

BEFORE THE MARION COUNTY HEARINGS OFFICER

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

ORDER

I. Nature of the Application

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

II. Relevant Criteria

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

III. Hearing

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

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

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

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

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

- August 31, 2023 Submission on behalf of Shaloe Putman and Julia Kraemer from Jennie Bricker and Erica Tatoian regarding circuit court litigation, prior use and development of subject property, course of development, ongoing maintenance and funding, and challenging the veracity of information submitted by Applicant. The Submission also includes the Second Declaration of Erica Tatoian with Exhibits.

- August 31, 2023 Marion County Sheriff’s Office Dispatch Report detailing multiple calls to MCSO for alleged criminal activity

- September 7, 2023 Submission on behalf of Friends of Historic Butteville with supporting documentation, including Marion County correspondence

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

IV. Executive Summary

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

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

V. Findings of Fact

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

1. This matter is the Application of Friends of Historic Butteville (“FOHB”), by Benjamin Williams on behalf of FOHB, for a floodplain and greenway development permit to install a dock and gangway in identified 100-year floodplain of the Willamette River at Butteville Landing (River Mile 42.9), in the 10800 block of Butte Street NE, Aurora. (TS3; R1W; Section 32CC)
2. The subject property (also referred to as “The Landing”) constitutes an existing right-of-way and is designated Rural Residential and correspondingly zoned AR (Acreage Residential). A portion of the property within the Willamette River is in the floodway of the river. Portions of the property outside of the river are in the 500-year flood plain of the Willamette River. The property is also within the Willamette River Greenway. The property is in the rural community of Butteville in the 23700 block of 1st Street NE. Surrounding properties in all directions are zoned AR and developed with dwellings. Property to the northeast is zoned CC (Community Commercial) and owned by Oregon State Parks.

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

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

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

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

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

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

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

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

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

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

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

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

VI. Additional Finding of Fact and Conclusions of Law

1. Applicants have the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met as explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390, 394-395(1987).

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

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

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

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

3. The purpose of the Floodplain Overlay Zone is to promote public health, safety, and general welfare to minimize public and private losses due to flood conditions. In order to ensure that the development is reasonably safe from flooding, the County requires the development comply with the criteria and standards listed in Section 17.178.050 and 17.178.060 of the Marion County Code (MCC).
4. Marion County Flood Insurance Rate Map #41047C0050G indicates that the development site is within the floodway of the Willamette River. Based on the Flood Profile, the Base Flood Elevation (BFE) at the development site is approximately 94.2 feet mean sea level.

5. MCC 17.178.050 (C) requires:

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

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

6. MCC 17.178.050 (D) requires:

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

Applicant provided a certification by Corbey Boatwright, PDE, Boatwright Engineering, Inc. Corbey Boatwright certified that the installation of the proposed pilings will not produce an increase in flood levels within the community during the occurrence of the base flood discharge. The requirement for certification as required by MCC 17.178.050 (D) can be made a condition of approval, and the criteria can be met.

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

C. Nonresidential Development.

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

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

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

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

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

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

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

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

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

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

D. Anchoring.

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

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

E. Construction Materials and Methods.

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

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

F. Utilities.

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

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

H. Storage of Materials and Equipment. Materials that are buoyant, flammable, obnoxious, toxic or otherwise injurious to persons or property, if transported by floodwaters, are prohibited. Storage of materials and equipment not having these characteristics is permissible only if the materials and equipment have low damage potential and are anchored or are readily removable from the area within the time available after forecasting and warning.

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

J. Floodways. Located within areas of floodplain established in MCC 17.178.030 are areas designated as floodways. Since the floodway is an extremely hazardous area due to the velocity of floodwaters which carry debris, potential projectiles and erosion potential the following provisions shall apply in addition to the requirement in subsection (I) of this section:

- 1. Prohibit encroachments, including fill, new construction, substantial improvements and other development within the adopted regulatory floodway unless certification by a registered professional civil engineer is provided demonstrating through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment shall not result in any increase in flood levels within the community during the occurrence of the base flood discharge.*
- 2. If subsection (J)(1) of this section is satisfied, all new construction, substantial improvements, and other development shall comply with all applicable flood hazard reduction provisions of this section.*
- 3. The area below the lowest floor shall remain open and unenclosed to allow the unrestricted flow of floodwaters beneath the structure.*

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

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

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

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

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

B. Significant fish and wildlife habitats shall be protected.

Applicant states that the project has received approval from the National Marine Fisheries Service. Applicant states that the dock shape and location, as well as stormwater management, were designed with the National Marine Fisheries Service (“NMFS”) and were approved by NMFS as part of the Applicant’s Joint Permit Application (“JPA”) with the United States Army Corp of Engineers (“Corps”) and the Oregon Department of State Lands (“DSL”). No information to the contrary has been provided. This criterion appears to be met.

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

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

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

Applicant states that a cultural survey has been conducted and the State Historic Preservation Office (“SHPO”) listing has been complete. This criterion appears to be met.

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

The property has been an open area previously and has recently been developed into an accessway for staging paddlecraft and to allow for safe river access. There is no evidence to indicate that the right of way improvements will affect the quality of air, water, or land resources with the greenway. Applicant states that the improvements have been professionally designed to preserve the integrity of the riverbank and not to disturb the historic concrete footings. There is no evidence that the quality of the air, water and land resources will be affected by this proposal. This criterion is met.

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

Portions of the subject property are located within the floodway of the Willamette River. The portions of the land in the floodway are subject to the permit described above and will have minimal impact on flooding because the dock and gangway will float on the surface of the river. This criterion is met.

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

The subject of this Application is the installation of the dock and gangway on the surface of the Willamette River. The Opponents cite that FOHB have already destroyed shade trees in the project location. No further tree removal is contemplated in the Application. The subject area has been planted with native species to prevent further erosion and to stabilize the lower landing which is designed to prevent stormwater runoff and erosion. The proposal will have no negative effect on the natural vegetative fringe. This criterion is met.

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

No harvest of timber is proposed. This criterion is not applicable.

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

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

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

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

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

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

The applicant states that erosion protection was approved by the National Marine Fisheries Service as part of the joint Army Corp of Engineers and Division of State Lands permit. The new bank above the OHW was planted with native species for bank stabilization and erosion control. The removal area will be replanted with native vegetation as well. This criterion appears to be met.

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

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

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

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

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

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

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

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

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

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

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

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

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

The installation of guardrails across the bottom of the landing will prevent any access to adjoining properties. This criterion is met.

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

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

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

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

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

The dock and gangway improvement are water dependent uses and must be located within the Willamette River. The remainder and existing restoration project has been designed to facilitate safe and easy access to the river. The proposal complies with this criterion.

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

The subject property has been re-landscaped with native species and will be revegetated with native species once the dock and gangway are installed. This criterion is met.

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

The proposed dock and gangway is public. This criterion above does not apply.

VII. Order

It is hereby found that the Applicant has met the burden of proving the applicable standards and criteria for approval of the Friends of Historic Butteville's ("FOHB") Application for a floodplain and greenway development permit to install a dock and gangway in identified 100-year floodplain of the Willamette River at Butteville Landing (River Mile 42.9), in the 10800 block of Butte Street NE, Aurora. (TS3; R1W; Section 32CC). The Application is APPROVED subject to the following conditions of Approval:

Conditions of Approval:

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

3. Prior to issuance of building permits for or beginning work on the gangway, dock and related structures and supports, a registered civil engineer shall certify the following standards of Marion County Code are met: MCC 17.178.060(C), (D)(1), (E), (F) and (J).
4. Materials that are buoyant, flammable, obnoxious, toxic or otherwise injurious to persons or property, if transported by floodwaters, are prohibited. Storage of materials and equipment not having these characteristics is permissible only if the materials and equipment have low damage potential and are anchored or are readily removable from the area within the time available after forecasting and warning.
5. The natural native vegetation and habitat on the subject property within the riparian area and greenway shall be maintained to the maximum extent.

VIII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this Order. An appeal must be filed with the Marion County Clerk (555 Court St. NE, Suite 2130, Salem, Oregon) by 5:00 p.m. on the 24th day of November, 2023 (15 days after the date of the Order). The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be returned.

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



Jill F. Foster

Marion County Hearings Officer

CERTIFICATE OF MAILING

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

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FEMA – REGION X *(via email)*
Roxanne.Pilkenton@fema.dhs.gov

By mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 9th day of November, 2023 and that the postage thereon was prepaid.



Administrative Assistant to the
Hearings Officer