Exhibit J.1

Bateman Seidel

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March 28, 2025

VIA EMAIL (LUP-Comments@multco.us)

Multnomah County Hearings Officer
1600 SE 190th Ave
Portland, OR 97233

Re: New Horizon Utility - 6928 SE 282nd Ave
County Case File T2-2024-0031 – Open Record Response

Dear Hearings Officer:

On behalf of New Horizon Utility Construction LLC, the applicant in the above-referenced case, this letter responds to the materials filed by the Multnomah County Attorney's office dated March 14, 2025. In this submittal, County staff agreed with the Applicant's objections in nearly all respects, except with regard to the nonconforming pavement and the County's landscaping standards. Although the Applicant appreciates that an agreement has been reached, the Applicant's planner met with staff after the Director's decision issued, raising many of the points raised in this appeal. That effort fell on deaf ears and forced my client (as well as the County) to incur significant additional costs seeking resolution through this appeal and endure unnecessary delay. This additional delay is particularly troubling because this application was deemed complete on March 22, 2024, over one year ago, resulting in a decision issued well after the 150-day decision-making deadline required by state law.

This response will focus on the areas where dispute remains, primarily the nonconforming condition issues. As noted previously, the existing paved surface within the yard area was installed in 1960 before the County adopted off-street parking and design review standards requiring landscaping around parking and prohibiting pavement within yards. County staff does not challenge this showing. Rather, what the County staff argues is that a previous land use decision conclusively determined that the parking surface was not nonconforming and that the nonconforming parking surface has been abandoned by lack of use. Both of these arguments are incorrect.

The 2017 Denial Decision

In 2017, the County denied an application to operate a marijuana dispensary on the subject property because the use would not support the rural community, a requirement for the OCI zone. According to the County, the following statement in the 2017 findings is conclusive of the

paving status question: “The nonconforming status of the parking surface has been lost due to lack of use.” p 17-18.

Before getting into the proper legal framework, it is important to point out that the County’s reliance on cases like *Richardi v. City of Eugene,* 78 Or LUBA 229 (2008) and its progeny are misplaced. In *Richardi*, the applicant got a zone verification under ORS 227.160 and then relied on that zone verification for the eventual approval of the facility. The "zone verification" process is set up under state law to specifically avoid this issue and, unless the 2017 decision was a zone verification which it was not (which isn't available in a county in any event), these holdings are inapplicable in this case.

As a general rule Oregon's system of land use adjudication "is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding." *Nelson v. Clackamas County*, 19 Or LUBA 131, 140 (1990). More specifically, LUBA has explained:

> "When an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue if five requirements are met: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given." *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519 (2001), *aff'd*, 180 Or App 495, 43 P3d 1192 (2002).

None of these factors are met in this case. Regarding factors one and two, the nonconforming use verification criteria applied in 2017 considered only the location of the buildings in relation to the setbacks. P 28-29. The statement about the parking surface being lost due to lack of use appears in response to the parking surfacing standards in MCC 36.4180, which is not in dispute in this case. There is no indication as to whether the applicant in 2017 sought a nonconforming use determination for the pavement or whether the nonconforming use criteria were applied to consider this question. Regarding factor three, the denial was based on the applicant’s failure to establish that the business would serve the rural area, a requirement for the OCI zone and had nothing to do with the nonconforming surface issue. Again, there is no indication whether the dispensary applicant pursued nonconforming acknowledgment for the pavement or whether they had a fair opportunity to litigate this question. The current Applicant had no involvement in the

2017 proceeding and was fully unaware of it.[1] Finally, there is nothing on the face of this denial to suggest that it was intended to be given preclusive effect.

It is also telling that the 2017 decision did not apply any of the landscaping standards that the County now claims must be satisfied in this case. The 2017 decision did not suggest any removal of pavement or landscaping to any degree which would have been required upon a finding no nonconforming authorization to continued use. As noted, these landscaping standards were adopted in 1979. If this 2017 decision is to be given any preclusive effect, it must also be determinative of the criteria that apply in this case, which expressly did not include the parking and design review standards that the County now alleges are essential.

To the extent that the 2017 decision is relevant, the hearings officer could find that this denial decision is conclusive in verifying that the structures are nonconforming with respect to setbacks. P 28-29. Returning to the *Lawrence* factors, the findings do suggest that this specific question was considered and findings were adopted in response. Relying on this previous decision as verification of the nonconforming status of the structure offers a legally supportable approach that is more sound than the staff's position of avoidance.

The County Code and ORS 215.130 Allow Nonconforming Structures to Continue

The second argument put forward by the County is that the nonconforming code, which implements ORS 215.130(5), does not allow nonconforming structures to continue where there has been no use for more than two years. The parties appear to agree that an improvement, such as pavement used for parking vehicles, can qualify as a nonconforming use. A "nonconforming use" is defined in the code to include "a legally established…physical improvement." Nothing in the code suggests that these qualifying "improvements" are limited to include only "structures and infrastructure," as the County suggests. An "improvement" is defined as a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Webster's Third New Int'l Dictionary* 1138 (unabridged ed 2002). The definition of "improve" specifically includes "the act of laying out streets." If a street can qualify as an "improvements," the pavement installed within the yard area is similarly a "physical improvement" as it has altered the natural condition of the property with the effect of increasing its useability and, in turn, its value.

ORS 215.130(5) provides that 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." If there were any doubt about whether state law protects and allows physical improvements to remain available for use, whether conforming or nonconforming, ORS 215.130(9)(b) specifically lists "a

[1] In fact, in preparing for this hearing, the Applicant's representative inquired if the County had any land use approvals on file for this property or other decisions where the County has considered nonconforming improvements and the response what that there were none.

change in the structure or physical improvements of no greater adverse impact to the neighborhood" as a qualifying nonconforming "alteration." If "alteration" of a nonconforming improvement is allowed to occur under state law, then the use of those same improvements without alteration must similarly be allowed to continue.

The Applicant has verified the parking surface as a nonconforming improvement in compliance with MCC 39.8305 as detailed in its letter dated February 18, 2025. A nonconforming use verification requires a finding that the use was legally established and operating at the time that the restrictive regulations were enacted. The evidence shows that the pavement was installed on the property around 1960. This evidence gets further support from a finding in the 2017 denial that there was a permit on file for a 1959 building remodel that may well have included this paving. The evidence shows that this paving was installed in order to provide an outdoor showroom space for tractor sales. See affidavit of G. Bergh. The off-street parking and design review-imposed landscape standards were first adopted in 1979, nearly 20 years after the parking was installed. The County does not dispute these findings.

The County's argument is that the parking improvement cannot be verified because many of the review factors in MCC 39.8305 focus on the type of use, its nature and changes in intensity that cannot be determined without regard to the use. The defect in the County's position is that these are just factors to be "considered," rather than criteria that must be individually and discretely satisfied. *Downtown Community Association v. City of Portland*, 80 Or App 336, 722 P2d 1258, *rev den* 302 Or 86 (1986).

A number of the factors do apply in the context of a physical improvement and serve to ensure that the improvement has not been altered over time to increase the nonconformity. For example, they require understanding the size of the existing the paved area and has it always remained that size. If a previously owner had removed pavement in the yard area, there would be "a reduction of scope or intensity of the 'physical improvement'" and thereby a reduction in the amount of yard area that may be considered nonconforming.

The crux of the County's argument is that in order for a physical improvement to retain is nonconforming status it must be continuously used and not "abandoned or interrupted for a continuous two year period." MCC 39.8305(A)(2). The MCC does not define the terms "abandoned or interrupted." *Webster's Third International Dictionary* defines the term "abandoned" to mean "given up". As a past tense of the term "abandon," "to cease to assert or exercise an interest, right, or title to especially with the intent of never again resuming or reasserting it." p 3. As the past tense of the term "discontinued", "discontinue" means "end the operations or existence of." p 646. What is important about these definitions is that they require some affirmative action by an owner evidencing an intent to relinquish an established right in the form of physical removal. *See also Fountain Village Dev. Co. v. Multnomah County,* where the court held that abandonment requires "intentional relinquishment of a known right," 39 Or LUBA 207, 221 (2000)*, rev'd and remanded* 176 Or App 213, 31 P3d 458 (2001). These

definitions all require some action to remove a structure, or to otherwise make it unusable for the stated purpose, as the threshold for establishing abandonment.

Whether something less than demolition might qualify, there is no evidence that this owner or any of the preceding owners took steps to abandon the pavement. Attached is a series of aerial photos taken from Google Earth for the period from 2013 to the present. These photos show that tractors were parked on this property until sometime after July 2014. After that point, the parking was more sporadic but it did regulatory occur. Attached the attached statement from the owner Scott Johnson has indication, parking occurs daily including people pulling in to make phone calls, look at their vehicles, meet people, walk across the street to the gas station and sometimes people park and leave their cars for the day. Parked cars are visible in the aerial photos from 2016 through 2019. Although one would not expect to see any vehicles parked during the COVID shutdown but sometime between August 2019 and August 2020, the rear portion of the property was repaved and all of the grass growing along the SE Orient Drive frontage was removed. This is not an indication of abandonment of the nonconforming parking condition. Then, before June 2022, it appears that the southeast corner of the property was resurfaced. Again, this is not an indication of abandonment. Regular parking on the property is resumed before 2022 and has continued through to the present. This is evidence that at no time was the paved surface abandoned or discontinued. The Hearings Officer should verify the nonconforming improvement and allow it to continue.

Design Review Standards are Preempted by Nonconforming Protections

Finally, the County argues that no nonconforming use protection is available for the design review standards in MCC 39.8010 because there is no language authorizing as much. Under MCC 39.8300 and ORS 215.130(5), nonconforming physical improvements are allowed to continue and do not require further authorization in the design review standards themselves. Further, this lack of a parallel reference with respect to authorizing nonconforming uses exists throughout the code. For example, nothing in the OCI standards including siting and design make any reference to authorizing nonconforming uses to continue although presumably such action is allowed. Stated simply, there is nothing in the plain text to suggest that nonconforming physical improvements must comply with the current design review standards as part of initiating a new use. Therefore, these standards do not apply.

If the Landscaping-Related Standards Apply, They Are Satisfied

Should the hearings officer conclude that the landscaping standards do apply, the Applicant has included a tentative site plan that allows for a finding that the standards are satisfied. This "Plan B" plan is offered only in the event that the Hearings Officer concludes that the existing pavement does not qualify as a nonconforming improvement. The Applicant believes obtaining Hearings Officer review of this plan for compliance with the standards is necessary because the remaining conditions advocated by the County remain inconsistent and unclear. Condition 2.b.iv requires a 30 foot planting area and condition 2.b.vi requires a 10 foot planting area. Neither of

these conditions acknowledge that the location of the building, which the County does not dispute, makes installing a 10-foot planting in the northwest area impossible. This alternative plan should not be construed as any sort of offer or concession by the Applicant.

MCC 39.6570(B) requires physical separation between public street and parking. This can be accomplished by landscaping, when it is otherwise "required" or by curbs or other permanent barrier. MCC 39.6580(B) requires a minimum 10-foot landscaped front or side street yard setback. MCC 39.6580(C) provides that this 10-foot yard obligation in subsection (B) cannot be paved except for walkways, which do not exceed 12 feet in width and to driveways for 150 feet in width. What is shown in Plan B is landscaping of no less than 10 feet in depth along all of the public right-of-way. Because the location of the building making in-ground planting impossible on northern portion of SE 282nd Ave, Plan B shows planter boxes. There are two marked pedestrian walkways – one on SE Powell Valley Rd and the other on SE 282nd Ave. The opening in the landscaping to accommodate the walkways is less than 12 feet wide. The Applicant's Plan B plan satisfies these standards.

Moving on to the design standards, MC 39.8045(C)(1) requires that a minimum of 15% of the area is landscaped. Plan B shows that 15% of the total site area will be landscaped. MCC 39.8045(C)(2) requires that all area "not otherwise improved" must be landscaped. As noted above, the paved condition of the yard area is an "improvement" and therefore, need not be landscaped. Where there is setback yard area exceeds 10 feet, that area may retain its existing paved status. MCC 39.8045(C)(3)(a) requires 25 square feet of landscaping per parking space. There are 22 parking spaces requiring 550 square feet of landscaping. Here, 6756 square feet is proposed, far exceeding this threshold. MCC 39.8045(C)(b) requires, again, parking separated by a 10 foot strip. This is provided in the Plan B plan to the extent it is feasible given the location of the structure. MCC 39.8045(3)(c) requires certain planting types and spacing. To the extent it is necessary, the Plan B plan establishes full compliance with the landscaping standards.

Conclusion

Based on the foregoing, the hearings officer should conclude that the pavement within the setback areas adjacent to the street can remain in its nonconforming condition until such time as it is removed. To the extent that a nonconforming improvement can be abandoned without physical removal, the Hearings Officer should find that the pavement for parking condition has not been abandoned. As a result, the hearings officer should delete conditions 2.b.ii, 2.b.iv, 2.b.vi, 2.b.xii, and 2.b.xiv from the County's final decision.

Should the Hearings Officer concludes that the landscaping standards do apply, a finding may be made that Plan B plan fully satisfies those standard. Therefore, the five conditions listed above should be deleted and replaced with a singular condition governing the required planting mix as set forth in MCC 39.8045(3)(c):

> "Any required landscaping, not including the planter boxes proposed for SE 282nd Ave, shall include street trees, not to exceed 50 feet apart, on average, low shrubs, not to reach of height greater than 3 feet spaced no more than 5 feet apart and vegetative ground cover."

With this submittal, the Applicant would like to waive its right to any further submittal final written argument and respectfully requests that the Hearings Officer move forward with making a final decision.

Very truly yours,

Carrie A. Richter

CAR:kms
cc: Client
Andrew Mulkey
Enclosures

Google Earth Aerial images of the New Horizon Property Obtained on 3/25/2025

July 2013 – Green vehicles perhaps tractors or John Deere machinery visible throughout:

July 2014 – Same as above:

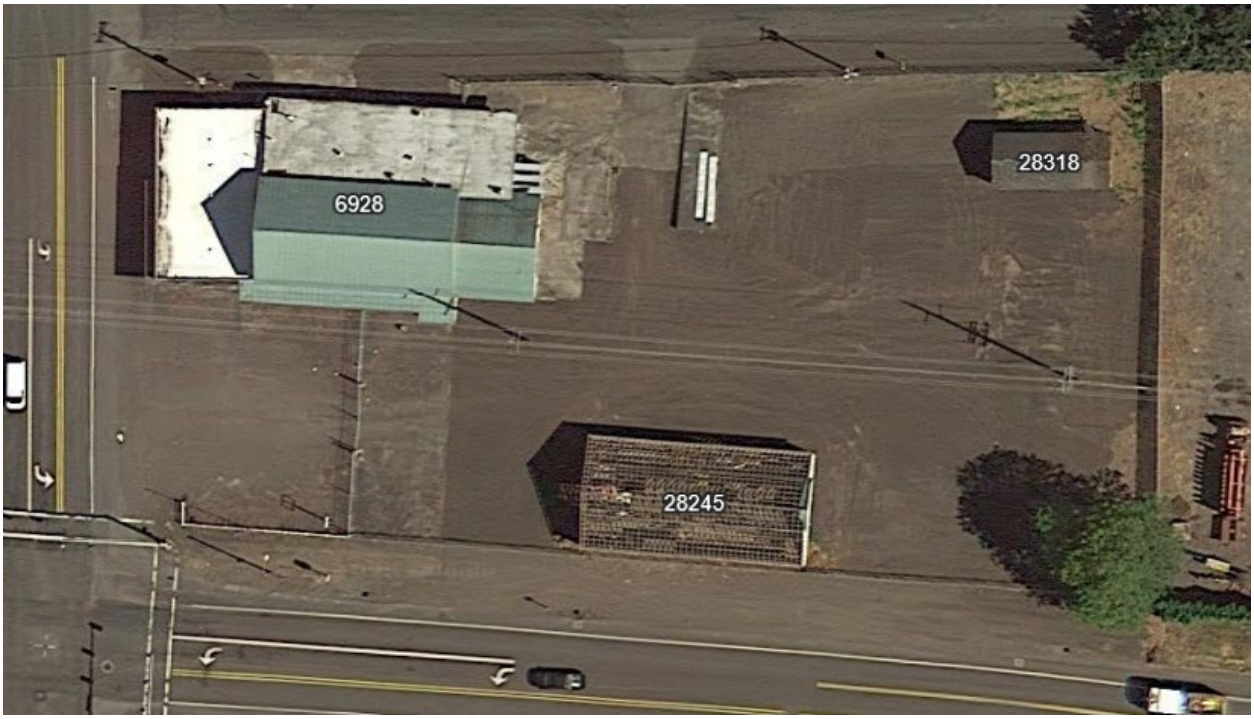
July 2016 – one vehicle parked:

July 2018 - at least one vehicle parked:

May 2019 – multiple vehicles parked:

Aug 2019 – not a very clear image but at least one vehicle is parked:

Aug 2020 – North and east side of the property is resurfaced:



June 2022 – southwest corner of the property has been resurfaced:

April 2023 – parking occurring:

May 2024 – parking continues:

BEFORE THE HEARINGS OFFICER

FOR MULTNOMAH COUNTY

In the matter of the New Horizons Appeal of a Decision by the Planning Director and Design Review to establish a business in an existing building.	Case No. T2-2024-0031 **STATEMENT OF SCOTT JOHNSON**

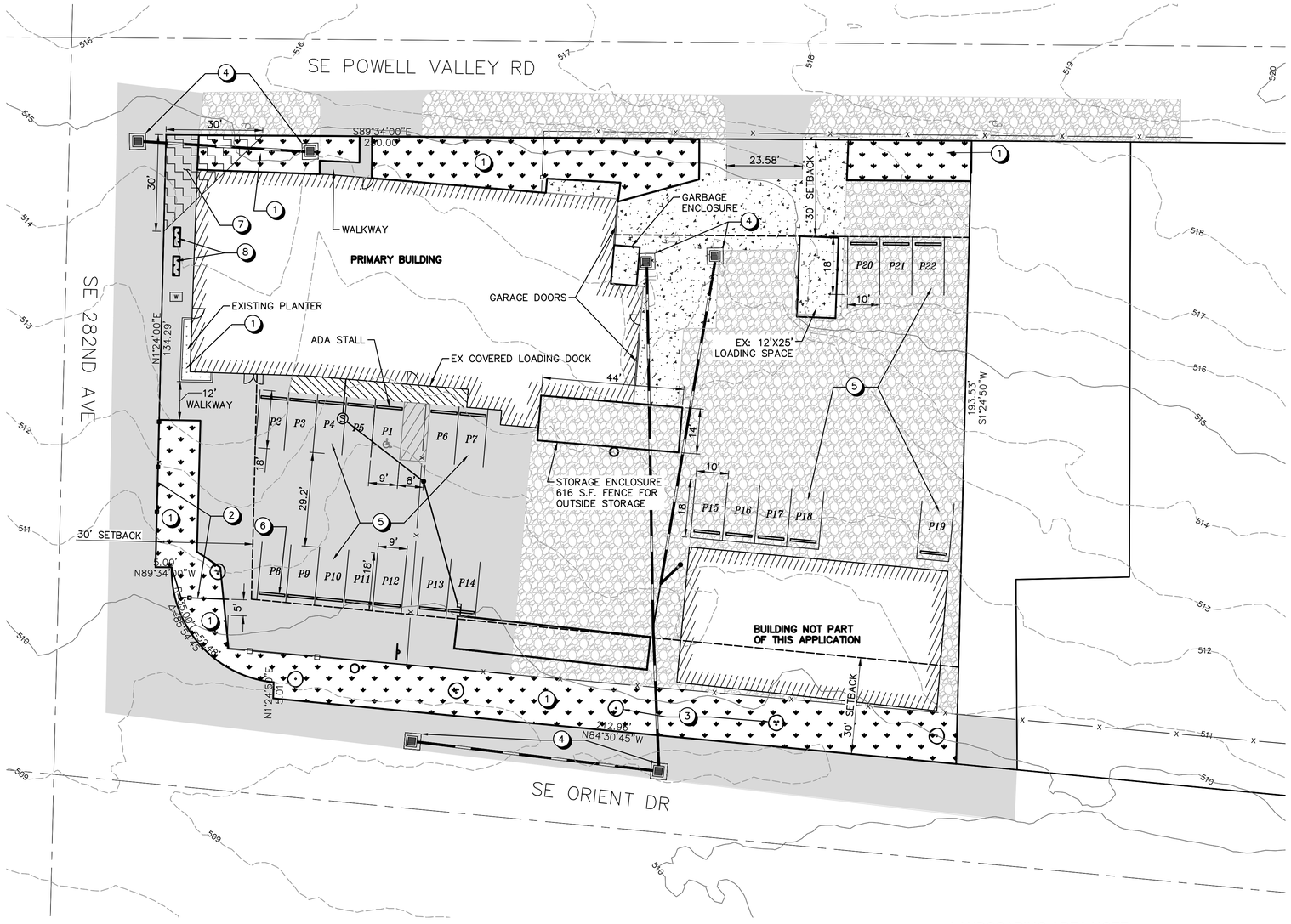
I am the owner of New Horizon Utility Construction LLC. I purchased the subject property planning for eventual use by New Horizon in May of 2022.

I have not taken any action to abandon or otherwise eliminate any of the pavement that currently exists on the property.

I can confirm that since May 2022, I have seen vehicles parking on the property including people pulling in to make phone calls, look at their vehicles, and walk across the street to the gas station. Sometimes people park there and leave their cars for the day like it is some sort of carpooling meeting point. No period of two-year vacancy has occurred.

March 27, 2025

Scott Johnson



LANDSCAPE DENSITY		
LOT	45,040	SF
NEW LANDSCAPE	6,755	SF
NEW LANDSCAPE COVERAGE	15.00%	

STREET TREE		SPACING	HEIGHT
ACER CIRCINATUM	VINE MAPLE	50 FT MAX	VARIES
CORYLUS CORNUTA	WESTERN HAZELNUT	50 FT MAX	VARIES
SHRUBS		SPACING	HEIGHT
SYMPHORICARPOS ALBUS	COMMON SNOWBERRY	5 FT MAX	3.0 FT MAX
RIBES VISCOSISSIMUM	STICKY CURRANT	5 FT MAX	3.0 FT MAX
RUBUS PARVIFLORUS	THIMBLEBERRY	5 FT MAX	3.0 FT MAX

GENERAL NOTES

1. EXISTING UTILITY LOCATIONS APPROXIMATE BASED ON AERIAL.

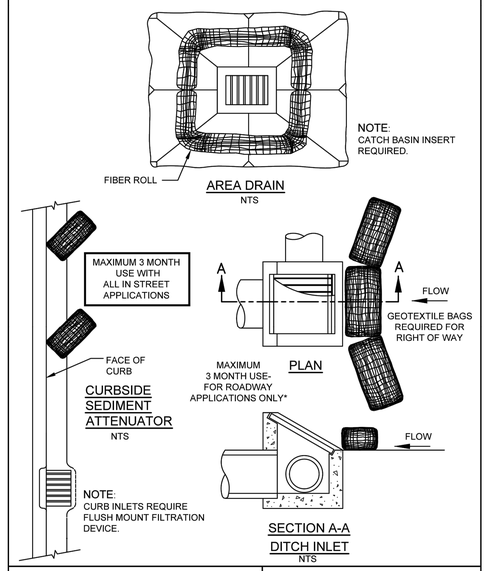
KEY NOTES

1. INSTALL GROUND COVER AND SHRUBS IN LANDSCAPE AREA PER LIST ON THIS SHEET.
2. INSTALL WHITE PLASTIC FENCE (MATCH EX STYLE). COORDINATE WITH PROPERTY OWNER ON GATE LOCATION.
3. INSTALL STREET TREES PER LIST THIS SHEET (TYP).
4. INSTALL INLET PROTECTION IN CONSTRUCTION AREAS PER DETAILS THIS SHEET.
5. PARKING STALL (TYP).
6. 8' WHEEL STOP (TYP).
7. CLEAR VISION TRIANGLE.
8. INSTALL 2 – 2' X 6' ABOVE GROUND PLANTER AND SHRUBS PER LIST ON THIS SHEET.

LANDSCAPING AREA NOTE:

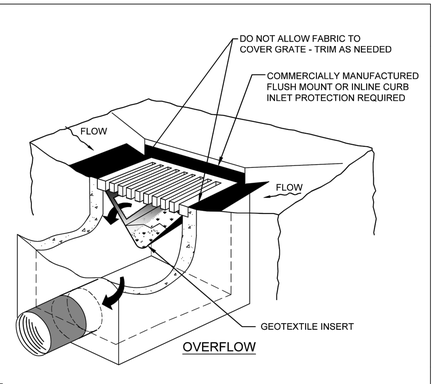
EXIST. GRAVEL AREA TO BE REMOVED: 3,632 S.F.
EXIST. ASPHALT AREA TO BE REMOVED: 2,443 S.F.
EXIST. CONCRETE AREA TO BE REMOVED: 656 S.F.
TOTAL HARDSCAPE AREA TO BE REMOVED: 6,731 S.F.
ABOVE GROUND LANDSCAPING AREA: 24 S.F.
TOTAL NEW LANDSCAPE AREA: 6,755 S.F.

*BIOBAGS MUST BE REMOVED AT END OF JOB



EROSION CONTROL MANUAL | FILTRATION BAGS AND SOCKS: TEMPORARY INLET PROTECTION
Detail Drawing 3.16-A

FILE DRAFT:INSPECTORS GRAPHICS DRAWING PLOT 1:1



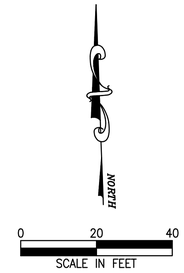
NOTE:
RECESSED CURB INLET MUST BE PROTECTED WHEN CURB INLET IS PRESENT.
SIZE OF FILTER FABRIC INLET SACK TO BE DETERMINED BY MANUFACTURER.

COMMERCIALLY MANUFACTURED DEVICES RATED AS "HIGH FLOW" REQUIRED IN LOCATIONS WHERE FREQUENT FLOODING OCCURS. GRATES THAT ARE NOT REMOVABLE MAY UTILIZE COMMERCIALLY MANUFACTURED "TOP OF GRATE" DEVICE.

DRAWING NOT TO SCALE

EROSION CONTROL MANUAL | STORM DRAIN INLET INSERT
Detail Drawing 3.19-B

FILE DRAFT:INSPECTORS GRAPHICS DRAWING PLOT 1:1



REGISTERED PROFESSIONAL ENGINEER
67149PE
OREGON
Jan. 14, 2003
KELLI A. GROVER

EXPIRES: 06/30/25
SIGNATURE DATE: 03/27/25

DATE:	NO.	REVISION

DRAWN: | DESIGNED: | CHECKED:
SCALE: AS SHOWN | DATE: MARCH 27, 2025
PROJECT NO. E23-034

FIRWOOD DESIGN GROUP
359 EAST HISTORIC COLUMBIA RIVER HIGHWAY
TROUTDALE, OREGON 97060
BUS: (503) 668-3737 ✦ FAX: (503) 668-3788

SCOTT JOHNSON
6928 SE 282ND AVE
GRESHAM, OR 97055

ALTERNATIVE PLAN B SITE PLAN

3
3