Exhibit I.1

# OFFICE OF MULTNOMAH COUNTY ATTORNEY


JENNY M. MADKOUR
*County Attorney*

KATHRYN A. SHORT
*Deputy County Attorney*

B. ANDREW JONES
*Deputy County Attorney*
*Litigation Manager*

501 S.E. HAWTHORNE, SUITE 500
PORTLAND, OREGON 97214

FAX 503.988.3377
503.988.3138

NICK BALDWIN-SAYRE
ASHLEY BANNON MOORE
CARLOS J. CALANDRIELLO
CHRISTOPHER A. GILMORE
WILLIAM H. GLASSON
CINDY L. HAHN
COURTNEY LORDS
ANDREW MACKENDRICK
LOUISA H. MCINTYRE
ANDREW MULKEY
CARLOS A. RASCH
VERONICA R. RODRIGUEZ
ROBERT E. SINNOTT
JONATHAN P. STRAUHULL
KATHERINE C. THOMAS
JED R. TOMKINS
ANDREW T. WEINER
*Assistants*


March 14, 2025

Re: T2-2024-0031, Response to Applicant's Hearing Statement and Proposed Modifications to Conditions of Approval

On behalf of the County Planning Staff, please accept the attached letter and exhibit as Staff's open record submission in this case.

Staff and the applicant agree that many of the conditions appealed by the applicant are no longer needed because the applicant either sought and met the requirements for a deviation, or demonstrated compliance with the applicable criteria and conditions by making changes in the revised site plan. For reasons explained in more detail below, Planning Staff agrees with the applicant that because the applicant will not need to re-surface the parking lot, that certain stormwater provisions do not apply. Planning Staff also agrees that the Hearings Officer can approve some of the applicant's proposed activities as accessory uses and that Condition 6 may be modified to reflect that approval.

For two reasons, however, Planning Staff disagrees with the applicant's interpretation of the nonconforming use provisions of the County's Code. A Hearings Officer has already determined that the parking lot does not qualify as a nonconforming use and has been abandoned. That prior decision is final and the applicant cannot collaterally attack that conclusion in these proceedings. Staff also explains that the applicant's interpretation of the nonconforming use provisions in statute and County Code are wrong. The parking lot has been abandoned and cannot meet the verification criteria. That legal rationale is reflected in Staff's responses to the applicant's request that the Hearings Officer not apply many of the landscaping requirements imposed by various provisions of the Code. Many of those requirements do in fact apply in this case, and the applicant cannot avoid those requirements.

## A. Discussion

In this section, section A, planning staff responds to the applicant's legal arguments in Ms. Richter's February 18, 2025 letter and the parties' discussion at the February 28, 2025 hearing. In section B, staff responds to the applicant's Exhibit H (County Exhibit E.9) and the applicant's proposed revisions to the listed conditions of approval (Conditions of Approval 2.b. and 6).

### 1. Accessory Use

Issues Raised:

There are two issues raised by the applicant related to conditions 6.a., 6.b., and 6.c. First, the applicant seeks to modify the conditions and seeks approval to park trucks or work vehicles used for the off-site installation of the products that the applicant proposes to manufacture on the subject property. Second, the applicant also seeks to store, outdoors, various types of cables that would be used in the manufacturing process. The applicant argues that these activities qualify as accessory uses and are allowed in the zone pursuant to MCC 39.4665(J).

Response and Legal Analysis:

Planning Staff agrees that an accessory use in the Orient Commercial Industrial zone can include the applicant's proposed outdoor parking of work trucks used for off-site installation of a manufactured product as well as the outdoor storage of cables used in the manufacturing process. In this case, MCC 39.4665(B)(1) allows "small-scale low impact industrial uses," which include "(1) Manufacturing and processing of… (j) Communications equipment [and] (k) Electronic components and accessories." The applicant has applied to manufacture communications utility components, which would be the primary use on the property.

The code defines the term "accessory use" separately from "accessory building." MCC 39.2000. An "accessory use" refers to "[a] lawful use that is customarily subordinate and incidental to a primary use on a lot." MCC 39.2000. Consistent with the code's distinction between accessory buildings and accessory uses (and subject to additional standards listed), MCC 39.4665(J) allows "structures *or uses* customarily accessory or incidental to any use permitted or approved in this base zone…." (emphasis added). Unlike the definition of "industrial use" that applies to the Orient Commercial Industrial Zone, the

"accessory use" definition and the provisions in MCC 39.4665(J) quoted above do not require that the accessory use occur "in a building or buildings not exceeding 10,000 square feet of floor space." MCC 39.2000 (defining "small-scale low impact industrial use").

The installation-truck parking and the cable storage proposed by the applicant could be considered to be "subordinate and incidental to" the primary manufacturing use. The terms "subordinate and incidental" have technical, well-established meanings in land use law:

> "Treatises and legal dictionaries frequently use the terms 'incidental' and 'subordinate' to define the concept of 'accessory' use in zoning laws. For instance, The American Law of Zoning defines an 'accessory building' as one whose 'use is subordinate to or customarily incidental to an existing permitted principal building located on the same lot.' Patricia E. Salkin, 4 Am. Law Zoning, Glossary of Terms, § 41:16 (5th ed.) (May 2019 update) (emphasis added); accord Black's Law Dictionary 1681-82 (9th ed. 2009) (defining 'incidental use' as '[l]and use that is dependent on or affiliated with the land's primary use,' and an 'accessory use' as '[a] use that is dependent on or pertains to a main use'); Zoning: What Constitutes "Incidental" or "Accessory" Use of Property Zoned, and Primarily Used, For Residential Purposes, 54 A.L.R. 4th 1034 (1987)."

*Friends of Yamhill County v. Yamhill County*, 301 Or App 776, 734 (2020). In *Friends of Yamhill County*, the Court of Appeals concluded that the phrase "incidental and subordinate to" required the local government to review the nature, intensity, and economic value or economic context of the proposed uses in relation to the primary use of the property. *Friends*, 301 Or App at 734-75.

a. Installation-Truck Parking

In the context of the primary manufacturing use, the applicant's proposed use of parking heavy duty vehicles is separate and distinct from the applicant's primary manufacturing use. Parking or storing work trucks is not part of the manufacturing process itself, but is related to the primary use because the trucks would be used to install the manufactured product off-site. The act of loading and parking 7 work trucks is certainly less intensive than the primary manufacturing use and would take up far less space. Finally, the economic value of the proposed

use–parking work vehicles–does not, in and of itself, generate any income or result in a money-making product. As the applicant has pointed out, many of the other uses listed in MCC 39.4660, which are also subject to a 10,000 square foot building limitation, could customarily involve parking work or delivery vehicles. For those reasons, the proposed installation-truck parking use is "incidental and subordinate" to the primary use and therefore qualifies as an accessory use.

b. Cable Storage

The applicant's proposed storage activities are more closely related to the manufacturing process than the vehicle parking, but are nevertheless distinct and accessory. Consistent with the Black's Law Dictionary definitions quoted in *Friends*, the storage of cable used in the applicant's proposed manufacturing process is dependent on and affiliated with the land's primary manufacturing use. The proposed cable storage would only occur as a result of and in service to the manufacturing use. The intensity of the storage activity is far less than the manufacturing use, and would require less area than the 10,000 square foot manufacturing activities. Finally, in this context, the applicant's proposed storage has no independent economic value. The act of storing material–as contemplated and described by the applicant–that would be used in the manufacturing process does not itself result in economic or commercial activity, especially not one that would risk overtaking the primary use of the property.

Proposed Outcome:

Planning Staff recommends that the Hearings Officer approve the two outdoor accessory uses proposed by the applicant: (1) outdoor work-truck parking for up to 7 trucks used in the off-site installation process; and (2) up to 2,500 square feet of outdoor storage of cables used in the manufacturing use as accessory uses that are accessory to the primary manufacturing use. Limits on the number of installation-trucks and the outdoor area dedicated to storage ensures that the activity remains accessory in its scope relative to the 10,000 square foot limit imposed on the manufacturing use.

Planning staff would like a finding in the decision that defines the scope of the accessory uses allowed and states that the accessory use may only occur as long as it maintains an incidental and subordinate connection to the primary use. For those reasons, staff believes the decision should state the number of installation trucks allowed, that the applicant should be required to indicate the general parking locations of the trucks on the property, and that the applicant must demonstrate that

the accessory parking use can occur consistent with and separate from the other parking and loading areas required by code. Staff believes that the storage area must be similarly defined and described.

For those reasons, staff disagrees with the applicant's proposed modifications of the conditions of approval 6.a. and 6.b. Rather than deleting the conditions entirely, staff asks that the Hearings Officer modify the conditions to define the scope of the accessory uses allowed and their connection to the primary use of the property for manufacturing. Proposed modifications are described in Section B below.

**2. Nonconforming Use**

Issues Raised:

As shown in the applicant's Exhibit H (County Exhibit E.9), the applicant has determined that many of the 2.b. approval criteria discussed in Mr. Richter's February 18, 2025 letter are no longer needed because the applicant has changed the site plan to comply with the relevant approval criteria. For that reason, this section addresses the criteria and conditions of approval that the applicant's revised site plan still fails to meet. With respect to the parking lot discussed in this section, the remaining unmet criteria include 2.b.iv, 2.b.vi, and 2.b.xiv. As discussed in this section, the applicant's legal analysis and interpretation of the County's nonconforming use verification criteria are wrong. The existing parking lot does not meet the verification criteria required for a nonconforming use.

For all of the other 2.b. conditions of approval that the applicant addressed through its site plan but nevertheless also challenged on the basis that the parking lot must be treated as a nonconforming use, the same legal analysis applies. If the parking lot does not meet the County's verification criteria for a nonconforming use, then the applicant must comply with the newer code standards. In many cases, the applicant's revised site plan demonstrates that the applicant will comply with those standards. Even though the applicant has demonstrated compliance, the underlying legal standards remain applicable.

Response and Legal Analysis:

a. Prior Hearings Officer Decision

At the hearing, the Hearings Officer asked that planning staff provide prior Hearings Officer decisions that addressed the nonconforming use verification criteria found in the County's code as applied to the subject property in this case. *See* Exhibit I.2 (April 3, 2017 Hearings Officer Decision, T2-2016-4951). In the 2016 case, the Hearings Officer evaluated the nonconforming use verification criteria and concluded that the parking lot did not qualify as a nonconforming use. Staff explained "[t]he nonconforming status of the parking surface has been lost due to lack of use." 2017 HO Decision at 17-18.

For the purposes of the present case, the relevant facts remain unchanged. The tractor store and repair business that operated on the subject property "moved to their new facility in Gresham on December 20, 2013" and the "tractor store has ceased operation from the site for over two years." *Id.* at 28. Staff explained, "[t]he parking lot has not been used for a lawful commercial or industrial use since Pape' Machinery has moved from the property." *Id.* at 28-29. The hearings officer agreed and adopted the staff's findings. *Id.* at 2 ("All staff comments are hereby adopted by the hearings officer as her findings.") Neither staff nor the Hearings Officer evaluated the nonconforming use verification criteria because staff determined that the parking lot had been "abandoned" for more than two years after the tractor store stopped its activities.

Notably, the prior conclusion by the Hearings Officer in T2-2016-4951 cannot be challenged or collaterally attacked in this proceeding. *See e.g. Richardi v. City of Eugene*, 78 Or LUBA 229, 305 (2018) (quoting and explaining *McCollough v. City of Eugene*, 74 Or LUBA 573, 578-79 (LUBA No. 2016-058, Dec 21, 2016)(slip op at 7-8)). LUBA has repeatedly held that participants in land use proceedings cannot collaterally attack final land use decisions in subsequent proceedings. *Richardi*, 78 Or LUBA 229, 304 (quoting *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489, 500 (2004) ("issues that were conclusively resolved in a final discretionary land use decision… cannot be raised to challenge a subsequent application for permits necessary to carry out the earlier final decision.")) The rule against collateral attack results from "the finality of the prior land use decision." *Richardi*, 78 Or LUBA 229, 305-06 (2018).

b. County's Nonconforming Use Provisions and Verification Process

To the extent that the Hearings Officer seeks to address the applicable nonconforming use criteria, Staff provides the following analysis to support its decision in this case. The applicant is correct that the nonconforming use standards that apply to uses and structures also apply to improvements. MCC 39.2000

(defining the term nonconforming use to include "a legally established use, structure or physical improvement…); MCC 39.8305(B). The applicant is also correct that MCC 39.6505 exempts compliance with section 6.C.1 (MCC 39.6500 et seq). MCC 39.6505 explains that "[f]or nonconforming uses, the objectives of this Subpart shall be evaluated under the criteria for the Alteration, Modification, and Expansion of Nonconforming Uses." MCC 39.6505 requires the County to apply different criteria to nonconforming uses, and the County's nonconforming use standards are located in MCC 39.8300. However, the applicant is wrong that the parking lot qualifies as a nonconforming use.

For reasons explained in more detail below, the applicant's interpretation of the nonconforming use provisions in the County's code is wrong. The applicant has attempted to rely on the phrase "nonconforming condition," to refer to the parking lot, but that term does not appear anywhere in code or statute. ORS 197.130(5). The fact that the parking lot on the applicant's property has continued to exist in the same or similar form since its initial construction does not demonstrate compliance with the criteria used to identify a nonconforming use, either in statute or in code. Notably, the applicant does not attempt to apply the County's criteria for verifying nonconforming use status. MCC 39.8305(B).

i. ORS 215.130

To the extent that the applicant argues that ORS 215.130(5)[1] would apply directly to override the staff's application of MCC 39.6500 et seq (parking and loading) or MCC 39.8000 et seq (design review), it is worth noting that the County's code provisions define "nonconforming use" to include structures and infrastructure. MCC 39.2000. In contrast, the statute's use of the term "use of any building, structure or land" does not inherently include the concept that structures or improvements themselves may obtain "nonconforming use" status or be—in the applicant's words—be declared stand alone "nonconforming conditions." *See*

[1] "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted."

*Parks v. Tillamook County*, 11 Or App 117, 196-97 (1972) (requiring nonconforming use provisions to be interpreted narrowly and against allowing nonconforming uses to continue) (discussed in detail below). For that reason, it is not clear that ORS 215.130 could apply directly to the parking lot at issue in this case in the manner that the applicant seeks.

The applicant's statutory argument is ultimately undeveloped. The statute explains the circumstances in which continuation or alteration of a "use" of a structure may occur. The statute does not, however, apply to a "structure" outside the context in which the structure has been (or has not been) used. Pursuant to the statute, if an owner discontinues the nonconforming use, then at the time an owner seeks to start a new use, the structures and infrastructure must be brought into compliance. The statute does not impose additional requirements that must be evaluated from the perspective of the existing structures or improvements. Therefore, the County's nonconforming use provisions only appear to apply to the parking lot by virtue of the county's definition of "nonconforming use." MCC 39.2000. The statute does not apply to the parking lot in the manner suggested by the applicant in its February 18, 2025 letter.

ii. MCC 39.8300(D) and 39.8305(B)

Staff disagrees with the applicant that the nonconforming use verification standards in the code can be applied in a manner that determines that an improvement qualifies as a nonconforming use, simply by virtue of the fact that the improvement has existed unchanged from the time of installation or construction. That is because, in part, the County's nonconforming use verification criteria (MCC 39.8305(B)) require the decision-maker to evaluate the nonconforming use in relation to the activities that occurred on the property at the time the use became nonconforming. The nonconforming use provisions also do not apply to if the use, structure, or improvement has been abandoned or discontinued:

> "If a nonconforming use is abandoned or discontinued for any reason for more than two years, it shall not be re-established unless the resumed use conforms with the requirements of this Zoning Code at the time of the proposed resumption."

MCC 39.8300(D). *See also* MCC 39.8305(B)(7) ("A reduction of scope or intensity of
any part of the use as determined under this subsection (B) for a period of two years or more creates a presumption that there is no right to resume the use above

the reduced level.")

For nonconforming use and verification criteria to have meaning as applied to improvements and in accordance with the standards of statutory interpretation (ORS 174.010; *State v. Gaines*, 346 Or 160, 171-72 (2009) (explaining methodology)), the decision-maker cannot ignore the fact that the parking lot in this case has been unused or otherwise abandoned and has not experienced the level of activity associated with applicant's proposed primary and accessory uses for many years. MCC 39.8300(D), 39.8305(B)(7).

The applicant's argument that the parking lot is a nonconforming use or nonconforming condition because it continues to exist in its original form is misplaced and not supported by the applicable code provisions. MCC 39.8300(D); MCC 39.8305(B). In this case, it appears that the staff concluded that the existing building was "nonconforming" with respect to one of the code's yard criteria. But staff did not support that conclusion with any evidence or findings. *See Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992); *Sunnyside v. Board of Comm'rs*, 280 Or 3, 2021 (1977). Neither the staff nor the applicant has provided information required to demonstrate that the structure meets the nonconforming use verification criteria in MCC 39.8305(B).

The applicant ultimately relies on staff's unsupported conclusion about the building to assert that the parking lot must therefore also qualify as a nonconforming use. However, pursuant MCC 39.8300(D) and MCC 39.8305(B), the fact that the building may or may not be a nonconforming use has no bearing on whether the parking lot meets the applicable code criteria. In this case, the applicant bears the burden of proof to demonstrate that the parking lot independently meets the criteria required in the County's verification process. *Id.* The applicant has not done so.

The aerial photos provided by the applicant show that the prior use of the building has been discontinued and the building abandoned with respect to the discontinued activities for more than two years. MCC 39.8300(D); MCC 39.8305(B)(7). The same is true for the parking lot, with some photos appearing to show vegetation growing in the parking lot as result of disuse. *Id.* Although the Hearings Officer has the ability as part of this de novo appeal proceeding to apply the criteria in the county's nonconforming use verification code (MCC 39.8305(B)) and determine whether the primary building qualifies as a "nonconforming use," no party to this proceeding has asked the Hearings Officer to conduct that analysis for the building or to override staff's unsupported and

potentially erroneous conclusion in the appealed decision that the building was "nonconforming" with respect to the yard criteria.[2]

However, the applicant *has requested* that the Hearings Officer determine whether the parking lot qualifies as a nonconforming use. That task requires the Hearings Officer to apply the criteria in MCC 39.8300(D) and MCC 39.8305(B). The applicant's proposed interpretation of the County's code would mean that so long as an improvement continues to exist, then—short of demolition or removal—such an improvement could never be considered to have been "discontinued" or "abandoned" as those terms are used in MCC 39.8300(D). The applicant's interpretation would also mean that an improvement could not experience a "reduction of scope or intensity for any part of the use" as described in MCC 39.8305(B)(7). In violation of ORS 174.010, the applicant's implied interpretation fails to give meaning to many of the code provisions as they apply to improvements.

As described in MCC 39.8300(D), uses may be discontinued or abandoned. In as much as a particular use that utilizes an improvement may be discontinued, improvements are also certainly capable of being "abandoned" as that term is used in MCC 39.8300(D) by virtue of the county's definition of "nonconforming use." In addition to determining whether or not a nonconforming use has been "abandoned" for more than two years (MCC 39.8300(D))—which has occurred in this case—the verification criteria for nonconforming uses require the County to consider the "nature and extent of a nonconforming use." MCC 39.8305(B). The verification provisions explain that "[a] reduction of scope or intensity of any part of the use as determined under this subsection… for a period of two years or more creates a presumption that there is no right to resume the use above the reduced level." MCC 39.8305(B)(7).

As applied to physical things, like the parking lot in this case, the County's verification criteria require a decision-maker to assess more than just the physical features, location, or extent of an improvement. *See* MCC 39.8305(B)(1), (4), and (5). The criteria require the decision-maker to consider how that improvement may (or may not) have been used "at the time of adoption or amendment of the Zoning Code provision disallowing the use." MCC 39.8305(B). The decision-maker must

[2] For any nonconforming use that does not meet the verification Criteria, the applicant has the option of applying for a variance. MCC 39.8200, 39.8215. If, as part of these appeal proceedings, the applicant attempts to modify their proposal to seek a variance, staff requests the right to respond.

consider the scope and frequency of activities that occurred in relation to the improvement. MCC 39.8305(B)(2), (3). For that reason, the applicant is wrong to equate nonconforming status with the mere fact of ongoing or continued existence of the improvement. Demonstrating that an improvement is a nonconforming use requires more, and requires the decision maker to analyze the level of activity conducted in relation to the improvement. MCC 39.8305(B)(2), (3), (7).

For physical infrastructure, such as improvements, the verification criteria require the decision-maker to consider the activities that occurred in relation to the improvement or "nonconforming use." These include, "[t]he types and quantities of goods or services provided and activities conducted," as well as "[t]he scope of the use (volume, intensity, frequency, etc.), including fluctuations in the level of activity." MCC 39.8305(B)(2), (3). Those provisions must have meaning in the context of determining whether a particular structure or improvement qualifies as a nonconforming use. ORS 174.010. To give effect to those provisions in the context of determining whether a parking lot qualifies as a "nonconforming use" requires the decision-maker to consider the activities that have occurred in relation to the improvement and the characteristics of that activity.

Moreover, as a matter of law, nonconforming use provisions "are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible." *Parks v. Tillamook County*, 11 Or App 117, 196-97 (1972) (emphasis added). In *Parks*, the Court of Appeals explained that "[n]onconforming uses are not favored because, by definition, they detract from the effectiveness of a comprehensive zoning plan." *Id.* "Provisions for the continuation of nonconforming uses are strictly construed against continuation of the use." *Id.* Under the applicant's interpretation, the only manner in which an improvement could be "abandoned" would be if the improvement was removed or destroyed. However, that ignores the manner in which an improvement may be abandoned by discontinuing the activities described in MCC 39.8305(B)(2) and (3). MCC 39.8305(B)(7). The applicant's proposed interpretation, which focuses on the continued existence of the improvement, would do the exact opposite of the rule established by *Parks*. Rather than strictly construing the provisions in MCC 39.8300 "against continuation of the use" and against "the continuation of nonconforming uses as much as possible," the applicant's implied interpretation would make it nearly impossible to ever conclude that any improvement could ever be passively abandoned or give meaning to the provisions in MCC 39.8305(B)(2), (3), or (7).

For a parking lot in this case, the relevant activities would include those that occurred on the parking lot pursuant to the previously permitted use. It appears that all parties agree that in this case, the level of activities such as customer and employee parking, equipment storage, and loading or unloading of goods stopped "for a period of two years or more." MCC 39.8305(B)(7). In other words, the "nonconforming use"—i.e. the parking lot—was abandoned with respect to the uses and activities for which it was originally permitted or approved. MCC 39.39.8300(D). In that case, the more than two-year pause in the previous level activity "creates a [rebuttable] presumption that there is no right to resume the use above the reduced level." MCC 39.8305(B)(7). The applicant has not rebutted that presumption by demonstrating that "long-term fluctuations are inherent in the type of use being considered." MCC 39.8305(B)(7).

The types and quantities of goods or services provided and activities conducted in relation to the parking lot have been significantly reduced from the levels that the applicant now proposes. MCC 39.8305(B)(2). The volume, intensity, and frequency of parking and loading activity has been greatly reduced during the time that the subject property was left vacant. MCC 39.8305(B)(3). The parking lot does not meet the verification criteria in MCC 39.8305(B) and "shall not be re-established unless the resumed use conforms to the requirements of this Zoning Code at the time of the proposed resumption." MCC 39.8300(D). Therefore, if the applicant wants to obtain a permit to increase the level activities associated with the improvement, then the improvement will need to be modified to comply with existing code requirements. MCC 39.6505. The planning staff was therefore correct to apply the parking and loading standards in MCC 39.6500 and the design review standards in MCC 39.8000.

**3. Stormwater**

The applicant argues that the provisions in MCC 39.6235 do not apply because the applicant will not create or replace any existing impervious surfaces. Similarly, MCC 39.4680(E)(2) applies to "new impervious surfaces." Planning staff agrees that based on the applicant's decision to keep the existing parking lot, those provisions do not apply. Staff agrees that the existing stormwater system may remain, and that conditions 2.b.ix and 2.b.x are not needed unless the applicant decides to create new impervious surfaces or replaces existing surfaces.

**4. Deviation Request**

The applicant has requested a deviation to the paving standards required by MCC 39.6570(A)(1). The applicant submitted a Fire Letter from Gresham Fire Department, Brandon Baird, Deputy Fire Marshal, indicating the proposed fire access plan has been approved for the deviation (Exhibit E.7). The applicant also submitted a memo from the County Engineer (Exhibit E.7) stating the County Transportation Engineering has no concerns with the proposed deviation as there is no conflict with the County Transportation standards. For those reasons, staff agrees that the applicant complies with the standards in MCC 39.6570(2)(a) and (b). Staff believes that the Hearings Officer also has evidence to conclude that the existing graveled area complies with MCC 39.6570(2)(c) and (d). Therefore, staff agrees that the applicant can comply with the requirements to obtain a deviation for the surfacing standards in MCC 39.6570(A)(1), the Hearings Officer can approve the deviation, and Condition 2.b.i is no longer needed.

**5. Design Review.**

The applicant argues that the design review process and standards should not apply and that the non-conforming use criteria should apply instead. Planning staff notes that unlike MCC 39.6505, the design review process does not contain an exemption for nonconforming uses. *See* MCC 39.8010 (requiring final design review) and MCC 39.8015 (listing limited exceptions). For that reason, the applicant's request to exempt the applicant from the design review process is not consistent with the code. In this case, the applicant will need to demonstrate compliance with various design review criteria required by conditions of approval. As written, the County has a right to review and respond to an applicant's final site plan to ensure compliance with applicable code requirements.

## B. Conditions of Approval

This section contains the conditions of approval subject to the applicant's appeal. For each challenged condition, the applicant's response from Exhibit E.9 is included below each condition of approval followed by the planning staff's reply.

b. File a Type I application for Final Design to modify the site plan and proposed improvements to meet these conditions of approval.

**Condition 2.b.i.**

i. The applicant shall amend the site plan to show all parking areas paved in compliance with MCC 39.6570(A)(1) or reduce the number of parking spaces to a minimum of 12-14 spaces depending on their needs. [MCC39.6590(E)]

Applicant Response:

> The Decision document bottom of page 18, states, "The applicant has requested a deviation from the surfacing requirements..." and goes on to state the applicant did not provide the required Fire Letter or approval from the County Engineer. Given this response, the applicant is unclear why these items were not part of the completeness review completed prior to deeming the application complete. Regardless, a letter from the County Engineer and Fire Department comments approving a deviation to this standard have been secured. A supplemental narrative, included as Exhibit F, provides justification for a deviation to this standard. The applicant requests this condition be removed.

Planning Staff Reply:

> Pursuant to MCC 39.6570(A)(2), the applicant has submitted information required to obtain a deviation from the surfacing standards in MCC 39.6570(A)(1). Staff agrees that condition 2.b.i can be removed.

**Condition 2.b.ii.**

ii. Revise the site plan to show a single driveway access point leading from Powell Valley Road. The width of the driveway on Powell Valley Road shall be a minimum of 20 ft in width. All other driveways shall be closed and landscaping extended to these areas.

Applicant Response:

> The submitted revised Site Plan features a single driveway on Powell Valley Road in compliance with the required minimum width and all other driveways are proposed to be closed. The applicant requests this condition be removed.

Planning Staff Reply:

The applicant's revised site plan County Exhibit E.8 shows one access to the subject property and the width of the driveway to be 23 feet. The applicant has demonstrated compliance with the first part of Condition 2.b.ii.

However, the applicant must still comply with the landscaping requirements. *See* MCC 39.6570 (B) (requiring parking and loading areas to be physically separated); MCC 39.8045(C)(3) (requiring separation between parking or loading area and street "by a landscaped strip at least 10 feet in width").

**Condition 2.b.iii.**

iii. Revised the layout of the parking lot by either:
A. Deleting parking spaces 20-22; or
B. Shifting parking spaces 20-22 southward so that they are a minimum of 10 ft from the property line adjacent to Powell Valley Road.

Applicant Response:

The revised Site Plan shows that parking spaces 20-22 have been shifted 30 feet to the south satisfying the requirements of this condition. The applicant requests this condition be removed.

Planning Staff Reply:

The County has reviewed the revised site plan and the site plan (Exhibit A.8) shows parking spaces 20-22 setback 30 feet from the property line. The applicant has complied with MCC 39.4680 and Condition 2.b.iii may be removed.

**Condition 2.b.iv.**

iv. Add a 30-ft wide landscape planter strips along all areas of SE Powell Valley Rd. [MCC 39.6570(B)]

Applicant Response:

As detailed in the Attorney's letter, the nonconforming condition of the area abutting SE Powell Valley Road is allowed to remain as it predates the implementation of MCC 39.6580(B). This condition should be removed. If MCC 39.6580(B) does apply, as discussed in the staff decision at page 19,

the parking adjacent to the road requires a 10-foot planting area. As reviewed in the Decision on page 19, parking adjacent to a road requires a 10 foot landscape strip, not a 30 foot strip as Conditioned. The above condition contains very broad language and is not feasible given the location of the existing building and other existing improvements. The applicant requests this condition be removed.

Planning Staff Reply:

MCC 39.6570(B) (requiring physical separation from public streets by landscaped strips), MCC 39.6580(B) (requiring compliance with minimum yard dimensions), MCC 39.4680 (front, side, and rear yard requirements), and MCC 39.8045(C)(b) apply. As explained in Section A.2. above, the parking lot does not qualify as a "nonconforming use" because of the reduction in activity and abandonment. The minimum landscaping strip required is 10 feet between a parking or loading area and a lot line adjacent to a street. MCC 39.8045(C)(b). The applicant's site plan shows that the parking adjacent to SE Powell is setback 30 feet. These provisions require landscaping separation between the street and parking and loading areas only.

However, as explained in the response to Condition 2.b.xiv, additional requirements can be read to require the applicant to landscape areas that do not abut parking areas.

**Condition 2.b.v.**

v. The ADA parking space near 282nd Ave. must be located outside of the 30-foot Yard.

Applicant Response:

The Site Plan has been revised to establish compliance with this condition. The applicant requests this condition be removed.

Planning Staff Reply:

The revised site plan County Exhibit E.8 shows the ADA parking stall outside the 30-foot setback from SE 282nd Ave. The revised site plan

complies with the applicable criteria, and this condition of approval may be removed.

**Condition 2.b.vi.**

vi. Landscape planters shall cover the entire side of 282nd, SE Orient Drive, and portions SE Powell Valley Road up to the access driveway to the subject property [MCC 39.8045(C)]

Applicant Response:

> The existing pavement within the setback areas predates the adoption of MCC 39.8045(C), it is a nonconforming condition and therefore this criterion does not apply and this condition should be deleted. If this criterion does apply, the applicant is prepared to provide a revised Site Plan containing 15% of the site to be landscaped. With regard to MCC 39.8045(C) statement that "all areas...not otherwise improved shall be landscaped," the areas within the setbacks are improved with pavement. The applicant requests this condition be removed.

Planning Staff Reply:

> MCC 39.6570(B) (requires physical separation of parking areas from public streets by landscaped strips), MCC 39.6580(B) (requiring compliance with minimum yard dimensions), MCC 39.4680 (front, side, and rear yard requirements), and MCC 39.8045(C)(b) apply. As explained above, the existing parking lot and paved area does not qualify as a "nonconforming use" because of the reduction in activity and abandonment. The minimum landscaping strip required is 10 feet between a parking or loading area and a lot line adjacent to a street. MCC 39.8045(C)(b). The applicant's revised site plan shows that the parking and loading areas adjacent to SE Powell, SE 282nd, and SE Orient are all setback 30 feet. The provisions listed above require landscaping separation between the street and parking and loading areas only, which means that it is more accurate to say that pursuant to the code criteria that require separation between parking areas and streets, only portions of 282nd, SE Orient, and SE Powell must be landscaped.
>
> However, other applicable criteria require yard areas to remain mostly unpaved, and it is not clear that the existing pavement not dedicated to parking qualifies as a nonconforming use. *See* Staff Reply to Condition

2.b.xiv (explaining applicability of MCC 39.6580(A), MCC 39.6580(C), and MCC 39.8045(C)(2)).

In addition, the applicant cannot ignore MCC 39.8045(C)(1). That provision requires that a minimum 15 percent of the development area shall be landscaped, and can include the landscaped area required by MCC 39.8045(C)(3)(a) (25 square feet per parking space) and MCC 39.8045(C)(3)(b) (minimum 10 feet of landscaping between street and parking or loading area). Staff do not read MCC 39.8045(C)(2) to mean that the applicant does not need to also comply with MCC 39.8045(C)(1) or MCC 39.8045(C)(3). Planning Staff's position is that at minimum, the applicant must comply with the requirements in MCC 39.8045(C)(1) and (C)(3), regardless of how the Hearing Officer resolves the issue related to MCC 39.8045(C)(2) discussed in Staff's Reply to Condition 2.b.xiv.

The applicant has not demonstrated that the existing parking lot meets the criteria for verification as a nonconforming use. The applicant's revised site plan does not show compliance with the landscaping requirements in the criteria listed above. This condition of approval should remain, and pursuant to MCC 39.8010 site plan review is required to ensure compliance.

**Condition 2.b.vii.**

vii.The Loading Space adjacent to SE Powell Valley Road will need to be shifted 30 feet southward so that the required landscape planter may be added. At least one (1) 12-ft wide by 25-ft long paved parking space shall be provided. [MCC 39.6565, 39.6570(A), MCC 6595(C)]

Applicant Response:

The revised Site Plan shows that all of the parking, including the loading space, have been shifted 30-feet southward from SE Powell Valley Road and the applicant has requested a deviation from the surfacing standards. The applicant requests this condition be removed.

Planning Staff Reply:

The revised site plan Exhibit E.8 shows loading spaces and parking spaces set back 30 feet (MCC 39.4680), and the applicant has complied with the surfactant standards deviation requirement.

**Condition 2.b.viii.**

viii. Revise the site plan to show the location of all walkways within any required landscape yards or planters and parking areas.

Applicant Response:

No walkways through the site are proposed or required and this condition is unnecessary. The applicant requests this condition be removed.

Planning Staff Reply:

The applicant has not proposed walkways.

**Condition 2.b.ix.**

ix. If through the redesigning of the parking area to comply with the code standards, more than 500 sq. ft. of new impervious surfaces are created, a Stormwater Drainage Control System shall be designed and installed in compliance with MCC 39.6235.

Applicant Response:

As shown on the revised Site Plan, no new impervious surface areas are proposed and this condition is not needed and should be removed. The Attorney's letter contains additional review of this condition. The applicant requests this condition be removed.

Planning Staff Reply:

Planning staff agrees that the applicant has demonstrated that no new impervious surfaces are proposed, and for that reason compliance with MCC 39.6235 is not required.

**Condition 2.b.x.**

x. A new Stormwater Drainage Control System in compliance with MCC 39.6235 and MCC 39.6570(D) shall be designed and installed to dispose of all the surface water being generate by the parking and maneuvering areas that are paved on the lot. [MCC 39.4680(E), MCC 39.6570(D), MCC 39.6235]

Applicant Response:

> All of the existing areas proposed for parking are pre-existing. The applicant is not proposing to "create or replace any existing impervious surfaces" and therefore, MCC 39.6235 and 39.6570(D) do not apply. The applicant requests this condition be removed.

Planning Staff Reply:

> Planning staff agrees that the applicant has demonstrated that no new impervious surfaces are proposed, and for that reason compliance with MCC 39.6235 is not required.

**Condition 2.b.xi.**

xi. All parking spaces, loading spaces and aisle widths shall meet the Dimensional Standards of MCC 39.6565(A), (B) & (C).

Applicant Response:

> All parking spaces depicted in the revised Site Plan comply with the County's dimensional standards in MCC 39.6565. The applicant requests this condition be removed.

Planning Staff Reply:

> Planning staff agrees that the revised site plan demonstrates compliance with the applicable approval criteria and this condition is no longer required.

**Condition 2.b.xii.**

xii. The plan drawn to scale shall be submitted as part of the Final Design Review showing the proposed ground disturbance, grading, site contouring and filling to occur in substantial compliance with the revised site plan to implement the physical improvement proposed and required. [MCC 39.8025(B)

Applicant Response:

> As noted above and shown on the submitted revised Site Plan, the only site improvements include stripping paving and construction of a garbage enclosure. The applicant is amenable to a condition requiring the submittal of a site plan that substantially conforms with the submitted revised Site Plan. The applicant requests this condition be modified.

Planning Staff Reply:

> Staff disagrees with the applicant's response. The code requires the applicant to submit a site plan (MCC 39.8010), and the applicant has not yet demonstrated compliance with the land scaping requirements cited above. *See* Staff Reply to Condition 2.b.iv. and 2.b.vi.

**Condition 2.b.xiii.**

xiii. A trash enclosure shall be built on the subject site outside of any required landscape area or yards. [MCC 39.8040(A)(7)]

Applicant Response:

> The submitted revised Site Plan shows the location of a proposed trash enclosure near the northeast corner of the building. The applicant requests this condition be removed.

Planning Staff Reply:

> Staff agrees that the revised site plan demonstrates that this criterion has been met, and that the condition may be removed.

**Condition 2.b.xiv.**

xiv. All areas on the subject property that are not utilized for physical improvements for the parking, loading and maneuvering shall be landscaped. [MCC 39.8045(C)(2)]

Applicant Response:

As reviewed in the attorney's letter, the paved areas within the building setback predate the adoption of MCC 39.8045(C)(2) and therefore, this regulation does not apply. The applicant requests this condition be removed.

Planning Staff Reply:

Staff agrees that the current conditions demonstrate that the current paved areas are "improved." However, the applicant has not demonstrated that those improvements are nonconforming uses, and the current code provisions would not otherwise allow the applicant to completely pave or gravel the required yard area. MCC 39.4680 (yard requirements), MCC 39.6580(A) (Any required yard which abuts upon a street lot line shall not be used for a parking or loading space, vehicle maneuvering area or access drive…."), MCC 39.6580(C) ("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"); MCC 39.8045(C)(2) ("areas subject to the final design review plan and not otherwise improved shall be landscaped"). For that reason, it is not clear that the applicant can maintain the full extent of the existing pavement in those yard areas that do not abut the parking area and are not otherwise covered by MCC 39.8045(C)(1) and (C)(3). Other criteria such as MCC 39.6580(A), (C), and 39.8045(C)(2) require the yard areas remain unpaved and landscaped.

MCC 39.8010 site plan review is required to ensure compliance.

Planning Staff's position is that at minimum, the applicant must comply with the requirements in MCC 39.8045(C)(1) and (C)(3), regardless of how the Hearing Officer resolves the issue related to MCC 39.8045(C)(2) discussed above.

**Condition 2.b.xv.**

xv. A minimum of a 5-ft wide landscape strip shall be installed along the interior lot east of SE 282nd Avenue. [MCC 39.8045(C)(3)(b)]

Applicant Response:

Staff appears to have interpreted this standard to require a five foot landscape planter along the entire eastern property line. The referenced Code section requires parking or loading areas to be separated from the street by a

landscape strip 10 feet in width, and any other lot line by a landscape strip at least 5 feet in width. As detailed in the Attorney's letter, the applicant does not believe any additional landscaping is warranted. In addition, because the applicant owns two additional properties east of the subject property accessed through the subject property, requiring a landscape planter along the entire eastern property line is unreasonable. It should also be considered that the two additional lots east of the subject property share a common line with an established scrap metal yard. The applicant requests this condition be removed.

Planning Staff Reply:

Due to common ownership of adjacent properties and access between the properties, staff agrees that the "other lot line" provision in MCC 39.8045(C)(3)(b), which would require a 5-ft wide landscape strip along the western side of the parking area and subject property shown on the applicant's revised site plan does not apply.

**Condition 6.a., 6.b, and 6.c.**

6. As an on-going condition, the property owner(s) shall:

a. Fleet vehicles cannot be stored on-site in the available parking spaces. In order to meet the OCI definition of "small scale lot impact industrial uses" business vehicles will need to be store inside the building per MCC 39.4665(B)(1)(j),(k), (B)(4) definition.

i. Small-scale Low Impact Commercial or Industrial Use [Orient Rural Center and Orient Commercial Industrial] - As used in the rural community of Orient, there terms have the following meanings:

(B) 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.

b. Only the Primary Building (see Exhibit A.5) may be used for the approved business. No storage or other use has been approved as part of this permit for the building located in the southeast portion of the property. [MCC 39.4655].

c. Required parking spaces shall be available for the parking of vehicles of customers, occupants, and employees without charge or other consideration. No parking of trucks, equipment, materials, structures or signs or the conducting of any business activity shall be permitted on any required parking space. A required loading space shall be available for the loading and unloading of vehicles concerned with the transportation of goods or services for the use associated with the loading space and may not be used for parking. MCC 39.6520

Applicant Response:

As explained in the Attorney's letter, the outdoor parking of vehicles is necessary to serve this proposed use and is consistent with the OCI zoning obligations. The applicant requests this condition be removed.

Planning Staff Reply:

Consistent with the analysis in Section A.1. above, Planning Staff requests that the Hearings Officer modify condition 6 to allow as an accessory use, parking for up to 7 work-trucks used for installing products off-site that have been manufactured as part of the primary use of the property so long as the applicant can demonstrate and maintain compliance with the other applicable code provisions. The applicant will need to revise the site plan to show where this accessory use will occur. Planning Staff also requests that the Hearings Officer modify the condition to allow the applicant to store cables used in the manufacturing process as an accessory use.

MCC 39.8010 site plan review is required to ensure compliance.

Proposed Revision:

Keep existing language in 6.c., and add the following language in bold:

**As an ongoing condition, the property owner(s) shall ensure the following:** "**r**equired parking spaces shall be available for the parking of vehicles of customers, occupants, and employees without charge or other consideration**; n**o parking of trucks, equipment, materials, structures or signs or the conducting of any business activity shall be permitted on any required parking space**; a** required loading space shall be available for the loading and unloading of vehicles concerned with the transportation of goods or services for the use associated with

the loading space and may not be used for parking. MCC 39.6520**; the accessory use described in 6.a and 6.b. may occur so long as the remaining requirements of this condition are met as well as other applicable conditions required by the design review process in MCC 39.8000.**"

Replace the language in 6.a and 6.b. with the following conditions:

6. As an ongoing condition, the property owner(s) may, as an accessory use to the primary manufacturing use engage in the following activities:

a. Park or store up to 7 heavy duty vehicles used for the purpose of installing the manufactured product off-site.

b. In an area no greater than 2,500 feet, and subject to other requirements such as yard, setbacks, and screening, store cables outdoors that will be used in the manufacturing process that occurs as part of the primary use of the property.

**C. Conclusion**

For the foregoing reasons, Staff requests that the Hearings Officer modify and uphold the Director's decision.

Respectfully submitted,

Andrew Mulkey, OSB No. 171237
Assistant County Attorney
Multnomah County Attorney's Office
501 SE Hawthorne, Ste. 500
Portland, OR 97214
(503) 988-3138
andrew.mulkey@multco.us

*On behalf of Multnomah County Planning Staff*