

BEFORE THE LAND USE HEARINGS OFFICER
CLACKAMAS COUNTY, OREGON

Regarding an Appeal of a Planning Director Decision Approving an Application for a Floodplain Development Type 2 Permit for Construction of a Single Family Residence Within the Sandy River Floodplain.

Case File No: Z0572-22-F

A. SUMMARY

1. The applicant Michael Gregory submitted two separate but substantially similar Floodplain Development Permits to construct new single family residences within the designated floodplain of the Sandy River, elevated and constructed pursuant to FEMA/County floodplain development standards. Each application was approved by the County, and appealed. The first appeal, application file no. Z0571-22-F, is reviewed here. The second application, file no. Z0572-22-F, was approved separately and was also appealed. The appeals were combined into a single hearing, but application file no. Z0572-22-F is reviewed in a separate decision largely identical to this one. This project also includes submittal of an upstream/downstream drainage/hydraulic analysis for design and construction of a culvert to cross an existing marsh/wetland area for access to the proposed home. The owner of the subject property is Gregory Management LLC. The location is on the west side of the Sandy River and east of E. Brightwood Loop Rd., near its intersection with E. Miller Road. The site address for the roughly 2.01-acre subject property of application file no. Z0571-22-F is 64285 E Brightwood Loop, Brightwood, OR 97011, within Clackamas County. The legal description for the subject property is T2S, R7E, Section 30BC, Tax Lot 00202. The Comprehensive Plan Designation for the subject property is Residential Recreational (RR). The subject property is not located inside an urban growth boundary. The application was deemed complete on January 3, 2023. The 150-day timeline for final action on the application pursuant to ORS 215.427(1) is June 2, 2023. The County's Planning Director¹ reviewed and approved the application by written decision issued on March 6, 2023, subject to a number of conditions of approval.
2. On March 20, 2023 the Hoodland CPO submitted a written appeal of this decision. The written appeal states that the Hoodland CPO Board of Directors met on 3/17/23 to discuss the County's approval of this application, reporting: "The CPO is against developing this land and voted unanimously to appeal." The written statement references several other substantially similar applications submitted by the Applicant on contiguous properties also owned by Gregory Management LLC and also approved by the County, the CPO's opposition to each of these applications, and the following additional statement: "The land for development has been brutally [sic] demolished by the applicant without consideration of law or permits. The sense of entitlement by the applicant is palpable and distasteful." The CPO Board also asked whether a County representative had been to the site and, if so, what was the

¹ ZDO 1307.3(B) provides that the Planning Director includes "Any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO]." County Sr. Planner Steve Hanschka acted in this capacity.

outcome of the visit. Further, the CPO requested that, if a site visit were scheduled, that a member of the CPO could be present.

3. On April 20, 2023, Hearings Officer Carl Cox (the “Hearings Officer”) conducted a single combined public hearing to receive testimony and evidence about the this appeal challenging the County Planning Director’s approval of this application for a Floodplain Development permit related to land use approval to develop the subject property with a single-family residence in the floodplain of the Sandy River. County staff recommended approval of the application subject to conditions, consistent with the approval by the County Planning Director. The Applicant provided testimony in support of the County’s recommended approval of the applications, and does not dispute the proposed conditions of approval. Appellant provided witness testimony and oral argument, submitted exhibits including photos, a video, written materials, and written comments and arguments, and opposes the applications and proposed development of this property.
4. Prior to ending the public hearing and closing the record, the Hearings Officer asked whether any of the parties or members of the audience wanted an opportunity to provide additional evidence, arguments, or testimony, stating in any case the record would remain open until 4:00 pm on April 20, 2023 to receive documents and statements referenced at the hearing and any comments submitted by that time. No one requested that the record remain open, and the Applicant waived the final period. The Hearings Officer closed the hearing, stating that the record would close at 4:00 pm on April 20, 2023. The Hearings Officer approved both application file nos. Z0571-22-F and Z0572-22-F, subject to conditions.

B. HEARING, RECORD HIGHLIGHTS, AND POST-HEARING SUBMITTALS

1. Notice of each of these land use applications was sent to property owners within 500 feet, Community Planning Organizations (CPO)², and interested citizens and agencies. Numerous Public comments were received by the County, reviewed and considered by the Hearings Officer in advance of the hearing, with relevant portions summarized below:

Relevant Background Information

2. The Property that is the subject of this application is one of six contiguous properties owned by Gregory Management LLC. On October 4, 2022, the County approved four separate Floodplain Development Permits submitted by Mr. Gregory proposing construction of a new single-family residence on each of these properties, substantially similar to this application. Each of those four applications was appealed. On December 1, 2022, the County Land Use Hearings Officer³ held a combined public hearing and also approved each application.⁴
3. On March 30, 2022, the Oregon Department of State Lands issued a Consent Order to Michael Gregory (Applicant) in the matter of DSL Enforcement File No. 8440-ENF

² The Appellant included a comment with its written appeal stating that the CPO was only sent notice for land use application file no. Z00572-22-F, and not provided notice for land use application file no. Z00571-22-F. The Hearings Officer asked Mr. Hanschka about this comment during the public hearing and Mr. Hanschka shared the email notices provided to the Hoodland CPO for both file nos. Z0571-22-F and Z0572-22-F.

³ I also acted in the capacity of County Land Use Hearings Officer at these hearings.

⁴ See file nos. Z0228-22-F, Z0229-22-F, Z0230-22-F, and Z0231-22-F.

concerning removal and fill activities he performed within an unnamed wetland located at the site of the subject properties. Specifically, DSL determined that a spring fed wetland exists at the site, and between January 15, 2022 and March 30, 2022, Mr. Gregory was responsible for more than 50 cubic yards of removal and fill of material within this wetland without a permit or other authorization. The stipulated agreement requires Mr. Gregory to complete certain restoration activities, and pay a fine.

4. On June 27, 2022, the Department of the Army's U.S. Army Corps of Engineers, Portland District, issued a determination to the Applicant Michael Gregory that certain work he performed within an unnamed wetland located at the site of the subject properties likely impacted areas under their jurisdiction, advising that further work may require permit authorization. This involved the same removal and fill activities that were the subject of the DSL Consent Order.
5. On June 30, 2022, County staff completed review of Floodplain Development Permit Z0063-22-F, a proposal for a floodplain development permit for site preparation work only to include: 3,000 cubic yards of cut/fill grading (including vegetation removal), construction of a culvert and access driveways for eight properties. (Two of these eight original lots are no longer tax lots per approved lot line adjustments, leaving the six remaining contiguous lots.) No structural/single family residential development was proposed as part of this application. Staff noted that this application was for "after the fact" approval of development (grading, driveway, and culvert construction) that had already occurred on the site and was the subject of an active violation action by the County and also by the Oregon Department of State Lands. County Senior Planner Melissa Ahrens, acting in the capacity of Planning Director, denied the application for a number of reasons, including not containing engineering information, scaled plans, or detailed information about the proposed culvert and watercourse alteration, with the comments:

Not all necessary permits have been obtained from Oregon Department of State Lands and staff do not have enough information to determine if permits are required from the Army Corps of Engineers for the full floodplain development proposed in this application. This criteria is not met.

Since staff do not have accurate scaled plans of the proposed culvert or an analysis that would demonstrate that the flood carrying capacity of the watercourse is not diminished by the proposed watercourse alteration staff find that the proposed development is not consistent with this criteria.
6. The Applicant appealed the denial of Floodplain Development Permit Z0063-22-F. The County held a public hearing on August 4, 2022 and Ms. Ahrens presented information in support of the decision before the County Land Use Hearings Officer.⁵ Among other things, Ms. Ahrens noted that, with respect to ZDO 703 polices related to cut and fill, the application materials did not contain engineering information, scaled plans, or detailed information about the proposed culvert and watercourse alteration, pointing to the requirements of sections 703.10 and 703.11. The applicant Michael Gregory presented evidence and testimony in support of his application. Several interested individuals provided written comments, and several members of the public appeared at the hearing and provided testimony largely in opposition to the application. The applicant withdrew the entire application (not just the appeal) before a decision was made.

⁵ I acted in the capacity of County Land Use Hearings Officer at this hearing, but did not issue a decision as the application was withdrawn.

Documents Submitted Prior to Hearing

7. County Sr. Planner Steve Hanschka prepared a Floodplain Detail Map dated January 31, 2022 showing the locations of the subject lot, the Sandy River, and the other lots Applicant is seeking to develop, indicating base flood elevations for each lot, showing the locations for the Sandy River floodplain and Sandy River Floodway. Mr. Hanschka and County staff provided a copy of FEMA Flood Insurance Study (FIS) Flood Profile 129P, dated January 18, 2019, providing Base Flood Elevation (BFE) Analysis of the Subject Lots. These exhibits state the following BFE for the subject properties for these two applications: TL 202 (Z0571-22-F⁶) BFE=1,140 feet; TL 3000 (Z0572-22-F⁷) BFE=1,138 feet; Mr. Hanschka and County staff also provided a copy of FEMA FIS Flood Insurance Rate Map (FIRM) No. 41005C0382E, dated January 18, 2019, providing the FIRM for the subject area. (Exhibits 18, 21, 22)
8. Applicant Michael Gregory submitted a complete application on December 15, 2022 with a site plan for the subject property, and cut/fill site plan for the site dated August 2022 showing the locations of each of the lots Mr. Gregory is seeking to develop. The application includes a site plan providing elevation data for each building site, including the lot that is the subject of this application, showing elevation data for the crawlspace area, main floor, and deck areas for the proposed home, showing primary and replacement septic areas for the proposed home, location of proposed driveway and utilities, and the approximate Flood Hazard Mark. The site plan also shows the location of the existing depression/marsh area, and approximately indicates the location of the access road to the site from Brightwood Loop Rd. and access easements serving each property. Mr. Gregory also submitted detailed site plans for the proposed single-family home prepared by Alan Mascord Design Associates, Inc. and stamped by a licensed professional engineer. The application includes a Stormwater Basin Map dated December 1, 2022 prepared by AKS Engineering & Forestry, LLC showing the entire site and vicinity including the Sandy River and an associated runoff channel. The application submitted by Mr. Gregory includes a Private Driveway & Culvert Crossing Plan and Profile and a Wetland Permit Volume Breakdown, each dated December 15, 2022, and associated HydroCAD Analysis, calculations, and supporting documentation, each prepared by AKS Engineering & Forestry, LLC. The applications also included a Record of Survey and Property Line Adjustment (PLA) prepared by Ronald Alvin Bush, Registered Professional Land Surveyor. (Exhibit 3)

Comments Submitted Prior to Hearing

9. County staff submitted numerous pages of email correspondence with staff that includes comments from the Applicant Mr. Gregory, the Appellant Hoodland CPO, and various other individuals, organizations and agencies, related to Mr. Gregory's activities on the subject properties and his plans to develop these sites.
10. Michael Tehan owns and resides on property adjacent to the sites Mr. Gregory is seeking to develop. Mr. Tehan appealed the County's approval of Floodplain Development Permit applications in file nos. Z0228-22-F, Z0229-22-F, Z0230-22-F, and Z0231-22-F, and also opposes this application. Mr. Tehan submitted several written comments concerning Mr.

⁶ This site was the subject of withdrawn application file no. Z0226-22-F.

⁷ This site was the subject of withdrawn application file no. Z0227-22-F.

Gregory's activities on these sites, referencing the removal and fill activities he performed that are the subject of the referenced DSL Consent Order and the determination by the U.S. Army Corps of Engineers, Portland District, that certain work Mr. Gregory performed within an unnamed wetland located at the site of the subject properties likely impacted areas under their jurisdiction. Mr. Tehan also provided several photos showing the grading and clearing work on these sites and on the easement that provides access to these sites. (Exhibit 7)

11. Mr. Tehan also submitted comments concerning the Floodplain Development Permit applications in file nos. Z0228-22-F, Z0229-22-F, Z0230-22-F, and Z0231-22-F, including arguments he advanced as Appellant in the appeals of County approval of those applications. Mr. Tehan advances these same concerns with respect to the applications in Z0571-22-F and Z0572-22-F. Mr. Tehan asserts that the County failed to provide analysis or consideration of associated sanitation systems, pointing out that he is the adjacent land owner with a domestic water well downstream of these and the current proposal site, noting these sites are all subject to flooding and expressing his concern whether these properties can be developed in a manner that avoids ground and surface water contamination from their septic systems. Mr. Tehan contends that the proposed engineered "bottomless sand filter" septic systems should be considered as fill, and points to the proximity of the proposed drain fields to the designated floodway and Principal River Conservation Area of the Sandy River. Mr. Tehan asserts that ZDO 704: Principal River Conservation Area (PRCA) should apply, contending that Mr. Gregory's activities extend into the regulated buffer for the Sandy River and contending that portions of the subject sites are actually within the floodway and not just the floodplain. (Exhibit 7)
12. Mr. Tehan further asserts that Mr. Gregory does not have a legally valid easement to access the proposal site. Mr. Tehan provides a detailed written response in opposition to applications Z0571-22-F and Z0571-22-F, including also his original comments submitted in response to withdrawn application Z0063-22-F, asserting the applications should be denied for several reasons. The submitted comments also include responses by County staff to several questions posed by Mr. Tehan. Mr. Tehan again points to the proposed water supplies and septic sanitation systems' potential to contaminate ground and surface waters, particularly during flooding events, and the effect on adjacent property owners such as himself, also referencing existing issues in the area from raw sewage exposure during the winter months when the nearby Timberline Rim septic pumping plant floods and spills untreated sewage effluent into the floodplain channels of the Sandy River. He provided a copy of a May 19, 2015 Clackamas County BCC Study Session on the Sandy River and Managing Flood Risk that includes photos of substantial property damage resulting from flooding and shows the shifting channel migration of the Sandy River and certain associated risks. (Exhibit 7)
13. Kelly Gabbert (aka Kelly Schacht) is one of the owners of a property adjacent to the sites Mr. Gregory is seeking to develop. Kelly Gabbert submitted written comments and questions to the County concerning this application, having purchased the adjacent property after the previous four applications were approved by the County, and received responses to these questions. In this correspondence, Kelly Gabbert asserts ownership of the easement Mr. Gregory is using to access the proposal sites, further contending there is no agreement for Mr. Gregory's use of this easement. (Exhibit 8)

14. Appellant Hoodland CPO submitted written comments dated March 2, 2023 concerning this application describing these applications by Mr. Gregory as complicated and long-running, noting also that the prior applications Z0228-22, Z0229-22, Z0230-22, Z0231-22 were firmly rejected by the CPO and the local community as “brutal and unnecessary destruction of the land at this site.” Hoodland CPO further advises that if this application is approved, the CPO intends to appeal as the community does not want this land developed. (Exhibit 9)
15. The County provided copies of various correspondence between Scott Kline, Division Chief/Fire Marshall for Hoodland Fire District #74 (the proposal site is located within Fire District #74) and Michael Tehan. In this correspondence, Fire Marshall Kline states that the fire district is not waiving fire department access and water supply, pointing to code sections that allow for alternative construction standards and advising that the applicant had requested an alternative for poor fire department access. Fire Marshall Kline informs Mr. Tehan that, as Fire Marshall, he is required to follow both the Oregon Fire Code and Oregon Administrative Rules. Fire Marshall Kline further advises that the proposed single-family home structures will need to meet one or more of the relevant criteria for alternative construction standards to make the homes fire resistant. Fire Marshall Kline also advises that the fire department can gain access to the proposed development, although “the initial fire engine will be delayed by a minute or two based on the slope and width of the upper portion of the proposed access road.” Fire Marshall Kline further advises that the fire district’s smaller brush engines can negotiate the proposed access without delay. Fire Marshall Kline also offers to meet with Mr. Tehan at his home and do a hazard assessment on recommendations to prevent fire spread to protect his own home. (Exhibit 10)
16. The County provided copies of correspondence between County staff and DSL staff concerning this application and the other applications submitted by Mr. Gregory and approved by the County. Among other things, this correspondence discusses certain conditions of approval for development of the site and requirements that a wetland delineation completed by a professional wetland consultant be submitted to DSL for concurrence. The County also provided copies of comments and questions by County Disaster Management and other County staff discussing that the CMZ hazards and risks of these proposed developments have been researched, documented, and mapped but not adopted by the County or State. In addition, the County submitted comments and discussion between the Applicant and County staff providing comments concerning grading permit requirements. (Exhibits 11, 12, 13)
17. The County provided a copy of its Access Easement Documentation verification findings concerning staff findings that the subject properties have a valid easement to Brightwood Loop Road. The County also provided copies of communication with County Development Engineering staff with the Applicant concerning issuance of Permit SC001223 for access, etc. including road access widening and fire truck turnaround, in addition to paving of the entrance. The County also provided copies of correspondence between County staff and the Applicant concerning certain surveys, a change in the naming of the tax lots affecting the Applicant’s site maps, and questions concerning calculations for base flood elevations. Respondent submitted an Updated Preliminary Site Plan and Lot Layout prepared by Licensed Professional Land Surveyor Ronald Alvin Bush. (Exhibits 14, 15, 16, 17)
18. The County submitted a copy of the Tax Assessor’s Map from the Clackamas County Dept. of Assessment and Taxation showing sites the Application is seeking to develop, identifying

each property by application file number and showing the vicinity including the Sandy River, E. Brightwood Loop Road, and several other properties. The County also submitted a copy of the Final Property Line Adjustment (PLA) Record of Survey, prepared by Licensed Professional Land Surveyor Ronald Alvin Bush. The County provided copies of construction plans with floodplain standards highlighted, together with the Site Plans submitted with Applications Z0571-22-F and Z0572-22-F, all prepared by Alan Mascord Design Associates, Inc. The County provided a copy of a drainage analysis of the marshy wetland and the proposed culvert design submitted with the application, prepared by AKS Engineering and Forestry, with supporting documentation. The County submitted a GIS Floodway Location Analysis dated January 3, 2023, prepared by Steve Hanschka, showing all of the subject lots, the floodway, and the floodplain, with overlays showing single family homes proposed by the Applicant, and also showing the vicinity of the site. (Exhibits 19, 20, 23, 24 , 25, 26, 27)

April 20, 2023 Public Hearing

19. The Hearings Officer received testimony and evidence at the April 20, 2023 public hearing about this application. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. The public hearing was conducted virtually over the Zoom platform due to the coronavirus, with the County providing an explanation for virtual participation. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the County's staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.
20. At the hearing, County Sr. Planner Steve Hanschka discussed the staff decision and related exhibits. Mr. Hanschka provided a PowerPoint presentation with relevant background information concerning the applications, the County's review of those applications, and the County's decisions approving the applications. (Exhibit 28)
21. Mr. Hanschka noted that the Applicant submitted applications for floodplain development permits for two new single-family residences in the floodplain of the Sandy River, providing a slide with a location map showing the site and vicinity, including the lots proposed for development, the nearby Sandy River, and E. Brightwood Loop Road. Mr. Hanschka also shared slides showing the Tax Assessor Map and Final PLA Record of Survey for the site and vicinity, highlighting the six lots Applicant is seeking to develop and showing that the two current applications approved by the County concern the southerly lots at the site, also showing the location of the existing gravel road (access easement) as traveled. (Exhibit 28)
22. Mr. Hanschka shared a slide and discussed certain background information, noting particularly that the entire site is within the floodplain of the Sandy River. Mr. Hanschka discussed how the subject properties were reconfigured through Property Line Adjustment File No. Z0417-21-PLA to create six potentially buildable lots in the floodplain of the Sandy River with sufficient buildable area outside of the unbuildable Regulatory Floodway. Mr. Hanschka points out that the application is not for a subdivision; rather, Applicant has filed six separate applications for Floodplain Development Permits for six individual lots of record, each of which is and has been potentially buildable, subject to all necessary permitting. Mr.

Hanschka referenced that the Applicant has been approved for development on the four northerly lots under the Hearings Officer final orders in file nos. Z0228-22-F, Z0229-22-F, Z0230-22-F, and Z0231-22-F, but the original applications for the two southerly lots, file nos. Z0227-22-F and Z0226-22-F, have expired and have been re-filed and reviewed under file nos. Z0571-22-F and Z0572-22-F. Each application proposed construction on each lot of a single-family home elevated and constructed pursuant to FEMA and County floodplain development standards.

23. Mr. Hanschka provided background information concerning the marshy wetland depression area that traverses the approximate middle of the site and has been determined to contain jurisdictional wetlands regulated by the Oregon Department of State Lands. Mr. Hanschka shared how the Applicant has incurred DSL Enforcement File No. 8440-ENF for disturbing wetlands and installing a culvert of the wetlands, and that the Applicant is in the process of addressing this Enforcement File through Joint Permit Application (JPA) Number 63868. Mr. Hanschka noted further that the U.S. Army Corps of Engineers (USACOE) has stated that it will not be pursuing enforcement action, as also noted in the previous applications. Mr. Hanschka reported that the Oregon Department of Environmental Quality (DEQ), Department of State Lands (DSL), Department of Fish & Wildlife (ODFW), and FEMA have been notified of this proposal, but thus far comments have only been received from DSL that primarily address clarification of the application submittals. Mr. Hanschka further reported that a number of comments from the Hoodland CPO and adjacent property owners have been received that are in opposition to the project, as outlined in several exhibits. (Exhibit 28)
24. Mr. Hanschka shared a slide and provided discussion concerning permitting details, noting that access to the site is by way of an existing, primitive gravel road along an easement from E. Brightwood Loop Rd. Mr. Hanschka reported that access rights to this easement have been verified by the County. Mr. Hanschka further reported that this gravel road has been approved for access to the site with conditions for design and improvements by the County Development Engineering Division under File No. SC001223, and the Hoodland Fire District has also approved this access. Mr. Hanschka noted that access to the two southerly lots which are the subject of these two applications would be from this same easement/road then cross the marshy depression area over a culvert, for which additional engineering approval is required. Mr. Hanschka pointed to Exhibit 26, included in the application submittal, which provides a drainage analysis illustrating that the marshy wetland is not hydrologically connected to the Sandy River. This analysis also includes specifications for a culvert designed through a hydro-analysis under the King County methodology to accommodate and convey the 25-year storm. Mr. Hanschka pointed to proposed conditions that require the culvert to be designed and installed in accordance with the specifications of this report. Mr. Hanschka also reported that the County Building Codes Division has determined that a grading permit is not required, but that septic permits for all six lots must be obtained before home construction begins. (Exhibit 28)
25. Mr. Hanschka shared a slide showing the Flood Insurance Rate Map (FIRM) for the area, pointing out the site's location, and a slide showing Base Flood Elevation (BF) Lot Analysis for each of the six lots Mr. Gregory is seeking to develop, including the lot that is the subject of this application. Mr. Hanschka shared a slide of the Floodplain Detail Map showing each of the six lots, indicated the size and BFE for each, the Sandy River, the designated Floodplain area, the designated Floodway area, and a portion of the vicinity. Mr. Hanschka

also shared an overlay of the overall site plan showing each of the six lots with some topographical and lot survey information, indicating locations of test pits, the Sandy River centerline and ordinary high water mark, the existing gravel road as traveled, and locations of existing well heads. Mr. Hanschka shared specific site plans for Z0571-22-F and Z0572-22-F, each showing proposed home site, access, the existing depression/marsh area, approximate flood hazard mark, BFE and lot survey information (Exhibit 28)

26. Mr. Hanschka provided a slide showing the requirements of homes built within the floodplain to meet FEMA/County Floodplain Development Standards. These standards require: elevation of first habitable floor at least 2 feet above the floodplain elevation, or BFE; installation of flood vents in foundation walls at a rate of 1 square inch of flood vent for every square foot of enclosed space, with bottom of flood vents installed no higher than 1 foot above finished grade on at least two (2) sides of the building; use of flood-resistant construction materials; standards for crawlspace design and construction; sufficient anchoring of the structure pursuant to Oregon Residential Specialty Code (ORSC) 301.2.4. Mr. Hanschka reported that these standards are outlined in detail on construction plans for the homes submitted by the Applicant. Mr. Hanschka also provided slides of the Applicant's constructions plans showing how these plans meet these Floodplain Construction Standards. (Exhibit 28)
27. Pat Erdenberger is a member of the Hoodland CPO. Ms. Erdenberger submitted written comments and materials in advance of the hearing opposing the approval of the applications and expressing strong opposition to the activities of Mr. Gregory at the site. Ms. Erdenberger essentially describes these activities as having a negative impact on the local community, also negatively affecting the health of the Sandy River, its clean water, and the fish and wildlife habitat. Ms. Erdenberger points to the Oregon DSL findings and enforcement action concerning Mr. Gregory's activities and the letter from the Army Corps of Engineers stating that these activities likely impacted waters under their jurisdiction. Ms. Erdenberger also described Mr. Gregory's activities in widening and grading the easement that provides access to the site, including felling of trees along this access road, and bringing in dozens of 10-yard truckloads of gravel. Ms. Erdenberger provided photos and a video of the site showing the continued work along the access road and within the floodplain including the wetlands located there. (Exhibits 29, 31)
28. Ms. Erdenberger contends that the County has failed to adequately consider the requirements of County ZDO Section 703 for protecting floodplains. Ms. Erdenberger specifically points to danger to life and property due to increased flood heights or velocities caused by encroachments such as construction of residential structures and associated infrastructure and "cut and fill" activities. Ms. Erdenberger also points to the danger that any new structures built on the site would be a source of materials and debris during flooding, increasing damage to other properties. Ms. Erdenberger asserts that the proposed water supply and sanitation systems will cause contamination of ground and surface waters, contending also that there is not enough room on these sites to meet County septic setback requirements, and disagreeing with the County allowing use of "bottomless sand filters" without considering the sand as "fill." Ms. Erdenberger notes the location of the proposal sites within the floodplain of the Sandy River, also pointing out that this location is within the "channel migration zone" mapped by Clackamas County (referring to the old Sandy River channel). Ms. Erdenberger also contends that legal and safe access to the subject properties is an issue, pointing to the

current access via a narrow unimproved roadway that does not meet County standards, describing it as a primitive one-lane road with blind corners, no pullouts, and vertical drop-offs, and further contending that the road does not meet Oregon Fire Code requirements for Fire Apparatus Access. (Exhibit 29)

29. Ms. Erdenberger further points to the DSL violation notice and the requirements of County ZDO 1307.02(A) that: “No person shall engage in or cause development to occur without first obtaining the necessary land use approvals required by, and according to the procedures in, Section 1307.” Ms. Erdenberger points to Mr. Gregory’s clearing and grading work and dredging and fill activities in the wetland area without obtaining permits. Ms. Erdenberger further points to the Conditions of Approval in the County’s approval of these applications, contending that expectations of future compliance is unrealistic and there is no way for the CPO or its members to monitor whether any of these conditions are met, such as requirements for septic permits and “cut and “fill requirements to balance fill. Ms. Erdenberger points to the previous combined FDP application for these two lots (Z0062-22) that was denied, contending that some of the deficiencies noted by the County in denying these applications still remain, and the subject applications should be denied for these same reasons, providing copies of these decisions and a copy of the letter from the USACOE advising Mr. Gregory that his activity on the site likely impacted areas meeting the definition of “waters of the United States” and recommending he contact the Corp’s Project Manager for Clackamas County to determine the need for a permit. (Exhibit 29)

Appellant’s Pre-Hearing Submissions

30. Appellant Hoodland CPO submitted ten Exhibits (labeled “Ex. 1” – “Ex. 10”), consisting of written comments, argument, maps with comments, appeal, a proposed communication plan with the County, numerous photos primarily of the site (showing Mr. Gregory’s activities), and copies of various documents and correspondence. Appellant’s Ex. 1 includes written comments by the members of the Hoodland CPO regarding Clackamas County Floodplain Permits Z0571 and Z0572. The CPO explains it is appealing the County’s decision to issue these two Floodplain Development Permits because they do not believe the County has adequately addressed the multiple factors for consideration under the County ZDO designed to protect Floodplain Management District including the interests of the public and adjacent landowners and neighbors, raising three main arguments. (Exhibit 30)
31. Firstly, the CPO contends the County has not fully considered the requirements of ZDO 703 for protecting floodplains. The CPO contends approval increases danger to life and property due to increased flood heights or velocities, asserting that allowing construction of the residential structures, drain fields, wells, driveways, and infrastructure will reduce the volume of flood storage capacity for the developed properties. The CPO also points to the “cut and fill” activities that Mr. Gregory has already engaged in and the findings of violations and enforcement action. The CPO contends that any new construction would become the source of materials and debris swept onto properties and damaging the homes downstream during flooding. The CPO contends that approval increases likelihood of ground and surface water contamination, asserting that the new septic filed located in the floodplain will be saturated or submerged much of the year and also arguing that the septic systems themselves should be considered “fill.” The CPO also contends that the sites do not have safe access, asserting that

legal and safe access is an issue, that the access road is unsafe, and contending that the road does not meet Oregon Fire Code requirements. (Exhibit 30)

32. Secondly, the CPO contends that the application should be denied under ZDO 1307.A. requirements that: “No person shall engage in or cause development to occur without first obtaining the necessary land use permit approvals required by, and according to the procedures in, Section 1307.” The CPO points to Mr. Gregory’s activities, including the clearing and grading work completed without approval of these floodplain development permits, the dredging and filling in the wetlands area that is the subject of code enforcement actions, including by the Oregon Department of State Lands, and by the USACOE, and also pointing to this activity as cited in the County’s earlier denial of the previous FDP application Z0063-22. The CPO characterizes these two floodplain development permit applications as “after-the-fact” requests for County approval of work completed in violation of the zoning ordinance. (Exhibit 30)
33. Thirdly, the CPO points to the conditions of approval required by its initial approval and proposed in its recommended approval of these applications. The CPO asserts there is no way for the CPO or its members to track or monitor whether any of these conditions are met. The CPO contends that the applications should be denied because: the sites do not have enough room to meet setback requirements for septic (and therefore permits should not be approved); wetland area work continues without permits; construction is proceeding without erosion control measures; and floodplain “cut and fill” requirements are not being met, reporting that the Applicant is bringing in many loads of fill while bulldozing the existing topsoil into the wetland. (Exhibit 30)
34. Appellant’s Ex. 2 includes flood maps of the area. These maps show areas of past flood damage, the Sandy River in its current channel and historic channel, with the site’s location within the floodplain area. The maps show developed areas that have been impacted by 1996 and 2011 flood damage, and the proximity of the subject sites to the Sandy River and its historic migration zone (essentially located on an “island” area in between). The maps also show the existing wetlands area that essentially bifurcates the site on which Mr. Gregory is working, with the four previously approved home sites on one side of the wetlands and the two home sites that are the subject of these appeals on the other, necessitating crossing the wetlands to reach them. Appellant’s Ex. 3 includes a proposed communication plan requesting monthly in-person meetings between representatives of the County and the CPO with the goal of sharing information concerning on-going land use decisions. (Exhibit 30)
35. Appellant’s Ex. 4 includes photos of the site at the time the Property was sold to Gregory Management, LLC in August 2022. These photos show the primitive access road, and show the undeveloped site with primarily deciduous trees and undergrowth visible and perhaps walking trails evident. (Exhibit 30)
36. Appellant’s Ex. 5 includes notes from the Oregon Dept. of State Lands’ January 28, 2022 visit with several supporting photos. The notes state the site visit was to determine whether wetlands are present at the site, noting that there are no mapped wetlands or hydric soils in the vicinity of Mr. Gregory’s activities (removing trees and grading in the area), but County Planning staff had stated wetlands were present. The notes from this site visit state that the ground has mounds and troughs, the soil is sandy, and most of the clearing is in the uplands,

with vegetation in the uplands consisting of cottonwood, hemlock, cedar, and alder, with blackberry, English ivy, and sword fern on the ground. The report notes the existence of a wetlands area dominated by Carex with some skunk cabbage, and states finding that: “Mr. Gregory excavated out a wetland formed in depression channel that begins at a hillside seep by pumping station facility south of his properties. Another wetland channel on the northeast side parallels the main wetland until they meet near the property boundary between TL 500 and TL 202. The excavation ranges from 8”–2.0’ deep and 4’-14’ wide. The excavation is approximately 575’ long. An averaged are [sic] (not including any fill or other disturbance) is approximately 160 yards.” The photos in Ex. 5 show the upper and lower extent of the wetland excavation and show the area near the top of the spring/seep channel and piles of fill located in the area below the crossing Mr. Gregory created for the wetlands. The exhibit also includes photos of the middle point of the excavation showing dredging work has occurred that appears to have deepened the channel for the wetlands at least to the point of confluence of the two channels, and showing placement of fill in the crossing area. (Exhibit 30)

37. Appellant’s Ex. 6 includes the June 27, 2022 correspondence to Gregory Management LLC from the USACOE, advising Mr. Gregory that his activities within the unnamed wetland on the site likely impact areas meeting the definition of “waters of the United States” under the Corps’ jurisdiction and advising him to contact the Corps’ Project Manager for Clackamas County to determine the need for a permit prior to conducting further such work. Appellant’s Ex. 7 includes a copy of the Applicant’s full site plan showing each home site, also showing the proposed septic system layout with primary septic areas and replacement septic areas delineated. (Exhibit 30)
38. Appellant’s Ex. 8 includes a copy of February 16, 2023 correspondence to Mr. Gregory from Scott Kline, Fire Marshall for the Hoodland Fire Department, concerning the Fire Department’s review of the reconfigured site plan for fire access to the site. Fire Marshall Kline notes that the access road is narrow with a steep grade and sharp curve before the start of the access improvement and advises Mr. Gregory concerning meeting Uniform Alternative Construction Standards. Fire Marshall Kline advises that if the Uniform Alternative Construction Standards are met, then the site plan is in conformance with the 2019 Oregon Fire Code and/or requirements of Clackamas County. Appellant’s Ex. 8 also includes a copy of December 27, 2022 correspondence to Mr. Gregory from Scott Kline, Fire Marshall for the Hoodland Fire Department concerning its approval of fire department access from a completed plans review, conditions to meet the Uniform Alternative Construction Standards, and recommendation concerning use of residential fire sprinklers. The CPO’s exhibit includes a copy of the Applicant’s revised site plan showing the access road, with plans to widen the road, replace existing culverts, and include two hammerhead fire turn-arounds. (Exhibit 30)
39. Appellant’s Ex. 9 includes April 16, 2023 photos of the site showing disturbance of the wetlands area. The photos include pictures of the widening of the access road and show gravel placed in the access road. These photos show puddles of water in the mud and show the wetlands depression area with tire tracks and what appears dredged material. These photos show an area along one of the channels that appears to have a culvert under the gravel access road. These photos show a picture of heavy equipment that appears involved in moving earth and preparing a home site or access to a home site. The photos include pictures of piles of downed trees and a pile of larger rocks such as used for rip-rap. (Exhibit 30)

40. Appellant's Ex. 10 includes minutes or notes from a January 11, 2023 Hoodland CPO meeting. These minutes show that 113 members of the community were in attendance. The minutes show that Clackamas County Commissioner Mark Shull attended the meeting and spoke to the history and current status of Short Term Rental regulations (there are none) and spoke to his suggestions concerning an applicable County ordinance governing such rentals. The minutes show that the CPO reviewed the status of several land use applications and is not appealing County approved applications for a temporary dwelling for care (Z04234-22) and for a partition (Z9385-22M). The minutes show that the CPO is awaiting County decisions in two other matters. The minutes show that the CPO received an update from Michael Tehan, Appellant in file nos. Z0228-22-F, Z0229-22-F, Z0230-22-F, and Z0231-22-F, concerning the appeals process as these matters move to LUBA. The minutes also reference that application file no. Z0572-22 was submitted but don't indicate any discussion of it. (Exhibit 30)

Appellant

41. The Hoodland CPO is the appellant in this matter. Nora Gамbee, Chair for Hoodland CPO appeared at the hearing and provided testimony and argument in support of the appeals. Ms. Gамbee strongly opposes approval of these applications, pointing to Appellant's written appeal package (Exhibit 30) as containing her arguments. Dave Lythgoe, Assistant Chair for Hoodland CPO, also appeared at the hearing and provided testimony and argument in support of the appeals. Mr. Lythgoe strongly opposes approval of these applications, also pointing to Appellant's written appeal package (Exhibit 30). Mr. Lythgoe points to Page 9 of Exhibit 30, which shows that the site is entirely within the Floodplain Management District, located within the designated channel migration zone for the Sandy River and within the FEMA 100-Year Flood Zone, meaning there is a 25% chance of a major flood on this site every 25 years. Mr. Lythgoe describes the presence of artesian wells at this location and the hazards of development within the floodplain, particularly from groundwater contamination associated with the flooding of the six new septic systems Mr. Gregory is seeking to install. Mr. Dave Lythgoe also submitted a written statement prior to the hearing concerning these same issues, pointing to these same maps and making these arguments concerning the hazards of approving these applications. Mr. Lythgoe points to the purposes stated in ZDO 703.02, asserting that approval is counter to these statements. (Exhibit 32⁸)
42. Ryan Tercek is the Communications Manager for the Hoodland CPO. Mr. Tercek also points to the CPO's written appeal package and Appellant's proposed "Communication Plan Between Hoodland CPO and Clackamas County" on Page 12, asserting the need for improved communication between the CPO and County. Mr. Tercek states that the CPO did not receive the application notice for Z0571-22-F, only the notice for Z0572-22-F.⁹ Marti Browne is the Secretary/Treasurer for the Hoodland CPO. Ms. Browne points to page 5 of Exhibit 30, discussing that while the County has required many conditions there is no way for the CPO or its members to track or monitor whether any of these conditions can or will be met. Ms. Browne also points to safety concerns with the site's location between the current channel for the Sandy River and its historic channel, the wetland channel through the site, and the area of flood damage just a short distance from the site. Ms. Browne also points to the need for a communication plan.

⁸ The author of this written statement is unidentified on the document, but I believe it to be Mr. Lythgoe.

⁹ Mr. Hanschka shared a view of his sent email showing notices for both applications were sent to the Hoodland CPO.

Applicant

43. Michael Gregory is the applicant. Mr. Gregory appeared for the hearing and provided testimony and advocacy in support of approving this application and answered several questions about the application. Mr. Gregory stated that no permit application has been required by DSL or the Army Corps. He points to the report by AKS Engineering that the cut/fill on the site does not exceed 50 yards, indicating this report was accepted and therefore no permit has been requested. With respect to septic requirements, Mr. Gregory notes that he submitted a preliminary site map, and discussed the need to meet requirements for a 50 foot setback from the wetlands area. Mr. Gregory asserts that the applications should be approved, pointing to the decision of the County's Planning Director that the applications meet all standards for approval, and he does not dispute any of the County's proposed conditions of approval.

Public

44. Patricia Erdenberger is a member of the Hoodland CPO. Ms. Erdenberger reports that Mr. Gregory's work at the site started in December 2021 and has not stopped since even despite the Army Corp.'s letter, the site inspection by DSL, or DSL's enforcement action.
45. Jack McAfee and Sylvia McAfee reported that the access road being used by Mr. Gregory to reach the site belonged to the Goldthorpes, and they kept a ditch along it that has been filled in by Mr. Gregory. They describe the effects of the 1964 flood in the area, the resulting property damage, and the likelihood that the entire site will also be flooded.
46. Mitch Williams of Brightwood, Oregon did not participate at the hearing but submitted a written comment shortly afterwards stating he has lived in the Sandy River basin for 40 years and has witnessed many floods. Mr. Williams asserts that: "The Hoodland CPO and Mr. Tehan have made compelling, rational, legal and county planning arguments against all of the plans submitted in these applications by Mr. Gregory." Mr. Williams points to the multiple complaints of Mr. Gregory's activities at the site and within the wetlands, issues around the access, and hazards to water supplies and neighborhood homes. Mr. Williams asserts these applications must be denied. (Exhibit 33)

C. FINDINGS AND DISCUSSION

This matter involves the appeal of a Planning Director decision approving an application for a Floodplain Development permit for construction of a new single-family residence in the floodplain of the Sandy River. The application was initially processed by the County under ZDO Section 1307 as a land use permit under the required Type II procedure for a Floodplain Development permit whereby the Planning Director is the initial decision review authority, and the Hearings Officer is the appeal review authority.¹⁰ The Planning Director¹¹ approved the application and this appeal

¹⁰ See Table 1307-1: Land Use Permits by Procedure Type.

¹¹ ZDO 1307.3(B) provides that the Planning Director includes "Any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO]." County Sr. Planner Steve Hanschka acted in this capacity.

followed. The evidence presented is reliable, probative and substantial evidence upon which to base a determination in these matters. The appeal discussed below is reviewed subject to the appeal procedures contained in ZDO 1307.13. These procedures provide for de novo review of the application whereby all issues of law and fact are heard anew, and no issue of law or fact decided by the lower-level review authority is binding on the parties in the hearing. The record of the initial proceedings shall, however, be made a part of the record of the appeal. New parties may participate, and any party may present new evidence and legal argument by written or oral testimony.

SECTION I: CONDITIONS OF APPROVAL:

The conditions listed are proposed by staff as necessary to ensure that approval criteria for this land use permit are satisfied. Where a condition relates to a specific approval criterion, the code citation for that criterion follows in parentheses. *The Hearings Officer reviewed, adopted, and/or modified (as denoted by boldface type in italics) each of these proposed Conditions of Approval:*

1. **General Conditions:**

- A) Approval of this land use permit is based on the submitted written narrative and plan(s) submitted to the file up to the date of this decision. No work shall occur under this permit other than which is specified within these documents. It shall be the responsibility of the property owner(s) to comply with this document(s) and the limitation of approval described herein.
- B) The service of a certified surveyor and/or engineer is required for completing the remaining two (2) elevation certificates.
- C) Approval Period: The approval of this Floodplain Development Permit is valid for four years from the date of the final written decision. If the County's final written decision is appealed, the approval period shall commence on the date of the final appellate decision. During this four-year period, the approval shall be implemented, or the approval will become void.
 - i. "Implemented" means at least one major development permit shall be obtained and maintained, or if a major development permit is not required to complete the development contemplated by the approved FDP, "implemented" means all other necessary County development permits (e.g. grading permit, building permit for an accessory structure) shall be obtained and maintained.
 - a) A "major development permit" is:
 - 1. A building or manufactured dwelling placement permit for a new primary structure that was part of the FDP approval; or
 - 2. A permit issued by the County Engineering Division for parking lot or road improvements that were part of the FDP approval.
- D) Time Extension: If the approval of this Floodplain Development Permit is not implemented within the initial approval period established by Subsection 703.09(F), a two-year time extension may be approved pursuant to Section 1310.

2. **General Approval Criteria:**

- A) Other Permitting Requirements: All necessary permits shall be obtained from those federal, state, or local governmental agencies from which prior approval is required.

- i. Approval shall be obtained from the Oregon Department of State Lands (DSL) for Permit No. 63868-RF.
 - ii. Resolution of DSL Enforcement File No. 8440-ENF shall be required.
 - iii. Adequate fish passage shall be verified through ODFW.
- B) Compliance with Subsections 703.10 and 703.11: The proposed development shall comply with the applicable provisions of Subsections 703.10 and 703.11, as outlined below.

3. **Elevation Certificate & Floodproofing Certificate Requirements:**

- A) All Elevated Structures:
- i. Prior to the approval of the foundation inspection, a second Elevation Certificate shall be submitted, verifying that the foundation shall be built, poured, configured, elevated, etc., in a manner that ensures that the Lowest Floor / first habitable floor, along with all applicable utilities, shall be elevated at least 2 feet above the BFE of 1,138 ft. NAVD88 (or 1 foot above BFE for ductwork).
 - ii. Prior to the final inspections for the building permit(s) for the proposed new home, a Final Elevation Certificate must be completed in its entirety, in accordance with the FEMA NFIP Elevation Certificate Instructions, and submitted to both the Planning and Building Code Divisions prior to the final building inspections. The building permit(s) cannot be finalized until the Planning Division has deemed the Final Elevation Certificate to be correct and complete, while confirming that the new home as built has, according to the Final Elevation Certificate, been built pursuant to the applicable FEMA NFIP and County floodplain development standards.

4. **County Permitting Requirements:**

- A) County-approved building and other development permits are required for the construction of the proposed new home. The construction of the home shall meet building code and the FEMA NFIP standards.
- i. Fire sprinklers may be required for the dwelling as determined by the County Building Codes Division in coordination with the Hoodland Fire District.
 - ii. An Erosion Permit is required for all of the site development work.
 - iii. All home construction shall meet the floodplain development requirements of the Oregon Residential Specialty Code (ORSC) 301.2.4.
- B) Access to the site, some culvert installation and driveways are subject to the Engineering Permit SC001223.
- C) Water supply and access are subject to the standards of the Hoodland Fire District, including:
- i. The 2019 Oregon Fire Code Chapter 5, Appendices B, C & D
 - ii. The Oregon Fire Code Fire Code Applications Guide

- D) A septic system permit shall be obtained, as required by the County Septic & Onsite Wastewater Program.
- E) The siting of the home shall comply with the applicable Dimensional Standards of the Recreational Residential (RR) zoning district outlined in Table 316-2 of ZDO Section 316.
- F) Pursuant to FEMA NFIP and County Building Code regulations, the building permit to construct the proposed new home, along with any other County development permits, shall be finalized in accordance with the permitting requirements of the County Building Codes Division and other applicable County agencies.

5. **General Standards:**

- A) **Anchoring:** 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.
- B) **Construction Materials and Methods, and Utilities:**
 - i. **Below-Grade Crawlspace:** The following standards shall apply to below-grade crawl spaces. For more detailed information, refer to FEMA Technical Bulletin 11-01, *Crawlspace Construction for Buildings Located in Special Flood Hazard Areas*. For flood insurance purposes, there is an additional charge that is added to the basic flood insurance policy premium for structures that are built on below-grade crawl spaces.
 - a) The building shall be designed and adequately anchored to resist flotation, collapse, and lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy. Hydrostatic loads and the effects of buoyancy can usually be addressed through the openings required by Subsection 703.10(B)(1)(b). Because of hydrodynamic loads, crawl-space construction is prohibited in areas with flood velocities greater than 5 feet per second unless the design is reviewed by a qualified design professional, such as a professional engineer or licensed architect. Other types of foundations are recommended for these areas.
 - b) The crawl space shall have openings that equalize hydrostatic pressures by allowing the automatic entry and exit of floodwaters. The bottom of each flood vent opening shall be no more than one foot above the lowest adjacent exterior grade.
 - c) Portions of the building below the base flood elevation (BFE) shall be constructed with materials resistant to flood damage. This includes not only the foundation walls of the crawl space used to elevate the building, but also any joists, insulation, or other materials that extend below the BFE. The recommended construction practice is to elevate the bottom of joists and all insulation above BFE.
 - d) Any building utility systems within the crawl space shall be elevated above the BFE or designed so that floodwaters cannot enter or accumulate within the system components during flood conditions. Ductwork, in

particular, shall either be placed above the BFE or sealed from floodwaters.

- e) The interior grade of a crawl space below the BFE shall not be more than 2 feet below the lowest adjacent exterior grade.
- f) The height of the below-grade crawl space, measured from the interior grade of the crawl space to the top of the crawl space foundation wall shall not exceed 4 feet at any point. The height limitation is the maximum allowable unsupported wall height according to the engineering analyses and building code requirements for flood hazard areas.
- g) There shall be an adequate drainage system that removes floodwaters from the interior area of the crawl space. The enclosed area shall be drained within a reasonable time after a flood event. The type of drainage system will vary because of the site gradient and other drainage characteristics, such as soil types. Possible options include natural drainage through porous, well-drained soils and drainage systems such as perforated pipes, drainage tiles, or gravel or crushed stone drainage by gravity or mechanical means.
- h) The velocity of floodwaters at the site should not exceed 5 feet per second for any crawl space. For velocities in excess of 5 feet per second, other foundation types should be used.

- C. Flood-Resistant Materials & Utility Equipment: All new construction and substantial improvements shall be constructed with materials and utility equipment resistant to flood damage, and using methods and practices that minimize flood damage. For more detailed information, refer to November 1999 FEMA Publication 348, *Protecting Building Utilities from Flood Damage*; and FEMA Technical Bulletin 2-93, *Flood-Resistant Materials Requirements*.
- D. Water Supply Systems: New and replacement water supply systems shall be designed to minimize or eliminate infiltration of floodwaters into the system.
- E. Sanitary Sewage Systems: New and replacement sanitary sewage systems shall be designed to minimize or eliminate infiltration of floodwaters into the system and discharge from the system into floodwaters.
- F. Building Utilities: All equipment, machinery, appliances, and electrical boxes that pertain to electrical, ventilation, plumbing, and heating and air-conditioning systems and services, as well as outside fuel storage tanks, outside air-conditioning units, and other interior or exterior service facilities, systems, equipment, machinery, appliances, and other utilities shall be elevated or floodproofed so as to prevent water from entering or accumulating within the components during conditions of flooding.
 - i. Floodproofed facilities, systems, equipment, machinery, and appliances — except for waterproofed wires and cables, as well as waterproofed and sealed plumbing pipes and other plumbing services — shall be certified as such by a preliminary and final floodproofing certificate.
 - ii. Except for manufactured dwelling electrical crossover connections, regulated pursuant to Subsection 703.11(A)(1), non-floodproofed facilities, systems,

equipment, machinery, and appliances shall be elevated at least 2 feet above the BFE, except that duct systems may be elevated at least 1 foot above the BFE.

- G. Onsite Wastewater Disposal Systems: Onsite wastewater disposal systems shall be located to avoid impairment to them or contamination from them during flooding consistent with Oregon Department of Environmental Quality regulations.
- H. Professional Certification: A professional engineer or licensed architect shall certify 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. Such certifications shall be provided to the County.
- I) Fill: No fill is permitted to be brought on site, except that material for driveways can be brought on site, providing that the organic material scraped away for the driveway construction is taken off site, and thereby results in no gain of additional material in the floodplain, i.e. balanced cut and fill for driveway construction.
- J) Watercourse Crossing / Culvert
 - i. The culvert crossing the marshy wetland area shall be constructed pursuant to the analysis and plans prepared by AKS Engineering and dated 12/1/22.
 - ii. The culvert project shall be designed as balanced removal and fill project, or designed to not raise the BFE.
 - iii. The culvert shall be designed to minimize the area of fill in the special flood hazard area (SFHA) and to minimize erosive water velocities.
 - iv. The culvert shall be as close to perpendicular to the stream as practicable.
 - v. The culvert shall be designed to allow fish passage, as verified by ODFW.
 - vi. The culvert is subject to review and approval pursuant to applicable federal and state statutes and administrative rules.

6. **Specific Standards for Lowest Floor Elevation, Flood Vents & Floodproofing in AE Zones with Designated Floodways:**

- A) Residential Construction, Manufactured Dwelling Placement, and Elevated Commercial, Industrial & Institutional Construction:
 - i. Lowest Floor Elevation of Site-Built Residential and Elevated Commercial, Industrial & Institutional Construction: The lowest floor, including basement, shall be elevated at least 2 feet above the BFE of 1,138 ft. NAVD88.
 - ii. Limitations on Use of Areas below Lowest Floor for All Elevated Construction: Areas below the lowest floor shall be utilized solely for parking of vehicles, building access, storage and / or uses that are typical of a crawl space. None of the areas below the lowest floor shall be used for human habitation.
 - iii. Flood Vents for All Elevated Construction: Fully enclosed areas below the lowest floor that are subject to flooding are prohibited, or shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement shall either be certified by a professional engineer or licensed architect or shall meet

or exceed the following minimum criteria. For more detailed information, refer to FEMA Technical Bulletin 1-93, *Openings in Foundation Walls*.

- a) A minimum of two openings having a total net area of not less than 1 square inch for every square foot of enclosed area subject to flooding shall be provided, unless the applicant provides documentation from a professional engineer or licensed architect that a flood vent manufacturer's product can provide less than 1 square inch of opening for every square foot of enclosed area and still meet National Flood Insurance Program standards.
- b) The bottom of all openings shall be no higher than 1 foot above grade.
- c) Openings may be equipped with screens, louvers, or other coverings or devices provided that they permit the automatic entry and exit of floodwaters.

SECTION II: FINDINGS:

This application is subject to Clackamas County Zoning and Development Ordinance (ZDO) Sections 202, 316, 703, 1007.03, 1307, and the County's Comprehensive Plan. The Planning Division has reviewed these sections of the ZDO in conjunction with these application proposals and makes the following proposed findings, conclusions, and related conditions of approval reviewed below. The findings below identify the standards and criteria that are relevant to this decision, state the facts relied upon in rendering the decision, and explain the justification for the recommended decision.

These findings and conclusions were reviewed, modified, and/or adopted by the Hearings Officer, with comments denoted by boldface type in italics. The primary specific issue raised in this appeal is improper consideration of ZDO Section 703 requirements. An assertion was also made that the Hoodland CPO did not receive notice of one of these two applications (Z0571-22-F) Mr. Hanschka addressed by sharing a a view of his sent email showing both notices were sent to the Hoodland CPO. In any case these applications are substantially identical, were processed together, and the comments received were considered as comments on both applications. I also note that many if not all of the comments received were directly addressed by County staff through email correspondence. All of the written comments and testimony received were carefully reviewed and considered in this appeal process with respect o both applications. I note that development of single-family residences is a permitted use in the Rural Residential (RR) zone under Section 316 of the County ZDO, and that the access requirements under ZDO 1007.03 are addressed through conditions of approval. As noted by Mr. Hanschka the primary purpose of this application is to address the FEMA and County floodplain development performance standards and this application does not encompass easement rights, access/easement improvements, fire department approval, septic system permitting, grading permitting, culvert installation or grading for the wetland crossing or other permitting requirements for developing the site. This application does not address the enforcement action by DSL or requirements to resolve the impacts to the wetlands, resolution of which is required through condition. As noted by the County, this application addresses the FEMA and County floodplain development performance standards under Section 703 required for the construction of a new home in the floodplain.

The discussion below addresses the requirements of Section 703 concerning development within the Floodplain Management District. The Appellant Hoodland CPO and opponents of the application make several other assertions, such as damage to trees, vegetation clearing, grading without permits (including within wetlands) and issues concerning work within the access easement, among other things, that are outside the scope of this hearing. In addition, numerous written comments and opposition testimony are directed towards the basic underlying issue of allowing any new development within the designated floodplain area, including valid questions concerning why development within the floodplain was allowed in the first place given the known hazards of these areas. There are numerous strong arguments, many reviewed and reported in the comments, testimony, and findings from the hearing, that no homes or other development should be allowed within the designated floodplain for the Sandy River. The fact remains, however, that such development remains lawful on properties such as those that are the subject of these applications, and changing these laws is a matter of legislation. Thus, these arguments are also outside the scope of this hearing. This hearing concerns two applications submitted by Mr. Gregory seeking approval related to floodplain performance standards for two homes proposed for construction in the floodplain.

1. PROJECT OVERVIEW:

[Taken from Staff Report: the differences in each narrative for the individual applications Z0571-22-F and Z0572-22-F concern facts specific to each subject property such as its size, street address, legal description, the Map & Taxlot, BFE (including elevation certificates), and File No. for each lot. Each application also has its own site plan and plans with specific details for each lot. I find no substantive differences between the applications that are relevant to the project narrative described below.]

The roughly 0.69-acre subject property is located west of the Sandy River and east of E Brightwood Loop Rd. near its intersection with E Miller Road. The subject lot is the second most southerly lot of an overall site that consists of six lots, each of which are proposed to be developed with a single-family residence in the floodplain of the Sandy River. The four northerly lots have been reviewed for homes in the floodplain under file numbers Z0228-22-F, Z0229-22-F, Z0230-22-F and Z0231-22-F. As previously noted, the subject lot is being reviewed for a single-family residence in the floodplain under this File No. Z0572-22-F, while the most southerly lot is being reviewed for a single-family residence in the floodplain under File No. Z0571-22-F.

The entire overall site is located in the floodplain of the Sandy River, and there is marshy wetland depression area that traverses the approximate middle of the site that has been determined to contain jurisdictional wetlands regulated by the Oregon Department of State Lands (DSL). DSL has been notified of this application, though no comments have yet been received. The two southerly lots will be accessed by crossing the marshy wetland by way of a culvert that has been designed by AKS Engineering & Forestry Inc. The culvert design includes a drainage analysis and associated design and sizing criteria to adequately allow the marshy wetland area to run through the culvert up to the 25-year storm event. The Oregon Department of Fish & Wildlife (ODFW) has been notified of the application so ensure that the culvert is adequate for fish passage, though no comments have yet been received. The areas of proposed development are located more than 150 feet from the mean high water line of the Sandy River and, therefore, beyond the area of the Sandy Principal River Conservation Area (PRCA), where land use review is required under a PRCA Review.

An existing road from E Brightwood Loop Rd. winds its way to the site, which would provide access to the properties. The applicant is working with the County Transportation Engineering Division to obtain approval of improvements to the road for access. The applicant is working with the local Fire Marshall to provide emergency access or mitigate substandard access through other fire suppressions requirements. No private drive access or building permits have been issued at this time.

The primary purpose of this application is to address the FEMA and County floodplain development performance standards — such as elevation of first habitable floor; installation of flood vents; use of flood-resistant materials; anchoring, etc. — required for the construction of a new home in the floodplain. The remaining requirements for development of the site are outlined as conditions.

2. FLOODPLAIN MANAGEMENT DISTRICT (FMD) FINDINGS:

The findings below identify the standards and criteria that are relevant to this decision, state the facts relied upon in rendering the decision, and explain the justification for the decision.

703.01 FINDINGS OF FACT

A Floodplain Management District (FMD) is needed for the following reasons:

- A. Flood Losses Resulting from Periodic Inundation: The special flood hazard areas of the County are subject to periodic inundation that results in loss of life and property, health and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for flood protection and relief, and impairment of the County's tax base, all of which adversely affect the public health, safety, and general welfare.
- B. General Causes of These Flood Losses: Flood losses are caused by:
 - 1. The cumulative effect of obstructions in special flood hazard areas that increase flood heights and velocities and, when inadequately anchored, damage land uses in other areas; and
 - 2. The occupancy of special flood hazard areas by uses vulnerable to floods or hazardous to others that are inadequately floodproofed, inadequately elevated, or otherwise unprotected from flood damages.

703.02 PURPOSE

Section 703 is adopted to:

- A. Promote the public health, safety, and general welfare;
- B. Protect human life and health;
- C. Minimize public and private flood losses due to flooding in flood hazard areas;
- D. Minimize expenditure of public money for costly flood control projects;
- E. Minimize prolonged business interruptions;

- F. Help maintain a stable tax base by providing for the sound use and development of special flood hazard areas so as to minimize future flood blight areas;
- G. Restrict or prohibit uses that are dangerous to health, safety, or property in times of flooding or that cause increases in erosion, flood heights, or velocities;
- H. Minimize damage to public facilities and utilities—such as water and gas mains; electric, telephone, and sewer lines; streets; and bridges—located in special flood hazard areas;
- I. Require that uses vulnerable to floods, including public facilities that serve such uses, be provided with flood protection at the time of initial construction;
- J. Notify those who occupy special flood hazard areas that they assume responsibility for their actions;
- K. Protect individuals, as much as possible, from buying lands that are not suitable for intended purposes because of flood hazard, by ensuring to the degree possible that potential buyers are notified that property is in a special flood hazard area; and
- L. Minimize the need for rescue and relief efforts associated with flooding undertaken at the expense of the general public.

703.03 WARNING AND DISCLAIMER OF LIABILITY

The degree of flood protection required by the FMD is considered reasonable for regulatory purposes and is based on engineering and scientific study. Larger floods may occur on rare occasions. Flood heights may be increased by manmade or natural causes, such as ice jams and bridge openings restricted by debris. Section 703 does not imply that areas outside the FMD or land uses permitted within the FMD will be free from flooding or flood damages. Section 703 shall not create liability on the part of the County, any officer or employee thereof, or the Federal Insurance Administration, for any flood damages that result from reliance on the FMD or any administrative decision lawfully made hereunder.

703.04 APPLICABILITY

Section 703 applies to the FMD, which is applied to the special flood hazard areas (SFHAs) identified by the Federal Insurance Administration in a scientific and engineering report entitled, “The Flood Insurance Study for Clackamas County, Oregon & Incorporated Areas,” (FIS) dated January 18, 2019, with accompanying Flood Insurance Rate Maps (FIRMs).

- A. The FIS and FIRMs are hereby adopted by reference and declared to be a part of Section 703 and are on file at the County Department of Transportation and Development.
- B. The Planning Director shall make interpretations where needed, as to the exact location of the boundaries of the SFHA (for example, where there appears to be a conflict between a mapped boundary and actual field conditions, topography, and/or

elevations). In areas where base flood elevation data have been provided, the Planning Director may require the applicant to submit an elevation certificate. To most precisely determine the base flood elevation of the subject area, the elevations provided by the FIS flood profiles in combination with the cross section lines on the FIRM shall supersede the base flood elevation lines and values identified on the FIRM.

*Per Map Number 41005C0382E, effective January 18, 2019, the subject property is located within the SFHA, therefore ZDO Section 703 applies to this development. With the available information at hand, particularly the site-specific elevation information, no interpretations of the boundary by the Planning Director are necessary. **The Hearings Officer concurs in this finding.***

703.05 DEFINITIONS

*Development in the FMD is subject to the definitions outlined in this Subsection. **The Hearings Officer adopts this finding.***

703.07 DEVELOPMENT IN THE FLOODWAY

*No development is proposed or authorized in the floodway. **The Hearings Officer concurs with this finding. Although the appellant and public commentators contend that the proposal site is within the floodway for the Sandy River, the submitted maps and surveys show that the site proposed for development with a home and associated infrasture is not actually located within the floodway. I am persuaded that the proposal site for this application and the similar applications submitted by Mr. Gregory include only areas within the designated floodplain, and no areas within the floodway.***

703.08 DUTIES OF THE PLANNING DIRECTOR

The Planning Director is hereby appointed to administer and implement Section 703 by granting or denying development permit applications in accordance with its provisions. The Planning Director may delegate authority to implement these provisions. Duties of the Planning Director under Section 703 include:

- A. The Planning Director shall review floodplain development permits to determine if the proposed development adversely affects the flood carrying capacity of the special flood hazard area. For purposes of this subsection, "adversely affects" means that the cumulative effect of the proposed development and all other existing and anticipated development, will not increase the water surface elevation of the base flood more than one foot at any point.

*The area of the project is located within an AE Zone that includes a mapped Floodway. The Floodway is defined as the channel of the river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevations more than 1 foot. As long as the Floodway remains fully reserved and any encroachments achieve a "no-rise" condition, the cumulative effect of all existing and proposed development will not increase the water surface elevations of the base flood by more than 1 foot at any point. As previously noted, there will be no encroachment into the floodway. **The Hearings Officer concurs in this finding. Appellant***

Hoodland CPO and its members are correct in asserting that any and all development within the floodplain has an impact on the flood carrying capacity of the special flood hazard area. The regulation here, however, allows development as long as such impact does not exceed the standard of “adversely affects,” meaning that the cumulative effect of the proposed development and all other existing and anticipated development must not increase the water surface elevation of the base flood more than one foot at any point. The proposal meets this standard.

- B. Within the special flood hazard area, when more detailed base flood elevation or floodway data is available outside of the adopted Flood Insurance Study (FIS) from a federal, state or other authoritative source — such as preliminary or draft information from a new study that will revise the FIS —the Planning Director may obtain, review, and reasonably utilize such data as long as it is more restrictive than the currently effective data. When the data pertains to a preliminary or draft FIS in Zone A, the Planning Director is required to reasonably utilize the data, and is allowed discretion in using this data only to the extent that the technical or scientific validity of the data in the draft or preliminary FIS is questioned by a qualified professional.

There is no more detailed BFE or floodway data than the currently adopted and effective FIS. The Hearings Officer concurs in this finding.

- C. When base flood elevation data has not been provided (A zones), the Planning Director shall obtain, review, and reasonably utilize any base flood elevation and floodway data available from a Federal, State, or other source, in order to administer the standards in Subsections 703.08, 703.10, and 703.11.

The site is not in an A Zone. The Hearings Officer concurs in this finding.

- D. The Planning Director shall, where base flood elevation data is provided through the FIS, Flood Insurance Rate Map, or utilized pursuant to Subsections 703.08(B) or (C), obtain and record the actual elevation (in relation to mean sea level) of the lowest floor (including basements and below-grade crawlspaces) of all new or substantially improved structures, and whether or not the structure contains a basement.

The lowest floor elevation is being recorded on the three (3) required elevation certificates. The Hearings Officer concurs in this finding.

- E. For all new or substantially improved structures, the Planning Director shall review an elevation certificate or a Federal Emergency Management Agency National Flood Insurance Program Floodproofing Certificate (for Non-Residential Structures) provided by the applicant and shall verify and record the actual elevation (in relation to mean sea level) and maintain the elevation and floodproofing certificates required.

1. In either case, the currently effective form shall be used, and it shall be completed in accordance with the accompanying instructions.
2. The determination regarding which certificate is required shall be made based on the nature of the development consistent with National Flood Insurance Program regulations.

Three (3) elevation certificates are being reviewed. The Hearings Officer adopts this finding.

- F. The Planning Director shall maintain for public inspection all records pertaining to the provisions of Section 703.

*All records pertaining to the provisions of Section 703 are on file and publically available at the offices of the County Planning Division, including those that pertain to this proposal. **The Hearings Officer concurs in this finding.***

- G. The Planning Director shall review all floodplain development permits to determine if the proposed development activity qualifies as a substantial improvement.

*The proposed floodplain development permit is for new construction and not for a substantial improvement. **The Hearings Officer concurs in this finding.***

- H. The Planning Director shall provide to building officials the regulatory flood protection elevation applicable to any building requiring a building permit.

*The building officials are being provided the regulatory flood protection elevation of the proposed new home. **The Hearings Officer concurs in this finding.***

- I. The Planning Director shall notify adjacent communities, the State of Oregon Department of Land Conservation and Development, and other appropriate state and federal agencies prior to any alteration or relocation of a watercourse and submit evidence of such notification to the Federal Insurance Administration.

*The Hoodland CPO, adjacent property owners within 500 ft. and the DLCDC have all been notified of the project in the event that the activities within the marshy wetland area and culverting of the marshy wetland area constitute alteration or relocation of a watercourse. **The Hearings Officer concurs in this finding.***

- J. The Planning Director shall notify the Federal Emergency Management Agency (FEMA) within six months of project completion when an applicant had obtained a Conditional Letter of Map Revision (CLOMR) from FEMA, or when development altered a watercourse, modified floodplain boundaries, or modified base flood elevations. This notification shall be provided as a Letter of Map Revision (LOMR).

*A CLOMR / LOMR is not required for this project. **The Hearings Officer concurs in this finding.***

703.09 FLOODPLAIN DEVELOPMENT PERMITS

Except as provided under Subsection 703.06, a floodplain development permit (FDP) shall be obtained for development laterally within the FMD before construction or development begins. The permit shall be for all structures, including manufactured dwellings, and for all development, including fill and other activities. Work that is necessary to protect existing structures, utility facilities, roadways, driveways, and stream banks in response to emergencies may be undertaken prior to obtaining an FDP, provided that an application is made within 90 days of water receding. The measures used for protection may not be able to be permitted. An FDP requires review as a Type II application pursuant to Section 1307, *Procedures*.

*The applicant has proposed a new home in the floodplain of the Sandy River for which a Floodplain Development Permit is required. **The Hearings Officer adopts this finding.***

- A. Submittal Requirements: In addition to the submittal requirements identified in Subsection 1307.07(C), an application for an FDP shall include:

The applicant has provided sufficient submittal materials under this Subsection to proceed with the application. The Hearings Officer concurs in this finding, noting that submitted plans were stamped by a licensed professional engineer meeting the above requirements, three elevation certificates were submitted for each lot, and no watercourse is proposed to be altered or relocated. I noted also the findings by AKS Engineering that the wetlands area running through the approximate middle of the site is not hydrologically connected to the Sandy River, and the finding that this wetlands originates from a hillside seep below a pump station. Related Conditions of Approval are adopted concerning meeting these standards and requirements.

- B. Factors of Consideration: In reviewing an application for an FDP, the following factors shall be considered:

1. The danger to life and property due to increased flood heights or velocities caused by encroachments;

By definition, an encroachment is any form of development in the floodway. As previously noted, there will be no development in the floodway. The Hearings Officer concurs in this finding. Appellant argues that the construction of these two additional residential structures, with associated infrastructure, will reduce the volume of flood storage capacity of these properties within the floodplain. This is true, as is true with all development within the floodplain. As discussed, development of these properties within the floodplain with residential homes is a legally allowed use despite the associated and known risks. As noted the development proposed by these applications is a primary allowed use of these properties within the floodplain and is not proposed to occur within the designated floodway for the Sandy River.

2. The danger that materials may be swept on to other lands or downstream to the injury of others;

The proposed new home will be anchored pursuant to applicable FEMA NFIP and County Building Code standards. The Hearings Officer adopts this finding, noting that the plans submitted are stamped by a licensed professional engineer as meeting these requirements and standards. Appellant argues that existing residences immediately downstream of the subject properties would be harmed by the proposed new homes in the event of future flooding, contending that any new structures would become a source of materials and debris swept onto these adjacent properties and homes in the event of a flood. I understand this concern as it fairly characterizes one of the many risks inherent in allowing any development within the floodplain. However, as discussed, development is allowed within the floodplain provided it meets the standards of this section. I am persuaded by the certification made by the licensed PE that the Applicant's plans meet the requirements and standards for construction of these proposed homes within the floodplain.

3. The proposed water supply and sanitation systems and the ability of those systems to prevent disease, contamination, and unsanitary conditions;

*The water supply and sanitation systems will be constructed and connected pursuant to federal, state and local standards, as required by the Oregon Department of Water Resources and County Septic & Onsite Wastewater Program. **The Hearings Officer adopts this finding and related Conditions of Approval. Appellant points to neighboring homes immediately downstream from the subject properties, including wells that serve these homes, and argues that septic drain fields serving the proposed new could potentially contaminate these downstream wells and properties, pointing to expected flooding of the site. As noted, Conditions of Approval require that the water supply and sanitation systems meet federal, state, and local standards for development within the floodplain. I find this condition ensure this proposal meets the requirement of this section.***

4. The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;

*The proposed new home will be designed and constructed pursuant to applicable FEMA NFIP and County Building Code standards. **The Hearings Officer adopts this finding, noting that the plans submitted are stamped by a licensed professional engineer as meeting these requirements. I am persuaded by the certification made by the licensed PE that the Applicant's plans meet or exceed all requirements and standards for construction of these proposed homes within the floodplain.***

5. The importance to the community of the service provided by the proposed facility;

*The proposed new home shall not provide a community service. **The Hearings Officer concurs in this finding.***

6. The requirements of the facility for a waterfront location;

*The proposed new home does not exhibit a waterfront location. **The Hearings Officer concurs in this finding.***

7. The availability of alternative locations not subject to flooding for the proposed use;

*The entire site is subject to flooding. **The Hearings Officer adopts this finding, noting not only the location within the designated floodplain but also the testimony and written comments received concerning the flooding that occurs at this location. As noted, however, development is allowed within the designated floodplain subject to meeting the requirements of this section, and a single-family home is a primary allowed use of each of these properties.***

8. The compatibility of the proposed use with existing development and development anticipated in the foreseeable future;

*A Single-family residential home is permitted in the floodplain, subject to applicable floodplain development standards, on the subject lot. **The Hearings Officer concurs in this finding, noting also existing single-family residential home development on properties in the surrounding area consistent with the proposed residential development as a primary allowed use of these properties.***

9. The relationship of the proposed use to the Comprehensive Plan and floodplain management program for the area;

*The proposed new home can be sited and constructed in compliance with applicable policies of the Comprehensive Plan and with the floodplain management program for the area. **The Hearings Officer concurs in this finding. As I discussed above, the floodplain regulatory scheme provides for development of these areas with residential structures provided such new homes can be sited and constructed in compliance with the applicable policies of the Comprehensive Plan and floodplain management program. Here, I find persuasive evidence submitted by the Applicant that these proposed home sites can be sited and constructed in compliance with these standards and requirements.***

10. The safety of access to property in times of flood for ordinary and emergency vehicles;

*The entire site is located in the floodplain. The applicant is advised that the property may not be accessible by ordinary or emergency vehicles in times of flood. **The Hearings Officer concurs in these findings and adopts the related Conditions of Approval and Advisory Notes. Appellant points out that access to the site is via a private access roadway, describing it as a narrow one-lane road that is unimproved, and constrained, with blind corners and no pull-outs. I also note, however, that the Hoodland Fire Department has approved the access, proposing additional related building standards incorporated within County Building Permit conditions. I also note that County Engineering staff are reviewing Applicant's plans to improve this access. I find that, as conditioned, these requirements can be met.***

11. Whether the proposed development activity represents a substantial improvement to an existing structure;

*The proposed new home is not substantial improvement. **The Hearings Officer adopts this finding.***

12. Whether the proposed structure qualifies as a critical facility;

*The proposed new home is not critical facility. **The Hearings Officer adopts this finding.***

13. The expected heights, velocity, duration, rate of rise, and sediment transport of the floodwaters expected at the site; and

*BFE at the site is 1,138 ft., while the mean velocity of floodwaters is 10.2 feet per second. Information was not available regarding duration, rate of rise and sediment transport. **The Hearings Officer adopts these findings. Appellant's materials, public comment, and public testimony reference the flood damage and repair costs from the 1964 flood of the Sandy River and other flooding through the area. These are known hazards that will certainly affect these sites.***

14. Other factors that are relevant to the purpose of Section 703.

*All other relevant factors to the Purpose of Section 703 have been considered. **The Hearings Officer concurs in this finding.***

- C. Approval Criteria: An FDP shall be subject to the following standards and criteria:

The applicable standards of this Subsection are non-discretionary, and outlined above as Conditions of Approval. The Hearings Officer concurs in this finding, adopting the proposed Conditions of Approval.

- D. Conditions of Approval: The County may attach conditions of approval to an FDP if such conditions are deemed necessary to further the purpose of Section 703. Such conditions may include, but are not limited to:

The applicable standards of this Subsection are non-discretionary, and outlined above as Conditions of Approval. The Hearings Officer concurs in this finding, adopting the proposed Conditions of Approval.

- E. Finalization of an FDP: If a preliminary elevation certificate was required for this structure, a second elevation certificate is required prior to approval of the foundation inspection. In addition, a building permit for that structure shall not receive a final approval or certificate of occupancy until the County approves a final elevation certificate or floodproofing certificate that is based on the as-built/finished construction.

A Final Elevation Certificate is required by Condition. The Hearings Officer adopts this finding and the related Conditions of Approval.

- F. Approval Period: Approval of an FDP is valid for four years from the date of the final written decision. If the County's final written decision is appealed, the approval period shall commence on the date of the final appellate decision. During this four-year period, the approval shall be implemented, or the approval will become void.

These standards are non-discretionary, and outlined above under the Conditions of Approval. The Hearings Officer concurs in this finding, adopting the related Conditions of Approval.

- G. Time Extension: If the approval of an FDP is not implemented within the initial approval period established by Subsection 703.09(F), a two-year time extension may be approved pursuant to Section 1310, *Time Extension*.

These standards are non-discretionary, and outlined above under the Conditions of Approval. The Hearings Officer concurs in this finding, adopting the related Conditions of Approval.

703.10 GENERAL FMD STANDARDS

Development in the FMD shall comply with the following standards:

The applicable standards of this Subsection are outlined above as Conditions of Approval. The Hearings Officer adopts this finding and related Conditions of Approval.

703.11 SPECIFIC STANDARDS

The applicant has proposed a new single-family residence in an AE Flood Zone. The applicable standards of this Subsection are non-discretionary, and outlined above as Conditions of Approval. The Hearings Officer adopts this finding and related Conditions of Approval.

703.12 EXCEPTIONS

The Hearings Officer notes that no exceptions are proposed with this application.

703.13 VARIANCES

The Hearings Officer notes that no variances are proposed with this application.

ZDO SECTION 704 — RIVER AND STREAM CONSERVATION AREA (RSCA)

704.03 AREA OF APPLICATION

- A. Section 704 applies to land that is generally within a quarter mile of the mean high water line of the Clackamas, Sandy/Salmon, Molalla/Pudding, Roaring, Tualatin, and Zig Zag Rivers. These lands are classified as Principal River Conservation Areas and are identified on Comprehensive Plan Maps III-1a, Principal River Conservation Area Clackamas River Design Plan, III-1b, Principal River Conservation Area Sandy-Salmon River Design Plan, III-1c, Principal River Conservation Area Molalla River Design Plan, III-1d, Principal River Conservation Area Tualatin River Design Plan, and III-2, Scenic & Distinctive Resource Areas. The location of these rivers may vary from these maps, if more specific information is provided.

*The subject land is located within a quarter mile of the mean high water line of the Sandy River. Therefore Section 704 applies. **The Hearings Officer concurs in this finding.***

704.09 ADMINISTRATION OF SECTION 704

- A. Development and tree-cutting activities controlled by Section 704 in a Principal River Conservation Area (PRCA) shall be reviewed to ensure consistency with Section 704. Proposed developments on lands within 150 feet of the mean high water line shall be reviewed through a Type II application pursuant to Section 1307. For lands beyond 150 feet of the mean high water line, notice shall be sent to the U.S. Forest Service and Bureau of Land Management.

*The proposed development within the Sandy River PRCA is not located within 150 ft. of the mean high water line of the Sandy River. Therefore a Type II PRCA review subject to Section 1307 is not required. **The Hearings Officer concurs in this finding. There are assertions that Mr. Gregory's activities have infringed on the floodway, and have involved work within this 150 foot buffer. The site plans show, however, that development associated with these two proposed home sites is not located within this area. I understand that there are existing issues remaining with respect to Mr. Gregory's activities in the wetlands area that traverses the entire site, but note that clearing of trees and vegetation is allowed in the areas shown for these home sites as shown on the Applicant's site plans.***

ADVISORY NOTES

Advisory notes are not a part of the decision on this land use permit. The items listed below are not conditions of land use approval and are not subject to appeal. They are advisory and informational

only but may represent requirements of other agencies/departments. As such, they may be required by these other agencies/departments in order to complete your proposed development.

*No advisory notes were received for this application. Applicable advisory notes for the overall site were received for the previous applications, File Nos. Z0228-22-F through Z0331-22-F. **This statement is factually correct and I find no reason to reproduce the advisory notes from these previous matters here.***

D. DECISION

Based on the findings, discussion, conclusions, and record in this matter, the Hearings Officer APPROVES application Z0572-22-F subject to conditions of approval.

Dated: May 9, 2023



Carl D. Cox
Clackamas County Hearings Officer

APPEAL RIGHTS

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision is "final" for purposes of a LUBA appeal as of the date of the decision appearing by my signature.