

*For: Monday, **April 13, 2015**, City Council Meeting*

## **Advance Packet Information**

Dated: April 3, 2015

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

### **PUBLIC HEARINGS/FINAL ORDERS**

1. Quasi-judicial public hearing in the matter of File ANX-1-14, to consider the applicant's response to the LUBA remand regarding the annexation of tax lots 1500 and 2000, located on Assessor's Map 40-13-32D, into the City of Brookings. [Planning, pg. 2]
  - a. Applicant's findings [pg. 9]
  - b. Draft final order [pg. 18]

\*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.

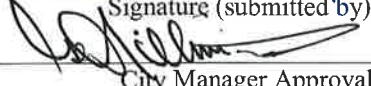
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# CITY OF BROOKINGS

## COUNCIL AGENDA REPORT

Meeting Date: April 13, 2015

Originating Dept: PWDS -Planning

19 Donna Colby-Hanks  
Signature (submitted by)  
  
City Manager Approval

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Subject: Request to consider Applicant's responses to Land Use Board of Appeal's remand 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; Third Assignment of Error, the availability of the City water supply to serve the annexed territory relative to capacity and Fourth Assignment of Error, Statewide Planning Goal 16 (Estuarine Resources) for File ANX-1-14 requesting to annex two tax lots comprising of approximately 13.33 acres of land into the City of Brookings as well as approve the Remand Final Order with original conditions of approval.

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

Background/Discussion: The subject property is within the City's Urban Growth Boundary and is located adjacent to the eastern boundary of the North Bank Chetco River Road, approximately 380 feet northeast of its intersection with Thompson Road and adjacent to the Chetco River. The subject property is owned by Mahar/Tribble, LLC. The current Curry County zoning on taxlot 2000, 7.77 acres is Light Commercial (C-1) and taxlot 1500, 5.56 acres is Industrial (I). The subject property is approximately 13.33 acres in size and is undeveloped. The extreme southern portion of the subject property, being the area adjacent to Snug Harbor, is designated as Priority Dredge Material Disposal Site #3. 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").

The Chetco River runs along the subject property's entire southeastern boundary line. Ferry Creek traverses the subject property but is located entirely 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. A substantial amount of engineered fill has been placed on the subject property pursuant to approval of a Conditional Use Permit issued by Curry County. A Conditional Letter of Map Revision based on Fill (CLOMR-F) was issued by the Federal Emergency Management Agency (FEMA). The Applicant states the CLOMR-F was also reviewed and approved by the Department of the Army ("the Corp") and the Oregon Department of State Lands (DSL). Endangered Species Act (ESA) compliance was

determined through *Standard Local Operating Procedures for Endangered Species* (SLOPES). Furthermore, a National Pollutant Discharge Elimination System (NPDES) 1200-C Permit for the grading work was issued by the Oregon Department of Environmental Quality (DEQ).

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).

Following a public hearing on the annexation request, City Council approved the annexation with the Final Order and adopting Ordinance 14-O-738. The Council's approval was appealed to LUBA, citing five assignments of error. The relocation of the Shoreland Boundary on the subject property being previously amended was affirmed by the Land Use Board of Appeals.

### **LAND USE BOARD OF APPEALS REMAND.**

LUBA's decision remanded two issues back to the City for reconsideration. The first issue was the availability of the City water supply to serve the annexed territory relative to capacity. The Remand stated that more adequate findings, supported by substantial evidence are necessary. Since this issue requires additional evidence, a public hearing is required.

The second remand issue regards Statewide Planning Goal 16, Estuarine Resources. LUBA concluded that the findings within the City's decision were inadequate to demonstrate compliance with Goal 16. This remand issue is not evidence based in that there is substantial evidence in the record to support sufficient findings. Therefore, a public hearing is not required.

### **PROPOSED FINDINGS IN RESPONSE TO REMAND ISSUES**

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

**Availability of city water relative to capacity.** Brookings Municipal Code Chapter 17.144.020(J)(5) governs annexation application procedures and 17.144.030(B) requires the analysis of annexation impacts on the level of urban services and infrastructure including the availability of the same relative to capacity. Urban services are defined as sanitary sewer, storm drainage, and water service. The LUBA Remand regarding urban services was limited to water.

The Applicant's findings (**Attachment A**) summarize the estimate of needed water in relation to the maximum potential dwelling units of 59 for the subject property. The City's municipal water system has a current pump distribution capacity of 2.1 million gallons per day. The addition of the 59 dwelling units should increase the average daily use to 0.966 million gallons per day and the peak daily usage to 1.862 million gallons per day. The summary is supported by confirmation from Loree Pryce, Brookings Public Works & Development Services Director. Pryce also confirmed that the existing 14' water main located in the North Bank Chetco River Road right-of-way can be utilized to provide water service and has more than enough capacity for development of the subject property.

Opponents have alleged water deficiencies involving Salmon Run Golf Course. According to Pryce, the City has never provided or denied Salmon Run water. Salmon Run is located on the opposite side of the Chetco River from the City's water system and the golf course operators have indicated that water service from the City is not needed.

**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 to 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).

The Applicant states in the findings that no activities identified in the provisions of Statewide Planning Goal 16 are proposed, anticipated or probable as a result of the annexation approval. However, a substantial amount of fill is being placed on the property under Curry County's jurisdiction with Conditional Use Permit (AD-0816) approval and pursuant to a Conditional Letter of Map Revision based on the fill (CLOMR-F) issued by the Federal Emergency Management Agency (FEMA). The Applicant states that no fill will be deposited within the estuary boundary.

The required riparian buffer between the estuary boundary and future development will be maintained providing protection from possible impacts generally associated with residential development. The application of pesticides and herbicides shall not be allowed within the riparian buffer. Maintenance of the riparian buffer will preserve the aesthetic and recreational characteristics of the estuarine resource.

Future development will be served by municipal water and sewer services. Storm water conveyance will be conducted in accordance with City standards and other applicable agencies minimizing the potential adverse impacts on the estuarine resource.

A potential use in conjunction the estuary is the stockpiling of dredged materials. The City's Comprehensive Plan and BMC Chapter 17.72 Marine Activity District provide for the protection of potential areas for stockpiling of dredged materials (DMD Sites). A map depicting the location of DMD site #3 on the subject property is included in the record and is Figure 3 of this staff report. Based on mapping provided by the Applicant's engineer, DMD #3 is located at the extreme southern portion of the subject property. In order to preserve and protect DMD #3, Applicant has stipulated to maintain the extreme southern portion of the subject property identified on the Site Map (Record 604) as the "Area Established in Comprehensive Plan as DMD 3" as open space. Consequently, no future development will occur in this protected area consistent with BLDC 17.72.050 and Goal 16.

The subject property is currently zoned commercial and industrial which allows for more intensive uses than the proposed residential zoning designation. The proposed downzoning of the subject property reduces the potential for adverse impacts as industrial uses are often incompatible with the protection of environmental resources.

Future restoration of Ferry Creek could potentially impact estuarine resources. Ferry Creek traverses the subject property entirely within a pipe. Restoration of the stream bed would be a significant environmental benefit but is not a requirement for development of the subject property. In the event that the streambed is restored, there are sufficient safeguards in place to prevent adverse impacts from such work. The Applicant has testified and states in the findings that no work will occur without review and permits from the applicable state and federal agencies. The extensive review process will ensure the protection of the estuarine resource in the event the stream bed restoration project occurs.

Based on the foregoing, there is substantial evidence in the record demonstrating that the Estuarine Resources will not be adversely impacted from the approval of the application and future development allowed consistent with the approval.

Staff recommends adoption of Applicant's proposed findings (**Attachment A**) which have been incorporated into the draft Final Order.

Policy Considerations:           None.

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

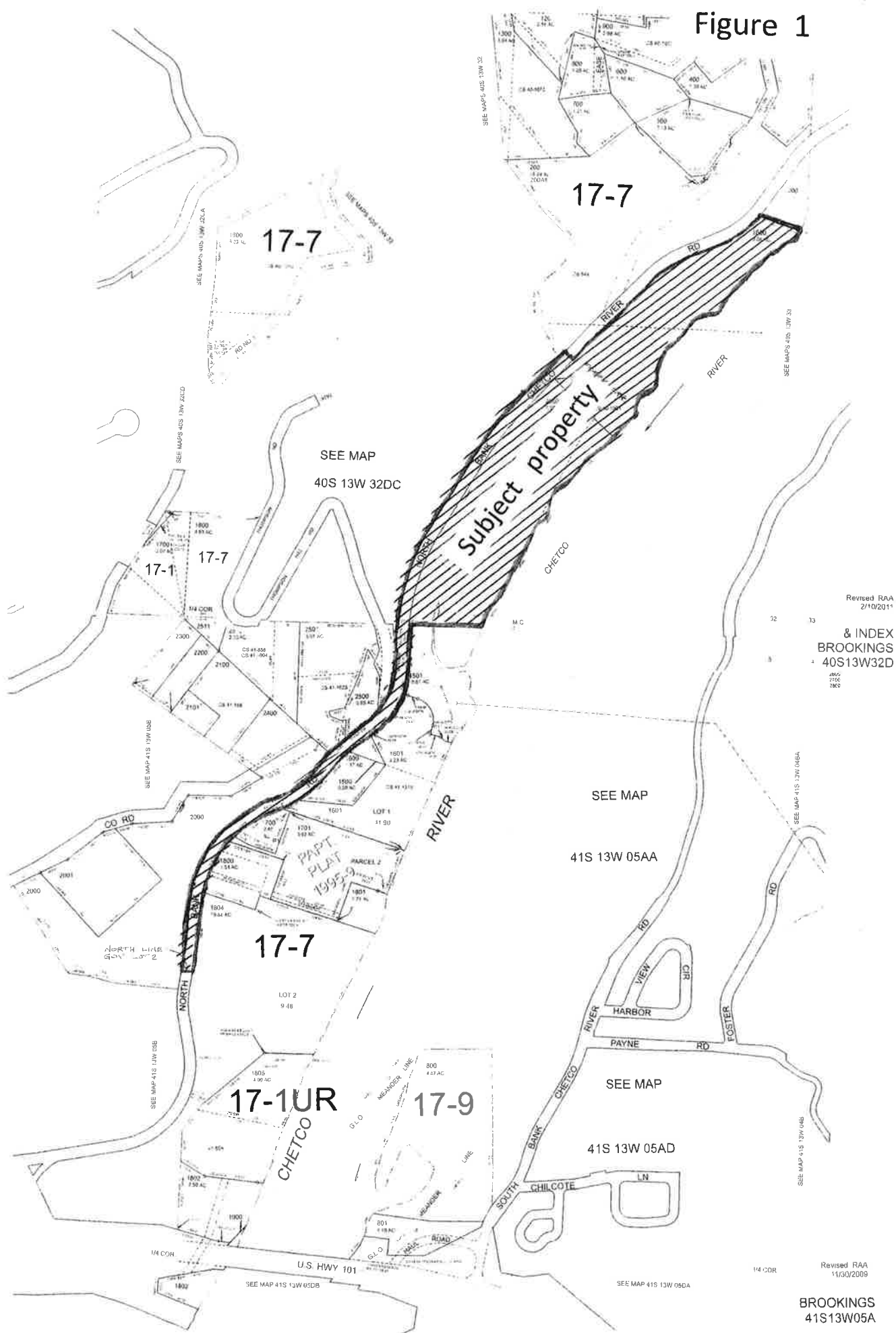
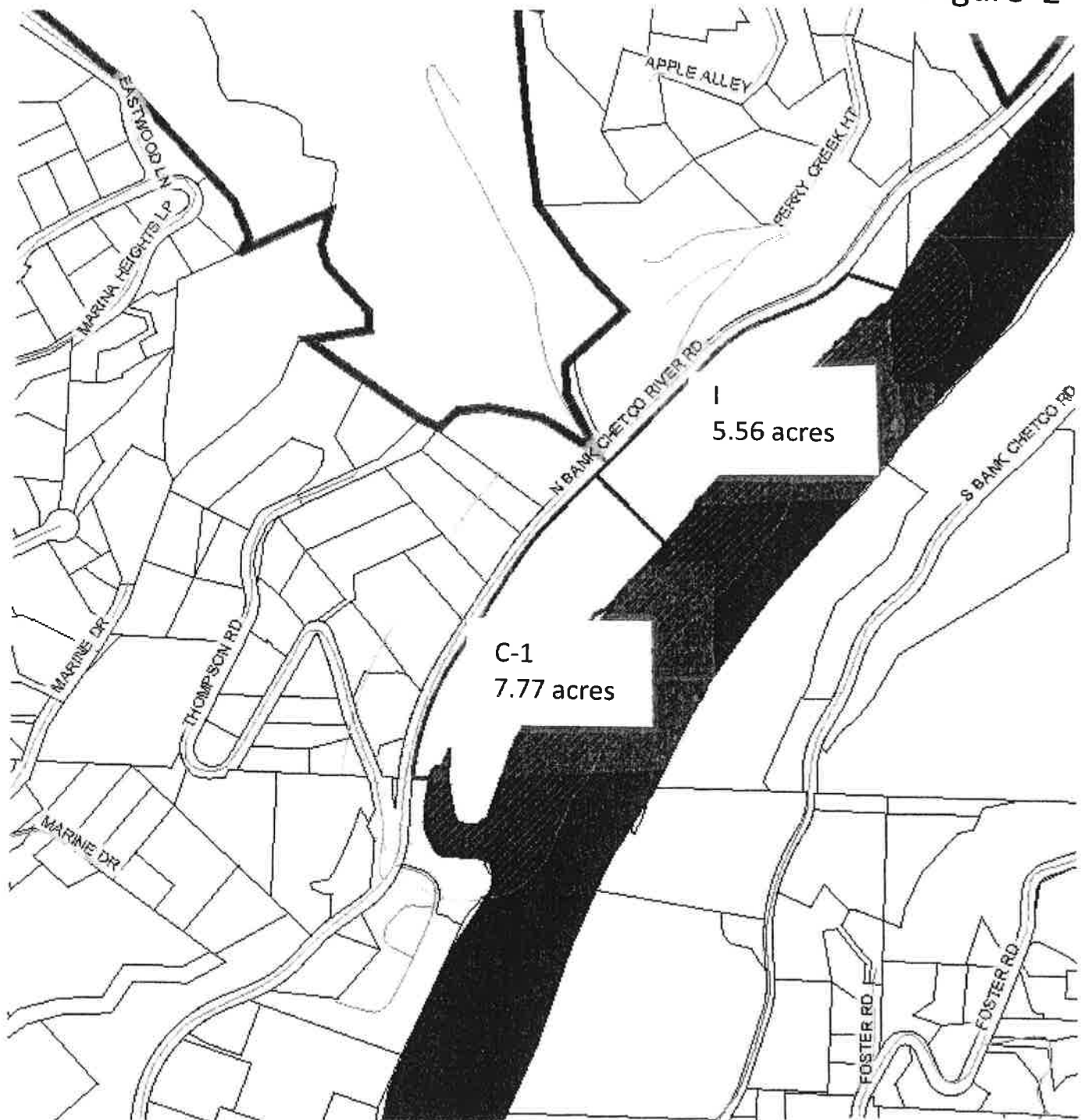


Figure 2



Existing Zoning Legend:

I.....Industrial

C-1.....Light Commercial

Proposed Zoning:  
(both parcels)

R-2.....Two-Family Residential

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## MEMORANDUM

**TO:** Donna Colby-Hanks  
City of Brookings  
898 Elk Drive  
Brookings, Oregon 97415  
dcolbyhanks@brookings.or.us

**FROM:** Dan O'Connor  
Huycke O'Connor Jarvis, LLP  
823 Alder Creek Drive  
Medford, Oregon 97504  
dano@medfordlaw.net

**RE:** File No. ANX-1-14 (Remand)

**DATE:** March 18, 2015

Dear Ms. Colby-Hanks:

This firm represents Mahar/Tribble, LLC, an Oregon limited liability company, being the applicant ("the Applicant") in the above-stated land use matter. The purpose of this Memorandum is to submit evidence into the record concerning the availability of domestic water relative to capacity for potential development of the subject property. Applicant acknowledges that evidence and testimony must be limited to this specific issue.

### **A. Background.**

Applicant is the owner of certain real property commonly known as Township 40 South, Range 13 West, Section 32D, Tax Lots 1500 and 2000 ("the subject property"). The land use application included: (a) annexation of the subject property into city limits; (b) amending the comprehensive plan designation for the subject property from Commercial/Industrial to Residential; and (c) changing the zoning designation of the subject property from Commercial/Industrial to Two-Family Residential (R-2) ("the Application"). A public hearing was held before the City of Brookings City Council on September 8, 2014. The City 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). 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 16 (Estuarine Resources) (“the LUBA Remand”).

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 Decision includes the annexation of the aforementioned County right-of-way into the City. 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. Pursuant to the Application, the proposed zoning of the subject property will be Two-Family Residential (R-2). As asserted during the proceedings before the Planning Commission and City Council, the maximum development potential for the subject property is 59 residential units.

**B. Availability of Water Relative to Capacity.**


As set forth above, the maximum potential number of dwelling units is 59. The U.S. Geological Survey estimates that in-house use averages between 80 to 100 gallons of water per day for each person. The largest household use is flushing toilets followed by showers and baths. Oregon Water Resources Department, *Water Well Owner's Handbook*, March, 2010, Pg. 10. The foregoing is consistent with the City of Brookings Water Master Plan Update, April, 2014 (Water Plan), which states the average gallons per capita per day usage to be 77.8 gallons. Water Plan, Pg. ES-1.

The average household size in the City is just under 2.5 persons pursuant to the Water Plan. Consequently, 59 units would result in approximately 148 occupants of the subject property ( $59 \times 2.5 = 147.5$ ) for an approximate total daily water usage of 14,800 gallons. Pursuant to Loree Pryce, the City’s Public Works/Development Services Director, the City’s municipal water system has a current capacity of 2.1 million gallons per day. In 2014, the City’s average annual water demand was 0.951 million gallons per day with a peak day (August 18, 2014) usage of 1.847 million gallons per day. The addition of the 59 dwelling units should increase the average daily usage to approximately 0.966 million gallons per day and the peak day usage to 1.862 million gallons per day. It is important to note that the average annual rainfall in the City is approximately 75 inches. Consequently, no significant irrigation use of domestic water is anticipated for landscaping. Therefore, the municipal water system has capacity to serve the future development of the subject property relative to capacity.

Furthermore, Ms. Pryce confirmed that the existing 14” water main located in the North Bank Chetco River Road right-of-way may be utilized to provide water service to the subject property, as developed. In particular, Ms. Pryce confirmed that the aforementioned water main has more than enough capacity for the development of the subject property (i.e. 59 residential units).

Please do not hesitate to contact me if you have any questions, comments or concerns regarding this matter. Your attention to this matter is greatly appreciated.

HUYCKE O’CONNOR JARVIS, LLP

A handwritten signature in dark ink, appearing to read "D. O'Connor", written over a horizontal line.

DANIEL O’CONNOR, OSB No. 950444



# City of Brookings

**PUBLIC WORKS/DEVELOPMENT SERVICES DEPARTMENT**  
898 Elk Drive, Brookings, OR 97415  
(541) 469-1138, Fax (541) 469-3650, TTY (800) 735-1232

March 27, 2015

Revised the March 10, 2015 letter per comments on occupancy

**Dan O'Connor**

Huycke O'Connor Jarvis, LLP  
823 Alder Creek Drive  
Medford, Oregon 97504  
[dano@medfordlaw.net](mailto:dano@medfordlaw.net)

Re: LUBA Remand for Mahar/Tribble Development

Dear Dan,

Please refer to the following responses to the questions you presented in the March 10, 2014 letter to City of Brookings.

Q1. How much water does a residential dwelling unit generally use on a daily basis?

Response: The current water master plan adopted in 2014 states 77.8 gallons per capita day (gpcd) for fiscal year 2011-12 evaluation.

2. How much water do you anticipate a fully developed 59-unit residential development would use on a daily basis?

Response: A conservative number representing an average single family residential water use value is 100 gpcd for a household. The average household occupancy is roughly 2.5 people per household in Brookings, Oregon. Therefore 59-units would use  $((2.5 \times 59,000 \times 100) / 1 \text{exp}6)$  or 0.015 million gallons per day (MGD) on average.

3. Does the City have sufficient capacity to serve the anticipated 59-unit residential development relative to the capacity of the City's municipal water system?

Response: Yes, the City's 12" and 14" transmission main and distribution pumps are capable of conveying the additional demand of 0.015 MGD or to this development.

4. What is the City's current municipal water capacity in terms of providing water on a daily basis?

Response: The water distribution pumps operate at a maximum of 2.1 MGD at their current settings.



# City of Brookings

**PUBLIC WORKS/DEVELOPMENT SERVICES DEPARTMENT**  
898 Elk Drive, Brookings, OR 97415

5. What is the current average citywide daily water usage? Water use varies throughout the year.

Response: In 2014, the City's average annual water demand was 0.951 MGD with a peak demand the month of August 18, 2014 of 1.847 MGD for the entire City wide water consumption.

6. May future development on the subject property utilize the 14" water main located in the adjacent right-of-way?

Response: Yes, the 14" water main can be utilized for water service to the development site.

7. Is the 14" water main of sufficient size to serve the potential future development of the subject property relative to other existing users of said water main?

Response: Yes, the 14" water main has more than enough capacity for this development.

8. Opponents of the Application have indicated that the City has insufficient water to serve the subject property. The foregoing allegation is based on an assertion that the City has "curtailed" or "denied" water supplies to the City golf course (Salmon Run Golf Course). Is aforementioned allegation accurate? Please explain.

Response: The City has never provided or denied water service to the Salmon Run Golf Course. There is no relationship between Salmon Run Golf Course and the City's water supply. Salmon Run Golf Course is on the opposite side of the Chetco River from the City's water system. The City has explored opportunities to provide water to Salmon Run Golf Course by establishing a new point of diversion on the opposite side of the river, or extending water service from Harbor Water District who is the water purveyor on the south side of the Chetco River. As of this writing, the operators of Salmon Run Golf Course have stated that water service from the City is not needed.

If you have any further questions in this subject, please feel free to contact me at (541)469-1138.

Sincerely,

Loree Fryce, PE

Public Works/Development Services Director

Attachment(s): Letter dated March 10, 2014

Cc: City Manager  
Planning Manager  
Public Works Supervisor



**MEMORANDUM**

**TO:**           **Loree Pryce, PE**  
Public Works and Development Services Director  
City of Brookings  
898 Elk Drive  
Brookings, Oregon 97415  
[lpryce@brookings.or.us](mailto:lpryce@brookings.or.us)

**FROM:**       **Dan O'Connor**  
Huycke O'Connor Jarvis, LLP  
823 Alder Creek Drive  
Medford, Oregon 97504  
[dano@medfordlaw.net](mailto:dano@medfordlaw.net)

**RE:**           **File No. ANX-1-14**

**DATE:**       **March 10, 2015**

Dear, Ms. Pryce:

This firm represents Mahar/Tribble, LLC, an Oregon limited liability company, being the applicant ("the Applicant") in the above-stated land use matter. Applicant is the owner of certain real property commonly known as Township 40 South, Range 13 West, Section 32D, Tax Lots 1500 and 2000 ("the subject property"). The purpose of this Memorandum is to ascertain the availability of City to serve the potential future development of the subject property.

**A.     Background.**

The land use application included: (a) annexation of the subject property into city limits; (b) amending the comprehensive plan designation for the subject property from Commercial/Industrial to Residential; and (c) changing the zoning designation of the subject property from Commercial/Industrial to Two-Family Residential (R-2) ("the Application"). A public hearing was held before the City of Brookings City Council on September 8, 2014. The City 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). 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 16 (Estuarine Resources) ("the LUBA Remand").

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 Decision includes the annexation of the aforementioned County right-of-way into the City. 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. Pursuant to the Application, the proposed zoning of the subject property will be Two-Family Residential (R-2). As asserted during the proceedings before the Planning Commission and City Council, the maximum development potential for the subject property is 59 residential units.

**B. Questions.**

In order to comply with the LUBA Remand instructions concerning municipal water capacity, will you please answer the following questions:

1. How much water does a residential dwelling unit generally use on a daily basis?
2. How much water do you anticipate a fully developed 59-unit residential development would use on a daily basis?
3. Does the City have sufficient capacity to serve the anticipated 59-unit residential development relative to the capacity of the City's municipal water system?
4. What is the City's current municipal water capacity in terms of providing water on a daily basis?
5. What is the current average citywide daily water usage?
6. May future development on the subject property utilize the 14" water main located in the adjacent right-of-way?
7. Is the 14" water main of sufficient size to serve the potential future development of the subject property relative to other existing users of said water main?
8. Opponents of the Application have indicated that the City has insufficient water to serve the subject property. The foregoing allegation is based on an assertion that the City has "curtailed" or "denied" water supplies to the City golf course (Salmon Run Golf Course). Is aforementioned allegation accurate? Please explain.

Your attention to this matter is greatly appreciated.

HUYCKE O'CONNOR JARVIS, LLP

## 2. Statewide Planning Goal 16 (Estuarine Resources).

The Chetco River Estuary Boundary runs along the eastern boundary of the subject property (*See Record*, 604).<sup>1</sup> 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 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.

The approval of the Application and any resulting future development of the subject property will have no significant adverse impact on Chetco River estuarine resources. The Estuary Boundary is the line of Mean Higher High Water (MHHW). The Estuary Boundary is delineated on maps prepared by Donald G. Porior, an Oregon registered professional engineer (*See Record*, 604-606). There has been no dispute concerning the accuracy of the Estuary Boundary mapping and, therefore, mapping is an accurate representation of the Estuary Boundary. The resource to be protected is the Chetco River estuary.

The approval of the Application will not alter the Chetco River estuarine ecosystem and that the estuary resources shall be protected. First, no activities contemplated by Goal 16 are proposed, anticipated or probable as a result of the approval. 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 or other activities that could affect the estuary's physical processes or biological resources. It is important to note that the fill being placed on the subject property is based upon a CLOMR-F previously issued by FEMA and is not within the scope of the Council's review of the Application. In any event, no fill deposited on the subject property will be placed within the Estuary Boundary.

No future development on the subject property will occur within the Estuary Boundary.

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<sup>1</sup> Record references are to the LUBA Record.

Furthermore, a riparian buffer between the Estuary Boundary and future development on the subject property shall be maintained providing protection from possible adverse impacts generally associated with residential development (*See Record*, 604). The application of pesticides and herbicides shall not be allowed within the riparian buffer. Future development of the subject property shall be served by municipal water and sewer services. Accordingly, no water intake or effluent discharge into the estuarine resource shall occur. Storm water conveyance shall be conducted in accordance with City standards and other applicable agencies minimizing potential adverse impacts on the estuarine resource. The maintenance of the riparian buffer along the Estuary Boundary will preserve the aesthetic and recreational characteristics of the estuarine resource. Navigational uses of the estuary will not be impacted by the approval of the Application.

The other potential use in conjunction with the estuary is the stockpiling of dredged materials. Specifically, Goal 16 of the City's Comprehensive Plan (BCP) provides for the protection of potential areas for the stockpiling of dredged materials ("DMD Sites"). A map depicting the DMD Sites is included in the record. Goal 16 of the BCP relating to DMD Sites is implemented pursuant to Section 17.72.050 of the City of Brookings Land Development Code (BLDC), which states as follows:

***17.72.050 Priority dredge material disposal sites (DMD).***

*A. Purpose. The purpose of DMD subareas in marine activity zones is to protect essential DMD sites from incompatible and preemptive uses that could limit their ultimate use for deposit of dredge material, and thereby limit the Port of Brookings and the Corps of Engineers from maintaining a navigable channel in the Chetco.*

*B. For subareas designated DMD, the following standards shall apply.*

*1. Structural improvements (e.g., construction of buildings) or other alteration of topography that would preempt use of the site for the amount of DMD planned will be prohibited until such time as alternative sites providing equivalent capacity to meet five-year disposal needs (within convenient reach of planned dredging projects) have been identified; and these alternate sites have been protected by plan amendment.*

Based on mapping provided by Applicant's engineer, DMD #3 is located at the extreme southern portion of the subject property adjacent to the Snug Harbor inlet. In order to preserve and protect DMD #3, Applicant has stipulated to maintain the extreme southern portion of the subject property identified on the Site Map (Record 604) as the "Area Established in Comprehensive Plan as DMD 3" as open space. Consequently, no future development will occur in this protected area consistent with BLDC 17.72.050 and Goal 16.

In addition to the foregoing, the subject property is currently zoned Commercial (C-1)



and Industrial (I), which allows for a more intensive use of the subject property than the proposed Two-Family Residential (R-2) zoning designation. Thus, the proposed downzoning of the subject property reduces the potential for adverse impacts on the estuarine resource in that industrial uses are often incompatible with the protection of environmental resources.

Any future restoration of Ferry Creek could potentially impact estuarine resources but there are sufficient safeguards in place to prevent adverse impacts as a result of such work. Ferry Creek traverses the subject property entirely within a pipe. Community stakeholders have expressed a desire that the Ferry Creek streambed be restored on the subject property. The owner of the subject property has also expressed a willingness to restore the streambed. However, it is important to note that there is no requirement that the owner restore the streambed. Furthermore, the restoration of the streambed is not required for the development of the subject property. In short, the restoration of the Ferry Creek streambed on the subject property would be a significant environmental benefit but such work must be conducted prudently to avoid adverse impacts on estuarine resources. The Applicant testified that no such work would occur without the appropriate review and permit(s) from the participating state and federal agencies. Specifically, such work will require a joint permit from the Army Corp of Engineers ("the Corp") and the Oregon Department of State Lands (DSL). The aforementioned permit process requires Endangered Species Act (ESA) compliance review by the National Marine Fisheries Services (NMFS) as well as review by the Oregon Department of Fish and Wildlife (ODFW). The aforementioned extensive review process will ensure the protection of the estuarine resource in the event the Ferry Creek stream restoration occurs.

Based on the foregoing, there is substantial evidence in the record demonstrating that the Statewide Planning Goal 16 Estuarine Resources will not be adversely impacted from the approval of the Application and future development allowed consistent with the approval. Furthermore, the area designated for future development on the subject property is sufficiently buffered from the Estuary Boundary to mitigate unforeseen development impacts and to maintain the recreational and aesthetic characteristics of the estuary. Also, estuary dependent resource sites, in this case DMD #3, shall be preserved consistent with Goal 16 of the BCP.

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

<b>In the matter of Planning Commission File No. ANX-1-14/Remand; a request for approval of the Applicant's response to the issues remanded by the Land Use Board of Appeals, LUBA No. 2014-087 for approval of annexation, Mahar/Tribble, LCC, applicant.</b>	)	
	)	<b>Final ORDER</b>
	)	<b>and Findings of</b>
	)	<b>Fact</b>
	)	

**ORDER** approving the materials submitted in response to the issues remanded by the Land Use Board of Appeals (LUBA), in the appeal of the City's approval 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. The location of the Shoreland Boundary on the subject property being previously amended pursuant to the Final Order of ANX-1-14 and affirmed by the Land Use Board of Appeals.

**WHEREAS:**

1. Applicant submitted a petition/land use application with the City of Brookings, Oregon ("the Application").
2. The Application consisted of four (4) components: (a) annexation of the subject property into 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.
3. A public hearing for the Application was held before the City of Brookings Planning Commission on August 5, 2014. The Planning Commission voted to recommend approval of the Application to the Brookings City Council.
4. A public hearing was held before the Brookings City Council ("the Council") on September 8, 2014. The Council approved the Application pursuant to the Final Order and adoption of Ordinance 14-O-738 ("the Decision"). The Decision was the final decision of the City of Brookings concerning the Application.

5. The Decision was appealed to the Land Use Board of Appeals (LUBA) by Oregon Coast Alliance. 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.

6. 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.

7. The LUBA Remand instructions concerning the inadequacy of findings relating to Statewide Planning Goal 16 (Estuarine Resources) are not evidenced based in that there is substantial evidence in the record to support legally sufficient findings. Consequently, no public hearing was held concerning this component of the LUBA Remand.

**THEREFORE, IT IS HEREBY ORDERED** that the Application is approved consistent with the Decision. Findings and conclusions consistent with the LUBA Remand are set forth as follows:

**A. Property Background.**

The subject property is approximately 13.33 acres in size and is undeveloped. The subject property is located within the City’s 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”).

The Chetco River runs along the subject property’s entire southeastern boundary line. Ferry Creek traverses the subject property but is located entirely 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. Under Curry County’s jurisdiction and with Conditional Use Permit (AD-0816) approval, a substantial amount of fill has been placed on the subject property.

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).

### **C. Standards, Criteria and Findings.**

The standards, criteria and findings set forth in this Order are limited consistent with the LUBA Remand. Specifically, the standards and criteria addressed herein are limited to the following: (a) the “availability” of municipal water “relative to capacity” pursuant to BMC 17.144.20(J)(5) and 17.144.030(B); and (b) compliance with Statewide Planning Goal 16 (Estuarine Resources).

#### **1. Domestic Water Capacity.**

The Council finds that there is substantial evidence in the record demonstrating that the City’s municipal water system has more than sufficient capacity to serve the potential development of the subject property. The Council further finds that there is substantial evidence in the record demonstrating that municipal water is available to the subject property through the 14” water main located in the North Bank Chetco River Road right-of-way. BMC 17.144.20(J)(5) governs annexation application procedures and BMC 17.144.30(B) requires the analysis of annexation impacts on the level of urban services and infrastructure. BMC 17.144.30(B) states as follows:

*5. Urban services needed and necessary to service the territory proposed to be annexed, including the **availability of the same relative to capacity**, condition and cost of extension and/or improvement to urban standards and an estimated timeline for any required improvements. City staff will provide written information regarding existing infrastructure and any improvements that would be necessary to serve the territory proposed to be annexed, as well as any other properties within the urban growth area that would also be served by these improvements in the future.*

BMC 17.144.30(B) states as follows:

*B. An adequate level of urban services and infrastructure to accommodate anticipated future development either is available, or can reasonably be made available. An adequate level of urban services shall be defined as: municipal sanitary sewer, storm drainage, and water service meeting the requirements enumerated in the Brookings public facilities plan and the land development code for provision of these services. The adequacy of these services shall be considered in relation to annexation proposals. If any substandard infrastructure exists within the boundaries of the area proposed for annexation, the city may deny an annexation application.*

As set forth above, the LUBA Remand instructions specifically require findings addressing the “availability” of water “relative to capacity. There is substantial evidence in the record demonstrating that the maximum feasible potential development on the subject property is 59 residential units based on the proposed zoning designation and development constraints (i.e. setbacks, etc.). United States Geological Survey estimates that in-house use averages 80 to 100 gallons of water per day for each person. Oregon Water Resources Department, *Water Well*

*Owner's Handbook*, March, 2010, Pg. 10. The City's adopted Water Master Plan (April, 2014) states the average per capita per day usage to be 77.8 gallons.

The average household size in the City is just under 2.5 persons pursuant to the adopted Water Master Plan. Consequently, 59 units would result in approximately 148 residents to be served ( $59 \times 2.5 = 147.5$ ) for an approximate total daily water usage of 14,800 gallons. Pursuant to Loree Pryce, the City's Public Works/Development Services Director, the City's municipal water system has a current pump distribution capacity of 2.1 million gallons per day. In 2014, the City's average annual water demand was 0.951 million gallons per day with a peak day (August 18, 2014) usage of 1.847 million gallons per day. The addition of the 59 dwelling units should increase the average daily usage to approximately 0.966 million gallons per day and the peak day usage to 1.862 million gallons per day. It is important to note that the average annual rainfall in the City is approximately 75 inches. The Applicant states that, consequently, no significant irrigation use of domestic water is anticipated for landscaping in conjunction with the residential development of the subject property. Therefore, the municipal water system has capacity to serve the future development of the subject property relative to capacity.

Furthermore, Ms. Pryce confirmed that the existing 14" water main located in the North Bank Chetco River Road right-of-way may be utilized to provide water service to the subject property, as developed. In particular, Ms. Pryce confirmed that the aforementioned water main has more than enough capacity for the development of the subject property (i.e. 59 residential units).

Opponents of the Application have indicated a lack of available municipal water capacity based on alleged water deficiencies involving Salmon Run Golf Course. The Council finds that such a position is unsupported. Specifically, pursuant to the Public Works Director, the City has never provided or denied the Salmon Run Golf Course water. The golf course is on the opposite side of the Chetco River from the City's water system. The City has explored opportunities to provide water to the golf course by establishing a new point of diversion on the opposite side of the river or extending water service from Harbor Water District who provides water on the south side of the river. Furthermore, the operators of the golf course have indicated that water from the City is not necessary.

## **2. Statewide Planning Goal 16 (Estuarine Resources).**

The Chetco River Estuary Boundary runs along the eastern boundary of the subject property (*See Record*, 604).<sup>1</sup> 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 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*

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<sup>1</sup> Record references are to the LUBA Record.

*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.

The Council finds that the approval of the Application and any resulting future development of the subject property will have no significant adverse impact on Chetco River estuarine resources. The Estuary Boundary is the line of Mean Higher High Water (MHHW). The Estuary Boundary is delineated on maps prepared by Donald G. Porior, an Oregon registered professional engineer (*See Record*, 604-606). There has been no dispute concerning the accuracy of the Estuary Boundary mapping and, therefore, the Council adopts such mapping as an accurate representation of the Estuary Boundary. The resource to be protected is the Chetco River estuary.

The Council finds that the approval of the Application will not alter the Chetco River estuarine ecosystem and that the estuary resources shall be protected. First, no activities contemplated by Goal 16 are proposed, anticipated or probable as a result of the approval. 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 or other activities that could affect the estuary's physical processes or biological resources. It is important to note that the fill being placed on the subject property is based upon a CLOMR-F previously issued by FEMA and is not within the scope of the Council's review of the Application. In any event, no fill deposited on the subject property will be placed within the Estuary Boundary.

The Council further finds that no future development on the subject property will occur within the Estuary Boundary. Furthermore, a riparian buffer between the Estuary Boundary and future development on the subject property shall be maintained providing protection from possible adverse impacts generally associated with residential development (*See Record*, 604). The application of pesticides and herbicides shall not be allowed within the riparian buffer. Future development of the subject property shall be served by municipal water and sewer services. Accordingly, no water intake or effluent discharge into the estuarine resource shall occur. Storm water conveyance shall be conducted in accordance with City standards and other applicable agencies minimizing potential adverse impacts on the estuarine resource. The maintenance of the riparian buffer along the Estuary Boundary will preserve the aesthetic and recreational characteristics of the estuarine resource. Navigational uses of the estuary will not be impacted by the approval of the Application.

The other potential use in conjunction with the estuary is the stockpiling of dredged materials. Specifically, the Council finds that Goal 16 of the City's Comprehensive Plan (BCP) provides for the protection of potential areas for the stockpiling of dredged materials ("DMD Sites"). A map depicting the DMD Sites is included in the record. Goal 16 of the BCP relating to DMD Sites is implemented pursuant to Section 17.72.050 of the City of Brookings Land Development Code (BLDC), which states as follows:

***17.72.050 Priority dredge material disposal sites (DMD).***

*A. Purpose. The purpose of DMD subareas in marine activity zones is to protect essential DMD sites from incompatible and preemptive uses that could limit their ultimate use for deposit of dredge material, and thereby limit the Port of Brookings and the Corps of Engineers from maintaining a navigable channel in the Chetco.*

*B. For subareas designated DMD, the following standards shall apply.*

*1. Structural improvements (e.g., construction of buildings) or other alteration of topography that would preempt use of the site for the amount of DMD planned will be prohibited until such time as alternative sites providing equivalent capacity to meet five-year disposal needs (within convenient reach of planned dredging projects) have been identified; and these alternate sites have been protected by plan amendment.*

Based on mapping provided by Applicant's engineer and accepted by Council, DMD #3 is located at the extreme southern portion of the subject property adjacent to the Snug Harbor inlet. In order to preserve and protect DMD #3, the Applicant has stipulated to maintain the extreme southern portion of the subject property identified on the Site Map (Record 604) as the "Area Established in Comprehensive Plan as DMD 3" as open space. Consequently, no future development will occur in this protected area consistent with BLDC 17.72.050 and Goal 16.

In addition to the foregoing, the Council acknowledges that the subject property has a current Curry County zoning of Commercial (C-1) and Industrial (I), which allows for a more intensive use of the subject property than the proposed Two-Family Residential (R-2) City zoning designation. Thus, the Council finds that the proposed downzoning of the subject property reduces the potential for adverse impacts on the estuarine resource in that industrial uses are often incompatible with the protection of environmental resources.

The Council further finds that any future restoration of Ferry Creek could potentially impact estuarine resources but there are sufficient safeguards in place to prevent adverse impacts as a result of such work. Ferry Creek traverses the subject property entirely within a pipe. Community stakeholders have expressed a desire that the Ferry Creek streambed be restored on the subject property. The owner of the subject property has also expressed a willingness to restore the streambed. However, it is important to note that there is no requirement that the owner restore the streambed. Furthermore, the restoration of the streambed is not required for the development of the subject property. The Council believes that the restoration of the Ferry

Creek streambed on the subject property would be a significant environmental benefit but recognizes that such work must be conducted prudently to avoid adverse impacts on estuarine resources. The Applicant testified that no such work would occur without the appropriate review and permit(s) from participating state and federal agencies. Specifically, such work will require a joint permit from the Army Corp of Engineers ("the Corp") and the Oregon Department of State Lands (DSL). The aforementioned permit process requires Endangered Species Act (ESA) compliance review by the National Marine Fisheries Services (NMFS) as well as review by the Oregon Department of Fish and Wildlife (ODFW). The Council finds that the aforementioned extensive review process will ensure the protection of the estuarine resource in the event the Ferry Creek stream restoration occurs.

Based on the foregoing, the Council finds that there is substantial evidence in the record demonstrating that the Statewide Planning Goal 16 Estuarine Resources will not be adversely impacted from the approval of the Application and future development allowed consistent with the approval. Furthermore, the area designated for future development on the subject property is sufficiently buffered from the Estuary Boundary to mitigate unforeseen development impacts and to maintain the recreational and aesthetic characteristics of the estuary. Also, estuary dependent resource sites, in this case DMD #3, shall be preserved consistent with Goal 16 of the BCP.

**D. Conditions of Approval (from original Final Order approval)**

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.

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

Dated this 13th day of April, 2015.

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Ron Hedenskog, Mayor

ATTEST:

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Donna Colby-Hanks, Planning Manager