

Freeland Final Response

The following is response to the transportation planning commentary of Graham Martin and the Applicants response to this as well as final arguments for our proposal and the conditions being proposed by the county. Additionally, we have prepared our own proposed conditions listed below.

Questions Asked:

At the appeal hearing on November 13, 2020 you asked:

Pursuant to MCRR 3.000 and MCRR 5.300, in determining a transportation impact: 1.

Are the ITE Manual's trip generation numbers for a single family detached residence rounded up from 9.44 to 10?

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2. Why did the County focus on 10 trips per day within the definition to determine the impact rather than the other qualifying criteria such as the "20 percent increase"; "...by more than 100 trips per day or by more than 10 trips in the peak hour"?

3. Provided there is a transportation impact, and that this provides a "nexus," then are the requirements that the County seeks the applicant to make "roughly proportional" to this impact?

Applicant response #1: *please consider that these averages for a transportation impact are generally found in residential areas of the entirety of Multnomah county that generally has thoroughfare traffic on the road. Victory road is currently a dead-end road with no projection to create an access on either division or on oxbow drive. We have not done a traffic study however our engineer as well as us are confident in saying that our development would very likely be found to be less than 100 trips a day or 10 trips in a peak hour which is the actual standard. Not 10 trips a day. Grahams interpretation of the code is drastically far from the standard and is a misrepresentation in our denial and county findings. Additionally, there is no current transportation county engineer currently employed to find any impact or variances from the standard of general trips in a peak hour or in a day..*

1. County Answers and Explanations

Answers to Questions Nos. 1 & 2 Because Questions Nos. 1 & 2 are interrelated, the answers to these questions are explained together.

First, the County has typically "rounded up" the ITE Trip Generation Manual's (10th Edition) trips per day for a single family detached house from 9.44 to 10. However, it is not this figure alone that the County has used to determine whether the proposal generates a transportation impact. For instance, relevant provisions of the MCRR provide the following:

MCRR 5.100 provides:

To determine if a Transportation Impact is caused by a proposed development, the County Engineer will determine the number of new trips generated by a site by one of the following methods:

A. Calculations from the most recent edition of the Institute of Transportation Engineers' Trip Generation (ITE); or

B. A site development transportation impact study conducted by a professional engineer registered in the State of Oregon and accepted by the County.

To calculate a transportation impact, the County used ITE Trip Generation Manual figures per 5.100 A. It did not require an impact study referred to in MCRR 5.100B. A single family detached house generates 9.44 trips per day, according to the ITE Trip Generation Manual (10th Edition).

Applicant Response #2: please see applicant response #1, there is no County Engineer currently employed with Multnomah county, only an interim employee in the staff that HAS not reviewed our RRV to make any alternate determination and take into consideration the following. Again, this is a dead end road, making our transportation impact not the same as any other development. The remoteness of this site is in an area where the transportation is typically only that of the residents or guests of the residents. No thoroughfare. The access of this section of Victory road would require you to turn off of the paved road onto a gravel road that has been marked with a "private drive" and "dead end" signage at the entrance for the last 3 years we have owned the property. This signage and the very remote location of this property makes the average trip generation estimate very unlikely to be met. We ask that the hearings officer make a determination that the traffic on this remote road would likely not generate the average 10trips in a peak hour or 100 trips in a day per residential home. If this were to be found as true then the traffic would be estimated by the transportation department to be 40 trips per peak hour and 400 trips a day. We would be so bold to say this trip estimate is IMPOSIBLE for this road and its residents. A traffic study would show this trip estimate of the county to be far from what is actually happening on this rural road for trips. If a traffic study were to find the impact to be less than the county standard which it likely would.

2. County Explanations:

MCRR 5.300 provides:

Except where special circumstances require the County Engineer to make an alternate determination, any new construction or alteration which will increase the number of trips generated by a site by more than 20 percent, by more than 100 trips per day or by more

than 10 trips in the peak hour shall be found to have a Transportation Impact. A minimum increase of 10 new trips per day is required to find a Transportation Impact. The proposed single family residence on SE Victory Rd generates a transportation impact because it increases the trips generated by the site by more than 20%. As established in the response to 5.100A above, a single family detached house generates 9.44 trips per day, according to the ITE Trip Generation Manual (10th Edition). Given the site is vacant, the subject property's site generated trips provide a 944% increase (from zero to 9.44 trips). Additionally, the proposed development will also increase trips on SE Victory Rd by more than 20%. There are three existing houses with accesses on

Applicant Response #3:

Again this code section refers to the County Engineer to make an alternate determination to the trips of a transportation impact of the specific development.

Our project has not gotten the courtesy of the County Engineer reviewing our project to make any alternate determination. The determination of the county is only that of Graham Martin and his objective of strict adherence to the county standards of 20ft driving surface. The county has completely overlooked the determination of our local fire official making the determination that the road currently meets and is approved with the current road width.

This Transportation impact is taken from a manual that is looking at an impact of roads that have thoroughfare traffic in addition to being within city limits. This ROW is a dead end gravel road that serves only the residents and their guests. The county has conceded on their strict adherence to the 20ft standard for the entire length of the ROW thus allowing the hearings officer to weigh in favor and approval of our RRV with the second concept plan. However the county continues in attempting to find justification of harm with this transportation impact as to impose further conditions that have NEVER been discussed in previous planning. The county have newly fabricated a unrelated and unjustified list of conditions to be imposed. The only reason for dwelling on minor transportation impact is justify these new exactions. Again, no county engineer has reviewed our project for special circumstances of trip generation or a lesser impact of trips due to these circumstances as there is no current county engineer employed at Multnomah county transportation planning.

3. County Explanation of trip generation determination:

*SE Victory Rd (31325, 31431, 31620). Using the ITE Trip General Manual figure of 9.44 daily trips generated by a single household as a basis, it is clear that three houses generate a total of 28.32 trips per day (9.44 x 3). With the proposed fourth house the total trips per day on SE Victory Rd would be 37.76. The percentage increase of trips on SE Victory Rd due to the proposed house is 33.3% (37.76/28.32*100-100).*

To clarify, the definition of a transportation impact provided by MCRR 3.000 and MCRR 5.300 does not require all the conditions of the definition to apply in order for the County to determine a transportation impact. While the definition states "increase the number of trips generated by a site by more than 20 percent, by more than 100 trips per day or by more than 10 trips in the peak hour shall be found to have a Transportation Impact..." the operative word is "or". Therefore, only one of these must be met for the County to find a transportation impact.

As demonstrated above, the site generates more than a 20% increase in trips, therefore the proposed development will have a transportation impact. The purpose of these additional qualifying conditions in MCRR 3.000 and 5.200 is to accommodate the wide variety of locations (rural versus urban) and road classifications (urban arterials and collectors to rural local and rural local access roads) that are present in the County. So long as one of the conditions is met, there is a traffic impact.

Applicant Response #4

Again, no alternate determination was made or even considered by the county engineer. Additionally, Graham's interpretation of the code is blatantly incorrect when talking about trips in a day. The code specifically reads that an impact is 10 trips in a peak hour, not 10 trips a day. This error in determination is impactful to this project because it is understandable to imagine 10 trips per household in a day, however it is not understandable to see it as what it reads, 10 trips in a peak hour per home. This would require a transportation study to find a current impact of 28.32, or 30 trips in a peak hour. This finding would be not possible because there is just not that level of activity on this road currently, and will not be significantly increased by our proposed home.

We have not argued that our development will create some minor impact, however the impact that is being assumed is quite extensive for this rural, dead end road that only proposes to serve 4 homes. We are proposing to widen the road to the county standard in the areas where the most traffic is occurring and only propose for a substandard width where only two homes are being accessed. As well as, no property's are being accessed by a driveway within this section of environmental overlay being requested in this RRV. There is not traffic safety issues specifically addressed other than road width, this width meets the OFC local jurisdictions standards.

The county has failed to talk about the specific request that the applicant is proposing. The county has not addressed any harm or safety concerns other than implementing a standard trip generation that is a general finding for any residential project in all of Multnomah county. The fact is that the county standards do not supersede the fire code and that OFC specifically allows for the local fire official to make an alternate determination on road width. Which in this case we have been in close communication

with our local fire official and the specifics of our project. The road width requirements of the 12ft driving surface and 2ft of clearance on either side has been met and approved by Gresham fire, as well as the 13ft 6in height clearance. The fire official Samantha Chandler only listed these requirements in her findings because the applicant specifically requested she did, as to further point out the approvability of this request.

The county has no evidence that this standard has not been met and the applicant has ample evidence in the approval of the plan by the fire official as well as the multiple surveys showing this clearance being met the whole length of Victory and specifically the area where the four property corners come to meet the right of way. Ultimately the fact of the fire official giving approval has more authority than the county's set general standards for all residential areas in Multnomah county. This request is reasonable and poses no negative impact or harm. If no identifiable harms related to development exist in this SEC-WR area, no basis for a legitimate use of the municipality's land-use powers exists either.

Three major arguments that weigh in favor of heightened scrutiny for Development exactions also demonstrate the constitutional necessity of the rough "proportionality test". First, some form of close scrutiny is required to ensure municipalities are not achieving their eminent domain goals through the abuse of their police powers. Second, because of the concerns for simple fairness that underlie the Takings Clause, heightened scrutiny is required. Third, heightened scrutiny ensures that municipalities do not overreach or abuse their monopoly of power over land use. This part reviews these arguments and demonstrated how they support the constitutional necessity of the "Rough Proportionality" test

PROPOSED CONDITIONS OF APPROVAL

The improvements sought through MCRR 11.000 above, and conditioned below, are considered proportionate to the applicant's transportation impact. They will also contribute to the safety and integrity of the ROW, the primary concern of the County's request for improvements.

1. Apply for a driveway permit for the proposed access/driveways onto SE Victory Rd.

As part of the driveway permit applications, the applicant shall provide

- a. A site plan showing the driveway/accesses to the residence, roadway, and parcel lines, and provide annotation of the plans with the width of the driveways and accesses [MCRR 18.250]. The width of the second access (fire truck turnaround) shall be consistent with condition 2a below.
- b. The driveway serving the site must have a 20-foot paved approach to SE Victory Rd. This paved approach will be measured from the edge of the subject property boundary and ROW of SE Victory Rd. It must not create any drainage problems along the County Road. This paved approach will

help to protect the County Road from debris from the new driveway, and will improve the safety of this access. A refundable deposit is required for this work.

Applicant Condition 1 Response:

1. Yes, we will apply for a driveway permit.
 - a. We consent to this condition and that it is an obvious requirement of a grading and erosion control permit and that the drawings will be drawn by an engineer to that standard.
 - b. We do not consent to this condition. This is not a requirement written into the code for our rural area and no other homes on this section of Victory road have this type of access. The harm needed to be proven by more than conclusory statements and that proof has not been fulfilled in the form of facts, applicable code, or evidence specific to our development. If the county were to look at the grading and elevation plans it would be evident that the risk of debris is very unlikely if not impossible due to the fact that victory road lies at a higher elevation than our driveway falls. Gravity and the slope would not allow for debris to enter Victory road from our driveway. We are paying for and facilitating the development of the road as well as our driveway. The county does not maintain this road or even observe the condition of the road at any time. The condition of the road and our driveway access will be maintained and preserved by the property owner and it would make no logical sense for us to allow our significant investment and access to our property to degrade at any rate. Our engineer at Firwood Design was very confused as to the justification or logical design reasoning to this request as it would be a gravel road, going onto a paved approach below it and then back to gravel and then onto concrete. This change in material and absorption rates would ONLY result in drainage issues and erosion issues from cars leaving the solid surface to move onto gravel resulting in cars spinning out their tires and eroding this transition. With maintaining the same surface materials, the tires would continue to have the same levels of traction during travel. Additionally, the gravel would end up falling downhill onto the paved approach and degrading our investment in this surface. This exaction of an approach could degrade our property and is additionally not justified in code or logical reason specific to our project. The county may not simply offer conclusory statements that the type of development in question generally results in such harms. The county must demonstrate how the specifics of this development create this direct harm, not just a potential for harm generally. This condition holds no ground within code or logically/logistically, the applicant does not consent to this condition. The exaction (paved approach) condition proposed must be shown to be necessary to alleviate no more than the identified harm. This requested condition not only is an excessive cost addition with no reference to applicable code it is an unproportioned burden to a harm that is not demonstrated in evidence, reference, applicable code, but in a statement of assumption of a harm not related to our specific development or its

characteristics. This request would make more sense if our driveway had a slope down to the local access road as gravity would allow for debris to fall onto the road, however that is not the case. The driveway slopes down away from the road municipalities must show that any exaction (paved driveway approach) being imposed as a condition is necessary, both in extent and degree, to offset a harm identified with the proposed development. the level of exaction must be necessary in degree to alleviate the level of harm associated with development. This harm has not been explained or been given evidence to substantiate this exaction. The county is responsible to identify "specifically and uniquely attributable" harm caused by this development that would be proportional to this condition of the paved approach and this is not apparent in any of the county's most recent exaction. This proposed condition has never been discussed previously to this most recent document submittal.

2. The firetruck turnaround shall meet the dimensions set out in the Oregon Fire Code (OFC 503 & Appendix D).

- a. The turning radii of the firetruck turnaround shall be placed as far north into the ROW as possible to reduce the second access width between the ROW and the subject property to meet the County's access width standards for residential properties (25 feet, or as close to this as possible), as shown on concept plan (Exhibit H.4).
- b. The second access shall be gated with a KNOX padlock or gate switch and unobstructed at all times to ensure that it complies with the OFC and Fire Services requirements (see Exhibit A.34, number 2).
- c. Make improvements to the ROW to accommodate the emergency vehicle pullout indicated in Exhibit A.31.

Applicant Condition 2 Response:

- a. This standard is met, and is shown in the concept drawing and will be proposed more specifically in the GEC permit application.
- b. In exhibit A34, number 2. The fire department was only saying "IF" we plan to erect a gate that those standards would apply, however we do not propose a gate and have not proposed a gate in any of our submittals. A gate is not required in OFC or for Multnomah county and we do not propose to be held to this request of the transportation department as it is not up to their jurisdiction or authority to fabricate this requirement. However, we do plan to post "no parking" and "fire lane" signs in the area of the hammer head as to show and designate that area. These signs will also be posted in the Right of way where an unobstructed width is necessary. This posting of signage will be laid out in our grading and erosion control permit and specific placement of signage can be discussed

with the county.

- c. This improvement has been proposed and will be more specifically laid out in our grading and erosion control permit, this improvement is planned for the Existing pull out that meets current dimensional standards and would only require the improvement of gravel depth and compaction.

3. Obtain a Construction Permit from Multnomah County for all improvements within the County right of way. a,b,c

Applicant Condition 3 Response:

we accept this condition as the road already is meeting this standard and will show in our grading and erosion control paperwork.

4. Obtain a Construction Permit from Multnomah County for all improvements within the County right of way.

Applicants Condition 4 Response:

We consent to this condition and will obtain a construction permit for the development of the ROW that will include information requested in section 4(a,b,c)

5. Dedicate 5 feet of right of way along the subject property's frontage to Multnomah County for road purposes. The minimum County standard right of way for a local access road is 50 feet. The applicant is required to dedicate 5 feet in order to achieve a proportional share of this standard. Contact Pat Hinds at (503) 988-3712 or patrick.j.hinds@multco.us to complete the ROW dedication [MCRR 18.150].

Applicants Condition 5 Response:

The applicant is dedicating 3,200SQFT to the county along the property frontage. Protection of private property in the Fifth Amendment provides that it shall not be taken without compensation, no compensation is being proposed. This forced dedication is an unconstitutional taking of private property under the narrative of "future use". It is purely extortion by the county holding our permits hostage. There is no future possible development as the zoning currently stands for this area. It is not possible for this width of right of way to be necessary unless the lot size zoning were to change and this road was planned for thoroughfare by another development proposal. We are willing to accept this taking of our private property with the proposal of no further deed restrictions. We understand that this requirement is just the county asking for something that is written in code, however it is our right and responsibility to point out that this is unconstitutional at its core. We accept this condition only to move forward with our permit process.

6. Furnish deed restrictions committing the property owner to participate in future right of way improvements. A non-remonstrance agreement, or deed restriction, will require that the property participate in standard Local Access Road improvements along the site's frontage on SE Victory Rd that are not completed as a part of the site's required interim improvements [MCRR 11.100 C]. Contact Pat Hinds at (503) 988-3712 or patrick.j.hinds@multco.us to complete the deed restrictions

Applicants Condition 6 Response: We do not consent to or propose this condition in the slightest. *"As well as necessary improvements to facilitate fire suppression vehicles."* – County

The County continues to ignore the fact that this road currently meets the width standards for the facilitation of fire suppression vehicles and is asking to impose conditions off of baseless claims and nonexistent evidence of safety concerns. *"concern regarding safety issues presented by a substandard width in right of way"* Its not possible to ask for a condition to be imposed because of "safety concerns" when no specific concerns or issues are listed or found by any survey, fire district or county official. On the contrary no safety concerns are found by the fire district, engineers, or surveys. It is the county's responsibility to show the proportionality of their requests which it truly has not shown in facts or specifics of those concerns other than stating a generic trip generation from the ITE General Manual to justify the request. This is not considering our special circumstances or any specifics to our development such as this being a dead end road and only being planned to serve two residential homes in a rural remote area. The county is required to show that this deed restriction "specifically and uniquely attributable" to some harm identified with the Development, which these uniquely attributable harms are not stated in any of the county's self-serving conclusory statements. The municipality may not simply offer conclusory statements that the type of development in question generally results in such harms. Second, the exaction required must be shown to be necessary to alleviate no more than the identified harm. Again the county has not done this.

Our proposed improvements are substantially contributing to our proportional share of development within the ROW and any future required development would be the responsibility of the developer at that time. In the case of Dolan, potential future development it is not related to the request for this current RRV. MCRR Code and the case of Jordan, requires the municipality to demonstrate an actual need for the exaction rather than allowing the municipality to refer to the legitimacy of a town zoning ordinance as a basis for demanding an exaction. The fifth amendment states- "nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This exaction of a deed restriction is unfounded and unconstitutional. This link of "safety concern" needed to be proven by more than self-serving conclusory statements

and that has not been fulfilled. According to the court in *Jordan*, municipalities must show that any exaction (deed restriction) required is necessary, both in extent and degree, to offset a harm identified with the proposed development

“County finds these requirements to be reasonable and roughly proportional to the impact of applicant’s proposed development on the County road system.” Finally, the county has not shown evidence of this proportionality and again has only stated zoning ordinance as a basis for demanding an exaction. This is not evidence of rough proportionality in the slightest. The above statement is just that, a statement and holds zero weight to the evidence required to substantiate such exactions. The applicant is already bringing the ROW road as traveled to the county standard the ¾ of the length of the row, the applicants proportional share of development has been met at that rate and it is not proportional or reasonable to require this condition of a deed restriction.

This condition is not reasonable or considering the significant cost and development we will already be improving upon the road. If this section of Victory road would need to be developed then that would be due to an additional development taking place on another subject property. Which at this time there no possible or proposed development on victory road. We do not have the luxury of the other subject property’s furnishing funds to develop this road and for any future development that would be the responsibility of any future developer if that were to take place. The protection of private property in the Fifth Amendment provides that it shall not be taken... without compensation. an exaction must satisfy to be a valid exercise of the police power under the current standard. By analogy, a legitimate use of the police power (the reflection in the mirror) exists only when a harm (the object creating the reflection) exists and must be alleviated. **If** no identifiable harms related to development exist, no basis for a legitimate use of the municipality’s land-use powers exists either. The county has not identified any harm whatsoever that would occur from the substandard width within this SEC-WR zone by this proposed development. Understandably there is not harm caused because it is a minor section of Extremely low traffic road, that is a relatively flat and straight section of road with optimal sight distance. use of hypothetical figures are insufficient to demonstrate that the exaction was roughly proportional to a harm identified in the case of *Jordan*. The county has neglected to not only demonstrate a harm (because there is none to be found within this section) but has neglected to identify any safety concerns. No harm means that there is no reasonable implementation of a deed restriction upon our land and would only negatively impact the property owner’s rights to their 5th amendment. exaction must be proportional to the harm that gives rise to its need. The county must demonstrate that the proposed action by the developer will either forthwith or in the demonstrably immediate future result in a harm for this specific SEC-WR zone. No harm for this specific area has been identified by the county or a potential for harm in the demonstrably future. The only harm identified is a minor transportation impact that is being mitigated by the widening of the entirety of the road as traveled.

County jurisdictions stop short of requiring a demonstration that the need for the exaction is "specifically and uniquely attributable" to some harm identified with the Development.

In Conclusion:

The county has presented a total of 13 possible conditions or condition aspects to our RRV approval and we have given consent and approval of 7 out of the 13 possible aspects of these conditions. We find that this compromise is roughly proportional to the harm that has been identified as a trip generation of 10trips in a peak hour or 100 trips in a day. We do not agree that this is accurate for our rural area however we have agreed to comply with more than half of these conditions that will bring this local access road to county standards in $\frac{3}{4}$ of the length and to the standard of our local fire district on the $\frac{1}{4}^{\text{th}}$ of the ROW that falls in the SEC-WR zone. We find that this development will be significantly improving the integrity of Victory Road as well the safety and traffic flow. We find that this 7/13 ratio is us accepting and bearing the burden proportionally. We ask that the hearings officer weigh in favor of our constitutional rights and logical reasoning behind our choices to argue some of the proposed conditions by the county. We want to sincerely thank you for your time and careful consideration of this project, RRV and our final responses. This project has been a long and costly road to get to this point and we look forward to living in our dream home on our Victory road property.

Sincerely,

Daniel & Abigail Freeland