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October 2, 2026

ZONING VIOLATION CASE NO. CCPR1-2025-0003

STAFF'S POST-HEARING STATEMENT

Submitted To The Record Via Email

Multnomah County

Land Use Planning Division

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I. Introduction

This statement is timely provided pursuant to the bench order of the Hearings Officer (Sept. 11, 2026) and is provided in supplement to the NOV (Ex. C.6) and the Staff Report (Ex. C.10).

As explained below, staff agrees with Respondents that violations associated with forest practices are preempted. In contrast, Staff does not agree that the violations pertaining to Respondents' activities in Area H (corral site preparation) are preempted and, accordingly, Staff requests that those violations, together with the recommended civil fines and compliance actions associated therewith, be upheld because they are consistent with Code and other law and not overcome by Respondents' defenses or objections thereto.

II. Respondents' Request for Reconsideration of its Motion to Dismiss Should be Denied

Respondents' request for reconsideration of its motion to dismiss (Ex. D.11 at 4) should be denied for the reasons set forth in the Hearings Officer's decision on that motion, for the reasons set forth in Staff's response to that motion, and for the reasons that Respondents have not raised any new basis for reconsideration thereof.

III. Preemption

A. ORS 527.722 (Forest Practices): The Violations Associated with Driveways A–F and Loading Area G are Preempted

Through their pre-hearing memorandum (Ex. D.11) and attachments thereto (Ex. D.12), Respondents have introduced for the first time in this matter evidence of a commercial forestry operation on the Property. The evidence submitted by Respondents is the only evidence in the record pertaining to forest practices on the Property. As such, the record establishes that Respondents actively cultivate and manage Douglas Fir production on the Property and that Driveways A–F and Loading Area G are used directly in that operation.¹ In addition, the record establishes that the Property is located

¹ For convenience, salient elements of the record evidence on commercial forest operations on the Property are compiled in Attachment A hereto.

outside of an acknowledged urban growth boundary, outside of city limits, and is not located on lands for which an acknowledged exception to an agricultural or forest land goal has been taken. Consequently, on the record in this case, Respondents conduct “forest practices” concerning “forest tree species” on “forestland” as each of those terms is defined for purposes of ORS 527.722(1).

This development of the record is significant because local government is prohibited from taking any action that in any way affects forest practices described in ORS 527.722(1):²

“Notwithstanding any provisions of ORS chapters 195, 196, 197, 197A, 215 and 227, and except as provided in subsections (2), (3) and (4) of this section, no unit of local government shall adopt any rules, regulations or ordinances or take any other actions that prohibit, limit, regulate, subject to approval or in any other way affect forest practices on forestlands located outside of an acknowledged urban growth boundary.”³

It is important to note the opening clause of ORS 527.722(1), which makes clear that the provisions therein shall control over (i.e., preempt) conflicting land use regulations. *Accord* ORS 197.277(1) and (2) (subordinating land use regulations to the Oregon Forest Practices Act of which ORS 527.722 is a part).

Consequently, on the record in this case, the alleged violations of MCC 39.6210(A) (requiring permits for ground disturbing activity) and MCC 39.5510(A)(1) (requiring permits for development within the SEC-s) due to excavation and/or filling of Driveways A–F and Loading Area G must be denied because the only evidence in this record is that those activities constitute “forest practice” on “forestland” that, under ORS 527.722(1), may not be subjected to the asserted permit requirements.

² Similarly, this development of the record is significant because of exemptions in the Code for “forest practices;” however, Staff frames this discussion in terms of preemption because preemption under ORS 527.722(1) most simply and conclusively resolves the specified issues in this case.

³ Staff agrees that none of the exceptions in ORS 527.722(2), (3) and (4) apply. Ex. D.11 at 19.

B. ORS 215.253 (Farming Practices): The Area H Violations (Corral) Are Not Preempted

The limitations on regulating farming practices in ORS 215.253 are not as comprehensive as the limitations on regulating forest practices in ORS 527.722. Accordingly, Respondents are incorrect that the ground disturbing activity permit requirement in MCC 39.6210(A) and the SEC-s permit requirement in MCC 39.5510(A)(1) are preempted under ORS 215.253 as applied to Respondents' farming practice of fill placed in preparation of a corral in Area H ("Area H"). Ex. D.11 at 19.

ORS 215.253(1) provides, as relevant here, that counties cannot exercise any of their powers to restrict or regulate farm use land in the EFU in a way that restricts or regulates farming practices:

“No state agency, city, county or political subdivision of this state may exercise any of its powers to enact local laws or ordinances or impose restrictions or regulations affecting any farm use land situated within an exclusive farm use zone established under ORS 215.203 * * * in a manner that would restrict or regulate farm structures or that would restrict or regulate farming practices [as defined in ORS 30.930] * * *.”

Importantly, the legislature did not stop there, and instead went on to unequivocally state in ORS 215.253(2) that the legislature was *not* placing a limit on a county's ability to exercise its power to protect the public health, safety and welfare:

“Nothing in this section is intended to limit or restrict the lawful exercise by any state agency, city, county or political subdivision of its power to protect the health, safety and welfare of the citizens of this state.”

The scope of the power reserved to counties in ORS 215.253(2) is a question of first impression. That said, LUBA has recognized that ORS 215.253 does not impose an “absolute bar on county regulation of farm uses,” explaining that ORS 215.253(2) provides “a potential source of authority for counties to regulate farm uses and farm practices.” *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107, 123 (2004).

LUBA's reading of ORS 215.253 tracks with the Oregon Supreme Court's recognition that “the intent to preclude local regulation must be *unambiguously expressed* in the statute—[the court] will not find it through implication or inference.” *Schwartz v.*

Washington County, 375 Or 227, 241 (2026) (emphasis in original). With that in mind, the question before the Hearings Officer is whether the wording in ORS 215.253(1) unambiguously preempts application of the County’s ground disturbing activity and SEC-s code to Respondents’ activities, taking into account the reservation of authority in ORS 215.253(2).

1. Text

Beginning with the text, Staff acknowledge that ORS 215.253(1) purports to restrict the authority of counties to enact ordinances that impose restrictions or regulations on farm use land in the EFU in a way that restricts or regulates farming practices. *See State v. Gaines* 346 Or 160, 171-72 (2009) (describing statutory interpretation methodology as beginning with text and context before turning to legislative history). However, that is not the end of the inquiry because the text of ORS 215.253(2) provides that “[n]othing in [ORS 215.253],” meaning *nothing* about the wording in ORS 215.253(1), prohibits the county from exercising its “power to protect the health, safety and welfare of the citizens of this state.”

The phrase “power to protect the health, safety and welfare of the citizens of this state” refers to the county’s police power. *See Black’s Law Dictionary* (12th ed 2024) (defining “police power” as “[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice” and “[a] state’s Tenth Amendment right, subject to due-process and other limitations, to establish and enforce laws *protecting the public’s health, safety, and general welfare*, or to delegate this right to local governments” (emphasis added)); *State v. Dickerson*, 356 Or 822, 829 (consulting legal dictionary for established legal meaning of legal terms); *Elkhorn Baptist Church v. Brown*, 366 Or 506, 524 (2020) (quoting *Union Fishermen’s Co. v. Shoemaker*, 98 Or 659, 674 (1920)) (describing police power as “the whole sum of inherent sovereign power which the state possesses, and, within constitutional limitations, may exercise for the promotion of the order, safety, health, morals, and general welfare of the public”). As the relevant legal definitions indicate, the police power is “very broad and farreaching.” *Christian v. La Forge*, 194 Or 450, 460 (1952).

That said, the police power is not unlimited. Exercise of the police power is subject to constitutional limits. *Elkhorn Baptist Church*, 366 Or at 526 (explaining that “courts may intervene if the [police power] regulations exceed constitutional limits”). Those limits include a requirement that the exercise of the police power not be “arbitrary” or “unreasonable.” *Id.* (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905)); *see*

also Christian, 194 Or at 462 (providing that courts must determine whether police power regulations “are reasonable, or are otherwise unconstitutional”). In other words, a law enacted under the police power must “bear some reasonable and substantial relation to the object sought to be accomplished.” *Christian*, 194 Or at 464. In evaluating whether that reasonable relationship exists, courts “accord to the lawmaking body a large discretion in determining not only what the interests of the public require, but also what measures are necessary for the protection of such interests.” *Id.* at 461. In addition, “the courts give due consideration to a declaration therein that the act is in the interests of the public health, safety, and general welfare,” and although such a declaration is “not conclusive,” it is given “great weight.” *Id.* at 462.

Taking the text of ORS 215.253(1) and (2) together, then, counties cannot restrict or regulate farm use land in the EFU in a way that restricts or regulates farming practices, unless those restrictions or regulations bear a reasonable and substantial relationship to the protection of a public health, safety or welfare interest.

2. Legislative History

The legislative history further supports that understanding. As Respondents note, ORS 215.253 originally was enacted in 1973 as part of Senate Bill (SB) 101. Ex. D.11 at 15. However, SB 101 was not the first limitation on regulation of farmland. Section 2 of SB 101 removed a prior preemption in ORS 215.130, which read, “Land within a farm use zone which is used exclusively for farm purposes shall be exempt from regulation under a zoning ordinance enacted by authority of ORS 215.010 to 215.190.” Or Laws 1973, ch 503, §2. That blanket preemption was removed and ORS 215.253 was added, including the significant reservation of police power in ORS 215.253(2). The addition of ORS 215.253(2) led legislators to grapple with the apparent contradiction between the restrictive wording in subsection (1), on the one hand, and the expansive reservation of authority in subsection (2), on the other. *See* Tape Recording, Senate Committee on Environment and Land Use, SB 101, June 7, 1973, Tape 19, side 2 (statement of Sen Wingard) (“When you say in one section of the law that you can’t meddle and then you say in the next section maybe you can, where are we?”). Legislative Counsel Steve Hawes explained the reasoning behind adding subsection (2):

“When it was drafted, there was a realization made that you don’t want to cut out all their authority to regulate. There’s a valid reason for regulation and that is the protection of the public health, welfare and safety. So if you’ve got poisonous

material being carried in the air, from spraying for instance, agricultural spraying causing it, you'll regulate that. You'll say thou shalt not. Because you know what the effect is going to be."

Tape Recording, Senate Committee on Environment and Land Use, SB 101, June 7, 1973, Tape 19, side 2 (statement of Legislative Counsel Steve Hawes). The legislature understood that despite SB 101's prohibition on "unreasonably restricting or regulating accepted farming practices because of * * * materials carried in the air," it would be permissible to regulate poisonous material in the air given such a regulation's reasonable and substantial relationship to public health and safety.

As Respondents note, ORS 215.253 was later amended in 1995 to remove the term "unreasonably" and the reference to "noise, dust, odor or other materials carried in the air or other conditions arising therefrom" from subsection (1). Or Laws 1995, ch 703, §10. The legislative history provides little insight into the reasons for those changes, but there are two notable aspects. First, it is notable that the legislature did *not* amend ORS 215.253(2)—that is, any intent to expand the breadth of ORS 215.253(1) was not accompanied by any narrowing of the reservation of authority in ORS 215.253(2). Had the legislature intended to limit local government police power authority in the 1995 amendments, it ultimately would have had to narrow subsection (2). By leaving ORS 215.253(2) intact, the legislature chose not to unambiguously preempt local government regulation of farming practices when that regulation is for protection of public health, safety and welfare. Second, an additional change in 1995 was to link the definition of "farming practice" in ORS 215.253(1) to the definition thereof in ORS 30.930—because that definition limits "farming practice" to "reasonable and prudent" methods of farm operation there would no longer have been a need frame the prohibition in ORS 215.253(1) in terms of "unreasonable" restrictions because the protected activity itself would now be required to be performed in a "reasonable" manner.

3. Application to Respondents' Activities

Here, Staff acknowledge that MCC 39.6210 and MCC 39.5510 regulate Respondents' farming practices on EFU land by requiring a permit for the filling associated with preparation of a corral in Area H and, therefore, such permit requirements fall within the text of ORS 215.253(1). However, because both permit requirements are reasonably and substantially related to protection of public health, safety and welfare, both permit requirements are permissible under ORS 215.253(2).

MCC 39.6200 provides that the ground disturbing activity permit requirements are intended

“to promote public health, safety and general welfare and to minimize the following risks potentially arising from ground disturbing activity or the establishment or replacement of impervious surfaces; public and private costs, expenses and losses; environmental harm; and human-caused erosion, sedimentation or landslides.”

The County’s legislative declaration that there is a reasonable relationship between ground disturbing activity permits and the protection of public health and safety by addressing risks such as public and private costs and losses, environmental harm, sedimentation, and landslides must be given “great weight,” and Respondents do not dispute the purpose of the ground disturbing activity regulations. *Christian*, 194 Or at 462; Ex. D.11 at 18. Similarly, the SEC permit requirements “protect * * * significant natural and human-made features which are of public value.” MCC 39.5500. Despite those purpose statements, Respondents argue that it is unlikely that the legislature would have intended to allow a purpose statement to overcome the wording of ORS 215.253(1) as amended in 1995. What Respondents do not address is that the legislature chose to maintain expansive local government authority to regulate when it left ORS 215.253(2) unchanged in those same amendments. It is not the purpose statement alone that overcomes ORS 215.253(1); it is both the reservation of authority to local governments in ORS 215.253(2) and the lawful exercise of that authority where there is a reasonable relationship between the regulation and protection of public health, safety and welfare.

To be sure, a purpose statement – and associated regulation – that does not show a reasonable and substantial relationship to public health, safety and welfare would not survive under ORS 215.253, and Respondents essentially have argued that the County’s regulations should not survive for that reason. Ex. D.11 at 18 n 5. In particular, Respondents argue that the County has exempted other activities that “arguably carry far greater potential safety risks than routine farm maintenance” from both permit requirements and has treated risks differently within different jurisdictional boundaries. Ex. D.11 at 18 n 5, 19. However, the fact that the County has not regulated all possible safety risks, or regulates in compliance with external limitations on its authority, does not undermine the health and safety justification for the regulations that have been imposed.

Similarly, Respondents argue that the ground disturbing activity exemption for forest practices, which includes construction and maintenance of roads, undermines any

argument that regulation of those same roads as part of a farming practice is to protect health and safety. Ex. D.11 at 18-19. That argument ignores the preemption in ORS 527.722; the County has no choice but to exempt forest practices from regulation. That limitation, however, does not change the health and safety purposes underlying the County's application of ground disturbing activity permit requirements to fill associated with farming practices.

Finally, Respondents suggest that the County's authority is limited to addressing the risks of farming practices on a case-by-case basis. Ex. D.11 at 19. They assert that the flaw in the County's enforcement action is that it does not address "an actual, documented hazard" and that no "health or safety threat exists." Ex. D.11 at 19. However, the County's authority is not so narrow. Nothing in the text of the statute suggests that the expansive reservation of authority in ORS 215.253(2) is limited to a case-by-case analysis. It would be difficult to "protect the health, safety and welfare" if the County had to show that there was an "actual, documented hazard" occurring before it could act, as Respondents assert. Ex. D.11 at 19. Nothing in the text of ORS 215.253 suggests that the County must wait for harm to occur before it has the authority to regulate.

In sum, the County's permit requirements in MCC 39.6210 and MCC 39.5510 are within the County's lawful exercise of authority to protect public health, safety and welfare under ORS 215.253(2) and therefore are not preempted as applied to Respondents' activities in relation to Corral H.

IV. Standard of Review

Regarding Respondents' statement of the standard of review (Ex. D.11 at 13-14), Staff agrees with Respondents that Staff must "prove the violations alleged by a preponderance of the evidence." MCC 39.1550(C)(1). In addition, Staff agrees that proving the violations includes disproving the existence of exceptions or exemptions to permit requirements by a preponderance of the evidence as well.

"Preponderance of the evidence" means "that the facts asserted are more probably true than false." *State v. Rider*, 157 Or. App. 480, 482, 970 P.2d 258, 259 (1998), quoting *Cook v. Michael*, 214 Or 513, 527, 330 P.2d 1026 (1958). As such, the standard is: (a) less deferential than the substantial evidence standard (*Morgan v. Jackson County*, 78 Or LUBA 188, 198 (2018) (LUBA No. 2017-053, slip op. at 12 (Mar. 16, 2018))); but (b) "is satisfied by a lower degree of certainty than is required in criminal cases where proof

must be beyond a reasonable doubt. *Rider*, 157 Or. App. at FN2, *citing Cook*, 214 Or. at 527 (criminal standard requires facts showing that allegations “are almost certainly true”).

V. The Area H Violations Should Be Upheld

A. Filling in Violation of MCC 39.6210(A) (Ground Disturbing Activity)

The Notice of Violation properly alleges that Respondents conducted filling related to ground preparation for a corral in Area H without the required permit in violation of MCC 39.6210(A).

Under MCC 39.6210(A), a permit is required for “ground disturbing activity,” unless an exemption applies. In relevant part, the term “ground disturbing activity” is defined to include “filling;” the term “fill” (including its gerund form, “filling”) means the deposit of “earth materials” (defined as any rock, natural soil, or combination thereof) by motorized means for any purpose. MCC 39.2000. In short, as relevant to this case, under MCC 39.6210(A), no deposit of soil by mechanized means is allowed without a permit unless an exemption applies. Ex.C.6 at 4, Ex. C.10 at 7 (setting forth the Code standards in further detail).

Under the NOV, Respondents are charged correctly with unpermitted filling in Area H in violation of MCC 39.6210(A). Respondents admit that soil was deposited by motorized means in Area H in June of 2025. Ex. D.11 at 29 (also verifying that Staff’s evidence at Ex. B.14 at 21–24 establishes the same); *see also* Ex. C.10 at 9 (Staff identification of additional evidence in the record supporting this allegation in the NOV). Further, there is no dispute that Respondents have no permit under MCC 39.6210(A) for that activity. As such, the only question remaining under the Code is whether an exemption applies.

The only permit exemption raised by Respondents is the exemption in MCC 39.6215(P) for “placement of gravel or asphalt for the maintenance of existing driveways, roads and other travel surfaces” . Ex. D.11 at 29–30. However, by its plain terms, this exemption does not apply to the subject filling—the subject filling, Area H, is a corral area for goats (Ex. D.11 at 2, 29), not a driveway, road or other travel surface.

Accordingly, for the foregoing reasons, the alleged violation of MCC 39.6210(A) pertaining to Area H should be upheld together with the civil fine and corrective actions proposed therefor, which are discussed further below.

B. Filling in Violation of MCC 39.5510(A)(1) (SEC)

The Notice of Violation properly alleges that Respondents conducted filling related to ground preparation for a corral in Area H without the required permit in violation of MCC 39.5510(A)(1).

Under MCC 39.5510(A)(1), a permit is required for “all development,” unless an exception applies. In relevant part, the term “development” is defined to include filling in excess of 10 cubic yards on any lot or excavation; and, again, the term “fill” (including its gerund form, “filling”) means the deposit of “earth materials” (defined as any rock, natural soil, or combination thereof) by motorized means for any purpose. MCC 39.2000. In short, as relevant to this case, under MCC 39.5510(A)(1), on a project-by-project basis,⁴ no deposit of soil by mechanized means in excess of 10 cubic yards is allowed without a permit unless an exception applies. Ex.C.6 at 4, Ex. C.10 at 7 (setting forth the Code standards in further detail).

Under the NOV, Respondents are charged correctly with unpermitted filling in Area H in violation of MCC 39.5510(A)(1). Evidence in support of this allegation includes:

1. Area H is located within the SEC-s Overlay. Ex. C.10 at 2, and Ex. B.25 at 3 (testimony and documentary evidence showing Area H within the SEC-s Overlay indicated by blue hatch-marked polygons);
2. Area H is within Metro’s 2009 jurisdictional boundary such that the exception in MCC 39.5515(B)(2) from the permit requirement of MCC 39.5510(A)(1) does not apply to the subject activity. Ex. C.10 at 10, and Ex. B.28 at 1 (testimony and documentary evidence establishing the location of Area H within Metro’s 2009 jurisdictional boundary);

⁴ Compare MCC 39.5515(A)(4)(b) expressly stating that a similar threshold (400 square feet) “does not apply on a project-by-project basis.”

3. Respondents admit that soil was deposited by motorized means in Area H in June of 2025. Ex. D.11 at 29 (also verifying that Staff's evidence at Ex. B.14 at 21–24 establishes the same);⁵
4. Using ArcGIS, Staff calculated the Area H fill area at 13,183 square feet. Hearing, Sept. 11, 2026, *Testimony of Staff*; Ex. C.10 at 13, *citing* Ex. B.25 at 1, 3;⁶
5. Assuming an average depth of 1" of deposit across this fill area, the total volume of such fill is 41 cubic yards, well in excess of the 10-cubic-yard-allowance per project. Ex. C.10 at 13, *citing* Ex. B.25 at 1;
6. Such 1" depth is a very conservative assumption:
 - a. Respondents admit that the 2025 corral work included "level[ing] out Area H. Ex. D.11 at 3, 29;
 - b. Consistent with that admission, the images in Ex. B.14 at 21–24 (i.e., the very images that Respondents admit as showing the alleged unlawful activity in June 2025 (Ex. D.11 at 29)) show the significant slope of the land in this area and the substantial amount of fill

⁵ At Ex. D.11 at 59, Respondents identify various other activities also occurring in or around the subject June 2025 filling—all of those activities are *in addition* to the filling admitted by Respondents and none of those activities are of concern here.

⁶ Respondents challenge the use of Google Earth images as lacking authentication of various attributes (*e.g.*, undetermined height, scale, date (Ex. D.11 at 24, 59))—those concerns are unavailing here. The *calculations* used in support of the subject violations derive *solely* from the ArcGIS system relied on by Staff (*i.e.*, not from Google Earth or other aerial images with any unauthenticated attributes). ArcGIS is software designed for analysis and interpretation of spatial data and is the "is the leading geographic information system (GIS) technology." Hearing, Sept. 11, 2026, *Testimony of Staff*; Gartner Peer Insights, *Product Information on ArcGIS* (September 29, 2026, at 11:29 PDT), <https://www.gartner.com/reviews/product/arcgis>; ESRI, *What is ArcGIS?* (September 29, 2026, at 11:34 PDT), <https://www.esri.com/en-us/arcgis/geospatial-platform/overview>.

In contrast, the Google Earth images are offered for what is clearly *depicted*—*i.e.*, the *visible existence* of fill in Area H commencing in 2023 and continuing through 2025 (Ex. B.12 at 1–5); as compared to the *visible nonexistence* thereof just prior to that (Ex. B.12 at 5–9 (2020–2022)).

required to achieve a level corral—quite a bit more than 1” of deposited fill throughout the area.

7. Lastly, there is no dispute that Respondents have no permit under MCC 39.5510(A)(1) for the subject activity;

In light of the foregoing evidence, the only question remaining under the Code is whether an exception applies—the answer is no.

Respondents’ claim of exception from permitting requirements pursuant to MCC 39.5515(A)(2)(c) (allowing certain irrigation maintenance without permits) is unavailing. Ex. D.11 at 61–62. While Respondents appear to describe some activities that might fall within such exception, those activities are not at issue here and Respondents have admitted that they performed the subject activity—mechanized filling of soil for a corral (*i.e.*, not an activity described in the exception). Ex. D.11 at 29.

Similarly, Respondents’ claim of exception from permitting requirements pursuant to MCC 39.5515(A)(4) (allowing expansion of a structure without permits if less than 400 square feet) is unavailing. Respondents assert an impossibility of untangling activity that may have occurred over the years between 1998 and 2025. However, one need look back only so far as February 2025 or November or July 2024 to see that nothing on the order of the fill area established in June 2025 existed prior to that work, including absolutely no evidence of a corral as recently as 2022. Ex. B.12 at 1–3, 6. Accordingly, at a minimum, the evidence establishes by a preponderance of the evidence that the subject filling resulted in an expansion of far more than 400 square feet, if not the establishment of an entirely new structure.

Likewise, Respondents’ claim of exception from permitting requirements pursuant to MCC 39.5515(A)(9) (allowing routine maintenance and repair of lawfully established structures without permits) is unavailing. Respondents admit that the corral work included improving the corral in a “new configuration.” This new configuration is not routine maintenance or repair of an existing use, but, instead, an alteration and expansion of a use to something new. *See* Ex. D.11 at 3.

Accordingly, for the foregoing reasons, the alleged violation of MCC 39.5510(A)(1) pertaining to Area H should be upheld together with the civil fine and corrective actions proposed therefor, as discussed below.

VI. The Proposed Civil Fines Should Be Upheld

If the Hearings Officer affirms either or both of the alleged violations pertaining to Area H, then the respective recommended civil fine should be upheld as well—*i.e.*, \$210.00 per day for the violation of MCC 39.6210(A); and \$315.00 for the violation of MCC 39.5510(A)(1).

Notwithstanding the substantial reduction of alleged violations, no reduction in civil fines is recommended because they were already calculated in the most limited manner—*i.e.*, as a *single* violation of each of the two subject permit requirements. In relevant part, the term “violation” is defined as *any* act that is not allowed and civil fines may be imposed on *each* violation. MCC 39.1500, 39.1560. As such, the Code would allow for the imposition of civil fines on each fill project described in the NOV and the Staff Report (*e.g.*, each of the subject driveways, etc.). However, as discussed in more detail below, to best align with the circumstances of violation, Staff recommended the civil fines be imposed in their most limited form as a single violation of MCC 39.6210(A) and a single violation of MCC 39.5510(A)(1). Because a single violation of each of those permit requirements still remains, no reduction in the proposed civil fines is recommended.

As stated in the NOV, it is further recommended that any civil fine upheld should be imposed on a daily basis, as authorized in MCC 39.1560, beginning on the date of the Hearings Officer’s final order in this matter and continuing until the respective violation is corrected, meaning either: (a) the date on which the fill deposited in violation of the Code is removed from the Property; or (b) the date on which Respondents perfect the permit(s) for the subject fill (*i.e.*, obtain permit approval and meet all applicable requirements and conditions of approval therefor), provided that, under this course of corrective action, Staff recommends that the daily accrual of civil fines be tolled from the date of submission of an application for such permit through: (i) the date of denial thereof; or (ii) in the case of approval, the date by which, under the Code and/or conditions of approval, the permit must be perfected. Ex. C.6 at Sec. II.A and III.C.1. Daily accrual of the fines should occur whenever not tolled and continue until the required compliance action is completed.

A. The Recommended Civil Fines Comply with MCC 39.1530(A) and Due Process

Respondents seek to insert confusion in the foregoing recommendation where there is none and their objections based on failure of the NOV to comply with MCC 39.1530(A) (in relevant part requiring the NOV to contain the fine to be paid) and due process are readily set aside. Ex. D.11 at 4–13, generally, including 4–6, 9–10.

In satisfaction of MCC 39.1530(A) and due process, the NOV clearly states the fines to be paid. At Section II.A and B, the NOV identifies a recommended “continuing civil fine of \$525.00 per day (the total of two daily civil fines of \$210.00 and \$315.00)” based on the acts described in Section I of the NOV, which “constitute a violation of MCC 39.6210 ... and MCC 39.5510 ...” Ex. C.6 at Sec. II.A, B (emphasis added). This statement is unambiguous in recommending a “total,” “daily” fine of \$525 based on the sum of one (i.e., “a”) daily fine for violation of MCC 39.6210(A) and one (i.e., “a”) daily fine for violation of MCC 39.5510. *See also* Ex. C.8 (showing the calculation of a single fine for violation of MCC 39.6210 and a single fine for violation of MCC 39.5510).

In point of fact, contrary to Respondents’ suggestion, the statements at Section II.A and B. of the NOV would be insufficient to impose a fine on any other basis, such as on the basis of each of 13 alleged violations or each of 33 instances of alleged unlawful activity as Respondents suggest. In order to impose civil fines on such bases, language such as “per each violation” or “per each unlawful activity” would have to be added to Section II.A, and Section II.B would require the substitution of “a violation” with “violations”.

Thus, because Section II of the NOV (Ex. C.6 at 6) setting forth the recommended civil fines is clear and not vague, the NOV satisfies both MCC 39.1530(A) and due process requirements and Respondents' objections thereto on these grounds must be denied.

B. The Recommended Civil Fines Are Not Excessive

Similarly, Respondents raise no credible objection to the civil fines as excessive in violation of the 8th Amendment to the U.S. Constitution.

The civil fines are authorized by law, with the potential amount of civil fine being deemed appropriate by the Multnomah County Board of Commissioners ranging from

\$45.00 to \$3,500.00 per day per violation. MCC 39.1560. The specific civil fine to be assessed for a specific violation cannot be arbitrarily determined, but instead must comply with rules established for such calculation (MCC 39.1560(B)), which are exceedingly prescriptive (Ex. C.8, setting forth the required formula and prescribing the appropriate value for each variable therein). As a result, by operation of law and rule, civil fines imposed by the County are narrowly tailored to the associated violation by taking numerous aspects of the circumstances of the alleged violation into consideration, such as degree of intent, prior history, frequency of occurrence, and severity or magnitude.

Here, the recommended civil fines comply with the foregoing law and rules, are at the lower end of the range of potential civil fines, and, as stated above, were calculated in the most limited manner to best align with the circumstances and evidence of the violations as a single violation of MCC 39.6210(A) and a single violation of MCC 39.5510(A)(1), rather than as a series of multiple fines assessed on a series of multiple violations.

Further, the civil fines are imposed for violation of law enacted by the Multnomah County Board of Commissioners to proscribe certain conduct deemed harmful to the community. *See* MCC 39.5500 (stating, *inter alia*, that the purpose of the permit requirements established in MCC 39.6210 is to protect significant environmental features), MCC 39.6200 (stating, *inter alia*, that the purpose of the permit requirements established in MCC 39.6210 is to minimize risks inherent in ground disturbing activity as well as public and private costs and environmental harm).

Under the 8th Amendment, a fine is unconstitutionally excessive if it is: (1) punishment for an offense; and (2) grossly disproportionate to the offense. *United States v. Mackby*, 261 F.3d 821, 829 (9th Cir. 2001) (citing *United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998)). Finding that a civil fine is “grossly disproportionate” essentially requires a complete absence of justification:

“[s]o long as a government provides an unrebutted commonsense explanation or some—even relatively weak—evidence to justify its fine, it will likely prevail against an Excessive Fines Clause challenge.”

Pimentel v. City of Los Angeles, 115 F.4th 1062, 1069 (9th Cir. 2024) (*Pimentel II*). As such, here, the the authorities and reasons described above upon which the recommended civil fines derive establish much more than a “weak” civil fine program and, accordingly, readily dispel any concern under the 8th Amendment

Although unnecessary in light of the County’s robust civil fine program, application of the elements of proportionality to the fines in this case further establish the constitutionality thereof. To determine proportionality, the following factors are balanced; (1) the nature and extent of underlying offense, including violators culpability, (2) whether the underlying offense relates to other illegal activities, (3) whether other, lesser penalties could be imposed for the same offense, and (4) the extent of harm caused by offense. *United States v. \$100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004) (citing *Bajakajian* 524 U.S. at 337-40).

Regarding the first element (nature and extent of underlying offense), culpability increases when a violation is significant or involves reckless behavior; however, even benign actions can result in non-minimal culpability. *Pimentel v. City of Los Angeles*, 974 F.3d 917, 923 (9th Cir. 2020). For instance, overstaying a parking meter was found to be minimal but not de minimis, since violators were culpable for violating municipal code. *Pimentel II* 115 F.4th at 1068. As such, this factor weighs in favor of the constitutionality of the recommended civil fines in that violation of Code is viewed, at the very least, as a minimal degree of culpability (*i.e.*, more than de minimis).

The second element (whether the underlying offense relates to illegal activities) is often neutral in civil contexts, since offenses have “no nexus to other illegal activity.” *Pimentel II*, 115 F.4th at 1068. This holds true for the present case.

The third element (whether lesser penalties could be imposed) refers to “other penalties the legislature has authorized,” not hypothetical penalties. *Pimentel II*, 115 F.4th at 1068. Here, there is no separate and distinct penalty available. Further, as explained above, the recommended civil fines have been calculated in the most limited manner to best align with the circumstances and evidence of this case. As such, this factor weighs in favor of the constitutionality of the recommended civil fines in that no lesser, non-hypothetical penalty could be imposed.

The final element (extent of harm from offense) includes consideration of both monetary and non-monetary harms. *Pimentel*, 115 F.4th at 1068. This can include considerations of how a “violation erodes the government’s purposes for proscribing the

conduct.” *Id.* at 1068-69. For a parking violation, the court considered the administrative costs of collecting fines and time-value of fees not collected as well as the government’s interest in ensuring compliance with the law, “even for a matter as seemingly trifling” as parking. *Id.* at 1069. Relevant harm may also include harm that falls on the community—the Ninth Circuit did not require quantitative justification and found for a county that provided specific legislative findings that unlicensed short-term rentals harm affordable housing availability, increase public nuisance, and interfere with tax collection. *Diamond Sands Apartments, LLC v. Clark Cnty, Nevada*, 164 F.4th 759, 764 (9th Cir. 2026). As such, this factor weighs strongly in favor of the constitutionality of the recommended civil fines as the subject harms implicate both the county’s interest in ensuring compliance with law as well as the avoidance of harms to property, the community, and the environment (*i.e.*, as explained above, the harms sought to be avoided through the subject permit programs).

Thus, for the foregoing reasons, the recommended civil fines do not violate the 8th Amendment to the U.S. Constitution and Respondents’ objections on these grounds must be denied.

VII. The Proposed Compliance Actions Should Be Upheld

If the Hearings Officer affirms either or both of the alleged violations pertaining to Area H, then the recommended compliance actions set forth in Ex. C.6, Sec. III, should be upheld as well.

As above, Respondents seek to insert confusion into this recommendation where there is none (Ex. D.11 at 4–13, generally). Quite simply, Respondents must either seek and perfect the required permit(s) or remove from the Property the fill that gave rise to the violation(s).

Respondents’ objections to alleged vagaries of the permitting process are unavailing—they are simply describing the Oregon land use permitting process. No applicant “knows” in advance whether they will obtain a land use permit—land use decisions involve discretionary determinations and, accordingly, could result in either of two outcomes, approval or denial. Indeed, it is unlawful to render a land use decision outside of land use permitting procedures. ORS 197.835. Of note, the fact that Respondents would be seeking retroactive approval does not change anything because, like a permit properly sought in advance, analysis of retroactive approval of development

proceeds as if the development does not already exist. *Bishop et al v. Deschutes County*, 79 Or LUBA 380, 417 (2019). As such, Staff has no obligation to identify, and indeed is prohibited from identifying, one or more specific permits that Respondents *can* obtain—instead, it is Respondents’ obligation to engage the process of obtaining a permit (including, if necessary, altering their proposed use to one allowed under the Code) or to bring their use within an exemption or exception to permit requirements (*i.e.*, normal land use process).⁷

Similarly, Respondents’ alleged vagaries as to the fill-removal compliance action option are unavailing. The test is simply: return the site to its pre-filling condition. The evidence establishes that this means the removal of fill in the amount of at least 41 cubic yards from at least a 13,183 square foot area. Further, the evidence establishes that the condition of Area H as depicted in images such as Ex. B.25 at 3 (bottom right), Ex. B.12 at 1–4, and Ex. B.14 at 21–24 must be returned to the condition of Area H depicted in Ex. B.12 at, for instance, 6 (6/30/2022) (*see also* Ex. B.12 at 7 and 8 (2021), 9 (2020)).

Lastly, contrary to Respondents’ assertions, the fill-removal remedy does not leave Respondents open to never-ending dispute. Ex. D.11 at 7–9. As with all laws, it is Respondents’ obligation to bring their activities within the allowances of the Code (and other laws) and any order of the Hearings Officer. If, in the future, Staff believes Respondents have failed in that regard and enforcement becomes necessary, that would be a new case once again benefitting from the protections of due process requirements,

⁷ Respondents also claim uncertainty about the standards applicable to permits for retroactive approval and whether they must engage in multiple permitting procedures, but these concerns are clearly addressed as basic elements of the Oregon land use framework. In all cases, including retroactive approval, approval or denial of an application is based upon the standards and criteria applicable at the time the application is first submitted. ORS 215.427(3)(a) (goal post rule); *Bishop et al v. Deschutes County*, 79 Or LUBA 380, 417 (2019) (analysis of retroactive approval of development should proceed as if the development does not already exist); *Dep’t of Land Conservation & Dev. v. Jefferson County*, 220 Or. App. 518, 523, 188 P.3d 313, 316 (2008) (“By its terms, the statute ensures that an applicant who has otherwise fulfilled the statutory requirements will be subject to the ‘standards and criteria that were applicable at the time the application was first submitted.’”). As for concern over the processing of multiple permits, an applicant may have a choice, but, at the very least, counties are required to establish a consolidated procedure for land use permits. ORS 215.416(2).

including a neutral decision maker—that is, Staff cannot simply tell Respondents that more must be done.⁸

Thus, because Section III of the NOV (Ex. C.6 at 6) setting forth the recommended compliance actions is clear and not vague, the NOV satisfies both MCC 39.1530(A) and due process requirements and Respondents' objections thereto on these grounds must be denied.

VIII. Conclusion

For the foregoing reasons, Staff recommends and requests that the Hearings Officer uphold the two violations pertaining to Respondents' unlawful fill activities in Area H, together with the recommended civil fines and compliance actions associated therewith.

⁸ Respondents express confusion over the recommendation in Section III.C.2 of the NOV (Ex. C.6 at 6) that Respondents meet with Staff in the event of Permit denial. Ex. D.11 at 8–9. This step is recommended as there are a few options at that point: the availability of other permits can be further explored (including exploration of alteration of use to come within a potential permit or exception or exemption from permits); or Respondents could then pivot to the recommended compliance action of removing the unlawful fill. Although the latter option is already a recommended compliance action, the purpose of meeting with Staff could include consideration of entering into a voluntary compliance agreement under MCC 39.1525, one benefit of which can be the tolling of accrual of civil fines.

ATTACHMENT A

Excerpt of Evidence of Commercial Forest Operation on the Property

The record evidence of commercial forest operation on the Property (*i.e.*, forest practices) includes the following:

1. *Stipulated Facts*: The subject property (Property) is located outside of an acknowledged urban growth boundary, outside of city limits, and is not located on lands for which an acknowledged exception to an agricultural or forest land goal has been taken.
2. Prior to [Respondent's] purchase of the Property, the Property had been in commercial farm and forest use since the 1930s. Ex. D.11 at 2; Ex. D.12 at 3 ¶ 5.
3. Respondents purchased the property with the intention of continuing to farm and produce timber on the property and have used the property since acquisition exclusively for farm use and forest practices. Ex. D.11 at 2; Ex. D.12 at 3 ¶ 7.
4. Today, the Property is home to both Fat Goat Co. and Springwood Acres Farm – two commercial farming ventures run by the Respondents. Additionally, the Eastern Portion of the property includes approximately 20 acres of commercial timber that Respondents actively manage. Ex. D.11 at 2; Ex. D.12 at 3 ¶ 6.
5. Respondents actively cultivate and manage Douglas Fir (*Pseudotsuga menziesii*), a primary merchantable tree species central to Oregon timber production. Ex. D.11 at 3; Ex. D.12 at 3 ¶ 6; See Kyaw, Hsu Y. et al., *Optimal Forest Management of Douglas-fir in Western Oregon: Stochastic Prices, Carbon Sequestration and Wildfire Risk* (September 18, 2026, at 11:21 PDT) (Douglas-fir is the most commercially significant species in Oregon's timber stock), <https://www.sciencedirect.com/science/article/abs/pii/S1389934125002084>.
6. These trees were established as seedlings around 2007 after the prior owners clear cut most of the existing tree stands. Ex. D.11 at 3; Ex. D.12 at 3 ¶ 6; Ex. D.12 at 15, 16.
7. To maintain these timber stands, Respondents perform regular stand maintenance and timber release activities, such as mechanical vegetative clearing and

precommercial thinning, to ensure appropriate tree spacing and unimpeded canopy growth. Ex. D.11 at 3; Ex. D.12 at 4 ¶ 11; Ex. D.12 at 11.

8. Respondents also carry out routine and vital forest protection and infrastructure measures required to sustain a healthy working tree farm, including seedling protection from browse damage, insect and disease management, and slash disposal to mitigate wildfire risk.. *Id.*
9. Respondents use timber harvested from their properties to create merchantable wood products such as firewood, slabs, and boards. Ex. D.11 at 3; Ex. D.12 at 12–14.
10. Additionally, to ensure continuous equipment and vehicular access across the terrain, Respondents perform necessary road construction and routine road maintenance. Ex. D.11 at 3; Ex. D.12 at 5 ¶ 19.
11. Respondents access and maintain their timber stand using the network of roads on the Property, including those referred to in the Staff Report as “Private Driveways” A, B, C, D, E, and F. Ex. D.11 at 3; Ex. D.12 at 4–5 ¶ 11–19
12. Loading Area G serves as Respondents’ “woodlot” and is used for timber product and slash processing, storage and disposal and the storage and maintenance of materials and equipment used in the forestry operation. Ex. D.11 at 20; Ex. D.12 at 4–5 ¶ 13, 14, 16, 18, 20.