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MARION COUNTY PUBLIC WORKS

MEMORANDUM

TO: Marion County Hearings Officer

FROM: Marion County Planning Division/Reich

SUBJECT: Revised Staff Report FP/GW23-010/Friends of Historic Butteville

DATE: March 20, 2023

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

FACTS:

1. Application of Friends of Historic Butteville for a floodplain and greenway development permit to install a dock and gangway in identified 100 year floodplain and floodway of the Willamette River at Butteville Landing (River Mile 42.9), in the 10700 block of Butte Street NE, Aurora.
2. The subject property constitutes an existing right-of-way and is designated Rural Residential and correspondingly zoned AR (Acreage Residential). The portion of the property within the Willamette River is in the floodway of the river. Portions of the property outside of the river are in the 500-year flood plain of the Willamette River. The property is also within the Willamette River Greenway. The property is in the rural community of Butteville in the 10700 block of Butte Street NE. Surrounding properties in all directions are zoned AR and developed with dwellings. Property to the northeast is zoned CC (Community Commercial) and owned by Oregon State Parks.
3. The applicant is proposing to construct a gangway and dock in the Willamette River for public access to and from the Willamette River. Staff originally recommended approval to the hearings officer who held a public hearing on August 17, 2023. The hearings officer approved the request subject to conditions. The decision was subsequently appealed. The board held a hearing on January 28, 2024 and remanded the matter back to the hearings officer to make a recommendation to the board based on the appeal and matters brought up at the board's hearing.

STAFF FINDINGS AND ANALYSIS:

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4. Both the floodplain and greenway permits are types of conditional use permits and follow the procedures for a conditional use. Marion County Code (MCC) 17.119.020(G) states that an application may be filed by:

A public agency or utility, or an entity authorized by a public agency or utility, if the public agency or utility holds an easement or other right that entitles the applicant to conduct the proposed use on the subject property without the approval of the property owner.

MCC 17.119.025(A)(5) requires that applications be signed by:

For an application filed by an entity authorized by a public agency or utility pursuant to MCC [17.119.020\(G\)](#), the signature of an authorized agent of a public agency or utility holding an easement or other right that entitles the applicant to conduct the proposed use on the subject property without the approval of the property owners; or

Brian Nicholas, Marion County Public Works Director, signed an application for this project on September 21, 2022. At the direction of staff that application was withdrawn by the Friends of Historic Butteville and the current application, signed by Ben Williams, was submitted on July 3, 2023. This criterion is met.

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

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

Since none of the development will require a building permit for a structure, the requirement does not apply.

8. MCC 17.178.050 (D) requires:

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

The applicants have provided these certifications in a letter from their engineer dated December 13, 2021. This criterion is met.

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

C. Nonresidential Development.

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

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

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

MCC 17.178.020(KK) defines structure:

“Structure” means, for floodplain management purposes, a walled and roofed building, including a gas or liquid storage tank, that is principally above ground, as well as a manufactured dwelling.

None of the development on the property meets the definition of structure so, these standards for development do not apply.

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

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

D. Anchoring.

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

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

E. Construction Materials and Methods.

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

2. *All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damages.*

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

F. Utilities.

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

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

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

This can be made a condition of any approval.

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

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

The applicant's engineer provided a no-rise certification based on removal material from within the floodplain along the banks of the Willamette River to compensate for the dock pilings in a letter dated December 13, 2021.

In a conversation with Division of State Lands, planning staff determined that the Willamette River is salmonid habitat. It would be uncertain that the Division of State Lands could approve the removal of material from the bank of the Willamette River. It may also not meet guidelines from the Oregon Department of Fish and Wildlife for that work. The applicant's proposal to remove material from the bank of the Willamette in order that the dock and gangway constitute no-rise of the base flood elevation may not be able to be implemented. If that were the case, this proposal does not meet this standard for development in the floodway and must be denied. DSL also informed staff that while there are specific standards for private docks to address salmonid habitat, there are not similar standards for public docks, which is what this dock would be.

11. The purpose of the Greenway Management Overlay Zone is to protect the natural, scenic and recreational qualities of lands along the Willamette River in Marion County. MCC 17.179.030 exempts certain uses from requiring approval for a greenway permit:

D. 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 applicants are not proposing public recreational, scenic, historical or natural uses of public lands. They are proposing to further develop a right-of-way used for access to the Willamette River. This exemption does not apply.

H. Maintenance and repair usual and necessary for the continuance of an existing use;

Access to the river has been historically permitted on the property. The development appears to constitute an intensification of the use of the property, not only maintenance and repair usual and necessary for the continuance of an existing use. Trees were removed from the property, a new pathway/driveway was established, and it appears that topographical work was done to reform parts of the right-of-way. Goal 15—Willamette Greenway defines intensification as

Intensification means any additions which increase or expand the area or amount of an existing use, or the level of activity. Remodeling of the exterior of a structure not excluded below is an intensification when it will substantially alter the appearance of the structure. Intensification shall not include the completion of a structure for which a valid permit was issued as of December 6, 1975 and under which permit substantial construction has been undertaken by July 1, 1976. Maintenance and repair usual and necessary for the continuance of an existing use is not an intensification of use. Reasonable emergency procedures necessary for the safety or the protection of property are not an intensification of use. Residential use of lands within the Greenway includes the practices and activities customarily related to the use and enjoyment of one's home. Landscaping, construction of driveways, modification of existing structures or construction or placement of such subsidiary structures or facilities adjacent to the residence as are usual and necessary to such use and enjoyment shall not be considered an intensification for the purposes of this Goal. Seasonal increases in gravel operations shall not be considered an intensification of use.

The definition makes it clear that maintenance and repair is specifically differentiated from intensification. The applicants are not landscaping, constructing driveways, modifying existing structures or construction or placement of such subsidiary structures or facilities adjacent to the residence. Intensification is the circumstance where there is an increase or expansion of the area or amount of an existing use or the level of activity. Previously, there was a walking path down to the river and the remainder of the property was fully treed. Now many of the trees have been removed, with some replanted, and there is a paved walkway/roadway down to the river. Additionally, a dock and gangway are proposed to be developed. What has occurred already in the right-of-way, and is proposed in this application for the right-of-way, constitutes an intensification of the use.

I. Landscaping, construction of driveways, repair or maintenance of existing structures, and the construction or placement of accessory structures other than guest houses; provided, that such activities are conducted in conjunction with uses already existing on the same property and that they are accomplished in a manner compatible with the purpose of this chapter;

The applicants are not landscaping, constructing driveways, repairing or maintenance existing structures or construction and placing accessory structures. This exemption does not apply.

No exemptions apply and this work must be permitted.

12. In 2020, the applicants applied for a similar permit for the dock, greenway and work in the right-of-way in Floodplain/Greenway Case 20-003. That decision was ultimately remanded by LUBA to the county and the applicants subsequently made this application.

Based on the applicant's statement in this application, it appears the applicants did not apply for the work in the right-of-way, the tree removal, walkway/roadway, and topographical work, as part of this application and it was not approved previously. This work has been done without the required greenway permit and, because this application does not include a request for a permit for that work, the work in the right-of-way is in violation of county code. MCC 17110.680 prohibits the issuance of a permit if there are outstanding land use violations that issuing the permit will not resolve:

No permit for the use of land or structures or for the alteration or construction of any structure shall be issued and no land use approval shall be granted if the land for which the permit or approval is sought is being used in violation of any condition of approval of any land use action, is in violation of local, state or federal law, except federal laws related to marijuana, or is being used or has been divided in violation of the provisions of this title, unless issuance of the permit or land use approval would correct the violation.

Based on this, this application should be denied or the applicants withdraw it so that they can make a new application that includes the work done in the right-of-way.

13. In reviewing a request for a Greenway Development Permit the proposal is reviewed to ensure compliance with certain considerations and criteria, those that apply to this type of request are listed in Section 17.179.050 of the Marion County Code (MCC). The discussion below includes both information provided by the applicant with the application and staff conversations with the applicant about the proposal.

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

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

B. Significant fish and wildlife habitats shall be protected.

The applicant states that the project has received approval from the National Marine Fisheries Service. However, it is unclear that the proposal to remove material from the banks of the Willamette River would be approved by the Division of State Lands through their permitting process. Without further information from the applicant, it cannot be determined whether this criterion is met.

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

While the gangway and dock, and its related structures on land, provide a means for the public to access and experience the river, a significant number of trees were removed which impacts the visual aspect of this land when viewed from the river. The applicant should provide additional information how this criterion is met.

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

The applicant states that a cultural survey and State Historic Preservation Office listing has been complete. The office requested to be on site and work with the applicants further to address any items of significance that may be present during construction. This criterion can be conditioned to be met.

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

The property has been an open area previously and has recently been developed into an accessway for staging paddlecraft and to allow for safe river access. There is no evidence that the quality of the air, water and land resources will be affected by this proposal. This criterion is met.

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

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

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

The subject area has been planted with native species to prevent further erosion and to stabilize the lower landing which is designed to prevent stormwater runoff and erosion. The proposal will have no negative effect on the natural vegetative fringe. This criterion is met.

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

No commercial 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.*

Opponents to the proposal have testified that the change from a pathway down to the river to a walkway, and the related tree removal and other property modifications, have increased use of the property without adequate services to support the access to the river. According to opponents, persons using the park have trespassed on neighboring properties both by the road and along the river. The opponents brought up concerns about how quickly the Marion County Sheriff can respond to the property. The existing work done in the right-of-way has intensified the use of the property and is causing conflicts with existing uses in the surrounding area. The applicants have not provided adequate evidence about how impacts to neighboring properties can be minimized. While this existing work has not been approved in the greenway, additional development of a dock and gangway would likely increase the impacts to the surrounding area. This criterion does not appear to be 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.

The proposed use a public facility to access the river in a right-of-way. Opponents to the proposal have testified that the change from a pathway down to the river to a walkway, and the related tree removal and other property modifications, have increased use of the property without adequate services to support the access to the river. According to opponents, persons using the park have trespassed on neighboring properties both by the road and along the river. The opponents brought up concerns about how quickly the Marion County Sheriff can respond to the property. The existing work done in the right-of-way has caused conflicts with existing uses in the surrounding area. While this existing work has not been approved in the greenway, additional development of a dock and gangway would likely further substantially interfere with established uses on adjoining property. The applicants have not provided adequate evidence about how impacts to neighboring properties can be minimized. This criterion does not appear to be 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.

While there are signs on the property indicating house of use and prohibiting overnight parking, these, along with established fencing, do not appear to have been adequate to date to prohibit trespass onto neighboring property. According to opponents, persons using the park have trespassed on neighboring properties both by the road and along the river. The applicants have not provided adequate evidence about how impacts to neighboring properties can be minimized. While there is a memorandum of understanding between the county and the applicant about how to physically maintain the property, the applicant hasn't provided evidence about how safety on the property will be maintained. The sheriff's office provided a written response about the ability to serve the

property. While there is not a dedicated sheriff position for that area of the county, the sheriff's office is able to respond to calls as it does in other areas. This level of service may not be adequate for the use proposed by the applicant, who also has not suggested other ways to provide safety services to the property, such as having a dedicated phone line to call a security service or having security patrols for the right-of-way. There does not appear to be adequate safety services available to serve the used as proposed by the applicant. Because the property is already experiencing safety issues, as documented by the opponents, it appears that any further development on the property would only increase those issues. The applicants have not adequately addressed existing issues nor provided a means to address them in the future. This criterion does not appear to be met.

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

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

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

While there are signs on the property indicating house of use and prohibiting overnight parking, these, along with established fencing, do not appear to have been adequate to date to prohibit trespass onto neighboring property. According to opponents, persons using the park have trespassed on neighboring properties both by the road and along the river. The applicants have not provided adequate evidence about how impacts to neighboring properties can be minimized. This criterion does not appear to be 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.

While the gangway and dock, and its related structures on land, provide a means for the public to access and experience the river, a significant number of trees were removed which impacts the visual aspect of this land when viewed from the river. The applicant should provide additional information how this criterion is met.

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

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

CONCLUSION:

14. Based on the discussion above, staff recommends denial of the application. Should the hearings officer recommend to the board granting the applicant's request for the conditional use to construct a dock and gangway on the Willamette River, the Planning Division recommends the following conditions be applied:
- a) The applicant shall obtain all permits required by the Marion County Building Inspection Division.
 - b) The applicant shall obtain all necessary permits from the Division of State Lands.
 - c) Work with the State Historic Preservation Office to meet their requirements for construction activity related to historic resources that may be present on site.
 - d) 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(D)(1), (E), (F) and (J).
 - e) 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

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readily removable from the area within the time available after forecasting and warning.

- f) The natural native vegetation and habitat on the subject property within the riparian area and greenway shall be maintained to the maximum extent.