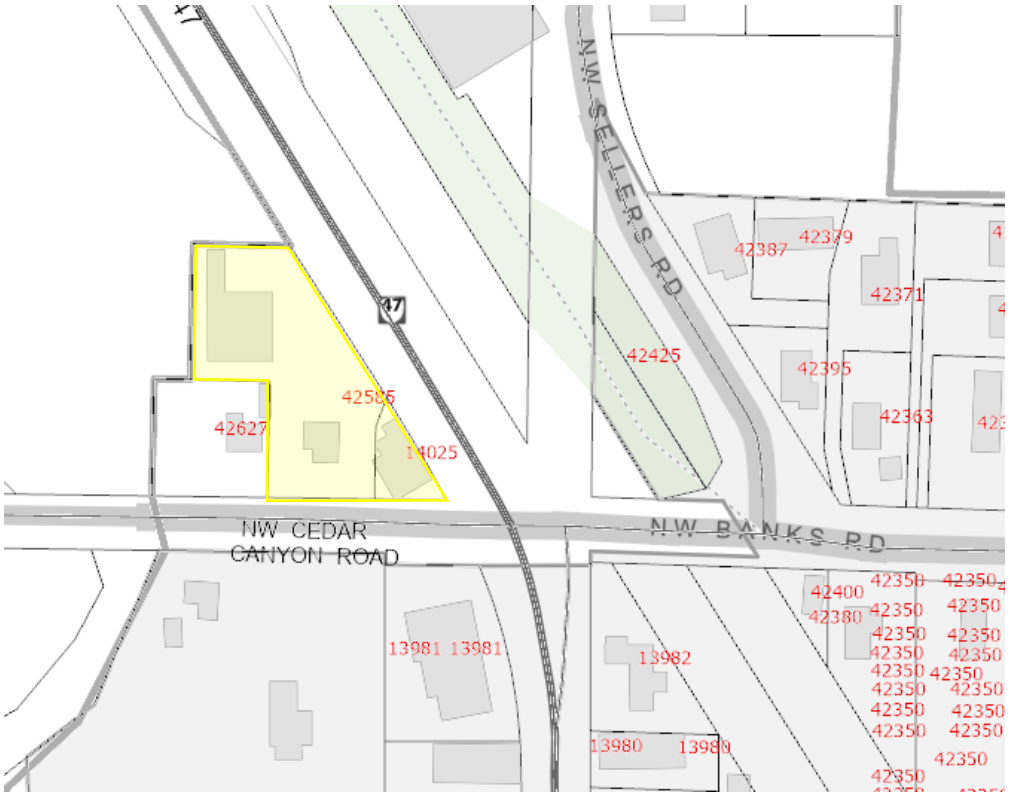
Response to Staff Report & Supplemental Narrative Statement
Application for Annexation of Territory into City of Banks

City File No. AN 23-01
Planning Commission Meeting: April 2, 2024

Parcel 1	*Parcel 2*
42585 NW Cedar Canyon Road, Banks, Oregon 97106	14025 NW Main Street, Banks, Oregon 97106
Tax Lot 2N4250002300	Tax Lot 2N331 BB05600
Owner: Robert Duncan	Owner: Holbrook Timber Co. LLC



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LIST OF ADDITIONAL EXHIBITS

Exhibit 10	Condemnation Appraisal – Parcel 1 (Tax Lot 2300)
Exhibit 11	Condemnation Appraisal – Parcel 2 (Tax Lot 5600)

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1. PROPOSAL SUMMARY

1.1 General Information

Parcel 1 – 42585 NW Cedar Canyon Road, Banks, Oregon 97106 (0.66 acres)
Tax Lot: 2N4250002300
Owner/Applicant: Robert Duncan

Parcel 2 – 14025 NW Main Street, Banks, Oregon 97106 (0.07 acres)
Tax Lot: 2N331 BB05600
Owner: Holbrook Timber Co. LLC
Applicant: David Duncan for Holbrook Timber Co. LLC

Total Area: 0.73 acres

County Comprehensive Plan: Within City of Banks Urban Growth Boundary[1]

[1] *See* Washington Co. Comp. Plan Map 1.5, *available at* https://washcomultimedia.s3.amazonaws.com /CMSBigFiles/LUT/PDS/Wash+Co+Comp+Plan/RNRP+Maps+20220804_WEB.pdf .

Current County Zoning: Future Development 10-Acre District ("FD-10")

Applicants' Representative: David Phillips
Vial Fotheringham LLP
6000 Meadows Rd., Suite 500
Lake Oswego, Oregon 97035

1.2 Annexation Request

Applicants request approval of an annexation of two parcels totaling approximately 0.73 acres of land. The two parcels at issue are contiguous with the current city limits of the City of Banks, and they are located within the City's urban growth boundary ("UGB"). The current Washington County zoning designation for the two parcels is FD-10, and it is now appropriate for these lands to be annexed into the City.

The City's Comprehensive Plan map indicates the two parcels could be zoned Mixed-Use ("MU").[2] This designation, however, is not binding on the City if the annexation is approved. *See generally* BCC § 151.025 (noting the Comprehensive Plan only "guide[s] the designation of zoning for annexed areas"). Concurrent with the annexation approval, the Planning Commission recommends "applying [an] *applicable* zoning designation[]" to the annexed properties. *See id*. (emphasis added).

The following narrative and the attached exhibits describe the subject property and demonstrate compliance with the applicable annexation criteria.

1.3 Site Description

Parcel 1 is a 0.66–acre parcel with both a current residential use and a commercial use. The southern half of Parcel 1 is improved with a single-family residence with driveway access to NW Cedar Canyon Road. The northern half of Parcel 1 is an established automotive repair business with driveway access to State Highway 47. The sole employee of the business lives in the single-family residence on the property. Generally, the business averages approximately 10 to 20 site visits per day, and even during the busiest periods, the site does not receive more than 30 visits during a day.[3] These visits largely consist of the arrival of customers and their vehicles and the delivery of automotive parts.

Parcel 1 is subject to condemnation by Washington County, which largely seeks temporary construction easements to facilitate the expansion of the State Highway 47 – NW Cedar Canyon Road intersection.[4] Parcel 1 is currently served by a municipal water line and uses an on-site septic system. As part of Washington County's work on the intersection, Washington County will relocate the existing driveway to the automotive repair business approximately 50 feet north. The access to the rebuilt driveway will continue to be off of Highway 47.

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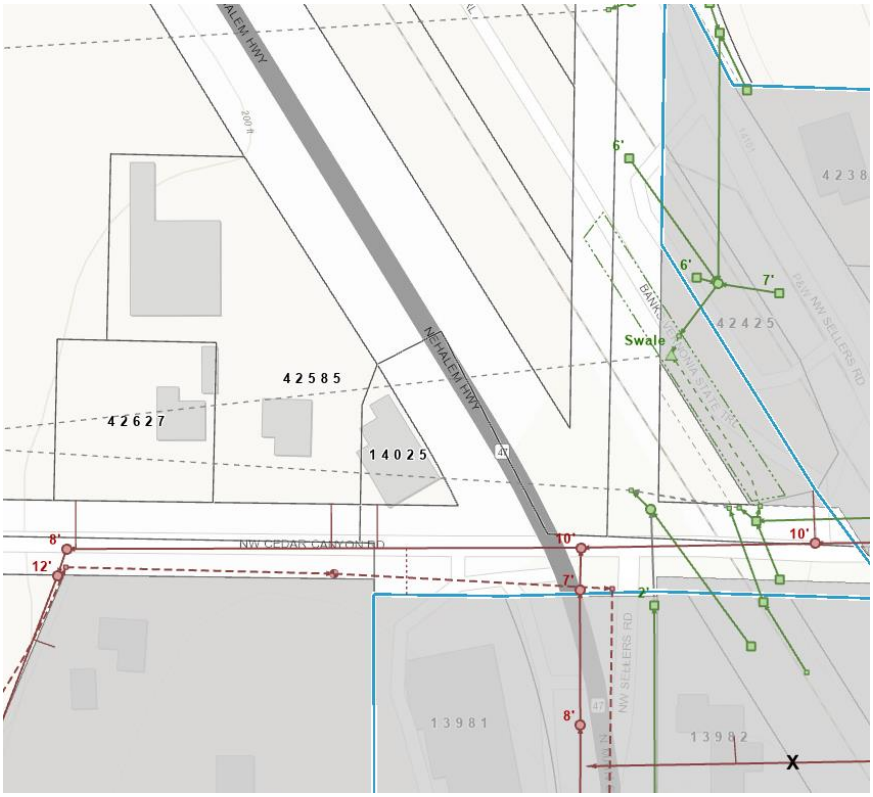
[2] "Mixed-Use (MU) zone is intended to provide a mix of medium density residential uses together with small to medium scale retail commercial and civic uses that emphasize a pedestrian environment." BCC § 151.035(6) (stating the purpose of the MU zoning designation). Commercial uses, including "[r]etail sales and service," are permitted outright in the MU zone subject to the standards in § 151.079. *See* BCC § 151.036, Table 2.2-A.

[3] ODOT estimates there are 7,536 trips per day in the vicinity of the parcels (5,870 along Highway 47 and 1,666 along Cedar Canyon Road). *See* Ex. 10 at 13–14.

[4] The condemnation is part of Project No. 100312 of Washington County's Department of Land Use & Transportation. This condemnation is largely taking temporary construction easements; however, approximately 110 square feet of frontage on NW Cedar Canyon Road is also being permanently taken.

Parcel 2 is a 0.07-acre parcel on which a commercial building, formerly used as a service station, is located; the building is approximately 1,891 square feet. Parcel 2 is served by a municipal water line. Washington County is in the process of condemning a large portion of Parcel 2 in order to expand the State Highway 47 – NW Cedar Canyon Road intersection.[5] As a result of the County's condemnation, the building located on Parcel 2 will be removed.

Both Parcel 1 and Parcel 2 are immediately adjacent to the city limits, which currently ends at NW Cedar Canyon Road. Although neither Parcel 1 nor Parcel 2 currently have access to a sanitary sewer or stormwater sewer system, Clean Water Services has mains for both immediately adjacent to the parcels as shown on the following image.[6]



1.4 Surrounding Area

Parcel 1 and Parcel 2 front Highway 47 swhere it intersects with NW Cedar Canyon Road. The area surrounding the two parcels has a diverse array of uses. The properties bordering Highway 47 near the two parcels include an immediately adjacent commercial district. Other nearby properties are put to residential uses or agricultural uses. Given the myriad uses of the surrounding properties, the two different uses made of Parcel 1 are entirely consistent with the surrounding area. The automative shop on Parcel 1 is consistent with the immediately adjacent Commercial district to the southeast (or the immediately adjacent land designated Industrial on the City's Comprehensive Plan Map, which properties are directly across Highway 47).

The following table identifies the zoning designations and uses made of the properties surrounding Parcel 1 and Parcel 2.

[5] The condemnation is part of Project No. 100312 of Washington County's Department of Land Use & Transportation.
[6] This is an excerpt of Clean Water Services' "Sanitary Sewer & Storm Sewer Map" available at https://cws.maps.arcgis.com/apps/webappviewer/index.html?id=a2a448a5079d4dc18f78383af829f247. Sanitary sewers are shown in red and stormwater facilities are shown in green.

Direction	City Comp. Plan Designation	Zoning District
Northeast / East	Industrial	EFU / FD-10
South / Southeast	Commercial	Commercial
South / Southwest	Medium Density Residential-High ("MDR-H")	High Density Residential ("HDR")
West	Mixed Use	FD-10
Northwest / North	N/A (Outside of UGB)	Agriculture and Forest-20 ("AF-20")

2. RESPONSE TO STAFF REPORT

Staff submitted a report to the Planning Commission dated March 26, 2024, which report recommends denial of the annexation applications. The Staff Report largely recommends denial of the Applications because one of the parcels, Parcel 1, the subject of several Washington County Code Enforcement actions. *See* Staff Rep. at 3–4. But the Staff Report fails to show where outstanding violations of the County's Development Code—particularly when those purported violations would be resolved upon annexation—are contrary to the specific approval criteria in BCC § 30.02. Further, even if the outstanding violations offered a cognizable ground on which to deny annexation, those violations only pertain to one of the parcels, Parcel 1; they do not affect the eligibility of Parcel 2. Finally, the Staff Report notes the record lacks statements from several service providers. *See* Staff Rep. at 7 (lacking comments from Clean Water Services, Oregon Department of Transportation, and Banks Traffic Engineer). Applicants expect to have the missing statements in short order; however, even without those statements, other information in the record allows the Planning Commission to find the relevant criteria satisfied.

2.1 The Banks City Code does not require annexing property be free of violations of the County's Development Code.

The Staff Report assumes, without explanation and support, that a property many not annex into the City until all outstanding County Code Enforcement issues have been resolved. The City Code lists specific approval criteria, and the compliance demanded by the Staff Report is nowhere to be found. *See* BCC § 30.04(B) (requiring the Planning Commission make findings of fact regarding the review criteria in § 30.02); *see also* BCC § 30.02 (requiring "eligibility" criteria be met and "timeliness" criteria be met). To satisfy the Staff Report's imagined criterion (i.e., to correct the outstanding violations), would require Applicant to spend thousands of dollars on land use applications and proceedings to achieve compliance with a Code that would cease to apply as soon as Parcel 1 was annexed in. Annexation itself resolves the compliance issues because the County will lose jurisdiction over the annexed parcels—problem solved.

The Staff Report relies on the decision of a Hearings Officer to establish two ongoing violations on Parcel 1. *See generally* Staff Rep. Ex. B. First, the Hearings Officer concluded that an automotive repair business is not a permitted use in the FD-10 zone. *See id.* Ex. B at 4, 10 (affirming violation). Second, the Hearings Officer concluded that fill was placed in a mapped floodplain without a permit on Parcel 1. *See id.* Ex. B at 10; *see also* Wash. Co. CDC § 421-14.8 ("There shall be no dumping of fill in a flood area without a floodplain or drainage hazard area alteration permit.").[7] Both of these violations involve provisions of the County's Development Code that will be inapplicable upon annexation; the violations will lapse.

[7] The Hearings Officer noted that if a "flood plain and drainage hazard area delineation" showed the fill was not placed in a flood plain, the fine imposed would be waived. *See* Staff Rep. Ex. B at 11. Applicant has made several requests to the County in furtherance of such a delineation, but the County has been nonresponsive.

The first violation will be resolved by annexing Parcel 1 into the City. The City's Comprehensive Plan Map indicates that the two parcels could be zoned Mixed-Use ("MU") upon annexation.[8] But this designation is not fixed as indicated on the map; instead, it is merely a "guide" to the ultimately realized zoning designation. *See generally* BCC § 151.025 (noting the Comprehensive Plan only "guide[s] the designation of zoning for annexed areas"). Concurrent with the approval of an annexation application, the Planning Commission recommends "applying [an] *applicable* zoning designation[]" to the annexed properties. *See id*. (emphasis added). Here, the Planning Commission should recommend the Commercial zoning designation be applied to Parcel 1. Vehicle repair is allowed as a conditional use in commercial zones. *See* BCC § 151.052, Table 2.3-A; *see also* BCC § 151.273 (standards for conditional use approval).

The second violation involves the placement of fill in a suspected floodplain. The Staff Report claims that the City lacks the "necessary procedures or processes to . . . resolve the . . . violation." Staff Rep. at 4. As such, the violation will necessarily resolve upon annexation. To the extent the Planning Commission believes the fill violation will persist even after annexation, the Planning Commission should, rather than deny the application, impose a condition of approval requiring Applicant to either establish a non-violation through a delineation or remove any infringing fill material.

2.2 The violations identified in the Staff Report only affect Parcel 1; those violations are not relevant to the annexation application of Parcel 2.

The violations at issue are described thoroughly in the Hearings Officer's decision attached as Exhibit B to the Staff Report. The decision identifies the property at issue as located at 42585 NW Cedar Canyon Rd and as Tax Lot 2N4250002300 (i.e., Parcel 1). *See* Staff Rep. Ex. B at 1; *see also id.* Ex. A (same), Ex. C (same). The violations are not relevant to the Planning Commission's review of Parcel 2's eligibility for annexation.

2.3 The outstanding service provider statements will be available in short order, and in any event, the evidence already in the record allows the Planning Commission to find that both parcels meet the "timeliness criteria."

The Staff Report claims that missing information, including statements from Clean Water Services, ODOT, and the Banks Traffic Engineer, prevent the Planning Commission from finding Applicants satisfied the "timeliness criteria." *See* Staff Rep. at 6–7. Much of the information identified as missing in the Staff Report has been provided in this document, including a detailed description of the business operating on Parcel 1. Likewise, even without the three outstanding statements from service provides, the record includes sufficient information from which to find Applicants meet the timeliness criteria.

The Staff Report's demand for technical information and expert reports is not required by Section 30.02 (review criteria) or Section 30.03 application requirements. Such information is not needed, here, because the annexation proposed by Applicants is not complicated. Applicants do not seek annexation in order to further develop their properties; rather, Applicants want to annex to continue the current uses, which are already adequately served by urban services and infrastructure. Parcel 2 has no present commercial use, and following the County's condemnation, the building on Parcel 2 will be torn down. Parcel 2 requires no additional infrastructure or capacity because it has a de minimis, if any, effect on the City's urban services and infrastructure. *See* BCC § 30.02(B)(1) (requiring an "adequate level" of services be available).

[8] "Mixed-Use (MU) zone is intended to provide a mix of medium density residential uses together with small to medium scale retail commercial and civic uses that emphasize a pedestrian environment." BCC § 151.035(6) (stating the purpose of the MU zoning designation). Commercial uses, including "[r]etail sales and service," are permitted outright in the MU zone subject to the standards in § 151.079. *See* BCC § 151.036, Table 2.2-A.

Parcel 1 is slightly more complicated because it includes a single-family residence and the commercial auto repair business. But the business is small—it has a single employee and never more than 30 trips per day. *See supra* § 1.3 (giving additional details about the usage of Parcel 1). Parcel 1 is already served by sufficient urban services and infrastructure, and although annexation will allow for the provision of additional services (such as a connection to a sanitary sewer), those are not necessary to maintain the current level of use. Because the current uses of Parcel 1 will be maintained, the timeliness criteria are met and further studies are not required.[9]

The Staff Report suggests that without the statements from Clean Water Services, ODOT, or the Banks Traffic Engineer, Applicants have failed to satisfy the requirements for an annexation application (§ 30.03) and, as a matter of law, cannot demonstrate satisfaction of the timeliness criteria. The Staff Report is incorrect. Although Applicants expect that they will be able to place those missing statements in the record, nothing in the City Code requires service provider statements.

Proving the adequacy of the level of services may be done through "conform[ance] to adopted plans and ordinances *or* as may be determined by the [relevant] agency." BCC § 30.02(B)(1)(a) (emphasis added). Nothing else in the substantive criteria in Section 30.02 even hints that service provider statements are compulsory.

Section 30.03 lists materials that must be included with an annexation application. An applicant must provide "[a] detailed statement of [the] availability, capacity, and status of existing water, sewer, drainage, transportation, park and school facilities." BCC § 30.03(H). Nothing, however, requires the source of that information be the service providers themselves. Again, Applicants are not proposing new development; they merely wish to continue their present uses in the City rather than the County. This case should not require a team of experts (and their attendant costs) to demonstrate the appropriateness of annexation; otherwise, annexation is only available for large tracts of developable land with their correspondingly large budgets.

This document supplements the information already in the record regarding the uses of Parcel 1 and Parcel 2. There is sufficient information from which the Planning Commission can conclude that Applicants meet the review criteria in Section 30.02. The objections raised in the Staff Report do not—and cannot—detract from that conclusion.

3. APPLICABLE PROCEDURES

The City of Banks prescribes specific procedures for the review of annexation applications. *See generally* BCC § 30.04.

An annexation application is reviewed first by the Planning Commission, which must hold at least one public hearing on the application. *See* BCC § 30.04(A). The Planning Commission is allowed to continue the hearing until a later date. See BCC § 30.04(B) (requiring a recommendation with findings within 45 days "unless a continuance is announced"). After the public hearing (and any continuances), the Planning Commission has 45 days to make a decision on the application. *See id.* The Planning Commission's decision "must make specific findings off fact [consistent] . . . with the review criteria set forth in § 30.02" and include a recommendation to approve or deny the application. *See* BCC § 30.04(B).

[9] As part of the condemnation action, Washington County is constructing a new access point for the business on Parcel 1. However, that access point will remain on Highway 47. As such, the County has accepted the adequacy of the transportation services and infrastructure available to Parcel 1. Contrary to the Staff Report, Applicants do not need documentation from ODOT or the Banks Traffic Engineer to reestablish what the County has already accepted.

If the Planning Commission recommends approving the application, the City Council may, in its discretion, approve the annexation on a closed record or convene a public hearing to review the recommendation de novo. *See* BCC § 30.04(C).

If the Planning Commission recommends denying the application, the applicant must file a notice of appeal within 14 days of the Commission's decision. BCC § 30.04(B)(2). "If an appeal is filed, the Council must hold a public hearing following the procedures set forth in § [151.234]." BCC § 30.04(D).[10] Annexation applications are addressed by the City Council as a Type IV decision. *See* BCC § 151.230, Table 4.1-A. "Type IV reviews are considered by the Planning Commission, which makes a recommendation to City Council. City Council makes the final decision on a legislative proposal through the enactment of an ordinance." BCC § 151.230(B)(4). The procedures applicable to Type IV proceedings are found in Section 151.234. Where the Planning Commission recommends denial and a timely appeal is filed, the City Council convenes a public hearing and considers the matter de novo.[11]

4. ANNEXATION CRITERIA

4.1 State Statutes and Common Law

State law establishes some basic substantive standards for all annexations. For example, ORS § 222.111(1) requires that the territory to be annexed must be located either "contiguous" to the city or "separated from it only by a public right of way or by a stream, bay, lake or other body of water." In this case, the territory to be annexed is contiguous to the existing City boundary.

There is also a judicially-imposed "reasonableness" requirement applicable to annexations. *See Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145 (1952); *Marion County Fire Dist. #1 v. Marion-Polk County Boundary Comm'n*, 19 Or App 108 (1974); *DLCD v. City of St. Helens*, 138 Or App 222 (1995). However, these cases—and the "reasonableness" standard—typically apply to so-called "cherry-stem" or "pan handle" annexations. This type of application is not at issue here.

Because of the way ORS Chapter 222 is organized and written, the "general" or "default" annexation process is an "annexation by vote" of the electors in the territory to be annexed. All other annexation methods being considered are "exceptions" to this general method. A City Council may elect to dispose of the election in the territory to be annexed (otherwise required under ORS §§ 222.111(5), 222.120(4)(a), 222.160) by instead utilizing one of the three "consent" methods. In this case, Applicants are seeking to use the "100% consent" annexation method. This method may be utilized if all of the landowners in the area to be annexed consent to the annexation. ORS § 222.125. In this case, the owner of Parcel 1 and the owner of Parcel 2 consent to the annexation. *See* Staff Rep. Ex. D.

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[10] Section 30.04(D) actually directs one to § 151.176; however, that Section of the BCC sets standards for "Parking Lot Enclosure and Screening." BCC § 151.176 (enacted by Ord. 2021-08-02). The code sections were apparently renumbered at some point between the last revision of the annexation ordinance (Ord. 102500, passed Oct. 25, 2000) and 2021. In any event, the BCC provides that "[w]henever in 1 section reference is made to another section . . . that reference shall extend and apply to the section referred to as subsequently . . . renumbered[.]" BCC § 10.08. Section 151.230 lists the applicability of the various review types. In Table 4.1-A, it lists an "Annexation" as following a Type IV procedure. "Type IV reviews are considered by the Planning Commission, which makes a recommendation to City Council. City Council makes the final decision on a legislative proposal through the enactment of an ordinance." BCC § 151.230(B)(4).

[11] Although the BCC does not specifically describe the proceeding as de novo, the nature of the proceeding is apparent from the text, context, and structure of the applicable code provisions.). Section 30.04, which provides the annexation-specific procedure for the reviewing applications, describes the Planning Commission as holding a "public hearing" on the application and requires the City Council to hold a "public hearing" on an appeal of a denial. *Compare* BCC § 30.04(C) (allowing the City Council to hold a closed record hearing where the Planning Commission recommends approval). Accordingly, the scope of the hearing before each body is the same.

4.2 City of Banks Annexation Standards

The City Code provides specific review criteria for annexation applications, BCC § 30.02. *See* BCC § 30.04(B) (requiring the Planning Commission to evaluate the application based on the criteria at BCC § 30.02). To be approved, an application must meet both the "eligibility" criteria and the "timeliness" criteria. Each criterion will be addressed in turn.

BCC § 30.02(A) Eligibility criteria. *The Council must determine that property is eligible for annexation based on the following criteria:*

(1) The property is contiguous to the existing city limits;
(2) The property is located within Banks Urban Growth Boundary; and
(3) Any other prerequisite requirement that may be applicable under the Oregon Revised Statutes.

Response: These criteria are met. The City of Banks Comprehensive Plan Map demonstrates that both Parcel 1 and Parcel 2 are "contiguous to the existing city limits" and within the UGB. Further, Applicants have met the requirements of ORS § 222.120, 222.125, and 222.170 by demonstrating 100% consent by the parcels' owners for the annexation. *See* Staff Rep. Ex. D. Accordingly, the application satisfies the eligibility criteria.

BCC § 30.02(B) Timeliness criteria. *The Council must determine that it is timely to annex property based on the following criteria.*

(1) An adequate level of urban services and infrastructure is available, or will be made available in a timely manner.

*(a) **ADEQUATE LEVEL** means conforms to adopted plans and ordinances, or as may be determined by the agency that provides the service or infrastructure.*
*(b) **URBAN SERVICES** means police; fire; school facilities; parks and recreation facilities; greenways and open spaces and other city-provided services.*
*(c) **INFRASTRUCTURE** means sanitary sewer, water, storm drainage, and streets.*
*(d) **BE MADE AVAILABLE IN A TIMELY MANNER** means that improvements needed for an adequate level of urban services and infrastructures will be provided in a logical, economical, and efficient manner and are made available in accordance with the development agreement or other funding mechanism at the time of approval. Improvements for the needed infrastructure and urban services must be secured by a development agreement or other funding mechanism that places the primary economic burden on the annexed property and not on the city.*

Response: This criterion is met. As discussed extensively in Section 2, *supra*, the annexation proposed by Applicants is simple. It is two parcels with no present plans for future development. Applicants merely want to continue their existing (limited) uses of their parcels within the jurisdiction of the City rather than the County.

BCC § 30.02(B)(2) Sufficient planning and engineering data must be provided, and all necessary studies and reviews must be completed in such a manner that there are no unresolved issues regarding development of the annexation property. It may not be timely to annex property if the appropriateness of the proposed use could be altered by plans or studies that are underway, or are needed, to update, clarify, or provide additional specificity to the property use. Examples of needed studies may include, but are not limited to, public infrastructure plans, buildable lands inventories, area refinement plans, park study, or any related planning study pertaining to growth management.

Response: This criterion is met. The simplicity of this annexation—and lack of any proposal for further development—belie the need for extensive data compilations or studies. As discussed in §§ 2.1, 2.2, *supra*, the outstanding violations of the County Development Code is not an "unresolved issue"; indeed, annexation will itself resolve the issue.

BCC § 30.02(B)(3) The Council may consider, at its discretion, any other factors that effect the timeliness or wisdom of any particular annexation petition.

Response: This criterion is met. As discussed in §§ 2.1, 2.2, *supra*, the Planning Commission should decline to consider Parcel 1's outstanding violations of the County Development Code is affecting the timeliness or wisdom of annexation.

BCC § 30.02(B)(4) The burden for providing the findings and cost thereof for this section and § 30.03 is placed upon the applicant.

Response: These criteria are met. As demonstrated *supra*, Applicants have met their burden to show the proposed annexations satisfy both the eligibility and timeliness criteria. If the Planning Commission recommends approval of this annexation application, Applicants will prepare, at their own cost, proposed findings for the Planning Commission to review. *See* BCC § 30.04(B) (giving the Planning Commission 45 days to issue the required findings).

5. CONCLUSION

Applicants ask the Parcel 1 and Parcel 2 be annexed into the City of Banks. Both parcels are within the UGB and adjacent to the existing city limits. Moreover, the present uses of Parcel 1 and Parcel 2 are entirely consistent with the adjacent and surrounding land in the City of Banks. In particular, the commercial use on Parcel 1 fits as a contiguous extension of the existing commercial district south on Main Street. Parcel 1 and Parcel 2 meet both the eligibility criteria and the timeliness criteria. Accordingly, Applicants respectfully request the Planning Commission recommend approval of their annexation applications.