



Hearings Office

City of Portland

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DECISION OF THE HEARINGS OFFICER ON APPEAL OF ADMINISTRATIVE DECISION

I. GENERAL INFORMATION

File Number: LU 20-151838 GW AD (Hearings Office 4200017)

Applicant(s): Laurie Simpson, Connect Architecture
33 NE Monroe Street
Portland, OR 97212

Owner/Agent: Stuart Lindquist / Lindquist Development Co. Inc.
PO Box 42135
Portland, OR 97242-0135

Hearings Officer: Nancy Hochman

Bureau of Development Services (BDS) Staff Representative: Kate Green

Site Address: S Macadam Avenue (also known as S Riverside Drive and State Highway 43)

Legal Description: TL 300 0.40 ACRES, SECTION 26 18 1E

Tax Account Number(s): R991260220

State ID Number(s): 1S1E26CB 00300

Quarter Section(s): 4031

Neighborhood: None

Neighborhood Within 400 Feet: None

Business District: None

District Neighborhood Coalition: None

Plan District: None

Zoning: Single Dwelling Residential 20,000 (R20)
Greenway River General (g)
Greenway River Water Quality (q)
Scenic (s)

Other Designations: Flood Hazard Area, Landslide Hazard Area, Public
Recreational Trail

Land Use Review: Type II, Greenway, Adjustment Review

BDS Administrative Decision: On December 15, 2020, BDS denied the project proposal in Applicant's Greenway Review and Adjustment Review due to missing information regarding the existing features on the site, insufficient details about potential project impacts and effective mitigation measures, and its determination that the proposal triggered the need for additional land use reviews not applied for, including a Greenway Goal Exception. BDS found that the proposed residence appeared to be located within 25-feet of the top of the bank, where non river-dependent and river-related development requires approval through a Greenway Goal Exception, a Type III land use procedure, with a final decision made by City Council (Portland City Code (Code) 33.840.040).

Public Hearing: The hearing was opened at 1:00 p.m. on January 25, 2021, on the Zoom platform, and was closed at 2:55 p.m. on January 25, 2021. Applicant was given through February 1, 2021 to file additional evidence. BDS was given through February 8, 2021 to file its rebuttal. The deadline for Applicant's rebuttal was February 16, 2021, on which date the record was closed. Applicant stated on the record that it wanted to extend the 120 day for the Hearings Officer's decision to March 4, 2021, and on February 18, 2021, confirmed that request in writing. The Hearings Officer found that no party was prejudiced by Applicant submitting that confirmation after the record was closed.

Testified at the Hearing: Kate Green, BDS Planner (BDS Staff Representative) presented the case for the Bureau of Development Services (BDS). Laurie Simpson (Connect Architecture) (Applicant) presented Applicant's proposal. Erin Holsonback of Otten & Associates Landscape Architecture; Paige Miller of civil engineers Humber Design Group, Inc.; and Stuart Lindquist of Lindquist Development Co., Inc. also testified at the hearing.

Proposal: The applicant proposes to remove approximately 30 trees and an existing shed to construct a new multi-story residence on a riverfront site within the River General (g) and River Water Quality (q) overlays and requests a Greenway Review. The applicant also requested an Adjustment to allow the Scenic (s) overlay setback required along on S. Riverside (also known as S. Macadam Avenue/ Highway 43) to be reduced from 20 feet to 9 feet (33.480.040.B/ Table 480-1) for the multi-story residence. Since the public notice was

issued, the requested reduction of the Scenic overlay setback was changed to 10 feet from the Street Lot Line.

The public notice initially described the proposal as including a detached garage. BDS staff determined that the building elevations showed there is a canopy connecting the garage, entry structure, and multi-story dwelling, resulting in the building being a single structure, instead of separate detached buildings. Based on those comments, Applicant modified the garage and entry structure.

The new house is proposed to be located within the q-setback and includes an elevated structure over the rail corridor that bisects the property. Retaining walls were proposed along the rail corridor and near the southeast corner of the proposed house. Since the public notice was issued, the Applicant removed one proposed retaining wall. Water and sewer services are proposed west of the new residence. A stormwater planter and outfall are proposed within the q-setback and riverward, between the proposed house and an existing stairway access to an existing dock on the river. No changes are proposed to the existing dock, which was formerly owned and operated by Lewis and Clark College.

Relevant Approval Criteria: In order for Applicant's requested Review and Adjustment to be approved, this proposal must comply with the approval criteria of Title 33 (also referred to herein as the Zoning Code). The relevant criteria are:

- 33.440.350 Greenway Approval Criteria
- 33.805.040 Adjustment Approval Criteria
- Greenway Design Guidelines.

II ANALYSIS

Site and Vicinity: The Subject Property is situated on the west bank of the Willamette River, near River Mile 17, south of the Sellwood Bridge and Powers Marine Park, and approximately 200 feet north of the city border with a residential area known as Dunthorpe.

The property fronts onto S Riverside Drive (also known as SW Macadam Avenue and Highway 43) and is bisected by an approximately 20-foot wide publicly owned rail corridor.

The western portion of the site, between S Riverside Drive and the rail corridor, has a gravel area, which appears to be used as a vehicle area, and a mix of native and non-native trees and understory vegetation. This portion of the site is relatively level and then steeply drops down to the rail corridor. The rail corridor is relatively flat and has tracks running down the center of it, which extend over multiple properties to the north and south. The eastern portion of the site, between the rail corridor and the river, is steeply sloped and also includes a mix of native

and non-native trees and understory vegetation. Many of the trees are laden with ivy. A shed and a stairway, which leads to an existing dock on the river, are located near the center of the site. The dock is located within an in-water lease area from the Department of State Lands and was formerly used by *Lewis and Clark College* for a rowing and sailing club.

The owner of the subject site also owns the two adjacent riverfront properties to the north; one is in the R20 zone and another is in an Open Space (OS) zone. Further to the north are properties within the OS zone, including *Powers Marine Park* and *Riverview Cemetery*. Other nearby properties to the south and west are in the R20 and RIO single dwelling residential zones and many are developed with houses. Several of the riverfront residences also have stairs or ramps that lead to boat docks. The property directly across the river is within the City of Milwaukie and is developed as a golf course and country club.

Greenway Resources: The project site is mapped within Resource Site 23.7 (Rank III) of the *Lower Willamette River Wildlife Habitat Inventory (1986)*. Identified resources and functional values within these resource sites include the Willamette River, upland and riparian vegetation, fish and wildlife, and special status species.

The functional values of the water quality resource area include: providing a vegetated corridor to separate protected water features from development; maintaining or reducing stream temperatures; maintaining natural stream corridors; minimizing erosion, nutrient and pollutant loading into water; filtering, infiltration and natural water purification; and stabilizing slopes to prevent landslides contributing to sedimentation of water features.

The BES response includes additional details:

- *Endangered Species Act (ESA) Listed Species: The Willamette River provides habitat for 15 ESA listed species including Chinook and coho salmon and steelhead trout. These species rely on intact riparian habitat for feeding, resting, rearing, and migration.*
- *Mature Trees: The site contains mature trees within the Willamette River riparian zone, which functions as critical transition area for both terrestrial and aquatic species. Riparian vegetation provides shade, food and shelter for aquatic organisms and habitat for animals that move between land and water including insects, amphibians and birds. The mature trees the applicant is proposing to remove also provide stormwater benefits as they intercept at least 30% of precipitation that falls on the canopy, filter stormwater, help prevent erosion, and provide shade which cools the air and stormwater runoff. Trees, particularly those in the riparian area, help support Portland's adaptation to climate change. It is difficult to mitigate for the removal of mature trees as it can take decades for new trees to provide equivalent benefits.*

• *Nesting Birds: BES recommended that the applicant avoid disturbance (i.e. tree removal) between primary nesting season, April 15- July 31. If tree removal is necessary during this time, it is recommended that the applicant survey the trees slated for removal for signs of nesting. If an active nest is found (one with eggs or young), it is recommended that the applicant avoid removing it until the young have fledged. Information on avoiding impacts on nesting birds can be found in guidance document. Additional information can be found in the City's Resource Guide for Bird-friendly Building Design.*

• *Shoreline, Floodplain, and Riparian Habitat: This site includes shoreline and riparian habitat, which provides habitat for both aquatic and terrestrial species. The shallow water habitat is designated as critical habitat for 5 populations of salmon and trout that are listed as threatened under the Endangered Species Act (ESA). This habitat is also used by 10 additional Columbia Basin populations of fish that are ESA-protected, as well as white sturgeon and Pacific lamprey, which are on conservation alert. The lower Willamette shoreline distinctly provides natal nursery and rearing habitat for juvenile fish, and migratory habitat for adults. Therefore, it serves incredibly important roles for all life stages of salmon and trout. The applicant should consider removing all non-native plant species in the 100-foot riparian setback and densely planting it with native species of trees and shrubs to provide the maximum benefit to these listed species.*

The floodplain habitat that extends across a portion of the site provides valuable high flow refuge for numerous aquatic species, including these 15 species listed under the ESA. When connected with the river it slows flow, providing flood hazard relief downstream and recharges groundwater that is cooled and slowly released back to the river throughout the year. The floodplain also provides feeding opportunities for salmon. Studies show that salmonids with annual access to functioning floodplain habitat are on average double the size and fitness of those without access. BES recommended the applicant restore floodplain function to the near shore area to mitigate for the habitat loss within the overlay zone. This can be accomplished by densely planting native trees, shrubs, and groundcover and leaving any large woody debris that washes on shore. Trees and shrubs including willow and nine bark create roughness that will catch floating woody debris. Woody debris is prime habitat for salmonids and their food source. Native groundcover also provides habitat for the insects salmonids feed upon during high water events. Disconnecting or eliminating this habitat in the shallow water, riparian area and floodplain may adversely affect these species that are threatened with extinction.

Scenic Resources: The *Scenic Resources Protection Plan* (Map 23) shows the site is situated along Scenic Corridor 16: SW Macadam/Terwilliger Scenic Drive (SD 38-27). As further described in the *Scenic Resources Inventory* this scenic resource consists of a loop drive framed by trees (Exhibit G.3).

The *Scenic Resources Protection Plan* (Map 23) also identifies the Willamette River as Scenic Corridor 1: Willamette River (SD 01-04). A note on Map 23 indicates the scenic character of SD 01-04 is protected through environmental zoning regulations, which in this case are the Greenway regulations. However, the *Willamette Greenway Plan* does not identify any required viewpoints or view corridors at this site.

Zoning: The zoning designations on the site include the Single Dwelling Residential 20,000 (R20) base zone, the River General (g) and River Water Quality (q) overlay zones, and the Scenic Resource (s) overlay zone.

The R20 and other single-dwelling zones are intended to preserve land for housing and to provide housing opportunities for individual households.

The River General zone allows for uses and development which are consistent with the base zoning, which allow for public use and enjoyment of the waterfront, and which enhance the river's natural and scenic qualities.

The River Water Quality zone is designed to protect the functional values of water quality resources by limiting or mitigating the impact of development in the setback.

The Scenic Resource zone is to be applied to all significant scenic resources identified in the *Scenic Resources Protection Plan* or the *Central City Scenic Resources Protection Plan*. Any changes to land or development, including rights-of-way, within the Scenic Resource zone are subject to the regulations of this chapter.

Land Use History: City records indicate that the following land use review was conducted for this site:

- GP 006-80: Greenway Review for addition of a 20-foot by 14-foot boat equipment storage building for Lewis and Clark College.

The site has also been listed as an "also-owned" property under several land use reviews for the primary Lewis and Clark College campus, but none of those reviews appear to address development or activities on the subject site.

Agency Review: Several Bureaus and agencies have responded to this proposal. Please see Exhibits for complete details.

The **Water Bureau** (Exhibit E.3) noted no concerns.

The **Bureau of Environmental Services** (Exhibit E.1) does not recommend approval of the greenway review application due to outstanding information related to the proposed sanitary

connection for this development. Although there are no BES-specific approval criteria, the applicant should submit sufficient information for BES to confirm that the proposed sanitary connection is feasible and can be constructed within the identified disturbance areas.

BES notes that given the location of the existing public sanitary sewer lines and other utilities in S Riverwood/Macadam/Highway 43, it could be problematic to construct a sanitary sewer connection to serve the proposed residence. BES informed the applicant they must obtain a public works permit to demonstrate a sanitary sewer connection is feasible within the proposed disturbance area. To date, the applicant has not applied for the public works permit.

BES also provided information about storm water management requirements and details about site considerations and construction methods related to the protection of riparian resources.

Portland Bureau of Transportation-PBOT (Exhibit E.2) notes the PBOT has relieved the applicant of the standard right-of-way improvements and necessary property dedication; and instead, the applicant will need to submit completed and executed Street and Storm Sewer Waivers of Remonstrance, at the time of permit review. PBOT also notes an ODOT Highway Access Approach Permit will be required, in relation to the permit process for the new home. The Site Development Section of BDS (Exhibit E.5) responded with information about geotechnical, flood hazard, erosion control, and construction requirements that will apply at the time of permit review.

Urban Forestry (Exhibit E.6) does not support approval, noting the project plans do not appear to show all the existing trees on the site or accurately show what impacts are expected from the proposed work.

The **Fire Bureau** (Exhibit E.4) and the Life Safety Section of BDS (Exhibit E.7) noted a separate Building Permit is required for the work proposed and the proposal must be designed to meet all applicable fire and building codes.

The **Oregon Department of State Lands** (DSL) provided a Wetland Land Use Notification response (Exhibit E.8), which indicates there are wetland, waterway or other water features on the property and the site includes or is adjacent to Essential Salmonid Habitat. DSL notes an onsite inspection by a qualified wetland consultant is recommended to determine if there are regulated areas subject to state and federal permits.

Neighborhood Review: A Notice of Proposal in Your Neighborhood was mailed on November 6, 2020. One written response has been received, which outlines various issues

regarding the proposal including concerns about: tree removal, traffic safety, height limits, current zoning, required land use reviews, accessibility and use of the existing dock.

Staff Response: With regard to trees, BDS Staff concur with the Urban Forestry comments regarding the deficiencies in the tree information provided on the applicant's plans. The plans do not appear to accurately or thoroughly identify all the trees on the site or provide the scientific name of the trees. Absent those details, the applicant has not provided a complete inventory of which trees will be impacted by the proposed development or shown how those impacts will be effectively mitigated. This is further addressed in the analysis and findings below.

As noted in the PBOT comments, the applicant will need to obtain a permit from ODOT for access to and from Highway 43. The applicant has provided preliminary input from ODOT, which calls for the site design to include space for vehicles to enter and exit the site in a forward motion and the project plans appear to include a vehicle area for that purpose. ODOT will determine if the design is sufficient for highway safety.

As discussed in the analysis and findings, below, the applicant has proposed to use a height allowance for steeply sloping lots (33.110.215.D.1), which provides the height limit is the higher of either 23 feet above the average grade of the street, or the general 30-foot height limit for the R20 zone. The project plans show the height of the house relative to 23-feet above the street grade.

The current zoning for the subject property is described above and shown on the attached Zoning Map.

The applicant has indicated the use of the existing dock will be for the proposed residence only. BDS Staff have informed the applicant that a commercial use of the dock is prohibited in the R20 zone. No changes have been proposed to the existing dock or accessway.

ZONING CODE APPROVAL CRITERIA

GREENWAY REVIEW

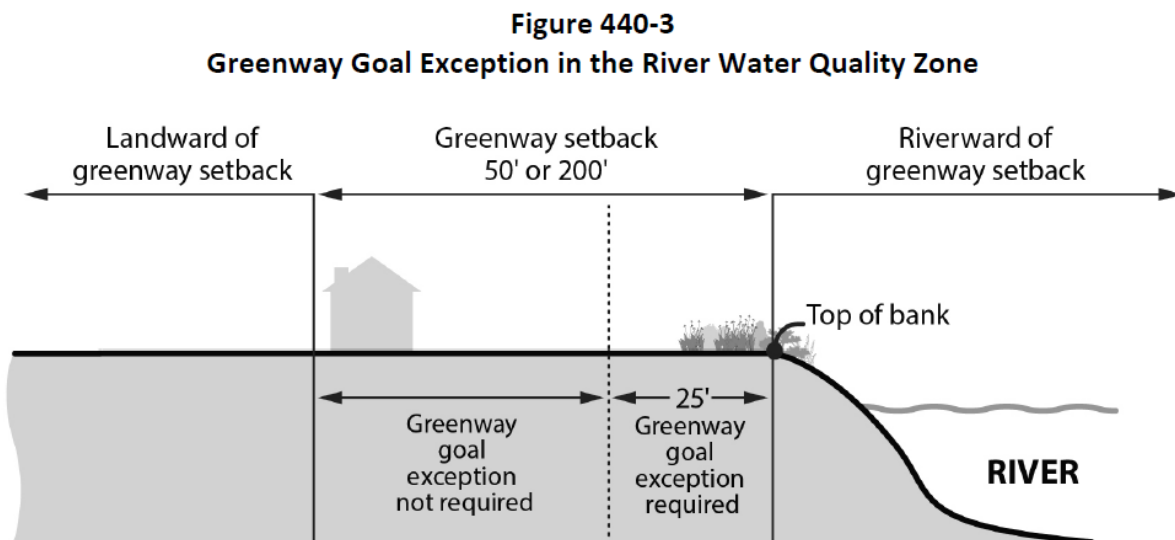
Preliminary Issue – Delineating Top of Bank/ beginning of the Greenway Setback:

Prior to addressing the relevant approval criteria in this case, the Hearings Officer finds it necessary to address an issue raised by BDS regarding delineation of the "top of bank". Different approval criteria apply depending on whether the property being reviewed is within, riverward of, or landward of the greenway setback. The greenway setback is

established based on the riverbank topography relative to the top of the bank. Applicant and BDS disagree as to the proper location of the “top of bank” as defined and measured under the Zoning Code.

Pursuant to Code 33.440.210 (Development in the Greenway Setback) the greenway setback extends from the top of the bank to a point 25 feet landward of the top of the bank, except in the River Water Quality overlay zone, where it extends from the top of the bank to a point either 50 or 200 feet landward of top of the bank depending on the site’s slope. (Code 33.400.2210.B.1 and 33.400.210.B.2.) The subject site is subject to both the River General 25-foot greenway setback and the 50-foot River Water Quality setback.

For both areas, development that is not river-dependent or river-related (such as the subject project) may only be allowed within the first 25 feet landward of the top of bank and riverward if approved through a Greenway Goal Exception (Code 33.440.210.C.2.b and 33.440.210.C.3). See Figure 440-3.



Where the top of bank is located is determinative as to whether the proposed development requires a Greenway goal exception: If top of bank is measured where the City indicates, the proposed construction *is* within the first 25 feet landward of the top of bank and a Greenway Goal Exception is required. If top of bank is measured where the Applicant indicates, then the construction is not. (See also Exhibit C-2, Site Plan).

BDS staff, at the public hearing, referred the Hearings Officer to Exhibit C-11, an Existing Site Plan created on March 29, 2019, reflecting a top of bank line that, if used, would place the

proposed house location riverward of the first 25 feet landward of top of bank (and requiring a Greenway Goal Exception). The surveyor added the Default top of bank line to that Site Plan on May 22, 2019.

Applicant points the Hearings Officer to Exhibit H-10, a topographical map last amended January 27, 2021 to add Slope Analysis, and to Exhibit H-8 pp. 5 and 6 (Top of Bank & Slope Analysis). Using the default top of bank line and the Analysis' associated dashed line marking the 25 foot buffer from the default top of bank, Applicant indicates that the proposed house is landward of the first 25 feet of the Greenway Setback.

Portland City Code (Code) 33.910.030 (Zoning Code definitions) defines Top of Bank as follows:

The largest decrease in slope that is 10 percent or greater between the ordinary high water mark of a water body and a point 50 feet landward from the ordinary high water mark. See Section 33.930.150, Measuring Top of Bank. If there is no decrease in slope that is 10 percent or greater within a distance of 50 feet from the ordinary high water mark, then the top of bank will be the default location described in Section 33.930.150, Measuring Top of Bank.

Code 33.930.150 provides, in pertinent part, "Measuring Top of Bank . . .

A. Using Percent Slope. Percent slope is determined by dividing the vertical rise by the horizontal run, and converting that decimal to a percentage. For example, a slope section that rises 1 foot over a distance of 4 feet is a 25 percent slope.

B. Identifying a Decrease in Slope. A decrease in slope is a change in percent slope from a steeper to a less steep grade. For example, a change from 40 percent slope to 30 percent slope is a decrease in slope of 10 percent. A change from 35 percent slope to 15 percent slope is a decrease in slope of 20 percent. To identify the decrease in slope the slope must be sampled every 3 feet between the ordinary high water mark and a point 50 feet from the ordinary high water mark. See Figure 930-27.

Figure 930-27a
Example 1: Identifying a Decrease in Slope

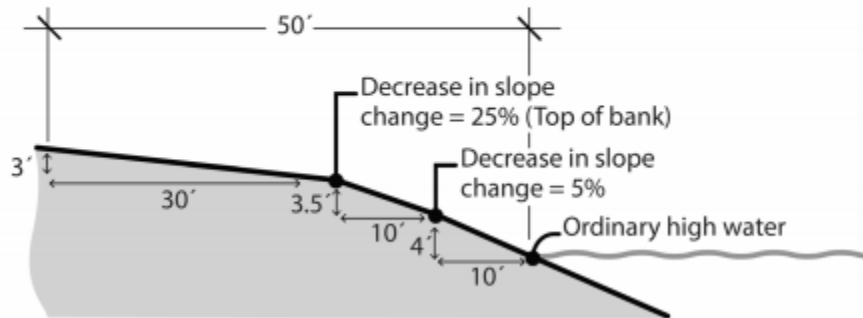
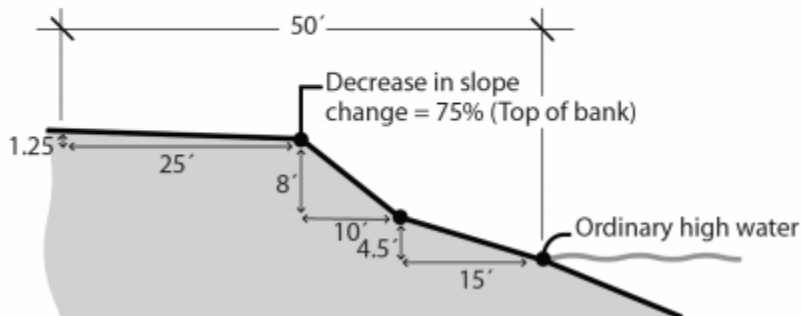


Figure 930-27b
Example 2: Identifying a Decrease in Slope



...

D. Default Top of Bank. If no slope decrease of 10 percent or more is found within 50 feet (measured horizontally) of the ordinary high water mark, then the top of bank will be one of the following default locations, see Figure 930-29. The Willamette River Reaches are shown on Map 440-1 and 475-1:

1. For the Willamette River Central Reach, the default top of bank is 50 feet (measured horizontally) from the ordinary high water mark.
2. For the Willamette River North Reach, Willamette River South Reach, and the Columbia River, the default top of bank is 2 feet (measured vertically) from the ordinary high water mark. . . ."

As the subject property is in the Willamette River South Reach, the default location of the top of bank, therefore, is defined the same way as in the definition used by BDS Staff, and by Applicant -- 2 feet, measured vertically, from the ordinary high water mark.

BDS' presentation (Ex. H-6, p. 8) included two Code 33.910 definitions of top of bank: one, labeled 3/1/20, containing the current definition, and the other, labeled 9/11/20, which reflected a language change from measuring the top of bank by finding the "largest decrease in slope that is ten percent or greater" to a "major change in the slope of the incline", where "major change" was internally defined as "a change of ten degrees or more". As Applicant's file was deemed complete on November 3, 2020, it appears that the later-dated definition (using degrees) would be one applied to Applicant's application. However, that exhibit may be mislabeled, as the latest amendment of the Definitional section was on September 11, 2020 (and uses the "percent" language), so based on the file completion date, that is the language applicable to this case. (Code 33.700.080.A.1).

BDS assert, and the Hearings Officer agrees, that a change in in the Code definition of Top of Bank from "percent", to "degrees" (or vice versa) does not change the result of whether or not the proposed house is within the greenway setback.

BDS Staff asserts that there is a 10% change in slope within the first 50 feet of the ordinary high water mark (Code 33.910.030 and 33.930.150) and that under either definition of Top of Bank, the proposed residence is within 25 feet of the Top of Bank where non river-dependent/non river-related development requires a Greenway Goal Exception. (See Code 33.440.210.B and Code 33.440.C.3). Applicant asserts that while a portion of the proposed structure is located within the landward 25 feet of the 50 foot Greenway River Water Quality Setback, the development is landward of the *first* 25 feet of top of bank, and no Greenway Goal Exception is required.

BDS originally asserted that Applicant failed to provide a detailed slope analysis, showing the location of decreased slope as necessary to accurately map the top of bank. Applicant has submitted slope analysis Exhibit H-10, marking the (first) 10% change in slope.

Applicant's surveyor acknowledges that there are changes greater than 10 percent within the first 50 feet landward from the ordinary high water level of the Willamette River (in which case, the default top of bank definition would not be used). However, the Surveyor asserts that the building of the railroad created an unnaturally steep disruption that does not reflect the true slope of the riverbank, and that a 6-foot high berm was created when, it appeared, excess soil from the bank cut for the railroad line created an unnaturally steep slope. (See Exhibits H-8 and H-10). BDS asserts that construction necessarily changes the topography of the land, but that those changes are taken into account (i.e., not ignored) when its determinations are made.

Finding that there was no [natural] decrease in slope that is 10 percent or greater within a distance of 50 feet from the ordinary high water mark, Applicant's surveyor used the default location of top of bank. Using that measurement, the proposed house is outside the first 25 feet landward of top of bank. (Exhibit H-8, page 1, Revised Drawings).

Applicant's surveyor also used the top of bank default location because of the following language concerning Code 33.910.030, which, Applicant testified (record at 108), was from Central City 2035 Zoning Code & Map Amendments Part 2: Willamette River & Trails ("Central City 2035 Amendments"):

The existing definition of top of bank is problematic when the shoreline is variable. The definition has been clarified and a section added to 33.930 describing how to measure top of bank . . . The change from degrees to percent slope makes this language more consistent with other code chapters, which refer to percent slope.

The definition is intended to identify the plateau of the river/stream bank. If the slope of the bank decreases by 10% and then decreases by 15% *where it stays steady*, the location where the slope decreased by 15% is the top of the bank. If the slope decreases by 5% and then by 10% where it stays steady, then the location at which the slope decreases by 10% is at the top of the bank. If there is no decrease in slope 10% or greater within 50 feet of the ordinary high water mark, then a default top of the bank is applied."

Exhibit H-8, p. 5. Emphasis added. Applicant did not indicate whether the subject property was within the Central City boundary.

Applicant's surveyor diagramed where a steady slope occurs, which he noted, is at least 80 feet beyond the Ordinary High Water line. (Ex. H-8, p. 6). (This sharp decrease in slope, without degree markings, is also clearly shown in the slope profiles on Ex. H-9.) As the point where the decrease in slope "stays steady" was greater than 50 feet from the Ordinary High Water mark, Applicant's surveyor used the default top of bank. Using that default top of bank, the proposed house is located between the first and second 25 feet landward of top of bank in the River Water Quality overlay zone setback. Non-river-dependent or river-related development within the River Water Quality overlay zone does not require a Greenway Goal Exception when located outside of the area that is within the first 25 feet landward of the top of bank (Code 33.440.210.B.2). Therefore, under that top of bank determination, Applicant's project would not require a Greenway Goal Exception. (Code 33.440.210.B.2, Exhibit H-8, p. 1).

Although “degree” to “percent” amendments to the top of bank definition discussed in the language pointed to by Applicant were made, neither Code 33.930 (containing the definition of top of bank) nor Code 33.930.150 (measuring top of bank) includes language requiring the slope to “stay steady” after finding the largest decrease in slope that is 10 percent or greater in the defined 50-foot area.

Applicant urges that the Hearings Officer apply an interpretation of Code 33.930 that uses the “stay steady” language. However, the Zoning Code requires a literal reading of Code language, providing:

“The rules of this section apply to this Title and any conditions of a land use approval granted under this Title.

A. Reading and applying the code. Literal readings of the code language will be used. Regulations are no more or less strict than as stated. Applications of the regulations that are consistent with the rules of this section are nondiscretionary actions of the Director of BDS to implement the code. The action of the Director of BDS is final.

B. Ambiguous or unclear language. Where the language is ambiguous or unclear, the Director of BDS may issue a statement of clarification processed through a Type III procedure, or initiate an amendment to Title 33 as stated in Chapter 33.835, Goal, Policy, and Regulation Amendments.”

Emphasis added. Although the section references the Director of BDS, Code 33.700.070 does not limit its application to the first level of Code interpretation (BDS), and, therefore, it applies also to the reviewer on appeal.

Does Code 33.700.070’s “literal reading” requirement preclude the Hearings Officer from looking at other evidence to interpret a Code section’s meaning? Case law provides guidance on statutory interpretation. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (Or. 2009) (*Gaines*), which built on the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993), instructs that legislative history may be proffered to the statute reviewer, even if the text and context appear clear. The reviewer of the statute then determines in what way to use it.

In the case where the City Council has given specific guidance about how to interpret its own ordinances under Title 33, the Hearings Officer concludes that the Hearings Officer may not use information outside the statute (including “legislative history”) if it would change the interpretation resulting from a clear literal reading, as that would be contrary to the Code mandate. And emphasizing that point, Code 33.700.070.B provides the method of how to clarify Zoning Code provisions where the language is ambiguous or unclear – via a formally

promulgated statement of clarification or amendment of Title 33. Clearly, the City Council intended that BDS be give deference in its interpretation of the Zoning Code.

The text is not unclear, and it does not contain language regarding the land staying steady. Therefore, the language of Code 33.910.030 does not expressly or impliedly require that the bank “stay steady” after the 10% decrease or require that the decrease be measured at a bank formed purely by natural processes. The Hearings Officer concludes that in this case, in order to give effect to the “legislative history” (and in this case, Applicant’s language likely does not formally qualify as legislative history), one would have to add language that changes the meaning of the literal interpretation of Code section 33.910.030. Put another way, one can *only* apply the legislative history if one does *not* literally read the section.

While it appears from the information in Applicant’s quote that the definition of top of bank may have been intended to identify the plateau of the river/stream bank at a point where the slope of the bank decreases and then stays steady, language of any such intent was not included in the two Code amendments that the Central City 2035 Amendments described, and the Code interpreter cannot both give effect to the “legislative history” and to Code 33.910.030.

The Hearings Officer recognizes that this literal interpretation of Code deviates from the *Gaines* analysis, under which legislative history may be proffered to the statute reviewer, even if the text and context appear clear. However, the City Council has given specific guidance about how to interpret its own ordinances under Title 33, and in this instance, using additional information violates that instruction. Application of Code 33.910.030 is mandated.

Applicant also asserts that BDS is measuring top of bank in a manner inconsistent with the measurement method that BDS used in 1990 during a Greenway Review for the neighboring house located at 9990 S Riverside Drive. Using a Code section with similar criteria (except for the degree/percent difference discussed above), BDS relied on the default top of bank to determine the greenway setback for that prior applicant’s Greenway Permit. Applicant also points to other properties nearby on S Riverside Drive where the default top of bank was used in determining the Greenway Setback for house modifications and additions. Applicant indicates that aside from a neighboring property where BDS used the foundation of the existing house in a proposal to build a new dock, Applicant could not find evidence where BDS established a Greenway Setback along the shoreline in the neighborhood of the subject property without using the default top of bank.. Those cases, however, have had different facts, including different topography, and possibly different law. The Hearings Officer must review the facts and law applicable to this case.

Applicant lastly asserts that the subject parcel became a legal lot of record before construction of the railroad. Code 33.700.130.C provides, “The determination that a lot has

legal status does not mean that the lot may be developed, unless all requirements of this Title are met." Therefore, the fact that the tax lot pre-dated the railroad does not confer building rights to the lot owner. With certain exceptions, applications for land use reviews are processed based on the regulations in effect on the date an application is filed with the City. (Code 33.700.080.A.1).

In summary, Code 33.700.070 requires a literal reading of sections in the Zoning Code. The language in Code sections 33.930.150 and 33.910.030, respectively, is not ambiguous or unclear: only one interpretation exists applying a literal reading. While Applicant's interpretation appears reasonable, the reviewer of the Code may look no further than the Code section for interpretation.

Because there is a 10 percent or greater slope decrease within 50 feet of the ordinary high water mark (Ex. H-8), a literal reading of Code 33.910.030 and Code 33.930.150 puts the top of bank, and, therefore, the river-side edge of the Greenway Setback, at the line marked "line of slope change of 10%" on Exhibit H-10. The result is that the location of the proposed house is within the first 25 feet landward of that line. (See Ex. H-11). Accordingly, Appellant's non-river-dependent or river-related development requires a Greenway Goal Exception.(Code 33.440.210.B.2).

33.440.350 Greenway Review Approval Criteria

The approval criteria for a Greenway review are divided by location or situation. However the divisions are not exclusive; a proposal must comply with all of the approval criteria that apply to the site. A Greenway review application will be approved if the review body finds that the applicant has shown that all of the approval criteria are met.

A. Design Guidelines. The Willamette Greenway Design Guidelines must be met for all greenway reviews.

Findings: The Willamette Greenway Design Guidelines address the quality of the environment along the river and require public and private developments to complement and enhance the riverbank area. The Design Guidelines are grouped in a series of eight Issues:

- Issue A. Relationship of Structures to the Greenway Setback Area
- Issue B. Public Access
- Issue C. Natural Riverbank and Riparian Habitat
- Issue D. Riverbank Stabilization Treatments
- Issue E. Landscape Treatments
- Issue F. Alignment of Greenway Trail

- Issue G. Viewpoints
- Issue H. View Corridors

A complete description of the Design Guidelines and their applicability is provided in pages 45-81 in the *Willamette Greenway Plan*. Each of the Design Guidelines is addressed below. The Guidelines have been regrouped according to similarity of Issues:

Summary Findings for Issues A, B and F: The guidelines in Issues A, B and F apply to sites with a Greenway Trail designation. The site has a Greenway Trail designation. However, based on the city's *Administrative Rule: Determination of Rough Proportionality from Major Public Trail Requirements*, the scale of the proposed development is below the threshold that triggers an easement or improvements for the trail, so no trail improvements are triggered at this time. Therefore, the guidelines in Issues A, B and F are not applicable.

Issue C. Natural Riverbank and Riparian Habitat: This Issue “applies to situations where the river bank is in a natural state, or has significant wildlife habitat, as determined by the wildlife habitat inventory.” These guidelines call for the preservation and enhancement of natural banks and areas with riparian habitat.

1. Natural Riverbanks
2. Riparian Habitat

Finding for Issue C:

1. Natural Riverbank. The subject property is at the southern end of a stretch of natural stream corridor that spans from the Sellwood Bridge south through Powers Marine Park. The riverbank was previously modified with a shed, boat slide, and stairs leading to a river dock that was used by a sailing/rowing club. The dock, stairs, and boat slide reduce the natural stream corridor functional value of the site. There are also nearby residential land uses. The functional value of the steep slope shading the western shoreline of the Willamette River in the afternoon will remain after construction. The Greenway Permit for the development next door (on property with the same environmental designation) provides that the site is not in a natural state primarily because of the existing railroad tracks that bisect the property.”(Ex. H-8, p. 10).

2. Riparian Habitat. The Riparian Habitat Guideline for Issue C. provides, “Rank I riparian habitat areas, as identified in the wildlife habitat inventory, should be conserved and enhanced with a riparian landscape treatment.” (Emphasis added).

The site is within Resource Site 23. 7 (Rank III) of the Lower Willamette River Wildlife Habitat Inventory (1986). Rank III sites are described as “...sites which have been greatly altered, or are surrounded by areas with conflicting land uses which make use of the site by a variety of wildlife less likely.” The portion of the site that is not heavily impacted by

the railroad, S Riverside Drive, and other existing development consists of the very steep variable bank with its approximate 87% slope, which is extensively covered by English ivy. Therefore, the site is not in a fully natural state and does not contain "significant wildlife habitat".

The project has been designed and is to be constructed to limit and minimize potential detrimental impacts to the riverbank and waterway, and the existing riparian habitat areas that remain are to be protected during construction and enhanced with riparian landscape treatments. The location of the proposed stormwater outfall was chosen to minimize the temporary disturbance area to access and install the pipe, and native groundcover vegetation will be planted in the temporary disturbance area following installation of the pipe. Issue C has been met.

Issue D. Riverbank Stabilization Treatments: This Issue "applies to all applications for Greenway Approval." This guideline promotes bank treatments for upland developments that enhance the appearance of the riverbank, promote public access to the river, and incorporate the use of vegetation where possible:

1. Riverbank Enhancement

Finding for Issue D: BDS indicated there is no easement for the trail (public access to the river). Applicant will be using riprap for construction of the outfall, with the riprap pad sized according to Clean Water Services' sizing chart for rock protection at outfalls. Live cuttings/plantings will be replaced between joints of the rocks to provide additional vegetated area within the riprap zone.(Ex. H-5, p. 6). This Issue has been met.

Issue E. Landscape Treatments: This issue "applies to all applications for Greenway Approval which are subject to the landscape requirements of the Greenway chapter of Title 33 Planning and Zoning of the Portland Municipal Code." These guidelines call for landscaping treatments which create a balance between the needs of both human and wildlife populations:

1. Landscape Treatment
2. Grouping

Findings for Issue E. The Greenway Plantings Standards in Code 33.440.230.B call for a minimum of one tree and 10 shrubs per 20 feet of river frontage, and a sufficient number of groundcover plantings to cover the bank. Applicant has provided a Tree Plan (Exhibit H-12) which includes a Tree Removal & Preservation Summary reflecting the preservation and density of existing trees and a Mitigation Planting Monitoring & Maintenance Plan. The Tree Plan reflects a mitigation & restoration area that includes greenway landscaping, with the number of trees and shrubs to be planted and groundcover and the area within the Scenic Overlay Zone to be landscaped to L2 standards.

The Planting Plan submitted post-hearing reflects 2,710 square ft. of mitigation and restoration area in the river side of the subject property, and monitoring and maintenance actions where the boat slide meets the stairs. The plan lists the Mitigation and Restoration Plantings requirements of Code 33.248.090 and the Code 33.440.230.B that will be met.

In the context of a Greenway Review in isolation, the development would meet landscape treatment requirements and Issue F would be met. However, because a Greenway Goal Exception is required to approve Applicant's proposal, the Issue has not been evaluated in the necessary context.

Issue G. Viewpoints

Issue H. View Corridors

Summary Findings for Issues G and H: The guidelines in Issues G and H apply to sites with a viewpoint or view corridor designation per the Willamette Greenway Plan. Though the Scenic Resources inventory identifies the Willamette River as a scenic corridor, no viewpoint or view corridor designations are applied at this location the Willamette Greenway Plan. Therefore, these issues and the associated guidelines do not apply.

Based on the foregoing, Criterion A is not met.

B. River Frontage lots in the River Industrial zone

C. Development within the River Natural zone.

D. Development on land within 50 feet of the River Natural zone

Summary Findings for Criteria B, C, and D. The site is located within the River General and River Water Quality zones and is not within 50 feet of the River Natural zone. Therefore, Criteria B, C, and D do not apply.

E. Development within the greenway setback. The applicant must show that the proposed development or fill within the greenway setback will not have a significant detrimental environmental impact on Rank I and II wildlife habitat areas on the riverbank. Habitat rankings are found in the *Lower Willamette River Wildlife Habitat Inventory*.

Summary Findings: The site is shown on Map 5, Zone 23 in the *Lower Willamette River Wildlife Habitat Inventory*, with the nearest Rank I and Rank II wildlife habitat areas approximately 1+ miles downstream of the site, including the west bank of the river north of the Sellwood Bridge to Willamette Park (Sites 23.4A and 23.5) and the shoreline and uplands at Oaks Bottom (Sites 21. IA, 21. IB) on the east side of river.

Based on its surveyor's analysis of top of bank, Applicant indicated that the proposed stormwater outfall is the only development within the greenway setback and that will not have significant impact on wildlife habitat on the riverbank. However, based on the above conclusion that the proposed development contain non-river dependent development within the Greenway Setback, including the multi-story residence, Applicant is required to, but has not addressed, the effects of that non-stormwater construction. Therefore, Appellant has not met its burden, regarding whether the non-stormwater outfall development will avoid impacts to those downstream wildlife habitat areas. Criterion E is not met.

F. Development riverward of the greenway setback. The applicant must show that the proposed development or fill riverward of the greenway setback will comply with all of the following criteria:

1. The proposal will not result in the significant loss of biological productivity in the river;
2. The riverbank will be protected from wave and wake damage;
3. The proposal will not:
 - a) Restrict boat access to adjacent properties;
 - b) Interfere with the commercial navigational use of the river, including transiting, turning, passing, and berthing movements;
 - c) Interfere with fishing use of the river;
 - d) Significantly add to recreational boating congestion;
4. The request will not significantly interfere with beaches that are open to the public.

Summary Findings: Development proposed riverward of the Greenway Setback includes construction of the proposed house. Applicant's narrative does not include a response to Criterion F. Criterion F is not met.

G. Development within the River Water Quality overlay zone setback. If the proposal includes development, exterior alterations, excavations, or fills in the River Water Quality overlay zone setback the approval criteria below must be met. River-dependent development, exterior alterations, excavations, and fills in the River Water Quality zone are exempt from the approval criteria of this subsection.

1. Streets, right-of-way dedications, driveways, walkways, outfalls, and utilities. For streets, right-of-way dedications, driveways, walkways, outfalls, and utilities, the applicant's impact evaluation must demonstrate that all of the following are met:

- a. Proposed development or right-of-way (ROW) locations, designs, and construction methods have the least significant detrimental impact to the functional values of the water

quality resource area than other practicable and significantly different alternatives including alternatives outside the River Water Quality overlay zone setback;

b. The location, design, and construction method of any outfall or utility proposed within a River Water Quality overlay zone has the least significant detrimental impact to the functional values of the water quality resource area than other practicable alternatives including alternatives outside the River Water Quality overlay zone setback;

c. Water bodies are crossed only when there are no practicable alternatives with fewer significant detrimental impacts. Where a water body is crossed, the location, design, and construction method of that crossing has the least significant detrimental impact to the functioning of the water body and considering practicable alternatives;

d. There will be no significant detrimental impact on functional values in areas designated to be left undisturbed within the River Water Quality overlay zone setback;

e. All significant detrimental impacts on functional values that cannot be avoided will be mitigated by meeting the requirements of Subsection 33.440.350.H; and

f. The mitigation plan ensures that the proposed development will not contribute to a cumulative loss of functional values over time.

2. Public safety facilities. . . (Not applicable)

3. Resource enhancement projects. . . (Not applicable)

4. Public recreational facilities. . . (Not applicable)

5. Other development, excavations, and fills in the River Water Quality overlay zone setback. Where development, exterior alterations, excavation, or fill is proposed in the River Water Quality overlay zone setback, the applicant's impact evaluation must demonstrate that all of the following are met:

a. Proposed development minimizes the loss of functional values, consistent with allowing those uses generally permitted or allowed in the greenway overlay zone without a land use review;

b. Proposed development locations, designs, and construction methods are less detrimental to the functional values of the water quality resource area than other practicable and significantly different alternatives including alternatives outside the River Water Quality overlay zone setback;

- c. There will be no significant detrimental impact on functional values in areas designated to be left undisturbed;
- d. Areas disturbed during construction that do not contain permanent development will be restored with native vegetation appropriate to the site conditions and found in the Portland Plant List;
- e. All significant detrimental impacts on functional values will be offset through mitigation;
- f. The mitigation plan meets the requirements of Subsection 33.440.350.H;
- g. The mitigation plan ensures that the proposed development will not contribute to a cumulative loss of functional values over time; and
- h. Where significant restoration or enhancement opportunities have been identified in City-adopted watershed restoration plans or where previous restoration projects have taken place, the proposed development will not preclude those restoration or enhancement opportunities or damage existing restoration projects.

Applicant's narrative explains that the location of the proposed project is constrained by steep topography, geotechnical considerations, a rail corridor that bisects the property, and an existing stairway and boat rail. Applicant described five alternative options as follows:

- **Option 1** (1,260 square feet of building coverage) includes a 3-story building structure that is outside of the riverward 25 feet of RWQ overlay zone setback, does not exceed the height limit, and maintains a river view within the scenic corridor north of the proposed structure. The home parallels the grade and minimizes impact to slope stability. The photos and map of riverfront housing in the neighborhood, on Sheet AI.02, demonstrate that the proposed home is set back from the river significantly further than any other home in the area, including the house next door that had its permit finalized in 2018.
- **Option 2** (2,300 square feet of building coverage) includes a 3-story building structure that is outside of the riverward 25 feet of the RWQ overlay zone setback and does not exceed the height limit standard. It has a larger footprint to accommodate more internal living space than any of the other options evaluated, which the owner highly prefers. River views are blocked within the subject parcel and there is a greater site impact.
- **Option 3** (2,600 square feet of building coverage) includes a 2-story building structure that meets the height limit standard-the owner prefers a single or 2 story house. Option 3 encroaches into the riverward 25 feet of RWQ overlay zone setback in order to provide the minimum living space square footage. Option 3 maintains a potential river view within the

scenic corridor north of the proposed structure.

- **Option 4** (960 square feet of building coverage) includes a 4-story building structure that is outside of the riverward 25 feet of RWQ overlay zone setback. The home has less impact on the ground but exceeds the maximum height limit if the building is to provide the minimum living space square footage. The home becomes inefficient with four floors and has an inappropriately tall form facing the river.

- **Option 5** (1,440 square feet of building coverage) includes a 3-story home with no parking that avoids building on the area riverward of the rail ROW. There is no room on or off site for parking so this option is not feasible. It also exceeds the height limit and blocks views and access to the river. The home would be inappropriately tall and intrusive to the passerby.

Summary findings: These criteria require the applicant to demonstrate that alternatives were considered during the design process, that there are no practicable alternatives that would be less detrimental to the functional values of the water quality resource area, and that resources outside of the proposed disturbance area will be protected from impacts related to the proposal, such as damage to vegetation, erosion of soils off the site, and impacts to water quality and fish habitat from increased stormwater runoff and erosion off the site.

Factors G.5.b: Each of Applicant's Option except Option 5 includes development which is not river dependent or river-related that is within and riverward of the greenway setback. Each, therefore, is without a necessary Greenway Goal Exception and so not practicable for development within the Greenway. Therefore, the five options are not individually evaluated.

BDS noted that based on the configuration of the property, almost any development landward of the rail corridor, will project into the required 20-foot base zone and scenic setbacks. Other than to state that Option 5 would likely need a height adjustment, setback adjustments needed but not requested, are, similarly, not discussed, as the findings under this Criterion are to address a different issue -- whether the desired option has the least significant detrimental impact to the functional values of the water quality resource area. Other findings regarding Applicant's desired Option, Option 1, are listed below.

Factors G.5. a, c – h: Applicant's proposed construction management plan includes the installation of temporary construction, sediment, and/or tree protection fencing around the limits of temporary disturbance. However, details about project elements and construction methods are missing, so how construction will effectively protect the functional values of the water quality resource area cannot be assessed.

Applicant has shown that areas disturbed during construction that do not contain permanent development are to be restored with native vegetation appropriate to the site conditions and found in the Portland Plant List (Ex. H-12, p. 3). The proposed Mitigation and Remediation Plan includes the installation of native trees, shrubs, and groundcovers within the temporary disturbance area. (Sheet L1.03, Ex. H-12). These will enhance the structure and diversity of the vegetative community and improve the erosion, nutrient, and pollutant loading minimization and filtering, infiltration, and natural water purification and slope stabilization functional values as well as maintain the stream temperature regulation functional values. The mitigation area will be maintained in perpetuity by the owner such that there will be no cumulative loss of functional values over time.

Factors G.1.a, b (Outfall). The proposed stormwater outfall plan under Option 1 keeps construction close to the existing stairway for purposes of minimal impact during construction and for maintenance. However, Applicant has not shown that those construction methods are less detrimental to the functional values of the water quality resource area than other practicable and significantly different alternatives including alternatives outside the River Water Quality overlay zone setback.

The criteria for Issue G have not been met.

H. Mitigation or remediation plans. Where a mitigation or remediation plan is required by the approval criteria of this chapter, the applicant's mitigation or remediation plan must demonstrate that the following are met:

1. Except when the purpose of the mitigation could be better provided elsewhere, mitigation will occur:
 - a. On site and as close as practicable to the area of disturbance;
 - b. Within the same watershed as the proposed use or development; and
 - c. Within the Portland city limits.
2. The applicant owns the mitigation or remediation site; possesses a legal instrument that is approved by the City (such as an easement or deed restriction) sufficient to carry out and ensure the success of the mitigation or remediation plan; or can demonstrate legal authority to acquire property through eminent domain;
3. The mitigation or remediation plan contains a construction timetable and a minimum 1 year monitoring and maintenance plan that demonstrates compliance with Subsection 33.248.090.E and includes the following elements:
 - a. Identification of the responsible party or parties that will carry out the mitigation or remediation plan;

- b. Identification of clear and objective performance benchmarks that will be used to judge the mitigation or remediation plan success; and
- c. A contingency plan that indicates the actions to be taken in the event that performance benchmarks are not met.

Summary Findings: The proposal includes plan for the subject site that includes the minimum 1-year monitoring (Ex. H-12). The mitigation is proposed to be implemented and maintained by the property owner. A timetable and performance benchmarks have been identified, along with a contingency plan to be enacted if the benchmarks (plant survival and ground coverage) are not met.

As discussed above, the full extent of the project impacts is not sufficiently documented. Therefore, absent a full account of the project impacts, the applicant has not demonstrated that the proposed mitigation, performance benchmarks, or contingencies are sufficient. Accordingly, Criterion H is not met.

ADJUSTMENT - SCENIC CORRIDOR SETBACK

The site is situated along Scenic Corridor 16: SW Macadam/Terwilliger Scenic Drive (SD 38-27), which consists of a loop drive framed by trees. The applicant is requesting an Adjustment to reduce the scenic corridor setback from 20 feet from the lot line (33.480.040.B.2.a/ Table 480-1) to 9 feet (later amended to 10 feet).

Applicant also requested (Ex. H-16) to add to the scenic setback adjustment a change in the height of a stairway from the garage. That is not reviewed herein.

33.805.040 Adjustment Review Approval Criteria

Code 33.805.040 provides that (non-sign) adjustment requests will be approved if the review body finds that the applicant has shown that either approval criteria A. through F. or approval criteria G. through I., below, have been met.

A. Granting the adjustment will equally or better meet the purpose of the regulation to be modified; and

B. If in a residential, CI1, or IR zone, the proposal will not significantly detract from the livability or appearance of the residential area, or if in an OS, C, E, I, or CI2 zone, the proposal will be consistent with the classifications of the adjacent streets and the desired character of the area; and

C. If more than one adjustment is being requested, the cumulative effect of the adjustments results in a project which is still consistent with the overall purpose of the zone; and

D. City-designated scenic resources and historic resources are preserved; and

E. Any impacts resulting from the adjustment are mitigated to the extent practical; and

F. If in an environmental zone, the proposal has as few significant detrimental environmental impacts on the resource and resource values as is practicable; or

G. Application of the regulation in question would preclude all reasonable economic use of the site; and

H. Granting the adjustment is the minimum necessary to allow the use of the site; and

I. Any impacts resulting from the adjustment are mitigated to the extent practical.

Criterion A. *Granting the adjustment will equally or better meet the purpose of the regulation to be modified;*

The purpose of the scenic corridor designation is “to preserve and enhance the scenic character along corridors, and where possible, scenic vistas from corridors. This is accomplished by limiting the length of buildings, preserving existing trees, providing additional landscaping, preventing development in side setbacks, screening mechanical equipment, and restricting signs. Property owners and others are encouraged to make every effort to locate buildings, easements, parking strips, sidewalks, and vehicle areas to preserve the maximum number of trees.” (Code 33.480.040.B.1).

The applicant states the proposal will enhance the scenic character of the corridor, by limiting the building length; providing windows in the entry/skybridge; screening mechanical and vehicle areas; retaining the largest trees; and adding new plantings to meet the L2 standard.

Since BDS’ original objection, Applicant amended its plan to remove 23, not the previously planned 31, trees. Applicant’s Tree Survey (Ex. 14), Tree mitigation and remediation plan (Ex. 12, p. 3), and Tree removal and protection plan (Ex. 12, p. 1) provide sufficient information about tree removal and tree protection to reflect that the requirement to preserve existing trees and provide additional landscaping has been satisfied.

While BDS asserts other necessary Adjustments have not been requested, and therefore, the proposed development is not allowed, Criteria A has been met.

Criterion B. *If in a residential, C11, or IR zone, the proposal will not significantly detract from the livability or appearance of the residential area, or if in an OS, C, E, I, or CI2 zone, the proposal will be consistent with the classifications of the adjacent streets and the desired character of the area;*

Finding: The subject site is a steeply sloped lot in a residential zone, R20. When a lot is steeply sloped, features, such as street-facing doors and windows, which generally contribute to livability by allowing for a visual connection between the street and the residence, do not apply. Therefore, the expansive blank street-facing façade of the proposed development does not necessarily conflict with the livability or detract from the appearance of the residential area, as allowed by these exceptions. Criterion B is met.

Criterion C. *If more than one adjustment is being requested, the cumulative effect of the adjustments results in a project which is still consistent with the overall purpose of the zone;*

Finding: More Adjustments may be necessary for the development, as currently proposed. However, as only one Adjustment is requested, this criterion is not applicable.

Criterion D. *City-designated scenic resources and historic resources are preserved;*

Finding: There are no City-designated historic resource on the site. This criterion does not apply.

Criterion E. *Any impacts resulting from the adjustment are mitigated to the extent practical;*

Finding: While Applicant's proposal meets the purpose of the designation to preserve and enhance the scenic character along corridors, the development, as currently proposed, is not allowed. Therefore, the impacts resulting from the adjustment are not mitigated *to the extent practical*. This criterion is not met.

Criterion F. *If in an environmental zone, the proposal has as few significant detrimental environmental impacts on the resource and resource values as is practicable;*

Finding: The site is not located within an environmental zone, so this criterion does not apply.

III. CONCLUSIONS

Top of bank for the subject property is located where the slope decreases 10% within the first 50 feet landward from the ordinary high water mark.

The proposed house location is at least partially landward of the top of bank and within the first 25 feet of the Greenway Setback. Accordingly, Appellant's non-river-dependent or river-

related development requires a Greenway Goal Exception and cannot be accomplished through a Greenway Review.

In addition, as the proposed construction is within the area of the greenway setback where a Greenway Goal Exception is required, Applicant cannot meet its burden to show that the project meets all the Greenway Review Criteria. Appellant did not show that the project is a practicable development alternative; did not provide all details about potential project impacts because it did not consider all development that is within that part of the greenway setback; and did not responded to all applicable criteria. Applicant's Greenway Review must be denied.

An Adjustment cannot be approved to allow a use not allowed by the regulations. Without a Greenway Goal Exception, the proposed development is not allowed. As such, the project does not meet the approval criteria that the impacts from a scenic corridor are mitigated to the extent practical. The Adjustment must be denied.

IV. DECISION

Denial of a **Greenway Review** to remove approximately 30 trees and an existing shed to construct a new multi-story residence on a riverfront site within the River General (g) and River Water Quality (q) overlays.

Denial of an **Adjustment** to allow the Scenic (s) overlay setback.

Nancy E. Hochman

Nancy E. Hochman, Hearings Officer

March 4, 2021

Date

Application Determined Complete:	November 3, 2020
Staff Decision to Hearings Officer:	January 15, 2021
Decision Mailed:	March 4, 2021
Last Date to Appeal:	March 25, 2021

Appealing this decision. The Hearings Officer's decision is final and takes effect on the day the notice of decision is mailed. The decision may not be appealed to City Council, but may be appealed to the Oregon Land Use Board of Appeals (LUBA), as specified in the Oregon Revised Statute (ORS) 197.830. Among other things, ORS 197.830 requires that:

- an appellant before LUBA must have presented testimony (orally or in writing) as part of the local hearing before the Hearing's Officer; and
- a notice of intent to appeal be filed with LUBA within 21 days after the Hearings Officer's decision becomes final.

Please contact LUBA at 1-503-373-1265 for further information on filing an appeal.

EXHIBITS
NOT ATTACHED UNLESS INDICATED

- A. Applicant's Statement
 - 1. Initial Submittal, June 3, 2020
 - 2. Revised Submittal, November 3, 2020
 - a. Narrative
 - b. Arborist Report
 - c. Deed
 - d. DSL Letter from applicant
 - e. Geotech Letter
 - f. ODOT email from applicant
 - g. Storm Report
 - h. Survey Trace and Slope Determination
 - i. Photos
- B. Zoning Map
- C. Plans/Drawings:
 - 1. Coversheet
 - 2. Proposed Development Site Plan
 - 3. Construction Management Site Plan
 - 4. Civil Details
 - 5. Proposed Site Plan-Floor Plans & Staging Diagram
 - 6. Alternative Design Options-Floor Plan & Vicinity Diagram
 - 7. Building Elevations / Sections
 - 8. Existing Conditions Site Plan
 - 9. Tree Removal and Protection Plan
 - 10. Mitigation and Remediation Plan
 - 11. Survey
- D. Notification information:
 - 1. Mailing list
 - 2. Mailed notice
- E. Agency Responses:
 - 1. Bureau of Environmental Services
 - 2. Bureau of Transportation Engineering and Development Review
 - 3. Water Bureau
 - 4. Fire Bureau
 - 5. Site Development/BDS
 - 6. Urban Forestry/Parks
 - 7. Life Safety/BDS
 - 8. Division of State Lands

F. Correspondence:

1. James Alderman, November 26, 2020, re: concerns about the project details, trees, traffic impacts, and review requirements

G. Other:

1. Original LU Application
2. Correspondence to/from applicant
3. Scenic Resource Inventory description

H. Received in Hearings Office:

1. Notice of Appeal Hearing
2. Hearings Office COVID 19 Order
3. Appeal Submittal
4. LU_20_151838_GW_AD DEC(DEC17)
5. Revised Appeal
6. Planner PowerPoint Presentation
7. Riverside Updated Site Plan
8. 21-02-21 Additional Applicant Evidence
9. Slope Profile current section
10. 9401 Riverside TOPO 1-27-21
11. A1 01 Revised Site Plan & Sections
12. Lewis and Clark Riverside-LS 2-1-21
13. PHS Determination Memo 9932 S riverside
14. Riverside – Arborist Tree Survey
15. Memo to Hearings Officer
16. 21-02-16 Riverside_Rev5
17. TOPO of site and adjacent site
18. 21-02-06 Riverside Rev5. Accepted in-part only for corrections indicated on page 5. Other additions or removals are rejected.
19. Email request for an extension