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February 18, 2025

VIA EMAIL (LUP-Comments@multco.us)

Multnomah County Hearings Officer  
 1600 SE 190<sup>th</sup> Ave  
 Portland, OR 97233

Re: New Horizon Utility Reuse of Existing Structure at 6928 SE 282<sup>nd</sup> Ave  
 County Case File T2-2024-0031

Dear Hearings Officer:

This firm represents New Horizon Utility Construction LLC, a telecommunication equipment installation and repair company, that is both the applicant as well as the appellant in the above-referenced case (“New Horizon” or “Applicant”). New Horizon filed this appeal seeking removal of a number of conditions of approval because they impose obligations that exceed what the code standards require or are unnecessary because the applicant has modified the proposal to comply with the applicable criteria. What follows is a detailed explanation organized by topic and code section organized in the order presented in the Director’s decision. This narrative is followed by a number of exhibits in support which are referenced throughout. By way of introduction, this table identifies the appeal issue with the supporting documents which are discussed in further detail below:

<b>Issue</b>	<b>Exhibit Title / Description</b>	<b>Ex No.</b>
Outdoor fleet parking or storage	New Horizon’s daily operations showing limited outdoor accessory storage of materials and fleet vehicles	A
	Site vicinity aerial with current zoning showing surrounding uses	B
Nonconforming use verification and alteration	Historic aerial photos from 1948 showing that the existing fully paved property condition back to 1960	C
	Affidavit of Gary Bergh supporting that paved condition existed in 1962	D
	Historic codes	E

Parking Surfacing	Application narrative w/ exhibits	F
Relocate parking spaces	Revised Site Plan	G
Changes to conditions	Proposed redline revisions of Director’s conditions	H

**I. Outside Parking of Fleet Vehicles in Support of a Review Use is Permitted Within the Orient Industrial Commercial (OIC) Zone**

The subject property is zoned Orient – Commercial Industrial (OCI) which is an industrial base zone that provides for “small-scale low-impact commercial and industrial uses.” The manufacturing and processing of “communications equipment” and “electronic components” is a review use allowed within the OCI zone. The term “small-scale low impact industrial use” is defined in the MCC 39.2000(B) as follows: “A small-scale low impact industrial use is one which takes place in a building or buildings not exceeding 10,000 square feet of floor space.” Without explanation, the Planning Director interpreted this provision to prohibit the parking of fleet vehicles outside and as such imposed Condition 6a requiring that all business-related vehicles be parked inside the building. Such a condition will sound the death knell for a business that relies on bucket trucks, support and digger trucks for installation and repair of telephone poles.

New Horizons is in the business of manufacturing and installing communications utility components. In addition to the New Horizons Business Plan that was included with the application at Ex A.14, attached is a statement from Adam Boatright, the New Horizons office manager, explaining how this business functions day-to-day. Ex A. As Mr. Boatright explains, manufacture of materials and assembly of pre-fabricated materials will occur within the building that is less than 10,000 square feet. Storage of fiber optic cable, coax cable and strand necessary for assembly will be stored outside. Installation occurs off-site, which is only possible via a boom truck or a digger derrick. These vehicles must be parked outside when not in use because they are too large to fit within the building.

By its plain terms, the “small-scale low impact industrial use” definition does not preclude the outdoor storage of materials, including fleet vehicles, so long as those accessory functions which, when considered in conjunction with the primary use, continue to satisfy the review uses approval criteria of MCC 39.4670. Nothing in the OCI zoning regulations or the zone purpose statement suggests any limitation on outdoor storage or a limitation on the parking of fleet vehicles. Rather, “uses customarily accessory or incidental to any permit use” are expressly

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permitted. MCC 39.4665(J). The manufacturing and processing of communication equipment demands installation efforts that can only be accomplished through the use of heavy machinery that must be stored onsite.

Allowing the parking of fleet vehicles outside is similarly required by a majority of uses allowed in the OCI zone. Any “automobile repair” or “service station” use would require storing customer vehicles outside. MCC 39.4665(A)(1) and (9). Similarly, a “freight trucking terminal,” is a permitted use which, again, by definition, would have trucks parked outside in the process of or in line for loading. MCC 39.4665(2). These vehicle-demanding uses could not exist without some reliance on the parking of work-related vehicles or outdoor storage, just like the New Horizons use in this case. See MCC 39.4665.

Further, the Planning Director’s overly narrow approach to the authorization of uses would essentially prohibit “any” outside supportive, accessory uses including employee or customer parking, a loading dock, or a trash enclosure area that might be necessary to support the commercial or industrial use and is otherwise required by the MCC. If the County intent was to demand that all parking and storage to occur within a 10,000 square foot building, it is likely that it would have made such a requirement explicit.

The Planning Director’s interpretation of “small-scale low impact industrial use” would demand all restaurant or garden supply store customers park inside the 10,000 square foot building. This example reveals the absurdity of this interpretation. It is impossible to identify a commercial or industrial use that could reasonable function with all parking occurring indoors. If that was the intent, it would be have been much more explicit. A more reasonable reading, and one that would be entirely consistent with the “small-scale low impact industrial use” language is one where the primary use occurs within a 10,000 building with accessory uses like customer, employee, and fleet vehicle parking scaled to serve that “small-scale low impact” business.

In conclusion, there is nothing in the language of the OCI standards that prohibits the storage of materials and work vehicles outside of the building. Mr. Boatright’s statement indicates that the fleet vehicle storage must accommodate approximately 7 heavy duty vehicles. Ex A. As detailed in the Applicant’s business plan 83 percent of all business activities occurring off-site for the period 2022 through the end of January 2024 occurred within rural areas. New Horizons is offering an essential safety service to the surrounding rural area that the OCI zone was expressly intended to accommodate. Unlike the two towing business that monopolize a majority of the remaining OCI zone that are visible from aerial photos in the record, the outdoor accessory component at New Horizon is small-scale and low impact and will service primarily rural

customers. For these reasons, Planning Director's Condition 6a should be deleted. See Ex H for a complete copy of conditions redlined for revision.

## **II. Nonconforming Site Conditions Preclude Application of the Setback, Landscaping and Stormwater Criteria**

A number of the Planning Director's conditions of approval obligate the applicant to remove substantial amounts of pavement adjacent to the public roads to accommodate landscaping and to design and install a new stormwater system. These obligations are grounded in various off-street parking and design review criteria that do not apply to require modification of site conditions that predate their implementation in the code. Said differently, these site conditions are nonconforming and are allowed to continue.

As the photographs in the record show, the subject property was improved with a structure for use as the Bergh Machinery Company for the repair and sale of farm equipment as far back as the 1940s. Ex C. The aerial photographs from 1952 and 1955 suggest a dirt covered surface but by 1960, the property was fully paved including the 30-feet of area adjacent SE 282<sup>nd</sup> Ave, SE Orient Drive and SE Powell Valley Road – what would otherwise be the setback area. What appears in the aerial photographs, is supported by the affidavit of Gary Bergh, the son of the original business owner, confirmed that the site paving occurred sometime before 1962, when Gary started working for Bergh Machinery. Ex D. This same paved condition has remained unchanged up through to the present day.

The Planning Director's conditions demand removal of the pavement in the setback areas, extensive landscaping and installation of stormwater detention at a significant expense to the Applicant when the only physical improvements proposed are the painting parking spaces on the existing asphalt surface as required by the off-street parking requirements for the use. The Planning Director accepted that the existing building was a nonconforming structure that could not comply with many of the current development siting standards such as setbacks but gave no thought to the long-standing paving condition that can also remain. What the applicant is seeking is acknowledgment that it is not just the building that is nonconforming but also the pavement and stormwater system that need not change in order to comply with the current MCC standards.

Off-street parking and loading obligations are set forth in MCC 39.6500 through 39.6600. Compliance is required when constructing a new building or addition, or changing uses in a way that is more intense. MCC 39.6505. Although the Applicant is changing the use, this change is not any more intense than the farm equipment sales and repair use that existed on this property for more than 50 years. Therefore, the parking and loading obligations do not apply.

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Should the County conclude that the proposed use is more intense than the current vacant property, there is an exception in the final sentence of MCC 39.6505 which states:

“For nonconforming uses, the objectives of this Subpart shall be evaluated under the criteria for the Alteration, Modification, and Expansion of Nonconforming Uses.”<sup>1</sup>

Pursuant to ORS 215.130 and MCC 39.8300(C), nonconforming situations, such as physical improvements that were installed before zoning regulations changed to make the improvement unlawful are allowed to continue. Because these improvements were installed before the current off-street parking and design standards requiring landscaping and modern stormwater conveyance system, the existing conditions may remain unchanged.

Satisfying the criteria for altering a nonconforming use, as set forth in MCC 39.6505 and, in turn, MCC 39.8315, requires a finding that (1) the condition is a lawful nonconformity and (2) the alteration is “of no greater adverse impact” including consideration of nine factors set forth in MCC 39.8315(1-9). Although the MCC sets forth a procedure to verify a nonconforming use, the County did not require the applicant to go through such a review in order to reuse the long-standing structure. In the event that such review is required for the County to allow the existing paved conditions to remain, the Applicant responds to the applicable criteria and seeks amendment of its application to include such a request.

A. The Property Condition was Legally Established and has Continued Since that Time

The OCI zoning was created and first applied to the property in 2003 through Ordinance No. 1001. The property was zoned Rural Center (RC) from 1974 until 2002 and before 1974 it was zoned M-2 (General Manufacturing). As noted above, the aerial photos and testimony suggest that the property was paved before 1962. The zoning regulations in place in 1962 did not impose any setback obligations, the parking regulations did not impose any landscaping requirements or stormwater standards, including road rules and design standards, and there was no design review. Ex. E, excerpts from 1962 Ord 100. The first regulations governing landscaping, stormwater and design review obligations were adopted in 1979, long after the property was fully paved. Ex E, excerpts from 1979 Ord 100. For these reasons, the Hearings Officer should conclude that the physical condition of the property was legally established and may continue.

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<sup>1</sup> A “nonconforming use” is defined in MCC 39.2000 to include “a legally established use, structure or physical improvement in existence at the time of enactment or amendment of the Zone Code...” An existing paved parking surface is a “physical improvement” covered by this exception provision for nonconforming uses.

- B. Installing a New Use in this Existing Long-Vacant Property without Full Compliance with the Parking Standards will not have any Greater Impact on the Neighborhood

The only physical alterations proposed with this application is to apply paint to formally designate off-street parking spaces as necessary to serve the proposed new use. This minor physical alteration will have no greater adverse impact on the neighborhood considering the MCC 39.8315 factors. If anything, striping the parking will enhance the visual appearance of the property and allow for an active use to occupy the property placing additional “eyes on the street.”

Considering the use itself as the alteration, any of the review use criteria in MCC 39.4670 are substantially similar to the nonconforming use factors in that they consider environmental and infrastructure impacts, noise, dust and odor impacts and impacts to surrounding uses. The Planning Director found that all of these review use criteria were satisfied. Given the substantial similarity in the language of the criteria, finding the review use criteria satisfied for the use suggests that the nonconforming use alteration criteria are also satisfied.

In summary, because the applicant has established that the existing pavement and stormwater conveyance system predated the County’s regulations prohibiting such actions, the County is prohibited from imposing these standards onto the applicant as part of this review. More specifically, the code standards that will not apply given the preexisting site conditions include:

MCC provision that does not apply:	Condition
MCC 39.6580(C) – Setback areas of 30 feet adjacent to roadways may not be paved and must be landscaped.	2(b)(iii), 2(b)(iv)
MCC 39.6570(B) – All parking must be physically separated from public streets by landscape strips or yards	2(b)(iv), 2(b)(vi)
MCC 39.8045(C)(1) – A minimum of 15% of the development area shall be landscaped	
MCC 39.8045(C)(2) – All areas not used for improvements must be landscaped	2(b)(xiv)
MCC 39.8045(C)(3)(a) – Parking with 10 or more spaces improved with landscaped areas totaling no less than 25 square feet per parking space	
MCC 39.8045(C)(3)(b) – Landscape strip surrounding parking adjacent to street and on interior lot line	2(b)(xv)
MCC 39.8045(C)(3)(c) – Type of landscaping to be planted	2(b)(xvi)
MCC 39.6235, 39.4680(D) and (E) – Design and installation of a new stormwater conveyance system	2(b)(ix). 2(b)(x)
Multnomah County Road Rules and the Multnomah County Design Construction Manual	

For these reasons, the applicant has revised the proposed site plan to retain the existing conditions within the setback areas adjacent to the street as they are entitled to do pursuant to the nonconforming use authorizations. Ex G.

**III. Deviation for the Parking Surfacing is Requested**

MCC 39.6565(2) allows for a deviation from the obligation to hard surface parking and driveways where certain standards are satisfied.<sup>2</sup> The four criteria that must be satisfied for granting such a request include:

<sup>2</sup> It is worth noting that the argument that the Applicant is pursuing regarding the nonconforming site conditions preempting application of the parking standards in MCC 39.6500 would apply to the surfacing criteria as well but the Applicant has prepared a response on this point to show that a deviation should be granted or that maintaining the existing pre-existing conditions will have no adverse impact on the surrounding area.

- “a) Verification from an authorized fire protection services provider that the deviation complies with minimum fire access standards and the Oregon Fire Code;
- b) Verification by the County Engineer that the deviation complies with the County Road Rules and the County Design and Construction Manual Standards. Driveway approaches must be paved.
- c) The deviation would not be detrimental to public welfare, injurious to property in the vicinity or adversely affect development of adjoining properties;
- d) Impacts from deviation are mitigated including drainage runoff control and dust measures.”

Attached as Ex F, the applicant has provided a detailed response to each of these criteria including verification from the Fire and Road Department that they have no concern with the proposed gravel surfacing. The Director’s decision notes that it might be possible for the applicant to reduce the number of parking spaces minimizing the need for the deviation but nothing in the criteria requires that an applicant first make some preliminary effort to reduce the need before seeking a deviation. For these reasons, this deviation should be granted and the requirement in Condition 2(b)(i) that the parking surface be fully paved should be removed.

**IV. Setbacks, where applicable, are satisfied.**

Although the applicant objects to any obligation to alter the existing conditions within the setbacks, it does acknowledge that the striping to formally designate parking on the existing asphalt may require compliance with the current county standards. As such, the revised site plans shows that all parking spaces, including the ADA, the fleet vehicle spaces and loading spaces have been located 30 feet from all public roads. Ex G. This eliminates the need for Conditions 2(b)(iii) and 2(b)(vii).

**V. To the extent that Landscaping Standards apply, they are satisfied.**

MCC 39.6580(C) provides that:

“A required yard which abuts a street lot line shall not be paved, except for walkways which do not exceed 12 feet in total width and not more than two driveways which do not exceed the width of their curb cuts for each 150 feet of street frontage of the lot.”

This says that this street abutting area cannot be paved. However, this conclusion also fails to acknowledge that nonconforming conditions on properties are allowed to continue. MC 39.8300(C). The applicant is not proposing to “pave” anything but rather seeks to use a property that contains pavement that was lawfully installed. This development will not alter the existing building, its roof overhang, existing door access or the nonconforming paved condition of the area within the yard setbacks. As such, these pre-existing site conditions – including the existing pavement - should be allowed to remain. The applicant cannot be required to remove this existing paved surface and install landscaping as required by Conditions 2(b)(iv) and (vi).

Although the design review standard prohibiting paving within the setback does not apply, the applicant does acknowledge that the addition of off-street parking abutting public roads will demand the installation of curbs, bumper rails or other channeling to avoid unchanneled vehicle access for safety. MCC 39.6570(3)(B). As such, the applicant will install a curb at the end of each space of at least four inches in height along the south and to further articulate these boundaries, the entire property will be fenced, as denoted in the revised site plan. Ex G.

Finally, a number of additional Design Review standards deal with landscaping. MCC 39.8045(C)(2) provides that “all areas...not otherwise improved shall be landscaped.” Again, this standard cannot be used to require the removal and replacement of nonconforming site conditions. Second, this landscaping standard applies to areas that are not “improved.” Asphalt pavement is an “improvement” and therefore this landscaping standard does not apply. As such, Condition 2(b)(xiv) must be removed.

## **VII. The Stormwater Conveyance System Standards, if Applicable, are Satisfied**

Stormwater drainage is dealt with in a number of different provisions within the MCC. For clarity, each of these provisions is addressed in turn. First, MCC 39.6235(A) provides that the stormwater standards apply whenever “creating new or replacing existing impervious surfaces exceeding 500 square feet.” No new impervious surfaces will be created with this required and no existing impervious surfaces will be replaced. Therefore, MCC 39.6235 does not apply to this application.

If the Hearings Officer disagrees, as noted above, MCC 39.6235 was adopted after the existing system of subsurface conveyance lines were installed and as such, they can continue to be relied on to remove stormwater as they have done for the past 50 years. Establishing telecommunication electronics manufacture and installation business on the existing site will have no impact on stormwater flows, how they are collected or how they are transported through and off the site.

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There are additional stormwater standards within the County's parking and loading and design review chapters that again are inapplicable because of the existing nonconforming status of the stormwater system. MCC 39.6570(D), the on-site disposal standard, and MCC 39.8040(D)(6), a design review drainage standard that focuses on adverse impacts were adopted after the property was improved with a parking surface that the applicant seeks to reuse. Continued reliance on the long-standing and functioning stormwater system will impose no adverse impacts on neighbors. Therefore, these standards do not apply. For these reasons, conditions 2(b)(ix) and (x) should be deleted.

### VIII. Conclusion

New Horizon seeks to locate its business on a property that has a long, long history of use as an industrial site. Once used to sell tractors and farm equipment to meet the needs of surrounding rural residents, New Horizon will repair telecommunications equipment to again meet the needs of the rural community. New Horizon is exactly the type of user that the OCI zone was envisioned to accommodate. Yet, the Planning Director's decision prohibiting any outdoor fleet storage and imposing expensive pavement removal and landscaping obligations makes New Horizon's development impossible. The existing site conditions long-predate the County's adoption of its parking and design standards. These conditions, just like the building, should be allowed to remain. With respect to the location of the off-street parking, loading, and trash facility, the applicant has revised the site plan so as to establish compliance. Ex G. For these reasons, the applicant has shown that the applicable approval criteria will be satisfied and a majority of the conditions of approval should be deleted or significantly modified as shown in Ex H.

Please place this letter along with the attachments in the record and provide me with notice of your final decision. Thank you for your serious consideration of these requests.

Very truly yours,



Carrie A. Richter

CAR:kms  
cc: Client