

FINAL STAFF REPORT ON REMAND



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To: Hearings Officer Fancher
From: Multnomah County Staff
Date: May 21, 2025
RE: County Staff Final Submission in T3-2022-16220 Remand Proceedings

Staff offers this timely final submission for admission to the record in Multnomah County Case No. T3-2022-16220 in compliance with the May 27, 2025, deadline set forth in the Hearings Officer’s order on post-hearing submissions (Record Ex. S.1, April 17, 2025).

This matter is before the Hearings Officer on remand from the Land Use Board of Appeals (LUBA) in *Cottrell Community Planning Organization et al. v. Multnomah County*, LUBA No. 2023-086 (January 22, 2025) (“*Cottrell*”). Pursuant to *Cottrell*, the Hearings Officer’s review on remand is limited to determining the meaning and application of MCC 39.7515(B). Under that standard, Applicant must establish that the proposed water filtration facility and pipelines “will not adversely affect natural resources.”

Because Applicant and interested parties have been invited to submit draft findings to the Hearings Officer, this final report is limited to: (1) addressing certain questions of law raised thus far in the remand proceedings; and (2) proposing conditions of approval for the Hearings Officer’s consideration in order to address three existing circumstances that may need to be addressed through conditions of approval in order to find that some or all of the proposed use can meet the standard set forth in MCC 39.7515(B).

Before turning to these items, staff has one “housekeeping” matter to address. In the Staff Report on Remand (Exhibit N.7), staff offered that “the question before the Hearings Officer is whether the use, *as proposed to be operated*, will adversely affect natural resources[.]” (Emphasis in original.) Seeing no support for that interpretation and, in contrast, seeing general agreement on a pre-construction versus post-construction analysis, staff rescinds and waives its prior argument.

PART I – QUESTIONS OF LAW

1. **Question:** Is the definition of “natural resource” set forth in the glossary (“Glossary”) to the 2016 Multnomah County Comprehensive Plan (“2016 Plan”) applicable to interpretation of MCC 39.7515(B)?

At the hearing on remand (“**Remand Hearing**”), the Hearings Officer questioned the applicability of the definition of “natural resource” set forth in the Glossary because the Glossary defines terms for purposes of the 2016 Plan as opposed to the Multnomah County land use code (“**Code**”). In addition, Applicant argued that, in the absence of a definition in the Code, the dictionary definition from the time of enactment of MCC 39.7515(B) (i.e., 1977) serves as the

starting point for interpretation under Oregon statutory rules of construction. *See State v. Gaines*, 346 Or 160, 171-72 (2009).

While not necessarily at odds with the concerns described above, equally demanding Oregon legal principles hold that the 2016 Plan is the controlling land use planning document and the Code, including provisions adopted prior to the 2016 Plan, must conform to and be interpreted consistently with the 2016 Plan. *See Baker v. City of Milwaukie*, 271 Or 500, 514, 533 P2d 772 (1975) (“[A] comprehensive plan is the controlling land use planning instrument for a city. Upon passage of a comprehensive plan a city assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it.”); *Philippi v. City of Sublimity*, 294 Or 730, 735, 662 P2d 325 (1983) (“Analysis here must be prefaced with the recognition that a local government's comprehensive plan holds the preeminent position in its land use powers and responsibilities. Zoning and subdivision ordinances, and local land use decisions, are intended to be the means by which the plan is effectuated and, to such an extent, they are subservient to the plan.”).¹

Indeed, in this case, while recognizing that the 2016 Plan does not necessarily demand strict adherence to the definitions in the Glossary, LUBA considered the Glossary definition as applicable to interpretation of MCC 39.7515(B). *Cottrell*, LUBA No. 2023-086 (slip op at 121-22) (rejecting hearings officer’s interpretation in part because the Glossary definition of “natural resource” contradicted that interpretation).²

Accordingly, notwithstanding the Glossary’s direct application to the 2016 Plan rather than the Code, and in addition to (or in the course of) the *Gaines* analysis, MCC 39.7515(B) must be construed in a manner consistent with the 2016 Plan, which, in turn, means that interpretation of MCC 39.7515(B) requires analysis beyond the meaning intended at the time of enactment in 1977.

2. Question: Can MCC 39.7515(B) be met through conditions of approval, including conditions requiring mitigation of adverse effects?

As with any land use standard, the standard in MCC 39.7515(B) can be met through imposition of conditions. *See Stephens v. Multnomah County*, 10 Or LUBA 147, 151 (1984) (concluding that county could “impose conditions so as to make an otherwise objectionable use not objectionable” when applying community service use standards). In fact, the Code expressly

¹ Even outside the land use context, the fact that a law is enacted after the law being interpreted does not necessarily preclude it from being relevant context. *See, e.g., State v. Swanson*, 351 Or 286, 295-96 (2011) (concluding that definition of the term “crime” adopted as part of a comprehensive revision of the criminal code served to narrow the definition of “crime” in an earlier enacted procedural statute).

² Similarly, LUBA found another provision of the 2016 Plan, Policy 2.45, applicable to its review. *Cottrell*, LUBA No. 2023-086 (slip op at 123)

provides that a decision maker may impose conditions on a community service use. MCC 39.7510.

One aspect of the debate over whether mitigation may be imposed as a condition in satisfaction of MCC 39.7515(B) appears to concern the degree of reduction meant by “mitigation.” The term “mitigation” is often used to refer to a *lessening* of an impact, but one might also use the term to mean complete abatement of an impact. Under MCC 39.7515(B), mitigation, either alone or in combination with other conditions, could be imposed as a condition so long as the ultimate finding is that the proposed uses “will not adversely affect natural resources.”

3. Question: Should the Hearings Officer consider any natural resources other than those identified in the 2023 proceedings?

At the Remand Hearing, the Hearings Officer indicated that new evidence regarding natural resources not identified in the 2023 proceedings would not be considered on remand. The Hearings Officer based that reasoning, in part, on LUBA’s reference to addressing “the identified natural resources” on remand. However, although LUBA did direct the Hearings Officer to make findings about the natural resources identified in 2023, LUBA did not direct the Hearings Officer to *limit* their findings to natural resources identified in 2023, and doing so would be contrary to law.

LUBA addressed the issue on remand in this case in multiple subassignments of error, which focused on the prior hearings officer’s construction of MCC 39.7515(B), as well as the sufficiency of the findings made under that standard. When addressing the subassignment of error relating to construction of the standard, LUBA directed that “[o]n remand, the hearings officer should determine whether *any* natural resources will be affected by the community service use and must find that the proposed use will not adversely affect natural resources.” *Cottrell* (slip op at 123) (emphasis added). That portion of LUBA’s order indicated that the hearings officer on remand would have to interpret the standard and apply it to *any* natural resource, not just those identified in the prior proceeding.

LUBA’s remand instructions in a later subassignment of error are not contrary to that general direction. When addressing the subassignment of error asserting that the hearings officer’s findings were inadequate because he did not address resources outside the SEC identified by opponents, LUBA explained that the findings were, in fact, inadequate because the hearings officer had not addressed all of the resources identified by opponents due to his misconstruction of the law:

“Specific issues concerning various natural resources outside SEC areas were *identified by opponents and not addressed*, based on the hearings officer’s misconstruction of the MCC 39.7515(B) natural resources criterion. *Under a proper construction of MCC 39.7515(B) on remand*, the hearings officer should determine

whether any of the *identified natural resources* will be affected by the community service use and must find that the proposed use will not adversely affect those natural resources or explain why the *identified natural resources* are not subject to the criterion.”

Cottrell, LUBA No. 2023-086 (slip op at 126-27) (emphasis added). LUBA directed the hearings officer on remand to remedy the prior failure to address all of the natural resources identified by the opponents, but did not further limit the hearings officer’s ability to consider other natural resources.

It is likely that LUBA did not so limit the hearings officer because LUBA understood that, on remand, the hearings officer would “significantly change an existing interpretation,” entitling the parties to offer new evidence. *See Gutoski v. Lane County*, 155 Or App 369, 373-74 (1998) (explaining that parties should have an opportunity to present additional evidence and argument after initial evidentiary hearing where the interpretation will “either significantly change an existing interpretation or, for other reasons, be beyond the range of interpretations that the parties could reasonably have anticipated” and parties can show specific, directly responsive, and substantively different evidence). Here, as LUBA explained, “the county consistently interpreted natural resources to mean those located with an SEC overlay[.]” *Cottrell*, LUBA No. 2023-083 (slip op at 120). Because LUBA rejected that interpretation, the parties should have an opportunity on remand to both argue for a new interpretation and offer new evidence in support of that interpretation.

To be sure, opponents did argue for a broader interpretation of the standard in the 2023 proceeding, but that does not change the fact that there was an existing, longstanding interpretation that LUBA rejected, requiring a significant change in that interpretation on remand that the parties should be allowed to address with new evidence. As a result, the parties should not be limited to presenting evidence on natural resources identified in the 2023 proceedings when a different definition was applied.³

4. Question: If the Hearings Officer finds that MCC 39.7515(B) is not met as to any proposed Community Service Use, what is the disposition of each of the consolidated permits?

In the 2023 decision, the Hearings Officer approved multiple permit applications that had been consolidated for review, and the entire consolidated application was remanded by LUBA.

³ Even if the Hearings Officer concludes that LUBA did limit the scope of the remand to previously identified resources, the Hearings Officer can expand consideration beyond those resources, and staff believes the Hearings Officer should do so to avoid the possibility of error. *See Columbia County Citizens for Orderly Growth v. Columbia County*, 44 Or LUBA 438, 444 (2003) (“[W]hile not required to do so, a city may expand the scope of its remand hearing beyond the scope of the remand.”).

As a result, in issuing a final decision on remand, the Hearings Officer will need to address the following permits:

- Community Service Conditional Use Permit for Utility Facility (Filtration Facility)
- Community Service Conditional Use Permit for Utility Facility (Pipelines)
- Community Service Conditional Use Permit for Radio Transmission Tower (Communication Tower)
- Review Use for Utility Facility (Pipeline – EFU)
- Design Review (Filtration Facility, Pipelines, Communication Tower, Intertie Site)
- Significant Environmental Concern for Wildlife Habitat (Lusted Rd Pipeline, Raw Water Pipeline)
- Geologic Hazard (Raw Water Pipeline)
- Lot of Record Verifications

Under MCC 39.1140(G), denial of a Type III decision on a Community Service Conditional Use Permit application “shall result in denial of all associated Type II decisions applied for at the same time that are subject to some part of the Type III decision.”

Here, there are some Type II decisions associated with the Type III decisions that are at issue on remand, but there are also other permits that are not associated with the disputed Type III decisions. As a result, if the Hearings Officer finds that MCC 39.7515(B) is not met as to either of the Community Service Use permits before the Hearings Officer (filtration facility and pipelines), staff recommends the disposition of permits set forth in Exhibit 1 hereto.

5. Question: If the Hearings Officer finds that MCC 39.7515(B) is not met for either Community Service Use, should the Hearings Officer order restoration as part of the decision in this case?

In comments submitted prior to the Remand Hearing, an argument was presented that, as part of any denial, “the hearings officer must also adopt specific and exacting criterion for restoration of the lands affected by PWB’s premature use.” Exhibit N.69, p.7. The Hearings Officer should decline that request because addressing any work that is unpermitted as the result of a denial in this proceeding is outside the scope of the matter before the Hearings Officer.

The County has an Enforcement Code that sets out a separate process for addressing code violations. *See* MCC 39.1500 to 39.1565. That process includes the identification of violations and available remedies, and provides a process for resolving the matters either through voluntary compliance or enforcement proceedings, the latter of which conclude with an order by a Hearings Officer. That order may include direction to “[m]ake any and all necessary repairs, modifications, and/or improvements to the structure, real property, or equipment involved.” MCC 39.1550(C).

In light of the posture of this case and foregoing procedures, addressing enforcement at this time is beyond the scope of this proceeding on remand and it would be premature for the Hearings Officer to address enforcement matters in this proceeding.

PART II – PROPOSED CONDITIONS

Staff notes the following three existing circumstances that may need to be addressed through conditions of approval in order to find that some or all of the proposed use can meet the standard set forth in MCC 39.7515(B):

Circumstance #1: Currently, Applicant has proposed to install fencing along the entirety of the perimeter of the contiguous parcel(s) Tax Lot 1S4E22-00400 (“Tax Lot 400”) and Tax Lot 1S4E22D-00100 (“Tax Lot 100”) (*See Decision of Hearings Officer, Case File T3-2022-16220 (2023)* at 2 (depicting the perimeter of these two contiguous parcels as a black polygon labeled “Filtration Facility and Communications Tower: CU Review, Design Review,” and showing the shared property line, with Tax Lot 400 being the western parcel and Tax Lot 100 being the eastern parcel). Some of this perimeter fencing will enclose a 40+/- acre field located largely within Tax Lot 100 (i.e., the southeast portion of the aforementioned polygon), which will include native plants and vegetation, and potential wildlife habitat and corridor.

If the Hearings Officer finds that such fencing could result in impacts not allowed under MCC 39.7515(B), there may be opportunity to address those impacts through revision of the fencing plan such that less of this field is enclosed, thereby potentially alleviating impacts to natural resources. Accordingly, a condition along the lines of the following might be appropriate for consideration:

“The 40+/- acre field area in the southeast portion of the Water Filtration Facility site shall be planted with native species (trees, shrubs and ground cover to provide native wildlife habitat for birds, deer, elk, and other species). Fencing may be installed around the Raw Water Pipeline Cover area; all other fencing shall be: (1) limited in a manner that reduces the amount of enclosed land to the greatest possible extent, subject to Permittee’s commercially reasonable discretion and compliance with state or federal security or other regulatory fencing requirements; and (2) located in a manner that maximizes wildlife habitat within, and wildlife access through, such field to the greatest possible extent, subject to Permittee’s commercially reasonable discretion and compliance with state or federal security or other regulatory fencing requirements.

“a. No use other than wildlife habitat shall occur within this area unless approved by revising this CS approval.

“b. Prior to the plantings required by this condition being installed, Permittee or its representative shall submit the mitigation planting plan, and the revised fencing plan, to Land Use Planning for review and approval.

“[MCC 39.7815(B), MCC 39.8010, MCC 39.8020(D)]”

Circumstance #2: Historically, there has been some degree of flow of surface and groundwater in and around the site of the proposed water filtration facility to Johnson Creek. The proposed use has the potential to increase such flow due to subsurface work that may displace groundwater. If the Hearings Officer finds that, in the absence of conditions, such circumstance could result in impacts that would not be allowed under MCC 39.7515(B), a condition along the lines of the following might be appropriate for consideration:

“To reduce the amount of stormwater/groundwater being directed to Johnson Creek, Permittee shall deploy natural water-detention solutions on-site to the greatest extent practicable. Any outflows shall not increase the run-off from the property beyond the natural rate for a 10-year/24-hour storm event. [MCC 39.7815(B), MCC 39.4325 (G)]”

Circumstance #3: There has been much discussion about application of MCC 39.7515(B) to the “Hedgerow/ROW” area near the proposed water filtration facility. If the Hearings Officer finds that such area is subject to the standard and that, in the absence of conditions, such area could be impacted in a manner that would not be allowed under the standard, a condition along the lines of the following might be appropriate for consideration:

“Within the areas of the public rights-of-way of SE Carpenter Ln, SE Dodge Park Blvd, SE Cottrell, SE Lusted Rd, and SE Altman Rd, where hedgerows or trees were removed, the disturbed areas shall be planted with native shrubs and low vegetation to restore the wildlife habitat that was removed to install the pipelines or temporarily widen the paved areas of the roadway. [MCC 39.7815(B)

“a. Permittee shall obtain approval of the restoration plans from both Transportation Planning and Land Use Planning on the types of vegetation to be used before planting. The restoration of the areas shall take place within 1 year of completion of pipeline installation on each roadway.

“b. Permittee shall maintain these planting for a minimum of 10 years to ensure their naturalization. If the plantings die, become diseased or fail to thrive, Permittee will continue to maintain them until such time as they naturalize.

“[MCC 39.7815(B), MCC 39.8010, MCC 39.8020(D)]”

EXHIBIT 1

If the Hearings Officer finds that MCC 39.7515(B) is not met as to either of the Community Service Use permits before the Hearings Officer (filtration facility and pipelines), staff recommends the disposition of permits as follows – please note that the Project is covered by a single Design Review Permit, a single SEC-h Permit, and a single GH Permit, such that certain circumstance below may require denial of such permits only in part:

Permit	Associated Permits	Disposition	Reason
Community Service Conditional Use Permit for Utility Facility (Filtration Facility)	Design Review (Filtration Facility <i>portion</i>) Community Service Conditional Use Permit for Utility Facility (Pipelines)	If MCC 39.7515(B) is not met as to the filtration facility, deny Permit, deny specified portion of Associated Design Review Permit, and make supplemental findings on Associated CS (Pipelines) Permit: if proposed pipeline use is no longer allowed in the zone, deny CS permit and all associated permit(s) (see next row); otherwise, issue CS permit.	Design Review is a Type II permit (MCC 39.1140(G)). Unused/unconnected pipes are not a use allowed in the zone. <i>See</i> MCC 39.4305, 39.4320(A), 39.7520.
Community Service Conditional Use Permit for Utility Facility (Pipelines)	Design Review (CS Pipelines, Intertie <i>portions</i>) Significant Environmental Concern for Wildlife Habitat (SEC-h) (Lusted Rd Pipeline <i>portion</i>) Geologic Hazard (GH) (Lusted Rd. pipeline from Cottrell Rd., which crosses the Lusted Hill site <i>portion</i>)	If MCC 39.7515(B) is not met as to the pipelines, deny CS Permit, deny specified portions of all Associated Permits	Design Review, SEC-h, and GH are all Type II permits (MCC 39.1140(G))

Community Service Conditional Use Permit for Radio Transmission Tower (Communication Tower)	Design Review (Communications Tower <i>portion</i>)	Issue Permit and Associated Permit	Community Service Conditional Use Permit is not subject to MCC 39.7515(B) and is not a Type II subject to MCC 39.1140(G). These permits were affirmed by LUBA.
Review Use for Utility Facility (Raw Water Pipeline – EFU)	Design Review (Raw Water Pipeline <i>portion</i>) Significant Environmental Concern for Wildlife Habitat (SEC-h) (Raw Water Pipeline <i>portion</i>) Geologic Hazard (GH) (Raw Water Pipeline <i>portion</i>)	If MCC 39.7515(B) is not met as to the CS filtration facility or pipelines, review proposal for continuing compliance with MCC 39.4225(A)(3)(a) and make supplemental findings: if criterion no longer satisfied, deny Permit and specified portions of all Associated Permit(s); otherwise, issue Permit and Associated Permits.	Generally, 39.4225(A)(3)(a) requires a utility facility to be “necessary for public service.” If either of the CS permits is denied, that might result in this segment of pipeline not being connected to anything, thereby necessitating reconsideration as being “necessary for public service.”
Lot of Record Verifications	N/A	Issue Permits	These are Type II permits but are not subject to any part of the two Type III applications at issue.