

## MEMORANDUM

TO Mr Joe Turner, Hearings Officer

FROM Graham Martin, Interim Transportation Planning Development Program Supervisor  
Andrew Mulkey, Assistant County Attorney

DATE May 23, 2025

ADDRESS 18611 Sauvie Island Rd (R971170130)

SUBJECT **Post Hearing (May 9, 2025) - Open record period response**

REFERENCE RRV-2024-0004

This memo clarifies some of the questions and issues raised in the Hearing on May 9, 2025, as well as offers a potential outcome for the Hearings Officer to consider when making the decision. The first section addresses Existing Non-Conforming Accesses (MCRR 4.700). The second section addresses the Road Rules Variance criteria and suggested conditions of approval.

The suggested conditions provide a pathway for the Hearing Officer to enable the applicant to provide additional information to satisfy some of the County's concerns regarding sight distance availability. Should these steps be taken the County would support a Hearing Officer decision for two accesses (dual) on the frontage of the property pursuant to the variance criteria.

On the following pages, all references to *Multnomah County Design and Construction Manual* (DCM) use the acronym "DCM" and all references to *Multnomah County Road Rules* (MCRR) use the acronym "MCRR". Numbers correspond to the relevant sections within the MCRR or DCM.

### **Applicant applied for a variance, only (MCRR 16.000 to 16.310), not an ENCA**

The applicant applied for a variance pursuant to MCRR 16.000 and MCC 29.507. Although the applicant's attorney raised the issue of the Existing Nonconforming Accesses (ENCAs) criteria after the applicant filed the appeal, none of those criteria apply to the applicant's variance application, which seeks a variance to the county's access standards pursuant to MCRR 16.000. See Exhibit A.2 (application narrative) and C.6 at 2 (notice of decision) (listing applicable criteria). The fact that the

applicant could potentially seek other types of decisions from the Transportation Division, subject to different criteria, for the purpose of maintaining the existing access does not demonstrate that the Transportation Division erred in its application of the criteria for a variance. Consideration of criteria for other types of decisions—such as an ENCA or non-conforming use determination (see MCC 39.8300 et seq (outlining the County process for verifying existence of a “non-conforming use”))—is beyond the scope of the decision sought by the application and beyond the scope of this appeal. The applicant sought a variance pursuant to MCRR 16.100, 16.200, and 16.225 in lieu of other potentially available pathways.

The County added the code section for Existing Non-Confirming Accesses (ENCAs) to the Road Rules in 2018 as an alternate pathway that would allow applicants to potentially avoid the need to apply for a Road Rules Variance (which is akin to a Type II Land Use application). For reference, the ENCA provisions were not included in the 2004 version of the Road Rules, nor were they part of the County’s Street Standards (1978, revised 1987), which preceded the Road Rules. In this context, the ENCA provisions offer a potentially less cumbersome pathway to achieve a similar outcome to the variance process, provided an applicant can meet the ENCA approval criteria. However, the ENCA criteria are separate and distinct from the approval criteria for a variance, and an ENCA determination results in a different type of decision, one that the applicant did not seek as part of the application in this case. Exhibit A.2. For that reason, the appealed decision did not evaluate the ENCA criteria, and those criteria do not apply to the question of whether or not the applicant meets the criteria for the variance that the applicant applied for.

Although this appeal is de novo, a review of criteria for a different type of decision than the one that the applicant applied for, exceeds the scope of the review for this appeal. MCC 39.1160(6). De novo review allows the Hearings Officer to consider “all issues relevant to *the applicable approval criteria*.” (emphasis added). Here, the applicant applied for a variance, and applicable approval criteria—MCRR 16.200 to 16.250—do not include the ENCA provisions at MCRR 4.700 or any criteria related to a determination for a nonconforming use. For that reason, a request by the applicant that the Hearings Officer determine whether or not the applicant can meet the ENCA criteria or separate criteria for verification of a nonconforming use exceeds the Hearings Officer’s scope of review.

Had the applicant sought an ENCA determination by the Transportation Division, there are approval criteria and legal and factual arguments from the applicant that would need to be addressed by the Transportation Division as part of a separate decision that applies the ENCA criteria. For instance, the Road Rules do not treat access as a distinct use or as a nonconforming use. Accesses, even those that qualify as an ENCA, must be permitted and may be required to be re-permitted or even closed depending on the circumstances. MCRR 4.700(C); 4.100; 18.130 (allowing revocation to protect public safety).

Given the compressed timeline and general procedure of a Type II appeal proceeding, the Transportation Division has a limited ability to respond to the applicant’s legal arguments and factual presentation related to alternative approval pathways for the access points (first raised in the May 5, 2025 letter from the applicant’s attorney). Unlike a typical process that requires the applicant to present its case in full to the Transportation Division staff, the applicant’s use of the Type II appeal procedures to effectively apply for a different type of decision than the decision being appealed allows the applicant

to make a rolling presentation of factual and legal arguments. See ORS 197.797(6), (7), (9) (providing for an open record period, subsequent response period, and allowing the applicant a final rebuttal). That process ultimately deprives the County Engineer of the ability to respond and determine in the first instance whether the applicant meets the relevant approval criteria after considering the entirety of the applicant's factual and legal presentation. ORS 197.797(9). For that reason, it is not a fair or efficient use of County time or resources, nor is it consistent with the procedure of the Road Rules, for the Hearings Officer to determine in the first instance during an appeal proceeding, whether the applicant could meet the criteria for an ENCA or for the Hearings Officer to determine how provisions of state and local law that apply to nonconforming uses could potentially apply to the three access points. The Road Rules place the burden on the applicant to make their case first to the County Engineer, who then has the opportunity to issue a decision that the applicants may subsequently appeal. See e.g. MCRR 17.200.

As just one example of why the applicant should not be allowed in the first instance to seek an ENCA determination from the Hearings Officer as part of this appeal process, it appears that an owner or the applicant has made recent and unpermitted changes to the access points. These include resurfacing the access and potentially widening the access. Exhibit F.6. For reference, the main components of access are location, distance to other access points, access width, and other safety measures such as sight distance. DCM 1.2.4; 1.2.5; MCRR 4.100(C). The Road Rules 4.700(A) allows the county to accept as existing non-conforming accesses, "[a]ccess locations that were previously approved through a prior land use decision but for which there is no record of an access permit having been granted by the County." The Road Rules state that the applicant has the burden "to show prior land use approval for the ENCA." MCRR 4.700(B).

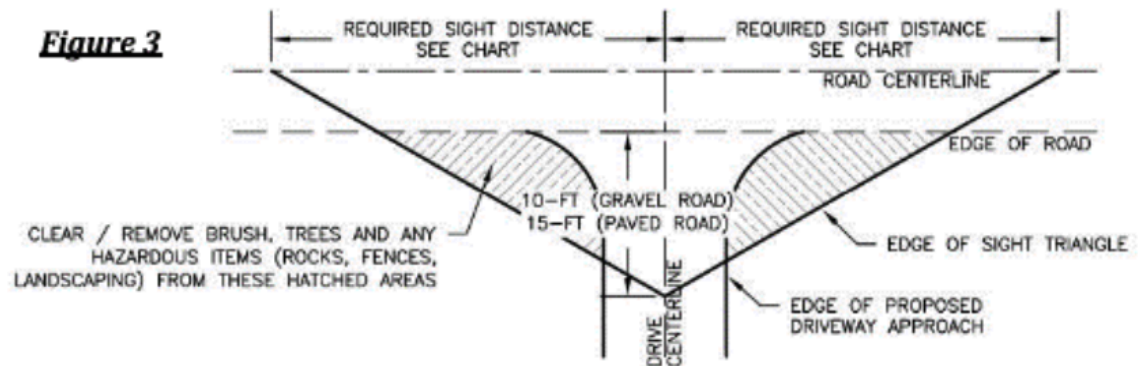
Even if the applicant's submission of the planning diagram for a property line adjustment decision could demonstrate that the Planning Department considered or approved the existing access locations or dimensions, the fact that the access points have been subsequently changed and potentially widened further complicates the matter. At this point in the appeal proceedings, the Transportation Division does not have the procedural ability to respond to applicant's responses to these issues or make a decision in the first instance. For those reasons and the reasons explained above, the County asks that the Hearings Officer decline to apply the ENCA criteria or the non-conforming use provisions of state or local law discussed at the hearing.

### **Road Rules Variance - suggested conditions of approval**

Notwithstanding the County's Notice of Decision (Exhibit C.6), and if the Hearing Officer is inclined, County Transportation would support the following steps as conditions of approval:

1. Applicant must submit a revised plan to County Transportation showing the sight triangle (see example below) required to show the vegetation area required to be cleared to the south of "Access 3" in order to meet AASHTO minimum Sight Distance requirements.

- a. Applicant should show clearly the property/ROW line, with a Survey, and indicate which vegetation belongs within the ROW, and which vegetation may be within the property



line of the neighboring property (18525 Sauvie Island Rd).

- b. If not removed entirely, vegetation should be no higher than 2 feet tall within the sight triangle area
2. Once condition 1 has been satisfied, Applicant must submit the plan to County Transportation via email ([row.permits@multco.us](mailto:row.permits@multco.us)) or via the See Click Fix App<sup>1</sup> (links can be found below and on the County website) for County Maintenance to clear the vegetation within the County ROW (see applicant's Maintenance Request Exhibit F.3). **Note:** County Transportation Maintenance has no authority to remove vegetation from the neighboring property. Applicant would require a permit to do this instead of County Transportation Maintenance (see MCRR 18.750(G)).
3. Applicant is required to re-evaluate and verify the Sight Distance availability from Access "3", following removal of the vegetation in the ROW by County Maintenance, meets AASHTO Standards. Please provide new photographs to update Figures K and L from the current Sight Distance Memos (Exhibits A.4 and E.1). Hearing Officer and/or County Engineer is required to approve the revised Sight Distance Certification, to ensure continued safety of the transportation system prior to issuing a ROW-General (driveway) permit (see condition 5 below).
4. If conditions 1-3 demonstrate that AASHTO minimum Sight Distance standards can be achieved, County Transportation will support retention of Access 1 and 3 to serve different portions of the property.
  - a. Access 1 will serve the residential portion of the property. Access 3 will serve the rear/agricultural portion of the property.

Condition 4, Note 1 to Hearing Officer: County Transportation does not recommend retention of Access 2, as two accesses are considered sufficient to adequately serve the property. Two accesses are also consistent with the MCRR 16.225A approval criteria for "dual accesses" on any one property frontage. Whether via Road Rules Variance or ENCA, County Transportation's general policy is to minimize the number of access points on any one property frontage (see MCRR 4.200).

Condition 4, Note 2 to Hearing Officer: County Transportation does not consider the ingress on Access 2 and Egress via Access 1 solution offered by the Applicant as an

<sup>1</sup> <https://multco.us/info/road-and-bridge-service-request-app>

enforceable condition. County Code does not have provisions for such ingress/egress requirements on residential accesses.

5. Applicant must obtain a ROW-General (driveway) permit for the retained accesses via the [Permit Portal](#) (MCRR 18.250). Further information can be obtained at the following URL: <https://multco.us/info/permitting-driveway>
  - a. Plan showing the two retained accesses must be clearly shown with annotations demonstrating driveway width meets DCM standards (MCRR 4.400). DCM Table 1.2.4 Private Access Driveway Widths for Single Family properties are 12-25 feet wide. Agricultural driveway widths should be between 20-35 feet wide.
  - b. Plan must also show a permanent method of closing the "Access 2" i.e fencing, permanent non-moveable shrubs/tree planting etc