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August 7, 2023

Via email to LUP-Comments@multco.us and LUP-Hearings@multco.us

Land Use Hearings Officer
Multnomah County
1600 SE 190th Av.
Portland, OR 97233

Re: Case File No. T3-2022-16220 (Portland Water Bureau)

Dear Hearings Officer Rappleyea:

Introduction

Once again, I represent the Pleasant Home Community Association (“PHCA”) in this matter. We provided a lengthy letter to you at the time of the hearing in this case. The evidence presented by farmers, school district officials, RFPD 10, the Oregon Department of Agriculture, and traffic engineer Mike Ard serve to buttress our points. (Hopefully, the testimony of counsel for PHCA and the Cottrell CPO were of some benefit, as well.) The materials filed by the applicant, especially with regard to potential conditions of approval, serve to reinforce the position taken by opponents.

The following matters are set out on PHCA’s behalf to supplement the record during this initial open record period.

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The Applicant Made this Bed . . .

PWB evaluated six different sites, and chose to proceed with one subject to the most onerous approval standards, taking on the county's farmland protection criteria and extremely difficult service issues. The applicant apparently assumed that it would face a passive, supine community, and that approval would be a sure thing regardless of the difficult criteria.

As the Hearings Officer has stated, there is only one application before him, and this is it. Arguments about more suitable alternatives are irrelevant. However, so too are any contentions by the applicant about a purportedly hard deadline. The applicant must live with the choice-and the assumption of inevitability-it has made. They are not entitled to the benefit of the land use equivalent of "reliance" damages.

PWB made this bed and must now lie in it. If, to use an old camp expression, it turns out that they have short-sheeted that bed, the fault is theirs alone. The responsibility does not lie with the affected communities in Multnomah and Clackamas counties, which seek only to compel compliance with the law as it is written.

Hawk Haven Equine Letter

Under separate cover, a letter has been submitted on behalf of Angela Parker, owner of Hawk Haven Equine, an equestrian facility on SE Carpenter Lane. An additional copy of that letter is attached for ease of reference. In this regard, please note the language of ORS 215.203(2)(a), which contains the statutory definition of "farm use." It provides in material part:

"Farm use" also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. * * *

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Ms. Parker provides detailed testimony regarding her equine business, and the significant impacts of the applicant's proposed development upon her accepted farm practices and the cost of carrying out those practices under MCC 39.7515(C). All the other, voluminous evidence in this case aside, that set out by Ms. Parker should be sufficient to compel denial of this application.

The (Probably Optimistic) Five-Year Construction Period Counts.

PWB has predictably argued that the impacts of the extended construction period for the proposed filtration facility and related pipelines should be disregarded in weighing whether it has met its difficult burden of proof under MCC 39.7515. The practical effect of such a view would be to enable the lawful closure, quite possibly permanently, of farm businesses expressly protected by the Multnomah County Code and by statute. As indicated in my letter of June 30, case law compels the evaluation of the relevant construction period, whether short or, as in this case, nearly interminable. We reiterate here:

In *Von Lubken v. Hood River County*, 28 Or LUBA 362, 369 (1994), LUBA held with respect to the farm impacts test that even an increased cost of just \$20,000 to mitigate for dust generated during a short, 2½-month construction period must be taken into account. This was true even when construction was complete by the time the appeal was ultimately decided:

We conclude the court of appeals¹ determined LUBA was incorrect in concluding in *Von Lubken III* that changes in or increases in costs of accepted farm practices attributable to dust generated during the construction phase need not be considered in addressing ORS 215.296(1), simply because those impacts and costs occurred prior to approval of the disputed decision.

The Court of Appeals subsequently reinforced this point in *Von Lubken v. Hood River County*, 133 Or App 286, 289-90 (1995). We would also note that

¹in *Von Lubken v. Hood River County*, 118 Or App 246, rev den 316 Or 529 (1993).

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while the construction in *Von Lubken* had already been concluded, the construction activity here, for the filtration facility and related pipelines, is part and parcel of the within application for the use, and described in detail in that application. The notion that it can be cracked out and discarded in this review is simply without merit.

Citizens Against LNG v. Coos County(??)

In the contemporaneous review before Clackamas County, the applicant argued the relevance of a case it has not identified here, but may be saving for a future submittal which opponents will not be able to rebut. Thus, as a precaution, we address it here.

PWB suggested, “LUBA has held that temporary construction activity is not a ‘use in itself [governed by the land use regulations], but rather an accessory function that is necessary to construct the authorized use.’ *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011) (slip op at 11).” (bracketed language supplied by PWB) This is not what LUBA held.

In *Citizens Against LNG*, an issue arose regarding the impact of time-limited dredging for a pipeline upon potential oyster beds, in light of Coos County’s estuarine management provisions. 63 Or LUBA at 174. The approval standards in that case did not arise under the provisions of ORS 215.296(1) protecting farm practices. Moreover, the key finding upon which LUBA partially upheld the county’s decision on this issue was that the “impacts will be ‘temporary *and insignificant*’.” (*Id.*, emphasis added.) LUBA remanded nonetheless for further review of the oyster bed issue. *Id.*, 174-75.

Of course, significance is a key element of the required analysis under ORS 215.296(1) and MCC 39.7515(C). Opponents have demonstrated the significant impacts of PWB’s proposed construction activities upon both accepted farm practices and the costs of carrying out those practices many times over. With respect to certain farm practices, such as sustaining equestrian operations, the impacts may not merely be significant, but may well be permanent rather than

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temporary. The burden of proving the absence of such significant impacts has at all times been on PWB as applicant. It has not met and cannot meet that burden.

Conditions of Approval

In our June 30 letter, we addressed and challenged the sufficiency of the proposed conditions of approval relating to transportation issues set out in the Staff Report, including but not limited to Transportation Planning Condition 7(c):

- c. TCP(s) must demonstrate consultation/engagement with Agricultural businesses abutting the pipeline and detour routes and Gresham-Barlow School Districts, as recommended in the Construction TIA (Exhibit A.230) to ensure impacts on the local transportation network are known in advance.

Staff Report, 12-13.

This and the other identified traffic-related conditions fly in the face of the requirements of *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992):

Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied

with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances.

(Internal citations and footnotes omitted.)

None of the listed bases for approval exists here. The evidence is insufficient to support a finding that the county's approval standards are satisfied, or that feasible solutions to the identified problems exist and will be achieved by conditions of approval. There will be no second stage approval process with notice and hearing.

The applicant has carried these defects forward in the modified conditions proposed in its pre-hearing statement of June 29, 2023. These conditions include proposed Condition 4 (at 3), and the Transportation Demand Management (TDM) Plan appended as Attachment 3. The TDM Plan is notable for the following elements:

(1) Attempting to limit peak hour trips on Carpenter Lane to 387 per hour, or more than six per minute, producing the farm impacts described by witnesses as well as being utterly inconsistent with the character of the area and creating hazardous conditions. (MCC 39.7515 (A), (C) and (F))

(2) Relying upon alternate access via Bluff Road for excess "commuter" (but not truck) traffic, although Clackamas County has rejected that possibility.

(3) Relying upon speculative alternative strategies for moving commuters on and off the site, should Bluff Road indeed be unavailable.

(4) Relying upon uncertain methodologies for predicting future traffic in order to design ostensible mitigation, and upon “monitoring reports” provided to the county to arrive at mitigation at some point in the future.

(5) Relying upon speculative “[a]dditional strategies [which] will be developed and implemented if needed.”

With respect to proposed, modified Transportation Planning Condition 6 (Pre-Hearing Statement at 4-6), for all the reasons set out on the record before you, the improvements in question will not create a safe transportation network; will, in the course of construction, significantly impact farm traffic; and will increase hazards for bicyclists, pedestrians and horseback riders by encouraging enhanced speeds including on the part of construction traffic.

Modified Transportation Planning Condition 7 (Pre-Hearing Statement at 6-7) relies upon temporary road closures which will significantly impact farm traffic, and upon future consultations with farmers and school administrators entirely lacking in proven successful outcomes.

Modified Transportation Planning Condition 8(b) (Pre-Hearing Statement at 7) removes staff’s proposed prohibition upon through trucks on Carpenter Lane, as *all* truck traffic will now have to use Carpenter. The proposed modification purports to keep trucks off Carpenter west of Cottrell. However, as explained by Ms. Parker and Brent Leathers among others, that simply will not happen. Only tank traps will keep truck drivers working for any number of contractors, or serving as owner-operators, from choosing the route that works best for them. Often, in at least one direction, that will include westerly portions of Carpenter.

Finally, we would observe that much of the proposed, loosely defined rigamarole developed by the applicant appears to regard truck drivers, construction crews, pipeline workers, local drivers, school bus drivers, parents dropping off and picking up kids, bicyclists and pedestrians as performers in a precisely choreographed, long-rehearsed ballet in which no stacking of performers will occur

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and none of the dancers could possibly get hurt. Neither the record nor logic justifies such an approach.

The applicant's proposed conditions present a Rube Goldberg device mounted on a Jenga tower. Simply stated, they do not bring the applicant into compliance with the difficult approval standards which apply in this case.

Conclusion

For the reasons set out here and all those identified in the written submittals and testimony of others, the applicant has utterly failed to meet its burden of proof in this matter.

This application must be denied.

Respectfully submitted,

Jeffrey L. Kleinman

Jeffrey L. Kleinman
Attorney for Pleasant Home Community
Association

JLK:cme
cc: client

HAWK HAVEN EQUINE

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hawkhavenequine@gmail.com

August 4, 2023

Re: Case File No. T3-2022-16220 (Portland Water Bureau)

Dear Hearings Officer Rappleyea,

I am writing to supplement my letter of June 15, 2023. I own and have for many years operated the farm and farm business known as Hawk Haven Equine at the above address. My farm is located roughly 4,000 feet west of the PWB site, on SE Carpenter Lane between SE Cottrell Rd, and SE Altman Rd.

As part of my equestrian operation under the above name, I board and train horses and give riding lessons (especially in dressage), all for a fee. This is how I make my living. My clients are horse owners who generally do not have farm facilities of their own. I house and feed their horses and provide the horses with room to graze and exercise. I offer an arena for schooling and dressage riding. I generally board 20-25 horses at a time. The owners come from as far away as Wilsonville and Lake Oswego.

I do not have riding trails on my property and there are no accessible public trails in this area. Therefore, the quiet country roads around my farm, most especially including Carpenter Lane running east between the farm and the Water Bureau site, as well as adjoining and nearby rural roads such as Cottrell Road, are an important feature for existing and prospective clients who wish to ride outside of the arena. Such riding on country roads is an accepted farm practice of farm operations such as mine, and Carpenter Lane east of Cottrell is the route most favored by my boarders because it is the quietest and most peaceful one.

Horses are naturally nervous, skittish animals. They are easily disturbed by loud sounds, such as noise from the diesel engines and air brakes of trucks, or horn honking by drivers unfamiliar with driving in the vicinity of livestock. Vehicles, especially large loud vehicles, driving past horses are a major problem, and are likely to spook a horse who at best will fidget, or at worst will throw their rider onto the pavement and run away.

Neighbors in the area generally understand the need to drive slowly past horses and other livestock, whereas visitors to our area often behave as if they are passing a bicyclist and speed up, passing within a few feet of the animal. This is dangerous and unsafe for the horse and the rider. Widening Carpenter would only cause traffic, including truck traffic, to speed up, creating additional dangers for riders, as well as for pedestrians and bicyclists on Carpenter (many of whom are of school age).

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Truck noise will also make my horse training extremely difficult, and cause horse owners and novice riders to go elsewhere. Such distracting stimuli will make this aspect of my business untenable.

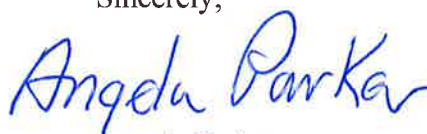
This is an agricultural area with quiet country roads and lanes with minimal traffic, which my clients find suitable for horseback riding. My clients will not want to ride on these roads with the increased traffic proposed by the Water Bureau, including but not limited to the truck and employee/contractor traffic proposed during five years of construction of the filtration plant and pipelines.

I would add that regardless of any condition supposedly directing construction traffic to go to and from Carpenter Lane only via Cottrell, there is no chance that, short of placing tank traps in Carpenter west of my farm, such a condition could succeed. The turning movements for trucks turning onto and off of Carpenter at its intersection with Cottrell are practically impossible, regardless of any "improvements" proposed for Carpenter. For the sake of both safety and efficiency, inbound (eastbound) truck traffic will inevitably stack up on Carpenter in front of my farm, in order to obtain a clear line of sight as to truck traffic on Cottrell, and to provide straight, direct access to Carpenter east of Cottrell. This will enhance vehicular safety, but it will at the same time destroy my farm business.

Losing the use of community roads for my clients will force a major change in my equestrian operation, and increase its costs by depriving me of substantial revenue, and spreading my fixed costs among far fewer patrons. A number of my clients will simply move their horses elsewhere in search of the peace and quiet and safety they require, and which they expect in an agricultural setting such as ours. Both existing and potential clients will choose to board at a different facility in a country setting. Based upon my experience, once they have made that decision, they will not come back; there are alternatives out there, including some closer to where some of my clients reside. Regardless of routing, the enormous increase in traffic on the surrounding road system will impede my clients' access to my farm, delaying travel and encouraging them to move their horses elsewhere. Mine is a word-of-mouth business, so when I lose one client, I am likely to lose the business of future clients as well.

In summary, the proposal before you will force a significant change in my accepted farm practices and will significantly increase the cost of those practices, eliminating much of the farm income on which I depend. I respectfully request that this application be denied.

Sincerely,



Angela Parker
Hawk Haven Equine



Lisa Estrin <lisa.m.estrin@multco.us>

Case File No. T3-2022-16220 (Portland Water Bureau)

1 message

Jeffrey L. Kleinman <kleinmanjl@aol.com>

Mon, Aug 7, 2023 at 6:35 AM

To: "LUP-Hearings@multco.us" <lup-hearings@multco.us>, "LUP-Comments@multco.us" <lup-comments@multco.us>

Cc: Lisa Estrin <lisa.m.estrin@multco.us>



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Good morning,

Attached please find a letter on behalf of Pleasant Home Community Association for filing in the above matter.

Thanks very much.

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Hearings Officer letter (Pleasant Home Community Association) 8-7-23.pdf

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