

## Notice of Hearings Officer Decision

Attached please find notice of the Hearings Officer's decision in the matter of **T2-2019-12701**, mailed December 4, 2020. This notice is being mailed to those persons entitled to receive notice under MCC 39.1170(D).

The Hearings Officer's Decision is the County's final decision and may be appealed to the State of Oregon Land Use Board of Appeals (LUBA) by any person or organization that appeared and testified at the hearing, or by those who submitted written testimony into the record.

Appeal instructions and forms are available from:

Land Use Board of Appeals  
775 Summer Street NE, Suite 330  
Salem, Oregon 97301

503-373-1265  
[www.oregon.gov/LUBA](http://www.oregon.gov/LUBA)

For further information call the Multnomah County Land Use Planning Division at: 503-988-3043.

**BEFORE THE LAND USE HEARINGS OFFICER  
FOR MULTNOMAH COUNTY, OREGON**

In the Matter of an appeal of a Director’s Type II Decision approving a Design Review and Lot of Record verification for a 156-foot tall Wireless Communications Facility on 8.36-acres zoned Mixed Use Agriculture (MUA-20) in unincorporated Multnomah County, Oregon

**FINAL ORDER**

**POR Stinger - appeal**

**T2-2019-12701**

**I. Summary:**

This Order is the decision of the Multnomah County Land Use Hearings Officer denying the appeal and affirming the Director’s August 20, 2020 Decision that approved a Design Review and Legal Lot of Record determination for a 156-foot tall Wireless Communications Facility on an 8.36-acre parcel zoned Mixed Use Agriculture (MUA-20) using concealment technology.

**II. Introduction to the underlying application and the Director’s decision:**

**Applicant** ..... Blackrock LLC  
Attn: Kimberly Spongberg  
22135 SW Cole Court  
Tualatin, OR 97062

**Owners**..... Clifton E. Hegstad Trust & Doreen F. Hegstad Trust  
29421 E. Woodward Rd.  
Troutdale, OR 97060

**Appellants**..... Woodward and Seidl Roads Neighbors Group  
Brian and JoAnne Vincent and Allison Knieriem  
330 NE Seidl Road  
33341 SE Carpenter Lane  
Gresham, OR 97080

**Property**..... Legal Description: Tax Lot 600 in Section 31DB, Township 1 North, Range 4 East of the Willamette Meridian, Alternative tax acct: R944310660, Property ID: R322458.

**Applicable Laws** ..... Multnomah County Code (MCC) 39.1515 (Code Compliance and Applications), MCC 39.2000 (Definitions), MCC 39.3005 (Lot of Record – Generally), MCC 39.3080 (Lot of Record – MUA-20), MCC 39.4315(F) (Review Uses), MCC 39.4325 (Dimensional Requirements and Development Standards), MCC 39.4340 (Off-Street parking and Loading), MCC 39.4345 (Access), Parking, Loading, Circulation and Access: MCC 39.6505 (General Provisions), MCC 39.6510 (Continuing Obligation), MCC 39.6515 (Plan Required), MCC 39.6520 (Use of Space), MCC 39.6525 (Location of Parking and Loading Spaces), MCC 39.6530 (Improvements Required), MCC 39.6535 (Change of Use),

MCC 39.6540 (Joint Parking or Loading Facilities), MCC 39.6555 (Design Standards: Scope), MCC 39.6560 (Access), MCC 39.6565 (Dimensional Standards), MCC 39.6570 (Improvements), MCC 39.6580 (Design Standards: Setbacks), MCC 39.6585 (Landscape and Screening Requirements), MCC 39.6590 (Minimum Required Off-Street Parking Spaces), MCC 39.6595 (Minimum Required Off-Street Loading Spaces), Exterior Lighting: MCC 39.6850 (Dark Sky Lighting Standards), Wireless Communication Facilities: MCC 39.7710 (Review Procedures Distinguished), MCC 39.7715 (Definitions), MCC 39.7725 (General Requirements), MCC 39.7735(B) (Application Submittal Requirements), MCC 39.7740 (Approval Criteria for Lands Not Zoned Exclusive Farm Use), Design Review: MCC 39.8010 (Design Review Plan Approval Required), MCC 39.8020 (Application of Regulations), MCC 39.8040(A) (Design Review Criteria).

The subject site is a 2,500 sf lease area within two parcels totaling 10.74 acres that are consolidated as a single lot of record for purposes of this proposal (TLs 500 & 600). As initially contemplated, the applicant planned a new stand-alone 150-foot wireless communication tower, which would have been processed as a Type III use. The final form of the application, however, included concealment technology, which required only a Type II process. The tower height also increased to 156 feet so that the antennal panels could be maintained at the same elevation and still accommodate the mono-pine concealment features. The proposal includes a chain link fence enclosing the lease lot, parking space for a single vehicle, an access drive to the nearest public right-of-way (Woodard Road), a 30kw diesel back-up power generator, a ground-based equipment cabinet, and the 156-foot monopole disguised to resemble a conifer tree (a so-called mono-pine style).

The application and supporting documentation were submitted November 19, 2019 (Exs. A.1 to A.38) for a new stand-alone wireless communication facility (156-foot monopole cell tower) including concealment technology (mono-pine). The County followed a Type II process, deemed the application complete on March 10, 2020 (Ex. C-3), issued notice of the application and solicited comments from property owners within the 750-foot notice range as required by MCC 39.1105 (Ex. C.4). Numerous neighbors to the site submitted comments in opposition, including JoAnne Vincent (Exs. D.1, D.2 & D.13), Jasmine Zimmer-Stucky (Ex. D.3), Brian Vincent (Ex. D.4), Mia Schreiner (Ex. D.5), Dave Flood (Ex. D.6), Chris Winters (Ex. D.7), Donna Davis (Ex. D.8), George and Donna Knieriem (Ex. D.9), Mark and Alison Knieriem (Ex. D.10), Pamela Teseniar (Ex. D.11), Alyssa Denny (Ex. D.12), Gordon Fulks (Ex. D.14) and Janet Helus (Ex. D.15). The applicant responded to the public comments in an August 11, 2020 memo (Ex. A.40) and an updated RF usage and facility justification (Exs. A.41 & I.2).

The Director compiled the record, including all public comments received during the 14-day comment period and issued a written decision on August 20, 2020 approving the application with 8 multi-part conditions (Ex. C.7).

### **III. The Appeal and Hearing Process:**

The two near-by neighbors (JoAnne Vincent and Alison Knieriem) and an ad-hoc organization (Woodward and Seidl Roads Neighbors Group) timely appealed the Director's decision (Ex. H.1), listing every one of the applicable code sections as potential basis for the appeal, but providing no legal argument nor any indication of the arguments against the application. The County issued notice of an October 16, 2020 public hearing (Ex. H.2), and the

applicant agreed to extend the 150-day final decision deadline (Ex. H.3) to accommodate the appeal hearing. The appellants waited until the day of the hearing to submit a memo (Ex. H.4) that articulated their arguments for the appeal and against approval of the application.

The October 16, 2020 hearing was held remotely via a Zoom internet platform, in which everyone participating via video or via telephone audio could hear everything that everyone said. At the commencement of the hearing, the Hearings Officer made the disclosures and announcements required by ORS 197.763(5) and (6) and 197.796 and disclaimed any *ex parte* contacts, conflict of interest or bias. No one raised any procedural objections or challenged the Hearings Officer's ability to decide the matter impartially, or otherwise challenged the Officer's jurisdiction.

At the hearing, Rithy Khut, Land Use Planner for the County, provided a verbal summary of the Director's August 20, 2020 decision (Ex. C.7). The appellants, JoAnne Vincent and Alison Knieriem, appeared through their attorney, John Rankin, PhD physicist Gordon Fulks, and on their own behalf in support of their appeal and against the Director's decision. During the hearing, Mr. Rankin provided a copy of a legal memo and a few exhibits in support of the appeal. In the memo and in his oral remarks, Mr. Rankin articulated for the first time the following grounds for the appeal:

1. MCC 39.6850 – Dark Sky Lighting Standards
2. MCC 39.7700 – Wireless Communication Facilities, Purpose
3. MCC 39.7725 – WCF General Requirements
4. MCC 39.7735 – Application Submittal Requirements
5. MCC 39.7740 – WCF Approval Criteria for Lands Not Zoned EFU
  - a. Accuracy of the Mapping
  - b. Non-ionizing electromagnetic radiation (NIER)
  - c. Visual Study and Graph Simulation
  - d. Environmental Resource Protection Subsection (A)(4)
  - e. Engineer's Report – Reasons Why

The 15 exhibits (Exs. H.5 to H.19) supporting the appeal were not submitted until later in the day after the hearing ended.

The applicant was represented by attorney Michael Connors, who began by objecting to the deficient appeal notice that listed every code section applicable to the proposal but provided no argument or indication of how the Director's decision was in error. In anticipation of what legal and factual arguments the appellants might raise, the applicant's attorney explained how the proposal met all of the approval criteria and that the Director should be affirmed. Mr. Connors also attempted to digest the appellants' just-filed legal memo and respond to the grounds for the appeal.

No one else requested the opportunity to testify, and no new written comments were received into the record. However, due to the late filing of the appeal arguments and supporting exhibits, the Hearings Officer ordered the record to remain open after the hearing according to the following schedule:

- 1 day (October 17, 2020) – appellants will submit a complete copy of their memo and all supporting exhibits.
- 2 weeks (October 30, 2020) – any party to submit new argument and/or new evidence relevant to the appeal issues

- 1 week (November 6, 2020) – any party to respond to arguments or evidence submitted during the first 2-week open-record period
- 1 week (November 13, 2020) – applicant’s final rebuttal, no new evidence

During the 2-week first open-record segment, the applicant’s attorney submitted a short memo (Ex. I.1), a memo from Verizon’s RF consultant (Ex. I.2), an Update to Protected Species Impact Evaluation by EBI Consulting (Ex. I.3), an FAA letter requiring lighting on the tower (Ex. I.4), and information about current FAA lighting technology (Ex. I.5).

The appellants waited until the second open-record period to submit the following documents in response to the applicant’s submissions in the first open-record period:

- Attorney’s memo (Ex. J.1)
- Memo from Gordon Fulks, PhD (Ex. J.2)
- A spring 2013 checklist from a bird survey of the Sandy River delta (Ex. J.3)
- A map showing how the 2013 bird survey was conducted (Ex. J.4)
- A memo from Mark and Ali Knieriem regarding FAA lighting requirements and visual subordination (Ex. J.5)
- Copies of the application form and supporting narrative in Exs A.1, A.2, A.3 & A.4 (Ex. J.6)
- Copy of the applicant’s response to public comments in Ex. A.40 (Ex. J.7)
- Copy of the Director’s decision in T2-2010-774, approving a 124-foot tall Wireless Communication Facility, using concealment technology at a site along Evans Road (Ex. J.8)
- A memo from JoAnne Vincent responding to the EBI natural resources review (Ex. J.9)

The applicant submitted a final written rebuttal on November 13, 2020, after which the record closed (Ex. K.1).

#### **IV. Findings:**

Only issues and approval criteria raised in the course of the application, during the hearing or before the close of the record are discussed in this section. All approval criteria or issues not raised by staff, the applicant or a party to the proceeding have been waived as contested issues, and no argument with regard to these issues can be raised in any subsequent appeal. The Hearings Officer finds those criteria to be met, even though they are not specifically addressed in these findings. The Hearings Officer adopts the Director’s Decision and the following additional findings related to the issues and approval criteria that were preserved during the proceeding while the record was open:

**A. Procedural Issues:** The following procedural objections to the process were raised by the applicant (Ex. K.1):

MCC 39.1160(A)(3)(d) requires a “statement of the specific grounds for the appeal” to be included in the notice of appeal. The applicant objects that the appeal notice in this case (Ex. H.1) listed every one of the applicable code provisions but articulated no arguments in support of the appeal, leaving staff and the applicant no indication as to the basis for the appeal. The appellants then waited until the morning of the hearing to provide a statement of their appeal arguments (Ex. J.1), with the supporting exhibits being submitted later in the day after the hearing had concluded. The applicant claims that the appellants’ tactics violated MCC 39.1160(A)(3) and

caused an unfair surprise that prejudiced the applicant's ability to respond to the appeal. The applicant's attorney asks that Hearings Officer reject the appeal on this basis.

This is a close call. Use of the mandatory word "must" in MCC 39.1160(A)(3) indicates that a failure to comply with any of the requirements for an appeal notice constitutes a jurisdictional defect that would result in rejection of the appeal. That did not happen in this case when Community Development staff accepted the appeal. When presented with the argument, the Hearings Officer concludes that listing all of the applicable criteria provided (just barely) technical compliance with the requirements of MCC 39.1160(A)(3)(d) that in this case, survives the jurisdictional defect argument. That conclusion is based in part on the extensive pre-appeal opponent arguments that provided a good indication of the arguments that could be in the appeal (Exs. D.1 to D.15). That leaves the unfair surprise aspect of this procedural objection and the question of whether the appellants' tactics were prejudicial to the applicant.

If there were nothing more to this process than the hearing, the Hearings Officer would agree that the appellants' tactics caused a prejudicial surprise to the applicant, especially when there was no explanation of appeal issues until the morning of the appeal hearing. However, the grounds for appeal eventually were articulated verbally and in writing at the hearing, and the record was left open during which the applicant figured out what the appeal arguments were and responded to them with focused arguments and evidence. Additionally, there was a substantial amount of pre-appeal opponent comments in the record (Exs. D.1 to D.15), which provided an understandable indication of arguments likely to be raised in the appeal. In the face of similar procedural objections, LUBA concluded that, where there is no actual procedural violation, the post-hearing open record and opportunities to review and rebut the other side's submissions cured an otherwise defective and prejudicial process. *See Eng v. Wallowa County*, \_\_ Or LUBA \_\_ (LUBA No. 2018-085, May 7, 2019, slip op at 9-14).

In a related argument, the applicant objects to the appellants having submitted new evidence during the second open-record period, when new evidence was not supposed to come in. The applicant claims it was unable during its final rebuttal to respond adequately to the appellants' new evidence, because no new evidence is allowed in the applicant's final rebuttal. ORS 197.763(6)(e). By way of a remedy, the applicant asks that the Hearings Officer reject the appellants' new evidence submitted during the second period (Exs. J.2 – J.9).

As a starting point, the new evidence submitted by the appellants could have and should have been submitted during the first open-record period. The fact that this new evidence came in during the second period does not mean the applicant had no recourse. ORS 197.763(6)(c) provided a remedy, but the applicant did not avail itself of that opportunity to re-open the record.<sup>1</sup> On this basis, the Hearings Officer declines to strike the appellants' Exs. J.2 – J.9.

**B. Substantive Issues:** The following substantive issues were raised by the appellants in their written materials submitted on the day of the hearing (Exs. H.1 to H.19 & J.1). As a starting point, however, many of the appellants' arguments are focused not on the approval criteria for WCFs in MCC 39.7740 or the dark sky lighting standards in MCC 39.6850, but on various purpose statements, submission requirements, MCC chapters, and other sources that are unrelated to the approval criteria applicable to this proposal.

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<sup>1</sup> In pertinent part, ORS 197.763(6)(c) provides that "Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section."

This application and the Hearings Officer’s decision are governed quite strictly by the applicable approval criteria. If the appellants are going to draw upon other sources within and outside of the MCC, it is incumbent upon them to identify why and how those sources apply as approval criteria to this proposal. The appellants’ reliance upon the purpose statements and application submission requirements for the dark sky lighting standards and WCF regulations are prime examples, and the appellants assert they are approval statements without any justification.

“...while the particular wording can lead to different results, purpose statements are generally not applied as approval criteria. ... Petitioner has not pointed to anything in the language of PCC 33.296.010 that suggests that it is an applicable approval criterion.”

*Madrona Park LLC v. City of Portland*, \_\_ Or. LUBA \_\_ (LUBA No. 2019-032, July 17, 2019, slip op at 21) (citations omitted, emphasis added).

“The application requirements are not approval criteria. The fact that application requirements may not have been satisfied provides no basis for remand absent a showing that the failure to satisfy the requirements resulted in non-compliance with at least one mandatory approval criterion.”

*LeRoux v. Malheur County*, 32 Or. LUBA 124, 129 (1996) (citations omitted, emphasis added).

Given that all of the code chapters applicable to this proposal include separate sections entitled “approval criteria,” the Hearings Officer will rely upon those sections, exclusively, as the source of approval criteria in this matter. Absent some logical argument from the appellants as to why or how any other provisions should also be construed as approval criteria, the Hearings Officer will not rely upon purpose statements, application submission requirements or unrelated code chapters or sources of law as applicable approval criteria.

1. **MCC 39.6850 – Dark Sky Lighting Standards**. In pertinent part, the stated purpose of the County’s dark sky lighting standards is to “preserv[e] the use of exterior lighting for security and the nighttime use and enjoyment of property while minimizing the obtrusive aspects of exterior lighting uses that degrade the nighttime visual environment and negatively impact wildlife and human health.” This objective is reflected in the performance standards in MCC 39.6850(C), but the listed exceptions to these requirements also reflect the safety and security exception to the general dark skies rule by include the following:

*“Lighting required by a federal, state, or local law or rule, when such lighting cannot comply with both the law or rule and the standards in paragraph (C) of this section.”* MCC 39.6850(B)(9).

The applicant claims that the lighting required by the FAA to mark the proposed tower qualifies for this exception (Ex. K.1). The application included documents from FAA and Oregon Department of Aviation that expressly require that the tower be marked with flashing red lights at the top and the middle (Exs. A.27 to A.30 & I.4). The lights must be visible to approaching aircraft, and therefore cannot comply with MCC 39.6850(C), which requires light fixtures to be fully shielded and that light be contained within the subject property.

The appellants' arguments are not clear (Ex. H.4). While they appear to acknowledge that the FAA and the Oregon Aviation Division require flashing lights, they do not seem to accept that the light is exempt under MCC 39.6850(B)(9), or at least argue that it is still subject to other additional requirements in MCC 39.6850. These other/additional requirements, according to the appellants, include the County's SEC overlay regulations, that the tower and its light must still comply with the substantive dark sky lighting requirements in MCC 39.6850(C), and that evidence of migratory birds in the area triggers the requirement for an environmental assessment. In support, the appellants provide various bird reports and migratory bird survey data from the Sandy River Delta (Exs. H.18, J.3 & J.4).

The legal basis for these assertions is even less clear and appears to be drawn from the above-quoted purpose statement's objective of "minimizing the obtrusive aspects of exterior lighting uses that degrade the nighttime visual environment and negatively impact wildlife and human health." From this the appellants draw upon the National Environmental Policy Act (Ex. H.7) and a reference in MCC 39.7740 to the County's Significant Environmental Concern Overlay regulations (Exs. H.6 & H.8). There is also the assertion that the County has violated, or failed to comply with, State-wide Goal 5 (Ex. H.19). The appellants also assert that the radio frequency radiation and flashing marker light will have deleterious health effects on people living in the area (Ex. H.9).

As explained at the onset of this decision, purpose statements in MCC 39.6850 or 39.7700, related to dark sky lighting and WCFs, respectively, are not approval criteria, and the appellants fail to explain why or how they should be construed as such. The Hearings Officer expressly finds that the purpose statement in MCC 39.6850(A) does not amount to a separate approval criterion, and he rejects these arguments based on the purpose statement. Similarly, there is no legal basis for importing into this local land use proceeding federal law, such as NEPA, the Migratory Bird Treaty Act or the Endangered Species Act, as sources of approval criteria in this matter based on the purpose statement or otherwise, as the appellants suggest (Ex. H.7). The County does not administer federal law, and if there are any federal law triggers, it will be a federal agency that administers these programs, not Multnomah County. This record, however, contains no credible evidence that this site is actual or designated critical habitat for any state-listed threatened or endangered species. That was the conclusion of the appellants' wildlife consultant (Ex. H.8), who could not confirm the presence of any protected species. These regulatory programs are not sources of approval criteria within the purview of the Hearings Officer or applicable to this proposal, and the Hearings Officer declines to view them as such.

The appellants' argument that the SEC regulations in MCC 39.5500, *et seq.* apply directly or indirectly to this application as a source of approval criteria or to somehow trigger a requirement for the applicant to perform an environmental analysis (Ex. H.6) is also without merit. According to MCC 39.5505, "the SEC shall apply to those lands designated SEC on the Multnomah County Zoning Map consisting of [SEC resource area overlay map designations]." The Multnomah County Zoning Map does not show the subject property as having any SEC overlay designation. Similarly, there are no inventoried or designated Goal 5 resources on this property. Therefore, neither the SEC nor any Goal 5 requirements or limitations apply to this proposal. To the extent that the appellants imply that the County should have, but failed to, apply an SEC designation or some other Goal 5 protection, that would be a collateral attack on the County's legislative process. As the record and the County's ordinances currently stand, nothing in MCC 39.5500, *et seq.* applies to this proposal.

MCC 39.6850(C) provides the mandatory approval criteria for outside lighting; however, MCC 39.6850(B) expressly exempts from the dark skies lighting requirements any lighting that is required by state or federal law. The applicant provided sufficient credible evidence that the FAA and the Oregon Aviation Department require a flashing red top light on this tower (Exs. A.27 to A.30, I.4 & I.5), and that light must be visible for a considerable distance off of this property. None of the arguments or evidence provided by the appellants detracts from that evidence or the necessary conclusion that the lighting required by the FAA and the Oregon Aviation Department are exempt from the dark sky lighting requirements of MCC 39.6850. Nothing in the chapter's purpose statement changes that conclusion.

2. **MCC 39.7700 – Wireless Communication Facilities, Purpose.** In this argument, appellants select several passages from the WCF purpose statement in MCC 39.7700 and claim without justification that they amount to approval criteria. In fact, the purpose statement in MCC 39.7700 is not a source of approval criteria for this application because the approval criteria are contained in MCC 39.7740, which is expressly captioned “Approval Criteria for Lands not Zoned Exclusive Farm Use.” The appellants provide no legally cognizable justification for interpreting MCC 39.7700 as approval criteria, and the Hearings Officer declines to do so.
  
3. **MCC 39.7725 – WCF General Requirements.** In this argument, the appellants point to the requirement in MCC 39.7725(A) that “[n]o WCF shall be constructed or operated within unincorporated Multnomah County until all necessary approvals and permits, whether local, state, or federal have been secured.” While it is clear that other state and federal permits are likely necessary before this WCF can begin operation, nothing in MCC 39.7725(A) precludes land use approval of this WCF, conditioned upon the applicant obtaining all necessary state and federal permits before commencing operations. When faced with appeals of permits that were conditioned upon the applicant subsequently obtaining necessary state or federal permits, LUBA generally affirms the local decision unless there is evidence that obtaining those state or federal permits is precluded as a matter of law. *See Oregon Coastal Alliance v. Curry County*, \_\_ Or. LUBA \_\_ (2011) LUBA No. 2011-006, *citing Bouman v. Jackson County*, 23 Or LUBA 628, 646-47 (1992). LUBA also has concluded that there “does not have to be substantial evidence in the record that it is feasible to comply with all discretionary state agency permit approval standards because the state agency, which has expertise and established standards and procedures, will ultimately determine whether those standards are met.” *Id.*

In this case, the appellants provide no credible evidence that this particular tower will be unable to obtain any needed state or federal permits. First, the appellants fail to identify what state or federal permits would be required. Second, the appellants do not identify what approval criteria would have to be met by any such state or federal permits. Finally, the appellants fail to demonstrate with any credible evidence that this applicant would be precluded, as a matter of law, from obtaining any needed state or federal permits.

Instead, the appellants make general, non-specific arguments that this tower will have an adverse impact on wildlife species protected under state or federal law. The Hearings Officer accepts that there are numerous studies that show that some towers in some locations have a strong detrimental and fatal impact on migratory birds and other wildlife species; however, there is no evidence that this tower in this location will have any

measurable impact on any protected species. The appellants' general references to the County's SEC regulations are equally unpersuasive because this site is not mapped as having any SEC overlay. Proximity to SEC zoned property does not change that conclusion about this property. For that reason alone, the County's SEC regulations and requirements are inapplicable to this site or tower. *See* MCC 39.5505.

4. **MCC 39.7735 – Application Submittal Requirements.** Under this topic, the appellants cite MCC 39.7735(A)(8) and (B)(4) as grounds for denying this application (Ex. H.4). As explained previously, however, the application submission requirements for WCFs in MCC 39.7735 are not approval criteria. The applicable approval criteria for this tower are contained in MCC 39.7740, not in the purpose statement (MCC 39.7700), nor in the submission requirements (MCC 39.7735). *See LeRoux v. Malheur County, supra*. As a general matter, failure to provide items listed in this section is not sufficient to deny the application, unless the omission is directly tied to the evaluation of an express mandatory approval criterion. It is also an applicant's right to refuse to submit any of the documents that are normally required to make a complete application. *See* ORS 215.427(2)(c). This legal reality is congruent with the view that a failure to fully comply with application submittal requirements does not equate to a failure to comply with approval criteria. Only if the omission of a particular submission requirement prevents the decision maker from determining compliance with a mandatory approval criterion would the omission be material. The appellants do not explain how or why the alleged omission of one or more application requirements amounts to failure to demonstrate compliance with one of the approval criteria in MCC 39.7740.

The appellants' reliance on MCC 39.7735(A)(8) is misplaced for the additional reason that Subsection (A) applies to co-located antennas, which this WCF is not. While the Subsection (B) submission requirements apply to this tower (a new free-standing tower), the requirements of Subsection (B)(4) are discussed below in response to the appellants' Accuracy of Mapping arguments. In short, even if MCC 39.7735(B)(4) were an approval standard (which it is not), it does not impose a particularly stringent standard or demanding set of requirements for documenting the need for a particular WCF location at a particular height.

In this case, however, the applicant provided documentation demonstrating the reasons why the WCF must be located at the proposed site at the proposed height (Exs. A.22, A.41 & I.2). While the appellants may dispute this evidence as not compelling or reliable, the Hearings Officer disagrees and finds it to be credible and probative on the issues it addresses, which include these relatively undemanding application requirements. The applicant's evidence is also attested to by an Oregon registered professional engineer (A.21). The opponents provide testimony from PhD physicist, Dr. Gordon Fulks (Exs. D.14, H.14 & J.2) in support of their challenge to the applicant's justification for this site. As explained below under Accuracy of Mapping, the Hearings Officer tends to agree with Dr. Fulks, but given the relatively undemanding requirements of this application submission requirement, the Hearings Officer concludes the application has satisfied this requirement.

5. **MCC 39.7740 – WCF Approval Criteria for Lands Not Zoned EFU.** The mandatory approval criteria for this WCF are set forth in MCC 39.7740. Unlike the prior code sections related to purpose and the submission requirements for complete applications, the issues listed in this section are germane to whether the application can be approved. If the applicant provides sufficient credible and relevant evidence to demonstrate that the

requirements contained in the following 11 items are met, the application will be approved, unless the opponents' evidence and argument so detract from the applicant's documentation and arguments as to lead to the conclusion that a particular standard is not met. Additionally, some standards can be achieved through the imposition of reasonable conditions, in which case, the Hearings Officer is required to impose such conditions. ORS 197.522(4).<sup>2</sup> The 11 approval requirements in MCC 39.7740 are as follows:

1. Location
2. Height
3. Setback/Yard
4. Storage
5. Color and materials
6. Fences
7. Security
8. Lighting
9. Signs
10. Access driveways and parking
11. Landscape and screening

- a. Accuracy of the Mapping. The appellants assert (Exs. H.4, H.14 & J.2) that the applicant's signal propagation and strength mapping (Exs. A.3, A.14, A.41 & I.2) are inaccurate and unsupported by sufficient scientific data. Dr. Fulks, in particular, provides compelling arguments that call into question the accuracy, reliability and precision of the applicant's signal propagation and strength mapping, and by implication, the applicant's statement of need for this particular location and this site's ability to meet precisely the stated need. These issues persisted and proliferated in the post-hearing briefing (Exs. A.41 & J.2).

The Hearings Officer agrees with the appellants that the applicant's signal propagation and strength mapping (Exs. A.14 & A.41) appear to be almost entirely computer-generated simulations and not based on data collected in the field. In only broad terms are the applicant's color plots reliable and then only as relatively rough estimates of signal strength in various locations. At best, they document the existence of a significant gap in service area for this carrier. However, given the multiple practical (as opposed to legal or land use) concerns in WCF siting, such as lease cost, site availability, zoning restrictions, and proximity to opponents, there is little doubt that signal propagation and strength might take a backseat to the practical concerns when an applicant seeks to site a new WCF. It is a near 100% certainty that the proposed location in most WCF applications is not "the best site" for achieving the applicant's stated coverage objectives. In this light, the Hearings Officer agrees with Dr. Fulks' assertions about the reliability and precision of the applicant's signal propagation and strength mapping.

Despite the strength of the appellants' arguments and the weakness of the applicant's evidence, the WCF approval criteria in MCC 39.7740 do not require more. In fact, the approval criteria really require little by way of technical justification for a particular proposed WCF site. Under the federal Telecommunications Act in 47 USC §332(c)(7) (B) (i)(II), the Ninth Circuit has adopted a 2-pronged analysis for tower

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<sup>2</sup> "A local government shall deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through amendments to the application or the imposition of reasonable conditions of approval." ORS 197.522(4).

siting that requires: (1) the showing of a “significant gap” in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations.” *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995 (9<sup>th</sup> Cir. 2009). The significant gap prong is satisfied “whenever a provider is prevented from filling a significant gap in its own service coverage.” *Metro PCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 733 (9<sup>th</sup> Cir. 2005). The Ninth Circuit evaluates the feasibility prong under a “least intrusive means” standard, which “requires that the provider show that the manner in which it proposes to fill the significant gap in services is the *least intrusive on the values that the denial sought to serve.*” *City of Anacortes*, 572 F.3d at 995. See also *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056 (9<sup>th</sup> Cir. 2014).

In this legal context, federal law allows local government to select the least obtrusive means of filling the identified service gap, based on the locally (legislatively) adopted priorities. *Metro PCS*, 400 F.3d at 734. For example, federal case law recognizes a local government’s prerogative to regulate cell tower siting based on aesthetic considerations. See *Voice Stream PCS I, LLC v. City of Hillsboro*, 301 F.Supp.2d 1251 (D. Or. 2004) (affirming a local denial based on visual/aesthetic impact of the proposed cell tower). In Multnomah County, however, the local priorities articulated in MCC 39.7740 are oriented to, at most, “visual subordination,” rather than technical precision and justification for a particular site. Under the “Location” criterion in MCC 39.7740(B)(1), visual subordination can be achieved simply by the use of concealment technology, and nothing more. MCC 39.7740(B)(1)(b). None of the other siting requirements in MCC 39.7740(B) come any closer to the issue that the opponents raise in this assignment. While Multnomah County could incorporate these other standards and priorities into its development code consistent with the *Metro PCS* decision, it has not elected to do so. Moreover, the applicant provided evidence of the alternative sites it considered and why each one was rejected (Exs. A.3, A.14, A.41 & K.1), which the Hearings Officer accepts as credible and probative evidence that the alternative sites are not suitable. Despite the apparent validity of Dr. Fulks’ conclusions about the applicant’s signal strength and propagation mapping or the fact that the proposed site may not be the “best location” for filling the identified “significant gap” in service, these concerns are not material to the County’s siting requirements that apply, and cannot serve as a basis to condition or deny this application.

- b. Non-ionizing electromagnetic radiation (NIER). Under this argument (Ex. H.4), the appellants assert that the applicant has not provided sufficient evidence that this WCF will comply with the FCC’s requirements for Non-ionizing Electromagnetic radiation (NIER) as required by MCC 39.7735(A)(9). The appellants cite in support of this argument Exhibits E and K (Exs. H.9 & H.15) and their hearing memo (Ex. H.4). Exhibit K is a 190-page document containing a vast array of materials generally related to health and environmental effects ascribed to RF radiation, and Exhibit E is a smaller set of documents focused on medical issues. There are several problems with the appellants’ argument, however.

First, MCC 39.7735(A) applies to proposals to collocate antennas on existing towers or structures. The present application is for a new tower, which is subject to MCC 39.7735(B), not Subsection (A).

Second, even if this proposal were subject to MCC 39.7735(A)(9)'s requirements, the applicant provided sufficient credible evidence that this tower, in fact, will comply with the FCC's NIER limitations and requirements (Ex. A.22).

Third, MCC 39.7735 contains, as mentioned previously, the application submission requirements, and do not constitute approval criteria. Therefore, even a failure to comply with this section's requirements cannot be a valid basis for denial of a WCF.

Fourth, applicable to this application is MCC 39.7740(A)(2), which requires the applicant to comply with "all applicable FCC RF emissions standards" and references the FCC Guidelines. This is an operational requirement that is appropriate for a condition of approval.

Finally, regarding the appellants' arguments about the health and environmental effects ascribed to RF radiation (Exs. H.9 & H.15), the federal Telecommunications Act expressly prohibits consideration of direct or indirect environmental and health effects in deciding this permit. *See* 47 USC §332(c)(7).<sup>3</sup> While sympathetic to these environmental and human health concerns, federal law prevents the Hearings Officer from using actual or perceived health or environmental effects of RF radiation as a basis to condition or deny this permit.

- c. Visual Study and Graph Simulation. In this assignment, the appellants assert that the applicant's visual study and graphics do not accurately represent the proposed WCF or its visual and scenic impacts (Ex. H.4). The applicant provided photo simulations of the mono-pine concealed WCF in its proposed location as seen from several different angles (Ex. A.19). In support of this argument, appellants cite to Exhibits A & F (Exs. H.5 & H.10). These exhibits appear to relate to the nighttime (dark skies) impact of the FAA lighting this tower will have and arguments to the effect that the proposed mono-pine design does not resemble close enough the local subspecies of Douglas fir native to the area.

The appellant's dark skies argument was addressed above under MCC 39.6850, where the Hearings Officer rejected it because lighting required for this tower by governmental entities (FAA and Oregon Aviation Dept.) is exempt from MCC 39.6850's requirements (Exs. A.27, A.28, A.29, A.30, I.4 & I.5). Appellants Exhibit A (Ex. H.5) also appears to raise the claim that the tower, while disguised as a mono-pine, will be visible from several locations in the area. At more than one point, the appellants claim this tower is supposed to be "visually subordinate," and cite the definition of the term in MCC 39.7710 and the purpose statement in MCC 39.7700 in support of the argument. What is missing, however, is any reference to a code requirement that this tower actually be "visually subordinate." The Hearings Officer is unable to locate any such requirement. Instead, MCC 39.7740(B)(1) requires that "WCFs shall be located so as to minimize their visibility." The text and context of this section indicate that Subsections (B)(1)(a), (b) and (c) provide the means by which new WCFs minimize their visibility. In this case, the applicant has selected concealment technology under MCC 39.7740(B)(1)(b). While it is true that the

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<sup>3</sup> "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 USC §332(c)(7)(B).

mono-pine will be visible from several different locations in the area (Ex. A.19), merely being visible is not the test. The Hearings Officer finds that use of the concealment technology of a mono-pine design achieves the minimize visibility requirement of MCC 39.7740(B)(1). The proof of that compliance and this tower's visual minimization is demonstrated in the applicant's photo simulations (Ex. A.19). Concealed as a mono-pine, the Hearings Officer finds these photo simulations are substantial evidence that the visibility of this tower will be minimized.

With regard to the contention that the proposed mono-pine design is not consistent with the local variety of Douglas fir and therefore may not blend in very effectively with the pervasive Douglas fir trees, nothing in MCC 39.7740(B)(1)(b), relating to concealment technology, requires such a high degree of consistency with native trees. Instead, this code section requires that the WCF be "designed so as to be camouflaged to the greatest extent possible, including ... concealment technology." Nothing in MCC 39.7740(B)(1)(b) suggests that the design must match the native tree species, much less subspecies. Granted, in the world of camouflaged cell towers, some are better and more convincing than others, but MCC 39.7740(B)(1)(b) does not establish a very high bar, and this proposal meets the Code's requirement for "concealment technology" that minimizes this tower's visibility.

- d. Environmental Resource Protection Subsection (A)(4). The appellants assert that the applicant failed to provide sufficient documentation under MCC 39.7740(A)(4) to demonstrate that this WCF will "minimize the effect on environmental resources." They cite Exhibits A and D (Exs. H.5 & H.8) in support of the argument. The application addresses the four substantive requirements in MCC 39.7740(A)(4) in its narrative (Ex. A.4) and provides a report documenting the absence of any protected species, habitats or natural resources (Ex. I.3). Under the first requirement, the applicant states that the site does not have an SEC overlay and is therefore not subject to SEC regulations. As for requirements 2 through 4, the applicant asserts that it will: (2) comply with all applicable county grading and erosion control regulations in MCC 39.6200-6235; (3) comply with any applicable flood hazard regulations in MCC 39.5000-5055, but none appear to be indicated and (4) that "the Applicant will take all efforts to minimize alteration or disturbance of native vegetation and topography."

The starting point for this issue is the text and context of MCC 39.7740(A)(4) and its four requirements. The first element requires compliance with "Significant Environmental Concern regulations when applicable." The appellants provided an environmental consultant's report (Ex. H.8) based on an internet and literature review, but no field work specific to this site. The report confirms the lack of an SEC overlay and the absence of any confirmed sightings of threatened or endangered (state or federal) species on the site, and the lack of any designated critical habitat. In short, the appellants' evidence confirms the applicant's assertion that there are no protected species, habitats or natural resources on the site.

Where a site is not mapped with an SEC overlay designation, the SEC regulations are not applicable. MCC 39.5505. Because the Multnomah County Zoning Map does not show the subject property as having any SEC overlay designation, the Hearings Officer concludes that SEC regulations are not applicable. The appellants' evidence only confirms this (Ex. H.8).

The appellants make no arguments related to the second through fourth requirements in MCC 39.7740(A)(4). In the absence of a focused argument that and of these is not met, the Hearings Officer finds that all three are adequately addressed by the application materials and by conditions of approval.

- e. Engineer's Report – Reasons Why. This argument appears to be based on MCC 39.7735(B)(4), which requires that the application include documentation supported by a suitably qualified licensed engineer that the WCF must be located at the proposed site and at the proposed height. The appellants rely on Exhibits I and J (Exs. H.13 & H.14) in support of the argument.

This argument suffers from several problems. First, MCC 39.7735(B) sets forth the submission requirements for a new stand-alone tower application, and does not implicate any approval criteria. Because the Hearings Officer finds that MCC 39.7735(B) does not constitute a source of approval criteria, it cannot generally serve as a basis for denial of the permit.

Second, MCC 39.7735(B)(4)'s requirement for documents is relatively non-specific and does not impose any particular burden of persuasion or proof, only that the documents be submitted and be attested to by a suitably qualified professional engineer. The applicant provided this documentation (Exs. A.13, A.14, A.21, A.22, I.2 & I.41).

Third, the applicant's documentation is responsive to MCC 39.7735(B)(4)'s requirements, such as they are, and the Hearings Officer finds them to be credible and persuasive as to why this tower needs to be sited in this location generally and at this height. Again, the requirements of MCC 39.7735(B)(4) do not establish a very exacting standard. The Hearings Officer does not find the appellants' evidence to be particularly relevant to this issue, mostly because of the non-specific nature of MCC 39.7735(B)(4)'s requirements and the fact that the appellants' evidence is drawn from nationwide studies and is not specific to this site or application. Also, the Hearings Officer discussed Dr. Fulks' testimony previously and found his points well taken, but immaterial in light of the Code's relatively general requirements for justifying a particular WCF site.

Finally, an additional locational consideration bears mentioning. Several appellants assert that, as a matter of policy, WCFs should be located in urban areas, not rural areas. This policy argument, however, is contradicted by the County's legislative policy decision to allow WCFs in all rural areas, *e.g.*, MCC 39.4315(F), and state law that allows them on EFU zoned land. ORS 215.283(1)(c) & 215.275. The fundamental problem that this case illustrates is, not so much that WCFs are incompatible with rural or resource land, but rather they are unwanted by residents in residential areas. That reality tends to undercut the appellants' assertion that WCFs should be located in more densely populated urban areas. The lesson from this case is that WCFs may be more welcome (or face less opposition) if located in rural areas near but outside of urban areas of higher density and more intense use. Conflicts with people and their activities will be less frequent or intense, and significant gaps in coverage can still be covered while minimizing conflicts with people. Regardless of those apparent implications of this case, the Hearings Officer is bound by the County Code, which expressly allows WCFs in the MUA-20 zone such as this one.

6. **Other Substantive Appeal Issues.** Several other issues were explicitly or implicitly asserted in the appellants' various submissions and supporting documentation, even though they were not expressly stated in the appellants' hearing memos (Exs. H.1, H.4 & J.1). The Hearings Officer adopts the following findings in response to each.

- a. **Subject property is not a legal lot of record.** This argument is asserted in appellants' Exhibit L (Ex. H.16) and is somewhat difficult to follow. The applicant provided documentation of the title history for the property (Exs. A.6, A.7, A.8, A.9 & A.10) that was sufficient to demonstrate that the two tax lots (TLs 500 & 600) constitute a single 10.74-acre lot of record. There are several buildings on TL 600, one of which was constructed as an ag-exempt building. The appellants assert with no evidence or legal authority that the property is presently not being put to agricultural use and the building is now unlawful. From that, the appellants claim that a new/different land use process must be initiated to verify the legal status of TL 600 and its buildings.

Code enforcement in Multnomah County is complaint driven, and the appellants are free to file such a complaint. For purposes of the present land use proceeding, however, the parcel in question must be a legal lot of record under MCC 39.3005. This does not require property owners or applicants to retroactively provide proof documenting that all aspects of the property and its use are lawful in every respect. That would be a particularly unfair and nearly unattainable burden for any property owner. It is also not required by the MCC. To proceed with this application, it is sufficient to merely document the status of the parcel as a legal lot of record under MCC 39.3005, and the applicant has accomplished that. The balance of the appellants' arguments are more properly raised in a code enforcement action.

- b. **Approval of this proposal conflicts with County planning and federal law.** This broad set of arguments is asserted in appellants' Exhibit N (Ex. H.18) and implicates multiple sources of law: county, state, regional and federal. In this proceeding the Hearings Officer's authority is based solely on county ordinances that were adopted, in part to implement the state-wide land use program. Neither Multnomah County nor the Hearings Officer apply or enforce federal law. Consequently, the appellants' argument that an environmental assessment is warranted under 47 CFR §1.1307(a)(3) may have some validity before the FCC tasked with reviewing a federal permit application or contemplating a federal action, but is not enforceable by the Hearings Officer in this proceeding.

Similarly, the appellants' arguments based on State-wide Planning Goal 3 (Agricultural Lands) are equally misplaced. The subject property is zoned MUA-20, which is not a Goal 3 designation, and not subject to the state's farmland protection laws. Therefore, neither Goal 3 nor the Goal 3 administrative rule have any relevance in this permit proceeding.

Likewise, the appellants' Goal 5 arguments are misplaced. Goal 5 and its so-called ESEE analysis is implemented through a legislative process, resulting in an inventory of resources protected to varying degrees as Goal 5 and its administrative rule allow. Contrary to appellants' assumptions, Goal 5 is not implemented on a case-by-case basis during a quasi-judicial permit proceeding such as this. The record shows that this site does not contain any Goal 5 resources.

The appellants make several generalized arguments in Exhibit N to the effect that a cell tower is incompatible with the rural character of the area and is inconsistent with the purposes of the MUA-20 zone. However, nothing in the MCC supports these arguments. As previously stated, the MUA-20 purpose statement in MCC 39.4300 is not an approval criterion. Even if it were, it establishes that the MUA-20 zone is reserved for lands that are not suitable for large-scale or full-time commercial farming, but allow smaller-scale agricultural uses and some non-farm residential, recreational and forestry uses. There is nothing about this proposed WCF that precludes those uses on adjacent MUA-20 zoned lands. While the appellants may object to the WCF on aesthetic grounds, that is a highly subjective determination, and is not reflected in any of the locally adopted priorities in the County Code.

- c. Another preapplication conference was/is required. The appellants assert in Exhibit O (Ex. H.19) that when the applicant amended the application to include concealment technology (the mono-pine design), the applicant was required to reinitiate the process, beginning with another pre-application conference. While the argument is difficult to follow, there does not appear to be a basis in the County Code for it. At most, if a second pre-application conference were required when this proposal converted from a Type III process to the present Type II process, no purpose would be served by holding such a conference since it is designed to inform the applicant about the substantive and procedural requirements. In that light, it is difficult to see how such a procedural error could possibly prejudice the appellants' procedural rights. Moreover, even if a second pre-application conference were required, the Director has the express authority in MCC 39.1120(D) to waive it.
- d. Wildlife and habitat impacts. This argument has taken several forms in the appellants' materials, but is restated as a slightly different variation in Exhibit O (Ex. H.19). The appellants assert that the Director committed procedural and substantive errors in not recognizing federal law and the possible, yet undocumented, presence of federal or state listed endangered species on this site. The undocumented existence of these species, according to the appellants, should have triggered a SEPA checklist and an environmental evaluation of the site and this project's environmental impact.

"SEPA" stands for State Environmental Policy Act, which does not exist in Oregon. There is no evidence, nor really any argument, that this site is designated "critical habitat" under the state or federal endangered species act, a conclusion confirmed by the appellants' own consultant (Ex. H.8) and the applicant's consultant (Ex. I.3). Multnomah County is not authorized to designate critical habitat of listed species, especially in the context of a quasi-judicial permit proceeding such as this. As close as it comes is a legislative process to designate wildlife habitat on this site under State-wide Planning Goal 5 or an SEC overlay, neither of which have happened. The record of this proceeding shows no such designations for the subject property; therefore, none of the SEC or Goal 5 protections apply to the property.

**V. DECISION and CONDITIONS:**

Based on the foregoing Findings, the Hearings Officer denies the appeal and affirms the Director's August 20, 2020 decision that approves this request for a wireless communication facility using concealment technology (mono-pine), subject to the following conditions:

The conditions listed 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 and this WCF approval shall become null, void, and non-renewable if the facility is not constructed and placed into service within two years of the date of the final decision. MCC 39.7725(H)
2. Prior to land use sign-off for building plan check, the property owners or their representatives shall perform the following:

- a. Record pages 17 through Conditions of Approval and pages 1 through 7 and Exhibit A.15 (Sheet No. T-1, A-1, A-1.1, and A-2) of the Director's August 20, 2020 Decision with the County Recorder, and the Decision shall run with the land. 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. Exhibit A.15 shall be reduced to a size of 8.5" x 11" for recording purposes.

**Note:** Tax lot 500 and 600, Section 31DB, Township 1 North, Range 4 East, W.M., are described as a single parcel in the deed record and therefore qualify as a single Lot of Record. It is recommended that the two tax lots be consolidated into one tax lot to correspond with the Lot of Record in this case. If the owners wish to consolidate tax lots, they should contact the Division of Assessment, Recording, and Taxation: Parcel Management at (503) 988-9780 for questions about this process.

- b. Obtain an Erosion and Sediment Control permit for any ground disturbing activities associated with the construction and establishment of the wireless communications facility. MCC 39.7740(A)(4).
- c. Revise the plans to show compliance with the land use approvals granted, all conditions of approval and required modifications. Final design review plan shall contain the following, drawn to scale:
  - i. Site Development and Landscape Plans drawn to scale, indicating the locations and specifications of the items described in MCC 39.8025, as appropriate;
  - ii. Architectural drawings, indicating floor plans, sections, and elevations:
    1. Updated elevations shall include the labeling of the paint color of the tower, on-tower components, associated on-ground structures (i.e., vaults and equipment cabinets), and fence. A paint chip or sample shall be provided showing the proposed colors. The colors shall be either green or brown in a non-reflective flat dark earth tone or a non-reflective flat earth tone. MCC 39.7740(B)(1)(b), MCC 39.7740(B)(5), MCC 39.7740(B)(6), MCC 39.8040(A)(1)(a).

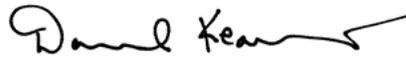
3. At the time of land use sign-off for building plan check, the property owners or their representative shall perform the following:

- a. Obtain and secure all necessary approvals and permits, whether local, state, or federal. MCC 39.7725.
  - b. Provide a Final Design Plan that demonstrates compliance with Condition of Approval 2.c. MCC 39.8030.
4. During construction, the property owners or their representatives shall:
- a. Ensure that the exterior surfaces of the wireless communications storage facilities (i.e., vaults, equipment rooms, utilities, and equipment cabinets or enclosures) are constructed of non-reflective materials. MCC 39.7740(B)(4).
  - b. Ensure that all structures, poles, towers, antenna supports, antennas, and other components of the wireless communications facility are painted according to the updated Elevation Plan provided during land use sign-off for building plan check. MCC 39.7740(B)(1)(b), MCC 39.7740(B)(5), MCC 39.7740(B)(6), MCC 39.8040(A)(1)(a).
  - c. Protect any retained trees, as shown in the Landscape Plan, in the vicinity of the WCF, along the access drive, and any power/telecommunication line routes from damage. MCC 39.7740(B)(11) & MCC 39.8040(A)(4).
5. Prior to issuance of the Certification of Occupancy, the property owner(s) or their representative(s) shall ensure that the one required parking space is improved and placed in condition for use. MCC 39.6530.
6. As an on-going condition, the property owner(s), applicant, co-applicant, tenant(s), service provider of the WCF, or their representative(s) shall:
- a. Obtain a new permit for all modifications, not constituting maintenance MCC 39.7725(F).
  - b. Notify the Planning Director of the Land Use Planning Division of all changes in applicant and/or co-applicants or tenants of a previously permitted WCF permitted under MCC 39.7700 through 39.7765 within 90 days of change. Failure to provide appropriate notice shall constitute a violation of the original permit approval and be processed pursuant to 39.1510. MCC 39.7725(I).
  - c. Maintain the WCF. Such maintenance shall include, but shall not be limited to painting, maintaining structural integrity, and landscaping. In the event the applicant/co-applicant, tenant/carrier or their representatives fails to maintain the facility in accordance with permit conditions regarding visual impacts or public safety, Multnomah County may undertake the maintenance at the expense of the property owners, applicant/co-applicant, tenant/carrier or their representatives. MCC 39.7750.
  - d. Ensure that no on-premises storage of material or equipment shall be allowed other than that used in the operation and maintenance of the WCF site. MCC 39.7725(K).
  - e. Not test the functionality of any back-up power generators located within the WCF between the hours of 8 p.m. and 8 a.m. MCC 39.7740(A)(3).
  - f. Provide for and maintain off-street parking and loading facilities without charge to users. The required parking spaces shall be available for the parking of vehicles of customers, occupants, and employees without charge or other consideration. MCC 39.6510 & MCC 39.6520(A).
  - g. Not park trucks, equipment, materials, structures or signs in any required parking space. The conducting of any business activity shall not be permitted in any required parking space. The storage or accumulation of equipment, material, or goods in a loading space in

- a manner which would render such loading space temporarily or permanently incapable of immediate use for loading operations is not allowed. MCC 39.6520(B) & (E).
- h. Ensure that any exterior lighting associated with the WCF that is not required by the Federal Aviation Administration or other governmental body shall meet the definition of Dark Sky Lighting pursuant to MCC 39.6850. MCC 39.6850.
  - i. Be responsible for the proper maintenance and survival of any vegetation required to be retained. If any retrained trees become diseased, die, or are removed; a replacement tree that is of similar type shall be planted. If the replacement tree is an evergreen tree, a Douglas-fir or western redcedar that is a minimum height of 3 to 4 feet bare-root or of similar size shall be planted. If the replacement tree is a deciduous tree, the tree shall be a minimum planting height of 3 to 4 feet (2 gallon) or of similar size. MCC 39.7740(B)(11).
7. As an on-going condition, the service provider of the WCF, Verizon Wireless and their successors and assigns shall be bound to the following:
- a. Respond in a timely, comprehensive manner to a request for information from a potential co-location applicant, in exchange for a reasonable fee not in excess of the actual cost of preparing a response;
  - b. Negotiate in good faith for shared use of the WCF by third parties; and
  - c. Allow shared use of the WCF if an applicant agrees in writing to pay reasonable charges for co-location. MCC 39.7740(A).
8. At such time that a carrier plans to abandon or discontinue, or is required to discontinue, the operation of a WCF, such carrier shall notify Multnomah County Land Use Planning Division by certified U.S. mail of the proposed date of abandonment or discontinuation of operations. Such notice shall be given no less than 30 days prior to abandonment or discontinuation of operations.
- a. In the event that a carrier fails to give such notice, the WCF shall be considered abandoned if the antenna or tower is not operated for a continuous period of 12 months, unless the owner of said tower provides proof of continued maintenance on a quarterly basis.
  - b. Upon abandonment or discontinuation of use, the person(s) who constructed the facility, the person(s) who operated the facility, the carrier, or the property owner(s) shall physically remove the WCF within 90 days from the date of abandonment or discontinuation of use. "Physically remove" shall include, but is not limited to:
    - i. Site Development and Landscape Plans drawn to scale, indicating the locations and specifications of the items described in MCC 39.8025, as appropriate;
    - ii. Removal of the antenna(s), mounts, equipment cabinets, security barriers, and foundations down to three feet below ground surface.
    - iii. Transportation of the antenna(s), mount, equipment cabinets, and security barriers to an appropriate disposal site.
    - iv. Restoring the site of the WCF to its pre-construction condition, except any remaining landscaping and grading.
    - v. The owner of the facility shall pay all site reclamation costs deemed necessary and reasonable to return the site to its pre-construction condition.

- c. If a party described in Condition 8.b fails to remove a WCF in accordance with this Condition 8, Multnomah County has the authority and shall enter the subject property and physically remove the facility. Costs for the removal of the WCF shall be charged to the landowner of record in the event Multnomah County must remove the facility.
- d. If there are two or more carriers/operators of a single tower, then provisions of this Condition 8 shall not become effective until all carriers/operators cease using the tower.
- e. Failure to remove an abandoned facility as required by this Condition 8 shall constitute a violation and be subject to the penalties prescribed in Multnomah County Zoning Code. MCC 39.7755.

**Date of Decision:** December 4, 2020.



By: \_\_\_\_\_  
 Daniel Kearns,  
 Land Use Hearings Officer

**Notice of Appeal Rights**

This is the County’s final decision on this application and appeal. Anyone with standing may appeal any aspect of the Hearings Officer’s decision, to the Oregon Land Use Board of Appeals within 21 days of the date of this decision pursuant to ORS Chapter 197.

**Exhibit List for T2-2019-12701**

<b>Exhibit No.</b>	<b># of Pages</b>	<b>Description of Exhibit</b>	<b>Date</b>
A.1	1	General Application Form	11/19/2019
A.2	1	Letter of Authorization	11/19/2019
A.3	3	Cover Letter and Applicant Response	11/19/2019
A.4	23	Applicant Narrative	11/19/2019
A.5	3	Statutory Warranty Deed record as Instrument #2016-098955 on August 10, 2016	11/19/2019
A.6	2	Warranty Deed recorded in Book 2139, Page 531 on October 17, 1962	11/19/2019
A.7	1	Parcel Record – Cartographic Unit Card for 1N4E31DB - 00600	11/19/2019

A.8	1	Parcel Record – Cartographic Unit Card for 1N4E31DB - 00500	11/19/2019
A.9	1	Department of Assessment, Records and Taxation (DART): Map for 1N4E31DB – 00500 and 1N4E31DB – 00600 with notations from applicant	11/19/2019
A.10	3	Statutory Warranty Deed record as Instrument #2016-098955 on August 10, 2016 with notations from applicant	11/19/2019
A.11	1	Site Plan showing Multnomah County Zoning Approval for Agricultural Building dated on August 10, 1995	11/19/2019
A.12	1	Residential Building Permit Inspection Record dated August 21, 1995	11/19/2019
A.13	1	Search Ring Map	11/19/2019
A.14	10	RF Usage and Facility Justification	11/19/2019
A.15*	16	<p>Site Plans (11” x 17”)</p> <ul style="list-style-type: none"> <li>• *Cover Sheet: Sheet No. T-1</li> <li>• General Notes and Symbols: Sheet No. T-2</li> <li>• Existing Site Survey: Sheet No. SV1</li> <li>• Existing Site Survey: Sheet No. SV2</li> <li>• Erosion, Sediment and Pollution Control Plan: Sheet No. C1</li> <li>• Road and Grading Plan: Sheet No. C2</li> <li>• Grading Details: Sheet No. C3</li> <li>• *Site Plan: Sheet No. A-1</li> <li>• *Proposed Compound and Equipment Plans: Sheet No. A-1.1</li> <li>• *Proposed Elevations: Sheet No. A-2</li> <li>• Construction Details: Sheet No. A-3</li> <li>• Generator Details: Sheet No. A-4</li> <li>• Generator Details: Sheet No. A-4.1</li> <li>• Proposed Antenna Configuration: Sheet No. RF-1</li> <li>• Plumbing Diagram: Sheet No. RF-2</li> <li>• Landscape Plan: Sheet No. L-1</li> <li>• Landscape Plan: Sheet No. L-2</li> </ul>	11/19/2019

A.16	10	Utility Report Site Plans (6.5" x 11") <ul style="list-style-type: none"> <li>Title Sheet: Sheet No. T-1.0</li> <li>Overall Site Plan: Sheet No. A-1.0</li> <li>Photos: Sheet No. A-2.0</li> <li>Photos: Sheet No. A-3.0</li> <li>Photos: Sheet No. A-4.0</li> <li>Photos: Sheet No. A-5.0</li> <li>Photos: Sheet No. A-6.0</li> <li>Photos: Sheet No. A-7.0</li> <li>Photos: Sheet No. A-6.0</li> </ul>	11/19/2019
A.17	3	E-mail from Sydney Cox detailing PGE Preliminary Electrical Design	11/19/2019
A.18	1	Site Plan (8.5" x 11") <ul style="list-style-type: none"> <li>Site Plan: Sheet No. A-1</li> </ul>	11/19/2019
A.19	5	Photo Simulations <ul style="list-style-type: none"> <li>Locations</li> <li>View 1: Looking north at 29421 E. Woodard Road</li> <li>View 2: Looking northwest at 29853 E. Woodard Road</li> <li>View 3: Looking northeast at E. Woodard Road and NE Seidl Road</li> <li>View 4: Looking south on NE Lampert Road</li> </ul>	11/19/2019
A.20	1	Aerial Photo	11/19/2019
A.21	5	RF Engineering Review completed by David J. Pinion, Registered Professional Engineer	11/19/2019
A.22	6	Non-ionizing Electromagnetic Exposure Analysis and Engineering Certification completed by David J. Pinion, Registered Professional Engineer	11/19/2019
A.23	23	Structural Design Report	11/19/2019
A.24	1	Letter from Malissa Johnson, Real Estate Specialist concerning Future Facility Collocations	11/19/2019
A.25	12	Land Lease Agreement	11/19/2019
A.26	2	Acoustical Report completed by Alan Burt, Registered Professional Engineer	11/19/2019
A.27	8	Federal Aviation Administration Aeronautical Study	11/19/2019
A.28	2	Federal Aviation Administration Aeronautical Study Extension	11/19/2019

A.29	1	Medium-Intensity Dual Obstruction Light Standards Specification Sheet	11/19/2019
A.30	1	Oregon Department of Aviation Comments	11/19/2019
A.31	3	Fire Service Agency Review	11/19/2019
A.32	9	Pre-Application Conference Notes	11/19/2019
A.33	7	Transportation Planning Review (not reviewed by Transportation Division)	11/19/2019
A.34	7	Access Permit (not reviewed by Transportation Division)	11/19/2019
A.35	8	Grading and Erosion Control Worksheet	11/19/2019
A.36	5	Storm Water Certificate	11/19/2019
A.37	2	Septic Review Certification	11/19/2019
A.38	4	Lighting Specification Sheet for HLF1: High Lumen LED Flood Luminaire	11/19/2019
A.39	1	Letter from Robert E. Beacom, Registered Professional Engineer and Registered Structural Engineer concerning wind and ice hazards	11/19/2019
A.40	4	Applicant Response to Comments provided during Opportunity to Comment	08/11/2020
A.41	14	Updated RF Usage and Facility Justification	08/11/2020
<b>B</b>	<b>pages</b>	<b>Staff Exhibits</b>	<b>Date</b>
B.1	2	Department of Assessment, Records and Taxation (DART): Property Information for 1N4E31DB – 00600 (R944310660)	11/19/2019
B.2	1	Department of Assessment, Records and Taxation (DART): Map with 1N4E31DB – 00600 (R944310660) Highlighted	11/19/2019
B.3	1	Aerial Photo from 2018	06/03/2020
B.4	1	Aerial Photo from 1974	06/03/2020
B.5	1	Aerial Photo from 1977	06/03/2020
B.6	1	Aerial Photo from 1998	06/03/2020
B.7	1	Zoning Map showing zoning over the subject property in 1962	06/03/2020
B.8	1	Zoning Code in effect in 1962	06/03/2020

B.9	2	Department of Assessment, Records and Taxation (DART): Property Information for 1N4E31DB – 00600 (R944310660)	06/29/2020
B.10	2	Statutory Bargain and Sale Deed record as Instrument #2020-030630 on March 13, 2020	06/29/2020
<b>C</b>	<b>pages</b>	<b>Administration &amp; Procedures</b>	<b>Date</b>
C.1	6	Incomplete letter	12/17/2019
C.2	1	Applicant's acceptance of 180 day clock	12/20/2019
C.3	1	Complete letter (day 1)	03/10/2020
C.4	8	Opportunity to comment & mailing list	06/30/2020
C.5	1	Request for Extension of 150-day clock	07/13/2020
C.6	1	2 <sup>nd</sup> Request for Extension of 150-day clock	07/24/2020
C.7	58	Administrative decision & mailing list	08/20/2020
<b>D</b>	<b>pages</b>	<b>Public Comments</b>	<b>Date</b>
D.1	2	JoAnne Vincent (330 NE Seidl Road) e-mail comments	07/07/2020
D.2	1	JoAnne Vincent (330 NE Seidl Road) e-mail comments	07/09/2020
D.3	1	Jasmine Zimmer-Stucky (30134 E Woodard Road) e-mail comments	07/10/2020
D.4	6	Brian Vincent (330 NE Seidl Road) e-mail and letter	07/12/2020
D.5	1	Mia Schreiner (28725 E Woodard Road) e-mail comments	07/12/2020
D.6	1	Dave Flood (31780 NE Wand Road) email comments	07/13/2020
D.7	2	Chris Winters (29446 E Woodard Road) e-mail and letter sent by Mark and Alison Knieriem	07/13/2020
D.8	2	Donna Davis (29610 E Woodard Road) e-mail and letter sent by Mark and Alison Knieriem	07/13/2020
D.9	2	George and Donna Knieriem (29735 E Woodard Road) e-mail and letter sent by Mark and Alison Knieriem	07/13/2020
D.10	4	Mark and Alison Knieriem (29805 E Woodard Road) e-mail and letter	07/13/2020

D.11	3	Pamela Teseniar (29635 E Woodard Road) e-mail and letter	07/13/2020
D.12	10	Alyssa Denny letter sent by Pamela Teseniar via e-mail	07/13/2020
D.13	28	JoAnne Vincent (330 NE Seidl Road) e-mail with attached and physical letter	07/14/2020
D.14	3	Gordon Fulks, PhD (28812 E Woodard Road e-mail and letter	07/14/2020
D.15	13	Janet Helus (29827 E Woodard Road) e-mail and letter sent by Mark and Alison Knieriem	07/14/2020
<b>H</b>	<b>pages</b>	<b>Hearing Exhibits</b>	<b>Date</b>
H.1	4	Notice of Appeal	09/03/2020
H.2	4	Notice of Public Hearing and Mailing List	09/16/2020
H.3	1	3 <sup>rd</sup> Request for Extension of 150-day clock	09/17/2020
H.4	7	Appellant's Written Testimony Letter	10/16/2020
H.5	10	Exhibit A - APPEAL Dark Sky and Visual Dominance - Mark and Ali Knieriem with exhibits	10/16/2020
H.6	9	Exhibit B - Section 1 Notes evidence for land use zoning SEC and environmental concerns (1) Amended - JoAnne Vincent	10/16/2020
H.7	35	Exhibit C - Section 2 Notes for Basis for Environmental Assessment	10/16/2020
H.8	11	Exhibit D - Schott and Associates Email SEC and Natural Resources with Exhibits	10/16/2020
H.9	5	Exhibit E - APPEAL FAA Lighting affecting Resident with Disorder with Exhibits	10/16/2020
H.10	21	Exhibit F - APPEAL Dark Sky Standard and FAA Recommendations with exhibits	10/16/2020
H.11	6	Exhibit G - USFWS and WCFs Guidance	10/16/2020
H.12	5	Exhibit H - Selected pages of Ordinance No. 958	10/16/2020
H.13	33	Exhibit I - Accuracy of Mapping Supporting Documents	10/16/2020
H.14	8	Exhibit J - Statement on Woodard Cell Tower Gordon Fulks PhD Locational and Alternative Sites Mapping, 5G and Dark Sky	10/16/2020

H.15	190	Exhibit K - NEIR and RF Evidence and Argument Additional	10/16/2020
H.16	3	Exhibit L - Summary Conditional Use and Compliance Lot of Record Problem	10/16/2020
H.17	2	Exhibit M - Aerial Photo Showing Existing Tree Canopy and Wildlife Habitat	10/16/2020
H.18	3	Exhibit N - Appeal Hearing Summary regarding Verizon Stinger cell tower - JoAnne Vincent Amended	10/16/2020
H.19	3	Exhibit O - Verizon WCF Tower Appeal - BV comment regarding process timeline and Critical Habitat Omission - Brian Vincent	10/16/2020
<b>I</b>	<b>pages</b>	<b>Supplemental Evidence</b>	<b>Date</b>
I.1	2	Applicant's Hearings Officer Letter - Supplemental Evidence	10/30/2020
I.2	2	Updated RF Usage and Facility Justification	10/30/2020
I.3	83	EBI Natural Resources Review	10/30/2020
I.4	8	FAA Letter	10/30/2020
I.5	3	Lighting Information	10/30/2020
<b>J</b>	<b>pages</b>	<b>Rebuttal</b>	<b>Date</b>
J.1	6	Appellant's Follow-Up and Rebuttal	11/06/2020
J.2	3	Gordon Fulks PhD Additional Response	11/06/2020
J.3	2	Attachment One - 2013 Checklist of birds at Sandy River Delta May-June	11/06/2020
J.4	1	Attachment Two - 2013 Sandy River Delta Bird Survey - Map of survey transects and point-counts	11/06/2020
J.5	3	Attachment One - FAA Lighting, Visually Subordinate and Visual Study - by Mark and Ali Knieriem	11/06/2020
J.6	27	Attachment Two T2-2019-12701 -01- Original 2019 General Application Form and Narrative	11/06/2020
J.7	4	Attachment Three - Visually Subordinate BlackRock	11/06/2020
J.8	23	Attachment Four T2-2010-774 Evans Road Decision	11/06/2020
J.9	8	Response to 1.3EBI Natural Resource review - JoAnne Vincent	11/06/2020

J.10	1	List of Exhibits	11/06/2020
<b>K</b>	<b>pages</b>	<b>Final Argument</b>	<b>Date</b>
K.1	13	Applicant Final Written Argument	11/13/2020