

POST-HEARING MEMORANDUM

To: Record in Hearing of T2-2021-14981
From: County Staff
Date: September 2, 2022
RE: Response to New Information Submitted by the Applicant into the Hearing Record

The Applicant submitted to the Hearing's Officer ("HO") additional information addressing specific sections of the County's Decision ("Decision"). The County reviewed the Applicant's new information [Exhibits H.2.a – H.2.u, H.3, and I.2] submitted in support of the requested Approval of a Dwelling Customarily Provided in Conjunction with a Farm Use ("Customary Farm Dwelling"), Geologic Hazards ("GH") permit exemption, Significant Environmental Concern for Wildlife Habitat ("SEC-h") and Erosion and Sediment Control ("ESC") permits. There are multiple Multnomah County Code ("MCC" or "Code") considerations for the HO to account for in their analysis of the new information.

CONSIDERATIONS

- 1. Administrative Procedures [MCC 39.1135]: Not discussed in the Decision, but referenced in Exhibit H.3, p.3 – 5.**

During the Hearing, staff provided background on the "completeness review" process, including that there is no "review" of site plans or other documents by the County prior to the issuance of the decision as such an action would constitute a "land use decision" as defined in ORS 197.015(10) and require written findings and notice as set forth in ORS 215.416(9 through 11). The site plan and project description an applicant submits to a partner agency as part of obtaining service provider comments is the same as that provided with the land use application.

Staff provides the following additional comments:

A timeline of relevant dates for the "completeness review" is included in the table below. Should the HO have additional questions regarding MCC 39.1135, staff can provide further comment.

Date	Action
August 18, 2021	<ul style="list-style-type: none"> • Application fees paid / Application Received. <ul style="list-style-type: none"> ○ Start of 30 Day “completeness review” per MCC 39.1135.
September 08, 2021	<ul style="list-style-type: none"> • Application deemed Incomplete. Incomplete Letter sent to Applicant in accordance with MCC 39.1135. <ul style="list-style-type: none"> ○ February 14, 2022 listed as the 180 Day deadline [per ORS 215.427] to provide the missing information [listed in the Incomplete Letter].
September 18, 2021	<ul style="list-style-type: none"> • Applicant submits acknowledgement and acceptance of 180 Day deadline [to submit the missing information listed in the September 08, 2021 Incomplete Letter]
February 14, 2022	<ul style="list-style-type: none"> • Applicant’s Response [to September 08, 2021 Incomplete Letter] received.
February 14, 2022	<ul style="list-style-type: none"> • 180 Day deadline for missing information. Staff has two options: <ul style="list-style-type: none"> ○ Per MCC 39.1135(B), if the missing information is not provided by the deadline, the application shall be void. ○ Per ORS 215.427, if some of the missing information is provided with written notice from the Applicant that no further information will be provided, the application is complete as it stands. <p><i>NOTE: Staff determined the response letter to be consistent with ORS 215.427(4)(b).</i></p>
March 08, 2022	<ul style="list-style-type: none"> • Email response from County Staff to Applicant’s March 04, 2022 email [inquiring on the status of the review]. <ul style="list-style-type: none"> ○ Staff informs the Applicant that the case is on Day 22 of the 150 Day case review clock [per MCC 39.1135].
March 25, 2022	<ul style="list-style-type: none"> • Email response from County Staff to Applicant’s March 23, 2022 email [inquiring on the status of the review and if the case is in the 150 Day review]. <ul style="list-style-type: none"> ○ Staff responds that the case is on Day 39 of the 150 Day clock, and that the review of submitted application materials and drafting of findings is in progress.

2. General Provisions: In section 4.3, County Staff identified the need for additional information to address portions of the Code relative to Stormwater Drainage Control.

Staff amends and replaces their findings in the Decision for the following sections:

Section 4.3: A current Septic Review Certification completed August 11, 2022 is included as Exhibit H.2.f. A current, signed and stamped Stormwater Certificate is included as Exhibit H.2.p. A Stamped and signed [Stormwater] calculations document is included as Exhibit H.2.q.

According to the Stormwater Certificate, which lists Erik Esparza as the Professional Engineer, the proposal requires the construction of an on-site storm water drainage control system. The Stormwater Certificate references supporting documents (signed site plan, signed storm water system details, and stamped and signed calculations) dated February 12, 2022.

In Exhibit H.3, p. 6 – 7, the Applicant notes that the site plan and drainage details are included in the preliminary development plans (Exhibit H.2.o). The ‘Site and Access Plan, p. C-401’ (Exhibit H.2.o, p.9) and ‘Drainage Details, p. C-603’ are dated January 2021. Exhibit H.2.o does not contain the signed site plan or the signed storm water system details dated February 12, 2022.

Based on the above, Staff is unable to find that the proposal complies with MCC 39.6235. *Criteria not met.*

3. Customary Farm Dwelling Criteria: In sections 5.3 – 5.5, 5.8 – 5.10, and 5.12, County Staff identified the need for additional information to address portions of the Code relative to a Customary Farm Dwelling.

Staff amends and replaces their findings in the Decision for the following sections:

Section 5.3: The Applicant provided a letter from a licensed Architect (Exhibit H.2.g) regarding the calculation of the building height for the proposed house. Based on the Architect’s letter, affirming that the proposed building height complies with this standard, staff finds this standard met. *Standard met.*

Section 5.4: The County Right-of-way office indicates in the August 10, 2022 memorandum that NW Springville Road has sufficient right-of-way width (Exhibit H.1, p.14). Therefore, additional yard requirements are not necessary. *Criterion met.*

Section 5.5: A current Septic Review Certification completed August 11, 2022 is included as Exhibit H.2.f. A current, signed and stamped Stormwater Certificate is included as Exhibit H.2.p. A Stamped

and signed [Stormwater] calculations document is included as Exhibit H.2.q. The Applicant still needs to provide the February 12, 2022 signed storm water system details referenced in the Stormwater Certificate (Exhibit H.2.p). *Criteria not met.*

Staff provides the comments below in addition to their findings in the Decision for the following sections:

Section 5.10: The Applicant references purported income in Exhibit H.3, pp. 20 – 21. Staff is unable to confirm the farm related income until the Applicant provides certified copies of the 2020 and 2021 Schedule F forms. Certified copies of the Schedule F forms are key documentary evidence that would serve as the basis for a finding that the standard in this section is or is not met.

Section 5.12: The Applicant provided pictures of farming activities conducted on the subject property (Exhibit H.2.u). The Applicant states that they work 40 hours / week on the subject property and intend to give up “future apartments work” after moving into the requested Customary Farm Dwelling; the Applicant agrees with Staff that Stacy Reed works full-time as a dermatologist (Exhibit H.3, p. 23). A sworn affidavit from the Applicant reiterates the Applicant’s aforementioned statements (Exhibit I.2). Additional factors that the Applicant believes serves as evidence of farming activity is that the Applicant was elected to the Multnomah County Farm bureau [a voluntary external position] and that 3.0 acres [of the 84.0 acres] will be dedicated to the residential use (Exhibit H.3, p. 24).

The Applicant relies on their testimony and pictures as the primary evidence to support a finding of their principal engagement in a farm use on the subject property. Without additional evidence, the Applicant’s testimony and pictures do not sufficiently demonstrate satisfaction of this standard. As mentioned in the Decision, documentary evidence [including certified copies of 2020 and 2021 Schedule F forms] is necessary to support a finding that the Applicant is principally engaged in a farm use of the land.

4. SEC-h permit Criteria: In sections 6.9 – 6.10 and 6.12 of the Decision, County Staff identified the need for additional information to address portions of the Code relative to a Wildlife Conservation Plan.

Staff amends and replaces their findings in the Decision for the following sections:

Section 6.9: There does not appear to be any physical characteristics unique to the property preventing the applicant from meeting the development standards of subsection (B). As the applicant could meet the development standards of subsection (B), but chose a design that does not comply with said standards, the applicant must demonstrate that the alternative conservation measures (wildlife conservation plan) satisfies (C)(2) above.

The proposed Wildlife Conservation Plan (Exhibit H.2.k) addresses subsection (C)(3), described below, which [according to the Applicant’s consultant, a Professional Wetland Scientist] should improve wildlife habitat on the subject property. Conditions of approval ensure the implementation and maintenance of the mitigation area proposed in the Wildlife Conservation Plan. Therefore, the proposed Wildlife Conservation Plan can be considered the minimum departure from the standards required in order to allow the [requested] use. *As conditioned, the above criteria are met.*

Section 6.10: The Applicant’s consultant addresses the criteria of subsection (C)(3) in Exhibit H.2.k, pp. 9 – 10. Staff concurs with the consultant’s assessment that the criteria of subsection (C)(3) are met. Conditions of approval ensure the implementation and maintenance of the mitigation area proposed in the Wildlife Conservation Plan. *As conditioned, the above criteria are met.*

Section 6.12: The Applicant’s consultant addresses the criteria of subsection (C)(3) in Exhibit H.2.k, pp. 9 – 10. Staff concurs with the consultant’s assessment that the criteria of subsection (C)(3) are met. *Criteria met.*

5. GH permit Criteria: In section 7.1 – 7.2 of the Decision, County Staff identified the need for additional information to address portions of the Code relative to GH requirements.

Staff provides the comments below in addition to their findings in the Decision for the following sections:

Section 7.1: The Applicant provided a current Fire Service Agency Review (Exhibit H.2.n), which does not list any access road / driveway improvement requirements. An August 10, 2022 memorandum from the County Right-of-way office notes that paving will be required for the access and that additional information is needed to complete the Transportation Planning Review (Exhibit H.1, pp. 5 – 15).

Section 7.2: The Applicant references new documentation from an Oregon Licensed Professional Engineer to address this section (Exhibit H.3, p. 33). The new documentation (Exhibit H.2.m), must be reviewed by the HO to determine if the project qualifies for any relevant GH permit exemption(s) in MCC 39.5080. As noted in the Decision, the project does not qualify for the exemption listed in MCC 39.5080(N).

If the project requires a GH permit, the HO is not able to grant a GH permit through the appeal process due to the fact that the Applicant did not include a GH permit in their application. The application subject to this appeal process specifically requested a GH permit exemption.

6. ESC permit Criteria: In section 8.1 – 8.3 of the Decision, County Staff identified the need for additional information to address portions of the Code relative to ESC permit requirements.

As a general matter, the Applicant will need to revise the Erosion and Sediment Control (ESC) plan (Exhibit A.15), so that the ESC plan serves as the central document relative to ESC permit requirements. A detailed notes page should be added to address requirements of the most recent edition of the City of Portland Erosion and Sediment Control Manual, OAR 340-041-0345(4), and MCC 39.6225. Additional pages may be added to the ESC plan to address ESC requirements currently shown as details in other areas of the preliminary plans. A comprehensive, ESC specific plan is necessary to ensure that the ESC requirements are satisfied and the County ESC inspector can readily identify compliance when a project commences.

Staff provides the comments below in addition to their findings in the Decision for the following sections:

Section 8.1, (A) – (C): If after reviewing the documentation from the Oregon Licensed Professional Engineer (Exhibit H.2.m), the HO finds that the project meets a GH permit exemption(s) in MCC 39.5080, an ESC permit would be appropriate for the project. If the HO finds that the project requires a GH permit, the requested ESC permit cannot be authorized.

Section 8.1, (D): Public comments (Exhibit D.7) noted the deposition of debris on a public trail adjacent to the subject tract. The commenter provided pictures and noted the debris appeared following ground disturbing activity conducted on the subject tract. Previous issues with the deposition of debris during ground disturbing activity leads to additional concern(s) of a reoccurrence for the proposed project. The Applicant needs to specifically address in their ESC plan how they will prevent the deposition of debris on adjacent property and the public right-of-way during the proposed project.

Section 8.3, (B)(3) – (4): The Applicant references specific preliminary development plans in Exhibit H.3, p.39. The Applicant included a Geotechnical Reconnaissance, Geotechnical Report and Landslide Hazard Study (Exhibit H.2.m.) from an Oregon Licensed Professional Engineer to support their compliance with these standards.

Section 8.3, (B)(7): The Applicant provides more detail regarding the design of the erosion control measures and cites specific pages from the preliminary development plans (Exhibit H.3, p.42). A detailed notes page should be added to the ESC plan to address requirements of the most recent edition of the City of Portland Erosion and Sediment Control Manual, OAR 340-041-0345(4), and MCC 39.6225. Additional pages should be added to the ESC plan to address ESC requirements currently shown as details in other areas of the preliminary plans. Upon completion of the aforementioned revisions to the ESC plan, this standard would be met.

Section 8.3, (B)(8) – (10): The Applicant provides more detail on planned erosion control measures (Exhibit H.3, p. 43). This information needs to be incorporated into the ESC plan, possibly in a detailed notes page. A condition of approval related to the mulching requirement is included.

Section 8.3, (B)(13): The Applicant discusses provisions to address runoff (Exhibit H.3, p.44) and cites specific preliminary development plans. Additional pages should be added to the ESC plan to address this requirement, which according to the Applicant, is currently shown as details in other areas of the preliminary plans.

Section 8.3, (B)(14) – (15): The Applicant provides more detail on planned erosion control measures (Exhibit H.3, p.45). The information regarding plastic sheeting, rye grass and blown straw needs to be incorporated into the ESC plan (i.e. in a detailed notes section). Additional pages should be added to the ESC plan to address this requirement.

Section 8.3, (B)(16): The Applicant provides more detail on planned erosion control measures (Exhibit H.3, p. 46). The Applicant still needs to provide the storm water system details dated 02.12.2022 referenced in the Stormwater Certificate (Exhibit H.2.p). Additional pages should be added to the ESC plan to address this requirement.

Section 8.3, (B)(18): The Applicant provided more detail and cited specific preliminary plans (Exhibit H.3, p.47). The information regarding protective measures needs to be incorporated into the ESC plan (i.e. in a detailed notes section). Additional pages should be added to the ESC plan to address this requirement.

Section 8.3, (B)(19): The Applicant provided more detail and cited specific preliminary plans (Exhibit H.3, p.48). The information regarding protective measures needs to be incorporated into the ESC plan (i.e. notes section). Additional pages should be added to the ESC plan to address this requirement.

Section 8.3, (B)(20): The Applicant provided more detail and cited specific preliminary plans (Exhibit H.3, p.49). The information regarding protective measures needs to be incorporated into the ESC plan (i.e. notes section). Additional pages should be added to the ESC plan to address this requirement.

Section 8.3, (B)(22): The August 10, 2022 Memorandum from the County Right-of-Way office regarding the Applicant's request for a Transportation Planning review (Exhibit H.1, p.5 – 36), notes that additional information is needed to determine if the project creates a transportation impact (Exhibit H.1, p.6, Requirement no.3 and Exhibit H.1, p.14). Until the Applicant provides the County Right-of-Way office with the information needed to complete the Transportation Planning Review, and a completed Transportation Planning Review is available, staff is unable to find that this standard is met.

Staff amends and replaces their findings in the Decision for the following sections:

Section 8.2, (A)(4): The applicant provided a current Septic Review Certification completed August 11, 2022 by the City of Portland Sanitarian. *Standard met.*

Section 8.3, (B)(1): The Applicant's new information (Exhibit H.3, p. 37) states that they do not agree with the 20-year period outlined in this section. Other than the Applicant's statement, it is unclear how the submitted materials demonstrate that the total deposit of non-agricultural [imported] fill for the 20-year period preceding the date of the ESC permit application, and including the fill proposed in this ESC permit application does not exceed 5,000 cubic yards. Therefore, Staff is unable to find that this standard is met. *Standard not met.*

Section 8.3, (B)(2): The Applicant states that the fill is composed of on-site earth materials and that no outside fill will be used (Exhibit H.3, p. 38). A condition of approval requires compliance with this standard. *As conditioned, this standard is met.*

Section 8.3, (B)(5): The Applicant stated they were open to a condition of approval to address this standard (Exhibit H.3, p. 40). Staff agrees with that approach in this specific situation and includes a condition of approval to address this standard. *As conditioned, this standard is met.*

Section 8.3, (B)(6): The Applicant states that the fill is composed of on-site earth materials and that no outside fill will be used (Exhibit H.3, p. 38). A condition of approval requires compliance with this standard. *As conditioned, this standard is met.*

CONCLUSION

Based on the new information (Exhibits H.2.a – H.2.u, and H.3) submitted by the applicant to the HO, staff is able to recommend approval of the requested SEC-h permit. As described in this Memorandum, staff is still unable to recommend approval of the requested Customary Farm Dwelling and ESC permit. The new information contained in Exhibit H.2.m must be reviewed by the HO to determine

if the project qualifies for any relevant Geologic Hazards Permit Exemption(s) in MCC 39.5080 [excluding MCC 39.5080(N)]. Staff has drafted conditions of approval in the event the HO finds the Applicant meets the criteria for the Customary Farm Dwelling, GH permit exemption, and ESC permit. The conditions of approval are included as 'Attachment 1' of this memorandum.

ATTACHMENT 1

Conditions of Approval

The conditions listed below are necessary to ensure that approval criteria for this land use permit are satisfied. Where a condition relates to a specific approval criterion, the code citation for that criterion follows in parenthesis. Approval of this land use permit is based on the submitted written narrative(s) and plan(s). No work shall occur under this permit other than that which is specified within these documents. It shall be the responsibility of the property owner(s) to comply with these documents and the limitations of approval described herein.

1. Permit Expiration – This land use permit shall expire as follows:
 - a. Within two (2) years of the date of the final decision when construction has not commenced. [MCC 39.1185(B). Commencement of construction shall mean actual construction of the foundation or frame of the approved structure.
 - i. Notification of commencement of construction shall be given to Multnomah County Land Use Planning Division a minimum of seven (7) days prior to the date of commencement. Notification shall be sent via email to LUP-submittals@multco.us.
 - b. Within four (4) years of the date of commencement of construction when the structure has not been completed. Completion of the structure shall mean completion of the exterior surface(s) of the structure and compliance with all conditions of approval in the land use approval. [MCC 39.1185(B)]

Note: The property owner may request to extend the timeframe within which this permit is valid, as provided under MCC 39.1195, as applicable. The request for a permit extension must be submitted prior to the expiration of the approval period.

2. Prior to the Planning Director's signoff for any building permit for the dwelling use, the property owner(s) shall:
 - a. Record with the County Recorder the cover page of the hearings officer final decision, all pages containing conditions of approval, and the approved site plan. Proof of recording shall be made prior to the issuance of any permits and shall be filed with the Land Use Planning Division. Recording shall be at the applicant's expense. [MCC 39.1175]
 - b. Sign and record in the deed records for the County a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or

cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937 as required by MCC 39.4240.

- c. Submit product specification details for all exterior lighting demonstrating compliance with the County Dark Sky Lighting Standards as required by MCC 39.6850.
- d. Submit a Wildlife Conservation Site Plan to County Land Use Planning. This site plan shall clearly identify the mitigation area identified by the consultant in Exhibit H.2.k, note the required mitigation measures outlined by the consultant in Exhibit H.2.k., and note that the mitigation area shall be protected and maintained in perpetuity. [MCC 39.5860(C)]
 - i. Following the Applicant's submission of the Wildlife Conservation Site Plan, County Land Use Planning shall verify that the plan matches the requirements of MCC 39.5860(C). Following the County's verification, the verified Wildlife Conservation Site Plan shall be included with the final building plan review documents submitted to the building department.
- e. Submit evidence of compliance with the requirements set forth in the Transportation Planning Review Memorandum dated August 10, 2022 and authored by Graham Martin, Senior Planner (Exhibit H.1, Attachment A).

3. Prior to and during construction, the property owner(s) shall:

- a. Following County approval of the revised Erosion and Sediment Control Plan, the property owner(s) shall implement the erosion and sediment control measures as shown on the approved Erosion and Sediment Control Plan. [MCC 39.6225]
- b. Verify and document that all fill associated with the Erosion and Sediment Control permit is composed of earth materials only. [MCC 39.6225(B)(2)]
- c. Fills associated with the Erosion and Sediment Control permit shall not encroach on any water body unless an Oregon licensed Professional Engineer certifies that the altered portion of the water body will continue to provide equal or greater flood carrying capacity for a storm of 10-year design frequency. [MCC 39.6225(B)(5) – (6)]
- d. Temporary vegetation and/or mulching shall be used to protect exposed critical areas during development. [MCC 39.6225(B)(10)]
- e. Erosion and sediment control measures must be utilized such that no visible or measurable erosion or sediment shall exit the site, enter the public right-of-way or be deposited into any water body or storm drainage system. [MCC 39.6225(B)(18)]
- f. Such non-erosion pollution associated with construction such as pesticides, fertilizers, petrochemicals, solid wastes, construction chemicals, or wastewaters shall be prevented from leaving the construction site through proper handling, disposal, continuous site monitoring and clean-up activities. [MCC 39.6225(B)(20)]

- g. Fill trucks shall be constructed, loaded, covered, or otherwise managed to prevent any of their load from dropping, sifting, leaking, or otherwise escaping from the vehicle. No fill shall be tracked or discharged in any manner onto any public right-of-way. [MCC 39.6225(B)(22)]
 - h. No compensation, monetary or otherwise, shall be received by the property owner for the receipt or placement of fill. [MCC 39.6225(B)(23)]
 - i. Whenever sedimentation is caused by ground disturbing activity, the property owner(s) shall be responsible for removing that sedimentation from all adjoining surfaces and drainage systems prior to issuance of occupancy or final approvals for the project. [MCC 39.6210(E)]
 - j. Maintain as nearly as possible in its present state the water body, floodplain, and right-of-way during ground disturbing activity, and return the same to a functional condition equal to or better than the condition existing immediately prior to the ground disturbing activity. [MCC 39.6210(E)]
4. On-going Conditions. The following conditions shall apply in perpetuity, and compliance shall be required on an on-going basis:
- a. The customary farm dwelling use, including dwelling structures and associated accessory structures (collectively referred to hereinafter as “dwelling use”), approved through this Permit is a “dwelling customarily provided in conjunction with a farm use on not high-value farmland soils, capable of producing the median level of annual gross sales,” Former MCC 39.4265(B)(3). Any dwelling use of the Property pursuant to this Permit must be established and maintained in compliance with the criteria in Former MCC 39.4265(B)(3) and the other terms of approval of this Permit. Unless authorized by a separate permit, a dwelling use that is not established or maintained in compliance with the criteria in Former MCC 39.4265(B)(3) and the other terms of approval of this Permit is not allowed and all dwelling structures and accessory structures supporting such noncompliant dwelling use may be required to be removed from the Property. Upon request by the Planning Director, the Owner shall provide a report on the identity of the occupants of the dwelling approved through this permit and their relation to the farm use of the land as well as the annual gross sales for not more than a five year period prior to such request; the Planning Director shall not make such request without good reason nor make more than one such request within any three-year period. No such request shall be made earlier than one (1) year after final building inspection approval of the dwelling. The County shall provide the Owner a reasonable time to cure any violation. [Former MCC 39.4265(B)(3)]
 - b. The nuisance plants in MCC 39.5580 Table 1 shall not be planted on the subject property and shall be removed and kept removed from cleared areas of the subject property. [MCC 39.5860]