

*For: Monday, January 11, 2016, City Council Meeting*

## **Advance Packet Information**

Dated: December 31, 2015

Included in this packet is documentation to support the following Agenda items:

### **PUBLIC HEARINGS/ORDINANCES**

1. Quasi-judicial public hearing in the matter of ANX-1-14, LUBA remand to the City's approval to annex approximately 13.33 acres into the City of Brookings. The hearing will consider only the remand item in regards to Statewide Planning Goal 16, impact assessment of the Chetco River Estuary. [Planning, pg. 2]
  - a. Applicant's findings [pg. 6]
  - b. Draft final order [pg. 45]
  - c. Agency Comments [pg. 51]
2. Legislative public hearing in the matter of LDC-2-15, adding conditional use provisions for amateur radio facilities to the Brookings Municipal Code. [Planning, pg. 52]
  - a. Rice letter and Imlay email [pg. 53]
  - b. Draft language [pg. 60]
3. Ordinance 16-O-752, adding provisions for Amateur Radio Facilities as conditional uses to the Brookings Municipal Code. [Planning, pg. 63]
  - a. Ordinance 16-O-752 [pg. 64]
4. Ordinance 16-O-751, adding provisions for water use to Brookings Municipal Code Section 13.05.060. [PWDS, pg. 68]
  - a. Ordinance 16-O-751 [pg. 69]

\*Obtain Public Comment Forms and view the agenda and packet information on-line at [www.brookings.or.us](http://www.brookings.or.us), or at City Hall. Return completed Public Comment Forms to the City Recorder before the start of meeting or during regular business hours.

All public meetings are held in accessible locations. Auxiliary aids will be provided upon request with at least fourteen days advance notification. Please contact 541-469-1102 if you have any questions regarding this notice.

# CITY OF BROOKINGS

## COUNCIL AGENDA REPORT

Meeting Date: January 11, 2016

Originating Dept: PWDS -Planning

Donna Colby-Hanks DC  
Signature (submitted by)  
[Signature]  
City Manager Approval

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**Subject:** Request to consider Applicant's responses to Land Use Board of Appeal's remand (LUBA No. 2015-037) to the City's approval of annexation, File No. ANX-1-14, tax lots 2000 & 1500 on Assessor's Map 40-13-32D; approximately 13.33 acres, adjacent to the Chetco River into the City of Brookings.

**Recommended Motion:** A motion to approve the Applicant's responses to the issues raised by Oregon Land Use Board of Appeals (LUBA) Remand; Statewide Planning Goal 16 (Estuarine Resources) impact assessment on the Chetco River estuary for File ANX-1-14 as well as approve the Remand Final Order with the additional conditions of approval.

**Financial Impact:** Approximately \$1,100 in additional taxes prior to development of the subject property.

**Background/Discussion:** The original approval of the proposed annexation was remanded by LUBA back to the City to address the availability of water in relation to capacity and to address Goal 16, Estuarine Resources. City Council conducted several meetings to consider the remand. The staff report as well as City Council's approval of the final order including findings that addressed both issues.

The Goal 16 approval was again appealed to LUBA. LUBA remanded the issue back to the City for assessment of potential impacts to the estuary as well as identification of methods of mitigation to avoid or minimize adverse impacts. LUBA determined that the assessment does not need to address a possible future reduction in the riparian buffer, placement of fill in the floodplain under Curry County approval, or the possible future restoration of Ferry Creek.

### PROPOSED FINDINGS IN RESPONSE TO REMAND ISSUE

The Applicant has submitted a set of findings (**Attachment A**) to support the remand issue described above.

**Statewide Planning Goal 16, Estuarine Resources, Chetco River Estuary Boundary.** The Chetco River Estuary Boundary runs along the eastern boundary of the subject property and is identified as the Mean Higher High Water (MHHW) line. Pursuant to the LUBA Remand,

findings assessing potential impacts from residential development on the estuarine resources and measures to prevent such impacts are required. The relevant provisions of Statewide Planning Goal 16 are set forth in the Applicant's findings (Attachment A) and are below.

### **ANALYSIS, FINDINGS AND CONCLUSIONS to Statewide Planning Goal 16, Implementation Requirement 1**

*1. Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources.*

*The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:*

- a. The type and extent of alterations expected;*
- b. The type of resource(s) affected;*
- c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and*
- d. The methods which could be employed to avoid or minimize adverse impacts.*

#### ***a. The type and extent of alterations expected;***

The applicant states in the findings that the proposed residential development of the property will not include any physical intrusion into the Estuary Boundary. However, future development would be located within close proximity to the Estuary Boundary. The potential impacts to the estuary resources are primarily based on pollution resulting from the residential development. The pollution could consist of both chemicals and sediment. The applicant has submitted a *Statewide Planning Goal 16 Impact Assessment Report* prepared by Frank Galea, a certified wildlife biologist with Galea Wildlife Consulting to fulfill the requirement of an assessment from the remand.

#### ***b. The type of resource(s) affected;***

According to the Impact Assessment Report provided by the applicant in the findings, the resources that could be impacted with future development of the subject property consist of wildlife resulting from water quality degradation. The location of the proposed development could also impact aesthetic views of the estuary from river users if not protected. No physical alterations within the Estuary Boundary are proposed.

#### ***c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary;***

The applicant identifies potential impacts from development of the subject property on the following estuarine resources:

1. water quality degradation within the estuary from construction activities.
2. on-going water quality degradation from residential development located within close proximity to the estuary.
3. adverse impacts on wildlife utilizing estuarine resources as a result of water quality degradation during construction and post-construction.
4. adverse impacts on wildlife utilizing the estuarine resource and adjacent lands during construction activities.
5. adverse impacts on the aesthetic view from the estuarine resource.

Since no physical development will occur within the Estuary Boundary, there is no anticipated impacts on the physical characteristics of the estuary, navigation, or existing and potential uses of the estuary.

***d. The methods which could be employed to avoid or minimize adverse impacts.***

Water Quality Degradation

As stated in the Impact Assessment Report, the greatest potential for impacts to the estuary would be from the development's sewage and storm water runoff (sediment and pollution). There is also a potential for sediment to increase during the construction phase.

The residential development is proposed to be served by the City of Brookings public sewer system. This will eliminate the potential of sewage contaminants from entering the estuarine resource.

The Impact Assessment Report identified several recommendations to avoid or minimize adverse impacts on the estuarine resource from storm water runoff. The use of Best Management Practices as outlined in the report during construction will minimize potential impacts. This is included as a requirement in proposed condition of approval #4. The impacted riparian area can be enhanced by the removal of invasive plants to improve its functioning to remove sediment. Any replanting should consist of plants listed in the most current Appendix A of the Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds. This is included in proposed condition of approval #6.

In addition, the applicant states in the findings that the storm water system for the future residential development of the property will be designed in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). The Impact Assessment Report noted this was recommended by Chuck Wheeler, Fisheries Biologist, Oregon Coast Branch, NOAA Fisheries West Coast Region. This is addressed with proposed condition of approval #8.

The use of herbicides, pesticides or fertilizers can impact the estuarine resource. The applicant proposes that only herbicides, pesticides, or fertilizers approved by Oregon Department of Fish and Wildlife (ODFW) or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams or rivers shall be applied on the subject property. However, these matters are under the oversight of Oregon Department of Agriculture. Any chemicals applied to the subject property shall be approved for application near aquatic environments. Proposed condition of approval (#9) will require a



restrictive covenant to be recorded in the Official Records of Curry County. The covenant would be transferred to any future property owner upon sale or division of the subject property. This will alert any future owners of the limits of chemical use on the property.

#### Wildlife Habitat

Several species of wildlife were identified in the detailed habitat assessment of the Impact Assessment Report as well as the optimal method for protection. Prior to any disturbance on the subject property a wildlife biologist must survey the area. Upon discovery of the western pond turtle or the northern re-legged frog, the species would need to be relocated to an undisturbed area. If any Migratory Bird Treaty Act nesting sites were discovered, a buffer of 300 feet would need to be maintained until the birds fledge. This is included in proposed condition of approval #10.

#### Aesthetic Resources

The applicant states in the findings that in order to minimize impacts to the view from users of the river, the applicant proposes to enhance the impacted riparian area by removing invasive plants. The invasive species adversely impact native riparian vegetation. Any replanting would need to consist of plants listed in the most current Appendix A of the Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds. This impact is addressed in proposed condition of approval #6.

All recommendations from the Impact Assessment Report have been incorporated into the draft final order as conditions of approval.

Staff recommends adoption of Applicant's findings (**Attachment A**) as well as the analysis and findings contained in the staff report.

Policy Considerations:           None.

Attachment(s):   A.   Applicant's findings  
                          B.   Draft final order  
                          C.   Agency comments

BEFORE THE CITY COUNCIL FOR  
THE CITY OF BROOKINGS, OREGON

MAHAR/TRIBBLE, LLC,	)	FILE NO.: ANX-1-14-(Remand)
	)	
Applicant,	)	
	)	LUBA NO.: 2015-037
OREGON COAST ALLIANCE,	)	
	)	APPLICANT'S SUBMITTAL
Appellant.	)	

This firm represents Mahar/Tribble, LLC, an Oregon limited liability company ("Applicant"), concerning the above-stated matter. The purpose of this submittal is to submit findings and supporting evidence pursuant to remand instructions provided by the Land Use Board of Appeals in its *Final Opinion and Order* dated October 6, 2015.

**A. Property Background.**

("Applicant"), is the owner of certain real property located in Curry County, Oregon, and commonly known as Township 40 South, Range 13 West, Section 32D, Tax Lots 1500 and 2000 (collectively, "the subject property"). The subject property is approximately 13.33 acres in size and is undeveloped. The subject property is located within the City of Brookings' ("the City") Urban Growth Boundary and has a County zoning designation of Commercial (C-1) and Industrial (I). The southern portion of the subject property (Tax Lot 2000) has a "Commercial" Comprehensive Plan designation and the northern portion of the subject property (Tax Lot 1500) has an "Industrial" Comprehensive Plan designation. The extreme southern portion of the subject property, being the area adjacent to Snug Harbor, is designated as Priority Dredge Material Disposal Site #3. The subject property fronts on the North Bank Chetco River Road right-of-way. Municipal water is available to the subject property pursuant to a 14" water main located in the North Bank Chetco River Road right-of-way. Public sewer will be provided to the subject property pursuant to a proposed Infrastructure Financing Agreement between the Applicant and the City ("the Infrastructure Agreement"). Pursuant to the Infrastructure Agreement, Applicant, at Applicant's expense, shall install a sewage lift station with sufficient capacity to serve a maximum of 217 Equivalent Dwelling Unit's ("EDU") and a pressurized 3-inch sanitary sewer main.

The Chetco River runs along the subject property's entire southeastern boundary line. Ferry Creek traverses the subject property but is located within an enclosed culvert. The subject property has been heavily impacted from historical commercial/industrial uses resulting in a significant degradation of the riparian habitat along the Chetco River. The Statewide Planning Goal 16 Chetco River Estuary Boundary ("the Estuary Boundary") is located along the eastern boundary of the subject property. The Estuary Boundary being the line of Mean Higher High Water (MHHW).

## **B. Procedural History.**

Applicant submitted a petition/land use application with the City of Brookings, Oregon (“the Application”). The Application consisted of four (4) components: (a) annexation of the subject property into Respondent’s city limits; (b) amending the comprehensive plan designation for the subject property from Commercial/Industrial to Residential; (c) changing the zoning designation of the subject property from Commercial/Industrial to Two-Family Residential (R-2); and (d) amending the Chetco River Estuary Shorelands Boundary along the subject property’s southeastern boundary.

A public hearing was held before the City of Brookings City Council (“the Council”) on September 8, 2014. The Council approved the Application pursuant to the adoption of Ordinance 14-O-738 (“the Decision”). The Decision was appealed to the Land Use Board of Appeals (LUBA) by Oregon Coast Alliance (ORCA). In a *Final Opinion and Order* dated January 6, 2015, LUBA remanded the Decision to the City for additional findings addressing the following: (a) municipal water capacity to serve the future development of the subject property; and (b) Statewide Planning Goal 16 (Estuarine Resources) (“the LUBA Remand”). The remainder of the Decision was affirmed by LUBA.

Consistent with the LUBA Remand, a public hearing was held on April 13, 2015, before the Council to consider additional testimony and evidence to squarely address the “availability” of domestic water “relative to capacity” for the potential development of the subject property based on the Application. The public hearing was not open for issues relating to Goal 16 (Estuarine Resources) because the LUBA Remand concerning Goal 16 was for insufficient findings and was not evidence based. The Council approved the Application again on April 27, 2015 (“the 2<sup>nd</sup> Decision”).

The 2<sup>nd</sup> Decision was appealed to LUBA by ORCA. In a *Final Opinion and Order* dated October 6, 2015, LUBA remanded the Decision to the City in order to conduct a Goal 16 impact assessment (“the 2<sup>nd</sup> Remand”). LUBA made it clear that the impact assessment must be supported by substantial evidence, specifically, expert testimony. Pursuant to the aforementioned LUBA Remands, all other issues involving the application have been resolved. One important LUBA determination was that the remaining fill to be placed on the subject property pursuant to a prior CLOMR approval and fill and grade permit issued by Curry County is not to be considered in the Goal 16 impact assessment set forth below.

## **C. Goal 16 Impact Assessment.**

As directed by LUBA, the relevant provisions of Statewide Planning Goal 16 are set forth as follows:

*1. Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent*

*discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources.*

*The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:*

- a. The type and extent of alterations expected;*
  - b. The type of resource(s) affected;*
  - c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and*
  - d. The methods which could be employed to avoid or minimize adverse impacts.*
- Goal 16; Implementation Requirements 1.

#### **1. Type and extent of alterations expected.**

As set forth above, the Statewide Planning Goal 16 Chetco River Estuary Boundary is located along the eastern boundary of the subject property. The Estuary Boundary being the line of Mean Higher High Water (MHHW). A map depicting the Estuary boundary is attached hereto as **Exhibit "A"** ("the Map"). The approval of the Application will not result in a physical intrusion into the Estuary Boundary. In other words, no actual development will occur within the Estuary Boundary. However, the future residential development of the subject property consistent with the Application would be located within close proximity to the Estuary Boundary. Applicant acknowledges that potential impacts on the estuary resource from development located outside the Estuary Boundary are possible unless such potential impacts are resolved or mitigated. Such potential impacts on the estuary resources are primarily based on pollution resulting from the contemplated residential development of the subject property. Such pollution consists of both chemicals (e.g. fertilizers, sewage and roadway pollutants) and sediment (*See Habitat Assessment for Federally-Listed Wildlife Species, Statewide Planning Goal 16 Estuary Resources Impact Assessment Report* attached hereto as **Exhibit "B"**) ("the Impact Assessment Report"). The Impact Assessment Report was prepared by Frank Galea, a certified wildlife biologist with Galea Wildlife Consulting.

#### **2. Types of resources affected.**

The resources that could be affected in conjunction with the future development of the subject property primarily consist of impacts on wildlife, including fisheries, resulting from water quality degradation. Also, the location of the proposed development could adversely impact aesthetic values of the estuary if such values are not properly protected. As set forth above, the Application will not authorize any physical alterations within the Estuary Boundary.

### 3. Potential Impacts.

The potential impacts on the estuarine resources resulting from the approval of the Application consist of the following: (a) water quality degradation within the estuarine resource from construction activities; (b) on-going water quality degradation from the residential development being located in close proximity to the estuarine resource; (c) adverse impacts on wildlife, including fisheries, utilizing estuarine resources as a result of water quality degradation during construction and post-construction; (d) adverse impacts on wildlife utilizing the estuarine resource and adjacent lands during construction activities; and (e) adverse impacts on aesthetic resources of the estuarine resource (i.e. view from the estuarine resource). There are no anticipated impacts on the physical characteristics of the estuary, navigation, or existing potential uses of the estuary because no physical development will occur within the Estuary Boundary.

### 4. Methods to Avoid or Minimize Adverse Impacts.

a. **Water Quality Degradation.** The Impact Assessment Report states, in part, as follows:

*The greatest potential for impacts to the Chetco River estuary or any adjacent wetlands would be from the development's sewage and storm water runoff. Although the project is only 1.3 miles from the ocean and thereby this portion of the Chetco River is not likely to be used as spawning habitat for salmonids, juvenile salmonids likely frequent the area during low river flow months. Juvenile salmonids, amphibians and aquatic insects can be directly affected by pollutants entering the estuary. Every effort should be made not to allow sediments or chemicals to migrate from the project site, during construction or after the development is completed.* Impact Assessment Report, Pg. 14.

As to construction activities in conjunction with the development of the subject property, the Impact Assessment Report states:

*No alterations to salmonid habitats are currently proposed for this property. Any construction, vegetation clearing or heavy equipment activity on the property has the potential to increase sediment flows to the Chetco River. The limited amount of current riparian habitat between development and the river is insufficient as a buffer to prevent sediment transport. Any activities as described should be mitigated with the best management practices (BMPs) possible, in order to prevent sediment or fuels (leaked oils, diesel or gasoline or any other unnatural substance) movement to the river. BMPs can include sediment fences, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-filling equipment, etc. An enhanced riparian area will eventually mitigate by providing an enhanced buffer to the river from construction and other activities.* Impact Assessment Report, Pg. 12.



In order to avoid or minimize adverse impacts on the estuarine resource, Applicant proposes that all construction activities on the subject property will comply with Best Management Practices as set forth in the Impact Assessment Report in order to minimize sediment and unnatural substances (i.e. diesel, oil, etc.) transported into the estuarine resource during the construction of any development on the subject property.

The Impacts Assessment Report also states that a “functioning riparian area can also act as barriers to sediment movement” and recommends that the existing impacted riparian areas be enhanced by the removal of invasive plants such as the Himalayan blackberry. Accordingly, in order to avoid or minimize adverse impacts on the estuarine resource, Applicant proposes to enhance the impacted riparian areas by removing invasive plants such as the Himalayan blackberry. Any replanting within the riparian area will consist of plants set forth in the *Plant List for Riparian Zones on the South Coast of Oregon*, being Appendix A to the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.

In order to avoid or minimize adverse impacts on the estuarine resource, Applicant proposes that all development on the subject property, being the proposed residential development, will be served by the City’s public sewer system (*See Impact Assessment Report, Pg. 14*). The foregoing will eliminate the potential of sewage contaminants from the anticipated residential development from entering the estuarine resource. Public sewer will be provided to the subject property pursuant to the Infrastructure Agreement.

In order to avoid or minimize adverse impacts on the estuarine resource, Applicant proposes that the storm water system to serve the development of the subject property be designed in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). In a letter attached hereto as **Exhibit “C”** (“the Porior Letter”), Don Porior, an Oregon registered professional engineer with Porior Engineering, LLC, states, as follows:

*This letter responds to our proposed Storm Water design for the Tribble Property Development in Brookings (the subject property). The final approved plans will be developed using the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V) as recommended by Chuck Wheeler, a Fisheries Biologist working for the Oregon Coast Branch NOAA Fisheries West Coast Region.*

*We concur with Mr. Wheeler that the use of the Storm Water Manual and Slope V compliance will reduce the potential for adverse impacts on the Chetco estuary resources as water are filtered through vegetative filter systems or comparable prior to entering the estuary. Porior Letter (explanation added).*

The Impact Assessment Report also states:

*A storm water runoff system is being designed by an engineer, using the City of Portland Storm Water Manual and the Standard Local Operation Procedures for*



*Endangered Species (SLOPES V). Use of the Storm Water Manual and Slope V compliance will reduce the potential for adverse impacts on the Chetco estuary resources as water are filtered through vegetative filter systems, bioswales and/or comparable uses prior to entering the estuary. Impact Assessment Report, Pg. 14.*

In order to avoid or minimize adverse impacts on the estuarine resource, specifically water quality, Applicant proposes that no herbicides, pesticides or fertilizers shall be applied on the subject property unless such herbicides, pesticides and fertilizers are: (a) approved by ODFW or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams and rivers (i.e. environmentally friendly products); and (b) such applications are consistent with the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.

**b. Wildlife Habitat.**

In order to avoid or minimize impacts on estuarine based wildlife (excluding fisheries) and their respective habitats, Applicant proposes to implement the mitigation measures set forth in the Impact Assessment Report. The Impact Assessment Report contains a detailed habitat assessment of estuarine based wildlife. Species of concern specific to this Application include: (a) migratory birds under the Migratory Bird Treaty Act; (b) the Western pond turtle; and (c) the Northern Red-legged frog. In order to protect the aforementioned species, the Impact Assessment Report recommends that a wildlife biologist survey the designated construction area prior to the initiation of construction activities. Upon discovery of Western pond turtle(s) and/or Northern Red-legged frog(s), these species should simply be relocated to the undisturbed areas of the subject property to avoid injury. In the event an active Migratory Bird Treaty Act nesting site is discovered (i.e. March through August), a 300 foot buffer is recommended until such time the birds fledge (See Impact Assessment Report, Pg. 10). Applicant agrees to implement the Impact Assessment Report's recommendations as conditions of approval.

**c. Aesthetic Resources.**

In order to minimize impacts on the aesthetic values of the estuarine resource (e.g. view from users of the estuary such as boaters), Applicant proposes to enhance the existing impacted riparian area. Specifically, Applicant proposes to enhance the impacted riparian areas by removing invasive plants such as the Himalayan blackberry, which are unsightly and adversely impact native riparian species. Any replanting of the impacted riparian area will consist of native riparian species set forth in the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.

**D. Conditions of Approval.**

Based on the foregoing, Applicant stipulates to the following conditions of approval in order to avoid or minimize adverse impacts on the Chetco River estuarine resource and proposes that the following conditions of approval be incorporated into an order approving the Application:

1. All construction activities on the subject property shall comply with Best Management Practices (BMPs) in order to prevent sediment or fuel (leaked oils, diesel or gasoline or any other unnatural substance) movement to the estuary. BMPs shall include but not be limited to sediment fences, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-filling equipment.
2. The existing degraded riparian area along the subject property's eastern boundary shall be enhanced by the removal of invasive species such as Himalayan blackberry which is prevalent. Any replanting of the degraded riparian area will consist of native riparian species set forth in the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.
3. All residential development on the subject property, as well as other development allowed by the proposed zoning designation, shall be served by the City's public sewer system and the City's municipal water system. Public sewer will be provided to the subject property pursuant to the Infrastructure Agreement.
4. The storm water system to serve the development of the subject property shall be developed in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V).
5. No herbicides, pesticides or fertilizers shall be applied on the subject property unless such herbicides, pesticides and fertilizers are: (a) approved by ODFW or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams and rivers (i.e. environmentally friendly products); and (b) such applications are consistent with the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof. Applicant shall cause a restrictive covenant to be recorded against the subject property implementing this restriction in the Official Records of Curry County, Oregon. A draft of the restrictive covenant shall be submitted to the City for approval prior to the execution and recording of the covenant.
6. Prior to the initiation of construction on the subject property, including clearing and grading of the subject property, a survey by a qualified wildlife biologist shall be conducted for the following species: (a) migratory birds under the Migratory Bird Treaty Act; (b) the Western pond turtle; and (c) the Northern Red-legged frog. Upon discovery of Western pond turtle(s) and/or Northern Red-legged frog(s), these species will simply be relocated to undisturbed areas of the subject property to avoid injury. In the event an active Migratory Bird Treaty Act nesting site is discovered (i.e. March through August), a 300 foot buffer will be maintained from such nest until such time the birds fledge.

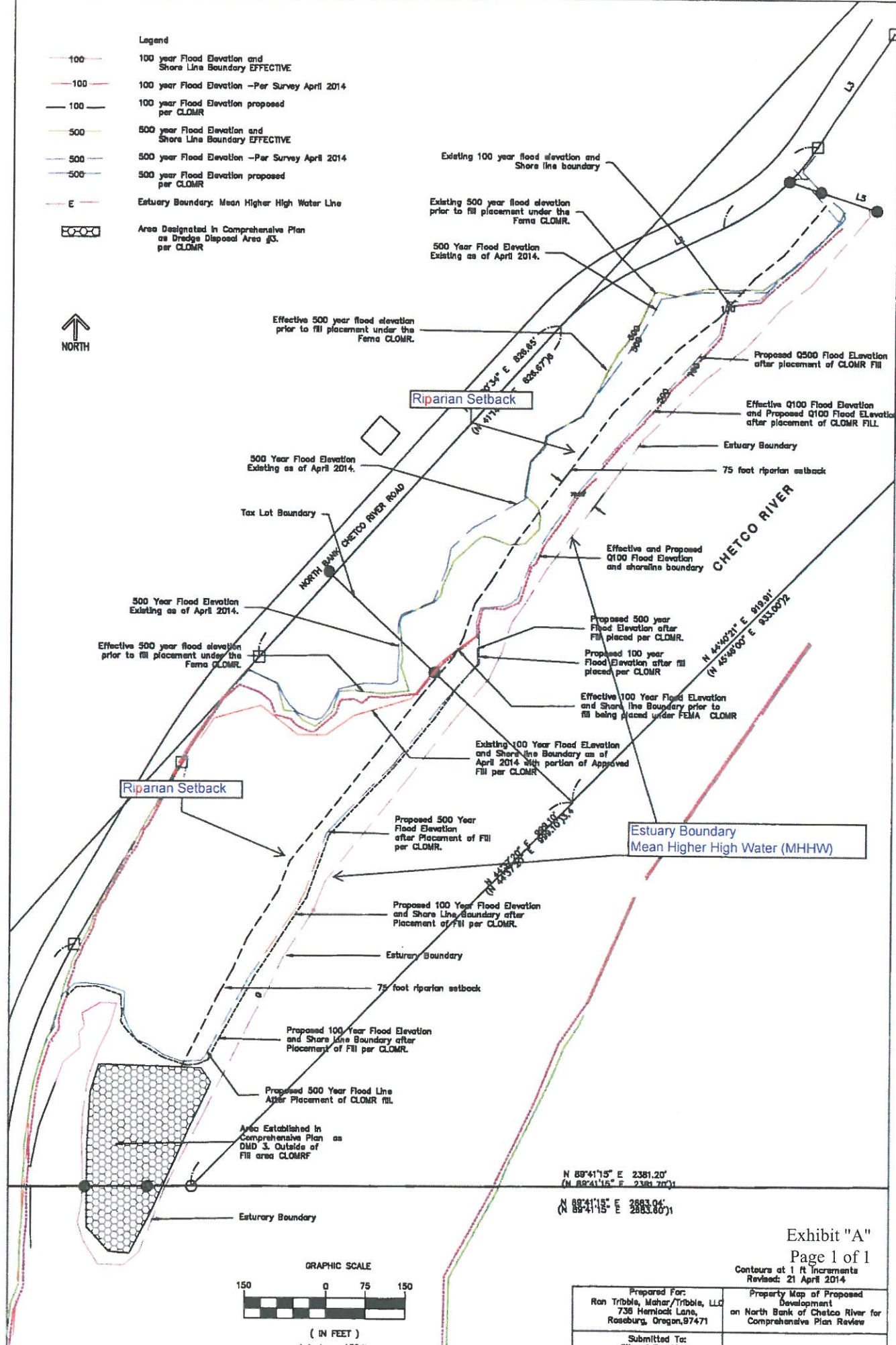
HUYCKE O'CONNOR JARVIS, LLP



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DANIEL B. O'CONNOR, OSB No. 950444

- Legend**
- 100 100 year Flood Elevation and Shore Line Boundary EFFECTIVE
  - 100 100 year Flood Elevation -Per Survey April 2014
  - 100 100 year Flood Elevation proposed per CLOMR
  - 500 500 year Flood Elevation and Shore Line Boundary EFFECTIVE
  - 500 500 year Flood Elevation -Per Survey April 2014
  - 500 500 year Flood Elevation proposed per CLOMR
  - E Estuary Boundary: Mean Higher High Water Line
  - Area Designated in Comprehensive Plan as Dredge Disposal Area §3. per CLOMR





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## **HABITAT ASSESSMENT FOR FEDERALLY-LISTED WILDLIFE SPECIES, STATEWIDE PLANNING GOAL 16 ESTUARY RESOURCES IMPACT ASSESSMENT REPORT, MAHAR PROJECT SITE, BROOKINGS, OREGON**

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Crescent City, CA 95531

Submitted: December 2015

By:



## TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
1.0 SUMMARY.....	1
2.0 INTRODUCTION.....	1
2.1 Statewide Planning Goal 16 .....	3
2.2 Environmental Setting.....	3
2.3 Physical Environment .....	4
2.3 Regulatory Context .....	4
3.0 METHODS .....	5
3.1 Records Search.....	5
3.2 Field Reconnaissance .....	6
4.0 RESULTS .....	6
4.1 Records Search.....	6
4.2 Habitat Analysis for Federally Protected Wildlife .....	6
4.3 Marbled murrelet .....	6
4.4 Northern spotted owl .....	8
4.5 Snowy plover .....	8
4.6 Bald eagle .....	9
4.7 Osprey .....	9
4.8 Migratory Bird Treaty Act .....	10
4.9 Western pond turtle.....	10
4.10 Red-legged frog.....	11
4.11 Salmonids.....	11
4.12 Sensitive Plants .....	12
4.13 Invasive Plants .....	12
4.14 Wetlands .....	13
4.15 Ferry Creek .....	13
4.16 Riparian Habitats.....	14
5.0 POTENTIAL IMPACTS OF DEVELOPMENT TO CHETCO RIVER ESTUARY .....	14
6.0 RECOMMENDATIONS .....	15
7.0 STAFF QUALIFICATIONS .....	15
8.0 LITERATURE CITED .....	16

### FIGURES

1	Map showing Location of Proposed Project Site .....	2
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### TABLES

1	Federally Protected Wildlife Species Potentially Occurring in the Area .....	7
2	Sensitive Plant Species Potentially Occurring in the Area .....	12

APPENDIX A. 2006 Wetland Delineation Report .....	17
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## SUMMARY

The Applicant (Mahar/Tribble, owners) propose to prepare a historically industrial property along the Chetco River for future development (Figure 1). Galea Wildlife Consulting (GWC), Incorporated, of Crescent City, California was contracted by the Applicant's agent to provide a biological assessment to determine the potential for federal and state-protected species being within the disturbance area of the project.

The Oregon Statewide Planning Goal 16 Chetco River Estuary Boundary ("the Estuary Boundary") is located along the eastern boundary of the subject property. The Estuary Boundary being the line of Mean Higher High Water (MHHW). The project, as proposed, would have minimal impacts upon the estuary. Mitigations include riparian area enhancement, a potential re-alignment of Ferry Creek through the property, and use of "best management practices" during land clearing and construction.

No potential habitats were found for the marbled murrelet (*Brachyramphus marmoratus*), snowy plover (*Charadrius alexandrinus nivosus*), the northern spotted owl (*Strix occidentalis caurina*) or the candidate species, the Pacific fisher (*Martes pennant*). No potential nesting habitat for the bald eagle (*Haliaeetus leucocephalus*) was located on or near the project site.

Wetlands are present in the western portion of the property, including potential habitat for the federally-listed western lily (*Lilium occidentale*). Recommendations include surveys for red-legged frogs (*Rana aurora aurora*) and western pond turtles (*Actinemys marmoratus marmoratus*) before any land clearing or construction.

## INTRODUCTION

The Applicant proposes: (1) the annexation of the subject property into the City of Brookings; (2) an amendment of the Comprehensive Plan designation of the subject property from Commercial/Industrial to Residential; (3) change the zoning of the subject property from Commercial (C-1)/Industrial (I) to Two-Family Residential (R-2); and (4) amend the Chetco River Estuary Shorelands Boundary to be consistent with the 100-year floodplain boundary. Based on the foregoing proposed Two-Family Residential (R-2) zoning designation the maximum development potential of the subject property is 59 residential units. There would be no alterations or physical changes to the Chetco River estuary from this development.

Wildlife species potentially located in the general area which are federally-listed as threatened include snowy plover, the northern spotted owl, the Pacific fisher and the marbled murrelet. The bald eagle is de-listed but is still protected under the federal Bald and Golden Eagle Act. Listed salmonids were also considered for this biological assessment as the project is located on the north bank of the Chetco River.



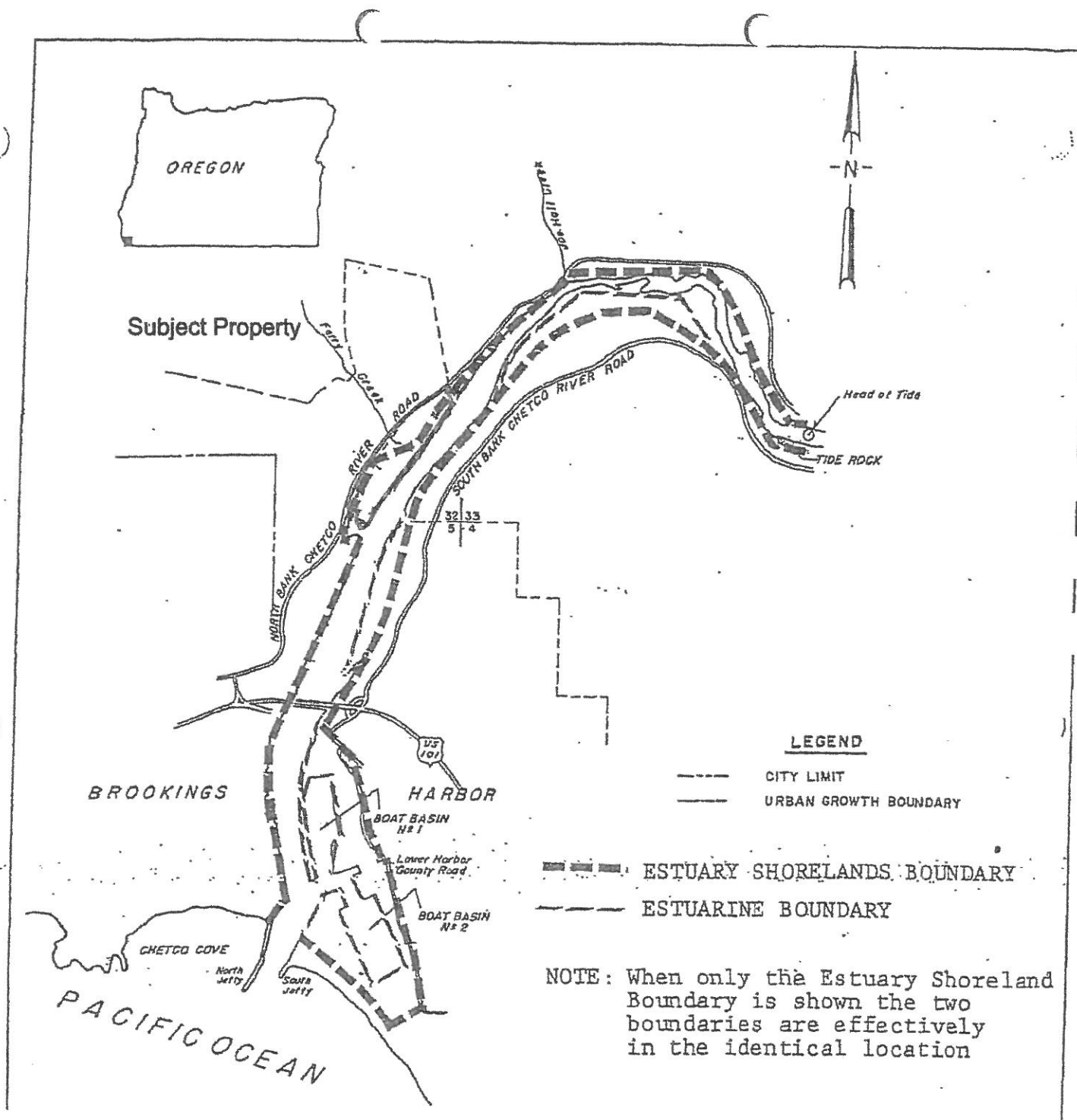


Figure 1. Location of Mahar/Tribble property relative to Brookings, Oregon

## 2.1 Statewide Planning Goal 16.

Oregon Statewide Planning Goal 16 (Estuarine Resources) provides for the protection of the unique environmental, economic, and social values of estuaries and associated wetlands. Goal 16 requires that actions that could potentially alter an estuarine ecosystem be subject to the following impact assessment:

*1. Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources.*

*The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:*

- a. The type and extent of alterations expected;*
- b. The type of resource(s) affected;*
- c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and*
- d. The methods which could be employed to avoid or minimize adverse impacts.*

## 2.2 Environmental Setting

The project site is located in Curry County, Oregon, and commonly known as Township 40 South, Range 13 West, Section 32D, Tax Lots 1500 and 2000 (collectively, "the subject property"). The subject property is approximately 13.33 acres in size and is undeveloped. The subject property fronts on the North Bank Chetco River Road right-of-way.

The Chetco River runs along the subject property's entire south boundary line. Immediately west of the property a small inlet off the Chetco River can be found, which runs from the river northeast towards the subject property. This site is called Snug Harbor, and used to be the historical harbor for the city of Brookings. Directly west of the inlet is the Chetco River Resort.

Ferry Creek traverses the subject property but is located almost entirely within an underground pipe. After crossing under North Bank Road via a large culvert, Ferry Creek is briefly exposed on the property, surrounded by alders and Himalayan blackberry bushes, but then continues to the Chetco River via the underground pipe.

The subject property has been heavily impacted from historical commercial/industrial uses resulting in a significant degradation of the riparian habitat along the Chetco River.

## 2.3 Physical Environment

The climate of southern Oregon is characterized as Mediterranean, with cool, wet winters and warm, dry summers with frequent fog. Along the coastline, proximity to the Pacific Ocean produces high levels of humidity and results in abundant fog and fog drip precipitation. The maritime influence diminishes with distance from the coast, resulting in lesser amounts of fog, drier summer conditions and more variable temperatures. Annual precipitation in the project area ranges from 40 - 120 inches occurring primarily as rain during the winter months.

## 2.4 Regulatory Context

The project is located within the geographic range of several special- status plant and wildlife species. Biological resources on the site may be subject to agency jurisdictions and regulations, as described below.

(a) **U.S. Fish and Wildlife Service (USFWS).** The USFWS has jurisdiction over species listed as threatened or endangered under the federal Endangered Species Act (ESA). The ESA protects listed species from "take," broadly defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." An activity is defined as a "take" even if unintentional or accidental. An endangered plant or wildlife species is one that is considered in danger of becoming extinct throughout all, or a significant portion of its range. A threatened species is one that is likely to become endangered within the foreseeable future. In addition to endangered and threatened species, the USFWS has a list of candidate species, which are those for which the USFWS currently has enough information to support a proposal for listing. Section 9 of the ESA and its applicable regulations restrict certain activities with respect to endangered and threatened plants. However, these restrictions are less stringent than those applicable to fish and wildlife species. These provisions prohibit the removal of, malicious damage to, or destruction of any listed plant species "from areas under federal jurisdiction." Listed plants may not be cut, dug up, damaged or destroyed, or removed from any other area (including private lands) in knowing violation of a State law or regulation.

(b) **Migratory Bird Treaty Act (MBTA).** The MBTA (16 United States Code [USC] 703) enacts the provisions of treaties between the United States, Great Britain, Mexico, Japan, and the Soviet Union and authorized the U.S. Secretary of the Interior to protect and regulate the taking of migratory birds. The MBTA sets seasons and bag limits for hunted species and protects migratory birds, their occupied nests, and their eggs (16 USC 703, 50 CFR 21, 50 CFR 10).

(c) **The Bald and Golden Eagle Protection Act (BGEPA).** The Bald and Golden Eagle Protection Act (16 U.S.C. 668-668c), enacted in 1940 and amended several times since then, prohibits anyone, without a permit issued by the Secretary of the Interior, from "taking" bald eagles, or golden eagles (as amended). In addition to immediate impacts, this definition also covers impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagle's return, such alterations agitate or bother an eagle to a degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, and causes injury, death or nest abandonment.

(c) **U.S. Army Corps of Engineers.** Under Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers is responsible for regulating the discharge of fill material into waters of the U.S. Waters of the U.S. and their lateral limits are defined in 33 CFR (Code of Federal Regulations) Part 328.3 (a) and include streams that are tributary to navigable waters and their adjacent wetlands. Wetlands that are not adjacent to waters of the U.S. are termed "isolated wetlands" and may be subject to U.S. Army Corps of Engineers jurisdiction.

(d) **Oregon Department of Fish and Wildlife (ODF&W).** The ODF&W has jurisdiction over threatened or endangered species that are formally listed by the State under the Oregon Endangered Species Act (OESA). The OESA is similar to the federal Endangered Species Act both in process and substance; it is intended to provide additional protection to threatened and endangered species in Oregon.

The OESA does not supersede the federal Endangered Species Act, but operates in conjunction with it. Species may be listed as threatened or endangered under both acts (in which case the provisions of both State and federal laws would apply) or under only one act. The Oregon endangered species laws prohibit the taking of any plant listed as threatened, endangered, or rare. In Oregon, an activity on private lands (such as development) will violate Section 9 of the Endangered Species Act if a plant species, listed under both State and federal endangered species laws, is intentionally removed, damaged, or destroyed. Under the State Fish and Game Code, the ODF&W also has jurisdiction over species that are designated as "fully protected." These species are protected against direct impacts.

### 3.0

## METHODS

### 3.1 Records Search

A December 2015 IPaC (Information Planning and Conservation Report) report from the USFWS was used to provide potential sensitive species information. This report identified the marbled murrelet, snowy plover, the northern spotted owl, the Pacific fisher and the western lily as federally-listed species potentially occurring in the area. GWC also contributed to the sensitive species assessment list based on GWC records and previous work in the area.

The owner of the Chetco River Resort, Mr. Alan Murray, was contacted for information regarding any sensitive species information he may know of, having built and owned the resort for decades.

A wetland delineation report prepared for the Applicant in 2006 (*Wetland Delineation report, John Curry Property, Brookings, Curry County, Oregon*) was reviewed for biological information gathered at that time.

For the purposes of this report, special-status plant and animal species are defined as those listed in the as Threatened or Endangered under the Federal Endangered Species Act, or candidates for federal listing. Listed wildlife species potentially occurring within or near the assessment area are presented in Table 1.

### 3.2 Field Reconnaissance and Habitat Assessment

A field investigation of the project area was conducted in December of 2015. Certified Wildlife Biologist Frank Galea conducted the field review. Potential wildlife habitats within and around the project area were assessed for their potential for federally protected wildlife species. Stands in proximity to the project site were assessed for their potential as nesting, denning, resting or forage habitats for target species.

## 4.0

## RESULTS

### 4.1 Records Search

The IPaC report provided a summary of those federally-listed wildlife and plant species with potential to occur near the project area. GWC supplemented this list based on our knowledge of the area and sensitive species which may occur there.

### 4.2 Habitat Analysis for Federally - Protected Wildlife

Table 1 provides the list of sensitive or listed wildlife species potentially occurring in the general vicinity of the project area based upon the U.S. Fish and Wildlife Service IPAC report and GWC records. The listing status of each species and if potential habitat (as determined by GWC, based upon a review of habitat available within the project area) was located within or immediately adjacent to the project area is also provided in Table 1.

### 4.3 Marbled Murrelet (*Brachyramphus marmoratus*)

The marbled murrelet (MAMU) occurs only in North America, from Alaska south to Santa Cruz, California (Nelson 1997). The MAMU is closely associated with old-growth and mature forests for nesting and population declines have been attributed in part to loss or modification of forest habitat (USFWS 1997). This species is state-listed as endangered in California and threatened in Oregon and Washington (Nelson and Sealy 1995). In September 1992, the U.S. Fish and Wildlife Service listed MAMU as federally threatened in Washington, Oregon, and California (USFWS 1997).

Unlike most members of the family Alcidae, MAMU most often nest in trees. MAMU prefer to nest in old-growth and mature coniferous forests throughout most of their range (Nelson and Sealy 1995, Ralph et al. 1995). They also have been found in younger forests with structural elements similar to old growth, such as remnant old-growth trees or younger trees with platforms created by deformities or dwarf mistletoe infestations (Grenier and Nelson 1995, Nelson and Wilson 2001).



**Table 1 . Federally-Protected Wildlife Species Potentially Occurring near the Project Area  
due to Suitable Habitat Conditions  
(From USFWS & ODF&W lists)**

Common Name	Scientific Name	Federal Status	State Status	Breeding Habitat near Project Area?	Forage Habitat near Project Area?
<b>BIRDS</b>					
Marbled murrelet	<i>Brachyramphus marmoratus</i>	FT	OE	No	No
Northern spotted owl	<i>Strix occidentalis caurina</i>	FT	OT	No	No
Western snowy plover	<i>Charadrius alexandrinus nivosus</i>	FT	OT	No	No
Pacific Fisher	<i>Martes pennanti</i>	FC	NL	No	No
Western Lily	<i>Lilium occidentale</i>	FE	OE	Yes	NA
<b>FISH</b>					
S. OR./N. CA Coho salmon	<i>Oncorhynchus kisutch</i>	FT	NL	Yes	Yes
Chinook salmon	<i>Oncorhynchus tshawytscha</i>	FC	NL	Yes	Yes
Coastal cutthroat trout	<i>Oncorhynchus clarki clarki</i>	NL	NL	Yes	Yes
Summer-run steelhead trout	<i>Oncorhynchus mykiss irrideus</i>	FC	NL	Yes	Yes

Codes: Federal Status

FE Federally endangered

FT Federally threatened

FC Federal candidate for listing

NL Not listed Federally

OE

State Status

Oregon endangered

OT Oregon threatened

OCE Oregon candidate for endangered listing

NL Oregon not listed



### Potential for Impacts from this Project

MAMU are known to utilize old-growth redwood stands to the south in California, and old-growth fir stands in Oregon, for nesting. The project area is located in a rural residential / commercial area surrounded by early seral (young growth stage) commercial timberlands with no potential for MAMU nesting habitat. Due to the lack of suitable nesting habitat for murrelets near the project area it is highly unlikely that marbled murrelets would be found in proximity to this project site. This project would have no impact on MAMU. Surveys or mitigation for marbled murrelet are not necessary.

#### **4.4 Northern Spotted Owl (*Strix occidentalis caurina*)**

The northern spotted owl (NSO) is listed as federally threatened and also listed as threatened by the State of Oregon. The NSO is not uncommon over most of its range, which in southern Oregon includes late seral conifer forests and mixed-conifer woodlands of the coastal mountains. It occurs locally in old growth and mid-seral second-growth forests.

NSO prefer large diameter trees or snags within well-shaded stands for nest sites, where they will use old nests, cavities or shaded, broken-topped trees. While NSOs close association with old growth has been documented extensively (Forsman et al. 1984, Gutiérrez and Carey 1995, Thomas et al. 1990), it also nests in mid to late seral forests when stands are highly variable in structure and composition (Spies and Franklin 1991). They prefer an overhead canopy over nests and roost sites for thermal and predator protection and are intolerant to extreme heat, especially for nest sites. NSO hunt in relatively closed canopy forests with open sub-canopies and moderate stem densities.

### Potential for Impacts from this Project

The project site is located in a rural residential / commercial area, with associated young, commercial timberlands. No habitat for NSO is available on or near the project site, and this project would have no impacts on NSO. Surveys or mitigations for NSO are therefore not necessary and are not recommended.

#### **4.5 Western snowy plover (*Charadrius alexandrinus nivosus*)**

The snowy plover is listed as federally threatened and State of Oregon threatened. The snowy plover is a rare bird along the Oregon coast, nesting on barren sand beaches and occasionally gravel bars along large rivers, for nest sites. The Pacific coast population of the western snowy plover breeds primarily on coastal beaches from southern Washington to southern Baja California, Mexico.

Historical records indicate that nesting western snowy plovers were once more widely distributed in coastal California, Oregon, and Washington. In Oregon, snowy plovers historically nested at 29 locations on the coast. Currently there are only 10 nesting locations, representing a 65 percent decline in active breeding areas. Plover numbers have slightly increased in the past few years.

#### Potential for Impacts from this Project

This project is located 1.3 miles from the ocean with no potential habitat in or near the project for this species. This project would have no impact on snowy plovers. Surveys or mitigations for snowy plovers are therefore not necessary and are not recommended.

#### **4.6 Bald eagle (*Haliaeetus leucocephalus*)**

Although the bald eagle was de-listed from the endangered species list is still protected under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty. Management guidelines for protection of the bald eagle and nest sites were issued by the U.S. Fish and Wildlife Service in 2007.

The bald eagle population in southern Oregon has been gradually increasing in size, and greatly re-establishing its range. In the past ten years the bald eagle population increased its range and one pair has been nesting in the Smith River area, south of the Chetco drainage, for several years.

Bald eagles prefer to nest close (within one mile, usually in view) to large, fish-rich waters such as lakes and rivers. They typically utilize large conifers to build nests in, which can be standing alone or in the midst of a dense timber stand. Bald eagles typically have alternate nest sites located within one territory, which are used some years as alternates to the primary nest site.

#### Potential for Impacts from this Project

According to the owner of the resort immediately west of the project, no bald eagles have been observed anywhere near the project area. No stands of large conifer are located near the project site which would provide preferred nesting habitat. This project would have no impact on bald eagles. No additional surveys or mitigations are required for this species.

#### **4.7 Osprey (*Pandion haliaetus*)**

The osprey was included in this analysis due to the proximity of the harbor and the Chetco River, both potential forage areas for osprey. Osprey utilize the same habitats as the bald eagle, feeding exclusively on fish. Nests are built on top of or close to the top of large trees or snags, usually close to feeding areas, or at least within sight of feeding areas.

One osprey nest site is known of in the general area. This is a nest site located on the southeast corner of the Chetco River Resort, directly overlooking the Snug Harbor inlet and the Chetco River. According to Mr. Murray, owner of the resort, this nest site has been used many years, and osprey return to nest at this location every year.

#### Potential for Impacts from this Project

A known osprey nest is located 1,000 feet west of the developed west edge of the property, with dense vegetation between the two. This constitutes a sufficient buffer between the nest site and proposed development. No additional surveys or mitigations are required for this species.

#### 4.8 Migratory Bird Treaty Act

Potential nesting habitat for birds covered by the Migratory Bird Treaty Act occurs within the project area. As migratory birds can potentially nest in wetlands, riparian habitats and surrounding trees and brush, potential nesting habitat could be impacted during construction and vegetation removal. Nesting bird surveys should include any potential nesting of birds belonging to the Ardeidae family, which includes herons, egrets, bitterns and their allies. Locally abundant great blue herons and snowy egrets are colony nesters, forming large assemblages of nests in one location. It is therefore critical to located any heron or egret colony nest sites which may be impacted by the project.

It is recommended that surveys for bird nests should be conducted prior to vegetation removal and construction if this is to occur during the migratory bird nesting season, March through August of any given year. If nests are found construction activities should be halted within 300 feet until nestlings fledge.

#### Potential for Impacts from this Project

The previously developed portion of the property contains little nesting habitat for migratory birds, and as this is where future development is planned, there would be no significant impact to migratory birds. As the Applicant intends to enhance the riparian buffer between the river and future development, nesting habitat for migratory birds would actually be improved. Mitigations include nesting bird surveys prior to land clearing and construction, plus an enhanced riparian strip along the river.

#### 4.9 Western pond turtle (*Actinemys marmoratus marmoratus*)

The western pond turtle (WPT) is assessed here due to the proximity of the project to the Chetco River. Very little is known about the western pond turtle in Curry County, although they have been found in the Chetco River system. The western pond turtle inhabits wetlands, coastal lagoons, river, ponds and swampy areas subject to seasonal flooding. To the north, a large population can be found in the Rogue River. As their name suggests, these turtles prefer the calm, deep waters offered by ponds and will utilize man-made ponds if they have access to them. Large marsh areas are a preferred habitat.

Female western pond turtles require suitable nesting habitat near their summer forage habitats in order to lay their eggs. Preferred nesting habitat would be dry, upland sites with reduced canopy closure where eggs developing in the ground would be warmed by sunlight.

Western pond turtles also prefer to overwinter in upland habitats. Although they can successfully overwinter in mud substrates on the bottom of ponds, some populations use upland sites to overwinter under vegetation. This is especially true of WPT populations using large rivers, where they leave the river system once rivers rise and increase in flow, and move into dense vegetation above high water levels to estivate over winter.

### Potential for Impacts from this Project

WPT are known to utilize the upper portions of the Chetco River. Potential habitat for WPT exists in the western portion of the property, where a backwater area is found just east of Snug Harbor and the Chetco River Resort. However, the owner of the resort reports that he has never seen turtles anywhere near the resort or the project area.

Only the westernmost portion of the property contains preferred WPT habitat. Therefore, construction on the previously developed portion of the property would have no impact upon this species. An enhanced riparian strip along the river would be beneficial for WPT, as would a restored Ferry Creek. It is recommended that a biologist survey for and move any turtles found from any area where heavy machinery is to be used and move them out of harm's way to a non-impacted location. No additional mitigations are necessary.

#### **4.10 Northern Red-legged Frog (*Rana aurora aurora*)**

The northern red-legged frog likely occurs on the west end of this property in wetland habitat. This species requires standing water for breeding, but can be found some distance from standing water for foraging. Although red-legged frog numbers are greatly diminished in most areas of California and even listed as federally-threatened in some localities, this species is relatively abundant in Del Norte County to the south and is not a protected species.

### Potential for Impacts from this Project

Habitat for red-legged frogs exists on much of the property, except where paving and hard gravels persist and vegetation is limited and scarce. The previously developed area of the property may provide seasonal forage habitat during wet years for this species, however nesting habitat is limited to those areas where standing water is available all year, which only occurs in the most western portion of the property, near Snug Harbor. Therefore, land clearing and construction on the previously developed portion of the property would have an insignificant impact upon this species.

Red-legged frogs should be protected wherever possible from construction. It is recommended that a biologist survey for and move any red-legged frogs found from any area where heavy machinery is to be used and move them out of harm's way to a non-impacted location. No additional mitigations are necessary.

#### **4.11 Salmonids**

The project area is located on the north bank of the Chetco River. Coho salmon (*Oncorhynchus kisutch*), Chinook salmon (*Oncorhynchus tshawytscha*) and Klamath Mountains steelhead trout (*Oncorhynchus mykiss irrideus*) are all known to occur in the Chetco River. It is likely that Snug Harbor, immediately west of the property, provides a backwater refugia for juvenile salmonids.



### Potential for Impacts from this Project

No alterations to salmonid habitats are currently proposed for this property. Any construction, vegetation clearing or heavy equipment activity on the property has the potential to increase sediment flows to the Chetco River. The limited amount of current riparian habitat between development and the river is insufficient as a buffer to prevent sediment transport. Any activities as described should be mitigated with the best management practices (BMPs) possible, in order to prevent sediment or fuels (leaked oils, diesel or gasoline or any other unnatural substance) movement to the river. BMPs can include sediment fences, bioswales, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-filling equipment, etc. An enhanced riparian area will eventually mitigate the project by providing an improved buffer to the river from construction and other activities.

#### **4.12 Sensitive Plants**

The western lily grows at the edges of sphagnum bogs and in forest or thicket openings along the margins of ephemeral ponds and small channels. It also grows in coastal prairie and scrub near the ocean where fog is common.

Potential habitat for the western lily was found on the west side end of the property, which is undeveloped and consists of a mix of upland riparian and wetland habitats. The 2006 wetland delineation by Roberts and Associates noted that no western lily were encountered during their surveys, and mentioned a lack of wet bog conditions on site, thereby noting a lack of preferred habitat for the species.

Table 2. Federally-listed Plant Species Potentially Occurring near Project Site.					
Common Name	Scientific Name	Federal Status	State Status	Preferred Habitat	Habitat in Project Area?
Western Lily	<i>Lilium occidentale</i>	End.	End.	Bogs, fens, wet gaps in coastal conifer forest	Yes

### Potential for Impacts from this Project

The only potential habitat for the western lily is within the western portion of the property, where no construction or habitat alteration is planned. Unless construction or habitat alteration is planned beyond the area of previous development and impact, no surveys or mitigations for western lily are required.

#### **4.13 Invasive Plants**

Invasive Himalayan berry (*Rubus discolor*), English ivy (*Hedera helix*) Scotch broom (*Cytisus scoparius*) and other invasive plants occur throughout the property. Wherever possible during vegetation removal and construction, invasive plants should be removed by the root. *Hedera* vines growing up trees should be cut, killing the plant above the cut and not allowing flowering and thus seed dissemination, which only occurs when the plant flowers along vines off the ground. Removal of invasive plants and the exclusion of invasive plants in the future is a positive mitigation for this project.

#### 4.14 Wetlands

A wetland delineation report (*Wetland Delineation report, John Curry Property, Brookings, Curry County, Oregon*) was prepared for the Applicant by Roberts and Associates of Harbor, Oregon in 2006. This report identified a small (0.12 acre) wetland area on the northwest edge of the property, the west edge of which borders the Snug Harbor open water inlet. The report is attached as Appendix A.

#### Potential for Impacts from this Project

Any construction, vegetation clearing or heavy equipment activity on the property has the potential to cause sediment flows to wetlands located immediately west of the development site. Any activities as described should be mitigated with the best management practices (BMPs) possible, in order to prevent sediment or fuels (leaked oils, diesel or gasoline or any other unnatural substance) movement to wetland habitats. BMPs can include sediment fences, bioswales, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-filling equipment, etc. Mitigation should include fencing installed between the development and wetland habitats to prevent access and thereby degradation to resources.

#### 4.15 Ferry Creek

As noted above, Ferry Creek enters this property via a culvert under the North Bank of the Chetco River Road, where it is at first open for approximately 100 feet but then enters a pipe which runs the flow all the way down to the bank of the Chetco River. It is highly likely, given the status of Ferry Creek north of the main road, that all of the creek channel on the property is artificial.

The Applicant is amiable to restoring the creek on his property. Options vary, one of which would be to remove the conduit the creek is currently in and create a streambed through the midst of the property, directly to the Chetco. This would be the shortest route to take and the least expensive scenario.

Another option would be to create a new streambed leading west from where the creek enters the property, along the roadway edge and down to the terminus of the Snug Harbor inlet. This option would increase the length of Ferry Creek, would introduce a fresh flow of water into Snug Harbor and surrounding wetlands, and allow for maximizing the use of the already-impacted portion of the subject property. By re-directing Ferry Creek into Snug Harbor, this would likely increase the size and depth of the inlet and increase the quality and amount of juvenile salmonid rearing habitat for this location along the river. Restoring Ferry Creek in this manner would be an excellent mitigation for this project, as it would enhance wetland habitats by increasing the water source into the western portion of the property, improve conditions within the Snug Harbor portion of the Chetco River estuary and improve habitat conditions for salmonids, amphibians and potentially for the western pond turtle.

#### Potential for Impacts from this Project

As Ferry Creek is already severely impacted, with most of the creek running through pipe underground on the property, the project as designed would have no additional impact on the creek. Restoring Ferry Creek to a new location, or creating a new streambed where the pipe currently runs, would be an excellent mitigation.



#### 4.16 Riparian Habitats

The State of Oregon requires riparian buffers of 75 feet. Currently, a riparian edge of alder, with a width of 50-80 feet depending upon location, borders the south edge of the developed edge of the property. The west edge of the property is undeveloped and the riparian edge is far less impacted and much greater in width. Riparian areas were dominated by red alder (*Alnus rubra*), willows (*Salix spp.*) and chitum (*Rhamnus purshiana*) trees, with an understory of salmon berry (*Rubus spectabilis*), Himalayan blackberry (*Rubus discolor*) and swordfern (*Polystichum munitum*).

Riparian habitats are important habitats for wildlife species as nesting and foraging habitat for birds, as migration corridors for terrestrial species, and as refugia for reptiles and amphibians. Riparian habitats also act as a visual and sound screen between development and natural resources such as the Chetco River estuary. An active, functioning riparian buffer can also act as barriers to sediment movement and as sediment and contaminant filters, to prevent sediment flow into river systems. As a mitigation the Applicant is proposing to enhance the current riparian area by removing invasive plants, such as Himalayan blackberry, as a mitigation for this project.

#### 5.0 POTENTIAL IMPACTS OF DEVELOPMENT TO CHETCO RIVER ESTUARY

The project property has approximately 6.2 acres of previously developed area within which to develop the housing project. This excludes the undeveloped portion of the property to the west, and the current riparian strip along the river. The proposed project can therefore be built on land which was previously commercially impacted, with no need to degrade surrounding natural areas.

The greatest potential for impacts to the Chetco River estuary or any adjacent wetlands would be from the development's sewage and storm water runoff. Although the project is only 1.3 miles from the ocean and thereby this portion of the Chetco River is not likely to be used as spawning habitat for salmonids, juvenile salmonids likely frequent the area during low river flow months. Juvenile salmonids, amphibians and aquatic insects can be directly affected by pollutants entering the estuary. Every effort should be made not to allow sediments or chemicals to migrate from the project site, during construction or after the development is completed.

The Applicant proposes to use city water and sewer systems, thereby eliminating the need for any on-site septic disposal system or water wells. A storm water runoff system is being designed by an engineer, using the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). Use of the Storm Water Manual and Slope V compliance will reduce the potential for adverse impacts on the Chetco estuary resources as water are filtered through vegetative filter systems, bioswales and/ or comparable uses prior to entering the estuary. A proposed improvement in the riparian strip along the estuary will enhance the Slopes V compliance.

To the extent allowed, pervious materials should be used for roadways and parking lots within the development to reduce the amount of stormwater runoff toward wetlands or the estuary. Landscaping methods should be considered which require the least amount of pesticides or herbicides to maintain the grounds. The selection of local plant and tree species should be used wherever possible, as these would prove most resistant to disease or insect infestation.

## 6.0

### RECOMMENDATIONS

1. It is recommended that a biologist survey for and move any red-legged frogs found in areas where heavy machinery is to be used.
2. It is recommended that a biologist survey for and move any western pond turtles found in areas where heavy machinery is to be used.
3. It is recommended that a biologist survey for nesting migratory birds if construction or vegetation removal is to occur during the migratory bird nesting season, March through August of any given year.
4. *Hedera* vines growing up trees should be cut, killing the plant above the cut and not allowing flowering and thus seed dissemination.
5. Best management practices (BMPs) should be used wherever possible to prevent sediments, fuels or contaminants from reaching the Chetco River during any work on the property.
6. Should Ferry Creek be restored, we recommend that the creek be routed west along the northwest property line and connected to the Snug Harbor inlet via a newly created streambed.

## 7.0

### STAFF QUALIFICATIONS

This biological assessment was prepared by Principal Biologist Frank Galea. Frank is the primary Biological Consultant and owner of Galea Wildlife Consulting, established in 1989. Frank is Certified as a Wildlife Biologist through the Wildlife Society. Frank's qualifications include a Master of Science Degree in Wildlife Management from Humboldt State University and a Bachelor of Science in Zoology from San Diego State University. Frank has been assessing habitat and conducting field surveys for Threatened and Endangered species for over 26 years. Frank has taken an accredited class on wetland delineation through the Wetland Training Institute, and has successfully completed a Watershed Assessment and Erosion Treatment course through the Salmonid Restoration Federation.

- Ehrlich, P.R., D.S. Dobkins, and D. Wheye. 1988. The Birder's Handbook. Simon and Schuster, Fireside Books, New York.
- Forsman, E.D., E.C. Meslow, and H.M. Wright. 1984. Distribution and biology of the spotted owl in Oregon. Wildl. Monogr. 87:1-64
- Grenier, J.J., and S.K. Nelson. 1995. Marbled Murrelet habitat associations in Oregon. Pp. 191-201 in Ralph, C.J., G.L. Hunt, Jr., M.G. Raphael, and J.F. Piatt, tech. eds. Ecology and conservation of the Marbled Murrelet. USDA Forest Service General Technical Report PSW-GTR-152, Albany, CA.
- Gutiérrez, R.J., and A.B. Carey. 1985. Ecology and management of the spotted owl in the Pacific Northwest. USDA For. Serv. Gen. Tech.
- Nelson, S.K. 1997. Marbled Murrelet (*Brachyramphus marmoratus*). In the Birds of North America No. 276 (A. Poole and F. Gill, eds.). The Academy of Natural Sciences, Philadelphia, PA. and the American Ornithologist's Union, Washington, D.C.
- Nelson, S.K., and S.G. Sealy, eds. 1995. Biology of the marbled murrelet: inland and at sea. NW Naturalist 76.
- Nelson, S.K. and A.K. Wilson. 2001. Marbled Murrelet habitat characteristics of state lands in western Oregon. Unpublished final report, OR Coop. Fish and Wildlife Research Unit, Oregon State Univ., Department of Fisheries and Wildlife, Corvallis, OR. 108 pp.
- Ralph, C.J., G.L. Hunt, Jr., M.G. Raphael, and J.F. Piatt, tech. eds. 1995. Ecology and conservation of the Marbled Murrelet. USDA Forest Service General Technical Report PSW-GTR-152, Albany, CA.
- Rosenberg, Kenneth V.; Raphael, Martin G. 1986. Effects of forest fragmentation on vertebrates in Douglas-fir forests. In: Verner, Jared; Morrison, Michael L.; Ralph, C. John, eds. Wildlife 2000: modeling habitat relationships of terrestrial vertebrates: Proceedings of an international symposium; 1984 October 7-11; Fallen Leaf Lake, CA. Madison, WI: The University of Wisconsin Press: 263-272. [61627]
- Thomas, J.W., et al. 1990. A conservation strategy for the northern spotted owl. Rep. of the Interagency Comm. to Address the Conserv. Strategy of the Northern Spotted Owl. USDA For. Serv., Portland, OR.
- Roberson, D. 1980. Rare birds of the West Coast. Woodcock Publications, Pacific Grove, CA. 496 pp.
- U.S. Fish and Wildlife Service. 1997. Recovery plan for the threatened Marbled Murrelet (*Brachyramphus marmoratus*) in Washington, Oregon, and California. USDI, Fish and Wildlife Service Region 1, Portland, OR.

## APPENDIX A

### 2006 Wetland Delineation Report

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**WETLAND DELINEATION REPORT**  
**JOHN CURRY PROPERTY**  
**SE¼ OF SECTION 32, T40S, R13W**  
**BROOKINGS, CURRY COUNTY, OREGON**

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**Prepared for:** John & Patricia Curry  
P.O. Box 5030  
Brookings, Oregon 97415

**Prepared by:** Wilbur E. & Matthew J. Ternyik  
P.O. Box 1190  
Florence, Oregon 97439

**Surveyed**  
**Mapped by:** Roberts & Associates  
English Village Center  
15957 Hwy 101 S. #11  
Harbor, Oregon 97415



## 1.0 INTRODUCTION

This wetland delineation report for the Curry property was conducted and prepared by Wilbur B. Ternyik and Matthew J. Ternyik at the request of John Curry owner of the property. The purpose of the investigation was to delineate and map wetland boundaries of all jurisdictional wetlands within the identified 12.33 acre Study Area. Using as guidance for this report was the US Army Corps of Engineers (COE) 1987 Wetland Delineation Manual and new additional supplements from COE and Oregon Department of Lands (DSL). This information will be used in the planning and implementing of planning and construction future development at the site during the immediate future.

## 2.0 SITE LOCATION

As illustrated on the site Location Map the site is located on the North Bank of the Chetco River Estuary about 1 mile east of Highway 101. In order to reach the property coming from the north on Highway 101 you turn left just before the Chetco Bridge. Then turn right onto the North Bank-Chetco River Road. The site is easily identified as a former industrial truck yard, mostly cleared and covered with gravel. The Study Area legal description is as follows; SE¼ of Section 32, T40S, R13W, W.M. Curry County, Oregon. Longitude 42° 03'57", Latitude 124° 15'55".

## 2.1 HISTORIC INFORMATION

Little information was available on actual historic use of the property. We do however know that Mr. Curry for years used the location for his former Rock Crushing & Sand and

John Curry Wetland Delineation Report

Gravel business operation. This started 20 years ago and there are indications that it was initially cleared at that time. The extreme west portion which is not a part of the current Study Area was recently logged with an Oregon Department of Forestry Permit. Logging access through the property was approved during this operation.

Early contacts by Mr. Curry indicated a possible wetland violation issue by DSL in the extreme northwest corner of the current Study Area. After consulting with Bob Lobdell we examined the subject area of the complaint and determined that while some vegetation had been cleared there was not sufficient disturbance to verify any regulatory fill or removal violation.

### 3.0 SITE CONDITIONS

The entire Study Area site bordering the Chetco River on the south and North Bank River Road on the north is a totally disturbed site, with historic fill on the east half and historic cleared land to the west. One small patch of standing Alder trees and upland Fern benches is located at the west end next to the inner tidal channel. Recent permitted logging removed a substantial number of these mature Alders and created a cleared logging access road. No wetlands within the Study Area appeared to be disturbed. A narrow land of upland/wetland vegetation exists next to the Chetco River. All vegetation within this area protected by a regulated 35 foot riparian setback from the edge of the river OHWL.

### 3.1 TOPOGRAPHY

Due to past historic commercial use most of the site has been cleared. The east half slopes towards the river. The west side slopes gently into the northwest wetland area and the southwest portion to the river. HGM classification is Flat. The west portion is several feet lower than the east industrial area and as yet is unfilled.

### 3.2 SOILS

Soils as mapped by US Department of Agriculture, Natural Resource Conservation Service (NRCS) 1987 is as follows.

- 15A Bagness-Pistoriver complex, 0 to 3% slopes (Map Unit 15A)  
Bagness silt loam, well drained, as mapped for entire TL 2000 and southwest to southeast portion of TL 1500 within the Study Area.
- 274D Winchuck silt loam, 3 to 15% slopes (Map Unit 274D) as mapped for the northwest to the northeast portion of TL 1500 within the study area.

During our field investigations hydric soil indicators, hydrophytic vegetation and presence of hydrology were used to satisfy wetland manual criteria.

### 3.3 HYDROLOGY

The main source of hydrology to the site is seasonal rainfall on site with some run off from the North Bank River Road. Some winter river flooding in the west end low areas.

### 3.4 VEGETATION (Dominant species only)

Vegetation at this site within the Study Area will be listed in three distinct areas below.

#### Area (1) West Lower Portion

Sci-Name	Common Name	Plant Indicator Status
<i>Alnus rubra</i>	Red alder	FAC
<i>Cirsium arvense</i>	Thistle creeping	FACU+
<i>Equisetum telmateia</i>	Horsetail giant	FACW
<i>Polystichum munitum</i>	Pineland sword fern	FACU
<i>Rubus discolor</i>	Himalayan blackberry	FACU
<i>Rubus laciniatus</i>	Cut-leaf blackberry	FACU+
<i>Rubus spectabilis</i>	Salmon berry	FAC
<i>Symphoricarpos mollis</i>	Snowberry creeping	NOL

#### Area (2) East Upland Industrial Area

Sci-Name	Common Name	Plant Indicator Status
<i>Alnus Rubra</i>	Red alder	FAC
<i>Acer macrophyllum</i>	Maple big leaf	FACU
<i>Equisetum arvense</i>	Horsetail field	FAC
<i>Polystichum munitum</i>	Pineland sword fern	FACU
<i>Pteridium aquilinum</i>	Bracken fern	FACU
<i>Rubus discolor</i>	Himalayan blackberry	FACU
<i>Rubus ursinus</i>	California dewberry	FACU
<i>Ranunculus repens</i>	Butter-cup creeping	FACW
<i>Sambucus racemosa</i>	European red elder	FACU
<i>Trifolium repens</i>	White clover	FACU+

### Area (3) Jurisdictional Wetland Area

Sci-Name	Common Name	Plant Indicator Status
<i>Agrostis capillaris</i>	Colonial bentgrass	FAC
<i>Athyrium filix-femina</i>	Lady fern	FAC
<i>Carex obnupta</i>	Slough sedge	OBL
<i>Carex macrocephala</i>	Big-head sedge	OBL
<i>Cyperus strigosus</i>	Flatsedge straw-color	FACW
<i>Juncus effusus</i>	Rush soft	FACW
<i>Ranunculus repens</i>	Butter-cup creeping	FACW

It should be noted that the entire Study Area is a disturbed site; mainly due to historical industrial use and later a Oregon Department of Forestry logging permit operations.

### 3.5 RARE OR ENDANGERED SPECIES

Based on Oregon Heritage Information on nearby sites we did not observe any of the rare plants species listed for this portion of Curry County. Special attention was given to search for the listed *Lilium occidentale* (Western bog lily) as we have encountered this plant before in the Brookings area. The species is not present on the site mainly due to lack of wet bog conditions. Chetco River and Estuary does have Oregon/California Coho Salmon (*Oncorhynchus kisutch*), a listed Threatened Species (ODF&W Gold Beach office contact). Required riparian vegetation setbacks of 75-feet will protect the river banks. Future project Stormwater Management Plans will meet all federal, state, and local agency requirements for runoff water into the estuary.



### 3.6 CULTURAL RESOURCES

We have contacted the Siletz Indian Tribal Historian about the location of the Study Area. He expressed no documented prior Native American Indian use. However due to the disturbed conditions at the site historic evidence may have been lost. Should any artifacts or evidence be found during future development construction activities work will cease and the tribe notified.

### 4.0 WETLAND DELINEATION METHODS USED

The entire field investigations and report preparation was conducted to required format contained in the Corps of Engineers Wetland Delineation Manual published in 1987. With added attention to recently issued Wetland Delineation Report Guidelines developed jointly by the Portland District Corps of Engineers and US Environmental Protection Agency, Region 10, and also in line with recent Oregon Department of State Lands Administrative Rules guidelines.

Soils were inspected for evidence of hydric soil indicators in the field by use of the Munsell Soil Charts. Soil moisture content, matrix color and the presence of mottles and gleying were recorded on data sheets for each Observation test pit.

The delineation of the uplands and wetlands of this site and resulting surveyed maps was arrived at by use of field notes, colored photos, and by use of published sources.

The boundary between wetlands and uplands was based on visual identification of the plant community, soil sampling to identify hydric soils and hydrology gathered and recorded during site visits. The wetland boundary on site is clearly marked by orange Wetland Boundary flagging tape. Test points upland and wetland locations are identified on site by numbered blue flagging tape. Plain blue flagging tape also used to identify on site boundaries of Waters of the U S and Oregon. Wobbe & Associates did the wetland delineation map surveying.

#### 5.0 WETLAND DELINEATION RESULTS

As shown on the attached Wetland Delineation Map only one small jurisdictional wetland was identified. This small 0.12 of an acre wetland is located in the extreme NW corner at the bottom of the North Bank River Road steep embankment. The Cowardin Classification is PEM and HGM Classification is Flat/depressional. The hydrology is seasonal.

#### 6.0 CONCLUSIONS & RECOMMENDATIONS

We consulted with Bob Lobdell by phone several times during this site investigation that was interrupted several times due to various circumstances, including Alms rubra logging activity.

In order to avoid problems with Curry County's 75-foot riparian vegetation set back the original study area was reduced; leaving the extreme west small peninsula between the main Chetco River and the interior tidal channel out of the Study Area.

Current conditions at the site verify that the vegetation cleared area has now fully recovered. If this small jurisdictional wetland is to be impacted by fill or removal; then a joint COE/DSL Section 404 Permit is necessary. Care should be taken to preserve the Chetco River riparian vegetation area.

#### **7.0 CONSULTANT DISCLAIMER**

We believe the services performed for this study site investigation were conducted with the level of care and skill ordinarily exercised in our area of expertise. The data presented in this report is believed to be representative of conditions at the site. The conclusions are professional opinions in accordance with current standards of professional practice and no warranty is expressed or implied.

#### **7.1 DSL CONCURRENCE DECISION STATEMENT**

This report documents the investigation, best professional judgment and conclusions of the investigators. It should be considered a Preliminary Jurisdictional Determination and used at your own risk until it has been reviewed and approved in writing by the Oregon

Department of State Lands in accordance with OAR 141-090-0005 through 141-090-0055. Delineation reports associated with applications are given first priority for review. Be advised that review of wetland reports without an associated permit may take months for initial review.

## REFERENCES:

Environmental Laboratory, 1987, *Corps of Engineers Wetlands Delineation Manual*, Technical Report & 87-1, U.S. Army Corps of Engineers Waterways Experiment Station, Vicksburg, MS

Federal Interagency Committee for Wetland Delineation, 1989, *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish & Wildlife Service, and U.S.D.A. Soil Conservation Service, Washington, D.C. Cooperative technical publication 238pp.

Kollmorgen Corporation, 1984 Edition, *Munsell Soil Color Charts*. Macbeth Division of Kollmorgen Instruments Corporation, Newburgh, NY

Reed, P.B. 1988 *National List of Plant Species that Occur in Wetlands: Northwest (Region 9)*, U.S. Fish and Wildlife Service, Biological Report 88 (26.9) 89 pp.

U.S. Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS) *Soil Survey of Curry County Area, Oregon* (1970), Washington D.C.

US Department of the Interior, Fish and Wildlife Service *National Wetland Inventory Map of Brookings*

Oregon National Heritage Information Center, Portland, Oregon (List of ESA noted within the vicinity of the site)

John Curry Wetland Delineation Report



Tribble Property in Brookings

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Facility: Tribble Property- Storm Water Quality

Mr. O'Connor

This letter responds to our proposed Storm Water design for the Tribble Property Development in Brookings. The final approved plans will be developed using the City of Portland Storm water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V) as recommended by Chuck Wheeler, a Fisheries Biologist working for the Oregon Coast Branch NOAA Fisheries West Coast Region.

We concur with Mr. Wheeler that the use of the Storm Water Manual and Slope V compliance will reduce the potential for adverse impacts on the Chetco estuary resources as water are filtered through vegetative filter systems or comparable prior to entering the estuary.

Respectfully Yours,



Donald Porior, PE

Cc: Ron Tribble, Owner



EXPIRES 12/31/2016

BEFORE THE CITY COUNCIL FOR  
THE CITY OF BROOKINGS, COUNTY OF CURRY,  
STATE OF OREGON

In the matter of Planning Commission File No.	)	
ANX-1-14/Remand; a request for approval of the	)	<b>Final ORDER</b>
Applicant's response to the issues remanded by the	)	<b>and Findings of</b>
Land Use Board of Appeals, LUBA No. 2015-037	)	<b>Fact</b>
for approval of annexation, Mahar/Tribble, LCC,	)	
applicant.	)	

**ORDER** approving the materials submitted in response to the issue remanded by the Land Use Board of Appeals (LUBA), in the appeal of the City's approval of the annexation of approximately 13.33 acres of land located in Curry County, Oregon, and commonly known as Township 40 South, Range 13 West, Section 32D, Tax Lots 1500 and 2000 ("the subject property"), being located adjacent to the eastern boundary of the North Bank Chetco River Road right-of-way, and approximately 3,294 feet of the North Bank Chetco River Road right-of-way from the city limits boundary to the subject property.

**WHEREAS:**

1. In its decision of an appeal by Oregon Coast Alliance of the City of Brookings' approval of ANX-1-14, the Land Use Board of Appeals (LUBA) remanded with the *Final Opinion and Order* dated October 6, 2015, to the City for additional findings to assess the potential impacts to the estuary from residential uses and identify methods of mitigation to avoid or minimize adverse impacts.
2. The applicant submitted materials to the city in response to the issue of the remand as follows:
3. Consistent with the LUBA Remand, a public hearing was held on January 11, 2016, before City Council to consider the applicant's materials and additional testimony and evidence to address Goal 16. The planning staff presented the Council Agenda Report with recommendations. Oral and written testimony from the public was also presented.
4. At the conclusion of said public hearing, after consideration and discussion of testimony and evidence presented in the public hearing, the City Council, upon a motion duly seconded, approved the materials.

**THEREFORE, IT IS HEREBY ORDERED** that the materials (**Attachment A**) submitted in response to the issue of the remand are approved. Findings and conclusions consistent with the LUBA Remand are set forth as follows:

**Standards, Criteria, Findings and Conclusions for Statewide Planning Goal 16, Estuarine Resources**

The Statewide Planning Goal 16 Chetco River Estuary Boundary (“the Estuary Boundary”) is located along the eastern boundary of the subject property. The Estuary Boundary being the line of Mean Higher High Water (MHHW). Pursuant to the LUBA Remand, findings assessing potential impacts to estuarine resources and measures to prevent such impacts are required. As directed by LUBA, the relevant provisions of Statewide Planning Goal 16, Implementation Requirement 1 are set forth as follows:

*1. Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources.*

*The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:*

- a. The type and extent of alterations expected;*
- b. The type of resource(s) affected;*
- c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and*
- d. The methods which could be employed to avoid or minimize adverse impacts.*

***a. The type and extent of alterations expected;***

The applicant states in the findings that the proposed residential development of the property will not include any physical intrusion into the Estuary Boundary. However, future development would be located within close proximity to the Estuary Boundary. The potential impacts to the estuary resources are primarily based on pollution resulting from the residential development. The pollution could consist of both chemicals and sediment. The applicant has submitted a *Statewide Planning Goal 16 Impact Assessment Report* prepared by Frank Galea, a certified wildlife biologist with Galea Wildlife Consulting to fulfill the requirement of an assessment from the remand.

***b. The type of resource(s) affected;***

According to the Impact Assessment Report provided by the applicant in the findings, the resources that could be impacted with future development of the subject property consist of wildlife resulting from water quality degradation. The location of the proposed development could also impact aesthetic views of the estuary from river users if not

protected. No physical alterations within the Estuary Boundary are proposed.

***c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary;***

The applicant identifies potential impacts from development of the subject property on the following estuarine resources:

1. water quality degradation within the estuary from construction activities.
2. on-going water quality degradation from residential development located within close proximity to the estuary.
3. adverse impacts on wildlife utilizing estuarine resources as a result of water quality degradation during construction and post-construction.
4. adverse impacts on wildlife utilizing the estuarine resource and adjacent lands during construction activities.
5. adverse impacts on the aesthetic view from the estuarine resource.

Since no physical development will occur within the Estuary Boundary, there is no anticipated impacts on the physical characteristics of the estuary, navigation, or existing and potential uses of the estuary.

***d. The methods which could be employed to avoid or minimize adverse impacts.***

Water Quality Degradation

As stated in the Impact Assessment Report, the greatest potential for impacts to the estuary would be from the development's sewage and storm water runoff (sediment and pollution). There is also a potential for sediment to increase during the construction phase.

The residential development is proposed to be served by the City of Brookings public sewer system. This will eliminate the potential of sewage contaminants from entering the estuarine resource.

The Impact Assessment Report identified several recommendations to avoid or minimize adverse impacts on the estuarine resource from storm water runoff. The use of Best Management Practices as outlined in the report during construction will minimize potential impacts. The impacted riparian area can be enhanced by the removal of invasive plants to improve its functioning to remove sediment. Any replanting should consist of plants listed in the most current Appendix A of the Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds.

In addition, the applicant states in the findings that the storm water system for the future residential development of the property will be designed in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). The Impact Assessment Report noted this was recommended by Chuck Wheeler, Fisheries Biologist, Oregon Coast Branch, NOAA Fisheries West Coast Region.

The use of herbicides, pesticides or fertilizers can impact the estuarine resource. The applicant proposes that only herbicides, pesticides, or fertilizers approved by Oregon Department of Fish and Wildlife (ODFW) or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams or rivers shall be applied on the subject property. However, these matters are under the oversight of Oregon Department of Agriculture. Any chemicals applied to the subject property shall be approved for application near aquatic environments.

#### Wildlife Habitat

Several species of wildlife were identified in the detailed habitat assessment of the Impact Assessment Report as well as the optimal method for protection. Prior to any disturbance on the subject property a wildlife biologist must survey the area. Upon discovery of the western pond turtle or the northern re-legged frog, the species would need to be relocated to an undisturbed area. If any Migratory Bird Treaty Act nesting sites were discovered, a buffer of 300 feet would need to be maintained until the birds fledge.

#### Aesthetic Resources

The applicant states in the findings that in order to minimize impacts to the view from users of the river, the applicant proposes to enhance the impacted riparian area by removing invasive plants. The invasive species adversely impact native riparian vegetation. Any replanting would need to consist of plants listed in the most current Appendix A of the Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds.

#### **Conditions of Approval** (As amended by City Council at the remand hearing of January 11, 2016, added text is **bold**)

1. Prior to approval of any new development permits or final plat approval on the subject property, the Applicant is required to record a deed declaration against the subject properties that acknowledges the existence of the Infrastructure Financing Agreement between the parties and its essential role in determining sewer feasibility to achieve municipal zoning. The Deed Declaration shall state that the existence of the Infrastructure Financing Agreement between the City and the Mahar/Tribble LLC was essential in approving the municipal zoning for the property by determining the provision of sewer was feasible and shall state that the City is under no obligation to extend sewer in a manner other than specified in the terms of the Infrastructure Financing Agreement.
2. Prior to issuance of any development permits or final plat approval, the owners must furnish the City of Brookings with a legal description prepared by a registered professional land surveyor that describes Shoreland Boundary as approved herein for the entire length of the subject properties and the boundary shall be staked at 50-foot intervals by the surveyor who prepared the legal descriptions. Notwithstanding the foregoing, the staking of the Shoreland Boundary on that portion of the subject property included within the approved FEMA Conditional Letter of Map Revision shall be completed contemporaneously with the completion of the FEMA Letter of Map Revision.



3. Development on the site is required to comply with the following Hazard Mitigation conditions:

- a. Prior to issuance of any development permits or final plat approval, Applicant will provide a statement from an Oregon Registered Engineering Geologist that the fill placed four years ago satisfies the recommended 95% compaction and is appropriate for residential and street construction.
- b. Prior to issuance of any development permits or final plat approval, Applicant will provide a statement from an Oregon Registered Engineering Geologist that any new fill will satisfy the recommended 95% compaction and is appropriate for residential and street construction.
- c. Prior to issuance of any development permits or final plat approval on the portion of the subject property located within the existing 100-year floodplain, Applicant will complete the Letter of Map Revision process with FEMA that establishes the revised 100-year floodplain elevations and the floodway boundary for the site.
- d. In the event any future development is to be located within the 100-year floodplain, topographic information will be provided for development permits that demonstrate the ground elevation building pads have been raised 1-foot above the 100-year floodplain elevation.
- e. A report from an Oregon Registered Engineer or an Oregon Registered Engineering Geologist shall be provided with all building plans for residential foundations at the time of building plan submittal to the City that explain how the proposed foundation designs are consistent with Recommendations No. 4 through 6 set forth on Page 7 of the Geologic Hazard Evaluation Report dated February 29, 2008, and prepared by Garcia Consultants. A copy of the aforementioned report being contained in the record.

**4. Prior to any disturbance or development of the subject property, all required state and federal permits and approvals must be obtained and copies provided to the City. All construction activities on the subject property shall comply with Oregon Department of Environmental Quality's Best Management Practices (BMPs) in order to prevent sediment or fuel (leaked oils, diesel, gasoline or any other unnatural substance) movement to the estuary. BMPs shall include but not be limited to sediment fences, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-fueling equipment.**

**5. Prior to any disturbance or development of the subject property, a sediment fence shall be placed between the development and the wetland delineated in the most current report with concurrence from the Department of State Lands.**

**6. Prior to any disturbance or development of the subject property, a riparian enhancement plan shall be submitted to the City for approval in conference with ODFW. The plan shall show the areas where invasive species are proposed for removal and the method of removal. Any replanting will consist of native riparian species set forth in the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.**

7. All residential development on the subject property, as well as other development allowed by the proposed zoning designation, shall be served by the City of Brookings municipal sewer and water systems.

8. The storm water system to serve the development of the subject property shall be prepared by an Oregon-licensed civil engineer in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V).

9. Only pesticides, herbicides, or fertilizers approved by Oregon Department of Agriculture (ODA) for application near aquatic environments shall be utilized on the subject property. Such applications must be in compliance with manufacturer's instructions and must be consistent with the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watershed*, December, 2003, or any amendments thereof. If the services of a Commercial Applicator are utilized, they must be licensed by ODA. The Applicant shall cause a restrictive covenant to be recorded against the subject property implementing this restriction in the Official Records of Curry County, Oregon. A draft of the restrictive covenant shall be submitted to the City for approval prior to the execution and recording of the covenant.

10. Prior to the initiation of construction on the subject property, including clearing and grading, a survey by a qualified wildlife biologist shall be conducted for the following species: (a) migratory birds under the Migratory Bird Treaty Act; (b) the western pond turtle; and (c) the northern red-legged frog. Upon discovery of the western pond turtle or the northern red-legged frog, these species will be relocated to undisturbed areas of the subject property to avoid injury. In the event an active Migratory Bird Treaty Act nesting site is discovered (i.e. March through August), a 300 foot buffer will be maintained from the nest until such time the nestlings fledge.

**LET IT FURTHER BE OF RECORD** that City Council APPROVED the materials submitted in response to the issue of the remand based on the evidence in the record and the findings of fact.

Dated this 11th day of January, 2016.

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Ron Hedenskog, Mayor

ATTEST:

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Donna Colby-Hanks, Planning Manager



Donna Colby-Hanks <[dcolbyhanks@brookings.or.us](mailto:dcolbyhanks@brookings.or.us)>

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## Notice of Tribble ANX-1-14 remand hearing

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**MCDONALD John** <[John.MCDONALD@odot.state.or.us](mailto:John.MCDONALD@odot.state.or.us)>  
To: Donna Colby-Hanks <[dcolbyhanks@brookings.or.us](mailto:dcolbyhanks@brookings.or.us)>

Thu, Dec 17, 2015 at 3:33 PM

Donna,

Thank you for the opportunity to comment on the LUBA remand hearing.

We have no comments.

Sincerely,

John McDonald

Development Review Planner

ODOT Southwestern Region

541-957-3688

**From:** Donna Colby-Hanks [mailto:[dcolbyhanks@brookings.or.us](mailto:dcolbyhanks@brookings.or.us)]

**Sent:** Thursday, December 17, 2015 11:18 AM

**To:** GUEVARA Thomas; PERRY Dave; Shala Helm; Dan O'Connor; Ron Tribble; Ken Phippen; Chuck Wheeler - NOAA Federal; Andazola, Anita M NWP; Cameron La Follette; ODOT Reg 3 Planning Manager

**Subject:** Notice of Tribble ANX-1-14 remand hearing

[Quoted text hidden]

# CITY OF BROOKINGS

## COUNCIL AGENDA REPORT

Meeting Date: January 11, 2016

Originating Dept: PWDS-Planning

Donna Colby-Hanks ldt  
Signature (submitted by)  
[Signature]  
City Manager Approval

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**Subject:** A hearing on File LDC-2-15 for consideration of the addition of BMC Section 17.124.230 Specific Standards Applying to Conditional Uses, Amateur communication facilities and the addition of Amateur communication facilities as a conditional use in all applicable zoning districts.

**Recommended Motion:** A motion to approve revisions proposed by LDC-2-15 to add provisions for additional opportunities for amateur radio facilities as an accessory use to dwellings with the approval of a conditional use permit.

**Background/Discussion:** At its meeting of December 14, 2015, City Council directed staff to revise the proposed amateur radio facility ordinance consistent with the recommendations in a letter dated December 8, 2015, provided by City Attorney Martha Rice. The recommendations were in response to a letter received from Christopher Imlay, General Counsel for the National Association for Amateur Radio. Both documents are included with this report as Attachment A. Attachment B is the revised provisions of BMC Section 17.124.230.

Since this matter has been of great interest to the public and as suggested by the City Attorney, notice of the public hearing was published in the local newspaper and mailed directly to all participants and agencies to allow for additional testimony and input.

**Attachment(s):**

- A. Rice letter and Imlay email
- B. Draft revised provisions

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## Advice Letter<sup>1</sup>

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TO: Mayor Ron Hedenskog and Members of the City Council;  
City Manager Gary Milliman; City Planning Manager Donna Colby-Hanks

FR: Martha D. Rice, City Attorney

DT: December 8, 2015

RE: Response to Christopher Imlay's Letter Raising Concerns over Content of Proposed City Ordinance to Amend the City Code to Regulate Amateur Radio Installations

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### A. Background

Amateur radio is a federally regulated communications service. The federal agency tasked with enforcing the federal regulations is the Federal Communications Commission ("FCC"). In 1985, the FCC issued PRB-1, an administration ruling declaring a policy of limited preemption of state and local laws regarding the regulation of amateur radio facilities. The policy of limited preemption is an attempt to balance the strong federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters. The policy states that local regulation of an antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minim practicable regulation to accomplish the state or local authority's legitimate purpose. Municipalities must provide reasonable accommodation in all cases.

### B. Reasonable Accommodation

The Ninth Circuit Court of Appeals announced a three-prong test for determining whether a municipality has "reasonably accommodated" an amateur radio operator.<sup>2</sup> Prior to denying an application to construct an amateur radio antenna facility, the municipality is required to (1) consider the application, (2) make factual findings, and (3) attempt to negotiate a satisfactory compromise with the applicant. If the amateur radio operator's communication is made ineffective by the limitations placed on the facility by the City, then the City has not complied with the reasonable accommodation requirement.<sup>3</sup>

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<sup>1</sup> This advice letter is confidential as an attorney-client communication, unless Client chooses to release it.

<sup>2</sup> *Howard v. City of Burlingame* (9th Cir. 1991) 937 F.2d 1376.

<sup>3</sup> *Pentel v. City of Mendota Heights* (8th Cir. 1994) 13 F.3d 1261.



### C. Addressing Christopher Imlay's Concerns Outlined in His Letter

Concern No. 1: The ordinance makes "each and every amateur radio antenna, regardless of height or configuration, subject to a conditional use permit."

- Response: This is incorrect. Amateur radio towers and antennas are allowed as an accessory use on all properties with a height limitation of one and one-half times the height limitation of the applicable zoning district. If the tower and antenna are in excess of the height limitation exception set forth in BMC 17.128.020(B), then a special use permit is required in accordance with BMC 17.124.230 (added with this new ordinance).
- Recommendation: No action necessary.

Concern No. 2: Subsection 17.124.030(A) requirement of a "needs analysis" for any tower/antenna that exceeds the one and one-half times the zoning district's height limitation is unclear as to what will be an adequate showing and who will evaluate the evidence.

- Response: This can be fixed by clarifying what is meant by a "needs analysis."
- Recommendation: The City should amend the language to provide clarification to the "needs analysis" process. In accordance with current law, the applicant could be required to show the planning commission, by a preponderance of the evidence, that the desired height is necessary to achieve reliable amateur radio communication, i.e., that reliable communications cannot or are not likely to be achieved with a shorter tower/antenna.

Concern No. 3: Setback limitations without exceptions or alternatives such as retractable antennas or antennas bracketed to structure are unreasonable. Allowing such alternatives is a reasonable accommodation. The one to one setback is unjustifiable since radio antenna support structures do not fall laterally from the base.

- Response: I agree with Mr. Imlay's assessment of this provision. There appears to be no justification for the increased setback requirement versus outright permitted uses such as flagpoles, etc. For example, a 45 foot flagpole could be located say 5 or 10 feet from a property line, but a 50 foot radio tower would have to be located 50 feet from the same property line. Such a heightened requirement is the opposite of a "reasonable accommodation" as it is more restrictive than similar uses. In addition, radio towers are engineered for specific wind loads and are also designed to collapse on themselves and not from the base. Therefore, the "safety" concern is undermined by the design of the towers themselves. One last consideration - this requirement could lead to unintended consequences. The 1 to 1 setback requirement severely limits the placement of the tower on the subject property. Thus, the only compliant placement of the structure may be more disruptive aesthetically than a location closer to one of the property lines.
- Recommendation: The ordinance should be amended so that the setback requirement is the same as the setback for similar facilities that do not exceed the height limitation.

Concern No. 4: The provision requiring an inspection and report every three years is unclear if it is referring to every facility or only those 25 years or older. If it is the latter, which it is, then Mr. Imlay has no objection.

- Response: The latter interpretation is correct. The language was intended to only require the inspection and report for a tower 25 years or older or if the building inspector observes signs of instability or deterioration.
- Recommendation: I recommend clarifying the language of BMC 17.124.230(K) to make it clear that inspections and reports are only required for structures 25 years or older, or upon request of the building inspector.

Concern No. 5: The provision that requires that the tower be monopole is not justified by either safety or aesthetic impacts (BMC 17.124.230(P)). The same provision also requires that the antenna be a directional, rotatable “beam” type antenna. The provision also regulates the overall size of the antenna independent of the structure – an instrumentality of interstate commerce which the City cannot regulate. The city may “evaluate the safety of the installation of the antenna array but not the antenna configuration.”

- Response: Regulation of the type of antenna tower must have a justification. It is difficult to justify the monopole requirement for towers requiring a use permit but not for those towers not requiring a use permit. By way of explanation, House A could have a 45-foot structure with a lattice tower and neighboring House B that applies for a use permit to build a 50-foot structure would be required to have a monopole tower. This is difficult to justify in terms of either aesthetic or safety considerations. Therefore, the point that the monopole requirement is not justified by either safety or aesthetic considerations is well taken.

The second point regarding the “configuration” of the antenna is also a valid point. There is really no overarching safety or aesthetic concern that would justify the City setting type and size requirements that apply to structures requiring a use permit but not structures permitted outright. In addition, the City’s regulation of the type and size of antenna size, without any direct relation to safety or aesthetic concerns, is in danger of intruding upon the FCC’s jurisdiction over ham radio operations.

- Recommendation: My recommendation is to remove the paragraph entirely or to replace it with language similar to the following: “The tower must be of a design that is consistent with characteristics of the surrounding neighborhood. The tower and the antenna must be designed and configured in a manner that do not endanger the safety of persons or property.”

#### D. Ordinance Revisions – Recommendation

I recommend that the Council direct staff to revise the proposed ordinance consistent with the recommendations in the letter. I also recommend that the City Council hold another public hearing since this topic has been of great interest to the public and further changes will be made. I am fully willing and able to explain to the public some of the limitations that the City has when it comes to regulating amateur radio facilities.

# BOOTH, FRERET & IMLAY, LLC

ATTORNEYS AT LAW

ROBERT M. BOOTH, JR. (1911-1981)  
JULIAN P. FRERET (1918-1999)  
CHRISTOPHER D. IMLAY

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CHRIS@IMLAYLAW.COM

October 26, 2015

Via E-mail Only

Honorable Ron Hedenskog, Mayor  
Brookings City Council  
898 Elk Dr.  
Brookings, OR 97415 |

Attention: [dcobyhanks@brookings.or.us](mailto:dcobyhanks@brookings.or.us)

Re: City Council Hearing re Amateur Radio Ordinance;  
Proposed Revised Chapter 17, Brookings Ordinances

Greetings:

The undersigned serves as General Counsel for ARRL, the national association for Amateur Radio (formally known as the American Radio Relay League, Incorporated). Our members in the Town of Brookings have requested that we bring to your attention some concerns we have relative to your proposed ordinance changes, most particularly Section 17.124 pertaining to conditional use permits for Amateur Radio antennas and support structures. There are numerous aspects of your proposal that seriously (and unnecessarily) overregulate, and in some cases, prohibit Amateur Radio antennas on a *de facto* basis, in direct violation of both Oregon Statutes Section 221.295<sup>1</sup> and 47 C.F.R. Section 97.15(b), an FCC regulation that has the preemptive effect of a Federal statute.

It is our opinion, having actively practiced Federal Telecommunications Law and Regulation exclusively for the past 35 years, and having initiated the proceeding that resulted in the FCC's limited preemption policy applicable to Amateur Radio antennas that the proposed ordinance restrictions are not consistent with the strong Federal interest in Amateur Radio communications. The City is without jurisdiction to enforce certain of the restrictive provisions contained in the draft ordinance now under consideration.

Our specific concerns are as follows: First, the proposed ordinance changes would make each and every amateur radio antenna, regardless of height or configuration, subject to a

<sup>1</sup> ORS Section 221.295 reads as follows: "Notwithstanding ORS chapters 215 and 227, a city or county ordinance based on health, safety or aesthetic considerations that regulates the placement, screening or height of the antennas or antenna support structures of amateur radio operators must reasonably accommodate amateur radio communications and must represent the minimum practicable regulation necessary to accomplish the purpose of the city or county. However, a city or county may not restrict antennas or antenna support structures of amateur radio operators to heights of 70 feet or lower unless the restriction is necessary to achieve a clearly defined health, safety or aesthetic objective of the city or county. [1999 c.507 §1]".

conditional use permit. There is no provision for any antenna, even a small, ground-mounted vertical monopole or a chimney-mounted VHF and UHF vertical antenna, as a matter of right. The cost and expense of obtaining a conditional use permit for such an antenna is prohibitive. Virtually all reasonable antenna ordinances permit antennas less than a particular fixed height and/or configuration as a matter of right with a building permit only, and they have provisions for conditional use permits for antennas of greater height or configuration.<sup>2</sup> Despite the claim in your draft ordinance that the City “recognizes the importance of amateur radio operators and their service to the community especially in the event of emergencies,” the provisions of the revised ordinance appear to be intended to inhibit antennas through the permitting process.

Second, in proposed Subsection 17.124.230A, which limits overall antenna height to 70 feet maximum, you require that a “needs analysis” to be “submitted with the application providing justification of the need for the requested height.” It is unclear in view of ORS Section 221.295 what the purpose of this submission is and how it is to be adjudicated. It can only be assumed that the City intends to use it to conduct an evaluation of the need of the Amateur Radio licensee for the antenna, regardless of the height thereof. It is also unclear what will constitute an adequate showing and who will be qualified to evaluate the showing. The burden of this showing is not necessary in order to achieve a clearly defined health, safety or aesthetic objective.

Third, the height limit overall is subject to setback limitations. There is no provision for the use of retractable antennas or antennas that are bracketed to the master residence or other accessory building. A one-to-one setback requirement relative to height is unjustifiable in any case since radio antenna support structures do not fall laterally from the base, but even if they did, a less restrictive alternative would be to permit antennas and antenna support structures to be bracketed to the principal structure on lots that cannot accommodate an Amateur Radio antenna of a reasonable height up to 70 feet without violating the setback restriction. The FCC preemption policy calls on municipalities to provide the least restrictive provisions consistent with the legitimate municipal interest as well as “reasonable accommodation.” Amateur Radio antenna permitting cannot be based on the wealth of the licensee and his or her ability to afford a larger lot. A reasonable alternative for setback compliance is to call for the licensee on a smaller lot to install a retractable antenna support structure and to keep it retracted when not in use. Another option is to call for house-bracketed support structures and measure the setback from the highest point of the bracket to the highest point of the antenna.

Fourth, one provision of Subsection 17.124.230K is that the “facility must be inspected by an Oregon structural engineer every three (3) years and a report provided to the City for towers more than 25 years of age...” It is unclear whether this provision calls for all antenna facilities to be inspected by a structural engineer every three years, or whether that provision applies *only to those antenna towers that are more than 25 years old*. If the latter, that is not an

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<sup>2</sup> It is noteworthy that some smaller Amateur Radio antennas approximate the size of a residential television broadcast reception antenna. Video reception antennas at residences of any size at all, if used for television reception, could be erected without any prior approval of the City at all, on rooftops at locations on the property and heights that are far more obtrusive than many Amateur Radio antennas. FCC Rule Section 1.4000 (47 C.F.R. § 1.4000) preempts local regulation of over the air television reception devices, including broadcast television antennas of unlimited size, at heights up to 12 feet above roof level without any local approvals *at all*. Given this, there is no point in attempting to overregulate an Amateur Radio antenna as proposed.

unreasonable provision. If, however, it is to apply to all towers with permits, the cost of such inspections is undoubtedly prohibitive due to the cost of structural engineering inspections and wet-seal certifications every three years, and the ordinance fails the FCC's "no prohibition" and "reasonable accommodation" tests for municipal ordinances. Permitting and maintenance costs, if prohibitive or unnecessary, are inconsistent with the FCC Amateur Radio preemption policy. See, *Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures*, 14 F.C.C.R. 19,413 para. 7 (1999)<sup>3</sup>, FCC 99-2569; *Reconsideration denied by Order on Reconsideration*, 15 F.C.C.R. 22151 (November 15, 2000); *Review denied on other grounds*, 17 F.C.C.R. 333 (2001). The United States District Court for the Northern District of New York in Randall Palmer v. City of Saratoga Springs, et al., 180 F. Supp. 2d 379 (N.D.N.Y. 2001) found that "undeniable tension exists between amateur radio operators' interests in erecting a radio antenna high enough to ensure successful communications, and local municipalities' interests in regulating the size and placement of amateur radio antennas. Choosing between the two, the federal government aligned its interests with those of the amateurs... Accordingly, 'federal interests are furthered when local regulations do not unduly restrict the erection of amateur radio antennas.'"

Subsection 17.124.230K provides that "the tower must be a monopole with an aerial or directional beam type antenna. If a directional beam antenna is proposed, it must cover an area less than 100 sq. ft. or a needs analysis must be submitted providing justification of the need for a larger antenna." There are a number of major problems with this provision. It appears intended to prohibit support structures other than monopoles. Specifically, lattice tower structures typically used in most Amateur Radio antenna installations appear to be prohibited. There is no justification provided for the restriction and there is none as a matter of fact, either in terms of aesthetic impact or safety. Second, the restriction indicates that a directional, rotatable "beam" type antennas must be used. Some radio amateurs prefer vertical, ground-mounted antennas with no support structure at all, and some prefer wire antennas suspended from trees. These are not accommodated at all by the proposed ordinance. Finally, the ordinance proposes to regulate the antenna size independent of the support structure. This is the attempted regulation of an instrumentality of interstate commerce over which states and municipalities have no jurisdiction. The ordinance could evaluate the safety of the installation of the antenna array but not the antenna configuration.

ARRL and this office would be pleased to assist in the preparation of ordinance provisions that accomplish the City's legitimate goals without unnecessary and unreasonable

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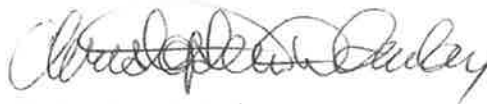
<sup>3</sup> "We return once again to the position that we have stated earlier in this *Order*, that is, that the standards of "reasonable accommodation" and "minimum practicable regulation" are sufficiently efficacious as guideposts for state, local and municipal authorities...In addition, we believe that PRB-1's guidelines brings to a local zoning board's awareness that the very least regulation necessary for the welfare of the community must be the aim of its regulations so that such regulations will not impinge on the needs of amateur operators to engage in amateur communications."



restrictions on Amateur Radio antennas. Please include this letter in the record in this proceeding.

Please also let me know if additional information is called for.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "Christopher D. Imlay". The signature is fluid and cursive, with the first name "Christopher" being the most prominent part.

Christopher D. Imlay  
General Counsel, ARRL

Text to be added is **bold**.

Text to be deleted is ~~stricken~~.

**17.124.230 Amateur radio facilities.**

Amateur radio facilities are private, non-commercial wireless communication facilities consisting of antennas, towers, and/or support structures. The City recognizes the importance of amateur radio operators and their service to the community especially in the event of emergencies.

Amateur radio facilities are considered an accessory use to a residential dwelling. Chapter 17.128.020(B) provides for exceptions to height limitations for masts, aerals and antenna.

The following siting criteria shall apply to amateur radio facilities that do not meet the provisions of Chapter 17.128.020(B) and/or the applicable zoning district. The criteria are intended to maximize public safety and minimize visual impacts to promote and protect the residential characteristics of the residential zoning districts consistent with federal and state law. Public notice shall be provided to all property owners within 1000 feet of a proposed amateur radio facility requesting approval with a conditional use permit (CUP).

A. Height. The maximum tower/antenna height shall not exceed 70 feet from the finished grade at the base of the tower. A ~~needs analysis~~ **narrative** must be submitted with the application providing justification of the need for the requested height. **The narrative need not be complex but must provide an explanation as to why a taller tower/antenna is needed to obtain the reliable communications desired by the applicant.**

B. Front, Side and Rear Yard Setbacks. **All components of the facility, including guy wires, antennas, and footings shall meet the minimum setbacks of the applicable zone.** ~~The minimum setback from all property lines to the finished grade at the base of the tower shall be one (1) foot for every one foot of height. No towers shall be sited within the front yard setback of the underlying zone. With the exception of guy wires, antennas, and footings that do not project above grade level, no component of the facility may encroach into the required setback. Guy wires and antennas must meet the minimum setback of the underlying zone.~~

C. Construction. A building permit shall be obtained for the construction or erection of the amateur radio facility. Plans and calculations shall be provided and shall comply with the provisions of Section 3108 of the Oregon Structural Specialty Code.

D. Finish (paint/surface). The facility shall have a finish, tone or color that reduces its visibility. In most circumstances this condition may be satisfied by painting the facility with a flat light haze gray paint. The owner shall maintain the finish, painted or unpainted. Red and white or orange and white finish is not allowed. If these colors are required by the FAA (Federal Aviation Administration) or ODA (Oregon Department of Aviation), the height shall be reduced to a level that it is not required.

E. Fencing and Security. For security purposes, towers and accessory facilities shall be enclosed by a minimum six-foot fence or be equipped with anti-climb devices. If this conflicts with TIA-222 or other agencies, the most restrictive requirements shall prevail.

F. Lighting. No lighting shall be permitted on the facility. If required by the FAA or ODA, the facility shall be reduced to a level that does not require lighting.

G. Airport Overlay Zone. The facility shall comply with the requirements in BMC Chapter 17.76, Airport Overlay Zone.

H. Advertising/Signs. No advertising or signs of any type are to be placed on the tower at any time except those required or necessary for safety and warnings. Safety and warning signs shall be less than two square feet and be placed on the facility at a height of less than six feet.

I. License. The owner of the facility shall possess and provide a copy of a current FCC license to the City. After six (6) months with no valid license, the facility shall be considered abandoned and shall be removed by the property owner within 60 days thereafter. The owner shall provide a copy of a valid FCC license every three (3) years.

J. Abandonment. The property owner shall provide annual written documentation that the facilities are functioning. Amateur radio facilities that do not have functioning antennas for a period of six months shall be considered abandoned and shall be removed by the owner of the facility within 60 days thereafter. Upon written application, prior to the expiration of the six-month period, the planning commission if approved with a CUP or staff if permitted outright may, in writing, grant a six-month time extension for reuse of the facility. Additional extensions beyond the first six-month extension may be granted by the planning commission subject to any conditions required to bring the project or facility into compliance with current regulation(s).

K. Maintenance. Amateur radio facilities shall be maintained in good order and repair at all time so to not constitute any danger or hazard to adjacent properties. **All The facilities 25 years or older** must be inspected by an Oregon structural engineer every three (3) years and a report provided to the City. ~~for towers more than 25 years of age, or at anytime that t~~The Building Official **may request an inspection of a facility of any age where** ~~observes~~ signs of deterioration or instability **are observed.** ~~and requests such an inspection.~~ If repairs are needed, they must be completed within six (6) months, reinspected, and a report provided to the City.

L. Unrelated equipment. Equipment and antenna for other than amateur radio facilities shall comply with height and setback requirements of Chapter 17.128.020(B) and the underlying zone.

M. Hazardous Building Sites. Construction or erection of amateur radio facilities shall comply with Chapter 17.100 Hazardous Building Site Protection.

N. Permanent structures must not be located in any easement.

O. The City must be notified if the property is sold. The City will provide the new property owner a copy of the final order with conditions of approval of the Conditional Use Permit granting approval.

~~P. The tower must be a monopole with an aerial or directional beam type antenna. If a directional beam antenna is proposed, it must cover an area less than 100 sq. ft. or a needs analysis must be submitted providing justification of the need for a larger antenna.~~

QP. The amateur radio facilities must be located, designed and installed so as to minimize conflicts with scenic views to the extent possible **and to not endanger the safety of persons or property.**

# CITY OF BROOKINGS

## COUNCIL AGENDA REPORT

Meeting Date: January 11, 2016

Originating Dept: PWDS - Planning

Donna Colby-Hanks *RHS*  
Signature (submitted by)  
[Signature]  
City Manager Approval

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**Subject:** Ordinance amending applicable zoning districts to accommodate amateur radio facilities as conditional uses and adding Section 17.124.230 Amateur Radio Facilities to Chapter 17.124, Title 17, Land Development Code, of the Brookings Municipal Code.

**Recommended Motion:** Motion to adopt Ordinance 16-O-752.

**Financial Impact:** None.

**Background/Discussion:** Revisions to add provisions for additional opportunities for amateur radio facilities as an accessory use to a dwelling and with the approval of a conditional use permit were considered by the City Council at several meetings. City Council approved the revisions at their January 11, 2016, meeting.

**Policy Considerations:** N/A

**Attachment(s):** Adopting Ordinance 16-O-752.

**IN AND FOR THE CITY OF BROOKINGS**  
**STATE OF OREGON**  
**ORDINANCE 16-O-752**

**IN THE MATTER OF ORDINANCE 16-O-752, AN ORDINANCE ADDING SECTION 17.124.230, AMATEUR RADIO FACILITIES, AND AMATEUR RADIO FACILITIES AS CONDITIONAL USES IN APPLICABLE ZONING DISTRICTS, TO TITLE 17, LAND DEVELOPMENT CODE OF THE BROOKINGS MUNICIPAL CODE.**

Sections:

Section 1. Ordinance Identified.

Section 2. Adds Section 17.124.230.

Section 3. Adds amateur radio facilities as Conditional Uses in applicable zoning districts.

The City of Brookings ordains as follows:

Section 1. Ordinance Identified. Adds Section 17.124.230, Amateur Radio Facilities, and Amateur Radio Facilities as Conditional Uses in applicable Zoning Districts, to Title 17, Land Development Code of the Brookings Municipal Code.

Section 2. Adds Section 17.124.230. Section 17.124.230 is hereby added to Chapter read as follows:

**17.124.230 Amateur radio facilities.**

Amateur radio facilities are private, non-commercial wireless communication facilities consisting of antennas, towers, and/or support structures. The City recognizes the importance of amateur radio operators and their service to the community especially in the event of emergencies.

Amateur radio facilities are considered an accessory use to a residential dwelling. Chapter 17.128.020(B) provides for exceptions to height limitations for masts, aerials and antenna.

The following siting criteria shall apply to amateur radio facilities that do not meet the provisions of Chapter 17.128.020(B) and/or the applicable zoning district. The criteria are intended to maximize public safety and minimize visual impacts to promote and protect the residential characteristics of the residential zoning districts consistent with federal and state law. Public notice shall be provided to all property owners within 1000 feet of a proposed amateur radio facility requesting approval with a conditional use permit (CUP).

A. Height. The maximum tower/antenna height shall not exceed 70 feet from the finished grade at the base of the tower. A narrative must be submitted with the application providing justification of the need for the requested height. The narrative need not be complex but must provide an explanation as to why a taller tower/antenna is needed to obtain the reliable communications desired by the applicant.



B. Front, Side and Rear Yard Setbacks. All components of the facility, including guy wires, antennas, and footings shall meet the minimum setbacks of the applicable zone.

C. Construction. A building permit shall be obtained for the construction or erection of the amateur radio facility. Plans and calculations shall be provided and shall comply with the provisions of Section 3108 of the Oregon Structural Specialty Code.

D. Finish (paint/surface). The facility shall have a finish, tone or color that reduces its visibility. In most circumstances this condition may be satisfied by painting the facility with a flat light haze gray paint. The owner shall maintain the finish, painted or unpainted. Red and white or orange and white finish is not allowed. If these colors are required by the FAA (Federal Aviation Administration) or ODA (Oregon Department of Aviation), the height shall be reduced to a level that it is not required.

E. Fencing and Security. For security purposes, towers and accessory facilities shall be enclosed by a minimum six-foot fence or be equipped with anti-climb devices. If this conflicts with TIA-222 or other agencies, the most restrictive requirements shall prevail.

F. Lighting. No lighting shall be permitted on the facility. If required by the FAA or ODA, the facility shall be reduced to a level that does not require lighting.

G. Airport Overlay Zone. The facility shall comply with the requirements in BMC Chapter 17.76, Airport Overlay Zone.

H. Advertising/Signs. No advertising or signs of any type are to be placed on the tower at any time except those required or necessary for safety and warnings. Safety and warning signs shall be less than two square feet and be placed on the facility at a height of less than six feet.

I. License. The owner of the facility shall possess and provide a copy of a current FCC license to the City. After six (6) months with no valid license, the facility shall be considered abandoned and shall be removed by the property owner within 60 days thereafter. The owner shall provide a copy of a valid FCC license every three (3) years.

J. Abandonment. The property owner shall provide annual written documentation that the facilities are functioning. Amateur radio facilities that do not have functioning antennas for a period of six months shall be considered abandoned and shall be removed by the owner of the facility within 60 days thereafter. Upon written application, prior to the expiration of the six-month period, the planning commission if approved with a CUP or staff if permitted outright may, in writing, grant a six-month time extension for reuse of the facility. Additional extensions beyond the first six-month extension may be granted by the planning commission subject to any conditions required to bring the project or facility into compliance with current regulation(s).

K. Maintenance. Amateur radio facilities shall be maintained in good order and repair at all time so to not constitute any danger or hazard to adjacent properties. All facilities 25 years or older must be inspected by an Oregon structural engineer every three (3) years and a report provided to the City. The Building Official may request an inspection of a facility of any age where signs of

deterioration or instability are observed. If repairs are needed, they must be completed within six (6) months, reinspected, and a report provided to the City.

L. Unrelated equipment. Equipment and antenna for other than amateur radio facilities shall comply with height and setback requirements of Chapter 17.128.020(B) and the underlying zone.

M. Hazardous Building Sites. Construction or erection of amateur radio facilities shall comply with Chapter 17.100 Hazardous Building Site Protection.

N. Permanent structures must not be located in any easement.

O. The City must be notified if the property is sold. The City will provide the new property owner a copy of the final order with conditions of approval of the Conditional Use Permit granting approval.

P. The amateur radio facilities must be located, designed and installed so as to minimize conflicts with scenic views to the extent possible and to not endanger the safety of persons or property.

Section 3. Adds amateur radio facilities as Conditional Uses in applicable zoning districts: The following subsections are hereby added as follows:

17.16.040(V). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.20.040(U). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.24.040(V). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.28.040(T). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.32.040(V). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.36.040(L). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.40.040(D). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.44.040(D). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.48.040(J). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.52.040(O). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.56.040(J). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.64.040(I). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

17.68.040(G). Amateur radio facilities, accessory to a dwelling, subject to the provisions of BMC 17.124.230.

First Reading: \_\_\_\_\_ Passage: \_\_\_\_\_  
Second Reading: \_\_\_\_\_ Effective Date: \_\_\_\_\_  
Signed by me in authentication of its passage this \_\_\_\_\_, day of \_\_\_\_\_, 2016

ATTEST:

\_\_\_\_\_  
Mayor Ron Hedenskog



\_\_\_\_\_  
City Recorder Joyce Heffington

# CITY OF BROOKINGS

## COUNCIL AGENDA REPORT

Meeting Date: January 11, 2016

Originating Dept: PWDS

  
\_\_\_\_\_  
Signature (submitted by)  
  
\_\_\_\_\_  
City Manager Approval

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Subject:

Amendments to Brookings Municipal Code Section 13.05.060, Description of service.

Recommended Motion:

Adopt Ordinance 16-O-751, amending Brookings Municipal Code Section 13.05.060, Description of service.

Financial Impact:

None.

Background/Discussion:

During staff's review of hydrant use policies, it was discovered that the Brookings Municipal Code (BMC) contained no provisions for water use by agencies other than for fire protection purposes.

Water is sometimes provided to agencies for uses other than fire protection. Most often these occurrences relate to street maintenance processes. Amending Section BMC 13.05.060 to include "Utility work" water use by an "Agency," as described in the attached ordinance, aligns actual practice with written regulations.

The approval process under "Special Contracts" in this section is also amended to remove the requirement for the City Attorney, Mayor and City Recorder to sign the contract after being approved by the City Council.

Attachment(s):

- a. Ordinance 16-O-751

**IN AND FOR THE CITY OF BROOKINGS**

**STATE OF OREGON**

**ORDINANCE 16-O-751**

**IN THE MATTER OF ORDINANCE 16-O-751, AN ORDINANCE AMENDING, IN ITS ENTIRETY, BROOKINGS MUNICIPAL CODE SECTION 13.05.060, DESCRIPTION OF SERVICE OF CHAPTER 13.05, WATER.**

Sections:

- Section 1. Ordinance identified.
- Section 2. Amends Section 13.05.060

The City of Brookings ordains as follows:

Section 1. Ordinance Identified. This ordinance amends, in its entirety, Brookings Municipal Code Section 13.05.060, Description of Services of Chapter 13.05, Water.

Section 2. Amends Section 13.05.060 Section 13.05.060 is amended to read as follows:

**13.05.060 Description of service.**

Services shall be residential, commercial, standby fire, utility work and contract, as follows:

**A. Inside City Limits.**

1. Residential Service. Residential service shall consist of all services for domestic purposes, single-family dwellings, multifamily dwellings, mobile homes, and municipal purposes.
2. Commercial Service. Commercial services shall consist of those services where water is used for commercial services, such as businesses, restaurants and recreational vehicle parks.
3. Standby Fire. Standby fire services shall consist of those services where water is available or used for fire protection only.
4. Utility Work. Utility work shall consist of water needed to facilitate Agency utility work, such as flushing culverts, street cleaning and other maintenance activities.
  - a. As used herein, “Agency” is defined as; cities, school districts, fire districts, water and sewer districts, health districts, parks and recreation districts, transit districts, irrigation districts, library districts, port districts, public facility districts, public utility districts, housing districts, and other authorized special districts.
5. Contract Service. Contract services shall consist of those services for industrial or independent water district purposes under contracts authorized by the city council.

**B. Outside City Limits.**

1. Residential Service. Residential service shall consist of all services for domestic purposes, single-family dwellings, multifamily dwellings, mobile homes, and municipal purposes.
2. Commercial Service. Commercial services shall consist of those services where water is used for commercial services, such as businesses, restaurants and recreational vehicle parks.
3. Standby Fire. Standby fire services shall consist of those services where water is available or used for fire protection only.

4. Utility Work. Utility work shall consist of water needed to facilitate Agency utility work, such as flushing culverts, street cleaning and other maintenance activities.
  5. Contract Service. Contract services shall consist of those services for subdivisions, developments, industrial or independent water district purposes under contracts authorized by the city council.
- C. Special Contracts. When the applicant's requirements for water are unusual or large, such as an independent water district, or necessitates considerable special or reserve equipment or capacity, such as a subdivision or other development, the city council reserves the right to make a special contract, the provisions of which are different from and have exceptions to the regularly published water rates, rules, and regulations. This special contract shall be in writing, signed by the applicant and approved by the city council.
- D. Resale of Water. Resale of water shall be permitted only under special contract in writing between the city council and the persons, parties, or corporation selling the water.
- E. Water Conservation. In case of shortage of supply, the city reserves the right to give preference in the matter of furnishing service to consumers, as in the judgment of its representatives shall be for the best interests of the city, from the standpoint of public convenience and necessity. The city council is hereby authorized and empowered, in any case of emergency, to establish such hours as it may find necessary for the use of water for irrigation of lawns and other irrigation purposes, and is authorized and empowered to otherwise limit the amount of water used by consumers, in order to conserve the city water supply.

First Reading: \_\_\_\_\_ Passage: \_\_\_\_\_  
Second Reading: \_\_\_\_\_ Effective Date: \_\_\_\_\_

Signed by me in authentication of its passage this \_\_\_\_\_, day of \_\_\_\_\_, 2015

ATTEST:

\_\_\_\_\_  
Mayor Ron Hedenskog

\_\_\_\_\_  
City Recorder Joyce Heffington