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October 23, 2026

Multnomah County Land Use Planning
1600 SE 190th Ave,
Portland, OR 97233

RE: Respondents' Reply to Multnomah County's Post-Hearing Statement

Officer Doughman,

Please consider this Respondents Scott and Stacy Reed's Reply to Multnomah County's Post-Hearing Statement. Respondents appreciate the County's concession that its permit requirements are preempted as applied to Areas A–G. The Hearings Officer should therefore dismiss those alleged violations. This reply focuses on the remaining legal and evidentiary issues concerning Corral Area H, the associated fines, and the proposed compliance measures.

The County also seeks to clarify that, despite identifying 33 instances of alleged noncompliance over five years, it charges Respondents with only one violation of MCC 39.6210(A) and one violation of MCC 39.5510, carrying daily fines of $210 and $315, respectively (a combined $525 per day). Although the County admits that the code's definition of "violation" encompasses *any* prohibited act (thus allowing the County or Hearings Officer to impose a separate fine for each act described in the Staff Report), the County has chosen to treat those acts collectively as only two violations.

As explained herein, the County's remaining arguments are unpersuasive: ORS 215.253(1) preempts its regulation of the goat corral, and the County has not overcome the evidentiary deficiencies identified by Respondents. The County's post-hearing explanation does not resolve whether the original NOV satisfied due process. Nor does clarifying the number of fines eliminate the continuing uncertainty over what Respondents must do to stop each daily fine from accruing. The County cannot cure these procedural defects simply by explaining its position more clearly months after the NOV was served on Respondents and after the hearing is over.

I. The County Misinterprets and Misapplies ORS 215.253(2):

This case requires the Hearings Officer to determine the strength of ORS 215.253(1), and the proper interpretation and implementation of the "health, safety, and welfare" carveout provided in ORS 215.253(2). As explained in greater detail below, Respondents argue that ORS 215.253(1) is intended to provide significant protection for farm practices in the farm zone as this is a foundational element of Oregon's land use planning system and exclusive farm use (EFU) zoning. Accordingly, under ORS 215.253(2), a local government is preempted from restricting or regulating farming practices on EFU zoned land unless it is within a lawful exercise of the local government's authority to protect the health, safety, and welfare of local residents.

The County acknowledges that MCC 39.6210 (Ground Disturbing Activity) and MCC 39.5510 (SEC-s Overlay) regulate Respondents' farming practices on EFU land by requiring a permit for the filling associated with preparation of a goat corral in Area H and, therefore, such permit requirements fall within the text of ORS 215.253(1). See Staff's Post-Hearing Statement ("Statement") at 8. However, the County broadens ORS 215.253(2) to assert that the exemption is synonymous with the exercise of its police power. Consequently, the County asserts that both permit requirements are "reasonably and substantially related to protection of public health, safety and welfare" and thus are permissible under ORS 215.253(2). Id.

This cannot be correct. ORS 215.253(1)–(2) must be read to preserve **both** its restriction on regulation of protected farming practices and its reservation of lawful protective authority. If subsection (2) simply preserves every constitutionally permissible exercise of police power, subsection (1) would provide little meaningful protection, and the exception would swallow the rule. Respondents instead contend that the reservation requires a demonstrated connection between the restrictions or regulation imposed and protection of the public's health, safety, or welfare. In this case, requiring Respondents to retroactively obtain Ground Disturbing Activity Permits or SEC-s Overlay permits for leveling and filling in a goat corral.

Therefore, the question is not whether the County has general authority to regulate farming practices to protect public health, safety, and welfare. It is whether that reservation authorizes the particular permit requirements the County seeks to impose on Respondents and whether the exercise of that authority is warranted here. This is a matter of proper statutory interpretation and implementation.

As explained below, to read ORS 215.253(2) as broadly and expansively as the County would render ORS 215.253(1) meaningless and would justify the County requiring farmers to obtain countless land use approvals just conduct basic farming activities in the farm zone.

(a) The County Cannot Overcome ORS 215.253(1) Merely By Declaring That Its Ground-Disturbing Activity Permit Requirements Protect Public Health, Safety, And Welfare:

The County points to MCC 39.6200, which explains the County's reasons for requiring ground disturbing activity permits:

> *"[…] 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.*"

According to the County, the fact that this purpose statement exists in the code is all that is needed to overcome ORS 215.253(1). This cannot be the case.

ORS 215.253(1) expressly limits the County's authority to restrict or regulate farming practices on qualifying farmland. Subsection (2) preserves the lawful exercise of authority to protect public health, safety, and welfare. If a general purpose statement is sufficient to bring every application of its permit requirements within subsection (2), then the protection in subsection (1) would depend exclusively on how the County introduces an ordinance. The County could avoid that protection simply by placing a health, safety, and welfare statement at the beginning of *any* regulation affecting farming practices, or more generally, at the beginning of Chapter 39 of the MCC. Nearly any land-use restriction could be described as addressing public costs or general welfare. Under that interpretation, subsection (2) would swallow subsection (1), leaving the statutory protection with little practical effect.

The County's own code illustrates the flaw in its argument. MCC 39.6210(A) requires a property owner to obtain a ground disturbing permit for any "ground disturbing activity". "Ground disturbing activity" is defined in MCC 39.2000 as:

> "*Any excavating or filling or combination thereof.*"

The term "excavation" is defined in MCC 39.2000 as:

> "*The motorized removal of earth material or other motorized activity resulting in the exposure of the ground surface or other earth layer to wind, water, ice, gravity, or other element, including, but not limited to, cutting, digging, grading, stripping, trenching, dredging, bulldozing, benching, terracing, mining of quarrying, and vegetation or tree removal. Work conducted by hand without the use of motorized equipment is not excavating*"

"Fill" is defined in MCC 39.2000 as:

> "*The deposit (noun or verb) of any earth materials by motorized means for any purpose, including, but not limited to, stockpiling, storage, dumping, raising elevation or topography, and tracking materials such as mud onto a road surface with vehicle tires. Work conducted by hand without the use of motorized equipment is not filling. For the purposes of this code, fill does not include materials included in a design by a registered professional engineer to physically support and/or protect a structure or access road for essential and public facilities subject to earthquake or tsunami building code requirements of the Oregon Structural Specialty Code."*

By its terms, a farmer plowing a field with a tractor would be engaged in "ground disturbing activity" as defined in MCC 39.2000, as the farmer is both removing earth material that results in the exposure of subsurface earth to wind, water, gravity[1], etc. (i.e. excavating) and depositing earth materials by motorized means for any purpose (i.e. filling).

The spectacular breadth of the code definitions of "ground disturbing activity", "excavating" and "fill" would require a farmer to obtain a ground disturbing activity permit under MCC 39.6210(A) for the most basic of daily farm activities. If the County is correct that ORS 215.253(2) enables a local government to exempt what are obviously "farm uses" (and the County acknowledges in this case that everything that Respondents have allegedly done to require a permit under MCC 39.6210(A) is either a "farm use" or a forest use), then the preemption in ORS 215.253(1) is meaningless. That cannot be what the legislature intended.

The Oregon Supreme Court rejected a comparable effort to read a reservation of county authority so broadly that it defeated statutory preemption in *1000 Friends of Oregon v. Land Conservation & Development Commission*, 303 Or. 430, 440–42, 737 P.2d 607 (1987). There, the Forest Practices Act generally prohibited local regulation of covered forest operations while preserving specified county planning authority. The Court rejected an interpretation that would allow counties to regulate those operations whenever they considered regulation necessary to protect Goal 5 resources. That reading allowed the exception to swallow the rule and undermined the legislature's objective of uniform regulation. *Id.* at 441.

The same interpretive problem arises here. Under the County's position, it could avoid ORS 215.253(1) simply by adding a health, safety, and welfare statement to any ordinance regulating farming practices. The legislature's express restriction would then have no independent force: the County could invoke subsection (2) merely by announcing a protective purpose. Subsection (1) would cease to limit the County's authority and become nothing more than a drafting obstacle. *1000 Friends* counsels against that result.

[1] We're not physicists, but isn't all soil exposed to gravity at all times, regardless of whether it's on the surface or below the surface?

(b) SEC-S Overlay Permits Are Unrelated To Public Health, Safety, Or Welfare:

The County acknowledges that 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. Statement at 9. Yet the County fails to provide a purpose statement or any findings showing that SEC-s Overlay permits show a reasonable and substantial relationship to public health, safety and welfare. That is because no such language or findings exists.

The SEC-s Overlay permits have nothing to do with public health, safety, or welfare. Instead, the SEC-s Overlay permits are related to supporting conservation, aesthetics, recreation, and tourism:

> *"The purposes of the Significant Environmental Concern Overlays, MCC 39.5500 through MCC 39.5590 (collectively, the "SEC Overlays") are to protect, conserve, enhance, restore, and maintain significant natural and human-made features which are of public value, including among other things, river corridors, streams, lakes and islands, domestic water supply watersheds, flood water storage areas, natural shorelines and unique vegetation, wetlands, wildlife and fish habitats, significant geological features, tourist attractions, archaeological features and sites, and scenic views and vistas, and to establish criteria, standards, and procedures for the development, change of use, or alteration of such features or of the lands adjacent thereto."*

See MCC § 39.5500.

Therefore, even if the Hearings Officer agrees with the County's interpretation of ORS 215.253(2), the Hearings Officer cannot find that requiring farmers to get SEC-s Overlay permits before they farm in a farm zone is "reasonably and substantially related to protection of public health, safety and welfare" of Multnomah County residents. That assumption is not supported by the plain language of the code, any findings in the record, or evidence presented by the County.

A plain reading of Multnomah County's code explains why the Hearings Officer should not supply the justification the County has failed to establish. The County requires an SEC-s Overlay permit anytime "development" of a certain quantity occurs with the SEC-s Overlay. "Development" is defined as:

> *"Any human-made change defined as buildings or other structures, mining, dredging, paving, filling, or grading in amounts greater than ten (10) cubic yards on any lot or excavation. Any other activity that results in the removal of more than 10 percent of the existing vegetation in the Riparian Area on a lot or parcel."*

See MCC § 39.5520. The term "excavation" is defined in MCC 39.2000 and is set forth above.

As set out above, based upon Multnomah County's code, any time a farmer is using motorized equipment in an SEC-s overlay, and the earth is in any way disturbed, they are "excavating." If that "excavation" exceeds 10 cubic yards that triggers an SEC-s overlay permit. In practice, this

requires a farmer to somehow quantify and keep track of how much "exposure" of the earth they are causing every time they use a tractor, combine, harvester, Kubota, four-wheeler, truck or any other piece of motorized equipment in an SEC-s overlay. If they somehow expose more than 10 cubic yards of earth, they need to halt their farming activities and apply for a permit before they can go back to work on their farm. One can imagine how quickly this could become a serious headache when farmers start discing fields, plowing soil, preparing seedbeds, or in this case – repairing farm roads, travel surfaces, or maintaining farm structures.

If the purpose statement outlined in MCC § 39.5500 is all that is required to defeat the preemption in ORS 215.253(1), then farmers in Multnomah County will be required to expend time and resources complying with SEC-s Overlay requirements and risk liability every time they do *anything* with motorized equipment in an SEC-s Overlay zone. That result would render ORS 215.253(1) wholly meaningless.

(c) The Evidence In The Record Makes The County's Reliance On Its Purpose Statements Even Less Persuasive:

First, the County's own records undermine its public-health-and-safety justification. For example, the Stop Work Order (SWO) used in this case identified "environmental harm" as the justification for the SWO. The County left "Danger to Health & Safety" unchecked. Ex. C.2 at 1. The County later assigned the alleged ground-disturbing activity violation a gravity rating of "2" – a category expressly defined as presenting no immediate threat to public health, safety, or natural resources, with corrective action that can occur in due course without risking irreparable harm. Ex. C.8 at 1, 3. These assessments do not support the County's suggestion that preemptive or retroactive permit approval is necessary to address a public health-and-safety threat in this case.

Additionally, as explained in detail in Respondents Memorandum, the Oregon Department of Agriculture's December 2, 2025 letter further undermines the County's justification for requiring ground disturbing activity or SEC-s Overlay permits for maintaining the goat corral. After reviewing photographs submitted in response to a water-quality complaint, ODA found no water-quality concerns in the photographed areas and concluded that conditions on the property complied with the applicable agricultural water-quality requirements. Resp. Ex. K. ODA is the authority to regulate how agricultural practices may affect or harm water quality and thus public health and safety.

The County identified no immediate threat to public health and safety, and ODA found no water-quality concerns in the areas it reviewed. Yet the County asks the Hearings Officer to disregard those assessments and accept its purpose statement as a blank check to regulate protected farming practices. The County cannot manufacture a public health-and-safety justification by pointing to the opening paragraph of its own ordinance. If that were enough, ORS 215.253(1) would protect farmers from nothing more than poorly drafted purpose statements.

To note, the County argues that Respondents' interpretation would require the County to wait for harm to occur before regulating. That is not what Respondents are arguing. 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. As explained above, Respondents' arguments center on proof of a legitimate risk stemming from the farm practice being regulated, not proof of completed injury. Respondents contend that the County may not require a permit for an otherwise protected farming practice without demonstrating that the activity presents a public health, safety, or welfare risk justifying the restriction.

If both local and state regulators found that there was no threat to public health and safety from Respondents filling the goat corral without permits, then how can the County rely on a general-purpose statement to sidestep ORS 215.253(1)? The County cannot use a general-purpose statement to assume the very safety risk its own assessments failed to identify.

II. The Parties Agree On The Evidentiary Standard, But The County Still Fails To Meet Its Burden:

The County acknowledges that it must prove the alleged violations by a preponderance of the evidence. In addition, the County acknowledges that proving the violations includes disproving the existence of exceptions or exemptions to permit requirements by a preponderance of the evidence as well. The Hearings Officer must apply that burden to each remaining allegation related to Corral Area H and each exemption supported by the record.

To prevail on the remaining violations, the County must prove each alleged violation by a preponderance of the evidence. MCC 39.1550(C)(1). For the ground-disturbing activity charge, it must prove that Respondents deposited earth materials by motorized means in Corral Area H without a required ground-disturbing activity permit and that no exemption applies. MCC 39.2000, 39.6210(A), 39.6215. For the SEC-s charge, it must prove that Respondents deposited more than ten (10) cubic yards of nonexempt earth materials by motorized means within the SEC-s overlay without required approval and that no exemption applies. MCC 39.2000, 39.5510(A)(1), 39.5520, 39.5515.

Respondents challenge the County's evidence on several grounds. Respondents raise significant concerns about the reliability of the Google Earth Images collected by the County. Additionally, Respondents argue that the County's aerial photographs do not show motorized placement of fill in Area H. Ex. D.11 at 29. The County somewhat acknowledges this and focuses on Respondents' acknowledgement that soil was deposited by motorized means in Area H in June of 2025. Statement at 11; citing Ex. D.11 at 29.

Of all of the evidence put forth by the County, only Ex. B.14 photos 9296-9299 depict soil being deposited by motorized means in Corral Area H. This is a requirement for the County to prove both ground disturbing activity and "development" in the SEC-s Overlay. Accordingly, the only reliable evidence and potential instance of alleged wrongful activity is the activity that occurred in

June of 2025 when Multnomah County code enforcement inspected the Property from a public right of way, and saw motorized activity occurring. As such, the Hearings Officer should disregard the aerial images submitted in relation to Corral Area H on prior dates and focus its inquiry to the June 2025 activity.

In June 2025, Respondents repaired drainage infrastructure in Corral Area H during the same period the County attributes to the unlawful development and ground disturbing activity. As explained in Respondents' memorandum, KEN Construction replaced culverts, broken drain tiles, and overgrown drainage ditches. That work required excavation and fill to restore proper drainage and ended with the new corral structure and travel surface being finished over the top. Respondents explained this work and connected it to Ex. B.14 photos 9296-9299. Ex. D.11 at 59, 61–62 (citing Resp. Ex. C, ¶¶ 21, 24, and Resp. Ex. P).

Despite Respondents acknowledging that fill was deposited in the corral at this time, the County still bears the burden of proving that the fill is not exempt under the County's code, and in the case of SEC-S Overlay permits, that non-exempt fill was of a requisite volume to trigger a permit. As explained in Respondents memorandum and in more detail below, the County has failed to do so:

(a) SEC-s Overlay – The County Has Not Met Its Burden of Proof to Establish That Respondents Engaged in Non-Exempt Development or Expansion Beyond Exempt Thresholds:

The County never conducted an engineering review to prove that Respondents engaged in development significant enough to trigger an SEC-s Overlay permit. Staff Report at 12-13. Instead, the County overlayed a 1998 aerial image onto a 2025 aerial image taken from satellite imagery. Using desktop GIS polygon tracing, County staff manually drew boundaries over the aerial imagery to delineate the bounds of Corral Area H. Id. Comparing the two, the County concludes that Corral Area H had been "disturbed" by 13,183 square feet. Id. The County then acknowledges that it has never conducted a site visit or done any actual measuring of the development, so it assumes a "an average depth of 1 inch of excavation and/or deposit of material across the developed area" to determine that the alleged development has moved 41 cubic yards. Id.

In its Post-Hearing Statement, the County acknowledges that some of the depicted work may qualify for the exemption in MCC 39.5515(A)(2)(c) from the SEC-s Overlay permit, but dismisses it because Respondents also admit to filling in the corral in June 2025. Statement at 14. **The County misses the point.** To prevail on this violation, the County must prove that nonexempt filling by motorized means exceeded ten (10) cubic yards. MCC 39.5520. It cannot count material placed during exempt drainage maintenance to establish its threshold. Yet its volume calculation treats the entire measured area as nonexempt fill without separating the drainage work from corral preparation, and the photos taken from the right of way of that exempt work are the only reliable evidence the County has to rely upon that development occurred via motorized means. The County

has failed to produce any evidence establishing that Respondents deposited more than ten (10) cubic yards of non-exempt material by motorized means.

Again, the County's 13,183-square-foot calculation combines changes over 27 years, from 1998 to 2025. Staff Report at 12. But the ten-cubic-yard threshold applies to a particular filling project – not every change accumulated over decades. The County has introduced zero measurements for how much soil was deposited in June of 2025. The inspector observed motorized activity in June 2025. The County could have sought access to measure the deposited material that day or shortly afterward, while the work was fresh and identifiable. It did not. The County could have inquired with the workers depicted in the photos as to what work they were doing and why they were doing it. It did not. Instead, the County assumed it was unlawful activity, drew a footprint from aerial images spanning decades, and assumed a one-inch depth. That calculation does not establish how much nonexempt fill Respondents deposited by motorized means. The County fails to meet its threshold burden.

Similarly, MCC 39.5515(A)(4) exempts changes, alterations, or expansions of a lawfully established use or structure from SEC approval if they do not increase ground coverage by more than 400 square feet. In its Post-Hearing Statement, the County once again attempts to shift its evidentiary burden, asking the Hearings Officer to infer facts and measurements that the County is required to prove. Rather than providing an established baseline or actual measurements, the County asserts that "one need look back" at aerial images to conclude the work expanded coverage by "far more than 400 square feet" (Ex. C.14 at 14). The County offers no concrete data, instead asking the Hearings Officer to rely on unverified Google Earth photographs and simply "trust" its visual estimates. Speculation from aerial imagery cannot substitute for actual evidence.

The parties dispute that Corral Area H is a lawfully established use and structure. As explained in Respondents' memorandum and Scott Reed's declaration, which the County does not challenge, Corral Area H has been used as a corral and is the area in which Respondents have sold their goats since 2014. Ex. D.11 at 62 (citing Resp. Ex. C, ¶ 23). Prior to replacing it in 2025, Respondents used a makeshift corral and loading area in the same location. Id. Just because this makeshift corral doesn't show up on the County's Google Earth search, doesn't mean it didn't exist and Respondents didn't use Corral Area H animal husbandry and livestock sales, which is outright allowed in the EFU zone.

The County ultimately asks the Hearings Officer to assume a baseline, boundaries, and measurements, and then declare the increase greater than 400 square feet. The County bears the burden of disproving the exemption by a preponderance of the evidence. Relying on assumptions and repeating that its conclusion is obvious does not satisfy that burden.

Under MCC 39.5515(A)(9), the routine repair and maintenance of lawfully established structures, roadways, and driveways are exempt from SEC Overlay permit requirements. The County's evidence fails to demonstrate that Respondents' activities were anything other than exempt repair

and maintenance. The letter from KEN Construction confirms that the existing corral gravel pad had deteriorated over time, and that the fencing and pad were merely replaced to restore the corral to its prior functional state (Resp. Ex. P). Consequently, the preponderance of evidence shows that the activities in Corral Area H constitute routine repair and maintenance of lawfully established structures and roadways.

(b) Ground Disturbing Activity – Corral Area H Qualifies As An Exempt Travel Surface Under MCC 39.6215(P), And The County's Permit Requirement Is Preempted By ORS 215.253(1).

First, Respondents dispute that Corral Area H is not a "travel surface". Corral Area H includes both the corral structure and the surrounding loading area where customers bring trucks and trailers to load goats safely and transport them off the property. Respondents explained that distinction in their September 10 memorandum. Ex. D.11 at 29–30 (citing Resp. Ex. C, ¶¶ 23–25). This was also explained in detail at the violation hearing. Calling the entire area a "corral" does not erase its function as a travel surface. MCC 39.6215(P) exempts the placement of gravel or asphalt to maintain existing driveways, roads, and other travel surfaces. That exemption applies to Corral Area H. The County must distinguish the exempt placement of gravel in the corral area from non-exempt fill. Regardless, Respondents admit that soil was deposited by motorized means in Area H in June of 2025. Ex. D.11 at 29. Ex. B.14 photos 9296-9299 depict as much.

However, Respondents maintain that requiring farmers to obtain local permits before placing soil on agricultural land or within livestock areas impermissibly restricts accepted farming practices and is preempted by ORS 215.253(1). This regulatory conflict is made starker by the County's illogical enforcement scheme: while the County permits farmers to deposit gravel, it penalizes the deposition of soil. The County offers no rationale for why placing soil poses a greater threat to public health or safety than placing gravel. This arbitrary distinction in the Multnomah County Code undermines the credibility of the County's position and highlights precisely why its permit scheme constitutes an unreasonable restriction preempted under ORS 215.253(1).

III. The County's Post-Hearing Clarifications Cannot Cure Its Procedural Defects:

In its Post-Hearing Statement, the County clarifies that, despite alleging 33 instances of noncompliance over five years, it charges Respondents with only one violation of MCC 39.6210(A) and one violation of MCC 39.5510, carrying daily fines of $210 and $315, respectively. Although the County acknowledges that the Code would treat each prohibited act as a distinct violation, it has chosen to group the alleged acts collectively into two violations.

The County nevertheless accuses Respondents of seeking to "insert confusion" where none exists. That characterization is unwarranted. Given the Code's definition of "violation" (MCC 39.1505) and the Staff Report's presentation of 33 discrete instances of noncompliance, Respondents reasonably understood that each instance required a defense, carried its own penalty, and

demanded individual remediation. The County's decision to group those acts into only two violations was hardly self-evident. The County cannot dismiss genuine uncertainty as manufactured confusion simply because it has finally clarified its position post-hearing.

The details of the County's allegations matter. A central issue is whether the NOV adequately identified the specific allegations and relief sought, so Respondents could understand their exposure and prepare a meaningful defense. Respondents raised that exact objection under MCC 39.1530(A) and the Due Process Clause. Accordingly, Respondents were entitled to know from the face of the NOV not only their potential daily financial exposure, but also the specific conduct supporting each charged violation and the exact corrective action required to stop the accrual of fines.

Neither the NOV nor the County's Post-Hearing Statement answer these critical questions. The County has still not identified what specific material Respondents must remove or what condition they must restore. Without a reliable baseline separating the alleged unlawful development from existing improvements and exempt work, a directive to restore the land to its "pre-development condition" provides no clear endpoint. How can Respondents restore a condition when the County has never established what that condition was, nor identified precisely what must change?

For example, assume the Hearings Officer finds that the soil deposited in June 2025 was unlawful and orders its removal. Because the County never measured that deposit or established the baseline condition of the area before the work occurred, how will the County determine how much soil must be removed? More importantly, how can Respondents know when compliance has been achieved to stop the daily fines? Are we just supposed to work off of the county's unverified assumptions of volume? Are Respondents supposed to remove gravel they lawfully we allowed to place over the top of the soil?

Respondents agree with the County that if this was a permit application initiated by Respondent, Respondent would be required to determine what the County meant by "pre-development condition" and address that in its application materials if it expected to obtain a land use permit. **But this is not a land use permit application initiated by Respondents.** The NOV seeks to require Respondent to restore the property to its "pre-development condition" in order to stop a significant daily fine in a violation proceeding. If the County intends to fine Respondents daily, due process requires the County to provide Respondents with a clear path to satisfy the requirements to end the daily fine. The County fails to do so.

MCC 39.1530(A) and Due Process protect Respondents' right to understand and defend against the charges before the hearing and understand their possible liability – not merely to receive post-hoc explanations after the record has closed. While the County's Post-Hearing Statement clarifies the number of fines requested, it cannot cure the underlying notice defects or provide a definite, workable path to compliance. The Hearings Officer should therefore dismiss these proceedings.

IV. The County Has Failed to Provide Evidence Justifying the Amount of the Proposed Fine:

MCC 39.1560(B) authorizes the County Director of the Department of Community Services to set the criteria for determining fine amounts for code violations such as those alleged in this case. Pursuant to that authority, the County has chosen to calculate fines in this matter based upon a "Calculation Worksheet", which can be found at Ex. C.8. Based upon the Calculation Worksheet, the County has proposed an ongoing daily fine of $210 for Respondents failure to obtain a ground disturbing activity permit under MCC 39.6210 and an ongoing daily fine of $315 for Respondents failure to obtain a SEC-s overlay permit under MCC 39.5510, for a total of $525 per day.

To calculate the amount of each fine, the Calculation Worksheet requires the County to evaluate Respondents current and past actions pursuant to the following formula: XY(15) = daily fine amount for each violation. Calculation of the "X" variable is also based on a formula as follows: X = (H + P + R + C + E). Calculation of the "Y" variable is based on the following formula: Y = (A x G). In sum, the calculation of the fine for each of Respondents alleged violations (and we now know that the County only proposes to fine Respondents for one violation of MCC 39.6210 and one violation of MCC 39.5510, despite alleging in the NOV that Respondents had failed to obtain 13 separate permits in eight different locations on the subject property) is based upon the following formula: (H + P + R + C +E) x (A x G) x ($15) = daily fine amount.

Each of the variables used to calculate the X and Y amounts (H, P, R, C, E, A, and G) are explained on page 2 of the Calculation Worksheet (pg. 2, Ex. C.8), and require a discretionary choice by the County. For example, variable H (history) is based upon Respondents efforts to attempt to correct the alleged violation prior to the issuance of the NOV, and ranges from a score of 0 if Respondents took actual steps to cure the violation to 4 if Respondents took no steps to correct the violation prior to the issuance of the NOV. In this case, the County assigns Respondents a score of 1, meaning they took some steps to correct their alleged violations, but the steps were minor. Pg. 1, Ex C.8. Petitioners challenge that assessment, as there is no evidence in the record to support the County's determination. The County has now conceded that it lacks authority to require either a ground disturbing activity permit or a SEC-s permit for Areas A-G, and are now focused solely on Corral Area H. For variable H, It is unclear whether the County based its score of 1 as a result of Respondents failure to take steps to obtain permits for Areas A-G, but if the County did factor that in its calculation, it was error, as the County now admits Respondents were never required to obtain permits for their farm and forest activities in those areas. The County can't seek to fine Respondents for activity that did not require either a MCC 39.6210 or MCC 39.5510 permit. The H variable should be 0.

For the R (Repeated) variable, the County assigns a score of 2 for both the alleged MCC 39.6210 and MCC 39.5510 violations. Pg. 1, Ex. C.8. A score of 2 for this section indicates an "intermittent, repeated or continuous event." There is no evidence in the record to support a score of 2 for this variable. Presumably, the County is relying upon the fact that Respondents were required to obtain

permits for multiple activities occurring in multiple areas of the property. But the County now acknowledges that Respondents were not required to obtain permits for Areas A-G on the property. This score should be reduced to 1.

The County assigns a score of 2 for the C (Cause) variable, alleging that Respondents failed to exercise the standard of care that a reasonably prudent person would have exercised in determining not to obtain permits. Yet the County offers no evidence of what a "reasonably prudent person" would do in a situation similar to Respondents. For example, the County now concedes that it is both "reasonable" and "prudent" for Respondents to engage in farm and forest practices in Areas A-G without need to seek the County's blessing. Given the County's concession that each of the ground disturbing and fill activities on Respondents properties constituted either farm use or forest use (or both) would a "reasonably prudent farmer/forester" be expected to know that they would be required to obtain permits for the work on the corral, given that it is just another farm activity on the subject property, and none of the other similar activities required a permit. Would a reasonably prudent farmer be negligent in relying upon ORS 215.253(1), even if the farmer was sophisticated enough to wade through the MCC to determine that it might need a permit to farm in a farm zone? And what is a "reasonably prudent farmer?" We don't know because the County offers no evidence on this standard. This score should be 0.

For the E (Efforts to Correct) variable, the County assigns a score of 1, meaning the Respondents were "moderately responsive such that the Director found a need to repeat only a small portion of prior communications and/or requests". Assuming this score is based upon Respondents failure to comply with the County's directives to obtain permits for Areas A-G, the score must fail, because the County acknowledges that Respondent doesn't need permits for these areas. Had the County understood and conveyed to Respondents that they were only seeking a permit for Corral Area H, Respondents response may have been completely different, but we'll never know. The E score should be 0.

Adding the numbers for variables H, P, R, C and E, the X variable should be 2 – one for the P variable and one for the R variable.

For the Y variable, the County assigns a number for variables A (Action to Enforce) and G (Gravity). In this matter, the County assigns Respondents a score of 1 for the A variable, 2 for the G variable as it applies to the MCC 39.6210 permit, and 3 for the G variable for the MCC 39.5510 permit.

For the G variable, a score of 2 indicates that the County believes "there is no immediate threat to public health and safety or to natural resources, but the remaining measures of severity or magnitude of the violation prove moderate." Pg. 3, Ex. C.8. This means the County is alleging that the Respondents failure to obtain a ground disturbing activity permit for Areas A, B, C, D, G and H did not rise to an immediate threat to the public's health and safety. Not only is this inconsistent with the County's argument that MCC 39.6210 is exempt from the preemption

requirements of ORS 215.253(1) as a health, safety and welfare regulation under ORS 215.253(2), but the County has not offered any evidence of whether they would apply the same score for the G variable after acknowledging that Respondents don't need a MCC 39.6210 permit for Areas A, B, C, D, and G. In short, there is nothing in the record to demonstrate that Respondent's activity in Corral Area H creates any threat at all to the public's health and safety or to natural resources. In fact, the only evidence in record shows that it does not. See ODA letter, Resp. Ex. K. The G variable score for the MCC 39.6210 permit should be 0.

The County assigned a G variable score of 3 for Respondents failure to obtain a MCC 39.5510 permit for Areas A, B, D, E, F, G and H. For the G variable, as score of 3 indicates that the County believes that the violation "poses an immediate threat to public health and safety or to natural resources or the remaining measures of severity or magnitude of the violation prove substantial." It's difficult to understand how the County can determine that the failure to obtain a permit under MCC 39.6210 does not create an immediate threat to public health and safety while a failure to obtain a permit under MCC 39.5510 poses an immediate threat to public health and safety since it is the exact same activity by Respondents that the County alleges gives rise to the need to obtain both permits.

Nevertheless, there is nothing in the record to demonstrate that the County would assign a G variable score of 3 to Respondents failure to seek a MCC 39.5510 permit for Corral Area H absent the need to obtain permits for Areas A, B, D, E, F and G, which the County now acknowledges that Respondents do not need. In fact, the only evidence in the record (the ODA letter referenced immediately above) indicates that Respondents failure to get a MCC 39.5510 permit for Corral Area H (or all or any of the other Areas) does not pose any threat whatsoever to the public health and safety. The G variable score for the MCC 39.5510 permit should be 0.

Applying the correct fine amounts based upon the evidence in the record, using the County's Civil Fine Calculation Worksheet yields the following fine amount:

X variable (0 + 1 + 1 + 0 +0) = 2

Y variable (1 x 0) = 0

Civil Fine Amount (2 x 0 x $15) = $0.

The total fine for either or both alleged Corral Area H violations should be $0, based upon the evidence in the record.

The Oregon Court of Appeals has already addressed a nearly identical Civil Fine Calculation method to the one chosen by the County in this case. In *Salosha, Inc. v. Lane County*, 201 Or App 136 (2004), the Oregon Court of Appeals reversed a Lane County Circuit Court ruling pursuant to a writ of review of a County Hearings Officer's ruling applying Lane County's Civil Fine

Calculation method, which appears from the facts of the case to be nearly identical to Multnomah County's standard in this case.

The Court's reversal was based upon the failure of the Lane County Hearings Officer to make sufficient findings demonstrating that the presence of solid waste on a property was a "significant" failure to comply with the County code, but not an "immediate threat." Based upon the Lane County Civil Fine Calculation method, a "significant" but not "immediate" violation was assigned a score of 2 on the County's "G" (Gravity) variable. In fact, the Lane County Civil Fine Calculation was as follows:

(H + P + R + C + E) x (A + G) x $15. *Id.* at 143.

Except for calculating the Y variable as (A + G), whereas Multnomah County calculates the Y variable as (A x G), the calculations and variables are identical.

According to the Court, the Hearings Officer's conclusory statement that the presence of solid waste was "significant" was insufficient to justify a score of 2 on the County's G variable. Applying the "substantial reason" rule, the Court held that an administrative decision maker must "demonstrate in its order a rational relationship between the facts and the legal conclusions upon which it acts in each case." *Id.* at 144. The Court held that "even though we can trace through the record a legitimate path by which the hearings official could have reached his conclusion regarding the significance of petitioners' violation, our task on judicial review is not to serve as a pathfinder." *Id.* at 145. Consequently, the Court reversed and remanded the County's order to the trial court.

The only difference between this case and *Salosha* is that in this case there is no evidence upon which the Hearings Officer can determine that the Respondents failure to obtain a permit under MCC 39.6210 or MCC 39.5510 posed any threat whatsoever to the public's health and welfare or to natural resources. In other words, there is no way for the Hearings Officer (or a court) to "trace through the record a legitimate path" to make a significance determination under the County's G variable, much less the other variables. Consequently, the Hearings Officer cannot impose a fine in this matter.

V. CONCLUSION

For the foregoing reasons, the Hearings Officer should dismiss these enforcement proceedings in their entirety.

Dated this 23rd day of October, 2026. OPOA LEGAL CENTER

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