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Hearings Officer Joe Turner
c/o Sean Conrad & Eric Rutledge
City of Sherwood Planning Dept.
22560 SW Pine Street,
Sherwood, OR 97140

RE: *Meadowlark Energy Storage LLC / Conditional Use Permit / Site Plan Review*
City File 785-26-000057-PLNG
Final Argument

Dear Hearings Officer Turner:

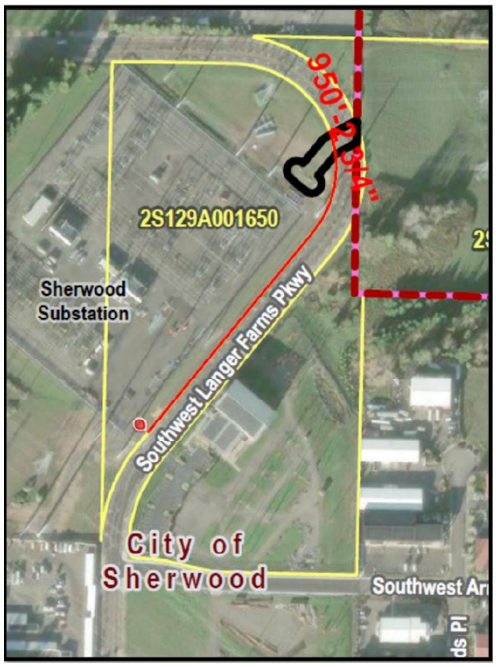
This office represents the applicant in the above-stated matter. This letter constitutes the applicant's final argument and does not contain new evidence.

The parties and staff have made good efforts to arrive at a compromise solution that meets the needs of all involved, and the only remaining issues are not of critical significance. Staff is now recommending the following modifications to condition B.2:

> Submit a landscape and irrigation plan to city staff for review and approval. The landscape plan shall include a minimum ~~20~~ 10 foot wide landscape area between the sidewalk along SW Langer Farms Parkway and the access driveway/riser pole location for a total landscape area of 15,000 square feet. The width of the landscaping and types of planting may be modified if aerial and/or underground utilities limit or prohibit landscaping. The landscape plan shall provide for a combination of ground cover, bushes and trees to create a continuous visual landscape corridor.
>
> Tree density and spacing shall meet the parameters detailed under Section 16.140.060.A.4, to ensure that sufficient visual impact is minimized. The irrigation plan shall be designed in accordance with section 16.92.040.C. (Note: The driveway along SW Langer Farms Parkway will need to be relocated to accommodate

> the minimum amount of required landscaping. In some locations, the width of the landscape strip will need to exceed 10 ft. to reach the required 15,000 square feet)

As previously noted, the applicant accepts the requirement to install 15,000 s.f. of landscaping on the PGE property. The applicant proposes this landscaping to be placed in the vicinity of the three new poles in order to help screen them and their associated fencing from persons traveling on the parkway. Meadowlark is willing to achieve the city's screening objectives under SZCDC 16.82.020(D)(4) in a manner consistent with PGE's requirements. This would include screening the riser-pole enclosure in a manner that complies with PGE standards, keeping trees and shrubs outside a 25 ft clear zone from the substation perimeter fence, and using low-growth and low-fuel species within the corridor. These concessions are made voluntarily and without waiver of rights to object to other aspects of the staff analysis.



Although we do not quibble with the amount of screening demanded by staff, we do question whether the entire 950-foot length that staff proposes for the landscaping accomplishes the goal of screening the three new poles and associated facilities, as opposed to screening the previously approved substation. The Hearings Officer will recall that staff seeks to have the landscaping start along the eastern boundary of the substation in the vicinity of the site's approach road / entrance gate, and then traverse northeasterly along the eastern boundary of the substation property between the access driveway and the parkway for a distance of 950 feet (+/-).[1] We believe that the landscaping should be concentrated closer to the proposed poles and associated fencing / equipment, and the access road should be left in its current condition.

As we noted in previous correspondence, conditions of approval must relate to the impacts of the proposed development, not the impact of a prior development. Staff does not challenge our assessment of the law. We further noted that, in our opinion, staff seemed more interested in screening the substation rather than the three new poles. Indeed, in the section of the staff report addressing SZCDC 16.82.020(D), staff conceded that it wanted the landscaping due to the "harsh visual condition of the substation site from those travelling along SW Langer Farms Parkway." Staff Report at p. 14.

In his letter dated September 24, 2026, staff member Sean Conrad expresses disagreement with the idea that staff is merely trying to screen the substation. He points out that the staff report addressed a different approval criterion with the following staff comment:

> Staff agrees that the poles are limited in number and extent and are

[1] The photo set forth above is not new evidence; it originated in Attachement A of the staff letter dated September 24, 2026.

> designed to be located adjacent to existing electrical infrastructure, reducing the degree to which the structures introduce a new or visually distinct feature into the surrounding landscape. However, the poles are exceeding the maximum height of 50 feet. To address this height increase and to assist in screening the associated security fencing at base of the poles, staff is recommending landscaping along the frontage of the project site. The recommended landscaping will serve to visually soften the proposed project from SW Langer Farms Parkway for pedestrians, bicyclists, and those traveling in vehicles.

Staff Report at p. 12. Staff's point is not very convincing. At best, it shows that staff had a dual purpose, one of which was legitimate and one that is not. It seems rather obvious that landscaping / screening added to the southeastern portion of the site will not do anything to "visually soften the proposed project from SW Langer Farms Parkway for pedestrians, bicyclists, and those traveling in vehicles." In fact, during the growing season (March - Oct), the three new proposed poles will be obscured from view by the existing street trees in the ROW. This is particularly true as it relates to the location where the staff wants the access road moved to the west, as well as areas further south therefrom. In our opinion, the landscaping will only be effective at screening the three new poles if it is located within 250 feet (+/-) of those poles.

The Applicant also has concerns regarding the prospect of relocating the access road to accommodate the 10-foot-wide landscaping area required under proposed Condition B.3. That condition states:

> 3. The applicant shall provide city staff with a plan to bring the existing gravel driveway, from the entrance/exit on SW Langer Farms Parkway to the location the three riser poles, to the surface standards required in section 16.94.010.G.

We do not understand PGE staff to object to realigning the access road or adding landscaping in the 10-foot corridor, although we understand that they would prefer that things be left in their existing condition. The applicant also believes that Condition B.3 is a solution in search of a problem.



As noted in our letter dated September 17, 2026, the access road is a chip seal surface, as opposed to mere gravel. Staff opines that the road surface "is not chip sealed." The factual premise for that statement is difficult to comprehend, as the photo at right (submitted as part of the first open-record period) clearly and unmistakenly shows a surface that has in the past been treated with liquid asphalt. While it is true that the road could use some maintenance (*i.e.* another application of liquid asphalt emulsion) it most certainly has been subjected to a chip seal process at some point in the past, and it is an

impervious hard surface that suppresses dust. The access road does not need to be ripped out and rebuilt.

Staff report attempts to justify the imposition of Condition B.3 by tying it to SZCDC 16.94.010(G)(1). This code provision states:

> ***16.94.010 General Requirements***
>
> ***G. Surface and Drainage***
>
> ***1. All parking and loading areas shall be improved with a permanent hard surface such as asphalt, concrete or a durable pervious surface. Use of pervious paving material is encouraged and preferred where appropriate considering soils, location, anticipated vehicle usage and other pertinent factors.***

SZCDC 16.94.010(G)(1) addresses parking and loading areas. Staff makes to effort to explain why it considers the access road to be a "parking" or "loading" area. These terms are not defined in the code. Webster's Third New International Dictionary (Unabridged, 2002) defines the word "parking" as follows:

> "2 a: the leaving of a vehicle in an accessible location b: an area in which vehicles may be left."

Id. at 1642. SZCDC 16.94.020(B)(1) states that a "parking space" means a stall nine (9) feet in width and twenty (20) feet in length. Black's Law Dictionary (6th Ed, 1990) defines the term as "not or include merely temporary or momentary stoppage but rather connotes a stoppage with intent of permitting vehicle to remain standing for an appreciable length of time. *Id.* at 1116 (citing *Ford v. Stevens*, 280 Minn 16, 157 NW2d 510, 513 (1968). Viewed in tandem, the code and dictionaries undermine staff's conclusion that a "parking area" includes an access driveway. *Compare Campbell v. United States*, 163 A.3d 790 (D.C. 2017) (for purposes of an open container statute that made it unlawful to "possess in an open container an alcoholic beverage in ... a vehicle in or upon any street, alley, park, or parking area," the phrase "parking area" did not encompass an unmarked grassy median between two parking lots.).

The phrase "loading area" has an even more narrow focus. Webster's Third New International Dictionary (Unabridged, 2002) defines the verb "load" as follows:

> 1 a: to put a load in or on (a means of conveyance) : to fill with material, animals, or passengers to be transported <had ~ed the moving van by noon> <~the plane with cargo> * * *.

Id. at 1325. Black's Law Dictionary (6th Ed, 1990) at p. 936 defines the term "loading" as "the act of putting a load on or in, as to load a car or a vessel." Thus, as relevant here, a loading area is a location where a car is parked so that it can be loaded or unloaded with material or equipment. A "loading area" is not an access driveway. The applicant is willing to pave an actual parking and loading area, if

needed.

Staff also incorrectly reads SZCDC 16.94.010(G)(1) as creating an exclusive list of "permanent hard surfaces" that meet the code requirement. Staff states the following in its letter dated September 24, 2026:

> Section 16.94.010.G requires a permanent hard surface with the code clarifying what type of permanent hard surface is acceptable: asphalt, concrete or a durable pervious surface. The existing gravel driveway surface being something in the nature of a "chip seal" is not a surface standard allowed under section 16.94.010.G or a surface staff has accepted in past developments as a permanent hard surface on industrial zoned land.

We disagree. Staff's past practices and interpretations are not relevant to this case. The issue turns primarily on the meaning of the phrase "permanent hard surface," which is not defined in the code. We therefore turn to the dictionary. SZCDC 16.10.010. Webster's Third New International Dictionary (Unabridged, 2002) defines the word "permanent" as follows:

> "continuing or enduring (as in the same state, status, place) without fundamental or marked change; not subject to fluctuation or alteration; fixed or intended to be fixed: LASTING, STABLE."

Id. at 1683. It defines "hard" as:

> Hard. "not easily penetrated cut or separated into parts; not easily yielding to pressure: FIRM, SOLID, COMPACT."

Id. at 1031. And it defines "surface" as:

> "the exterior or outside of an object or body: the outermost or uppermost boundary."

Id. at 2300. Read together, those definitions establish a functional standard. A "permanent hard surface" is a lasting or stable exterior surface that is firm, solid or compact and does not readily yield to pressure, so as to provide a durable and dustless surface. The definitions describe the qualities the surface must possess; they do not identify an exclusive list of materials from which the surface must be constructed. Nothing in the meaning of the phrase limits compliance to asphalt, concrete, or any other particular material. A chip seal surface is universally understood to be a hard and durable surface capable of suppressing dust. The existing chip seal surface therefore can't be rejected merely because it is not asphalt, concrete, or a durable previous surface. The relevant inquiry is whether the particular chip seal driveway is lasting or stable and sufficiently firm, solid, or compact to satisfy the code's performance standard.

Furthermore, the code uses the phrase "such as," which is interpreted by Oregon to be a non-

exclusive list. In *State v. Kurtz*, the Oregon Supreme Court recognized that statutory examples may illuminate the meaning of a general term without exhaustively defining its scope. Applied here, the listed paving materials inform the meaning of "permanent hard surface," but they do not restrict the code to those materials alone.

The Court of Appeals likewise has explained that "such as" is indicative of a nonexclusive list of examples. In *Clinical Research Institute of Southern Oregon, P.C. v. Kemper Insurance Cos.*, 191 Or App 595, 602, 84 P3d 147 (2004), the court discussed the maxim known as "ejusdem generis." Black's Law Dictionary defines *ejusdem generis* as "[a] canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." Black's Law Dictionary 556 (Bryan A. Garner ed., 8th ed 2004).

The "ejusdem generis" maxim requires a list from which the court can identify common characteristics that might aid the court in discerning the meaning and scope of the general term, ejusdem generis does not apply if it does not appear that (1) the legislature intended the list as a class with a common characteristic, *see State v. Mayorga,* 186 Or App 175, 182 n 4, 62 P3d 818 (2003) (discussing issues surrounding search for common characteristic); or (2) if the "list of specifically enumerated items [is not] long enough to reveal the characteristics of a recognizable class to which the general term may be limited." *State v. Walker,* 192 Or App 535, 539–540, 86 P3d 690 (2004) (refusing to apply ejusdem generis because, among other things, "list" only included two "general items" stated in the disjunctive).

The *Clinical Research* court cautioned that ejusdem generis is particularly uncertain and malleable when the supposed common characteristic of the examples is not clear. *Clinical Research Institute*, 191 Or App at 602 (citing *State v. Mayorga*, 186 Or App 175, 182, 62 P3d 818 (2003)). That is the problem with staff's reading of the code: the three examples do not present a common characteristic that fits within the phrase "permanent hard surface" but excludes chip seal. Staff treats "such as" as though the code said, "*only* asphalt, concrete, or a durable previous surface." But the code contains no such limiting language. It states a general requirement: a "permanent hard surface" and then identifies materials that are examples of surfaces that may satisfy that requirement. Reading the examples as an exhaustive list would improperly add the word "only" to the code and would replace a functional standard with a closed material list.

Accordingly, a chip seal driveway is not disqualified categorically. Whether this driveway satisfies SZCDC 16.94.010(G)(1) depends on evidence concerning its construction, durability, stability, firmness, compactness and suitability for the anticipated use. Staff may evaluate those characteristics, but it may not reject the surface solely because "chip seal" doesn't appear among the examples listed after "such as."

The other code section cited by staff is SZCDC 16.92.030(A)(2)(a), which provides:

> ***A. Perimeter Screening and Buffering***
> * * * * *
> ***2.Perimeter Landscaping Buffer***
> ***a. A minimum ten (10) foot wide landscaped strip comprised of trees, shrubs and ground cover shall be provided between off-***

street parking, loading, or vehicular use areas on separate, abutting, or adjacent properties.

b. The access drives to a rear lots in the residential zone (i.e. flag lot) shall be separated from abutting property(ies) by a minimum of forty-two-inch sight-obscuring fence or a forty-two-inch to an eight (8) feet high landscape hedge within a four-foot wide landscape buffer. Alternatively, where existing mature trees and vegetation are suitable, Review Authority may waive the fence/buffer in order to preserve the mature vegetation.

3. Perimeter Landscape Buffer Reduction
If the separate, abutting[2] property to the proposed development contains an existing perimeter landscape buffer of at least five (5) feet in width, the applicant may reduce the proposed site's required perimeter landscaping up to five (5) feet maximum, if the development is not adjacent to a residential zone. For example, if the separate abutting perimeter landscaping is five (5) feet, then applicant may reduce the perimeter landscaping to five (5) feet in width on their site so there is at least five (5) feet of landscaping on each lot.

Although it is not written with precision, that section of the code only applies to development that requires site plan review. SZCDC 16.92.010 informs the reader when a landscape plan is required:

Chapter 16.92 - LANDSCAPING
16.92.010 - Landscaping Plan Required
All proposed developments for which site plan review is required pursuant to Section 16.90.020 shall submit a landscaping plan that meets the standards of this Chapter. All areas not occupied by structures, paved roadways, walkways, or patios shall be landscaped or maintained according to an approved site plan.

It states: "all proposed developments for which site plan review is required * * * shall submit a landscaping plan." Proposed developments that do not need to undertake site plan review are exempt from landscaping standards. Utility facilities are a "civic' use that does not require site plan review.

16.90.020 - Site Plan Review
A. Site Plan Review Required
Site Plan review is required prior to any substantial change to a site or use that is not

[2] The code defines the term "abut' as follows:

Abut: Contiguous to, in contact with, or adjoining with a common property line; two properties separated by another parcel, lot, tract or right-of-way measuring twenty (20) feet in width or less, shall be considered abutting for the purposes of interpreting the infill-related development standards. See also "adjacent."

> ***subject to Residential Design Checklist or Residential Design Review, does not meet the criteria of a minor or major modification per 16.90.030, issuance of building permits for a new building or structure, or for the substantial alteration of an existing structure or use. Exemptions noted below.***
> ***Site Plan Review is required for the following development:***
> ***1. Multi-dwelling***
> ***2. Commercial***
> ***3. Industrial***
> ***4. Mixed-use***

In their letter dated September 24, 2026, staff cites to SZCDC 16.140.040 as the second of two code sections that support the imposition of the 10-foot-wide landscaping. SZCDC 16.140.040 provides:

> ***16.140.040 - Visual Corridors***
> ***A. Corridors Required***
> ***New developments located outside of the Old Town Overlay with frontage on Highway 99W, or arterial or collector streets designated on Figure 8-1 of the Transportation System Plan shall be required to establish a landscaped visual corridor according to the following standards:***

The current operative version of the TSP does not have a "Figure 8-1." Apparently, the reference is to a 2005 version of the TSP, which has been superseded by Ordinance. Because "Figure 8-1" does not exist, the city cannot apply SZCDC 16.140.040 to the applicant.

ORS 227.173(1) sets forth what is known to land use practitioners as the "codification requirement." It provides:

> ***(1) Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.***

The codification statute has two separate prongs:

> (1) that development ordinances set forth reasonably clear standards for discretionary permit applications (aka: the "vagueness" prong), and
> (2) that permits issued by the county be decided based on text and maps adopted into the county's zoning codes (aka: the "incorporation" prong).

Both of these considerations have resulted in their own lines of caselaw. The "incorporation" prong focuses on whether the "standards and criteria" applied by the local government are "set forth" in the zoning ordinance. Three common lines of cases have emerged:

- ❖ cases involving standards that do not yet exist at the time of the application,
- ❖ standards that need to be refined or developed in the course of a land use application, and
- ❖ standards that exist but are not set forth in the zoning code or comprehensive plan.

With regard to the third line, sample cases include:

- ❖ *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016), *rev'd on other grounds*, 280 Or App 752 (2016), LUBA found that laws which are not incorporated into the zoning ordinance are not applicable to a permit. In that case, the Oregon Fire Code was found to only apply to the extent that its specific provisions were incorporated in the zoning code.

- ❖ *Neal v. Clackamas County*, 52 Or LUBA 248 (2006), LUBA determined that the Federal Endangered Species Act and Clean Water Act were not approval standards for a forest template dwelling.

- ❖ *The Athletic Club of Bend, Inc. v. City of Bend*, 63 Or LUBA 467, 478 (2011), LUBA found that a "master plan" for a Planned Unit Development is not a "standard or criteria" within the meaning of ORS 227.173(1).

Here, the city attempts to apply a map that is not part of the *current* operative comprehensive plan. Rather, it seeks to apply an old obsolete and superseded map as an approval standard. Because Figure 8-1 (2005) is no longer acknowledged, ORS 227.173(1) prohibits the city from using it as an approval criterion for a statutory permit. Further note that ORS 197.175(2) requires the city to make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations:

> ***(2) Pursuant to ORS chapters 195, 196, 197 and 197A, each city and county in this state shall:***
> **** * * * *.***
> ***(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations; * * * * *.***

Figure 8-1 is no longer acknowledged and cannot be used as an approval standard. For this reason, the Hearings Officer cannot apply SZDCD 16.140.040 to this case.

Finally, we wish to briefly comment on staff's observations set forth on page 4 of its letter dated September 24, 2026. Therein, staff mentions two smaller substations and notes that those substations feature "landscaping along the perimeter security fencing." However, staff makes no effort to show that the two examples it provides are regulated by FERC and NERC in the same matter as the substation at issue. Without belaboring the point, we simply note staff has not laid the necessary foundation for the comparison, and in fact is making an "apples to oranges" comparison.

CONCLUSION

As noted above, the applicant is certainly willing to achieve the city's screening objectives under SZCDC 16.82.020(D)(1) in a manner consistent with PGE's requirements. This would include screening the riser-pole enclosure in a manner that complies with PGE standards, keeping trees and shrubs outside a 25 ft clear zone from the substation perimeter fence, and using low-growth and low-fuel species within the corridor.

The applicant would prefer that the existing access road be left at its current location. While the existing access road surface could certainly benefit from an additional layer of liquid asphalt emulsion, the applicant does not understand the code to require the access road to be ripped out and replaced with asphalt or durable pervious surface. The code allows a "permanent hard surface," and a chip seal road surface certainly falls within the definition.

Accordingly, the applicant requests that the Hearings Officer revise staff's proposed conditions to incorporate the following concepts:

1. **Condition B.2 — Landscaping:** Require the 15,000 square feet of landscaping to be concentrated within approximately 250 feet (+/-) of the proposed poles, located outside PGE's 25-foot clear zone, and comprised of low-growth, low-fuel species, subject to coordination with PGE. The landscaping requirement should not require relocation of the existing access road.

2. **Condition B.3 — Access/Driveway:** Replace the proposed condition with a requirement for continued maintenance of the existing chip seal.

We thank the Hearings Officer for presiding over this case.

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/s/ *Andrew H. Stamp*

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