

February 28, 2024

VIA HAND DELIVERY

Marion County Board of Commissioners
c/o Brandon Reich, Planning Director
PO Box 14500
Salem, OR 97309
Email: breich@co.marion.or.us

Re: Floodplain/Greenway Application No. 23-010

Dear Commissioners:

Thank you for hosting the land use hearing on the referenced application. We represent Friends of Historic Butteville, and provide this response to the appeal by the project opponents. Please include this letter and the exhibits in the record, and send us a copy of the land use decision.

To recap the history, the Butteville Landing dock and gangway were first approved by the county, but that approval was appealed to LUBA by the project opponents. In August, 2021, LUBA remanded the approval regarding flood level engineering details and the authority to sign the land use application. The county revised its zoning code to clarify authority to sign the land use application in March, 2023, and this new application was submitted with revised engineering information shortly thereafter. The Hearings Officer correctly approved this application by written order dated November 9, 2023.

As described in more detail below, the opponents' submittal makes numerous legal conclusions about events that are not directly related to the application at issue. In so doing, it represents an unlawful collateral attack on prior county actions. Additional information regarding those prior actions is provided to help clarify the history, including the history of the opponents' participation in prior, completed permit proceedings which they now seek to reopen.

The hearings officer adroitly asked the staff planner Lindsey King about the scope of this application at the hearing, and Ms. King correctly responded.

"Hearings Officer: Ok, Ms. King is there any guidance and maybe Ms. Bricker will do that too, and maybe post-submission, I'm feeling like there's questions about the increase impact from the dock specifically from where we are right now. Is that the criteria I look at? Because obviously there's been a huge impact since the store operations it sounds like to me.

Lindsey King: So, what you're going to want to look at is based on the specific criteria in the Greenway and Floodplain codes with relation to only the dock and gangway, not the store, not the, you know, the parking on the side of the public right-of-ways, things like that. It would just be for the dock and gangway cause that's what specifically what this application is for. Although, it may be you know, an influencing factor in other things like traffic in the neighboring streets, or the parking areas and things like that, uhm, but the criteria specifically based on only the gangway and dock.

The application is for, as we say, for the gangway and dock, not for a public park, this is a public right-of-way to allow for public access to the Willamette River and that access can be either a crosswalk, it can be a road, it can be a trolley car, it's a public access."

In short, the opponents argue about many things that do not pertain to the approval criteria for the proposed dock and gangway. The Board of Commissioners must remain focused on the actual application under review, and the criteria which apply to that application. The opponents' arguments about prior construction in years past, and other neighborhood activities like the Butteville Store, simply are not relevant. With that introduction, the specific appeal issues are now addressed.

1. The property litigation does not supersede this land use application.

The opponents have sued Marion County in circuit court, and essentially argue the public right-of-way that was created in the plat of St. Alexcie in 1871 does not allow the County to construct a gangway and dock within the right-of-way for public access to the Willamette River. They insist this land use application must be postponed until the litigation is complete. However, the Hearings Officer correctly concluded that the litigation has not resulted in any ruling that indicates the County lacks authority over the public right-of-way, or lacks the right to construct public improvements to aid the public in traveling to and from the Willamette River. In short, the opponents assume they have won the litigation, but that has not occurred.

The Hearings Officer's conclusion is consistent with LUBA's view, which also rejected the same argument presented by the opponents in this case. An applicant is not required to "win a quiet title action in circuit court as a condition precedent to filing the application, simply because another party disputes the applicant's title[.]" *Van Dyke v. Yamhill County*, 78 Or LUBA 530, 546 (2018).

In addition, the opponents neglect that Marion County, as a political subdivision of the State of Oregon, is obligated under federal law to preserve access to the Willamette River by the Oregon Admissions Act. Since the 1800's, this segment of Butte Street has been used for public access to the Willamette River, a navigable waterway. When Oregon was admitted to the Union, Section 2 of the Admission Act specified that the Willamette River was a common highway and open to all

Oregonians.¹ Butte Street and Butteville Landing at the terminus thereof provide public access to the navigable river. The opponents want to close that public road access. Marion County is the public road authority that manages the Butte Street right-of-way for the public pursuant to ORS 810.010 and 810.030, which is implemented through Title 11 of the Marion County Code. The opponents ignore all these authorities, and their arguments therefore fail.

The Hearings Officer's decision correctly evaluates the opponents argument, and explains why the argument does not support denial of the application, in two succinct paragraphs.

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

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

That finding is correct and the opponents present no evidence to support their argument that the County lacks authority over the right-of-way, nor any law to support their argument that the pending court case means the County lacks authority to process and approve this land use application.

¹ “2. Concurrent Jurisdiction on Columbia & Other Rivers--Navigable Waters to be Common Highways
The said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States, without any tax, duty & impost, or toll thereof.”

2. The opponents had adequate notice.

The opponents complain that they did not receive adequate notice, and that the staff report was not available seven days before the Hearings Officer hearing. The record demonstrates that the opponents were informed about the application and the Hearings Officer hearing, which they attended and participated in, with the assistance of counsel.

Because this application is now on appeal, the opponents have a second opportunity to present their arguments to the County, and any procedural defects which occurred earlier in this proceeding are no longer relevant. Therefore, even if there were notice mishaps earlier, this would be harmless error. See *Lord v. City of Oregon City*, 43 Or LUBA 361, 370 (2002) (defective notice regarding the planning commission did not prejudice petitioner's right to a full and fair hearing at the city council). In this appeal, the opponents fail to articulate any reason why what occurred during the Hearings Officer stage of this application adversely affects their ability to receive a full and fair hearing during this appeal to the Board of Commissioners.

3. The Hearings Officer's decision correctly found the application satisfies the applicable criteria.

The appeal takes issue with various statements in the Hearings Officer's decision regarding the applicant's burden of proof. It makes a variety of conclusory allegations, without ever identifying a particular criterion that the application does not satisfy. The application is supported by voluminous engineering information, and favorable comments from numerous public agencies. None of this expert evidence is directly challenged by competing expert testimony.

Nor does the appeal identify any portion of the Hearings Officer's decision that shifts the burden of proof to the opponents by requiring them to disprove that an application criterion is not satisfied. Because the appeal does not specifically identify any approval criterion for which the burden of proof is not satisfied, this appeal issue lacks merit.

4. Marion County is the road authority for the public right-of-way at issue, which allows the County to approve the installation of improvements for the travelling public to access the Willamette River.

The opponents insist that Marion County "did not have a valid right-of-way." The opponents present no evidence in support of this contention, only argument. The plat of St. Alexcie is in the record for all to see. This segment of the Butte Street right-of-way was dedicated in 1871, along with all the other streets in Butteville that are illustrated on the same plat. In effect, the opponents argue there are no public roads in Butteville. That is clearly wrong. The opponents cite various contemporary sources which attempt to cast some doubt on the origin of the plat. But the plat has been accepted and undisputed since 1871. The time to challenge that plat is long past.

The dedication of right-of-way traditionally reserves the fee interest to abutting property owners. That does not give those owners a veto power over public improvements in the right-of-way that are constructed for the purpose of public access over and across the right-of-way.

The opponents' first erroneous legal conclusion is that they own the real property that is the subject of the application. The subject property has been public right-of-way since 1871 when the plat of St. Alexie was recorded. The opponents provide no evidence that the plat is invalid, or that this segment of right-of-way was ever vacated. Consider the consequence of the opponents' argument, which effectively is that any neighbor could stop any development application and project by simply filing a complaint in the Circuit Court to allege a property dispute, such as a boundary line encroachment. The pending litigation has no bearing on this land use application.

The pertinent statute is ORS 215.416(1), which provides:

“When required or authorized by the ordinances, rules and regulations of a county, an owner of land may apply in writing to such persons as the governing body designates, for a permit, in the manner prescribed by the governing body.”

This application was duly submitted as prescribed by the county's governing body in the rural zoning code. The opponents do not allege otherwise. Instead, they argue that the county should not approve the application until the circuit court “determines that it may lawfully do so.” The circuit court has no jurisdiction over, and does not decide, land use applications. The county decides, under its exclusive authority in ORS 215.416(8)(a):

“Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.”

Moreover, the opponents understood Marion County's authority over this right-of-way in 2009, when the county Sheriff and Public Works Director wrote to them on February 3, 2009 detailing “historical facts and documented allegations.” The allegations against the opponents include disposal of yard debris “in an attempt to interfere with the public's use of the trail to the river.” Then they were instructed by the county counsel on April 24, 2009 to remove encroachments and cease “confronting individuals who, with the County's approval, provide ongoing volunteer service to maintain the public access.” Said plainly, opponents have been harassing volunteers and obstructing access to the river since 2009. In addition, they attempted, unsuccessfully, to vacate the right-of-way in 2017. The argument that opponents own this right-of-way is wrong and contradicted by their own prior actions.

There are public parking spaces in the Butte Street right-of-way. The opponents contend public parking in this public right-of-way is not allowed because the right-of-way is intended only for ingress and egress for adjacent property owners, as if the public right-of-way was merely a private driveway. That Marion County Public Works classifies this road segment as local access does not mean that other common uses of the right-of-way are prohibited. This argument misconstrues the purpose of public right-of-way generally, and in particular, the purpose of this segment of Butte Street.

Since the 1800's, this segment of Butte Street has been used for public access to the Willamette River, a navigable waterway. Butte Street and Butteville Landing at the terminus thereof provide public access to the navigable river, which the opponents want to close. Marion County is the public road authority that manages the Butte Street right-of-way for the public pursuant to ORS 810.010 and 810.030, which is implemented through Title 11 of the Marion County Code. The opponents ignore all these authorities, and their arguments therefore fail.

5. The previous improvements to the Butte St. right-of-way were lawfully completed.

The opponents' fifth appeal issue is that the prior improvements to the public right-of-way completed in 2017 were not properly permitted. The opponents previously concluded that the exemptions from the floodplain and greenway permit requirements do not apply. Those conclusions are wrong. MCC 17.178.040(A)(2) exempts "streets, driveways, parking lots and other open space use areas where no alteration of topography will occur" from a floodplain permit. Here, the prior road surface was cleared and a new, ADA-compliant paved access road for emergency vehicle access was provided, without a material change to the topography.

The opponents also complain about signs. MCC 17.178.040(A)(1) and 17.179.030(C) exempt signs to serve the public. Clearly the signs installed are to serve the public and the opponents do not contend otherwise. MCC 17.179.030(D) exempts "Activities to protect, conserve, enhance and maintain public recreational, scenic, historical and natural uses of public lands, except that a substantial increase in the level of development of existing public recreational, scenic, historical or natural uses on public lands shall require review as provided by this chapter."

The Butteville Landing is a historic site which has experienced greater and lesser use over the more than century since it was most active. The Butte Street right-of-way which has always provided public access to the landing has also seen variation in the amount of public use over the same time period. MCC 17.179.030(H) exempts maintenance and repair for continuing an existing use. Again, the prior road surface was cleared and repaired with a new ADA-compliant surface. MCC 17.179.030(I) exempts construction of driveways, such as the emergency vehicle driveway. These are the very activities that opponents insist that Marion County needed permits for. But the exemptions applied.

February 28, 2024
Page 7

When the improvements built in 2017 were permitted, the county planning director Joe Fennimore concluded that a floodplain and greenway permit were not required due to these two exemptions. The director's authority to make that determination is found in MCC 17.179.060.

"The Marion County planning director is hereby appointed to administer and implement this chapter by granting or denying greenway development permit applications in accordance with its provisions. The procedure for review of permit applications shall be by the conditional use process as defined in MCC 17.119.100. The director shall review greenway development permits to determine that the requirements of this title have been met. The director may impose conditions, restrictions or limitations upon a permit in order to accomplish the provisions of this title."

Returning to the alleged deficiencies in the permitting history, as the opponents admit, they were present at public meetings where the prior—and long since completed—actions were presented. Marion County or Friends of Historic Butteville performed actions which the opponents admit they were contemporaneously aware of. Therefore, the opponents had actual notice of those actions, and failed to timely appeal them. ORS 197.830(3)(b), (4)(a), and (5)(a) provide the deadline for them to have appealed, which is 21 days following formal or constructive notice. The opponents did not appeal any of these prior actions, and have waived their opportunity to do so at this time.

Opponents next argue that work completed six years ago must be reconsidered in this proceeding. As explained above, the prior work done was exempt from the permit requirements that opponents assert. In addition, the time for the opponents to appeal that prior work has long since passed. The argument alleges that the opponents had no opportunity to raise concerns in 2017 but that is not correct. Again, ORS 197.830(5)(b) provides a deadline for an appeal to LUBA when an opponent should have known about a decision. The opponents admit they were aware of the prior actions, but they did nothing. That failure to contemporaneously appeal means there is no basis for the opponents to challenge this application for different work based on arguments about the previous completed right-of-way improvements.

This application does not include artificial segmentation of project elements to avoid code limitations as the opponents allege. The opponents provide no evidence of such artificial segmentation. The Board of Commissioners cannot assume such a nefarious intent to circumvent the law. A floodplain permit and a greenway permit are required for the gangway and dock. Those permits were not required for the other work authorized by the county seven years ago. The scope of this application is limited to the dock and gangway.

6. Long-term funding for maintenance and support is not an approval criterion.

The appeal complains that there is no long-term maintenance or support for the Butteville Landing. This is another extraneous argument. The appeal first attempts to argue that this is required to demonstrate compliance with MCC 17.179.050(I) regarding compatibility, MCC 17.179.050(L) regarding substantial interference, and MCC 17.179.050(M) regarding protection of public safety and property. It provides nothing from the text of the code, or from another legal authority, to support the assertion that specified funding must be provided for long-term maintenance to ensure compatibility with other uses; lack of substantial interference with adjoining uses, and protection of property.

The opponents argue that the project will interfere with private property, but fail to explain why the impacts are any larger than commonly seen for properties abutting right-of-way. The argument is based on the incorrect assumption that the proposed use is a public park. That is not the use. This right-of-way has not been converted to a public park. The Marion County Parks Commission is not involved in the project. The map of Marion County Parks does not include this right-of-way segment. None of the signage that the opponents dispute indicates the right-of-way is a public park.

The edge of the public right-of-way is already fenced for protection of adjoining uses. This physical barrier exceeds the protection that is typically provided along right-of-way, and is substantial evidence that the challenged criteria are satisfied.

7. The floodplain criteria in MCC 17.178 are satisfied.

The application includes detailed engineering reports which demonstrate the project will not cause any increase in flood levels. The opponents present no contrary evidence. Instead, they only complain about how the Hearings Officer conditioned the approval. To eliminate any uncertainty, we respectfully request that the Board of Commissioners expressly find that that engineering reports demonstrate the criteria are satisfied.

The appeal complains the engineer's exhibits were not included in the record. That was an oversight, as the exhibits were previously provided to the county. The exhibits provide technical support for the conclusions in the engineer's report. The opponents have no contrary expert evidence to challenge the accuracy of the engineering report, or the exhibits.

The appeal cites the various criteria and asserts they are not met because the engineer's letter is allegedly not included in the original application. Engineering submittals are frequently made apart from the original application form. What matters is that the engineering reports, and all exhibits, are in the record for all parties to review and comment on. The appeal fails to challenge any of this specific evidence; it simply declares that various criteria are not met, without explaining why the engineering report and exhibits are inadequate.

The appeal also alleges the no net rise certification is inaccurate because excavation above ordinary high water cannot compensate for the pilings. The appeal misunderstands the criterion, which is to ensure no net rise in flood levels. The criterion does not require that the pilings never result in any rise below ordinary high water. In short, the appeal criticizes the project for not doing something that is not required.

The appeal next contends that MCC 17.178.050(c) regarding the owner's acknowledgment of the floodplain cannot be met. The appeal is incorrect, because Marion County, as the road authority, has sufficient ownership interest in the right-of-way for the proposed right-of-way improvements. The Board of Commissioners' final decision in this case should include an interpretation of the relevant codes to clarify this issue. The opponents are not the owner of the right-of-way interest in the Butte Street right-of-way, in either the deed records or the tax rolls.

8. The Greenway Management Overlay Zone criteria in MCC 17.178 are satisfied.

The appeal first disputes that fish and wildlife habitat are protected. The project approvals from the National Marine Fisheries Service and the Department of State Lands speak for themselves. The appeal presents no evidence of hazards to fish or wildlife habitat from a qualified professional; it just argues that habitat is being destroyed. That argument misses the point. Like all projects involving construction on the riverbank and in the water itself, the DSL, Corps of Engineers, and National Marine Fisheries Service must review and approve the work to ensure habitat is protected. That the opponents disagree is not a basis for finding that the criterion is not satisfied.

The same reasoning applies to the appeal's argument that the historic Butteville Landing is not being preserved or enhanced. This application will modernize the landing and restore safe access to the waterfront. The project was reviewed by the State Historic Preservation Office which has approved the design. This reasoning also applies to the opponents' assertions regarding increased pollution, and intensification of development. By the opponents' reasoning, no project can ever be approved in the greenway, because any such change is incompatible with their private property. The County zoning code, and statewide Goal 15, simply do not prevent all development along the waterfront as the appeal suggests.

The opponents complain that the proposed dock is inadequately spaced from theirs. A quick glance at the aerial photos demonstrates consistent spacing of docks along this bank of the river. What the opponents are really arguing is that their private dock cannot coexist with a dock that is open to the public. Which will interfere with their private property. In sum, they believe the public right-of-way must be closed to the public, except for their own use of the right-of-way for private driveways. That is not what the zoning code mandates.

9. Goal 15 does not apply directly to this application.

The structure of Oregon's land use system requires local government comprehensive plans to be reviewed and acknowledged by the state for compliance with the land use goals. Once acknowledgment occurs, the statewide goals only apply to local application for amendments to a comprehensive plan. In this instance, the application is for a greenway permit to place a dock and gangway in the Willamette River Greenway.

The opponents contend that the application violates Sections F and G of Goal 15. Generally speaking, the goals only directly apply when a local government comprehensive plan and land use regulations are not yet acknowledged. See ORS 197.175(2)(c). However, the Marion County Comprehensive Plan and land use regulations are acknowledged, and, therefore, the goals do not apply to this greenway application. More specifically, ORS 197.175(2)(d) provides that, after acknowledgement, a local government evaluates a land use application to determine whether the application complies only with its land use regulations and comprehensive plan. *Talbott v. City of Happy Valley*, 74 Or LUBA 143, 154-55 (2016); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, 911 P2d 350 (1996).

10. OAR 660-020-0060 does not apply directly to this application.

The tenth appeal issue fails for reasons similar to the ninth. The LCDC administrative rule OAR 660-020-0060 merely "adopts by reference orders approving the Oregon Department of Transportation Willamette River Greenway Plan Segments for the following" including Marion County. The appeal fails to demonstrate why the order on this segment of the greenway is violated. The rule was last amended in 1988.

Nor does the appeal explain why this rule applies to this application for a greenway permit. As with the statewide planning goals, their implementing administrative rules do not apply directly to an application submitted to a local government with an acknowledged comprehensive plan and land use regulations, unless the rule has not been implemented in the local government plan and land use regulations. Again, the rule is from 1988. Marion County's most recent update of the greenway regulations was in 2008, which was contemporaneously acknowledged. Therefore, Marion County has implemented Goal 15 and OAR 660-020 by adoption of the greenway provisions in the comprehensive plan and the land use regulations in 17.179, Greenway Management Overlay Zone. Therefore, OAR 660-020-0060 does not apply to this application. See ORS 197.646(3)

Conclusion.

The opponents' long history of challenges to various activities for maintenance and modernization of this public access to the navigable Willamette River is well documented. Their current attempt to stop this dock and gangway conflicts with the floodplain and greenway regulations, and even conflicts with state's founding document, the Oregon Admission Act. The public has the

February 28, 2024
Page 11

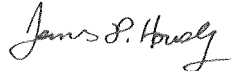
right to freely access the Willamette River using the platted Butte Street right-of-way, as has occurred since the 1800's. The Hearings Officer correctly followed the recommendation from Ms. King regarding the scope of this application, and the Board of Commissioners should likewise also not be distracted by the opponents' attempt to litigate issues that were decided many years ago. The relevant criteria are satisfied as the voluminous evidence shows.

Friends of Historic Butteville appreciates the county's efforts to facilitate the modernization of this public access to the Willamette River. All the engineering studies are in the record to show that there will be no increase in flooding, or other risks to the floodplain, floodway, and greenway. The proposed gangway and dock provide pedestrian access for kayaks and similar small watercraft. The alarmist allegations of excessive off-site impacts from this modest project are unsupported by substantial record evidence, and fail to provide a basis for denial of the application.

We look forward to receiving the decision approving the application.

Sincerely,

JORDAN RAMIS PC



Jamie D. Howsley
Admitted in Oregon and Washington