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February 27, 2024

Via e-mail: planning@co.marion.or.us

Marion County Planning Division
5155 Silverton Road NE
Salem, OR 97305

Re: Friends of Historic Butteville Floodplain/Greenway Application No. 23-010

Marion County Board of Commissioners:

Our firm represents Shaloe Putnam and Julia Kraemer, homeowners whose properties include a portion of "Butte Street" in Butteville. Ms. Putnam and Ms. Kraemer oppose the Floodplain/Greenway Application filed by Friends of Historic Butteville ("FOHB") with Marion County on July 3, 2023, and demand that Marion County deny the application.

This letter supplements prior submissions our office has made to Marion County concerning Application No. 23-010.¹ As will be discussed during the public hearing, there are at least two additional bases which require Marion County to deny FOHB's Application. In addition, we take this opportunity to respond to arguments made by FOHB's counsel in their letter dated September 7, 2023. Finally, enclosed with this letter is an additional exhibit, reflecting an email exchange between undersigned counsel and records custodian for the State Historic Preservation Office.

1. The Application lacks the required signatures under Marion County Code MCC 17.119.025.

FOHB's Application on its face fails to comply with Marion County Code. The Application states that, pursuant to Marion County Rural Zoning Code 17.116.040(G), the Application "is being completed in a manner consistent with Marion County as the Owner of the Butteville Landing right of way rather than fee title holder." See Applicant Statement. The problem is that MCC

¹ Those submissions include (1) the Letter of Opposition, dated August 16, 2023, with three supporting declarations; (2) the Letter of Opposition, dated August 31, 2023, with one supporting declaration; (3) the Supplemental Letter, dated August 31, 2023; and (4) the Appeal to the Board of Commissioners, dated November 21, 2023, with copies of Marion County and Friends of Historic Butteville's Responses to Plaintiffs' Requests for Admissions.

17.116 concerns adjustments—not conditional use permits for floodplain or greenway development permits.² Conditional use permits are governed by MCC 17.119.

Under MCC 17.119.020(G), an application for a conditional use permit 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.” Presumably, this is the provision on which FOHB intended to rely. However, when an application is filed pursuant to MCC 17.119.020(G), the application “shall include” “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[.]” MCC 17.119.025(A)(5).

The only signature appearing on the Application is the signature of Benjamin Williams, President of FOHB. The Application does not contain the signature of any authorized agent of Marion County. Nor can FOHB rely on its Memorandum of Understanding with Marion County to contend that it is an authorized agent of Marion County sufficient to satisfy MCC 17.119.025. The Memorandum of Understanding explicitly states that “[n]either party is an agent of the other[.]”

Recall that the Land Use Board of Appeals has already remanded FOHB’s prior application for failing to comply with the signature requirements of MCC 17.119. Under the circumstances, Marion County cannot approve FOHB’s facially defective application.

2. FOHB’s proposal to satisfy MCC 17.178.060(J) is not permitted by its DSL permit.

Our submissions have repeatedly noted that FOHB’s Application was incomplete because it relied on an engineering letter to satisfy the criteria in MCC 17.178, but FOHB failed to include all nine of the referenced attachments to its application. After the Board of Commissioners accepted Ms. Putnam and Ms. Kraemer’s appeal, FOHB submitted the missing attachments to the engineering letter. Having now had the opportunity to examine those attachments, it is evident that FOHB’s proposal to satisfy MCC 17.178.060(J) is not permitted by its DSL removal/fill permit.

MCC 17.178.060(J) provides that any improvements in the floodway “shall not result in any increase in flood levels within the community.” To satisfy this “no rise” standard, FOHB proposes to dig two large holes to remove over 40 cubic yards of the riverbank to compensate for the installation of its pilings. See Boatright Engineering letter at 2. Without the attachments to the engineering letter, it was unknown where the excavation would take place. Now, with the

² Our August 16, 2023, letter pointed out that FOHB was erroneously relying on MCC 17.116.

Tatoian Decl., Ex. 16 at 2 (DSL's Removal/Fill Permit).

The purpose of this land use process, as described in the Marion County Code, is to ensure that all requirements have been satisfied and all necessary permits have been obtained. MCC 17.178.030(G) ("Duties of the floodplain administrator" "shall include," among other things, (1) reviewing "all development permits to determine that the permit requirements of this title *have been satisfied*"; (2) reviewing all development permits to determine that all necessary permits from various agencies "*have been obtained*"; (3) reviewing "all development permits to determine if the proposed development is located in the floodway. If located in the floodway, assure that the encroachment provisions of MCC 17.178.060(J) *are met*.").

Here, it cannot reasonably be disputed that FOHB lacks the requisite approval to perform its proposal to satisfy MCC 17.178.060(J). Nor can it be disputed that FOHB failed to seek that approval from DSL. Under the circumstances, Marion County must deny FOHB's Application because FOHB has not satisfied its burden of establishing that it satisfies the criteria in MCC 17.118.

3. Responses to FOHB's attorney's legal arguments

The following arguments respond to legal arguments raised by FOHB's attorney in their September 7, 2023, letter to the Marion County Hearings Officer. We respond only to the issues that are not otherwise addressed in prior submissions.

A. ORS 215.416(1) is inapplicable because neither FOHB nor Marion County own the Disputed Property.

FOHB, through counsel, argues that "the pertinent statute is ORS 215.416(1)." Despite quoting the provision, FOHB fails to appreciate its plain text:

"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. The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service."

(Emphasis added.). It is undisputed that neither FOHB nor Marion County own the Disputed Property. To the contrary, both FOHB and Marion County have admitted in filings submitted with the Marion County Circuit Court that Ms. Putnam, Ms. Kraemer, and Ms. Maysels are the undisputed fee title owners of the Disputed Property. Consequently, ORS 215.416(1) is not

"pertinent" because it does not authorize FOHB to seek permits from Marion County to develop property which it undisputedly does not own.

B. No "waiver" has occurred with respect to Ms. Putnam and Ms. Kraemer's ability to challenge FOHB's unpermitted development to date.

FOHB erroneously relies on ORS 197.830 to argue that Ms. Putnam and Ms. Kraemer "waived their opportunity" to challenge FOHB's unpermitted developments. Again, FOHB misrepresents the plain text of Oregon law.

FOHB relies upon ORS 197.830(3)(b), (4)(a), and (5)(a) for its waiver argument.⁴ Each provision deals with situations in which "a local government makes a land use decision." A "land use decision" includes "[a] final decision or determination made by a local government * * * that concerns the * * * application of (i) the goals; (ii) a comprehensive plan provision; (iii) a land use regulation; or (iv) a new land use regulation." ORS 197.015(10)(a)(A).

⁴ ORS 197.830(3) provides:

"If a local government makes a land use decision without providing a hearing, * * * or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

"(a) Within 21 days of actual notice where notice is required; or

"(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

ORS 197.830(4)(a) provides: "If a local government makes a land use decision without a hearing pursuant * * *: (a) A person who was not provided notice of the decision as required under ORS 215.416 (11)(c) or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision."

ORS 197.830(5)(a) provides: "If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required[.]"

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As is obvious from the text of the statute itself, the statute is inapposite. Marion County never made a land use decision because FOHB never sought or obtained permission from Marion County to develop the Disputed Property in 2017. As such, FOHB's waiver argument is baseless.

We look forward to answering any questions you may have at the public hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Erica Tatoian". The signature is written in a cursive style with a large initial "E" and a long, sweeping underline.

Erica Tatoian

cc: Scott Norris (snorris@co.marion.or.us)

Sarah Churchill

From: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Sent: Wednesday, September 6, 2023 1:38 PM
To: Erica R. Tatoian
Subject: RE: Public Records Request

External Sender - From: (HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>)

[Learn More](#)

This message came from outside your organization.

There is a single archaeological site report for the property you outlined that has technical data we can't release without compromising resources at the site. There are separate archaeological summary reports that are the closest thing to what you're requesting, but they don't pertain to the property you highlighted (between the street and the river). Instead, they pertain to resources **across the street** (the opposite direction from the river) from the property you outlined.

From: Erica R. Tatoian <erica.tatoian@harrang.com>
Sent: Wednesday, September 6, 2023 1:33 PM
To: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Subject: RE: Public Records Request

Hi Chris,

I may be confused. Are you saying there are no additional records relating to Butte Street? Does that mean that no cultural resources survey was conducted on the property?

Erica Tatoian
(she/her)
Shareholder



111 SW Columbia Street, Suite 950, Portland, OR 97201
Phone: 503.242.0000 **Fax:** 541.686.6564
[email](#) | [website](#) | [profile](#) | [LinkedIn](#)

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From: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Sent: Tuesday, September 5, 2023 10:20 AM
To: Erica R. Tatoian <erica.tatoian@harrang.com>
Subject: RE: Public Records Request

Well, this took a weird turn. Upon closer inspection, the archeologist reports those summary reports don't actually address resources in the boundary of the subject parcel. There is a summary report that deals with an **adjacent** parcel. Do you want it?

The only document we have that concerns the property you identified is one of those technical reports, the kind that can't be released without revealing the location of a protected archaeological resource.

Sorry for the delay getting to this point. Let me know how you'd like to proceed.

From: Erica R. Tatoian <erica.tatoian@harrang.com>
Sent: Friday, August 25, 2023 8:17 AM
To: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Subject: RE: Public Records Request

Absolutely. I'll be ready to make payment by credit card as soon as you give the word.

Thanks so much, Chris!

Erica Tatoian
(she/her)
Shareholder



111 SW Columbia Street, Suite 950, Portland, OR 97201
Phone: 503.242.0000 **Fax:** 541.686.6564
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From: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Sent: Friday, August 25, 2023 8:03 AM
To: Erica R. Tatoian <erica.tatoian@harrang.com>
Subject: RE: Public Records Request

We can have our front office person call you and take a credit card number over the phone. Would that work for you?

We'll do this after we deliver the file, of course.

Thanks.

From: Erica R. Tatoian <erica.tatoian@harrang.com>
Sent: Thursday, August 24, 2023 4:06 PM
To: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Subject: RE: Public Records Request

Hi Chris,

Two questions for you:

1. How would you like me to make the \$150 payment? Hoping there's an electronic way as opposed to sending a check in by mail.

2. Can you please confirm whether SHPO has conducted a cultural resources survey for Butteville Landing? I don't see anything in the records identified as a cultural resources survey, but I'm not sure how SHPO would identify it.

Thanks!

Erica Tatoian
(she/her)
Shareholder



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From: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Sent: Thursday, August 24, 2023 12:45 PM
To: Erica R. Tatoian <erica.tatoian@harrang.com>
Subject: RE: Public Records Request

Cool, thanks.

From: Erica R. Tatoian <erica.tatoian@harrang.com>
Sent: Wednesday, August 23, 2023 8:18 AM
To: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Subject: RE: Public Records Request

Thank you, Chris. I'll follow up with you about the additional records as soon as I can.

Erica Tatoian
(she/her)
Shareholder



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From: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Sent: Monday, August 21, 2023 10:35 AM
To: Erica R. Tatoian <erica.tatoian@harrang.com>
Subject: RE: Public Records Request

OK, I've uploaded new files to [the Google drive](#). New stuff:

1. 18-0412 Records Request: this has files related to review of the site by the State Historic Preservation Office in 2018.
2. Email 5.pdf: A couple related emails
3. Email 5 attachments: copies of files attached to the emails in "Email 5.pdf"

There are internal summary reports associated with 2018, but because some archaeological information is protected from disclosure*, it would take the state archaeologist about two hours to redact them. There are also a couple of technical reports (called archaeological site reports) that can't be effectively redacted, so those would not be included in the archaeologist's review of the summary report and we are claiming the technical reports qualify for an exemption from disclosure under the same statute footnoted below.

The fee for professional time provided in Oregon Administrative Rule 736-001-0030 is \$75/hour. You can request a waiver that would cut this in half, if our agency director determines the request is in the public interest. If you approve the full cost, estimated at \$150, I will have staff proceed and give a delivery date, and then invoice you when the work is done. If the cost exceeds this estimate by 10%, I would direct them to stop work and check with you before going any further.

What would you like to do?

Thanks.

* ORS 192.345 (11)

From: Erica R. Tatoian <erica.tatoian@harrang.com>
Sent: Monday, August 14, 2023 3:54 PM
To: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Subject: RE: Public Records Request

Hi Chris,

Thanks for reaching out. What if we limit the date range from 2016 to present and only concerning the "Butteville Landing/ Butte Street"? I think it's safe to say we are most interested in compliance files and a cultural survey that SHPO is purported to have done of the area. You can see a depiction of the area highlighted in yellow in Exhibit 1 to the attached complaint.

Please don't hesitate to reach out if you have any further questions. Thanks!

Erica Tatoian
(she/her)
Shareholder



111 SW Columbia Street, Suite 950, Portland, OR 97201
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From: HAVEL Chris * OPRD <Chris.HAVEL@opr.oregon.gov>
Sent: Monday, August 14, 2023 3:43 PM
To: Erica R. Tatoian <erica.tatoian@harrang.com>
Subject: Re: Public Records Request

Hi, Erica. I giving the State Historic Preservation Office folks a hand assembling their documents, and two questions have come up.

1. When you say the request covers EVERYTHING related to Butteville, that could conceivably mean retrieving records across several programs, some of which contain highly sensitive information that isn't automatically subject to disclosure, which means we could be looking at quite a few hours if staff time to review and redact the files. We avoid charging for records whenever possible, but after the first half hour, we'd need to charge a rate set in rule. If you just want records related to compliance with state and federal law, that's a smaller scope and we should be able to get it done with little or no cost. Can you confirm whether this request is for everything that mentions butteville, or just compliance files?

2. Second, while the geographic description is pretty good, it would be even better to draw it out on a map so it would make the staff search go way faster. A taxlot map would be best, but I think even a zoomed-in Google map would do in a pinch.

Thanks.

Sent from my Verizon, Samsung Galaxy smartphone
Get [Outlook for Android](#)

From: Erica R. Tatoian <erica.tatoian@harrang.com>
Sent: Wednesday, August 9, 2023 9:14 AM
To: HERITAGE Oregon * OPRD <oregon.heritage@oregon.gov>
Subject: Public Records Request

You don't often get email from erica.tatoian@harrang.com. [Learn why this is important](#)
Hello,

Please see the attached public records request.

Thank you,

Erica Tatoian
(she/her)
Shareholder



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