017)
9	May 2020 Photographs
10	Email exchange between J. Kraemer and Friends of Historic Butteville (May 2018)
11	Excerpts from Friends of Historic Butteville Community Meeting Powerpoint (Nov. 29, 2017)
12	Excerpts from U.S. Army Corps of Engineers and Department of State Lands Permit application and permit packet
13	Oregon State Agency (OSMB, DEQ, ODFW) reviews of Army Corps of Engineers and Department of State Lands Permit application
14	Marine Structures Engineer, Inc. to Marion Co. Planning Department - Butteville Landing Engineer Certification of pile supported floating dock and walkway (May 29, 2020)
15	Boatwright Engineering Inc. to Marion Co. Planning Department – Butteville Landing Engineer Certifications of Marion County Code provisions (May 4, 2020)
16	Butteville Dock Proximities
17	NOAA NMFS Letter (July 9, 2019)
18	Marion County Public Works Land Development Engineering & Permit Application (excerpt, highlighting application for public road right of way work)
19	Marion County Sheriff's Office Incident List (2016-June 30, 2020)
20	Letters of support (2019)
21	FOHB Survey Results (June 2020)
22	1962 Resolution

23	Corps Approval
24	Community and paddlers' letters of support for project
25	Letter and response of Greg Leo, FOHB Vice President, Community Watch Organizer, Aurora Fire District # 63 Position # 5 President of Board of Directors, and former member of the Marion County Law Enforcement Coordinating Council (July 13, 2020)
26	Email between Ben Williams, FOHB and Putnams (2017)
27	John Mullen, Champoege Park Manager Email (July 12, 2020)
28	<i>Smalley v. Benton Co.</i> -- Or. LUBA -- (LUBA No. 2014-110, March 17, 2015) Final Order and Opinion

7/19/2020

Exhibit 24

Willamette
RIVERKEEPER.org

Fwd: Friends of Historic Butteville

1 message

Travis Williams <travis@willametteriverkeeper.org>

Sat, Jul 18, 2020 at 5:43 PM

From: Bruce <bbillo@comcast.net>

Subject: Friends of Historic Butteville

Date: July 18, 2020 at 10:55:34 AM PDT

To: travis@willametteriverkeeper.org

Hi Travis - I support the project to provide public access and a kayak / canoe launch spot at Butteville to increase human powered river access on this stretch of the Willamette.

thanks for your work!
Bruce (Portland)

Willamette Riverkeeper
403 SE Caruthers St., #101
Portland, OR 97214
Main office: 503-223-6418
Cell: 503-890-1683

South Valley Office:
454 Willamette St.
Eugene, OR 97401

www.willametteriverkeeper.org
www.willamettewatertrail.org
www.paddleoregon.org

7/19/2020



Fwd: Historic Butteville Landing

1 message

Travis Williams <travis@willametteriverkeeper.org>
Ben Williams <ben.williams@liturgica.com>

Wed, Jul 15, 2020 at 5:07 PM

Begin forwarded message:

From: Julie Griswold <juliegriswold@yahoo.com>
Subject: Historic Butteville Landing
Date: July 15, 2020 at 3:28:33 PM PDT
To: Willamette Riverkeeper <travis@willametteriverkeeper.org>

Dear Friends of Historic Butteville,

I wholeheartedly support a safe, low-impact access point for the public to enjoy this portion of the Willamette River which is really tricky to enjoy if you don't already own property here. Public right of ways are critically important to maintain historic traditions and to allow people who live in the county and state to enjoy their state. Beautiful, natural places should not belong only to those who can pay the highest price. Private property along rivers and beaches that denies access to all the people does not support healthy, vibrant communities.

I support access. I support native species in riparian zones. I support the removal of concrete junk and any other debris that remains at this site that makes for an unsafe place for animals and people and natural environment. I support minimal impact development in flood zones or along embankments. I support people and their choices to recreate healthfully and safely with minimal impact. We all need ways to stay active. I support historic traditions and right of ways.

I would be happy to support with small donations or volunteer work. This sounds like a fantastic resource and project. Hurrah to the Friends of Historic Butteville. Thanks to Travis of the Willamette Riverkeeper for caring about our treasured river.

Best wishes in this endeavor!
Julia Griswold
1234 NE 71 Avenue
Portland, OR 97213

Willamette Riverkeeper
403 SE Caruthers St., #101
Portland, OR 97214
Main office: 503-223-6418
Cell: 503-890-1683

South Valley Office:
454 Willamette St.
Eugene, OR 97401

7/19/2020



Fwd: To: Friends of Historic Butteville

1 message

Travis Williams <travis@willametteriverkeeper.org>
Cc: Ben Williams <ben.williams@liturgica.com>

Wed, Jul 15, 2020 at 5:07 PM

Begin forwarded message:

From: Jeanne Mitchell <jeanne.a.mitchell@gmail.com>
Subject: To: Friends of Historic Butteville
Date: July 15, 2020 at 3:53:01 PM PDT
To: Travis@willametteriverkeeper.org

To: Friends of Historic Butteville

I support the Friends of Historic Butteville and I support the public access to the Willamette River. I am a kayaker and I belong to numerous kayak groups. Access to the river is important to allow all people (not just people who own private riverfront property) to kayak on the Willamette River.

Thank you,
Jeanne Mitchell
2723 SE 28th Pl
Portland, OR 97202

7/19/2020



Fwd: Butteville access project

1 message

Travis Williams <travis@willametteriverkeeper.org>
Cc: Ben Williams <ben.williams@liturgica.com>

Thu, Jul 16, 2020 at 3:50 PM

Begin forwarded message:

From: Michelle Zietlow <mzietlow@rocketmail.com>
Subject: Butteville access project
Date: July 16, 2020 at 3:46:30 PM PDT
To: travis@willametteriverkeeper.org

To The Friends of Historic Butteville-

I support your project to finish the river access either the floating dock as planned. I feel there is a need for this access point for low impact craft, and that there is minimal impact in the adjacent landowners.

Thank you for your consideration.

Sincerely,
Michelle Zietlow

Willamette Riverkeeper
403 SE Caruthers St., #101
Portland, OR 97214
Main office: 503-223-6418
Cell: 503-890-1683

South Valley Office:
454 Willamette St.
Eugene, OR 97401

www.willametteriverkeeper.org
www.willamettewatertrail.org
www.paddleoregon.org

7/19/2020



Fwd: Butteville Ferry access

1 message

Travis Williams <travis@willametteriverkeeper.org>
Cc: Ben Williams <ben.williams@liturgica.com>

Wed, Jul 15, 2020 at 5:07 PM

Begin forwarded message:

From: Peter and Kathy Keyes <comerkeyes@yahoo.com>
Subject: Butteville Ferry access
Date: July 15, 2020 at 3:37:37 PM PDT
To: travis@willametteriverkeeper.org

Friends of Historic Butteville

What a great idea, a small low impact access to the Willamette River. My canoe 🛶 is excited at the prospect of being able to put in here rather than in Newberg. Perhaps a bit of extra business for the Historic Butteville Store?
Keep up the good work.

Peter and Kathy Keyes
Portland, OR

Willamette Riverkeeper
403 SE Caruthers St., #101
Portland, OR 97214
Main office: 503-223-6418
Cell: 503-890-1683

South Valley Office:
454 Willamette St.
Eugene, OR 97401

www.willametteriverkeeper.org
www.willamettewatertrail.org
www.paddleoregon.org

EXHIBIT 25

ben.williams@liturgica.com

From: Greg Leo <greg@theleocompany.com>
Sent: Monday, July 13, 2020 9:07 AM
To: Ben Williams
Subject: Butteville Landing -Report of Community Watch Activity June 22nd through July 13th - Statement by Greg Leo

Ben:

Please share this statement with the Friends of Historic Butteville Attorney:

For the Record:

My name is Greg Leo, I live at 9318 Champoeg Road NE, 2.5 miles from Butteville Landing. I am the organizer of the Butteville/Champoeg Community Watch, lead on Aurora Next-Door and former a Member of the Marion County Law Enforcement Coordinating Council. I am also an elected Member of the Aurora Fire District # 63, Position Number 5 currently serving as President of the Board of Directors. For full disclosure, I am also Vice President of Friends of Historic Butteville, the sponsor of the Butteville Landing and paddle dock project.

In my neighborhood watch function I provide eyes and ears on my neighborhood and report any suspicious activity to the Marion County Sheriff's office. I have been doing this for approximately 8 years. In this time I have assisted the Sheriff's office in car accidents, helping citizens report burglaries, reported illegal homeless camping and reported suspicious behavior. On several occasions I have assisted property owners remove trespassers by calling the Sheriff and assisting citizens until Deputies arrive. I am very familiar with law enforcement conditions in the Butteville/Champoeg area.

On June 22nd I was advised by a community member that there was vandalism, disruptive behavior and after hours trespassing at the Butteville Landing right of way. During the period of June 22nd through July 13th I personally visited the landing and saw no evidence of the alleged activity reported.

In my role as neighborhood watch coordinator, I contacted the Marion County Sheriff's Office Patrol Supervisor Don Parise and the French Prairie Deputy, Senior Deputy Todd Sphoon to advise them that a community member had advised me that a crowd was expected at the landing on during the weekend of July 3rd through 6th, due to a large fireworks display held by a private citizen in the Butteville Landing gated community.

On Monday July 6th I spoke with Sargent Don Parise who advised me that the Marion County Sheriff's office increased patrol activity at the landing as I had requested, and not seen any evidence or crowds, drinking or disruptive behavior. In checking the area for trash, including inspection of trash cans, it was clear that there were only a few people using the landing right of way during the 4th of July.

One allegation that needs to be addressed is a statement made by the same community member, who is a property owner proximate to the landing that "A Marion County Sheriff's Deputy said: Just wait until the dock comes in, there will be more drinking, vandalism and disruptive behavior after that." In the seven years that I have attended the Marion County Law Enforcement Citizen's Academy, served on the Marion County Sheriff's Advisory Committee and as the North County Representative on the Marion County Law Enforcement Coordination Committee, it is not my experience that a Sheriff's Deputy would make a speculative statement of this type. Our Sheriff's are well trained not to make speculative statements not based in facts or evidence. Therefore this statement has no credibility, and should be considered the opinion of self-interested adjacent property owner.

There has been long standing community conflict between the property owners adjacent to the landing, who do not want to allow public access to the Butteville Landing right of way. I am making this statement because I believe unsubstantiated allegations about vandalism and disruptive behavior are being made to support the closing of the landing to public use. I have not seen facts or evidence that support these allegations.

I am happy to respond to any questions about this matter.

Greg Leo

The Leo Company, LLC

Greg@theleocompany.com

(503) 804-6391

“Recent Incidents at Butteville Landing”

Slide 2 - Alleged IV drug use not substantiated by evidence

- It is not clear that this is drug paraphernalia. These could be insulin needles rather than indicators of drug use. There are no cooking spoons, plastic bindles, or other signs of ‘cooking’ injectable drugs. It is also unlikely that five identical needles would be used by ‘a group’ of drug addicts, who are unlikely to shoot up in such an open public space.
- This could be dumping of home garbage by someone without a sharps container for their diabetic needles at home.
- There is no credible evidence to support allegation of ‘suspicious behavior’; number of persons, age, dress, behavior all missing from this allegation.
- This is at best an unsubstantiated allegation without supportive evidence of drug use.
- Picture of Deputy looking into trash can does not support allegation.

Slide 3 - Alleged Trespassing

- The car and person are both in the public right of way.
- There is no time stamp on the picture to verify alleged time.
- No evidence to support allegation that they were on a private dock.
- Calling the Sheriff does not verify the allegation.
- The only thing clear is that a car is in the public right of way after dark.

Slide 4 - Late Night Disturbance

- Sunset on June 10, 2020 was at 8:59 PDT, so this was not a ‘late night disturbance’, rather it was within 49 minutes of sunset.

Sunday, July 19, 2020

- What evidence was there of drug use, or only an unsubstantiated allegation?
- Were these local teenagers, or someone else?
- The picture of a car at night does not prove anything.
- Who asked them to leave? By what authority was this demand made? What was said by both parties? What 'vulgar language' was used?
- What did the Marion County Sheriffs Deputy find when he/she arrived?
- Did the property owners swear a complaint to the Sheriff, or only make an unsubstantiated allegation of this incident after the fact?

Slide 5 - Gunshots sounds at the Landing

- There are often gun shots sounds, fireworks and other similar noises in the country.
- Sounds travel long distances over water. How do we know that the sounds came from the Landing?
- Is there any evidence of this incident other than this very general allegation.
- How do you know they were drinking alcohol? How do you know they were at the Landing?
- There is no evidence to support this allegation.

Slide 6 - Homeless Felon Committing Crimes at Landing - not specific to the Landing

- This RV is well know in the Champoeg State Park area. It was at the Park for months. After it left the Park, it was seen on several public right of ways in the area. Eventually it burned at the Charbonneau I-5 Exit. This was a derelict RV which was 'run off' parking in several places in the Butteville/Champoeg area.

Sunday, July 19, 2020

- Was there a report filed about the alleged altercation and arrest?
- What was the nature of the trespass which is alleged?
- Was a theft report filed detailing the property taken, time, date place?
- How do you know this was a felon, and not just a homeless person.
- Incidents with this RV are not unique to the landing, after leaving the park, this RV stayed in several locations in the local area.
- What is the name of alleged felon? How do you know his arrest/conviction record?

Slide 7 - Late Night Visitors

- A car parked on the right of way after dark. A violation perhaps, but allegation of frequent occurrences are only allegations.
- The picture is not time and date stamped and proves nothing.

Slide 8 - Confrontation with Angry, Vulgar Trespassers

- There is no photographic evidence to support this allegation.
- Where did the alleged trespass occur? How do we know that they were no in the public right of way?
- How do you know the dog was a pitbull?
- What specific words were said? How can the allegation that one side was 'polite' and the other side 'vulgar' without knowing what specifically was said and how it was spoken.
- This may or may not have happened as alleged, but details seem vague and one-sided. There is not much evidence to support this allegation.

Sunday, July 19, 2020

- The Putnams might consider clearly marking their property lines. There have been previous situations when the Putnams have claimed to own land which was truly part of the public right of way.
- This allegation lacks credibility and is not supported by verifiable evidence.

Sent by email Sept. 15, 2017 to Shay Putnam and Robyn Brandt

Shay (and Robyn);

Thanks for your message. I am fully aware and sensitive to concerns you all may have about the direction the Landing is going, and potential negative impacts. I have to hope you understand we have been working diligently on this for almost a year and a half to assure a positive outcome for all residents of Butteville – including the two immediate property owners.

That said, will there be change? Yes. When we first described the project fifteen months ago it was positioned as a “park-like amenity focused on the Landing’s history and access to the river” and that hasn’t changed.

As to property rights, I’d encourage you to reach out to local residents, because there are two sides to property rights.....like so much else in life. Specifically, it certainly can be interpreted to make the case from the position of the immediately adjacent property owners. I submit it can equally be interpreted to make the case from the position of surrounding property owners.

I say that because you may be aware that a couple of months ago Julie Kraemer sent a letter to Marion County requesting the County vacate the right-of-way. The County does not plan on vacating in as much as the right-of-way has been in the County’s possession since at least the 1901 survey. What was interesting was the number of surrounding property owners in Butteville who wrote the County in opposition to the request to vacate. The common reason was that it is a public right-of-way and provides public access to the river.

Many also cited property rights: that their decision to move to Butteville and purchase of specific property that did not have its own river access was significantly informed by the fact that there was a public right-of-way. Specifically, the case they made was that their property values are in part made by the fact that there is very nearby public river access that does not require them to pay the very high costs of river front property, and that their property value would be negatively impacted if the County vacated and the right-of-way was no longer public.

The extension of that argument is twofold. First, with the very infrequent maintenance the right-of-way now gets, going down to the water is hazardous much of the year. Second, if the right-of-way was enhanced into a “park-like amenity” and properly maintained it would, in fact, enhance the property values of the surrounding residents – in addition to improving the community at large.

Underlying all of this is the fact that it is a public right-of-way owned by the County, and they have decided it is in the best interests of all citizens and especially Butteville residents, to improve the right-of-way. There is no way we, or the County can “guarantee” there will be no negative consequences. Yesterday we discovered that the top 30 feet of the big cottonwood at the bottom was broken out and down from last year’s wind storm! So much of life can’t be guaranteed against.

That said, this project is a partnership between the County and Friends of Historic Butteville, and we are being responsible, diligent, deliberate and transparent in how we proceed, and hopefully you’ll agree (or come to see) that we are taking all impacts and benefits into account.



FW: Two things re: Schuler Road and Butteville Landing

1 message

July 12 email from John Mullen, Champoege Park Manager

From: MULLEN John * OPRD
Sent: Sunday, July 12, 2020 4:40 PM
To: ben.williams@liturgica.com; Brian Nicholas <BNicholas@co.marion.or.us>
Subject: RE: Two things re: Schuler Road and Butteville Landing

Ben,

Thanks for sending over info. Regarding Item 1: hopefully transfer will wrap up pretty soon on Schuler Road. Our Lands staff called recently to make sure we will provide access for the neighbors that use Schuler to get to their property and I assured that we would – we'll put together some sort of access agreement. But, as you know, once on Butteville Road, bicyclist are on county road. When we go to pave, I can have project lead paint arrows to indicate bicyclist turn onto curbed separated shoulder. But I think the county would have to do any painting of "Bike Lane" on that separated curbed Butteville Road section.

Regarding Item 2: Sorry for Mo in described instance. I stopped in their twice yesterday, once in Ranger truck and uniform, once in personal. When in truck, I always park truck at Butteville Store and walk over. Very peaceful and nice. First time a young man was reading a book on lower bench, two couples were hanging out enjoying the space, and a father with 3 kids asked about fishing. Later that day stopped by and a family was enjoying the lower picnic table and a couple were taking in the view of the river.

I continue to stop by when I can. I have yet to find any nefarious activity. Sure is a nice looking right-of-way!

P.S.: I pulled a couple of weeds too!

Thanks!

John Mullen, Park Manager
Oregon Parks and Recreation Department

Champoege Management Unit
7679 Champoege Road NE

7/20/2020

Gmail - FW: Two things re: Schuler Road and Butteville Landing

St. Paul, Oregon 97137

(503) 678-1251 Ext 230

John.Mullen@oregon.gov

Cell: (503) 970-8545



From: ben.williams@liturgica.com <ben.williams@liturgica.com>

Sent: Sunday, July 12, 2020 3:25 PM

To: Brian Nicholas <BNicholas@co.marion.or.us>; MULLEN John * OPRD <John.Mullen@oregon.gov>

Subject: Fwd: Two things re: Schuler Road and Butteville Landing

Brian and John;

I'm sending this to both of you since you're working together on the Schuler Road transfer (Item 1 below) and communicating on the Landing (item 2 below). Mo is Maureen Zwicker, FOHB Board member and lives 300 feet from the Landing.

Ben Williams

Begin forwarded message:

From: mo.zwicker@gmail.com

Date: July 10, 2020 at 6:56:10 PM PDT

To: Ben.williams@liturgica.com

Subject: Two things:

1. A new item to put before the board: Safety and the bike trail that leads from Schuler to the store. We watch people ride in the road all the time, stopping traffic as they wind around the curve, in both directions. Most of the time, it's the distance riders. But with summer upon us again, it's very often little people who are riding alone (families are camping at the park), or little people with well-meaning parents, teaching their kids to ride "with" the traffic. Unfortunately, those little people are very unsure of themselves and unstable on their bikes. I've watched several groups of little people, almost killed over the last several months.
 - a. My request is to find out if we can get authorization to paint yellow "bike" trail signs on the path leading both from the store and from Schuler, to indicate that the trail is meant for bikes. It's just a matter of time before someone gets seriously hurt. Our traffic is so much heavier now, and people do not always slow to the posted 25 mile an hour speed.
2. I walked Captain to the landing earlier today. I was being watched. It was so creepy. We made it down to the lowest grassy level when I saw Julie moving about like a cat to hide behind a tree. She

7/20/2020

Gmail - FW: Two things re: Schuler Road and Butteville Landing

was holding a rake and pretending to peer out at the river. But she was watching every move we made. I purposely hung out for a little while longer. Then, when I was leaving, I had just made it to the top of the landing when the Putnam lady pulled on the road in her Porsche. She stopped her car and watched me until I was fully out by the mailboxes. Have to tell you, its pretty sad. I know I wasn't imagining things, I was definitely being watched. But unfortunately for them, I pulled a couple weeds that I deposited in the garbage cans, and went on my way, with nothing for them to report.

Thanks for taking the first request forward, and for letting me let off a little petty steam. I feel better. 🤔

Mo

FYI, I have had the same thing happen twice when I was there weeding (Putman son shadowing me) and last week Shay Putnam sitting at the top of the Landing watching me work. Mo was weeding in late May and the Putnam kids were verbally harassing her (Go Away, Go Away!) through their fence.

I share this just so you know they are already acting like they've won the appeal and the County has vacated the Landing in their favor.

Let me know your thoughts on the traffic safety matter - another element could be extending the guard rail to Schuler, as well as signage or road markings.

All the best

Ben

EXHIBIT 28

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

ROBERT SMALLEY and DONNA SMALLEY,
Petitioners,

vs.

BENTON COUNTY,
Respondent.

LUBA No. 2014-110

FINAL OPINION
AND ORDER

Appeal from Benton County.

Michael E. Farthing, Eugene, filed the petition for review and argued on behalf of petitioners.

Vance M. Croney, County Counsel, Corvallis, filed the response brief and argued on behalf of respondent.

BASSHAM, Board Member; HOLSTUN, Board Member, participated in the decision.

RYAN, Board Chair, did not participate in the decision.

AFFIRMED

03/17/2015

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a board of commissioners' decision concluding that petitioners' event facility on land zoned for exclusive farm use (EFU) does not constitute "on-site filming" allowed on EFU land under ORS 215.306.

FACTS

The subject property is a 70-acre, EFU-zoned parcel developed with a single-family dwelling and outbuildings. Most of the parcel is cultivated, except for a wooded creek that runs through the middle of the parcel.

Since 2003, petitioners have operated the "Whisper-n-Oaks Outdoor Wedding and Event Center" on the subject property. The Center's website describes it as "an outdoor facility available to host your event," accommodating up to 500 people, with a number of amenities, including a 900-square foot covered area, a dance floor, tables and chairs, large wooden gazebo, two large dressing rooms, table décor, and guest parking. Record 14.¹

¹ The county's decision further describes the activities that occur during events:

"The use that has been occurring for the past several years on this property has been described by the property owners (for example, on their website) as a 'wedding and event center.' The applicant in his submittal refers to it as an 'on-site filming and event facility.' Regardless of what the facility is named, the facility has been operated and, with no evidence submitted to the contrary, would continue to operate as follows: a member of the public rents the venue—most typically for a wedding, but potentially for a class reunion, family reunion, party or other event—and invites up to 500 people to attend. In the example of a wedding, any or all of the following activities occur at the facility: wedding ceremony, reception, catered meals, music, dancing. Other (non-

1 On August 1, 2013, prompted by a complaint, the county contacted
2 petitioners to advise them that their wedding and event facility is not an
3 allowed use on EFU lands.

4 On June 20, 2014, after considerable back and forth, petitioners applied
5 to the county requesting a determination that petitioners' facility, which the
6 application describes as a "film and event production facility," qualifies as "on-
7 site filming" and therefore constitutes a permitted use in the EFU zone under
8 ORS 215.306(3)(a). ORS 215.306(3)(a) provides that "[o]n-site filming and
9 activities accessory to on-site filming may be conducted in any area" zoned
10 EFU without prior approval of the county, with some limitations.² Petitioners

wedding) events held at the facility likely include similar activities. Apparently it is typical that portions or all of the event are video recorded to memorialize the event for the participants. This recording is performed by either a professional hired by the party renting the facility, or by one or more non-professionals associated with the event. There is no evidence that video recording has necessarily been an element of all events in the past, nor that it would be in the future.

"The Board notes that the website for 'Whisper-n-Oaks' makes no mention of filming, or any form of video recording, as of November 13, 2013, and July 16, 2014." Record 16 (footnotes omitted).

² ORS 215.306(3) provides:

"(a) On-site filming and activities accessory to on-site filming may be conducted in any area zoned for exclusive farm use without prior approval of local government but subject to ORS 30.930 to 30.947.

"(b) Notwithstanding paragraph (a) of this subsection, on-site filming and activities accessory to on-site filming that exceed 45 days on any site within a one-year period or

1 argued to the county that weddings and other events at their facility qualify as
2 “on-site filming,” because the events are typically videotaped by the
3 participants.

4 ORS 215.306(3)(a) and (b) distinguish between two types of “on-site
5 filming”: (1) filming that lasts less than 45 days and requires no county land
6 use approval, and (2) filming that exceeds 45 days and requires county land use
7 approval, subject to standards at ORS 215.296. *See* n 2. ORS 215.306(4)
8 describes what is and is not included in the scope of “on-site filming and
9 activities accessory to on-site filming.”³ Among the qualifying activities is the

involve erection of sets that would remain in place for longer than 45 days may be conducted only upon approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296. In addition to other activities described in subsection (4) of this section, these activities may include office administrative functions such as payroll and scheduling, and the use of campers, truck trailers or similar temporary facilities. Temporary facilities may be used as temporary housing for security personnel.”

³ ORS 215.306(4) provides:

“For purposes of this section, ‘on-site filming and activities accessory to on-site filming’:

“(a) Includes:

“(A) Filming and site preparation, construction of sets, staging, makeup and support services customarily provided for on-site filming.

“(B) Production of advertisements, documentaries, feature film, television services and other film productions that rely on the rural qualities of an exclusive farm use zone in more than an incidental way.

1 production of “documentaries” that rely on the rural qualities of an exclusive
2 farm use zone in more than an incidental way. *See* n 3. As discussed below,
3 petitioners argued to the county that videotaping a wedding or similar event on
4 the property constitutes the “production” of a “documentary” within the
5 meaning of ORS 215.306(4)(a)(B).

6 ORS 215.306(1) provides that the limitations on uses of EFU-zoned land
7 set out in several ORS chapter 215 sections, and any limitations adopted by the
8 Land Conservation and Development Commission (LCDC) pursuant to ORS
9 197.040, do not apply to “on-site filming” activities authorized by ORS
10 215.306.⁴ Finally, ORS 215.306(5) provides that any county permit approvals
11 that may be necessary for activities allowed under ORS 215.306(3)(a) are not
12 land use decisions.⁵

“(b) Does not include:

“(A) Facilities for marketing, editing and other such
activities that are allowed only as a home occupation;
or

“(B) Construction of new structures that requires a
building permit.”

⁴ ORS 215.306(1) provides:

“The limitations on uses made of land in exclusive farm use zones
described in ORS 215.213, 215.283, 215.284 and 215.700 to
215.780 and limitations imposed by or adopted pursuant to ORS
197.040 do not apply to activities described in this section.”

⁵ ORS 215.306(5) provides:

“A decision of local government issuing any permits necessary for
activities under subsection (3)(a) of this section is not a land use
decision.”

1 In the present case, the county planning official issued a decision on
2 petitioners' request for an interpretation, concluding that petitioner's facility
3 does not qualify as "on-site filming and activities accessory to on-site filming."
4 Petitioners appealed that decision to the county planning commission, which
5 conducted a hearing and issued a decision reaching the same conclusion.
6 Petitioners appealed the planning commission decision to the county board of
7 commissioners, who conducted a hearing and, on December 2, 2014, issued its
8 decision upholding the planning official's interpretation.

9 This appeal followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 In three sub-assignments of error, petitioners challenge the county's
12 conclusion that their event facility does not qualify as "on-site filming and
13 activities accessory to on-site filming" that ORS 215.306 allows as a permitted
14 use in the EFU zone under ORS 215.306(3)(a).

15 Reduced to essentials, petitioners' position to the county below and to
16 LUBA on appeal is that the scope of "on-site filming," as that term is used in
17 ORS 215.306(3)(a), includes the videotaping of weddings and similar events
18 that occur at petitioners' event facility. According to petitioners, the event
19 facility is a permitted use in the EFU zone, because the digital video-recordings
20 of events held on the property constitute the "filming" and "production" of
21 "documentaries" as those terms as used in ORS 215.306, and because the
22 events rely "on the rural qualities of an exclusive farm use zone in more than an
23 incidental way." *See* n 3. For the following reasons, we agree with the county
24 that petitioners' position is inconsistent with the text, context and legislative
25 history of ORS 215.306.

1 The meaning and scope of the terms of ORS 215.306 is a matter of
2 statutory interpretation, determined by examination of the text, context, and
3 available legislative history. *See PGE v. Bureau of Labor and Industries*, 317
4 Or 606, 610-612, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or
5 160, 172, 206 P3d 1042 (2009) (to determine legislative intent, a court first
6 examines a statute's text and context, and may consider legislative history to
7 the extent it deems appropriate. If the legislature's intent is still unclear, the
8 court may resort to general maxims of statutory construction).

9 The statute does not define the key terms "filming," "production" and
10 "documentary." In the county's decision, the county initially noted that ORS
11 215.306 was adopted in 1995, at a time when digital recording devices did not
12 exist, and the term "filming" was typically understood, based on then-current
13 dictionary definitions, to mean the act of making a motion picture or similar
14 connected narrative, using the medium of celluloid film. The county's decision
15 acknowledges that technology changes, and that the term "filming" today could
16 be understood to encompass use of modern digital cameras to perform the
17 equivalent function to "filming" as that term was understood in 1995. Record
18 17. However, the county noted that "filming" as used in ORS 215.306 requires
19 "production," which the county understood to suggest an "involved and
20 substantial undertaking, not the mere recording of an event through
21 commonplace technology." *Id.* The county ultimately concluded that

22 "the video recording the applicant describes is not 'filming' as
23 authorized by ORS 215.306. The use the applicant is proposing is
24 more appropriately termed 'events and the recording of those
25 events.' That is a different use from production of a film." *Id.*

1 Secondly, the county concluded that as used in ORS 215.306, “filming”
2 and “production” of a film must be the primary use proposed, not an incidental
3 part of a different primary use. According to the county,

4 “A wedding (or similar event) is not ‘filming.’ Neither is a
5 wedding ‘accessory to filming.’ In fact, the reverse is true: the
6 recording of a wedding is accessory to the wedding. The purpose
7 of the event is to hold the event, not to create a film. Because the
8 events are neither filming nor accessory to filming, neither the
9 events nor the facility for such events is authorized by this statute.

10 “To expand on the Board’s reasoning, the recording of events is
11 incidental to the primary purpose of the facility, which is to host
12 events. Even if the video recording were allowed outright or
13 unregulated, the event facility needs to be authorized on its own
14 merits. A use is not suddenly allowable on EFU land simply by
15 virtue of being recorded on a digital device. By the applicant’s
16 logic, a hunting preserve, a golf course, a mass gathering, or any
17 number of other uses that are either limited or prohibited on EFU
18 land would become permissible without review, provided the
19 activities were video recorded. Filming could be as minimal as
20 one of the participants recording video on a smart-phone. This is
21 inconsistent with the concept of ‘filming’ laid out in the statute in
22 1995, and is inconsistent with the policy of protecting the
23 agricultural land base as laid out in statute and statewide planning
24 goals. The letter from the Department of Land Conservation and
25 Development, in the record, amplifies on these points.” Record
26 17-18.

27 Petitioners challenge the foregoing findings, arguing first that restricting
28 the scope of “filming” and “production” of films to exclude videotaping of
29 weddings and other events reads limitations into the statute that the legislature
30 omitted. According to petitioners, videotaping a wedding or similar event
31 constitutes the production of a “documentary” of a real-life event for posterity,
32 and therefore falls within the description of “on-site filming” at ORS
33 215.306(4)(a). Petitioners contend that the county improperly attempts to

1 separate the event being filmed, a wedding for example, from the filming itself.
2 Petitioners argue that nothing in the statute requires that the event being filmed
3 must be a use independently authorized in the EFU zone, or that the filming
4 itself must be the primary use of EFU land. On that point, petitioners argue
5 that a wedding or similar event and the filming of that event constitute a single
6 unified use: the production of a documentary about the event. And production
7 of such a documentary meets the only express limitation set out in the statute,
8 petitioners argue, because such a documentary relies “on the rural qualities of
9 an exclusive farm use zone in more than an incidental way.”

10 Petitioners’ extremely broad reading of ORS 215.306 is not consistent
11 with the statutory text, read as a whole, and what we understand to be the
12 legislative intent of the statute. ORS 215.306(3) authorizes in an EFU zone
13 “on-site filming and activities accessory to on-site filming[.]” The inclusion of
14 activities “accessory to on-site filming” makes it clear that “on-site filming”
15 itself must be the primary use. Filming that is incidental to a primary use of the
16 property cannot legitimize that primary use, if it is otherwise not allowed in the
17 EFU zone, and such incidental filming cannot bring that primary use within the
18 scope of “on-site filming.”⁶

⁶ A hypothetical may serve to illustrate the distinction. In the first instance, imagine that a film company wishes to make a film of William Shakespeare’s *As You Like It*, and to use the woods on petitioners’ farm to film scenes in the Forest of Arden. There is no possible dispute that such filming would constitute “on-site filming.” In the second instance, imagine that a Shakespearean play company wishes to perform *As You Like It* on the same location, with a public audience, as part of a Shakespeare in the Park series. That an audience member videotapes the play performance on a smart-phone does not render the use of EFU land “on-site filming.” Even if the play company videotapes the performance for archival or study purposes, such

1 With respect to petitioners' event facility, hosting the weddings and
2 other events at the facility is the main, indeed the only, purpose of the facility;
3 the videotaping of those events, if videotaping happens to occur, is at most an
4 incidental part of the events. As the findings note, the description of the
5 facility on petitioners' website does not mention filming or videotaping events.
6 Further, as the county notes, petitioner Donna Smalley testified that "most
7 customers do film but it isn't required." Record 130. An event that may or
8 may not involve videotaping, depending on the whims of the event participants,
9 does not constitute "on-site filming," because any videotaping that occurs is
10 not the *primary* use of EFU land, but at best only an incidental part of the
11 event. Even if the facts were that petitioners' facility *required* the videotaping
12 of weddings and other events, we agree with the county that such events would
13 still not qualify as "on-site filming," because it is the events themselves, not the
14 recording of them, which would be the principal use of EFU land.

15 The foregoing view is consistent with other terms in the statute. ORS
16 215.306(4)(B) provides for the "production" of films that "rely on the rural
17 qualities of an exclusive farm use zone in more than an incidental way."
18 Notably, it is the *production* of the *film* itself that must rely on the rural
19 qualities of the EFU zone in an essential way; that petitioners' customers are
20 attracted to the rural qualities of the property as a beautiful site to conduct their
21 wedding or event is not the question. There must be some non-incidental
22 reason why the film itself must be produced on EFU-zoned land.

videotaping would not render the activity "on-site filming." That is because in that circumstance the "play's the thing," *i.e.* the primary use, not the videotape recording of the play, which is merely incidental.

1 In addition, the list of activities at ORS 215.306(4)(b) that constitute
2 “on-site filming,” *i.e.*, the production of “advertisements, documentaries,
3 feature film, television services and other film productions,” suggest that
4 “filming” refers to production of films and television for broadcast or
5 distribution to the public in some manner, not private home videos that simply
6 memorialize personal events of interest only to the participants. Given that
7 context for the term “documentary,” we disagree with petitioners that
8 videotaping a wedding or similar private event constitutes the production of a
9 “documentary” within the meaning of ORS 215.306(4)(a).

10 Petitioners’ textual and contextual arguments to the contrary are not
11 persuasive. Petitioners cite to ORS 215.306(1), which provides that the
12 limitations on uses allowed in the EFU zone set out in several statutes do not
13 apply to activities described under ORS 215.306. *See* n 4. We understand
14 petitioners to argue that ORS 215.306(1) is evidence that the legislature
15 intended “on-site filming” to have a broad scope, restricted only by the
16 limitations in ORS 215.306 itself. However, ORS 215.306(1) simply clarifies
17 that the standards or restrictions that apply to other non-farm uses authorized
18 by other statutory provisions and implementing rules do not apply to “on-site
19 filming” as that use is described and limited in ORS 215.306(4). ORS
20 215.306(1) provides no particular insight into the scope of what constitutes
21 “on-site filming.” That question is answered most directly by ORS 215.306(4).
22 As explained above, the text and context of ORS 215.306(4) do not support
23 petitioners’ expansive interpretation of the scope of “on-site filming.”

24 Although the parties do not cite to any legislative history of ORS
25 215.306, the legislative history available to us also provides no support for
26 petitioners’ interpretation. ORS 215.306 was adopted in 1995 as SB 1049, and

1 was proposed and drafted by Deschutes County, following that county's
2 experience with a film company that wanted to film a television series on an
3 EFU-zoned parcel that included a scenic log cabin. *See* testimony of George
4 Read, Deschutes County Community Director, before the Senate Water and
5 Land Use Committee, April 13, 1995. The county sought to clarify the status
6 of permitted filmmaking activities on farm land, which it characterized as
7 "temporal" and "limited to those filming activities that require the often scenic,
8 rural setting afforded by the EFU zones." *Id.* at 2. As far as we can tell,
9 nothing in the available legislative history suggests that the proponents of the
10 bill or the legislature contemplated that SB 1049 would authorize wedding
11 event facilities or any similar uses, in the guise of "on-site filming."

12 In sum, the text, context and legislative history of ORS 215.306 do not
13 support petitioners' expansive interpretation of that statute, and petitioners
14 accordingly have not demonstrated that the county erred in concluding that
15 petitioners' event facility does not fall within the scope of "on-site filming"
16 authorized under ORS 215.306.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 Under the second assignment of error, petitioners contend that the
20 county, in rejecting petitioners' argument that their event facility qualified as a
21 permitted use under ORS 215.306(3)(a), violated Benton County Code (BCC
22 53.110, which provides in relevant part that "the County may not impose
23 additional criteria or condition of approval upon a permitted use."⁷ Petitioners

⁷ BCC 53.110 provides:

1 argue that by interpreting the scope of “on-site filming” to exclude petitioners’
2 event facility, the county effectively imposed “additional criteria or conditions
3 of approval upon a permitted use.”

4 However, we have affirmed the county’s conclusion that petitioners’
5 event facility does not qualify as a “permitted use” allowed under ORS
6 215.306(3)(a), so BCC 53.110 has no possible applicability in the present case.
7 In addition, the county’s decision simply interprets ORS 215.306 to answer the
8 question posed by petitioners’ request for an interpretation regarding the scope
9 of “on-site filming.” We do not understand how such an interpretation, even if
10 incorrect, could possibly impose “additional criteria or conditions of approval
11 upon a permitted use” within the meaning of BCC 53.110.

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 The final two paragraphs of the county’s decision appear to suggest that
15 petitioners’ event facility should not be viewed as a permitted use allowed
16 without review under ORS 215.306(3)(a), but rather as a conditional use
17 subject to county review and approval.⁸ The first paragraph discusses the

“In general, permitted uses are allowed to be established in a zone without review. Some permitted uses are regulated by a review process, but approval such uses is based upon clear and objective standards. Unless specifically authorized by this code, the County may not impose additional criteria or conditions of approval upon a permitted use.”

⁸ The county’s findings state, in relevant part:

“* * * The introduction into farmland of commercial activities unrelated to agriculture creates a variety of likely conflicts. The wedding season and the farming season overlap. The commercial

1 potential for conflicts with farm uses created by the overlap between the
2 wedding season and the farming season, and argue that such conflicts
3 demonstrate that the event facility should not be allowed without county
4 review. The second paragraph argues that the event facility's operations as a
5 whole, including marketing, scheduling and other administrative functions,
6 exceed 45 days and for that reason alone cannot qualify as a permitted use
7 under ORS 215.306(3)(a). We understand the county to have concluded that, to
8 the extent petitioners' event facility or some portions of it *could* qualify as "on-
9 site filming," the event facility as a whole could only be approved as a
10 conditional use, pursuant to ORS 215.306(3)(b), because the operations of that
11 facility exceed 45 days and could create conflicts that should be reviewed to
12 protect farm uses.

host of an event has a financial interest in ensuring that typical elements related to farming do not occur in a way that affects the event—for example: noise, dust, odors, spraying, irrigation, moving farm machinery on roadways. The primary purpose of the EFU zone is to preserve lands for agricultural production. Allowing events to occur in farmland without oversight would likely lead to increased conflicts and would be inconsistent with the purpose of the EFU zone. The complaint that prompted Benton County to investigate Whisper-n-Oaks facility identified such conflicts as a reason for the complaint.

The Board also notes that ORS 215.306(3)(b) and (4) appear to distinguish between on-site filming and accessory activities that do not exceed 45 days. In the case of an event facility, facilities involved in the marketing, scheduling and other administrative functions are part of the operation. Pursuant to the statute, these are allowed only through review pursuant to ORS 215.296 (which in Benton County entails review as a Conditional Use)." Record 18.

1 Under the third sub-assignment of error to the first assignment of error,
2 and under this third assignment of error, petitioners challenge the findings
3 quoted at note 8. Petitioners dispute that the events held at the facility have or
4 are likely to cause conflicts with agricultural operations. Other than the
5 complaint filed with the county that led to the county's enforcement action,
6 petitioners argue that there is no evidence of conflicts with farm uses created
7 during the 12 years the event facility has operated. To the extent there are
8 conflicts, petitioners argue, the legislature has chosen to allow on-site filming
9 that does not exceed 45 days as a permitted use without county review or any
10 evaluation for conflicts.

11 With respect to the 45-day period, petitioners argue that the county erred
12 in suggesting that petitioners' facility operates beyond the 45-day maximum
13 allowed for a permitted use, but notes that the "issue was never explored in
14 detail because of the County's position that the film production event facility
15 was not allowed in the EFU zone." Petition for Review 20. Petitioners state
16 that they "would welcome a remand on this issue in order to work with the
17 County about each years' time period for conducting the 'on-site filming' use."
18 *Id.*

19 As noted above, ORS 215.306(3)(a) and (b) distinguish between "on-site
20 filming" that lasts 45 days or less and that does not require county review, and
21 "on-site filming" that exceeds 45 days in duration and that does require county
22 review. We understand the county to have rejected petitioners' premise that the
23 use under consideration consists only of the individual events themselves,
24 which last only one day, and that determining the status of petitioners' event
25 facility requires evaluation of the event facility viewed as a whole.

1 It is reasonably clear from the limitations in ORS 215.306(3) and (4) that
2 the legislature contemplated that “on-site filming” would constitute a use of
3 temporal or non-permanent duration. In contrast, petitioners operate an
4 apparently permanent commercial enterprise to host weddings and other events.
5 While the individual events may last only one day, the enterprise as a whole,
6 including all events, marketing, scheduling, *etc.*, operates over a time span that
7 is significantly greater than 45 days and appears to be an on-going enterprise
8 that so far has lasted 12 years, with no end in sight. In our view, the
9 continuous and apparently permanent nature of petitioners’ event facility
10 demonstrate even more clearly that the event facility does not fall within the
11 scope of “on-site filming” as that term is used in ORS 215.306.

12 Given that conclusion, petitioners’ challenges to the county’s findings
13 quoted at note 8 do not provide a basis for reversal or remand.

14 The third assignment of error is denied.

15 The county’s decision is affirmed.